

THE REPUBLIC OF UGANDA
IN THE TAX APPEALS TRIBUNAL AT KAMPALA
APPLICATION NO. 331 OF 2024

CHANDARIA FOUNDATION REGISTERED TRUSTEES.....APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY..... RESPONDENT

**BEFORE: MS. CRYSTAL KABAJWARA, MRS. KABAKUMBA MASIKO,
MRS. STELLA NYAPENDI CHOMBO**

RULING

This ruling is in respect of an application seeking a declaration that the capital gain derived by the Applicant on the disposal of its shares in Uganda Baati limited, a public limited company is exempt from income tax.

1. Background Facts

The Applicant is a charitable trust duly registered and validly existing under the Laws of Uganda and is engaged in various charitable activities. On various dates between 1999 and 2002, the Applicant acquired shares in Uganda Baati Limited ("UBL"), a public limited liability company at a total cost of Shs. 49,084,320.

In 2021, the Applicant disposed of its entire shareholding in UBL to Safal Investments (Mauritius) Limited ("SAFAL") and Dr. Allan Shonubi for a total consideration of Shs. 2,454,250,000. The Applicant did not pay income tax on the capital gains arising from the disposal of its shares to SAFAL and Dr. Alan Shonubi on the basis that such capital gains are exempt from income tax pursuant to Section 21(1) (j) of the Income Tax Act.

In 2024, the Respondent investigated the Applicant's tax affairs and raised an income tax additional assessment against the Applicant on 10 July 2024 for the period January 2021 to December 2021 amounting to Shs. 809,393,700 arising from the disposal of the Applicant's shares in UBL. The Applicant objected to the assessment in respect of

the sale of its shares in UBL on grounds that the capital gains made from the sale of its shares in UBL, a public limited liability company are exempt from income tax under Section 21 (1) (j) of the ITA.

The Respondent disallowed the Applicant's objection on the basis that the income earned from the sale of the Applicant's shares in UBL is taxable under the ITA. The Applicant was aggrieved with the objection decision and lodged this Application before this Honourable Tribunal for review of the Respondent's objection decision.

2. Representation

At the hearing of this application, the Applicant was represented by Mr Bruno Kalibala and Mr. Amany Bruno while the Respondent was represented by Ms. Christine Mpumwire an Officer from the Respondents Legal Services and Board Affairs Department.

3. Issues

The issues for determination by the Tribunal is whether the Applicant is liable to income tax on the sale of its shares in UBL, a public limited company.

4. Submissions of the Applicant

The Applicant submitted that the capital gain derived from the disposal of its shares in UBL, a public limited liability company are exempt from income tax pursuant to Section 21 (1) (j) of the Income Tax Act (ITA).

The Applicant relied on Section 21 (j) of the ITA which provides that any capital gain that is not included in business income, other than capital gain on the sale of shares in a private limited liability company or on the sale of a commercial building.

The Applicant contended that its income derived from the disposal of its shares in UBL is exempt under **Section 21 (1) (j)** because;

- (i) the income is a capital gain;
- (ii) the capital gain is not included in its business income; and
- (iii) the capital gain was not derived from the sale of shares in a private limited liability company or from the sale of a commercial building.

The Applicant contended that capital gain is defined by the Black's Law Dictionary 8th Edition at page 222 as the profit realized when a capital asset is sold or exchanged.

In the present case, the Applicant purchased the shares in UBL between 1999 and 2002 and held them as capital assets for more than twenty years until their disposal in 2021.

The Applicant submitted that the capital gain made on the disposal of its shares in UBL is not included in business income under the ITA and therefore exempt under Section 21(1)(j) of the ITA.

A capital gains is only included in business income if it falls within the scope of Section 18(1)(a) of the ITA i.e. where it is derived by a person on the disposal of a business asset, or on the satisfaction or cancellation of a business debt, whether or not the asset or debt was on revenue or capital account. The question for determination in this regard is whether the disposal of the Applicant's shares in UBL qualifies as a disposal of a business asset.

