THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 423 OF 2010

UGANDA ELECTRICITY TRANSMISSION COMPANY LTD}...............PLAINTIFF

VERSUS

COMMISSIONER GENERAL,

UGANDA REVENUE AUTHORITY}... .DEFENDANT

BEFORE HON JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff is a public limited liability company incorporated in Uganda and filed this action against the Commissioner General, Uganda Revenue Authority for the acts of her agents, officers and other persons acting on her instructions for declaratory orders, injunctions, damages and costs of the suit. The declarations and orders sought are:

(a) That the defendants claim against the plaintiff for payment of a sum of **Uganda shillings 24,914,755,000/=** as Corporation tax arrears for the years of income 2001 – 2004 is unlawful and without legal basis.

(b) That the plaintiff is entitled to a refund of the sums wrongfully withheld by the defendant on account of VAT and withholding tax as pleaded in paragraph 11 of the plaint.

(c) An order for refund of the plaintiff of the sums wrongfully and unlawfully withheld by the defendant as VAT and WHT refunds spelt out in paragraph 11 of the plaint.

(d) Interest on the refunds sought at the rate of 26% per annum from the date when the refunds were due to the plaintiff until payment in full.

(e) A permanent injunction restraining the defendant and or any persons acting under her instructions from instituting any enforcement measures against the plaintiff for the recovery of a sum Uganda shillings 24,914,755,000/= claimed as Corporation tax.

(f) General, aggravated and exemplary damages for the loss, damage and inconvenience suffered by the plaintiff spelt out in paragraphs 10 and 11 of the plaint.

(g) Costs of the suit.

The facts constituting the plaintiffs cause of action are that the plaintiff submitted self assessment tax returns for the years 2001 – 2004 on diverse dates under section 96 of the Income Tax Act cap 340 as amended. Thereafter the plaintiff duly effected payments to the defendant towards the full settlement of the amounts due in Corporation tax and the defendant issued the plaintiff tax clearance certificates in respect of the years of income 2001 – 2004. Subsequently on 18 August 2010 the defendant issued amendment assessment notices against the plaintiff under section 95 of Cap 340 for the years of income 2001 – 2004 demanding for **Uganda shillings 24,914,755,000/=** as Corporation tax arrears. The revised assessments were carried out on the basis of audit findings by the defendant. The plaintiff by letter dated 3rd September 2010 objected to the assessment on grounds that it was time barred under section 95 (1) of cap 340. Alternatively Corporation tax arrears for years of income 2001 – 2002 were waived by section 4 of the Finance Act 2008. The defendant rejected the plaintiff's objection in its objection decision dated 10th November 2010. Thereafter the defendant threatened to initiate enforcement measures against the plaintiff for recovery of the Corporation tax arrears. In the particulars of illegality the plaintiff avers that the claim is time barred because it was issued contrary to section 95 (1) of the Income Tax Act cap 340 because the claim was submitted to the plaintiff after a period of five years from the date the plaintiffs filed tax returns for the years of income 2001 – 2004.

Secondly the defendant wrongfully or illegally disallowed or failed to take into account while computing the Corporation tax arrears, the plaintiff's claim of offset of the UEB losses inherited by the plaintiff under section 33 of the Public Enterprise Reform and Divestiture Act cap 98. Thirdly the demand was wrongful because Corporation tax arrears for the years of income 2001 – 2002 were waived by section 4 of the Finance Act 2008. The defendant erroneously or unlawfully relied on section 97 (2) of the Income Tax Act Cap 340, a provision that was not applicable to revised assessments issued by the defendant on 18 August 2010 under section 95.

Alternatively and ordered prejudiced the plaintiff averred that the defendant erroneously and unlawfully relied on alleged new information while issuing the revised assessments without availing to the plaintiff the particulars of the information. The information does not exist and is a mere concoction of the defendant's servants. Alternatively the plaintiff avers that the information does not amount to new information within the meaning of section 97 (2) of the Income Tax Act Cap 340 because at all material times the information was available to the defendant or ought to have been upon the exercise of reasonable diligence. The defendant is estopped from raising the new assessment upon the issuance of tax clearance certificates to the plaintiff and other written representations regarding the plaintiff's tax status made by the defendant. The plaintiff further alleges that the withholding of VAT refunds and withholding tax of Uganda shillings 14 billion was unlawful. Consequently the plaintiff has suffered loss and damage inconvenience for which it holds the defendant liable.

Additionally the plaintiff alleges that the defendant is acting *mala fide* by demanding immediate payment of the claimed Corporation tax arrears from the plaintiff when they have defaulted or neglected in honouring the plaintiffs claims for VAT and withholding tax.

The defendant denies all the averments of the plaintiff and contends that on 31 March 2001 Uganda Electricity Board was split leading to the formation of three successor companies namely Uganda Electricity Generation Company, Uganda Electricity Transmission Company (the plaintiff) and Uganda Electricity Distribution Company. Under the Public Enterprise Reform and Divestiture Act cap 98 the assets and liabilities of Uganda Electricity Board were distributed to the three successor companies. 1 July 2002 the plaintiff filed self assessment tax returns for the year of income ending 31st of December 2001 on the basis of draft accounts. On 28 March 2003 the defendant requested for a detailed breakdown of the profit and loss account for the year of income 2001. The defendant discovered that they were no opening balances for the tax written down values of the assets in the wear and tear schedule submitted for purposes of computing correct capital deductions to be granted to the plaintiff in accordance with the law. The facts show that the defendant justifies the new assessments objected to by the plaintiff. The defendant avers that the Corporation tax issued was lawful, due and owing to the defendant. Secondly the Corporation tax assessments were not time barred as the law empowers the defendant to issue assessments for any period upon the discovery of new information. Thirdly the defendant avers that it came up with the assessment after considering new information provided by the plaintiff’s tax consultants. Fourthly under the Finance Act 2008 section 4 provides for waiver of tax, duty, interest and penalties on arrears outstanding on or before 30 June 2002 and still outstanding by 30 June 2008. The assessment the subject matter of the dispute is not part of the arrears that were outstanding on or before 30 June 2002 or 2008 within the meaning of the Income Tax Act.

The new information which neither the plaintiff nor the defendant had at the time the plaintiff provided the self assessment tax returns for the year 2001 was the allocation of tax written down values of Uganda Electricity Board to successor companies and that information was only confirmed to the defendant in 2010 during a comprehensive audit. The defendant contends that at no time did she refuse neglect or fail to make refunds due to the plaintiff on account of VAT and withholding tax. The defendant avers that the Corporation tax is due and owing and has been for a long time and should be paid immediately.

The plaintiff was represented at the hearing by Counsels John Fisher Kanyemibwa and Dennis Wamala of Messrs Kateera and Kagumire Advocates while Counsel Mathew Mugabi of the Legal Services and Board Affairs Department, Uganda Revenue Authority represented the defendant.

The following facts and issues were agreed upon in the joint scheduling memorandum filed on 17 March 2011 by counsels for the parties.

Agreed facts

a. The Plaintiff is one of the successor companies of Uganda Electricity Board and was incorporated under the Public Enterprise Reform and Divestiture Act after the unbundling of UEB in March 2001. Some of the assets and liabilities of UEB were subsequent to its unbundling, vested in the plaintiff by the Act.
b. The plaintiff conducted self assessment of income for the years of income 2001 – 2004 and on diverse dates on or before 18th of August 2005 submitted Corporation tax returns for the said years of income to Uganda Revenue Authority under section 96 of the Income Tax Act. The plaintiff thereafter paid to URA, the full amount of Corporation tax arrears from the said years of income as assessed under the said self assessment returns.
c. On 18 August 2010 Uganda Revenue Authority issued amended assessment notices against the plaintiff for the years of income 2001 – 2004. The reason given by Uganda Revenue Authority for issuing the amended assessment notices outside the five-year time limit was that Uganda Revenue Authority had received new information.
d. A sum of **Uganda shillings 24,914,715,000/=** was demanded by Uganda Revenue Authority as due and owing from the plaintiff under the said amended assessment notices on account of Corporation tax arrears for the years of income 2001 – 2004.
e. The said amended Corporation tax assessments issued by Uganda Revenue Authority on 18th of August 2010 were inter alia, premised on a document by the plaintiffs tax consultants Messieurs PricewaterhouseCoopers and named "connected thinking" which was submitted to Uganda Revenue Authority by the said tax consultants on behalf of the plaintiff in August 2006.

Agreed issues

i. Whether the revised assessments issued by Uganda Revenue Authority to the plaintiff on 18th of August 2010 in respect of the years of income 2001 – 2004 were time barred;

ii. Whether the plaintiffs Corporation tax arrears in respect of the years of income 2001 and 20021 waived by the Finance Act 2008.

iii. Whether the plaintiff is entitled to VAT refunds from Uganda Revenue Authority and if so, what sums are due to the plaintiff on account of the said refunds?

iv. Whether the plaintiff is entitled to withholding tax refunds from Uganda Revenue Authority and if so, what sums are due to the plaintiff on account of the said refunds?

v. What remedies are available to the plaintiff?

The Plaintiff called three witnesses while the defendant called one witness. Counsels then filed written submissions.

The plaintiff submitted on three issues namely: issues number 1 and 2 and the remedies under issue number 5.

Issue Number 1

Whether the revised assessments issued by Uganda Revenue Authority to the plaintiff on 18 August 2010 in respect of the years of income 2001 – 2003 are time barred?

The plaintiff submitted that the revised assessments issued by the defendant to the plaintiff on 18 August 2010 in respect of the years of income 2001 – 2003 are time barred and therefore unlawful under section 95 (1) of the Income Tax Act. This section provides that:

"*… the Commissioner shall based on the taxpayers return of income and on any other information available, make an assessment of the chargeable income of the taxpayer and the tax payable thereon for a year of income within five years from the date the return was furnished.*"

Counsel contended that it was not in dispute that the self assessment returns of the plaintiff for the years 2001 – 2003 furnished to the defendant on 20 February 2003, 31st of October 2003 and 11th of August 2004 respectively. On the other hand revised assessments were issued by the defendant on 18 August 2010 after a period of more than five years from the date of receipt by the defendant of the plaintiffs self assessment returns. The amended assessments were issued outside the timeframe provided for under section 95 of the Income Tax Act. Counsel contended that the defendant relies on section 97 (2) of the Income Tax Act which grants the defendant power to issue at any time, additional assessments, for any period upon the discovery of new information. Secondly according to the plaintiff's counsel, the position of the defendant is that references to section 95 in exhibits P4, P6 and P8 did not affect the substance of the assessments based on section 98 (3) of the ITA. Learned counsel contended that for a meaningful discussion of issue number one the following matters must be addressed namely:

- ***Whether the Uganda Revenue Authority discovered new information in the relation to the tax payable by the plaintiff for the years of income 2001 – 2003 which information was not available to the defendant during the five-year period after the plaintiff furnished it with self assessment returns for the years of income in issue.***
- ***Whether the amended assessments issued by the defendant to the plaintiff on 18 August 2010 for the payment of the sum of Uganda shillings 20,915,715,500/= where in substance and effect issued by the defendant under section 97 (2) of the ITA.***

As far as new information is concerned, counsel submitted that the defendant presented to court two contrasting versions of 'new information' relied upon to issue the revised assessments under section 97 (2) of the ITA. The first version was pleaded and originally communicated to the plaintiff in the objection decision but was not supported by any evidence during the hearing of the suit. Counsel submitted that this version is the letter from paragraph 7 of the written statement of defence where it is averred that the defendant considered new information that was provided by the plaintiff's tax consultants whereupon it made the required adjustments and came up with revised assessments. Secondly in paragraph 9 of the written statement of defence it is averred that the new information was neither with the plaintiff nor the defendant at the time the plaintiff provided the self assessments for the year is 2001 which was the year the allocation of the tax written down values of Uganda Electricity Board to the successor companies and the information was only confirmed by the defendant in 2010 during the comprehensive tax audit. That position is restated in the objection decision dated 10th of November 2010 exhibit PE 11 and paragraph 3 thereof. Furthermore the defendant replied that the defendant is not bound by the statutory time limit on account of the emergence of new information as provided for in section 97 (2) of the Income Tax Act. The case of the plaintiff is peculiar in the sense that it was not subject to the conclusion of the assessment of the former UCB – a process that provided new information since the plaintiff had not taken into account the proper tax written down values at the time of submission of its first financial statements.

Counsel therefore concluded that it was clear that the position the defendant communicated to the plaintiff in its objection decision and in its written statement of defence was the conclusion that the assessment of UEB provided new information related to the proper tax written down values of the assets inherited by the plaintiff from UEB which information was not available to the defendant at the time of filing the self assessment returns by the plaintiff. The new information was provided by the plaintiff's tax consultants according to the defendants WSD and objection decision. Counsel submitted that the data of the 'new information' referred to in the written statement of defence and exhibit P 11 were never furnished to the plaintiff. The evidence adduced by the defendant in support of its defence totally and wholly contradicts the defendant's pleadings and objection decision. It is to the effect that the defendant’s new information had nothing to do with the tax affairs of UEB but with a tax written down values of the assets inherited by the plaintiff from UEB. Counsel submitted that according to PW1 the new information relied on by the defendant was the discovery after the 2009/210 tax audit, and the plaintiff was not entitled to a loss of shillings 40,510,595,000/= in 2001 as had earlier on been indicated by the plaintiff in its self assessment returns for the years of income 2001 – 2003 consequently the plaintiff had table income for the relevant years of income. DW1 testified in cross examination and there was no loss inherited from Uganda Electricity Board and further that the said loss had no bearing on Uganda Electricity Board. The loss stemmed from the plaintiffs own operations as an entity after incorporation in 2001. It was discovered after the tax audit in 2010 and the plaintiff was not entitled to the said loss which was the 'new emerging information'. Counsel contended that DW1 reiterated this position during cross-examination and re-examination and it is also contained in paragraphs 19 and 20 of the witness statement of DW1. Counsel contended that DW1 was unable to provide details of the new information or the material that the defendant relied upon for the new assessment in issue. Thereafter DW1 upon being shown in exhibit P 14 completely changed his earlier testimony and admitted that as far as losses were concerned, the 2009 (2010) tax audit discovered nothing new beyond what had already been communicated to the plaintiff. Exhibit P 14 is a letter from the defendant to the plaintiff dated 1st November 2006 and in paragraph 1 thereof indicates that the defendant communicated to the plaintiff that there were no losses to be allocated to the successor companies from UEB. In re-examination PW1 testified that what changed from a loss position to taxable position were the adjustments made on the capital allowances on the assets inherited by the plaintiff from UEB. The loss of 40 billion claimed by the plaintiff in the self assessment return for the year of income 2001 stemmed from adjustments of capital allowances of 63 billion which figure was derived from the “Connected Thinking” document.

Counsel prayed that the court disregards the evidence of DW1 on the question of new information because DW1 was unreliable and a consummate liar whose word cannot be trusted by the court. He lied about many issues including new data or adjustments made. He's evidence was incoherent and he was not the author of any of the material documents the defendant relied upon. There were inconsistencies in his witness statement and cross examination and re-examination. DW1 was instructed by the Commissioner to carry out a tax audit of the plaintiff for the years ending 31st of December 2003 and 31st of December 2007 under section 113 (3) and section 128 (4) of the ITA according to paragraph 6, 7 and 8 of annexure "C" of his witness statement, he unilaterally decided to extend the ambit of the audit to the years of income 2001 and 2002 without authority of the Commissioner. In paragraph 6 of his witness statement he invoked section 128 (4) of the ITA which was clearly illegal as the power to invoke are only vested in the Commissioner. He lied to court that the plaintiff was notified by the Commissioner in writing that the tax audit had been extended to cover the years of income 2001 – 2003 whereas not. No document of instruction was adduced in evidence.

Counsel further prayed that the testimony of DW1 should be disregarded because it was contrary to or inconsistent with the written statement of defence of the defendant. It was not written in the objection decision or pleaded in the written statement of defence that the new information was the discovery after the tax audit of 2009/2010 that the plaintiff was in a taxpaying position for the years of income 2001 – 2003. The plaintiff was deprived of the opportunity afforded by section 99 of the Income Tax Act to object to the revised assessments on the basis of the 'new information' furnished by DW1 in his witness testimony. The plaintiff’s counsel prayed that the court disbelieve both the written statement of defence and the testimony of DW1. He relied on the case of **Inter-Freight Forwarders Uganda Ltd versus East African Development Bank** Supreme Court civil appeal number 33 of 1992 where Oder JSC held that the party is bound to prove the case alleged by him and covered in the issues framed. He or she will not be allowed to succeed on the case not so set up by him and be allowed at the trial to change the case or set up a case inconsistent with that alleged in his pleadings except by way of amendment of pleadings.

