

**THE REPUBLIC OF UGANDA**

**IN THE TAX APPEALS TRIBUNAL AT KAMPALA**

**TAT APPLICATION NO.57 OF 2023**

**SHARAD KARIA.....APPLICANT**

**VERSUS**

**UGANDA REVENUE AUTHORITY.....RESPONDENT**

**BEFORE: MR.SIRAJ ALI MRS. CHRISTINE KATWE MS. SAFI GRACE**

**RULING**

This ruling is in respect of an application challenging an administrative additional assessment issued by the Respondent against the Applicant on the ground that the Applicant's property at Plot 1A Baker Road, Nakasero, Kampala, is a serviced apartment and therefore its letting or leasing is not VAT exempt within the meaning of paragraph 1(f) (v) Schedule 3 of the VAT Act.

**1. Background facts**

The Applicant is an individual carrying on a real estate business with property located at Plot 1A, Baker Road Kampala. On 29<sup>th</sup> May 2022, the Respondent issued the Applicant with an Administrative Additional Assessment of VAT amounting to Shs. 230,738,527/- on the grounds that the Applicant had not declared VAT on rental income earned from the above property. The Applicant filed an objection on the grounds that the income in question had been derived from letting out the property for residential purposes and was thus VAT exempt. On 16<sup>th</sup> March 2023, the Respondent issued an objection decision disallowing the objection and upheld the assessment on the ground that the property in question was a serviced apartment. The Applicant filed the instant application for a review of the Respondent's objection decision.

**2. Representation**

At the hearing, the Applicant was represented by Mr. Cephass Birungyi, Ms. Dorothy Bishagenda, Ms. Precious Aheirwe and Mr. Jonathan Rukikaire. The Respondent was represented by Mr. Sam Kwerit, Ms. Sheba Tayahwe and Mr. Derrick Nahumuza.

### 3. The issues for determination

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

- (i) Whether the Applicant is liable to pay the tax assessed?
- (ii) What remedies are available to the parties?

The Applicant's first witness was its tax accountant, Mr. Sarangan Venkatesalu. The witness testified that the Applicant owns a property at Plot 1A, Baker Road, Nakasero, Kampala which is rented out on a long-term basis in partnership. The witness submitted that on 19<sup>th</sup> May 2022, the Applicant received from the Respondent an assessment of vatable income amounting to Shs. 1,281,880,711/- which was higher than the Applicant's return of Shs. 1,225,659,419/-. The witness stated that the rental income derived from the leases was declared in the tax returns for the period in question. The witness testified that the business of the Applicant falls within the definition of a supply by way of a lease of immovable property and is not a supply of serviced apartments. The witness stated that meetings were held between the officials of the Respondent and the Applicant in which the Respondent informed the Applicant that the premises in question are serviced apartments on the basis that the apartments are self-contained, fully furnished, contains a swimming pool and that the electricity and water bills are paid by the Applicant.

The witness testified that according to the tenancy agreements, the tenants pay their own utility bills. The witness testified further that according to his knowledge of tax law the term 'serviced apartments' are neither defined in the VAT Act nor in the VAT Regulations. The witness stated that it was within his knowledge that the Applicant's tenants are long term occupants, they are required to give notice of termination before vacating the premises, they are required to pay security deposits on or before renting the premises, they are required to reinstate the premises by carrying out general cleaning and painting before handing them over to the Applicant, the Applicant only cleans common areas.

The witness testified that none of the apartments contains a swimming pool or a boardroom and that the tenants do their own cleaning and cooking. The witness testified that the existence of furniture and kitchens in the apartments does not make them serviced apartments. The witness testified that it is the practice in the hospitality

sector for landlords to pay utility bills and provide cleaning services in serviced apartments, which is not the case for the Applicant. The witness testified that through consultation with the South Korean Embassy in Kampala, the Respondent has been able to establish that the apartments in question are for long term stay. The witness testified that Property Services Ltd charges the Applicant property management fees.

The Applicant's second witness was Ms. Julian Kayoby, its Property Manager. The witness stated that she is in charge of the day to day management, maintenance and upkeep of the property. The witness testified that the premises are occupied mainly by expatriates, diplomats and UN officials. The witness stated that these tenants are non-Ugandans on work contracts who wish to have furnished apartments with only basic items to serve them during their time of stay. The witness stated that the majority of the tenants do not purchase items since they travel back to their home countries and are sometimes transferred to other countries on the expiration of their work contracts. The witness stated that the tenants are only admitted for long stays and some of them bring additional home equipment. The witness stated that the tenants pay their own utility bills and have their own independent sub-meters with bills varying according to usage.

