TAX APPEALS TRIBUNAL
Justice in Taxation

THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 004 OF 2024

BUJAGALI ENERGY LIMITED..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY.....RESPONDENT

BEFORE: MR. SIRAJ ALI, MS. CHRISTINE KATWE, MR. WILLY NANGOSYAH

RULING

I. Introduction

1. This ruling is in respect of an application, challenging Administrative Additional Income and Withholding Tax Assessments of **Shs. 157,839,904,229**. The Assessments arise, principally, out of a dispute, relating to the correct interpretation of **S. 56(2)** of the **Income Tax Act,** which provides for the conversion, into Uganda Shillings, of amounts, in foreign currency, taken into account, for tax purposes.

II. Background Facts

2. The Applicant was incorporated in Uganda in the year 2005, as a special purpose vehicle to develop and operate the Bujagali Hydro Electric power project in Uganda. In the year 2017, as part of efforts by the Government of Uganda, to achieve affordable electricity tariffs in the country, **S. 21** of the **Income Tax Act** (ITA) was amended to grant the Applicant, income tax exemption up to 30th June 2022.

3. On 18th May 2022, a one year extension of the exemption, was granted to the Applicant, pending the report of an Ad hoc Committee of Parliament, set up to review the tax waiver granted to the Applicant in the year 2017. The report of the Ad hoc Committee, which upon its release, was adopted by Parliament, recommended among others things, a comprehensive tax audit of the Applicant`s tax affairs, by the Respondent.

4. Pursuant to the above recommendation, the Respondent conducted a comprehensive audit covering the period 2008 to 2022 and on 4th August 2023, issued Administrative Additional Assessments totaling to **Shs. 159, 914,348,868. Shs. 157,350,116,411** comprised of income tax for the period 2016-2017, while **Shs. 1,182,033,636** and **Shs. 1,382,198,821**, comprised of VAT and WHT, for the year 2017 and for the periods 2005 to 2022, respectively.

5. On 12th September 2023, the Applicant objected to the assessments. On 14th December 2023, the Respondent issued objection decisions, partially allowing the objection. The Respondent accordingly revised the assessments, by reducing the income tax liability from **Shs. 157,350,116,411** to **Shs. 157,290,629,721**, the WHT liability from Shs. **1,321,967,790** to **Shs. 490,667,417**. The VAT assessment was vacated in its entirety. The total revised tax liability was **Shs. 157,839,904,229**.

6. Being dissatisfied, the Applicant filed this Application, for review of the Respondent`s decision.

7. During mediation, the total tax liability was revised to **Shs. 155,618,956,093**, following the adjustment by the Respondent of WHT on foreign services and the allowance of credit notes from UETCL and ERA.

III. Issues

8. At scheduling, the following issues were set down for determination.
    1. Whether the Assessment is valid?
    2. Whether the Applicant is liable to pay the taxes assessed?
    3. What remedies are available to the parties?

IV. Representation and Evidence

9. The Applicant was represented by Mr. Oscar Kambona, Mr. Bruce Musinguzi and Mr. Thomas Katto while the Respondent was represented by Ms. Charlotte Katutuu, Ms. Gloria Twinomugisha and Mr. Tony Kalungi.

10. The applicant`s first witness, was Mr. John Mary Ndaula, its Finance Manager. The witness testified that he worked as an acting accountant with the Applicant between the years 2005 and 2007 and officially joined the Applicant from 2nd January 2008 to 31st July 2012 and thereafter from 1st August 2012 to date. The witness testified that the Applicant was incorporated in Uganda in 2005 as a limited liability company for developing the Bujagali Hydro Electric Power project and generate hydro-electric power in Uganda.

11. The witness testified that it entered into an Engineering Procurement Contract for the construction of the dam with Salini Hydro Ltd and Salini Costruttori on 6th December 2007. The witness testified that the construction of the dam was started in 2007 and completed in 2012. The witness testified that the Applicant entered into a Power Purchase Agreement with Uganda Electricity Transmission Company (UETCL) on 6th December 2007 to regulate the supply of hydro-electricity to UETCL. The witness testified that the Government of Uganda also simultaneously entered into an implementation agreement with the Applicant with respect to the project.

12. The witness testified that throughout the construction period, all related construction and development costs including financing and sponsor costs were recorded and accounted for in USD with the approval of the Respondent. The witness testified that upon emerging as the successful bidder it applied to the Respondent for permission to keep its books of accounts in United States Dollars. The witness testified that this permission was granted by a letter dated 15th June 2007. The witness testified further that the Power Purchase Agreement (PPA) required the Applicant to keep its books of accounts in United States Dollars.

13. The witness testified that throughout the construction of the dam, it did not claim any capital or initial allowances and all the plant and machinery were kept off the books of account. The witness testified that the reason for this was that the asset expenditure was not yet used or even ready for use in the production of gross income in the years 2007 to 31st July 2012 as the Applicant was not yet ready to produce gross income then. The witness testified that it was only after 31st July 2012, when the dam asset project had been completed that the Applicant started producing gross income and all the USD capital expenditure became either tax depreciable assets or industrial buildings from an income tax perspective. The witness testified that the Applicant did not have any chargeable income before 1st August 2012.
14. The witness testified that upon the completion of the construction of the dam in August 2012, the Applicant commenced the use of the plant and machinery and as a result the Applicant was entitled to claim both initial and capital allowances. The witness testified that since the Applicant`s books of account had been kept in USD, it used a single annual average exchange rate to convert the total accumulated USD cost of the project dam asset in 2012. The witness testified that the Applicant used the 2012 average Bank of Uganda mid-exchange rate for the year 2012 of Shs. 2,501 for capital allowance deduction purposes in that year.
15. The witness testified that the dam is a concession asset that was constructed under a Public Private Partnership (PPP) which can only be recognized when the asset is completed and the final cost has been determined. The witness testified that this was in line with concession accounting and PPA arrangements. The witness testified that the PPA recognizes that the project cannot commence commercial operations until its full commissioning. The witness testified that in the event that the project was never commissioned, taxes would never have been due because there would have been no revenue to tax.

16. The witness testified that in line with the PPA, the actual cost of the construction of the dam would be determined upon the completion of construction, at which point the Applicant would know how much the construction of the dam cost and thus the actual amount to be claimed by the Applicant. The witness testified that the project dam asset was fully completed on 1st August 2012, which was also when the Applicant placed the asset in service for generation of electricity for sale to UETCL. The witness testified that it was only in the year 2012 that the Applicant`s USD expenditure costs relating to the construction and development of the project dam assets qualified to fall within the definition of tax depreciable assets and industrial buildings from an income tax perspective.

17. The witness testified that for the purpose of computing and granting depreciation allowance deductions, the Applicant`s USD expenditure relating to the project dam asset was converted to Uganda Shillings, using the 2012 exchange rate as this was when the assets were put into use for tax purposes. The witness testified that in that year the Applicant used the 2012 average Bank of Uganda mid-exchange rate of Shs. 2,501 for capital allowance deduction purposes. The witness testified that there was therefore no basis for the Respondent to convert the capital expenditures incurred from 2007 to 2011 since the USD expenditures recorded at that time did not fall within the requirement for depreciable assets or industrial buildings expenditure at the time that they were incurred.

18. The witness testified that in the Auditor General`s Report of 1st October 2014, an issue was raised to the effect that the Applicant had overstated the costs of the project by applying an incorrect foreign exchange rate mechanism of the EPC price. The witness testified that the Government instituted a Committee, whose review of the matter concluded that the application by the Applicant of the foreign exchange adjustment mechanism was correct. The witness testified that the findings of the Committee were adopted by the Solicitor General. The witness testified that as a result the Electricity Regulatory

Authority directed the Minister of Energy to implement the recommendation of the Solicitor General.

19. The witness testified that from his understanding of income tax law, where the calculation of chargeable income involves an amount in a foreign currency, the amount has to be converted to Uganda Shillings at the Bank of Uganda mid-exchange rate applying between the currency and the Uganda Shilling, on the date that the amount is taken into account for tax purposes. The witness testified that in the instant case, the Applicant is entitled by law to use the BOU mid-exchange rate as at the date when the amount was considered for tax purposes, which is 2012, the year of income when the Applicant USD expenditures on the project dam assets would start to be taken into account for the specific tax purpose of computing and granting tax depreciation allowance deductions.

20. The witness testified that the Applicant incurred start-up costs at the commencement of the construction phase of the dam worth USD. 31,479,646. The Applicant explained that these costs which were incurred to create access to the project sites included clearing project sites and reservoir areas, construction laborers set-up, feasibility studies, community development and compensation for crops. The witness testified that the Applicant wrongly re-classified the said costs into industrial buildings and land contrary to the law. The witness submitted that because the costs in question were start-up costs, the Applicant used the 25% straight-line deduction over a period of four years. The witness stated that however the Respondent re-classified some of these costs as industrial buildings which get a 5% straight-line deduction over a period of 20 years contending that these costs were incidental to the acquisition of land.

21. The witness testified that the costs relating to civil works in respect of the switchyard, creating access to the project site, clearing the project and reservoir areas together with the set-up costs of the construction laborers site camps, do not fall within the definition of industrial buildings. The witness testified further that other costs related to land such as community

development, project feasibility study or compensation for crops are not land. The witness testified that the above costs were incorrectly re-classified by the Respondent.

22. The witness testified that in April and May 2017, the Applicant reversed sales it had made to UETCL. The witness testified that the Applicant informed the Respondent that the reversals took place when UETCL refused to pay the Applicant. The witness stated that the Respondent however added back capacity payments totaling to Shs. 6,566,853,532 on the grounds that no confirmations were provided by the Electricity Regulatory Authority (ERA) and UETCL.

23. The witness testified further that the capacity payments invoiced to UETCL include high income tax estimates to be paid to the Respondent. The witness explained that at the time the estimates were made, the Applicant could not have foreseen that it would be granted an income tax exemption by the Government, in July 2017. The witness testified that by the time Applicant was informed about the exemption, it had already overcharged UETCL. The witness explained that as a result it issued credit notes to UETCL to reverse the respective monthly income tax components for the invoices which were not paid such as for April and May 2017. The witness testified that the invoices which had been paid and had excess income tax components were reversed in September 2017. The witness stated that the Respondent had no basis for adding back the reversals for the months of April and May 2017 since they constituted overcharges of income tax to UETCL, which the Applicant would not pay to the Respondent in light of the 2017 income tax exemption. The witness testified that had UETCL paid the overcharges, the Applicant would still have credited the overcharges to UETCL in the same year. The witness stated that the Respondent had stated in its objection decision that the reasons for the refusal of the reversals were because of non-confirmation by UETCL. The witness stated that by an email dated 31st July 2024, the Respondent had clarified that it had obtained confirmation from UETCL and that the

assessments related to credit notes were vacated. The witness stated that the Applicant was yet to receive notice of vacation of these assessments.

24. The witness testified further that between the years 2005 and 2014, the Applicant incurred travel and accommodation costs for sponsor labour experts during the development and operational phases of the project, amounting to Shs. 14,363,466,035. The witness testified that the Applicant treated these costs as deductible expenses since the costs were incurred entirely for business purposes. The witness stated that the Respondent instead treated these costs as costs of a private nature on the basis that no agreement was provided in relation to the arrangement and that the Applicant was not charged.

25. The witness explained that despite the fact that no contract existed for the implementation of the sponsor`s costs, the Applicant had received services from the said sponsors and work was done for the period in which the costs were incurred. The witness explained that the fact that the costs were not charged to the Applicant does not make the corresponding disbursements private expenses. The stated that it was erroneous and unjustified for the Respondent to have added back these costs for being costs of a private nature.

26. The witness testified further that the Respondent wrongly added back a total of Shs. 565,546,300 of expenses made to suppliers who purportedly did not have TINs. The witness stated that this was erroneous as the suppliers actually had TINs.

27. The witness testified that prior to the year 2015, WHT did not apply to offshore services rendered by non-resident suppliers. The witness testified that between the years 2008 and 2015, the Applicant received offshore supplies from various non-resident suppliers. The Respondent issued an assessment of **Shs. 1, 321,967,790** on the assumption that the above services had all been rendered in Uganda. The witness testified that the Applicant disputed the assessment and provided all the invoices which showed that the services had been rendered offshore. The witness testified that in light of the said evidence the Respondent vacated most of the assessment, maintaining a tax of **Shs. 239,773,341.**

28. The witness testified that out of the above a tax of **Shs. 9,931,115** relates to Poyry Energy Ltd, which provided services to the Applicant both offshore and onshore. The witness stated that services provided offshore ought to be vacated by the Respondent. The witness testified further that the tax of **Shs. 229,842,226** relates to MWH Americas, which supplied offshore technical support to the Applicant.
29. The witness testified that the Applicant received supplies from 3 local suppliers namely; Adrift Adventure Company Ltd, AIDS Information Centre and Ahimbisibwe Michael, in the period 2010, 2012 and 2022. The witness testified that the assessment in respect of Ahimbisibwe Michael was accounted for by the Applicant in its December 2022 return, as was accordingly vacated.
30. The witness testified that regarding the rest of the WHT assessments, namely that in respect of Adrift Adventure and AIDS Information Centre, no tax was withheld because these payments were below Shs. 1,000,000.
31. The witness testified that the assessments raised by the Respondent go as far back as the years 2005 which is more than 18 years and are accordingly out of time.
32. The Applicant`s second witness was Mr. Samson Ssonko, an Associate Director Tax, at the Applicant`s tax advisor, PwC.
33. The witness testified that the Applicant used the 2012 average Bank of Uganda mid-exchange rate of Shs. 2,501 for capital allowance deduction purposes, on the basis that 2012, is when the entire project dam asset first came into use and started to qualify for capital allowance deductions.
34. The witness testified that as a tax expert he knew that the Applicant is allowed by law to convert a foreign currency amount to Uganda Shilling at the Bank of Uganda mid-exchange rate applicable at the time when the amount is taken into account for tax purposes. The witness testified that in the instant case, the specific tax purpose for which the foreign currency amount was taken into account was to compute capital allowance tax deductions for the depreciable dam asset.

35. The witness testified that S. 57 of the ITA (now S.56) outlines how and when foreign currency amounts should be converted into Uganda Shillings for tax purposes. The witness testified that the above provision allows a taxpayer with the prior written consent of the Commissioner General to use the average rate of exchange during the year of income and to keep books of accounts, in a currency other than the Uganda Shillings. The witness stated that any amount in a foreign currency namely; income, expenses, assets, liabilities or any other financial value relevant to the tax calculation must be converted into Uganda Shillings for the tax computation of that year based on a number of dates including when the date the amount is otherwise taken into account.

36. The witness testified that the question as to `*when does the tax purpose arise or occur*` is answered by looking at when the Applicant`s depreciable asset qualifies for capital deductions under the ITA. The witness testified that under the ITA one can only qualify for capital allowance on depreciable assets once the asset is ready for use. The witness testified that in the Applicant`s case it means that during the construction of the dam between 2007 and 2011, none of the Applicant`s USD construction costs fell within the definition of a tax depreciable asset. The witness testified that this was because the asset expenditure had not yet been placed into service.

