THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL APPEAL NO. 006 OF 2022

INFECTIOUS DISEASES INSTITUTE] APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY] RESPONDENT

Before: Hon. Justice Ocaya Thomas O.R

JUDGMENT

Introduction

This is an appeal against the decision of the Tax Appeals Tribunal ["TAT"] in respect of TAT Application No. 15 of 2019 between the parties herein, the ruling of TAT having been issued on 27 January 2022.

The Appellant describes itself a company limited by guarantee whose objective is researching infectious diseases and providing medical assistance to patients suffering from contagious diseases in Uganda. The Appellant stated that it partners with numerous institutions and individuals to provide research expertise and funding to execute its mandate.

The Appellant stated that it co-opts specialists to provide specialized support on the research projects it undertakes and such specialists are hired on more than one project at a time. The said consultants are retained as independent consultants on projects to support specific projects as disclosed in their consultancy agreements and continue to serve on those projects unless donors suspend funding or the subject of the project is complete.

It is the Appellant's case that the said consultants are expected to deliver their obligations under the terms of reference and are not afforded the benefits of employees for the duration of their contracts. The Appellant contended that it deducted 6% withholding tax ["WHT"] and remitted the same to URA. For purposes of neutrality, since the Appellant refers to the said persons as "Consultants" and the Respondent as "employees", I have felt the need to refer to them as "team members" until I can pronounce myself on their status.

It is the Appellant's case that in 2012, URA conducted a tax compliance audit on the Applicant resulting in an assessment of UGX 1,927,442,716 which comprised of WHT of UGX 150,464,359 and PAYE of UGX 1,776,978,357. The Appellant contends that the assessments were based on URA's regard for consultants, trainers, volunteers and directors as employees.

The Appellant objected to these assessments and made reference to the guidelines distinguishing employees and consultants. The Respondent reviewed and responded to the Appellant's objection reducing the assessment to UGX 322,013,900.

In response, the Appellant conceded in part to the revised assessment. They accepted an assessment of UGX 136,811,172 comprising of principal tax of UGX 92,617,735 and interest of UGX 44,195,437 and rejected the assessment of UGX 185,200,728 on the basis that it related to individuals who had consultancy agreements that set them apart from employees and that their mode of work was autonomous, designed and agreed to in their TORs and they were not subject to the Human resource policies of the Appellant.

The Appellant also contended that it also objected to the assessments because they related to medical students it awarded scholarships. The scholarship award was documented with a contract that spelt out the benefits to a student, from the tuition or stipend or associated costs extended to a scholarship beneficiary.

For the Respondent, it was not disputed that the gist of the present appeal is whether the Appellant was obliged to account for PAYE in the tax period under review. The Respondent contended that it carried out a comprehensive audit on the Appellant's operations from 1st July 2008 to 30th June 2012 and raised a PAYE assessment of UGX 1,776,978,357 against the

Appellant. The Appellant objected to the same assessment and the Respondent issued an objection decision revising the tax liability to UGX 322,013,900. The Respondent asserts that the Appellant paid all the tax assessed as per the revised assessment save for UGX 185,200,728 being a PAYE liability.

Representation

The Appellant was represented Mr. Ronald Kalema and Ms. Mbekeka Vannessa Irene from M/s AF Mpanga Advocates. The Respondents were represented by Mr. Lomuria Thomas Davis, Barbara Kasibante, Derrick Nahumuza and Bakashaba Donald from the Respondent's Legal Services and Board Affairs department.

Both sets of advocates made written submissions supplemented with oral highlights in support of their client's respective cases in this appeal. I have considered these submissions before coming to the decision below and I thank both counsel for their most helpful submissions.

Decision

Role of High Court in Tax Appeals

Section 27(2) of the Tax Appeals Tribunal Act provides as below:

"An appeal to the High Court may be made on questions of law only, and the notice of appeal shall state the question or questions of law that will be raised on the appeal."

An appeal on a point of law arises when the court whose decision is being appealed against made a finding on a case before it but got the relevant law wrong or applied it wrongly in arriving at that finding or if the court reached a conclusion on the facts which is outside the range that the court would have arrived at, had the court properly directed itself as to the applicable law. The error must be a result of a misapprehension or misapplication of the law. Where an appeal is confined to questions of law, grounds of appeal raising questions of fact or questions of mixed fact and law are either abandoned or struck out. See **Lubanga Jamada v Ddumba Edward (2016) UGCA 11, Celtel Uganda Limited v Karungi Susan CACA 73/2013.**

As held in **URA v Tembo Steel Mills HCCA 9/2005** questions of law are those which involve some controversy about the law. There must be an allegation that the tribunal misdirected itself on the law or that there is an error of law. This must be brought out clearly in the grounds of appeal.

Against this background, I will consider the appeal by investigating and resolving each of the grounds of appeal framed for consideration.

Grounds of Appeal

The Appellant framed three grounds of appeal namely;

1. The Tax Appeals Tribunal misapplied the principles in Section 2(z) of the Income Tax Act to the consultants engaged by the Appellant thereby erring in law and reaching the wrong conclusions.
2. The Tax Appeals Tribunal misapplied the principle/tests for determining the existence of the employment relationship, thereby erring in law and reaching the wrong conclusions.
3. The Tax Appeals Tribunal erred in law when it failed to evaluate all the evidence before it in the application thereby reaching the wrong conclusions.

Ground 1: The Tax Appeals Tribunal misapplied the principles in Section 2(z) of the Income Tax Act to the consultants engaged by the Appellant thereby erring in law and reaching the wrong conclusions.

The Appellant criticized the Tax Appeals Tribunal for holding that a person who receives remuneration for more than two months is an employee for tax purposes. Counsel submitted that by holding as above, the tribunal rewrote the provisions of the law and as such reached an erroneous decision while exercising power that it did not have.

Counsel submitted that the Tax Appeals Tribunal usurped the powers of parliament and relied on the case of **ATC Uganda Limited & Anor v KCCA HCCS 323/2018** as authority for the proposition that the court ought to interpret the law as legislated and not to place an unnatural interpretation of the language used by the legislation.

Counsel submitted that the tribunal inserted a two-month limitation on who can be an employee based on a fixed and ascertainable income whereas this is not provided for under the law.

Counsel relied on the case of **Emin Pasha Ltd v Soedi B Barigye LDA 10/2019** wherein the Respondent was held to be an independent contractor having been in the position of Interim General Manager for the Appellant from October 2014 to April 2018, a period when he received a fixed and ascertainable income.

Counsel for the Respondent contended that at pages 8-13 of the ruling of TAT [Page 434-437 of the record of appeal], the TAT held that there is a distinction between a contract of service and a contract for service. The Respondent contended that employees are deemed to enter a contract for service while independent contractors are deemed to have entered a contract of service.

Counsel submitted that to determine whether one is an employee or a contractor, recourse has to be made to Section 2(z) of the Income Tax Act which is the interpretation section. Counsel submitted that Section 2(z) of the Income Tax Act classifies an individual in a position entitling the holder to a fixed or ascertainable remuneration as an employee for tax purposes.

Counsel referred to Pages 438-440 of the Record of Appeal and submitted that all the Appellant's employees were granted contracts with a fixed or ascertainable income. He submitted that the finding of the tribunal is that there no duration for payment for a relationship to be considered that of an employer/employee and held that the time period of two months was not sufficient to determine a fixed or ascertainable income and there was need to look at the terms of the contract.

Counsel submitted that the decision of the tribunal was based on the terms of the contract and not the two months' period as contended by the Appellant.

