

THE COMMERCIAL HIGH COURT IN KIGALI AT ITS SEAT ADJUDICATING COMMERCIAL MATTERS AT APPEAL LEVEL, DECIDES THIS CASE ON 23/11/2018 AS FOLLOWS:

**PARTIES DETAILS**

**APPELLANT:**

- **GASHAYIJA Jean-Baptiste**, residing in Rwanda, Western Province, Rubavu, Gisenyi, Bugoyi, Isangano, represented by Me RUKANGIRA Emmanuel and Me KALIMBA Daniel.

**RESPONDENT:**

- **RWANDA REVENUE AUTHORITY**, for an on behalf of its Commissioner General represented by Me TWAHIRWA Jean Baptiste.

**MATTER OF LITIGATION:**

- *Removal of tax equivalent to RwF 38,076,620 charged on Jean Baptiste because it was imposed contrary to the law*

Appeal against Case RCOM 00287/2017/TC/NYGE decided by the Commercial Court of Nyarugenge, on 02/06/2017.

Review for Case RCOMA 00415/2017/CHC/HCC decided by the Commercial High Court on 22/02/2018.

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**CASE SUMMARY**

- [1] **GASHAYIJA Jean Baptiste** filed a claim with the Commercial High Court against **RWANDA REVENUE AURHORITY** requesting removal of the tax charged, because it was imposed contrary to the law, as said tax was charged based on cash transferred on account mistaken for a business account for lack of proper assessment.
- [2] This Court heard both parties and ruled that the claim filed by **GASHAYIJA Jean Baptiste** is not legally grounded. Dissatisfied with this ruling, he lodged appeal with the Commercial High Court, arguing that the previous Court disregarded elements of evidence he submitted in support to his claim. This Commercial High Court also heard the case and decided that the appeal filed by **GASHAYIJA Jean Baptiste** is not legally grounded.

- [3] In the case to be examined, GASHAYIJA Jean Baptiste seized Court, seeking review of appeal case, on grounds that the Judge had made grave errors and confused the situation of facts and the fact that there are elements of evidence which clearly point to injustice suffered consecutive to the case for which review is applied for. Justifications for this claim will be examined by answering the following issues: (1) Determining whether there are errors made by Court in confusing the situation of facts. (2) Determining whether any elements of evidence were not taken into account by the Court, resulting in injustice against GASHAYIJA Jean Baptiste.

### ANALYSIS OF ISSUES CONTAINED IN THIS CASE

#### *A) Determining whether any grave errors were made by Court in confusing the situation of facts*

- [4] As justification for his claim, GASHAYIJA Jean Baptiste argues that he based on Article 186, 6° of Law No. 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, in its stipulation that *'if, during the hearing, there were errors committed based on confusion about the situation of facts...'*; and upon examining paragraph [12] and [13] of the judgment in respect for which he requests case review, Judge based on a bank account statement yet the bank account statement serves as a basis when conducting an audit, examining contents of this bank account statement accompanied with a detailed description of each operation or transaction made for reconciliation with other business records and the operation carried out and other details of all funds transferred on this account; enabling to successfully determine the amount of tax worth charging to a taxpayer.

- [5] GASHAYIJA Jean Baptiste notes that the fact that Judge based on the bank account statement and failed to reconcile the contents in that bank account statement with other business records and detailed explanations given by taxpayer, constitutes a grave error of confusing the situation of facts, because the bank account statement should be reconciled with other banking records. Adding that case review should be admitted. GASHAYIJA Jean Baptiste explains that he notes the Judge decided that there has been an examination of other banking records/books despite Rwanda Revenue Authority (RRA) itself admitting it was not necessary; grave errors being therefore based on the grounds that GASHAYIJA Jean Baptiste may have submitted his business records to RRA which acknowledged receipt, and Court considered them as having been audited but were not. This is, at law, a clear indication of confusion of the situation of facts, as so requested during case hearing, that RRA should have examined elements of

evidence contained therein including financial statements, general ledger he received but sticks to its position arguing assessment of elements of evidence was not necessary, and omitted to consider them and, instead, relied on the bank account statement.

