Re. RWANDA BAR ASSOCIATION (2)

[Rwanda SUPREME COURT – RS/INTL/SPEC 00001/2020/SC– (Ntezilyayo, P.J., Hitiyaremye, Cyanzayire, Rukundakuvuga and Muhumuza, J.) October 23, 2020]

Constitution – Authentic interpretation of laws – Requirements for admissibility – The applicant must beforehand demonstrate in his/her submissions a private or public legitimate interest pursued, the issue arising in the law and in respect of which he/she seeks interpretation, that there exist contradictory court or administrative decisions to the interpretation of the provision of the law, or the text of the law in respect of which the misinterpretation arises and likely to lead to equivocal and contradictory interpretations, and being in the general interests to determine the right interpretation.

Constitution – Authentic interpretation of laws – The fact that there arises dissension from its interpretation should not be considered as dispute in the event there exists a final court decision that sets the position about the issue pointed out by the parties to have given rise to the confusion.

Facts: ENSafrica Rwanda Ltd (ENSafrica) requested in writing the Bar Association the endorsement to initiate a petition for the interpretation of article 5, paragraph 1(1°) of the Law n°37/2012 of 09/11/2012 as amended by article one of the Law n° 02/2015 of 25/2/2015 establishing the Value Added Tax. This application is closely related to the case initially introduced to the Commercial Court between ENSafrica and Rwanda Revenue Authority (RRA), where ENSafrica requested the cancellation of the value added tax it was imposed in contravention with the Law. ENSafrica lost the case and was ordered to pay the amount of tax that was determined by RRA during the amicable settlement.

Following the admission and examination of the of ENSafrica's motion, the Bar Association addressed the petition for the interpretation of article 5, paragraph 1 (1º) of the stated Law n° 37/2012 to the President of the Supreme Court. The Bar Association elucidates that while article 5 paragraph 1(1°) of the Law of 2012 provided for the list of the commodities and services regarded as exported, and therefore taxed at zero rate, especially exported services, article one, paragraph 1(1°) of the Law of 2015 does neither provide for the explanation nor the instances of exported goods or services. This implies that the legislator has never provided for the explanation for exported services while it was necessary in order to avoid confusion or divergent interpretation about the amendments that were made, especially the instance the service is considered to have been exported.

The Bar Association further states that the lack of explicit definition of the exported services amounts to a disputable issue because a service is not tangible, therefore different from tangible commodities exported, control of destination is easy. In addition, it states that considering the current world situation, services may be delivered to a person living abroad without necessitating the supplier to cross the border, this may lead to the divergent interpretation about this provision where some persons may construe exported services as those produced from abroad, while others may state that they are services produced and/or delivered to persons residing in foreign countries.

Basing on the Protocol on the establishment of the East African Community Common Market, the Bar Association adduces that the definition given to exported services by that protocol indicates clearly that they may be those produced from abroad or supplied to individuals residing abroad.

It further argues that the dissent interpretations on this provision arose from different administrative and court decisions, where for instance, Rwanda Revenue Authority (RRA) at different occasions, has asserted that the services produced in Rwanda and supplied to individuals living abroad, are exported services, while at the same time, it disapproved other services produced under same conditions or similar services without a reliable ground, and that this same situation is present in court decisions in which ENSafrica was a party to.

The Bar Association states that this petition for the interpretation intervenes in the context of one of the positions set by the Supreme Court, where it held that among the guiding principles to admit that a legal provision needs to be interpreted, includes the existence of the court or administrative decisions that diverge about the definitions of the legal provision, and thus, they find that the Supreme Court should provide its right interpretation because there have been different understandings during its application at RRA and court levels.

The State Attorney states that the position of the Government of Rwanda should be perceived in the position adopted by the Supreme Court in the case delivered in 2017, where it was held that, in order for the interpretation of the legal provision to be requested, there should have been taken contradictory decisions, and it should be done in general interests. He alleges that the decisions would be considered as contradictory in the event the Commissioner General would take a decision about one particular taxpayer and take a contradictory decision for another taxpayer while they have similar issue.

