

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
CIVIL SUIT No. 270 OF 2011**

AAR HEALH SERVICES (U) LIMITED :::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

UGANDA REVENUE AUTHORITY :::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

JUDGMENT

On 17th November, 2008, the plaintiff entered into a management services contract with African Management Services Company (AMSCO) where Mark Abwao Achola, who was seconded by AMSCO would provide management services to the plaintiff, and the plaintiff had the obligation of paying US\$ 82,500 payable in monthly installments of US\$ 6,875 to AMSCO. The contract / engagement between Mark Achola and AMSCO provided for basic terms which were to be read together with the Standard Terms of Engagement of Technical Experts (Standard Terms). The contract was for a period from 1st November, 2008, to 31st October, 2011, or such other period as would be agreed between the parties.

On 27th June, 2010, to 14th July, 2010, the defendant carried out an audit with the plaintiff to ascertain the plaintiff's tax compliance in respect of Pay as You Earn (PAYE) for the period between January, 2005, to December, 2009 for its employees. By the above audit, the defendant discovered that apparently, the plaintiff was not deducting the PAYE from the earnings of Mark Abwao Achola, who was then the plaintiff's General Manager. The audit further revealed that Mark Abwao Achola had been seconded to the plaintiff by AMSCO vide Management Agreement dated 17th November, 2008, and further that the individual tax payable by him for the year of income 2008/2009 was UGX 33,680,600/= and for the year of income 2009/2010, the individual tax payable was UGX 50,149,623/=.

On the 22nd October, 2010, the defendant issued two separate assessments to the said Mark Abwao Achola totaling to UGX 83,830,223/=-, and he was served with the same. Mark Achola requested the defendant to halt the collection of the accrued taxes for the reason that he wanted to confirm

his tax exemption from Ministry of Finance Planning and Economic Development. The defendant wrote a letter to Mark Achola reminding him to clear the tax liability which had accumulated to UGX 97,243,059/= and was due by the 25th May, 2011; apparently Mark Achola did not clear/pay the said tax liability assessed.

5 By Third Party Agency Notice, the defendant appointed the plaintiff as the collection agent for the taxes due and payable by Mark Achola, but the plaintiff did not heed the notice. On the 30th July, 2011, the plaintiff requested the defendant to halt the collection of the taxes on the ground that Mark Achola was not the plaintiff's employee. The defendant then shifted the tax liability of Mark Achola to the plaintiff. On the 25th July, 2011, the defendant appointed Standard Chartered Bank
10 (U) Ltd, who were the plaintiff's Bankers, as collection agent to collect UGX 100,596,268/= from the plaintiff.

The plaintiff subsequently sued the defendant objecting the tax assessment made by the defendant on grounds that the appointment of the plaintiff as collection agent of Mark Achola was in disregard of the fact that the plaintiff was not Mark Achola's employer and that the defendant's
15 refusal to grant the plaintiff's application for a Tax Clearance Certificate on grounds that the plaintiff had failed to account for Mark Achola's PAYE was illegal.

On the other hand, the defendant filed a written statement of defence and contended that the plaintiff held and continues to hold money on account of Mark Achola and also hold's money on account of AMSCO for payment to Mark Achola. Further, that the defendant properly shifted
20 liability to pay the tax to the plaintiff and that the plaintiff was not entitled to any of the remedies sought.

At the scheduling conference, the following issues were agreed upon for determination:

1. *Whether Mark Abwao Achola is liable to pay income tax in Uganda.*
2. *Whether the plaintiff is liable in the circumstances for the tax obligations if any of Mark
25 Abwao Achola.*
3. *Whether the defendant's refusal to grant the plaintiff a Tax Clearance Certificate is proper and lawful in the circumstances.*
4. *Whether the plaintiff is liable to pay the Withholding Tax and Value Added Tax assessed upon it in relation to management fees paid to AMSCO.*

5. *What remedies are available to the parties.*

At the hearing, the plaintiff was represented by Mr. Noah Mwesigwa and Mr. Innocent Kihika and the defendant was represented by Mr. Bernard Olok.

ISSUE 1: *Whether Mark Abwao Achola is liable to pay income tax in Uganda.*

5 Kofi Andah (PW1) testified that he was a management consultant and was the East African Regional Manager with AMSCO. It was his testimony that on the 18th June, 2013, the Permanent Secretary of the Ministry of Foreign Affairs confirmed to the Ministry of Finance that AMSCO was one of the agencies accorded tax exemption under Annex XIII of the Convention on the Privileges and Immunities of Specialized Agencies. Further, that in a subsequent letter to the
10 Commissioner General of Uganda Revenue Authority (defendant), dated 22nd July, 2013, the Permanent Secretary of Ministry of Finance changed their position on AMSCO tax status and directed URA to accord AMSCO and all other eligible persons concerned the privileges of tax exemption.

PW2, Mark Achola, testified that in 2008, while under the employment of AMSCO, he was
15 seconded as a technical expert of the United Nations Development Program (UNDP), African Training and Management Services (ATMS) project, to AMSCO's client at the time called AAR Health Services (U) Limited (plaintiff herein). His secondment was by letter of engagement dated 9th December, 2008, for a period of three years ending on 31st October, 2011, with Standard Terms of Engagement of Technical Experts by AMSCO to client.

