THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO 38 OF 2011

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

TMP (UGANDA) LIMITED (IN LIQUIDATION).....APPLICANT

VS

UGANDA REVENUE AUTHORITY}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Applicant commenced this application for judicial review under the provisions of sections 41 and 42 of the Judicature Act Cap 13 and rules 3 (2) and 6 of the Judicature (Judicial Review) Rules 2009 for the following declarations and costs of the proceedings namely:

1. A declaration that the Respondent ought to prove its debt if any before the Liquidator of the Applicant Company in line with the Creditors of the Applicant Company.
2. A declaration that the Respondent's apparent attachment of the Applicant's monies after commencement of the liquidation process was unlawful.
3. A declaration that in any event the Respondent's Agency Notice did not comply with the requirements of section 131 of the East African Community Customs Management Act.
4. An order that the Respondent pays the costs of the proceedings.

The facts averred in support of the notice of motion are that on 8 December 2011 the Applicant Company commenced its winding up process under the Companies Act cap 110 and published a notice in the New Vision Newspaper inviting its creditors for a meeting. A similar notice was duly published in the Uganda Gazette of 9th of December 2011. The Applicant was at all times unaware of any existing debt to the Respondent and no assessment or demand from the Respondent was in place at the time of the commencement of the liquidation process. On 16 December 2011, the Respondent being well aware of the commencement of the winding up process, and in an apparent attempt to circumvent the winding up process, issued against the Applicant and its bankers Messieurs Standard Chartered bank Ltd a third-party agency notice based upon a provisional tax assessment of Uganda shillings 1,473,976,873.12 and collected therefore monies in excess of US$250,000. The Applicant contends that the purported attachment of its accounts after commencement of winding up proceedings was unlawful. The Applicant further contends that the Respondent’s debts is not proved to the liquidator and cannot

therefore be collected. Furthermore in any event the employees of the Applicant rank first before the Respondent and that the debts of the employees are proven by virtue of their known payroll for their earned wages and salaries for the month of December 2011. The Applicant contends that the agency notice was issued in bad faith as the same was backdated and issued contrary to the provisions of section 131 of the East African Community Customs Management Act 2005. Finally that it is just and convenient for the declarations and injunction to be granted on an application for judicial review.

The notice of motion is supported by the affidavit of Perry Muhebwe the liquidator. The facts disclosed in the affidavit are that the Applicant carries on the business of provision of broadband services in Uganda. On 8th of December 2011, the Applicant Company commenced its winding up process under the Companies Act. The Respondent has all along been part of the process and has not objected to the manner in which the processes are being carried out. The Applicant is required to follow the procedure set out in the Companies Act and the Employment Act 2006 in respect of payment of preferred creditors. Under section 48 of the Employment Act 2006, wages of its employees take precedence over all other secured creditors in the winding up process. The Respondent issued a party agency notice to the Applicant's bankers Messieurs Standard Chartered bank in respect of taxes for Uganda shillings 1,473,976,873.12 and collected there from monies in excess of US$250,000. The notice was served on the bank after the winding up process had commenced and therefore can only be carried out in line with the provisions on priority ranking under section 315 of the Companies Act Cap 110 and section 48 of the Employment Act 2006. The agency notice was issued in bad faith as it was backdated and issued contrary to section 131 of the East African Community Customs Management Act 2004. In any event the agency notice can only be paid in accordance with the provisions of section 315 of the Companies Act and the amount must be fully proved to the Liquidator before payment can be made. The provisional assessments issued by the Respondent have not been proved yet. The payment of monies attached by the Respondent are in contravention of the rules that govern the winding up process and any amounts collected should be refunded to the Liquidator. The Applicant has instituted a suit against the Respondent seeking redress in respect of the actions of the Respondent and is yet to be heard. If the actions of the Respondent are left unchecked, it would unlawfully and unfairly prejudice the claims of other preferential creditors entitled to priority in payments.

