

THE SUPREME COURT, IN KIGALI, ADJUDICATING COMMERCIAL MATTERS, DECIDES IN A PUBLIC HEARING, CASE RCOMAA 0012/15/CS ON 24/03/2017 AS FOLLOWS:

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**PARTIES DETAILS:**

**APPELLANT:**

**ERICSSON AB Ltd**, with its headquarters in Nyagacyamo Village, Kamatamu Cell, Kacyiru Sector, District of Gasabo, City of Kigali.

**RESPONDENT:**

**Rwanda Revenue Authority (RRA)**, on behalf of its representative

**MATTER OF LITIGATION:**

- Value Added Tax (VAT) worth RwF 739,558,080 charged for fiscal year 2009;
- Removal of income tax worth RwF 280,736,160 for Fiscal Year 2011 accruing from amount worth RwF 1,041,054,586 charged as tax for that fiscal year;
- Counsel fees equivalent to 10% of amount claimed.

**SUBJECT MATTER:**

- Appeal against Case RCOMA 0575/14/HCC rendered by the Commercial High Court on 12/01/2015
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**I. CASE SUMMARY**

[1] ERICSSON AB RWANDA Ltd was audited for Corporate Income Tax (CIT)<sup>1</sup>, *Pay As You Earn*, Withholding Tax of 15% (WHT)<sup>2</sup> and Value Added Tax (VAT)<sup>3</sup> related to Fiscal Years 2009, 2010, 2011 and 2012 and was charged a tax equivalent to RwF 1,131,862,367 and was granted a VAT refund worth RwF 1,390,481,914.

[2] ERICSSON AB Ltd was not satisfied with the tax charged against it with regard to Value Added Tax (VAT) equivalent to RwF 739,558,080 for FY 2009 and

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<sup>1</sup> Corporate Income Tax

<sup>2</sup> Withholding Tax

<sup>3</sup> Value Added Tax

Corporate Income Tax (CIT) equivalent to RwF 280,736,160 for FY 2011, and appealed to the Commissioner General for Taxes who, after examining its appeal, decided that its appeal was not legally substantiated in all its defence elements.

- [3] Dissatisfied with the decision of the Commissioner General, ERICSSON AB RWANDA Ltd, petitioned the Commercial Court of Nyarugenge, saying that it was charged a Value Added Tax (VAT) equivalent to RwF 739,658,080 for Fiscal Year 2009 and that no value addition was ever made and that no taxable service was provided; that that amount accrues from the financial support granted by ERICSSON SWEEDEN for salary payments, rental for working offices and payment for miscellaneous goods; that even if that service was to be provide, it would be taxable at a rate of 0% because it was a service rendered to those in foreign countries; that 5% mentioned by Rwanda Revenue Authority is the very amount that is taxable. It also said that Rwanda Revenue Authority charged it a Corporate Income Tax equivalent to RwF 280,736,160 accruing from RwF 1,041,054,586 for the Fiscal Year 2011 alleged to never have been subject to tax declaration, whereas no invoice had been yet made, which was nothing but an estimation at that time;
- [4] On 23/10/2014, the Commercial Court of Nyarugenge rendered a judgment in Case No RCOM 0868/14/TC/NYGE, declaring the legal action filed by ERICSSON AB RWANDA Ltd to be legally grounded on certain issues, that there is no acceptable justification likely to cause removal of the VAT tax worth RwF 739,558,080 for FY 2009 charged against ERICSSON AB RWANDA Ltd that, on the contrary, the Corporate Income Tax worth RwF 280,736,160 charged for FY 2011 on '*unbilled sales*' be removed for that year. That Court ordered Rwanda Revenue Authority to pay to ERICSSON AB RWANDA Ltd RwF 500,000 as case proceedings fees, and to refund to it case filing fee.
- [5] Rwanda Revenue Authority filed appeal to the Commercial High Court arguing that the claim related to the Corporate Income Tax worth RwF 280, 736,160

should not have been admitted because ERICSSON AB RWANDA Ltd did not appeal against it with the Commissioner General, that its sole wish was that it be not subjected to double taxation because, during the audit, it did not deny that no bill was made for the amount from which originated the tax for 2010 mainly for system shift, but the goods corresponding to the bill had been sold, therefore be brought forward into fiscal year 2011, and that ERICSSON AB RWANDA Ltd was asked whether it had evidence to the effect that the amount had indeed been taxed, but failed to furnish it.