20 It was PW2's further testimony that on 6th September, 2010, the plaintiff received a letter from URA, addressed to him, for assessment of tax arrears for the periods 2008/2009, and 2009/2010, indicating that terms of engagement of technical experts by AMSCO for secondment to client companies under ATMS did not include exemption of salaries and emoluments, and then URA made a PAYE assessment of UGX 83,830,223/= against him. Further, that on 30th September,
25 2010, he objected to the assessment by way of a letter requesting URA to halt the collection pending confirmation of his tax exemption from the Ministry of Finance. However, that on 18th May, 2011, the defendant issued the plaintiff with a revised assessment against him of UGX 97,234,059/= upon adding interest on the initial assessment, and on 26th May, 2011, the defendant

issued the plaintiff with a Third Party Agency Notice as collection agent demanding the plaintiff to pay the newly assed taxes on account of Mark Achola.

It was his further testimony that the Permanent Secretary of Ministry of Foreign Affairs confirmed to the Ministry of Finance by way of letter that AMSCO falls under the agencies accorded tax exemption. Further, that in a subsequent letter to the Commissioner General of URA dated 22nd July, 2013, the Permanent Secretary of Ministry of Finance changed their position on AMSCO's tax status and directed URA to accord AMSCO and all other eligible persons the privileges of tax exemption.

PW3, Christine Nasuna, testified that she was the Financial Controller of the plaintiff and was aware that in 2010, the plaintiff was involved in a tax dispute with the defendant. It was her testimony that the Ministry of Finance had recently written to the Commissioner General of the defendant (URA) confirming AMSCO's tax exemption status and directing the defendant to accord AMSCO and all other eligible persons concerned the privileges of tax exemption.

On the other hand, the defendant led the evidence of Sirajji Kanyesigye Baguma (DW1) to prove that Mark Achola was liable to pay income tax in Uganda. It was his testimony that by letter dated 21st July, 2011, the Ministry of Finance, Planning and Economic Development had clarified that the income tax derived from rendering management services by AMSCO was not tax exempt and that, thus, Mark Achola was liable to pay income tax.

During cross examination, DW1 testified that subsequent to the letter relied upon by the plaintiff that the Ministry of Finance had confirmed that AMSCO was tax exempt, there was a letter written by the defendant to the Ministry of Finance, seeking for further clarification on the matter. Further, that on issuing assessments against Mark Achola, the defendant was basing on the letter of 21st July, 2011, where the Ministry of Finance had indicated that AMSCO and Mark Achola were not entitled to exemption from tax.

Counsel for the plaintiff and the defendant filed written submissions in support of and in opposition of the matter respectively.

Counsel for the plaintiff submitted that Mark Achola is / was not liable to pay tax in Uganda and that any tax assessment levied against him was done in error. Counsel cited section 19 of the

Income Tax Act where employment income is defined as income derived by an employee from any employment. It was counsel's submission that the tax levied could only have been applicable to Mark Achola if he had been employed and was receiving income from the plaintiff, which was not the case herein. Counsel contended that the evidence on record indicated that Mark Achola was employed by AMSCO, and there was no evidence indicating that he was ever an employee of the plaintiff. Counsel relied on ***Fukasi Kabugo Vs Attorney General [1975] HCB 338***, for the above submission.

Counsel further submitted that even if the defendant were to raise an argument that the individual income tax levied was proper since Mark Achola would be paid out of the management fees paid by the plaintiff, there was no way of quantifying what portion of the management fees was designed for paying Mark Achola and which portion would be retained by AMSCO as their management fees. In counsel's view, to levy an individual tax assessment based on the entire amount and on the wrong party was purely erroneous.

In addition to the above, Counsel further submitted that an assessment levied on Mark Achola's payments from AMSCO would also be in error considering that the payment would be tax exempt. Counsel made reference to the letter written by Mark Achola to the defendant (EXH P15) where he indicated that he was awaiting proof of his tax exemption status from the Ministry of Finance. Counsel indicated that this proof was later obtained by letter from the Ministry of Finance (EXH P1) where it was confirmed that AMSCO as well as its officials assigned to projects were tax exempt. Further, that the project document (EXH P2) indicated that the Government of Uganda had bound itself to the provisions of the Convention on the Privileges and Immunities of Specialized Agencies and that the said privileges applied to AMSCO, its property, funds, assets and that the Government would grant to all persons performing services on the projects other than nationals of the host country the same privileges and immunities as officials of IFC.

Counsel further submitted that by virtue of the fact that IFC was immune to all taxation under clause 5 of the Convention stated above, and by virtue of the fact that Uganda consented under the project document to extend such immunities to AMSCO, even if the individual assessments for income tax were properly made against Mark Achola on the basis of salary payments from AMSCO, such payments would have been tax exempt.

It was counsel's further contention that AMSCO qualifies as a specialized agency and as such the salary paid to Mark Achola by AMSCO would also be tax exempt from taxation as provided under section 19 of the Convention.

In reply, Counsel for the defendant submitted that the letter of engagement signed between AMSCO and Mark Achola was proof that Mark Achola was an employee in Uganda. Clause 2 of the letter read together with the preamble to the letter stated that Mark Achola was seconded to the plaintiff as a technical expert and the place of assignment was Kampala, Uganda. In that regard, Counsel submitted that Mark Achola was an employee in Uganda in the assessed tax period, working as a General Manager of the plaintiff for the entire tax period.

