

UGANDA / JUDGMENT

Embassy Supermarket (U) Limited v Uganda Revenue Authority (TAT Application 114 of 2021) [2023] UGTAT 21 (5 May 2023) [2023] UGTAT 21

COURT

Tax Appeals Tribunal (Uganda)

BEFORE

Mugenyi, Chairperson, Akabway, Panel Member, Ali

CASE / FILE NUMBER

TAT Application 114 of 2021

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THE REPUBLIC OF UGANDA IN THE TAX APPEALS TRIBUNAL AT KAMPALA APPLICATION NO. 114 OF 2021

EMBASSY SUPERMARKET (U) LIMITED..... VERSUS

UGANDA REVENUE AUTHORITY.....

BEFORE: DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MR. SIRAJI ALI

RULIING

This ruling is in respect of an application challenging penal tax assessments of Shs. 84,000,000 issued by the respondent on the applicant for failure to issue Electronic Fiscal Receipting and Invoicing Solution (EFRIS) invoices.

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

The following issues were set down for determination.

- 1. Whether the applicant issued invoices?
- 2. If not, whether it is liable to pay the penal tax assessed?
- 3. What remedies are available?

The applicant was represented by Mr. Deus Mugabe, Mr. Bruno Kalibala and Mr. Andrew Kibaya while the respondent by Ms. Eseza Sendege and Mr. George Senyomo.

This dispute arose from the respondent issuing penal tax for the applicant's alleged failure to issue EFRIS e-invoices or e-receipts. The applicant contends that the penalty was not due as the respondent did not exercise its discretion properly and the penalty was excessive.

The applicants first witness, Mr. Asif Panjwani, its manager in charge of the operation testified that the respondent on 17th November 2021 issued the applicant with two assessments of Shs 72,000,000 and Shs 12,000,000 for failure to issue e-invoices from 1st to 14th November 2021 under S. 73A(2) of the Tax Procedure Code Act. On 24th November 2021, the applicant objected to the penal tax. On 30th November 2021 the respondent disallowed the objection on grounds that the applicant did not issue invoice or e-receipts as required under the law.

The witness stated that applicant faced challenges in effecting the EFRIS system. The applicant's product coding system got corrupted which delayed it in effecting the system. The product coding system with the respondent was complicated. There were many different codes. It was difficult for the applicant to acquire software that would easily integrate the applicant's system with that of the respondent. He testified that the applicant rectified the challenges. He contended that it is unjust to punish it for failing to implement a new complicated system.

The respondent's witness, Mr. Hassan Wasajja Lukenge, a supervisor in its domestic taxes department, testified that on 18th June 2020 the respondent issued a public notice in the New Vision newspaper introducing EFRIS in Uganda. On 23rd June 2020, the respondent issued General Notice No. 595 of 2020 in the gazette making it mandatory for taxpayers to issue e-invoices or e-receipts. It also issued a public notice in the New Vision newspaper indicating the commencement of e-invoices or e-receipts on 1st July 2020. The respondent issued several public notices extending implementation of EFRIS. It effectively rolled out the EFRIS on 1st January 2021. A notice was sent out on 15th September 2021. On 20th September 2021 the respondent wrote to the applicant to issue e-invoices for all business transactions as required by law. On 7th to 18th October 2021 and 18th October 2021, the respondent wrote to Uganda Supermarket Owners Association (USOA) informing its members, inclusive of the applicant to issue e-invoices for all transactions as required by law. He stated that the applicant deliberately refused to issue e-invoices and instead issued manual invoices from 1st to 14th November 2021 in contravention of the law.

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He testified that the applicant was trained on the use of EFRIS by the respondent. The respondent instituted a technical working committee to address issues regarding the implementation of EFRIS in supermarkets. This was done through USOA. The organization assisted its members to deal with product coding and make clarifications in areas that were not clear. The respondent has no pending issue or service request from the applicant.

