THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL No. 55 OF 2021

(ARISING FROM TAX APPEALS TRIBUNAL APPLICATION No. 109 & No.113 OF 2019)

GAKOU BROTHERS ENTERPRISES LIMITED ……... APPELLANT

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 Appellant for review of the decision of the Respondent, which was dismissed by the Tribunal on 27th October, 2021.

Background

That the Appellant is a company duly incorporated under the Laws of Uganda, and deals in whole sale trade of second hand clothes at Ovino mall, old Kampala. That the Appellant in 2019 applied to the Respondent for her withholding tax refund amounting to UGX 275,500,000, for the period January, 2014 to December, 2019.

That the Respondent in that respect commenced an audit into the affairs of the Appellant, to ascertain her refund worthiness, and established that the Appellant was reporting a negative gross loss in its returns, and undeclared sales for the year.

That the Respondent contacted the Appellant's representatives, and informed them about the anomaly, and requested them to provide additional documents but the Appellant's representatives failed to provide the documents for the period in question.

That the Respondent then issued the Appellant with an Income Tax assessment of UGX 88, 214,153, and Value Added Tax assessment of UGX 52,928,492 for the period of January to December, 2018. The Appellant being aggrieved with the assessments, objected the same, and the Respondent made an objection decision disallowing the Appellant's objection on grounds that the Appellant did not provide documents.

The Appellant being aggrieved by that decision filed TAT Applications No.109, and No. 113 of 2019, against the Income Tax and Value Added Tax assessments by the Respondent, from which the Tax Appeals Tribunal delivered a ruling on 27th October, 2021 against the Appellant hence this appeal.

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

1. That the Chairman and the Honourable members of the Tax Appeals Tribunal erred in law, when they held that Salabed Imports and Exports Limited was a trader dealing in second hand clothes, whereas not.
2. That the Chairman and the Honourable members of the Tax Appeals Tribunal erred in law, when they held that the Respondent applied 24% mark up to arrive at a taxable amount for the Appellant.
3. That the Chairman and the Honourable members of the Tax Appeals Tribunal erred in law, when they relied on untendered documents to hold that the Appellant was assessed upon the application of 24% mark up.
4. That the Chairman and the Honourable members of the Tax Appeals Tribunal erred in law, when they held that the right to a fair hearing was expended to the Appellant, when it was never informed of the companies used as benchmarks for determining the industrial average during the assessment period.
5. That the Chairman and the Honourable members of the Tax Appeals Tribunal erred in law, when they upheld the assessments against the Appellant despite holding that the Respondent applied a procedure not sanctioned in law.

6. That the Chairman and the Honourable members of the Tax Appeals Tribunal erred in law, when they held that it is within the Commissioner's discretion to apply any procedure to charge tax on a tax payer, whether sanctioned in law or not.
7. That the Chairman and the Honourable members of the Tax Appeals Tribunal erred in law, when they held that the Appellant was liable to tax because it provided unsigned books of accounts and or audited accounts.
8. That the Chairman and the Honourable members of the Tax Appeals Tribunal erred in law, when they held that the decision of the Commissioner was not vitiated by illegality, irrationality, and procedural impropriety, whereas not.
9. That the Chairman and the Honourable members of the Tax Appeals Tribunal erred in law, when they failed to properly evaluate the evidence on record, and rendered a decision not supported evidentially.

Representation

The Appellant was represented by Counsel Angura Joseph jointly with Counsel Mutesi Gertrude of M/S E. Angura & Co. Advocates while the Respondent was represented by Counsel Sam Kwerit jointly with Counsel Donald Bakashaba, of Legal Services and Board Affairs Department, Uganda Revenue Authority. Counsel for the parties herein, filed written submissions as directed by this Court.

During the scheduling proceedings, Counsel for the parties herein agreed to argue grounds 1, 2, 3, and 9 of the appeal concurrently, grounds 5, and 6 jointly, and grounds 4, 7, and 8 independently.