Counsel cited **Section 9(1)(b)(i)** of the **Income Tax Act** where it is provided that a person is a resident for the year of income if that person is present in Uganda for periods amounting in aggregate to 183 days or more in 12 months period that commences or ends during the year of income. Counsel submitted that Mark Achola had been resident in Uganda for the period of assessment 2008-2011 and employed in Uganda.

Further, that Mark Achola was entitled to income from his employment while working for the plaintiff in Uganda and was thus liable to pay tax considering that his income was subject to payment of tax and in accordance with **Section 4(1)** of the **Income Tax Act**. Counsel relied on *Fall (Inspector of Taxes) Vs Hitchen [1973]1 ALL ER 374*, for the above submission.

It was counsel's further submission that it was irrelevant to say that Mark Achola was an employee of AMSCO, because what was important was that AMSCO paid him income while he was resident within Uganda in any tax period, and the plaintiff paid AMSCO from funds sourced within Uganda. Counsel made reference to the evidence of PW3 that Mark Achola was the plaintiff's employee and answerable to its Board. It was Counsel's contention that the argument that the payment to Mark Achola on account of the management services were tax exempt was not supported by any law or instrument of tax exemption.

Counsel further submitted that Mark Achola was a *defacto* employee of the plaintiff as its General Manager and that he also reported to the plaintiff's Board. It was his contention that in the absence of AMSCO coming to answer directly for the tax obligation of Mark Achola, the tax liability was

then shifted to the plaintiff who by law substituted AMSCO in all respects regarding the tax liability of AMSCO as Mark Achola's employer.

It was counsel's further submission that there was no tax exemption for Mark Achola, and that his contract of employment could not, on its own, legally accord / grant a tax exemption without an
5 existing enabling provision of the law supporting it. Counsel made reference to the evidence of Mark Achola during cross examination that he was accredited to UNDP and not an employee of UNDP. Counsel contended that the letter (EXH P1) which was sought to be relied upon by the plaintiff written by the Permanent Secretary/Secretary to Treasury of Ministry of Finance was not authored by the Minister of Finance. Further, that DW1 had indicated that there was a letter from
10 the Commissioner General of the defendant to the Permanent Secretary/ Secretary to Treasury dated 28th August, 2014, which advised that AMSCO was not tax exempt.

Counsel further submitted that the project document (EXH P2) was an agreement between the parties who signed it, yet the document was not dated and had no place for signature. It was his contention that the document was not certified and it was admitted that IFC did not sign the
15 document; it was only signed by two parties of three. The document was signed on behalf of the Government of Uganda and UNDP, yet clause 3 of the document stipulated that the document could only be effective when signed by all the 3 parties. Further, that PW2 had admitted that there was no agreement between AMSCO and Government of Uganda in regard to tax exemption.

Counsel contended that AMSCO was not among the listed institutions exempt from tax. Further,
20 that AMSCO was not affiliated to UNDP and had never been a specialized agency of the United Nations. In that regard, Counsel submitted that the Convention on Immunities and Privileges did not apply to AMSCO.

Counsel invited this court to find that Mark Achola was liable to income tax in Uganda and had no valid tax exemption whatsoever.

25 In rejoinder, Counsel for the plaintiff reiterated that Mark Achola was an employee in Uganda but was an employee of AMSCO and not the plaintiff. Counsel indicated that the management fees paid by the plaintiff to AMSCO did not amount to employment income of Mark Achola and the PAYE assessments in that regard were therefore erroneous.

Counsel reiterated that the tax exemption status of payments made to AMSCO for services rendered by Mark Achola as an expert on secondment to the plaintiff was based on the agreements with the Government, the International Convention on Privileges and Immunities of Specialized Agencies and the Income Tax Act. Further, that this was confirmed by the Ministry of Foreign Affairs as well as the Ministry of Finance.

Counsel further submitted that the project document (EXH P2) was not in any way disputed by any of the parties to it, and that the Government through the Ministry of Finance and the Ministry of Foreign Affairs had confirmed the binding nature of the document. Further, that PW1 had indicated that IFC assented to the document and communicated so to the Government.

- 10 It was counsel's submission that AMSCO was a specialized agency for reason that it was in a relationship with the United Nations as the executing agency for the ATMS project. Further that it qualified as a United Nations related agency as provided under the **Income Tax Act**.

I have carefully considered the evidence adduced by both parties, the law and submissions of Counsel in support of and in opposition of the case respectively. The first point of contention is whether Mark Achola was an employee of the plaintiff as alleged by the defendant or an employee of AMSCO as alleged by the plaintiff.

It is not in dispute that Mark Achola was resident and an employee in Uganda at the time when the tax assessments were carried out by the defendant against him. According to the Management Agreement signed between the plaintiff and AMSCO, AMSCO would provide management services to the plaintiff through Mark Achola. There was also a letter of engagement between Mark Achola and AMSCO (EXH P6) which indicated that Mark Achola was to render management services on behalf of AMSCO and not the plaintiff. Clause 4 of the letter of engagement stated as follows:

25 *"You have agreed subject to the terms of this Letter of Engagement and the Standard Terms of Engagement attached hereto, to provide the services required of AMSCO in terms of the management Agreement".*

There is no proof that there was a subsequent contract or understanding reached between the plaintiff and Mark Achola to indicate that he was an employee of the plaintiff. I find that at all

material times, Mark Achola was a technical expert rendering services to the plaintiff on behalf of AMSCO. It is apparent that his salary and all benefits were being catered for by AMSCO and not the plaintiff.

