THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: CHEBORION, MADRAMA AND MULYAGONJA, JJA)

CIVIL APPEAL NO 104 OF 2019

(ARISING FROM HCCS NO. 38 OF 2014)

UGANDA RAILWAYS CORPORATION} ..... APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY} .....RESPONDENT

(*Appeal against the Judgment and Orders of Wangutusi, J in High Court Civil Suit No 38 of 2014 delivered on 12th January 2016*)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

This appeal arises from the judgment and orders of Hon Justice David Wangutusi of the Commercial Division of the High Court in which he dismissed the appellant's appeal from the objection decision of the Commissioner General Uganda Revenue Authority.

The facts of this appeal as clearly stated by the respondent's counsel are that the appellant entered into a concession agreement with the government of Uganda. In April 2006, the appellant privatised its business operations by giving a 25-year concession to the concessionaire Messrs Rift Valley Railways Uganda Ltd (hereinafter referred to as RVR) at a concession fee of 11.1% of the gross annual revenue from income derived by the concessionaire within the boundaries of Uganda. Further, the concessionaire had the right to use the conceded assets of the appellant in providing freight services for the period of the concession in accordance with the terms of the agreement. The concession period was exclusively granted to RVR for a period of 25 years.

On 30th July 2014, the appellant wrote to the respondent to amend its VAT returns prior to July 2013 on the ground that it had erroneously declared its concession fees as standard rated when it is exempt under the Second Schedule of the VAT Act, cap 349. The respondent advised that the concession fees payable by the concessionaire to the appellant were standard rated since they do not full within the ambit of paragraph 1 (f) of the Second Schedule of the VAT Act. Secondly, the grant of the concession of the supply or service was within the meaning of section 11 (1) (B) of the VAT Act and the appellant was required to account for VAT on the receipts and there was no need to amend the earlier VAT Returns filed by the appellant. On 20th October 2014, the appellant applied for a private reading from the respondent under section 80 of the VAT Act on the issue of whether the concession fees are taxable or exempt under the Second Schedule of the VAT Act. On 29th October 2014, the respondent issued a private ruling in which it ruled that the concession fees paid or payable by the concessionaire to the appellant is a supply of services that does not fall within the ambit of section 19 and paragraph 1 (f) of the Second Schedule to the VAT Act and the appellant is required to account for VAT on fees paid by the concessionaire.

The appellant was aggrieved by the decision of the respondent and appealed to the High Court in High Court Civil Suit No 38 of 2014 for orders that the concession was a lease of immovable property which is exempt from VAT under the Second Schedule of the VAT Act.

At the hearing, the issue framed in court was:

"Whether the concession agreement between the Appellant and the concessionaire amounts to a lease under section 10 of the VAT Act, cap 349 and whether to that extent, the concession is exempt under Schedule 2, Part 1 (f) of the Act."

The learned trial judge dismissed the appeal with costs when he found that:

The concession agreement between the appellant and RVR took the form of a lease and was therefore a supply of goods by way of lease under section 10 (1) of the VAT Act.

The character of the lease between the appellant and the concessionaire did not take the form of an exempt supply since it was incidental to the principal supply of freight services.

The appellant being aggrieved appealed to this court on three grounds of appeal that:

1. The trial judge erred in law and in fact in holding that payments made by Rift Valley Railways to the appellant were in respect of freight services.
2. The learned trial judge erred in law and in fact in holding that the lease between the Appellant and the concessionaire did not take the form of those exempt from tax as outlined in paragraph 1 (f) of the Second Schedule of the VAT Act.
3. The learned trial judge erred in law and in fact by failing to evaluate the evidence and thereby came to a wrong conclusion.

The appellant prays that the court allows the appeal and sets aside the decision of the first appellate court. Secondly, the appellant prays that it be granted the remedies prayed for in the High Court. Thirdly that the costs of the appeal be granted to the appellant in this court and in the High Court.

When the appeal came for hearing, the appellant was represented by learned counsel Mr Cephas Birungyi appearing together with learned Counsel Ms Belinda Nakiganda while the respondent was represented by learned counsel Ms Nakku Mwajuma Mubiru and learned Counsel Tony Kalungi.

The advocates of the parties adopted their conferencing notes which had been filed on court record containing the skeleton arguments in this appeal and judgment was reserved on notice.

Submissions of the appellant's counsel.

In the written conferencing notes of the appellant, the appellant's counsel recounted the facts and in addition submitted that on 30th July 2014, the appellant wrote to the respondent applying for amendments on all VAT returns prior to July 2013 on the basis that the appellant leased its immovable assets for 25 years to the concessionaire with effect from 7th of April 2006. Secondly the concessionaire paid the appellant at a rate of 11.1% of the gross revenue for the leased assets on a quarterly basis which was the concession rate. Thirdly that the appellant erroneously declared this concession fee as standard rated yet it is exempt under the Second Schedule of the VAT Act cap 349.

On 11th September 2014, the respondent replied advising that the concession fees payable by the concessionaire to the appellant did not fall within the ambit of paragraph 1 (f) of the Second Schedule to the VAT Act and is therefore a standard rated supply. Further, that the concession is not a lease of immovable property but a right or an advantage, which is a service within the meaning of section 11 (1) (b) of the VAT Act and the appellant was required to account for VAT on the receipts and there was no need to amend earlier VAT returns.

On 20th October 2014, the appellant wrote to the respondent seeking a private ruling under section 80 of the VAT act on whether the concession fees are taxable or exempt under the Second Schedule of the VAT Act.