- [6] ERICSSON AB RWANDA Ltd also filed a cross appeal, requesting that the Value Added Tax (VAT) equivalent to RwF 739,558,080 be removed on grounds that: (1) it was charged on grant extended to it by ERICSSON SWEDEN, and no exchange for the service rendered was received by this company is such a way as to constitute justification for any tax due, (2) the contract agreement based on by the Commercial Court of Nyarugenge was not a Specific Service Contract because if the service was known a specific service contract would be concluded<sup>4</sup>, (3) even if there were any service rendered to ERICSSON SWEDEN, it would be charged at a rate of 0% as provided for in Article 87, g of the Law No 06/2001 establishing Value Added Tax.
- [7] In Case RCOMA 0575/14/HCC rendered on 12/01/2015, the High Commercial Court ruled that the appeal lodged by Rwanda Revenue Authority was legally substantiated, that the Corporate Income Tax equivalent to RwF 280,736,160 charged to ERICSSON AB RWANDA Ltd for FY 2011 be maintained. Court ruled that the cross appeal lodged by ERICSSON AB RWANDA Ltd was not legally grounded.
- [8] Dissatisfied with the ruling, ERICSSON AB RWANDA Ltd appealed against to the Supreme Court, arguing that:
- a) **regarding the Corporate Income Tax equivalent to 280, 736,160**, Court considered the amount not yet claimed as a debt for which a person may seek recovery, whereas this is not the way it should be interpreted, because whenever no invoice has been made any person seeking payment, there is no amount receivable.
  - b) **regarding VAT tax equivalent to RwF 739,558,080**, Court made a decision pursuant to evidence not related to the matter of litigation, because it argued that the amount based on to charge VAT cannot be taken as grant especially as such was not the case; it was not the case;

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<sup>4</sup> This is provided for in Article 3.1 and 3.2. of the General Agreement ERICSSON Sweden concluded with ERICSSON AB RWANDA Ltd.

Court did not say anything regarding the specific agreement in respect of which the initial court had based its ruling, on the contrary, it relied on the General Agreement signed by all ERICSSON COMPANIES undertaking to regularly work in partnership; deciding the case by not taking into consideration article 93, paragraph 2 of the Constitution of the Republic of Rwanda of 04/06/2003 as amended then.

- [9] Case was heard in public on 28/02/2017, ERICSSON AB RWANDA Ltd represented by Me NSENGIYUMVA Abel, while Rwanda Revenue Authority was represented by Me GASANA Raoul. The latter raised an objection regarding lack of jurisdiction, on the issue related to VAT equivalent to 739,558,080, because ERICSSON AB RWANDA Ltd lost case in the initial two Courts on the same grounds, later, upon thoroughly analysing Article 28 of Organic Law No 03/2012/OL of 13/06/2012 determining organization, functioning and jurisdiction of the Supreme Court and pursuant to other cases decided by this same Court<sup>5</sup>, made a ruling while the Bench was hearing the case, deciding that the objection raised was not substantiated because some of the justifying reasons are given credit with regard to the case as a whole and not to the case for some of its elements.

## **B. ISSUES IN THIS CASE AND THEIR ANALYSIS**

### **a. Determining whether the Corporate Income Tax equivalent to RwF 280,736,160 should be paid by ERICSSON AB RWANDA Ltd**

- [10] Me NSENGIYUMVA Abel, representing ERICSSON AB RWANDA Ltd, argues that, in point 11 of the case appealed against, Court considered as a debt to be recovered any amount a person has not yet claimed, but that this is not actually the case because once an invoice has not been made issued to the person concerned, no debt is considered to be pending payment, that the same person cannot note in his/her books of accounts that someone owes him/her some amount of cash whereas he/she cannot furnish any evidence to this effect. He says that Article 28 of Law No 16/2005 of 18/08/2005 on direct taxes on income, cannot be invoked in this case because it only concerns 'sales' for which 'invoices' were made because acknowledgement of debt due is only valid

