THE COMMERCIAL HIGH COURT, SEATING IN KIGALI, DECIDING COMMERCIAL MATTERS AT APPEAL LEVEL, TODAY, 09/11/2018, DECIDES IN A PUBLIC HEARING, CASE RCOMA 00137/2018/CHC/HCC, AS FOLLOWS.

PARTIES DETAILS:

AIRTEL RWANDA LTD, with registered address in Amarembo I Village, Nyabisindu Cell, Remera Sector, Gasabo District, City of Kigali, IND Number 1198080004310005, Tel. +250731000020, email: steven.gasana@rw.airtel.com represented by Me NSENGIYUMVA Abel: **APPELLANT**.

And:

RWANDA REVENUE AUTHORITY (RRA), represented by Me BYIRINGIRO Bajeni: **RESPONDENT**

SUBJECT MATTER:

- Declaring that the loss AIRTEL RWANDA Ltd incurred during 2011 is equivalent to RwF 211,477,417 be brought forward in the years following the year in which loss was incurred and counsel fee 9Appeal against judgment RCOM 01567/2017/2017 /TC/NYGE on 26/01/2017)

I. CASE SUMMARY

[1] In the case initiated in the Commercial Court of Nyarugenge, AIRTEL RWANDA's claim against RRA requests that the loss AIRTEL RWANDA Ltd incurred for 2011 equivalent to RwF 211,477,417 be brought forward in the years following the year in which loss was incurred and counsel fee.

[2] This case originates from an audit RRA conducted in AIRTEL, for auditing corporate income tax, value added tax, withholding tax of 15% and tax for 2011, and out of the loss it had declared equivalent to RwF272,627,074 it was denied the amount of RwF 211,477,417. The reason being that there was a change in the shareholders at the level higher than 25%. Airtel filed an informal appeal to the Commissioner General,

in his decision dated 05/06/2017, the Commissioner General confirmed that the appeal was not legally grounded because there had been change in the name of the shareholder, that on the contrary, BHARTI AIRTEL RWANDA HOLDINGS Ltd and ZEBRANO (MAURITIUS) Ltd are two different companies, that there has been transfer of 100% shares between these two companies resulting in a change in the shareholders' right to vote within these two companies, making it impossible for the loss incurred in 2011 to be brought forward to next years.

[3] AIRTEL RWANDA Ltd filed a claim requesting the Court to decide in favour of bringing forward the loss incurred in 2011 to years that followed the year during which loss was incurred.

[4] In deciding the case, Court declared the claim of AIRTEL RWANDA Ltd not legally grounded and ordered it to pay RRA representation fees and counsel fees.

[5] Dissatisfied with the decision, on behalf of AIRTEL RWANDA Ltd, Me NSENGIYUMVA Abel appealed against the decision arguing in favour of examining whether there was issue of shares at a rate of 100% considered as a change, examining whether paragraph 3 of article 29 of Law No. 16/2005 of 18/08/2005 on direct taxes on income should apply in case there was no recognized stock exchange that was operational on 26/09/2011, examining whether there was change in the shareholder or whether there was error, examining whether there was change in the right to vote. He concluded requesting for representation fees and counsel fees.

[6] Reacting to the grounds for the appeal, Me BYIRINGIRO BAJENI for and on behalf of RRA argues that these grounds are not valid because there was change in the shareholder at a rate of 100%, making impossible to carry forward any loss. He concluded requesting for representation fees.

[7] In these proceedings, Court will examine whether there was issue of 100% shares to be considered as a change, examining whether paragraph 3 of article 29 of Law No. 16/2005 of 18/08/2005 on direct taxes on income applicable at the time there was no capital market operational on 26/09/2011, examining whether there was change of shareholder or whether there was an error, examining whether there was change in the

right to vote, examining whether representation fees and counsel fees claimed against AIRTEL are legally grounded.

