THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 750 OF 2011

ARISING FROM CIVIL SUIT NO 482 OF 2011

UGANDA CROP INDUSTRIES LTD}..... APPLICANT

VERSUS

COMMISSIONER GENERAL URA} .....RESPONDENT

BEFORE HONOURABLE JUSTICE CHRISTOPHER MADRAMA

RULING

The Applicants application is for a temporary injunction to restrain the Respondent, at agents, servants and employees, and anyone acting through her authority, from assessing, collecting or taking any measures to enforce the collection of taxes against the Applicant, pending the final determination of the main suit. The Applicant's application is also for an order to suspend the third-party agency notice raised by the Respondent against the Applicant on 2 December 2011 pending the final determination of the main suit. The Applicant further seeks costs of the application.

The grounds of the application are that the Applicant filed a suit for an order to vacate and set aside the corporate income tax assessment raised by the defendant against the plaintiff for the years of income 2002 and 2003 for being contrary to the provisions of the Income Tax Act. To vacate and set aside the objection decision made by the defendant on 16 November 2011 as contrary to the defendant's obligation to consider objections fairly and judicially. It is also to set aside the third-party agency notice raised by the defendant against the plaintiff on 2 December 2011 and for a permanent injunction to restrain the

defendants and her agents, servants, employees or anyone acting through her authority from assessing, collecting or taking any measures to enforce any taxes against the plaintiff for the years of income 2002 – 2003.

The Applicant avers that it has a reasonable apprehension that the Respondent may take illegal action to enforce and collect upon taxes which are the subject of the dispute in the main suit and that the company stands to suffer grievous and irreparable harm should the Respondent take such action. That in the past the Respondent Applicant action by freezing the Applicant's bank accounts which render the Applicant unable to conduct its businesses such as the payment of its suppliers, employees, and receive and have access to its sales revenues and remain solvent and functional. The balance of convenience favours the granting of the orders prayed for as the Applicant is an agricultural company with sufficient assets within jurisdiction of the court including agricultural lands to satisfy any taxes found to be due or any adverse order made by the court upon conclusion of the suit. Finally that it would be in the interest of justice that the Respondent is restrained from taking any measures to enforce the collection of taxes from the Applicant pending the final resolution of the main suit.

The application is supported by the affidavit of Mr Yusuf Sabir the Manager Accounts and Administration of the Applicant Company. The deponent repeats the grounds of the chamber summons set up above and adds that on three separate occasions the Respondent had taken illegal action against the Applicant on the subject of the dispute. The facts are that on 31 August 2011 the Respondent raised assessments of tax against the plaintiff and the amount of approximately 125,000,000 Uganda shillings. The assessments are disputed by the Applicant in the main suit. On 16 November 2011 the Respondent issued an "objection decision" in the response to the Applicant's objection to assessment. On 20 November 2011 the Applicant wrote and informed the Respondent that it intended to challenge the Respondents "objection decision" and therefore the taxes assessed remained in dispute. On 2 December 2011 the Respondent issued yet another third-party agency notice to seize funds due to the Applicant despite having been informed that the taxes remained in dispute. The third-party agency

notice is in force and the Applicant seeks to have it suspended in this application. Consequently the Applicant has a reasonable apprehension that the Respondent may again take similar measures to enforce and collect taxes under dispute before the main suit has been decided by this court.

The deponent further filed a supplementary affidavit in support of the application and filed it on court record on 19 March 2012. In the supplementary affidavit, the deponent attaches the written statement of defence of the Respondent in the main suit. He asserts that the Respondent has always acted outside the law. To illustrate the Applicant's deponent attaches a final assessment issued by the Respondent in the year of income 2001 after a general audit assessing tax losses of the Applicant of about 73 million. That is mandatory for such losses to be carried forward to the next financial year. In the year of income 2002 the Respondent failed to reflect the losses carried forward from the Applicant's tax losses in the year 2001. Furthermore the Respondent's premises for assessing the Applicant were that it had understated its prices for vanilla. The deponent therefore at attaches a chart showing that the Applicants prices were not the lowest comparatively to other vanilla exporters. Furthermore, that the Respondent accepted other vanilla exporters with lower prices. The deponent further refers a letter from the Respondent dated 11 July 2006 advising on the audit period 2002 2005 however the Respondent never audited the Applicant's vanilla process for the year 2004 and 2005 despite being requested to do so.

