Re AKAGERA BUSINESS GROUP (PETITION FOR THE REPEAL OF THE LEGAL PROVISION INCONSISTENT WITH THE CONSTITUTION)

[Rwanda SUPREME COURT – RS/SPEC/0001/16/CS (Rugege, P.J., Mukanyundo, Hatangimbabazi, Kanyange, Mukamulisa, Rugabirwa, Hitiyaremye, Ngagi and Nyirandabaruta, J.) September 23, 2016]

Constitution – Unconstitutionality – Petition to repeal the provision of article 1(5)of the Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 on tax procedures – Taxpayer litigant – Production of new evidence at appeal level – The fact that taxpayers are not allowed to produce new evidence at appeal level, should not be considered as different treatment with regard to other litigants, because this treatment relies on their special status and legal duty to keep account statements – The Constitution of the republic of Rwanda of 2003 revised in 2015, articles 15 and 16 – Organic Law N°03/2012/OL of 13/06/2012 determining the organisation, functioning and jurisdiction of the Supreme Court, article 53(2) – The Universal Declaration of Human Rights (UDHR) of 10 December 1948, article 7 – International Covenant on Civil and Political Rights of 16 December 1966, articles 14 and 26 – Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, article 168(3) – Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 on tax procedures, article 1(5).

Facts: ABG filed a claim to the Commercial High Court whereby it sued Rwanda Revenue Authority (RRA) requesting the reduction of the tax imposed amounting to 1,050,442,993Frw. The Commercial High Court ruled that the ABG loses the case due to the failure to produce evidence for its allegations. ABG appealed the case to the Supreme Court alleging that there exist elements of evidence submitted to the Commercial High Court which it did not examine. In the defence submission, RRA stated that ABG did not produce evidence in support of its allegations. In the course of preliminary hearing before the Supreme Court, ABG indicated the elements of evidence which were not examined and subsequently RRA prepared the additional defence submission whereby it requested their inadmissibility according to article 1(5) of the Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 on tax procedures.

After ABG realised that those elements of evidence were disregarded by the court at all, it seized the Supreme Court whereby it alleged that the provision of article 1(5) of the Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 on tax procedures on which RRA relies, should be repealed because it is inconsistent with the provisions of articles 11 and 16 of the Constitution of Rwanda of 04 June 2003 as it was applicable at the time the petition was submitted. After the submission of the petition, ABG submitted the additional submissions whereby it intended to indicate the amendment of provisions of the constitution, where article 16 became was 15 while article 11 became 16.

Held: 1. Though the provision of article 1(5) of the Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 on tax procedures does not treat the taxpayers litigants in the same manner as litigants in other kind of litigations, it does not contain inequality before and protection of the law as well as any kind of discrimination.

2. The fact that taxpayers are not allowed to produce evidence they did not exhibit at the time of audit at appeal level, while the tax administration is allowed to do so, should not be considered as inequality of arms before the court. Rather, this is justified by the fact that taxpayers are the only custodians of those elements of evidence who can avail them in due time. Therefore, due to the particularity of the taxpayer litigants, the law treats them differently from other litigants for reasonable grounds and which are not intended to prevent them from enjoyment of their rights and other privileges entitled to them by the Law.

3. The provision of the law which is petioned to be repealed is not inconsistent with the provision of articles 15 and 16 of the Constitution because it does not contain inequality of treatment and any discrimination by the law.

Petion without merit.
Court fees to the petitioner.

Statutes and statutory instruments referred to:

National statutes and ratified conventions:

Constitution of the republic of Rwanda of 2003 revised in 2015, articles 15 and 16.
Organic Law N°03/2012/OL of 13/06/2012 determining the organisation, functioning and jurisdiction of the Supreme Court, article 53(2).
The Universal Declaration of Human Rights (UDHR) of 10 December 1948, article 7.
International Covenant on Civil and Political Rights of 16 December 1966, articles 14 and 26.
Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, article 168(3).
Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 on tax procedures, article 1(5).

Foreign legislation:

The Constitution of the Republic of Kenya 2010, articles 27(1°, 4° and 5°).
The Constitution of the Republic of South Africa, 1996, articles 9(1) and 3.
Canadian Charter of Rights and Freedoms, article 15.

