THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEALS No. 0023 OF 2011 & No. 0003 OF 2012(CONSOLIDATED)

(ARISING FROM TAX APPEALS TRIBUNAL APPLICATIONS No. 26 OF 2010 & No.28 OF 2010)

HERITAGE OIL AND GAS LIMITED ..... APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY ..... RESPONDENT

BEFORE: HON. LADY JUSTICE SUSAN ABINYO

JUDGMENT

Introduction

This is a consolidated appeal brought under section 28 of the Tax Appeals Tribunal Act, Cap 341*(Revised Laws of Uganda, 2023 edition)* against two decisions of the Tax Appeals Tribunal (the "TAT") in TAT Application No. 26 of 2010 and TAT Application No. 28 of 2010.

Civil Appeal No. 0023 of 2011, arises from the TAT Application No. 26 of 2010, where the Applicant (Appellant herein) challenged an income tax assessment of US$ 404,925,000 by the Respondent arising out of a Sale and Purchase Agreement (SPA), wherein the Applicant sold its share in Production Sharing Agreements (PSAs) and a Joint Operating Agreement (JOA) to Tullow Uganda Limited (hereinafter called "Tullow") in which the Tribunal found in favour of the Respondent on 23rd November, 2011.

In Civil Appeal No.0003 of 2012, which arises from TAT Application No. 28 of 2010, the Applicant (Appellant herein) challenged an income tax assessment of US$ 30,000,000 by the Respondent arising out of a settlement amount of US$ 100,000,000, paid to the Appellant in relation to a contingent amount under a Sale and Purchase Agreement to satisfy and discharge Tullow's obligations, in which the Tribunal found in favour of the Respondent on 7th December, 2011.

The Appellant being dissatisfied with the said rulings, filed the two appeals referred to above that were consolidated.

Background

The Appellant Heritage Oil & Gas Limited (Heritage) and Energy Africa (U) Ltd entered into Production Sharing Agreements with the Government of Uganda in relation to Exploration Areas 1 & 3A (hereinafter jointly referred to as the "Exploration Areas") in the Albertine Graben, and were accordingly granted licenses for petroleum exploration, development, and production.

Energy Africa (U) Ltd later sold its interests to Tullow (U) Ltd, pursuant to which, the Appellant and Tullow (U) Ltd each held equal (50%) participating interests in the exploration areas. By way of a Joint Operating Agreement, the Appellant and Energy Africa (U) Ltd appointed Heritage, a wholly owned subsidiary of the Appellant, as the operator for both exploration areas; the Appellant the pioneer oil company in Uganda made discoveries of oil in Block 3A.

One of the terms in the Joint Operating Agreement between the Appellant and Tullow was that in the event the Appellant wished to dispose of its 50% interest, Tullow had a right of pre-emption. Tullow exercised its right of pre-emption with the result that the Appellant and Tullow entered into a Sale and Purchase Agreement dated 26th January 2010, by which the Appellant sought to transfer the following:

1. It's rights under the Petroleum Exploration licences (the "Exploration Licences") for exploration areas in the Republic of Uganda;
2. It's participating interests under the Joint Operating Agreement, and
3. It's rights under the Production Sharing Agreements, subject to the satisfaction of various conditions precedent, which included, among others, obtaining the consent of the Minister for Energy and Mineral Development (the "Minister") under section 44 of the Petroleum (Exploration and Production) Act, Cap 150(hereinafter referred to as the "Act") and Article 24 of the respective PSAs.

The total consideration for the purchase of the two exploration areas was US$ 1,450,000,000 being a base purchase price of US$ 1,350,000,000, and a contingency amount of US$ 100,000,000.

By a letter dated 6th July 2010, the Minister gave conditional consent to the Appellant for the proposed transfer of its interests on terms including that, the Appellant pays all taxes accruing from the transaction as shall be assessed by the

Respondent, and that the approval shall not become effective unless the Appellant has paid all taxes or demonstrated to the satisfaction of the Government of the Republic of Uganda that the said taxes shall be paid immediately upon demand.

The Respondent issued tax assessments to the Appellant in the amounts of US$ 404,925,000 on 6th July 2010 and US$ 30,000,000 on 19th August 2010, being taxes payable in relation to the base purchase price, and the contingency amount respectively. The Appellant objected to the first assessment on 18th August 2010 and to the additional assessment on 19th August 2010. The Respondent issued objection decisions on 12th November 2010 and 1st December 2010 in respect of the first assessment and the additional assessment respectively, and maintained the assessments for reasons that the transaction was subject to tax under the laws of Uganda.

Subsequently, the Appellant filed two applications in the Tax Appeals Tribunal vide TAT Application No. 26 of 2010 on 10th December 2010 and TAT Application No. 28 of 2010 on 31st December 2010, challenging the Respondent's objection decisions in respect of its tax liability, in which the Tribunal dismissed both applications and upheld the assessments.

The Appellant being dissatisfied with the said decisions of the Tax Appeals Tribunal, filed the instant Appeals to the High Court of Uganda vide Civil Appeal No. 23 of 2011 and Civil Appeal No.3 of 2012 (Consolidated) thus this judgment.

The grounds of appeal as stated in the Notice of Appeal are that: -

1. The Tax Appeals Tribunal erred in law in its decision relating to TAT Application 26 of 2010 that section 79(g) of the Income Tax Act applied.
2. The Tax Appeals Tribunal erred in law when it held that section 79(s) of the Income Tax Act applied.
3. The Tax Appeals Tribunal erred in law when it disallowed the addition of the admitted and agreed exploration cost of US$ 150, 000,000 to the cost base in calculating the capital gain.
4. The Tax Appeals Tribunal erred in law in failing to hold that there could be no tax liability by virtue of the "Convention between the Government of the Republic of Mauritius, and the Government of the Republic of Uganda for the avoidance of Double Taxation and the Prevention of Fiscal evasion with respect to Taxes on Income" and section 88 of the Income Tax Act, even if (which is denied) there would otherwise have been a tax liability.

5. The Tax Appeals Tribunal erred in law when it failed to properly evaluate the evidence before it and thereby came to the wrong conclusion that tax was due.
6. The Tax Appeals Tribunal erred in law when it held that the assessments dated 6th July 2010 and 19th August 2010, were validly issued.

Representation

The Appellant was represented by Mr. Denis Kusaasira jointly with Mr. Festus Akunobera, Mr. Joshua Byabashaija, and Mr. Steven Kabuye of M/s ABMAK Associates, Advocates & Legal Consultants while the Respondent was represented by Ms. Catherine Donovan Kyokunda jointly with Mr. Tonny Kalungi, Ms. Diana Prida Praff, Ms. Barbara Ajambo Nahone, Ms. Gloria Akatuhurira, and Ms. Charlotte Katutu of the Legal Services and Board Affairs Department, Uganda Revenue Authority.

I have carefully considered the submissions of Counsel for the parties herein, and the authorities referred to for which I am extremely grateful.

The Duty of this Court

The Court derives its powers from section 28(3) of the Tax Appeals Tribunal Act, Cap. 341, to hear and determine this appeal, which arises from the decision of the Tax Appeals Tribunal, and shall make orders as it thinks appropriate by reason of its decision, including an order affirming or setting aside the decision of the Tribunal or an order remitting the case to the Tribunal for reconsideration.

The procedure for filing the appeal is by a Notice of Appeal, which shall state the question (s) of law that form the basis of the appeal therefore, the jurisdiction of this Court is restricted to try question(s) of law only. ***(See: section 28(2) of TAT Act, Cap. 341(Revised Laws of Uganda, 2023 edition); Elias Kasolo Vs Security Group Uganda Limited & Anor, C.A.C.A No. 212 of 2020; Uganda Revenue Authority Vs K Files Limited (Civil Appeal 28 of 2022 [2024] UGCommC 313; Uganda Revenue Authority Vs Tembo Steel Ltd, Civil Appeal No. 09 of 2009; Uganda Revenue Authority Vs Shoprite Checkers (U) Limited, Civil Appeal No. 15 of 2008, and Uganda Revenue Authority Vs Toro Mityana Tea Company Limited, Civil Appeal No. 4 of 2006.***

In ***Uganda Revenue Authority Vs Tembo Steel Ltd,*** supra, the Court noted that points of law by their nature involve a controversy about the law and that there must be misdirection on the part of the Tribunal or an error of law, which must be stated in the grounds contained in the Notice of Appeal.

What amounts to a question of law has been decided in a plethora of cases. The phrase "an error of law" refers to instances where there is no evidence to support a finding or where the evidence contradicts the finding or where the only reasonable conclusion contradicts the finding. **(See: *Edwards Vs Bairstow [1956] AC 14***, cited with approval in ***Barry Edwards Vs The Commissioner for Her Majesty's Revenue & Customs [2019] UKUT 0131(TCC) Appeal No. UT/2017/0172*)**; *and* ***Uganda Revenue Authority Vs Rabbo Enterprises (U) LTD & Anor, S.C.C.A No. 12 of 2014***, and ***Lubanga Jamada Vs Dr. Ddumba Edward, C.A.C.A No.10 of 2011,*** cited by Counsel for the Respondent***; Kifamunte Henry Vs Uganda [1998] UGSC 20; Celtel Uganda Limited T/a Zain Uganda Vs Karungi Susan, C.A.C.A No. 73 of 2013; Federal Court of Australia Collector of Customs Vs Pozzolanic Enterprises Pty Ltd No. QG202 of 1992 and Collector of Customs Vs Pressure Tankers Pty Ltd QG 201 of 1992(Consolidated Appeal)***, and **Chatenay Vs Brazilian Submarine Telegraph Co Ltd [1892] 1 QB 79 at 85**, cited by Counsel for the Appellant.

The Appellant preferred to argue the above grounds of appeal in the following sequence; grounds 3, 1, 2, 4, and 6 separately and ground 5 generally since it cuts across all the grounds. The Respondent preferred to argue grounds 1, and 2 together, and the other grounds sequentially. This Court will adopt the Respondent's approach hereunder.

Preliminary objection

Counsel for the Respondent submitted that the preference by Counsel for the Appellant to argue ground 5 generally because it cuts across, was neither supported in its written arguments nor its oral highlights either generally or even as part of the other issues.

