

THE REPUBLIC OF UGANDA
IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA
APPLICATION NO. 230 OF 2022

BESTIN LIMITED APPLICANT

VERSUS

UGANDA REVENUE AUTHORITYRESPONDENT

BEFORE DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MR. GEORGE MUGERWA.

RULING

This ruling is in respect of an application challenging a penal tax assessment of Shs. 153,785,040 for non-declaration of Withholding Tax (WHT) on payments made on a purchase of a business asset prior to the enactment of S.118B(2) of the Income Tax.

The applicant manufactures paper products. On 27th January 2022, the respondent issued the applicant with an administrative additional income tax assessment based on non-declaration of WHT on the payments made to Ham Enterprises Limited on the purchase of a business asset. In 15th February 2022, the applicant objected to the assessment on ground that the purchase took place before the law giving raise to the WHT came in force. On 9th May 2022, the respondent issued the applicant with an objection decision disallowing the objection.

Issues

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

The applicant was represented by Mr. Wilson Kato while the respondent by Mr. Samuel Oseku and Mr. Sam Kwerit.

This dispute relates to whether a law can apply retrospectively to a transaction which took place before the law came into force but some payments were made after. The parties agreed that the facts were not in issue. The only issue in contention was whether the law can apply retrospectively.

The applicant's witness Ms. Mariah Nakiganda stated that on 23rd March 2017, the applicant executed an agreement for sale of development rights of land comprised in LRV 247 Folio 3, Plot 26, FRV 3 Folio 24 Plot 28 Kyadondo Block 268 land at Nakivubo place (herein known as the suit land). On 18th December 2019, the applicant executed an addendum for the sale of the said land. The applicant paid over Shs. 13 billion as consideration for the land before 1st July 2019. It paid the balance of Shs. 1,825,000,000, US\$ 200,000 and US\$ 120,000,000 on 23rd September 2019, 18th December 2019 and 10th March 2020 respectively. On 27th January 2022, the respondent issued the applicant with an administrative default WHT assessments on payments made to HAM Enterprises Limited for the purchase of a business asset. On 15th February 2022, the applicant objected to the assessment on the ground that the purchase took place before the law came in force. On 9th May 2022, the respondent made an objection decision disallowing the objection. The witness contended that the law applied by the respondent does not apply to the applicant since the land was purchased on 23rd May 2017 before S. 118B(12) of the Income Tax Act took effect, which was on 1st July 2019.

The applicant submitted that Article 152(1) of the 1995 Constitution provides that, "No tax shall be imposed except under the authority of an act of parliament". S. 1 of the Income Tax Amendment Act, 2019 provides that the "Commencement this Act shall come into force on 1 July 2019". The applicant submitted that S. 6 of the Income tax Amendment Act 2019 provides as follows; "6. Amendment of S. 118B of principal Act". It submitted that S. 118 reads-

"Section 118B of the principal Act is amended-

- (a) by renumbering the current section as subsection (1); and
 - (b) by inserting immediately after subsection (1) the following
- (2) A resident person who purchases a business or business asset shall withhold tax at a rate specified in part VIII of the Third schedule".

The applicant defined the word "purchase" as defined by *Black's Law Dictionary* 10th Edition P.1429 as.

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

The applicant cited *Comfort Homes (U) limited v Uganda Revenue Authority* Application 66 of 2020 where the Tribunal stated that "The word payment is defined under S. 2 (xx) of the Income tax Act to include any amount paid or payable in cash or kind and any other means of conferring value or benefit on a person." The applicant also cited *AON (U) Ltd v Uganda Revenue Authority* MC 65 OF 2009 where Kiryabwire J. stated that "Where the language of the statute is plain and unambiguous the words of the statute should be given an unambiguous meaning."

The applicant submitted that it paid over Shs. 13 billion as consideration for redevelopments rights in the suit land before 1st July 2019 and paid the balance of Shs.1,825,000,000, US\$ 200,000 and US\$ 120,000,000 on 23rd September 2019, 18th December 2019 and 10th March 2020 respectively. It contended that when it purchased the suit land on 23rd March 2017, there was no law requiring it withhold tax. S. 118 (2) of the Income Tax Act was passed after the purchase. S. 1 of the income tax (Amendment) Act, 2019 states that the commencement date is 1st July 2019. It submitted that in *Comfort Homes (U) Limited v Uganda Revenue Authority* (supra) the Tribunal noted that even if some payments were made after 1st July 2019 WHT is not payable since payment was made before coming in force of the amendment act. It is concluded that it is not liable to pay WHT assessed as there was no law imposing the obligation to withhold the tax as some payments were after the coming in force of the Amendment Act.

In reply, the respondent submitted that the applicant purchased a business asset, where upon the obligation to withhold tax arose, and having failed to do so is liable to pay the tax assessed. It cited S. 118B(2) of the Income Tax Act which provides that a resident person who purchases a business or business asset shall withhold tax at a rate specified in Part

viii of the Third Schedule. It submitted that S. 2(b) of the Income Tax Act defines a business asset as follows.