The impugned decision/findings of the Tax Appeals Tribunal are contained at Pages 8-17 of the ruling of TAT [Pages 431-440 of the record of proceedings]. In brief, the TAT found that;

1. An employee is defined under Section 2(z) of the Income Tax Act.
2. Under the Income Tax Act, a director is considered an employee which is not the case with the employment. Any person who receives a fixed or ascertainable remuneration is considered as an employee under the Income Tax Act but this may not be the case under the Employment Act.
3. The definition of an employee under the Income Tax Act is wider than that under the Employment Act to enlarge the net for taxation purposes.
4. The Income Tax Act is concerned with taxation of individuals and not employer-employee relationships which is the concern of the Employment Act an employee under the Income Tax Act may not necessarily one under the Employment Act.
5. To understand whether individuals hired by the Applicant are employees, one should look at different provisions under Section 2(z) of the Income Tax Act.
6. Section 2(z)(ii) of the Income Tax Act states that directors of a company are considered as employees. Though the Respondent contended that some of the individuals hired by the Applicant were also its directors, it did not disclose them. No evidence was adduced to show that some of the Applicant's directors were hired by it and as such TAT was not satisfied that the Applicant employed individuals under Section 2(z)(ii) of the Income Tax Act.
7. Section 2(z)(ii) of the Income Tax Act provides that a holder of a fixed or ascertainable remuneration is considered as one in employment. If an individual receives income that is constant or certain, he or she is deemed an employee for purposes of taxation. The Income Tax Act does not state the duration of payment for the relationship to be considered employer/employee. It is debateable whether a person who receives remuneration for a short period may be considered as one who obtains fixed or ascertainable income.
8. A person who receives remuneration for less than two months cannot be considered as receiving fixed or ascertainable income. A taxpayer is entitled to the benefit of doubt.

Section 4, 17(1)(b) and 19 of the Employment Act impose a tax on income earned by an employee from any employment. Section 2 defines employment to mean (a) the position of an individual in the employment of another person, (b) a directorship in a company, (c) a position entitling the holder to a fixed or ascertainable remuneration and (d) the holding or acting in any public office.

Clearly, the TAT found that any person who is entitled to a fixed or ascertainable remuneration is, for tax purposes, an employee inspite of the fact that other laws, such as the Employment Act may treat such person as an independent contractor for instance.

The contestation over the import of the above provision requires an interpretation of the law.

I am cognizant of the decision in **Cape Brandy Syndicate v IRC (1921) K.B 64** where it was held thus;

> "In a taxing Act, clear words are necessary in order to tax the subject in a taxing Act, one has merely to look at what is clearly said. There is no room for an intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in it, nothing is to be implied. One can only look fairly at the language used."

See also **Uganda Revenue Authority v Siraje Hassan Kajura SCCA 9/2015, Chestnut Uganda Limited v Uganda Revenue Authority TAT Application No. 94 of 2019.**

However, more recent precedents have underscored the use of other rules of statutory interpretation in interpreting tax statutes. In **URA v COWI A/S HCCA 34/2020** my learned brother Justice Mubiru opined extensively on the principles of statutory interpretation in respect of tax statutes. I am constrained to quote his judgment in some detail:

> "It has for long been a well-established principle in the interpretation of tax legislation that the taxpayer may only be taxed by clear words (see Russell v. Scott [I948] A.C. 422 and Macpherson v. Hall (H.M. Inspector of Taxes) (1969-1973) 48 TC 210). In the event of ambiguity in tax legislation (where the provision is so obscure that no meaning can be given to it), the taxpayer will be given the benefit of the ambiguity (see Fleming v. Associated Newspapers Ltd. (1970) 48 15 T.C. 382 at 390). Until relatively recently courts

generally used this "strict and literal" approach to the interpretation of statutes, especially in fiscal matters, to overcome interpretational problems. It did not matter that such approach led to unfairness or even hardship.

However, in modern times, any exercise in interpretation and application of statutes cannot be undertaken on the assumption that it is an exercise without any object, that the Acts have no "spirit" or aim. For example, the House of Lords, in Pepper (Inspector of Taxes) v. Hart [1993] 1 All ER 42, used the "purposive" approach to the interpretation of a fiscal statute and confirmed that it is permissible to use the Hansard Reports as an aid to statutory interpretation. Lord Denning led the way in Davis v. Johnson [1978] 1 All ER 841, when he used the Hansard Parliamentary Debates Reports (the "Hansard Reports"), the use of which was previously denied to the judiciary, as an aid to assist the court in finding the intention of Parliament and the purpose behind a provision. He rejected the notion that judges should "grope about in the dark for the meaning of an Act without switching on the light."

The harmonious rule of legislative interpretation is adopted when there is a conflict between two or more statutes or between two provisions of the same statute. The rule requires that a legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. The provisions of one statute should be interpreted in harmony with the tenor of other statutory provisions or the overall statutory purpose. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. However, if this is not possible then it is settled law that where there is a conflict between two sections, and one cannot reconcile the two, one has to determine which the leading provision is and which the subordinate provision is, and which one must give way to the other.

In *Metropolitan Life Limited v. Commissioner for the South African Revenue Services [2008] 4 All SA 558 (C),* the court was of the view that when faced with apparently conflicting provisions in tax legislation, the interpreter must endeavour to arrive at an interpretation which gives effect to the purpose with which the Legislature enacted the relevant provisions. The purpose (which is usually clear or easily discernible) is used, in conjunction with the appropriate meaning of the language of the provision, as a guide in order to ascertain the legislator's intention and the scope of the provision. The court will then consider the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation.

Using both the purposive and harmonious rules of legislative interpretation, a court must read two allegedly conflicting statutes or instruments made thereunder to give effect to each if it can do so while preserving their sense and purpose. The preferred interpretative approach is for both provisions to be interpreted purposively and holistically in order to be given a clear meaning whenever plausible, so that the provisions in the Regulations can be made to do work within the scheme of the Act. Only if provisions of two different statutes are irreconcilably conflicting, or if the later statute covers the whole subject of the earlier one and is clearly intended as a substitute, will courts apply the rule that the later of the two prevails."

See Also **Mangin v Inland Revenue Commissioner (1971) 1 ALL ER 179, URA v Patrick Nabiryo & Ors CACA 45/2013, Stanbic Bank Uganda Ltd & 7 Ors v Uganda Revenue Authority HCCA 170 of 2007**

The intention and context of a tax statute are helpful in its interpretation. In **INFORMER NO. TCI/002/07/05 – 06 v URA HCCS 579/2007**, court cited with approval the decision in **Engineering Industry Training Board v Samuel Talbot [1969] 1 ALL E.R. 480** when Lord Denning held thus:

"But we no longer construe Acts of Parliament according to their literal meaning. We construe them according to their object and intent."

The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. See **British Columbia Ltd. v. Canada, 1999 CanLII 639 (SCC), [1999] 3 S.C.R. 804**

From the above, it is clear that the modern approach to interpretation is what is relied on to interpret tax laws, as opposed to the approach in Cape Brandy (above). Interpretation of tax laws is a holistic approach in which the court tries to ascertain the objective intention of the legislation while utilizing one or more than one of the canons of construction. It is when, applying these canons, that if a statute is vague, it should be interpreted in favour of the tax payer. See **Stubart Investments Ltd. v. The Queen, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87; Stubart, at p. 578, per Estey J.**

I must add however that, on top of the above, where the meaning of a Statute cannot be discerned except through a more than reasonably simple process of inquiry, the same is vague and ought to be interpreted in favour of the taxpayer. See **Luwa Luwa Investments v Uganda Revenue Authority HCCA 43/2022.**

Tax laws should be clear and easy to understand in order not to make it unduly burdensome for persons and entities to comply by having to go through an unduly complex process of ascertaining their meaning. This is what is called tax transparency. Law makers have a duty to ensure that tax laws are clear, transparent and accessible. See **OECD (2014), "Fundamental principles of taxation", in Addressing the Tax Challenges of the Digital Economy, OECD Publishing, Paris**, **Richard Murphy and Andrew Baker (2021), Making Tax Work: A Framework for Enhancing Tax Transparency. GIFT**.

