

FOREST COMPANY VOLCANOES GORILLAS (FCVG) LTD v. RWANDA REVENUE AUTHORITY (RRA)

[Rwanda SUPREME COURT – RCOMAA 00055/2016/SC
(Kayitesi Z. P.J., Mutashya and Karimunda, J.) 29 September
2017]

Tax law – Value added tax – Income tax – The advance payment given to the successful bidder to begin the work, is exempted from taxes because it is not considered as a payment – Law N°37/2012 of 09/11/2012 establishing value added tax article 10 – Law N°12/2007 of 27/03/2007 on public procurement, article 86.

Facts: Forest Company Volcanoes Gorillas (FCVG) Ltd was audited by Rwanda Revenue for the year of 2011, 2012 and 2013, consequently was ordered to pay without notice various taxes which include income tax, value added tax, withholding tax not paid and was ordered to pay for penalties and interests equivalent to 125,737,718Frw.

FCVG appealed against that decision to Commissioner General who responded that its appeal has merit in part and decided to deduct 20,186,699Frw of withholding tax of 15% from the tax it was charged, because it was supported with evidence. Thus, it pays tax equal to 105,551,109Frw.

FCVG Ltd not satisfied with that decision, filed a case in Nyarugenge Commercial Court requesting that, no value added tax (VAT) should be charged on advance payment of 90,876,120Frw received in 2012, that the advance payment of

52,665,710Frw received in 2012 should not be included in tax base on which to charge the fine for not registering for VAT. That, it should be penalised at the rate of 50%, that the advance payment received in 2012 should be deducted from the revenue on which the income tax should be charged, that, the income tax of 2011, 2012 and 2013 should be computed at the profit margin of 3%; it prays the Court to order Rwanda Revenue Authority (RRA) to pay counsel fee of 3,000,000Frw.

The Court decided that its claim has no merit, that the advance payment given by the government of Rwanda to FCVG Ltd is in its possession, thus, the government could not pay tax on its behalf instead it is business person who has to pay for himself, then the Court decided that it should pay income tax on the advance payment it got, and penalties for tax evasion. It also ordered FCVG to pay procedural fee to RRA.

FCVG Ltd unsatisfied with that decision, appealed before Commercial High Court arguing that the value added tax cannot be charged on advance payment because it is not a payment and some issues contained in its claim were not examined by the previous Court.

After examination of the appeal, the Court decided that the appeal has no merit because it found that FCVG Ltd issued an invoice for advance payment it received with VAT inclusive and the penalties imposed due to tax evasion were based on the law governing taxation without notice. FCVG Ltd was not satisfied with that decision and appealed to the Supreme Court arguing that, the Commercial High Court held that, VAT should be charged from the advance payment because it was included on invoice which is not true, that the penalties should be calculated on the rate of 50% instead of 100% basing on the principle of independence of the fiscal year, that the advance

payment is excluded from the revenue on which the income tax is charged, it also requested the Court to order that it should be taxed on the same rate as the business people who carry out the same activities.

RRA argues that, the advance payment which is exempted is that one given on construction works which is not the case for FCVG Ltd. It explains also that, if FCVG Ltd thought that it should not be charged value added tax it would have separated its invoices of the tender it has been awarded from those of advance payment, but this was not the case, instead the invoices for advance payment which FCVG Ltd issued to MINAGRI included VAT and was given that tax, but it does not want to give it to the tax administration.

Held: 1. The advance payment given to the successful bidder to begin the work, is exempted from taxes because it is not considered as a payment, therefore the fact that FCVG Ltd included taxable and non taxable items on invoices it issued, is not enough basis to charge it tax on advance payment while this is not taxable item according to the provisions of the Law.

2. Construction works provided by the Law are not the only ones exempted for tax charged on advance payment because construction works were mentioned as an example, thus advance payment given to any successful bidder for any tender is exempted for taxes.

3. Advance payment is not included in the revenue on which the fine for not registering for value added tax is charged. because it is not part of the turnover or the profits of the successful bidder.

