THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 268 OF 2022

VIVO ENERGY UGANDA LIMITED.....APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY.....RESPONDENT

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

RULING

This ruling, is in respect of an application, challenging the imposition of Withholding tax and Value Added Tax, on fees paid by the Applicant to Vivo Energy Kenya Ltd, for the provision of services, related to the importation of fuel into Uganda.

1. Background

The Applicant imports and sells fuel products from the Middle East. Owing to the fact that Uganda is a land locked country, the Applicant`s fuel is imported through Kenya or Tanzania and transported to Uganda by road. The two systems through which fuel is imported into the East African region, are the Open Tender System (**OTS** now called Government to Government/ `G to G`), operated by the Government of Kenya and the Bulk Purchase System (**BPS),** operated by the Government of Tanzania.

By the policies of the Governments of Kenya and Tanzania, only Oil Marketing Companies (OMCs) registered to trade in either Kenya or Tanzania are permitted to participate in the Open Tender System or in the Bulk Purchase System.

The OTS infrastructure includes a pipeline managed by the Kenya Pipeline Company (**KPC)**, a State Corporation, wholly owned by the Government of Kenya. Only OMCs registered in Kenya, are permitted to access the product movement infrastructure including the storage and oil pipeline services provided by **KPC.** For this reason, the Applicant, who imports, 95% of its fuel through Kenya, can only import its fuel and access KPS`s product movement infrastructure through Vivo Energy Kenya (**VEK),** which is an OMC, registered to trade in Kenya. The Applicant

does not participate in the OTS or in the KPC activities by itself or directly. The Applicant makes bookings for the importation of fuel and their transportation through VEK. The Applicant submits its fuel requirements to VEK on a monthly basis and relies on VEK to submit a consolidated request to the OTS successful tenderer and further relies on VEK to coordinate the delivery of the fuel through the pipeline once it has arrived at Mombasa.

For the purpose of the above arrangement, the Applicant and VEK signed a Supply Services Agreement. A separate agreement for storage and transportation of fuel through the pipeline, was also signed between VEK and KPC. Under the Supply Services Agreement, the services provided by VEK to the Applicant include receiving, storage, processing, handling, loading and dispatch of fuel from Kenya to Uganda.

Third-party fees incurred in the importation and storage of the Applicant`s fuel including KPC fees, port charges, storage charges, hospitality, independent survey fees, ship demurrage and others are paid to the relevant authorities in Kenya by VEK on behalf of the Applicant and are reimbursed by the Applicant to VEK at actual cost. Under the Supply Services Agreement, the Applicant pays VEK, a throughput fee for the operational services and facilities provided to the Applicant by VEK.

In October 2022, the Respondent made a decision, that the payments of the throughput fee of USD 6.0 made to VEK between the years 2017 to 2019, attracted both Withholding Tax, as money sourced from Uganda and Value Added Tax, as imported services.

The Respondent accordingly issued an assessment of Shs. 14,957,108,104. The Applicant objected to the assessment on the ground that the payments constituted either disbursements or reimbursements, which did not attract tax in any form. The Respondent disallowed the objection in its entirety. Hence this Application.

2. Representation

At the hearing, the applicant was represented by Mr. Joseph Luswata and Mr. Winston Churchill Ruhayana while the Respondent was represented by Ms. Gloria Twinomugisha and Mr. Tony Kalungi.

3. Issues

At the scheduling, the following issues were set down for determination;

1. Whether the applicant is liable to pay the tax assessed?

2. What remedies are available to the parties?

Mr. Bukenya Samuel Tusubira, the Applicant`s Transport and Logistics Manager, testified that the Applicant deals in all types of fuels namely; Diesel, Petrol, Dual purpose Kerosene or jet fuel, Paraffin, Liquefied Petroleum gas, heavy fuels and lubricants.

The witness testified that during the period in issue, all the above products were imported through Tanzania or Kenya under the Bulk Purchase System (BPS) or the Open Tender System (OTS) respectively. The witness testified that the OTS which is managed by the Government of Kenya, offers tenders to one or several Oil Marketing Companies (OMCs) with the lowest bids, to import fuel into Kenya. The witness stated that since only Kenyan registered companies are eligible to participate in the bid for the OTS, Uganda Oil Marketing Companies including the Applicant book for their fuel requirements through proxies or through their counterparts in Kenya.

The witness stated that the Applicant imports its fuel through its Kenyan counterpart, Vivo Energy Kenya Limited (VEK), which is a Kenyan registered company eligible to participate in the OTS. The witness stated that the Applicant provides its monthly fuel requirements to VEK, who submits this requirement to Supply cor, an association of Open Tender Bidders, who act as the liaison between the bidders and the Government of Kenya.

The witness testified that the imported fuel is offloaded at Mombasa, into either the Government owned Kenya Pipeline terminal (KPC) or the private owned Shimanzi Oil terminal (SOT). In the case of the KPC, the fuel is pumped through the Kenya pipeline from Mombasa through Nairobi, Eldoret and Nakuru. Trucks are able to load the fuel from these terminals for domestic use in Kenya or for transit into other countries of the East African region.

The witness stated that the BPS is operated by the Government of Tanzania. Only companies registered and permitted to operate in Tanzania are eligible to bid for fuel under the BPS system. The witness stated that under the BPS, the Applicant purchased its fuel through Vitol Oil, a licensed Oil Marketing Company, in Tanzania.

The witness testified that for the period 2017 to date, the Applicant`s fuel purchases from the OTS was 95% of the entire fuel imported by it while 5% was imported through the BPS.

The witness stated that in order to actualize the fuel purchase relationship between the Applicant and VEK, the parties signed an agreement called the Supply Services Agreement, which provided for the services and technical assistance that VEK, would provide to the Applicant in the fuel importation process. The witness stated that these services specifically relate to receiving, storing, processing, taking delivery of, loading and dispatching the fuel from Kenya to Uganda. The witness stated that in the course of providing the above services, VEK, incurs and pays direct costs such as KPC fees, Port charges, KPC storage fees, inspection charges, third party hospitality charges or ship demurrage if any. The witness stated that the Applicant would have paid these charges itself if it was eligible to participate in the OTS. The witness stated that VEK receives a reimbursement of the above costs from the Applicant in accordance with clause 5 of the Supply Services Agreement. The witness stated that the Respondent did not impose VAT or withholding tax on the above payments.