I have considered the defendant's evidence that PW3 had testified that Mark Achola was answerable to the plaintiff's Board and that he was employed with the plaintiff. In that regard, Counsel for the defendant contended that Mark Achola was the plaintiff's employee. However, all the documents on record indicate that Mark Achola was an employee of AMSCO. From the start, there had never been any intention for him to be regarded as the plaintiff's employee. ***Fukasi Kabugo Vs Attorney General [1975] HCB 338***, is instructive in determining the existence of the employer- employee relationship. It was held that in determining the question whether there was a contract of services, the normal tests were:

- a. *The master's power of selection of his servants;*
- b. *Payment of wages;*
- c. *The master's right to control the method of doing the work;*
- d. *The master's right of suspension or dismissal.*

In the present case, according to the letter of engagement, all the above were a reserve of AMSCO and not the plaintiff. I am not satisfied that a mere statement made by PW3 in cross examination that Mark Achola was answerable to the plaintiff's Board changed the fact that he was actually an employee of AMSCO and simply carrying out a managerial position with the plaintiff on behalf of AMSCO.

The next question for determination is whether Mark Achola was liable to income tax.

It was not in dispute that Mark Achola was a resident and employed in Uganda for the period between 2008 and 2009, and ordinarily, his income would be taxable by virtue of **Section 19** of the **Income Tax Act**.

Mark Achola's Terms of Engagement between him and AMSCO stated that his remuneration would not be subject to taxation. Article 10.1 of the said terms provided that:

"The Government of the Country of Assignment is party to the Project Document under which AMSCO operates. For fiscal purposes, the AMSCO Manager shall be

considered as a member of UNDP staff and shall therefore not be subject to income tax in the Country of Assignment on the salary and emoluments paid by AMSCO”.

I agree with the submission of Counsel for the defendant that a contract of employment cannot on its own accord, legally grant a tax exemption. However, from the above Article in the Terms of Engagement between Mark Achola and AMSCO, it is indicated that the Government of Uganda was subject to the Project Document (EXH P2) where apparently Mark Achola’s payments would not be subject to income tax.

The said project document was challenged by the defendant because it was not certified and that it had not been signed by IFC. In Counsel for the defendant’s view, the document could only become effective if it was signed by all parties. I have looked at the said document and it was only signed on behalf of the Government of Uganda and on behalf of UNDP. However, it was never signed on behalf of IFC.

However, I find that it would be unfair to determine the validity of the above document in the present matter considering that neither of the parties to the document are party to this suit. In the same vein, I am not able to make a finding as to whether AMSCO is affiliated to the United Nations or whether it’s employee’s are entitled to the status of being tax exempt considering that it is not party in the present suit. In that regard, my finding on this issue shall not be based upon the project document or the status of AMSCO as an alleged specialized agency of the United Nations but rather on the evidence before me.

From the record, upon the defendant issuing a tax assessment, by letter dated 20th September, 2010, Mark Achola wrote to the defendant requesting for extension of the payment of the tax assessed in order to engage the Ministry of Finance with the requisite exemption. The letter partly read as follows:

“RE: REQUEST FOR EXTENSION OF PAYMENT OF TAX ARREARS USHS 83,830,223 FOR THE PERIOD 2008/2009 AND 2009/2010

Reference is made to your letter dated 6th September 2010 and the contents therein.

I would like to formally request that URA holds collection and enforcement of the claimed arrears as per the August 25th meeting with the AMSCO East Africa Regional Manger, Mr.

Kofi Andah where it was agreed between AMSCO and URA that AMSCO should engage the Ministry of Finance Planning and Economic Development for an application to effect the requisite exemption.”

By letter dated 21st July, 2011, the Permanent Secretary/Secretary to the Treasury wrote to the Permanent Secretary of the Ministry of Foreign Affairs, and the same letter was copied to the defendant indicating that AMSCO was a separate legal entity from UNDP and that AMSCO’s employees or independent consultants were not performing services on behalf of UNDP. The above essentially indicated that Mark Achola’s income was subject to taxation.

The plaintiff led evidence that after various correspondences on the matter, the Permanent Secretary/Secretary to the Treasury of the Ministry of Finance wrote a letter to the defendant, and the letter was among others copied to the Permanent Secretary of the Ministry of Foreign Affairs, the resident representative of UNDP, Director- East and South Africa- International Finance Corporation Kenya, Chief Executive Officer – AMSCO. The letter partly read as follows:

“TAX EXEMPTION FOR COMPANIES UNDERTAKING PROJECTS UNDER THE AUSPICES OF THE UNITED NATIONS DEVELOPMENT PROGRAMME

Reference is made to the letter MOT/257/01 dated 18th June 2013 from the Permanent Secretary Ministry of Foreign Affairs on the above mentioned subject. Further reference is made to our letters dated 12th April 2013 and 26th August 2011 in which we sought advice from the Ministry of Foreign Affairs with respect to the status of African Management Services Company (AMSCO) in regard to the extension of privileges and immunities of tax exemption for companies undertaking projects under the auspices of the United Nations Development Programme. These correspondences are attached for ease of reference.