"An asset which is used or held ready for use in a business and includes any asset held for sale in a business and any asset of a partnership or company."

The respondent submitted that S. 2(g) of the Income Tax Act defines business as "Any trade, profession, vocation or adventure in the nature of trade but does not include employment".

The respondent submitted that S. 118B (2) of the Income Tax Act provides that a resident person who purchases a business or business asset shall withhold tax at a rate specified in Part VIII of the Third Schedule. Part VIII of the Third Schedule of the Income tax Act provides for gross payments. The WHT rate for S. 118B (2) is 6% of the gross payment. S. 2 (xx) of the Income Tax Act defines a payment to include any amount paid or payable in cash or kind, and any other means of conferring value or benefit on a person. The respondent submitted that the *Macmillan English Dictionary for advanced learners New Edition* defines gross as; "Earned before anything such as taxes or costs have been taken out." The respondent contended that the execution of the agreement before the coming in force of the Act did not take away the obligation of the applicant to withhold tax as the same is on payments and not a transaction. Therefore, the applicant had an obligation to withhold tax on payments made after the law had come in force.

The respondent submitted that, it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute, so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than a matter of procedure (*Halsbury's Laws of England*, 3rd Ed. Vol. 36). This follows the latin maxim; *nova constitution futuris formam imponere debet non praeteritis* (a new law ought to regulate what is to follow, not the past). It submitted that the subject of the dispute took place when the law was in place. The respondent contended that the applicant's argument that some transactions took place before the law came into force and attempting to place themselves outside the scope of the act is untenable as it amounts to

cherry picking. The respondent cited *Bank of England v Vagliano Bros* 1891 AC 107, where Lord Halsbury LCJ said:

"It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction".

The respondent submitted that it is trite law that where a taxpayer falls within the ambits of the law, it ought to be taxed unless expressly exempted. This same inference can be drawn from *Halsbury's Laws of England* 4th Edition Vol. 23 at Paragraph 22 which was cited with approval in the Kenyan case of *Primarosa Flowers Limited v The Commissioner of Income Tax* Income Tax Appeal 18 of 2013 where it was noted that:

"...it is a general principle of fiscal legislation that to be liable to tax, the subject must fall clearly within the words of the charge imposing the tax, otherwise he goes free ...".

The respondent submitted that the taxes assessed and payable by the applicant are duly sanctioned under S. 118B of the Income Tax Act and the applicant has not demonstrated that it is exempt from paying WHT. The respondent submitted that the applicant is liable to pay the WHT as assessed.

In rejoinder, the applicant submitted that S. 118B(2) of the Income Tax Act applies to transactions and not to payments and there was no law which required the applicant to withhold tax on the purchase of the redevelopment rights over the suit land. The applicant cited *Luwaluwa Investment Limited v Uganda Revenue Authority* Civil Appeal 43 of 2022 Hon Justice Ocaya Thomas O.R at page 49 held that:

"By way of first principles, S. 118 (2) (which provides for with withholding) is a mode of collection of income tax. Where the transaction is not amenable to income tax, there can be no withholding since there is no tax to remit".

The applicant submitted that at the time it made the purchase there was no law requiring the applicant to withhold tax on the purchase. It submitted that imposing WHT after the law came into force is illegal. It would amount to applying the law retrospectively.

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

The applicant entered into an agreement for the sale of redevelopments rights over land comprised in LRV Folio 3, Plot 26, FRV 3 Folio 24 plot 28 Kyadondo Block 268 land at Nakivubo Place on 23rd March 2017. The agreement states that the full purchase price for the transaction was US\$ 5,000,000. The applicant paid over Shs. 13 billion as consideration for the land before 1st July 2019. It paid the balances of Shs. 1,825,000,000, US\$ 200,000 and US\$ 120,000,000 on 23rd September 2019, 18th December 2019 and 10th March 2020 respectively. The dispute is whether the said payments made after 1st July 2019 attract WHT under S.118B(2) of the Income Tax Act.

S. 118B(2) of the Income Tax Act provides that a resident person who purchases a business or businesses asset shall withhold tax at a rate specified in Part Six of the Third Schedule. Part Six of the Third Schedule of the Income Tax Act provides that WHT rate for purpose of S. 118B (2) is 6% of the gross payments. S.6 of the Income Tax (Amendment) Act 2019 reads.;

“Section 118B of the principal Act is amended-

(c) by renumbering the current section as subsection (1); and

(d) by inserting immediately after subsection (1) the following

(2) A resident person who purchases a business or business asset shall withhold tax at a rate specified in part VIII of the Third schedule”.

S. 2(h) of the income Tax Act states that a business asset is defined as an asset which is used or held for use in a business and includes any asset held for sale in a business and any asset of a partnership or Company. In this case, the applicant does not dispute the categorization of the transaction as a sale of a business asset.

The applicant contended that on 23rd March 2017 when the applicant purchased the redevelopment rights over the suit land there was no law requiring the applicant to withhold tax. This would amount to applying the law retrospectively which is contrary to the law. According to S. 1 of the Income tax (Amendment) Act 2019, its commencement date was 1 July 2019. S. 17 of the Interpretation Act states that;

“(1) Subject to this section—

(a) the commencement of a statutory instrument shall be such date as is provided in or under the instrument or, where no date is so provided, the date of its publication as notified in the Gazette.

