TAX APPEALS TRIBUNAL

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 29 OF 2020

GAKOU AND BROTHERS ENTERPRISES LIMITED :::::::::::::::::::::::: APPLICANT

VERSUS

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

BEFORE DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MR. GEORGE MUGERWA

RULING

This ruling is in respect of an application challenging the respondent's decision to impose an export levy of Shs. 28,580,296 and a penalty of US$ 3,000 for purported exports of hides and skins and imports of spice respectively on the applicant.

The applicant exports hides and skins to Nigeria. In March 2011, the respondent carried an audit on the applicant where it issued an export levy assessment of Shs. 28,580,296 for purported export of hides and skins and a penalty of US$ 2,000 for import of spice.

The following issues were agreed upon.

1. Whether the applicant is liable to pay the tax and penalty assessed?
2. What remedies are available to the patties?

The applicant was represented by Mr. Denis Mbasa while the respondent by Mr. Sam Kwerit.

The dispute revolves around an export levy and penalty imposed on the applicant for exports of Hide and Skins to Nigeria and import of spice from the Democratic Republic of Congo respectively.

The applicant's first witness, Mr. Nelson Outa, a clearing agent testified that sometime around 6th November 2018, the applicant through its director, Mr. Muhammad Gakou requested him to clear hides and skins destined to Nigeria. He accepted the offer and obtained permission to export from the ministry of agriculture and animal department. That he loaded the goods on a truck for export. That when he went to obtain an assessment from the respondent he was informed that the export was not subject to taxes. The goods were exported. He was late informed by Mr. Mohammad Gakou that the respondent has demanded for taxes. He contended that it was the respondent who advised them that they were not liable to pay taxes. Hence they should not be penalized. The witness testified that the applicant is not exempt from paying taxes. It did not pay taxes.

The applicant's second witness, Mr. Obonyo Abubakar, it's accountant, testified that one Mr. Gazama was allowed to export hides and skins to Nigeria using the applicant's Tax Identification Number (TIN) on condition that he pays the taxes and costs. In 2019, the respondent conducted an audit on the applicant and it demanded that the latter pay taxes for the hides and skins. He admitted that the applicant did not pay taxes for the hides and skins because it's clearing agent told them that there were no taxes to pay. The respondent also penalized the applicant for import of spices from the Democratic Republic of Congo. He contended that the penalty imposed was illegal and wrong. The applicant also did not pay taxes for the spices as they were produce.

The respondent's witness, Mr. Ismail Nyanzi, an officer in its customs audit unit, testified that the respondent conducted a customs post clearance audit on the applicant for the period January 2014 to January 2019. The audit revealed that the applicant exported hides and skins to Nigeria without paying export levy of Shs. 28,580,296. The respondent further established that the applicant imported spices allegedly from the Democratic Republic of Congo but there was no evidence of importation. The importation was considered as smuggling and a penalty of US$ 2,000 was imposed on the applicant. He testified that the applicant is not a tax exempt entity.

In its submission, the applicant contended that the imposition of penalty was illegal and irrational. It contended that the applicant had never been found in possession of smuggled goods nor been prosecuted. The applicant contended that whereas the law places the burden on it to prove that it is not a smuggler, it shifts to the respondent after having adduced evidence that it has never smuggled or been found in possession of unaccustomed goods. The applicant cited Sections 200, 203 and 209 of the East African Community Customs Management Act (EACCMA) which provides that a person who commits an offence is liable to conviction. The applicant contended that it has not been found guilty by a competent court, nor convicted or sentenced to pay a fine.

The applicant submitted that Article 42 of the Constitution provides that a person appearing before an administrative official or body has a right to be treated justly and fairly. The applicant cited *David Tinyefuza v Attorney General* Constitutional Petition 1 of 1996 where the Court held that the right to fair hearing was not derogable. The applicant also cited *Zachary Olum and another v Attorney General* Constitutional Petition 6 of 1999 where the court said that "if a petitioner is to enjoy a fair hearing which affords him an opportunity to canvass all matters before the court that would support his case, then he ought to be allowed, subject to the law, to put in evidence, all such evidence receivable by this court, that supports or purports to support his case…" The applicant contended that it was not heard nor afforded an opportunity to call witnesses or cross-examine.

The applicant submitted that S. 210(1) of the EACCMA read together with Article 139 of the Constitution confers jurisdiction on magistrate's courts and the High Court to try accused persons under the Act. The applicant contended that the respondent does not have jurisdiction to try person for criminal offences. The applicant cited *Anisminic Ltd. v Foreign Compensation Commissioner* [1969] 2 AC 147 where the court stated that any error of law made by a public body will make its decision a nullity. The applicant argued that decision to impose a penalty was illegal, irrational and fundamentally tainted with procedural impropriety. The applicant also cited *Twinomuhanig v Kabale District and others* [200] HCB 130 where the court held that "Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a

decision. The unfairness may be in the non-observance of the rules of natural justice or to act with procedural fairness towards one affected by the decision." The applicant also cited *Ndimwibo and another v Uganda Revenue Authority* Civil suit 2021/424 where the court stated a penal tax cannot be imposed without a conviction. The applicant further cited *Chandoo Enterprises (EA) Limited v Uganda Revenue Authority* Civil Suit 2011/1 where the court stated that "According to section 200(d)(iii) of the Act, any person who commits an offence under the provision is liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty percent to the dutiable value of the goods involved, or both." The applicant contended that the respondent can only impose penalty on the applicant if it had accepted that it committed an offence and applied under S. 219 of the EACCMA for the offence to be compounded.