Cases referred to:

Cases from foreign courts:

Firma A. Racke v Hauptzollamt Mainz, Court of Justice of the European Union
Backus v. Fort St. Union Depot Co., 169 U.S. 557, 18 S. Ct. 445, 42 L. Ed. 853 (1898).
S v Lawrence 1997 (4) SA 1176 para. 44-45.
Eur.Court HR, Case "relating to certain aspects of the laws on the use of language in education in Belgium" judgment of 23 July 1968, series A, N°6.p.31. para 10.
UNHR, Dudko v. Australia, Comm. N°1347/2005, UN.Doc. CCPR//90/D/1347/2005 (Aug. 29. 2007 para 7.4.)

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Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc.HRI/GEN/1/Rev.1 at 26 (1994).

Primsloo Van der Linde 1997(3) SA 1012 CC para. 22.

Communication N°172/1984 S.W.M. Broeks v The Netherlands (views adopted on 9 April 1987) in UN Doc.

GOAR, A/42/40 P.150, para. 13.

CJCE, aff. 283/83, 13 novembre 1984, Racke/Hauptzollamt Mainz, Rec., 1984, p.3791. ; CJCE, aff. 106/83, 13 décembre 1984, Société Sermide, Rec., p.4209 ; CEDH, 6 Avril 2000, Thlimennos c. Grèce, N°34369/97.

Hogg "Proof of facts in Constitutional Cases (1976) 26 University of Toronto Law Journal 386 at 396-7.

UNHR, Dudko v Australia, Comm. N°1347/2005, UN.Doc.CCPR//90/D/1347/2005 (Aug.29.2007para 7.4.

United Nations Human Rights Committee, General Comment N°.32, Article 14, Right to equality before Courts and tribunals and fair trial, UN.Doc. CCPR//G/32/Aug.23, 2007 para 13.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] ABG filed the claim to the Commercial High Court against Rwanda Revenue Authority (RRA) whereby it requested the reduction of imposed tax amounting to 1,050,442,993Frw. The Commercial High Court delivered the judgment on 20/12/2012, whereby it decided the ABG loses the case due to the failure to provide evidence in support of its allegations. ABG appealed against the case to the Supreme Court alleging that there are elements of evidence disregarded by Commercial High Court. In the Supreme Court, the judgment was recorded on N°RCOMA0009/13/CS.

[2] In its defense submission, RRA stated that ABG did not produce evidence in support of its pretentions. In the course of preliminary hearing before the Supreme Court, ABG indicated elements of evidence it alleges were disregarded. Meantime, RRA prepared the additional defense submissions whereby it relied on article 1(5) of the Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 on tax procedures to request the rejection of those elements of evidence.

[3] Subsequently, ABG petitioned the Supreme Court requesting article 1(5) of the Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 on tax procedures on which RRA relies to be repealed because it is inconsistent with article 11 and 16 of the Constitution of the Republic of Rwanda of June 4, 2003 as amended to date, and the petition was registered on N° RS/SPEC/0001/16/CS.

[4] After the initiation of the petition, the Constitution was revised, therefore ABG submitted additional explanations of the petition intending to indicate the changes in the constitution whereby article 15 was 16 and 16 was article 11. The petition was examined in the hearing held on 19/07/2016, where AKAGERA BUSINESS GROUP was represented by Counsel Nsengiyumva Abel while the Ministry of Justice which was summoned to submit its opinion was represented by the State Attorney Kabibi Speciose.

II. ANALYSIS OF LEGAL ISSUE

Whether article 1(5) of the Law N°74/2008 modifying and complementing the Law N°25/2005 on tax procedures is inconsistent with the provision of article 15 and 16 of the Constitution of the Republic of Rwanda of June 4, 2003 revised in 2015.

[5] Counsel Nsengiyumva Abel representing ABG states that articles 15 and 16 of the Constitution provide for equal treatment and that all Rwandans are born and remain equal in rights. These provisions read along with article 1(5) of the Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 on tax procedures which states that the taxpayer is not allowed to submit at any level of appeal, other documents or statements he/she did not submit at the time of tax audit, which implies that the taxpayers in the capacity of litigants are bared from some rights which are however bestowed to litigants in other kind of cases, and this is therefore the obstruction of their constitutional rights.