On 29th October 2014, the respondent ruled that section 4 (a) of the VAT Act provides that a tax to be known as a value-added tax shall be charged in accordance with the VAT Act on every taxable supply in Uganda made by a taxable person. Secondly that section 18 (1) defines a taxable supply, made by a taxable person for consideration as part of his or her business activities. Thirdly section 11 (1) (b) of the VAT Act provides that the supply of services includes the making available of any facility or advantage.

The respondent concluded that on the basis of the provisions, the concession fees payable by the concessionaire to the appellant is a supply

of services and does not fall within the ambit of section 19 and paragraph 1 (f) of the Second Schedule to the VAT Act and the appellant is required to account for VAT on fees paid by the concessionaire.

The appellant was aggrieved and lodged an appeal to the High Court for orders that the concession was a lease of immovable property exempt from VAT under the second schedule of the VAT Act 349.

On the question of whether the concession agreement between the Uganda Railways Corporation and Rift Valley Railways Uganda Ltd amounted to a lease under section 10 of the VAT Act, and whether to the extent the concession is exempt under the second schedule paragraph 1 (f) of the VAT Act, the learned first appellate court judge held that the concession agreement between the appellant and RVR took the form of a lease and was therefore a supply of goods by way of a lease under section 10 (1) of the VAT Act. Secondly the character of the lease between the appellant and the concessionaire did not take the form of an exempt supply since it was incidental to the principal supply of freight services.

The appellant's counsel submitted that the learned trial judge relied on the decision in **Furness vs Bond [1988] 4 TLR 457, Harvey v Pratt [1965] 1 WLR 1025** to hold that since there was exclusive possession of the right to use premises to the exclusion of all others, then the concession agreement between the appellant and RVR took the form of a lease and thus was a supply of goods as envisaged under section 10 (1) of the VAT Act.

The appellant's counsel addressed the issue of whether the transaction being a lease makes it exempt from tax under the Second Schedule Part 1 (f) of the VAT Act?

He submitted that the trial judge considered the authorities of **Card Protection Plan Vs Commissioner Customs & Exercise Case C - 349/96, Uganda Taxi Operators** and **Drivers Association (UTODA) vs URA Court of Appeal Civil Appeal number 15/2013** and **Purple Parking (Purple Parking Ltd vs HMRC 2009 SFTD 445** for the principle to consider the question "what did the consumer think he was getting or what was the purpose of the supply

in the eyes of the consumer?" Learned first appellate court judge decided that the objective of the transaction was freight services and that the transaction encompassed multiple supplies in the conceded assets which were incidental to the principal supply of freight services. Further the learned first appellate judge decided that the criteria for the supply by the appellant being incidental to freight services was that the parties did not intend to have two distinctive services. Accordingly, there would be no release if freight services could not be sustained thereon. The assets conceded were not an end in themselves but a means for the concessionaire to better enjoy the principal objective of freight services.

Ground one:

The learned trial judge erred in law and in fact in holding that the payments made by the Rift Valley Railways to the Appellant were in respect of freight services.

The appellant's counsel pointed out that the High Court deferred in the interpretation of the concession agreement in that the respondent had treated the concession agreement as a supply of services under section 11 of the VAT Act while the High Court decided that this was a supply of a lease and therefore a supply of goods. The appellants counsel contended that it was erroneous for his Lordship having found that the supply was of goods, to stretch it into the requirement for deciding incidental supplies. He submitted that according to section 10 of the VAT Act, a supply of goods is defined as follows:

> (1) Except as otherwise provided for under this Act, a supply of goods means any arrangement under which the owner of the goods parts or will part with possession of the goods, including a lease or an agreement of a lease and purchase.
>
> (3 The application of goods to only use is a supply of the goods.

The appellant's counsel pointed out that the only exception to this according to section 10 of the VAT Act is "Except as otherwise provided in this Act...". Further that the question is what the exception to the general rule is in

section 10 (supply of goods) and section 11 (supply of services) that would justify the introduction of section 12 which deals with mixed supplies? He submitted that section 12 of the VAT Act provides for mixed supplies and that is where the incidental provision arises. Section 12 still does not define what is incidental but refers to regulations made under section 78. The VAT Regulations make no mention of the term; "incidental" and therefore are not helpful. Without prejudice, even if there was room to find for incidental supplies, the learned trial judge ignored the laid down principles for determining what is incidental when he stated that the issue was whether the parties looking at the transaction intended to have distinctive services. Secondly whether the services create an end in themselves to a customer or are just a means of better enjoying the principal service. Thirdly whether a single price is being charged for the service and that a single supply from an economic point of view should not be artificially split so as to avoid distorting the VAT mechanism.

The appellant's counsel submitted that the learned first appellate court judge misconstrued the principle of incidental supplies as laid out in **Card Protection Plan Vs Commissioner Customs & Exercise Case** (supra) and the **Uganda Taxi Operators & Drivers Association (UTODA) vs Uganda Revenue Authority Court of Appeal Civil Appeal Number 15 of 2013**.

Counsel submitted that if the well tested principles had been applied, it would be clear for example that the supply of say office furniture, railway tracks, and marine infrastructure are very distinctive from freight services. A railway line which is a fixture on the ground cannot be confused for a train which runs on the track the same way a road cannot be confused with a bus which moves along it. The appellant's counsel contended that in this case, the appellant is likened to the owner of the road and the concessionaire as the owner of the bus. Whereas the bus may not run without the road, once the owner of the bus or road user charges, the owner of the road (government) cannot be deemed to be providing transport service.