II. ANALYSIS OF ISSUES

A. Concerning determining whether issue of 100% shares is considered as a change

[8] Me NSENGIYUMVA Abel explains that in point 18 of the judgment in this case being appealed against, Judge held that there was change of the shareholder and of the right to vote at the rate of 100%. However, any mention of change implies that something did remain. Therefore, if nothing subsisted, article 29 of Law No. 16/2005 of 18/08/2005 on direct taxes on income should not apply. This is what was decided by the Supreme Court in judgment RCOM A 0070 /10/CS (see points 14 and 15).

[9] Me BYIRINGIRO Bajeni explains that article 29, 3 of Law No.16/2005 of 18/08/2005 on direct taxes on income, provides that if a company whose shares are not traded on a recognized stock exchange changes more than twenty five percent (25%) by value or by number, by shares or by right to vote, shall not be allowed to carry forward its loss when there is change, direct or indirect, that exceeds 25%. The issue being considered in this case is to assess whether there were changes at the rate of 25% or even higher than 25%. When such change occurs, the right to vote is then taken into account because this right is determined by the number of shares held by a person in the company.

[10] He further explains that specifically for AIRTEL Rwanda, there was change of shareholder, meaning that apart from its impact on the number of shares, even the right to vote was modified because shareholder is no longer BHARTI AIRTEL RWANDA HOLDING LTD which still holds the right to vote, it is instead ZEBRANO (Mauritius) Ltd. The fact that nothing subsisted implies that this article does not apply to the operations made or what happened between BHARTI AIRTEL RWANDA HOLDING LTD and ZEBRANO (Mauritius) Ltd are not targeted by article 29, 3 of the above law.

[11] He concludes adding that AIRTEL Rwanda still exists as a company, what happened is a change in the shareholders only. This contradicts the judgment RCOMA 0070/10/CS which appellant sought to invoke as having

no link with the case being heard today. Upon reading paragraph 14 of that judgment, Court's argument was that article 29,3 is referred to when there has been change in the number of shares when the company subsisted, that article does not apply to the company that was definitively dissolved. This is what is implied in paragraph 15, in which Court argued that the shares of SHELL Rwanda was entirely sold, SHELL Rwanda was deregistered from the company registers. This is different from the case of AIRTEL Rwanda because, for the latter company, the change applied to shareholders only, but the company itself subsists and is written in the company registers.

Court Findings

[12] Article 29, 3 of Law No. 16/2005 of 18/08/2005 on direct taxes on income as modified and complemented to date provides that '*…If during a tax period, the direct and indirect ownership of the share capital or the voting rights of a company, which shares are not traded on a recognized stock exchange changes more than twenty five per cent (25%) by value or by number, paragraph one of this Article ceases to apply to losses incurred by that company in the tax period and previous tax periods.'*

[13] Article 174 of Law No. 17/2018 of 13/04/2018 governing companies provides that '*An issue of shares by a holding company to its subsidiary is void. A transfer of shares in a holding company to its subsidiary is void'.*

[14] Article 110 of Law No. 15/2004 of 12/06/2004 on evidence and its production provides that *'A judicial admission refers to statements the accused or his or her representative makes before the court. Such statements shall serve as plaintiff arguments'.*

[15] Court notes that the position defended by Me NSENGIYUMVA Abel arguing that there was a 100% change in the company means that it was dissolved with nothing related thereto remaining, should not be given credit because as indicated, the certificate of registration shows that AIRTEL RWANDA Ltd still exists legally, but what changed is its shareholder who changed from BHARTI AIRTEL RWANDA HOLDING LTD to

ZEBRANO (Mauritius) according to the decision handed down by the initial judge which is the same view held by this court.

[16] Court notes that reference should not be made to judgment RCOMA 0070/10/CS because judgment in this case based on the fact that the company was 100% purchased and deregistered from company registers, the fact that AIRTEL RWANDA Ltd is still registered in the company registers and continues its operations, the decisions in the judgment in this case do not apply to it.

[17] Court further notes that basis was paragraph 3 of Article 29 of Law No. 16/2005 of 18/08/2005, for content in this paragraph to grant to AIRTEL Rwanda Ltd the right applied for, basis should be on the fact that company was 100% acquired and deregistered from company registers, for the new company to be granted the right to carry forward that loss to the next five years, as explained in the judgement that AIRTEL RWANDA Ltd is no longer existent, therefore its requests should not be granted any valid consideration.

