THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 004 OF 2021

MAGNET CONSTRUCTION CO. LTD ========== APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ========== RESPONDENT

BEFORE: MS. CHRISTINE KATWE, MR. SIRAJ ALI

RULING

This ruling is in respect of an application challenging a tax liability of Shs. 283,838,183 arising from purported undervaluation, misclassification and non-declaration of imports by the Applicant.

1. Background facts

The Applicant is engaged in mining and quarrying. It imported spare parts and machines for own use. The Respondent carried out a Customs Post Clearance Audit for the period 2019/2020 and issued an assessment of Shs. 370,372,648.62 against the Applicant on the grounds of undervaluation, misclassification and non-declaration of imports. The Applicant conceded to and paid taxes of Shs. 86,534,465 and filed an objection in respect of the balance of Shs. 283,838,183.62. The Respondent disallowed the objection. During mediation, the Applicant provided further documentary proof which led to the vacation of Shs. 107,275,659, leaving in dispute the sum of Shs. 193,111,780.

The disputed tax liability of Shs. 193,111,780 is divided as follows;

a) Shs. 11,766,762 under Sch. II, arising from the reclassification of imported pumps from a duty rate of 0% to 10%.

b) Shs.17,366,783, under Sch. III A, arising from an assessment of VAT on imported services.

c) Shs. 68,334,253 under Sch. III B, arising from an assessment of withholding tax and VAT on consultancy fees.

d) Shs. 95,633,984, under Sch. V, arising from an assessment in respect of purported undeclared imports.

2. The issues for determination

The following issues were set down for determination.

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

(ii) What remedies are available to the parties?

3. Representation

The Applicant was represented by Mr. Omagor David Stephen while the Respondent was represented by Ms. Charlotte Katutu and Ms. Gloria Twinomugisha.

4. The Applicant's evidence and submissions

The Applicant`s first witness was Mr. Shimon Halfon, its Managing Director. The witness testified that he received information of a customs audit from the Respondent. The sum of Shs. 193,501,566 was referred to the tribunal for determination. The witness stated as follows in respect of the amounts in dispute:

a) Imported services under Schedule II A

With regard to assessments in respect of imported services, the Applicant's witness stated as follows:

(i) Payments made to Epiroc Eastern Africa Ltd were made on the account of Epiroc Rock Drills towards outstanding payments and not in respect of a particular import.

(ii) Payments made to Mult-T-Lock Technologies were payments made on account in respect of tax Invoice No. 27 of 1st August 2017, Tin number 1009679293 and VAT was declared and paid.

(iii) Payment to Rock plant Kenya was payment made on account for the machine supplied and the cost included after sales service by a technician. Payment made to Panafrican Equipment was for the service of the machine that malfunctioned. The service and spares were provided by Panafrican.

b) Withholding tax and VAT on consultancy services (Schedule 111B)

The witness testified that Nana Otibu, Shimon Ran, Michael, Mcehil and Ohad, were employees for Magnet Tanzania Ltd and were given operational funds for the project in Tanzania while Madam Silvia was a director and did not provide any consultancy services.

The witness clarified that Madam Silvia was a director in the Applicant company and did not provide consultancy services and she was refunded her money. The witness stated that she was paid as a director and not as an expatriate. The witness testified that the Applicant regularly imports spares and machinery for the Applicant`s machinery for the Applicant`s own use, all of which are declared to customs. The witness stated that the tax which was referred to the tribunal is Shs. 193,501,566 out of which the Applicant disputed Shs. 181,335,019 leaving the sum of Shs. 12,166,547 as payable.

Further, the Respondent did not identify the consultancy that was done. No consultancy was undertaken by the Applicant and that the names provided in the list were all employees of the Applicant in Tanzania and one of them was a director to whom advances were made as a director.

Submissions

In written submissions, the Applicant objected to the withholding tax and VAT on consultancy fees assessed in respect of funds sent to Shimon Ran and others. The Applicant submitted that the payments made were for a project in Tanzania and no consultancy was provided in Uganda. The Applicant stated further that Ms. Silvia Halfon was a director of the company and the funds were advanced to her as a director in order to further the company`s business. The Applicant stated that the Respondent had failed to specify the consultancies if any which had been undertaken by the Applicant.

In respect of Schedule IIIA, the Applicant submitted that the payment of USD 2,150 to Epiroc Eastern Africa indicated as being payment to the technician was in actual fact a disbursement for the spares imported by Epiroc and was made on account as Epiroc was a regular supplier of the company. The Applicant stated that the requisite taxes were paid

by the technician. The Applicant submitted that a tax of Shs. 2,683,083 on the purchase and installation of a security lock was not applicable as it was declared by Mult-T-Lock Technologies as a sale in its VAT returns. The Applicant submitted further that the payment of USD 6,500 paid to the account of Rock Plant Kenya for the purchase of a Hitachi Wheel Loader was paid directly to the company and not to the technician and accordingly the recipient of the purchase price was Rock Plant Kenya and not the technician as shown in the ledger. The Applicant submitted that the said sum does not appear in the Applicant`s ledger.