Further, the appellant's counsel submitted that the second test for an incidental supply is whether it creates an end in itself to a customer or is

just a means of better enjoying the principal service. He submitted that a lease of land can be used for multiple purposes including providing accommodation, storage and any exclusive rights for a period of 25 years. The lesser cannot be responsible for how the lessee uses it. Further that a party who leases an asset, say a house could not possibly be considered to be carrying on the business of his tenants, say a shopkeeper. Each does the business that is an end in itself. The landlord cannot be deemed to be part of the shop keeping business simply because the shop sits on his land.

The appellant's counsel submitted that the third principle is whether a single price is being charged for the service and that a single supply from an economic point of view should not be artificially split so as to avoid distorting the VAT mechanism. He contended that this principle applies where for example in this case, when freight is provided by the concessionaire, the invoice value includes the lease charges and the appellant is using the same invoice to account for its transaction to the revenue authorities. This is clearly not the case for the impugned transaction.

In the premises, the three tests would not have found the appellant's supply to be incidental to freight services.

The appellants counsel further submitted that even if the test applied by the first appellate judge were to be correctly applied based on the **Purple Packing Case** (supra) which is what was the consumer thinking he was getting? In this case, the consumer was the concessionaire and clearly the consumer was getting a lease and not getting freight. The concessionaire was not expecting to get freight from the appellant.

The second test applied was what the purpose of the supply was in the eyes of the consumer. The appellant's counsel submitted that by the learned first appellate court judge shifting from the very test that he relied on to create a new test of the objective of the transaction, he stretched the intention of the law and of precedent. He submitted that section B B.1 of the concession agreement relied on by the learned first appellate court judge reads that

"the Government of Uganda grants the concessionaire the right to use the conceded assets in providing freight services for the concession term in accordance with the terms of this agreement."

Counsel submitted that the concessionaire's purpose is to provide freight services but that does not mean that the whole contract with the concessionaire is providing freight services. The test or objective of the transaction as advanced by the learned first appellate judge is clearly looking at the transaction from the perspective of one party which methodology is flawed. The appellant's counsel submitted that there are two distinct supplies provided by different persons. The appellant is to lease its property by way of concession and RVR is to provide freight services to third parties.

The appellant's counsel submitted that the supply of the lease concession by the appellant having been confirmed as a supply of goods, the other incidental supplies like office furniture and marine infrastructure could at worst become a mixed supply as provided for in section 12 of the VAT Act. He submitted that this was the argument of the appellant that was ignored in the judgment of the learned first appellate judge. The appellant also argued that if these supplies were not considered incidental, the respondent ought to have apportioned the tax per ratio of movable goods to immovable goods.

Counsel further referred to the **Field Fisher case** (supra) where the court held that "in cases where various services are supplied in return for an overall remuneration, but some of them are exempted from VAT, as the principal supplier is, while others are subject to VAT as independent supplies, it is necessary in such a case to apportioned between the various services, the service charges subject to VAT and the proportion exempt from VAT."

The appellant's counsel further submitted that the law having provided that leases beyond three months are exempt from tax have to be seen in their own right. Such leases are exempt but if the person paying the lessor is

doing standard rated business then the lease is incidental to that business and therefore becomes standard rated.

He submitted that the laws have to be read literally unless there is a mischief in reading them literally. (See **Cape Brandy Syndicate vs CIR [1921] 1 KB 64)**. In this case there was no mischief because the lease is clear that the freight services are not provided by the lessor (the appellant) but RVR who is the lessee. RVR never claimed that the payments of the lease are incidental to the freight and neither did the respondent argue that the lease is incidental to the freight services.

The appellant's counsel argued that freight services were to be supplied by RVR to 3rd parties and therefore it cannot be the principal supply by the appellant. Further they are distinct and independent of each other. The appellant's argument was that a service can only be ancillary/incidental if it is an integral part of the main supply. In this case the principal supply by the appellant to RVR was a lease concession. Further the other services that the respondent mentioned are services most of which are exempt under the VAT Act and the rest like software were merely incidental to the lease as an independent supply by the appellant.

The appellant's counsel relied on **Field Fisher Waterhouse LLP versus Commissioners of Her Majesty's Revenue and Customs; judgment of 27/9/12 Case C – 392/11** where it was held that a supply must be regarded as a single supply where two or more elements are supplied by a taxable person and have so close a link that they form, objectively, a single, indivisible economic supply, which it will be artificial to split.

The appellant submitted that the judge having held that the concession was a lease and thus a supply of goods, had no basis to import the idea of incidental supply and lead to the absurd conclusion that it was both a supply of goods and services.

Ground 2

The learned trial judge erred in law and in fact in holding that the lease between the appellant and the concessionaire did not take the form of those exempt from tax as outlined in paragraph 1 (f) of the Second Schedule of the VAT Act.

The appellant's counsel submitted that the trial court made a finding that the lease was a supply of goods under section 10 (1) of the VAT Act. This section defines "supply of goods" to mean "any arrangement under which the owner of the goods parts or will part with possession of the goods, including a lease, or an arrangement of sale and purchase."

It was crucial for the court to determine whether a lease is taxable or not under the VAT Act. The appellant's counsel relied on section 18 of the VAT Act which defines a "taxable supply" to mean "a supply of goods or services other than an exempt supply made in Uganda by a taxable person for consideration as part of his or her business activities. Further section 19 (1) of the VAT Act states that a supply of goods or services is an exempt supply if it is specified in the Second Schedule. Counsel relied on paragraph 1 (f) of the Second Schedule of the VAT Act which provides that certain supplies are specified as exempt supplies for purposes of section 19. This included "a supply by way of sale, leasing or letting of immovable property, other than, a sale, lease or letting of commercial premises; a sale, lease or letting for packing of string cars or other vehicles; a sale, lease or letting of hotel or holiday accommodation; a sale, lease or letting for periods not exceeding three months; or a sale, lease or letting of service apartments." He submitted that this implies that the lease of immovable property for more than three months is exempt from VAT.

