THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

MISC.APPLICATION NO. 59 OF 2023

(ARISING FROM APPLICATION NO. 40 OF 2023)

NIVED ENTERPRISES LIMITED ..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ....RESPONDENT

CORAM DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MR.GEORGE MUGERWA.

RULING

This ruling is in respect of an application for a temporary injunction to restrain the respondent from enforcing collection measures against the applicant in respect of 8,540 tons of rice to be imported from Tanzania.

It is brought under S. 98 of the Civil Procedure Act, Order 52 Rules 1 and 3 of the Civil Procedure Rules, Rules 30 and 31 of the Tax Appeals Tribunal Procedure Rules. It is for orders.

Issues:

1. Whether the applicant is entitled to the injunction?
2. What remedies are available to the parties?

The applicant was represented by Mr. Gilbert Agaba and Joanita Nanteza while the respondent by Ms. Barbara Ajambo Nahone, Mr. Derrick Nahumuza, Mr. Samuel Oseku and Ms. Sheba Tayahwe

The applicant's director, Mr. Isaac Kashaija testified that the applicant imports rice from Tanzania to Uganda. On 25th May 2022, it applied for a Withholding Tax (WHT) exemption which was approved and granted from 1st July 2022 to 30th June 2023. After failure to get its goods through the Mutukula border, the applicant filed an application to

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recover the WHT exemption status in the main application which is yet to be determined.

The applicant contends that the respondent revoked its WHT exemption for non-compliance, yet it has been compliant. On 5th April 2023, the applicant was granted a temporary injunction to have the 5,000 tons of rice released. It imported an additional 8,540 tons of rice from Tanzania which will be subjected to WHT. It contended that paying WHT on the rice imports will cause it to incur extra costs of US$ 500,000 which it has not been prepared for. It suffered losses due to the respondent withdrawing the exemption certificate. The applicant's business is under threat should the respondent proceed to enforce the collection of the taxes.

The respondent's affidavit in reply was sworn by Ms. Nabirye Ritah from its legal services and board affairs department. She stated that the respondent issued WHT assessments of Shs. 576,831,130 on the applicant for its rice imports. The applicant has never objected to the assessments and the respondent has never issued any objection decision. She stated further that on 29th March 2023, the respondent revoked the applicant's WHT exemption certificate. On 12th April 2023, the applicant amended its application to contest the revocation of its WHT exemption certificate. She stated that the applicant has never objected to the revocation of the exemption certificate and no objection to review has been filed. She contended that that the revocation is lawful and premised on the applicant's noncompliance. The application is meant to deny revenue to the respondent and nation at large. She contended further that the applicant has not paid the 30 percent tax in dispute in the main application hence has no locus to pursue the main application. The applicant shall not suffer such irreparable injury which cannot adequately be compensated for by an award of damages. The respondent contended that the balance of convenience lies in its favor.

The applicant through Mr, Isaac Kashaija filed an affidavit in rejoinder, where he stated the dispute is about the unlawful revocation of the applicant's WHT exemption certificate. He stated that in April 2023 the applicant imported 2000 tons of rice and paid to the respondent Shs. 70,288,488 in fulfillment of the temporary injunction. Despite

paying taxes, the respondent only released 1,071 tons of rice to it. It refused to release the rest, forcing the applicant to transfer 389 tons to AG investments Finance Limited which paid WHT on 389 tons. The remainder, 540 tons, were left unpaid. The applicant objected to the impoundment of its consignment. The revocation of its exemption certificate was made after it filed its main application.

The applicant submitted that the grounds for temporary injunction are that.

1. It must show that there is a substantial question to be investigated regarding the chances of success.
2. It would suffer irreparable injury which damages would not be capable of atoning if the temporary injunction is denied, and the status quo not maintained.
3. The balance of convenience is in favour of the applicant.

To demonstrate a prima face case the applicant cited *American Cyannid CO. v Ethicon* (1975) ALLER 504 where it was stated that an injunction should be granted where a claim is not frivolous or vexatious and there is a serious question to be tried. It submitted that it was aggrieved by the revocation of its WHT exemption certificate, which was arbitral, irrational, and illegal. It contended that it affidavit shows that there are serious questions to be investigated and it has established a prime facie case.

