

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION

CIVIL APPEAL NO. 6 OF 2001
(Arising out of Tax Appeals Tribunal Case No. 2 of 2001)

TOTAL UGANDA LIMITEDAPPELLANT

VERSUS

UGANDA REVENUE AUTHORITYRESPONDENT

BEFORE: THE HON. MR JUSTICE RO.OKUMU WENGI

JUDGEMENT:

This is an appeal from a decision of the Tax Appeals Tribunal of 21/8/2001. The central question that this appeal raises is whether a holder of a certificate of incentives issued under the Investment Code (No. 1 of 1991) could continue to claim the tax exemption under it after the repeal of those exemptions by the Income Tax Act 1997. The facts that gave rise to this appeal were that in April 1996 a tax incentives certificate which exempted the relevant investors from payment of certain taxes by their business project and by themselves was issued in respect of the Appellant oil business in Uganda in 1996. The tax holiday was to endure until December 2000. But immediately the certificate was issued the law and scope of the incentive was amended in May 1996, which, as will get clearer, limited the exemption to withholding tax on dividends on shares issued by the holder of the certificate. In 1997 a new tax law was enacted which abolished the tax incentive regime then in force all together. It however validated existing and pipeline incentive schemes, subject to an election, for such benefit to continue, by the holder of the certificate.

As it has come to pass the exemptions were stipulated and later repealed in Language that has resulted in this appeal.

I will now set out the specific law giving rise to the tax remissions claimed and their subsequent abolition by the income tax Act of 1997. Section 24 of the Investment Code (statute No. 1 of 1991) (as amended) provides inter alia as follows: -

“24(1) An investor intending to avail himself of incentives under this part may if qualified in accordance with Section 23, apply to the Authority for a certificate of incentives.

(2) A foreign investor shall not be required to make a separate 20 application under this part if in his application for an investment licence made under Part 111 he provides the relevant information relating to incentives....

(3)

(4)

(5).....

(6) Every investor who qualifies for incentives and whose application for a certificate of incentives has been approved by the Authority shall be issued by the Authority a certificate of incentives covering those incentives for which he qualifies.”

S.25. A holder of a certificate of incentives shall be entitled to the following: -

(a) Exemption from tax on corporation profits earned from the project and exemption from withholding tax on dividends on shares issued by the holder, on royalties paid under an agreement registered with the UTA and on interest paid on loan capital.

(b) for a period of five years in the case of an investment of a value greater than three hundred thousand United States dollars. (Underlining added)

Under the Investment Code an application for an investment licence had to be made spelling out among other things the business enterprise for which an investment licence was sought. Section 12 of the Code prescribed the manner of application, which if made comprehensively by providing the relevant information relating to incentives, no or separate application would be required to be made under section 24 by a foreign investor. A foreign investor was then defined by section 10 of the Code as follows: -

“10. (1) In this Code foreign investor means —

- (a) a person who is not a citizen of Uganda.
- (b) a Company in which more than fifty percent of the shares are held by a person who is not a citizen of Uganda.
- (c)
- (2)

From the above definition, and from the evidence on record, I would say that Total (U) Ltd could, be treated as foreign investor. I would also say that the non-resident shareholders of Total (U) Ltd were no doubt foreign investors. From the certificate of incentives the name of the Business Enterprise Total (U) Ltd and the nationality and other particulars of the Investors (shareholders) in it were indicated. And so was the nature of the incentives covered. This in short rendered it unnecessary for another application for incentives to be made under section 24 of the Code. What is not so clear from the whole incentives regime is who then became a holder of the certificate of incentives and how come Total Uganda Limited filed an election under the Income Tax Act for the continuation of the exemptions subject of this appeal. It is clear though in my mind that Total Uganda was not the investor itself. Rather it was a project, business enterprise of or the Investment by its nonresident shareholders. And this now brings me to the Section 168 transitional provisions in the Income Tax Act 1997 which provides:

“168(1) ... (20)

(21) Notwithstanding the repeal of section 25 of the Investment Code 1991 by Section 167, the holder of a Certificate of Incentives which is valid at the commencement of this act may make an election in writing to the Commissioner by 31st December 1997 for the exemption from withholding tax paid on corporate profits and the exemption from withholding tax paid on dividends and interest paid to resident persons as provided under section of the Investment Code to continue until the exemption expires in accordance with that section, as if that section had not been repealed.” (Underlining added).