By the learned trial judge finding that the transaction between RVR and the appellant was a lease of the conceded assets under the VAT Act, it led to the logical conclusion that the said supply is an exempt supply. Further the appellant submitted that having found that the supply was one of a lease, it was automatic that it fell within the provision of the Second Schedule paragraph 1 (f) and in section 10 (2).

Ground 3: That the learned trial judge erred in law and fact by failing to evaluate the evidence and thereby came to a wrong decision.

The appellant's counsel submitted that the way the learned trial judge arrived at the decision that the supply by the appellant was the supply of a lease, in the absence of any facts to introduce the element of incidental supply, that conclusion that the appellant supplies are freight services is not supported.

Further counsel submitted that the learned trial judge having addressed case law on what constitutes incidental supplies diverted from those principles for no justifiable reason and after misconstruing who the consumer of the services is, arrived at a wrong conclusion that the consumer of the supply is government rather than RVR.

Further the learned trial judge ignored all the submissions of the appellant in respect of actual supplies which co-founded the separate and stand-alone supplies of goods.

In the premises, the appellant's counsel prayed that the grounds of appeal be allowed and the decision of the learned trial judge be set aside in respect of the conclusion that the supply is one of freight. Further, the appellant be allowed to amend the returns to reflect the exempt status of the lease payments from RVR and the appellant be awarded costs both in this court and in the High Court.

Submissions of the respondent in reply.

In reply, the respondent's counsel argued grounds 1 and 2 of the appeal together.

1. The learned trial judge erred in law and fact in holding that payments made by the Rift Valley Railways to the Appellant were in respect of freight services.
2. The learned trial judge erred in law and fact in holding that the lease between the Appellant and the Concessionaire did not take the form

of those exempt from tax as outlined in Paragraph 1 (f) of the Second Schedule of the VAT Act.

The respondent's counsel argued that the learned trial judge rightly found that the principal objective of the transaction was provision of freight services. Secondly, he submitted that the appellant was wrong to argue that the learned trial judge erred when his decision deferred from the interpretation of the respondent on the treatment of the concession assets. The role of the trial court is to analyse the evidence on record and come to an informed decision without necessarily having to stick to arguments of the parties before court. She contended that the learned trial judge was right to come to an informed decision, having analysed the evidence on record.

Counsel argued that the appellant's appeal was an appeal from a taxation decision and therefore the appeal to this court was from the appellate decision of the High Court making this appeal a second appeal which can only be brought on a question of law. Counsel further referred to section B (Part B.1 of the concession agreement which states that the "GOU grants the concessionaire the right to use the conceded assets in providing the freight services for the concession term...". Further under B 4 paragraph 1, the concessionaire shall operate all freight services in accordance with the provisions of the agreement.

In the premises the learned trial judge rightly held that the principal objective of the transaction was freight services. The respondent's counsel submitted that the transaction consisted of various supplies in the conceded assets which were incidental to the principal supply of freight services. The term "incidental" is not defined in the VAT Act. However, in **Customs and the Exercise Commissioners Vs Midget and Baldwin (trading as Howden Court Hotel) (1998) STC, 1189** it was held that "a service must be regarded as ancillary to the principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied."

Further in the **Canadian National Railway Corporation vs Harris [1946] SCR 352 at 386**, and incidental thing was defined as something occurring or liable to occur in fortuitous or subordinate conjunction with something else.

The respondent's counsel submitted that the assets which the appellant provided to RVR in the concession were not an end in themselves but a means for the concessionaire to better enjoy the principal objective of freight services. The respondent argued that the appellant provided a single supply which cannot be divided into several supplies.

Further the respondents counsel relied on **Card Protection Plan vs Commissioner Customs & Exercise, Case C – 349/96** where it was held that "a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical customer, with several distinct principal services or with a single service."

The respondent's supported the finding of the learned first appellate court judge that looking at the transaction, the parties did not intend to have two distinctive services. He found that there would be no lease if freight services could not be sustained thereon. The respondent's counsel also relied on the **Commissioners for Her Majesty's Revenue and Customs vs The Honourable Society of Middle Temple, [2013] UKUT 0250 (TCC) Appeal No FTC/45/2012** where it was held that two distinct types of single composite supply are available namely (1) where one or more supplies constitutes a principal supply and other supply or supplies constitute one or more ancillary supplies which do not constitute for customers an end in themselves but a means of better enjoying the principal service supplied; and (2) where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

The respondent's counsel submitted that the transaction is a single transaction which cannot be split into provision of different types of supplies. The principal objective of the concession, indeed, the learned trial judge rightly found that there would be no lease if freight services could not be sustained thereon. The supplies in the conceded assets were incidental to the principal supply of freight services.

Counsel further relied on **Purple Parking Ltd, Parks Services Ltd Vs Revenue & Customs Commissioners (Case C – 117/11) [2012] BVC 268** where it was held that: "in certain cases, several formally distinct services, which could be supplied separately and thus give rise, separately, to taxation or exemption, must be considered to be a single transaction when they are not independent. Such is the case particularly where one or more elements are to be regarded as constituting the principal supply, while other elements are to be regarded, by contrast, as one or more ancillary supplies which share the tax treatment of the principal supply...".

Counsel emphasised that the learned trial judge rightly found that the principal objective of the transaction was freight services.