AMSCO was established by the International Finance Corporation (IFC) in 1989 as a Special Purpose Corporation to solely and exclusively carry out IFC’s role in implementing the African Training and Management Services (ATMS) project across Africa. The ATMS project was initiated in 1989 by the UNDP’s Regional Bureau for Africa (RBA) with International Finance Corporation (IFC) as the Executing Agency to provide Training and Management Services to African Private and Public Enterprises. AMSCO is thus the operational arm of the ATMS Project.

To operationalise the ATMS Project in Uganda, UNDP, IFC and GoU represented by the Ministry of Finance Planning and Economic Development signed a Joint Project Agreement (Annex 1) with AMSCO B.V. in July 1999. Consequently a number of Uganda Enterprises have been assisted by the AMSCO /ATMS Project. These institutions have improved their performance resulting in increased taxes paid to the Government of Uganda and supported the transfer of skills to Ugandans. Currently the project is supporting 13 Ugandan Institutions (Annex 2).

Pursuant to Article 5 of the Project Agreement the Government is obliged to adhere to the provisions of Annex XIII of the Convention on the Privileges and Immunities of the Specialized Agencies in as far as AMSCO is concerned. The Government of Uganda's obligation extends to all persons performing services on this project, other than nationals of the host country employed locally, the same privileges and immunities as officials of IFC under Sections 18, 19, 22 and 23 of the Convention on the Privileges and Immunities of the Specialized Agencies.

The correspondence of the Ministry of Foreign Affairs dated 18th June 2013 confirms that the Project Agreement accords Tax Exemption and similar Immunities and Privileges as those of UN Agencies, to AMSCO as well as its officials assigned to Projects supported under the Agreement.

Please ensure that all eligible persons concerned are duly accorded the privileges and immunities in accordance with the relevant articles in the agreement that the Government of Uganda has assented to"

The above communication would in my view imply that Mark Achola's income was tax free. The above letter, in my view was an alteration of the prior communication made on 21st July, 2011 from the Permanent Secretary Ministry of Finance. DW1 testified at the hearing that there was a subsequent communication from the defendant to the Ministry of Finance seeking for further clarification on the matter. However, it is apparent that there is no further correspondence on the same from the Ministry of Finance yet. In that regard, the letter from the Ministry of Finance (EXH P1) dated 22nd July, 2013, is still the most recent communication to be relied upon on the issue.

I have taken into consideration the submission of Counsel for the defendant that the letter dated 22nd July, 2013, was signed by the Permanent Secretary/ Secretary to the Treasury and not the Minister, who apparently is the only person authorized to give tax exemptions. First, I note that even the letter dated 21st July, 2011, which was the communication from the Ministry of Finance
5 which the defendant sought to rely upon was also signed by the Permanent Secretary/Secretary to the Treasury. Further, I find that the above communication was not a grant of tax exemption, but was a confirmation that indeed AMSCO and its employees were tax exempt by virtue of the Agreement entered into by the Government of Uganda.

I find that the current position as per the letter dated 22nd July, 2013, from the Ministry of Finance,
10 Mark Achola was not liable to pay income tax in Uganda.

I, accordingly, answer this issue in the negative.

ISSUE 2: *Whether the plaintiff is liable in the circumstances for the tax obligations, if any, of Mark Abwao Achola.*

PW2, Mark Achola, testified that subsequent to him being issued with a revised tax assessment, by
15 letter dated 26th May 2011, the defendant issued the plaintiff with a Third party Agency Notice as collection agent on his account and demanding the plaintiff to pay the newly assessed taxes of UGX 97,243,059/=. Further, that the plaintiff, by letter dated 30th June, 2011, wrote to the defendant communicating that Mark Achola was not their employee but an employee of AMSCO. However, that regardless of the above communication, the defendant issued a Third Party Agency
20 Notice on Standard Chartered Bank (U) Ltd dated 25th July, 2011, on account of the plaintiff, having treated the tax claim against him due and payable by the plaintiff.

On the other hand, DW1, testified that upon Mark Achola failing to comply with the demand to pay the tax assessments made against him, the defendant issued a third party agency notice on the 26th May, 2011, appointing the plaintiff as a collection agent of the taxes due and payable by Mark
25 Achola. It was his testimony that the plaintiff holds and continues to hold money on account of Mark Achola on account of AMSCO BV for payment to Mark Achola vide the management agreement/ letter of engagement as well as Standard Terms of Engagement. It was his testimony that the defendant properly shifted the liability to pay the tax due on to the plaintiff.

In his submissions, Counsel for the plaintiff submitted that the plaintiff was not liable for the tax obligations of Mark Achola, owing to the fact that Mark Achola was not an employee of the plaintiff and that the plaintiff was making payments directly to AMSCO and not to Mark Achola.

While citing **Section 106** of the **Income Tax Act**, Counsel submitted that in the circumstances of this case, the defendant was not justified in issuing a third party agency notice. First, that the plaintiff did not owe Mark Achola money; the money payable for the management services was payable to AMSCO, with whom the plaintiff had entered a management contract. Counsel further submitted that an assumption could not be made that the money paid to AMSCO as management fees would eventually be paid to Mark Achola. To impose the assessment on the entire amount payable to AMSCO and on the wrong party was purely erroneous. Counsel further submitted that there was no evidence on record to indicate that the plaintiff had authority from any other person to pay money to Mark Achola.

