THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

MISC. APPLICATION NO. 94 OF 2024

(ARISING FROM APPLICATION N0.71 OF 2021)

ZHONGHAO OVERSEAS CONSTRUCTION ENG. CO. LTD ..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY.....RESPONDENT

BEFORE: MS. CRYSTAL KABAJWARA, MS. KABAKUMBA MASIKO, MR. WILLY NANGOSYAH

RULING

This ruling is in respect of an application brought under Section 98 of the Civil Procedure Act, Section 28(1) of the Tax Procedure Code Act, Section 15 of the Tax Appeals Tribunal Act, Order 50 and Order 52, Rules 1,2, and 3 of the Civil Procedure Rules seeking an order that:

a) A temporary Injunction restraining the Respondent from enforcing the third party agency notice until the disposal of the main application or until further orders of the Tribunal be granted
b) The third-party agency notice issued by the Respondent be lifted;
c) That the Applicant be allowed to pay the 30% of the tax assessed by the Respondent in installments; and
d) That the costs of this Application be provided for.

The application is supported by an affidavit of Wang Nan, deponed by the Finance Manager of the Applicant Company.

1. Background facts

The grounds upon which this application is premised are laid out in the notice of motion and the affidavit in support and are briefly that:

i. In 2016, the Respondent `commenced a comprehensive tax audit of the Applicant's tax declarations, reviewing corporate income tax, Pay As You Earn, withholding tax and value added tax for the periods 2017 to 2021.

ii. In October 2023, the Respondent communicated to the Applicant that it had a tax liability of Shs. 4,749,709,283.

iii. On 7 December 2023, the Applicant objected to the findings of the audit review and the tax assessed.

iv. On 28 February 2024, the Respondent disallowed the Applicant's objection. The Applicant then challenged the Respondent's decision by filing TAT Application No. 71 of 2024 on grounds that the Applicant is not liable to pay the taxes assessed.

v. On 17 May 2024, the Applicant and the Respondent agreed that Applicant pays Shs. 100,000,000 as part of 30% of Shs. 713,742,718 as a condition for the Respondent to halt the enforcement of recovering all the taxes assessed until disposal of Application No. 71 of 2024.

vi. The Applicant then paid Shs. 100,000,000 to the Respondent on 22/05/2024 in fulfillment of the agreement reached on 17/05/2024.

vii. However, on 23 May 2024, the Respondent instead issued third party agency notices on the Applicant's bank account held with United Bank of Africa in disregard of the agreement reached upon by the parties.

viii. The Applicant's bank account is holding monies for the execution of construction works LOT2- Construction of No. Rural Growth centers of Kikoora and Mwatanzige in Kakumiro District in Premier Minister's village, which contract shall be terminated for non-performance.

ix. The Applicant and the Respondent again agreed that the Applicant pays Shs. 114,123,000 and submit the plan to pay the outstanding of the 30% in instalments to lift the third party agency notice which the Applicant paid.

x. The Respondent has since not lifted the agency notice as earlier agreed and efforts to engage the Respondent's officials on several occasions have proved futile.

xi. The Respondent keeps increasing the amounts of the outstanding tax liability.

xii. The balance of convenience lies with the Applicant, the Respondent shall not suffer any irreparable damages if the third party agency notice issued by the Respondents is lifted.

xiii. That it is in the interest of justice that the application is granted.

The Respondent filed an affidavit in reply deponed by George Senyomo sworn on 17 June 2024, opposing the application on grounds that;

i. The main application from which this current one arises is out of time

ii. The Application contravenes the law on timelines and fails to the extent that the Applicant is out of time and accordingly the application arises from an illegal application.

iii. The agency notice bears different amounts from the amounts in TAT Application 71/2024 and the same has not been objected to in accordance with the law.

iv. The Application is bad in law given the fact that the disputed agency notice was lodged in accordance with the law, arises from different taxes due from the Applicant which were not objected to or challenged as provided for under the law.

v. The objection decisions bore different objection decisions with different dates as per the objection decision notices issued.

vi. The Applicant has not paid the 30% of the tax in dispute in accordance with the law.

vii. There is a laid down legal procedure for lifting an agency notice which was not applied nor followed by the Applicant and the Applicant had not engaged the Respondent in accordance with and as required by the law.

viii. The amounts due from the Applicant as communicated in the agency notice arose from taxes undisputed and due from the Applicant and not from the subject matter of Application 71/2024.

ix. Lifting the agency notice would be akin to undoing exercise of statutory power which is illegal and against the interests of justice.

x. Payment of 30% of tax in dispute in instalments is illegal and as such against the interests of justice.

xi. Tax due that remains uncollected leaves many Ugandans to suffer irreparable and accordingly the balance of convenience lies with the Applicant.

xii. The Applicant is liable to pay the entire tax as disputed vide TAT 71/2024.

