THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 93 OF 2022

CFAO MOTORS UGANDA LIMITED.....APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY.....RESPONDENT

BEFORE: MR. SIRAJ ALI, MS. CHRISTINE KATWE, MS. KABAKUMBA MASIKO

RULING

This ruling, relates to the question, whether a supply of services incidental to the import of goods, is exempt from VAT, under the provisions of **S. 12(3) and S. 23(c)** of the **VAT Act.**

1. Background

The Applicant is a company engaged in the business of selling, leasing, and the maintenance of motor vehicles.

On or about the year 2021, the Respondent carried out an audit on the Applicant for the period 2018 to 2020. Following the audit, the Respondent issued Administrative Additional VAT tax assessments of Shs. 2,088,468,660 for the period of the audit. The Applicant's objection to the assessment was disallowed by the Respondent through an objection decision dated 15th March 2022. Aggrieved with the decision of the Respondent, the Applicant filed this application.

2. Representation

At the hearing, the Applicant was represented by Ms. Leah Nambuya and Ms. Jemima Mushabe. The Respondent was represented by Mr. Alex Aliddeki Ssali, Mr. Ronald Baluku, Ms. Ritah Nabirye, Mr. Edmond Agaba and Mr. Amanya Mishambi.

3. Issues for determination

At the scheduling, the following issues were set down for hearing:

1. Whether the Applicant is liable to pay the tax assessed?

2. What remedies are available to the parties?

The Applicant`s sole witness was Ms. Anita Akishure. The witness testified in her capacity as the Applicant`s Chief Finance Officer. The witness stated that the Applicant is engaged in the business of selling, leasing and maintenance of motor vehicles. The witness stated that the Applicant is a dealer in motor vehicles imported from South Africa, Japan and the United Arab Emirates. The witness stated that at the port of loading, the vehicles are consigned to the Applicant and the Applicant`s name is indicated in the bill of lading, as the consignee. The witness stated that on arrival in Uganda, the motor vehicles are placed in a bonded warehouse, within the Respondent`s customs control and that no customs duties are payable while the vehicles are in the bonded warehouse.

The witness stated that the Applicant sells some of the vehicles in the bonded warehouse and upon sale, the motor vehicles are transferred into the names of the customer, as the owner, before the vehicle is released from URA customs control. The witness stated that where a motor vehicle is transferred whilst in the bonded warehouse, the customer is treated by the Respondent, as the importer, as per the provisions of the East African Community Customs Management Act.

The witness testified that some of the Applicant`s customers include diplomats, Embassies, UPDF, the United Nations and its agencies, International and Regional organizations, aid-funded organizations, and government ministries, departments and authorities. The witness stated that the exempt customers are exempt from customs duties and VAT, under Parts A and B of the 5th Schedule of EACCMA and Ss. 12(3), 20(1)(a) and 23 of the VAT Act. The witness stated that the above exempt status are confirmed by exemption letters issued by the Respondent and the Ministry of Foreign Affairs of the Republic of Uganda.

The witness testified that the Applicant`s invoice to an exempt customer for the sale of the motor vehicle in a bonded warehouse, includes the cost, insurance, freight of the vehicle and the Applicant`s sales mark-up. The witness stated that the Applicant does not charge VAT on the sale in the bonded warehouse to its exempt customers. The witness stated that the Applicant disagrees with the Respondent`s assessment on the grounds that the Applicant`s exempt customers are exempt from customs duties, under the relevant provisions of Part A and B of the 5th Schedule of EACCMA

and the 1st Schedule of the VAT Act. The witness stated that the mark-up charged by the Applicant is not for a stand-alone service but is incidental to the sale of the motor vehicle in bonded warehouse and therefore falls under S. 12(3) of the VAT Act. The witness also stated that the sale in bond transaction, being a export by the Applicant and an import by the exempt customer, falls outside the scope of VAT because it is neither a taxable import nor a taxable supply under the VAT Act.

