THE REPUBLIC OF UGANDA

THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 104 OF 2023

TOTAL ENERGIES MARKETING UGANDA LTD ..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ..... RESPONDENT

BEFORE: MS. PROSCOVIA R. NAMBI, MS. CHRISTINE KATWE, MR. WILLY NANGOSYAH

RULING

This ruling is in respect to an application challenging Value Added Tax (VAT) and Withholding Tax (WHT) assessments on "service charges" paid to TotalEnergies Marketing Kenya (Total Kenya) for facilitating the importation and transportation of the Applicant's fuel into Uganda. The core of this dispute concerns whether these charges should be subjected to reserve charge VAT and WHT as independent services or treated as part of the cost of the imported fuel itself, and therefore not subject to separate VAT and withholding tax.

1. Background facts

The Applicant is a company incorporated in Uganda and engaged in the importation, marketing, and distribution of petroleum products in Uganda. Since Uganda is landlocked, the Applicant imports its fuel requirements through Kenya (95%) or Tanzania (5%). In Kenya, the importation is done using the Open Tender System (OTS, now called Government to Government/ "G to G") which is operated by the Government of Kenya. It is the policy of the Government of Kenya that only Oil Marketing Companies (OMCs) registered to trade in Kenya are permitted to participate in the OTS as well as access the country's petroleum movement infrastructure comprising a pipeline managed by the Kenya Pipeline Company (KPC) and the Kipevu Oil Storage Facility (KOSF).

Because the Applicant, not being registered in Kenya, cannot directly participate in the OTS nor access the KPC pipeline and the storage facility, it relies on Total Kenya to

handle all importation logistics, including bidding under OTS, securing ullage, and coordinating pipeline transport from Mombasa to inland loading depots in Kenya.

The Applicant communicates its monthly fuel requirements to Total Kenya and Total Kenya consolidates its own local requirements and participates in the OTS bidding processes. Once the OTS allocates volumes, petroleum products are sourced from international suppliers (often in the Middle East) and shipped into Kenya. Vessels arrive and offload the products at the Kipevu Oil Storage Facility (KOSF) in Mombasa or other authorized Kenyan storage terminals connected to the Kenya Pipeline Company's (KPC) pipeline network. The Applicant's share of the imported product is identified and confirmed by an independent surveyor's out-turn report.

To formalize this relationship, the Applicant and Total Kenya executed a Service Level Agreement (SLA) with the most current version dated 16th March 2021. Under the SLA, Total Kenya provides a suite of services enabling the Applicant to obtain, handle, and dispatch its petroleum products from Kenya to Uganda. In return, the Applicant pays Total Kenya fees, including a service/handling fee.

Following an issue audit of the Applicant for the period January 2015 to December 2021, the Respondent issued additional assessments totalling Shs 14,468,651,395 for VAT and withholding tax in respect on the fees paid to Total Kenya.

The Applicant objected to the assessment on the grounds that;

i. The handling services are incidental to the purchase and importation of fuel and the related handling charges ought to have formed part of the customs value of the imported fuel therefore VAT and WHT would be out of scope for the services; and
ii. The handling services are incidental to the international transportation of fuel into Uganda and are zero rated for VAT purposes, while for WHT purposes, the handling charges are not income derived from sources in Uganda.

The Respondent disallowed the objection, arguing that these were independent taxable services, separate from the fuel supply. Hence this application.

2. Issues for determination

At scheduling, the issues set down for determination were:

1. Whether the Applicant is liable to pay the tax as assessed?
2. What remedies are available to the parties?

3. Representation

The Applicant was represented by Mr. Joseph Luswata and Mr. Winston Churchill Ruhayana while the Respondent was represented by Ms. Rita Nabirye and Mr. Amanya Mushambi.

The Applicant presented evidence to the Tribunal through its Supply and Petroleum Affairs Manager, **Richard Oneil Olokojo (AW)**, to support its claim that the tax assessments issued by the Respondent were incorrect. The witness testified that the Applicant imports petroleum products (diesel, petrol, paraffin, LPG, heavy fuel oil, lubricants) from outside Uganda, mainly through Kenya or Tanzania using either the Open Tender System (OTS), now called Government-to-Government ('G to G') in Kenya, or the Bulk Purchase System (BPS) in Tanzania. He referenced the OTS terms in exhibit AE10. The OTS is managed by the Kenyan government, which offers tenders to oil marketing companies (OMCs) to import fuel into Kenya.

AW1 testified that due to restrictions on non-Kenyan companies participating in the OTS, the Applicant relies on TotalEnergies Marketing Kenya to handle the tendering process and pipeline access. The process involves product sourcing, vessel transport to Mombasa (Kenya), storage (often KPC but sometimes private facilities like Konza), and trucking to Uganda. He stated that Total Kenya manages significant aspects of this process. The Applicant provides monthly fuel requirements to Total Kenya, who then incorporates this into their bids within the OTS.

The witness references the Service Level Agreement (SLA, exhibit AE7) between the Applicant and Total Kenya, which came into force on March 16th, 2021 and which outlines the services provided by Total Kenya. The witness stated that Total Kenya's role is detailed in the SLA, which includes representing the Applicant in the OTS, coordinating the discharge of fuel, making ullage and storage arrangements, coordinating processing and clearing fuel through the KPC system, and handling, loading and dispatching fuel from Kenya to Uganda. He specifically discussed clauses

9A-9G, 10A and11D-11H within the SLA which highlighting the responsibilities of the parties.

The documents referenced extensively by the witness include the manifest (exhibit AE12), Adjusted Stock Entitlement (ASE) (Exhibit AE8a-8d), invoices (Exhibit AE9, Exhibit AE19), discharge instructions (Exhibit AE11) and Kenfreight invoices/schedules (exhibit AE13). These exhibits demonstrate the various stages of the import process.

The witness testified that the Applicant receives separate invoices: one for the product from the winning OMC in the OTS, and another from Total Kenya for handling fees and throughput fees. The Applicant's witness stated that the handling fees related to the services of Total Kenya for managing the logistics within Kenya, and not directly related to the fuel cost itself.

He stated that the handling fees are treated as a separate expense, not included in the customs value of the products. He also stated that the Applicant's financial statements show these handling fees as part of the cost of sales. The volume of the product is the tax base for petroleum products, meaning the handling value will not be part of the final customs tax. He also testified that the Applicant is exempted from withholding tax.

AW1 testified that the service charge was scientifically determined by prorating the actual fuel importation handling costs with the fuel requirements of each party. Referencing exhibit AE 18, he testified that the service charge is broken down into several components:

a) Clearing and forwarding – this involves declaring the imports in Assycuda World and coordinating the release/exit of the cleared transit trucks to Uganda by the Applicant's clearing agent Africa Global Logistics together with Kenfrieght (EA) Ltd.

b) Supply logistics and administration costs - which relate to the operational costs for Total Kenya staff handling fuel products belonging to the Applicant. The Total Kenya staff coordinate the discharge of ships, make ullage arrangements, and other import formalities in respect of the Applicant's fuel.

c) KPC linefill financing costs – this is a portion of the financing costs for interest paid on borrowed funds to maintain the linefill obligations.

d) margin – this is Total Kenya's profit for the service and technical assistance offered under this arrangement.

He testified that the costs incurred in the importation of fuel into Uganda include KPC fees, storage fees, demurrage port charges, third party hospitality, clearing and forwarding, supply logistics administration costs and KPC linefill financing costs. He states that third-party entities provide the handling services and these providers have running contracts. He also states that the independent service providers directly invoice the applicant for services independent of Total Kenya. It was his testimony that Total Kenya pays third-party fees on behalf of the Applicant and these costs are then reimbursed by the Applicant to Total Kenya at actual cost.

