THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO 35 OF 2010

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

GORDON SENTIBA AND
OTHER.....APPLICANTS

VERSUS

UGANDA REVENUE
AUTHORITY.....RESPONDENT

BEFORE: THE HON. MR. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The Applicants Gordon Sentiba and Others brought this action for judicial review against the Uganda Revenue Authority under [sections 41 and 42 of the Judicature Act cap 13 and rules or 3 (2) and 6 of the Judicature (Judicial Review) Rules 2009]. The application is for declarations and injunction. It is supported by the affidavit of Gordon Sentiba sworn to on the 18th of October 2010 and a further affidavit sworn to by Martin Mbanza on the 19th of October 2010. The Respondents filed an affidavit in rebuttal sworn to by Rodney Gulooba a legal officer of the Respondent on the 20th of October 2010.

The Applicants were represented by Birungyi Cephas of Messrs Birungyi, Barata & Associates while the Respondent was represented by Counsels Kazibwe Moses Kawumi Assistant Commissioner Litigation and Mathew Mugabi legal officer both of whom are officials of the Legal Services Department of the Respondent. Both parties agreed to proceed with the application though the Respondent had been served on the 18th of October 2010 and the matter was scheduled for hearing before me on the 22nd of October being less than ten days as required by Rule 6 (3) of the Judicature (Judicial Review) Rules 2009.

At the commencement of arguments I observed that the only Applicants who may be heard are those before court in terms of Order 1 rule 9 of the Civil Procedure Rules. The Parties before court are the ones mentioned in the Application. This was because there was no order to represent others parties and it was a new cause of action and Uganda revenue Authority was a new party. The previous action hereinafter cited was between the Applicants and the Attorney General. However the orders sought by the parties mentioned in the pleadings will affect all other interested persons in the application namely the other minority shareholders not mentioned specifically in the application.

The facts in this application are not in dispute. The genesis of the dispute as set out in the pleadings of the parties is that the applicants filed a suit against the Attorney General vide **High Court Civil Suit No. 431 of 2006** on behalf of the minority shareholders of Nyanza Textile Industries Ltd (Nytil) as a consequence of the divesture of the said company by the Government of Uganda and pursuant to an agreement with the buyer that the non government shareholders would be compensated for their share holding in the company. Nytil was sold off to Picfare Uganda Limited. The suit was settled by consent of the parties in January 2007. The relevant part of the consent judgment reads as follows

"(a) The Defendant shall pay the plaintiffs a sum of USD 2,770,239 (USD two million, Seven Hundred Seventy Thousand, Two Hundred and Thirty Nine) Being the agreed value of the shares of the Plaintiffs in the undertaking called Nyanza Textile Industries Limited NYTIL), net of any deductions.

(b) The Defendant shall pay interest on the said amount at the rate of 18% p.a. from the 21st of March 1996 to the date of full payment.

The consent decree was drawn jointly by the Attorney General's Chambers and Messrs Byenkya, Kihika & Co. Advocates. Pursuant to the consent judgment, the Applicants applied to the Commissioner Domestic Taxes, Uganda Revenue Authority in a letter dated 2nd of June 2010 for a private ruling under section 161 of the Income Tax Act inter alia for a confirmation by the Commissioner of the Respondent that and to quote:

"(a) Payment for the value of shares is not a taxable gain subject to Income Tax.

(b) "Interest" referred to in the consent is a return of capital within the meaning of section 2 (kk) of the Income Tax Act. It is not arising from a tax obligation that is compensation of capital falling within section 61 of the Income Tax Act.

(c) No withholding tax is deductible from the monies under Section 119 of the Income Tax Act because such payment is not for the supply of any goods or services to Government."

The Ruling of the Commissioner is annexure "F" to the supplementary affidavit of Martin Mbanza in support of the application. The Ruling of the Commissioner Domestic Taxes Department is dated June 14, 2010 and reads in part:

"APPLICATION FOR A PRIVATE RULING UNDER SECTION 161 OF THE INCOME TAX ACT.

Reference is made to your letter dated 02nd June, 2010 referenced as above.

Due consideration of the facts pertaining to your application has been made and we wish to advise as follows:

1. From the disclosures made regarding the payments for the value of shares, we wish to advise that the gain derived by individuals is exempt income tax as per section 21 (1) (k) of the Income Tax Act which stipulates that any capital gain that is not included in the business income is exempt income.

2. Interest; we agree with your interpretation of the treatment of this payment. It is a payment not arising from a debt obligation but is a compensation of capital falling within section 61 of the Income Tax Act..."

The crux of the grievance of the Applicants is contained in ground 6 of the Notice of Motion where it is contended that on the 13th of October 2010 the Respondent through its Commissioner for Domestic Taxes, purported to revoke the private ruling without any reason whatsoever and sought to deduct withholding tax from the amounts due to the applicants under the award. The revocation is attached to paragraph 8 of the affidavit of Gordon Sentiba as annexure G. Annexure G is a letter written by the same Commissioner who made the ruling namely Commissioner Moses M Kajubi. In a letter dated 13th of October, 2010, and addressed to the director Privatisation Unit Public Enterprise Reform and Divestiture the Commissioner states and I quote:

"We have analysed all the additional documents you have provided to us vide letter dated 7 October, 2010 and wish to advise as follows;

1. The interest payments amounting to U.S. dollars 7,206,416.25 payable to the minority shareholders of Nyanza textiles limited (NYTIL) is subject to withholding tax at the rate of 15% in accordance with section 117 of the Income Tax Act cap 340.

2. We have revoked the private ruling earlier on issued in June 2010 regarding the aspect of interest.

Please find attached an assessment of 15 per cent withholding tax amounting to Uganda shillings 2,437,073,054 for your immediate payment..."

The letter was copied to the Commissioner General of the Respondent. Pursuant to this letter, the Applicants filed this application for judicial review and also applied for an interim injunction in Miscellaneous Application No. 589 of 2010. An interim order was issued by the Honourable Deputy Registrar of this court on the 18th of October, 2010 against the Respondent staying enforcement of the tax demand on monies due and owing to the Applicants from the Public Enterprise Reform and Divestiture/ Privatisation Unit which monies are part of the court award in **High Court Civil Suit No. 431 of 2006 Gordon SENTIBA and others against the Attorney-General** pending the hearing and determination of Miscellaneous Cause No. 35 2010, the matter before me now. The interim order was to last until the 22nd of October, 2010 when the main application for judicial review would be heard.

In the application for judicial review, the Applicant prays for orders:

1. That a declaration is issued that the Respondent has no legal authority to revoke the private ruling made under section 161 of the Income Tax

Act chapter 340 once the ruling has been made and communicated to the taxpayer.

2. That a declaration is issued that the Respondents alleged revocation of the 13th of October, 2010 of its private ruling made in June 2010 on the applicant's return of capital is erroneous, unlawful.

3. That an injunction is issued restraining the Respondent from making any further revocations of the said the private ruling communicated to the Applicant in June 2010.

