

THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 378 OF 2024

ENVIROSERV (U) LTD .....APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY .....RESPONDENT

BEFORE: MS. CRYSTAL KABAJWARA, MS. PROSCOVIA R. NAMBI,  
MR. WILLY NANGOSYAH

RULING

This ruling is in respect of an administrative additional income tax assessment of Shs. 9,267,550,780 in respect of a purported gain arising from the indirect change in the Applicant's ownership.

**1. Background facts**

The Applicant, a company incorporated in Uganda, is in the business of waste management. It operates landfills for industrial and hazardous waste management and treatment in Hoima.

The Applicant's shareholders are EnviroServ Waste Management Proprietary Limited a South African Company (EWM), which holds 52% of the shares and Green Albertine Limited (GAL), a Ugandan Company holding 48%.

In 2019, Rockwood Fund 1 (the Seller), a private equity investor, commenced the divestment of its interest in the EnviroServ Group. Rockwood Fund was the majority ultimate shareholder, with a shareholding of 92% and the rest was held by minority shareholders. In 2022, Rockwood Fund 1 concluded a Share Purchase Agreement which became effective on 30 September 2022. The effect of the SPA was that Rockwood Fund 1 and the other shareholders sold their shares in the EnviroServ Group to a consortium

comprising of Suez International, Royal Bafokeng (Pty) Ltd, and The IDEA Infrastructure 1 Partnership. The consortium now owns 100% of the shares in the group through a South Africa based special purpose vehicle, Umzwilili Environmental Solutions.

The above activities led to the changes in the indirect ownership of the Applicant. While the immediate shareholding of the Applicant did not change, at group level, there was a change in the ownership following the divestment by Rockwood Fund 1.

Following the above, the Respondent, having determined that there was an indirect change in the ownership of the Applicant, deemed capital gain on the Applicant pursuant to Section 74(2) read together with 78 (h) of the Income Tax Act (ITA).

The Respondent consequently issued the Applicant with administrative additional income tax assessment of Shs. 9,267,550,780 in respect of deemed capital gain arising from the change of ownership.

On 6 September 2024, the Applicant objected to the assessment on the grounds that:

- (i) The basis of the assessment notice issued is not supported by law.
- (ii) Section 74(2) Income Tax Act relied on for the assessment does not deem a disposal of assets in Uganda where a person does not change its ownership within 3 years.
- (iii) That even if Section 74 (2) was applicable, the way the deemed capital gain was determined is erroneous to the extent that the would-be eligible assets, their cost base, and the deemed consideration, was wrongly computed.

The Respondent disallowed the Applicant's objection, hence this application.

## **2. Issue for determination**

The issue for determination is whether the Applicant is liable to pay the tax assessed.

## **3. Representation**

The Applicant was represented Ms. Nabulya Ramathan Fatuma and while Mr. Orishaba Simon Peter and Ms. Ssendege Eseza Victoria appeared for the Respondent.

#### **4. Submissions by the Applicant**

The Applicant submitted that the dispute revolves around the taxability of an offshore share sale transaction which the Respondent asserts resulted in an indirect change of ownership of the Applicant. The Applicant challenged the assessment of Shs. 9,267,550,780, stating it was unlawfully issued based on an offshore share sale and a misconstruction of Section 74(2) of the ITA. They contended that the assessment was without a legal basis.

The Applicant also submitted that the transaction involved an indirect change in the underlying ownership at the level of their majority shareholder and not a direct change in the Applicant's ownership in Uganda. The Applicant's direct shareholding structure had not changed since incorporation.

#### Override of the Uganda – South Africa DTA

The Applicant also submitted that the Double Taxation Agreement (DTA) between Uganda and South Africa was applicable to the transaction. Specifically, the gains from the sale of offshore shares fall under Article 14 (4) DTA. To avoid double taxation, a treaty will typically award either exclusive taxing rights to the residence state or taxing right to the state where the asses is located. The sale of shares by the the South African entities is taxable exclusively in South Africa where the seller is a resident.

The Applicant cited Article 14 of the DTA which is set out below.

#### Article 14 of the Uganda – South Africa DTA

Article 14 (Capital Gains) of the DTA states:

*“(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 other Contracting State for the purpose of performing Independent personal services,*

*including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.*

*(3) Gains of an enterprise of a Contracting State from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft, shall be taxable only in that State. (4) Gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3, shall be taxable only in the Contracting State of which the alienator is a resident”.*

The Applicant argued that the gains derived from the alienation of property (other than specific types like immovable property or business property) were taxable only in the Contracting State where the alienator was resident. Since the shares were sold by South African entities resident in South Africa, they contended that South Africa held the exclusive taxing rights over the gain.

The Applicant also submitted that the enactment of the Section 74(2) of the ITA conflicts with the South Africa- Uganda DTA. The Respondent's unlawful application creates a violation of the DTA.

