

THE REPUBLIC OF UGANDA
IN THE TAX APPEALS TRIBUNAL AT KAMPALA
MISC. APPLICATION NO.78/2024
(ARISING FROM TAT NO. 128/2024)

VIVO ENERGY UGANDA LIMITED..... APPLICANT

VERSUS

THE UGANDA REVENUE AUTHORITY.....RESPONDENT

BEFORE: MR SIRAJ ALI, MS. CHRISTINE KATWE, MS. ROSEMARY NAJJEMBA

RULING

This ruling is in respect of an application brought under Section 15 of the Tax Appeals Tribunal Act and Rule 30 of the Tax Appeals Tribunal (Procedure) Rules, seeking:

- a) A declaration that Application 128 of 2024 is not subject to the requirement to pay 30% of the tax in dispute, and alternatively;
- b) An order that the payment of the 30% of the tax in dispute be satisfied by a bank guarantee from a reputable Ugandan financial institution.
- c) Costs of the application be provided for.

The application is supported by the affidavit of the Finance Manager of the Applicant Mr. Louis Kiggundu.

1. Background facts

The grounds upon which this application is premised are laid out in the notice of motion and the affidavit in support and are briefly that;

- (i) The applicant is part of a group of companies called Vivo Energy Group, the parent company of which, is a United Kingdom registered company called Vivo Energy Limited ("VEL").
- (ii) In July 2022, non- Ugandan resident shareholders of VEL holding 64% of the shares in VEL sold their shares through the London Stock Exchange to another shareholder called Vitol Group.
- (iii) The Applicant did not derive any income from the transaction giving rise to the tax in dispute.
- (iv) The amount of the tax assessed is colossal, and the Applicant is involved in other tax disputes with the Respondent.
- (v) 30% of the assessed tax is more than one third of the Applicant's net annual income.
- (vi) As an alternative, application 128 of 2024 ("the main application") is a proper case for an order to pay 30% of the tax in dispute by way of a bank guarantee.
- (vii) The main application also raises principal questions or points of law which are novel and stand a high chance of success.
- (viii) It is in the interest of justice that this application be granted.

The Respondent filed an affidavit in reply deponed by Diana Prida Praff sworn on the 4th day of June 2024 opposing the application on grounds that;

- (i) The application has no merit whatsoever and is an abuse of court process.
- (ii) The application is premature being that the respondent has not made any taxation decision or objection decision on payment of 30% of the tax in dispute.
- (iii) The Applicant has not made any application to the Respondent not to pay 30% of the tax in dispute or alternatively pay the same by way of bank guarantee to enable the Respondent to make a taxation decision that can be objected to if the Applicant is not satisfied and the Respondent to make an objection decision.
- (iv) The applicant has not made any application to the Respondent to pay the 30% of the tax in dispute by way of installments.
- (v) The respondent is aware a bank guarantee is not a payment.

2. Representation

At the hearing of the application, **Mr. Joseph Luswata** appeared for the Applicant, with the Applicant's Company Secretary, **Mr. Steven Chomi** in attendance, while **Mr. Tonny Kalungi**, **Ms. Gloria Twinomugisha** and **Ms. Barbara Nahone** appeared for the Respondent. Both parties filed written submissions that were adopted as their legal arguments.

3. Submissions of the Applicant

Counsel for the Applicant submitted that the tax challenged under the main application is a fiction of the law. It is imposed on Ugandan residents, who are part of an international group, whenever ownership changes constituting 50% or more occur in the group. These changes usually take place outside of Uganda between persons that the local or the Ugandan subsidiary, like the Applicant has no control over and from which it derives no monetary benefit or income. In paragraph 10 of the Applicant's submissions counsel argued that *Section 15 of the Tax Appeals Tribunal Act* requires that a taxpayer contesting an assessment of tax must pay 30% of the tax in dispute. The Applicant submitted that in ***Fuelex (U) Ltd v Uganda Revenue Authority (Constitutional Petition No. 3 of 2009) [2020] UGCC***, the Constitutional Court doubted the correctness of the decision in *Uganda Projects Implementation and Management Centre versus Uganda Revenue Authority SCCA no. 2 of 2009* and narrowed its wide scope by holding by a majority of 4-2 that the requirement to pay 30% of the tax in dispute does not apply where the legal basis of the tax is in issue at the Tribunal.

In the alternative, the Applicant's counsel submitted that the Applicant did not receive any money out of the transaction from which the contested tax arises. The amount of the assessed tax is Ugx 59 billion and 30% thereof is Ugx 17.7 billion which is more than 1/3 of the Applicant's revenue. Counsel further argued that to require the Applicant to pay 30% of the 59 billion being the tax imposed under the main application, in cash, will cripple the Applicant's trading activity and its very existence and viability as a trading entity. The Applicant prayed that, in the event the 30% of the tax in dispute is payable,

it should be permitted to pay it by way of a bank guarantee. The Applicant prayed for a declaration that main application was validly filed without the payment of the 30% of the tax in dispute or that a bank guarantee be issued to discharge that liability.

