THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

TAT APPLICATION NO. 38 OF 2018

RED CHILLI HIDEAWAY LIMITED ==========APPLICANT

V

UGANDA REVENUE AUTHORITY ==========RESPONDENT

BEFORE DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MR. SIRAJ ALI

RULING

This ruling is in respect of an application challenging the respondent's decision not to use the former's withholding tax credit and provisional tax payment for the period 2012 to 2013 to offset its tax liability of 2016.

The applicant is a duly registered taxpayer engaged in hotel business. It filed returns for the period 1st January to 31st December 2016. The respondent audited the applicant for the said period and raised an assessment of income taxes of Shs. 86,731,699 and a penalty of Shs. 14,202,613 for non-payment of taxes. The applicant objected to the tax and the penalty and contended that the respondent could recover the taxes by offsetting from its withholding tax credit and provisional tax payment for the period 2012 to 2013. The respondent used withholding tax credit and provisional tax payments for the period 2015 to 2016 to reduce the tax liability and penalties to Shs. 7,770,343 and requested the applicant to apply for a refund of the credit for the period 2012 to 2013 to offset further its tax liability of 2016.

The following issues were framed.

1. Whether the applicant can use the withholding tax credit and provisional tax payment for the period 2012 to 2013, if any, to offset the liability for 2016?
2. What remedies are available?

The applicant was represented by Mr. Patrick Kabagambe while the respondent by Ms. Tracy Basiima.

The dispute between the parties revolves around the applicant's attempt to use its withholding tax credit and provisional tax payments for the period 2012 to 2013 to offset a tax liability of 2016. The parties opted to file submissions and not call witnesses as they felt their dispute involved an interpretation of the law.

The applicant submitted that a tax payer who has a tax liability is said to have a tax debit while one who has paid more than its liability has a tax credit, hence tax credit certificates are issued under S. 125 of the Income Tax Act. The applicant submitted S. 122 of the Income Tax Act provides for cases where withholding tax is a final tax. This implies that other than S.122 of the Income Tax Act, there are situations where withholding tax is not a final tax and is a credit due to a taxpayer. The applicant submitted that it had tax credits. The respondent's position was that the applicant could only utilize its tax credits after applying for a refund. On 18th July 2018 the respondent directed the applicant to apply for a refund under S. 113 of the Income Tax Act. The applicant did not apply for a refund and the respondent considered that no tax credit was due to offset the tax liabilities and proceeded to issue an assessment.

The applicant contended that S. 4(3) of the Income Tax Act allows a taxpayer to utilize its tax credit. It submitted further that S. 128(3) provides that tax withheld from a payment is deemed to have been paid by the tax payer. Unless it is a final tax, it is deemed a tax credit for the tax payer for the year of income in which payment is made. The applicant further contended that S. 128(4) provides that where any tax and any provisional tax paid exceeds the tax liability for that year the excess shall be dealt with by the Commissioner in accordance with S. 113(3). S. 113(3) of the Income Tax Act provides that where the Commissioner is satisfied that tax has been over paid, the Commissioner shall a) apply the excess in reduction of any other tax due from the taxpayer b) apply the balance of the excess, if any, in reduction of any outstanding liability of the taxpayer to pay other taxes not in dispute or to make provisional tax payments during the year of income in which the

refund is made, and c) refund the remainder, if any, to the tax payer. The applicant argued that it is not stated anywhere in S. 113(3) that a taxpayer has to apply for a refund before utilizing its tax credit. The intention of the law was never to give the Commissioner discretion to allow or to refuse a taxpayer to utilize its credit.

The applicant submitted that because the respondent deemed that it had not applied for a refund which it would use to offset its liability, it had refused to pay tax; it charged interest. The respondent relied on S. 136(1) of the Income Tax Act which provides that a person who fails to pay the required tax on or before the due date for payment is liable to pay interest. The applicant argued that it had tax credits. Hence it cannot be categorized as one who has failed to pay. The applicant argued that the respondent had all the information and documents to confirm that it had made tax credits as it carried out an audit for the period 2015 to 2016. The respondent has powers under S. 16(4) of the Tax Procedure Code Act to ask the taxpayer to provide a further tax return.