There are three things that come to mind here. Firstly it should be noted that the whole tax incentive scheme benefited an investor who became a holder of a certificate of incentives issued to it in respect of a business enterprise or project. Secondly, section 25 of the Investment code refers to “exemption from tax on Corporation profits. Withholding tax on dividends on

shares....on royalties.. .and on interest “. I do not read in this text the exact words that appear in section 168(21), and for instance “interest paid to resident persons “are not stipulated in section 25 of the investment Code. Thirdly under the Investment Code any dispute arising between a foreign investor and the (Uganda Investment) Authority or the government in respect of a licensed business enterprise ought to be settled amicably and through arbitration. Failure to so settle entitles a party aggrieved by a compulsory acquisition or possession or the amount of compensation, or in respect of any other matter relating the business enterprise to apply to the High court (See section 30 of the Investment Code). Fourthly the Law safeguards the holder of a certificate of incentives, from acts by the government that would adversely affect the rights or interests of a foreign investor over his licenced business enterprise. In his submissions to this Court Mr. Masembe Kanyerezi learned counsel for the appellant contended that the continuation of exemption referred to in section 168(21) of the Income Tax Act 1997 extended to withholding tax paid on dividends without qualification namely that it covered non residents as well as residents. He further contended that the continuation of exemption extended to cover three different categories of tax distinguished by the use of the word ‘and”. Counsel further submitted that the continuation also referred separately to payment of tax on interest paid to resident persons. He contended that “interest paid to resident persons” was defined in section 118 of the Income Tax Act. He further pointed out that section 119 referred to payment of dividends to resident shareholders. He was of the considered view therefore that the reference in the transitional provision was to three different taxes and that the exemption that continued was not founded on residence.

Mr. Masembe Kanyerezi also submitted that the tax incentives were a property right and had been saved and was enforceable within the Constitutional limits. He asked Court to find that the exemption existed and if section 168(21) was found ambiguous, being a taxing statute, it should be carefully interpreted to benefit the tax payer and to charge tax only where it was chargeable within the letter of the taxing words. In her reply learned Counsel for the Uganda Revenue Authority, Ms Anna Bitature submitted that a holder of a certificate of incentives who elected to continue enjoying it was not entitled to exemption from tax on dividends paid to nonresident shareholders. She contended that there were only two tax categories envisaged, namely corporate tax and secondly withholding tax on dividends and interest paid to resident persons. Learned

counsel further submitted that the words exemption tied all the sources of income described after them to the conditionality that qualified a taxpayer namely a resident person. She further contended that the use of the word “and” as employed between the words “dividend and interest” was conjunctive to relate to resident persons and as such Section 168(21) of the Income Tax Act 1997 was clear and unambiguous.

She told Court that the election by Total Uganda Ltd was of no consequence as it was not available since the exemption from tax that had benefited non-resident shareholders had been withdrawn.

Counsel also told Court that Section 25 of the Investment Code was repealed and the common incentives were revoked; that only resident persons could access exemption. She prayed Court to interpret the section according to the object and not just the language of the Income Tax Act, looking as well at the context, object and meaning of the law. She prayed that the appeal be dismissed with costs.

From the evidence on record the incentive certificate was issued to the two French shareholders of Total Uganda Ltd, the business enterprise. They themselves did not issue shares to any local company or individual. Total also did not issue any shares nor establish any new project or enterprises locally. Now on 28th July Total Uganda Limited, the business enterprise in respect of which an investment licence and the certificate of incentives had been issued, wrote a letter to the Commissioner General Uganda Revenue Authority.