The Applicant submitted further that the payment of USD 3,332.40 paid to Panafrican Equipment was a reimbursement for cartridges, Head Assy, valves and wiring harness which were imported by the technician for use on a Komatsu Wheel Loader. The Applicant submitted that the spares were cleared by the technician as he was responsible for fixing them in the machine. The Applicant submitted that it could not declare the said import to customs as the technician had imported the said spares under Panafrican Equipment. The Applicant submitted therefore that there was no outstanding tax in respect of Schedule III as the spares were duly cleared by the companies which sent the technicians. The Applicant stated that further payment by it would amount to double taxation.

c) Undeclared imports (Schedule V)

The witness stated that payments were made to Global Machinery Hong Kong, Rock plant Kenya, Global Machinery, Stetson Industrial Equipment, Almog Technical services and the spares which had been paid for were not delivered and no declaration could be made to customs as the said spares have never been delivered. In addition, the witness stated as follows:

(i) Applicant appointed a clearing agent whose job it was to handle all customs procedures. The witness was consequently surprised to learn about allegations of undervaluation, excess payments, undeclared goods, import of services and import of expatriates without declarations to customs.

(ii) Undervaluation arose from different invoice values in relation to payments made for goods ordered.

(iii) Payments were made according to the items ordered and upon delivery, certain items were missing and thus affected the final commercial invoice. The witness clarified that it was the Applicant`s duty to demand for payment of the excess payment since the goods were short delivered.

(iv) Other imports were made on credit like CMD Engineering Equipment Supplies, Almog Technical Equipment, Leegold Limited, Rikmat Plada Ltd. The witness stated that these particular issues were handled during mediation.

(v) In respect of the allegation of undervaluation, the Applicant has ever engaged in undervaluation.

(vi) The excess payment which was made to suppliers constituted deposits for goods yet to be supplied and that it was wrong for the Respondent to tax goods not yet received by the Applicant.

Submissions

In written submissions, the Applicant submitted that it made payments for spares but the spares were not delivered. The Applicant submitted that these payments remained on its ledgers pending delivery of the spares or the refund of the money. The Applicant submitted that it could not declare goods which were not received and the Respondent did not provide documentary proof like seizure notices to confirm that the goods in question had been smuggled. The Applicant submitted further that no tax applies in the instant case as the goods in question were not received by the Applicant.

In addition, the Applicant that there were few instances arising in respect of undervaluation due to the difference in prices between the commercial invoices and the amounts paid for the spares. The Applicant submitted that the commercial invoices reflected the actual values of the spares packed and shipped and the differences in values were treated accordingly in the supplier`s ledger. The Applicant submitted that correct commercial invoices were submitted as it was impossible to submit two commercial invoices to customs for the same item. The Applicant submitted that this anomaly was

corrected in respect of entry no. C20623 but a request for an adjustment made to the Respondent received no answer. The Applicant stated that it accordingly computed a tax of Shs. 53,567,929 in respect of Schedule 1. The Applicant submitted that it conceded to tax of Shs. 71,680,080 in respect of Schedule 1 and Shs. 14,854,385 in respect of Schedule II, totaling to a concession of Shs. 86,534,534,465.

The Applicant`s second witness was Mr. P.V Raveendran, the Applicant`s accountant. The witness testified that the Applicant has experienced short deliveries which are reflected as overpayments due to the failure by the supplier to supply the quantity ordered. The witness stated further that the Applicant also makes deposits to its regular suppliers who then offset their balances regularly. The witness testified that the Applicant has not had any expatriates but only workers recruited from the Applicant`s sister company in Tanzania whose payments are made from the parent company in Uganda.

5. The Respondent's evidence and submissions

The Respondent's first witness, was Ms. Scovia Amaniyo, an officer in the Customs Audit Division of the Respondent's Customs department. The witness testified that she was part of the team that carried out the Customs Post Clearance Audit of the Applicant for the year 2019/2020 and established instances of undervaluation, misclassification and general non-compliance among other issues. The witness stated that the Applicant objected to most of the findings of the audit. The witness stated that on 2nd July 2020, the parties held an objection reconciliation meeting in which the Applicant conceded to a tax liability of Shs. 86,534,465 being comprised of Shs. 71,680,080 from Schedule I and Shs. 14,854,385 being part of the tax liability in Schedule II as per the assessment schedules in the management letter. The witness stated that the parties agreed that Shs. 681,196 being tax on water pumps and hand pumps be vacated. The witness stated that the Applicant disputed the rest of the tax liability of Shs. 300,158,757.59 and it was agreed that the Applicant should provide documentary evidence to support the objection.

