

RWANDA REVENUE AUTHORITY v. KAMBA GENERAL MARCHANDISE Ltd

[Rwanda SUPREME COURT – RCOMA0152/12/CS (Mugenzi, P.J., Karimunda and Gatete, J.) January 22, 2016]

Tax law – Taxable income – Money deposited by buyers as caution – This money is not an income, it is rather the caution which is not taxable – Law N°16/2005 of 18/08/2005 2005 on Direct taxes on income, article 16.

Tax law – Tax base – Taxable income – Who has the burden to prove the tax base – Rwanda Revenue Authority has the burden to prove the taxable profit – Law N°25/2005 of 04/12/2005 on tax procedures, article 44.

Damages – Procedural and advocate fees – The winner must be awarded these damages because there are incurred expenses in the follow-up of the proceedings in addition to the hired advocate – Law of 30/07/1888 governing contracts or obligations, article 258.

Facts: Rwanda Revenue Authority conducted tax audit for Kamba General Merchandise Ltd and imposed the tax of 37,447,020Frw. Not satisfied with the outcome of the audit, Kamba General Merchandise Ltd appealed to the General Commissioner and the latter responded that 2,790,000Frw was returned to Kigali Multi Choice Ltd being deducted from the due tax and hence must pay the difference. Kamba General Merchandise Ltd filed a claim to the Commercial High Court against that decision requesting for the deduction of 22,957,627Frw from the due tax because it was not the proceeds of commercial activities, rather the caution of the buyers. The Court held that the tax equivalent to 22,957,627Frw had to be deducted from the one imposed by the Commissioner General and ordered RRA to pay procedural, advocate and court fees.

Dissatisfied of that decision, RRA appealed to the Supreme Court lamenting that tax audit that was carried out for Kamba General Marchandise Ltd is of the type of levy which is conducted through tax rectification whereby in collecting tax, fundamental principles of accounting apply because prior to the deposit of the money in the bank, it must first be recorded in the accounting books that prove that it had been recorded in the cash books but with regard to this case, the money was deposited on the bank without prior record in the cash book, the reason why it must be taxed. Moreover, had the money been the caution, it would have been proven by the bank slips. Furthermore, another evidence to show that it is not the caution is that it did not refund in entirety the persons whom he refers to as the depositors of that money while Kamba General Merchandise Ltd concedes that the money refunded to clients is not equivalent to the money they received as caution.

Kamba General Marchandise Ltd explained in response that keeping the money for caution on the bank account and the reimbursement to whoever claims it back with the help of what is recorded in the cash book is not a fault. Kamba General Marchandise Ltd explains further that what is essential is that the money must be available so that the depositor of the caution who claims it back can be refunded at any time.

Kamba General Merchandise Ltd ended up requesting for damages for procedural and advocate fees for being dragged into unjustified proceeding.

Held: 1. Business profit is determined as the income from all business activities reduced by all business expenses. Business profit also includes proceeds of sale of any business asset and

liquidation proceeds received during the tax period. That profit is also computed based on the computation of the profit or loss grounding on national accounting fundamental principles. Therefore, the fact that the defendant had transferred money to the bank account without recording it in the cash book, is not evidence that it is the business profit because its books of accounts indicate that it was the caution that were pledged by clients while RRA does not deny the veracity therein. Therefore, the money pledged as caution is not business profit; it is rather the act of guaranty on which tax must not be levied.

2. The burden to figure out the taxable profit lies to Rwanda Revenue Authority. Therefore, the fact that it did not demonstrate the profit that Kamba General Merchandise Ltd might have gained from the caution deposited by its buyers, nor it demonstrated that it deposited money for caution on the same bank account with intention of profits indicates that RRA has no evidence of its allegations.

3. Any act of man, which causes damage to another obliges the person by whose fault it happened to repair it. Hence, Kamba General Merchandise Ltd is awarded procedural and advocate's fees because there are expenses incurred during the follow-up of the case and it necessitated to hire an advocate.

**Appeal lacks merit;
Appealed judgment upheld;
Appellant is ordered to pay the procedural and advocate fees;
Court fees to the appellant.**

Statutes and statutory instruments referred to:

Law N°25/2005 of 04/12/2005 on tax procedures, article 44.

Law N°16/2005 of 18/08/2005 on Direct taxes on income, article 16.

