THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA (COMMERCIAL COURT DIVISION)

HCT - 00 - CC - CA - 05 - 2005

UGANDA REVENUE AUTHORITY :: APPELLANT

VERSUS

BANK OF BARODA - INDIA :: RESPONDENT

Appeal from the ruling of the Tax Appeals Tribunal at Kampala dated 21st February 2005 in Application No. TAT 05 of 2005

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

This is an appeal from the ruling and award of the Tax Appeals Tribunal (hereinafter called "TAT") in a matter where the Appellant had assessed and demanded capital gain tax worth Ug.Shs.451,442,456/= from the Respondent. The brief facts of case as stated by TAT are as follows;

> *" Bank of Baroda India, a non- resident bank, and the Government of Uganda jointly owned Bank of Baroda Uganda Ltd with shares of 51% and 49% respectively.*

By virtue of the Public Enterprise Reform and Divestiture Statute 1993 (hereinafter referred to as the PERD ACT) the Government of Uganda was obliged to dispose of its shares held in several local companies including its 49% shares in Bank of Baroda (U) Ltd. By agreement dated 8th June 1999 the Government of Uganda sold 49% of its shares in Bank of Baroda (U) Ltd.

As part of its Reform and Divestiture Enterprises policy any company purchasing shares originally owned by government would undertake to sell a percentage of the shares to the general public through the stock exchange.

Pursuant to the share sale agreement dated 8th June 1999, the current Respondent was required to sell 20% of the voting shares in Bank of Baroda (U) Ltd to the public. Subsequently Bank of Baroda India sold 20% of the said shares to the public and raised proceeds of Ug.Shs.4,794,350,000/=.

The current Appellants computed and demanded taxes of Ug.Shs.872,272,044/= of which Ug.Shs.420,829,896/= was paid leaving a balance of Ug.Shs.451,442,456/= i.e. as capital gains tax on the proceeds of sale which the current Respondent declined to pay as the disposal of the shares was involuntary and were reinvested in an asset of a like kind within one year (as provided by law) of disposal".

At the TAT hearing both counsel agreed that there was no need to adduce oral evidence since the points of disagreement were simply questions of interpretation of the law.

The issues to be determined at TAT were the following;

1. Whether capital gains tax is payable by Bank of Baroda on sale of shares.
2. Whether or not the sale of shares by Bank of Baroda India was voluntary.
3. Whether the criteria set out in the letter of September 10th 2002 was properly followed by the Respondent and whether it is relevant to the issue at hand.
4. Whether the income of Bank of Baroda India is taxable under Section 85 of the Income Tax Act.
5. Costs and Remedies.

TAT in brief found for the current Respondent in that its sale of 20% shares was not voluntary. TAT also found that the current Respondent was not liable to pay any capital gains tax and any tax paid should be refunded together with interest.

The Appellant now appeals on the following grounds;

1. That the tribunal erred in law in holding that the sale of 20% shares by the Applicant was imposed on the Applicant and was therefore involuntary and any such gain made qualified under Section 54 (1) (c) of the Income Tax Act and liability to pay capital gains tax does not arise.

2. That the tribunal erred in ruling that the sale Agreement between the parties was not a basis upon which a voluntary sale, purchase of shares and compliance with the attended terms and conditions between the Government of Uganda and the Applicant was grounded.

3. That the tribunal erred in law when it proceeded to interpret the law, a mandate over which it has no Jurisdiction.

4. That the tribunal erred in law in ruling on the issue of reinvestment of an asset of a like kind within one year of disposal which was not raised at the hearing and submitted upon by the Respondent.

Mrs. Anna Mugenyi Bitature appeared for the Appellant while Mr. Oscar Kambona appeared for the Respondent.

Like at the hearing at TAT both parties choose by consent to file written submissions for this appeal.

Grounds No. 1 and 3

Counsel for the Appellant choose to argue grounds 1 and 3 together because both referred to the issue of *"involuntariness"* of the transaction between the Government of Uganda and the Respondent. Simply put it is the case for the Appellant that the Respondent in selling its 20% shares acquired from the Government performed a

voluntary act which put it outside the arm bit of Section 54 of the Income Tax Act (hereinafter referred to as ITA); which provides

> *"no gain or loss is taken into account in determining changeable income in relation to an involuntary disposal of an asset to the extent the proceeds are reinvested in an asset of a like kind within one year of disposal".*

Counsel of the Appellant in support of their case lays down five concise arguments. First, that the Respondent could not claim that it was forced to sale the said shares by reason of the PERD ACT 1993 and the Divestiture guidelines there under. This is because the law just provided a legal framework for the divestiture process however the actual process divestiture was a negotiated one as between the parties culminating into a signed agreement. This said negotiated agreement cannot be said to have been forced.