The Applicant submitted that **Section 2 of the ITA** defines a business asset as an asset which is used or held for use in a business and includes any asset held for sale in a business and any asset of a partnership or company. The Applicant relied on the case of ***Luwaluwa v Uganda Revenue Authority Civil Appeal No. 43 of 2022*** which held that an asset is a business asset if it is:

- (a) used in a business,
- (b) is held ready for use in a business,
- (c) is held for sale in a business, or
- (d) is owned by a partnership or a company.

Further, in regard to conditions a), b), and c) above, the common thread for classifying an asset as a business asset is the existence of a business in which the asset is used or held ready for use or sale.

The Applicant submitted that its holding of shares in UBL was a long-term passive investment to enable the earning of dividends and not a business. Therefore, the shares could not be a business asset without a business in which the Applicant used the shares or held them ready for use or sale.

The ITA defines a business to include any trade, profession, vocation or adventure in the nature of trade. The Applicant argued that its holding of shares in UBL did not amount to any trade, profession, vocation or adventure in the nature of trade and therefore, the shares were not a business asset because, like the holding of other securities such as government bonds or treasury bills, holding shares is a passive activity.

Further, the fact that holding of shares in a company is not a business is reinforced under the ITA particularly section 20 (1) (a) of the ITA which classifies income from shares (dividends) as property income and not business income. Had the legislature intended the holding of shares to be classified as a business, the income arising from such holding would have been classified as business income under section 18 of the ITA.

The Applicant quoted ***Uganda Revenue Authority v COWI A/S (Civil Appeal 34 of 2020)***, where the High Court, while discussing the harmonious rule of statutory interpretation stated:

“...The rule requires that a legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals.... The provisions of one statute should be interpreted in harmony with the tenor of the statutory provisions or the overall statutory purpose....”

The Applicant further argued that the Tribunal should construe or interpret **section 18(1)(a)** in harmony with **section 20(1)(a)** which classifies the holding shares as a passive investment in property and not a business venture. This inevitably means that the holding of shares is not a business and therefore shares are not a business asset. In regard to the criterion of an asset owned by a partnership or a company, it is an agreed fact that the Applicant is charitable trust. The Applicant is neither an individual nor a company nor a partnership and therefore, the shares held by it cannot be classified as a business asset under this limb of the definition of a business asset.

The Applicant submitted that it is an agreed fact that UBL is a public limited liability company and it is also not in dispute that the capital gain related to a sale of shares in a public limited liability company. Therefore, the capital gain made on the sale of the Applicant's shares in UBL is not derived from the sale of shares in a private limited liability company or from the sale of a commercial building.

The Applicant submitted that the legislative intent or purpose clearly shows that capital gains on the disposal of shares (except shares owned by a company or partnership) are excluded from business income and therefore exempt from income tax under section 21(1)(j) and the modern approach to interpretation of tax statutes requires ascertaining the purpose / aim of the provision sought to be interpreted.

The explanatory notes to the **Income Tax Bill 1997** which resulted into the ITA provide the legislative intent / purpose for section 21(1)(j) at page 42 as follows:

“...that any capital gain derived by a person that is not business, employment or property income of the person is exempt from tax. This would apply, for example, to the investment assets (such as shares) of an individual provided the individual was not a share trader (i.e. a dealer in shares).”

The explanatory notes to the Income Tax Bill 1997 provide clarity beyond doubt that shares are not a business asset (save where they are owned by a company or a partnership) and that the purpose of section 21(1)(j) was to exempt any capital gain made on the sale of such shares from income tax.

The Applicant argued that the Respondent has in the past interpreted and applied section 21(1)(j) of the ITA on the basis that shares are not a business asset and that capital gains made on the sale of such shares are not included in business income and therefore exempt from income tax. ***In Gordon Sentiba & Others v Uganda Revenue Authority Misc Cause No. 38 of 2010***, the High Court noted the Respondent's interpretation and application of section 21(1)(k) (now j) which the Respondent, while writing to a taxpayer who had made a capital gain on disposal of shares noted that the gain derived by individuals is exempt income tax as per section 21 (1) (k) of the Income Tax Act which stipulates that any capital gain that is not included in the business income is exempt income.

