THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 87 OF 2021

BULLION REFINERY LIMITED ..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ..... RESPONDENT

BEFORE: DR. ASA MUGENYI, MR. GEORGE MUGERWA, MS. CHRISTINE KATWE.

RULING

This ruling is in respect of an application challenging income tax and Value Added Tax (VAT) assessments of Shs. 486,299,992 and Shs. 200,422,051 respectively arising from a re-characterization of the applicant's loan as income, undeclared sales from purportedly underdeclared refinery charges and forceful registration of VAT.

The applicant is in the business of refining gold in Uganda. Around June 2020, the respondent conducted an audit on the applicant for the period February 2018 to June 2019. As a result, the respondent issued additional income tax and VAT assessments of Shs. 486,299,992 and Shs. 200,422,051 respectively. The income tax assessment was issued firstly because the applicant's loan was re- characterized as income due to lack of supporting evidence. Secondly, there were undeclared sales due to purportedly underdeclared refinery charges. The VAT assessment arose from the respondent issuing a retrospective VAT registration certificate on the applicant. It also arose from adjustments in the income tax of the applicant. The respondent also assessed an additional VAT assessment of Shs. 1,512,479 resulting from using exchange rates of VAT as opposed to those of income tax. The applicant objected and the respondent disallowed the objection.

Issues:

1. Whether the applicant is liable to pay the taxes assessed?
2. What remedies are available?

The applicant was represented by Mr. Martin Tayebwa while the respondent by Ms. Christa Namutebi and Mr. Derrick Nahumuza

The applicant's first witness, Mr. Richard Karumuna, its director, testified that the applicant refines gold. In April 2016, the company obtained a loan from Top Straight -line General Trading LLC for purposes of procuring refining equipment. He stated that the loan amounts were brought to Uganda in cash in trances of less than US$ 10,000 per trip by the witness and one Davis Mbabazi between 2016 and 2019 The applicant would issue receipts in favour of the lender acknowledging receipt of the money. The witness stated that when the respondent conducted the audit it wanted an interpretation of the loan agreement as it was in Arabic. It had errors. The agreement was interpreted from Makerere University. He stated that the applicant had no other sources of funding. He stated that there was no security for the loan.

The witness contended that it was arbitrary for the respondent to recharacterize the applicant's loan. The applicant started business around September 2018. The loan was approved around 10th April 2016. He stated that applicant used cheaper and effective means of refining gold. Its refining charge was between US$ 10 and US 25 which was affordable to customers, and it would make profit. He stated that the applicant's business model is different from others which incurred a lot of expenditure in setting the refineries. Hence their high refinery charges. He stated that the refinery charge of US$ 50 decided by the respondent was arbitrary and excessive considering the uniqueness of the applicant's business. He stated that the applicant's business would collapse if it used the said charge.

The applicant's second witness, Mr. Isaac Atukunda, testified that the applicant carries on the business of gold refining. It was able to raise Shs. 10,000,000 as share capital. A decision was taken to obtain a loan from Top Straight Line General Trading LLC in United Arabs Emirates, Dubai. The applicant did not have a bank account. It was advised that the company's director carry cash below US$ 10,000 whenever travelling from Dubai. He stated the loan agreement was written in Arabic and the English translation had errors on the company name. He stated that the applicant did not have any other source of funds.

He testified further that the applicant did not conduct any business from 2016 to August 2018. Therefore, it could not have earned the loan amount as income. He stated that when the respondent conducted an audit on the applicant there was no evidence in the bank statements and other documents that it conducted business in the said period.

He stated that applicant charges its clients between US$ 10 and US$ 25 per kilogram of gold depending on the amount of gold to be refined. He stated that between 2016 and June 2019 there were only three gold refineries to Uganda and there was no uniform refining price. The companies used different amounts of money to set up the refineries, so they charge different rates. He stated that when the respondent conducted an audit on the applicant it did not find any document to show that the applicant ever charged US$ 50 per kilogram of gold for refining. The respondent reviewed its refining charge from US$ 100 to US$ 50 per kilogram which it considered as an industrial average. It considered that the applicant had underdeclared its sale. He contended that Uganda operates a free market where each business entity sets its own prices and therefore the decision to impose an industrial average is without merit.

The applicant's third witness, Mr. James Ofong its tax consultant, testified that in March 2018, the company obtained a Tax Identification Number (TIN). He contradicted himself when he stated that applicant applied for VAT registration on 10th August 2018. The respondent rejected the application. Around 20th May 2020 the applicant was forcefully registered for VAT effective 1st July 2019. He stated that the applicant had never charged VAT until it was forcefully registered. The applicant filed its audited books of account where it indicated that it had a loan with Top Straight Line General Trading Company. It also indicated that it was charging refining charges between US$ 10 and US$ 25. He stated that the applicant commenced operation around September 2018.

The witness stated that around July 2019, the respondent conducted a compliance review on the applicant. Around 1st January 2021, the respondent issued the applicant a management letter where it indicated that the latter was liable to pay income tax and VAT of Shs. 721,227,706.53. The respondent revised the applicant's refining charges to US$ 100 for 2018 to 2019. It imposed VAT and income tax on the refining charge. It re-

characterized the applicant's unsecured loan as income and subjected it to income tax and VAT. It charged the applicant VAT retrospectively. On 9th February 2021, the applicant objected to the tax assessed. On 28th April 2021, the respondent issued an objection decision where the refinery charge was lowered to US$ 50 per kilogram of gold. The applicant was considered to have undeclared sales of Shs. 807,709,425 and VAT exclusive sales of Shs. 593,357,020. The VAT assessment was increased to Shs. 200,411,051. Loan amounts of Shs. 951,420,000 and Shs. 225,600,000 was re-characterized as income and taxed. The respondent imposed a tax liability of Shs. 686,711,045 on the applicant.