Counsel further contended that ground 5 of the appeal is inconcise and amounts to a fishing expedition. Counsel relied on the decision of the Supreme Court in *Ranchobai Shivabhai Patel Ltd & Anor V Henry Wambuga & Anor, SCCA No. 6 of 2017,* where the ground of appeal had been couched as: "*The Learned Justices of the Court of Appeal erred in law and fact when they failed to evaluate the evidence on record and thereby arrived at a wrong conclusion*"

In the lead judgment, Mugamba. JSC, held that the ground was too general as it does not specify in what way, and in which specific areas the Learned Justices of Appeal failed to evaluate the evidence. The ground was struck out.

The Supreme Court further noted that such a ground allows the Appellant to ambush the Respondent with issues not contemplated, and the reason for striking out such a ground is to prevent abuse of the Court process. **(See: *Celtel Uganda***

Limited t/a Zain Uganda V Karungi Susan, supra, and Attorney General Versus Florence Baliraine, Court of Appeal Civil Appeal No. 79 of 2003) cited by Counsel for the Respondent in support of their submissions.

In reply, Counsel for the Appellant submitted that the right time to raise an objection to this ground was before the Appellant proposed not to argue it as an independent ground, since it cuts across all the five grounds of appeal and that the objection is misconceived and should be overruled.

Determination of the preliminary objection

Following the settled position of the law decided in a plethora of cases on what amounts to the phrase "an error of law" and that the grounds of appeal must be stated with precision and clarity to illustrate the error, this Court finds that ground 5 of the appeal is stated in general terms, which does not either point out or illustrate the error with precision. **(*See: Hwang Sung Ltd Vs M and D Timber Merchants, S.C.C.A No.2 of 2018*)**

Consequently, the preliminary objection raised by Counsel for the Respondent is upheld, and this Court makes orders that ground 5 of the appeal is hereby struck out.

This Court will now turn to consider the merits of grounds 1, 2, 3, 4, and 6 of the appeal as below.

Ground 1: The Tax Appeals Tribunal erred in law in its decision relating to TAT Application 26 of 2010 that section 79(g) of the Income Tax Act applied.

Submissions of Counsel for the Appellant

Counsel contended that in arriving at the decision that section 79(g) applied to the transaction under the SPA, the Tax Appeal Tribunal (TAT) committed errors of law as follows:

The TAT misconstrued and misapplied provisions of the PSA and thereby erroneously concluded that the PSAs granted the Appellant a usufruct over government land in exploration areas 1 and 3A, and the PSAs granted the Appellant equitable interests in land in exploration areas 1 and 3A. The TAT's determination that the licensee had a usufruct over Blocks 1 and 3A was not supported by any evidence of land acquisition, as explicitly required by Article 22(1); this oversight by the TAT indicates a failure to apply the correct legal standard, thus constituting an error of law. Counsel cited the case of *Celtel*

Uganda Limited T/a Zain Uganda Vs Karungi Susan, C.A.C.A No. 73 of 2013, in support of their submissions.

Counsel further relied on the decision of *Chatenay Vs Brazilian Submarine Telegraph Co Ltd [1892] 1 QB 79 at 85,* on the proposition of law that the construction of documents, including contracts, are questions of law, to support their submissions.

Counsel further contended that the Tribunal made findings of fact without supporting evidence, and erroneously concluded that all land in Exploration Areas 1 and 3A was government land, and the Appellant was using this land rent-free and that the Appellant had fixtures or property attached to the said land.

Counsel submitted that the surface rentals under Article 22(1) of the PSA are administrative charges in petroleum licencing. They are distinct from the concept of rent. That by equating surface rentals with rent, the TAT misconstrued the contractual terms, leading to an erroneous legal conclusion.

Counsel relied on the decision of *Kifamunte Henry Vs Uganda [1998] UGSC 20,* on the proposition of law that a Court that makes a finding of fact without any evidence to support the finding commits an error of law, in support of their submissions.

Counsel argued that the TAT impermissibly used the Double Taxation Agreement (DTA) to interpret section 79(g) of the Income Tax Act (ITA), and thereby erroneously concluded that the words "interest" and "immovable property" in section 79(g) of the ITA must be interpreted separately. This caused the TAT to erroneously conclude as follows: that the word "interest" under section 79(g) means property accessory to immovable property; the "interest" under section 79(g) of the ITA must include ordinary and non-proprietary interests; the exclusivity granted by the petroleum exploration licence and under section 12 of the Petroleum (Exploration and Development) Act, creates an ordinary interest in immovable property, and therefore in its ordinary meaning, a petroleum exploration licence creates an interest in land, and the Applicant's sale of its interest in Block 1 and 3A under the SPA was a sale of an interest in immovable property, which is taxable under income tax.

Counsel further argued that as a rule of statutory interpretation, a composite expression, such as "interest in immovable property" under section 79(g) of the ITA must be construed as a whole. It is impermissible to use each word in the phrase separately, and then combine their several meanings. That each word in the phrase may modify the meaning of the others, giving the whole its own meaning.

Counsel relied on *Bailey, Diggory, and Luke Norbury: Bennion on Statutory Interpretation, 7th edition*, edited by Professor David Feldman QC (Hon) FBA, LexisNexis, 2017, section 22.3 pg. 533 in support of their submissions.

Counsel further submitted that since the ITA did not contain a definition of the term "interest in immovable property", the term had to be interpreted in line with its common law meaning, as required by section 14(2)(b)(i) of the Judicature Act, Cap 16.

In addition, Counsel contended that the TAT interpreted the PSAs and the Exploration licence in isolation of the Petroleum (Exploration and Production) Act, and thereby came to an erroneous conclusion that Exploration Areas (Blocks 1 and 3A) are pieces of land; the PSA and the Exploration Licences granted the Appellant an interest in the land covered by Exploration Areas in Blocks 1 and 3A.

Counsel submitted that the Tribunal equated petroleum Blocks, which are created under the petroleum law for regulatory and administrative purposes, to Blocks of land created under section 38 of the Registration of Titles Act (the "RTA") for purposes of demarcating and plotting parcels of land. That the term "block" in the context of the Act serves a regulatory function. The "block" delineates areas for petroleum exploration activities; it is not intended to demarcate parcels of land for ownership or real estate purposes. That the area referred to as a "block under the Exploration Licence is referred to as a "Contract Area" under the PSA.

Counsel further contended that the interpretation of the term "block" should be consistent with the overall legal framework of the Act, which is focused on the administration of the exploration and extraction of petroleum resources. That the TAT's characterisation of these blocks as "pieces of land" conflates their regulatory purpose with blocks delineated for purposes of ownership, which are governed by the RTA.

Counsel argued that interpreting "blocks" as regulatory tools is in line with the established practices in the administration of petroleum resources, where the term exploration areas is delineated for conduct of petroleum exploration activities without granting the licensee legal or equitable interest in the land in the exploration area. That the TAT's interpretation deviates from this norm and creates potential inconsistencies with how exploration rights are understood and administered. (*See the persuasive decision of the High Court of Australia; The King Vs Wilson and Another; Ex parte. [1934] pg. 234*)

Submissions in reply by Counsel for the Respondent

Counsel cited the provisions of section 79 (g) and (s) of the ITA to submit that Heritage made a capital gain and derived business income from the disposal of an interest in immovable property located in Uganda. Accordingly, the income being sourced in Uganda is taxable in Uganda.

Counsel contended that what was sold by the Appellant under the SPA are rights and interests in immovable property situated in Uganda under S.79 (g). That the Appellant sold a bundle of rights and interest in the interest documents and not a mere exploration licence. The bundle of rights and interests sold under the SPA created an interest in immovable property in Uganda, and from the reading of the documents (PSAs and JOA), the following rights and obligations, which Heritage sold are ascertained;

i. An exploration license in respect of the contract area with a term not exceeding two years (Article 3.1)
ii. A right to renew the exploration license having fulfilled its obligations under the Act and the Production Sharing Agreement (Article 3.1).
iii. Exclusive right to conduct Petroleum Operations within the contract Area for the term of the exploration License and any production license granted to it (Article 3.3). Petroleum operations are defined in the PSA to mean exploration operations, development operations and production operations (Article 1.1.54).
iv. A right to prepare a development plan and submit an application for a production license to the Minister and if the application met the requirements of section 22 of the Petroleum Act, the right to prompt issuance of the production license.
v. A right to recover all exploration, development, production, and operating expenditures incurred by the licensee from 60% of gross oil production and 70% for gas after deduction of royalty (Article 12).
vi. A right to carry forward to subsequent years all unrecovered costs until full recovery is completed (Article 12.2).
vii. A right to a share of the profit oil (Article 13).

Counsel further contended that Heritage did not just have the right to explore for hydrocarbons but a bundle of rights as seen above, arising from the PSAs and JOA. That these rights are cumulative in nature and subject to the fulfilment of certain obligations; an exploration licence was only one such right in the interest documents and that what Heritage assigned under the SPA was its rights, title,

and interests as granted in the interest documents, not only those rights which had crystallized.

Counsel argued that the Appellant's approach of limiting itself to the exploration interest without reference to all the other interests of exclusivity, production, and profits would not denote the entire value derived under the PSAs and JOA. That the said approach would greatly diminish the value of the interest sold and bring into question the consideration obtained in the SPA. Accordingly, the only correct interpretation is that the Appellant had a bundle of interests, as envisaged under section 79(g) of the ITA.

Counsel submitted that the authorities cited by Heritage are inapplicable in the instant case because whereas it is the position at common law relating to land, the same is not true when it comes to a statutory licence such as the one that was granted pursuant to the Petroleum (Exploration and Production) Act. That the grant of an exploration licence under the Petroleum (Exploration and Production) Act (PEPA) not only gave Heritage the right to carry out exploration activities in the exploration area (the premises that formed the contract area) but also upon discovery of petroleum, a right to be issued with a production licence.

Counsel further argued that based on the above, the Respondent contends that the exploration licence, being a statutory licence differed in substance, and character from the licence referred to under the authorities relied on by Heritage and indeed created an interest in immovable property for Heritage in the exploration areas 1 and 3A of the Albertine Graben.

