

TE COURT OF APPEAL SITTING IN KIGALI, ADJUDICATING COMMERCIAL MATTERS, DECIDES IN A PUBLIC HEARING, CASE RCOMAA No 00055/2018/CA ON 14/01/2019 AS FOLLOWS:

PARTIES DETAILS:

APPELLANT:

ECO POWER GLOBAL PRIVATE Ltd, operating in Nyamagabe District, Southern Province, B.P. 4715 Kigali.

RESPONDENT:

Rwanda Revenue Authority (RRA), with its headquarters at Kimihurura, Avenue du Lac Muhazi, B.P. 3987 Kigali, on behalf of its Commissioner General.

MATTER OF LITIGATION:

- Removal of tax equivalent to RwF 769,841,596 because it was charged contrary to the law.

SUBJECT MATTER:

- Appeal against Case RCOMA 0100/15/HCC rendered by the Commercial High Court on 17/04/2015
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I. CASE SUMMARY

- [1] ECO POWER GLOBAL PRIVATE Ltd was audited for Corporate Income Tax (CIT), Value Added Tax and Withholding Tax related to Fiscal Years 2008, 2009, 2010, 2011 and was charged a tax equivalent to RwF 776,399,155 and appealed to the Commissioner General, after examining its appeal, decided that it pays tax equivalent to RwF 769,841,596. Dissatisfied with the decision, ECO POWER GLOBAL PRIVATE Ltd filed a case with the Commercial Court of Nyarugenge requesting removal of the whole tax and related damages.
- [2] In Case No. RCOM 1146/13/TC/NYGE rendered on 11/06/2014, the Commercial Court of Nyarugenge found out that the claim filed by ECO POWER GLOBAL PRIVATE Ltd was legally grounded for certain issues, deciding it should not pay the entire equivalent to RwF 568,580,088.
- [3] Dissatisfied with the decision, Rwanda Revenue Authority appealed to the Commercial High Court arguing that the Commercial Court of Nyarugenge did not

exercise thorough scrutiny because it unduly removed withholding tax and value added tax. ECO POWER GLOBAL PRIVATE Ltd also filed a cross appeal contesting the corporate income tax charged for fiscal year 2008.

- [4] In Case No RCOMA 0100/15/HCC rendered on 17/04/2015, the Commercial High Court found out that the withholding tax equivalent to RwF 4,615,087 should not have been removed because it was based on Article 54, 4 of the Law No. 16/2005 of 18/08/2005 on direct tax on income, while for the value added tax worth RwF 54,475,492, and the withholding tax equivalent to RwF 69,069,037 and that of RwF 38,475,000, Court found that even though the agreement provided that some taxes would be paid by Government of Rwanda, no mistake was made by the tax officer when charging those taxes because he/she did so pursuant to laws, and laws should precede over the agreement ECO POWER GLOBAL PRIVATE Ltd entered into with Government of Rwanda. Court further noted that for issues related to removal of tax worth RwF 111,828,111, RwF 17,100,000 and RwF 47,367,392, ECO POWER GLOBAL PRIVATE Ltd is of the view that this tax originates from the services performed on its behalf, therefore it is its responsibility to respect legal requirements, meaning that the said tax should not have been removed.
- [5] Court proceeded with the cross appeal whereby ECO POWER GLOBAL PRIVATE Ltd requested that loss equivalent to RwF 1,396,034,615 incurred for FY 2011 should be replaced with profits worth RwF 973,792,000 as determined by Tax Officer in 2008, instead of being charged corporate income tax, and be taken as a loss worth RwF 422,242,615, and that there professional expenses that he wishes the tax officer should take into account when calculating tax payable, and noted that this justification for the appeal was not included in the elements examined by Commissioner General or the Court in the first instance, and ruled there was no basis for examining issues related to loss or deciding that there are professional expenses that were disregarded by the Tax Officer, Court decided that the ruling in Case No. RCOM 1146/13/TC/NYGE rendered by the Commercial Court of Nyarugenge on 11/06/2014 changes in all its provisions, ordering ECO Power Global Private Ltd to pay the whole tax for which he filed claim with the Commercial Court of Nyarugenge.
- [6] ECO Power Global Private Ltd appealed to the Supreme Court, its appeal was docketed as No. RCOMAA 00052/2017/CS, after the judicial system review, the case was transferred to the Court of Appeal pursuant to the provisions of Article 105 of Law No. 30/2018 of 02/06/2018 determining the competence of courts, case was docketed as No. RCOMAA 00055/2018/CA.

