

**THE REPUBLIC OF UGANDA**  
**IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA**  
**APPLICATION NO. 61 OF 201**

**MULTIPLE ICD LIMITED =====APPLICANT**

**VERSUS**

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

**BEFORE DR. ASA MUGENYI, DR. STEPHEN AKABWAY. MR. SIRAJ ALI,**

**RULING**

This ruling is in respect of an application brought by the applicant challenging a Value Added Tax (VAT) assessment of Shs. 2,860,326,866 for leasing equipment and a plant.

The applicant shares directors and shareholders with Kampala Cement Company Limited. On 1<sup>st</sup> July 2014, the applicant entered into an agreement with Kampala Cement Company Limited for the lease of a cement making equipment and a plant at rent of US\$ 65,000 per month for a period of 30 years. There was a moratorium period of 3 years in the agreement from November 2016 to 31<sup>st</sup> December 2019. The equipment and plant were sold in February 2018. The respondent carried out an audit on the applicant and issued a VAT assessment of Shs. 2,860,326,866

The agreed issues are:

1. Whether the applicant is liable to pay the VAT assessed?
2. What remedies are available to the parties?

The applicant was represented by Ms. Jackie Aturinda while the respondent by Ms. Barbara Nahone Ajambo.

The dispute between the applicant and the respondent revolves around VAT payable on leasing of plant and equipment. The applicant was given a moratorium of 3 years and the issue is whether it was liable to pay VAT for the said period.

The applicant's first witness, Mr. Sunil Malhotra, its General Manager testified that the applicant entered into an agreement with Kampala Cement Company for the lease of cement equipment and plant at US\$ 65,000 per month for 30 years. The lease agreement provided for a moratorium period up to November 2016 which was extended up to 31<sup>st</sup> December 2017 to allow installation and testing of the cement equipment and plant. The applicant handed over the plant to Kampala Cement at the end of January 2015. The witness stated that the cement equipment and plant were transferred in February 2018. He also testified that because of the moratorium clause no invoice was issued and rent paid. The respondent carried out an audit and found that no VAT was charged and raised an assessment of Shs. 2,860,326,866. The applicant objected. The witness confirmed that the applicant did not charge VAT. The applicant and Kampala Cement Company have common directors. From February 2015 to February 2018 the applicant claimed wear and tear of equipment. The machine was with Kampala Cement Company Limited.

The respondent's witness, Mr. Isaac Collins Okuonzi, an officer in its Domestic Taxes Department testified that the respondent did an audit on the applicant for the period September 2014 to February 2018 for VAT and income tax. The audit established that the applicant had leased equipment and plant to Kampala Cement Company Limited at US\$ 65,000 per month inclusive of VAT. The income the applicant obtained was not declared nor was VAT charged. In February 2018, the applicant sold the plant to Kampala Cement Company Limited. The respondent established that there was undeclared income of Shs. 8,276,312,830 for the period in issue. On 31<sup>st</sup> May 2019, the respondent communicated to the applicant a VAT liability of Shs. 2,860,326,866. The respondent also established that a supply of the above equipment was not exempt from VAT. He testified that Kampala Cement Company Limited claimed rent for the said period as an expense.

The applicant submitted that S. 4 of the VAT Act provides for VAT on every taxable supply by a taxable person. S. 18 provides that a taxable supply shall be made by a taxable person for consideration. S. 1(d) of the VAT Act provides that consideration is the total amount in money or kind paid or payable for the supply. S. 21(4) provides that the taxable supply under a rental agreement is the amount of rent payment due or received. S. 14(2)

of the VAT Act provides that where goods are supplied under a rental agreement, each successive supply occurs on the earlier of the date on which payment is due or received. The applicant contended that the agreement provided for a moratorium period to facilitate erection of the plant, production trials and any improvements. The applicant contended that the Article 2.8 of the Agreement provided for a moratorium period which did not exceed November 2016 which was extended upto December 2017. There was a delay due to shipping equipment, erecting the plant, installation and testing the equipment. The applicant argued that *Black's Law Dictionary* 8<sup>th</sup> Edition p. 101 defines a moratorium as "an authorized postponement, usu. a lengthy one, in the deadline for paying a debt or performing an obligation." As a result, the applicant did not invoice Kampala Cement Company Limited nor was rent paid. The applicant contended that no rent was due or paid until the expiry of the moratorium period i.e. 31<sup>st</sup> December 2017.