The witness stated further that there is a front desk at the lobby to monitor each and every person entering the premises due to the routine security checks from State House. No room service is provided to the tenants as they bring their own house helps. The common areas are cleaned by a private cleaning company hired by the Applicant. The witness testified further that the tenants do their own laundry and clean the interior of their own apartments. Common areas like the swimming pool and gym are restricted to tenants only with no charge or fee for the use of these amenities. The witness testified that the apartments do not have commercial activities like restaurants, shops or salons and that the Applicant has no right of access to the apartments without the consent of the tenants.

The Respondent's sole witness was Mr. Gumisiriza Kenedy, an officer in the Objections Unit of the Respondent's Domestic Taxes Department. The witness testified that the Applicant is a taxpayer carrying on real estate business activity at Nakasero, Kampala. The witness testified that the Respondent issued the Applicant with an administrative additional assessment of Shs. 230,738,527/- on the basis that

the Applicant was letting out serviced apartments without paying VAT. The witness stated that the Applicant objected to the said assessment on the grounds that the assessed income was rental income from residential properties and therefore did not attract VAT. The witness testified that as part of the objection review process he consulted the Applicant's tenants namely; the Turkish Embassy, NCBA Bank, Stanbic Bank, UBA Bank, Barclays Bank and the South Korean Embassy, all of whom confirmed that they were paying rent to the Applicant for the use of the premises by their officials.

The witness stated that he reviewed tenancy agreements provided to him by the tenants and observed that the landlord is responsible for repairs related to the structural failures of the premises including electrical system, plumbing system, water heater, kitchen equipment, washing machine and air conditioner, which are regularly serviced by the Applicant.

The witness observed further that the landlord provides the tenant with monthly internet, Dstv access package, common security, standby generator, lift maintenance, parking, cleaning of common areas, free gym and swimming pool access, onsite duty manager and 24 hour dedicated reception. The witness stated that the tenants pay the Applicant a monthly service charge of USD 300. The witness stated further that the water bills for the tenants was paid by the Applicant and in some cases the rent was inclusive of VAT. The witness submitted that through inspection of the premises he was able to establish that the apartments were only let out to Managing Directors and Chief Executive Officers of various companies.

The apartments are referred to as 'Royal Palms Nakasero' and consist of 34 apartments comprising 5 three-bedroom houses at USD 3,500, 2 penthouses at USD 2,500 and 10 one-bedroom houses at USD 1,500. The witness testified that all the apartments are fully furnished with a fully fitted kitchen having modern cooking equipment and accessories like fridges, microwaves and ovens. Other items include washing machines, dining table and chairs, a living room fitted with sofa sets and television sets, bedroom fitted out with a bed, mattress, bed sheets, pillows and pillowcases. The witness stated that all the above indicated that the Applicant was dealing in serviced apartments and therefore liable to pay VAT on rental income.

#### 4. Submissions of the Applicant

The Applicant submitted that it is not liable to pay the tax assessed by the Respondent because the assessment relates to income derived from letting out residential property which is exempt from VAT under paragraph (f) of Schedule 3 of the VAT Act. The Applicant submitted that his business does not fall within the exceptions provided for under the Schedule 3.

The Applicant submitted that his business falls within the definition of a supply by way of a lease of immovable property because the Applicant's tenants have long term tenancies ranging from 1 year to 2 years and 11 months, the Applicant's tenants are required to give notice of termination of tenancy before vacating their premises, the Applicant's tenants are required to pay security deposit on or before renting the apartment, the Applicant's tenants pay their own utility bills, the Applicant's tenants are required to reinstate the premises before the handover of the apartment i.e. carrying out general cleaning and painting of the apartment, the maintenance of the apartments is left to the tenants as the Applicant only maintains common areas. The Applicant submitted that the impugned assessment relates to residential property and therefore the Respondent illegally assessed the Applicant, yet its property is exempt from VAT under the law.

The Applicant submitted further that the decision to classify the property in question as serviced apartments and therefore subject to VAT was illegal and without any legal basis. The Applicant submitted that item 1(f)(v) of Schedule 3 to the VAT Act states that people who deal in serviced apartments are not exempt from accounting for VAT. The Applicant submitted that the term `service apartments` is not defined in the law and as such it is ambiguous. The Applicant submitted that the property in question was categorized as serviced apartments on the basis that they were let to `non-ordinary` people and that the apartments were fully furnished.

