THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 82 OF 2019

MH-JHU CARE LIMITED ==========APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ==========RESPONDENT

BEFORE: DR. ASA MUGENYI MRS. CHRISTINE KATWE MR. SIRAJ ALI

RULING

This ruling relates to the apportionment of input tax and whether the applicant is liable to pay Value Added Tax (VAT) of Shs. 129,904,532.01.

The applicant is a non-profit organization whose main business is medical research, carried out in collaboration with Makerere University and John Hopkins University. The applicant derives income through the hire of its conference facilities and provision of dexa scan services. The applicant's supplies consist of both taxable and exempt supplies. The applicant claimed input tax credit a portion of which was disallowed.

The respondent conducted a review of the applicant's returns and raised a VAT assessment of Shs. 14,165,047,716 on the basis of variances between VAT returns and income tax sales. After the applicant's objection, the said sum was revised to Shs. 129,904,532.01.

The following issues were set down for determination;

1. What is the applicant's VAT liability?
2. What remedies are available to the parties?

The applicant was represented by Ms. Belinda Nakiganda and Ms. Lydia Namungoma while the respondent by Ms. Charlotte Katuutu.

The question for our determination is whether in applying the formula for the apportionment of input tax provided for under S. 1(f) of the Fourth Schedule of the VAT Act, donor funds received by the applicant should be included as a supply?

The applicant's witness, Mr. Charles Gabula, its financial manager testified that the applicant is a non-profit organization. The applicant collaborates with Makerere University and John Hopkins University to conduct medical research. It receives funds from various donors for the running of its activities. It also receives income from the provision of specialized scans to measure bone density using dexa scan machines. It also receives income from hiring out its conference rooms to other research partners.

He testified that on 6th December 2018, the respondent assessed the applicant VAT of Shs. 14,165,047,716 for the financial years 2014 to 2017. It objected. Following the objection the assessed amount was reduced to Shs. 129,904,532. He also testified that the income from the use of the dexa scan was exempt. He testified that the dispute between the parties relates to the computation of the allowable input tax using the formula provided for under Paragraph 1(f) of the 4th Schedule of the VAT Act relating to the apportionment of input tax. He contended that in apportioning the input tax allowed, the applicant included income from the use of the dexa scans (exempt supplies) and rental income from the hire of its conference rooms (taxable income) and excluded donor funds because they did not constitute a supply under the VAT Act. The witness prayed for the tribunal to find that the donor funds received by the applicant did not constitute a supply and were therefore not subject to VAT and that the applicant is entitled to input tax of Shs. 66,839,658 and Shs. 39,648,023 for the financial years ended 30th June 2016 and 30th June 2017 respectively.

The respondent's witness, Mr. Muketa Herbert Eric, an officer in its objections and appeals unit testified that the applicant is a non-profit making company whose main activity is medical research. It receives donor funds and income from rental of conference facilities and provision of dexa scan services. The witness testified that the applicant's

taxable supplies constitute of rent from its conference facilities while its exempt supplies consist of income from the provision of dexa scan services and medical research.

Mr. Muketa testified that the respondent carried out a review of the applicant's VAT returns and raised an assessment of Shs. 14,165,047,716 for the financial years 2014 to 2017. The assessment was based on the variances between the applicant's VAT returns and its income tax sales. The witness testified that following an objection from the applicant the assessments were eventually reduced to Shs. 129,904,532.01. The only issue requiring the determination of the tribunal was the apportionment of input tax and what constituted exempt supplies. Mr. Muketa stated that the applicant's argument was that donor funds are not a supply and should be excluded from the computation of input tax. Mr. Muketa stated that on the other hand the determinant in computing the applicant's input tax was whether the supply is taxable or exempt and not the method by which the medical research was financed. The witness contended that donor funding was only a mode of financing. The witness testified that since according to its computation the fraction of B/C was less than 0.05, the applicant was not entitled to input credit for the years 2016 to 2017 and has a VAT liability of Shs. 129,904,532.01.

