THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 8 OF 2019

MTN UGANDA LTD ==========APPLICANT

VERSUS

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

BEFORE DR. ASA MUGENYI, MR. GEORGE MUGERWA, MR. SIRAJI ALI

RULING

This ruling is in respect on the point of imposition and computation of excise duty on the provision of airtime by telecom service providers.

In 2009, the applicant introduced a product known as mobile money. The mobile money platform is used to sell airtime. The applicant sells airtime to dealers at what is known as point of sale (sale price). The dealers sell airtime to customers at a market rate which includes his or her commission (retail price). The customers use airtime for making calls, data or SMS or text messages (point of usage). The respondent issued an assessment of Shs. 24,273,771,472 to the applicant basing on the point of usage which the latter objected to and insisted that the former uses a point of sale. In a consent arising in HCCS 938 of 2016 involving the same parties, it was agreed that the amount of excise duty on airtime would be referred to the Tribunal for determination as to whether it is calculated at point of sale or point of usage.

The following issues were set down for determination;

1. Whether excise duty on the sale of airtime should be calculated based on the point of sale or point of usage?
2. What remedies are available?

The applicant was represented by Mr. Oscar Kambona, Mr. Bruce Musinguzi and Ms. Barbara Musiimenta while the respondent was represented by Mr. Habib Arike.

The dispute between the parties revolves around at what point excise duty should be imposed on airtime. While the applicant contends it should be at the point of sale the respondent insists it should be at the point of usage. The respondent issued the applicant an excise duty assessment of Shs. 24,273,771,472 using the point of usage as the basis of calculating the duty. The parties opted to file written submissions without calling witnesses as they felt the matter involved the interpretation of the law.

The applicant submitted that S. 3A(1) of the Excise Tariff (Amendment) Act 2002 provides that "there shall be charged in respect of provision of airtime or talk time for mobile cellular phones, excise duty at the rate specified in Schedule 2 of the Act." The applicant contended that the taxable value should be determined at a point where consideration is paid. The applicant based its argument on S. 3A(6) of the Excise Tariff (Amendment) Act which provides that "the taxable value of the usage charges shall be determined in accordance with section 22 of the Value Added Tax Statute." S. 22 of the VAT Act provides that "Except as otherwise provided under this Act, the taxable value of a taxable supply is the total consideration paid in money or in kind by all persons for that supply." The applicant argued that the literal interpretation of S. 3A(6) of the Excise Tariff (Amendment) Act and S. 22 of the VAT Act is that the taxable value for excise duty for the provision of airtime is the same as the taxable value for VAT on the supply of airtime. The applicant cited **Cape Brandy Syndicate v IRC** (infra) as an authority for the use the literal interpretation.

The applicant argued that the amount the dealer pays for the airtime is what the law requires the applicant to use to account for excise duty. The applicant sells the airtime at a discount. For instance, if the applicant sells to a dealer an airtime card of Shs. 10,000 (point of usage), the agent pays Shs. 8,000 (point of sale). The applicant should account for excise duty on the Shs. 8,000 because it is the consideration it received. The applicant cannot account for excise duty on Shs. 10,000 because it does not receive consideration

for that amount. It argued that therefore the discount or reduced consideration is the taxable value for both excise duty and VAT.

The applicant submitted that S. 3A(5) of the Excise Tariff (Amendment) Act provides that: "The excise duty shall be charged together with the Value Added Tax but the credit input tax allowed under section 29 of the Value Added Statute shall not apply to the excise duty." The applicant argued that the Excise Duty Act provides that the timing of accounting for duty is similar to that for VAT. Therefore under S. 3A(5) of the Act the applicant would be required to account for excise duty at the point VAT is paid. Hence using the above scenario if a dealer purchases from the applicant airtime worth Shs. 10,000 at Shs. 8,000 the applicant is required to account for the VAT at the point the dealer pays the Shs. 8,000. The applicant argued that under S. 3A(5) it would be mandated to account for the excise duty at that point. The applicant therefore submitted that it should account for the duty as soon as the dealer purchases the airtime and not when the customer uses the airtime. The point at which the dealer purchases the airtime is the point is the point of sale and the applicant prayed that this is the point the Tribunal should find as when excise duty should be paid.

The applicant argued that the issue of accounting was covered in the consent in HCCS 938 of 2016 where it was agreed that the computation of VAT and excise duty applied by the applicant should conform to the VAT Act, the Finance Act and other relevant laws governing excise duty on airtime. The applicant contended that by signing the consent decree, the respondent bound themselves to the law. The applicant prayed that if the applicant's computation of excise duty is in conformity with the law, the assessment of Shs. 24,273,771,472 is vacated.