The witness stated that in addition to the above, the Applicant pays to VEK, a throughput fee for each cubic meter (1000 liters) of fuel loaded onto trucks for onward delivery to Uganda from the terminals in Kenya. The witness stated that the throughput fees have changed overtime and were at USD 6.00 (Own depot) and USD 4.5 (KPC depot).

The witness testified that in October, 2022, the Respondent concluded an audit and determined that VAT and WHT was payable on the throughput fees for the period 2017-2019.

The witness testified that according to Appendix `A` of the Supply Services Agreement, the throughput fee is broken into distribution and supply cost, financing

cost, C&F cost, and Margin and Rounding. The witness stated that the Applicant conceded that VAT and WHT was due and payable on the Margin and Rounding component of the throughput fees and accordingly paid the sum of Shs.3,400,000,000 to the Respondent, for the period 2017-2021. The Applicant however contested VAT and WHT on the rest of the throughput fees because it regarded the payments as reimbursements or disbursements which did not attract tax in any form.

The witness testified that OMCs using the Kenya pipeline are allocated a line fill`, which at any one time must have fuel for the line fill capacity. The line fill capacity for VEK is determined by aggregating the volume of fuel for VEK`s local requirements and for transit to Uganda. The witness stated that VEK purchases and fills the pipeline with the combined capacity which includes the Applicant`s fuel requirements. The witness testified further that VEK uses borrowed funds to purchase the said fuel so that the pipeline can operate on a full system.

The witness testified that VEK`s cost of borrowing for the line fill requirements, which is referred to as `financing costs` under Appendix `A` of the Supply Services Agreement, are passed over proportionately to the Applicant.

The witness testified that the Distribution and supply cost under Appendix `A` to the Supply Services Agreement are Opex costs incurred by VEK to run its offices at the KPC terminals that handle its supplies and those of the Applicant. The witness stated that the KPC provides office space to each MC at all its terminals for the activities of dispatching oil for local use and for transit. The witness stated further that VEK employs staff in these different offices to manage activities relating to the supply of fuel to the Applicant. The witness stated that these activities include booking trucks for loading fuel, issuing delivery notes for trucks and managing clearing agent activities for trucks exiting from all terminals. The witness stated that, at the terminals owned by VEK, staff perform the same activities as those performed at the KPC terminals.

The witness testified that the cost incurred by VEK to run operations for the service of the Applicant for its supply of products, like office rent and staff cost at the terminals is reimbursed to VEK by the Applicant as `Supply and Distribution cost` under Appendix `A` to the Supply Services Agreement.

The witness testified further that VEK incurs the costs for clearing and forwarding the fuel to Uganda. As a result, VEK charges the Applicant `C&F costs` under Appendix `a` of the Supply Services Agreement. The witness stated that some of the agents used by VEK for clearing and forwarding are Seacon, Cargo handling and DWG.

The witness testified that VEK issues invoices to the Applicant for the services rendered and the costs incurred on its behalf. The invoices are supported by workings by VEK which are validated by the Applicant. The witness testified that between 2017 to September 2018, the Ap6plicant and VEK used an accounting system known as JDE, which produced invoices by way of Debit notes. The witness stated that sometimes the invoice was by way of a credit note. The witness stated that in September 2018, the accounting system changed from JDE to SAP and the invoices began to be referred to as Tax invoice/Debit note.

The witness stated that the invoices were issued monthly and comprise the pipeline charges under clause 5 and the throughput fees under clause 6 of Appendix `A` of the Supply Services Agreement. The witness stated that in the workings supporting the invoice, the throughput fee are calculated separately from the KPC pipeline costs, sometimes called freight amount. The witness stated that the fees in question were paid by the Applicant to VEK.

The witness stated further that under the BPS system the Applicant buys fuel from a licensed company called Vitol Bahrain which transports the fuel up to Kampala. The witness stated that the Applicant pays a fee to Vitol Bahrain per liter of fuel delivered to the Applicant. The witness stated that the fee is determined depending on the expenses that the Applicant would have paid if it was collecting the fuel directly from Tanzania. The fees paid by Vitol Bahrain on behalf of the Applicant include C&F costs, hospitality fees, terminal fees, transport charges and others.

Rhita Namugumya, an officer in the Respondent`s Large Tax Payer`s Office, testified that the Respondent carried out an audit on the Applicant`s declarations which established that the Applicant had not declared WHT and VAT on imported services on the throughput fees paid to VEK, as per the Supply and Services Agreement.

The witness stated that in respect of the WHT, a review of the Applicant`s transfer pricing reports and the Supply and Services Agreement with VEK for the period in

issue established that the Applicant paid throughput fees to VEK for the provision of the following services; scheduling receipts, arranging facilities and storage capacities, conducting all negotiations for storage and hospitality, monitoring performance of service providers, administering, ensuring proper documentation and advice to the Applicant on procedures followed to ensure correct follow up on claims relating to losses or quality of the product and facilitation of the issuance of product quality certificates. The witness stated that in addition to the above, the Applicant paid VEK a financing charge for pre-financing services provided by VEK to the Applicant and a remuneration charge for the financing provision in the Supply and Services Agreement.

The witness testified that the Applicant did not account for VAT on imported services in relation to the throughput fees paid to VEK. The witness stated that upon review of the transfer pricing reports and the Supply and Service Agreement with VEK for the period in question, it was established that VEK received throughput fees amounting to Shs. 10,146,917,707 for the year 2017, Shs.10, 577,841,714 for the year 2018 and Shs.8, 375,258,938 for the year 2019 but the Applicant did not account for the VAT on the said payments. The witness stated that the services in question were received by the Applicant and all payments in respect of the said services were made for the benefit of the Applicant. The witness stated that the Respondent accordingly issued assessments of VAT of Shs. 4,438,985,851 and WHT of Shs. 3,899,284,023.

