

THE SUPREME COURT, ADJUDICATING COMMERCIAL MATTERS, DECIDES IN A PUBLIC HEARING, ON 03/11/2017, CASE No. RCOM AA 0021/15/CS AS FOLLOWS:

APPELLANT:

Rwanda Revenue Authority (RRA) for and on behalf of its Commissioner General

RESPONDENT:

RUTAGARAMA Alexandre, son of **RUTABINGWA** and **KARAGIRE**, residing in Kinunga Village, Gikondo Sector, Kicukiro District, City of Kigali

MATTER OF LITIGATION:

- Value Added Tax (VAT) equivalent to RwF 87,401,738;
 - Counsel fees equivalent to RwF 1,000,000.
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I. CASE SUMMARY

1. **RUTAGARAMA Alexandre** filed a claim seeking removal of the Value Added Tax (VAT) charged by Rwanda Revenue Authority (RRA) on maize flour sold after purchasing it from **MINIMEX**, arguing maize flour was VAT exempted. He declares that he lodged informal appeal to the Commissioner General for removal of the tax but his request was rejected with justification that the exemption concerns **MINIMEX** factory, that **RUTAGARAMA** should have charged VAT tax on customers, and that said tax was charged and declared, therefore making him liable to pay that tax.
2. In Case No. **RCOM 0966/14/TC/NYGE** rendered on 08/14/2014, the Commercial Court of Nyarugenge ruled in favour of removal of the VAT payable by **RUTAGARAMA Alexandre** on maize flour sold following purchase from **MINIMEX**, and ordered RRA to pay him RwF 500,000 as Counsel Fees.
3. **RRA** filed appeal with the Commercial High Court, arguing that **RUTAGARAMA Alexandre** should not have been granted removal of the VAT because the flour he whole purchased from **MINIMEX** was not exempted as the exemption applied only to **MINIMEX** as a factory, and that

even if court would rule that RUTAGARAMA Alexandre should not pay that tax, does not exempt him from declaring and paying the tax thus charged.

4. Court decided this Case No. RCOMA 0010/HCC on 26/02/2015, declaring RRA's appeal not legally grounded, that the judgment in case No. RCOM 0966/14/TC/NYGE rendered by the Commercial Court of Nyarugenge on 08/04/2014 remains unchanged. In so deciding, the Court explained that the Law on Value Added Tax, provides that this tax applies to taxable goods and services, that it cannot therefore be exempted on MINIMEX but rather can be exempted on its goods and services, hence exemption applied to the flour manufactured by this factory.
5. Court elaborated that the fact that RUTAGARAMA charged VAT, RRA is not requesting him to pay it because it fails to provide evidence of a law authorizing it to collect taxes charged contrary to the law, while for other goods on sale for RRA argues he did not pay VAT, Court sees this as a new claim not worth examining at appellate level.
6. RRA lodged appeal to the Supreme Court arguing that the Commercial High Court ruled that MINIMEX Flour was exempted from VAT not MINIMEX as a factory, and that seized Court disregarded the fact that even if tax exemption would only apply to flour, does not relieve RUTAGARAMA of his liability to pay the tax thus charged because it relates to VAT on while purchase price it wrongly claimed was charged by MINIMEX. Its appeal was also triggered by Court's decision not ordering him to pay VAT charged of maize flour sold.
7. Court first examined the objection for Court's lack of competence raised by RUTAGARAMA, in a related previous judgment rendered on 10/03/2017, Court noted this objection was invalid, judgment on merits was heard in public on 16/05/2017 and on 28/06/2017, with RRA represented by Me BYIRINGIRO Bajeni while RUTAGARAMA was represented by Me NSENGIYUMVA Abel.
8. During case hearing of 28/06/2017, RRA representation saying it abandoned the first ground for appeal concerning determining what was exempted from VAT, but instead consideration should concern whether the maize flour was exempted from tax, which would lead to removal of the tax levied against

RUTAGARAMA, along with the issue of value added tax RUTAGARAMA deducted on his flour customers and compensation claimed by RRA.

9. In a related previous judgment rendered on 28/07/2017, Court noted the necessity to resume case hearing for RRA to appoint a tax officer knowledgeable in matters related to value added tax, for Court to seek clarifications on the tax for which RUTAGARAMA Alexandre seeks removal, and to consider the contents of the decision dated 07/08/2014 as made by the Commissioner General.
10. Case hearing resumed on 20/09/2017, with the same representations as earlier on, also present was HABİYAMBERE Aimable, Commissioner for Domestic Taxes, who presented to Court the clarifications needed, and RRA representation in this hearing declared abandoning the ground for appeal on issue related to value added tax in respect of which he argued RUTAGARAMA deducted from customers who bought maize flour he purchased from MINIMEX.