Certainty in tax laws is important as it enables tax payers to know, without complexity or debate, what specific transactions are taxable, what the charge of tax is, in whose hands the income or benefit is taxable, how the tax should be accounted for/declared, how the tax is to be computed (if at all) and when it must be paid. See **Farid Meghani v Uganda Revenue Authority HCCA 6/2021**

Having reviewed the principles guiding interpretation of tax statutes, we will now interpret the impugned statutes guided by the principles above.

The starting point is to consider whether the import of the provision above is that any person retained under any engagement that establishes a fixed or ascertainable fee is an employee notwithstanding if such person is not classified as so by the Employment Act.

I agree that with the submissions of Counsel for the Respondent that a tax law may re-prescribe one legal relationship as another for tax purposes, as long as it does not create obligations beyond the tax relationship itself since if it does, the proper position of the law in respect of the parties for these additional obligations is a question to be settled by law on conflict of laws. See **C.I.C Life Insurance Limited v Commissioner of Legal Services and Board Coordination (Tax Appeal 1031 of 2022)**

I have read the decision of the Court in **APA Insurance (U) Ltd & Ors v Uganda Revenue Authority HCCA 29/2018** wherein the court held that held that the relationship between the insurers and the insurance agents is defined by the Insurance Act which is an Act of Parliament and not by the contracts.

With the greatest respect to the Learned Judge, I disagree with the dicta above. In my considered view, the tax treatment of a specific legal relationship is a question for a taxing law only. Other laws are only relevant where the taxing law has not pronounced itself clearly on the matter in dispute, such that recourse to the relevant law/laws is to be heard for purposes of resolving a tax dispute arising from the same relationship. See **C.I.C Life Insurance Limited v Commissioner of Legal Services and Board Coordination (Tax Appeal 1031 of 2022)**

Fixed Payments and Consultants: A Review of Precedent

Before an interpretation can be rendered regarding the above-mentioned provision, one has to consider the treatment of the question as to whether the receipt of a fixed or ascertainable fee makes one an employee.

In the Kenyan case of **John Kawa Ilume v Gemina Insurance Co. Ltd [2014] eKLR** the court considered whether a commission agent who earned a fixed retainer fee was an employee. The Court held thus;

> "To answer the first issue, the court considered Section 2 of the Employment Act which defines an employee as a person employed for wages or salary. In the present case the claimant was being paid in the form of a retainer and commission. It is common knowledge that a retainer is a fee to keep an independent contractor of services engaged so as to provided the contracted service as and when required. It also means an advance lupsum pay for example to a lawyer when he is instructed to act for a client.
>
> From the above context, the fact that the claimant was paid a retainer every month did not make it a salary or wage. Consequently, the court agrees with the defence that there was no employment relationship between the parties herein as contemplated by Section 2 of the Employment Act. Flowing from the foregoing finding, it is obvious that this court lacks jurisdiction to determine this suit. Article 162(1) of the constitution establishes this court to deal with employment and labour relations disputes only and not disputes related to Agency contracts for services between principals and independent contractors. The Industrial Court Act which donates jurisdiction to this court does not seem to extend it to cover disputes of retainer of independent contractors.
>
> Consequently, the suit is to be forwarded to another forum which has the jurisdiction to entertain the dispute for hearing and final determination. The parties have not suggested in their submissions which forum is best suited to receive this file. Consequently, the matter shall be stood over generally until the parties suggest the forum before which the suit will be tried."

In **UAP Life Assurance Company v Commissioner For Domestic Taxes (2019) EKLR** where the case of Joshua Kawa (above) was considered, and which dealt with whether tied insurance agents who received a certain monthly payment were consultants, the court held thus:

> "I find that although the Respondent argued that according to the letter dated 18th March 2016, written by Doreen Mbingi for Commission of Domestic Taxes Ltd, the decision to demand tax was based on the fact that the samples of unit managers contracts revealed that, these agents receive a retainer, otherwise known as a subsidy for the services offered; offer services at the employer's premises; are required to give regular reports to the underwriter and this shows an element of control from the underwriter; select, recruit and develop agents who market the underwriter; and the services of these agents are only to be offered to the underwriter hence restricting them from working for more than one firm, these did not qualify them to be employee of the Appellant."

A similar finding was reached in **C.I.C Life Insurance Limited v Commissioner of Legal Services and Board Coordination (Tax Appeal 1031 of 2022)**

Fixed and Ascertainable: What Does It Mean?

In **Guérin v. Minister of National Revenue 52 DTC 118**, by the Tax Appeal Board, was also cited to me. In that case, income received by a judge who temporarily ceased acting in a judicial capacity and took up sitting as a chairman of various arbitration boards was not held to be income from an office. In that case, the taxpayer was paid a stipulated amount for each sitting but there was no way of knowing the number of sittings any given board would have nor the number of boards on which the Appellant would sit. The Tax Appeal Board held that as long as the number of sittings was indeterminate, the remuneration for the office could not be said to be ascertainable and therefore the income must be treated as business income, at p. 121:

> "By "position entitling one to a fixed or ascertainable stipend or remuneration" Parliament, in my opinion, meant a position carrying such a remuneration that when accepting it a person knows exactly how much he will receive for the services he is called upon to render . . ."

See also **Merchant v. The Queen, 1984 CanLII 5801 (FCA), 84 DTC 6215.**

In **Payette v. Canada, [2002] T.C.J. No. 386** the court defined what an ascertainable income meant for purposes of the taxing law, holding thus;

"As well, the Court considers that the descriptor "ascertainable" must refer to something that can be ascertained a priori; otherwise it would have no meaning since everything can be ascertained *a posteriori*. Thus if the "stipend" or "remuneration" is not fixed, it must still be ascertainable in advance with at least some degree of accuracy by using some formula or by referring to certain set factors."

In **Jean Guyard v The Minister of National Revenue 2007 TCC 231 (CanLII)** the Court considered whether a person engaged as a consultant in a temporary transitional committee who was required a minimum of eight hours a day and whose pay was subject to a fixed per hour rate earned a "fixed or ascertainable income". The court held that, notwithstanding that the rate per hour was fixed, the Appellant did not earn a fixed income since the committee was temporary and accordingly, the legislative intent of the provision relating to fixed or ascertainable income" was not designed to apply to persons like the Appellant.

In **Churchman v. Canada, 2004 TCC 191** court considered the question as to whether a lawyer who provided services to Human Resources Development Canada ("HRDC") as Chairperson of the Board of Referees pursuant to two three-year contracts was an employee owing to the fact that she earned a fixed pay for hearings. The Court held that whereas the pay was fixed for hearings, the same did not mean that overall the lawyer earned a fixed and ascertainable payment as the fixed rate applied only to payments in respect of attendance of hearings.

In **Rumford v. Canada (F.C.A.), [1993] F.C.J. No. 1359** Court heard an application for judicial review of a Tax Court of Canada decision. The facts are set out in the judgment of the court as below:

"**2** The applicant, during the 1988 taxation year, held the office of "commended worker" in the Plymouth Brethren Assembly or church. His work was not confined to meeting the

spiritual needs of that assembly, however. He preached at other chapels as well, lectured at Bible School, spent 143 hours counselling members of other congregations, and gave 147 sermons to other congregations.

