THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBBUNAL AT KAMPALA

APPLICATIONS NO. 025 OF 2020

GAME DISCOUNT WORLD (UGANDA) LIMITED==========APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ==========RESPONDENT

BEFORE DR. ASA MUGENYI, MR. GEORGE MUGERWA, MR. SIRAJ ALI

RULING

This ruling is in respect of a preliminary objection raised by the respondent that the above application is time barred.

The applicant filed an application in the Tax Appeals Tribunal seeking to review import duty, withholding tax and Value Added Tax (VAT) assessments of Shs. 21, 485,110,040 issued by the respondent on it for the period July 2013 to December 2017.

Sometime around 9th July 2019, the respondent informed the applicant of an audit finding done on it which indicated a tax liability of Shs. 32,907,788,016. On 9th August 2019, the applicant objected to the finding and applied to the Commissioner to review the decision. On 18th December 2019, the respondent reviewed the decision and communicated to the applicant a tax liability of Shs. 21,485,110,040. On 20th January 2020 the applicant wrote to the respondent objecting to the respondent's decision. On 5th February 2020, the respondent wrote to the applicant maintaining its position. The said communication was received by the applicant on the 6th February 2020. The applicant filed its application before the Tribunal on 6th March 2020.

The applicant was represented by Mr. Ronald Kalema while the respondent by Mr. Ronald Baluku, Mr. Aliddeki Alex Sali and Mr. Sam Kwerit.

The respondent raised a preliminary objection that the applicant's application was time barred. The respondent cited O.15 r.2 of the CPR which provides that a court may try any issue of law which may dispose of a case. The respondent also cited *Mukisa Biscuit Manufacturing Company v West End Distributors Ltd.* [1969] EA 696 where it was stated that a preliminary objection consists of a point of law which has been pleaded which arises by clear implication out of pleadings and if argued as a preliminary point may dispose of the suit. The respondent contended that S. 230 of the East African Community Customs Management Act (EACCMA) provides that a person shall lodge an appeal within forty-five days after service of the decision. The respondent also cited S. 16(2) and (7) of the Tax Appeals Tribunal Act which provides that an applicant for review of a taxation decision shall be *made* within six months after the date of the taxation decision. The respondent also cited *Uganda Revenue Authority v Uganda Consolidated Properties Limited* Civil Appeal 75 of 2000 where the court stated that timelines set by statutes are matters of substantive law and not mere technicalities. The respondent further cited *Cable Corporation v Uganda Revenue Authority* Civil Appeal 1 of 2011 where the court observed that the respondent does not have powers to review its objection decision. The respondent argued that the objection decision was communicated to the applicant on 19th December 2019. By the time the applicant filed its application for review of the objection decision on 6th March 2020 it was outside the mandatory 45 days prescribed by the EACCMA.

Without prejudice, the respondent argued that time for filing the application began to run after the service of the taxation decision of 18th December 2019 and not that of 6th February 2020. The letter of 6th February 2020 merely maintained the position stated in the letter of 18th December 2019. The application is still outside the mandatory 45 days' period prescribed by the EACCMA.

In reply, the applicant conceded that the respondent can raise a preliminary objection at any time during the trial. The applicant also raised a preliminary objection. It contended that the respondent filed its Form TAT 2 on the 16th April 2020 outside the prescribed time. Therefore, the respondent does not have locus standi in this matter nor can it raise a preliminary objection. The applicant argued that S. 17 if the Tax Appeals Tribunal Act provides that the respondent ought to have lodged a notice of the decision, a statement giving reasons for the decision not later than thirty days from being served with served with the application. This is similar to Rule 14 of the Tax Appeals Tribunal Procedure Rules. The applicant submitted that it served the respondent with the application on the 6th March 2020. The respondent therefore filed its statement of reason outside the mandatory 30 days prescribed by the law. The applicant cited the above case of *Uganda Revenue Authority v Uganda Consolidated Properties Limited* (supra).