The Applicant filed an affidavit in rejoinder wherein it reiterated the grounds in the Affidavit in support of the Application.

2. Representation

At the hearing of the application Mr. Raphael Masaba appeared for the Applicant and Mr. George Senyomo appeared for the Respondent. Both parties filed written submissions that were adopted as their legal arguments.

3. The submissions of the Applicant

Counsel for the Applicant submitted that the Respondent is claiming taxes of Shs. 4,749,709,283 and by placing third party agency notices to collect Shs. 10,387,534,283, the Respondent is collecting all disputed taxes and penalties despite there being a case challenging the same. The Applicant submitted that in ***Airtel Uganda Limited v Uganda Revenue Authority, Application No. 043 of 2020***, the Tax Appeals Tribunal cited with approval the decision in ***Airtel Uganda Ltd v Commissioner General, URA Civil Appeal No. 40 of 2013***, where the Court of Appeal stated that;

"….. The requirement to pay the 30% of the objected tax suspends the requirement to pay the whole sum which is objected to which may only be paid after the objection is dismissed"

The Applicant went ahead to submit that it is settled law that the granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve matters in status quo until the question to be investigated in the suit can finally be disposed of. The Applicant cited the case of ***Kiyimba Kaggwa v Katende Civil Suit***

No. 2109 of 1985 where the court observed that the conditions for a grant of an injunction are;-

a. There is a pending suit;
b. Prima facie case with a probability of success;
c. The Applicant must show that he or she will suffer irreparable loss should the order of injunction be denied; and
d. If the court is in doubt about these two conditions, it will entirely determine the matter on a balance of convenience.

The Applicant submitted that it has a prima facie case with a probability of success and in approval cited ***Gapco Uganda Ltd v Kaweesa & Anor, Miscellaneous Application No. 259 of 2013*** where it was held that on whether there is a prima facie case with the probability of success, the Court must be satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried.

In relation to this, the Applicant submitted stated that it averred in its mediation summary that the Respondent did not adequately review the Applicant's information and erroneously maintained the assessment amounting to Shs. 618,792,250 as for the periods FY2018 to FY2021 with regards to the Pay As You Earn (PAYE). According to the Applicant, the Respondent conducted an analysis of immigration data, NSSF, and monthly progress reports for various contractor assignments. In addition, the Respondent alleged that some foreign and local stuff were omitted for tax purposes resulting in a PAYE liability of Shs. 618,792,250. Therefore, ends of justice dictate that the Applicant has a proper case where an order for a temporary injunction pending determination of the main application before the Tax Appeals Tribunal would rightly arise.

In its submissions about payment of the 30% of the tax assessed by the Respondent in instalments, the Applicant stated that both parties agreed to the Applicant paying the 30% of the tax Assessed in instalments. This was supported by the Affidavit in support of the Application deponed by the Applicant's Finance Manager, Wang Nan. The

Applicant also attached correspondences between with the Respondent containing payment plans as agreed upon.

The Applicant made reference to Section 28 of the Tax Procedure Code Act which provides for extension of time and it states:

"A tax payer may apply in writing to the Commissioner for an extension of time within which to pay tax that is due."

The Applicant goes ahead to affirm that basing on the provision above, the Respondent has the powers to accept receiving the 30% of the tax disputed in installments. The Applicant further submitted that the refusal or inaction by the respondent to reply to the Applicant's Application for payment of tax in instalment despite having agreed to honor and accept the same amounts to a taxation decision to which the Applicant seeks from this Tribunal that it instead pays the 30% of the principal tax in instalments.

The Applicant referred this Tribunal to the position in ***Century Bottling Company Limited v Uganda Revenue Authority (Miscellaneous Application No. 32 of 2020) [2020] UGTAT 12*** where it was held that;

"In accordance with S.14(1) of the Tax Appeals Tribunal Act, the Tribunal has the powers to review any taxation decision by the Respondent, including a decision, rejecting a proposal to pay 30% of the principal tax in instalments."

Lastly, on the prayer for costs, the Applicant cited the general principle under Section 27(2) of the Civil Procedure Act, Cap 71 that costs follow the event and the successful party should not be deprived of costs except for good reasons.