The respondent's first witness, Mr. Lawrence Muwonge, an officer in its petroleum division submitted that in June 2020 the respondent conducted a compliance review audit on the applicant for VAT and income tax for February 2018 to June 2019. He stated that the respondent examined the applicant's income tax returns for 2017/18 and 2018/19 and made the following discoveries.

a) The refining charges of the applicant of US$10 to US$ 20 per kilogram were below the industry average. The average charge of US$ 50 per kilogram was determined based on two other sector players.
b) A review of the applicant's financial statement indicated a loan balance of Shs. 1,177,020,000 as 30th June 2019. It was not supported by any documentation. Loan amounts of Shs. 951,420,000 and Shs. 225,600,000 for the Financial Year (FY) 2017/18 and 2018/18 respectively were recharacterized. The taxpayer provided a loan agreement written in Arabic which showed the borrower as Poion Refinery Company and the company director as Mr. Caromona Richard.
c) The applicant claimed direct costs of Shs. 152,184,459 which lacked supporting documents.
d) There was wear and tear which was overstated by the applicant. It is not part of the dispute.
e) The applicant had made taxable supplies for September 2018. The applicant's first application for VAT was rejected by the respondent. The applicant registered for VAT effective 1st September 2018.
f) The applicant did not charge withholding tax (WHT) for professional fees.

He stated the respondent obtained invoices issued to the applicant in respect of freight charge for the gold from Entebbe to Dubai. It reflected an average charge of US$ 12.5 per kilogram of gold. He stated further that the respondent found the applicant liable to pay VAT and income tax of Shs. 199,491,487 and Shs. 520,536,220 respectively.

The respondent's second witness, Mr. Alex Lwanga, an officer in its objection's unit, testified that in February 2021, the applicant filed an objection for VAT and income tax for the period February 2018 to June 2019. In March 2021, the applicant held meetings with the applicant. He stated the applicant wrote to the respondent agreeing to a rate of US$ 45 per kilogram which was the basis of the objections team maintaining the industrial average of US$ 50 used by the audit team.

The respondent's third witness, Ms. Sandra Kaitare, it's Assistant Commissioner Petroleum and Mining Division, testified that the respondent conducted an audit on the applicant covering VAT and income tax for February 2018 to June 2019. It requested for information from the applicant to enable it to audit. She stated that several meetings were held to reconcile the outstanding VAT and income tax. She stated that the applicant sent a letter dated 22nd December 2020 requesting the respondent to apply a refining charge of US$ 45 per kilogram. The respondent applied to tender in the letter as an exhibit. The Tribunal stated it will make its decision when making the final ruling.

The applicant submitted that S. 4 of the Income Tax Act imposes income tax on every person who has chargeable income. Before the applicant is held liable to pay taxes assessed by the respondent, there must be proof that it earned chargeable income and did not pay tax. Under S. 18 of the Tax Appeals Tribunal Act, in tax matters the burden of proof lies on the taxpayer to prove that the assessment was wrong, or the tax authority should have decided the matter differently. It cited *Red Concepts v Uganda Revenue Authority* Application 36 of 2018, where it was stated that the standard of proof is on a balance of probabilities. Where there is doubt, the taxpayer takes the benefit of it because the respondent is in position to influence changes in the law.

The applicant submitted that it obtained a loan of US$ 500,000 from Top-Straight General Trading LLC to purchase plant, machinery, pay refinery set up and establishment costs. The commencement date of the loan was 10th April 2016. The respondent re-characterized the applicant's loans of Shs 951,420,000 and Shs 225,600,000 for the FYs 2017/2018 and 2018/2019 respectively as income because of inconsistencies in the interpreted loan agreement and that the applicant's failure to show the movement of the loans to it. The applicant submitted that the re- characterization of its loans as sales was unjust and unfair. It contended that it explained the inconsistencies to the respondent and provided sufficient evidence to show the movement of the loans to it.

The applicant cited *Bisaso Nathan v Eva Sengonga and Jackson Senyonga* HCCS 750 of 2017 where Justice Jean Rwakakoko stated that before any private document presented as authentic is received in evidence, its due execution and authenticity must be proved either by anyone who saw the document executed or written or by the evidence of the genuineness of the signature or the handwriting of the maker. Under S. 64 of the Evidence Act the document must be proved by primary evidence and except in exceptional cases by secondary evidence. The loan agreement was presented by Richard Karumuna who signed it for the applicant. He testified that between 2016 and 2018, he and one Mbabazi Davis an employee of the applicant travelled to United Arab Emirates and picked the loan in tranches of less than US$ 10,000 and delivered it to the applicant who acknowledged receipt. The loans were indicated in the applicant's audited books of accounts and the returns filed with the respondent. It contended that there is no legal requirement on it to move money from Dubai to Uganda through a bank. It argued that a bank statement is not the only evidence required to prove movement of money as long as it produced other relevant evidence to prove that it received the loan. Paragraph 3.2 of the loan agreement provided that the applicant could withdraw the loan in installments. The applicant contended that the commissioner should have lawful and valid reasons to doubt the applicant's loan agreement. It contended that the respondent had no sufficient grounds to re-characterize its loan as undeclared sales.

