

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION**

HCT - 00 - CC - CS - 457 - 2010

AIRTEL UGANDA LIMITED.....PLAINTIFF

VERSES

COMMISSIONER GENERAL

UGANDA REVENUE AUTHORITY DEFENDANT

Before: The Hon Justice Geoffrey Kiryabwire

Judgment

The plaintiff a telecommunications company brought this suit against the defendant for declarations that interest imposed on the plaintiff by the defendant on a disputed but later settled tax is contrary to the law and is unjust.

The case for the plaintiff is that it objected to a tax assessment by the defendant and on the 19th May 2004 lodged an objection with the Tax Appeals Tribunal (herein after referred to as TAT) and paid 30% of the disputed tax as required by the law. TAT and the High Court on appeal there from upheld the assessment and the plaintiff's appeal to the Court of Appeal was dismissed. The plaintiff then paid the outstanding tax balance of Shs 428,269,883/= which had been withheld pending resolution of the Appeal through TAT. On payment of this sum the

defendant then made a demand for interest on the sum being a total of Shs 1,555,836,915/= which additional demand the plaintiff objected to. However without prejudice to its rights and in order to avoid enforcement procedures against it by the defendant the plaintiff paid the disputed interest and then filed this suit.

It is the case for the plaintiff that no interest was awarded against it by TAT or the High Court and therefore this cannot be demanded for by the defendant. Secondly that by paying 30% of the disputed tax under section 15 of the TAT Act the plaintiff could not be classified as a person who failed to pay a tax imposed under an Act.

For the defendant it was contended that the interest imposed was by Statue under the VAT Act and not from the decision/judgment or decree of the Courts and or Tribunal.

At the scheduling of this case it was agreed that the issues for trial required an interpretation of the law only. The following issues were then agreed upon for the parties to submit to court

ISSUES

1. Whether interest which is not claimed or awarded by the Tax Appeals Tribunal or the Court which heard the appeals may be claimed by the defendant after the judgment and decrees there from.

2. Whether having paid 30% of the tax and withheld the balance in accordance with section 15 of the TAX appeals Tribunal Act the Plaintiff should have penalties imposed on it as person “who fails to pay tax imposed under the Act”
3. Remedies, if any.

Dr Byamugisha appeared for the plaintiff while Mr Ssekatawa and Mr. Mugabi appeared for the defendant.

ISSUE 1: Whether interest which is not claimed or awarded by the Tax Appeals Tribunal or the courts which heard to the appeals may be claimed by defendant after the judgments and decrees there from.

It was submitted by the plaintiff that the award of the Tribunal and the judgment of the court are documents 9, 10 and 11 in the scheduling bundle .They do not award any interest to the defendant and the defendant and is not entitled to any interest under them.

On the other hand the defendant submitted that tax and interest in question arises from statute and not an award or Judgment. He submitted that Section 34(1) (a) and (b) of the VAT Act provides that;

1) *Tax payable under this Act is due and payable-*

(a) In the case of a taxable supply by a taxable person in respect of a tax period on the date the return for the tax period must be lodged

(b) In the case of assessment issued under this Act, on the date specified in the notice of assessment.”

Furthermore Section 34(3) of the same Act further provides that

“When an objection to or a notice of appeal against an assessment has been lodged, the tax payable under the assessment is due and payable and may be recovered notwithstanding that objection or appeal”.

The defendant further submitted that was clear from the above provision that upon the assessment of the plaintiff of shs 1,024,209,566/=, it was due and payable on the date specified in the notice of assessment and remained due and payable at all material times notwithstanding the objection lodged by the plaintiff.

The defendant also submitted that the consequences of not paying the tax meant that it would by law attract penal tax in form of interest at a rate specified in the VAT Act.

It was also counsel for the defendant’s submission that section 65(3) of the VAT Act provides that,

“A person who fails to pay tax imposed under this Act on or before the due date is liable for a penal tax on the unpaid tax at a rate specified in the fifth schedule for the tax which is outstanding.”

The fifth schedule to the Act provides

“Calculation of interest penalty

The rate of interest chargeable as penalty shall be 2% per month, compounded...”

The defendant also submitted that this position was also reiterated by Justice Bamwine in **Kasampa Kalifani V URA HCCS No.579 of 2007** where he held that if a person failed to pay tax imposed under the statute on or before the due date, he was liable to pay a penal tax at the rate specified in the law.

Counsel for the defendant further submitted that the fact that the plaintiff paid 30% of the tax in dispute and did not pay the 70% means that the plaintiff remained with a tax liability of shs 428,269,883/= that it had not discharged which as long as the tax remained outstanding, continued to accrue interest.

Counsel for the defendant submitted that a penal tax was to be treated as any other tax and referred to section 66(5) of the Vat Act which provides that,

“Penal tax shall for purposes of this Act be treated as a tax of the same nature as the output to which it relates and shall be payable in and for the same tax period as that output tax.

Counsel further referred to section 66(6) in their submissions which provides that

“...penal tax shall be assessed by the Commissioner General in the same manner as the output to which it relates and an assessment of penalty tax shall be treated for all purposes as an assessment of tax under this Act.”

As to the decision of TAT, counsel for the defendant submitted that the issue of interest was not a contested issue so the Tax Appeals Tribunal had no reason to make a finding on it.

He submitted that to accept the applicant's argument would lead to an absurdity in the law and it would amount to rewarding non compliance and punishing compliance. Counsel for the defendant submitted that the assessment was issued on 25th February 2004 but the plaintiff didn't comply but instead embarked on an unsuccessful litigation of six years.