37. The witness testified that the concession asset was constructed under a Public Private Partnership, which can only be recognized when the asset is completed and after the final cost has been determined, in line with concession accounting and PPP arrangements. The witness testified that the PPA recognizes that the project cannot commence commercial operations until it has been fully commissioned. The witness testified that in the event that the project was never commissioned, taxes would never have been due because there would be n revenue to tax. The witness testified that as a result the Applicant is permitted to record its asset cost base values in USD at the time when that respective USD amount is taken into account and used for a specific purpose in UGX. The witness testified that there was therefore no basis for the Respondent to refer to the Applicant`s asset cost base as being overstated nor

to convert the Applicant`s USD project dam asset cost base using rates relating to years prior to 2012 for the specific purpose of computing and deducting the corresponding tax depreciation allowances.

38. The witness testified that S. 56(2) provides for additional alternative options when foreign currency amounts can be converted namely; the period when the amount is incurred, or the period when the amount is derived. The witness testified that the Respondent`s treatment is based primarily on when the amount is incurred. The witness stated that neither of the above options apply to the instant case because the term "incurred" denotes expenditure while the term "derived" denotes income. The witness testified that none of the terms "derived" or "incurred" relate to the tax purpose of determining when an asset is granted tax depreciation allowance deductions, which is the specific purpose for which the USD amounts were taken into account. The witness testified that the only applicable provision for this specific tax purpose is the third option "*otherwise taken into account*".

39. The witness testified that the Respondent`s treatment creates an automatic deductible realized foreign exchange loss for the Applicant in 2012 which the Respondent has not considered. The witness explained that this 2012 foreign exchange loss arises from the fact that using the Respondent`s treatment and conversion approach, the qualifying tax capital allowance costs of the dam asset at the time of commissioning would be lower than the actual cost of the dam to the Applicant based on the prevailing exchange rate in 2012, due to the Respondent`s use of prior period exchange rates (2007-2011) being lower than the 2012 exchange rate used by the Applicant. The witness explained that this loss crystallizes in 2012, when the asset is commissioned and capital allowances computed and is deductible in accordance with S. 22 of the ITA. The witness stated that the deduction of the said loss would have the effect of squarely netting off the additional current tax liability caused by the use of lower exchange rates which would leave the Applicant in the same neutral position.

40. The Respondent`s sole witness, was Mr. Silas Barasa, its Ag. Supervisor Manufacturing Sector. The witness testified that in the year 2022, the

Parliament of Uganda set up and Ad hoc committee to investigate the Bujagali Energy Tax waiver. The witness testified that the committee recommended to the Respondent to conduct a comprehensive tax audit of the Applicant. The witness testified that the audit was conducted by the Respondent and assessments amounting to Shs. 159,913,878,578 for the period 2008 to 2022 were issued to the Applicant on 4 August 2023. The witness testified that the Applicant`s objection to the above assessments, were disallowed by the Respondent`s objection decision.

41. The witness testified that in respect of the use by the Respondent of different foreign exchange rates to convert the concession asset costs from United States Dollars to Uganda Shillings for tax allowance purposes in the year 2012, the Respondent`s audit team reviewed the Applicant`s assets and found that the same had been overstated because the Applicant had used the exchange rate of the year ending 2012 instead of the exchange rate when the assets were obtained at cost. The witness testified that the Respondent maintained the assessments on the grounds that the depreciable amount for tax purposes is determined by the cost base of the asset at the date of acquisition and not at the time the asset is put into use and that the primary provision for determining the value of assets for capital allowance purposes is S. 52 of the ITA. The witness testified that the Respondent also noted that S. 56(2) of the ITA provides for conversion of the amount on the date that the amount is derived and incurred.

42. In respect of the re-classification of start-up costs for 2012 tax allowance deductions, the witness testified that the Applicant had for the period 2012, classified asset costs amounting to USD. 31,479,646 as start-up costs. The witness stated that out of these costs the Respondent re-classified cost amounting to USD. 24,574,992 from start-up costs to fixed assets/ buildings, subject to depreciation and granted the depreciation allowances accordingly. The witness stated that the balance of USD. 6,904,654 was e-classified to land and did not qualify for any tax deduction depreciation. The witness stated that the assessment was maintained for the reasons that the costs were in respect

of land and buildings, the costs incurred were required under GAAP to be capitalized under land and buildings but not start-up costs to be expensed as profit or loss since they were incurred in the construction phase. The witness testified further that a review of the details of the switchyard costs showed that these were costs of civil works for the bases of the switch yard machinery and the feasibility costs were survey costs incurred in the acquisition of land such as compensation and community development programs. The witness stated that these costs were incidental to the acquisition of land and did not therefore constitute start-up costs.

43. The witness testified that the Respondent added back capacity payment component of Shs. 6,566,853,532 which had been reversed by the Applicant. The witness testified that the Respondent reviewed the detailed sales ledgers and audited accounts of the Applicant and noted that the Applicant had reversed sales for April and May 2017, amounting to USD. 1,813,684.70. The witness testified that the Applicant explained that the said invoices were reversed when UETCL refused to pay after the announcement of the income tax exemption granted by the Government to the Applicant in the year 2017. The witness stated that the Applicant explained that the invoices raised for April and May 2017, were not paid on the grounds that the projected revenue that had already been billed was higher than the projected income tax for the six months spanning January 2017 to June 2017, accordingly credit notes were passed in respect of the invoices that had already been billed. The witness stated that it sought confirmation from UETCL but did not receive confirmation of the Applicant`s position, as a result the assessment was maintained.

44. The witness testified that the Respondent added back a total of Shs. 14,363,466,035 obtained from the ledgers relating to expense payments made to shareholders namely; Seith Global and Industrial Promotion Services) for travel, accommodation on the grounds that they were expenses of a private nature. The witness stated that the Applicant`s argument was that these expenses related to travel and accommodation costs incurred by sponsor labour experts travelling to and from Uganda for the hydro power project during

both the development and the operational phases and that these expenses related to technical services provided at no cost.

45. The witness testified that the Respondent established that there was no evidence to confirm the above assertions by the Applicant and accordingly the assessment was maintained.

46. The witness testified that the Respondent reviewed the Applicant`s WHT returns and disallowed expenses incurred and claimed against suppliers without TINs in accordance with S. 22(2)(m) of the ITA, for the years 2015, 2016 and 2017 and added back the sum of Shs. 569,546,300. The witness stated that the Respondent reviewed the registration and TIN profiles provided and established that National Fisheries Resources Research Institute were a branch of the National Fisheries Resources Research Institute. Accordingly the related tax was vacated.

47. The witness testified that the TIN provided in respect of Sustainable Development Engineers Ltd belonged instead to Mr. Herman Ssenyondwa. Accordingly the related tax was maintained.

48. The witness testified further that the TIN provided in respect of Mulwanyi & Sons, belonged to Ms. Jesca Mulwanyi Baami and was acquired on 22nd October 2019, which implied that Ms. Mulwanyi did not have a TIN during the period under review. The related tax was accordingly maintained.

49. In respect of Kagoda David and Turyatunga Filmon, the witness testified that the TIN provided belonged to Kagoda David, an employee of Mpongo Limited and was acquired on 17th November 2017. The witness testified that no evidence was provided by the Applicant showing that the above persons were one and the same. The witness stated that the assessment was for this reason maintained.

50. In respect of P&O Logistics Consultant, the witness testified that the TIN provided belonged to Okurut Peter, an employee of the Applicant and was acquired on 20th July 2010. The witness stated that no evidence was provided by the Applicant that Okurut Peter and P&O Logistics were one and the same person. The witness stated that the assessment was accordingly maintained.

51. In respect of Ikwang Vanessa, the witness testified that the TIN provided belonged to Ms. Vanessa Ikwang and was acquired on 11th October 2019, which implied that Ms. Vanessa Ikwang did not have a TIN during the period under review. The witness stated that additionally no evidence was provided to the Respondent that the Ikwang Vanessa and the supplier were one and the same person. The witness stated that the related tax was accordingly maintained.

52. The witness testified that although the Respondent had conceded that prior to 1st July 2015, no WHT was applicable in respect of offshore services, the Respondent`s audit team disputed the fact that some services relating to 3 specific foreign suppliers namely; MWH Americas, Quantum International Consulting and Poyry Energy, worth Shs. 8,865,353,566 were rendered outside Uganda during the period under review.

53. The witness testified that the Respondent analyzed the audit workings, invoices, notice of withdrawals and contracts for the services and established that some of the payments that formed the basis of the assessment were supplied overseas while some were supplied in Uganda. The witness testified that some other payments did not have supporting documents. The witness testified that the Respondent accordingly revised the assessment from Shs. 1,321,967,790 to Shs. 490,667,417.

54. The witness testified that the Respondent reviewed the Applicant`s WHT returns and identified three local suppliers namely; Adrift Adventure Company Ltd, AIDS Information Centre Ltd and Ahimbisibwe Michael, who were not exempt from the local 6% WHT during the period under review but the Applicant did not withhold tax on payments to them above Shs. 1,000,000 for the said period. The witness testified that the gross payments amounted to Shs. 986,415,257 and gave rise to WHT liability of Shs. 59,000,000.

55. The witness testified that the tax on Ahimbisibwe Michael was accounted for under the name Ahimbisibwe Michael Traders and the same was accordingly vacated. The witness testified that the tax in respect of Adrift Adventure and the AIDS Information Centre was maintained because the Respondent

received new information from an investigation audit. The witness testified that the Respondent revised the assessment from Shs. 59,184,915 to Shs. 58,609,091.

56. In respect of the VAT assessment of Shs. 1,182,033,636 the witness testified that the Respondent was able to confirm that the Applicant did not reverse the 18% VAT component for both invoices because the VAT had already been accounted for and remitted to the Respondent in the April and May 2017 VAT returns. The witness stated that the VAT assessment was accordingly vacated.

57. In respect of the assertion by the Applicant that the Respondent was time barred from going back over 18 years to raise income tax assessments, the witness testified that new information was obtained during the comprehensive audit carried out by the Respondent which showed gross or wilful neglect on the part of the Applicant. The witness testified that the Respondent was not aware that the exchange rate used by the Applicant was for the year 2012 and not the exchange rate at the time of the acquisition of the assets. The witness testified that this information was obtained during the audit.

V. Applicant's Submissions

58. The Applicant submitted that the Administrative Additional Assessments raised by the Respondent are illegal and invalid for being raised beyond the 3 year statutory limit. The Applicant submitted that the Respondent raised Administrative Additional Assessments for income tax and Withholding tax amounting to Shs. 153, 990, 814, 959/- for the period 2005 to 2022 going back over 18 years. These assessments were raised in 2023 covering the periods spanning back to 2005. The Applicant submitted that these assessments were accordingly time barred.

59. The Applicant submitted that whereas **S. 25(1)** of the **Tax Procedures Code Act** (TPCA) allows the Commissioner General to make Additional Assessments, this power is limited under **S. 25(2)** of the TPCA to a period of three years after a taxpayer has filed its returns. The Applicant submitted under S. 25(2) of the TPCA, the Respondent has no power to raise Additional

Assessments beyond a three year period in the absence of fraud, wilful neglect or the discovery of new information. The Applicant cited the decision in **Kampala Hospitality Development Ltd v Uganda Revenue Authority TAT 63 of 2023.**

60. The Applicant submitted that under **S. 25(1)** of the TPCA, a self-assessment return is deemed final and conclusive after a period of three years from the date of the filing of the self-assessed return. The Applicant submitted that the burden rests on the Respondent to clearly identify the exceptional ground relied upon and to demonstrate that it applied to the period and the head assessed. The Applicant cited the decision of the Tribunal in **Century Bottling Co. Ltd v Uganda Revenue Authority TAT 096 of 2022,** in support of this argument.

61. The Applicant submitted that the Respondent raised Administrative Additional Assessments for income tax and WHT amounting to Shs. 153,990,814, 959/-. The Applicant submitted that these assessments were raised by the Respondent following a comprehensive audit conducted by the Respondent in the year 2022. The Applicant submitted that in its Audit Management letter, the Respondent alleged that the Applicant had among others;

    i. Over-claimed capital allowances by using the wrong foreign exchange rate to convert the concession costs from USD to UGX for the year 2012 tax allowances purposes.
    ii. Over-claimed Industrial building deductions.
    iii. Over-claimed start-up costs.
    iv. Over-claimed loan interest expenses.
    v. Expensed items of a private nature.
    vi. Not declared supplier TINs in the WHT returns.
    vii. Failed to declare WHT on International transactions and payments.
    viii. Failed to declare WHT on local services.

62. The Applicant submitted that in its audit findings the Respondent does not state anywhere any of the exceptional circumstances as the basis for raising additional assessments in the year 2023 going back as far as the year 2005.

63. The Applicant submitted that in its objections, it brought it to the attention of the Respondent that the assessment was time barred. The Applicant submitted that the Respondent did not address this ground in its objection decision. The Applicant submitted that the objection decision does not state that there was fraud, wilful neglect or the discovery of new information.

64. The Applicant submitted that in its Statement of Reasons at paragraph 7 the Respondent contended that there was new information obtained during an investigation to the effect that the Respondent did not know that the exchange rate used by the Applicant for the year 2012 was not the correct rate at the time of the acquisition of assets.

65. The Applicant submitted that the Respondent`s argument that there was discovery of new information was only raised for the first time in the Statement of Reasons and does not appear anywhere in the assessments or in the objection decision. In support of its argument the Applicant cited the decision in Steel Corporation of East Africa v Uganda Revenue Authority HCT-00-CC-CA-0 of 2010, where the court held that it was a procedural error for URA to raise an issue that had not been brought to the attention of the taxpayer before they applied to the Tribunal. The Applicant submitted that on the basis of the above decision alone, the argument by the Respondent on discovery of new information cannot be considered by the Tribunal since no leave was sought by the Respondent. In further support of the above argument the Applicant cited the decision in **Uganda Electricity Transmission Company Ltd v Commissioner General Uganda Revenue Authority Civil Suit No. 423 of 2010.** The Applicant submitted that it was erroneous for the Respondent to raise the issue of the discovery of new information yet it was not raised during the objection process and not availed to the Applicant.

66. The Applicant submitted that the Respondent`s contention that it discovered new information does not meet the parameters of this exception. The Applicant submitted that whereas the Respondent contends that it relied on discovery of new information as the basis for issuing the additional assessments, the Respondent did not list or explain this so-called new information which it riled

upon. The Applicant submitted that any information relied upon by the Respondent during the audit in 2022, had been in the Respondent`s possession for more than 18 years and therefore did not qualify as new information as interpreted by courts in several decisions.

67. The Applicant submitted that while the TPCA does not define "discovery of new information" case law has interpreted it as *getting to know something new.* The Applicant submitted that the information relied upon by the Respondent was not new at all nor was it hidden or concealed from the Respondent. The Applicant submitted that this information was availed to the Respondent in the form of tax returns and audited books of accounts. The Applicant submitted that the Respondent had decades of time to review the information in order to raise any additional assessments but chose not to do so. The Applicant submitted that the Respondent`s negligence or failure to review the said information cannot be visited upon the Applicant. The Applicant submitted that any assessment for the period 2007-2020/1 are therefore illegal.

