THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NOS. 46, 100 & 110 OF 2022

NILE BREWERIES LIMITTED.....APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY..... RESPONDENT

BEFORE; DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MS. CHRISTINE KATWE.

RULING

This ruling is in respect of an application challenging Value Added Tax (VAT) and Local Excise Duty (LED) assessments raised by the respondent in respect of the applicant's purported exports.

The applicant is a manufacturer of alcoholic beverages which are sold locally in Uganda and exported. The goods manufactured for export are clearly marked 'for export' and are exported to the Democratic Republic of Congo (DRC) and South Sudan. The applicant does not pay VAT or LED exports. The respondent insisted that the applicant misclassified its goods as zero rated since they were not exported by the latter and therefore should pay both LED and VAT.

The respondent audited the applicant for the periods between January to August 2021 and September 2021 to December 2021 and issued additional administrative tax assessments of Shs. 11,025,779,590.98 and Shs. 7,537,585,897 for LED and VAT respectively.

Issues;

1. Whether the applicant is liable to pay VAT assessed?
2. Whether the applicant is liable to pay LED assessed?
3. What remedies are available?

The applicant was represented by Mr. Bruce Musinguzi, Mr. Thomas Kato, Mr. Henry Agaba and Mr. Saidi Kiralira while the respondent by Mr. Derrick Nahumuza, Mr. Doanld Bakashaba, Mr. Alex Sali Aleddiki. Ronald Baluku and Mr. Kenan Aruho.

The applicant's first witness, Mr. Hilary Nowangye, its credit manager testified that the applicant contracted Ituri Investments Limited and Kabaco Uganda Limited as agents to export its beverages to South Sudan and DRC. He stated that the applicant receives orders. It generates invoice which indicate that the goods are for export and therefore no VAT is charged. He stated that the invoices are issued to Ituri Investments Limited and Kabaco (U) Limited. He said there are not sales to the said companies. The goods are loaded at the bonded warehouse. He stated that for exports to South Sudan the export documents clearly indicated that the applicant was the exporter. He stated that all beer manufactured by the applicant for export to South Sudan and the DRC exited Uganda to the final destinations in accordance with the guidelines provided by the respondent. The goods were not sold locally as purported by the respondent. He stated that the respondent has not challenged the exports data issued before the assessments. He stated that the assessments were unlawfully assessed as the said exports attracted a VAT zero rate and no local excise duty.

The applicant's second witness, Mr. Miren D. Mer, an accountant working with Ituri Investments Limited testified that the applicant is a manufacturer of alcoholic beverages which are sold locally in Uganda and also exported to various counties including South Sudan. He stated that Ituri Investments Limited is the applicant's agent for export of alcoholic beverages to South Sudan. He stated that all alcohol for export is marked 'for export.' He stated that the applicant transports goods to South Sudan where Ituri Investments Limited receives and takes charge of them. He stated the sales invoices, customs bills of entry are checked and stamped by URA customs. He stated that customs bills of entry and export documents clearly show that the applicant is the exporter of the goods. On 17th October 2014, the respondent acknowledged that the treatment of the export was zero rated. He stated that the respondent de-activated VAT for Ituri Investments Limited.

The applicant's third witness, Mr. John Mayanja Walakira, a deputy Chief of Party of USAID domestic revenue mobilization project testified that Ituri Investments Limited is an agent of the applicant. He recognized exhibit AE5.which is in respect of a contention on treatment of goods exported by the applicant. He stated that the applicant exported the goods in question. He stated that he ceased working with the respondent in 2016.

The respondent's first witness, Mr. Abdulnoor Katende, a supervisor in its domestic taxes department testified that the applicant manufactures, markets, distributes and exports alcoholic beverages. He stated the respondent conducted a returns examination of the applicant's VAT and LED declarations for 2021. As a result of the audit the respondent issued assessments totaling to Shs. 19,268,906,467.28. He stated that respondent observed that the applicant sold beers for export to Ituri Investments Limited and Kabaco (u) Limited where it wrongly put VAT as zero-rate. It did not pay LED The total sales were Shs. 25,784,841,545. He stated that the applicant issued EFRIS invoices to the said companies where it classified standard rated sales as zero-rated. He stated that the tax invoices were fully paid including security deposits on the crates. The goods were delivered to the companies at its premises. He stated that the applicant declared the local sales to Kabaco (U) Limited as exports yet no exports were made. He stated that the applicant charges Kabaco (U) limited US$ 8 per crate, and the latter exports it at US$ 11. At exportation, the price declared is higher. Ituri issues invoices to importers at cost plus markup. He contended that two transactions take place, local sale and export.

The respondent's second witness, Mr. Robert Amanya, a supervisor in its domestic taxes department stated that the applicant deals in the manufacture, marketing, distribution and export of alcoholic beverages. The respondent conducted a return examination on the applicant's VAT and LED declarations for 2021. The respondent issued assessments based on misclassifications of standard rated local sales to Ituri Investments Limited and Kabaco (U) Limited which were classified as zero-rated export sales hence understating VAT and LED. He stated that the tax invoices were fully paid by the two companies and goods delivered at their premises. The applicant declared local sales as exports. He stated that the agreements between the applicant and the two companies show that the applicant makes local sales to them. The applicant objected on grounds that it appointed Kabaco (U)

Limited and Ituri Investments Limited as export agents and did not make local sales to them. Mr. Abdulnoor confirmed that the exporter is Nile Breweries Ltd.

The applicant submitted that the respondent assessed it LED and VAT on the ground that it made local sales of beer but misclassified them as exports for the tax periods. The applicant objected to the assessments on grounds that it appointed Kabaco (U) Ltd and Ituri Investments Limited as export agents and it does not make local sales to them. The goods (beer) that are the subject of the assessments were exported.

