Re. NZAFASHWANAYO

[Rwanda SUPREME COURT – RS/INCONST/SPEC 00004/2019/SC – (Ntezilyayo, P.J., Nyirinkwaya, Cyanzayire, Hitiyaremye and Rukundakuvuga, J.) July 24, 2020]

Tax law – Value Added Tax (VAT) – Treating the taxpayers who buy services and goods which are not available in Rwanda different from those who buy services and goods from abroad but which are available in Rwanda is not discrimination or not according to the equal protection before the law because they are intended to promote service delivery and it was done on a justifiable ground of reducing on the quality of implementation of strategies to reduce the gap in trade and foreign exchange.

Tax law – Value Added Tax (VAT) – The Reverse Charge Principle – The Reverse Charge Principle mandates the buyer of goods or services from outside Rwanda to pay the value-added tax for those goods and services

Tax law – Value Added Tax (VAT) – Destination principle of taxation – The Destination Principle mandates that VAT on goods be paid in the country where the purchaser is resident (i.e. the country of consumption) and exempted from paying the VAT from the country of origin.

Facts: Nzafashwanayo filed a constitutional petition in the Supreme Court, arguing that article 12, paragraphs 3 and 4 of Law N ° 37/2012 of 09/11/2012 establishing the value added tax (VAT) is inconsistent with article 15 and 95 of the Constitution of the Republic of Rwanda of 04/06/2003 amended in 2015. The University of Rwanda (School of Law) intervened as amicus curiae.

Explaining his petition, Nzafashwanayo argues that article 12, in paragraphs 3 and 4 of the above-mentioned law is inconsistent with the principles embedded in article 15 of the Constitution, as it does not treat taxpayers equally. A taxpayer who imports services is allowed to deduct VAT input from those services on VAT output only if those services are not available in Rwanda, yet the buyer of domestic services is allowed to deduct VAT on those services from the VAT received without any other requirement.

Based on the International Trade Agreements ratified by Rwanda (GATS, EAC Common Market Protocol and Protocol to the Agreement Establishing the African Continental Free Trade Area on Trade in Services), he also said that the principle of National treatment embedded in those agreements is contradicted by article 12 in paragraphs 3 and 4 of the law mentioned above, therefore it is inconsistent with article 95 of the Constitution. Thus the inequality and the discriminatory nature of the law makes domestic services less competitive vis-a-vis the foreign services that can be needed by business operators in Rwanda

The State argues that the legislature put the taxpayers in two categories that cannot be considered as discriminatory or being unequal before the law since it was done based on justifiable grounds.

The position of the State was emphasized by the Amicus Curiae's brief (School of Law of the University of Rwanda) that averred that in tax matters treating equally people who are not in the same category would be injustice or inequality. Furthermore, argues the impugned article of the Law on value added tax does not contradict article 15 of the Constitution, as the taxpayers in question are two (2), different people. Taxing a person who buys goods or services abroad which

are also available in Rwanda is intended to protect and promote traders and investors operating in Rwanda, which is acceptable in those agreements.

As to whether it is contrary to article 95 of the Constitution, the petitioner argues that article 12 of the above-mentioned law is inconsistent with article 95 of the Constitution because it contradicts the international treaty ratified by Rwanda when that treaty is higher in the hierarchy than the law on the Value Added Tax. The international treaty, in line with the principle of National Treatment, stipulates that imports are treated in the same way as domestic ones once they have been cleared from customs. Failure to comply with this principle would result in a change in the competitiveness of service providers or service providers in Rwanda compared to service providers in other countries, which is a consequence of article 12 of the impugned law.

The State argues that article 12 does not violate article 95 of the Constitution and does not contradict the principle of National Treatment but rather upholds that principle, because domestic and international services are treated the same because they are charged value added tax for those goods or services to which it applies or exempted on the goods or services for which they are exonerated.

The Amicus Curiae submits that article 12 of the aforementioned Law is not inconsistent with article 95 of the Constitution because apart from the fact that whenever an article of the law does not comply with an article that is higher in the hierarchy cannot be concluded that it is unconstitutional.

Held: 1. Treating the taxpayers who buy services and goods which are not available in Rwanda different from those who buy services and goods from abroad but which are available in Rwanda is not discrimination or not according them equal protection before the law because they are intended to promote service delivery and it was done on a justifiable ground of reducing on the quality of implementation of strategies to reduce the gap in trade and foreign exchange

2. The Reverse Charge Principle mandates the buyer of goods or services from outside Rwanda to pay the value-added tax for those goods and services.

3. The Destination Principle mandates that VAT on goods be paid in the country where the purchaser is resident (i.e. the country of consumption) and exempted from paying the VAT from the country of origin.

4. While negotiations are yet to take place or what needs to be done first to get the countries to agree on the basis for the implementation of an international treaty that has been ratified, it is not considered a violation of that treaty.

Petition dismissed.

Statutes and statutory instruments referred to:

The constitution of the Republic of Rwanda of 2003 as it is amended in 2015, articles 15 and 95.
World Trade Organization General Agreement on Trade in services (GATS).
World Trade Organization. Communication from Rwanda, Schedule of Specific Commitments under the General Agreement on Trade in Services, 30 August 1995
Protocol on establishment of East African Community Common Market.

Protocol to the Agreement Establishing the African Continental Free Trade Area on Trade in Services.
Decision on the African Continental Free Trade Area (AfCFTA), 33rd Ordinary Session of the Assembly of the Union, 9-10 February 2020, Addis Abeba, Ethiopia,
Law N ° 37/2012 of 09/11/2012 establishing the value added tax, articles 11 and 12.