- [6] GASHAYIJA Jean Baptiste concludes saying those were the explanations given to Commercial Court and Commercial High Court s but were invalidated by these Courts. He detailed how the tax charged was calculated based on funds RRA found on his bank account instead of basing on business records and cash money available as there was no error identified that could lead to looking for the tax of the FY 2011 only on his bank account, mainly because all cash entries did not come from sales only; most important was the financial statements as detailed in the general ledger.
- [7] In its defence, RRA argues that it sees GASHAYIJA Jean Baptiste as trying to take only reasons provided for by law for case review seeking to ensure case being heard again, and seeks to relate them to the procedure in which the case was heard for a new trial, whereas there is no correlation. For RRA, no reason provided for in the law could lead GASHAYIJA Jean Baptiste to seek case review; that he was charged for tax based on cash found on his bank account statements; for FY 2011, the audit assessed his tax declarations on profits (IBPP) and found he declared a turnover worth RwF 363,567,378 instead of declaring RwF 336,957, 998, resulting in a difference equivalent to RwF 26,609, 380. This difference was realized after GASHAYIJA was granted opportunity for further explanations, indicating cash available on his bank account not used as a business account, and was removed from taxable amount.
- [8] RRA explains that the amounts removed from taxable profits for FY 2011 are equivalent to RwF 13,175,965 for different reasons given by taxpayer including: delayed payments by some of the customers affecting the turnover for the next year. (*See Final Notice of Assessment, p.2 of 7*). This is in contradiction with his allegations that tax assessment was based on cash transfers via his bank account without taking into account the type of transfers made. The audit operations were not contrary to the law, because Article 16 of Law No. 16/2005 of 18/08/2005 on direct taxes on income, stipulates that '*the Commissioner General may use any other accounting method or other source of information in accordance with the law, to ensure the accuracy of the taxpayer's profit*'. Adding that as provided for in article 42 of Law No. 25/2005 of 04/12/2005 on tax procedure, specifies that '*All types of proof used are allowed to the Tax Administration except the oath*' such that the fact that RRA base on the bank account statement should not pose any problem. This method of tax assessment based on bank account statement was the subject of a ruling by the Supreme Court and other Courts in various cases, including

Case RCOMA 0003/08/CS (RRA vs. HABİYAKARE Leonard) decided by the Supreme Court on 08/07/2011, (page 3, whereby this Court ruled that cash available on business account is considered as taxable business cash; its owner (taxpayer) has the burden to prove such money is not for business purposes, whereas no further proof is required of Tax Administration.

- [9] RRA further explains that the Supreme Court in another Case RCOM A 0089/10/CS (NYIRANEZA Rose vs. RRA) decided on 29/07/2011, also ruled that taxpayer has the burden to prove that the money on his bank account statement is not for business purposes, in case he does not deny the account is being used for business purposes. Still on this issue, GASHAYIJA Jean Baptiste is critical of the fact that he was charged tax using the method of bank account statement, but fails to determine which amounts were unduly taxed.
- [10] RRA explains that even in the initial instances, GASHAYIJA Jean Baptiste argued that his business records/books were disregarded and did not serve as a reference; this is a false allegation because RRA assessed tax based on all his business books in the form of bank account statement, and the latter is also considered to be a business record; especially as there is no law obliging RRA to base tax assessment on all documents held by the taxpayer, instead it bases on those it deems likely to enable it conduct its audit operation. Regarding another issue that there is no concern of existence of cash that may have been double-taxed because only cash entered on bank account was taxed. Only cash entered on bank account was taxed. Taxpayer could not be taxed without prior notice because auditors submitted all his books but based on some of these books they deemed helpful to provide accurate information they wanted leaving aside the other books. They also found they could not give credit to the cash book which the appellant says it was disregarded because it indicated receivables; this explains that if the cash book indicated that if GASHAYIJA operated a lot of cash out higher than cash available. This would not be possible because no one can operate cash out higher than what is actually available. The example given is where he withdrew Rwf 4,500,000 whereas progressive account balance indicated he had Rwf 3,935,941 though this is impossible (*See Annex: Cash book/livre de caisse, p.1*).
- [11] Regarding the fact that claimant (appellant) says that Judge should reconcile the bank account statement with other documents and records and explanations, we note that this was done because all the elements of evidence submitted by parties were examined and he decided based on them and gave explanations on them. In view of the above, we feel that what the claimant alleges that there has been confusion of the situation of facts should not be given legal

consideration because the Judge decided the case based on the explanations, the pleadings and elements of evidence provided by both parties and were later entered in the system at all levels of this case hearing.

