THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA

(COMMERCIAL DIVISION)

HCT - 00 - CC - CS - 201 - 2011

MANDELA AUTO SPARES LTD. ..... PLAINTIFF

VERSUS

COMMISSIONER CUSTOMS (URA) …..... DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T

The Plaintiff company sued the Defendant Commissioner Customs Uganda Revenue Authority (hereinafter referred to as "URA") for the recovery of Shs. 3,912,381,187/= in over paid taxes in relation to imported pneumatic rubber tyres.

The dispute arises from a post clearance audit carried out by URA on the Plaintiff company between July 2007 and December 2008. During the audit, the URA made a finding that the Plaintiff was importing certain types of tyres for light trucks and declared them classification HSC 4011.20.00 (import duty at the rate of 10%) instead of HSC 4011.10.00 (import duty rate of 25%. The URA then a tax assessment to be paid by the Plaintiff of Shs. 326,393,458/=. The Plaintiff challenged this new assessment and filed application No. 12 of 2010 with the Tax Appeals Tribunal (TAT).

The parties subsequently on the 20th September, 2010 recorded a consent judgment wherein both parties agreed that the tyres for the light trucks should be classified under HSC 4011.20.00 (i.e. import duty at 10%). As a result of this consent judgment the URA vacated the assessment of Shs. 326,393,458/= as based on the wrong classification.

On the 7th October, 2010, the Plaintiff company wrote to the URA noting that since the parties had resolved by the consent judgment that tyres for light trucks should attract import duty at 10% under classification HSC 4011.20.00 then URA should in accordance with Section 144(3) of the East African Customs Management Act 2004 (hereinafter referred to as EACCMA) refund over paid taxes of Shs. 3,912,381,187/= done under the wrong code for the period 2006 to 2009.

The Defendant URA in their Written Statement of Defence denied liability. At the pretrial scheduling conference, it was disclosed that on or about the 28th July, 2011, the URA refunded Shs. 512,177,086/= out of the tax refund claim of Shs. 3,912,318,187/=. It is the case of the Defendant URA that the Plaintiff under Section 144(3) of the EACCMA is entitled to a refund limited to one year. In this regard, the parties then recorded a consent judgment and agreed that the balance of the tax claim be referred to adjudication before court.

The parties agreed to the following issues for trial.

1. **Whether the Plaintiff's claim for refund of Shs. 3,400,204,101/= falls within the provisions of Section 134 and or Section 144 of the EACCMA?**
2. **Whether the Plaintiff is entitled to interest on the refunds.**
3. **Remedies.**

At the trial the Plaintiff company was represented by Mr. C. Birungyi while the Defendant Commissioner for Customs URA was represented by Mr. H. Arike. The main issue being a point of law, the parties agreed to fill written submissions only.

Issue No. 1: **<u>Whether the Plaintiff's claim for a refund of Shs. 3,400,204,101 falls within Section 134 and or 144 of the EACCMA</u>?**

It is the case for the Plaintiff that the dispute between the parties as to the correct classification for the tyres for light trucks was resolved following a ruling dated 21st September, 2006 by the Directorate of Customs in the East African Community Secretariat. It is also the case of the

Plaintiff that this ruling had the effect of altering the classification of goods as provided for under Section 134 of the EACCMA.

Section 134 of the EACCMA provides

> ***"Where any practice or method of procedure of the Customs approved by the Commissioner or arising from a ruling by the Directorate or Customs co-operation council relating to the classification or enumeration of any goods for the purposes of the liability to duty is altered with the result that less duty is therefore charged on goods of the same class or description, no person shall become entitled to any refund of any duty paid before such alteration took effect ..."***

It is therefore the case of the Plaintiff that it is entitled to a refund of over paid taxes made after September 2006 and that is what they did. On the other hand it is the case of the Plaintiff that only sub section (2) of Section 144 of the EACCMA is applicable to it. the rest of the sub sections of Section 144 are not applicable to it. Section 144 of the EACCMA provides

"… **1) Subject to any regulations, the Commissioner may grant a refund**

a) Of any import duty, or part thereof which has been paid in respect of goods which have been damaged or pillaged during the voyage or damaged or destroyed while subject to customs control.

b) Of any import or export duty which has been paid in error.