The State Attorney states again that the Bar Association does not demonstrate that the stated legal instrument is not clear with respect to its purpose of enactment because its diction is similar to that in previous instruments. They state that what this provision provides is that exported goods and services are taxed at zero rate, while those that are not, meaning the works and services supplied within the country are not concerned by this article. They further adduce that this provision is clearly understandable when it is read concurrently with other provisions, especially article 2(7) of the mentioned Law nº 37/2012 providing for the definition of services produced in Rwanda.

Held: 1. The applicant must beforehand demonstrate in his/her submissions a private or public legitimate interest pursued, the issue arising in the law and in respect of which he/she seeks interpretation, that there exist contradictory court or administrative decisions to the interpretation of the provision of the law, or the text of the law in respect of which the misinterpretation arises and likely to lead to equivocal and contradictory interpretations, and being in the general interests to determine the right interpretation.

2. The fact that there arises dissension from its interpretation should not be regarded as dispute in the event there exists a final court decision that set the position about the issue pointed out by the parties to have given rise to the confusion.

Petition for interpretation of the provision of the Law is dismissed.

Statutes and statutory instruments referred to:

Constitution of the Republic of Rwanda of 2003 revised in 2015, article 95.
World Trade Organization General Agreement on Trade in services (GATS), article 1.
Protocol on establishment of East African Community Common Market, article 16.
Organisation for Economic Cooperation and Development (OECD).
Law n° 30/2018 of 02/06/2018 determining the jurisdiction of courts, articles 65 and 79.
Law nº 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 9.
Law n°37/2012 of 09/11/2012 as modified and complemented by Law n° 02/2015 of 25/2/2015, establishing the Value Added Tax, articles 5 and 1.

Cases referred to:
Re Bar Association, RS/SPEC/00001/2017/SC rendered by the Supreme Court on 28/04/2017.

Judgment

BACKGROUND OF THE CASE

[1] On 10th October 2019, ENSafrica Rwanda Ltd (hereby referred to as "ENSafrica") wrote to the Bar Association requesting the latter to initiate a petition for the interpretation of article 5, paragraph 1-1°, of the Law n° 37/2012 of 09/11/2012 as modified by article 1 of the Law n° 02/2015 of 25/2/2015 establishing the Value Added Tax. ENSafrica is a law firm providing legal services to its clientele including non-residents individuals or legal entities.

[2] This petition of ENSafrica is closely related to the case initiated for the first time to the Commercial Court, whereby ENSAfrica sued Rwanda Revenue Authority (RRA), requesting the cancellation of the Value Added Tax (TVA) amounting to 53,157,360Frw alleging that it was unlawful imposed.

[3] After the submission of the claim, ENSAfrica and RRA expressed the intention to settle the issue amicably, which the Court endorsed, and RRA reduced the tax from 53,157,360Frw to 29,261,826Frw, but ENSafrica was not satisfied and pursued the case. In its submissions, ENSafrica explained that it is a legal entity registered in RDB, and providing legal services to various individuals especially those residing outside Rwanda. It indicated that the services it delivered from July to November 2017 were in the category of exported services, and should have taxed at zero tax rate basing on article 5, paragraph 1(1°) of the Law n°37/2012 of 09/11/2012 as modified by article 1 of the Law n°02/2015 of 25/2/2015 establishing the Value Added Tax.

[4] On 20/03/2019, the Commercial Court tried the case RCOM 01492/2019/TC and held that the claim submitted by ENSafrica has merit in part, that the tax for which ENSafrica requested the cancellation should be maintained, but be reduced. The court ordered it to pay the valued added tax and related penalties amounting to 22,814,510Frw. It held that the counterclaim raised by RRA has merit and ordered ENSafrica to pay RRA judicial damages amounting to 600,000Frw.

[5] The Court relied its decision on the invoices for which ENSafrica did not pay VAT while the services delivered to the clients were in their need and benefit in Rwanda according to article

2 sub-paragraph 7(d)[1] of the Law n°37/2012 of 09/11/2012 establishing VAT. Therefore, those services should have been imposed. The Court also relied on the fact that there were invoices relating to services that were exported such that they should have been imposed at zero rate.

[6] ENSafrica lodged an appeal to the Commercial High Court on ground that the Commercial Court disregarded its explanations because it took a decision on the basis of the provision of the law that is not relevant with appealable issues, the fact that it issued contradictory rulings and that ENSafrica was instructed to pay damages despite that the Court found its claim partially valid. RRA has also raised a cross-appeal demanding the Commercial High Court to reconsider the invoices that the previous Court has excluded from those taxable of VAT and requested judicial damages as well.

