THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

HCT - 00 - CC - CA - 18 – 2010

CRANE BANK …….
APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY ……..
RESPONDENT

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T

This is an appeal from the ruling and award of the Tax Appeals Tribunal (hereinafter referred to as "TAT") delivered on the 16th day of July 2010. The matter before the TAT arose from an assessment of tax on interest on agricultural loans which the applicant considered to be exempt from tax under the Income Tax Act Cap 340 (herein after referred to as the "ITA"). The brief background to the dispute is that the respondent audited the applicant for the period of 2005 to 2006 for corporation tax, Pay As You Earn (hereinafter referred to as "PAYE") and withholding tax and raised an assessment against the appellant for the sum of Ushs. 399,684,725/= (three million nine hundred and ninety thousand six hundred eighty four thousand seven twenty five only) on the 31st December 2007.

The appellant in 2008 objected to the manner of treatment by the respondent of interest on agricultural loans, and the respondent made an objection decision confirming their decision that interest on loans extended to

companies in the business of processing and exporting fish, and coffee was not exempt from tax under the provisions of S. 21(1) (u) of the ITA. The appellants then appealed to TAT against the objection decision of the respondent and TAT ruled against the current appellant and found that the exemption created under S. 21(1) (u) of the ITA only covers the interest on loans granted to persons engaged in actual growing of crops and fish, bee keeping, animal and poultry husbandry or similar operations but not interest on loans to persons who process and export fish and coffee hence this further appeals to the High Court to set aside the said assessment.

The grounds of this appeal as set out in the memorandum of appeal are as follows;

1. The tribunal erred in law when it failed to evaluate the evidence thereby coming to a wrong conclusion that the question of retrospective application could not arise.

2. The tribunal erred in law when it held that the exemption created under S. 21(1) (u) of the Income Tax Act does not include processing and exporting of coffee and fish.

3. The tribunal erred in law when it failed to evaluate the evidence thereby coming to the conclusion that the Bank of Uganda guidelines to financial institutions for the treatment of agricultural loans were not applicable.

Ground number one was later abandoned leaving two grounds for court's consideration. At the hearing of this appeal, the appellant was represented by Mr. Birungi while the respondent was represented by Mr. Ote. The parties filed written submissions.

I will consider the two grounds as raised by the appellant in the submissions.

Ground One; The tribunal erred in law when it held that the exemption under S. 21(1) (u) of the Income Tax Act does not include processing and exporting of coffee and fish.

In relation to this ground, counsel for the appellant submitted that the parties relied on the Minister's budget speech of 2005/2006 to back up their case for the interpretation of S. 21(1) (u) of the ITA. In that speech, the Minister stated that,

> *"In order to encourage lending to the agricultural sector, I am proposing that interest earned by financial institutions on loans granted to persons engaged in agriculture be exempt from tax."*

Counsel for the appellant submitted that the TAT erred when it found that, the word agriculture does not appear in S.21 (1) (u) of the ITA. According to Counsel for the appellant, whereas the word agriculture may not appear in S. 21(1) (u) it does appear in the interpretation of the word 'farming' in S.2 (cc) of the same Act. Furthermore, counsel for the appellant submitted that the bulk of the earnings from agriculture are from coffee and fish exports and these are categorised under agriculture, and therefore, the restrictive and not literal interpretation of the word "farming" by the TAT not to include agricultural processing was absurd. According to counsel, in the broadest sense, agriculture comprises the entire range of economic activities involved in manufacturing and distributing the industrial inputs used in farming, the farming products of crops, animals, and animal products, the processing of these materials into finished products; and the provision of products at a time and place demanded by consumers. In this regard counsel for the appellant referred court to the definition in McGraw-HILL DICTIONARY OF SCIENTIFIC & TECHNICAL TERMS, 6th edition, 2003 by the McGraw-HILL COMPANIES Inc.