The affidavit in opposition to the application is sworn by Mr Timothy Malinga Iloket, an officer in the Trade Division of the Customs Department of the Respondent. He deposes that the Applicant owed monies to the Respondent as a result of VAT deferment facilities enjoyed on their imports worth Uganda shillings 1,473,976,873.12. On 14th of November 2011, the Respondent received a letter dated 3rd of November 2011 from the Applicant’s clearing agent Messrs St Mark Clearing and Forwarding International Ltd notifying Uganda Revenue Authority of the Applicant’s liquidation process so as to recover the outstanding taxes. Following that notice, an agency notice was issued on the Applicants bank Messrs Standard Chartered Bank for

the payment of the taxes due. On 4th of January 2012, another third-party agency notice was issued to Messieurs Stanbic Bank Uganda Limited for the payment of Uganda shillings 1,473,976,873.12 owing to the Respondent. On 17th of January 2012, Standard Chartered Bank made payment of Uganda shillings 634,400,000/= to the Respondent. Owing to the Respondent's actions above, the Applicant through its lawyers communicated his client's objection to the directives given in the third-party agency notice issued on Standard Chartered bank. On 8 February 2012, the Respondent replied to the clients letter clarifying steps taken to recover payment and demanded for the balance of Uganda shillings 839,576,873/= from the tax assessment presented to the Applicant. The Respondents' issuance of third-party agency notice was in accordance with the provisions of the East African Community Customs Management Act, 2004. In the premises Mr Timothy Malinga deposes on the basis of advice of his lawyers that the suit is bad in law, misconceived and discloses no cause of action.

In rejoinder Perry Muhebwe deposed an affidavit in rejoinder which indicates that he had read and understood the affidavit in reply sworn by Timothy Malinga. The Applicant had a value added tax deferment facility for domestic value added tax under the Value Added Tax Act and the Value Added Tax Regulations 1996 as an investment trader duly licensed as such by the Uganda Investment Authority. The Applicant had commenced a winding up process and there had been no previous claim or assessment made against the Applicant or him as the liquidator in the winding up process. The exemption and declaration made by the Applicant upon each import cleared the Applicant of any obligation to pay the VAT on the declared importation under the deferment facility. In any event the Applicant was discharged of the taxes according to copies of the declarations and discharge notices attached to the affidavit. In the premises it was erroneous for the Respondent to allege that the Applicant owed the Respondent a sum of Uganda shillings 1,473,976,873.12 when in fact the taxes were exempted and discharged. The Respondent's agency notice was therefore not issued in accordance with the East African Community Customs Management Act 2004 or under any other legal provision whatsoever.

The matter was referred for court annexed mediation which failed according to the report dated 22nd of January 2014. There is no information as to what happened between the filing of the application on 22 December 2011 until the mediator filed a report dated 22nd of January 2014 indicating that the parties agreed that judicial determination of specific issues of law is crucial for resolution of the case and therefore mediation was unable to provide a clear resolution of the matter.

On 4 April 2014 when the application came for hearing Counsel Enoch Barata of Messieurs Birungyi, Barata and Associates Advocates represented the Applicants while Counsel Habib Arike of the Legal Services and Board Affairs Department of the Respondent represented the Respondent in the application. They agreed that they would file a joint scheduling memorandum agreeing on the facts and issues for determination by the court. Thereafter they would address the court in written submissions.

In the scheduling memorandum the following facts are agreed:

"Agreed Facts as Disclosed by the Pleadings"

a) The Applicant carried out the business of provision of broadband services.
b) On 27th of November 2007 the Applicant was issued an investment licence by Uganda Investment Authority.
c) On 11th of August 2008 the Applicant appealed to the Minister in charge of Finance for various tax exemptions including Value Added Tax.
d) On the 5 September 2008 the Secretary to the Treasury granted a VAT deferment on plant and machinery for provision of public infrastructure services and voice data services.
e) On 14th of November 2008 the Applicant made an application to the Respondent for tax exemption.
f) On 27th of November 2008 the Respondent deferred the VAT on various goods proposed to be imported by the Applicant.
g) The Applicant formally applied for VAT deferment on plant and machinery on 11th of December 2008 and on several occasions thereafter until December 2009.
h) By December 2009 the Respondent discharged the Applicants VAT which had earlier been preferred on plant and machinery vide customs entry numbers C41889, C43626, C31189, C24246, C25444, C24432, C10237, C11454, C13519, C4408, C3977, C552.
i) On 8th December 2011 the Applicant commenced its winding up process under the Companies Act cap 110 and published a notice in the New Vision Newspaper inviting its creditors for a meeting. A similar notice was published in the Uganda Gazette of 9th of December 2011 Vol. CIV No. 37.
j) On 14th of December 2011 the Kampala district labour officer wrote to the Applicant notifying it of a complaint filed by the Applicant's employees against the failure by the Applicant to pay its employees their entitlements amounting to Uganda shillings 305,465,872/=.
k) The Respondent issued against the Applicant and its bankers Messieurs Standard Chartered bank Ltd the third-party agency notice based on a "Provisional Tax" assessment of Uganda shillings 1,472,976,872.12 and collected monies in excess of US$250,000.

