

THE SUPREME COURT SEATING IN KIGALI, DECIDING COMMERCIAL MATTERS, DECIDES IN A PUBLIC HEARING, CASE RCOMAA 0028/18/CS\_AS FOLLOWS.

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**PARTIES:**

**APPELLANT:** Rwanda Revenue Authority (RRA) on behalf of its Commissioner General.

**RESPONDENT:** SONARWA GENERAL INSURANCE COMPANY Ltd, on behalf of its Managing Director, operating in Nyarurembo Village, Kiyovu Cell, Nyarugenge Sector, Nyarugenge District, Kigali City.

**MATTER OF LITIGATION:**

- Withholding tax on reinsurance premium charged on SONARWA Ltd for Fiscal Year 2009 equivalent to Frw 68,552,976 and for Fiscal Year 2010 equivalent to Frw 227,463,774;
- Withholding tax equivalent to Frw 105,010,562 charged on SONARWA Ltd as 'management fees';
- VAT equivalent to Frw 126,012,696 charged on SONARWA Ltd, as 'management fees';
- Deciding that the tax on professional income for Fiscal Year 2010 be calculated by deducting the tax paid by SONARWA Ltd which is equivalent to Frw 72,575,967;
- Expenses equivalent to Frw 225,762,547 for Fiscal Year 2009 and other expenses equivalent to Frw 211,323,158 for Fiscal Year 2010;
- Counsel fees equivalent to 10% of the tax imposed contrary to the laws;

**SUBJECT MATTER:**

- Appeal against Case RCOMA 0082 /14/HCC rendered by the Commercial High Court on 12/03/2014
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**I. CASE SUMMARY**

1. A fiscal audit was conducted in SONARWA GENERAL INSURANCE COMPANY Ltd for Fiscal Years 2009 and 2010 and it was charged a tax equivalent to Frw 1,131,862,367 and was granted a VAT refund worth Frw 135,872,417. SONARWA filed appeal to the Commissioner General for Taxes against this tax, after examining its appeal, he decided that it should pay a tax equivalent to Rwf 1,063,541,589. Dissatisfied with this decision, SONARWA filed a case with the Commercial Court of Nyarugenge requesting removal of all the taxes including the withholding tax on reinsurance premium charged for Fiscal Year 2009 equivalent to Frw 68,522,976, that of Fiscal Year 2010 equivalent to Frw 227,463,774,

withholding tax equivalent to Frw 105,010,582 charged as management fees, VAT equivalent to Frw 126, 012,696 calculated by deducting the tax already paid equivalent to Frw 72,575,965;

2. The Commercial Court of Nyarugenge rendered Case No RCOM 0973/13/TC/NYGE on 10/10/2014, deciding that the claim filed by SONARWA is legally grounded for certain aspects, that it had to pay Frw 68,552,976 as tax for Fiscal Year 2009 and Frw 227,463,774 as tax for Fiscal Year 2010, all for the withholding tax charged for Services of reinsurance, and the withholding tax on the management fees equivalent to Frw 105,010,582, but with removal of the VAT worth Frw 126,012,696 charged as management fees and that charged on professional income worth Frw 72,575,965, and also ordered SONARWA to pay a provisional fine towards its income tax worth Frw 200,000 for delaying judicial proceedings;
3. SONARWA lodged appeal to the Commercial High Court, RRA also lodged a cross appeal and the Court rendered the judgment on 12/03/2014, deciding that the appeal lodged by SONARWA was legally grounded for certain aspects, that the withholding tax of 15% appealed against by SONARWA charged on reinsurance premiums for Fiscal Year 2009 which was equivalent to Frw 68,552,976 and that for Fiscal Year 2010 which was equivalent to Frw 227,463,774 charged as management fees be removed. The court decided that the withholding tax contested in the appeal lodged by SONARWA, worth Frw 105,010,582 charged as management fees is maintained, that the fine for delaying the case proceedings amounting to Frw 200,000 which SONARWA had been charged, be removed. The Court decided that cross appeal filed by RRA is legally grounded, that the VAT which is equivalent to Frw 126,012,696 charged on SONARWA as management fees be maintained, that no change be made on the professional income tax charged on SONARWA, and is to be maintained. The court ordered that the case filing fee worth Rwf 12,700 be paid by SONARWA.
4. RRA lodged appeal to the Supreme Court, arguing that the Judge decided that *'reinsurance' is not a service* and that *even if it were a service, the withholding tax of 15% could not be applied*, while RRA thinks that what the Judge decided was actually not true. SONARWA also filed a cross appeal.
5. The case hearing was conducted in public on 22/11/2016, with Rwanda Revenue Authority represented by Me BYIRINGIRO Bajeni, while SONARWA Ltd was represented by Me NSENGIYUMVA Abel.