In its reply, the respondent cited S. 125(1) of the Income Tax Act which provides that a withholding tax agent shall deliver to the payee a tax credit certificate setting out the amount of payments made and tax withheld during the year of income. Further S. 125(2) provides that a payee who is required to furnish a return of income shall attach to the return, a tax credit certificate or certificates. The respondent contended that the applicant ought to have filed its income tax return and attached withholding tax credit certificates showing the amount of withholding tax incurred by it during the year of income.

The respondent submitted that S. 136 of the Income Tax Act provides that any person who fails to pay any tax including provisional tax, pay any penal tax or any tax withheld is liable to pay interest. The respondent argued that the applicant failed to pay tax when assessments were issued to it. The respondent cited **AON v Uganda Revenue Authority** *HCCT 00-CC-MC-66-2009* where the court held that statutory interest is payable where it is provided for in the law. The Judge said that “It would appear to me in the instant case that where a person failed to pay tax imposed under the Statute on or before the due date, he was liable to pay a penal tax on the unpaid tax due at the rate specified in the law.”

In respect of a tax refund, the respondent cited S. 113 of the Income Tax Act which provides that a taxpayer may apply to the Commissioner for a refund, in respect of any year of income, of any tax paid by withholding, instalments, or otherwise in excess of the tax liability assessed to or due by the taxpayer. The respondent argued that where a taxpayer has paid tax in excess of the tax liability, it is required to apply to the Commissioner for a refund. The respondent further contended that under S. 113(2) of the Income Tax Act a taxpayer should make the application in writing. It should be within five years of the date on which the Commissioner has served a notice of assessment for the year of income to which the refund application relates to or the date on which the tax was paid. The respondent contended that the circumstances under which the Commissioner can refund an amount of tax to a person under S. 113(4) of the Income Tax Act are; (a) an application made to him or her under this Act; (b) a decision under S. 99; (c) a decision of the High Court or Tribunal under S. 100; or (d) a decision of the Court of Appeal under S. 101. The respondent argued that an application has to be made in order for a Commissioner to make a refund. Obtaining a refund is not automatic or at the whim of a taxpayer.

The respondent submitted that under S. 113(5) of the Income Tax Act the Commissioner shall within thirty days of making a decision on the refund application serve on the person applying for a refund, a notice in writing of the decision. Under S. 113(6) a person dissatisfied with the decision can challenge it under an objection or appeal procedure. The respondent contended that it did not serve its decision on the applicant since it did not apply for a refund. The respondent contended that the requirement to apply for a refund from the Commissioner is not an administrative but a statutory requirement under the Income Tax Act. The respondent contended that the applicant's refusal to apply for a refund amounted to a waiver of its right.

The respondent contended further that the applicant is time barred from applying for a refund. S. 113(2) of the Income Tax Act requires an application for a refund to be made within 5 years from the date of the notice of assessment or payment of taxes. The applicant

made payments in 2013 and 2014, hence the five year period prescribed by the law has since lapsed. The respondent cited **Uganda Revenue Authority v Uganda Consolidated Properties Limited** *Civil Appeal 31 of 2000* where the Court of Appeal held that: "Timelines set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with." In **Madhavani International S.A v Attorney General** *SCCA 23 of 2010* the court held that "A statute of limitation is strict in its nature and inflexible and is not concerned with the merits of the case." Lord Greene MR in **Hilton v Sulton Steam Laundry** 1946] 1 KB 81 stated that: "But the statute of limitation is not concerned with the merits. Once the axe falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled, of course to insist on his strict rights." The respondent contended that the applicant is estopped from applying for a refund.

