RRA v. ENGEN RWANDA LTD

[Rwanda SUPREME COURT – RCOMA0027/12/CS (Mugenzi, P.J., Kanyange and Nyirinkwaya, J.) May 13, 2016]

Company Law – Sale of shares – Sale of company asset – The sale of shares should not be considered as a sale of company assets and it is exempt from tax – Law N°6/1988 of 12/02/1988 which regulated the companies when the contract was made, article 8.

Facts: TOTAL RWANDA S.A.R.L was a company registered in Rwanda which became ENGEN RWANDA Ltd. It was made up of two shareholders namely TOTAL OUTRE MER S.A registered in France which was the majority shareholders and Momar Nguer who had a single share which was later transferred to TOTAL OUTRE MER S.A. TOTAL OUTRE MER SA sold all of its shares to ENGEN HOLDINGS (MAURITIUS Ltd) at a value of 6,867,000USD.

Thereafter the general meeting of the shareholders decided to change the name TOTAL RWANDA SARL to ENGEN RWANDA Ltd, of which it was issued the certificate from Rwanda Development Board (RDB) proving it.

RRA notified TOTAL RWANDA S.A.R.L that it owed value added tax amounting to 2,150,513,368Frw. B after lodging administrative appeal the tax was reduced to 1,923,619,013Frw.

ENGEN RWANDA Ltd seized the Commercial High Court seeking the exemption of that tax on the ground that TOTAL OUTRE MER sold its shares it had in TOTAL RWANDA SARL, which is exempted from being taxed and it is different from selling the assets of the company which consists of various elements. RRA argue that there has been the sale of the assets since the shares are not constituted only of papers, rather, of assets and liabilities of the company, that even though the contract made states that it is the sale of the shares, its article 2, paragraph 1 indicates that it is the shares and aspects thereon which are concerned, which imply that even assets were sold and they are taxable. The court decided that no tax has to be waived since there was no sale of property rather of shares by the shareholder of TOTAL RWANDA S.A.R.L.

RRA appealed to the Supreme Court arguing that the previous court disregarding the evidences proving that there was a sale of assets.

ENGEN RWANDA Ltd argued that it sold nothing to be taxed because the seller was TOTAL OUTRE MER and the sale contract clearly indicates that the sale was that of shares and this differs from the sale of the company's assets.

The friend of the court (amicus curiae), was called upon to give some clarification to the Court, whereby he clarified that the transaction carried out was that of transfer of shares, which are exempted to taxed value added tax because it differs from commercial transaction.

Held: The fact that RRA does not produce another evidence to sustain its allegation that there was a sale of assets of TOTAL RWANDA SARL, leads to the conclusion that it should be relied on the contract which indicates that the transaction made consists of sale of shares by TOTAL OUTRE MER. This decision concurs with that of amicus curiae where he has demonstrated that after assessing the performed transactions, there has been the transfer of shares.

Appeal lacks merit.
Appealed judgment sustained.
Court fees to the plaintiff.

Statutes and Statutory instruments referred to:
Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 9.
Law Nº6/1988 of 12/02/1988 regulating companies, article 8.

Case referred to:
Frank Lyon co v United States, 435 U.S. 561 (1978)
Beauvallet v Naturana, N°81-1372881-16259, March 7, 1984, Court of cassation, Commercial chamber.
Salomon v Salomon & Co Ltd [1896] UKHL 1 (16 November 1896).

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] TOTAL RWANDA S.A.R.L is a company registered in Rwanda which was made of two shareholders namely TOTAL OUTRE MER S.A (registered in France) which held the majority of the shares since another shareholder, Didier Harel, held only one share which he later sold to Momar Nguer. On 30 July 2008, there has been signed a sale contract between TOTAL OUTRE MER S.A, ENGEN INTERNATIONAL HOLDINGS (MAURITIUS) Ltd on one hand and ENGEN PETROLEUM LIMITED on the other hand of the shares in TOTAL RWANDA S.A.R.L, and on 27 October 2008, the meeting of shareholders confirmed the transfer of the share that Momar Nguer held in TOTAL RWANDA SARL to TOTAL OUTRE MER SA, and the transfer of all shares that TOTAL OUTRE MER held in TOTAL RWANDA S.A.R.L to ENGEN INTERNATIONAL HOLDINGS (MAURITIUS) Ltd, which paid 6,867,000USD.