4. The income tax should be computed at a profit margin of 21% which is indicated in both tax declaration and in its bank

statement because the appellant failed to provide its books of accounts or those for the company it compares itself with.

5. When there is evidence which prove that the taxpayer made a tax declaration with the intention of evading tax, he/she is charged a fine of hundred per cent (100%) of the tax evaded.

6. Counsel and procedural fee are not awarded when both parties lost in part.

**Appeal has merit in part.
Judgment RCOMA00184/2016/CHC/HCC is reversed in
part.
Court fees are bone by both parties.**

Statutes and statutory instruments referred to:

Constitution of the Republic of Rwanda of 2003 revised in 2015, article 164.

Law N^o37/2012 of 09/11/2012 establishing the value added tax article 10.

Law N^o12/2007 of 27/03/2007 on public procurement, article 87 and 89.

Law N^o25/2005 of 04/12/2005 on tax procedures as modified and complimented to date, article 10, 45, 60, 63 and 64.

Law N^o16/2005 of 18/08/2005 on direct taxes on income, article 16 and 37.

Law N^o06/2001 of 20/01/2001 establishing value added tax articles 12 and 16.

Cases referred to:

Rwanda Revenue Authority (RRA) v. Rubare Josias,
RCOMA0149/12/CS rendered by Supreme Court on
11/03/2016.

Rwanda Revenue Authority (RRA) v. Misigaro Louis,
RCOMA0074/11/CS rendered by Supreme Court on
11/04/2014.

Authors cited:

*Yvon Colson, Le principe de légalité de l'impôt et
l'interprétation des lois fiscales, Pacoli N°327, 2011,
p.2.*

Judgment

I. BACKGROUND OF THE CASE

[1] Forest Company Volcanoes Gorillas (FCVG) Ltd was audited for taxes of 2011, 2012, and 2013, and was charged taxes and penalties of 125,737,718Frw. FCVG Ltd not satisfied by that conclusion of auditors, it appealed to Commissioner General, who replied on 08/10/2012, informing that it's appeal has merit with regarding withholding tax of 15% equal to 1,293,537Frw for which it produced evidence, decided that 20,186,699Frw be deducted from the tax it was charged, and consequently pay 105,551,109Frw.

[2] FCVG Ltd not satisfied with that decision, it filed a claim to the Commercial Court of Nyarugenge requesting that :

- a. There is no VAT which should be charged on advance payment (*avance de démarrage*) of 90.876.120 Frw for 2012 ;

- b. Advance payment of 52.665.710 Frw for the year 2012 should not be among the income to be fined for not registering for VAT
- c. FCVG Ltd should be penalised at the rate of 50% instead of 100% ;
- d. Income tax should not be charged from advance payment received by FCVG Ltd in 2012.;
- e. Income tax of 2011,2012 and 2013 should be computed at the interest rate of 3% ;
- f. The Court should order Rwanda Revenue Authority to pay Counsel fee equal to 3.000.000 Frw.

[3] In judgment RCOM1574/15/TC/NYGE rendered on 24/03/2016, the Court found the advance payment which the government of Rwanda gave to FCVG Ltd is in its possession, thus, the government could not pay tax on its behalf instead the business person pays taxes for him/her self basing on the provisions of article 29 of the Law N^o25/2005 of 04/12/2005 on tax procedure as modified and complemented to date, and it decided that, FCVG Ltd should pay income tax on advance payment it received and even penalties for not paying tax, thus it's claim has no merit, and ordered to pay RRA 500,000Frw for procedural fee.

[4] FCVG Ltd not contented with that decision, appealed in Commercial High Court arguing that VAT could not be charged on advance payment because it is not a payment and there are some issues which were not examined by Commercial Court.

[5] In the judgment RCOMA00184/2016/CHC/HCC rendered on 29/07/2016, the Court found that FCVG Ltd issued

invoices for advance payment with VAT inclusive and the penalties imposed for tax evasion were based on the law governing taxation without notice, and it decided that those invoices are enough evidence to charge it tax because that advance payment was no longer a loan, thus, the appealed judgment is sustained.