[6] He states further that the fact that the taxpayer has obligation to prepare and preserve account statements, should not be a ground to be treated differently from other litigants, because even in case it becomes clear that there was tax fraud, the author could be punished or ordered to pay a heavy tax as a fine rather than preventing him from the opportunity to produce his supporting evidence whenever he finds them since he may be unaware of them while they may be useful.

[7] He states in addition that it is not clear how in cases other than tax, litigants are permitted to submit new evidence and grounds at any instance level including appeal which were not raised at the first instance, while this is not allowed in tax cases whereby only the tax administration is permitted to do so and taxpayer prohibited. He closes his defence by stating that this is inconsistent with the Constitution given that the taxpayer is not treated equally with another litigant to ordinary cases whereas they should be governed by same general principles, and this consists of inequality of treatment which is inconsistent with article 15 and 16 of the Constitution.

[8] Counsel Kabibi Spéciose, the state attorney states that article 1(5) of the Law N°74/2008 of 31/12/2008 modifying and implementing the Law N°25/2005 on tax procedure is not inconsistent with articles 15 and 16 of the Constitution of 2003 revised in 2015, because this provision does not intend to prevent the taxpayers from submitting conclusive evidence as ABG insinuates, rather, this article emphysizes the duties of the taxpayer to keep the documents and account statements at the business place and has obligation to produce them in the course of the tax audit unless there are reasonable grounds. It states that it is inconceivable for the law which provides for these obligations to allow at the same time the taxpayer to submit these documents and statements of account at the appeal level without reasonable grounds which prevented him from submitting them at the time of the tax audit.

[9] She explains that in tax cases, the taxpayer and tax administration are not in the same position to the extent that the Law may treat them equally, because RRA does not have obligation to fill and keep account statements of the taxpayer since article 13 of Law N°25/2005 on tax procedure provides for the obligation of the trader to keep documents and account statements to prove the real picture of his/her business. This is the reason why the tax auditor should find them at the business place, and if the trader was allowed to submit them later, this obligation to keep them would be vain.

[10] She concludes that another element emphysizing that litigants who are not in the same category should not be governed by the same law, is the fact that in ordinary cases, whenever the litigant submits elements of evidence is not likely to affect his opponent, while concerning the taxpayer, he/she may deny to submit his/her account statements at the time of tax audit with the intent of tax evasion due to the fact that his/her income cannot be known while it constitutes the tax base.

OPINION OF THE COURT

[11] Article 53(2) of the Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court states that the Supreme Court shall also hear petitions regarding the partial or complete repealing of an organic law, an ordinary law, or a decree-law on account of non-conformity with the Constitution. As stated above, ABG petitioned to declare article 1(5) of the Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 on tax procedure because he finds it inconsistent with articles 15 and 16 of the Constitution.

[12] Article 15 of the Constitution of the Republic of Rwanda of 2003 as revised in 2015 states that "All persons are equal before the law. They are entitled to equal protection of the law", while its article 16 states that "All Rwandans are born and remain equal in rights and freedoms. Discrimination of any kind or its propaganda based on, inter alia, ethnic origin, family or ancestry, clan, skin colour or race, sex, region, economic categories, religion or faith, opinion, fortune, cultural differences, language, economic status, physical or mental disability or any other form of discrimination are prohibited and punishable by law".

[13] The provision for which the repeal is petitioned consists of article 1(5) of the Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 on tax procedure which reads "[…..] the taxpayer shall not be allowed to provide at any stage of appeal, any additional evidence that had not been produced during the audit". This provision modified and complemented article 20 of the Law N°25/2005 of 04/12/2005 on tax procedure which is in the title of this law concerning tax audit and investigation.

[14] In order to provide a right answer to the issue raised in this case, it is necessary to interpret the provisions of both articles of the Constitution to find their meaning about the right of:

(i) Equality before the law

(ii) Non-discrimination.

[15] These two provisions are linked to the extent that their separate interpretation is hard. Article 15 states that all persons are equal before the law. They are entitled to equal protection of the law. This implies that there should not be discrimination from equal protection or loss of rights where they should be entitled to them. Article 16 states in addition how distinction of people is considered as a discrimination which is prohibited by the Constitution. Both articles ought to be considered as containing same principle but which is divided into two parts which are related.

