UNDERSTANDING THE IMPLICATION OF THE UGANDA REVENUE AUTHORITY VS COWI A/S[1] CASE TO THE TAX JUSTICE MOVEMENT.

BACKGROUND

COWI A/S is a consultancy engineering company incorporated in Denmark where it has its principal place of business. It is registered in Uganda as a foreign company where it operates a branch. During the year 2018, Uganda Revenue Authority (URA) conducted an audit of COWI A/S branch office operations for the year 2013 – 2016. One of the findings from the audit was that the branch had not charged and / or paid Value Added Tax (VAT) on the man hour cost of staff at the head office (offshore services) whose cost was allocated to the branch. While URA contended the services involved consultants based in Denmark doing work for the branch, COWI A/S contended it was a mere allocation of costs to the branch as part of an arm's length share of profits and losses within the entire group since all work was done in Denmark. URA nevertheless issued COWI A/S an assessment that included a component of VAT of Ushs. 361,167,524/= (Uganda Shillings Three Hundred Sixty One Million One Hundred Sixty Seven Five Hundred Twenty Four only). COWI A/S paid the tax assessed under protest and lodged an objection regarding this component to URA which was unsuccessful.

APPEAL TO THE TAX APPEALS TRIBUNAL

COWI A/S appealed to the Tax Appeals Tribunal where the objection decision was overturned on the basis that the company in Denmark and the office in Uganda are one and the same legal person. The Tribunal held that a taxable person under the VAT Act is one registered for VAT. Branches do not register. For an import to take place there should be two legal persons involved in the activity which was not the case here.

APPEAL TO THE HIGH COURT

Dissatisfied with that decision, URA appealed to the High Court. It contended that there was ample evidence that consultancy services were rendered to the branch in Uganda by staff at the head office in Denmark. The branch in Uganda adopted the instructions given on review by the head office. They were therefore imported into Uganda. It further argued that what is taxable is the service rendered by the overseas head office to the branch. The employer – employee relationship is not part of that consideration and it is entirely irrelevant.

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[1] Civil Appeal No. 0034 of 2020. Decided at the High Court of Uganda (Commercial Division) by Hon. Justice Stephen Mubiru. Accessed via https://ulii.org/ug/judgment/court-appeal-uganda/2021/134 on the 5th day of January 2022.

COWI A/S contended that the man hour cost of staff at the head office was not a taxable service under the Act. That since COWI A/S is a foreign company registered in Uganda; its branch is not a separate entity but a mere place of business in Uganda for COWI A/S as a foreign company. That the services were not performed in Uganda but at the Head Office in Denmark and therefore were not imported into Uganda in order to be subject to VAT. Charging or allocating them to the branch was a mere arm's length share of profits and losses by the entire group.

DECISION OF THE HIGH COURT

Honorable Justice Stephen Mubiru held that under *Regulation 13 (a) of The Value Added Tax (Amendment) Regulations, 2011*, a branch in Uganda as distinct from its head office overseas, is considered to be a taxable person for VAT purposes, even though they both form part of the same legal entity. This also applies in case of two branches with different commercial registrations. As such, a branch is registered as a taxable person in its own right. As a consequence a transaction between a local branch and its head office overseas, or between commercial registrations within the same legal entity, would be considered as a VAT relevant supply.

The Learned Justice also held that Support or supervisory / administrative work rendered to a branch from a head office overseas in the course or furtherance of business of the branch becomes a supply when it is made for a consideration.

His Lordship further held that in determining whether a transaction is a sham or an illusory transaction or a device or ruse, tax authorities and Courts of law have the powers to lift the corporate veil of a company to ensure that it is not used to circumvent tax obligation or to perpetrate fraud. He added that *Regulation 13 (a) of The Value Added Tax (Amendment) Regulations, 2011*, lifts the corporate veil as a means of creating an even playing field between local and overseas businesses. That it is intended to level the VAT treatment for services procured from overseas and those procured locally so as to achieve parity in VAT treatment for all services consumed in Uganda. He emphasized that Regulation 13 is based on the concept of tax neutrality in VAT which has a number of dimensions, including the absence of discrimination in a tax environment that is unbiased and impartial and the elimination of undue tax burdens and disproportionate or inappropriate compliance costs for businesses.

RELEVANCE OF THE DECISION TO THE TAX JUSTICE MOVEMENT

In a country estimated to be losing over Ushs 2 trillion annually to illicit financial flows (IFFs), 65% of which constitute commercial drivers such as base erosion and profit shifting[2], this decision has set a very crucial precedent in the fight against transfer pricing mostly perpetuated by Multi-national corporations in Uganda and thus boosted government's efforts to raise revenues domestically. The aspect of lifting the corporate veil of a corporation to determine whether a transaction is a sham or a device used to evade taxes particularly stands out here to curb the transfer pricing loopholes.

The decision is also very important because it touches on the importance of taxation as a tool for promoting fairness and neutrality in the business field. This is intended to level the playing field for multi-national corporations and Micro, Small and Medium Enterprises (MSMEs). It is also intended to keep MSMEs in business as a going concern without being pushed out because of disproportionate and inappropriate compliance costs.

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[2] Accessed via https://observer.ug/businessnews/68701-uganda-losing-revenue-in-illicit-flows on the 5th day of January 2022.