[6] FCVG Ltd was not satisfied with that decision, and appealed to the Supreme Court arguing that :

- a) The Commercial High Court held that VAT should be charged on advance payment because it was included on invoices which is not true because the precedent of the Supreme Court case RCOMA0074/11/CS rendered on 11/04/2014 provides that the advance payment is refundable in whole including VAT and A withholding tax of 3% charged on it ;
- b) The commercial High Court declared that the VAT should be charged on advance payment because it was included on invoices but it did not demonstrate whether the invoices based on to penalise FCVG Ltd also included that tax, if there is a fault committed in 2012 there is no reason to be penalised for even other years this means that the penalties should be computed at the rate of 50% instead of 100% basingon the principle of independence of fiscal year ;
- c) If this Court decides that VAT is not charged on advance payment, because it is not a payment, it should also decide that advance payment should be deducted from the revenue on which the income tax is charged.
- d) In computing income tax, the tax administration, compared FCVG Ltd to other similar business, and

calculated the profits at the rate of 21% and being aware that a company called Coocaster Ltd which deals in the same business, declared the profit of 1% in 2011, 6% in 2012 and 1% in 2013, which makes the average of 3% which was also declared by FCVG Ltd.

[7] The hearing was scheduled on 20/06/2017 but it did not take place on that day because RRA had not yet paid civil fine it was charged in another case, the hearing was postponed to 28/06/2017. That day the hearing was conducted in public, FCVG Ltd represented by Counsel NSENGIYUMVA Abel while RRA was represented by Counsel BYIRINGIRO Bajeni.

[8] At the beginning of the hearing, Counsel Byiringiro Bajeni informed the Court that he has abandoned the objection of lack of jurisdiction of this Court that he had raised basing on the fact that FCVG Ltd lost the case for the same grounds in both previous Courts because he found that it is not true.

[9] The Court ordered RRA to demonstrate whether the taxpayer called COOCASTER carries the same activities as FCVG Ltd and to know on which profit rate it was taxed, the hearing was postponed to 12/07/2017, so that the parties could debate on those information. That day the hearing was conducted in public, parties represented as earlier and the hearing was also closed.

II. ANALYSIS OF LEGAL ISSUES

II.1. whether the value added tax and income tax are charged on advance payment.

[10] Council Nsengiyumva Abel adduces that, on 12/09/2012, FCVG Ltd was given by the ministry of agriculture (MINAGRI) an advance payment of 42,815,120Frw and on 12/10/2012 it was given another one of 48,061,400Frw. He explains that RRA considered that advance payment as a payment for the work done, and it appealed against that decision to Commissioner General, who also upheld it as indicated on page 5,6 and 9 of his decision, When it took the case to Commercial High Court, this Court also held that the advance payment it received is a payment which should be taxed. He adds that, the Court based its decision on the fact that FCVG Ltd erred and included tax on invoices it issued to MINAGRI, but it disregarded the issue brought before it of determining whether the advance payment is taxed. He states that the advance payment was thoroughly explained by this Court in the case of RRA v. Misigaro Louis,¹ whereby it held that it is not a payment because it is refunded to the government whether the execution of the concerned tender is completed or not, for that reason he prays the Court to sustain its precedent, and declare that VAT and income tax are not charged on 90,876,520Frw.

[11] Council Byiringiro Bajeni states that the Law clearly provides that the advance payment which is exempted for tax is that one for construction works which is not the case for FCVG Ltd. He explains that if FCVG Ltd finds that it was exempted

¹ see case RCOMA0074/11/CS of Rwanda revenue Authority v. Misigaro Louis, rendered by the Supreme Court on 11/04/2014.

from value added tax it would have separated its invoices of the tender it has been awarded from those of advance payment but this is not the case, instead the invoices of advance payment it issued to MINAGRI that tax was inclusive and consequently was given it, but it does not want to pay it to the tax administration, reason why he finds that, the motivations provided by this Court regarding advance payment in the case of RRA v. Misigaro Louis cannot be useful because the subject matter is different as Misigaro Louis was pursued for not withholding that tax on invoices of advance payment he issued.