The witness testified that the Respondent's audit (AE1, Respondent's management letter) questioned the tax treatment of these handling fees and issued additional tax assessments. The Applicant objected to the assessment and the Respondent rejected that objection.

The Respondent presented evidence through its witness **Mr. Kakyoma Gonzaga (RW1)** to demonstrate that the Applicant is liable for the disputed tax assessments on service charge paid to Total Kenya. The Respondent's evidence references several key documents, including: Transfer Pricing Report (TP Report, dated June 30, 2022) which details the functional characterization of the involved entities and their respective roles in the supply chain, the Service Level Agreement (SLA, dated March 16, 2021) which specifies the details of the handling and storage services and invoices from Total Kenya which show the separate charging for handling services.

RW testified that the Respondent conducted a tax audit of the Applicant and basing on the SLA and the TP Report concluded that the fees paid by the Applicant to Total Kenya constituted income sourced in Uganda, and were thus subject to WHT and VAT.

RW testified that the services detailed in the SLA are independent services, separate from the fuel itself, similar to other services like transport, marking and security. RW testified that the handling services provided by Total Kenya are not incidental to the import of fuel or international transport. He testified that the Applicant's customs declarations show that the handling costs were not included in the customs value at importation, indicating they were treated as separate costs.

The Respondent's witness asserted that the economic reality of the transaction is that Total Kenya provides back-end technical support services for which the Applicant pays a service fee. These services include representing the Applicant in the Kenya Open Tender System (OTS), coordinating transportation, and coordinating customs clearance.

RW highlighted that the TP report indicates that Total Kenya's handling service charge is set using a CUP method, implying that this is a separately priced service, and should be taxed as such. RW1 further testified that the storage and handling services are offered to the Applicant as independent services over and above the value of the products suppled, which constitutes a charge over and above the customs value of the imported fuel.

RW1's witness statement refers to the functional characterization of Total Kenya as a local fully-fledged service provider of technical services to TMUL. RW's statement outlines the functions undertaken by Total Kenya in respect of fuel products purchased by the Applicant through the Open Tender System, which include coordinating the discharge of ships, storage of products, and coordinating the transport of the product to the port of export. They also coordinate taxes and duties and lodge claims for taxes and duties on behalf of the Applicant.

Further, the Respondent cites evidence of invoices that show that the service (handling) fee is invoiced separately in addition to the cost of the products. This implies that the service is an additional service for which payments are made. The witness testified that the handling services are not part of the supply of petroleum products but are rather independent services.

Based on the above points, the Respondent's witness concluded that the assessment raised is lawful, justified and proper within the meaning of the tax laws.

4. Submissions of the Applicant

The Applicant submitted that the issue in this Application is the true character of the "service charge" payments made by the Applicant to its counterpart - Total Kenya for services rendered in the importation and transportation of the Applicant's fuel for sale in Uganda. The Applicant argued that the character of the payment determines

whether an obligation to pay imported services VAT and withholding taxes at the time the payments are made arises.

The Applicant argues that the tribunal should look at the true nature of the transactions and not just their form when determining whether tax is payable. They invoke the legal principle of substance over form, citing **Intertek Testing Services v. Uganda Revenue Authority.**

The Applicant contends that the service fees in issue are substantively incidental payments for incidental services rendered in the purchase, importation and international transportation of fuel to Uganda, for VAT purposes; or disbursements for VAT and WHT purposes: and alternatively, reimbursements for WHT purposes.

Issue 1: Whether the Applicant is liable to pay the tax as assessed?

The Applicant submitted that the answer is "no" and it relies on two principal grounds in resolving this issue:

a) The service fees are incidental to the purchase, importation and international transportation of fuel into Uganda and are out of scope for VAT and WHT purposes - zero rated for VAT purposes, while for WHT purposes, the handling charges are not income derived from sources in Uganda.
b) The service fees were disbursements which are not liable to VAT and WHT or in the alternative reimbursements not liable to WHT

The Applicant submitted that the handling services are incidental to the international transportation of fuel into Uganda and are zero rated for VAT purposes. They contended that, under **Section 12(3) of the VAT Act**, services incidental to the import of goods is part of the import of goods and therefore the handling service should be accorded the same VAT treatment as the fuel itself.

The Applicant referred the Tribunal to the holding in ***Customs and Excise Commissioners v. Madgett and Baldwin t/a Howden Court Hotel, Joined Cases C-308/96 and C-94/97*** where it was held:

"A service must be regarded as ancillary to the principal service if it does not constitute for customers an aim in itself but a means of better enjoying the principal supplied."

The Applicant submitted that their evidence shows that the handling services were only a means of enabling the Applicant import and transport fuel into Uganda. The services would not be required without the importation and transportation of fuel in Uganda.

The Applicant further cited ***Uganda Revenue Authority v. Uganda Taxi Operators & Drivers Association Civil Appeal No. 13 of 2015***, where in finding that the management of taxi parks was incidental to the provision of passenger transport services based on the fact that the management of taxi parks would not be necessary without the provision of passenger transport services, the Supreme Court relied on ***UTODA Entebbe Branch Ltd v. Uganda Revenue Authority, TAT Application No. 8 of 2009*** for the holding that:

". . Can the provision of the services by the taxpayer be independent of the exempted supply? In other words, can taxi parks operate independently of the provision of passenger transport services? No, they cannot. There is need for the provision of transport services in order to have a taxi park. The operation of taxi parks is incidental and ancillary to the provision of passenger transport services."

Court emphasized that:

"The essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer with several distinct principal services or a single service."

The Applicant argued that in this case there is need for importation and transportation of fuel into Uganda to require the handling fees.

The Applicant further submitted that the handling services are incidental to the international transportation of fuel because of the negligible value of the handling services relative to the value of the imported fuel. According to AEX3, at page 27 of the 8 of 19 trial bundle, the value of the handling services was a mere 0.6% of the value of the imported fuel. The Applicant cited ***Madgett and Baldwin v. Commissioners of Customs & Excise (supra),*** where the Court relied on the fact that the price of the [ancillary\ services in issue (transportation by coach) took up a small proportion of the package price as compared to accommodation (the principal service) and the Court then concluded that -

"Those bought-in services do not therefore constitute for customers an aim in itself, but a means of better enjoying the principal service supplied by the trader."

The Applicant concluded that the handling services are incidental to the importation and international transportation of fuel and are therefore zero rated for VAT purposes.

Disbursements/ Reimbursements

The Applicant also submitted that the service fees were disbursements which are not liable to VAT and WHT or in the alternative, reimbursements and are not liable to WHT.

The Applicant submitted that during the pendency of this application, the Applicant applied to this Tribunal to allow it rely on an additional ground that was not raised during the objection process. Whilst the Tribunal dismissed the application, the tribunal held the handling fees, whether categorised as disbursements or not would fit within the first two grounds initially raised during the objection process.

They submitted that at the heart of this dispute is the question of whether the throughput payments are a disbursement or a reimbursement.

The Applicant submitted that the difference between a disbursement and reimbursement is significant from a VAT point of view. A reimbursement is subject to VAT while a disbursement is outside the scope of VAT. They referred the Tribunal to ***Bank of Africa v. Uganda Revenue Authority, TAT 62 of 2018; Prime Solutions Ltd v. Uganda Revenue Authority, TAT 116 of 2019***

The Applicant argues that a large part of the service charge consists of payments made by Total Kenya on the Applicant's behalf to third parties for costs like KPC fees, port charges, storage charges, and other expenses. They contend that these are not payments for services to the Applicant by Total Kenya, but are rather payments disbursed by Total Kenya as an agent of Applicant.

