THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 02 OF 2022

GOLD MAX ADVISORY..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY.....RESPONDENT

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

This ruling is in respect of assessments by the respondent for failure to file a return in time and on a re- characterization of monies on the applicant's bank account as sales.

On 6th November 2019, the applicant was penalized Shs. 1,260,000 for failure to file an income tax return. On 24th June 2011, the applicant was also penalized Shs. 12,215,783 for an unsatisfactory declaration in its return

Issues

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

The applicant was represented by Mr. Paul Bananywa while the respondent by Mr. Thomas Davis Lomuria.

The applicant's witness, Mr. Edgar Mutebi, its director testified that on 22nd June 2019 after facing challenges of uploading the applicant's income tax return for the year ended 2018, he sent an email to the respondent that it was unable to file returns. He made several communications with the respondent where he shared the problem the applicant was having. He tried to load the template again on 30th June 2019 but in vain. He sent the income tax return in soft copy so that the respondent may help. The last communication was on 6th November 2019. The respondent requested for a soft copy of

the applicant's income tax return. The respondent informed the applicant that it was unable to trace its previous submission. On 3rd Feb 2021, the applicant was penalized Shs. 1,260,000. for failure to file a return The applicant objected because it dd not defaulted in filing an income tax return and had engaged the respondent. Upon objection the respondent asked the applicant to provide a soft copy of its income return for 2018. It later asked for the operational bank account of the applicant. He stated that the respondent treated the company's capital as undeclared deposits of Shs. 50,638,375. He stated that the respondent considered the applicant's credits on its bank statement as sales. The applicant was issued a default assessment of Shs. 12,215,783 for unsatisfactory declaration. He stated that the applicant took necessary steps to be tax compliant. He stated that the applicant had a share capital of Shs. 10,000,000. The Shs. 50,638,375 was the trending capital of the applicant. The applicant did not provide the respondent with details on alternative capital fund providers.

The respondent's witness. Ms. Susan Nuwasasira, an officer in its objection's unit under its domestic taxes department testified that on the applicant's failure to file an income tax return for the year 2018/2019, the respondent issued a default administrative assessment of Shs. 1,260,000. She stated that applicant listed its share capital as Shs. 10,000,000. She testified that upon review of its bank statements, the respondent found that the applicant had declared deposits of US$ 13,552 an equivalent of Shs. 50,638,375. She stated that the applicant alleged that it was investing in forex offshore and that the deposits on its bank account were capital and not sales. The applicant failed to substantiate its claim with supporting evidence and as such the respondent considered the deposits as sales. The respondent issued the applicant with an additional assessment of Shs. 12,215,783. She stated that a taxpayer can communicate with the respondent through a letter.

The applicant submitted that it attempted to engage the respondent on its failure to file its income tax period for the year ending 2018. Despite making several submissions, the respondent was unable to trace them. The respondent penalized the applicant Shs. 1,260,000 though it was able to retrieve the latter's previous net income tax submissions.

On 24th June, 2021, the applicant was issued a default notice of Shs. 12,215,783 for unsatisfactory declaration.

The applicant submitted that it is not liable to pay the penal tax because that it exchanged emails with the respondent. It submitted that electronic transmission is governed by Sections 20 and 73 of the Tax Procedure Code Act and S. 5 of the Electronic Transaction Act 2011. The applicant submitted that the respondent is estopped from penalizing it when it undertook to aid it. In the circumstances, the penalty of Shs. 1,260,000 for not filing returns was illegal and must be set aside.

The applicant submitted that the penalty tax of Shs.12, 215,783 was illegal as it was based on working capital. It submitted that the respondent erroneously categorized trading stock for forex trading (which is money) as sales and in turn considered it as income. It submitted that its witness explained the bank statement. It contended that the failure by the respondent to understand the nature of the applicant's business and misinterpreting the bank statement occasioned it a miscarriage of justice. The applicant was condemned to pay an illegal tax that is based on capital not sales.

The applicant submitted that the respondent was provided with proof of transfer of monies from the applicant to an international online forex trading platform for trading managed by Blue Max Global Limited, a broker. The applicant had a contract with the broker who has since closed business. The applicant provided the only available evidence of contractual obligation by submission of email in exhibit PEX 1 pursuant to S. 8(1)(b) of the Electronic Transactions Act. The applicant further provided emails and client transaction statements, exhibits PEX 11 and PEX 13, as proof of transfer of monies from its bank account to Blue Max Global. The email also served as a contract since they had an offer, acceptance and consideration. This is supported by S. 13 of the Electronic Transactions Act 2011.