II. ANALYSIS OF ISSUES IN THIS CASE

1. **Determining whether MINIMEX maize flour being Value Added Tax (VAT) exempted would lead to removal of the tax charged on RUTAGARAMA after an audit conducted by RRA**
11. Me BYIRINGIRO BAJENI first explains how VAT operates, that it is paid by the end consumer, the responsibility of a VAT registered business owner being to deduct that tax for submission to RRA, while deducting also a downstream VAT and an upstream VAT (*TVA en montant - TVA en aval*). He further explains that when declaring value added tax (VAT), two errors are possible: the first error is when tax deducted is not paid or is paid at a lower rate or not simply deducted despite so required by law, the second error occurs when a taxpayer recovers unduly downstream VAT or was never charged for VAT. He explains that in such a circumstance, the tax administration rectifies it by authorizing to charge tax at wholesale price, impact thereof being increase in the tax due for payment because the wholesale price reduces tax due, therefore, in such a situation, taxpayer falls liable for unpaid tax along with penalties.

12. In respect of this case, he argues that, as explained at the first instance, the tax charged on RUTAGARAMA does result from his failure to deduct VAT on customers, instead it results from MINIMEX invoices he used to seek refund of VAT on whole sale price whereas the purchased maize flour was VAT exempted, meaning that he was not VAT charged, and should therefore not seek its refund using those invoices.
13. He further explains that the disputed tax equivalent to RWF 83,182,377 accrues from Rwf 52,291,893 RUTAGARAMA indicated as VAT charged on purchase price from MINIMEX whereas the maize flour is VAT exempted, plus related penalties, as he admitted failing to declare it as upstream VAT. He proceeds explaining that the fact that all the tax charged is equivalent to Rwf 87,401,738 implying that the difference of Rwf 4,219,361 accruing from rectifying the error made on other sales. He also said that in the decision the Commission General for RRA (p.6) communicated to RUTAGARAMA according to which said amount was considered to be professional expenses for fiscal years 2010, 2011 and 2012, and such amount would not be accepted as an upstream tax (purchase price tax).
14. He realizes that the tax charged on RUTAGARAMA does not accrue from his failure to deduct VAT from his customers on maize flour from MINIMEX as claimed in his claim, instead it originated from his indicating that tax on purchase from MINIMEX on goods deductible for tax, a tax procedure rectified by auditors.
15. Counsel representing RUTAGARAMA says that some issues are reintroduced during case hearing despite prior coverage, that the remaining issue is to determine whether exemption concerned the factory or maize flour it produces because all other issues were solved in the case adjudicated by the Commercial Court of Nyarugenge.
16. He states that RUTAGARAMA admits that in his tax declaration, he indicated that input VAT tax was applied to him when purchasing from MNIMEX, however this was rectified, and this issue was closed and is no more an issue with the Commissioner General, and is ready to pay, should RRA determine the amount of tax RUTAGARAMA recovered as accruing from MINIMEX maize flour, clarifying however, that the tax worth Rwf 87,000,000 relating to a rectification RRA made, its representation should not resurface the issues related to MINIMEX.

17. He further explains that they took the turnover related to maize flour from the taxable turnover, the remaining balance being RwF F83,000,000, RUTAGARAMA agreed to pay it, but found out this tax was not accruing from VAT input, he gave an example of rejected VAT input for the month of 12/2010 worth RwF 465,253, whereby fines and penalties are worth RwF 1,557,153, whereas applicable penalties are a 100% rated which would not yield RwF 1,557,153, but instead notes that the tax of RwF 83,000,000 accrues from the fact that RRA considered maize flour was taxable, especially as 98% of the sales realized by RUTAGARAMA are made up of MINIMEX maize flour, therefore no impact on VAT input would affect the business in general, because other goods were estimated at a value of RwF 12,000,000, on the contrary Court should decide that VAT input on these goods (as a principle), hence tax equivalent to RwF 4,146,928 should be the amount to be paid by RUTAGARAMA.
18. HABİYAMBERE Aimable clarified to the Court that RUTAGARAMA purchased maize flour from MINIMEX at the time no VAT was applied to MINIMEX, but he would deduct VAT on purchases he made as if he had been charged for that VAT, which resulted in him being charged the tax which is now the matter of litigation.
19. Regarding the question raised by the representation of RUTAGARAMA on VAT for the month of 12/2010, he explained that all the turnover was equivalent to RwF 32,688,941, VAT collected is worth RwF 5,884,009, VAT mentioned as paid on input tax is equivalent to RwF 5,352,712, while deductible VAT if he had properly applied the tax procedure amounts to RwF 4,887,458, that upon adjustment, they found out that the tax due was RwF 973,220, plus penalties worth RwF 977,000, tax amounting to RwF 1,557,153. He further explained that rectification made by RRA following RUTAGARAMA's tax declaration, is to disclose undue deducted VAT, the adverse effect being the tax charged and penalties imposed.
20. As regards the letter by the Commissioner General in reply to RUTAGARAMA's informal appeal, whereby he wrote that appellant should be granted removal of VAT for expenses incurred for FY 2010, 2011 and 2012 what he termed 'VAT input' equivalent to RwF 52,291,894 on his purchases from MINIMEX, HABİYAMBERE Aimable clarified that the fact that RUTAGARAMA showed that he was charged for VAT in MINIMEX,