The Applicant submitted on the authority of the decision of the Tribunal in ***Comfort Homes v. URA TAT Application No. 66 of 2020*** that before one is assessed for a tax liability, the law imposing tax must be clear and unequivocal. The Applicant submitted further on the authority of the decision in ***URA vs. Uganda Taxi Operators and Drivers Association Civil Appeal No. 13 of 2015*** and ***Embassy Supermarket Ltd vs. Uganda Revenue Authority TAT Application No. 114 of 2021***, that where

the court finds that the language of a taxation provision is ambiguous or capable of more than one meaning, the court has to adopt the interpretation that favors the taxpayer. The Applicant submitted that the Respondent had no legal basis to assess him on the ground that his property was serviced apartments, yet the law does not define the term. The Applicant submitted that this ambiguity should be construed in his favour.

The Applicant submitted further that he has discharged his burden of proof to the standard prescribed by the law by adducing evidence that it deals in letting out residential property which is exempt from VAT. In support of the preceding argument the Applicant relied on the provisions of S. 103 of the Evidence Act, which provides for burden of proof. The Applicant submitted that in support of its case it adduced the uncontroverted testimonies of Mr. Sarangan Venkatesalu and Ms. Julian Kayobybo and the tenancy agreements of the respective tenants.

The Applicant submitted that on the other hand the Respondent failed to discharge its evidential burden by failing to provide any legal basis to support the allegation that the Applicant's property was a serviced apartment. The Applicant submitted that the reasons given by the Respondent for stating that the Applicant's property was a serviced apartment, namely, that it was let to only `non-ordinary people`, the amenities provided, the presence of a gym, swimming pool and boardroom, all showed that the Respondent had no legal basis for alleging that the property in question was a serviced apartment. The Applicant stated further that the Respondent's conclusion that the property in question was a serviced apartment is based on the review of only 10 tenancy agreements out of a total of 34 tenancy agreements.

The Applicant stated that such an incomplete analysis brought into question the soundness of the Respondent's analysis. The Applicant relied on the decision in ***J.K Patel vs. Spear Motors Ltd SCCA No. 4/1994***, where the court held that the burden of proof rests on the party asserting the affirmative before evidence is given and then shifts and rests on the party against whom judgment would be given if no further evidence is adduced.

## 5. Submissions of the Respondent

The Respondent submitted that the Applicant is liable to pay the tax as assessed by the Respondent. The Respondent submitted that VAT is not charged on exempt supplies. The Respondent submitted that the general rule is that exemptions from payment of tax must be specifically provided for under the law and strictly construed and proved by the person seeking to benefit from them. The Respondent relied on the decision of the Supreme Court in **URA v. Siraje Hassan Kajura SCCA No. 9 of 2015**. The Respondent submitted that in order for the Applicant to qualify for the exemption provided under paragraph 1(f)(v) of Schedule 3 to the VAT Act, the Applicant must prove that there was a supply by way of leasing or letting of immovable property and that the lease or letting must not be of serviced apartments.

The Respondent relied on the following definition of 'immovable property' in **Black's Law Dictionary 11<sup>th</sup> Edition** at page 898, "*Property that cannot be moved; an object so firmly attached to land that it is regarded as part of the land*". The Respondent submitted that premised on the above definition, an immovable property must be something lacking the quality of flexibility or detachability.

The Respondent relied on the definition of "*leasing or letting immovable property*" as set out in the decision of the European Court of Justice in **Belgian State versus Temco Europe SA Case C-284/03** wherein the Court stated that the concept of the letting of immovable property within the meaning of Article 13(B) (b) of the Sixth Directive as the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such right. The Court stated that the letting of immovable property is usually a relatively passive activity linked simply to the passage of time and not generating any significant added value. The Court stated further that while a payment to the landlord which is strictly linked to the period of occupation of the property by the tenant appears best to reflect the passive nature of a letting transaction, it is not to be inferred from that that a payment which takes into account other factors has the effect of precluding a 'letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive, particularly where the other factors taken into account are plainly accessory in light of the part of the payment

linked to the passage of time or pay for no serve other than the simple making available of the property``.