Cases referred to:

Conseil Constitutionnel, décision no 2009-599 DC du 29 décembre 2009, para 80
Gulf, Colorado & Santa Fe Ry. Co. v. Ellis 165 U.S. 150 (1897)
Vodacom Business Nigeria v. Federal Inland Revenue Service (FIRS), Appeal No. CA/556/2018, p.23
Re AKAGERA BUSINESS GROUP, RS/SPEC/0001/16/CS rendered by the Supreme Court on 23/09/2016
Re Murangwa, RS/INCONST/SPEC 00001/2019/ rendered by the Supreme Court on 29/11/2019

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P. Lampreave,' Fiscal Competitiveness Versus Harmful Tax Competition in the European Union" (2011) bfit 65 (6), p.4;
P T Scanlam, 'Globalization and Tax-Related Issues: What are the Concerns?' in R Biswas (ed), International Tax Competition: Globalization and Fiscal Sovereignty (commonwealth Secretariat 2002), p.45;
Victor Thuronyi (ed), Tax Law Design and Drafting, Volume 1 (International Monetary Fund, 1996), page 196
William B. Barker, 'The Three Faces of Equality: Constitutional Requirements in Taxation', (2006), Case W.Res.L.Rev. 57(1), p. 5
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Consultants 'Report on the Harmonization of Income Taxes within the East African Community, 1 November 2014; East African Community, Report of the Meeting to validate the studies on the development of policy frameworks for the harmonization of VAT, Excise duties and Income tax in EAC, Mombasa, 23rd – 25th October 2014; PWC, Policy for harmonization of VAT and Excise duties, 28 October 2014.
East African Community, Report of the 38th Meeting of the Council of Ministers, 6th – 10th May 2019, pp. 30-31.
East African Community, Report of the 38th Meeting of the Council of Ministers, 6th – 10th May 2019, Annex IV: EAC Domestic Tax Harmonization Policy, pp. 8-9.

Judgment

I. BACKGROUND OF THE CASE

[1] Counsel Nzafashwanayo Dieudonné filed a claim in the Supreme Court, sustaining that article 12, paragraph 3 and 4 of the Law N° 37/2012 of 09/11/2012 establishing the value added tax (VAT) is contrary to the articleS 15 and 95 of the Constitution of the Republic of Rwanda of 04/06/2003 revised in 2015.

[2] Counsel Nzafashwanayo Dieudonné further avers that the article 12, paragraphs 3 and 4 of the Law n° 37/2012 above mentioned herein against which he filed a claim as it is unconstitutional provides that:

a. If a taxpayer gets services from a person who is outside Rwanda, the taxpayer is considered as if he/she has delivered taxable services and has received an output tax from that person residing outside Rwanda.

b. The service delivery is treated as it was made on the date on which the services were performed by the person residing outside Rwanda for a value determined under Article 11 of this Law. The output tax is payable on the date of filing the value added tax declaration for the value added tax period in which those services were performed. The output tax must appear on the receipt that justified the payment to the foreign services provider, and that document is considered to be the value added tax invoice.

c. Notwithstanding the provisions of Paragraphs, One and 2 of this Article, recipients of foreign services that are not available in Rwanda are allowed to deduct input tax on output tax.

d. Services are considered not to be available in Rwanda if no person can deliver identical or similar services on the local market.

[3] Article 15 of the Constitution of the Republic of Rwanda provides that “All persons are equal before the law. They are entitled to equal protection of the law“ and article 95 provides that "The hierarchy of laws is as follows :

1° Constitution ;

2° organic law ;

3° international treaties and agreements ratified by Rwanda ;

4° ordinary law ;

5° orders.

A law cannot contradict another law that is higher in hierarchy.

[4] The case was heard in public on 23/06/2020, Counsel Nzafashwanayo Dieudonné was assisted by Counsel Bizimana Emmanuel, in presence of the Republic of Rwanda represented by Counsel Kabibi Spéciose. In the course of the hearing, the Court firstly heard the parties about the request of the University of Rwanda (School of Law) to intervene in the case as *Amicus Curiae*

for providing the ideas, and after having noticed that they accepted that it could be admitted to do so because it fulfilled the requirements, it considered that its request was admitted, then it heard the case on the merits.

[5] As they explained in the submissions and the pleading before the Court, Counsel Nzafashwanayo Dieudonné and Counsel Bizimana Emmanuel who assists him sustain that on basis of the principle upheld under article 15 of the Constitution above mentioned herein, note that article 12, paragraphs 3 and 4 of Law N° 37/2012 above mentioned herein does not equally treat the taxpayers, whereby a recipient of foreign services for his/her business activity which is not available in Rwanda is allowed to deduct input tax on output tax when the services are considered not to be available in Rwanda, however, the recipient of domestic services is allowed to deduct the input tax on the services without any other requirement.

[6] They also support that the provision of such article 12, paragraphs 3 and 4 is contrary to the article 95 of the Constitution above mentioned, given that it violates the principle of the national treatment applied in the international trade in services provided under the World Trade Organization General Agreement on Trade in Services (GATS), Protocol on establishment of East African Community Common Market (EAC Common Market Protocol), and Protocol to the Agreement Establishing the African Continental Free Trade Area on Trade in Services, those international protocols had been signed and ratified by Rwanda.

