THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT – 00 – CC – CA - 0 OF 2010

STEEL CORPORATION OF EAST AFRICA LIMITED ………… APPELLANT

VERSES

UGANDA REVENUE AUTHORITY ………………………………. RESPONDENT

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE

J u d g m e n t

This is an appeal from the ruling and award of the Tax Appeals Tribunal (hereinafter called "TAT") in relation to the treatment of capital deductions for appellant company.

The Uganda Revenue Authority (Respondents) carried out a special audit of the appellants for the period 1994-2005 for Corporation Tax. The question relating to capital deductions followed the appellant's repossession of the steel mills under the Expropriation of Properties Act. The Steel Mills had been expropriated and run by the Government of Uganda during which period the Government had run the Steel Mills and purchased plant and machinery. On return of the expropriated Steel mils to the appellants, it was agreed in a share sale and purchase agreement that the value of these additions be converted in to shares in favor of the Government. Subsequently shares worth shs 6, 450,030,000 were exchanged in lieu of the capital investment by the Government.

The respondent audited the applicants starting in October 2006 for the period April 1994 to December 2005. Pursuant to the special audit, the respondents disallowed the capital allowance claimed by the Applicant amounting to Shs 5,337,159,439 on the basis that the assets were not

purchased in a way qualifying for Wear& Tear under Section 27(3) (4) and 52(2) of the Income Tax Act 1997. In the alternative the respondents argued that the capital allowances were not granted because the capital allowance on the assets had already been claimed during the period the Government was in control of the Steel Mills therefore, no further capital allowances were due to appellants.

The Appellant maintains that the share and transfer agreement constituted a sale of assets qualifying for wear and Tear and that the Wear and Tear in question had not been earlier claimed as alleged. This dispute was then referred to the Tax Appeals Tribunal in TAT No. 4 of 2008.

When this matter went to the Tax Appeals Tribunal the following issues were raised;

1. Whether the share sale and purchase agreement created a sale of capital assets qualifying for wear and tear

2. Whether the wear and tear had been earlier claimed by the owner of the assets.

3. Remedies and costs.

On issue number one the Tribunal in making its decision found that the applicant (the appellant here) had failed to show how an agreement between its shareholders tantamount to a disposal of assets to the applicant and that the share sale and purchase agreement did not create a sale of capital assets qualifying for wear and tear.

With regard to the second issue, the Tribunal found that the respondent did not advance evidence to show that depreciation allowances and initial allowances had already been granted or claimed by the applicant on these assets prior to 1994 and the applicant also failed to prove that initial allowances and depreciation had not been claimed prior to 1994 and in such circumstances the tribunal made no finding on issue number two and the application was then dismissed with costs.

It was from the above decision of the Tax Appeals Tribunal that an appeal was lodged in the High Court Commercial division.

The grounds of appeal are;

1. The Honorable Members of the Tribunal erred in Law when they ruled that the purchase agreement did not amount to the disposal of the assets qualifying for wear and tear.
2. The Honorable Members of the Tribunal erred when they ruled that the appellant had the burden to prove that the wear and tear had been awarded by the respondent in the period when the Government owned that property and that they failed to discharge that burden of proof.
3. The Honorable members of the Tribunal erred in fact when they rejected the valuation report of the Chief Government Valuer.
4. That the Honorable members of the Tribunal erred in law when they failed to properly evaluate the evidence on record and there by came to an erroneous decision.

Mr. C. Birungyi appeared for the appellants while Mr. E. Muyise appeared for the Respondent URA

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GROUND NO 1.

The Honorable members of the Tribunal erred in Law when they ruled that the purchase agreement did not amount to the disposal of the assets qualifying for wear and tear.

The Case for the appellants

Counsel for appellant submitted that the share purchase agreement amounted to a disposal of assets qualifying for wear and tear.

Counsel for the appellant relied on section 51(1) of the Income Tax (Cap 340) which provides that a tax payer is treated as having disposed of an asset when the asset has been,

"…a) Sold, exchanged, redeemed or distributed by the tax payer,

b) Transferred by the taxpayer by way of gift or

c) Destroyed or lost…"

Counsel for the appellant further submitted that in the present case the Government of Uganda and Muljibhai Madhvani Group of Companies entered an agreement where it was agreed that the assets of Government be exchanged for shares in Steel Corporation of East Africa.

