

THE REPUBLIC OF UGANDA
IN THE TAX APPEALS TRIBUNAL AT KAMPALA
MISC. APPLICATION NO. 105 OF 2024
(ARISING FROM APPLICATION NO. 104 OF 2023)

TOTAL ENERGIES MARKETING UGANDA LIMITED APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY.....RESPONDENT

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

RULING

This ruling is in respect of an Application brought under Section 16(4) of the Tax Appeals Tribunal Act, Rule 30 of the Tax Appeals Tribunal Rules and Order 52 of the Civil Procedure Rules seeking orders that:

- (i) Leave be granted to the Applicant to rely on an additional ground in the review application, namely that the handling service of the fee on which the disputed tax has been assessed is a disbursement.
- (ii) Costs of this application be provided for.

1. Background facts

The application is supported by the affidavit of Ms. Maria Kyomukama, a Tax Manager of the Applicant Company. Briefly, the facts are as follows: -

- (i) The Applicant is a limited liability entity engaged in the business of selling and distributing of petroleum products Petrol (PMS), Diesel (AGO), Jet fuel and Paraffin in Uganda. The Applicant imports its petroleum products from either Kenya through

the Open Tender System (OTS) managed by the Government of Kenya or Tanzania through the Bulk Procurement System (BPS) managed by the Government of Tanzania.

- (ii) The Applicant entered into a service level agreement with Total Energies Marketing Kenya to provide handling services in respect of the importation of petroleum products for which services the Applicant pays handling service fees to Total Energies Kenya.
- (iii) Following an audit into the operations of the Applicant, the Respondent issued administrative additional assessments to the Applicant totaling Shs. 7,891,991,671.24 as Value Added Tax and Shs 6,576,659,725.34 as withholding tax in respect of the handling fees that the Applicant paid to Total Energies Marketing Kenya.
- (iv) The Applicant objected to the assessments on the grounds that: -
 - a) The handling services are incidental to the purchase and importation of the fuel and the related charges form part of the customs value of the imported fuel in accordance with Section 122 as well as the Fourth Schedule of the East African Community Customs Management Act, 2004.
 - b) The handling services are also incidental to the international transportation of the fuel into Uganda and are zero rated for VAT purposes, while for Income tax purposes, the handling charges are not income derived from sources in Uganda and are therefore not subject to withholding tax.
- (v) The Respondent disallowed the objection and maintained the assessments.
- (vi) On 26 June 2023, the Applicant filed an application in the Tribunal based on the grounds as raised in its objection and as considered by the Respondent in the Objection Decision.
- (vii) In addition to the initial grounds of objection, the Applicant seeks to rely the ground that *the handling service fee paid to Total Energies Kenya which is the subject of the assessments qualifies as a disbursement that does not attract any tax.*

- (viii) The new ground was inadvertently not raised during the objection process and allowing the Applicant to rely on the new ground would promote justice as it would enable the Tribunal to determine the true tax liability of the Applicant as well as avoid multiplicity of suits.

The Respondent in the affidavit in reply deposed by Nkoyooyo Allan, an advocate in the Respondent's Legal Services and Board Affairs Department, opposed the application on the grounds that:

- (i) The new ground is an afterthought by the Applicant and it is intended to defeat the Respondent's defense.
- (ii) The ground was not pleaded as a ground of objection and consequently did not form part of the objection decision from which the Applicant seeks to be reviewed.
- (iii) The jurisdiction of review of taxation by the Tribunal is limited to the grounds in the objection decision.
- (iv) It is just, fair and equitable that the orders sought are not granted and the application be dismissed with costs to the Respondent.

2. Representation

At the hearing of the application **Mr. Joseph Luswata** appeared for the Applicant while **Ms. Ritah Nabirye** and **Mr. Amany Mishambi** appeared for the Respondent. Both parties made oral and written submissions.

3. Submissions of the Applicant

The Applicant stated that it objected to the assessments on 3 grounds namely that the handling fee;

- a) Forms or is part of the customs value of the product;
- b) Is paid as part of the international transportation of fuel and like international transport, is a zero- rated supply; and
- c) Does not attract withholding tax because the Applicant was exempted from WHT obligations at the time.

The Applicant stated that it inadvertently and by mistake missed to raise the ground that the handling fee was a disbursement.

The Applicant cited Section 16 (4) of Tax Appeals Tribunal Act which states,

*"Where an application for review relates to taxation decision that is an objection decision, the applicant is, **unless the tribunal orders otherwise**, limited to the grounds stated in the Taxation objection to which the decision relates".*

The Applicant also relied on **URA vs Nile Hotel International Limited, Civil Appeal No. 15 of 2017** where the Court emphasized that *"a party could introduce a new issue with the permission of the Tribunal."*

Relying on the Australian case of **Federal Commissioner v Dalco 90 ACTR 341**, the Applicant further submitted that the overall duty of the tax court is to determine the true tax liability of the taxpayer. To fulfill that duty, the Tribunal will consider all possible grounds of objections including those not specifically raised during objection.