The Respondent submitted that the limitation of `letting and leasing of immovable property` to a passive activity with only plainly accessorial add-ons goes to the very fabric of the Value Added Tax regime. The Respondent also relied on the following excerpt from *Principles of Tax Law 7<sup>th</sup> Edition by Geoffrey Morse and David Williams at page 427.*

*`We call it `value added tax`, but the Irish call it `value-added tax` and are probably correct. Why? Because the name is a direct translation from the French *taxe sur la valeur ajoutee*- tax on added value`.*

The Respondent submitted that in the present case, the Applicant rents out its premises located in Nakasero, Kampala, for accommodation purposes. The Respondent submitted that while the tenants receive exclusive possession of the premises, the Applicant doesn't play the passive role of merely providing space for accommodation. The Respondent submitted that the Applicant provides the tenants with more than plainly accessorial add-ons on top of the accommodation. The Respondent submitted that the uncontroverted testimony of Gumisiriza Kenedy (RW1) which was corroborated at the locus visit, proved that the Applicant provides the tenants with fully furnished premises including; a kitchen fully fitted with modern cooking equipment and accessories like fridges, microwaves, ovens and washing machines, dining table and chairs, a living room fitted with sofa sets and television sets, bedrooms fitted out with a bed, mattress, bedsheets, pillows and pillow cases and access to recreational amenities like a swimming pool, gym and boardroom. The Respondent submitted that according to the evidence adduced by its witnesses, the Applicant is responsible for repairs to kitchen equipment, washing machine and air conditioners, which are regularly serviced by the landlord. The Respondent submitted that the Applicant also provides the tenants with monthly internet, Dstv Access Package, standby generator, onsite duty manager and 24 hours dedicated reception.

The Respondent submitted that AW1, Sarangan Venkatesalu, admitted under cross-examination that the Applicant provides its tenants with internet and Dstv. The Respondent submitted that the Applicant did not only develop the apartments but has also added value to the premises rendering the property VATable. The Respondent

submitted that the role of the Applicant is more active than that which would arise from a letting of immovable property as envisaged under paragraph 1(f)(v) Schedule 3 to the VAT Act. The Respondent submitted that in some cases, namely exhibit REX3, the rent charged to the tenants was VAT inclusive, but no VAT was remitted to the Respondent.

The Respondent submitted that the Applicant also lets out moveable property as mentioned above. The Respondent submitted that the Applicant charges the tenant a lump sum rent ranging from USD 1,500 to USD 4,400 which entitles them to all the above amenities and the premises. The Respondent submitted that the rent charged does not differentiate what portion of it relates to the premises and what portion relates to the moveable property. The Respondent submitted further that the rent charged by the Applicant is informed by the additional factors like internet, wifi, Dstv, gym, swimming pool and boardroom. The Respondent submitted that all these amenities are not provided in ordinary apartments or residential property commonly let out in Uganda. The Respondent submitted that accordingly, the Applicant does not let or lease immovable property within the meaning of the VAT Act.

The Respondent submitted that since the VAT Act does not define the term "*serviced apartments*" the term must be given its plain and ordinary meaning.

The Respondent submitted that the term 'services' as defined under S.1(t) of the VAT Act means anything that is not goods or money. The Respondent also relied on S. 11(1) of the VAT Act for what constitutes services. The Respondent submitted that generally an apartment is a serviced apartment if the tenant is provided boarding including bed, linen, furniture, cleaning and laundry, security, and the right to recreational facilities like gym, tennis courts, swimming pool amongst others. The Respondent submitted that all the above mentioned elements need not be present as it is sufficient if the landlord goes over and beyond the provision of mere empty space for accommodation.

The Respondent submitted that the services provided by the Respondent to its tenants are comparable to the services provided in a hotel, with the main distinction being that hotels have a fixed food menu, while the apartment features a fully equipped kitchen complete with cookware, allowing guests to prepare their own meals. The Respondent

submitted that the Applicant's premises are therefore serviced apartments and are not exempt from VAT.

In response to the submissions by the Applicant that paragraph 1(f)(v) of Schedule 3 to the VAT Act is ambiguous, the Respondent submitted that the Applicant had not substantiated the alleged ambiguity. The Respondent submitted that an ambiguity occurs where a provision is capable of two or more meanings. The Respondent submitted that in the instant case the alleged ambiguity is the absence of a definition for the term, "serviced apartments" which in its view is not an ambiguity. The Respondent submitted that to construe the lack of a definition of a term in a statute as an ambiguity would mean that there is an ambiguity any time an Act does not define a term. The Respondent submitted that where words are not given special definitions under an Act, their ordinary meanings should apply. In support of its arguments, the Respondent cited the decision in *Inland Revenue Commissioner vs. Rossminster Ltd (1980) 1 All ER 80 on page 90*.