Further, the respondent argued that the learned trial judge rightly found that the lease between the appellant and the concessionaire did not take the form of those exempt from tax as outlined in paragraph 1 (f) of the Second Schedule to the VAT Act. The respondents counsel supported the decision of the first appellate court judge that the principal objective of the transaction was for provision of freight services. This means that the freight services at the principal supply to be taxed. Counsel relied on section 4 of the VAT Act which imposes a tax to be known as value-added tax to be charged on every taxable supply made by a taxable person. He submitted that the tax payable in the case is paid by the taxable person making the supply in accordance with section 5 of the VAT Act. Further under section 18 of the VAT Act, a taxable supply is a supply of goods or services, other than an exempt supply made in Uganda by a taxable person for consideration as part of his or her business activities.

The respondents counsel relied on **Faaborg – Gelting Linien A/S vs Finanzamt Flensburg, Case C – 231/94,** where it was held that in order to determine whether transactions constitute supplies of goods or supplies of services, regard must be hard to all the circumstances in which the transaction in question takes place in order to identify its characteristic features.

The respondent argued that the appellant is a taxable person who made taxable supplies. The learned trial judge found that the concession agreement between the appellant and RVR took the form of a lease and was therefore a supply of goods by way of a lease as envisaged under section 10 (1) of the VAT Act. The learned trial judge further found that the principal objective of the transaction was freight services, and the assets conceded were incidental to the principal supply of freight services. Further section 19 of the VAT Act provides that the supply of goods or services which are exempt from VAT are those specified in the Second Schedule of the VAT Act.

Counsel submitted that freight services are a taxable supply as envisaged under section 18 of the VAT Act since they are not among those specified in the Second Schedule and in section 19 of the VAT Act. Further under section 12 (2) of the VAT Act, a supply of goods incidental to the supply of services is part of the supply of services.

The respondent's counsel submitted that the learned first appellate court judge rightly found that the conceded assets in the lease were incidental to the principal supply of freight services. This meant that the supply became part of the principal supply of freight services which is a standard rated supply that is not exempt from VAT. It followed that the concession agreement between the appellant and RVR is not VAT exempt.

Further the respondent's counsel supported the decision of the learned trial judge that the lease between the appellant and the concessionaire did not take the form of those exempt from tax as outlined in paragraph 1 (f) of the Second Schedule to the VAT Act.

The respondent's counsel invited the court to find that the principal objective of the transaction was freight services and that the concession agreement between the appellant and RVR is not exempt from VAT. Further, that grounds 1 & 2 of the appeal have no merit and should be dismissed.

Ground 3: The learned trial judge erred in law and fact by failing to evaluate the evidence and thereby came to a wrong decision.

The respondents counsel submitted that the learned first appellate court judge properly evaluated the evidence on record and came to a correct and well-informed decision. She prayed that this ground of appeal be struck out on the ground that it is frivolous since the appellant does not clearly point out what evidence on record was not evaluated by the learned trial judge. She contended that this ground is speculative and unsupported and ought to be dismissed.

Secondly as a second appeal counsel submitted that it can only be on questions of law and not on evaluation of evidence (see **Kifamunte Henry vs Uganda; Criminal Appeal Number 10 of 1997**). He contended that the learned trial judge properly evaluated the evidence.

Submission of the appellant's counsel in rejoinder.

With regard to objection to ground one of the appeal that the learned trial judge not hold that payments made by the Rift Valley Railways to the appellant were in respect of freight services, the appellant's counsel submitted that the true decision of the learned trial judge is that payments made by the Rift Valley Railways to the appellant were in respect of freight services. This is because the learned trial judge found that "the assets conceded were not an end in themselves but a means for the concessionaire to enjoy the principal objective of freight services." Further the learned trial judge found that since the character of the lease between the appellant and the concessionaire did not take the form of those exempt from tax as outlined in paragraph 1 (f) of the Second Schedule of the VAT Act, having found that it was incidental to the principal supply of freight services, the concession agreement between the appellant and the Rift

Valley Railways is not exempt from VAT. In summary the learned trial judge finding was that the principal purpose of the transaction between the appellant and the Rift Valley Railways was a supply of freight services.

The appellant's counsel submitted that VAT may be charged on payments under section 14 (1) (c) of the VAT Act applies. In other words, the supply of freight services is taxable as found by the learned trial judge and this implies that payment by the Rift Valley Railways to the appellant were in respect of freight services and therefore taxable. Counsel for the appellant submitted that the finding of the learned trial judge implies that all the concession payments made by Rift Valley Railways to the appellant were in respect of the principal objective of the supply of freight services. He submitted that this position reflects the true decision of the learned trial judge.

Further, the appellant's counsel submitted that the respondent's argument that the first ground of appeal should be dismissed for not reflecting the true decision of the trial judge is misguided and should be overlooked.

With regard to the supply being incidental supplies, it was the finding of the learned trial judge that the principal objective of the transaction was freight services and that the assets which the appellant provided to RVR in the concession were not an end in themselves but a means for the concessionaire to better enjoy the principal objective of freight services.

The appellant submits that the learned trial judge contradicted himself on the nature of the transaction between the appellant and RVR. On the one hand the learned trial judge agreed with the appellant and found that the transaction was a lease. However later in the judgment, he found that the principal objective of the transaction was freight services. Counsel relied on the definition of "freight services" to include rail transportation of freight including any marine component on the Lake Victoria linking railway freight services between separate railway networks or any road component within Uganda provided the same form an integral part of the provision of such railway freight services. He further referred to the definition of the word

"freight" by **Black's Law Dictionary Eight Edition** to mean goods transported by water, land or air, cargo, or the compensation paid to a carrier for transportation of goods. He submitted that the definitions and the agreement between the appellant and RVR is clear that the appellant was not providing freight services as defined because it was not performing any transportation of cargo for RVR but was leasing its assets to enable the latter to provide freight services.

