THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 39 OF 2021

GUMALUWA INVESTMENTS LIMITED ..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ..... RESPONDENT

BEFORE: DR. ASA MUGENYI, MR. SIRAJ ALI, MS. CHRISTINE KATWE

RULING

This ruling relates to an application challenging a Withholding Tax (WHT) assessment of Shs. 965,700,000 arising from the purchase of mortgaged land.

The applicant is a company dealing in real estate and transport. It purchased property known as Afrique Suite sitting on five plots from Equity Bank but did not pay WHT. On 8th April 2021, the respondent issued a WHT assessment of Shs. 965,700,000 on the applicant for October 2020. The applicant objected on the ground that the sale of the property did not attract WHT. The respondent disallowed the objection.

The following issues were agreed upon.

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

The applicant was represented by Mr. Sim Katende, Mr. Arnold Ojakol, Ms. Sophia Nampijja and Mr. Mohamad Golooba while the respondent by Ms. Nakku Mwajuuma and Mr. George Ssenyomo.

This dispute relates to whether the land purchased by the applicant was a business asset under the Income Tax Act. The dispute also related to whether WHT under the Income Tax Act applied to a purchase of mortgaged land.

The applicant's first witness, Mr. Ronald Luwangula, its director testified that on 8th October 2020, the applicant submitted its bid in a public auction of mortgaged

properties comprised in Kyadondo Block 243 Plots 1799 and 1800, 2794, 957 and 958, and Kyadondo Block 237 Plot 95, all located at Mutungo, Luzira (herein referred to as "Afrique Suites"). The applicant emerged the best bidder. On the same day, a sale agreement between Equity Bank and the applicant was executed. On 21st March 2021, the respondent requested the applicant to avail documents on the purchase of the seven properties worth Shs. 21,404,800,000. On 15th March 2021, the applicant availed the required documents. On 8th April 2021, the respondent issued an administrative assessment of Shs. 965,700,000 in respect of the purchase of two properties. On 12th April 2021, the applicant objected to the assessment. On 11th May 2021, the respondent made its objection decision upholding its assessment. The witness contended that the applicant did not purchase a business asset from the mortgagee and is therefore not required to pay WHT. Further, the mortgagee is exempt from paying any WHT as it was only recovering the principal amount and interest owed to it by the mortgagor. The applicant paid WHT on the other properties as they were not exempt.

The applicant's second witness, Mr. Jimmy Mwangangi, Head of Credit for Equity Bank Limited testified that Simbamanyo Estates Limited mortgaged Afrique Suites to the bank. It defaulted on its loan obligations which forced the mortgagee to exercise its right of foreclosure. The mortgagor filed a civil suit in the High Court. It did not deposit 30% of the loan as instructed by the High Court. On 8th October 2021, the mortgaged property was sold to the applicant. He stated that there are various methods a bank can recover its principal loan and interest. Selling Afrique suites was one way. He stated that Afrique Suites was never owned by Equity bank, nor was it registered in its name. He contended that no WHT is payable by a borrower/mortgagor when recovering the principal sum. Equity Bank was exempt from paying any WHT at the time it sold Afrique Suites. He stated that the building sold was a hotel

The applicant's third witness, Mr. Isha Baguma, a Senior Legal Manager for Equity Bank reiterated what was stated by Mr. Jimmy Mwangangi. He stated that the proceeds of the foreclosure were paid through the mortgagor's bank account as part of standard banking procedures to ensure traceability of the funds and for audit purposes. He stated that the mortgagor has no right of access or to determine the use of the funds and the bank has a lien on its account.

The respondent's witness, Mr. Seth Nahabwe, Acting Manager in its Domestic Tax department testified that the respondent received information that on 8th October 2020 the applicant had purchased seven properties worth Shs. 21,404,800,000. On 10th March 2021, the respondent informed the applicant of its failure to withhold taxes and requested it to furnish information on the purchase. On 16th March 2021, the applicant furnished the respondent with the information. The respondent raised a WHT assessment of Shs. 965,700,000 for October 2020 against the applicant for failure to withhold tax of 6% on the purchase of an asset of US$ 4,350,000 under the Income Tax Act. The applicant objected and the respondent disallowed it.

The applicant submitted that it had no obligation to withhold tax at 6% when it acquired Afrique Suites. It contended that S. 118B(2) of the Income Tax Act does not apply to a foreclosure of mortgaged property by a Bank. The applicant contended that the bank did not sell a business asset owned by it. The properties were sold to recover the principal loan amount and interest due to the bank.

The applicant submitted that S. 118(b)(2) of the Income Tax Act provides that a resident person who purchases a business asset shall withhold tax at a rate specified in Part VIII of the Third Schedule. S.2(h) defines a business asset as one used or held ready for use in a business and includes any asset held for sale in a business and any asset of a partnership or company. The applicant contended that Afrique Suits does not qualify as a business asset for purposes of income tax. The applicant contended that for a property to qualify as a business asset it is important to prove the following.

1. That the property is an asset.
2. That the asset is used in a business; or
3. The asset is held ready for use in a business.
4. Includes an asset held ready for sale in a business.
5. Inciudes an asset that is owned by a partnership or company.

The applicant submitted that *Black's Law Dictionary* 8th Edition defines an asset to mean "an item that is owned and has value". It is also an entry on a balance sheet showing the items of property owned including real estate. It also includes all properties of a person available for paying debts or for distribution. The applicant contended that Afrique Suits was not owned by Equity Bank nor was it an asset in its balance sheet.

The applicant argued that the Mortgage Act restricts the rights of a mortgagee over a security in the principle "once a mortgage, always a mortgage." S.8(1) of the Mortgage Act states that a mortgage is a security and shall not operate as a transfer of any interest or right in the land from the mortgagor to the mortgagee. The applicant cited *Kiyaga v Segujja and another* Civil Appeal 37 of 2010 where it was stated "if money is lent on security of land, the lender gets security and nothing more. It is trite law that once a mortgage always a mortgage." The applicant also argued that under S. 38 of the Financial Institutions Act, a financial institution shall not purchase or acquire any immovable property or any right in it except as may be reasonably necessary for the purpose of conducting its business. The applicant submitted that Equity Bank could not legally own or use Afrique Suites.

The applicant submitted that S. 2 of the Mortgage Act defines a mortgage to include any charge or lien over land or any estate, or interest in land in Uganda for securing the payment of an existing or future or a contingent debt or other money or money's worth of the performance of an obligation. The applicant contended that a mortgage is a not an account receivable but simply a charge over land for securing the payment of a contingent debt. Therefore, it is not an asset that can be listed in the books of accounts.