The Applicant further relied on **Airtel Uganda Limited v Uganda Revenue Authority TAT Application No.10 of 2019** where the Tribunal allowed the Applicant to raise the ground of time limitation that had not been raised at objection. The Tribunal's decision to allow the additional ground was informed by the need to avoid an injustice or hardship occasioned by accident, inadvertence or excusable mistake or error.

Further, the Applicant submitted that this Application should be allowed because the hearing is yet to start and allowing the additional ground will enable the determination of the true tax liability of the Applicant without prejudice to the Respondent who will have the opportunity to respond.

4. Submissions of the Respondent

The Respondent opposed the Application for being bad in law because the Applicant's new ground is not within the scope of the objection decision which is under review in the main Application No. 105 of 2023. The Respondent further submitted that the Application is an afterthought which is intended to introduce a new cause of action to defeat the Respondent's defense.

The Respondent acknowledged Order 6, Rule 19 of the Civil Procedure Rules which states:

"A court may, at any stage of proceedings allow either party to alter or amend his or her pleadings in such a manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining all questions in controversy between the parties."

The Respondent, however, submitted that such an amendment should not prejudice the other party. The Respondent relied on the decision of the Supreme Court in **Mulwooza and Brothers Ltd v Shah Co. Limited, SC Civil Appeal No. 26 of 2010**, where it was held:

"This is, I think, the correct statement of the law on amendments to pleadings. Amendment of pleadings are allowed by courts so that the real question in controversy between the parties is determined and justice is administered without undue regard to technicalities pursuant to Article 126(2) (e) of the Constitution. Therefore, if a plaintiff applies for leave to amend his pleadings, courts should in the interest of promoting justice, freely allow him to do so unless this cause an injustice to the opposite party which cannot be compensated for by an award of costs, or unless the amendment would introduce a distinct cause of action in place of the original cause."

The Respondent submitted that its defence was premised on the fact that the handling fees were not declared as part of the Applicant's customs value when accounting for import customs duties. Resultantly, all costs that are not included in the declaration of customs value are disallowed in the computation of customs duties. That the Applicant's

attempt to rely on an additional ground that the handling fees paid to Total Energies Kenya Limited are disbursements is intended to defeat the Respondent's defense to the extent that disbursements are allowable costs in the computation of customs values.

5. The Applicant's submissions in Rejoinder

In rejoinder, the Applicant submitted that the Respondent's submission on change or alteration of a cause of action and/or assumed prejudice do not arise because in a tax dispute before the Tribunal, there is only one cause of action namely, the tax assessed is not due, is erroneous, or is excessive and all the other averments support only that cause of action. Accordingly, the Respondent cannot claim to be prejudiced by a taxpayer who seeks to raise a new ground since what is in issue is the true tax liability of taxpayer/Applicant.

The Applicant further submitted that the Respondent would have the opportunity during the hearing of the case to challenge the new ground.

6. Determination of the application by the Tribunal

We have read and considered the affidavits on record, the submissions of both parties as well as the authorities relied upon by both parties.

This application has been brought under Section 16 (4) of the Tax Appeals Tribunal Act, which states as follows:

"(4) Where an application for review relates to a taxation decision that is an objection decision, the applicant is, unless the tribunal orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates."

This provision was intended to limit a taxpayer from raising new factual grounds not stated in the objection notice. (see **Cowi AS v Uganda Revenue Authority, TAT Application No. 4 of 2019**). And yet as the Applicant rightly argues, the Tribunal, has the discretion to allow the Applicant to rely on a new ground that was not stated in the taxation objection.

(See *Uganda Revenue Authority v Nile Hotel Limited, Airtel Uganda vs Uganda Revenue Authority*).

However, while exercising its discretion, the Tribunal ought to do so judiciously so as not to occasion an injustice to either party. The decision of the High Court in *Farid Meghani V Uganda Revenue Authority, Civil Appeal No. 6 of 2021* gives some insight into how the Tribunal should exercise its discretion. The Court stated:

*"Where the decision challenged involves the exercise of a discretion, broadly described to include states of satisfaction and value judgments, the appellant must identify either specific error of fact or law or inferred error (e.g. where the decision is unreasonable or clearly unjust). The appellate court will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle. It should not interfere with the exercise of discretion unless it is satisfied that the Tribunal in exercising its discretion misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Tribunal has been clearly wrong in the exercise of its discretion and that as a result there has been injustice (see *Mbogo and another v. Shah [1968] 1 EA 93*)."*

Therefore, when the Tribunal is considering whether to exercise its discretion to allow an Applicant to go beyond the grounds stated in the taxation objection in a review of a taxation decision, there are several factors that the Tribunal may consider. The Tribunal considered the following factors:

- (i) **Legal Considerations:** The Tribunal took into account any legal principles, rules, or guidelines that govern the review process. In an application to rely on an additional ground, as is in the present case, the Tribunal will take into account Rule 30 of the Tax Appeals Tribunal (Procedure) Rules which provides for the applicability of the High Court rules of practice and procedure (Civil Procedure Rules) subject to such modifications as the Tribunal may direct. The Civil Procedure Rules provide for amendment of pleadings. Specifically, Order 6 rule 19 is to the effect that, a court may at any stage of the proceedings allow either party to alter or amend his or her pleadings in such a manner and on such terms as may be just.

