

**THE REPUBLIC OF UGANDA**  
**IN THE TAX APPEALS TRIBUNAL AT KAMPALA**  
**TAT APPLICATION NO. 51 OF 2018**

**EAST AFRICAN CRANES LIMITED =====APPLICANT**

**V**

**UGANDA REVENUE AUTHORITY =====RESPONDENT**

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

**RULING**

This ruling is in respect of an application challenging the respondent's decision not to refund withholding tax that was overpaid.

The applicant withheld and remitted income tax to the respondent for the period 2008 to 2013. On 23<sup>rd</sup> January 2015, the respondent carried out a comprehensive audit on the applicant for the period 2011 to 2013 and raised a tax assessment of Shs. 1,299,300,442. On 23<sup>rd</sup> June 2016, the applicant objected against the assessment. On 31<sup>st</sup> March 2017 the respondent issued a final assessment of Shs. 126,571,255.

Consequently, on 18<sup>th</sup> March 2017 the applicant applied for a tax refund of Shs. 883,242,413 for the entire period 2008 to 2013 from the respondent, which sum was arrived at after deducting the uncontested tax liability of Shs. 126,571,255 from the applicant's total refund claim of Shs. 1,009,813,668.

On 11<sup>th</sup> March 2016 and on 9<sup>th</sup> August 2017, the respondent issued two agency notices on the applicant's banker and debited the sums of Shs. 25,612,429 and Shs. 12,110,400 respectively totaling to Shs. 37,731,829 from the applicant's account in part payment of the tax liability.

On 22<sup>nd</sup> March 2018, the respondent rejected the applicant's application for a refund on grounds that it is barred by S. 113(2) of the Income Tax Act. The applicant conceded that pursuant to S. 113(2) of the Income Tax Act only the overpaid tax of Shs. 607,333,933 for the period 2008 to 2010 is not refundable.

The following issues were framed.

1. Whether the applicant's overpaid tax for the period 2011 to 2013 is refundable?
2. Whether the applicant's overpaid tax for the period 2008 to 2010 which is non-refundable can be applied to offset the applicant's current and future tax liability pursuant to S. 113(3)(a) of the Income Tax Act?
3. Whether the sum of Shs. 37,731,000 debited of the applicant's account by agency notice is refundable?
4. What remedies are available?

The applicant was represented by Mr. Timothy Lugayizi while the respondent by Ms. Barbara Nahone Ajombo..

The dispute between the parties revolves around the applicant's attempt to have withholding tax that was overpaid refunded and or offset against current and future tax liabilities. The parties opted to file submissions and not call witnesses.

The applicant submitted that S. 113 of the Income Tax Act provides for tax refunds. Under the said Section, a taxpayer may make an application for a refund within five years of the latter of the date of service of a notice of assessment or the date on which the tax was paid. The applicant conceded that Shs. 607,333,933 for the period 2008 to 2010 was not refundable. The respondent issued a final income tax assessment on 31<sup>st</sup> March 2017 of Shs. 126,571,255 for the period 2011 to 2013. On the 18<sup>th</sup> May 2017 the applicant made an application for a tax refund for the period 2008 to 2013. While the refund in respect of the period 2011 to 2013 was made in time the one for 2008 to 2010 was out of time. Therefore, the sum of Shs. 402,479,735 for the period 2011 to 2013 should be refunded.

The applicant contended that though the Shs. 607,233,933, the overpaid tax for the period 2008 to 2010 is not refundable as it is caught by S. 113(2)(b) of the Income Tax Act, it should be applied to offset the applicant's current tax liability of Shs. 126,571,255 and its future tax liability. The applicant cited S. 113(3)(a) which provides that where the Commissioner is satisfied that a tax has been overpaid, he may apply the excess in reduction of any other tax due from the taxpayer. The applicant contended that the said Section does not provide a time limit for the application of overpaid tax. The applicant cited **Red Chilli Hideaway Limited v Uganda Revenue Authority** TAT 38 of 2018 where the Tribunal stated that: "The time limit is in respect of an application for a refund. It does not apply to the Commissioner applying tax credits excess payments to offset tax liabilities. The import of S. 113(3) is that the Commissioner has a lien on overpayments and tax credits so as to pay off any outstanding tax liabilities." The applicant contended that therefore its tax liability of Shs. 126,571,255 be deducted from overpaid non-refundable tax of Shs. 607,333,933. This leaves a balance of Shs. 480,762,678 which should be applied to the applicant's future tax liability.