The applicant submitted that locus standi was defined in *Dima Dominic poro v Inyani Godfrey and Apiku Martin* Civil Appeal 7 of 2016 as to mean a place of standing. It means a right to appear in court, and conversely to stay a person has no locus standi means that he has no right to appear or be heard in a specified proceeding. The applicant argued that therefore the respondent does have a right to be heard. The respondent is improperly appearing before the Tribunal.

In respect of the respondent's preliminary objection, the applicant argued that it was misconceived and not merited. The respondent is not sure whether the decision that is the objection decision was the letter of 9th September 2019 or that of 18th December 2019. The applicant contended that the objection decision that was made in respect to its application was made on 20th January 2020.

The applicant also contended that the letter of 9th September 2020 was not an objection within the meaning of S. 229(4) of the EACCMA. The applicant contended that the respondent has never communicated an assessment of Shs. 21,485,110,040. The applicant contended that S.17(1)(a) of the Tax Appeals Tribunal Act requires that form

TAT 2 is lodged with two copies of the notice of the decision. The respondent did not lodge the letter of 9th September 2019.

The applicant submitted that if the Tribunal was to consider the letter of 18th December 2020 as the objection decision, it would be time barred. The applicant contended that it submitted its application for review on 9th August 2019. This would make the objection decision illegal and of no consequence. The applicant cited *Republic v The Commissioner of Customs Services, Ex parte Tetra Pak Limited* MA 221 of 2010 where the court stated that S. 229 (4) of the EACCMA requires that the Commissioner must make and communicate a decision to the affected taxpayer within 30 days. If no *decision* is made and communicated within 30 days, the respondent under S. 229(5) is deemed to have made a decision allowing the application for review.

The applicant invited the Tribunal to scrutinize the letter of 20th January 2020. It contended that it raised new issues. The respondent provided its detailed working on 9th January 2020. These raised new issues addressed by the applicant which included the fallback remittance method used, inclusion of payments to local supplies, inclusion of payments to the respondent for routine tax obligations, double counting of figures, failure to consider opening and closing balances.

The applicant contended that taxation is like trespass which is a continuing tort. Every assessment or decision made by the respondent is a new *decision* that creates a fresh cause of action for the aggrieved taxpayer. The applicant cited *Stanbic Bank Holding Limited v Uganda Revenue Authority* TAT Application 14 of 2018 where the Tribunal stated that:

> "…whenever the respondent issues an assessment or makes a decision, an aggrieved party has the option of objecting to the said decision. It is irrelevant whether a demand or an assessment is made or not but it is a decision. The said assessment or decision creates a fresh cause of action. Taxation is like trespass."

The applicant contended that the letter of 18th December 2020 created a fresh cause of action.

The applicant prayed that the Tribunal finds that the respondent form TAT 2 lodged is time barred. The respondent has no locus standi to appear in this application nor raise a preliminary objection. The preliminary objection is not merited and should be dismissed with costs.

In rejoinder, the respondent contended that the preliminary objection by the applicant is diversionary. The respondent contended that a court is required to determine the legality and the tenability of a suit before it may determine the propriety of a defence. The respondent cited *Katuntu v MTN Uganda and another* HCCS 248 of 2012 where the court stated the question of whether there is a proper defence on merits to the action is a matter that can only be considered if the court finds that suit is properly before it.

The respondent contended that it had locus standi. It cited *Njau and others v City Council of Nairobi* [1976-1985] 1 EA 407 where the term 'locus standi' was also said to mean a place of standing. It means a right to appear in court. The respondent contended that if a party has been refused to file a defence it is forbidden from appearing in court to adduce evidence or argue on facts but it has a right in law to argue issues of law only. The respondent cited also *Attorney General v Sengendo* [1972] 1 EA 356 where the court said it has discretion to allow a defendant to be heard. It argued that the Tribunal has discretion to allow it to defend a matter.

In rejoinder to the first applicant's preliminary objection, the applicant argued that the provisions of the Tax Appeals Tribunal Act do not grant it discretion to extend time for the respondent to file a defence where there is no valid defence filed. The applicant cited *Rio Insurance Co. Ltd. v Uganda Revenue Authority* Application 6 of 1999, where the court stated that although S. 23 (now 22) of the Tax Appeals Tribunal Act empowers the Tribunal to direct the application of rules of practice and procedure of any court such powers are limited by S. 18 (now 17) of the Act which does not allow the Tribunal to extend time to enable the respondent to file late documents. The applicant argued that the Tribunal has no discretion to grant the respondent locus standi to argue its application.