The grounds of the application as set out in the notice of motion are that:

1. That in March 1996 the government of Uganda, being at the time the majority shareholder in Nyanza Textiles limited sold the company to Messrs. Picfare ltd, without consent of the minority shareholders.

2. The applicants were a minority shareholders sued the government of Uganda vide HC CS 431 of 2006 Gordon SENTIBA and others verses the Attorney-General for compensation for the value of the minority shares.

3. The High Court of Uganda ordered the said compensation and awarded interests.

4. The Applicants and then sought a private ruling from the Respondent that payment for the value of shares is not a taxable gain subject to income tax; that the interest awarded in the order of the High Court in HCCS 431 of 2006 was a return of capital within the meaning of section 2 (kk) and section 61 of the Income Tax Acts; and that no withholding tax was deductible from the monies under section 119 of

the Act since they were not payment for supply of any goods or services to Government.

5. In June 2010, the Respondent made a private ruling on the matter confirming all three positions and the Applicants began to pursue payment from the Public Enterprise Reform and Divestiture Unit (Privatisation Unit).

6. On 13 October, 2010 the Respondent, through the Commissioner of Domestic Taxes, purported to revoke the private ruling without any reason whatsoever and sought to deduct withholding tax from the amounts due to the Applicant under the award.

7. The Applicants maintain that the Respondent did not have the authority of law to revoke the private ruling once the same has been made.

8. The Applicants contended that in purporting to revoke the private ruling, the Commissioner exercised authority not vested in him and/or exercised his authority wrongfully and unlawfully.

9. The applicants contend that the purported revocation is unlawful and that the private ruling is made was made correctly, legally and is binding upon the respondent.

10. The applicant also contends that it is just and convenient for the declarations and injunctions to be granted on an application for judicial review.

The Respondent opposed the application and inter alia the main grounds for the opposition are contained in the affidavit in rebuttal and particularly from paragraph 5 which I quote:

"5. That the Public Enterprise Reform and Divestiture Unit (Privatisation Unit) which was meant to effect payment of United States dollars 2,770,239 and the consent and interest thereon in the amount of United States dollars 7,206,416.25 subsequently furnished the Respondent with the additional information and documents which were never brought to its attention at the time the private ruling was applied for. (Copies of these documents are attached and marked "D").

6. That upon receiving and scrutinising these documents it became apparent that there was no full and true disclosure by the Applicant of the nature of all aspects of the transaction relevant to the ruling at the time of applying for the private ruling, upon which the private ruling issued was revoked on an assessment of withholding tax on the interest raised in the amount of Uganda shillings 2,437,072,054 (a copy of the revocation and assessment is attached and collectively market "E").

7. That the private ruling that was issued could only be binding on the Respondent if full and true disclosure of all aspects of the transaction were made which was not done.

8. That the said private ruling was issued in error for the following reasons

a) the Respondent erred in holding that the interest referred to in the consent decree was a return of capital which would not be subject to tax under section 2 (kk) of the Income Tax Act yet it is a return on capital which is subject to withholding tax under section 117 of the Income Tax Act at the rate of 15 %.

b) that the capital which is in this case/was the agreed value of the shares of the minority shareholders/applicants of United States dollars

2,770,439 as per the consent decree which was meant to be paid by the Public Enterprise Reform and Divestiture Unit (Privatisation Unit) Gordon Sentiba and others and was not assessed to tax.

c) that therefore, the interest in the sum of United States dollars 7,206,416.25 paid on the agreed value of the shares was erroneously considered as a return of capital which is not taxable yet it can only be a return on the capital (shares) and therefore liable to tax.

d) the Respondent erred further by stating that the interest awarded is the compensation of capital falling within section 61 of the Income Tax Act. (the rest of the paragraph d) was severed and expunged from the record by consent of the parties)

Submissions of Counsel

Counsel for the Applicants Cephas Birungyi submitted that the application was made under the enabling laws stated in the notice of motion supported by the affidavit of Gordon Sentiba. The Application seeks judicial reliefs by way of declarations and injunction inter alia that URA has no legal authority to revoke a private ruling made by it. The remedies sought are set out in the notice of motion and affidavit in support.

Counsel submitted that the Applicants were given an award by court and conscientiously determined whether there were tax implications. They applied for a private ruling to the Commissioner Domestic Taxes of the Respondent that interest arising from a consent decree in High Court Civil Suit No. 431 of 2006 is not liable to tax. The relevant part of the application has already been set out above.

Applicant's Counsel submitted that the sale document, of divestiture docs, decision of the court and the consent decree were attached to the application.

Counsel referred to annexure “E” the application which lists the documents attached to the application namely:

- Sale the agreement of Nytil;
- Plaint of Gordon Sentiba and others
- Consent Decree
- Details of the 120 non government and minority shareholders
- Proposal for settlement based on libor plus 7.5%.

Counsel further referred to the ruling of the Commissioner for Domestic Tax dated June 14th 2010 details of which I have set out above. This is annexure “C” to the affidavit. The Respondent agreed with the applicant and ruled that there was no tax implication. However the Applicants are aggrieved by the fact that the Respondent reversed its decision in a letter dated 13/10/2010 authored by the same person (Commissioner Domestic Taxes) who made the original ruling. See annexure “E” dated 13th October 2010. Counsel submitted that this letter is addressed to the Director Privatisation Unit and copied to Commissioner General. However the letter of revocation is not addressed to the person who applied for the ruling. Counsel for the Applicant submitted that the letter purports to have analysed all additional documents in a letter dated 7th October but does not give grounds why those additional documents led to the revocation. It would be necessary to set up the wording of the letter referred to above:

“...

1. The interest payments amounting to United States dollars 7,206,416.25 payable to the minority shareholders of Nyanza textiles limited

(NYTIL) is subject to withholding tax at the rate of 15% in accordance with section 117 of the income tax act cap 340.

2. We have revoked the private ruling earlier on issued in June 2010 regarding the aspect of interest.

Please find attached an assessment for 15 per cent withholding tax amounting to Uganda shillings 2,437,073,054 shillings for your immediate payment."

The applicants then applied for and obtained an interim order of injunction restraining the Respondent from collecting this tax. Counsel submitted that this was a proper case befitting judicial review. He referred to the case of **Kasibo Joshua versus Commissioner of Customs H.C.M.A 44 of 2007** at pages 5 and 21 where Hon. Justice Geoffrey Kiryabwire agrees with Justice Kasule's holding in **John Jet Tumwebaze v Makerere University Council** that *"prerogative orders look to the control of the exercise an abuse of power by those in public offices, rather than at providing final determination of private rights which is done in normal civil suit…*" Furthermore, at page he states:

> "… Judicial review is concerned not with the decision, but the decision-making process. Essentially judicial review involves an assessment of the manner in which the decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory of the manner… not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic principles of legality, fairness and rationality…"

Counsel for the applicant submitted that the process of making this decision is material. He cited the case of **Owor Arthur and 8 others vs. Gulu University. High Court MA 18 of 2007** referring to page 8 and quoting extensively at page 9:

"the essence of judicial review jurisdiction is for this court to ensure that the machinery of justice is observed and controlled in its exercise by those inferior bodies in society that happened to be vested with the legal authority to determine questions affecting the rights of subjects. Such bodies or individuals have a duty to act judicially.

