THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL No. 71 OF 2020

(ARISING FROM TAX APPEALS TRIBUNAL APPLICATION No. 43 OF 2019)

1. **UGANDA COMMUNICATIONS COMMISSION**
2. **HARUNA MUSINGUZI ..... APPELLANTS**

VERSUS

UGANDA REVENUE AUTHORITY ..... RESPONDENT

BEFORE: HON. LADY JUSTICE SUSAN ABINYO

JUDGMENT

Introduction

This is an appeal from the ruling of the Tax Appeals Tribunal, following an application by the Applicants (Appellants herein) to the Respondent for a refund of overpaid tax on the motor vehicle benefit for the period of 2011- 2018, which was rejected by the Respondent on the ground that the benefit was rightly taxed. The Appellants being aggrieved by the said decision made an application to the Tax Appeals Tribunal for review, which was dismissed.

Background

The 1st Appellant was established by the Uganda Communications Act (hereinafter referred to as the "Act") to regulate the communications sector in Uganda. The 1st Appellant also provides motor vehicles to some of its employees to carry out day to day operations of the commission. That the 1st Appellant has been deducting taxes from the motor vehicle benefits of its employees, and remitting the same to the Respondent. The 2nd Appellant is an employee of the 1st Appellant, and the donee of Powers of Attorney for the employees, and former employees who were provided with the motor vehicles by the 1st Appellant, and from whom overpayment of tax is claimed.

The 2nd Appellant on behalf of other employees of the 1st Appellant, sought for refund of the taxes deducted from each employee, and remitted to the Respondent, which was rejected by the Respondent. The Appellants being aggrieved by the said decision made an application No. 43 of 2019 to the Tax Appeals Tribunal, which was dismissed on 24th November, 2020 hence this appeal.

The grounds of appeal as stated in the Notice of Appeal are that: -

1. That the Learned Members of the Tribunal erred in law when they failed to properly evaluate the evidence, and came to a conclusion that the value of the motor vehicle was not stated therefore, it was unable to compute the tax amount paid in excess.
2. That the Learned Members of the Tribunal erred in law when they found that to compute the 2nd Appellant's use of the motor vehicle as fully for private use would be erroneous but then went on to dismiss the case.
3. That the Learned Members of the Tribunal erred in law when they held that the 35% depreciation on the value of motor vehicles would apply to vehicles after 1st July, 2018.
4. That the Learned Members of the Tribunal erred in law when they failed to properly evaluate the evidence, and came to a conclusion that the Applicants did not discharge their burden of proof that the motor vehicles in question were used for private purposes only over the weekend.

Representation

The Appellants were represented by Counsel Nakiganda Belinda of M/S Birungyi, Barata & Associates, while the Respondent was represented by Counsel Alidekki Ssali Alex jointly with Counsel Mulira Diana, Legal Services and Board Affairs Department, of Uganda Revenue Authority. Counsel for the parties herein, filed written submissions as directed by this Court.

Counsel for the Respondent raised a preliminary point of law that grounds one and two of the appeal are argumentative. Counsel relied on the provision of Order 43 Rule 2 of the Civil Procedure Rules, and the case of *Attorney General Vs Florence Baliraine CA Civil Appeal No. 79 of 2003,* to submit that the grounds of objection to the decree appealed from should be concise and not argumentative, and that grounds one and two of the appeal should be struck out as they offend Order 43 Rule 1 of the Civil Procedure Rules.

In reply, Counsel for the Appellants relied on the *case of Yaya Farajallah Vs Obur Ronald & Others, Civil Appeal No. 81 of 2018,* to submit that the Respondent should have raised the Preliminary objection either at mention or scheduling stage, and not to ambush the Appellants in their submission.

Counsel argued that the ruling should be read as a whole, and if done the grounds of appeal will be seen to have been drafted in accordance with the ruling, and that they are not argumentative, and relied further on the case of *Nyero Jema Vs Olweny Jacob & Others Civil Appeal No. 50 of 2018* in support of their submission.

Determination of the preliminary objection

I have carefully considered the submissions, and cases relied upon by Counsel for the parties herein to find as follows:

The well-established principle of law, is that a preliminary objection on a point of law must be pleaded, or should arise by clear implication out of the pleadings. ***(See Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd [1966] EA 696)***, cited with approval in the cases of ***Yaya Farajallah Vs Obur Ronald & Others, Civil Appeal No. 81 of 2018,*** and ***Eddie Kazi Vs URA Civil Appeal No. 10 of 2019***.

