

THE REPUBLIC OF UGAND
IN THE TAX APPEALS TRIBUNAL AT KAMPALA
APPLICATION NO. 102 OF 2018.

MINI BAKERIES (U) LTD **APPLICANT**

VERSUS

UGANDA REVENUE AUTHORITY **RESPONDENT**

BEFORE: DR. ASA MUGENYI, MR. GEORGE MUGERWA, MS. CHRISTINE KATWE

RULING

This ruling is in respect of an application challenging a penal tax assessment of Shs. 52,881,046 for underestimating provisional tax for the period 2017 to 2018.

The applicant is a company duly incorporated in Uganda and is engaged in bakery. On the 17th December 2017, the applicant filed a provisional income tax return for the period 2017/2018 with an estimated tax liability of Shs. 311,446,187. On the 25th June 2018, the applicant filed an amended provisional income tax return of Shs. 450,000,000 as an estimated tax liability. On 7th December 2018, the applicant filed its final income declaring a tax liability of Shs. 793,783,590. Upon submission of the final return the respondent issued a penal tax assessment of Shs. 52,881,046.

The following issues were agreed upon;

1. Whether the applicant is liable to pay penal tax?
2. What remedies are available?

The applicant was represented by Ms. Jackie Aturinda while the respondent by Mr. Stuart Aheebwa and Mr. Banabas Nuwaha.

The applicant's witness, Ms. Yvonne Tusiime, a tax consultant with its tax agent, testified that the applicant filed its provisional return on 17th December 2017 for the period 2017/2018 with an estimated tax liability of Shs. 311,446,187. The applicant paid Shs.

294,103,660 as a provisional tax and the applicant had a withholding tax credit of Shs. 41,896,831. She testified that due to increase in the applicant's estimated income for the year, the chargeable income was Shs. 2,620,000,638 with a tax liability of Shs. 786,000,941. She further testified that the total tax paid at the time was Shs. 336, 000,491 which the applicant accounted for. The outstanding provisional tax for the year was Shs. 450,000,000. On the 25th June 2018 the applicant amended the provisional return to indicate a tax liability of Shs. 450,000,000. The correct tax of Shs. 786,000,941 was paid. Ms. Tusiime testified that an error was detected after the due date of amending the returns. The applicant wrote to the respondent informing them of the error. The respondent rejected the request and instead issued a penal assessment of Shs. 52,881,104. The witness admitted that the applicant did not correct the error in the amendment. The error was discovered after filing the final return. The final return was filed on 7th December 2018. The applicant did apply for a waiver from the Minister of Finance.

The respondent did not call any witnesses. It opted for submissions.

The applicant submitted that it filed a provisional income tax return for the period 2017/2018 with an estimated tax liability of Shs. 311,446,187 and paid Shs. 292,226,110. An amended provisional return was filed in 2018 with an estimated income tax of 450,000,000 which was paid. The applicant contended that the return filed showed income of Shs. 1,500,000,000 which was an error in the figures declared compared to the final return of 7th December 2018 with chargeable income of Shs. 2,645,945,303. The applicant submitted that the total provisional tax it paid was Shs. 784,122,941. The applicant contended that it communicated to the respondent about the error in figures declared but the respondent did not respond instead the system generated a penal tax assessment of Shs 52,881,046.

The applicant argued that S.19 of the Tax Appeals Tribunal Act provides that in reviewing a taxation decision a tribunal may exercise all the powers and discretions that are conferred by the relevant taxing Act on the decision maker and may affirm, vary set aside or remit the decision under review back to the decision maker. The applicant further contended that for the tribunal to arrive at a correct decision, it should address the facts, errors and

omissions committed by the parties. The applicant argued that the respondent is mandated under the URA Client Services Charter to give proper guidance to the taxpayers. The applicant cited S.51 (1) of the Tax Procedure Code Act and argued that penalty arises where the difference between the provisional tax and final tax is more than 10%. The applicant paid Shs. 784,122,941 as provisional tax compared to Shs. 793,783,590 as declared in the final return.

The applicant argued that under S. 23 (3) of the Tax Procedure Code Act a taxpayer who has furnished a self-assessment return, may upon discovering an error within twelve months after the date of furnishing the return, apply to the Commissioner for leave to make an additional assessment. The applicant argued further that S. 69 of the Act allows a taxpayer to make corrections and amend a return. The applicant contended that the respondent ought to have allowed the applicant to correct the errors in the return. The penal tax imposed on the applicant is therefore not sustainable. S. 2 of the Act defines a penal tax as a tax imposed as penalty to perform an act under the law. It is a tax imposed on someone who fails to perform under the Act. It is intended to deter non-compliance.