- [7] Case was heard in public on 18/12/2018, Eco Power Global Private Ltd was represented by Me NSENGIYUMVA Abel and Me ZAWADI Stephen, while Rwanda Revenue Authority was represented by Me BYIRINGIRO Bajeni.
- [8] Court first examined the objection raised by Me BYIRINGIRO Bajeni against admissibility of the appeal filed by Eco Power Global Private Ltd because the judgment appealed against was rendered on 17/04/2015, while the appeal was lodged on 23/07/2017, far beyond the period of one month provided for by laws. Eco Power Global Private Ltd argued that the Electronic Filing System (EFS) indicates the appeal was filed on 15/05/2015, that the Registrar General of the Supreme Court could not admit the appeal that was filed too late and that they proved it to the representative of Rwanda Revenue Authority during the pre-trial conference.
- [9] Court noted that the case file contained an EFS notification indicating that the appeal was made on 15/05/2015, and carried an attached letter by Me NSENGIYUMVA Abel who wrote he was filing appealing before getting a copy of the judgment, and further found there was a decision of the Registrar General acknowledging receipt of the claim because it was filed within such a timeframe as provided for by the law, also noted that Me TWAHIRWA Jean Baptiste who represented Rwanda Revenue Authority in the pre-trial conference had accepted that the appeal was received timely, and when Court decided while in the pre-trial conference, ruled that decision was based on provisions of Article 148 of Law No. 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, the appeal by Eco Power Global Private Ltd was timely lodged because the judgment appealed against was rendered on 17/04/2015 and filed the appeal of 15/05/2015, thus making the objection not legally substantiated, and ordered hearings to proceed.
- [10] Case hearing proceeded with the grounds for the appeal of Eco Power Global Private Ltd to determine whether it should pay the value added tax which the Commercial High Court maintained, to determine whether it was its responsibility to withhold tax for persons not registered with VAT in 2009, to determine whether 'the advance' on payment is withheld for tax purposes and to determine whether the Commercial High Court disregarded laws and denied to make any ruling on taxation of profits accruing from long term agreement.

II. ISSUES IN THIS CASE AND THEIR ANALYSIS

II.1. Determining whether Eco Power Global Private Ltd has the duty to pay the Value Added Tax and the type of appropriate penalty in case of failure to pay.

- [11] Me NSENGIYUMVA Abel and Me ZAWADI Stephen, representing Eco Power Global Private Ltd, argue that their client entered into agreement with Government of Rwanda to construct a hydropower plant with general interest, article 4, 1&2 of the agreement stipulates that Government of Rwanda shall be liable to pay entirely the value added tax for the purpose of decreasing the power price to the citizen, and was later confirmed by a letter dated 05/06/2019 by the Minister for Infrastructure reminding the Commissioner General for Rwanda Revenue Authority of the existence of the Agreement. They specified that even if previously they would request for removal of the Value Added Tax worth RwF54, 475,492; RwF 111,828,111; RwF 17,100,000; RwF 273,017,250; they omitted to do so, but requested for removal of RwF 11,137,810 for 2009, RwF 6,557,559 for 2010, RwF 78,628, 969 for 2011, altogether making a total RwF 96,324,338 and that the latter amounts are accurate because they are clearly mentioned in the letter of the Commissioner General. They concluded arguing that the penalty for failure by Eco Power Global private Ltd to charge value added tax on its customers should not affect the person who depleted the tax but should rather be an administrative fine as provided for by the law.
- [12] Me BYIRINGIRO Bajeni, representing Rwanda Revenue Authority, argues that Eco Power Global Private Ltd filed a claim contesting the amount of tax due, that in case it disregards the amounts with which it pleads its case with the Commercial High Court would mean that he abandons the grounds for which it filed appeal. He explained to the Court that, in the alternative, it would decide Eco Power Global Private Ltd, as VAT registered taxpayer, has the responsibility to draw invoices indicating VAT, the fact that it did not charge VAT while it was not exempted is a violation of the law punishable by a fine in article 63 of Law No. 25/2005 of 04/12/2005 on tax procedures. He further explained that a Tax officer is not answerable for the effects of the agreement entered into between Government of Rwanda and Eco Power Global Private Ltd to which he/she was not party.

COURT FINDINGS

- [13] Article 164 of the Constitution of the republic of Rwanda of 2003 revised in 2015 provides that: *'tax is imposed, modified or removed by Law. No exemption or reduction of a tax can be granted unless authorized by law'*.

