

THE REPUBLIC OF UGANDA
IN THE TAX APPEALS TRIBUNAL AT KAMPALA
MISCELLANEOUS APPLICATION NO. 32 OF 2020
ARISING OUT OF TAT APPLICATION NO. 33 OF 2020

CENTURY BOTTLING COMPANY LIMITED ===== APPLICANT
VERSUS
UGANDA REVENUE AUTHORITY ===== RESPONDENT

BEFORE DR. ASA MUGENYI, MRS. CHRISTINE KATWE, MR. SIRAJ ALI

RULING

This ruling is in respect of an application for a review of the exercise by the Commissioner General of the discretion to pay tax in installments and for a temporary injunction restraining the respondent from collecting the tax assessed pending the disposal of the main application.

The application has been brought under Rule 30 of the Tax Appeals Tribunal (Procedure) Rules 2012 and is based on the grounds set out in the affidavit of Mr. John Mukiibi. The respondent opposes the application based on the grounds set out in the affidavit of Ms. Christa Namutebi.

The facts giving rise to this application are as follows: The applicant is a private limited liability company incorporated in Uganda and engaged in the production and distribution of soft drinks under a franchise from Coca Cola Company. A tax audit carried out on the applicant by the respondent in 2019, for the period January 2014 to December 2017, disclosed an assessed tax liability of Shs. 58,141,883,182 comprising of Local Excise Duty, Value Added Tax and Corporate Income Tax. The applicant formally objected to this assessment on 16th January 2020. The applicant's said objection was disallowed on 12th April 2020.

Pursuant to the respondent's objection decision, the applicant filed TAT application no. 33 of 2020, for a review of the said assessment. S. 15 of the Tax Appeals Tribunal Act, requires a tax payer who has lodged an objection, to pay 30% of the tax assessed or part of the tax not in dispute, whichever is higher, pending final resolution of the objection. In seeking to comply with this provision the applicant wrote to the respondent on 16th April 2020, requesting to pay 30% of the tax assessed in instalments. The respondent rejected this request by its letter dated 23rd April 2020. Further, the respondent sent the applicant a final demand on 17th April 2020, requiring the applicant to make full payment of the said assessment. This application seeks to review the decision by the Commissioner General, rejecting the request by the applicant to pay 30% of the principal tax in instalments and to restrain the respondent from collecting the sum assessed pending the determination of its dispute with the respondent.

In respect of the first part of this application, namely, the prayer to pay 30% of the principal tax in installments, the applicant made the following broad arguments. Firstly, that owing to the COVID 19 pandemic and the resulting restrictions imposed by the Government, its operations are at a fraction of their installed capacity. Further, its sales dropped by over 55% between March and April 2020, without a corresponding reduction to its wage bill and other expenses. In short, the applicant did not have the means to pay 30% of the principal tax in a lump sum. Secondly, that in accordance with S. 14(1) of the Tax Appeals Tribunals Act, the tribunal has the powers to review any taxation decision by the respondent, including a decision, rejecting a proposal to pay 30% of the principal tax in installments. Thirdly, that S. 28 of the Tax Procedure Code Act, grants the Commissioner General, the discretion to accept the payment of tax in installments.

In respect of the application for a temporary injunction, the applicant argued that it has a good and meritorious case, with a high likelihood of success. The applicant will suffer irreparable loss and that on a balance of convenience, the respondent ought to be restrained. Relying on the affidavit of John Mukiibi, the applicant submitted that, there exists a serious dispute between it and the respondent, as to the interpretation and application of the term 'ex-factory' as used in assessing Local Excise Duty. The

applicant submitted further, that the recovery of the entire assessment, would not only cripple its business, but also lead to loss of reputation and market share, as its liquidity and operations will be permanently affected. This would not only affect its continued economic contribution to the national fiscal effort but also negatively affect its employees.