In this regard, the Applicant submitted that the Respondent's assessment amounted to a treaty override, which disregarded the DTA and violated principles of international law and Section 88(2) of the ITA. The Applicant submitted that the extension of 78(h) ITA and the introduction of Section 74(2) ITA should have prompted an amendment in the DTA to ensure that those extended rules are not restricted by the DTA.

The Applicant submitted that when states conclude an agreement, their sovereignty is limited on the basis of reciprocal obligations, and unilateral amendments are not admissible. Therefore, the treaty override by the Respondent is contrary to the superiority of international agreements under Section 88(2) of the ITA. This in violation of Article 26 of the Vienna Convention which states:

*“Every treaty in force is binding upon parties to it and must be performed by them in good faith.”* Further, Article 27 of the Vienna Convention provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a duty.

The Applicant quoted Section 88 of the ITA which provides:

*“(1) International agreements between the government of Uganda and the government of a foreign country shall have effect as if the agreement was contained in the Act.*

*“(2) Provides that the terms of an international agreement to which Uganda is a party, prevail over the provisions of the Act to the extent to which the terms of the agreement are inconsistent with the provisions of the Income Tax Act and any other law of Uganda dealing with matters covered by the agreement”.*

The Applicant submitted that having signed the DTA, Uganda is bound by it. The Applicant submitted that the Respondent made the Applicant liable for a tax they did not actually derive on the basis that the Applicants assets have undergone a change of control because of an offshore sale of an entity that owns the Applicant.

Further, the Applicant argued that they did not receive any funds from offshore transfer of the shares and therefore lack the liquidity required to pay the tax liability. The South African company has to make sure the Applicant has sufficient funds to discharge her tax liability and prevent the Respondent's enforcements on locally held assets. This results in the Applicant and the South African parties being taxed on the same income

The Applicant invited the Tribunal to find that the Respondent's action of taxing offshore indirect transfer of shares in the applicant company under Section 74 (2) ITA without considering the terms of the DTA between South Africa and Uganda violates the principle of governing treaties.

#### Applicability of Section 74 (2) to the transaction

The Applicant submitted that Section 74(2) and 78(h) are not applicable to the transaction involving offshore indirect sale of shares by the Applicant's non-resident shareholders.

The Applicant quoted Section 74(2) which provides:

*“(2) For the purposes of section 78(h), a person other than an individual, a local government, a political subdivision of a local government and a listed institution, that changes its ownership by fifty percent or more, within a period of three years shall be treated as-*

*(a) realising all its assets and liabilities immediately before the change:*

*(b) having parted with ownership of each asset and deriving an amount in respect of the realisation equal to the market value of the asset at the time of the realisation;*

*(c) re-acquiring the asset and incurring expenditure of the amount referred to in paragraph (b) for the acquisition;*

*(d) realising each liability; and is deemed to have spent the amount equal to the market value of that liability at the time of the realisation; and (e) re-stating the liability for the amount referred to in paragraph (d)."*

The Applicant also quotes Section 78(h) which provides:

*"Income is derived from sources in Uganda to the extent to which it is - (h) derived from the direct or indirect change of ownership by 50% or more of a person, other than an individual, located in Uganda".*

The Applicant submitted that EWM is the Applicant's majority shareholder and owns 52% of the shareholding, with GAL owning 48%. Since 2013, the Applicant's shareholding has never changed. The share sale agreement executed in South Africa did not alter the Applicant's ownership.

#### Indirect ownership v underlying ownership

The Applicant submitted that there is distinction between changes that occur directly or indirectly through interposed companies and quoted section 2 of the ITA which defines underlying ownership as:

*"An interest held in, or over, the person directly or indirectly through interposed companies, partnerships, or trusts by an individual or by a person not ultimately owned by individuals."*

The Applicant also gave several examples of other provisions such as section 74 (1), 76 (3), 25 and 102 of the ITA which use the term "underlying ownership" and distinguished the term "ownership" in Section 74(2) from "underlying ownership" used elsewhere in the ITA. Changes in ownership envisaged in Section 74(2) signifies a direct transfer of ownership rights from one party to another.

### Proportion belonging to GAL

The Applicant also argued that Section 74(2) was inapplicable to assets attributed to GAL Ltd because its 48% shareholding was below the 50% threshold mentioned in the section.

### The three year period

In addition, the Applicant submitted that the **three-year period** requirement in Section 74(2) ITA is ambiguous because it does not specify the starting period

The period requires a definite date but if it is silent, it can only be assumed. It may be from incorporation, from the change, from the share sale transaction, or from the commencement of business. The logical interpretation would be 3 years either from incorporation or from the last change in shareholding. The Applicant incorporated in 2013 with no change.

The Applicant cited the case of ***URA V Uganda Tax Operates and Drivers Association, Civil Appeal No. 13 of 2015:***

*“If the court find that the language of the taxation provision is ambiguous or capable of more meaning than one, then the court has to adopt the interpretation that favors the taxpayer.”*

The Applicant submitted that due to the ambiguity of Section 74(2), it's inapplicable to the Applicant since the 3-year statute of limitations excludes the Applicant from liability under the deemed assets disposal asset disposal taxing provision.

