THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

CIVIL APPEAL NO.49 OF 2021
(ARISING FROM TAT APPLICATION NO.35 OF 2020)

BOLLORE TRANSPORT & LOGISTICS LTD:::::::::::: APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY:::::::::::::::::::::: RESPONDENT

Before Hon. Lady Justice Patricia Kahigi Asiimwe

Judgement

Introduction:

1. This is an appeal from the Ruling of the Tax Appeals Tribunal following an application by the Appellant challenging two withholding tax assessments by the Respondent. The application challenged the Withholding Tax assessment of UGX 123,539,723 on the gross payments for the services of outsourced casual labourers and PAYE assessment of UGX 404,007,535 on the fuel cards provided to the Applicant's employees.

Background:

2. The Appellant is a company in the business of providing transport, clearing, and forwarding services. The Appellant offers fuel cards with fixed amounts every month to its employees and the fuel is used in the employees' private cars. The Appellant also obtains casual labourers from two companies.

3. In 2019, the Respondent audited the Appellant's operations for the period January 2015 to December 2017. The Respondent accordingly issued an assessment of UGX 123,539,723 for Withholding Tax on the gross payments for the services

rendered by the casual labourers. The Respondent also issued an assessment which was adjusted to UGX 404,007,535 for PAYE Tax on the fuel cards issued to the Appellant's employees. The Appellant disputed these assessments and applied to the Tax Appeals Tribunal vide TAT Application No.35 of 2020.

The Ruling of the Tax Appeals Tribunal:

4. In its ruling delivered on 22nd September 2021, the Tribunal partially allowed the application. It overruled and set aside the withholding tax assessment of UGX 123,539,723 relating to gross payments for the wages of the outsourced casual labourers. The Tribunal however upheld the adjusted PAYE assessment of UGX 404,007,535 on the fuel cards issued to the appellant's employees.

5. The Tribunal held that while the Appellant provided accountability of the fuel by the various employees, it did not adduce evidence to show that the said employees' duties involved travelling. The Tribunal held that the fuel allowance given to the appellant's employees was a benefit.

Appeal to this Court and grounds of appeal:

6. Being partially dissatisfied with the ruling of the Tribunal, the Appellant filed this appeal. The Notice of Appeal contained the following grounds:
    I. That the learned members of the Tribunal erred in law when they found that the provision of fuel cards to the appellant's employees was taxable as a benefit
    II. That the learned members of the Tribunal erred in law when they ordered the Applicant to pay taxes amounting to UGX 404,007,535.
    III. The learned members of the Tribunal erred in law in failing to properly evaluate the evidence on record thereby coming to the wrong conclusion.
7. The Appellant subsequently filed a Record of Appeal containing among others, a Memorandum of Appeal. The memorandum of appeal had grounds of appeal which were almost identical to

those in the Notice of Appeal, except for the further elaboration of ground one to read as follows:

"That the learned members of the Tribunal erred in law when they found that the provision of fuel card[s] to the Appellant's employees was taxable as a benefit and thereby erroneously held that:

i. The revised pay as you earn assessment of UGX 404,007,535 as stated in the objection decision relating to staff fuel allowance is upheld."

Representation:

8. The Appellant was represented by M/s Kampala Associated Advocates and the Respondent was represented by the Respondent's Department of Legal Services and Board Affairs. Both parties filed written submissions.

Resolution:

Preliminary Objections:

9. In their written submissions, the parties raised preliminary objections which I will address before resolving the grounds of appeal:

1st Preliminary Objection:

The Appellant's submissions are defective as they are premised on the grounds in the memorandum of appeal which has no legal basis in appeals to this Court from decisions of the Tax Appeal Tribunal.

10. Counsel for the Respondent submitted that under section 27 of the Tax Appeals Tribunal Act, the appeals to this Court from decisions of the Tax Appeals Tribunal are commenced by Notice of Motion and cited the case of **URA v. Toro Mityana Tea Company Ltd, HCCA No.4 of 2006**. The Respondent's Counsel thereby submitted that whereas the Appellant filed both a Notice of Appeal and Memorandum of Appeal, the Memorandum of Appeal is alien in tax matters. Counsel submitted that the Appellant's submissions, therefore, have no

legal basis because they were premised on the grounds in the memorandum of appeal and prayed that the Appellant's submissions be struck off the record.