[7] The Republic of Rwanda and *Amicus Curiae* do not concur with them. They aver that in taxation law, a State can make a classification of the citizens for reasonable grounds. Such procedure is not contrary to the principle of equality before the law, rather equally imposing the taxes on the citizens who are not in the same category would amount to inequality. They sustain that allowing to deduct input tax on output tax to the recipients of foreign services which are not available in Rwanda but not to the recipients of foreign services which are available in Rwanda is a procedure of protecting the investors in the country and such procedure is provided under WTO/GATS as an exception to the principle of national treatment.

[8] The Court observes that the legal issues to be examined in this case are :

a. **Determine if article 12, paragraphs 3 and of the Law N° 37/2012 of 09/11/2012 establishing the value added tax is contrary to article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.**
b. **Determine if article 12, paragraphs 3 and 4 of the Law N° 37/2012 of 09/11/2012 establishing the value added tax is contrary to article 95 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.**

II. LEGAL ISSUES OF THE CASE AND THEIR ANALYSIS

a. Determine if the article 12, paragraphs 3 and of the Law N° 37/2012 of 09 /11/2012 establishing the value added tax is contrary to article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015

[9] Counsel Nzafashwanayo Dieudonné and Counsel Bizimana Emmanuel sustain that article 12, paragraphs 3 and 4 of the Law n° 37/2012 of 09/11/2012 above mentioned is contrary to the

article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 which provides that the persons who are in the same category are equal before the law, given that it does not equally consider the taxpayers whereby a recipient of foreign services for his/her business activity which is not available in Rwanda is allowed to deduct input tax on output tax when the services are considered not to be available in Rwanda, however, the recipient of domestic services is allowed to deduct the input tax on the services without any other requirement. They explain that even if the Republic is allowed to differently consider the taxpayers or classify them, there is a procedure to be applied on basis of a reasonable ground, and it should be done in respect of the constitutional principles as upheld by the Constitutional Court of France which ruled that "It is a duty of the legislator to determine, in respect of constitutional principles and by taking account of the features of each tax, the rules governing the taxpayers[1]".

[10] Counsel Bizimana Emmanuel supports that the Supreme Court of the United States of America upheld that "The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases, it must appear not merely that a classification has been made, but also that it is based upon some reasonable ground - something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection[2]".

[11] Basing on the decisions of the other Sates' high courts with jurisdiction of judicial review, Counsel Bizimana Emmanuel notes that there is no reasonable nor evident ground for which a recipient of foreign services for his/her business activity which is not available in Rwanda is allowed to deduct input tax on output tax when the services are considered not to be available in Rwanda, while the recipient of domestic services is allowed to deduct the input tax on the services without any other requirement.

[12] Counsel Nzafashwanayo Dieudonné and Counsel Bizimana Emmanuel who assists him observe that even if the Republic of Rwanda can sustain that the intention for enacting the article 12 (paragraphs 3 and 4) of the Law n° 37/2012 is to motivate the taxpayers to resort to domestic services more than foreign services in order to safeguard the services sector, the Court cannot consider it as the lawful ground as it is contrary to the principle of national treatment provided under the article 17 of East African Community Common Market Protocol, the article 17 of General Agreement on Trade in Services (GATS) and the article 20 of African Continental Free Trade Area Protocol on Trade in Services, and those Protocols should enforce the principle of no less favourable treatment for the same service suppliers, the country of the suppliers of the similar services.

[13] Basing on those grounds above mentioned, they conclude by sustaining that article 12 (paragraphs 3 and 4) of the Law N° 37/2012 brings about the inequality of taxpayers before the law and the unequal protection by the law as provided under article 15 of the Constitution and the domestic services cannot compete on the same level with the foreign services which can be needed by the owners of the business activities in Rwanda because of the inequality.

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[1] See Conseil Constitutionnel, décision no 2009-599 DC du 29 Décembre 2009, para. 80.

[2] See Gulf, Colorado & Santa Fe Ry. Co. v. Ellis 165 U.S. 150 (1897)

[14] Counsel Kabibi Spéciose who represents the Republic of Rwanda avers that the classification of the taxpayers by a given organ does not always amount to discrimination, such guideline had been decided by the Supreme Court in the judgment n° RS/SPEC/0001/16/CS rendered on 23/09/2016 and the judgment n° RS/INCONST/SPEC 00001/2019/SC rendered on 29/11/2019.

[15] Counsel Kabibi Spéciose further sustains that in the judgment n° RS/INCONST/SPEC 00001/2019/SC rendered on 29/11/2019, the Supreme Court upheld that "concerning the taxation, the legislator has the full right to classify the taxpayers, especially because he/she is well placed than the judge to identify the needs of the Citizens and the Republic which can serve for him/her to set up the categories and the tax rate, he/she is entitled to do so, except when it is evident that the classification was done on basis of the discrimination meant for prejudicing some individuals".

[16] Counsel Kabibi Speciose explains that the fact that the legislator has classified the taxpayers into two categories including the category of the recipients of foreign services that are not available in Rwanda and the category of the recipients of foreign services available in Rwanda cannot be considered as the discrimination and the unequal protection before the law given that he/she did so for appropriate and reasonable grounds. Some of those grounds are the protection and the promotion of the small businessmen and investors operating in Rwanda, strengthening the value added tax sector, given that when a recipient gets the service in Rwanda, those who supply to him/her the service pay the value added tax while for a recipient who gets the service not available in Rwanda, those who supply to him/her the service do not pay the tax in Rwanda, this means that when a recipient decides to get the service abroad he/she should pay such value added tax as he/she does not get the service from the supplier who would pay the tax in Rwanda while he/she is available.