The witness stated that the Applicant objected to the said assessments on 7th and 10th October 2022, on the grounds that the lumpsum payments for throughput fees include a fixed portion (reimbursement) and a margin and that VAT and WHT should be charged on the margin only.

The witness testified that the reimbursable costs are different from throughput fees. The witness stated that the reimbursable costs included the pipeline fees, port charges, ships demurrage and transport fees. The witness stated that these were separately charged and were not included in the tax computation.

The witness stated that the Applicant`s Transfer Pricing Local files for the period under review provide that the remuneration VEK receives from the Applicant for its services consists of disbursements, financing costs and throughput fees. The

witness stated that the Respondent charged WHT on the financing costs and VAT and WHT on the throughput fees. The witness stated that the Respondent did not assess any tax on the disbursements.

The witness stated that on 9th December 2022, the Respondent communicated to the Applicant that its objection had been disallowed on the grounds that the throughput fees had been correctly subjected to tax for being payment for imported services rendered to the Applicant.

4. Submissions of the Applicant

The Applicant submitted that the issues for determination in this matter relates to the true character of the "throughput" payments made by the Applicant to VEK for services rendered by VEK in the importation and transportation of the Applicant`s fuel for sale in Uganda. The Applicant submitted that the true character of the payment determines whether an obligation to pay imported services VAT and withholding tax, arises. The Applicant took the position that the throughput payments take substantively, the character of a disbursement and a reimbursement for value added tax and withholding tax respectively.

The Applicant submitted that payments made as disbursements are outside the scope of VAT. The Applicant submitted on the authority of the decision in **Intertek Testing Services vs. Uganda Revenue Authority, HC Civil Appeal No. 5 of 2002,** that in determining whether tax is payable on a transaction or not prominence will be given to the substance rather than to the form of a transaction.

The Applicant submitted on the basis of the decision of the tribunal in **Jacobsen Uganda vs. Uganda Revenue Authority, TAT Application No, 11 of 2016** and that of the High Court in **Civil Appeal No. 26 of 2018; Uganda Revenue Authority vs. Jacobsen Uganda Power Plant Co. Ltd,** that the obligation to withhold tax does not arise on mere payment but on payments that are taxable in the hands of the non-resident.

The Applicant submitted further that the liability to pay withholding tax only arises when there is tax payable in the first place. The Applicant relied on the decision of the High Court in **Luwaluwa Investment Limited vs. Uganda Revenue Authority HC Civil Appeal No. 43 of 2022,** in support of this position.

The Applicant also cited the decision in **GE India Technology Centre vs. CIT (2010) 327 ITR 456171,** in support of the position that a withholding tax obligation arises in respect of both pure income and composite payments with an embedded income element and that in determining whether a withholding tax obligation arises, the Act must be read as a whole.

The Applicant also cited the decision of the Supreme Court of India in **Principal CIT vs. Organising Committee Hero Honda FIH World Cup (2019) 260 Taxman,** where the court stated that expenses of travel, hospitality and food, reimbursed by the event sponsor, were not subject to withholding tax. The Applicant also relied on the decisions in **CIT vs. Siemens Aktiongesellchaft (2009) (310 ITR 320.177)** and **CIT vs. Tejaji, Farasaram Khara Walle Ltd (1968) ITR95,** for the same proposition of law.

The Applicant submitted that the difference between a reimbursement and a disbursement is significant from a VAT point of view. The Applicant submitted that a reimbursement is subject to VAT while a disbursement is outside the scope of VAT. In support of this argument the Applicant cited the decisions of the tribunal in **Bank of Africa vs. Uganda Revenue Authority, TAT 62 OF 2018;** and **Prime Solutions Ltd vs. Uganda Revenue Authority, TAT 116 of 2019.** The Applicant also cited the decision in **Nell Gwynn House Maintenance Fund Trustees vs. Customs & Excise Commissioner (1999) STC 79,90)** for a distinction between a disbursement and a reimbursement.

The Applicant submitted that the payment in issue in the instant case is the USD 6.0 per 1000 liters of fuel paid to the Applicant`s sister company VEK for services rendered in sourcing and delivery of the Applicant`s fuel from Kenya. The Applicant submitted that this amount was broken down to USD 3.7 being distribution and supply cost, USD 1.66, being Finance costs, USD 0.44 being C&F costs and USD 0.22, being margin and rounding,

The Applicant conceded that margin and rounding constituted income to VEK which rightly attracted withholding tax. The Applicant submitted that the resultant tax was paid in full.

Relying on the **Jacobsen v URA** case and the **GE India** case, both of which have been cited above, the Applicant submitted that in order to determine whether withholding tax applies to a particular payment, it must be determined if that payment is income in the hands of the payee. The Applicant submitted that in the instant case, the withholding tax was imposed on the Applicant pursuant to Sections 78, 85 and 120 of the Income Tax Act.

The Applicant submitted that S. 85(1) imposes tax on every non-resident person deriving income under a Ugandan source services contract subject to the Act.

The Applicant submitted that S. 78 is a source section and provides generally for what constitutes income derived from sources in Uganda. The Applicant submitted that the word income in both provisions, is critical and has a technical meaning that may differ depending on the context. The Applicant submitted that for taxation purposes, the term income means the types of revenue that are eligible for income tax in Uganda. The Applicant submitted that this view is reinforced by the fact that S. 85(1) is subject to the Act, which means that the rest of the Act must be read together to determine the true scope of S. 85(1) as recommended in the above decisions. The Applicant submitted that S. 4(1) controls S. 85(1) to the extent that it imposes income tax on chargeable income. The Applicant submitted that Chargeable Income means gross income and gross income is either business, employment or property income.

The Applicant submitted that in the **GE India** case and in the **Principal CIT vs. Organizing Committee of Hockey,** the expenses escaped the withholding tax net because they were not chargeable to tax as stated in S. 195 of the Indian Act. The Applicant submitted that the term `chargeable to tax` has the same meaning as `chargeable income` as used in the Ugandan Income Tax Act.