Counsel further submitted that the Uganda Mauritius DTA, which by virtue of S.88 (1) of the ITA is part of Uganda law, provides in Article 14(1) that gains derived by a resident of a Contracting State (Mauritius) from the alienation of immovable property, referred to in Article 6, and situated in the other Contracting State (Uganda) may be taxed in that other State (Uganda). That the DTA defines immovable property to include: - property accessory to immovable property; livestock and equipment used in agriculture and forestry; rights to which the provisions of general law respecting landed property apply; usufruct of immovable property; rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources, and other natural resources.

Counsel submitted that the PSAs not only gave exclusive rights to Heritage to work, and or use but also accorded Heritage the right to enjoy the fruits of the use of Government's property in the form of cost recovery and profit oil. That it is incorrect for Heritage to assert that it had only an exploration licence.

Counsel argued that a right need not have crystallized or enjoyed to be had. That the premise of the PSA and its significant consideration hinges greatly on the nature of interest derived from the specific contract area, constituted by the exploration area therefore, Heritage had a usufruct in immovable property, which according to the Double Taxation Agreement between Uganda and Mauritius amounts to immovable property. Counsel relied on Megarry and Wade: *The Law of Real Property 6th Edition, at pg. 371; Lenwood Lumber Co. Ltd Vs Phillips [1904] A.C. 405*, and *Street Vs Mountford [1985] 2 All ER 289*, to support their submissions.

Counsel further argued that whereas it is true that the income was received pursuant to the sale of Heritage's rights, those rights arose out of the PSA and JOA that clearly laid out obligations from which the rights would accrue to Heritage. That the Appellant had to conduct business through a branch in Uganda and indeed, had a branch in Uganda within the meaning of s.78 (a) of the Income Tax Act, as it then was. That it is these activities that the Appellant conducted through its branch in Uganda, that fall within the ambit of s.79 (s) and added value to the rights and interests that were sold.

Counsel further argued that whereas the Appellant cited the case of *Kifamunte(supra)* on the proposition that the Court can interfere in a finding of fact as a matter of law if the decision was made without evidence; the finding of TAT was made on the basis of evidence of the PSA, JOA, and SPA to the effect that the Appellant had sold more than an exploration license and accordingly this finding of fact cannot be challenged as a matter of law.

Decision

Section 79 (g) of the ITA will be reproduced for emphasis hereunder.

79. Source of income

"Income is derived from sources in Uganda to the extent to which it is:

(g) derived from the disposal of an interest in immovable property located in Uganda or from the disposal of a share in a company the property of which consists directly or indirectly principally of an interest or interests in such immovable property, where the interest or share is a business asset. [Emphasis added]

I am fully persuaded by the decision in ***Samwiri Kibuuka Vs Eriya Lugeya Lubanga, HCMA 0656 of 2005, (arising out of HCCS No. 0384 of 2001)***, in which, Lameck N. Mukasa. J (as he then was) stated as follows:

> *"It is trite law of statutory construction that where there is a specific legislative provision and a general provision on a particular matter or procedure, the specific provision takes precedence over the general provision."*

In the given circumstances of this appeal, therefore, the specific law on the tax in question was the Income Tax Act, Cap. 340 (now Cap. 338 *(Revised Laws of Uganda, 2023 edition),* and the specific law that governed petroleum exploration, and production was the Petroleum (Exploration and Production) Act, Cap. 150 (now the Petroleum (Exploration, Development and Production) Act, Cap.161 *(Revised Laws of Uganda, 2023 edition)*

In addition, the rules of statutory interpretation require firstly, that words in a statute must be given a plain meaning unless the words and or language used are unclear and ambiguous, and secondly, that the sections in a statute should be construed in its entirety. **(See: *Cape Brandy Syndicate Vs Inland Revenue Commissioners [1921] 1KB 64 at p.71***, and ***Uganda Revenue Authority Vs Kajura, Civil Appeal No. 9 of 2015[2017] UGSC 63*)**

Following the above rule of statutory interpretation that words in a statute must be given a plain meaning unless the words and or language used are unclear and ambiguous, this Court finds that the phrase "interest in immovable property" as provided under s. 79(g) of the ITA is a technical term in the context of petroleum activities, and the ordinary meaning may be misleading in the context of petroleum operations as will be expounded hereunder.

I am fortified in the above finding with the persuasive decision in the High Court of Australia; ***The King Vs Wilson and Another; Ex parte. [1934] pg. 234***, where the Court held that:

> *"The rules of interpretation require us to take expressions in their context and to construe them with proper regard to the subject matter with which the instrument deals and the objects it seeks to achieve, to arrive at the meaning attached to them by those who use them. To ascertain this meaning the compound expression must be taken and not its disintegrated parts."* [Emphasis added]

It's trite law that it is not permissible to interpret a word in accordance with its definition in another statute and more so when the same is not dealing with the cognate subject. ***(See Africa Broadcasting (U) Limited Vs Uganda Revenue Authority (Civil Appeal 52 of 2020) [2024] UGCommC 326,*** which cited with approval the India Supreme Court decision in ***Tata Consultancy Services Vs State of Andhra Pradesh Case No. 2582 of 1992)***

The question that ensues is whether the Appellant derived income sourced from Uganda in the SPA within the meaning of s.79(g) of the ITA, and if so, whether s.79(s) was properly applied?

It is not in dispute that the Appellant Heritage Oil & Gas Limited (Heritage) and Energy Africa (U) Ltd entered into Production Sharing Agreements with the Government of Uganda in relation to Exploration Areas 1 & 3A in the Albertine Graben, and were accordingly granted licences for petroleum exploration.

Energy Africa (U) Ltd later sold its interests to Tullow (U) Ltd, pursuant to which, the Appellant and Tullow (U) Ltd each held equal (50%) participating interests in the exploration areas. By way of a Joint Operating Agreement, the Appellant and Energy Africa (U) Ltd appointed Heritage, a wholly owned subsidiary of the Appellant, as the operator for both exploration areas; the Appellant the pioneer oil company in Uganda made discoveries of oil in Block 3A.

One of the terms in the Joint Operating Agreement between the Appellant and Tullow was that in the event the Appellant wished to dispose of its 50% interest, Tullow had a right of pre-emption. Tullow exercised its right of pre-emption with the result that the Appellant and Tullow entered into a Sale and Purchase Agreement dated 26th January 2010, by which the Appellant sought to transfer the following:- it's rights under the Petroleum Exploration licences for exploration areas in the Republic of Uganda; it's participating interests under the Joint Operating Agreement, and it's rights under the Production Sharing Agreements, subject to the satisfaction of various conditions precedent, which included, among others, obtaining the consent of the Minister for Energy and Mineral Development under section 44 of the Act, and Article 24 of the respective PSAs.

From the above, this Court has established that a bundle of rights was sold by the Appellant to Tullow under the SPA, JOA, and PSA; some of these rights were contingent on the satisfaction of certain conditions for example, the right to petroleum production in the respective PSAs was contingent on the approval by the Minister, and issuance of the production licence if the application met the requirements of section 22 of the Act.

The Tribunal held in its ruling at pgs.31-34 that:

> *"In order to arrive at what the Applicant sold, the Tribunal will restrict itself to the SPA and the documents it referred to, that is the JOA and PSAs only, so as to respect the parties 'freedom to contract'… Under Article 22 the licensee had a right to use all land under the Agreement rent-free (save in respect of surface rentals payable) until the Agreement is terminated. However, the said land and all equipments and other assets became the property of the government. The Licensee had unlimited and exclusive use of such equipments and assets. Under Article 24 the licensee had a right to assign its rights and privileges, duties and obligations under the Agreement with the consent of the Government. Under the JOA, exhibit AB, the Applicant had a participating interest which under Article 1 .45 meant the undivided percentage interest of each party in the rights and obligation from the contract and the Agreement. The contract(s) were the PSAs. Under Article 32 the participating interest was 50%. Under Article 3.3 (A) of the JOA, the Applicant had rights and interests in and under the Contract(s), of all joint property, and any hydrocarbons produced from the contract area. Under the said Agreement the Applicant through its wholly owned subsidiary Heritage Oil and Gas (U) Ltd had rights and duties stated under Article 4.2. These included the rights, functions, and duties of an operator under the Contract and the Applicant had exclusive charge of and conduct of all joint operations. Under Article 4.6 there was a limit on the liability of an operator. Article 7.9 dealt with the use of property. Under Article 9.1 each party had a right and obligation to own, take in kind, and separately dispose of the share of total production available to it from any exploitation area pursuant to the contract. …The licences were issued under Article 3.1 of the PSAs and pursuant to section 9 of the Petroleum (Exploration and Production) Act. It would be inconceivable to say that the Applicant sold only its rights under the licences to Tullow for US$ 1,450,000,000. The licences did not sever or demarcate the portion of the contract area of which each co- licence holder would explore. …The effect of the sale under the SPA did not have substantial effect on the rights under the licence because Tullow already had permission to explore for petroleum in the said areas under the licences as a joint holder. The Applicant paid US$ 250,000 for the licences as signature bonuses. There is evidence that oil was discovered. Without the discovery, the Applicant could not have sold its interests for US$ 1,450,000,000. Definitely, for licences that were bought for US$ 250,000, it is inconceivable that it would be sold*

more than ten times its price, of course without taking into consideration the licences were jointly owned. The Applicant sold more than a licence to Tullow. Both the PSAs and JOA created rights and interests which the Applicant sold to Tullow. It sold inter alia, the right to cost recovery, the right to entitlement to proceeds in the event of production, and also the rights, privileges, and immunities mentioned in the PSAs and JOA. The Applicant sold its participatory interest to Tullow and of course the corresponding entitlements thereto. The Tribunal agrees with the Respondent that the Applicant sold a bundle of rights and interests to Tullow and therefore earned income. The sale of the Applicant's rights and interests was a sale of property. [Emphasis added]

Accordingly, this Court finds the decision of the Tribunal that the Appellant sold a bundle of rights and the Appellant earned income is proper, suffice to add that the said rights are divisible, and cumulative in nature as will be explained below.

Article 1.1.54 of the PSA defines petroleum operations to mean exploration operations, development operations, and production operations.

Section 2 of the Petroleum (Exploration, Development, and Production) Act, Cap 161 defines the term "exploration" to mean the undertaking of activities, whether on land or water, for the purpose of discovering petroleum and includes geological, geophysical, and geochemical surveys and drilling of wells for the purpose of making a discovery and its appraisal.

