THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 22 OF 2020

KASABA INVESTMENT LIMITED ..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ..... RESPONDENT

BEFORE: DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MS. CHRISTINE KATWE.

RULING

This ruling is in respect of an application challenging income tax assessments of Shs. 130,271,358 on broker fees.

The applicant provides transport services to Masaka, Mbarara, Ntugamo and Rukungiri. The respondent issued income tax assessments of Shs. 154,061,008 and Shs. 138,518,269 for 1st July 2017 to 30th June 2019 on the applicant. The applicant objected to the assessments on the ground that the respondent ought to have allowed its expenditures on brokers fees. The respondent partially allowed the objections and revised the assessments to Shs. 71,462,204 and Shs. 58,809,154 for 1st July 2016 to 30th June 2017 and 1st July 2017 to 30th June 2018 respectively.

Issues

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

The applicant was represented by Mr. Joseph Angura while the respondent by Mr. Alex Ssali Aliddeki, Mr. Samuel Oseku, and Mr. Sam Kwerit.

The applicant's first witness, Mr. Ronald Kyalisime its accounts manager testified that the applicant is in the business of bus transport. It operates a bus park at Kisenyi bus terminal.

It has 4 buses. It relies on brokers to bring in customers. It pays the brokers a fee of Shs. 3,000 for each customer brought in. It uses brokers in Kampala and where customers disembark. The applicant employes drivers, conductors and turnboys who are given a subsistence allowance of Shs. 12,500 per day. The applicant meets expenses for directors' meetings. The conductors document the expenses incurred per trip. The brokers are not in the applicant's control or of any other bus. He also said that it is the conductor that pays the driver but he does not sign anywhere. He stated that the bus caries 65 people, Shs.195,000 is paid to brokers. He also stated that each passenger pays 20,000. The brokers charge Shs. 40,000 during peak seasons. He stated that the applicant filed its returns for 2016 to 2018. The respondent conducted an audit and raised assessments. The applicant objected on the ground that the brokers fees were incurred in the course of its business and are therefore deductible expenses. The respondent partially allowed the objection and disallowed overstated or unsupported expenses.

The applicant's second witness, Mr. Julius Arinde, a conductor testified that the buses use brokers and passenger guides. They are paid an average of Shs. 12,000 per day. The applicant pays a broker Shs. 2,000 to Shs. 3,000 per passenger. The applicant which has an old fleet of buses spends more on brokers to entice passengers. The applicant spends on brokers enroute. If one fails to pay the brokers they tarnish the bus, and stop passengers from entering. The monies paid to the brokers and the conductors is captured in the highway bill. He stated that the applicant pays him Sh. 40,000, the turn boy Shs. 40,000 and the driver Shs. 45,000 he stated that the bus carries 65 passengers, 3 staff and a turn boy and a driver. He said that they pay Shs. 128,000 to a broker. He also confirmed that the bus is full by the time they leave Kampala.

The applicant's third witness Mr. Umar Ddungu, a director in Swift bus company and the chairperson of Uganda Bus Owners' Association testified that he operates at Kisenyi bus terminal with the applicant. He stated because of competition buses have to use brokers. The brokers are paid for each passenger they bring. The commission ranges from Shs. 2,000 to Shs. 3,000 per passenger. Depending on the season, it can go up to Shs. 5,000. If an operator refuses to pay a commission, the brokers will not bring passengers. By the time a bus leaves the terminal the operator may have spent over Shs. 300,000 on brokers.

Brokers are on all stages along the route. He spends about Shs. 200,000 on brokers. Most passengers are brought by brokers. They do not record all the payments to the brokers.

The applicant's fourth witness, Mr. Marin Turinawe, its managing director testified that the applicant operates a family business. The applicant has four buses. He stated that the applicant's approved route is Kampala to Rukungiri. The applicant operates a public terminal at Kisenyi bus terminal. It uses brokers. The brokers are not owned by any company. The applicant which has an old fleet of buses relies heavily on brokers. Each passenger is brought by a tout or broker. A broker is paid Shs. 2,000 to Shs. 3,000 per passenger. A broker may earn Shs. 180,000 to Shs. 190,000 per day. The conductor is responsible for recording the income and expenses of the bus. He issues payment vouchers. The applicant pays Shs. 45,000 and Shs. 40,000 to the driver and conductor respectively. He stated that the records the applicant submitted were a true reflection of its expenditure.