The Applicant submitted further that a `reimbursement` is not employment or business or property income because it is not in the same class as any of the examples of business, employment or property income specified in sections 18-20 of the Income Tax Act. The Applicant submitted that a reimbursement is a return of the tax payer`s money spent in performing services by the taxpayer to the client. The Applicant submitted that the client refunds this money to the taxpayer. It is not new

money and does not improve the tax payer`s income level or position. The Applicant stated therefore that the said money is not income to the taxpayer.

The Applicant stated that the term `reimburse` has been defined in **Black`s Law Dictionary** to mean `to pay back, to make restoration, to repay that is expended, to indemnify or make whole`. The Applicant submitted therefore that reimbursement is not income and that at any rate it is not taxable or chargeable income. The Applicant submitted that the dissenting opinion in the **Jacobsen case** at the tribunal determined liability to pay tax on reimbursement based on a procedural or collection section of the Act instead of the chargeability section and without harmonizing both.

The Applicant submitted that for the purposes of withholding tax, the overriding consideration should be whether a reimbursement changes the non-resident`s income position or not. The Applicant submitted that if the answer to this question is that a reimbursement simply restores the non-resident to the position that they were in before the expenditure then reimbursements are not income in the hands of the non-resident and are not liable to withholding tax.

The Applicant submitted that in **Coca Cola vs. DCIT (2006) 7 SOT,** The Indian Tax Tribunal, took the view that it was the markup of 5% on the actual costs incurred by the assessee in providing the services which were taxable and not the amount of reimbursement of the actual cost. The Applicant stated that the same position was taken by the court in the **GE India** case when it held that withholding tax was payable only to the proportion of income tax chargeable to tax.

The Applicant submitted that based on the breakdown, the Supply and Distribution cost, comprises largely of the salaries of the VEK staff who process the bids through the OTS, who handle the fuel on arrival of the vessel, its discharge into the KPC pipeline, the payment of taxes, the payment of third party charges, the raising of invoices, the coordination with other third party service providers such as insurance and clearing agents, the cost of printing, office space for the staff etc. The Applicant submitted that the above costs are incurred by VEK on behalf of the Applicant and are paid back at actual cost to VEK. The Applicant submitted that these costs constitute reimbursements because they are incurred by VEK in the course of providing the service to the Applicant and they do not improve or increase the sales

in the VEK balance sheet. They represent the expenses of providing the service to the Applicant and not income to VEK.

The Applicant submitted that the Financing costs comprise the cost of borrowing by VEK to wet the pipeline as a requirement of the KPC authority. The Applicant submitted that the borrowing is from Commercial banks in Kenya and VEK pays this cost to the commercial banks and charges the Applicant a proportion thereof, which is recovered from the Applicant by VEK when the Applicant pays the invoice issued by VEK. The Applicant submitted that this cost is a reimbursable as it was incurred on behalf of the Applicant and does not improve the income position of VEK.

The Applicant submitted that the C&F costs comprise the cost of clearing and forwarding. Third parties contracted by VEK issue invoices to VEK for handling the clearing and forwarding of the imported products. The invoices are paid by VEK who in turn issues its own invoice to the Applicant for the costs incurred on its behalf by VEK. Once the invoice is paid by the Applicant VEK is restored to its original position.

The Applicant submitted that the above constitute expenses for providing the service incurred on behalf of the Applicant and do not comprise income to VEK. The Applicant stated that they are reimbursements or disbursements. The Applicant stated that the position would have been different if the Applicant had placed money in a fund administered by VEK for payment of staff costs, C&F and Financing costs. The Applicant stated further that the above costs would have been directly paid by it if could directly participate in the OTS and access the operations of the KPC. The Applicant prayed that the withholding tax assessment be discharged.

The Applicant submitted that VAT on the Throughput payments to VEK was imposed upon the Applicant pursuant to S.5 (1)(c) of the VAT Act, as imported service VAT.

The Applicant submitted that Rule 13(2) of the VAT Regulations provides that the value of an imported service is determined using S. 21 of the VAT Act. S. 21 provides that the taxable value of a supply is the total consideration for the supply. The Applicant submitted that Supply and Distribution costs do not constitute consideration because they are a disbursement incurred by VEK on behalf of the Applicant. The Applicant submitted further that Finance costs are incurred or

charged by a commercial bank and are disbursements and do not constitute consideration for the supply of services. The Applicant submitted that Clearing and Forwarding costs are paid to VEK who pays them to Seacon, DWG etc. These payments constitute disbursements which are outside the scope of VAT. The Applicant submitted that in any case Finance costs are exempt as a financial service by virtue of paragraph 1(c) of Schedule 3 of the VAT Act.

The Applicant submitted further 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 the operations of the KPC pipeline. The Applicant reiterated that VEK paid supply and distribution costs, clearing and forwarding and finance costs to third parties as an agent on behalf of the Applicant.

The Applicant submitted that the character of the payments in issue satisfied the definition of disbursements as set out in both the **Prime Solutions case** and the **Nell Gwynn House case.** The Applicant submitted that according to the service level agreement, the Applicant was the client while VEK was the agent. The Applicant stated that save for the margin and the rounding, the evidence before the tribunal shows that the throughput fees of USD 6.0 on which the Respondent imposed VAT constituted payments made by VEK to third parties for services rendered in respect of the Applicant`s fuel entitlement. The Applicant submitted further that in as far as the payments made by the Applicant were directly proportional to the Applicant`s fuel entitlement, VEK acted as an agent in making the payments for services exclusively enjoyed by the Applicant.

The Applicant prayed that the assessment be vacated and the 30% of the tax in dispute paid by the Applicant be refunded.

5. Submissions of the Respondent.

The Respondent submitted that the question to be determined is whether the throughput fees paid by the Applicant to VEK is a reimbursement or disbursement for tax purposes.

Relying on the decision of the High Court in **COWI AS v. URA HCCA 34/2020,** the Respondent submitted that the import of services involves the provision of a service

by a person who is resident or carries on business outside Uganda to a person who is resident or carries on business in Uganda.