In reply, the respondent submitted that S.3(1)(A) of the Excise Tariff (Amendment) Act 2002 imposes a charge in respect of airtime or talk time for mobile cellular phones, excise duty at a rate specified in Schedule 2 of the said Act. S. 3A(2) provided that the duty shall be levied on the usage charges and access charges prepaid or postpaid, charged by mobile cellular phone service providers for use of cellular services. The respondent

argued that those sections implied that for the period commencing 1st July 2001 excise duty was chargeable on usage.

The respondent submitted that S. 3A of the above law was amended in 2012 by S. 3A(6) of the Excise Tariff (Amendment) Act 2012 which provided that "the taxable value of provision of airtime or talk time for public pay phones and landlines shall be the price paid or payable by the consumer of that service. The effective day of the Act was 1st July 2012. The respondent submitted further that Part 1 of the Schedule to the Excise Tariff (Amendment) Act 2013 item 13(d) provided that an excise duty rate of 12% and 5% shall be applied for the usage of airtime on mobile cellular lines and landline/public pay phones respectively. The respondent argued that excise duty is chargeable at the point of sale for transactions that occurred after 1st July 2012 while transactions that were effected before 1st July are subject to excise duty on usage. The respondent reiterated that applicant's position that the Tribunal uses the literal method in interpreting the statutes. It cited **Cape Brandy Syndicate v IRC** *(1921) KB 64* where the court stated "...There is no presumption as to a tax. Nothing is to read in it, nothing to be implied. One can only look fairly at the language used." The respondent concluded that the transactions in issue are subject to excise duty on usage. This is a bit of a contradiction from the earlier argument.

In respect of the consent decree, the respondent cited **Peter Mulira v Mitchell Cotts Ltd**. *CACA 15 of 2002* where the court stated: "The law regarding consent judgment is that parties to a Civil Suit are free to consent to a judgment..." The respondent submitted that the consent judgment was binding on the parties as far as it relates to the assessment of Shs. 14,945,562,576. The respondent argued it is not tenable to rely on the said consent judgment in the current suit since its terms are not applicable to the current matter. There have been changes in the law.

In rejoinder, the applicant contended that the amendment of S. 3A(6) of the Excise Tariff (Amendment) Act did not change the tax point. The applicant argued that S. 3A(6) was substituted with a provision which did not deviate from the earlier one but only emphasized that excise duty is accounted for at the point of sale. The applicant also

contended that the respondent conceded that for the period 2012 to 2013, the law allowed for excise duty to be charged at the point of sale. It prayed that the Tribunal takes that into consideration. The applicant also argued that Part 1 of the Schedule to the Excise Tariff (Amendment) Act does not supersede a provision of the law.

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The applicant argued that the terms of the consent are directly applicable to the issues before the Tribunal in the computation of excise duty on airtime. At the time the consent decree was signed the legislation in force was the Excise Tariff (Amendment) Act, 2002. The Act was not amended till 2012. Therefore the issues in dispute cover a period when the consent was still binding.

Having read the submissions of the parties this is the ruling of the Tribunal.

The applicant introduced a product known as mobile money which is used to sell airtime. The applicant sells airtime at, what the parties called a 'discount' to dealers known as point of sale (sale price). The dealers sell airtime to customers at a market rate which includes his or her commission (retail price). The customers use airtime for making calls, data or SMS or text messages (point of usage). The respondent is authorized to collect excise duty from the applicant. The question is: at what stage should the excise duty be collected?

From the illustrations given by the applicant, it sells airtime to the dealer where the commission of the latter is factored in. Therefore if an airtime card is Shs. 10,000 and the commission is Shs. 2,000 the applicant will sell the card to the dealer at Shs. 8,000. One wonders whether the Shs. 2,000 should be called a discount, when it is actually a commission. A commission and a discount are not one and the same thing. A commission is defined by *Black's Law Dictionary* page 327 as "5. A fee paid to an agent or employee for a particular transaction, usually, as a percentage of the money received from the transaction." A discount is defined by *Black Law Dictionary* (supra) page 564 as "1. A reduction from the full amount or value of something especially, a price." When a commission is paid to an agent the value of the service is not reduced. The commission

is factored in the price of the item or service. When there is a discount on a price, in most cases the commission is reduced accordingly. A discount is therefore not synonymous with a commission.

Excise duty is a tax imposed on specified imported or locally manufactured goods and services. *Black's Law Dictionary* 10th Edition page 684 defines excise [duty] as "A tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity." As such it may be taxed on either the manufacture, or sale or use of an item or service depending on the intention of the legislature. One needs to look at the legislature imposing the tax and determine at what point it should be taxed.