Counsel further submitted that the 'new information' testified to by DW1 forming the alleged basis of the revised assessments under section 97 (2) of the Income Tax Act does not amount to new information within the meaning of the provision. Counsel submitted that the word "new information" is not defined. The Oxford Advanced Learners Dictionary 8th edition defines the word 'new' as not existed before, recently made, invented and the word 'information' to mean facts or details about something. Counsel contended that it meant facts or details relating to the tax payer that did not exist or were unknown to the defendant during the five-year statutory period provided for under section 95 (1) of the ITA. From the evidence, the tax affairs of Uganda Electricity Board were concluded within the statutory five-year period. The final assessments were submitted in evidence by PW1 and PW3 as exhibit P 14, P 15, and P16. The tax matters of Uganda Electricity Board were concluded by 9 November 2006 and no other returns were subsequently furnished to the defendant. The testimony of PW2 was that the Commissioner General confirmed sometime in 2008 that the tax affairs of Uganda Electricity Board had been concluded. The evidence shows that the defendant never obtained any new information relevant to the revised assessments issued to the plaintiff after conclusion of the tax affairs of Uganda Electricity Board. By 2006 the defendant had all the information relating to the allocation of tax written down values of the assets inherited by the plaintiff from Uganda Electricity Board which information was provided by the plaintiff's tax consultants in August 2006 in the 'connected thinking document' exhibit P12. The date of receipt of the document was confirmed by the author PW2 and admitted by the defendant as August 2006 in paragraph 4 of the written statement of defence. It is also admitted in paragraph 1.0 (e) of the joint scheduling memorandum in paragraph 4 (n) and 9 of the written statement of defence the defendant confirmed the adoption of ratios proposed by the plaintiff's tax consultants on the allocation of assets from UEB on 11th of February 2010. Counsel referred to Black's Law Dictionary 7th edition for definition of the word 'confirm' as to verify or corroborate or to make it more certain. Consequently the defendant had earlier on received information in 2006 and only confirmed it in 2010. Such information cannot be new information. The defendant had all the relevant information on the written down values of the plaintiffs assets inherited from Uganda Electricity Board by August 2006.

Additionally counsel contended that there is no evidence on record to suggest that the defendant discovered new information relating to the years of income 2001 – 2003. On the contrary information on record is that the defendant had received all the information by November 2006 which it had relied upon to issue revised assessments in August 2010.

Alternatively counsel argued on the issue of whether the amended assessments issued by the defendant to the plaintiff on 18 August 2010 for the payment of a sum of Uganda shillings 20,915,715,500/= were in substance and effect issued by the defendant under section 97 (2) of the ITA.

The plaintiff averred in paragraph 6 of the plaint that the revised assessments were issued under section 95 of the ITA. It was clearly indicated in the documents that the assessments were issued under section 95. They were labelled "amended assessments" and that the taxpayers details to put the plaintiff on notice that they were issued by the defendant because the Commissioner was not satisfied with the self assessment return earlier filed by the plaintiff for the years of income 2001 – 2003. In the documents under the taxpayer's details it is provided that the said assessments must clearly specify the grounds upon which the defendant was dissatisfied with the previous assessments. It also provides that it is supposed to be made within five years from the date the plaintiff's returns of income were furnished to the defendant. Nowhere on the face of the assessments is it stated that the assessments were issued under section 97 (2) of the Income Tax Act. Prior to the issue of the revised assessments the defendant had vacated the earlier self assessments filed by the plaintiff for the years of income 2001 – 2003 by exhibits P5, P7 and P9. The notices showed zero tax payable by the plaintiff.

The written statement of defence does not explicitly deny that the revised assessments were issued under section 95 of the Income Tax Act. In paragraph 22 of the witness statement of DW1, the witness states that the assessments were issued under section 95 of the Income Tax Act. It is an agreed fact in the joint scheduling memorandum that the defendant issued amended assessments to the plaintiff. DW1 in contradiction to the written statement of defence and scheduling memorandum testified that the assessments were additional assessments issued under section 97 of the Income Tax Act. Exhibit P13 is a letter dated 15th of July 2010 written by the defendant to the plaintiff in response to a proposal submitted to the defendant on the plaintiff's behalf and as a follow up of several discussions between the parties. It only informed the plaintiff that the defendant issued additional assessments upon discovery of new information. It did not disclose the particulars of the new information. The defendant did not issue additional assessments but amended assessments. The testimony of DW1 is that additional assessments are different from amended assessments and different forms are used by the defendant in issuing both kinds of assessments. A taxpayer's self assessment return is not vacated prior to the issuance of additional assessments. DW1 on the other hand confirmed that the assessments clearly provided that they were amended assessment notices issued under section 95 of the ITA, in substance and in effect they were issued under section 97 of the Income Tax Act. Counsel reiterated submissions that the testimony of DW1 was unreliable, secondly the argument was not set up in the written statement of defence neither was it referred to in the objection decision of the defendant. The defendant did not rectify the alleged error of form under section 98 (4) of the Income Tax Act. The new information referred to were never communicated to the plaintiff on the face of the assessments so that the plaintiff may specify the grounds of objection to the assessment. The objection decision did not specify the details of the new information but specified that the new information related to the proper tax written down values of the plaintiff's assets. In any case DW1 disagreed with the version of the new information appearing in the written statement of defence. Counsel concluded that it cannot be lawful to contend that in substance or otherwise the revised assessments were in fact, additional assessments issued by the defendant under section 97 of the Income Tax Act. Counsel contended that in the circumstances section 98 (3) cannot come to the aid of the defendant to legitimise the revised assessments. He contended that the provision was only applicable where a notice of assessment was in substance and in effect issued in conformity with the Income Tax Act which was not the case in this case.

Reply by Defendant's Counsel

The revised assessments issued to the plaintiff on 18 August 2010 for the years of income 2001 – 2004 while lawful and not barred by time. Counsel referred to annexure "K" to the written statement of defence for the tax being demanded for each assessment based on a year of income. Counsel submitted that the plaintiff quoted section 95 (1) of the Income Tax Act selectively. Counsel submitted that section 95 is subject to the provisions of section 96. Consequently the limitation period prescribed in section 95 is subject to the provisions of section 96 and should not be read in isolation. The plaintiff was under a self assessment regime governed by section 96 which provides that

"*where a tax payer has furnished a return of income for a year of income, the Commissioner is deemed to have made an assessment of the chargeable income of the taxpayer and the tax payable on that chargeable income for that year, being those respective amounts shown in the return.*"

For the years of income 2001 – 2003 the plaintiff indicated that it had made losses and therefore no tax was payable. Under section 96 (2) a taxpayers return of income is treated as a notice of assessment issued on the taxpayer by the Commissioner on the due date for the furnishing of the return or on the actual date the return was furnished whichever is later. Section 96 (3) provides:

> ***"Notwithstanding subsection (1), the Commissioner may make an assessment under section 95 on the taxpayer in any case the Commissioner considers necessary."***

The self assessment returns are deemed to have been served by the Commissioner on the taxpayer. The five-year limitation period is inapplicable to assessments which fall under section 96 save if the Commissioner chooses in accordance with section 96 (3) to make an assessment under section 95. Counsel contended that it cannot be maintained that the assessments were issued by the Commissioner outside the time frame provided for under section 95 of the Income Tax Act. Counsel contended that the limitation period would only apply if the Commissioner General considers it necessary to make an assessment after being furnished with the self assessment under section 95.

The assessment in contention was issued under section 97 (2) upon discovery of new information. The provision provides that where there is discovery of new information in relation to the tax payable for any year of income, then the five-year limitation period does not apply and an additional assessment may be made at any time. Counsel emphasised the words "the discovery of new information in relation to the tax payable for any year of income" and that the additional assessment may be made at any time. Counsel submitted that the provision gives the Commissioner discretionary powers and overrides the limitation period under section 95 (1) and 96 of the Income Tax Act.

In the circumstances the defendants counsel submitted that the question to be answered is not whether the defendant discovered new information in relation to the tax payable by the plaintiff for the years of income 2001 – 2003 with information was not available to the defendant during the five-year period but rather what new information was discovered that warranted the making of an additional assessment?

Counsel contended that this was a pure question of fact which could only be determined by evidence and which the defendant has demonstrated to the court. Counsel went ahead to define what is meant by "discovery" which was defined in the case of **King versus Bloomsbury Income Tax Commissioners** [1915] 3 KB at 762 to means to come to the conclusion from the examination the Commissioner makes and from any information you may choose to receive, or has arisen to belief or finds or satisfies himself. To discover meant coming to the conclusion from available information. **In R v St Giles and George Commissioners (ex parte Hooper) [1915] 3 KB 768** it was held that where discovery of information is honest and bona fide after due care and diligence, assessments can be made. The defendants counsel further defines the word "discover" to mean to be the first find or find out about; to learn about to encounter for the first time; realise; to find after study or search and to reveal or make known. Counsel referred to the case of **Parkin v Cattell, CA 1971, 48 TC 462 (Cited in Tolleys Tax Cases 27th Ed, 2003 at page 91**) between 1954 and 1962 taxpayer acquired a number of houses. He sold the houses as they became vacant. The transactions were declared in his returns and no assessments were raised until 1965 when a new inspector formed the opinion that the transactions amounted to trading and raised assessments for the relevant years of income. The Commissioners upheld the validity of the assessments and the taxpayer appealed contending that the Inspector had not made any discovery. His appeal was dismissed by the Court of Appeal when Lord Denning held that a discovery is made not only when the commissioner finds out new facts which were not known to him or his predecessor, but also when he finds out that he or his predecessor got the law wrong and did not assess the income when it ought to have been.

Counsel defined the word "new" as recently discovered, made brought into being or of a kind never existing before. Or having existed before but only recently discovered or markedly different from what was before. He further defined the word "information" as knowledge acquired through experience or study or knowledge of specific and timely events or situations. In the case of **Newspaper Society versus C.I.T (1979) I.T.R. 996** it was held that it is not necessary for the information to have an outside source but information may be found in the assessment record itself. The original assessment can be reopened on the ground that the Commissioner had rendered a wrong decision on the facts on wrong understandings of the facts relevant to the assessment. He concluded that the discovery of new information is not limited to finding out of facts which are not known to someone or his predecessor but extends to situations when the predecessor got the law wrong and did not assess income where it ought to have been assessed. Counsel submitted that the discovery that the plaintiff was not entitled to the losses they had earlier claimed was new information.

As far as the evidence is concerned counsel prayed that the court disbelieves the testimony of PW2 that the loss of 40 billion had been carried forward from Uganda Electricity Board but rather accepted the testimony of DW1 that they were no losses inherited from Uganda Electricity Board but losses were incurred from the plaintiffs on operations as an entity. Counsel contended that the "connected thinking document" submitted to the defendant in August 2006 and subsequently adopted by the defendant on 11 February 2010 was properly defined as "new information" and could only have been acquired by the defendant through study of the proposal. The information was discovered after studying the proposal. Additionally audit was carried out after the plaintiff applied for refund of Corporation and withholding tax amounting to Uganda shillings 5,783,254,881/=. There were a series of things which led or culminated into the revised assessments which cannot be divorced and are inextricably intertwined. The purpose of the tax audit was to ascertain the plaintiff's tax position covering Corporation tax, PAYE, VAT and withholding tax. In the process of audit and examination of the records and documents of the plaintiff the defendant examined the fixed assets schedules which contained the approved/confirmed written down values as proposed in the "connected thinking document". Section 113 (3) requires the Commissioner to satisfy himself or herself that the tax has been overpaid before a refund can be made. The outcome of the audit was communicated to the plaintiff. The information was found within the assessment records itself. The audit led to the discovery of new information according to the testimony of DW1. This information was conceded to by PW1 and PW2 in cross-examination. Counsel for the defendant concluded that there was new information based on the evidence on record discovered during the audit process in accordance with section 97 (2) of the Income Tax Act.

The proposal for the allocation of a written down values for the assets of the plaintiff as a successor company and as contained in the "connected thinking document" submitted in 2006 were not declared in the returns prior to 2006 neither were they declared in the plaintiffs returns after 2006. Uganda shillings 55 billion loss that the plaintiff mentioned in applying for the refund at the end of 2007 did not emerge/build up cumulatively from 2001 but rather from 2005. Out of the total refund claim of Uganda shillings 5,783,254,881/= only 2,187,154,967/= was attributable to the loss-making period 2005 – 2007. Balance of the total refund claim was not attributable to the loss-making period of 2005 – 2007. The loss of Uganda shillings 1,489,323,986/= according to self assessment returns at the end of 2004 arose from 2001. There is inconsistency in the loss closing balance of 2003 and the opening balance of 2004. Loss of Uganda shillings 40,410,496,000/= incurred in 2001 was attributable to capital allowances of Uganda shillings 63,221,726,000/= in the tax computation of 2001. Consequently no loss was inherited from Uganda Electricity Board. The plaintiff was not entitled to a loss of Uganda shillings 40,510,595,000/= in 2001 carried forward and utilised in the tax periods 2002 – 2004 as earlier declared in the self assessment returns of the plaintiff. It followed that the plaintiff was in a taxable position. Counsel invited the court to find that the assessment were valid and unlawful.

Whether the amended assessments issued by the defendant to the plaintiff on 18th of August 2010 were in substance and effect issued under section 97 (2) of the Income Tax Act?

Counsel submitted that the above issue was not a matter in controversy in the objection of the plaintiff and therefore in the objection decision it was not addressed. Counsel contended that the matter before the Commissioner in the objection of the plaintiff was whether the assessments were issued outside the statutory five-year time limit and secondly whether the assessments issued for tax arrears outstanding before 30th of June 2002 was waived by the Finance Act 2008. In the objection decision the defendant only responded to the two issues. Counsel concluded that this issue could not be raised in the High Court where the plaintiff was only entitled to appeal if dissatisfied with an objection decision under section 100 of the Income Tax Act.

Alternatively and without prejudice counsel for the defendant submitted that the defendant has always maintained that the revised assessments were issued under section 97 (2) and not section 95 of the Income Tax Act. He relied on the correspondence on record. It is the form used in making the assessment which provides that is under sections 95 and 158. However the notes accompanying the assessment indicated that the assessment is according to audit findings communicated in the letter of 5th of August 2010. This letter of 5th of August 2010 referred to as annexure J to the written statement of defence communicated to the plaintiff that the defendant had the right to make additional assessments under section 97 (2) of the Income Tax Act. The basis for making the additional assessment was clear and reference in the assessment form to sections 95 and 158 was an error of form and not substance. Section

98 (3) (a) and (b) of the Income Tax Act provides that an assessment cannot be quashed or deemed void or voidable due to an error in form and was applicable. This is supported by the case of **Baylis (Inspector of Taxes) verses Gregory [1986] STC 22 also reported in [1986] 1 All ER 289** where an error in a year of assessment was said to be an error of form under a similar provision with section 98 of the Income Tax Act. In the case of **Dominion Taxicab Association versus MNR [1954] SCR 82** the court held that it is a well settled principle of law that in considering whether a particular transaction brings a party within the terms of the Income Tax Act, it substance other than his form is to be regarded. Counsel relied on the cases of **Placer Dome Inc vs. Canada [1992] 2 CTC 98 at 109; Ramsay vs. I.R.C. [1982] AC 300 at 323** for the same proposition of law. In conclusion counsel prayed that the court should find that in substance the revised assessments were issued in accordance with section 97 (2) of the Income Tax Act.

In defence of DW 1's testimony counsel submitted his testimony was based on the documents relied upon by both the plaintiff and the defendant. The entire witness statement of DW 1 derives from paragraphs I to M of the defendant's written statement of defence and there was no departure from the pleadings.