[7] On 04/12/2019, the Commercial High Court tried the case RCOMA 00350/2019/HCC and found appeal lodged by ENSafrica without merit, and held rather that, the tax imposed to ENSafrica should not have been reduced by the Commercial Court, and ordered it to pay the VAT amounting to 29,261,826Frw as it was determined by the RRA at the moment of the amicable settlement.

[8] The Commercial High Court stated that the definition of exported services that should not be imposed VAT, must not rely on the fact that service beneficiary resides abroad, there should rather be considered the place where the services provided to the benefit of that person were produced. It therefore stated that ENSafrica had delivered services to foreigners who had to benefit them in Rwanda, and for this reason, the VAT should have been perceived, but which was not done. It also explains that damages ENSafrica was ordered to pay were based on its failure to withhold VAT on the delivered services to its clients, and of being the scapegoat for all those trials.

[9] After the entertainment and analysis of the motion of ENSafrica, the Bar Association wrote to the President of the Supreme Court to request the interpretation of article 5, paragraph one (1º) of the stated Law N°37/2012, and the application was given the docket number RS/INTL/SPEC 00001/2020/SC.

[10] The Bar Association explained that in the year 2015, the Parliament, Chamber of deputies, adopted the Law nº 02/2015 of 25/02/2015 modifying and complementing the Law n° 37/2012 of 09/11/2012 establishing the value added tax. Among the provisions amended by the law of 2015, the Bar Association emphasized on article 5, paragraph one (1º) of the Law n° 37/2012 of 09/11/2012 in order to indicate the merit of the interpretation sought by ENSafrica through the Bar Association to the Supreme Court.

[11] Article 5, paragraph one of the law of 2012 provided that the following goods and services shall be zero-rated:

1º exported goods and services:

a. exported goods bearing stamps recognized by the Commissioner General;

[1] The sub-paragraph 7(d) of this article provides about the services that are considered to be performed in Rwanda when the service provider does not have a headquarter in Rwanda and has it elsewhere instead and that the beneficiaries seek for or benefit them in Rwanda.

b. transportation services and other related services with regard to export goods referred to in item a) of this Article;

c. transportation services of goods in transit in Rwanda to other countries including related services;

d. aircraft benzene;

e. services rendered abroad;

f. goods used in aircrafts from Rwanda to abroad;

2º goods sold in shops that are exempted from tax as provided for by the law governing customs;

[12] The Bar Association indicates that the article 1, paragraph one(1º) of Law of 2015 has amended this provision as follows: the following goods and services shall be zero-rated:

1. exported goods and services;

2. minerals that are sold on the domestic market;

3. international transportation services of goods entering Rwanda and transportation services of goods in transit in Rwanda to other countries, including related services;

4. goods sold in shops that are exempted from tax as provided for by the law governing customs.

[13] The Bar Association stated that while article 5, paragraph one (1°) of the Law of 2012 provided for the list of goods and services considered as exported, and therefore zero-rated, especially "services rendered abroad"; the article one, paragraph one (1°) of the Law of 2015 does not provide for instances of goods and services considered as exported.

[14] The Bar Association continues adducing that the issue lies in the fact that at the time of modification of article 5 of the Law of 2012 establishing VAT where it was stated exported goods and services that are zero-rated, the legislator did not state the definition of an exported services, which was important in order to avoid the confusion, or disparate understandings of the amendments made, especially the instance of which a service should be regarded as exported. It states that it arises an issue in failing to provide for the definition of an exported service, given that the service is not tangible, which is different from tangible exported goods for which the control of the destination of export is easy. The Bar further added that according to the current trend, services can be delivered to a person residing abroad without necessitating to cross the border, and that this would result in equivocal understanding with regard to this provision whereby some people would allege that the exported services are those rendered abroad while according to others they are those rendered/delivered to customers residing abroad.