The Applicant denies owing the Respondent the monies in paragraph (k) above. The Applicant and the Respondents Counsel however agreed that the above facts are sufficient coupled with the documentary evidence agreed upon to resolve the dispute and therefore addressed the court in written submissions.

Applicant's submissions

The issues addressed by the Applicant are the following:

1. **Whether the Respondent ought to have proved its debts before the Applicant's liquidator.**
2. **Whether the Respondent's attachment of monies after the commencement of the winding up process was unlawful.**
3. **What are the remedies available to the parties?**

Issue 1: Whether the Respondent ought to have proved its debts before the Applicant's liquidator?

The Applicant relies on section 313 of the Companies Act 110 which provides that:

> "313. Debts of all descriptions may be proved**.**
>
> In every winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act of the law of bankruptcy), all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value."

According to the Applicants Counsel the above provision not only envisages all different nature of debts that may exist against the company but also mandates that the said debts should be proved. The Respondent debt falls within the debts described above as such, the Respondent ought to have proved its debts before the liquidator. However as soon as the Respondent got to know of the Applicants winding up process it issued an agency notice against the Applicant and in doing so, acted unlawfully.

Issue 2: Whether the Respondent's attachment of monies after the commencement of the winding up process was lawful?

The Applicants Counsel relies on section 278 of the Companies Act Cap 110, for the submission that the voluntary winding up is deemed to commence at the time of passing of the resolution for voluntary winding up the effect of which the company ceases to carry on business except so far as may be required for the beneficial winding up of the company according to section 279 of the Companies Act Cap 110. Secondly the entitlements owed to the Applicants employees rank higher in priority to the Respondent's if any. On 14th of December 2011 the Kampala District Labour Officer wrote to the Applicant notifying it of a complaint filed by the Applicants employees against the failure by the Applicant to pay employees their entitlements amounting to Uganda shillings 305,465,872/=. Under section 48 of the employment of 2006 it is provided that the claim of an employee or those claiming on his or her behalf, wages or other entitlements under which he or she is entitled under the Act, shall have priority over all other claims which

have accrued in respect of the 26 weeks immediately preceding the date of the declaration of bankruptcy or winding up.

Even if the Respondent had a legitimate claim against the Applicant, the date of Uganda shillings 305,465,872/= has priority over the Respondent's claim under section 315 (1) of the Companies Act, in the winding up of the company shall be paid in priority to all other debts all taxes of local rates due from the company and every other debt having become due and payable within 12 months next before the date not exceeding a whole one years' assessment. This provision strictly limits the Respondents claim to one years' assessment prior to the date of the commencement of the winding up process.

According to the Applicants Counsel it is alleged that the Respondent demanded taxes extending all the way back to the year 2008 and as a result collected monies in excess of US$250,000 from the Applicant by way of an agency notice. The Respondent alleges to have received a letter for the Applicant notifying of the Applicants winding up process. This clearly shows that the Respondent was aware of the winding up process of the Applicant at the time it issued the agency notice. The Respondent had neither the capacity nor the right to attach the Applicant's monies after commencement of the winding up process. Therefore well aware of the Applicants winding up process, the Respondent would only jumped the queue but also forcefully collected monies in excess of the period limited by the law and thus the Respondents acts were ultra vires.

Issue 3: Whether the agency notice issued by the Respondent was lawful?

The Applicants Counsel submitted that the agency notices issued by the Respondent were unlawful as there was no failure by the Applicant to pay the tax on the day the taxes due and payable and the agency notice was in excess of the monies owed the Respondent at the time they were issued. Although the Respondent deposes to have issued agency notices pursuant to the notification of the Applicants clearing agent, the letter is dated 13th of December 2011 and yet the agency notice issued to Messieurs Standard Chartered Bank is dated 3rd of November 2011. That notwithstanding in the case of Babibasa versus Commissioner General Uganda Revenue Authority HCCS 434 of 2011, it was held that the agency notice was unlawful since it was issued on the same day as the assessment notice has been issued before the tax payable became due and owing, and as such there was no failure by the taxpayer to pay tax on the date the said tax was due and payable. Further in the case of Paramount versus Commissioner General Uganda Revenue Authority HCCS 264 of 2010, it was held that the agency notice was unlawful because it was in excess of the amounts due to the defendant.