In rejoinder the Applicant submitted that according to the Respondent's own definition of immovable property, the premises at Plot 1A Baker Road, Kampala is undoubtedly and evidentially an immovable property as it cannot be moved, it being so firmly attached to the land that it is regarded as part of the land. In addition, the Applicant submitted that the property is leased out as evidenced in the tenancy agreements. The Applicant submitted therefore that its business undoubtedly falls within the ambit of a supply by way of sale, leasing or letting of immovable property.

The Applicant submitted that according to **Black's Law Dictionary 8<sup>th</sup> Edition**, the term 'passive' is defined at page 1155, as:

*"...not involving active participation; especially, of or relating to a business enterprise in which an investor does not have immediate control over the activity that produces income."*

The Applicant submitted that it was evident from the evidence before the tribunal namely, the tenancy agreements, witness statements and the locus in quo visit, that it is actively involved in the day to day activities relating to the business of letting out the premises. The Applicant submitted that it also has control over the business as the registered owner. The Applicant submitted further that it is actively involved in the business and has control over the activity that produces income by covenanting with

tenants to collect rent, pay all municipal rates and taxes, keep the premises in good repair and condition. The Applicant submitted therefor that it is absurd for the Respondent to assert that the Applicant doesn't play the passive role of providing space for accommodation.

The Applicant submitted that the assertion by the Respondent that in addition to renting out the premises in question for a fee, the Applicant also lets out moveable property within the premises separately is not only impossible but unheard of. The Applicant submitted that it does not let out any moveable property. The Applicant submitted that a locus in quo visit was carried out at the premises in question on 30<sup>th</sup> May 2024. The Applicant submitted that its business falls within the ambit of residential apartments because its tenants are long term tenants, they are required to give notice of termination of tenancy before vacating their premises, the tenants are required to pay security deposit on or before renting the apartment, the tenants pay their own utility bills, the tenants are required to reinstate the premises before the handover of the apartment, the Applicant only cleans common areas, the Applicant cannot access the tenant's apartments without the consent of the tenants and the tenants hire their own maids or caretakers and the Applicant does not provide the tenants with linen or curtains. The Applicant submitted that the above features remain incidental to the main function of providing housing. The Applicant submitted that modern premium residential properties often offer similar amenities as part of a competitive residential market and their inclusion does not transform the premises into a hotel or a serviced apartment. The Applicant submitted that given the evidence above they are VAT exempt and therefore the tax of Shs. 230,738,527 does not arise.

The Applicant submitted that according to the ***Dictionary of Leisure, Travel and Tourism, Second Edition*** at **page 275**, serviced apartments are defined as apartments where the rooms are cleaned daily, the beds are changed and new linen is put out. The Applicant also relied on the ***Dictionary of Travel, Tourism and Hospitality by S. Medlik, Second Edition*** at **page 150**, wherein service accommodation is defined as overnight accommodation usually provided by hotels and similar establishments with meals and service, and often also by holiday centers and others. Relying on the above definitions the Applicant submitted that the premises in question do not fall within the ambit of a serviced apartment as they do not pass any of the tests mentioned in the definition above. The Applicant submitted therefore that

the premises in question are not serviced apartments based on their characteristics and the above definition of a serviced apartment.

The Applicant submitted that it is well established that a taxpayer may only be taxed by clear words and that in the event of an ambiguity in tax legislation the taxpayer will be given the benefit of the ambiguity.

## **6. Determination by the Tribunal**

The determination of this dispute turns on the resolution of two questions. The first is whether on a proper construction of **paragraph 1(f) Schedule 3** of the **VAT Act**, the letting out of the Applicant's premises constituted a supply by way of leasing or letting of immovable property? The second is whether the property in question are serviced apartments, the letting of which does not constitute an exempt supply under **paragraph 1(f) (v) of the VAT Act**.

We will analyze each of the above questions in turn.