Counsel submitted that the TAT found that the words in the contents of the budget speech were 'proposals'. Counsel submitted that the purposive approach in interpretation used in the case of **LE GROUPE COMMERCE D'ASSURANCE V. THE QUEEN** [1996] 3 C.T.C 2086, D.T.C 54 T.C.C would recognise the fact that such speeches give a background to Parliament to understand the intention behind the policy. Furthermore, that the Minister's budget speech is a proposal however when it is passed by Parliament, then it means that Parliament has agreed with the proposal, and the words of the speech need not be quoted verbatim in the legislation. Thus counsel for the appellant submitted that the TAT misapplied the principle of the purposive approach to interpretation of the ITA.

Furthermore, counsel for the appellant submitted that the TAT also failed to appreciate the impact of the case of **GULT CANADA V. THE QUEEN** [1993], CTC 183.92 DTC 6123 FCA which alludes to the importance of courts relying on budget speeches to indicate the mischief in legislation. Counsel submitted that in this case the mischief to be ascertained is the gap between the meaning of the words farming and agriculture. According to counsel for the appellant, the interpretation section of the ITA defines farming to be wider than agriculture, yet S.21 (1) (u) says something different.

Counsel for the appellant cited the case of **LANSING MAYOR V. PUBLIC SERVICE COMM** 470 Mich 154,166,690, in which it was found that a statutory provision is ambiguous only if it irreconcilably conflicts with another statutory provision or it is equally susceptible to more than one meaning. Counsel submitted that the provisions of S.2 (cc) and those of S.21 (1) are capable of having more than one meaning.

Counsel for the appellant further submitted that where the meaning of the tax statute is ambiguous, the tax payer must be given the benefit of doubt and the interpretation should be best calculated to give effect to the intention of the legislature in the best interest of the tax payer. Counsel cited the

authorities of **STANBIC BANK & ORS V. URA** (HCCA No. 170 of 2007) **and URA V. SPEKE HOTEL LTD** (CA No. 12 of 2008).

Counsel for the appellant also submitted that in construing legislation, the literal rule is first used. If this leads to absurdity then the golden rule and finally the mischief rule may be used. According to counsel for the appellant, using the literal rule only for the word farming would cause an absurdity as it restricts the definitions in the ITA, and defeats the purpose for which the section was inserted. Counsel submitted that farming and agriculture has evolved over time and thus should be given a broad meaning from the ordinary sense. According to counsel for the appellant, the tribunal acknowledged that the agribusiness chain covers growing, processing and marketing, but because they are missed out in Section 2 (cc) of the ITA which includes agriculture, TAT then arrived at the wrong conclusion that S.21 (1) (u) of the same Act implied that the expenses of processing and marketing are not covered by the exemption.

In response, counsel for the respondent supported the finding of the TAT and submitted that in the case of **GULT CANADA V. THE QUEEN [1993], CTC 183.92 DTC 6123 FCA**, the court held that budget speeches are useful in indicating the mischief or condition at which the legislation is directing its attention but are not helpful where the statutory language is clear.

Counsel for the respondent submitted that, the Minister’s intention in the budget speech must be translated into clear unambiguous language in order to be implemented. According to counsel for the respondent, the mischief that the budget speech was intended address was the lack of financing to the large portion of Ugandans engaged in primary agriculture and this was achieved by the enactment of S.21 (1) (u) of the ITA but that it was not meant to cure any gap between the meaning of farming and agriculture as submitted by the applicant.

Furthermore, counsel for the respondent submitted that in the budget speech, the Minister specifically made mention of the word agriculture but did not include agribusiness. He submitted that the appellant bank does not lend to the bulk of Ugandans who till land, but to only those engaged in agribusiness activities such as processing, exportation and marketing. Furthermore, that the basic principle of legal policy is that law should serve public interest and therefore, the court should strive to avoid a construction that would be adverse to public policy.