[17] Counsel Kabibi Spéciose supports that the recipients of the services not available in Rwanda do not pay such tax (they are allowed to deduct input tax on output tax), given that they do not have any other alternative to get those services, except to get them abroad, and there is no businessman operating in Rwanda who could pay tax for those services, but who was denied the opportunity of supplying those services. She concludes by sustaining that the statements of Counsel Nzafashwanayo Dieudonné and Counsel Bizimana Emmanuel who assists him who maintain that article 12 (paragraphs 3 and 4) of the Law N° 37/2012 is contrary to article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 are baseless.

[18] As *Amicus curiae*, Counsel Habimana Pie avers that any State has the full independence to enact the laws governing the taxes in all their aspects. He supports that the independence as regards the taxes and the taxation is upheld by the legal scholars as to the fundamental element for the State existence as a State and it is inalienable[3]. He sustains that the independence relating to taxes is permanent even if those States are members of international organizations, he mentions the

[3] P. Lampreave,' Fiscal Competitiveness Versus Harmful Tax Competition in the European Union" (2011) bfit 65 (6),p.4;
P T Scanlam, 'Globalization and Tax-Related Issues: What are the Concerns?' in R Biswas (ed), International Tax Competition: Globalization and Fiscal Sovereignty (Commonwealth Secretariat 2002), p.45.

examples of the Organisation for Economic Cooperation and Development – (OECD) and the European Union (EU) where the taxation sector is based on each State independence and full right[4].

[19] Counsel Habimana Pie further sustains that even in the same State, it is possible that some districts or parts can have different tax laws, this applies in Rwanda to the immovable tax property where the tax rate is not identical, even the trade license tax is paid on basis of different rate according to the place where the taxpayers run their business activities and their nature.

[20] Counsel Habimana Pie also supports that equality or equal protection before the taxation law should be understood as the principle of the equal treatment of the persons in the same category and the unequal treatment of the persons in different categories. He bases his argumentation on the statement of the legal scholar called William B. Barker who wrote that "things that are alike should be treated alike and things that are unlike should be treated unlike in proportion of their un-likeness".[5] In this context, Counsel Habimana Pie further sustains that the equal treatment of the taxpayers who are unlike is rather the unequal treatment of taxpayers as upheld by the legal scholar William B. Barker who stated that "The truth is that a formally equal tax can be in some cases the most unequal of all taxes. [….] In the same token, it has been even argued that adhering to a strict standard of equality would result in a disaster".[6]

[21] Counsel Habimana Pie also maintains that article 12, paragraphs 3 and 4 of the law establishing the value added tax cannot be separately considered, rather it should be explained in relation with article 15 of the same law which provides under the allowance of input tax, therefore if these two articles are analysed together they can indicate that there are principle and exception in allowing to deduct or not the input value added tax.

[22] He concludes by supporting that article 12 (paragraphs 3 and 4) of the law n° 37/2012 of 09/11/2012 establishing the value added tax as modified and complemented to date is not contrary to article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015, given that in consideration of the taxpayer mentioned in the article 12 who gets service abroad available in Rwanda and the taxpayer who got the service in Rwanda, there are two different taxpayers so that there is no room to support that the article 15 of the Constitution was not enforced because the unlike taxpayers cannot be equally treated, especially that imposing a tax on the recipient who got abroad the service or goods available in Rwanda is a procedure of protecting and promoting the businessmen and the investors operating in Rwanda and it is provided under the international protocols mentioned by the claimant.

DETERMINATION OF THE COURT

[23] In examining the issue related to determine if the article 12 (paragraphs 3 and 4) of the law N° 37/2012 of 09/11/2012 establishing the value added tax is contrary to the article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2915, the Court observes that it is

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[4] Hans Gribnau, "Equality, Legal Certainty and Tax Legislation in the Netherlands: Fundamental Legal Principles as Checks on Legislative Power: A Case Study", (2013) *Utrecht L. Rev.* 52 (9), p.62.

[5] William B. Barker, 'The Three Faces of Equality: Constitutional Requirements in Taxation', (2006), Case *W.Res.L.Rev.* 57(1), p. 5 – See paragraph 8 of the submissions of Amicus curiae.

[6] William B. Barker, op. cit., pp. 7,8,16. – See para. 9 of the submissions of *Amicus Curiae*.

necessary to first explain two principles related to the value added tax on transnational trade of goods and services including the Reverse Charge Principle and Destination Principle, then after it will examine the principle of equality before the law.

[24] Concerning the principle of the reverse charge in tax, the legal scholars explain that such principle "treats the customer being supplied with a service originating abroad as making the supply to itself. It must then account to its tax authorities for the VAT due as output tax on that supply[7]".

[25] A similar statement has been upheld by the Court of Appeal of Nigeria in *Vodacom Business Nigeria V. Federal Inland Revenue Service (FIRS) case which supported that* "The reverse charge applicable to European Union Countries whereby the buyer of goods or services from the supplier(s) in other EU countries assumes the responsibility of paying the applicable VAT rates instead of the Supplier. By this principle it is the buyer of goods or services that pays the VAT, put differently the VAT is paid by the person to whom the goods or services are supplied.[8]"

[26] Basing on the statements above mentioned, the Court observes that according to the principle of the reverse charge tax applicable to European Union Countries, if a person is supplied with goods or services by the suppliers operating in other countries of the European Union, the buyer of goods or services assumes the responsibility of paying the applicable VAT rates instead of the supplier of goods or services. The principle exempts or reduces the obligation of the suppliers to be registered for the value added tax in the Destination State in which the goods or services are imported. In case the suppliers are required to pay the value added tax on the imported goods or services on basis of the principle of the reverse charge tax, they can be entitled to be refunded such tax on basis of the procedure used for requesting to be refunded the value added tax established in the European Union[9].