The applicant submitted that S. 30(1) of the Mortgage Act outlines how the proceeds of a mortgaged land shall be applied. Under S. 30(1)(b) it shall be applied in discharge of any prior mortgage or other encumbrance subject to which the sale was made. Under S. 30(d) it shall be applied in discharge of any sum advanced under the mortgage. Any residue shall be paid to the person who immediately before the sale was entitled to the discharge of the mortgage. The applicant cited *Hill v Smathers* 173 NC 642,92 SE 607,609 where the term 'asset' was said to be broad enough to cover anything which is or maybe available to pay creditors. It submitted that the proceeds from the sale of the property were not available for paying debts of Equity Bank or for distribution to its creditors or shareholders. The applicant submitted that Afrique Suits was not a business asset of Equity Bank as it was not registered in its names.

The applicant further contended that Equity Bank did not hold Afrique Suits as an asset ready for sale in business. It reiterated that S. 8(1) of the Mortgage Act restricts the

rights of the mortgagee in a property pledged. The applicant cited *Kiyaga v Seguja* (supra). The applicant contended that S. 31 of the Mortgage Act states that any residue from the sale of the mortgaged property by a mortgagee may be paid to the person entitled to discharge the mortgage. The applicant argued that when a borrower defaults and a financial institution exercises its recovery rights the borrower does not withhold 6% of the value of the security as the bank is recovering its principal loan plus interest.

The applicant contended that the law defines a business asset to include assets owned by a partnership or company to distinguish between those assets and the ones owned by individual persons. The applicant contended that the clause intended to exclude assets owned by individuals from being classified as business assets. The applicant contended that the mortgaged property was never owned by Equity Bank but by one Peter Kamya. The applicant contended that it acquired Afrique Suites at a public auction organised on behalf of Equity Bank Limited. The sale agreement shows that Equity Bank was the mortgagee and not the owner of the property. The applicant contended that the sale was not an ordinary sale but one of limited power to Equity Bank to recover outstanding principal and interest.

The applicant contended that S. 118B(2) of the Income Tax Act is ambiguous. He submitted that the Income Tax Act merely states that "a resident person who purchases a business asset shall withhold tax." The applicant contended that what may a business asset in the hands of a seller may not be one in the hands of a purchaser. It gave examples of a condominium property and a hotel being transferred from a deceased person to beneficiaries. The applicant contended that the only logical interpretation of this clause is that at the time of the purchase the purchaser must be buying a business asset of the seller. It contended that Afrique Suites was not a business asset of the mortgagee. The applicant contended that if Peter Kamya had sold the property to directly to it S. 118B(2) would apply.

The applicant contended further that Article 152(1) of the Constitution provides that no tax shall be imposed except under the authority of an Act of Parliament. The applicant cited *Comfort Homes (U) Limited v URA* Application 66 of 202 where the Tribunal stated that "Before one is assessed for a tax liability, the law imposing the liability should be clear and unequivocal." The applicant submitted that in interpretation of

taxes any ambiguity is interpreted in favour of the taxpayer. The applicant cited *Uganda Revenue Authority v Uganda Tax Operators and Drivers Association* Civil Appeal 13 of 2015 where the court noted that "If the court finds that the language of the taxation provision is ambiguous or capable of more meaning than one then the court has to adopt the interpretation that favours the assessee (taxpayer)." The applicant also cited *Lafarge Midwest Inc. v City of Detroit, State of Michigan* Court of Appeals No. 289292 where it was stated that "a provision of law is ambiguous only if it irreconcilably conflicts with another provision or when it is equally susceptible to more than one meaning." The applicant argued that the imposition should be clear and precise.

The applicant contended that S. 118B(2) of the Income Tax Act conflicts with S. 117(2)(b) of the same Act. The applicant submitted that Equity Bank sought to recover principal and interest from the loan. It contended that the interest obtained on the loan is not taxable under the Income Tax Act. It cited S. 18(1)(f) of the Income Tax Act that defines business income to include interest derived by a person engaged in the business of banking or money lending. The applicant contended that S. 18(2) states that an amount included in business income under subsection 18 retains its character as interest. It is not taxable for the purposes of the Act referring to income. When a bank sells a business asset it seeks to recover interest. The applicant submitted that under S. 117(2) of the Income Tax Act interest income paid to financial institutions is exempt from withholding tax.

The applicant further contended that S.119(5)(f)(ii) of the Income Tax Act exempts suppliers who the Commissioner is satisfied have regularly complied with the obligations imposed under the Act. It stated that Equity Bank is included on the list of entitles that are exempt from the payment of WHT

In reply, the respondent submitted that S. 118B(2) of the Income Tax Act provides that a resident person who purchases a business or business asset shall withhold tax specified in Part VIII of the Third Schedule which provides a rate of 6% of the gross payment. The respondent submitted that the applicant can only be liable to pay tax if

1) It is a resident person.
2) There is a purchase.
3) The purchase is for business or a business asset.

The respondent contended that a person is defined in s. 2(y) of the Income Tax Act to include an individual and a company. S. 2(hhh) defines a resident person to include a resident company. The respondent submitted that S.10(a) of the Income Tax Act states that a company is a resident company for a year of income if it is incorporated or formed under the laws of Uganda. The respondent submitted that the applicant is a company incorporated in Uganda.

The respondent submitted that Simbamanyo Estates Limited mortgaged five properties known as Afrique Suites registered in Peter Kamya's names to Equity Bank. The mortgagor defaulted on its loan obligations and Equity Bank exercised its right of foreclosure. On 8th October 2020, the applicant was the successful bidder and purchased Afrique Suites.

The respondent contended that words 'purchase' and 'sale' are not defined in the income Tax Act. It cited *Crane Bank v URA* HCT-00-CA-18 where the High Court stated "where the Act does not define a word or term, then the word or term must be given an ordinary literal meaning. The courts may have recourse to dictionaries, though with care." The respondent contended that according to *Black's Law Dictionary* the word 'sale' connotes to 'the transfer of property or title for a price' whereas the word 'purchase' connotes to 'the act or an instance of buying' and 'the acquisition of real property by one's own or another's act.' The respondent cited *Heritage Oil and Gas Ltd. v Uganda Revenue Authority* Application 26 of 2010 where the Tribunal noted that assessment was issued after the Sale and Purchase Agreement had been signed. It was not disputed that the transaction was eventually consummated by payment of consideration. The respondent contended that there was a sale agreement that was executed between the applicant and Equity Bank for the purchase of Afrique Suites which indicates that there was a purchase by the former. The respondent further contended that a sale by an auction is recognised as a sale under S. 70(a) and (b) of the Sale of Goods Act and S. 29 of the Mortgage Act.

