THE REPUBLIC OF UGANDA

IN THE MATTER OF THE TAX APPEALS TRIBUNAL

APPLICATION NO TAT 09/2010

TOTAL (U) LIMITED ……APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY……RESPONDENT

RULING

This ruling is in respect of an application challenging a taxation decision by the respondent imposing Value Added Tax (VAT) on 'closed' fuel cards issued by the applicant.

The brief facts for the application are: The applicant is a company that markets and sells 'Total' brand petroleum products in Uganda. The applicant supplies fuel cards to customers who consume its fuel. The fuel cards owners may be granted a discount. The applicant has two types of cards: the 'open' cards which, allows the card user to purchase both petroleum products and other items in the applicant's shops; and 'closed' cards which allow the users to purchase only fuel. The applicant was assessed VAT of Shs. 891,807,827/= for the issuance of the Total fuel cards. The applicant paid VAT of Shs. 202,406,581/= relating to the 'open' cards which are not the subject of this dispute. The tax in dispute is Shs. 689,401,245/= being VAT assessed for the issuance of the 'closed' cards.

Agreed issues:

1) Whether the issuance of the 'closed' cards attracts VAT?
2) What remedies are available of the parties?

The applicant called one witness Mr. Mamaduo Ngoma its managing director. He testified that the applicant allows customers to procure fuel at its fuel stations with the use of cards. There are two types of cards: one is called the closed card which allows the customer to be served white products which include petrol, diesel and kerosene; the second card called the open card allows the customer to buy products like car wash and groceries from the Total shops. For the closed cards the applicant was not paying VAT. This is because the white products; petrol, diesel and kerosene are exempted from VAT. For the open cards the applicant accounts for VAT. The applicant received an assessment for VAT for the open card which it paid. Discount is available to all customers and not only those who use the cards.

The applicant has two categories of customers; post and prepaid. The pre-paid customers pay in advance and discount is given at the time of making payment. For post paid customers, depending on consumption discount is given at the end of the month. There is no other benefit, apart from discounts, that is given to the customers.

The applicant charges the dealer a management fee because it incurs costs like IT (internet) costs, communication costs, maintenance fees, licensing fees related to software. The dealer is charged 5 to 7 shilling per litre. The dealer eventually benefits from the sale of large volumes. The customers pay Shs. 11,800/= for the cards. The card is Shs. 10,000/= and the Shs. 1,800/= is VAT which is remitted to the respondent.

The respondent called one witness Dickens Kateshumbwa who works as a Supervisor Tax Investigations. He testified that the respondent carried out a tax review on the applicant and established that it issues fuel cards to customers

who pay a fee of Shs. 10,000/= plus VAT. The card remains the property of the applicant. The customer can use the card to purchase fuel at any of the Total stations. The card enables the customer to purchase fuel without hard cash; in return the customer becomes a regular or permanent customer of the applicant. The respondent established that the applicant charges a fee on every litre of fuel the consumers buy and this is what they call the management fee. They were told that the fee is meant to recover the charges related to the card such as maintenance and the like. He contended that the management fee should be subject to VAT because as a benefit of the card arrangement the dealers are able to sell large volumes. Mr. Kateshumbwa testified that the cards would not be relevant without fuel. If there is no fuel there is no need to purchase the card. Customers can purchase fuel without fuel cards. The management fee is imposed by the applicant on the dealers and has nothing to do with the customers.

In its submissions, the applicant contended that S.12 of the VAT Act provides that a supply of services incidental to the supply of goods is part of the supply of goods and hence the use of the fuel cards to purchase petroleum products is part of the supply of the fuel which is VAT exempt in accordance with the second schedule to the VAT Act. The applicant submitted that since its major trade is the supply of petroleum products, the provision of fuel cards is incidental to the main supply of petroleum products and accordingly should be exempted for VAT purposes.

