

Ets KALINDA SEKWEKWE v. RWANDA REVENUE AUTHORITY

[Rwanda SUPREME COURT – RCOMA0028/13/CS (Mukanyundo, P.J., Ngagi and Nyirandabaruta, J.) November 6, 2015]

Tax law – Exportation of goods – Export declaration – Exemption of exported goods from levy – The exemption from the levy as provided for by the law for the exported goods is not benefited in case it is not proved that export declaration was made to the customs for release – Law N°21/2006 of 28/04/2006 establishing the customs system, articles 177 and 179.

Tax law – Evidence of export – Declaration of contract relating to exported goods to Rwanda Revenue Authority – Though the contract was not declared to Rwanda Revenue Authority, it does not even demonstrate that there has been export – Law N°74/2008 of 31/12/2008 modifying and complementing Law N°25/2005 of 04/12/2005 on Tax procedure, article 1(5).

Tax law – Exportation of goods – It is not export in case goods that are said to have been exported have not been manufactured in Rwanda – Law N°21/2006 of 28/04/2006 establishing the customs system, article 2(33).

Tax law – Levy for Commercial activities carried out on the territory other than Rwandan – Whoever has a place of residence in Rwanda but with a place of business elsewhere must pay value added tax – Law N°06/2001 of 20/01/2001 on the code of value added tax, articles 4, 9 and 12.

Evidence law – Burden of proof – He must pay tax because he failed to demonstrate that the taxed money was intended to pay the loan – Law N°15/2004 of 12/06/2004 relating to evidence and its production, article 3 – Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 9.

Tax law – Appeal to the Commissioner General – Issue raised for the first time at appeal level – Tax issue that has not been submitted to the Commissioner General cannot be ruled on, this is the same for any issue raised before the appellate court while it has not been debated on at the first instance court.

Damages – Advocate fees – They are not awarded to the requester who lost the case on all his grounds of appeal – Law N°30/07/1888 relating to contract or obligation, article 258.

Damages – Being dragged into unjust proceedings – Whoever is dragged into unjust proceedings must be awarded procedural fees – Law N°30/07/1888 relating to contract or obligation, article 258.

Facts: Rwanda Revenue Authority carried out tax audit and subsequently imposed Ets KALINDA SEKWEKWE to pay value added tax for the sale of three trucks two of which had been sold abroad. Being dissatisfied with audit results, it appealed to the Commissioner General but again it was not contented by the decision hence filing the claim to the Commercial High Court.

Before this Court, it was challenging the imposed VAT on the basis of three trucks that he sold abroad (export) while goods released to export are exempted from any taxed levy. The Commercial High Court held that the decision of the Commissioner General must not be changed and ordered ETS KALINDA SEKWEKWE to pay the value added tax as the money found on its account is the proceeds of the trucks that have been sold abroad.

ETS KALINDA SEKWEKWE appealed to the Supreme Court alleging that no VAT must be imposed on goods released to export and even added that the same tax must not be imposed on 76,000,000Frw which transited on his bank account opened in Access Bank (Ex-BANCOR) given that such amount was borrowed from Customer Care Services Petrol Station.

As to RRA, no evidence presented by Ets KALINDA SEKWEKWE that there was export, and that there is no evidence proving the conclusion of loan contract between Ets KALINDA SEKWEKWE and *Station* Customer Care Service based in Goma. RRA requested to uphold the appealed judgment and also requested damages for being unjustly dragged into proceedings.

Held: 1. All goods must be placed under customs declaration procedure of declaration and must leave the customs territory upon acceptance of the export declaration. Therefore, the fact that Ets KALINDA SEKWEKWE had conceded that the vehicles on which tax is imposed have been sold on the territory other than Rwandan while it does not demonstrate declaration on the customs so as to be released for export is evidence of unlawful sale. Hence, it cannot enjoy the benefit granted to the exporter as provided for by the law.