3 The $27,755 that he received from the Erindale Bible Chapel was made up of two components: (a) 14,640 allocated by the elders of Erindale Bible Chapel and (b) the balance being the total voluntary contributions made by members of the Erindale Bible Chapel congregation through envelopes on which the applicant's name was endorsed. The applicant claimed at trial that the balance of the revenues, approximately $54,500 came as reported in his return of income from self-employment, in effect as an itinerant preacher.

4 In his return of income for 1988, the applicant reported $27,755 received by him from Erindale Bible Chapel as income from office or employment. As well, he reported gross professional income of $54,494.83 and net professional income of $32,034.27. The amount of the deduction claimed under paragraph 8(1)(c) was $18,600."

The Court held thus;

"Remuneration is not ascertainable within the meaning of the definition simply because the total receipts can be determined by addition at year end of the fees received during the year. In Merchant v. The Queen [1984] 2 Federal Court Reports 197, Madame Justice Reed, in the course of a review of the jurisprudence with regard to the meaning of the word 'ascertainable' said the following at pages 202 and 203:

I take that word to mean that the amount to be paid is capable of being made certain, or capable of being determine but not that a definite sum be known by the office at the commencement of holding office. The word has to have some meaning beyond "fixed" or else it is completely redundant.

In this case, members of the congregation make contributions which form a very substantial part of the Appellant's remuneration and they render the total amount uncertain except by addition at year end.

The position is therefore not, in my view, an office. ..."

In **Real Estate Council of Alberta v. M.N.R., 2011 TCC 5 (CanLII)**, the court considered the question as to whether a member of a Real Estate Regulatory Council engaged for a tenure of office earned a "fixed or ascertainable" income. The hearings did not have a fixed length or fixed structure (some hearings were determined by. Decision and others by consents). The arrangement between the consultant and the council was that the services of the consultant was paid a flat fee for her services (by way of a honorarium). The Court held:

"urning to the facts in the within appeal, a review of the honorarium schedule - Exhibit A-1 – discloses that during the years in question there was little information that would permit a member of RECA to know in advance the amount of his or her remuneration. The number of hearings would need to be known as well as their duration. The appointees would not know whether the Chair of Council would appoint them to any committee or send them to conferences, seminars or to ceremonies and other events as a representative of RECA. Until a certain level of expertise in administrative law was obtained from sources approved by Council, a member was not eligible to participate in disciplinary matters at any level. As set forth in Exhibit A-2 – titled "Range of Member Participation During Period January 1, 2007 to December 31, 2009" – participation at meeting of Council and special events ranged from 3 to 16 days. The range for committee meetings was from 1.5 to 15.5 and conferences from 0 to 17.5 days. The range for Hearing and Appeal panels was from 0 to 12.5 and attendance at training courses and seminars varied from 0 to 5 days. An examination of the Honorarium Analysis – Exhibit A-3 – for the years 2004, 2005 and 2006 shows the income of Andre-Kopp as $10,275, $11,875, and $19,975, respectively. In 2004, 3 members earned no remuneration from hearings and one member earned only $75. During the entire relevant period one member did not participate in any hearings. In 2005 and 2006, one member earned zero during those years. In those years, two members did not attend any meetings of Council and earned zero under that category, although one of them did earn money for attending hearings. One member earned a total of $1500 in 2006 while the remuneration for other ordinary members ranged from $2700 to $16,000 with 8 members earning less than $6,000.

> If Council had been obliged to pay a minimum amount to a member, perhaps equal to a certain number of days or half-days or to pay a standby or cancellation fee if a hearing did not proceed, then at least those minimum amounts would be ascertainable in accordance with the decision in *Rumford*. According to the revised payment schedule – in effect from July 1, 2006 to December 31, 2006 – some of the new qualifying activities entitled the member to a flat fee of either $100 or $150. However, those services still had to be performed. In my view, upon appointment to Council, members – including Andre-Kopp – were not entitled to receive anything. The singular honour flowing from the appointment itself, provided it was supplemented by a "toonie", would enable the recipient to purchase a medium-sized coffee."

The impact of the dicta of the above decision is that where the consultant was paid a certain minimum fee, the same would be considered ascertainable. However, this would then make the court have to consider the dicta in **Churchman v. Canada** which is to the effect that the income of a tax payer is not "fixed or ascertainable" if only part of it (and not the whole of it) is fixed and ascertainable. The reasoning for this is that one cannot be considered an employee for one part of their income and a consultant in respect of the other in respect to the same role, however this may be possible where the roles for which the different income is earned are different and distinct.

A review of these precedents reveals a number of things:

1. A payment of a fixed or ascertainable income doesn't bring it within the scope of the provision if there isnt a contractual (or other legal) entitlement to the payment.
2. when the remuneration is not fixed, then the ascertainable aspect must be *a priori*, meaning formed or conceived beforehand, relating to or derived by reasoning from a self-evident proposition, and not *a posteriori,* meaning relating to or derived by reasoning from observed facts.
3. The permanency of the relationship as a result of which the payment is made is an important consideration. Even if the payment looks prima facie fixed or ascertainable, where the payment is made as a result of a relationship without some degree of permanency, the payment(s) may not be considered fixed since the relationship from

which they arise is not itself certain and there can be no payment without a relationship and because of this, the permanency of the relationship is relevant to a determination as to whether such payment is fixed or ascertainable.

Much closer to home, this court had the opportunity to consider the meaning of the above provision in **International Bible Students Association v Uganda Revenue Authority HCCS 209/2009**. I am constrained to quote the dicta of Lady Justice Elizabeth Musoke (*as she then was*) in some detail:

"This leaves court with the determination as to whether the members of the Order fit under the definition of "employment" under Section 2(z) (iii) of the Act which defines "**employment"** as **"a position entitling the holder to a fixed or ascertain remuneration".** The parties chose to distinctly analyse the elements constituting this definition: that is to say, "**position**", "**entitlement**", and "**fixed and ascertainable remuneration**".

In his submissions, the Plaintiff relied on the definition of "position" from the Oxford English Dictionary, which defines "**position**" as "**rank or status; high social standing; paid employment**". The Defence asserted that there was no such definition in the Oxford English Dictionary, and also asserted that "position" is synonymous with "arrangement" and that this is what was envisioned by the enactors of the Income Tax Act. This court's reference to the definition of "**position**" in the Oxford English Dictionary shows that the definition includes "**high rank or social standing; a job**" as well as "**a way in which someone or something is arranged**".

From this definition, the Plaintiff argued that there is no "position" as envisaged under the statute because in the Plaintiff's relationship with the members of the Order, there is no employment. To support this, Plaintiff cited the following facts: members do not apply for or choose their assignments; their assignment may change at any time and holds no status; some members are assigned to serve the other members by providing housekeeping and other duties; preparing and serving meals, and caring for the elderly and infirm; and all members of the Order may be called upon to perform any of the tasks

required to sustain the Order or to accomplish its objectives. The Plaintiff argued that there are no "positions" because, while members may have specific tasks to perform, there are no general descriptions of their work, as it varies depending on the needs of the Order.

The Defendant on the other hand, argued that the relationship between the members of the Order and the Plaintiff fits under the definition of "**position**" as an "arrangement" and thus, satisfies the "**position**" requirement of the statute.

The Defendant further relied on the application form (Page 9 thereof) which the intending members fill for consideration to become Bethel family members in the Order (See Exhibit 9) which provides that "……. ***if there is an opening for which we feel you are qualified, we will advise you. Otherwise please DO NOT expect an acknowledgement of this application***". Further, the same application form provides that the Branch Committee reserved the right to determine if and when one's membership should terminate.