The PSA, which is one of the contractual documents that sets out the rights and obligations of the Government of the Republic of Uganda, the Appellant, and Energy Africa (Uganda) Ltd, characterises petroleum activities into three namely; exploration operations, development operations, and production operations.

Pursuant to that characterization, and the above definition of the term exploration under the Petroleum (Exploration, Development, and Production) Act, Cap 161, this Court finds that the level of operation by the Appellant at the time of execution of the SPA between the Appellant, Heritage Oil Limited and Tullow was exploration operations and not production. In essence, the exploration licences were primarily concerned with the activity of exploration, which involves surveying, testing and drilling and not utilizing or profiting from the exploration areas.

It is therefore, my considered view that the Appellant's exploration operations in the exploration areas, in which exploration licences were issued and renewed from time to time, explains that the Appellant sold assigned rights in the

exploration licences. This is buttressed in the discovered barrels of oil in Block 3A by the Appellant, which added value to the exploration licences in particular the exploration area of Block 3A.

For the foregoing reason, this Court finds the submission of Counsel for the Respondent that the Appellant's approach of limiting itself to the exploration interest without reference to all the other interests of exclusivity, production, and profits would not denote the entire value derived under the PSAs and JOA, and that the said approach would greatly diminish the value of the interest sold and bring into question the consideration obtained in the SPA is untenable.

For the reasons stated above, this Court finds the contention by the Appellant that they sold their assigned rights in the exploration licence to Tullow is tenable.

The question, therefore, is whether the said assigned rights in the exploration licence amount to interest in immovable property within the meaning of s.79(g) of the ITA?

The phrase "interest in immovable property" is neither defined in the Income Tax Act, Cap. 340 (now the Income Tax Act, Cap. 338 *(Revised laws of Uganda, 2023 edition)* nor the Petroleum (Exploration and Production) Act, Cap 150 (now the Petroleum (Exploration, Development, and Production) Act, Cap. 161*(Revised laws of Uganda, 2023 edition)*

It's trite law that tax legislation is strictly applied and interpreted according to the language with no implied meaning or presumptions. **(See: *URA Vs Siraje Hassan Kajura & Ors, S.C.C.A, No.9 of 2015; Attorney General Vs Bugishu Coffee Marketing Association Ltd [1963] EA 39 at pg. 41***, and ***Cape Brandy Syndicate Vs Inland Revenue Commissioners [1921] 1KB 64 at p.71)***

For the foregoing reason, this Court will adopt the ordinary and natural meaning of the term licence as follows:

"It's permission, usually revocable, to commit some act that would otherwise be unlawful." **(See: *Black's Law Dictionary, 9th edition pg. 1004*)**

Accordingly, this Court finds that the SPA, PSA and JOA granted the Appellant exclusive rights to explore petroleum in the exploration areas however, these rights were not absolute since each activity required the approval of the Government and the renewal of licences from time to time.

Pursuant to the purpose and restrictive nature of licences granted to the Appellant by the Government, the said statutory licences were limited in scope; therefore, it is unimaginable that the Appellant could transfer any interest in immovable property. In other words, when the terms of the exploration licences and the PSAs are construed, having regard to the provisions of the Petroleum (Exploration, Development and Production) Act, it becomes clear that neither the licences nor the PSAs grant the holder of an exploration licence any interest in land. **(See: *sections 58, 60-67 of the Act***, and ***Hancock Prospecting Pty Vs Wright Prospecting Pty Ltd [2012] WASCA 216; (2012) 45 WAR 29*)**

I am fortified in the above finding with the decision of the Supreme Court of Western Australia in ***Commissioner of State Revenue Vs Abbots Exploration Pty Ltd [2014] WASCA, pg. 211***, on the proposition that a statutory licence must be construed having regard to the provisions of the Act under which it is issued.

In addition, section 88 of the ITA provides for the application of an International Agreement between the Government of Uganda and the Government of a foreign country or foreign countries to have effect as if it was contained in the Act.

The Tribunal in its ruling at pgs.37, 40-41 held that:

> *"…Article 6.2 of the Double Taxation Agreement provides that the term "Immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall, in any case, include "property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provision of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources." Halsbury Laws of England 5th Edition, Volume 19, Paragraph 676, page 1 states that whether the property is movable or immovable is determined by the law of the place where the property is situated…In the absence of a statutory definition of immovable property, the Tribunal will resort to rules of statutory interpretation to guide it to define an interest in immovable property under S. 79(g) of the Income Tax Act. <u>The Tribunal will also be guided by the Double Taxation Agreement… Having stated the guiding rules of statutory interpretation, the Tribunal will now address itself to what the Income Tax Act meant by "interest in immovable property" in S. 79(g). This shall be done in light of the Double Taxation Agreement.</u>*

While land law is important in defining "immovable property" the meaning should not differ much from the ordinary sense. The Oxford Advanced Learner's Dictionary 6th Edition, page 598 defines "immovable" as "that cannot be moved". At page 935, the said dictionary defines property as 'a thing or things that are owned' or 'a possession or possessions'. Black's Law Dictionary 8th Edition, page 765 defines "immovable property" as property that cannot be moved; an object so firmly attached to land that it is regarded as part of the land. It considers in its legal aspect, immovable property to include a piece of land. It is not disputed that the ordinary and or legal meaning of 'immovable property' consists of land. Blocks 1 and 3A of the Albertine Graben are pieces of land and therefore constitute immovable property. The nearest interpretation of what constitutes land is provided under the Interpretation Act, S. 2(11) of the Act, which provides that "land" includes messuages, tenements, hereditaments, houses, and buildings of any tenure, and land covered by water. Under the Petroleum (Exploration and Production Act) S. 1 (p) Land includes land beneath water and the subsoil thereof. These definitions do not mention all what land is or what it excludes. At common law, the definition of land includes everything that is attached to it. John T. Mugamba's in Principles of Land Law in Uganda at page 51 says that: "The common law definition of land includes everything that attaches to it. This proposition is summed up in yet another Latin maxim: quic quid plantatur solo, solo cedit Literally translated, it means that which attaches to the land goes with it." At page 52 he says that: "A fixture is a thing attached to land in such a way that in law it becomes part of the land". Megarry's Manual of the Law of Real Property 6th Edition, page 19 states that: "The general rule is "quic quid plantatur solo, solo cedit (whatever is attached to the soil becomes part of it). Thus if a building is erected on land and objects are attached to the building, the word "land" prima facie includes the soil, the building, and objects fixed to it" [Emphasis added]

In ***Fowler Vs Commissioner for Her Majesty's Revenue and Customs, [2020] UKSC 22,*** cited by Counsel for the Appellant, the Supreme Court of the United Kingdom, quoting the Court of Appeal decision in *Revenue and Customs Comnrs v Smallwood (2010) 80 TC 536*, provided guidance on the purpose of Double Tax Treaties. The Court stated as follows:

"In the Smallwood case, the Court of Appeal was considering the UK/Mauritius Double Tax Treaty, at paras 26-29, Patten LJ provided a useful summary of the

correct approach to interpretation, largely based on dicta of Mummery J in *Inland Revenue Comrs v Commerzbank AG [1990] STC 285*. The whole passage repays reading, but para 29 is worth quoting in full:

> *"As explained earlier, the provisions of the DTA [the UK/ Mauritius Double Tax Treaty] are given statutory effect in relation to the taxpayers concerned by section 788 TA 1988 [the Income and Corporation Taxes Act 1988 ("ICTA ")] as a form of relief against what would otherwise be the relevant tax liability under UK law. <u>But the DTA is not concerned to alter the basis of taxation adopted in each of the Contracting States as such or to dictate to each Contracting State how it should tax particular forms of receipts. Its purpose is to set out rules for resolving issues of double taxation which arise from the tax treatment adopted by each country's domestic legislation by reference to a series of tests agreed by the Contracting States under the DTA. The criteria adopted in these tests are not necessarily related to the test of liability under the relevant national laws and are certainly not intended to resolve these domestic issues.</u>*" [Emphasis added]

In the given circumstances of this case, I therefore, do not fault the Tribunal in the applicability of the Double Taxation Agreement, which was signed between the Government of the Republic of Mauritius and the Government of the Republic of Uganda as required under section 88 of the ITA, suffice to add that the purpose of the DTA, which was for avoidance of double taxation, and the prevention of fiscal evasion in regard to taxes on income was misconstrued by the Tribunal.

Following the guidance in Fowler's case above by the Supreme Court of the United Kingdom, and the rules of statutory interpretation discussed above, I find that the assigned rights created by the exploration licences are not to be governed by either general land law or common law but a specific law on the subject and interpreted in accordance with the literal rule of statutory interpretation, which is the cardinal principle in rules of statutory interpretation.

For the foregoing reason, this Court finds that the reference by the Tribunal to exploration areas (Blocks 1 and 3A) of the Albertine Graben as "pieces of land" after the Tribunal had cautioned itself on the rules of statutory interpretation as above but decided to adopt the meaning of the phrase "interest in immovable property" with regard to the DTA, which is not the specific law on the subject; the Tribunal ought to have known that in petroleum activities, Blocks are not delineated pieces of land but are created under the petroleum law for regulatory and administrative purposes. **(See: *Bailey, Diggory, and Luke Norbury Bennion on Statutory Interpretation, 7th Edition pg. 533*)** on the proposition of law that if a word

or phrase has a technical meaning in relation to a particular expertise, it is to be given its technical meaning unless the contrary intention appears.

I am fortified in the above finding with the persuasive decision in ***Federal Court of Australia Collector of Customs Vs Pozzolanic Enterprises Pty Ltd No. QG202 of 1992 and Collector of Customs Vs Pressure Tankers Pty Ltd QG 201 of 1992(Consolidated Appeal)*** on the proposition, whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning, is a question of law- *Jedko Game Co. Pty Vs Collector of Customs (1987) 12 ALD 491; Brutus Vs Cozens [1973] AC 854*, cited by Counsel for the Appellant.