4. Submissions of the Respondent

The Respondent raised a preliminary objection to the effect that the application is premature being that the Respondent has not made any taxation decision or objection to payment of 30% of the tax in dispute. The Respondent submitted that Order 6 Rule 28 of the Civil Procedure Rules allows for raising a preliminary objection by way of pleading.

The Respondent further argued on the authority of ***Precise Engineering Services Limited vs. Uganda Revenue Authority TAT Application No 84 of 2022***, that the filing of a matter before the tribunal, without an objection decision or tax decision is illegal and should not be entertained since it denies the tribunal jurisdiction to review the application. The respondent submitted further on the authority of ***Uganda Projects Implementation and Management Centre versus Uganda Revenue Authority SCCA No. 2 of 2009*** that where a taxpayer is unable to pay the 30% of the tax in dispute, he or she should apply to the Commissioner General. He further argued that the Applicant ought to have applied to the Respondent instead of filing the instant application. The Respondent submitted further on the authority of ***Samona Limited versus Uganda Revenue Authority Tat No. 2022***, where an application to pay 30% of the tax in dispute, in installments was rejected by the tribunal on the grounds that no evidence had been provided by the applicant that it had applied to pay 30% of the tax in dispute in installments.

The Respondent submitted on the authority of the decision ***Bullion Refinery Limited V URA Tat Application No.36 Of 2021*** where the Tribunal analyzed the decisions in ***Fuelex (U) Ltd v Uganda Revenue Authority (Constitutional Petition No. 3 of 2009) [2020] UGCC*** and ***Uganda Projects Implementation and Management Centre versus Uganda Revenue Authority SCCA no. 2 of 2009*** and held that where a taxpayer objects to an assessment and also seeks legal interpretation of a decision

such as the Applicant in the instant case, the taxpayer will still be required to pay 30% of the tax in dispute

The Respondent submitted that Section 15 of the Tax Appeals Tribunals Act doesn't provide for satisfaction of 30% of the tax in dispute by a bank guarantee. The Respondent submitted further that the applicant has not provided proof of its annual net revenue or cash flow, or trading capacity and does not challenge the sale of shares at the London Stock Exchange which resulted in the tax in issue. The Respondent submitted further the issues raised by the Applicant are considerations which cannot override the express provisions of Section 15 of the Tax Appeals Tribunal Act.

The Respondent prayed that an order that the payment of 30% of the tax in dispute be satisfied by a bank guarantee from a reputable Ugandan financial institution be denied.

5. The Applicant's submissions in rejoinder

In rejoinder, the Applicant submitted in response to the preliminary objection that Section 3 of the Tax Procedures Code Act, 2014, defines a tax decision on any matter left to the discretion, judgment, direction, opinion, approval, satisfaction or determination of the Commissioner, other than a decision made in relation to a tax assessment. The Applicant submitted further that the questions raised in this application are not decisions left to the discretion, judgment, direction, opinion, approval, satisfaction or determination of the Commissioner. In short, these questions are not tax decisions; accordingly, no objection arises to be challenged by way of review therefore there was no need to first refer these issues to the Commissioner.

The Applicant submitted that the cases of *Fuelex (U) Ltd v Uganda Revenue Authority (supra)* and *Uganda Projects Implementation and Management Centre v Uganda Revenue Authority (supra)* are distinguishable from the facts of this application because those cases dealt with the question of whether the time for payment for 30% of the tax assessed or not in dispute could be extended or the amount be paid in installments. The Applicant submitted further that the cases were decided pursuant to sec 34A (3) of the VAT Act and section 28 of the Tax Appeals Tribunal Act

that allows the Commissioner General to make a tax decision relating to either extending the time for payment for a tax that is due or the payment of the tax in installments which is not the issue in this case. The Applicant submitted that the reasoning of the Respondent that an objection decision was required before filing this application or heard would cripple the Tribunal's authority to determine the interlocutory issues that arise from proceedings before it. The Applicant argued that payment within the meaning of Section 15 of the Tax Appeals Tribunal Act does not only mean a payment by cash; the Applicant submitted that cash is not the only way of making payments. A bank guarantee is one form of effecting payment because it is irrevocable and is cashed on the happening of a specified event therefore a bank guarantee satisfies the requirement of Section 15 of the Tax Appeals Tribunal Act. The Applicant submitted that the main application raises principally questions or points of law which are novel and stand a high chance of success.

6. Resolution of the application by the Tribunal

We have carefully read and considered the affidavits on record and submissions of both parties. We have also perused the authorities provided by the parties.

S. 15 of the Tax Appeals Tribunal Act states as follows;

"A taxpayer who has lodged a notice of objection to an assessment shall, pending final resolution of the objection, pay 30 percent of the tax assessed or that part of the tax assessed not in dispute, whichever is greater."