[18] Furthermore, for AIRTEL RWANDA Ltd to claim entitlement to the right applied for pursuant to paragraph 2 of Article 29, there is need to consider whether its shares are traded on a recognized stock exchange, the fact that no evidence is furnished by its representation proving to the Court that its shares are traded on a recognized stock exchange, AIRTEL RWANDA Ltd should therefore not be granted the right mentioned in paragraph 1 of article 29 of Law No.16/2005 of 18/08/2005.

B. Concerning assessing whether paragraph 3 of article 29 of Law No.16/2005 of 18/08/2005 on direct taxes on income should apply in case there is no stock exchange that was operational on the date of 26/09/2011

[19] Me NSENGIYUMVA Abel explains that among the legal requirements for carrying forward a loss into the five years following the year in which loss was incurred is the criterion that a taxpayer must have shares being traded on a recognized stock exchange. On 26/09/2011, at the time BHARTI AIRTEL RWANDA HOLDING Limited was deregistered as the shareholder in AIRTEL RWANDA Ltd, the stock exchange was yet to be operational in Rwanda. Even if stock exchange was provided for by Law No. 11/2011 of 18/05/2011 establishing the Capital Market Authority which was put in place

before these changes, in reality this stock exchange had no registered operational address.

[20] He concludes saying that in case RCOM A 0070/10/CS the Supreme Court maintained that in case of absence of the stock exchange, para 3 of article 29 above should not apply (see paragraph 13 of that judgment).

[21] Me BYIRINGIRO Bajeni explains that these allegations by the appellant that there was no stock exchange in Rwanda at the time of the sale of Airtel Rwanda shares, are wrong that, on the contrary, it is obvious that these allegations of the appellant contain self-contradiction, because he personally says the sale of the shares of Airtel Rwanda occurred on 15/09/2011, and ends up saying that the law establishing the Capital Market Authority was published on 18/05/2011.

[22] He concludes questioning how his allegation that the registered address of stock exchange was unknown whereas it was established by the law. Another element is that article 29, 3 of the above law, not only mentioned the stock exchange operating in Rwanda, but mentioned a recognized stock exchange, implying a stock exchange capable to be a stock exchange operating in Rwanda, but most importantly, being a recognized stock exchange. Regarding case RCOMA 0070/10/CS the appellant seeks to invoke, indicating that the matter of litigation is the same, because in the judgment the sale did not concern shares only, but there was sale of all the assets of the company, resulting in its definitive dissolution, when the matter was pending against Airtel, there was change in the shareholders, but the company continued to exist with no deregistration from company registers, as was the case for SHELL Rwanda and KOBIL.

Court Findings

[23] Article 20 of Law No. 11/2011 of 18/05/2011 establishing the Capital Market Authority (CMA) and determining its mission, powers, organisation and functioning provides that '*This Law shall come into force on the date of its publication in the Official Gazette of the Republic of Rwanda'.*

[24] Article 29, paragraph 3 of Law No. 16/2005 of 18/08/2005 on direct taxes on income as modified and complemented to date provides that '*If during a tax period, the direct and indirect ownership of the share capital or the voting rights of a company, which shares are not traded* <u>*on a recognized stock exchange*</u> *changes more than twenty five per cent (25%) by value or by*

number, paragraph one of this Article ceases to apply to losses incurred by that company in the tax period and previous tax periods'.

[25] Court notes that allegations by Me NSENGIYUMVA Abel that for loss to be carried forward to the next five years following the year during which loss was incurred, taxpayer must have shares traded on a recognized stock exchange, additionally, when BHARTI was deregistered as a shareholder in Airtel on 26/09/2011 even if the capital market authority was established by Law No. 11/2011 of 18/05/2011 was published before these changes, that however, in Rwanda, that stock exchange had no registered address should not be given any valid consideration because his judicial admission that when BHARTI became the shareholder of Airtel the law was existent, further, the fact that article 20 of Law No.11/2011 of 18/05/2011 mentioned above provides that the law shall come into force on the date of its publication in the Official Gazette of the Republic of Rwanda, Me NSENGIYUMVA Abel should not pretend that the stock exchange had no registered address while the acts of BHARTI were concluded four months after the law had already come into force, and should not oppose the fact that there are errors it made to file a case with the court.

