



THE REPUBLIC OF UGANDA
IN THE TAX APPEALS TRIBUNAL AT KAPALA
TAT APPLICATION NO. 54 OF 2025

KUKU FOODS UGANDA LIMITED.....APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY.....RESPONDENT

BEFORE: HON. CRYSTAL KABAJWARA, HON. PROSCOVIA REBECCA NAMBI,
HON. STELLA NYAPENDI CHOMBO

RULING

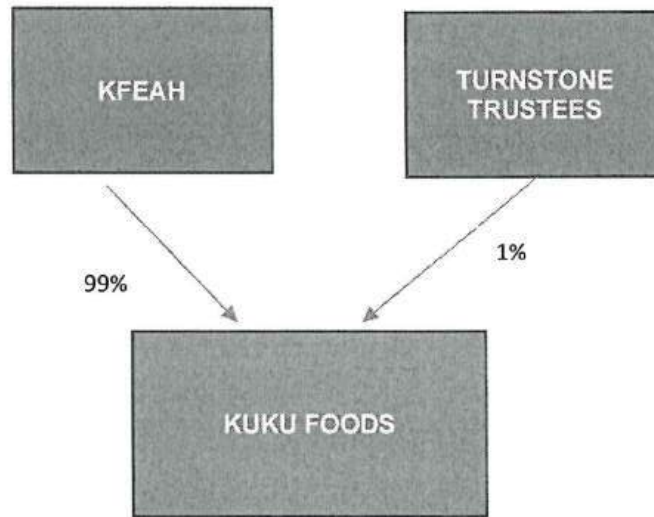
I. Introduction

1. This ruling is in respect of an application challenging a capital gains tax of Shs. 4,235,796,666 that arose as a result of the sale of the shares that had allegedly been unpaid by the Applicant.

II. Background Facts

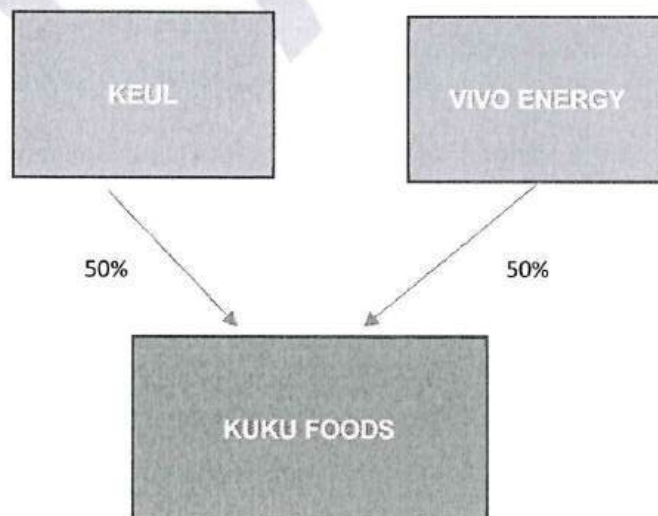
2. The Applicant operates as a fast-food restaurant with a core menu of fried chicken and fries. The Applicant was incorporated in Uganda in 2011 and started business in 2013, trading under the KFC brand name. At incorporation on 16 November 2011, the shareholders of the Applicant were Kuku Foods East Africa Holdings Limited (hereinafter referred to as KFEAH) and Turnstone Trustees (New Zealand) Limited as Trustee of the Legacy Trust, 20 holding 999 shares and 1 share, respectively, with a share capital of Shs. 1,000,000 divided into 1000 ordinary shares of Shs. 1,000 each.

3. A diagrammatic illustration of this shareholding structure is shown below.



4. On 19 June 2019, Vivo Energy Investments B.V (Vivo Energy), KFEAH and Gutsche Investment and Management Company Proprietary Limited ("Gutsche Investment"), the shareholders in Kuku Foods Kenya, Rwanda and Uganda, entered into a share purchase and subscription agreement.
5. The Agreement set out a roadmap comprising a series of conditions precedent that had to be achieved prior to the transfer of shares from KFEAH to Vivo Energy, and these included:
- (i) Transfer of the single share held by Turnstone Trustees in the Applicant Business to FNB International Trustees as Trustees of the Paradise Trust (FNB International Trustees');
 - (ii) Incorporation of a franchise company named Kuku Establishments Uganda Limited ('KEUL');
 - (iii) Increase of shares in the Applicant business from 1000 Ordinary shares to 30,395,674 ordinary shares;

- (iv) Issuance of the abovementioned new shares to KFEAH, which fulfilled its obligation to pay by setting off the subscription price against amounts owed to KFEAH by the Applicant, to wit: A shareholder loan of Shs. 21,816,911,414.64 and an equity investment of Shs. 8,577,762,800.
- (v) Transfer of a part of KEAH's shareholding in the Applicant business to the tune of 15,197,836 out of 30,395,673 ordinary shares to KEUL
- (vi) Transfer of FNB International Trustees' shareholding in the Applicant business of one (1) ordinary share to KEUL for a consideration of Shs. 1,000.
- (vii) Transfer of KFEAH's remaining shareholding in the Applicant business to the tune of 15,197,837 ordinary shares to Vivo Energy for a consideration of Shs. 9,539,818,850.
- (viii) The transfer of shares from KFEAH to Vivo Energy was duly registered with the URSB.
- (ix) The above events led to a change in the ownership of the Applicant as shown below.



- (x) The Respondent conducted a review of the transaction and concluded that there was a capital gains tax due. The Respondent issued assessments totalling Shs. 4,235,796,666. This was on the basis that the transactions resulted in a change in the Applicant's ownership, thereby triggering sections 74(2) and 78(h) of the Income Tax Act.

III. Issues for determination

6. At the scheduling of this application, the following issues were set down for determination:
- (i) Whether the Applicant is liable to pay the tax assessed?
 - (ii) What remedies are available to the parties?

IV. Representation and evidence

7. The Applicant was represented by Mr Emmanuel Kasamba, while the Respondent was represented by Mr Banabus Nuwaha and Ms Charlotte Katuutu.
8. The Applicant presented one witness, **Edgar Kabulidde (AW1)**, the Applicant's Management Accountant while the Respondent presented one witness, **Nampomba Aminah Sarah (RW1)**, an Officer in the Large Taxpayers Office, Domestic Taxes Department of the Respondent.
9. AW1 stated that at incorporation, the Applicant's nominal capital was Shs. 1,000,000 divided into 1000 shares.
10. On 19 June 2019, a share and subscription agreement was executed by Vivo Energy Invests B.V, Kuku Foods East Africa Holdings Limited (KFEAH), and Gustche Investment and Management Company Proprietary Limited (Gustche Limited), who were principal shareholders. In Kuku Foods Kenya Limited, Kuku Foods Rwanda Limited and Kuku Foods Uganda Limited in order to strengthen their market position.