The applicant's fifth witness, Mr. Brian Mugarura, a broker stated that his duty includes looking for passengers for buses that are willing to pay him an attractive commission. He does not work for any particular bus. He has worked as a broker for 12 years. The commission has increased from Shs. 500 to between 2,000 to Shs. 10,000 per passenger. He receives from the applicant, whose route is Kampala to Rukungiri, Shs. 2,000 to Shs, 3,000 per passenger. He stated that since the Covid period, brokers collect monies from passengers and sell them to the buses. In some instances, they divert passengers to taxis. Some companies employ brokers.

The respondent's first witness, Mr. Paul Mubeezi Ntambi, an officer in its Domestic Taxes Unit, testified that the respondent conducted a return examination on the applicant's returns. It issued two assessments of Shs. 154,061,008 and Shs. 138,518,269. The applicant objected to on the ground that brokers fees were deductible expenses as they were incurred in the applicant's business. It stated that the applicant claimed that it paid Shs. 40,000 to Shs. 45,000 per day as safari day allowances and broker fees. He stated that on analyzing the expenses it realized that the applicant incurred expenses which

were over 25% of the revenue earned per day which was unreasonably high as it was above the industrial average. He stated that the respondent conducted an inspection on that Kisenyi bus terminal. It discovered inter alia that brokers are paid Shs. 500 to Shs 1,500 per passenger brought in. The passenger's fees range from Shs. 15,000 to Shs. 20,000. He stated that the applicant could not provide the minutes to prove the expenses paid during the directors' meetings in Kampala and Rukungiri. There is no evidence of the daily expenditure for the staff.

The applicant submitted that the respondent's decision is null and void as it was rendered outside the statutory timeline. It submitted that under S. 20 of the Tax Procedure Code, a taxpayer is required to make a self-assessment return in every year of income. The Commissioner if not satisfied with the self- assessment made by the tax payer may under S. 23 make an additional assessment and serve it on the tax payer. The tax payer may to object to the tax assessment within forty-five days of receipt of the notice. The commissioner is required to make a decision under S. 24(6) of the Tax Procedure Code which states.

> "The commissioner shall serve notice of an objection decision on the person making objecting within ninety days from the date of receipt of the objection".

The applicant submitted that the law provides for 90 days within which the commissioner can make an objection decision on receipt of an objection from the tax payer. S.24(9) of the Act, states that:

> "The time limit for making an objection decision is wavered where a review of the tax payer's records is necessary for settlement of the objection decision and the tax payer is notified"

The applicant submitted that the manner through which a taxpayer is to be notified is provided in S. 72(2) of the Act.

The applicant submitted that in 2018, the respondent conducted a return examination of its returns and issued an additional income tax assessment of Shs. 151,651,830, and Shs. 138,071,659 for the financial years 2016/2017 and 2017/2018 respectively. The assessments arose on the grounds that the expenses declared by the applicant were not

genuinely incurred as brokerage fees. The respondent partially allowed the objection and revised the assessment to Shs. 71,462,204 and Shs. 58,809,154 respectively.

The applicant submitted that the assessments were made on 3rd July 2019. On 6th August 2019, the applicant objected to the assessments. On 22nd November 2019, the Commissioner made an objection decision partly allowing the objection. The Commissioner was in law enjoined to make a decision by 6th November 2019. The applicant submitted that Commissioner may be excused for not making a decision by 6th November 2019, since it was a Sunday, but then all subsequent days were not. The Commissioner made his decision eighteen days out of time. The applicant submitted that the decision and assessment are bad in law.