[26] Additionally, his allegations are not worth any legal consideration since he seeks to attribute to the law the wording and expression not contained therein because article 29, paragraph 3 of Law No. 16/2005 of 18/08/2005, the stock exchange referred to is the recognized stock exchange, no matter where it may be domiciled not necessarily in Rwanda, this being contrary to what Me NSENGIYUMVA wanted to clarify that the stock exchange must have a registered address in Rwanda, it existed also in Rwanda much as it could be anywhere else provided it be operational in conformity with the law or open to traders in stocks.

[27] These explanations supersede those put forth by Me NSENIYUMVA who suggested to argue in the line of case RCOMA 0070/10/CS in which the Supreme Court ruled that in case the stock exchange was non-existent, paragraph 3 of article 29 above should not apply because in this issue at hand concern is about the stock exchange that legally existed.

C. Concerning assessing whether there was change of the shareholder or whether any error was made

[28] Me. NSENGIYUMVA Abel explains that, at the very beginning, company owners namely BHARTI AIRTEL INTERNATIONAL (Netherlands) B.V. registered it on a no-existent company called BHARTI AIRTEL RWANDA HOLDING Ltd. This was a name they planned to give to the company they already owned called ZEBRANO (Mauritius) Limited. BHARTI AIRTEL INTERNATIONAL (Netherlands) B.V soon noticed it could not have as a shareholder only one person that was yet in existence. Such a situation made it request the management of AIRTEL Rwanda, which it had incorporated, to go and change the name of the shareholder, and put that of ZEBRANO (Mauritius) Limited. This change of name was effected on 26/09/2011, i.e. twenty four (24) days after the first registration. During that period of twenty-four (24) days no expense was ever made by AIRTEL RWANDA allegedly because it had not opened an account. The loss AIRTEL RWANDA incurred for 2011 accrues from the cash-out from AIRTEL with one shareholder named ZEBRANO (Mauritius).

[29] He further explains that changing the name of the shareholder to be named BHARTI AIRTEL RWANDA HOLDING Limited instead of ZEBRANO (Mauritius) took time but was later effected on 20/04/2014 as evidenced by the certificate of incorporation on change of name. Later on, RDB re-registered the changed name of the shareholder and became on this occasion BHARTI AIRTEL RWANDA HOLDING Limited as mentioned on the certificate issued by RDB on 29/01/2015. This means, truly speaking, that when AIRTEL RWANDA started legally operating on 26/09/2011 because prior to this date, it could not be legally existing since it had not even one shareholder.

[30] He further explained that, for statements by the Commissioner General about BHARTI AIRTEL RWANDA HOLDING Limited and ZEBRANO Mauritius to be accepted that these were indeed two distinct companies, this would require to furnish evidence that a company indeed existed in 2011, whether in Rwanda or anywhere else in the world under the name of BHARTI AIRTEL RWANDA HOLDING limited.

[31] He concludes saying that the explanations given above prove that there was no change of shareholders and that there was no acquisition of an insolvent company because ZEBRANO Mauritius could not buy shares in a company that did not exist.

What the judge said in paragraph 15 that ZEBRANO (Mauritius) is a name given to another company named ZAIN IP (Mauritius) Ltd does not exclude the fact that ZEBRANO is also the one that later changed again its name to be called BHARTI AIRTEL INTERNATIONAL(Netherlands) B.V as prior to it no other company carried that name. Even if during the first registration of AIRTEL, it was mentioned in writing that its shareholder is BHARTI AIRTEL RWANDA HOLDING LTD, the latter company did not exist. His view is that an error made should not prevent a person from claiming for the rights recognized to him/her by the law when he furnishes evidence to prove the reality of his allegations.