The applicant submitted that there is no basis for imposing the penalty on it. It submitted that whereas the respondent has discretion to penalize, it should be exercised fairly and judiciously. It cited *Farid Meghan v Uganda Revenue Authority Civil Appeal 6 of 2022*, for determining the circumstances what seems just, fair, right, equitable and reasonable. It argued that the respondent did not impose any penalties for failure to use EFRIS invoices from 2018 to November 2021 even though it had published in gazette a notice requesting taxpayers to implement EFRIS on 23rd June 2020. The applicant contended that the respondent should have extended the same discretion to it since in its objection, it indicated its readiness to comply, despite the challenges faced. The applicant stated it had little or no control over the challenges which included multiple codes for similar products, software incompatibility, collapse of the applicant's excels formal sheet, limited staff, and Government curfew. It submitted that these challenges were similar to those faced by the other industry players. The respondent ought to have exercised its discretion fairly and not imposed the penal tax on the applicant considering the circumstances and as per the letter to the Uganda Supermarket Owners Association dated 7th October 2021.

The applicant submitted that the penalty was erroneously determined and applied. It contended that under S.73B(2) of the Tax Procedure Code Act for an assessment to be legal it should have shown the tax payable on the goods or the currency points applied to arrive at the amount of the penal tax. It argued that there is basis for penalizing the applicant daily. S.73B(2) does not permit the respondent to raise assessments based on number of days or invoices to determine the penalty. The applicant contended that the lawful penalty is either the tax due on the aggregated value of the goods or three hundred currency points whichever is higher. Therefore, the applicable penalty ought to have been Shs. 6,000,000. The applicant argued that

the penalty on a series of invoices would result in a penal assessment of Shs. 7,878,000,000.

The applicant submitted that the charging Section is ambiguous. It neither imposes a penalty per invoice or per day of default. It submitted that the tribunal has a duty to protect the taxpayer. The imposition of the penalty daily or per invoice should be rejected as the tax imposed should be clear. It cited *Cape Brandy Syndicate v IRC (1921) KB 64* and **Uganda Revenue Authority v Hassan Kajura* Civil Appeal 9 of 2015*.

In reply, the respondent submitted that S. 73A of the Tax Procedure Code Act gives the respondent a statutory obligation to specify which taxpayers should issue invoices or e-receipts. It cited *Kampala Nissan v Uganda Revenue Authority High Court Civil Appeal 7 of 2009* and Maxwell on "The Interpretation of Statutes, Penal and Tax laws" to show that it is mandatory for the respondent to perform the duty under S. 73A of the Act. Gazette Notice 595 of 2020, by the

Commissioner General made it mandatory for all VAT registered taxpayers including the applicant to issue e-invoices / e-receipts / employ fiscal devices. The respondent contended that the applicant's applicants' admission that it was VAT registered, meant that it fell within the category of the notice and is required to issue invoices and have fiscal devices. The respondent contended that all issues regarding implementations of EFRIS were addressed through institution of technical working group to assist the applicant and other taxpayers. The applicant did not notify the respondent of the issue arising including product code or any other challenges. These were an afterthought and were not raised during the objection and should not be entertained as are in contravention of S.16(4) of the Tax Appeals Tribunal Act.

The respondent submitted that the penalty imposed was legal. The applicant failed to comply with S.73B(12) of the Tax Procedures Code Act. The respondent submitted that the penalty is one of strict liability and not of discretion. It cited *Radio Pacis Ltd v Uganda Revenue Authority* HCCS 8 of 2013 for what amounts to strict liability. It was 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:

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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 asserted that S:73B(2) creates strict liability penalty for failure to issue e-invoices. The applicant did not issue e-invoices from 1st to 14th November 2021. Several requests to the applicant to issue e-invoices for all transactions were refused and or neglected.

In response to the issue of the assessment being illegal and excessive, the respondent implored the tribunal to confine itself to the grounds stated in the taxation objection. It cited S.16(4) of the Tax Appeals Tribunal act and challenged the legality of the new facts raised before the tribunal. They were never raised by the applicant at objection stage.