- [14] Article 63, 2 of the Law No. 25/2005 of 04/12/2005 on tax procedures as modified and complemented to date provides that: *‘In the event of the incorrect issuance of a VAT invoice resulting in a decrease in the amount of VAT payable or in an increase of the VAT input credit or in the event of the failure to issue a VAT invoice, an administrative fine of one hundred percent (100%) of the amount of VAT for the invoice or on the transaction is imposed’.*
- [15] As for article 2, a) of the Law No. 06/2001 of 20/01/2001 establishing value added tax in force at the time of charging tax on Eco Power Global Private Ltd provides that that tax: *‘ is levied on goods and services performed in Rwanda and on goods, supplies and services imported’*, while articles 11 and 12 of that same Law provide that taxable are goods and services performed in Rwanda which are not exempted from tax with are imported or exported for price purposes whether performed by a personally VAT registered taxpayer, his/her partner or his/her employee.
- [16] Article 64 of the Law No. 45/2011 of 25/11/2011 governing contracts provides that: *‘.Contracts made in accordance with the law shall be binding between parties. They shall be performed in good faith. While article 113 of that law in paragraph one provides that: ‘Contracts shall have effect only on contracting parties. They shall not cause any prejudice to a third party and shall only benefit to him/her in case of provisions in favour of a third party’.*
- [17] The case file contains agreement entitled ‘Contract Agreement’ was entered into between Government of Rwanda represented by the Ministry for Infrastructures (Employer) and ECO POWER GLOBAL PRIVATE Ltd, in its article 14, 1 stipulates that :’ *The Employer shall directly pay all Value Added Taxes (VAT), customs’ dues and handling fees payable on equipment, material and other items imported to Rwanda by the Contractor for the purposes of meeting the Contractor’s obligations under the Contract, since the Employer is the ultimate consumer of all of these items. The said payments shall be made promptly by the Employer to the relevant authorities so that the Contractor can clear the items through Customs’ without any delays’.*
- [18] While Article 14, 2 of that Contract agreement, stipulates that: *‘The Employer warrants that the Contractor is not liable to pay VAT on the payments received by the Contractor from the Employer under the Contract and the Rwanda Revenue Authority (the Authority) will refund to the Contractor all VAT paid by the Contractor to civil contractors hired by the Contractor for the purposes of the Contractor within a period of xx weeks as stipulated in Rwandan law’.*

- [19] Court notes that the general principle governing tax laws in Rwanda and which was reiterated by the Supreme Court in Case Forest Company Volcanoes Gorillas (FCVG) Ltd vs. Rwanda Revenue Authority¹, is such that a tax is imposed, modified and removed by a law, and that it cannot be exempted or decreased unless done in such a manner as provided for by the law, the Constitution confirms this principle to ensure that tax is regularly imposed by a competent organ and for taxpayer to timely be aware that taxes must be paid, this principle implies that the contract agreement between Eco Power Global Private Ltd and Government of Rwanda cannot supersede or prevail over laws which grant responsibility to taxpayer to pay value added tax on services performed on his/her behalf or exempt Eco Power Global private Ltd from its responsibility to charge tax on invoices made when paying its customers.
- [20] Court further notes that in respect of the provisions of Article 64 and article 111 of the Law No. 45/2011 of 25/11/2011 governing contracts, Contracts shall have effect only on contracting parties. They shall not cause any prejudice to a third party and shall only benefit to him/her in case of provisions in favour of a third party. These articles make it clear that the agreement Eco Power Global Private Ltd entered into with the Ministry for Infrastructure without the knowledge nor involvement of the tax administration (tax officer) should not be invoked as a mechanism to obstruct tax officer to exercise his/her responsibilities vested in him/her by the law. The fact that Rwanda Revenue Authority is a public institution does not mean that every public institution has the powers and capacity to contract for the purposes of removing, decreasing of increasing tax, modifying the procedure for payment of the tax or modifying the type of the tax because such is the reason why all issues related to taxes and duties were transferred to this institution (the Authority), which in turn has the power and capacity, at its sole discretion, to influence or act in this respect and is itself not allowed to act as it pleases because, as reiterated above, in implementing the power, capacity and its autonomy, it should stay within such limits as established by the laws or their implementing regulations.
- [21] Court notes that provisions of the contract agreement Eco Power Global private Ltd entered into with Government of Rwanda which it invokes arguing that it should not pay value added tax, because Government of Rwanda committed to pay that value added tax, as a public institution, it should bear in mind the responsibility to which Government of Rwanda is committed under this contract agreement, nevertheless what ensues from this agreement is that Eco Power Global Private Ltd has the responsibility to mention on its invoices the amount of Value added tax, customs