The applicant submitted that the respondent does not actually disagree that the beer was not exported. The respondent contends that the applicant beer did not export the beer but sold it locally. It was then exported using Ituri Investments Limited and Kabaco (U) Limited. Exported good attract VAT at a zero rate under S. 24 of the VAT Act, which provides that the rate of tax imposed on taxable supplies specified in the Third Schedule is zero. Paragraph 1(a) of the Third Schedule provides that a supply of goods or services where the goods or services are exported from Uganda as part of the supply is zero-rated. Paragraph 2(a) of the Third Schedule defines goods that are treated as exports for purposes of Paragraph 1(a) of the Schedule. It reads.

> "In the case of goods, the goods are delivered to, or made available at, an address outside Uganda as evidenced by documentary proof acceptable to the Commissioner General."

The applicant submitted that Regulation 11 of the VAT Regulations reads:

> "For an export transaction to qualify for zero-rating, a registered taxpayer shall obtain and be able to show as proof of export for every export transaction the following-
>
> a. A copy of the bill of entry or export certified by the customs authorities;
>
> b. A copy of the invoices issued to the foreign purchasers with tax shown at the zero-rate
>
> c. Evidence sufficient to satisfy the Commissioner General that the goods have been exported, in the form of an order from, or signed contract with a foreign purchaser, or transport documentation which identify the goods such as-
>
> (i) Transit order or consignment note issued by the Uganda Railways Corporation for goods exported by rail;
>
> (ii) Copy of bill of lading for goods exported by water;
>
> (iii) Copy of bill of lading for goods exported by air; or
>
> (iv) Copy of a transport document for goods exported by road."

The applicant submitted that the section requires that goods are delivered to or made available at an address outside Uganda by documentary proof acceptable to the Commissioner General. For purposes of this case, the goods were delivered to South Sudan and the DRC. The goods were made available to the addresses in the respective countries by the applicant using Ituri Investments Limited and Kabaco (U) Limited respectively, pursuant to the export agent agreements.

The applicant submitted that S.13 of the VAT Act provides for supplies by agents. It reads:

"(1) A supply of goods or services made by a person as agent for another person being the principal is a supply by that principal.

(2) Subsection 1 does not apply to an agent's supply of services as agent to the principal".

The applicant submitted that where a person is contracted as an agent to supply goods on behalf of another person who is the principal, the agent's supply is the supply of the principal. Ituri Investments Limited and Kabaco (U) Limited made supplies of goods for the applicant, and those supplies were supplies of the applicant. It was not disputed that the goods were exported by the said agents on behalf of the principal. The agents were acting for their principal, the applicant, to export and sell its beer in South Sudan and the DRC.

The applicant submitted that the Asycuda forms bore Kabaco (U) Limited as exporters. However, s. 13 of the VAT Act states that a supply of goods or services made by a person as an agent for another person being the principal is a supply by that principal. The applicant and Kabaco had an agency relationship. There are controls the principal put in place in the agreement to manage the agent. Therefore, even if the export forms were declared in Kabaco's name, it remained a supply of the principal who is the applicant.

The applicant submitted that that the burden of proving whether goods were exported lies with the exporter as set out in *Republic v Kenya Revenue Authority Exparte United Millers Limited* JR Case 323 of 2013. where the court held it is the duty of the exporter to establish that the goods exited the country. In *Commissioner for Investigations and Enforcement v Menengai Oils Limited* Tax Appeal 40 of 2020, Justice D.S Majanja, in finding that the question of whether goods were exported was a question of fact stated:

"In conclusion, I find that the question whether goods were exported is a question of fact and that the respondent bears the burden of establishing the goods have been exported or at any rate, have crossed the border frontier of a Partner State. In answering these factual questions, this court would be obliged to consider not only the evidence presented by Commissioner but also by the respondent on each claim made by the Commissioner.

As I stated earlier, the Tribunal, in its judgment, did not engage with the evidence presented by the Commissioner thus leaving open the question whether I should affirm the Commissioner's demand of KES. 1,455,572,320.00 which the respondent contested. The Tribunal is the first appellate court from the decision of the Commissioner. It is under a duty to exhaustively evaluate the facts and law in issue within the confines of section 30 of the TATA and Section 56 of the TPA bearing in mind that the jurisdiction of the Superior Courts..."

The applicant submitted that the beer was exported by the applicant's agents on behalf of the applicant being the principal. Therefore, the applicant was correct to apply a zero rate of tax to the exported beer and the respondent's assessment for VAT of Shs. 7,537,585,897.02 ought to be set aside.

The applicant submitted that the respondent has not provided any evidence of a local sale of the goods. The goods subject of assessment was marked 'for export only'. The respondent would need to demonstrate that there are such specially labelled beers sold in the Ugandan market.

The applicant submitted that S. 4 of the Excise Duty Act states that:

"(1) Subject to this Act, the excisable goods and excisable services specified in Schedule 2 shall be chargeable with the excise duty specified in that Schedule.

(2) Unless otherwise provided in this Act excise duty- (b) In the case of manufactured excisable good is to be paid by the person manufacturing the excisable good.

(3) A manufacturer of an excisable good becomes liable to pay excise duty on that manufactured excisable good when the manufactured good is removed from the manufacturer's premises".

The applicant submitted that the Second Schedule to the excise duty include beer as one of the excisable goods under the Excise Duty Act. However, the Act provides an exemption to payment of Excise duty under S. 10 (3a). It provides that:

"The Commissioner may, if satisfied that the excisable goods have been exported, remit the excise duty chargeable on those goods".

The applicant submitted that S. 2 of the same Act, the term export is defined as; "to take or cause to be taken out of Uganda" The applicant submitted that there was no local sale of beer to Ituri Investments Limited and Kabaco (U) Limited which gives rise to LED. The assessment of Shs. 11,025,079,590.98 ought to be vacated, especially owing to the undisputed fact that all the applicant's beer that was manufactured for export was indeed taken out of Uganda.