On the ground of irreparable injury, the applicant cited *Kiyimba Kaggwa v Hajji Abdul Nasser Katende* mentioned with approval in *GAPCO Uganda Limited v Kaweesa and Anor* MA 259 of 2023 where it was stated that irreparable injury does not mean that the injury must be a substantial or material one that cannot be adequately compensated in damages. It submitted that the withdrawal of its license led to unanticipated expenses arising from assessments for WHT. It is hesitant to import 8,540 tons of rice stuck at the border due to unforeseen expenses. It has failed to meet its contractual obligation with the buyers of rice in Uganda. It contended that since rice is a staple food, failure to import it could lead to a food shortage. The applicant submitted WHT is only a fraction of the entire tax. It submitted that the loss it is suffering will be irreparable.

The applicant submits that the balance of convenience favors it. It cited *Victoria Construction Works Limited v Uganda National Roads Authority* HCMA 601 of 2010. It averred the failure to import rice is a loss to the respondent as it would not be entitled to taxes.

In response, the respondent opposed the application on grounds that.

1. The main application does not have a prima facie case with a likelihood of success.
2. The applicant will not suffer irreparable damage which cannot be compensated for by an award of damages.
3. The balance of convenient lies in favor of dismissal of the application

The respondent stated that granting the temporary injunction would distort the status quo. The applicant is not exempt from paying WHT following the revocation of its exemption certificate on 29th March 2023. The applicant's rice imported after 29th March 2023 inclusive of the 8,540 tons are subject to WHT at importation.

The respondent cited *Kiyimba kaggwa v Hajj Katende* (1985) HCB 43 which stated that the grounds for a temporary injunction are.

a) The applicant must establish a prima facie case with a probability of success.
b) It will suffer irreparable injury which would not be adequately atoned for by an award of damages.
c) If the court is in doubt, it will decide the application on the balance of convenience.

The respondent submitted that the applicant has not objected to anything and in the absence of an objection decision, the tribunal has nothing to review. It cited Sections 24 and 25 of the Tax Procedures Code Act that an objection decision is a prerequisite for lodging an application for review before the Tax Appeals Tribunal. It also cited S. 229 of the East African Community Customs Management Act to show that the applicant has not followed the procedure for review. The respondent also cited *Caroline Kahamutima v Commissioner General of Customs,* URA Misc. Application 51 of 2021 and *Gakou Brothers Enterprises Limited v URA* Application 20 of 2020.

The respondent submitted that S. 3 of the Tax Procedures Code Act defined what constitutes a tax objection and an objection decision. S. 1(k) of the Tax Appeals Tribunal Act defines a taxation decision while S. 1(g) defines an objection decision. The respondent also cited *Cable Corporation (U) Limited v URA* HCCA 1 of 2011 The respondent submitted that its mandatory for it to issue an objection decision before an application for review can be entertained. This did not take place. It submitted that instead of following the right procedure, the applicant amended its application to directly contest the revocation. It submitted that the application was prematurely filed and does not disclose a prima facie case with a probability of success.

The respondent contended that the applicant has not shown it will suffer irreparable injury. It cited *Tony Wasswav Joseph Kakooza* [1987] HCB 79 for the position that the injury or damage must be a substantial/ material one that is; one that cannot be adequately atoned for in damages. The respondent submitted that taxes are creatures of statute and there are procedures for refund of any taxes overpaid or wrongly paid. Therefore, the applicant will not suffer any irreparable damage.

The respondent also contended that the applicant has not shown that it will suffer on a balance of convenience. It cited *Carlton Douglas Kasirye v Sheena Ahumuza Bageine.* Misc. Application 148 of 2020 on a balance of convenience. It submitted that on the balance of convenience, it is the public that is bound to suffer if the application is granted as it would interfere with the respondent's exercise of its statutory mandate. It cited Sections 3(1) and 14 of the Uganda Revenue Authority Act which empower the respondent to carry out its mandate. The respondent also cited *Alcohol Association Uganda, Nile Breweries Limited & 38 others v Attorney General & URA* HCMA 744 of 2019 to support its position.