68. In support of the above argument the Applicant relied on the decisions in **Uganda Electricity Transmission Company Ltd v Commissioner General Uganda Revenue Authority Civil Suit 423 of 2010, Kampala Hospitality Development Ltd v Uganda Revenue Authority, Meghani Industries Limited v Uganda Revenue Authority.**

69. The Applicant submitted that the conclusion by the Respondent that it was not aware of the rate used by the Applicant is factually incorrect as this information was contained in the Applicant`s returns which were filed every year and reviewed by the Respondent. The Applicant submitted that it claimed its capital allowances in the year 2012 and correctly applied the exchange rate of the year 2012. The Applicant submitted that from the year 2012, the Respondent was aware that the exchange rate used for claiming the tax allowances was the one of 201. The Applicant submitted that these tax allowances were claimed from the Respondent and the Respondent cannot feign ignorance of the same for more than 10 years. The Applicant submitted that all the information regarding the exchange rate, classification of start-up costs, credit

notes, and sponsor labour disbursements costs, among others were in the possession of the Respondent since the year 2007.

70. The Applicant submitted that the above is in addition to the fact that following the Respondent`s USD approval letter of 2007, the Respondent has always been aware that the Applicant maintains books of accounts in USD and translates the USD amounts to UGX. When filing its returns throughout the period in question.

71. The preceding submission notwithstanding the Applicant submitted that the position taken by the Respondent to the effect that the Applicant used a wrong foreign exchange rate to convert the concession asset cost from USD to UGX for the 2012 tax allowances purposes was erroneous.

72. The Applicant submitted that **S. 56** of the **Income Tax Act** (ITA) allows taxpayers to convert a foreign currency amount to UGX at the BOU mid-exchange rate applicable at the time when the amount is taken into account for tax purposes, however a taxpayer can use the average rate of exchange or keep books of accounts in a foreign currency with the approval of the Respondent.

73. The Applicant submitted that upon the completion of the dam, it used the 2012 average Bank of Uganda USD mid-exchange rate for the year 2012 of UGX. 2501 for capital allowance deduction purposes in that year. The Applicant submitted that this was on the basis that the year 2012 was when the entire project dam asset came into use and first qualified for capital allowance deductions. The Applicant submitted that on the other hand the Respondent used multiple USD exchange rates relating to earlier years based on when the different specific expenditure components were initially recorded in the Applicant`s accounts throughout the construction period commencing from 2007. The Applicant submitted that the Applicant`s use of the 2012 USD mid-exchange rate to claim capital allowances after the completion of the dam was in line with S. 56 of the ITA.

74. The Applicant submitted that the contractual documents required it to keep its books of accounts in USD and it sought approval to do this from the Respondent.

75. The Applicant submitted that the use of the word "otherwise" in S. 56(2) of the ITA allows the taxpayer to use any other date other than the date the amount was incurred or derived where such other date is for taking into account the amount for tax purposes. The Applicant submitted that the words `*otherwise taken into account*` is not defined in the ITA. The Applicant cited the following definition of the word `*otherwise*` in Black`s Law Dictionary 11th Edition at page 1328; *"In a different way, in another manner, by other causes or means, in other conditions or circumstances, except for what has just been mentioned, doing something else, the contrary, differently".*

76. The Applicant submitted that the above definition clearly shows that a taxpayer has different choices to make while using the mid-exchange rate for conversion of currency. The Applicant submitted that the words `*otherwise taken into account for tax purposes*` was not inserted for no reason. It was clearly intended to give the tax payer the option to choose between when the amount was incurred or when it was derived or any other circumstances when the amount is taken into account for tax purposes.

77. The Applicant submitted that the Tribunal is required to interpret the meaning of the words in **S. 56(2)** of the ITA in order to determine the applicable exchange rate. The Applicant submitted that it is well established that the rules of statutory interpretation require that words in a Statute must be given their plain meaning unless the words used are unclear and ambiguous and that the provision in question should be construed in its entirety.

78. The Applicant submitted that the phrase `*otherwise taken into account for tax purposes*` is a technical term in the context of circumstances where a taxpayer is unable to claim its capital allowances due to the fact that the asset in question has not yet been put to use. The Applicant submitted that as such the phrase requires a technical interpretation giving proper context to the Applicant`s circumstances. In support of this argument the Applicant cited the

decision in **Heritage Oil and Gas Limited v. Uganda Revenue Authority, Consolidated Civil Appeal No. 23 of 2011** and **Civil Appeal No. 3 of 2012.**

79. The Applicant submitted that the amount in question was only taken into account in the year 2012 when the asset was put into use/service. The Applicant submitted that this was the time when the asset started producing income for the Applicant and the time when the Applicant qualified for capital allowances. The Applicant submitted further that it was at this time that the amount in question could be exchanged and therefore the 2012 exchange rate was the only correct applicable exchange rate. The Applicant submitted that this was the only logical interpretation that can be made given the issue in dispute. The Applicant submitted that its interpretation in this regard is in accordance with the language used in S. 56(2) of the ITA, with no implied meaning or presumptions.

80. The Applicant submitted that the position taken by the Respondent is untenable in law and raises more questions than it answers. The Applicant submitted that the Respondent`s interpretation ignores the purpose of the conversion which is the crux of the matter. The Applicant submitted that the questions which need to be asked in this regard are; what is the tax purpose for which the foreign currency amount is taken into account and at what point does this tax purpose arise? The Applicant submitted that its witness Samson Sonko testified that this question is answered by looking at when the Applicant`s depreciable asset qualified for capital allowance deductions. The Applicant submitted that in its case it was the year 2012.

81. The Applicant submitted that the Respondent`s belief is that the conversion of for the computation of capital allowances deduction should have taken place at the time when the asset expenditure was made. The Applicant submitted that it disagrees with this position because for the purpose of computing the respective capital allowances deductions on the asset amounts, the conversion could only have taken place at the time when the Applicant was allowed to claim the capital allowances. The Applicant submitted further that the specific tax purpose was to compute capital allowance tax deductions for

the depreciable dam asset and this tax purpose only arose in the year of income when the respective depreciable dam asset was placed in service. The Applicant submitted that this interpretation was consistent with Ss. 2, 27 and 28 of the ITA, which deal with claiming depreciation asset allowances.

82. The Applicant submitted that the above provisions including the repealed S. 28 clearly show that any expenditure in a year of income of an asset, plant or building that is not yet used or held ready for use in the production of gross income in that year, is not a depreciable asset or an industrial building for tax purposes in that respective year. The Applicant submitted that in the instant case this means that during the construction period of the dam between the years 2007 and 2011, none of the Applicant`s USD construction costs fell within the definition of a tax depreciable asset or industrial building.

83. The Applicant submitted that the only applicable provision for this specific purpose of computing and granting tax depreciation allowance deductions is the third option under S. 57(2) of the ITA which was used by the Applicant. The Applicant submitted that reading all the above provisions together leads to the conclusion that any expenditure in a year of income for an asset, plant or building which is not yet used or held ready for use in the production of gross income in that year, is not a depreciable asset or an industrial building for tax purposes in that same year of income. The Applicant submitted that therefore the assets acquired by it during the construction stage of the dam from the year 2007 to the year 2011/12 cannot be said to have been depreciable assets until the year 2012 when the same were put into use for the production of the Applicant`s gross income in that year of income. The Applicant submitted that it was not until the year 2012 that the capital expenditures either became depreciable assets or industrial buildings for tax purposes.

84. The Applicant submitted that the Power Purchase Agreement admitted in evidence as exhibit AEX3, provides for the commencement date of the project after its full commissioning. The Applicant submitted that if the project had not been commissioned in the year 2012, then the Applicant would not have started earning revenue from it and hence no income tax would have been

due, in addition to no capital deduction allowances being computed and deducted. The Applicant submitted therefore that a tax assessment for an expenditure that took place before the assets were put to use would have been illegal since there would be no revenue upon which the tax would be based. The Applicant submitted further that converting such expenses for the purpose of capital allowances deductions for periods before the assets were put into use is also illegal since such expenditure would not have qualified for the capital allowances deductions in those prior periods.

85. The Applicant submitted that S. 27(9) of the ITA further strengthens its case regarding the applicability of S. 56(2) of the ITA. The Applicant submitted that S. 27(9) clearly provides that for a taxpayer to claim a deduction on a depreciable asset, the cost base of the asset has to be added to a pool in the year of income in which the asset is placed in service.

86. The Applicant submitted that during cross-examination, the Respondent`s witness, Silas Barasa, conceded that the Applicant never claimed its capital allowance prior to the year 2012 but in 2012 after the asset started producing income. The Applicant relied on the decision in **UMEME Limited & Another v Uganda Revenue Authority TAT 40 od 2018** in support of the above argument. The Applicant submitted that in determining the applicable conversion rate the Respondent deliberately cherry-picked parts of S. 56(2) of the ITA which benefited it, at the expense of the Applicant. The Applicant submitted that the Respondent chose to limit the interpretation of the conversion date to only when the amount is derived or incurred and ignored the most applicable option in the Applicant`s circumstances, which is the time of taking the amount into account for tax purposes. The Applicant submitted that where a foreign currency amount of a depreciable asset or an industrial building is taken into account for tax depreciation allowance deduction purposes, it should be converted using the average exchange rate of the year when that respective asset is placed into service and used to produce gross income.

87. The Applicant disagreed with the view taken by the Respondent that the amounts were taken into account in earlier years because this was when they were disclosed in the respective UGX income tax returns as work in progress, because the above view by the Respondent refers to a different purpose from the issue at hand. The Applicant submitted that it did not disclose the corresponding UGX work in progress amounts in earlier tax returns for the tax purpose of granting and computing capital allowance deductions. The Applicant submitted that it disclosed the work in progress amounts in the income tax returns for a different purpose which was for balance sheet disclosure purposes within the respective returns in line with Generally Accepted Accounting Standards (GAAP). The Applicant submitted that the disclosure of the work in progress amounts in the respective income tax returns in line with GAAP is a different and unrelated purpose from the tax depreciation allowance computation and deduction purpose, which is what is under consideration.

88. The Applicant submitted that the Respondent`s Management letter stated that the UGX cost base of the project dam asset was overstated as defined in S. 50 of the ITA. The Applicant submitted that this view taken by the Respondent was incorrect because S. 5o does not restrict its applicability to only UGX. The Applicant submitted that S. 50 can also be applied to any currency for cost base valuation purposes especially since S. 56 allows he same taxpayers to maintain their books and records in any other foreign currency. The Applicant submitted that it correctly applied the cost base valuation provisions of S. 50 of the ITA in USD terms and is allowed to do so according to S. 56 of the ITA. The Applicant submitted that it is allowed to record and maintain its asset cost base values in USD and only translate specific components to UGX at the time when that respective USD amount is being taken into account and used for a specific tax purpose in UGX. The Applicant submitted therefore that the Respondent has no basis to refer to its asset cost base as being overstated nor to convert the Applicant`s USD project dam asset cost base using rates

relating to years earlier than 2012 for the specific purpose of computing and deducting the corresponding tax depreciation allowances.

89. The Applicant submitted that it always kept its books of accounts in USD and the conversion was only meant to obtain the UGX value of the respective assets. The Applicant stated that for instance if machinery in the year 2007 cost USD 1,000 and at that time the exchange rate was UGX. 1000, it would mean that in 2007, one needed UGX. 1,000,000/- to get the equivalent of USD 1,000 for that machinery. The Applicant submitted that if on other hand the person used the 2007 rate in the year 2012, it would mean that the same machinery would be valued at USD 500, being Shs. 1,000,000 divided by USD 2000, which would grossly understate the cost of the machinery. The Applicant submitted that by using the 2012 rate, it is not trying to gain any advantage but is only reflecting the accurate and representative value of its assets. The Applicant submitted that if the Respondent`s rates are applied, the Applicant would be grossly undervaluing its total asset value.

90. The Applicant submitted further but without prejudice to the foregoing submissions that the various options given under S. 56 of the ITA and the use of the words `*otherwise taken into account for tax purposes*` creates an ambiguity with regard to determining the cost base of a depreciable asset during currency conversion. The Applicant submitted that the provision is worded so as to give the taxpayer an open choice to use whichever option is applicable. The Applicant submitted that this creates an ambiguity or conflict in the tax legislation. The Applicant submitted on the authority of the decision in **Stanbic Bank & Others v URA (HCCA 170/2007)** that ambiguities in tax statutes must be determined in favor of the taxpayer.

91. The Applicant submitted further that the Respondent`s preferred treatment creates an automatic deductible realized foreign exchange loss for the Applicant in 2012 which was never considered by the Respondent. The Applicant submitted that this 2012 foreign exchange loss arises from the fact that the qualifying tax capital allowance costs of the dam asset at the time of commissioning is lower than the actual cost of the dam based on the prevailing

exchange rate in 2012 due to the use of prior period exchange rates that are lower. The Applicant submitted that applying the Respondent`s treatment, this exchange loss crystallizes in the year 2012 when the asset is commissioned and capital allowances computed. The Applicant submitted that this exchange loss is deductible in accordance with the general provisions of S. 22 of the ITA and should have the effect of squarely netting off, the additional current tax liability caused by the use of lower exchange rates, which would leave the Applicant in the same neutral position. The Applicant submitted that the Respondent should have considered and included this realized foreign exchange loss in the assessment workings in applying its treatment and methodology.

92. The Applicant submitted that it incurred start-up costs at the start of the construction of the dam upon which it applied a 25% straight-line deduction over a period of four years. The Applicant submitted that the Respondent reclassified some of these costs as industrial buildings which attract a 5% straight-line deduction over a period of 20 years. The Applicant submitted that the Respondent also reclassified other costs to land which is not entitled to deduction. The Applicant submitted that the Respondent then levied additional taxes of approximately Shs. 18 Billion as a result of these reclassifications. The Applicant disagreed with these reclassifications on the basis that the costs relating to civil works in respect of the switchyard, creating access to the project site, clearing the project reservoir areas, together with set up costs of the construction labourer's site camps and camp site installations do not fall within the definition of industrial buildings. The Applicant submitted that it also objected on the basis that some of the costs related to land such as community development, project feasibility study or compensation for crops do not amount to land.

93. The Applicant submitted that the phrase `*expenditure in starting up a business*` is defined under S. 29(2) of the ITA to mean non-recurring preliminary or pre-opening costs, which are associated with setting up a business such as fees of an accountant, registration charges, legal fees, costs for promotional and

advertising activities, as well as costs for employee training. The Applicant submitted that an Industrial building on the other hand is defined in S. 2 of the ITA, as any building which is wholly or partly used, or held ready for use, by a person in manufacturing operations or an approved commercial building among others.