The respondent submitted S. 2(h)of the Income Tax Act defines a business asset to mean an asset which is used, or held ready for use in a business, and includes any asset held for sale in a business, and any asset of a partnership or company. It cited

Comfort Homes (U) Ltd. v Uganda Revenue Authority Application 66 of 2020 where the Tribunal stated that in construing the term 'business asset' it must be established that it is in one of the categories stated in S. 2(h). It cited *Black's Law Dictionary* defines an 'asset' to mean "an item that is owned and has value." It contended that the suit property was an asset. It was owned and had business value. The respondent submitted that property comprised of a building and land that had commercial and residential value. It contended that the acquisition of the suit properties by the applicant which is a company qualifies them to be business assets. The applicant will report them under assets in its assets and liabilities report in its financial statement.

The respondent submitted that in interpretation of taxing statutes, one must look at what is clearly stated. It cited *Uganda Revenue Authority v Kajura* SCCA 9 of 2015 which *cited Cape Brandy Syndicate v Inland Revenue Commissioners* [1920] 1 KB 64 where it was stated that "In a taxing Act, one has merely to look at what is clearly said". The respondent contended that S. 118B(2) states that the purchaser and not the seller should withhold tax. The respondent contended further that the Section is couched in terms of 'shall.' The applicant is supposed to withhold tax and not inquire into the nature of the sale. The respondent stated that for a provision of law to be considered ambiguous it should have two or more distinct meanings. The term business asset is clearly defined.

The respondent contended that the applicant's submission that banks are not allowed to own property under the Financial Institutions Act is not only untenable but also irrelevant. The respondent contended that S. 38 of the Financial Institutions Act states that a financial institution shall not purchase or acquire any immoveable property except as may be necessary for the purpose of conducting its business. In other words, a financial institution is allowed to purchase immoveable property as far as the property is necessary for conducting business.

The respondent contended that the business of financial institutions included offering mortgages. It contended that on the sale of the mortgaged property, the applicant became an absolute owner. It cited *Halsbury's Laws of England* 32 paragraph 767 p.395 where it was stated that "the property belongs to the mortgagee absolutely, not only for the mortgage term, but also for the mortgagor's whole interest". It also cited

Bank of India (u) Ltd. v NC Beverages Ltd. and another HCCS 0009 of 2021 where it was stated that "Though a suit for foreclosure, the mortgagee become owner of the mortgaged property and those interests subsequent to the mortgage." The respondent submitted that upon foreclosure, the mortgaged property was owned by the mortgagee, Equity Bank. This was stated in the offer letter that in the case of failure to pay interest and capital the bank would sell or take over the assets mortgaged.

The respondent contended that once a property has been foreclosed it ceases to be governed by the Mortgage Act. It submitted that Regulation 15 of the Mortgage Regulations provides that "After the payment of the full purchase price, the mortgagee shall execute instruments of transfer of the property into the name of the purchaser." It cited *Bank of India v NC Beverages Ltd* (supra) where it was stated that "In a suit for foreclosure, following a final order of foreclosure the mortgagor and subsequent encumbrancers are absolutely debarred and foreclosed of and from all right, title and equity of redemption of, in and to the mortgaged land." It contended further that the fact the mortgaged property was sold by public auction does not deprive the transaction of its nature of being a sale regardless of how unique it was.

The respondent submitted further that S. 30 of the Mortgage Act provides for the priority on how the purchase money shall be applied. S. 30(a) states that the money shall be applied firstly to rates, rents, taxes, charges, or other sums owing. It contended that the S. 30 does not absolve the applicant from paying or withholding taxes.

The respondent contended that S. 118B(2) does not conflict with S. 117(2)(b) of the Income Tax Act which relates to interest payment made by a resident person to another. It submitted that the payments made by the applicant were not interest payments and therefore the transaction was not governed by S.117. It contended that the payment was not exempted under S. 117(2) of the Income Tax Act. The respondent contended that when a taxpayer falls within the ambit of the law, it ought to be taxed. The respondent cited *Manila North Tollways Corporation v Commissioner of Internal Revenue* C.T.A ETB No. 812 of 2012 where it was stated that "Unless exempted, the obligation to pay income tax is mandatory." The respondent submitted that there is no clear and explicit provision exempting the applicant from withholding tax. It submitted that the failure to withhold tax creates a liability on the withholding agent to pay the

amount not withheld to the Commissioner. It also submitted that the applicant failed to discharge its duty and is liable to pay the amount not withheld.

In rejoinder, the applicant submitted that the sale of Afrique Suites was a unique sale that does not fall under S.118B(2) of the Income Tax Act and there was no obligation on the applicant to withhold tax. The applicant contended that Equity bank did not own the asset. The applicant reiterated its submission that "once a mortgage always a mortgage." A mortgagee can never become the owner of the mortgaged property. The applicant contended that having established that Equity Bank was not the owner it could not qualify to be a business asset of Equity bank. The applicant submitted that one cannot own an asset when someone else has a right of redemption over it.

The applicant submitted that the evidence of non-inclusion of the property in its balance sheet is an indication that the property was not an asset of the bank. The applicant further submitted that a mortgage is a not an account receivable or a loan or a debt owed to the bank but simply a charge over land for securing the payment of a contingent debt. The applicant also submitted that the property was not held ready for use by Equity bank in its business. It also submitted that the property was not held by a company or a partnership.

The applicant argued that *Bank of India Ltd v NC Beverages* Ltd. and another (supra) cited by the respondent was not applicable to the present case. The applicant contended that the said case dealt with chattels and debentures registered under the Security interest in Movable property Act 2019 which dealt with securities over movable assets. The security in question was registered over immovable property under the Mortgage Act 2009.

The applicant submitted that the respondent's reliance on the Sale of Goods and Supply of Services Act for the assertion that sale by public auction was an ordinary sale was erroneous because the said Act does not apply to the sale of mortgaged property. The applicant contended that the preamble to the Sale of Goods Act states that it applies to contracts for the sale of goods and supply of services. Afrique Suites are not goods within the meaning of the Act.