[16] As it was stated by United Nations Human Rights Committee: "Non–discrimination, together with equality before the law and equal protection of the law without discrimination,

constitute a basic and general principle relating to the protection of human rights[1]". The link between articles 15 and 16 of the Constitution is the ground for which in other countries, the two principles are joined in single provision of the Constitution. In Canada for instance, article 15 of Canadian Charter of Rights and Freedoms states that: "[e]very individual is equal before and under the law and has the right of equal protection and equal benefit of the law without discrimination and in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[17] In Universal Declaration of Human Rights of 1948, its article 7 reads that: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and against any incitement to such discrimination". In addition, article 26 of International Covenant on Civil and Political Rights, 1966 states that: "All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status". The provisions of the Constitution of Kenya[2] and South Africa[3] are also drafted in that way. This is the reason why the Constitutional Court of South Africa stated that the examination of the issue of equality before the law and non-discrimination in the same judgment but in separate way is not desirable and feasible because the principle of equality before the law and non-discrimination is the same principle constituted by linked parts[4]. Even in this judgment, both issues shall be examined together, whereby answer to the following issue shall be provided: What does equality before the law and equal protection without discrimination mean?

[18] Equality before the law and non-dicrimination do not imply that distinction of individuals itself in all circumstances is a discrimination. Distinction of people or group of people could be necessary depending on objective and existence of legitimate or rational purpose. For instance, the government may award some help to needy or vulnerable groups of people like children, disabilities, indigenous and others, without according the same to the rest, or it may take affirmative action in favor of women. This may not be considered as discrimintion, rather it is alegitimate differentiation. This has also been communicated by the United Nations Committee in the following terms: "The right to equality before the law and equal protection of the law without any discrimination, does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26[5].

[19] In the course of providing advisory opinion on the revision of the constitution of Costa Rica, the Inter American Court of Human Rights explained clearly the meaning of equality and discrimination. It held that: "Precisely because equality and nondiscrimination are inherent in the idea of the oneness in dignity and worth of all human beings, it follows that not all differences in legal treatment are discriminatory as such, for not all differences in

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[1] Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc.HRI/GEN/1/Rev.1 at 26 (1994).

[2] The Constitution of Kenya 2010, Article 27, litera1, 4 and 5.

[3] The Constitution of the Republic of South Africa, 1996, article 9, para. 1 and 3.

[4] "It may be neither desirable nor feasible to divide the various subsections or descriptions into water tight compartments". Primsloo Van der Linde 1997(3) SA 1012 CC para. 22.

[5] Communication N°172/1984 S.W.M. Broeks v The Netherlands (views adopted on 9 April 1987) in UN Doc. GOAR, A/42/40 P.150, para 13.

legal treatment are in themselves offensive to human dignity […..]. There may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate the principle of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position. Accordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows, that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of human kind"[6].

[20] In the case Firma A. Racke v Hauptzollamt Mainz, the Court of Justice of the European Union explained that "[……] discrimination consists solely in the application of different rules to comparable situations or in the application of the same rule to differing situations [….][7]". It is therefore clear that the differentiation of people in different groups does not constitute a discrimination, but on the other hand, the application of same rules to different groups of people may constitute a discrimination.

[21] The aforementioned article 1(5) of the Law N°74/2008 of 31/12/2008, constitutes the basis of the allegations of the petitioner concerning the inconsistency with the constitution whereby he states that this provision differentiates between a taxpayer litigant and a litigant in other kind of cases and operates inequality before the Law because the litigant in cases other than tax is allowed to produce evidence at any stage of proceedings. Do these constitute inequality before the law and discrimination?

[22] Article 16 of the Constitution indicates clearly the list of reasons of differentiation. In general, discrimination means differentiation of people with intent to prevent some rights to them and favor others under illegitimate reasons. As far as this case is concerned, there exists the category of litigants in tax disputes, tax administration and litigants in other kind of cases. In these categories, none of them relies on one of legitimate reasons of differentiation as specified in the constitution.