Counsel further submitted that the third party agency notice could only be issued where the tax payable was not subject of a tax dispute. In the present case however, the income tax assessment was the subject of dispute since the plaintiff had written to the Commissioner General of the defendant requesting for the halting of the collection of the same pending confirmation of Mark Achola's tax exemption status.

It was counsel's contention that the Third Party Agency Notice issued against the plaintiff was issued erroneously and could not have the effect of shifting the liability of the taxpayer to the plaintiff.

In reply, Counsel for the defendant submitted that the agency notice issued against the plaintiff was validly issued. Further, that the fact that Mark Achola did not object to the assessment and therefore accepted that he was liable to the tax assessed by the defendant's agents. Counsel relied on **Attorney General Vs Bugisu Coffee Marketing Association Ltd [1963] EA 39**, where it was held that:

"...in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to read in, nothing is to be implied. One can only look fairly at the language used..."

In regard to the above, Counsel submitted that there was no tax dispute between the plaintiff and the defendant when the agency notice was issued against the plaintiff. Further, that it had been admitted by PW3 that the plaintiff was paying management fees to AMSCO which was a non resident tax payer and the plaintiff was holding money on behalf of AMSCO.

- 5 Counsel further submitted that as per EXH P 20(ii), dated 28th September, 2011, the plaintiff had made a tax objection on behalf of Mark Achola, thus assuming full responsibility for Mark Achola's tax obligations.

Further, that the plaintiff was at all material times aware of the fact that under the Income Tax Act, there was provision for indemnity of payments made pursuant to agency notices in civil, criminal,
10 judicial and extra judicial matters but still chose not to comply with the notice. In counsel's view, this was a deliberate choice intended to aid Mark Achola / AMSCO in tax evasion.

Counsel contended that it was misleading for the plaintiff to argue that the portion of the management fees payable to Mark Achola was unknown when his contract of employment clearly provided how much and what he was entitled to in terms of remuneration.

- 15 Counsel cited *Shah Jivraj Hira and Sons Vs M.K Ghoil [1960] EA 922*, and contended that the submissions raised for the plaintiff did not address the effects of non compliance with an agency notice.

In rejoinder, Counsel for the plaintiff submitted that by making a tax objection, the plaintiff did not assume the responsibilities of Mark Achola as alleged by the defendant and that the objection was
20 intended to show that there was no PAYE due to the defendant from the plaintiff.

Further, that even if the defendant was certain of the remuneration payable to Mark Achola by AMSCO, they could not make any such assessment against the plaintiff who was not the employer.

I reiterate my finding above that Mark Achola was an employee of AMSCO and was carrying out managerial services for the plaintiff on behalf of the AMSCO.

- 25 **Section 106(1)** of the **Income Tax Act** provides that where a tax payer fails to pay income tax on the date on which it becomes due and payable, and the tax payable is not the subject of a dispute, the Commissioner may by notice in writing require any person: owing or who may owe money to

the taxpayer; holding or who may substantially hold money for, or on account of some other person for payment to the taxpayer; holding or who may subsequently hold money on account of some other person for payment to the taxpayer; having authority from some other person to pay money to the taxpayer, to pay to the commissioner on the date set out in the notice, up to the amount of tax due. In *Shah Jivraj Hira and Sons Vs M.K Gholi [1960] EA 922*, court held that:

“... in my opinion, the position is clear. As at the time of service of the Commissioner’s order on the debtor’s employer the order binds the amounts specified in the order in the hands of the debtor’s employer. It takes effect in the nature of a statutory assignment and in respect of the portion of the debtor’s salary; the employer becomes a trustee for the Commissioner. I would accept the contention that such order has the effect of curtailing the amount payable to the debtor by way of salary at source before it comes into his hands...”

From the evidence on record, the money held by the plaintiff was payable to AMSCO on the contract for the managerial services. Counsel for the defendant submitted that the plaintiff was holding money on account of AMSCO for payment to Mark Achola. I am not satisfied with the above explanation as rightly falling within the confines of **Section 106(1)(c)** of the **Income Tax Act**. It is apparent to me from the Project document that the money payable by the plaintiff to AMSCO was paid for managerial services and there was no clause or guarantee that the said money was to be paid to Mark Achola thereafter. The money paid to AMSCO was directly arising from the contract between the plaintiff and AMSCO and Mark Achola was not a party to the said agreement. I am of the opinion that the third party agency notice ought to have been issued upon AMSCO and not the plaintiff.

I also do not accept the submission of Counsel for the defendant that by raising an objection against the tax assessed, the plaintiff assumed Mark Achola’s tax obligations.

In view of the above, I find that in the circumstances of this case, the plaintiff was not liable for Mark Achola’s tax obligations and, therefore, the agency notice issued against the plaintiff was issued in error.

In the result, this issue is also answered in the negative.

ISSUE 3: *Whether the defendant's refusal to grant the plaintiff a Tax Clearance Certificate was proper and lawful in the circumstances.*

It was the plaintiff's case that the defendant denied the plaintiff's application for a Tax Clearance Certificate on grounds that the plaintiff had not settled its outstanding tax liabilities in regard to
5 Mark Achola.

