THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - CA - 11 - 2007

ELGON ELECTRONICS LTD :: APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY :: RESPONDENT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

This is an appeal from the decision of the Tax Appeals Tribunal (hereinafter called *"TAT"*) delivered on the 5th October, 2007.

The brief facts of the case are that Respondents Uganda Revenue Authority (hereinafter called *"URA"*) some time in 2005 carried out a comprehensive audit of the Appellant/Applicant's tax affairs. As a result of the said audit an assessment of Ushs.134,402,000/= being Value Added Tax (VAT) and Corporation Tax was found due and owing by the Appellant. The Appellants did not agree with this assessment made by the URA.

On the 18th November, 2005 the Appellants through M/S Acumen Consultants wrote to the Manager Domestic Taxes Department URA and made a formal objection to the tax assessment. On the 24th March, 2006 the URA wrote back to the Appellants a letter entitled *"Notice of*

Objection Decision" and adjusted the assessed tax to Ushs.90,685,825/= (see pages 14 - 17 of the record of appeal).

The Appellant still being dissatisfied with the objection decision of URA on the 24th April, 2006 filed an application to the Tax Appeals Tribunal (No. 11 of 2006) **Elgon Electronics Ltd V Uganda Revenue Authority**.

When the matter came for hearing at TAT counsel for URA raised a preliminary objection under Sections 103(2) of The Income Tax Act and 15(1) of The Tax Appeals Tribunals Act. Counsel for the URA generally argued that the application before TAT was premature because the Appellant/Applicant had not paid 30% of disputed tax or that part of the assessed tax which was not in dispute which ever is the greater pending the final resolution of the objection as provided for under the law.

Counsel for the Appellant/Applicant referred TAT to their own decision of **Multi Choice (U) Ltd V Uganda Revenue Authority** TAT 01/2000 where the tribunal determined the effects of the non payment of the 30% of the tax. In that Application TAT is said to have found that the non payment of the 30% tax was not a precondition for filing an application with the Tribunal. It instead found that 30% tax was only relevant where a tax payer lodges an objection with the Commissioner General of the URA.

The TAT upheld the objection of URA and referred to the case of **Samuel Mayanja V Uganda Revenue Authority** HCCS 17 of 2005 where it was held;

"a taxpayer who has lodged a notice of objection to an assessment shall pending final resolution of the objection, pay 30% of the tax assessed or that part of the tax assessed not in dispute which ever is the greater…"

As to their earlier decision in **Multi Choice V Uganda Revenue Authority** (supra) the Tribunal said

> *"(we) would like to clarify that it (we) only made an observation and not a ruling as such. In any case payment of 30% tax before filing a case in the Tax Appeals Tribunal was not a requirement under the Value Added Tax at the time…"* (additions mine).

The Appellant/Applicant now appeals the TAT decision on the following grounds

1. That the tribunal erred in law in holding that the appellant's application was premature before the tribunal for non payment of 30% tax or that part of the tax assessed not in dispute, which ever is greater, pending final resolution of the objection.

2. The tribunal erred in law in holding that the Appellant ought not to have relied on the tribunal's earlier decision in **Multi Choice V Uganda Revenue Authority** where the tribunal held that the payment of 30% is not a pre-condition for filing an application nor does it render the application void.

Mr. K. Kiwanuka appeared for the Appellant while Mr. H. Aliker appeared for the Respondent.

As a precondition to hearing this appeal both parties agreed that the Appellant provide a Bank guarantee for the disputed amount. Such guarantee No. 261 from Orient Bank Ltd dated 30th November, 2007 was according deposited in court by the Appellants.

As to the first ground of appeal counsel for Appellant submitted that Section 99 of The Income Tax Act (Cap 340) provided for a tax payer to lodge an objection to a tax assessment with the commissioner within 45 days. It is his submission that the 30% tax payment was in relation to this objection to the Commissioner and not an application to review the decision of the Commissioner before TAT. Counsel for the Appellant submitted that the application before TAT was one of review and not objection and so did not require the payment of 30% of the disputed tax.

Counsel for the Appellant saw the payment of 30% tax deposit as oppressive to his client on two fronts.

First, it restricted his clients access to justice by compelling the payment of the tax in dispute before getting a hearing before TAT. In this regard he referred me to the decision of the Court of Appeal of Tanzania in the case of

Ndyanabo V Attorney General [2001]2 EA 485

In that case the Appellant lost an election and filed a petition to challenge the results. However, Section 111(2) of The Elections Act provided that a hearing date could not be fixed unless the petitioner had deposit T.Shs. 5,000,000/= as security for costs. The Appellant failed to pay for security for costs and filed a petition in the courts in Tanzania that the said statutory provision was unconstitutional. The court held that a person's right of access to justice was important in a democratic society like Tanzania and that right could only be limited by legislation that was not only clear but was also not in violation of the constitution.

Secondly, that Sections 103(2) of The Income Tax Act and 15(1) of The Tax Appeals Tribunal Act are indeed unconstitutional and contrary to Article 126(2) of The Constitution of The Republic of Uganda which provides

"In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law apply the following principles;

(a) *Justice shall be done to all irrespective of their social or economic status…"*

Lastly, counsel for the Appellant submitted since the Commissioner did not demand for the 30% tax at the time the objection was raised before the Commissioner it was deemed to have been waived.