This Court will adopt the same approach except grounds 5, 6, and 8, to be resolved concurrently.

Grounds 1, 2, 3, and 9

Arguments of Counsel for the Appellant

Counsel submitted that it is settled law that a decision of Court should be supported by the facts, and evidence that was led and adduced before the Court. That where the Court makes a decision that is not supported in evidence, or which goes against the evidence; that would amount to an error in law. Counsel cited the case of *Barry Edwards Vs The Commissioner for Her Majesty's Revenue & Customs [2019] UKUT 0131(TCC) Appeal No. UT/2017/0172*, to support his submission.

Counsel argued that Salabed Imports and Exports (U) Limited is a logistics provider, and not a company buying and selling clothes as the Appellant. That the holding of the Tribunal was contra, and against the evidence before it.

Counsel further argued that on the holding of the Tribunal that the Respondent applied 24% mark up to arrive at the taxable sum against the Appellant, it was without any supporting evidence as the Respondent never led evidence in proof that it applied 24% mark up to arrive at the taxable amount due to the Appellant.

Counsel contended that the only document where the Respondent indicated that it applied the mark up of 24%, is in an Annexture to a letter the Respondent wrote on compulsion by the Tribunal to explain how it arrived at the taxes assessed against the Appellant however, the said document was not tendered in evidence.

Arguments in reply by Counsel for the Respondent

In reply, Counsel for the Respondent submitted that the Respondent's witness testified in cross examination that indeed the companies he looked at, all deal in second hand clothes as the Appellant, and that the Respondent applied the 24% mark up value based on the industrial average of the companies that deal in second hand clothes, and operating in the same area.

Counsel further submitted that it is not correct that the Tribunal relied on an untendered document since the said document was in the joint trial bundle that was agreed by the parties as exhibit 13.

Arguments in rejoinder by Counsel for the Appellant

Counsel reiterated their earlier submissions, and argued further that Counsel for the Respondent led evidence from the bar, when he submitted that the Respondent used a lower industrial average of 10% as mark up, and that the argument by Counsel for the Respondent that the document was part of the trial bundle, and there was no need to tender it in Court is not grounded in law and misleading.

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;*** the cases of

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)***

The proposition of law is that an appeal to the High Court may be made on questions of law only, and that the Notice of Appeal shall state the question or questions of law to be raised on appeal. ***(See section 27(2) of the Tax Appeals Tribunal Act, Cap 345(as amended)***, and the case of ***Uganda Revenue Authority Vs Tembo Steels limited, Civil Appeal No. 09 of 2006,*** cited by Counsel for the Respondent.

The question posed here is, what amounts to a point of law?

I agree with the Learned Judge in Tembo's case above, that points of law by their nature involve a controversy about the law, and that there must be a misdirection on the part of the Tribunal or an error of law, which must be stated in the grounds contained in the Notice of Appeal.

The phrase "an error of law" has been decided in a plethora of cases to refer to instances where there is no evidence to support a finding or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding. (***See the case of Edwards Vs Bairstow [1956] AC 14***, cited with approval in the case of ***Barry Edwards Vs The Commissioner for Her Majesty's Revenue & Customs [2019] UKUT 0131(TCC) Appeal No. UT/2017/0172***, relied upon by Counsel for the Appellant.

The law is very clear under Order 12 of the Civil Procedure Rules SI 71-1(as amended) on the purpose of scheduling. Prior to the scheduling conference, parties are required to file a Joint Scheduling Memorandum, and trial bundles. The purpose of the joint trial bundle is to have the documents admitted as evidence to be relied upon by the parties in the case before Court, and the documents are marked accordingly as exhibits. Consequently, this informs the evidence to be adduced by the parties, and or relied upon by the witness(s) either by witness statements or viva voce.