Having read the submissions of the parties this is the ruling of the Tribunal.

In this application there are two preliminary objections. The first one was raised by the respondent in respect of the legality of the application while the second one was in respect to the statement of reason lodged and the locus standi of the respondent in this matter. The preliminary objection of the respondent was raised first and therefore it has to be addressed first as it was the first in time. We shall then address the one of the applicant and appreciate its consequences.

The respondent contended in its preliminary objection that the application of the applicant was time barred. Sometime around 9th July 2019, the applicant was informed of an audit finding done on it which indicated a liability of Shs. 32,907,788,016. On 9th August 2019, the applicant objected to the audit findings. On 18th December 2019, the respondent communicated to the applicant a tax liability of Shs. 21,485,110,040. The said communication was served on the applicant on 19th December 2019. On 20th January 2020, the applicant wrote to the respondent objecting to the latter's decision. On 5th February 2020, the respondent wrote to the applicant maintaining its position. The said communication was received by the applicant on 6th February 2020. The applicant filed its application before the Tribunal on 6th March 2020.

The dispute between the parties was in respect to which method of customs valuation should be applied to the applicant's imports. The dispute fell under the East African Community Customs Management Act (EACCMA). S. 229(1) of the EACCMA provides that:

> "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."

S. 229(4) of the same Act provides that:

> "The Commissioner shall within a period not exceeding thirty days of receipt of the application under subsection (2) and any further communication the Commissioner may

require from the person lodging the application communicate his or her reason in writing to the person lodging the application stating the reasons for the decision."

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 an appeal with forty five days after being served with the decision, and shall serve a copy of the appeal on the Commissioner."

After a customs post clearance audit, the commissioner communicated o the applicant around 9th July 2019 a liability of Shs. 32,907,788,016. On 9th September 2019, the applicant objected to the audit. Under S. 229(4) the Commissioner had 30 days to communicate his decision which he did not do. The applicant did not elect to treat the omission of the Commissioner to make a decision within the prescribed time as having made a decision. On the 18th December 2019, having reviewed the applicant's objection the respondent issued a revised tax liability of Shs. 21,485,110,040. The said letter was served on the applicant on the 19th December 2019. By filing an application before the Tribunal when the time for the commissioner to communicate his decision to the applicant had expired the latter treated the letter of 18th December 2019 as the decision in contention. In its application, the applicant did not raise the issue of omission of the Commissioner making a decision outside the prescribed time as a ground for review. Therefore the decision the applicant is challenging is the decision of 18th December 2019 and not the omission to make a decision. Under S. 230 (2) of the EACCMA the applicant was obliged to lodge an appeal with the Tax Appeals Tribunal within 45 days from the date of service of the decision, i.e. from 19th December 2019. The forty-five days would have expired around 3rd February 2020. The applicant filed its application on 6th March 2020 meaning it was time barred.

The applicant objected to the respondent's decision by a letter dated 20th January 2020. On 5th February 2020 the respondent wrote to the applicant which letter was received on the 6th February 2020. In *Cable Corporation v Uganda Revenue Authority* Application 6 of 2020 the Tribunal cited *Uganda Revenue Authority v Uganda Consolidated Properties* (supra) where it was stated that:

> "In the law of limitation, as I know it, writing letters even those with negative contents, may have the undeserved effect of reviving an otherwise stale cause. In this case it did just that and we up-date the decision to mid-June 1999."

