THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 142 OF 2020.

BENON RWAMAKUBA :: 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 taxes of US$ 83,169 arising from sale of shares to employees including the applicant.

The applicant is a former employee of Civil Aviation Authority (CAA). The applicant and others filed HCCS 305 of 2014 in High Court seeking payments from CAA. The court made an award in favour of inter alia, the applicant. On 30th November 2018, CAA wrote to the respondent seeking on the tax implication of the court award. On 4th December 2018, the respondent replied that the proceeds of sale of shares as stated in the court award were taxable. In December 2018, basing on the reply, CAA paid taxes of US$ 83,169 equivalent of Shs. 310,989,683. This included taxes of the applicant.

Issues.

1. Whether the share proceeds were lawfully taxed?
2. What remedies are available?

The applicant was represented by Mr. Amaro Ali while the respondent by Mr. Alex Aliddeki Ssali and Mr. Sam Kwerit.

The applicant testified that before the divesture of Uganda Airlines Corporation the government of Uganda privatized ground handling services at Entebbe International

Airport. A company known as Entebbe Handling Services Limited (ENHAS) was established with 150,000 shares. In 1995, CAA purchased 3,750 shares at US$ 282,250 on behalf of its employees. The consideration was recovered by CAA through dividends paid by ENHAS. In August 2018, CAA sold the 3,750 shares to ENHAS who had pre-emptive rights for US$ 155,247 but did not remit the said amount to the employees. The employees inclusive of the applicant filed HCCS 305 of 2014 against CAA for a declaration that they were entitled to the proceeds from the sale of the shares. On 22nd May 2018 the High Court delivered judgment in favor of the employees awarding them US$ 155,247 at interest of 8% from 16th October 2008 till payment in full. CAA withheld and remitted US$ 83,169 purportedly as employment income to the respondent. The applicant stated that the shares were purchased on behalf of the employees for their benefit by CAA which was the employer. CAA did not ask for the purchase monies from the employees. The purchase was paid from dividends of the shares of the employees.

The respondent opted not to call any witness as it contended that the matter involved interpretation of the law which will be addressed in its submissions.

The applicant submitted that CAA purchased 3,750 shares worth US$ 282,500 for its employees. It received dividends from the said shares which were used to pay for the shares. The said shares were sold for US$ 155,247. Following a judgment of the High Court, CAA paid the employees but withheld US$ 83,169 as taxes.

The applicant submitted that S. 19(1) of the Income Tax Act provides that employment income includes the amount of value by which shares are issued to an employee under an employment share acquisition scheme at the date the issue exceeds the consideration. It also includes any amount given as consideration for the grant of a right or option to acquire the shares. The applicant submitted that CAA purchased the shares at US$ 282,500. CAA sold the shares at US$ 155,247. Using simple mathematics, the applicant contended that the shares were sold at a loss of US$ 127,003. The applicant argued therefore the legal requirement that the value of the share exceeds consideration is not fulfilled under S. 19(1) of the Income Tax Act.

The applicant further contended that S. 19(1)(g) requires that the levying and collection of the tax at the moment the consideration of the shares is paid and not at the time the shares are resold. The applicant argued that it is unlawful for the respondent to levy taxes after the shares at a loss.

In reply, the respondent contended that the application is premature. The respondent cited S. 24(1) of the Tax Procedure Code Act which provides that a person dissatisfied with a tax decision may lodge an objection with the Commissioner within 45 days after receiving notice of the tax decision. S. 24(4) of the Act provides for extension of time being made to the Commissioner. S. 25(1) of the Act provides that a person dissatisfied with an objection decision may within 30 days lodge an application to the Tax Appeals Tribunal. The respondent contended that the applicant in a letter dated 4th March 2020 objected to the respondent's taxation decision. While seeking for extension of time, the respondent contended that the applicant ought to have made its application to the Commissioner and not the Tax Appeals Tribunal. The respondent contended that the jurisdiction of the Tribunal can only be triggered after the Commissioner has issued an objection decision. The respondent cited *Gakou Brothers and Enterprises v Uganda Revenue Authority* Application 29 of 2020 where the Tribunal stated that when 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. The respondent contended that this application is not properly before the Tribunal.

The respondent contended further that the application is incompetent and bad in law because the applicant did not obtain a representative order as required under Order 1 Rule 8 of the Civil Procedure Rules. The respondent cited *Prof. Kanyeihamba and 320 others v Amos Nzeyi* HCCS 0361 of 2010 where the court held that in representative action two steps are essential. The applicant must attach a list of the people he is representing. The second step he must notify the persons he seeks to represent. The respondent also cited *Dr. James Rwanyarare and another v Attorney General* 1997 VI KALR 61 where the court held that the application was incompetent because the applicant was not authorized by people who were unknown to him. The respondent contended that the applicant did not comply with Order 1 Rule 8 of the Civil Procedure Rules.