That the improper assessment of the Applicant for Uganda shillings 2 billion was vacated by consent judgement. A letter from the Respondent dated third of November 2011 acknowledges that the auditor reserves established a sum of approximately 11,000,000 Uganda shillings due to the Applicant and advise that there might be reduced by 3 million unlawfully partial refunds the Respondent had paid. No explanation is given as to why the audit wrongly omitted that payment. The Applicant advised the Respondent to make corrections that the Respondent has refused to do so. Therefore on the basis of the errors, omissions, and illegalities, the Applicant has a sound prima facie case to obtain redress in the

main suit. Because the matters drug for over 10 years it was proper that the High Court exercises the original jurisdiction and decides on the matter.

The Respondent's affidavit in rebuttal was sworn by one Yasir Sebubbidde, working as an officer in the Medium Taxpayers Unit of the Respondent. He contended that the Applicant filed miscellaneous cause number 5/2009 challenging its assessment for Uganda shillings 1,978,269,514/= by the Respondent. During the period of two years and whether and 10 meetings the Applicants representative a comprehensive review of the tax affairs of the Applicant and arrived at the compromise tax position of Uganda shillings 125,043,281/= as being the taxes due and payable. Thereafter one Samash Nathu who was not a party to the reconciliation exercise turned up after two years of reconciliation and disowned the authority of the representatives to bind the Applicant. The matter went to full hearing and the case was dismissed with costs on the 20th of May 2011 whereupon he filed a notice of appeal and applied for stay of execution. The High Court in its ruling directed that the Respondent makes clarification on the letter of 27th of October 2008 which it did by letter dated 18th of July 2012 which required the Applicant to pay 30% of the tax assessed and the Respondent made a formal demand for the same. The Applicant again applied for stay of payment. When the application came for hearing a consent order was agreed to and entered by the court. It was agreed in the consent judgement that the original assessment of the Applicant did the amount of Uganda shillings 1,978,269,514/= is vacated. The Respondent was to issue a new assessment in the amount of Uganda shillings 125,043,281/=. The Applicant was to pay 30% of the new assessment if it chose to object to the assessment and the full amount if no objection was taken within the statutory period.

In line with the consent order, new assessment for the period 2002 and 2003 for a sum of Uganda shillings 125,043,281/= was issued. The Applicant objected to assessment on 17 October 2011 in a letter dated 3rd of November 2011. The Respondent informed the Applicant that the EP claimable by the Applicant of Uganda shillings 8,146,265/= and income tax paid Uganda shillings 17,536,060/= were used to offset its liability to pay 30%. Consequently the Applicant was

advised to pay a sum of Uganda shillings 11,832,956/=. The Applicant declined to pay 30% demanded. An objection decision was made on 16 November 2011 upholding the assessment since the Applicant failed to furnish any evidence necessitating departure from the assessment. The Respondent maintains that the Applicant in an abuse of court process and in total disregard of mediation proceedings refused to pay its tax liabilities. That the Applicant will suffer irreparable harm that can be atoned for by an award of damages. As far as the Applicant's property is concerned the valuation report does not prove the Applicants ownership of the assets described. Consequently the Respondent maintains that the Applicant's application is lacking in merit and is fatally defective. In the alternative the Applicant should be ordered to pay the balance of the 30% and also deposit in court satisfactory security of about 70%.

In rejoinder, the Applicant's Director aforementioned filed a further affidavit in reply. As far as the reconciliation meetings were concerned he avers that there was no compromise tax position. No compromise was given because the Applicants position was that there was no under pricing in the sales of vanilla. Secondly the Applicants prices were not the law is in the market. In effect the deponent repeats the averments in the previous affidavits. These were that refunds were not taken into account, and losses were not carried forward.

As far as the consent order was concerned, the parties were supposed to work out refunds due to the Applicant but no resolution was reached by the Respondent before the deadline for filing an objection to the new assessment. The Applicant therefore sought an extension of time within which to make its objection. As far as the 30% is concerned, the Applicant maintained that the Respondent was holding monies due to it by way of refunds which monies exceeded the 30% demand or indeed the entire amount of assessments raised.