[32] Me BYIRINGIRO Bajeni explains that paragraph 1 of article 29 of Law No. 16/2005 of 18/08/2005 on direct taxes on income, grants authorization if the determination of business profit results in a loss for the tax period, the loss may be deducted from the business profit in the next five (5) years. He added that paragraph 3 of that article provides that if a company whose shares are not traded on a recognized stock exchange is not allowed to carry forward the loss when there is direct or indirect change higher than twenty five (25%) by value of by number, by shares or voting rights. When reading this article, especially in paragraph 3, one finds out that what AIRTEL Rwanda alleges is true because as evidenced by the document given to tax administration indicates there has been change of the shareholder, because it was formerly called BHARTI AIRTEL RWANDA HOLDING LTD and became ZEBRANO (Mauritius) Ltd.

[33] This was done on 15/09/2011, by the shareholder of AIRTEL Rwanda, especially as he was one and only shareholder, in the resolution of the shareholder which indicates that there was issue of 100% shares. This is an indication that it was not a mere change of name, but rather a change on the shareholder at the rate of 100%. Worth noticing is that the appellant reads paragraph 3 in part, where he/she wants to only indicate the change operated by value of the shareholders, whereas this paragraph also deals with the right to vote.

[34] He further explains that the former shareholder named BHARTI AIRTEL RWANDA HOLDING LTD changed to be ZEBRANO (Mauritius) Ltd, this means that the right to vote has changed because the holder of the right to shares of AIRTEL RWANDA is ZEBRANO (Mauritius) LTD and is no longer BHARTI AIRTEL RWANDA HOLDING LTD.

Another indication that the allegations by the appellant are wrong is the expression contained in his pleadings when filing a claim that at the time of AIRTEL RWANDA's first registration as a company operating in Rwanda, it had no shareholder.

[35] If such were the case, the person who would be empowered to issue shares would be BHARTI AIRTEL INTERNATIONAL (Netherlands) B.V as the owner of the shares as the appellant wants to put it. Another indication that the allegations of the appellant are wrong, where he argued that they registered a ghost company named BHARTI AIRTEL RWANDA HOLDING LTD, which is allegedly the name they planned to give to the company they already managed in the name of ZEBRANO (Mauritius) Ltd; nevertheless this company also came into existence on 15/09/2011, on which date it was given shares or was made a shareholder of AIRTEL RWANDA Ltd.

[36] He concluded saying his declarations were based on the certificate of incorporation on change of name dated 15/09/2011 which indicates that there was a company named ZAIN IP (Mauritius) Ltd which changed its name to be known as ZEBRANO (Mauritius) Ltd. When examining the Shareholders' Resolution dated 15/09/2011 issuing shares to ZEBRANO (Mauritius) Ltd, and thoroughly analysing the certificate of incorporation on change of name also issued on that same date, you wonder how the appellant says that this company was already existing under that corporate name, you notice that his allegations are wrong. This confirms that even the allegations that there was only change of name is a lie, instead there was change of the shareholder. This issue is quite similar to the issue whereby they say no change of shareholders and that there was no change in the value of shares, was discussed before this court and court maintained that whenever there is change of the shareholder, there is a 25% change, in such circumstance, the company shall be denied the right to carry forward its loss. The same ruling was made in deciding case RCOM 0927/14/TC/NYGE EUROTRADE INTERNATIONAL Ltd vs. Rwanda Revenue Authority and case R COMA 0023/15//HCC, decision in both cases was that change

of shareholders leads to change hence denying a company the right to carry forward its loss to the next five years.