The applicant submitted that the respondent's industrial average refining charge of US$ 50 was unjustifiable. The respondent alleged that it analyzed refining charges from

other industry players and obtained an average refining charge of US$ 100 per Kilogram of gold. The respondent changed the industrial average refining charge from US$ 100 to US$ 50. The applicant submitted that its refining charge was between US$ 10 and US$ 20 per kilogram which the respondent considered to be below the average. The applicant contended that this information on its charges was neither found to be false nor contradictory. It submitted that the respondent did not adduce any evidence or invoices issued by other industry players to prove how much they charge even when it requested for it. The respondent did not provide any evidence to show the business model operated by the different industry players.

The applicant submitted that though S. 90(1) of the Income Tax Act empowers the Commissioner to re- characterize transactions between taxpayers who are associates or in employment relationship by distributing, apportioning, allocating income or deductions or credits between tax payers as is necessary to reflect the chargeable income the tax payers should be in an arm's length transaction. There is no evidence on record to prove that there existed a transaction in which the applicant's clients were its business associates or in employment relationship to warrant re-computation of its sales in order to reflect the chargeable income received by the applicant. The applicant cited *Bondo Tea Estates Co. Ltd v Uganda Revenue Authority* Application 65 of 2018 which it submitted had facts which were similar to the one in this application. The Tax Appeals tribunal held that "from the evidence before us, we have failed to find sufficient justification for the adjustment by respondent of the applicant's sales prices. we accordingly find that there was no under-declaration by the applicant of its sales" It concluded that the respondent had no justifiable legal basis to recompute its sales based on the industrial average refining charge of US$ 50 per kilogram of gold.

The applicant submitted that it requested the respondent in a letter dated 22nd December 2020 to apply a refining charge of US$ 45 per Kg of gold for the period under review. It stated that it was written as a "without prejudice letter" following negotiations to resolve the tax dispute. The respondent was to provide tax concessions to it, but the negotiations failed rendering the letter useless. Secondly, the applicant's letter to the respondent was not an admission that it was charging a refining fee of US$ 45 per kilogram of gold. It

submitted that the respondent should not have used the applicant's letter to determine the Industrial average refining charge. It cited *Sarope Petroleum Ltd v* Orient *Bank & 2 Ors Ltd* HCCS 198 of 2009, where it was stated that;" the use of the words "without prejudice" implies that the letter reserves whatever the other cause of action or defence available to the writer. It could not preclude the writer from relying on any defence available to him.

The applicant submitted that it applied for VAT registration around 6th August 2018. The respondent rejected the application on the ground that it had no taxable supplies and an export license. It was not until around 20th May 2020 when the respondent wrote an email to it that a forced amendment had been made and the effective date of VAT registration was November 2018. The respondent accordingly made VAT assessments on the applicant which arose from re-computation of sales, which the respondent considered undeclared, using an industrial refinery charge of US$ 50 per kilogram of gold and subjected it to VAT. The applicant submitted that if the Tribunal finds that the respondent wrongfully re-computed its sales using the unjustified industrial average of US$ 50, then the VAT assessments should be declared null and void.

In the alternative but without prejudice to the foregoing, the applicant submitted that it is not liable to pay VAT based on the industrial refining charge since it did not charge any VAT on any of its customers as its application for registration for VAT was rejected by the respondent. It submitted that a taxpayer is liable to VAT when the sales turnover reaches the threshold, levying VAT retrospectively on already concluded transactions, revised refining charges and re-characterized loan amounts will not only cause a hardship to it but may lead to the collapse of its business as it will have nowhere to recover the tax assessed. It cited *Kenya Bankers Association v The Attorney General & Kenya Revenue Authority* Constitutional Petition 353 of 2018 where it was stated that.

> "The difficulty that the petitioner's members are faced with in trying to comply with the impugned law is that the transactions which are to be taxed had been completed by the time the law was passed. The unfairness therefore emanates in the taxation of customers who were not aware of this increase and who may either have closed their accounts or may not have enough funds. The Petitioner's members are therefore put in a precarious

position as they must find a way to raise the required funds either through pursuing their customers or by submitting their own profits. The law does not provide any guidance as to how the additional 10% is to be recovered from the banks' customers."

The applicant prayed that the tribunal set asides the taxation decision and awards it costs of the application.

In reply, the respondent submitted that under S. 26 of the Tax Procedures Code Act the burden of proof is on the applicant to prove that the assessment was incorrect or erroneous and it is not liable to pay the tax or that the taxation decision should not have been made. It submitted that this is similar to S. 18 of the Tax Appeals Tribunal Act and under S. 101 of the Evidence Act which states that he who alleges must prove. The respondent cited *Williamson Diamonds Ltd v Commissioner* General [2008] 4 TTLR 167, where the Tax Revenue Appeals Tribunal of Tanzania held that; "...the burden of proving that the assessment issued by the respondent is excessive or erroneous lies on the taxpayer (appellant) and in no way shifted to the respondent..."