### Calculation of the deemed capital gain

In the alternative, the Applicant argued that if Section 74(2) is applicable, the Tribunal should determine whether deemed capital gain was correctly computed. The Applicant argued that the apportionment by the Respondent of the Applicant's cost base to reflect 52% of the EnviroServ group interest in the Applicant was wrong. Specifically, the Applicant argued that Section 74 (2) of the ITA clearly deems all assets and liabilities of the company located in Uganda as having been realized at the market value of the assets at the time of the realization. Therefore, the apportionment by the Respondent was erroneous.

## 5. Submissions by the Respondent

The Respondent raised the following two preliminary points of law;

### (i) Admissibility of arguments not raised at objection

The Respondent raised a preliminary point of law arguing that the Applicant introduced arguments that were not raised in their objection to the tax assessment. They cited Section 16(4) of the Tax Appeals Tribunal Act (TAT Act), which states:

*“That an application relates to a taxation decision, the Applicant is, unless the Tribunal orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates”.*

The Respondent submitted that the Applicant’s objection relied on Section 74(2) of the Income Tax Act and the argument regarding the applicability of the DTA between Uganda and South Africa was not presented during the objection stage and not even during conferencing before the Tribunal. Therefore, it was irregular and contrary to the TAT Act for the Applicant to introduce new grounds. Therefore, the Tribunal should disregard the Applicant’s arguments regarding the DTA.

### (ii) Admissibility of Applicant’s affidavit

The Respondent submitted that at conferencing the Applicant notified the Tribunal that the dispute between the parties is purely a matter of law. It is on that basis that the Tribunal Directed the parties to proceed to file written submissions without leading evidence in the dispute. It is irregular for the Applicant to introduce evidence at the submissions stage. The Respondent submitted that allowing the affidavit in support would prejudice the Respondent as the Applicant’s evidence will go unchallenged. The Respondent prayed that the Affidavit is disregarded.

### Submissions on the merits

The Respondent submitted that in September 2022, there was a change in the shareholding of the Applicant’s majority shareholder involving 100% sale of shares to Umzwilili Environmental Solutions. Prior to 29 September the Applicant was owned by:

- (i) EnviroServ Waste Management Pty Ltd with 52% shares.
- (ii) Green Albertine Ltd Holding 48%.

The Respondent submitted that there was an indirect change in the Applicant's shareholding by over 50% when the shareholding of EnviroServ Holdings Pty Limited (EH Pty Limited), the immediate parent company of EWM changed. The Respondent submitted that this change falls within Section 78 (h) of the Income Tax Act which provides that income is derived from sources in Uganda to the extent to which it arises from the indirect change of ownership of a person by 50% or more from the indirect change of ownership of the person by 50% or more. Further, Section 74(2) provides for treatment of an entity where there is an indirect change exceeding 50% which is made within a period of 3 years. The Respondent submitted that it was on the basis that the disposal of the Applicant's assets was deemed to have occurred at their market value.

#### Non- applicability of the Uganda – South Africa Double Taxation Agreement

The Respondent submitted that the Applicant is incorporated in Uganda with its registered office located in Uganda making it a Ugandan entity. A person remains subject to the domestic law of the country of residence for provisions which are not affected by the treaty. It is an accepted principle that DTA's do not restrict a contracting state's rights or mandate to tax its residents

The Respondent contended that there were no provisions in the DTA that restrict or address the taxation of Ugandan residents under Sections 78(h) and 74 of the Income Tax Act.

The Respondent countered the Applicant's argument that Section 74(2) applies only to direct changes in ownership. They argued that Section 78(h) provides for the taxation of income derived from indirect changes in ownership, and Section 74(2), read with Section 78(h), clearly encompasses indirect changes. They accused the Applicant of attempting to misdirect the Tribunal by introducing the term "underlying ownership" which is not defined in Sections 74 or 78(h) in this context.

### Regarding the three year period

The Respondent submitted that there is no ambiguity in the law, The 3 years period is set in motion the moment there is a 50% change. From that time, changes in ownership are compounded. Should the changes exceed 50%, then section 74(2) comes into force. The Changes in the Applicant's ownership of 52% were done in one ago, the 3 years period is not applicable. There was an indirect change in ownership, and it occurred at market value. The Respondent submitted that the Applicant was liable to pay the tax assessed.

### Alternative Submission

The Respondent submitted that EWM owns 52% of the shares in the Applicant. The Applicant's assets were deemed to have been sold as a result of the indirect change in the Applicant's ownership. The proportion attributed to GAL's shareholding does not form part of the sale value agreed as it was never part of the sale transaction.

### Roll over relief

The Respondent submitted that the changes in ownership were not for purposes of reorganization; no evidence of this has been adduced to the Respondent or the Tribunal. Section 76 (3) is discretionary, and that power is given to the Commissioner General. The Applicant's prayer is misdirected. The Respondent prayed that the Tribunal finds that the Applicant is liable to pay the tax assessed and that the Application be dismissed the application with costs to the Respondent.