Law of 30/07/1888 governing contracts or obligations, article 258.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Tax audit on business profit tax, value added tax and income tax for the tax periods of 2006, 2007 and 2008 were conducted for Kamba General Merchandise Ltd. Then, the tax equivalent to 37,447,020Frw was imposed. Kamba General Merchandise Ltd was not satisfied with that audit and appealed to the Commissioner General and in his notice of January 10, 2012 he informed it that 2,790,000Frw was submitted back to Kigali Multi Choice Ltd being deducted from the imposed tax. He was ordered to pay 34,825,340Frw.

[2] Not satisfied with that decision, Kamba General Merchandise Ltd sued to the Commercial High Court requesting the waiver of the tax equivalent to 22,957,627Frw imposed by the Commissioner General because it was not business profit, but rather the advance payments that clients generally deposit on its account while waiting for commodities.

[3] In the judgment RCOM0026/12/HCC rendered on September 6, 2012, the Court found that the money on the account of Kamba General Merchandise Ltd was not the profit

from the commercial activities, but rather the advance payments which were deposited by the buyers. The imposed tax had a base on the sale of goods while the advance payments concerned the security and that there is no reason to analyze the matter concerning the quantum of the profit since commercial law in Rwanda allows both the buyer and the seller to agree on the price and even the litigants did not agree on the quantum of the profit and the Court held that tax equivalent to 22,957,627Frw must be deducted from that confirmed by the Commissioner General. The Court further ordered Rwanda Revenue Authority to pay damages for procedural and advocate fees equivalent to 500,000Frw and also the payment of court fees.

[4] Dissatisfied of the decision, Rwanda Revenue Authority appealed to the Supreme Court. Public hearing was fixed on December 22, 2015 whereby Kamba General Marchandise Ltd was represented by Counsel Twagilimana Joseph while Rwanda Revenue Authority was represented by Gasana Raoul, the counsel.

1. Whether the money which was refunded to their owners was generated from commercial activities.

[5] Gasana Raoul, counsel for Rwanda Revenue Authority states that tax audit that was conducted for Kamba General Marchandise Ltd is of the type of the tax collection which is done through the principle of “Audiatur et altera pars” whereby in the course of computation of the tax, fundamental principles of accounting apply because prior to the deposit of the money on the bank account, there must be the entry into the books which demonstrate that it was initially recorded into the cash books. However, with regard to this case, the money was deposited to the bank account without initial entry into the cash book, and this is the reason why it must be taxed.

[6] He explains that assessment of accounting books indicates that there is money that Kamba General Marchandise Ltd identifies as caution pledged by buyers that it deposited to its account and it is paid back after the buyers have received their commodities while the tax administration demonstrates that the money in question is not caution because, Kamugisha, the owner of Kamba General Marchandise Ltd and Sibomana Augustin, the Tax adviser, informed the tax auditors that, since the money deposited as caution was not their own, they used to receive that money in hands and after make the deposit to the bank account without initial entry into the cash books which is the reason why that money is not identified from the books of accounts.

[7] He concluded that if the money which was deposited to the bank account was the caution, then it would have been justified by the bank slips. He added that another indication that the money was not caution is for example the case of Nzaramba who had deposited 5,580,000Frw on September 10, 2007 and again 3,260,000Frw on October 12, 2007 but he was refunded 3,260,000Frw. This means that Kamba General Marchandise Ltd did not refund the entirety of the money that it qualifies as caution. In addition, the money they say they refunded does not equal to the entire amount they received.

[8] Twilingiyemungu Joseph, counsel for Kamba General Marchandise Ltd the conduct of the audit on profit tax, value added tax, and professional income tax on the tax periods of 2006, 2007 and 2008 based on the accounting done by Kamba General Marchandise Ltd which demonstrated that the conclusive due tax was 37,447,020Frw , however in imposing that tax, laws were disregarded. He added that they submitted the issue to the Commissioner General and the latter concluded that the tax equivalent to 2,621,716Frw be deducted from

that which was imposed but disregarded the main issue regarding the tax which was imposed unlawfully being the cause of action of Kamba General Merchandise Ltd to the Commercial High Court so that the latter can assess whether the advance payments which was refunded to the owners can be taxed as business profit.

[9] He states further that keeping the money for caution on the bank account and refunding whoever requests using the available cash, is not a fault because what matters is its availability because, if it was not available, it would cause the vacuum in accounting. He explains further that the person who pledged the caution can recover it any time. He insisted that the allegations of Rwanda Revenue Authority that the caution money served as the initial payment by the buyers has no merit because no specific laws indicate that the caution serves as initial payment. It is rather reimbursed to the owner when the cause of its constitution never exists.