94. The Applicant submitted that the above provisions leave no doubt as to the nature of start up costs incurred by the Applicant. The Applicant submitted that it incurred costs such as construction of labourer's site camp set-up and installations, switchyard site preparations, project site and reservoir clearing and set-up, as well as project site access, roads and perimeter fence. The Applicant submitted that none of these costs related to the construction of a building which was wholly or partly used or held ready for use by the Applicant in the Applicant`s manufacturing operations. The Applicant submitted further that relatedly, none of the costs were for the construction of an approved commercial building. The Applicant submitted that the above were clearly start-up costs and the Respondent`s re-classification of the same to industrial buildings was erroneous. The Applicant submitted that all the costs re-classified by the Respondent were done since erroneously start-up costs do not fall under Industrial buildings as provided for under S. 28 of the ITA. The Applicant submitted further that S. 28(10) of the ITA specifically forbids the inclusion of expenditure incurred on depreciable assets installed in an industrial building as part of capital expenses. The Applicant submitted that in any case the Respondent ought to have removed from its calculation the value of such installations before re-classifying the transactions.

95. The Applicant submitted further that some of the re-classifications were not only erroneous but also outright illegal. The Applicant submitted that the Respondent re-classified the switchyard related costs as industrial buildings yet there is no building located on the switchyard. The Applicant submitted that if these costs were to be re-classified they would form part of plant and machinery used in manufacturing operations thereby qualifying for a higher rate of 30% capital allowances deductions as opposed to the 25% claimed by

the Applicant. The Applicant submitted that the Respondent also illegally re-classified start-up costs like feasibility studies, community development programs and compensation for crops as land. The Applicant submitted that all the above costs were start-up costs since they were not remotely connected to any industrial building or purchase of any piece of land. The Applicant submitted that the Respondent`s re-classification has no foundation in law. The Applicant concluded this part of its arguments by stating that it was justified in claiming a deduction of 25% in the year of income and amortize the deduction over an additional period of three years as start-up cost expenditure.

96. The Applicant submitted that the Respondent added back 2017 income tax components claiming that they were undeclared sales to UETCL. The Applicant explained that prior to being granted a tax exemption in 2017, the Applicant had already invoiced UETCL for amounts inclusive of tax but when the Applicant was granted an exemption, it reversed the amounts that had been paid and issued credit notes to UETCL for the amounts not yet paid. The Applicant submitted that all this evidence was shared with the Respondent but the same was not considered. The Applicant submitted that in the reconciliation exercise which took place during the hearing, the amounts were verified by the Respondent. The Applicant submitted that the Respondent`s witness conceded under cross examination that the Respondent received information from UETCL and ERA that the credit notes were issued and therefore agreed to drop the issue.

97. The Applicant submitted that it incurred sponsor labour costs during the period 2005 – 2014. These expenses were incurred for multiple services during the development and operational phases of the project like staff expenses, IPS development costs charged through equity, independent consultant services charged to the Applicant including disbursements and sponsor labour travels/disbursements for which services were not charged to the Applicant. The Applicant submitted that it claimed these expenses but they were rejected by the Respondent for being expenses of a private nature. The Applicant submitted that the Respondent added back a total of approximately UGX. 14.4

Bn, which position the Applicant disagrees with. The Applicant submitted that these expenses were incurred in the development and operation stages of the project between 2005 and 2014 and were incurred entirely for the Applicant`s business and cannot therefore be categorized as expenses of a private nature. The Applicant submitted that the Respondent erroneously added these expenses back to the period 2012 to 2015.

98. The Applicant submitted that in its objection, the Applicant also brought it to the attention of the Respondent that the Respondent`s workings contained errors. The Applicant submitted that on top of overstating the Applicant`s sponsor labour costs by lumping together distinct and separate expenses, the Respondent`s workings had an error that resulted in double counting of the 2013 and 2014 disbursement costs. The Applicant submitted that the disbursements added back were overstated by Shs. 300,871,165 The Applicant submitted that this error ultimately led to Shs. 14.3Bn being added back instead of the correct amount of Shs. 14,062,594,870 as per the Respondent`s management letter.

99. The Applicant submitted that S. 22(1) (a) of the ITA, entitles a taxpayer to a deduction for expenses incurred in the production of income in a year of income. The Applicant submitted that S. 22(3)(a) of the ITA provides that no deduction will be allowed for any expenditure or loss incurred by a person to the extent to which it is of a domestic or private nature. The Applicant submitted that it provided sufficient evidence of the amounts paid, when they were paid and what they were paid for. The Applicant submitted that the Respondent demanded for extrinsic evidence beyond what is permissible under the law. In support of this argument the Applicant cited the decision in **Okello Okello v The Commissioner General Uganda Revenue Authority HCCS 229 of 2010,** where the court held that once credible evidence of the amount of the expenses paid or incurred is given, the sums are allowable deduction as business expenses.

100. The Applicant submitted that in order to determine whether an expense was for business purposes, the Tribunal only has to consider whether the

expenditure was wholly and exclusively for the purpose of obtaining income for the business. In support of this contention the Applicant cited the decision in **Bentleys, Stokes & Lowless v Beason (Inspector of Taxes) (1952) 2 AllER 82.**

101. The Applicant submitted that the Respondent reviewed the Applicant`s WHT returns and extracted suppliers who the Respondent said had no TINs for the period 1st January 2015 to 31 December 2017. The Applicant submitted that the Respondent added back all the expenses regarding the said supplies amounting to Shs. 569,546,300. The Applicant disagreed with the Respondent on the basis that the said suppliers had TINs at the time and the Applicant was entitled to claim a deduction for the expenses since the expenses formed part of its chargeable income. The Applicant submitted that **S. 22(3) (1)** of the ITA provides that no deduction is allowed for any expenditure above five million shillings in one transaction on goods and services from a supplier who does not have a Tax Identification Number (TIN). The Applicant submitted that the Respondent claimed that some of the suppliers paid during the period 2015-2017 did not have TINs. The Applicant submitted that the Respondent singled out National Fisheries Resources Research Institute, Sustainable Development Engineers Ltd, Mulwanyi & Sons, Kagoda David/Turyatunga Filmon, P&O Logistics Consultant, and Ikwang Vanessa.

102. The Applicant submitted that it objected to the Respondent`s position on the basis that the relevant taxing section had only been introduced in the 2015 income tax amendment and took effect on 1 July 2015. The Applicant submitted that as such it was only applicable in the year of income commencing on 1 January 2016 to 31st December 2016 and 1 January 2017 to 31 December 2017. The Applicant submitted that the Respondent was therefore wrong to apply the said provision to expenses incurred before the amendment. The Applicant submitted that it operates under a substituted year of income which commences on 1 January and closes on 31 December every year. The Applicant submitted that as such the amendment could only apply in the Applicant`s substituted year of income commencing on 1 January 2016 to

31 December 2016. The Applicant cited the decision in **Crane Bank Ltd v Commissioner General Uganda Revenue Authority HCCS 106 of 2009** in support of this argument. The Applicant submitted that the assessment covering the period before the amendment took effect was therefore illegal. The Applicant submitted that the Respondent had no reason to reject the TINs shared by the Applicant because all the TINs belong to the suppliers whose expenses were added back to the Applicant`s chargeable income erroneously.

103. The Applicant submitted that the Respondent issued an assessment for WHT on foreign services rendered outside Uganda prior to 1 July 2015, in the sum of Shs. 1,321,967,790. The Applicant submitted that the Respondent issued this assessment with respect to foreign services rendered to the Applicant by MWH Americas, Quantum International Consulting and Poyry Energy. The Applicant submitted that the said services were rendered to it during the period 2008 to 2015. The Applicant submitted that prior to 1 July 2015, there was no withholding tax requirement on foreign services provided outside Uganda. The Applicant submitted that all the services rendered by the three entities were rendered outside Uganda/offshore and did not attract WHT. The Applicant submitted that during mediation this amount was reduced to Shs. 239,773,341. The Applicant submitted that it still disputes this assessment of Shs. 239,773,341 for being illegal.

104. The Applicant submitted that the services rendered by the 3 foreign suppliers were provided outside Uganda. The Applicant submitted that it shared with the Respondent invoices and notices of withdrawals showing that the said services were indeed rendered offshore. The Applicant submitted that MWH Americas and Quantum International Consulting were non-resident suppliers who provided engineering services on the different Electro-Mechanical equipment before the equipment was shipped into Uganda for installation as part of the project asset. The Applicant submitted that none of the two entities operated a branch or had a permanent establishment in Uganda at that time. The Applicant submitted further that no staff of the said entities ever traveled to Uganda to provide services related to the said equipment. The Applicant

submitted that the said equipment was shipped into Uganda and installed and tested in Uganda by other suppliers.

105. The Applicant submitted that Poyry Energy provided both offshore and onshore services to the Applicant. The Applicant submitted that it illustrated which components of the services were rendered offshore and onshore on every invoice and accounted for WHT due on the onshore services. The Applicant submitted that the Respondent levied WHT on the services rendered offshore despite the fact that these services did not attract WHT before 1 July 2015. The Applicant submitted that it was wrong for the Respondent to apply WHT on all the services rendered by the three entities for the period before 1 July 2015. The Applicant submitted that the assessment of Shs. 239,773,341 with respect to offshore services prior to 1 July 2015 has no legal basis.

106. The Applicant submitted that the Respondent levied on it WHT of Shs. 59,184,915 on local supplies. The Applicant submitted that it obtained taxable supplies from Adrift Adventure Company Ltd and the Aids Information Centre in the period 201-2012 as well as Ahimbisibwe Michael in 2012. The Applicant submitted that the Respondent identified the said three local suppliers as persons who were not tax exempt during those periods. The Applicant submitted that during mediation, this assessment was reduced to Shs. 58,609,091/- and is still disputed by the Applicant for being illegal. The Applicant submitted that the WHT liability for Ahimbisibwe Michael was accounted for in the December 2022 return. The Applicant submitted that it did not withhold tax on the payment to Adrift Adventure Company and the Aids Information Centre as the payment to the said suppliers were below Shs. 1,000,000/-. The Applicant submitted that the Respondent did not provide any reasons for disallowing the Applicant`s objection to these assessments. The Applicant submitted further that the assessments relating to Adrift Adventure and the Aids Information Centre are time barred for having been raised beyond the 3 year limitation period provided under S. 25 of the TPCA.

107. The Applicant submitted that during the trial the parties conducted further reconciliation which reduced the amount in contention to Shs. 155,618,956,093. The Applicant submitted that this new position was admitted to by the Respondent`s witnesses during the trial.

108. The Applicant prayed that the entire assessment of **Shs. 155,618,956,093** be declared illegal for having been raised beyond the three year limitation period. The Applicant also prayed for an order that it is not liable for the Additional Income Tax and WHT assessments of Shs. 153,990,814,959 for the period 2005 to 2022 and that the same ought to be set aside. The Applicant prayed for the costs of the Application.

VI. The Respondent's Submissions

109. The Respondent submitted that the Administrative Additional Assessments levied on the Applicant are lawful and valid as they fall within the exceptions to the statutory limitation in S. 25(2) of the TPCA. The Respondent submitted that it relies on two statutory exceptions; discovery of new information and wilful neglect. The Respondent submitted that the TPCA does not define `new information` and accordingly the phrase must be given its ordinary and natural meaning guided by established principles of statutory interpretation.

110. The Respondent cited the decision in **Langham v Veltema (2004) STC 544,** where the court held that `new information` includes material facts which were not previously known to the tax authority and which, had they been known, would have led to a different assessment and that information may be regarded as new even if it relates to matters existing at the time of the original assessment provided it was not actually in the possession of the authority in a usable form. The Respondent submitted that it obtained new information during the audit which the Applicant had not disclosed in its returns. The Respondent submitted that the Applicant merely declared plant and machinery as aggregate figures in its income tax returns without providing a detailed breakdown of acquisition dates, foreign currency amounts and the exchange rates applied. The Respondent submitted that the detailed asset registers and

computation schedules, which showed that 2012 exchange rates had been retrospectively applied to assets acquired in earlier years, were only submitted to the Respondent during the audit process. The Respondent submitted that this information was necessary in determining the correct cost base under S. 52 of the ITA and the capital allowances claimed under S. 27 of the ITA. The Respondent submitted that it was neither apparent from the face of the self-assessment returns nor reasonably ascertainable without an in depth audit and reconciliation exercise. The Respondent submitted that the audit uncovered new and material information that fundamentally altered the understanding of the Applicant`s tax position. The Respondent submitted that the said information constitutes `discovery of new information` within the meaning of S. 25(2) (a) of the TPCA and lawfully permits the Respondent to issue Administrative Additional Assessments outside the statutory limitation period.

111. The Respondent submitted that `wilful neglect` has been defined according to **Black`a Law Dictionary, 11th Edition at page 1916,** as `wilful` denotes deliberate, conscious, or intentional conduct, while `neglect` denotes failure to give proper attention to a legal obligation. The Respondent submitted that wilful neglect therefore encompasses conduct demonstrating reckless disregard of duties.

112. The Respondent cited the decision in **Michael Ndichu v Commissioner, Domestic Taxes (2023),** where the Kenya Tax Appeals Tribunal held that wilful neglect may be inferred where a taxpayer fully aware of its statutory obligations, fails to comply and benefits from the non-compliance. The Respondent submitted that in the present case, the Applicant applied the exchange rate prevailing in the year 2012 to assets acquired in earlier years despite the provisions of Ss. 52 and 57 of the ITA, which clearly required that the cost base be determined by reference to amounts paid or incurred at acquisition and converted at the applicable exchange rate on the date incurred.

113. The Respondent submitted that the dates of acquisition, the foreign currency consideration and the applicable historical exchange rates were ascertainable from the Applicant`s own records. The Respondent submitted that the decision

to apply a later exchange rate which inflated the asset pool's written-down value and increased the capital allowance deductions cannot be characterized as a mere clerical oversight. The Respondent submitted that the Applicant's conduct amounted to a reckless disregard of statutory requirements and constitutes wilful neglect within the meaning of S. 25(2) of the TPCA.

114. The Respondent submitted that whether arising from the discovery of new information or from wilful neglect, the Additional Assessments were lawfully issued outside the statutory limitation period.

115. The Respondent submitted that the main dispute addresses the correct interpretation of Ss. 50, 27 and 56 of the ITA, when determining the cost base of depreciable assets acquired in foreign currency. The Respondent submitted that S. 50(1) of the ITA establishes the cost base of an asset for the purposes of the ITA. The Respondent submitted that S. 50(2) of the ITA defines the cost base, in the case of an asset purchased or constructed by a taxpayer, as the amount paid or incurred in respect of the asset, including incidental capital expenditures. The Respondent submitted that S. 27 of the ITA provides that depreciable assets are grouped into pools and that depreciation is calculated based on the written-down value of the pool. The Respondent submitted that S. 27(4) of the ITA requires that assets added to a pool be brought in at their cost base.

116. The Respondent submitted further that S. 56(2) of the ITA requires that where an amount taken into account under the Act is in a foreign currency, it shall be converted to Uganda Shillings at the Bank of Uganda mid-exchange rate applying on the date that the amount is derived, incurred, or otherwise taken into account for tax purposes.