Alternatively the defendants counsel submitted that the test in determining whether a complaint should be allowed to succeed was enunciated by honourable Justice Oder JSC in the case of **Uganda Breweries Ltd versus Uganda Railways Corporation [2002] 2 EA 634** and is whether the party complaining had a fair notice of the case it had to meet and whether the departure from pleadings caused a failure of justice to the party complaining or whether the departure was a mere irregularity, not fatal to the case of the respondent whose evidence departed from its pleadings. This case was followed in the case of **Balaba Mukasa vs. Namboze Betty Bakireke election petition appeal number 4 of 2009** where the Supreme Court held that as long as the opposite party has fair notice of the case he has to answer and it does answer it and adduces evidence accordingly, and has not suffered injustice, the court will not allow such irregularity or departure to frustrate the determination of the case.

As far as the alleged illegal and unilateral decision to extend the ambit of the audit, years of income 2001 and 2002 without authority of the Commissioner, counsel contended that the Commissioner General or the Commissioner does not act in a vacuum. Counsel relied on the case of **Cable Corporation (U) Ltd versus Uganda Revenue Authority civil appeal number 1 of 2011** for the proposition that various Commissioners are delegated powers of the Commissioner General under the Act. Finally counsel contended that the submissions of the plaintiff did not discharge the burden under section 102 of the Income Tax Act to prove that the assessment is excessive or erroneous.

Submissions of the plaintiff's counsel in rejoinder

The Plaintiff's counsel submitted that it was proper that this honourable court determines whether the revised assessments were issued by the defendant under section 95 or 97 of the Income Tax Act. If they were issued under section 95 of the Income Tax Act, the court would have no option but to quash the assessments on the ground that they were time barred. If the court were to find that the assessments were in substance issued under section 97 cited above, the court would then determine whether or not the defendant discovered new information during the 2009/10 tax audit which warranted additional assessments.

Counsel submitted that the provisions relating to assessments are very clear. The first option is to do nothing and maintain the tax payable by a tax payer as disclosed in the self assessment. The second option is for the defendant to vacate the self-assessment return if dissatisfied and make a new assessment in terms of section 95 (1) and 96 (3) of the Income Tax Act. The third option is to amend the self assessment return by issuing an additional assessment under section 97 (1) within a period of three years from service of the self assessment upon the taxpayer.

Counsel submitted that the defendant indicates that it exercised the third option after discovering new information during the 2009/10 tax audit. However counsel reiterated submissions that the evidence on record does not support this argument. Counsel submitted that an additional assessment can only be made by the defendant after service of the notice of assessment on the taxpayer as prescribed. The additional assessment is subsequently issued by the defendant in addition to the notice of assessment served on the taxpayer. Counsel contended that service of the self assessment upon the taxpayer is deemed by law. Evidence shows that the self assessments for the years of income 2001 – 2003 were vacated by the defendant on 18th of August 2010. The self assessment ceased to exist in law on 18 October 2010 and no addition or amendment thereto would be lawfully made. Therefore the new assessments were not made in addition to or in amendment to the earlier self assessment returns.

Assessments were issued on 18 August 2010 and served on the plaintiff on 19 August 2010. Additional assessments amending revised assessments would only have been lawfully issued under section 97 on the basis of new information discovered by the defendant. There was no service of an assessment upon the plaintiff and therefore no additional assessment in terms of section 97 of the Income Tax Act was valid. Instead the defendant exercised the second option in dealing with the plaintiff self-assessment returns and the revised assessments issued after vacating the plaintiffs self assessment returns could never have been validly made under section 97. Consequently references to that section as the law under which the revised assessments were issued are misconceived.

Counsel for the plaintiff further submitted at length on inconsistencies in the defendant's evidence on the new information relied upon by the defendant. Counsel disagreed that the document "connected thinking" exhibit P 12 could be described as a new proposal and that the information contained therein new information. The submission of the defendant is that the 2009/2010 audit led to the discovery of new information relating to losses and therefore gave a foundation to new assessments. Counsel disagreed that the "connected thinking document" was inextricably linked to the tax audit 2009/10. The evidence of PW1 was that the audit and the document were not at all connected. The audit was undertaken for purposes of verifying the plaintiffs claim for tax refund in respect to the years of income 2007 – 2009 and not to confirm information in the "connected thinking document". Counsel submitted that the "connected thinking document" had no connection with the substance of the audit or the losses incurred by the plaintiff after 2001 and only proposed the rationales for the allocation of the tax written down values of the assets vested in the successor companies of Uganda Electricity Board.

The evidence of DW 1 is that the auditor verified the plaintiffs claim for losses incurred after incorporation in 2001. The losses claimed by the plaintiff related to the plaintiff's own operation as an entity after incorporation. Counsel contended that contrasting versions of what amounted to new information introduced fatal flaws in the evidence of the defendant. The results of the 2009/10 tax audit could not lawfully form the basis of issuing the revised assessments under section 97 of the Income Tax Act. This is because the audit was conducted prior to service of revised assessment notices upon the plaintiff and yet an additional assessment can only be issued after service of notice of assessment on the taxpayer.

Counsel reiterated earlier submissions that the evidence of DW 1 that the revised assessments was the conclusion arising out of the 2009/10 tax audit is a material departure from the averments in paragraph 9 of the defendant's written statement of defence which is to the effect that the new information was the allocation of the proper tax written down values of the assets inherited by the plaintiff during the unbundling of Uganda Electricity Board. DW1 distanced himself from the averments in the written statement of defence because it did not give a clear picture and his position is that the new information relied upon by the defendant has nothing to the tax written down values of the assets inherited by the plaintiff from Uganda Electricity Board. It is nowhere indicated in the written statement of defence that the new information relied upon by the defendant to issue the revised assessments was the conclusion of the 2009/10 tax audit to the effect that the plaintiff was not entitled to losses as had earlier been indicated in self assessment returns.

The plaintiff further submitted that the authorities of the Supreme Court quoted by the defendant cannot be the legal basis for the court to ignore material departure of the defendant's evidence from pleadings prejudicial to the plaintiff. The departure from pleadings was prejudicial to the plaintiff’s case. Counsel contended that this is because the plaintiff was deprived of an opportunity in its reply to the written statement of defence to rebut the alleged new information of DW1 contained in the witness statements and further to call evidence to rebut the version of the alleged new information belatedly brought forth in the defendant's evidence.

On the meaning of the phrase "discovery of new information" counsel contended that the authorities relied upon by the defendant are distinguishable from the facts of the present case. None of the authorities relate to the interpretation of the phrase "discovery of new information" as contained in section 97 (2) of the Income Tax Act. The new information was never produced in court. On a question of fact alone the authorities are not helpful to the defendant. Counsel further contended that the three words "discovery" "new" and "information" should not be severed but construed together. He submitted that the material words are "new information". He contended that the discovery of new information should be given its simple meaning as in the **Cape Brandy Case (supra)**. It simply means finding new data or material. In the context of the provision it merely means previously unknown material or data which came to light during the 2009/10 tax audit. Counsel contended that the submission that the discovery of new information extends frustrations where once predecessor got the law wrong or did not assess income where it ought to have been assessed and that such information may be found from available records is legally untenable, misleading and contrary to the express provisions of the Income Tax Act. Under section 97 (1) of the ITA, the defendant has three years after service of the notice of assessment within which to issue an additional assessment. Where the defendant discovers new formation after the service of an assessment on the taxpayer, the defendant has power under section 97 (2) to issue an additional assessment to amend the previous assessment. Counsel contended that the section does not give the defendant absolute right upon review or confirmation of information in its possession before service of the assessment on the taxpayer. The defendant can only lawfully exercise powers under the section upon receipt of information which was not in its possession before revised assessments were issued.

The defendant is obliged under article 28 of the Constitution and under the Income Tax Act to disclose particulars of the new information relied upon in making an additional assessment in the absence of which such an assessment is invalid and issued in error. The plaintiff was not availed the opportunity to object to the alleged "new information".

As far as the alleged want of form in the assessments is concerned the plaintiff's counsel submitted that section 98 (4) of the Income Tax Act grants powers to the defendant at any time to correct errors of from appearing in assessment notices i.e. arithmetical and typographical errors. The defendant ought to have recalled the assessments and revised them. Failure to make the correction meant that the assessments were made under section 95 and was time barred. The defendant did not point out in the objection decision that references to section 95 in the assessments was made in error.

On whether the revised assessments were issued under section 95 or 97 is concerned, counsel contended that the revised assessment notices state expressly that they were made in accordance with section 95 which mandates the Commissioner to make an assessment of the tax payable by a person where the Commissioner is not satisfied with the return lodged by the taxpayer. This could not be cured by the letter of the defendant contending that the defendant has the right to make an additional assessment under section 97 by reason of discovery of new information. In any case the new information relied upon was not disclosed. Attached to the letter were only computations in respect of VAT, PAYE and withholding tax.

As far as authorities on alleged want of form are concerned, they deal with irregularity on the face of an assessment and the court is invited to ascertain the substance of the assessment which should not be struck out for want of form. Counsel contended that the substance of the assessment was that they were issued under section 95 and this was communicated to the plaintiff by the defendant. At no time did the defendant indicate that the notices vacating the plaintiffs self assessment returns were issued under section 97 of the Income Tax Act.

As far as the validity of the tax audit is concerned, PW1 unilaterally invoked the provisions of sections 113 and 128 of the ITA to extend the ambit of the 2009/10 tax audit to cover years of income 2001 – 2003 contrary to the defendants instructions to conduct a tax audit on the plaintiff for the period from 31 December 2003 to 31 December 2007. Consequently it was not a case of delegation of powers as held in the case of **Cable Corporation versus Uganda Revenue Authority High Court civil appeal number 1 of 2011.** There is no evidence that the Commissioner delegated to DW1 the power to extend the audit. It is only the defendant's letter dated 23rd of March 2009 informing the plaintiff that the audit would cover the period 31st December 2003 to 31 December 2007.

Resolution of issue number one

I have tried my best to go take into account the lengthy written submissions of the plaintiff, the reply of the defendant and the rejoinder of the plaintiff. I have also examined the documentary evidence relied upon and agreed to in the joint scheduling memorandum of the parties. I have read the pleadings and attachments thereto and record of proceedings which includes the testimonies of the plaintiff's witnesses, written witness statement of DW1 and transcripts of cross examination and re-examination of the witnesses.

From the outset I must say that the primary mandate of the High Court under the Income Tax Act cap 340 (often referred to as the ITA) as set out in section 100 (4) is to determine questions of law. The subsection gives an option to the appellant who may appeal on questions of law only and the prescribed procedure for appealing by notice of appeal shall state the question or questions of law raised on appeal. Under section 100 of the ITA, a tax payer dissatisfied with an objection decision may either elect to appeal the decision to the High Court or apply for review of the decision to the Tax Appeals Tribunal. Section 100 (2) specifically prescribes the procedure of an appeal to the High Court and the period within which to Lodge the appeal.

It may be argued that the High Court does not lose its inherent jurisdiction to hear all matters and causes. In this suit, the plaintiff's appeal was commenced by plaint like an ordinary suit and evidence was adduced through witnesses in support and defence of the suit. First of all the plaintiff opted to file an action in the High Court and not apply for revision of the defendant's objection decision to the Tax Appeals Tribunal.

The genesis of the appeal as agreed in the joint scheduling memorandum is the objection of the plaintiff to additional assessments. The objection was addressed to the Commissioner and embodied in the plaintiff's letter dated 3rd of September 2010 and received by the defendant on 6 September 2010. Subsequently in a letter dated 10th November 2010 and apparently received by the plaintiff on the same day the defendant communicated the objection decision of the defendant on two questions. These are whether the assessments were issued outside the statutory five-year time limit and secondly whether assessments issued for tax arrears outstanding before 30 June 2002 were waived by the Finance Act 2008. The plaintiff lodged this action in the High Court on 19 November 2010 barely nine days after service of the objection decision on the defendant. The plaintiff mainly seeks declarations and an order of refund.

The defendant did not object to the procedure adopted by the plaintiff which procedure is not the procedure for appeals provided for by section 100 of the Income Tax Act. Though evidence was adduced for and against the suit, the declarations sought by the plaintiff would derive from resolution of the points of law raised in the objection of the plaintiff and the objection decision.

In the case of **Ketan Morjaria and Rajni Karia vs. The Commissioner General Uganda Revenue Authority MA NO 628 of 2010 Arising from Civil Suit No 398 of 2010** I held that the High Court should exercise appellate jurisdiction in matters of the Income Tax Act as intended by Parliament under section 100 thereof. This is because section 14 of the Judicature Act confer both appellate and original jurisdiction on the High Court. Where there is an appellate jurisdiction, the court should permit the designated court or tribunal to hear the matter and exercise appellate or supervisory powers thereto. My views in the above case are quoted below:

> ***"It is my humble finding that though the Constitution and the Judicature Act clearly give the High Court unlimited original jurisdiction in all matters, it also gives the High Court such appellate jurisdiction and other jurisdiction as is conferred by the Constitution and any Act of Parliament. This original jurisdiction shall be applied in conformity with the written law. The written law and the intention of Parliament under the Income Tax Act give the High Court specific***

> ***appellate jurisdiction from an objection decision made by the Commissioner General. Why should the High Court exercise original jurisdiction in this respect?***
>
> ***To illustrate this point, Chief Magistrates Courts have jurisdiction to handle civil suits whose pecuniary value is up to a maximum of Uganda shillings 50,000,000/=. The High Court has unlimited original jurisdiction in such civil suits as well! However the Constitution under article 139 and the Magistrates Court Act give the High Court appellate jurisdiction from decisions of subordinate courts. Should the High Court exercise original jurisdiction with the Magistrates Courts concurrently? It cannot be said that because an appeal lies to the High Court from the decisions of Grade 1 and Chief Magistrates that this ousts the original and inherent jurisdiction of the High Court to handle suits falling within their pecuniary jurisdiction. There is therefore a clear policy issue that a civil suit within the pecuniary jurisdiction of Magistrates Courts should be filed in the Magistrates Courts to enable the High Court exercise both Appellate and supervisory powers. The question in this case can be examined by looking at the issue of whether an appeal lies from an assessment. It is clear from the Income Tax Act that an appeal lies only from an objection decision and upon the election of the taxpayer to appeal to the High Court. No appeal lies to the High Court from an assessment. The suit filed by the Applicants is not an appeal as envisaged in the Income Tax Act but an ordinary suit which challenges the assessment of the applicants for income tax on a particular transaction."***

Appellate jurisdiction has a prescribed procedure and is commenced by notice of appeal. Notwithstanding, the defendant has not objected to the procedure of an ordinary suit despite the express provisions of section 100 subsections (2), (3) and (4) of the Income Tax Act. Apparently the defendant was not prejudiced by the procedure adopted. It is only the High Court which is prejudiced by hearing evidence some of which evidence was possibly not before the Commissioner General by the time of making the objection decision in question. In light of the above, I will try as much as possible to look at the documentation between the parties without being biased by the opinion of the witnesses or issues of admissibility. What is relevant in appeal matters is what materials the decision-making authority had and the decision it made which has become the subject matter of the appeal. Consequently the issue would be whether the decision making authority erred in law or on questions of fact. The duty of the court is to review or examine what the Commissioner took into account or ought to have taken into account in making the objection decision. A lot of effort was made to criticise the witnesses of the plaintiff and the defendant on questions of fact. Again a lot of effort was made to review evidence relevant to the question. This has had the effect of protracting the proceedings and subjecting the court to lengthy evidence and contradictions or alleged contradictions which could not have been a matter before the Commissioner. The best the witnesses could do is to put all the relevant materials on record on the issues the subject matter of the appeal/suit. The witnesses cannot deconstruct the evidence available to the Commissioner and reconstruct it in favour of any of the parties. The court would be entitled to examine all the materials which are relevant to the subject matter of the objection before the Commissioner General and the objection decision. Had the matter gone to the Tax Appeals Tribunal, it would have been a review and it would have been entitled to take evidence to make that the review. They are even entitled to make a reassessment of tax. By filing an original suit, the High Court is more or less being asked to carry out a review of the evidence to establish whether it supports the objection decision of the Commissioner. The Supreme Court has already established that the original and inherent jurisdiction of the High Court in tax matters is limited. In the case of **Uganda Projects Implementation and Management Centre versus Uganda Revenue Authority Supreme Court Const Appeal No. 2 of 2009, Kitumba** JSC who delivered the judgment of Court held at page 21 that such original jurisdiction covers the exercise by the High Court, of powers of judicial review of the Commissioner's action. She held: "*Judicial review of administrative action is, in my view, original jurisdiction of the High Court and cannot be taken away by any other law because it is conferred on it by the Constitution, which is the Supreme Law of the land.*" Secondly in the Supreme Court decision of **Commissioner General, Uganda Revenue Authority versus Meera Investments Ltd, Supreme Court Civil Appeal No. 22 of 2007** Hon. Justice Kanyeihamba JSC who delivered the judgment of the Court examined the dual jurisdiction of the High Court in terms of its concurrent appellate and original jurisdiction. The Supreme Court interpretation seems to restrict the original jurisdiction of the High Court to cases akin to where a taxpayer is actually in the words of the Supreme Court:

"challenging the Commissioner General's powers to impose tax on property. That kind of dispute properly belongs to the jurisdiction of the High Court and not of a tax tribunal."