In respect of the first issue, the applicant submitted that it obtains income from dexa scans. Under S. 19 of the VAT Act a supply of goods or services is an exempt supply if it is specified in the Second Schedule. The said Schedule Paragraph 1 provides that the supply of medical services is an exempt supply. The applicant contended that since dexa scans are used to measure bone density, it is a medical service and therefore VAT exempt. The applicant also contended that it receives grants from different organizations. It contended that donor funds were not taxable supplies because they are neither goods nor services. The applicant cited S. 1(h) of the VAT Act which defines goods as all kinds of movable and immovable property but does not include money. The applicant submitted therefore that since donor funds amounted to money they were not goods within the meaning of S. 1(h) of the Act. The applicant also cited S. 1(t) of the VAT Act which defines services as anything that is not goods or money. The applicant submitted that since donor funds took the character of money they were not services.

The applicant contended that the dispute revolves around apportionment of input tax. The applicant is a non-profit making institution which deals in both taxable and exempt supplies. The taxable supply being rent while the exempt one was provision of dexa scans. The applicant submitted that S. 28(7) of the VAT Act provides that input tax is calculated according to the formula specified in the Fourth Schedule which is set out in S. 1(f) as **A x B /C** where;

A is the total amount of input tax for the period.

B is the total amount of taxable supplies made by the taxable person during the period.

C is the total amount of all supplies made by the taxable person during the period other than an exempt supply under paragraph 1(k) of the Second Schedule to the VAT Act.

According to the applicant, A comprised of Shs. 92,065,644 and Shs. 98,872,876 which was input tax claimed for the years 2016 and 2017 respectively. B comprised of rental income from the hire of the applicant's conference rooms for the years 2014 to 2017 of Shs. 184,074,751, Shs. 256,401,318, Shs. 347,859,305.41 and Shs. 63,261,001.8 respectively. C comprised the rent and the provision of the dexa scan services for the years 2014 to 2017 of Shs. 317,832,167.8, Shs. 364,552,555, Shs. 478,887,054.97 and Shs. 157,612,684.8 respectively. Applying the above formula, the applicant submitted that it is entitled to input tax credit of Shs. 66,839,657 for the year 2016 and Shs. 39,648,023 for the year 2017.

The applicant claimed that it is entitled to input tax credit of Shs. 66,839,657 and Shs. 39,648,023 for the years 2016 and 2017 respectively. It also contended that any penalties or interest on any tax arrears be waived in accordance with S. 40C of the Tax Procedure Code Act.

In reply, the respondent contended that the applicant's VAT liability for the period is Shs. 129,904,532.01. The respondent submitted that that the applicant's main business is HIV medical research conducted with Makerere University and John Hopkins University. The respondent submitted that the applicant's supplies constitute exempt supplies which

include the provision of dexa scan services and medical research and taxable supplies which include rent from conference rooms and facilities. The respondent submitted that the crux of the dispute between the parties related to the apportionment of input tax credit.

The respondent cited S. 28(3) of the VAT Act which provides the circumstances under which an input tax credit is allowed to a taxable person. The respondent submitted that the correct formula for apportioning the input tax credit is the formula set out under S. 28(7) (b) and S. 1(f) of the Fourth Schedule. The respondent submitted that the expenses the applicant claimed for input tax credit are listed in paragraph 26 of the witness statement of Muketa Eric Herbert as electricity, water, security, computer hardware and accessories, internet services, telephone services, cleaning services, air conditioning services, stationery, audit and legal services, furniture, supply of vehicles and motor vehicle repairs, hotel hire and office supplies. The respondent submitted that the applicant can only claim input tax credit in respect of conference facilities but it has failed to adduce evidence to prove the expenses it incurred in respect of the provision of conference facilities and therefore its claim ought to fail. The respondent submitted that the testimony of Muketa Eric Herbert showed that the applicant was assigning all its costs on its conference hire income.