The applicant relied on the doctrine of legitimate expectation and argued that the respondent represented that the export of hides and skin did not attract export duty and therefore the latter cannot turn around and deprive it of the benefit of the representation. The applicant contended that legitimate expectations include expectations that go beyond legal rights. It may be based on some statement or undertaking by or on behalf of a public authority which has the duty of making the decision. When a public authority has promised to follow a certain procedure it is in the interest of good administration that it should act fairly and should implement its promise as long as it does not interfere with its statutory duty.

The applicant cited *Borissik Svetlana v Urban Redevelopment Authority* [2009] 154 where the court stated that the required conditions for legitimate expectation are;

1. The representation must be clear, unambiguous and not have any relevant qualification.
2. The expectation must be induced by the behavior of the public authority.
3. The representation must have been made by someone who had actual or apparent authority.
4. The representation must be applicable to the aggrieved parties.

The applicant also cited *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult* [no. 2][2008] UKHL 61 where it was stated that

1. The representation may arise from either the words used or the behavior of the parties.

2. The aggrieved party must not have utilized fraudulent measures to obtain the representation and must have disclosed all relevant information.

The applicant contended that when it applies the above tests, there was a legitimate expectation from the respondent to the applicant.

In reply, the respondent raised two preliminary objections. The first objection was that under S. 229 of the EACCMA, a person directly affected by the decision or omission of the Commissioner on matters relating to customs shall within 30 days lodge an application of review to the Commissioner. The respondent contended that it communicated its audit findings to the applicant who ought to have applied for review to the Commissioner and then later appealed to the Tax Appeals Tribunal, which it did not. The applicant applied to the tribunal directly. The respondent contended that the application was premature.

The second objection was that the application was time barred. The respondent contended that S. 14(1) of the Tax Appeals Tribunal Act provides that any person who is aggrieved by a decision under a taxing Act should apply for review. S. 230(2) of the EACCMA provides that any person intending to appeal should apply within 45 days after being served with the decision. The respondent contended that S. 16(2) and (7) of the Tax Appeals Tribunal Act provide for extension of time for applications. The respondent cited *Uganda Revenue Authority v Uganda Consolidate Properties Limited* Civil Appeal 75 where the Court of Appeal stated that "Timelines set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with." The respondent submitted that it communicated its taxation decision to the applicant on 30th March 2019 which was received on the same date. The applicant ought to have lodged its application within 45 days from 30th March 2019 which it did not.

The respondent contended that the applicant is liable to pay the custom duties levied against it. The post clearance audit established that the respondent exported hides and skins without paying export levy of Shs. 28,580,296. The respondent also submitted that the applicant exported spices to West Africa which were sourced from the Democratic Republic of Congo. There was no import date traced in the Asycuda world system of the

respondent. The applicant was fined a penalty of US$ 2,000 for smuggling. The respondent contends that the applicant did not rebut its evidence. Therefore it was justified in considering that it was smuggling and imposed the penalty.

The respondent contended that the principle of legitimate expectation does not override a statutory provision. The respondent cited *Republic v Kenya Revenue Authority ex parte Shake Distributors* {2012} ekLR where the court stated that for the promise to hold, the same must be within the confines of the law. The respondent also cited *Justice Kalpana Rawal v Judicial Service Commission and 3 others* {2016} eKLR where it was stated that the law does not protect every expectation save only for those which are legitimate. The respondent contended that it has no power to excuse any one from paying taxes. The respondent cited *R v Inland Revenue Commissioner ex parte MFK Underwriting Agents Limited* [1989] STC 873 where it was stated that "Every ordinary sophisticated tax payer knows that the Revenue is a tax- collecting agency, not a tax – imposing authority. The tax payer's only legitimate expectation is, prima facie that he will be taxed according to statute, not concession or wrong view of the law…" The respondent concluded that the applicant should not hide behind the wings of legitimate expectation to dodge payment of taxes.

In rejoinder, the applicant objected to the preliminary objection arguing that it was brought in bad faith. The applicant contended that the respondent ought to have pleaded the preliminary points of law. If not pleaded they take the applicant by surprise. The applicant cited *Yaya v Obur and others* Civil Appeal 81 of 2018 where it was stated that a defendant who intends to raise the defence of the Limitation Act or the suit is time barred, it must specifically plead that defence. The applicant contended that the respondent never pleaded limitation as a defence.