11. The witness testified that the agreement was entered into with a view to directly disposing of shareholding in Kuku Foods Kenya Limited, Kuku Foods Rwanda Limited and Kuku Foods Uganda Limited to Vivo Energy.
12. The witness testified that the agreement had conditions Precedent which had to be achieved prior to the transfer of shares from KFEAH to Vivo Energy (refer to para.5 above).
13. The witness testified that the transfer from KFEAH to Vivo Energy was duly registered with Uganda Registration Services Bureau on 20 January 2021, and therefore, the transfer of shares to Vivo Energy for tax purposes crystallised on that date.
14. At the conclusion of the agreement, the Applicant's ownership structure was as shown in the table below.

Name	Shares	Effective Dates of Transfer
Kuku Establishments Uganda Limited (KEUL)	50%	26 February 2020
Vivo Energy Investments B.V (Vivo Energy)	50%	20 January 2021

15. The witness testified that the Respondent arrived at an erroneous conclusion that the change of ownership had become effective on 28 February 2019, and as such, there was a capital gains tax that had been unpaid by the Applicant.
16. The witness also stated that the transaction at hand is not an offshore (Indirect) share disposal transaction and is within the reach of the Respondent, rendering Section 74 (2) and Section 78 (h) inapplicable. The shares were directly disposed of and registered with the URSB. Therefore, the applicable provision is section 78 (g) of the ITA, and the Respondent should have gone after the vendor, KFEAH, which is located in a jurisdiction that has a double taxation

agreement with Uganda, rather than proceeding under section 78 (h).

17. In the alternative, the change of 50% can trigger section 74(2) and section 78 (h) only upon completion of the condition's precedent in the agreement and upon registration of the transfer, which is 20 January 2021 and not 28 February 2019 as determined by the Respondent.
18. The witness further testified that the Respondent applied the wrong figure in its computation, as USD 4,072,124, as the base purchase price of the shares, as opposed to the correct figure of USD 2,604,059 under clause 10 of the agreement.
19. The Respondent's sole witness, RW1, testified that on 19 June 2019, Vivo Energy, Kuku Foods East Africa Holdings Ltd (KFEAH), Mauritius, and Gutsche Investments and Management Company Proprietary Ltd (GIMCO), entered into a Share Purchase and Subscription Agreement in respect of the shares in Kuku Kenya, Kuku Foods Uganda Ltd and Kuku Rwanda, operating companies of KFEAH.
20. She further testified that KFEAH and Vivo Energy agreed to enter into a joint venture regarding the operating companies, which entailed different restructuring transactions in the operating companies, including a share purchase transaction between Vivo Energy and KFEAH.
21. On 26 June 2019, Turnstone Trustees (New Zealand) Limited, as Trustees of the Legacy Trust, transferred their 1 share in Kuku Foods Uganda Limited to FNB International Trustees Limited as trustees of The Paradise Trust at a consideration of Shs. 1000.
22. Pursuant to Clause 5.1.1 and Schedule 5 of the Share Purchase and Subscription Agreement between KFEAH, Vivo Energy and GIMCO,

a new company (Franchise company), Kuku Establishments Uganda Limited (KEUL), was incorporated as a condition to the sale of the shares in the Applicant. KEUL was incorporated with 1000 shares; 999 and 1 shares held by KFEAH and FNB International Trustees Limited as Trustees of the Paradise Trust, respectively.

23. She further testified that on 12 February 2020, the Applicant passed and registered a resolution to increase its share capital from Shs. 1,000,000, comprising 1000 ordinary shares to Shs. 30,395,674,000, divided into 30,395,674 ordinary shares of Shs. 1000 each.
24. KFEAH was issued the new shares and discharged its obligation to pay the subscription price by way of offsetting the amounts owing to KFEAH by the Applicant arising from a shareholder loan of Shs. 21,816,911,414 together with an equity investment of Shs. 8,577,762,800, received by the Applicant from KFEAH in November 2017, for which no shares had been issued.
25. She also stated that pursuant to the resolution dated 13 February 2020 (registered on 26 February 2020), KFEAH sold and transferred 15,197,836 shares to KEUL for a consideration of Shs. 9,757,302,637.
26. Further, pursuant to the resolution dated 13 February 2020 (registered on 26 February 2020), FNB International Trustees Limited sold its 1 share in KFUL to KEUL for the purchase price of Shs. 1000. This gave KEUL a total shareholding of 15,197,837 shares, making KEUL a shareholder of the Applicant, holding 50% of the shares.
27. On 6 March 2020, KFUL passed a resolution registered on 20 January 2021, taking cognisance therein that KFEAH had entered into a Share Purchase and Subscription Agreement dated 19 June 2019, with Vivo Energy and Gutsche Investment and Management

Company Proprietary Limited (GIMCO). Further, under the agreement, 50% of the Applicant's shares, i.e., 15,197,837, held by KFEAH, would be transferred to VE at a purchase price of USD 4,072,124.

28. The witness testified that during the review, they took note that the price on the transfer of shares certificate registered with the Registrar of Companies for the transaction was Shs. 9,539,818,850 and not USD 4,072,124 as per the Share Purchase and Subscription Agreement.
29. The witness testified that from the share purchase and subscription agreement, KFEAH and Vivo Energy agreed to enter into a joint venture regarding the operating companies. It was decided that KFEAH would establish a franchise company (KUEL), transfer 50% of its shares in the Applicant to KUEL, and transfer 50% of the remaining shares in KFUL to Vivo Energy
30. According to Clauses 1 and 8 of the Agreement, the purchase price for KFUL's shares transferred to VE was USD 4,072,124. KUEL and VE each subscribed for 7,300,000 additional shares in KFUL at a price of USD 2,000,000. The witness testified that the transfer of shares from KFEAH to KEUL and Vivo Energy resulted in a change in the ownership of the Applicant.

V. **Submissions of the Applicant**

Whether the Applicant the rightful person to pay the capital gains tax arising from the transactions under the agreement?

31. The Applicant submitted that the Income Tax Act imposes a tax for every year of income on every person who has a chargeable income for that year of income. In the case of *AAR Health Services Uganda Limited v URA, Civil Suit No. 270 of 2011*, the High Court

confirmed the principle that income tax liability cannot be shifted to another person who did not derive income at the whims of the tax man. The Applicant derived no income, but the Applicant's shareholder (KFEAH) did. The Applicant argued that it was not liable to pay the tax assessed.