117. The Respondent submitted that the proper approach to statutory interpretation requires that provisions of a statute should be read harmoniously and in context, so as to give effect to the overall legislative scheme. The Respondent submitted that no provision should be interpreted in a manner that renders another redundant or internally inconsistent. The Respondent submitted that S. 50 of the ITA is the primary and specific provision governing the

determination of cost base. The Respondent submitted that it fixes the cost base at the amount paid or incurred at the time of acquisition and S. 27 of the ITA then operationalizes that cost base for the purposes of computing capital allowances. The Respondent submitted that S. 56 is a mechanical conversion provision applicable when the relevant amount is denominated in a foreign currency. The Respondent submitted that it followed that S. 56 does not create an independent or elective tax point rather it applies to amounts whose legal character has already been determined under other provisions of the Act. The Respondent submitted that in the present case, the legally relevant amount is the cost incurred at acquisition under S. 50 of the ITA.

118. The Respondent submitted that the argument by the Applicant that the phrase `*otherwise taken into account*` permits it to choose the date on which the asset was first used in computing capital allowances for the year 2012 as the exchange rate conversion date, is legally untenable for the following reasons;

119. Firstly, applying the *ejusdem generis* rule, the phrase, `*otherwise taken into account*` must be interpreted in light of the preceding words `derived` and `incurred `. The Respondent submitted that both these words refer to legally crystallized tax events. The Residual phrase cannot be construed so broadly as to allow a taxpayer to defer or substitute the legally relevant incurrence date established under S. 50.

120. Secondly, a literal interpretation that allows conversion at the date of first use would undermine S. 50 by decoupling the cost base from the historical economic outlay actually incurred. The Respondent submitted that the legislature expressly tied the cost base to amounts paid or incurred and not to the commencement of depreciation.

121. Thirdly, the Applicant`s interpretation would create asymmetry and a potential for manipulation. The Respondent submitted that taxpayers could defer exchange conversion to a year with favorable exchange movements, thereby artificially inflating capital allowances and distorting taxable income. Such a construction the Respondent submitted would defeat the object and purpose

of the capital allowance regime, which is to permit recovery of actual capital outlay not windfall exchange gains.

122. The Respondent submitted that Capital Allowances allow taxpayers to recover the actual cost of capital assets over time. They are not intended to create speculative exchange-rate advantages unrelated to the underlying economic investment. The Respondent submitted that the explanatory notes to S. 56, (the foreign exchange conversion provision) indicate that its purpose is to provide certainty in foreign currency transactions by fixing a conversion date linked to the underlying taxable event. The Respondent submitted that the underlying event in the context of asset acquisition is the incurrence of cost. The Respondent submitted that a purposive reading of the above provision supports its position that conversion must occur on the date the cost was incurred, not at a later accounting milestone chosen by the taxpayer.

123. The Respondent submitted that its interpretation aligns with both the statutory text and the accounting principles incorporated by reference into the ITA. The Respondent submitted that under GAAP, assets are initially recognized at their historical cost on the acquisition date. Exchange differences after initial recognition are handled separately and do not retroactively alter historical costs unless specific accounting standards specify otherwise. The Respondent submitted that the Applicant has not shown that any applicable standard requires a retrospective re-measurement of historical acquisition cost at a later exchange rate for tax purposes.

124. The Respondent submitted that the assets included in the hydroelectric project were acquired over several years with each component having a specific acquisition date and a foreign currency cost and were recorded as work in progress during the construction phase. The Respondent submitted that when the project became operational in 2012, the Applicant aggregated prior costs and used the 2012 exchange rate for the project`s total value. The Respondent submitted that this method replaced a previous exchange rate with the 2012 rate for historically incurred costs, thus increasing the asset pool`s written down value.

125. The Respondent submitted that it re-calculated the cost base by applying the exchange rate prevailing on the respective dates of incurrence because this approach preserves the integrity of S. 50 and gives proper effect to S. 56 and ensures that capital allowances align with actual economic expenditure. The Respondent contended that based on a textual, contextual, and purposive reading of the ITA, the applicable exchange rates are those in effect on the dates that the assets were incurred and that the additional assessments on this basis are legally justified.
126. The Respondent submitted that comparative jurisprudence from other common law jurisdictions support the principle that capital expenditure incurred in a foreign currency must be translated at the exchange rate prevailing at the time the liability is incurred rather than at a later discretionary date chosen by the taxpayer.
127. The Respondent cited the decision in **Bentley v Pike (1981) STC 360 (UK** where the court emphasized that for tax purposes, expenditure is recognized when the legal obligation to pay arises and that subsequent currency fluctuations do not retrospectively alter an asset`s historical cost.
128. The Respondent also cited the decision in **CSARS v Bosch 2015 (2) SA 174 (CC)**, where the South African Constitutional Court affirmed that tax statutes must be interpreted in a manner consistent with their text, context and purpose and that provisions dealing with valuation or timing cannot be manipulated to achieve unintended fiscal advantages.
129. The Respondent submitted that the above authorities collectively demonstrate a consistent common law approach to the effect that where legislation has fixed cost or expenditure by reference to the amount incurred, foreign currency conversion must align with that incurrence date and that later accounting recognition or operational commencement does not reset the historical cost for tax purposes.
130. The Respondent submitted that applying the above principles, the cost base of the Applicant`s assets was fixed at the time the expenditure was incurred in foreign currency. The Respondent submitted that S. 56(2) operates to convert

the amount incurred at the exchange rate prevailing on the incurrence date. The Respondent submitted that the commencement of operations in 2012 did not create a new tax event capable of re-determining the Applicant`s historical cost.

131. In response to the contention by the Applicant that the Respondent did not consider the foreign exchange losses for the years 2007, 2008, 2009, 2010 and 2011 in the 2012 computation, the Respondent submitted that it determined that exchange losses apply to only one year of income and one accounting period and these had been clearly accounted for in the returns for the respective periods.

132. The Respondent submitted further that the Applicant`s assertion that the exchange rate in the year 2007 was lower than the exchange rate in 2012 and that a loss should be granted is erroneous under GAAP, as envisaged in S. 38 of the ITA.

133. In response to the contention by the Applicant that the dam`s actual cost would be determined only upon completion, the Respondent submitted that the dam comprises of many assets, each with a cost determined at the time of purchase. The Respondent submitted that these individual costs are classified as work in progress under GAAP and therefore when the dam is completed, the individual costs should be aggregated to form the dam`s cost.

134. The Respondent submitted that for the period 2012, the Applicant classified asset costs amounting to USD 31,479,646 as start-up costs and recovered them over the first four years. The Respondent submitted that of the costs amounting to USD 31,479,646 the Respondent re-classified costs amounting to USD 24,574,992 from start-up costs to fixed Assets- Buildings subject to depreciation and granted the depreciation allowances, with the cost recoverable over 20 years.

135. The Respondent submitted that it resolved to maintain the assessments because the costs constituted land and buildings and not start-up costs. The Respondent relying on S. 29 of the ITA defined start-up costs as expenses incurred in starting up a business to produce income included in gross income

or in the initial public offering at the stock market. The Respondent submitted that these costs are non-recurring, preliminary or pre-opening costs, which are associated with setting up a business such as fees of an accountant, registration charges, legal fees, costs for promotion and advertising as well as employee training.

136. The Respondent submitted that a review of the said costs shows that they do not fall within the ambit of S. 30 of the ITA. The Respondent submitted that the construction costs for the site camp setup and installation were incurred in relation to the buildings constructed by the Applicant to accommodate the labourers and as such they constituted part of the building structures and ought to have been classified as buildings rather than start-up costs.

137. The Respondent submitted that it categorized the site preparation, access road construction, demobilization and foundation construction for the switchyard as costs that are ordinarily incurred in setting up a building. The Respondent submitted that this is because a building must have an access road, the site must be cleared to make way for the foundations and a perimeter fence, all of which are ordinarily categorized as part of the building. The Respondent submitted that it also transferred to land, feasibility study survey fees, which are vital to the acquisition of land, whereas dam survey fees are incidental to the cost of the land.

138. The Respondent submitted further that the Community Development cost was incurred to resettle the community displaced from the land acquired by the Applicant and therefore forms part of the land cost and the cost for compensation for crops forms part of the land and not a start-up cost as it results from acquiring the land and is included in the land cost. The Respondent submitted that the above costs incurred by the Applicant would be required under GAAP to be capitalized as part of land and buildings and not as start-up costs to be expensed in the profit or loss, since they were incurred during the construction phase.

139. The Respondent submitted that the Applicant reversed invoices for April and May 2017, totaling to Shs. 6,566,853,532 after UETCL allegedly declined

payment. The Respondent submitted that it examined the sales ledger and financial statements and established that the income had accrued and had been invoiced. The Respondent submitted that following mediation in the Tribunal this issue was resolved between the parties.

140. The Respondent submitted that costs in the sum of Shs. 14,363,466,035 purportedly incurred by the Applicant for sponsor labour experts travelling to and from Uganda for the hydropower project during both the development and operational phase were added back because they were private in nature. The Respondent submitted that these expenses were paid to shareholders and included travel, accommodation of individuals and members of the shareholder companies. The Respondent submitted that the Applicant did not provide evidence to prove that these expenses were incurred for business purposes.

141. The Respondent submitted that it reviewed the Applicant's withholding tax returns and disallowed expenses incurred and claimed against suppliers without TINs, in accordance with S. 22(2)(m) of the ITA, the years 2015, 2016 and 2017. The Respondent submitted that the total amount added back was Shs. 569,546,300. The Respondent submitted that it analyzed the assessment and found that S. 22(2)(m) of the ITA was introduced by the Income Tax Amendment Act 2015 which took effect from 1st July 2015. The Respondent submitted that the tax arising from expenses incurred and paid prior to 1st July 2015 was vacated in accordance with S. 22(2) (m) of the ITA.

142. The Respondent submitted that it reviewed the registration and TIN profiles for the TINs provided in respect of various suppliers namely;

    a) National Fisheries Resource Research Institute: The Respondent found that the TIN 1000029757 belongs to the National Agricultural Research Organization (NARO) and that the National Fisheries Resources Research Institute is a government body registered as a branch of NARO. The Respondent submitted that the related tax was therefore waived.

    b) Sustainable Development Engineers Ltd: The Respondent submitted that it established that the TIN 1001825165 belongs to Mr. Herman

Ssenyondwa and not to Sustainable Development Engineers Ltd. The Respondent submitted that the related tax was therefore maintained.

c) Mulwanyi & Sons: The Respondent submitted that it established that TIN 1015846677 belongs to Jesca Mulwanyi Baami and was acquired on 22 November 2019, implying that Jesca Mulwanyi Baami did not have a TIN during the period under review. The Respondent submitted further that as the TIN was acquired in the year 2019, after the period under review, the taxpayer`s grounds are not valid. The Respondent submitted that the related tax was therefore maintained.

d) Kagoda David/Turyatunga Filmon: The Respondent that the TIN 1011502413 belongs to Kagoda David, an employee of Mpongo Limited and was issued on 17 November 2017. The Respondent submitted that there was no evidence showing that Kagoda David and Turyatunga Filmon, were the same person. The Respondent submitted that the related tax was also maintained.

e) P&O Logistics Consultant: The Respondent submitted that TIN 1000227209 belongs to Mr. Okurut Peter, an employee of Bujagali Energy Limited and was issued on 20 July 2010. The Respondent submitted that there was no evidence that Mr. Peter Okurut was also the P&O Logistics Consultant.

f) Ikwang Vanessa: The Respondent submitted that TIN 1015805882 belongs to Vanessa Ikwang and was issued on 11 October 2019, indicating that Vanessa Ikwang did not have a TIN during the period under review. The Respondent submitted further that it was also not able to establish that the supplier and the taxpayer whose TIN was provided are the same. The Respondent submitted that the related tax was maintained.

143. The Respondent submitted that it verified the TIN records and allowed objections where the evidence supported compliance. However where it was established that the suppliers did not have valid TINs during the relevant

period, the objections were disallowed and assessments of Shs. 111,377,200 were upheld.

144. In respect of WHT on foreign services rendered outside Uganda prior to 1 July 2015, the Respondent submitted that it disputed that certain services relating to MWH Americas, Quantum International Consulting and Poyry Energy, valued at Shs. 8,865,353,566 were rendered outside Uganda between the years 2008 and 2015. The Respondent submitted that during TAT guided mediation it revised the tax from Shs. 490,667,417 to Shs. 239,773,341, to exclude offshore services and maintained the assessments only where the services had been rendered in Uganda or were unsupported by documentation. The Respondent submitted that the WHT assessment of Shs. 239,773,341 is therefore justified.

145. In respect of the WHT on local supplies of Shs. 59,184,915 the Respondent submitted that it reviewed the Applicant`s WHT returns and identified three local suppliers to wit; Adrift Adventure Company, AIDS Information Centre and Ahimbisibwe Michael, as persons not exempt from the local 6% WHT at that time. The Respondent submitted that the Applicant failed to withhold tax on payments to these persons in excess of Shs. 1,000,000 for the periods 2010*2012 and 2022. The Respondent submitted that these gross payments totaled to Shs. 986,415,257 giving rise to the WHT liability of Shs. 59,000,000. The Respondent submitted that following TAT guided mediation and the review of the Applicant`s documentation, the overall WHT was adjusted from Shs. 549,276,508 to Shs. 298,382,432.

146. The Respondent submitted the Applicant failed to withhold 6% WHT on payments exceeding Shs. 1,000,000 made to certain non-exempt suppliers, with the exception of one supplier, whose tax was vacated where the evidence showed compliance. The Respondent submitted that the revised WHT was properly maintained at Shs. 298,384,432.

147. The Respondent prayed that the Application be dismissed in its entirety and that the revised assessment totaling to Shs. 155,618,956,094 comprising of WHT of Shs. 298,382,432 and income tax of Shs. 155,320,573,662 be upheld.

148. The Respondent prayed that the Application be dismissed with costs.

VII. The Applicant's Submissions in Rejoinder

149. In rejoinder the Applicant reiterated the contents of its submissions and rejoined that the additional assessments are time barred and that the Respondent`s attempts to justify them through unsubstantiated claims of "new information" and "wilful neglect" are mere afterthoughts, lacking specificity and contrary to established precedent. The Applicant rejoined that the issue relating to wilful neglect was raised at the trial without leave from the Tribunal since it was not mentioned in either the assessment or the objection decision. The Applicant rejoined that its 2012, exchange rate application was a reasonable interpretation of S. 57(2) of the ITA, tying conversion to when costs are taken into account and aligns with accrual accounting under S. 38 of the ITA and GAAP, where the project was treated as work-in-progress until commissioning.

150. The Applicant rejoined that the Respondent`s re-calculations of the cost base for depreciable assets are misguided. The Applicant rejoined that its use of exchange rates aligns with the Income Tax Act`s provisions for accrual based accounting and the timing of when costs are taken into account for tax purposes under S. 56(2) of the ITA. The Applicant rejoined that the Respondent rigid insistence on historical incurrence dates ignores the project`s fundamental nature as a single integrated asset, constructed over a period of time but commissioned in its entirety and put into operation on a single date in the year 2012.