11. In reply through their submissions in rejoinder, Counsel for the Appellant submitted that Appeals to this Court from the Tax Appeals Tribunal are governed by not just the Tax Appeals Tribunal Act only but also Order 43 Rule 1 of the Civil Procedure Rules. The Appellant's Counsel argued that the Civil Procedure Rules take precedence over the Tax Appeals Tribunal Act for purposes of procedure in the High Court.

Resolution:

12. *Section 27 of the Tax Appeals Tribunal Act* provides that:

> *(1) A party to a proceeding before a tribunal may, within thirty days after being notified of the decision or within such further time as the High Court may allow, lodge a notice of appeal with the registrar of the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party to the proceeding before the tribunal.* (Emphasis mine)

13. It is clear from the above provision that an appeal to this Court from the decision of the Tax Appeals Tribunal is instituted by lodging a Notice of Appeal. This question of procedure was resolved in the case cited by counsel for the Respondent of **URA v. Toro Mityana Tea Company Ltd, supra** where an objection had been raised that there was no competent appeal since the appellant had not filed a memorandum of appeal as required by *Order 43 Rule 1 (I) of the Civil Procedure Rules*. The Court held that section 27 of the Tax Appeals Tribunal Act negated the requirements of Order 43. I agree with the Court's decision that the correct procedure for filing an appeal from the decision of the Tax Appeals Tribunal is by Notice of Appeal as provided under section 27 of the Tax Appeals Tribunal Act.

14. I, however, do not agree with the Respondent's submission and prayer that the Appellant's submissions should therefore be rejected because they were premised on the grounds stated in the memorandum of appeal. As already noted the grounds in the notice of appeal and the memorandum of appeal are substantially similar. The only major difference is under the 1st ground which was further elaborated in the memorandum of appeal.

15. In conclusion, therefore, the 1st preliminary objection is sustained in principle. The memorandum of appeal contained in the record of appeal is alien to this appeal and stands rejected and struck off the record. However, in the interest of justice, the submissions of the Appellant's Counsel stand preserved.

2nd Preliminary Objection:

The Respondent attempted to introduce new evidence without leave of Court when they filed a supplementary record of appeal containing documents that were neither introduced before nor tested by the Tribunal.

16. Counsel for the Appellant submitted that the sample employment contracts in the Respondent's supplementary record of appeal constitute new evidence not presented to the Tribunal and which has been introduced without leave of this Court. The Respondent did not have any chance to respond to this preliminary objection because it was raised in the Appellant's written submissions in rejoinder.

17. Under the Joint Trial Bundle submitted in the record of appeal, the last exhibit is marked R2. However, at page 9 (page 354 of the record of appeal) of its Ruling, the Tax Appeals Tribunal, noted that:

"Duties vary depending on the office one holds. While the Applicant provided accountability of the fuel by the various employees, it did not adduce evidence to show that the said employees' duties involved travelling. ***The contracts, exhibit R3 attached,*** *do not show that the employees have to travel to different places to carry out their duties. For instance, Adam Wasswa is a Warehouse manager, there is no evidence that he was managing various warehouses and needs to visit them. Ms. Annet Ndagire is a declaration clerk while Nakamya Sophia was a Netting officer..... There is no evidence that all the locations visited in the accountability have to do with the duties of the employees. Some of the activities the applicant shows are questionable. For instance, the legal activities by Namugenyi Juliet, whose contract was not attached involved visiting Save the children Uganda... Are employees of a clearing, forwarding and transport company required to go for field trips? The relationship between the locations and duties of the employees is missing."* [Emphasis mine]

18. From the above quotation it is clear that the Tribunal had looked at some contracts of employment which were exhibited as R3 in a Trial Bundle filed before it. It is my conclusion therefore that the Joint Trial Bundle before the Tribunal did not stop at exhibit R2 but also contained some documents which were "Exhibit R3".