The applicant contended that the respondent did not adduce evidence to show that rent was paid. The applicant also contended that under Article 2.8 the agreement was not supposed to commence unless certain conditions were met. These were the shipping of equipment, the erection, installation, commissioning and production trials of the plant. The applicant further contended that though the respondent's witness claimed that the former claimed the rent as expenses it did not adduce evidence to prove the same. The applicant cited *Umeme Limited v URA* TAT 4 of 2007 and *Uganda Electricity Distribution Company Limited V URA* TAT 7 of 2007 where the Tribunal found that the definition of consideration in S.1 of the VAT Act was tied to that of a taxable supply. There could be no taxable supply if there is no consideration.

The applicant submitted that the respondent disallowed the objection on the ground that the plant was leased by the applicant to an associate. A transaction between an associate falls under S. 18(7) of the VAT Act which provides that a supply is made for a reduced consideration if it is made by associates for consideration less than the fair market value of the supply. The applicant contended that under S. 3 of the VAT Act an associate controls directly or indirectly fifty percent or more of the voting power in the company. The applicant argued that voting power lies with the shareholders. There is no evidence to

show that there is an associate controlling 50% or more of the voting power of the applicant.

In reply, the respondent submitted clause 2.2.1 of the agreement between the applicant and Kampala Cement Company Limited provided that the lessee shall pay to the lessor US\$ 65,000 per month plus VAT. The respondent contended that the supply is taxable as the contract clearly states that VAT is to be paid. The respondent contended that the supply in issue was not exempt under S. 19 of the VAT Act. S. 14 of the VAT Act provides that where goods are supplied under a rental agreement or services under an agreement or law which provides for periodic payment, the services are treated as successively supplied for successive parts of the period of the agreement or as determined by law. The respondent contended that the applicant's agreement was a rental agreement which provided for periodic payments. The respondent contended that time of supply is on the date when payment is due or received, or the earlier date. The respondent contended that periodic payments were due monthly and the applicant ought to have charged VAT.

The respondent contended that the VAT Act does not define moratorium. It cited *Black's Law Dictionary* (supra) which defined it as "An authorized postponement ... deadline for paying a debt or performing an obligation." The respondent submitted that under Article 17 of the Constitution of Uganda it is the duty of the every citizen to pay taxes. The respondent argued that this is in effect a waiver of payment of tax and the powers to do so lie with parliament. It contended that under S. 3 of the Uganda Revenue Act the respondent is empowered to administer and give effect to the law which includes the VAT Act. The respondent contended that the applicant did not have any express authorization to postpone payment of taxes. The respondent was not party to the contract and therefore it does not bind it. The contract was not authorized by the respondent.

The respondent also contended that because the VAT Act does not define moratorium recourse can be made to the literal rule of statutory interpretation. It cited *Cape Brandy Syndicate v Inland Revenue Commissioners* [1920] 1 KB where it was stated that "if a person sought to be taxed comes within the letter of the law he must be taxed." It also cited inter alia, *Russel v Scott* [1948] 2 ALL ER 5 where it was stated that "the subject is

not be taxed unless the words of the taxing statute unambiguously impose the tax on him.”

The respondent further contended that the applicant was claiming wear and tear from February 2015 to February 2018. It also claimed depreciation allowance of Shs. 19,889,021,459. The respondent wondered why the applicant was claiming wear and tear when the machines were not operating.

The respondent also contended that the applicant and Kampala Cement Company Limited were associates within the meaning of the VAT Act. S. 18(7) of the Act provides that a supply is made for reduced consideration if the supply is between associates for no consideration or for a consideration that is less than the fair market value of the supply. The applicant and the respondent have common directors. The respondent contended that three of the applicant’s directors Mr. Rajinder Singh Baryan, Mr. Tarlochan Singh and Mr. Sukhiminder Singh Baryan each own 2,250,000 shares which totals to 6,750,000 shares which is more than 50% of the shares. The said three directors own 4,000 shares in Kampala Cement Company Limited which is more than 50% of the shares. The respondent contended that the said three shareholders are the ones who make the decisions and hold the majority voting power in decision making. The respondent argued that the applicant’s directors hold more than 50 % of the voting power of Kampala Cement Company Limited within the meaning of associates under S. 3 of the VAT Act. The respondent contended that the applicant entered into a lease agreement with the lessee to lease equipment at a consideration of US\$ 65,000 for a period of 30 years and included a moratorium clause. The respondent argued that it appears that there is no consideration during the moratorium period for a taxable supply because the parties were associates. This leads to a conclusion that it was a tax avoidance scheme. The respondent cited *Commissioners of Inland Revenue v McGuckian* [1997] UKHL 22 where the court noted that in tax avoidance schemes courts are compelled to adopt a step by step analysis of such schemes, treating each step as a distinct transaction producing its own tax consequence. The respondent contended that under S. 75 of the VAT Act, where a person has obtained a tax benefit under such scheme the Commissioner General may determine the liability of the person as if the scheme had not been entered into and