The Applicant relies on the definition of a disbursement from ***Prime Solutions v. URA***, which describes it as *a recovery of a payment made by a party on behalf of a client, acting as an agent.* They argue that the court clarified that:

"Disbursements do not constitute consideration for a taxable supply and are therefore outside the scope of VAT."

The Applicant also cited ***Bank of Africa (supra),*** where it was held that:

"a reimbursement refers to the recovery of an expense that has been incurred by a party as a principal on behalf of a client when supplying goods or services to a client whereas a disbursement refers to the recovery of a payment made by a party on behalf of a client".

They further argue that in England and the European Community Jurisdiction, the distinction between a disbursement and a reimbursement has been expressed as follows:

"VAT law drew a clear distinction in principle between (i) the case when the relevant expenses paid to a third party C had been incurred by A in the course of making his own supply of services to B and as part of the whole of the services rendered by him to B; an d (i) the case where specific services had been supplied by the third party C to B (not A) and A had merely acted as B's known and authorized representative in paying C. Only in case (it) could the amounts of the payment to C qualify for treatment as disbursement for VAT purposes, and on that account as constituting no part of the consideration for A's own services to B." ***(Nell Gwynn House Maintenance Fund Trustees vs Customs & Excise Commissioners (1999) STC 79, 90).***

The Applicant maintains that according to ***Nell Gwynn House Maintenance Fund Trustees vs Customs & Excise Commissioners,*** payments made to a third party by an agent on behalf of a client can be treated as a disbursement. The Applicant however concedes that only the margin portion of the service fee should be subject to VAT.

The Applicant emphasizes that these payments were proportional to the Applicant's fuel entitlement, solidifying the agency relationship. The Applicant contended that disbursements are merely *pass-through costs* and should not be treated as income to Total Kenya nor as a service liable to tax.

The Applicant submitted that the VAT on the service charge payments to Total Kenya was imposed upon the Respondent pursuant to section 5(1)(c) of the VAT Act as imported service VAT. However, Rule 13(2) of the VAT Regulations provides that the value of an imported service is determined using Section 21 of the VAT Act. Under section 21 of the VAT Act, the taxable value of a supply is the total consideration for the supply.

Under section 1 of the VAT Act, consideration 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"

According to the Applicant, Supply Logistics and Administration Costs do not constitute consideration because they are a disbursement incurred by Total Kenya on behalf of the Applicant. Linefill Financing Costs are charged by a Commercial Bank and are a disbursement which does not constitute consideration for the supply of services. Clearing & Forward Costs are remitted to Total Kenya for onward payment to Kenfreight. These costs are therefore a disbursement outside the scope of VAT. The Applicant further argues that, at any rate, it would have directly paid the third parties for all the expenses incurred had it been able to directly participate in the OTS and KPC operations. We submit that Total Kenya paid supply logistics and administration costs, clearing and forwarding and financing costs to third parties as an agent on behalf of the Applicant.

The Applicant argues that character of the payments in issue satisfies the definition of disbursements as articulated by case law. ***In Prime Solutions v. URA (supra),*** the Tribunal at page 1 of the ruling observed as follows:

"A disbursement on the other hand refers to the recovery of a payment made by a party on behalf of a client, as an agent, for goods or services received a n d used exclusively by the client."

The Applicant argues that according to the SLA, the Applicant was the client. They argue that save for margin, the evidence shows that the service fees of US$ 5.54 on which the Respondent imposed VAT constitute payments made by Total Kenya to third parties for services rendered in respect of the Applicant's fuel entitlement. In as far as the payments made by the Applicant were directly proportional to the Applicant's fuel entitlement, Total Kenya acted as an agent in making the payments for services exclusively enjoyed by the Applicant. Only margin formed part of the consideration for the services rendered by Total Kenya to the Applicant.

The Applicant therefore prayed that VAT be discharged except for the margin portion of the service fees.

Withholding Tax:

The Applicant's argument against WHT is that the payments to Total Kenya, except for the margin, do not constitute income to Total Kenya. They argue that WHT should only apply to payments that are considered taxable income in the hands of the recipient. They submit that WHT does not apply to disbursements, and it is uncertain whether it applies to reimbursements. The Applicant invited the Tribunal to find that WHT does not apply should the Tribunal find a portion of the service fees were reimbursements and not disbursements.

The Applicant claims that components such as supply logistics and administration costs, KPC linefill financing costs, and clearing and forwarding costs are either disbursements or reimbursements, but not income for WHT purposes. The Applicant refers to ***Jacobosen Uganda v. Uganda Revenue Authority, TAT Application No. 11 of 2016***, where it was held that an expenditure incurred in the provision of management services does not constitute a management claim or charge. The Tribunal held by majority 2:1 -

"These are expenses incurred and paid to third parties and not to the service provider. It is income for third parties or service providers and who are not parties in the contract. If we are to consider it as a charge, it is still not a management charge as it is paid for tickets, hotels, travel and per diem. The charges which are taxable are restricted to management and not all charges."

In ***Civil Appeal No. 26 of 2018: Uganda Revenue Authority v. Jacobsen Uganda Power Plant Co. Ltd;*** the High Court has largely confirmed the Tax Appeals Tribunal's majority decision by holding, at page 1 that –

"An expense does not become income because it is reimbursable. The Euro 15,000 to JELCO not having been a dividend nor a management charge but a reimbursement of expenses incurred in deriving income could not attract a tax and the Tribunal therefore rightly found so."

And on Page 7, that

"The reimbursed expenses of Euro 15,000 per month were not paid as consideration for services provided by JELCO but rather as reimbursement of expenses already incurred by JELCO in rendering services to the Respondent. As such, these expenses cannot be categorized as management charge."

The Applicant also cites the ruling in ***Luwaluwa Investment Limited v. URA HC Civil Appeal No. 43 of 2022*** where the learned judge, Justice Ocaya held thus at page 49:

"I must note that withholding is a mode of collection of tax and not a head of tax in itself... Where the transaction is not amenable to income tax, there can be no withholding since there is no tax to remit."

The Applicant submitted that WHT is an income tax collected and paid by the payer on behalf of the payee. Therefore, to determine if WHT applies, it must first be determined if the payment is income in the hands of the payee. WHT does not apply to disbursements. And that while it is not settled whether it applies to reimbursements, the Applicant argues that WHT should not apply to reimbursements either.

The Applicant contends that for WHT purposes, the key issue is whether a reimbursement changes the non-resident's income position. If the reimbursement simply restores the non-resident to the position they were in before the expenditure, it is not income and therefore not subject to WHT. The Applicant argues that the term "income" in sections 78 and 84 of the Income Tax Act has a technical meaning, referring to the types of revenue eligible for income tax in Uganda. They argue that Section 4(1) controls section 84(1), imposing income tax on chargeable income, which is gross income less allowable deductions, and gross income is either business, employment, or property income.

They argue that the payment in question is US$5.54 per 1000 litres of fuel, broken down into (a) Clearing and Forwarding (US$0.19) which are the expenses paid by Total Kenya to Kenfreight for clearing the Applicant's fuel; (b) Supply Logistics and Administration Costs (US$3.29), which are primarily salaries of Total Kenya staff who handle fuel and related processes on behalf of the Applicant and which the Applicant reimburses at cost, KPC Linefill Financing Cost (US$1.80), which are the costs incurred by Total Kenya to maintain the pipeline and are then recharged to the Applicant based on their fuel entitlement , and Margin (US$0.26), which the Applicant concedes constitutes income to Total Kenya. The Applicant argues that they would have directly paid these costs if they could participate in the Open Tender System (OTS) and KPC operations.