Prima facie a duty to act judicially arises in the exercise of power to deprive one of the livelihood, or legal status, or liberty, or property rights, or any legitimate interest or expectation or to impose a penalty on someone.

A judicial review jurisdiction, has, over the years, developed and expanded, so that the modern view now , is that in order to establish that the duty to act judicially applies to the performance of a particular function, it is no longer necessary to show that the function is analytically of the judicial character or involves determination of lis inter parties:… Judicial review goes to the manner in which the decision being challenged was made. Judicial review is primarily not available as a means of reviewing a decision taken on the basis of whether it is fair or reasonable: … The overriding purpose of judicial review is to ensure that the individual concerned receives fair treatment, if that lawful authority is not abused by unfair treatment. It is not for the court to take over the authority and the person entrusted to that authority, by substituting its own decision on the merits of what has to be decided. ... implicit in the concept of fair treatment are the two cardinal rules that constitute naturally justice; no one shall be a judge in one's own cause; and: no one shall be condemned unheard…"

Counsel for the Applicants invited the court to read the law under which the private ruling was applied for. This is section 161 of the Income Tax Act. He

submitted that the ruling was made after the application and the only question would have been whether there was full disclosure and whether the transaction proceeded in all material respects on the basis of the full disclosure. He submitted that all disclosures were made and the transaction proceeded as provided by law. Counsel for the applicant further submitted that not only was revocation not provided for in the law but the manner in which the revocation was done proved that the action was not taken judiciously. Counsel for the applicant strongly submitted, that the Respondent acted on the basis of information provided by a third party which is the Privatisation Unit. He referred to the letter of the Privatisation Unit annexure G. That they did not disclose that transaction to the Applicant neither did they call the Applicants to explain. IN other words the Applicants were not given a hearing before the revocation. That the Respondent had up to the time of making the submission not communicated that revocation directly to the Applicant or representatives. Counsel again referred to the holding in the case of **Owor Arthur vs. Gulu University** at page 9 as quoted above. He further referred to the case of **AON Uganda Ltd vs. URA HCCS NO. 021 of 2008** a decision of Hon Justice Lameck Mukasa where he held that all the Applicant need to establish in an application for prerogative orders is a prima facie case to sustain the grounds upon which he seeks judicial review namely whether:

a. The decision making body or official took into account matters which it ought not to have taken into account.

b. Or did not take into account matters which it ought to have taken into account.

c. Or lacked or exercised excess of jurisdiction.

d. Or arrived at a conclusion which is so unreasonable that no reasonable authority could even come to it.

e. Or rules of natural justice have been violated

f. Or illegality of procedures or decision.

He submitted that this is a situation where Uganda Revenue Authority lacked jurisdiction because it had made a ruling. If it wanted to review this ruling, it should have informed the affected party so that it would understand the grounds of the revocation and be given a hearing which it did not.

Counsel referred to the affidavit in rebuttal at paragraph 8 which in his submission gave the grounds for varying the original application. The main thrust of this submission was that the Respondent in rebuttal raised questions of interpretation but not that there were no materials for them to decide under section 161 of the Income Tax Act which required a true and full disclosure. He referred to paragraphs 8 (a) and (b). He submitted that the amount of 2.7 Million USD was already disclosed in the application for a private ruling, the Decree attached etc. There is nothing new in it. 8 (c) That the interest was erroneously considered as return capital and therefore not taxable. This is an issue of interpretation. Amount of interest was known and there is nothing new discovered. 8 (d) there was no new disclosure.

Counsel referred court to the assertion in the affidavit in rebuttal that some information was not disclosed at the time of application for a private ruling by the Applicants. With reference to annexure "D" of the rebuttal dated October 7 2010 and further annexure "D" dated 7th November 2006. That these two documents were not included by the Applicants in their application because "D" was between a 3rd party and URA. It had docs which were part of the application. Court documents were not disclosed because they are known and judicial notice can be taken of judgments. Letter from Ms Byenkya Kihika and Co. Advocates dated 29th Sep 2010 also refers. It is a letter after the application and ruling delivered on the 14th of June 2010 it could not have

been part of the disclosed matters for the application which came prior in time. With reference to annexure "D" computation of amount due, the Applicants do not have the computation, if they were there, they would not affect the principle, because the principle is whether the item is taxable or not. Concerning the letter of the AG dated 24th Nov 2006, counsel submitted that it was not part of the record. Furthermore the report on the legal status of the company is not attached to the rebuttal affidavit and in counsels submission is irrelevant.

Counsel for the Applicant further submitted that the Letter 7th of November 2006 has some material issues for this case. Firstly it is a 2006 letter before the private ruling was made. The letter cites two cases namely JK Patel vs. Spear Motors and the other is that of Lake Victoria Bottling Company. He prayed that the court notes that the awards given in those cases were not taxed. That Nile Bank and Orient Bank were not taxed. I disallowed this submission on whether these other companies were taxed or not because it was not properly put in evidence and was a submission from the bar. I would not take it into account in arriving at a decision in this case. Evidence should be properly adduced in court for judicial consideration.

Last but not least Counsel for the Applicant submitted that the relevant letter is quoting an expert on valuation and is an opinion of how compensation should be arrived at. However the opinion is not attached and the letter should therefore be disregarded on that account. It was an incomplete document so to speak.

Counsel concluded that no reasons were given either to the Applicants or to the third party (PU) for revocation of the ruling. That the affidavit of the Respondent did not have new information to vary the private ruling of 14th June 2010 under section 161 of the Income Tax Act. Counsel prayed for

declarations that the revocation of the private ruling was illegal and reiterated his prayers as set out in the Notice of Motion with costs.

Kazibwe Moses Kawumi submitted for the Respondent. He asserted that the application seeks two declarations. However counsel for the applicant submitted on many things including procedure, how it was not served on his client and all of which were not pleaded. He submitted that the application is not questioning the procedure but the result. He prayed that whatever was submitted outside the affidavit of the Applicant should be disregarded and expunged from the record. He contended that the Respondent rightly revoked the ruling made and its interpretation after revocation is the correct interpretation of the transaction which the Applicants sought a private ruling on. He agreed that the provision under the Income Tax Act (ITA) section 161 does not provide for how to revoke a private ruling. It however provides for full and true disclosure of the nature of the transaction that a ruling is sought on. Counsel for the Respondent referred to paragraphs 4 and 5 of the affidavit in rebuttal for the assertion that the Respondent only gained full information from documents obtained from PERD/PU

Counsel for the Respondent criticised the Applicants for vaguely talking about payment in the application for a private ruling *but not how payment arose*. Referring to the last paragraph interest is mentioned but there is no elaboration of how this interest arose. In the decree annexure "B" to reply, Counsel submitted that interest is not qualified. That it was only after URA had made the earlier ruling which it later revoked that information was obtained from PERD which characterised the interest payment in the decree. Counsel asked court to examine annexure "D" to the affidavit in rebuttal being letter from Byenkya Kihika and Co Advocates 7th Nov 2006, particularly page 4 paragraphs 2. (2) (i). It was after obtaining this document that there was a

basis for the consent decree. The Respondent has now appreciated what this interest entailed and it is a return on investment and is taxable.