2. Export means the customs procedure which allows locally manufactured goods to leave the customs territory. Therefore, Ets KALINDA SEKWEKWE cannot allege that it had exported goods in case of failure to demonstrate that the said goods have been manufactured on Rwandan territory.

3. The fact that it has a place of residence in Rwanda, while it runs its business in Goma implies that it must pay value added tax.

4. Every plaintiff must prove a claim. Failure to obtain proof, the defendant wins the case and each party has the burden of proving the facts it alleges. Ets KALINDA SEKWEKWE must lose the case therefore, since it failed to demonstrate that the money for which it must pay tax was from the loan especially that it would be illogic how that money was not deposited on the account opened in the lending bank but instead deposited in another bank and there is no evidence that such money was to pay back the loan. Therefore, it fails to prove that such money is not taxable.

5. No decision about a fiscal dispute can be admitted in case such dispute was not submitted to the Commissioner General and it cannot be examined if it was not debated on at the first instance court.

6. Ets KALINDA SEKWEKWE cannot be awarded damages in case all of its grounds of appeal have no merit. Rather, the fact that its appeal has no merit while RRA has been summoned in the proceedings implies that it incurred expenses on its side. Hence, it must be awarded procedural fees.

Appeal has no merit.

Cross appeal has merit in apart.

Appealed judgment not changed, save for damages awarded on this instance.

Deposited court fees are equivalent to the works of the court to the case.

Statutes and statutory instruments referred to:

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 9.

Law N°74/2008 of 31/12/2008 modifying and complementing Law N°25/2005 of 04/12/2005 on tax procedures, article 5.
Law N°21/2006 of 28/04/2006 establishing the customs system, articles 1(33), 177 and 179.
Law N°06/2001 of 20/01/2001 on the code of value added tax, articles 4, 9 and 12.
Law N°15/2004 of 12/06/2004 relating to evidence and its production, article 3.
Law of 30/7/1888 governing contracts or obligations, article 258.

No case was referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case arose from tax audit that was carried out by Rwanda Revenue Authority for the years 2006, 2007, 2008, 2009 and 2010 for Ets KALINDA SEKWEKWE. Following that audit, 53,202,550Frw for TVA was imposed and acknowledged its loss of 181,516,897Frw. Ets KALINDA SEKWEKWE appealed against that imposed tax and it was exempted VAT equivalent to 4,729,535Frw hence 48,473,015Frw remained and it was ordered to pay it.

[2] Unsatisfied with the decision, Ets KALINDA SEKWEKWE appealed against the decision of Commissioner General to the Commercial High Court alleging that the tax liability of 48,473,535Frw should not be imposed as VAT based on the fact that it hand back number plate of one of the three vehicles that it owned and the rest two trucks for which this tax was levied were sold abroad. It added that exported goods are exempted from value added tax.

[3] In its judgment RCOM0057/12/HCC rendered on January 18, 2013, the Commercial High Court upheld the decision of the Commissioner General of Tax. It ordered in consequence Ets KALINDA SEKWEKWE to pay the total of the imposed tax equivalent to 48,473,015Frw and the court fees.

[4] Unsatisfied with the decision of the Commercial High Court, Ets KALINDA SEKWEKWE appealed to the Supreme Court claiming that it was ordered to pay value added tax on exports while the law provides that exported goods are exempted from value added tax. It deplored further the VAT that was imposed on 76,000,000Frw, the amount that RRA had considered as business profit while it was a debt that it borrowed from *Customer Care Services Petrol Station* based in Goma, Democratic Republic of Congo and that there is other 12,032,500Frw that must be excluded from sales turnover on which tax is levied. It requested to be released from 48,473,015Frw that was unlawfully imposed and order RRA to pay 500,000Frw for advocate fees.

[5] RRA states that Ets KALINDA SEKWEKWE submitted no evidence that it exported the trucks and that the loan contract with “Station Customer Care Services” that is located in Goma Town. RRA requested the Court to dismiss its other claims and to uphold the decision rendered by the Commercial High Court and the payment of damages from Ets KALINDA SEKWEKWE for being dragged into court proceedings.