The respondent submitted that item 1(h) of the Second Schedule to the VAT Act provides that medical services are exempt supplies for the purposes of S.19 of the VAT Act. The respondent submitted that as such the provision of medical research services and the provision of dexa scan services by the applicant are exempt supplies. The respondent submitted that in determining what amounted to the total supplies of the applicant it included medical research and the provision of dexa scan services as exempt supplies and income from the hire of the conference rooms and facilities as taxable supplies.

The respondent submitted that according to S. 28(8) of the VAT Act, where the fraction of B/C in S. 1(f) of the Fourth Schedule is less than 0.05%, the taxable person may not credit any input tax for the period. The respondent contended that since the fraction of B/C is less than 0.05, the applicant is not entitled to input tax credit for the years 2016

and 2017. The respondent submitted that according to its computation the amount of credit allowed for the year 2016 is Shs. 1,371,502 being 0.0028% while that for the year 2017 is Shs. 276,974 which amounts to 0.028%. The respondent prayed that the application be dismissed with costs and the applicant be found liable to pay Shs. 129,904,532.01 as VAT.

In rejoinder, the applicant contended that medical research is not an exempt supply because it does not generate income or profit unlike the provision of dexa scan services. The applicant reiterated that its only exempt supply was the provision of dexa scan services while its taxable supply comprised income derived from the hire of its conference rooms and facilities. The applicant submitted that the donor funds received by it for the facilitation of its medical research are not consideration for medical research.

Having listened to the evidence and read the submissions this is the ruling of the tribunal

The applicant provides dexa scan services which is an exempt supply. S. 19 of the VAT Act provides that a supply of goods is an exempt supply if it is specified in the Second Schedule. Paragraph 1 of the Second Schedule specifies medical services as exempt supply. It also hires out its conference hall which is a taxable supply. The applicant receives grants from abroad. The applicant claimed for input tax which was disallowed. The respondent issued a VAT assessment which was eventually revised to Shs. 129,904,532. The respondent contended that medical research constituted a supply. The gist of the dispute between the parties is the apportionment of input tax provided for under S. 1(f) of the Fourth Schedule of the VAT Act assertion by the respondent that medical research constitutes an exempt supply. While it is not in dispute that the hiring of the conference hall is a taxably supply, whether the receipt of donor funds by the applicant is a taxable supply is in dispute.

The first question the Tribunal must ask itself is whether the donor funds received constitute a taxable supply. S. 4 of the VAT Act provides that a tax known as value added tax shall be charged in accordance this Act on every taxable supply made by a taxable

person. S. 18 of the VAT Act defines a taxable supply as a supply of goods or services other than an exempt supply for consideration as part of his or her business activities.. S. 1(h) of the VAT Act defines "goods" to include all kinds of moveable and immoveable property but does not include money. Therefore the receipt of donor funds cannot be considered as a supply of goods. So, if the donor funds were not a supply of goods was it one of services. S. 11 of the VAT Act provides that

> "(1) A supply of services means a supply which is not a supply of goods or money including:
>
> (a) The performance of services for another person
>
> (b) The making available of any facility or advantage
>
> (c) The toleration of any situation or the refraining form doing of any activity; or
>
> (d) The provision of thermal and electrical energy, heating, gas, refrigeration, air conditioning and water."

The receipt of donor funds does not fall under the conditions provided in the above Section to constitute a supply. There is no evidence that the applicant provided services to the donors. The Section states a supply of services does not include a supply of goods or money. The receipt of donor funds is not a supply of money nor of services. Furthermore there is no consideration provided for the donor funds by the applicant as required under S. 18 of the VAT Act.

The respondent contended that the donor funds were used to fund medical research. Therefore the donor funds were a supply of goods. Were the donors funding the research? A perusal of the financial statements show the money from the donor grants was used by the applicant to meet expenses other than medical research. In fact the monies received from hiring the conference and dexa scans are not sufficient to meet the expenses of the applicant. Also, there is no evidence that the medical research that was carried out by the applicant yielded results which was supplied to the donors. Medical research is an ongoing activity and there is no evidence of any supply in respect of it. The link between the donor funds and the medical research carried out by the applicant is missing. Therefore it is difficult to say that because the applicant was receiving donor funds and carrying out research, there was a supply of goods or services to them. There is no consideration in respect of medical services.

