

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**HCCS NO. 400 OF 2015**

**BIIRA UDEAR CO. LTD .....PLAINTIFF**

**VERSUS**

**COMMISSIONER GENERAL UGANDA REVENUE**

**AUTHORITY.....DEFENDANT**

**BEFORE: THE HON. JUSTICE DAVID WANGUTUSI**

**J U D G M E N T:**

The Plaintiff Biira Udear Company Limited sued the Commissioner General Uganda Revenue Authority referred to herein as the Defendant for the following declarations;

- a) That the Value Added Tax assessments issued on account of the supply of coffee husks and palm kernel to Hima Cement Limited against the Plaintiff was illegal.
- b) That the tax collection enforcement measures invoked by the Defendant were unlawful.

The Plaintiff also sought an injunction restraining the Defendant from collecting UGX. 1,222,109,817/=, an order directing the Defendant to

refund UGX 2,234,129,834/= to the Plaintiff being the Value Added Tax unlawfully collected, damages, interest and costs.

The facts as constituting this claim are that the Plaintiff Company engages in supply of coffee husks, rice husks, groundnut husks and crushed palm kernel. The Defendant carried out an audit on the Plaintiff's supply of coffee husks and palm kernel to Hima Cement Factory for the period of 2012 and 2013. Upon the assessment the Defendant found the Plaintiff with a tax liability in the sum of UGX 635,951,666/=

The Plaintiff contends that they requested the Defendant to substantiate the assessment however the Defendant responded by threatening to enforce recovery measures. In order to continue with business, the Plaintiff entered into a Memorandum of Understanding dated 14<sup>th</sup> May 2013, **ExhP1** with the Defendant.

Under this MOU the Plaintiff acknowledged indebtedness to the Defendant in a sum of UGX 653,951,666/= being VAT arrears of a principal sum of UGX 620,575,940/= and interest of UGX. 33,375,726/=. The Parties agreed that the Plaintiff would immediately pay UGX. 100,000,000/= and the balance of UGX. 553,951,666/= would be paid in six consecutive monthly installments.

In 2014 the Defendant again carried out a tax assessment of the Plaintiff this time demanding UGX 1,127,705,717. The Defendant threatened to freeze her bank accounts for non-payment of tax and in fact issued agency notices to her bankers and Hima Cement to recover the money. Because of the Defendant's actions the Plaintiff could not transact and so Hima Cement made no payments.



In order not to lose Hima Cement as a client the Plaintiff suggested paying this sum in installments which culminated into the parties executing a second memorandum of understanding on 17<sup>th</sup> June 2014, **ExhP2**. By this MOU the Plaintiff acknowledged indebtedness in a sum of UGX. 1,127,705,717/=. The parties agreed that the sum would be paid in monthly installments and payment would be due on every 16<sup>th</sup> day of the month from June 2014 to November 2014. Finding a lot of difficulty in payment the Plaintiff consulted her advocates.

On 2<sup>nd</sup> April 2015, through her advocates Birungyi Batata & Associates she applied for a Private Ruling contending that palm kernel and coffee husks were exempt from Value Added Tax, Exh P4. On 20<sup>th</sup> April 2015 the Defendants still demanded for payment Exh P5.

On 27<sup>th</sup> April 2015 the Defendant delivered a Private Ruling, **ExhP6** confirming that the supply of coffee husks and palm kernel was exempt from Value Added Tax because the supply falls within the provisions of section 19 (1) and the Second Schedule paragraph 1(a) to the Value Added Tax Act.

On the strength of this Ruling the Plaintiff requested the Defendant to vacate its earlier assessments and refund the taxes she had erroneously paid to the Defendant. The Plaintiff also sought a review of the whole assessment and memorandum of understanding. This the Defendant did not and so the Plaintiff brought this suit.

The issues that now arise for resolution are;

1. Whether the supply of palm kernels and coffee husks by the Plaintiff is exempt from Value Added Tax?

2. Whether the Defendant misrepresented to the Plaintiff on payment of tax on palm kernel and coffee husks?
3. Whether the Plaintiff is liable to pay the taxes to the Defendant?
4. What remedies are available to the parties?