Furthermore, the Applicant contended that even if the gains from the disposal of the Applicant's shares in UBL are taxable under sections **18(1)(a), 50(1) and 51 of the ITA** as asserted by the Respondent, the assessment is illegal and or erroneous because the Respondent failed to index the cost base of the Applicant's shares.

The Applicant relied on **Section 48(1) of the ITA** provides that the amount of any gain arising from the disposal of an asset is the excess of the consideration received for

the disposal over the cost base of the asset at the time of the disposal and Section 48(3) of the ITA provides:

"Where as a result of the Application of this Act, a gain or loss on disposal of an asset is subject to tax being a gain or loss, the cost base of the asset is calculated on the basis that each item of cost or expense included in the cost base shall be determined according to the formular."

The Applicant argued that they purchased the shares on various occasions between 1999 and 2002 for a total consideration of Shs. 49,084,320. The Respondent ought to have indexed the cost of the shares to derive the cost base prior to determination of the taxable gain and therefore the tax. However, the Respondent assessed tax amounting Shs. 809,393,700 on the disposal of the shares without taking into account the indexed cost base of the shares as required under section **48(1) (3) of the ITA**. The Respondent erroneously calculated the applicable tax, thus the assessment of Shs. 809,393,700 which is even more than 30% of the selling price.

In ***Registered Trustees of Freemasons Hall v Uganda Revenue Authority (Taxation Application No. 51 of 2019)***, where the Respondent omitted to properly index the cost base, the Tribunal observed as follows:

"... the Respondent ought to have considered the acquisition value of 1949 in computing the gain. It should have considered what the value of the said amount would be today taking into consideration the differences in the foreign exchange rate and the inflation index at that time as compared to currently.... By the respondent applying 30% to the sale value of the property, it was imposing a sale tax on the sale of property and not capital gains tax and assessment issued without taking into consideration the gain a taxpayer has obtained cannot be said to be one of capital gains tax..."

The inconsistencies in the Respondent's computation particularly the glaring failure to index the cost base, contrary to express provisions of the law shows that the Respondent's assessment was arbitrary, baseless, and unlawful.

The Applicant prayed that this application is allowed and that a declaration that the capital gain derived by the Applicant on the disposal of its shares in Uganda Baati Limited, a Public Limited Company is exempt under Section 21(j) of the Income Tax Act, Cap 338. The Applicant also prayed for an order directing the Respondent to refund to the Applicant the deposit of 30% of the assessed tax, with interest at 2% per

month from the date of payment until the refund is made in accordance with section 31 of the Tax Appeals Tribunal Act.

5. Submissions of the Respondent

The Respondent submitted that the income earned by the Applicant from the sale of its shares in Uganda Baati Limited is business income and therefore taxable income.

Section 18(1) (a) of the Income Tax Act defines business income as;

"Any Income derived by a person in carrying on a business and includes the following whether of a revenue or capital nature, a) The amount of any gain, as determined under part VI of this Act which deals with gain, and losses on disposal of assets, derived by a person on the disposal of a business asset, or on the asset or debt was on a revenue or capital account."

The Respondent submitted that the Applicant is in the business of investing in shares in different Companies to wit; Uganda Aluminium Limited and Uganda Baati Limited with a view of earning dividends and their shares appreciating in value, unsecured loans and fixed deposits to earn interest among others. Therefore, the Respondent treated such investments such as the of buying shares as generating business income for the Applicant in accordance with Section 18(1) of the Income Tax Act.

The Respondent argued that it was wrong for the Applicant to classify dividends and capital gain from the sale of shares as one under **Section 20(1) (a) of the Income Tax Act** that provide for property income. **Section 2(h) of the Income Tax Act** defines Business asset as;

"An asset which is used or held ready for use in a business and includes any asset held for sale in a business and any asset of a Partnership or Company."