The applicant submitted that the law requires the respondent to show that there was sufficient notice sent to the applicant requesting for documents. The notice should show the documents the commissioner wanted, when the commissioner sent the notice, requested documents and when the Commissioner received them. The effect of the notice is to freeze time. It freezes time within which the commissioner is required to make his decision until that time when the tax payer avails the documents. Then the 90 days period would be unfrozen, and time starts to run. The applicant submitted that timelines set by the statutes are matters of substantive law which must be strictly complied with. It cited *Uganda Revenue Authority v Uganda Consolidated Properties Ltd* Civil Appeal 75 of 2000. The applicant also cited *U.O.I. v. Kirloskar Co., Pneumatic* 1996 (15) RIT 1 (SC).

The applicant submitted that when a taxpayer claims a deduction, there must be a specific provision of the statute in which that deduction is authorized and it is entitled to the deduction which the law allows. It submitted further that allowable expenses are those that incurred in production of income under S. 22(1)(a) of the Income Tax Act. It cited *Commissioner of Internal Revenue v General Foods, (Phils.)* Inc, G.R. No. SCRA 545, 550 and Atlas *Consolidated Mining and Development Corporation v Commissioner of Internal Revenue,* No. L-26911, SCRA 246, 253 where it was stated that an item of expenditure to be allowable, it must fall squarely within the language of the law. A mere averment that the taxpayer has incurred a loss does not automatically warrant a deduction

from its gross income. The applicant submitted that it is not liable to pay the taxes assessed, as the expenses were duly incurred in direct production of income.

The applicant submitted that it does not have its own bus terminal and therefore operates in a public terminal, shared with many other bus companies which share the route. The other bus operators have new buses as compared to applicant's old buses. Therefore, the applicant has to use brokers. The brokers bring passengers to bus companies that gives good commissions for each passenger brought. The applicant pays between Shs. 2,000 to Shs. 3,000 per passenger to the broker, depending on the final destination of the passenger.

The applicant submitted that the expenses incurred are captured in the way bills which are given to the accountant who issues payment vouchers. The applicant tendered in the bills and payment vouchers as exhibits. Perusal of the way bills clearly shows that the money spent on brokers. The way bills show that less money is paid to brokers when the bus is coming from Rukungiri to Kampala. The applicant submitted that the expenses incurred on brokers is allowable under S.22 (1) (a) of the Income Tax Act.

The applicant submitted the respondent's contention that expenses were more than 25% of the revenue earned by it was high should be disregarded. The applicant argued that the respondent was relying on emotions and morality. The applicant cited *T.A. Quereshi v. Commissioner of Income Tax*, Bhopal 12 where the Supreme Court of India in allowing the tax payer to deduct the cost of heroin seized as a business loss, held that;

> "In our opinion, the High Court has adopted an emotional and moral approach rather than a legal approach. We fully agree with the High Court that the assesse was committing a highly immoral act in illegally manufacturing and selling heroin. However, cast are to be decided by the court on legal principles and not on one's own moral views. Law is different".

The applicant submitted that taxing the applicant because it spent more than 25% of its revenue earned per day is erroneous as it is lower than the acceptable international standards. The applicant submitted that its expenditure of more than 25% per day of its income was acceptable as it was within the acceptable standards and even lower.

The applicant submitted that the evidence shows that a bus carries 65 passengers. The respondent allowed that 70% of the passengers were brought by brokers and the remaining 30% boarded on their own. 70% of 65 equals to 45.5 brought by brokers. Multiply 45.5 by 7 the number of buses operating at the time (as per the respondent) that equates to 318.5 being the overall number of passengers brought by brokers per day. Multiply then 318.5 passengers by Shs. 1,500 being the brokerage fees per passenger. This equals to Shs. 477,750 (overall expenditure on brokers per day). Multiply Shs. 477,750 by 360 being the number of days in a year. The applicant used less days in a year, assuming a bus didn't travel when it was under repair. The calculations ignore when the buses make return journeys. So, Shs. 477,750 multiplied by 360 equals to Shs. 171,990,000 would be the overall money spent by the applicant on brokerage in a year.