The applicant submitted that the respondent issued two agency notices on 11<sup>th</sup> March 2016 and 9<sup>th</sup> August 2017 for Shs. 25,621,429 and Shs. 12,110,400 respectively totaling to Shs. 37,731,000 on the applicant's account in part payment of the tax liability. The applicant contended that the issuing of the agency notices was unlawful as it had a tax credit of Shs. 1,009,813,668. The applicant prayed that the Shs. 37,731,000 be refunded.

In reply, the respondent submitted according to the facts agreed, the sum overpaid by the applicant is Shs. 402,479,735. The respondent cited **Manila North Tollways Corporation v Commissioner of Internal Revenue** C.T.A. EB 812 of 2012 where it was stated that; "... he who claims an exemption must be able to point the provision of the law creating the said right." The respondent contended that the applicant applied for a refund and the respondent is to verify it through an audit before it can be refunded. Therefore, the application is premature. In the absence of an audit the respondent cannot determine that the applicant is entitled to a refund.

In respect of the overpaid tax being applied to offset future taxes, the respondent contended that S. 113(3) of the Income Tax Act should be read *ejusdem generis* with S. 113(1) which refers to refunds. S. 113(2) of the Income Tax Act requires an application for a refund to be made within 5 years which have elapsed in this case. The respondent cited **Uganda Revenue Authority Uganda v Consolidated Properties Limited** Civil Appeal 31 of 2000 where the Court of Appeal held that timelines set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with. Once a time limit has been set by statute, an aggrieved party has no option but to abide by the law.

As regards the two agency notices, the respondent contended that it issued them under S. 31 of the Tax Procedure Code Act which are applied to a person who is or will become liable to pay tax and the tax is unpaid or the Commissioner has reasonable grounds to believe that the taxpayer will not pay the tax on the due date. The respondent contended that the word "illegal" is defined by **Black's Law Dictionary** 11<sup>th</sup> Edition p.896 as "forbidden by law, unlawful." The respondent also cited **Dawson v Bingley Urban Council** [1911] 2 KB 149 where it was held that a breach of a statutory duty created for the benefit of an individual or a class entitling anyone who suffers special advantages thereof from to recover such damages against the tortfeasor. The proper remedy for a breach of a statute is an action of damages especially where the statute lays no rule for non-compliance.

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

The applicant applied for a tax refund of Shs, 883,242,413 for the period 2008 to 2013 from the respondent. This sum was arrived at after deducting a tax liability of Shs. 126,571,255 from a total refund claim of Shs. 1,009,813,668. The applicant conceded that Shs. 607,333,933 for the period 2008 to 2010 was time barred hence non-refundable. The applicant contends that 402,479,735 for period 2011 to 2013 is refundable. However, if one were to remove Shs. 607,333,933 from the amount applied for in the refund of Shs. 883,242,413 the balance remaining would be Shs. 275,908,480.

The issue of overpaid tax is addressed by S. 113(3) of the Income Tax Act which provides that:

“Where the Commissioner is satisfied that tax has been over paid, the Commissioner shall

- (a) apply the excess in reduction of any other tax due from the taxpayer;
- (b) apply the balance of the excess, if any, in reduction of any outstanding liability of the taxpayer to pay other taxes not in dispute or to make provisional tax payments during the year of income in which the refund is to be made; and
- (c) refund the remainder, if any, to the taxpayer.”

S.113 (3) of the Income Tax Act requires the Commissioner to make a refund if there is an over payment after he or she has applied the excess in reduction of any tax due from the taxpayer. Shs. 126,571,255 was applied in reduction of tax due. It does not seem to be in dispute that the applicant had excess or overpaid taxes. Among the agreed facts, the applicant applied for a refund of Shs. 883,242,413. It conceded to Shs. 607,333,933 as non- refundable. It is not clear why the respondent deducted the Shs.. 607,333,933 from the total tax liability of 1,009,813,668 to arrive at a figure of Shs. 402,479,735 and not from Shs. 883,242,413 which it applied for which would leave a balance of Shs. 275,908,480 as refundable. This would have required the applicant calling evidence to explain the discrepancies. There is no evidence for which period, whether 2008 to 2010 or 2011 to 2013 the Shs. 126,571,255 was paid for to enable the Tribunal reach a clear determinable figure. However, since the burden is on the applicant under S. 18 of the Tax Appeals Tribunal Act, and no evidence was called to ascertain the claim of Shs. 402,479,735 the Tribunal will go by the clear figure of Shs. 275,908,480 as refundable from the agreed facts.