Business included any trade, profession, vocation or adventure in the nature of trade, but does not include employment.

Further, the Respondent cited **Section 49 of the Income Tax Act Cap 338** which provides:

"a taxpayer is treated as having disposed of an asset when the asset has been, a) sold, exchanged, redeemed or distributed by the taxpayer."

Section 49 (7) of the Income Tax Act Cap 338 defines a taxable asset to *"mean an asset the disposal of which would give rise to a gain included in the gross income of, or a loss allowed as a deduction to, a resident or non-resident taxpayer."*

The import of the above provisions is that shares are business assets which are taxable.

The Respondent submitted that the Applicant's sale of its shares in Uganda Baati Limited was a sale of a business asset (shares) and therefore the income earned from the sale is taxable income in accordance with Sections **18(1) (a), 50(1) and 51 of the Income Tax Act Cap 340** and prayed that this Tribunal finds that the Applicant's sale of its shares was sale of a business asset and the same was taxed under Sections 18(1) (a), 50(1) and 51 of the Income Tax Act Cap 340 and now Sections 18(1) (a), and 49 of the Income Tax Act Cap 338.

Regarding indexation, the Respondent submitted that they indexed the cost base of the shares disposed of by the Applicant and proof was shared with the Applicant's representatives during audit and before the assessment was raised.

The Respondent prayed that the Tribunal dismisses this application with the findings that the Applicant's sale of its shares in Uganda Baati Limited was a sale of a business asset (shares). The income earned from the sale is taxable income and was properly indexed and therefore the Applicant is therefore liable to pay tax.

In rejoinder, the Applicant reiterated the arguments that we made in their submissions

6. The determination of the issues

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

The Applicant is a charitable trust that sold shares in Uganda Baati Limited (UBL), a Ugandan public company, realizing a capital gain. The Respondent (URA) assessed tax on this gain, treating it as taxable income. The Applicant contends that the gain is a capital gain exempt under Section 21(1)(j) of the Income Tax Act (ITA) because the gain was not realised from the sale of a business asset. The Respondent contends that the shares were business assets and that the gain is therefore taxable business income.

The Tribunal must determine (a) whether the UBL shares were “business assets” under the ITA, (b) whether the gain on their disposal is business income or an exempt capital gain, (c) whether the capital gain exemption in Section 21(1)(j) applies, and (d) whether the URA correctly computed the gain, including any indexation of the cost base under Section 48.

Below, we analyse the statutory provisions relating to the taxation of gains arising from the disposal of assets. and relevant case law.

As background, the Income Tax Act does not impose a separate capital gains tax. Gains on disposal of assets are included in income only if they fall under business income.

Section 4 of the ITA imposes income tax on any every person who has chargeable income for the year of income. Chargeable income is defined under Section **15** of the ITA to mean gross income less allowable deductions.

Section 17 defines gross income to include business, employment, and property income. Section 18(1)(a) defines “business income” to include gains “derived by a person on the disposal of a business asset”.

However, **Section 21(1)(j)** exempts from income tax “any capital gain that is not included in business income, except the sale of shares in a private company or the sale of a commercial building.

Bringing all the above provisions together in harmony, one can reasonably conclude that income tax is chargeable on gains derived from the disposal of assets were the assets disposed of are business assets. If the assets are not business assets, for example, personal assets such as a person’s residential dwelling, such gains are not taxable.

Therefore, we must now determine whether the shares that the Applicant held in UBL qualify as business assets.

Section 2(h) defines a business asset as “an asset which is used or held ready for use in a business,” and it specifically includes “any asset held for sale in a business and any asset of a partnership or company”.

Under this definition, only assets employed in or held for a business enterprise qualify.