The applicant submitted that in its income tax returns it declared Shs. 274,406,100 as. brokerage fees. 2017/2018. If it reduced Shs. 171,990,000 which would come to 102,416,100, as disallowed expense which if taxed at 30% the tax rate the income tax would be 30,724,830. For 2016/2017 returns, the applicant declared Shs. 265,816,100 as expenditure on brokerage fees. If the applicant reduced Shs.171, 990,000 one would get Shs. 93,826,100 as chargeable income for 2016/2017. If it is subjected to 30% the tax rate the income tax would be Shs. 28,147,830. The applicant submitted that the summation of the income tax payable for the year 2016/2017 and 2017/2018 is Shs. 28,147,830 plus Shs. 30,724,830 giving a total income tax payable of Shs. 58,872,660. Those figures are derived from the formulae the respondent employed as stated by the taxing officer Mr. Paul Mubeezi. The applicant submitted that there is no mathematical calculation that the respondent can adduce to show how it arrived at the Shs. 130,271,358 it assessed.

The applicant submitted that that the buses sometimes made return journeys The applicant submitted that the respondent should have allowed the applicant expenses for return journey expenses on brokers. The failure to consider the return journey expenses is unfair and inflated income tax assessments.

In reply, the respondent submitted that the applicant, did not in its pleadings nor during scheduling, raise the preliminary point of law. Raising a preliminary point of law during submissions stage is a belated attempt to circumvent the ends of justice and amounts to trial by ambush. The respondent cited *Airtel Uganda Limited v Uganda Revenue Authority* Application 10 of 2019 where it was stated

> The Tribunal has already noted that issues of time limits are points of substantive law that can be raised at any time during trial. However, the Respondent should be given ample time to contradict them or raise grounds objecting to them. That is why the Tribunal insists they should be raised at the beginning of the Trial..."

Without prejudice, the respondent submitted that the law provides for scenarios where the respondent has not provided an objection decision within 90 days. S. 24(6) and (7) of the Tax Procedure Code Act provide that;

> "(6) The Commissioner shall serve notice of an objection decision on the person objecting within ninety days from the date of receipt of the objection.
>
> (7) Subject to subsection (9), where an objection decision has not been served within the time specified under subsection (6), the person objecting may, by notice in writing to the Commissioner elect to treat the Commissioner as having made a decision to allow the objection".

The respondent submitted that the applicant did not make any election or let alone adduce any evidence of it. The respondent cited *Game Discount World Uganda Limited v URA* HCCA 39 of 2021 where it was held that a tax payer had an obligation to elect to treat its application for review as successful when the respondent did not deliver a decision within the prescribed period of time. In absence of a valid election, the argument that the objection decision was issued late does not arise.

The respondent submitted that the applicant was assessed on disallowed expenses S. 15 of the Income Tax Act provides that chargeable income of a person for a year of income is the gross income of the person for the year, less total deductions. The respondent cited *Wrights' Canadian Ropes Ltd v The Minister of National Revenue* [1946] SCR 139 where it was stated that;

"The exercise of discretion.... to disallow a claim for deduction should be exercised on proper legal principles".

The respondent submitted that the law that governs deductions is under S. 22 of the Income Tax Act which states that

"22. Expenses of deriving income

(1) Subject to this Act, for the purposes of ascertaining the chargeable income of a person for a year of income, there shall be allowed as a deduction-

(a) all expenditures and losses incurred by the person during the year of income to the extent to which the expenditures or losses were incurred in the production of income included in gross income; "

The respondent submitted that the *Black's Law Dictionary* defines 'incur' to mean;

"To have liabilities cast upon one by act or operation of law, as distinguished from contract, where the party acts affirmatively"

It submitted that for these expenses to be allowed as deductible expenses, they have to be actually incurred in the production of income and should not be based on mere assumptions or even outrageous claims. To determine whether these deductions were actually incurred, there is need to look at the accounting principles that govern deductions. S. 17(3) of the Income Tax Act provides that;

"Unless this Act provides otherwise, Part V of this Act, which deals with tax accounting principles, applies in determining when an amount is derived for the purposes of this Act".

The respondent submitted that further S. 22(4) states that;

"Unless this Act provides otherwise, Part V, which deals with tax accounting principles, applies for the purposes of determining when an expenditure or loss is incurred for the purposes of this Act".