The applicant reiterated its submission that financial institutions are not allowed to own property. it contended further that the character of a seller is important because it is exempt from the payment of withholding tax on interest. S.17(2)(b) of the Income Tax Act states that interest income paid to financial institutions is exempt from WHT. The applicant submitted that S. 118 of the Income Tax Act is ambiguous to the extent that it does not specify in whose hands the asset sold should qualify as a business asset. The applicant contended that S. 118B(2) is susceptible to more than one meaning.

The applicant contended that rules of statutory interpretation require that a statute must be read as whole. It cited *Farid Meghani v URA* HCCA 6 of 2021 where the court stated that one of the cardinal rules of statutory interpretation is that statues are to be read as a whole, in context, and if possible if the court is to give effect to every word of the statute. The applicant contended that charging WHT on financial institution runs contrary to the purpose of withholding tax in general and S.118B(2) specifically.

Having perused the evidence and read the submissions of the parties, this is the ruling of the tribunal.

On 8th October 2020, the applicant purchased mortgaged properties comprised in Kyadondo Block 243 Plots 1799 and 1800, 2794, 957 and 958, and Kyadondo Block 237 Plot 95 all located at Mutungo, Luzira known as "Afrique Suites" in a public auction. On 8th April 2021, the respondent issued a WHT assessment of Shs. 965,700,000 on the applicant on the ground that it ought to have withheld taxes of 6% on its purchase. The applicant objected and contended that it did not purchase a business asset from the mortgagee and is therefore not required to pay WHT.

The law relating to WHT tax on purchase of a property is spelt in S. 118B(2) of the Income Tax Act. S. 118B(2) provides that; "a resident person who purchases a business or business asset shall withhold tax at a rate specified in Part VIII of the Third Schedule." Part VIII of the Third Schedule provides under Paragraph 3 - 'the withholding tax rate for purposes of S. 118B(2) is 6% of the gross payment. S. 2(h) of the Income Tax Act defines a 'business asset' to mean; "an asset which is used or held ready for use in a business, and includes any asset held for sale in a business and any asset of a partnership or a company". The applicant contended that its purchase of

Afrique Suites was not that of a business asset under the law. In *Comfort Homes (U) Ltd. v URA* Application 66 of 2020 the Tribunal stated that "Before one is assessed for a tax liability, the law imposing the liability should be clear and unequivocal." Therefore, the Tribunal must ask itself as to whether the law imposing the duty on the applicant was clear.

A reading of S. 118B(2) of the Income Tax Act shows that for one to withhold tax under the said Section the following conditions must be met.

1) There must be a resident person.
2) There must be a purchase.
3) The purchase must be of a business and or business asset.
4) The purchaser must withhold tax.

S. 118B(2) Act limits its scope to a resident person and not every taxable person. Secondly, the Section provides for the term 'purchase' instead of 'sale.' Would the effect have been different if it has used the word 'sale'? The purchase is of either a business and or a business asset. Lastly, the duty to withhold tax is on the purchaser and not the seller.

To understand whether the above provisions are clear and applicable to the applicant, one must apply rules of statutory interpretation. The first rule of statutory interpretation is that words must be given their ordinary and literal meaning. In *Cape Brandy Syndicate v Inland Revenue Commissioners* [1920] 1 KB 64 which was cited in *Uganda Revenue Authority v Kajura* SCCA 9 of 2015 and other authorities it was stated that:

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

To ensure that we are all on the same page, the word "intend" is defined by *Black's Law Dictionary* 10th Edition p.930 as "1. To have in mind a fixed purpose to reach a desired objective; to have as one's purpose." The Tribunal must ask itself, was the intention of the legislature in enacting S. 118B(2) intended to give effect to the Mortgage Act? In Uganda *Revenue Authority v Uganda Tax Operators and Drivers Association* Civil Appeal 13 of 2015 Justice Mwondha noted:

" If the court finds that the language of the taxation provision is ambiguous or capable of more meaning than one then the court has to adopt the interpretation that favours the assessee (taxpayer)."

The Tribunal has also to ask itself whether there was any ambiguity in S. 118B(2).

In *Lafarge Midwest Inc. v City of Detroit, State of Michigan* Court of Appeal No. 289292 12th October 2010, the court defined what amounts to an ambiguity as, "a provision of law is ambiguous only if it is irreconcilably conflicting with another provision or when it is equally susceptible to more than one meaning." *Black's Law Dictionary* 10th Edition p.97 defines 'ambiguity' as "1. Doubtfulness or uncertainty of meaning or intention, as in a contractual or statutory provision." In the event the provisions of a statute are unclear that the Tribunal will apply the golden or purposive rules of statutory interpretation to see if it can cure the uncertainty. *Black's Law Dictionary* p.807 on the golden rule states that:

"The interpretive doctrine that words in a legal instrument should be given their ordinary sense, as understood in context, unless that would lead to some absurdity or inconsistency with the rest of the text."

The golden rule adds the word 'absurdity.' The word 'absurdity' is defined by *Black's Law Dictionary* p.11 as "1. The quality, state, or condition of being grossly unreasonable. 2. An interpretation that would lead to an unconscionable result, esp. one that the parties or (esp. for a statute) the drafters could not have intended". On the same page 11, the absurdity doctrine is defined as "The principle that a provision in a legal instrument may be either disregarded or judicially corrected as an error (esp. when the correction is textually simple) if failing to do so would result in a disposition no reasonable person could approve." The Tribunal may also use the purposive approach in interpreting a statue. In *Crane Bank v Uganda Revenue Authority* HCT-00-CA-18-2010 his Lordship Kiryabwire stated that:

"The position of the law is that if any doubt arises from the words used in the statute where the literal meaning yields more than one interpretation, the purposive approach may be used, to determine the intention of the law maker in enacting of the statute. (See Justice Choudry in the case of *Uganda Revenue Authority v Speke Hotel* (1996) LTD (CA No. 12 of 2008).

The rules hinge on two words "ambiguity" and "absurdity." A word may be clear or unambiguous but creates an absurd effect. Taking the above into consideration, the

Tribunal will delve into the task at hand. Was S. 118B(2) of the Income Tax Act ambiguous and or absurd?

It is not in dispute that the applicant was a resident person. S. 2(yy) of the Income Tax Act defines a person to include a company. S. 2(hhh) defines a resident person to include a resident company. S. 10(a) of the Income Tax Act states that a company is a resident company for a year of income if it is incorporated or formed under the laws of Uganda. It is not in contention that the applicant is a resident person.