The respondent contended that it exercised its discretion to reduce the tax liability. It opted to penalize the applicant for one invoice issued each day instead of the total 1300 invoices which would have driven the latter out of business.

In rejoinder, the applicant submitted it sought leave of the tribunal on 11th August /2022 to challenge the legality of the assessment under S.16(4) of Tax Appeals Tribunal Act. Secondly, the tribunal cannot ignore illegality once brought to its attention. It cited *Makula International Ltd v His Eminence Emmanuel Cardinal Nansubuga & Rev. Fr. Dr. Kyeyune* 1982 HCB 11 and *ICEA General Co. Limited v Uganda Revenue Authority* Application 100 of 2019. It

submitted the penalty issued was illegal as it was not determined and applied appropriately. The respondent is supposed to assess the tax due on the aggregated value of the goods against three hundred currency points. There is nothing in the Act that permits the respondent to assess penalties on each invoice or per day.

As regards discretion, the applicant submitted that the respondent postponed enforcement of the requirement and in other instances decided not to penalize defaulters. It concluded that considering the circumstances prevailing at the time it was unjust for the respondent to penalize it.

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

The applicant operates a supermarket. Sometime in October 2020, the respondent issued a notice in the gazette making it mandatory for supermarkets to issue Electronic Fiscal Receipting and Invoicing Solution (EFRIS) invoices. In November 2021, the respondent issued two penal tax assessments totaling to Shs. 84, 000,000 on the applicant for not issuing EFRIS invoices to its customers between 1st and 14th November 2021. The applicant objected and the respondent disallowed its objection.

The requirement to issue mandatory EFRIS invoices is provided for in the Tax Procedure Code Act. S. 73 of the Act provides that the Commissioner may establish and operate a system known as the electronic notice system for the electronic furnishing of returns. Under S. 73A(1) of the Act, a taxpayer may issue an e-invoice or e-receipt or employ an electronic fiscal device which shall be linked to the centralized invoice and receipting system, or device authenticated by Uganda Revenue Authority (URA). Under S. 73A(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 URA. Under S. 73A(3), a taxpayer specified by the Commissioner under subsection (2) shall issue electronic invoices / e-receipts /employ an electronic fiscal device in all business transactions.

Failure to comply with the requirement to issue e-invoices or e-receipts as required by law attracts a penalty. S. 73B (1) of the Tax Procedure Code states that.

- 1) A taxpayer specified under section 73A(2) who does not use an electronic fiscal device is liable to pay a penal tax equivalent to the tax due on the goods /services or 400 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 /services or who tampers within electronic fiscal device is liable to pay a penal tax equivalent to the tax due on the goods/services or 300 currency points, whichever is higher.

This is where the dispute arose. On 18th June 2020 the respondent issued a public notice in the New Vision newspaper introducing EFRIS in Uganda. On 23rd June 2020, the respondent in the gazette issued General Notice 595 of 2020 indicating to

taxpayers that it was mandatory to issue e-invoices or e-receipts. Eventually the respondent issued a public notice on 15th September 2021 where it indicated that it would effect the implementation of EFRIS with effect from 20th September 2021. On 20th September 2021, the respondent wrote to the applicant advising it to comply with EFRIS by 1st October 2021. The applicant did not issue e-invoices from 1st and 14th November 2021

The Tax Procedures Code (e-invoicing and e-receipting) Regulations 2020, Regulation 3 provided that the Commissioner shall cause to be installed at the Authority the centralized and invoicing and receipting system referred to in S. 73A of the Act. Regulation 4 of the Regulations provided for the issuance of fiscal documents through amongst others a web portal, fiscal devices. Regulation 6 provides for the issuance of manual receipts. It states that.

"A taxpayer may issue manual receipts where –

- (a) the system is not available and offline transactions occur.
- (b) the taxpayer's system is off.
- (c) the fiscal device is undergoing maintenance in accordance with regulation 7, or
- (d) there is any other justifiable reason."