The applicant referred to the case of *Commissioners of Customs and Excise V Madgett and Baldwin* (1998) ECR 6229 where it was held that

> *"A service must be regarded as ancillary or incidental to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied."*

The applicant contended that since the supply of fuel cards is intended to enable the applicant's customers better enjoy the goods supplied the cards do not constitute an aim in themselves. The applicant's witness admitted that cards are only given for the purpose of purchasing petroleum products.

The applicant also relied on the case of *Card Protection Plan Limited V Commissioners of Customs and Excise* (Case C -349/96) (unreported) where court explained that,

> *"There is a singly supply in particular in cases where one or more element are to be regarded as constituting the principal service, whilst one or more elements are to be regarded by contrast, as ancillary services which share the tax treatment of the Principal Service. A service must be regarded as ancillary to a principal service if it does not constitute for customer's an aim in itself but a means of better enjoying the principle service supplied."*

The applicant submitted that the fuel cards are clearly ancillary to the supply of petroleum products for they do not constitute a different aim in themselves.

The applicants also cited the case of *Commissioners of Customs and Excise V British Telecommunications PLC* (1999) UKHL 3 where the House of Lords observed that no single factor or set of factors can determine whether a supply is incidental or not. The court should take into account the circumstances of each case.

The applicant also referred to a recent decision of the House of Lords in *Dr. Beynon and Partners V C & E Commissioners* (2004) UKHL 53 where Lord Hoffman explained that in determining whether there is a single supply, regard

had to be made to all the circumstances in which the transaction took place, but in any case, a supply which from an economic point of view is a single service should not be artificially split into separate services.

The applicant argued that it is clear that fuel cards offered by the applicant to its customers are clearly incidental to the supply of petroleum products. The cards do not constitute a distinct aim in themselves but are intended to enable the applicant's customers to better enjoy the company's products. The applicant likened the applicant's fuel cards to a bank's ATM cards. ATM cards are not liable to VAT because financial services are VAT exempt.

The respondent submitted that S. 19 (1) of the VAT Act provides that a supply of goods and services is an exempt supply if it is specified in the Second Schedule. The Second Schedule provides for the exemptions of petroleum fuels subject to excise duty. S. 12(1) provides that a "supply of services incidental to the supply of goods is part of the supply of goods." S. 11(1) provides what a supply of services is.

The respondent contended that the applicant charges the dealers a management fee yet the cards remain the property of the applicant. The respondent submitted that the applicant makes a supply of two services; one is the supply of fuel cards and the second one is making available the service of facilitating the increase of volume of sales of the dealers. The respondent contended the said facility of improving the volume of sales is not incidental to the supply of goods and is therefore not exempt.

Counsel for the respondent stated that the term 'incidental' is not defined in the VAT Act. However cases have expounded on it. He referred to the case of

Customs and Excise Commissioners V Madgett and Baldwin (supra). The respondent submitted the services which the applicant renders to the dealers do not enable the customer better enjoy the fuel. The services by the applicant to the dealers do not constitute the principal service which is the supply of fuel to customers.

The respondent also referred to the cases of *Card Protection Plan Limited V Customs and Excise Commissioners* [1999] STC 199*, Customs and Excise Commissioners V British Telecommunications* [1997] STC 475, *Customs and Excise Commissioners V Leighton Ltd* [1995] STC 4548, *Bophuthatswana National Commercial Corp Ltd V Customs and Excise Commissioners* [1993] STC 702, *C & E Commissioners V Leightons* [1995] STC 463, *British Airways PLC V Customs and Excise Commissioners* [1990] STC 643 and *Customs and Excise Commissioners V Welling Private Hospital* Ltd [1997] STC 445.

The applicant stated that there are pertinent questions that are used as a yardstick for determining whether the supply of the secondary goods is incidental or ancillary to the principal supply. These questions are: (1) Was it one supply or two or more? (2) Were the other supplies an integral part of the principal supply? Or did the other supplies lose their separate identity as a supply for fiscal purposes? (3) Are the other supplies physically and economically dissociable from the principal supply and can the individual supplies be analyzed by reference to specific taxing and relieving provisions? (4) Can the consideration received by the taxpayer be apportioned between the supplies? Or if it was a single sum paid what did the taxable person supply in return for the single sum paid by the other party to the transaction? (5) Was it a supply of goods to which the supply of services was ancillary (or incidental)? Or was it a supply of services to which the supply of goods was ancillary (or

incidental) or did he make two supplies? (6) Does the supply of the service or good constitute for the customer an aim in itself or is it a means of better enjoying the principal service supplied?

