

RWANDA / JUDGMENT

RUBARE v. RWANDA REVENUE AUTHORITY (RRA)_303666_en

RCOMA0149/12/CS

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RUBARE v. RWANDA REVENUE AUTHORITY (RRA) [Rwanda SUPREME COURT- RCOMA0149/12/CS (Kayitesi R., P.J., Mukandamage and Kanyange, J.) March 11, 2016] Tax laws – Value added tax – Declaration of value added tax – Advance payment which is paid to the successful bidder for the commencement of works cannot be considered as the payment nor the time on which they have been paid, be considered as the period of tax declaration – Law N°37/2012 of 09/11/2012 establishing the value added tax, article 10 – Law N°12/2007 of 27/03/2007 on public procurement, articles 20, 86(2) and 89 – Law N°06/2001 of 20/01/2001 establishing the value added tax, article 20. Facts: RRA imposed to Rubare the fines and late payment penalties amounting to 21,380,684Frw arguing that they result from the tax declaration of value added tax he made in delay on the advance payment. Rubare appealed to the Commissioner General claiming to be innocent since the advance payment does not consist of payment, rather, they are funds intended to finance the commencement of works that are lent to the successful bidder of the public tender and his appeal was not considered therefore he filed the claim to the Commercial High Court requesting

to annul the decision thereto arguing that they have been illegally imposed to him. The Court decided that his claim was baseless, and maintained the decision of RRA Rubare appealed to the Supreme Court arguing that the previous Court disregarded that the advance payment for the commencement of works does not constitute a payment on which value added tax is levied. RRA argues that the issue to be examined in this case was that regarding the period of VAT taxation.

Held: 1. The funds for advance payment which are paid to the successful bidder for the commencement of works cannot be considered as the payment nor the time on which they have been paid, be considered as the period of tax declaration. Therefore, neither fines nor late payment penalties on the value added tax should have been imposed to Rubare since he had to pay at time of the issuance of the invoice or payment of completed works.

2. The appellant is awarded procedural and counsel fees in the discretion of the Court in case the requested amount is excessive. Appeal has merit. Court fees to the defendant. Statutes and Statutory instruments referred to: Law N°37/2012 of 09/11/2012 establishing the value added tax, article 10. Law N°12/2007 of 27/03/2007 on public procurement, articles 20, 86(2) and 89. Law N°06/2001 of 20/01/2001 establishing the value added tax, article 20. Cases referred to:

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RRA v. MISIGARO Louis, RCOMA 0074/11/CS decided by the Supreme Court on 11th April 2014

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] Rubare Josias was charged fines and interests for late declaration of the value added tax, after applying the administrative appeal to the Commissioner General claiming to be innocent but his appeal was not considered and he filed the claim before the Commercial High Court requesting to be discharged of 21,380,684Frw of the fines and late payment penalty since they have been illegally imposed. He explains that tax was imposed to the advance payment while it is not a payment, rather, the loan given to the successful bidder which is paid in accordance to article 89 of the Law on Public Procurement, while RRA argued that the advance payment for the commencement of works is not the loan but the portion of the value of the whole tender which is paid in advance, and that it must be taxed with VAT basing on the provisions of article 20(c) of the Law N°06/2001 of 20/01/2001 establishing the value added tax as amended up to date, which states that if before the time applicable under (a) and (b) there has been payment, it is regarded as related to goods and services supplied therefore the VAT is imposed on the payment. [2] The Court found without merit the claim of Rubare, and ordered him to pay 2,380,684Frw in fines and late payment penalty to RRA. It relied that decision on article 86 of the Law on Public Procurement, whereby it realized that the payment made to Rubare was not the loan, rather, an advance payment, which must be taxed basing on the provisions of article 20

(c) of the Law establishing value added tax. [3] Rubare Josias appealed against that judgment to the Supreme Court arguing that the Court disregarded that the advance payment does not constitute the payment likely to be imposed the value added tax, while RRA keeps alleging that the tax has to be imposed basing on the provision of article 20 (c) of the Law establishing value added tax. [4] The hearing was held in public on 2 February 2016, Rubare being represented by Counsel Nsengiyumva Abel while RRA was represented by the State Attorney Kabibi Speciose. II. ANALYSIS OF LEGAL ISSUES Whether Rubare should not be held liable for late payment penalty resulting from the value added tax which RRA alleges he delayed to declare. [5] The Counsel for Rubare argues that he appealed because the previous Court sustained the fines and late payment penalty imposed to him by RRA which argued that he delayed to declare the value added tax on the advance payment while it was not the payment, rather, the advance payment for the commencement of works given to the successful bidder after providing the personal guarantor who, in case he fails to perform the tender shall pay on his behalf, and otherwise those funds are deducted from each invoice. He adds that Rubare imputed the advance payment got from Caisse Sociale du Rwanda and guaranteed by SORAS on every issued