In this case, the record of appeal indicates at pages 45-46, the documents which were agreed upon by the parties, and as such admitted as exhibits. The alleged untendered document was admitted as an agreed document adduced in the joint trial bundle, and marked exhibit A13.

Accordingly, I find that the documents in the joint trial bundle relied upon by the parties herein, were admitted in evidence, and marked accordingly as exhibits.

This Court therefore, finds the contention by Counsel for the Respondent that the document was part of the trial bundle is correct however, the argument that there was no need to tender it in Court is misleading, as discussed above on the process of scheduling.

I have looked at the record of the hearing proceedings conducted by the Learned members of the Tribunal, and find that during the cross examination of Mr. Emmanuel Okwi the Appellant's witness at pgs. 542–545 of the record of appeal, the said witness stated that:

"In reference to tab 5, the break down shows the mark rate of 24%"

In response to the question by the Tribunal in clarification; whether the Applicant had external auditors, he stated at pg. 543 of the record of appeal that:

"Yes"

The Tribunal further asked the question; whether the external auditors made any financial statement for the period in dispute, and he stated that:

"Yes"

It was the evidence of Mr. Paul Mubeezi the Respondent's witness, in paragraphs 7-12 of the witness statement at pgs. 560-561 of the record of appeal that:

"On 11th June, 2019, the Respondent carried out a return examination wherein she reviewed the Applicants return declarations and established that the Applicant was reporting a negative gross loss. That subsequently, the Respondent issued the Applicant with administrative additional statements for VAT and Income Tax for the period 0/01/2018 to 31/12/2018 amounting to UGX 52,928,492, and UGX 88,214,153 respectively, as seen in the copies of the assessments attached to the joint trial bundle marked R2, and A9 respectively. That on 16th June, 2019, the Applicant objected to the assessment issued on grounds that the estimated sales are not from their sales ledger or records. That on 14th August, 2019, the Respondent requested the Applicant to provide documents in support of the grounds of the objection namely; a bank statement for the period January, 2018 to December, 2018, audited financial statement for the period January, 2018 to December, 2018, and any other document that supports the objection.

A copy of the request was attached to the joint trial bundle, and marked R1. That on 9th September, 2019, the Respondent disallowed the objection on the basis that the Applicant failed to provide documents in support of the objection. A copy of the objection decision was attached to the joint trial bundle and marked R4."

In the ruling of the Tribunal at pgs.656-657 it was stated that:

> "The law does not provide how the Commissioner may reach at what the correct tax a tax payer must pay… This means that the Commissioner may use any information, and it does not have to be the best. In the matter before us, the Applicant did not avail information as to its losses. The Commissioner used the mark up from three companies that dealt in the same goods as the Applicant… since the Respondent is at liberty to use any method, the use of the three companies to arrive at the mark up was within the discretion of the Commissioner. Using the 3 companies, the Commissioner decided to assess the liability of the Applicant using a mark-up of 24%. The said mark up is an estimate in the absence of documentation and information from the Applicant… As regards illegality and procedural impropriety, we already stated that S.23(1)(c) of the Tax Procedures Act empowered the Commissioner to issue an additional assessment stating the correct tax liable. Therefore, there is no illegality and procedural impropriety."

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

Its settled law 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)***

Section 18 of the Tax Appeals Tribunals Act, Cap 345(as amended) provides that:

"18**. Burden of proof**
In a proceeding before a tribunal for review of a taxation decision, the Applicant has the burden of proving that —
(a) where the taxation decision is an objection decision in relation to an assessment, the assessment is excessive; or

(b) in any other case, the taxation decision should not have been made or should have been made differently.

The evidence of the Respondent was that the Applicant failed to adduce documents to prove the objection.

The onus was on the Appellant in the given circumstances to show that the assessment was either excessive, or should not have been made at all, however, this burden of proof was not discharged by the Appellant to the required standard.

It is my considered view that the Appellant failed to discharge the burden of proof to the standard required under section 18 of the Tax Appeals Tribunals Act.