The applicant argued that the Income Tax Act places two basic obligations on the taxpayer; to file the tax returns and pay liability when due. The applicant further argued that S.16(8)(a) of the Tax Procedure Code Act provides a time frame within which the taxpayer is obliged to file a tax return. The applicant submitted that it filed its first provisional return on 19th December 2017 and paid Shs. 336, 000,491 and thereafter amended its returns erroneously and declared Shs. 450,000,000 as estimated liability for the year and paid Shs. 786,000,941 by 30th June 2018. The applicant submitted that it paid all the taxes as required under the law and it did not intend to defraud the respondent. The applicant invited the tribunal to hold that the penal tax assessed by the respondent is not payable and prayed for an order to allow the applicant amend its return plus costs of the suit.

In reply the respondent submitted that the applicant is liable to pay the penal tax as assessed under S. 51 of the Tax Procedure Code Act which provides that a provisional taxpayer, whose estimate or revised estimate of chargeable income for a year of income is less than ninety percent of the taxpayer's actual chargeable income assessed for that

year, is liable to penal tax equal to twenty percent of the difference between the tax calculated in respect of the taxpayer's estimate, or as revised, of chargeable income and the tax calculated in respect of ninety percent of the taxpayer's actual chargeable income for the year of income. The respondent contended that the above provision establishes the conditions upon which a penal tax is payable. The first is that a taxpayer is a provisional tax payer. Secondly, that the taxpayer's estimate or revised estimate of chargeable income for a year is less than 90% of the taxpayer's actual chargeable income assessed. Lastly, such a taxpayer is liable to penal tax. The applicant in 2018, filed a revised estimate of chargeable income for the year to a tune Shs. 1,500,000,000 and the resultant tax was Shs. 450,000,000. The respondent contended that in the final return the applicant declared Shs. 2,645,945,303 and going by S. 51 (1) of the Tax Procedure Code Act, the amount declared in the final return is greater than the revised estimate. The respondent argued that the applicant underestimated and understated the provisional income and it is liable to pay penal tax. The respondent cited **Radio Pacis Ltd v The Commissioner General URA** Civil Suit No. 8 of 2013 where court held that;

"Notwithstanding the plaintiff not being at fault or taking reasonable care to ensure compliance the plaintiff was liable to penalty. The question of whether or not there is a good reason by and for the applicant is moot given that the wording of the section is very clear and precise. The presumption of *mens rea* is rebutted by express provision in the statute excluding the requirement of *mens rea*"

The respondent submitted that the applicant has failed to discharge the burden as provided for under S. 26 of the Tax Procedure Code Act and argued that penal tax as assessed of Shs. 52,881,046 by the respondent is due and payable.

In rejoinder, the applicant contended that it did not understate the provisional tax but merely mis-declared it. It declared it erroneously or wrongly. It stated 1,500,000,000 instead of Shs. 2,620,001,638. The applicant in its final return declared Shs. 2,645,945,306 and paid tax of Shs. 793,783,590. It contended that the applicant made a voluntary declaration on 1st February 2019 about the error. The applicant submitted that under S. 53(5) where good cause is shown in writing that a person is liable to pay penal tax, the minister may on advice of the Commissioner remit in whole or part any penal tax. The applicant further contended

that S. 15 of the Income Tax Act fall under Part VI of the Act. Offences under the said Part constitute those that are liable on conviction. It is not of strict liability.

Having listened to the evidence and read the submissions of the parties, this is the ruling of the Tribunal.

The applicant is a company incorporated in Uganda engaged in the business of bakery. The dispute between the parties relates to an amended final provisional income tax return filed by the applicant for the year 2017/ 2018. On the 17th December 2017, the applicant filed a provisional income tax return for the period 2017/2018 with an estimated tax liability of Shs. 311,446,187. The applicant paid Shs. 294,103,660 as provisional tax. On 25th June 2018 the applicant amended the provisional return to read income of Shs. 1,500,000,000 with a tax liability of Shs. 450,000,000. On 7th December 2018 a final return was submitted declaring a tax liability of Shs. 793,783,590. On filing the final return the respondent issued a penal tax assessment of Shs. 52,881,046 under S. 51 of the Tax Procedure Code Act.

The requirement to pay provisional income tax is provided for in S. 111(1) of the Income Tax Act which reads that;

“a person who derives or expects to derive any income during a year of income which is not or will not be subject to withholding of tax at the source under section 116, 117 or 118 is liable to pay provisional tax under this section.”

S.112 of the Income Tax Act requires a taxpayer to provide an estimate of the tax payable. The gross turnover of the applicant's income was over 150,000,000 making S. 112(1)(b) of the Income Tax Act applicable. It reads that a provisional taxpayer's estimated tax payable for a year of income is the amount calculated by applying the rates of tax in force for the year against the amount estimated. S. 112(3) states that every provisional taxpayer shall furnish an estimate of the chargeable income. S. 112(5) of the Income Tax Act provides that an estimate shall remain in force for the whole year of income unless the taxpayer furnishes a revised estimate to the Commissioner. S. 112(5) of the Income Tax Act, provisional taxpayer has up to the end of the year of income to revise its estimate or furnish a revised estimate so as to avoid penalty. A provisional tax regime is a method of paying tax in advance such that a taxpayer is not overburdened at the end of the year with

payment of whole tax liability. The applicant having made an estimate of Shs. 311,446,187 on 17th December 2017 revised it to Shs. 450,000,000 on 25th June 2018. The chargeable income was Shs. 1,500,000,000