The Respondent submitted on the authority of the decision in **Africa Broadcasting Uganda Ltd vs. Uganda Revenue Authority, TAT Application No. 44 of 2018,** that the three requirements for a service to fall within the ambit of imported services, were that the services must have been rendered by a supplier who is outside Uganda, the recipients of the services must be in Uganda, the services must be utilized or consumed in Uganda and are taxable. The Respondent submitted further that VAT is a destination-based consumption tax levied on commercial activities, not as a charge on the business but on the consumer. The Respondent submitted further that VAT is a tax on activity and in order to identify the person who should bear the tax, it is necessary to identify the taxable event. The Respondent cited **Regulation 13(1)** of the **VAT Regulations 1996**, in support of the above submission.

The Respondent submitted that the Applicant had a Supply Services Agreement with VEK and that it was clear from a perusal of the said agreement that there was a contract of service between the Applicant and VEK for which VEK was paid financing costs and extra costs in the form of `throughput fees` as consideration for the services rendered. The Respondent submitted that the only logical conclusion from the interpretation of the clauses in the agreement is that the Applicant was procuring services from VEK as stipulated in the agreement which clearly shows that there was importation of services since the consumer of these services is in Uganda. The Respondent submitted that having established that the Applicant was consuming imported services, the Applicant ought to have paid VAT as provided for under the **Regulation 13(1)** of the **VAT Regulations.**

The Respondent submitted that in order to understand whether the Applicant is liable to pay withholding tax, the form taken by the `throughput` must be determined. The Respondent submitted that the term `throughput` has been defined in **Black`s Law Dictionary** as the productivity of a process, machine, procedure or system over time and is expressed as a figure of merit such as output per hour, cash turnover or shipped. The Respondent submitted further that under the Service Level Agreement

between the Applicant and VEK, the Applicant pays VEK a throughput fee for the operational services and facilities provided to the Applicant.

Relying on the **Bank of Africa case,** the Respondent submitted that disbursements are simply recovery of payments made by a party on behalf of the client as an agent for goods and services received and used exclusively by the client. The Respondent submitted that in the instant Application it cannot be said that financing costs and throughput fees were paid by VEK as agent of the Applicant. The Respondent submitted that there was clearly as agreement between the Applicant and VEK and the costs incurred by VEK were incidental to the fulfilling or for the performance of their agreement. In support of this argument the Respondent cited the decisions in **Rowe & Maw (a firm) v. Commissioners of Customs & Excise (1975) 1 BVC 51, Medical Services & Equipment (ME) Ltd 1996 BVC,** and the **Prime Solutions case.**

The Respondent submitted that the element of consideration is vital in determining whether a fee falls under reimbursement or disbursement. Relying on the definition of consideration under S. 1(d) and on S. 21, the Respondent submitted that the spirit of the agreement between the Applicant and VEK as deduced from clause 6 of the Service Level Agreement, is that in addition to the financing cost paid by the Applicant, the Applicant was under an obligation to pay throughput fees for operational services and facilities provided by VEK to the Applicant. The Respondent submitted that this clearly spoke to the consideration by the Applicant for the services rendered to it by VEK. The Respondent submitted that the consideration cannot be said to be a mere recharge for costs entirely incurred on behalf of the Applicant. The Respondent wound up this argument by stating that the fee paid to VEK falls squarely within the meaning of reimbursement and is accordingly subject to withholding tax.

The Respondent submitted further that the decision in the **Jacobsen case** is distinguishable from the present case as in the former case, the services were provided by third parties who were not parties to the contract while in the instant case, the services were provided by VEK, a party to the Service Level Agreement.

The Respondent prayed that the Application be dismissed with costs.

In rejoinder, the applicant reiterated its earlier submissions and invited the tribunal to critically examine the character and purpose of the distribution and supply costs, financing costs, clearing and forwarding costs instead of lumping them together as the Respondent did. The Applicant submitted that the inevitable conclusion would be that the payments made by the Applicant to VEK were not part of the consideration received by VEK and were in fact disbursements and therefore not liable to VAT and WHT.

The Applicant stated further that the decision in the **Jacobsen case** is not distinguishable from the instant case. The Respondent stated that in the instant case, like in the **Jacobsen case,** most of the services in issue were rendered by third parties who were not party to the Supply Services Agreement. The Applicant stated that VEK was simply the supplier of record, just like JELCO in the **Jacobsen case.**

Having listened to the arguments and submissions of the parties, this the ruling of the Tribunal;

6. Determination of the Issues;

1. Whether the applicant is liable to pay the tax assessed?

Withholding Tax:

The resolution of this part of the dispute turns on the construction of S. 84 of the Income Tax Act. S. 84 provides as follows;

1) Subject to this Act, a tax is imposed on every non-resident person deriving income under a Ugandan source services contract.
2) The tax payable by a non-resident person under this section is calculated by applying the rate prescribed in Part V of Schedule 4 to this Act to the gross amount of any payment to a non-resident under a Ugandan source services contract.
3) Subsection (1) does not apply to a royalty or management charge charged to tax under section 82.
4) this section, "Ugandan source services contract" means a contract, other than an employment contract, under which-

(a) The principal purpose of the contract is the performance of services which gives rise to income sourced in Uganda; and

b) Any goods supplied are only incidental to that purpose.

5) For avoidance of doubt, income derived from the carriage of passengers who do not embark or cargo or mail which is not embarked in Uganda is not income derived from a Ugandan- source service contract.

A perusal of the above provision, gives rise, to two observations. The first, relates to the imposition of the tax. The second, relates to the payment of the tax. Under S. 84(1) the tax is imposed on a non-resident deriving income under a Ugandan source services contract. Under S. 84(2) the tax payable is calculated by applying the requisite rate to the gross amount of any payment to a non-resident person under a Ugandan source services contract.

The decision by the legislature, to use `income` as the basis for imposing the tax, and the `gross amount of any payment` as the basis for calculating the tax payable, should not be lost on us, as we determine this matter.