The Respondent`s sole witness was Samuel Lwetutte, an officer in the Respondent`s Large Taxpayer`s Office. The witness testified that the Respondent conducted an audit of the Applicant for the period 2018 to March 2020. The witness stated that the audit revealed that the Applicant had made sales in bond but that VAT was not declared by the Applicant on the mark-up earned. The witness stated that the Respondent accordingly issued the Applicant with a VAT Administrative Additional Assessment of Shs. 2,088,468,660. The witness stated that the Applicant objected to the assessments on the ground that the imported vehicles were exempt from VAT by virtue of the exemptions granted to the Applicant`s customers under the EACCMA.

The witness stated further that the mark-up represented consideration for a separate service which is incidental to the supply of the vehicle and should be treated as part of the taxable value of the imported goods. The witness testified that the review established that the exemptions referred to only related to the customs duties which are based on the CIF values and that any amount over and above the customs value is not part of the exemption. The review also established the Applicant is not entitled to the exemption granted to its exempt customers and that the mark-up realized by the Applicant is not in any way different from other bond sales whose mark-up is subject to tax.

4. Submissions of the Applicant

The Applicant submitted that the sales in bond which are the subject of this application are sales to diplomats, Embassies, Uganda People`s Defense Forces, United Nations and its agencies, International and Regional Organizations, Aid funded Organizations and Government Ministries, Departments and Authorities.

The Applicant submitted that it imports motor vehicles and at the port of loading, the vehicles are consigned to the Applicant and the Applicant`s name is indicated on the

bill of lading, as the Consignee. On arrival in Uganda, the motor vehicles are placed in a bonded warehouse, under the control of the Respondent. The Applicant sells some of the motor vehicles while in the customs bonded warehouse and upon sale, the motor vehicle is transferred into the names of the customer, as the owner, before the vehicle is released from the URA Customs control.

The Applicant submitted that where a motor vehicle is transferred in bond, the customer is treated by the Respondent, as the importer, as per the provisions of the East African Community Customs Management Act (EACCMA). The IM4 exit form bears the name of the customer as the importer and that of the Applicant as the exporter. The importer, being the customer, pays all customs duties and all other taxes assessed. The Applicant submitted that under S. 114(1) and the applicable provisions of Parts A and B of the 5th schedule of the EACCMA, the purchase of the motor vehicles in bond by exempt customers is exempt from customs duties. The Applicant submitted further that the purchase of a motor vehicle by an exempt customer in a bonded warehouse is exempt from VAT by virtue of Ss. 4(b) and 20(1)(a) of the VAT Act. The Applicant conceded that it charges a mark-up on sales made by it in the bonded warehouse.

The Applicant stated that its invoice to an exempt customer in respect of the sale of a motor vehicle in a bonded warehouse, includes the cost, insurance, freight (CIF) of the vehicle and the Applicant`s mark-up. The Applicant stated that the sales mark-up is charged in respect of the Applicant`s services in relation to sales in bond (the service of importing the motor vehicle and delivering it to the customs bonded warehouse and making it available to the exempt customers for purchase). The Applicant submitted that this service is incidental to the import/purchase of the motor vehicle by the exempt customer and is part of the import of the motor vehicle in accordance with S. 12(3) of the VAT Act. The Applicant submitted that S. 12(3) of the VAT Act provides that a supply of services incidental to the import of goods is part of the import of goods. The Applicant stated that the criteria for determining whether services are incidental was laid out in ***URA vs. Total Uganda Limited Civil Appeal No. 11 of 2012,*** where the High Court held on appeal that the supply of cards and the management system for the cards is ancillary to the supply of fuel which is the principal supply. The Applicant submitted that the import of the car and the Applicant`s services on which the mark-

up is charged comprise of a single transaction and that the Applicant`s services are ancillary to the import/purchase of the motor vehicle by the exempt customer.

The Applicant submitted that the decision in ***Kampala Nissan Uganda Ltd vs. URA Civil Appeal No. 7 of 2009***, was decided *per incuriam* as the court did not delve into the application of S. 12(3) of the VAT Act, in respect of sales in bond. The Applicant submitted that the sale in a bonded warehouse includes the import of the motor vehicle by the Applicant, delivering it to the customs bonded warehouse and making it available to the customer for purchase. The Applicant submitted that its services are an integral part of the import without which the motor vehicle would not be available for purchase by the exempt customer. The Applicant submitted further that its services cannot be severed from the import/purchase of the motor vehicle by the exempt customer. The Applicant submitted that the importation of the motor vehicle, its delivery to the customs bonded warehouse and the purchase by the exempt customer, is a single continuous transaction of the sale in bond.