The Applicant further argues that the WHT was imposed on them under sections 79, 85 and 120 of the Income Tax Act (now sections 78, 84 and 137), and that section

85(1) imposes tax on non-residents deriving income under a Ugandan source service contract. The Applicant claims that the word "income" in both sections 78 and 84 has a technical meaning that may differ depending on the context.

The Applicant notes that a reimbursement is not employment, business or property income and it is not new money, therefore it does not improve the taxpayer's income level and should not be taxed. The Applicant also cites Black's Law Dictionary, which defines "reimburse" as to pay back, to make restoration, to repay that which is expended, to indemnify or make whole.

The Applicant cites ***GE India Technology Centre v. CIT (2010) 327 I T 456171,*** which held that a withholding tax obligation arises for payments with an embedded income element and is limited to the portion that is chargeable to tax. The Applicant further cites ***Principal CIT v. Organising Committee Hero Hondo FIH World Cup (2019) 260 Taxman,*** where it was found that reimbursed expenses were not subject to withholding tax.

They also cite ***CIT v. Siemens Aktiongesellchaft (310 IT 320/177),*** which held that reimbursements are not income if the taxpayer receives no excess money over the incurred expenses, as well as ***CIT v. Tejaji, Farasaram Khara Walle Ltd (1968) ITR95***, which held that reimbursements of services are not revenue receipts.

The Applicant argued that the fees paid to Total Kenya were not income derived from a source in Uganda because the services were performed outside Uganda. Accordingly, under the Income Tax Act, WHT does not apply.

In summary, the applicant argues that the payments, except for the margin, are either reimbursements or disbursements, and thus do not constitute income for Total Kenya and should not be subjected to WHT. That they are costs incurred by Total Kenya on behalf of the Applicant.

Critique of the Respondent's Evidence:

The Applicant contests the evidence of the Respondent's witness, arguing that his testimony was contradictory and illogical. The Applicant pointed out that the witness claimed the Applicant could import fuel and participate in KPC operations directly while also admitting that the Applicant could not participate in the OTS. The Applicant argues that such inconsistent evidence should be rejected and resolved in favor of the

Applicant, citing ***Crane Management Services Limited v DFCU Bank Limited Civil Suit No. 109 of 2018***, where the High Court in rejecting DWI's evidence for being riddled with inconsistencies and contradictions held thus at page 25:

"It is trite law that where the evidence of a party is riddled with inconsistencies and contradictions, which remain unexplained, their evidence should not only be rejected but that such contradictions and inconsistencies should be resolved in favour of the opposite party. I am fortified by the decision in Alfred Tajar versus Uganda EACA Criminal Appeal No. 167/196."

Issue 2: Remedies

The Applicant requests that the Tribunal set aside the Respondent's assessment of VAT and WHT, and order a refund of any tax paid along with interest. They argue that the majority of the service fees are either disbursements or reimbursements and should not be taxed, except for the margin.

5. Submissions of the Respondent

The Respondent started off by submitting that the burden of proof rests on the taxpayer (Applicant) to demonstrate that a tax assessment issued by the tax authority (Respondent) is incorrect or unlawful. This principle is codified in:

Section 28 of the Tax Procedures Code Act, Cap 343 that;

"In any proceeding under this Act

a) *for a tax assessment, the burden is on the taxpayer to prove that the assessment is incorrect, or*
b) *for any other tax decision, the burden is on the person objecting to the decision to prove that the decision should not have been made or should have been made differently."*

This is also reiterated in Section 19 of the Tax Appeals Tribunal Act and further in Section 101 the Evidence Act, that he who alleges must prove.

The Respondent referred the Tribunal to ***Williamson Diamonds Ltd v. Commissioner General (2008)*** where the Tanzanian Tax Revenue Appeals Tribunal

ruled that the taxpayer bears the burden of proving an assessment is excessive or erroneous, and this burden cannot shift to the tax authority.

They also referred to ***Uganda v. Gurindwa & Others (2012)*** where High Court affirmed that taxpayers must prove they do not owe disputed taxes, except where factual matters require the tax authority to provide evidence.

The Respondent's submitted that where the Applicant is challenging the validity of an assessment or its lawfulness, the burden squarely rests upon them to prove to the satisfaction of the Tribunal that this assessment is incorrect and that the Applicant is not liable to pay the taxes as assessed by the Respondent.

Issue 1: Whether the Applicant is liable to pay the tax as assessed?

The Respondent submitted that in determining whether the Applicant is liable to pay the taxes assessed, the main issues to be resolved are;

a) Whether the handling services (service/handling charges) are incidental to the importation of fuel, incidental to the international transportation of fuel
b) Whether the handling/throughput fees paid by the Applicant to Total Kenya is a reimbursement or disbursement for tax purposes.
c) Whether the handling charges are not derived from sources in Uganda and therefore not subject to Withholding Tax?

The Respondent's argument is built on the premise that these services are distinct from the fuel supply itself, constitute taxable supplies, and are not merely reimbursements or disbursements.

The Respondent submitted that the services fees paid to Total Kenya do not qualify as incidental to the importation and international transportation of fuel and are therefore subject to Value Added Tax (VAT) under the VAT Act.

The Respondent relied on Section 23(3) of the VAT Act, which provides:

"The taxable value of an import of goods is the sum of—

a) the value of the goods ascertained for the purposes of customs duty under the laws relating to customs;
b) the amount of customs duty, excise tax, and any other fiscal charge; and

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

The Respondent argued that Section 23(3) must be read together with Section 12(3) to determine the proper tax treatment of services related to imported goods. The Respondent contended that for services to qualify as "incidental to importation," their value must be included in the customs value of the goods at the point of entry. In this case, the handling services fees were not declared as part of the customs value, and as such, they are taxable services under the VAT Act.

The Respondent further submitted that the handling services provided by Total Kenya are distinct from the principal supply of fuel and cannot be treated as ancillary. The Respondent relied on the principle laid out in ***Victoria Motors Limited v. Uganda Revenue Authority, TAT No. 2 of 2017,*** where the Tribunal held:

"The liability to pay VAT arises where there is a taxable supply made to a taxable person, and VAT shall be charged on any distinct supply of goods or services."

The Respondent argued that the handling services are not inseparable from the fuel importation, as they represent *additional logistical support* provided to the Applicant. Therefore, the fees constitute a distinct supply of services, which is subject to VAT.

To further support this position, the Respondent referred to **Section 11(1)(b) of the VAT Act,** which provides:

"Except as otherwise provided under this Act, a supply of services means a supply which is not a supply of goods or money including—b) the making available of any facility or advantage."

The Respondent contended that the handling services provide an advantage to the Applicant in the form of logistical coordination and facilitation of fuel transportation. Accordingly, the Respondent submitted that the fees paid to Total Kenya are for a taxable supply of services and do not qualify as incidental to the importation of goods.

Whether the handling services fees constitute disbursements or reimbursements and are not subject to VAT or WHT?

The Respondent submitted that the handling fees paid to Total Kenya do not qualify as disbursements or reimbursements but constitute service charges and are therefore subject to VAT and Withholding Tax (WHT).

Disbursements:

The Respondent argued that for payments to qualify as disbursements, they must meet the following criteria:

i. The agent incurs the expense on behalf of the principal;

ii. The agent does not derive any benefit from the payment; and

iii. The principal is directly liable for the expense.

The Respondent submitted that Total Kenya did not incur the handling fees strictly as an agent for the Applicant. Referring to Clause 19 (reimbursement of third-party costs) and Clause 20 (handling fees for Total Kenya's services) of the Transfer Pricing report, the Respondent argues that the USD 5.54 fee is **consideration**, not a disbursement. The Transfer Pricing Report confirms Total Kenya acts as a "service provider," not an agent, and uses the Comparable Uncontrolled Price (CUP) method.