As to whether the supply of palm kernels and coffee husks by the Plaintiff are exempt from Value Added Tax has its answer in The Value Added Tax Act, section 19 and the Second Schedule.

Section 19 of the VAT Act provides for exempt supply as follows;

*“(1) A supply of goods or services is an exempt supply if it is specified in the Second Schedule.*

The Second Schedule categorizes the supplies that fall under exempt supplies to include;

*“(a) the supply of livestock, unprocessed food stuffs and unprocessed agricultural products except wheat grain.”*

Counsel for the Plaintiff contended that palm kernels and coffee husks fell in the class of unprocessed agricultural products.

The Act provides procedure for a tax payer who is not sure of his / her liability to use to find out whether he is liable to pay or not.

Section 80 of the Value Added Tax Act reads:

1. *The Commissioner General may, upon application in writing by a tax payer, issue to the tax payer a Private Ruling setting out the Commissioner General's position*



regarding the application of this Act to a transaction proposed or entered into by the taxpayer.

2. Where the taxpayer has made a full and true disclosure of the nature of all aspects of the transaction relevant to the ruling and the transaction has proceeded in all material respects as described in the taxpayer's application for the ruling, the ruling shall be binding on the Commissioner General with respect to the application to the transaction of the law as it stood at the time the ruling was issued.

That being the case, counsel of the Plaintiff by a letter dated 2<sup>nd</sup> April 2015 Exh P 4 wrote to the Defendant's Commissioner, Domestic Taxes, seeking a private ruling under Section 80 of the VAT Act, they wrote:

*"Our client Biira Udear Company Limited of TIN 100029612 imports palm kernel and coffee husks from the Democratic Republic of Congo and supplies them to Hima Cement Limited in Uganda"*

*We have advised our client that the coffee husks and palm kernel fall under the provisions of Section 19 second schedule paragraph 1 (a) as unprocessed agricultural products.*

*We request for a ruling as to whether it is your position that the said suppliers to Hima Cement Limited are exempt from VAT.*

The application received a reply Exh P6 dated 26<sup>th</sup> April 2015 in which the Commissioner General ruled:

**“RE: APPLICATION FOR A PRIVATE RULING  
UNDER SECTION 80 OF THE VAT ACT.”**

*Reference is made to yours dated 2<sup>nd</sup> April 2015 on the above subject matter.*

*We wish to confirm that the supply of coffee husks and palm kernel falls within the ambit of Section 19 and Paragraph 1(a) of the Second Schedule to the VAT Act.*

*The said supplies are therefore exempt from Value Added Tax.”*

In this way the Commissioner General bound the Defendant as provided for under Section 80 (2) namely that:

*“The ruling shall be binding on the Commissioner General with respect to the application to the transaction”*

It meant that a supplier of palm kernel and coffee husks was exempt from payment of VAT. As long as this private ruling remained in place the Plaintiff would enjoy that exemption. In fact it meant that the Plaintiff's earlier payments were done in error. It also meant that the Defendant could not demand for even 'pending' payments.

Furthermore in the absence of revocation of the Private Ruling and rectification of the Oder or change of legislation, the Defendant could not even in future levy tax in that regard.



Rectification is provided for under section 69 of The Tax Procedure Code Act, to correct an error, amend an order, decision, document or notice issued by the commissioner. This must however be done within three years from date of making or issuing the order, decision document or notice. This power of the commissioner to rectify the mistake can however only be exercised where the error is apparent from the record and it does not involve a dispute as to the interpretation of the law or facts of the case.

In the instant case no error is apparent on the record. There is however a dispute as to the interpretation of the law. In such a situation the Defendant could only take recourse of a higher tribunal or legislation because in my view the Commissioner General was now functus official.