[2] ENGEN INTERNATIONAL HOLDINGS Ltd which has bought all shares from TOTAL RWANDA S.A.R.L, awarded one share to Adama Soro, its Managing Director, and on 13/02/2009, the general assembly of the shareholders decided to change the name of the company to ENGEN RWANDA Ltd and it got the certificate from the Registrar General of Rwanda Development Board (RDB).

[3] Meanwhile, RRA notified to TOTAL RWANDA S.A.R.L that it owes taxes amounting to 2,150,513,368Frw, and after the appeal, the tax balance amounted to 1,923,619,013Frw. TOTAL RWANDA S.A.R.L/ENGEN RWANDA Ltd seized the court requesting the waiver of that tax. The Commercial High Court analyzed one issue concerning whether there has been a sale of shares or assets of TOTAL RWANDA S.A.R.L, which has to be considered as the basis for the computation of the income tax and value added tax.

[4] The court decided that the claim of TOTAL RWANDA S.A.R.L which has become ENGEN/RWANDA Ltd has basis, therefore it should not be imposed any tax since no sale of property was done. The court relied on the fact that TOTAL OUTRE MERT SA sold the shares it hold in TOTAL/RWANDA S.A.R.L to ENGEN RWANDA Ltd, especially that the parties to the case and the court concur that that company, through the veto power it got from

status of majority shareholder allowed it to change to ENGEN RWANDA Ltd; therefore the transaction performed by TOTAL OUTRE MER SA itself may not constitute the basis of the tax to be charged to TOTAL/RWANDA S.A.R.L since RRA does not produce evidence the property sale that and that even though its argument may be considered, TOTAL RWANDA S.A.R.L may not be held liable for any thing since the contract binds parties.

[5] It explained that the fact that the assets of TOTAL RWANDA S.A.R.L were revealed in financial statements of ENGEN RWANDA Ltd would not be relied on by RRA to assume that they have been sold since that would be baseless. In addition, the statements of RRA that after TOTAL OUTRE MER SA had secured all shares of TOTAL RWANDA SARL, the latter lost its capacity, especially that at the time, the law did not provide for sole proprietorship company, could not support the statements of RRA because if it was considered as such, it is TOTAL OUTRE MER SA which would be held liable of the transaction on which RRA relies on to tax, and that even in case that ground is accepted, TOTAL RWANDA SARL would not be sued since it would had immediately lost the capacity, considering article 1 of the law which governed companies. It held also that the principle that the company has the legal personality which is different from that of its shareholders should not be ignored.

[6] It realised rather that the sale of the shares and the change of the name has been respected, and RRA accepted to allocate a TIN to ENGEN RWANDA Ltd with full knowledge that it is the same which used to be TOTAL RWANDA SARL, especially that it does not prove that the act intended to lead to tax evasion.

[7] RRA has appealed to the Supreme Court, arguing that the first judge has disregarded elements of evidence indicating that there has been the sale of assets of TOTAL RWANDA S.A.R.L, and not of shares.

[8] The hearing was held in public on different dates, whereby RRA was represented by Counsel Kabibi Spéciose and Gasana Raoul, while TOTAL RWANDA SARL/ENGEN was represented by Counsel Nsengiyumva Abel, Kamanzi Désiré and Kabera Jean Claude. All parties to the case agreed that there was no problem with regard to pay as you earn tax which was charged to TOTAL RWANDA/ENGEN RWANDA Ltd, therefore the only issue to be analysed is b whether there has been the sale of the property or of the shares.

[9] In the analysis of that issue, the court realised that there was a need for an expert to provide legal arguments, therefore it appointed Habimana Pie, a lecturer in the University of Rwanda, as the friend of the court (amicus curiae), who gave his arguments in a written document which has been also provided to the parties. They have been given time to comment thereon in the hearing of 24 November 2015, in the presence of the friend of the court.

II. ANALYSIS OF LEGAL ISSUE

Whether the Commercial High Court erred in deciding that there has been no sale of the property of TOTAL RWANDA SARL.

[10] The counsel for RRA argues that the court disregarded the elements of evidence indicating that there has been the sale of the assets since the shares are not constituted only of papers, rather, of assets and liabilities of the company, that even though the contract made states that it is the sale of the shares, its article 2, paragraph 1 indicates that it is the shares

and aspects thereon which are concerned. This implies that the assets have been sold, and were transferred from TOTAL RWANDA S.A.R.L account statements to that of ENGEN S.A.R.L, and that in the course of application for property registration in the name of ENGEN RWANDA, they stated that the sale concerned assets and liabilities of TOTAL RWANDA S.A.R.L.