[27] The Court observes that the principle of reverse charge tax above mentioned as applied in the European Union is provided under article 12, paragraph 1 of the law No. 37 of 09/04/2012 establishing the value added tax which stipulates that "If a taxpayer gets services from a person who is outside Rwanda, the taxpayer is considered as if he/she has delivered taxable services and has received an output tax from that person residing outside Rwanda".

[28] Concerning the Destination Principle in Tax Law, the Court observes that it has been explained in Vodacom Business Nigeria and Federal Inland Revenue Service (FIRS) case above mentioned herein whereby the Court of Appeal upheld that "The Destination principle in taxation stipulates that goods imported from a State are exempted from VAT and are instead taxed from

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[7] Victor Thuronyi (ed), *Tax Law Design and Drafting, Volume 1* (International Monetary Fund, 1996), page 196.

[8] "**The reverse charge applicable to European Union Countries whereby the buyer of goods or services from supplier(s) in other EU countries assumes the responsibility of paying the applicable VAT rates instead of the Supplier. By this principle it is the buyer of goods or services that pays the VAT, put differently the VAT is paid by the person to whom the goods or services are supplied.**" - Vodacom Business Nigeria V. Federal Inland Revenue Service (FIRS), Appeal No. CA/556/2018, p.23, https://lawpavilionplus.com/summary/judgments/?suitno=CA.

[9] KPMG International, VAT/GST Treatment of Cross-Border Services, 2017 Survey, p.20, https://assets.kpmg/content, 13-nov-17.pdf

VAT in the Destination State in which the goods are imported. It is in principle promoted by Organization for Economic Co-operation and Development (OECD)"[10].

[29] The legal scholars sustain that "Under the destination principle of taxation, goods and services are taxed where they are purchased or consumed, rather than where they are produced or originate. Destination-basis treatment can be contrasted with the origin principle, under which goods and services are taxed where they are produced. All goods and services sold in the destination jurisdiction are taxed, provided they are not specifically exempted from the tax base"[11].

[30] Concerning the principle of equality before the law, article 7 of the Universal Declaration of Human Rights, 1948 provides 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 any incitement to such discrimination".[12] The article 26 of *the International Covenant on Civil and Political Rights, 1966* provides that "All persons are equal before the law and are entitled without any discrimination to the 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, sex, language, religion, political or other opinions, national or social origin, property, birth or other status".[13]

[31] As explained by Amicus Curiae[14], the legal scholars sustain that the principle of equality before the law upholds that the law equally treats the persons in the same category and it is equally enforced. In other words, things that are alike should be treated alike. There should be no discrimination against the persons in the same circumstances and in the same conditions. The persons who are not in the same category should not be equally treated.

[32] Basing on the statements above provided, the Court observes that the classification of the taxpayers by a State does not always mean discrimination, such guideline has been adopted by the Supreme Court in the judgment N° RS/SPEC/0001/16/CS rendered on 23/09/2016 and the

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[10] **The Destination principle in taxation stipulates that goods imported from a State are exempted from VAT and are instead taxed from VAT in the Destination State in which the goods are imported. It is in principle promoted by Organization for Economic Co-operation and Development (OECD).”** Vodacom Business Nigeria V. Federal Inland Revenue Service (FIRS), Appeal No.CA/556/2018,p.23,https://lawpavilionplus.com/summary/judgments/?suitno=CA.

[11] Joseph J. Cordes, Robert D. Ebel, and Jane Gravelle, The Encyclopedia of Taxation & Tax Policy (The Urban Insitute, 2005), page 82-83. **Under the destination principle** of taxation, goods and services are taxed where they are purchased or consumed, rather than where they are produced or originate. Destination-basis treatment can be contrasted with the origin principle, under which goods and services are taxed where they are produced. All goods and services sold in the destination jurisdiction are taxed, provided they are not specifically exempted from the tax base;

[12] 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’’

[13] 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”

[14] See the brief of the School of Law/University of Rwanda) as *Amicus curiae* for the judgment RS/INCONST/SPEC/00004/2019/SC, para. 8, 9 and 10.

judgment n° RS/INCONST/SPEC 00001/2019/SC rendered on 29/11/2019 whereby it upheld that "the equality before the law and the non-discrimination do not mean that the distinction of the persons is always the discrimination. The distinction or the classification of the persons can be necessary on basis of the legitimate or rational purpose".

[33] In this case, the distinction between the taxpayers who get abroad the services not available in Rwanda and the taxpayers who get abroad the services available in Rwanda cannot be considered as discrimination nor unequal protection before the law, given that the State did it on basis of the legitimate or rational purpose, for example setting up the strategies to safeguard the balance of payments as Rwanda is liberalizing the services in the framework of the transnational trade in services, as we will explain it by analysing that issue[15].

[34] Basing on the explanations provided in the previous paragraphs, the Court observes that article 12 (paragraphs 3 and 4) of the Law n° 37/2012 of 09/11/2012 establishing the value added tax is not contrary to article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

b. Determine if article 12, paragraphs 3 and 4 of the Law n° 37/2012 of 09/11/2012 establishing the value added tax is contrary to article 95 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

[35] Counsel Bizimana Emmanuel avers that article 12 (paragraphs 3 and 4) of the Law N° 37/2012 of 09/11/2012 establishing the value added tax is contrary to the article 95 of the Constitution of the Republic of Rwanda given that it is contrary to the international protocols ratified by Rwanda while those protocols prevail over the law establishing the value added tax as it is an ordinary law and the article 95 of the Constitution providing for the hierarchy of laws stipulates that a law cannot contradict another law that is higher in hierarchy.

