THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISC. APPLICATION NO. 464 OF 2014

(ARISING FROM CIVIL SUIT NO. 403 OF 2016)

J.P. PROPERTIES LIMITED}.....APPLICANT

VERSUS

COMMISSIONER GENERAL UGANDA REVENUE AUTHORITY}..... RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This is an application for a temporary injunction to issue staying enforcement by the Respondent or its agents of taxes amounting to Uganda shillings 253,041,187/= pending the hearing of the main suit and for costs of the application to be provided for.

The grounds of the application are contained in the affidavit of Pankajkumar Vaidya, the financial controller in the Applicant Company. He deposes that the Respondent carried out an assessment of the Applicant for the period 2011 – 2014 and raise an assessment of Uganda shillings 253,041,187 on the 27th of May 2016. Thereafter the Respondent demanded payment for the monies by 2nd June, 2016 or it would proceed to recover the money under the Income Tax Act. The Applicant being dissatisfied by the Respondent's action advised its lawyers to Institute a suit detailing the Applicants grievances wherein the Applicant filed HCCS number 403 of 2016. The Applicant was further advised by the lawyers that since the deadline for payment of the parties had expired, the Respondent with no further notice will issue agency notices on the Applicant's bank accounts. He further deposes that the suit has valid and strong founded grounds with a good prospect of success. That it is just and equitable in the circumstances that the stay of execution is granted staying the status quo against the Respondent, pending the disposal of the main suit in the High Court. Furthermore the Applicant would suffer substantial loss, irreparable damage and the suit will be rendered nugatory. The application was made without delay and it is in the interest of justice that the status quo is maintained.

In reply Barbara Ajambo, a legal officer in the legal services & board affairs Department of the Respondent deposed to an affidavit in which she gives the following facts and grounds in opposition to the application. First of all she deposes that the application is based on falsehoods

and is devoid of any sufficient facts on which the court cannot adjudicate the merits of the application which ought to be dismissed with costs. Secondly, in the normal course of the statutory duties of revenue collection, the Respondent examined the Applicant's final returns for the period 2011 to 2014 to which an assessment of Uganda shillings 937,512,557/= was raised and served on the Applicant on 10th September, 2015. On 14th September, 2015 the Applicant through its tax consultants wrote a letter objecting to the assessment and on 23rd September, 2015 it was advised to make an online objection and further provide the necessary documentation to support its objection. On 21st December, 2015 following several reconciliation meetings with the Applicant, the Respondent made an objection decision revising the total assessed tax to Uganda shillings 253,014,374/=. On 28th December, 2015, the Applicant was further invited for a meeting with the objections team to address the outstanding issues before the closure of the objection in the income tax system, the Applicant and its tax consultants did not show up. On 5th January, 2016 Respondent closed the objection in the system by partly allowing the objection but nonetheless erroneously made an objection decision of Uganda shillings 137,105,289/= and amendments to correct the same were consequently made and further brought to the attention of the Applicant according to copies of correspondences attached. On 6th January, 2016 the Applicant wrote communicating discrepancies between the amounts indicated in the objection decision dated 21st of December, 2015 and that of 5th of January, 2016 and further requested for a meeting concerning the same. On 18th January, 2016 the Applicant requested for a review of the objection decision made by the Respondent on the basis that the losses and gains made during the years 2011, 2012, 2013 and 2014 were not calculated. Foreign exchange losses, travelling expenses, advertising expenses were all unlawfully assessed by the Respondent and the assessment of 2011 was time barred under section 97 of the Income Tax Act. On the 17th May, 2016 the Applicant purportedly elected to treat the Commissioner General to have allowed the Applicant's objection basing on its letter requesting for a review of the objection decision dated 18th of January, 2016.