151. The Applicant rejoined that the re-classification of expenses including start-up costs as capital expenditure, sponsor labour disbursements as private in nature and withholding tax adjustments are arbitrary and unsupported.

VIII. The Determination

Having listened to the evidence and read the submissions of the parties, this is the ruling of the Tribunal.

152. We will begin, by addressing, the question relating to the validity of this application.

153. The Applicant has submitted that the Administrative Additional Assessments raised by the Respondent are illegal and invalid for being raised beyond the 3 year statutory limit. The Applicant submitted that the Respondent raised Administrative Additional Assessments for income tax and Withholding tax amounting to Shs. 153, 990, 814, 959/- for the period 2005 to 2022 going back over 18 years. These assessments were raised in 2023 covering the periods spanning back to 2005. The Applicant submitted that these assessments were accordingly time barred.

154. The Applicant submitted that whereas **S. 25(1)** of the **Tax Procedures Code Act** (TPCA) allows the Commissioner General to make Additional Assessments, this power is limited under **S. 25(2)** of the TPCA to a period of three years after a taxpayer has filed its returns. The Applicant submitted under S. 25(2) of the TPCA, the Respondent has no power to raise Additional Assessments beyond a three year period in the absence of fraud, wilful neglect or the discovery of new information. The Applicant cited the decision in **Kampala Hospitality Development Ltd v Uganda Revenue Authority TAT 63 of 2023.**

155. The Applicant submitted that under **S. 25(1)** of the TPCA, a self-assessment return is deemed final and conclusive after a period of three years from the date of the filing of the self-assessed return. The Applicant submitted that the burden rests on the Respondent to clearly identify the exceptional ground relied upon and to demonstrate that it applied to the period and the head assessed. The Applicant cited the decision of the Tribunal in **Century Bottling Co. Ltd v Uganda Revenue Authority TAT 096 of 2022,** in support of this argument.

156. The Respondent submitted that the Administrative Additional Assessments levied on the Applicant are lawful and valid as they fall within the exceptions to the statutory limitation in S. 25(2) of the TPCA. The Respondent submitted that it relies on two statutory exceptions; discovery of new information and wilful

neglect. The Respondent submitted that the TPCA does not define `new information` and accordingly the phrase must be given its ordinary and natural meaning guided by established principles of statutory interpretation.

157. The Respondent cited the decision in **Langham v Veltema (2004) STC 544,** where the court held that `new information` includes material facts which were not previously known to the tax authority and which, had they been known, would have led to a different assessment and that information may be regarded as new even if it relates to matters existing at the time of the original assessment provided it was not actually in the possession of the authority in a usable form. The Respondent submitted that it obtained new information during the audit which the Applicant had not disclosed in its returns. The Respondent submitted that the Applicant merely declared plant and machinery as aggregate figures in its income tax returns without providing a detailed breakdown of acquisition dates, foreign currency amounts and the exchange rates applied.

158. The Respondent submitted that the detailed asset registers and computation schedules, which showed that 2012 exchange rates had been retrospectively applied to assets acquired in earlier years, were only submitted to the Respondent during the audit process. The Respondent submitted that this information was necessary in determining the correct cost base under S. 52 of the ITA and the capital allowances claimed under S. 27 of the ITA. The Respondent submitted that it was neither apparent from the face of the self-assessment returns nor reasonably ascertainable without an in depth audit and reconciliation exercise.

159. The Respondent submitted that the audit uncovered new and material information that fundamentally altered the understanding of the Applicant`s tax position. The Respondent submitted that the said information constitutes `discovery of new information` within the meaning of S. 25(2) (a) of the TPCA and lawfully permits the Respondent to issue Administrative Additional Assessments outside the statutory limitation period.

160. Additional Assessments, are provided for as follows, under **S. 25** of the **Tax Procedures Code Act** (TPCA).

25. Additional Assessment

(1) The Commissioner General may make an additional assessment amending a tax assessment made for a tax period to ensure that-

a) For an assessed loss under the Income Tax Act, the taxpayer is assessed in respect of the correct amount of the assessed loss for the period;

b) For an excess input tax credit under the Value Added Tax Act, the taxpayer is assessed in respect of the correct amount of the excess input tax credit for the period;

c) In any other case, the taxpayer is liable for the correct amount of tax payable in respect of the period.

(2) An additional assessment under subsection (1) may be made-

a) At any time, if fraud or any gross or wilful neglect has been committed by, or on behalf of the taxpayer, or new information has been discovered in relation to the tax payable by the taxpayer for a tax period;

b) In the case of an additional assessment, within three years from the date of service of the notice of the additional assessment; or

c) In any other case, within three years after the date-

i. The taxpayer furnished the self-assessment return to which the original assessment relates; or

ii. The Commissioner General served notice of the original assessment on the taxpayer.

161. In order to determine, whether the Additional Assessments, for the tax periods in question, are time barred, we must first establish, whether as submitted by the Respondent, the findings of the refund audit, constituted the discovery of new information, for the purposes of **S. 25(2) (a)** of the TPCA.

162. The terms `discovers` or `discovery` have formed the basis of tax provisions, prescribing additional assessments, in cases of insufficiency of tax, arising from inaccurate assessments. In the United Kingdom, the term "discovers" has

been used in **S. 52** of the repealed **Tax Management Act, 1880** and **S. 29** of the **Tax Management Act, 1970**, as the basis for permitting, the making of additional assessments, beyond the requisite statutory period. In our own jurisdiction, the term `discovery of new information` has been used in the now repealed **S. 97(2)** of ITA and currently, in **S. 25(2)** of the TPCA.

163. In **Commercial Structures Ltd v. Briggs 30 TC 477,** a taxable amount of certain rents, depended on the terms, on which a property was let. The taxpayer contended that, as the Inspector of taxes, had at all material times been in possession of full information, as to the terms of the letting, he had not made any discovery which would justify the making of the relevant assessments. **Tucker LJ** said;

> *"I think the word "discover" in itself, according to the ordinary use of language, may be taken simply to mean "find out". What has to be found or found out is that any properties or profits chargeable to tax have been omitted from the first assessment.*
>
> *"Of course, if there were any reason in the context for restricting the word "discover" to the discovery of an error in fact, that restriction would necessarily receive effect, but in my opinion the context points, not to any such restriction, but on the contrary, to so wide a meaning, that the word ought to be held to cover just the kind of discovery which was made here, when the Special Commissioners found out that, by reason of a misapprehension of the legal position, certain of the profits chargeable to tax had been omitted from the first assessment". (Emphasis Added).*

164. In **IRC v Mackinlay`s Trustees 22 TC 305,** Lord Normand said at page 312

> *"I do not think it is stretching the word "discovers" to hold that it covers the finding out, that an error in law has been committed in the first assessment, when it is desired to correct that by an additional assessment".*

In **Cenlon Finance Co. Ltd vs. Ellwood (Inspector of Taxes) (1962) AC 782,** the House of Lords, while considering, the meaning of the word

`discovers`, rejected the argument that a discovery entailed the ascertainment of a new fact. **Viscount Simonds** said at page 794;

> *"I can see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation".*

165. In **UETCL vs. Commissioner General Uganda Revenue Authority, HCCS. 423 of 2010**, the plaintiff filed self-assessed tax returns for the period 2001-2004, and duly effected payment in respect of the said returns. More than five years later, on 18th August 2010, the defendant issued additional assessments against the plaintiff, on the ground that the defendant had discovered new information through an audit of the plaintiff, which showed that the plaintiff's earlier assessment was inaccurate. The defendant specifically alleged that the sum of Shs. 40bn, which was reflected in the plaintiff's self-assessment returns, as loss carried forward from Uganda Electricity Board, was erroneously used in computing the plaintiff's taxable income, as a loss carried forward, when in actual fact, no loss had been carried forward from Uganda Electricity Board. The plaintiff contended that the alleged new information relied on by the defendant did not amount to new information within the meaning of **S. 97(2)** because at all material times, the information, was available to the defendant or ought to have been upon the exercise of reasonable diligence. The new information, which neither the plaintiff nor the defendant, had, at the time, the plaintiff provided the self-assessment tax returns, was the Allocation of tax written down values of Uganda Electricity Board, to successor companies and that information was only confirmed to the defendant in 2010 during the audit.

166. Madrama **J, (**as he then was), cited the decision in **King vs. Bloomsbury Tax Commissioners (1915) 3 KB 762,** which arose from the construction of **S. 52** of the **Tax Management Act, 1880,** referred to above, and stated as follows;

> *"Section 52 quoted above is not in pari materia with section 97(2) of the ITA. Section 97(2) of the ITA uses the words `discovery of new information`. The word `discovery` by its nature means getting to know something new. The* ***Cambridge International Dictionary of English, Cambridge University Press, 1995*** *defines the word `discover` as to find information, a place or an object especially for the first time. The word "discovers" therefore substantially has the same meaning as the phrase "discovery of new information". The only qualification and difference is that in the Ugandan Income Tax Act, it deals with discovery of information in relation to the tax payable"*

At page 33, His Lordship, found, as follows;

> *"In the context of the plaintiff`s case any information that shows that the returns of the plaintiff to the defendant for any year of income is false or misleading can be termed a "discovery of new information". This is because previously the Commissioner was presumed or deemed to be satisfied by the returns and did not have any suspicions that the plaintiff`s returns did not contain accurate information."*

At page 49, His Lordship stated that;

> *"In conclusion, the evidence strongly shows that the defendant realized that no losses had been carried forward to the plaintiff from Uganda Electricity Board as concluded by the plaintiff, in its self -assessment of 2001.....The assessment is not time barred based on discovery of new information. Notwithstanding, issue number one, is resolved in favour of the defendant that the purported assessment of August 2010, was not time barred on the following grounds. It is not time barred because it was premised on the information discovered during the audit of the defendant between 2009 and 2010. The actual link between no losses carried forward from Uganda Electricity Board and the self-assessment*

of the year 2001, was made by the defendant during the audit process after the plaintiff applied for refund of tax in the year 2009".

His Lordship, went on to hold, as follows, at page 50;

> *"Furthermore, the information would be new information simply because the defendant was satisfied with the tax returns of the plaintiff for the years of income 2001. However, the audit conducted by the defendant linked the information that no losses were brought forward from Uganda Electricity Board in the 2001 self-assessment. This revealed that the self-assessments were misleading for containing information that losses were carried forward. The Commissioner had not reconciled the information available by August 2006 to the self-assessment returns until after the defendant carried out an audit in 2009-2010. Consequently, the reconciliation of the information and the result of the reconciliation that the plaintiff was in a taxable position in the year of income 2001, is new information within the meaning of section 97(2) of the Income Tax Act and the assessments issued in August 2010 are not time barred."*

167. In the instant case, the Applicant filed self-assessed returns and in the year 2012, claimed initial allowance of 50% and depreciation allowances as per asset class in the pool, against concession receivable assets (Plant and Equipment), amounting to **Shs. 1,422,855,004,423**. Further, the Applicant declared **Shs. 402,384,244,162** as the cost of the power house buildings and structures in 2012, against which the Applicant claimed initial allowance of 20% and Industrial Building Allowance. The above sums were obtained after converting the costs of the said assets from United States Dollars to Uganda Shilling, at the, 2012 Bank of Uganda Mid- Year exchange rate of **Shs. 2,501.54**. A review of the Applicant`s asset register by the Respondent revealed that the above assets had been acquired between the years 2005-2012 and had been kept as work in progress, in the Applicant`s books of accounts. The Respondent believed that this review showed that the Applicant had not correctly applied the provisions of **S. 56(2)** of the ITA and had as a result overstated the initial allowance by **Shs. 186,937,230,631** and the

depreciation allowance by **Shs. 152,430,447,847,** in its income tax computation. The Respondent also believed that the review had revealed that the cost of the power house buildings and structures had been overstated by **Shs. 83,272,095,901** and as a result the initial allowance had been overstated by **Shs. 16,654,419,180** and the Industrial Building Allowance had been overstated by **Shs. 14,714,317,875** in the Applicant`s income tax computation.

168. The findings of the audit, which led the Respondent, to believe, that the Applicant had misconstrued the provisions of **S. 56(2)** of the ITA, convinced the Respondent that the Applicant`s self-assessed returns were inaccurate and had led to an incorrect amount of tax payable in respect of the period in question, contrary to **S. 25(1) (c)** of the TPCA. This information which came to the knowledge of the Respondent through the audit, amounted to a discovery of new information within the meaning of **S. 25(2) (a)** of the TPCA. This is so, because prior to the audit, the Respondent was satisfied in the belief that the Applicant`s returns were accurate. This belief changed upon receipt of the information that the Applicant had misconstrued the provisions mentioned above.
169. Relying on the above authorities and considering ourselves bound by the decision in **UETCL vs. Commissioner General Uganda Revenue Authority** (supra), we find that the assessments in question, are not time barred.
170. We will now proceed to determine the sub-issue, as to whether the Applicant used a wrong foreign exchange rate, to convert the concession asset costs, from United States Dollars to Uganda Shillings.
171. The resolution of this sub-issue, turns on the construction of **S.56 (2)** of the ITA. **S. 56** provides as follows;

56. Currency Conversion

(1) Chargeable income under this Act shall be calculated in Uganda Shillings.

(2) Where an amount taken into account under this Act is in a currency other than the Uganda Shilling, the amount shall be converted to the

Uganda Shilling at the Bank of Uganda mid-exchange rate applying between the currency and the Uganda Shilling on the date that the amount is derived, incurred, or otherwise taken into account for tax purposes.

(3) With the prior written permission of the Commissioner General, a taxpayer may use the average rate of exchange during the year of income, or may keep books of accounts in a currency other than the Uganda Shilling.

172. In tax legislation, the phrase "taken into account" has a precise legal meaning which goes beyond its everyday use. It is a term of art, used to determine exactly when a financial item such as income or expense, becomes part of a person`s tax calculation. The phrase "amount taken into account under this Act" refers to the income, expenses, gains or losses which must be included in a tax **return** to determine a person`s tax liability under the ITA. What constitutes an "amount taken into account under this Act" is a question of fact. Under the ITA, an amount is taken into account when it is formally recorded or recognized in a person`s tax return for the purpose of calculating that person`s chargeable income.

With the above in mind, **S. 56(2)**, can be summarized as follows;

a) Where an amount taken into account under this Act, is in a currency other than the Uganda Shilling;
b) The amount shall be converted to the Uganda Shilling at the Bank of Uganda mid-exchange rate applying between the currency and the Uganda Shilling on the date that the amount;
    i. Is derived,
    ii. incurred,
    iii. Or otherwise taken into account for tax purposes.

We will analyze each of the above components of **S. 56(2)** in turn.

1. **Where an amount taken into account under this Act, is in a currency other than the Uganda Shilling;**

173. The above phrase, refers to an amount in a foreign currency, constituting a financial item, **included** by a taxpayer, in its tax returns, for the purpose of determining, that taxpayer`s liability under the ITA.