[36] Counsel Bizimana Emmanuel sustains that article 12 (paragraphs 3 and 4) of the law N° 37/2012 establishing the value added tax is contrary to the international protocols ratified by Rwanda including Protocol on the Establishment of the East African Community Common Market (EAC Common Market) in its article 17, World Trade Organisation (WTO) General Agreement on Trade in Services ("GATS") in its article 17 and Protocol to the Agreement Establishing the African Continental Free Trade Area on Trade in Services (AfCFTA Protocol on Trade in Services) in its article 20. He sustains that the articles of those international protocols uphold that the principle of national treatment is not respected when the measures taken lead to the modification of the conditions of competition so as to privilege services or service suppliers of a given country in comparison with services or service suppliers of other countries.

[37] Counsel Bizimana Emmanuel further supports that the businessman who pays the input tax should be allowed to deduct the input tax on the output tax or be refunded the additional tax in case the output tax is higher than the input tax.

[38] Counsel Bizimana Emmanuel further maintains that article 12 (paragraphs 3 and 4) of the Law n° 37/2012 establishing the value added tax does not equally treat services available in

[15]The issue related to determining whether article 12, paragraphs 3 and 4 is contrary to GATS, AFCTA Protocol on Trade in Services and EAC Common Market Protocol

Rwanda and abroad, and such unequal treatment can make the businessmen operating in Rwanda to be disinterested in the services available abroad (rather they prefer the services available in Rwanda) because they are aware that they would not be allowed to deduct the input tax on the output tax in case those services are available in Rwanda.

[39] Counsel Bizimana Emmanuel supports that the effect caused by the article12 (paragraphs 3 and 4) is the modification of the conditions of competition to privilege services or service suppliers in Rwanda in comparison to the services and service suppliers in other countries, therefore such is contrary to the principle of the national treatment provided under the article 17 of EAC Common Market Protocol, the article 17 of GATS and the article 20 of AfCFTA Protocol on Trade in Services.

[40] Counsel Nzafashwanayo Dieudonné and Counsel Bizimana Emmanuel who assists him support that such has been upheld by World Trade Organisation (WTO) Panel which explains in the case related to the product trade[16] that the products imported abroad are equally considered with those domestically produced when they have been cleared through customs, also the fact that a law does not provide about the sale or the purchase is not an issue because, if it is not the case, the countries can indirectly block the products from abroad.

[41] They further sustain that the WTO Panel explains that the principle of national treatment does not only concern the laws governing the sale and the purchase, but it also concerns other laws that can have adverse effects on the competition at the domestic market between the products domestically produced and those imported from abroad, the explanations they mentioned above also served as a basis for WTO Panel to decide that the law passed by the Italian Parliament allows the subsidization to the farmers who purchase the machines produced in Italy, but it does not allow it to those who buy the machines imported from abroad, even if it is not indicated in that law, the objective was to illegally protect the machines produced in Italy, therefore it is contrary to the principle of national treatment.

[42] Counsel Kabibi Spéciose avers that article 12 (paragraphs 3 and 4) of the law establishing the value added tax is not contrary to article 95 of the Constitution and it does not contradict the principle of national treatment included in the international protocols ratified by Rwanda, given that the fact that the rights are entitled to the recipient of the services not available in the country, but denied to the recipient of the services available in the country is the measure of protecting the domestic investors by only acquiring the services not available in the country, and such measure is recognized by WTO/GATS as it admits the exception on the national treatment.

[43] Counsel Kabibi Spéciose further supports that article 12 (paragraphs 3 and 4) above mentioned is not contrary to the principle of national treatment, rather it highlights that principle, given that the domestic services and the services imported from abroad are alike treated as they are charged with the value added tax for those which should be normally taxed or exempted of taxes for those which should be normally exempted. She also explains that the fact that the taxpayer is allowed to deduct the input tax on the output tax for the services not available in Rwanda or the taxpayer who gets the services not available in Rwanda is refunded does not violate the principle

[16] See Italian Discrimination against Imported Agricultural Machinery, Report adopted on 23 October 1958 (L/833 - 7S/60

of national treatment, because those services are never available in the country so as they are allegedly accorded less favourable treatment than the services imported from abroad for which it is allowed to deduct such tax.

[44] As Amicus Curiae, Counsel HABIMANA Pie sustains that the fact that the claimant maintains that the article 12 (paragraphs 3 and 4) of the law N° 37/2012 of 09/11/2012 establishing the value added tax is contrary to the article 95 of the Constitution of the Republic of Rwanda as it contradicts the international protocols ratified by Rwanda is not true given that, apart from when a legal provision is not enforced or contrary to the article of a superior law, such cannot be considered as the violation of the Constitution, there is no indication that the article 12 contradicts the article 95 of the Constitution.

[45] Counsel Habimana Pie further supports that the principle of reciprocity as one of the fundamental principles governing the international protocols upholds that the countries treat other countries alike and they behave alike[17], no one can request a country to enforce a given article of the international protocol, rather he/she must request it to all countries parties to those protocols or to another international competent organ rather than being considered as an issue of unconstitutionality.