In my opinion where there is an express appellate jurisdiction conferred by statute, the High Court should exercise the specific appellate or other jurisdiction under the statute and not its inherent original jurisdiction. Judicial review comes under a specific law conferring specific jurisdiction namely for judicial review of administrative action under The Judicature (Judicial Review) Rules 2009. Where a taxpayer is challenging an objection decision, it is clearly the appellate jurisdiction which should be invoked and not its inherent and original jurisdiction. The appellate jurisdiction from objection decisions is conferred on the High Court by section 100 of the ITA.

The first and second issues for resolution by this court were the issues tabled before the Commissioner for objection decision. The conclusion is that even though an ordinary suit was filed, this is clearly a question of procedure and not jurisdiction. The High Court will exercise appellate jurisdiction in this action. Any evidence that is put before the court would be considered on the basis of whether those materials were available to the Commissioner General or ought to have been made available to the Commissioner General and were or ought to have been taken into account in arriving at the objection decision. Consequently any criticism of any of the witnesses on questions of interpretation or the opinion of the witnesses on interpretative questions may be considered but are not binding on the High Court which retains its jurisdiction to examine whether the objection decision should stand in light of the materials available to the Commissioner and whether the Commissioner erred law or in fact in arriving at the objection decision.

Notwithstanding the procedural questions raised above I will start by setting out the objection of the plaintiff to the assessment and the consequent objection decision of the Commissioner to clearly delineate the area of controversy in this appeal.

The first issue is **whether the assessments the subject matter of the suit are time barred under section 95 of the Income Tax Act.**

The objection letter of the plaintiff through its tax consultants PricewaterhouseCoopers dated 3rd September 2010. Ground 1 in that objection is that the assessments in question were issued outside the statutory five-year time limit. The letter reads on the first issue as follows:

> ***"The periods 2001 to 2004 are beyond the five-year statutory limit for which URA can issue additional assessments. This is in accordance with section 95 and section 97 of the Income Tax Act (ITA).***
>
> ***Section 95 (1) of the ITA provides for the five-year statutory limit for the Commissioner to issue assessments. According to this section,***
>
> ***'… The Commissioner shall, based on the taxpayers return of income <u>and any other information available</u>, make an assessment of the chargeable income of the taxpayer and the tax payable on it for a year of income within <u>five years</u> from the date the return was furnished."***
>
> Section 97 (2) of the ITA further provides for additional assessments beyond the statutory limit as follows: "…"
>
> From the above provisions of the ITA, the Uganda Revenue Authority can only audit and issue assessments for periods within five years after the return is filed based on available information unless the Commissioner establishes that there was fraud, gross or wilful neglect by the taxpayer or discovers new information which was not initially disclosed by the taxpayer.
>
> In your letter to us dated 5th of August 2010, you informed us that the five-year statutory limit was not applicable to the Corporation tax audit on UETCL because of the emergence of new information. You do not specify which new information was discovered by the URA that was not already available at the time of filing the returns.

Our understanding is that all the information that the URA has based on to conduct the audit and issue assessments (for all taxes) was already available to the URA at the time the respective returns were filed. We are not aware of any new information which you have now discovered that was not already available to you before the tax audit.

In the absence of new information discovered as a result of your audit, which information has not been disclosed to you by our client when they had filed the tax returns, we are of the view that there is no legal basis for issuing these new assessments outside the five-year statutory time limit."

I have carefully considered the submissions of counsels on this point which submissions have been set up above. The crux of the issue before the Commissioner was whether the assessments were time barred under section 95 (1) of the Income Tax Act. This is because the assessments were issued five years after the plaintiff filed returns and secondly the Commissioner had not indicated which information it had discovered to come to the conclusion that the limitation period was not applicable. Secondly that it did not have that information already. The objection decision of the defendant/Commissioner is contained in a letter dated 10th November 2010 and addressed to PricewaterhouseCoopers Ltd, the tax consultants of the plaintiff. On the first issue the assistant Commissioner Large Taxpayers' Office ruled as follows:

" ***We reiterate our earlier position as communicated to you on 5 August 2010 that URA is not bound by the statutory time limit on account of emergence of new information as provided for in section 97 (2) of the Income Tax Act cap 340.***

The case of UETCL is peculiar in the sense that it was subject to the conclusion of the assessments of the former UEB – a process that provided new information since you had not taken into account the proper tax written down value at the time of submission of UETCL's first financial statements."

The communications referred to of 5th of August 2010 responds to a letter of the plaintiffs tax consultants dated 19th of April 2010. The letter reads in part as far as is relevant to the first issue as follows:

"(b) The provisions relating to the statutory time limit is not applicable to Corporation tax because of the emergence of new information. We wish to state that URA has the right to make an additional assessment under section 97 (2) of the Income Tax Act where the need to make additional assessments arises as a result of "… discovery of new information in relation to the taxpayer for any year of income.""

(c) statutory time limits have been applied to the following taxes,

- ***VAT***
- ***PAYE***
- ***withholding tax***

  Attached is a revised tax computation limiting the period to 2005 onwards. (See Table 1)

  … "***The emergence of this new information is also important in that your client would be reporting the correct value of assets in the Financial Statements and not only for tax purposes.***

The defendants Manager, Finance and Manufacturing – Large Taxpayers Office indicated that they would issue amended assessments in respect of VAT, PAYE and withholding tax and final assessment in respect of Corporation tax. The subject matter of the new information according to the objection decision is the conclusion of the tax matters of the former Uganda Electricity Board and specifically the failure by the plaintiff to include the proper tax written down values of assets in its self assessment returns in its first financial statements. Subsequently several assessments were issued on 18 August 2010. It is apparent from the last letter dated 5th of August 2010 that the alleged emergence of new information had to do with the correct value of assets in the financial statements. Subsequently the defendant issued assessments which form indicates that it is issued under section 95 and 158 of the Income Tax Act. It is entitled *amended assessment notice*.

Counsel's dwelt at length on the characterisation of the assessment notice as to whether it was an amended assessment notice, a fresh assessment or an additional assessment. The characterisation of assessments is determined by the law. I have carefully read the submissions of both parties on the import of section 95 – 98 of the Income Tax Act and on the characterisation of the assessments issued to the plaintiff the subject matter of the dispute. Before reference can be made to any case law, the starting point for the characterisation and definition of the assessment is the objection decision. The objection decision indicates that there was discovery of new information. Indeed the plaintiff challenges the Commissioner in its objection by indicating that the alleged new information had not been provided. Secondly, the second line of analysis is the relevant statutory provisions.

Whatever the wording of the objection decision, an appellate court will always determine whether on the basis of the evidence before the tribunal or lower court, substantial prejudice has been occasioned to the appellant before the decision of the tribunal or lower court can be set aside. The basic principles applied for evaluation of evidence on appeal do not differ much between civil and criminal appeals.

In the case of Ephraim Ongom versus Francis Benega SCCA No. 10 of 1987 it was held that the duty of the first appellate Court is to re consider and evaluate the evidence, and come to its own conclusions. In so doing it should subject the evidence to the fresh and exhaustive scrutiny. The Supreme Court followed the holding of the East Africa Court of Appeal in Selle and Another vs Associated Motor Boat Company [1968] EA 123. Sir Clement De Lestang V-P at page 126 held:

> ***“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”***

In Peters v Sunday Post Limited [1958] 1 EA 424 East Africa Court of Appeal At Nairobi approved the decision of the House of Lords in **Watt vs Thomas [1947] AC 484**. In that case Viscount Simon LC said at page 485:

> ***"An appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon the evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. If the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight."***

Lord MacMillan said at page 491:

> ***"So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial court on the facts may be demonstrated on the printed evidence to be affected by a material inconsistencies and inaccuracies, or he made be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."***

The conclusion is that if the decision of the Commissioner is supported by evidence, then it will stand. If it is not so supported then the court will interfere with it. In others words even if the Commissioner took an incorrect view of the evidence in the objection decision, if there is material to show that the new assessment was based on discovery of new information, then the decision will not be disturbed. That relevant evidence is the materials available to the Commissioner and relevant to the issues before her.

It is important to start with the primary provision which is section 95 (1) of the Income Tax Act which provides that:

> ***"Subject to section 96, the Commissioner shall, based on the taxpayers return of income and [on] any other information available, make an assessment of the chargeable income of the taxpayer and the tax payable on it for a year of income within five years from the date the return was furnished."***

The plaintiff submitted that the provision limited the Commissioner to make an assessment within five years from the date the returns were filed or furnished to the Commissioner. The defendant on the other hand contended that the plaintiff operated under a self assessment regime and consequently section 95 applied subject to section 96 of the ITA to the plaintiff. Additional arguments were that new information had emerged and therefore an assessment could be made at any time based on the emergence of new information under section 97 (2) of the Income Tax Act. Before proceeding to deal with the arguments based on the emergence of new information or based on whether the assessment was an additional assessment, a revised assessments or a fresh assessment, we need to establish whether the limitation period under section 95 (1) of the ITA applies to such assessments of the plaintiff.

Section 95 (1) of the ITA provides that the Commissioner shall based on the taxpayers return of income make an assessment of the chargeable income of the taxpayer and the tax payable for a year of income within five years *from the date the return was furnished*. Returns are generally governed by section 92 of the ITA which provides that:

> ***"Subject to section 93, every taxpayer shall furnish a return of income for each year of income of the taxpayer not later than six months after the end of that year."***

Section 92 (2) of the ITA provides that a return of income shall be in the form prescribed by the Commissioner and shall state the information required which shall be furnished in the manner prescribed by the Commissioner. Section 93 which concerns cases where a return of income is not required does not apply to the plaintiff. The plaintiff is obliged to make yearly returns of income under section 92 (1). Section 95 (1) of the ITA puts the obligation on the Commissioner to make an assessment of chargeable income of the taxpayer and tax payable on it primary based on the return of income within five years from the date the return was furnished. Under section 95 (2) of the ITA where the Commissioner is not satisfied with a return of income for a year of income furnished by a taxpayer, the Commissioner may make an assessment of the chargeable income of the taxpayer and the tax payable therefore for that year. Under section 95 (3) where the Commissioner has made an assessment upon not been satisfied or in default of the taxpayer furnishing the return of income for a year of income, the Commissioner shall include a statement of reasons as to why the Commissioner was not satisfied with the return. The general rule therefore is that the Commissioner would make an assessment based on the taxpayer’s return of income and the tax payable on it. Whether the Commissioner was satisfied or not satisfied with the returns of income/self – assessment, she is supposed to be make the discretionary/additional assessment within five years from the date the return was furnished.

It was agreed in the joint scheduling memorandum that the plaintiff used to file self assessment returns. It is established that for the years of income 2001 – 2004 the plaintiff filed self assessment returns. Self assessment returns are made by persons to whom section 96 (5) of the ITA applies. Section 96 (5) provides that the section applies to taxpayers specified in a notice published by the Commissioner in the Gazette for a year of income.

No evidence was led to prove that the plaintiff was a person to whom section 96 applied for all the years of income relevant to this appeal. Section 96 (1) of the ITA provides that:

> ***"Where a tax payer has furnished a return of income for a year of income, the Commissioner is deemed to have made an assessment of the chargeable income of the taxpayer and the tax payable on that chargeable income for that year, being those respective amounts shown in the return. (Emphasis added)***

The quoted section makes it clear that any gazetted persons required to file self assessment returns of income are obliged to file returns of income for every year of income. In other words section 92 (1) of the ITA which requires every taxpayer to furnish a return of income for every year of income applies to the plaintiff notwithstanding that the plaintiff could be a gazetted person required to file self assessment of income. The term "self assessment" has not been clearly defined. Section 96 (2) of the ITA provides that the taxpayers return of income is treated as a notice of assessment served on the taxpayer by the Commissioner on the date of furnishing of the return or on the actual date the return was furnished, whichever is the later. In other words it is a return of income for the year of income by a gazetted person under section 96 (5) of the ITA which operates as a notice served on the taxpayer by the Commissioner on the due date for furnishing of the returns or on the actual date when the return was furnished to the Commissioner. In conclusion a gazetted person to whom section 96 is applicable is also required to file returns of income for every year of income as much as someone to whom section 95 (1) of the ITA applies. A return of self assessment operates as a notice of assessment. Under section 96 (3) the Commissioner has discretion to make an assessment in addition to the self assessment under section 95 only in any case where the Commissioner considers it necessary even though the person was under a self assessment regime. Such an assessment is made under section 95 (2) of the ITA in which case the Commissioner is obliged to include a statement of reasons as to why he/she was not satisfied with the returns as under section 96 (4) of the ITA.

Section 95 (1) of the ITA places the obligation on the Commissioner to make an assessment of the chargeable income of the taxpayer and the tax payable on it for a year of income within five years from the date the return was furnished. As contrasted with section 96 of the ITA, an assessment where the Commissioner deems it necessary is made within five years under section 95 (2) of the ITA which is also imported by section 96 (3) of the ITA and applies to the discretionary assessments by the Commissioner under section 96 of the ITA. Additionally the law deems an assessment to have been made where a return of income has been made under section 96 (1) of the ITA. Where the Commissioner does not make the additional assessment to that deemed by law within five years from the due date of the self assessment or the actual date of filing the self assessment, it is implied by law that the Commissioner was satisfied by the self assessment return. Where it is deemed by the law, section 95 (1) in as far as the limitation period is concerned would not be relevant and the self assessment is the notice of assessment. It is only relevant where the Commissioner in his or her discretion decides to make the assessment where he or she deems it necessary and for whatever reasons in addition to that deemed by law. Such a decision to make an assessment by the Commissioner has to be made and the assessment issued within five years in terms of section 95 (1) from the date of the return of income for the year of income in question. Section 95 (1) is of general application to all assessments to be made by the commissioner. The limitation period runs from the date of returns whether the Commissioner exercises that discretion or not. If the Commissioner decides to exercise their discretion, it has to be exercised within five years. If the Commissioner does not exercise their discretion, he or she cannot do so after the expiration of five years from the date of the returns.

The self assessments of the plaintiff which are relevant to the dispute are as follows: for the year of income ending 31st December 2001 the self assessment is dated 20th of February 2003. It is acknowledged by the Commissioner on 28 March 2003. Secondly, for the year of income ending 2002 the self assessment is dated 29th of April 2003 and was received on the 2nd of May 2003 by the defendant. For the accounting year ending the 31st December 2003 the self assessment is dated 11 August 2004. Lastly for the accounting year ending 31 December 2004 it is dated 11th of August 2005 and furnished on 22 August 2005. Tax clearance certificates dated 6th of April 2005 issued by the defendant show that the plaintiff discharged its total liabilities for the years of income 2003, 2004 and 2005. The tax clearance certificates were served on the defendant on 6 April 2005 and are issued by the Large Taxpayers Office of the defendant.

The clearance certificates show that the plaintiff had complied with filing self assessment returns up to the end of the year 2004. The assessments for consideration in this appeal were issued on 18 August 2010. They ought to have been issued within five years from 11 August 2005. They were however issued outside the five year period prescribed by section 95 (1) of the ITA unless there was discovery of new information.