[23] In case the differentiation of people relies on the reason specified in article 16 of the Constitution, it is considered as discrimination unless it is provided a legitimate reason of unequal treatment of individuals provided in the aforementioned article 16. However, this article 16 provides for the list of reasons on which differentiation may rely but varying the text with the following sentence "or any other form of discrimination". That is the reason why it should be examined the law or whatever act alleged to be inconsistent with this provision in order to indicate whether or not there is discrimination. As explained in previous paragraph, if differentiation of people does not rely on one of the reasons indicated on the list provided for by article 16, it is examined if the given reason is legitimate and with interest to people in general or to a given group.

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[6] I-A Court H.R, Proposed Amendment to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC 4/84 of Jan 19, 1984, series A N°4, p.104-106 paras 56-57.

[7] CJCE, aff. 283/83, 13 novembre 1984, Racke/Hauptzollamt Mainz, Rec., 1984, p.3791; CJCE, aff. 106/83, 13 décembre 1984, Société Sermide, Rec., p.4209; CEDH, 6 Avril 2000, Thlimennos c. Grèce, N°34369/97.

[24] It is realy true that in ordinary cases, the litigant is allowed to produce new elements of evidence at any stage of proceedings that was not produced at first instance level. Article 168(3) of the Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and Administrative procedure states that: "[…..] it is not prohibited to submit in appeal new arguments or elements of evidence that were not heard at the first level". It should therefore be examined if the law does not treat people in same category and situation equally and the rationale of the existence of article 1(5°) of the Law N°74/2008 modifying and complementing the Law N°25/2005 on tax procedure which prohibits the taxpayer to produce evidence at appeal level.

[25] The prohibition of the taxpayer from production of evedence at appeal level which were not produced in the course of audit may be understood like preventing him from the right entitled to other litigants, which is inconsistent with the principle of equality before the law and nondiscrimination. In the case law Backus v. Fort St. Union Depot Company in the United States of America, the provision of the law which used to prevent the landlord to sue the tenant for damages relating to destruction, in case the landlord mismanaged security deposit was analysed. The Supreme Court of this country held that the law which entitles the individual some rights in the course of court proceedings while it prevents it to others in the same status may be perceived as discriminatory and uncomplying with the principle of equality before and protection of the law, which is inconsistent with the constitution.

[26] However, it is clear in this judgment that taxpayer litigants are not in the same situation like other litigants. Taxpayers are in the category of special group which has some obligations in order for the important duty of the country to be well fulfilled. If some taxpayers were forbiden to produce evidence at appeal level while others are allowed to do so, it would constitute an inequality between litigants in the same category and situation. The reason behind the prohibition to all taxpayers to produce evidence at appeal level which were not produced at the time of audit, consists of incentive to submit them timely in order to allow the tax administration to perform tax audit duty with ease. The taxpayer is entitled the right to produce all evidence at the time of audit in order to evaluate the tax due. He is even the one holding all evidence likely to indicate the veracity of the tax due. This is different from the ordinary litigant who may be in need of evidence in the custody of third parties with no access to them whenever he wishes. This court considers that the existence of the provision of the Law for which the repeal is petitioned, is ligitimate and protects public interest, the reason why it should not be considered as discriminatory.

[27] However, the Law may have a reasonable and legitimate objective but with measure not proportional to the purpose or objective to be achieved. This is also what has been stated by the European Court of Human Rights in the following terms: "[…..] on this question, the Court holds that the principle of equality of treatment is violated if a distinction has no objective and reasonable justification. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised"[8].

[28] In this case, it should be examined if the measures taken to facilitate the taxpayer to produce all necessary documents in due time, meaning the prohibition to the taxpayer to produce new evidence at apeal level which were not submitted in the course of audit, is likely

[8]Eur.Court HR, Case "relating to certain aspects of the laws on the use of language in education in Belgium" judgment of 23 July 1968, series A, N°6., p.31. para 10.

to be considered as usurpation in determining the measures to be taken to achieve the objective. However, in the course of examination and ruling whether the provision of the law about the achievement of its aim or if there should be another way which would not hinder taxpayers, the court should avoid interfering in the power of the policy makers and its implementation, as well as the attributions of the legislator.