On the 27th May, 2016 the Respondent upheld its objection decision dated 21st of December 2015 and disallowed the appeal to review the objection decision since the Applicant never produce documentary evidence to support the expenses that it claimed for the period in issue. The Respondent raised the assessments in due exercise of its statutory mandate to collect taxes and objection decision was made within 90 days. Furthermore the income tax assessment for the year 2011 was not time barred under section 97 of the Income Tax Act Cap 340. The Respondent raised the assessment against the Applicant in due exercise in respect and demanded to collect taxes. Services under the **VAT Act** comprising anything that is not goods or money. That the Respondent is liable to pay the **VAT** assessed. The Applicant has to date failed to pay the above taxes, which amounts are a debt owing to the government of Uganda. In the premises the application for a temporary injunction should be denied.

In rejoinder Mr. Pankajkumar Vaidya depose that it is not true that his affidavit of 10th June, 2016 is based on falsehood. Secondly on the ground of advice by his lawyers, the affidavit sworn on 10th June, 2016 contains insufficient facts necessary for the determination of the temporary injunction with specific reference to the grievances of the Applicant/Plaintiff in the plaint filed in High Court civil suit number 403 of 2016. It is true that the Respondent made an objection decision and raised an amended assessment amounting to Uganda shillings 253,014,374/consign in December 2015 which the Applicant disputes up to date. It is also true that on 5th January, 2016 the Respondents in an assessment of Uganda shillings 137,105,289/= as tax payable. It is also true that on the same date, the Respondent issued amended assessments for the same period but it amounted to Uganda shillings 794,504,946/= contrary to the previous amount. Furthermore it is true that the application is for the review of the audit period. It is true that the Applicant elected to treat the Respondent as having accepted the review on the 17th of May 2016 and the Respondent affirmed the decision of 28th of December 2015 and demanded payment of Uganda shillings 253,014,374 before 2nd of June 2016 by way of recovery under the Income Tax Act.

The Applicant was advised by her lawyers that the Respondent issued an agency notice to recover the sums since a deadline of 2nd June, 2016 was given in the letter. Subsequently the Applicant obtained an interim order on 16th June, 2016 to prevent the Respondent and any of its agents from enforcing any recovery measures. Despite the interim order issued, the Respondent went ahead and issued an agency notice to the bank of Baroda for Uganda shillings 273,426,930/= on 17th June, 2016. There is therefore an actual threat by the Respondent to enforce by way of an agency notice the taxes assessed. There are contractual sums in the assessments of the Respondent and the admitted sum in the agency notice is unfounded in law and would cripple the Applicant into liquidation before the main suit is disposed of. The balance of convenience clearly favours the Applicant as the taxes if proven to can be paid with interest. In the premises it is just and equitable and in the interest of natural justice to allow the application.

At the hearing of the application, the Applicant was represented by Counsel Belinda Nakiganda while the Respondent was represented by Counsel Daniel Kasuti.

At the commencement of the application the Respondent's Counsel withdrew an objection on the ground that the Applicant moved under the wrong rule. Following judicial precedents on the matter, the correct rule was inserted and the application amended accordingly to read that it was brought under Order 41 rules 2 and 9 of the Civil Procedure Rules, section 98 of the Civil Procedure Act and section 37 of the Judicature Act. Counsels then addressed the court orally.

The Applicant seeks a temporary injunction to restrain the Respondent from enforcing any tax recovery measures against it. Counsel submitted that if an injunction is not granted enforcement would issue. She submitted that thus far the Applicant has against it three assessments. On the 5th of January the Respondent sent assessment of approximately 253 million Uganda shillings. The

second assessment was about 137 million Uganda shillings. The third assessment is for about 784 million all arising from the same audit period and this was the matter of contention between the parties. The agency notice has yet a different amount of about 273 million Uganda shillings. The Applicant applied for review and the Respondent did not respond within 60 days and there are triable issues with a possibility of success namely:

1. Whether Applicant rightly elected under the Income Tax Act
2. Whether the Applicant is liable to pay the different assessment as demanded by the Respondent.

The second ground is that the Applicant will suffer irreparable injury which cannot be compensated by an award of damages. The Applicant is in the business of real estate. If the money is withdrawn, it will cause substantial loss. The Applicant disclaims liability for all the assessments.