The respondent submitted that it still has to verify the above figure through a comprehensive audit. The Tribunal notes that the applicant applied for a refund on 18<sup>th</sup> May 2017. Over two years down the road, the respondent has not carried out nor concluded an audit. An audit cannot be carried out in perpetuity. An audit should be carried out in the financial year in which the application was made or at least not later than six months from the date of the application. The Tribunal finds the respondent’s explanation inconceivable. Moreover, it is an explanation that is given in its submissions and not from

evidence by testimony. Therefore, it is unacceptable and the Tribunal holds that the applicant is entitled to a refund of Shs. 275,908,480.

Having removed the Shs. 275,908,480 from the amount applied for of Shs. 883,242,413 there would be a balance of Shs. 607,333,933 which the applicant concedes it overpaid for the period 2008 to 2010. In **Red Chilli Hideaway Limited v Uganda Revenue Authority** (supra) the Tribunal noted that the Commissioner ought to apply the excess amount withheld and provisional tax payment to meet any tax liability of the applicant. If there is any remainder after paying off all the tax liabilities a tax payer may apply to the Commissioner for the refund.

The respondent contended that an application for a refund would be time barred under S. 113 (2) of the Income Tax Act which reads:

“An application for a refund under this Section shall be made to the Commissioner in writing within five years of the latter of-

- (a) the date on which the Commissioner has served the notice of assessment for the year of income to which the refund application relates; or
- (b) the date on which the tax was paid.”

The respondent contended likewise the application of any excess fund to offset any tax liability would be time barred. In **Red Chilli Hideaway Limited v Uganda Revenue Authority** (supra) the Tribunal stated that: “The time limit is in respect of an application for a refund. It does not apply to the Commissioner applying tax credits excess payments to offset tax liabilities. The import of S. 113(3) is that the Commissioner has a lien on overpayments and tax credits so as to pay off any outstanding tax liabilities.”

The reason the Tribunal held that the respondent ought to apply any excess payment of taxes to offset any tax liability is because of the right to property that is enshrined in the Constitution of Uganda. Article 26(1) of the Constitution provides that every person has a right to own property either individually or in association with others. Article 26(2) states the conditions under which a person may be compulsorily deprived of property. Money is property. A person cannot be deprived of his property without any lawful justification. Therefore, if one has an excess amount of tax paid, such person cannot be denied his

right to property. The State cannot legislate law on time limits to deprive of persons their right to property unless expressly stated in the taxing law. Therefore the Tribunal holds that while the time limits may apply to a taxpayer's application for a refund it is not expressly stated in the taxing law that such excess tax cannot be used to offset current or future tax liability. The Tribunal will not read into the Act what is not there.

Having stated the applicant had excess tax payments, the Tribunal does not see any justifications why the respondent issued two agency notices to recover Shs. 25,612,429 and Shs. 12,110,400 respectively totaling to Shs. 37,731,829 from the applicant's account. While the action may not have been unlawful, there is no justification as to why it was done.

Taking the above into consideration, this application is allowed. The Tribunal holds that:

- (a) The applicant is entitled to a refund of Shs. 275,908,480 for the period 2011 to 2013.
- (b) The applicant is entitled to use its excess amount of Shs. 607,333,933 for the period 2008 -2010 to offset its current and future tax liability.
- (c) The applicant is entitled to Shs. 37,731,829 removed from its accounts.
- (d) The applicant is awarded costs of the application.

Dated at Kampala this 21<sup>st</sup> day of January 2021.

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**DR. ASA MUGENYI**  
**CHAIRMAN**

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**DR. STEPHEN AKABWAY**  
**MEMBER**

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**MR. SIRAJ ALI**  
**MEMBER**