[15] The Bar Association alleges that, according to ENSafrica, there should be considered the International Agreements on cross-border trade in services signed and ratified by Rwanda, among others, the *General Agreement on Trade in Services (GATS) of 1995 of the World Trade Organization* in relation to international trade in services, and the *Protocol on the establishment of the East African Community Common Market*. They adduce that following article one of GATS agreement, internationally traded services mean services from the territory of one Member into the

territory of any other Member or services in the territory of one Member to the service consumer of any other Member.

[16] The Bar Association states that the text of the first article of GATS, which is similar to article 16.2 [a and b] of the East African Community Common Market, reads that the definition given to exported services in these both international agreements indicates clearly that the exported services could be those rendered abroad or those delivered to customers residing abroad.

[17] In addition, they state that the divergent understanding on this article was also discovered in different administrative and court decisions, notably where Rwanda Revenue Authority (RRA) has, at different occasions, admitted that services rendered in Rwanda to consumers abroad are considered as exported services, but at the same time, by rejecting similar services or those rendered in the same circumstances without any legitimate reason, and this consists of a similar situation in the court decisions in which ENSafrica has been a litigant.

[18] The Bar Association supports that the motion of ENSafrica has merit because the legislator did not provide for the definition of an exported service; consequently, there exists a manifest contradiction among different decisions taken at different occasions by RRA as well as those taken by courts in relation to the exported services (approval of exported services or not), whereby there has been adopted that the services rendered in Rwanda for foreign customers are regarded as exported services whereas other similar services or rendered in the same circumstances were rejected.

[19] The hearing of the case by this Court was held in public on 22/09/2020, the Rwanda Bar Association being represented by Counsel Basomingera Albert, Counsel Nzafashwanayo Dieudonné and Counsel Bizimana Emmanuel, and present was Counsel Kabibi Specioza Specioza, the State Attorney.

[20] The legal counsel for the Bar Association indicated on the basis of Article 79 of the Law nº 30/2018 of 02/06/2018 determining the jurisdiction of courts, that ENSafrica has personal and general interests to petition for the authentic interpretation of article 5, paragraph one (1°) of the Law n°37/2012 of 09/11/2012 as modified and complemented by article one of Law n°02/2015 of 25/2/2015 establishing the Value Added Tax in order for service providers to individuals or corporate customers from abroad be spared of the confusion about the understanding of that provision be it on the side of the taxpayers, RRA and Courts.

[21] Counsel Kabibi Specioza, the State Attorney did not raise an objection relating to the interests of parties, she rather focused on indicating that the stated Law does not cause uncertainty to the extent of necessitating authentic interpretation.

[22] The first issue to be determined consists of whether the motion for the authentic interpretation of article 5, paragraph one (1°) of the above stated Law n°37/2012 introduced by the Bar Association complies with the admissibility requirements.

II. ANALYSIS OF THE ISSUE FOR DETERMINATION

- **Determining whether the petition for the authentic interpretation of article 5, paragraph one (1°) of the Law n°37/2012 of 09/11/2012 as amended by the first article of the Law n° 02/2015 of 25/2/2015 establishing the Value Added Tax complies with the admissibility requirements**

[23] The counsel for the Bar Association declares that the authentic interpretation they are seeking is based on the contradiction that is manifest in different decisions made on different occasions by RRA and courts in relation to the exportation of services, whereby it was decided that the services delivered to foreigners but rendered in Rwanda are exported services, whereas other similar services or those rendered in the same circumstances were not considered as such. They state that in some dossiers of which they have even pointed out examples through the table of RRA's decisions, it adopted at Commissioner General level, that the services rendered by ENSafrica are exported services while other dossiers had to be put on hold for the amicable settlement after the case was already initiated to the Court. They add that aside from the contradiction at RRA level, the same case has also occurred between the Commercial Court and RRA as well as between that Court and the Commercial High Court on the right definition to that provision, whereby according to the interpretation of the Commercial High Court, exported services does not only entail services exported abroad as held by the Commercial Court with regards to some services, rather, services delivered to individuals abroad should not be regarded as exported services in the event they enjoyed them while in Rwanda.

[24] Counsel for the Bar Association states that the present motion for authentic interpretation is in line with one of the positions set by the Supreme Court in the case RS/SPEC/00001/2017/SC delivered on 28/04/2017 on the claim that was initiated by the Bar Association, where it explained that among the guiding principles for determining if the provision needs the authentic interpretation, includes the existence of contradictory judgments or administrative decisions with regards to the definition of legal provisions, and for this reason, they find that the Supreme Court should provide the authentic interpretation of this provision because its application invoked divergent interpretations by RRA as well as court.