Further, as stated by this Tribunal in the COWI case:

"a ground on law or on constitution can be raised at any time. If the Tribunal were to turn a blind eye to legal grounds, it may end up condoning illegalities. At times there is a thin line between a factual and a legal ground or at times they are too intertwined that one cannot raise a factual ground without raising a new legal ground. That is left to the discretion of the court or Tribunal where the party is not prejudiced by a new legal ground which is tied to the factual ground, the Tribunal will entertain it."

- (ii) Fairness and Prejudice: The Tribunal assessed whether allowing the applicant to introduce additional grounds would be fair to both parties involved in the dispute. The Tribunal noted the Applicant's submission that the Respondent would not be prejudiced as it would have the opportunity to challenge the new ground of review at the hearing. However, as the objection process requires, the Respondent ought to have had sufficient opportunity to respond to the new arguments and evidence. The Respondent would be unfairly disadvantaged by the introduction of such new issues at a later stage in the review process.
- (iii) Procedural Efficiency: The Tribunal evaluated whether considering the additional ground would unduly prolong the review process or complicate the proceedings. The Tribunal considered the impact on the timeliness and efficiency of the review. The Applicant argues that the hearing is yet to start, however the hearing should have started but for this Application. Both mediation and scheduling were completed, and allowing this Application would necessitate that the processes be redone.
- (iv) Public Interest: The Tribunal considered the broader public interest in the case, including the importance of ensuring that tax disputes are resolved fairly and efficiently. The Tribunal weighed the potential impact of its decision on the administration of tax laws. A taxpayer who unintentionally omitted to raise a ground of objection may raise it during the Alternative Dispute Resolution Procedure. The

Tribunal will not establish a precedent where taxpayers neglect the objection process with the Uganda Revenue Authority (URA) and then seek Tribunal permission to add new grounds. Our stance is that permission to introduce a new ground will only be granted in exceptionally compelling circumstances.

- (v) **Relevance:** The Tribunal also evaluated whether the Applicant's proposed additional ground is pertinent to the tax decision under consideration. If a new ground is closely connected to the issues raised in the objection and significantly affects the decision, the Tribunal may be more inclined to approve it.

Ultimately, the Tribunal will exercise its discretion based on the specific circumstances of each case and the principles of fairness, efficiency, and justice.

In the present case, with all due respect to the submissions of both parties, we do not agree that Applicant has a new ground. The Applicant submitted that it inadvertently and by mistake missed to raise the ground that the handling fee was a disbursement. The Respondent submitted that the implication of the Applicant's attempt to rely on a new ground that the handling fees are disbursements is intended to defeat the Respondent's case to the extent that disbursements are allowable costs in the computation of customs values. The Applicant did not rebut this statement in its rejoinder submissions.

It is our considered opinion that the handling fees, whether categorized as disbursements or not, would fit within the first two grounds initially raised during the objection process. The remaining question to be resolved is whether VAT and/or withholding tax apply to these handling fees. Indeed, the parties agreed in their joint scheduling memorandum that the issue for determination is whether the Applicant is liable to pay the assessed taxes. Therefore, there is no need for the Applicant to separately argue that the handling fees are disbursements. We therefore see no relevance in allowing this application.

Without prejudice to the foregoing, we note that while the Application for review of the taxation decision in question was filed on 26 June 2023, this Application was only made

on 27 June 2024 – over 1 year after filing TAT Application 104 of 2023. The law does not specify deadlines for submitting an application to rely on additional grounds. However, since an application to the Tribunal must be made within 30 days and, in any case, no later than 6 months with Tribunal approval, such applications should be submitted promptly and without delay. The Tribunal finds that this application was unreasonably delayed and allowing it would compromise the procedural efficiency of the review process.

Therefore, this Application is dismissed with costs to the Respondent.

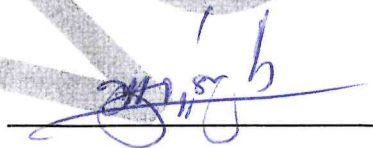
Dated at Kampala this 30th day of July 2024



MS. PROSCOVIA R. NAMBI
CHAIRPERSON



MRS. CHRISTINE KATWE
MEMBER



MR. WILLY NANGOSYAH
MEMBER