The appellants contend that the learned trial judge erred when taking cognizance of the lease and found that the principal objective was freight services. Counsel contends that the only supply the appellant made in the transaction was a supply of goods (the conceded assets) by way of a lease as rightly found out to by the learned trial judge. Secondly there were no incidental supplies in this case.

The appellant's counsel relied on section 12 (2) of the VAT Act which provides that the supply of goods incidental to the supply of services is part of the supply of services. He submitted that there was no supply of freight services from the appellant to RVR. That the agreement is between two parties namely the appellant and RVR. The appellant is the lessor and RVR is the lessee. He submitted that it is critical to separate the roles according to the agreement in order to identify which party supplies which service. The appellant supplied RVR with conceded assets by way of a 25 lease in exchange for concession fees. Under section 19 of the VAT Act, when read together with the Second Schedule, a lease of immovable property for more than three months is an exempt supply. The appellant's counsel submitted that under the agreement, RVR was supposed to supply freight services. He submitted that this are two independent supplies by two independent parties carrying out distinctive businesses. It would have been incidental if one party was providing both services. The appellant contends that it is also important to take cognizance of section 14 (1) (c) of the VAT Act that clearly stipulates that a supply is deemed to take place at the earliest of the following events; (i) the goods are delivered or made available, or the

performance of the service is completed; (ii) payment for the goods or services is made; or (iii) a tax invoice is issued.

VAT is charged at the point when a supply is made. In this case, the appellant when entering the transaction with RVR and was supplying its assets to RVR by way of a 25-year lease. Though it is known that RVR is in the business of providing freight services, there was no provision of freight services taking place between the appellant and RVR.

Counsel submitted that RVR entered the concession agreement to lease the appellant's assets and use the same to provide freight services and it cannot be said that the appellant supplied RVR with freight services. He further relied on the case of **Card Protection Plan vs Commissioners of Customs & Exercise Case C – 349/96** where the court held that "a supply which constitutes a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer being a typical customer with several distinct principal services or with a single service."

The appellant submitted that the learned trial judge artificially split the transaction and found that the principal objective was freight services, the VAT mechanism was distorted in order that a supply which is ordinarily exempt became a standard rated supply. In the premises, the only supply that the appellant made in the transaction was a supply of immovable property for 25 years from the appellant to RVR thus amounting to an exempt supply as provided for by section 19 and paragraph 1 (f) (iv) of the VAT Act.

The appellants counsel further submitted on the nature of the lease. He submitted that the respondent's position is that the learned trial judge rightly found that the lease between the appellant and the concessionaire did not take the form of those exempt from VAT under the VAT Act. Further that under section 10 of the VAT Act, a supply of goods is defined as "any

arrangement under which the owner of goods parts or will part with possession of the goods, including a lease of an agreement of sale and purchase." He submitted that for a supply to be deemed the supply of goods under section 10, it has to be considered whether under the concession agreement, the appellant owned the goods and agreed under the concession to part with those goods.

The appellant's counsel submitted that the concession agreement has certain clauses that show that the appellant owned the goods and agreed to part with the goods. In the clause C.1 (1) of the concession agreement, it is provided that the conceded assets are owned by the appellant. Secondly in clause C.1 (2) of the concession agreement, the appellant shall make available at the commencement date, the conceded assets to the Concessionaire. Further in clause B.1 (1) read together with clause B.2 of the concession agreement, it is clearly provided that the rights granted under the concession agreement is a right to use the conceded assets exclusively for a 25-year term. It followed that the appellant parted with its goods. It was further provided under clause M.9 (1) (a) that the possession of the conceded assets shall revert back to the appellant.

From the reading of the provisions, it is clear that the appellant parted with the conceded assets at the commencement date and give possession to the concessionaire for a period of 25 years. It followed that the concession agreement falls within the provisions of section 10 of the VAT Act as a supply of goods, specifically as a lease.

Counsel submitted that the VAT Act has not defined what amounts to leasing or letting of immovable property and relied on **Black's Law Dictionary Eighth Edition** for the definition as a contract by which the rightful owner of real property conveys the right to use and occupy property in exchange for consideration usually rent. The lease term can be for life, for a fixed period, or for a period terminable at will. The appellant's counsel further relied on **Halsbury's laws of England Volume 27 (1) (2006)** for principles in determining whether there is a lease agreement. He submitted that the learned trial judge rightly found that the concession agreement was a lease

as envisaged under section 10 of the VAT Act. He however went on to hold that the lease is not exempt regardless of the fact that it was for more than three months on the ground that it was an incidental supply of freight services.

The appellant's counsel further submitted that the concession agreement amounted to a lease of more than three months and is therefore exempt under section 19 and the Second Schedule paragraph 1 (f) of the VAT Act.

Counsel further made rejoinder on the issue of whether the learned trial judge failed to properly evaluate the evidence on record.

Consideration of the appeal.

This appeal purports to be a second appeal arising from the decision of the High Court/Commercial Division on appeal from an objection decision of the respondent. The appeal originates from a decision delivered at Kampala on appeal by the High Court on 12th January 2016 arising from a cause of action that arose in the April 2006 under the law in force then.

