THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 115 OF 2021

JAZZ SUPERMARKETS LIMITTED..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY..... RESPONDENT

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

RULING

This application is in respect of penal tax assessments of Shs 84,000,000 issued on the applicant by the respondent for not using Electronic Fiscal Receipting and Invoicing Solution (EFRIS) invoices to its customers.

The applicant operates a supermarket. In November 2021, the respondent issued two penal tax assessments totaling to Shs 84,000,000 for not issuing EFRIS invoices to its customers from 1st to 14th November 2021. The applicant objected and the respondent disallowed the objection.

Issues:

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

The applicant was represented by Mr. Deus Mugabe and Mr. Bruno Kalibbala while the respondent by Mr. George Ssenyomo.

The applicant's first witness, Mr. Asif Panjwani, its manager, testified that the respondent issued two assessments of Shs. 84,000,000 as penalty on the applicant for not issuing e-invoices. He stated that the applicant faced many challenges in effecting EFRIS. The product coding system got corrupted which delayed the applicant in effecting it. There were many different codes which made it hard for the applicant to understand and choose

the appropriate code. The applicant later acquired proper software and recruited competent staff to effect EFRIS. He admitted that the applicant did not issue e-invoices between 1st and 14th November 2021. It communicated to the respondent the challenges with the EFRIS. He stated that the applicant's delay in enforcing EFRIS was not deliberate. He contended that it is unjust that to punish the applicant for not implementing EFRIS.

The respondent's witness, Mr. Hassan Wassajja Lukenge, a supervisor in its domestic taxes department stated that on 18th June 2020 the respondent issued a public notice in the New Vision newspaper introducing EFRIS in Uganda. On 23rd June 2020, it published in the gazette General Notice 595 of 2020 informing taxpayers that it was mandatory to issue e-invoices or e-receipts. On 30th June 2020, it advertised the general notice. On 2nd July 2020, the respondent issued a public Notice in New Vision indicating e-invoices will commence on 1st July 2020. The respondent extended time for commencement of EFRIS to 31st December 2020. EFRIS was rolled out for use by taxpayers effective 1st January 2021.

Mr. Hassan Wassajja Lukenge stated that the applicant was trained on the use of EFRIS by the respondent. The respondent instituted a team to help members of the Uganda Supermarket Owners Associated (USOA), which included the applicant, to help with product coding and make clarifications on areas which were not clear. Between 1st January 2021 and 20th September 2021 there were no enforcement measures against the taxpayers for failure to implement EFRIS. On 20th September 2021 and on 7th October 2021, the respondent wrote to the applicant requesting it to issue e-invoices for all business transactions as required by law. He stated that the applicant deliberately refused to issue e-invoices and issued manual invoices between 1st and 14th November 2021. That approximately 1,313 invoices were issued without being fiscalised.

The applicant submitted that it was faced with several challenges in implementing EFRIS of which it had little or no control. These included multiple codes for related products, the collapse of its excels format sheet, software incompatibility, limited staff and the government curfew which limited its capacity. The applicant submitted that the above

challenges were brought to the attention of the respondent in its objection. The respondent never invited the applicant to discuss the challenges.

The applicant contended that the respondent should have exercised its discretion not to penalize it. The respondent postponed the roll out of EFRIS on several occasions despite the publication in the gazette because of the challenges in its implementation. The applicant submitted that discretion was defined in *Farid Meghani v Uganda Revenue Authority* Civil Appeal 006 of 2021 as the faculty of determining in accordance with the circumstances what seems just, fair, right, equitable and reasonable. The court stated that.

> The appellate court will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle. It should not interfere with the exercise of discretion unless it is satisfied that the Tribunal in exercising its discretion misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Tribunal has been clearly wrong in the exercise of its discretion and that as a result there has been injustice."

It also cited *Century Bottling Company Limited v Uganda Revenue Authority* Miscellaneous Application 32 of 2020 where the Tribunal quoted H.W.R. Wade, in "Administrative Law "on principles governing the exercise of discretion where he stated:

> "For more than three centuries it has been accepted that discretionary power conferred upon public authorities is not absolute, even within its apparent boundaries, but is subject to general legal limitations. These limitations are expressed in a variety of different ways, as by saying that discretion must be exercised reasonably and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious."