## **6. Submissions of the Applicant in rejoinder**

The Applicant reiterated their arguments regarding the DTA and the three year period.

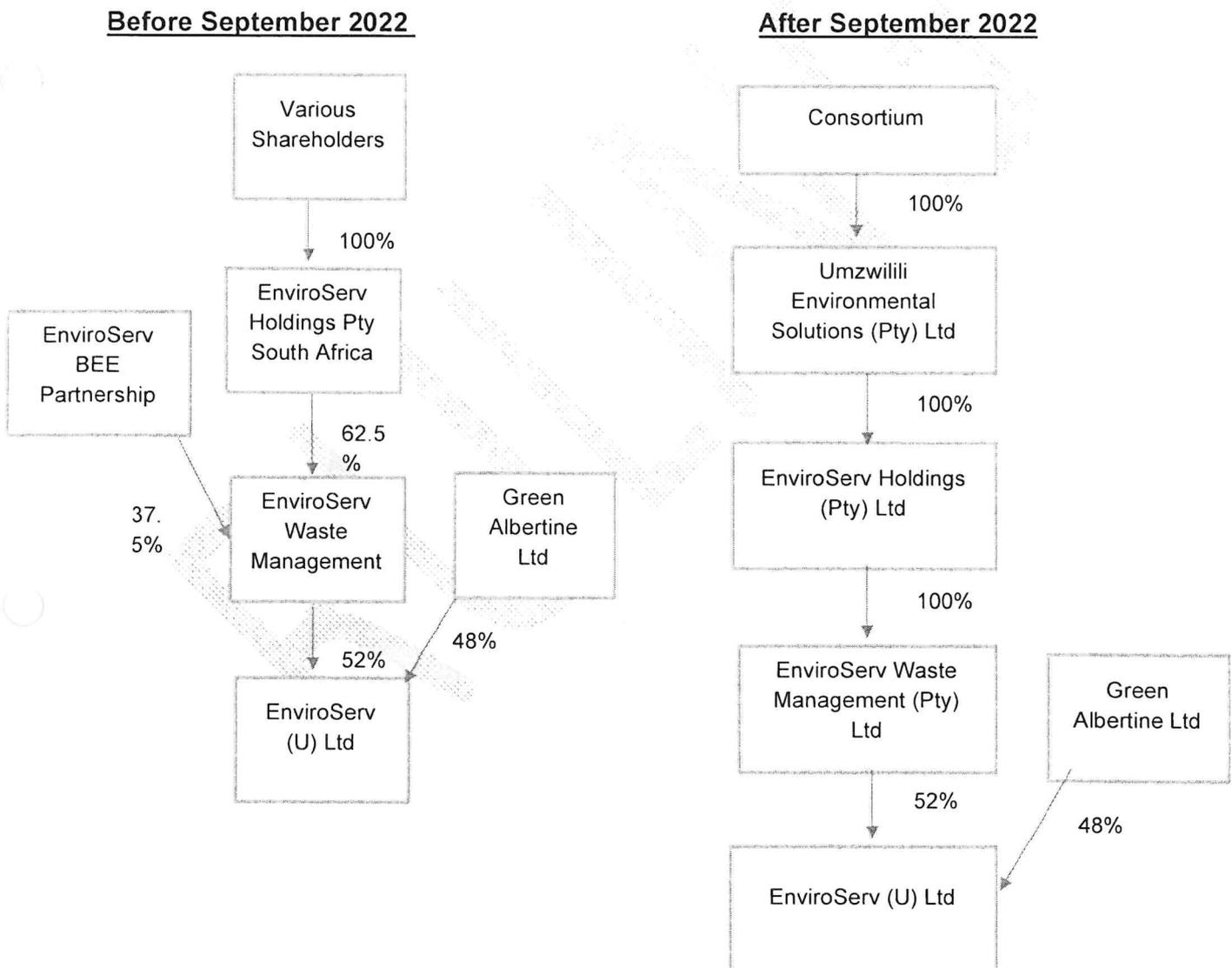
Regarding the affidavit, the Applicant submitted that the Tribunal requested that the presentation by the Applicant's Director form part of the Joint Trial Bundle. Pursuant to TAT Regulations 26 (1) and the presentation could only be received by means of an affidavit and in such form as directed by the Tribunal.

Further, regarding rollover relief, the Applicant submitted that they underwent a corporate reorganization and qualify for the relief in accordance with section 76 (3) of the ITA.

## 7. The determination of the issues

In September 2022, there was a change in the Applicant's ultimate shareholding which arose from the divestment by previous shareholders of their interests in the EnviroServ group. This change was effective 30 September 2022 and both sellers and buyers are resident outside Uganda.

Below is an illustration of the structure of the group before and after the change in ownership.



As shown in both the before and after, the changes only happened at group level above EnviroServ Waste Management (EWM) the immediate shareholder in the Applicant

company. Specifically, the direct shareholding of the Applicant, did not change as the Applicant's shareholders continued to be EWM and GAL. In other words, in Uganda, all continues as business as usual,

However, based on the above events, the Respondent determined that there was an indirect change in the ownership of the Applicant and that there was a deemed capital gain pursuant to Section 74(2) and 78 (h) ITA. Consequently, the Respondent raised an assessment of Shs. 9,267,550,780 in respect of capital gains tax.