The Applicants Counsel submits that it is not evident that the Respondent demanded full payment of the said Uganda shillings 1,473,967,873.12/= and the Applicant failed to pay it. As shown by the several discharged notices issued to the Applicant by the Respondent, by December 2009 the Respondent discharged the Applicants VAT which had earlier been deferred on plant and machinery according to the customs entry numbers C41889, C43666, C31189,

C24246, C25444, C10237, C11454, C130 519, C4408, C 3977, C552 but all the said entries were included in the Respondents demand. It follows that the agency notices issued by the Respondent were unlawful and as such the Respondent's act of issuing the said agency notices reflects an apparent illegality.

Issue 4: What are the remedies available to the parties?

The Applicants Counsel relies on the case of **Chief Constable of North Wales Police versus Evans [1982] 3 All ER** for the holding that the purpose of judicial review is to ensure that the individual receives fair treatment, but to ensure that the authority, after according a fair treatment, reaches on a matter which it is authorised or enjoined by the law to decide from itself a conclusion which is correct in the eyes of the court. In Kuluo Joseph Andrews and 2 others versus Attorney General and 6 others High Court Miscellaneous Cause 106 of 2010 it was held that judicial review is concerned not with the decision in issue per se, but the decision-making process. Consequently judicial review involves an assessment of the manner in which the decision is made and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that the public powers are exercised in accordance with the basic standards of legality, fairness and rationality. In the premises the Applicant prays that the remedies sought in the notice of motion are granted.

Submissions of the Respondent in reply

The Respondents Counsel framed different issues for determination namely:

1. **Whether the Applicant was liable to pay Uganda shillings 1,473,976,873/= the Respondent, being deferred VAT?**
2. **Whether the attachment of the deferred VAT by the Respondent was proper?**
3. **Remedies available to the parties**.

The Respondents Counsel tackled issues number one and two which he had framed together. He submitted that there was no dispute that the Applicant applied to the Commissioner General for deferment of VAT for the importation of plant and machinery. Secondly the application was granted. Deferment of VAT is premised on section 34 (4) of the Value Added Tax Act Cap 349. It provides that the Commissioner upon the application of a person liable to pay tax may extend time for payment of the tax by the person beyond the date on which it is due and payable or make such other arrangement as appropriate to ensure the payment of the tax due. Extension of time for payment is deferring the time of payment. Counsel relied on Black's Law Dictionary eighth edition which defines "deferred payment" as the principal and interest payment that was postponed or an instalment payment.

The Applicant applied for and was granted VAT deferment according to annexure "B" and annexure "C" to the affidavit of a Perry Muhebwe in rejoinder, on plant and machinery. Annexure "B" is a letter signed by Moses Kaggwa which in paragraph 1 writes as follows: "*your*

client will be entitled to VAT deferment of plant and machinery for provision of public infrastructure services and voice and data services". None of the cited entries by the Applicant were included in annexure "C" which forms the basis for the demand of the taxes. Under section 131 of the East African Community Customs Management Act, 2004, the Commissioner customs is mandated to appoint any person to be an agent of another for the purpose of collecting duty due under the Act and the Commissioner is satisfied that the agent holds money for or on account of the principal. In enforcing recovery for the deferred VAT, the Respondent notified the Applicant's bankers namely Standard Chartered Bank and Stanbic Bank (U) Ltd. The effort led to the recovery of Uganda shillings 634,400,000/= leaving a balance of Uganda shillings 839,476,873/= which is still outstanding. Consequently the Applicant erroneously submitted that its liability was discharged. From those premises the Applicant further submitted that the agency notices issued by the Respondent were unlawful.

In response to the allegation of the agency notices being unlawful section 67 (1) of the VAT Act provides that where the taxpayer's case has been referred to the Minister under subsection 1 and the Minister is satisfied that the tax due cannot be effectively recovered, the Minister may remit or write off in whole or in part the taxes due from the taxpayer. The provision clearly shows that it is only the Minister of finance upon due consideration who has the mandate to discharge or write off tax. The Respondents Counsel further submitted that the contentious issues in the matter squarely relate to VAT deferment and laws applicable and relevant laws cited by the Respondents Counsel.