The controversy on whether the assessments are time barred would therefore be determined on whether any new information was discovered by the Commissioner as the basis for saying that the limitation period relied on by the plaintiff was inapplicable under section 97 (2) of the ITA. Secondly whether there was communication of the new information and the effect thereof. Under section 97 (2) of the ITA where new information has been discovered, the limitation period does not run until the time of the discovery. Section 97 (2) of the ITA provides as follows:

> ***"(2) Where the need to make an additional assessment arises when by reason of fraud or any gross or wilful neglect by, or on behalf of the taxpayer, or the discovery of new information in the relation to the tax payable for any year of income, the Commissioner may make an additional assessments for that year any time"***

The above quoted provision is preceded by a head note which reads: "Additional Assessments". It deals with additional assessments. Secondly it provides that where there is a need to make an additional assessment, the Commissioner may make an additional assessment for that year of income anytime. The provision deals with the need to make an assessment when there is discovery of new information in relation to the tax payable for any year of income. In this case there is no allegation of fraud, gross or wilful neglect by or on behalf of the taxpayer. It is agreed that the defendant relied on the need arising due to "discovery of new information". The court was addressed on the meaning of "discovery of new information". Where necessary, this may indeed be resolved. The plaintiff however contended that in the circumstances of the case, it cannot be submitted that section 97 was applicable to the circumstances of the case. I will not consider the evidence before an analysis of the section providing for "discovery of new information".

Firstly section 97 deals with additional assessments. Additional assessments are made after any notice of assessments issued or deemed to be issued under sections 95 or 96 of the ITA. The express words used in section 97 (1) of the ITA introduces a three-year limitation period after service of notice of assessment for issuance of amended assessments. The use of the word "service of notice of assessment" introduces a controversy as to whether it is applicable to a deemed service of notice of assessment or an actual service of notice of assessment after assessment by the Commissioner. In the first instance, it is a question of fact whether the Commissioner assessed the plaintiff using his/her discretionary powers either under section 96 (3) of the ITA where the Commissioner deems it necessary to do so or under section 95 (2) (b) where the Commissioner is not satisfied with the return of income for a year of income furnished by a taxpayer. The evidence of PW2 is that the

Commissioner issued revised assessments in 2005 and they objected on behalf of the plaintiff. However the defendant never issued any objection decision. It is by operation of law under section 96 (2) of the ITA that the return of income of the plaintiff is deemed to have been a notice of assessment served on the taxpayer by the Commissioner. Consequently in considering section 97 (1), an amended additional assessment has to be made within three years from the date of service of the notice of assessment. If what is deemed by law is the notice of assessment, then there was no amended assessment within three years and section 97 (1) is inapplicable.

All the assessments in controversy dated 18th of August 2010 are entitled "Amended Assessment Notice". The Court was addressed on the question of whether the title of the assessments in question as “amended assessment” is a matter of form or substance which issue will be addressed subsequently. It is only for purposes of exclusion that the court holds that section 97 (1) is inapplicable to the dispute because it deals with amended assessments. There could not have been an amended assessment and the court can only handle the issue of whether the assessments in question are additional assessments based on discovery of new information notwithstanding the title of the assessment. This is based on the duty of the court on appeal to establish whether the objection decision is supported by evidence. The Commissioner ruled that the defendant relied on new evidence to issue the new assessment. Is this supported by the evidence?

The second consideration is under section 97 (2) which deal with the discovery of new information in relation to the tax payable for any year of income. Where there is discovery of new information in relation to the tax payable for any year of income, additional assessment for that year of income may be made by the Commissioner any time. The words "any time" are not defined. They do resolve the controversy as to whether the limitation period provided for under section 95 (1) of the ITA is applicable. That limitation period would be inapplicable because of the use of the words "any time". However, after the discovery of new information can an assessment be made anytime i.e. 10 years after the discovery? That is not the matter in controversy in this suit. However the words “any time” should be construed to mean anytime after the discovery of new information. This leaves it open to argue the issue of whether the limitation period of five years applies after discovery of the new information.

A lot of effort was made as to argue whether the assessments in dispute were issued under section 95 or 97. The written objection decision on record issued by the Commissioner states that there was discovery of new information. This appears in the objection decision dated 10th November 2010 where it is indicated that on 5 August 2010 the defendant communicated that position to the plaintiff. The letter of 5 August 2010 refers to the emergence of the new information. It is clear that the new information alleged relates to the value of assets in the Financial Statements. Secondly it is an agreed fact in the joint scheduling memorandum binding on the parties that the plaintiff conducted self assessments of income tax for the years of income 2001 – 2004 on diverse dates on or before 18th of August 2005. Self assessment is made by gazetted persons under section 96 (5) of the ITA. The law provides that a self assessment is deemed to be a notice of assessment issued by the Commissioner. For the years of income 2001 – 2004 it is deemed by law that the Commissioner issued notices of assessment on the taxpayer in accordance with section 96 (2) of the ITA. Section 96 (3) of the ITA provides that the Commissioner may make an assessment under section 95 of the taxpayer in any case in which the Commissioner considers necessary. There is no documentary proof that revised assessments were made by the Commissioner under section 95 of the ITA and section 96 (3) within five years from the date of filing of the self assessments or returns of income by the plaintiff in 2005 according to the testimony of PW2. Assessments were originally made under section 96 (3) of the ITA as deemed by the law. However discovery of new information can lead to further assessments irrespective of whether additional or revised assessments had been made. What is left is whether the Commissioner issued additional assessments to the previous assessments based on discovery of new information.

Counsels submitted on section 98 (3) as to whether the new assessments made by the Commissioner entitled to have been made under section 95 and also as amended assessments was in substance issued under section 97 (2). The question is whether the court should consider these arguments in light of the fact that the Commissioner in her objection decision decided clearly that the new information was communicated in the letter of 5th of August 2010. The information is in the relation to the written down value of assets in the financial statements. I have already held that this is an appeal even though it was filed as an ordinary suit. The fact that it was filed as an ordinary suit is merely procedural and not jurisdictional. The question therefore is whether the Commissioner erred in law or fact to rule that the assessment was made on the basis of new information and whether indeed the issues revolving around the written down value of assets was new information. A subset of this issue would be whether the alleged new information was communicated to the plaintiff in the additional assessments. It is therefore a fact that the Commissioner purported to issue assessments according to the objection decision on the basis of new information which new information is about the written down value of assets. Was there information about the written down value of assets that was new information?

DW1 was cross examined about this matter and insisted that the assessments were made pursuant to the discovery of new information. The defendant purports to have issued the assessments under section 97 (2) of the ITA pursuant to the discovery of new information. As an appeal the adducing of evidence only serves to give materials to the court as to what ought to have been taken into account in arriving at the objection decision. No prejudice has been occasioned to the defendant by the procedure adopted by way of ordinary suit to challenge the objection decision because the defendant did not object to the procedure adopted. The nature of the action before the court cannot change as jurisdiction is a creature of statute. The High Court enjoys appellate jurisdiction from an objection decision. It is therefore material and only the material relevant to what is embodied in the objection decision which should be considered. How the court accesses this material is not largely contentious. The correspondence attached to the pleadings may be considered. In the objection decision the Commissioner purports to rely on discovery of new information to overrule the objection of the plaintiff that the assessments were time barred. The court would therefore consider whether in substance there was discovery of any new information, the basis of the assessments in dispute. If there is any new information discovered subsequent to the assessments deemed to be a notice of assessment issued by the Commissioner, then the contention that the assessments were time barred would fail. The court will also determine whether the assessments on the face of it were issued under section 97 (2) of the ITA. The court will in the process also deal with whether the title of the assessments showing it was issued under section 95 of the ITA is a matter of form and not substance. Lastly the court is required to ascertain whether failure to notify the plaintiff of the alleged new information was a fundamental breach of the rules of procedure and substantive justice.

In the joint scheduling memorandum paragraph (e) it is an agreed fact that the amended Corporation tax assessments issued by the defendant on 18 August 2010 were inter alia premised on a document written by the plaintiff's tax consultants Messrs PricewaterhouseCoopers which document has been named as "Connected Thinking" submitted to Uganda Revenue Authority on behalf of the plaintiff. It substantially narrows down the controversy as to when the information became available and whether it was new information at all. Before considering the evidence we shall quote section 97 (2) of the Income Tax Act, and particularly the relevant part namely:

"*or the discovery of new information in relation to the tax payable for any year of income, the Commissioner may make an additional assessments for that year any time*."

The question has been whether there was any new information that was not available to the defendant by the time of making the assessment. The above provision provides that the new information must be in relation to the tax payable for any year of income. In this case it must be information in relation to tax payable for the year of income ending 2001. The defendant relied on the case of **King vs. Bloomsbury Tax Commissioners [1915] 3 KB 762**. In that case, the court considered section 52 of the Tax Management Act 1880. Lord Reading CJ quoted the provision and as far as is relevant to the definition of the word "discovers", it provides as follows:

> ***"If the surveyor discovers that any properties or profits chargeable to the duties have been omitted from such first assessments, or any person so chargeable has not made a full and proper or any return…"***

In establishing the meaning of the word "discovers" in the context of section 52 quoted above, Lord Reading CJ concluded at page 788:

> ***"This Court has decided in Rex versus Kensington Income Tax Commissioner's (1) that the expression "if the surveyor discovers" in section 52 does not mean it ascertains by legal evidence. My brother Bray said that it means "if he comes to the conclusion on the information before him." My brother Lush said that it means "if he is satisfied," and I said that it means "if he has reason to believe." ((1) [1915] 3 KB 870)***

The Honourable CJ further on observed that where the surveyor discovers i.e. has reason to believe that such a person is not entitled to an exemption, he thereby discovers that he is chargeable, the additional Commissioners are thereupon authorised and directed to make an assessment. The court examined the duty of the commissioners to make an assessment upon being satisfied that there was tax chargeable notwithstanding an earlier assessment. Section 52 quoted above is not in *pari materia* with section 97 (2) of the ITA. Section 97 (2) of the ITA uses the words "*discovery of new information*". The word ‘discovery’ by its nature means getting to know something new. The **Cambridge International Dictionary of English Cambridge University press 1995** defines the word "discover" as to find information, a place or an object especially for the first time. The word "discovers" therefore substantially has the same meaning as the phrase "discovery of new information". The only qualification and difference is that in the Ugandan Income Tax Act it deals with discovery of information in relation to the tax payable. In the context of the plaintiffs case any information that shows that the returns of the plaintiff to the defendant for any year of income is false or misleading can be termed a "discovery of new information". This is because previously the Commissioner was presumed or deemed to be satisfied by the returns and did not have any suspicions that the plaintiffs returns did not contain accurate information. I would further go to demonstrate after review of the evidence the full import of section 97 (2) of the Income Tax Act.

The plaintiffs evidence on the first controversy as to whether there was discovery of new information is first of all embodied in the documentary evidence admitted as exhibits and secondly in the testimonies of PW1 and PW2. The testimony of PW1 George Rwabajungu the Finance Manager of the plaintiff basically addresses the self assessment returns for the years of income 2001 – 2003. The self-assessment returns show a nil Corporation tax position. The defendant never challenged or reviewed the self assessment returns until 18 August 2010. When it did it was outside the five-year limitation period. I must emphasise that the Commissioner is deemed to have been satisfied by the tax returns of the plaintiff.

PW1 further testified that the plaintiff was in touch with the defendant through its tax consultants Messrs PricewaterhouseCoopers who made a proposal in 2006 that the tax losses of the former Uganda Electricity Board should be shared between its successor companies. The proposal was submitted by the tax consultants in 2006. The document proposed sharing capital allowances and industrial building allowances to successor companies and how to distribute any losses of Uganda Electricity Board to the successor companies for tax purposes. This document was adopted by the defendant and is the document termed "connected thinking". It was adopted by the defendant in 2010. The defendant then vacated the self-assessment returns of 2001 – 2003 and issued new tax assessments in August 2010. PW1 emphasised that the new assessments were issued under section 95 and 158 of the ITA. He further submitted the assessments as exhibits having details which are self-explanatory in the exhibits themselves. These are the assessments exhibit P4, P5, P6, P7, P8 and P9. PW1 emphasised that the first assessments vacated the self assessments of the plaintiff. The basis of the new assessment was the audit findings of the defendant in a letter communicated on 5 August 2010. The witness further testified that according to the advice of the tax consultants of the plaintiff, the new assessments were time barred for the years of income 2001 – 2003. The plaintiff objected to the assessments in its objection letter through the tax consultants exhibit P10. Subsequently the defendant made an objection decision.

PW2 Mr Francis Kamulegeya a tax consultant with PricewaterhouseCoopers gave the genesis of the dispute. The assessments in dispute were issued after a tax audit of the plaintiff by the defendant in 2009. They related to the years of income 2001 – 2003. For these years of income, PricewaterhouseCoopers had filed self assessment returns on behalf of the plaintiff. In the year 2005 the defendant issued revised assessments for the years 2001 – 2004. PricewaterhouseCoopers on behalf of the plaintiff objected to the revised assessments and the defendant did nothing. In 2006 the three successor companies of Uganda Electricity Board gave PricewaterhouseCoopers instructions to review the basis on which Uganda Electricity Board had been disbanded and make recommendations on how the three successor companies can take on the assets of Uganda Electricity Board which was by then a dormant company. PricewaterhouseCoopers made recommendations giving the basis on which assets could be allocated. The tax base of Uganda Electricity Board included tax losses and assets which are for the benefit of future tax allowances. They were to be inherited and allocated to the new companies appropriately to ensure continuity from the tax perspective. In the document termed "connected thinking" the new companies were to be allocated tax losses, tax written down values for assets. For tax losses the allocation was **65,670,380,000/=** in respect of tax written down values to the plaintiff. There were four classes of figures. Class 1 dealt with capital plant and machinery and is the class of computer equipment mainly. It had a loss of **439,052,000/=** Uganda shillings. Class 2 mainly dealt with motor vehicles and allocation to the plaintiff under this heading and was **Shillings 235,948,000/= c**lass three comprised of heavy plant and machinery out of which **3,034,463,000/=** Uganda shillings was allocated to the plaintiff. Finally class 4 dealt primarily with furniture and fittings out of which **Shillings 18,036,669,000/=** was allocated to the plaintiff. The document "connected thinking" was submitted to the defendant in August 2006 and was tendered in evidence as exhibit P12.

After submission of the proposal contained in the document named "Connected Thinking" the defendant proceeded to conclude the tax affairs of Uganda Electricity Board working in conjunction with the official receiver/liquidator. Sometime in the year 2008 PricewaterhouseCoopers received a letter from the Commissioner General that the tax affairs of Uganda Electricity Board had been concluded. Subsequently PricewaterhouseCoopers on behalf of the plaintiff applied for tax refund to the defendant in 2009. By this time the plaintiff had filed all the tax returns. It was the practice of the defendant to audit a firm applying for tax refund. Subsequently the defendant carried out an audit in 2009 which stretched up to May 2010. When the audit report was issued PricewaterhouseCoopers objected to the assessments made pursuant to the audit. The defendant conceded that they would not raise assessments which were more than five years old in respect to withholding tax and pay as you earn (PAYE). However they refused to restrict themselves as far as Corporation tax was concerned.

The witness emphasised that first of all the defendant issued assessments in 2005 which PricewaterhouseCoopers objected to on behalf of the plaintiff and exhibits P5, P6 and P9 are amended assessments reducing the original 2005 assessments to nil. Exhibits P4, P6 and PE 8 being new assessments were based on the tax audit. The new assessments based on the tax audit were issued in accordance with sections 95 of the ITA. The defendant used the accounts of the plaintiff for the years of income 2001 – 2003. The witness further testified that the history of Uganda Electricity Board was the key factor in the tax status of the successor companies and they had proposed in the "Connected Thinking” document allocation of the assets of Uganda Electricity Board to the successor companies and this was reflected in the revised assessments of the defendant. The defendant relied on what transpired between them and the Official Receiver to resolve the tax affairs of Uganda Electricity Board. The defendant denied Uganda Electricity Board the tax losses on the basis that the Official Liquidator failed to provide information they wanted from him to support the Uganda Electricity Board tax losses. The effect of that refusal was that suddenly tax losses of 65 billion were not reflected in the plaintiff's tax computations. The losses were coming from Uganda Electricity Board and secondly there was a small arithmetic error relating to industrial building allowances. The defendant used the plaintiffs accounts filed sometime back to make the tax computation. In the previous tax computations PricewaterhouseCoopers had indicated that the successor company will be inheriting part of the tax losses of Uganda Electricity Board but because the liquidator failed to prove to the defendant the tax losses, the defendant ruled that Uganda Electricity Board did not have tax losses. Consequently the 65 billion was not available to the plaintiff according to the revised tax computation of the defendant. Suddenly the revised assessments gave huge sums of money payable in the form of Corporation tax against the plaintiff. The defendant indicated in its letter dated 5th August 2010 that the revised assessments were based on audit findings. PricewaterhouseCoopers objected to the assessment on grounds that they were issued outside the five-year limitation period. Secondly the assessments arising from the year 2001 year of income had been waived under the Finance Act 2008 which waived all tax arrears outstanding as at 30 June 2002. In its objection decision the defendant never responded to the second ground of objection in its letter dated 5th of August 2010 exhibit P13. The objection exhibit P10 was signed by PW2. The response of the defendant was that the statutory time limit did not apply to them on account of emergence of new information under section 97 (2) of the ITA. Accordingly the defendant makes reference to the conclusion of the tax affairs of Uganda Electricity Board as the new information. The assessments are based on accounts filed sometime back for the years of income 2001 – 2003. Out of which the outstanding issue was the allocation of assets which was proposed to them in August 2006.