The respondent submitted that the Commissioner General is clothed with powers to re-characterize transactions where they do not reflect economic or substantive effect under S. 91 of the Income Tax Act. The respondent made a review of the applicant's financial statements and established that the latter had a fictitious loan balance of Shs, 1,177,020,000 as at 30th June 2019. On 4th June 2020, the respondent requested the applicant for supporting documents relating to the source of the loan. The applicant did not provide the requested documents. Having failed to support the loans, the respondent re-characterized them. The respondent cited *Commissioner Investigations and Enforcement v Kidero* (Income Tax Appeal E028 of 2020) [2022] KEHC 52 (KLR), where the court agreed with the Kenyan Revenue Authority's re-characterization of funds from undisclosed sources that had been deposited on the account of the respondent as a loan received from Family Bank Limited. The Commissioner had rejected the explanation provided because the respondent did not provide documents to support the loan. The appellant disallowed Kshs 423,000,000.00, which the respondent stated were political campaign contributions on the ground that the respondent did not provide a breakdown of how and when these funds were banked in his personal account, EK Center account

as well as the MPESA till number. The Commissioner argued that in the absence of this breakdown, it was not possible to assume that all these monies were deposited in the respondent's account for it to deduct the same. The High Court of Kenya agreed with the Commissioner and allowed the appeal. The Court stated that inter alia:

> "As I stated earlier S. 54A of the ITA, the taxpayer has a duty to maintain records to support its transactions. These records are those expected in the ordinary course of business. In the letter dated December 1, 2016, the Commissioner requested the respondent to provide loan agreements to show that the Kes74, 000,000.00 received from the Advocates was received as a loan. The respondent did not produce any document showing that it had taken a loan and purchased shares in a company. It also did not offer an explanation why the loan amount advanced by the related party through Family Bank was less than the amount ultimately transferred to his account by the Advocates."

The respondent submitted that the Commissioner was justified to recharacterize an unsupported loan allegedly obtained from Family Bank Limited. The respondent submitted that the facts at hand are not different from the Kenyan case.

The respondent submitted that S. 91 of the Income Tax Act mandates the Commissioner to re-characterize transactions by looking at the substance of the transaction over form. It submitted that the purported loans did not reflect the substance of a loan but was mere form. It submitted that the doctrine of economic substance of a transaction was discussed by Justice James Ogoola in *Intertek Services v URA* HCCA 5 of 2002 which cited *Dominion Taxicab Association v MNR* [1954] SCR 82 where the Court stated that.

> "It is well settled that in considering whether a particular transaction brings a party within the terms of the Income Tax Act, its substance rather than its form to be regarded."

Justice Ogoola went on to state that.

> "In similar vein, in the recent case of *Placer Dome Inc v Canada* [1992] 2 CTC 98 at 109, the Canadian Supreme Court held that.
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> > "It is the substance of a transaction/on that must be looked at in order to determine the true legal rights and obligations of the parties. Similarly, It Is the commercial and practical nature of the transaction, the true legal rights and obligations flowing from it that must be looked at to determine its tax implications".

The respondent submitted that the loan of US$ 500,000 from Top Straight Line General Training LLC was not justified or backed by the prerequisites needed in obtaining loans, defeating the principle of substance of a transaction.

The respondent submitted that it is trite law that for a company to obtain a loan, it must have a resolution filed and registered with Uganda Registration Service Bureau (URSB). It also submitted that decisions of a company are made following a resolution under S. 148 of the Companies Act and Item 106 of Table A in the Act. The respondent further cited *Halsbury's Laws of England*, Volume 14 (2016), Paragraph 567, where it was stated that company decisions have to be made in accordance with the MEMARTS and or the Companies Act. This same principle was echoed with approval in Necta *(U) Limited and John Ndyabagye v. Crane Bank Limited* CACA No. 219 of 2013; where it was stated that.

> "A company's articles of association usually contain provisions as to the way in which directors at their meetings may conduct business and make decisions, including allowance for decisions to be taken instead by way of director's written resolution... charges created by a company without a company resolution sanctioning them are devoid of authority and therefore null".

The respondent submitted that company decisions, like borrowing, are made by following a procedure laid down in the company law. It submitted that the applicant company did not follow the procedure and prerequisites to borrow and obtain the purported loan which included, a meeting, a resolution to justify the loan of USS 500,000 obtained. In absence of such procedures and prerequisites to obtain a loan, the Commissioner was justified to re-characterize the loan.

The respondent submitted that the said huge loan was not secured. The applicant did not provide any evidence that the loan was secured by any assets as security. The respondent submitted that the applicant failed to justify the existence of the loan in its financial statements. It only indicated a loan balance of Shs. 1,177,020,000 as of 30th June 2019. The respondent submitted that S. 17(3) of the Income Tax Act provides that part V of the Act, which deals with tax accounting principles, applies in determining when an amount is derived for purposes of the Act. The accounting treatment of loans and borrowings is provided under IFRS 9 which calls for all loans to be provided in financial

statements as evidence of indebtedness. The applicant did not provide any evidence in its financial statements to indicate that it obtained the alleged loans. The respondent submitted that the applicant only presented a loan agreement that was in Arabic. There is no evidence that the directors understood Arabic at the time of contracting.

The respondent submitted that the applicant brought in the loan in cash batches of less US$ 9,000. It cited S. 10 of the Anti-Money Laundering Act which provides that domestic or foreign currency which does not pass through the normal banking procedures or Uganda's financial system, exceeding one thousand five hundred currency points being transported or sent across the national borders, the person transporting shall notify Uganda Revenue Authority and the Customs and Excise Department of the respondent. The respondent submitted that amounts exceeding Shs. 30,000,000 have to be disclosed to URA Customs. This was not done by the applicant and thus there were no loans brought in as cash as alleged by the applicant.

The respondent submitted that the alleged loans constituted undisclosed incomes by the applicant. It submitted that the law on undisclosed incomes is clear. It cited *John Livingstone Okello DaBaby v Commissioner General,* URA. HCCS .229 of 2010, where court, while citing Business Dictionary.com defined undeclared income as.

> "Failure by a taxpayer to include certain income on his or her tax return in order to avoid paying taxes on the income."

In that case, the court went on to hold that the burden of proof was solely on the taxpayer to indicate that he disclosed the income. It held that.