Counsel for the respondent referred to the case of **FENDER V. ST JOHN MILDMAY** [1938] AC 38 in which Lord Wright, found that

> *"In one sense every rule of law, either common law or equity, which has been laid down by the courts, in that course of judicial legislation which has evolved the law of this country, has been based on considerations of public policy."*

Counsel for the respondent also submitted that there is no ambiguity created by the definition of the word farming under S.2(cc) and the use of the word under S.21(1) (u) of the ITA. He submitted that the elements of farming in S.2 (cc) are under the umbrella of farming which is exempt under S.21 (1), and that the word agriculture as stated in S. 2(cc) does not include agri-business activities such as processing, marketing and exportation of coffee and fish. In this regard counsel for the respondent submitted that, there is no ambiguity hence the literal rule must apply. Counsel argued that where the ITA does not define a word, then the words must be given their ordinary meaning. Counsel for the respondent in this regard cited the cases of **PINNER V. EVERETT** [1969] 3 ALL ER 257 and **MCCORMICK v. HORSEPOWER LTD** [1981] 2 ALL ER 746,751.

Furthermore, counsel for the respondent submitted that the TAT noted that the ordinary meaning of the word farming was to be found in the Advanced

Learners Dictionary and that according to the ejusdem generis rule of interpretation, the phrase ‘similar operations’ at the end of the provision means ‘to be included the activities which must be similar in nature to the ones enumerated before’, and thus the processing, exporting of coffee and fish are not words similar to growing coffee and fish. If the legislature had intended that the whole chain of agribusiness be included then, it would have specifically provided so.

I have considered the submissions and authorities cited by both counsels, for which I am grateful.

The provision which is the subject of this appeal is S. 21(1) (u) of the Income Tax Act Cap 340. According to S. 21(1) of the Income Tax Act Cap 340,

“Exempt income.

(1) The following amounts are exempt from tax-”

The Income Tax (Amendment) Act, 2005 provides for S.21 (1) (u) of the Act as follows;

“S.21 of the Income Tax Act is amended in subsection (1) by inserting immediately after paragraph (s) the following-

(u) interest earned by a financial institution on a loan to any person for the purpose of farming, forestry, fish farming, bee keeping, animal and poultry husbandry or similar operations;”

The meaning of the term farming is defined in S. 2(cc) of the ITA as follows;

> *“farming” means pastoral, agricultural, plantation, horticultural or other similar operations;”*

It is the case for the appellant that definition of the word farming under the Act is not helpful, to the extent that it is silent on the question of whether the

appellant's operations fall within the said definition. In the view of the appellant modern farming is so wide and should therefore include the processes of agro processing and export. In the case **of LAFARGE MIDWEST, INC v. CITY OF DETROIT** State of Michigan Court of Appeals No. 289292, the court defines what amounts to ambiguity in a statute, as follows;

> *"With regard to the issue of statutory ambiguity, the Lansing Mayor court held, [A] provision of the law is ambiguous only if it 'irreconcilably conflicts[s]' with another provision [Klapp v. United Ins Agency, Inc, 468 Mich 459, 467; 663 NW2d 447 (2003)], or when it is equally susceptible to more than one meaning. [Lansing mayor, 470 Mich at 166.]*
>
> *When is a provision equally susceptible to more than one meaning? The Lansing Mayor Court held that a "reasonable disagreement" is not the standard for identifying ambiguity. Id. at 168. That is, "[a] provision is not ambiguous just because 'reasonable minds can differ regarding' the meaning of the provision." People v. Gardner, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008), quoting Lansing mayor, 470 Mich at 1665. The Lansing mayor court, quoting Klapp, 468 Mich 474, concluded that "a finding of ambiguity is to be reached only after 'all other conventional means of []interpretation' have been applied and found wanting." Lansing mayor, 470 Mich at 165. That is, "ambiguity is a finding of last resort." Id, at 165 n 6.*

The appellant in this case argues that the meaning of the term 'farming' in the act is ambiguous, because it is susceptible to more than one meaning. Where the meaning of the term in a statute is ambiguous, the court may resort to the purposive meaning of the term, in interpretation of the statute.