¹ See judgment No. RCOMAA 00055 /2016/SC rendered by the Supreme Court on 29/09/2017, paragraph 20.

duties and the packing and unpacking prices (handling fees), for Government of Rwanda to bear their cost, that agreement grants Government of Rwanda the responsibility to immediately pay them the soonest possible and in conformity with legal provisions to enable Eco power Global Private Ltd to remove its equipment from bonded warehouse without delay.

- [22] Court also notes that Article 14, 2 of the Contract Agreement Eco Power Global Private Ltd entered into with Government of Rwanda makes it clear that Eco Power Global Private Ltd will not pay value added tax on amounts it will pay Government and that those amounts it will have paid to employees will be refunded to it, what should be made clear is not the fact that this tender was exempted to pay value added tax, but rather all the value added tax on invoices Eco Power Global Private Ltd issued to Government of Rwanda would be borne by Government of Rwanda, even other invoices issued to Eco Power Global Private Ltd by its customers who charged value added tax would be refunded to it, this making it clear that whatever the circumstances, any invoice whether made by or issued to Eco Power Global Private Ltd had to mention the value added tax, now therefore the manner in which the expense of that tax would be paid or reimbursed would be determined by the provisions of article 14, 2 of the Contract Agreement.
- [23] Court notes that as Eco Power Global Private Ltd issued invoices with no mention of VAT whereas it was not exempted from that tax constitute is a fault for failure to issue a VAT invoice punishable by one hundred percent (100%) of the amount of VAT for the invoice or on the transaction as provided for in Article 63, paragraph 2 of Law No. 25/2005 of 04/12/2005 on tax procedure.

II. Determining whether it was the responsibility of Eco Power Global Private Ltd to withhold tax on persons not registered with tax in 2009

- [24] Me NSENGIYUMVA Abel and Me ZAWADI Stephen, representing Eco Power Global private Ltd, argue that it did not have the capacity to manufacture equipment need to construct a hydropower plant, which is the reason why it first wanted to know their place of manufacture, their prices and their list, for submission to Government of Rwanda for further import in its name. They explain that payments to foreign suppliers were made by Government of Rwanda through National Bank of Rwanda, so Eco Power Global Private Ltd would not withhold tax in case it had not paid but rather withholding tax would be made by Government of Rwanda which managed the funds. They argued that Eco Power Global Private Ltd would not withhold the tax on suppliers of equipment in the country simply because there

was no legal requirements, especially as the first law to make such a provision was published in 2010.

- [25] Me BYIRINGIRO Bajeni, representing Rwanda Revenue Authority, argues that the structure of the agreement Eco Power Global Private Ltd entered into with Government of Rwanda indicates there is intervention of a third party which performs the services, these services were rendered to Eco Power Global Private Ltd and therefore cannot pretend it had no money yet it was paying, that it would regularly declare to Government of Rwanda an amount of tax of 15% withheld on each invoice as provided for by article 51, paragraph one of the Law No. 16/2005 of 18/08/2005, on direct taxes on income, which was applicable at the time of levying tax, therefore the pretext of Eco Power Global Private Ltd according to which no law was in place that related to taxation is a baseless allegation.

COURT FINDINGS

- [26] Article 51 of Law No. 16/2005 of 18/08/2005 on direct taxes on income applicable at the time of charging the contested taxes provides that: *‘A withholding tax of fifteen (15%) percent is levied on the following payments made by resident individuals or resident entities including tax-exempt entities: 1° dividends, except those governed by Article 45 of this law; 2° interests; 3° royalties; 4° service fees including management and technical service fees; 5° performance payments made to an artist, a musician or an athlete irrespective of whether paid directly or through an entity that is not resident in Rwanda; 6° lottery and other gambling proceeds.*

The withholding agent is required to file a tax declaration based on procedures prescribed by the Commissioner General and transmit the tax withheld to the Tax Administration according to paragraph one of this Article within fifteen (15) working days after the tax is withheld.

Paragraphs 1 and 2 of this Article are also applicable to non-resident individuals and non-resident entities for such payments that can be allocated to a permanent establishment which that person maintains in Rwanda’.