Counsel for the plaintiff submitted that the defendant had written a letter to the plaintiff (EXH P15) indicating that upon obtaining proof of exemption status from the Ministry of Finance, tax clearance would be granted. However, that even after the Ministry of Finance had written a letter to the defendant dated 22nd July, 1023, the defendant had still not issued a tax clearance certificate
10 to the plaintiff. Further, that the defendant had recovered the money after issuing a third party agency notice to Standard Chartered Bank on account of the plaintiff, but had still unfairly and maliciously refused to issue a tax clearance certificate to the plaintiff.

Counsel contended that denying the plaintiff a tax clearance certificate on the basis of wrongly assessed tax liability was improper and erroneous in the circumstances, and that the defendant was
15 liable in damages.

In reply, Counsel for the defendant submitted that it was the mandate as well as the discretion of the defendant to issue a tax clearance certificate in accordance with **Section 134** of the **Income Tax Act**. However, that where tax liability remained due and unpaid, a tax clearance could not be issued to a tax payer. Counsel contended that in the present case, the plaintiff was aware of the
20 outstanding tax assessments which were not set aside by the defendant through an objection process. In that regard, Counsel submitted that the plaintiff's liability remained outstanding and there was no court order stopping the collection of the taxes assessed.

It was counsel's further submission that a prudent tax payer would have paid the taxes under the agency notice and pursue other remedies for its recovery from court or otherwise.

25 In rejoinder, Counsel for the plaintiff submitted that the tax assessments that are the subject of this suit were issued in error and the plaintiff was not obliged to honor the same. Further, that the plaintiff objected to the assessments and filed this suit in order to determine the propriety of the

assessments. In that view, Counsel submitted that the plaintiff was entitled to a tax clearance certificate and the refusal by the defendant to grant it was done in error.

It is not in dispute that the defendant had the power and discretion to grant or decline to grant a certificate of tax clearance to the plaintiff. It is also apparent that the defendant had the power to
5 decline the grant of the certificate on the basis that a tax payer was in default of paying taxes which were due to be paid.

First, I have already made a finding above that the third party agency notice issued against the plaintiff was done in error, and the plaintiff was not liable for Mark Achola's tax obligations.

Further, the defendant admitted collection of the taxes assessed by appointing Standard Chartered
10 Bank as the plaintiff's collection agent. In my view, after the said liability had been settled, the defendant could only properly use its discretion by issuing the tax clearance certificate.

I also find that upon the Ministry of Finance communicating to the defendant that Mark Achola's income was tax exempt, the defendant then should have issued the tax clearance to the plaintiff.

In the circumstances of this case, I find that the defendant's refusal to grant the plaintiff a tax
15 clearance certificate was improper.

ISSUE 4: *Whether the plaintiff is liable to pay the Withholding Tax and Value Added Tax assessed upon it in relation to management fees paid to AMSCO.*

PW2, Mark Achola, testified that in addition to the PAYE tax assessments made by the defendant
20 against him, the defendant also raised a withholding tax assessment of UGX 95,392,770/= on the plaintiff for payments to AMSCO for the period between November, 2010, and July, 2011, and Value Added Tax (VAT) assessment for the same period to the tune of UGX 120,000,000/= which were served upon the plaintiff. It was his testimony that the plaintiff objected to the above assessments. Further, that Ministry of Finance had confirmed AMSCO's tax exempt status by
25 letter dated 22nd July, 2013 to the Commissioner General of the defendant.

Counsel for the plaintiff submitted that the plaintiff was not liable to pay withholding and Value Added Tax in relation to management fees paid to AMSCO, on the basis of the fact that AMSCO was tax exempt as had been agreed by the Government of Uganda and the parties to the project.

Counsel further relied on **International Finance Corporation Act, Cap 190** where it is provided under **Section 9(a)** that the Corporation, its assets, property, income and its operations and transactions authorized by the agreement are immune from taxation and from all customs duties. Counsel contended that by virtue of the project document, the Government agreed to extend IFC privileges to AMSCO.

Counsel further submitted that AMSCO qualified to be regarded as a specialized agency where by virtue of the project document AMSCO was brought into a relationship with the UNDP. Counsel indicated that the letter from the Ministry of Finance (EXH P1) had confirmed this position to the Commissioner General of the defendant.

Counsel invited this court to be alive to the public policy considerations concerning AMSCO's activities, which were intended to improve skills of Ugandans and the need to build local capacity.

In reply, Counsel for the defendant submitted that **Section 83(1)** of the **Income Tax Act** imposes on non-resident persons who derive management charges from sources within Uganda. Counsel submitted that it had been admitted by the plaintiff that it had paid management fees to AMSCO, without any tax exemption, the management fee paid to AMSCO was therefore liable to tax in Uganda as a withholding tax.

Counsel cited **Manila North Tollways Corporation Vs Commissioner of Internal Revenue C.T.A EB No. 812 of 2012**, where it was held as follows:

“...it is well settled principle that tax refunds are in the nature of tax exemptions and are to be construed in stricissimi juris against the entity claiming the same; exemptions from taxation are highly disfavored, so much that they may be odious to the law; the law does not look with favor on tax exemptions and that he who would seek to be thus privileged must justify it by words too plain to be mistaken and too categorical to be misinterpreted; a state cannot be stripped off this most essential power by doubtful words and of this highest

attribute of sovereignty by ambiguous language; he who claims an exemption must be able to point the provision of law creating said right...”.