In reply, the respondent raised a preliminary objection on a point of law, to the effect that the tribunal does not have the jurisdiction, to grant the applicant, an order permitting it to pay 30% of the principal tax in instalments. The respondent, relying on S. 28(1) of the Tax Procedures Code Act and on the Supreme Court decision of **Uganda Projects Implementation Management Centre (UPIMAC) v URA** Constitutional Appeal No. 02 of 2009, submitted that the power to permit the payment of 30% of the principal tax in installments belongs to the Commissioner General. The respondent submitted that the proper procedure was for the applicant to file an application for a judicial review of the Commissioner General's decision in the High Court. The respondent submitted further, that the Commissioner General's decision, rejecting the applicant's request to pay 30% of the principal tax in instalments, did not amount to a taxation decision. The respondent submitted, that as a result, the tribunal, whose jurisdiction is confined to the review of taxation decisions, was not the proper forum for the determination of the question relating to whether the Commissioner General had exercised her powers judiciously.

In respect of the application, for a grant of a temporary injunction, the respondent submitted, that the applicant, having failed to pay 30% of the principal tax, had no locus to appear before the tribunal, on any business, let alone file an application, for an injunction, seeking to restrain the lawful collection of tax. The respondent submitted that, a proper interpretation of S.15 of the Tax Appeals Tribunal Act, envisaged payment of 30% of the tax assessed, at the time an objection is filed, but before an objection decision has been rendered. It was the respondent's submission that the term 'final resolution of the objection' refers to an objection decision by the respondent, after an objection by a tax payer under S. 24 of the Tax Procedures Code Act.

The respondent submitted further that though the term 'objection' was not defined under the Tax Appeals Tribunal Act, S. 24 of the Tax Procedures Code Act, defines it as 'objections against tax decisions of the Commissioner'. The respondent submitted that the Commissioner is bound to render an objection decision which is a final determination of the S. 24 of the Tax Procedures Code Act.

The respondent submitted further, that the grant of the order of temporary injunction, would maintain the status quo, thus undermining the observance of S.15 of the Tax Appeals Tribunal Act. The respondent cited the South African decision in **Metcash Trading Co. Ltd v Commissioner for South African Revenue Services and another**, cited with approval by their Lordships, in the UPIMAC case, urged the applicant to pay the taxes now and argue later.

The respondent opposed the application for temporary injunction, on the grounds that the applicant had not satisfied the conditions for their grant. The respondent cited **Kiyimba Kaggwa v Haji Abdu Nasser Katende** [1985] HCB 43, where it was stated that the application did not disclose a prima facie case with a probability of success because it had been filed without payment having been made of the 30% of the tax assessed as required under S.15.

The respondent submitted that any injury that the applicant suffered, would be amply compensated for in damages, as the respondent owing to its position as a statutory body, would be in a position to pay the damages awarded. The respondent relied on the High Court decision of **Victor Construction Works Ltd v Uganda National Roads Authority**, Miscellaneous Application No. 601 of 2010, in support of this proposition. The respondent submitted further, that the balance of convenience did not favor the grant of the order of temporary injunction to the applicant.

The respondent prayed that the application for temporary injunction be dismissed. The respondent urged the tribunal to find that the instant application was premature for not complying with S.15 of the Tax Appeals Tribunal Act and that the tribunal did not have

jurisdiction to permit the payment of 30% of the tax assessed in instalments or through the furnishing of security.

In answer to the respondent's objection that the Tax Appeals Tribunal did not have jurisdiction to hear this application, the applicant cited **URA v Rabbo Enterprises Ltd**, where it was stated tribunal has original jurisdiction over all tax disputes arising from tax decisions of the Respondent. .