Page 4 paragraph 2 and (i) reads as follows:

> "in addition to the basic payment of United States dollars 3,000,000, we claim interest of 25% per annum from the date of the divestiture till payment in full. This claim is based on the following considerations:
>
> (I) the nationalization in 1973 effectively deprived non government shareholders of any return on their investment between 1973 and 1996. This massive loss of value to shareholders needs to be factored into the interest rate and period of payment."

Counsel for the Respondent submitted that the Respondent rightly revoked the private ruling on that ground. Secondly counsel submitted that the common law is that estoppels cannot be raised to fetter a statutory function: Counsel referred to paragraphs 11 to 13 of the affidavit in rebuttal.

11. "that I agree with the Applicant's assertions in paragraph 11 to the extent that the Commissioner exercised this power wrongly and unlawfully since the issuance of the erroneous ruling tantamount to denying government taxes which would be collected within the law.

12. That the said ruling has the effect of amending the Income Tax Act, which powers are not vested in the Commissioner.

13. that by confirming the said ruling, this Honourable Court will be sanctioning an illegality which court should not be seen to condone."

Counsel submitted that when the Respondent realised this error that is when it revoked the private ruling. Furthermore, counsel submitted that the ruling was erroneous and much as it is a binding ruling, as long it fetters the collection functions within the Act, and has an effect of amending the Act; it is an illegal ruling and has to be revoked. Counsel referred court to the case of KM Enterprises Ltd vs. URA for the assertion that an illegal contract cannot be enforced by court. Neither can an agreement between URA officials and a private person override the statutory scheme for collection of taxes. See also Court of Appeal CA 64 of 2008, Golden leafs and hotels and Resorts Ltd vs. URA pages 20 and 21 and 22. Paragraphs 15 on p 20. Para 10 page 21, paragraph 5 page 22. For the assertion that there are no estoppels against a statutory provision. Counsel further referred to 4th edition Halsbury's laws of England volume 44 (1) Para 1366 on estoppels. "Estoppels cannot operate to prevent or hinder the performance of a positive statutory duty, or the exercise of the statutory discretion which is intended to be performed and exercised for the benefit of the public or the section of the public."

In response to the second declaration sought by the Applicant with reference to the revocation leads to a wrong interpretation of the interest payment to the Applicant. The declaration sought is:" That a declaration is issued that the Respondent's alleged revocation of the 13th of October, 2010 of its private ruling made in June 2010 on the applicant's return of capital is erroneous, unlawful". He submitted that This was a two part payment. The Respondent states that there is a payment of the value of shares which was not assessed for taxation. This is a return of capital. Paragraph 8 (a) and (b) of the affidavit in reply refers. The second part of the payment which is the interest part see letter of Kihika page 2, 2) i) is that part that is assessed to tax. In other words it is the profits that the applicant would have got from 1973 – 1996. See

section 117 (1) ITA. What we are claiming is that amount still held by PERD. The rest of the sections do not apply here.

Counsel submitted that the applicant made mention of the case of JK Patel and Lake Vic Bottling that they were not subjected to the same tax as applicant. The Applicant's case is however set out in the application. He is not claiming selective application of the Income Tax Act. Even if these two companies were not taxed, two wrongs would not make a right and this court cannot on that basis be seen to condone an illegality brought to its attention. Anything done under the erroneous ruling would be illegal. Finally counsel prayed that the application is dismissed for want of merit with costs and that whatever sum of money held by PERD should be paid to the Respondent as tax demanded.

Applicant's advocate in rejoinder submitted that:

Affidavits and the Notice of Motion do not highlight some points. He stated that not everything submitted should be in the affidavit. Court has power to evaluate evidence. Learned counsel referred to paragraphs 4 and 5 of their rebuttal affidavit. About the assertion that the applicant vaguely talked about payment and not how it arose or that they mentioned interest and not how it arose, this is factually incorrect. The decree in issue and attachments clearly showed all this. The purpose of empowering a Commissioner to make a ruling is that the person is competent and can ask for further information where necessary. The same person cannot seek information which was available to him and later challenge a statutory provision which binds him. He submitted that counsel referred to annex D" Para 2.1 pages 4 of Byenkya's letter on what he asserted was a new finding because of the words "any return on their investment". "Massive loss of value" in stated in the document is not about interest but capital. The entire paragraph should be considered as a whole and not in isolation. Further submitted that the Applicants did not have the

Attorney General's reply to this letter. How can one conclude that this was the basis of the consent decree?

Concerning estoppels, Counsel for the Applicant contended that when you using a statute one cannot rely on estoppels. Estoppels is a common law plea. Where there is a statute you cannot go to common law. Counsel submitted that the two cases one of KM and Gold leaf are about illegality. You cannot have estoppels when there is an illegality.

He contended that there was nothing illegal in the applicant's case. Illegality would mean that the applicant gave false information or deliberately gave erroneous information or did not disclose any information. The test of full disclosure cannot be invoked in this case. It's only that the person who made the decision misconstrued the law. Once you have made ruling you cannot revoke.

Counsel submitted that section 117 of the ITA merely charges tax and refers to interest paid by a resident to another resident. He invited court to consider section 2 (kk) the **issue is the difference between return of capital and interest on capital. Section (kk) defined interest inter alia as "any payment, including a discount or premium, made under a debt obligation which is not a return of capital;" According to him a return on capital would be something like a dividend on shares or interest on a fixed deposit account.**

With reference to section 61 and of the ITA provides: "a compensation payment derived by a person takes the character of the item that is compensated." On this section the payment for the shares was compensation for the capital. Counsel further submitted that if there was an illegality it would be on the part of the Respondents and not the Applicant.

On the issue raised in the affidavit in rebuttal Counsel referred to the case of **R vs. Income Tax Commissioners WLR 1 1990 page 1575**. The suggestion that a huge amount of tax would be lost is not tenable or "relevant" to be taken into account by the court.