Re: “Election For Exemption from Corporation Tax, withholding Tax and Tax on Dividends”

“We are holders of a certificate of incentives valid from 1/1/96 to 31 / 12/2000 provided for under section 25 of the Investment Code 1991.

We wish to elect for the exemption there under to continue to apply after 30 June 1997 until the exemption expires pursuant to section 168(2) of the Income Tax Bill.

Anticipating due consideration of our application....”

On the 6th August 1997, a letter was written to the Legal Officer Total (U) Ltd accepting the election as valid, by a district Revenue officer. Thereafter Total Uganda Ltd remitted tax but was on 19/6/2000 notified that the balance of shs. 453,000,000 was payable. Total Uganda reacted on the same day insisting on an exemption. The following day 20/6/2000 the Uganda Revenue Authority insisted that the exemption did not apply to non-resident persons. Yet again the following day, 21/6/2000, Total Uganda Limited appointed a tax handler to deal with the crisis which continued to unfold. Price Water House Coopers then took on the argument. Their Annebritt Aslund in her letter to URA of 29th June 2000 contended that the section 25 exemption continued to apply as if the section had not been repealed. Under further pressure of URA to pay the tax, Total Uganda on the 10/8/2000 notified URA of a tripartite meeting with the Minister of Finance on 13/7/2000 in which the latter promised to respond. The oil multinational then suggested strongly that since the dispute involved an agreement between the owners of Total Uganda limited and the Government of Uganda in 1996, a reversal of that decision would be notified for executive intervention. In a typically haughty expatriate tone and attitude Mr. J.C Boyadjian threatened the commissioner, Large Tax Payers Department in the Respondent.

He Wrote:

“Any reversal of the decision taken in 1996 could call for the arbitration of H.E the President of the Republic of Uganda.”

There then followed some correspondence between Total Uganda Ltd and the Hon. Minister of Finance. On 24 January 2001 M/s Peat Marwick (KPMG) wrote to the URA stating that the Certificate of Incentives was a contractual obligation between the Government of Uganda and Total.

That was the day a tax appeal was filed with the Tribunal. All the above correspondence appear in the record of this Appeal. In dealing with the issues before it, the Tribunal found that Total Uganda Ltd (the applicant before it) elected to continue with exemption benefits under the certificate of incentives. It then held that non-resident shareholders were not entitled to continue with the exemption benefits. The Tribunal also found that Total Uganda limited was obliged to withhold 15% of the remittance of dividends to its nonresident shareholders as required under

section 84(1) of the Income Tax Act, such portion not being tax exempt. The Tribunal then lamented: -

“Despite its findings which are based on the law as it stands, the Tribunal observes that the change in the law could be unfair and embarrass investors. Their investment decision could have been heavily influenced by availability of incentives. To withdraw them when the investment has already been made can therefore occasion difficulties for the investor. Despite the unfairness, it is the duty of the Tribunal to apply the Law as it stands.”

I have formed the view that on the one hand Total Uganda limited, the appellant here, may be entitled to a decision whether it was obliged to withhold tax or if it was not so obliged in case the tax in dispute was exempt. On the other hand there is a more substantive issue and that is whether the holder of the 1996 certificate of incentives had his position altered in 1997 and if in that process he was entitled to elect to continue with the exempt status. Then there is the question if the holder of the certificate of incentives (if it was still valid) did effectively exercise a right to elect to continue his status. Now these are distinct positions even if the one is dependent on the other position. It is interesting that the certificate of incentives in this appeal was issued on 26/4/1996 and was effective 1/1/1996 to 31/12/2000; and the very section under which it was issued was amended on 8/5/1996 by Section 23 of the Finance Statute No. 9 of 1996. While the original exemption covered “Corporation tax, withholding tax and tax on dividends” after this amendment the incentives exempted tax on

- (a) Corporation profits earned from the project
- (b) Withholding tax
 - (i) on dividends on shares issued by the holder.
 - (ii) on royalties paid under an agreement registered **with** the UTA.
- (iii) On interest paid on loan Capital.