It is notable that in matters of this nature, the grounds of appeal are set out in the Notice of Appeal in accordance with section 27(1) of the Tax Appeals Tribunals Act, Cap 345 (as amended). The response by the Respondent to the Notice of Appeal is not required in any form except to hear the Respondent against the appeal, where the Appellant has been heard in support of the appeal. (*See Rule 13 of Order 43 of the Civil Procedure Rules SI 71-1*)

The above procedure illustrates that the grounds of objection to the decree appealed from should be set fourth concisely, without any argument or narrative, and the only available opportunity for the Respondent to raise an objection would then be, when the case is fixed for either mention or scheduling.

In addition, the practice is that a party who wishes to raise a preliminary objection, may apply orally in Court at the earliest opportunity, so as to give room for the other party to respond, and also to enable the Court to make an appropriate decision for the expeditious disposal of the case.

In the given circumstances of this case, I find that the Respondent did not raise the preliminary point of law at the earliest opportunity, which should have been either when the matter was called on for mention or at scheduling.

For the foregoing reason, this Court finds that the preliminary point of law raised by Counsel for the Respondent is untenable at this stage. The preliminary point of law is hereby dismissed.

I will now turn to consider the merits of this appeal as hereunder:

Counsel for the Appellants preferred to argue grounds 1, 2, and 4 of the appeal concurrently, and ground 3 of the appeal separately. Counsel for the Respondent followed the same approach. This Court will adopt the same approach as below:

Grounds 1,2, and 4

1. That the learned members of the Tribunal erred in law when they failed to properly evaluate the evidence, and came to a conclusion that the value of the motor vehicle was not stated therefore, it was unable to compute the tax amount paid in excess.
2. That the learned members of the Tribunal erred in law when they found that to compute the 2nd Appellant's use of the motor vehicle as fully for private use would be erroneous but then went on to dismiss the case.
4 That the learned members of the Tribunal erred in law when they failed to properly evaluate the evidence, and came to a conclusion that the Applicants did not discharge their burden of proof that the motor vehicles in question were used for private purposes only over the weekend.

Arguments by Counsel for the Appellants

Counsel for the Appellants submitted that the Appellants do not dispute that the vehicles are used for both private and work related matters. That what is in dispute is for the whole benefit to be considered as private use without apportioning the work related days. That the Tribunal erred in not considering the computation as per the formula in paragraph 3 of the 5th Schedule to the Income Tax Act to verify the amount.

Counsel contended that the formula used to calculate motor vehicle benefit is laid out in section 19(3) of the Income Tax Act, which provides that the value of any benefit is determined in accordance with the 5th schedule to this Act.

Counsel argued that the computation in accordance with the formula (20% x A x B/C)- D, in paragraph 3 of the 5th schedule of the Income Tax Act, clearly shows market value (initial value), depreciated value, benefit, percentage of benefit, days for private use, monthly benefit, tax due, paid and refundable which amounts to UGX 394, 869,273.

Counsel further argued that section 113 of the Income Tax Act provides for refunds of overpaid tax, and that the Appellants complied with section 113 (1) of the Income Tax Act, by applying to the Commissioner in writing for the refund of overpaid tax.

Counsel further contended that the Appellants are entitled to a refund of the overpaid tax amounting to UGX 394, 869,273, arising from taxation of the motor vehicle as fully for private use, without taking into account the weekdays when the vehicles are used for work purposes.

Arguments in reply by Counsel for the Respondent

Counsel submitted that paragraph 3 of the 5th schedule of the Income Tax Act, Cap 340 (as amended) provides that where a benefit provided by an employer to an employee consists of use, or availability for use, of a motor vehicle wholly or partly for the private use of the employee, the value of the benefit is calculated according to the formula (20% x A x B/C)- D.

Counsel contended that the formula to determine tax payable clearly provides for A as the market value of the vehicle at the time it was first provided for the private use of the employee, and that the Tribunal correctly ruled that that there was no basis for the estimates when the 1st Appellant put the estimates to 100 days, and that the market value at the time of registration of the motor vehicle in Uganda should have been stated to ease computation of the benefit.