The applicant contended that although the respondent made it mandatory to issue EFRIS from 23rd June 2020, using its discretion, it did not impose or enforce any penalties for failure to use EFRIS invoices from 2018 to November 2021. It submitted that having exercised such discretion in implementing EFRIS and not enforcing penalties for more than two years (2018 to 2021), the respondent should be lenient to the applicant who in its objection indicated readiness to comply after highlighting the problems it faced.

The applicant submitted that if a penalty is payable, it was illegally determined and applied. It cited *Makula International Ltd v His Eminence Emmanuel Cardinal Nsubuga and Rev. Fr. Dr. Kyeyune,* CACA 4 of 1981 or 1982 HCB 11, where the Court of Appeal inter alia held that: "A court of law cannot sanction what is illegal, an illegality once brought to the attention of Court, overrides all questions of pleading, including any admission thereof and court cannot sanction an illegality." The applicant submitted that S. 73B (2) of the Tax Procedure Code Act provides for failure to implement EFRIS penal tax payable is equivalent to the tax due or three hundred currency points, whichever is higher. It submitted that to be valid and legal, an assessment under S. 73 B (2) should have shown the tax payable on the goods or the currency points applied to arrive at the penal tax. Contrarily, the notes to the assessment indicated as follows: "Penalty for failure to issue e-invoices from 1st -14th November 2021 as per the requirement of S. 73A (2) TPCA".

The applicant submitted penalty is either the tax due on the aggregated value of the goods or three hundred currency points, whichever is higher. In this case, the value of the goods of the ten invoices which the respondent exhibited is Shs. 500,200. The applicable penalty ought to have been Shs. 6,000,000. The applicant submitted that it is erroneous to argue the penalty is imposed on each invoice or daily. If this were the case, the respondent would have assessed Shs. 6,000,000 for each of the non-fiscalised invoices, resulting into a penal assessment of Shs. 7,878,000,000. In such a case, the respondent would have no discretion to cherry pick as it did.

The applicant contended that the assessment was excessive. It cited *United States v Bajakajian* 24 US 321 (1998) *at Pg. 335* where the court defined excessive to mean surpassing the usual, the proper, or normal measure of proportion. It contended that the penalty advocated for by the respondent is beyond the usual, proper, or normal measure of proportion, considering that before this case, the latter had freely and voluntarily waived penalties for similar omissions.

The applicant submitted that the words of the charging provision are clear and unambiguous. They neither impose a penalty per invoice nor daily. It cited *Cape Brandy Syndicate v IRC (1921) KB 64* where the court said:

"In a taxing Act, clear words are necessary in order to tax the subject. In a taxing Act one has merely to look at what is clearly said. There is no room for intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in it, nothing to be implied. One can only look fairly at the language used".

The applicant submitted that in *Uganda Revenue Authority v Hassan Kajura*, the Supreme Court of Uganda observed that:

"...the above principle (literal rule of interpretation) is to the effect that when words of a statute are clear and unambiguous, they should be given their plain meaning and that Courts should not read into the Sections of a taxing statute words that are not there so as to meet the minds of the legislators."

The applicant submitted that upholding the respondent's assessments requires reading into the charging provision an imposition of the penalty per day or per invoice on default.

In reply, the respondent submitted that the applicant is liable to pay the tax assessed of Shs. 84,000,000. It submitted that S. 73A of the Tax Procedure Code Act provides a taxpayer may issue an e-invoice or e- receipt, or employ an electronic fiscal device linked to the system or device authenticated by Uganda Revenue Authority. The Commissioner shall, by notice in the Gazette, specify taxpayers for whom it shall be mandatory to issue e-invoices or e-receipts or employ electronic fiscal devices. The respondent submitted that S. 1 of the Tax Procedure Code Act (Amendment) Act, 2018 provides that this Act shall come into force on publication. The respondent cited *Kampala Nissan v Uganda Revenue Authority* HCCA 7 of 2009, where the court held that word "shall" makes the charging of VAT on taxable supplies on the items specified by the VAT Act mandatory, imperative, or obligatory and therefore acts done in disobedience of the provision are invalid. It submitted that it has a statutory obligation to specify which taxpayers for whom it shall be mandatory to issue e-invoices or e-receipts or employ electronic fiscal devices under S. 73A (2) of the Act. The Commissioner published General Notice 595 of 2020 in the gazette making it mandatory for all VAT registered taxpayers to issue e-invoices or e-receipts or employ electronic fiscal devices. The respondent submitted that the applicant admitted that it is a VAT registered taxpayer and it fell under the category in the Notice and is bound to abide by the law. It failed to comply with the law from 1st to 14th November 2021. The respondent submitted that it addressed all issues raised by the Uganda