Court Findings

[37] Article 29, paragraph 3 of Law No. 16/2005 of 18/08/2005 on direct taxes on income as modified and complemented to date provides that '…*If during a tax period, the direct and indirect ownership of the share capital or the voting rights of a company, which shares are not traded on a recognized stock exchange changes more than twenty five per cent (25%) by value or by number, paragraph one of this Article ceases to apply to losses incurred by that company in the tax period and previous tax periods'.*

[38] Court notes that the allegations of Me NSENGIYUMVA Abel that there was no change on the shareholder, that instead there was error made by owners of BHARTI AIRTEL INTERNATIONAL (Netherlands) B.V when they registered it on a *ghost (shadow)* company called BHARTI AIRTEL RWANDA HOLDING Ltd because it was a corporate name they planned to give to the company they already owned and known as ZEBRANO (Mauritius) Limited, should not be granted legal consideration because there was no mistake but what really happened is the shareholder who changed and the right to vote as explained by the initial judge and which is the view of the Court, in paragraph 18 and 19 of the case appealed against, where he specified that as indicated in the *Shareholders' Resolution* dated 15/09/2011 BHARTI AIRTEL RWANDA HOLDINGS B.V showing there was transfer of shares to ZEBRANO (Mauritius) Ltd, and that despite mention of BHARTI RWANDA HOLDINGS B.V in that *shareholders' resolution,* but the certificate of registration dated 02/09/2011 indicating that the shareholder of AIRTEL RWANDA Ltd was BHARTI AIRTEL RWANDA HOLDINGS Ltd, and that this change cannot affect the transfer of shares.

[39] Additionally, as he explained that the allegations by the representation according to which BHARTI AIRTEL INTERNATIONAL HOLDINGS (Netherlands) B.V was registered on a *ghost* company namely BHARTI AIRTEL RWANDA HOLDINGS Ltd, a corporate name they planned to give to the company they already owned named ZEBRANO (Mauritius) Ltd, are not worth any legal validity because on 02/09/2011 when AIRTEL RWANDA Ltd was registered with RDB, this company was also non-existent as proved by an exhibit presented by RRA of the existence of ZEBRANO (Mauritius) Ltd on the date of 15/09/2011 after the so called ZAIN IP (Mauritius) changed its corporate name to be known as ZEBRANO (Mauritius) ltd, hence the fact that there was change of shareholders at the rate higher than 25%, pursuant to article 29, paragraph 3 of the above Law No. 16/2005 of 18/08/2005 does also change the right to vote which is the reason the AIRTEL RWANDA Ltd should not be granted what it has requested.

D. Assessing whether there was change in the right to vote

[40] Me NSENGIYUMBA Abel explains that article 29 paragraph 3 stipulates that when there is change of the right to vote, the loss incurred by a company is carried forward to the next years. The issue here is to determine whether for companies within one group and which are subsidiaries of another company which holds 100% in them when there is swap of shareholders between subsidiaries, the right to vote also changes. Basis should be the option that a corporate entity exercises voting rights as a shareholder, the shareholder is a corporate entity, that in decision making, the corporate entity as a shareholder will not be the person sitting during voting session but the owners of the corporate entity who appoints directors who in turn inform the senior management what needs to be done. The person who incorporated the company and gave it shares in another company he/she owns, when he/she takes a decision to withdraw his/her shares for registration on another company in which he/she holds 100% shares, the mode of decision making will not change because the person making the decision remains the same. In this case, the decision maker is only one person namely BHARTI AIRTEL INTERNATIONAL.

[41] He further explains that any company is likely to incur loss and that it can be acquired by another or another external person, in such a circumstance, the acquiring company will bear the cost of the loss from the company thus

bought and will be permitted to deduct it from the profit it will realize in the next five years, what is purported here is a much bigger dividend. This being a mechanism of tax evasion, punishable by law, that should new shareholders be part of the shareholding, that loss will no longer be allowed to carry forward loss to next years. Furthermore, the issue at hand concerns the group, that the dividends to be shared out in AIRTEL would be of no use to it because they all go into the parent company and due to membership of a new subsidiary company joining the group, the same scenario will apply. In this case, the loss and profit shall be borne by one person, BHARTI.

[42] He further says that one of the reasons why the taxpayer is not authorized to carry forward the loss is because the right to vote changes. The right to vote means the right to decision making. In the case being appealed against, judge never explained how there was change of the right to vote as the company itself does not vote because a moral entity does not think, instead votes through its senior managers. These managers/directors take the decision upon orientation by their appointing authority.