I therefore, find no fault with the decision of the Learned Members of the Tribunal in the absence of any evidence adduced by the Appellant.

In addition, the phrase "best information available" was used by the Learned members of the Tribunal in the ruling with reference to the evidence of the Respondent, and the case of Tembo Steels (Supra) however, the Tribunal concluded that the mark up of 24% was within the discretion of the Commissioner, and observed that the Respondent was at liberty to use any method.

This Court has looked at the document marked A13 (The Memorandum and Articles of Association of Salabed Import and Export (U) Limited, and finds that under clause 3(a) thereof, one of the objects for which the company of Salabed Import and Export (U) Limited was registered, is to carry on the business of second hand clothes, shoes and other accessories.

It is notable from the 1st ground of appeal, that the Appellant only contests the use of information for Salabed Import and Export (U) Limited.

From the above object for which the company of Salabed Import and Export (U) Limited was registered, and the import data marked A14 in the joint trial bundle, the said company for example at pgs.332, 364, and 368 of the record of appeal, dealt in worn clothing among other goods.

The impugned provisions of section 95 of the Income Tax Act, 2006, and section 32 of the Value Added Tax Act, Cap 349, which provided that assessments by a Commissioner on the chargeable income of a taxpayer, and the tax payable, could be based on best judgment, and best information available respectively, were repealed under section 77 of the Tax Procedures Code Act, 2014.

I am cognizant of the fact that the law is silent on the method to be used by the Commissioner however, the law does not prohibit the use of a mark up, which was the method used by the Commissioner in the instant case.

It is my understanding that the information from the company of Salabed Import and Export (U) Limited, was part of the information, which the Commissioner used to derive a mark up of 24% from the three companies, in order to determine the industrial average of the Appellant for purposes of tax liablity.

For reasons above, this Court finds that the use of the information from the three companies by the Commissioner to arrive at the mark up of 24%, was relevant in the given circumstances, and within the discretion of the Commissioner.

Accordingly, I find no merit on grounds 1, 2, 3, and 9 of the appeal.

Grounds 1, 2, 3, and 9 of the appeal fails.

Ground 4: That the Chairman and the Honourable members of the Tax Appeals Tribunal erred in law, when they held that the right to a fair hearing was expended to the Appellant, when it was never informed of the companies used as benchmarks for determining the industrial average during the assessment period.

I have considered the submissions of Counsel for the parties herein, and the joint trial bundle to find that during the scheduling proceedings, when the documents were marked, for example A12, A14, A15, and R1, an opportunity was made available for the Appellant to be heard in respect of any objection to the said documents being admitted in evidence, which the Appellant did not object to.

Be that as it may, the fact that the documents were filed in a joint trial bundle, meant that they were agreed documents by the parties herein, and would be relied upon in evidence by the said parties.

I have taken into consideration the purpose of scheduling cases, which aims at mainly narrowing down the issues for trial, and the evidence to be relied upon by either party, so as to enable the Court and the parties to properly plan, and manage the subsequent process for the evidence to be adduced by the parties either by witness statements or viva voce, until the conclusion of the hearing proceedings.

For the foregoing reason, I find that the contention by the Appellant that they were not given a right to a fair hearing is far-fetched.

Following the guidance of Justice Alfonse Owiny Dollo, DCJ (as he then was), in ***Tembo Steels (U) Ltd Vs Uganda Revenue Authority CA Civil Appeal No. 77 of 2011***, that the two phrases "based on the best information available" used in the Ugandan VAT Act, and "best judgment" used in the English legislations could be used interchangeably without doing any damage to the import of the provisions in the Act. He expounded that, best judgment can only be arrived at or is informed by the best information. Thus the use of the phrase "best information" is meaningless unless it is considered together with the consequence of that information.