[6] The hearing was conducted on October 6, 2015; Ets KALINDA SEKWEKWE was represented by Counsel Musafiri Alain while RRA was represented by Kabibi Spéciose, the counsel.

II. ANALYSIS OF LEGAL ISSUES

1. Whether Ets KALINDA SEKWEKWE was imposed to pay VAT on 86,000USD from exported goods.

[7] Musafiri Alain, counsel for Ets KALINDA SEKWEKWE argued that Commercial High Court did not consider the explanation submitted about the fact that 86,000USD that was deposited on its account and latter taxed for VAT by RRA considering it as a return from trucks which had been sold and used abroad. This ignored that those vehicles should be considered in the same context as those which had been exported (export) as provided for by article 87(1) (a) of Law N°06/2001 of 20/01/2001 on the code of value added tax. He states that the Court based on the fact that it did not fulfill the requirements set for the exportation as provided for by articles 176, 177, 178 and 179 of Law N°21/2006 establishing the customs system at the time when the verification was conducted because they were used trucks. He added that it is a principle that no VAT shall be levied on exported goods and that the non-respect of formalities does not mean there is no exportation of goods. He pleaded further that even the Commissioner did not base on those grounds to levy the VAT equivalent to 4,729,535Frw.

[8] It argued further that those formalities for exportation of goods were set for goods which are not easily identifiable while trucks are tangible things. It argued further that the trucks which are taxed are two in number and had been brought in Rwanda from Republic Democratic of Congo and later sold in Uganda. He insisted that it is not comprehensible how VAT was imposed on that sale while this is considered as export (the sale of commodities from inside the country to another country). He adduced further that though the formalities for export had not been respected, they submitted evidence proving the sale of those trucks through the post mail and the plates which were submitted back to RRA and that Ets KALINDA SEKWEKWE Ltd was exonerated from paying the tax of 4,729,535Frw after the submission of the plate of one of those trucks after it was declared that this truck was no longer registered on its names, which it thinks it would be the same practice for other two remaining trucks.

[9] Kabibi Spéciose, the counsel for RRA submitted that the statements of Ets KALINDA SEKWEKWE have no merit because it is the money deposited on the commercial account that was taxed and this is accepted by commercial law unless the trader demonstrates that such money or its portion is neither the profit gained from commercial activities nor can it be levied.

[10] She pleaded further that according to the provisions of article 176 of Law N°21/2006 of 28/04/2006 establishing the customs systems, exportation of goods is not done in contradiction of the law; rather he/she who intends to exports goods must first resort to declarations before the customs. She adds that for vehicles, there must be a prior submission of legal papers that proves that they were in use in Rwanda. In addition, the fact that Ets KALINDA SEKWEKWE failed to demonstrate to the Court that those trucks were intended to be sold abroad, they must not be granted the advantages of exported goods which are provided for by article 87(1) of Law on value added tax (VAT) as referred to above and that there is no evidence that this sale was declared in home countries of the buyers. Therefore,

she concluded that the Commercial High Court could not find basis to hold that the claims of Ets KALINDA SEKWEKWE have merit.

[11] With regard to the trucks plates that were submitted back, the counsel for RRA states that it has not been debated on before the Commercial High Court, and based on article 1(5) of Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 of 04/12/2005 on tax procedures, documents or evidence which had not been submitted during tax audit must not be considered and therefore, the Court could not consider those plates since they were not revealed during the tax audit that was conducted on September 11, 2012. Whereas the proceedings were ongoing, the plates were returned after the tax audit 2006 – 2010. She states further that, the plates are normally handed back with the yellow card that serve as basis for tax audit after they are returned, but Ets KALINDA SEKWEKWE returned the plates only.