The respondent cited *Willingale (Inspector of Taxes) v International Commercial Bank Ltd*: CA 1977, where Sir John Pennycuik said:

"But it is likewise well established that the principles of commercial accountancy must yield not only to statutory provisions, in particular the prohibition of specified deductions, but also to any overriding principle of tax law."

The respondent submitted that the applicant was an accrual-basis taxpayer which technically means that it derives incomes when receivable by it and incur expenditures when they are payable by it.

The respondent submitted that S. 42(3) of the same Act provides for tax treatment of expenditures. It states that;

> "Subject to this Act, an amount is treated as payable by the taxpayer when all the events that determine liability have occurred and the amount of the liability can be determined with reasonable accuracy, but not before economic performance with respect to the amount occurs."

The respondent submitted that the applicant's case is that it paid brokerage fees of Shs. 40,000 to Shs. 45,000 per day. Each broker was allegedly paid Shs. 10,000 per passenger. It contended that there was no supporting documentation. The number of passengers a bus carry is about 65. The respondent argued that it is inconceivable that brokers are paid Shs. 130,000 per day. The expenses are over stated. For instance, on 18th January 2016 brokers were paid Shs. 374,000. On 1st July 2016, the bus made a trip to Bwonguera Girls' S.S but brokers were paid. Such trips are made on a special hire basis without need for brokers. The applicant still claimed brokerage fees erroneously. On 5th July 2016, there was a special trip to Kasese c/o St. Geralds S.S Nyakibale but the applicant still claimed brokerage fees of Shs.110, 000. How then can the applicant justify payments allegedly made to brokers for trips that involved schools? Was the applicant touting even when they made such trips? This applies to several other payment vouchers.

The respondent submitted that the applicant also claimed expenses of "home affairs" as per the cash payment voucher on page 52 of the joint trial bundle. Such expenses were disallowed. At the locus visit, it was established that the applicant only pays a total of Shs. 1,500 to brokers. The respondent submitted that the applicant claims of Shs. 40,000 which is far beyond the amounts actually incurred by it

The respondent submitted that in *Atherton v British Insulated and Helsby Cables* Ltd 10TC 191, the principle on deductions were laid down when Lord Cave stated that;

> "In determining whether a particular item may or may not be deducted from profits it is necessary first to inquire whether the deduction is expressly prohibited by the Act and if it's not so prohibited to consider whether it is of such a nature that its proper to be charged against incomings."

The respondent also cited *Morley v Lawford* 14 TC 229 and *Okello Okello John Livingstone v The commissioner general Uganda Revenue Authority* HCCS 229 of 2010 while citing *George Cohan v Commissioner* with approval, it was stated that.

> "Decided cases have established that once credible evidence of the amount of the expenses paid or incurred is given, the sums are allowable deductions as business expenses. See George Cohan -V- Commissioner, 39 F.2d 540 (2d Cir.1930); The Federal Appeals Court, Judgment of Hand J.

The respondent submitted that it is justified to disallow deductions where there is no evidence to support them. The respondent cited *New Vision Printing & Publishing Corporation v URA* HCCA 78 of 1999 where Justice R.O. Okumu Wengi stated that;

> "From a reading of Kenya Meat Commission vs, The Commissioner of Income Tax Civil Appeal No. 56 of 1967 (reported as case No. 127) it is clear that evidence of the nature of the expenditure is important in the determination of the question whether its deduction was permitted...".

The respondent submitted that for an expense to be deductible it must have been incurred for the direct purpose of producing profits. For expenditure to qualify for a deduction some evidence of its character must be adduced. Thus, to a certain extent it is a question of fact and law. The evidence must demonstrate that the expenditure was wholly and exclusively incurred in the production of the income.

The respondent submitted that the applicant adduced inconsistent journey way bills and unsigned cash payment vouchers. The applicant further did not adduce evidence that the buses were charged brokerage fees of over Shs. 300,000 per route. The respondent submitted that in *Red Concepts Ltd v Uganda Revenue Authority* Application 36 of 2018, the tribunal emphasized the necessity of accurate information and documentation when it observed that;

> "Where a statute requires one to give information or other particulars, the said information should be accurate to enable public authorities act on it. If the information is false or misleading, the tribunal cannot turn a blind eye to it as this would be tantamount to condoning an illegality and perpetrating fraud."