In reply, the respondent submitted that the dispute is whether the applicant's goods were exported or locally sold and are liable to pay LED and VAT. Whereas the applicant contends that it is not liable to pay the taxes because the goods were exported to South Sudan and the DRC and are zero rated sales, the respondent contends that the applicant misclassified the goods as zero rated as they were not exported by it but by Kabaco (U) Limited and Ituri Investments Limited. The applicant made local sales to them and is, therefore, liable to pay LED and VAT. The respondent submitted that the burden of proof is on the applicant to prove that the assessments were incorrect or erroneous and the taxation decision should not have been made or should have been made differently.

The respondent submitted that S. 4(a) of the VAT Act stipulates that VAT shall be charged on every taxable supply made by a taxable person. S. 5(a) stipulates that the tax payable in the case of a taxable supply, is to be paid by the taxable person making the supply. S. 10 of the Act states

"(1) Except as otherwise provided under this Act, a supply of goods means any arrangement under which the owner of the goods parts or will part with possession of the goods, including a lease or an agreement of sale and purchase".

The respondent submitted that S. 18 of the VAT Act defines a taxable supply as "a supply of goods or services, other than an exempt supply, made in Uganda by a taxable person for consideration as part of his or her business activities."

The respondent submitted that it is not in contention that the applicant provided goods to Kabaco (U) Limited and Ituri Investments Limited which constituted a supply of goods. It

submitted that in *Celtel Uganda Limited v Uganda Revenue Authority* CACA 22 of 2006 the Court of Appeal held.

> "One other factor distinguishing goods from services is the mode of supply. In *Faagorg-Gelting Linien Vs A/S Finanzamt Flensburg* (1996) ALL ER 656, it was held that in order to determine whether a transaction is a supply of goods or service, regard must be had to all the circumstances in which the transaction took place in order to identify its characteristic features."

Similarly, in *Customs and Excise Commissioners v Oliver* (1980) 1 ALL ER 1353, 'Supply' was defined as the passing of possession of goods pursuant to an arrangement whereunder the supplier agrees to part with possession and the recipient agrees to take possession, and by 'possession' is meant in this context, control over the goods, in the sense of having the immediate facility for their use. The respondent submitted that it is apparent that parting possession of the goods is what distinguishes the supply of goods from the supply of services in the context of VAT Act.

The respondent submitted that S.14 of the VAT Act provides that;

> "14. Time of Supply
>
> (1) Except as otherwise provided under this Act, a supply of goods or services occurs-
>
> (c) in any other case, on the earliest of the date on which-
>
> (i) the goods are delivered or made available, or the performance of the service is completed;
>
> (ii) payment for the goods or services is made; or
>
> (iii) a tax invoice is issued."

The respondent submitted that a perusal of the delivery terms under Paragraph 5.1 of the export agreement, the products were to be delivered from the applicant's premises to Ituri Investments Limited. It states that;

> "The products shall be delivered Ex Works (Incoterms 2000 from NBL manufacturing premises in Jinja or Mbarara whereupon the title of the products shall pass to Ituri/the agent.".

The respondent submitted that the applicant parted with the goods at its premises in Uganda (Jinja & Mbarara) to Ituri Investments Limited and Kabaco (U) Limited who received title to the goods. This constituted a supply of goods as the applicant parted with

title of the products which constituted a sale. The respondent submitted that Sale of Goods and Supply of Services Act, S. 2 defines a contract of sale as;

> "A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price."

According to *Black's Law Dictionary*, the word "sale" connotes 'the transfer of property or title for a price'.

The respondent submitted that the applicant sold goods for consideration to the agents also constituted a supply of goods under Sections 10 and 14 of the VAT Act. S. 1(d) of the VAT Act defines 'consideration' to include payment of a price. It states.

> "consideration", in relation to a supply of goods or services, means the total amount in money or kind paid or payable for the supply by any person, directly or indirectly, including any duties, levies, fees, and charges paid or payable on, or by reason of, the supply other than tax, reduced by any discounts or rebates allowed and accounted for at the time of the supply:"

The respondent submitted that it established that there was a definite purchase price in the sale. This is further evidenced in the invoices issued to both Kabaco and Ituri Investments where they were also referred to as "buyers". The respondent submitted that S. 1(b) of the Sale of Goods and Supply of Services Act defines "buyer" to mean a person who buys or agrees to buy goods or who procures or agrees to procure services. *Black's Law Dictionary* defines 'buyer' as "one who buys; a purchase, particularly of chattels. Kabaco (U) Limited and Ituri Investments Limited being buyers, took over ownership of the goods". The two companies fully paid for these transactions and even made security deposits on every crate.

The respondent submitted that S. 29 of the VAT Act states that "(1) A taxable person making a taxable supply to any person shall provide that other person, at the time of supply, with an original tax invoice for the supply". The applicant issued Kabaco (U) Limited and Ituri Investments Limited with tax invoices. S. 29(1) has to be read in line with S. 14(1)(c) of the Act whose import is that where an invoice is issued, a supply of goods has occurred. The respondent submitted that *in Uganda Revenue Authority v Total Uganda Limited* HCCA 08 of 2010 Justice Madrama stated.

"I agree with the ruling of the chairperson of the tribunal that VAT deals with value added and not consumption. The fuel is supplied at Entebbe airport and is not exported. This is based on the wording of S. 15 (1) which provides that the supply of goods takes place where the goods are delivered or made available by the supplier. In this case the goods are consumed at the airport by refueling. Secondly Section 14 of the VAT Act specifies the time of supply. Section 14(1) (c)(i) is relevant."

The tax invoices in the respondent's supplementary trial bundle indicate that the applicant, issued invoices to Kabaco (u) Limited. The invoices indicate that they were to customers. The invoices instruct Kabaco Exporter to "Use your code reference when making payment." The invoices had a description of crates and bottles sold, the unit prices at which they were sold and the amounts before VAT.