VIEW OF THE COURT

[12] Article 12, paragraph one of the Law N°06/2001 of 20/01/2001 instituting value added tax which was into force when FCVG Ltd was given advance payment provides that goods or services are taxed [...] When goods are done for cost by the taxpayer who registered himself, his partner or his employee [...] while article 16, paragraph one provides that the taxed value for any good or service is determined [...] as follows : a) except otherwise provided by this Law, the taxed value for goods and service, it is their cost paid in cash or other means of payment.

[13] Article 87 of the Law N°12/2007 of 27/03/2007 governing public procurement which was into force when FCVG Ltd was given advance payment provides that the advance payment shall not exceed twenty per cent (20 %) of the price of the tender and shall be paid upon submission by the successful bidder to the procuring entity of an advance payment security equivalent to the advance itself. That security shall be given by a bank or any authorized financial institution. Whereas

article 89 of the Law N^o12/2007 of 27/03/2007 governing public procurement which was into force when FCVG Ltd was given advance payment provides that the advance received by the successful bidder shall be refunded by deducting a certain amount from submitted and approved invoices. The bidding document shall determine the percentage to be deducted until the whole amount of the advance is refunded. The advance security shall be returned to the successful bidder within thirty (30) days following the payment of the entire advance received.

[14] Article 16 of the Law N^o16/2005 of 18/08/2005 of direct tax on income 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. Whereas article 37 of the same Law provides that corporate income tax is levied on business profits received by entities.

[15] The case file contains a document titled “Invoice of Advance N^o01/RSSP/10/2012 issued on 24/10/2012 by FCVG Ltd requesting a payment of 48,061,400Frw which includes VAT of 18% equivalent to 7,331,400Frw and withholding tax of 3% equivalent to 1,221,900Frw, on the payroll displaying the money paid to FCVG Ltd, it is clear that it was paid the sum equivalent to 112,428,925Frw, the value added tax was equivalent to 11,944,489Frw while the withholding tax of 3% was equivalent to 1,990,748Frw, however it is obvious that 48,061,400Frw of advance payment paid on 09/11/2012, VAT or withholding were not charged on it.

[16] The case file also contains the document titled invoice N^o2-06/12/2011 issued on 06/12/2011 requesting payment for

the second installment of the advance payment of 6,506,528Frw, that installment is for september 2011 to february 2012, that money was paid on 06/01/2012, the payroll does not indicate that there was tax levied on that money. (Identification mark 24).

[17] The Court finds that, what is taxed on works is its cost whether it is paid in cash or other means of payment, this implies that, after completing the execution of the tender it was awarded, the taxpayer issues an invoice to his procuring entity indicating the cost of the works he completed, therefore, he declares the tax of the payment he received basing on that cost.

[18] The Court finds that, as it was so decided in the case of RRA v. Misigaro Louis² and was also emphasized in the case of RRA v. Rubare Josias,³ the advance payment, it is money which is given out to a successful bidder so that he can commence to execute the tender he was awarded, this means that there is no part of a given work he is paid for, so that it can be considered as a payment, rather as the successful bidder keeps on requesting for payment of works done and he deducts a given amount of advance agreed by the contracting parties, thus, he is completely paid for all works done with refunding the whole advance to the procuring entity, therefore, it can not be refunded to the procuring entity, and be considered at same time as a payment to that tender.

² Case RCOMA0074/11/CS of Rwanda revenue Authority v. Misigaro Louis, rendered by the Supreme Court on 11/04/2014, paragraph 18-20.

³ Case RCOMA0149/12/CS of Rwanda Revenue Authority v. Rubare Josias, rendered by the Supreme Court on 11/03/2016, paragraph 15 and 16.