The applicant cited **MTN (U) LTD v URA** TAT Application No. 15 of 2018, where the tribunal ruled that matters before it involve a review of the decisions of the respondent or the Commissioner General, and that a tax payer is entitled to challenge such decisions as long as they can be shown to be illegal, irrational or arrived at through procedural impropriety. The applicant submitted that it was trite law that no remedies can be granted under judicial review where the law has prescribed alternative remedies. The applicant submitted further that, the question that the tribunal ought to ask itself in reviewing the decision of the Commissioner General is whether the decision by the Commissioner General to decline payment of 30% of the tax assessed in instalments was unreasonable and irrational in the circumstances. The applicant, citing the decision of Kasule J, in **Twinomuhangi v Kabaale District Local Government Council** HCB Vol 1 2006, submitted that irrationality refers to such gross unreasonableness, in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision.

The applicant cited the following examples of unreasonable conduct from the respondent. Firstly, that the respondent arrived at the objection decision without considering all the information submitted to it, while falsely claiming that the information had not been submitted. The applicant submitted that it was grossly unreasonable for the respondent to uphold such a huge assessment without considering all the information availed to it and thereafter refusing to entertain any form of accommodation on how it should be paid. Secondly, that the insistence by the respondent that the said assessment should be paid at once despite the economic effects of the covid19

pandemic and its effect on the applicant, is unreasonable and irrational conduct from the respondent.

Relying on the **Cape Brandy Syndicate** case, the applicant submitted that the text of the law is to pay 30% pending the final resolution of the dispute. The applicant submitted that the final resolution is not done by the respondent but by the Tribunal.

Having read the submissions and perused the affidavits filed by the parties, this is the ruling of the tribunal.

The gist of the preliminary objection is that the tribunal has no jurisdiction to determine an application to review a decision made by the Commissioner General rejecting a request to pay 30% of the tax assessed in installments. The reason given by the respondent is that the rejection by the Commissioner General of the applicant's request does not constitute a taxation decision within the meaning of S. 1(k) of the Tax Appeals Tribunal Act and S.1 of the Tax Procedures Code Act. Our first order of business therefore, is to determine whether the Commissioner General's rejection of the said request by the applicant, constitutes a taxation decision. The Commissioner General's rejection of the applicant's said request is set out in a letter dated 23rd April 2020 addressed to the applicant.

The terms "taxation decision" and "tax decision" which mean the same thing, have been defined in substantially the same terms, under both the Tax Appeals Tribunal Act and the Tax Procedures Code Act. Under S.1 (k) of the Tax Appeals Tribunal Act, "taxation decision" means any assessment, determination, decision or notice. Under S.1 of the Tax Procedures Code Act, "tax decision" means either a tax assessment or a decision on any matter left to the discretion, judgment, direction, opinion, approval, satisfaction or determination of the Commissioner, other than a decision made in relation to a tax assessment.

Applying the literal rule of statutory interpretation to S. 1(k) and S.1 of the Tax Appeals Tribunal Act and the Tax Procedures Code Act respectively it is apparent, that a

decision by the Commissioner General, rejecting a request by a tax payer, to pay 30% of the tax assessed in instalments, is a taxation decision. This is so, because the said rejection of the tax payer's request by the Commissioner General is a decision. Under both S. 1(k) and S.1, above, a taxation decision includes a decision. The making of a decision involves the exercise of discretion. The discretion accorded to the Commissioner General, to permit the payment of tax in instalments is provided for under S. 28(3) (b) of the Tax Procedures Code Act. The tribunal held in **MTN Uganda Ltd v URA** TAT Application No. 15 of 2018 that it has the jurisdiction to review the exercise of discretion by the Commissioner General. A tax payer aggrieved with the exercise of discretion by the Commissioner General is entitled to have the Commissioner General's decision reviewed by the tribunal. We find therefore, that the decision by the Commissioner General, rejecting the applicant's request to pay 30% of the assessed tax in instalments, is a taxation decision. This being the case, the tribunal has the jurisdiction to review the Commissioner General's said exercise of discretion.