In its Ruling the tribunal held that the agreement was between shareholders (i.e. The Government of Uganda and Muljibhai Madhvani Group of Companies) and that it was not a share and purchase agreement as alleged by the appellant and that since that appellants were not part of the agreement, they could not benefit from it and therefore there was no sale of assets to the appellant by this agreement and no consideration given for these assets.

Counsel for the appellant submitted that although Steel Corporation of East Africa did not sign the share sale and purchase agreement with the Government of Uganda, it is a subsidiary of Muljibhai Madhvani Group of Companies and that the transaction is recognized as making Steel Corporation of East Africa a party to the agreement. Furthermore the consideration given in this regard was clearly stated in the agreement as 645,000 non cumulative 7% redeemable preference shares of Ush.10,000/= each. Therefore since the shares that were being transferred was in the Appellant Company that was sufficient to make it a party to the agreement.

Counsel for the appellant further submitted that the basis of the agreement was in relation to assets owned by the appellant and this is clearly stated on the first page of the agreement where it's written **"***sale of shares in Steel Corporation East Africa Limited***"** and the agreement defined the word **"**company**"** in clause **1.1(c)** of the agreement as "*Steel Corporation East Africa Limited"*. Therefore the tribunal misdirected itself when it held the view that the appellant were not a party to the agreement.

Counsel for the appellants further relied on section 2(u) of the Income Tax Act which provides for the definition of depreciable assets to mean *"Any plant and machinery or any implement, utensil or similar article which is wholly or partly used or held ready for use, by a person in the production of income included in gross income and which is likely to lose value because of wear and tear or obsolescence"* Based on this definition Counsel for the appellant submitted that plant and machinery as used by Steel Corporation East Africa qualifies as depreciable assets.

Counsel for the appellant further submitted that the Tribunal also allowed the respondent to raise a new issue which was not in its objection decision as it was not stated in the objection decision that the appellant was denied capital allowances because the agreement in question was between shareholders. He referred to section 16(4) of the Tax Appeals Tribunal Act (Cap 350) which provides that 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 ground stated in the taxation decision to which the decision relate.

By allowing the respondent to raise a new issue, the tribunal offended a cardinal principle of natural justice which provides a right for each party to be heard.

Case for the respondent

Counsel for the Respondent submitted that the Tribunal rightly ruled that the share sale and purchase agreement did not amount to a disposal of assets qualifying for wear and tear and that section 51(1) of The Income Tax Act was inapplicable as the appellant is not a party to the said agreement and there was no sale of assets to the appellant by this agreement nor consideration given.

Counsel fort he Respondent also submitted that the Appellant was not a party or privy to the share sale and purchase agreement document (A2). What the share sale and purchase agreement reflected was a purchase of shares by Government of Uganda in exchange for plant and machinery that the Government had purchased between 1972 and 1994

The Respondent further submitted that the plant machinery and equipment has always been in possession of the same company (the appellant) which was incorporated in 1960, taken over by Government in 1972 and it was then renamed East African Steel Corporation that it later became Steel Corporation of East Africa.

Counsel for the respondent further submitted that with respect to a new issue allowed by the Tribunal for the respondent to rely on section 16(4) of The Tax Appeals Tribunal Act only limits the applicant and not the commissioner as what grounds can be relied upon in the taxation decision. Further the commissioner can submit further reasons to support his/her decision.

However in the instance case no new grounds were raised by the respondent but rather an elaboration on the grounds of its objection at page 328 of the record of appeal.

Counsel for the respondent also submitted that under paragraph (h) at page 6 of the agreement "parties" means The Government of Uganda and Muljhibhai Madhivani & Co Ltd.

Counsel for the respondent submitted that it would be absurd for the appellant to claim to be party to the agreement and thus the purchase agreement did not amount to disposal of assets qualifying for tear wear with in the meaning of S.51(1) of the Income Tax Act.