> "...the burden of proof that the Plaintiff declared all his income in the returns is on the taxpayer and it is on the balance of probabilities to the extent that the assessment made by the Commissioner is excessive or erroneous".

The respondent also cited *Kale Khan Mohammad Hanif v CIT* [1963] 50 ITR 1 (SC) and *Commissioner of Income-Tax v Maduri Rajaiahgari Kistaiah* 1979 120 ITR 294 AP for the position that unexplained amounts found credited on the applicant's accounts constitute income that is taxable in the hands of the person in whose account the money was found.

In respect of re-computation of the applicant's sales based on industrial average refining charge of US$ 50 per kilogram, the respondent submitted that a transaction by a party must indicate a fair market value in this case the industrial average. The respondent contended that the Income Tax Act provides that when a taxpayer is valuing any amounts in question, it has to use the fair market value. It cited S. 56 of the Income Tax Act which provides that.

> "56. Valuation
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> (1) For the purposes of this Act and subject to Section 19(1)(b), the value of a benefit in kind is the fair market value of the benefit on the date the benefit is taken into account for tax purposes
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> (2) The fair market value of a benefit is determined without regard to any restriction on transfer or to the fact that it is not otherwise convertible to cash"

The respondent submitted that the applicant's amounts were not reflective of the industrial average. It stated that the term 'industrial average' is defined to mean; "benchmarks or tools which help business to make comparisons that help to determine its position within the industry and evaluate financial performance of the business." It takes into consideration the amounts that have been charged by different industrial players. The industrial average is synonymous with the term 'fair market value' which B*lack's Law Dictionary* defines as "the price at which a willing seller and a willing buyer will trade."

The respondent submitted that the applicant declared refining fees of US$ 10 to 20 per kilogram. When the respondent conducted an analysis of several industrial players, it found that they were refining the same product at US$ 100 per kilo gram as per the compliance review dated 12th October 2020 for the period July 2017 to June 2019. The respondent charged a refinery charge of US$ 50 per kilogram based on two other players in the sector. The respondent stated that it also relied on the applicant's letter dated 22nd December 2020, in which it requested to apply a refining charge of US$ 45 per kilogram for the review period. The respondent submitted that the applicant knew that it was declaring less amounts than the actual rate.

The respondent contended that *Bondo Tea Estates v* URA (supra) was distinguishable from the facts in this case. In that case, URA conducted a field report but did not consider

the transport costs paid to out growers which varied depending on where the out growers came from. The facts at hand did not relate to the failure to include expenses in the price adjustments and the applicant has not alleged so.

The respondent submitted that the applicant was assessed VAT under S. 4(c), 5(1)(c) and 18 of the VAT Act. it submitted that S. 18(1) of the VAT Act provides that a taxable supply is a supply of goods or services other than an exempt supply made in Uganda by a taxable person for consideration as part of his or her business activities. The respondent submitted that the applicant was forcefully registered under Sections 6(2) and 8(6) of the VAT Act. The respondent submitted that the applicant provided records which indicated that it was making taxable sales from September 2018. An analysis of the sales revealed that the company's supplies for the period were above the threshold. The applicant was forcefully registered since 1st September 2018 to include periods when the company ought to have been registered for VAT. It submitted that it is trite law that forceful registration takes effect from the date indicated on the VAT registration certificate. The respondent cited *Palladium Group Uganda Limited v URA* Application 109 of 2020. It submitted that the applicant was charged VAT which arose from the precomputation of sales to arrive at a refinery charge of US$ 50 per kilogram. The respondent submitted that the applicant has not been able to discharge the burden of proof to satisfy that the assessments were either excessive or unjustified at law.

In rejoinder, the applicant submitted that there was no issue agreed on relating to WHT. The respondent in its taxation decision raised only two reasons for re-characterization of the applicant's loans.

a) There were inconsistencies in the interpreted loan agreement

b) The applicant failed to show the movement of loans into the company.

The applicant submitted that the facts relating to loans have never been the subject of the application before the Tribunal. It submitted that it provided sufficient explanation about the source of the loan, the movement of the loans to Uganda, the purpose for which the loan was obtained. The audited books of accounts were given to the respondent detailing the purpose for the loans and how they were was used.

The applicant submitted that the reasons by the respondent to re- characterize the loan, absence of company decisions, the issue of unsecured loan, financial statements, and cross border transfer of funds were not contained in the taxation decision nor part of the agreed facts or evidence before the Tribunal. The respondent was satisfied with all evidence provided to it relating to the company decisions, financial statements, and that these were not the reasons the respondent based on for re-characterization of the loan. The applicant submitted that the respondent's submission about cross border transfer of funds is misleading. That is, the applicant needed to notify the respondent when the former brought in the loan amounts below US$ 9,000 from 2016 to 2018. The applicant submitted that the dollar rate exchange rate in Uganda was around Shs 3,300 which translated US$ 9,000 to Shs. 29,700,000 whereas S. 10 of the Anti-Money Laundering Act requires declaration of an amount above Shs 30,000,000. The applicant contended that the respondent's submission and authorities on the cross-border transfer of funds are not only irrelevant but also misleading and should be ignored.

The applicant submitted that the respondent did not present any receipt or invoice or report to show that other industry players were charging a refining fee of US$ 100 as alleged by it. It submitted that the evidential burden of proof of a fact lies on the party who wants the court to believe in the existence of it under S. 103 of the Evidence Act. It submitted that there never existed an industrial average or if it existed, the respondent was not sure of it. The applicant submitted that the respondent relied on a without prejudice letter from the former to determine the industrial average which has no evidential value, especially where the negotiations which led to its writing were unsuccessful. It cited *Bashir Bagalaliwo v George Kabyemera* HCCS. 51 of 2014 (Judgement delivered in 2023) where Justice Esta Nambayo held that; "the without prejudice letter" dated 11/11/2014 that counsel for the defendant seeks to rely on as exhibit did not lead to settlement of the dispute and therefore it cannot be admitted as evidence in court." The applicant submitted that the re-computation of its refining charge to US$ 50 per kilogram of gold and subsequent subjecting of the same to VAT was unjustifiable.