a) **Under valuation (Schedule 1)**

On 15th December 2020, the Respondent communicated to the Applicant a tax liability of Shs. 370,372,648.62. The witness stated that during mediation the Applicant made a further concession of Shs. 71,680,080 in respect of Schedule 1 and paid the same. The witness testified that the tax liability under Schedule I arose from double invoicing by declaring a different currency from that declared in the invoice namely declaring an invoice in Israeli Shekels while the original invoice recovered from the Applicant`s premises was in United States Dollars, a lower CIF declared on the Single Administrative Documents (SAD/IM4) compared to the amount declared on the sales agreement, over-declaration of the actual value of the freight invoice was less.

The Respondent stated that the tax liability in Schedule 1 arose from undervaluation through double invoicing, under-declaration of CIF and Over-declaration of freight. The Respondent stated that double invoicing arose in instances where the Applicant declared a different currency from that reflected on the invoice. For instance, the Applicant declared an invoice in Shekels while the original invoice recovered from the Applicant`s premises was in US Dollars. The Respondent submitted that the under-declaration constituted lower declarations of CIF by the Applicant on the Single Administrative Document (SAD/IM4) as compared to the amount declared on the sales agreement. The Respondent stated further that the over-declaration of the freight arose as a result of lower freight values in the actual invoices with the result that the variance between the values was added back to the value of the goods. The Respondent submitted that the Applicant had conceded that the tax liability in respect of the Schedule 1 was Shs. 71,680,080 and that therefore the Applicant was precluded from raising that fact in the instant application.

The Respondent explained that in a reconciliation meeting held on 2nd July 2020, whose minutes have been exhibited as RE8, the Applicant admitted that a wrong currency had been declared as Shekels instead of US Dollars; that in relation to Entry No. C44614/2017, a lower CIF of USD 24,148 had been declared instead of USD 25,530; that in relation to Entry C32871/2017 freight had been over-declared and as such the Applicant was in agreement with and conceded to the tax liability of Shs. 71,680,080. The Respondent submitted that this position was communicated to the Applicant by

correspondences dated 7th July 2020 (RE9), 25th November 2020 (RE19), and 15th December 2020 (RE20). The Respondent stated that the Applicant accepted this position by letter dated 16th December 2020 (RE21) and further that it was an agreed fact at scheduling that the Applicant had conceded to taxes of Shs. 86,534,465, which it paid (the entire liability under Schedule 1 and part of the liability under Schedule II). The Respondent submitted that the Applicant had admitted the above on page 2 of its submissions. The Respondent cited S. 57 of the Evidence Act for the authority that admitted facts need not be proved at the hearing.

b) Misclassification of imports (Schedule II)

The witness stated further that in respect of Schedule II which related to the misclassification of imports, Shs. 618,196 which had been included in error was vacated, the Applicant conceded to Shs. 14,854,385 and paid the same, the Respondent found that Entry C18894/18 had been correctly classified and Shs. 294,866 was accordingly vacated while the outstanding amount of Shs. 12,166,547 remained payable.

Submissions

The Respondent submitted in respect of Schedule II that Shs. 618,196 had been included in error and was vacated. The Applicant conceded to and made payment for Shs. 14,854,385. The Respondent stated that Entry C18894/18 had been properly classified and therefore the sum of Shs. 294,866 was vacated. The Respondent stated that the sum of Shs. 11,766,762 remained outstanding (RE43 Revised Schedule II). The Respondent maintained that the Applicant misclassified the pumps and is therefore liable to pay the outstanding tax of Shs. 11,766,762. The Respondent submitted that the EACCET is governed by 6 rules of interpretation known as the **General Interpretation Rules (GIR).** These rules, the Respondent submitted, are applied in a hierarchical order for instance rule 2 can only be applied after rule 1 has been found to be inapplicable. In support of this argument the Respondent cited the decision of the Kenya Tax Appeals Tribunal in ***Solutions Medical Systems Ltd vs. Commissioner of Customs & Border Control, TAT Appeal No. 472 of 2020,*** wherein the tribunal stated that GIR1 requires that classification be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes and unless otherwise required, according to the

remaining GIRs taken in that order. The Respondent submitted that the Applicant imported hydraulic, steering, fuel, transmission and water pumps and declared them under HSC 8413.81.00 with a duty rate of 0% instead of HSC 8413.30.00 with a duty rate of 10%. The Respondent submitted that HSC 8413.81.00 under which the Applicant classified the items is a residual subheading under heading 84.13 and ought to cover items not specifically mentioned under any of the competing subheadings under a specific heading. The Respondent submitted that as such HSC 8413.81.00 covers other pumps not specifically provided for under heading 84.13. The Respondent submitted that it reclassified the pumps to subheading 8413.30.00 which provides for fuel, lubricating, or cooling pumps for internal combustion, piston engines. The Respondent submitted that these imported pumps fit within the above specified sub-heading since they are for use in earth moving equipment like excavators, wheel loaders among others. The Respondent submitted that it is sufficient that the subheading under which the Applicant declared the goods is 8413.81 which is a double dash subheading under the single dash subheading of ``Other pumps; liquid elevators``. The Respondent submitted that the above subheading under which the Applicant classified the goods is a subset of ``other pumps`` apart from those specifically mentioned and that since the pumps imported by the Applicant are specifically provided for under HSC 8413.30, they cannot be classified under the residual subheading of other pumps.