I have carefully considered the submissions of both counsel and the authorities cited and supplied. I thank both counsels for their able representations to court. The crux of the dispute would be determined on the basis of firstly:

- Whether there are grounds for judicial review of the decision revoking the private ruling of the Respondent of 14th June 2010. Counsel for the Respondent submitted that the Applicants concern is not with procedural fairness or legality but with the result. I.e. with the legality of the revocation of the private ruling. However It is my judgment that if there is any procedural unfairness tending to prejudice the Applicants rights, the impugned decision can be challenged. This is because procedural fairness and justice is part of the aspect of "fair and just treatment" enshrined as a fundamental right or freedom under article 42 of the Constitution of the Republic of Uganda. Failure to treat someone fairly and justly can be a ground for nullity of a decision on its own. On this issue the court will also have to determine whether there is an illegality brought to the attention of court so as to justify overlooking any issue of procedural unfairness. The second basis for judicial review would be whether this court can look at the merits of the decision on the questions:

- Whether the Commissioner for Domestic Taxes had power to revoke his own private ruling under section 161 of the Income Tax Act.

- Whether the court should look into the merits of the legality or illegality of the interpretative question of whether the amount assessed on the basis of the interest in the decree is a taxable income under the definitions in section 2 (kk), 61, and 117 of the Income Tax Act.

However before we delve into the above issues it is necessary to examine the scope of the rule 3 (2) of the Judicature (Judicial Review) Rules 2009. Does it empower courts to make declarations on the merits of the decision in a judicial review application?

Rules 3 (2) of the Judicature (Judicial Review Rules) 2009 provides:

"…

(2) An application for a declaration or an injunction (not being an injunction mentioned in sub rule (1) (b) may be made by way of application for judicial review, and on such an application, the high court may grant the declaration or injunction claim if it considers that, having regard to –

a. The nature of the matter in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari;

b. The nature of the persons and bodies against whom relief may be granted by way of such an order; and

c. All the circumstances of the case,

It will be just and convenient for the declaration or injunction to be granted on an application for judicial review."

There are two modes for invoking the jurisdiction of the court for declaratory orders and judgments. These are order 2 rule 9 of the Civil Procedure Rules and the above cited provisions of the Judicature (Judicial Review) Rules 2009. One method is by ordinary plaint or any originating action or motion and another though an application for judicial Review. I have not had much assistance from Counsel in terms of judicial precedents on declaratory judgments on an application for judicial review. What tests should be applied to determine which cases are appropriate for the exercise of the discretion of the High Court to make declarations?

The traditional grounds for an application for certiorari, mandamus and prohibition are well trod. In the case of **Kasibo Joshua versus Commissioner of Customs Uganda Revenue Authority High court MA 44 of 2007** Hon. Justice Kiryabwire quoting from previous precedents echoed these traditional grounds:

> "prerogative orders look to the control of the exercise an abuse of power by those in public offices, rather than at providing final determination of private rights which is done in a normal civil suit…"

Furthermore, at page 21 of the judgment he states:

> "… Judicial review is concerned not with the decision, but the decision-making process. Essentially judicial review involves an assessment of the manner in which the decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory manner… not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic principles of legality, fairness and rationality…"

The above authorities do not directly deal with the circumstances under which an application for declaration or injunction under the Judicature (Judicial Review) Rules of the court may be made.

Hon. Justice Kasule in **Owor Arthur and 8 others vs. Gulu University, MA 18 of 2007** stated at page 9 of his judgment that:

> "the essence of judicial review jurisdiction is for this court to ensure that the machinery of justice is observed and controlled in its exercise by those inferior bodies in society that happened to be vested with the legal authority to determine questions affecting the rights of subjects. Such bodies or individuals have a duty to act judicially.
>
> Prima facie a duty to act judicially arises in the exercise of power to deprive one of the livelihood, or legal status, or liberty, or property rights, or any legitimate interest or expectation or to impose a penalty on someone.
>
> A judicial review jurisdiction, has, over the years, developed and expanded, so that the modern view now , is that in order to establish that the duty to act judicially applies to the performance of a particular function, it is no longer necessary to show that the function is analytically of the judicial character or involves determination of lis inter parties:… Judicial review goes to the manner in which the decision being challenged was made. Judicial review is primarily not available as a means of reviewing a decision taken on the basis of whether it is fair or reasonable: … The overriding purpose of judicial review is to ensure that the individual concerned receives fair treatment, if that lawful authority is not abused by unfair treatment. It is not for the court to take over the authority and the person entrusted to that authority, by substituting its own decision on the merits of what has to be decided. ... implicit in the concept of fair

treatment are the two cardinal rules that constitute natural justice; no one shall be a judge in one's own cause; and: no one shall be condemned unheard…"

Last but not least I was referred to the case of **AON Uganda Ltd vs. URA HCCS NO. 021 of 2008** a decision of Hon. Justice Lameck Mukasa where he held that the applicant only have to establish a Prima facie case to sustain the grounds upon which he seeks judicial review that is whether:

- The tribunal or body took into account matters which it ought not to have taken into account.
- That the decision making authority did not take into account matters which it ought to have taken into account;
- That it lacked or exercised excess of jurisdiction.
- That it arrived at a conclusion which is so unreasonable that no reasonable authority could even come to it.
- That rules of natural justice have been violated
- Or the illegality of procedures or decision.

The authorities suggest that the court should not look into the merits of the decision. Yet when you examine the declarations sought it engages the court into deciding whether the decision made by the Respondent was null and void on the merits. The Applicant does not seek an order to quash the decision. The nature of declaratory judgments is well known. Under order 2 rule 9 CPR

"No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought by the suit, and the court may make binding

declarations of right whether any consequential relief is or could be claimed or not."

A suit may be filed merely to obtain a declaratory judgment whether a consequential relief is claimed in it or not. This statutory provision/rule was interpreted in the case of **Ellis vs. Duke of Bedford (1899) 1 Ch 494 by Lindley MR at pages 514-515**. As may be noted Order 25 rule 5 which was being interpreted in this case is in ***pari materia*** with the Ugandan order 2 rule 9 of the CPR. Lindley M.R. interpreted the provision at pages 514 – 515 as follows:

"Moreover now, under the judicature act, actions can be brought merely to declare rights, and this is an innovation of a very important kind. I am referring to Order XXV rule 5 which says "No *action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."* Having regard to that rule, it appears to me impossible now to say that one grower could not maintain such an action as this, on behalf himself and all other growers of fruit and vegetables, to assert preferential rights to which he says the whole class of growers are entitled."

The rule has been held to confer a right to file an action whether consequential relief could be obtained or not. In fact it has been held that there was no restriction in the rule as to whether the plaintiff had a cause of action or not. This was in the case of **Guaranty Trust Company of New York versus Hannay and Company Limited. [1915] 2 KB 536 at page 562 Pickford LJ** held:

"The next contention is that, even if there is no necessity for a cause of action, the declaration can only be made at the instance of the person

claiming the right and intending to assert it if it should become necessary. I can find no such limitation in the words of the rule, and I can see no reason why it should be imposed if it is once established that a declaration can be made where no consequential relief can be given. … *I think the effect of the rule is to give general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration.* It does not extend to enable a stranger to the transaction to go and ask the court to express an opinion in order to help him in other transactions.