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

The applicant conducts the business of refining gold in Uganda. Around June 2020, the respondent conducted an audit on it for the period February 2018 to June 2019. As a result, the respondent issued an additional income tax assessment of Shs. 486,299,992 and a VAT assessment of Shs. 200,422,051. The income tax assessment was issued because firstly the applicant's loan was re-characterized as income by the respondent as it had no supporting evidence. Secondly there were purportedly undeclared sales resulting from underdeclared refining charges. The VAT assessment arose from the respondent issuing a retrospective VAT registration certificate on the applicant. It also arose from the adjustments in the income tax of the applicant. The respondent also assessed additional VAT of Shs.1,512,479 resulting from using exchange rates of VAT as opposed to those of income tax. The applicant objected and the respondent disallowed the objection.

The first dispute arose from a re-characterization of the applicant's loan as income. The respondent contended that there was no supporting evidence. It submitted that it has powers to re-characterize a transaction under S. 91 of the Income Tax Act which states that.

> "(1) For the purposes of determining liability to tax under this Act, the Commissioner may.
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> a) re-characterize a transaction or an element of a transaction that was entered into as part of a tax avoidance scheme
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> b) disregard a transaction that does not have substantial economic effect: or
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> c) re-characterize a transaction the form of which does not reflect the substance.
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> (2) A tax avoidance scheme in subsection (1) includes any transaction, one of the main purposes of which is the avoidance or reduction of liability to tax from the facts at hand."

The powers to re-characterize a transaction are statutory. In *Dominion Taxicab Association v MNR* [1954] SCR 82 the court stated that.

> "It is well settled that in considering whether a particular transaction brings a party within the terms of the Income Tax Act, its substance rather than its form to be regarded."

In *East Africa Breweries International Limited v Uganda Revenue Authority* Application 14 of 2017 the Tribunal stated that Commissioner's powers to re-characterize a transaction cannot be faulted unless there are satisfactory explanations. The Tribunal will not interfere with such powers unless it is shown that the decision of the respondent was illegal, irrational or was made with procedural impropriety. When a matter comes for hearing before the Tribunal S. 19(1) of the Tax Appeals Tribunal Act allows the Tribunal to exercise all the powers and discretions that are conferred by the relevant taxing Act on the decision maker. If the Tribunal is to exercise such discretion it has to be judiciously.

In order to consider whether the decision was irrational, the Tribunal has to ask itself whether the respondent did not exercise proper discretion when it decided to recharacterize the loan. The applicant obtained a loan of US$ 500,000 from Top Straight -line General Trading LLC for purposes of procuring refinery equipment. The respondent contended that there was no supporting evidence for the loan. It recharacterized the loan because of inconsistencies in the interpreted loan agreement and due to the applicant's failure to show the movement of the loans to it. Since S. 19(1)(c) of the Tax Appeals Tribunal Act allows the Tribunal to exercise powers and discretions conferred on the decision maker, the Tribunal may not limit itself to the grounds in an objection especially where there is an illegality. It cannot close its eyes to an illegality. An illegality one brought to the attention of court; overrides all pleadings.

Firstly, the loan agreement was in Arabic. It shows the borrower as Poion Refinery Company and the company director as Mr. Caromona Richard. The applicant alleges it was the borrower i.e., Bullion Refinery Limited and not Poion Refinery Company. These look like two different companies. The signatory or directors seems to be different people. There is nothing in the agreement to show that it was translated from Arabic to the language of the signatory or the applicant, which is English at time of signing. Where one signs an agreement in a language not known to him, he is considered illiterate. The Illiterates Protection Act S. 1 defines an illiterate to mean ", in relation to any document, a person who is unable to read and understand the script or language in which the document is written or printed. S. 2 of the Act requires verification of signatures of the illiterate. S. 3 requires verification of the document written for illiterates In *Stanbic Bank*

Uganda Limited v Ssenyonjo Moses Civil Appeal 147 of 2015 which was an appeal against a decision by Hon Justice Henry Peter Adonyo in which he held that the contract, the subject matter of the suit was illegal on account of breach of the Illiterates Protection Act. Pursuant to the finding, he held that the lease agreement was illegal and unenforceable. The justices of the Court of Appeal unanimously upheld the decision stating that the respondents had schooled up to primary 3 and primary 4 respectively and the expression illiterate does not mean unable to understand English language, but it means unable to read and write in that language. The respondents were not sufficiently informed about the contents of the documents they executed. The document was filled for the respondents, however there was no indication that the document was translated. Court noted that the duty is on the person who writes the name of the illiterate or who writes a document on behalf of the illiterate to prove that the contents were understood. The Illiterates Protection Act requires the translator to write his full name and address. Section 4 further makes it an offence for the writer of a document or witness to the signature of the illiterate not to write his full name and address. This is meant to protect the illiterate from endorsing a document he or she does not understand. The individual has a freedom to decide that he will be bound by. Though the agreement may have been made in the United Arab Emirates in Arabic, for a party to rely on it in Uganda he has to show that it complied with the Illiterates Protection Act. That is, it was translated to him, and he understood it. Otherwise, the parties may not have been in agreement. It becomes difficult for the Tribunal to rely on a document that does not conform to the said statute. The Tribunal exercising the powers and discretion conferred on the decision maker finds the agreement null and void.