c) Imported Services (Schedule IIIA)

In respect of Schedule IIIA which related to imported services the witness stated that in respect of the tax of Shs. 2,679,540 for Epiroc Eastern Africa, the Applicant provided entry no. C21467/18 as proof that the items in question were spare parts. The witness stated that although the items indicated on the entry were spare parts and the exporter is indicated as Epiroc Rock Drills Sweden, the total entry value was USD 1,948.8 while the amount on the Funds Transfer Request Form dated 28th August was USD 2,150. The witness stated that this amount was also reflected in the ledger with the narration `*payment for Technician*`. The Respondent concluded therefore that the sum of USD 2,150 was for the payment of a service and not goods. In the same vein, the witness testified that Shs. 2,683,083 relating to Mult-t-Lock Technologies, Shs. 7,751,129 relating

to Rock Plant Kenya and Shs. 4,253,030 relating to Pana-Africa Kenya were all for payment of services and not goods.

The witness stated that the total tax outstanding in Schedule IIIA is Shs. 17,366,783 and that the interest of Shs. 6,899,889 computed under Schedule III was waived pursuant to S. 40C of the Tax Procedures Code Act (TPCA).

d) VAT on consultancy services (Schedule IIIB)

The witness testified further that as regards Schedule IIIB relating to WHT and VAT on Consultancy fees, the tax of Shs. 15,539,187 assessed in respect of Nana Otibu and Damien Michael Sullivan was vacated upon the Applicant presenting the work permits proving that they were employees for the period, the interest of Shs. 40,259,251 was waived pursuant to S. 40C of the TPCA, while the balance of Shs. 68,334,253 which related to persons who had been paid consultancy fees by the Applicant remained outstanding.

Submissions

In respect of Schedule IIIA which relates to imported services the Respondent submitted that S. 5(1) (c) of the VAT Act provides that the tax payable in the case of a supply of imported services other than an exempt service shall be paid by the person receiving the supply. The Respondent submitted that in respect of the tax of Shs. 2,679,540 relating to Epiroc Eastern Africa the Applicant provided entry C21467/18 to prove that the items were spare parts. The Respondent submitted that while the items on the entry are indeed spare parts the total value of the items on the entry is USD 1,948.8 yet the amount on the funds transfer request form dated 28th August 2018 is USD 2,150. This amount is also reflected in the ledger with the narration ``*payment for technician*``. The Respondent concluded therefore that the USD 2,150 was for the payment of services provided by the technician and not for the supply of goods. The Respondent submitted that the payment of Shs. 2,683,083 for door repairs by Mult-t-Lock Technologies was for the purchase and installation of a security door. However, the narration in the funds transfer request form ``payment for door repairs invoice No. 42350857` shows that the payment was for the

payment of services and not goods. The Respondent submitted further that the payments of Shs. 7,751,129 to Rock Plant Kenya and Shs. 4,253,030 to Pana-Africa Kenya Ltd were also for payment of services and not goods as shown by the ledger and the funds transfer request form and invoice no. 2824. The Respondent submitted that the interest of Shs. 6,899,889 computed under Schedule III was waived pursuant to S. 40C of the TPCA leaving the total outstanding tax under Schedule IIIA as Shs. 17,366,783.

In respect of Schedule IIIB the Respondent submitted that the tax of Shs. 15,539,187 assessed in respect of Nana Otibu and Damien Michael Sullivan was vacated upon the Applicant presenting work permits as proof of employment for the period in question. The Respondent submitted further that the interest of Shs. 40,259,251 was waived pursuant to S. 40C of the TPCA. The Respondent submitted that the balance of Shs. 68,334,253 remained outstanding as the Applicant had failed to prove that Ms. Silvia Halfon was an employee of the Applicant.

e) Undervaluation due to excess payments

In respect of Schedule IVA and IVB relating to undervaluation due to excess payments the Respondent submitted that the tax in both instances was vacated. The Respondent submitted that no dispute existed in respect of both schedules.

