THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL APPEAL NO. 0002 OF 2023

UGANDA REVENUE AUTHORITY] APPELLANT

VERSUS

BALONDEMU DAVID] RESPONDENT

Before: Hon. Justice Ocaya Thomas O.R

JUDGMENT

Introduction

This is an Appeal under Section 27 of the Tax Appeals Tribunal Act. The Appellant, Uganda Revenue Authority ["URA"] appeals against the decision of the Tax Appeals Tribunal in Tax Appeals Tribunal Application No. 18 of 2022.

The Respondent operated a law firm known as Balondemu & Co. Advocates. Sometime in 2020, the Appellant requested for information from the Respondent's firm in respect of certain clients. The Respondent provided the information which the Appellant found insufficient and as a result issued an income tax assessment of UGX 665,738,205 and a penal tax assessment of UGX 20,000,000. The Respondent objected to this assessment and their objection was disallowed. Consequently, the Respondent commenced TAT Application 18 of 2022 challenging the above assessments. The Tax Appeals Tribunal ruled in the Respondent's favour hence this appeal.

Representation

The Appellant was represented by Mr. Tonny Kalungi from its Legal Services and Board Affairs Department while the Respondent was represented by Mr. Robert Bautu of M/s Arcadia Advocates.

Both Counsel filed written submissions in support of their respective cases and made oral highlight submissions before the court. I thank both counsel for their submissions.

Grounds of Appeal

The Appellant raised eight grounds of Appeal namely;

1. The Honourable Members of the Tax Appeals Tribunal erred in law when they failed to evaluate the evidence on record and held that the Appellant was not liable to pay penal tax of UGX 20,000,000.
2. The Honourable Members of the Tax Appeals Tribunal erred in law when they held that certainty of the penal tax objection was not clear having also held that the Respondent did not adduce the online objection thereby reaching an erroneous objection that the Respondent was not liable to pay penal tax of UGX 20,000,000.
3. The Honourable Members of the Tax Appeals Tribunal erred in law when they held that there was a possibility that the Respondent did not object but went ahead to set aside the penal tax assessment of UGX 20,000,000.
4. The Honourable Members of the Tax Appeals Tribunal erred in law when they failed to properly evaluate the evidence on record as a whole thereby reaching an erroneous decision that the Respondent was not liable to pay the income tax assessment of UGX 665,738,205
5. The Honourable Members of the Tribunal erred in law when they ignored transactions of the Respondent with other parties other than Trimceke Group Ltd thereby reaching an erroneous decision that the Respondent was not to pay the entire income tax assessment of 665,738,205
6. The Honourable Members of the Tribunal erred in law when they placed the burden of proof on the Appellant to prove the correctness of its decisions in respect to the penal tax assessments of UGX 20,000,000 and the income tax assessment of UGX 665,738,205 contrary to law
7. The Honourable Members of the Tribunal erred in law when they held that there was no report from the issuing authority stating that the identity cards presented by Fred Semakula and James Ssali of Trimceke Group Ltd were fake yet the same was on

record thereby reaching an erroneous decision that the Respondent was not liable to pay the income tax assessment of UGX 665,738,205

8. The Honourable Members of the Tribunal erred in law when they held that there was no rule that requires a director to sign all contracts/deeds of acknowledgment on behalf of a company thereby reaching an erroneous decision that the Respondent was not liable to pay the income tax assessment of UGX 665,738,205

PART ONE: PRELIMINARY POINTS OF LAW

The Respondent raised two preliminary points of law namely

(a) The Present Appeal is incompetent as it was filed out of time

(b) The Present Appeal ought to be dismissed as the Appellant is in contempt of court and has not purged itself of such contempt

Appeal Out of Time

The Respondent contends that the decision of the tribunal was rendered on 14 December 2022, that the Respondent was served with a Notice of Appeal on 14 January 2024, the same notice having been filed on 5 January 2023.

Section 27(1) of the Tax Appeals Tribunal Act provides thus

"A party to a proceeding before a tribunal may, within thirty days after being notified of the decision or within such further time as the High Court may allow, lodge a Notice of Appeal with the registrar of the High Court, and the party so appealing shall serve a copy of the Notice of Appeal on the other party to the proceeding before the tribunal."

The commencement of an Appeal from the Tax Appeals Tribunal to the High Court is by Notice of Appeal which ought to be filed within thirty days from the date a party is notified of the decision they intend to Appeal against. In my considered view, an interpretation of the above provision renders that the obligation on the Appellant is to file the Notice of Appeal within thirty days. In my view, whereas the provision places an obligation on the appellant to serve the notice of appeal, it does not provide a timeframe within which to do so. If the

provision had intended to make filing and serving of the notice within thirty days, it perhaps would have read as follows;

"A party to a proceeding before a tribunal may, within thirty days after being notified of the decision or within such further time as the High Court may allow, lodge a Notice of Appeal with the registrar of the High Court, and the party so appealing shall serve a copy of the Notice of Appeal on the other party to the proceeding before the tribunal within thirty days after being notified of the decision against which that party prefers an appeal."

I am strengthened in my view by the comparison between Section 27(1) of the TPCA on one hand with other provisions that require the service of documents, such as Section 14(3) of the Tax Appeals Tribunal Act. The provision reads thus;

"(3) An applicant to a tribunal shall serve a copy of the application on the decision maker within five days after lodging the application with the tribunal."

The above provision clearly encapsulates an obligation to serve the application on the taxpayer within a specific time framework. Section 27(1) above on the other hand only clearly imposes a time constraint on the filing of the Notice of Appeal and we do not see a specific timeframe for serving the same.

It is trite law that the role of court is not re-write the law or infer fanciful or extraneous interpretations into plain provisions of the law, but rather to interpret and apply the meaning reasonable deductible from the provisions. Whereas a diligent litigant ought to serve the Notice of Appeal as soon as it is filed, I am unable to read into the above provision a statutory directive requiring an appellant to serve a Notice of Appeal to the adverse party/parties within thirty days.

There not being a timeframe within which to serve the Notice of Appeal, it follows that such Notice of Appeal ought to be served within a reasonable time. Where the law does not impose clear timelines for undertaking an act, the same ought to be undertaken within a reasonable time, and what constitutes a reasonable time is a question of fact and subject to the circumstances of each case. See **David Muhenda v Humphrey Mirembe SCCA 5/2012**

The case for the Respondent is that the Appeal ought to be struck out because the Notice of Appeal was filed on 5 January 2023 and served on the Respondent on 14 January 2024, a year later.

As noted above, once an Appeal is filed within thirty days from the date a party is notified of the decision of the tribunal, the same Appeal is validly before this court. This last day for filing the Notice of Appeal was 14 January 2023 and the Appellant's notice of appeal, as admitted by the Respondent, was filed about ten days earlier. The Respondent did not refer to any provision of law entitling the dismissal of an Appeal where the Notice of Appeal is not served on the Respondent in time in the circumstances of an Appeal to the High Court from the Tax Appeals Tribunal. It therefore follows that, despite the Appellant's imprudence, there is no legal basis for striking out an Appeal if the Notice of Appeal is filed in time, notwithstanding that there is an extended delay in serving the same on the Respondent.

What is more, the Respondent was notified of and participated in the present proceedings at every step, including and especially the hearing of the present Appeal. Moreover, the Appellant accommodated the Respondent's counsel by acceding to requests for adjournments on a few instances. It follows that the above lack of diligence by the Appellant did not seriously prejudice the Respondent and in any case is not a legal basis for striking out the Appeal but would be a factor to consider in the determination of attribution of costs, which I will address later in this judgment.

Contempt

The Respondent contended that the Appellant, in contempt of the decision of the Tax Appeals Tribunal took measures to recover the disputed tax even when the Tax Appeals Tribunal had vacated the impugned tax assessments. To this end, the Respondent filed HCMA 761/2023 against the Appellant for contempt of court. For the Appellant it was contended that;

(a) Such allegations of contempt ought to be addressed before the Tax Appeals Tribunal by way of an application

(b) There was no injunction against the collection of the tax despite the pendency of an application to the Tax Appeals Tribunal.

(c) The Application is overtaken by events.

By consent of the parties, this application for contempt was withdrawn and even though the parties did submit on the same prior to withdrawal, I will not pronounce myself on the same as the issue of contempt is no longer before the court for determination.

PART II: MERITS OF THE APPEAL

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

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

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

The Appellant argued grounds 1, 2 and 3 together and I will dispose of them in the same fashion.

Ground 1: The Honourable Members of the Tax Appeals Tribunal erred in law when they failed to evaluate the evidence on record and held that the Appellant was not liable to pay penal tax of UGX 20,000,000.

Ground 2: The Honourable Members of the Tax Appeals Tribunal erred in law when they held that the certainty of the penal tax objection was not clear having also held that the Respondent did not adduce the online objection thereby reaching an erroneous objection that the Respondent was not liable to pay penal tax of UGX 20,000,000.

Ground 3: The Honourable Members of the Tax Appeals Tribunal erred in law when they held that there was a possibility that the Respondent did not object but went ahead to set aside the penal tax assessment of UGX 20,000,000.

Here, the crux of the Appellant's submissions is that the Respondent did not object to the assessment of UGX 20,000,000 as penal tax and this was sufficient to make the tax payable. Counsel submitted that in tax matters, the burden of proof lies with the tax payer in accordance with Section 26 of the Tax Procedures Code Act ["TPCA"], Section 18 of the Tax Appeals Tribunal Act ["TATA"] and Section 101 of the Evidence Act.

Counsel submitted that Section 24(1) of the TPCA requires a taxpayer dissatisfied with a tax decision to lodge an objection with the Commissioner within forty-five (45) days. Counsel submitted that Section 24(2) of the TATA provides that the objection shall be in the prescribed form, state the grounds on which it is made and contain sufficient evidence to support the decision. Counsel contended that the Respondent was issued with an assessment for penal tax, the Respondent failed to produce evidence of the objection against the assessment, that the issuance of the assessment was admitted in scheduling, and that the non-production of the same was the basis for the award of only half of the costs by the tribunal. Against this background, the Appellant essentially submitted that the tribunal having found that the proof of objection to the penal tax assessment having not been presented, it ought to have found that the assessment amount was due and payable.

In Response Counsel for the Respondent contended that an objection is a formal notification opposing a tax decision. Counsel submitted that because there isn't a mode for making the penal tax objection in the Appellant's online system, a formal notification of the objection in any way was sufficient. Counsel submitted that, as regarding the merits of the penal tax assessments, the requested information was premised on Section 47 of the TPCA which doesn't explicitly indicate what is sufficient information. Accordingly, Counsel submitted that the tribunal correctly interpreted the evidence of the adducement of information by way of various letters and emails as compliance with the information request, thereby finding that the penal tax was wrongly assessed.

A review of the three grounds above shows that the Appellant's complaint with the tribunal's decision on these grounds is that the tribunal ought to have found that the penal tax assessment was not objected to.

