

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CA-0007-2006

(Appeal from a ruling of the Tax Appeals Tribunal in Civil Application No. 26 of 2006)

MATOVU AND MATOVU ADVOCATES

APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY

RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGMENT

1. The appellants were the applicants before the Tax Appeals Tribunal. They went to the tax appeals tribunal to contest the issuance of a third party agency notice by the respondent, dated 22 September 2005, to the Uganda Electricity Board seeking to collect the sum of Shs.260,194,312.00 being VAT tax arrears that the firm of Matovu and Kimanje Advocates acknowledged as due and owing in earlier proceedings before the Tax Appeals Tribunal. The appellants contended that this money claimed was due from Matovu and Kimanje Advocates and not Matovu and Matovu Advocates. Since the tax liability arose and was admitted by the firm of Matovu and Kimanje Nsibambi Advocates, the said firm has ceased to exist, with the partnership business dissolved.
2. Mr. John Matovu was a partner in the firm of Matovu and Kimanje Advocates, and is now a partner in the firm of Matovu and Matovu Advocates. Uganda Revenue Authority has turned to Mr. John Matovu, and in particular to his new firm, Matovu and Matovu to pay the outstanding vat arrears that were adjudged by consent of the parties, including Matovu and Kimanje Advocates, before the Tax Appeals Tribunal, to be due and owing to the Uganda Revenue Authority.

3. The complaint before the TAT was in effect that Mr. John Matovu is being compelled to pay the tax liability of Mr. Kimanje, his former partner in Matovu and Kimanje Nsibambi Advocates.
4. The Tax Appeals Tribunal heard both parties and found that the third party agency notice issued by the Uganda Revenue was properly issued, and that Mr. John Matovu, or Matovu and Matovu Advocates can be compelled to pay the tax liability of the Matovu and Kimanje Advocates. The tribunal dismissed the application with costs.
5. The appellant appeals against that decision and has set forth two grounds of appeal. Firstly that the tribunal erred in law and in fact when they held that the respondent properly issued a Third Party Agency Notice against the appellant for the recovery of taxes due to the partners in M/S Matovu & Kimanje Nsibambi Advocates under S. 71 of the VAT Act. Secondly that the tribunal erred in fact when they held that the Applicant guaranteed the Tax Liability (debt) of M/S Matovu & Kimanje Nsibambi Advocates by issuing post dated cheques which bounced.
6. Mr. John Matovu, learned counsel for the appellant, submitted that he relied on the submissions made in the tribunal. He argued that Section 71 of the VAT Act does not authorise recovering of money due from one partner from another partner without the consent of such partner. He argued that there was some ambiguity in this section with regard to the question of discharge of a partnership tax liability, and that this ambiguity ought to be resolved in favour of the tax payer. With regard to ground 2 he stated that the cheques in question were signed by both partners at the time, and were not only signed by him.
7. Ms Ann Bitature, learned counsel for the respondent opposed the appeal, arguing that there was no ambiguity in Section 71 of the VAT Act. Secondly that this section imposed joint and several liability on the partners in a firm for the tax liability of that firm, and the tax authority could proceed against a partner either jointly or severally for the tax liability of the firm. This is what occurred in this situation. With regard to ground 2 she submitted that this was raised as an issue of fact, a matter that was not appealable. She prayed that this appeal be dismissed.
8. The Tribunal resolved the issues in question stating in part,

‘The Tribunal agrees with the Applicant that the discretion in 71(1) (a) is exercisable by the partner, and not the respondent to determine which partner. The Tribunal further agrees with the applicant that according to Section 71(1) (b) each partner has the obligation to meet his burden of the partnership depending on the Partnership Deed.’

9. The Tribunal, however, went on to state, after drawing a connection between Mr. John Matovu and the previous proceedings, the post dated cheques issued in relation thereto, and the partnership deed of Matovu & Kimanje Nsibambi Advocates,

‘The Tribunal assumes that this Article of the Partnership was followed to the letter when dissolving the partnership. The Tribunal further presumes that the person who undertook/guaranteed payment of tax by signing post dated cheques in settlement of the outstanding tax obligations must have taken interest in ensuring that the tax is paid. The Tribunal therefore finds that in the Third Party Agency Notice, the Respondent was reminding Mr. John Matovu, now of Matovu & Matovu Advocates for the outstanding taxes he had undertaken to bear.’