Upon being cross examined, PW2 testified that the figure based on tax loss was a cumulative figure. The self-assessment returns show tax loss of 55 billion. On the other hand the refund requested for by the plaintiff was attributable to the years of income 2004. The amount which the plaintiff seeks refunded is made up of two components namely a figure attributed to the year of income 2004 and secondly interest withholding tax deducted and relates to 2005 – 2007 year of income. Out of the Uganda shillings 5.7 billion, 2,490,424,353/= Uganda shillings related to the year of income 2005 – 2007. Withholding tax is normally held at the source and the tax is deducted by banks and other financial institutions. The loss in issue was coming from Uganda Electricity Board and the loss was eventually denied to Uganda Electricity Board. By the year 2003 the loss carried forward was Uganda shillings 550,648,000/=. In the year of income 2001 the loss brought forward was about 40 billion Uganda shillings and the defendant has recognised it because it was contained in the self-assessment returns. For the year of income 2002 the loss was about 14 billion. The witness further testified that for accounting purposes and for financial reporting purposes there was a need to ascertain balances for purposes of fair valuation. The successor companies were using the assets of the former Uganda Electricity Board to generate income. The assets according to tax law were entitled to allowances. The tax consultant came up with allocation among the successor companies based on ratios agreed upon at the disbanding of Uganda Electricity Board. Finally PW2 testified on cross-examination that Uganda shillings 48 billion was a loss brought forward in preparing the 2001 tax return. It was a loss inherited or carried over from Uganda Electricity Board.

In the re-examination he testified that a new assessment is not new information and new information can be used to make new assessment. Where there is no new information the assessment which is according to the return filed by the taxpayer constitutes an assessment issued to the taxpayer by the Commissioner General and is time barred.

PW3 Darius Ruta Senior Registration Officer in Charge of Registration testified that the last assessments in relation to UEB were issued by the defendant for the years of income 2000 and 2001. Assessments were issued by the defendant for the years 2000 and 2001 on 7 November 2006. They were forwarded to the office of the Official Receiver in a covering letter dated 9th November 2006 and addressed to the liquidator of Uganda Electricity Board. The document with the attached assessments was tendered in for identification subject to the furnishing of clear copies since the attachments were not very legible. In the absence of clear copies after efforts to trace any clearer copies were futile, I have subsequently admitted the document as exhibit P 15 for purposes of the appeal after the parties submitted. This is because no clear copy was availed to court after it was admitted as an ID pending availability of a clearer copy. The document is relevant to the controversy in the appeal and was written by the defendant's Commissioner. On cross examination the witness was examined on exhibit D1 which is a statutory declaration by Jacqueline Kobusingye which was received by the Official Receiver on 6 March 2007. The witness was not aware of the statutory declaration other than identifying the stamp of the Official Receiver showing that it had been received on 6 March 2007. The statutory declaration shows that on 17 January 2002 for the financial year 1997 – 1999 Uganda Electricity Board had assessed losses carried forward of **Uganda shillings 30,616,884,771/=** and it paid taxes of **Uganda shillings 640,571,934/=** because there was new assessment for the tax period in issue, they paid and the sum was carried forward for purposes of offsetting the taxes assessed in subsequent years. Again Uganda Electricity Board in its self assessment assessed losses carried forward at the end of the financial year 2002 amounting to **Uganda shillings 458,000,361,000/=**. There was lack of supporting documents and the losses were disallowed in the tax period 2000 – 2001. After assessing Uganda Electricity Board for the financial years 2001 – 2004 in November 2006, it was established that Uganda Electricity Board had a total assessed tax of **Uganda Shillings 5,873,623,791** out of which it paid **Uganda shillings 1,888,014,640/=** leaving an outstanding balance of **Uganda shillings 3,985,609,151/=** which remained unpaid at the time of making the statutory declaration on 5 March 2007.

The defendant called one witness who filed a witness statement and was cross examined on it. DW1 Simon Odur, the Supervisor Audit, Domestic Taxes in the Large Taxpayers Office. In his testimony on 6 January 2009 an application for refund of **Uganda shillings 5,783,254,881/=** was lodged by PricewaterhouseCoopers on behalf of the plaintiff and was premised on the tax loss of **Uganda shillings 55,502,959,000/=** subsisting in the year of income which ended 31st of December 2007. To determine whether there was an overpayment the witness invoked section 128 (4) of the Income Tax Act. The defendant carried out a comprehensive audit into the affairs of the plaintiff and it was initiated in a letter dated 23rd of March 2009 which restricted the audit to cover periods 2003 to 2007. Based on the self assessment returns for the years 2004, 2005, 2006 and 2007, the total loss of the Plaintiff was **Uganda shillings 55,502,959,000/=**. Following the review of the loss claimed, only **Uganda shillings 2,187,154,967/=** was attributed to the loss-making period 2005 – 2007. Loss of **shillings 55, 502,959,000/=** is not attributed to the loss-making period 2005 – 2007. Loss of **Uganda shillings 1,489,323,986/**= according to self assessments for years of income 2004 originated from 2001 because the losses of 2001 of **Uganda shillings 40,510,596,000/=** was carried forward through 2002, 2003 and 2004 reduced on the profits available for tax purposes in accordance with section 38 (1) of the ITA. Because the losses were originated from 2001, it became necessary to examine losses incurred in 2001. The losses were carried forward through 2002, 2003 and finally utilised in 2004. The losses gave the plaintiff zero liability in taxes up to 2004 when the plaintiff had a tax liability of **419,628,689/=.**

The loss of Uganda shillings 40,510,496,000/= incurred in 2001 is attributable to capital allowances of **Uganda shillings 63,221,726,000/=** under the tax returns of 2001. Therefore there was no loss inherited from Uganda Electricity Board. The review showed that the plaintiff was not entitled to a loss of **Uganda shillings 40,410,595,000/=** in the year of income 2001 which had been carried forward and utilised in the tax periods 2002, 2003 and 2004 according to the declared self assessment returns. Therefore the new information was the discovery that the plaintiff was not entitled to the losses claimed in the self assessments of 2002, 2003 and 2004. On the same point the witness testified that the fact that the assessments were titled as having been issued under section 95 of the ITA was a matter of form as they were actually issued under section 97 as explained in the letter dated 5th of August 2010.

Upon cross examination on the authority to carry out an audit beyond the year 2003, he testified that the losses for purposes of the refund claimed by the plaintiff started in the years 2005, 2006 and 2007. When the examined the returns for the year 2004 they realised a big anomaly in that what was brought forward was erroneous. Tax losses did not exist for the years 2001 – 2003. This is because no losses were carried over from Uganda Electricity Board. The witness further testified that the losses of **shillings 55 billion** which formed the subject matter for the claim of refund by the plaintiff came from the generation of income by the plaintiff. Tax affairs of Uganda Electricity Board were confirmed and showed that he did not pass over any losses to successor companies such as the plaintiff. The 2001 losses arose due to a **shillings 63 billion** capital allowance from assets granted on the basis that they were the assets of the plaintiff. Information in 2001, 2002 and 2003 put the plaintiff in losses. After audit the company did not have any taxable income. The new information was the adjustments made in that the plaintiff had claimed more capital allowances than was due to them.

When re-examined DW 1 testified that in the year 2001 the plaintiff declared loss of about **Uganda shillings 40 billion** on account of operation of the company. The loss was offset in the years 2002, 2003 and what was carried forward to the year 2004 was about **Uganda shillings 1.4 billion.** The tax affairs of Uganda Electricity Board had to be concluded to enable the defendant to determine the tax written down values of assets. The proposal was made by PricewaterhouseCoopers to the defendant in 2006. Secondly a separate audit revealed that Uganda Electricity Board did not have any losses and none were allocated to successor companies. In the year 2001 the plaintiff pledged assets of about **shillings 63 billion** not confirmed and posted a loss of about **shillings 40 billion.**

I have tried to exhaustively evaluate all the available information attached to the pleadings of the parties which are deemed to be available to the Commissioner at the time of making the objection decision. Correspondence received by the Commissioner General or Uganda Revenue Authority and any correspondence written by PricewaterhouseCoopers to the defendant on the subject matter in question are relevant and available to the Commissioner at the time of the objection decision. As I have indicated above the Commissioner purported to rely on new information to overrule the plaintiff's objection that the assessment were time barred. Any appellate issue would be whether the Commissioner erred in law or fact to hold that the basis of the assessment was the discovery of new information not available to the defendant at the time of assessments for the years of income 2001, 2002 and 2003. The issue of whether the assessment was issued under section 97 (2) relates to the entitlement of the assessment in dispute. Was the Commissioner wrong to invoke section 97 (2) after expressly sending an assessment under section 95? The objection letter of the plaintiff written by PricewaterhouseCoopers dated 3rd of September 2010 specifically states as follows:

> ***"In your letter to us dated 5th of August 2010 you informed us that the five-year statutory limit was not applicable to the Corporation tax audit on UETCL because of the emergence of new information. You do not specify which new information was discovered by the Uganda Revenue Authority that was not already available at the time of filing the returns."***

The answer of the defendant in its objection decision dated 10th of November 2010 explicitly provides that the case of the plaintiff is peculiar in the sense that it was subject to conclusion of the assessment of the former Uganda Electricity Board, a process that provided new information. This was that the plaintiff had not taken into account the proper tax written down value at the time of submission of the first financial statements of the plaintiff. In other words the new information was that the plaintiff had not taken into account the proper tax written down value at the time of submission of its financial statement of 2001. To say the very least, it may be argued that the defendant was vague by making reference to the tax written down value at the time of submission of the plaintiffs first financial statements. The new information relates to the tax written down value submitted by the plaintiff.

The main controversy between the parties arises from the contention of the defendant that about **40 billion Uganda shillings** which was previously reflected in the self assessment returns of the plaintiff as loss carried forward from Uganda Electricity Board was erroneously used in computation of the plaintiffs taxable income as a loss carried forward whereas no loss was carried forward from Uganda Electricity Board. Consequently when the plaintiff applied for tax refund in 2009 the defendant carried out a comprehensive tax audit which included revisiting the years of income 2001, 2002, and 2003. The defendants alleged new information is that **Uganda shillings 40,510,598,000/=** was reflected as loss carried forward from Uganda Electricity Board which was then erroneously used to put the plaintiff in a non-taxable status for the relevant years of income because the loss would always offset the income. The defendant concluded that because no loss was carried forward from Uganda Electricity Board, the **Uganda shillings 40,510,598,000/=** was erroneously used to offset the chargeable income of the plaintiff hence reflecting a nil corporate tax status for the years of income 2001, 2002, 2003 and 1.4 billion carried over to 2004. Additionally the defendant's contention is that this information was discovered after the audit carried out in 2009. The plaintiff's position is partially reflected in the reply to the written statement of defence which avers that in any case the information was contained in the document "Connected Thinking" submitted by its tax consultants PricewaterhouseCoopers in August 2006. This was also agreed to in the joint scheduling memorandum of the parties. I must emphasise that the attack of the plaintiff on the assessment as far as the substance of the assessment is concerned is based on the limitation period provided for under section 95 (1) of the Income Tax Act. Secondly it is premised on the provisions of the Finance Act 2008.

Before proceeding further, I have considered the submissions that DW1 exceeded his mandate in carrying out the audit beyond the period set by the Commissioner and proceeded to include the years of income 2001 – 2003 contrary to instructions. I do not need to answer this issue because whether information is obtained irregularity or not, the question will remain whether the information was new information. The information can be provided by an informer for instance. Therefore the issue of whether DW1 exceeded his mandate concerning the audit period is immaterial to the question of whether there was new information.

The matter before the court is therefore a point of law as to whether the new assessments issued by the defendant in August 2010 were time barred. This point of law depends for resolution on questions of fact as to whether the information which allegedly formed the basis of the new assessment namely that no losses were carried over from Uganda Electricity Board in the year of income 2001 was established after the audit in 2009.

The controversy requires an evaluation of all the information concerning the Corporation tax matters of the plaintiff from the time it was incorporated in 2001. The directors report which was submitted to the defendant on 25 February 2003 by KPMG Certified Public Accountants shows that the plaintiff was incorporated on 26th of March 2001 to take over the assets and liabilities of Uganda Electricity Board on 30th of March 2001 in accordance with **statutory instrument 2001 No 18 namely: The Public Enterprise Reform and Divestiture (Vesting of Undertaking of Uganda Electricity Board) instrument 2001**. Paragraph 5 of the letter of KPMG dated 9th of December 2002 states that they had not been provided with reconciliation of the assets and liabilities handed over from Uganda Electricity Board which would have enabled them to confirm the completeness and accuracy of the assets and liabilities handed over by Uganda Electricity Board to the plaintiff. The Director's Report is part of the financial statements for the nine months previous to 30th of December 2001 of the plaintiff submitted to the defendant.

The testimony of PW2 unequivocally states that the 48 billion reflected in the self assessment return of the plaintiff for the year of income 2001 was brought forward from Uganda Electricity Board though the issues of allocation of assets remained outstanding.

The conclusion of the defendant is that no losses were carried forward from Uganda Electricity Board. I have reviewed the correspondence on the contention of the defendant that no losses had been brought forward from Uganda Electricity Board. First of all the plaintiff applied to adduce a letter from the defendant dated 9th of November 2006 attaching assessments of Uganda Electricity Board (In Liquidation) for the years of income 2000 and 2001. According to this letter, the defendants position was that Uganda Electricity Board was assessed for **Uganda shillings 4,056,762,708/=** for the years of income 2000 and 2001. The liquidator of Uganda Electricity Board was advised to recover the tax from the liquidation proceedings and remit it to the defendant's Large Taxpayers Office. The assessments were issued on 7 November 2006. From this evidence no loss was brought forward for the years of income 2000 and 2001 respectively. Exhibit P 14 is addressed to PricewaterhouseCoopers the tax consultants of the plaintiff and is dated 1st of November 2006 from the Manager Finance and Manufacturing Audits Large Taxpayers Office. The relevant part of the letter of the defendant to the tax consultant reads as follows:

> ***"1.There are no losses to be allocated to the UEB successor companies based on our computation sent to you in our letter of 4 August 2006 to which you never responded implying that you agreed to it. An assessment is to be sent to the liquidator of UEB under separate cover. …"***
>
> ***4. The copies of revised tax computation for UETCL and UEDCL sent to us by e-mail on 30th of October 2006 are being studied. We shall give our comments later. However, a quick look at the said computations indicates that UEDCL would have paid tax in 2001 had it not been for the losses they claim from UEB (in liquidation) which our letter of 4 August 2006 clearly indicates that they do not exist. The same applies to UETCL.***
>
> …

7. ***The schedule prepared by us for the distribution of capital allowances to successor companies based on the criteria in your report is enclosed for your comments before we can incorporate them within the tax computations. The industrial building additions for 1999 and 2000 have been restricted to UEGCL as the related specifically to the construction of the dam in Jinja."***

The above letter was copied to all the successor companies and Uganda Electricity Board (in Liquidation). By 1 November 2006 as a question of fact the defendant knew or had information by which it concluded that there were no losses to be inherited by the plaintiff which is a successor company of Uganda Electricity Board from Uganda Electricity Board. The letter quoted above also shows that this information was available and communicated by the defendant in the previous letter of 4 August 2006 that the losses do not exist. The conclusion is that by 4 August 2006 the defendant had information by which the Commissioner concluded that the plaintiff had not inherited any losses from Uganda Electricity Board.