The Applicant has however argued that the gain, if any, is not taxable in Uganda. The Applicant argues that the country with the taxing rights to the gain is South Africa, where the sellers are resident as provided by the Uganda – South Africa DTA. In the alternative, the Applicant has argued that should section 74 of the ITA be found to apply, then the Respondent's calculation of the tax payable under section 74 was inaccurate and should be revised. Further, the Applicant also argued that roll-over relief as provided from under section 76 of the ITA applies to the transaction.

#### The Respondent's preliminary objection

We have taken note of the Respondent's preliminary objections concerning the raising of new grounds in respect of the application of the Uganda – South Africa DTA and the Applicant's affidavit.

The ground raised by the Applicant concerning the Uganda – South Africa DTA raises a question of law that is integral to the interpretation of section 74 (2). Therefore, it is in the interest of justice that the question is determined, not just for this case, but for purposes of providing certainty to the tax community,

Regarding the affidavit, it does not introduce any new evidence or information that is not within the knowledge of the Respondent. Moreover, the Applicant was asked by the Tribunal to avail the copy of the presentation that was made on 13 March 2025 when the parties last appeared before this Tribunal. Therefore, therefore, the Respondent will not be prejudiced in any way.

On this basis, the Respondent's preliminary objections are disallowed and we shall now proceed to determine the matter on its merits.

### The merits

The Tribunal notes that the dispute between the parties revolves around the interpretation on the Application of Section 74(2) read together with section 78 (h) of the ITA and whether the Uganda – South Africa DTA, applies to the transaction in question.

### Application of Section 74 (2) of the Income Tax Act

Before we examine the application of section 74 (2) and 78 (h) of the ITA, it is important to establish first, the applicable taxing provisions. This is because sections 74 and 78 do not impose tax.

The transaction in question, namely the sale of shares in the EnviroServ group, of which the Applicant is a member, happened between non-resident persons.

Therefore, we must determine whether the transaction falls within the scope of the ITA.

### The taxation of non-resident persons

For non-residents persons, a gain on disposal will only be taxable to the extent the income is sourced from Uganda. Conversely, a capital loss on disposal would only be deductible on the basis that it arises from income derived from Ugandan sources.

The shareholders who sold their shares in the EnviroServ group are based outside Uganda with no operations in Uganda and their management and control is exercised outside Uganda. Therefore, being non-residents persons, they are subject to income tax only on income derived from sources in Uganda.

This is in accordance with Section 4 of the Income Tax Act ("ITA") read together with Section 17 (2)(b) of the ITA. Section 4 imposes Ugandan income tax on every person that has chargeable income for a year of income. Chargeable income is defined as the gross income of a person for the year less allowable deductions. According to section 17(2)(b)

of the ITA, the gross income of a non-resident person only includes income derived from sources in Uganda.

Source rules are contained in section 78 of the ITA, and these are chronologically listed from (a) to (s). The source rule at the centre of this dispute is section 78 (h). It provides as follows:

**“78. Source of income**

*Income is derived from sources in Uganda to the extent to which it is....*

*(h) derived from the direct or indirect change of ownership by fifty percent or more of a person other than an individual, a local government, a political subdivision of a local government and a listed institution located in Uganda;”*

In the present case, there was an indirect change of ownership of the Applicant, arising from the changes in the ultimate ownership of the EH Pty Limited, the Applicant’s parent company. 100% of the shares in EH Pty were sold to new shareholders, who now own 52% of the shares in the Applicant. Therefore, the indirect change in ownership exceeded the 50% threshold provided in section 78 of the ITA.

Therefore, when section 4, the income tax charging provision is read together with section 17 and section 78 (h) of the ITA, the overall effect is that non-resident persons who derive income from the direct or indirect change in the ownership of a person located in Uganda are subject to tax in Uganda only to the extent of the income they would have derived from Uganda.

However, the story does not end here as section 78 (h) is subject to section 74 (2) of the ITA. This is because section 74 (2) creates a unique and peculiar exception whereby the tax that would ordinarily have been paid by the non-resident person who would have derived income under section 78 (h) is instead deemed on the resident person whose indirect ownership has changed.

## Section 74 (2) of the ITA

Provides as follows:

*“For the purposes of section 78(h), a person other than an individual, a local government, a political subdivision of a local government and a listed institution, that changes its ownership by fifty percent or more, within a period of three years shall be treated as-*

- a. realising all its assets and liabilities immediately before the change;*
- b. having parted with ownership of each asset and deriving an amount in respect of the realisation equal to the market value of the asset at the time of the realisation;*
- c. re-acquiring the asset and incurring expenditure of the amount referred to in paragraph (b) for the acquisition:*
- d. realising such liability; and is deemed to have spent the amount equal to the market value of that liability at the time of the realisation; and (c) re-stating the liability for the amount referred to in paragraph(d).*

The above provision deems persons such as the Applicant, whose ownership has changed, as having realized their assets and liabilities.