Counsel for the respondent also submitted and relies on section 74(1) of Income Tax Act, that a company is liable to tax separately from its share holder's and because of this, it is the respondents submission that this ground should fail.

The findings and the decision of the Court.

I have read the record of appeal and considered the submissions of both counsels for which I am grateful.

It is important to note that under Section 27 of the Tax Appeals Tribunal Act an appeal to the High Court may be made on questions of law only and a notice of appeal shall state the question or questions of law that will be raised on appeal. It is therefore necessary as a preliminary matter to establish whether the grounds of appeal disclose points of law for the Court hear **Uganda Revenue Authority V Tembo Steel Ltd Civil Appeal No 9 of 2006.**

Whether wear and tear should be an allowable deduction to my mind is a point of law so Court has jurisdiction to hear the appeal on that point.

Section 27 of the Income Tax Act provides the deduction for depreciation for depreciable assets. However it's important to understand the meaning of the 'Depreciable assets'

Section 2(u) of the Income Tax Act defines "depreciable asset" to mean any plant or machinery, or any implement, utensil, or similar article, which is wholly or partly used, or held ready for use, by a person in the production of income included in gross income and which is likely to lose value because of wear and tear, or obsolescence.

According to the **Blacks Law Dictionary** depreciation is a decline in an asset's value because of wear or obsolescence.

From the facts of this case it is clear that the plant machinery and equipment in issue in this case would be a depreciable asset.

As to whether this depreciable asset was disposed of Section 51 of the Income Tax provides that a tax payer is treated as having disposed of an asset when the asset has been,

> "…*a) Sold, exchanged, redeemed or distributed by the tax payer,*
>
> *b) Transferred by the taxpayer by way of gift or*
>
> *c) Destroyed or lost…"*

The legal dictionary **"Words & Phases legally defined vol 2"** defines "dispose" to mean "…*sell given in exchange, pledge or otherwise handover…"*.
According to **Halsburys Laws of England** 4th Edition Vol 5 (1) Para 16 p13 there is deemed to be a disposal of assets whenever a capital sum is derived from assets. Disposal connotes the transfer of ownership of an asset by one person to another or the transfer of the beneficial title to property by one person in favor of another.

The text in Halsbury's Laws Of England further at Para 21 P17 indicates that there is a disposal where a person having control of a company exercises his control so that value passes out of shares in the company owned or out of rights over the company exercisable by him or by a person with whom he is connected and into other shares in or rights over the company. This is treated as a disposal of shares or rights out of which value passes by the person by whom they owned or exercisable.

From the facts of this case as regard disposal of assets, it is clear that it was agreed in a share sale and purchase agreement that the value of the property be converted in to shares in favor of the

Government. Shares worth shs 6, 450,030,000 were exchanged in lieu of the capital investment by the Government.

For the respondent it has been argued that the share sale and purchase agreement did not amount to a disposal of assets qualifying for wear and tear and that the appellant is not a party to the agreement so can not benefit from it.

With the greatest of respect this is a very narrow interpretation of what is clearly a deeply involving agreement to sort out an expropriation question. The purpose and sophistication of the transaction can be derived from the Recitals on pages 2 to 5 of the Agreement. For all intents and purposes the appellant was the only subject matter of the agreement. How then can it be alienated from it because it was signed by its owners and the Government of Uganda? That would be to defeat the purpose of the agreement. To my mind it can legally be found that the Muljibhai Madivani & Co Ltd had control over the appellant company and therefore acted as its agents. The question of agency most often arises in the context of associated or group companies. Where such a relationship is established then the veil of incorporation may be lifted **Smith, Stone & knight Ltd V Birmingham Corporation [1939]4 ALL ER 116**.