The applicant submitted that the bank statements did not provide any narrative that was contrary to the deposits made and subsequent transfers to the international broker. The

respondent has not provided any proof that the monies that were paid into the applicant's account were meant for any other purpose or payment save for the forex trading business

In reply, the respondent raised a preliminary objection that the applicant has never objected to the additional assessment of Shs.12, 215,783. As such, the respondent has never issued an objection decision in respect of the said assessment and the applicant is prematurely before the tribunal. The respondent submitted that S. 24 of the Tax Procedures Code Act provides that a taxpayer who is aggrieved by a tax decision to lodge an objection with the Commissioner. The taxpayer can then lodge an application in the Tax Appeals Tribunal for review of the objection decision under S. 25(1) of the Tax Procedures Code Act. It contended that where there is no objection decision, the taxpayer is prematurely before the Tribunal. it submitted that the applicant did not object to the administrative additional assessment and therefore there is no objection decision. The Tribunal does not have jurisdiction in respect of the administrative additional assessment of Shs. 12,215,783 without an objection decision. The respondent submitted that in *Precise Engineering Services Ltd v URA* Application 84 of 2022, this Tribunal held that; "coming to the Tribunal without an objection decision or tax decision is illegal and should not be entertained'.

The respondent submitted it is trite law that a preliminary objection can be raised at any time in the proceedings of the case. The respondent cited Makula *International Ltd v His Eminence Cardinal Nsubuga & Anor* (1982) HCB 11 where it was held that;

> "A court of law cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleading, including any admission made thereon."

It also cited *Musoke Mike v Kalumba James* Revision Cause 09 of 2019 where it was held that a preliminary point of law can be raised at any time of the case including at submissions stage. Justice Bashaija held that;

> "Quite on the contrary, this court was cognizant of the fact that issues of law could be raised at any time and in this case, the objection on a point of law could be raised in the submissions and court would determine it pursuant to Order 15r.2 CPR which provides as follows;

"Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part of it may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."

The respondent submitted that the law on preliminary points of law is provided for under Order 6 rule 28 of the Civil Procedure Rules which states 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 or after the hearing.

The respondent submitted that an administrative default assessment was issued on the applicant for failure to furnish the right return at the right time. The due date of filing the return was indicated as 31st December 2019. The respondent cited S.16 (8) (a) of the Tax Procedures Code Act which states that.

"....in the case of a return for income, every taxpayer shall furnish a return of income for each year of income of the taxpayer not later than six months after the end of that year".

The respondent submitted that the applicant's year of income runs from July to June. Six months after June is December. Therefore, the applicant's final return of income for the financial year July 2018 to June 2019 was due not later than 31st December 2019 which is the date indicated in the said assessment. The respondent submitted that the applicant has not adduced any evidence explaining its failure to file its final return of income by 31st December 2019. It submitted that, it has never issued the applicant with a default assessment for failure to file a provisional or advance return. The applicant's final return of income for the year 1st July 2018 to 30th June 2019 was only filed during the objection process. In light of the above the applicant did not file its final return of income.

The respondent submitted that S. 21(1)(c) of the Tax Procedures Code Act states.

"Where a taxpayer fails to furnish a self-assessment return for a tax period as required under a tax law, the Commissioner may, at any time make an assessment as follows- ...
c) in any other case, the tax payable by the taxpayer for the tax period"

The respondent submitted that the applicant was required to furnish a final return for its year of income 1st July 2018 to 30th June 2019, and having further submitted that no such

return was filed within the required time, the respondent prayed that the Tribunal finds that the applicant is liable to pay the taxes as assessed in the default assessment issued.