The Tribunal was of the view a letter can rejuvenate a cause of action. The Tribunal stated that: "We agree with the applicant that time continues to run if there is further communication that opens the subject by reviewing the assessments." In *Cable Corporation (U) Ltd v Uganda Revenue Authority,* High Court Civil Appeal No.1 of 2011 the High Court was of the view that the Tribunal was lenient by allowing further communications to extend the time for filing an application. It was of the view that once a Commissioner has made an objection decision it become functus officio. It stated that:

> "Will it not encourage corrupt practices. What principles of law or policy or standards will the Respondent use to review its own objection decision pursuant to a further objection to it by the taxpayer? Does a taxpayer have a right to object to an objection decision to the same authority? How many time can a taxpayer object to an objection decision."

The court held that a taxation decision means any assessment, determination, decision or notice. In this case we do not have an objection decision but a tax decision. The law is silent on where the respondent usually makes more than one decision, which may be out of sheer ignorance that once it has made a decision it cannot review it, or as a result of over zealousness on the respondent's part that it is obliged to reply all communications by aggrieved parities. At times the taxpayer, as noted, goes back to the respondent with the hope of influencing a decision. This is because the law allows an aggrieved party to file an application where there is a taxation decision. As a result, the tribunal is at times faced with multiple decisions from the respondent and has to choose from them the final decision. Where the taxes have been reduced, it reduces the complexity of the dispute before the Tribunal. Therefore, we take the last decision made as the one that counts.

The Tribunal has to ask itself whether the letter of 5th February 2020 reopened the matter or was a new decision. A perusal of the said letter does not show so. The said letter states that; "… we would like to inform you that our decision as earlier communicated and as stated above still stands and is final." The letter maintains the position stated in the letter of 18th December 2019. Therefore, the letter of 5th February 2020 did not revive any cause of action. This means that the applicant's case is still time barred. In *Uganda Revenue*

Authority v Uganda Consolidated Properties Ltd Civil Appeal No. 75 where the Court of Appeal held that: "Timelines lines set by statutes are matters of substantive law and not, mere technicalities and must be strictly complied with". Therefore, the applicant ought to have complied with the timelines set in the EACCMA.

The applicant contended that the statement of reasons of the respondent was lodged out of time. The applicant served the respondent its application on the 6th March 2020. The respondent filed its statement of reason TAT form 2 on the 16th April 2020. S. 17 of the Tax Appeals Tribunal Act provides that:

> "17. Lodging of material documents with the tribunal.
>
> (1) Subject to this Section, not later than thirty days after being served with a copy of an application to a tribunal to review a taxation decision, the decision make shall lodge with the tribunal two copies of –
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> (a) the notice of the decision;
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> (b) a statement giving the reasons for the decision; and
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> (c) every other document in the decision maker's possession or under his or her control which is necessary to the tribunal's review of the decision."

The respondent does not dispute that it filed its statement of reasons on the 16th April 2020. Having been served with the application on 6th March 2020 it ought to have filed its statement of reason on 6th April 2020. Therefore, the statement of reasons is time barred and it is struck out. The respondent therefore is not entitled to have locus standi in this matter.

A question remains as to what then is the fate of the application. In *Mukula International Limited v Cardinal Nsubuga* Civil Appeal 14 of 1982 it was stated that once an illegality is brought to the attention of court it takes precedence over all pleadings. It has been brought to the attention of the Tribunal that the application filed by the applicant is time barred. That is an illegality that the Tribunal cannot ignore.

Furthermore, in *Katuntu v MTN Uganda and another* HCCS 248 of 2012 the court stated:

> "The question of whether there is a proper defence on the merits to the action is a matter that can only be considered if the court finds that the suit is properly before court."

The Tribunal like any other court would first need to look at the legality of the application before it, before it can address the legality of the statement of reason. In other words, the Tribunal has to determine the objections to the application being time barred before it can consider those in respect of the statement of reasons being lodged outside the prescribed time or the issue of locus standi. Without prejudice, even if the statement of reason is struck out, the Tribunal on its own motion or within its own discretion can determine the legality of the application before it.

Therefore, this application is dismissed. Since the respondent does not have locus standi it cannot be awarded costs. No order as to costs.

Dated at Kampala this 5th day of July 2021.

DR. ASA MUGENYI **MR. GEORGE MUGERWA** **MR. ALI SIRAJI**

CHAIRMAN **MEMBER** **MEMBER**