The witness testified further that as regards Schedule IVA relating to undervaluation due to excess payments, the amount of Shs. 16,320,844 was vacated on account of the Applicant providing evidence of cancellation of the supply contract by Hippocampus. The witness stated further that regarding Schedule IVB which also related to undervaluation due to excess payments, the tax of Shs. 19,032,119 was vacated upon reconciliation of the new ledger postings provided by the Applicant, the tax of Shs. 8,311,307 relating to Xiamen Globe Truth was vacated upon confirmation that the excess payment was added in error.

f) Undeclared imports (Schedule V)

In respect of undeclared imports, which related to Global Machinery Ltd, no entry was provided to confirm clearance of the said goods yet there existed proof of payment through the forex bureau. In respect of Shs. 14,503,524 relating to Rock Plant Kenya, the

client provided entry C28128/17 as the entry through which the goods were cleared but the total amount on this entry was Shs. 13,327,964 while the amount reflected in the ledger was Shs. 17,839,512.60 for the purchase of spare parts. The witness testified that there was no evidence to prove that the two were one and the same consignment.

In respect of Stetson Industrial Equipment of Shs. 34,355,835, the witness stated that no entry had been provided to prove the clearance of the goods despite the fact that the clearance of the goods was stated in the supplier`s ledger. In respect of Shs. 43,606,445 relating to Almong Technical Services, the witness testified that the entries C31658/16 and C37892/16 provided by the Applicant were checked but none of them related to invoice no. 11/149191 of 16th September 2017, the witness clarified that the Respondent found that the Applicant`s suppliers made payments to suppliers in this schedule but there were no import declarations for the same. The witness explained that the total outstanding tax in Schedule V is Shs. 95,663,984 and that a total amount of Shs. 107,275,659 was vacated leaving the sum of Shs. 193,111,780 as payable.

Submissions

The Respondent submitted that no entries were provided by the Applicant for Shs. 3,168,180 paid to Global Machinery Ltd and Shs. 34,355,835 paid to Stetson Industrial Equipment. The Respondent submitted that although the Applicant provided entry no. C28128/17 for the clearance of goods purchased from Rock Plant Kenya at Shs. 14,503,524, the amount on the said entry is Shs. 13,327,964. The Respondent submitted in respect of Shs. 43,606,445, relating to Almog Technical Services Ltd that the entries provided did not correspond to the invoices provided. The Respondent submitted further that the Applicant`s suppliers made payments to suppliers but no corresponding import declarations for the same were made. The Respondent submitted further that the Applicant did not present evidence of the short deliveries which were allegedly made by its suppliers. The Respondent stated that the total outstanding tax in Schedule V was Shs. 95,633,984. In conclusion the Respondent stated that a total of Shs. 107,275,659 was vacated while a total of Shs. 193,111,780 remained outstanding and payable.

The Respondent`s second witness was Jude Ochieng, supervisor tariff in the Tariff Unit of the Respondent`s Customs Department. The witness testified that the Applicant imported hydraulic, steering, fuel, transmission and water pumps and declared them under HSC 8413.81.00 with a duty rate of 0% instead of HSC 8413.30.00 with a duty rate of 10%. The witness testified that HSC 8413.81.00 under which the Applicant classified the items is a residual subheading under heading 84.13. The witness explained that a residual subheading under the EAC-CET covers items not specifically mentioned under any of the competing sub-headings under a specific heading. The witness clarified that this HS code covers other pumps not specifically provided for under heading 84.13. The witness testified that the Respondent accordingly re-classified the pumps to subheading 8413.30.00 which provides for fuel, lubricating, or cooling pumps for internal combustion piston engines. The witness explained that the imported pumps fit within the specified sub-heading since they are for use in earth moving equipment like excavators, wheel loaders among others. The witness stated that the Applicant is liable to pay the tax as assessed.

In rejoinder the Applicant reiterated its earlier submissions.

6. The determination by the Tribunal

Having listened to the evidence and read the submissions of the parties, the following is the ruling of the tribunal.

As stated earlier, the disputed tax liability of Shs. 193,111,780, is divided as follows;

a) Shs. 11,766,762 under Sch. II, arising from the reclassification of imported pumps from a duty rate of 0% to 10%.
b) Shs.17, 366,783, under Sch. III A, arising from an assessment of VAT on imported services.
c) Shs. 68,334,253 under Sch. III B, arising from an assessment of withholding tax and VAT on consultancy fees.
d) Shs. 95,633,984, under Sch. V, arising from an assessment in respect of purported undeclared imports.

(a) Shs. 11,766,762 under Sch. II, arising from the reclassification of imported pumps from a duty rate of 0% to 10%

Jude Ochieng, RW2, testified that the sum of Shs. 11,766,762 arose from a misclassification by the Applicant of its imported pumps under HSC 8413.81.00 with a duty rate of 0% instead of HSC 8413.30.00 which stipulates a duty rate of 10%. In response the Applicant stated that Mr. Ochieng did not physically inspect the pumps and could not therefore determine that the pumps in questions fell under HSC 8413.30.00 instead of HSC 8413.81.00.