The applicant applied for input credit. S. 28(3) of the VAT Act provides that:

> "A credit is allowed to a taxable person on becoming registered for input tax paid or payable in regards of-
>
> (a) All taxable supplies of goods, including capital assets, made to the person prior to becoming registered; or
>
> (b) All imports of goods including capital assets, made by the person prior to become registered."

It is not in dispute that the applicant was entitled to input VAT credit. The dispute is in respect of the apportionment of input tax in relation of the supplies that are taxable and those that are exempt.

S. 28(7) deals with apportionment of input tax between exempt and taxable supplies. It provides:

> "Subject to subsection (8) and (9), the input tax that may be credited by a taxable person for a tax period is-
>
> (a) Where all of the taxable person's supplies for that period are taxable supplies, the whole of the input tax specified in subsection (1) or (2); or
>
> (b) Where only part of the taxable person's supplies for that period are taxable supplies, the amount calculated according to the formula specified in Section 1(f) of the Fourth Schedule."

We already stated that the applicant dealt in both exempt and taxable supplies, therefore S. 28(7)(a) does not apply to it, but S. 28(7)(b).

S. 28(7)(b) of the Act provides that where only part of a taxpayer's supplies are taxable the formula specified in S. 1(f) of the Fourth Schedule applies. The formula in S. 1(f) of the Fourth Schedule is as follows: **A x B /C** where;

A is the total amount of input tax for the period.

B is the total amount of taxable supplies made by the taxable person during the period.

C is the total amount of all supplies made by the taxable person during the period other than an exempt supply under paragraph 1(k) of the Second Schedule to the VAT Act.

Both parties agree that the above formula applies to the input tax credit claimed by the applicant.

However, while both parties are agreeable to the formula, what is in dispute is what should be included as the total amount of all supplies made by a taxable person. The respondent included the donor funds received by the applicant. The Tribunal has already stated that the receipt of donor funds does not constitute a taxable supply of goods and services under the VAT Act. The computation by the respondent, which was in the witness statement of Eric Herbert Muketa is stated as below:

TABLE A

PERIOD	TOTAL INCOME	EXCHANGE RATE	LOCAL CURRENCY	RENTAL INCOME & CONFERENCE FACILITIES (B)	RATE B/C
2014	5,673,970	2,528.40	14,346,065,748	184,074,751	0.0128
2015	6,197,438	3,000.95	18,598,201,566	256,401,318	0.0138
2016	6,943,925	3,362.79	23,350.965,551	347,859,305	0.0149
2017	6,196,412	3,644.47	22,582,637,642	63,261,002	0.0028

Having obtained the above rates, the respondent applied them to the input tax claimed as follows:

TABLE B

PERIOD	INPUT TAX (A)	RATE	AMOUNT ALLOWED
2014	0	0.0128	-
2015	0	0.0138	-
2016	92,065,644	0.0.149	1,371,502
2017	98,872,876	0.0028	276,974

The consideration by the respondent of donor funds in the above formula had the effect of distorting the computation. It lowered the rate applicable to the input tax. As a result,

the applicant obtained less input tax than what was due. The respondent issued an assessment as a result of the reduction of the input tax credit claimed by the applicant.

The caption **"C"** in the formula is the total amount of all supplies made by the taxable person during the period other than an exemption supply paragraph 1(K) of the Second Schedule to the VAT Act. Paragraph 1(k) of the Second Schedule the supply of goods as part of the transfer of a business as a going concern. There was no transfer of a busines as going concern in the dispute before us. The respondent ought to have added the taxable supplies of hiring the hall to the exempt supply of provision of dexa scans. Since B is the total amount of taxable supplies. The respondent ought to have considered the total amount. Therefore **B/C**

B is the total amount of supply of hiring the conference hall

C is the total amount of supply of hiring the conference hall plus the total amount of the supply of dexa scans

The ratio of **B/C** should have been applied to the total amount of input tax.