**Paragraph 1(f) Schedule 3 of the VAT Act** provides as follows;

*"1. The following supplies are specified as exempt supplies for the purposes of S. 19-*

- (f) A supply by way of sale, leasing or letting of immovable property, other than
  - i. A sale, lease or letting of commercial premises;*
  - ii. A sale, lease or letting for parking or storing cars or other vehicles;*
  - iii. A sale, lease or letting of hotel or holiday accommodation;*
  - iv. A sale, lease or letting for periods not exceeding three months;*
  - v. A sale, lease or letting of service apartments;"**

The Applicant submitted that his business does not fall among the exceptions set out under paragraph 1(f) (i) - (v) above. The Applicant submitted that his business falls within the definition of a supply by way of a lease of immovable property for the following reasons:

- a) The Applicant's tenants have long term tenancies ranging from 1 year to 2 years and 11 months.
- b) The Applicant's tenants are required to give notice of termination of tenancy before vacating their premises.

- c) The Applicant's tenants are required to pay security deposit on or before renting the apartment.
- d) The Applicant's tenants pay their own utility bills.
- e) The Applicant's tenants are required to reinstate the premises before handing them over to the landlord at the end of the tenancy.
- f) The maintenance of the apartment is left to the tenant and the Applicant only maintains the common areas.

In order to determine whether the letting out of the Applicant's property constituted a supply by way of a lease of immovable property, it is necessary to inquire into the *ratio legis* of paragraph 1(f) of Schedule 3 of the VAT Act.

The Latin term *ratio legis* literally means "reason of the law". It refers to the reasoning or principle behind a law that guides how it should be interpreted.

The Value Added Tax Act (VAT Act) came into force on 1<sup>st</sup> July 1996. A perusal of the Hansard of the Parliamentary debate leading to the enactment of the VAT Act provides no reason for the exemption accorded under Paragraph 1(f) to supplies by way of leasing immovable property.

Value Added Tax was first introduced in France in the year 1958. It was adopted by the European Economic Community (now the European Union) in April 1967. On 1<sup>st</sup> January 1973, the United Kingdom joined the European Economic Community, as a consequence of which, it replaced its Purchase Tax with a Value Added Tax on 1<sup>st</sup> April, 1973. Our VAT Act was adopted from the United Kingdom, who as stated above had adopted theirs from the Value Added Tax law of the European Economic Community.

Indeed, **Article 13B (b) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the Harmonisation of the Laws of the Member States relating to turnover taxes – Common System of Value Added Tax; Uniform Basis of Assessment (OJ 1977 L 145, p. 1,)** also known as 'the Sixth Directive' is in *pari materia* with Paragraph 1(f) Schedule 3 of our VAT Act.

**Article 13B (b) of the Sixth Directive** states as follows;

*"B. Other Exemptions*

*Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:*

- (b) *The leasing or letting of immovable property excluding:*

1. *The provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;*
2. *The letting of premises and sites for parking vehicles;*
3. *Lettings of permanently installed equipment and machinery;*
4. *Hire of safes;”*

In order to find the *ratio legis* behind the enactment of **paragraph 1(f) Schedule 3** of the VAT Act, we must therefore look at the *ratio legis* behind the enactment of **Article 13B (b) of the Sixth Directive**, which forms the basis of **paragraph 1(f) of Schedule 3** of our VAT Act.

The *ratio legis* behind the exemption granted under **Article 13B (b) of the Sixth Directive** was analysed as follows by the Court of Justice of the European Union in ***Stichting “Goed Wonen” v Staatssecretaris van Financien C-326/99***.

*“Consequently, in order to provide a helpful answer to the second question as reformulated in paragraph 39 above, it is first necessary to analyse the ratio legis of the exemption established by Article 13B(b) of the Sixth Directive for the leasing or letting of immovable property...*

*In this regard, the Explanatory Memorandum to the Commission’s proposal for the Sixth Directive, presented to the Council on 29 June 1973 (Bull. EC 11-73, Supplement, p.7, particularly p.16), states, with regard to Title X of the Sixth Directive, concerning exemptions, that the list of exemptions has been drawn up having regard to*

- (i) The exemptions already existing in the various Member States, and*
- (ii) The need to keep the number of exemptions as small as possible....*

*In the Member States the letting of immovable property is generally exempted on technical, economic and social grounds. But the arguments which justify the exemption of lettings of premises as dwellings....no longer apply in the case of hotel premises or of lettings for industrial or commercial purposes”.*

Having restated the *ratio legis* of the exemption established by **Article 13B (b) of the Sixth Directive** for the leasing or letting of immovable property, as set out in the Explanatory Memorandum to the Commission’s proposal for the Sixth Directive, the Court concluded as follows:

*“Although the leasing of immovable property is in principle covered by the concept of economic activity within the meaning of Article 4 of the Sixth Directive, it is normally a relatively passive activity, not generating any significant added value. Like sales of new buildings following their first supply to a final consumer, which marks the end of the production process, the leasing of immovable property must therefore in principle be exempt from taxation, without prejudice to the right to opt for taxation which the Member States may grant to taxable persons, pursuant to Article 13C of the Sixth Directive.*

*“However, it is also consistent with the general aim of the Sixth Directive that if immovable property is made available to a taxable person through leasing or letting, as a means of contributing to the production of goods or services whose cost is passed on in their price, the property stays within, or returns to, the economic circuit and must be capable of giving rise to taxable transactions. The common characteristic of the transactions which Article 13B(b) of the Sixth Directive excludes from the scope of the exemption is indeed that they involve more active exploitation of immovable property, thus justifying supplementary taxation, in addition to that charged on the initial sale of the property”*

It is clear from the above, that the reasoning behind the exemption granted under paragraph 1(f) of Schedule 3, had as its basis the principle, that the leasing of immovable property, is normally a relatively passive activity not generating any significant added value and therefore providing no justification for the imposition of Value Added Tax. However, this argument does not apply where the leasing of immovable property involves active exploitation of the immovable property as in the case of hotel premises or lettings for industrial or commercial purposes.

In order to determine whether the letting of the property in question is exempt for the purposes of paragraph 1(f) of Schedule 3, we must determine whether, the letting of the property in question, was a passive activity not generating any significant added value or whether the letting of the property in question involved active exploitation of the property, thereby justifying the imposition of Value Added Tax.

Tenancy agreements between the Applicant's agent and various tenants were admitted in evidence by both parties. The tenancy agreement of Ms. Divya Lata shows that the permitted usage of the property is residential, the tenancy is for a period of 2 years and 11 months, the tenant is required to make electricity charges and water contributions and the tenant is required to give the landlord a period of months as termination notice.

The tenancy agreement of Mr. Lee Jungchae is for a period of 2 years and 11 months, the usage is residential, electricity, unlimited internet, cooking gas and housekeeping charges to be covered by the tenant.

The tenancy agreement of Ms. Yeji Jung is for a period of one year, the usage is residential, electricity, unlimited internet, cooking gas and housekeeping charges are to be paid by the tenant.

The tenancy agreement of Mr. Jeongsu Lee was for a period of two years, the tenant was responsible for the payment of his utility charges, the permitted usage of the premises was residential, the notice period in case of termination of tenancy was one month, the agreement sets out the following as the amenities offered by the landlord; Common security, standby generator, lift maintenance, parking, cleaning of common areas, free gym and swimming pool access, onsite duty manager and 24 hour dedicated reception.

The tenancy agreement of Mr. Naidoo Vinesh Anil was for a period of 6 months (renewable). The monthly rent of USD 1,500 was inclusive of service charge, electricity charges were payable by the tenant while water charges was payable by the landlord, the permitted usage was residential, notice period in case of termination was months. The landlord was to be responsible for repairs related to the structural failures of the premises, including the electrical system, plumbing system, water heater, kitchen equipment, washing machine and air conditioner except in the case of flagrant misuse by the tenant. A service charge of USD 300 inclusive of VAT was included in the rent. The landlord also provided internet of 9GB per month, Dstv Access package, Common Security, standby generator, lift maintenance, parking for one vehicle, cleaning of common areas, free gym and swimming pool access, onsite duty manager and 24 hours dedicated reception. The agreement also states that the minimum stay in the apartment is for a period of 6 months.

The tenancy agreement for Regis Uganda Ltd was for a period of one year, the monthly rent was USD 1600 inclusive of VAT, the service charge was USD 300 inclusive of VAT, the permitted usage of the premises was residential, notice period in case of termination was months.

The tenancy agreement of Africa Plantation Capital was for a period of 2 years and 11 months, the monthly rent was USD 1,600, the service charge was USD 300, the electricity charge was payable by the tenant while the water charges were payable by the landlord out of the service charge paid by the tenant. The notice period in the case of termination of tenancy was months. The tenant was entitled to one parking slot which was included in the rent amount, electricity, unlimited internet, cooking gas and housekeeping covered by the tenant.