HSC 8413.30.00 provides as follows;

84.13 **Pumps for liquids, whether or not fitted with a measuring device; liquid elevators.**

- Pumps fitted or designed to be fitted with a measuring device:

8413.11.00 -- Pumps for dispensing fuel or lubricants, of the type used in filing-stations or garages.

8413.19.00 -- Other

8413.20.00 - Hand pumps, other than those of subheading 8413.11 or 8413.19

8413.30.00 - Fuel, lubricating or cooling medium pumps for internal combustion piston engines

8413.40.00 - Concrete pumps

8413.50.00 - Other reciprocating positive displacement pumps

8413.60.00 - Other rotary positive displacement pumps

8413.70.00 - Other centrifugal pumps

Other pumps; liquid elevators:

8413.81.00 -- Pumps

8413.82.00 -- Liquid elevators

- Parts:

8413.91.00 -- Of pumps

8413.92.00 -- Of Liquid elevators.

It will be seen at pages 57-59 of the joint trial bundle that the following pumps were imported by the Applicant; hydraulic pump, steering pump for wheel loader, water pump, water pump for Caterpillar, Gear pump, Transmission pump, Lift pump for Perkins Engine and oil pump assembly. All these pumps were declared to customs under HSC 8413.81.00 which stipulates a duty of 0%. It is apparent from the types of pumps imported that they are for use in internal combustion piston engines. Pumps for use in internal combustion piston engines are specifically provided for under HSC 8413.30.00 with a duty rate of 10%. We agree with the Respondent that HSC 8413.81.00 under which the Applicant classified its pumps is a residual subheading under heading 84.13 which covers items not specifically mentioned under any of the sub-headings. The Applicant ought to have classified the imported pumps which from their description, are for use in internal combustion piston engines, under HSC 8413.30.00 and not HSC 8413.81.00.
We accordingly find that the Applicant is liable to pay the tax of Shs. 11,766,762.

(b) Shs.17, 366,783, under Sch. III A, arising from an assessment of VAT on imported services.

The taxes of Shs.17,366,783 under the broad head of imported services under Sch.III A, arise from four different transactions. The Respondent`s position is that the Applicant was the recipient of imported services and should have paid VAT on the said services as the person receiving the supply. We will look at each of these transactions in turn to determine whether they constituted supplies of imported services. In making this determination we must first resolve the question as to whether there was a supply of services in each of these instances and if so whether they constituted supplies of imported services.

i. Shs. 2,679,540 in respect of Epiroc Eastern Africa

The documents which relate to this payment are at pages 60-69 of the joint trial bundle. The import entry document no. C21467/18 and the invoice show that the items imported were parts for boring or sinking machinery. The exporter is indicated in the entry as Epiroc Rock Drills of Sweden while the total value of the imported items is USD 1,948.800. As proof of payment of this sum the Applicant presented a copy of a Funds Transfer Request Form from Barclays Bank. This form is at page 69 of the joint trial bundle. The Applicant is indicated in the form as the account owner while the beneficiary is indicated as Epiroc Eastern Africa Ltd.

The payment amount is USD 2,150 and the purpose of funds is indicated as `*payment for technician*`. The amount in the entry form does not tally with the amount in the Funds Transfer Request Form. The name of the exporter in the entry is different from that stated in the Funds Transfer Request Form. Further the reason for payment given in the Funds Transfer Request Form is different from that stated in the invoice. The above documents show that the transaction in respect of which the Applicant paid Epiroc Eastern Africa Ltd the sum of USD 2,150 has no relation with the goods imported by the Applicant under the above entry. It is clear from the Funds Transfer Request Form that the sum of USD 2,150 was paid by the Applicant for services performed by a technician. Having determined that a service was provided in respect of which the Applicant made payment to Epiroc Eastern Africa Ltd what remains to be determined is whether the service in question was an imported service. S. 1(j) of the VAT Act defines the term "import" as "*to bring or cause to be brought into Uganda from a foreign country of place*"

Regulation 13(1) of the VAT Regulations provides that a person receiving an imported service will account for VAT on the supply. In *COWI AS v URA HCCA 34/2020,* the High Court stated that an import of services involves the provision of a service by a person who is resident or carries on business outside Uganda to a person that is resident or carries on business in Uganda. There is no doubt in our minds that Epiroc Eastern Africa Limited to whom the payment was made is resident in Kenya as can be seen from their physical address at *Sameer Business Park Block CJ, Mombasa Road, Nairobi, Kenya,* as stated in the Funds Transfer Request Form. The Applicant's address is stated as Plot 15 Mackenzie Vale, Kololo, Kampala, Uganda. This shows that the services by the technician were provided by Epiroc Eastern African Ltd to the Applicant in Uganda. This makes the service in question an imported service as per the above decision of the High Court.