which was not true, made RRA to determine that VAT and imposed penalties on him, but in rendering justice to him, the Commissioner General included that money in the expenses, counsel representing RUTAGARAMA replied in turn, arguing that this was the right procedure because it is provided for by the law governing tax procedure.

21. Regarding clarifications given by HABİYAMBERE, RUTAGARAMA's representation reacted saying no error was made by RRA, instead, what needs to be taken into account is all the turnover less the turnover of maize flour sales, and to apply tax on the remaining turnover.
22. He further argued that RRA's abandonment of the ground for appeal related to VAT it claimed RUTAGARAMA had deducted on maize flour sold, taxpayer is, in his opinion (counsel's), not answerable because he himself admits deducting VAT on maize flour, as a conclusion, he requests for appointment of an independent expert to determine the actual tax to be imposed on RUTAGARAMA because he and HABİYAMBERE disagree on where lies the problem, whereas counsel representing RRA argues that the suggested expert is not necessary because the whole issue was detailed in the tax declaration he made.

COURT FINDINGS

23. Article 26 of Law 25/2005 of 0/12/2005 on tax procedure, provides that *'When the Tax Administration discovers a miscalculation, a misrepresentation, an understatement of income or any other reason in the tax declaration or an assessment, it has the right to issue an adjusted assessment'*.
24. Article 3, paragraph one of Law No. 15/2004 of 12/06/2004 relating to evidence and its production, provides that *'Each party has the burden of proving the facts it alleges'*.
25. It is clear that in the cases previously decided, Courts assessed the issue of determining who and what was tax exempted between MINIMEX factory and maize flour manufactured by this factory, due to the fact that the claim filed by RUTAGARAMA, the latter argued that the tax imposed on him results from RRA's statement that exemption applied to the factory, not its maize product, even the counsel representing RRA pleads her case in the same line stating that tax exemption applied to food factories.

26. It appears also that in RRA's position, also proved that even if maize flour were regarded as tax exempted, would not lead to removal of the tax imposed of RUTAGARAMA because it accrues from invoices issued, proving that tax was charged on VAT when purchasing maize, and requested that such an amount be regarded as VAT input, a request later rejected by auditor because he had earlier indicated that maize flour was tax exempted.
27. Regarding the second question, the Commercial Court explained that the fact that RUTAGARAMA proved he was charged for VAT input by MINIMEX and invoices he issued to his customers indicate he deducted VAT, is no cause for him to be charged for tax exempted goods, rather only RRA has the capacity to rectify pursuant to article 26 of Law No. 25/2005 of 04/12/2005 on tax procedure¹.
28. It appears that, at appeals level, in the Commercial High Court, RRA revisited the issue of determining what/who was tax exempted between MINIMEX and maize flour it produced, but also indicated that when declaring value added tax, RUTAGARAMA deducted from tax payable relating to maize flour purchased from MINIMEX and personally admits he was never charged for that tax, nevertheless it is clear that this issue was not examined because only the issue to determine what/who was tax exempted and the issue of determining whether RUTAGARAMA should return VAT he charged on maize customers.
29. Court therefore notes that, at this instance, despite RRA's abandonment of its ground for appeal regarding what/who was tax exempted between MINIMEX and maize flour it produced, and the ground for appeal related to VAT he claimed RUTAGARAMA deducted on his maize sales, nothing prohibits assessing whether the origin of the tax imposed on RUTAGARAMA Alexandre is indeed a VAT input of which he claimed refund whereas no tax had been deducted by MINIMEX because this issue is among the grounds of RRA's appeal before this Court as evidenced by its pleadings.

¹ 'When the Tax Administration discovers a miscalculation, a misrepresentation, an understatement of income or any other reason in the tax declaration or an assessment, it has the right to issue an adjusted assessment'.