The respondent submitted that S. 42(3) of the Income Tax Act uses the words 'reasonable accuracy'. These words are not defined in the Act. However, *Collins Dictionary* defines

'reasonably accurate' to mean "Accurate information, measurements, and statistics are correct to a very detailed level" The respondent submitted that the taxpayer ought to maintain records of its transactions including expenses and these expenses have to be recorded with accuracy and correct a detailed level.

The respondent submitted that it inspected the applicant's operation and premises and established that brokers are paid between Shs. 500 and Shs. 1,500 as stated by its witness, Mr. Paul Mubeezi Ntambi. This was below the claimed expenses of Shs. 40,000 to Shs. 45,000. Expenses of such a magnitude go beyond 25% of the revenue earned per day and are unreasonably high. This was beyond the industrial average and goes beyond the reasonable accuracy standard expected from accrued based taxpayers.

The respondent submitted that the applicant's computations were not raised by its counsel during the hearing nor evidence adduced on it. The same computation was not availed to the respondent during objection. It contended that this amounts to submission from the bar. The respondent submitted that the powers to compute Income Tax are powers granted to it under S. 3 of the Uganda Revenue Authority Act. They cannot be delegated to the applicant. It argued that the computation by the applicant is not only erroneous but also misguided. The respondent's witness testified that the respondent used values of Shs. 1,500, for brokerage fee per passenger using an average of 70% capacity of the passengers and derived an average fare of Shs. 22,500 to compute the expenses. The applicant did not dispute this computation at the time during cross examination. The respondent submitted that computation was not controverted by the applicant. The respondent was therefore right to compute the expenses using the known accounting principles. The respondent was justified to impose the tax liabilities of Shs. 71,462,204 and Shs. 58,809,154.

In rejoinder, the applicant submitted that it is trite law, that an illegality is when a decision, subject to review, is made contrary to the law empowering the decision maker. The test is whether the decision maker has acted or not within the law. It cited *Philadelphia Trade & Industry Lady Kampala City Council*, Civil Revision: 2012 where it was stated that

> "If the illegality of any action is brought to the notice of the Court, whether the matter shows illegality, as it appears in the course of the proceedings, and the person invoking the aid of court is implicated in the illegality, the court will not assist him, even if the defendant has not pleaded the illegality, and does not raise the objection."

The applicant also cited *Gakou & Brothers Enterprises Limited v Uganda Revenue Authority*. Application 29 of 2020 where the respondent raised an objection on the tenability of an application, The tribunal noted:

> "Without going through a long discussion, it is trite law that a preliminary objection on a point of law can be raised at any time during a trial."

The objection in that matter was raised by the respondent at submission stage, and the Tribunal dismissed it. The applicant contended that the objection in this matter is raised at the same time, it prayed that the Tribunal should entertain it.

The applicant reiterated that it is an established principle in law that any decision that is made out of time stipulated by the statue is null and void, (See Justice Yorokamu Bamwine in Clear *Channel Independent Uganda Ltd v Public Procurement and Disposal of Public Assets Authority SC* Misc Application 380 of 2008). The applicant submitted that with or without an election, any decision that is null and void by want of time cannot be validated. If the law regards any decision made out of time null and void, can that decision be validated by in actions of the tax payer. It cannot be validated. Secondly, the applicant submitted that the requirement to elect is not mandatory. Had the legislature intended that every illegal decision of the respondent be legitimized or delegitimized by the tax payer in writing, it would have specifically stated so.

The applicant submitted that none of its witnesses mentioned a brokerage fee of Shs. 40,000 to Shs. 50,000. It has always its case that it spends between Shs. 2000 to Shs. 3,000 as brokerage fee per passenger. The applicant submitted that it its way bills, payments vouchers, audited books of accounts, show that the expenditure incurred as brokerage fees. The documents produced are a true reflection of its business affairs. The applicant submitted that in *Okello Bambini v The Commissioner General, Uganda Revenue Authority*. (supra) the high Court held that the production of payment vouchers was proof that there was expenditure and the Commissioner cannot assert otherwise.

