THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 22 OF 2006

CELTEL UGANDA LIMITED :::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

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

CORAM: HON JUSTICE L.E.M MUKASA-KIKONYOGO, DCJ
HON JUSTICE A.E.N MPAGI-BAHIGEINE, JA
HON JUSTICE S.G. ENGWAU, JA

JUDGEMENT OF A.E.N. MPAGI-BAHIGEINE, JA

This is a second appeal. It is against the decision of the High Court Commercial Division dated 5th January 2006 in Tax Appeal No. 1 of 2005.

The respondent, Uganda Revenue Authority, is the revenue collecting agency of the Uganda Government.

The appellant, Celtel Uganda Limited, is a telecommunications provider engaged in the business of providing mobile cellular phones, airtime, and related services.

The Background facts are as follows:

The respondent carried out a Value Added Tax ["VAT"] and excise audit on the appellant for the period of April 2000 to July 2003. As a result of the said audit, the respondent assessed VAT of Uganda Shs. 358,652,458 on airtime issued by the appellant to its staff for use in their official duties.

The respondent assessed a penalty of Ug. Shs. 253,161,660.

The appellant objected to the tax and the penalty. He appealed to the **Tribunal Vide Application No. TAT No. 8 of 2004.**

The Tax Appeal Tribunal [TAT] ruled that airtime is a consumable product like gas or air conditioning and is therefore a good within the context of the **VAT Act.** Hence the

airtime provided by the appellants to its employees for use on their official duties was a taxable supply under **Sections 10 and 18 of the VAT Act.** The appellant instituted **High Court Tax Appeal No. 01 of 2005** to challenge the decision of the Tribunal.

The learned appellate judge upheld the decision of the Tribunal and dismissed the appeal with costs. Hence this appeal on the following grounds;

1. **The learned judge erred in law in deciding that the supply of airtime made by the appellant to its staff was between associates for no consideration and as such at reduced consideration under Section 3 and 18(7) of the VAT Act and therefore a taxable supply under Section 18(1) of the VAT Act.**
2. **The learned judge erred in law in deciding that the Tax Appeal Tribunal was correct in upholding the assessment of Shs. 358,652,458/= and the penalty of Shs 253,161,660/=.**
3. **The learned judge erred in deciding that the appellant pays the costs of the appeal.**

At the hearing of this appeal, Dr. Joseph Byamugisha appeared for the appellant while Mr. Ali Ssekatawa with Mr. Charles Ouma were for the respondent.

The issues before court were whether:

1. **The supply of airtime provided by the mobile cellular phones is a supply of goods of a supply of services and**
2. **The supply of airtime is a taxable supply.**

Regarding issue No. 1, Dr. Byamugisha contended that the holding of the learned judge that the supply of airtime by the appellant to its staff had been associates for no consideration as such at reduced consideration under **Sections 3 and 18(7)** of the VAT Act and therefore a taxable supply under **Section 18(1)** of the VAT Act was wrong. He reasoned that the VAT distinguishing between two supplies, that is the supply of goods defined in **Section 10** and supply of services provided for in **Section 11** of the Act. The supply of services is not the supply of goods.

Learned counsel submitted therefore that the supply provided for under these Sections is basically one of sale and the VAT Act provides for sales tax.

Citing **"Words and Phrases Legally Defined" [3rd Edition Volume 4 R.2 at pp 261.** Dr. Byamugisha asserted that the supply in relation to goods is by way of sale, lease, hire and hire- purchase. Taxable supply in the context of **Sections 18(1) and (4)** of

VAT Act entails exchange of goods or services for consideration. The airtime bought and supplied by the appellant to its employees for use in the business is not taxable because airtime is not goods but services and could not be charged VAT under this Section. The provision of airtime for the appellant's business was not a supply because no consideration was furnished.

Dr. Byamugisha further submitted that the respondents wrongly resorted to Section 18(7) of the Act in order to impose VAT on the appellant yet the supply of airtime was not made between associates because the appellant and its employees are not associates in the context of **Sections 3(1)** of the VAT Act.

