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Legal Alert: Right to Privacy during Tax Investigations by the Commissioner General of Uganda Revenue Authority.

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Constitutional Court holds that the notices issued by the Commissioner General, URA requiring all banks to furnish details of all bank accounts held by them for two years violated the rights of the account holders and were further in breach of Article 27 of the Constitution of the Uganda.

**Tax authority must show probable cause to exercise powers under tax law:
*ABC Capital Bank & 30 Others v. Attorney General & Commissioner General, Uganda Revenue Authority, Constitutional Petition No 14/2018***

Background

The Petitioners in this case are financial institutions licenced to operate in Uganda by the Central Bank. On March 16, 2018, the Commissioner-General, Uganda Revenue Authority, acting under section 42 of the Tax Procedures Code Act, issued notices to the Petitioners requiring them to furnish to URA details of all bank accounts held by them for the two year period of January 1, 2016 to December 31, 2017. The details were to include, but were not limited to, account name, the account number, the name of the signatory, the type of account, a tax-payer identification number (TIN) where available, national identification numbers or business registration numbers where applicable, total credits and debits for each of the two years, current balance, account holders' telephone contact and email.

Rationale of the Petition

The Petitioners brought this petition to court challenging the legality of the Notices issued and the powers granted to Uganda Revenue Authority (URA) under Section 41 and 42 of the Tax Procedures Code Act 2014 ("TPC Act").

They averred that the provisions of Section 41 and 42 give URA unfettered powers to access premises, records, and data storage devices and obtain information without any reasonable cause, administrative or democratic supervision of all safeguards in a manner that far exceeds what is necessary to accomplish the objective of tax collection and is accordingly beyond what is acceptable and demonstrably justifiable in a free and democratic society contrary to Article 43 of the Constitution.

The petitioners noted that Section 42 of the TCP Act relates to tax investigations and there was no pending tax investigation in relation to each and every bank account holder in Uganda. On that basis, they averred that it was infringement to the right of privacy as the notices were issued to all financial institutions in Uganda in respect of each and every bank account in Uganda, an act which was an indiscriminate fishing exercise lacking any objective and rational basis.

The Petitioners therefore sought to establish:

- Whether Sections 41(7) (a) and 42(4) (a) of the TPC Act nullify any law relating to privilege which includes, but is not limited to, the privilege against self-incrimination and legal professional privilege are inconsistent with the right to fair hearing in Article 28 of the Constitution of Uganda ("First Issue")
- Whether the notice issued by the Commissioner, URA together with Sections 41 and 42 of the TPC Act are inconsistent with and contravene Article 27(2) read together with Article 43(2)(c) of the Constitution of Uganda ("Second Issue")

Legal arguments and Judgment of the Constitutional Court

First issue: The Petitioners sought to establish whether Sections 41(7)(a) and 42(4) (a) of the TPC Act nullify any law relating to privilege which includes, but is not limited to, the privilege against self-incrimination and legal professional privilege are inconsistent with the right to fair hearing in Article 28 of the Constitution of Uganda.

Section 41(7) and 42(4) provides that:

“the section shall have effect despite any law relating to privilege or the public interest with respect to access of premises or places, or the production of any property, record, including in electronic format.”

The Petitioners relied on the case of *Dr Robert Ayisi v. Kenya Revenue Authority & Another* Petition No 412/2016 [2018] e-KLR where the Constitutional Court of Kenya held that Section 59(4) of the Kenya Tax Procedures Code, 2015, which is similar to Section 42(4) of the Uganda’s TPC Act, was unconstitutional on the basis that it was likely to fall foul of the privilege between advocate and client, contrary to the privilege rule on evidence. In the *Ayisi* case, the Kenyan court held that section 59(4) of the TPA falls foul of the privilege rule and thus declared it unconstitutional and invalid on the ground that the section violated the privilege for communications between an advocate and a client (as outlined under section 137 of the Evidence Act).

Notably, the Constitutional Court did not rule on this issue. The Court differentiated the cases and held that in the Kenyan case, there was legal privilege between the lawyer and his client, whereas in the case before court, the petition was one of bank/customer privilege and the duty of confidentiality and not legal privilege as made out in their submissions. As such, the Court did not consider the arguments by the petitioners. The Court additionally held that the petitioners’ prayers on the issue could not be answered in the terms prayed for because the principles of fair hearing under Article 28 do not relate to the principles for investigation of the tax matters as the Commissioner is not an independent tribunal or court established by law.