In addition, as a rule of statutory interpretation, it is not permissible to interpret a word in accordance with its definition in another statute and more so when the same is not dealing with the cognate subject. **(**See the India Supreme Court decision in ***Tata Consultancy Services Vs State of Andhra Pradesh***, supra**)**

I, therefore, agree with the submission of Counsel for the Appellant that the interpretation of the term "block" should be consistent with the overall legal framework of the Petroleum (Exploration and Production) Act, Cap. 150(now the Petroleum (Exploration, Development and Production) Act, Cap 161, which provides for the administration of the exploration, and extraction of petroleum resources.

For the reasons stated above, this Court finds that the phrase "interest in immovable property" as provided under s. 79(g) of the ITA, and its interpretation by the Tribunal in regard to Article 6.2 of the DTA, was misconstrued by the Tribunal.

Accordingly, ground one of the appeal succeeds.

Ground 2: <u>The Tax Appeals Tribunal erred in law when it held that section 79(s) of the Income Tax Act applied</u>.

<u>Submissions of Counsel for the Appellant</u>

Counsel submitted that the Appellant has already demonstrated under Ground 1) above that the TAT erred in law when it held that the Appellant sold interests arising from immovable property, and argued that what the Appellant sold under the SPA was movable property i.e. a petroleum exploration licence, and contractual rights under the PSA and JOA in respect of Blocks 1 and 3A. That it was the Appellant's contention before TAT that the gain derived from the sale of the said movable property was governed by the source rule in section 79(h) of

the ITA, which regarded the gain as foreign-sourced because the SPA was signed outside Uganda.

Counsel further submitted that 79(s) of the ITA is a residual provision, which only applies, where the particular type of income is not contemplated by the prior paragraphs in 79(a) - (r) of the ITA. That if the income is of a type contemplated in other paragraphs, then paragraph 79(s) of the ITA cannot apply. That the phrase "any other activity" in section 79(s) of the ITA clearly shows that paragraph 79(s) is a residual provision, which only applies where no other paragraph in 79 (a) - (r) applies.

Counsel relied on the Explanatory Notes to the Income Tax Bill 1997 (which became the ITA) on page 100 which states as follows:

"In determining whether income is derived from sources in Uganda, it is first necessary to characterize the income. Paragraphs (a) - (q) provide source rules for particular types of income. Where the income is of a type not mentioned in paragraphs (a) -(q), then the residual rule in paragraph (s) applies."

Counsel further relied on the case of *Samwiri Kibuuka versus Eriya Lugeya Lubanga, (*supra) in support of their submissions.

Counsel contended that from the foregoing rule of statutory interpretation, section 79(s) is a residual provision, and cannot apply to gains derived from a disposal of movable property because this type of income is specifically provided under section 79(h). That section 79(s) of the ITA must yield to section 79(h) of the ITA; Where section 79(h) of the ITA treats gains from the disposal of movable property as foreign sourced because the agreement for the disposal of such movable property is made and concluded outside Uganda; section 79(s) of the ITA cannot be used as the "backdoor" to displace section 79(h) of the ITA and regard such gains as Ugandan-sourced.

Counsel further contended that on the basis that the subject of the transaction between Tullow and Heritage properly belonged under section 79(h) of the ITA save for the fact that the SPA and the Supplemental Agreement were concluded outside Uganda, which gave rise to foreign-sourced income under section 79(h)); the TAT was not entitled to apply section 79(s) of the ITA.

<u>Submissions in reply by Counsel for the Respondent</u>

As noted earlier, Counsel preferred to argue grounds 1, and 2 together therefore, the above submissions by the Respondent on ground 1 will not be reproduced here but will be considered by the Court in resolving this ground of appeal.

Decision

Section 79(s) of the ITA provides that:

79. Source of income

"Income is derived from sources in Uganda to the extent to which it is:

(s) attributable to any other activity which occurs in Uganda, including an activity conducted through a branch in Uganda. "[Emphasis added]

I have taken into further consideration the rules of statutory interpretation that tax legislation is strictly applied and interpreted according to the language with no implied meaning or presumptions and that the sections in a statute should be construed in its entirety. **(See *Cape Brandy Syndicate Vs Inland Revenue Commissioners***, and ***Uganda Revenue Authority Vs Kajura,*** (supra)

The Tribunal in its ruling at pgs.35-36 held that:

> *"S. 4(1) of the Income Tax Act provides that there shall be a tax known as income tax to be charged for each year of income and is hereby imposed on every person who has chargeable income for the year of income. Under S. 15, the chargeable income of a person for a year of income is the gross income of the person for the year less total deductions allowed under the Act for the year. S. 17(1) provides that the gross income of a person for the year is the total amount of business income, employment income and property income. S. 17(2) states that for purposes of subsection (1) the gross income of a non-resident person includes only income derived from sources in Uganda. S. 17(3) provides that unless otherwise, Part V of the Act which deals with accounting principles shall apply in determining the amounts derived for purposes of the Act. Part VI, in particular S.50, deals with the gains and losses on disposal of assets.*
>
> *S. 18 of the Income Tax Act deals with taxation of business income. Business income refers to any income derived by a person carrying on a business and includes the amount of any gain derived by a person on the disposal of a business asset. Under S. 2(g) of the Act "business" includes any trade, profession, vocation, or adventure in the nature of trade, but does not include employment; Under S. 2(h) "business asset" means 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 a company. Since the Applicant disposed of a business asset, Part VI of the Act applies. It is not in dispute that the Applicant is a non-resident person. However, the Act, s.*

17(2) requires for a non-resident person, income should be derived from sources within Uganda. The source of income of a non-resident person is determined in accordance with the source rules stated in S. 79 of the Income Tax Act.

The jurisdiction of a state to tax a non-resident taxpayer is based on the existence of a nexus connecting the person sought to be taxed with the jurisdiction which seeks to tax. The connection can be based on the residence of the person or the business connection within the territory of a taxing state or a situation within the state where the money or property from which the taxable income is derived. Residence is not a necessary condition for tax liability if there is sufficient connection between the source of income, profit, or gain and the taxing jurisdiction then such income, profit or gain may be taxable. The Applicant had business in Uganda which qualified it to be a taxpayer."

For the avoidance of doubt, section 79(h), which Counsel for the Appellant relied on provides that:

79. Source of income

"Income is derived from sources in Uganda to the extent to which it is:

(h) derived from the disposal of movable property, other than goods, under an agreement made in Uganda for the sale of the property, wherever the property is to be delivered." [Emphasis added]

The term "make" is defined in *Black's Law Dictionary, 9th edition pg. 1041*, to mean legally perform, as by executing, signing or delivering a document.

The term "movable property" is defined in *Black's Law Dictionary*, *9th edition pg.1110,* to mean a tangible or intangible thing in which an interest constitutes personal property; anything that is not so attached to land as to be regarded as part of it as determined by local law.

In the circumstances of this appeal, this Court finds that the Appellant disposed of its assigned rights in the exploration licences, albeit contractual, which constitutes intangible movable property within the meaning of s.79(h) above, from which the SPA was signed outside Uganda.

I find the submission of Counsel for the Appellant that s. 79(s) of the ITA is a residual provision, which only applies where the particular type of income is not contemplated by the prior paragraphs in 79(a) - (r) of the ITA is tenable.

For the foregoing reason, this Court finds that where s.79(h) of the ITA would apply, which is not the case here, the application of S.79(s) by the Tribunal, which is a residual provision would therefore be proper.

In addition, this Court having allowed ground 1 of the appeal as above, and further taken into account the argument by Counsel for the Appellant that the source rule under section 79(h) of the ITA, regarded the gain as foreign-sourced because the SPA was signed outside Uganda, finds that the application of s.79(s) as a residual provision was proper by the Tribunal.

Consequently, this Court finds that the exploration licences that were primarily concerned with exploration operations, which involved surveying, testing and drilling in the exploration areas, constitute activities carried out by the Appellant within the meaning of s.79(s) of the ITA, from which the Appellant gained income, which was taxable under the ITA.

Accordingly, this ground of appeal fails.

Ground 3: The Tax Appeals Tribunal erred in law when it disallowed the addition of the admitted and agreed exploration cost of US$ 150, 000,000 to the cost base in calculating the capital gain.

Submissions of Counsel for the Appellant

Counsel contended that the Respondent failed to comply with section 52(6) of the ITA, which provides for expenditures incurred to alter or improve an asset to be added to its cost base, provided these expenditures have not been allowed as a deduction elsewhere.

Counsel further contended that contrary to sections 52(2) and (6) of the ITA, the Respondent, while calculating the capital gain, did not consider the exploration expenditure of US$ 150,000,000, which the Appellant incurred to improve the value of the licences, and or activities that led to the discovery of oil.

Submissions in reply by Counsel for the Respondent

Counsel submitted that the law on taxation of petroleum activities in Uganda and the PSA, provide that cost is deductible only against cost oil. That section 89C of the ITA pursuant to the 2010 Amendment, provides for the treatment of expenditures incurred in petroleum operations; specifically, section 89C (1) provides that amounts deductible in relation to petroleum operations are allowed as a deduction only against cost oil derived by the contractor from those operations in the contract area for that year.

Counsel relied on the definitions of the terms "cost oil", and "contractor" under section 89A of the ITA, to submit that the Appellant having entered into a Petroleum Agreement with the Government of Uganda is a contractor. Accordingly, under section 89B (1), the Appellant, being a contractor is subject to tax in accordance with the Income Tax Act subject to modifications in Part IXA.

Counsel further submitted that section 52(6) of the ITA does not give the basis for including petroleum operation expenditures in the contractor's cost base. That a reading of section 52 and Part IXA of the ITA, makes it clear that in the circumstances, section 89C takes precedence over section 52.

Counsel contended that the Appellant was not taxed on gross proceeds or on expenditure as alleged and the correct cost base was considered by the Respondent in determining the capital gain, as such there was no excess tax collected by the Respondent.

Decision

Before I delve into the merits of this ground, it is important to give a brief background on the terms "exploration and "exploration expenditures" as below.

In 2008, the ITA was amended to introduce Part IXA, which deals with the taxation of petroleum operations. The Income Tax (Amendment) Act, 2009 also introduced the 8th Schedule to the ITA, which remained in force until 1st July 2015, when it was repealed. In the then Eighth Schedule to the ITA, which was introduced by the Income Tax (Amendment) Act, 2009, under paragraph 1 thereof, the term "exploration expenditure" was broadly defined to include aerial, geophysical, geochemical, paleontological, geological, topographical and seismic surveys and studies and their interpretation, core hole drilling and water well drilling, as well as a long list of other activities, including general and administrative expenses.