## II. LEGAL ISSUES AND THEIR ANALYSIS

### A. APPEAL BY RRA

#### *Determining whether 'reinsurance' is a service that is taxable*

7. Me BYIRINGIRO Bajeni argues that their object of litigation is knowing whether 'reinsurance' is a service, that the Judge said that 'reinsurance' is not a service and that RRA finds that 'reinsurance is a service that must be taxable for withholding tax of 15%, based on Article 1 of the Law No 20/75 of 20/05/1975 governing insurance, whereby this article provides that insurance contract, whereby the insurer undertakes to cover the insured party, but upon payment of a fee, explaining that '*reinsurance*' is an insurance service, the insurance company is given by the reinsurance company to be able to operate without heavy losses, which makes it clear that reinsurance must be charged for tax because that service is not a gratuity since it aims to seek for other support from the third party, meaning that the agreement for which the insurer undertakes to perform for the third party is an insurance while reinsurance is a service of insurance, the insurer gets from the reinsurer to be able to conduct its operations without sustaining any heavy loss, and that laws provided that any service provided is taxable by 15%.
8. Me BYIRINGIRO Bajeni further says that another indication that 'reinsurance' is a service and is taxable by 15%, is the document he submitted to the Court, indicating that the agreement between RRA and all insurance companies operating in Rwanda in the meeting which brought them together on 20 May 2014, whereby they mutually agreed that 'reinsurance' is a service that is taxable by 15%, as provided for by Article 51,4<sup>o</sup>, of the Law No 16/2005 of 18/08/2005 on direct income tax. He further says that this corroborates with the requirements of the National Bank of Rwanda in the last paragraph of its Regulation No 05/2009 of 29/07/2009 on licensing and other requirements for carrying out insurance business, but which was also disregarded by the Court. In addition, he says that SONARWA misinterprets issues because Article 13 of that Regulation provides that *a licensed insurer shall operate with a reinsurer*, it therefore does not state that an insured party is the one to whom service is provided because he/she does not even know that there is a reinsurer.
9. Me NSENGIYUMVA Abel says that collaboration with reinsurance companies is a directive of the National Bank of Rwanda (BNR) that Article 13 of its above Regulation 05/2009 of 29/07/2009, states that any single risk which comprises more than five per cent (5%) of the capital of the insurer must be reinsured, that no person is licensed to be insurer unless he/she operates with reinsurer, that the fact that BNR made it a requirement for being licensed as an insurer, is the basis for arguing that 'reinsurance' is not a service. He says that the term *operates with* used in this Article 13 above indicates that the two parties namely the insurance company and the reinsurance company jointly cover the same thing because the item insured under an 'insurance' and 'reinsurance' is the same thing, because the premium received by the first insurer and that which is received by the reinsurer all come from one same person who seeks insurance coverage, that the interests that SONARWA may have in taking insurance on an item covered by insurance is that it is assisted in payment in case of any accident.