- [27] The case file indicates that in paragraph 30 of the judgment rendered by the Commercial Court of Nyarugenge, this Court explained that in charging the withholding tax of 15%, the Commissioner general based on article 51 of Law No.

16/2005 of 18/08/2005 on direct taxes on income, but this article was modified and complemented by Law No. 24/2010 of 28/05/2010, such that relying on the law that was published after the activities being taxed were implemented, this tax was charged contrary to the law because the law had no retroactive force empowering it to charge taxes on goods performed before it came into being.

- [28] Wording of case file, under paragraph 9 of the judgment in the case under appeal, indicated that the Commercial High Court had declared the grounds for appeal legally substantiated because the tax was charged based on Article 51, 4^o of Law No. 16/2005 of 18/08/2005 on direct taxes on income, this law was in force at the time of conducting a taxation exercise, and clarified that in the letter written by the Commissioner General dated 26/09/2013, ECO POWER GLOBAL PRIVATE Ltd was reminded that tax was not charged basing on whether it had made payments to persons not registered, instead it was a tax imposed on any payments it had made, regardless of whether those persons were registered or not.
- [29] Court notes that the taxation document dated 10/07/2013 indicates that tax was charged on payments done by Eco Power to local civil contractors not registered instead of goods and supplies mentioned in Article 8, point 7 of Law No. 24/2010 of 28/05/2010, these services being the same services as those provided for in point 4 of article 51, paragraph one of the Law No. 16/2005 of 18/08/2005 mentioned above, paragraph I of this article further states that the withholding tax of 15% is on the following amounts paid by individual persons residing in the country or corporate entities operating inside the country ‘including those not liable for tax’, hence, the fact that article 8, point 7 of Law No.24/2010 of 28/05/2010 later included this wording ‘natural persons or legal entities not registered with tax administration’ does not itself explain that that law that was used retroacts in case even failure to register as taxpayer is one of the reasons for not paying tax.
- [30] Court further notes that Eco Power Global Private Ltd deliberately says the services were rendered to it after identifying the site for the words it needs and informs the Ministry for Infrastructure for payment, therefore it cannot change its mind to say that it was not concerned by the provisions of article 51 of Law No. 16/2005 of 18/08/2005 on direct taxes on income under the pretext that Government of Rwanda made payments, such that it would rely on it to relinquish to Government of Rwanda its responsibilities as per the law to withhold the tax of 15% on invoices it transmitted to it, it should instead indicate that the invoices it issued mentioned that that tax was withheld such that Government of Rwanda, then making payments,

would have violated the legal requirements, all these allegations showing that its appeal in respect of this article is not legally grounded.

II.3. Determining whether 'advance payment' should be subject to withholding tax

- [31] Me NSENGIYUMVA Abel and Me ZAWADI Stephen, representing Eco Power Global Private Ltd, who argue that there is an amount of RwF 38,475,000 granted to their client before starting up works, and should not have been charged for value added tax because this amount was not a payment.
- [32] Me BYIRINGIRO Bajeni, representing Rwanda Revenue Authority, state that RwF 38,475,000 Eco Power Global Private Ltd says it was granted was not the value added tax but rather a withholding tax of 25% equivalent to RwF 69, 069,039 charged for FY 2009, Eco Power Global Private Ltd was saying it would not pay it because no law required it to withhold the tax for the same year.

COURT FINDINGS

- [33] Article 3 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'*.
- [34] Case file indicates that in the informal appeal dated 03/08/2013 lodged to the Commissioner General, Eco Power Global Private Ltd argued that RwF38,475,000 should not be subjected to withholding tax of 15% because this is an amount granted as an advance on invoices of purchased goods to be imported from China, this is the same view held by the Commissioner General who assessed the issue when he said that the allegations made by Eco Power Global Private Ltd that RwF 38,475,000 should not be subjected to withholding tax of 15% as this amount was an advance payment for equipment to be imported from China are baseless. Eco Power Global Private Ltd further said that that amount was an advance payment for equipment purchased from China on Folio 9 of its pleadings which served the basis for filing the claim with the Commercial Court of Nyarugenge.
- [35] Court notes that the allegations of Eco Power Global Private Ltd that the advance paid for equipment in China was meant to start up the works meaning that it I not liable for tax should not be given any credible justification because, as explained by the Supreme Court in Case Forest Company Volcanoes Gorilla (FCVG) vs. Rwanda

Revenue Authority², in the case Rwanda Revenue Authority vs. Misigaro Louis³, and in case Rwanda Revenue Authority vs. Rubare Josias⁴ advance to start up works (*avance de démarrage*) is an amount of money disbursed to a successful bidder who won the tender to enable him/her to start implement the activities of the tender won, there is no portion of work whatsoever being paid for such that it can be considered to be payment, on the contrary, as the successful bidder who won the tender gradually requests payment of the value of the works done, he/she deducts a given amount of all the advance as agreed upon between the parties to the tender contract, with completion of payment occurring once all the works done and all the advance being refunded to the procuring entity.