The respondent alternatively prayed that should the tribunal find otherwise; it should order the applicant to pay 30% of the tax assessed on any rice imports brought into the country by the applicant in accordance with S.15 of the Tax Appeals tribunal Act.

In rejoinder, the applicant submitted that the status quo to be reserved is to prevent enforcement of collection of tax against it in respect of import of 8,450 tons of rice. It contended that the respondent has not yet assessed and collected WHT in respect to the consignment. Therefore, the injunction is intended to stop the respondent from committing an injury against it. The respondent further stated that the gist of the application is not to reinstate its exemption position but rather to seek an injunction preventing collection of the said taxes pending determination of the main application.

Having perused the application and the affidavits and submissions from both the parties, this is the finding of the tribunal.

The applicant filed Application 59 of 2023 challenging a WHT assessment of Shs 576,831,330 by the respondent. The applicant amended its application to include a ground of revocation of its exemption certificate. In Miscellaneous Application 047 of 2023 the applicant was granted a temporary injunction before the Tribunal. The applicant filed this application seeking another temporary injunction.

This is where the problem beings. The Tribunal like a court cannot grant two temporary injunctions in the same application. The first injunction granted should subsist until the disposal of the application on its merits. If the first injunction was not sufficient to address any dispute arising, the applicant ought to have applied to vary it especially after amending the application or have it vacated so that it files a fresh one. If the subsisting injunction is not being respected the applicant should have elected to institute contempt proceedings against the respondent. However, in its current form, this application amounts to abuse of court process. The root cause of the problem arose from the applicant trying to address two separate causes of action in one application. When it filed the main application, the first injunction was to stop the respondent from collecting taxes of Shs. 576,831,33. Its deponent stated the taxes were paid and the goods later released. It is now in the process of importing 8,540 tones of rice. The first injunction dealt with a different consignment. Though the applicant paid the taxes, the injunction is still in force. The second consignment which has not yet reached the country, is a separate cause of action. An injunction cannot serve preemptive purposes

where items have not been imported. It would be speculative in nature. In *Otimong Dismas and 2 others v Eastern Mining Ltd.* HCMA 148 of 2015 the court stated that an injunction cannot be sought based on speculation.

Be that as it may, if the Tribunal was wrong to state that this application is an abuse of court process, it would like to look at the merits of the application. In *Kiyimba Kagwa V Haji Abdu Nasser Katende* 1985 HCB 43 it was stated that the grounds which the applicants must prove are.

1. The applicant has a prima facie case with a probability of success.
2. The applicant is likely to suffer irreparable damages which cannot be adequately compensated by an award of damages.
3. The balance of convenience tilts in favour of the applicant

The purpose of a temporary injunction is to preserve the status quo. A court has a duty to protect the interests of the parties pending the disposal of the substantive suit. The applicant submitted that the respondent revoked its WHT exemption certificate which means that the applicant is now liable to pay any taxes assessed. The applicant contends that it wants to prevent the respondent from collecting the same. The issue of revocation of the certificate was pleaded in the main application. Therefore the status quo at the time of filing this application has changed, meaning that there is no exemption certificate to exempt the applicant from withholding tax.

The first ground to grant a temporary injunction is that there must be a prima facie case with a high probability of success. The respondent contended that the applicant did not file an objection. There is no objection decision. If there is no objection decision it means the applicant cannot file an application before the Tribunal. It cannot establish that it has a prima facie case against the respondent when there is no decision to review. The rice which is in dispute has not been imported.

On the ground of irreparable loss, the applicant contended that if this injunction is not granted, it will suffer largely because of colossal expenses it will incur. The applicant stated that its WHT exemption was revoked, any taxes paid wrongly can be refunded to them if it is found that the revocation was illegally done. It is not clear how somebody

who is paying taxes can suffer irreparable loss. What happens if the Tribunal finds that the tax is payable. .

This application henceforth stands dismissed with costs to the respondent.

Dated at Kampala this 19th day of May 2023.

DR. ASA MUGENYI
CHAIRMAN

DR. STEPHEN AKABWAY
MEMBER

MR. GEORGE MUGERWA
MEMBER