What the audit team of DW1 did was to use this information in examination of the self assessment returns of the plaintiff for the years of income 2001, 2002, 2003 and 2004 when it carried out a comprehensive audit of the plaintiff. The comprehensive audit of the plaintiff was initiated as a consequence of an application by PricewaterhouseCoopers on behalf of the plaintiff for refund of tax. The plaintiff was notified in a letter dated 23rd of March 2009 by the Manager, Manufacturing and Finance - Large Taxpayers Office that the defendant needed to carry out a comprehensive audit to ascertain the tax position in conformity with section 128 (3) and (4) of the Income Tax Act cap 340. The audit covered Corporation tax, PAYE, VAT and withholding tax. The comprehensive audit was to cover the years ending 31st of December 2003 – 31 December 2007.

The testimony of DW1 is that they discovered that in the year 2004 the plaintiff had carried forward a tax loss of about 1.4 billion which originated from the years of income 2001. On the basis of this anomaly, he traces the origin of the losses carried forward. The oral testimony of DW1 on cross examination became more complex. The unequivocal written statement of DW1 paragraph 14 thereof states as follows:

"***That the loss of shillings 1,489,323,986/= (as per self assessment returns) pertaining at the beginning of 2004 stemmed from 2001. I.e., the losses of 2001 of shillings 40,510,596,000/= were carried forward to 2002, 2003 and 2004 to reduce on the profits available for tax in accordance with section 38 (1) of the ITA. At the beginning of 2004, the 40 billion had been diminished to shillings 1,489,323, 986/=.***

His witness statement in paragraph 17 thereof is that ascertainment of loss was a fulfilment of the Commissioner's mandate under section 113 (3) and 128 (4) of the ITA. The loss of **Uganda shillings 40,510,596,000** in 2001 is attributable to capital allowances of **Uganda**

shillings 63,221,726,000/= according to the tax competition in the self assessment 2001. He goes on to emphasise: "*For the avoidance of doubt, for the tax computation of 2001, there was no loss inherited from UEB*". Consequently in paragraphs 19 and 20 of his witness testimony he states as follows:

> ***"19. That it emerged following the review of UETCL's tax affairs that the taxpayer was not entitled to a loss of shillings 40, 510,495,000 in 2001 carried forward and utilised in the tax periods 2002, 2003 and 2004 as the taxpayer had earlier declared in the self assessment returns."***
>
> ***20. That the above discovery in 2010 was the new emerging information based on which, the Commissioner raised the additional assessments under section 97 (2) in 2010 which span over the five-year timeline envisaged under section 95 (1). …"***

It is apparent that the discovery of the alleged new information was that the taxpayer was not entitled to claim a loss for the year of income 2001 which had been carried forward or inherited from Uganda Electricity Board. Because the offset of the tax loss of **Uganda shillings 40, 510,495,000** became unavailable, the self assessment returns and any other assessments for the years 2001, 2002, 2003 and 2004 were reversed and the plaintiff became liable to the tax assessed afresh of **Uganda shillings 24,914,715,000/=**. The defendant used the information it had by August 2006 to revisit the previous assessments referred to, the subject matter of the dispute. The testimony of DW1 also agrees with that of PW2 Mr. Francis Kamulegeya of PricewaterhouseCoopers. PW2 had testified that pursuant to the audit by the defendant in 2010, the tax loss for the previous years of assessment became unavailable to the plaintiff to offset its taxable income for the years of income in question. Suddenly, the plaintiff's income was in a taxable state because of wiping out the loss carried forward from UEB on the ground that no loss was in fact available to be carried forward to the plaintiff in the 2001 year of income. This ought to have indicated the nature of the alleged new information. However the wording of the objection decision is about the "tax written down value of assets".

The question of tax written down values of assets of the plaintiff inherited from Uganda Electricity Board has been at the centre of what the appropriate tax computation of the plaintiff should be. Both parties agree that the proposals of PricewaterhouseCoopers in the document "connected thinking" was utilised by the defendant and in fact adopted. The fact that this proposal was adopted is reflected in the letter of the defendant to the Senior Manager Tax Services PricewaterhouseCoopers dated 11 February 2010 and attached as annexure "F" to the defendant's written statement of defence. Paragraph 5 of the letter states as follows:

> "***The position regarding tax written down values of assets has been reached after studying a proposal in your document codenamed "the UEB Group – Connected Thinking" where we found it prudent to adopt the proposed ratios of allocating***

tax written down values of UEB assets to successor companies. (See proposal in closed)

Please note that the proposed ratios have been applied to the tax written down values of the assets of UEB to determine the values of its successor company as at the time of vesting. The enclosed allocation will thus form the basis of our final assessments for all the successor companies.

We look forward to concluding the outstanding tax affairs of the successor companies."

The attached schedule from the office of the defendant gives the ratios/percentages for all classes under schedule 6 of the ITA and the amounts proposed. The proposal contained in the "connected thinking" document of PricewaterhouseCoopers dated August 2006 is exhibit P12. Paragraph 1 of the Executive Summary of the document indicates that PricewaterhouseCoopers was engaged to analyse the tax position of Uganda Electricity Board as at 31st of March 2001 in order to determine the allocation of capital allowances and tax losses among the successor companies. They indicate in paragraph 1 of the executive summary that:

"The analysis covered allocation of capital allowances, provisions for bad debts, foreign exchange movements, and allocation of tax losses."

Apparently they received instructions from the successor companies named as the "UEB Group". Allocation of capital allowances required the tax written down values of the assets of Uganda Electricity Board by 31 March 2001. Capital allowances and tax losses were considered as separate items in the "connected thinking" document. PricewaterhouseCoopers took into account tax computations of Uganda Electricity Board for the 2001 financial year and previous years brought forward i.e. 1999 and 2000. They noted that the bulk of the losses related to capital allowances traced back to a number of years. They took into account several variables such as the net book values of assets depreciated and capital allowances claimed due to the various underlying causes of the losses.

The evidence of the defendant is that the tax affairs of Uganda Electricity Board were assessed in a separate audit exercise. Consequently the words used "written down value of assets" and losses carried forward are not necessarily the same thing. Written down values of assets are used to determine the capital allowances or depreciation which are deductible from the chargeable income. So long as the written down value of assets are and not established, assessments or the necessary deductions under section 27 which deals with depreciable assets cannot accurately be made. Notwithstanding the above observation, the "connected thinking" document was commissioned by inter alia the plaintiff. The document expressly indicates that the question of allocation of losses among successor companies remained pending by August 2006 when the "connected thinking" document was generated and forwarded to the defendant for consideration.

Written down value under the ITA are used in the calculation of allowances to be granted in respect of plant and machinery. The Income Tax Act section 15 defines chargeable income of a person for a year of income as the gross income of the person for the year less total deductions allowed under the Act for the year. Deductions are further defined by section 22 of the ITA which deals with deductions. It provides that for purposes of ascertaining the chargeable income of the person for a year of income there shall be allowed deductions as specified in the provision. With regard to depreciable assets section 27 (1) of the ITA provides that:

> "***A person is allowed a deduction for the depreciation of the persons depreciable assets, other than an asset to which section 26 (2) applies, during the year of income as calculated in accordance with this section.***
>
> ***(2) Depreciable assets are classified into four classes are set out in Part 1 of The Sixth Schedule of this Act would depreciation rates applicable for each class are specified in that Part.***

Section 2 (u) of the ITA defines "depreciable assets" to mean "any plant or machinery, or any implement, utensil, or similar article, which is wholly or partly used, or held ready for use, by a person in the production of income included in gross income and which is likely to lose value because of wear and tear, or obsolescence." Part 1 of the 6th Schedule to the ITA gives depreciation rates and the vehicle depreciation ceilings and divides the assets into four classes. Class 1 applies to computers and data handling equipment. Class 2 applies to automobiles, buses and minibuses with a seating capacity of less than 30 passengers; goods vehicles with a load capacity of less than seven tons; construction and earth moving equipment. Class 3 provides for buses with a seating capacity of 30 or more passengers; goods vehicles designed to carry or pull loads of seven tons or more; specialised trucks, tractors; trailers and trailer mounted containers; plant and machinery used in farming, manufacturing or mining operations. Lastly class 4 applies to railcars, locomotives and equipment; vessels, barges, tugs and similar water transportation equipment; aircraft; specialised public utility plant, equipment and machinery; office furniture, fixtures and equipment; any depreciable assets not included in another class.

Section 27 (3) provides that the taxpayers depreciable assets should be placed into separate pools for each class of assets and the depreciation deduction for each pool is calculated according to a specified formula. That is the written down value of the pool at the end of the year of income multiplied by (times) the depreciation rate applicable to the pool. Section 27 (4) of the ITA give the formula for determining the written down value of a pool at the end of the year of income. Depreciation allowances are based on the written down values, the classification of the asset and the rate of depreciation applicable to the pool for purposes of deduction from gross income to establish chargeable income. They are part of the losses used to offset gross income to arrive at the chargeable income for any year of income.

As noted above, the director's report in the plaintiff's financial statement to the defendant for the year of income 2001 indicates that the plaintiff was incorporated in the year 2001 to take over the assets of Uganda Electricity Board. The plaintiff is a public enterprise specified in class 2 the Public Enterprise Reform and Divestiture Act Cap 98. It was formed as a successor company in class 2 and is defined as a public enterprise in which the government is to retain majority shares. Assets of Uganda Electricity Board were transferred to the plaintiff by statutory instrument specifying the date of transfer. The first statutory instrument that is relevant is the **Public Enterprise Reform and Divestiture (Vesting of Undertaking of Uganda Electricity Board) Instrument, 2001 that is 2001 No. 18.** By virtue of the powers conferred on the Minister responsible for the reform and divestiture of public enterprises by section 25A regulation 12 thereof provides that 30 March 2001 is appointed to be the date on which the undertaking of Uganda Electricity Board shall vest in its successor companies namely Uganda Electricity Generation Company Ltd, Uganda Electricity Transmission Company Ltd and Uganda Electricity Distribution Company Ltd. Section 2 (2) (b) provides that the assets and liabilities specified in the second schedule "which, before the commencement's of this instrument belonged to Uganda Electricity Board, are transferred Uganda Electricity Transmission Company Ltd;". The second schedule in Paragraph A lists fixed operating assets vested in the plaintiff in various districts. Under paragraph B of the second schedule all lines and lands associated with all supporting structures, substations, switchgear and Transformers and the SCADA System and communications equipment thereof vested in the plaintiff. In paragraph C land in the fourth Street Kampala vested in the plaintiff. Paragraph D contracts vested in the plaintiff. In paragraph E thirty motor vehicles and 14 motorcycles and also 2 heavy vehicles listed therein vested in the plaintiff. Paragraph F dealt with other fixed assets such as furniture and equipment, office equipment, tools and equipment in specified locations. Paragraph G dealt with stock and paragraph H indicated the amount of cash which vested in the plaintiff. Consequently under this statutory instrument the assets vested became available for tax treatment as part of the plaintiffs assets by 30th of March 2001. This statutory instrument was published on 30th of March 2001 in the Uganda Gazette. This confirmed the director's report in the financial statement for nine months of 2001 ending 30th of December 2001.

Secondly the above statutory instrument was revoked by the **Public Enterprises Reform and Divestiture Statute (Vesting of Undertaking of Uganda Electricity Board) (number 2) instrument, 2002 Statutory Instrument 2002 number 28** section 3 thereof. The new statutory instrument was published on 26 April 2002. It provided that the asset specified in it would be deemed to have vested in the successor companies in the manner specified. As far as the plaintiff is concerned paragraph 2 (b) provided that all the assets and liabilities specified in the second schedule to the instrument which previously belonged to Uganda Electricity Board were transferred to Uganda Electricity Transmission Company Ltd. The second schedule gives a comprehensive list of the specified assets in various districts. What is material is that it gives a somewhat different list of assets from that of the revoked statutory instrument of 2001. For instance it lists 33 cars, 24 commercial vehicles, 4 motorcycles and 4 heavy vehicles. The list of fixed operating assets was expanded. What is material is that the original list of assets was revoked and substituted by the new list.

Transferred assets would be taken into account in the calculation of chargeable income for any year of income after they have vested in the successor companies to Uganda Electricity Board. The provisions of the PERD Act cap 98 and stated instruments specifying the vesting of property or undertakings of Uganda Electricity Board are relevant in the controversy before this court. What is relevant is that any assessment of income based on the previous vesting of property in statutory instrument **2001 No. 18** was rendered invalid because the instrument was revoked and another specified list was made in a subsequent instrument by the Minister. As to whether the revocation of the vesting of property can be revoked in the manner done by the statutory instrument **2002 No. 28** is not relevant because it was done by the majority shareholder and as part of the privatisation process of UEB. Consequently as far as tax written down values or any losses based on depreciation is concerned, the appropriate list of assets is found in the statutory instrument published on 26th of April 2002 referred to above. Consequently neither of the parties could validly and conclusively except for estimates rely on any estimates based on the statutory instrument of 2001. Secondly as a question of fact, a subsequent list of assets was only established after 26th of April 2002 under the subsequent statutory instrument of 2002.

Lastly by statutory instrument 2004 No. 58 namely **The Public Enterprises Reform and Divestiture (Vesting of Undertaking of Uganda Electricity Board) Instrument, 2004**, which came into force on 31 July 2004, additional assets were vested in the plaintiff in the second schedule thereof. Consequently the proposals of PricewaterhouseCoopers in the "connected thinking document" of August 2006 is consistent with the state of affairs of Uganda Electricity Board and the successor companies. The question of determination of capital allowances and allocation of losses if any remained pending. The complex issue is that capital allowances are deductible on a yearly basis and became applicable from the vesting of property. DW1 explained that losses were applicable from the running of the plaintiff’s assets as an operational company and I believe this testimony.

For emphasis the meaning and context of the use of the term "written down value of assets" was within the knowledge of the plaintiff through its tax consultants and the defendant based on correspondence on the matter. According to Black's Law Dictionary 8th edition to write down is an accounting term which means to transfer a portion of the costs of an asset to an expense account because the assets value has decreased. What can be concluded is that the book value of the assets vested in the plaintiff had to be determined less depreciation and other variables which may be relevant to arrive at the taxable income of the plaintiff for the relevant years. If the plaintiff's proposal was only adopted by the defendant in 2010, can it be said that the relevant computations have been conclusively made? Furthermore the evidence adduced that Uganda Electricity Board was liable to pay tax for the years of income 2000 and 2001 is a parallel consideration whose implications can only be determined by an audit and correlation of facts. Secondly the fact that no losses were inherited from UEB is a separate factor from capital allowances to which the plaintiff is entitled.

The adoption of the proposals in the "connected thinking document" only came in 2010 in the letter of the defendant dated 11th of February 2010. On the other hand the audit of the plaintiff purports to deal with the question of Corporation tax without reference to a conclusion of the tax affairs of UEB and inheritance by the three successor companies. It specifically answers the question of whether the plaintiff is entitled to refund applied for in 2009.

Last but not least counsels addressed the court on the provisions of section 98 (3) of the ITA. Section 98 (3) (a) provides that no notice of assessment, warrant or other document purporting to be made, issued, or executed under the Income Tax Act shall be quashed or deemed to be void or voidable for want of form.

I have critically examined the notices of assessment. First of all the specifically indicated as having been issued under section 95 of the ITA. Secondly they are entitled "amended assessments". They are extremely flawed and amount to an irregularity under section 97 (2). Section 97 requires the Commissioner to issue an additional assessment and not amended assessment. The nature of the assessment however shows that it took into account the issue of inherited losses from UEB which remained outstanding issue after the "connected thinking document" of August 2006. In the substance, I have found that it was issued pursuant to the finding of the defendant that no losses were carried over from UEB. This is however not the end of the matter. Even though the Commissioner in its objection decision overruled the plaintiff on the ground that the assessment was based on new information, the evidence submitted in court by DW1 and which was not contradicted in anyway by PW2 of PricewaterhouseCoopers is that losses were carried forward from Uganda Electricity Board in the self assessment of the plaintiff for the year of income ending 2001. I have demonstrated that the statutory instrument which vested property in the plaintiff in the year of income 2001 was revoked by another statutory instrument in 2002. Notwithstanding, if no losses had been carried over from Uganda Electricity Board, this information emerged in 2006 pursuant to the audit of Uganda Electricity Board in November 2006. However Uganda Electricity Board ought to have passed over the information to the successor company. There is no evidence to this effect. The information that losses were carried forward amounting to about 40,510,596,000/= Uganda shillings could have been introduced into the self assessment report presumptuously. How could any such colossal losses be inherited by the plaintiff if there were no losses in the accounts of UEB? Additionally it would have amounted to false or misleading information in the self assessment of 2001 by the plaintiff under section 142 of the Income Tax Act. However, I agree with the defendant’s contention that this information was not available to the plaintiff and the defendant. The initial vesting of property was revoked and the list of assets of the plaintiff kept on changing while the privatisation process was ongoing. This is reflected by the three statutory instruments quoted above vesting property in the plaintiff the last of which was issued in the year 2004. Consequently, the allocation of losses in the 2001 returns was a proposal based on the anticipated assets and losses vested during the privatisation process. It was not a final figure by any stretch of the imagination because the proper value to be used in calculations had as yet not been established.