Citing **Ormond Investment Company Limited V Betts [1928] AC 143 and Words and Phrases Legally Defined (3rd Ed. Vol. 2:** at pp 144) to argue that using the Ejusdem Generis rule of interpretation, employees are not of the same gems or nature of the things enumerated under **Section 3(1) of the VAT Act, No. 12/2009,** amended **Section 18(5**) of the parent Statute by adding services, the appellant could not have paid it because it was not required to do so before the amendment. Dr. Byamugisha prayed court to allow the appeal and set aside the findings of the court below.

For the respondent Mr. Ouma posed the following questions by way of resolving issue No. 1; Are the appellant's employees its associates? Do the appellant's employees act in accordance with the directions, requests, suggestions or wishes of the appellant. Whether the appellant supplied airtime to its employees at a reduced consideration.

In answering the first question Mr. Ouma submitted that **Section 3(1)** of the VAT Act defines who an associate is as any person who acts in accordance with the directions, requests, suggestions or wishes of the person whether or not they are communicated to each other.

Although **Section 3(2**) gives the list of persons who may be associates and the resolution of the appeal depends on the interpretation of **Section 3(1).** The appellant is an artificial person and it cannot itself perform the business of supplying the airtime. This function is done by its employees. The airtime is provided for the appellant's business and any employee who does not follow the instructions, wishes and directions of the appellant is severely punished. Relying on **V.C. Crabbe's Understanding Statute, [Cavendish Publishing Limited, London 1994 at p.73].**

Mr. Ouma submitted that the employees are the associates of the appellant within the context of **Section 3(1).**

On whether the appellant supplied airtime to its employees at a reduced consideration Mr. Ouma contended that a supply is made between associates for no consideration or for a consideration at a reduced value less than the market value.
Section 21(2) (b) of the VAT Act gives the value of supplied reduced consideration as the fair market value of the goods or services at the time of supply. Learned counsel maintained that therefore, the supply of airtime by the appellant was a reduced consideration and, therefore a taxable supply within the meaning of Section 18(1) of the Act.

Mr. Ouma further expressed the view that despite the fact that **Section 18(7)** does not distinguish between goods and services, **Subsections (5) and (6)** provide for the supply of goods while **Subsection (5) and (7)** provide for supply of services. As to the appellant's allusion to VAT Amendment Act, learned counsel argued that the reason for the amendment is conjecture and neither party nor the Bench is privy as to the reason for the amendment.
Mr. Ouma therefore prayed court to uphold the judge's decision and dismiss the appeal with costs.

On whether the appellant supplied airtime to its employees at a reduced consideration, the learned judge held;
"My considered view is that Subsection 18(2), (4), and (8) make provisions for supply generally whether of 'goods' or 'service'.
Under the subsections any supply whether of 'goods' or 'service', if made between associates for no consideration or between associates for a consideration that is less than the fair market value of the supply, is a supply made for reduced consideration.
***Subsection 18(7)** does not make any reference to the foregoing **Subsection (6)** for them to be read together. All the subsection 18(1), which reorganises the taxable supplies as being, supplies either of goods or services [sic]. I therefore find that the airtime provided by mobile cellular phone companies is a supply of services, that the supply made by the appellant to its staff as between associates for no consideration*

*under **Section 3 and 18(7)** of the VAT Act and therefore a taxable supply under **Section 18(1)** of the VAT Act"*

This being a second appeal, the Court is only enjoined to decide matters of law or mixed law and fact. It will only re-evaluate the evidence where it is clearly necessary. See **Mpungu & Sons Transporters Limited Vs Attorney General & Another SCCA No. 17 of 2001.**

In its judgement, the TAT decided that airtime is a good and that the supply of air was a supply of goods. The learned judge held otherwise.

Section 1(h) defines 'goods' to include all kinds of movable and immovable property, thermal and electrical energy, heating gas, refrigeration, air conditioning and water, but does not include money".

The purpose of the word 'include' is to enlarge rather than restrict the meaning of the word 'goods'. See **Dilworth Vs Commissioner of Stamps (1899) AC 99 at 105**, where the Privy Council held;

"The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which for the purposes of the Act, must invariably be attached to these words or expressions".