Counsel submitted that the plaintiff had not pointed to a definite provision in the taxing legislation granting it tax exemption in this respect. Counsel indicated that the plaintiff could not claim that it was tax exempt because AMSCO was tax exempt.

Further, that the argument that AMSCO was a specialized agency of the United Nations and therefore tax exempt was not supported by any law and there was no international instrument to confirm that AMSCO was a specialized agency. Further, that public policy concerns raised by Counsel for the plaintiff were not fiscal concerns and were irrelevant considering that they were not incorporated within the law.

Counsel concluded that the plaintiff was liable to both withholding tax and Value Added Tax chargeable on management fees payable to AMSCO.

In rejoinder, Counsel for the plaintiff submitted that the plaintiff was not liable to pay withholding tax on payments to AMSCO considering that AMSCO was tax exempt, and that the Government through the Ministry of Finance had pronounced itself on the matter.

I have considered the submissions of Counsel and the relevant law in regard to this issue.

Section 83(1) of the Income Tax Act provides as follows:

“...subject to this Act, a tax is imposed on every non-resident person who derives any dividend, interest, royalty, natural resource payment, or management charge from sources in Uganda.

The tax payable by non-resident person under this section is calculated by applying the rate prescribed in Part IV of the Third Schedule to the Act to the gross amount of the dividend, interest, royalty, natural resource payment, or management charge by a non-resident person...”

From the submissions of Counsel for the defendant, it appears to be the argument that it was the plaintiff which was liable to pay the tax on the management fee paid to AMSCO. However, it is apparent from the reading of the above provision of the law that the tax is payable by the non-

resident person who is paid the management fees. Therefore, I do not accept the contention raised by Counsel for the defendant that the plaintiff was liable to pay tax regardless whether AMSCO was tax exempt or not. The plaintiff's liability could only arise if the defendant had demanded AMSCO to pay tax to no avail, and then by issuing a third party agency notice upon the plaintiff on account of AMSCO. The plaintiff could not be directly liable to pay tax on the management fee it had paid to AMSCO.

I have already made a finding above that by virtue of the letter dated 22nd July, 2013, (EXH P1), AMSCO is currently considered as being tax exempt. There has not been a communication contrary to the above from the Ministry of Finance.

10 In view of the above, I find that the plaintiff is not liable to pay withholding tax assessed upon it in relation to management fees paid to AMSCO.

ISSUE 4: *What remedies are available to the parties.*

Counsel for the plaintiff prayed for the following orders:

- 15 a. An order that the defendant refrains from denying the plaintiff a tax clearance certificate on the basis of assessments that are the subject of the suit and grants the tax clearance certificate.
- b. An order that the defendant refunds the money taken from the plaintiff's Standard Chartered Bank account by way of third party agency notice to settle withholding and Value Added Tax wrongly assessed against the plaintiff amounting to UGX 216,037,424/=.
- 20 c. An order that the court order requiring the Standard Chartered Bank Limited to maintain and not remit to the defendant the amount of UGX 100,596,268/= be lifted and the plaintiff is granted access to use the money.
- d. Interest at commercial rate on the UGX 216,037,424/= from the date the money was taken until payment in full.

25 Counsel further submitted that considering that the plaintiff had been wrongfully denied a tax clearance certificate for over four years since 2011, and that as a result the plaintiff was unable to obtain work through bids and invitations to tender which was the main source of its income. Counsel, therefore, prayed for an award of general damages to the plaintiff.

I have already made a finding above that the refusal by the defendant to grant the plaintiff a tax clearance certificate was improper in the circumstances. I, therefore, order that unless there are other matters under which the defendant is entitled to exercise its discretion in granting a tax clearance certificate to the plaintiff which are not related to the present one, the tax clearance certificate should be issued to the plaintiff.

From the evidence on record, the defendant did not deny having issued a third party agency notice on Standard Chartered Bank where money was paid to the defendant on account of the plaintiff's liability. The third party agency notice (EXH P21) claimed for an amount of UGX 95,392,770/=, and the Plaintiff's operating account statement (EXH P210) with the same bank indicates that the same amount was on 26th October, 2011, paid to the defendant. I accordingly award the plaintiff the above stated amount as special damages. I also order that the order requiring the Standard Chartered Bank Ltd to maintain and not remit to the defendant UGX 100,596,268/= is hereby lifted and the plaintiff is granted access to the use of the money.

I also find that the refusal by the defendant to grant the plaintiff a tax clearance certificate caused it a lot of inconvenience and it was unable to get involved in possible transactions that could have earned it income. I therefore award the plaintiff general damages of UGX 30,000,000/=.

In conclusion, the suit against the defendant succeeds and awards to the plaintiff are made as follows:

1. Special damages UGX 95,392,770/=
2. General damages UGX 30,000,000/=
3. 12% Interest on the award (1) above from the date of filing the suit till payment in full.
4. Interest at court rate on award (2) above from the date of judgment till payment in full.
5. Costs of the suit.

I so order.

B. Kainamura
Judge
27.10.2016

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