I have taken into account the submission of Counsel for the Respondent that the assessments, which are the subject of this appeal were issued in July and August 2010, and that section 89Q of the ITA, which introduced the 8th Schedule was repealed by section 22 of the Income Tax (Amendment) Act, 2010 that commenced on 1st July 2010 therefore, by necessary implication, Schedule 8 of the ITA ceased to have any effect on 30th June 2010.

Section 1 (j) of the Petroleum (Exploration and Production) Act, Cap 150, defined the term "exploration" to mean exploration for the purpose of discovering

petroleum, and includes geological, geophysical, and geochemical surveys, exploration drilling and appraisal drilling in land in Uganda.

Section 89A (1) of the ITA, which was introduced by the Income Tax (Amendment) (No. 2) Act, 2008 defined "exploration expenditure" as expenditure incurred, prior to approval of a development plan, in undertaking exploration operations, including in the acquisition of a depreciable asset used in those operations and an expenditure treated as exploration expenditure under a petroleum agreement, but does not include expenditure that is not allowed under section 22(2) or 23 of the ITA.

It is noteworthy that expenditure is classified and quantified for the purpose of determining the deductions to be taken by a taxpayer from the gross income, to arrive at chargeable income.

The well-established principle in section 4(1) of the Income Tax Act, Cap. 338 *(Revised Laws of Uganda, 2023 Edition)* is that income tax is imposed not on gross income but on chargeable income. This proposition is illustrated as follows: -

The Income Tax Act, Cap. 338, imposes a tax on every person who has chargeable income for the year of income. The chargeable income of a person for a year of income is defined under section 15 thereof, to mean the gross income of a person for the year less deductions allowed under the ITA for the year. Section 17(1)(a) of the Income Tax Act, Cap. 338 defines gross income to include business income.

Section 18(1)(a) of the Income Tax Act, Cap. 338 provides that:

> "(1) Business income means any income derived by a person in carrying on a business and includes the following amounts, whether of a revenue or capital nature-
>
> (a) the amount of any gain, as determined under part VI of the Act which deals with gains and losses on disposal of assets, 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."

Section 22 of the Income Tax Act, Cap. 338, prescribes the expenditures allowed to be deducted, and those that are not allowed to be deducted. Under section 22(3)(c) of the Income Tax Act, Cap. 338, where an expenditure is recoverable by the taxpayer under any insurance, contract, or indemnity, a taxpayer is not allowed to deduct such expenditure from gross income. The rationale is that a

taxpayer who has recovered the expenditure under a contract has been restored to the same position as if the taxpayer did not incur that expenditure.

In the context of oil and gas, the impact of section 22(3)(c) is that a licensee who has recovered expenditure through the relevant contractual provision such as under a Petroleum Agreement, is not allowed to again deduct such expenditure against the licensee's share of profit oil.

On the other hand, a licensee who has sold an exploration licence has done so before producing oil; as such, the licensee has not recovered (and will not recover) any exploration expenditure through cost oil. The exploration expenditure incurred by such a licensee is included in the cost base of the exploration licence under sections 50(2) and 50(6) of the Income Tax Act, Cap. 338, as expenditure incurred to acquire and improve the licence.

Section 48 of the Income Tax Act, Cap 338, provides that capital gain is the amount by which the consideration received from the sale of an asset exceeds the cost base of an asset at the time of disposal. [Emphasis added]

Capital gains tax is therefore imposed not on consideration, but on gain. (i.e. the difference between consideration and the cost base, being the costs incurred to acquire and improve the asset)

Section 50(2) of the Income Tax Act, Cap. 338, defines a cost base of an asset purchased, produced, or constructed by the taxpayer, as the amount paid or incurred by the taxpayer in respect of the asset, including incidental expenditures of a capital nature incurred in acquiring the asset, and includes the market value at the date of acquisition of any consideration in kind given for the asset.

The Tribunal in its ruling at pgs. 69-70 held that:

> *"Apart from the costs of the signature bonuses which were included in the cost base, the Income Tax Act allowed the Applicant other deductions which were not allowed under S. 22 to be added but ought to have been included if they altered or improved the asset, Under S.102 of the Income Tax Act and S. 18 of the Tax Appeals Tribunal Act, the onus is on the taxpayer to prove that the assessment made by the Commissioner is excessive or erroneous. At the scheduling, it was agreed that the Applicant incurred costs of US$ 150,000,000. The Tribunal cannot discern from the said US$ 150,000,000, which amount was used to alter or improve the assets or interests which were sold to Tullow. Mr. Atherton testified that the Applicant incurred costs for a multiplicity of activities including management,*

supervision, legal fees, travel, marketing, drilling, analysis, processing, sizing (Sic) and interpreting data were incurred in the acquisition of the asset. The Applicant did not adduce evidence to show which of the said activities and costs incurred in respect thereof were used to alter and improve the interests or assets. By looking at the figure of US$ 150,000,000, the Tribunal cannot arrive at an amount that ought to be deducted and was not and should be added to the cost base." [Emphasis added]

I have taken into consideration the above provisions on the definition of the terms "exploration and "exploration expenditure" to find that the activities undertaken by a licensee as indicated above by the Tribunal in an exploration licence granted under section 58 of the Petroleum (Exploration, Development and Production) Act, Cap. 161*(Revised Laws of Uganda, 2023 Edition),* which are renewed from time to time, constitute exploration activities and the costs associated with those exploration activities, which subsequently improve the value of the licence, as is the case here, constitute exploration expenditure.

Given the above background, this Court finds that allowable deductions under section 22 of the Income Tax Act, Cap. 338, apply to a person, who is granted or purchases an exploration licence and goes on to generate income from producing oil while section 50(2) and 50(6) of the Income Tax Act, Cap. 338, applies to a licensee who has sold an exploration licence. The latter provision allows a seller of an exploration licence to recognise the exploration expenditure incurred as forming part of the cost base for purposes of capital gains tax.

An excerpt from an Article on ***"Cost Recovery Analysis in Production Sharing Contract in Upstream Oil and Gas Industry (Study on Gas Upstream Industries Indonesia): Vol.1, Issue 6, January 2021"*** at pg. 1039-1040), relied upon by Counsel for the Respondent provides that:

"Cost recovery varies between countries even within a country depending on the agreement when the contract was signed. In Production Sharing Contracts, the contractor is entitled to receive a refund for as long as it does not exceed a certain percentage of annual production in the contract area; this proportion is known as cost oil. Shortages that have not been obtained are carried forward for the year. The following year, with the same principle, cost oil is valued using the market price of crude oil before it is compared with recoverable costs. The maximum limit of cost oil is known as a cost stop (cost recovery ceiling), which varies depending on the country and contract but usually ranges between 30 and 60% although it

can be 100%. Cost stop prices affect the economy, the greater the better the return on investment. "

In the circumstances of this appeal, it is notable that whereas a purchaser of an exploration license may inherit the cost recovery provisions of an applicable Petroleum Agreement for capital gains tax purposes, under the provisions of section 50(2) and 50(6) of the Income Tax Act, Cap. 338, it still allows the seller (Appellant herein) of the exploration licence to deduct the unrecovered exploration expenditure from the consideration received when computing the capital gains tax.

For the foregoing reasons, this Court finds that the exploration costs of US$ 150, 000,000, ought to have been added to the cost base in the computation of capital gains tax owing from the Appellant to the Respondent. This means that the capital gains tax must be based on an amount that excludes the impugned US$ 150000000 since this sum was part of the cost base incurred by the Appellants; and therefore not taxable.

Accordingly, this Court faults the Tribunal for including the exploration costs of US$ 150, 000,000 to the cost base in calculating the capital gains tax; and yet at the scheduling proceedings the parties had agreed that the Applicant incurred exploration costs of US$ 150,000,000 ***(See: Kakooza JB Vs Electoral Commission & Anor [2008] KALR 138***, where the Court noted that the most appropriate time to require a party to prove an admitted fact otherwise than by such admission would be at the pre-hearing scheduling conference, though the Court may exercise the discretion later in the proceedings).

Consequently, this Court finds that the Tribunal sought to impose on the Appellant a burden to prove admitted facts contrary to s.57 of the Evidence Act, Cap.8 *(Revised Laws of Uganda, 2023 edition)*

For the above reasons, this ground of appeal succeeds.

Ground 4: The Tax Appeals Tribunal erred in law in failing to hold that there could be no tax liability by virtue of the "Convention between the Government of the Republic of Mauritius, and the Government of the Republic of Uganda for the avoidance of Double Taxation and the Prevention of Fiscal evasion with respect to Taxes on Income" and section 88 of the Income Tax Act, even if (which is denied) there would otherwise have been a tax liability.

Submissions of Counsel for the Appellant

Counsel submitted that section 88(1) of the ITA provides that an international agreement entered into between the Government of Uganda and the Government of a foreign country or foreign countries shall have effect as if the agreement was contained in the ITA. That under section 88(6) of the ITA, the term "international agreement" means, inter alia, an agreement with a foreign government providing for the relief of double taxation and prevention of fiscal evasion.

Counsel contended that there is in force a Convention between the Government of the Republic of Mauritius and the Government of the Republic of Uganda for the avoidance of Double Taxation and the Prevention of Fiscal Evasion (hereinafter referred to as the "Uganda - Mauritius DTA"), whose effective date is 1st July 2005, and was in force at the time the Appellant concluded its transactions with Tullow under the SPA and Supplemental Agreement. Therefore, Uganda-Mauritius DTA is an international agreement within the meaning of section 88 of the ITA.

Counsel further submitted that section 88(2) of the ITA provides, in material part, that to the extent that the terms of an international agreement to which Uganda is a party are inconsistent with the provisions of the ITA, or any other law of Uganda dealing with matters covered by the international agreement, the terms of the international agreement prevail over the provisions of the ITA and any other law of Uganda dealing with matters covered by the international agreement.

Counsel further contended that the Uganda- Mauritius DTA is based on the Model Tax Convention prepared by the OECD. That the OECD Commentary on the Model Tax Convention makes it clear that the DTA operates only to exclude a tax liability that would have otherwise arisen under domestic law of the contracting state, but does not impose a tax liability where none is imposed under domestic law.