In respect of the second assessment, the respondent disagreed with the applicant's claim is that it based its assessment on the applicant's capital and not interest to calculate the income tax. The respondent submitted that in the return that the applicant filed, it listed its total capital as Shs.10, 000,000. Furthermore, according to the applicant's submitted financial statement the applicant's capital is listed as Shs. 10,000,000. In cross examination of the applicant's witness, he stated that he did not share with the respondent any documents showing alternative sources of capital funds providers. Neither did the applicant ever share with the respondent any documents relating to its share capital. The respondent submitted that for the applicant to claim of US$ 13, 552 approximately Shs. 50,638,375 found on the latter's bank account as capital is a fabrication. The applicant failed to substantiate this claim with documentary evidence. The respondent submitted that it was justified in treating the applicant's unexplained bank deposits as income and the tax assessed was correctly arrived at.

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

The respondent raised a preliminary objection that the applicant has never objected to the additional assessment of Shs.12, 215,783 issued to it. As such, the respondent has never issued an objection decision in respect of the said assessment and the applicant is prematurely before this tribunal.;

The law on preliminary objections is provided for under Order 6 Rule. 28 of the Civil Procedure Rules which states 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 a 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".

Sir Charles Newbold in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 stated that;

> "A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit".

Before the tribunal addresses the dispute in this case, we will first address the preliminary objection

S. 24 of the Tax Procedure Code Act states that;

> "A person who is dissatisfied with a tax decision may lodge an objection with the commissioner within 45 days after receiving a notice of the tax decision."

S. 25(1) of the Tax Procedures Code Act states that;

> "a person dissatisfied with an objection decision may, within 30 days after being served with a notice of objection, lodge an application with the Tax Appeals Tribunal for review of the objection decision".

The objection decision dated 24th June 2021 was made in respect of the tax assessed of Shs. 1,260,000. The objection was partially allowed. This is a different tax liability from the Shs. 12,215,783.

The assessment of Shs. 12,215,783 dated 24th June 2021 which was issued on the applicant read;

> 'Objection has been partially allowed based on verified income based on bank deposit method of indirect income determination'.

The respondent contends that there is no objection or objection decision in respect of the liability of Shs. 12,215,783. The respondent argued that the applicant ought to have objected to the assessment but did not do so. It cited *Mujib Juma v Adam Musa & others* Civil Appeal 2015 [2018] where the court stated.

> "That Jurisdiction of court can only be granted by law. If the proceedings are conducted by a court without jurisdiction, they are a nullity. This was the case in *Desai V Warsaw* (1967) EA 351. Therefore, any award or judgment arising from such proceedings of court without jurisdiction is also a nullity".

In *Desai v Wasama* [1967] EA 351 court stated that.

"No court can confer jurisdiction upon itself and where a court assumes jurisdiction and proceeds to hear and determine a matter not within its jurisdiction, the proceedings and the determination are nullities... lack of jurisdiction goes far beyond any error, omission, or irregularity nor can it be regarded as a mere technicality and that there is in law nothing to be reversed or altered and there is a complete absence of any material from which an appeal can be heard.....".

Therefore, the issue of jurisdiction is paramount to the determination of the second assessment.

The objection decision of 24th June 2021 which disallowed the applicant's objection to the assessment of Shs. 1,260,000 read

"Objection has been partially allowed based on verified income based on bank deposit method of indirect income determination. [sic]"

Though the objection was partially allowed it still required the applicant to pay the penal tax of Shs. 1,260,000. Therefore, what was partially allowed? A reading of the objection decision and the assessment show that the assessment of Shs. 12,215,783 arose from "information based on verified income based on the bank deposit method of indirect income determination." What was stated in the assessment is what is stated in the objection decision. If the applicant had filed another objection, the respondent would have countered that it is functus officio. The reading of the objection decision and the assessment as well as the use of the words 'additional default administrative assessment' shows that the 2nd assessment arose from the objection decision. Though the applicant was denied a chance to make a refresh objection because of the operation of the law on time limits, it could file an application to the Tribunal. This is because how many times will a taxpayer object if the respondent is issuing additional assessments instead of new ones?

The Tribunal notes that on 6th November 2019, the applicant was penalized Shs. 1,260,000 for failure to file an income tax return. On 24th June 2011, the respondent issued the assessment of Shs. 12,215,783. The second assessment was issued after over a year. The second assessment was issued, as stated by the respondent, as an additional default administrative assessment. It was not a fresh or new assessment. It

was in addition to the one of Shs. 1,260,000. Therefore, it arose from a continuation of the dispute in respect to non-filing of returns. Therefore, the preliminary objection is overruled.