THE VIEW OF THE COURT

[12] Article 177 of Law N°21/2006 of 28/04/2006 establishing the customs systems which was into effect at the time when tax audit was carried out against Ets KALINDA SEKWEKWE provides that with the exception of goods placed under the outward processing procedure or a transit procedure, all locally manufactured goods intended for export must be placed under the export procedure. While article 179 provides that goods concerned must immediately leave the customs territory, upon acceptance of the export declaration.

[13] Likewise, article 1(5) of Law N°74/2008 of 31/12/2008 modifying and complementing Law N°25/2005 of 04/12/2005¹ on tax procedures provides that a taxpayer shall not be allowed to provide at any stage of appeal, any additional evidence that had not been produced during the audit. The last paragraph of that article provides that the preceding paragraph shall not apply in cases where the taxpayer has reasonable grounds justifying his/her inability to provide the required evidence during the audit period.

[14] The Court finds that the representative of Ets KALINDA SEKWEKWE admits that no declaration was done at the customs as imposed by the law for the trucks that are alleged to have been sold overseas so that they can be released for export upon acceptance of the export declaration. His statement itself demonstrates that though those trucks might have been sold overseas, it would have been unlawfully done. Therefore Ets KALINDA SEKWEKWE cannot benefit the advantages granted by the Law for exportation.

[15] The case file includes the contract dated May 4, 2006 that was concluded in Kigali between Ets KALINDA SEKWEKWE, Kalinda Donatien and Nduwumwami Victor. The contract concerned the sale of vehicle Trailer of type Mercedes-Benz 2628 with plate number RAA864M, the sale contract dated July 26, 2007 for trailer with plate number RL0246 and “Mercedes-Benz” 2635 with plate RAA863M and trailer *Doll* with plate number RL0244 was concluded also in Kigali between Ets KALINDA SEKWEKWE represented by Kavunga Kalinda and Kipkemoi and lastly the contract dated August 22, 2008 concluded also in Kigali and concerning the sale of *Camion Mercedes-Benz* 2628 with plate number RAA860, *Camion Iveco Eurotruc* with plate number RAA859M and trailer *Doll* with plate number

¹All those legislations were applied during tax audit.

RL0245 between Ets KALINDA represented by Kavuga Kalinda and Mr Ssebanakitta Hakim. All these contracts were submitted to prove that its trucks were sold abroad.

[16] The Court finds that RRA received no declaration over all of those sale contracts of the vehicles in the course of tax audit that had been carried out. It finds further that all of those contracts were entered into in Kigali. Basing on article 1(5) of Law N°74/2008 of 31/12/2008 modifying and complementing Law N°25/2005 of 04/12/2005 on tax procedures, since these contracts were not presented to RRA at the time of tax audit nor demonstration that the said vehicles were exported. Therefore the ground of appeal that 86,000USD which is the proceeds of the sold vehicles should not be taxable is groundless.

[17] The Court further finds that article 2 of the Law N°21/2006 of 28/04/2006 referred to above provides in its *litera* 33 with regard to the definitions of terms and the scope of its application that exportation means the customs procedure which allows locally made goods to leave the customs territory. Therefore, the fact that the representative of Ets KALINDA SEKWEKWE states that two vehicles were exported is not true since the Law provides that exportation is selling of goods manufactured in Rwanda while those vehicles were not manufactured in Rwanda. These holdings also stress that, with regard to those vehicles, Ets KALINDA SEKWEKWE cannot benefit from the advantages that the law reserves for exporters.

2) Whether no VAT had to be levied to 76,216,240Frw that was deposited to the account of Ets KALINDA SEKWEKWE.

[18] Counsel Musafiri Alain argues that Ets KALINDA SEKWEKWE showed to the Commercial High Court 76,216,240Frw that was deposited to its account was made from the sale of the products of *Station Customer Care Services* owned by Kalinda Sekwekwe located in Goma; however, the Court held that *bons de prélèvement* that they had showed are not sufficient, but they had to show the contract that was concluded between Ets KALINDA SEKWEKWE and that Station disregarding that all of those companies are sole proprietorships owned by Kalinda Sekwekwe and not two companies with legal personality though they may be having the same shareholders and that no contract can be drafted in these circumstances to have the borrower and the lender.