The next task the Tribunal has to address is whether there was a purchase. The Income Tax Act does not define the word 'purchase' or 'sale.' In *Crane Bank v URA (supra)* while citing *Cape Brandy Syndicate v IRA* (supra) the High court stated that.

> "Where the act does not define a word or term, then the word or term must be given its ordinary literal meaning. The courts may have recourse to dictionaries, though with care."

The word 'purchase' is defined by *Black's Law Dictionary* 10th Edition p. 1429 as:

> "1. The act or an instance of buying. 2. The acquisition of an interest in real or personal property by sale, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any other voluntary transaction."

Under the said definition, one can acquire an interest by mortgage. The word 'purchase' as defined in the dictionary meaning and as used in S. 118B(2) of the Income Tax Act is clear. It is unambiguous and is unequivocal. There is no other meaning that can be assigned to it. If a taxpayer were to withhold tax on a purchase it would not lead to an absurdity, or a disposition no reasonable person could disapprove. At this stage, the Tribunal can confirm that use of the literal and ordinary meaning of the word 'purchase' does not create any ambiguity or absurdity. If one buys property for another and does not disclose it, he is deemed the purchaser. So, identifying a purchaser is not difficult.

It is not in dispute that the applicant purchased Afrique Suites. The applicant acquired its interest through a public auction arising from a mortgage. An auction is defined by *Black's Law Dictionary* 10th Edition p.155 as:

> "A public sale of property to the highest bidder; a sale by consecutive bidding, intended to reach the highest price of the article through competition. Under UCC 2-328(2) a

sale by auction is ordinarily complete when the auctioneer so announces in a customary manner, as by pounding a hammer."

In this case, the sale by auction was by opening bids. The sale is complete when the auctioneer announces the highest bidder. The bank executed a sale agreement. That was superfluous. It merely shows that the bank was not confident that the sale had already been executed by the auctioneer. On completion of an auction, the auctioneer is supposed to communicate to the bank the successful bidder. At times he may execute an agreement which binds the bank. A sale agreement between the bank, not by the auctioneer, and the applicant connotes that the sale was by private treaty, as it is done privately. A sale by private treaty is the oxymoron of a public auction. Since the auction was done before the agreement, it will be taken as the mode of sale of the suit property to the applicant. However whichever mode is used does not affect the purchase.

The question is why did the applicant not withhold the 6% as soon as it purchased the property in question? This takes the Tribunal to its next task, which is, was the property in question a business asset?

S. 2(h) of the Income Tax Act defines a 'business asset' as "an asset which is used or held ready for use in a business, and includes any asset held for sale in a business and any asset of a partnership or company." In construing the term `business asset` as under S. 2(h), it must be established, either:

a) That the asset being used is a business, or
b) That the asset was held ready for use in a business, and
c) Includes any asset held for sale in a business, and
d) Includes any asset was of a partnership or a company.

The first two provisions, (a) and (b) define what a business asset is. Provisions (c) and (d) states what is included in the definition of a business asset.

The registered proprietor of Afrique Suites was Mr. Peter Kamya, therefore the properties were not assets of a partnership or company. The applicant contended that the clause intended to exclude assets owned by individuals from being classified as business assets. The tribunal thinks this is an erroneous interpretation of the

Section. S. 2(h) uses the word "include" which shows that the items mentioned as asset of a partnership or a company are part of a business asset, but do not define what a business asset is. S. 2(h) merely asserts that an asset of a company or a partnership is a business asset whether or not it is being used in the business or held ready for use, or is held for sale. For an individual, not all its assets are business assets, he or she has to show that the asset was used or held ready for use in the business or held for sale.

The word 'business' is defined under S. 2(g) to include "any trade, profession, vocation or adventure in the nature of trade, but does not include employment." The word "asset" is defined by *Black's Law Dictionary* 10th Edition p. 140 for our purpose as "1. An item that is owned and has value." It is not in dispute that Afrique Suites was owned or had value. Therefore, it is an asset.

As regards whether it was a business asset, one has to ask what the business of the asset was involved in. The property belonged to Peter Kamya, the registered proprietor. The applicant's witness, Mr. Jimmy Mwangangi stated that the asset was a hotel. The applicant contends that the Act should be interested in the business of the seller. There is a bit of confusion here. This is because from the submissions of both parties they indicate that Equity Bank was not the seller. The applicant stated that the asset was not in the balance sheet of the bank as an indication that the property was not its asset. Equity Bank is in the business of providing financial services and is not in the hotel business. Therefore, it could not be a business asset of it. Mr. Peter Kamya gave a power of attorney to Simbamanyo Estates Limited which is in real estates. Real Estate business is different from hotel business. Without the power of attorney, the bank would not have sold Afrique Suits. Therefore, Afrique Suites was not a business asset of Simbamanyo Estate nor of Equity Bank. However, S. 118S(2) of the Income Tax Act does not state whose business the asset should be assigned to. As long as it is a business asset. Did the omission to prescribe how the business asset should be determined according to who owns it, or use it, or mortgage it, or sell is create an ambiguity or absurdity?

The applicant contended that the law should have provided that purchaser must be buying a business asset of a seller. It contended that the S 118B(2) merely stating that "a resident person who purchases a business asset shall withhold tax" created an ambiguity. An ambiguity is where the provision creates more than one meaning or it is irreconcilably conflicting with another provision. So, the Tribunal has to ask itself whether the omission to include that the business asset should belong to a seller created an ambiguity or absurdity. *Black's Law Dictionary* 10th Edition p. 1567 defines a seller as "someone who sells or contracts to sell goods, a vendor". It does not state that the seller must be the owner of the goods he or she is selling. In most cases persons who sell are not the owners. The applicant argued that the only logical interpretation of the S. 118B(2) of the Income Tax Act is that at the time of purchase the purchaser must be buying a business asset of a seller. What happens where a seller is not the owner of the business asset? In order to circumvent the application of the provision, owners would get other persons to sell their business assets. By omitting to state who the business asset belongs to, the provision applies to all purchases irrespective of the owner or seller. A purchase of a business asset not being restricted to an owner, or a seller does not make S. 118B(2) ambiguous or absurd. It simply widens the tax base which the provision applies to. It may affect various institutions and individuals who sell properties, like banks which sell mortgaged properties because of its wide application but that does not make it ambiguous or absurd. Because everybody knows those to whom it applies. Where an Act passed by Parliament is clear, one cannot add into the law or statute what is not there. One cannot add the word 'seller' or 'owner' because he does not want it to apply to others. There is no room of intendment. The legislature did not wish to restrict the withholding of taxes to only where the business belonged to the seller. The legislature wanted to cover all purchases of business assets.