The respondent also contended that S. 26 of the Tax Procedure Code Act places the burden on the taxpayer to show that a decision should not have been made or should have been made differently. The respondent cited *Williamson Diamonds Ltd. v Commissioner General* [2008] 4 KLR 197 where the court held the burden of proving an assessment is excessive or erroneous lies on the taxpayer. The respondent contended that the applicant had not discharged the burden.

The respondent contended that S. 19(1)(b) of the Income Tax Act provides that employment income includes the value of any benefit whether of a revenue or capital nature. The respondent also cited S. 19(1)(g) of the Act which provides that income includes the amount by which the value of the shares issued under an employment share acquisition scheme exceeds the consideration if any given by the employee for the shares. The respondent contended that S. 19(8)(a) of the Income Tax Act defines an employee share acquisition scheme. The respondent contended further that the applicant purchased shares which constituted a benefit under the Income Tax Act.

In rejoinder, the applicant submitted that AEX7, was an objection decision and he proceeded to lodge this application thereafter. The applicant fully exhausted the procedure to be followed under the Tax Procedures Code Act.

The applicant, on the 2nd preliminary objection submitted that the representative order obtained from the high court before he came to the tribunal still stands and that in the alternative under Article 126 (2) of the Constitution of Uganda, the Tribunal may apply substantive justice and if it finds that the sale of share proceeds was unlawful the order for refund is made applicable to only the applicant.

The applicant also contended that the all taxes, interest and penalties were waived by S. 4 of the Finance Act 2008. It provided that all arrears due on or before 30th June 2002 and still outstanding by 30th June 2008 were waived.

Having listened to the evidence and read the submissions of the parties, this is the ruling of the tribunal:

The tribunal will address the preliminary objections first. The respondent contended that this application was premature as the applicant did not object under the Tax Procedure Code Act. A perusal of exhibit A7 dated 24th March 2020 is titled and refers to an objection to taxation decision in relation to staff share proceedings. The objection is not part of the exhibits. The respondent raised the preliminary objection at the end of the trial in its submissions. At this stage, the Tribunal cannot ask the applicant to submit the objection the letter refers to. A preliminary objection at the end of the trial which requires evidence from the opposite party prejudices its case and it right to a fair hearing. Therefore, the preliminary objection is overruled.

As regards the absence of a representative order, the Tribunal allowed the applicant to bring this application in his own capacity. There is only one party to the application, the applicant himself. There are no other parties and therefore there is no need for a representative order. As regards the amount to be awarded the Tribunal may make a ruling applicable only to the applicant. Therefore, the second objection is overruled.

The applicant is a former employee of Civil Aviation Authority (CAA). The applicant and others filed HCCS. 305 of 2014 seeking payments of sale of share proceeds from CAA. The court made an award on May 2018. On 30th November 2018, CAA wrote to the respondent seeking guidance on the tax implications of the court award. On 4th December 2018, the respondent replied stating that the proceeds of the sale of shares as per court award were taxable which the applicant objects to. CAA remitted the taxes to the respondent.

The taxes in dispute are in relation to sale of shares to employees. Sale of shares benefiting employees relates to employment income which is provided for in S. 19(1) of the Income Tax Act. It states that;

> "Employment income means any income derived by an employee from any employment and includes the following amounts, whether of a revenue or capital

nature— …

b) the value of any benefit granted

The relevant Subsection is

(g) The amount by which the value of shares issued to an employee under an employee share acquisition scheme at the date of issue exceeds the consideration, if any, given by the employee for the shares, including any amount given as consideration for the grant of a right or option to acquire the shares".

S. 19(8)(a) of the Income Tax Act provides that

An employee share acquisition scheme is an agreement under which

(i) A company is required to issue shares to employees of the company or an associate company or

(ii) A company is required to issues shares to a trustee of a trust and under the trust deed, the trustee is required to transfer the shares to employees of the company or of an associate company.

Therefore, the Tribunal must ask itself whether the applicant received employment income.

It is not in dispute the CAA bought 3,750 shares at US$ 282,250 on behalf of its employees. The said shares were purportedly paid for by dividends. S. 19(1)(g) states that employment income is derived when the value of shares issued to an employee by the employer exceeds the consideration given by the employee for the shares. Our understanding of S. 19(1)(g) is that where the value of the shares bought by the employer exceeds the amount paid or consideration by the employee the excess is employment income. For instance, if the value of a share is Shs. 1,500 and the employee pays Shs. 1,000 the excess of Shs. 500 is considered as employment income.

So what was the consideration the employees paid for the shares? In the judgment in HCCS 305 of 2014 the court noted:

"DW1 in his witness statement shows $ 305,000 was paid on 15.3.2008 of which $ 213,000 was paid back to CAA for purchase of shares while $ 92,000 was paid into the Provident fund. In theory only dividends of $92,000 is available for approbation."