From an ordinary reading of the application, particularly the clause cited above, it appears that one would be admitted to the Order if there is an opening (a position) which is terminable, which one is qualified to occupy when admitted to the Bethel family.

The court finds that although the duties the aspirants to membership of the Order are "appointed" to perform are of a volunteer nature, their secular work background and experience, apart from their spiritual qualifications, are relevant in determining where (positions) they are deemed fit to serve. In this sense, therefore, they will be filling positions. The position element is thereby fulfilled.

The other element in the definition under sub-section (iii) is "entitlement". *Black's Law Dictionary* defines "entitlement" to mean "an absolute right to a (usually monetary) benefit such as social security granted immediately upon meeting a legal requirement". Based on this definition, the Plaintiff submitted that there is no entitlement in the relationship between the plaintiff and the members of the order, the reason being that to become a member of the Order, one had to take a vow promising not to take part in any secular employment, and to accept the modest material support provided. And if the

Plaintiff decides to decrease the monetary support given to members of the Order, the members have no right to make a lawful demand for an increased amount.

The Defense contended that to establish the true meaning of "entitlement" calls for a further definition of an "absolute right". According to *Black's Dictionary,* an "absolute right" is ***"a right that belongs to every human being such as the right of personal liberty; a natural right, an unqualified right; specifically, a right that cannot be denied or curtailed except under specific conditions".*** The Defense contended that this is not the meaning of "entitlement" intended under the Income Tax Act. Instead, the Defense provided an alternative definition from the *Oxford Advanced Learner's Dictionary, 6th Edition,* which defines "entitlement" as ***"the official right to have or do something; something that you have an official right to do; the amount that you have the right to receive".*** Based on this definition, the Defense asserted that members of the Order are entitled to the monetary support provided by the Plaintiff.

The defendant further submitted that from facts in Exhibit P.10 and the plaint, the members of the Order are entitled upon becoming part of the Order, to monetary and other benefits which are ascertainable and accordingly should be accordingly fall to be taxed. The said modest support is Shs. 170,000= monthly for personal necessities and an annual amount of Shs. 576,000= for expenses such as clothing or emergencies. The defendant also relied on Clause 5(6) (c) of the plaintiff's Articles of Association which stated in reference to benefits of trustees of the order, that ***"(c) the accommodation, board, monetary and other benefits enjoyed by the Trustees shall be of the same or similar standard to that of the other volunteers working fulltime with the charity".***

As far as "entitlement" to the said sums, the court finds that in order for a person to be entitled to remuneration, that person must be able to make a legal claim to that remuneration should it fail to be provided. In the case at hand, the disbursements made by the Plaintiff are not given in direct exchange for services provided. This is indicated by the fact that members receive the same support regardless of the tasks they perform. As noted by the Plaintiff, the statute states "fixed or ascertainable remuneration", which

means payment for services, and not fixed or ascertainable disbursements, such as social security. The members of the Order are not in a contractual relationship with the plaintiff and therefore could not make a legal claim to the monetary support provided by the Plaintiff. This court finds that the members of the Order are not entitled to the support they receive from the Plaintiff and thus, do not fit under section 2(z) (iii) of the Income Tax Act.

Having found as I have that the members of the Order do not fit squarely within the four corners of sub-section (iii) of the definition of employment, the monetary support provided by the Plaintiff to the members of the Order does not qualify as taxable income."

In my considered view, the import of the above section is that one must have a "position" of some permanency. In my view, a consultant cannot be considered a position within the mean and context of the above provision since a consultant is not a permanent part of the staff team of an organisation. It is indeed true that many organisation describe consultant's roles as "positions" but this is an administrative reference, and is used in a wholly different context as in the present case. Here, the provision target persons who may be classified as consultants or not classified formally as either but whose role is really one of employment as can be seen from the tenents of the position they hold and their entitlement to a fixed or ascertainable remuneration.

Consultancy contracts are by their nature typically deliverables based, such that nonperformance by the consultant does not entitle them to payment. Employment relationships are different since it is the duty of the employer to provide work and bad performance by a staff does not, by itself alone, entitle the employer to withhold salary except where there is a contractual or statutory basis for the same. In that context, employees occupy "positions" within the structure of the employer and have an "entitlement" to pay which is typically fixed or capable of being ascertained.

The determination as to whether one is a consultant or a staff is a question of fact (guided of course by the relevant legal principles and provisions of the law which we will explore in some detail in the next grounds) and not a matter for speculation, conjecture, assumption or

loose theories. It is possible for an employee's team to be fully comprised of employees, it is possible for it to be a hybrid team with consultants and employees only and it is possible for their team to be made up of only consultants. This is more so where technology and the development of new working tools have continued to make models that dictated the recruitment of only staff to be obsolete. Increasingly also, many organisations are out sourcing non-core roles to consultants to enable them force on their core tasks. Court will take a dynamic approach to interpreting and applying the law to the circumstances, fully cognizant of the changing times in the world and it is important that the Respondent, as the principal body charged with enforcing compliance with tax laws takes a same approach, rather than, say, a more collections oriented approach.

Accordingly, and with the greatest respect to the Learned members of the Tax Appeals Tribunal, I cannot find a legal or jurisprudential basis for the assertion that any person who receives a fixed or ascertainable remuneration for a period in excess of two months is to be considered an employee. A professional services provider such as a chef, advocate, medical doctor etc. may have their retainer paid in regular monthly installments. That by itself does not make them employees.

A reading of the impugned provision leads to the conclusion that one must consider whether (a) such a person occupies a position in the employer of some permanency that can be properly considered to be an employment position (rather than a consultancy role), (b) whether they are entitled to a fixed or ascertainable remuneration and (c) whether that entitlement has some degree of permanency. This would mean that even a person who is entitled to a fixed or ascertainable income for one month and meets the above threshold can be correctly considered an employee while a person who is entitled to a fixed or ascertainable payment for five years but does not meet the rest of the ingredients above may not be considered an employee. One must consider the tenents/features of the relationship as a whole rather than isolate only parts of that relationship and consider them to reveal a classification as either an employee or consultant.

For this reasons, I respectfully find myself unable to agree with the opinion of the members of the Tax Appeals Tribunal and I accordingly find for the Appellant on Ground One.

Ground 2: The Tax Appeals Tribunal misapplied the principle/tests for determining the existence of the employment relationship, thereby erring in law and reaching the wrong conclusions.

Ground 3: The Tax Appeals Tribunal erred in law when it failed to evaluate all the evidence before it in the application thereby reaching the wrong conclusions.

I have felt the need to consider these grounds together. Ground 2 deals with the legal principles for determining the existence of an employment relationship while ground 3 deals with the application of those principles to the facts before the Tax Appeals Tribunal.

Submissions on Ground Two

Counsel for the Appellant submitted that the tribunal misdirected itself in determining the existence of an employment relationship by only considering one element namely fixed and ascertainable income and disregarded all other customary tests it ought to have considered.

The Appellant submitted that there exists no single test to determine whether an employment relationship exists. Counsel relied on Section 2 of the Employment Act to define an employee, an employer an a contract of service. Counsel relied on page 8 of the Income Tax Act explanatory notes for the distinction between an employee and an independent contractor.

Counsel relied on the cases of **Hollis v Vabu Pty Limited (2001) 207 CLR 21, Ready Mixed Concrete v Minister Of Pension (supra), Stevens v Brodribb Sawmilling Company Pty Limited (1986) 160 CLR 16**. Counsel identified a number of conditions that he submitted were to be used to assess the existence of an employment relationship namely (a) the terms of the contract and (b) control (or lack thereof)

Counsel for the Respondent referred to page 438 of the record of appeal and submitted that the TAT held that Section 2(z)(ii) of the ITA provides that a holder to a fixed or ascertainable remuneration is considered as one in employment. Counsel submitted that the provisions of the said law are clear and it ought to be read as is.