Bankes L.J. at page 572 agreed and held that the rule was meant to assist suitors whether they have a legal cause of action or not and must be given as liberal a construction as possible. He explored the effect of this rule:

> "In every action there must be a plaintiff who is the person seeking relief (Judicature Statute Act, 1873, s. 100), or to use the language of order XVI, r. 1, a person in whom a right of relief is alleged to exists, whose application to the Court is not to be defeated because he applies merely a judgment or order, and whose application for declaration of his right is not to be refused merely because, he cannot establish a legal cause of action. It is essential, however, that a person who seeks to take advantage of the rule must be claiming relief. What is meant by this word relief? When once it is established, as I think it is established, that a relief is not confined to a relief in respect of a cause of action it seems to follow that the word itself must be given its fullest meaning. There, is, however one limitation which must always be attached to it, that is to say, the relief claimed must not be something unlawful or unconstitutional or inequitable for the court to grant or contrary to the accepted principles upon which the exercises jurisdiction. Subject to this limitation, I see nothing to fetter the

discretion of the Court in exercising a jurisdiction under the rule to grant relief, and having regard to the general business convenience and the importance of adapting the machinery of the Courts to the needs of suitors I think the rule should receive as liberal a construction as possible."

The rule is generally explained in Halsbury's laws of England 3rd edition volume 22 at paragraph 1610 pages 746 – 747. "It is however sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the rights of a party without reference to their enforcement. Such merely declaratory judgments may now be given and the court is authorised to make binding declarations of right whether any consequential relief is or could be claimed or not …"

The declaratory judgment under order 2 rule 9 of the CPR is however different procedurally from that sought in an application for judicial review. The distinction is set out in the House of Lords case of **O'Reilly v Mackman and others and other cases [1982] 3 All ER 1124**

In England leave to apply for declarations and injunction in an application for judicial review is a requirement. This is not the case in Uganda anymore. The application for leave used to be made ex parte supported by a statement setting out the grounds on which the relief was sought and affidavits verifying the facts. It can be seen from the House of Lords case cited above that in England a rule for declaration and injunction which is in *pari materia* with the procedure under the Judicature (Judicial Review) Rules 2009 section 3 (2) thereof (English order 53 of 1977 preserved the application for leave).

The application for leave is seen as a safeguard. According to Lord Diplock at page 1132 of the judgment,

> "...public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision. In contrast, allegations made in a statement of claim or an endorsement of an originating summons are not on oath, so the requirement of a prior application for leave to be supported by full and candid affidavits verifying the facts relied on is an important safeguard against groundless or unmeritorious claims that a particular decision is a nullity. There was also power in the court on granting leave to impose terms as to costs or security..."

Secondly their Lordships noted that the English order 53 upon grant of leave provided a very speedy means, available in urgent cases within a matter of days rather than months, for determining whether a disputed decision was valid in law or not. Moreover leave to apply for judicial review had a limitation period of six months. In Uganda it is 3 months.

The Lordships in the **O'Reilley case** cited above noted at pages 1133 – 1134 the differences between a suit for declaration under the Civil Procedure Rules equivalent of our order 2 rule 9 and that under rule 3 (2) of the Judicature (Judicial Review) Rules, 2009.

> "...Finally r 1 of the new Ord 53 enables an application for a declaration or an injunction to be included in an application for judicial review. This was not previously the case; only prerogative orders could be obtained in proceedings under Ord 53. Declarations or injunctions were obtainable only in actions begun by writ or originating summons. So a person seeking to challenge a decision had

to make a choice of the remedy that he sought at the outset of the proceedings, although when the matter was examined more closely in the course of the proceedings it might appear that he was not entitled to that remedy but would have been entitled to some other remedy available only in the other kind of proceeding.

This reform may have lost some of its importance since there have come to be realised that the full consequences of Anisminic, in introducing the concept that if a statutory decision-making authority asks itself the wrong question it acts without jurisdiction, have been virtually to abolish the distinction between errors within jurisdiction that rendered voidable a decision that remained valid until quashed, and errors that went to jurisdiction and rendered a decision void ab initio provided that its validity was challenged timeously in the High Court by an appropriate procedure. Failing such challenge within the applicable time limit, public policy, expressed in the maxim *omnia praesumuntur rite esse acta*, requires that after the expiry of the time limit it should be given all the effects in law of a valid decision.

Nevertheless, there may still be cases where it turns out in the course of proceedings to challenge a decision of a statutory authority that a declaration of rights rather than certiorari is the appropriate remedy. The Pyx Granite case [1959] 3 All ER 1, [1960] AC 260 provides an example of such a case.

So Ord 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of

what has emerged on the hearing of the application, can be granted to him. If what should emerge is that his complaint is not of an infringement of any of his rights that are entitled to protection in public law, but may be an infringement of his rights in private law and thus not a proper subject for judicial review, the court has power under r 9(5), instead of refusing the application, to order the proceedings to continue as if they had begun by writ. There is no such converse power under the Rules of the Supreme Court to permit an action begun by writ to continue as if it were an application for judicial review; and I respectfully disagree with that part of the judgment of Lord Denning MR in the instant case which suggests that such a power may exist; nor do I see the need to amend the rules in order to create one.

My Lords, at the outset of this speech, I drew attention to the fact that the remedy by way of declaration of nullity of the decisions of the board was discretionary: as are all the remedies available on judicial review. Counsel for the appellants accordingly conceded that the fact that by adopting the procedure of an action begun by writ or by originating summons instead of an application for judicial review under Ord 53 (from which there have now been removed all those disadvantages to applicants that had previously led the courts to countenance actions for declarations and injunctions as an alternative procedure for obtaining a remedy for infringement of the rights of the individual that are entitled to protection in public law only) the appellants had thereby been able to evade those protections against groundless, unmeritorious or tardy harassment that were afforded to statutory tribunals or decision-making public authorities by Ord 53, and which might have resulted in the summary, and would in any event have resulted in the speedy, disposition of the application, is

among the matters fit to be taken into consideration by the judge in deciding whether to exercise his discretion by refusing to grant a declaration; but, it was contended, this he may only do at the conclusion of the trial..."

The important distinction with the Ugandan situation is that no leave is required to apply for declaration and injunction as in the English case when applying for judicial review. This is in part due to the imperative nature of article 42 of the Ugandan Constitution. Article 42 provides that:

"Any person appearing before an administrative official or body has a right to be treated fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her."

