THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

CIVIL APPEAL NO. 12 OF 2008

UGANDA REVENUE AUTHORITY::::::::::::::::::APPELLANT(RESPONDENT)

-Vs-

SPEKE HOTEL (1996) LTD::::::::::::::::::::::::::::::::RESPONDENT(APPLICANT)

BEFORE: *HON MR. JUSTICE ANUP SINGH CHOUDRY*

J U D G M E N T

This is an appeal by the Appellant against the decision o the Tax Appeal Tribunal dated 10th June 2008 under Sec. 27 of the Tax Appeals Tribunal Act Cap 345.

The grounds of appeal are:

1. The Honourable members of the tribunal erred in law in holding that Marquee tents were hotel equipment within the meaning of item N. 23 of the 3rd Schedule Part II of the Finance Act and therefore the decision to demand for taxes was not justifiable.

2. The Honourable members of the Tribunal erred in law in holding that the actions of the Commissioner granting the tax exemptions were intra vires and not ultra vires as provided under the item 23 Part II of the 3rd Schedule of the Finance Act.

3. The Honourable members of the Tribunal erred in law in holding that tax incentives are general in terms and could be granted by the Commissioner if conditions attached were fulfilled not withstanding statutory interpretation.

4. The Honourable members of the Tribunal erred in law when they held that the Commissioner communicated his decision in reply to the application for review beyond the prescribed 30 day period.

TRIBUNAL'S DECISION

We have looked at the submissions carefully in context of the law. The approaches of the parties to the resolution of the issues are wide apart. While the Applicant's approach is on purpose for which the exemptions wee granted, the respondent is on strict statutory interpretation and the nomenclature/tariff classification of the goods. The Respondent also wants to rely on the principle of "ejusdem generic." The purpose for which tax incentives are given in our view cannot be defeated by strict interpretation of the law or nomenclature classification unless the tariff itself is used. These incentives are general in terms and ought to be liberally applied so that the purpose for which they are intended is achieved and more especially if conditions attached are fulfilled. We therefore see no merit in the withdrawal of the authorization of the exemption by the Commissioner.

Now turning to the meaning of the words "hotel equipment" Black's Law Dictionary 8th edition at page 578 defines the word "equipment" as articles or implements used for a purpose especially a business operation. Without going into the definition of an "hotel" the words "hotel equipment" as used in item 23 of the 3rd Schedule (Supra) would in our understanding mean articles used at an hotel for specific purpose or business operation. The specific purpose in our opinion would be to give shelter to hotel users on any occasion, be it parties, weddings, et cetera.

We fully agree with the submissions of Counsel of the Applicant on all the issue under review. The commissioner of customs, the decision maker, in the instant application made the right decision in allowing the said goods free of taxes which at the material time ware part of tax incentives extended to hotel owners in accordance with item 23 Part II 3rd Schedule of the Finance Act 2003. The subsequent decision to demand taxes is not justifiable under the law.

The actions of the Commissioner of Customs in our view were intra vires the exemption law embedded in item 23 Part II 3rd Schedule of the Finance Act. And not ultra vires as the

Respondent would wish the Tribunal to rule. One this ground alone the application would succeed.

Now we turn to Section 229(5) of the East African community Customs Management Act.

Section 229(5) of EACMA provides as follows:

(1) *A person directly affected by the decision or omission of the Commissioner or any other Officer on matters relating to customs shall within thirty days of the date of the decision or omission lodge in application for review of that decision or omission.*

(2) *The commissioner shall within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.*

(3) *Where the commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application.*

In the instant case the Respondent decided to demand for taxes on 24/10/2006. The applicant compiled with Section 229(5) (1) of the Act on 1/11/2006.