As far as the Applicant's property is concerned, the information is contained in the company's financial statements in every year of income that was filed with the Respondent. The Applicant further maintains that evaluation of the Applicant's property is reflected in several documents which were attached to the affidavit.

At the hearing of the Application, Counsel Sekatawa Ali represented the Applicant while Shamash Nathu a Director of the Applicant with powers of Attorney to represent the Applicant represented the Applicant. Counsels presented oral arguments.

The Applicants representative submitted that the law on temporary injunctions is well settled in the case of Ketan Marjoria Vs URA and what the Applicant needs to demonstrate is whether the application discloses a prima facie case; whether the Applicant would otherwise suffer irreparable harm if the injunction is not granted. If the court is in doubt it would decide the case on the balance of probabilities.

On the question of payment of 30% deposit to the Respondent Director Nathu submitted that there is a second prayer for relief against an agency notice issued by the Respondent. As far as assessments are concerned he submitted that the evidence exhibited demonstrated that there was a deficit/loss of 73 million that had been carried forward. Section 38 of the Income Tax Act provides that losses "shall be carried forward" to "the following years of income". Exhibit E1 attached shows that losses were not brought forward the next year and this is not a clerical error. They assessed the Applicant for Uganda Shillings 140 m and if they had they deducted the shillings 73 m it would be less by about half. The Director contended that this was an abuse of law. He submitted that the illegality is captured in the plaint paragraph 7 (c) thereof.

The allegation of under pricing made against the Applicant is in bad faith because they refused to look into the vanilla prices for the years 2004 – 2005 when the prices had drastically fallen. Prices further fell in 2006. On the other hand the Respondent arbitrarily applied 400 US$ for the years 2004 and 200 UD$ for the year 2002.

As far as refunds are concerned, they have a bearing on the order for the Respondent to pay 30% of the assessed tax. The Respondent is holding monies due to the Applicant. The Respondent has not completed its audit and does not have the final figure due if any.

The Director submitted that there are illegal enforcement measures that the court vacated. He contended that the assessment of 2002 is an illegality and evasion of law. The Respondent bases its claim for 30% on the illegal assessment and if the court were to require it, it would be enforcing an illegality. The Director contended that the issue of refunds should be looked into and whether the 30% is not already with the Respondent.

As far as irreparable harm is concerned, the Respondent is very powerful and they are violating the law. They made two subsequent agency notices, an illegal assessment and violation of the Constitutional rights of the Applicant. It would be unfair to say that one violate the rights and compensates later with damages. The Applicant seeks the protection of court until the suit is determined.

On the balance of convenience, the Director submitted that the plaintiff has assets and land within the jurisdiction of the court which is valued at over 4 billion Uganda shillings. The Respondent does not stand to lose anything while the Applicant does.

Ali Sekatawa for the Respondent submitted that they were looking at taxes of 2001 to 2012. Since the audit was started, the Applicant has never paid. The assessment was 1.9 billion The Applicant objected and no enforcement was done. The agency notice was stayed. This application is trying to set aside two court judgments. The 1st court order is in the ruling dated 20th May 2011 when the Applicants application was dismissed with costs and the Commissioner was ordered to clarity the position it made in its letter on what deposit of 30% should be made. This was clarified. The Applicant filed a notice of appeal in the Court of Appeal and enforcement was stayed.

Counsel submitted that they had reconciliation meetings with the Applicant for 2 years and made another assessment. Director Samash came up with a power of attorney and opposed everything. When the consent order was made he disputed the basis of the 30% deposit. The refund issue was not part of the pleadings. He said he has a refund. The Respondent agreed that the Applicant comes up with evidence of entitlement to refund which will be used to offset the assessment.

An assessment of 125 million was issued in accordance with the consent order. Director Nathu for the Applicant was referred to auditors to process the refund.

Counsel contended that all submissions relating to pricing are taking the parties back to the pre consent order position and was res judicata.

After offsetting some refunds the Applicant was requested to pay about 11 million but they have not complied.