The right to apply to a court of law necessitates the doing away with the procedure to apply for the leave of court which previously gave the judge the prerogative of accepting or refusing the application for leave to apply for judicial review. Secondly, the rule does not bar an applicant from seeking a declaration per se without certiorari to quash the decision. A decision made without jurisdiction may be declared null and void ab initio. However, as noted above this jurisdiction should only be exercised in meritorious cause after taking into account the matters set out in rule 3 (2) of the Judicature (Judicial Review) Rules 2009 namely:

a. The nature of the matter in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari;

b. The nature of the persons and bodies against whom relief may be granted by way of such an order; and

c. All the circumstances of the case,

The Applicant seeks an assessment of both procedural fairness and declarations of nullity of the decision. The Applicant has not sought an order to quash the decision and thereby have the authority reconsider the matter. This can force the court to decided a matter that primarily and originally belongs to the Tax Appeals tribunal. The current application for judicial review was made without delay. I am however persuaded that that the High Court has jurisdiction to exercise its discretion as to whether to grant the declaratory orders sought in this application particularly on matters of breach of fundamental principles of justice going to jurisdiction.

It is not disputed that the Applicants applied for a private ruling under section 161 on in a letter dated 2nd June 2010 under section 161 of the Income Tax Act. Section 161 provides that:

> "(1) The Commissioner may, upon application in writing by the taxpayer, issue to the tax payer a private ruling setting out the Commissioners position regarding the application of this Act to a transaction proposed or entered into by the taxpayer.
>
> (2)Where the taxpayer has made a full and true disclosure of the nature of all aspects of the transactions relevant to the ruling and the transaction has proceeded in all material aspects as described in the taxpayers application for the ruling, the ruling shall be binding on the Commissioner with respect to the application for the transaction of the law as it stood at the time the ruling was issued."

The key words are "the Commissioners position" with regard to the application of the act to a transaction. This ruling was conveyed to the Applicants in a letter dated 14th June 2010 stating that from the disclosures made, the interest is a compensation of capital under section 61 and not liable to income Tax. The Respondent has since held and submitted that this is an

illegal ruling as the transaction defined in the letter of Messrs Byenkya Kihika to the Attorney General Dated 7th November 2006 page 4 item 2 (2) (i) talks about the basis of the interest in the decree as "massive loss of value to shareholder needs to be factored into the interest rate and period of payment". The problem is that when the Respondent in its letter dated 13th October 2010 addressed to the Privatization Unit demanded for tax of Uganda Shillings 2,437,073,054/- assessed on the basis of interest arising from the decree of the High court from the Privatisation Unit. This was money due to be paid to the Applicants. The Respondent had by this time revoked the private ruling without notice to or hearing of the Applicants.

The fact that the letter of revocation was not communicated to the Applicants is not disputed. Furthermore it is a proven fact that the Applicants were not given a hearing at all when this matters was decided by the Respondent and the private tax ruling revoked. It is a cardinal rule of procedural fairness and justice that no party shall be condemned unheard. The case of **Owor Arthur and 8 others vs. Gulu University. MA 18 of 2007** refers. On this question alone I find that the right of the Applicants to be treated justly and fairly as enshrined in article 42 of the Constitution of the Republic of Uganda has been infringed. Uganda Revenue Authority as a public Institution is enjoined by article 20 (2) of the Constitution to respect, uphold and promote fundamental rights and freedoms. It is not mere courtesy that a party to a ruling on a pertinent question affecting their tax liability which ruling involves colossal sums of money is at the very least entitled to be heard on the question as to why their liability which had avoided over 2 billion Uganda shillings in the Respondents ruling should be revisited on them. Such a liability should not be imposed without a hearing of the affected persons. Especially since they had been given a favourable ruling showing that the item in question is not taxable. Moreover it is the same person who delivered the private ruling who

purports to revoke the same. Failure in the circumstances to afford a hearing goes to jurisdiction. However there are some other matters as to whether the private decision can be revisited by the same person that needs to be considered.

Counsel Kazibwe prays that this court ignores this procedural irregularity and unfairness and adopt his submission that the private ruling was wrong and illegal. In my opinion the question as to whether the "massive loss of value to shareholder needs to be factored into the interest rate and period of payment" which deals with a period from 1977 – 1996 as cited by Counsel for the Respondent and as forming the basis of the interest in the decree and therefore taxable is not obvious. It was the Commissioner's opinion as stipulated under section 161 that interest in question was compensatory. Compensation under section 61 of the Income Tax Act takes the nature of the capital which is to be compensated. Interest can be compensatory to deal with factors like inflation, devaluation of currency etc. One cannot on the face of it decided that interest was a profit. This matter needs a full hearing before it is decided. Moreover there is no satisfactory evidence led to prove that the letter of Messrs Byenkya Kihika and Company Advocates dated 7th of November 2006 formed the basis for the interest on the decreed amount. The interest of 18% per annum is from 21st March 1996 till payment in full. The letter applying for a private ruling by Messrs Birungyi, Barata & Associates dated 2nd of June paragraph (b) thereof applied for a private ruling on the "interest referred to in the consent " as to whether it is a return of capital within the meaning of section 2 (kk) of the Income Tax Act. From my reading the interest in question in the private ruling is that on the decreed amount. If interest is chargeable under section 117 of the Income Tax Act, the Commissioner cannot say that he did not have the information at the time of the ruling. The rate of interest and the amount of interest is stipulated in the documents referred to in the ruling. The parties

should not be permitted to go behind the consent decree. What is taxed is spelt out in the consent decree. However if the Respondent disputes the position of the Commissioner it should have first given a hearing to the tax payer. Section 161 of the ITA provides that the ruling is binding on the Commissioner. How will he revoke it if it is binding?

Counsel for the Respondent submitted that the Commissioner is not barred by the doctrine of estoppels. However the cases he referred to are distinguishable. The Case of **KM Enterprises Ltd and 2 Others vs. URA High Court Civil Suit No. 0599 of 2001** dealt with agreement between a tax payer and the Respondents officials. The Court found that neither the taxpayer nor the Respondents officials had authority to enter into such an agreement. In this case a private ruling is authorised by section 161 of the Income Tax Act. Where full disclosure is made, section 161 stipulates the private ruling is binding. What is material is whether there was full disclosure. There is no evidence that the Commissioner for Domestic taxes did not have all the materials. Moreover the law does not make it clear that the opinion may not be wrong. What happens if the opinion is wrong? In my view, it cannot just be revoked. The tax payer who invoked section 161 should be heard. However I have not decided the question as to whether the commissioner is functus officio after making the ruling.

As noted the amounts being paid were amounts in the decree and the documents thereof are court documents within the knowledge of the Commissioner for Domestic Taxes. Counsel also refers the case of **Regina vs. Inland Revenue Commissioners ex parte M.F.K Underwriting Agents Ltd [1990] 1 WLR 1545** in the case revenue authority gave advise which was held not to be binding. At page 1574 paragraph H court held that “the revenue is not bound to give any guidance at all. If however the taxpayer approaches the Revenue with clear and precise proposals about the future conduct of his fiscal

affairs and received unequivocal statements about how they will be treated for tax purposes if implemented, the revenue should not in my judgment be subject to judicial review on grounds of unfair abuse of power if it peremptorily decides that it will not be bound by such statements when the tax payer has relied on them. This authority is distinguishable from section 161 of the income Tax act. Section 161 firstly provides for a ruling on a particular transaction. Secondly it provides for a full disclosure pursuant to which the decision is binding. Moreover the court held that where the tax payer was frank, about his disclosures, the decision of the revenue as reneges from their original position can be subject to judicial review.