ii. Shs. 2,683,083 in respect of Mult-t-Lock Technologies

From the Applicant`s own submissions the payment in question was for door repairs. It is therefore not in dispute that a service was provided in respect of which the above sum was paid. The question which needs to be resolved is whether this was an imported service. The address of Mul-T-Lock Technologies Ltd is stated in the Funds Transfer Request Form as 25, Habarzel St, Tel Aviv, Israel. It is apparent therefore that the door repairs were carried out by the above company at the Applicant`s premises in Kampala. Since the service in question was provided by Mul-T-Lock Technologies Ltd, a non-resident, to the Applicant who is resident in Uganda, the service in question was an imported service.

iii. Shs. 7,751,129 in respect of Rock Plant Kenya

The position set out in the Applicant`s invoice no. 10412 dated 8/12/2017 is that the sum of Shs. 7,751,129 was paid to Rock Plant Kenya for the supply of a Hitachi Wheel Loader. However, the Funds Transfer Request Form provided by the Applicant as proof of payment of the above sum and the Applicant`s own ledger shows the purpose of the funds as `payment to technician`. This shows that the payment in question was made in respect of the supply of a service. The Funds Transfer Request Form shows that Rock

Plant Kenya Ltd is resident in Kenya, at Savannah Business Park, Warehouse 10-11, Mombasa Road, Nairobi while the Applicant is resident in Uganda. Services provided by a technician from the above company to the Applicant qualifies as an imported service in accordance with the *COWI* decision set out above.

iv. Shs. 4,253,030 in respect of Panafrican Equipment Kenya Ltd

Invoice 137066 issued to the Applicant by Panafrican Equipment (Kenya) Ltd states that the sum of USD 3332.40 paid by the Applicant was for " *cost of providing our technicians to carry out troubleshooting of the engine low pressure and fuel injection pump malfunction. Carried out remedial repairs awaiting fixing of new parts, services the engine and gave recommendations for the FIP parts required. Job done between 27-02-/02/16 as per attached filed service report".* The Applicant admits in its submission that the invoice sum indicated above was paid to the technician. It is clear from the above that a service was supplied by Panafrican Equipment Kenya Ltd to the Applicant. The above invoice shows that the above company`s address is Uhuru Highway, P.O Box 44927-06100 Nairobi, Kenya. The service was therefore supplied by a non-resident person to the Applicant. This makes the supply of the service an imported service.

Having looked at each of the above transactions, we are satisfied that they all constituted supplies of imported services by the above companies to the Applicant in respect of which VAT ought to have been paid by the Applicant. We accordingly find the sum of Shs. 17,366,783 due and payable.

(c) Shs. 68,334,253 under Sch. III B, arising from an assessment of withholding tax and VAT on consultancy fees

In a letter dated 10th March 2020, the Respondent informed the Applicant that payments made to the Applicant`s expatriate staff as stated in the Applicant`s records had been treated as consultancy fees due to the fact that the Applicant had not provided proof of their employment. The Applicant provided the required proof and the assessments in question were vacated save that in respect of Ms. Silvia Halfon. Ms. Halfon is also referred

to in these documents as Madam Silvia. Exhibit C53 at page 48 of the Joint Trial Bundle shows that Ms. Halfon was paid the sum of USD 25,000 by the Applicant on 31st May 2016. On 17th November, 2020, the Applicant wrote to the Respondent and stated that the payment of USD 25,000 made to Ms. Halfon was a refund of money that she had lent the company.

On 19th August, 2021, the Applicant wrote to the Respondent stating that Ms. Halfon was a Director of the Applicant and had not provided any consultancy services. The Applicant therefore requested that the assessment imposed on the basis of the provision of such services ought to be vacated. This position is repeated in the witness statement of Mr. Shimon Halfon dated 12th September, 2022, at paragraph 9. The Respondent on the other hand asserts that the Applicant has failed to prove that Ms. Halfon was its employee during the period in question. By virtue of S. 18 of the Tax Appeals Tribunal Act, the Applicant is under the duty to prove that the tax assessed was excessive or that the taxation decision should not have been made or should have been made differently. The Applicant must on a balance of probabilities prove that neither Withholding tax nor VAT applies to the payment of USD 25,000 made to Ms. Halfon.

The reason given by the Applicant for this payment was that it was a refund of a loan made by Ms. Halfon to the Applicant. Subsequent letters from the Applicant to the Respondent fail to mention this and instead state that Ms. Halfon was a Director of the Applicant and did not provide consultancy services. If the money in question was a refund of a loan which Ms. Halfon had made to the Applicant, then the Applicant ought to have provided proof of this. For instance, by providing a loan agreement or failing that proof of disbursement of this loan by Ms. Halfon to the Applicant. The Applicant has provided none of these. The annual returns of December 2017, relied upon by the Applicant show that Ms. Halfon had ceased to be a shareholder and director as of 26th April 2013. By failing to explain the purpose of the above payment to Ms. Halfon, the Applicant has failed to discharge the burden of proof placed upon it by the law.
We accordingly find that the sum of Shs. 68,334,253 is due and payable by the Applicant.