2) Refund of import or export duty or part thereof, shall not be granted under subsection (1) unless the person claiming such a refund presents such claim within a period of twelve months from the date of the payment of the duty.

3) The Commissioner shall refund any import duty paid on goods in respect of which an order remitting such duty has been made under this Act …"

Counsel for the Plaintiff submitted that the Plaintiff's goods were not damaged during voyaged or pillaged while subject to Customs control. Counsel however, submitted that his clients could claim refund under Section 144 (3) which was a general refund provision and this is what they had done.

For the Defendant URA it is their case that the Plaintiff is not entitled to any further refund. It is the case of the URA that the import duty was paid in error within the meaning of Section 144(1)(b) and therefore a claim for such a refund of over paid taxes should have been made within twelve months from the date of payment under Section 144(2) of the EACCMA.

Counsel for the Defendant further submitted that it was not until the consent decree executed by the parties on the 20th September 2010 vide TAT Application No. 12/2010 that the erroneous classification was corrected. This resulted in the vacation of an assessment of Shs. 326,393,457/= which was based on a post tax clearance audit for the period January 2006 to December 2008.

Counsel for the Defendant submitted that despite this reversal of assessment, the Plaintiff went on to claim Shs. 3,912,381,187/= for over tax payments for tyres for light trucks for the period 2006 to 2008. He submitted that the consent decree did not revive any cause of action for excess duty paid and that any claim for excess duty paid in error should have been lodged within twelve months of the error.

Counsel for the Defendant referred me to the case of **Uganda Revenue Authority V Uganda Consolidated Properties Ltd** CA 31 of 2000 where **Justice Amos Twinomujuni** (JA) held

> ***"Time limits set by statutes are matters of substantive law are not mere technicalities and must be complied strictly with …"***

Counsel for the Defendant submitted that in this regard the Plaintiff was only entitled to Shs. 512,177,086/= was refunded and not more.

I have addressed my mind to evidence placed before court on this issue and the submissions of both counsel for which I am grateful.

It is not in dispute that following an application to TAT in 2010 (No. 12 of 2010) the parties by consent decree agreed that the wrong tax classification had been applied to tyres imported by the Plaintiff for light trucks. It is also not in dispute that following the consent decree the Defendant URA vacated an import tax assessment made in respect of a post clearance audit on the Plaintiff for the period January 2006 to December 2008 for the sum of Shs. 326,393,458/= which the Plaintiff company did not have to top up and pay. The Shs. 326,393,458/= assessed by URA would have been the short fall in import tax if the rate of 25% under HSC 4011.10.00 had been applied to the said tyres. This to my mind means that during this period, the Plaintiff company was applying the lower rate of 10% under HSC 4011.20.00.

However, following the consent decree, the Plaintiff made a separate claim for refund of Shs. 3,912,381,187/= which is the basis of this suit on the grounds that it had paid import tax on tyres for light trucks at the high rate of 25% (under HSC 4011.10.00) between the period 2006 to 2009.

It is significant to note that the period for the claim under this suit is virtually the same as that for dispute under TAT Application No. 12 of 2010. That means that sometimes the Plaintiff company would import tax for tyres for light trucks at 10% and at other times 25% over the same period.