The applicant in paragraph 6 of his witness statement states the said sum of $ 282,259 was eventually recovered by CAA through dividends paid by ENHAS. There seems to be

a contradiction between the amounts that was paid for consideration for the shares in the judgment and that in the witness statement.

What is important to note is that at the time CAA paid for the shares for its employees they had provided no consideration, that is, in 1995. The issue of shares of which the applicant and other employees did not pay for amounted to a benefit which is taxable. The employment income became due in 1995. The dividends paid in or before 2008 were proceeds from the shares obtained by the employees. They ought to have also been taxed. If the shares were sold at a profit, the said profit also ought to be taxed. Payment of the shares using dividends does not absolve the employee from paying employment income as soon as it becomes due. The tax point is at the moment of acquisition of shares.

The applicant's interpretation of the Section that one needs to look at whether there was a gain in the sale of shares is unfounded in law. The consideration referred to in S. 19(1)(g) refers to the amount paid by the shareholder and not from sale of shares.

The applicant contended that the taxes were due were waived by the Finance Act 2008. The relevant portion read;

> "4. Waiver for tax, duty, interest and penalties on arrears outstanding on or before 30th June 2002 and still outstanding by 30th June 2008.
>
> (1) All arrears of value added tax, income tax, excise duty, import duty, penal tax and interest shall be waived.
>
> (2) Subsection (1) applies to arrears due on or before the 30th day of June 2002 and still outstanding by 30th June 2008."

CAA acquired the 3,750 shares on behalf of its employees in 1995. Therefore employment income became due in 1995 and not the date the shares were sold in 2018. Under Finance Act 2008, all arrears of income tax due on or before 30th June 2002 were waived. Therefore by the time the respondent assessed income tax on the employees of CAA in 2018 the tax had been waived. By the time the High Court made the award in 2018, the tax had been waived. Therefore the respondent ought not to have issued an

assessment in 2018 but in 1995. The employees apart from the applicant did not object to the assessment which was issued or when the tax was collected.

The Tribunal notes that the other employees of CAA are not parties to this application. The applicant did not get a representative order to represent the other employees. The one issued in High court cannot suffice. The other employees did not make an objection nor is there an objection decision in respect of taxes paid on their behalf. Therefore the Tribunal cannot make an award to them.

The applicant though an employee of CAA did not quantify the shares that were purchased on his behalf, nor did he adduce evidence to show how much tax was paid in respect of those shares. The judgment of the High Court in HCCS 305 of 2014 concluded that the employees entitled to benefit from the proceeds from sale of the shares are those employees in employment in May 1995 as listed in the payroll exhibited in court. The award was not made to the plaintiffs but to those in employment in May 1995. The said payroll was not exhibited in the Tribunal. The Tribunal cannot speculate that the applicant was an employee in May 1995 in the absence of the payroll of that month. It cannot also speculate how much shares were due to him as we do not know the number of employees in the payroll and the shares apportioned to them. Using the payroll, it is possible to ascertain the amount of tax each employee paid. This is because the court stated that the proceeds should be shared equally.

Under S. 18(a) of the Tax Appeals Tribunal Act the burden is placed on the tax payer to prove that where tax decision is an objection decision in relation to an assessment that the assessment is excessive. According to exhibit AE4, the applicant objected to a tax decision in relation to taxation of sale of staff share proceeds. The applicant did not seek leave to represent the other employees whose shares are not known or the tax that was paid for them. The applicant does not show the taxes that were paid in respect of the sale of his shares, therefore, it becomes difficult for the Tribunal to state that the assessment is excessive or even make an award for the applicant. The applicant has not discharged the burden under S. 18(a) of the Tax Appeals Tribunal Act.

Under S. 26 of the Tax Procedure Code Act the burden is on the person objecting to the decision to prove that the decision should not have been made or should have been made differently. The Tribunal has stated that the respondent ought not to have taxed the employment arising from the shares as it was waived. However the Tribunal cannot make an award to the applicant as he did not adduce evidence on his shares and the taxes paid in respect thereof.

Taking the above into consideration, the Tribunal would have allowed this application but the applicant did not discharge the burden to prove that he was entitled to a refund of the tax personally. The Tribunal cannot make an order that an applicant is entitled to an amount which is not clear. A dispute cannot continue in perpetuity. It has to end in court unless a party has sufficiently proved that it should be remitted for reconsideration under S. 19 of the Tax Appeals Tribunal Act which was not done in this case. All evidence should be adduced in court. Failure to do so would mean a party has not discharged the burden of proof placed on him. No award can be made. This application was therefore filed in futility. It is therefore dismissed. No order as to costs is made.

Dated at Kampala this day of 2022.

DR. ASA MUGENYI
CHAIRMAN

MR. GEORGE MUGERWA
MEMBER

MS. CHRISTINE KATWE
MEMBER