Counsel argued that the fact that no fleet or mileage was ever availed to the Tribunal , the Tribunal had no basis for relying on the Applicant's own deductions at arriving at 100 days for private use, and that Appellant not only failed to meet the burden of proof as to how the 100 days were arrived at but this was exacerbated by the fact that there existed no over payment of tax in the Respondent's record as at the date of making the application of the refund, considering the tax paid was in accordance with the Appellants' self-declared returns.

Counsel further submitted that the burden of proof squarely rests on the Appellant as the taxpayer who challenges the validity of a tax decision or its lawfulness, to prove that it is incorrect, and that the refund claimed is actually due to the 2nd Appellant and his representatives.

Counsel cited the cases of *Williamson Diamonds Ltd Vs Commissioner General (2008) TLR 67*, and *Dr Charles Amupe Vs Wilberforce Muhanji Civil Appeal No. 62 of 2019* in support of their submission that the Appellants failed to discharge this burden as was correctly ruled by the Tax Appeals Tribunal at pg6 of their ruling.

Arguments in rejoinder by Counsel for the Appellants

Counsel submitted that the Appellants wrote a letter to the Respondent, which was duly stamped, and that the Appellants provided computation and summary of computation for each employee's benefit, which were tendered in at trial and mediation.

Counsel contended that the Appellants provided market value for each vehicle for the period in dispute contrary to the Tribunal's ruling, and that the Tribunal should have remitted the matter back to the Respondent for review in accordance with section 19(1) (c) (ii) of the Tax Appeals Tribunals Act.

Decision

I have taken into account the duty of this Court as the first appellate Court, to re-evaluate the evidence on record, and subject it to fresh scrutiny so as to reach its own conclusion. ***(See section 80 of the Civil Procedure Act Cap 71; Fredrick Zaabwe Vs Orient Bank Ltd SC. Civil Appeal No. 4 of 2006*** *and* ***Sanyu Lwanga Musoke Vs Sam Galiwango SC. Civil Appeal No. 48 of 1995)***

Section 19 of the Income Tax Act, Cap 340 (as amended) provides for employment income. Subsection 3 thereof, provides for the determination of the value of any benefit in accordance with the 5th schedule to this Act.

Paragraph 3 of the 5th schedule provides that:

"Where a benefit provided by an employer to an employee consists of the use, or availability for use, of a motor vehicle wholly or partly for the private purposes of the employee, the value of the benefit is calculated according to the formula–

20% x A x B/C – D

where –

A is the market value of the motor vehicle at the time when it was first provided for the private use of the employee, depreciated on a reducing balance basis at a rate of 35% per annum for the subsequent years;

B is the number of days in the year of income during which the motor vehicle was used or available for use for private purposes by the employee for all or part of the day;

C is the number of days in the year of income; and

D is any payment made by the employee for the benefit."

The record of appeal at pgs. 431-432 indicates that during the cross examination of Ms. Joan Nabafuma Nyanzi, she stated that:

" she would not be in position to tell which vehicles transport employees from their home to work daily, and that the vehicles are available for private use when you are not using the vehicle for work purposes. We recommended that since they had not amended their returns, there was no excess tax paid."

At pg. 436 of the record of appeal, during the cross examination of Mr. Haruna Musinguzi, he stated that:

"His employment contract does not show working on weekends. It shows formal working hours. He uses the motor vehicle allocated to him for private use over the weekend. That the estimated 100 days for private use was based on weekends and some public holidays. That the returns were a self-declaration and filed by themselves. That they did not use the fleet report in the computation of the tax for motor vehicle benefit because they used the number of days instead."

In re-examination at pg. 438 of the record of appeal, Mr. Haruna stated that:

"Normal working days are Monday to Friday 8:00am to 5:00pm. That they sometimes have work beyond 8:00 am to 5:00 pm over weekends. "

In response to the question by the Tribunal in clarification; whether he is the person in charge of paying taxes?

Mr. Haruna stated that:

"He is the person in charge of paying taxes, and when paying taxes, he indicates that the vehicles are being used by the employees, and that the taxes were remitted."