19. In the premises, I find that the Appellant in its record of Appeal omitted the contracts constituting exhibit R3. The contracts of employment of four of the Appellant's staff which are in the Respondent's supplementary record of appeal seem to be the same as the contracts reviewed by the Tribunal and referred to in its Ruling. For example, the supplementary bundle includes contracts of Adam Wasswa, Annet Ndagire Kasule and Nakamya Sophia which the Tribunal referred to. Just like the Tribunal noted in its ruling, these contracts do not show that the employees have to travel to different places

to carry out their duties. None of them has specific terms on the job description detailing the duties of the employee. I note that page 1 of the 1st contract in the Respondent's supplementary record reflects a marking of "**R3**" at its top.

20. I find that the documents contained in the Respondent's supplementary record of appeal are the same documents that the Tribunal referred to in its Ruling which the Appellant omitted from the version of the Joint Trial Bundle included in its record of appeal. In the premises therefore, I do not accept the Appellant's view that the documents contained in the Respondent's supplementary record of appeal amount to new evidence being smuggled into this appeal. The Appellant's objection is accordingly overruled.

1st Ground of Appeal:

That the learned members of the Tribunal erred in law when they ordered that the Applicant to pay taxes amounting to UGX 404,007,535.

21. The Appellant's Counsel argued that the Tribunal disregarded the facts before it and thereby misapplied the definition of a benefit. Counsel noted that there was evidence before the Tribunal showing that the Appellant's staff do not derive any benefit from the fuel. Counsel argued that this was demonstrable by the fact that the Appellant has proper mechanisms, policies and practices to ensure that the fuel is utilized for work-related travels only. The Appellant's Counsel further argued that the Tribunal's interpretation of section 19(2)(d) of the Income Tax Act was erroneous. Counsel also submitted that the Tribunal clearly confused sections 19(2)(d)(ii) and 19(2)(e) on the one hand which oblige an employer to provide meals or refreshments to all full-time employees on equal terms, with section 19(2)(d)(i) which does not. Counsel submitted that the law must be read strictly with no additions and relied on the case of **Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] KB 64.**

22. In reply, Counsel for the Respondent noted that the issue at hand is whether the receipt and subsequent use of fuel cards amounts to a benefit. Relying on the same Blacks' Law Dictionary (11th Edition) definition of a benefit, Counsel submitted that the provision of fuel cards to the Appellant's employees was a benefit. Counsel submitted that the fuel cards fuel the employees' private cars which implies that the fuel cards are provided for private use and not work use. Counsel noted that the Appellant did not provide any evidence to the Tribunal to show that the fuel provided in the employees' private cars was used for only work purposes. Secondly, Counsel argued that section 19(2)(d) is only applicable where it is the employee who has incurred the cost of fuel out of pocket and the employer reimburses the same. The Respondent's Counsel argued therefore that the instant case is different because the cost of fuel availed through the fuel cards is borne by the Appellant as employer and not the employees. Counsel further noted that high ranking officials are given more fuel than the lower-ranking which shows that the fuel cards which are prepaid monthly are a benefit to the Appellant's employees based on seniority.

Resolution:

23. Under Section 19(2)(d) of the Income Tax Act, it is provided that:

> "*Notwithstanding subsection (1), the employment income of an employee does not include—*
>
> *(d) any allowance given for, and which does not exceed the cost actually or likely to be incurred, or a reimbursement or discharge of expenditure incurred by the employee on—*
>
> *(i) accommodation and travel expenses; or*
>
> *(ii)meals and refreshment while undertaking travel, in the course of performing duties of employment*"

24. The cardinal principles for the interpretation of a tax statute were settled by the Supreme Court in **Uganda Revenue Authority v Siraje Hassan Kajura, Civil Appeal No.09 of 2016** where Arach-Amoko JSC (as she then was) adopted the principle in the case of **Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] KB 64** 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.*

25. Under section 19(2)(d)(i) of the Income Tax Act for an allowance given to an employee to qualify as an allowance for accommodation and travel under that section, one only has to prove that:
    a) The employee incurred or will incur those expenses in the course of performing duties of employment; and
    b) The allowance does not exceed the expenses actually incurred or likely to be incurred.

26. In this case, since the allowance is prepaid, by giving the employees fuel cards, the Appellant needed to prove that the fuel provided caters for fuel expenses that will be incurred in the performance of the duties of an employee and that the amount given does not exceed the expenses likely to be incurred.