The Transfer Pricing Report and Service Level Agreement (SLA) do not categorize the handling fees as disbursements, and no evidence was provided to demonstrate that Total Kenya acted solely as an agent.

The Respondent referred to **Section 4(c) of the VAT Act**, which provides that VAT shall be charged on:

"The supply of imported services other than an exempt service by any person."

The Respondent argued that Total Kenya's handling services constitute imported services, which are subject to VAT under this provision.

Reimbursements:

The Respondent submitted that the handling fees cannot be treated as reimbursements because there is no direct evidence showing that Total Kenya incurred costs for the Applicant's direct benefit without earning a margin. The Respondent cited **Section 83(1) of the Income Tax Act**, which imposes withholding tax on income derived from Uganda by non-residents.

The Respondent relied on the case of ***Golden Leaves Hotels and Resorts Limited v. Uganda Revenue Authority*** and ***Apollo Hotel Corporation v. Uganda Revenue Authority Civil Appeal 64 of 2008,*** where it was held that:

"Payments made for services performed outside the country are taxable if the recipient derives income from sources in Uganda."

The Respondent argued that the handling fees represent income earned by Total Kenya, as the services facilitated the Applicant's business operations in Uganda. Therefore, the fees constitute income derived from Uganda and are subject to WHT under the Income Tax Act.

The Economic Substance of the Handling Fees

The Respondent submitted that the Applicant's attempt to classify the handling fees as disbursements or reimbursements ignores the economic reality of the transaction. The Respondent argued that Total Kenya provided valuable logistical services to the Applicant, which enabled the smooth importation and transportation of fuel. These services represent a taxable supply under the VAT Act and taxable income under the Income Tax Act.

The Respondent referred to the Tribunal's decision in ***Mix Telematics East Africa Limited v. Uganda Revenue Authority, TAT Application No. 4 of 2018***, where it was held that:

"Imported services are taxable where the recipient in Uganda derives a benefit from the services supplied outside the jurisdiction."

The Respondent submitted that the Applicant derives a clear benefit from Total Kenya's services, as they are essential to its business operations in Uganda. Therefore, the handling fees are subject to VAT as imported services and to WHT as income sourced in Uganda.

Issue 2: Remedies

The Respondent requests the tribunal to confirm the tax liability of Shs. 14.4 billion and dismiss the Application with costs awarded to the Respondent.

1. Applicant's submissions in rejoinder

The Applicant reiterated its opening submissions and provided clarifications in response to the Respondent's arguments. The Applicant argued that the handling services provided by Total Kenya are incidental to the importation and international

transportation of fuel into Uganda and therefore zero-rated under **Section 12(3) of the VAT Act, Cap. 344.**

The Applicant emphasized that the fact that the cost of the handling services was not included in the customs value does not negate their incidental nature. The Applicant posed two critical questions for the Tribunal's consideration:

i. Would the Applicant require the handling services in the absence of importing fuel into Uganda?
ii. Were the handling services simply a means to facilitate the Applicant's importation of fuel into Uganda rather than an end in themselves?

The Applicant submitted that the answer to both questions is self-evident. The Applicant would not require Total Kenya's support if it did not have to import fuel into landlocked Uganda via Kenya. The handling services merely enabled the Applicant to realize the importation of fuel into Uganda.

The Applicant relied on the Respondent's own test that for services to be incidental, that *"the supply of the service should be as a result of the import, and they should be supplied together and dependent on the import."* It was submitted that this test was satisfied in this case.

The Applicant reiterated that the negligible value of the handling services—0.6% of the total fuel value—demonstrates their incidental nature. The Applicant relied on ***Customs and Excise Commissioners v. Madgett and Baldwin t/a Howden Court Hotel [1998] STC 1189.***

The Applicant prayed that the Tribunal finds that the handling services are incidental to the importation and international transportation of fuel into Uganda and are therefore zero-rated for VAT purposes.

The Applicant rejected the Respondent's protest that reliance on the disbursement argument is prejudicial. The Applicant clarified that the Tribunal, in its earlier ruling, permitted reliance on this ground as a subset of the original objections. The Tribunal in **TAT Application No. 105 of 2024** held that:

"It is our considered opinion that the handling fees, whether categorised as disbursements or not, would fit within the first two grounds initially raised during the objection process."

The Applicant further relied on ***Jazz Supermarkets Limited v. Uganda Revenue Authority, TAT Application No. 115 of 2021,*** where the Tribunal stated:

"While the Tribunal is limited to the grounds in the objection and or objection decision, it cannot ignore legal arguments raised by a party as it would create a miscarriage of justice."

The Applicant argued that disbursements are payments made by one party (Total Kenya) on behalf of another (the Applicant) to third parties, and such payments do not attract VAT or WHT. The service charge of USD 5.54 per cubic meter comprises various components, including supply logistics, clearing and forwarding, line-fill financing, and a margin. The Applicant maintained that all components except the margin were disbursements made by Total Kenya to third parties on behalf of the Applicant.

The Applicant again cited ***Luwaluwa Investment Ltd v. Uganda Revenue Authority***, where the Tribunal held that:

"Payments made purely to reimburse a party for expenses incurred do not attract VAT or withholding tax."

The Applicant invited the Tribunal to interrogate the composite items in the service charge and conclude that the bulk of the payments were disbursements and therefore not subject to VAT or WHT.

In the alternative, the Applicant submitted that the handling fees qualify as reimbursements, which represent a refund of costs incurred and do not constitute taxable income. The Applicant again cited ***CIT v. Siemens Aktiongesellschaft***, where it was held:

"Reimbursements do not constitute taxable income as they do not enhance the income position of the recipient."

The Applicant rejected the Respondent's contention that ***Jacobsen v. URA, TAT Application No. 11 of 2016*** was distinguishable. It was submitted that in the present case, line-fill financing, supply logistics, and clearing and forwarding were provided by third parties. Total Kenya merely acted as the supplier of record or coordinator and was paid a margin for its services. The Applicant argued that the rest of the payment represented costs passed through to third parties and could not attract WHT.

The Applicant submitted that the economic reality of the service charge must be considered. If this approach is adopted, it becomes clear that the bulk of the handling fees—excluding the margin—were disbursements or reimbursements and are therefore not liable to VAT or WHT.

The Applicant concluded that the Respondent's reliance on the presence of a taxable supply is misplaced. While Total Kenya rendered handling services, the greater portion of the USD 5.54 charge represented costs incurred on behalf of the Applicant.

6. Determination of the Tribunal

Issue 1: Whether the Applicant is liable to pay the tax as assessed?

Value Added Tax

To determine whether the services in question attract a VAT charge or not, it is important to understand what the charging sections in the VAT Act cover and how the arguments from both the Applicant and Respondent align with these sections.

Section 4 of the VAT Act outlines the charge of tax and states that VAT shall be charged on:

"(a) every taxable supply made by a taxable person;
(b) every import of goods other than an exempt import; and
(c) the supply of imported services, other than an exempt service, by any person".

Section 20 (1) VAT Act provides:

1. *An import of goods is an exempt import if the goods –*
   a) *are exempt from customs duty under the Fifth Schedule of the East African Community Customs Management Act, except compact fluorescent bulbs with a power connecting cap at the end, and lamps and bulbs made from Light Emitting Diodes (LED) technology for domestic and industrial us; or*
   b) *would be exempt had they been supplied in Uganda*

1) *An import of a service is an exempt import if the service would be exempt had it been supplied in Uganda.*

The supply of petroleum fuels subject to excise duty is listed as exempt supply under Schedule 3 to the VAT Act. Therefore, since the supply of petroleum fuels would be exempt if supplied in Uganda, the import of petroleum fuels is equally exempt. The

supply of international transport of goods is listed as a zero-rated supply under Schedule 4 the VAT Act.