It is therefore apparent that the definition of goods in the context of VAT Act is very broad and inclusive enough to encompass even airtime. However, this definition should be limited to only tangible other than intangibles. Service on the other hand is defined by **Section 1(1**) of VAT Act as anything that is not goods or money.

The **New Zealand case of Dwyer Vs Hunter (1951) NZLR 177 at 189, 190 CA** is very instructive in distinguishing goods from services.

Here Finlay J observed;

"It was submitted that the relationship of hotel –keeper and guest could not be said to entail the selling of goods and the performance of service and that it was something different. We cannot accept this view. An hotel-keeper does render services, even if that term be regarded in the narrowest way. On 'arrival' a guest is received and escorted to the room he is to occupy, and his baggage is taken to that room. Thereafter, meals are brought to him, either in the dinning room or the room he is to occupy. His shoes may be cleaned and his clothing sent to and received from a laundry. Mail addressed to him is received and delivered. Telephone calls and taxes are obtained as needed. These are only some of the services rendered, but all these are properly described as services.

The supply of meals may be considered either as the rendering of services or as the sale and delivery of meals or it may be something of both. We are unable to regard the supply of meals, as we were invited to do as something different from either and different from a combination of both".

From the above excerpt it appears that the rendering of any intangible skill or advantage or the provision of any facility is a service, whereas goods may be movable and immovable property other than money.

Is airtime thus a good or a service? Airtime is an intangible software.

In Uganda, when a customer wants to enjoy airtime services, shops and asks for the denomination of airtime of her choice, pays the money and the airtime ifs given to him over the counter.

The customer loads the airtime on his cellophone and uses it subject to the control of the service provider, the telecom company. By its very nature, airtime is intangible and does not fit the fundamental characteristic of goods, tangibility. I would thus conclude that airtime is a service rather than a good.

One other factor distinguishing goods from services is the mode of supply. In **Faagorg – Gelting Linien Vs A/S Finanzamt Flensburg (1996) ALL ER 656**, it was held that in order to determine whether a transaction is a supply of goods or service, regard must be had to all the circumstances in which the transaction took place in order to identify its characteristic features. Supply of goods is defined by **Section 10(1)** of the VAT Act as follows;

1. **A supply of goods means any arrangement under which the owner of the goods parties or will part with possession of the goods, including an agreement of sale and purchase.**
2. **A supply of electrical or thermal energy, heating gas, refrigerator, air conditioning and water is a supply of goods.**
3. **The Application of goods to own use is a supply of goods.**

Similarly in **Customs and Excise Commissioners Vs Oliver (1980) 1 ALL ER 1353,** 'Supply' was defined as the passing of possession of goods pursuant to an arrangement whereunder the supplier agrees to part with possession and the recipient agrees to take possession, and by 'possession' is meant in this context, control over the goods, in the sense of having the immediate facility for their use".

Nonetheless, **Section 11** of the VAT Act states:

1. **…….a supply of services means any supply which is not supply of goods or money including-**
    a) **The performance of service for another person;**
    b) **The making available of any facility or advantage; or the toleration of any situation or the refraining from the doing of any activity.**

From the foregoing definitions, it is apparent that parting with possession of goods and taking possession of the goods is what distinguishes the supply of goods from the supply of services in the context of VAT Act.

Thus, although, the transaction involving airtime is commonly referred to as selling and buying of airtime, the customer does not actually take possession of the airtime. The intangible airtime is loaded on the cellophone and the customer uses it subject to the control by the service provider, the telephone company. It is therefore logical in my view to conclude that airtime is a service rather than a good.

The next question is whether the supply of airtime to staff for official use was a supply between associates.

The appellant argues that an employee is not an associate of his employer within the meaning of Section 3 of the VAT Act. This section defines 'associate' as any other person who acts or is likely to act in accordance with the directions, requests,

suggestions or wishes of the person whether or not they are communicated to that other person.