On the other hand, restricting withholding tax to where business assets belong to a seller may have undesired effects. The use of the term 'seller' may create ambiguity. This is because under common law, there are many persons who sell properties but are not the owners, e.g., auctioneers, banks, bailors, and other persons who exercise liens on them. Whereas it may not be difficult to identify a purchaser, determining who an actual seller may not be simple. For instance, questions as to who the actual seller of Afrique Suits still lingers. The sale was done under a court order arising from a

mortgage. There was a sale by public auction. Equity bank also made a sale by an agreement which was more of a sale by private treaty. The registered proprietor gave powers of attorney to his company who was the mortgagor. Therefore, a question arises as to who actually sold the properties? Was it the auctioneer, the bank, the court, the borrower/mortgagor, or the owner who gave it a power of attorney? The bank alleged the assets were not in its balance sheet and it was therefore not the owner. A seller does not need to have an asset in its balance sheet in order to sell it. If the seller is not the owner how will the sale be treated under S. 118B(2) of the Act?

The applicant contended that if Peter Kamya had sold the property directly to the applicant, S. 118B(2) of the income tax Act would apply. In respect of ownership, a scenario may arise where an owner can give his asset to another person to use it in his or her business. For instance, where a father allows a child to use the asset. That would create a problem as to whether the S.118B(2) was applicable where the person using it at the time of sale is not the user or owner. It is not a business asset of the owner. If the Act had restricted its application to an owner or user of the asset, the application of the law would not only create ambiguity but also inequities and discrimination in its application. Determining who an owner, user or seller is would create legal complexities that may take time to unravel or may never be unravelled. Legally, the suit properties were sold on behalf of Mr. Peter Kamya who granted powers of attorney to Simbamanyo Estates Limited which defaulted on its loan obligations. As to whether who the actual seller is, the answer is subjective. It is still debateable. As we already said the seller does not have to be the owner. He is one who sells or contracts to sell. Any purported seller may tell the taxman, "Go and collect the WHT from court as the sale was under a court order." One of the canons of a good tax law is that it should not create inequalities in its application. It should have certainty. The Tribunal does not think that the omission to state that the business asset should belong to an owner or seller created any ambiguity and absurdity. The legislature was not interested in who was selling the business asset or its owner. If it were so, it would have stated so. All it is interested in is whether the property purchased was a business asset.

Therefore, in order to determine whether WHT was due in respect of purchase of the business asset in the dispute, the Tribunal needs to know: what business Afrique

Suites was being used for? Who purchased it? The applicant's second witness, Jimmy Mwangangi, Head of Credit for Equity Bank Limited admitted that Afrique Suites was a hotel. Our understanding of the law is that providing services of a hotel amount to a business. Therefore, a hotel would therefore qualify as a business asset. The purchaser, who is required to withhold tax is known. It is the applicant. As to who actually sold, was it the owner, or the court, or the auctioneer, the bank, or the mortgagor is not important because the wording of S. 118B(2) of the Act are clear. There is no ambiguity in respect of whether Afrique Suites was a business asset, and who purchased it.

There is still a dispute as to whether the purchaser should have withheld tax. The applicant contended that S. 118B(2) of the Income Tax Act conflicts with other provisions of the Act. We already stated that a provision of the law is ambiguous if it conflicts with other provisions of the same law. In *Lafarge Midwest Inc. v City of Detroit, State of Michigan* Court of Appeals No. 289292 it was stated that "a provision of law is ambiguous only if it irreconcilably conflicts with another provision or when it is equally susceptible to more than one meaning." In *Farid Meghani v URA* HCCA 6 of 2021 the court stated that "one of the cardinal rules of statutory interpretation is that statues are to be read as a whole, in context, and if possible if the court is to give effect to every word of the statute". There should be in harmony applying provisions of a law. The applicant contended that S. 118B(2) of the Income Tax Act conflicts with S. 117(2)(b) of the same Act. S. 118B(2) deals with withholding tax on the purchase of a business asset. S. 117(2)(b) deals with withholding tax on interest paid by a resident person to another person. It exempts withholding tax on interest paid to banks. The applicant contended that the Equity Bank sold the mortgaged properties to recover the loan amount and interest obtained under a loan. Therefore, the sale of property was for recovery of interest. A resident person is exempted from withholding tax on interest that is paid to a bank. Therefore, the applicant argued that this should be extended to withholding tax on purchase of a mortgaged property as the bank is recovering interest. The word "purchase price" is defined *by Black's Law Dictionary* 10th Edition p. 1361 as "the price actually paid for something. esp. a house." In this case the applicant paid purchase price for the mortgaged properties. Interest is defined under s. 1(kk) of the Income Tax Act to include.

"(I) any payment, including a discount, or premium, made under a debt obligation which is not a return of capital.

(ii) any swap or other payments functionally equivalent to interest

(iii) any commitment, guarantee, or service fee paid in respect of a debt obligation or swap agreement; or

(iv) a distribution by a building society;"

Ejusdem generis construction requires that when interpreting provisions where a general word is followed by a list of specifics, the general word will be interpreted to include only items of the same class listed. If the Tribunal were to use the ejusdem generis approach in interpreting S. 117(2)(b) of the Income Tax Act the word 'purchase price' would not be included in the same class of the specifics stated in the said Section. In other words, a purchase price is not interest. S. 117(2)(b) deals with exemption of withholding tax on interest which is business income. S. 118B(2) deals with withholding tax on purchase of property which is property income. Business income and property income are not the same and are treated differently under the Income Tax Act If one is exempted from business income it does not mean that is automatically exempt from property tax. If the law intended to exempt an individual from paying or withholding tax on the sale or purchase of a property, the exemption should be clear. It should not be inferred.

The applicant is a purchaser of properties and is not a customer of Equity Bank who is seeking to pay for financial services rendered to it where it would be required to withhold interest. The applicant paid a purchase price for mortgaged properties. It was not payment for an interest under a loan arrangement. A mortgaged property is security. It is only foreclosed when the bank has failed to recover the principal loan and interest. Any residue from the sale of the mortgaged property by a mortgagee is paid to the person entitled to discharge of the mortgage. The mortgagee does not keep the residue. Both parties admit that the bank was not the seller of the purchased properties. Therefore, there is nothing to prevent the applicant from withholding tax. There is no evidence that the money recovered from the sale was only used to pay interest of the bank and nothing more. There is no evidence that there was no residue after the bank loan and or interest and other expenses was paid to cater for the WHT.