The tribunal having listened to the evidence and taking into consideration the submissions of the parties rules as hereunder.

Under S. 1(f) of the VAT Act an exempt supply means a supply of goods or services to which S. 19 applies. S. 19 of the VAT Act provides that a supply of goods and services is an exempt supply if it is specified in the Second Schedule. Under item 1(o) of the Second Schedule the supply of petroleum fuels (petrol, diesel and paraffin) subject to excise duty is exempt. It is not in dispute that a supply of fuel is an exempt supply.

What is in dispute is the provision of management services in respect of the ‘closed’ fuel cards issued. The applicant supplies its customers with fuel cards at Shs. 10,000/= and VAT of Shs. 1,800/=. There are two types of cards ‘open’ and ‘closed’ cards. Open Cards are used to purchase fuel and groceries. Closed fuel cards allow customers to only purchase fuel. While the applicant contends that the open cards are not VAT exempt the closed cards are exempt. It is the VAT element of the closed cards that is the bone of contention.

This application involves the supply of fuel on the one hand and the supply of management services to dealers in respect of issuing fuel cards on the other. That is, there is a supply of goods on the one hand and a supply of services on the other. S. 12 of the VAT Act deals with mixed supplies. S. 12 of the VAT Act reads

"(1) A supply of services incidental to the supply of goods is part of the supply of goods.

(2) A supply of goods incidental to the supply of services is part of the supply of services.

(3) A supply of services incidental to the import of goods is part of the import of goods.

(4) Regulations made under section 78 may provide that a supply is a supply of goods or services."

While the applicant contends that the provision of the management services is incidental to the supply of the fuel cards the respondent objects.

As rightly pointed out by the respondent the VAT Act does not define incidental. However it is trite law that Acts of Parliament including taxation law should always be given ordinary meaning. The Oxford Advanced Learner's Dictionary 6th Edition p.604 defines "incidental" as something that happens in connection with something else, but is less important. So the issue is whether the management services are provided in connection with the issuing of fuel cards and are less important?

We agree with the counsel for the applicant in the case of *Commissioners of Customs and Excise V British Telecommunications* PLC (1999) UKHL 3 where the House of Lords observed that no single factor or set of factors can determine whether a supply is incidental to the principal supply or not. The court should take into account the circumstances of each case.

Both parties agreed with the principle stated in *Card Protection Plan (CPP) Limited V Commissioners of Customs and Excises* (Case C-349/96) where the court stated that,

"A service must be regarded as ancillary to a principle service if it does not constitute for customers an aim in itself but a means of better enjoying the principal service supplied.

The tribunal agreed with the said principle in *UTODA Branch Limited V Uganda Revenue Authority* TAT 8 of 2009 where it stated the test should be: can the provision of the services by the taxpayer be independent of the exempted supply? In other words, if there is no fuel being purchased would one need the 'closed' card? Without fuel there would be no need for the 'closed' card. Unlike the closed card, the open card would still be used to purchase groceries which are not an exempted supply.

In *Diamond Shipping V Uganda Revenue Authority* TAT 21 of 2008 the tribunal held that the provision of clearing and forwarding services as well shipping, which Uganda Revenue Authority termed as coordinating and handling international trade, were part of international transport. The Tribunal said it would be difficult to draw a dichotomy between the services provided by the applicant and the owners of the modes of international transport. They both provide one service. Likewise the provision of management services in respect fuel cards and the supply of fuel is the provision of one service that is of fuel.

