

UGANDA / JUDGMENT

Makinen Huganda Limited v Uganda Revenue Authority (Application 143 of 2023) [2023] UGTAT 41 (13 April 2023)

[2023] UGTAT 41

COURT

Tax Appeals Tribunal (Uganda)

BEFORE

Mugenyi, Chairperson, Mugerwa, Panel Member,
Katwe

CASE / FILE NUMBER

Application 143 of 2023

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THE REPUBLIC OF UGANDA IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA APPLICATION 143 OF 2023

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MAKINEN HUGANDA LIMITED

APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY.....

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

This ruling is in respect of a preliminary objection raised by the respondent that the applicant has not paid 30% of the tax in dispute.

On 18th January 2022, the respondent raised an income tax assessment of Shs. 1,440,574,500 on the applicant for July 2019 to June 2020. The assessment was raised because of the variance in the applicant's retained earnings and employment expenses claimed but not subjected to Pay as You Earn (PAYE). The applicant objected to the assessment which the respondent disallowed. The applicant filed an application before the Tribunal. At the trial, the respondent raised an objection that the applicant had not paid 30% of the tax in dispute.

The issue for determination is: whether the application is proper before the Tribunal?

The applicant was represented by Mr. Gregory Byamugisha while the respondent by Ms. Ritah Nabirye.

The respondent submitted that the applicant has not paid 30% of the tax in dispute or that part of the tax not in dispute or whichever is greater. The respondent cited S. 15 of the Tax Appeals Tribunal Act which provides that a taxpayer should on lodging an application pay 30% of the tax in dispute or that part of tax assessed not in dispute whichever is greater.

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The respondent also cited Uganda Projects Implementation and Management Centre v Uganda Revenue Authority Constitutional Appeal 2 of 1999 which held that the statutory requirement in the VAT Act similar to S. 15 of the Tax Appeals Tribunal Act is constitutional and did not infringe on a right to a fair hearing and the right to equal treatment under the law. The said appeal cited the South African case of Metcash Trading Co. Limited v Commissioner for South African Revenue Services and another where it was stated that a taxpayer has to pay his tax and argue later.

The respondent cited Commissioner General Uganda Revenue Authority v Meera Investments Limited. Civil Appeal 22 of 2007 where the court stated that the government needs taxes paid expeditiously in national interest." In Elgon Electronic v Uganda Revenue Authority HCCA 11 of 2007, the court held that the provisions of S. 15(1) of the Tax Appeals Tribunal Act are mandatory. In a Better Place Limited v Uganda Revenue Authority Civil Appeal 37 of 2019 the High court noted that the applicant did not apply to the Tax Appeals Tribunal to enforce any alternative means of payment of the 30% tax in dispute and the therefore the Tribunal cannot be faulted for dismissing the matter.

In reply, the applicant contended that is only fair that the Tribunal first considers the legality of the objection decision before it can determine the preliminary objection. The applicant contended that the respondent was attending commercial court on 24th March 2023 which is not true as per a cause list the applicant attached. Nevertheless, the tribunal issued directives on filing submissions which the respondent did not comply with. The respondent served the applicant late. The applicant argued that the respondent did not comply with court orders. It cited Amrit Goyal v Harichard Goyal and 3 others Civil Application 109 of 2004 where the Court of Appeal held that "A court order is a court order. It must be obeyed as ordered unless set aside or varied. It is not a mere technicality that can be ignored." The applicant contended that the submissions were filed in contempt of court. It submitted that a party to litigation should not choose to file submissions contrary to the directives of the court. The applicant cited Kezaala Mohammed Baswari Batwagaine v Batambuze Majid and another Civil Appeal 66 of 2016 where the Court of Appeal stated that timelines set by court were disregarded by the appellant. A party cannot be allowed to file and serve process as he chooses in total disregard of court directives. The applicant also cited Judith Rwakishumba and another v Sikh Sawmills and Ginners Limited Civil Application 182 of 2021 where the court accepted that the applicant was in contempt of court orders. The applicant prayed that the respondent's submissions be expunged from the court

record.

In respect of the objection decision, the applicant submitted that it read "Objection disallowed, and assessment upheld as agreed in the meeting held 12th May 2022". The applicant submitted that it never attended the said meeting. The applicant wondered who agreed to the assessment. The applicant contended that the objection does not reveal its reasons.

The applicant contended that the constitutional court held that S. 15 of the Tax Appeals Tribunal Act should not be applied indiscriminately. The court held that where a taxpayer challenges an assessment on legal or technical grounds the 30% payment should not be enforced. The applicant cited Fuelex (U) Ltd. v Uganda Revenue Authority Constitutional Petition 3 of 2009 where the court stated that "Constitutionality comes into question where its applicability is sought to extend to parties whose disputes are purely legal and or technical". It submitted that the Court of Appeal proceed to declare S. 15 unconstitutional.

Having read the submissions of the parties this is the ruling of the tribunal.

The law relating to preliminary objections is provided for under Order 6 Rule 28 of the Civil Procedure Rules which is to the effect that.

"Any party shall be entitled to raise by his or her pleadings any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing".

In Yaya v Obur and Others Civil Appeal 81 of 2018 [2020] the court stated that.

"It is always in the interest of justice to hear such objections on dispositive points of law at the earliest so as to save time and costs and to avoid a trial in nullity. A court has discretion to dispose of the preliminary objection immediately or defer its ruling until after hearing the whole case. Such a deferment may be made where it is necessary to hear some or the

entire evidence to enable the Court to decide whether the objection raised is dispositive of the suit or not."