The respondent submitted that the delivery of goods and subsequent payments were made at a place in Uganda. S. 15 and S. 14(1)(c) of the VAT Act are to the effect that a supply of goods takes place in Uganda where goods are delivered in Uganda or made available by the supplier in Uganda. S.15 of the VAT Act provides that;

"(1) A supply of goods shall take place in Uganda if the goods are delivered or made available in Uganda by the supplier, or if the delivery or making available involves transportation, the goods are in Uganda when the transportation commences."

The respondent submitted that the place of supply was in Uganda. This is evidenced by Clause 5 in the agreements which place of delivery was in Jinja or Mbarara.

The respondent submitted that in *Aviation Hangar Services Ltd v URA* Application 21 of 2019, the applicant contended that no VAT was payable in Uganda since the services were consumed abroad. The Tribunal however held that VAT is not a consumption tax but a tax on transactions. The respondent submitted that in this case there were two sale transactions, one by the applicant to the companies and the other by the companies exporting the goods. The former is a local sale subject to LED and VAT.

The respondent further submitted that under Part 2(a) of the Third Schedule, goods are treated as exported from Uganda if the goods are delivered to, or made available at an address outside Uganda as evidenced by documentary proof acceptable to the

Commissioner General. The respondent submitted that the applicant did not produce any documentary evidence expressly showing that it delivers or makes available the goods to an address outside Uganda. in fact, all the documentary evidence shows otherwise.

The respondent submitted S. 11 of the VAT Act which provides for exports states.

"(1) Where goods are supplied by a registered taxpayer to a person in another country and the goods are delivered by a registered taxpayer to a port of exit for export, the goods may be invoiced at the zero rate, provided the registered taxpayer obtains the documentary proof set out in this regulation and the goods are removed from Uganda within thirty days of delivery to a port of exit.

(2) For an export transaction to qualify for zero rating, a registered taxpayer shall obtain and be able to show as proof of export for every export transaction the following-

(a) a copy of the bill of entry or export certified by the customs authorities;

(b) a copy of the invoice issued to the foreign purchaser with tax shown at the zero rate; and

(c) evidence sufficient to satisfy the Commissioner General that the goods have been exported, in the form of an order from, or signed contract with, a foreign purchaser, or transport documentation which identifies the goods such as-

(i) a transit order or consignment note issued by the Uganda Railways Corporation for goods exported by rail;

(ii) a copy of a bill of lading for goods exported by water;

(iii) a copy of an airway bill for goods exported by air; or

(iv) a copy of a transport document for goods exported by road."

The respondent submitted that for a transaction to qualify as an export, the taxpayer has to avail a copy of the invoice issued to the foreign purchaser. The applicant did not avail any invoices between itself and a foreign purchaser as required by the law but only availed invoices it issued to the local companies (Kabaco and Ituri). To the contrary, the invoice issued to the foreign purchaser is by Ituri Investment to Nector General Trading in Juba. The respondent submitted that it is clear from the export documents that Kabaco (U) Limited was the exporter of the goods, which is in conformity with Paragraph 6.2.6 of the agreement.

The respondent submitted that Paragraph 11.2 of agreement between Kabaco (U) Limited and the applicant indicate that risk or damage to the products would pass to the former upon delivery. It is trite law that once risk has been transferred, ownership goes with it under S. 26 of the Sale of Goods and Supply of Services Act.

The respondent submitted that under S. 75 of the VAT Act, where a person has obtained a tax benefit under a scheme, the Commissioner General may determine the liability of the person as if the scheme had not been entered into and consider the appropriate action for the prevention and reduction of the tax benefit. S. 2(a) defines a scheme to include one where there is a reduction of liability of any one to pay taxes. The applicant entered into the agency agreements as a scheme to benefit from a tax reduction The respondent submitted that the doctrine of economic substance of a transaction was discussed by Justice James Ogoola in *Intertek Services v Uganda Revenue Authority* HCCA 5 of 2002 which cited *Dominion Taxicab Association v MNR*. [1954] SCR 82 with approval where the court held that:

> "In similar vein, in the recent case of *Placer Dome Inc v Canada* [1992] 2 CTC 98 at 109, the Canadian Supreme Court held that: It is the substance of a transact/on that must be looked at in order to determine the true legal rights and obligations of the parties. Similarly, it is the commercial and practical nature of the transaction, the true legal rights and obligations flowing from it that must be looked at to determine its tax implications."

The respondent submitted that in *Hampton and Sons v George* (1939) 3 ALLER 627, it was held that an agent ought to be paid consideration in form of a commission. In this case, there was no payment of commission but instead, the two contracted entities were making payments to the applicant.

The respondent submitted that in Paragraphs 4.1 of the agreements with between Kabaco (U) Limited, Ituri Investments Limited with the applicant show that the applicant was to delivered products which are then handed over to a designated carrier. The respondent submitted that S. 2 of the Sale of Goods and Supply of Services Act provides that;

> "A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price."

The respondent submitted that in this case, goods were transferred upon delivery and a purchase price was paid. The terms of the agreement point to a sale of goods.

The respondent submitted that the said agreements were agreements for sale of goods and not agency agreements. S. 118 of the Contracts Act states that an "agent" means a person employed by a principal to do any act for that principal or to represent the principal in dealing with a third person;" Kabaco and Ituri were given the liberty to act for themselves and deal with third parties in any manner they wanted since title in the property had passed to them. Where an agent is making payment for goods to the principal, it is a clear case of a purchase. Therefore, the two entities were in charge of the exporting and no, the applicant. The two entities exported in their own names. The export returns registered with URA show them as exporters and indicate the applicant as a manufacturer. The applicant filed returns for January 2021 to August 2021. For this period, it issued electronic invoices amounting to Shs. 60,311,217,017 related to exports, yet its returns indicate exports worth Shs. 26,462,010,801. The applicant also invoiced the two companies (Kabaco and Ituri) for the same periods. All this is conclusive evidence that there was a local sale that was subject to VAT at a rate of 18%.