consider appropriate action for the prevention and reduction of the tax benefit. The respondent cited S. 2(a) where a tax benefit includes in a reduction in the liability of any person to pay tax. The respondent stated that the applicant did not issue any invoice and no rent was paid because of the tax benefit created by the moratorium.

In rejoinder, the applicant submitted that it received no income from Multiple Cement Company Limited and therefore there was nothing to declare. However, in contradiction, the applicant cited Regulation 3 of the VAT (Deferment of Tax on Plant and Machinery) Regulations 2013 which defines deferment as “postponement of payment of value added tax under the Act in respect of imported plant and machinery. Regulation 10 provides that there the period of deferment is terminated in accordance with the Regulations, the tax due shall become payable in accordance with the Act. The applicant submitted that upon expiry of the deferment period it paid the VAT due. Then applicant further contradicts itself when it states that it could only pay the taxes after the moratorium period.

The applicant contended that the VAT Act does not define the word ‘moratorium’ and therefore the rules of statutory interpretation do not apply. The applicant contended that the respondent does not distinguish between a statutory provision and a clause in an agreement.

The applicant submitted that it has only 2 and not three directors, Mr. Tarlochan Singh and Mr. Rajinder Singh Baryan. The applicant contended that the respondent did not adduce evidence to show that they are related. The applicant submitted that S. 3(2) of the VAT Act looks at person who either alone or together with an associate control 50% of the voting powers of a company. The applicant argued that a company is a different legal entity from its owners. Therefore, for the respondent to forge an associate relationship based on directorship and shareholding is misguided. Subject to the definition of S. 3(2) of the VAT Act, the applicant argued that it would be an associate of Kampala Cement Company Limited if it an associate held 50% of the voting rights in Kampala Cement Company Limited. It submitted therefore it does not qualify to be regarded as an associate.

The applicant submitted that it was liable to charge VAT upon production and not at the point of installation of the machinery. It also submitted that none of the parties claimed input tax. It contended that wear and tear is not a VAT concept but one of income tax.

Having listened to the evidence and read the submissions, the Tribunal gives its ruling as below:

On 1<sup>st</sup> July 2014 the applicant entered into an agreement with Kampala Cement Company Limited for the lease of cement making equipment and plant at US\$ 65,000 monthly. Article 2.7 of the agreement read that the applicant shall lease the plant for 30 years from the commencement date. A moratorium period not exceeding November 2016 was granted.

Under Article 2.6 the commencement date was 1<sup>st</sup> July 2014 or when the lessor and the lessee have fulfilled the conditions specified in Article 2.8 of the agreement. Article 2.8 of the agreement provided that the applicant shall undertake to ship and deliver the leased plant. The applicant shall further facilitate the commencement and conclusion, erection, installation, commissioning and production of the plant. No evidence was adduced to show when the plant was shipped nor installed. However Mr. Sunil Malhotra deponed in paragraph 6 of his witness statement that the applicant handed over the plant to Kampala Cement Limited at the end of January 2015. This was not rebutted by the respondent. Therefore the 1<sup>st</sup> February 2015 shall be taken as the commencement date of the lease agreement as the conditions specified in Article 2.8 were fulfilled.