One could see that since 1991 there were creeping redefinitions of the tax incentive scheme. The Oil Company, though, felt secure and was only jolted into action when section 168(21) of the Income Act 1997 was enacted. What was the effect of section 168(21) of the Income Tax Act 1997? Firstly the section allowed a holder of a certificate of incentives to continue by election to enjoy certain tax exemptions. Who was the holder of the Certificate of incentives exhibited

before the Tribunal? In any case who was the investor who applied for it? Was it Total Uganda limited, its shareholders or both of them? The election made to the Commissioner General in this appeal was written by Total Uganda Limited. Was Total allowed to elect not to withhold the taxes? These are the questions that could have nagged the appellant on this case. Secondly, the section amended the scope of the exemptions themselves by substituting new words describing the taxes exempted. It tended to create a multistage basis for the exemptions which replaced somewhat the original direct benefit scheme. The benefits are firstly exemption from tax on corporate profits and secondly exemption from two other kinds of tax namely withholding tax on dividends on shares issued by the holder and interest. These are the categories of income tax payable on dividends and interest paid to resident persons. These are the taxes where continuation of exemption applied. Then where do we put the nonresident persons? Should it embrace the recipients of dividends or only the recipients of interest?

The Investment Code 1991 made a distinction between two kinds of investor's namely foreign investors and local ones. See: Uganda Revenue Authority vs Capital Finance Corporation Ltd Civil Appeal No. 2 of 2000 (Unreported). I would presume that the local investors including the resident foreign company in this case were resident and could receive dividends and interest and either pay or be exempt from tax. In this respect the shareholders of Total are foreign investors and are also non-resident. But Total Uganda Ltd is a resident for tax purposes. If it received dividends and interest, then it could, if it held a certificate of incentives, elect to continue to enjoy exemption from withholding tax on those incomes. In this appeal we are not considering exempting dividends or interest received by Total Uganda limited but rather taxes on payments made by Total to its nonresident investors. We also do not seem to be dealing with an appeal by the holder of a certificate of incentive issued to it over its licenced business enterprise but an appeal brought by the enterprise itself. Could this be possible?

It is quite clear in my mind that the common incentives in the Investment Code were abolished by the Income Tax Act 1997. Before that final fact there was a creeping claw back on the scope of the incentives in 1996. As the package of otherwise vested rights acquired under the certificates atrophied and changed in character and substance no recourse was taken to the appropriate remedies. Eventually the certificates issued to investors were revoked altogether. However the entire terms of the certificates were saved and as such were therefore not wholly

expropriated. Holders were required to make an election in writing to benefit by a continuation in force of the incentives. But in order for one to claim an exemption, besides being a holder of a Certificate of Incentives, he, the holder, had to make an election. Further the exemption related to dividends on shares issued by the holder of the certificate. In this case the holders of the certificate were the two nonresident shareholders of Total Uganda Limited. The certificate bestowed upon them the exemption from corporation tax payable by their project Total Uganda. They were also exempted from paying withholding tax on dividends paid to them “on shares issued by the holder ...“ What was exempted was such tax, if any, on shares issued by the holder of the certificate of incentives namely the shareholders in Total Uganda Limited. Thus from 1996 the incentive scheme offered only a pyrrhic haven as only by some remote reference could the exemption be accessed! It was only an assumption that the company Total Uganda was a holder of the incentive certificate, exhibited in these proceedings. The condition set was that a company (investor) could only claim the exemption if it had secured a certificate in its name. Only then would its own shareholders access the exemption.