Supermarket Owners Association (USOA) members which included the applicant on implementation of EFRIS. It instituted a technical working group to assist USOA members in resolving any issues arising, such as product coding, and address other clarifications sought.

The respondent submitted that it imposed a penalty on the applicant under S. 73A(2) of the Tax Procedures Code Act which states that a taxpayer who is specified does not issue an e-invoice or a receipt for goods or services is liable to pay penal tax equivalent to the tax due on the goods or services or three hundred currency points, whichever is higher. It cited *Okello Okello v. The Commissioner General, Uganda Revenue Authority,* where it was held that.

> "According to case law, the Commissioners determination of tax liability is ordinarily presumed correct, the taxpayer therefore, bears the burden of proving that the determination is erroneous or arbitrary".

The respondent submitted that the penalty was imposed as a matter of law and not because of the use of its discretion. The respondent submitted that if it exercised its discretion to reduce the tax liability this does not waive the liability.

The respondent submitted that the penalty imposed is one of strict liability. It cited *Radio Pacis Limited v Uganda Revenue Authority* HCCS 8 of 2013 where court held that.

> "Strict liability would imply that the plaintiff may be liable to a penalty even if it was not at fault or took all reasonable care to ensure compliance with the law but did not."

The Court further stated that.

> "In determining whether an offence is one of strict liability there is a presumption that *mens rea* is required. This presumption may be rebutted where:
>
> 1. The crime is regulatory as opposed to a true crime; or
> 2. The crime is one of social concern; or
> 3. The wording of the Act indicates strict liability; or
> 4. The offence carries a small penalty".

The respondent submitted that S. 73B(2) of the Tax Procedures Code Act creates a strict liability penalty for failure to issue e-invoices. The applicant did not issue e- invoices for the period 1st to 14th November 2021, contrary to S. 73B (2). The respondent submitted

that the applicant is liable to pay the penal tax assessed. The respondent submitted that it is a trite law that unless exempt, a taxpayer has an obligation to pay taxes.

The respondent submitted that the issue of the assessment being illegal and excessive was never raised by the applicant at objection. It cannot raise it during the trial because it would be contrary to S. 16(4) of the Tax Appeals Tribunal Act which provides that an application for review is unless the tribunal orders limited to the grounds stated in the taxation objection to which the decision relates.

The respondent submitted that the applicant admitted not to issuing e-invoices. Therefore, judgement should be passed against the latter. It cited *Connie Kekiyonza Watuwa and 2 others v Attorney General* Civil Miscellaneous Application 544 of 2020 where the court held that where an admission of facts has been made, either on the pleadings or otherwise, a party to such a suit may apply to the court for judgment.

In rejoinder, the applicant reiterated that the assessments issued by the respondent are illegal. It cited *ICEA General Insurance Company Limited v URA* Application 100 of 2019, where the Tribunal observed: "While the Tribunal is limited to the grounds in the objection, it cannot ignore legal arguments raised by a party as it would create a miscarriage of justice". The applicant submitted that a question regarding legality of an assessment can be raised before the Tribunal even when it never formed part of the grounds of objection.

The applicant submitted that the non-EFRIS invoices issued by it were discovered at ago by the respondent. Its contention that each invoice or day constitutes a separate offence and therefore attracts a separate penalty is incorrect. It cited *Re Snow-Appeal from the Third Judicial District Court, Salt Lake County Utah.* 1887 p. 282, where the prosecution indicted the defendant for three counts of cohabiting with multiple women in thirty-five months. In determining whether the defendant had committed a separate indictable offence every time he cohabited with a woman as argued by the prosecution, the court observed as follows:

" ...that a rule has obtained that a continuing offence of the character of the one in this case can be committed but once, for the purpose of the indictment or prosecution, prior to the time the prosecution is instituted."