[19] The Court finds that the procuring entity has legal obligations to follow up the use of the advance payment if it finds that it is not used in relation to the tender awarded, it can be considered as a loan and it is entitled to seize the provided guaranty so that it can get be paid, whereas the advance is used and refunded properly, the procuring entity releases the guaranty within a period of thirty days (30) from the date the whole advance was refunded to the procuring entity, this also emphasizes that the statment of RRA has no merit since it argues that the advance is a payment, because if it is a payment, it means that it will remain in the possesssion of the successful bidder rather than to be refunded to the procuring entity.

[20] The Court finds further that, the general principle which govern tax Laws in Rwanda is that tax is established, modified or repealed by the law, and also can be exempted or reduced in procedures provided by the Law, also, the Constitution⁴ emphasizes this principle so that, the tax be established by a competent organ and known earlier by the taxpayer who is aware of the taxes he owes to tax administration.⁵ Thus, the fact that FCVG Ltd based on the provisions of article 89 of the Law N°12/2007 of 27/03/2007 mentioned above providing that “the advance received by the successful bidder shall be refunded by deducting a certain amount from submitted and approved invoices”, and it issued invoices whereby it mentioned taxables

⁴ « Tax is imposed, modified or removed by law. No exemption or reduction of a tax can be granted unless authorised by law. » article 164 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

⁵« Cette interdiction vise à garantir au citoyen que l'impôt qu'il doit payer a été mis en place exclusivement par une institution qu'il a élue. Le citoyen est donc en droit de savoir à l'avance la hauteur des prélèvements qu'il va devoir subir. » see Yvon Colson, « Le principe de légalité de l'impôt et l'interprétation des lois fiscales » in *Pacoli* n° 327, 2011, p.2.

and no taxable items, this is not enough to hold it liable for tax on advance payment since that advance is not provided by the Law as taxable items. Thus, the advance of 90,876,520Frw which Minagri gave to FCVG Ltd can not be charged value added tax.

[21] The Court finds also that the provisions of article 10, paragraph one, *Litera* 2, of the Law N^o37/2012 of 09/11/2012 establishing the value added tax provides that [...] the taxation period for the supply of goods and services shall be the one that is the earliest among the following : the date on which payment of goods and services, including a partial payment is made. 1^o [...], 2^o However this paragraph does not concern the advance payment made to the contractors who later re-imburse it by deducting it from the invoices presented to the client; this also emphasizes that the advance payment is not a payment, instead, this article recalls the principle that, what is taxed is a payment whether for work done or items bought in whole or in part, and when it is read together with article 87 and 89 of the Law N^o12/2007 of 27/03/2007 mentioned above, provide in general for any advance payment or an advance given to a successful bidder for any tender, this means that construction works it mentions is just an example, thus, the statement of Counsel Byiringiro Bajeni that article 10, paragraph one, *litera* 2 of the Law N^o37/2012 of 09/11/2012 forementioned exempts the tax on advance given to constructors only, has no merit.

[22] Basing on motivations above, the Court also finds that, the advance payment is not a payment at the extent that it can be considered as an income produced by a company which is provided for by article 37 of the Law N^o16/2005 of 18/08/2005 forementioned, because it is refunded to the procuring entity so

that it releases the given guaranty, therefore, it should not be among the amount of money on which the income tax is charged.

II.2 Determining the amount of profit which should be charged penalties for not registering for value added tax.

[23] Counsel Nsengiyumva Abel argues that FCVG Ltd was charged penalties of not registering for VAT on basis of 100,000,000Frw whereas RRA acknowledges that amount includes the advance payment of 6,506,528Frw received on 06/01/2012, and other amount of 46,159,182Frw received on 13/04/2012 which is not recognized by RRA but which MINAGRI confirmed in its letter of 09/09/2016 that it was also an advance payment issued on the tender of Gatsibo-8 and it was refunded, meaning that this 52,665,710Frw is an advance payment which is exempted from VAT, then that amount should not be included in turnover for which FCVG Ltd is being fined for delaying to register for VAT, because it would imply that ,it was fined 100% instead of 50% which is provided by article 63, paragraph one of the Law N^o25/2005 of 04/12/2005 on tax procedure.