[25] They also submit that the contradiction should not be perceived through the big number of cases as it could occur in a single case. They accordingly find that the Supreme Court should not declare itself incompetent to issue the authentic interpretation sought on the basis that the Commercial High Court has set the leading position, because the Supreme Court is superior to the Commercial High Court, whose decisions are not binding to other courts.

[26] Concerning the definitions of exported services, the Bar Association adduces that they are based on internationally accepted principles relating to VAT as provided under Organisation for Economic Cooperation and Development (OECD) different documents, of which Rwanda is a member state, and therefore, the fact for the Supreme Court to rely on these documents for providing the interpretation of article 5, paragraph one of the Law establishing VAT is admissible. In addition, the OECD documents were referred to by Courts in other countries and upheld that the principles raised are internationally acknowledged and that it would be missing the opportunity for the Court to disregard them while they are not inconsistent with any internal legislation of any country.

[27] Counsel Kabibi Specioza, the State Attorney rebuts that the opinion of the Government of Rwanda should be perceived in the position set by the Supreme Court in the judgment RS/INCONST/SPEC 00001/2017/SC rendered on 28/04/2017, where it held that in order for the authentic interpretation of the provision of the Law to be provided, contradictory decisions must have been taken, and the interpretation should be in general interests. She explains that the taxpayer who is not satisfied with the tax he/she is imposed submits his/her appeal to the Commissioner General of RRA. This is an ordinary administrative remedy with the purpose of allowing the Commissioner General to assess whether the tax officer who computed the tax did not err or misinterpret the law. She further declares that there exists another form of remedy known as amicable settlement and that the decisions reached at would not be considered inconsistent. She adduces that the decisions would be considered contradictory in the event the Commissioner General takes a particular decision with regards to a taxpayer and takes another divergent decision to the first one with respect to another taxpayer who nonetheless has a similar issue.

[28] Counsel Kabibi Specioza adds that the Bar Association does not demonstrate that the above-stated law is not understandable as far as its purpose of enactment is concerned, given that it is articulated in the same manner as of the previous laws. She submits that, according to the content of this provision, exported goods and services are zero-rate taxed while those not exported, meaning the goods and services sold to the domestic market, are excluded. She adds that this provision becomes clearly understandable if read jointly with other provisions, especially article 2(7) of the Law nº 37/2012 above-stated, clarifying the services rendered in Rwanda. This article 2(7), subparagraph d, provides that services shall be regarded as provided in Rwanda if the service provider has no headquarters in Rwanda but it has it elsewhere and the recipients of the services need it or benefits from them in Rwanda. She states that this implies that the service provider, as well as the recipient, would not reside in Rwanda, but the recipient needs or benefits from it in Rwanda, and in this case, the service is regarded as provided in Rwanda such that it is taxed at 18% rate since it is not an exported service.

[29] Therefore, she alleges that the analysis of article 5(1) and 2(7°, d) of the above-stated Law 37/2012 led to the answer to the issue of determination of the service regarded as exported without being necessary to refer to the international principles of OECD, foreign court decisions, or authentic interpretation.

DETERMINATION OF THE COURT

[30] Article 79, paragraph 2 of the Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts provides that the applicant must demonstrate in his/her submissions a private or public legitimate interest pursued, the subject of the dispute.

[31] This provision implies that the petitioner must first indicate interest, which may be personal or public, he/she intends to protect. He/she must also demonstrate that the provision of the Law for which the authentic interpretation is sought is vague, which implies there should be inconsistent court and administrative decisions with regards to the interpretation of the provision of the law, or that there are some terms of the law that cause confusion such that they would be given contradictory interpretations while being in the general interests to determine the right

interpretation. And this is similar to the holding of the judgment RS/SPEC/00001/2017/SC rendered by the Supreme Court on 28/04/2017[2].