In the ruling of the Tribunal at pg. 5-6, it was stated that:

> *"An employer may grant an employee use of a vehicle specifically for work or official purposes. Such grant may not be considered as an employment benefit. The employee is required to use the vehicle strictly for official business of the employer. In the event the employee diverts it to private use, that use is subject to taxation. A vehicle being available for use on week days does not mean that it cannot be used for private purposes. It is fallacious to say that on week days the cars were being used exclusively for office work. An employee may be granted a vehicle partly for both office use and private use. The private use of a vehicle is considered as a benefit granted to an employee. Such private use of a vehicle is subject to income tax. Where a motor vehicle is provided by an employer either wholly or partly for private use, the value of the benefit is calculated according to the following formula*
>
> *(20% x A x B/C – D) ...*
>
> *For an employer to determine how many days an employee has used a vehicle for private use there is need for it to have a journey or mileage log to show how the vehicles have been used. The journey or mileage log should show when the vehicle was used for official purposes and for private use. Using the journey or mileage log, the employer should be able to determine how many days a month a vehicle was used for private use... It is not clearly shown how the amount refundable was arrived at in the absence of records showing the use of the vehicles... In the instant case, the burden of proof was on the Applicants to prove on a balance of probabilities that the motor vehicles in question were used for private purposes only over the weekend. This burden could only be discharged through real and credible evidence. In the absence of journey or mileage logs the evidence adduced by the Applicants was not sufficient to discharge this burden."*

This Court has re- evaluated the evidence, and taken into consideration the submissions of Counsel for the parties herein as above to find as follows:

The proposition of law is that, whoever alleges given facts, and desires the Court to give judgment on any legal right or liability dependent on the existence of those facts, has the burden to prove those facts unless, it is provided by law that the proof of that fact(s) shall lie on another person. ***(See sections 101 and 103 of the Evidence Act, Cap 6, and the case of Dr Julius Amupe Vs Wilberforce Muhanji Civil Appeal No. 62 of 2019*** *cited by Counsel for the Respondent**)***

The evidence adduced by the Appellants in Annexture "A15" at pg. 236 of the proceedings, shows a summary of the amount refundable to 13 employees in the total sum of UGX 394, 869,273(Uganda Shillings Three Hundred Ninety Four Million Eight Hundred Sixty Nine Thousand Two Hundred Seventy Three only).

The formula of (20% x A x B/C –D) provided in paragraph 3 of the 5th schedule to the Act was used by the Appellants to compute the tax on motor vehicle benefit for the following:

1. Annexture "A3" at pgs. 251-252 of the record of Appeal in respect of Alice Nyangoma for the period (2011- 2018), in the total sum of UGX 46,326,664.85.
2. Annexture "A4" at pg. 250 of the record of Appeal in respect of Irene Sewankambo for the period (2016- 2018), in the total sum of UGX 5,278,809.60.
3. Annexture "A5" at pg. 249 of the record of Appeal in respect of Twinemanzi Tumubweinee for the period (2016- 2018), in the total sum of UGX 4,387,435.13.
4. Annexture "A6" at pg. 248 of the record of Appeal in respect of Fred Otunnu for the period (2011- 2018), in the total sum of UGX 15,803,603.97.
5. Annexture "A7" at pg. 247 of the record of Appeal in respect of Haruna Musinguzi for the period (2017- 2018), in the total sum of UGX 8,830,335.83
6. Annexture "A8" at pg. 246 of the record of Appeal in respect of Thembo Nyombi for the period (2017- 2018), in the total sum of UGX 8,746,993.30.
7. Annexture "A9" at pg. 245 of the record of Appeal in respect of Quinto Rwotoyera for the period (2017- 2018), in the total sum of UGX 30,366,531.28.
8. Annexture "A10" at pg. 244 of the record of Appeal in respect of Patrick Mwesigwa for the period (2011- 2016), in the total sum of UGX 30.366.530.76.