[10] He concluded that both the books of accounts and bank statement indicate that there is 26,825,000Frw which was deposited on the account by the buyers as the caution of the delivery of the commodities and that, the accounting indicates that this money was collected by the buyers and the tax administrator who till now does not deny the outcome of the accounting which is the reason of the holding of the judge in the appealed judgment that in the case, Rwanda Revenue Authority fails to rebut the content in the books of accounts of Kamba General Merchandise Ltd, and must lose the case grounding on article 44 of the Law N°25/2005 of 04/12/2005 on tax procedures.

THE VIEW OF THE COURT

[11] Article 16(1) of Law N°16/2005 of 18/08/2005 2005 on Direct taxes on incomes provides that Business profit is determined as the income from all business activities reduced by all business expenses. Business profit also includes proceeds of sale of any business asset and liquidation proceeds received during the tax period. That profit is also computed based on the computation of the profit or loss based on the national accounting fundamental principles, while paragraph two of the same article provides that business profit is determined per tax period on the basis of the profit or loss account drawn up in accordance with the National Accounting Plan.

[12] Article 44 of Law N°25/2005 of 04/12/2005 on tax procedure as modified and complemented to date, provides that the burden of proof lies with the Tax Administration when rectifying tax declaration of the tax payer.

[13] The case file demonstrates that the audit on the tax that KAMBA General Merchandise Ltd is imposed to pay is grounded on the rectification note which is different from the Assessment procedure without notice, given that the books of accounts indicated that there is an amount of money equivalent to 26,825,000Frw which was paid cash by the clients of KAMBA General Merchandise Ltd as caution so that they could have the commodities and that amount was deposited to the bank accounts and refunded to their owners on different dates after the entry in the cash books which were made (identification code 5). In addition, there is an investigation which was conducted by Rwanda Revenue Authority so that the latter could reassure of the due tax based on the accounting records done by KAMBA General Merchandise Ltd (pages 20-21).

[14] The Court finds that, the fact that the money was received cash and later deposited to the bank account by the employees of KAMBA General Merchandise Ltd without prior entry into the cash books does not constitute evidence that it is the profit from business and in case the books of accounting of KAMBA General Merchandise Ltd demonstrates that such amount is constituted of the caution for commodities and that their owners later recovered it, while Rwanda Revenue Authority does not challenge the books of accounts of KAMBA General Merchandise Ltd, rather confirming that the tax base is the profit while caution is not a profit since it is the security which must not be taxed, led the Court to the conclusion that there is no base to confirm that the money for caution which was later refunded to the owners must be taxed.

[15] The Court further notes that as provided for by article 44 of Law N°25/2005 of 04/12/2005 as cited above, the burden to prove the taxable profit that KAMBA General Merchandise Ltd might have gained from the caution that it used to request its clients to constitute, lies to Rwanda Revenue Authority. Hence, as long as this Institution cannot prove that KAMBA General Merchandise Ltd used in commercial activities the money it ordered from its clients to give as caution nor proves that the reason of the deposit of the money for caution on the same bank account as the one for commercial activities was to make profit of any kind, must be considered as failure for Rwanda Revenue Authority to present evidence of its allegations. Hence, its appeal has no merit.

2. Whether KAMBA General Merchandise Ltd can be awarded the requested damages in this proceeding.

[16] Twilingiyemungu Joseph states that KAMBA General Merchandise Ltd continues being dragged into proceedings and hence requests for damages equivalent to 1,000,000Frw for procedural and advocate fees.

[17] Counsel Gasana Raoul states that the issue of damages for procedural and advocate fees which are requested by KAMBA General Merchandise Ltd must be assessed in the discretion of the court because they are requested based on the main suit.

THE VIEW OF THE COURT

[18] The Court notes that given that KAMBA General Merchandise Ltd was sued in courts caused it to incur expenses in follow-up of the case and it necessitated to hire an advocate. Therefore, based on article 258 of the 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, KAMBA General Merchandise Ltd is therefore awarded at this instance, 500,000Frw for procedural and advocate fees.

III. THE DECISION OF THE COURT

[19] Decides that appeal of Rwanda Revenue Authority has no merit;

[20] Upholds the ruling of the judgment RCOM0026/12/HCC rendered by the Commercial High Court on September 6, 2012;

[21] Orders Rwanda Revenue Authority to pay KAMBA General Merchandise Ltd 500,000Frw for procedural and advocate fees on this instance in addition to that which was imposed at the first instance;

[22] Orders Rwanda Revenue Authority to pay the court fees equivalent to 100,000Frw.