We will now proceed to determine whether this discretion was exercised judiciously by the Commissioner General. In 'Administrative Law' by H.W.R. Wade, the learned author stated the following on the exercise of discretionary powers by public authorities:

"For more than three centuries it has been accepted that discretionary power conferred upon public authorities is not absolute, even within its apparent boundaries, but is subject to general legal limitations. These limitations are expressed in a variety of different ways, as by saying that discretion must be exercised reasonably and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious".

In **Twinomuhangi Pastoli v Kabale District Local Government Council, Katarishangwa Jack and Beebwajuba Mary** [2006] HCB Vol. 1 p. 30 Kasule J (as he then was) set out the following grounds for an application for a judicial review.

- "1. In order to succeed in an application for judicial review the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety"

2. Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.
3. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.
4. Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in the non-observance of the rules of natural justice or to act with procedural unfairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision."

The applicant has submitted that the insistence by the respondent that 30% of the tax assessed, should be paid at once despite the economic effects of the covid19 pandemic on the applicant, is irrational.

The question that the Tribunal must answer is this; would a reasonable authority, addressing itself to the widespread economic losses occasioned to the manufacturing sector and the economy at large, as a result of the Covid19 pandemic, reject a request by a tax payer, to pay Shs. 7bn in instalments? This question should be understood in light of the fact, that not only does the authority in question have powers accorded to it by statute to grant such a request, but that it has in the past granted such requests, in times, much less precarious than these and for amounts much smaller than what the applicant is required to pay.

Relying on the decision in **Associated Provincial Picture Houses Ltd v. Wednesbury Corporation** [1948] 1 KB 223 and applying the standard set out in that case, now known as "Wednesbury unreasonableness" we find that the decision of the Commissioner General rejecting the application to pay 30% of the tax assessed in instalments, was so outrageous in its defiance of logic that no sensible person who had

applied his mind to the question to be decided could have arrived at it. (See also 'Public Law in East Africa' by Ssekaana Musa, at page 182).

Moving on to the application for a temporary injunction, the respondent's first ground of objection is that in accordance with S. 15 of the Tax Appeals Tribunal Act, the payment of 30% of the tax assessed is a pre-requisite to the filing of any application before the Tribunal. It is the respondent's argument that S.15 requires that 30% of the tax assessed or that part of the tax assessed not in dispute be paid before an objection decision has been rendered by the respondent. This argument is based on the respondent's construction of S.15 and specifically the meaning of the term 'objection' as used in that section.

Relying on S. 24 of the Tax Procedures Code Act, the respondent argues that the term 'objection' as used under S.15 of the Tax Appeals Tribunal Act, means objections against tax decisions of the Commissioner. The respondent also construes the term 'final resolution of the objection' to mean the objection decision rendered by the respondent in response to an objection filed by an applicant.

For the above reason, the respondent contends that the applicant has no locus to appear before the tribunal on any matter since S.15 requires it to have paid 30% of the tax assessed before filing its claim in the Tribunal. It is also the respondent's case that the applicant cannot claim to have a prima facie case if it has no locus to appear before the tribunal. The applicant on the other hand, contends that payment of 30% of the tax assessed is not a pre-requisite to the filing of any matter before the tribunal, as S.15 provides that it should be paid pending the final resolution of the dispute.

A resolution of the above objection calls for an inquiry into the meaning of the terms 'objection' and 'final resolution of the objection' as set out under S.15 above. We have found the following provisions of the Tax Appeals Tribunal Act of great help in this regard. S. 1(1) (g) objection decision" means a taxation decision made in respect of a taxation objection; S1(2) For the purposes of this Act, where a taxing Act provides that

person dissatisfied with a taxation decision may object against the decision such an objection is referred to as a "taxation objection". S. 16(1) Where an application for review, relates to a taxation decision that is an objection decision, the applicant is, unless the tribunal orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates.

A perusal of the above provisions shows that there is a distinction to be made between the terms 'objection' and 'taxation objection' as used in the Act. Under S.1 (2) a taxation objection refers to an objection made against a taxation decision. The term 'objection' cannot therefore also refer to objections against tax decisions of the Commissioner as argued by the respondent.