- [36] Court notes that Eco Power Global private Ltd fails to specify that RwF 38,475,000 is an amount it was granted by Government of Rwanda to start up works, and is the same amount the Company paid for the equipment it had purchased from China as it puts it itself, the fact that it paid part of all the invoice cannot be a factor making this advance to be meant for start-up of works, all this is an indication that what Eco Power Global Private Ltd alleges on this article are not accurately substantiated.

II.4. Determining whether the provision related to insolvency of Eco Power Global private Ltd was submitted first in the appeal such that it should not be admissible

- [37] Me NSENGIYUMVA Abel and Me ZAWADI Stephen, representing Eco Power Global Private Ltd, state they had requested not to pay the tax for 2008 because they had made a profit of only RwF 973,792,000, while professional expenses stood at RwF 1,572,658,847, therefore, based on the provisions of Article 20 of Law No. 16/2005 of 18/08/2005 on direct taxes on income they found out that the loss incurred for 2011 should be turned into profit realized for 2008. They explain that the Commercial High Court refused to examine this issue saying it was a new claim, disregarded the fact that, even if no informal appeal was made to the Commissioner General or to the Commercial Court of Nyarugenge, article 168 of the Law relating to the civil, commercial, labour and administrative procedure allows, during appeal, for submission of a new provision or new evidences.

² See Judgment No.RCOMAA 00055/2016/SC Rwanda Revenue Authority vs. Forest Company Volcanoes Gorillas (FCVG), Icyegeranyo cy'Ibyemezo by'Inkiko, V.4-2018, p.71

³ See Judgment No. RCOMA 0074/11/CS/ Rwanda Revenue Authority v. Misigaro Louis, rendered by the Supreme Court on 11/04/2014, paragraphs 18-20

⁴ See judgment No. 0149/12/CS/CS Rwanda Revenue Authority v. Rubare Josias, rendered on 11/03/2016, paragraphs 15-16

- [38] They explain that even when the Court noted it was a new provision, nothing would prevent their admissibility because they fall within public order because the tax is imposed by law, and is appropriate for the tax officer to take into account professional expenses before calculating the tax.
- [39] Me BYIRINGIRO Bajeni, representing Rwanda Revenue Authority, argues that in case Eco Power Global Private Ltd fails to prove to the Commissioner General or the Commercial Court the provision related to insolvency, means that it had no loss for that period, it would instead be a new provision brought in for the first time at the level of the second appeal, which is prohibited by Article 168 of the law relating to the Civil, commercial, labour and administrative procedure. He explains that either the tax for 2008 or for 2011, both taxes were charged contrary to the law and comes to the conclusion that the opposite parties have no single basis to claim that provision is within public order.

COURT FINDINGS

- [40] Article 168 of the Law No. 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure which was applicable at the time of the appeal by Eco Power Global Private Ltd, provides that: *‘No new claim may be lodged at the appeal level, unless it concerns compensation or the new claim constitutes a defence to the principal action before the appeal court. However, parties may claim interests, rents and other accessories which were realised since the pronouncement of the judgement and moral damages for the loss suffered from the time the judgement was delivered. It is not prohibited to submit in appeal new arguments or elements of evidence that were not heard at the first level’*.⁵
- [41] Case file indicates that in the Commercial High Court, Eco Power Global private Ltd filed a cross appeal on the appeal by Rwanda Revenue Authority requesting that the loss incurred in 2011 equivalent to RwF 1, 396,034,615 be replaced with the profits made in 2011 equivalent to RwF 973,792,000, the Commercial High Court ruled that this reason should not be examined for the first time in the appeal because Eco Power Global Private Ltd should have filed an informal appeal thereon to the Commissioner General, and if not found to be legally grounded, a related case would be filed in the first instance with the Commercial Court of Nyarugenge.