[11] They explain that when the Court ruled that all shares were sold, it should have also decided that all assets were sold, since the right to shares is equivalent to the right on assets, and the fact that their adversaries state that the seller of shares is TOTAL OUTRE MER, alters nothing, because since it was a majority shareholder, it cannot be differentiated from TOTAL RWANDA S.A.R.L. They furthermore argue that another ground emphasizing that there was a sale of the assets is that the corporate income tax (CIT) declaration 2009 of ENGEN RWANDA Ltd demonstrated that assets of TOTAL RWANDA SARL were included in the financial status of the former company. They add that basing on article 4 *litera* 11 of the Law N°16/2005 of 18/08/2005 regulating the direct income tax which provides for the origin of the income, TOTAL RWANDA/ENGEN RWANDA must pay the tax it was imposed since that article provides for any interest generating activity.

[12] They also state that the previous Court decided that after TOTAL OUTRE MER acquired all shares, TOTAL RWANDA S.A.R.L could not be imposed of taxes since it was no longer considered as a company basing on article 1 of the Law governing companies, disregarding that not only companies are imposed of taxes but also the entities similar to them or the associations, regardless of their nature, as long as they carry out interests generating activities as provided for by the article 38.6 of the Law N°16/2005 of 18/08/2005 regulating the direct income tax. They stated in addition that even if during that period TOTAL RWANDA S.A.R.L did not legally exist as realised by Court, it acted as a company because it generated interest on what it sold.

[13] Counsel for RRA argue also that even though TOTAL RWANDA S.A.R.L was made up of two shareholders; during the sale of TOTAL OUTRE MER did not separate shares, implying that the entire company and its component were sold. They go further and state that the law that governed the contracts at time the sale was concluded provided that the company had to be composed of at least two shareholders. However, in course of the sale, TOTAL OUTRE MER was the sole shareholder, implying that his acts should be considered as carried out by TOTAL RWANDA S.A.R.L since they were the same. Therefore, the assets were sold by TOTAL RWANDA S.A.R.L. They furthermore argue that in the laws of other countries there is a notion of "Corporate veil" intending to recover taxes in case the company hides itself behind an activity in order to evade from taxes.

[14] They went on explaining that interpretation of the contract mentioned above demonstrates that during the sale of shares assets of the company were also sold, that article 6.4.1 provides that when the buyer is aware of the status of assets, and that the seller will not be held liable for what will be revealed thereafter, while article 5.1(a) TOTAL RWANDA S.A.R.L was deprived of the right to sale, lease or alienate the immovable property (…). All these indicate that there was not only a sale of shares but also assets.

[15] They gave an example of the judgment rendered by the Supreme Court of America (Frank Lyon co v United States), which ruled that the ownership of assets is demonstrated by the right of the company to sell them, that even TOTAL RWANDA S.A.R.L could not have accepted to be deprived of the right to its assets by ENGEN INTERNATIONAL if it was still

the owner, instead it is a proof that it had been also sold as demonstrated in article 5.1(b), (c), (d), (e), (f) of the contract.

[16] They explain further that the reason why ENGEN RWANDA Ltd is included among the defendants, was due to the fact that ENGEN RWANDA Ltd emerged in lieu of TOTAL RWANDA S.A.R.L which disappeared; but that even though this happened in documents, its activities still exist, and the latter had the obligation to notify RRA about the change in status, in order for its audit to be carried out as provided for by article 10 of the aforementioned Law N°25/2005. they add that the fact that TOTAL RWANDA still exists legally, as far as there are unfulfilled obligations and assets likely to be seized for execution, the law governing the value added tax provides that it may be charged for the tax in relation to the acquisition performed.

[17] Counsel for TOTAL RWANDA SARL/ENGEN RWANDA Ltd states that RRA raised no new ground at appeal level, since the contract concluded explains clearly that the subject of sale concerns shares and even the law governing companies provides for the sale procedure of shares (article 75). Therefore, TOTAL OUTRE MER has sold the shares it held in TOTAL RWANDA SARL, which is different from selling the assets of the company (plots, vehicles, accounts, etc…). The counsel alleges that MOMAR who owned one share submitted it to the sale, but that the company survived due to the fact that shares did not belong to it, and it remained with its assets made up of different things (plots, vehicles, liquids, stock of fuel,...), therefore the counsel wonders what TOTAL RWANDA S.A.R.L has sold to be charged taxes while the seller is TOTAL OUTRE MER.