In rejoinder, the applicant contended it is not challenging the powers of the respondent to charge interest. What it is contending is that for S. 136 to apply tax must first be due and owing. The applicant submits that no tax is due because the variance between the tax it declared and the tax assessed is zero. The applicant had overpayments of tax.

The applicant submitted that S. 113 of the Income Tax Act was enacted to provide for taxpayers who voluntarily apply for refunds. The provision for refund under S. 113(1) of the Income Tax Act is different from that of S. 113(3). The applicant argued that S. 113 does not take away the right of taxpayers to utilize their overpayments.

Having read the submissions of the parties, this is the ruling of the Tribunal.

The applicant has withholding tax credit and provisional tax payment for the period 2012 to 2013 and for other years. The applicant filed income tax returns for the period 1st January to 31st December 2016. The respondent audited the applicant for the said period and issued a tax assessment of Shs. 86,731,699 and a penalty of Shs. 14,202,613 for non-payment. The respondent used the tax credit and provisional tax payments for the period 2015 to 2016 to reduce its tax liability. The respondent requested the applicant to

apply for a refund of the credit for the period 2012 to 2103 so as to offset any further tax liability. The applicant objected on the ground that it does not need to do so as it was not mandatory to do so.

Tax credits are provided for in S. 4(2) of the Income Tax Act which reads:

> "Subject to subsection (4) and (5), the income tax payable by a taxpayer for a year of income is calculated by applying the relevant rates of tax determined under this Act to the chargeable income of the taxpayer for the year of income and from the resulting amount are subtracted any tax credits allowed to the taxpayer for the year of income."

In other words, while S. 4 imposes income tax, a taxpayer can reduce its tax liability by use of tax credits.

Tax credit certificates are provided for under S. 125 of the Income Tax Act which reads:

> "(1) Subject to subsection (3), a withholding agent shall deliver to the payee a tax credit certificate setting out the amount of payments made and tax withheld during a year of income.
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> (2) A payee who is required to furnish a return of income shall attach to the return the tax credit certificates or certificates supplied to the payee for the year of income for which the return is filed."

Tax credit certificates are issued whenever income tax is withheld by a withholding agent. S.115 of the Income Tax Act provides that a "withholding agent" means a person obliged to withhold tax under this part. A "payee" is defined to mean a person receiving payments from which the tax is required to be withheld under Part XIII of the Income Tax Act. It is not in dispute that the applicant had withholding tax credit and provisional tax overpayment for the period 2012 to 2013. The dispute is whether the applicant could use the said tax credit and provisional tax overpayment to offset a liability of the period 2015 to 2016.

S.128 of the Income Tax Act provides for adjustments on assessments and indemnifying the withholding agents. It reads:

> "(1) The amount of tax withheld under this Part is treated as income derived by the payee at the time it was withheld.

(2) A withholding agent who has withheld tax under this Part and remitted that amount withheld to the Commissioner is treated as having paid the withheld amount to the payee for purposes of any claim by that person for payment of the amount withheld.

(3) Tax withheld from a payment under this Part is deemed to have been paid by the payee and, except in the case of a tax that is a final tax under this Act, is credited against the tax assessed on the payee for the year of income in which the payment is made.

(4) Where the tax withheld under this Part for the year of income, together with any provisional tax paid under Section 111 for that year, exceeds the liability under an assessment of the taxpayer for that year, the excess shall be dealt with by the Commissioner in accordance with Section 113(3)."

In other words, when a withholding agent withholds income from a payee and remits it to the Commissioner, the agent is deemed to have made a tax payment on behalf of the payee. The payee has no claim against the agent. The tax payment is credited against the tax assessed on the payee for the year of income in which the payment is made. Where the tax payment exceeds the tax liability under an assessment the Commissioner may deal with the excess under S. 113(3) of the Act. The dispute between the parties is on how the respondent ought to have dealt with the excess amount of withholding tax credit and provisional overpayment for the period 2012 to 2013.