Regulation 6(2) provides that.

"A taxpayer who issues a manual receipt under subregulation (1)(a) shall upload the manual receipt as soon as practicable after the System is restored, and in any case, not later than twenty-four hours after the system has been restored."

The Regulations allowed a taxpayer to issue manual receipts to cater for challenges. However, it was supposed to upload the receipts as soon as practicable within twentyfour hours after the system has been restored.

The applicant is challenging the respondent's decision to impose penalty on it for failing to implement EFRIS between 1st and 4th November 2021. The decision to implement EFRIS was administrative. A statutory body is required to exercise discretion when making administrative decisions. Discretion can only be challenged if it is applied illegally, irrationally or without procedural impropriety.

The first question the Tribunal will ask itself was whether the discretion was exercised illegally. 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."

The Tribunal has to determine whether the law imposing the penalty was illegal. In **Cape Brandy Syndicate v IRC** (1921) KB 64 the court said:

"..... that 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."

S. 73A of the Tax Procedure Code Act provides that 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 gazette was issued in June 2020. That is the day that EFRIS was supposed to be implemented. For unknown reasons, the respondent kept on postponing the implementation using public notices in the newspapers. Since the law was clear it ought to have been implemented EFRIS from June 2020. S. 73B provides that a taxpayer specified under S. 73A who does not use an electronic fiscal device is liable to pay a penal tax. S. 72A and S. 73B are clear. There is no ambiguity in the implementation of the law. Any taxpayer who does not implement EFRIS commits an offence and is liable to a penalty on default. The tax penalty imposed is one of strict liability. The respondent is required to implement the provisions of the Act and penalize individuals who do not comply with it.

The applicant challenged whether the respondent exercised the discretion rationally. Halsbury's Law of England 3rd Edition Vol. 30 p. 687 para. 1326 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."

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 a 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."

In short, the Tribunal has to determine whether the discretion exercised by the respondent was done irrationally.

There are several reasons the applicant gave for its failure to implement EFRIS. Firstly, it argued that the respondent used its discretion to postpone the effective date for implementation of EFRIS to various dates. Since the respondent was postponing the implementation, due to numerous challenges faced by taxpayers including the applicant, the former ought to waive

penalties for failure to issue EFRIS invoices. According to the applicant the respondent had discretion to act judiciary and fairly since it had used the discretion from 2018 to November 2021 to waive penalties of taxpayers for failure to use EFRIS. The question the applicant is asking itself is that if all along the respondent was extending the implementation of EFRIS why should it penalize it when it was still facing the same challenges? When a law is passed it is supposed to be implemented on the date it states it should be effected. S. 73A of the Tax Procedure Code Act provide that 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 effective date of implementation should have been the date the gazette was issued, that is June 2020. Therefore, the applicant's contention that because the respondent was postponing the implementation may not help. Once the gazette has been issued, a postponement by a public notice in a newspaper has no legal effect as it is not provided in the law. Therefore, those postponements which are not provided in the law cannot be an excuse for failure to comply with the law.

Furthermore, and without prejudice, the postponements were supposed to enable taxpayers to overcome the challenges faced in implementation of EFRIS. Such postponement was not supposed to be in perpetuity. One cannot explain what type of challenge facing EFRIS that cannot be rectified from June 2020 to November 2021. The applicant under the association of USOA was supposed to have been trained in how to implement EFRIS. The applicant did not state whether its staff went

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for the training on how to implement EFRIS or why they did not. The applicant does not list other supermarkets who were faced with similar challenges and failed to implement ERFIS in time, but the respondent did not penalize them.

If there were challenges in implementing EFRIS the applicant ought to have complied with the Tax Procedures Code (e-invoicing and e-receipting) Regulations. Regulation 6 provides for the issuance of manual receipts. Regulation 6(2) provides that a taxpayer who issues a manual receipt shall upload the manual receipt as soon as practicable after the system is restored, and in any case, not later than twenty-four hours after the system has been restored. The applicant does not show that it complied with the Section. Failure by the applicant to implement EFRIS for 14 days, when the Regulations gave a window period of twenty- four hours was unreasonable on its part.