Secondly the said agreement was legally binding on the parties and was entered into intentionally, under no duress or lack of free will. Counsel further argued that there was no sign of compulsory acquisition. Expropriation loss and destruction by reason of this agreement. It is her contention that the Respondent is therefore estopped from claiming that the agreement was involuntary and yet by the same agreement the bank had agreed to be bound by it.

Thirdly counsel for the Appellant referring to the Sale of Goods Act (Cap 82) argued that the conditions attached to the sale of the shares to the public were undertakings and or terms of the agreement agreed to by both parties.

Fourthly, counsel for the Appellant argued that the Respondent can not claim that it had no alternative or power of choice not to buy the 20% shares from Government when in para 5.3 of the said agreement the bank states that it

> *" ...has the requisite power and authority to execute and deliver this agreement and to perform its obligations under it..."*

Fifthly the Respondent undertook under para 5.5 of the agreement that no law or regulation applicable to it had been violated by entering into it.

Counsel for the Appellant also referred court to the explanatory notes attached to the Income Tax Bill 1997 as to what an involuntary act would amount to. Examples given include the destruction, theft or compulsory acquisition of an asset. She argued there is no similarity with these examples, in this case.

Counsel for the Respondent in reply, submitted and agreed that the issue was whether Section 54(1) (c) of the ITA applied to the Respondent's sale of 20% shares to the public. Counsel agreed with the ruling in TAT to the effect that *"... the sale of 20% shares by the Applicant was not an ordinary commercial transaction or trade but rather a transaction in fulfillment of Government policy and compliance with the law*".

Counsel for the Respondent referred me to the case of

Pearn V Miller (1927) 11 TC 610

for the proposition that in dealing with capital gains tax, court observed that the difference between the cost price and selling price of goods could be taxed only if the transaction was a trade or adventure in the nature of trade. He argued that this transaction was not a normal trade. Counsel for the Respondents argued that the explanatory notes to the Income Tax Bill 1997 are not law. He argued that involuntary disposal cannot be limited to the said explanatory notes.

I have read the submissions of both counsels which are equally spirited and well researched. In making my findings on these grounds counsel for the Appellant drew my attention to the following;

That according to **Lord Russell** in the case **Attorney General V Carlton Bank** (1989) IKB 64

that the duty of the court is to give effect to the intention of the legislature as gathered from the language employed having regard to the context with which it is made. Lord Russell also stated

> *"... it is not open to court to narrow or whittle down the operation of the Act by considerations of hardship or business convenience or the like..."*

Counsel also referred me to

Heydon's case 76 ER 637

where it was held

> *"...the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and ... to add force and life to the cure and remedy according to the true intent of the makers of the Act for the public benefit..."*

Indeed counsel for the Respondent also referred me to

Baylis V Gregory (1987) 3 all E.R 27 which basically applies the same principles of construction of statutes but in more detail with regard to tax statutes.

I generally agree with those parameters of statutory interpretation. Section 27 (3) of the TAT Act gives the High Court very wide powers on appeal. It states that the role of the High Court on appeal shall be to

> *"...hear and determine the appeal and shall make such order as it thinks appropriate by reason of its decision, including an order...*
>
> - *affirming or*
> - *setting aside the decision of the tribunal or*
> - *an order remitting the case to the tribunal for reconsideration (modification mine for case of presentation)..."*

The issue is whether the sale of the 20% shares by the Respondents was voluntary or not? Both parties laboured the definition of *"involuntary"* both at TAT and now an appeal.

Counsel for the Appellant argued that it is whether one exercised free will or not. Her five arguments point to one basic point that the Respondent freely entered into an agreement so cannot now say that act was *"involuntary".*

There is indeed an argument to be had there. However one has to look at the agreement itself to ascertain its true intention and not just the fact that it was entered into. The evidence clearly shows that the sale of the 20% shares was a structured sale in furtherance of privatization of the Government of Uganda shares in Bank of Baroda Uganda. The structure was as follows; first by an agreement dated 8th June 1999 the Government of Uganda sold its 49% shareholding in Bank of Baroda Uganda, to Bank of Baroda India (which already held 51% of the shares in Bank of Baroda Uganda).

