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

HCT - 00 - CC - MC - 06 – 2010 (TWO)

AMIRAN ENTERPRISES LTD. …….…….….. APPLICANT

VERSUS

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

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

Ruling

This application is brought by Notice of motion under Rules 3 (2), 6 and 8 of the Judicature (Judicial Review) Rules 2009 for orders that;

1. A declaration that the applicant lawfully elected under S. 99 (7) of the Income Tax Act Cap 340 (hereinafter referred to as ITA) be issued, a declaration that the tax assessments raised against the applicant pursuant to a general audit for the years 2003 to 2008 were vacated following the election under S. 99 (7) of the Income Tax Act be issued.

2. An order of prohibition be issued against the respondent and her agents restraining them from enforcing any tax collection enforcement measures in respect of the assessment of Ushs. 220,837,279/=

3. General damages and costs.

The application is supported by the affidavit of Samash Nathu, a director of the applicant's company.

The case for the applicant in this application as stated in the affidavit of Mr. Samash Nathu is that the respondent carried out a comprehensive audit of the applicant for the years 2003 to 2008 and made a tax assessment of Ushs. 327,708,263/= which was communicated to the applicant on 17th December 2008. Mr. Nathu deponed that the applicant objected to the assessment by a letter dated 28th January 2009. Furthermore, that by letter dated 12th January 2010, the applicant wrote to the respondent notifying it that since no objection decision had been made by the respondent, the applicant had elected to treat the Commissioner as having allowed the objection.

Mr. Nathu further deponed that by a letter dated 21st January 2010, the respondent maintained that it had made an objection decision by letter dated 13th February 2009. Furthermore in a letter dated 21st

January 2010 an amended assessment of Ushs. 220,837,279/= (which the applicant was not aware of) was communicated to the applicant. Mr. Nathu further deponed that the respondent's letter of 13th February 2009 was not an objection decision because it neither responded to the objections of the applicant nor communicated the amended sum that the respondent seeks to recover from the applicant. Furthermore, that the respondent has threatened to attach, distrain and or enforce collection measures against the applicant in respect of the assessment.

In response, Ms Kizza Robinah a supervisor Audit-Expansion unit of the respondent in her affidavit in reply to the application deponed that a comprehensive audit was conducted by the respondent for the years 2003 to 2008 and an assessment of Ushs. 327,708,263 I was communicated to the applicant by a letter dated 17th December 2008. That the applicant objected to the said assessment by a letter dated 28th January 2009. Ms. Kizza deponed that on 13th February 2009, the respondent served the applicant with a notice of objection. Furthermore, that during the months of April and October 2009, both the applicant and the respondent's representatives engaged in review meetings and correspondences in a bid to reconcile the dispute.

Ms. Kizza deponed that on 12th January 2010, the applicant wrote to the respondent stating that since no objection decision had been made by the Commissioner, the applicant had elected to treat the Commissioner as having allowed the objection. Furthermore, that in a letter dated 21st January 2010 the respondent maintained that it had made an objection decision by letter dated 13th February 2009. Ms. Kizza deponed that in the same letter the respondent communicated its reviewed assessment. Ms. Kizza deponed that the letter dated 5th October 2009 was not a notice of objection to which the respondent was required to make an objection decision and that the respondent has not threatened to attach or distrain upon the applicant's property in any enforcement measures to recover the tax in dispute.

At the hearing of this application, the applicant was represented by Mr. C. Birungyi while the respondent was represented by Mr. C. Ouma. The parties provided skeleton arguments and also made oral submissions in respect of this application.

At the hearing of the application counsel for the applicant submitted that the real issue for determination was whether the applicant had made a valid election under the ITA which was binding on the respondent Authority? He suggested the following issues would direct the resolution of this dispute:-

1. **Whether the respondent made an objection decision on the 13th February which closed off the matter?**

2. **Whether the election of the 12th January 2010 by the applicant was valid?**

3. **Whether the respondent authority can reject an election by the applicant?**

This application is for Judicial Review. The law relating to such applications is fairly settled. I have myself extensively discussed the law relating to Judicial Review in the case of

Joshua Kasibo V The Commissioner Customs URA MA 844 of 2007

I shall restate the position of law here briefly. The orders sought in this application are declarations and prohibition. These are reliefs in the category of prerogative orders of old. A declaration is defined as a pronouncement by court, after considering the evidence and applying the law to that evidence, of an existing legal situation. A declaration enables a party to discover what his/her legal position is, about the matter of the declaration; and thus open a way to the party concerned to resort to other remedies for giving effect to the declared legal situation. Prohibition on the other hand is an order that forbids some act or decision which would be ultra vires.

It must always be borne in mind that prerogative orders are discretionary in nature and the Court must act judicially and according to well settled principles.

Such principles may include common sense and justice; whether the application is meritorious; whether there is reasonableness; vigilance and not any waiver of rights by the Applicant. It must be remembered that prerogative orders look to the control of the exercise and abuse of power by those in public offices, rather than at providing final determination of private rights which is done in normal civil suits.

The tests to be met and considered by court are well articulated by Hilary Delany in his book *"Judicial Review of Administrative Action"* 2001 Sweet and Maxwell at pages 5 and 6. He writes

> ***"…Judicial review is concerned not with the decision, but the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory manner… not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality…"*** **(Emphasis mine).**

In arguing the preliminary objection counsel for the applicant submitted that this application was about a point of law better suited for a Court of Law to handle. The was whether URA can over rule an election of a tax payer under section 99(7) of the Income Tax Act and by so doing the URA had acted ultra vires its powers.

I agreed that judicial review could deal with a matter that raises a pure point of law. This was in line with the argument of the applicant that the Respondent Authority had acted ultra vires its powers. According to Osborn's Law Dictionary the term ultra vires means

> ***"… [Beyond the power] An act in excess of authority conferred by law and therefore invalid…"***

To my mind therefore a decision that is made ultra vires the decision maker's powers is an illegality that can be quashed by judicial review.

When the application came up for hearing it would appear to me on careful consideration of the submissions that the ultra vires argument was abandoned.

Instead counsel for the applicant immediately attacked the impugned decision itself without stating how it was made in excess of authority conferred by the ITA (i.e. ultra vires). Section 99 (7) of the ITA does provide powers for the Commissioner to act within 90 days of a tax payer lodging an objection. It does not for example state that the Commissioner has no powers under that section in which case for the Commissioner to make a decision under that section would be ultra vires. I cannot see how I can make a declaration to that effect thus opening the way for the applicant to consider other remedies to give effect to the declared legal situation.

In this case it appear to me that what the applicant really wants the Court to do is to make a final decision on whether or not there was a valid election made under the ITA which in substance is a vindication of ones rights. I view this therefore more as an appeal than anything else. The arguments presented to Court in this matter are clearly not about the decision making process of the respondent Authority and therefore are outside the ambit of the remedy of judicial review.

With regard to the exercise of judicial discretion therefore I do not find this application not meritorious and I accordingly dismiss it with costs.

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Geoffrey Kiryabwire

JUDGE

Date: 17/08/2012

17/08/12

10:25

Ruling read and signed in Court in the presence of;

- Samash Nathu Director of Applicant
- Rose Emeru – Court Clerk

Nathu: I seek leave to appeal.

Court: Leave to appeal granted.

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Geoffrey Kiryabwire

JUDGE

Date: 17/08/12