The applicant led evidence to show that due to increase in estimated income for the year, the chargeable income for the year was Shs. 2,620,000,638 with the tax liability of Shs, 786,000,941. On 7th December 2018 a final return was submitted declaring a tax liability of Shs. 793,783,590. In **Radio Pacis Limited v The Commissioner General Uganda Revenue Authority** (CIVIL SUIT No. 0008 OF 2013) [2017] UGHCCD 112 It was observed that:

“The obligation to file annual income tax returns is intended to provide the defendant with information, of which it likely to be uninformed unless the tax returns are filed. Tax returns contain declarations of the gross income earned from taxable activities on basis of which the liability to pay tax, if any and the amount payable can then be determined.”

It is on the basis of the final return that the tax payable for period of income is determined. If there is a wide variance between the tax estimated in the provisional returns and that in the final returns a penal tax assessment may be issued against the taxpayer.

The respondent issued an assessment of Shs. 52,881,046 as penal tax under S. 51 of the Tax Procedure Code Act which provides for penal tax for understating tax estimates. It reads that:

“(1) A provisional taxpayer, whose estimate or revised estimate of chargeable income for a year of income is less than ninety percent of chargeable income assessed for that year, is liable to penal tax equal to twenty percent of the difference between the tax calculated in respect of the taxpayer’s estimate, or as revised, of chargeable income and the tax calculated in respect of ninety percent of the taxpayer’s actual chargeable income for the year of income.

“(2) A provisional taxpayer whose estimate or revised estimate of gross turnover of a year of income is less than ninety percent of the taxpayer’s actual turnover for that year is liable to penal tax equal to twenty percent of the difference between the tax calculated in respect of the taxpayer’s estimate, or as revised, of gross turnover and the tax calculated in respect of ninety percent of the taxpayer’s actual gross turnover for the year of income.”

It is not in dispute that the gross turnover declared by the applicant in its revised provisional tax assessment was less than 90% of that declared in the final return. This is captured in Table A below.

	Activity	Gross Turnover	Tax declared
1.	First provisional return 17 th December 2017	1,038,153,958	Shs. 311,446,187
2.	Second provisional return on 25 th June 2018	1,500,000,000	Shs. 450,000,000
3.	The final return	2,645,945,303	Shs.793,783,590
4.	90% of tax declared in final return	2,381,350,772.7	Shs. 714,405,231
5.	Difference between amounts in revised and final return	1,145,945,303	Shs. 343,783,590
6.	% of amounts in revised as to final return	56%	56%
7.	Difference between amount in revised assessment and in respect of 90%	881,350,772	264,405,231
	Penalty 20% using tax declared in difference between column 4 and 2		Shs. 52,881,046.20

Using the above table, it is clear that the amount estimated in the provisional returns were 56% which is less than the required 90% by law. Therefore, the respondent was justified to impose penal tax. Under S. 51(1) of the Tax Procedure Code Act using the tax calculated and imposing 20% as penal tax the amount arrived at is Shs. 52,881,046.20 which the Tribunal believes was correctly imposed.

The applicant argued that the error in the return was discovered after the due date of amendment. The law does not provide for making an amendment after the whole year the assessment is in force. S. 51 of the Tax Procedure Code Act, 2014 imposes strict liability

penal tax on a provisional taxpayer whose estimate or revised estimate of chargeable income or gross turnover for a year of income is less than 90% of the taxpayer's actual chargeable income or gross turnover for that year. An estimate is bound to have errors. The law permits a 10% margin of error in the estimated income of the taxpayer. Where the taxpayer fails to estimate properly within the margin it is penalized. In this case the applicant margin was (100% - 56%) 44%. If it was 10% or less, the law would find it acceptable. The purpose of S. 51 of the Tax Procedure Code Act is to penalize the margin in the error and not the error itself. That is a bit harsh. But that is the law. Where a taxpayer makes an error resulting in an overpayment of tax he or she is not penalized

The applicant cited S. 53(5) of the Tax Procedure Code Act which provides that; "Where good cause is shown, in writing, by the person liable to pay penal tax, the Minister may, on the advice of the Commissioner, remit in whole or part, any penal tax paid." The Section requires the taxpayer to show good cause to the Minister. The Tribunal cannot usurp the powers of the Minister. There is no evidence that good cause was ever shown to the Minister who was then advised by the Commissioner.

Taking all into account, the applicant is liable to pay penal tax as assessed by the respondent. This application is dismissed with costs to the respondent.

Dated at Kampala this 25th day January 2021.

DR. ASA MUGENYI
CHAIRMAN

MR. GEORGE MUGERWA
MEMBER

MS. CHRISTINE KATWE
MEMBER