As correctly noted by Counsel for the Appellant, Section 24(1) and (2) of the Tax Appeals Tribunal Act empowers an aggrieved taxpayer to make an objection to a tax decision within 45 days in the prescribed form.

In practice, a taxpayer accesses their URA portal for a lot of the correspondence/interaction with URA. The portal makes provision for filing of returns, amendment of returns, objection to tax decision and as a correspondence function that allows you to receive responses/decisions to the above actions. I have interfaced with the portal and I am aware that in respect of penal tax objections, there isn't a clear gazetted mode of objection.

The practice is for taxpayers or their representatives to use the penal tax waiver feature and indicate in the interface that they object to the penal tax decision (Form DT-2018). However, the same feature is used for taxpayers who wish to request for a waiver of penal tax. Where the taxpayer or their representative cannot object through the Appellant's self-help portal (such as where the portal is down), the taxpayer may make a manual objection.

As noted above, in appeals confined to points of law, the court does not reevaluate the evidence and materials on record, but merely identifies the findings of fact in the lower court and assesses whether the resultant decision arising therefrom is correct in law. In short, the court assesses whether, having made such factual findings, the court correctly applied the law to those factual findings in arriving at its decision.

The factual findings of the tribunal on the matter of the penal tax assessment of UGX 20,000,000 are contained at pages 12-19 of its ruling, or pages 941-948 of the record of proceedings. I have generated the table below to summarise the findings of fact and consequent decision of the tribunal.

Finding Of Fact	(a) Although the Respondent claimed to have filed an objection against this assessment, there is no such objection on record but what is on record are emails, (b) The Appellant did not consider the Respondent's letter of 28 September 2021 as an objection, (c) Minutes of the parties meeting on 20 October 2021 show that the parties agreed that the Respondent would submit an online objection and no such online objection was tendered into evidence.
Decision Of Tribunal	On the basis of the above, the Tribunal held that since the parties did not seem to deny that the Appellant made an objection decision which is not on record, the tribunal cannot say the parties are not properly before it. The Tribunal held that it could not state that the issue of penal tax was not part of the objection decision without looking at the objection which the applicant ought to have filed and which the Respondent ought to have responded to. Since the parties agreed that the Respondent should file an online objection, one party cannot turn around and argue that the objection decision did not include an issue when the objection or the decision are not before the tribunal.

Section 14(1) -(4) of the TATA provide thus

(1(An application to a tribunal for review of a taxation decision shall—

(a)be in writing in the prescribed form;

(b)include a statement of the reasons for the application; and

(c)be lodged with the tribunal within thirty days after the person making the application has been served with notice of the decision.

(2) A tribunal may, upon application in writing, extend the time for the making of an application to the tribunal for a review of a taxation decision.

(3) An applicant to a tribunal shall serve a copy of the application on the decision maker within five days after lodging the application with the tribunal.

(4) Where an application for review relates to a taxation decision that is an objection decision, the applicant is, unless the tribunal orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates."

It is common ground that the application filed by the Respondent before the Tax Appeals Tribunal arose from an objection decision contained in the email of Mr. Fred Kyomuhendo sent to the Respondent on 27 December 2021.

In my view, Section 14(4) requires for there to have been an objection to an assessment before an application for review of the objection decision can be preferred before the Tax Appeals Tribunal. This is because the above provision confines the tax payer to preferring the application for review on the same grounds as were the basis for the objection. If the taxpayer did not object to the assessment, then they cannot object to the same by way of an application for review under Section 14 of the TATA.

It must be remembered that an application under Section 14 seeks a review of a taxation decision made by the Appellant. In the present circumstances, the application was one for review of an objection decision. It follows that if there is no objection, then there can be no objection decision warranting an application for review.

The exception to this rule is where the Tax Appeals Tribunal orders that additional grounds not raised in the objection be presented before the tribunal as the basis for an application for review. This, in my considered view, is also a narrow exception because it does not apply to circumstances where no objection was made, but only to situations where the applicant wishes to raise additional/new grounds of contesting the taxation decision. The Tax Appeals Tribunal as a unique tribunal that does not have the technical rigors of a court like this one ought to allow applications for leave to present additional grounds if the same have, on their face some merit, and are not frivolous, vexatious or aimed at an evasive delay. In any case, there must be a record indicating that the tribunal exercised its powers in Section 14(4) to

allow production of additional grounds and a review of the record of proceedings does not show the same.

Counsel for the Respondent submitted that in any case the tribunal rendered a decision on the appropriateness of the assessment to resolve any contestation over the same. With the greatest respect to counsel, I do not agree. Section 14(4) places a jurisdictional limitation on the Tax Appeals Tribunal. Where a taxpayer has not objected to a taxation decision, the tribunal cannot have jurisdiction to review a decision over the same, especially in the present circumstances.

I must note that neither the objection nor the objection decision regarding the penal tax assessment were presented. Section 18(1) of the TATA provides thus

"In a proceeding before a tribunal for review of a taxation decision, the applicant has the burden of proving that —

(a) where the taxation decision is an objection decision in relation to an assessment, the assessment is excessive; or

(b)in any other case, the taxation decision should not have been made or should have been made differently."

In my considered view, an Applicant for review before the Tax Appeals Tribunal ought to demonstrate that there is a taxation decision (in this case an objection decision) which ought to be reviewed. The Tribunal having returned a finding of fact that neither the objection nor the objection decision was on record, it out to have found that the assessment was not objected to and the same was correctly raised.

The Appellant therefore succeeds on these three grounds.

Ground 4: The Honourable Members of the Tax Appeals Tribunal erred in law when they failed to properly evaluate the evidence on record as a whole thereby reaching an erroneous decision that the Respondent was not liable to pay the income tax assessment of UGX 665,738,205

Ground 7: The Honourable Members Of The Tribunal erred in law when they held that there was no report from the issuing authority stating that the identity cards presented by Fred Semakula and James Ssali of Trimceke Group Ltd were fake yet the same was on record thereby reaching an erroneous decision that the Respondent was not liable to pay the income tax assessment of UGX 665,738,205

These two grounds are related and I will deal with them together.

On Ground 4, Counsel for the Appellants submitted that the tribunal erred when it held that where the activities of a taxpayer give rise to taxable income where a person is not an agent or employee of the principal offender there would be need for a conviction or conclusive proof implicating the agent in the commission of the crime.

I take issue with the way this ground is framed. Properly framed grounds of Appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned, a miscarriage of justice. See **Jema Nyero v Olweny Jacob & Ors HCCA 50/2018, JW & Partners v Keppuller Investments Limited HCCA 6/2022, Lukozi Nelson v Meera Investments Limited HCMA 1919/2023(unreported)**

Appellate courts frown upon non-compliant grounds of Appeal and such grounds have been struck out numerous times see **Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 62T, Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003**

I took issue with the framing of this ground as it did not explicitly indicate the alleged error/mistake in the decision of the tribunal. In the interests of justice, rather than striking the ground out, I reframed it thus

"The Honourable Members of the Tax Appeals Tribunal erred in law when they held that where the activities of a taxpayer give rise to taxable income where a person is not an agent or employee of the principal offender there would be need for a conviction or conclusive proof implicating the agent in the commission of the crime."

5 The factual findings of the tribunal on the matter of the penal tax assessment of UGX 20,000,000 are contained at pages 19-30 of its ruling, or pages 948-959

Findings Of Fact	The proceeds wired to the account were from the purported sale of generators. The Respondent was operating a legal firm under the name Balondemu & Co. Advocates. The said legal firm cannot be said to be in the business of selling generators. There is a criminal investigation against the Respondent which has not yet been concluded. The money deposited on the Respondent's account came from prospective purchasers of generators. The money was kept separately in accordance with a legal obligation under Section 40 of the Advocates Act. In the agreements, it was agreed that the consideration would be paid to the Applicant's firm. The Applicant then transmitted the funds to Trimceke. The monies were not paid to a non-existent person since the impugned agreements were signed by representatives of BHF Technologies SDN BHD and Weei TA Engineering who must have seen Mr. Kagawa Yamato who signed for Trimceke. These witnesses were not adduced to prove they did not see Mr. Yamato. Disbursement of funds was acknowledged by Mr. Yamato and Mr. James Ssali. While the recipients did not have a physical address, they were natural persons. The Appellant did not fully investigate the involvement of Mr. Ssali and Yamato in Trimceke and did not call Fred Ssemakula the sole member of the company.

	It was not shown that Mr. Ssali and Mr. Yamato passed the proceeds to the Respondent. The documents adduced in respect of the shipping activities pointed to differing outcomes (delays in shipping vis a vis non shipment).
Findings Of Law	The allegations made by the appellant are criminal in nature. The tax appeals tribunal is not a criminal court but can still consider the tax implications of the applicant's acts. Under Section 18 of the Income Tax Act ["ITA"], without looking at other sections, the Appellant can only assess the Respondent's income tax for the provision of legal services in handling the transaction for the sale of generators. Section 18(1)(d) provides that business income includes any amount derived by a person under any other section of the act. Section 58 provides for indirect payments. Courts have drawn a distinction between cases where normal income-producing activities become illegal due to non-compliance with licensing requirements or acting in contravention of a ban and on the other hand profits acquired from the commission of crimes. Taxing of proceeds of systematic crimes may send wrong signals. Taxing proceeds of crimes may have the effect of encouraging vices sought to be taxed. It would also undermine the work of state organisations mandated to curb such activities. The state might be considered a silent beneficiary of the vices it intends to curb. Taxable income is defined as assessable income less deductions. On this basis, income is taxable notwithstanding the legality of the activities from which it is derived.

	For a person who is not an agent nor employee of the principal offender to be held liable for the taxes, there need to be a conviction or conclusive evidence. Conclusive evidence is evidence that implicates the agent in the commission of a crime. Undertaking a crime is undertaking a business under Section 1(g) of the income tax, notwithstanding that the business activities are criminal. The absence of a conviction or prosecution does not bar the Appellant from recovery of tax (from gains arising from criminal activities).

In support of his submissions on this ground, Counsel for the Appellant cited the case of **John Livingstone Okello v Commissioner General URA, HCCS 29/2010** as authority to support the view that burden is on the holder of undeclared income to prove that they declared all their income. In this case, the Appellant contended that the income sought to be taxed were proceeds from money laundering operations conducted by the Respondent while the Respondent contended that the same was money belonging to his clients.

It must be noted that the contention of the Appellant is not that the above stated sums are client's money taxable in the hands of the Respondent as their advocate. Indeed, it is settled law that money held in trust for a client does not form part of the chargeable income of the advocate. See **Section 15, 17, 19, 20** of the Income Tax Act.

Instead, the contention of the Appellant is that the sums above are the income of the Respondent obtained by criminal activities, or at least the same is his indirect income which is taxable and that the presentation of the same as monies of clients is false. The court will therefore consider this question.