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<sup>5</sup> RCOMAA 0028/14/CS of 06/01/2017, RWANDA REVENUE AUTHORITY vs. SONARWA LTD; RCOMAA 0017/15/CS/2016 TICOS vs. Bugesera District & SORAS

when existence of such a debt has been clearly demonstrated, requiring debtor to settle debt. He further says that the amount charged as tax, was taken from 'Notes au bilan' (*explanatory notes on the balance sheet*) by Rwanda Revenue Authority, that it based on the cash on the bank account of ERICSSON AB RWANDA Ltd, the amount for which an estimate was made and the amount in 'unbilled sales' to calculate the tax, but that the amount of cash for which ERICSSON AB RWANDA Ltd has serious concerns is RwF 280,736,160 worth of tax charged based on the income worth RwF 1,041,054,000, while the Company has no concerns with regard to all other amounts.

- [11] Me GASANA Raoul, representing Rwanda Revenue Authority, argues that Article 43, paragraph one of the Law No16/2005 on direct taxes on income provides that a taxpayer who has performed income generating works, such income is taxable, that any service performed gives rise to payment of tax by taxpayer whereas '*invoices*' would be prepared by taxpayer any time of his/her choice; giving the example to the effect that, in lease agreement, when a month elapses without payee seeking payment of the rental fees, nothing restricts the rental income to subject to tax, he continues arguing that when 'the estimate' made decreases, and the taxpayer does not get payment of the debt owed to him/her, this happening for a period of one (1) year, the debt shall be deemed as relinquished as it is a bad debt, and is therefore removed from taxable income, but when the debt is brought forward and applies to two (2) different fiscal years, the difference shall be regarded as 'expenses' to be brought forward in the following year.

## COURT FINDINGS

- [12] Article 43, paragraph one of the Law No16/2005 of 18/08/2005 on direct taxes on income, as modified and complemented to date, provides that: '*A taxpayer who receives taxable business profit prepares an annual tax declaration in accordance with the form determined by the tax administration and presents it, at the same time, with the accounting balance sheet, profit and loss statement for the tax period, the annexes thereto, as well as any other relevant document required by the Tax Administration, not later than 31<sup>st</sup> March of the following tax period. [...]'*
- [13] Article 44 of the above Law No16/2005 provides that '*Corporate taxable profit is calculated in accordance with the principles applied when calculating profits on individual businesses*'; while Article 16, paragraph two of

the same Law, provides that, '*Business profit is determined per tax period on the basis of the profit or loss account drawn up in accordance with the National Accounting Plan, subject to the provisions of this Law.*'

- [14] Article 28, paragraph one of the above Law No16/2005 of 18/08/2005 on direct taxes on income provides that: '*In the determination of business profit, a deduction is allowed for bad debts if the following conditions are fulfilled: 1° If an amount corresponding to the debt was previously included in the income of the taxpayer; 2° if the debt is written off in the books of accounts of the taxpayer; and; 3° if the taxpayer has taken all possible steps in pursuing payment and has shown concrete proofs that the debtor is insolvent. [...]*'.
- [15] In this case, case file shows that corporate income tax under litigation is equivalent to RwF 280,736,160, accruing from income realized by ERICSSON AB RWANDA Ltd for fiscal year 2011 equivalent to RwF 1,041,054,080, but ERICSSON AB RWANDA Ltd argues that it cannot pay that tax because, even though the income from which it accrues is indicated in the 'Notes au bilan (*Explanatory notes on the balance sheet*) as 'unbilled sales', it was never claimed for payment nor was it ever subject of any 'invoices', and still remains an estimated amount.
- [16] Court notes that, as confirmed in the case appealed against, that the fact that ERICSSON AB RWANDA Ltd agrees to have provided services for which it is required to pay tax, and included an entry thereof in 'Notes au bilan' when it was declaring tax based of the fact that payment of the debt was not yet claimed for there to be preparation of invoice, is tantamount to an attempt to evade its obligations to pay tax on business profits realized by this Company.
- [17] Court notes that, the fact that the representation of ERICSSON AB RWANDA Ltd argues that Article 28 of the above Law No16/2005, cannot be invoked simply because it relates only to 'sales' for which 'invoices' were prepared, these are unsubstantiated arguments, because that article never highlighted that difference of determining whether a debt was subject for an

invoice or not, but only provides that issues related to removal of the bad debt, on taxable profit, and criteria for approval for the removal.