- [12] RWANDA REVENUE AUTHORITY concludes saying that the fact that GASHAYIJA Jean Baptiste bases on the document called '*Les retraits et versements bancaires*' arguing that the Court confused the situation of facts, should not be regarded as valid, because he wants to rely only on circumstances provided for by the law for case review and wants to establish their similarity with the method in which the case was heard with the sole purpose to have case reviewed whereas no similarity was noted. Furthermore, he submitted for the first time such document to Court, despite prohibition by Law, since article 20 of Law No. 25/2005 of 04/12/2005 on tax procedure as modified and complemented to date, in its stipulation that '*A taxpayer shall not be allowed to provide at any stage of appeal, any additional evidence that had not been produced during the audit*'. Even if that document was also regarded as not valid because it fails to accurately prove that the expenses were made based on the bank account statement which is not a business account statement, because he personally elaborated this document at the time case hearing was about to close at the first level trying, on several occasions, to prove that some amounts of money were taxed yet these were amounts he took from his account and would credit on same account, with RRA wrongly suspecting them as accruing from business. This is not true because it is clear that claimant elaborated it with the sole purpose of reconcile the figures and could not prove that the amount of money drawn from the account was deposited in the same amount, especially as the amount withdrawn was not equal to the amount previously deposited. Another indication that GASHAYIJA Jean Baptiste is trying to play tricks is that he started saying that Court confused the situation of facts even before getting a copy of judgment for which he seeks case review. This is to prove that, truly speaking, that there is not ground for case review, hence Court should rule that the decision of the Court for which review is sought be maintained.

### **COURT FINDINGS**

- [13] Pursuant to the above grounds and explanations of the claim filed by GASHAYIJA Jean Baptiste, and on the pleadings by RWANDA REVENUE AUTHORITY; pursuant to provision of article 16 of Law No.16/2005 of 18/08/2005 on direct taxes on income, as modified and complemented to date, which provides '*A profit on commercial activities is equivalent to income received from all activities excluding all expenses related to such activities. A profit on*

*the activities also includes the sales of any assets and money received from liquidation during the tax period. A profit on commercial activities is determined at every tax period on the basis of the profit or loss account drawn up in accordance with the National Accounting Plan, in consideration of provisions of this Law. The Commissioner General of the Rwanda Revenue Authority may use any other accounting method or other source of information in accordance with the law, to ensure the accuracy of the taxpayer's profit.' And article 42 of Law No. 25/2005 of 04/12/2005 on tax procedure, as modified and complemented to date, stipulating that '*All types of proof used are allowed to the Tax Administration except the oath*'.*

- [14] Pursuant to the fact that in this justification, GASHAYIJA Jean Baptiste fails to indicate to us that there is a Law restricting taxpayer from using this type of proof during audit, or to rely only on this proof, and that he proved to Judge the irregularity of proof which served as a basis by tax officer, irregularity of the law; for a decision to be made that a Law was not complied with, especially Article 186.6 of Law No. 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure; concludes there is no basis to determine that in the case for which case review is sought, there has been confusion of the situation of facts, or basing on a non-existing Law. Therefore, this reason is not among those likely to trigger case review.

**B) *Assessing whether there is evidence to prove that there was injustice caused by case for which review is sought and which evidence is contained in the documents submitted to Court but which Court did not see.***

- [15] Explaining this reason, GASHAYIJA Jean Baptiste argues that he based on the fact that the Commercial High Court disregarded the proof provided in the case file, related to books of accounts, where he explained that expenses made and cash-in and cash and bank entries; that if that proof he provided was examined, the Court would regard all non-business account transactions/operations as a principle such that charge worth RwF 38,076,620 applies, regardless of its wording in the books of accounts, because they provide details likely to be regarded as business related; especially as tax procedure relies on treasury (money-in) should inevitably look at cash and bank balances, to avoid double taxation. He therefore notes that failure to consider this proof and existence of confusion of the situation of facts, led Court to confuse facts because the proof was in the case file yet Court did not see it whereas it was crucial evidence to solve the dispute but instead ruled it had examined the proofs.