Effective date of the Transaction

32. The Applicant submitted that it is an agreed fact that the transaction is the transfer of shares owned and held by KFEAH in Kuku Foods Uganda Limited to Vivo Energy, which led to a change in the ownership of the Applicant.
33. The Applicant submitted that the transfer of shares was effected on 20 January 2021, which is when the board resolution and the transfer of share stock were duly filed and registered by the Registrar of Companies.
34. The Applicant submitted that upon review of the transaction, the Respondent imposed Capital gains tax on the Applicant pursuant to Section 74(2), which states:

"For the Purposes of Section 78(h), a person other than an individual, a government, a political subdivision of a government, or a listed institution, changes its ownership by 50% or more within a period of 3 years, it shall be treated as:

- a) Realizing all its assets and liabilities immediately before the change.*
- b) Having parted with ownership of each asset and deriving an amount in respect of the realization equal to the market value of the asset at the time of the realization.*
- c) Re-acquiring the asset and incurring expenditure of the amount referred to above for the acquisition.*
- d) Realizing each liability and is deemed to have spent the amount equal to the market value of that liability at the time of the realization.*
- e) Re-stating the liability for the amount referred to in (d) above".*

35. Additionally, Section 78(h) states:
"Income is derived from sources in Uganda to the extent to which it is:
a) *Derived from the direct or indirect change of ownership by 50% or more of a person other than an individual, a government, a political subdivision of a government and a listed institution located in Uganda;"*
36. The Applicant submitted that the Respondent's deemed disposal provisions in respect of the direct sale of shares by KFEAH to Vivo are legally untenable. The gain realised by KFEAH, a non-resident shareholder from the disposal of its shareholding in the Applicant, falls within Uganda's taxing jurisdiction under section 78 (g) of the Income Tax Act. The Applicant submitted that, where a transaction is already taxable under another provision of the Income Tax Act, namely, section 78(g), the deemed-disposal provisions should not be invoked.
37. The Applicant cited Section 78(g), which provides:
"Income is derived from sources in Uganda to the extent to which it is:-
(g) *Derived from the disposal of an interest in immovable property located in Uganda or from the disposal of a share in a company the property of which consists directly or indirectly principally of an interest or interests in such immovable property, where the interest or share is a business asset.*
38. The Applicant submitted that the Respondent should have taxed the selling shareholder, as opposed to the Applicant, who did not derive any income.
39. The Applicant submitted that section 77 defines immovable property to include a mining right, petroleum right, mining information, or petroleum information, any intangible asset which is a business asset or any part of the business. Further, the ***Oxford Learners Dictionary 7th Edition*** defines intangible asset to mean " something that does not exist as a physical thing but is still valuable to a company.

40. The Applicant contended that by the time of the transfer of the shares in the Applicant from KFEAH to Vivo Energy, the property of the Applicant had consisted of an interest in immovable property, to wit, a right to use asset (leases) as construed under IFRS 16. The lease agreement the Applicant obtained gave them the right to use several premises. The rights to use are intangible and do not exist as physical things.

Whether the shares were a business asset?

41. The Applicant submitted that the KFEAH was a shareholder owning shares in the Applicant that were transferred to Vivo Energy; those were business assets. The Applicant argued that it would be erroneous for the Respondent to disregard section 78 (g) and apply section 78 (h). It would have been evident that KFEAH derived income from the disposal of its business asset, namely, shares in the Applicant.

Purchase Price

42. The Applicant submitted that the actual purchase price of the shares from KFEAH to Vivo Energy was USD 2,604,059 and not the base purchase price of USD 4,072,124 that the Respondent considered as provided under Article 8.1 and Schedule 10 of the share purchase and subscription agreement.
43. The Applicant submitted that the Purchase price would be reached by applying this formula: $\text{Purchase Price} = A - (50\% \times (B + C))$, where A is the base purchase price, B is the Net Financial Debt, and C is the overdue payables.
44. The Applicant explained that the formula was used because the Applicant had significant debt, yet Vivo Energy was only purchasing 50% stakes in the company and was not responsible for the accumulation of the debts. Therefore, if the amount is not apportioned, Vivo Energy would end up paying for the assets and

debts. The Applicant submitted that the actual price was USD 2,604,059, equivalent to Shs. 9,539,818,850, and not USD 4,072,124. This was the purchase price as resolved in the board resolution and in the stock transfer.

45. In the alternative, the Applicant submitted that the Respondent used the wrong transaction date and wrong purchase price, the Applicant submitted that the effective date of transfer of the shares should have been 20 January 2021 and not the date of signing the purchase and subscription agreement in 2019. The Applicant submitted that the Respondent had applied the wrong law and taxed the wrong party; the Applicant is not liable to pay the capital gains tax assessed.
46. The Applicant prayed for a declaration that the Applicant was incorrectly assessed as the party to pay capital gains tax and is therefore not liable to pay capital gains tax of USD 4, 234, 796, 666 and the same be vacated. The Applicant further prayed for a refund of 30% deposit and the costs of this Application.

VI. Submissions of the Respondent

47. In reply, the Respondent submitted that according to the pre-restructuring of the Applicant, a change in ownership of the Applicant triggered section 74 (2) and Section 78 (h) of the Income Tax Act. In determining the market value of the Applicant's assets, the Respondent used the base share purchase price of Shs. 15,715, 616 for the shares transferred to Vivo Energy.
48. The Respondent submitted that it used the financial statements for the year ended 28 February 2019 because the Applicant operated under a substituted year of income with its financial year ending 28 February. This was in line with clause 1 and schedule 6 of the agreement, which provided that accounts for the period ending 30

November 2018 served as the basis for the valuation of Vivo Energy's shares.

49. The Respondent maintains that Section 74(2) and 78 (h) of the ITA, the gain is computed as market value minus cost base, not purchase price minus cost base, as contended by the Applicant. The event of realisation of assets and liabilities at market price triggers Section 48 for the determination of the gains and losses on the disposal of assets.
50. The Respondent submitted that in cases where the taxpayer fails to provide a valuation report or where the report does not reflect the value of the business and its assets, the purchase price of the shares may serve as a reasonable basis for determining the market value of the assets.
51. The Respondent contended that in the accounting equation: $\text{Assets} - \text{Liabilities} = \text{Equity}$, the purchase price of shares represents the Equity. The Respondent submitted that Section 50, the cost base includes:
 - (i) The purchase or construction cost;
 - (ii) Incidental costs (e.g. legal and registration fees); and
 - (iii) Expenditure incurred in acquiring, improving, or defending ownership.
52. The Respondent argued that where the asset has been depreciating, the Tax Written Down Value becomes the cost base of that asset because the taxpayer has claimed that deduction, and it no longer forms part of the cost base. The non-deductible expenses form part of the cost base.
53. The Respondent submitted that the period preceding the ownership change is the financial year 2018, while the Applicant's position is that the Respondent ought to have used the financial year 2020. The

Respondent submitted that the conditions in this case affected the change in ownership and structure. These included the transfer of the KFC Franchise from the Applicant to Kuku Establishment Limited (KUEL), the transfer of 50% of KFEAH's shareholding to KUEL, and the conversion of KFEAAH's shareholder loans into equity in the Applicant. The steps altered the company's assets, liabilities, and ownership structure, hence realising under section 74 (2) of the ITA.