In *Card Protection Plan Limited V Customs and Excise Commissioners* (supra) the plaintiff operated a card protection plan which was intended to limit the financial loss and inconvenience caused by the loss of cardholders' credits cards and other types of property. The scheme had various benefits and services (15 in total). It was contended that the services supplied were under an arrangement for the provision of insurance which was exempt from VAT. So the dispute revolved around whether there was a single supply of insurance or a single supply of card registration service. It was held that whether the supply of

insurance was incidental to, or an integral part of the supply of convenience, or vice versa was necessarily a matter of impression on which different minds might reach different conclusions. The tribunal found that the services supplied were the contractual obligations of CPP as set out in the advertising leaflet. While those services contained elements of both convenience and insurance, the main element of the majority of the services was the element of convenience; indeed only two services could be classified as pure insurance. Accordingly the supply of insurance was incidental to the supply of convenience. CPP had a single supply of card registration service which was chargeable to VAT at the standard rate.

RW1 Mr. Dickens Kateshumbwa informed the Tribunal that the customer can use the credit card to purchase fuel at his own convenience and also to obtain fuel on credit. The customer does not have to carry cash. The cards are of two types. The prepaid and post paid. On the prepaid card the issue of credit does not arise. Therefore the convenience of credit is not the reason the cards are issued. However a customer does not have to carry cash which is convenient. The main purpose of the card is the provision of convenience to customers as they do not have to go to banks to collect money.

The management fees arise from the convenience the cards provide to customers. A customer needs the closed card to purchase fuel. Without the supply of fuel the closed card would be rendered irrelevant. As already defined by the Oxford Learners Dictionary (supra) “incidental” is something that happens in connection with something else, but is less important. The convenience the card provides is less important than the supply of fuel. Therefore the supply of the convenience service provided by the closed card is incidental to the supply of fuel. The closed cards are issued as a means of a customer better enjoying of

the principal service of supply of fuel. In contrast, the supply of fuel is incidental to the supply of convenience in respect of the open card because without fuel the card can still be used to buy groceries. For the open card the supply of fuel is less important than the provision of the card. It cannot be said for the open card that the supply for convenience is incidental to the supply of fuel.

In *British Airways plc V Customs and Excise Commissioners* [1990] STC 643 British Airways operated the business of transporting passengers and freight by air. It endeavored to provide in-flight catering for passengers on its many domestic flights. Passengers paid a single amount according to the type of ticket purchased. No part of the ticket price was expressly attributed to the in-flight catering. The price was the same whether or not a passenger wanted or took advantage of the facility and no refund was payable. Evidence showed that the British Airways provided catering to make the service saleable and to compete effectively and that the public wanted it. The Commissioners of Customs and Excise decided that British Airways made two supplies to its passengers, one of transport by air which fell to be zero-rated and the other of in-flight catering which was chargeable to tax. The Court held that the question whether British Airways has made one supply or two supplies was a question of law on which the court was entitled and bound to form its own view. It further held that in-flight catering was part of and integral to the supply of air transportation. Accordingly, British Airways had made one supply, namely that of air transportation. The Commissioners appeal was therefore dismissed.

Like in the above case, the applicant provided both the closed and open cards in order to improve its sale of fuel and to compete effectively. The price of fuel was the same whether a customer had a card or not though at times a discount would be negotiated. Apart from the amount the customer paid for the card i.e.

Shs. 11,800/= no amount on the card would be expressly attributed to the convenience the customer was enjoying. The applicant was charging the dealers a management fee for the costs of making the cards. However the dealers were not the end users and were not the beneficiary of the convenience the card provided. It is the view of the Tribunal that the supply of the convenience is part and integral to the supply of fuel. Accordingly the applicant makes one supply, namely of fuel.

In the circumstance this Tribunal will allow this application, set aside the assessment of Shs. 689,401,245/= being VAT assessed. Costs of the application are awarded to the applicant.

Dated at Kampala this ……day of……2011.

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Asa Mugenyi	**Stephen Akabway**	**Pius Bahemuka**
Chairman	**Member**	**Member**