Counsel for the Respondent URA submitted that the provisions of the law were clear and mandatory.

He referred me to the case of

Cape Brandy Syndicate V IRC [1921] 1 K.B 403 where it was held

"In a taxing Act, one has only to look at what is clearly said… there is no room for an intendment, there is no equity about a tax, there is no presumption as to a tax, nothing is to be read in, and nothing is to be implied, one can only look fairly at the language used…"

Counsel for the Respondent submitted that court had simply to apply the law. He disagreed that the Commissioner had made any waiver as to the 30% tax deposit. Counsel for Respondent further objected that law denied the Appellant access to justice and that it was unconstitutional.

I have read the submissions of both counsel on this ground. It would appear to me that the two main pieces of legislation in issue here are Sections 103(2) of The Income Tax Act (Cap 340) and 15(1) of The Tax Appeals Tribunal Act (Cap 345).

Section 103(2) of The Income Tax Act provides

"…subject to subsection(3) where a tax payer has lodged a notice of objection of an assessment, the amount of tax payable by the taxpayer pending final resolution of the objection is 30% of the tax assessed or that part of the tax not in dispute whichever is greater…"

Section 15(1) of The Tax Appeals Tribunals Act provides

"…A tax payer who has lodged a notice of objection shall pending final resolution of the objection pay 30% of tax assessed or that of the tax not in dispute which ever is greater…"

It would appear to me that if a tax payer challenges a decision of the Commissioner under the Income Tax Act or under the Tax Appeals Tribunal Act there are similar provisions as to depositing 30% of the tax assessed or that tax which is not in dispute, whichever is greater.

Counsel for the Appellants submits that the application before TAT is a review and not an objection and thus not subject to rule of deposit.

In substance that is a correct reflection of the law that TAT carries out a review. Section 14 and 16 of the Tax Appeals Tribunal Act make it clear that the application made to TAT under the Act is one for a review of a tax decision. Section 15(1) of the Tax Appeals Tribunal Act on the other hand refers to a person who has lodged *"a notice of objection to an assessment…"*

Section 15(1) seems to stand out by itself but I think it should be read with other sections to provide full meaning. Section 16(4) of the Tax Appeals Tribunal Act provides

> *"…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…"* (emphasis mine)

Clearly Section 16(4) of The Tax Appeals Tribunal Act of necessity takes you back to Section 103(2) of The Income Tax Act which largely states the same thing. The two sections therefore work together and narrow the scope of the application to be made to TAT.

Is that a narrowing of access to justice through the tribunal as counsel for the Appellant would have it? It probably is. Is that a ground for this court to disapply Section 15(1) of The Tax Appeals Tribunal Act? I think not. The job of the court and the High Court at that, is to interpret and enforce legislation as it is.

In the Tanzanian case of **Ndyanabo** (supra) **Samatta C.J.** (as he then was) took a proactive view against legislation that reduced access of individuals to justice especially in the courts of law. He found Section 111(2) of the Elections Act 1985 arbitrary in that it creates a class of persons who could access the courts because they could provide the mandatory security for costs while at the same time denying others who could not afford it. He argued that even the

fear of frivolous and vexatious suits should not close the doors of justice. However, it must be remembered that in so holding, the learned Chief Justice of Tanzania was dealing with a question of interpretation of the Constitution of Tanzania and in particular Article 13(1) thereof which is not the case here.

Any question as to the interpretation of The Constitutional of The Republic of Uganda 1995 under Article 137(1) must be determined by the Court of Appeal sitting as a constitutional court and not the High Court.

In this regard I am inclined to agree with counsel for the Respondent first that court shall apply both Sections 103(2) of The Income Tax Act and 15(1) of The Tax Appeals Tribunals Act as to the deposit. Secondly, the Tax Appeals Tribunal Act does not provide for waiver and therefore the provisions of Section 15(1) are mandatory. Thirdly, if the Appellant has a problem in this case relating to a Constitutional interpretation then it should take that up with the constitutional court of Uganda.

As to ground number one therefore I find that the tribunal did not err in law as alleged.

Before I totally leave this ground however, it may be useful if TAT has not already, as a matter of discretion to consider the use of some other security other than cash as one way of accommodating tax payers while applying Section 15(1) of The Tax Appeals Tribunal Act. This is what this court did in allowing this appeal to be heard thus giving the Appellant a chance to state their case.

Ground number two is that TAT erred when it did not follow its earlier decision of **Multi Choice (U) Ltd V URA** (TAT No. 01 of 2000) where it held that the 30% tax deposit was not payable.

Counsel for the Respondent submitted that TAT was bound to rely on a decision of the High Court in **Sam Mayanja V URA** (supra) which held otherwise because the High Court was in this regard a superior court of record.

In light of my findings in ground one, this second ground is largely academic. It is my view that the decision of TAT in **Multi Choice (U) Ltd** (supra) was per incuriam that is a mistake.

Accordingly, this second ground of appeal also fails.

I accordingly dismiss this appeal with costs to the Respondent.

Geoffrey Kiryabwire
JUDGE

Date: 24/06/08

24/06/08
9:14am

Judgment read and signed in Court in the presence of;

- K. Kiwanuka for Appellant

In Court

- Representatives of Appellant
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 24/06/08