54. The Respondent submitted that Vivo Energy, as the purchaser, relied on the management accounts for 2018 in determining the base purchase price of USD 4 million as referenced in clauses 1, 8.2 and Schedule 6 of the Share Purchase Agreement ("SPA"). Both parties consider 2018 as the valuation date. The 2020 and 2021 financials already had the effects of the restructuring and did not represent the pre-change position under section 74 (2).

The valuation Methodology

55. The Respondent submitted that the valuation reports submitted by the Applicant used the market-based approach valuation methodology instead of the income-based approach. The approach was inappropriate for a business whose value is predominantly driven by intangible assets, namely franchise rights, brand equity, brand goodwill, customer loyalty, operational know-how and ongoing profitability prospects. The value is in the KFC franchise.
56. The Respondent submitted that the valuation methodology adopted did not reflect the market value of the taxpayers' business as contemplated under section 74(2) since the reports were limited. An income-based approach would have been more appropriate given the nature of the business and its reliance on intangibles.
57. The Respondent submitted that section 74 (2), upon a change in ownership of 50% or more, the resident company is deemed to have disposed of all its assets and liabilities at their market value,

proportionate to the interest transferred. This necessitates valuation of the entire business as a going concern, not a piecemeal or book value exercise.

The valuation report relied on the audited financial statements of 2020 instead of 2018

58. The Respondent submitted that it observed that the Applicant had used the audited financial statements for 2020. The Respondent maintained that the 2018 audited financial statements were a proper reference point for establishing the gain in contrast to the 2020 and 2021 financial statements used in the valuation reports.
59. The Respondent further submitted that Vivo Energy, as the purchaser, relied on the management accounts for 2018 in determining the base purchase price of USD 4 million as referenced in clause 1, 8,2 and schedule 6 of the SPA. This confirmed that both parties considered 2018 as the relevant valuation date.

Enterprise Value

60. The Respondent submitted that they did not consider the USD 2.6 million reflected in schedule 10 of the agreement because USD 4 million represents the contractually agreed consideration for the disposal as agreed in the main body of the share agreement and reflects the total value of the assets and liabilities of the Applicant, i.e., its enterprise value.
61. The Respondent submitted that this was consistent with section 74 (2)(a) of the Income Tax Act, which requires that the realisation amount on disposal be determined with reference to the value of the assets and liabilities of the entity.
62. The Respondent argued that the 2.6 million is an adjusted value derived after applying completion date adjustments for purposes of determining the equity value payable to the shareholders rather than

the underlying value of the enterprise itself. The SPA confirms USD 4 million as the agreed consideration for the disposal of the full enterprise value, as agreed by the parties.

The Right party to be taxed

63. The Respondent submitted that the Applicant stated that it was not the right party to be taxed, but the shareholders of the Applicant. The Respondent averred that Parliament enacted Section 74(2) to treat a Ugandan entity as having realised its assets where its ownership changes by 50% or more.
64. The Respondent submitted that the Applicant concedes that before the transaction, KFEAH held 100% of the Applicant, and after the Transaction, Vivo Energy and KEUL collectively acquired 50%, a change acknowledged by the Applicant.
65. The Respondent submitted that this constitutes a direct change in ownership of 50% of a Ugandan entity and Section 78(h) is triggered. Section 78(h) states that income is derived from sources in Uganda to the extent to which it is derived from the direct or indirect change of ownership by fifty per cent or more of a person other than an individual, a local government, a political subdivision of a government and a listed institution located in Uganda.
66. The Respondent further cited Section 74(2) of the ITA which provides:

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

 - (a) realising all its assets and liabilities immediately before the change;*
 - (b) having parted with ownership of each asset and deriving an amount in respect of the realisation equal to the market value of the asset at the time of the realisation;*
 - (c) re-acquiring the asset and incurring expenditure of the amount referred*

to in paragraph (d) for the acquisition;

(d) realising each liability, and is deemed to have spent the amount equal to the market value of that liability at the time of the realisation; and

(e) re-stating the liability for the amount referred to in paragraph (d)".

67. The Respondent submitted that, based on Section 74(2) of the ITA, the tax liability arising from Section 78(h) is imposed not on the non-resident seller (KFEAH) but on the Ugandan company whose ownership has changed. Thus, the Applicant is the rightful party to account for capital gains tax arising from the transaction. The provision applies whenever the stipulated ownership change threshold is met.

68. The Respondent argued that the legislative intention of Section 78(g) is to tax disposals of real-estate-rich companies, not operating franchise businesses. The Applicant has not proven that more than 50% of its value was derived from immovable property in the sense contemplated by the Act. Therefore, section 78(g) cannot apply. The Applicant is the rightful taxpayer in the circumstances. The Respondent prayed that this Application be dismissed with costs to the Respondent.

VII. Submissions of the Applicant in rejoinder

69. In rejoinder, the Applicant reiterated its earlier submissions and further stated that section 74 (2) is inapplicable abnatio. The Applicant submitted that all arguments concerning the above section collapse, since 78(h) was wrongly invoked.

70. The Respondent's use of the base purchase price of USD 4,072,124 as a proxy for market value was unsupported by statute or evidence and ignores the financial reality of the transaction. It disregards the actual purchase price.

71. The Applicant submitted that the transfer of shares in a Ugandan company passes only upon execution and registration of share transfer instruments with the Registrar of Companies. The Transfer of shares from KFEAH to Vivo Energy was registered on 20 January 2021. That is the legally cognizable date of transfer.
72. The Applicant submitted that the Respondent's approach in disregarding the Applicant's valuation reports on the basis that they employed a market-based approach rather than an income-based approach is inconsistent.
73. The Applicant submitted that the Respondent's witness was not a professional valuer, no Respondent's valuer participated in the assessment, and no alternative valuation was prepared. The Respondent had no statutory provision mandating the exclusive use of the income approach. The Respondent's reliance on the base purchase price of USD 4,072,124 contradicts contractual figures.
74. The Applicant further submitted that section 74 (2) and section 78 (h) were enacted to address changes in indirect ownership. This transaction was a direct onshore disposal of shares already taxable under section 78 (g). Section 78 (g) applies where there is a disposal of shares; the company's property consists of interests in immovable property and the shares are business assets.
75. The Applicant submitted that the Respondent applied the wrong statutory provision, taxed the wrong person, relied on the wrong value and disregarded professional advice without a lawful basis.