9. Annexture "A11" at pgs. 242-243 of the record of Appeal in respect of Godfrey Mutabazi for the period (2011- 2018), in the total sum of UGX 121,353,615.
10. Annexture "not numbered" at pgs. 240-241 of the record of Appeal in respect of Harriet Omoding for the period (2011- 2018), in the total sum of UGX 41,443,096.
11. Annexture "A12" at pgs. 239 of the record of Appeal in respect of Bob Lyazi for the period (2011- 2016), in the total sum of UGX 28,116,181.
12. Annexture "A13" at pg. 238 of the record of Appeal in respect of David Ogong for the period (2011- 2013), in the total sum of UGX 12, 569,392.
13. Annexture "A14" at pg. 237 of the record of Appeal in respect of Susan Wegoye for the period (2012 to 2018), in the total sum of UGX 41, 280,083.

I have taken into further consideration that Mr. Musinguzi who was in charge of the remittance of the tax benefit to the Respondent stated that the employment contract does not show working on weekends. It shows formal working hours which was from 8:00am to 5:00pm on Monday to Friday, and the observation by the Tribunal in its ruling that a vehicle being available for use on week days does not mean that it cannot be used for private purposes.

In the absence of any evidence on the fleet management policy, this Court finds that the Appellants' estimates of the 100 days, being the deduction of the weekends, and public holidays, was sufficient to prove on a balance of probabilities that those were the days for which the allocated vehicles were used or made available for private use, and as a result of such private use, the vehicles were subject to taxation.

For the foregoing reasons, this Court faults the Learned Members of the Tribunal for finding that in the absence of journey or mileage logs, the evidence adduced by the Appellants was not sufficient to discharge this burden to the required standard.

The case of ***Vinyl Design Limited Vs Hanmer: Templeman 2014 TC 03345***, cited by Counsel for the Respondent is not binding on this Court.

Grounds 1, 2, and 4 of the appeal succeeds.

Ground 3: That the Learned Members of the Tribunal erred in law when they held that the 35% depreciation on the value of motor vehicles would apply to vehicles after 1st July, 2018.

It was submitted for the Appellant that the law on depreciation of motor vehicles benefit was amended by section 12 of the Income Tax (Amendment Act) 2017 in paragraph 3 of the 5th schedule, and that the date of commencement of the said amendment is clearly stated as 1st July, 2017 therefore, depreciation at a reducing balance of 35% was effective as of 1st July, 2017, and not 2018 as ruled by the Tribunal.

Counsel relied on Black's Law Dictionary 8th edition at pg.1468, on the definition of the term subsequent to mean; "occurring later, coming after something else", to argue that the meaning of the word subsequent in A of the formula above, is that since the amendment was in 2017, subsequent years implies the year 2017, and the next following years, where 2017 was the base year, and then 2018, 2019, and 2020 are the subsequent years.

Counsel contended that the Appellants made a mistake in the computation when they stated that depreciation started in November 2017, instead of July 2017 when the law came into force, and that the Appellants duly wrote to the Respondent notifying them of the error, and seeking for a refund in accordance with section 113(4) of the Income Tax Act.

In reply, Counsel for the Respondent submitted that prior to the amendment in 2017, the market value of the vehicle impliedly stayed constant for each year of income the employee used it however, in 2017, the inserted amendment under section 12 of the Income Tax Act (as amended), meant that the Company Income returns would be affected for the period from 1st July to 30th June 2018.

Counsel further submitted that the amendment to depreciate the motor vehicle benefit at a reducing balance at the rate of 35% came into effect on 1st July, 2017, and therefore became applicable from July, 2018, since depreciation of motor vehicles is calculated at the year end, and that accounting principles do not allow depreciation in the middle of the year but at the end.

Counsel contended that the Appellant's assertion that she started to depreciate the motor vehicle benefit in November, 2017 instead of 1st July, 2018 is misconceived and baseless in law, and therefore the period in contention from 2011 to 2017 is not affected by the amendment, which cannot operate retrospectively.

This Court has taken into consideration the provision of paragraph 3 of the 5th schedule of the Income Tax (Amendment Act) 2017 above, (hereinafter referred to as the "Act") where a benefit provided by an employer to an employee consists of the use, or availability for use, of a motor vehicle wholly or partly for the private purposes of the employee, the value of the benefit, and the formula for calculating the value of that benefit shall be (20% XA X B/C)-D.

A is the market value of the motor vehicle at the time when it was first provided for the private use of the employee, depreciated on a reducing balance basis at a rate of 35% per annum for the subsequent years;(Emphasis is mine)

The term private use is not defined by the Act however, the term working days is defined in the Uganda Communications Commission (UCC) Human Resource Policy Manual (hereinafter referred to as the "Manual") to mean any days on which the Commission is open for normal business.