As to allowing the respondent to raise new issues that were not part of the objection decision Section 16(4) of the Tax Appeal Tribunal Act provides that *"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 ground stated in the taxation decision to which the decision relate."* It is true that this section relates to the applicant. However in the case of **Warid Telecom Uganda Ltd V Uganda Revenue Authority Civil Appeal No 24 of 2011** before Justice Christopher Madrama the case of **Standard Chartered Bank V Grand Hotel Ltd Civil Appeal No 13 of 1999** was cited where it was held that cases have to be decided on the issues on record and not any other issues. The objection decision of the 19th October 2007actually did not raise issues of the agreement when discussing wear and tear allowances. This was a new issue and not just an elaboration that had not been brought to the attention of the appellants as applicants before they applied to the tribunal. This was a procedural error in my view.

Based on the above authorities it is clear that Muljubhai Madhivani was acting as an agent for Steel Corporation of East Africa limited I therefore find that the Honorable Tribunal misdirected

its self when it held that the Steel Corporation of East Africa was not a party to the share sale and purchase agreement and therefore it could not benefit from an agreement to which it was not a party.

GROUND 2

The Honorable members of the Tribunal erred when they ruled that the Applicant had the burden to prove that wear and Tear had been awarded by the respondent in the period when the Government owned that property and that the Appellant failed to discharge that burden of proof.

Case for the appellants

Counsel for the Appellant refers to section 28(1) of the Income Tax Act which provide that

> *"A person who places an item of an eligible property into service for the first time during the year of income is allowed a deduction for that year of an amount equal to…."*

He further relies on the **2nd November 2001 Practice Note** by the Commissioner General for the interpretation of "placing an item of eligible property into service for the first time". It is stated therein that Placing an item of eligible property into service for the first time should be interpreted to mean for the first time in the taxpayer's business. Therefore where a tax payer 'B' is entitled to initial allowance in the first year he puts the same equipment to use notwithstanding that 'A' got initial allowance in respect to the same equipment.

Counsel for the appellant therefore submitted that it was not relevant whether the Government had claimed wear and tear for as long as there was a disposal, the Appellant would be entitled to wear and tear.

Counsel for the appellant also relied on section 18 of Tax Appeals Tribunal Act which provides that,

> *"… In proceedings before a tribunal for review of a taxation decision, the applicant has the burden of proving that.*
>
> *a) where the taxation decision is an objection decision in relation to an assessment, the assessment is excessive or*
>
> *b) In any other case, the taxation decision should not have been made or should have been made differently…"*

Counsel for the appellant further submitted that during 1972-1994 the company was being run by the Government of Uganda and evidence was led to show that this information of whether wear

and tear had been allowed before was not available from the Privatization Unit or the Registrar of Companies.

Counsel for the appellant further pointed out that the Tribunal had requested the respondent to also try and get the same financial records on the appellant but the respondent could only find for years 1982, 1983, 1985,1986,1987,1988 and 1989 which was in this case was not relevant.

Counsel for the appellant further submitted that Section 129(3) of the Income Tax Act provides that,

> *"…The record or evidence referred to in this section (i.e. books of account) shall be retained for five years after the end of the year of income to which the record or evidence relates..."*

Counsel for the appellant therefore submitted that it was unfair for the Tax Appeal Tribunal to expect the appellant to produce documents that did not belong to it and which the appellant is indeed not required to keep.

Case for the respondent

Counsel for the Respondent also submitted that the appellant and East African Steel Corporation Ltd are one and the same and that the plant and machinery have always been in the possession of the same company.

Counsel for the respondent therefore submitted that there was no sale of the equipment to the Appellants as the share sale and purchase agreement clearly states the parties as Government of Uganda and Muljibhai Madhvani Group.

Counsel for the Responded further submitted that Section 129 of the Income Tax Act does not apply in the instance where the appellant filed an application before the Tribunal to have a taxation decision reviewed on the grounds that assessments were excessive.

Findings and decision of the Court

I have read the record of appeal and considered the submissions of both counsels for which I am grateful.

The question of law here is one of burden of proof and who bears the said burden in this case.

Section 18 of the Tax Appeal Tribunal Act provides that in a proceeding before a tribunal for review of a taxation decision, the applicant has the burden of proving that the taxation decision is an objection decision in relation to an assessment, and that the assessment is excessive or in any other case, the taxation decision should not have been made or should have been made differently. As to the standard of proof it should the same as in all civil cases that is on the balance of probabilities **Nsubuga V Kavuma [1978] HCB 307**.