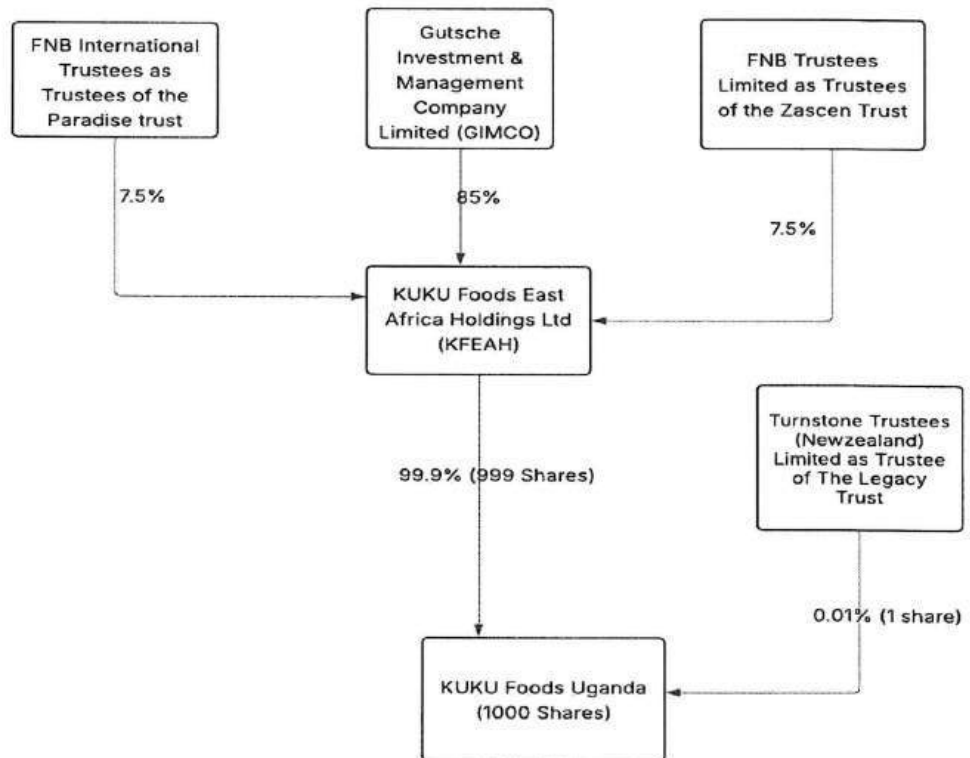
VIII. The Determination

76. Having perused the evidence and submissions of both parties, this is the resolution of the Tribunal. This dispute arises from a transaction involving the disposal of shares in the Applicant by its

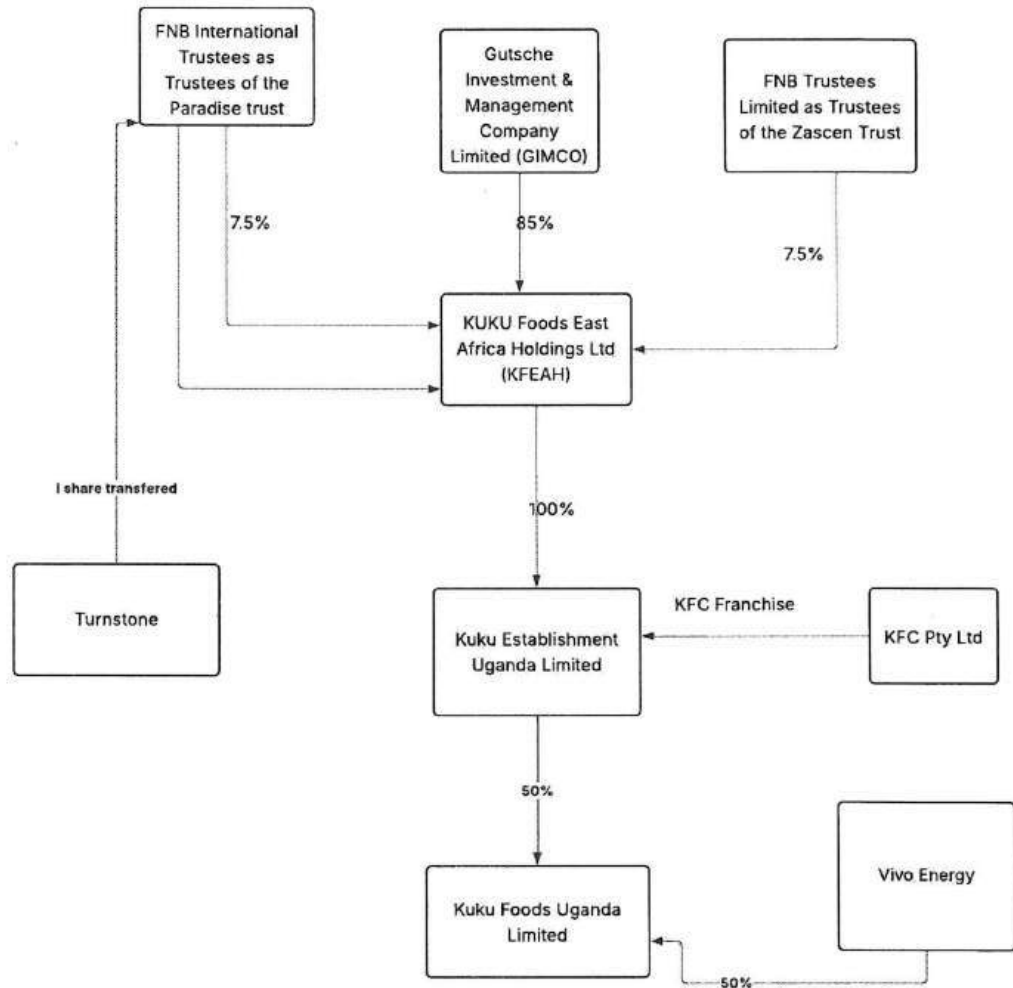
shareholders to other persons. Following the transaction, Vivo Energy and KEUL became the Applicant's shareholders, replacing the previous shareholders, KFEAH and Turnstone Trustees.

77. In their submissions, the Respondent provided elaborate diagrammatic illustrations of the group structure before and after the change in ownership. It is important to replicate this here to complete the picture.

Pre-transaction structure



Post transaction structure



78. From the above diagrammatic illustrations, we can derive three things:

- (i) There was a change in the ownership of the Applicant arising from the direct sale of shares in Uganda by KFEAH, Vivo Energy, and KEUL. This change of ownership arose from the direct sale of shares by the previous shareholders to the current shareholders of the Applicant.
- (ii) There was no change in the indirect/underlying ownership of the Applicant as the shareholding at the group level remained the same.