Lastly, the applicant submitted that the assessment if payable was erroneously determined and applied. The applicant argued that there was no basis for penalizing it daily or per invoice. The respondent argued that the applicant was raising a new ground not stated in its objection. The applicant is 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 held that.

"... While the tribunal is limited to the ground in the objection and or objection, 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 an objection and a legal argument raised. When a tribunal is interpreting a law it should entertain all the legal reasons in order to ensure the justice is delivered."

Paying the correct tax by a taxpayer is a requirement for a tax system to be effective and equitable. It is part of the legality of an assessment.

S. 73B (1) of the Tax Procedure Code states that a taxpayer specified under S.73A(2) who does not use an electronic fiscal device is liable to pay a penal tax equivalent to the tax due on the goods /services or 400 currency points, whichever is higher. S.73B(2) of the Tax Procedure Code Act states that 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. The respondent contended that penal tax is paid on each invoice issued or day the applicant did not comply with the implementation of EFRIS.

In **Cape Brandy v Inland Revenue Commissioners** [1920] 1 KB 64 Rowlatt J said.

'In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied'.

A reading of the above Sections does not indicate anywhere that the penal tax should be charged on an invoice not issued or for each day EFRIS was not implemented. There is a lacuna in the law. The Tribunal cannot insert the words 'invoice' and or 'day' as they were not provided for when the legislature enacted the law. To do would require the Tribunal to usurp the powers of the legislature.

In the above Sections the taxpayer is liable to pay three hundred or four hundred currency points. They do not indicate whether it is per transaction or per day. Such an omission is fatal. The first rule of law is the rule of thumb. The rule of thumb requires that when one is applying the law it should use experience and common sense. It involves the practical application of the law. The Tribunal will apply the rule of thumb. If one was to apply the three hundred or four hundred currency points to each invoice or transaction or per day, it is highly unlikely that the tax due would exceed the one using currency points. The application of the currency points using the respondent's method would be unconscionable, excessive and unfair and tantamount to unjust enrichment. The penalty would also be disproportional to the offence committed especially where a taxpayer may be facing challenges. The applicant argued that the penalty on a series of invoices would result in a penal assessment of Shs. 7,878,000,000. The respondent witness testified that if they considered the value of each receipt the value of the penal tax would be high. The decision by the respondent to penalize the applicant Shs. 84,000,000 was

concessionary and not the actual penal tax payable if it applied its method to the dot. The Tribunal does not think that was the intention of the legislature to use penal tax that would be harsh and out of reach for taxpayers to pay. A penal tax should be clear and ascertainable. It should not depend on the magnanimity of a revenue collecting body. Otherwise, it may breed corruption and avenues for extortion to avoid paying a harsh penal tax. The Tribunal takes into consideration the principle that where the law is ambiguous, the benefit of doubt is given to the taxpayer. The only practical interpretation of the above Sections is that a taxpayer is liable to pay the currency points on an omission to implement EFRIS in the tax period in the VAT Act. The tax period in the VAT Act is one calendar month. Therefore, each month the applicant omits to implement EFRIS the respondent should penalize it. Where the actual tax payable is greater than the currency points, then it should be liable to pay the actual tax instead of the currency points. The applicant omitted to implement EFRIS for one tax period. Therefore, the three hundred currency points which the applicant was liable to pay amounts to Shs. 6,000,000 on its omission to implement EFRIS.

In conclusion the tribunal makes the following orders.

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

Dated at Kampala this ... 5Th day of Man \$\ldots \ldots\$ 2023\$

DR. ASA MUGENYI CHAIRMAN

DR. STEPHEN AKABWAY MEMBER

MR. SIRAJ ALI MEMBER

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