The respondent submitted that in *Total v URA* (supra) it was held that where goods are made available in Uganda, it cannot be a supply outside Uganda. It was stated.

> "Under S. 15 of the VAT Act, goods are made available to the international carrier at Entebbe airport. The fuel is pumped into the fuel tank of the international carrier and is not put in the cargo section of the carrier. It is not a supply outside Uganda and by the time the carrier reaches its destination there is no fuel available to be passed on. Therefore, there is no export. Secondly, the chairman of the Tax Appeals Tribunal observed that where fuel is pumped into a tank, there's nothing for the carrier to deliver to an address outside Uganda. This is because the fuel is consumed when the carrier is in flight. Consequently, there is no documentary evidence that can be availed to the Commissioner General as regards a non-existent cargo delivered outside Uganda. He considered clause 3 of the Second Schedule and held that it is very specific because it provides that goods must be delivered at an address outside Uganda. For services it states that it must be supplied for use or consumption outside Uganda. The fuel is therefore supplied for use."

The respondent submitted that having established that the applicant made a sale and a delivery of goods within Uganda, it ought to have been charged 18% as VAT under S. 21(1) of the VAT Act.

In respect of LED, the respondent submitted that the applicant entered into sale agreements with Kabaco (u) Limited and Ituri Investments Limited whereby it made sales to the companies. The goods are sold at the applicant's premises to the companies who are also registered taxpayers. The companies are invoiced by the applicant and they pay the full amount before receipt of the goods. The respondent submitted that S. 4(1) & 4(2)(b) and S. 4(3) of the Excise Duty Act 2014 provides for imposition of excise duty in respect of manufactured excisable goods. It states that "Subject to this Act, the excisable goods and excisable services specified in Schedule 2 shall be chargeable with the excise duty specified in that Schedule." The respondent submitted that S. 4(2)(b) provides that "Excise duty; in case of a manufactured excisable good, is to be paid by the person manufacturing the excisable good". It submitted that in *MTN Uganda Ltd v Uganda Revenue Authority* Application 8 of 2019 it was held that.

> "Excise duty is a tax imposed on specified imported or locally manufactured goods and services, *Black's Law Dictionary* 10th Edition page 684 defines excise (duty) as "A tax imposed on the manufacture, sale, or use of goods (such as cigarette tax), or on an occupation or activity. As such, it may be taxed on either the manufacture, or sale or use of an item or service depending on the intention of the legislature. One needs to look at the legislature imposing the tax and determine at what point it should be taxed..."

The respondent submitted that S. 4(3) provides for a taxing point for manufactured goods. It states that;

> "A manufacturer of an excisable good becomes liable to pay excise duty on that manufactured excisable good when the manufactured good is removed from the manufacturer's premises".

The respondent submitted that the excise duty arose the moment delivery of the goods from the applicant to Kabaco (U) Limited and Ituri Investments Limited was made. This was a local sale that gave rise to excise duty in line with S. 4. The obligation to pay the excise duty is on the manufacturer who is the applicant in this case.

The respondent submitted that S. 2 of the Excise Duty Act defines an export as; "to take or cause to be taken out of Uganda." The applicant's transactions do not fall within this Section as the applicant neither exported nor caused the goods to be taken out of Uganda but rather only made a supply to Kabaco (U) Limited and Ituri Investments Limited. The respondent prayed that this Tribunal to uphold the assessments of VAT and LED of Shs. 7,537,585,897.02 and Shs. 11,025,079,590.98 respectively.

In rejoinder, the applicant submitted that it executed agency agreements with its agents Ituri Investments Limited and Kabaco Ug Ltd. The principal agency relationship existed by conduct. The respondent was privy to the long-standing agency relationship. The applicant submitted that in *Place Dome Inc v Canada* [1992] 2 CTC 98 at 109, the Canadian Supreme Court held that.

> "It is the substance of a transaction that must be looked at in order to determine the true legal rights and obligations of the parties. Similarities, it is the commercial and practical nature of the transaction, the true legal rights and obligations flowing from it that must be looked at to determine its tax implications".

The applicant submitted that it was already established that the applicant manufactures beer for export which is specifically marked "for export". That the respondent didn't dispute export or prove or even allude to any dumping of beer that was manufactured for export purposes.

The applicant submitted that after several engagements the respondent accepted the applicant's exports through the applicant's agents in a letter dated 17th October 2015. By virtue of the letters presented the respondent, the respondent made a promise and a legitimate expectation that the procedure of exporting the applicant's beer was proper. The respondent is precluded from treating the export process of the applicant as well as the principal and agent relationship between the applicant and Ituri Investments Limited and Kabaco (U) Ltd as a scheme within the meaning of a scheme under S. 75 and S. 2 (a) of the VAT Act. The applicant submitted that legitimate expectation is not simply restricted to procedural benefit but also a substantive benefit. The applicant should not be expected to pay VAT on goods that were exported to DRC and South Sudan when the VAT Act provides that such goods are Zero rated.

Having listened to the evidence, perused the exhibits, and read the submissions of the parties, this is the ruling of the tribunal.

The applicant is a manufacturer of beer which was sold locally in Uganda and exported to the DRC and South Sudan. The goods manufactured for export are clearly marked 'for export'. The dispute is around the export of beers. The respondent contends that the applicant did not export beer but sold it locally. The respondent insists that the applicant misclassified the goods as zero rated since they were not exported and that it should pay VAT and LED. The applicant contends that the beer was sold to its agents, Ituri Investments Limited and Kabaco (U) Limited which exported the beer.