In effect, it deems the resident person, as having:

- a) Disposed of their assets at market value; and
- b) Re-acquired the same assets at the same market value i.e. at an elevated cost base.

The above provision effectively does the following:

- a) It deems the resident person, whose ownership has changed, to be the taxpayer, i.e. the person, in this case, the Applicant, bears the tax arising from section 78 (h). Ordinarily, the tax would be borne or payable by the non-resident person who would have derived income from sources in Uganda.
- b) The above in (a) is achieved by deeming the resident person, whose ownership has changed, as having disposed of and re-acquired the assets hence effectively requiring the resident person to calculate the gain or loss arising from the disposal of the assets as prescribed by the provision. Should the calculation lead to a gain, the resident person, in this case, the Applicant, will be liable to tax on the gain at the

rate of 30%. Should the calculation result in a loss, the resident person would be entitled to a deduction for the loss.

The Applicant has raised several issues concerning section 74 (2) read together with section 78 (h) of the ITA. We shall proceed to address each of them hereunder.

(i) Section 78 (h) only deals with direct changes in ownership

The Applicant submitted that section 78 (h) only deals with direct changes on ownership. The Applicant argued that if the intention of the legislature was to extend the provision to indirect changes in ownership, the correct terminology would have been the use of the term “underlying ownership” as used in other provisions of the ITA such as section 76 and section 102.

We do not agree with the Applicant's interpretation.

To begin with, section 78 (h) refers to both direct and indirect changes in ownership. It states:

*“Income is derived from sources in Uganda to the extent to which it is.... derived from the direct or indirect change of ownership by fifty percent or more of a person....”*

Indirect ownership occurs when an individual or entity controls an asset or company through a chain of ownership rather than directly holding the asset or company itself.

In the present case, there was a change in the ownership of EH Pty Limited, the entity that previously controlled the Applicant through a chain of ownership (EWM) rather than holding the shares in the Applicant itself.

Therefore, section 78 (h) explicitly covers “indirect ownership”. On the other hand, the term “underlying ownership” is not used in the provision. Therefore, just as it is a principle of interpretation that one should not read into the provision what does not exist, it also follows that one cannot wish away a term that is used in a provision and substitute it for another.

Consequently, we do not agree with the Applicant that section 74 (2) only applies to direct disposals.

(ii) The three year period

The Applicant has argued that the three year period provided for under section 74 (2) is ambiguous as it has no reference point for the start date. In other words, the Applicant wonders, when does the three year period begin to run?

It is important to look at the wording of the provision to understand the context for the “three year period”. The provision reads:

*“...a person other than an individual, a local government, a political subdivision of a local government and a listed institution, that changes its ownership by fifty percent or more, within a period of three years shall be treated as...”*

Based on a reading of the provision, the three year period begins to run from the date of the change of ownership. Where the ownership changes by 50% or more immediately, as is in the case here, whereby on 30 September 2022, the indirect ownership of the Applicant changed by more than 50%, the three year period does not apply.

However, there are scenarios where the change in ownership is gradual. In such cases, the provision sets a three year limitation whereby if the change in ownership aggregates to 50% or more within the set timeframe, the change will fall within section 78 (h).

For example, using the same set of facts before us, if, instead of 50% change in ownership that happened on 30 September 2022, there were gradual changes spread over a three year period, such as:

- a) A change of 25% on 30 September 2022 - section 78 (h) would not apply since the change in ownership would have been below the 50% threshold.
- b) A subsequent change of 15% on 30 September 2023 - section 78 (h) would still not apply as the 50% threshold would not have been reached. The total change would at this point be 40%.

c) A change of 10% 25 September 2024 – the provisions of section 78 (h) would now kick in as the 50% threshold would have been met within a three year period.

However, should the events in (c) above happen in December 2025, which is outside the three year period, section 78 (h) would not apply because whilst there would have been a change in the indirect ownership by 50% or more, the threshold was met outside the three year period.

In effect, the three year period is an anti-avoidance measure that is aimed at preventing the artificial fragmentation of changes in ownership over a period of time for tax rather than commercial purposes.

Therefore, we do not agree with the Applicant's contention that the three year period is ambiguous.

#### The Uganda – South Africa DTA

The Applicant has argued that the provisions of the DTA take precedence over the ITA as provided by section 88 of the ITA.

The Applicant's position is that the gains derived from the alienation of property (other than specific types like immovable property or business property) are taxable only in the Contracting State where the alienator (seller) is resident. Therefore, since the shares were sold by South African entities resident in South Africa, South Africa held the exclusive taxing rights over the gain.