Since the lease started running, the next question we have to ask ourselves is: was the above transaction liable to VAT? S. 4 of the VAT Act imposes VAT on “every taxable supply made by a taxable person.” It is not in dispute that the applicant and Kampala Cement Company Limited are taxable persons. The dispute is whether there was a taxable supply by the applicant. S. 18(1) of the VAT Act provides that “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”. S. 18(4) of the VAT Act provides that “a supply is made for consideration if the supply directly or indirectly

receives payment for the supply, whether from the person supplied or any other person, including the payment wholly or partly in money or kind.” S. 1(d) of the Act provides that consideration 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. The Section states that the money should have been paid or is payable. The word “payable” is defined by *Black’s Law Dictionary* 10<sup>th</sup> Edition p. 1309 as “(Of a sum of money or a negotiable instrument) that is to be paid. An amount maybe payable without being due. Debts are commonly payable long before they fall due.” This means that there is a taxable supply even where money has not been paid but is due. Article 2.2 of the Agreement provided that “the LESSEE shall pay the LESSOR during the Lease Period a sum of USD 65,000/- (United States Dollars Sixty Five Thousand only) per month plus VAT...” Therefore if the applicant leased the plant for the lease period at a consideration then there was a taxable supply.

The next question is when was the applicant required to charge VAT? The payment of VAT is a statutory obligation. S. 11 of the VAT Act provides that a supply of services includes the making available of any facility or advantage. The leasing of equipment and plant is making available of a facility and advantage. S. 14 of the VAT Act provides for the time of supply. In respect of this matter, S. 14(1) of the VAT Act states that a supply of goods or services occurs:

“(c)in any other case, on the earliest of the date on which –

- (a) the goods are delivered or made available, or the performance of the services is completed.
- (b) payment for the goods or services is made; or
- (c) a tax invoice is issued.”

As soon as the service of leasing is performed it is deemed that it is complete. In this case, leasing was a continuous activity. S. 14(2)(a) of the VAT Act provides where goods are supplied under a rental agreement

“The goods or services are treated as successively supplied for successive parts of the period of the agreement or as determined by that law, and each successive supply occurs on the earlier of the date on which payment is due or received.”

S. 14(5) of the VAT Act reads that “In this Section, “rental agreement” means any agreement for the letting of goods including a hire-purchase agreement or finance lease. Article 2.5 clause 1.1.29 provided that “the lessee shall, during the period of lease pay to the lessor every month in advance on or before the 10<sup>th</sup> day of commencement of the month after the expiry of the last rent payment..” Therefore according to the agreement the service of leasing of the cement equipment and plant was supplied monthly.

S. 29 of the Tax Procedure Code Act provides that “tax payable under a tax law is a debt due to the Government of Uganda and is payable to the Commissioner in the manner and at the place determined by the Commissioner.” S. 27 of the Tax Procedure Code Act provides that the tax owing by a taxpayer for a tax period is payable on the date specified in the tax law under which the tax is payable. S. 25 of the VAT Act provides that subject to S. 26 VAT the tax payable by a taxable person for a tax period is paid using the formula in the fourth schedule. The VAT Act S. 1(w) defines tax period to mean calendar month. This implies that VAT has to be paid monthly. S. 34A of the VAT Act further provides for the due date for payment of tax. S.34A (1)(a) of the VAT Act reads:

“(1) Tax payable under the Act this Act is due and payable –

(a) In the case of a taxable supply by a taxable person in respect of a tax period, on the date the return for the tax period must be lodged.”

S. 31(A) states that a taxable person shall lodge a tax return with the Commissioner General for each tax period within fifteen days after the end of the tax period. This implies that VAT is payable before the fifteenth of the following month of the transaction. S. 34A was inserted in the VAT Act by the Value Added Tax (Amendment) Act 2018. Before the amendment S.34 provided for the due date for payment of the tax. It was expressed in similar words. Therefore the applicant was required to issue monthly VAT invoices on Kampala Cement Company Limited and collect VAT before the fifteenth of each month.

The applicant contended that the lease agreement had a moratorium from November 2016 to 31<sup>st</sup> December 2019 under which the lessee was not required to pay rent. As both parties noticed the word “moratorium” is not defined in the VAT Act. This is because it is in the lease agreement and not in the Act. The respondent also contended that because the VAT Act does not define moratorium recourse can be made to the literal rule of

statutory interpretation. One cannot use statutory rules of interpretation to give effect to the terms in a contract. Contracts are interpreted by discerning the intention of the parties to the agreement.