Counsel for the Respondent submitted that the court correctly relied on the test for a fixed or ascertainable income under Section 2(z) alone to determine that there was an employment relationship. Counsel submitted that each of the conditions thereunder (tests) were exclusive of each other and accordingly, there was no need for all of them to be met. Counsel submitted that as long as one condition was met, this was sufficient.

Counsel also submitted that the Appellant wrongly faulted the Tax Appeals Tribunal for not relying on the provisions of the employment act in so far as they defined what constitutes employment. Counsel submitted that for tax purposes, the instructive law is the Income Tax act and as such there was no need for inference or intendment in a clear provision of the law. Counsel relied on the dicta in **Bank of England v Vagliano Brothers (1891) AC 107** and **Cape Brandy Syndicate v Inland Revenue Commissioners (1920) I KB 64**.

Counsel further submitted that the Income Tax Act is a specific provision which governs taxation of employment income specifically and therefore prevails over the general statute being the Employment Act which governs the law of employment generally. Counsel cited the decision in **Commercial Tax Officer Rajasthan. V Binani Cement Limited & Anor SCCA 336/2003**. Counsel submitted that in the present circumstances, the specific definition of employment relative to income tax takes precedence over the definition of employment generally under the Employment Act.

Counsel submitted that in any case the court considered the tenents of employment and relied on the decision in **Ready Mixed Concrete v Minister of Pensions And National Insurance (1968) 2 QB 496**. Counsel referred to page 437 of the record of appeal.

Submissions on Ground Three

Counsel for the Appellant submitted that whereas an appeal from a decision of the TAT is treated as a second appeal which is confined to an errors of law, a failure to re-evaluate evidence is an error of law which would entitle the appellate court to re-evaluate the evidence and pronounce itself on the same. Counsel relied on **Ham Enterprises Limited v Diamond Trust Bank (U) Ltd & Ors SCCA 13/2021** and **Martin v Glywed Distributors Limited 1983 ICR 511**. Counsel submitted that the Appellant presented evidence including witness statements testifying to the nature of the relationship between the Appellants and the independent consultants. Counsel submitted that the Appellant adduced a human resource manual, guideline of employment status and sample contracts contained at pages 60 and 134 of the record of appeal which accurately represent the contractual relationship between the Appellant and its consultants. Counsel referred to page 414 of the record of appeal where the Appellant's witness confirmed that the entity at the time had 1,800 employees and less than 50 consultants to show that the Appellant was not objecting to the taxes assessed in a bid to evade its obligations but that the tax was simply not due and payable. Counsel therefore submitted that the decision of the TAT should be overturned.

Counsel for the Respondent submitted that it is trite that in taxation matters, the burden of proof is on the Applicant to prove that the assessment that was raised by the Respondent was incorrect or erroneous or that the taxpayer was not liable to pay the tax assessed. Counsel cited **S. 26 of the Tax Procedures Code Act, S. 18 of the Tax Appeals Tribunal Act and S. 101 of the Evidence Act**. Counsel also cited the decisions of **Williamson Diamons v Commissioner General (2008) 4 TTLR 167** and **Uganda v Gurindwa & 5 Ors HCT-00-AC-70-2012** as authorities in support of the above proposition.

Counsel submitted that the tribunal undertook a thorough perusal of the contracts as availed during the proceedings and upon evaluating the evidence determined that the Appellant was liable to pay the taxes issued. Counsel submitted that the tribunal rightly evaluated the evidence and came to the right conclusion having applied the law accordingly. Counsel submitted that the Appellant failed to discharge its burden to prove that it was not liable to pay the taxes as assessed.

What is Employment under the Income Tax Act?

In my view, the starting point is to ask ourselves an important question. What does the income tax act define employment to mean? As already noted above, what is considered employment for purposes of taxation is a question of the taxing statute, in this case the Income Tax Act. It is where the Act is silent that recourse may be had to other legislation. The basis for this is the long standing principle of tax legislation that where a taxing act has defined a word to mean something, that thing means that it is defined to mean, and one cannot have recourse to extrinsic materials in such circumstances. See **Taylor (M.K.) v. M.N.R., 1988 CanLII 10125 (TCC) Yellow Cab v Board Of Industrial Relations (1980) 2 SCR 761**

Section 2 of the Income Tax Act defines "employee", "employer" and "employment" as below:

"Employee means an individual engaged in employment"

"Employer means a person who employs or remunerates an employee"

"Employment means-

(a) The position of an individual in the employment of another person;

(b) A directorship of a company;

(c) A position entitling the holder to a fixed or ascertainable remuneration; or

(d) The holding or acting in any public office"

The definition of who an employee is as set out in the section defining an employee is fairly clear from the plain reading of the act.

As regards who an employer is, it must be noted that it is not confined to a person who employs the employs but may also be applied to the person who remunerates them. In my considered view, one cannot have two employers in respect of the same contract of service except where it is a syndicated employment relationship; that is, where an employee is engaged to work for two or more entities that share the responsibility for their emoluments. It follows that under the ITA, the responsibility of an employer for tax purposes may be pegged on the person utilising the individual in employment or the person paying for those services.

However, where the person paying the employee's salary only does the same under an agency/representative relationship, (such as happens between associated companies or organisations) they cannot be considered the employer for purposes of the ITA since they only make payment for an on behalf of the employer. See **Prime Solutions v Uganda Revenue Authority TAT Application No. 116/2019.**

We now have clarity on who an employer and employee are. The Question which remains to be considered is what is employment.

Employment: Definition for Tax Purposes

We have already tackled one of the four incidents of employment, namely the holding of a position entitling the holder to a fixed or ascertainable remuneration. We have seen that the incident is circular in the sense that the position envisaged therein is an employment position and therefore, the provision is essentially an anti-evasion provision, largely target persons who are practically employees but creatively classified as not to appear so.

Equally so, the holding or acting in any public office is an incident that is fairly certain. One needs to establish that the person assessed holds or is acting in a public office and they are considered employees for tax purposes.

We turn to the other two incidents of employment namely the holding of a directorship and the position of an individual in employment. In the Tax Appeals Tribunal, the tribunal held that the holding of a directorship in a company is by itself employment within the ITA. A similar decision was entered by the tribunal in **International Food Policy v Uganda Revenue Authority TAT Application No. 59/2023**

Directors

In **Michael K. Taylor v Minister of National Revenue 1988 2 CTC 2227**, the Court held that a directorship is an office and a director is an employee. The court went on to hold that the Appellant was hired as a director and was thus an employee. See **Also Robert Stack v Ajar-Tee Limited [2015] EWCA Civ 46**

In **Bradley Rainford v Dorsett Aquatics Limited EA-2020-000123-BA** in a Labour Dispute, the court held that a director was not an employee inspite of the fact that he earned a salary on the site operated by the Respondent as a site manager.

In **Nesbitt and Nesbitt v Secretary of State for Trade and Industry, UKEAT/0091/07** the Appellants had entered into contracts of employment with a small company they jointly managed as husband and wife, and between them owned 99.99% of the shares. After the company became insolvent, and having been made redundant by the liquidator, they each applied to the Insolvency Service for a statutory redundancy payment, a right only accorded to employees. Their claims were rejected by both the Insolvency Service and the Employment Tribunal on the basis that they were not classed as employees within the meaning of the Employment Rights Act of the UK. The Court found that the company's majority shareholder and director was an employee because of a pre-existing contractual agreement equivalent to those issued to other staff and they did not receive director's fees, dividends but way paid only by way of salary.