The terms of the tenancy agreements set out above show that the letting of the premises in question by the Applicant to the various tenants was not a passive activity which generated no significant added value. The amenities provided by the Applicant to its tenants namely; the furnishings, internet, Dstv Access package, Common Security, standby generator, lift maintenance, parking, cleaning of common areas, free gym and swimming pool access, onsite duty manager and 24 hours dedicated reception, all point towards an active exploitation of the property in question.

The amenities provided above generate significant added value. This added value is passed on to the tenants in the monthly rent and in the service charge. Indeed, the tenancy agreement of Naidoo Vinesh Anil shows that the service charge of USD 300 is inclusive of VAT while the tenancy agreement of Regis Uganda Ltd, shows that the monthly rent of USD 1,900, was also inclusive of VAT.

The addition of value to the property in question, through the provision of the above amenities, is apparent from the fact that properties providing the above amenities are able to command higher monthly rents, compared to similar properties without the said amenities. A passive exploitation of the property for the purposes of paragraph 1(f) of Schedule , would not entail the provision of the above amenities. The active exploitation of the property in question places it among the transactions excluded from the exemption under paragraph 1(f) (i)(ii)(iii)(iv) and (v) of Schedule 3 to the VAT Act.

Relying on the *ratio legis* behind the exemption granted under paragraph 1(f) of Schedule 3 of the VAT Act, we find that the leasing or letting of the property in question by the Applicant did not constitute a supply by way of leasing or letting of immovable property.

The second question for our determination relates to whether the property in question is a serviced apartment.

The Applicant submitted that the decision to classify the property in question as serviced apartments and therefore subject to VAT was without any legal basis. The Applicant submitted that the term `serviced apartments` is not defined in the law and as such it is ambiguous. The Applicant submitted that this ambiguity should be construed in his favour.

The Respondent submitted that ambiguity occurs where a provision is capable of two or more meanings. The Respondent submitted that the absence of a definition for the term `serviced apartments` did not render paragraph 1(f)(v) Schedule 3 of the VAT Act ambiguous.

We agree with the Respondent that the absence of a specific definition for the term `serviced apartment` does not render paragraph 1(f)(v) Schedule 3 of the VAT Act ambiguous. The said provision is only capable of the meaning that the exemption from VAT accorded to supplies by way of sale, leasing or letting of immovable property does not extend to a sale, lease or letting of serviced apartments. It is the duty of the Tribunal to look at the provision in question and determine what the term `serviced apartments` means.

Our definition of a serviced apartment is temporary accommodation, halfway between a traditional apartment and a hotel. These apartments can be booked for both short-term and long-term stays. They contain fully furnished apartments with separate living, dining, and sleeping areas. They also contain kitchen facilities with appliances and cooking utensils, including amenities like fridges, stoves, microwaves, and dish washers. Utilities such as electricity, water, gas, Wi-Fi or other internet access, television with cable or satellite channels are provided. Other amenities include laundry facilities, which may include washing machines and dryers, 24-hour security, concierge and reception services, gym or fitness facilities, swimming pool and other recreational amenities. In some instances, housekeeping facilities which may include daily or weekly cleaning, linen and towel changes and restocking of toiletries and other supplies may be provided.

As part of the hearing, the Tribunal visited the *locus in quo* in the company of the parties and their witnesses. The Tribunal was able to observe for itself and through the testimony of Ms. Julian Kayoby, that property in question comprises of 32 apartments, the amenities include a swimming pool, gym, reception, each apartment has a dining table with chairs, a kitchen with an in-built cooker, kitchen cabinets without cutlery, a washing machine, a gas cylinder replenished by the tenant and a fridge. The bedrooms contained a bed and a mattress without linen, a bathroom, an outdoor balcony and coffee chairs and separate Yaka meters and an air-conditioner. We were informed by the witness that the landlord charges a service charge for each tenant which caters for the cost of security, water and the cleaning of common areas and that the tenants pay for their own internet and cable television.

Relying on the definition of a serviced apartment set out above we find that the Applicant's property at Plot 1A Baker Road, Nakasero, Kampala is a serviced apartment for the purposes of paragraph 1(f) (v) of Schedule 3 to the VAT Act. We accordingly find that the letting or leasing of the said property by the Applicant is not VAT exempt.

This application is accordingly dismissed with costs.

Dated at Kampala this 4<sup>th</sup> day of November 2024.

  
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MR. SIRAJ ALI

  
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MRS. CHRISTINE KATWE

  
\_\_\_\_\_

MS. SAFI GRACE