In this I am fortified by the holding in **Re VGM Holdings Ltd [1941] 2 ALL E.R. 417** that was later cited in **Gordon Sentimba& Others vs URA HCMA No. 35 of 2010** wherein the Learned Judge as he then was held that

*"A correct course should have been to refer the matter to the Tax Appeals tribunal rather than have the same person who makes the private ruling purport to revoke the same. The lacunae in the law are that there is no specific provision allowing the Uganda Revenue Authority to appeal to the Tax Appeals tribunal. The authorities cited above give the principle that in the absence of an enabling statute once an authority exercising judicial or quasi judicial functions such as an arbitrator decided a*

*matter, the authority becomes functus officio and cannot revisit that decision again. Any person aggrieved with the decision of the authority can only appeal to a higher tribunal to reverse, set aside or vary the decision.*

In my view since the Private Ruling had not been reversed it remained binding on the Commissioner General and informed the position of the Plaintiffs liability.

The sum total is that the supply of palm kernals and coffee husks was exempt from Value Added Tax and the Defendant should not have demanded for it.

That being the case the assertion by the Defendant that the supplies were not exempt and that the Plaintiff was indebted yet the Private Ruling spoke the contrary, amounted to a misrepresentation. Since the tax being demanded was illegal, all the memoranda of understanding entered as a result of the levy were void abinitio and cannot be enforced.

On whether the Plaintiff is entitled to the refund of the UGX 2,234,129,834= as prayed, it is this Courts holding that since it was collected from her illegally the same be refunded.

On whether the Defendant can demand for the UGX 1,222,109,817= as VAT unpaid it is the holding of this Court that since it would be contrary to the Private Ruling and therefore amount to collecting an exempt tax the demand would be illegal and the Defendants are hereby restrained from doing so.

The Plaintiff also prayed for general damages. General damages are a discretion of the Court which must however be exercised judiciously.

**Southern Engineering Company vs. Mutia [1985] KLR 730.** It wil be



presumed to be the natural and probable consequence of the Defendant's act or omission; **James Fredrick Nsubuga vs Attorney General HCCS 13** of 1993. An attempt is made to put the Plaintiff in a position as near as he should have been in had he or she not suffered the wrong. In doing this the Court is guided by the value of the subject matter, and the economic inconvenience that a party may have been put through; **Kibimba Rice Limited vs Umar Salim SCCA 17** of 1992.

Having considered the circumstances of this case, the fact that the demand was contrary to the law, the Plaintiff was put to grave economic inconvenience, and deprived of the use of her money taken by the Defendant, I find an award of 80,000,000= (eighty million) appropriate which I award.

As for interest the sums of money wrongly collected by the Defendants was due 30 days from the date of the Private Ruling Exh P6 namely 27<sup>th</sup> May 2015. The sum to be refunded will therefore, from that date till payment in full, attract interest of 2% pm compounded as provided for under section 44 of the Value Added Act.

Interest on the general damages is awarded at 6% pa from date of judgment till payment in full.

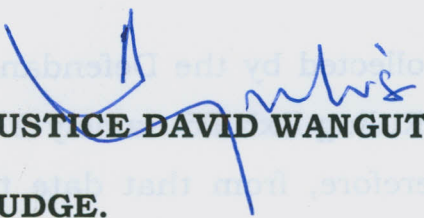
The defendant will also pay the costs of the suit.

In conclusion judgment is entered in favour of the Plaintiff against the Defendant in the following terms;

- a) The VAT assessments issued on account of the supply of coffee husks and palm kernel to Hima Cement Limited against the Plaintiff was illegal.
- b) The collection of the tax unlawful.

- c) The defendant is restrained from collecting from collecting UGX. 1,222,109,817/= from the Plaintiff.
- d) Refund of UGX. 2,234,129,834/= to the Plaintiff by the Defendant being VAT unlawfully collected.
- e) UGX. 80,000,000/= as general damages.
- f) Interest on (d) 2% pm compounded from 27<sup>th</sup> May 2015 till payment in full.
- g) Interest on (e) at 6% pa from date of judgment till payment in full.
- h) Costs.

**Dated at Kampala this.....20<sup>th</sup>.....day of.....August.....2018.**

  
**JUSTICE DAVID WANGUTUSI**  
**JUDGE.**