30. Court notes the document produced upon closing the audit, indicated that RUTAGARAMA regularly declared VAT input (upstream VAT) auditors indicated step by step the VAT input they rejected because the goods were tax exempted².
31. Through explanations furnished by counsel representing RRA regarding the amount of that Value Added tax, he disclosed that it was equivalent to RwF 52,291,893, which is also mentioned in the document of the Commissioner General in reply to RUTAGARAMA's appeal. Calculation of this tax includes 'fines' and penalties, and is equivalent to RwF 83,182,377. The fact that all the tax charged is worth RwF 87,401,738, counsel representing RRA explained that it means tax is equal to RwF 4,219,361 accrues from other items sold by RUTAGARAMA and was not the subject of a claim he filed related to tax related maize flour produced by MINIMEX.
32. Court notes that RUTAGARAMA Alexandre also admits that in the tax declaration he made, has indicated there was a VAT input charged on goods purchased from MINIMEX, and states a rectification was finally made such that when informal appeal was lodged to the Commissioner General that issue was no more, but fails to explain the different procedure used to make the rectification which procedure was different the procedure explained by the counsel representing RRA; after finding out there was a tax charged on VAT input on goods purchased from MINIMEX, which was not true, an adjusted assessment was done meaning that the rectification did not end with identifying the error in the document, instead is aimed at proving that the tax deducted from the amount of tax due for payment, because the procedure thus used by the taxpayer, would have made him reduce the tax he should have paid.
33. Court notes further that, the allegations by the counsel representing RUTGARAMA that the tax should be calculated based on all of the turnover less the turnover realized on maize flour should not be granted legal consideration because this would be as if the tax was to be charged on presently, whereas it was the tax that was determined following the tax declaration RUTAGARAMA Alexandre had made personally. In addition, he fails to indicate that in the total VAT input tax, disclosed as amount charged by MINIMEX, included any other type of tax.

² Non-deductible since the products are tax exempted.

34. Based on all the clarifications, Court notes that the ground for RRA's appeal is valid because the initial courts removed the tax RUTAGARAMA was charged basing their decision on the sole fact that maize flour was VAT exempted, but did not consider the issue of the VAT input he mentioned was charged on purchases from MINIMEX, which was not true, and is therefore to be maintained.

2. Damages claimed by RRA

35. Counsel representing RRA requested to be granted RwF 1,000,000 as legal fees and RwF 1,000,000 as counsel fees because even if the defence counsel is a State Attorney, is an advocate like any other and should be granted counsel fees, because if no litigations were brought in for hearing, posts of RRA advocates would be suppressed, and that their salary is commensurate with the duties discharged during legal representations.

36. The Counsel representing RUTAGARAMA argues that regarding the counsel fees, RRA's representation should indicate that some expenses were made in order for counsel to offer representation services, or that he would be denied his statutory salary if no representation services were offered, instead he thinks that given the monthly salary allocated to him, he should not seek counsel fees. As regards procedural fees, he states that Court should make a decision thereon based on evidence furnished.

COURT FINDINGS

37. Court notes that nothing restricts RRA from allocating counsel fees because it is up to this institution to hire paid employee to represent it before courts, this was also upheld by other cases where Court decisions granted to State Institutions counsel fees³. Furthermore, there are expenses made in legal representations including travel cost, therefore, at its sole discretion, Court grants RwF 1,200,000 as Counsel Fees and representation fees at all levels of representation, because the amount of RwF 2,000,000 claimed as compensation, is an overestimation.

³ Judgment in Case RCOM A 0035/14/CS pronounced on 24/02/2017 and Judgment in Case RCOM AA 00050/2016/SC rendered on 12/05/2017.

III. DECISION OF THE COURT

38. **Declares** the appeal lodged by RRA to be legally grounded.
39. **Decides** that the Tax RUTAGARAMA Alexandre was charged should not be removed.
40. **Orders** RUTAGARAMA Alexandre to pay to RRA RwF 1,200,000 as procedural fees and counsel fees.
41. **Rules** that the pronouncement in Case RCOMA 0010/15/HCC decided by the Commercial High Court of 26/02/2015 remains unchanged.
42. **Orders** that Court fees deposited be chargeable to RUTAGARAMA Alexandre.

SO ORDERED AND PRONOUNCED IN THE PUBLIC HEARING ON 03/11/2017.

NGAGI M. Alphonse	KANYANGE Fidélité	MUKANDAMAGE M. Josée
(Sé)	(Sé)	(Sé)
Judge	Presiding Judge	Judge

HABYARIMANA Marcel
(Sé)
Court registrar

Certified true copy

Done at Kigali, on 21/11/2017

Jérôme IMANIRAHARI [signed and stamped]