In my view, a determination of this ground requires an investigation of two questions

(a) Are proceeds of criminal activities taxable in Uganda

(b) If so, where the assessed person is not the principal offender, is there need for a conviction or conclusive proof implicating the agent in the commission of the crime

Taxation of Criminal Proceedings

Courts all around the world have considered the question of taxation of proceeds of criminal activities. In **Commissioner v. Wilcox, 327 U. S. 404**, the Court held that embezzled money does not constitute taxable income to the embezzler in the year of the embezzlement under § 22(a) of the Internal Revenue Code of 1939. The court held;

"That a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received any gain or profit within the reach of Section 22(a)."

Since Wilcox embezzled the money, held it "without any semblance of a bona fide claim of right," and therefore "was at all times under an unqualified duty and obligation to repay the money to his employer," ibid., the Court found that the money embezzled was not includible within "gross income."

In **Rutkin v. United States, 343 U. S.** 130 the court, recognizing that income from illegitimate sources was taxable, held that money earned by extortion in such a case was not taxable, confined only to the specific circumstances of that case. In this case, the court defined a gain as constituting taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it and held that the proceeds from the extortion, though given "willingly" in this case did not meet that threshold. In this case, the court took the view that only proceeds from crimes which are not subject to a right of repayment are taxable as a gain.

In **Sullivan v United States 15 F.2d 809 (4th Cir. 1926), rev'd, 274 U.S. 259 (1927)** Court had this to say about the subject:

"It does not satisfy one's sense of justice to tax persons in legitimate enterprises, and allow those who thrive by violation of the law to escape. It does not seem likely that Congress intended to allow an individual to set up his own wrong in order to avoid taxation, and thereby increase the burdens of others lawfully employed. The problem which Congress had to consider was not so simple as that presented by the case of one whose entire income is earned in a business which offends against a national law of uniform application. Activities lawful in one state of the Union may be unlawful in another. The operations of individual men in the prosecution of their business enterprises are sometimes within and sometimes without the pale of the law. Great aggregations ""of capital, which have a place in the popular mind, far above the sordid level of the illicit distiller, and the common criminal, sometimes find it profitable to ignore the laws of the state or of the nation. The complexities of the situation are without number. Can it be said that in all such cases Congress intended to tax the law-abiding, and let the criminal go free?"

On appeal, the US Supreme Court held thus

"Most of the items [called for by the return] warranted no complaint. It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law."

A number of cases thereafter found that income from illicit sources was taxable in the same manner as income from legitimate sources "to remove the incongruity of having the gains of the honest laborer taxed and the gains of the dishonest immune". A number of cases returned the dicta that the construction of "gross income" should be as broad as possible. See **Johnson v. United States, 318 U. S. 189; United States v. Johnson, 319 U. S. 503. Helvering v. Clifford, 309 U. S. 331, 309 U. S. 334, Commissioner v. Glenshaw Glass Co., 348 U. S. 426, 348 U. S. 431**

In **James v. United States, 366 U.S. 213 (1961)**, The Petitioner was a union official who, with another person, embezzled in excess of $738,000 during the years 1951 through 1954 from his employer union and from an insurance company with which the union was doing business. The Petitioner failed to report these amounts in his gross income in those years, and was convicted for willfully attempting to evade the federal income tax due for each of the years 1951 through 1954 in violation of § 145(b) of the Internal Revenue Code of 1939 and § 7201 of the Internal Revenue Code of 1954. A dispute arose as to whether the proceeds of the embezzlement ought to have been included in the income of the petitioner and therefore subject to tax. The US Supreme Court considered this question. The court held thus: "When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, "he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent."…. In such case, the taxpayer has "actual command over the property taxed-the actual benefit for which the tax is paid," Corliss v. Bowers, supra. This standard brings wrongful appropriations within the broad sweep of "gross income"; it excludes loans. When a law-abiding taxpayer mistakenly receives income in one year, which receipt is assailed and found to be invalid in a subsequent year, the taxpayer must nonetheless report the amount as "gross income" in the year received. United States- v. Lewis, supra; Healy v. Commissioner, supra. We do not believe that Congress intended to treat a law-breaking taxpayer differently. Just as the honest taxpayer may deduct any amount repaid in the year in which the repayment is made, the Government points out that, "If, when, and to the extent that the victim recovers back the misappropriated funds, there is of course a reduction in the embezzler's income."

The majority opinion returned the dicta that if a taxpayer receives income legally or illegally without consensual recognition of obligation to repay, the income is taxable. In this case, the court was making a distinction between income earned from criminal activities where that income is "the fixed property" of the recipient and income which isn't. One category of income from the former category would be income from the sale of drugs or guns while income in the latter category would be income from theft or fraud. A common thread from

the above judgments is that tax laws apply to both gains from honest and criminal activities, such that all such income is taxable. The splitting point is that one set of decisions holds that all income from criminal activities is taxable notwithstanding that it is not “the fixed property” of the recipient while other decisions take the view that only income that is “the fixed property” of the recipient is taxable.

In the James and Ratkin cases above, the dissenters went to significant length to distinguish between to distinguish between the "regular business profits" of a bootlegger or professional gambler, which they regarded as taxable, and the "sporadic loot" of embezzlers, extortioners, and robbers, which they would not include in "income. In the article **Taxing Income from Unlawful Activities by Boris Bittker, Case Western Reserve Law Review, Article 12, Volume 25, Issue 1, 1974** the learned author rendered the following critique of this dissent: “But it is difficult to justify such a differentiation, and even more difficult to see how it could be effectively administered. Unlawful receipts are of equal economic value to the recipient whether they are sporadic or regular, and they are equally likely to be retained or spent by him. In any event, the full range of the taxpayer's unlawful activities, which would determine whether he is engaged in a "regular business" or only in "sporadic" criminal activities, will ordinarily not be known. Unless he has been convicted in a separate criminal case, the only evidencethe tax case may 'be that his expenditures substantially exceeded the income reported on his tax returns, and that he was reputed to be a gambler, thief, corrupt public official, or loan shark. For these reasons, it would be very difficult to administer a distinction between one type of illegal income and another, whether it is based on the regularity of the receipts, the morality of the behavior, the existence of a legal duty to make restitution, or the severity of the penalties. On the other hand, a blanket exemption for all unlawful income would embrace not only the neighborhood thief and bootlegger, but also a much broader range of taxpayers, including businessmen whose profits are attributable to violations of antitrust and price control laws, health, safety, environmental, labor, and racial standards, and other governmental regulations.”

The learned author then turned to the question as to whether allowing taxation of proceeds of crime would cause persons to be singled out for prosecution by tax authorities when the

real intention of such prosecution was because they were believed to have been involved in a crime (and this could not easily be proved). This is the so called “Al Capone Syndrome” and the learned author posited thus:

“While these sentiments were evidently put forth in a spirit of resignation if not serenity, often there is an attitude of queasiness about what might be called the "Al Capone syndrome."

It would be fatuous to deny that taxpayers with income from unlawful activities are sometimes selected for intensive tax audit because they are suspected by officials of the Treasury or Justice Departments of violating nontax laws, 26 but it would be equally fatuous to overlook the many taxpayers with the same type of income whose returns come -to the surface in the course of routine tax investigations. A blanket tax exemption for income from unlawful activities would apply to both groups, including, as pointed out above, numerous taxpayers with income from violations of antitrust, usury, fair advertising, health, and price control laws, whose tax returns are often selected for examination for reasons unrelated to their misconduct, under standards uniformly applied to all taxpayers. Exempting income that flows from an unlawful source in order to discourage discriminatory law enforcement is a needlessly blunt instrument. To use a term that is currently popular among constitutional lawyers, it is "over inclusive."

But it is simultaneously under inclusive. The disease that produces the "Al Capone syndrome" is discriminatory enforcement of the law, whose victims can include political enemies as well as persons suspected of engaging in criminal misconduct. Exempting the income of the latter group will do nothing for their fellow victims. A remedy is required that will discourage discriminatory law enforcement, without regard to sources from which its victims derive their income. The most drastic remedy would be a grant of tax immunity to anyone whose return was selected for audit in an irregular fashion; slightly less draconic would be a forbidden-fruit doctrine, under which the Treasury could assess a deficiency against a person whose return was improperly selected for examination only upon proof that the same deficiency would have been assessed if the return had been processed in a routine manner.

Still another point needs to be made about the "Al Capone syndrome." While it is easy and proper to condemn use of the tax laws to punish someone whose "real" crime is embezzlement or black marketeering, it is difficult to decide when this has happened. Enough pillars of society are tried and convicted for tax evasion to rebut the notion that the offense is comparable to "spitting on the sidewalk," 27 or that it is condoned or overlooked unless committed by one of society's outlaws. Gamblers and racketeers account for only about 10 percent of tax prosecutions; as defendants, they are outnumbered by doctors, lawyers, and accountants. 28 These statistics, of course, do not prove that gamblers and racketeers have not been singled out for disproportionate attention by revenue agents; perhaps they would be even less numerous if their returns were examined in a completely routine fashion. Even so, it is altogether too glib to assert that a charge of tax evasion is no more than a pretext for prosecuting persons whose "real" offense is gambling, embezzlement, or other illegal activity, or who are reputed to engage in such misconduct. With greater accuracy, it could be said that to refrain from taxing unlawful receipts would amount to exempting persons from one law because they have violated another."

The author then turned to the question as to whether taxation of proceeds of crimes would affect the right of the individual to fair hearing, and specifically the right against self-incrimination. The Author argued thus:

"Though real enough, the danger to the defendant's right to a fair trial does not justify a tax exemption for all income from unlawful activity. To begin with, a tax evasion trial may require only a minimal reference to the defendant's illegal behavior, or even none at all. If the government's case consists of evidence that the taxpayer spent more money than his reported income made available to him and that he had a "likely source" of unreported income from which the unaccounted-for funds may have come, for example, there is rarely a need for extensive details about the source, and the judge can reduce the possibility of prejudice by firm instructions to the jury. If a public official is charged with deducting the cost of his daughter's wedding as a business expense, to take another example, proof that he financed the party with funds received as bribes might well be excluded as irrelevant. Sometimes, however, more extensive or lurid evidence of the defendant's misconduct is properly offered by the government or must be introduced by the defendant himself, and he

must rely on the judge, acting under the principles established by the appellate courts, to exert his authority over the jury in an effort to insure a fair trial. While the residual risk of prejudice to the defendant is not trivial, neither is it demonstrably so substantial that prosecuting persons with income from unlawful activities on federal tax evasion charges is inconsistent with the fair administration of justice. Mr. Justice Black himself was prepared to tolerate the risk of unfairness in the case of bootleggers, professional gamblers, and other '"businessmen," whose income he regarded as subject to tax. And he suggested no reservations about taxing persons whose income derives from false advertising, black marketeering, usurious loans, over-ceiling rental charges, and violations of other regulatory laws, even though juries---especially in urban centers-may well find these white collar crimes as abhorrent as extortion and robbery."