The agreement consisted of mistakes. An agreement may be void where the mistakes are significant. If a party is misspelt, that is an insignificant mistake. In this case, the borrower does not seem to be the same as the applicant. While the parties to the contract may not challenge it, a third party like a revenue collecting body would be justified to doubt its authenticity especially where the person who is alleged to have signed it Mr. Richard Karumuna is indicated as Mr. Richard Caromona. The said agreement is not notarized nor was stamp duty paid in respect of it. Not only does its authenticity but its admissibility become a point of contention. There is no affidavit or statutory declaration

presented to the respondent to show that the said Mr. Richard Caromona is the same as Mr. Richard Karumuna or that Poion Refinery is actually Bullion Refinery Limited or the applicant. Suppose there is actually a Mr. Richard Caromona and Poion Refinery?

In the tax audit management letter, the respondent contended that the agreement did not have supporting documents. The applicant failed to show the movement of the loan to it. In respect of supporting documents, the Tribunal notes that there was no resolution from the applicant allowing it to borrow from the said company. A resolution goes to the legality of the borrowing. Even when not addressed in the objection decision, a party is required to present it when requested. The Tribunal also notes that the applicant failed to tender in bank statements to show the movement of the loan amounts into its account. If the applicant borrowed US$ 500,000 one would expect evidence to show acknowledgement or receipt of the said monies. The applicant tendered in cash receipts. *Black's Law Dictionary* 10th Edition p.1459 defines a receipt as "A written acknowledgement that something has been received; especially., a piece of paper or an electronic notification that one has paid for something." In this case, the receipts were issued by the applicant to one Mbabazi Davis. One wonders what the said Mbabazi was paying for. There was no consideration he was paying for. The acknowledgements should have been from Top Straight -line General Trading LLC showing it had advanced monies to the applicant. The purported receipts do not indicate whether the money was received by cash or cheque or other. They also do not indicate the amount or balance due. The value of all the receipts tendered in as evidence adds up to US$ 218,500. There are still queries on how the balance of US$ 281,500 entered the country. Therefore, the respondent was justified to state that applicant did not provide all supporting documents.

The respondent contended that the applicant contravened the Anti- Money Laundering Act. S. 10 of the Anti-Money Act provides that for domestic or foreign currency which does not pass through the normal banking procedures or Uganda's financial system, exceeding one thousand five hundred currency points being transported or sent across the national borders, the person transporting shall notify Uganda Revenue Authority and the Customs and Excise Department of the respondent. The respondent submitted that amounts exceeding Shs. 30,000,000 have to be disclosed to URA Customs. The receipts tendered

in had figures, most of which fell below the threshold of Shs. 30,000,000. The applicant submitted that the dollar rate exchange rate in Uganda was around Shs 3,300 which translated US$ 9,000 to Shs. 29,700,000 which is below the threshold. However. the applicant did not tender in receipts of US$ 281,500. It cannot be ascertained that all the transactions were below Shs. 30,000,000.

When the issue of anti- money laundering is considered in isolation it may not raise any suspicion. However, when the facts are considered together, eyebrows are raised. One would be suspicious where a huge loan or US$ 500,000 is paid in small installments of less than US$. 9,000, if it is not to circumvent the Anti -Money Laundering Act. An issue arises as to how many trips one would have to make in order to bring the entire loans amounts into Uganda. The trips the applicant showed can only account for US$ 218,500 The said huge loan of US$ 500,000 was not secured. The loan agreement which was in Arabic, did not have an English version and had errors. When all the facts are considered together one would suspect that the said transactions never took place. If the respondent doubted the sincerity of the transactions, the Tribunal cannot hold it for acting irrationally.

Taking the above into consideration, the Tribunal cannot state that respondent was not justified in recharacterizing the applicant's loan agreement as income. In *Kale Khan Mohammad Hanif v CIT* [1963] 50 ITR 1 (SC) the Indian Supreme court stated that.

> "It is now well settled that the onus of proving the source of a sum of money found to have been credited by the assessee either in his name or in the names of third parties is on the assessee who must be held to have the special knowledge about the circumstances under which the credit was made by him or by his agent or clerks in the books of account maintained by him and if he fails to establish the source of such a cash credit satisfactorily, such amount can be treated by the taxing authorities as taxable income. It is for the assessee and not for the department, either to establish satisfactorily by independent evidence that the receipt was not income or that even if it was income, the same was not taxable as it was exempt or already taxed under a different head under the provisions of the IT. Act.

In *Commissioner of Income-Tax v Maduri Rajaiahgari Kistaiah* 1979 120 ITR 294 AP it was stated that:

> "Where the ITO finds unexplained cash credits, it is open to him to add such sums as income from an undisclosed source, The burden of proving the cash credits is always on the assessee, as the source of unexplained cash credits is within his special knowledge. The ITO need not establish by independent evidence that a particular cash credit pertains to a particular source of income of the assessee. It is open to the assessee within whose special knowledge the source of the credit is, to plead and establish that a particular credit relates to, or has any connection with, the undisclosed income from his known business in the year of account and, therefore, it cannot be added once again when the business."

Therefore, the respondent was justified to consider the unexplained sums of the applicant as undeclared income and tax them accordingly.