The appellant commenced an appeal by notice of appeal in the High Court under section 33D of the VAT Act. The appeal was listed as Civil Appeal No 88 of 2014 and the notice indicates that the appellant was dissatisfied with the taxation decision of the Uganda Revenue Authority dated 29th October 2014 and appeal to the High Court against the decision for determination of the question:

> **Whether the concession agreement between Uganda Railways Corp and Rift Valley Railways Uganda Ltd amounts to a lease under Section 10 of the VAT Act cap 349 and whether to that extent the concession is exempt under Schedule 2 (f) of the Act.**

Section 33D of the Value Added Tax Act provides that:

> (1) A party who is dissatisfied with the decision of the Tax Appeals Tribunal may, within 30 days after being notified of the decision, lodge a notice of appeal with the Registrar of the High Court and the party so appealing shall serve a copy of the notice of appeal on the other party to the proceedings before the Tribunal.

(2) An appeal to the High Court shall be made on a question of law only and the notice of appeal shall state the question or questions of law that are to be raised on the appeal.

The appellant did not appeal to the Tax Appeals Tribunal but opted to appeal to the High Court. Section 33D (2) of the VAT Act confines an appeal to the High Court to questions of law only. In the circumstances of this appeal, the appellant never filed an appeal to the Tax Appeals Tribunal. Section 33C of the VAT Act envisages an appeal to the Tax Appeals Tribunal because it provides that:

33C (1) A person dissatisfied with an objection decision may, within 30 days after being served with notice of the objection decision, lodge an application with the Tax Appeals Tribunal for review of the objection decision and shall serve a copy of the application on the Commissioner General.

(2) An appeal lodged under subsection (1) shall be conducted in accordance with the Tax Appeals Tribunal Act 1997 and Rules and Regulations made under it.

(3) A person shall, before lodging an application with the Tribunal, pay to the Commissioner General, 30% of the tax in dispute or that part of the tax assessed not in dispute, whichever is greater.

The subsequent section 33D deals with appeals to the High Court and it is clear under section 33-D that a right of appeal is granted to a person who is dissatisfied with the decision of the Tax Appeals Tribunal who may within 30 days after being notified of the decision, lodge a notice of appeal with the Registrar of the High Court. Thereafter it is provided that an appeal to the High Court shall be made on the question of law only. It is further pertinent to note that a person who files an appeal direct to the High Court from the Commissioners objection decision is technically not bound to pay the 30% tax provided for under section 33C (3) of the VAT Act.

Further, it is erroneous to consider the appellant's appeal as a second appeal. The High Court had no appellate jurisdiction because appellate jurisdiction is a creature of statute and the statutory provision which confers the right of appeal specifies which court or tribunal has jurisdiction

to hear the appeal. Article 152 (3) of the Constitution of the Republic of Uganda provides that:

> (3) Parliament shall make laws to establish tax tribunals for the purposes of settling tax disputes.

The constitutionally envisaged Tax Appeals Tribunal was established under The Tax Appeals Tribunals Act cap 345 laws of Uganda which under section 2 thereof establishes it. Under section 27 of the Tax Appeals Tribunal Act, it is provided that an appeal shall lie to the High Court from decisions of the tribunal. Section 27 provides as follows:

> 27. Appeals to the High Court from decisions of the tribunal.
>
> (1) A party to a proceeding before a tribunal may, within 30 days after being notified of the decision or within such further time as the High Court may allow, lodge a notice of appeal with the registrar of the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party to the proceeding before the tribunal.
>
> (2) An appeal to the High Court may be made on the question of law only, and the notice of appeal shall state the question or questions of law that would be raised on the appeal.
>
> (3) The High Court shall hear and determine the appeal and shall make such order as it thinks appropriate by reason of its decision, including an order affirming or setting aside the decision of the tribunal or an order remitting the case to the tribunal for reconsideration.

By the time the appellant filed an appeal to this court, there was no decision of the Tax Appeals Tribunal. Granted, appeals lie to the Court of Appeal from decisions of the High Court under section 10 of the Judicature Act cap 13 laws of Uganda which provides for the jurisdiction of the Court of Appeal in the following words:

> An appeal shall lie to the Court of Appeal from decisions of the High Court prescribed by the Constitution, this Act or any other law.

Further, article 134 (2) of the Constitution provides that:

An appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law.

I have referred to this appeal as a purported appeal because the appellant in the notice of appeal to the High Court, clearly indicated that it is an appeal against the decision of Uganda Revenue Authority dated 29th of October 2014. Secondly, it was entitled as an appeal under section 100 of the Income Tax Act. The section 100 cited in the notice of appeal was amended to read section 33D VAT Act by handwriting. Clearly this was an appeal under the VAT Act because it challenges the decision of the Commissioner General pursuant to an objection decision. Objection decisions are made under section 33B (1) of the VAT Act which provides that:

(1) A person who is dissatisfied with an assessment may, within 45 days after receipt of the notice of assessment decision, lodge an objection to the Commissioner General.

The Commissioner General of the respondent then makes a decision which is defined under section 33A (ii) as an "objection decision". An objection decision is appealed to the Tax Appeals Tribunal under section 33C of the VAT Act. There is no statutory provision that enables an appeal to the High Court from an objection decision under the VAT Act. Before amendment, it is the Income Tax Act cap 340 which gave an appellant the right to appeal either to the High Court or to the Tax Appeals Tribunal. This is under section 100 (1) which provides that:

100.(1) A taxpayer dissatisfied with an objection decision may, at the election of the taxpayer –

(a) appeal the decision to the High Court; or

(b) apply for review of the decision to a tax tribunal established by Parliament by law for purposes of settling tax disputes in accordance with Article 152 (3) of the Constitution.

The section further in subsection 4 provides that an appeal to the High Court under subsection (1) may be made on questions of law only and notice of

appeal shall state the question or questions of law that will be raised on the appeal. Section 101 of the Income Tax Act further provides that:

> A party to a proceeding before the High Court who is dissatisfied with the decision of the High Court may, with the leave of the Court of Appeal, appeal the decision to the Court of Appeal.