However clause 8.1 of the same agreement provided that not less than 20% of 49% shares sold by the Government of Uganda to Bank of Baroda India were to be resold within 3 years to the public through the stock exchange.

It does not require much, to understand that the Government of Uganda at all material times wanted to divest the said 20% of its shares to the public and not to Bank of Baroda, India. Bank of Baroda for all intent and purposes was just an interim/holding shareholder of the said 20% shares.

To my mind Bank of Baroda, India had no choice as to how to deal with the 20% shares as a normal purchaser of shares would have had. To that extent clearly the sale of shares was involuntary. This can be seen also from a letter from Bank of Baroda, Uganda referenced HO/MISC/2K2/319 of the 15th February 2002 wrote to the privatization unit and said

> *"...Bank of Baroda, India has been considering floating the shares (i.e. the 20%) in the market (USE) by the target date of June 2002. However the bank after a thorough review of the market believes this is not an opportune time for share floatation.*
>
> *... we at Baroda have every intention and are committed to divest 20% of the banks voting shares to the public. However, in view of the reasons stated above and (the) depressed market we request your good office to extend the floating period by two years..."*

This letter does not show that the shareholder had a free will to decide what time to float shares even having regard to market conditions.

As shown in the authorities the court is to add force and life to the interpretation of a statute having regard to the language of the statute and the particular facts of the case. I am not persuaded that the explanatory notes to the Income Tax Bill 1997 on the issue are exclusive, but rather I find them indicative of some examples of an involuntary action. In any event they are not the law.

I therefore find that the sale of the 20% shares was involuntary and that TAT found correctly in this regard. I find that ground number 1 and 3 of this appeal must fail. I also find with regard to ground 3 of this Appeal that TAT had the Jurisdiction to interpret the law as it did. In any event the parties by consent requested this interpretation.

Ground 2

In light of my findings in ground No. 1 this ground cannot stand as well. The sale agreement set out the terms under which the sale of the Government shares would be handled with regard to the Respondent and the general public. The flexibility and free will that the Respondent had with regard to dealing with the two categories of shares was not the same.

Ground 4

Ground 4 relates to whether there was reinvestment of an asset of a like kind within one year of disposal within the meaning of Section 54 (1) (c)

The finding of TAT on this issue was as follows

> *"...related to this issue is whether the proceeds were reinvested in an asset of a like kind within one year of the disposal. No evidence was adduced by the Respondent (i.e. URA) to the contrary, neither was the Applicant put to task whether or not the proceeds were reinvested in an asset of a like kind within one year of disposal. Be that as it may the submission by counsel for the*

Applicant that the assessment was raised before the expiry of one year was not challenged. Nevertheless as a matter of fact it is not open to the tribunal to make a finding on a point not raised in the pleadings and where no evidence has been adduced..." (emphasis mine).

Counsel for the Appellant submitted that for TAT

"... to find that the Respondent should not pay capital gains tax merely on the ground that its sale of shares to the public was involuntary... was not only wrong but also a misinterpretation of the law..."

Counsel for the Respondent submitted this ground was not in contention.

I am unable to see how this ground arises. The TAT did not make a finding on the matter save for an observation that the Appellant did not contest the allegation by the tax payer that a tax assessment was made before the expiry of a year. This is a point where evidence as to reinvestment within a year will have to be made. The onus is on Respondent to prove the reinvestment was done so that tax is not due.

Before I leave this matter altogether, it would appear to me that the appellant in this regard made its assessment before the one year had elapsed on the understanding that the act of sale was voluntary whereas not.

Lastly I also wish to observe, that even though the parties did not argue the point in TAT and on this appeal, the treatment of shares as assets for purposes of parts VI and IX of the Income Tax Act merits deeper thought. The arguments of counsel seemed to treat shares, which are equity, in the same way as one would moveable or immovable assets. I think such an equation is both too general and simplistic. I shall take the matter no further for purposes of this appeal. As for this appeal based on my findings above I hereby dismiss it with costs to the Respondent.

Geoffrey Kiryabwire

JUDGE

Date: 01/02/07

01/02/07

10:20am

Judgment read and signed in Court in the presence of;

- O. Kambona for the Respondent

In Court

- No parties
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 01/02/07