[18] The Counsel states that if there has been the sale of the capital of TOTAL RWANDA S.A.R.L, RRA would have relied the computation of the tax on its value which exceeded six billion Rwandan francs, which would not therefore have been sold at only two million, and that the sale of the shares has been performed within other companies and no tax has been charged to them, thus, RRA should not confuse the sale of the shares to that of the property, since this one belongs to the company as decided by the Supreme Court in England, in the case Macaura v Nothem Assurance company, and in the case opposing two companies, Beauvallet v Naturana decided by the Court of Appeal in France, and that article 8 of the law which governed contracts when the sale was made provided also that the company holds its own property.

[19] It further explains that the reason why ENGEN RWANDA Ltd applied for the property to be registered under its name was due to the fact that the name of the company had changed as agreed upon in article 4 of the contract because for instance, the designation of TOTAL, falling in its intellectual property rights was not part of the assets sold. Counsel also argued that TOTAL RWANDA S.A.R.L and ENGEN RWAND Ltd had never existed as two different companies, and besides, one company may not acquire its own assets, rather, the financial reports of ENGEN are the same as those of TOTAL RWANDA, which became ENGEN.

[20] With regard to article 6.4.1 of the contract that RRA relies on, the counsel states that even though the company is different from its shareholders and holds its own assets, if the shareholders decide to invest in the company they intend it to do the business in their interests (to share dividends), therefore ENGEN INTERNATIONAL had to know the status of the company even if it was not intending to buy its assets. It states in addition that the prohibition to TOTAL RWANDA S.A.R.L to perform some operations without the authorisation from ENGEN INTERNATIONAL intended to avoid the variation of the status of the company

before the transfer of shares. Counsel is of the view that the ruling of the Frank Lyon v United States should not be referred to since the issue which was determined differs from the one in the case at hand.

[21] With regard to the procedure of taxation, the counsel alleges that at the beginning, RRA stated that there were profits generated from sale of shares which were not declared, but that after TOTAL RWANDA S.A.R.L explained to it that the shares sold did not belong to it, rather, belonged to TOTAL OUTRE MER which as a foreign company would not have been charged taxes, RRA took another position and stated that the tax relies on the sold property, which implies that it sought the perception of tax at all costs.

[22] Counsel further finds that the concept of "corporate veil" cannot be invoked, since the tax is established by law as provided for in article 81 of the Constitution and article 4 of Law N°16/2005 of 18/08/2005 cannot be based on the fact that it relates to the sale of assets in Rwandan territory, especially that even if this article provided for a solution to the problem, RRA would not have invoked the concept of "corporate veil".

[23] Regarding the situation of TOTAL RWANDA SARL at the time of signing the contract of sale on July 30, 2008, his lawyer argues that even if this contract was signed on that date, other transactions should be completed for the effectiveness of the sale in accordance with article 4 of this contract. For instance, other shareholders of TOTAL RWANDA SARL should approve such sale, which was made by the shareholders' meeting held on October 27, 2008, finally approved at the February 13, 2009 meeting. Indeed, TOTAL RWANDA SARL was owned by two shareholders on July 30, 2008; TOTAL OUTRE MER SA which held 25,749 shares and MOMAR NGUER which held a share.

[24] The friend of the court also provided his arguments on the issue of the case, where he demonstrated, basing on articles 4 and 37 of the Law N°16/2005 of 18/08/2005 on direct taxes on income, that if an act carried out falls within business activity and generated income in Rwanda, the direct tax on income should be paid, and that an act is considered to be a business activity in case it is performed by a professional individual or company. With regard to TOTAL RWANDA S.A.R.L, he is of the view that transactions which were successively done constitute the transfer of shares within that company which later became ENGEN RWANDA Ltd, and do not consist of business activities since they were not performed by capital market professional company to generate profits, and that the change of the company name is not a business activity which may generate profit. However, he states that all these operations are not likely to spare TOTAL RWANDA S.A.R.L from tax obligation as a commercial company.