The Commissioner did not comply with Section 229(5)(2) of the Act because he communicated his decision in reply to the application for review on 5/12/2006 beyond the prescribed thirty days. Therefore by Section 229(5) of the Act the Commissioner in failing to communicate in time was deemed to have made a decision allowing the application. Section 229 of the Act cited above is mandatory by the very use of the word “shall.” In this particular case the Applicant takes the benefit of the law and succeeds.

Lastly the Respondent submitted that the goods were released provisionally on a Custom Bond CB1 (C21), but not as exempt. While we agree that provisional entry procedures are legally available under the East African Community Customs Management Act, the Respondent did

not adduce any evidence to support the claim and the Tribunal finds itself unable to rule in favour of the Respondent on the matter.

BACKGROUND TO THE APPEAL:

On 12th September the Appellants were represented by Muliisa Peter and the Respondents were represented by Birungyi Cephas and Enock Barata.

The hearing was fixed for a scheduling conference but Counsel for the Applicant was not prepared and sought adjournment. Mr. Muliisa Peter informed the Court that he was holding brief for Counsel who had the conduct of his case.

I adjourned the case so that both parties could file the skeleton argument with particular reference to whether the hotel 'equipment included the tents that were imported: the subject matter of this Appeal, hence tax liability thereon.

I ordered Appellant to pay the wasted cost of the hearing to cover fees for 2 Counsels at a total of 400,000 shillings.

The Applicants failed to comply with the court order of 12th September and were in breach thereof. At the hearing today they were represented by Charles Ouma. They were again unprepared. Mr. Ouma stated that he was in the Court holding brief for Peter Muliisa and there was some mix up with the dates. He sought adjournment. Upon further enquiry Mr. Ouma informed the Court that Ali Ssekatawa had conduct of this case and he wa in Mombasa.

Peter Muliisa was the manager of the Litigation Department and responsible for the prosecution of cases. Mr. Muliisa had asked Mr. Ouma not to proceed today and seek an adjournment.

The hearing was for scheduling conference and could have been dealt by a junior.

I refused adjournment as I found the behaviour of the Appellant's Lawyers quite extraordinary. I proceeded with the Appeal.

APPELLANT'S REASON:

The Court understood that the Appellant's contention was that the tents were not exclusively for hotel use. Conversely what items under item 23 Part II of 3rd Schedule were exclusively used as such?

This was clearly a bad point when the tents were ordered within the purview of the statutory provisions; and used for hotel business only such as weddings, parties and conferences at Munyonyo and elsewhere.

RESPONDENT'S REASONS:

There were submitted as per their skeleton argument:

Ground 1:

a) The decision must be viewed with specific reference to the tents imported by the Respondent under the conditional exemptions, in light of item No. 23 of the 3rd Schedule Part II of the Finance Act, rather than a general finding on the nature of Marquee tents.

b) The word equipment must be accorded it natural meaning. Equipment is as defined in Blacks Law Dictionary refers to:
"the articles or implements used for a specific purpose or activity (esp. a business operation). Under the UCC, equipment includes goods if (1) the goods are used or bought for a business enterprise…"

The rest of the conditions to classify equipment as hotel equipment under item 23 are specified therein i.e. to be engraved with the hotel Logo, and to have been imported with prior approval of the Minister of Finance.

It is not disputed that both conditions with regard to the tents were met. It is also not disputed that the tents were "used or bought for a business enterprise."

The Appellants only contention appears to be that it ought to have been shown that the tents were for "exclusive| use in the Respondents Hotel business. This assertion is not

supported by either law or logic. It would only have relevance if it had been the Appellants case that the tents were never used by the hotel.

c) We maintain that determination of what qualified as hotel equipment is best determined by looking at legislative intent. **See**: **Pepper vs. hart Pg**. **43(e) (f), Pg. 50(b) (g) Pg. 64 (d), (e) (f) (g), Pg. 65(a), Pg. 67(e).**

The provisions of item No.23 of the 3rd Schedule part II of the Finance Act were introduced in Budget speech Minister of Finance at the 3rd Session of 7th parliament on 12th June 2003.