VAT is imposed by the VAT Act. S. 4 of the VAT Act states that "Value Added Tax shall be charged on every taxable supply made by a taxable person". S. 5(a) of the VAT Act stipulates that the tax payable in respect to a taxable supply, is to be paid by the taxable person making the supply. S. 18 of the VAT Act provides that.

> "A taxable supply is a supply of goods or services, other than an exempt supply, made in Uganda by a taxable person for consideration as part of his or her business activities."

S. 24 of the VAT Act provides that the rate of tax imposed on taxable supplies specified in the Third Schedule is 0. Paragraph 1(a) of the Third Schedule of the VAT Act provides that a supply of goods or services where the goods or services are exported from Uganda as part of a supply the rate is zero. Therefore, where there is a local supply of beer VAT is due at the rate of 18%. If beer is exported it attracts VAT at a 0 rate.

S. 4 of the Excise Duty Act 2014 provides for imposition of excise duty in respect of manufactured goods. It states that "Subject to this Act, the excisable goods and excisable services specified in Schedule 2 shall be chargeable with the excise duty specified in that schedule." S. 4(2)(b) provides that "Excise duty; in case of a manufactured excisable good, is to be paid by the person manufacturing the excisable good. S. 4(3) provides for a taxing point for manufactured goods. It states that;

> "A manufacturer of an excisable good becomes liable to pay excise duty on that manufactured excisable good when the manufactured good is removed from the manufacturer's premises".

Where goods are not removed from the manufacturer's premises, then excisable duty is not due. This happens where goods are exported. S. 2 of the Excise Duty Act defines an export as; "to take or cause to be taken out of Uganda."

In order to understand the dispute, one has to realize that if the applicant sold beer locally it attracts VAT and LED. Beer that is exported does not attract VAT and LED. So, the question, is did the applicant export goods in dispute? Or were the goods sold locally and no VAT and LED was paid? One can purport that the goods that were manufactured were exported yet they were sold locally so as to avoid paying taxes. It was agreed that the goods for export were marked as such. No sample was provided. Does this stop one from indicating that goods manufactured for the local market were actually exported? There is no evidence to indicate that there is a checkpoint set by the respondent at the manufacturer's premises that checks on the goods leaving the premises. Goods for export are refused to exit the premises. There is also no evidence that shows that a consumer in the local market would refuse to drink a beer marked 'for export'.

In order to determine whether the beer was sold locally or exported or both, one needs to look at the facts of the case, taking into consideration the law. In *Place Dome Inc v Canada* [1992] 2 CTC 98 at 109, the Canadian Supreme Court held that.

> "It is the substance of a transaction that must be looked at in order to determine the true legal rights and obligations of the parties. Similarities, it is the commercial and practical nature of the transaction, the true legal rights and obligations flowing from it that must be looked at to determine its tax implications".

Therefore, the Tribunal will look at the evidence presented.

The applicant contends that exports were delivered to South Sudan and DRC by it using its agents, Ituri Investments Limited and Kabaco (U) Limited. The applicant and the said companies entered into export agent agreements. The applicant submitted that S. 13 of the VAT Act S. 13 provides that:

> "(1) A supply of goods or services made by a person as agent for another person being the principal is a supply by that principal.
>
> (2) Subsection 1 does not apply to an agent's supply of services as agent to the principal".

The applicant cited *Commissioner of Domestic Taxes v W.E.C. Lines K. Limited* (Tax Appeal E084 of 2020 where it was stated

> "As an agent, it follows that any contract or contact made by the respondent to a third party is essentially a contractual relationship between the principal and the third party and all actions by agents are deemed to be those of the principal."

Can tax liability be transmitted from an agent to a principal? The Tribunal has to see whether that can apply to exports.

S. 118 of the Contracts Act states an "agent" means "a person employed by a principal to do any act for that principal or to represent the principal in dealing with a third person." The *Black's Law* 10th Dictionary Edition p. 74 defines an agency;

> "As a relationship that arises when one person (a principal) manifests assent to another (an agent) that the agent will act on the principal's behalf, subject to the principal's control and the agent manifests, assent or otherwise consents to do so. An agent 's action has legal consequences for the principal when the agent acts within the scope of the agent's actual authority or with apparent authority, or principal later ratifies the agent's action."

The *Black's Law Dictionary* (Supra) further explains that;

> "The basic theory of the agency device is to enable a person through the services of another, to broaden the scope of his activities and receive the product of another's efforts, paying such other for what he does but retaining for himself any net benefit resulting from the work performed."

According to *Words and Phrases Legally* Defined 3rd Edition Vol 1, it states that; "agency is used to connote the relationship which exists where a person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties". It further explains that; "the relation of agency arises whenever one person called the agent has authority to act on behalf of another called the principal and consents so to act". A question which was unanswered was whether agents are not supposed to pay for goods delivered to them. Manufacturers are known to have agents who are distributors who buy goods at discounted prices. The respondent's witness testified that the applicant was selling a beer crate to Kabaco (U) limited at US$ 8 per crate, and the latter exports it at US$ 11.

S. 13 of the VAT Act refers to a supply of goods or services made by a person for another person being the principal is a supply by the principal. It does not specifically mention export. It does not say that an export of goods by a person for another person being the principal is an export by the principal. If we are to say that export by an agent is that of the principal, are we not reading into the Act what is not there? The Act seems to differentiate between a supply of goods and services, from an import or export of goods and services. This can be seen in Sections 4, 5 and 16 of the VAT Act. The Act has to be read as a whole. In *Cape Brandy Syndicate v CIR* (1921) 1 KB 64 it was stated that

> "One has to look merely at what is clearly stated. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Our understanding of the above Section is that it applies where the goods are supplied in Uganda. When it comes to exports and import, other statutes like the East African Community Customs Management Act come into play. It would be difficult to envisage a situation where an agent exports goods and requests Customs to bill the principal. The person indicated on the export documents as exporter or importer is the one who incurs the taxes. The VAT Act limits a supply of goods to Uganda. S. 15 of the VAT Act states that.