Section 88 provides as follows:

#### ***“88. International agreements***

*1) An international agreement entered into between the Government of Uganda and the government of a foreign country or governments of foreign countries shall have effect as if the agreement was contained in this Act.*

*(2) To the extent that the terms of an international agreement to which Uganda is a party are inconsistent with the provisions of this Act... the terms of the international agreement prevail over*

*the provisions of this Act and any other law of Uganda dealing with matters covered by this agreement.”*

While we agree with the provision of section 88 regarding the supremacy of international agreements in relation to the provisions of the ITA, we must first determine whether there is any inconsistency in the first place between the ITA and the DTA.

As already explained above, section 74 (2), deems the Ugandan resident person whose ownership has changed, to be the taxpayer. This is in as far as the provision deems the Ugandan resident person, who in this case is the Applicant, as having realized all their assets and liabilities for purposes of computing the capital gain or loss that is subject to tax.

Section 74 (2) states:

*“For the purposes of section 78(h), a person ... that changes its ownership by fifty percent or more, within a period of three years shall be treated as-*

To the extent that section 74 (2) disregards the non-resident person and imputes a gain upon the resident person whose ownership has changed, then the provisions of the Uganda – South Africa DTA do not apply. This is augmented by the fact that it is the Uganda resident person that bears the tax.

Therefore, while we agree with the Applicant that under Article 14 of the DTA, subject to the specified exceptions, gains derived from the alienation of property are taxable only in the Contracting State where the alienator (seller) is resident, in the present case, the sellers / alienators who are resident in South Africa are not subject to tax. Therefore, the provisions of the DTA do not apply.

We also do not agree with the Applicant that section 74 (2) amount to treaty override. This is because the provision deals with the taxation of persons who are resident in Uganda for tax purposes. Just as DTAs do not impose taxes, in the same vein, they do not alienate a nation’s right to tax its residents under its own domestic tax laws.

### Calculation of the tax payable

So far, we have concluded that section 74 (2) read together with section 78 (h) apply to the transactions or changes in the EnviroServ group, which resulted in an indirect change in the ownership of the Applicant in excess of 50%.

The Applicant argued that if Section 74(2) is found to be applicable, the Tribunal should determine whether deemed capital gain was correctly computed.

The contention around the calculation revolves around the approach taken by the Respondent which seeks to apportion the cost base of the Applicant's assets in proportion to its shareholding. In effect, in computing the tax payable, the Respondent apportioned the cost base relative to the 52% shareholding of the EnviroServ group in the Applicant. The Applicant has disputed this approach as being contrary to the provisions of section 74 (2).

The calculation of both parties is shown below.

<b>Description</b>	<b>Respondent's computation</b>	<b>Applicant's computation</b>
	Amounts in Shs.	Amounts in Shs.
<b>Market value attributed to Applicant's assets</b>	35,514 488,900	35,514 488,900
<b>Cost base of assets as at 30/09/2022</b>	50,474,881,000	50,474,881,000
<b>Cost base recognizes for reduction against proceeds</b>	52%	100%
<b>Recognised cost base of assets</b>	26,246,938, 120	50,474,881,000
<b>Taxable gain / (allowable loss)</b>	9,267,550,780	(14,960,392,100)

In order to determine whether any of the above approaches is correct, it is important to revisit the provision.

*“For the purposes of section 78(h), a person other than an individual, a local government, a political subdivision of a local government and a listed institution, that changes its ownership by fifty percent or more, within a period of three years shall be treated as-*

- a. realising all its assets and liabilities immediately before the change;*
- b. having parted with ownership of each asset and deriving an amount in respect of the realisation equal to the market value of the asset at the time of the realisation;*
- c. re-acquiring the asset and incurring expenditure of the amount referred to in paragraph (b) for the acquisition:*
- d. realising such liability; and is deemed to have spent the amount equal to the market value of that liability at the time of the realisation; and (c) re-stating the liability for the amount referred to in paragraph(d).*

The most important aspect of the above provision as far as the calculation is concerned is that it treats the Applicant as having disposed of **ALL** of its assets and liabilities for market value.

The provision does not refer, at all, to apportionment of the realised proceeds relative to the shareholding of the taxpayer or the change in ownership.

Therefore, since the provision deems all the assets as having been disposed of, it therefore follows that there can be no apportionment of the proceeds or the cost base.

It is a well-established principle of the interpretation of tax statutes that one has to look merely at what is clearly said and not make assumptions.

Therefore, the first error in the Respondent’s calculation is the apportionment of the cost base. The Respondent has argued that this is in line with section 50 (5) of the ITA which provides:

*“Where a part of an asset is disposed of, the cost base of the asset shall be apportioned between the part of the asset retained and the part disposed of in accordance with their respective market values at the time of acquisition of the asset.”*

In the present case, section 74 (2) is clear as it deems **ALL** assets and liabilities realised and not part of the assets.

Further, if for arguments sake, one was to follow the Respondent's logic, it would not be appropriate for the Respondent to apportion the cost base, without a corresponding apportionment of the proceeds. Therefore, therein lies a flaw within the Respondent's own workings.

That said, this does not mean that the Applicant's calculation is entirely accurate.

Based on the reading of the provision, the following would be the correct approach.