10. I must point out, at this stage, that this last finding is erroneous. The purpose of a third party agency notice is to collect monies in the hands of a third party belonging to the person liable to pay the tax, and not to remind the taxpayer that the liability is still outstanding. See Section 40 of the VAT Act.
11. The Tribunal went on to hold that as Mr. John Matovu guaranteed/undertook to pay the outstanding tax which he knew he is liable to pay the said such tax. To found against the appellants the Tribunal rested its finding on a ground, not advanced by any of the parties. It was not definitely advanced by the respondent. The result is that the Tribunal rested its decision on a matter both of law and fact that had not been argued before it. Whereas it is possible for a court or tribunal to decide thus, this is an undesirable practice, unless such issue or matter be brought to the attention of the parties for their views to be known.
12. In the instant the cheques that the tribunal treated as a guarantee by Mr. Matovu to pay the tax were actually issued by the firm of Matovu & K Nsibambi Advocates on their clients account. This is evident from a reading of the cheque leaves on record. The cheques were firm cheques and not individual cheques of Mr. John Matovu. It is therefore surprising that the Tribunal holds that because Mr. John Matovu signed the cheques it must be taken that he guaranteed the payment of taxes due.

13. Guarantee is an agreement whereby one party agrees to pay the debts of another in case of default by that other party to pay the debt. There was no evidence before the tribunal in these proceedings of the existence of an agreement of guarantee, and the tribunal erred in law, to presume the existence of such an agreement, and find, albeit obliquely, that it formed sufficient basis for the issue of a third party agency notice in respect of proceeds due to a former partner of a partnership liable to pay the tax in question.
14. The tribunal having agreed with Mr. John Matovu's interpretation of Section 71 of the VAT Act, and found that that Act, read together with the partnership deed of Matovu & Kimanje Nsibambi Advocates, imposed on each partner the obligation to meet his share of the burden of the tax obligation, it had no logical basis to find that Mr. John Matovu was then liable to pay the tax obligation of the partnership of Matovu & Kimanje Nsibambi Advocates, apart from his share of that tax burden. However, on my part, and with respect to the tribunal, I do not share the conclusions of the tribunal with regard to application of Section 71 of the VAT Act to the facts of this case.
15. Both parties provided different views on the application of Section 71 of the VAT Act, providing reasons for each particular view or position, together with authorities to support their contentions. The tribunal merely agreed with the appellant, without an analysis of both the reasons for and against that position, and choice of what reasons were acceptable and why such reasons were acceptable and why the reasons for the adverse party were not acceptable to the tribunal.
16. The tribunal had an obligation to provide a reasoned decision on that issue rather than merely adopting one position and proceeding on to other matters. Section 19 (2) of The Tax Appeals Tribunal Act, which imposes this obligation, states,

‘The tribunal shall give reasons in writing for its decision, including its findings on material questions of fact and reference to the evidence or other material on which those findings are based.’
17. The tribunal in its decision under the section entitled ‘Findings, Ruling and Award of The Tribunal’ started with this statement.

‘The tribunal has carefully considered the submissions by Counsel for the Applicant. The Tribunal however finds that there is , in principle, an agreement by both parties that the matter falls squarely within the provisions of Section of section 71 (1) (a) and (b) of the VAT Act.’

18. The Tribunal then set out the provisions of the section. The Tribunal then concluded that it agreed with the applicant's position. It is clear that the position of the respondent was never examined before accepting the position of the applicant. The tribunal was obliged to examine the same, and was entitled, if it was so minded, to reject the position, but providing reasons for that rejection. It was an error not to do so.
19. Basically the case for the appellant is that under Section 71 (1) (a) of the VAT Act, the tax liability for a partnership is imposed on all the partners though this liability may be discharged by one or the other of the partners. The discharging of the tax by the partners or any one of them would be a choice made by the partners or partner. It is then argued that though under Section 71 (1) (b) this tax liability is joint and/ or several, if it is enforced severally, it would render Section 71(1) (a) meaningless. Each partner should therefore meet his or her part of the tax burden incurred by the defunct partnership. The tax burden of the partnership cannot be imposed upon one former partner.
20. The case for the respondent was that Section 71 of the VAT Act had to be read as a whole, and if it was read as whole, it is then clear that whereas under Section 71(1) (a) one partner may choose to discharge all tax liability of all the partners and partnership, under Section 71(1) (b) of the same Act, all partners were jointly and severally liable, and thus liability could be enforced severally against one or each of the partners.
21. I will set out Section 71 (1) of the VAT Act. It states,
- ‘ **Application of Act to partnerships and unincorporated associations.** (1)
This Act applies to a partnership as if the partnership were a person, but with the following changes— (a)
obligations that would be imposed on the partnership are imposed on each partner, but may be discharged by any of the partners; (b) the
partners are jointly and severally liable to pay any amount that would be payable by the partnership, ’
22. There is no ambiguity in the provisions of this section. They provide firstly in Section 71 (1) (a) that the obligations of the partnership are imposed on each partner. Each partner, in my view, is made to carry the burden of the partnership. Each partner carries this liability singly. There is no suggestion that the burden is divided up between the partners in any manner or proportion. Secondly one partner may choose to discharge the tax liability though all the partners bear the burden singly.