[29] The court should not declare the law to be inconsistent with the Constitution by relying solely on the ground that the objective of the law would be achieved through other means. The litigant who criticizes a provision of the law has the duty to indicate that the path opted by the legislator is ambiguous, unclear, or if subject to rationale, it does not meet the aim of the enactment of the law. This meets the principle of separation of powers[9]. This assertion has been supported in the case law S v Lawrence[10] rendered by the Constitutional Court of South Africa which invoked the statements of Professor Hogg whereby hestates that the Court is free to decide on issues under litigation but that it is not free to decide on issues relating to the grounds the legislator relies on to enact laws. The act of the court would only consists of valueing the existence of rational connection between a law and the objective intended by the legislator, that is to mean whether or not facts relied on are legitimate. This author pursue stating that in democracy, it would not be rational for courts to disregard the discretion of the legislature on account of theirs"[11].

[30] In general, the production of evidence is governed by the law N°15/2004 of 12/6/2004 on administration of evidence and its production but it is especially governed by the Law N°74/2008 of 31/12/2008 modifying and implementing the Law N°25/2005 on tax procedure in tax matters, precisely in its first article. The purpose of this provision is not the distinction of taxpayers from other litigants with the view to prevent them from the opportunity to exercice the right to defence and produce evidence, rather it intends to determine the special procedure in accordance of which the taxpayer produces evidence especially by relying on the legal obligation he has to keep account statements and other related documents. Therefore, the taxpayer is entitled the right to produce evidence according to the procedure specified by the law which is different from that provided for other litigants.

[31] The law obliges the taxpayer to keep and maintain all documents relating to his/her business in order to produce them in the course of audit. Subsequent to that, he/she is allowed to produce to the tax admistration other testimonial evidence and other kind of evidence within 30 days from the day he/she was served the notification of rectification document in

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[9] Article 61 of the Constitution of Rwanda, 2015.

[10] S v Lawrence 1997 (4) SA 1176 para. 44-45.

[11] Hogg "Proof of facts in Constitutional Cases (1976) 26 University of Toronto Law Journal 386 at 396-7 "While a court must reach a definite conclusion on the adjudicative facts which are relevant to the disposition of litigation, the court need not be so definite in respect of legislative facts in constitutional cases. The most that the court can ask in respect of legislative facts is whether there is a rational basis for the legislative judgment that the facts exist. The rational-basis test involves restraint on the part of the court in finding legislative facts. Restraint is often compelled by the nature of the issue: for example, an issue of economics which is disputed by professional economists can hardly be definitively resolved by a court staffed by lawyers. The most that can realistically be expected of a court is a finding that there is, or is not, a rational basis for a particular position on the disputed issue. The more important reason for restraint, however, is related to the respective roles of court and legislature. A legislature acts not merely on the basis of findings of fact, but upon its judgment as to the public perceptions of a situation and its judgments as to the appropriate policy to meet the situation. These judgments are political…. It is not for the court to disturb political judgments, much less to substitute the opinions of experts. In a democracy it would be a serious distortion of the political process if appointed officials (the judges) could veto the policies of elected officials.

order to correct potential mistakes[12]. Apart from that, he/she is allowed to submit them at appeal level whenever there is a reasonable ground to the failure of submitting them at the time of audit[13]. This is to mean that the evidence forbidden to be produced consists of the evidence the taxpayer would have produced in the course of audit but which he/she failed to do with bad faith, misleading or unjustifiable negligence. The taxpayer with good faith to pay the taxes due at time does not incur any damage from the provision for which repeal is requested because the required elements of evidence are communicated to him/her before the audit, whereby those still missing are submitted at the time of their finding but after providing reasonable grounds as to why they were not availed before.

[32] The prohibition to produce elements of evidence at appeal level that one did not indicate at the time of audit, is the consequence of default to assume responsibility to hand to tax administration accounts statements and documents mentioned in articles 12, 13 and 15 of the Law N°25/2005 of 04/12/2005 at the time the audit was conducted. If the taxpayer is allowed to submit accounts statements and other documents at any time after the conduct of audit, this duty would no longer be mendatory as longer as he/she has option to submit them immediately or later at appeal level, and this is likely to hinder the tax audit.