[18] Court notes that, in accordance with the explanations outlined above, corporate income tax equivalent to RwF 280,736,160 should be paid by ERICSSON AB RWANDA Ltd, therefore the ruling in the case appealed against, on the provision related to this tax, and remains unchanged.

**a. Determining whether Value Added Tax (VAT) charged to ERICSSON AB RWANDA Ltd equivalent to RwF 739,558,080 should not be paid**

[19] Me NSENGIYUMVA Abel argues that ERICSSON SWEDEN came to Rwanda and found there was permanent job, and incorporated ERICSSON AB RWANDA Ltd and would deposit cash on its account, which monies were taxed by Rwanda Revenue Authority. He states that ERICSSON AB RWANDA Ltd defended its position arguing that the money was a grant extended to it by ERICSSON SWEDEN, while Rwanda Revenue Authority requested for evidence proving the monies were in the form of grant and that this authority should also be asked what kind of service ERICSSON AB RWANDA Ltd provided to ERICSSON SWEDEN that could justify payment of such an amount, that the evidence sought to determine whether the cash are in the form of grant, was not the evidence that to be produced, on the contrary, the evidence to be furnished was the service that ERICSSON AB RWANDA Ltd rendered to ERICSSON SWEDEN.

[20] Me NSENGIYUMVA Abel further argues that, should Court determine otherwise (in the alternative), there are items taxed at a rate of 18% and those taxed at a rate of 0%; those taxed at 0% rate include services provided to those in foreign countries, but in Article 87, 1(g) of the Law No 06/2001 of 20/01/2001 establishing Value Added tax, in English version, they say goods/services performed (manufactured) outside the country; that Article 93 of the Constitution of the Republic of Rwanda stipulates that in case of conflict between the languages in which a law was published, the language in which that law was adopted or drafted shall prevail, but that the Commercial High Court chose English language in which the law was drafted, but forgot that back in 2010 that

article 93 was amended, to confirm that the language that would prevail is the language in which the law was adopted; performance of a service to a person abroad, is when a person residing in Rwanda has been hired by a person in a foreign country, and when that service is performed in Rwanda. He argues that the agreement between ERICSSON SWEEDEN and ERICSSON AB RWANDA Ltd is a general agreement, these two companies mutually agreed that should any service require to be performed, there shall be a Specific Agreement, but no such agreement was ever made; that in the 'General Agreement' they convened to pay 'expenses' plus 5%, therefore, should there be any tax payable, the 5% would then be taxed.

- [21] Me GASANA Raoul argues that Rwanda Revenue Authority showed an agreement known as General Agreement of Collaboration between ERICSSON Company worldwide; saying this agreement provided that ERICSSON SWEEDEN pays to ERICSSON AB RWANDA Ltd for the services rendered to it, adding that the amount charged for VAT was not in the form of a grant, despite ERICSSON's failure to prove that such an amount was indeed a grant extended to it. He further said that Rwanda Revenue Authority was unable to find the Specific Agreement entered into between ERICSSON SWEEDEN and ERICSSON AB RWANDA Ltd, instead what it found out was the amount of money on the account which ERICSSON AB RWANDA Ltd proved it was an account used for business purposes, therefore this was strong evidence to confirm the tax charged against it.
- [22] Me GASANA Raoul further states that, regarding reports that the services performed should be taxed at a rate of 0%, Article 87 of the Law No 06/2001 of 20/01/2001 establishing Value Added Tax, deals with services and goods bound for export, while ERICSSON AB RWANDA Ltd was performing in Rwanda those services, that no 'export of export' ever existed. He says that the Law did not define the term 'export' but did define the term 'import', that if 'import' means the services he imported from abroad to be performed in Rwanda, 'export' would mean the services a service carried abroad to be performed there. He further argues that, saying that the 5% in addition to 'expenses'

as agreed on under the General Agreement, is impossible because the VAT is taxed on the good/service as a whole and that ‘expenses’ are VAT deductible.