10. Me NSENGIYUMVA Abel went as far as saying that he accepts that 'reinsurance' is a service, but a service that is not provided to SONARWA, but rather provided to the insurance subscriber, and that even if it was to treat 'reinsurance' as a service that was provided to SONARWA, no tax of 15% should be withheld on the amounts it may have been paid for that service, as foreign companies do not pay income tax in Rwanda, that it was approved (namely that foreign companies do not pay any income tax in Rwanda) by the Commissioner General of Rwanda Revenue Authority, in the letters he addressed to FINA BANK and SINA Gerard and even the letter the National Bank of Rwanda wrote to KCB.
11. Me NSENGIYUMVA Abel also says that no withholding should be possible, because withholding is done at the time of payment, but that regarding this issue nor payment was made, because at the close of the fiscal year, consideration is made on each side what each company owes to another, for damages, another issue being that the withholding was not possible as far as no rule of the Commissioner General provided for in Article 51 of the Law on direct income tax was yet to be put in place.

### COURT FINDINGS

12. Concerning the issue of determining whether reinsurance is a service that is taxable by 15%, article 1 of the Law No 20/75 of 20/06/1975 governing insurance provides that insurance policy is a contract to which one of the contracting parties known as the insurer undertakes upon payment of a fee to pay for the other party known as the insured party or the co-insured party, in case he/she incurs one of the sinisters that have been provided for in the contract.
13. Article 51 of the Law No 16/2005 of 18/08/2005 on direct income tax provides that the withholding tax of 15%, *is levied on the following payments made by resident individuals or resident entities including tax-exempt entities: ... 4° service fees including management and technical service fees.....* Paragraph 2 of this article stipulates that *'The withholding agent is required to file a tax declaration based on procedures prescribed by the Commissioner General of Rwanda Revenue Authority and transmit the tax withheld to the Tax Administration according to paragraph One Article within fifteen (15) working days after the tax is withheld'*.

14. Article 13 of the Regulation No 05/2009 of 29/07/2009 of the National Bank of Rwanda on licensing and other requirements for carrying out insurance business, provides that *A licensed insurer shall operate with a reinsurer and shall submit its reinsurance strategy and a copy of its reinsurance agreements to the Central Bank for review.* While Article 4 of the Commissioner General rules no 009/2010 of 03/09/2010 implementing the Law n° 24/2010 of 28/05/2010 modifying and complementing Law n° 16/2005 of 18/08/2005 on direct tax on income provides that *'All services fees are subject to withholding tax of 15% except the transport service'*.
15. The case file indicates that in a meeting held on 20 May 2014, which brought together representatives of insurance institutions in Rwanda and the Deputy Commissioner General for Taxes and also Commissioner General in charge of Corporate Services, SONARWA which was then represented, and on the agenda there was this item *'improving taxation of reinsurance services*, in this meeting, as indicated in its minutes, it was highlighted that each of the representatives of those insurance institutions, agreed that 'reinsurance' is a service that is taxable by 15% as provided for by the Law No 16/2005 of 18/08/2005 on direct income tax.
16. The Court notes that when it consolidates the provisions of Article 52, 4° above, the Law No 16/2005 of 18/08/2005 on direct income tax and the BNR Regulation and the Rules of the Commissioner General for Rwanda Revenue Authority also highlighted above, it is evident that 'reinsurance' is a service that must be taxable by 15% because the provisions in point 4° of Article 51 of the Law No 16/2005 of 18/08/2005 on direct income tax above, concern all operators who provide service except transport services, and that SONARWA deals in these services, and that the counsel representing it in this case hearing agrees that 'reinsurance' is a Service.
17. The Court notes that the allegations of the counsel representing SONARWA that it should not be subject to a withholding tax of 15% on premiums paid for the service of 'reinsurance' , are in contradiction with the provisions of Article 1 of the Law No 20/75 of 20/6/1975 governing insurance as stated above, explaining that the purpose of 'reinsurance' is to ensure that when the insurer incurs sinisters in the provisions in the contract entered into with the reinsurer, the latter will reimburse him, thus preventing him/her from incurring a heavy loss. The Court notes therefore that the service of 'reinsurance' is not provided to the insured party, but rather to the insurer who is SONARWA, which therefore had the obligation to retain the withholding tax on the payment of that service, it is then liable for its failure to do so for further declaration with a view for its payment.