79. With this in mind, we now turn to the tax treatment of the transaction. The Respondent's position is that the transaction is taxable under section 74 (2), read together with section 78 (h). The implication of this position is that the incidence of tax falls on the Applicant, a Ugandan resident company. On the other hand, the Applicant contends that it falls within section 78(g) of the ITA because it involves a direct disposal of shares, and that the correct taxpayers for purposes of the transaction are KFEAH and Turnstone.
80. We, therefore, find ourselves in a pickle – to determine which of the two provisions is the most appropriate for the transaction in question, that is, whether section 78 (g) or 78 (h) of the ITA.
81. Before we determine this question, it is important at this point to highlight two things:
- (i) Section 78 of the ITA is not a taxing provision. It contains sourcing rules that serve as a useful guide for determining when a non-resident person is deemed to have derived income from sources in Uganda.
 - (ii) Therefore, section 78 cannot be applied in isolation from the appropriate taxing provision.
82. For income tax purposes, the taxing provisions are sections 4, read together with sections 15 and 17 of the ITA. These provisions, when read together, impose income tax on every person, including a non-resident person, who has chargeable income (gross income less allowable deductions) for a year of income. For non-resident persons, only gross income derived *from sources in Uganda* is subject to taxation in Uganda.
83. In the present case, we have two non-resident persons, namely, KFEAH and Turnstone Trustees, who disposed of their shares in the

Applicant, for consideration, to Vivo Energy and KEUL. Therefore, we must determine the extent to which income was derived from sources in Uganda.

84. To do this, we turn to the source rules under section 78. In the present case, two source rules are in contention: sections 78(g) and 78(h).
85. The Applicant argued that the capital gains tax was wrongly imposed on it because the transaction was a direct sale of shares by KFEAH, and not a change of ownership under Section 78(h); the effective transfer occurred on 20 January 2021 when the shares were registered, and the correct purchase price was USD 2,604,059, not USD 4,072,124. The Applicant contends that the appropriate source rule is section 78(g), which imposes tax on the selling shareholders, that is, KFEAH and Turnstone.
86. The Respondent argued that 78(h) apply because Kuku Uganda underwent a direct 50% change in ownership and that the base purchase price of USD 4,072,124 represents the enterprise value used to compute the capital gain, while Section 78(g) does not apply because the Applicant is an operating franchise business, not a property-rich company.
87. Let's now turn to each of the sourcing rules, in the chronological order in which they appear in the ITA.

Section 78 (g) provides:

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

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

Section 78 (h) provides:

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

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

88. Further, section 74(2) explains what constitutes an indirect change of ownership under section 78(h). It provides:

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

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

89. We must now apply the above provisions sequentially. When items are listed specifically, from item (a) and end with a residual item (in this case, section 78 (s), which provides for "any other activity", it is the natural order of things that the provisions are analysed sequentially.

Section 78 (g)

90. For a transaction to fall in scope for section 78 (g), either of the following elements must be present:

- (i) There must have been a disposal of an interest in immovable property. Immovable property is defined in section 77 to include: *"a mining right, petroleum right, mining information, or*

petroleum information, any intangible asset which is a business asset or any part of the business.”

OR

(ii) A disposal of a share in a company the property of which consists directly or indirectly principally of an interest or interests in such immovable property.

91. Was the sale of shares by KFEAH and Turnstone in the Applicant, a disposal of an interest in immovable property? The Applicant is a fast-food service provider. However, they contend that at the time of the transfer of the shares in the Applicant to Vivo Energy, the property of the Applicant had consisted of an interest in immovable property, to wit, a right to use asset (leases) as construed under IFRS 16. The lease agreement the Applicant obtained gave them the right to use several premises.
92. On the other hand, the Respondent contends that the value of the Applicant is the KFC Franchise and other intangible assets such as brand equity, brand goodwill, customer loyalty and operational know-how and that Section 78(g) is aimed at disposals of real-estate-rich companies and not operating franchise businesses.
93. We are inclined to agree with the Respondent. The first part of section 78 (g) concerns the disposal of a direct interest in immovable property. The second part of the provision concerns the disposal of an indirect interest in immovable property that arises from the disposal of shares in a company, which consists, directly or indirectly, **principally** of an interest or interests in such immovable property. In other words, the company, whose shares have been the subject of the disposal, must be “immovable property rich”. This means that its assets must comprise predominantly of immovable assets such as land and buildings and/or mining rights, petroleum rights, mining information, or petroleum information, and any intangible assets.

94. While immovable property is defined in section 77 to include *any intangible asset which is a business asset or any part of the business*, and while shares are a business asset (section 2 of the ITA), they are not immovable. The application of the ejusdem generis rule would require that the words "*any intangible asset*" be restricted to include only items of the same class or nature as those afore-listed. In the present case, shares are not in the same or similar class to mining rights, petroleum rights, mining information, or petroleum information.
95. Further, it is worth noting that section 83 of the Companies Act provides that shares are movable property.
96. The Applicant has argued that at the time of the transfer of the shares, the property of the Applicant comprised mainly a "right of use asset", in respect of leases, which comprise an intangible asset as defined by the Oxford Learners Dictionary. We do not agree with this theory because, as already indicated, the words "intangible asset" must be interpreted using the ejusdem generis rule and not as a standalone expression.

At the time of the transfer, were the interests of the Applicant consisting, principally of an interest or interests in such immovable property?

97. To answer this question, we considered the Applicant's most recent audited financial statements at the time of the transfer. The transfer, as per the Applicant's position, occurred on 20 January 2021. The Applicant's financial year ends in February. Therefore, the most recent audited financial statements at the time were for the period ended 29 February 2020. The financial statements show that out of an asset base of Shs. 49 billion, only Shs. 7.9 bn related to immovable assets, being leasehold improvements. The bulk of the assets, amounting to Shs. 35.6 billion related to "right -of-use- asset.

This means that 72.6% of the Applicant's interests consisted principally of an interest in right-of-use assets.

Is a right-of-use asset an immovable property within the meaning of section 78 (g)?

98. Under IFRS 16, a Right-of-Use asset represents a lessee's right to use an underlying asset for a lease term. Lessees, such as the Applicant, must recognise this asset and a corresponding liability on their balance sheet. As previously indicated, the Applicant is a fast-food service provider. They lease several facilities in shopping malls, petrol stations, and commercial buildings under long-term lease arrangements. From an accounting perspective, such leases must be classified as right-of-use assets on the balance sheet.
99. However, it is important to distinguish the accounting and tax treatment of items. While a right-of-use asset is recognised on the balance sheet under non-current assets, from a tax perspective, primarily within the context of sections 77 and 78 of the ITA, that does not make it immovable property. Specifically, while we may agree with the Applicant that rights of any form, including the right to use, are intangible in nature, we disagree to the extent that, on account of the ejusdem generis rule, they are not the kind of intangible assets envisaged by section 78 (g) of the ITA.
100. It is also worth pointing out that IFRS 16, which the Applicant so heavily relies on, does not distinguish based on whether the underlying asset is movable or immovable. Instead, it focuses on whether the contract conveys the right to control the use of an identified asset for a period of time and must be reported on the statement of financial position (balance sheet), regardless of whether the physical asset is affixed or easily movable.
101. Therefore, for the reasons mentioned above, we conclude that the transaction is outside the scope of section 78 (g). This is because it

comprised a disposal of shares in a company that is not "immovable property rich".