The Applicant took this argument further by submitting that the above sale constitutes, a single transaction from an economic point of view and should not be artificially split. In support of this argument, the Applicant cited the decision in ***Commissioners of Customs and Excise vs. British Telecommunications Plc***.

The Applicant submitted that its sales mark-up for services incidental to the import/purchase of the motor vehicle by an exempt customer is exempt from VAT because the Applicant`s services are incidental and integral to the importation of the motor vehicle and the sale in bond.

The Applicant submitted that the exemption referred to under S. 20(1)(a) of the VAT Act, relates to the taxable value of the import as defined under S.23 of the VAT Act.

The Applicant submitted that the argument by the Respondent that the VAT exemption referred to by the Applicant only relates to the customs duties which are based on the CIF value and that any amount over and above the customs value is not part of the exemption, is untenable. The Applicant submitted that the reason for this is that the VAT Act clearly provides for the taxable value of an import under S. 23, which includes the value of any incidental services to which S. 12(3) of the VAT Act, applies. The Applicant submitted that it follows that the exemption under S. 20(1) (a) of the VAT Act

relates to the taxable value of the import which ordinarily would have been subject to VAT, if no exemption had been in place. In conclusion, the Applicant stated that its sales margin which forms part of the taxable value for a motor vehicle sold in bond is exempt from VAT in accordance with S. 20(1)(a) and S. 23 of the VAT Act.

5. Submissions of the Respondent

The Respondent submitted that the instant dispute centers on the tax treatment of the Applicant`s sales mark-up on motor vehicles bond sales to customers who are entitled to specific exemptions under Part A or B of the 5th Schedule of the East African Community Customs Management Act. The Respondent rejected the argument by the Applicant that the sales mark-up earned on the bond sales represents consideration for a separate service that is incidental to the importation or purchase of the motor vehicles by exempt customers and that the supply of such separate service should be exempt from VAT.

The Respondent submitted that in order to determine whether the Applicant`s imported motor vehicles qualify as exempt from VAT, reference must be made to the 5th Schedule of the EACCMA, which outlines specific and general exemptions from customs duties, which by extension apply to VAT under S. 20(1)(a) of the VAT Act. The Respondent submitted that the 5th Schedule provides a specific exemption for certain organizations and individuals such as diplomats, embassies and government bodies under Part A and a general exemption to a broader category of goods under Part B. The Respondent submitted that the Applicant`s customers who are diplomats or government entities, are exempt from customs duties under the 5th Schedule and S. 114 of EACCMA and consequently, the vehicles sold to them in bond should be considered exempt imports under the VAT Act. The Respondent submitted that this aligned with S. 20 of the VAT Act, which exempts goods from VAT if they are exempt from customs duties.

The Respondent conceded to the assertion by the Applicant that the supply of services by the Applicant is incidental to the import of goods under S.12 (3) of the VAT Act. The Respondent argued that the issue in contention is the tax treatment of the Applicant`s sales mark-up on motor vehicle bond sales to customers who benefit from the specific exemptions under Part A or B of the 5th Schedule to EACCMA.

The Respondent relied on the following definition of term `mark-up` by **Collins Dictionary 17th Edition 2008 at page 1019,** `a percentage or amount added to the cost of a commodity to provide the seller with a profit and to cover overhead costs; or an increase in the price of the commodity`. The Respondent submitted that the exemptions claimed by the Applicant only relate to the customs duties which are based on the CIF value, and that any amount exceeding the CIF value(import value) is not exempt from VAT. The Respondent submitted that the VAT Act and EACCMA both clearly distinguish between the customs value and any additional mark-up, which constitutes a separate taxable supply. In support of this argument the Respondent relied on the provisions of S. 23 (c) of the VAT Act and submitted that where the services supplied are incidental to the import of goods and the value of those services is not included in the customs value under S. 23(a), the value of such services constitutes the taxable value that is subject to VAT.