See Page 23 – "Measures to stimulate investment and promote Export" and **Page 24** – "Hotel Industry"

> ***Hotel Industry***
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> *"The tourist industry has suffered a setback over the past few years, which has been compounded by global terrorism. To assist the industry and encourage the development of tourist facilities in the country, I am proposing to remit duty on essential inputs in the hotel industry. However, these inputs must be imported with the names and logos of the respective hotel printed on them. This relief will not include construction materials. The details will be found in the Finance Bill."*

The purpose and intention was to encourage development of tourist facilities by remitting duty on essential inputs in the hotel industry. The only exclusion was construction materials. Certainly Marquee tents are not construction materials.

Ground 3:

a) The decision of the Tribunal on this point must also be restricted to the particular facts of the case rather than to tax incentives generally. The Tribunal was well aware and took account of the conditions, and cannot therefore be said to have disregarded statutory interpretation. We maintain that the Tribunal made no ruling in the terms set out in the Appellants ground of Appeal No. 3.

b) The Tribunal used the purposive approach of interpreting the provision. This is the correct position of legal interpretation. In any event, it is trite law that where the language is unambiguous, it is to be interpretation strictly (literally). If on the other hand it is ambiguous, it is to be interpreted in favour of the taxpayer.

See: Pepper vs. hart Pg. 43(e)(f), Pg. 50(b)(g) Pg.64(d)(e)(f)(g), Pg. 65(a), Pg.67(e).

It must be noted however, that the purposive approach is only used where the literal meaning of the legislation yields or tends to yield more that one interpretation.

We maintain that in any even, item 23 of the Finance Act as amended is wholly unambiguous and ought to be interpreted literally. Nonetheless, even if it were ambiguous, the intent of the legislature shows that the item 23 intended to cover equipment, except construction equipment as long as the same was engraved with the hotel Logo and was imported with prior approval of the Minister of Finance.

Ground 4:

a) This is a ground that seeks to make this Honourable court make a determination of fact. The law restricts appeals to this court to only points of law. **See. Sec. 28 Tax Appeal Tribunal Act Cap.**

A finding as to the dates of the communications or as to the number of days in between communications is one of the fact rather than law, on which this court has not been vested with jurisdiction and on which the Appellant cannot be entertained by this Honourable Court.

See: Thiongo vs. Republic (2004) 1 E.A 333

b) The Appellant did not appear when the matter came up for hearing before the Tax Appeals Tribunal and therefore did not challenge the matters of fact. Even when the Applicant filed its written submission before the Tribunal, it did not challenge these facts. The Appellant cannot therefore seek to re-open the case on appeal and cannot fault the Tribunals finding of fact on the matter.

c) In the even that this Honourable Court is inclined to consider the matter, we submit, without prejudice, that we maintain that time limits prescribed by statute ought to be adhered too strictly.

See: <u>Uganda Revenue Authority vs. Uganda Consolidated Properties CACA N0. 31 of 2000.</u>

The relevant provisions of the law are Section 229(1), (2), (4) and (5) of the East African Community Customs Management Act 2005.

It is clear from the Appellants letter of 5th December 2006, that the Respondent had made its application under Section 229(1) on 1st November 2006. It need not be laboured that the Appellant's letter of 5th December 2006 came more than thirty days after the Respondent's applications

This court will only set aside Tribunal's decision if it has erred in law or misdirected itself.

I have no reason to disagree with Tribunal's eloquent decision. I entirely agree with reasons given by the Respondents. The Appeal is disallowed with costs to be paid within 14 days of taxation if not agreed.

Cost Order:

In view of the wasted costs the court has exercised its inherent jurisdiction under Sec. 98 of the Civil Procedure Act and ordered costs of the appeal be paid by Muliisa Peter personally with liberty to apply to the court on application within 14 days showing cause why this order should not be confirmed.

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Anup Singh Choudry

Judge

22/09/08