(b) Every statutory instrument shall be deemed to come into force immediately on the expiration of the day next preceding its commencement”.

The respondent submitted that the subject of the dispute took place when the law was in place. It contended that the applicant's argument that some transactions took place before the law came into force and attempting to place themselves outside the scope of the Act is untenable as it amounts to cherry picking. The respondent submitted that, execution of the agreement before the coming in force of the provision did not take away the obligation of the applicant to withhold tax as the same is on payments and not a transaction.

On 23rd March 2017, the applicant purchased the suit land. The administrative default assessment was made on 7th January 2022 for the assessment period of 1st to 31st December 2019. The word ‘payment’ is defined in S. 2(xx) of the Income Tax Act to include; “Any amount paid or payable in cash or kind, and any other means of conferring value or benefit on a person”. The term ‘purchase’ is defined in *Black’s Law Dictionary* 10th Edition p.1429 as;

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

In *Comfort Homes Uganda Limited v URA* Application 66 of 2020, the Tribunal cited *AON (U) Limited v URA* MC 66 of 2000, Where Kiryabwire J. stated that.

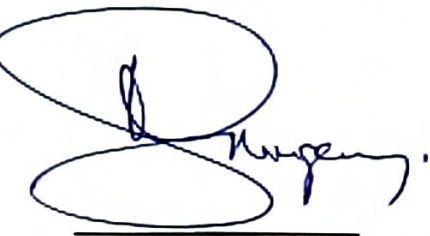
“It is trite law that where the language of the statute is plain and unambiguous, the words of the statute should be given unambiguous meaning. Payment under the section included what was paid and what was payable. Therefore, the payment by the applicant included the amount paid on 26th June 2019 and the amount payable on 22nd August 2019, even when the amount payable was paid after the coming into force of S. 118B (2) of the Income Tax (Amendment) Act on 1st July 2019. Since the payment was effected before the coming into force of the amendment WHT is not payable”.

The authority above is very similar to this case. The respondent issued the applicant with an administrative additional income tax assessment based on non-declaration of WHT on the payments made to Ham Enterprises Limited on the purchase of a business asset. The law that requires withholding tax after the purchase was passed after the applicant had made the transaction. The purchase was made before the law was amended. What happened after the amendment was the payment of installments.

One of the canon principles of a good tax is that it should be certain. A taxpayer should know the tax that is due at the time of the transaction. At the time of the purchase of the suit land, the WHT was not enacted. There is no way the applicant should have prepared for the incoming law when it did not know what was required of it. Where there is doubt as to the application of a law, the taxpayer is given the benefit of the doubt. What is certain about the amendment is that it mentions that WHT is payable on the purchase of a business assets. The word purchase is clear. It should be given its unambiguous meaning. A property maybe purchased even where there is no completion on payment of the purchase price. Where a purchaser defaults a seller's only remedy maybe to recover the balance unpaid but not the property. The Act did not mention that WHT is payable on completion of payment of the purchase price or of installments. The Income Tax Act did not mention how installments paid after the Act was amended where a purchase was made before would be dealt with. This omission creates uncertainty and doubt. In *Comfort Homes Limited v URA* (supra) the Tribunal noted that payment under this section includes what was paid and what is payable. The Tribunal held that the amendment is silent as to whether it applies to transactions or payments. The Tribunal concluded that where there is an ambiguity in the law, it is decided in favor of the tax payer. The amount paid includes the amounts payable. Therefore, the payment by the applicant included the amounts payable on 23rd September 2019, 18th December 2019 and 10th March 2020, even when they were paid after coming into force of S.118B (2) of the Income Tax Amendment Act on 1st July 2019. Since the purchase and payment was effected before the coming into force of the amendment of WHT is not payable'

In this case, the Income Tax (Amendment) Act 2019 was made after the transaction of purchase was made, even if some payments were made later. This does not affect the transaction. The transaction was already completed on 23rd March 2017 while the Income Tax (Amendment) Act commenced on 1st July 2019. The payments that followed were fulfillment of what was completed in the transaction. In the circumstances, this application is allowed with costs to the applicant.

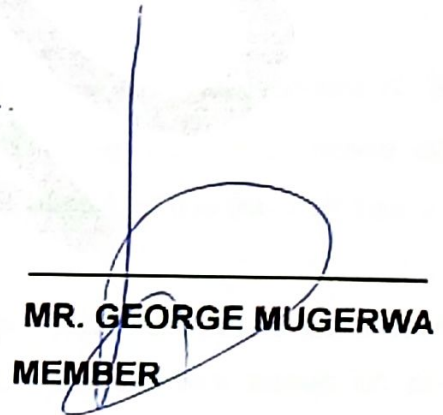
Dated at Kampala this 29th day of June 2023.



DR. ASA MUGENYI
CHAIRMAN



DR. STEPHEN AKABWAY
MEMBER



MR. GEORGE MUGERWA
MEMBER