The Excise Tariff (Amendment) Act 2002 S. 3A provides for the imposition of excise duty on the provision of airtime and the modalities for its collection. S. 3A reads:

"(1) There shall be charged in respect of the provision of airtime or talktime for mobile cellular phones, excise duty at the rate specified in Schedule 2 to this Act.

(2) The duty shall be levied on the usage charges and access charges pre-paid or post-paid or post-paid charged by mobile cellular phone service providers for the use of cellular services.

(3) The duty shall be collected and paid by the mobile cellular phone service providers licensed by the Uganda Communications Commission established by the Uganda Communications Act, 1997, in accordance with the provisions of the Management Act.

(4) Where no usage fee is charged, or where there is an application to own use by the cellular phone service provider for the purpose of its business activities, the duty shall be charged on the market value of the cellular phone service provided, as if this were a sale in the open market.

(5) The excise duty shall be charged together with the Value Added Tax but the credit input tax allowed under section 29 of the Value Added Tax Statute shall not apply to the excise duty.

(6) The taxable value of the usage charges shall be determined in accordance with section 22 of the Value Added Tax Statute.

(7) Every mobile cellular phone service provider that collects excise duty under this Act shall lodge a tax return with the Commissioner General on a prescribed form and pay the tax due by the fifteenth day of the following month.

(8) The provisions of the Management Act shall, with necessary modifications, apply to the collection, payment and enforcement of the duty".

The Second Schedule provides that the rate of duty on airtime or talktime for mobile cellular phones is 7%. Part 1 of the Schedule to the Excise Tariff (Amendment) Act 2013 item 13(d) increased the excise duty rate to 12% and 5% for the usage of airtime on airtime on mobile cellular devices, landlines and public pay phones respectively. Part II of the Schedule item 2(3) provided that the value of an excisable service shall be the price paid by the consumer of the service excluding value added tax chargeable under the Value Added Tax Act and excise duty chargeable under this Act.

Both parties cited, which the Tribunal agrees with, the authority of **Cape Brandy Syndicate v The Commissioners of Inland Revenue** *CA [1921] 2 KB 403* where Rowlatt J stated:

> "It means this, I think; it means that in taxation you have to look simply at what is clearly said. There is no room for an intendment; there is no equity about a tax; there is no presumption as to a tax; you read nothing in; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax."

So the Tribunal has to ask itself: What is the literal meaning of the Excise Tariff (Amendment) Act in respect of the imposition of excise duty on airtime. Is it imposed on usage or sale of airtime?

A literal reading of S. 3A(2) of the Excise Tariff Amendment Act shows that the imposition of excise duty on airtime is concerned with the usage of airtime. S. 3A(2) mentions that the duty shall be levied on usage charges and access charges by the service providers for the use of cellular services. The Section is self- explanatory. It is clear and unambiguous.

S. 3A(4) provides for circumstances that look like an exception where there is no usage fee charged or where the service providers uses the airtime for the purpose of its business

activities. Usage charges are usually not charged on free calls. For this and for own use for business, the duty is charged on the market value of the service provided or as if it was a sale in the open market. That is when the point of sale is considered. What the Section seems to emphasize is that, if there are no charges or the providers use the airtime for purposes of own business they should still pay the market value. In essence there is no exception.

S. 3A(6) provides that the taxable value of usage charges shall be determined in accordance with S. 22 of the Value Added Tax Act. S. 22 of the VAT Act is now S. 21. S. 22 of the VAT Act now deals with adjustments while S. 21 deals with taxable values of taxable supplies. S. 21(1) of the Act provides:

> "Except as otherwise provided under this Act, the taxable value of a taxable supply is the total consideration paid in money or in kind by all persons for that supply."

The term "consideration" is defined by S. 1 of the VAT Act:

> "... 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, directly or indirectly, including any duties, levies, fees, and charges paid or payable on, or by reason of, the supply other than tax, reduced by any discounts or rebates allowed and accounted for at the time of supply"

A literal reading of Sections 1 and 21 of the VAT Act show that consideration is viewed as the total amount of money paid for a supply of good or services. S. 1 of the VAT Act does not provide for a reduced consideration, or reduced by a commission payable to an agent.

The applicant contended that under S. 21(1) of the VAT Act a discount or a reduced consideration should be considered the taxable value for both excise duty and VAT. The Tribunal does not think it was the intention of the legislature to consider a "reduced consideration" as the taxable value of a service. The Act clearly stated total consideration. Reduced consideration is not total consideration. The word 'total' is not synonymous with 'reduced'. If the Act had intended that reduced consideration should be considered as the value of a service it should have said so. As already stated there is no equity about a tax, you read nothing in and you imply nothing. In tax matters, there are no presumptions as

to a tax. You look fairly at what is stated. The Act states taxes should be based on total consideration and not reduced consideration and that is how it should remain.