102. Since the transaction is not taxable under section 78(g), it follows that the previous shareholders are not the appropriate taxable persons in the circumstances.
103. Having established that the transaction is outside the scope of section 78(g), we now turn to section 78(h).

Section 78 (h)

104. Section 78 (h) covers income derived from the direct or indirect change of ownership by fifty per cent or more of a person other than an individual, a local government, a political subdivision of a local government, or a listed institution located in Uganda. The Applicant has argued that this provision conflicts with section 78 (g) and that the conflict should be resolved in the taxpayer's favour. The Respondent's position is that section 78(g) does not apply because the Applicant's assets do not principally consist of immovable property, a position that this Tribunal agrees with.

Whether there is a conflict between section 78 (g) and 78(h)

105. The short answer to that is that there is no conflict between the two provisions. Section 78 (g) is concerned with disposals of direct or indirect interests in immovable property. Section 78 (h) is a residual provision that captures changes in ownership of 50% or more, whether direct or indirect. With specific reference to direct changes in ownership, it is residual to the extent that it captures all other kinds of direct changes in ownership other than those arising from direct disposals of interests in immovable property or the direct disposal of shares in immovable property-rich companies. In other words, it is a catch-all for all indirect disposals and direct disposals that fall outside 78(g).

106. Why is this distinction important? Before the introduction of section 78(h) by the Income Tax (Amendment) Act of 2018, the disposal of shares in companies that are not immovable property-rich escaped the tax net. Therefore, disposal of shares in service-based companies such as the Applicant, whose business model does not rely on a heavy immovable asset base, including land and buildings, as would, for example, a manufacturer, would not be taxable under 78(g).
107. It should also be noted that the Income Tax Act was originally designed for brick-and-mortar businesses. Section 78 of the ITA (formerly section 79) dates back to the Income Tax Act of 1997. However, as industry, trade and commerce evolved, the economy witnessed a proliferation of service-based businesses that focus on labour and expertise, requiring little to no industrial buildings or commercial real estate.
108. To keep up with the changing times, in 2018, Parliament passed the Income Tax (Amendment) Act. The purpose of the Act was to, among others, provide for the taxation of income arising from the change in ownership. The Applicant, in their submissions, states that the 2018 amendment was aimed at sealing avoidance gaps and may "apply to direct ownership changes by non-resident persons that are not otherwise caught under the ordinary sourcing provisions of section 78."
109. That is indeed accurate. At the time the Act was passed, section 78 did not capture direct changes in ownership attributed to non-immovable property-rich companies. Therefore, the addition of section 78(h) cured that by widening the tax net.
110. Therefore, since the current transaction involved the disposal of shares in a company outside the scope of section 78(g), it follows that section 78 (h), which is residual and encompasses both changes

in ownership arising from any kind of disposal (whether direct or indirect), is applicable to the transaction.

111. It is also worth pointing out that section 78 (i) of the ITA (*which covers income derived from the disposal of movable property, other than goods, under an agreement made in Uganda for the sale of the property, wherever the property is to be delivered*) would have applied had it not been for the requirement that the agreement be made in Uganda. The SPA between KFEAH and Vivo Energy was made in Nairobi, as evidenced by the witness, at page 49 of the Applicant's trial bundle, who indicated his address as Karen, Nairobi (it is also worth noting that none of the parties submitted on this).

What are the implications of section 78(h)?

112. The implications of the provision were extensively covered by this Tribunal in *Enviroserv (U) Ltd v Uganda Revenue Authority, TAT Application No. 378 of 2024*.

113. Section 78(h) is operationalised by section 74 (2) of the ITA, which provides:

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

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

114. Section 74(2) creates a statutory deeming fiction whereby the resident entity itself is treated as having realised and reacquired all its assets and liabilities immediately before the ownership change. The provision therefore creates a separate tax event distinct from the shareholder's disposal of shares.
115. Under this statutory fiction, the tax liability does not arise on account of the sale and consideration. Rather, liability arises because Parliament deemed the company to have realised its underlying assets at market value upon the qualifying ownership change.
116. The Tribunal therefore agrees with the Respondent that the incidence of taxation under section 74(2), read together with section 78(h), falls upon the resident entity whose ownership changed and not necessarily upon the disposing shareholder.
117. The Applicant's argument that it derived no income overlooks the legal effect of deeming provisions in tax legislation. A deeming provision creates an artificial tax consequence which Parliament directs must be treated as real for purposes of taxation, irrespective of ordinary commercial form.
118. In the present case, Parliament expressly directed that where ownership changes by fifty per cent or more, the resident entity shall be treated as having realised all its assets and liabilities immediately before the change. The Tribunal is therefore bound to give effect to that statutory fiction.
119. Accordingly, the fact that consideration was received by KFEAH rather than the Applicant does not displace the operation of section 74(2).

120. In *Enviroserv (supra)*, this Tribunal stated as follows:

*"The ...above provision...treats the Applicant as having disposed of **ALL** its assets and liabilities for market value."*

121. The Tribunal went on to explain the formula for determining a gain under section 74 (2) as follows:

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

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

Where:

A - represents the "proceeds" from the deemed realisation of the Applicant's assets at market value, as evidenced, for example, by a valuation report.

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

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

D - Is the gain or loss resulting from subtracting the Applicant's net assets from the realised proceeds (A)."

122. In the present case, the Applicant's previous shareholders disposed of the entire business through a share purchase agreement. However, the formula prescribed by section 74(2) focuses on the entity's net asset position, which is deducted from the deemed

proceeds arising from the realisation of the entity's assets at market value.