It is clear from S. 84(1) that the tax is confined to non-resident persons deriving income from a Ugandan source services contract. It is not in dispute that VEK is a non-resident company and that the Supply Services Agreement, between the Applicant and VEK, is a Ugandan source services contract. What is in dispute, is whether the throughput fees earned by VEK, constitutes income? VEK will only be liable to pay WHT if the throughput fees paid by the Applicant to VEK, constitutes income. In order to determine this, we must look at the definition of income.

The term "income" has been defined in **Black`s Law Dictionary 10th Edition, Bryan A. Garner, at page 880** as "*The money or other form of payment that one receives usually periodically, from employment, business, investments, royalties, gifts, and the like.*"

The term "income" has also been defined in the **United States Supreme Court** decision of **Eisner v. Macomber, 252 U.S 189 (1920)** as follows:

"*Income may be defined as the gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital. P.252 U.S. 207.*

Mere growth or increment of value in a capital investment is not income: income is essentially a gain or profit, in itself, of exchangeable value, proceeding from capital, severed from it, and derived or received by the taxpayer for his separate use, benefit, and disposal."

From the above definition of income, we are able to conclude, that the costs comprising the throughput fees, namely; the distribution and supply costs, the financing cost, and the C&F cost, do not constitute income, while the margin component of the throughput fees, does.

There is no requirement, under S. 84(1), that, in order for the tax to be imposed, the payment, made to the non-resident person, under the Ugandan source services contract, should comprise exclusively of income. It is sufficient that the payment, should comprise a component of income, however large or small. It is in the natural order of business, that payments for the provision of services, will invariably be composite in nature, comprising of amounts, which constitute income, and those which do not.

We can conclude from the fact, that the margin component of the throughput fees, constituted income, that VEK, a non-resident person, derived income, from a Ugandan source services contract. VEK, therefore falls squarely within the ambit of S. 84(1) above.

Having determined, that WHT was properly imposed on VEK, the question which arises, is whether WHT should be charged on the other components of the throughput fees, which do not constitute income, namely; the distribution and supply costs, the financing cost, and the C&F cost?

In order to answer this question, we must go back to S. 84(2) above. Unlike S.84 (1) which uses income as the basis for the imposition of the tax, S. 84(2) uses the `gross amount of any payment` as the basis for calculating the tax payable. The construction of this term, will therefore determine, whether WHT, is chargeable on the distribution and supply costs, the financing cost, and the C&F cost.

The plain and ordinary meaning of the term `gross` according **to Oxford Advanced Learner`s Dictionary, 10th Edition**, is *"being the total amount of something before anything is taken away ".*

The term `gross amount of any payment` must therefore mean the entire amount of the throughput fees. This amount includes the distribution and supply costs, the financing cost, the C&F cost and the margin.

The above conclusion means that, WHT, is chargeable on the entire amount of the throughput fees.

We find support for this view from **S. 87** of the **Income Tax Act**, which states as follows;

S.87. General Provisions relating to taxes imposed under sections 82, 83, 84, and 85.

(1) The tax imposed on a non-resident person under sections 82, 83, 84, 85(1) and 85(4) is a final tax on the income on which the tax has been imposed and –

(a) That income is not included in the gross income of the non- resident person who derives the income;

(b) No deduction is allowed for any expenditure or loss incurred by the non-resident person in deriving that income; and

(c) The liability of the non-resident person is satisfied if the tax payable has been withheld by a withholding agent under section 137 and paid to the Commissioner General under section 140. (Emphasis Added)

S. 87(1) (b) provides that no deduction is allowed for any expenditure or loss incurred by the non-resident person, in deriving the income.

The testimony of Bukenya Samuel Tusubira, shows that the distribution and supply costs, the financing cost and the C&F cost, are all expenses incurred by VEK, in deriving the throughput fees.

S. 87(1) (b) complements **S. 84(2)** by ensuring that the tax imposed under **S.84 (1)** is paid on the gross amount of the payment received by the non-resident person. This is achieved by restricting the non-resident person from deducting the expenses incurred by it in deriving the income.

The argument by the Applicant, which is a formidable one, is essentially, that it should be allowed, to deduct the expenses, incurred by it, in deriving the throughput fees. This would result, in the tax in question, being charged on the income component of the throughput fees and not on the expenses incurred by the Applicant in deriving the income. Indeed, under **S. 22** of the **Income Tax Act**, resident persons are permitted, in determining their chargeable incomes, to deduct expenses incurred by them in deriving this income.

The position, is however different, with respect to non-resident persons. In determining, the tax payable by non-resident persons, most jurisdictions, place restrictions on non-resident persons, from deducting expenses and losses incurred by them in deriving income. The policy objective for this restriction is to ensure, the efficient administration and collection of tax. As compensation for this restriction, non-resident companies are usually charged lower rates of tax as compared to resident companies.

The following observation, was made by the tribunal, in **Bank of Africa Uganda Ltd vs. Uganda Revenue Authority TAT Application No. 62/2018**

"A look at the legislative intent of Parliament in enacting section 87(1) (b) will show that this provision is an important part of a deliberate policy by Government to achieve efficiency in the collection of tax on income derived by non-resident persons from sources in Uganda.

The two main challenges faced by any tax administration, in the collection of tax, are the twin difficulties of taxing certain types of income and that of establishing with certainty the expenses incurred by certain groups of tax payers in deriving income. The first difficulty is dealt with under this policy by taxing, at source, income deemed difficult to tax. This is achieved through the concept of a withholding tax provided for under Part XIII of the Income Tax Act.

The other difficulty, that of establishing with certainty, the expenses incurred by certain groups of tax payers in deriving income, is dealt with by taxing the income earned by these tax payers at gross rate, by disallowing the deduction of expenses incurred by the said tax payers in deriving the income in question. The group of tax payers whose expenses in incurring income are considered difficult to establish with

certainty as can be seen from the Income Tax Act, include non-resident tax payers under sections 83, 84, 85, 86, 89GG and 118D of the Act, resident persons earning management or professional fees under S. 118A and recipients of winnings of sports betting or pool betting under S.118C.