In other words, before amendment of the Income Tax Act through a repeal by the Tax Procedures Code Act 2014, of the section, an appeal to the Court of Appeal had to be with the leave of the Court of Appeal. This was under the Income Tax Act.

Judicial precedents on the point are clear that an appeal is a creature of statute as held by the East African Court of Appeal in **Attorney General v Shah (No. 4) [1971] EA, 50**. In that judgment an appeal against an order of mandamus against officers of the Government had been challenged by the Attorney General who lodged an appeal to the East African Court of Appeal which had jurisdiction to hear appeals from the High Court. The respondent objected to the appeal on the ground that no appeal lies as the court had no jurisdiction in the matter. Spry Ag P who delivered the judgment of court held *inter alia* that:

> It has long been established and we think there is ample authority for saying that appellate jurisdiction springs only from statute. There is no such thing as inherent appellate jurisdiction.

In establishing what jurisdiction the court had, the court considered the relevant statutes that conferred the jurisdiction. This included Article 89 of the Constitution of the Republic of Uganda 1967 (which is repealed by the Constitution of the Republic of Uganda 1995 and which substituted that section with article 134 (2)) and the Judicature Act 1967 (repealed by the Judicature Act cap 13 which replaced it with section 10 of the Judicature Act that I have considered above). Under Article 134 (2) of the Constitution an appeal lies to the Court of Appeal from such decisions of the High Court as are prescribed by law. The question of which law is applicable is clear. Section 33D confers appellate jurisdiction on this court to hear appeals

from the decision of the Tax Appeals Tribunal in VAT tax disputes under the VAT Act. It confers a right of appeal to appeal to the Tax Appeals Tribunal from a taxation decision of the Commissioner General as I have outlined above.

Calling the appeal before this court a second appeal does not confer jurisdiction on the High Court and consequentially on this court. The High Court heard the appeal without any appellate jurisdiction and without objection from the appellant. However, a decision without jurisdiction is a nullity. The High court did not hear an original suit under its inherent powers so as to confer a right to appeal to this court. The High Court in the circumstances, ought to have referred the matter to the Tax Appeals Tribunal since its jurisdiction was that of a second appellate court. The procedure adopted in handling the matter not only circumvented the payment of 30% of the VAT assessed but also put the proper determination of the dispute in jeopardy for want of jurisdiction of the Courts.

There is no right of appeal to the High Court and as indicated above, and an appeal is a creature of statute. The statute which caters for objection decisions prescribed a right of appeal to the Tax Appeals Tribunal under section 33C of the VAT Act. Section 33D which is the very section quoted by the appellant to move the High Court confers jurisdiction on the High Court to hear appeals from a decision of the Tax Appeals Tribunal and not from the Commissioner General. The High Court had no appellate jurisdiction to determine directly the fate of the objection decision of the Commissioner General except by way of an appeal from the decision of the tax tribunal.

It follows that the appellant did not have a right of appeal to the High Court and conversely the High Court had no appellate jurisdiction in the matter. An appeal to the High Court would be a second appeal and an appeal to this Court, a third appeal. Under section 73 of the Civil Procedure Act, a third appeal lies on a certificate of the High Court that the matter concerns a matter of law of great public or general importance or where the Court of Appeal in its overall duty to see that justice is done considers that the appeal should be heard. This is not a third appeal and originates from an

appellate decision issued without jurisdiction. The High Court having handled the matter without jurisdiction, the same matter cannot be remitted to the Tax Appeals Tribunal who were the proper forum to hear the appeal.

In the premises, I would strike out the appeal with no order as to costs.

Dated at Kampala the 16th day of Sept 2022

Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Cheborion Barishaki, Christopher Madrama & Irene Mulyagonja)

CIVIL APPEAL NO. 104 OF 2019

(Arising from HCCS No.38 of 2014)

UGANDA RAILWAYS CORPORATION::::::::::::::::::::::::::::::::**APPELLANT**

VERSUS

UGANDA REVENUE AUTHORITY::::::::::::::::::::::::::::::::::::**RESPONDENT**

(Appeal from the Judgment and Orders of Wangutusi, J delivered on 12th January, 2016 in High Court Civil Suit No.38 of 2014)

JUDGMENT OF CHEBORION BARISHAKI, JA

I have had the benefit of reading in draft the judgment of my learned brother Christopher Madrama, JA and I agree with him that the appellant had no right of appeal to the High Court and the High Court had no appellate jurisdiction in the matter. The purported appeal to this Court originates from an appellate decision which was issued without jurisdiction.

For that and other reasons he has given, the appeal ought to be struck out. Since Mulyagonja, JA also agrees, this appeal is struck out with no order as to costs.

It is so ordered.

Dated at Kampala this ...16th..... Day of .....Sept..... 2022

Cheborion Barishaki

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Barishaki, Madrama and Mulyagonja, JJA)

CIVIL APPEAL NO 104 OF 2019

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UGANDA RAILWAYS CORPORATION :::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY ::::::::::::::::::::::::::::::RESPONDENT

(Appeal from the Judgment and Orders of Wangutusi, J delivered on 12th January 2016 in High Court Civil Suit No 38 of 2014)

JUDGMENT OF IRENE MULYAGONJA JA

I have had the benefit of reading in draft the judgment of my learned brother Christopher Madrama, JA. I agree that the appeal be struck out for the reasons that he has given, and with no order as to costs.

Dated at Kampala this 16th Day of Sept 2022.

Irene Mulyagonja

JUSTICE OF APPEAL