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invoice, until he finished, which implies that it was a loan since the payment is not refunded, and that even the judgment RCOM0074/12/CS rendered by this Court on 11 April 2014, resolved that problem where it demonstrated that the advance payment does not consist in payment. [6] He further argues that RRA cannot claim that there was a delay in declaring VAT basing on the fact that it has to be paid on the date of issuance of advance payment because it does not consist of a payment, and in addition that tax was levied on the total value of the tender. Even if RRA considers it as payment, one could wonder its purpose especially that in the public tenders the payment covers the completed works as provided for by article 86 of the Law on the Public Procurement, therefore, it implies that advance payment should not be considered as a payment. Furthermore, it would constitute double payment if VAT is paid on the total value of the tender and again on the advance payment. [7] She further alleges that even the paragraph (c) of article 20 of the Law on the value added tax that RRA relies on, provides that there should be the issuance of invoice or reception of payment, which implies that an advance payment does not cover a certain part of works and that VAT cannot be imposed in case no work was executed. She goes on to state that due to the persistent disputes relating to the advance payment, it has been necessary to provide a definition in article 10 of the new Law establishing the value added tax (the Law N°37/2012 of 09/11/2012), therefore she concludes by requesting to quash the appealed judgment. [8] The Counsel for RRA argues that the issue to be examined is to determine the time of the payment of VAT since with regard to Rubare, he paid VAT but in delay, and the arguments of his advocate, are based only on article 20(b) which provides for the time of the issuance of the invoice or the time of payment of the executed work, but disregards its literal (c) which provides that if the payment is made before the execution of works, the VAT shall immediately be paid, which means that the advance payment consists of the payment made before the execution of works

and before the issuance of the invoice. He argues also that the judgment raised by Rubare's advocate to have resolved the issue lack merit since it only focused on litera (a) and (b) of the article 20 of the Law on added value tax. [9] She goes on stating that even if it is understandable that the payment covers the completed works, it should be questioned the purpose of advance payment, since for her, it is paid to the successful bidder to enable him/her to perform the tender, which means it consists of funds paid before execution works and they are paid in relation to the contract of the concerned works since if that contract is inexistent even the money could not be paid. [10] With regard to the new Law on the value added tax, the counsel for RRA states that its purpose is not the interpretation of article 20 of the previous one Law, rather, it amended the means of payment. In conclusion, she requested that the appealed judgment to be sustained. VIEW OF THE COURT [11] With regard to the period of payment of the value added tax article 20 of the Law N°06/2001 of 20/01/2001 on the code of value added tax which was into force at the time fines and late payment penalty were imposed to Rubare, provides that "The tax is due and payable at

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the time when goods or services are regarded as supplied. The time for imposition shall be whichever is the earliest of the following:

- a) in the case of a supply of goods
 - i) the time when goods are removed from the premises of the supplier; ii) if the goods are not to be removed, at the time when they are made available to the person to whom they are supplied.
- b) in the case of services a supply shall be treated as taking place at the time when the services are performed; Where services are supplied for a continuous period under any enactment or agreement which provides for periodic payments, the services are treated as successively supplied for successive parts of the period as determined by the enactment or agreement and each successive supply shall be deemed to take place:
 - i) at the time an invoice or a VAT invoice in respect of that supply is issued by the supplier; or
 - ii) at the time payment for the supply is received by the supplier, whichever is the earlier.
- c) if, before the time applicable under (a) and (b) above the person making the supply issues a tax invoice or receives a payment in respect of it, the supply, to the extent covered by the invoice or payment, shall be treated as taking place at the time the invoice is issued or payment is received". [12] With regard to the advance payment, article 86 paragraph 2 of the Law N°12/2007 of 27/03/2007 on Public Procurement, provides that "However, the bidding document may provide for an advance payment. Such an advance payment shall not be paid before the contract is signed". The article 89 of the mentioned law provides that "The advance received by the successful bidder shall be refunded by deducting a certain amount from submitted and approved invoices. The bidding document shall determine the percentage to be deducted until the whole amount of the advance is refunded". [13]