### COURT FINDINGS

✓ *Concerning determining whether Rwanda Revenue Authority had to find out the service ERICSSON AB RWANDA Ltd rendered to ERICSSON SWEEDEN*

[23] Article 9, paragraph one of the Law No 21/2012 of 14/06/2012 relating to the civil, commercial, social and administrative procedure provides that ‘*Every plaintiff must prove a claim. Failure to obtain proof, the defendant wins the case.*’ Article 3 of the Law No 15/2004 of 12/06/2004 on evidence and its production provides that ‘*Each party has the burden of proving the facts it alleges [....].*’

[24] Court notes, pursuant to the provisions of the above articles, existence of the general agreement on collaboration concluded between ERICSSON Companies including ERICSSON AB RWANDA Ltd and the presence of funds found on the business account of ERICSSON AB RWANDA Ltd, which money was targeted by VAT tax equivalent to Rwf 739,558,080, and that ERICSSON AB RWANDA Ltd does not prove that those funds do not accrue from the services it performed for ERICSSON SWEEDEN<sup>6</sup>, this indicates that it must pay that tax, especially because it did not furnish evidence to the effect that those funds were a grant/donation. The fact that its representation argues that it was not the proof of a grant/donation that needed to be found out, that, on the contrary, the service that ERICSSON AB RWANDA Ltd rendered to ERICSSON SWEEDEN, Court notes that this attitude is off the track, because the explanations according to which this money is a grant/donation extended to it, emanates from it, and had therefore furnish evidence to that effect, failing which, it loses the case, as provided for in Articles of the Laws quoted above in the previous paragraph.

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<sup>6</sup> Telefonaktiebolaget L M Ericsson (‘LME’)

- ✓ *As regards determining whether the services charged for VAT equivalent to RwF 739,558,080, is included in the among those services taxable in Rwanda at the rate of 0%*

- [25] Article 87, paragraph 1(g) of the Law No 06/2001 instituting Value Added tax, in force at the time of charging the tax which is the subject of litigation, provided that ‘Subject to the powers of the Minister provided for in Article 15 of this Law, goods and services taxed at the rate of 0% are detailed as follows: 1) *Goods and services exported: [...]; g) Outsourcing a person in a foreign country to perform a service ; [...].* In the French version, this Article reads as follows: *Sous reserve des pouvoirs du Ministre stipulés à l’article 15 de la présente loi, les biens et les services à taux zéro sont classifiés comme suit : 1) les exportations : [...]; g) la prestation réelle de service à l’extérieur du Rwanda ; [...]* whereas in English, this article provides that : ‘*Notwithstanding the powers vested into the Minister by the provisions of article 15 of this law, the following supplies are zero-rated; [...]; g) The supply of services which are physically rendered outside Rwanda; [...].*
- [26] Court notes, after thorough analysis of the abovementioned article (as written in its three versions), the legislator, in the Kinyarwanda language, explained that services taxable at the rate of 0%, include those ‘exported’ (article 87,1), these services exported include those provided for in point g) related to ‘providing services to those in foreign countries’. This is to show that, even if in this point g) the legislator did not indicate that the services performed for those in foreign countries must have been performed abroad, first item of this article (87, 1) clearly indicates that when services are exported, means that they must have been performed abroad, especially as even in other versions (*French and English*), this is the actual meaning of this article.
- [27] Court notes therefore that the allegation by the representation of ERICSSON AB RWANDA Ltd that the Commercial High Court disregarded article 93 of the Constitution on authentic interpretation of the laws in case there is conflict between the languages in which the law was published are not worth any credit,

because there is no conflict between the languages in the article 87, 1 (g) of the Law No 16/2005.

[28] Court notes, according to the explanations above, the services charged for VAAT worth RwF 739,558,080 which were not performed abroad, hence cannot taxed at the rate of 0% as alleged by the counsel representing ERICSSON AB RWANDA Ltd.

✓ *Concerning determining whether ERICSSON AB RWANDA Ltd could be charge VAT on the income of 5% referred to in the 'General Agreement'*

[29] Article 2, a. of the above Law No. 06/2001 of 20/01/2001 provided that the value added tax is levied on goods and services performed in Rwanda and on goods and services imported from outside the country<sup>7</sup>.