The Applicant argues that the services provided by Total Kenya are incidental to the importation and international transportation of fuel into Uganda and are zero rated for VAT purposes. It was also one of the Applicant's grounds of objection that "the handling services are incidental to the purchase and importation of fuel and the related handling charges ought to have formed part of the customs value of the imported fuel therefore VAT and WHT would be out of scope for the services."

Citing **Section 12(3) of the VAT Act**, the Applicant contents that the services in issue should also be treated as incidental to international transport and thus zero rated for VAT purposes. They further contend that services incidental to the importation of fuel should be treated as part of the imported fuel itself (under Section 4(b)). Since fuel is *exempt* from VAT, if the applicant's position is accepted this would mean the services should also be exempt from VAT.

On the other hand, the Respondent argues that the services are distinct and separate from the import of goods and should be categorized as imported services under Section 4(c). This interpretation would mean that the services would be subject to VAT as a separate supply of services.

Are the services incidental to international transport and therefore zero rated?

To determine whether the handling services are incidental to the importation and international transportation of fuel into Uganda and are zero rated for VAT purposes, it is important to examine Section 12 of the VAT Act, which is reproduced below. The section provides:

> *"12. Mixed Supplies*
>
> *(1) A supply of services incidental to the supply of goods is part of the supply of goods.*
>
> *(2) A supply of goods incidental to the supply of services is part of the supply of services.*
>
> *(3) A supply of services incidental to the import of goods is part of the import of goods.*
>
> *(4) Regulations made under section 51 may provide that a supply is a supply of goods or services."*

Without delving into whether the handling services are indeed incidental to international transportation, it is evident that Section 12(3) pertains only to services incidental to the import of goods, not services. A supply of services cannot be said to be part of a supply of another service. Consequently, the handling services provided by Total Kenya to the Applicant cannot be included as part of the importation and international transportation service by relying on Section 12 (3).

Perhaps the correct question should have been whether the handling services qualify as the supply of international transport of goods which is a zero rated supply under Schedule 4 to the VAT Act. The Tribunal has considered the definition of international transport set out in Paragraph 3 of Schedule 4 as follows:

> *"3. For purposes of paragraph (1)(b), international transport of goods or passengers occurs where goods or passengers are transported by road, rail, water or air –*
>
> *a) From a place outside Uganda to another place outside Uganda where the transport or part of the transport is across the territory of Uganda*
> *b) From a place outside Uganda to a place in Uganda, or*
> *c) From a place is Uganda to a place outside Uganda."*

The Tribunal acknowledges that services that are closely related to international transport of goods or passengers such as storage, clearing and forwarding form part of the international transport. However, this is not the case in the present cases. According to the Applicant's own Transfer Pricing report, the service fee of USD 5.54 per cubic meter does not include Kipevu Oil Storage Facility (KOSF) charges, which amount to USD 3.45 per cubic meter. We reproduce the extract from the Applicant's TP Policy report below -

"In 2019, Total Kenya charged TUL a service fee of USD 5.54 per cubic meter for all transit material ex KOSF and USD 5.5 per cubic meter if Total Kenya is involved in the coordination of third-party purchases and loading coordination. The service fee does not include Kipevu Oil Storage Facility (KOSF) charges of USD 3.45 per cubic meter. The total fee charged is thus USD 8.99 per cubic meter."

The policy goes on to explain that the total fee charged, including KOSF charges, is USD 8.99 per cubic meter. The service/handling fee of USD 5.54 is applicable only when Total Kenya represents TMUL in the Open Tender System (OTS), and not for private orders between the two companies. This suggests that the services are tied

specifically to the Open Tender System. Transportation is outsourced to third parties, indicating that Total Energies Kenya Limited's role is distinct from transportation. We also note that the services that are closely related to international transport such as storage, clearing and forwarding are not part of the current assessment.

Are the services incidental to fuel import and therefore VAT exempt?

A supply of services incidental to the import of goods is part of the import of goods. The VAT Act however does not determine the term "incidental." The approach to identifying whether there is a single supply or multiple supplies, and whether any supply is merely ancillary or incidental to a principal supply, is guided by the principles established in ***Card Protection Plan Ltd v. Customs and Excise Commissioners* [2001] UKHL 4 ("CPP").** In CPP, the House of Lords, following guidance from the European Court of Justice, emphasized that:

"One must determine the essential features of the transaction and ascertain whether there is an economically indivisible single supply. A service is considered ancillary if it is not an aim in itself but a means of better enjoying the principal service. Artificial fragmentation must be avoided, yet so must the bundling together of distinct supplies that do not form a single economic whole".

The Applicant seeks to draw support from the decision in ***UTODA v. Uganda Revenue Authority, SCCA No. 13 of 2015,*** where management of taxi parks was held to be incidental to the principal supply of passenger transportation services. The reasoning there was that taxi park management had no separate commercial purpose; it was inseparably linked to the passenger transport provided by the same supplier. Without the passenger transport, the taxi park management had no independent reason to exist. Thus, one supplier provided both the principal and the ancillary service within a single transaction framework.

The Tribunal notes the precedent set in the UTODA case (supra) that *an incidental service cannot be independent of the principal service.* However, the present case differs from the UTODA case in critical ways. First, in UTODA, the principal and incidental services were furnished by the same supplier, within one integrated contractual relationship.

If a service is truly incidental—merely a means of better enjoying the principal supply—one typically finds a single integrated supply chain, often from the same supplier. In

UTODA, the single supplier was responsible for both the main exempt service (passenger transport) and the incidental service (park management). This unified chain allowed for treating the second service as purely ancillary.

In the present case, the multiplicity of suppliers and separate contractual arrangements complicates the notion of ***an economically indivisible single supply.*** The chain in the present case involves separate contracts, separate suppliers, and distinct revenue streams, so the services cannot be seamlessly folded into the importation of fuel for VAT purposes.

The Tribunal has also reviewed AE18 and finds it to be at odds with other evidence on record, particularly the terms of the Service Level Agreement (SLA) and the accompanying Transfer Pricing Documentation. We note that the Respondent witness pointed out that Exhibit AE18 was first presented at trial - the Applicant did not present this exhibit during the entire audit and objection process.

The Tribunal notes that the Applicant's Transfer Pricing policy report uses a Comparable Uncontrolled Price (CUP) method to determine the arm's length remuneration of the handling services. This implies that these services are treated as a separately priced and distinct offering. If Total Kenya's services were deeply intertwined with transportation services or the fuel itself, other transfer pricing methods like the transactional net margin method (TNMM) would have been more suitable.

The Tribunal also notes the functional characterization of Total Kenya as a local fully-fledged service provider of technical services to TMUL, as well as the coordination of transport by Total Kenya to third parties.

The fact that these handling costs were not included in the declared customs value of fuel for import duties purposes further indicates their separate nature. Further, it was the Applicant's witness testimony the handling services are separately invoiced from the fuel supply, and accounted for separately in the Applicant's financial statements. The Tribunal therefore finds that the Applicant did not consider the handling services as an intrinsic part of the fuel cost.

The services outlined in the Service Level Agreement (SLA) between Total Kenya and the Applicant are independent services, separate from the fuel itself.

Consequently, the handling and related services provided under the SLA cannot be treated as incidental to the principal supply of petroleum fuels.