The applicant contended that the penalty was illegally imposed. Courts cannot condone an illegality. The applicant cited *Scott v Brown* Doering MCNO1 & Co. (3) (1892) 2QD 724 where the court stated that it is trite law that courts will not condone or enforce an illegality. The applicant also cited *Active Automobiles Spares Ltd. v Crane Bank Limited*

and another Civil Appeal 21 of 2001 where the Supreme court opined that courts of law will not enforce an illegal act. The applicant contended that the respondent does not have powers to convict a person as a court.

Having listened to the evidence of both parties, perused their exhibits and read their submissions this is the ruling of the tribunal.

The respondent raised two preliminary objections which the Tribunal will address first before discussing the other issues. Without going through a long discussion, it is trite law that a preliminary objection on a point of law can be raised at any time during a trial.

The first objection raised by the respondent was that the application before the Tribunal was premature. The respondent conducted a post clearance audit on the applicant for the period January 2014 to January 2019 in line with Sections 235 and 236 of the East African Community Customs Management Act (EACCMA). The audit finding dated 30th March 2019 established that the respondent exported hides and skins to Nigeria and did not pay export levy. The said audit also revealed that the applicant imported spices into Uganda from the Democratic Republic of Uganda which it considered as smuggling. The applicant was fined a penalty of US$ 2,000. The applicant aggrieved by the audit findings filed an application before the Tribunal.

The procedure for resolving customs disputes is set out in the EACCMA. S. 229 of the said Act provides that:

> "(1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.
>
> (2) The application referred to under subsection (1) shall be lodged with the commissioner in writing stating the grounds upon which it is lodged."

In this matter, the applicant did not apply for a review of the audit findings to the Commissioner. Where a statute sets out a procedure to be followed in the event of a dispute, the said procedure should be exhausted before coming to the Tribunal. There is

no appeal before the Tribunal. Therefore the application by the applicant was premature as it did not exhaust the procedure set out in the EACCMA in respect of custom disputes.

The second objection by the applicant was that this matter was time barred. The respondent communicated the audit findings to the applicant on the 30th March 2019. The applicant filed this application on 16th April 2020. This was after a year. S. 230 of the EACCMA provides that:

> "(1) A person dissatisfied with the decision of the Commissioner under section 229 may appeal to a tax appeals tribunal established in accordance with section 231.
>
> (2) A person intending to lodge an appeal under this section shall lodge the appeal within forty-five days after being served with the decision, and shall serve a copy of the appeal on the commissioner."

The Tribunal already stated that there is no appeal before it. If the Tribunal were wrong to state that there is no appeal, the application filed by the applicant would be time barred. It was filed outside the prescribed forty five days period.

Therefore on both preliminary objections, this application ought to be and is dismissed. The Tribunal can only comment on the export levy imposed on the applicant of Shs. 28,580,296 and the penalty of US$ 2,000 as per curiam. That is, they do not form the basis of the decision of the Tribunal.

The applicant contends that it did not pay the export levy because it was informed by the respondent that there were no taxes due. The applicant relied on the doctrine of legitimate expectation. The applicant does not disclose the officer of the respondent who informed them of that position. The Tribunal is not in a position to state whether such officer could bind the respondent. The applicant cited *Borissik Svetlana v Urban Redevelopment Authority* [2009] 154 where it was stated that the representation must have been made by someone who had actual or apparent authority. Neither does the applicant inform the tribunal of the actual statement that constituted the disclosure. The applicant cited *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult* [no. 2][2008] UKHL 61 where it was stated that the representation may arise from either the words used or the behavior of the parties. The representation must be clear and unambiguous.

Lastly, the representation must be legitimate. In *Kalpana Rawal v Judicial Service Commissioner and 3 others* {2016} E KLR Civil Appeal 1 of 2016 the court cited *South African Veterinary Council v Szymanski* 2003 ZASCA 11 where it was stated that the law does not protect every expectation save only for those which are legitimate. In *Republic v Kenya Revenue Authority ex parte Shake Distributors* {2012} ekLR the court stated that for the promise to hold, the same must be within the confines of the law. A representation which allows a taxpayer not to pay taxes when there are due cannot be said to be legitimate. Courts cannot honour such an expectation as it is illegitimate.

The audit findings imposed a penalty of US$ 2,000 on the applicant under S. 203 of the EACCMA. The said Section provides for punishment of offences where one makes or uses false documents. It provides that where one commits an offence he shall be liable to conviction for a term or a fine not exceeding ten thousand dollars. For one to be fined under the said Section it ought to be convicted. In this case, the applicant was not convicted. However, the Tribunal is not in a position to remedy the grievance as it does not have jurisdiction to entertain that aspect of the application. The applicant contended that once an illegality is brought to the attention of court it should not condone it. A tribunal like a court cannot vest itself with jurisdiction where a matter is prematurely brought before it or is time barred. It cannot use illegal means to remedy an illegality.

This application is therefore dismissed with costs.

Dated at Kampala this 30th day of July 2021.

DR. ASA MUGENYI	**DR. STEPHEN AKABWAY**	**MR. GEORGE MUGERWA**
CHAIRMAN	**MEMBER**	**MEMBER**