That similarly, the best judgment made only makes proper sense, or best be understood in the light of the value of the information that results in arriving at the judgment. The case of ***Argosy Co. Ltd Vs Inland Revenue Commissioner [1971] WLR 514 at pgs.516-517 as per Lord Donovan***, was cited with approval as most relevant in appreciating the use of the two phrases.

In the given circumstances of this case, it was the evidence of the Respondent's witness above, that on 14th August, 2019, the Respondent requested the Applicant to provide documents in support of the grounds of the objection namely; a bank statement for the period January, 2018 to December, 2018, audited financial statement for the period January, 2018 to December, 2018, and any other document that supports the objection. A copy of the request was attached to the joint trial bundle, and marked R1. That on 9th September, 2019, the Respondent disallowed the objection on the basis that the Applicant failed to provide documents in support of the objection, and a copy of the objection decision was attached to the joint trial bundle and marked R4.

In the instant case, the Tribunal in its ruling stated that:

> "In the matter before us, the Applicant did not avail information as to its losses. The Commissioner used the mark up from three companies that dealt in the same goods as the Applicant… since the Respondent is at liberty to use any method, the use of the three companies to arrive at the mark up was within the discretion of the Commissioner. Using the 3 companies, the Commissioner decided to assess the liability of the Applicant using a mark-up of 24%. The said mark up is an estimate in the absence of documentation and information from the Applicant."

In light of the explanation above by Hon. Justice A.C Owiny Dollo DCJ (as he then was) in Tembo's case, I find that the use of the mark up of 24% by the Commissioner from the three companies that dealt in the same goods as the Appellant, was as such relevant materials available to the Commissioner, and since the law is silent on the methods that the Commissioner may use, it is my considered view that any method that is used by the Commissioner, should have a justification on a case by case basis.

This Court finds that the justification by the Commissioner in the instant case, was the use of a mark up of 24% for the three companies that dealt in the same goods as the Appellant.

In conclusion, I find that the Commissioner used the mark up of the three companies that dealt in the same business as the Appellant, in the absence of any contrary information adduced by the Appellant in that regard, and failure by the Appellant to prove its losses, to arrive at an estimate of the Appellant's tax liability for the period in question.

Accordingly, I find that this ground has no merit.

Grounds 5, 6, and 8

Ground 5: That the Chairman and the Honourable members of the Tax Appeals Tribunal erred in law, when they upheld the assessments against the Appellant despite holding that the Respondent applied a procedure not sanctioned in law.

Ground 6: That the Chairman and the Honourable members of the Tax Appeals Tribunal erred in law, when they held that it is within the Commissioner's discretion to apply any procedure to charge tax on a tax payer, whether sanctioned in law or not.

Ground 8: That the Chairman and the Honourable members of the Tax Appeals Tribunal erred in law, when they held that the decision of the Commissioner was not vitiated by illegality, irrationality, and procedural impropriety, whereas not.

I have taken into account the submissions of Counsel for the parties herein, which will not be reproduced here, and the authorities relied upon to make the following findings:

To begin with ground 5 of this appeal, the Learned Members of the tribunal did not hold that the Respondent applied a procedure not sanctioned in law. At pg.656 of the Record of Appeal, the Tribunal held that:

"The law does not provide how the Commissioner may reach at what the correct tax a taxpayer must pay…The mark-up of 24% was an estimate used to assess the Applicant."

It is noteworthy that the use of the mark up of 24% by the Commissioner is not provided in the repealed law as Counsel for the Appellant wants this Court to believe.

In the result, this Court finds that failure by the Appellant to avail documentation as to its losses, justified the discretion exercised by the Commissioner on the use of the estimates of the mark up of 24% to determine the industrial average of the Appellant for purposes of tax liability.

The question that ensues is whether such discretion was exercised with an illegality, irrationality or with procedural impropriety?

The Tribunal addressed the issue of discretion in its ruling at pgs.657-658, and the answer was in the negative.