The application is seeking to set aside these orders. There is a consent order and the Respondent complied. Refunds to the Applicant were verified at about 37 million by the audit team. The balance on the 30% stands at 11 million after offsetting the refunds but the Applicant refused to pay. He prayed that the Applicant complies with the consent order and pays the 11 million. Secondly because of conduct of the Applicant, the Applicant deposits its titles in court. If court is inclined to grant a temporary injunction, it should be done on those terms.

In reply Director Nathu submitted that the Income Tax Act provides for deductable allowances for investors in agriculture and gives favourable terms. There is no allegation by the Respondent that the law has not been complied with.

As far as the consent is concerned, it allows the Applicant to raise further objection to the agreed assessment which it did. The Applicant contends that the assessment is illegal and objected by letter to the Commissioner.

As far as refunds are concerned, the audit made glaring errors. Director Samash submitted that he had shown to the court a receipt of URA which they refused to take into account. This if allowed would be with interest and would constitute over 8 million which is a large proportion of the 11m/= being the decreed balance of 30% of assessed taxes. Director Nathu contended that the Applicant has a right to object.

Ruling

I have carefully considered the Applicant's application and affidavits filed in support and opposition to the same. I have also carefully listened to the oral submissions of the Applicant's representative Director Samash Nathu and the Respondents Counsel Ali Sekatwa.

The Applicant's case has had a protracted history and there would be no need for this court to examine the background of this application. The facts of the application have been sufficiently set out in the summary of the pleadings at the beginning of this ruling. The genesis of the Applicant's application is the consent order made in Miscellaneous Application No. 414 of 2011 arising out of Miscellaneous Application No. 355 of 2011 and arising out of Miscellaneous Cause No. 5 of 2009.

Consent terms of settlement were executed by the parties and endorsed by this court on the 9th of August 2011 in the following terms:

1. The old tax assessment issued in 2008 by the Respondent against the Applicant in the amount of **1,978,269,514/= shillings** be vacated, and the Respondent shall issue a new assessment in the amount of **125,043,281/= shillings** with the Applicant having full rights of objection thereto in accordance with the Income Tax Act.
2. The third-party agency notices in the amount of **446,501,032/=** issued on 25th of July 2011 by the Respondent against the Applicant shall be forthwith lifted and set aside.
3. The Applicant shall pay 30% of the new assessment if it chooses to object thereto, and the full amount if no objection is taken within the stipulated period.
4. All remaining applications brought by the Applicant to this court are hereby resolved, namely miscellaneous application number 355 of 2011.
5. The Applicant shall withdraw its notice of appeal to the Court of Appeal.
6. Each party shall bear its own costs.

It is agreed that pursuant to the consent order the Respondent issued an assessment of **Uganda shillings 125,043,251/=**. Thereafter, the Applicant

exercised its right under paragraph 3 of the consent judgement to object to the new assessment made in paragraph 1 of the same. Paragraph 3 of the consent order is explicit that if the Applicant opted to object to the new assessment, it would pay 30% of the new assessment. It is also an agreed fact that the Applicant has paid part of the 30% through offset of refunds due to it from the Respondent. As far as the consent to pay 30% is concerned the Applicants, compliance with the same would depend on reconciliation overtures made between the Applicant and the Respondent in terms of what the refunds are due to the Applicant if at all any.

The Respondent submits that the Applicants still owes **11,000,000 Uganda shillings** being part of the 30% that remains unpaid. The Applicant on the other hand submitted that the Respondent owes it some more refunds. The court cannot at this stage determine whether the 30% has been paid. The court directs that the Respondent audits its state of affairs with the Applicant to establish how much of the 11 million is due if at all. If it is due, it is the order of the court dated 8th of August 2011 and by consent of the parties that the Applicant shall pay what is due on the 30%. This is a purely executory affair. If audit is not acceptable the parties can agree on an independent auditor and meet the costs of the independent auditor on a 50% to 50% basis to reconcile the Applicants entitlement to refunds Vis a Vis obligation to pay 11,000,000 shillings as spelt out above.

As far as the merits of the application for temporary injunction are concerned, it was also agreed in the consent order that the Applicant was entitled to object to the new assessment. The Applicant has objected to the new assessment and the Commissioner declined its objection. The Applicant has further filed a suit in this court challenging the assessment. This was in accordance with the agreement of the parties that the Applicant may opt to challenge the new assessment.

