UGANDA / JUDGMENT

Photon Technologies Ltd v The Commissioner General Uganda Revenue Authority (Miscellaneous Cause No. 14 of 2016) [2016] UGCommC 69 (5 October 2016)

[2016] UGCommC 69

COURT
Commercial Court of Uganda

CASE / FILE NUMBER
Miscellaneous Cause No. 14 of 2016

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THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO 14 OF 2016

PHOTON TECHNOLOGIES LTD}..... APPLICANT

VERSUS

THE COMMISSIONER GENERAL UGANDA REVENUE AUTHORITY}..... RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant filed this application by Notice of Motion under section 99 (7) of the Income Tax Act, section 33, 36, (1) (2) (3) 38 (1) (2) (3) & 39 (2) of the Judicature Act Cap 13 laws of Uganda, rules 3 (2) 6, 7 & 8 of the Judicature (Judicial Review) Rules and Orders 41 and 52 of the Civil Procedure Rules as well as section 98 of the Civil Procedure Act for the following reliefs:

1. A declaration that the Respondents tax assessment and demand of 3rd of April 2016 is unlawful.
2. A declaration that the Applicant election to have its tax objection upheld is binding on the Respondent.
3. An order of certiorari quashing the Respondents demand for taxes in the instant matter beyond that due under the Applicant election to uphold its tax obligation.

4. A permanent injunction barring the Respondent from further unlawfully instituting recovery measures in the matter.

5. Costs of the suit should be provided for.

The grounds of the application are that in February 2016 the Applicant objected to the Respondent's tax assessment. The Respondent did not make an objection decision to the Applicant's objection within 90 days from the objection date. After the passing of 90 days the Applicant elected to treat its tax objection as upheld. Furthermore the Applicant asserts that the Respondent's actions are illegal, high-handed or procedurally ultra vires. Fourthly the Respondent has threatened to institute tax recovery measures. Fifthly the Applicant avers that the court can intervene in the circumstances and grant an order of judicial review. If the court does not intervene there is a high likelihood that the Respondent will shortly take adverse steps to recover the contested sums to the Applicant's peril, high-cost and embarrassment.

The application is supported by the affidavit of Ali Daniyaal, a manager of the Applicant. The affidavit verifies the facts in the notice of motion.

The affidavit in reply is that of Noah Byamugisha an advocate in the Legal Services and Board Affairs Department of the Respondent. He deposed that the Respondent issued an assessment to the Applicant on 15th February, 2016, under which the Applicant was required to pay the taxes by 31st March, 2016. The Respondent duly maintained its position that taxes were due and owing when it demanded the same from the Applicant. In the premises he contended that the Respondent made an objection decision within the required time and as such the application ought to be dismissed. He further deposed that the Applicant does not have a bona fide arguable case for consideration on the merits before the court and the dictates of natural justice and substantive justice require the application for orders ought to be refused.

When the matter came for arguments on 26th September, 2016 Counsel Ronald Baluku represented the Respondent but Counsel Nelson Walusimbi who represents the Applicant was absent. This was when High Court Miscellaneous Application Number 400 of 2016 for a temporary injunction was mentioned.

Having considered the law, I was of the view which I verbally communicated to counsel that the question of election by a taxpayer espouses a process of law and does not deal with the tax dispute on the merits. The law was simply that if the Commissioner General did not make an objection decision within the specified period under the statute, the taxpayer who has made an objection to an assessment has the option to elect to treat the objection as having been allowed. In the premises, I directed the Respondent's Counsel to avail to the court any written objection decision that had been made within the statutory period prescribed under the Income Tax Act and fixed the matter for mention on 30th September, 2016. On 30th September, 2016 Counsel Baluku Ronald verbally informed the court that he had made a request for such a written objection decision but until that moment had been unable to come up with the written objection decision so as to challenge the Applicant election to treat its objection to assessment as having been allowed.