This begs the following questions:

- (i) Did the Applicant use the shares or hold them ready for use in a business? **No**. A business is defined by Section 2 of the ITA to include any trade, profession, vocation or adventure in the nature of trade. The Applicant is not in the business of buying and selling shares. Contrast this with in ***Luwaluwa Investments Limited v URA (Uganda Comm. Ct., 2023)***, where the Court of Appeal found that a mortgaged hotel property, purchased by a bank and held to recover a loan, was a business asset of the bank because it was used by the bank in its business of lending and security recovery. In addition, the length of time in which the Applicant held the shares i.e., from 1999 to 2021 i.e. **22 years** clearly rebuts any suggestion of a trade. The length of time an asset is held is an important indicator of trade. The longer the period of ownership the greater the chance of it being seen as an investment rather than a trade (***Wisdom v Chamberlain – CA 1968, 45 TC 92***).
- (ii) Did the Applicant hold the asset for sale in a business? Again, the answer to this **is in the negative** as we have already stated that the Applicant was not in business. The duration for which the asset was held shows that it was not held for sale as no reasonable business owner would hold an asset for 22 years for sale. This clearly indicates that the shares were for investment purposes.
- (iii) Were the shares the assets of a partnership or a company? **No**. The Applicant is a trust and is neither a partnership nor a company. For emphasis, a trust is a legal arrangement where a property interest held by one person (the trustees) at the request of another (the settlor) for the benefit of a third party (the beneficiary) (***Black’s Law Dictionary, 10th Edition***).

Therefore, basing on the above, the gain that was realised by the Applicant from the disposal of its shares in UBL did not arise from the disposal of a business asset and therefore, could not have been included in the business income of the Applicant.

We now turn to Section 21 (j) of the ITA which exempts the following income from tax:

“Any capital gain that is not included in the business income, other than capital gains on the sale of shares in a private limited liability company or on the sale of a commercial building.”

The above provision has the following elements

- (i) the capital gain is not included in its business income – we have already established that the income ought not to be included because it did not arise from the disposal of a business asset; and
- (ii) the capital gain was not derived from the sale of shares in a private limited liability company or from the sale of a commercial building – the shares were held in UBL, a public limited company.

In addition to the above, the use of the words “other than” presupposes that ordinarily, gains from the sale of shares do not form part of business income, hence the creation of an exception relating to shares held in a private limited company.

Consequently, the Applicant qualifies for the exemption under Section 21 (j) of the ITA.

In sum, the Applicant held the shares in UBL for over two decades, a holding period that is more characteristic of a long-term passive investment and not trading asset. Therefore, the shares could not be categorized as business assets without a corresponding business in which the Applicant used the shares or held them ready for use or sale.

There is no evidence of any activity aimed at enhancing the value or marketability of the shares prior to their sale. The shares were acquired for dividend income to fund charitable objectives, not for speculative or resale purposes. The Applicant is not engaged in any form of share trading or financial services and there is no indication that the acquisition was financed in a manner typical of commercial ventures.

Indexation

Having established that the Applicant is not liable to income tax on the gain that was realized from the sale of its shares, it is not necessary to examine the computation of the gain and whether the cost base was correctly indexed.

However, we agree with the Applicant that the cost base of assets held for more than a year should be indexed in accordance with Section 48 (3) of the ITA to adjust for inflation and currency fluctuations. The failure to index would understate the cost base and overstate the gain. While the Respondent alleges to have indexed, they have not produced any evidence to that effect such as indexation workings.

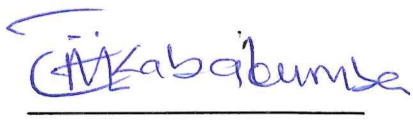
In view of the above, the Tribunal makes the following orders:

- (i) The capital gain arising from the disposal of the Uganda Baati Limited shares held by the Applicant is exempt under Section 21(1)(j) of the Income Tax Act and is not subject to income tax.
- (ii) The assessment of Shs. 809,393,700 is hereby set aside.
- (iii) The Respondent is ordered to refund to the Applicant the deposit of 30% of the assessed tax with interest at 2% per month from the date of payment until the refund is made.
- (iv) Costs are hereby awarded to the Applicant.

Dated at Kampala this ^{23rd}.....day of May 2025.


CRYSTAL KABAJWARA


STELLA N. CHOMBO


KABAKUMBA MASIKO