4. Submissions of the Respondent

The Respondent raised a preliminary point of law to the effect that the Applicant had not paid 30% of the tax in dispute and as such had no audience before the tribunal under the law. Furthermore, an agency notice is not a tax decision that can be challenged before the Tribunal. The Respondent submitted that Section 14(1) of the Tax Appeals

Tribunal Act confines the jurisdiction of the Tribunal to matters arising from a taxing Act. The Respondent also cited ***Bank of India Ltd v NC Beverages Ltd & Anor CS 009 of 2021*** in confirmation of this position.

The Respondent submitted further that Article 152 (3) provides for the Tax appeals Tribunal to handle tax disputes. While further citing Section 1(1) (k) of the Tax Appeals Tribunal Act, a taxation decision means any assessment, determination, decision or notice. The Respondent also cited Section 1 (1) (1) that defines a "taxing Act" as an Act which imposes a tax.

The Respondent cited Section 15 of the Tax Appeals Tribunal Act that provides for payment of 30% of the tax in dispute or the amount not in dispute, whichever is higher. This position is fortified by the dictum of ***Rowlatt J in Cape Brandy Syndicate v The Commissioner of Inland Revenue [1921] 1 KB 64*** which was cited in ***Chestnut Uganda Limited v Uganda Revenue Authority [2021] UG TAT:***

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

While breaking down the requirements for an application of a temporary injunction to succeed, the Respondent submitted that Section 38 of the Judicature Act, Cap 13, sections 64 and 98 of the Civil Procedure Act Cap 71 and Order 41 Rules 1&2 of the Civil Procedure Rules are the governing laws for the same. The Respondent brought to the attention of the Tribunal, the dictum of **Lord Diplock** in the case of ***American Cyanamid Co. v Ethicon [1975] AC 396*** where he stated:

"The governing principle is that court should first consider whether if the Plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant's continuing to do what was sought to be enjoined between the time of the Application and the time of the trial. If damages in the measure recoverable at common law

would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff's claim appeared to be at that stage…."

The Respondent further submitted that it already demands taxes that remain unpaid and are long overdue, furthermore that the Applicant failed to meet its civic and statutory obligation as it fell due, as such, granting a temporary injunction will tilt the balance of convenience in favor of the Applicant yet they neglected their duty to pay tax, resulting in a benefit that disregards statutory prescription and bars the respondent from carrying on their statutory obligation.

In their conclusion, the Respondent concluded by praying that the application be dismissed with costs to itself since the Applicant had failed to show that it fulfilled the conditions for the grant of a temporary injunction.

5. Determination of the Application by the Tribunal

We have carefully read and considered the affidavits on record and submissions of both parties. We have also perused the authorities provided by the parties.

In their submissions, both the Applicant and the Respondent agree upon the conditions that have to be met for a temporary injunction. Both cite the case of ***Kiyimba Kaggwa v Katende (supra),*** which lists the following conditions:

1. *The granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve matters in status quo until the question to be investigated in the suit can finally be disposed of.*
2. *The conditions for the grant of an injunction are first that; the Applicant must show a prima facie case with a probability of success, Secondly, such injunction will not normally be granted unless the appellant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.*

3. *Irreparable injury does not mean that there must not be physical possibility of repairing injury but means that the injury must be a substantial or material one, that is, one that cannot be adequately compensated for in damages.*

The Applicant`s Finance Manager, Wang Nan stated in paragraphs 1-6 of his affidavit that the Respondent communicated to the Applicant a tax liability of Shs. 4,749,709,283 which the Applicant objected to and challenged the Respondent's decision by filing TAT application No. 71 / 2024. The deponent goes on to state that if a temporary injunction is not granted, the main application will be rendered moot and the applicant will suffer irreparable damage, particularly as the Respondent has since increased the amounts of the outstanding tax liability from Shs. 4,749,709,283 to Shs. 10,387,534,890.

At the hearing of the main application, the tribunal will be required to determine whether the tax assessed by the Respondent is due and payable.

The Respondent through the affidavit in reply deponed by George Senyomo avers that the application is bad in law. This is based on the argument that the Applicant has not paid 30% of the tax in dispute.

We now address the issue as to whether the Applicant has fulfilled the conditions for the grant of a temporary injunction, particularly, whether the Applicant has demonstrated a prima facie case with a probability of success.