Counsel argued that had the Tribunal not erroneously found that the Appellant had a permanent establishment in Uganda, the Tribunal would have concluded that Article 14(4) of the Uganda - Mauritius DTA, provided relief to the Appellant against Ugandan tax liability, if any arose under section 79(s) of the ITA.

Submissions in reply by Counsel for the Respondent

Counsel submitted that the Appellant had a permanent establishment in Uganda and thus the Respondent is entitled to subject to tax the profits that arise out of the said permanent establishment. That the provision of Article 5 of the Uganda – Mauritius DTA does not refer to ownership of the structures utilized for purposes of

drilling oil. The said provision simply makes reference to a fixed place of business through which the business of an enterprise is wholly or partly carried on.

Counsel further submitted that indeed the Government of Uganda and Mauritius agreed to insert Article 5(h) to the DTA, which allows for exploration activities to constitute a permanent establishment; in this instance therefore, the above provision applies to the Appellant, who conducted exploration in Uganda and thus sourced income from Uganda.

Counsel contended that according to the Joint Operating Agreement, clause 1.15, thereof, Heritage performed its obligations under the contract by way of its wholly owned subsidiary Heritage Oil and Gas (U) Ltd. That Heritage Oil and Gas (U) Ltd being a wholly owned subsidiary of the Appellant in Uganda, leads to the conclusion that Heritage had a permanent establishment in Uganda, within the meaning of the DTA.

Counsel cited the decision in *Spain Vs Roche Vitamins: Tribunal Supremo. Contentious Chamber Madrid, 12/01/2012, 1626/2008,* where the Spanish Court stated that a subsidiary is a fixed place of business of a foreign entity if all the activities of the subsidiary are directed, organized, and managed by the parent, to submit that it will thus constitute a permanent establishment under Article 5 (4) of the DTA.

Counsel further relied on *Article 26 of the Vienna Convention on the Law of Treaties*, which provides that; "Pacta sunt servanda" that is "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." to submit that the actions of the Appellant in changing residence from the Bahamas to Mauritius was NOT in good faith and was made with the intention of benefiting from the treaty and this amounts to treaty abuse.

Counsel argued that even under the Uganda –Mauritius DTA, the income sourced in Uganda is subject to tax in Uganda, and thus the Appellant is liable to tax in Uganda since Heritage had a permanent establishment in Uganda.

Decision

This Court having found as above that s.79(g) was not applicable, and that s.79(s) applied, the question that ensues is whether the Uganda - Mauritius DTA, provided relief to the Appellant against Ugandan tax liability under section 79(s) of the ITA.

Notably, the Uganda- Mauritius DTA is based on the Model Tax Convention of the Organisation for Economic Co-operation and Development *(OECD)*. The OECD Commentary on the Model Tax Convention makes it clear that the DTA operates

only to exclude a tax liability that would have otherwise arisen under domestic law of the contracting state, but does not impose a tax liability where none is imposed under domestic law. (See *Article 26 of the Vienna Convention on the Law of Treaties*, which provides that; "*Pacta sunt servanda*" that is "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*")

The Tribunal in TAT No.26/2010 ruling at pg.54 held that:

> "*Under Article 5 of the Uganda – Mauritius DTA, for the purposes of the Agreement, the term "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on. Under Article 5(2)(g) of the Double Taxation Agreement, the term permanent establishment shall include a mine, an oil and gas well, a quarry or any other place of extraction of natural resources. Oil was discovered in Block 3A. Under Article 5(3)(a) the permanent establishment likewise encompasses a building site, a construction, installation or assembly project or supervisory activities in connection therewith, only if the site, project or activity lasts more than 6 months. It is not denied that the Applicant did not carry on business through permanent establishments in Uganda namely the structures in Block 1 and 3A. These permanent establishments are immovable property. Under Article 5(6) of the Double Taxation Agreement an enterprise shall be deemed to have a permanent establishment if its agent of an independent status is acting in the ordinary course of their business. Heritage Oil & Gas (U) Ltd is deemed to have been acting in the ordinary course of business of exploration for the Applicant. Under the Double Taxation Agreement, one would look at where the permanent establishments which are the subject of the sale are, and not where the agreement was signed.*" [Emphasis added]

In TAT No. 28/2010 ruling at pgs. 18-20, the Tribunal held that:

> "…*Though the Tribunal agrees with the Applicant that the said payment was not for the sale of an interest of immovable property, the contingent amount was incidental to and part of the consideration. The Applicant sold a bundle of rights and interests of which the sale of interest in immovable property was part and parcel of the property sold. For an item of income to be taxed at all it must fall within an express taxing provision contained in the Income Tax Act. Under S. 79 (s) any income attributable to any activity which occurs in Uganda is taxable. The question then is: whether the payment of the US$ 100,000,000 was attributable to an activity which*

occurred in Uganda. The Double Taxation Agreement does not restrict the Contracting States from taxing only income from immovable property. Article 7 of the Double Taxation Agreement allows for the taxation of other profits than those derived from the alienation of immovable property. Under the said Article a contracting state is allowed to tax business profits. Under Article 7 business profits are taxable if they can be attributed to the taxing state. Article 7.1 states that the profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other state but only so much of them as is attributable to that permanent establishment. The term permanent establishment is defined under Article 5 of the Double Taxation Agreement to include a mine, an oil or gas well, a quarry or any other place of extraction of natural resources. The receipt of US$ 100,000,000 by the Applicant can be attributed to its business or the sale of its interest of an oil well in Uganda. The payment of the US$ 100,000,000 depended on the grant of a tax relief by the Government of Uganda and on the sale of the Applicant's interest in the oil well. The Government did not grant a tax relief and therefore the payment of the contingent amount was solely attributable to the permanent establishment in Uganda. The receipt of the US$ 100,000,000 was a business profit arising from the SPA and may be taxable…If the application of Article 7 of the Double Taxation Agreement and S. 79(s) of the Income Tax Act is more convenient to apply to the taxation of the subject matter, there is no reasonable cause why the Respondent should stick to applying Article 6 of the Double Taxation Agreement and S. 79(g) of the Income Tax Act.

The Respondent cannot elect to charge the profits under one section to the exclusion of the others if there is another section applicable. The Tribunal having looked at the source rules to determine which sections are relevant or applicable to the transaction, rules that S. 79(s) of the Income Tax Act is applicable. Under S. 79(s) any income attributable to any activity which occurs in Uganda is taxable. The payment of the US$ 100,000,000 is attributable to the sale of the Applicant's bundle of interests and rights as stated in the SPA in Uganda. The omission or the failure to obtain a tax relief from the Government is attributable to an event in Uganda." [Emphasis added]

According to section 88 (1) of the ITA, the Uganda - Mauritius DTA shall have effect as if the agreement was contained in the ITA, and under s.88(2), the DTA takes precedence over any other law of Uganda to which Uganda is a party, to the extent of the inconsistent terms of an international agreement with the provisions of the ITA.

In accordance with the OECD Commentary on the Model Tax Convention, the DTA operates only to exclude a tax liability that would have otherwise arisen under domestic law of the contracting state but does not impose a tax liability where none is imposed under domestic law. (***See: Fowler Vs Commissioner for Her Majesty's Revenue and Customs***, (supra), in which the Court noted that the purpose of Double Taxation Agreements is to set out rules for resolving issues of double taxation that arise from the tax treatment adopted by each country's domestic legislation by reference to a series of tests agreed by the Contracting States under the DTA.

In the given circumstances of this appeal, this Court does not fault the Tribunal in the applicability of the Double Taxation Agreement, which was signed between the Government of the Republic of Mauritius and the Government of the Republic of Uganda as required under section 88 of the ITA however, the phrase "permanent establishment" in the DTA was misconstrued by the Tribunal by failing to take into account the purpose of the DTA, which was for the avoidance of double taxation, and the prevention of fiscal evasion in regard to taxes on income.

Article 5 (2) of the Uganda - Mauritius DTA defines the phrase "permanent establishment "to include:

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a warehouse, in relation to a person providing storage facilities for others;

(g) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources; [Emphasis added]

(h) an installation or structure used for the exploration of natural resources; and

(i) any premises used as a sales outlet or for receiving or soliciting orders.

3. The term "permanent establishment" likewise encompasses:

(a) a building site, a construction, installation or assembly project or supervisory activities in connection therewith only if the site, project or activity lasts more than 6 months;

(b) the furnishing of services including consultancy services by an enterprise of a Contracting State through employees or other personnel engaged in the other Contracting State, provided that such activities continue for the same or a connected project for a period or periods aggregating more than 4 months within any 12-month period…"

I have taken into consideration the above definition of the phrase" permanent establishment and specifically under Article 5(g) of the Uganda - Mauritius DTA, to conclude that the oil wells discovered in Kingfisher 1, 2, and 3, located in Albertine Graben, formed part of the exploration activities in the exploration areas, in particular Block 3A, where barrels of oil was discovered that added value to the exploration licences, in which the Appellant disposed its assigned rights in the SPA together with the contractual obligations in the PSA and JOA.

It is my considered view, therefore, that the said alienated rights constitute movable property attributable to the Appellant's permanent establishment in the said Blocks within the meaning of Article 14 (2) of the Uganda - Mauritius DTA.

Article 14 of the Uganda - Mauritius DTA provides for capital gains as follows:

"1. Gains derived by a resident of a Contracting State from the alienation of immovable property, referred to in Article 6, and situated in the other Contracting State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the ether Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base, may be taxed in that other State. [Emphasis added]

3. Gains from the alienation of ships or aircraft operated in international traffic and movable property pertaining to the operation of such ships or aircraft shall

be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

4. Gains from the alienation of any property other than that mentioned in paragraphs 1, 2, and 3 shall be taxable only in the Contracting State of which the alienator is a resident."

From the reading of Article 14 of the DTA cited above, I find that under Article 14(2) of the Uganda - Mauritius DTA, (the equivalent of Article 13 of the Model Tax Convention of OECD), the Appellant had a permanent establishment in Uganda within the meaning of Article 5(2)(g) of the DTA therefore, the Uganda - Mauritius DTA would not provide relief against Uganda tax liability in respect of capital gains derived from the alienation of such movable property, which forms part of the business property of the Appellant's permanent establishment in Uganda.