Whether the service fees were disbursements and not liable to VAT and WHT, or alternatively are reimbursements not subject to WHT.

The Applicant argues that the service charges paid to Total Kenya are not simply fees for services, but rather represent

a) Disbursements: Total Kenya acts as an agent, disbursing funds to third parties (e.g., KPC, clearing agents) on behalf of the Applicant. Therefore, these payments should be considered disbursements and do not constitute consideration for a taxable supply.
b) Reimbursements: Alternatively, the Applicant argues that the payments are reimbursements for expenses already incurred by Total Kenya. Reimbursements are not considered taxable income.

Before delving into the substantive question of whether the payments are disbursements or reimbursements, we must first address the procedural point raised by the Respondent and the Tribunal's ruling on the Applicant's right to raise this legal argument.

The Respondent argued that the Applicant's emphasis on the services being disbursements or reimbursements was not part of the original objection nor within the scope of the objection decision that triggered the Application before the Tribunal. According to the Respondent, entertaining this argument would prejudice the Respondent and even amount to contempt of the Tribunal by the Applicant.

In Miscellaneous Application No. 105 of 2024, this Tribunal considered the Respondent's procedural complaint and found that the argument concerning whether the throughput fees constitute disbursements or reimbursements does not amount to raising a new ground. Rather, it fits within the initial grounds raised during the objection process as a legal argument stemming from the same factual matrix. This aligns with the principles set out in ***Jazz Supermarkets Limited v. Uganda Revenue Authority, TAT Application No. 115 of 2021***, and ***ICEA General Insurance Limited v. Uganda Revenue Authority, TAT Application No. 100 of 2019***, where the Tribunal recognized that while it is limited to grounds in the objection and objection decision, it

cannot ignore legal arguments raised by a party. To do so would lead to a miscarriage of justice. A distinction must be drawn between a "new ground" and a "legal argument" arising from an already raised ground.

Further yet, the Respondent had the benefit of responding to this line of argument during cross-examination and in its written submissions. Thus, no prejudice arises simply from allowing the Applicant to refine or elaborate its legal arguments. Indeed, the Respondent engaged with the merits of the disbursement/reimbursement argument both in cross-examination and in its written submissions, leaving no residual procedural unfairness. Both parties have thoroughly addressed this issue, and it is now properly before the Tribunal for determination.

We will now address the **disbursement argument for VAT**.

The Applicant attempts to draw a distinction between what it terms "disbursements" and "reimbursements," contending that if certain charges are mere disbursements (costs incurred and passed on without markup), they should not attract VAT. Such distinctions may have been relevant in the context of purely domestic transactions, as evidenced in ***Prime Solutions Limited v. Uganda Revenue Authority (2019)*** **and** ***Bank of Africa (U) Ltd v. URA,*** where the question before the courts related to whether a supplier's incidental pass-through costs formed part of the taxable supply within Uganda. However, this line of reasoning does not alter the VAT obligations when services are imported into Uganda.

Section 4(c) of the VAT Act is clear that VAT is charged on the supply of imported services, other than an exempt service, by any person. Under the VAT Act, the nature of cross-border or imported services is governed by the "destination principle," which focuses on where the services are consumed or utilized. The critical inquiry is whether the services are used or consumed in Uganda, thereby constituting imported services and triggering the recipient's VAT obligation.

The High Court decision in ***COWI A/S v. URA*** provides instructive guidance on the VAT treatment of imported services. Although that case addressed multiple nuances regarding a head office-branch relationship, what is germane here is the principle it confirmed: ***services sourced from outside Uganda that are used in Uganda are deemed imported services subject to VAT.*** In *COWI*, the Court emphasized that when services, no matter how internally arranged or contractually structured, are

eventually consumed in Uganda by a Ugandan entity, VAT attaches under the reverse charge mechanism. The Court's analysis underscored that the key determinant is the place of consumption and that VAT should be accounted for by the Ugandan entity receiving the benefit of the foreign-supplied service.

Therefore, in determining whether foreign services are subject to VAT in Uganda, there are only 2 questions to answer – 1) are the services imported? If yes, 2) are they exempt services? If the imported services are exempt services, then no VAT is chargeable.

In the present case, the Applicant does not dispute that the services are imported services. We therefore ask if they are exempt services. As earlier mentioned, an import of a service is an exempt import if the service would be exempt had it been supplied in Uganda (Section 20 (1) VAT Act). Exempt supplies are listed in Schedule 3 to the VAT Act. The tribunal notes that none of the services for which the service fees are paid to Total Kenya are listed in Schedule 3 to the VAT Act.

The Tribunal also considered Regulation 13(2) of the VAT Regulations 1996 which requires that *the value of an imported service is determined using section 21 of the VAT Act.* Section 21 (1) provides -

"Except, as otherwise provided under this Act, the taxable value of a taxable supply is the total consideration paid in money or in kind by all persons for that supply."

Consideration is defined in Section1 of the VAT Act as follows;

"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 VAT Act and its Regulations do not provide an exception for imported services simply because they are billed as a "pass-through" charge. To hold otherwise would encourage a circumvention of VAT by mere labelling, undermining the destination principle and the integrity of the tax system.

Accordingly, the handling and related services provided by Total Kenya fall squarely under the ambit of VAT on imported services, and the Applicant must account for it under the reverse charge mechanism.

Disbursements / Reimbursements argument for WHT

The obligation to withhold tax on international payments is imposed in Section 137 of the Income Tax Act. Section 137 (1) requires any person making a payment of the kind referred to in section 82, 84 and 85 to withhold tax on such payments at prescribed rate. Of relevance, section 84 of the Income Tax Act imposes tax on every non-resident person deriving income under a Ugandan source services contract. A "Ugandan source services contract" is defined in Section 84 (4) to mean a contract, other than an employment contract, under which the principal purpose of the contract is the performance of services which gives rise to income sourced in Uganda; and any goods supplied are only incidental to that purpose.

Under section 78 income is derived from sources in Uganda to the extent to which it is (of relevance) –

d) Employment income or a fee for the provision of services –

(i) Derived from employment or services exercised or rendered in Uganda

(ii) Paid by a resident person, other than as expenditure of a business carried on by a person outside Uganda through a permanent establishment; or

(iii) Paid by a non resident person as an expenditure of a business carried on by a person through a permanent establishment in Uganda.

Simply put a fee for the provision of services paid by resident person is income sourced in Uganda (except where the non resident person is doing business outside Uganda through a PE).

In present case, the critical inquiry is whether the Service Level Agreement between the Applicant is a Ugandan source services contract. In other words, is the principal purpose of the SLA the performance of services which give rise to income sourced in Uganda? Is the SLA principally for the performance of services renumerated by fees paid a resident person in Uganda? The principal purpose of the Service Level Agreement (which purpose is also embedded in the title of the agreement) is to provide

services to the Applicant and the Applicant – a resident person – is required to pay fees for the services provided.

Both parties have emphasized that in disputes of this nature, it is essential to look beyond mere labels and ascertain the substantive commercial arrangement. To accomplish this, we have carefully considered Clauses 19 and 20 of the SLA, as well as Annexures C and D, which offer detailed guidance on how costs and fees are structured and recovered.

Clause 19 of the SLA deals with "Payment of Third-Party Costs." It outlines how the SELLER (Total Kenya) will be indemnified for liabilities to third parties and how it will transfer third-party costs to the BUYER (the Applicant). The language here strongly suggests that "third-party costs" are external, pass-through expenses that Total Kenya incurs on the Applicant's behalf. These would typically exemplify what could rightly be termed as disbursements (pure pass-through costs).