On the issue of whether tax from criminal activities makes government a silent partner or beneficiary, the learned author took the following view:

"The notion that the government is a "silent partner" in all profitable activities because it taxes their income is a familiar and sometimes useful figure of speech, but the relationship entails no moral responsibility for the behavior of the private member of this fictional partnership. A tax is an enforced exaction that reduces the profits of the taxed enterprise, and this no more implies approval than does the confiscation and sale of a drug peddler's automobile and merchandise by the police. Moreover, as suggested earlier, unlawful income arises not only from wholly unlawful activities, like bootlegging and embezzlement, but also from a wide range of activities that could be, but are not conducted in a wholly lawful manner. If taxing income implies moral responsibility for the activities from which it flows, the government could preserve its soul only by exempting not only the income of bootleggers, but also the profits derived from violating the antitrust laws, charging over-ceiling prices, manufacturing unsafe products, and misrepresenting the quality of the taxpayer's merchandise. Finally, Judge Manton's advice turns tax exemption-often a device to encourage the exempted activity-on its head. It suggests -that spiritual purity is -to be obtained only by exempting, and hence encouraging, the very activity which the government should despise."

On this point, the court in of **Mann v Nash (HM Inspector of Taxes) [1932] 1 KB 752** pronounced itself thus:

"The Revenue, representing the State, is merely looking at an accomplished fact. It is not condoning it; it has not taken part in it; it merely finds profits made from what appears to be a trade, and the Revenue laws happen to say that the profits made from trades have to be taxed, and they say: 'Give us the tax'' It is not the purpose in my judgment to say: 'but the same State that you represent has said they are unlawful'; that is immaterial altogether and I do not see that there is any contact between the two propositions . . . It is said again: 'Is the State coming forward to take a share of unlawful gains?' It is mere rhetoric. The State is doing nothing of the kind; they are taxing the individual with reference to certain facts. They are not partners; they are not principals in the illegality, or sharers in the illegality; they are merely taxing a man in respect of those resources."

In **Canadian Minister of Finance v Smith [1927] AC193**, the Privy Council held that once the character of a business has been ascertained as being of the nature of trade, the person who carries it on cannot found upon elements of illegality to avoid the tax. The court took the view that once was a crime was essentially a trade, albeit an illegal one, the proceeds therefrom would be taxable. This would for instance mean that proceeds from an illegal gambling service would be taxable, but income from an extortion racket would not. This view is similar to the distinction drawn by the US courts on actual and refundable income from a crime.

In **Lindsay, Woodward and Hiscox v Inland Revenue Commissioners (1932) 18 TC 43**, Lindsay, a wine merchant, agreed with Woodward and Hiscox that he would join with them in shipping a quantity of rye whisky to the USA for sale there. The three individuals would share in the resulting profits. The venture was in violation of the laws of the USA and the shipping of the whisky from the UK also involved the making of certain untrue Customs declarations concerning the destination of the whisky. The Revenue Body sought to tax the appellants on profits made from the sales of the whisky in the USA over a period of two years. The Appellants argued (inter alia) that, owing to the illegality of the activity, it did not constitute a trade within the meaning of the Tax Acts and that the profits made from the

venture were not taxable because they were derived from illegal acts. The court held that the distribution of the alcohol in the United States was incidental to the business of marketing the alcohol in the US which was not criminal and therefore the income was taxable. The court further held thus:

"'It is plain enough, I think, that the profits of crime could not be assessable to Income Tax as the profits of trade. If – to take an example – the mode of living followed by an individual consisted in nothing – or practically nothing – but the commission of the crime of re-setting [receiving] stolen goods, it might be difficult to say that the profits were assessable to Income Tax as the profits of 'trade' within the meaning of the Act of 1918. I am offering no opinion on the point. I am only saying that such a case would, in the unlikely event of its occurring, present the difficulty in an acute form. But, in the present case, the 'trade' did not consist in the commission of crime; it consisted in the marketing of a commercial article. The frauds on the Customs authorities were only incidents of that 'trade'. Frauds are sometimes incidents of some 'trades' without exempting their profits from assessment to Income Tax. On the other hand, it is true in this case that the frauds on the Customs authorities were inseparable incidents of the conduct of the partnership trade. Is this enough to exempt the profits of the trade from assessment to Income Tax? I think not, because the marketing of the whisky in the United States was undoubtedly 'trade', or 'in the nature of trade', and was not less so because, in order to enable the whisky to be so marketed, it was necessary to commit a fraud on the Customs authorities at the stage of export.'

...

The third question is whether the profits of the adventure are exempt from Income Tax because their acquisition was tainted with offence against the criminal law. The tax is imposed upon profits of trade. Crime, such as housebreaking, is not trade, and therefore the proceeds are not caught by the tax. It does not follow, however, that there cannot be a business answering to the description of trade, albeit it is tainted with illegality. Trafficking in drugs, for example, is of the nature of trade, albeit such trafficking may in the circumstances be illegal. I respectfully adopt the *dictum* of Lord Haldane, in delivering the judgment of the Privy Council in the case of *Smith*, that once the character of a business has been ascertained as being of the nature of trade, the person who carries it on cannot found upon elements of illegality to avoid the tax.

It is quite immaterial that the particular method of carrying on the trade involved the making of a false declaration to the Customs authorities or giving bribes to persons in America. In my opinion, these are entirely irrelevant considerations. When it is established that a trade has existed for a year, the question is whether it realised a profit as ascertained under the rules of the statute. It is quite in vain for the person who has realised the profit to prove that he made it by cheating or fraudulent trading, or to attempt to contend that the profit he has earned ought to escape chargeability because he might have been convicted of a breach of the law. During the discussion a question was raised as to whether the profits or gains of a burglar were subject to tax. Obviously not, because burglary is not a trade or business; but if a trader committed a housebreaking and stole his rival's order book and, from its information, was able to increase the profits of his own business, I have no doubt that these profits are subject to tax. It is, in my opinion, absurd to suppose that honest gains are charged to tax and dishonest gains escape. To hold otherwise would involve a plain breach of the rules of the statute, which require the full amount of the profits to be taxed and merely put a premium on dishonest trading. The burglar and the swindler, who carry on a trade or business for profit, are as liable to tax as an honest business man, and, in addition, they get their deserts elsewhere."

In **United States v. Wampler, 5 F. Supp. 796 (D. Md. 1934)** the court considered the question of taxation of proceeds of a crime. I am constrained to cite the relevant part of the dicta of the court in some detail:

"The first contention is, I think, untenable because it has been clearly decided by the Supreme Court of the United States that income derived from the proceeds of criminal transactions must nevertheless be reported by the taxpayer and is subject to taxation. It was so held in United States v. Sullivan, 274 U.S. 259, 47 S. Ct. 607, 71 L. Ed. 1037, 51 A. L. R. 1020, affirming on this point the decision of the United States Circuit Court of Appeals for the 4th Circuit where the opinion was by Judge Soper, reported in 15 F.(2d) 809. It is clear that the defendant is not being tried in this case for any criminal transaction other than the alleged violation of the income tax laws, but when it becomes necessary and material for the Government, by testimony to establish the violation charged, to show the sources from which the income was derived and this necessarily involves evidence tending to show the

commission of other and separate crimes, it cannot be said that the evidence is inadmissible although of course the jury should be instructed very explicitly that the defendant is on trial for the crime charged in the indictment and not for the other incidental violations of law which may be comprehended by the testimony. An examination of a number of reported income tax cases where the source of income resulted from criminal activities will show that the testimony is not inadmissible for the reason suggested in the motion. See for illustration Oliver v. United States (C. C. A. 7) 54 F.(2d) 48; United States v. Commerford (C. C. A. 2) 64 F.(2d) 28; O'Brien v. U. S. (C. C. A. 7) 51 F.(2d) 193. And I do not think the cases support the distinction contended for by defendant's counsel that income obtained by conduct malum in se, as contrasted with conduct malum prohibitum, is to be excluded from taxable income.

A possibly close question of law is raised by the defendant's second contention, that is, that the moneys received and alleged to have been retained by the defendant did not constitute reportable or taxable income. It is said by defendant's counsel that the income referred to, if the Government's allegations are to be sustained, result from a conspiracy to defraud the witness Dean, participated in by the defendant and, therefore, the money was obtained by fraud and may of course be recovered from the defendant and therefore cannot constitute income. As an original proposition for judicial consideration the point undoubtedly has some substance although there are important considerations adverse to it. It may be thought beneath the dignity of the Government to assess and collect taxes on such illegally gotten gains, but another point of view is certainly equally important for consideration in that there is no just reason why a taxpayer should escape his fair proportion of the burden of taxation because his gains are illegally gotten and thus increase the burden of taxation upon other citizens. It is not sound to consider the Government itself as a partial beneficiary of the defendant's alleged fraud because taxation is a power exercised for the benefit of the nation as a whole. But whatever might have been considered the wiser public policy in dealing with this question as an original one, I reach the conclusion, after study of the important and controlling authorities, that it has been decided adversely to the defendant's contention. In the Sullivan Case the court was dealing with the taxability of a bootlegger's profits from the extensive violation of the National Prohibition Act. 27 USCA. The considerations pro and con and the authorities decided up to that time are very fully reviewed in the opinion of Judge

Soper for the Circuit Court of Appeals in 15 F.(2d) 809, and, as I have said, the opinion on this point was affirmed by the Supreme Court in an opinion written by Mr. Justice Holmes. A similar conclusion was reached by the Judicial Committee of the Privy Council in England on Appeal from the Supreme Court of the Dominion of Canada in a case dealing with the same subject-matter under the Canadian Income Tax Law. The opinion of the Supreme Court of Canada is to be found in Dominion Law Reports (1925) vol. 2, page 1137, the title of the case being Smith v. Minister of Finance; and on Appeal to the Privy Council the opinion of the court was delivered by Viscount Haldane reported in Law Reports Appeal Cases (1927) page 193. Cases decided by other Courts of Appeal show that moneys received as bribes have been held subject to income tax, and in various cases disposed of in this court heretofore it has been held that moneys obtained by proprietors of gambling houses are taxable. In this very case the taxpayer himself has reported for taxation moneys obtained by games of chance.

