

THE REPUBLIC OF UGANDA
IN THE TAX APPEALS TRIBUNAL AT KAMPALA
APPLICATION NO. 146 OF 2020
MISC. APPLICATION NO. 64 OF 2020

UGANDA REVENUE AUTHORITY ===== APPLICANT

V

KANSAI PLASCON UGANDA LIMITED ===== RESPONDENT

BEFORE DR. ASA MUGENYI, DR. STEPHEN AKABWAY MS. CHRISTINE KATWE

RULING

This ruling is in respect of an application to amend the applicant's statement of reason to include a counterclaim.

This application was brought under Articles 21, 28, 44 and 152(3) of the Constitution of Uganda, S. 2(2) of the Uganda Revenue Authority Act, Rule 31 of the Tax Appeals Tribunal (Procedure) Rules, S. 98 of the Civil Procedure Act, Orders 6 Rules 13 & 19 of the Civil Procedure Rules. It is for orders that leave be granted to amend the Statement of Reasons in the main application and costs of the application.

The applicant was represented by Mr. Tonny Kalungi and Ms. Diana Mulira Kagonyera while the respondent by Mr. Philip Karugaba and Mr. Patrick Turinawe.

The application is supported by the affidavit of Mr. Sam Kwerit, an officer in the respondent's legal services and board affairs. He states the grounds for the application which are: The amendment is for purpose of determining the real questions in controversy between the applicant and the respondent. The amendment seeks to introduce a cross action against the respondent for taxes due as a withholding agent. The tax dispute arose from the acquisition of shares by the applicant's parent company. Following the sale of shares it was discovered that taxes had not been paid. The amount due is Shs.

130,822,569,360. The applicant ought to have withheld taxes. When the applicant filed its Statement of Reason it inadvertently omitted to include a counter claim. The former shareholders are not resident in Uganda and enforcing the tax obligations against them will be impossible. If the amendment is not allowed the government stands to lose the taxes.

The respondent's affidavit in reply was made by Mr. Santosh Gumte. He deponed that the respondent is not a party to the sale agreement. The respondent does not owe or hold any consideration for the shares sold. Mr. Gumte contended that the tax dispute in the main application does not relate to taxes arising from acquisition of shares. The main application is in relation to waiver of interest and penalties arising from a voluntary disclosure of tax liabilities and is different from the dispute in the proposed amendment. The monies in escrow accounts in relation to the share sale are not held by respondent. The respondent is not aware of any current tax assessments that the applicant is seeking to ensure recovery as against any related party. It is against principles of natural justice to seek adverse orders against persons in proceedings they are not party to.

In its submissions, the applicant contended that the amendment was for the purposes of determining the real questions of controversy between the parties. It submitted that the amendment seeks to introduce a cross action against the applicant for taxes it should have withheld. The applicant contended that the tax dispute arose from the sale of shares by the respondent's parent company Kansai Plascon East Africa among others. The taxes due are over Shs. 130,822,569. The respondent notified the applicant of its intention to voluntarily disclose various tax liabilities. In its notification, the respondent indicated that some consideration would be held to settle tax liabilities. The applicant in its statement of reason inadvertently omitted to counterclaim amounts the respondent ought to have withheld from the former shareholders. The former shareholders not being resident in Uganda makes it possible to enforce tax obligations against them.

The applicant cited **Eastern Bakery v Casterino** [1958] EA 461 where it was stated that amendments to pleadings should be freely allowed if they can be made without injustice

to the other side and there is no injustice if the other side can be compensated. The applicant also cited **Rwakahanda v Uganda Post Telecommunications Corporations** MA 484 of 2014 where the court relied on grounds for grant of leave to amend as stated in **Gasu Transport Service Bus Ltd. v Martin Adala Obene** SCCA 4/94 where the grounds of amendment included: The amendment should not work injustice to the other side. Multiplicity of proceeding should be avoided as far as possible.

In reply, the respondent argued that a party can oppose the application for amendment and the court if satisfied that justice requires may disallow the amendment. The respondent opposed the amendment because it does not relate to the real questions between the parties. The amendment would create injustice to it and the selling shareholders who are not party to the main application. The applicant submitted that the main application deals with questions of voluntary disclosure. The proposed amendment deals with claims for capital gain taxes. The respondent is not party to the agreement for sale of share and does not hold any funds for the selling shareholders. The application for amendment seeks to delve into questions of capital gains tax. The selling shareholders cannot be properly made parties to the main application. The respondent cited **Carolyne Turyatamba v Attorney General** (Constitutional Petition 15 of 2006) where the Constitutional Court declined to order reliefs adverse to persons not party to the petition because to do so would be to condemn such third parties without having availed them a right to be heard.

The respondent contended that it obtained a private ruling from the applicant who unilaterally revoked it. The selling shareholders challenged the tax assessments in High Court in **Salim Alibhai v Uganda Revenue Authority** Misc. Cause 123 of 2020 where the court granted an order quashing the decision of the applicant to revoke the private ruling.

In rejoinder, the applicant contended that a counter claim does need to relate to the real question in controversy between the parties. The applicant cited Order 8 Rule 2 of the Civil Procedure Rules which provide that a counterclaim may be brought for any right or claim.

The respondent has not cited any law that prohibits the applicant from amending its Statement of Reasons to introduce a counterclaim.

Having read the pleadings and the submissions of the parties, this is the ruling of the Tribunal.

The respondent filed an application against the applicant disputing an assessment of Shs. 54,638,596,596 arising from interest and penal tax. The respondent contended that it voluntarily declared taxes and therefore the interest and penal taxes should be waived. Having filed a Statement of reason, the applicant contends that it inadvertently omitted to include a counterclaim arising from the applicant omission to withhold taxes arising from a sell of shares by its shareholders.