The applicant did not have any input tax for the period 2014 and 2015, the Tribunal will therefore not bother itself with computing for the said periods. The Tribunal will look at the financial statement for the periods 2016 and 2017. We already stated that donor grants and donation do not constitute taxable supplies. We shall look at the income for hiring the halls and the supply of dexa scans. For the period 2016, the financial statement shows that other income is US$ 169,646. For the period 2017, the financial statement shows other income as US$ 43,858. However, the financial statement do not show the breakdown between hiring the conference hall and the supply of the Dexa scans. The applicant's computation for input tax was allowed in as an exhibit AEX9 in the Joint Trial bundle implies that the respondent was not contesting the figures used. The figures in the computation are lower than those in the financial statements.

In 2016 the applicant had a taxable supply of hiring the hall of US$ 103,443.66. The supply of Dexa scans was US$ 38,964. Applying the formula **B/C** would mean

103,443.66/ 103.443.66 + 38,964 (142,407.66) = 72.6%

Therefore, the respondent ought to have applied the 72.6% to the input tax of 92,065,644 for the period 2016 which would come to Shs. 66,839,658. Therefore the applicant was entitled to input tax of Shs. 66,839,658 for the tax period 2016.

For the tax period 2017, the applicant had a taxable supply of hiring the hall of US$ 17,358.08. The supply of Dexa scans was US$ 25,889. Applying the formula **B/C** would mean

17,358.08/ 17,358.08 + 25,889 (43,247.08) = 40.1%

Therefore, the respondent ought to have applied the 40.1% to the input tax of 98,872,876 which come to Shs. 39,648, 023. Therefore, the applicant is entitled to input tax of Shs. 39,648,023 for the tax period 2017.

Having found that the respondent applied the formula wrongly and that the applicant is entitled to input tax for the tax periods 2016 and 2017, the tax assessment of Shs. 129,904,532.01 would not arise. This is because if the applicant is entitled to input tax, no VAT liability would arise. Therefore, the VAT assessment of Shs. 129,904,532.01 is set aside

For the above reasons, we accordingly order as follows;

1. The applicant is entitled to input tax of Shs. 66,839,658 for the tax period 2016.
2. The applicant is entitled to Shs. 39,648, 023 for the tax period 2017.
3. The VAT assessment of Shs. 129,904,532.01 is set aside.
4. The applicant is awarded the costs of the application.

It is so ordered.

Dated at Kampala this 31st day of March 2021.

DR. ASA MUGENYI
CHAIRMAN

MS. CHRISTINE KATWE
MEMBER

THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 65 OF 2018

MH-JHU CARE LIMITED ==========APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ==========RESPONDENT

RULING

RULING

I have read the ruling of my colleagues I would like to state as follows.

The gist of the dispute between the parties is the assertion by the respondent, that medical research constitutes an exempt supply. In its written submissions, the respondent stated that since item 1(h) of the Second Schedule to the VAT Act, specifies medical services as exempt supplies, it followed that medical research services formed a part of medical services and were therefore exempt supplies for the purposes of S.19(1) of the VAT Act.

We consider the above assertion to be erroneous for the following reasons.

Firstly, the respondent's interpretation of item 1(h) of the Second Schedule goes against the *ejusdem generis* rule. This rule states that

> '*If in an enactment or document a general word follows particular and specific words of the same nature as itself, the general word takes its meaning from them, and is held to be restricted to the same genus as those more limited words, unless there be something to show that a wider sense is intended to be borne by the general word'. (**See Journal of criminal law vol. 10 of 1946. The application of the Ejusdem Generis rule in the interpretation of criminal statutes**)*.

Item **1(h)** states as follows, *"The following supplies are specified as exempt supplies for the purposes of section 19(i) "The supply of medical, dental and nursing services".*

The general word in the above enactment is the word '**services**'. The word 'services' ought to take its meaning from the particular and specific words preceding it and in interpreting what constitutes this word, we must be restricted to the same genus, as the words preceding it unless there is something to show that a wider sense is intended to be borne by the word services.