The Applicant relies on the decision of the Constitutional Court in ***Fuelex (U) Ltd v Uganda Revenue Authority*** (*supra*) in support of its case, that the requirement to pay 30% of the tax in dispute, does not apply to *Application No. 128 of 2024 (Vivo Energy Uganda Ltd vs. the Commissioner General Uganda Revenue Authority)*. In the Fuelex case, the Constitutional Court held by majority decision, that S. 15 of the Tax Appeals Tribunal Act – in so far as it compels an objector to a tax assessment whose challenge is not with regard to the amount of tax payable, to pay to the tax authority 30% of the tax

assessed – is inconsistent with Article 44 of the Constitution; hence it is unconstitutional.

The Respondent on the other hand relies on the decision of the Supreme Court of Uganda in ***Uganda Projects Implementation and Management Centre v Uganda Revenue Authority*** (*supra*) in support of its argument that the requirement to pay 30% of the tax in dispute applies to the above stated application. In ***Uganda Projects Implementation and Management Centre v Uganda Revenue Authority***, the Supreme Court unanimously held that while the requirement to pay 30% of the tax in dispute would occasion hardship on taxpayers, Article 17 of the Constitution imposed a duty on citizens to pay taxes and to do so promptly so that Government business can go on. The Supreme Court endorsed the principle in Metcash Trading Co. Ltd (*supra*) that a taxpayer must pay his tax then argue later. It is apparent from the above that these two cases are at odds with each other. The resolution of the issue as to whether the main application is subject to the requirement to pay 30% of the tax in dispute will therefore turn on which of the above decisions the tribunal is bound to follow.

The following excerpt from the ruling of Owiny-Dollo; DCJ (as he then was) in ***Fuelex (U) Ltd v Uganda Revenue Authority*** (*supra*) is instructive for our purposes.

*“While this is so, I must hasten to point out that, however, the Courts of Judicature operate under the discipline of hierarchical order; which ensures that a decision by a higher Court of record binds all Courts below that Court, on the principle of ‘stare decisis et non quieta movere’ which according to **Black’s Law Dictionary**, means to ‘adhere to precedents, and not to unsettle things that are established’; and is more commonly in use as ‘stare decisis’, which means: to abide by, or adhere to, decided cases.”*

Article 132(4) of the Constitution provides that all other courts are bound to follow the decisions of the Supreme Court on questions of law. This being the case, the Tribunal is bound to follow the decision of the Supreme Court in ***Uganda Projects Implementation and Management Centre v Uganda Revenue Authority*** (*supra*) over

the decision of the Constitutional Court in ***Fuelex (U) Ltd v Uganda Revenue Authority*** (*supra*).

Accordingly, we find that the main application is subject to the requirement to pay 30% of the tax in dispute.

The resolution of the issue as to whether the applicant should be permitted to pay 30% of the tax in dispute by way of a bank guarantee will depend on the construction of the word 'pay' as used under S. 15 of the Tax Appeals Tribunal Act. S. 15 is reproduced here again for ease of reference.

"A taxpayer who has lodged a notice of objection to an assessment shall, pending final resolution of the objection, pay 30 percent of the tax assessed or that part of the tax assessed not in dispute, whichever is greater." (emphasis added).

The term 'pay' has been defined in **Black's Law Dictionary, Tenth Edition by Bryan A. Garner** as follows:

"Pay" 1. To give money for a good or service that one buys; to make satisfaction. 2. To transfer money that one owes to a person, company, etc. 3. To give (someone) money for the job that he or she does; to compensate a person for his or her occupation. 4. To give (money) to someone because one has been ordered by a court to do so. 5. To be profitable; to bring in a return.

In **Words and Phrases Legally Defined, Third Edition Volume 2: D-I**, the term 'guarantee' has been defined at **page 333** as follows:

"A guarantee is an accessory contract by which the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person, whose primary liability to the promisee must exist or be contemplated. As in the case of any other contract, its validity depends upon the mutual assent of the parties to it, their capacity to contract; and consideration, actual or implied. An additional statutory

requirement is that the contract must either be in writing or be evidenced by a written note or memorandum signed by or on behalf of the party to be charged."

Paragraph 3 of the **Bank of Uganda Financial Consumer Protection Guidelines, 2011** defines a "guarantee" to mean any document, notice or other written statement containing an undertaking, however described, given by a person called the guarantor promising to fulfill the obligations or discharge the liability of a third party if that third party fails to do so.

The above definitions show that the two terms are completely distinct. While it is true that the primary purpose of a guarantee is to ensure that a payment will be made at a certain point in time upon the occurrence of an event that does not make a guarantee a form of payment. The requirement under S. 15 above is for a payment and not a guarantee.

Having determined that a guarantee is not a form of payment, we find that the requirement to pay 30% of the tax in dispute cannot be satisfied by a bank guarantee.

This application is accordingly dismissed with costs.

Dated this 21st day of JUNE 2024



MR. SIRAJ AL
CHAIRMAN



MS. CHRISTINE KATWE
MEMBER



MS. ROSEMARY NAJJEMBA
MEMBER