Our understanding is that the term 'objection' has been used under S.15, not in a technical sense, to mean objections against the respondent's tax decisions, but in its ordinary sense to mean the action of challenging or disagreeing with something. Indeed it is one of the canons of the construction of statutes that words are to be understood in their ordinary, everyday meanings unless the context indicates that they bear a technical sense.

The respondent's argument, based on S.24 of the Tax Procedures Code Act, is incorrect, for the reason that there was no justification for the respondent, to look to the Tax Procedures Code Act for assistance, as no ambiguity, had been found, in the use of the said terms in the Tax Appeals Tribunal Act.

In the same vein, we are of the view that the phrase 'final resolution of the objection' refers to the proceedings before the Tribunal filed by an applicant in response to a taxation decision and not to the objection decision rendered by the respondent in answer to an objection.

The High Court's decision in **Digital Solutions Ltd v MTN Uganda Ltd**, Miscellaneous Application No. 546 of 2004, is authority for the position that in showing that the applicant has a *prima facie* case with a probability of success, "Court must be satisfied on the basis of the material availed at that stage that there are serious questions to be tried between the parties with a probability that the question will be decided in favour of the applicant".

A perusal of the affidavits deposed by John Mukiibi, the applicant's financial controller, show that there is a serious question to be tried between the parties relating to the interpretation and application of the term 'ex-factory price' as used in assessing Local Excise Duty. We are satisfied that a *prima facie* case with a likelihood of success has been made out by the applicant.

In answer to the contention by the applicant, that it would suffer irreparable injury, that cannot be compensated for by damages in the event that this application is not granted, the respondent has submitted that, owing to its status as a statutory body, it would be in a position to pay the damages that might be awarded to the applicant, if the applicant finally emerged as the successful party. In support of this argument the respondent has relied on the decision of Obura J (as she then was) in **Victor Construction Works Limited v Uganda National Roads Authority**, Miscellaneous Application No. 601 of 2010, where in declining to grant an application for a temporary injunction against, Uganda National Roads Authority (UNRA), Court noted that given UNRA's status as a statutory body, it was confident that it would be in a position to pay damages that might be awarded to the applicant in the event that it emerged as the successful party in the main suit.

While it is conceded, that the respondent, being a statutory body, may have access to funds from the national coffers, which could be used to pay damages, it goes without saying, that a great deal of circumspection, must be employed, in ensuring that increases to the national debt, are kept to a bare minimum and that the State is not burdened with debts that can be avoided through the use of prudence and good sense.

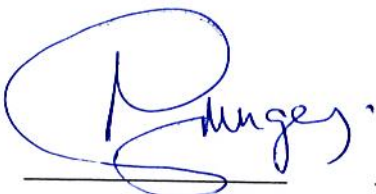
For this reason, we are reluctant to accept this argument of the respondent. Applying the test, set out in the **Kiyimba Kaggwa** case, to the evidence before us we find that this is a deserving case for the grant of the application for a temporary injunction.

We accordingly order as follows;

1. The applicant is hereby permitted to pay 30% of the tax assessed, in four equal monthly instalments, with the first payment being on 6th July 2020. The entire sum, being 30% of the tax assessed, or such remainder, will immediately become due and payable, if the applicant fails to pay any of the said instalments, by the sixth day, of each of the months comprising the four months period.
2. The applicant is granted a temporary injunction restraining the respondent from collecting the tax assessed against the applicant in the sum of Shs. 58,141,883,182 until final determination of TAT Application No. 33 of 2020.
3. The costs of this application shall abide the outcome of TAT Application No. 33 of 2020.

It is so ordered.

Dated at Kampala this 30th day of June 2020.



DR. ASA MUGENYI,
CHAIRMAN



MRS. CHRISTINE KATWE,
MEMBER



MR. SIRAJ ALI
MEMBER