Lord Mackey of Clashfern in the case of **PEPPER V. HART** [1993]1 All ER 42 at 48 found that,

"If reference to Parliamentary material is permitted as an aid to the construction of legislation which is ambiguous, or obscure or the literal meaning of which leads to an absurdity, I believe as I have said that in practically every case it will be incumbent on those preparing the argument to examine the whole proceedings on the bill in question in both Houses of Parliament. Questions of construction may be involved on what is said in Parliament and I can not see how if the rule is modified in this way the parties' legal advisers could properly come to court without having looked to see whether there was anything in the Hansard report on he bill which could assist their case."

Furthermore, Lord Bridge of Harwich at pg 50 in the same case found that,

"The object of the court in interpreting legislation is to give effect so far as the language permits to the legislature. If the language s to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt the purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted."

A review of the record shows that TAT in its ruling found as follows;

"The income Tax Act does not define the term "farming…fish farming". Under the rules of interpretation, where the Act does not define a word or tem, then the words or terms must be given their

ordinary literal meaning. In determining the ordinary meaning, the courts may have recourse to dictionaries, though with care. The Advanced Dictionary defines the word "farming" to mean "the business of managing or working on a farm." The same dictionary defines the word "farm" to mean "an area of land and the buildings on it, used for growing crops and/or keeping animals." It therefore means that the ordinary meaning of the term "... farming...fish farming" is the activity of growing crops, fish and/or keeping animals on a farm.

According to the ejusdem generis rule, the phrase "or similar operations" at the end means that to be included the activities must be similar in nature to the ones enumerated before it. In our view, processing and exporting fish are not similar to the growing of coffee and fish. If the legislature had intended the whole chain of agribusiness to benefit, that is growing, processing, and marketing agricultural products, it would have specifically stated so in the law."

The position of the law is that if any doubt arises from the words used in the statute, where the literal meaning yields more than one interpretation, the purposive approach may be used, to determine the intention of the law maker in enacting of the statute. (See Justice Choudry in the case of **UGANDA REVENUE AUTHORITY V. SPEKE HOTEL** (1996) LTD (CA No. 12 of 2008).

The purposive approach has been used in several cases. In the case of the SUSSEX PEERAGE (1844) 8 ER 1034 at 1057, it was held that

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the law giver but if any doubt arises from the terms employed by the

legislature, it has always been held a safe means of collecting the intention to call in aid the grounds and cause of enacting the statute and to have recourse to the preamble which according to Dire CJ is 'a key to open the minds of the makers of the Act and the mischiefs they intend to redress."

Lord Griffiths in the case **of PEPPER V. HART** [1993] 1 All ER 42 at pg 50, also held that

"The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt a literal meaning of the language. The court must adopt a purposive approach which seeks to give effect to the true purpose of the legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted."

In the case of **WELLCOME INC. V. THE GLAYO QUEEN 1996 ICTC 96 DTC 161 TCC** referred to by both counsels in this case, reference to budget speeches and papers has been accepted by the courts in interpretation of statutes.

In this case, the purpose of the Act can be established from the Minister's budget speech for the year 2005/2006 at pg 45, which reads as follows;

"Credit to Agriculture
According to the results of the 2002 Population and Housing Census, agriculture accounts for the livelihood of a very large proportion of the population. Despite this, access to finance is still very poor. In order to encourage lending to the agricultural sector, I am proposing that interest earned by financial institutions on loans granted to persons engaged in agriculture

be exempt from tax. The details will be found in the Income Tax (Amendment) Bill 2005."