123. Determining the market value of the Applicant's assets would require a valuation report of all the Applicant's assets, assets and liabilities of the entity. The Applicant provided a valuation report of its assets and liabilities as at 29 February 2020, which the Respondent rejected. This was based on the Applicant's use of a market-based valuation methodology rather than an income-based approach.
124. The Respondent argued that the Applicant's approach focused on the fair market value of physical assets and liabilities as reflected in the balance sheet. The Respondent submitted that this approach is inappropriate for a business whose value is predominantly driven by intangible assets, namely, franchise rights, brand equity, and ongoing profitability prospects. The Respondent stated that the valuation method does not capture the entire enterprise value.
125. We do not agree with the Respondent's views regarding the valuation method. This is because section 74 (2) is prescriptive. It refers to:
- (i) Realisation of assets and liabilities;
 - (ii) Parting with the ownership of each asset at market value;
 - (iii) Re-acquiring the asset;
 - (iv) Realising each liability;
 - (v) Restating each liability.
126. We realise that implementing this provision is a complicated endeavour; however, we must guard against reading into it non-existent wording. For example, the provision does not mention the words "enterprise value". Enterprise value and net assets are not the same thing. Enterprise value (EV) measures a company's total value by combining its market capitalisation with debt and subtracting cash. Net assets represent the total value of an entity's assets minus its

- total liabilities, effectively showing its net worth or equity. Further, section 74 (2) of the ITA makes no mention of future income or cash flows generated by the assets.
127. It is the net assets that are then netted off the "deemed realised" proceeds from the disposal of the company's total assets at market value, that give rise to a gain or loss under section 74(2).
128. Therefore, any valuation must focus on the Applicant's assets and liabilities. The Applicant's market approach focused on determining the asset or liability value (page 201 of the Applicant's trial bundle). That said, the Respondent is not bound by the Applicant's valuation report and is at liberty to commission their own report and, indeed, ought to have done so in the first place. However, any valuation they undertake must be in line with the requirements of section 74(2) and none other.
129. In the same vein, we do not agree with the use of either the base purchase price of USD 4 million or the adjusted purchase price of USD 2.6 million for the purpose of computing the tax liability under section 74(2). It is important that both parties follow the formula prescribed by the provision.
130. The Respondent argued that the Applicant's approach focused on the fair market value of physical assets and liabilities as reflected in the balance sheet. The Respondent submitted that this approach is inappropriate for a business whose value is predominantly driven by intangible assets, namely, franchise rights, brand equity, and ongoing profitability prospects
131. The Tribunal finds that section 74(2) specifically requires valuation of the Applicant's assets and liabilities at market value. The provision does not refer to enterprise value, future earnings, or discounted cash flow valuation. Consequently, any valuation exercise undertaken pursuant to section 74(2) must focus on determining the

market value of the Applicant's assets and liabilities as at the effective date of the ownership change.

What is the Effective date of transfer?

132. The Applicant argued that the effective transfer date was 20 January 2021, being the date on which the agreement was registered with the URSB. The Respondent, on the other hand, argues that the effective date was 19 June 2019 when the Share Purchase and Subscription Agreement was executed.

133. Determining the effective date of ownership change requires distinguishing between the contractual intention to transfer shares, beneficial ownership and legal ownership recognised under company law. While parties may enter into a binding agreement for the sale of shares before completion, legal title to shares ordinarily passes upon execution and registration of the relevant transfer instruments in accordance with company law requirements.

134. Again, it is important that we are guided by the wording in section 74 (2). It reads:

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

In the *Enviroserv* case (supra), this Tribunal held:

"Based on a reading of the provision, the three-year period begins to run from the date of the change of ownership. Where ownership changes by 50% or more immediately, as is the case here, with the indirect ownership of the Applicant changing by more than 50% on 30 September 2022, the three-year period does not apply. However, there are scenarios where the change in ownership is gradual. In such cases, the provision sets a three-year limitation whereby if the change in ownership aggregates to 50% or more within the set timeframe, the change will fall within section 78 (h)."

135. Section 83 of the Companies Act recognizes shares as movable property capable of transfer in accordance with the company's articles and applicable statutory formalities. Accordingly, execution of the Share Purchase Agreement alone did not immediately effect legal transfer of the shares. Therefore, the appropriate question to ask is when the change of ownership occurred.
136. In the present case, although the Share Purchase and Subscription agreement is dated 19 June 2019, it contemplated several conditions precedent which had to be fulfilled before the ownership restructuring could be completed. These included incorporation of KEUL, restructuring of shareholding; issuance of additional shares, conversion of shareholder loans into equity, transfer and registration of shares. Until those conditions precedent were fulfilled, the transaction remained executory and incomplete. Consequently, although the parties had expressed an intention to transfer ownership on 19 June 2019, beneficial and legal ownership had not yet crystallized.
137. The evidence before the Tribunal shows that the first effective transfer resulting in a fifty per cent ownership change occurred pursuant to the resolution dated 13 February 2020 and the share transfer form was signed on 18 February 2020, registered with the URSB on 26 February 2020, and the corresponding stamp duty was paid. Once the share transfer instruments were executed, stamp duty was paid, and the transfer was duly registered, at that point, legal ownership in the relevant shares passed.
138. The Tribunal therefore finds that the effective ownership change for purposes of section 74(2) and section 78(h) occurred on 26 February 2020 and not on 19 June 2019.
139. Therefore, for purposes of section 78(h) and 74 (2), on 26 February 2020, the Applicant was deemed to have:

- (a) realised all its assets and liabilities immediately before the change;
- (b) parted with ownership of each asset and deriving an amount in respect of the realisation equal to the market value of the asset at the time of the realisation;
- (c) re-acquired the asset and incurred the expenditure of the amount referred to in paragraph (b) for the acquisition;
- (d) realised each liability; and is deemed to have spent the amount equal to the market value of that liability at the time of the realisation; and
- (e) re-stated the liability for the amount referred to in paragraph (d).

140. In view of the parties' evidence, submissions and the Tribunal's analysis, we **FIND** as follows:


- (i) There is no conflict between section 78(g) and (h) of the ITA;
- (ii) The transaction is outside the scope of section 78 (g);
- (iii) The transaction is within the scope of section 78 (h);
- (iv) The Applicant is the proper taxable person in respect of any gain that will arise from the Application of section 78 (h), read together with section 74 (2).
- (v) Therefore, the application fails for the reasons indicated above.
- (vi) However, there is a need to correctly recompute the correct tax in line with the formula set out in section 74 (2) of the ITA.

141. Therefore, the Tribunal now makes the following orders:

- (i) The assessment of Shs. 4,235,796,666 is hereby set aside;
- (ii) The matter is hereby remitted to the Respondent to determine the gain and resultant tax arising from a correct application of 78(h) and 74 (2) of the ITA;

- (iii) Both parties are hereby directed to jointly appoint a valuer, who may be the Chief Government Valuer or an independent third-party valuer, to determine the market value of the assets and liabilities of the Applicant as at 26 February 2020;
- (iv) The above exercise should be completed by 30 September 2026;
- (v) Given that there is still work to be done in recomputing the liability, each party shall bear its own costs.


Dated at Kampala this.....^{11th}.....day of.....^{May}.....2026.



HON. CRYSTAL KABAJWARA
CHAIRPERSON



HON. STELLA NYAPENDI CHOMBO
MEMBER



HON. PROSCOVIA REBECCA NAMBI
MEMBER