The applicant submitted that in this case, where the default consists of continuous non-issuance of EFRIS invoices for several transactions, all discovered at once by the respondent, there is one transgression and in determining the applicable penalty, the respondent is supposed to assess the tax due on the aggregated value of the goods or against three hundred currency points. Instead, and contrary to the law, the respondent penalized the applicant per day of the default. The applicant submitted that under the doctrine of proportionality, a penalty must be proportional to the gravity of offence being penalized. In this case, the tax payable on the aggregated value of the goods for which the applicant did not issue EFRIS invoices is Shs. 90,036.

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

The applicant submitted that it was faced with several challenges in implementing EFRIS for which it had little or no control over. These included multiple codes for related products, the collapse of its excels format sheet, software incompatibility, limited staff and the government curfew which severely limited its capacity. It submitted that the respondent ought to have exercised its discretion and not penalized it for failure to implement EFRIS. Without prejudice if it is liable to pay penal tax, it should be Shs. 6,000,000

The law on EFRIS is provided under S. 73A of the Tax Procedure Code Act which provides.

"(1) A taxpayer may issue an e-invoice or e-receipt or employ an electronic fiscal device which shall be linked to the centralized invoicing and receipting system, or a device authenticated by the Uganda Revenue Authority".

(2) The commissioner shall, by notice in the Gazette, specify taxpayers for whom it shall be Mandatory to issue e- invoices or e-receipts or employ electronic fiscal devices which shall be linked to the centralized invoicing and receipting system, or devices authenticated by the Uganda Revenue authority.

(3) A taxpayer specified by the commissioner under subsection (2), shall issue electronic Invoices or receipts or employ an electronic fiscal device."

S. 73B of the Tax Procedure Code Act provides that.

"(1) A taxpayer specified under section 73A who does not use an electronic fiscal device is liable to pay a penal tax equivalent to the tax due on the goods or services or four hundred currency points, whichever is higher.

(2) A taxpayer specified under section, 73A (2) who does not issue an e -invoice or e-receipt for goods or services, or who tampers with an electronic fiscal device is liable to pay a penal tax equivalent to the tax due on the goods or services or three hundred currency points, whichever is higher".

On 30th June 2020, the Commissioner published General Notice 595 of 2020 in the gazette making it mandatory for all VAT registered taxpayers to issue e-invoices or e-receipts and employ electronic fiscal devices. The applicant fell into the category for registered taxpayers required to issue EFRIS invoices. The respondent made other communications in the Monitor and New Vision newspapers informing the public that it shall be mandatory for VAT registered taxpayers to issue EFRIS e-invoices or e-receipts. On 29th September 2020, the respondent informed the public that the effective date of the implementation of the EFRIS was 1st January 2021 and not 1st July 2020 as earlier communicated. It had come to the respondent's attention that taxpayers were having problems using the new system. The reason for the extension of the time of effectiveness was to make sure these challenges were addressed.

The first dispute the Tribunal will address was whether the respondent exercised its discretion rationally when it penalized the applicant. In *Embassy Supermarket v Uganda Revenue Authority* Application 114 of 2021 the Tribunal quoted Halsbury's Law of England 3rd Edition Vol. 30 p. 687 para. 1326 which states that.

"Where public bodies are given a discretion in the exercise of powers conferred upon them by statute, the courts will not interfere with the exercise of that discretion so long as it is exercised bona fide and reasonably; nor will the decision of an administrative body be interfered with by the courts if there is anything on which that body could reasonably have come to its conclusion." ...

In *Breen v Amalgamated Engineering Union* [1971] 2. Q.B 1 Lord Denning underlined the importance of an unfettered discretion by stating that:

> "The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant consideration and not by irrelevant. If its decision is influenced by extraneous consideration which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless, the decision will be set aside."

As regards irrationality, in Twinomuhangi Pastoli V Kabale District Local Government Council, Katarishangwa Jack & Beebwajuba Mary [2006] HCB Vol. 1 p. 30 Kasule J. stated.

> "Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards."