The Applicant's Counsel had filed skeleton arguments and the Respondent was unable to produce evidence that it had indeed made an objection decision within the statutory period.

The applicable law is section 33B of the Value Added Tax Act Cap 349 Laws of Uganda. Section 33B (1) 1 thereof provides that a person who is dissatisfied with an assessment may within 45 days after receipt of the notice of the assessment decision; lodge an objection to the Commissioner General. Secondly, subsection 4 thereof provides that the Commissioner General may, within 30 days after receiving the objection, consider it and allow the objection in whole or in part and amend the assessment accordingly. Thirdly, subsection 5 provides that the Commissioner General shall serve the person objecting with notice in writing of the objection decision within 30 days after receiving the objection. Last but not least subsection 6 provides that where a decision has not been made within 30 days after the lodging of the objection by the Commissioner General, the taxpayer may by notice in writing to the Commissioner General elect to treat the Commissioner General as having made the decision to allow the objection. Finally the taxpayer is treated as having been served with notice of the objection decision on the date the taxpayer's election is lodged with the Commissioner General.

The summary of the above provisions is that where a taxpayer has lodged an objection to an assessment made by the Commissioner, and the Commissioner General has not made an objection decision within 30 days after receiving the objection, the tax payer may elect to treat the Commissioner General as having allowed the objection. In which case time when the objection is deemed allowed is the date the written election is lodged with the Commissioner General.

I have therefore considered the facts in support of the application and the affidavit in reply. The facts are that the Applicant was assessed for VAT and the notice date of assessment is dated 15th of February, 2016. The due payment date in the assessment notice is 31st of March 26 and the total VAT payable comprising of declared assessment together with audited assessment amounted to Uganda shillings 114,441,920/=. Broken into its constituent parts, the declared assessment was Uganda shillings 2,309,576/= while the audited assessment was Uganda shillings 116,751,496/=. The total assessed amount is less the declared assessment was Uganda shillings 2,309,576/=. According to annexure "B" to the application, the Applicant filed an objection to assessment under the notice dated 7th of March 2016. The disputed amount was the principal tax of Uganda shillings 91,173,067/= plus the penalty imposed of Uganda shillings 17,703,688/=. The reason was that this was an over estimate when the Applicant had already filed the return and paid under reference CRO1162336013.

In annexure "C" to the application the Applicant received a validation of objection showing that the objection reference number was CRO 1163026508 and has been received on a particular date. The reference number of the application was the same and search number was 35017581665CN. It was written that the Applicant could use the 'track your status' link on the web portal to track the status of the application by providing the reference number and the search code. The document is dated 9th of March 2016 and was automatically generated by the Respondent's software with a message that it should not be replied to. Finally on 13th April, 2016 the

Respondent wrote indicating that the Applicant's application for election of objection decision has been received through the web portal. Furthermore, the Respondent wrote that the application would be forwarded to the concerned area officer for further processing. Objection reference number quoted is CR 01163026508.

Finally I have considered annexure "D" which is another e-mail from Uganda revenue authority Kiguli Lumu, who wrote for the Commissioner General and is dated 5th of April, 2016. They wrote on the VAT outstanding liability of Uganda shillings 109,683,490/=. Reference was made to the communication dated 23rd of March, 2016 and the Applicant was reminded to pay the sum by 12th April, 2016 to avoid recovery of tax through other enforcement measures. Secondly by Election Rejection notice dated 15th of April 2016 the Respondent wrote that the date of the objection was 7th March, 2016. Secondly, the date of assessment was 4th March, 2016 and the date of election was 13th of April 2016. The Respondent wrote that the election is invalid.

Last but not least section 33B (5) provides that the Commissioner General shall serve the person objecting with notice in writing of the objection decision within 30 days after receiving the objection.