The hardship caused to such tax payers in being required to pay tax at gross rate without deductions for expenses incurred in deriving the income is compensated for by the relatively lower rates of tax imposed on such tax payers, as compared with the rates of tax imposed on tax payers permitted to make deductions for expenses incurred in deriving income.

The above position can be proved by comparing the rate of tax imposed by the Income Tax Act, on these two groups of tax payers. The one, permitted to pay tax after deductions, the other required to pay tax on the gross rate without deductions.

Under the first group, S.7 of the Income Tax Act and Part II of the Third Schedule imposes tax at the rate of 30% on the chargeable income of a company. The term chargeable income as described under S.15 of the Act means the gross income of a person less total deductions.

Under S. 8 of the Act and Part III of the Third Schedule, a trustee of a trust is charged to tax at the rate of 30% on the chargeable trust income. Once again, the term chargeable here implies that the taxable amount is less total deductions.

S. 89B of the Act together with paragraph 1 of Part IX of the Third Schedule, imposes tax at the rate of 30% on a licensee deriving income from mining operations in Uganda. S. 89C (1) permits the tax payer to deduct expenses incurred against the gross income derived by the licensee from the said mining operations.

S. 89G together with paragraph 2 of Part IX of the Third Schedule imposes tax at the rate of 30% on licensees deriving income from petroleum operations in Uganda. S. 89G (4) permits the tax payer to deduct losses carried forward against the gross income derived by the licensee from the said petroleum operations.

Under the group required by the Act, to pay tax at gross rate without deductions for expenses incurred in deriving the income, fall various categories of non-resident tax payers as set out under sections 83, 84, 85 and 86 of the Act. The rate of tax

imposed on these tax payers is 15% with the exception of S. 86 which imposes tax on non-resident persons carrying on the business of a ship operator, charterer or air transport from the carriage of persons embarking in Uganda at the rate of 2% under Part VII of the Third Schedule. As seen above, S.87 (1) (b) of the Act prohibits the deduction of expenses incurred by the said non-resident tax payers in deriving income.

The above shows that the requirement under the various provisions of the Act for tax to be paid at gross rate without deductions is part of a policy by the government to achieve efficiency in tax collections in respect of persons whose expenses in incurring income are considered difficult to establish with certainty. The most important of these tax payers are the non-resident tax payers as can be seen from sections 83, 84, 85 and 86 of the Act.

It is therefore apparent from the above, that the meaning to be assigned to the term 'gross amount' under S. 83(2) of the Act, is an amount from which no deductions for expenses incurred in deriving the income in question have been made. Any other interpretation of this term would be to go against the legislative intent of Parliament as shown above".

For the reasons above, we find that WHT tax is chargeable on the entire amount of the throughput fees. We do not agree with the Applicant, that the tax should only be charged, on the margin or the income component of the throughput fees.

Value Added Tax (VAT).

The Respondent imposed VAT, on the throughput fees, paid to VEK by the Applicant, on the grounds that these fees, constituted payment for imported services supplied by VEK to the Applicant.

VAT is charged on the supply of imported services by S. 4(c) of the VAT Act.

S. 4 states as follows;

"A tax, to be known as a value added tax, shall be charged in accordance with this Act 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".

S. 5 of the VAT Act, which sets out the persons liable to pay VAT, provides as follows;

Except as otherwise provided in this Act, the tax payable-

a. *"In the case of a taxable supply, is to be paid by the taxable person making the supply,*
b. *In the case of an import of goods, is to be paid by the importer;*
c. *In the case of a supply of imported services, other than an exempt service, is to be paid by the person receiving the supply".*

Regulation 13(1) of the **VAT Regulations 1996,** which sets out the tax point, for VAT on imported services, provides as follows;

"*A person who receives imported services other than an exempt service shall account for the tax due on the supply, and the taxpayer shall account for that service when performance of the service is completed, or when payment for the service is made, or when the invoice is received from the foreign supplier, whichever is the earliest".*

Regulation 13(2) of the **VAT Regulations 1996**, which provides for the valuation of imported services, states as follows;

"The value of an imported service is determined using section 21 of the VAT Act".

Section 21 (1) states as follows;

"*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".*

S.1 of the VAT Act defines consideration 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".*

It is not in dispute, that the services supplied by VEK to the Applicant constitute imported services. What is in dispute is whether the distribution and supply costs, the

financing cost and the C&F cost, which form part of the throughput fees, are disbursements and are therefore outside the scope of VAT.

The resolution of this part of the dispute, therefore turns on whether the above costs are disbursements or reimbursements.

In order to determine, whether the above costs, are disbursements or reimbursements, we must look at these costs in detail, so as to determine their true character. The costs in question are provided for under the Supply Services Agreement, between Vivo Kenya Ltd and Vivo Uganda Ltd. The Agreement is dated 1st July, 2014. The agreement was admitted in evidence as exhibit AE7. For the sake of completeness, we will look, at all the costs provided for in the Supply Services Agreement.

Clause 5 of the Supply Services Agreement provides as follows;

5. Fees and Charges Levied by Third Parties

To facilitate payment of fees and charges levied by third parties, the CLIENT will pay a financing cost to VEK to cover the monthly costs incurred.

5.1 The following is a list of probable services and charges that will be incurred by the CLIENT and settled by VEK through the EASU:

5.1.1 KPC – Pipeline Fees

The EASU will facilitate the settlement of the Pipeline fee by VEK in accordance with the Transport and Storage agreement in force between VEK and KPC.

5.1.2 Port Charges

The EASU will facilitate the settling of port charges by VEK in respect of imported products.

5.1.3 KOSF Storage

The EASU will facilitate the settling of storage charges levied by KPC and payable by VEK for the storage in Mombasa in respect of imported main products.

5.1.4 Other Charges

The EASU shall facilitate payment by VEK of independent inspection charges, third party hospitality charges and any other third party charges incurred in respect of the services provided to the CLIENT under this Agreement.

5.1.5 Ship`s Demurrage.

The EASU will make a full investigation of each case of imposed demurrage charges and shall provide the CLIENT, with a complete statement of facts. All due demurrage charges shall be paid by the CLIENT.