⁵ This article became Article 154 of Law No. 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure

- [42] Case file indicates that nowhere does the document of informal appeal by Eco Power Global Private Ltd to the Commissioner General indicate that in 2011 it incurred loss equivalent to RwF 1,396, 034,615, while in the pleadings submitted to the Commercial Court of Nyarugenge, the request sought only to remove the tax equivalent to RwF 796,841,596, further, in that same year, nowhere does Eco Power Global Private Ltd indicate that it might have incurred the loss specified above.
- [43] Court notes that in its position, Eco Power Global Private Ltd admitted that issues of the loss for 2011 was not among those for which it submitted informal appeal to the Commissioner General, or in a related case filed with the Commercial Court of Nyarugenge which heard the case in the first instance, and it is nowhere indicated that this provision has ever been the subject of court case, meaning that this provision was raised for the first time before the Commercial High Court, whereas article 168 of Law No. 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure which was applicable at that time prohibited to file a new claim at the appeal level. Therefore no errors were made when the Commercial High Court declared that claim inadmissible because it was a new claim filed at the level of appeal.
- [44] Court notes that the allegations advanced by Eco Power Global Private Ltd to defend its position are explanations and new evidence are baseless, because its purpose is to see Court deciding that it incurred loss equivalent to RwF 1, 396,034,615 for the year 2011, then from that loss there would deduction of the profit made for 2008, and pay tax for the balance, this has serious effects on the case as a whole as initiated in the Commercial Court of Nyarugenge, while at that time, it did not prove that the same provision was among those for which it filed a claim, which in turn is prohibited by the law, it is only permitted to give explanations or new evidence which maintain the claim within such limits as it was initially filed. This is even the same explanation given by legal experts, when they specify that the appellant is not permitted to change the claim itself, he/she can change the provision to plead his/her case and defending his/her position in respect of his/her appeal with a view to emphasize and make more understandable the claim filed.⁶

⁶ « Dans la mesure où la demande elle-même n'est pas modifiée, l'appellant peut présenter une argumentation et des moyens totalement nouveaux, même si ceux-ci changent le débat...Le moyen et le fondement juridique, le développement d'une argumentation de droit propre à conduire au succès d'une prétention. Il est aussi l'ensemble des raisonnements conduits sur les faits de l'espèce. Argumentation de fait et moyen de droit ont un seul et même objet : le succès d'une demande. La demande est intangible et fixée définitivement, sauf exceptions légales. Le reste n'est que moyens et peut évoluer » ; Voir Serge Guinchard *et alii* (sous la dir), Droit et Pratique de la procédure Civile, Paris Dalloz, 2007, pp 1513

- [45] Court further notes that this reasoning corresponds to the decisions of the Supreme Court in Case *Kalinda Sekwekwe vs. Rwanda Revenue Authority* in which case it said the issue was not examined in the case appealed against simply because it was never submitted to the Commissioner General for taxes and should not be examined at the appeal level because parties have not debated the issue⁷, while in the case *Akagera Business Group Ltd vs. Rwanda Revenue Authority*, the Supreme Court notes that the taxpayer has the responsibility to declare the tax⁸, responsibilities to possess and keep all records relating to his/her business, audit of tax helping to assess only whether tax declaration was transparent based on the principles and laws governing taxes, and when dissatisfied with the findings, the law grants him the chance to seek correction of the declaration, provide explanations and evidence of what he/she disagrees to as regards audit conducted and to appeal to the Commissioner General when he/she feels injustice from tax inspectors, failure to provide evidence at his disposal at all these levels, and for which he/she had been granted opportunity to do present to tax officer and fails to furnish to Court substantiated evidence of what he/she alleges, makes inadmissible the new provisions brought to Court because he/she would not be the one to gain profit from his/her failure to respect what he/she was granted or required by the law⁹, all this adding to the fact that no errors were made by the Commercial High Court when rejecting this provision for appeal.
- [46] Court notes, however, that in paragraph 31 of judgment in case appealed against, the Commercial High Court specified that *‘there is no basis for the Court to confirm that all the expenses for which ECO POWER GLOBAL PRIVATE Ltd filed claim, the way it justifies such expenses in its pleadings were professional expenses, for the purposes of securing reduction of the tax charged, because it fails to provide evidence to support this allegation. Court therefore notes that this justification for the appeal should not be accepted to be legally grounded’*. The Commercial High Court made errors when, after declaring inadmissible this provision, still proceeded to examine it and found no evidence were furnished to support it and ruled it was not legally grounded, because after deciding to reject this provision, nothing more