The applicant contended that S.119(5)(f)(ii) of the Income Tax Act exempts suppliers who the Commissioner is satisfied have regularly complied with the obligations imposed under the Act. S. 119 applies to provision of payment of goods or services to Government and other entities who are obliged to withhold tax where the amount exceeds one million. S. 119(5) provides for a list of companies exempted from the application of S.119(1). The applicant contended that Equity Bank is included on the list of entitles that are exempt from the payment of WHT under S. 119(5)(f)(ii). The applicant did not avail the list of entities that are exempt from the payment of WHT. None of the witness testified on that. It only came up in submissions. There is no evidence adduced that at the time of sale the Commissioner was satisfied that Equity Bank had complied with its obligations under the Income Tax Act. Without prejudice, S. 119 of the Income Tax act applies to payments of goods and services as stated in its heading. Equity Bank was not providing goods or services to the applicant who is not obliged to withhold under S. 119(1) of the Income Tax Act. The business asset or property sold was immoveable properties which would not qualify to be considered as goods. Goods are defined *in Black's Law Dictionary* 10th Edition p. 808 as tangible or moveable property other than money. Equity Bank was a mortgagee and not a seller or supplier of goods. As already stated, it was an intermediary. It was merely recovering principal loan amount and interest. Secondly, S.119(5) states clearly that "This Section does not apply to..." The Section referred to is S.119. The application of S.119(5) is restricted to S. 119 and not any other Section inclusive of S.118B(2) of the Income Tax Act. Even if we are to believe that Equity Bank is on the exempted list, there is no evidence that the applicant is listed as an entity under S. 119(5) as exempt.

If the Income Tax Act had intended that the exemptions in S.119(5) and S. 117(2)(b) would apply to S. 118B(2) of the Income Tax Act it would have clearly stated so. In *Manilla North Tollways Corporation v Commissioner of Internal Revenue C-T. A ED No. 812 of 2012*, the court stated that.

> "... the law does not look with favor on tax exemptions; and he who claims an exemption must be able to point the provision of the law creating the said right and justify it (relay the facts upon which the claim is based) by words too plain to be mistaken and too categorical to be misinterpreted."

Therefore, their application by the applicant is out of context. There is no exemption under S. 118B(2) of the Income Tax Act. The beneficiary of the said exemptions who

maybe the bank is not a party to the application. One wonders how the applicant can benefit on exemptions not granted to it or how it can sue for them.

The applicant's first witness, Mr. Ronald Luwangula testified that that applicant paid WHT on certain properties which were not exempt. He did not clarify as to why they were not exempt. Those that ended before the Tribunal were considered exempt. It is not clear why the applicant applied the purported exemption selectively. One may suspect that the applicant was testing the waters to see whether WHT should be payable on the purchase of mortgaged properties. As a purchaser it is obliged to withhold tax on purchased business assets. It is not affected whether the property was sold under a mortgage or not. When a purchaser buys a mortgaged property, it is not party to the mortgage agreement. The Mortgage Act does not apply to the purchaser unless the sale is challenged. In this case, the sale was by court order. There is no evidence that the purchase by the applicant was ever revoked by court because the Mortgage Act was not complied with. The bank also is not selling its own property. S. 8(1) of the Mortgage Act states that a mortgage is a security and shall not operate as a transfer of any interest or right in the land from the mortgagor to the mortgagee. S. 30 of the Mortgage Act provides for payment of taxes on the list of priority payments. In order for a bank not to be affected by WHT under S. 118B(2) of the Income Tax, when appraising the values of business assets at time of mortgaging, the forced sale values should cater for the loan, interest and WHT. All a purchaser is required to do, is withhold a tax of 6% on the purchase payment. The person who withholds the tax, the purchaser, is merely a collecting agent. Under S. 124 of the Income Tax Act there are consequences where the purchaser fails to withhold tax.

Before the Tribunal can put down its pen, there were issues raised on the Mortgage Act, the Financial Institutions Act, the Sale of Goods Act. The Tribunal wishes to state that where the provisions in a taxing Act are clear and unambiguous, it cannot apply other statues to interpret the Act. In *Cape Brandy Syndicate v Inland Revenue Commissioners* i(supra) it was stated that in interpreting a statute "There is no equity about tax." "The law should be applied as it is stated." "There is no room for intendment." One cannot suppose that the intention of the Income Tax Act was supposed to give effect to the provisions of the Mortgage Act. The preamble of the Income Tax Act shows that it is an Act to consolidate and amend the law to relating to

income tax and for other connected purposes. While the Mortgage Act is an Act to inter alia, consolidate the law relating to mortgages; to provide for the creation of mortgages; for the duties of mortgagors and mortgagees regarding mortgages. It was not intended to be applied in assessing income tax liability. When it comes to determining or imposing income tax, the Income Tax Act takes precedence. The Tribunal finds that where the provisions of a taxing statute are clear and unequivocal, a court cannot use the Mortgage Act, the Financial Institutions Act, and the Sale of Goods Act to interpret S 118B2 of the Income Tax Act. If the Tribunal were to use other statutes to interpret taxing Acts where the provisions are clear, the sky would be the limit. Issues like spousal consent under the Land Act, licencing of a Hotel under the Hotels Act, or matrimonial home under the Marriage Act would arise and it would become difficult to collect taxes as it would require the taxman to be a jack of all trades.

In conclusion, the Tribunal finds that the provisions of S. 118B(2) of the Income Tax Act are clear. It does not see any reason it should not apply the literal and ordinary meaning to it. The Tribunal finds that S. 118B(2) does not conflict with S. 117(2) of the Income Tax act. The Tribunal also finds that the applicant is not exempted under S. 119(5) of the Income Tax Act from withholding tax under S. 118B(2).

Taking the above into consideration, this application is dismissed with costs.

Dated at Kampala this 23rd day of September 2022.

DR. ASA MUGENYI
CHAIRMAN

MS. CHRISTINE KATWE
MEMBER

THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 039 OF 2021

LUWALUWA INVESTMENTS LIMITED .....APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY .....RESPONDENT

BEFORE: DR. ASA MUGENYI, DR. STEPHEN AKABWAY MR. SIRAJ ALI

RULING

I have had the opportunity of reading the draft ruling of my colleagues and would wish to dissent as follows.