18. The Court further notes that the allegations of the Counsel representing SONARWA according to which no withholding tax of 15% should have been charged on the amounts it may have paid to IGI for the service of 'reinsurance' because IGI is not a company operating in Rwanda that was taxable since foreign companies do not pay income tax in Rwanda, are baseless, because the tax which is being contested is not an income tax, but rather a withholding tax on amounts of money paid on the service of 'reinsurance', and in accordance with the provisions of Article 51 of the Law No 16/2005 of 18/08/2005 on direct income tax, that tax must be withheld regardless of the person who provided the service. The fact that IGI received income on the service of 'reinsurance', it had to be charged for the withholding tax of 15% on the income it realised, the fact that SONARWA did not withhold it whereas it was so required by the Law is the very reason as to why it must be liable for payment of that tax.

#### 19. CROSS APPEAL FILED BY SONARWA

*a) Determining whether the exception raised by RRA that the appeal of SONARWA on the article related to management fees was not within the competence of the Supreme Court*

20. Me BYIRINGIRO Bajeni says that in filing the cross appeal, SONARWA was seeking examination of issues related to management fees and that for this article, it lost the case on the first degree and on the second degree for the same grounds, that in point 20 of the judgment rendered by the Commercial Court of Nyarugenge, SONARWA indicated in its records that the 'management fees' for which it was paid, consideration should be made of Article 2 of the Law on evidence and its production, while in the judgment rendered by the Commercial High Court, point 12, the Court maintained that SONARWA does not say that that tax was not in place whereas it is indicated in its records.

21. Me NSENGIYUMVA Abel says that the allegations by the counsel representing RRA are not in conformity with the provisions of Article 28 of the Organic Law No 03/2012/OL of 13/06/2012 determining the organisation, functioning and competence of the Supreme Court, paragraph 5, because SONARWA did not lose the case twice for the same reasons, because in the cross appeal they filed there are issues related to VAT taxes and management fees, and does not accept that they lost the case twice because the VAT tax was not included and requests the Court that this exception should be examined even if it is evident that it reached the Court on 18/11/2016, and requests that when examining issues related to VAT, the Court will notice that 'the conditions for payment and invoicing' were non-existent.

#### COURT FINDINGS

22. Article 27, paragraph 5, of the Organic Law No 03/2012/OL of 13/06/2012 determining the organisation, functioning and competence of the Supreme Court provides that a case lost by a party on the first level and the second level for the same grounds, shall not be appealable before the Supreme Court.

23. The Supreme Court finds that, with no need to proceed with the analysis conducted by the previous two Courts, the allegation of the counsel representing RRA according to which the issue relating to the tax worth Frw 105,010,582 charged on SONARWA for the amounts it was paid in relation to 'management fees' should not be examined because it lost the case on it at the first degree and the second degree for the same grounds, are baseless, because the above law provides that a claim that is not within the competence of the Supreme Court is the one related to the case lost by the party for the same grounds both at the first and the second instance, this is therefore not an issue of the judgment for which the party lost the case for the same grounds in the first degree and in the second degree. Therefore, the exception raised by the counsel representing RRA on the cross appeal filed by SONARWA on matters relating to the tax of 15% withheld on the amounts referred to as management fees is therefore not legally grounded.