The Tribunal will proceed to resolve the preliminary objections.

Before we can address the preliminary objection of the respondent, the applicant had objections in respect of the one raised by the former. It contended that it was not true that the respondent was attending Commercial Court on 24th March 2023. It attached a cause list. At this stage, the Tribunal cannot state whether that is true the respondent's counsel was attending Commercial Court or not. That is because the respondent has not been given a chance to respond to it. The respondent deserves a right to a fair hearing. Secondly, courts are known to hear matters which may not be on the cause list. The applicant further contended that the respondent did not comply with directives on filing submissions. A directive is different from a court order. Where directives are not complied with a Tribunal has the option of dismissing the matter concerned. However, it has to weigh it in light of all the circumstances. For instance, if it

dismisses the preliminary objection, there is nothing that stops the respondent from raising it later as it goes to the root of the matter. Payment of 30% of the tax in dispute or that portion not in dispute whichever is greater goes to the legality of a matter before the Tribunal. In *Makula International Limited v Cardinal Nsubuga Civil Appeal 4 of 1981* it was stated that a court cannot sanction what is illegal. Therefore, the Tribunal has to determine if there was any illegality in filing the application. Furthermore, the Tribunal notes that the applicant was not prejudiced by the respondent's delay in filing its submissions. The applicant was able to reply to the preliminary objection of the respondent.

The respondent raised a preliminary objection that the applicant has not paid 30% of the tax in dispute or that not in dispute whichever is greater as required by S. 15 of the Tax Appeals Tribunal Act which reads:

"a taxpayer who has lodged a notice of objection to an assessment shall, pending final resolution of the objection, pay 30 percent of the tax assessed or that part of the tax assessed not in dispute, whichever is greater."

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The applicant does not dispute that it did not pay 30% of the tax assessed or the amount not in dispute. It contends that the requirement to pay 30% of the tax in dispute is unconstitutional.

In Bullion Refinery v Uganda Revenue Authority Application 36 of 2021 the Tribunal noted that

"In *Uganda Projects Implementation and Management Centre v Uganda Revenue Authority Constitutional Appeal 2 of 1999* the dispute was whether S. 34(C) of the Value Added Tax (VAT) Act contravenes the 1995 Constitution of Uganda in as far as it requires a person lodging an application with the Tax Appeals Tribunal to pay the Commissioner General 30% of the tax in dispute or that part of the tax assessed not in dispute, whichever is greater. The Supreme Court ruled that the impugned section does not contravene Articles 21(1)(2) and 126 of the Constitution by completely blocking the appellants access to court. The said decision was in respect of the VAT Act. The dispute before the Tribunal is in respect of S. 15 of the Tax Appeals Tribunal Act which was not the basis of the decision in the Supreme Court. However, the Tribunal notes that the Supreme Court decision was in relation to the right to access justice or constitutionality of the impugned S. 34(C) of the VAT Act which would be similar to the right of accessibility under S. 15 of the Tax Appeals Tribunal Act. A taxpayer bringing a dispute under impugned S. 34(C) of the VAT Act would face a similar challenge to one bringing an income tax dispute under S. 15 of the Tax Appeals Tribunal Act. By deciding on the constitutionality of the VAT Act the Supreme Court was implicitly determining the constitutionality of S. 15 of the Tax Appeals Tribunal Act. It does not need a rocket scientist to see that the Supreme Court decision in respect of the constitutionality of the impugned S. 34(C) of the VAT Act applies to S. 15 of the Tax Appeals Tribunal Act. Though the Tribunal is not a court of judicature, the Supreme Court is the Highest Court, and its decision is binding on the Tribunal."

The Supreme Court decision is still binding on the Tribunal.

The applicant cited Fuelex (U) Limited v Uganda Revenue Authority Constitutional Petition No. 03 of 2009. The relevant portion of decision of his Lordship Kakuru is.:

"I find that Section 15 of the Tax Appeals Tribunal Act is not unconstitutional as far as it applies only to disputes over the tax amounts assessed. Its constitutionality comes into question where its applicability is sought to extend to parties whose disputes are purely legal or technical and where the issue for determination before the Tax Appeals Tribunal does not relate only to the amount of tax payable."

If we are to apply that portion to this application, the applicant would still be required to pay 30% of the tax assessed.

In its application, the applicant does not state the amount of the tax in dispute. However, it refers to assessment no. PL012200191349. The said assessment which is in the applicant's trial bundle has a figure of Shs. 1,440,574,500. During scheduling, the parties agreed to the said figure. The dispute of the parties is not purely legal nor technical. There is no evidence to show that the applicant objected to only a legal interpretation of a tax dispute. We already stated that it is challenging an assessment of Shs. 1,440,574,500. In *Bullion Refinery v Uganda Revenue Authority* (supra) the Tribunal noted that. However, where a taxpayer objects to an assessment and to a legal interpretation of a decision, the taxpayer will still be required to pay 30% of the tax assessed in the objection. The Tribunal does not see any reason the applicant should not pay 30% of the tax in dispute.

In conclusion, the preliminary objection is sustained. The main application is dismissed for failure by the applicant to pay 30% of the tax assessed.

day of

Dated at Kampala this

DR. ASA MUGENYI CHAIRMAN

MR. GEORGE MUGERWA MEMBER

2023.

Is. Arekathus

MS. CHRISTINE KATWE MEMBER

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