> "A supply of goods shall take place in Uganda if the goods are delivered or made available in Uganda by the supplier, or the delivery or making available involves transportation, the goods are in Uganda when the transportation commences."

Therefore, where goods are delivered by a supplier to a person in Uganda, that is a local supply. If goods are supplied to a person or agent who is abroad, then that is an export. The VAT applicable to a local supply by the principal will apply to the agent.

The Tribunal perused the export agreements between the applicant, Ituri Investments Limited and Kabaco (U) Limited. The Tribunal has to determine whether the applicant made local sales to agents or appointed them as export agents. The Tribunal has also to determine whether there was a local sale to the agents who then exported the beer, in essence there were two transactions. Clause C of the Preamble reads.

> "The parties desire to enter into an agreement wherein .../the agent will market and sell NBL's products in South Sudan [Congo] according to the terms and conditions in this agreement."

The agreement was to market and sell the applicant's products abroad. It does not mention any sale. However, agreement allowed the applicant to sell its products to its agents. Clause 3.1 states.

> "The purchase price for each of the products shall be at NBL's prevailing ex-factory price at the time of each order and NBL reserves the right to change the prices subject to notifying .../the Agent within 3(three) days prior to the effective date of the price change."

S. 1(d) of the VAT Act defines the term consideration to include payment of a price. It states.

> "consideration", in relation to a supply of goods or services, means the total amount in money or kind paid or payable for the supply by any person, directly or indirectly, including any duties, levies, fees, and charges paid or payable on, or by reason of, the supply other than tax, reduced by any discounts or rebates allowed and accounted for at the time of the supply:"

The invoices were issued to the agents. Regulation 11(2)(b) of the VAT Regulations requires that a copy of the invoices should be issued to the foreign purchaser with tax shown as zero rate. There is no evidence that the applicant's agents were foreign. The agreement allowed the applicant to deliver the goods to the agents in Uganda and title changed hands. Clause 5.1 states

> "The products shall be delivered Ex Works Incoterms 2000 from NBL manufacturing premises in Jinja or Mbarara whereupon the title of the product shall pass to .../the Agent."

This contradicts the evidence of the applicants second witness Mr. Miren D. Mer that the applicant transports goods to South Sudan where Ituri Investments Limited receives and takes charge of them. If the goods were exported to the agents, the export documents should have shown them as the consignees. Some of the export documents showed Kabaco (U) Limited as exporter (p. 277 of the joint trial bundle) while others showed the applicant, some showed Nectar Geneal Trading Limited (p. 260) which is also shown as a consignee in others. Others show Kesh International Limited as consignee (pages 42 to 46). It is this confusion that marks the applicant's case.

S. 10(1) of the VAT Act, defines a supply of goods as any arrangement under which the owner of the goods parts or will part with possession of the goods, including a lease or an agreement of sale and purchase. S. 2 of the Sale of Goods and Supply of Services Act states that "A contract of sale of goods is a contract by which the seller transfers or agrees

to transfer the property in the goods to the buyer for a money consideration, called the price". Paragraph 2(a) of the Third Schedule of the VAT Act states

> "For the purposes of pararagraph1(a), goods or services are treated as exported from Uganda if -
>
> (a) in case of goods, the goods are delivered to, or made available at an address outside Uganda as evidenced by documentary proof acceptable to the Commissioner General."

The export agreement shows that the goods were delivered at the applicant's premises in Uganda. If the applicant had provided documentary evidence to the Commissioner General that was acceptable to him that there was an export, this dispute would not have arisen. Therefore, it cannot be denied that there was a local sale and supply of the applicant's beer to the agents. The applicant cannot purport or even pretend that it exports its beers to Ituri Investments and Kabaco (U) Limited when they were in Uganda. We thought and still think that for an export to take place it has to be to another country. Since the agents were in Uganda, there was no export.

The applicant issued e-invoices. In respect of invoices the VAT Act S.14 reads.

> "14. Time of Supply
>
> (1) Except as otherwise provided under this Act, a supply of goods or services occurs-
>
> (c) in any other case, on the earliest of the date on which-
>
> (i) the goods are delivered or made available, or the performance of the service is completed;
>
> (ii) payment for the goods or services is made; or
>
> (iii) a tax invoice is issued".

Therefore, when the applicant issued tax invoices, a supply was confirmed. The earliest of the delivery, payment or when the tax invoice was issued was the time of supply. They all took place in Uganda.

S. 24 of the VAT Act, which provides that the rate of tax imposed on taxable supplies specified in the Third Schedule is zero. Paragraph 1(a) of the Third Schedule provides that a supply of goods or services where the goods or services are exported from Uganda as part of the supply is zero-rated. Paragraph 2(a) of the Third Schedule then goes ahead to

define goods that are treated as exports for purposes of Paragraph 1(a) of the Schedule. It provides that:

"In the case of goods, the goods are delivered to, or made available at, an address outside Uganda as evidenced by documentary proof acceptable to the Commissioner General".

Regulation 11 of the its VAT Regulations states that.

"11. Export of Goods

(1) Where goods are supplied by a registered taxpayer to a person in another country and the goods are delivered by a registered taxpayer to a port of exit for export, the goods may be invoiced at the zero rate, provided the registered taxpayer obtains documentary proof set out in this Section and the goods are removed from Uganda within 30 days of delivery to a port of exit.

(1a) For the purposes of sub-Regulation (1), the Commissioner General may require goods for export specified in a notice in the Uganda Gazette to be distinctively labelled by the registered taxpayer."