*b) Determining whether SONARWA should not have been subject to a withholding tax of 15% of amounts referred to as management fees*

24. Me NSENGIYUMVA Abel says that nothing indicates that there is an amount to the tune of Frw 177,798,673 and another amount worth Frw 259,745,418 which SONARWA ever paid to Industrial and General Insurance (IGI) for FY 2009, that the Judge ordered that SONARWA should pay a withholding tax of 15% on any amounts referred to as 'management fees' (point 12 on the case judgment which is the subject of appeal, based on the mention in the statements of accounts of SONARWA that a certain amount has been paid. He said the piece of paper referred to as the book of accounts is not an acceptable statement of account and what is mentioned on that piece of paper is nowhere to be seen in what SONARWA declared to Rwanda Revenue Authority. He says that in the audit of SONARWA for FY 2009 and FY 2010, there is no such notice in those FYs, SONARWA declared that it paid management fees because no compensation was ever made, and that it does not appear anywhere in the cash fund or on any account that some amounts of money were paid, that the payments for FY 2009 are visible from page 2 to page 4 of the notice of 6//6/2013 referred to as 'the final notice of assessment', while the payments made for FY 2010 appear from page 14, of this final notice of assessment. He further say that if payment were ever made, under no circumstance should SONARWA not be informed of the expenses to the tune of Frw 503,175,705 an amount equivalent to what RRA paid to IGI plus a tax of 15% which it could have withheld as this could relieve it off the tax on income worth Frw 150,952,711 and penalties equivalent to Frw 75,476,355 altogether totalling Frw 226,429,066.

26. Me NSENGIYUMVA Abel recalled that the statement of accounts is only valid when it has been approved by those competent to do so as provided for by Article 7 of the Ministerial Order No16/2005 of 18/08/2005 on direct income tax, and that when you consider the accounts you find that nothing indicates there is no money out towards payment for the 'management fees', hence concluding that the final notice of assessment the Judge took as being the statement of accounts was not worth to be based on because it is nowhere written that any payment was made to IGI by SONARWA,

on the contrary he questions as to why Rwanda Revenue Authority did not recover from SONARWA the tax accruing from the amount worth Frw 174,029,430 which are visible on that final notice of assessment. He says that even if there were any payment SONARWA made to IGI, no tax of 15% would be withheld because there was no permanent establishment IGI has in Rwanda since it is a foreign company, meaning that it should not pay any income tax in Rwanda which also explains that it should not be subject to deduction of any advance on income tax of 15%.

27. Me BYIRINGIRO Bajeni, arguing his case in defence on this issue, says that the tax on 'management fees' is necessary because when deducting the tax, the auditors found those fees in the statement of accounts of SONARWA, that this is sufficient evidence to prove that such payment was indeed made, and that SONARWA should have withheld 15% on that payment as provided for by Article 51 point 4 of the Law No16/2005 of 18/08/2005 above, and that 15% is not an advance on the income tax as alleged by SONARWA since that advance is provided for by Article 43 of that Law cited above.

### COURT FINDINGS

28. Article 53 of the Law No 16/2005 of 18/08/2005 on direct income tax, provides that a withholding agent who fails to withhold tax in accordance with this law is personally liable to pay to the Tax Administration, as provided for by paragraph 2, Article 48 of this law, the amount of tax which has not been withheld including penalties and interest on arrears. However, the agent is entitled to recover this amount from the payee excluding the associated fines and the interest on arrears.
29. Article 23 of the Law No 15/2004 of 12/06/2004 on evidence and its production provides that '*..... Books of merchants can be admitted as evidence against the merchants themselves...*'
30. As indicated in Case No RCOM 0973/13/TC/NYGE on page 4, paragraph 15, SONARWA accepted that an amount worth Frw 177,798,673 and an additional amount of Frw 259,745,418 subjected to a tax as 'management fees' by RRA is equivalent to the expenses so deducted upon declaration that it was done by misrepresentation, because no such payment was ever made.
31. The Court finds that all the pieces of evidence based upon by Rwanda Revenue Authority in charging SONARWA a withholding tax on management fees was a result from the books of SONARWA during the time of the audit, therefore, the allegation of the counsel representing SONARWA that such payment did not occur should not be taken as grounded based on Article 23 of the Law No 15/2004 of 12/06/2004 on evidence and its production which provides that '*..... Books of merchants can be admitted as evidence against the merchants themselves, therefore SONARWA should not be exempted from paying the tax of management fees*'.