In distinguishing the Kenyan case—which involved a letter dated by the tax authority to the Petitioner seeking details of transaction between the interested party and another party for the period 2009-2016, which details including fee note numbers, dates, gross amount, VAT and nature of payment—the Constitutional Court considered the wording of constitutions of both countries. The Court noted under Article 27 of the Uganda Constitution, no person shall be subjected to *unlawful search*, and that it follows Article 27 permits lawful searches and lawful entries. The wording in the Kenya Constitution is different, as it does not use the word “unlawful search or entry” but generalises all searches.

Accordingly, the Court held that the Uganda Constitution, a search can be conducted under a statutory provision that permits it to be done without a warrant. Sections 41 and 42 of the TPC Act do not require a search warrant. As such, the Commissioner has power to conduct lawful searches as provided under the TPC Act. However, Article 27(2) of the Constitution forbids the invasion of privacy of a person’s home, correspondence, communication or other property. Therefore, the Court noted that it will be necessary to develop safeguards against arbitrary interference without probable cause in any tax related matter and held that investigations should be prompted by some probable cause such as the alleged commission of an offence under tax laws for which information may be obtained through investigations.

Second issue: The Court considered this the primary issue in the petition on whether the commissioner should have a right of access to information by gaining physical entry into private premises, record of private accounts etc. without a warrant.

In its judgment, the Court noted that Article 43(2) of the Constitution does not require any justification of a limitation to fundamental right of freedom if it is provided. However, the Court noted Sections 41 and 42 of the TPC Act are meant to empower the commissioner in the investigation of tax related matters and, as such, the investigation should be prompted by some probable cause such as the alleged commission of any offence under the tax laws for which information may be obtained through investigations.

The Court stated that each tax payer is an individual and therefore the information sought should be information required of the account holder lawfully sought in tax matters rather than the information that was required of the petitioner banks in the notices. The Court thus accepted the petitioners’ submissions that the notices issued by URA were not preceded by any ongoing investigations into commission of any tax crime and there was no probable cause for the issuance of the notices to all the petitioners.

To that end, the Court held that the blanket notices issued by the Commissioner violated the rights of the account holders and were further in breach of Article 27 of the Constitution.

However, it is to be noted that, unlike the Kenyan situation where the provisions granting the tax authority powers to carry out searches or entries were nullified, in Uganda, URA has power to conduct searches and entries as long as they have probable cause and the search is lawfully conducted according to the provisions under the TPC Act.

Effect of Judgment of the Constitutional Court

Primarily, the Constitutional Court upheld the privacy rights of tax payers in Uganda to their bank accounts, in holding that before investigations are undertaken, there must be probable cause such as alleged commission of any offence under the tax laws for which information may be obtained through investigations.

Notably, the judgment makes it prudent for all Ugandan tax payers to comply with their tax obligations in accordance to the tax laws of Uganda. This is particularly critical during these times when the URA is increasing enforcement measures to ensure that all taxpayers pay their fair share of tax.

Nonetheless, notwithstanding the above, the judgment does not address the scope of lawful searches and leaves room for the use of the provisions in the TPC Act for political reasons, as it does not address how such persons would be protected against enforcement measures that are politically instigated.

In contrast to the Kenyan case, provisions of sections 41(7) and 42(4) of the TPC Act were not nullified. As such, the Commissioner of Uganda Revenue Authority still has powers to conduct searches, enter and seize any records or information relating to a tax investigation.

Additionally, the issue of Article 41(7) and 42(3) of the TPC Act that allows URA to demand private and privileged communication between parties in contravention of the general law and application of privilege information under section 128 of the Evidence Act and Article 27(2) of the Constitution. This remains unresolved. The Court did not consider submissions on the issue because the submissions related to legal privilege and yet their facts related to banker/customer privilege. The failure to address this issue leaves room for infringement of the legal privilege between lawyers and their clients which is contrary to Section 128 of the Evidence Act and Article 27(2) of the Constitution.

Conclusion

Tax payers should take measures and steps to comply with their tax obligations to avoid searches on their accounts or premises for purposes of tax investigations. On its part, URA must take steps to demonstrate probable cause before carrying out their searches to avoid cases of unlawful entry and searches on tax payers in Uganda.

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