27. It is the contention of the Appellant that the transport allowance given to its employees meets the requirement of section 19(2)(d)(i) of the Income Tax Act, and is therefore not a benefit attracting income tax.

28. For the Application before the Tribunal, the Appellant relied on its fuel policy which was exhibited as A1. In addition, the Appellant provided under Exhibit A2 documents indicating the amount of fuel allocated to the different employees, the actual monthly consumption, and the vehicles used. They also provided accountability from the employees indicating the

trips made, the number of kilometres covered, the estimated fuel consumption of the vehicle per kilometre, and the number of litres of fuel consumed. The Appellant also relied on the testimony of Nanfuka Winfred that its employees do not derive any benefit or advantage from use of the fuel cards. The key question which was raised by the Tribunal is whether the fuel allowance was used "*in the course of performing duties of employment*". The Tribunal in its Ruling discussed the contracts that were provided in evidence and came to the conclusion that "The relationship between the locations and duties of the employees is missing."

29. According to the *Oxford Advanced Learners Dictionary*, 9th Edition "in the course of" means "during.". Therefore, my interpretation of the phrase "*in the course of performing duties of employment*" is that an employer has to prove that the travel allowance was to cater for transport costs during the performance of an employee's duties. In order to determine whether the travel allowance was for travel expenses incurred or likely to be incurred during the performance of an employee's duties, it is important to relate the duties of employment to the travel in question.

30. As pointed out earlier, the Appellant provided in evidence, information on the travels undertaken by the employees including the destinations, the number of kilometres covered, and the amount of fuel consumed. However, the Appellant did not provide information on the duties of the employees so as to provide that nexus between the travels and the duties of the employees, thus failing to prove that the travels in question were in the course of the performance of the employees' duties. A good example that would clearly fall under section 19(2)(d)(i) of the Income Tax Act is an employee who is a delivery man. In this case, his duties under his contract would clearly indicate the delivery of documents to for example clients. Transport allowance given to such an employee that does not exceed the actual costs incurred or

likely to be incurred during the delivery of those documents meets the requirements of 19(2)(d)(i) of the Income Tax Act. Obviously the destinations in question would have to be known.

31. Under section 26 of the Tax Appeals Tribunal Act, the burden was on the Appellant to prove that the tax in question was incorrect. The contracts provided under Exhibit R 3 did not provide the duties of the employees. I agree with the Tribunal that in the absence of a nexus between the duties of the employee and the travel destination, the allowance was a benefit.

32. The Tribunal also held that *"There is no doubt that a fuel allowance given to the applicant's employees gave them an advantage. For it not to qualify as a privilege one has to show that all employees elsewhere receive fuel allowances."*

33. Counsel for the Appellants argued that section 19(2)(d)(i) of the Income Tax Act does not require an equal distribution of fuel allowances. I agree with counsel for the Appellant. As discussed above one has to prove that firstly, that the employee incurred or will incur those expenses while undertaking travel in the course of performing duties of employment; and secondly that the allowance does not exceed the expenses actually incurred or likely to be incurred.

34. I also do not agree with the Respondent's Counsel's argument that the fuel cards should be treated as a benefit because the fuel was used in the employees' private cars. Whereas there is a likelihood that fuel put in an employee's private car will potentially be used for personal errands, the guiding principle should always be what is laid out in section 19(2)(d)(i) of the Income Tax Act.

35. I equally do not agree with the argument that because different employees get different amounts of fuel, that's a

benefit. It is clear that for a travel expense to be exempted from tax under section 19(2)(d)(i) of the Income Tax Act, the key issue is to determine whether the allowance is required in the course of the performance of one's duties. Employees carrying out different roles will not necessarily require the same amount of fuel to carry out those duties. Equity should not be read into this provision.

36. Counsel for the Respondent further argued that section 19(2)(d) of the Income Tax Act is only applicable where it is an employee who has incurred the cost of fuel out of pocket and the employer reimburses the same. The section uses the words "*reimbursement or discharge of an expense actually incurred or likely to be incurred*". The provision envisages an allowance given in advance of incurring the travel expense. This argument too cannot stand.

37. In conclusion, I find that the Appellants did not prove that the travels in question were carried out by its employees in the performance of their duties of employment as required under section 19(2)(d)(i) of the Income Tax Act. I therefore answer this ground in the negative.