However the Respondents Counsel submitted without prejudice that section 15 of the Companies Act cap 110 which deals with preferential payments on winding up clearly provides that taxes and local rates due at the time of winding up takes priority and should be cleared first before any other debts. He submitted that taxes and duties are to be cleared before settlement of any other creditors. Contrary to the submission of the Applicants Counsel, wages or salaries are ranked a distant third in the order of priorities.

On the question of whether the taxes sought to be recovered and outside the limitation period provided for under section 315 of the Companies Act, in the sense that the Applicant submitted that the demanded taxes extended way back to 2008, this was evidence from the bar. There was no evidence led to prove or disprove the dates when the debt arose. In any case the Applicant has not disputed the tax liability but rather seeks to be discharged from paying the VAT deferred.

Remedies

On the question of remedies, the Respondents Counsel submitted that there were several authorities on the rationale for bringing judicial review proceedings. He referred to the case of **Chief Constable of North Wales Police versus Evans [1982] 3 All ER 141** where it was held that judicial review is concerned not with the decision in issue per se, but with the decision-making process. Judicial review involves an assessment of the manner in which a decision is

made. It is not an appeal and the jurisdiction is exercised in a supervisory manner not to vindicate rights as such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality.

The Applicant was granted deferment of the defendant on plant and machinery. Secondly the Applicant does not deny the fact that it is indebted to the Respondent but rather seeks to be discharged from settling its tax liability. The taxes can only be discharged by the Minister of Finance. The act of taxing the Applicant and subsequent actions to recover tax outstanding by the Respondent are creatures of statutes. The Respondent did not contravene any of the statutory provisions and in the premises the Respondents Counsel prayed that this honourable court be pleased to rule as follows:

1. The Applicant is indebted to the Respondent to the tune of Uganda shillings 1,473,976,873/=.
2. A declaration that the agency notice issued by the Respondent was lawful.
3. The Applicant's application is dismissed with costs to the Respondent.

Applicant's submissions in rejoinder

On the issue of whether the Applicant was liable to pay Uganda shillings 1,477,976,874/= for the Respondent, being deferred VAT. The Applicants Counsel submits that the amount is based on various items imported by the Applicant as indicated in the Applicants provisional tax position generated by the Respondent according to annexure "A" of the Respondents affidavit in reply. The provisional tax position include the entries which were discharged i.e. C41889, C43666, C31189, C24246, C25444, C10237, C11454, C130 519, C4408, C 3977, C552. Consequently the Respondent is barred by the doctrine of estoppels from claiming that none of the discharged entries cited by the Applicant were included in the demand for the tax amount.

He further contended that notwithstanding the provisions of section 315 (1) of the Companies Act Cap 110 that in the winding up of the company there shall be paid in priority to all other debts all taxes and local rates due from the company at the relevant date and having become due and payable within 12 months next before that date not exceeding in the whole one years' assessment. The Applicant's provisional tax position generated by the Respondent clearly shows that most of the demands made by the Respondent has become due and payable before 12 months prior to the winding up date. Consequently the demands are time barred and as such the Applicant is not liable to pay the said tax of over 1.4 billion Uganda shillings.

Whether the attachment of the deferred VAT was proper?

On this issue Counsel rejoined on the submissions of the Respondent pursuant to section 131 of the East African Community Customs Management Act, 2004. VAT on imports is a creature of the VAT Act section 4 (b) and not the East African Community Customs Management Act.

Consequently the agency notice was issued under the wrong law and as such the attachment of the deferred VAT was improper.

As to the submissions under section 315 (1) of the Companies Act cap 110 that taxes and local rates take priority over wages and salaries, the Respondent did not make reference to section 48 of the Employment Act 2006. The provision provides that notwithstanding any other law to the contrary, on the bankruptcy or winding up of the employers business, the claim of an employee or those claiming on his or her behalf, wages other entitlements under which he or she is entitled under the Act, shall have priority over all other claims which accrued in respect of the 26 weeks immediately preceding the date of the declaration of bankruptcy or winding up. Consequently the Applicant maintains that the attachment of the Applicant's money before the payment of the Applicant's employees was unlawful. He reiterated that the Respondent attached the Applicants monies after the winding up of the Applicant Company had commenced. It follows that the Respondent in an attempt to circumvent the winding up process unlawfully attached the Applicant's monies.