[24] Counsel Byiringiro Bajeni states that even FCVG Ltd acknowledges that, it has to be fined as provided by article 63, of the Law N^o25/2005 of 04/12/2005 on tax procedures since it had reached a turnover of 20,000,000Frw and failed to register for VAT within seven days (7). He explains that 46,159,182Frw is not an advance payment because its invoice N^o1-03/03/2012 of 26/3/2012 and was paid on 6/1/2012 and charged 3% because it is a public tender and withholding tax of 15% as a payment of

services and those taxes were also levied on 6,506,528Frw, its invoice was issued on 6/12/2011 and paid on 6/1/2012, he further states that the payment which was charged various taxes and even those taxes were deducted from a revised turnover can not be considered as an advance payment. Even if it was an advance payment it had to be charged VAT because the activities of FCVG Ltd are not related to construction work of which advance payment is exempted from tax.

VIEW OF THE COURT

[25] Article 10, paragraph one of the Law N^o25/2005 of 04/12/2005 of tax procedures as modified and complemented to date, provides that any person who sets up a business or other activities that may be taxable is obliged to register with the Tax Administration within a period of seven (7) days from the beginning of the business or activity or the establishment of the company. Whereas paragraph two of that article provides that any person who carries out taxable activities exceeding twenty million Rwanda Francs (20,000,000RWF) of its turnover in the previous fiscal year, or five million Rwanda Francs (5,000,000RWF) in the preceding calendar quarter is required to register for VAT with the tax administration within a period of seven (7) days from the end of the year or from the end of the quarter mentioned above.

[26] Article 60, paragraph one, litera 7 of the Law N^o25/2005 of 04/12/2005 of tax procedures as modified and complimented to date, provides that a taxpayer or any person is subject to an administrative penalty if he/she fails to: register as described in Article 10 of this Law; while article 63, *litera* 1, of that Law provides that the following administrative fines are imposed to

persons who do not comply with provisions of Value Added Tax: 1° in the event of operation without VAT registration where VAT registration is required, fifty percent (50%) of the amount of VAT payable for the entire period of operation.

[27] The case file contains an invoice N° 01- 03/03/2012 indicating that on 26/03/2012 FCVG Ltd requested for advance payment of 46,159,240Frw for Gatsibo-8 site, that money was paid by cheque issued to FCVG Ltd on 03/04/2012, in it's letter dated 09/09/2016, MINAGRI admitted that the money referred to was for advance payment.

[28] In the case file There is also an invoice N°2-06/12/2011 of 06/12/2011 requesting for the second installement of the advance payment equivalent to 6,506,528Frw, for September 2011 to February 2012, that money was paid by cheque on 06/01/2012, the payroll does not indicate anywhere that VAT was included.

[29] The Court finds that RRA acknowledges that 6,506,528Frw was paid as advance payment, in addition to that, the documents in the case file indicate that 46,159,182Frw was also paid for that purpose, in its letter dated 09/09/2016 MINAGRI emphasizes that 46,159,182Frw was fully refunded to it, that is why it accepted to release the guaranty that was provided by FCVG Ltd in SONARWA S.A., thus, there is no doubt that 52,665,710 Frw (6,506,528Frw + 46,159,182Frw) was paid by MINAGRI as an advance payment and was refunded.

[30] As motivated above the Court finds that VAT is not charged on advance payment because it is refunded by the successful bidder to the procuring entity so that the latter can

release the guaranty it was given, this implies that it is not part of turnover or profit accrued by the successful bidder, thus, it can not be based on to charge a fine of 50% which applies to the business person who does not register for VAT while he is legally obliged to do so.

[31] Based on the motivations in the previous paragraphs, the Court finds that, on 99,004,711Frw based on to charge FCVG Ltd a fine of 50% because of not registering for VAT on time, be deducted 52,665,710Frw from it because it was an advance payment that was refunded to MINAGRI as a procuring entity.

II.3 Determining the profit margin on which income tax should be levied.