DETERMINATION OF THE COURT

[46] In examining the issue to determine if article 12 (paragraphs 3 and 4) of the Law n° 37/2012 of 09/11/2012 establishing the value added tax is contrary to the article 95 of the Constitution of the Republic of Rwanda of 2003 revised in 2015, the Court observes that it is necessary to first examine if the article 12, paragraphs 3 and 4 of the law above mentioned herein is contrary to the international protocols mentioned by the claimant as he takes into account this issue for supporting that the provisions of these paragraphs of this article contradict the protocols while those protocols are higher than the law establishing the value added tax, according to the article 95 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

c. Determine if the article 12, paragraphs 3 and 4 of the Law N^{0} 37/2012 of 09/11/2012 establishing the value added tax is contrary to the General Agreement on Trade in Services (GATS), African Continental Free Trade Area Protocol on Trade in Services and East African Community Common Market Protocol

[47] General Agreement on Trade in Services (GTS) includes the Agreement articles, the Annexes and the Schedule which indicates the services each country member is committed to liberalizing or excluding to other countries in a given period. In order to determine how a country member of GATS is enforcing the fundamental principles of GATS including the principle of national treatment, it is necessary to consider the Schedule above mentioned.

[48] Concerning the national treatment, the article XVII[18] of GATS provides that "each Member shall accord to services and service suppliers of any other Member, in respect of all measures

[17] F. Paris and N. Ghei, "The Role of Reciprocity in International Law" (2003) *Cornell International LJ* 36 (93), p. 94.

[18] ***Article XVII: National Treatment***

affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers". A country member wishing to exclude some services in this framework, meaning taking some measures for according to foreign services or service suppliers different treatment with the domestic services, the country must indicate it in the specific commitments of its schedule.

[49] The Court observes that according to the schedule commitments of Rwanda in the framework of GATS submitted to the World Trade Organization in 1995, there are limitations including some commercial services, some education services, some tourism services and transport services[19].

[50] The Court observes that article XII[20]. of GATS provides that a country can set up the restrictions to safeguard the balance of payments

[51] In this framework, basing on different policies including "Made in Rwanda Policy"[21], Rwanda set up policies for safeguarding the balance of payments

[52] Basing on the explanations provided in the previous paragraphs, the Court observes that the statements of the claimant who supports that by enacting article 12, paragraphs 3 and 4 of the Law establishing the value added tax, Rwanda did not fulfill its commitments as a member of GATS, and he pointed out that such concerns all services without considering its restrictions or its rights to take measures to safeguard the balance of payments, cannot be taken as true. Therefore, he cannot base his statements on that issue for maintaining that such article is contrary to that Protocol.

[53] Concerning the African Continental Free Trade Area Protocol on Trade in Services, its article 18 which provides for progressive liberalization stipulates that "State Parties shall negotiate sector specific obligations through the development of regulatory frameworks for each of the sectors, as necessary, taking account of the best practices and acquis from the RECs, as well as the negotiated agreement on sectors for regulatory cooperation. State Parties agree that negotiations for continuing the process shall commence following the establishment of the AfCFTA, based on the work program to be agreed by the Committee on Trade in Services".

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1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

[19] World Trade Organization. Communication from Rwanda, Schedule of Specific Commitments under the General Agreement on Trade in Services, 30 August 1995

[20] *Article XII GATS:* ***Restrictions to Safeguard the Balance of Payments***

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

Part III. Specific Commitment.

[21]MINICOM, Made in Rwanda Policy, 2017, pp. 1-2, http://www.minicom.gov.rw, January_2018_v2.pdf

[54] The same article provides that "The list of Priority Sectors and the Modalities on Trade in Services shall be annexed to this Protocol and shall form an integral part hereof". The Protocol also provides that the States will hold negotiations on the issues upon which they do not agree.

[55] The Court observes that the session of the Heads of State Members of AfCFTA held in February 2020 approved the resolutions of the Council of the Ministers which decided that the extraordinary session of the Heads of States should be held on 30 May 2020 to decide on all necessary requirements for launching the AfCFTA on 1 July 2020[22].

[56] The Court also observes that the Session requested the Ministers of Commerce to hold the necessary sessions to conclude the negotiations on the rule of origin, the schedules of tariff concessions and the schedules of specific commitments concerning five principal sectors of services, it requested the States to determine their commitments on the remaining sectors of services and the cooperation on the trade in services not later than June 2020[23].

[57] Basing on the explanations provided in the previous paragraphs on this issue, the Court observes that the statements of the claimant who maintains that Rwanda did not respect the provisions of the African Continental Free Trade Area Protocol on Trade in Services are not founded, as long as there are negotiations which should be held to decide on some requirements necessary for the implementation of that Protocol. Thus, the Court does not have any basis to decide that article 12, paragraphs 3 and 4 of the Law establishing the value added tax contradicts the African Continental Free Trade Area Protocol on Trade in Services.

[58] The claimant also avers that article 12, paragraphs 3 and 4 of the Law establishing the value added tax is contrary to the East African Community Common Market Protocol. The article 16 the first[24] paragraph of the Protocol provides for the Partner States to guarantee the free movement of services supplied by nationals of the Partner States and the free movement of service suppliers who are nationals of the Partner State within the Community".

[59] The paragraph 5 of that article provides for the purposes of paragraph 1, the Partner States shall progressively remove existing restrictions and shall not introduce any new restrictions on the provision of services in the Partner States, by nationals of other Partner States except as otherwise provided in this Protocol[25].

[60] The article 17 of that Protocol concerning the national treatment provides for each Partner State to accord services and service suppliers of other Partner States treatment no less favourable than that accorded to similar services and services suppliers of the partner states"[26].