On the question of remedies the Applicants Counsel submitted that the Respondent acted unlawfully and in the premises the Applicants reiterates the prayers in the notice of motion and includes other prayers namely:

1. A declaration that the Applicant is not liable to pay Uganda shillings 1,472,976,873/= to the Respondent.
2. A declaration that the Respondent ought to prove its debts if any before the Liquidator in line with the creditors of the Applicant Company.
3. A declaration that the Respondent's apparent attachment of the Applicant's monies after the commencement of the liquidation process was unlawful.
4. A declaration that the agency notice issued by the Respondent was unlawful.
5. A prerogative order of certiorari be granted quashing the Respondent's decision that the Applicant owes the Respondent Uganda shillings 1,472,976,873/=.
6. A prerogative order of prohibition be granted prohibiting the Respondent from enforcing the demand of Uganda shillings 1,472,976,873/=.
7. An injunction is issued ordering the Respondent to return all the monies in excess of the Respondents proven debts.
8. Costs of the suit

Judgment

I have duly considered the Applicants application as contained in the notice of motion brought by way of an application for judicial review commenced under the Judicature (Judicial Review) Rules 2009 and particularly rule 3 (2) and 6 thereof.

The Applicant's application as disclosed by the pleading in the notice of motion is an application for declaratory orders and costs by way of an application for judicial review. The mode for applying for judicial review is provided for by rule 6 of the Judicature (Judicial Review) Rules 2009 which provides under sub rule 1 thereof that in any criminal or civil cause or matter, an application for judicial review shall be made by notice of motion in the form specified in the Schedule to the rules. The schedule indicates that the form is made under rules 6, 7 and 8 of the Judicature (Judicial Review) Rules, 2009. Specifically the first paragraph of the form of the notice of motion in the schedule makes it is apparent that the reliefs sought by the application have to be specified i.e. for an order of mandamus, certiorari etc. Secondly the form prescribes that the grounds for the application are to be stated.

In this application the Applicant only seeks the prescribed relief of declarations and costs. The above position is made much clearer by reading in context rule 7 of the Judicature (Judicial Review) Rules, 2009. Particularly refer to rule 7 (1) of the Judicature (Judicial Review) Rules, 2009 which provides that:

> "(1) The Court may, on the hearing of the motion, allow the Applicant to amend his or her motion, whether by specifying different additional grounds or reliefs or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any other party to the application."

Sub rule 2 provides that where the Applicant intends to ask to be allowed to amend his or her motion or to use further affidavits, he or she shall give notice of his or intention and of any proposed amendment to every other party.

In this application and in the written submissions of the Applicants Counsel additional remedies are sought without amendment of the notice of motion. These include prayers in the written submissions for the following remedies:

1. A prerogative order of certiorari be granted quashing the Respondent's decision that the Applicant owes the Respondent Uganda shillings 1,472,976,873/=.
2. A prerogative order of prohibition be granted prohibiting the Respondent from enforcing the demand of Uganda shillings 1,472,976,873/=.
3. An injunction is issued ordering the Respondent to return all the monies in excess of the Respondents proven debts.

In light of provisions of rules 6 and 7 of the **Judicature (Judicial Review) Rules, 2009**, additional remedies prayed for are without any pleadings in the notice of motion and the court has no powers to grant specific remedies provided for under the **Judicature (Judicial Review) Rules, 2009** without specifying the reliefs sought in the motion originally or by way of amendment by introducing additional relief prayed for with due notice to the other party. Compliance with the rules is further necessary because different rules cater for different

remedies. For instance rule 3 (2) under which the Applicant moved in the notice of motion is not mandatory and caters for application for a declaration or an injunction not mentioned in sub rule 1 (b) of rule 3 of the **Judicature (Judicial Review) Rules, 2009**. An application for an order of mandamus, prohibition or certiorari or an injunction under section 38 (2) of the Judicature Act restraining a person from acting in any office in which the person is not entitled to act, shall be made by way of an application for judicial review under the rules. On the other hand an application for a declaration or an injunction other than an injunction restraining a person from acting in any office under section 38 (2) of the Judicature Act may be made by way of an application for judicial review. Furthermore it gives the High Court discretionary powers whether to grant the declaration or injunction claimed having regard to the nature of the matter in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari; the nature of the persons and bodies against whom relief may be granted by way of such an order; and all circumstances of the case that it would be just and convenient for the declaration or injunction be granted on an application for judicial review.