In the affidavit in rejoinder it is affirmed that the Respondent has issued a third party notice which has started affecting the Applicant by way of bounced cheques and will affect the Applicant's reputation and credit rating by the bank. There is an actual threat of enforcement of the agency notice by the Respondent. It was served on the Bank of Baroda on 17th June, 2016. Lastly the balance of convenience of not granting Temporary injunction will put the business in jeopardy and cause an injustice. If it is refused the money will be paid with interest. The temporary injunction should be granted until final disposal of the suit.

In Reply Counsel Daniel Kasuti submitted that the law on temporary injunctions looks at preserving the status quo. The status quo is that agencies notices have been served on the Applicants banks. The question is whether this is what the Applicant wants to be preserved?

On the question of having different figures, each day a tax is in default there is an interest payable. This plays a role on the different figures.

As far as irreparable injury is concerned, the injured party is put back by payment of a 2% interest as a penalty. Together with fact that agency notice has been filed the Applicant can be put back to their position by payment of interest.

On balance of convenience the all persons are taxable and it is fair that the Applicant pays what is due to the consolidated fund. On the balance of convenience it is the treasury to suffer when taxpayers fail to reach tax collection targets. The application should be dismissed with costs.

In rejoinder Counsel Belinda submitted that the status quo is that in the interim order was issued on 16th of June 2016 and served on Respondent. The Respondent on 17th June served the agency notices in breach of the status quo to stay enforcement. On the question of interest payable, interest within a span of two months cannot accumulate interest accumulate from Uganda

shillings 200,000,000/= to Uganda shillings 700,000,000/=. Though the Act provides that when a taxpayer pays tax assessed he or she can be refund upon successful challenge to the tax at 2% interest, the law allows a party to stay assessment until the court decides. She submitted that if the money is removed taxes have to be deducted every month from the Applicant and they will fail to pay taxes if enforced. The Respondent has several methods of recovery of money under section 106 of the ITA and the balance of convenience favours the Applicant. The Respondent is charged with collecting taxes and the Applicant has been a diligent payer of taxes.

Ruling

I have carefully considered the Applicants application together with the submissions of Counsel. The application was initially not supported by sufficient facts. Facts were only beefed up by the Respondent in **the affidavit in** reply and the rejoinder by the Applicant. The Applicant attached a letter dated 27th of May, 2016 entitled a review of objection decision for the period 2011 – 2014. I have duly considered the law under the Income Tax Act and will make my conclusions on the basis of the point of law in that regard.

As far as applications for a temporary injunction are concerned, the grant of a temporary injunction is an exercise of the court's discretion in equity. An injunction is granted for purposes of maintaining the status quo until the question to be investigated in the suit is disposed off finally after adducing evidence in the main suit and after address on the issues disclosed by the pleadings and evidence finally by the parties.

The principles for grant of a temporary injunction are summarised in the digest of **Kiyimba Kaggwa vs. Katende [1985] HCB 43** and holding number 2 thereof. Firstly, the Applicant must show a prima facie case with a probability of success. This is sometimes summarised as showing that there are serious questions that merit trial and judicial consideration before a conclusion can be reached (See **American Cyanamid Co. Ltd v Ethicon [1975] 1** ALL E.R. 504). The Plaintiff should show that the action is not frivolous or vexatious. Secondly, an injunction 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. The third test is only applied where the court is in doubt on the first two principles and is the assessment of the balance of convenience.