5.1.6 Transportation by road or rail.

The CLIENT shall pay charges directly to the service provider in respect of each consignment transported.

5.2 Invoicing of financing costs:

The CLIENT will reimburse VEK the full amount charged under clause 5.1 plus a financing charge determined as follows;

5.2.1 USD Invoices:

At the one month LIBOR rate ruling on the last day of previous month plus 5% (five percent) prorated for 30 days.

5.2.2 Kshs Invoices:

At the Base rate ruling on the last day of the previous month from VEK bank plus 5% (five percent) prorated for 30 days.

6. VEK Throughput fee

In addition to the CLIENT reimbursing VEK for all actual costs incurred, the CLIENT will also pay VEK a throughput fee for the operational services and facilities provided to the CLIENT by VEK.

It will be seen from the above, that the expenses under clause 5 of the Supply Services Agreement are Pipeline fees, Port charges, storage charges, independent inspection charges and demurrage charges.

The expenses, forming part, of the throughput fees under clause 6 are;

i. Supply and Distribution costs, which comprise salaries for VEK staff, the cost of printing and the cost of renting office space for VEK staff.

ii. Financing costs, which comprise the cost of borrowing from Commercial banks by VEK to wet the pipeline (ensure sufficient quantities of fuel are in the pipeline) as a requirement of the KPC Authority.

iii. C&F costs which comprise the cost of clearing and forwarding.

In order to determine, which of the above costs, are disbursements or reimbursements, we need to analyze, each of them, in turn.

A perusal of Clause 5, shows that these costs, were incurred directly by the Applicant and the role of VEK was merely to make payment on behalf of the Applicant. This is apparent from clause 5.1, which expressly states that the costs will be incurred by the Applicant and settled by VEK. The fact that the costs were incurred by the Applicant, with VEK merely making payment on behalf of the Applicant, can be seen from clause 6, which expressly provides that the Applicant will reimburse VEK for the actual costs incurred by VEK.

A perusal of Clause 6 and Appendix A of the Supply Services Agreement, shows that the costs forming part of the throughput fees, were incurred directly by VEK. It is clear that these costs namely staff salaries, office rent, borrowing costs, clearing and forwarding costs, were incurred to facilitate VEK`s day to day operations.

In **Rowe & Maw (a firm) v. Commissioners of Customs & Excise (1975) 1 BVC 51,** the appellant tax payer were a firm of solicitors who were engaged to act on behalf of a client in criminal proceedings. A representative of the firm attended the proceedings and the firm paid the rail fare incurred. When the firm submitted their bill to the client, no VAT, was added to the amount paid. The firm claimed that the item did not represent a taxable supply of services since it was not payment for services supplied to the client but merely a reimbursement of sums incurred on the client's behalf.

In drawing a distinction between 'reimbursement' and 'disbursement' **Bridge J.** stated as follows;

"I also agree and I only add a word to emphasize the importance of the distinction between two different classes of disbursements which a solicitor may expend on his client's behalf which lead to different consequences in respect of the incidence of VAT.

On the one hand, a solicitor (like any agent) may purchase goods or services for his client, as for instance when paying stamp duty, court fees, or buying, say, a travel ticket to enable the client to travel. The goods or services purchased are supplied to the client not to the solicitor who merely acts as an agent to make the payment. Naturally no VAT is payable because such payments form no part of the consideration for the solicitor's own services to his client. But on the other hand, quite different considerations apply where the goods or services purchased are supplied to the solicitor, as here in the form of travel tickets, to enable him effectively perform the service supplied to his client, in this case to travel to the place where the solicitor's service is required to be performed. In such case, in whatever form, the solicitor recovers such expenditure from his client, whether as a separately itemized expense or as part of an inclusive overall fee. VAT is payable because the payment is part of the consideration which the client pays for the service supplied by the solicitor".

In **Bank of Africa v URA TAT No. 62 of 2018**, the Tribunal made the following distinction between disbursements and reimbursements for the purposes of VAT.

"The above authorities establish that disbursements fall outside the scope of VAT while reimbursements form part of the consideration for VAT for a supply.

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. A reimbursement is a supply and is subject to VAT.

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 and used exclusively by the client. A disbursement does not constitute a supply and hence, is not subject to VAT because it is the client, who buys and receives the goods or services the agent only makes the payment on the client's behalf."

Applying the above decisions, to the facts of our case, it is clear that the costs incurred by the Applicant under Clause 5 are disbursements, while those incurred under Clause 6, are reimbursements.

This is so, because the services supplied under Clause 5, were supplied to the Applicant with VEK, merely acting as an agent for the purpose of making payment. This is apparent from Clause 5.1 above. Further, the services in question were received and used exclusively by the Applicant.

The costs under Clause 6, namely the costs forming part of the throughput fees, are reimbursements, for the following reasons;

i. They constituted the recovery of expenses, which were incurred, by VEK, as a principal, on behalf of the Applicant. These expenses were incurred by VEK, in order to supply, the operational services, set out under clause 6, of the Supply Services Agreement. The absence of a provision, requiring the Applicant to reimburse VEK for these costs, is very telling, as it shows that the costs incurred by VEK under clause 6, were incurred by VEK on its own behalf.

ii. The expenses in question were incurred by VEK, to enable it effectively, perform the operational services. It was essential for VEK to pay the salaries of its staff, the cost of its printing, the cost of renting its office space, the finance cost and the cost of clearing and forwarding, to enable it perform these services.

iii. Further, the expenses incurred were not for the exclusive use of the Applicant. The staff salaries, the office rent, the cost of borrowing and the clearing and forwarding expenses were all for the benefit of VEK.

For these reasons, we find that the Supply and Distribution costs, the financing costs and the clearing and forwarding costs, being reimbursements, constitute a supply and are accordingly subject to VAT.

Having determined as above, in respect of Withholding tax and Value Added Tax, this Application is dismissed with costs.

Dated at Kampala this.....21st.....day of.....February.....2025.

SIRAJ ALI	**ROSEMARY NAJJEMBA**	**CHRISTINE KATWE**
CHAIRMAN	**MEMBER**	**MEMBER**