It may be suggested that there is a technical distinction as to the nature of the right of the taxpayer to retain and hold, as against adverse claims, moneys secured from illegal transactions in liquor and gambling and from bribes on the one hand, and money obtained by a conspiracy to defraud on the other hand, it being contended that the present case falls in the latter category. The distinction is, however, I think, too narrow and technical to accomplish a difference in result in view of the very comprehensive definition of income contained in the Sixteenth Amendment and in the law itself which includes gains or profits from any source whatever, and as I read the cases the principle announced is broad enough to cover the particular case. The consideration that the money involved in this case may be recoverable at suit of the witness Dean is not conclusive. Under the operation of the income tax law the money, if recovered, would presumably be a taxable loss in the year when recovered but this does not destroy the taxability to the taxpayer of the gain or profit for the year in which it was received and held by him, income taxation being on an annual basis. And as a matter of judicial authority it is noteworthy that the Canadian liquor law under consideration in the case above mentioned provided in section 57 as follows: "Any payment or compensation for liquor furnished in contravention of this act or otherwise, in violation of law, whether made in money or securities for money or in labor or property of any kind, shall be held to have been received without any consideration and against justice and good

conscience, and the amount or value thereof may be recovered from the receiver by the party who made the same." (D. L. R. (1925) vol. 2, page 1139) And in discussing the subject-matter Justice Mignault said: "It is argued that the language of this definition is broad enough to include income derived from a business the carrying on of which is expressly prohibited by law. So would it be wide enough to comprise gains resulting from the commission of crimes, such as burglary or highway robbery, if such crimes, as often happens, be resorted to habitually as a means of making a gain or profit." Despite these considerations the bootlegger's income in that case was held taxable by the Judicial Committee of the Privy Council and the latter's decision was cited with approval by Justice Holmes in the Sullivan Case.

The exact technical nature of the Defendant's acquisition and retention of the moneys involved in the motion to strike out testimony is not certainly and definitely clear. Defendant's counsel argued that the money must be considered to have been embezzled or stolen. As a matter of technical law, as the money was delivered by Dean to the defendant to be applied to a particular purpose, it could not be embezzlement, as a matter of common or statutory law in Maryland, and presumably the same is true as to the District of Columbia. The tendency of the testimony is to show that when the money was actually delivered by Dean to the defendant the amount required to be paid for the settlement of the damage claims involved in the respective cases was still uncertain and therefore unless the defendant was a party to the original conspiracy to defraud it could not be said that the money was obtained by means of either embezzlement, larceny or false pretenses. The defendant denies any fraudulent or criminal participation in the transaction. It seems to me that the most that can be said in support of the defendant's contention on this motion is that the money received by the defendant as attorney for Dean, to be delivered to a particular person, was misapplied, and thus his offense was that of a breach of trust between attorney and client. For the purpose of ruling on the motion, therefore, I do not think it can be said that the defendant is justified in assuming that the testimony shows that the money was either embezzled or stolen or even obtained by false pretenses in the technical sense.

The defendant is a lawyer. The alleged income came through the general practice of his profession. It does not become him, and I think is not admissible for him, to set up his own wrongful professional conduct in obtaining income as a lawful reason for escaping the tax thereon. I have noted that Circuit Judge Manton in Rau v. United States (C. C. A.) 260 F. 131, 136, decided in 1919 in passing on an incidental and not the main point in a case, said that money obtained by embezzlement or through the commission of a larceny would not be subject to taxation under the income tax law; and in Steinberg v. United States (C. C. A.) 14 F.(2d) 564, there was a similar situation. Judge Manton in his concurring opinion at page 569 of 14 F.(2d) said: "In Emmich v. United States (C. C. A.) 298 F. 5, an embezzler was convicted, and in Levin v. United States (C. C. A.) 5 F.(2d) 598, a bootlegger was convicted, of making false returns by evading the proper income tax upon their respective incomes. In neither case does it appear that the question presented here was considered." These two expressions, so far as I have been able to find, are the only judicial support that can be cited for the proposition that the income involved in this case is not taxable."

In **Commissioners for Inland Revenue v Marie Aken [1990] EWCA Civ J0518-5** that taxpayer was a sex worker against whom the revenue body sought to recover tax in respect of her earnings as sex worker for some years until 1983. The court upheld the assessments taxing the proceeds from the sex work and rejected the contention of the taxpayer that these incomes were taxable. See also **Commissioners for Inland Revenue v Delagoa Bay Cigarette Co. Ltd 1918 TPD 391**

In **Geldenhuys v Commissioner for Inland Revenue (1947) (3) SA 256 (C)** considered the question of when income was deemed received by a person within which the same was taxable. The court held thus:

"Both 'income' and 'taxable income' are in their respective definitions linked up with the definition of 'gross income' and it seems to be clear that in the definition of gross income' the words 'received by….' Must mean 'received by the taxpayer on his own behalf for his own benefit."

See also **CIR v Genn & Co (Pty) Ltd 1955 (3) SA 293 (A)**

I must now turn to the consideration of this issue much closer to home. In the Zimbabwean case of **Commissioner of Taxes v G 1981 (4) SA 167 (ZA)**, the court held that, stolen money cannot constitute gross income in the hands of the thief, because of the fact that the money never became the property of the thief, despite his own intentions. The court held that a thief who obtains property "takes" it instead of "receiving" it. Accordingly, a thief would not have "received" income within the meaning of the tax legislation.

In **MP Finance Group CC (in liquidation) v Commissioner for South African Revenue Service (41/06) [2007] ZASCA 71**, the South African Supreme Court of Appeal considered a case where for some years beginning in 1998 one Marietjie Prinsloo operated an illegal investment enterprise commonly called a pyramid scheme. The scheme promised dazzling investment returns to "investors". The scheme eventually went burst, and as a result of this state of affairs, many persons were owed money from the scheme. The scheme was run by a number of incorporated and unincorporated entities, which were eventually insolvent and their insolvency proceedings were consolidated. The tax authority raised assessments in respect of the income of the scheme for the years of income 2000-2002. The Liquidators objected to the assessments, leading to litigation. On appeal, it was argued that the deposits were not taxable because they were not amounts 'received'. The court considered the contract between the scheme and the "investors" holding that an illegal contract can have fiscal implications. The court further held thus:

"The sole question as between scheme and fiscus is whether the amounts paid to the scheme in the tax years in issue came within the literal meaning of the Act. Unquestionably they did. They were accepted by the operators of the scheme with the intention of retaining them for their own benefit. Notwithstanding that in law they were immediately repayable, they constituted receipts within the meaning of the Act. In other words, it does not matter for present purposes that the scheme was not entitled, as against the investors, to retain their money. What matters is that what they took in was income received and duly taxable. The assessments were correctly raised."

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This decision essentially means that any receipt of proceeds of a crime is taxable, and the precedent doesn't make distinctions between funds repayable and those not repayable, as in the case of Z (above).

I have also read and reviewed number of treatises and publications on the topic including the following **G Goldswain 'Illegal activities – Taxability of its proceeds' (2008) 22 Tax Planning' 143, E Muller 'The taxation of illegal receipts. A pyramid of problems! A discussion on ITC 1789 (Income Tax Court – Natal)' (2007) 28(1) Obiter at 166.**

A review of the above precedents and treatises raises two questions to explore from an income tax perspective:

(a) Does ITA cast a broad definition of what constitutes income?

(b) If so, does ITA categorise all proceeds of a crime as income on which a tax may be levied?

The Case of Income Tax Act ["ITA"]

Section 4(1) of the Income Tax Act ["ITA"] reads thus

"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 for the year of income."

The framing of the above provision is interesting because the tax is essentially imposed on the person rather than on the income. This, of course is a very complicated hypothesis because the tax is calculated against income. In my view, the meaning of the above provision is that the tax is charged on the person who must pay it out of income subject to tax. Who should pay, and in respect of what income is a function of the proceeding sections of the Act.

Section 17(1) of the ITA defines gross income in the following manner

"Subject to this Act, the gross income of a person for a year of income is the total amount of—

(a)business income;

(b)employment income; and

(c)property income, derived during the year by the person, other than income exempt from tax."

Income = $P_I+B_I+E_I$
Where
PI is Property Income
BI is Business Income
EI is Employment Income

A review of **Section 19** of the ITA shows that proceeds of a crime in the character alleged by the Appellant (and this by no way determines whether the said sums were illegally earned) is not employment income. However, it is important to note that Section 19 provides that any income which falls within the scope of the sub sections therein is employment income. It is common ground that the Respondent was not an employee at any point but was instead a legal practitioner practicing with the firm M/s Balondemu & Co. Advocates, which, from the averments on the record, he has since left.

Section 20 of the ITA defines property income in the following way

"Property income means—

(a) any dividends, interest, annuity, natural resource payments, rents, royalties and any other payment derived by a person from the provision, use or exploitation of property;

(b) the value of any gifts derived by a person in connection with the provision, use or exploitation of property;

(c) the total amount of any contributions made to a retirement fund during a year of income by a tax-exempt employer; and

(d) any other income derived by a person, but does not include any amount which is business, employment or exempt income.

The said sums could potentially fall under **Section 20(d)** of the ITA, if it can be demonstrated that they are not business income.

Section 18(1) of the ITA reads thus:

"Business income means any income derived by a person in carrying on a business and includes the following amounts, whether of a revenue or capital nature—

(a) the amount of any gain, as determined under Part VI which deals with gains and losses on disposal of assets, derived by a person on the disposal of a business asset, or on the satisfaction or cancellation of a business debt, whether or not the asset or debt was on revenue or capital account;

(b) any amount derived by a person as consideration for accepting a restriction on the person's capacity to carry on business;

(c) the gross proceeds derived by a person from the disposal of trading stock;

(d) any amount included in the business income of the person under any other section of this Act;

(e) the value of any gifts derived by a person in the course of, or by virtue of, a past, present or prospective business relationship;

(f) the interest derived by a person in respect of trade receivables or by a person engaged in the business of banking or money lending; and

(g) rent derived by a person whose business is wholly or mainly the holding or letting of property."

Business income must be derived from business. **Section 1(g)** of the Income tax defines "business" as

""Business" includes any trade, profession, vocation or adventure in the nature of trade, but does not include employment"

This leads us to the question; what is income? In **Frank Babibaasa v Commissioner General, Uganda Revenue Authority HCCS 434/2011**, Hon. Justice Geoffrey Kiryabwire *(as he then was)* explored this question. The court considered the decision in **Albert D. Campbell v Commissioner Of Internal Revenue** (134 T.C. No. 3 United States Tax Court) which defined gross income this way:

"Gross income is "all income from whatever source derived". Courts have given a broad construction to the definition of gross income. Commissioner v. Glenshaw Glass Co., 348 U.S.

426, 430 (1955). The effect of such a broad view of gross income is that exclusions from gross income are narrowly construed. Commissioner v. Schleier, 515 U.S. 323, 328 (1995) ...this Court has considered the issue of whether a qui tam payment is taxable income. In Roco v. Commissioner, 121 T.C. 160 (2003), the taxpayer received a qui tam payment from the United States for his role as relator in an action pursuant to the FCA. The Court ruled that rewards are included in gross income pursuant to section 1.61-2(a), Income Tax Regs., and that the qui tam payment was the equivalent of a reward and, therefore, includable in the taxpayer's gross income. Roco v. Commissioner, supra at 164."

The court found itself persuaded by the judgment above to find that a payment to a whistleblower was income within the meaning of **Section 58(a)** of the Income Tax Act.
Black's Law Dictionary, 7th Edition, Page 766 defines income as
"The money or other form of payment one receives usu. (usually) periodically from employment, business, investments, royalties, gifts and the like."