In further support of this argument, the Respondent relied on the decision of the High Court in ***Kampala Nissan Uganda Limited v. Uganda Revenue Authority Civil Appeal No. 7 of 2009.*** The Respondent submitted that this decision clarified that any additional value including the sales mark-up which increases the price of the imported goods beyond the customs value is subject to VAT. The Respondent submitted that the value added by the Applicant in the form of a mark-up for making the vehicles available to the customers constitutes a taxable value subject to VAT.

The Respondent submitted on the authority of **S. 23(a)** of the **VAT Act** and the decision of the High Court in **Kampala Nissan Uganda Limited** *(supra)* that the customs value of a good is determined in accordance with the customs laws, namely the EACCMA. The Respondent submitted that **S. 122 of EACCMA** stipulates that when imported goods are subject to Ad valorem import duty, their value is determined according to the 4th Schedule and import duty is levied on that value. The Respondent submitted that **Paragraph 2(1)** of **Part 1** of the **4th Schedule** specifies that the customs value of imported goods is the transaction value (the price actually paid or payable for the goods when sold for export to the partner State.

The Respondent submitted that the transaction value is adjusted according to **Paragraph 9(2)** of **Part 1** of the **4th Schedule to EACCMA**, through a methodology known as the CIF value (Cost, Insurance and Freight). The Respondent submitted

that this methodology is the exclusive basis for determining the customs value. The Respondent submitted further that the CIF value does not include the Applicant`s sales mark-up for making the vehicles available to its customers. The Respondent submitted that pursuant to **S. 23 (c)** of the VAT Act, any amount beyond the CIF value, such as the Applicant`s sales mark-up, is subject to VAT. The Respondent submitted that the sales mark-up is not part of the customs value and is therefore treated as a separate taxable value subject to VAT. The Respondent submitted that the VAT exemption applicable to the Applicant`s customers under EACCMA relates only to the customs duty based on the CIF value and not the sales mark-up or other additional charges.

The Respondent submitted that the meaning of **S.23(c)** of the **VAT Act**, is that where the value of any service incidental to the import of goods, is not included in the customs value of the good, the value of such an incidental service constitutes a taxable value subject to VAT. Relying on the oft-cited decision of **Cape Brandy Syndicate v. Inland Revenue Commissioners (1921) 1 K.B 64,** the Respondent submitted that the tribunal should apply the plain and grammatical meaning of the words of **S. 23 (c)**. The Respondent submitted that the plain meaning of S. 23(c) dictates that the Applicant`s sales mark-up, which is not included in the CIF value, is subject to VAT, irrespective of any customs duty exemptions afforded to its customers. The Respondent submitted that for this reason the Applicant cannot claim VAT exemptions on the sales mark-up.

The Respondent submitted that the Applicant`s sales mark-up constitutes a separate taxable supply subject to VAT at the rate of 18%. The Respondent submitted further that the Applicant`s supply of services would only be exempt, if it is listed in the 3rd Schedule, in accordance with S. 19. The Respondent submitted that the Applicant`s service is therefore a taxable supply as it is not listed in the 3rd Schedule to the VAT Act.

In conclusion, the Respondent stated that the price paid by the Applicant`s customers exceed the customs value of the imported motor vehicles. The Respondent stated that this difference in value, which is the sales mark-up represents the value added and as is chargeable to VAT, in accordance with the VAT Act. The Respondent submitted that the Applicant`s service of importing the motor vehicles and making them available for exempt customers, adds value to the vehicles beyond the customs value. This additional value, reflected in the sales price, attracts VAT under S. 23(c) of the VAT

Act. The Respondent submitted that it was clear that the sales mark-up represents the value of a service not included in the customs value and is therefore the taxable value subject to VAT. The Respondent submitted that it is the Applicant`s customers and not the Applicant who are entitled to the specific exemptions under Part A or B of the 5th Schedule of EACCMA.