Concerning Rubare, article 29(1) of the contract he concluded with Caisse Sociale du Rwanda, provides that he shall get an advance payment of 20% of the total value of the tender 1 and that money will be paid on each invoice issued, and Rubare also states that he got an advance payment amounting to 328,099,434Frw equivalent to 20% of the whole tender. [14] Analyzing the provisions of article 20 N°06/2001 of 20/01/2001 mentioned above, the tax on services is levied at the time of issuance of the invoice or VAT invoice or when the tax payer has been paid for the executed work, as mentioned in litera(c) of that article which also RRA relies on. When an invoice is issued or there has been payment of the value of the works before the time provided in litera (a) and (b) mentioned above, in that case it is considered the portion for which the invoice was issued or the one paid and it considered as the time when the invoice was issued or when the payment was made. 1The contractor shall get, on his demand an advance payment equivalent as a maximum to twenty percent (20%) of the total contract sum. This advance should be guaranteed with a guarantee of 100% repayment stocked in a confirmed bank in Rwanda. Advance payment shall be reimbursed proportionally on each certificate submitted to full amount before the final certificate”.

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- [15] The court finds that, even though RRA relies on litera (c) to argue that the advance payment received by Rubare constitutes the payment, that arguments lacks merit because does not demonstrate the portion of the work for which the invoice was issued or for which the payment was made as provided for by provision of law, rather, it must be considered as the advance payment paid to the successful bidder to enable him/her to commence the tender but not as a payment for a certain work. [16] In addition to that, the advance payment paid to the successful bidder, is progressively paid back in accordance with the provision of article 89 of the Law on Public Procurement mentioned above, and this is supported by clause 29.1 of the contract between Rubare and CSR mentioned above, and that was what happened, considering invoice N°1/Novembre-2008that Rubareproduced as an example demonstrating that on the amount of 147,248,763Frw which he had to be paid, 10% was withheld and another amount of 26,684,777Frw (for the reimbursement of 20%) was deducted, which Rubare alleges it constitutes the reimbursement on advance payment and indeed it corresponds to the amount provided for by article 89 mentioned above as well as clause 29.1 of the tender contract, hence the balance on that invoice owed to Rubare being 106,739,109Frw. [17] The above statements demonstrate that the advance payment that Rubare received as the successful bidder, was not the payment as RRA alleges, therefore it could not have been considered as the occurrence of the taxation period, thus neither fines nor late payment penalties should have been imposed to him since he had to pay tax at the time he issued the invoice or at the time of the payment of the works. [18] The opinion that the issuance of the advance payment is not considered as the taxation period was the same opinion mentioned in the new Law N°37/2012 of 09/11/2012 establishing the value added tax, in its article 10 relating to the time of payment of the tax, where the paragraph 2 states that “the date on which the payment of the goods or service including the partial payment is

made. However this paragraph does not concern the advance payment made to the constructors who later reimburse it by deducting it from the invoices presented to their client”. Even if this Law was not the one which was into force at the time the fines and late payment penalty was imposed to Rubare, but the opinion that the advance payment is reimbursed by the successful bidder as Rubare did, it is the ground which emphasizes the motivation highlighted above which also concurs with the rulings of another judgment N°RCOMA0074/11/CS rendered on 11 April 2014 by this Court between RRA and Misigaro Louis which also held that the advance payment does not constitute a payment. [19] Considering the motivations above, the Court finds that neither fines nor late payment penalties should have been imposed to Rubare, therefore the appealed judgment is overruled.

2. Whether Rubare should be awarded the procedural and counsel fees. [20] Rubare requests that RRA be ordered to pay him 2,000,000Frw for procedural and counsel fees, while RRA argues that he should bear his expenses. VIEW OF THE COURT

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- [21] The Court deems that given that Rubare’s appeal was found with merit he should be awarded procedural and counsel fees basing on the provisions of article 258 of CCB III which provides that “any act of a person that causes prejudice to another, obliges the one whose fault to repair the damage”, however, since 2,000,000Frw he requests is inordinate he should rather be awarded 1,000,000Frw in the discretion of the Court. III. THE DECISION OF THE COURT [22] Finds with merit the appeal lodged by Rubare Josias; [23] Overrules the fines and late payment penalties amounting to 21,380,684Frw imposed to him by RRA; [24] Orders RRA to pay Rubare Josias 1,000,000Frw of procedural and counsel fees; [25] Orders RRA to pay 100,000Frw for the Court fees

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