It must then be considered whether, for instance in light of the definition of a business, whether proceeds from a criminal enterprise would be business income. As noted above, **Section 1(g)** of the Income tax defines "business" as
""Business" includes any trade, profession, vocation or adventure in the nature of trade, but does not include employment"

In my view, a business as defined in Section 1(g) is not strictly a lawful one. In my view, an unlawful combination, enterprise or undertaking which fits within the above definition can be assessed for tax in the event that it earns income, which would be business income.

Further, the definitions of property income and employment income show that the provisions in that regard apply to any income which falls within the ambit of the provisions of the relevant sections. I cannot see an intention in the statute to only tax legal activities. The relevant provisions reviewed above read together show the exercise of a broad taxing mandate by parliament on all income which falls within the above provisions notwithstanding the source.

Whether or not a specific quantum of income obtained from legitimate or illegitimate means is taxable is a question of applying the relevant from provisions of the ITA to the specific facts of the case. I will not render a broadly applying rule here, as income generating activities are by their nature varied, complex and nuanced and need to be dealt with on a case by case basis. However, what is clear is that there is no basis for asserting that incomes earned from illegal activities are by that fact alone not taxable.

The relevant forums retain their mandate to investigate whether any income whatever the source is taxable, if so, in whose hands, at what rate, with what deductions (if any) and who bears the burden to report the tax. This process requires an investigation of the relevant facts and affairs of the taxpayer and an examination of facts demonstrated by evidence as against the applicable law. However, there can be no basis in law for asserting that the ITA only charges income tax on proceeds from lawful enterprises or activities. The ITA charges income tax on all income stated to be taxable under the act, notwithstanding the source, in accordance with the relevant provisions of the ITA.

I now turn to the reformulated ground of appeal. The question to examine is whether the Honourable Members of the Tax Appeals Tribunal erred in law when they held that where the activities of a taxpayer give rise to taxable income where a person is not an agent or employee of the principal offender there would be need for a conviction or conclusive proof implicating the agent in the commission of the crime.

I would answer this question simply: all that is required is for the person asserting so/or who has a duty to do so to demonstrate that the said income is taxable. In my considered view, this does not require a criminal conviction. One needs to demonstrate, on the balance of probabilities, that applying the law to the facts, the said income is taxable within the meaning of the ITA. In determining that question, the responsible decision maker (an officer of the Appellant handling the objection, a tribunal or a judge) would not be determining whether indeed a crime has been committed but whether the said income is income that is subject to tax. As I have noted, this has nothing to do with the source of the income per se (whether it was earned legitimately or not) but whether that income is income within the

meaning of the ITA and whether, on the evidence available, the same is taxable within the meaning of the ITA. A decision maker required to provide a decision may, where they consider the evidence so inextricably linked, or find themselves so required (such as the need to protect a person's right against self-incrimination) stay proceedings pending the completion of criminal proceedings.

This is however a matter of the law and circumstances at the time of such proceedings, rather than a necessary precondition as found by the Tax Appeals Tribunal. The determination of whether income is taxable has little to do, if at all, with whether such income was earned legally and everything to do with whether, on the reading of the ITA, such income is actually subject to tax. It is an interpretative and sometimes computational exercise, rather than one that set out to examine criminal culpability and even punish it.

Impact: Ground 7

As I noted above, Grounds 4 and 7 are related. A determination on ground 4 affects ground 7. On ground 7 the Appellant argued that The Appellant contended that the tribunal erroneously found that the identity cards presented by Fred Ssemakula and Mukiibi Joseph of Trimceke Group Ltd were fake yet the proof of the same was on the record. Counsel for the Appellant referenced page 298 and 972 of the record.

From Page 278 to 298 of the record of proceedings, there are several documents demonstrating that two persons namely a one Mukiibi Joseph and Ssemakula Fred are the directors of Trimceke Group. At P. 298 and 972 of the record, it is shown that the National ID of Joseph Mukiibi was not issued by NIRA. This is evidence that the ID is a forgery as only NIRA is empowered to issue a national identification card under Sections 68-69 of the Registration of Persons Act, 2015.

Could it be said that the above forgeries were the function of third parties and the Respondent as merely an advocate could not have known? I have not seen a legal provision requiring advocates to verify the authenticity of documents provided to them by clients applicable to the instant proceedings. Advocates, except if so required by law or the specific

circumstances of the case, do not often inquire into the validity and/or completeness of documents provided by clients. Instead, advocates will typically execute their instructions on the basis of the understanding that the documents or information provided by the client is genuine and/or complete.

Therefore, the mere fact that a lawyer was engaged in a transaction where some documents turned out to be forged doesn't not necessarily mean the advocate is culpable, or that he forged them or that he was aware of the same.

However, in the present case, this court has already found evidence of circular payments to clients in a clearly fraudulent manner, as has been seen on grounds 5 above. Accordingly, from the evidence on record, it is clear to me that the documents on record were clearly used by the Respondent to mask the correct character of the assessed incomes as belonging to Trimceke Group Limited which, in my considered view, was under the direct control of the Respondent, or at least the Respondent and others.

In my humble view, the evidence on the record leaves no doubt in my mind that the forgery of the above identity card is to the effect that the persons presented as being the principal officials of the Trimceke were not indeed the persons so named whose identity cards and names have been revealed but indeed the Respondent alone or together with others.

It therefore follows that the income supposedly presented as being the property of Trimceke and therefore subject to the beneficial interest of the above-mentioned person actually belonged to the Respondent.

As correctly submitted by the Appellant, the above constituted indirect payments which were correctly recharactised by the Appellant. See **Section 4, 58, Frank Babibasa v URA HCCS 434/2011**

Accordingly, I find that these two grounds of Appeal succeed and that the Appellant correctly levied an income tax assessment on USD 426,730 being the funds rightly attributed to the Respondent for the reasons above.

The Honourable Members of the Tribunal erred in law when they ignored transactions of the Respondent with other parties other than Trimceke Group Ltd thereby reaching an erroneous decision that the Respondent was not to pay the entire income tax assessment of 665,738,205

This ground requires the court to examine three questions sequentially;

(a) Can an appellate court entertaining an Appeal on a point of law consider a ground relating to ignoring/failing to consider evidence?

(b) If so, can the court make findings in substitution of the finding of fact of the lower court, if it were to find that this was necessary?

(c) If both questions above are answered in the affirmative, did the Tax Appeals Tribunal Ignore the impugned transactions and if so, what effect does this have on its decision?

Can an appellate court entertaining an Appeal on a point of law consider a ground relating to ignoring/failing to consider evidence?

As a general rule, a court against which only appeals on points of law can be preferred does not have jurisdiction to re-appraise evidence unless a lower court failed to discharge this duty, which makes it an error of law. See **Kasoma Fred v James Sembatya CACA 78/2011, Henry Kifamunte v Uganda SCCA 10/1997, Mugerwa Evaristo Kafeero v National Forestry Authority SCCA 8/2020**

As noted above, appeals to this court from the Tax Appeals Tribunal are confined to points of law. Whereas the above decisions were in respect to appeals to the Supreme Court, which are also confined to points of law, I take the view that they are at least persuasive as the objective context of the decisions in the same; an alleged failure to appraise evidence raised in an Appeal on points of law only.

If so, can the court make findings in substitution of the finding of fact of the lower court, if it were to find that this was necessary?

As noted above, the purpose of such a re-appraisal by a court entertaining an Appeal on points of law would be to correct any injustice that would be caused by allowing the decision to stand without factoring in the evidence that ought to have been assessed/examined. It would follow that once a court establishes that the lower court did not discharge its duty to

access evidence properly, the appellate court will discharge that responsibility and render a decision that is in line with the evaluation of evidence it would have undertaken.

<u>If both questions above are answered in the affirmative, did the Tax Appeals Tribunal Ignore the impugned transactions and if so, what effect does this have on its decision</u>?

On this ground, Counsel for the Appellants submitted that the Tax Appeals Tribunal only looked at the transactions with other parties other than Trimceke Group Ltd ["Trimceke"] yet the assessments were also based on the transactions the Respondent had with Trimceke. The Appellant's Counsel raised the following transactions for consideration:

PREMISE	**TRANSACTION**
"Fictitious" Management Fees	Wickham Terrence invoiced USD 25,600 being management fees by the Applicant's law firm vide invoice dated 12th April 2019, this amount was paid into the firm account on 25th April 2019 and then purportedly paid out to Wickham Terrence on 26th April 2019 pursuant to an escrow agreement executed much later on 14th June 2019; this pointed to fraud.
"Fictitious" Registration/Apartment Fees	Didier Robert, sent USD 11,500 to the account of Balondemu and Company Advocates. The Respondent submitted an invoice to the bank as proof of source of the funds describing the funds as registration fees. The Respondent then adduced a deed of acknowledgment signed by a one Mulumba Jimmy claiming to receive the money on behalf of Didier Robert for payment of Signature Apartments in Nairobi. Counsel for the Appellant wondered why Respondent would invoice a client for registration fees and then pass it on to an unknown third party for payment for apartments.

"Fictitious" Consultancy Agreement	Thamsanqa Sibya, paid USD 11,500 to the Applicant's account, purportedly for consultancy services vide a memorandum of understanding dated 3rd May 2019, the Respondent purported to have paid out this sum to Thamsanqa as money received on their behalf on 11th May 2019. All these documents bore the name and signature of the Respondent for and on behalf of Balondemu and Co. Advocates long after he purportedly left the firm.
Undelivered Solar Generators	Weei Ta Engineering and Construction, made payment to the firm account purportedly for supply of solar generators that were never delivered. The documents submitted by the Respondent in support of the transaction were filled with inconsistencies regarding addresses and signatories thereto.
Scam Solar Generator Payment	BHF Technologies SDN BHD, acknowledged making payment to the firm account but stated that the transaction was a Scam and that the purported solar generators were never delivered. The documents submitted by the Respondent in support of the transaction were filled with inconsistencies regarding addresses and signatories thereto

I have reviewed the record. At pages 25-30 of the judgment of the tribunal (pages 954-959 of the record of proceedings), the court considers the transactions involving BHF Technologies, Weei TA Engineering and Trimceke. In short, the court makes the following findings:

(a) The agreements involving trimceke were signed by Mr. Kagawa Yamato who is the same person that received money from Balondemu & Co. Advocates on behalf of Trimceke.

(b) The use of a different acknowledgment stamp did not make Trimceke a non-existent entity.

(c) There was no proof that the identity cards and passports of the promoters of Trimceke were fake.

(d) Whereas there is no rule requiring directors of a company to sign all contracts or deeds of acknowledgement on behalf of a company, Mr. Yamato and Mr. James Ssali were not directors, this makes them personally liable.

(e) There is no evidence that the Applicant (now Respondent) is an accomplice.

(f) Documents in Respondent's (now Appellant's) trial bundle provide conflicting reasons for non-delivery of goods. Owing to the above, there is no evidence that this was a criminal activity rather than, for instance, a breach of contract.