The tribunal found at page 449 of the record that *"…The applicants case is that the assessment by the respondent is excessive by reason of denial of capital deductions. The applicant adduced no evidence to show that capital deductions on these assets had not been granted. The applicant therefore failed to discharge the burden of proof…"*

A look at the application of the appellant as applicant at the Tribunal dated 2nd April 2008 however at Para 3 reads

> *"…The Uganda Revenue Authority (Respondents) audited the applicant's for the period 1994-2005 for corporation tax and the two disagreed on the treatment of capital allowances…"*

It therefore appears to me that the present appellant was not concerned with excessive tax per se but rather the treatment of tax allowances. Put differently, that the taxation decision should not have been made; or should have been made differently within the meaning of section 18 (b) of the Tax Appeals Tribunal Act.

To discharge the burden of proof here the appellant had to show that the decision should not have been made or should have been done differently.

In the same application the present appellants stated

> *"…the applicants maintain that the share and transfer agreement constituted a sale of assets which qualifies for wear and tear as was claimed between 1994-2005 and that the wear and tear in question had not been claimed earlier…"*

Both parties admittedly failed to produce the records in question. The Tribunal also found at Page 449

> *"… However for some inexplicable reason the respondents did not produce the returns for the East African Steel Corporation for the years 1972-1994…"*

This points to a different approach that the tax decision could have taken i.e. establish whether wear and tear had previously been provided for from their own records.

It would appear to me that it was an uncontested fact as stated by the appellant that the Government of Uganda run the appellant company during the period in question and so the records were in the custody of Government. The burden of proof in such a situation would swing to the Government side to show that the allowance had previously been claimed and it is logical that the respondents should have that information if at all it was there also. In **J.K Patel V Spear Motors Ltd SCCA No 4/1991** it was made clear that the burden of proof rests before evidence is given on the party asserting the affirmative. It then however shifts and rests after evidence is given on the party against whom judgment would be given if no further evidence is adduced, that is to say the Respondent in this case. Courts takes judicial notice that this was a chaotic time in Uganda's history and it is not surprising that information around this subject is hard to get.

To my mind the appellants discharged the burden of proof that the taxation decision should have been made differently and the respondents failed show otherwise.

That being the case it is not necessary for me to address the matter as the practice note of 2nd November 2001 is applicable.

GROUND 3

The Honorable members of the Tribunal erred in fact when they rejected the valuation report of the Chief Government Valuer.

The case for the appellants is that the Tribunal rejected the valuation report of the Chief Government valuer, which clearly stated the value of assets acquired at the time they were acquired by the Appellant Company. The chief valuer indicated that assets were acquired between 1972-1994.

The case for the respondents inter alia was that the basis of the valuation used by the valuer was flawed because it was impractical to come up with similar written down values of two sets of plant and machinery ,one being an old model and the other being a state of the art equipment.

Both parties then went on to elaborate on their arguments.

To my mind however it is necessary to recall that an appeal to this Court under Section 27 of the Tax Appeals Tribunal Act may be made on questions of law only and a notice of appeal shall state the question or questions of law that will be raised on appeal (see **Uganda Revenue Authority V ShopRite Checkers (U) Ltd Civil Appeal No 15 of 2008**).

I am not able to discern a point of law with regard to this ground therefore this ground of appeal fails.

GROUND 4

The Honorable members of the Tribunal erred in fact when they failed to properly evaluate the evidence on record and thereby came to an erroneous decision.

Like the ground before I do not see a specific point of law raised here and so I am able find merit in it so this ground too fails.

For the reason herein before given I hereby set aside the decision of the Tribunal with costs to the appellants here and below.

…………………………………

Geoffrey Kiryabwire

JUDGE

Date: <u>19/12/2012</u>

19/12/12

10:00

<u>Judgment read and signed in Court in the presence of;</u>

- P. Kabagambe h/b C. Birungyi for Appellant

<u>In Court</u>

- No parties in court
- Rose Emeru – Court Clerk

…………………………………

Geoffrey Kiryabwire

JUDGE

Date: 19/12/2012