[33] Although Akagera Business Group did not rely on the equality of arms in its submissions, it raised it in the course of hearing. It alleged that it is controversial to prohibit the taxpayer to produce evidence at appeal level that was not submitted in the course of tax audit whereas the tax administration is allowed to do so. In his defence, the state attorney states that the taxpayer and tax administration as parties are not in the same category and situation, because they have different obligations, therefore their different treatment should not be considered as inequality before the law or discrimination.

[34] Equality of arms between litigants is not provided for by the Constitution of Rwanda, therefore this is not a special right. However, consideration made of International principles and United States Human Rights Committee (UNHRC), the court finds that equality of arms before the court is considered as part or portion of the right to equal treatment before courts as provided for by article 14 of International Convenant on civil and pilitical rights (ICCPR). This article stipulates that all people are treated equal before courts. In linking this provision to the right to defence, the Committtee stated that same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the litigant[14].

[35] In the case Dudko v Australia, the committee (UNHRC) stated: "It is for the State party to show that any procedural inequality was based on reasonable and objective grounds not entailing actual disadvantage or other unfairness to the author […]"[15].

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[12] Articles 27 and 29 of the Law N°25/2005 entitles the taxpayer the right to submit to the tax administration additional testimony and evidence within 30 days from the time of reception of rectification notice, which indicate the mistakes in imposition in order to reexamine it and rectify it if necessary.

[13] The last paragraph of the provision for which repeal is petitioned states 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] United Nations Human Rights Committee, General Comment N°.32, Article 14, Right to equality before Courts and tribunals and fair trial, UN.Doc. CCPR//G/32/Aug.23, 2007 para 13. "This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant".

[15] UNHR, Dudko v Australia, Comm. N°1347/2005, UN.Doc.CCPR//90/D/1347/2005 (Aug.29.2007 para 7.4.)

[36] Concerning this issue relating to the inequality of treatment before the law and production of evidence, the court finds that the status of tax audit and its perception and the fact that the taxpayer has the obligation to keep account statements and other documents, therefore being the sole person who holds the reliable information of which he/she may opt to communicate or not; this entitles the tax administration with the right to produce new evidence although the taxpayer is not allowed to do so. Thus, this is not likely to be considered as inequality to the right of defence before courts.

[37] Consideration made of the explanations provided above, the court finds that even if the provision of article 1(5) of the Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 on tax procedure does not treat taxpayers litigants in the same way as other litigants, but it does not contain inequality of treatment and protection by the law as well as discrimination of any kind. The ground relied on by the plaintiff to allege the existence of discrimination is not included into the instances likely to lead to discrimination as mentioned in article 16 of the Constitution; and this ground is clear. It should neither be considered as if it has no impact on the objective of encouraging taxpayers to cooperate with the tax administration to abide by the obligations of the law. Due to special status of taxpayers litigants, the law treats them differently from other litigants on ligitimate grounds which do not intend to prevent them from the privileges and right they are entitled by the law. And in addition, the fact that they are not allowed to produce at appeal level, the evidence they produced at first instance level, while the tax administration is allowed to do so, this should not be considered as inequality in the exercice of the right to defense before courts, rather, it is due to the fact that only taxpayers hold those elements of evidence and may submit them at request as it was held above. In summary, the provision of the law for which the repeal is petitioned, is not inconsistent with the provision of articles 15 and 16 of the Constitution because it does not contain inequality of treatment before the law as well as any kind of discrimination.

III. DECISION OF THE COURT

[38] The Supreme Court admits the petition filed by AKAGERA BUSINESS GROUP for the repeal of article 1(5) of the Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 on tax procedure alleged to be inconsistent with the Constitution of the Republic of Rwanda of 2003 revised in 2015, in its articles 15 and 16;

[39] Finds it without merit;

[40] Declares that article 1(5) of the Law N°74/2008 of 31/12/2008 modifying and complementing the Law N°25/2005 on tax procedure is not inconsistent with the provisions of articles 15 and 16 of the Constitution of the Republic of Rwanda of 2003 revised in 2015;

[41] Declares court fees deposited by AKAGERA BUSINESS GROUP to be equivalent to the cost of procedures undertaken in the case.