[25] With regard to the value added tax, the friend of the court explains that, considering the period during which the activities were carried out, he realises that the article 2 of the Law N°06/2001 of 20/01/2001 on the code of value added tax (as amended in 2010), has established the tax on transactions involving the supply of goods and services in Rwanda and the importation of the same into Rwanda, while article 3 explains deeply the meaning of the supply of goods or service and that this is subject to the value added tax if those goods or services are supplied for profit. He also argues that basing on article 86 of the Law N°06/2001 of 20/01/2001 mentioned above, the transfer of shares is exempted from tax.

[26] He also explained that shares do not constitute assets of the company, rather, of the shareholders and they are the ones with the right to sell them, while the assets belong to the

company and once they are sold, the company has the obligation to pay taxes, while the tax on dividends is paid by the shareholder.

[27] Concerning those explanations of the friend of the Court, RRA states that they should not be considered because they consist nothing new likely to be relied on by the Court, especially that alleging that the operation done constitute a transfer of shares is wrong since what has to be considered is the generation of profit by the company as stated in article 16 of the Law N°16/2005 on direct taxes on income, which must be considered along with articles 5 and 37.

[28] RRA considers also that the allegation that there has been only the transfer of shares contradicts the statements of the counsel for TOTAL RWANDA Ltd as well as available elements of evidence proving that it was the sale of assets that took place. Therefore, the issue which would have been analysed by the friend of the court concerns whether there has been the sale of shares or assets, due to the fact that the entire company has been sold, and this leading to wonder whether even assets are not sold at the same occasion, therefore the tax being computed in the same way as in personal income tax, while with regard to VAT it should be relied on article 3 of the Law N°06/2001 of 20/01/2001 on the code of value added tax, assessed together with article 4.1 and article 85.16 of the same law. In addition, RRA argues that the fact that the sale of assets is not part of defendant's business is not likely to exempt them from the obligation to pay VAT once they realised income.

[29] Counsel for RRA states further that article 86.7.c, which the friend of the court relied on stating that the transfer of shares is exempted from VAT should not be considered in this case, since that provision was introduced in this Law while the operation which gave rise to that tax had already been carried out and even the tax audit was in its final stage given that the law was promulgated on 30 June 2010, and in addition VAT was not imposed on the sale of shares, rather, of assets.

[30] The Counsel for TOTAL RWANDA/ENGEN RWANDA argues that they concur with the statements of the friend of the Court demonstrating that there has been no sale of the assets; rather, of shares which he qualified as its transfer, therefore tax is levied on generated profit rather than on assets. The Counsel goes on stating that article 46 of the Law N°16/2005 on the code of VAT uses two terms (property and shares), but the fact that those terms are used within one article does not imply that they have the same meaning to the extent to be confused, and that RRA should reveal another contract relating to the sale of assets of TOTAL RWANDA S.A.R.L.

OPINION OF THE COURT

[31] The issue to be analysed which was also analysed by the Commercial High Court, is whether there has been the sale of assets of TOTAL RWANDA SARL which should have been tax base as computed, since both parties have agreed to refrain from debating on the amount as indicated in the appealed judgment.

[32] The contract signed on 30 July 2008, indicates that it concerned the sale of share, while RRA argues that it conceals the sale of assets of TOTAL RWANDA SARL. That contract reveals that the seller is TOTAL OUTRE MER S.A which is one of the two former shareholders of TOTAL RWANDA SARL, while the buyer is ENGEN INTERNATIONAL (Mauritius) Ltd.

[33] Article 8 of the Law N°06/1988 of 12/02/1988 relating to companies which was in force when the contract was signed, provides that the company has its own assets, while article 122 of the same Law stated that shares may be transferred to any person in case articles of association do not provide otherwise, while articles of association governing TOTAL RWANDA S.A.R.L also provided in article 11, that the shares may be transferred but other shareholders or the company have pre-emption right.

[34] In clarifying the difference between the sale of shares and the sale of assets, law scholars demonstrate that the sale of assets takes place between the company and the acquirer while the sale of the shares takes place between the seller (shareholder (s)) and the acquirer[1]. They also demonstrate the effects of the sale, whereby in case of the sale of shares, the company does not undergo any changes because there is only a change of shareholders while the sale of assets has a significant impact on the existence of the company as new company in which the assets are transferred, will be created[2].