The second dispute was in respect of the refining charges for gold. The respondent contended that it obtained refining charges from other industrial players, which confirmed an average charge of US$ 100 per kilogram. The respondent adduced a "without prejudice letter" dated 22nd December 2020 that was sent to it by the applicant offering to pay US$ 45 per kilogram. The applicant objected to the said letter on the grounds that it was inadmissible. S. 22(1) of the Tax Appeals Tribunal Act states "In any proceeding before a tribunal, the procedure of the Tribunal is subject to this Act, within the discretion of the Tribunal." S. 22(2) states that "A proceeding before a tribunal shall be conducted with as little formality and technicality as possible, and the Tribunal shall not be bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate." Taking the said into consideration the Tribunal will first delve into whether it should rely on the said letter in determining the refining charge to be applied to the applicant.

Admissibility of documents is governed by Evidence Act and not by court decisions. S. 60 of the Evidence Act stated that the contents of documents may be proved by primary or by secondary evidence. S. 61 of the Act states that primary evidence means that the document itself must be produced for inspection of the court. In this case, the letter was secondary evidence as the respondent tendered in a copy. The said letter was produced during the hearing. It was addressed to the Commissioner Mining and Petroleum Ms. Sandra Kaitare who came and tendered it in as an exhibit. The contents of the letters

were not disputed. Therefore, the Tribunal will allow it as an exhibit. It is admissible especially where the person who it was addressed to adduces it as evidence. *Black's Law Dictionary* 10th Edition p. 56 defines admissible as "1. Capable of being legally admitted, allowable, permissible". Admissible evidence is defined at p. 674 as "Evidence that is relevant and is of such a character (e.g., not unfairly prejudicial, based on hearsay, or privileged. The said letter is not hearsay or privileged The Tribunal does not think that the contents of the letter are prejudicial to the parties. The letter is clear. It protects the applicant.

However, having admitted the letter the Tribunal will address the issue of the weight to be attached to the said letter. The said letter was made "without prejudice" to the interests of the applicant. The applicant had offered to pay US$ 45 per kilogram on certain conditions which were to be met by the respondent. The respondent did not meet the conditions. Therefore, the respondent cannot use the said letter to the detriment of the applicant when it did not meet the conditions. Though the said letter is admitted, it carries no weight on the price of refining gold to be applied to the applicant. The Tribunal will not consider the charge of US$ 45 as the one that should be applied to the applicant.

The respondent stated that it used the average refining charge of other industrial players. The invoices showing that refining charges of the other industrial players were using were not tendered in court. Mr. Lawrence Muwonge also testified that an industrial average charge of US$ 50 was determined based on two other players. This contradicts the evidence where it was stated that the industrial charge was US$ 100 per kilogram. Or if it was US$ 100, it is not clear how and why the respondent arbitrarily reduced it to US$ 50. There is no evidence of an industrial average of US$ 50 per kilogram. Industrial averages cannot be determined according to the whims of the respondent. The two other players using the average of US$ 100 or US$ 50 were not disclosed. The information the respondent relied on is also not disclosed. There is no report or who indicated that the said averages are used. It is hearsay evidence. The person who made the comparison or the report is not disclosed, nor did he testify. There was no justification as to why the respondent doubted the rate applied by the applicant. Therefore, any assessment in respect of the said refining charge used by the respondent is not proper and is set aside.

The third dispute was in respect of forcibly registering the applicant for VAT, effective 1st September or November 2018. The applicant applied for VAT registration around 6th August 2018. The respondent rejected the application on grounds that the applicant had no taxable supplies and no export license. It was not until around 20th May 2020 when the respondent wrote an email to the applicant that a forced amendment had been approved and the effective date of VAT registration was November 2018. S. 8(6) of the VAT Act states that that Commissioner General may register a person if there are reasonable grounds for believing that the person is required to apply for registration under S. 7 but has failed to do so, and the registration shall take effect from the date specified in the certificate of registration. The applicant does not deny that it was making taxable supplies in September or November 2018. In fact, it had applied for VAT registration in August 2018. Therefore, the applicant's application for registration had been rejected in error. Though the application of the applicant for VAT registration was rejected, the Commissioner General had reasonable grounds for believing the applicant should have been registered under S. 7 of the VAT Act. Therefore, the Commissioner General was justified to forcibly register the applicant. S. 8(6) of the VAT Act states the registration takes effect from the date of registration. Any taxable supplies made from the date of registration attract VAT.

Taking the above into consideration, the applicant is liable to pay income tax on the unsecured loans which was re-characterized as income. There were loans of Shs. 951,420,000 and Shs. 225,600,000 for the financial years 2017/18 and 2018/19 totaling to Shs. 1,177,020,000. The income tax payable is Shs. 353,106,000. The respondent was not justified in using an industrial average of US$ 50. Therefore, the computation of undeclared sales of Shs. 807,709,425 for the financial year 2018/2019 was not correctly arrived at. The Tribunal will not consider it. Since the Tribunal has held that the respondent was justified to register the applicant forcibly. The applicant ought to pay VAT on the unsecured loans amounts of Shs. 1,177,020,000. This would attract VAT of Shs. 211,863,360. The applicant did not challenge the VAT of Shs. 1,512,479 resulting from using exchange rates of VAT as opposed to those of income tax.

Therefore, the Tribunal makes the following orders.

1) The applicant shall pay income tax of Shs. 353,106,000
2) The applicant shall pay VAT of Shs. 211,863,360
3) The applicant shall pay VAT of Shs. 1,512,479 resulting from using different exchange rates
4) The applicant shall pay the costs of the suit.

Dated at Kampala this 19th day of July 2023

DR. ASA MUGENYI	**MR. GEORGE MUGERWA**	**MS, CHRISTINE KATWE**
CHAIRMAN	**MEMBER**	**MEMBER**