(1b) The Commissioner General shall issue guidelines to specify the colour, nature, size and type of labels referred to in sub-Regulation (la),

(2) For an export transaction to qualify for zero-rating, a registered taxpayer shall obtain and be able to show as proof of export for every export transaction the following-

(a) a copy of the bill of entry or export certified by the Customs authorities,

(b) a copy of the invoice issued to the foreign purchaser with tax shown at the zero rate;

(c) evidence sufficient to satisfy the Commissioner General that the goods have been exported, in the form of an order from, or signed contract with, a foreign purchaser, or transport documentation which identify the goods such as-

(i) transit order or consignment note issued by the Uganda Railways Corporation for goods exported by rail;

(ii) copy of a bill of lading for goods exported by water,

(iii) copy of an airway bill for goods exported by air, or

(iv) copy of a transport document for goods exported by road".

Clause 6.2.7 of the agreement between Nile Breweries and Ituri provided that, the agents shall provide the applicant with

"i. A copy of the bill of entry certified by the customs officials,

ii. A copy of the invoice issued to the South Sudan purchasers with tax shown at zero rate.

iii. Documentation by the designated carried indicating delivery of the products in South Sudan such as a copy of a transport document for goods exported by road.

iv. Any other evidence sufficient to satisfy the Commissioner General of URA that the goods have been exported, in the form of an order from, or signed contract with, a foreign purchaser, or transport documentation that identifies the export goods."

The bill of entry, invoices, copy of transport document, contract with foreign purchasers, were not tended in evidence. Since the e-invoices were issued to the agents and delivery was made to them at the applicant's premises, and title was passed to them, they were local sales. The exports of the applicant were another transaction. There is no evidence that the beer that was sold to the applicant locally was the one that was eventually exported. It would be difficult to assume that because the agents bought beer from the applicant in Uganda it ended up in DRC or South Sudan.

Therefore, if by any chance Ituri investments Limited and Kabaco (U) Limited exported the beer purchased or supplied by the applicant the VAT charged would be zero. Because the VAT is zero, they are entitled to a VAT refund under S. 28 of the VAT Act for the VAT they paid for the beer exported. However, there is no evidence that the agents ever exported the beer. There are no copies of the bills of ladings, invoices etc. If the agents exported the beer in the names of the principal or the applicant as shown in exhibit AE8, then they have to pay for the sin of their ignorance of the VAT Act. They should have exported the goods in their own names to entitle them to a VAT refund. They do not have to rely on S. 13 of the VAT Act not to pay VAT. That is why the Tribunal stated that S. 13 does not apply to exports. It is like pushing the cart before the horse The Act must be read as a whole. If one is entitled to VAT refund for exports on presentation of documentary proof of the exports, one wonders why it would want to circumvent paying VAT using other Sections of the law, unless the goods were not exported. If the applicant exported the goods, they are entitled to a VAT refund of what was paid. If the goods were never exported but ended up in the local market, VAT is still due. The respondent complained that the applicant's exports fell, implying that the goods that were meant for export may have ended up on the local market. The respondent submitted that the applicant issued electronic invoices amounting to Shs. 60,311,217,017 related to exports, yet in its returns it indicates exports of Shs. 26,462,010,801. The Ugandans may have drunk beer marked 'For export only'.

The letter relied on by the respondent, exhibit AE5 may not be helpful. Firstly, it was addressed to Ituri Investments Limited and not the applicant. Therefore, there was no legitimate expectation that was created in the applicant's mind. Secondly it was for the period 2011 to October 2013 which is not the period in issue. Thirdly it stated the correct position of the law, that is, the exports of beer by the applicant to Congo are zero-rated. However, the said letter did not address the local sale of beer by the applicant to Ituri Investments Limited. It was under the impression that the applicant exported beer to Ituri Investments which is the consignee. The applicant has not tendered in any documents that show beer was exported to Ituri Investments Limited as consignee for the period in dispute.

In respect of the LED assessment., S. 4 of the Excise Duty Act provides for imposition of excise duty in respect of manufactured excisable goods. It states that "Subject to this Act, the excisable goods and excisable services specified in Schedule 2 shall be chargeable with the excise duty specified in that schedule." The Second Schedule to the Excise duty include beer as one of the excisable goods under the Excise Duty Act. S. 4(2)(b) provides that "Excise duty; in case of a manufactured excisable good, is to be paid by the person manufacturing the excisable good." S. 4(3) provides for a taxing point for manufactured goods. It states.

> "A manufacturer of an excisable good becomes liable to pay excise duty on that manufactured excisable good when the manufactured good is removed from the manufacturer's premises".

We already stated that the export agreements showed that the applicant delivers the beer at its premises to the agents. Where goods are removed from the manufacturer's premises, then excisable duty is due. S. 2 of the Excise Duty Act defines an export as; "to take or cause to be taken out of Uganda. The Act provides an exemption to payment of LED under S. 10 (3a). It provides that:

> "The Commissioner may, if satisfied that the excisable goods have been exported, remit the excise duty chargeable on those goods".

There is no evidence linking the beer that was sold to the applicant and the exports. The evidence on exports is so contradictory that the Tribunal cannot rely on it. There is also no evidence that showed that the agents presented evidence to the Commissioner for the

exports. The Tribunal finds that in the absence of such evidence, delivery was in Uganda and no export took place therefore LED is due. If the applicant exported the goods subject to the assessment it would not have difficulty in presenting evidence to the Commissioner of the exports, In the export agreements, it stated the documents required for export.

In the circumstances, the tribunal finds that the applicant is liable to pay both VAT of Shs. 7,537,585,897 and LED of Shs. 11,025,779,590.98. This application is dismissed with costs to the respondent.

Dated at Kampala this 28th day of November 2023.

DR. ASA MUGENYI	**DR. STEPHEN AKABWAY**	**MS. CHRISTINE KATWE**
CHAIRMAN	**MEMBER**	**MEMBER**