In the High Court decision of ***Kigongo Edward Nakabale vs. Kakeeto Rogers & Another Misc. Application No. 144 of 2017***, the Court stated as follows:

"*A prima facie case with a probability of success is no more than that the Court must be satisfied that the claim is not frivolous or vexatious. In other words, that there is a serious question to be tried".*

In ***Robert Kavuma vs. M/s Hotel International SCCA No. 8 of 1990, Wambuzi CJ (as he then was)*** was emphatic and stated that the Applicant is required at this stage of the trial, to show a prima facie case and a probability of success but not success:

"As to whether the suit establishes a prima facie case with a probability of success, case law is to the effect that though the Applicant has to satisfy court that there is merit in the case, it does not mean that one should succeed. It means that there should be a triable issue, that is, an issue which raises a prima facie case for adjudication. The case of Kiyimba Kaggwa (1985) HCB 43 is in point".

We are satisfied at this stage that a prima facie case with a probability of success has been made out by the Applicant. This is because there is a triable issue in the main suit regarding whether the tax assessed by the Respondent of Shs. 4,749,709,283 is due and payable by the Applicant.

The Applicant has also stated that it will suffer irreparable injury if this application is not granted. In ***Giella v. Cassman Brown & Co. (1973) E.A 358***, it was held that by irreparable injury it does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or damage must be substantial or a material one that is; one that cannot be adequately atoned for in damages.

In the present case, the Applicant, through the affidavit of Wang Nan has stated that the Respondent's third party agency notice has restricted the Applicant's ability to access funds needed to execute a construction contract that the Applicant has with the Government of Uganda. Therefore, there is a risk that the Applicant's contract may be terminated for non-performance.

Having found that the Applicant has established a prima facie case with a probability of success and that it will suffer irreparable injury, of which damages would not be adequate compensation, the application for temporary injunction is accordingly granted.

Payment of the 30% deposit in instalments

We now turn to the issue as to whether the Applicant should pay 30% of the tax in dispute in instalments or not.

The Applicant, through the Affidavit of Wang Nan avers that both parties agreed to an instalment plan. This is as per a meeting which was held on 17 May 2024 in which it

was agreed that the Applicant would pay Shs. 100 million as part of the 30% deposit as a condition for halting enforcement measures against the taxes in dispute.

Despite this agreement, the Respondent went ahead and issued third party agency notices against the Applicant's bankers on 23 May 2024.

On 31 May 2024, the parties again agreed that the Applicant pays another Shs. 114,123,000, which the Applicant paid. The Respondent also advised the Applicant submit an application for the payment of tax in instalments to the Respondent. This application was made on 4 June 2024.

The Respondent, through the affidavit of George Senyomo contends that payment of 30% of tax in dispute in instalments is illegal and against the interests of justice.

It is clear from the evidence on record, particularly, minutes of meetings between the Applicant and Respondent, that the parties agreed to a payment plan. Moreover, the Applicant made payments to the Respondent, not only once, but twice. In fact, the second payment of Shs. 114, 123,000 was at the behest of the Respondent as per the minutes of the meeting of 31 May 2024. The minutes state, under the heading "action points" as follows:

"Taxpayer agrees to pay 114,123,000

Taxpayer agrees to apply for an instalment plan to pay the 30% of the amount in TAT in four equal instalments starting June 2024".

URA to lift agency notice upon payment of Shs. 114,123,000 and submission of instalment plan".

Having reached the above position, which is clearly documented in black and white, it is astounding that the Respondent can turn around and feign ignorance of the payment plan and seek to enforce an agency notice whose stay was conditional on the Applicant paying Shs. 114,123,000 and submission of a payment plan, both of which the

Applicant complied with to the letter. Had the Applicant not met their end of the bargain, that would be a different matter.

It must be emphasized that trust is fundamental for any tax system to work and building and maintaining trust must be a priority for all are part of the system, whether tax administrators or taxpayers or their advisors.

In view of the above, the Applicant is hereby allowed to pay the remainder of the 30% of the tax assessed by the Respondent in three (3) equal monthly instalments beginning on the 15 July 2024. We have reduced the instalments to three as the Applicant had committed to paying the tax in four equal instalments, starting June 2024. As the month of June is spent, the Applicant should now pay the amount in three equal instalments.

Each party will bear its own costs.

Date this .....12th.....day of .....July.....2024

Ms. CRYSTAL KABAJWARA	**Ms. KABAKUMBA MASIKO**	**Mr. WILLY NANGOSYAH**
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CHAIRPERSON	**MEMBER**	**MEMBER**