Both parties in this matter agree that the word “moratorium” is defined by *Black’s Law Dictionary* 11<sup>th</sup> edition as “1. An authorized postponement, usu, a lengthy on, in the deadline for paying a debt or performing an obligation.” The moratorium clause in Article 2.8 of the agreement is not clear on whether it was postponing the deadline for paying rent or the performance of any other obligation. However, Mr. Sunil Malthorta, the applicant’s general manager stated that based on the moratorium clause the applicant did not issue invoices and no rent was paid. The definition of the term moratorium shows that its intention is to postpone an activity but not to waive it. In respect of rent or debt, in a common man’s parlance it would mean: “Do not pay now, but pay later” and not “Do not pay anything.” Therefore the moratorium did not waive the obligation to pay rent, it only extended the deadline for paying it. Mr. Sunil Malhotra stated in his witness statement that the moratorium period was extended to 31<sup>st</sup> December 2017. If it was in respect of rent, it would mean that Kampala Cement Company Limited was supposed to start paying rent for the months it leased after 31<sup>st</sup> December 2017. It did not mean that the rent before 31<sup>st</sup> December 2017 for which Kampala Cement Company Limited leased the premises was not payable.

The Tribunal, next has to ask itself, what was the effect of the moratorium clause in the agreement on the applicant’s tax obligations? In this case no payment of rent was made nor tax invoice issued. Under the VAT Act the applicant was supposed to pay VAT monthly payable before the fifteenth of following month of the transaction. Under the lease agreement the applicant had extended the payment of VAT up to 31<sup>st</sup> December 2017. The Tribunal has to ask itself what is the effect of a contractual obligation on a statutory obligation? In *Uganda Revenue Authority v Golden Leaves and Resorts Limited* HCCS 12 of 2007 Justice Egonda Ntende cited *York Corporation v Henry Leatham & Sons Limited* [1924] ALL ER 477 where it was held that:

“A body charged with statutory powers for public purpose is not capable of divesting itself of those powers or of fettering itself in their use, and an agreement which seeks to do is

ultra vires and void. Such an ultra vires agreement cannot become intra vires by reason of estoppel, lapse of time, ratification or acquiescence, or delay.”

Therefore the agreement between the applicant and Kampala Cement Company Limited provision of a moratorium clause cannot fetter a statutory obligation. A contract obligation cannot fetter a statutory obligation. The moratorium clause in the agreement should not have stopped the applicant from issuing VAT invoices on Kampala Cement Company Limited because collection of VAT is a statutory duty.

The Value Added (Deferment on tax on plant and Machinery) Regulations 2013 provide for deferment of VAT on importation of plant and machinery. Under Regulation 4(1) an importer of plant and machinery may apply to the Commissioner General to defer the payment of tax due in respect of imported plant. Regulation 3 defines “deferment” to mean postponement of payment of the value added tax in respect of imported plant and machinery. Though the word deferment has the same effect as a moratorium, the VAT under the regulations is in respect of import. It is not in respect of rent where an imported machinery is leased. If the Regulations provide for deferment of VAT on importation of plant and machinery, it means that for one to postpone payment of VAT on leasing imported equipment one would require Regulations. There are no Regulations to that effect. Furthermore, the Value Added (Deferment on tax on plant and Machinery) Regulations postpone but do not waive the payment of VAT on an imported machine. There is no law that exempts a lessor from charging VAT in respect of leasing an imported machinery. A postponement of VAT like exemption cannot be created by acquiescence of parties but by a provision in the law.

S. 28 of the Tax Procedure Code Act provides that a taxpayer may apply, in writing to the Commissioner for an extension of time within which to pay tax that is due. Under S. 3 of the Act Commissioner means the “Commissioner General’ appointed under the Uganda Revenue Act. Similarly, S. 34A (3) of the VAT Act provides;

“Upon written application by a person liable for tax, the Commissioner General may where good cause is shown, extend the time for payment of tax beyond the date on which it is due and payable, or make such other arrangements as appropriate to ensure payment of the tax due.”

There is no evidence to show that the applicant and Kampala Cement Company Limited applied to the Commissioner General to extend time of payment of VAT beyond the dues days or showed good cause.

Taking the above into consideration this application is dismissed with costs to the respondent.

Dated at Kampala this 30<sup>th</sup> day of April 2021.

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**DR. ASA MUGENYI**  
**CHAIRMAN**

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**DR. STEPHEN AKABWAY**  
**MEMBER**

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**MR. SIRAJI ALI**  
**MEMBER**