2nd Ground of Appeal

The learned members of the Tribunal erred in law when they ordered that the Appellant should pay taxes amounting to UGX 404,007,535.

38. Counsel for the Appellant submitted that the Tribunal overtaxed the Appellant when it ordered the Appellant to pay taxes amounting to UGX 404,007,535 as assessed instead of UGX 289,670,742. Counsel noted that the sum of UGX 404,007,535 of the taxes in dispute was comprised of PAYE on Fuel Cards amounting to UGX 289,670,742 and PAYE on Air Tickets amounting to UGX 114,336,793. Counsel noted further that the appellant agreed and paid the PAYE tax on

the Air Tickets amounting to UGX 114,336,793 during the objection stage, leaving the sum of UGX 289,670,742 only as the outstanding PAYE tax under that assessment. Counsel submitted that this was erroneously confirmed by the Tribunal's ruling that the Appellant was liable to pay taxes amounting to UGX 404,007,535 when actually the Appellant ought to have been required to pay taxes amounting to UGX 289,670,742.

39. In reply, the Respondent's Counsel submitted that the Tribunal is empowered by section 19(a) of the Tax Appeals Tribunal Act to make a decision affirming the decision of the Respondent. Counsel argued that the Tribunal therefore acted within its powers when it ruled that the Applicant was liable to pay taxes amounting to UGX 404,007,535 as the PAYE relating to the fuel cards.

40. I have reviewed the record of proceedings and noted that in the Application to the Tribunal which is on page 6 of the record of appeal, the amount of tax in dispute was stated as UGX. 527,547,260. (This included the tax in relation to labour services that the Tribunal set aside). The agreed facts as per page 363 of the record of proceedings refer to UGX. 404,007,535 as the contested Pay As You Earn Tax for fuel. On page 364 of the record, the disputed tax in relation to services rendered by the labourers was stated as UGX. 123,539,723. Counsel for the Applicant in their written submissions prayed that the assessment for UGX. 404,007,535 and UGX. 123,539,723 be set aside.

41. I have not found anywhere in the record where it was brought to the attention of the Tribunal that the UGX. 404,007,535 includes the tax of UGX. 114,336,793 in regard to air tickets or that the said UGX. 114,336,793 was paid by the Appellants.

42. From its Ruling, the Tribunal allowed the Application on the terms that:

1. *The Applicant should pay the PAYE of Shs. 404,007,535 on the fuel cards issued.*
2. *The withholding tax assessment of Shs. 123,539,723 is set aside.*
3. *The applicant is entitled to half of the costs of the Application.*

43. The decision of the Tribunal affirmed the objection decision of the Respondent in accordance with section 19(1)(a) of the Tax Appeals Tribunal Act. In the circumstances, in the absence of any evidence of payment of the said UGX. 123,539,723, I cannot fault the Tribunal for ordering the Appellants to pay the assessed tax of UGX. 404,007,535. I, therefore, answer this ground in the negative.

The 3rd ground of appeal:

The learned members of the Tribunal erred in law in failing to properly evaluate the evidence on record thereby coming to the wrong conclusion.

44. The Appellant re-echoed their submissions under the 1st ground of appeal and submitted that the real issue before the Tribunal was whether the fuel card allowances provided are utilized for personal use or not. The Appellant's Counsel submitted further that Exhibit A2 at page 24 of the Record of Appeal provided details of the employees' Motor Vehicle registration numbers, employee numbers & names, monthly fuel allocations, monthly consumption and fuel card numbers. Counsel argued that this information was sufficient for the Respondent to make an informed verification of the amount of fuel used and whether it was for the intended use.

45. In reply, the Respondent's Counsel submitted that the evidence presented before the Tribunal was duly evaluated

and duly considered to reach a proper determination as evident in the ruling.

46. As already discussed under the resolution of ground 1, the Tribunal evaluated the evidence before it and found that the Appellant did not provide evidence linking the travel destinations to the duties of the employees who were given fuel cards. I, therefore answer this ground in the negative.

47. In conclusion, therefore, the Appeal is dismissed with costs to the Respondent.

Dated this 1st day of September 2023.

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Patricia Kahigi Asiimwe
Judge
Delivered on ECCMIS