In the affidavit in reply of Noah Byamugisha paragraphs 3, 4, 5 and 6 he deposes as follows:

> *"3. That the Respondent issued an assessment to the Applicant on 15th February, 2016.*

4. That under the said assessment, the Applicant was to pay the taxes by 31st March, 2016.
5. That the Respondent duly maintained its position that the taxes were due and owing when it demanded the same from the Applicant.
6. The Respondent therefore contends that it made an objection decision within the required time and as such this application ought to be dismissed."

I have carefully considered the affidavit in reply and it does not give any documentary proof of any objection decision. Secondly in paragraph 5 thereof it clearly writes that the Respondent duly maintained its position that the taxes were due and owing when it demanded it from the Applicant. In other words the Respondent relies on a demand for taxes rather than on an objection decision. Does a demand for taxes amount to an objection decision? An assessment is made under section 32 of the Value Added Tax Act Cap 349 laws of Uganda. Secondly a notice of assessment is served on the taxpayer under section 32 (7) of the Value Added Tax Act. A demand for tax can only be made in the course of collection and recovery of tax and there are specific provisions which deal with that. In light of the strict construction of tax statutes, a demand for taxes is not and cannot be an objection decision. If that were so, it would be an objection decision by implication yet an objection decision is supposed to be in writing. Secondly, whether detailed reasons are given or not, the provisions of section 33B (5) of the Value Added Tax Act Cap 349 are mandatory and provide as follows:

"The Commissioner General shall serve the person objecting with notice in writing of the objection decision within 30 days after receiving the objection.

It is a requirement that notice in writing of the objection decision is served on the taxpayer within 30 days. A demand is not a notice of objection decision. The result is that the Respondent has not adduced any evidence of any notice of objection decision and therefore the only evidence available to the court shows that the Applicant was not served with any objection decision within 30 days. It is not in dispute that the Applicant filed a notice of objection, objecting to assessment on 7th March, 2016.

Finally, the Respondents Counsel was given an opportunity to present evidence of the notice of objection decision and by 30th of September, 2016 had not obtained any written evidence of an objection decision. The only conclusion I have reached is that there was no objection decision or notice thereof communicated to the Applicant within 30 days from 7th March 2016. The Applicant by 13th April, 2016 elected to treat the objection as having been allowed. This is a legal process which does not deal with the merits of the tax assessment. The burden is on the Commissioner General to deliver an objection decision which would kick in any other procedure such as appeals or review where the taxpayer is aggrieved and seeks to challenge the objection decision.

In the absence of that, the law makes it clear that upon election to treat the Commissioner having allowed the objection, the taxpayer is deemed to be liable only to the extent that he or she admits the assessed amount. The entire tax assessed is disputed.

I must say that it would be negligent on the part of the Commissioner General not to write an objection decision within the stipulated time if there are any grounds for maintaining the assessment or any part of it.

The legal process of election relieves the taxpayer of any payments not admitted in the objection to assessment if the Commissioner does not communicate a decision within the statutory period of 30 days. Enforcement of the assessment after election would be *ultra vires* section 33B (6) and (7) of the Value Added Tax Act Cap 349.

In the premises, the application for judicial review is allowed and the following orders issue:

1. A declaration issues that the Respondent’s demand of 3rd of April 2016 is unlawful.
2. A declaration issues that the Applicant’s election to have its tax objection as allowed is binding on the Respondent.
3. An order issues quashing the Respondents demand for taxes dated 3rd of April, 2016.
4. Finally a permanent injunction issues barring the Respondent from further unlawfully instituting recovery measures for the specific assessment for VAT dated 15th of February, 2016 totalling Uganda shillings 114,441,920/= under assessment number CR010216542108 for the period 01/12/2015 – 31/12/2015, the only subject matter of this ruling.
5. The Application is allowed with costs.

Ruling delivered on the 5th of October 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Ronald Baluku Counsel for the Respondent

Atukunda Fiona Holding brief for Nelson Walusimbi for the Applicant

Ali Daniyaal, Company Secretary

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

5th October 2016

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