I find no reason to vary the said decision of the Learned members of the Tribunal.

Accordingly, grounds 5, and 8 fail.

Section 23 of the Tax Procedures Code Act, 2014 provides that:

"23. Additional Assessment.

(1) The Commissioner may make an additional assessment amending a tax assessment made for a tax period to ensure that-

(a) for an assessed loss under the Income Tax Act, the tax payer is assessed in respect of the correct amount of the assessed loss for the period;

(b) for an excess input tax credit under the Value Added Tax Act, the tax payer is assessed in respect of the correct amount of the excess input tax credit for the period; or

(c) in any other case, the tax payer is liable for the correct amount of tax payable in respect of the period.

(2) An additional assessment under subsection (1) may be made-

(a) at any time, if fraud or any gross or willful neglect has been committed by, or on behalf of the taxpayer, or new information has been discovered in relation to the tax payable by the taxpayer for a tax period;

(b) in the case of an additional assessment, within three years from the date of service of the notice of the additional assessment; or

(c) in any other case, within three years after the date-

(i) the taxpayer furnished the self-assessment return to which the original assessment relates; or

(ii) the Commissioner served notice of the original assessment on the taxpayer." (Emphasis is mine)

From the above provision, it is clear that the Commissioner is required to take out an additional assessment only when fraud, gross or willful neglect has been committed by, or on behalf of the taxpayer, or new information has been discovered in relation to the tax payable by the taxpayer for a tax period.

In the instant case, it was the evidence of the Respondent that on 11th June, 2019, the Respondent carried out a return examination wherein, she reviewed the Applicants return declarations, and established that the Applicant was reporting a negative gross loss.

That subsequently, the Respondent issued the Applicant with administrative additional statements for VAT and Income Tax for the period 0/01/2018 to 31/12/2018 amounting to UGX 52,928,492, and UGX 88,214,153 respectively, as seen in the copies of the assessments attached to the joint trial bundle marked R2, and A9 respectively. That on 16th June, 2019, the Applicant objected to the assessment issued on grounds that the estimated sales are not from their sales ledger or records. That on 14th August, 2019, the Respondent requested the Applicant to provide documents in support of the grounds of the objection namely that; a bank statement for the period January, 2018 to December, 2018, audited financial statement for the period January, 2018 to December, 2018, and any other document that supports the objection. A copy of the request was attached to the joint trial bundle, and marked R1. That on 9th September, 2019, the Respondent disallowed the objection on the basis that the Applicant failed to provide documents in support of the objection. A copy of the objection decision was attached to the joint trial bundle and marked R4.

The term neglect was defined in ***Black's Law Dictionary 7th edition at Pg. 1055*** to mean the omission of proper attention to a person or thing.

In the given circumstances of this case, I find that the conduct of the Appellant in failing to furnish the required documents in support of their objection, which was their duty to furnish, amounts to gross neglect.

For the foregoing reason, I find no fault with the decision of the Learned Members of the Tribunal.

Ground 6 therefore fails.

Ground 7: That the Chairman and the Honourable members of the Tax Appeals Tribunal erred in law, when they held that the Appellant was liable to tax because it provided unsigned books of accounts and or audited accounts.

I have evaluated the evidence on record, and the ruling of the Tribunal to find that the reason for the Learned members of the Tribunal to conclude that the Appellant had failed to prove its losses, was the failure to provide signed books of accounts.

In addition, the assessment of the Appellant's tax liability was based on the mark up of 24%, and failure by the Appellant to prove its losses.

This Court therefore, finds that the framing of this ground of appeal was not correct.

Accordingly, this ground fails.

This Court finds that the entire appeal lacks merit. The decision of the Learned members of the Tribunal is hereby upheld.

Consequently, this appeal is dismissed with costs to the Respondent.

Dated and delivered electronically this 24th day of March, 2023.

SUSAN ABINYO

JUDGE

24/03/2023