[19] He explained that 76,216,240Frw that was deposited to the account of Ets KALINDA SEKWEKWE opened in Access Bank (ex BANCOR) belonged to his business based in Goma and must not be considered as money that had been generated from commercial activities in Rwanda because it used to be deposited on that account to help in paying the loan that he had got from Banque Commercial du Rwanda (BCR) while buying the trucks that he sold due to the lack of clients and led to a serious loss. He added that he borrowed 105,900USD from *Station Customer Care Services* to Ets KALINDA SEKWEKWE based in Rwanda in different periods of time equivalent to 60,363,000Frw which was deposited to the account opened in Access Bank Rwanda Ltd so as to enable him to pay the loan he had for BCR. He added further that this is found in the ledger and even in the *bons de prélèvement* which clearly demonstrate the source of that money.

[20] He ended arguing that article 12 of the Law N°06/2001 of 20/01/2001 on code of value added tax provides that goods or services shall be deemed as taxable supplies when the supply of the same is made by a taxable person, a partner or agent, for consideration. Therefore, the tax that Ets KALINDA SEKWEKWE was asked to pay on 76,216,240Frw that was deposited on his account from his business not based in Rwanda contradicts the

provisions mentioned above. Hence, no tax must be imposed since it is not goods or services which are traded in Rwanda.

[21] Kabibi Spéciose, counsel for RRA argued that the fact that the owner of Ets KALINDA SEKWEKWE based in Rwanda, is also the owner of *Station Customer Care Services* based in Goma does not mean that the money which circulates from one company to another one will be automatically be considered as credit (loan) in case of absence of the contract between the two companies, this is also has been the ground relied on by the Commercial High Court to reject the arguments of the counsel for Ets KALINDA SEKWEKWE. She added further that the business activities of Ets KALINDA SEKWEKWE is only identified from account books and that it is illogical how the commercial activities of one company can be recorded in the books of another company without demonstrating that that money has been acquired through lending contract. She adduced further that Ets KALINDA SEKWEKWE used to perform the transport activities of goods from Rwanda to Goma and hence she wonders whether 76,216,240Frw was not the payment of transport services from Rwanda.

THE VIEW OF THE COURT

[22] Article 12(1) of Law N°06/2001 of 20/01/2001 on the code of value added tax which was into effect at the time of tax audit provides that Goods or services shall be deemed as taxable supplies when the supply of the same is made by a taxable person, a partner or agent, for consideration, under the conditions set forth in articles 4 and 9² of this law.

[23] The Court finds that the fact that Kalinda Sekwekwe has a place of residence in Rwanda while he owns a petrol station in Goma and he gets all the benefits thereon being in Rwanda, while he failed to demonstrate that it is such a petrol station that lent him the amount of money totaling approximately 76,216,240Frw that he says was deposited to his account opened in Rwanda from Goma, leads to the conclusion that per provisions of the Law referred to above, he is liable and must pay the VAT.

[24] Article 3 of Law N°15/2004 of 12/06/2004 relating to evidence and its production provides that each party has the burden of proving the facts it alleges while article 9 of Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that every plaintiff must prove a claim. Failure to obtain proof, the defendant wins the case.

[25] The Court finds further that there is no any other evidence that the representative for Ets KALINDA SEKWEKWE submitted to the Court to prove that 76,216,240Frw is a debt

²Services shall be regarded as supplied in Rwanda if the supplier of the services:

- a) has a place of business in Rwanda and no place of business elsewhere;
- b) has no place of business in Rwanda or elsewhere but his usual place of residence is in Rwanda,
- c) has places of business in Rwanda and elsewhere but the place of business most directly concerned with the supply of the services in question is the one in Rwanda; or
- d) has no place of business in Rwanda, has place of business elsewhere but the recipient of the services uses or obtains the benefit of the services in Rwanda likewise, article 4 of the Law referred to above provides that, goods shall be regarded as being supplied in Rwanda if:
 - a) they are exported or temporarily exported from Rwanda;
 - b) their supply involves their installation, processing or assembly at a place in Rwanda from which they are removed.