[35] They furthermore explain that for the purchaser, buying the shares means to buy the business of the company, those shares are transferred from the seller to the buyer. However, the buyer loses the ability to pick and choose among assets; rather, he or she buys all of the business[3]. With regard to this case, the fact that the revealed contract was concluded between TOTAL OUTRE MER (the shareholder of TOTAL RWANDA SARL) and ENGEN INTERNATIONAL (Mauritius) Ltd, RRA has no ground to affirm that there has been the sale of company assets, since they do not belong to the shareholder to extent that he is entitled to sell them because they are owned by the company[4], especially that the latter has the legal personality different from that of its members[5] as indicated by the appealed judgment which relied also on the famous case Salomon v Salomon and co Ltd with regard to that principle. The said principle may be ignored in case it is proven that what has been done was inadmissible or conceals another activity. This ground was advanced by RRA in

[1]-"La vente d'actifs s'effectue entre la société et l'acquéreur et elle engendre des conséquences fiscales différentes de celles de la vente des actions, laquelle s'effectue entre le vendeur (actionnaire (s)) et l'acquéreur": UT Avovats, Aspects fiscaux des achats et ventes d'entreprises, available online at http://www.ljt.ca/fr/ljt-domaines/fiscalite/Aspects-fiscaux-des-achats-et-desventes-d-entreprises.sn, accessed on 11/05/2016.

[2] Dans le cas de vente des actions, l'entreprise ne subit pas de modifications car il ya seulement un changement d'actionnaires. Par conséquent, les créanciers ne perdent aucun droit, et peuvent poursuivre leurs relations avec la compagnie comme d'habitude (…) L'achat des actifs a un impact important sur la vie de l'entreprise, car l'entité juridique ne sera pas la même. Une nouvelle compagnie dans laquelle les actifs vont être transférés, va être créée": Achat des actions ou des actifs, les impacts á prendre en compte, available online at http://www.releve.qc.ca/quebec/, accessed on 27 April 2015.

[3]"For the purchaser, buying the shares means that he or she buys the company which owns business…The shares of the company are transferred from the seller to the buyer. However, the buyer loses the ability to pick and choose among assets. Generally, he or she buys all of the business": TD Wealth, Structuring a transaction-share sale or asset sale, available online at http://advisors.tdwaterhouse.ca/public/projectiles/5fcf3b08-020c-47c6-a74b-a8c76487fa2f.pdf, accessed on 11/05/2016.

[4]"The assets of the company are owned by the company. The members do not have a legal or equitable interest in them" Smith and Keenan, *Company Law*, Thirteenth edition, 2005, p.218.

[5]"La cession de parts ou d'actions n'est pas assimilable à une vente du fonds de commerce parce qu'elle ne porte pas sur les éléments composant le patrimoine social, mais sur les titres représentatifs du capital social, décider autrement serait méconnaitre la notion de la personnalité morale": J.P Sortais, note sous arrêt de la Cour de Cassation, Rev Soc.1974, p.323, cité dans le Mémoire de Sahar BADDOUR: Assimilation de la cession de droits sociaux à la cession du fonds de commerce exploité par la société.

terms of piercing the corporate veil, the concept of which has been applied in some case in other jurisdictions, in order to determine who should be held liable for certain activity between the company and its shareholders or between the parent company and its subsidiary.

[36] In addition to that, since there was the sale of shares of TOTAL RWANDA SARL, it implies that assets underwent the same fate since they are part of the shares, but this does not mean that they are the ones that have been sold in particular since even the Law scholars stated that the sale of shares of the company goes with the assets, liability and obligations, while in case of the sale of assets the purchaser has the freedom of choice[6].

[37] It is provided in article 2.1 of the contract of 30/07/2008 that the purchaser shall purchase shares together with all benefits, rights, liabilities and obligations, which means that what happened is the sale of the shares of TOTAL OUTRE MER while the assets remained in the ownership of TOTAL RWANDA SARL which became ENGEN INTERNATIONAL Ltd as it was agreed up in the contract that the former name will no longer be used, and RDB approved it as ENGEN RWANDA Ltd has revealed. In addition the documents which are in the file of the case prove that this company succeeded to the services of TOTAL RWANDA S.A.R.L (memorandum and articles of association made between the new shareholders of ENGEN RWANDA Ltd, the former TOTAL RWANDA S.A.R.L).