*c) Determining whether SONARWA was unduly charged a VAT tax on management*

32. Me NSENGIYUMVA Abel says that the amount on which SONARWA was charged a withholding tax was also subject of a VAT deduction contrary to the law, because allegedly the tax was charged whereas no payment was made to IGI, and that it never received any invoice. He further explains that in Article 20 of the Law No 06/2001 of 20/01/2001 establishing the value added tax mentions that a value added tax is payable when a VAT registered taxpayer was given an invoice or a tax declaration relating to the services rendered or when the registered taxpayer received payment for the services rendered, SONARWA should then be charged a VAT on 'management fees' in accordance with this article 20 if it is proved that there is any invoice received from the registered taxpayer ( who could be IGI), and notes that there is need to appoint an audit expert who would be able to thoroughly analyse the expenditures SONARWA may have made.
33. Me BYIRINGIRO Bajeni says that if amounts of money appear in the books of SONARWA as payments, he finds that the requested audit expert is not needed because it is not an issue of misrepresented financial statements, but rather an issue related to the piece of evidence to determine whether such payment was ever made.

**COURT FINDINGS**

34. *Article 2 of the Law no 06/2001 of 20/01/2001 establishing the value added tax provides that the law referred to in article one: establishes consumption tax on some imported and locally manufactured product.*
35. *Article 20 of that Law provides that a tax is levied when goods or services are consumed (paragraph 1.a). Concerning services, they are assumed to have been consumed when those services were truly carried out (paragraph 1.b). When services are permanent following a decree or contract providing that payment is done in instalment, those services are deemed to have been provided in successive moments of that period as determined by a decree or a contract and each performance of a service is deemed to have occurred within the time whichever comes before the other among the following: i) when a registered taxpayer has made an invoice or declaration of value added tax for that service provided; ii) when a registered taxpayer has received payment for the service rendered... Whereas article 29 of that Law provides that.... '(2) Subject to the provisions of article 9 (d), 10 (2) and any other article of this Law, payment of a tax for imported services is done by a buyer as part of levying a mixed tax. The tax must be paid in accordance with article 20 of this Law. The Commissioner General may issue directives concerning some specific examples in order to successfully implement the contents of this paragraph...'*
36. The Court finds that the Counsel representing SONARWA does not contest that it can pay VAT on 'management fees', but can pay it if it is proven that there is payment it made or there is an invoice it received from a registered taxpayer. Nevertheless, as explained above, the books of accounts have indicated that there is a payment it made. And as Article 29 of Law No 06/2001 of 20/01/2001 above provides, it is SONARWA which had the obligation to deduct tax on IGI which provided service to it, since it did not deduct that tax, it must therefore be accountable for payment of that tax, and hence the tax charged must be maintained.

**III. DECISION OF THE COURT**

37. DECLARES that the appeal lodged by Rwanda Revenue Authority is legally grounded.
38. DECLARES that the withholding tax of 15% charged on SONARWA's reinsurance premiums for FY 2009 worth Frw 68,552,976 and for FY 2010 worth Frw 227,463,774 must be maintained.
39. DECLARES that the cross appeal lodged by SONARWA falls within the competence of this Court, but is not legally grounded.
40. DECLARES that the withholding tax worth Frw 105,010,582 charged on SONARWA as management fees, is maintained.
41. DECLARES that the withholding tax worth 126,012,696 charged on SONARWA as management fees is maintained.
42. ORDERS SONARWA Ltd to pay case filing fee equivalent to Frw 100,000.

**SO ORDERED AND PRONOUNCED IN THE PUBLIC HEARING OF 06/01/2017**

sé

MUKANYUNDO Patricie

Presiding Judge

sé

KAYITESI R. Emily

Judge

sé

NYIRANDABARUTA M. Agnès

Judge

sé

UWARUGIRA Jean -Baptiste

Court Registrar

*Certified copy of the original*

*Done at Kigali, on 14/03/2017 Jerome IMANIRAHARI [Signature and Court's Stamp]*