On the first penal assessment, the applicant's due date for filling the return of the tax period 2018 to 2019 was 30th June 2019. The tribunal has to ascertain whether or not the applicant filled its return on or in time. According to the emails, the applicant was unable to file return from 22nd June 2019. The applicant's due date for filling the return was 30th June 2019. The applicant was later asked to resend the return template on 14th August 2019. On 6th November 2019, the respondent in another email stated that the applicant could have shared the return but unfortunately, they were unable to trace it. In another email dated 3rd February 2019, the respondent informed the applicant that for failure to furnish your return of income as required by S. 92(1) of the Income Tax Act, an administrative default assessment was issued of Shs. 1,260,000.00 for the period in question.

S. 92A of the Income Tax Act provides that;

> "(1) Subject to S. 93 every, tax payer shall furnish a return of income for each year of income not later than 6 months after the end of that year."

S. 93A of the Income Tax Act provides that;

> "The tax due under this act shall be payable-
>
> (a) in the case of a tax payer subject to S. 20 of the tax procedure code act, on the due date for furnishing of the return of income to which that assessment relates;"

S. 21 of the Tax Procedure Code Act provides that;

> "(1) Where a taxpayer fails to furnish a self-assessment return for a tax period as required under a tax law, the Commissioner may, at any time, make an assessment as follows-
>
> (a) in the case of an assessed loss under the Income Tax Act, the amount of the assessed loss of the taxpayer for the period;
>
> (b) in the case of an excess input tax credit under the Value Added Tax Act, the amount of the excess input tax credit of the taxpayer for the period; or
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> (c) in any other case, the tax payable by the taxpayer for the tax period.

(2) The Commissioner shall serve a taxpayer assessed under subsection (1) with notice, in writing, of the assessment specifying-

(a) the amount of tax assessed, assessed loss, or excess input tax credit, as the case may be;

(b) the amount of penal tax and interest, if any, payable in respect of the amount assessed;

(c) the tax period to which the assessment relates;

(d) the due date for payment of the tax, penal tax and interest, and

(e) the manner of objecting to the assessment.

(3) The service of a notice of an assessment under this section does not change the due date for payment of the tax payable under the assessment as determined under the tax law imposing the tax, and penal tax and interest remain payable based on the original due date".

When the respondent's witness was asked how a taxpayer may communicate with the respondent she replied "A client can communicate through a letter, though an email among others." If the applicant failed to file its return by online, it ought to have served the respondent a hard copy. There is no evidence that this was done. When the applicant failed to upload its returns, it should have gone to the respondent's offices to have this issue resolved. The applicant waited for two more years to ask for a physical meeting with the respondent. It seems that the applicant had no interest in filing of its returns.

The second assessment of Shs. 12,215,783 was based on deposits on the applicant's bank statement. The respondent submitted that in the return that the applicant filed, it listed its total capital as Shs. 10,000,000. Furthermore, according to the applicant's submitted financial statement the applicant's capital is listed as Shs. 10,000,000. The respondent contended that the applicant did not share with it documents showing alternative sources of capital funds providers. Neither did the applicant ever share with the respondent any documents relating to its share capital. The respondent submitted that the applicant's claim that the US$13, 552 approximately Shs. 50,638,375 found on the its bank account was capital is a fabrication. It is difficult to understand the respondent's argument that because a taxpayer has a total capital of Shs. 10,000,000 the amount on its bank accounts should not exceed it. The applicant is in the business of

trading. Operational capital should not be confused with share capital. Businesses are known to operate on amounts larger than what is stated as share capital. In the business of forex exchange it may not issue receipts or other evidence in respect of all transactions. This does not mean it did not receive the monies. The respondent does not indicate which documents it wanted the applicant to furnish. Therefore, we find that the respondent's contention that because the applicant has a share capital of Shs. 10,000,00 and did not have evidentiary documents to be unconvincing and irrational. The respondent's attempt to re-characterize the applicant's income is not sustainable.

In the circumstances, the applicant is liable to pay the penal tax assessed of Shs. 1,260,000. The assessment of Shs. 12,215,783 is set aside. The application is partially allowed. Each party to bear its costs.

Dated at Kampala this 16th day of August 2023.

DR. ASA MUGENYI
CHAIRMAN

MR. STEPHEN AKABWAY
MEMBER

MR. SIRAJ ALI
MEMBER