[32] Counsel Nsengiyumva Abel admits that the books of accounts of FCVG Ltd were not kept as provided by the Law, that is the reason why he acknowledges that it should have been taxed based on the principle of comparison of taxpayers, then FCVG Ltd should have been compared to other businesses dealing in the same activities, but it does not know, where RRA found the taxpayer dealing in the same activities as FCVG Ltd which made a profit margin of 21% because they were not informed about it, but the one they know which deals in same business is COCOASTER Ltd, and was taxed at the rate of 3%, therefore he requests that the income tax claimed to FCVG Ltd be computed at the rate of 3%.

[33] Counsel Byiringiro Bajeni argues that FCVG Ltd did not keep its accounts nor provide its commercial records so that they can be compared to the tax declaration it made. This implies that, it could not be compared to any taxpayer, even COCOASTER which it alleges to be compared with, they found

that there is COCOASTER which used to trade as a company but closed down in 2014 and another COCOASTER which is a cooperative operating in agriculture and constructs terraces, meaning that they don't deal in same activities, he explains that, it was the reason why FCVG Ltd was taxed without notice. He further explains that the tax administration finds that it declared a turnover of 34,105,600Frw and a profit of 7,809,700Frw which is equivalent to a profit margin of 23% while the bank statement indicates that, it made a profit of 21%, reason why he was taxed on average profit of 21%, thus, he finds that the Commercial High Court did not err in ordering FCVG Ltd to be taxed at rate of 21%.

VIEW OF THE COURT

[34] Article 45, *litera* one, of the Law N^o25/2005 of 04/12/2005 of tax procedures provides that the burden of proof lies with the taxpayer when : 1^o the Tax Administration conducts a tax assessment without notice.

[35] The case file indicates that FCVG Ltd was charged income tax of 2,849,742Frw for 2011, 16,988,112Frw for 2012 and 12,394,551Frw for 2013, and was notified by tax auditors that it won't be taxed at the rate of 3% because it did not produce evidence to support it, thus, it appealed to Commissioner General stating that it made a gross profit margin of 20% but when it deducts insurance, wages, taxes, depreciation, loan interests it remains with 3%. In his letter dated 17/09/2015, Commissioner General found that FCVG Ltd does not prove its claim, therefore decided that its appeal lacks merit.

[36] The Court finds that FCVG Ltd concurs with the tax administration that its accounting was not in compliance with the Law, and was taxed without notice, therefore pursuant to the provisions of article 45, litera 1, of the Law N°25/2005 of 04/12/2005 forementioned, it is the one with the burden to prove that the profit margin on which the tax administration based on to charge it tax, was incorrect. It can not up to now, demonstrate the basis of claiming that, it should be taxed at the profit margin of 3% because it can not indicate its turnover so that, if deductables expenses are subtracted, it remains 3% of profit, thus, its argument that it should be taxed on the profit margin of 3% has no merit.

[37] The Court also finds that, FCVG Ltd could not prove that the maximum profit of COCOASTER Ltd with which it compares itself with, is 3%, instead Counsel Nsengiyumva Abel who represents it, states that they could not find the books of accounts of COCOASTER, even the tax administration states that they could not gather accounting information of COCOASTER which operates as a cooperative, so that it can be based on to confirm that the maximum profit for those who work in construction of terraces is 3% for those reasons this Court can not decide that the profit of FCVG Ltd was 3% instead of 21% indicated both in tax declaration it made or in its bank statement, thus, the profit margin on which the income tax should be computed is 21%.

II.4. Whether FCVG Ltd evaded tax, so that it can be penalised.

[38] Counsel Nsengiyumva Abel states that, the penalties that FCVG Ltd deserve is 50% for not registering for VAT on time, but the tax administration charged it a fine of 100% for tax

evasion because they are some suppliers who denied VAT invoices they issued to it in 2012, while it is normal that the suppliers deny those invoices when they failed to declare them. He explains that, the issue was not well examined because what should have been examined is the invoices number and their issuers, and this should have been done for the year 2012 only, basing on the principle of independence of fiscal year, if faults were committed in 2012, penalties should not be beyond that specific year.