Having listened to the evidence, perused the exhibits and read the submissions of the parties, this is the ruling of the tribunal;

The applicant raised a preliminary objection stating that the respondent did not issue the objection decision on time. It argued that the respondent ought to have made the decision within the 90 days after receiving the objection. On the other hand, the respondent argued that the applicant did not make an election.

Order 15 Rule 2 of the Civil Procedure Rules states that;

> "Where issues both of law and of fact arise in the same suit and the court is of the opinion that the case or any part of it may be disposed of on the issues of law only, it shall try those issues first, and for that that purpose may, if it thinks fit, post pone the settlement of the issues of fact until after the issues of law have been determined".

Order 6 Rule 28 of the Civil Procedure Rules states that;

> "Any party shall be entitled to raise by his or her pleadings any point of law, and any point so raised shall be disposed of by the court or after the hearing; except that by consent of the parties, or by order of court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing".

Sir Charles Newbold in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, stated that;

> "...A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit".

In *Gakou & Brothers Enterprises Limited v Uganda Revenue Authority* Application 29 of 2020 the tribunal noted:

> "Without going through a long discussion, it is trite law that a preliminary objection on a point of law can be raised at any time during a trial."

Therefore, the Tribunal will dispose of the preliminary objection first.

The law on the treatment of service of objection decisions is in S. 24 of the Tax Procedure Code Act which provides inter alia that;

> "(6) The Commissioner shall serve notice of an objection decision on the person objecting within ninety days from the date of receipt of the objection.

(7) Subject to subsection (9), where an objection decision has not been served within the time specified under subsection (6), the person objecting may, by notice in writing to the commissioner, elect to treat the Commissioner as having made a decision to allow the objection".

In *Game Discount World Uganda Limited v URA* HCCA 39 of 2021 it was held that a tax payer had an obligation to elect to treat its application for review as successful when the respondent did not deliver a decision within the prescribed period of time.

A statute should be given it ordinary meaning. A reading of S. 24 of the Tax Procedure Code Act is clear. S. 24 (7) of the Tax Procedure code ACT states that the person "objecting may by notice in writing to the commissioner, elect to treat the Commissioner as having made a decision to allow the objection." So, there is need for the applicant to elect to treat the Commissioner as having allowed the objection. In this application there is no evidence that the applicant made an election. The argument by the applicant that that with or without an election, any decision that is null and void by want of time cannot be validated is not correct. That is not what is stated in S. 24 of the Tax Procedure Code Act. The Section would not have gone to length to require a taxpayer objecting to elect to treat the objection as having been allowed after the time prescribed has expired. If the applicant says that the respondent made the decision out of time, what did the applicant do about it? If the applicant did not do what it is legally supposed to do, then it cannot claim a right it decided not to exercise. In the circumstances, this preliminary objection is overruled.

Having disposed of the preliminary objection, the tribunal will proceed and address the main dispute.

The applicant submitted that the respondent in 2018 conducted a return examination of the applicant's returns for 1st July 2016 to 30th June 2017 and 1st July 2017 to 30th June 2018, and raised additional income tax assessments of Shs. 151,651,830 and Shs. 138,071,659 respectively. The assessments arose on the ground that the applicant's expenses of brokerage fees, subsistence allowance for the drivers, turnboys and conductors and directors' meetings were not genuinely incurred. The respondent partially

allowed the objection and revised the assessment to Shs. 71,462,204 and Shs. 58,809,154 for the financial years 2016/2017 and 2017/2018 respectively.

The applicant submitted that the only issue for the tribunal to determine in this matter is whether the brokerage fees declared were expenses incurred in the business and are allowable expenses. If so whether they are supported by records or receipts? Whether the assessments should have been made differently.