Clause 20 of the SLA addresses "Service Fees / Handling, Storage Fees & Hospitality Fees." This clause is central to the issue. Clause 20(B) is particularly pertinent, as it states that the "Service Fee (Handling Fee) shall be as per Annexure D," and further clarifies that this fee arrangement does not apply to private orders placed directly between the Applicant and Total Kenya. This implies that the handling fee structure laid out in Annexure D is the governing framework for standard transactions under the SLA.

Turning to Annexure D, we find a clear and unambiguous delineation of costs and fees:

i. Handling Fee (A) is fixed at US $5.54 per m^3.
ii. Storage Fee (B) varies between US $2/$m^3$ to US $9/$m^3$ depending on the facility.
iii. Hospitality Fee is defined as the sum of the Handling Fee (A) plus the Storage Fee (B).

Similarly, Annexure C references Throughput Fees, again suggesting distinct categories of costs that are neither subsumed nor conflated within the handling fee.

This detailed contractual language differs from the Applicant's breakdown in AE18. The Applicant's witness (AW1) testified that the entire "Hospitality Fee" is $5.54/m³ and then apportioned it as shown above.

However, the written agreement—the SLA along with Annexure D—expressly states that $5.54/m³ is the "Handling Fee" alone, and that the Hospitality Fee is a combination of Handling and Storage Fees.

Thus, the contract itself does not recognize a scenario where the $5.54/m³ represents anything other than a handling charge, much less a detailed breakdown into clearing & forwarding, supply logistics & administration, and linefill financing cost plus margin.

The discrepancy between AW1's testimony (and AE18) and the written SLA terms calls the Parol Evidence Rule into play. The Parol Evidence Rule, as upheld in Ugandan jurisprudence (for instance, ***D.S.S Motors Limited V. Afri Tours And Travels Limited And Amin Tejani*, and *Akugoba BodaBoda Transport Services Ltd & Anor v Hajji Swaibu Kizito & Anor*, and *Future Stare Investments (U) Ltd v Nusuru Yusuf*, Civil Suit No. 0012 of 2017)** states that where parties have reduced their agreement to writing, extrinsic evidence cannot be admitted to add to, vary, or contradict its terms. The rule's rationale is to ensure certainty and that the parties are bound by their formally executed contract.

Applying the Parol Evidence Rule here, we must give precedence to the SLA's written terms over the Applicant's ex-post facto classifications. The SLA is clear and unambiguous: the $5.54/m³ is the handling fee, not a blend of partial reimbursements and a small profit margin. The Applicant's attempt to retroactively recast the $5.54/m³ into various sub-components that are not reflected in the written contract cannot stand. The contract does not mention that $3.29 is purely "Supply Logistics & Administration Costs," or that $1.80 is "KPC Linefill Financing Cost," or that $0.19 is "Clearing & Forwarding." Instead, the SLA anchors these concepts in a broader fee structure, where certain categories of external costs are handled via Clause 19 as third-party pass-through charges, and others are integrated into the handling fee.

Moreover, Clause 20(B) distinguishes handling fees from other charges, reinforcing that the handling fee is a service charge by Total Kenya for the operational, logistical, and administrative work it performs to facilitate the Applicant's access to petroleum products. Such a service fee inherently represents income to Total Kenya because it

compensates Total Kenya for the provision of valuable services. It is not a mere reconstitution of Total Kenya's depleted funds but a charge levied for Total Kenya's role and expertise in managing the supply chain on the Applicant's behalf.

Since Total Kenya earns this handling fee for services rendered in relation to the Applicant's Ugandan operations, and the income arises under a Ugandan-source services contract, the handling fee falls squarely under the ambit of Withholding Tax according to Sections 78, 84, and 137 of the Income Tax Act. These provisions impose a duty on a Ugandan entity (the Applicant) to withhold tax on payments made to a non-resident for services performed that produce Ugandan-source income.

By contrast, if Total Kenya had simply been passing through expenses without adding any value, and if the contract had clearly stated that certain sums were exact reimbursements of third-party costs without any markup or integration into a service fee, the situation might differ. However, the SLA and annexures provide no such basis. On the contrary, they treat the $5.54/m^3$ handling fee as a component of a structured pricing methodology for Total Kenya's services, clearly indicating that it is a fee (and hence income) rather than a net neutral pass-through.

In light of the foregoing, the argument that only the $0.26 margin should be subject to WHT fails. The Applicant's attempt to isolate a "margin" is not supported by the contractual framework. The entire $5.54/m^3$ charge is presented and treated as a handling fee within the SLA, i.e., a fee for services rendered. As a fee for services, it constitutes income sourced in Uganda and is thus subject to WHT.

After reviewing the Service Level Agreement (SLA), annexures, Parol Evidence Rule, and the nature of the services provided, the Tribunal is not convinced by the applicant's claim that the handling fee paid to Total Kenya is a reimbursement or disbursement. The applicant references cases where courts did not tax reimbursement of expenses to third parties. However, in this situation, the entire US $5.54/m^3$ handling fee paid to Total Kenya is not a reimbursement but rather compensation for the services provided by Total Kenya.

The Tribunal determines that these payments are not reimbursements but rather consideration for services rendered by Total Kenya to the applicant, functioning as a principal. Reimbursements typically involve recovering expenses made on behalf of a client during the supply of goods or services. Instead, these payments are part of an

inclusive fee for Total Kenya's provision of services to the applicant. The Tribunal notes that the economic nature of the transaction illustrates that Total Kenya is offering "back end technical support services" for which the applicant pays a service/handling fee.

Burden of Proof

The Applicant bears the statutory burden of proof to show that the Respondent's assessment is incorrect or that the taxation decision should have been made differently. Section 28 of the Tax Procedures Code Act, Cap 343 states that:

"In any proceeding under this Act-

(a) for a tax assessment, the burden is on the taxpayer to prove that the assessment is incorrect; or
(b) for any other tax decision, the burden is on the person objecting to the decision to prove that the decision should not have been made or should have been made differently."

This principle is also reinforced in ***Section 19 of the Tax Appeals Tribunal Act*** *and* ***Section 101 of the Evidence Act***. The courts have consistently upheld this position, as seen in ***Williamson Diamonds Ltd Vs. Commissioner General13 and Uganda Vs Gurindwa and 5 others***.

In this case, the Applicant has not discharged that burden. It has not provided satisfactory evidence or pointed to any contractual language within the SLA that would support its claim that the $5.54/m³ figure is anything other than a handling/service fee. The Applicant's attempt to rely on extrinsic evidence (AE18) to re-characterize the handling fee as mostly reimbursements is directly contradicted by the SLA's clear terms and structure. The Applicant has not demonstrated that the Respondent's classification of the fee as Ugandan-source income subject to Withholding Tax is incorrect, nor has it shown that the Respondent's taxation decision should have been made differently.

Conclusion

Given the findings above, the Tribunal concludes that the handling fees are for taxable supplies of services and not incidental to the import of goods. Therefore, the VAT assessment on the service fees is lawful and proper.

The Tribunal notes that the Applicant's argument that the handling charges are not income derived from sources in Uganda is incorrect. The Tribunal also finds that the Service Level Agreement between the Applicant and Total Kenya constitutes a Ugandan source service contract. The payments arising from this contract to Total Kenya are considered income sourced from Uganda, and therefore attract WHT. The WHT assessment on the service fees is lawful and proper.

The Tribunal therefore upholds the Respondent's assessments for both VAT and WHT.

The Application is dismissed with costs to the Respondent.

Dated at Kampala this 21st day of February 2025.

PROSCOVIA R. NAMBI	**CHRISTINE KATWE**	**WILLY NANGOSYAH**
CHAIRPERSON	**MEMBER**	**MEMBER**