[38] The similar explanations have been given in the case decided by the Court of Cassation in France on the issue of relating to whether the sale of all shares of the company carried out by its shareholders, may be considered as the sale of assets of that company and whether that assets has been the basis to create the new company which has purchased shares of the former company. The court decided that there has been no sale of assets since the former company continued to exist with the legal personality, and that the shareholders are not entitled the right to sale the assets of the company *(Attendu qu'en statuant ainsi, alors que la société BAUVALLET n'ayant jamais cessé d'exister en tant que personne morale et les cédants des actions n'ayant pas qualité pour disposer de l'actif social, l'opération invoquée comme réelle par l'administration des impôts ne pouvait être retenue (...)*[7].

[39] The position that the sale of all shares of the company does not constitute the sale of all components of the company was also held in another judgment rendered by the Court of Cassation in France. *(Atttendu que la Cour d'appel a retenu à bon droit qu'une cession de parts d'une société à responsabilité limitée, même si elle porte sur la totalité de ces parts, ne peut pas être assimilée à la cession du fonds de commerce constituant l'actif de la société)*[8].

[40] The Court realises further that the fact for RRA to state that TOTAL RWANDA SARL should be held liable for taxes on the ground that at the time of acquisition of shares it was impossible to distinguish it from TOTAL OUTRE MER (because they were the same) due to the fact that it was the sole shareholder of that company; is baseless, since apart from alleging it , that effect is not provided for by the Law, especially that it is a principle that a company has the legal personality which different from that of its shareholders. Even though the argument of RRA is considered, the effect should have been the liquidation of the

[6] "If shares in a company are purchased, all its assets, liabilities and obligations are acquired … If only the assets are purchased then, only the assets (and liabilities) which the buyer agrees to obtain and which are identified in the sale agreement are acquired": Mark Gipson, Selling a business: Shares vs. assets, published on 28/02/2012 by the Birketts, available online at http://www.birketts.co.uk/resources/legal-updates/419/selling a business shares vs assets/, consulted on 11/05/2016.

[7] Cour de Cassation, chambre commerciale, Nº de pourvoi : 81-13728 81-16259 of 07 March 1984.

[8] Cour de cassation, chambre commerciale, Nº de pourvoi: 88-15784 of 6 June 1990.

company as it was provided for by article 45 of the Law N°06/1988 of 12/02/1988 which related to companies when the contract of the sale of shares was concluded, which implies that the company would be inexistent. The scholars states in contrast that during that occasion assets of a company is acquired by the remaining shareholder, which is considered as there has been the divvying up of assets since the company no longer exists[9]. It implies therefore that in that case, the legal action would have been brought against TOTAL OUTRE MER in the capacity of the acquirer of the company assets in conformity of the corporate veil principle highlighted above, therefore the liability of TOTAL OUTRE MER is not likely to shift to TOTAL RWANDA S.A.R.L.

[41] The Court realises therefore that no special transaction was carried out likely to lead to belief that the objective was the sale of assets especially that even the grounds RRA alleged to have been disregarded by the previous Court constitute the effects of the sale of shares, particularly that it failed to convince how it seeks the payment of tax from TOTAL RWANDA SARL and ENGEN RWANDA Ltd while it does not admit that ENGEN RWANDA Ltd is the former TOTAL RWANDA Ltd.

[42] Considering all explanations given above and the provision of article 9 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure which provides that the plaintiff must prove a claim, failure to obtain proof, the defendant wins the case, the Court finds the fact that RRA does not produce another evidence to sustain its allegation that there have been the sale of assets of TOTAL RWANDA SARL, leads to the conclusion that it should be relied on the contract which indicates that the transaction made consists of sale of shares by TOTAL OUTRE MER. This decision concurs with that of amicus curiae where he has demonstrated that after assessing the performed transactions, there has been the transfer of shares, therefore the ruling of the judgment RCOM0175/11/HCC which has been appealed against is upheld.

III. THE DECISION OF THE COURT

[43] Declares the appeal of RRA baseless;

[44] Upholds the ruling of the judgment RCOM0175/11/HCC rendered on 13 January 2012 by Commercial High Court;

[45] Orders RRA to pay the court fees amounting to 100,000Frw.

[9]L'associé unique se voit attribuer les biens de la société. Il reçoit alors tout le patrimoine de celle-ci, étant donné que la société disparait sans laisser de titulaire de son patrimoine, il y a immédiatement substitution d'une personne à la personne morale à la tête du patrimoine social'': E. Tyan, Droit commercial, Tome I, Librairies Antoine, 1968, p.352, cité dans le Mémoire de Sahar BADDOUR, op.cit.