174. What amounts, in a currency other than the Uganda Shilling, were taken into account by the **Applicant**, for the purposes of determining, its tax liability? This is a question of fact and refers to the actual amounts taken into account by the Applicant. In order to answer this question, we must ascertain the actual amounts taken into account by the Applicant, when it filed its income tax returns for the period under review.

175. Information relating to the Applicant`s income tax return filings, can be found in the Audit Management letter, issued by the Respondent to the Applicant, on 9th August 2023. This **letter** was admitted in evidence as exhibit REX3. At page 4 paragraph 4 of this letter, the Respondent stated as follows;

"A review of your income tax return especially wear and tear schedules established that you added concession receivable assets (Plant and Equipment) on your wear and tear schedule amounting to ***UGX. 1,422,855,004,423*** *in 2012 and claimed initial allowance of 50% and depreciation allowances as per asset class in the pool. We also noted that the above cost was obtained after translating the cost of the asset from* ***USD 568,526,466*** *to UGX. Using the Bank of Uganda Mid-year exchange rate of* ***UGX. 2,501.54.*** (Emphasis Added).

A further review of your asset register revealed that these assets were acquired between 2005 and 2012 although kept as work in progress in the books of accounts. We noted that the exchange rates used to convert Plant and Equipment amounts to UGX. was higher than the prevailing rates for the respective years when the assets were acquired...."

At page 6 paragraph 5, of the same document, the Respondent stated as follows;

*"We also noted that you declared **UGX. 402,384,244,162** as cost of the power house buildings and structures in 2012 on which you claimed initial allowance of 20% and Industrial building Allowance (IBD). We further established that the above cost was obtained after translating the USD cost of **USD 160,854,343** to UGX. using the Bank of Uganda Mid-Year exchange rate of UGX. 2,501.54.* (Emphasis Added).

176. The above excerpts show, that for our present purposes, two amounts in United States Dollars, were taken into account by the Applicant in the year 2012 and converted to **Uganda** Shillings. The first amount was **USD 568,526,466,** which constituted the cost of Plant and Equipment. The second amount was **USD 160,854,343,** which constituted the cost of the power house buildings and structures.

177. The **above**, answers the question as to the amounts, in a currency other than the Uganda Shilling, which were taken into account by the Applicant. For the purposes of the first part, of **S. 56(2)** of the ITA, the amounts taken into account by the Applicant, were **USD 568,526,466** and **USD 160,854,343.** These amounts respectively constituted the cost of Plant and Equipment and the cost of the Power House buildings structures.

2. The amount shall be converted to the Uganda Shilling at the Bank of Uganda mid-exchange rate applying between the currency and the Uganda Shilling on the date that the amount;

i. Is derived,

ii. Incurred,

iii. Or otherwise taken into account for tax purposes.

178. The second part of **S. 56(2),** sets out the circumstances, on the basis of which, the foreign exchange conversion rates, are to be determined.

179. In accrual-based accounting, the terms "derived" and "incurred" as used in **S. 56 (2) above**, refer to income and expenditure respectively. This is clear from **S. 40(1)** of the ITA, where the term "derive" is used in respect of income while

the term "incur" is used in respect of expenditure. **S. 40(1)** of the ITA provides as follows;

S. 40 Accrual-Basis taxpayer

(1)A taxpayer who is accounting for tax purposes on an accrual basis-

a) Derives income when it is receivable by the taxpayer; and
b) Incurs expenditure when it is payable by the taxpayer.

180. It follows, that the phrase "on the date that the amount is derived, incurred, or otherwise taken into account for tax purposes" specifically refers to the date when the income or expenditure constituting the amount taken into account, was derived or incurred. The phrase "otherwise taken into account" refers to other financial items not constituting income or expenditure, which must also be taken into account, in calculating a person`s chargeable income.
181. It is apparent, from the above, that for the purposes of **S. 56(2)**, where the amount taken into account, constitutes income, the amount shall be converted to Uganda Shillings, at the Bank of Uganda mid-exchange rate, applying on the date that the income was derived.
182. Similarly, where the amount taken into account, is an expenditure, the amount shall be converted to Uganda Shillings, at the Bank of Uganda mid-exchange rate, applying on the date that the expenditure was incurred.
183. The phrase `or otherwise taken into account` only applies when the amount taken into account constitutes neither income nor expenditure.
It is evident, that the amounts taken into account by the Applicant, namely; **USD 568,526,466,** being the cost of Plant and Equipment and **USD 160,854,343,** being the cost of the power house buildings and structures, did not constitute income. Did these amounts constitute expenditure for the purposes of **S. 56(2)** of the ITA?
184. In order, to answer this question, we must look at the provisions of **S. 40(4)** of the ITA, which provides as follows;

`Subject to this Act, an amount is treated as payable by the taxpayer when all the events that determine liability have occurred and the amount of the liability can be determined with reasonable accuracy, but not before economic performance with respect to the amount occurs`(Emphasis Added).

What constitutes economic performance for the purposes of **S. 40(4)** is provided for under **S. 40(6)** of the ITA, which states as follows;

(6)For the purposes of subsection (4), economic performance occurs-

a) With respect to the acquisition of services or property, at the time the services or property are provided;
b) With respect to the use of property, at the time the property is used; or
c) In any other case, at the time the taxpayer makes payment in full satisfaction of the liability.

185. Relying on the provisions of **S. 40(1) (b)**, **S. 40(4)** and **S. 40(6)** above, the Applicant can only be said to have incurred expenditure, when the following conditions have been met;
    i. All the events that determine liability have occurred and the amount of the liability can be determined with reasonable accuracy.
    ii. When economic performance has occurred.
186. It can be inferred from the amounts taken into account, by the Applicant, namely the cost of the plant and equipment and the cost of the power house and structures, that all the events that determine liability occurred with respect to the two amounts and that the liability could be determined with reasonable accuracy.
187. In accordance with **S. 40(6)**, economic performance, occurs, with respect to the acquisition of services or property, at the time the services or property are provided; With respect to the use of property, at the time the property is used; Or in any other case, at the time the taxpayer makes payment in full satisfaction of the liability.

188. In order to decide, which of the above options, apply to the instant case, we must determine, for what purpose, the amounts taken into account, were incurred.

189. The following excerpt from exhibit REX3, at pages 493-494, of the Joint Trial Bundle, shows that the amounts taken into account, were incurred for the purpose of acquiring plant and equipment and setting up the power house and related structures.

> *"A further review of your asset register revealed that these assets were acquired between 2005 and 2012 although kept as work in progress in the books of accounts. We noted that the exchange rates used to convert Plant and Equipment amounts to UGX. was higher than the prevailing rates for the respective years when the assets were acquired...." (Emphasis Added).*

Further evidence, that the amounts taken into account, were incurred for the purpose of acquiring services and property, can be found in the Applicant`s letter to the Respondent, dated 11th September 2023, which was admitted in evidence as exhibit AEX8. . The letter sets out in detail the Applicant`s grounds of objection. An excerpt is reproduced below for ease of reference.

> *"BEL is a company that was incorporated in Uganda in 2005 to develop the Bujagali Hydro Electric power project and generate hydro-electric power in Uganda. On 6th December 2007, BEL entered into a contract for the construction of the dam with the Government of Uganda (GOU) through Uganda Electricity Transmission Company (UETCL). Construction of the dam commenced in 2007 and was completed in 2012. Throughout the construction period, all related construction and development costs including financing and sponsor costs were recorded and accounted for in USD in accordance with the relevant contractual agreements. BEL also informed and obtained approval from the URA in respect of the same.*
>
> *BEL also used various services from different professionals and experts during the developmental and operational phases of the hydro power project including from the sponsors of the project. (Emphasis Added)."*

190. The above excerpt shows, that the Applicant acquired services and property, for the construction of the dam project and that these services and property were provided to the Applicant throughout the construction and development phase of the project. It is the cost of these services and property, which form the amounts taken into account by the Applicant. We can therefore conclude that economic performance in respect of the amounts taken into account occurred on the dates that the services and property in question were provided. We can also conclude that the amounts taken into account by the Applicant constituted expenditure for the purposes of **S. 40(4)** and **S. 56(2)** of the ITA.

191. Having come to the above conclusion, we find that the Respondent, correctly applied the provisions of **S. 56(2),** by converting the amounts taken into account from United States Dollars to Uganda shillings, on the dates on which the expenditure was incurred, by the Applicant.

192. Related to the above sub-issue, the Applicant submitted that the Respondent`s treatment creates an automatic deductible realized foreign exchange loss for the Applicant in the year 2012, which was not considered by the Respondent.

193. The Applicant submitted that this 2012 foreign exchange loss, arises from the fact that, the qualifying tax capital allowance costs of the dam asset at the time of commissioning is lower than the actual cost of the dam based on the prevailing exchange rate in 2012 due to the use of prior period exchange rates that are lower under the Respondent`s treatment.

194. The Applicant submitted that this foreign exchange loss crystallized in the year 2012 when the asset was commissioned and capital allowances computed. The Applicant submitted that this foreign exchange loss is deductible in accordance with the general provisions of **S. 22** of the ITA and should have the effect of squarely netting off, the additional current tax liability caused by the use of lower exchange rates, which should leave the Applicant in the same neutral position. The Applicant submitted that the Respondent should have considered and included this realized foreign exchange loss in their CIT workings.

195. The Respondent's position is that it determined that exchange losses apply to only one year of income and one accounting period and these had been clearly accounted for in the returns for the respective periods. The Respondent stated that the Applicant's assertion that the exchange rate in the year 2007 was lower than the exchange rate in 2012 and that a loss should be granted is erroneous under GAAP, as envisaged in S. 38 of the ITA.

196. The following excerpt from the cross examination of Mr. Silas Barasa, who testified for the Respondent, as RW1, clearly brings out the dispute between the parties on this point.

"**Mr. Bruce Musinguzi**

Do you agree that if I use the rate of conversion at the time that the expense was incurred it would be a much lower rate than in 2012 when the asset was put into use?

Mr. Silas Barasa

I agree because the exchange rates in 2010 are lower than those in 2012.

Mr. Bruce Musinguzi

Given that the rates in 2010 were lower, do you agree that the applicant would suffer a foreign exchange loss if it used the 2010 exchange rates in 2012?

Mr. Silas Barasa

I do not agree

Mr. Bruce Musinguzi

Why don't you agree?

Mr. Silas Barasa

I do not agree because the forex losses do not come about because of the difference in the dates of incurring the asset and the date of putting the asset into use. Forex losses arise due to the gap between when the invoice is raised and when payment in respect of the invoice is made.

Mr. Bruce Musinguzi

Do you agree that forex losses occur as a result of the change in the exchange rate?

Mr. Silas Barasa

Yes

Mr. Bruce Musinguzi

Do you agree that a higher rate in 2012 would result in a forex loss to the applicant in respect of acquisition made in 2010 when the forex rate was lower?

Mr. Silas Barasa

I do not agree because the applicant incurred the expenses in 2010 and the invoice was issued in 2010 and payment was made in 2010. Therefore, the forex of 2012 cannot affect the expenditure made in 2010.

Mr. Bruce Musinguzi

Do you agree that at the time the applicant incurred the expenses the rate was lower than at the time the applicant claimed the depreciation in 2012 and this resulted in a forex loss?

Mr. Silas Barasa

I do not agree that the lower exchange rate incurred in 2010 resulted into a forex loss at the time when the applicant claimed the depreciation allowances in 2010, because forex losses in my view do not arise because of the timing of the expenditure and the time of the claim of depreciation allowance".

197. We agree with the Respondent that in the context of this case, foreign exchange losses would only arise due to the length of time between when invoices were raised and when they were paid. In the instant case, the invoices were issued and paid in the year that the expenditure was incurred. Any foreign exchange losses arising in the year when the expenditure was incurred ought to have been utilized by the Applicant in that year.

198. We also agree with the Respondent that foreign exchange losses are not determined according to the length of time between when an expenditure is incurred and when a claim for a depreciation allowance is made.

We accordingly find no merit, in the above submissions.

Re-classification of Concession Asset Costs for 2012 tax allowance deduction purposes.

199. The Applicant submitted that the Respondent altered the 2012 tax classification of some of the project dam assets worth **USD 31,479,646.** These assets had been classified by the Applicant as start-up costs which qualify for a 25% straight line deduction over a 4 year period for the reason that these costs were mostly incurred at the start of the project in preparation for the commencement of the construction phase of the dam.
200. The Applicant submitted that out of the total sum of **USD 31,479,646**, the Respondent reclassified assets worth **USD 24,574,992** as Industrial buildings. Industrial buildings are only entitled to a 5% straight line deduction over a 20 year period. The remainder of the start-up costs being **USD 6,904,654** were re-classified as land, which, does not qualify for any tax deductions. The re-classified amounts are set out below;

Expenditure Items transferred to Industrial Buildings	**Amount (USD)**
Construction labourers` site camp set-up	10,354, 158
Construction labourers` camp site installations	6,794,429
Switchyard site preparation	3,343,848
Project site and reservoir clearing and set-up	862,182
Project site access, roads and perimeter fence	3,220,376

Total start-up costs re-classified to Industrial buildings	**24,574,992**
Expenditure items transferred to Land	**Amount (USD)**
Feasibility study – Baseline Project Dam survey reports	224,000
Community Development Programs	202,509
Compensation for crops and others	6,478,145

201. The Respondent submitted that the above re-classification was maintained because the costs in question were not start-up costs but fell under land and buildings. The Respondent submitted that the above costs do not fall within the ambit of **S. 29** of the ITA. The Respondent submitted that the construction costs for the site camp set-up and installation were incurred in relation to the building constructed by the Applicant to accommodate labourers. These costs were therefore part of the building structures and should have been classified as buildings, rather than start-up costs.
202. The Respondent submitted that it re-classified site preparation, access road construction, demobilization and construction of the foundation for the switchyard as costs ordinarily incurred in setting up a building because a building must have an access road and a perimeter fence and the site must be cleared to make way for the foundations.
203. The Respondent submitted that the costs transferred to land included feasibility study, survey fees, both of which are vital for land acquisition while the dam survey fees are incidental to the cost of the land. The Respondent submitted that the community development cost was incurred to resettle the community displaced from the land acquired by the Applicant and therefore forms part of the land because it arose from the acquisition of the land and is included in the cost of the land.

S. 29 of the ITA, which provides for Start-Up costs, states as follows;

"(1) A person who has incurred expenditure in starting up a business to produce income included in gross income or in the initial public offering at the stock market shall be allowed a deduction of an amount equal to twenty-five per cent of the amount of the expenditure in the year of income in which the expenditure was incurred and in the following three years of income in which the business is carried on by the person.

(2) In this section, "expenditure in starting up a business" means-

a) In the case of initial public offering, costs incurred in listing the business with the Uganda Stock Exchange;

b) In any other case, non-recurring preliminary or pre-opening costs, which are associated with setting up a business such as fees of an accountant, registration charges, legal fees, costs for promotional and advertising activities, as well as costs for employee training."