Secondly, the adoption of the "connected thinking document" first of all resolve the question as to whether the tax matters of the plaintiff related to succeeding UEB had been concluded. By February 2010, the issue of the tax affairs of the former Uganda Electricity Board and particularly the allocation of assets and losses remained pending. The final conclusion on the issue was yet to be made. Secondly the connected thinking document required the issue to be finalised for all the three successor companies.

In conclusion, the evidence strongly shows that the defendant realised that no losses had been carried forward to the plaintiff from Uganda Electricity Board as concluded by the plaintiff in its self assessment of 2001. This position was known to the defendant and by August 2006. The defendant made an assessment of the plaintiff within five years from August 2006 in August 2010. Five years from August 2006 will be in July 2011. The assessment is not have been time barred based on discovery of new information. Notwithstanding, issue number one is resolved in favour of the defendant that the purported assessment of August 2010 was not time barred of the following grounds: It is not time barred because it was premised on the information discovered during the audit of the defendant between 2009 and 2010. The actual link between no losses carried forward from Uganda Electricity Board and the self assessment of the year 2001 was made by the defendant during the audit process after the plaintiff applied for refund of tax in the year 2009.

The "connected thinking document" clearly indicated that the issue of losses and allocation of assets was yet to be resolved by the defendant by August 2006. PricewaterhouseCoopers on behalf of the plaintiff and other successor companies of Uganda Electricity Board proposed to the defendant how to treat the vesting of assets in the successor companies under the provisions of the PERD Act cap 98 as demonstrated above. The plaintiff cannot turn round and claim that the issue of losses or allocation of assets cannot be revisited by the defendant after its own proposal in the "connected thinking document" submitted after August 2006 to the defendant. The defendant could only have established all the material facts on losses and allocation of assets based on the "written down value of assets" after submission of the document dated August 2006, with ascertainment would be within time by August 2010. Furthermore, the information would be new information simply because the defendant was satisfied with the tax returns of the plaintiff for the years of income 2001. However, the audit conducted by the defendant linked the information that no losses were brought forward from Uganda Electricity Board in 2001 self assessment. This revealed that the self assessments were misleading for containing information that losses were carried forward. The Commissioner had not reconciled the information available by August 2006 to the self assessment returns until after the defendant carried out an audit in 2009 – 2010. Consequently the reconciliation of the information and the result of the reconciliation that the plaintiff was in a taxable position in the year of income 2001 is new information within the meaning of section 97 (2) of the Income Tax Act and the assessments issued in August 2010 are not time barred.

Issue 2

Whether the plaintiffs Corporation tax arrears in respect of the year of income 2001 were waived by the Finance Act 2008

Submission on issue 2 by Plaintiff's Counsel

The plaintiff submitted on this issue in the alternative. The contention is that section 4 of the Finance Act 2008 waived all arrears of income tax on or before the 30th 2002 and still outstanding by 30th of June 2008. According to the plaintiff and the defendants contention is that the provision applies only to arrears already assessed prior to 13th of June 2002 and which were still outstanding by 30th of June 2008. Consequently assessments made in August 2010 were due and payable by the plaintiff. Counsel for the plaintiff submitted that the position of the defendant is not legally tenable because the language of the Finance Act 2008 is clear and unambiguous. It does not refer to already assessed and outstanding arrears as contended by the defendant. The words "assessed outstanding" arrears has been added by the defendant and not legislature. Counsel contended that in the interpretation of tax statutes, the court should look merely at what is clearly said in the Act. Nothing is to be read in or nothing to be implied and the court can only look at the language used. Counsel referred to the judgment of Rawlatt J in **Cape Brandy Syndicate versus IRC [1921] 1 KB 64**. Consequently the plaintiff's counsel submits that the revised assessments issued by the defendant to the Plaintiff for the year of income 2001 was illegal and in contravention of section 4 of the Finance Act 2008.

Reply by Defendant's Counsel on Issue 2

The defendant's counsel submitted that for every year there is a distinct and separate tax assessment. He submitted that Part IV of the Finance Act 2008 and section 4 thereof provides for waiver of tax, duty, interest and penalties on arrears outstanding on or before 30 June 2002 and still outstanding by 30th of June 2008. It provides that all arrears of value added tax, income tax, excise duty, import duty, penal tax and interest shall be waived. Subsection 1 applied to arrears due on or before 30 June 2002 and still outstanding by 30th of June 2008.

Counsel contended that the only dispute between the plaintiff and the defendant is on the interpretation of what is referred to as "arrears due" on or before 30 June 2002 and still outstanding by 30th of June 2008. Counsel submitted that the Finance Act 2008 does not define what arrears are. He referred to the definition of arrears in the **Black's Law Dictionary 8th edition** page 116 where it is defined as the state of being behind in the payment of the date or the discharge of an obligation. It also defines the word "due" as immediately enforceable and owing or payable. Counsel contended that before 2010 the plaintiff was not in a state of payment of the debt obligation to pay the tax in question and therefore prior to the 2010 assessments, they were no arrears within the meaning of section 4 of the Finance Act 2008. For there to be an obligation to pay tax, there must first be an assessment or the requirement to file returns upon which the tax becomes due and payable. Upon failure to pay tax, it becomes a debt and would be in arrears and can be deemed to be outstanding.

Counsel contended that the defendant was not adding the word "outstanding" in the enactment of legislature because it appears in section 4 (2) (1) of the Finance Act 2008. Counsel agreed that a tax statute has to be construed and applied strictly if it is neither ambiguous nor uncertain. He relied on the holding of Lord Donovan in **Mangin vs Inland Revenue Commissioner [1971] 1 All ER 179** at page 182, that firstly words are to be given their ordinary meaning. They are not be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. It may be presumed that neither injustice nor absurdity was intended. Where a literal interpretation would produce absurdity or injustice and the language admits of an interpretation which would avoid it then such an interpretation may be adopted.

In the alternative the defendants counsel submitted that the taxes in dispute include **Uganda shillings 6,169,966,100/=** for the year of income 2001, **Uganda shillings 9,620,338,000/=** for the year of income 2002 and **Uganda shillings 6,633,615,000/=** for the year of income 2003. The plaintiff's year of income ends by 31st of December of each year. Consequently even if any tax was affected by the waiver, it would only be the 2001 assessment and partly 2002 stopping ending on the 30th of June 2002.

Rejoinder by Plaintiffs Counsel

In rejoinder counsel for the plaintiff agreed that the word "outstanding" appears in section 4 of the Finance Act 2008 but the word "assessed" relied upon by the defendant does not appear therein and has been added by the defendant to the provision. In the case of **Mangin vs Inland Revenue Commissioner [1971] 1 All ER 179,** the object of construction of a statute by the court should be to ascertain the will of legislature. It is assumed that neither injustice nor absurdity was intended by legislature. The interpretation of the defendant of section 4 of the Finance Act 2008 would lead to an absurdity as it would exclude the waiver of tax due to taxpayers such as the plaintiff who through no fault of their own have not had their tax status for the years of income prior to 30th of June 2002 ascertained by the defendant.

I have duly considered the written submissions of counsels set out above. The relevant provision of the Finance Act 2008 provides as follows:

> "4***. Waiver of tax, duty, interest and penalties on arrears outstanding on or before 30 June, 2002 and still outstanding by 30th day of June, 2008.***
>
> ***(1) All arrears of value added tax, income tax, excise duty, import duty, penal tax and interest shall be waived.***
> ***(2) Subsection (1) applies to arrears due on or before the 30th day of June, 2002 and still outstanding by 30th June 2008."***

I have carefully considered the above quoted provision of law. The first part of the provision gives the intention of Parliament as to provide for the waiver of tax, duty, interest and penalties on arrears outstanding or before 30 June 2002 and still outstanding by 30th of June 2008. There is no controversy about the categories of taxes, duty, interest and penalties to which the provision relates. However, in subsection 1 of section 4 mandatory language is used. It is mandatory that all arrears of value added tax, income tax, excise duty, import duty, penal tax and interest are waived. So far there is no ambiguity or absurdity in the provision. For emphasis section 4 deals with taxes, duty, interest and penalties on arrears. The words of subsection 1 of section 4 are qualified by subsection 2. Section 4 (2) delimits the application of subsection 1 of section 4 to arrears due on or before the 30th day of June 2002 and still outstanding by 30th of June 2008. The first part of subsection 2 of section 4 deals with arrears due on or before 30 June 2002. The head note of Part IV provides that it deals with: "Waiver of Tax Arrears". The defendant dwelt on the definition of the word "arrears due". When taxes are due is not defined by the dictionary but by the Tax Statute. These include the Value Added Tax Act and the Income Tax Act. In the context of the dispute before the court, the relevant law is the Income Tax Act Cap 340.

To build the context of the Income Tax Act, section 2 (aaaa) thereof defines "year of income" to mean the period of 12 months ending on 30th of June and includes a substituted year of income and a transitional year of income. Secondly section 4 of the Act imposes on every person who has chargeable income a tax to be known as income tax for each year of income (except those who are exempt). Consequently income tax is imposed by law. Thirdly, every taxpayer shall furnish a return of income for each year of income not later than six months after the end of that year under section 92 (1) of the ITA. An assessment is deemed to have been made under section 96 or made by the Commissioner under section 95 of the Income Tax Act. Additional assessments may be made under section 97 for a particular year of income. In other words every assessment relates to a particular year of income and not to others. Finally the due date for payment of tax is specifically provided for by section 103 (1) which provides as follows:

> "(1***) Subject to this Act, tax charged in any assessment shall be payable***
>
> ***(a) in the case of the taxpayer subject to section 96, on the due date for furnishing the return of income to which the assessment relates; or***
>
> ***(b) in any other case, within 45 days from the date of service of the notice of assessment. …"***

In this case section 103 clearly provides that the due date for a tax payer subject to section 96 is the date for furnishing the return of income to which the assessment relates.

The problem in the plaintiffs case is that tax was due and the returns shows that there was nil tax payable. If there was any arrears outstanding which was imposed by law under section 4 but not as reflected in the returns, it would not be known. The word "arrears" is defined by Chambers 21st Century Dictionary as an amount or quantity which still needs to be done or paid back. "arrears" means late in paying money that is owed, in doing the required work, or in meeting some obligation. The second meaning is being in a state of having the agreed, usually monthly, or payments overdue. According to Stroud's Judicial Dictionary of Words and Phrases 2000 edition Sweet and Maxwell:

> ***"'Arrears' presupposes a time fixed for payment of a sum of money and the lapse of time thereafter without payment" (per Mann C.J. in Paice v. Ayton [1941] V.L.R. 63, at p. 68)."***

The due date under a self-assessment regime is the time of filing the assessment. There is a yearly obligation to file income tax returns for each year of income. Where an assessment has been issued by the Commissioner the due date is within 45 days of service of the assessment on the taxpayer. The 45 days allow time for a taxpayer to object to assessment. Where there is an objection, 30% of the tax assessed is payable pending resolution of the tax dispute.

To give an analogy import duty becomes due upon importation of the product into the country. The problem that arises is where the value of the product has not been ascertained. For purposes of income tax there are cases where the chargeable income has not been ascertained. If the word "outstanding" is construed to mean tax which has been assessed and is therefore due, the construction would apply discriminatorily between persons whose income has not been assessed and those assessed. Tax would be waived for the persons whose income has been assessed and would not be waived for those whose incomes have not been assessed or whose income is assessed at a later stage. What would happen to cases where there is a dispute which takes seven years to resolve? Cannot such a person or taxpayer apply to the court to withdraw the dispute for the year of income ending 30th of June 2002 on the ground that the taxes have been waived by Parliament? Cannot that person apply for refund of the 30% paid pending resolution of the dispute concerning the assessment for a year of income ending 30th of June 2002?

The term "outstanding" presupposes that penalties and interest would be applied based on the due date for payment irrespective of when the income is assessed. Section 4 does not preclude the defendant from assessing income for previous years of income ending 30th of June 2002. This would be for purposes of ascertaining whether such income is due or outstanding. To illustrate the point, if there was a loss of 50 billion Uganda shillings for the year of income 2000, and that loss has been carried forward to the years of income 2001 and 2002, an assessment can be carried out to establish whether the taxpayer is entitled to claim a loss for the year of income 2003. Consequently it would be necessary to assess all the years of income to establish whether there is any income outstanding in order to apply the relevant losses or deductions. What stands waived are only the arrears which are due or outstanding for the particular year of income to which section 4 applies.

Section 38 of the Income Tax Act provides that for a year of income, where the total amount of income included in the gross income of the taxpayer is exceeded by the total amount of the deductions allowed the taxpayer, the amount of the excess which is referred to as "assessed loss" shall be carried forward and allowed as a deduction in determining the taxpayer’s chargeable income in the following year of income.

Consequently after the application of section 38 of the Income Tax Act where no outstanding amount is established, they would be no need to apply the waiver provided for by section 4 of the Finance Act 2008. The word "outstanding" should be restricted to mean tax which is due for that year of income mentioned in section 4 of the Finance Act 2008.

Where it is established that for the year of income prior to June 2002 there is any outstanding income, such an income would not be subjected to interest, penalties or tax. To emphasise the point, penalty interest are applied for late payment irrespective of whether the assessment is made some years later i.e. after 2002. Under section 136 interest is payable on the due date which has already been defined. In the case of the plaintiff the due date is the date of filing the self assessment. If the tax is concealed, it cannot be said that the due date is the date when it is discovered e.g. four years later. The Commissioner is entitled to impose penalties or interest from the due date.

In the circumstances I agree with the plaintiff's submission that section 4 of the Finance Act 2008 applies to the specific year of income referred to in the section namely 2001 and ending 30th June 2002. Issue number two is resolved in favour of the plaintiff. Under the Finance Act 2008 section 4 thereof, the plaintiff is not liable to pay corporation tax for the years since it was incorporated in 2001 up to the 30th of June 2002.

Remedies

The plaintiff's prayers for remedies were made pursuant to its submissions and were based on the premise contained in the first issue on whether the revised assessment notices issued by Uganda Revenue Authority on 18th of August 2010 in respect of the years of income 2001 – 2004 are time barred. Based on the premises that there were time barred the plaintiff prayed for certain declarations, vacation of the assessments, general damages and exemplary/aggravated damages and costs for two counsel.

Having held that the assessments were not time barred, the action for declarations, vacation of the entire assessments, general and exemplary/aggravated damages are hereby disallowed with costs.

Plaintiff succeeded on the second issue of whether the plaintiffs Corporation Tax arrears in respect of the years of income 2001 and 2002 were waived by the Finance Act, 2008.

The plaintiffs corporation tax arrears for the years of income 2001 – financial year ending 30th June 2002 were waived by Part VI section 4 (1) of the Finance Act 2008. Consequently any assessment notices relating to any chargeable income for the period ending 30th June 2002 is hereby vacated.

Additionally the defendant shall issue revised assessments for all the previous assessments taking into account the waiver of tax under section 4 (1) of the Finance Act 2008.

The plaintiff is awarded one quarter of the taxed costs and the defendant having in the main succeeded is awarded three quarters of the taxed costs of the suit. The final result would be that the defendant gets half the costs of the suit.

Judgment delivered in open court this 11th day of January 2013

Hon. Mr. Justice Christopher Madrama

Judge

Judgment delivered in the presence of:

Michael Balimukuubo for the plaintiff

Mbeta Haruna for the defendant holding brief for counsel Mathew Mugabi.

Charles Okuni: Court Clerk

Hon. Mr. Justice Christopher Madrama

Judge