6. Submissions of the Applicant in rejoinder

In rejoinder, the Applicant reiterated its earlier submissions and stated that S. 20(1) of the VAT Act should be read together with S. 12(3) of the VAT Act. The Applicant submitted that it is a cardinal principle of statutory interpretation that statutes should be interpreted as a whole and that no section of a statute should be considered in isolation. The Applicant cited the decision in ***Stephen Seruwagi Kavuma vs. Barclays Bank Uganda Ltd HCMA No. 634 of 2010,*** in support of this argument. The Applicant submitted that the Respondent`s attempt to interpret S. 20(1) (a) in isolation of S. 12(3) leads to an erroneous conclusion. The Applicant submitted that S. 20(1) (a) prescribes a VAT exemption for the importation of goods which are exempt from customs duty under the 5th Schedule of the EACCMA. The Applicant submitted that additionally S. 12(3) of the VAT Act provides that a supply of services incidental to the import of goods is part of the import of goods. The Applicant submitted that therefore a service which is incidental to an import of goods which are exempt from customs duty under the 5th Schedule of the EACCMA will also be exempt from VAT by virtue of the provisions of Ss. 12(3) and 20(1) of the VAT Act. The Applicant reiterated its earlier submissions that the exemption referred to under S. 20(1) (a) of the VAT Act, relates to the taxable value of the import as defined under S. 23 of the VAT Act. The Applicant submitted that the VAT Act clearly provides for the taxable value of an import under S. 23 which includes the value of any incidental services to which S. 12(3) of the VAT Act applies. The Applicant submitted that it followed that the exemption under S. 20(1) (a) relates to the taxable value of the import which would ordinarily be subject to VAT if no exemption was in place. The Applicant submitted that its sales margin which forms the taxable value of the motor vehicle sold in bond is exempt from VAT in accordance with S. 20(1)(a) and S. 23 of the VAT Act.

7. Determination of the Tribunal

(i) Whether the Applicant is liable to pay the tax assessed?

At its heart, this dispute is about the scope and application of sections **12(3)** and **23** of the VAT Act.

S. 12, which has been reproduced below, is a codification of the incidental transactions rule. Briefly stated, where two or more elements or acts supplied by a taxable person to a customer, are so closely linked that they form objectively a single economic supply, the taxation of the incidental element will be regarded as following the taxation of the primary element. The term incidental, indicates an element, which is subordinate in nature and does not directly form part of the taxable person`s main activity.

"12. Mixed Supplies

(1) A supply of services incidental to the supply of goods is part of the supply of goods.

(2) A supply of goods incidental to the supply of services is part of the supply of services.

(3) A supply of services incidental to the import of goods is part of the import of goods.

(4) Regulations made under section 51 may provide that a supply is a supply of goods or services."

The Applicant`s case, is that it rendered the service, of delivering and making the motor vehicles in question, available at the customs bonded warehouse. This service, the Applicant argues, was incidental to the import of the said motor vehicles. For the reason, that the motor vehicles were exempt from VAT by virtue of **S. 20(1) (a)** of the **VAT Act**, the Applicant argues, that the taxation of the incidental service, should follow the taxation of the primary service, with the result that the supply of the incidental service, should be considered as exempt from VAT.

S. 20(1) of the VAT Act provides:

"20. Exempt Import

(1) An import of goods is an exempt import if the goods;-

a) Are exempt from customs duty under the Fifth schedule of the East African Community Customs Management Act, except compact fluorescent bulbs with a power connecting cap at the end and lamps and bulbs made from light emitting diodes (LED) technology for domestic and industrial use; or

b) Would be exempt had they been supplied in Uganda."

The Respondent concedes, that while the services supplied by the Applicant, were incidental to the import of the motor vehicles, their supply was not exempt from VAT. The Respondent`s case, which is based on **S.20 (1) (a)** above and **S. 23(c)** of the **VAT Act**, is that the said services could only be exempt from VAT, if their value formed part of the customs value of the imported motor vehicles.

S. 23 of the VAT Act, states as follows;

"S. 23 Taxable value of import of goods

The taxable value of an import of goods is the sum of-

a) *The value of the goods ascertained for the purposes of customs duty under the laws relating to customs;*

b) *The amount of customs duty, excise tax and any other fiscal charge other than tax payable on those goods; and*

c) *The value of any services to which section 12(3) applies which is not otherwise included in the customs value under paragraph (a)."*

The above provision, sets out the amounts, which form the taxable value of imported goods. The importance of a taxable value cannot be over emphasized, as it forms, the basis for the application of the tax rate. This is apparent from **S. 24(1)** of the **VAT Act**, which has been reproduced below;

"24. Calculation of tax payable on taxable transaction

(1) Subject to subsection (2), the tax payable on a taxable transaction is calculated by applying the rate of tax to the taxable value of the transaction."