that it borrowed from *Station Customer Care Services* so that it could pay the loan that it had acquired from I&M Bank. It is further not understandable how that money, instead of being deposited on the loan account, it was deposited in another bank, in addition, there is no evidence that such amount of money was intended to pay the said loan. Moreover, *Bons de prélèvement* that were submitted do not demonstrate that such amount of money was intended to pay the debt. In addition, the fact that Kalinda Sekwekwe is the owner of Ets KALINDA SEKWEKWE and *Station Customer Care* based in Goma, it is simple for him to take the money of one company and use it in his own activities generating interests. Therefore, Ets KALINDA SEKWEKWE must lose on this issue for its failure to demonstrate beyond any doubt that 76,216,240Frw must not be subject to tax levy. Therefore, this ground of appeal has no merit.

3) Whether 12,032,500Frw must be excluded from the sold goods hence not taxable.

[26] Musafiri Alain, the counsel, argued in his submissions in this proceeding, that there is 12,032,500Frw from which VAT was levied that was deposited on the account of Ets KALINDA SEKWEKWE by its client HASS PETROLIUM about the payment receipts that Ets KALINDA SEKWEKWE had done for it but without specifying the price since it was paying the debt that it owed it and that Ets KALINDA SEKWEKWE had declared the VAT to Rwanda Revenue Authority and later paid it. He added that the Court did not address this ground of appeal during the hearing and the counsel for RRA did not reply about it even through its submissions.

THE VIEW OF THE COURT

[27] The Court finds that this issue was not examined at appeal on the ground that it was not submitted to the Commissioner General and cannot be assessed in this proceeding as it was not debated on by parties.

4) Assessment of the requested damages in this proceeding.

a) Regarding damages requested by Ets KALINDA SEKWEKWE.

[28] Musafiri Alain requested damages of 500,000Frw for advocate fees. Counsel Kabibi Spéciose replied that they must not be awarded as they do not have merit.

THE VIEW OF THE COURT

[29] As held above, the Court finds that all the grounds of appeal submitted by Ets KALINDA SEKWEKWE have no merit. Hence, he must not be awarded damages in this case.

b) Regarding the cross appeal filed by Rwanda Revenue Authority in which it requests damages.

[30] Counsel for Rwanda Revenue Authority based on article 258 of Civil Code Book III, requested damages relating to being dragged into unjustified proceedings and for the loss of time. She requested to order Ets KALINDA SEKWEKWE to pay damages amounting to 2,000,000Frw.

[31] Musafiri Alain states that Kabibi is in the proceeding as a state attorney and hence no damages must be awarded.

[32] The Court finds that the fact that Ets KALINDA SEKWEKWE appealed to this Court and that its appeal has no merit while RRA was summoned, implies that there is a prejudice. Consequently, based on article 258 of Civil Code Book III which provides that any act of man, which causes damage to another obliges the person by whose fault it happened to repair it; Ets KALINDA SEKWEKWE must pay RRA the procedural fees equivalent to 500,000Frw because 2,000,000Frw that it requests is excessive and is not supported by evidence.

III. THE DECISION OF THE COURT

[33] Decides that appeal lodged by Ets KALINDA SEKWEKWE has no merit.

[34] Decides that cross-appeal filed by Rwanda Revenue Authority has merit in part.

[35] Decides that the judgment N° R.COM0075/12/HCC rendered by the Commercial High Court on January 18, 2013 is not changed save damages that are awarded to Rwanda Revenue Authority at this instance.

[36] Orders Ets KALINDA SEKWEKWE to pay Rwanda Revenue Authority 500,000Frw for procedural fees.

[37] Decides that the deposited amount for court fees is equivalent to the cost of the works done in this case.