It follows that an Applicant in an application for declaration as in the Applicant's current application for judicial review for the grant of a declaration or injunction must inter alia persuade the court that it is just and convenient for the declaration or injunction to be granted in an application for judicial review. The flipside may be that the declarations may be granted in an ordinary suit other than an application for judicial review. I am further persuaded that among the tests specified under rule 3 (2) (a) and (b) of the **Judicature (Judicial Review) Rules, 2009** one of the qualifying factors is that the application for declaration may be in a matter in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari. Secondly the court considers the nature of the persons and bodies against which relief may be granted by way of such an order and thirdly that in all the circumstances of the case it would be just and convenient for the declaration or injunction to be granted in such an application.

In the premises additional prayers for mandamus, prohibition or certiorari in an application for declaratory relief has to be with the leave of court and with notice to other parties affected. The prayers of mandamus, prohibition or certiorari cannot be added by the Applicants Counsel unilaterally during submissions. I will therefore consider only whether the orders sought in the notice of motion should be issued. The reliefs sought in the motion are to the effect that:

1. A declaration issues that the Respondent ought to prove its debt if any before the liquidator of the Applicant company in line with the creditors of the Applicant company.
2. A declaration issues that the Respondent's apparent attachment of the Applicant's monies after commencement of the liquidation process was unlawful.
3. A declaration issues that in any event the Respondent's Agency Notice did not comply with the requirements of section 131 of the East African Community Customs Management Act, 2004.
4. An order for the Respondent to pay the costs of the proceedings.

Secondly the parties did not strictly adhere to the issues as framed in the joint scheduling memorandum endorsed by both Counsel and filed on court record on the 14th of May 2014.

The issues framed in the joint scheduling memorandum signed by both Counsels on the 12th of May 2014 are the following:

i. **Whether the Applicant is liable to pay Uganda shillings 1,473,976,873/= to the Respondent being deferred VAT?**
ii. **Whether the Respondent ought to have proved its debts before the Applicant's liquidator?**
iii. **Whether the Respondent's attachment of the monies of the Applicant was unlawful?**
iv. **What are the remedies available to the parties?**

Issue number (i) which is whether the Applicant is liable to pay for monies owed to the Respondent as a result of VAT deferment facilities in trade on imports worth Uganda shillings 1,473,976,873.12 seems to have arisen as a result of the affidavit in reply of Mr Malinga Timothy paragraph 4 thereof and the Respondents affidavit in rejoinder by Perry Muhebwe to the effect that the taxes mentioned as VAT deferment by the Respondent were exempt according to copies of alleged exemption annexure "B" and annexure "C" attached and also copies of declaration and discharge notices issued and attached as annexure "D" were not due and owing to the Respondent from the Applicant. Even though issue number (i) does not arise directly from the prayers sought in the Notice of Motion, it does arise from the affidavits for and against the application. For the moment I will deal with the issues that arise directly from the remedies prayed for though issue number (i) is corollary to the question of whether the demand for the VAT was lawful.

The material facts disclosed and as extracted from the documentary evidence shows that the Applicants annexure "A" to the affidavit in support of the application is a copy of the Uganda Gazette dated 9th of December 2011 in which under General Notice No 683 of 2011 the company give notice to creditors of TMP Uganda limited that a meeting of the creditors of the company will be held on the 19th day of December 2011 at the Golf Course Hotel to review the company's statement of accounts, list of creditors and the amount of the respective claims. Secondly the meeting will consider the appointment of a liquidator and any other business. The Applicant further relies on annexure "B" to the affidavits in support which is a letter from Kampala Capital City Authority and specifically the Labour Officer for Kampala dated 14th of December 2011 to the Chief Executive of TMP Ltd indicating that advocates had written lodging a complaint on behalf of the employees that the company intends to windup the company but the employees entitlements have not been paid and there is no evidence of how they would be paid. The attached schedule of unpaid employees and their entitlements inclusive of taxes is attached. Under annexure "C" the Applicant's affidavits in support attaches the third party notice issued under section 108 and 109 of the East African Community Customs Management Act, 2004. The

third-party notice is the appointment of an agent for TMP Uganda Limited and is dated 3rd of November 2011 addressed to Standard Chartered Bank Ltd. The third-party notice indicates that the Applicant is indebted to Uganda Revenue Authority to the tune of **Uganda shillings 1,473,976,873.12/=**. Attached to the third-party notice is a schedule of taxes leading to the total claim.