[32] As far as this case is concerned, the Court finds that there is no dispute with regards to interests because the petitioner has a particular interest in relation to his business activities, and for this reason, it is not necessary to make a determination thereto. It rather finds it necessary to determine whether article 5, paragraph one (1°) of the Law n°37/2012 of 09/11/2012 as amended by article one of the Law n° 02/2015 of 25/2/2015 establishing Value Added Tax, of which they petition for the authentic interpretation, causes dispute requiring authentic interpretation.

[33] The Court finds that in the event where the ambiguity is in the wording of the provision of the law, the interpretation guiding principles based on the hierarchy of norms and the time of enactment, court decisions as well as law scholars' opinions apply in accordance with article 9 of the Law n° 22/2018 of 29/04/2018 relating to civil, commercial, labour and administrative procedure.

[34] Article 95 of the Constitution of the Republic of Rwanda of 2003, revised in 2015, provides the hierarchy of norms as follows: 1° Constitution; 2° organic law; 3° international treaties and agreements ratified by Rwanda; 4° ordinary law; 5° orders, and a law cannot contradict another law that is higher in hierarchy. Based on these grounds, the Court notes that there are international agreements ratified by Rwanda that may provide for additional explanations of exported services as specified by article 5 of the aforementioned law of which the authentic interpretation is petitioned to enlighten someone who would miss its intended meaning.

[35] In addition, It is also in the finding of the Court that the parties to the case indicated themselves that there is a way through which the provision on the definition given to exported services would be understandable, especially by referring to the principles of international agreements, of which GATS and the Protocol on the establishment of the East African Community Common Market, because such conventions are part of the legislation of Rwanda in accordance with the provision of the Constitution of Rwanda stated in the previous paragraph, and for these reasons, it is not necessary to resort to the authentic interpretation as long as the issue they raised is likely to be solved through the ordinary way of legal interpretation.

[36] It further finds that the statements by the petitioners, according to which there have been contradictions among the decisions made, be they at RRA and courts levels, are groundless because what they allege to be the disputes about the definition of exported services was resolved by the Commercial High Court in the final judgment as they themselves admitted. The fact that there are explanations provided by the Court that are different from those provided by RRA, should not in itself be regarded as a contradiction because it is normal for the taxpayer who is not satisfied with the decision made by a given institution to submit the matter to the Court and the final decision becomes binding to all.

[37] The Court finds also that the statements of the parties according to which there occurred the divergence with respect to the understanding of this provision between the Commercial Court and the Commercial High Court, are groundless because, in practice, the superior court can rectify

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See paragraphs 25 and 26 of that judgment.

the decision of the lower court, which is the reason of the ranking of Courts. It would be regarded as a contradiction in the event the last instance Court made divergent decisions on similar issues, which is not the situation in this case since the petitioners fail to demonstrate that there are contradictory decisions delivered by the Commercial High Court on similar issues.

[38] The Court notes that if the last instance court has adopted the position with regard to a given issue, it is regarded as if it settles all disputes regarding that issue such that the interpretation is no longer needed. Thus, the statements according to which the petitioners allege that the Commercial High Court is not competent to set a leading position, are unfounded because according to the judicial system based on stare decisis, the position adopted by the court must be respected by the same court and lower courts[3]. The Law provides instead that the person who is not satisfied with the position adopted concerning a particular issue and wishes it to be changed in the interest of future cases seizes the Supreme Court according to article 65 of the Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts.

[39] Based on the explanations above, the Court is of the view that the provision of the Law of which the Bar Association demands the authentic interpretation does not cause ambiguity because it can be interpreted in accordance with the existent guiding principles of legal interpretation, and in addition to that, there is a position set by the Commercial High Court which has not yet been reversed. For all these reasons, the Court deems that the petition for authentic interpretation of article 5, paragraph one (1°) of the Law n°37/2012 of 09/11/2012, as amended by article one of the Law n°02/2015 of 25/2/2015 establishing the Value Added Tax, should not be admitted and examined because it does not comply with the law.

III. DECISION OF THE COURT

[40] Holds that the petition for authentic interpretation of article 5, paragraph one (1°) of the Law n°37/2012 of 09/11/2012, as amended by article one of the Law n°02/2015 of 25/2/2015 establishing the Value Added Tax, submitted by the Bar Association is dismissed.

[3]See the case RS/INCONST/SPEC 00002/2019/SC, paragraphs 32 and 33.