[43] He concludes saying that if ZEBRANO (formerly ZAIN IP (Mauritius) Limited as suggested by RRA, and BHARTI RWANDA HOLDING Ltd both belonging to BHARTI AIRTEL INTERNATIONAL (Netherlands) B.V, their resolutions were also adopted pursuant to recommendations from their appointing authorities.

[44] He concludes on a reminder that the management of AIRTEL RWANDA Ltd never changed because its former senior managers before entry of new shareholders in AIRTEL in 2011 would render impossible carrying forward the loss incurred in 2011 to the next years. Let's remind that former senior managers of AIRTEL RWANDA Ltd at the time BHARATI RWANDA HOLDING Ltd was still registered as its shareholder are the same managers who kept their positions as its managers and the shareholder became ZEBRANO only after rectifications were made.

[45] Me BYIRINGIRO Bajeni clarifies with regard to the right to vote that RRA contests the fact that the parent company comes to vote in the subsidiary company in which it bought shares or incorporated. BHARTI is domiciled in the Netherlands while ZEBRANO is domiciled in Mauritius and AIRTEL RWANDA is domiciled in Rwanda. AIRTEL had one shareholder, namely BARTHI AIRTEL RWANDA HOLDING Ltd,

when it started its business in Rwanda. Nowhere do its incorporation documents mention BHARTI INTERNATIONAL GOUP. BHARTI AIRTEL RWANDA HOLDING Ltd sold its 100% shares to ZEBRANO Mauritius, on this sale, nothing indicates this was done by BHARTI INTERNATIONAL GROUP as the parent company. Another reminder is that when a subsidiary opens its business, it must be registered in accordance with the laws of the country where it operates, and is then distinct from the branch because it is different from the parent company mainly because it keeps its own accounts.

[46] He further gives details on the right to vote, saying no single document indicates that voting is done by a person or Director because he/she is not a shareholder. A person with the right to vote is a shareholder, therefore a representative of the company votes for and on behalf of the company. He argues that at the very beginning of the case hearing, claimants indicated in their pleadings that they incorporated the company BHARTI AIRTEL RWANDA as a corporate name they planned to give to the company that would be established, but later found out they had made mistakes and changed through appointment of another shareholder, but if no mistake had been made the *ghost* company would not have the power to issue or sell shares. The reason this was done is that it is unacceptable for an opened subsidiary to be autonomous, be managed by a parent company and this is also an indication that AIRTEL RWANDA existed legally, not as a *ghost* company, and especially through the activities it conducted.

[47] These allegations by the appellant are not valid for the following reasons: firstly appellant wants to bring in another person he considers to be the decision maker, seeking to explain that he was not a decision maker in a company in which he held shares. But these are mere lies because in the incorporation documents or those related to its shareholding, BHARTI AIRTEL INTERNATIONAL (Netherlands) B.V referred to as the owner of the company and owner of the company is nowhere mentioned. Whatever his capacity as part of the company does not prevent applicability of the laws governing companies and his liability to pay taxes as provided for by the law. As highlighted in the defence by RRA, the change was made on 15/09/2011 by the shareholder of Airtel Rwanda, namely BHARTI AIRTEL RWANDA HOLDING LTD, its one and only shareholder by the shareholders resolution indicating there was transfer of 100% shares it owned in AIRTEL RWANDA to ZEBRANO (Mauritius) Ltd. This shows clearly that he could not allege it was a change of the manager of the company, but rather a change of the shareholder at a rate of 100%.

[48] He concluded indicating that the appellant reads the paragraph 3 in part, purporting to only indicate the change by value of shares, whereas this paragraph deals also with the change in the right to vote. As evidenced earlier, the fact that the former shareholder named BHARTI AIRTEL RWANDA HOLDING LTD changed into ZEBRANO (Mauritius) Ltd, clearly means that the right to vote also changed because the person with ownership right to shares of AIRTEL RWANDA is ZEBRANO (Mauritius) Ltd and is no longer BHARTI AIRTEL RWANDA HOLDING Ltd. The fact that the business owner for all these companies is one and same person, does not mean he does what he pleases in violation of the law especially as he is nowhere mentioned in incorporation documents governing those companies which have been transferring to each other the shares in AIRTEL RWANDA. BHARTI AIRTEL INTERNATIONAL (Netherlands) B.V has then nothing to do in this issue because the decisions it may take under unclear circumstances would not make any change as regards corporate governance mainly because we have already proven it is nowhere mentioned in all the incorporation documents of AIRTEL RWANDA.