Counsel for the defendant further relied on the case of **Uganda Projects Implementation & Management Centre V Uganda Revenue Authority, Constitutional Petition No 18 of 2007** where it was held that,

“....service delivery by government is dependent upon prompt payment of taxes and taxes due and payable under the Act is considered a debt to government and that's why there is a provision for imposing penalties if taxes are not paid in time.”

I have read carefully the submissions of both counsel and the authorities referred to.

The plaintiff's case is that the Tax Appeals Tribunal, High Court and Court of Appeal did not award interest to the defendant and therefore the defendant is not entitled to it. Without taking too much time on this, it is true that no interest was awarded either by the Tribunal or the High Court. On the other hand the defendant

contends that interest is statutory by virtual of **section 65(3)** of the VAT Act and therefore does not have to be awarded by the Tribunal or Court to be payable.

Section 65(3) of the VAT Act (referred to supra) provides that the penal tax is to be found in the fifth schedule of the Act. The fifth schedule refers to “**interest penalty**” to be calculated at “**2% per month compounded**”.

In my view the law is very clear and unambiguous and it should be construed in the strict sense.

In this regard the case of **Kasampa Kalifani V URA HCT-00-CV-CS-059-2007** (Supra which cites the case **Income Tax Commissioner vs Roshanali Nazerally Merali & Anor [1964] E.A. 95**) is instructive.

That case involved the payment of additional tax chargeable under Section 40 of the East African Income Tax (Management) Act, 1952. It was contested that the additional tax chargeable under S.40 amounted to a penalty, that at common law a penalty is not recoverable after the death of a person concerned and that the Act should be construed so as not to override the common law unless that intention was to be plainly gathered. It was held that although the effect of Section 40 of the Act was to impose higher rates in cases of default and omission, the important consideration was that whilst the section was expressed in terms of an amount, it was invariably an ‘**amount of tax**’, the additional tax was plainly a tax within the meaning of the Act and that the person concerned shall be chargeable with it. The court held further that though the additional tax chargeable by section 40 had been

designed as a penalty, there was no distinction in any part of the Act between the treatment accorded to this additional tax and any other tax.

The appeal was therefore allowed, decree of Supreme Court set aside and assessment confirmed

It would appear to me in the instant case that where a person failed to pay tax imposed under the Statute on or before the due date, he was liable to pay a penal tax on the unpaid tax at the rate specified in the law. In the instant case the tax was assessed at Shs.1,024,209,566/=. The plaintiff then paid 30% of the tax assessed in the amount of 183,544,232/=. On the Tax Appeals Tribunal, High Court and Court of Appeal upholding the defendants assessment the plaintiff then paid the balance of 428,269,883/= and the defendant then made a demand for the interest in the amount of 1,556,836,915/= which is the penal tax.

In the case of **AON V URA HCT.OO-CC-MC-66-2009** I held that,

“I therefore find that the words in S. 44 (1) of the VAT Act are clear. They provide that where one is entitled to a refund on the basis of a decision of the court, the Commissioner shall pay interest at the rate of two percent per month compounded. It follows that the applicant is statutorily entitled to interest at the rate of two percent per month compounded on the refund. I make a declaration and order that the respondent authority pay interest to the applicant at the rate of 2%p.a. compounded from the date the sum of Ushs 1,824,594349/= “

In other words statutory interest is payable where provided for in law like in the instant case. From the authorities above it is clear that once the words of the statute are clear and unambiguous, there is no need to make further inferences from a Tribunal or courts on the payment of interest. In short therefore the defendant has the right to claim for the interest because it is provided for under the law.

ISSUE 2: Whether having paid 30% of the tax and withheld the balance in accordance with section 15 of the Tax Appeals Act, the plaintiff should have penalties imposed on it as a person “who fails to pay tax imposed under the Act”

This issue has largely been resolved in my findings above. However let me address the concern of counsel for the plaintiff that by the plaintiff retaining 70% of the tax assessed as permitted by section 15 of the Tax Appeals Tribunal Act the tax payer is committing an offence.

Section 15(1) provides that,

A tax payer who has lodged a notice of objection to an assessment shall pending final resolution of the objection, pay 30 percent of the tax assessed or that part of the tax assessed not in dispute, whichever is greater.

In this regard the case cited by counsel for the defendant of **Uganda projects Implementation & Management Centre V Uganda Revenue Authority** (supra) is also instructive. In that case it was held by the Constitutional Court that the requirement to pay 30% of the tax assessed before the tax payer files an appeal

with the Tax Appeals Tribunal may be likened to an intended appellant who may be required to furnish security for the due performance of the decree before proceeding with the appeal process.

In that case Hon, Lady Justice Kitumba (JA) held that,

*“...according to Article 17 of the Constitution a citizen has a duty to pay taxes and to do so promptly, so that government business can go on. This was discussed in the **Metcash Trading Co.Ltd V Commissioner for South Africa Revenue Services** “the principle of pay now argue later” The tax payer has to pay his tax then argue later”*

In light of the authorities discussed above I therefore find that payment of 30% of the tax in accordance with section 15 of the Tax Appeals Tribunal Act does not absolve the tax payer from paying penalties in the event that the disputed tax under the Act is found to be payable.

ISSUE 3: Remedies

The plaintiff prays for a declaration that the said interest is not payable and also for an order for the refund of shs.1, 555,836,915/= with interest thereon.

Pursuant to my findings as on both issue one and two, this suit fails and is dismissed with costs.

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Geoffrey Kiryabwire

JUDGE

Date: 18/10/2012

18/10/12

9: 35 a.m.

Judgment read and signed in open court in the presence of;

- A. Byamugisha for Plaintiff
- C. Namutebi for Defendant

In Court

- Mr. Kakonge – Legal Manager of Plaintiff
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 18/10/2012