Counsel for the Plaintiff in this submissions stated that the high tax rate was paid under protest and referred court to Exhibit P.14 which is a letter from the Plaintiff company to the Commissioner Customs URA dated 7th April 2009. In that correspondence, the Plaintiff specifically refers to two forty feet containers (numbers are not legible) for which they paid import duty at the higher rate of 25% under protest. This letter was written about eight months before the URA post clearance Audit Report (of 2nd December 2009) which was the subject of TAT Application No. 12 of 2010. There is no other protest payment letter on record save in respect of the two containers mentioned in the Plaintiff's letter dated 7th April, 2009. It is not

therefore clear to my mind why and how the Plaintiff company would sometimes pay import duty at 25% and at other times at 10% as far back as 2006. That evidence is not on record. That withstanding is would have been helpful if the Plaintiff had consistently paid one rate i.e. the lower rate of 10% from 2006 then it not doubt would have benefited from the settlement under TAT Application No. 12 of 2010 for a refund.

I am therefore inclined to agree with counsel for the Defendant that any import tax paid by the Plaintiff company between 2006 and 2009 at 25% (HSC 4011.10.00) was paid in error because the same company for different consignments of the same tyres would pay at the lower rate of 10% (HSC 4011.20.00) as the post clearance audit clearly showed.

I therefore find that any claim for refund is caught up by the time limit Section 144(2) of the EACCMA and has to be presented within a period of twelve months from the date of payment. Since the Defendant URA has made an adjustment for this provision on the refund claim and paid the Plaintiff company a refund of Shs 512,177,076/=, I find that the rest of the claim is time barred.

Issue No. 2: <u>Whether the Plaintiff is entitled to interest on the refunds</u>.

Based on my findings on issue No. 1 above and in light of the partial consent judgment entered into by the parties for a refund of Shs. 512,177.076/= this issue shall be limited to this amount of money.

Counsel for the Plaintiff submits that his client is entitled to interest on the refunds under Section 249 of the EACCMA which provides

> ***"… where an amount of duty or other sum of money which is due under this Act remains unpaid after the date upon which it is payable, an interest of two per cent per month or part of the month of the unpaid amount shall be charged.***

Counsel noted that the provision does not indicate whether this interest is payable by a tax payer or from the Revenue Authority. Counsel for the Plaintiff then referred me to the decision of this court in **AON Insurance V Uganda Revenue Authority** MC 66 of 2009 where (held that such a gap can be resolved by reference to other tax statutes which are Pari Materia.

In this regard, Counsel for the Plaintiff submitted that Section 113(4) of the Income Tax Act (cap 340) and 44 of The Value Added Tax Act (cap 349) both provide for payment of interest on over payments due to the tax payer and are in Pari Materia to Section 249 of the EACCMA.

Counsel for the Plaintiff further submitted that court could grant interest at its discretion under Section 26(2) of The Civil Procedure Act..

Counsel for the Defendant submitted that under Section 249 of the EACCMA applies only when a refund has been ascertained/established. He further submitted that Section 26 of The Civil Procedure Act is not applicable to this case.

With regard to interest, I agree with the submissions of counsel for Plaintiff and follow my earlier decision in Aon Insurance (supra) and find that Section 249 is applicable to both the tax payer and the Revenue Authority. I accordingly find that the Plaintiff company is entitled to interest on the refund of Shs. 512,177,076/= at the rate of two percent per month from the 7th October, 2010 until the date the said money was paid.

Remedies

Since there is already a part consent decree dated 8th August, 2011 to refund Shs. 512,177,086/= to the Plaintiff by the Defendant URA, I only add that it shall attract interest at 2% per month from the 7th October, 2010 until payment in full.

The Plaintiff also prayed for general damages in the plaint but did not submit on its assessment or quantum. The Defendant was also silent on this claim in the plaint. I shall take it that the claim for general damages was abandoned.

Since the Plaintiff is partially successful in this suit, I award them half of their taxed costs.

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Justice Geoffrey Kiryabwire

JUDGE

Date: 24/01/13

24/01/13

9: 48 a.m.

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

- Kabagambe h/b for Birungyi for Plaintiff

In Court

- Hussein Director of Plaintiff
- Rose Emeru – Court Clerk

……..……

Geoffrey Kiryabwire

JUDGE

Date: 24/01/13