Court Findings

[49] Court notes that as explained in the case hearing mainly in the analysis of the issue prior to this one that there was 100%change of the shareholder implying a changer higher than 25% specified in the law thus giving rise to change in the right to vote and overall conclusion that the requested right to carry forward loss should not be granted.

E. Assessing whether damages claimed by AIRTEL as procedural fees and counsel fees are legally substantiated

[50] Me NSENGIYUMVA Abel explains that RRA should pay to AIRTEL RWANDA Ltd counsel fees equivalent to RwF 1,000,000 at the first instance and RwF 1,000,000 at the appellate level, and pay court fees deposit worth RwF 125,000 and procedural fees worth RwF 400,000.

[51] RRA representation has no reaction on claimed damages.

Court Findings

[52] Court notes that the damages claimed by AIRTEL RWANDA Ltd should not be granted because the case claim for which they are requested is not legally grounded.

F. Regarding assessing whether damages claimed by RRA are legally justified

[53] Me BYIRINGIRO Bajeni explains that when claimant, AIRTEL RWANDA Ltd, filed case against RRA, it sought representation by an advocate to plead its case and has to pay for the services rendered, and that RRA representation lawyer is to be treated like any other lawyer and is governed by the laws of Rwanda Bar Association. Let alone this counsel fee, for the purposes of proper preparation of this case, RRA disburses from the Public Treasury funds earmarked for its successful preparation. Expenses include internet cost, paper, vehicle and fuel etc. This being the reason why RRA requests to be granted RwF 3,000,000 as representation fees and counsel fees.

[54] The counsel representing AIRTEL RWANDA ltd has no reaction on these damages.

Court Findings

[55] Article 111, paragraph 2 of Article No. 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that '*the claim for legal costs is adjudicated at the same time with the principal claim. It can also be admitted and adjudicated even if the principle claim has not been admitted'.*

[56] Article 258 of Law of 30 July 1888 relating to the civil code, Book III on obligations and contracts provides that *'Any act by a person that is harmful to another obliges its author to pay reparations'.*

[57] Court deems legally grounded the compensation for procedural (legal) fees and counsel fees but the latter fees should be calculated within those of legal fees and be granted based on article 111 paragraph 2 of Law No. 22/2018 of 29/04/2018 mentioned above and article 258 of Law of 30 July 1888 above mentioned, because AIRTEL RWANDA Ltd kept involving RRA in unjustified court proceedings causing it to disburse funds for

procedural fees, reparations for the loss incurred should therefore be to the tune of RwF 1,000,000 as legal fees determined at Court's discretion because the amount claimed was an overestimation and that RRA fails to provide evidence to the effect that the cost of these court proceedings is equivalent to the claimed amount worth RwF 3,000,000.

III. DECISION OF THE COURT

[58] Declares admissible the appeal lodged by AIRTEL RWANDA Ltd because it was filed in accordance with the law, but upon thorough examination, found it legally ungrounded.

[59] Rules that the decision in Case RCOM 01567/2017/2017/TC/NYGE remains unchanged.

[60] Orders AIRTEL RWANDA Ltd to pay to RRA RwF 1,000,000 as procedural fees.

[61] Orders that Court fees deposited by AIRTEL RWANDA Ltd at appeal level be deposited in the public treasury.

SO ORDERED AND PRONOUNCED IN A PUBLIC HEARING BY MUTAJIRI M. THEONESTE AS JUDGE, ASSISTED BY BARIGE EMMANUEL, AS COURT REGISTRAR

(Sé)	**(Sé)**
BARIGE Emmanuel	**MUTAJIRI M. Théoneste**
Court Registrar	Judge

<u>N.B.</u>: Pronouncement is not made, as initially planned on 19/10/2018, delay was due to heavy workload for Judge