In **Rift Valley Water Services Board & 3 Others v Geoffrey Asanyo & 2 Others Civil Appeal 60 of 2015**, the court considered a similar question and found that the court could not hold that there existed an employment relationship between it and its director without a formal contract and/or proof of the incidents of an employment relationship.

It appears that, generally, as to whether a director is an employee or not is a question of fact which must be assessed on a case by case basis. However, this is in respect to the existent of a legal/contractual relationship of employment or the absence thereof and NOT whether a director is an employee for tax purposes.

It follows that a reading of the above provisions of the ITA leaves no other interpretation other than that for tax purposes, directors are employees and any taxable income earned or taxable benefit obtained constitutes part of their employment income. Accordingly, notwithstanding that directors may not be considered employees for purposes of the law of contract/law of employment, they are nonetheless considered employees for tax purposes. This ofcourse relates to only directors as defined in the Companies Act and does not apply to

persons who hold non directorial positions even though there is the use of "director" in their job title such as "Managing Director", "Director for Operations" etc. If those persons are not directors within the meaning of the Companies Act, they cannot be considered directors for purposes of the ITA.

The position of an individual in the employment of another person

The ITA does not define what an individual in the employment of another person mean. Recourse will need to be had to other relevant laws which provide a guide.

Section 2 of the Employment Act defines a contract of service as

"any contract, whether oral or in writing, whether express or implied, where a person agrees in return for remuneration, to work for an employer and includes a contract of apprenticeship"

Various precedents have sought to distinguish the difference between employees and independent contractors. The jurisprudence has developed three tests to determine existence of the employment relationship namely (1) the control test see Yewens v Noakes 6 QBD 530, (2) business integration test see Cassidy v Ministry Of Health (1951) 2 KB 343, **Stevenson, Jordan & Harrison Ltd v MacDonald & Evans** [1952] 1 TLR 101, and (3) the mixed methods test see **Ready Mixed Concrete v Minister Of Pensions And National Insurance [1968] 2 QB 497, Godfrey Kamukama v MUBS LDR 147/2019, NSSF v MTN & Anor HCCS 94/2014, Kangave Junia v King Albert Distillers HCCS 4/2022**

Accordingly, in determining whether one is an employee or otherwise, recourse is made to the following principles;

(a) Agreement to provide labour in exchange for a wage

(b) Agreement that the employee will be subject to a sufficient degree of control

(c) The other terms/incidents of the relationship are consistent with employment

In determining the existence or absence of an employment relationship, court assess all the relevant facts in totality, considering the terms of an agreement between the parties as well as the nature and character of the parties' relationship practically. See **Australian Mutual**

Provident Society v Chaplin (1978) 18 ALR 385, Security 2000 Limited v Cumberland CACA 916/2014

While assessing the evidence in regard to each of the above ingredients, the court reflects on a number of indicators namely In determining whether a person is an employee, consideration is made to several factors including the following;

(a) What work does the person do?

(b) Who determines the work to be done, how it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done?

(c) Whether the person is paid a fixed or ascertainable wage?

(d) Who provides the tools of work?

(e) How essential/critical the work is to the mission or mandate of the organisation?

(f) Whether the person does any work for other entities, including whether their contract precludes them from doing such work.

(g) Who takes the benefit for the work/who owns the work product?

Below is a table of the major differences between employees and consultants

Factor	Employee	Consultant
Control of Work	Typically does not dictate the work to be done, how it should be done, the means to be employed in doing it, the time when, and the place where it shall be done.	Typically determines the work to be done, how it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done.
Place of work	Typically works at the employer's premises or a place designated by the employer.	Typically choose their place of work.

Pay	Usually earns a fixed or ascertainable wage	Pay typically varies and depends on the extent of performance of the contract or meeting of Key Performance Indicators or milestones.
Tools of Work	Employer typically provides tools for work	Typically pays for or sources their tools of work
Integration of Work	Typically undertakes work that is critical/essential to the mission or mandate of the organisation.	Typically undertakes work that is not critical/essential to the mission or mandate of the organisation.
Other Engagements	Typically works exclusively for their employer and is barred from taking additional engagements without employer consent.	Typically works for more than one entity and is not precluded from undertaking additional engagements.
Benefits	Employees are typically entitled to various benefits including leave, bereavement contributions, workers contributions, etc	Consultants are not entitled to various benefits including leave, bereavement contributions, workers contributions, etc
Intergration	Typically occupies a role intergrated and embedded in the Appellant's structure with clear reporting lines.	Consultants do not have their roles clearly embedded in the organisational structure of the entity and typically engage the entity's structure as "outsiders"

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What the are incidents of the team members' relationship with the Applicant?

We now need to turn to consider whether from the evidence, the said team members are employees. If we are to find that they are consultants, it would follow that the Respondent's additional assesment would be without basis. However, if they are indeed employees, this court would be enjoined to accept the Respondent's re-classification and uphold the assessment. The Respondent is conferred on broad powers to reclassify transactions to reflect their true character and levy assessments where such reclassification reveals a tax to be paid. See **David Balondemu v URA HCCA 2/2023**

It is also common ground that the Appellant has been deducting WHT on the payments to the team members and remitting the same to URA. Should this court uphold the assessment, it would follow also that no WHT should have been remitted and the Appellant would be entitled to a refund under **Section 123** of the Income Tax Act as well as an obligation to pay the PAYE assessed.

I believe we must start by describing, from the evidence, what the character of the relationship of the impugned team members with the Appellant is. The relevant evidence in this regard is from the witness statements and evidence of the witnesses as well as the materials on the record. Key materials were contained at paages 134-278 of the record of appeal. What is clear is that the team members have consultacy contracts, they are covered under the insurance policy and are liable for the costs of any injury met, the consultants don't provide any further services except as itemised in their contracts, they do not neccesarily work at the premises of the Appellant and are utilised on projects where they are needed, some are paid for the days worked while others get one off payments one they met deliverables, they are not subject to the rules of the Appellant such as the HR Manual, the Appellant withholds 6% WHT and the contracts provide that the consultants have an obligation to account on their own for tax on the rest of their income.

Are The Impugned Team Members Employees?

We must now assess the available evidence as against the above principles.

An Agreement To Provide Labour For A Wage

A review of the contracts submitted by the Appellant before TAT shows that there are essentially two payment models that the Appellant uses in regards to these members of its team. Some team members are paid fixed fees on the basis of deliverables while others are paid for days worked. In the premises, there is not a direct relationship between provision of services and placement of income. The relationship here is varied in the sense that staff are either paid when they work, or when they hit a deliverable. Whereas it is possible, in employment, for the parties to agree that the employee is paid only if they work for instance, in the specific circumstances of this case, it is clear to me that the consultants did not agree to provide labour for a wage, but instead enterred a contract where either (a) they would be paid when utilised or (b) whent they deliver unlike in employment where utilisation/performance is a recurrent running obligation and payment of a wage is typically certain.

Control

Here, a helpful starting point is **Uber BV and others (Appellants) v Aslam and others (Respondents) [2021] UKSC 5** where the UK Supreme Court dealt with the question of whether Uber drivers were employees for purposes of UK Employment law. The court premised its decision on the conduct of the parties and noted that Uber exercised significant control over their drivers because (a) they set the fares for the trips performed by their drivers, (b) they ride is booked through the app (and not by the drivers), (c) drivers are not permitted to charge more than the fare which Uber has set for the trip, (d) drivers have no say in their contract terms, (e) Uber "constrains" the driver's choice as to whether to accept rides or not, (f) Uber controls the delivery of the transportation service by, inter alia, a rating system which means that the passenger rates the driver, and where the driver's ratings do not meet the threshold required by Uber, they are issued warnings and later, where the performance does not improve, their relationship is terminated.