Amendment of pleading are provided for in Order 6 Rule 19 of the Civil Procedure Rules which provides that:

“The court may at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.”

In **Gasu Transport Services (Bus) Ltd v Obene** [1990-94] EA 88 Tsekooko JSC stated the four principles that are recognized as governing the exercise of discretion, in allowing amendments as:

- “1. The amendment should not work injustice to the other side. An injury which can be compensated by award of costs is not treated as an injustice.
2. Multiplicity of proceedings should be avoided as far as possible and all amendment which avoid such multiplicity should be allowed.
3. An application made malafide should not be granted.
4. No amendment should be allowed where it is expressly or impliedly prohibited by law, e.g. limitation of actions.”

Therefore any amendment can be allowed at any stage of the proceedings as long as it does not prejudice the other party or cause injustice.

The amendment by the applicant seeks to include a counterclaim in the Statement of reasons. Counterclaims are provided for in Order 8 of the Civil Procedure Rules. Rule 2 of the said Order reads:

“A defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether the setoff or counterclaim sounds in damages or not, and the setoff or counterclaim shall have the same effect as a cross-action, so as to enable court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the court may on the application of the plaintiff before trial, if in the opinion of the court the setoff or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed refuse permission to the defendant to avail himself of it.”

Under the said Order a counterclaim may be filed in respect of any right or claim. Rule 7 of the said Order reads:

“Where any defence seeks to rely upon any grounds as supporting a right of counterclaim, he or she shall, in his or her statement of defence, state specifically that he or she does so by way of counterclaim.”

For a party to file a counterclaim, there should be a ground in the defence giving rise to a right to counterclaim.

The applicant is seeking to recover income tax that ought to have been paid on the sale of shares in the respondent. The said shareholders are alleged not to have paid capital gains tax. A counterclaim can be brought against other parties. **Odger’s on Pleadings and Practice, 20th Ed.** at pages 222 and 233 states that:

“The defendant can also plead a counterclaim against the plaintiff along with some other person, not already party to the action, described as a “defendant to counterclaim” ... whenever such a counterclaim is pleaded, the defendant must place at the head of his defence an additional title, stating the names of all persons whom he has thus made defendants to his counterclaim and serve the counterclaim upon them”.

Therefore it is not difficult for a Tribunal not to include other parties to a counterclaim who are not on the main application.

Having stated the law, the Tribunal has to ask itself whether it should allow the counterclaim. The respondent contended that the action in the counterclaim is distinct from

the one in the main application. The counterclaim seeks to recover capital gains tax arising from the sale of shares while the main application seeks to waive interest and penal tax arising from a voluntary disclosure. Order 8 Rule 2 allows a defendant to file any right or claim by way of counterclaim while Order 8 Rule 7 merely states that if the defendant want to rely upon grounds in the defence to support the counterclaim he should specifically state so. Therefore a revenue authority can counterclaim on any taxes still outstanding which are claimable.

In order for the applicant to claim or have a right to taxes, it ought to serve an assessment on the taxpayer(s). The taxpayer ought to object and an objection decision is made. In the application before us, the applicant has not attached any assessment. The respondent and the selling shareholders are entitled to be served with an assessment. They are required to make an objection. The applicant ought to make an objection decision. In the event there is no objection, the respondent does not need to file a counterclaim as it has statutory powers to recover any taxes due in the absence of an objection. The fact that the respondent is finding it impossible to trace the selling shareholders, filing a matter in the Tribunal will not make it any possible. The duty of the Tribunal is not to trace tax defaulters. Hearing a matter when a tax defaulter is not easily traceable just delays the start of the execution of tax recovery mechanism. In the event the applicant served an assessment on the shareholders and or the respondent, without any objection one wonders why the applicant would want to pick up an argument with taxpayers who might not be interested in contesting a tax liability. They may be willing to pay. The applicant would be pushing the cart before the horse. If an assessment is not objected to the applicant should enforce its statutory powers of recovery. The applicant has powers to recover taxes where the Commissioner has reasonable grounds to believe that a taxpayer will not pay an assessed tax on the due day. Taxes can be collected from third parties. Whoever is aggrieved by the recovery mechanism can object.

The applicant contended that the selling shareholders challenged in High court the tax assessments raised against them in **Salim Alibhai v Uganda Revenue Authority** Misc Cause 123 of 2020. A perusal of the ruling shows that the shareholders were challenging

the revocation of a private ruling which is different from challenging an assessment. The High court handled the matter as a civil right. That is the applicants were denied their right to be heard. It was not handled as a tax dispute but as an infringement of a civil right. At times the line between a civil right and a tax right maybe blurred. However in light of and after the decision of the Supreme Court in **Rabbo Enterprises Ltd. v Uganda Revenue Authority** Civil Appeal 12 of 2004 the Tax Appeals Tribunal is a court of first instance in tax disputes. A decision from the High Court exercising original jurisdiction in tax matters would not be binding on the Tribunal. After the **Rabbo** decision, a High Court decision is only binding when it is exercising appellate jurisdiction in tax matters. Therefore the argument by the respondent that the High Court stopped the applicant from issuing tax assessments is misleading. The respondent would be connoting that the High Court acted in contempt of the Supreme Court decision. The Tribunal does not believe so.

Taking the above into consideration, the Tribunal finds that this application is misconceived. It is not allowed with costs to the respondent.

Dated at Kampala this 5th day of February 2021.

DR. ASA MUGENYI
CHAIRMAN

DR. STEPHEN AKABWAY
MEMBER

MS. CHRISTINE KATWE
MEMBER