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[22] Decision on the African Continental Free Trade Area (AfCFTA), 33rd Ordinary Session of the Assembly of the Union, 9-10 February 2020, Addis Abeba, Ethiopia, https://www.tralac.org/documents/resources/cfta/3176-au-assembly-decision-on-the-afcfta-february2020/file.html

[23] Ibidem

[24] The Partner States hereby guarantee the free movement of services supplied by nationals of Partner States and the free movement of service suppliers who are nationals of the Partner State within the Community.

[25] For the purposes of paragraph 1, the Partner States shall progressively remove existing restrictions and shall not introduce any new restrictions on the provision of services in the Partner States, by nationals of other Partner States except as otherwise provided in this Protocol.

[26] Each partner State shall accord to services and service suppliers of other partner States treatment no less favorable than that accorded to similar services and services suppliers of the Partner States

[61] The article 20, paragraph 1 of that Protocol provides that the partner state may regulate their services actors provided the measures are consistent with the provisions of this Protocol and do not constitute trade barriers[27].

[62] Regarding the free movement of services, article 23 of that Protocol[28] provides that for the implementation of Article 16 of that Protocol shall be progressive and in accordance with the Schedule on the progressive liberalization of services specified in Annex V of this Protocol. The article 32 of that Protocol which provides for the harmonization of tax policies and laws provides for the Partner States undertake to progressively harmonize their tax policies and laws to remove tax distortions in order to facilitate the free movement of goods, services and capital and to promote investment within the Community[29].

[63] Moreover, article 47 of that Protocol provides for the partner states to undertake to approximate their national laws and to harmonize their policies and systems, for purposes of implementing this Protocol. Furthermore, the Community Council of the Ministers should set up the Council Directives for the implementation of this Protocol[30].

[64] The Court also observes that the Annex V of the Protocol above mentioned concerning the Schedule of Commitments on the progressive liberalization of services[31], Rwanda and other Partner States had made commitments up to 2015.

[65] It observe that the Partner States hold meetings for discussing the procedure of liberalization of transnational goods and services. In this framework, the Secretariat of the Community published the Consultants report[32] on the harmonization of income taxes within the East African Community. In its meeting of May 2019, the Council of the Ministers of East African Community validated the EAC Domestic Tax Harmonization Policy and requested the Partner States to implement it[33].

[66] The Court also observes that in the context of the harmonization of domestic tax policy, the Partner States agreed that the progressive approach would be used for the tax harmonization, starting with the excise tax, then the value added tax and the income tax. They decided that the Council Directives should be taken so that a specific directive should be taken on each tax category

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[27] The Partner State may regulate their services sectors provided the measures are consistent with the provisions of this Protocol and do not constitute barriers to trade.

[28] The implementation of Article 16 of this Protocol shall be progressive and in accordance with the Schedule on the progressive liberalization of services specified in Annex V of this Protocol.

[29] The Partner States undertake to progressively harmonize their tax policies and laws to remove tax distortions in order to facilitate the free movement of goods, services and capital and to promote investment within the Community

[30] The Partner States undertake to approximate their national laws and to harmonize their policies and systems, for purposes of implementing this Protocol.The Council shall issue directives for purposes of implementing this Article

[31] East African Community Common Market Protocol – Schedule of Commitments on the Progressive Liberalization of Services, November 2009.

[32] Consultants' Report on the Harmonization of Income Taxes within the East African Community, 1 November 2014; East African Community, Report of the Meeting to validate the studies on development of Policy frameworks for the harmonization of VAT, Excise duties and Income tax in EAC, Mombasa, 23rd – 25th October 2014; PWC, Policy for harmonization of VAT and Excise duties, 28 October 2014.

[33] East African Community, Report of the 38th Meeting of the Council of Ministers, 6th – 10th May 2019, pp. 30-31.

and the directives should indicate the period for which each Partner State should have harmonized its laws and each directive concerning each tax category[34].

[67] Basing on the explanations above mentioned, the Court observes that the statements of the claimant who maintains that Rwanda violated the East African Community Common Market Protocol by enacting the article 12, paragraphs 3 and 4 of the Law establishing the value added tax are baseless, given that there are the requirements necessary for the implementation of the domestic tax harmonization policy including the Directives of the Council of the Ministers of East African Community on the value added tax.

[68] Basing on its decision that the article 12, paragraphs 3 and 4 of the Law establishing the value added tax does not contradict the international protocols including GATS, AfCFTA Protocol on Trade in Services and EAC Common Market Protocol, and after realising that the claimant based on this issue to support that article 12, paragraphs 3 and 4 are contrary to the article 95 of the Constitution of 2003 revised in 2015, the Court observes that the article 12, paragraphs 3 and 4 of the Law establishing the value added tax is not contrary to the article 95 of the Constitution of the Republic of Rwanda of 2003 revised in2015.

III. THE COURT DECISION

[69] Decides that the claim filed by Counsel Nzafashwanayo Dieudonné is not founded.

[70] Decides that article 12, paragraphs 3 and 4 of the Law N^0 37/2012 of 09/11/2012 establishing the value added tax is not contrary to article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

[71] Decides that article 12, paragraphs 3 and 4 of the Law N^0 37/2012 of 09/11/2012 establishing the value added tax is not contrary to article 95 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

[34] East African Community, Report of the 38th Meeting of the Council of Ministers, 6th -10th May 2019, Annex IV: EAC Domestic Tax Harmonization Policy, pp. 8-9.