Realisation proceeds at Market value (A)	Total Assets (B)	Total liabilities (C)	Capital gain / loss D= A-B-C	Tax Rate 30%	Tax Payable E= 30% * D
xxx	xxx	xxx	xxx		xxx

Where:

A - represents the "proceeds" from the deemed realization of the Applicant's assets at market value as evidence, for example by a valuation report. This should be in respect of each individual asset as the taxpayer is deemed to have **parted with ownership of each asset** as stated in section 74 (2)(b).

B – is the total assets of the Applicant. For tax depreciable assets, this would be the tax written down value of the assets while for non- tax depreciable assets, this would be the net book value of the assets.

C – is the total liabilities of the Applicant as shown in their statement of financial position (balance sheet)

D – Is the gain or loss resulting from subtracting the Applicant's net assets from the realized proceeds (A).

We've noted that both parties' calculation does not show the net asset position, which requires that the Applicant's liabilities as at 30 September 2022 are deducted from the

total assets. Further, the calculation does not show how the tax depreciable and non-depreciable assets have been dealt with.

Therefore, there is a need for both parties to revisit the computation.

### **Re-acquisition and restatement of liabilities**

While the dispute is primarily concerned with the tax that would arise from the application of section 74 (2), which we have dealt with above, it is important that for completion, we also address the re-acquisition of the assets as provided for in section 74 (2) (c) and restatement of the liabilities as provided in part (d) of the provision.

Following the realization of the assets, section 74 (2) provides that the taxpayer re-acquires the assets at their market value that was attained at realization. This means that the taxpayer benefits from a step-up in the cost base of the assets.

In effect, the taxpayer will now have acquired the assets at a new cost equivalent to their market value, which is an enhanced cost base relative to the previous tax written down value (TWDV) for tax depreciable assets or net book value for the non-tax depreciable assets.

For example, if the market value of an asset such as a vehicle was Shs. 100,000 and this was the deemed realization, at re-acquisition, the cost base will be the same as the Shs. 100,000. The cost base will not be the previous TWDV e.g. 0, assuming that the asset had been fully depreciated for tax purposes. Therefore, for tax purposes, the Shs. 100,000 will be the new cost base of the asset for the purpose of claiming future capital allowances. This should result in a deferred tax asset for the Applicant as the future TWDVs of the assets will exceed their carrying value in the financial statements.

Similarly, the liabilities will be restated at a value equal to the market value attributed to them following the deemed realisation of the liabilities.

## Roll over relief

The Applicant has also argued that should section 74 (2) be found applicable, and the Applicant is deemed to have disposed of and re-acquired its assets and liabilities at market value, then the provisions of section 76 (2) which deal with rollover relief apply.

Section 76 provides as follows:

*“Where a resident person, in this subsection referred to as the “transferor”, transfers a business asset, with or without any liability not in excess of the cost base of the asset, to a resident company other than an exempt organisation, in this subsection referred to as the “transferee”, in exchange for a share in the transferee and the transferor has a fifty per cent or greater interest in the voting power of the transferee immediately after the transfer – ....”*

A reading of the above provision indicates that it is not applicable to the present facts for the following reasons:

- (i) Section 76 envisages transfers of business assets between two resident persons. In the present case, there is a deemed realization and re-acquisition by the same person. Further, the transaction involving the share sale happened between non-resident persons.
- (ii) Section 76 deals with transfer of assets by a transferor to a transferee in exchange for shares in the transferee as part of a re-organisation. In the present case, there is no asset / share deal between two parties.
- (iii) Further, following the asset/ share deal, the transferor must obtain 50% or more interest in the voting power of the transferee. The direct shareholding structure of the Applicant has remained the same with EWM holding 52% and GAL holding 48%.

Therefore, rollover relief does not apply to the present case.

In conclusion, we have determined that section 78(h) of the ITA read together with section 74 (2) are applicable to the transaction as there was a change in the ownership of the Applicant by more than 50% within a three year period. Further, the Uganda – South Africa DTA does not apply to the present case and as a result, the Applicant is subject to tax in Uganda in accordance with the above provisions of the DTA.

However, the Respondent's calculation of the tax payable was incorrect in as far as the Respondent sought to apportion the cost base. Further, the calculation did not follow the correct steps as set out in section 74 (2) of the ITA for purposes of determining the gain or loss subject to tax. It is important that the gain or loss is accurately calculated in order to determine the correct tax payable.

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

- (i) The transaction is taxable under section 74 (2) of the ITA and the tax should be determined within the parameters set by the provision;
- (ii) Owing to the inaccuracies in the Respondent's calculation, the tax assessed is hereby set aside;
- (iii) The matter is hereby remitted to the Respondent for the re-computation of the tax payable in line with section 74 (2) of the ITA;
- (iv) The revised calculation should be completed by 25 June 2025;
- (v) Each party should bear their own costs.

Dated at Kampala this.....11.....day of.....June.....2025.



MS. CRYSTAL KABAJWARA  
CHAIRPERSON



MS. PROCOVIA R. NAMBI  
MEMBER



MR. WILLY NANGOSYAH  
MEMBER