It is not in dispute that the brokers' fees were incurred in the courts of the applicant's business and are allowable expenses. S. 22. of the Income Tax Act reads

> **"Expenses of deriving income**
>
> (1) Subject to this Act, for the purposes of ascertaining the chargeable income of a person for a year of income, there shall be allowed as a deduction-
>
> (a) all expenditures and losses incurred by the person during the year of income to the extent to which the expenditures or losses were incurred in the production of income included in gross income;"

The dispute between the parties arises from the amount claimed by the applicant as allowable. The respondent contends that the expenses incurred by the applicant were inflated. While the applicant submitted that it pays brokers Shs. 2,000 to Shs. 3,000 per passenger, depending on the final destination of the passenger. The respondent contends that the applicants' expenses were more than 25% of its revenue. The respondent submitted that the applicant pays brokers Shs. 40,000 to Shs. 45,000 per day worked. Each broker is allegedly paid Shs. 10,000 for every passenger.

The first thing the Tribunal has to determine is how much were the brokers paid? What did the applicant declare. The journey way bills the applicant tendered showed that it was paying an average of Shs. 105,000 to Shs. 155,000. On 21st December 2016 the brokers were paid Shs. 105,000. The passengers were 61. Each broker was paid around Shs. 1,700. On 24th March 2017 it paid Shs. 135,000 to brokers. The total passengers were 46. The applicant testified it paid the brokers for each passenger they brought. It means the brokers were paid around Shs. 3,000. On 27th March 2017 the applicant paid Shs. 150,000. The passengers were 66. Each broker was paid around Shs. 2,200. The

average price would range would be from Shs. 1,700 to Shs. 3,000 per passenger which would be the actual price paid. During the Locus, the parties agreed that the tribunal would get a random broker and question him. A random broker stated that when he was paid Shs. 1,000 to Shs. 1,500 per passenger. Therefore, there is a possibility that the applicant exaggerated the amount paid to brokers by about Shs. 1,000. However, it can be given the benefit of the doubt. Not every passenger may be taken to a bus by a broker.

Paying a broker is not the same as declaring the amount paid for purposes of taxation. The only way the Tribunal can determine what the applicant declared is by looking at the annual returns and comparing them with the financial statements. The profit and loss account for the year 2017 shows that the applicant incurred broker expenses of Shs. 265,816,100 for the financial year. If that is divided by 364 days, it would mean that the applicant was paying Shs. 730,264 dally to the brokers. The applicant had 4 buses carrying 65 passengers which means it was paying about Shs. 2,800 per passenger. For the year ending 2018, the applicant incurred brokers fees of Shs. 274,406,100. It would mean the applicant was paying Shs. 753,263 per day. It means that the applicant was paying an average of about Shs. 2,900 per passenger. The respondent's witness Mr. Paul Mubeezi Ntambi stated that brokers were paid Shs. 500 and Shs. 1,500 per passenger. The figure of the respondent is slightly higher than the applicant, about double of the latter. However, the computations arrived by the applicant did not take into consideration the monies paid to brokers for passengers when the bus is en-route to Ntungamo or vice versa. It also did not consider monies paid to brokers on return journeys. The effect would be to reduce the applicant's average.

When you compare the averages in the journey way bills ranging from Shs. 2,200 to Shs. 3,000 per passenger to the averages in the income tax returns of Shs. 2,800 to Shs. 2,900 the difference is minimal. The witness at the locus put the range at Shs. 1,000 to Shs. 1,500 per passenger. A conductor may not record the exact amount he pays a broker. The Tribunal notes that the assessments were for the financial year 2017 to 2019. It is possible the brokers were not charging the same rate in 2023 as in 2018 and 2019. If there is any doubt, the taxpayer is given the benefit of the doubt. The respondent did not indicate how it arrived at the additional tax assessed.

Taking the above into consideration, the Tribunal is not convinced that the applicant was exaggerating the brokers' fees. Without prejudice, If the applicant was exaggerating the broker's fees, then it was minimal. It is difficult to ascertain with precise exactitude the broker's fees as no receipts are issued by the brokers. The issues involved relate to an informal sector which is not well regulated. Any benefit is given to the taxpayer. Therefore, this application is allowed with costs to the applicant.

Dated at Kampala this 29th day of August 2023.

DR. ASA MUGENYI	**DR. STEPHEN AKABWAY**	**MS. CHRISTINE KATWE.**
CHAIRMAN	**MEMBER**	**MEMBER**