204. Start-up costs as envisaged under **S. 29** above, are costs which are essential for the setting up of the legal, financial and operational infrastructure of a business. In other words these are costs which are necessary to launch or start a business.

205. The costs classified by the Applicant as start-up costs namely; **Construction labourers` site camp** set-**up**, **Construction labourers` camp site installations**, **switchyard site preparation**, **Project site and reservoir clearing and set-up**, **Project site access, roads and perimeter fence**, **Feasibility study – Baseline Project Dam survey reports**, **Community Development Programs**, **Compensation for crops**, are not costs which are essential for the setting up of a business. All these costs were incurred by the Applicant after its business had been set up. If anything, the above costs qualify as pre-construction costs not start-up costs, because they were incurred by the Applicant before it could start the construction of the dam project.

206. The start-up costs envisaged under **S.29** above, are costs such as the fees of an accountant, registration charges, legal fees, costs for promotional and advertising activities, costs of training.

207. In **Maharashtra University of Health Sciences & Others v. Satchikitsa Prasarak Mandal & Others (2010) 3 SCC 786,** the Supreme Court of India made the following statement, about the statutory canon known as *noscitur a sociis;*

> *"The Latin maxim noscitur a sociis contemplates that a statutory term is recognized by its associated words. The Latin word "sociis" means society. Therefore, when general words are juxtaposed with specific words, general words cannot be read in isolation. Their colour and their contents are to be derived from their context".*

208. It will be observed from a perusal of **S. 29** above, that the general words, "such as", precede the specific words, "fees of an accountant, registration charges, legal fees, costs for promotional and advertising activities, as well as costs for employee training". In determining the items which should be included under the general words "such as", we must limit ourselves to words similar in context to the items specified above.

209. Applying the above rule of statutory interpretation to the facts of our case, it is clear that the items classified by the Applicant as start-up costs are completely different in their context from the items specified under S. 29 above. We accordingly find that the Applicant`s classification of the costs set out above, as start-up costs did not comply with the provisions of S. 29 above.

210. We agree with the Respondent that the above expenditures fall under land and buildings based on the reasons aforementioned.

Add Back of 2017 Income Tax Components earlier included in capacity payment invoices issued to UETCL, which the Applicant later reversed and credited back to UETCL.

During the trial the Applicant provided further documentation on the basis of which this issue was resolved.

Add Back of Sponsor Labour Disbursement costs as expenses of a private nature incurred between 2005 and 2014.

211. The Applicant submitted that the Respondent added back **Shs. 14,363,466,035** relating to travel and accommodation costs incurred by sponsor labour experts travelling to and from Uganda for the hydro power project during both the development and the operational phases. The Applicant submitted that the Respondent treated the above amounts as expenses of a private nature because the respective sponsor personnel did not charge the Applicant for the services provided other than disbursements incurred and no contracts justifying such an arrangement were availed to the Respondent.

212. The Applicant submitted that the Respondent wrongly classified most of these expenses as sponsor labour disbursements for which technical services fees were not charged to the Applicant yet some of the amounts include staff expenses, third party consultant`s payments, all of which were business related expenses.

The Applicant set out the following as the correct cost classification and breakdown of the **Shs. 14,062,594,870**, added back by the Respondent.

Category	**Period**	**Total**
BEL staff expenses	2007-2014	1,202,424,254
IPS development costs charged through Equity	2007	3,337,930,122
Independent Consultants Services charged to BEL Inclusive of disbursements	2005-2007	1,479,528,568
Sponsor Labour services Charged to BEL Incl. disbursements	2005-2009	4,649,566,571

Sponsor labour travels/disbursements		
For which services not charged to BEL	2005-2010	3,393,145,355
Total		**14,062,594,870**

213. The Applicant submitted that the Sponsor labour disbursements for which the corresponding technical services were provided at NIL cost to the Applicant, only amounts to Shs. **3,393,145,355** out of the total added back sum of **Shs. 14,062,594,870**. The Applicant submitted that the Respondent significantly overstated the amounts that it intended to add back since its objective was to only add back disbursements for which the corresponding technical services were provided at NIL cost to the Applicant.
214. The Respondent submitted that it added back **Shs. 14,363,466,035** obtained from the Applicant's ledgers relating to payments made to its shareholders namely; Seith Global and Industrial Promotion Services, for travel and accommodation on the grounds that these expenses were private in nature. The Respondent submitted that the Applicant had failed to provide evidence to confirm the contractual arrangement through which it agreed with its shareholders, that the technical services would be provided at NIL cost and that the Applicant would only disburse the costs of travel and accommodation.
215. The Applicant's witness, Mr. Ndaula testified that despite the fact that no contract existed for the implementation of the sponsor's costs, the Applicant had received services from the sponsors and work was done by the said sponsors during the period under review and the costs in question were incurred. Mr. Ndaula testified that the fact that the services were not charged to the Applicant did not make the corresponding disbursements private expenses.
216. It is trite law that the burden of proving that the assessment issued by the Respondent is excessive or erroneous lies on the taxpayer. (See **S. 28** of the **Tax Procedures Code Act** and **S. 19** of the **Tax Appeals Tribunal Act**).

217. The evidence before us shows that the sums in question were paid to the Applicant`s shareholders, as expenses incurred in travel and accommodation for the Applicant`s business. Given the large sums involved, the size and reputation of the Applicant, the need to provide clarity of terms and avoid misunderstandings, especially between the Applicant and its shareholders, and the dictates of sound and responsible corporate management, it is hard to believe that an arrangement, such as described above, would have been accepted by the Applicant, without an agreement in writing.

218. Further, the Applicant has failed to adduce evidence to prove that the remainder of the amounts were paid in respect of staff expenses, IPS development costs charged through equity, independent consultants` services inclusive of disbursements, sponsor labour services inclusive of disbursements.

219. In the absence of credible and verifiable documentary evidence, we are not able to agree with the Applicant that the sum of **Shs. 14,062,594,870** was wrongly added back by the Respondent.

220. We note that in its objection letter dated 11th September 2023, the Applicant stated that an arithmetic error, by the Respondent, had led to double counting of the 2013 and 2014 disbursement costs. This error resulted in an overstatement of **Shs. 300,871,165** being added to the value of the disbursements, leading to a total added back amount of **Shs. 14,363,466,035** instead of **Shs. 14,062,594,870**, as set out in the Management letter.

221. We have perused the said Management letter and confirm that the amount assessed by the Respondent under the above head was **Shs. 14,062,594,870**. Accordingly, the sum of **Shs. 14,363,466,035** was arrived at in error.

Add Back of Expenses relating to suppliers without TINs for the period between 2015 and 2017.

222. The Applicant submitted that the Respondent reviewed the Applicant`s WHT returns and extracted the details of suppliers who allegedly did not possess TINs for the period 1st January 2015 to 31st December 2017. The Respondent added back all the expenses amounting to Shs. 569,546,300. The Applicant disagreed with the Respondent on the grounds that the said suppliers all had TINs during the period under review.

223. The Respondent submitted that the tax in respect of **National Fisheries Resources Research Institute** was vacated because the said organization is a government body registered as a branch of the National Agricultural Research Organization (NARO).

224. The Respondent submitted that the tax in respect of **Sustainable Development Engineers Ltd,** was maintained because the TIN, provided for **Sustainable Development Engineers Ltd**, belonged to Mr. Herman Ssenyondwa and not Sustainable Development Engineers Ltd.

225. The Respondent submitted that the tax in respect of **Mulwanyi & Sons** was maintained because the TIN provided by Ms. Jesca Mulwanyi Baami, was only acquired on 22nd October 2019. The above implied that the taxpayer did not possess a valid TIN for the period under review.

226. The Respondent submitted that the tax in respect of **Kagoda David/Turyatunga Filmon** was also maintained because the TIN provided belonged to Mr. Kagoda David and that no evidence was led to prove that Mr. Kagoda and Mr. Turyatunga, were one and the same person.

227. The Respondent submitted that the tax in respect of **P&O Logistic Consultant** was maintained because the TIN provided belonged to Mr. Okurut Peter. The Respondent submitted that no evidence was led by the Applicant to prove whether any relationship existed between Peter Okurut and P&O Logistics.

228. The Respondent submitted that the tax in respect of **Ms. Ikwang Vanessa** was maintained because the TIN provided, which, belonged to Ms. Ikwang was only acquired on 11 October 2019, which implied that Ms. Ikwang did not possess a TIN for the period under review.

229. Having perused the evidence provided by the parties in respect of the above, we find that the Respondent was justified in maintaining the tax in respect of **Sustainable Development Engineers Ltd,** because no evidence was led to prove the association between Sustainable Development Engineers Ltd and Mr. Herman Ssenyondwa. On the face of it, Sustainable Development Engineers Ltd is styled, as an incorporated entity, however the rejoinder by the Applicant that it is not an incorporated entity and belonged to Mr. Ssenyondwa, as a sole proprietor, is not supported by any evidence. It is trite that the onus of proving that Mr. Ssenyondwa owned the entity in question as a sole proprietor rests on the Applicant. In the absence of such evidence the Respondent could not be blamed for maintaining that Sustainable Development Engineers Ltd and Mr. Ssenyondwa, were different persons, in law.

230. We also find that the Respondent was justified in maintaining the tax in respect of **Mulwanyi & Sons** for the reason that the testimony of Mr. Silas Barasa proved that the TIN provided by Ms. Jesca Mulwanyi Baami, was only acquired on 22nd October 2019, after the period under review. No evidence contradicting Mr. Barasa`s testimony was adduced by the Applicant. In rejoinder, no effort was made by the Applicant to contradict, Mr. Barasa`s testimony.

231. The supply relating to **Kagoda David/Turyatunga Filmon** presents us with some difficulty. TINs by their nature can only belong to one person. The TIN provided belonged to Mr. Kagoda David. No evidence was provided by the Applicant about the relationship between the two said persons. We find that in the absence of credible evidence establishing that Mr. Kagoda and Mr. Turyatunga, were one and the same person, the tax in question was properly maintained.

232. We agree with the Respondent that the Applicant ought to have provided evidence establishing the relationship between Mr. Peter Okurut and P&O Logistics. No such evidence was presented before us. In the absence of such evidence we find that the Respondent was justified in maintaining the tax in question.

233. The submission by the Respondent and the testimony of Mr. Barasa to the effect that the TIN belonging to Ms. Ikwang was only acquired on 11th October 2019, with the result that Ms. Ikwang did not possess a TIN for the period under review, was neither rebutted nor contradicted by the Applicant. In the absence of evidence showing that Ms. Ikwang had a valid TIN for the period under review, we find that the Respondent was justified in maintaining the tax in question.

WHT on foreign services rendered outside Uganda prior to 1st July 2015- Principal tax Shs. 1,321,967,790

During the trial the above amount was reduced to **Shs. 239,773,341**, through mediation.

234. Out of the sum of **Shs. 239,773,341** the sum of **Shs. 9,931,115** relates to Poyry Energy Ltd. Mr. Ndaula testified that Poyry Energy rendered services to the Applicant both outside and in Uganda. It was Mr. Ndaula`s testimony that for each service rendered, Poyry Energy Ltd, indicated to the Applicant, which service was onshore and which service was offshore, on the basis of which the Applicant withheld the onshore components in accordance with the law.
235. In respect of the remainder of the sum, **Shs. 229,842,226**, relates to MWH Americas. Mr. Ndaula submitted that the above company provided technical support, design review, document control and project close-out activities in respect of electro-mechanical materials fabricated outside Uganda.
236. With the exception of the above oral evidence of Mr. Ndaula, no documentary evidence has been adduced by the Applicant to prove to the Tribunal that the services in question were rendered by the above companies outside Uganda, during the period under review.
237. An email dated 14 December 2023, from Fred Kyomuhendo (URA) to Samson Ssonko (PWC) shows that the Applicant submitted to the Respondent various documents, namely notices of withdrawals, on the basis of which, the Respondent conceded that some services were indeed supplied to the

Applicant offshore, and adjustments were made to the amount assessed from **Shs. 1,321,967,790** to Shs. **Shs. 239,773,341.**

238. In the said email, the Respondent confirmed that some payments were made by the Applicant in respect of services supplied onshore. The email also shows that some payments made by the Applicant to the said suppliers did not have supporting documents.

239. The above email, which is, the only documentary piece of evidence before the Tribunal on this issue, is only relevant for the purpose of showing that the assessment was reduced to **Shs. 239,773,341**. The Applicant has made no effort to provide to the Tribunal documentary evidence, such as those provided to the Respondent, to prove that the remainder of the services were supplied offshore. In the absence of such evidence the Applicant has failed to prove on a balance of probability that the services in question were supplied offshore and therefore not liable to tax. We accordingly find that the Respondent was justified in maintaining the assessment of **Shs. 239,773,341.**

WHT on Local Supplies – Principal tax Shs. 59,184,915

240. The Applicant submitted that it obtained taxable supplies from local suppliers like Adrift Adventure Company Ltd and AIDS Information Centre and Mr. Ahimbisibwe Michael. The Respondent stated that the Applicant ought to have withheld tax in respect of the said supplies and issued an assessment of **Shs. 59,184,915**. The Applicant submitted that during mediation the assessment was reduced to **Shs. 59,184,915** when the assessment against Mr. Ahimbisibwe Michael was vacated.

241. The Applicant submitted that it did not withhold tax on the payments due to Adrift Adventure Company Ltd and AIDS Information Centre because the amounts paid to the above entities were less than **Shs. 1,000,000**. The Applicant also submitted that the assessment in respect of the above entities was time barred for having been issued beyond the three year limitation period provided under the law.

242. The Respondent submitted that it reviewed the Applicant's WHT returns and identified three local suppliers who were not exempt from WHT and from whom the Applicant had not withheld tax in respect of supplies made to it.

243. The Respondent submitted that the tax in respect of Mr. Ahimbisibwe Michael was vacated because it had been accounted for under the trade name Ahimbisibwe Michael Traders and the assessed amount was revised to Shs. 58,609,091. The Respondent submitted that the assessed tax in respect of Adrift Adventure Company Ltd and AIDS Information Centre was maintained because they were not time barred on the basis that the Respondent had discovered new information.

244. The Applicant has led no evidence before the Tribunal to prove that the payments made to Adrift Adventure Company Ltd and AIDS Information Centre, were less than **Shs. 1,000,000.** Credible and verifiable evidence, such as a receipt, would have put this matter to rest.

245. The question relating to whether the assessment against Adrift Adventure Company Ltd and AIDS Information Centre is time barred, is determined in favour of the Respondent in accordance with the finding of the Tribunal on the question of the validity of this application.

246. For the reasons, set out above, this Application is dismissed with costs. The revised assessment of Shs.155,618,956,094 comprising of WHT of Shs. 298,382,432 and income tax of Shs.155,320,573,662 is hereby upheld.

Dated at Kampala this.....30th.....day of .....April.....2026.

MR. SIRAJ ALI
CHAIRMAN

MS. CHRISTINE KATWE
MEMBER

MR. WILLY NANGOSYAH
MEMBER