The court found that taking these factors together, the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber. Drivers are in a position of subordination and dependency in relation to Uber such

that they have little or no ability to improve their economic position through professional or entrepreneurial skill.

I note ofcourse that the Uber decision is determined in a slightly different legal regime in which the law distinguishes between an "employee", a "worker" and an independent contractor and appears to set statutory protections for contractors who are dependent on the entitty engaging them. For purposes of brevity, and relevance to the instant case, I do not feel the need to go into these details save to say that the UK Employment regime offers interesting reflections for possible legal reform.

In **Mingeley v Pennock (t/a Amber Cars) [2004] EWCA Civ 328; [2004] ICR 727**, in which the claimant driver brought a claim against a private hire vehicle operator trading under the name of "Amber Cars" alleging discrimination on the ground of race. The claimant owned his own vehicle and was responsible for obtaining a PHV driver's licence. He was one of some 225 drivers who paid a weekly fee to Amber Cars for access to what was initially a radio and later a computer system through which trip requests from customers were allocated to drivers. There was no obligation to work but, when he chose to work, the driver was obliged to wear a uniform and to apply a fixed scale of charges set by the operator. He collected and was entitled to keep the full fare paid by the customer. The operator had a procedure for dealing with complaints from passengers about the conduct of the driver and had the power to order a refund of the fare to the passenger. The Court Of Appeal upheld the finding that was not "employed" by the operator he claimant was "free to work or not to work at his own whim or fancy" and that even when working, a driver was not employed by Amber Cars "under … a contract personally to execute any work or labour" .

In **Cheng Yuen v Royal Hong Kong Golf Club [1998] ICR 131** the claimant worked as a caddie for individual members of the Respondent golf club. He was issued by the club with a number, a uniform and a locker. Caddying work was allocated to available caddies in strict rotation. They were not obliged to make themselves available for work and received no guarantee of work. The club was not obliged to give them work or to pay anything other than the amount of the fee per round owed by the individual golfer for whom they had caddied. On an appeal to the Privy Council the majority of the Board held that the only reasonable

view of the facts found was that the claimant had not been employed under a contract of employment by the club either on a continuing basis or separately each time he agreed to act as a caddie, and that the club did no more than grant him a licence to enter into contracts with individual golfers on terms dictated by the administrative convenience of the club and its members.

In **Quashie v Stringfellow Restaurants Ltd [2012] EWCA Civ 1735; [2013] IRLR 99** the claimant was a lap dancer who performed for the entertainment of guests at the respondent's clubs. An important factual finding was that the Respondent was not obliged to pay the claimant any money at all. Rather, the claimant paid the Respondent a fee for each night that she worked. Doing so enabled her to earn payments from the guests for whom she danced. She negotiated those payments with the guests and took the risk that on any particular night she might be out of pocket. The Court of Appeal held that on these facts the employment tribunal had been entitled to find that the claimant was not employed under a contract of employment (either for each engagement or on a continuous basis).

In my view, the question of control depends entirely on the circumstances of the case. There are controls which, though exercised cannot be expected to impute an employment relationship and there are controls which "matter". For instance, in the case of pharamcists and many medical practitioners, they often are engaged as consultants by a number of healthcare providers. Usually, they will determine their hours and days of work by negotiating with the healthcare provider what length of time they are willing to work and what periods they are not required to work. In that context, the provider may excerise some "administrative" controls such as requiring them to indicate in a record when they have arrived for purposes of docking how much pay they may be entitled to in contracts where they are paid for hours worked. This by itself does not make them employees. However, where the healthcare provider dictates their shifts and exercises overall control of their provision of the services, this may be consistent with employment. In any case it is a question of consider who, practically, exercises functional control over delivery of the services. In these circumstances, court must always note that the exisigencies of the market may sometimes provide the healthcare provider with greater leverage, such that the medical

practitioner makes compromises to retain their consultancy, but this by itself (the fact of that the healthcare provider has a higher bargaining hand) does not mean the consultant is an employee. A practical assesment of the real relationship between the parties is necessary.

In the present case, the consultants are not considered part of the employer's staff team and their employment relationship is clearly different. There is a clear difference between the consultancy contract and the template employment contract. The contractors are not beneficiaies of the benefits conferred on staff and are practically "left to their own devices" while the Appellant has a never of employment monitoring and tracking tools to measure performance and conduct of employees in its staff policies and contracts. It appears to me that the only "control" that the Appellant exercises, from the materials on the record of appeal, is contractual; that is, ensuring that the consultants deliver what has been contractually agreed to be delivered rather than overarching control in the employment sense.

It therefore is clear to me that the Appellant does not exercise control over the consultants in the employment sense.

The other terms/incidents of the relationship are consistent with employment

Again, in my view, the rest of the relationship between the Appellant and its consultants is not consistent with employment. There isnt a "certainity" to payment since the consultant must either deliver or work to be paid, unlike say an employee who may earn money while sick or on leave. There is no entitlement to leave, bereavement pay or sick days. There is no cover (contractual or otherwise) for injury in the course of work or proof that such payment may have ever been previously paid. The Appellant has no power to assign the consultants more work on projects than is provided for in their contracts. The consultants are not constrained to work witht the Appellant solely or seek the Appellant's permission to work with other entities. The consultants are not entitled to leave, sick pay or such other benefits. The consultant's contracts do not have probationary periods and neither are the consultants entitled not to work on public holidays. The consultants do not have streamlined roles embedded in the Appellant's structure with clear reporting lines.

In contrast, there is unchallenged evidence that the Appellant's employees are entitled to 25 days of leave per annum, they are subject to probation, they work standard hours (8:00am to 5:00 pm), they are subject to statutory deductions like PAYE and NSSF, they are entitled to medical coverage, worker's compensation, sick leave, bereavement leave of up to fixe days and a year end bonus of 50% of the employee's monthly gross pay. The employees' roles have clear reporting lines.

In my view, the above incidents in the relationship between the Appellant and its consultants is consistent with a consultancy relationship and not an employment relationship. It follows that the Tax Appeals Tribunal did not conduct an exhaustive evaluation of the evidence as the evidence on the record is inconsistent with the finding that the Appellant's consultants are employees for purposes of the Income Tax Act.

Accordingly therefore, the decision the TAT is, with the greatest respect, both unsupported by evidence on the record and in law.

I agree with the submission of Counsel for the Appellant that the Respondent essentially classified these contracts as employment contracts even in light of the glaring evidence to the contrary for purposes of perhaps enhancing their tax collection efforts which this court should not allow, as there is no tax due and the court will not allow an improper collection of tax against a tax payer.

I would therefore find for the Appellant on Grounds two and three.

Conclusion

In the premises, the Appellant's appeal succeeds on all three grounds and this court makes the following orders:

1. The Appellant succeeds on grounds 1,2 and 3 of its Appeal.
2. The Appellant is not obliged to pay UGX 185,200,728 (and any penalties and interest thereon) as assessed by the Respondent as there is no basis for the Respondent's assesment.

3. The decision of the Tax Appeals Tribunal to the contrary is set aside and substituted with the present decision of this court.
4. The Appellant is awarded costs in the Tax Appeals Tribunal and in this court.

I so Order

Dated this 25th day of October 2024, delivered electronically and uploaded on **ECCMIS.**

Ocaya Thomas O.R

Judge

25th October 2024