On the first principle of whether there is a prima facie case with a possibility of success, the Applicant's application does not refer to the arguable points of law or fact which merit judicial consideration. These issues are gleaned from the totality of the pleadings and I will not prejudice the Applicant's application on that ground. Accordingly I have considered the Applicant's plaint together with the attached documents because the Applicant did refer to a suit as having been filed against the Respondent. Paragraph 3 of the plaint avers that the Plaintiffs claim against the Defendant is against the Defendant's objection decision on the 27th of May 2016 and the assessment by the Defendant of 2011 which was out of time, unlawful and erroneous. It is clearly

disclosed that on 5th October, 2015 the Plaintiff objected to assessment and on 21st December, 2015 the Defendant partly allowed the objection. This resulted in a tax of Uganda shillings 253,041,187/= which was issued in the notice of assessment comprising of 6% withholding tax on commissions, and tax with interest at Uganda shillings 244,131,187 as well as withholding tax of 8,910,187/=. Subsequently the Respondent served the Applicant with several assessments on 5 January 2016. Thereafter the Defendant e-mailed the Plaintiff notifying it that the tax payable according to the objection decision of 21st of December, 2015 was Uganda shillings 137,105,289/=. Obviously that is not the bone of contention because the objection decision is clear as to the amount. The problem is that the parties continued engaging on the issue and on 6th January 2016, the Plaintiff's accountants objected to the amended assessments.

I have carefully considered section 99 of the Income Tax Act which deals with objection to assessment. Section 99 (5) of the Income Tax Act provides that:

> "After consideration of the objection, the Commissioner may allow the objection in whole or in part and amend the assessment accordingly or disallow the objection; and the Commissioner's decision is referred to as an "objection decision".

The Commissioner General after the objection decision, and admittedly so, served an amended assessment. That should have been the end of the matter unless the Applicant was aggrieved by this decision as can be shown by subsequent actions.

The remedy of the Applicant is to appeal to the High Court or a tax tribunal under section 100 of the Income Tax Act within 45 days after service of the notice of the objection decision.

The Applicant never appealed from the decision and instead they purported with the Respondent to have reviewed the objection decision by engaging in dialogue and discussions on the issue. When an objection decision has been made, it is not only binding on the Commissioner General, it is also binding on the taxpayer and the Commissioner General cannot review or amend its own decision. Unless of course the review and amending relates to correction of typographical errors or minor errors like mathematical errors. Further proceedings to review the objection decision are ultra vires the powers of the Commissioner. It follows that the subsequent actions of further assessments under reviews and any grievances arising there under are not raised triable issues for this court to consider.

The grievance of the Applicant in the plaint arises from the second objection decision dated 27th of May, 2016. An objection decision cannot arise from another objection decision. Secondly, there is no room to object to an objection decision. This is a tentative conclusion from a cursory reading of the Income Tax Act and the parties would be afforded another chance to address the court on the merits of the points of law raised by the court.

Tentatively, it follows that the proceedings subsequent to the objection decision of 21st of December, 2015 are liable to be examined on the ground only on points of law as to whether they are not ultra vires the powers of the Commissioner General.

I have further considered several other arguments which appear in the submissions of Counsels. It is apparent that the Commissioner purported to issue further assessments pursuant to another objection decision and is moving for enforcement. The question is whether the procedure adopted is erroneous and/or ultra vires the powers of the Commissioner General.

The issue of whether assessments for tax of 2011 are time barred ought to have been raised in the earlier objection to assessment which resulted in the decision of 21st December 2015.

Tentatively the question of election to treat an objection as having been allowed after a subsequent objection to the objection decision of 21st of December 2015 cannot arise since there is a substantive objection decision which could only be challenged by an appeal.

The parties have raised several issues of procedure and irregularities that I do not need to go into but will allow them an opportunity to address the court on the merits of the points of law.

From the above I am persuaded that the court will only consider, before handling on any other matter, the irregularities pointed out by the court in a further proceedings between the parties. In the meantime a conditional injunction will be granted upon the payment of 30% of the assessed tax of Uganda shillings 253,041, 187/= pursuant to the objection decision of 21st of December 2015.

A temporary injunction issues restraining the Respondent, agents or servants from applying further recovery measures against the Applicant pending determination of issues raised by the court and any other issues arising in the main suit on points of law under section 100 (4) of the Income Tax Act cap 340 laws of Uganda.

The costs of this application shall abide the outcome of the main suit.

Ruling delivered in open court on 14th October, 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Belinda Nakiganda for the Applicant

Counsel Tracy Basiima for the Respondent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

14th October 2016