The question of procedural fairness also engages another important point. Where the Applicants are heard, they have an opportunity to appeal to the Tax Appeal tribunal under section 100 of the Income Tax Act should the Commissioner assess income tax on interest which in principle they hold is not taxable. The matter would then go to a specialised Tribunal to determine. This is a procedural question not on merits. Therefore if the Commissioner was wrong and had given a hearing, the tax payer would have the statutory right to appeal on the merits. It is not sufficient to say that the ruling was illegal. The ruling was made under a statutory provision. I was not addressed on the jurisdiction of the Commissioner Domestic taxes to make a ruling under section 161 of the income Tax Act. Both parties assumed that he has jurisdiction and I leave it at that.

- Whether the Commissioner for Domestic Taxes had power to revoke his own private ruling under section 161 of the Income Tax Act.

Section 161 does not have any provision for revocation. It merely states that a private ruling shall be binding and shall have priority over a practice note issued to tax payers and officers of URA under section 160 (1) of the Income

Tax Act. (Section 161 (3) refers) To my mind the ruling is binding on the commissioner. I have noted that under the Income Tax Act, "Commissioner" means the Commissioner General Appointed under the Uganda Revenue Authority Act. (section 2 (m) ITA refers) Because the ruling is binding the Commissioner is functus officio and the matter should be referred to a higher tribunal.

Stroud's Judicial Dictionary fifth edition volume 2 at page 1064 defines the doctrine of functus officio as follows: "*(2) Where a judge has made an order for a stay of execution which has been passed and entered, he is* ***functus officio****, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay (re V.G.M, Holdings Limited [1941] 3 ALL. E.R. 417) (3) An arbitrator or umpire who has made his award is* ***functus officio****, and could not by common law alter it in any way whatsoever; he could not even correct an obvious clerical mistake…"*

Re VGM Holdings Ltd [1941] 2 ALL E.R. 417, It was held that where a judge has made an order for a stay of execution which has been passed and entered, he is *functus officio*, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal. The editorial note in the case is that it is well-settled rule of practice that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is *functus officio*, and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction. The applicant who was the respondent applied for variation of the terms of a stay of execution. Morton J at page 418:

> "I think that it would be a strange position if a judge were at liberty to reconsider his decision and grant a stay of execution after he had made an order refusing it. I think that, when a judge has made an order such as that in the present case, the only remedy for the respondent, if he is dissatisfied with the order, is to go to the Court of Appeal, which in this case he did not do. In my view, neither Bennett J, if he were sitting to-day, nor myself has jurisdiction to make the order asked for, but, assuming that I have jurisdiction, I should not feel justified, on the facts as now presented to me, in making the order asked for."

In the case of in Re: **An Application by Hirji Transport Service [1961] E.A. 88**, the Applicant applied for an obtained a licence from the Transport Licensing Authority. A company appeared at the hearing as an objector and then appealed to the Transport Licensing Appeal Tribunal against the decision of the licensing authority granting the licence. On the day fixed for hearing of the appeal counsel for the appellant company sought an adjournment which was refused and the appeal was summarily dismissed. The appeals tribunal later restored the appeal and allowed. The applicant applied for a writ of certiorari to quash the decision of the appeals tribunal on the ground that they acted without jurisdiction and it was held that the Transport Appeals Tribunal has no jurisdiction to restore an appeal it had previously dismissed. At page 90 Biron Ag. J held:

> "On the face of the record, the appeal tribunal in restoring the appeal, appear to have acted without jurisdiction, as it will not, I think, be disputed that once the appeal tribunal has properly dismissed an appeal, it has no power to restore it, and on the face of the record there

would appear to have been an appearance by the appellant company when the appeal was dismissed.

In the circumstances I consider that the applicant firm has made out a prima facie case for the issue of a writ of certiorari to remove into this court and quash the order of the appeal tribunal made on August 2, restoring the appeal it had dismissed."

In conclusion the correct course should have been to refer the matter to the Tax Appeals tribunal rather than have the same person who makes the private ruling purport to revoke the same. The lacunae in the law are that there is no specific provision allowing the Uganda Revenue Authority to appeal to the Tax Appeals tribunal. The authorities cited above give the principle that in the absence of an enabling statute once an authority exercising judicial or quasi judicial functions such as an arbitrator decided a matter, the authority becomes functus officio and cannot revisit that decision again. Any person aggrieved with the decision of the authority can only appeal to a higher tribunal to reverse, set aside or vary the decision. Last but not least the issue of whether illegality can be raised or not is not determined by the doctrine of estoppels. The Applicants have not relied on estoppels but assert that the Commissioner lacked jurisdiction to revoke the private ruling. This is because the statutory provision itself provides that the decision is binding. On this basis the matter should have been sent to a higher tribunal by the Respondent to reverse or test the legality of the Commissioners private ruling.

- Whether the court should look into the merits of the legality or illegality of the interpretative question of whether the amount assessed on the basis of the interest in the decree is a taxable income under the definitions in section 2 (kk), 61, and 117 of the Income Tax Act.

In view of my conclusion that the parties should have been given a chance to challenge the revocation before it was made, I need not consider the last issue as it will be premature. The jurisdiction to grant declarations and injunctions under rule 3 (2) of the Judicature (Judicial Review) Rules is a discretionary power. I am not satisfied that all the relevant elements for exercise of courts discretionary power to make declarations are present in both declarations sought. Considering that the Respondent is duty bound to assess all taxes in the interest of the public and it has a public duty in that regard I will confine myself at this stage to the issue of procedural fairness. I find that the right of the Applicants to be treated justly and fairly under article 42 of the Constitution and their right to be heard has been violated. They were in the very least entitled to be heard after delivery of the private ruling avoiding over 2 billion in taxes. The private ruling could not be revoked unilaterally and arbitrarily. I decline to find whether there were any grounds for revocation had the basic principles of natural justice been followed. In the result the following orders issue:

1. A declaration is issued that the Respondents alleged revocation of the 13th of October, 2010 of its private ruling made in June 2010 on the applicant's return of capital is erroneous, unlawful and of no legal effect.

2. The issue as to whether the interest in issue is taxable or not is not the proper subject for the exercise of the courts discretion to make a declaration at this stage.

3. An injunction is issued restraining the Respondent, its servants or agents from enforcing only the Respondents decision embodied in its letter dated 13th of October 2010.

4. The Applicant is awarded costs of this application.

Christopher Madrama

JUDGE

Date: 29th October 2010.

Ruling delivered in the presence of Cephas Birungyi Counsel for the Applicant, Mr. Mathew Mugabi and Moses Kazibwe Kawumi Counsel for the Respondents.

Patricia Akanyo Court clerk

Signed

Christopher Madrama

Judge