From the speech of the Minister, it is clearly evident that the proposal is as a result of the Population and Housing census that was conducted in 2002. The Minister considers the largest proportion of the population that derives its livelihood from agriculture, but has no access to funding. This to my mind shows that the consideration was for the largest portion of persons who are engaged in primary agriculture. This therefore would exclude the smaller proportion of persons engaged in agribusiness and processing, who also have the access to finances, because to make the legislation applicable to them, would not address the above stated purpose of the legislation. There can be no reasonable disagreement about that and even if there was that would not amount to ambiguity.

I therefore agree with the finding of the TAT that the exemption created under S.21 (1) (u) of the ITA covers the interest on loans granted to persons engaged in growing crops and fish, bee keeping, animal and crop husbandry and not to persons engaged in the process of export of coffee and fish. On this basis, ground one of this appeal fails.

Ground two; The tribunal erred in law when it held that the Bank of Uganda guidelines to financial institutions for treatment of agricultural loans were not applicable in the determination of the matter.

In relation to ground two of the appeal, counsel for the appellant submitted that the TAT erred when it found that it was erroneous for the appellant to aver that the Bank of Uganda (hereinafter referred to as "BOU") guidelines were relevant. Counsel for the appellant submitted that the Bank of Uganda guidelines are relevant because of the following reasons;

- the exemption under S.21(1) (u) applies to financial institutions
- Bank of Uganda supervises all financial institutions
- the Minister of Finance supervises both the Income Tax in Uganda and Bank of Uganda and financial institutions have to comply with both the ITA and the Bank of Uganda guidelines.

- the BOU guidelines referred to are about lending to the agricultural sector
- the ITA which had no other provisions explaining the operation, provided practice notes about the operation of the exemption in July 2006, long after this dispute and therefore, there was a gap that could be filled by the BOU guidelines.

Counsel for the appellant concluded by submitting that there was no conflict between the BOU guidelines and the ITA.

In reply, counsel for the respondent submitted that the tribunal rightly found that the BOU guidelines are intended for uniformity in reporting to BOU in order to fulfill its supervisory role over financial institutions. Furthermore, that for tax purposes, the strict wording of the Act has to be followed.

Counsel for the respondent submitted that according to S. 4(1) of the ITA, tax is only charged ‘subject to and in accordance to the ITA’ and therefore, only the ITA and/or other aids of interpretation can be used to interpret the provisions of the said Act. Counsel for the respondent further submitted that the BOU guidelines have no force of law and can not be used as an aid to statutory interpretation to the provisions of the ITA, and that there is no ambiguity in the law that calls for the use of these guidelines in the interpretation of the said Act.

I have considered the submissions of both counsels and the authorities in relation to this ground for which I am grateful.

According to Section 4 of the ITA,

> *"Income tax imposed.*
>
> *(1) 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 mechanism for interpretation of the Act is set out under S. 160 of the ITA as follows;

> *"(1) To achieve consistency in the administration of this Act and to provide guidance to taxpayers and officers of the Uganda Revenue Authority, the commissioner may issue practice notes setting out the commissioner's interpretation of this Act.*
>
> *(2) A practice note is binding on the commissioner until revoked.*
>
> *(3) A practice note is not binding on a taxpayer."*

It is clear that the Act does not refer to or expect any cross reference with the BOU guidelines. Only practice notices issued by the Commissioner URA are envisaged under the Act. These are still of limited application. I therefore find that the ITA can not be interpreted using guidelines set out by the Central Bank.

I am therefore of the considered opinion that the Bank of Uganda guidelines have no place in the interpretation of the ITA, and for this reason, ground two of the appeal fails.

That being the case the whole appeal fails and is dismissed with costs to the respondent

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Justice Geoffrey Kiryabwire

JUDGE

Date: <u>08/05/12</u>

08/05/12

9:39 a.m.

Judgment read and signed in open court in the presence of;

- Birungyi for Appellant
- Mugabi for Defendant

In Court

- Mr. Sharma F/ Manager of Plaintiff
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire
JUDGE

Date: 08/05/12