In the English decision of **Knott v. Blackburn** (1944 K.B. 77) the enactment that had to be interpreted was the **Vagrancy Act 1824,** section 4 of which stated that every person found in or upon "any dwelling –house, warehouse, coach-house, stable or outhouse or in any enclosed yard, garden or area" for any unlawful purpose shall be deemed to be a rogue or a vagabond. The justices held that railway sidings were not included by the general word 'area'. The word 'area' they stated was to be construed *ejusdem generis* with, and was a space related to, a yard or garden'.

In **Powell v Kempton (1897) 2 QB 242,** another English decision, the **Betting Act 1853** made it an offence to keep a house, office or other place for the purposes of betting. The House of Lords had to decide if the statute applied to Tattersall's enclosure at Kempton Park Racecourse. The court applied the *ejusdem generis* rule and held that the other items mentioned in the statute related to places indoors whereas Tattersall's enclosure was outside. There was thus no offence committed.

Applying the above rule, can it be said that medical research is a service akin to *medical, dental and nursing services* as referred to under item 1(h)? Medical, dental and nursing services refer to the ordinary services provided to patients in hospitals with the object of treating disease or injury and alleviating the effects of such disease or injury. Research on the other hand has been defined in **Black's Law Dictionary 10th edition** by **Bryan A. Garner**, as "*serious study of a subject with the purpose of acquiring more knowledge, discovering new facts, or testing new ideas'.* While medical research can be carried out

during the provision of medical, dental and nursing services, this fact does not turn medical research into a medical, dental and nursing service. In the instant case the word 'services' as used under item 1(h) must take its meaning from the words preceding it. The term 'medical research' is not a service that is ordinarily provided to patients in hospitals with the object of curing them from disease or alleviating their suffering. There is nothing in the enactment to show that a wider sense was intended to be borne by the word 'services'. We are of the opinion that the word 'medical research' is not of the same genus as the words 'medical, dental and nursing services'. We accordingly find that medical research services are not exempt supplies within the meaning of S.19 (1) and item 1(h) of the Second Schedule to the VAT Act.

Secondly, research funded by the charitable or public sector, for the public good, is generally outside the scope of VAT, as the funds received do not constitute consideration, for any supply by the person who receives the funding.

In the European Court of Justice decision of **'Keeping Newcastle Warm vs. Commissioners of Customs & Excise (C353/00)'**, The court stated that if the funding for research is provided by the public or charitable sector 'for the public good' then it served as an indicator that the funding is not consideration for any supply by the person who receives the funding.

Relying on the above decision, I take the position that, in ascertaining whether the research is outside the scope of VAT, the test is whether the funding is part of the consideration for any specific supply; does the funder receive anything for the consideration that is paid? If not, then the service is outside the scope of VAT.

In the instant case, it can be seen from the evidence of **Charles Gabula,** the applicant's financial manager that the purpose of the medical research was to prevent primary and secondary infections of HIV and to optimize care and treatment for Ugandan families infected with HIV. It is clear from the above that the research by the applicant was carried out for the public good. **Mr. Gabula's** evidence also shows that the funds for the research

are public funds provided by the **United States Government's National Institute of Health** and the **European Union**. The applicant has stated in its written submissions in rejoinder that the funds are not consideration for medical research. No evidence has been led to show that the funding is part of the consideration for any specific supply; nor has evidence been led to show that the funders receive anything in return for the sums paid. I am of the opinion that the medical research carried out by the applicant using the above stated public funds is for the public good and that these funds do not constitute consideration for the medical research carried on by the applicant. For this reason, I find that the medical research, carried on by the applicant, through these funds, is outside the scope of VAT.

I agree with the orders made by my colleagues.

Dated at Kampala this 31st day of March 2021.

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MR. SIRAJ ALI

MEMBER