23. Section 71 (1) (b) then provides that the partners are jointly and severally liable to pay any amount that would be payable by the partnership. I reject the claim by the appellant made in the tribunal that,

‘Further Section 71 (1) (b) of Cap. 349 states that the partners are jointly and severally liable to pay any amount that would be payable by the partnership. A literal interpretation of this would be that, each partner is entitled to meet his part of the obligation. In the circumstances therefore; each partner should meet his part of the obligation that accrued from the defunct firm and or partnership. To state otherwise, would render section 71(a) irrelevant and of no legal effect.’

24. I am unable to point to any part of the provisions referred to by counsel for the appellant which would suggest that the provisions of Section 71 (1) (a) of the VAT Act, say that each partner is entitled to pay only such partner’s share of the obligation of the tax burden of the partnership only. The provisions do not attempt to divide up proportionally or in any other manner whatsoever the tax burden of the partnership other than to make all the partners and or any one of them liable for the whole tax burden of the partnership. There is no way, ‘stating otherwise’ renders Section 71 (1) (a) of the VAT Act, irrelevant and of no legal effect.

25. It is true as Mr. John Matovu argued in tribunal below that the word ‘imposed’ refers to the power of the respondent to impose the tax and it is the taxpayer who discharges the tax obligation. The language of Section 71(1) (a) is very clear. The obligations that would be imposed on the partnership as one person are imposed on each partner. Each partner has the responsibility to bear the burden of the partnership. The provision may be harsh in its full import. However I see no ambiguity. However, if any ambiguity did exist such ambiguity is then removed by Section 71 (1) (b) of the Act, which expressly provides for joint and several liability of the partners for the tax burden of the partnership.

26. I would accordingly reject the position of the appellant that Section 71 (1) of the VAT Act does not impose liability on one partner. It does impose liability on each of the partners and on all the partners. Collection can be made from one partner or from all the partners. One partner may discharge all liability or all of the partners may discharge the liability of the partnership.

27. The Tribunal in its decision gave consideration, in construing the provisions of Section 71 (1) of the Act, to the provisions of the partnership deed of Matovu & Kimanje Nsibambi

Advocates. This was an error. In determining the liability between the two partners it is, of course, relevant to consider the terms of their agreement and give effect to them. This would be relevant in an action between the partners. However, it is not relevant in construing the statutory powers of the respondent, provided under the VAT Act, which was the matter in issue, in these proceedings.

28. It is not in dispute that the subject matter of the third party agency notice was tax liability of the defunct Matovu & Kimanje Nsibambi Advocates. Mr. John Matovu was a partner in that firm. All the partners in that firm were liable to pay the tax liability of the firm and one of the partners could opt to discharge the liability of the firm.
29. At the same time the respondent was authorised under Section 71 (1) (b) of the Act, to collect the tax from any one of the partners whether jointly or severally. The issuance of the third party agency notice in respect of liability of the partnership to a third party, in respect of monies due from that third party to one partner, Mr. John Matovu, under the name and style of Matovu and Matovu, was therefore lawful. I would accordingly reject ground number one of the appeal.
30. Given what I have already expressed in paragraphs 11 to 14 herein above, I agree that the tribunal erred to find that the appellant had guaranteed the tax liability of Ms Matovu & Kimanje Nsibambi Advocates by issuing the post dated cheques in question in a previous proceeding. Those cheques were not issued by Mr. John Matovu as such, but by the firm, Matovu & Kimanje Nsibambi Advocates. Secondly, issuing a cheque to a person may create some liability based on that cheque as a bill of exchange but not, necessarily, liability as a guarantee. I am aware of no law that creates liability based on guarantee, merely on the issuance of a cheque.
31. I would allow ground no.2 to succeed but this is inconsequential to the substance of the dispute discussed in relation to ground no1 of the appeal. In the result I would dismiss this appeal with costs here and below.

Signed, dated and delivered at Kampala this 28th day of September 2006

FMS Egonda-Ntende
Judge