(d) Shs. 95,633,984, under Sch. V, arising from an assessment in respect of purported undeclared imports.

The assessments under this Schedule relate to imports purportedly made by the Applicant but not declared to the Respondent. A breakdown of the above sum can be found in Exhibit RE46. The Applicant has submitted in respect of the above that it made orders to Global Machinery Ltd, Rock Plant Kenya, Stetson Industrial Equipment and Almog Technical Services and made the requisite payments. However, by the time of the audit by the Respondent the goods had not been delivered. The Applicant stated that it had no obligation to declare goods not delivered and that there did not exist any legal requirement for it to make declarations of short deliveries to customs. The Applicant stated that its obligation only extends to submitting import documents upon receipt of the imported goods. The assessments in respect of Global Machinery Ltd and Stetson Industrial Equipment are based on the failure by the Applicant to provide entries while those in respect of Rock Plant Kenya and Almog Technical Services are based on the fact that the entries provided by the Applicant do not tally with the amounts stated in the Applicant`s ledger and the invoices provided by the Applicant.

a) The Applicant has stated in respect of both Global Machinery Ltd and Stetson Industrial Equipment to whom the Applicant remitted Shs. 3,168,180 (See page 85 of Joint Trial Bundle) and Shs. 34,355,835, respectively that although the payments in question were made, the goods paid for had by the time of the audit, not yet been delivered by the said companies. The Money Remittance Form in respect of Global Machinery Ltd and the Applicant`s ledger for the period 1st January 2016 to 31st December 2018, shows that the money was remitted on 2nd August 2018 and 22nd August 2017 respectively. The letter notifying the Applicant about the audit in question was written by the Respondent on 18th November, 2019.

b) The period from the time the money was remitted to the suppliers, to the time the Applicant was notified of the audit by the Respondent, is 13 months for Global Machinery Ltd and 25 months for Stetson Industrial Equipment. This is an unusually long period for a business to wait for imported goods. Even if it is accepted that the

goods in question had not yet been delivered by the time of the audit surely it ought to have been delivered by the time the Applicant filed this application in the year 2021. The Applicant has not provided evidence by way of correspondence between it and the suppliers to explain the delay or non-delivery of the goods. It is hard to believe that a business can make payment for goods and take no steps against the sellers for delay or non-delivery. We find that the reasons given by the Applicant for non-declaration of the above imports are not credible and are accordingly rejected. The Applicant is liable to pay both the sum of Shs. 3,168,180 in respect of Global Machinery Ltd and Shs. 34,355,835 in respect of Stetson Industrial Equipment.

c) The assessments in respect of Rock Plant Kenya and Almog Technical Services are based on the fact that the entries provided by the Applicant do not tally with the amounts stated in the Applicant`s ledger and the invoices provided by the Applicant. The Respondent has submitted in respect Rock Plant Kenya Ltd that the total amount under Entry No. C28128 provided by the Applicant as evidence of declaration of imports is different from the amount in the Applicant`s ledger. The Respondent has submitted in respect of Almog Technical Services Ltd that entries C31658 and C37892 do not relate to invoice no. 11/149191 dated 16th September 2017.

In response, apart from stating that the goods in question were not delivered and that the Applicant has no obligation to declare short deliveries to the Respondent, the Applicant does not provide any meaningful explanation as to why the amount in the entry in respect of Rock Plant Kenya Ltd does not tally with that in its ledger nor why entries C31658 and C37892 not relate to invoice no. 11/149191 in respect of Almog Technical Services Ltd. The onus, as stated above, is on the Applicant to prove on a balance of probability that the goods in question were declared as imports. By failing to provide any credible evidence as proof that the goods were declared the Applicant has failed to discharge this onus. We accordingly find that the Applicant is liable to pay both the sum of Shs. 14,503,524 in respect of Rock Plant Kenya Ltd and Shs. 43,606,445 in respect of Almog Technical Services Ltd.

Having determined as above, we find that the Applicant has failed to prove on a balance of probability that the assessments in question were improperly issued. This application is accordingly dismissed with costs.

Dated at Kampala this 9th day of July 2024.

MR. SIRAJ ALI
CHAIRMAN

MRS. CHRISTINE KATWE
MEMBER

Note: *This matter was previously partly heard by a panel of three and one of the members, Dr. Asa Mugenyi ceased to be a member. In accordance with Section 13 (3) of the Tax Appeals Act, the parties agreed for the proceedings to be completed by the remaining members of the Tribunal.*