As in this case, the Tribunal noted that once the gazette has been published indicating the effective date of implementation, postponement is not an excuse as it is not provided for in the law. The requirement to implement EFRIS was in the law. A taxpayer ought to comply. Furthermore, the postponement was to enable the taxpayers to overcome the challenges of implementation of EFRIS. The taxpayers were trained in how to use EFRIS. Therefore, if the other taxpayers have complied, it would be important to know why the applicant did not overcome the said challenges. The Tribunal noted that the applicant must prove that there are other supermarkets which did not implement EFRIS who were not penalized by the respondent. That the application of the penalty was selective. The Tribunal noted that the applicant had failed to prove that the respondent did not exercise its discretion rationally. It must show that there was gross unreasonableness on the part of the respondent when it decided to penalize the applicant. As in the matter, the applicant has failed to prove that the respondent did not exercise its discretion rationally.

The applicant challenged the computation of the assessment. It argued that there was no basis for penalizing it daily or per invoice. The respondent argued that the applicant was raising a now ground not stated in its objection. It argued that the applicant should be limited to the grounds in the objection decision under S.16(4) of the Tax Appeals Tribunal

Act. In *ICEA General Insurance Limited v Uganda Revenue Authority* Application 100 of 2019 the tribunal noted that,

> "...While the tribunal is limited to the ground in the objection and or objection decision, it cannot ignore legal arguments raised by a party as it would create a miscarriage of justice. There is a difference between a ground stated in the objection and a legal argument raised. When a Tribunal is interpreting a law, it should entertain all legal reasons in order to ensure justice is delivered."

Computation of the right tax goes to the legality of the assessment which the Tribunal cannot ignore. The grounds to which the applicant is limited should be factual. Therefore, the Tribunal will address the computation of the tax assessed.

The respondent contended that penalty should be imposed per day or per invoice. The value of the goods which did not have invoices, indicated in exhibit REX4 is Shs. 500,200 compared to the penal tax suggested of Shs. 84,000,000. The penalty imposed using the respondent's method is not proportional to the offence committed.

The Tribunal asks itself whether it was proper for the respondent to charge the applicant penal tax on each invoice or daily. In *Embassy Supermarket v Uganda Revenue Authority* (supra) the Tribunal noted that a reading of the above Sections does not indicate anywhere that penal tax should be charged on an invoice not issued or per day EFRIS was not implemented. The Tribunal stated that it cannot insert the words, 'invoice' and or 'day' as they were not provided for when the legislature enacted the law. In *Uganda Revenue Authority v Hassan Kajura*, the Supreme Court of Uganda noted that:

> "...the above principle (literal rule of interpretation) is to the effect that when words of a statute are clear and unambiguous, they should be given their plain meaning and that Courts should not read into the Sections of a taxing statute words that are not there so as to meet the minds of the legislators."

Therefore, the Sections in the Tax Procedure Code Act should be given their plain meaning and no words should be inserted when the meaning is clear.

In *Embassy Supermarket v Uganda Revenue Authority* (supra) the Tribunal noted where the law is ambiguous, the benefit of doubt is given to the taxpayer. The applicant cited *Re*

Snow-Appeal from the Third Judicial District Court, Salt Lake County Utah (supra) where it was stated that.

> " ...that a rule has obtained that a continuing offence of the character of the one in this case can be committed but once, for the purpose of the indictment or prosecution, prior to the time the prosecution is instituted."

Where one omits to implement EFRIS, it commits an offence that is continuing but occurs once in the tax period under the VAT Act. Under the VAT Act, a tax period is one calendar month. Therefore, as in the Embassy supermarket case, the Tribunal stated that the penalty tax should be imposed on an omission to implement EFRIS per month, which is the tax period under the VAT Act or the tax due whichever is higher. If we are to charge penal tax per omission in the tax period, the applicant would be liable to pay 300 currency point which would come to Shs. 6,000,000. There is no evidence adduced on the tax payable. So we shall go with the Shs. 6,000.000 penalty.

Therefore, this application is dismissed. The Tribunal orders that.

1. The assessment of Shs. 84,000,000 is set aside.
2. The applicant is liable to pay penal tax of Shs. 6,000,000
3. The respondent is awarded half the costs of the application.

Dated this 8th day of May 2023.

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