[30] Court notes, based on the provisions of this law, value added tax that should be charged on taxable services performed, means that such a tax is calculated on the value of those services. Therefore, should the general agreement concluded between ERICSSON SWEEDEN and ERICSSON AB RWANDA Ltd, agreed that the value of the services performed would be paid with an additional 5%<sup>8</sup>, which is an indication that VAT should be levied on the value of those services plus the additional 5%.

[31] Therefore, Court notes that value added tax (VAT) ERICSSON AB RWANDA Ltd has to pay to Rwanda Revenue Authority, should not be calculated only on the income of 5% mentioned in the General Agreement; hence this justification for appeal is not legally substantiated.

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<sup>7</sup> These explanations were reiterated in article one of the Law No. 37/2012 of 09/11/2012 on value added tax

<sup>8</sup> In consideration for the services performed, the general principle shall be that the service provider shall be reimbursed in full for its service costs, plus an additional amount equal to 5% of such costs. Terms of payment and invoicing procedures shall be consistent with Ericsson policies, directives and procedures.

[32] Court notes that, based on the explanations contained in the previous paragraphs, the appeal lodged by ERICSSON AB RWANDA Ltd seeking removal of the VAT worth RwF739, 558,080 is not legally grounded.

**b. Determining whether there is compensation payable to Rwanda Revenue Authority**

[33] Me GASANA Raoul states that Rwanda Revenue Authority requested compensation for travels and time spent for the proceedings against it worth RwF 8,000,000, plus RwF 2.000.000 as counsel fee.

[34] Me NSENGIYUMVA Abel argues that, with regard to losses incurred in the case proceedings, no evidence is furnished by the counsel representing Rwanda Revenue Authority; while, as regards counsel fees, he should not request for such fees because he gets a salary from taxes paid by taxpayers including ERICSSON AB RWANDA Ltd.

**COURT FINDINGS**

[35] Court finds that as ERICSSON AB RWANDA Ltd filed appeal, and that its appeal was declared not legally grounded, understandably there has been damage to Rwanda Revenue Authority especially the time it wasted in Court proceedings, with ERICSSON AB RWANDA Ltd being required to pay to Rwanda Revenue Authority procedural fees equivalent to RwF 500,000, such compensation being determined at Court's discretion as the amounts of compensation claimed were overestimated and were accompanied with supporting evidence.

[36] Regarding counsel fees, article 2, 1 of Instructions No.01/2014 determining fees for counsels, explains that: *'Counsel fees shall be a remuneration or price given by a client in payment for ordinary and intellectual services for client's case file processing, [...]*. Court observes that the fact that Me GASANA Raoul is an employee of Rwanda Revenue Authority, and has represented his client with no further agreement on any fee expected from the services rendered such that said fee can be regarded as counsel fees paid him by this institution, clearly indicates

that Court has no legal basis to consider these fees as a remuneration for representation that need to be reimbursed to Rwanda Revenue Authority.

### III. DECISION OF THE COURT

- [37] **Declares** the appeal lodged by ERICSSON AB RWANDA Ltd not legally grounded.
- [38] **Decides** that judgment in Case No RCOMA 0575/14/HCC rendered on 12/01/2015 by the Commercial High Court is to be maintained as is, save only for issues relating to compensation granted to Rwanda Revenue Authority (RRA) in this instance.
- [39] **Orders** ERICSSON AB RWANDA Ltd to give to Rwanda Revenue Authority (RRA) RwF 500,000 as procedural fees.
- [40] **Orders** that Court fees deposited by ERICSSON AB RWANDA Ltd are equivalent to Court proceedings.

**SO ORDERED AND PRONOUNCED IN A PUBLIC HEARING TODAY  
ON 24/03/2017**

**KANYANGE Fidélité**

Presiding Judge

**MUKANDAMAGE Marie Josée**

Judge

**NGAGI M. Alphonse**

Judge

**GAKURU Ahmed**

Court registrar

*Certified true copy*

*Done at Kigali, on 10/09/2019*

Jerôme IMANIRAHARI [signed and stamped]

[Executory Formula]