- [16] Defending its position, RWANDA REVENUE AUTHORITY argues that the document entitled '*Les retraits et versements bancaires*' which serves as a basis for GASHAYIJA to say Court did not see it, but fails to give proof that Court did not see it, instead wants to prove that his losing the case stands as an indication as to why Judge did not see said document; this is not the way things should be looked at, especially as GASHAYIJA claims that such document had been entered in the Electronic Filing System at all levels. Another element is that the document was submitted was first submitted to Court despite prohibition by law, because article 20 of Law No. 25/2005 of 04/12/2005 on tax procedure as modified and complemented to date which stipulates that "*A taxpayer shall not be allowed to provide at any stage of appeal, any additional evidence that had not been produced during the audit*". Adding that, the document should not be granted any validity since it does not accurately indicate that the amount was taxed based on the bank account statement instead of a business account.
- [17] RWANDA REVENUE AUTHORITY also repeats his means of defence as mentioned above, arguing that GASHAYIJA Jean Baptiste personally drafted this document towards the end of case hearing at the first instance, trying to gradually indicate that there are amounts taxed whereas they were moved from and deposited back into account, leading RRA to mistakenly suspect that it was a business account. This is not true because clearly the claimant wants to reconcile /show similarity between figures yet cannot prove that the amount of cash withdrawn was equivalent to cash deposited back into account, as highlighted in an example of an incident whereby GASHAYIJA indicates that on 13/07/2011 he withdrew RwF 5,000,000 to purchase goods and spent RwF 4,076,500, then later on 15/07/2011 (two days later) returned to account RwF923,500. This proves he is just *playing tricks* because nothing proves that RwF 923,500 accrues from RwF 5,000,000, especially as the amounts are not equal and the dates of banking operations do not match. Nothing proves that RwF 923,500 was not business proceeds mainly because on 15/07/2011 some sales were realized. Another proof that he is *playing tricks* is that he started saying that Court did not see the proof he submitted whereas it was regularly talked about during case hearings at the two instances; therefore, truly speaking, he has no reasonable ground to seek case review.

## COURT FINDINGS

[18] Based on this reasoning as advanced by GASHAYIJA Jean Baptiste and on the line of defence of RWANDA REVENUE AUTHORITY; based, further, on its observations during analysis of the previous reasoning; and the fact that according to this reasoning, GASHAYIJA argues that Court did not take into account the proof he submitted in the case file, related to books of accounts, whereby he explained how expenses were made and how cash movements were operated in cash and on bank accounts; that this proof was in the documents submitted during judgment but Court did not see it; Court notes that these allegations are contradicted by the decision of the judgment of he seeks case review, where Judge explained that the tax was charged in accordance with information detailed by bank account statement, that the tax was calculated following disclosures and other elements of evidence, including his books of accounts, as outlined in the explanations contained in paragraph [12] and [13] of judgment in case for which review is being requested. Now therefore, Court notes there is no proof GASHAYIJA Jean Baptiste submitted to Judge which the latter did not see nor neglect. This ground is also not valid as any substantial element likely to give rise to case review.

*C) Assessing requests by the party in this case.*

[19] RWANDA REVENUE AUTHORITY concluded its pleadings arguing that in view of his involvement in court proceedings by GASHAYIJA Jean Baptiste, it requests for damages as procedural fees and counsel fees equivalent to RwF 2,000,000 (this includes time spent preparing for this case hearing, office equipment used, vehicle used from its preparation of case up to its pronouncement, fees being allocated for representation because due to his/her duties he is entitled to other benefits not applicable to other ordinary staff, based on article 258 CCLIII and instructions determining method of calculating counsel fees). Adding that possibility to determine counsel fees for RRA, was also approved by the Supreme Court in case RCOMAA 0021/15/CS rendered bon 03/11/2017. Its requests should be granted because they are legally substantiated.

**COURT FINDINGS**

[20] Based on the requests by RWANDA REVENUE AUTHORITY, and on its observations following analysis of the previous reasons, based on the provisions of article 258 of the civil code, which provides that *'Any act of a person that is detrimental to a third party obliges its author to pay damages'*. And based on the provisions of article 26 of instructions No.01/2014 governing counsel fees; finds it appropriate to order GASHAYIJA Jean Baptiste to pay

RWANDA REVENUE AUTHORITY, procedural fees at this instance, to be determined at Court's sole discretion, based on this article governing counsel fees, because the amount requested by RRA is exaggerated and does not provide detailed calculations.

**DECISION OF THE COURT**

[21] The Commercial High Court:

-Declares inadmissible the claim filed by GASHAYIJA Jean Batiste seeking case review for judgment on the merits.

-Decides that GASHAYIJA Jean Baptiste should pay to RWANDA REVENUE AUTHORITY, procedural fees to the tune of RwF 600,000.

-Orders GASHAYIJA Jean Baptiste to pay to RWANDA REVENUE AUTHORITY, RwF 600,000.

**SO ORDERED AND PRONOUNCED IN THE PUBLIC HEARING IN THE COMMERCIAL HIGH COURT, TODAY ON 23/11/2018 BY KIBUKA M. Jean- Luc, as JUDGE, ASSISTED BY NYINAWANKUSI Francine, as COURT REGISTRAR**

NB.: Pronouncement is not made, as initially planned due to heavy workload on previous cases

**COURT REGISTRAR**

**NYINAWANKUSI Francine**

Sé

**JUDGE**

**KIBUKA Jean-Luc**

Sé

**Certified true copy of the original**

**Duly acknowledged, Registrar**