I take the position that S. 118(B)(2) of the Income Tax Act (ITA) does not apply to proceeds arising out of the sale of properties by a financial institution under a mortgage. S. 118(B)(2) states as follows:

> "A resident person who purchases a business or business asset shall withhold tax at a rate specified in Part VIII of the Third Schedule."

A business asset has been defined under S. 2(h) of the ITA as "an asset which is used or held ready for use in a business, and includes any asset held for sale in a business and any asset of a partnership or company"

A financial institution has been defined as "any person carrying on the business of receiving funds from the public or from members through the acceptance of money deposits repayable upon demand, after a fixed period, or after notice, or any similar operation through the sale or placement of bonds, certificates, notes or other securities, and the use of such funds either in whole or part for loans, investments or any other operation authorised either by law or customary banking practices, for the account and at the risk of the person doing such business".

Income tax is imposed under S. 4 of the ITA. S. 4 states as follows:

"Subject to, and in accordance with this Act, a tax to be known as income tax shall be charged for each year of income, and is imposed on every person who has chargeable income"

It is apparent from the above provision, that income tax can only be imposed on income. S. 118(B)(2) is a withholding tax. It falls under Part XIII of the ITA which deals with withholding of tax at source. A Withholding tax is an income tax. For S. 118(B) (2) to apply to the proceeds arising from the sale of property by a financial institution such proceeds of sale must constitute income in the hands of the financial institution.

The term "income" has been defined under *Black's Law Dictionary* 10th Edition, Bryan A. Garner, at page 880 as "The money or other form of payment that one receives usually periodically, from employment, business, investments, royalties, gifts, and the like.". The term "income" has also been defined in the United States Supreme Court decision of *Eisner v Macomber*, 252 U.S 189 (1920) as follows:

"Income may be defined as the gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital. P.252 U.S. 207."

"Mere growth or increment of value in a capital investment is not income: income is essentially a gain or profit, in itself, of exchangeable value, proceeding from capital, severed from it, and derived or received by the taxpayer for his separate use, benefit, and disposal."

The question which arises is whether the money paid by the applicant to Equity Bank Ltd amounts to income in the hands of the bank. In order to determine this, we must look at what a mortgagee is entitled to from the proceeds of the sale of property under a mortgage. S. 31 of the Mortgage Act, 2009 states as follows:

"The purchase money received by a mortgagee who has exercised his or her power of sale shall be applied in the following order of priority-

a) In payment of any rates, taxes, charges, or other sums owing and required to be paid on the mortgaged land,
b) In discharge of any prior mortgage or other encumbrance subject to which the sale was made,
c) In payment of all costs and reasonable expenses properly incurred and incidental to the sale or any attempted sale,

d) In discharge of the sum advanced under the mortgage or so much of it as remains outstanding, interest, costs, and all other monies due under the mortgage, including any monies advanced to a receiver in respect of the mortgaged land under section2,

e) In payment of any subsequent mortgages in order of their priority: and

f) The residue, if any, of the money received shall be paid to the person who, immediately before the sale, was entitled to discharge the mortgage."

It will be observed from a perusal of the above provision that rates, taxes, charges and other sums owing and required to be paid on the mortgaged land do not amount to income in the hands of a financial institution following a sale under mortgage. Nor do the expenses set out under paragraphs (b), (c), (e) and (f). Reference to the sum advanced under the mortgage under paragraph (d) refers to the principal amount advanced by the financial institution to the borrower. This principal amount does not constitute income in the hands of the financial institution following sale of property under mortgage for the reason that it is neither a gain nor a profit. However, under paragraph (d) above reference has been made to "interest." The term "interest" has been defined under S. 2(kk) of the ITA as "any payment, including a discount or premium, made under a debt obligation which is not a return of capital." It is clear from the above definition that interest constitutes income in the hands of a financial institution upon the sale of mortgaged property. This position is however complicated by S. 117(2) (b) of the ITA which states as follows:

"(1) Subject to subsection (2), a resident person who pays interest to another resident person shall withhold tax on the gross amount of the payment at the rate prescribed in Part V of the Third Schedule to this Act.

(2) This section does not apply to-

a) Interest paid by a natural person,

b) Interest, other than interest from government securities, paid to a financial institution,

c) Interest paid by a company to an associated company, or

d) Interest paid which is exempt from tax in the hands of the recipient."

S. 117 (2) (b) above exempts financial institutions from withholding tax in respect of interest paid to them with the exception of interest from government securities. Without delving into whether property sold under a mortgage constitutes a business asset for the purposes of S.118 (B) (2), it will be seen that S. 117 (2) (b) is in conflict with S. 118(B) (2), as one provision appears to sanction the withholding of tax on the

payment of interest to a financial institution upon the sale of mortgaged property while the other exempts the withholding of tax on payments of interest to financial institutions.

It is well established that where there is a conflict between two statutory provisions, one of them a general statement and the other a specific statement, the court will apply the more specific statement as an exception to the general statement. This rule of statutory interpretation is explained in the following excerpt from Sullivan, R., Sullivan & Driedger on the Construction of Statutes 4th Edition, "(Implied exception *(generalia specialibus non derogant)*

> "When two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general: It does not matter which was enacted first. This strategy for the resolution of conflict is usually referred to by the Latin name *generalia specialibus non derogant,* the English term `implied exception` is adopted .... for, in effect, the specific provision implicitly carves out an exception to the general one..."

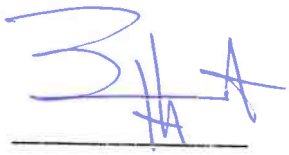
In *Rodger v. United States* 185 U.S. 83 (1902), the Court stated as follows in respect of the above maxim:

> "The rule is *generalia specialibus non derogant.* The general principle to be applied ... to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together. And the reason is.... that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do..."

Applying the above rule of statutory construction to the facts of our case, it is clear that S. 117(2) (b) which applies specifically to interest should prevail over S. 118(B) (2) which is of general application. It is implausible that the legislature having enacted S. 117(2) (b) after directing its attention to the question of the imposition of withholding tax on interest and after observing all the circumstances relating to such imposition should afterwards derogate from this position by way of a provision of general application which makes no specific reference to the withholding of tax on payments of interest.

For the above reasons, I find that Equity Bank Ltd, was not liable to withholding tax on the proceeds arising from the sale of mortgaged properties to the applicant. I also find that the applicant was under no legal duty to withhold tax on the purchase price paid to Equity Bank Ltd. Having found as above this application would have been allowed with costs.

Dated at Kampala this day of 2022.



MR. SIRAJ ALI
MEMBER