I am fortified in the above finding with the decision in *Fowler's case* above, in which the Court while considering the purpose of Double Taxation Agreements, observed that the criteria adopted in these tests are not necessarily related to the test of liability under the relevant national laws and are certainly not intended to resolve these domestic issues.

Accordingly, as the Tribunal rightly stated in its ruling above, that the government did not grant a tax relief and therefore the payment of the contingent amount was solely attributable to the permanent establishment in Uganda, this court upholds that decision.

Accordingly, this ground fails.

Ground 6: The Tax Appeals Tribunal erred in law when it held that the assessments dated 6th July 2010 and 19th August 2010, were validly issued.

Submissions of Counsel for the Appellant

Counsel contended that that the first assessment issued on 6th July 2010, and the additional assessment issued on 19th August 2010 were not validly issued for a number of reasons.

To begin with, the first assessment was issued before the Appellant had concluded the transaction since no ministerial consent had been granted to approve the transaction, as required by section 44 of the Petroleum (Exploration and Production) Act. That according to the condition stated in the Minister's consent letter dated 5th July 2010, the approval for the transfer of the licence would only become effective upon the fulfilment of a specific condition; the

Appellant must either pay the taxes or demonstrate to the satisfaction of the Government of the Republic of Uganda that the taxes would be paid immediately upon demand.

Counsel argued that until one of these conditions is met, the approval remains conditional and not effective, therefore, the first assessment, which was issued by the Respondent when the Appellant had no chargeable income was contrary to section 4(1) of the ITA, and therefore not validly issued.

Secondly, the assessment was invalid because it was issued under the wrong law. The assessment was made under S. 95 of the Income Tax Act on the basis that the Applicant had defaulted to furnish a return. That the Applicant never defaulted to file a return; it filed its returns in Mauritius, and cannot be deemed to have defaulted when the year of income had not ended and the return was not due.

Thirdly, the law only permits the Commissioner to issue an assessment before a taxpayer files a return, when the circumstances of section 95(4) have been satisfied. That TAT's holding that no law prohibits the Commissioner General from issuing an assessment before the taxpayer files a return is erroneous since it presupposes that the discretion given to the Commissioner under section 95(4) of the Act is absolute and without limitation.

In addition, the holding that the Tribunal does not fault the judgment of the Commissioner General and that the Commissioner General did not act dishonestly, vindictively, or capriciously is not legally tenable. That the Commissioner General did not use the best judgment and acted contrary to the law.

Submissions in reply by Counsel for the Respondent

Counsel submitted that the notices of assessment specify that they were issued under section 95 along with sections 96(3) and 158 of the ITA. That specific reference to section 96(3) in the assessment was further emphasis that the assessment was based on the Commissioner's "best judgment" and not on the failure to file a return. That the decision of the Commissioner was made within her best judgment, given the Appellant's conduct as described.

Counsel contended that the powers granted to the Commissioner under sections 95, 96(3), 92(8), and 158 of the ITA override the forty-five-day due date requirement under section 103 of the ITA and that the Tribunal rightly found that there was no procedural impropriety.

Decision

Notably, one of the essential requirements of an effective tax collection system is certainty and consistency; this resonates with the proposition that tax is a creature of statute. ***(See: A.V Fernandez Vs State of Kerala (AIR 1957 SC 657)***

The Tribunal in its ruling at pgs.60-64 held that:

> *"The normal practice is that taxes are charged on income derived by the taxpayer. However, there are times when income may be taxable when it has actually not been received for instance when goods have been sold on credit, or rental income where provisional returns based on estimated receipts have been filed. The law does not expressly prohibit the Commissioner General from issuing an assessment when income has not been received. There is also no law that prohibits the Commissioner General from issuing an assessment before the taxpayer files a return... What the law does not prohibit it usually allows.*
>
> *The Law merely requires the Commissioner General to exercise her discretion when requiring a taxpayer to furnish a return and use her best judgment when issuing an assessment under S. 92(8) and S. 95(4) of the Income Tax Act respectively ... The Commissioner General testified that the Applicant was treaty shopping. It was registering in different jurisdictions in order to reduce its tax liability. Registration per se does not confer a taxpayer status on a person. It is the business activity or operations, offices, and incorporation of the person that confer taxpayer status. Though the fear of the Respondent was unfounded that by the Applicant moving from jurisdiction to jurisdiction, it would not meet its tax obligations in Uganda, the Tribunal notes that the Applicant was selling its only asset in Uganda and was about to leave...*
>
> *This was sufficient to compel the Commissioner General to exercise her judgment and issue an assessment. The judgment of the Commissioner General to issue an assessment when a return had not been filed and when the Applicant had sold its only asset and was about to leave the country, cannot amount to 'gross unreasonableness'. The Tribunal does not fault the judgment of the Commissioner General. The Commissioner General did not act dishonestly, vindictively or capriciously…*
>
> *The Applicant was allowed to object to the Respondent's actions which it did, an objection decision was made to that effect. Therefore, it was not denied its right to be heard under natural justice. There was no serious*

anomaly and miscarriage of justice occasioned to the Applicant" [Emphasis added]

Section 95 of the ITA provides in the relevant parts hereunder;

"(1) Subject to section 96, the Commissioner shall, based on the taxpayer's return of income and any other information available, make an assessment of the chargeable income of a taxpayer and the tax payable thereon for a year of income within seven years from the date the return was furnished. [Emphasis added]

(4) In the circumstances specified in section 92(8) in lieu of requiring a return of income, the Commissioner may, according to the Commissioner's best judgment, make an assessment of the chargeable income of the taxpayer and the tax payable thereon for the year of income." [Emphasis added]

Section 92(8) of the ITA provides in the relevant parts as follows:

"Where during a year of income-

c) a taxpayer is about to leave Uganda indefinitely;

(d) a taxpayer is otherwise about to cease activity in Uganda; or

(e) The Commissioner otherwise considers it appropriate, the Commissioner may, by notice in writing, require the taxpayer or the taxpayer's trustee, as the case may be, to furnish, by the date specified in the notice, a return of income for the taxpayer for a period of less than 12 months." [Emphasis added]

Section 96(3) of the ITA provides that:

"Notwithstanding subsection (1), the Commissioner may make an assessment under section 95 on a taxpayer in any case the Commissioner considers necessary."

I have taken into further consideration the rule of statutory interpretation that the sections in a statute should be construed in its entirety, and having read the above sections together, this Court finds as follows:

The phrase "subject to "as provided under s.95(1) of the ITA, implies that the section referred to, which is s.96 takes precedence over this provision, therefore, this Court finds no fault with the decision of the Tribunal as above. The Commissioner exercised her discretionary powers in the assessment of the tax payable by the Appellant based on the information that the Appellant was going

to sell its only asset in Uganda and was about to leave the country. **(See: *Uganda Revenue Authority Vs Rabbo Enterprises (U) LTD & Anor, S.C.C.A No. 12 of 2014*)**

The phrase "best judgment" as provided under s. 95(4) of the ITA, implies that the Commissioner has the discretion to make a decision based on the available information, and considering his or her experience, knowledge, and analysis of all the factors, that conclusion was the most appropriate in a given situation.

Consequently, this Court finds that the Commissioner exercised her discretion based on the information that the Appellant was going to sell its only asset in Uganda and was about to leave the country, and yet the Appellant had not filed any returns, therefore, the said assessment based on the best judgment by the Commissioner cannot amount to gross unreasonableness.

It's trite law that an instrument or document that purports to be in such form shall not be void by reason of any deviation from that form, which does not affect the substance of the instrument. **(See: *Cable Corporation (U) Ltd Versus Uganda Revenue Authority (Civil Appeal No 1 of 2011) 2011 UGCommC 88*)**.

In the given circumstances of this appeal, although the Commissioner did not comply with the requirement of the 45 days' notice, this Court finds that the exercise of such discretion did not render the assessments invalid for want of form since the assessments were valid in substance.

This Court further finds that the exercise of such discretion by the Commissioner was not prejudicial to the Appellant, who had the opportunity to object and objected, in which an objection decision was made by the Respondent.

It is noteworthy that although, the Commissioner's exercise of discretion was not prejudicial to the Appellant, the law must not be flawed by the exercise of such discretionary powers. **(See: *R Vs Commissioner of Income Tax Exparte SDV Transami(K) Limited*)**, on the proposition that, in the case that the Commissioner notwithstanding its mandate to establish tax due "must not apply methods that are random and wanting in regularity …"

In addition, this Court finds the submission by Counsel for the Appellant that the Appellant paid US$ 121,477,500 eleven (11) months in advance of the due date for the payment of capital gains tax, is untenable for the reason that the Commissioner did not otherwise consider it appropriate to require the taxpayer to furnish a return of income for a period of less than 12 months, when the Commissioner had already applied the best judgment approach under s.95(4) of the ITA.

For the foregoing reasons, this ground of appeal fails.

Consequently, this Court finds that the consolidated appeal partially succeeds on grounds 1 and 3.

Accordingly, this Court makes the following declarations and orders:

(1) The computation of the capital gains tax excludes the sum of US$ 150,000,000, which formed part of the cost base, and therefore not subject to tax.
(2) The Respondent shall compute the capital gains tax in accordance with the order in (1) above, and the Appellant shall be entitled to a refund of the excess sum in the contested amount herein.
(3) The computed amount in (2) above, and as required under section 31 (2) of the Tax Appeals Tribunal Act, Cap. 341(*Revised Laws of Uganda, 2023 Edition*), the Respondent shall pay statutory interest to the Appellant on the excess tax at a rate of 2% per month, prescribed in section 123(4) of the Income Tax Act, from the date the Appellant paid the excess tax till the Respondent refunds the tax in full.
(4) The Appellant is awarded a quarter of the costs of this appeal, and in the Tax Appeals Tribunal.
(5) Interest on the costs in (4) above shall be at a rate of 6% per annum from the date of this judgment until payment in full. **(See *s. 27(2) of the Civil Procedure Act, Cap.282(Revised Laws of Uganda, 2023 Edition*)**

Dated and delivered electronically this 23rd day of December, 2024.

SUSAN ABINYO
JUDGE
23 -12 - 2024