[39] Counsel Byiringiro Bajeni states that the arguments of FCVG LTD that it should be penalised at a rate of 50% due to tax evasion lacks merit because the audit indicated that it declared non-existing deductables expenses and VAT input aiming to evade tax for the years of 2011, 2012, and 2013, this is proved by the statement of some suppliers who stated that they sold nothing to FCVG LTD, that is the reason why the Commercial High Court in paragraphs 11,14 and 15 held that the fine of 100% provided in article 64 of the Law N°25/2005 of 04/12/2005 of tax procedures had merit.

VIEW OF THE COURT

[40] Article 64 of the Law N°25/2005 of 04/12/2005 of tax procedure as modified and complemented to date provides that a taxpayer who commits fraud is subject to an administrative fine of one hundred percent (100%) of the evaded tax.

[41] The case file contains letters of business persons (UPROTUR, RUTA Trading Company Ltd, Gasangwa Vianney, S.R.D.S. Ltd) that they wrote to the deputy Commissioner General in charge of anti smuggling

departement confirming that, they did not sale goods to FCVG Ltd in 2011, 2012 and 2013. The case file also indicates that, FCVG Ltd was informed by auditors that it was fined at 100% because it declared false VAT invoices, whereas it stated itself that it has no evidence of its statement about deductible expenses, when it appealed to Commissionner General for those penalties, he also found that he does not provide evidence of its statement rather it deliberately evaded tax (identification mark 8 and 13).

[42] The Court finds that the documents in the case file indicate that FCVG Ltd states that there are goods it bought which were charged VAT which it had to be refunded whereas the suppliers it alleged to have bought from, denied it, in addition to that it can not provide the proof of deductible expenses which it claims they should be deducted from its turnover, meaning that its intention was to get a refund of VAT while there is no evidence that it paid it and also it wants to minimise its turnover by substracting detuctable expenses with no evidence, all these are means of tax evasion.

[43] The Court finds that, when there is evidence proving that FCVG Ltd made a tax declaration with the aim of tax evasion, it should be penalised at a fine of 100% of tax it evaded as provided by article 64 of the Law N^o25/2005 of 04/12/2005 of tax procedures as modified and complimented to date.

II.5 Whether FCVG Ltd should be awarded damages is requesting.

[44] Counsel Nsengiyumva Abel states that RRA should give FCVG Ltd three millions (3,000,000Frw) for counsel fee. Counsel.

[45] Byiringiro Bajeni states that damages requested by FCVG Ltd have no merit, instead RRA should be given damages for procedural fee determined in Court's discretion based on article 258 book three civil code.

VIEW OF THE COURT

[46] The Court finds that FCVG Ltd and RRA, respectively, has lost in part in this case, thus none can claim that it was dragged in vexatious lawsuit, reason why counsel fee requested by FCVG Ltd and procedural fee requested by RRA are not awarded.

III. DECISION OF THE COURT

[47] Decides that the appeal of Forest Company Volcanoes Gorillas (FCVG) Ltd has merit in part ;

[48] Decides that the judgment RCOMA00184/2016/CHC/HCC rendered by Commercial High Court on 29/07/2016 is reversed in part ;

[49] Decides that the advance payment equals to 90,876,520Frw cannot be charged value added tax ;

[50] Decides that the advance payment equals to 90,876,520Frw cannot be charged income tax;

[51] Decides to subtract 52,665,710Frw from 99,004,711Frw which is the tax base to compute a fine of 50% which Forest Company Volcanoes Gorillas (FCVG) Ltd was charged due to not registering for VAT on time, because it was an advance

payment which was refunded to the procuring entity (MINAGRI);

[52] Decides that the income tax should be computed at the profit margin of 21%;

[53] Decides that Forest Company Volcanoes Gorillas (FCVG) Ltd must be fined 100% of the tax it evaded ;

[54] It orders RRA and Forest Company Volcanoes Gorillas (FCVG) Ltd to jointly pay Court fee equal to hundred thousand (100,000Frw).