The grant of a temporary injunction is mainly an exercise of the court's discretion and is used for purposes of maintaining the status quo until the dispute in the suit which may affect the status quo is resolved after trial of the suit on the merits. The principles for grant of a temporary injunction are digested in **Kiyimba Kaggwa vs. Katende [1985] HCB at page 43** holding 2. They are that the Applicant must

show a prima facie case with a probability of success. Secondly injunctions will normally not be granted unless the Applicant might otherwise suffer irreparable injury which may not be adequately compensated for by an award of damages. Thirdly where the court is in doubt on the first two principles it will decide the case on the balance of convenience.

The Applicant's case is unique in that it is partly taken care of by the Income Tax Act. By consent of the parties it has already been agreed that 30% of the tax assessed would be paid. 30% is catered for under section 103 (2) of the Income Tax Act. The provision is explicit that the amount of tax payable by the taxpayer pending final resolution of the objection is 30% of the tax assessed or the part of the tax not in dispute, whichever is greater. The Applicant has objected to the new assessment which was made pursuant to the consent order of the parties dated 8th of August 2011. The payment of 30% presupposes that enforcement measures would be stayed pending the final resolution of the objection to the assessment. It is the clear intention of legislature that where a taxpayer has objected to assessment, he is required to only pay 30% of the assessment unless otherwise a lesser amount is paid at the discretion of the Commissioner or unless it is entirely waived by the Commissioner upon the written application of the taxpayer. Payment of 30% is a statutory condition for stay of enforcement procedures for collection of the tax assessed. In other words, the status quo would be maintained pending final resolution of the objection to assessment.

The payment of 30% tax pending objection to assessment or appeal from an objection decision was considered by the Supreme Court in the case of **Project Implementation and Management Centre versus Uganda Revenue Authority, Const Appeal No. 2 of 2009 Kitumba JSC** who delivered the judgment of the Supreme Court held that the requirement to pay 30% of the tax assessed prior to an application for review of a taxation decision by the Tax Appeals Tribunal was not a denial of access to justice. In any case, the Commissioner has the discretion to waive the 30% tax or extend the period within which it should be paid. Section 103 (2) of the Income Tax Act Provides:

> "Subject to subsection (3), where a taxpayer has lodged a notice of objection to an assessment, the amount of tax payable by the taxpayer pending final resolution of the objection is thirty percent of the tax assessed or that part of the tax not in dispute, whichever is greater."

In this particular case, the payment of 30% of the new assessment was agreed. The intention of the provision is very clear that if the amount which is not in dispute is greater than 30% of the assessed tax, the taxpayer would pay the amount which is not in dispute. If on the other hand 30% of the assessment is greater than what the taxpayer agreed to, the taxpayer would have to pay 30% of the assessment pending resolution of the tax dispute. The provision gives an intermediate position pending final resolution of the tax dispute. Section 136 (2) of the Income Tax Act provides that interest is payable on any monies to be refunded to the taxpayer. This includes money which is finally resolved not to be due such as 30% deposit pending resolution of the tax dispute. Consequently, the payment of 30% clearly presupposes that no further enforcement measures would be taken against the taxpayer. It is therefore a statutory condition for staying enforcement measures.

In those circumstances, subject to reconciliation by the auditors of any refunds due to the Applicant, the Applicant shall deposit with the Respondent any balance outstanding on the 30% under the consent order dated 8th of August 2011.

A temporary injunction issues, restraining the Respondent, its servants or agents, from levying any enforcement measures against the Applicant pending resolution of the main suit.

Costs of the application shall abide the outcome of the main suit.

Ruling delivered the 31st of August 2012.

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

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Ruling delivered the 31st of August 2012.

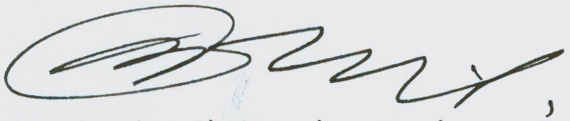
Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

Counsel Mbeeta Haruna holding brief for Ali Sekatawa for the respondent

Samash Nathu Director appearing by power of Attorney for the Applicant.

Charles Okuni: Court Clerk



Hon. Mr. Justice Christopher Madrama

31st of August 2012