⁷ See Case RCOMA 0028/13/CS rendered by the Supreme Court on 06/11/2015, paragraph 25. See Judgment *Akagera Business Group Ltd*. See Judgment Muhire [Email Olivier]

⁸ “(L’obligation déclarative) pèse sur le contribuable...parce que l’ensemble du processus fiscal est déclenché par le dépôt de sa déclaration » Jacques Grosclaude et Philippe Marchessou, *Droit fiscal général, paris : Dalloz, 2007, p.221*

⁹ See Case No. RCOM A 0009/13/CS (RCOM 0239/11/HCC) rendered by the Supreme Court on 10/02/2017, paragraphs 24 -27

should have done on this provision. Nevertheless, even if Court examined these issues before deciding on their inadmissibility, would not enable its consideration by this Court because this would have been done in a way and manner contrary to the law.

II.5. Determining whether the damages claimed are legally grounded

- [47] Me BYIRINGIRO Bajeni, representing Rwanda Revenue Authority, argues that he is requesting for RwF 5,000,000 including proceedings expenses worth RwF 2,000,000 calculated from the time case started up to this level, and RwF 3,000,000 as counsel fees because his client seeks the assistance of legal counsel before Courts.
- [48] Me NSENGIYUMVA Abel, representing Eco Power Global Private Ltd, states that no evidence for compensation requested by Rwanda revenue Authority is furnished, and reserves it to the sole discretion of the Court, while Me ZAWADI Stephen argues that when determining counsel fees in cases defended by legal counsels representing Government reference should be made to the orientation as taken in case Inspector General of Government (Uganda) vs. Godfrey Magezi decided by the East African Court of Justice, when the Court examined the issue of determining whether attorneys representing the Attorney General should be given counsel fees while they are discharging their duties as provided for by the Constitution, and noted indeed, they deserved no counsel fees¹⁰.

COURT FINDINGS

- [49] Court notes that the reason why the Attorney for Uganda Government was not granted counsel fees in case Inspector General of Government (Uganda) against Geoffrey Magezi is that the Attorney representing Government of Uganda declared that non-payment of the counsel fees would jeopardize the principle of equality between parties¹¹, and failed to prove that representation in court cases even if done by advocates paid monthly, lead to certain losses in the case hearing, lack of gaining value of items lost whereas the Court had just indicated that the claim filed by a party is legally grounded would also result in loss with no other alternative to pay for it.
- [50] Court further notes that this case should not be compared to the case the Inspector General of Government (Uganda) vs. Geoffrey Magezi because even if counsels

¹⁰ East African Court of Justice, Inspector general of Government (Uganda) v Geoffrey Magezi, 27/03/2017

¹¹ East African Court of Justice, Inspector general of Government (Uganda) v Geoffrey Magezi, 27/03/2017, para 44-46

representing Rwanda Revenue Authority get paid monthly, there are losses incurred by this institution when sending its lawyers for representation in Courts, hence bringing a halt their duties to prepare cases as required of any legal attorney, those representing Eco Power Global Private Ltd fail to prove that such is the same situation for Attorneys of Government of Uganda, but despite such a situation, there is no restriction for any party incurring loss to claim reimbursement, which is the reason why nothing prohibits Rwanda Revenue Authority to determine the cost of the loss incurred on case proceedings including counsel (attorney) fees.

- [51] Nevertheless, Court notes that despite loss incurred by Rwanda Revenue Authority in defending its position in this case, its representation fails to prove that the fee claimed is the actual amount spent on this case, therefore, the Court, at its discretion, allocates to Rwanda Revenue Authority RwF 1,000,000 for expenses incurred in this case ever since its beginning and RwF 2,000,000 as counsel fee at all levels where case was heard.

III. DECISION OF THE COURT

- [52] **Declares** inadmissible the appeal lodged by Eco Power Global Private Ltd.
- [52] **Decides** that judgment No. RCOMA 0100/15/HCC rendered by the Commercial High Court on 17/04/2015, changes only on issues related to representation fees and counsel fee.
- [53] **Orders** Eco Power Global Private Ltd to pay Rwanda Revenue Authority RwF 1,000,000 as representation fees and RwF 2,000,000 as counsel fees, totalling RwF 3,000,000.
- [54] **Orders** that Court fee deposited is equivalent to proceedings in this case.

CASE IS SO DECIDED AND PRONOUNCED IN PUBLIC ON 14/01/2018.

KALIMUNDA MUYOBOKE Aimé (Sé)

Presiding Judge

UWASE Zita (Sé)

Court registrar