Subsection (2) elaborates on what an associate is. It provides that without limiting the generality of **Subsection (1)**, the following are treated as an associate of a person; partners, relatives, trustee of a trust, and any person within a company who either indirectly or indirectly controls more than fifty percent of the company. I think the purpose of **Section 3 (1) VAT Act** is to impose VAT on supplies made by a taxable person to his or her associates at a reduced consideration or at no consideration at all. This was to ensure that no VAT is evaded.

The employees do not fit under the specific examples of associates in Subsection 2. however this list is not exhaustive. Subsection 2 is not meant to limit Section (1). The appellant provided the airtime to their employees to utilize in the scope of their employment. Any deviation therefrom or abuse of usage resulted in disciplinary action under the staff's cellophone policy. Accordingly since the employees acted in accordance with the directions of their employer, they were thus associates within the confines of the VAT Act, **Section 3 (1).**

The respondent's argument regarding applicability of **Section 11(2**) of the VAT Act is superfluous. This states that a supply of services made by an employee to an employer by reason of employment is not a supply made by the employee. The intended taation is not based on this notion; though the relationship of associates still holds and the issue before court concerns the employer supplying his employees with services.

That being the position, the remaining issue is whether **Section 18(7**) under the VAT Act applies to services. This section requires that a supply be made between associates and does not distinguish as to whether it is a supply of goods or of services. The appellant argues that because subsection 5 and 6 refer to goods and precede 7 then the supply is meant to be goods only.

These Subsections read;

> **(5) The application to own, use by a taxable person of goods supplied to him or her for the purposes of his or her business activities shall be regarded as a supply of goods for consideration as part of his or her business.**

(6) Where goods have been supplied to a taxable person for the purpose of his or business activities, the supply of these goods for reduced consideration shall be regarded as a supply for reduced consideration unless the goods are supplied or used only as trade samples.

(7) A supply made for reduced consideration if the supply is made between associates for no consideration or between associates for a consideration that is less than the fair market value of the supply.

I do not agree with Dr. Byamugisha's interpretation that since Subsections (5) & (6) preceding (7) refer to goods thus (7) is also meant to refer to goods. Looking at Section 18 as a whole, I form the view that it generally refers to both goods and services. **Subsections (1), (2) and (3)** deal with both goods and services. **Subsection (4**) deals with consideration without any specific reference to either 'goods' or 'services' while **Subsection (5), and (6)** specifically mention 'goods' while **Subsection (7)** mentions neither. I would thus conclude that since the entire section is general, then **Subsection 7** refers to both goods and services in absence of any specific reference therein.

I cannot therefore fault the learned appellate judge's finding that the supply of airtime is a service provided by the appellant to its associates under **Section 3** and **18 (7) of the VAT Act**.

Consequently, airtime is a taxable supply under the VAT Act and the assessment of Ug. Shs. 358,652,458/= VAT on airtime supplied to its staff for official work and the penalty of Ug. Shs. 253,161,660/= were correct.

The appeal would thus stand dismissed with costs

Dated at Kampala this…**14th** …day of…**July**…2010.

A.E.N.MPAGI-BHIGEINE

JUSTICE OF APPEAL

JUDGMENT OF L.E.M.MUKASA KIKONYOGO, DCJ

I had the advantage of reading through the judgment prepared in draft Alice E.N.Mpagi-Bahigeine, JA and I agree that the decision of the learned trial judge of the High Court cannot be faulted.

Since Engwau, JA entirely agrees with the reasons, conclusion and orders of the lead judgment, this appeal must fail.

It is accordingly dismissed with costs and the decision of the High Court is hereby upheld.

Dated at Kampala this ……**14th** …day of …**July**…2010.

L.E.M.MUKASA KIKONYOGO
HON. DEPUTY CHIEF JUSTICE

JUDGMENT OF ENGWAU, JA.

I have had the benefit of reading, in draft, the lead judgment prepared by Hon. Justice A.E.N. Mpagi-Bahigeine, JA and I entirely agree with her reasons, conclusion and orders.

I have nothing more useful to add.

Dated at Kampala this ……**14th**…..day of……**July**…….2010.

S.G. Engwau
JUSTICE OF APPEAL