(g) Payments of the sale of generators was not the income of the Applicant (now Respondent) as they were money paid to his clients and there is no evidence to show that he used his legal business to propagate a legal scam to benefit himself.

I agree with Counsel for the Appellant that the tribunal only considered transactions involving Trimceke. The tribunal did not assess the veracity of the rest of the above allegations and render a decision on them. In doing so, there was an error of law and it falls on this court to correct that error by assessing the evidence on the record and returning a decision.

Wickham Terrence Management Fees

The Appellant references a set of documents on the record of proceedings at pages 475-484. The Appellant alleges that the Respondent invoiced the said Wickham Terrence for management fees to the tune of USD 25,600 on 12 April 2019, it was paid to the Respondent on 25 April 2019 and then subsequently paid out to the same Wickham Terrence USD 25,600 on 26 April 2019 allegedly as part of an escrow arrangement which was executed on 14 June 2019, a time earlier than the invoicing date.

I have reviewed the escrow agreement executed by M/s Balondemu & Co. Advocates and Wickham Terrence. The agreement is executed on 14 June 2019, which is a couple of weeks prior to the payment of USD 25,600. In short, the escrow provides for the management of monies of Mr. Wickham Terrence by Balondemu & Co. The funds were to be used for "research and development by the funds owner in Uganda" under the agreement. The

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Respondent relied on the above agreement as evidence that the disbursement of the above funds was legitimate and the said funds did not belong to him.

Whereas Counsel for the Appellant questioned the fact that the transaction precedes the agreement, in my view, it is uncommon for a client to make an oral instruction to an advocate which is effected and perfected in writing later. The Respondent did not contend that the above agreement related to a different transaction, but only this specific transaction. In the instant case, the escrow agreement provided that the cost of this service would be USD 1,100 unlike the USD 25,600 that was invoiced and paid. Moreover, it was not contended that the payment of USD 25,600 was a refund of funds previously transferred from Mr. Wickham to the Respondent's firm for holding under escrow. This is because, under the escrow agreement, Mr. Wickham was supposed to provide USD 26,700 and there was no evidence that he provided less. Therefore, a refund of monies held in escrow would yield USD 25,600 (26,700 that was deposited less USD 1,100 being management fees). Instead, it was asserted that the USD 25,600 were management fees, something inconsistent with the contract that was signed.

In my view, and after an exhaustive review of the record, the evidence demonstrates that it is more likely than not that the said payment of USD 25,600 was not genuine. This is because it defeats logic for money to be fixed in escrow and then to be drawn from the account as management fees before they somehow find their way back to the person who credited them onto the escrow.

Whereas money laundering transactions typically take the nature of such "senseless" transactions, there isn't sufficient evidence on the record to show, on the balance of probabilities that this was a money laundering transaction. What however the evidence demonstrates is that it is more probable than not that the Respondent was the beneficiary of the above monies, as they controlled the disbursement and the transaction flow does not make sense except for the hypothesis that the acknowledgment by Mr. Wickham was a disguise to mask the fact that the Respondent was the final beneficiary.

Section 91(1) of the Income Tax Act provides:

"91. **Recharacterisation of income and deductions**

(1)

For the purposes of determining liability to tax under this Act, the commissioner may—

(a) recharacterise a transaction or an element of a transaction that was entered into as part of a tax avoidance scheme;

(b) disregard a transaction that does not have substantial economic effect; or

(c) recharacterise a transaction the form of which does not reflect the substance."

Section 91(1) empowers the Commissioner to disregard the "look of things" in preference for "what things actually are". This means that the commissioner can reject taxpayer accounting or representations where the same are part of a tax avoidance scheme or which have no substantial economic effect or which do not reflect the true substance of the transaction. The provision aims at having accurate representation of taxpayer affairs and avoiding of creative accounting or non-factual structuring or documentation of transactions.

In exercise of that power, the Commissioner or their delegate will reject the transaction as stated and reclassify the same, assigning tax losses or gains or liability to the party who ought to bear it if at all, from the evidence. In the instant case, the Respondent received the money and masked its use by presenting it as paid to Mr. Wickham. It having been demonstrated that the payment to Mr. Wickham was, on the balance of probabilities fictious, it means the Respondent retained the proceeds as income.

Section 58 of the Income Tax Act provides

"The income of a person includes—

(a)a payment that directly benefits the person; and

(b)a payment dealt with as the person directs, which would have been income of the person if the payment had been made directly to the person."

In my view, and on the basis of the above, the above payment was an indirect payment/benefit of the Respondent and accordingly, the Respondent was correctly assessed for the same.

"Fictitious" Registration/Apartment Fees

Here, the allegation by the Appellant is that the Respondent invoiced a one Didier Robert for USD 11,500 on 9 April 2019 as registration fees and subsequently paid USD 10,500 to Mr. Mulumba Jimmy, a said business partner of the said Didier Robert as hotel payments for signature apartments Nairobi on 18 April 2019, nine days later. At page 983-984 on the record of proceedings, Mr. Balondemu was cross examined on this transaction and he agreed that the payment of USD 10,500 was for a hotel in Nairobi and that he paid the money on the instruction of a client.

I have looked at the factual explanations advanced by both parties as well as the evidence on record, including the relevant exhibits, testimony and witness statements. In my view, again, it makes no sense that the Respondent's firm received professional fees from a client and shortly thereafter almost the entire sum was paid out to the business partner of the client for an unrelated purpose, especially where it was not demonstrated that the client sent USD 10,500 separately or that it was agreed that the sums previously paid be used for this purpose and the subsequent instruction be revoked or separate payment be made for it. I do not dispute that clients and their advocates may agree to use payments previously made for one purpose differently, or that indeed instructions for which an advocate has been paid may be revoked and the client requests a refund or designates someone else to receive the refund and even apply the same for a different purpose. However, here, there was no explanation for why within a space of just over a week, a payment made for registration fees was essentially re-routed to paying for accommodation of the client's supposed business partner in Nairobi. At the very least the client or the beneficiary ought to have been called, or a correspondence from them presented providing a narrative for this course of events. On the evidence available, the assertions by the Appellant were more probable than not, that is that the Respondent was the beneficiary of these proceeds and the payouts were presented as made to other parties to mask this reality.

Accordingly, and as already shown above, the Commissioner correctly recharacterized these payments as the indirect gains/payments/income of the Respondent for which he was correctly assessed for tax.

"Fictitious" Consultancy Agreement

The allegation under this head is that the Respondent signed a consultancy contract with Thamsanqa Sibya and then made a payout to the same person stating that this was a delivery of funds due to her and received on her behalf (supposedly from third parties). Page 490-495 of the record shows an MOU between Balondemu & Co. Advocates and Thamsanqa Sibya ["Sibya"] in which Sibya was appointed as a consultant to "cause its registration for pursuing various investment ventures in East Africa." Essentially, the purpose of the agreement appears to be to engage M/s Balondemu & Co. Advocates to act for Sibya and cause its registration, licensing and compliance as it seeks to pursue business ventures in East Africa. The agreement provides that the firm will be paid USD 11,500 for file opening, registration fees, and any other services mentioned in the agreement and any other expenses incidental thereto and USD 750 as the legal, professional fees and disbursements.

Subsequently, there is a payment of USD 11,500 to Sibya as remission of funds due to the company and having been received on their behalf by the firm. As noted above, where a taxpayer applies to the Tax Appeals Tribunal to review an objection decision, the burden to prove the facts supporting the review of the objection decision is on them.

A review of the evidence on the record shows that the above stated MOU was signed on 3 May 2019 and the purported payment to Sibya was made on 11 May 2019, just a week later. Again, no coherent explanation was offered for this transaction. Indeed, on the balance of probabilities, the version of events by the appellant is more plausible that is, that the payment was for the benefit of the Respondent who tried to mask the same by asserting, with the acknowledgment that the funds belonged to his client, Sibya.

It must be noted that it is not inconceivable and it is rather common place for an advocate acting for a client on one matter to receive monies on the client's behalf in respect of another

matter altogether. However, there is no evidence showing or explaining the receipt of this money for onward transmission to Sibya. The Respondent did not show whom from and in what circumstances it was received and neither was there any evidence from Sibya explaining the same. In the circumstances, the Appellant's evidence which involved an investigation and detailed examination of these transaction was more compelling and I am convinced to the requisite standard that the above payments were for the benefit of the Respondent and accordingly that he was correctly assessed for tax on the same.

Undelivered Solar Generators/Solar Scam Payments

The Appellant contends that Weei Ta Engineering and Construction made a payment to the firm account purportedly for solar generators which were not delivered. Further, BHF Technologies Limited SDN BHD acknowledged making a payment to the firm account but stated that the transaction was a scam and the generators were not delivered.

I agree with the observation of the tribunal that the failure to deliver goods is not evidence that the sums paid for them are the property of the holder. One would need to demonstrate that indeed the whole transaction is a hopeless transaction which was a front for masking the real beneficiary of the proceeds or the real nature of the transaction. It is not atypical for business people to transact through their lawyers or to appoint them to receive and remit or make payments of sums due to them and/or payable by them respectively. Further, I agree that the alleging or even proving that a transaction is a scam or is fraudulent cannot, without more, impute tax liability for that transaction on the advocate or advocates handling that transaction. It must be demonstrated that such transaction/scam was undertaken to benefit and did indeed benefit the advocate concerned, in what case their tax liability will be commensurate to the chargeable income on their gain.

In the instant case, the Respondent, as the assessed person, did not provide an explanation to disprove the assertion that these monies were wrongly classified as his income. Evidence such as documents explaining the reason/purpose for non-delivery or even client confirmations that these sums are owing to them and are only held by the advocate on their behalf could have been helpful. The Appellant led evidence to show that these two bodies of

transactions was part of a wider pattern in which transactions were masked to present as if they were not for the Respondent's benefit when indeed they were.

In the circumstances, the Respondent did not provide a credible explanation for the holding of these sums inspite of non-delivery unlike with the transaction involving Optimum Gold where a detailed narration of the transaction, along with police and other documents was supplied. I would therefore find that the Respondent was correctly assessed for these sums.

Should the Respondent have been assessed together with his partners?

It must be noted that the Appellant's investigation in the affairs above was, at least partly, in respect of Balondemu & Co. Advocates, and not only the Respondent. As noted from the record, the Respondent as a founding partner of the firm was later joined by other advocates, and eventually left the firm.

Unlike Companies for instance, partnerships, whether general or limited liability, are not liable for the payment of tax since they are not distinct legal persons. The partners are charged with fulfilling the tax obligations of the partnership. This is paid by both resident and non-resident partners.

The gross income of a resident partner for the year of income includes the partner's share of partnership income for that year, less the allowable deductions incurred in the production of that income. The gross income of a non-resident partner for the year of income includes the partner's share of income attributable to sources in Uganda. Partnerships in their own right are required to file a return of income. However, it is the partners of the partnership, rather than the partnership itself, that are subject to income tax under the ITA. A partnership in Uganda is considered a resident partnership if any of the partners is a resident person in Uganda during the year for tax purposes under the ITA. The finding of a resident partnership has nothing to do with the nationality or origin of the partners. See **Sections 65-69 of the Income Tax Act**.