The term normal business hours as defined in the Employment contract of Uganda Communications Commission means the hours between 8:00am and 5:00pm on all days except Saturdays, Sundays and public holidays.

It is my understanding therefore, that private use of a motor vehicle for purposes of the valuation of benefits in respect of employment income, entails the use of the motor vehicle outside 5:00pm on Mondays to Fridays, and Saturdays, Sundays and public holidays.

The question that ensues is whether the employer is capable of determining when the employee has used the vehicle for private purposes during normal business hours?

It is my considered view that the answer may be in the affirmative or in the negative depending on the circumstances of each case, taking into account the fact that working days according to the manual means any days on which the Commission is open for normal business, which could perhaps be a Saturday or after 5:00pm on Mondays to Fridays. The computation made by the Appellants of 100 days on the basis of weekends and public holidays was relevant, and satisfactory in the given circumstances.

Accordingly, this Court finds that the meaning of the term private use, is ambiguous, and calls for clarification in the Act. (***See Bank of Baroda Vs Uganda Revenue Authority CACA No.71 of 2013,*** which cited with approval the case of *Lafarge Midwest Inc. Vs City of Detroit, state of Michigan*, where the Court held that a finding of a statutory ambiguity is made when a provision conflicts with

another provision, or when it is equally susceptible to more than a single meaning). (Emphasis is mine)

Be that as it may, this Court further finds that the motor vehicle depreciation on a reducing balance basis at a rate of 35% per annum for the subsequent years implies that the computation would be effective from the year- end of 2017, since the Act was amended in 2017, and according to the Act, the year of income means the period of twelve months ending on 30th June, and includes a substituted year of income and a transitional year of income. (*See section 39 of the Act for the meaning of a substituted year of income and a transitional year of income*)

In the given circumstances of this appeal, a substituted year of income or a transitional year of income does not apply. The year-end from the period of twelve months ending on 30th June 2017, when the Income Tax Act was amended in 2017, in regard to the depreciation value implies that the normal year of Income begun on 1st July, 2018.

This Court therefore, finds that the Appellants adduced evidence in Annexture "A3" at pgs. 251-252 of the record of Appeal in respect of Alice Nyangoma for the period of 2018; Annexture "A4" at pg. 250 of the record of Appeal in respect of Irene Sewankambo for the period of 2018; Annexture "A5" at pg. 249 of the record of Appeal in respect of Twinemanzi Tumubweinee for the period of 2018; Annexture "A6" at pg. 248 of the record of Appeal in respect of Fred Otunnu for the period of 2018; Annexture "A7" at pg. 247 of the record of Appeal in respect of Haruna Musinguzi for the period of 2018; Annexture "A8" at pg. 246 of the record of Appeal in respect of Thembo Nyombi for the period of 2018; Annexture "A9" at pg. 245 of the record of Appeal in respect of Quinto Rwotoyera for the period of 2018; Annexture "A11" at pgs. 242-243 of the record of Appeal in respect of Godfrey Mutabazi for the period of 2018; Annexture "not numbered" at pgs. 240-241 of the record of Appeal in respect of Harriet Omoding for the period of 2018, and Annexture "A14" at pg. 237 of the record of Appeal in respect of Susan Wegoye for the period of 2018, to justify their claim for refund in the year 2018.

I agree with the submission of Counsel for the Respondent that the law does not operate retrospectively, and the period in contention from 2011-2017 is not backed by law.

Accordingly, this Court finds no reason to fault the Learned Members of the Tribunal for their finding on the period from 2011 to 2017.

The finding of the Learned Members of the Tribunal in respect of the year 2018, is hereby set aside.

This ground therefore partly succeeds.

In the result, this appeal is partially allowed, and Court makes orders that:

1. The ruling of the Tax Appeals Tribunal is partly set aside.
2. The Appellants are only entitled to the refund claimed as at 1st July, 2018.
3. Half of the costs in this appeal are awarded to the Appellants, and in the Tax Appeals Tribunal.

Dated, signed and delivered electronically this 17th day of February, 2023.

SUSAN ABINYO

JUDGE

17/02/2023