As it was Total Uganda Limited was not a holder of the certificate except perhaps as attorneys of its shareholders and no evidence was led on this. Secondly Total Uganda Limited was a statutory collector of the tax but certainly not a statutory beneficiary of the exemption by itself. The law did not provide for a collection agent to elect or opt out of the duty imposed on it by law to withhold tax. The project or enterprise of the investors (in this case Total Uganda Limited) could be a holder of a certificate over its other enterprises, business or projects initiated in Uganda, but not the certificate issued to its own Investors.

I have come to the conclusion that the election made in this case by Total Uganda Limited was not effectual to secure exemption from withholding tax on dividends payable by its nonresident shareholders. As such the Appellant was obliged to withhold the appropriate tax and remit it to the Respondent as the tax was not exempt. On this ground alone this appeal would fail as this Court would accept the verdict reached by the Tribunal, only that the premises for the decision of the Tribunal are perhaps different.

There is yet another and more fundamental angle to this dispute. Under the Investment Code the owners of Total Uganda Limited being the holders of the certificate were obliged to settle

disputes of this nature amicably or through mutually agreed arbitration. Failure to achieve this, left any party aggrieved, with only one option and that is to apply to this Court under Section 30(4) of the Investment Code. The whole section is reproduced here for easy reference.

“30. (1) Where a dispute arises between a foreign investor and the Authority or the Government in respect of a licenced business enterprise, all efforts shall be made to settle the dispute through negotiations for an *amicable* settlement.

(2) A dispute between a foreign investor and the Authority or Government in respect of a licenced business enterprise which is not settled through negotiations may be submitted to arbitration in accordance with the following methods as may be mutually agreed by the parties-

(a) in accordance with the rules of procedure 5 for arbitration of the International centre for the Settlement of Investment Disputes, or

(b) within the framework of any bilateral or multilateral agreement on investment protection to which the Government and the country of which the investor is a national are parties; or

(c) in accordance with any other international machinery for the settlement of investment disputes.

(3) The licence in respect of an enterprise may specify the particular mode of arbitration to be resorted to in the case of a dispute relating to that enterprises and that specification shall constitute the consent of the Government, the Authority or their respective agents and the investors to submit to that mode and forum of arbitration.

(4) Where the parties to a dispute do not agree on the mode or forum for arbitration, the party aggrieved by a compulsory acquisition or possession or the amount of compensation payable, or in respect of any other matter relating to the business enterprise may apply to the High Court for the determination of any of the following-

(a) His interest of right.

(b) The legality of the taking of the possession or acquisition of the property, interest or right; or

(c) The amount of compensation to which he is entitled and the prompt payment of that compensation;

(d) Any other matter in disputes relating to the business enterprise.

From the above it's clear that the parties to the present dispute should be wholly different. The law also required the Investors to pursue the correct remedy and procedure that was spelt out. This was not done. By bringing these proceedings before the Tribunal and here by the agency of the appellant, the investors did not access the remedy envisaged in section 30 of the Code. The action by the appellant was at once incompetent, misconceived and untenable. In short the investors did not follow the law from the beginning to the end. They did not fulfill or challenge the preconditions set out in the climate brought about by the Finance statute 1996, and did not exhaust the remedy provided in law. Their project Total Uganda limited did not initiate these proceedings by any power of Attorney in the names of the proper parties, and in compliance with the law and procedure. As a result, the total abolition of the common incentives or the tax holiday of the nineties fully and irreversibly materialised. The non-resident shareholders in the oily investment, subject of this appeal, long succumbed to the reality of the tax and investment paradigm.

In the result this appeal is dismissed with costs to the Respondents.

R.O. Okumu Wengi

JUDGE.

1.11.2001

2/11/2001 :- Oscar Kambona h/b for Masembe for Appellant

Anne Bitature for Respondent.

Court: - Judgment read in open court in the presence of the above persons.

ANGLIN FLAVIA

D/REGISTRAR

2/11/2001.