The term 'usage' in the Excise Tariff (Amendment) Act connotes the application of services by a consumer or customer. Therefore a usage charge would be the total amount the consumer pays for the use of a service. The Tribunal notes that 'usage charges', 'total consideration', 'total amount in money or kind payable' all have the same effect on the price a consumer will pay. When the taxes are excluded one would get the price paid by the consumer of the service excluding value added tax chargeable under the Value Added Tax Act and excise duty as provided for under Part II of the Schedule item 2(3) of the Excise Tariff (Amendment) Act 2013.

The applicant gave an illustration where airtime worth Shs. 10,000 is sold to an agent for Shs. 8,000. The commission of an agent is Shs. 2,000. Two of the principles underlying a good tax are it should be simple to collect and it should be certain. There are challenges on using a sale point or reduced commission where a service provider like the applicant sells directly to the market without use of agents. Where the applicant or principal sells an item directly to the market there is no commission payable. The price for the point of sale would be equivalent to that of point of usage. So how would a revenue collecting body treat the applicant when it is selling on its own or without using an agent? Secondly, how would a tax authority determine the sale price? There is difficulty in ascertaining the commission the service provider pays to the agents. A taxman cannot ascertain the commission unless he becomes part of the operation of the service provider.

There is a difference between point of sale, point of usage, point of payment of taxes. S. 3A(5) of the Excise Tariff Amendment Act provided the excise duty shall be charged together with VAT but the credit input allowed under S. 29 of the VAT Act shall not apply to excise duty. Charge is defined in *Black's Law Dictionary* page 282 as "To impose a lien or claim." The Act simply requires the service provider to impose or collect excise duty at the same time it does for VAT. S. 3A(5) does not specifically state that excise duty should be the same as VAT. S. 3A(6) merely states that taxable values for excise duty shall be

determined according to the VAT Act. S. 3A(5) states further that a service provider cannot claim excise duty paid elsewhere as input tax the same way credit input VAT is allowed under the VAT Act. VAT is paid or payable or collected at the point of sale so should excise duty. Therefore the Tribunal holds that while excise duty is charged according to usage and not sale value, it should be collected when services are sold. S. 3A(7) of the Excise Tariff (Amendment) Act requires the tax to be paid by the service provider on the fifteenth day of the following month.

The respondent cited S. 3A(6) of the Excise Tariff (Amendment) Act 2012 which provided that:

> "The taxable value of provision of airtime or talk time for public pay phones and landlines shall be the price paid or payable by the consumer of that service excluding the Value Added Tax chargeable under the Value Added Tax cap 349 and excise duty chargeable under the excise tariff Act Cap. 338".

The said Section applies to provision of service to public pay phones and landlines which are different from individual cellular phones which are provided for in S. 3A(4) of the Excise Tariff (Amendment) Act 2002. However what is important to note is the taxable value is the price paid by the customer excluding taxes. The said price does not exclude commissions paid to agents. The tax treatment of public pay phones, landlines and cellular phones is the same.

Both parties entered into a consent in HCCS 938 of 2016. Parties are free to enter consent decrees and judgment on the terms they wish. A consent decree involves "a give and take" arrangement. At times the parties in order to settle prefer not to apply to the law. A consent decree cannot be a binding authority on another court or Tribunal because they are not aware of the principles or the arrangements that were involved when it was made. It only binds the parties to the consent on the transaction in dispute. One wonders how parties who opted to refer, to the tribunal, an issue of determination on whether excise duty should have been calculated on point of sale or usage, can appear before the Tribunal and inform it that it is bound by the consent they filed in High Court. Then what was the Tribunal supposed to determine? The Tribunal also notes that the time period of

the consent, that is before 2005 and the issue in this matter, 2011 to 2013 is different. Therefore we cannot use the consent as a basis for making a decision

Taking all this into consideration, the Tribunal states that the Excise Tariff (Amendment) Act 2002 intended that excise duty should be paid according to what the parties know as usage of the services and not point of sale. The Tribunal therefore dismisses this application with costs to the respondent. The assessment of Shs. 24,273,771,472 is upheld.

It is so ordered.

Dated at Kampala this 28th day of May 2020.

DR. ASA MUGENYI	**MR. GEORGE MUGERWA**	**MR. SIRAJI ALI**
CHAIRMAN	**MEMBER**	**MEMBER**