Accordingly, any income which was received by the partnership is taxed in the hands of the partners who will have received a portion of the same as spelt out in the partnership deed

and/or any other agreements, policies or practices regulating such matters. However, in the instant case, the evidence led by the Appellant which is on the record is that the Respondent specifically handled all the impugned transactions, used the business of the firm to undertake and mask the transactions and derived the benefit of them. I have seen the testimony of the Respondent, at pages 983-985 of the record in which he asserts that on a number of transactions he was only a signatory to the account and was drawing money that was disbursed or handled by other parties. I found this testimony uncompelling because:

(a) There is no plausible explanation why the Respondent remained associated with the firm after he purportedly left and started a new firm. Whereas the Respondent testified that it was for "business development purposes" it is strange that the Respondent would continue doing business development for a firm which was essentially competing with his new firm.

(b) The Respondent did not present a shred of correspondence indicating these requests for payments to be made in which he was only a signatory to the disbursement of funds and was not involved in the transactions. Not even the Respondent's former partners testified to the same.

(c) The payments especially Weei Ta Engineering and Construction and BHF Technologies Limited SDN BHD were to Trimceke Group which was, prior to the admission of new partners, represented by the Respondent and there is no evidence that on the admission of the new partners, this client was served by a different partner or advocate.

(d) The Respondent as an advocate should have been able to require explanations for the disbursement of these funds and reject participation if the above inconsistent already pointed were not resolved and his not taking of this court is only consistent with the hypothesis that he was the actual participating undertaking the above transactions.

Accordingly, the above transactions having been operated and/or run by the Respondent for his benefit, it follows that it is he, and not he together with his partners that is assessable for tax.

Owing to my findings above, the Appellant accordingly succeeds on this ground.

Ground 6: The Honourable Members of the Tribunal erred in law when they placed the burden of proof on the Appellant to prove the correctness of its decisions in respect to the penal tax assessments of UGX 20,000,000 and the income tax assessment of UGX 665,738,205 contrary to law

On this ground, the Appellant contended that the tribunal faulted the Appellant for not providing the objection and objection decision. Regarding the income tax assessment, the Appellant contended that the Respondent did not undertake a thorough investigation and yet it is the Respondent as the Applicant who had a duty to prove the assertions in their application.

I agree with the proposition of law that in applications for review of a taxation decision, the burden of proof is on the Applicant, in this case the Respondent. See **Section 26 TPCA, Section 18 TAT Act and Section 101 of the Evidence Act**.

This must however be distinguished from the evidential burden of proof, which shifts when a case to the requisite standard is made out by a party. The Appellant is not a static or silent participant in tax proceedings, once a party makes out an assertion to the requisite standard, the evidential burden of proof shifts to the Appellant to disprove that assertion, even though the legal burden of proof does not shift. If this wasn't so, a party applying for review would be grossly prejudiced as allegations which have then made their way into a basis for the taxation decision and objection decision need to be only dealt with by one party rather than both.

I have reviewed the record, and especially the decision of the tribunal. With regard to the penal tax issue, it appears that the tribunal reviewed the assertions of the Respondent that indeed an objection to penal tax was made and accordingly, the evidential burden proof shifted to the Respondent who did not, in the tribunals view, adduce satisfactory evidence in support of its assertion. This was not the tribunal changing the legal burden, but assessing the quality and cogency of the evidence adduced by the Appellant when the evidential burden shifted. However, the finding of the tribunal on this head is now affected by the contrary finding above.

Further, with regard to the income tax assessment, the Respondent led evidence to the satisfaction of the tribunal that the impugned transactions dealt with money which he only held as a trustee for his clients, and accordingly, that the said monies were not his income. Again, this shifted the evidential burden on the Respondent to demonstrate otherwise. The tribunal noted, with regard to the Trimceke transactions considered, that the Respondent's investigation and evidence did not demonstrate to the requisite standard that the beneficiary of these transactions was the Respondent who is entitled to be account for tax on the same.

Again, this was not the tribunal changing the legal burden, but assessing the quality and cogency of the evidence adduced by the Appellant when the evidential burden shifted.

I would therefore find for the Respondent on this ground.

Ground 8: The Honourable Members of the Tribunal erred in law when they held that there was no rule that requires a director to sign all contracts/deeds of acknowledgment on behalf of a company thereby reaching an erroneous decision that the Respondent was not liable to pay the income tax assessment of UGX 665,738,205

At Page 28 of the ruling of the tribunal, the tribunal held thus:

"Though there is no rule that requires a director to sign all contracts and deeds of acknowledgement on behalf of a company, if Mr. Kagawa Yamato or James Ssali were not directors or officials of Trimceke respectively, it makes them personally liable for their actions. They were acting under false pretenses. There is no evidence on the persons who were holding out as them in the transactions. However, to make the Applicant liable for taxes, it must be shown that Mr. Kagawa Yamato and Mr. James Ssali or whoever was acting as them passed the monies to him (the Respondent) or shared it with him."

The Appellant referenced Section 59 of the Companies Act and contended that Fred Ssemakula was the sole director of Trimceke but all acknowledgements were signed by Mr. Yamato who was not an officer of the Respondent and who stamped the same using the stamp of another company, Kilowatt Bi Technologies SMC Limited.

A company is an artificial person. It does not have a body of its own. Accordingly, officials and/or employees of the company lend their body to a company and become the conduit through which the company takes actions and exercises its rights. See **Halsbury's Laws of England, 5th Edition, Vol 14 P 137, Para 115**

Who is empowered to take what action in the name of the company is a question of the rules, procedures and practices of the company and the law. **Section 59** of the Companies Act provides:

"A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company and need not be under its common seal."

Section 59 is an example of a law that regulates how documents requiring authentication by a company (which is an exercise of the personality of the company and its attendant rights) is undertaken. Essentially, any officer of the company so authorized may sign documents for and on behalf of a company.

Further, all persons with implied authority to act on behalf of the company will be deemed to have validly so done, save in circumstances where the doctrine of notice or where a law prevents reliance on this rule. This is what is called the indoor management rule. See **NSWC v Morifem Trading Company Limited HCCA 13/2019, Hotel Aribas Limited v Masindi District Local Government HCCS 23/2017, Monitor Publications Limited v KCCA HCCS 460/2015, CTM Uganda Limited & Ors v Alimuss Properties Uganda Limited & Ors SCCA 11/2022**

Accordingly, it follows that any person nominated by the company, or impliedly nominated, can sign documents on behalf of the company. In the present case, a person not being a director could lawfully sign the acknowledgments of receipt of money. The question as who can do what on behalf of a company is a question for the company itself and the law.

Therefore, the fact that a person other than a director signed acknowledgments on behalf of a company did not by that fact alone, make those acknowledgments illegal or irregular.

Further, the question regarding the use of a different stamp was handled by the tribunal and this being an Appeal on points of law, I do not have the jurisdiction to re-appraise those findings except for the reasons supplied above, which do not exist under this head. However, I wish to note that the stamp of another company would be something of an irregularity. An irregularity is not an illegality and depending on the circumstances, does not invalidate an action or transaction. The entire transaction must be considered wholesomely. For instance, irregularities at one part of the transaction may be cured. In **Lam Lagoro v Muni University HCMC 7/2016** court noted that irregularities in procedure may be cured at a later stage. While this precedent deals with a different question, in my view, the rationale is helpful and applicable.

Without a clear legal provision demanding so, a taxpayer does not owe URA perfect documents. What however the taxpayer owes is to comply to the law and account for all tax payable. Where there are imperfections with the documents (lack of signatures, dates, stamps and so on), those documents can still be relied on as long as it is shown that such documents set out the transaction/matter with some clarity and are authentic. Accordingly, a wrong stamp cannot, for that reason alone, be the basis for asserting that a document is forged and therefore attaching tax liability to a person. One must show that these irregularities are indeed evidence of fraudulent scheme or non-compliance rather than the imperfections alone being both the cause and proof of such fraud or non-compliance.

Moreover, taxpayer records should be examined against the basis that Ugandan corporations, especially private ones, struggle to keep detailed and accurate records. This phenomenon has received judicial notice. See **Mark Xavier Wamalwa v Stephen Aisu HCCC 27/2005, Seremba Mark v Isanga Emmanuel & Ors HCCC 27/2004**

By all reliable indicators, Uganda suffers some shortage in as far as highly trained human resource is concerned to keep meticulous records and as a result record generation, perfection and storage is many times compromised. This does not mean that recording and record keeping obligations of taxpayers imposed by law are to reneged from on the basis of the above judicial observation. However, it places into context imperfections in documents

generated and used by taxpayers. Therefore, except where these irregularities fit into evidence of fraud or non-compliance with tax law, the same are largely excusable.

From the above, there is no error in the decision of the tribunal on this ground and I find for the Respondent.

Conclusion

Having found as above, I find that the appellant has succeeded on grounds 1-5 and 7and fails on grounds 6 and 8.

As a rule of law, costs ordinarily follow the event and a successful litigant receives his or her costs in the absence of special circumstances justifying some other order. Where the successful party has been guilty of some misconduct, an order of costs may not be granted. See **Section 27(2) Civil Procedure Act, Harry Ssempa v Kambagambire David HCCS 408/2014, , Iyamuleme David vs. AG SCCA NO.4 of 2013, Kinyera George v Victoria Seeds Limited HCCS 604/2015, Anglo-Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd, [1951] 1 All ER 873**.

The Appellant succeeded on all but two grounds of appeal. Whereas I would otherwise be inclined to grant the Appellant a significant portion of the taxed costs owing to the fact that the appeal substantially succeeds, I note that the appeal was served relatively late which likely put the respondent to a little bit of discomfort as noted above. Accordingly, I would only award the appellant Two Thirds (2/3) the taxed costs in this court and the lower court.

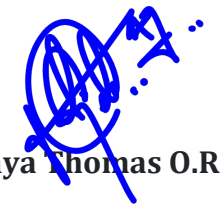
In the end, I make the following orders

1. The Appellant's Appeal succeeds on grounds 1-5 and 7 only and fails on grounds 6 and 8.
2. The decision of the Tax Appeals Tribunal is accordingly vacated and replaced with this decision of the court.
3. The orders of the Tax Appeals Tribunal vacating the assessment of penal tax to the Respondent is accordingly set aside and the Appellant's assessment of UGX 665, 738,205 is affirmed.

4. I award the Appellant Two Thirds (2/3) of the taxed costs of these proceedings and the proceedings before the Tax Appeals Tribunal. The decision of the Tax Appeals Tribunal to the contrary is accordingly vacated.

I so order.

Dated this 23rd day of August 2024, delivered electronically and uploaded on **ECCMIS.**



Ocaya Thomas O.R

Judge

23rd August 2024