It can be inferred from Ss. 23 and 24 above, that the amounts constituting the taxable value of imported goods, are liable to VAT while those not constituting the taxable value are exempt from VAT. In order to determine whether the services supplied by the Applicant are exempt from VAT, we must determine whether or not, the value of these services form part of the taxable value under S.23 above.

S. 23 can be reduced to the following formula;

Taxable Value of Imported Goods = *Customs Value of Imported Goods + The Amount of all taxes Payable on the Imported Goods except VAT + The Value of*

Services Incidental to the Import of the Goods which have not been included in the customs value of the imported goods.

Customs Value of Imported Goods

S. 23 (a) provides that the customs value of the goods should be the value of the imported goods ascertained for the purposes of customs duty under the laws relating to customs;

The customs value of goods imported into Uganda is determined in accordance with the ***East African Community Customs Management Act (EACCMA)***. **S. 122 of EACCMA** stipulates that when imported goods are subject to Ad valorem import duty, their value is determined according to the 4th Schedule and import duty is levied on that value.

Paragraph 2(1) of **Part 1** of the **4th Schedule** specifies that the customs value of imported goods is the transaction value (the price actually paid or payable for the goods when sold for export to the partner State).

Paragraph 9(2) of **Part 1** of the **4th Schedule to EACCMA**, provides that;

"In determining the value for duty purposes of any imported goods, there shall be added to the price actually paid or payable for the goods;

a) *The cost of transport of the imported goods to the port or place of importation into the Partner State, provided that in case of import by air no freight costs shall be added to the price paid or payable.*
b) *Loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation into the Partner State; and*
c) *The cost of insurance".*

The Amount of all taxes Payable on the Imported Goods except VAT.

To the customs value of the imported goods derived under **Paragraph 2(1)** of **Part 1** of the **4th Schedule** and **Paragraph 9(2)** of **Part 1** of the **4th Schedule to EACCMA,** should be added the amount of all taxes chargeable on the imported goods with the exception of VAT.

The Value of Services Incidental to the Import of the Goods which have not been included in the customs value of the imported goods.

S. 23(c), refers to the value of services incidental to the import of the goods which have not been included in the customs value under **S. 23(a)** above. We have seen under **Paragraph 9(2)** of **Part 1** of the **4th Schedule** of **EACCMA,** that the incidental services, whose values have been included in the customs value of the imported motor vehicles, are transportation services, loading and handling services and insurance. It is clear, that the incidental services supplied by the Applicant, are not the kind of incidental services, envisaged as forming part of the customs value of the imported goods under **Paragraph 9(2)** of **Part 1** of the **4th Schedule** of **EACCMA.** The exclusion of the value of the incidental services supplied by the Applicant, from the customs value of the imported motor vehicles, means that they form part of the taxable value of the imported motor vehicles under **S. 23(c)** and are accordingly taxable.

It should be noted that **S. 12(3)** is a general provision, which exempts the supply of services incidental to the import of goods from VAT. **S. 23(c)** on the other hand, is a specific provision which determines which of the incidental services under **S. 12(3)**, are exempt from VAT, under the incidental transactions rule.

It is trite that specific provisions of a legal instrument should prevail over more general, conflicting provisions. This principle of the interpretation of statutes goes under the maxim *Generalia specialibus non derogant (general things do not derogate from specific things).*

In the instant case, **S.23 (c)** which is a specific provision prevails over **S. 12(3)** which is a general provision.

For the reasons above, we find that the Applicant is liable to pay the tax assessed.

This application is dismissed with costs to the Respondent.

Dated at Kampala this ...31st.....day of...January.....2025.

SIRAJ ALI	**CHRISTINE KATWE**	**KABAKUMBA MATSIKO**
CHAIRMAN	**MEMBER**	**MEMBER**