S. 113(3) of the Income Tax Act provides:

"Where the Commissioner is satisfied that tax has been over paid, the Commissioner shall

(a) apply the excess in reduction of any other tax due from the taxpayer;

(b) apply the balance of the excess, if any, in reduction of any outstanding liability of the taxpayer to pay other taxes not in dispute or to make provisional tax payments during the year of income in which the refund is to be made; and

(c) refund the remainder, if any, to the taxpayer."

S.113 (3) of the Income Tax Act requires the Commissioner to make a refund if there is an over payment after he or she has applied the excess in reduction of any tax due from the taxpayer. Therefore a Commissioner cannot refund monies if there are other taxes due from the taxpayer. It is like pushing the cart before the horse. He has to first sort out the other taxes due from the taxpayer. Therefore the Commissioner ought to apply the excess tax of the applicant in respect of the period 2012 to 2013 to reduce the tax due from the tax payer for the period 2015 to 2016. If there is any balance, the Commissioner

had to apply it to pay other taxes not in dispute or make provisional tax payments for the year of income in which a refund is made. Lastly, if there is amount outstanding the Commissioner may refund it to the applicant in accordance with the Act.

A refund is a refund. *Black's Law Dictionary* 10th Edition page 147 defines a refund as "The return of money to a person who overpaid, such as a taxpayer who overestimated tax liability or whose employer withheld too much tax from an earning." When the Commissioner is applying the excess amount withheld to paying taxes he is not refunding. It would defeat logic if a taxpayer would first ask for a refund, after obtaining it, the Commissioner then applies it to meet excess tax liability. A refund presupposes that the monies is given to the taxpayer. Suppose the taxpayer applies for a refund and uses it to meet other obligations? Therefore the Commissioner ought to apply the excess amount withheld and provisional tax payment to meet any tax liability of the applicant. If there is any reminder after paying off all the tax liabilities a tax payer may apply to the Commissioner for the refund.

The respondent contended that an application for a refund would be time barred under S. 113 (2) of the Income Tax Act which reads:

> "An application for a refund under this Section shall be made to the Commissioner in writing within five years of the latter of-
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> (a) the date on which the Commissioner has served the notice of assessment for the year of income to which the refund application relates; or
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> (b) the date on which the tax was paid."

When one reads Sections 113(2) and 113(3) it would imply that if there is any refund available after the Commissioner has applied the tax credit and provisional payments to pay outstanding taxes the taxpayer may apply for it within the prescribed period. In this case the applicant has not applied for any refund. This does not stop the Commissioner from applying any tax credits and provisional payments of the applicant to meet its tax liabilities. The time limit is in respect of an application for a refund. It does not apply to the Commissioner applying tax credits excess payments to offset tax liabilities. The import of S. 113(3) is that the Commissioner has a lien on overpayments and tax credits so as to pay off any outstanding tax liabilities. The Commissioner does not need a taxpayer to ask

for a refund before it can offset any tax liabilities arising. If we are to say so, it would be reading into the Statute what is not there. It would be an attempt to whittle down the powers granted to the Commissioner under S. 113(3) of the Income Tax Act.

The respondent imposed penalty on the applicant. The respondent ought to have applied any excess payments, withholding and provisional tax, to reduce the tax liabilities of the applicant. Therefore no penalty would arise if the respondent had applied the excess payments to meet the tax liabilities in time. One cannot impose penalty on a debtor when the former has an option of offsetting the debt using other monies belonging to the debtor within its possession.

Taking the above into consideration, this application is allowed. The Tribunal holds that:

(a) The applicant is entitled to use its withholding tax and provisional tax credit for the period 2012 -2013 to offset its tax liability of 2016.
(b) The applicant is not liable to pay penal taxes assessed by the respondent.
(c) The applicant is awarded costs of the application.

Dated at Kampala this day of 2020.

DR. ASA MUGENYI	**DR. STEPHEN AKABWAY**	**MR. SIRAJ ALI**
CHAIRMAN	**MEMBER**	**MEMBER**