In the affidavit in reply deposed to by Malinga Timothy Iloket the above payment is described as VAT deferment facilities enjoyed for imports worth the amount claimed. It is admitted that the said third party notice was issued on the Applicants bank Messieurs Standard Chartered bank for the payment of the above amount and secondly on 4 January 2012 another third-party agency notice was issued to Messieurs Stanbic bank Uganda Limited for the payment of the same amount owed to the Respondent. On 17 January 2012, Standard Chartered bank paid Uganda shillings 634,400,000/= to the Respondent. Owing to the actions of the Respondent, the Applicant through its lawyers objected to the third-party agency notice issued to Standard Chartered bank. On 8 February 2012, the Respondent replied to the letter clarifying steps taken to recover payment and demanded for the balance of Uganda shillings 839,476,873/= from the tax assessment presented to the Applicant. Attached to the affidavit annexure "A" is the schedule of taxes giving the total amount claimed.

Secondly annexure "B" is a letter dated 3rd of December 2011 addressed to the Commissioner Customs Department Uganda Revenue Authority on the subject of collection of taxes due from broadband company. In this letter St. Mark Clearing and Forwarding International Company Uganda Limited wrote to the Commissioner Customs Department on the question of unpaid taxes of the Applicant. It is written therein that it was necessary for Uganda Revenue Authority to take measures to collect the outstanding taxes owed to Uganda Revenue Authority because their client Messieurs broadband is winding up their operations in Uganda. St Mark Clearing and Forwarding indicated that they should not be held responsible if Uganda Revenue Authority failed to collect the taxes arrears. The agency notice annexure "C" to the affidavit in reply is dated 3rd of November 2011. There is no evidence as to when it was received by Messieurs Standard Chartered bank Ltd.

The objections to the tax recovery measures referred to in the affidavit were written by Messieurs Birungyi, Barata and Associates in a letter dated 13 January 2012 and received by Uganda Revenue Authority on 13 January 2012 by the Commissioner customs Department. The objections alleged that their client commenced winding up process on 8 December 2011 using a process which Uganda Revenue Authority was aware of and Uganda Revenue Authority did not object to the manner in which it was being conducted.

On a matter of fact the notice in the Gazette gives the date of 19 December 2011 for a meeting of creditors and for the appointment of a liquidator. It is interesting to note that the lawyers allege that the letter/agency notice was apparently dated 9th of December 2011 and backdated to 3 November 2011. Notwithstanding the question of when the liquidation or winding up

proceedings commenced, I have noted that a liquidator could not have been appointed before 19 December 2011 which is the time of the meeting for inter alia considering the agenda which included appointment of a liquidator and consideration of the list of creditors. The crux of the objection on the other hand is that under section 315 (1) (a) of the Companies Act cap 110 only those taxes which became due and payable within 12 months before the date of commencement of the winding up can be paid and such tax was not to exceed in the whole, one year's assessment. The agency notice served on the client's bankers and attached taxed schedule indicated a provisional assessment which covered a period of over 12 months.

Secondly the objection was that their clients paid all the taxes due and currently owes no taxes to Uganda Revenue Authority. Any other monies that were not directly paid were exempted and the records can be found in the tax file of the Applicant. Thirdly the objection was that there was no indication that any customs bond was or has been breached to warrant its cancellation and enforcement of the guarantee and the measures adopted by the office were irregular and premature. Fourthly there is no authority under section 108 and 109 of the East African Community Customs Management Act to issue third-party agency notices and as such the same was irregular and ultra vires. Finally the objection was that the Companies Act requires that all debts of the company upon winding up must be proved to the liquidator before they can be paid. The agency notice issued to Messieurs Standard Chartered bank required the payment of the amount indicated therein yet the tax obligation has not yet been proved and allowed by the duly appointed liquidator. Consequently the Applicant objected to the directives issued to Messieurs Standard Chartered bank as it was in contravention of the Companies Act cap 110.

Uganda Revenue Authority responded in a letter dated 8th of February 2012 to the effect that the decision to issue third-party agency notice was taken in accordance with the authority conferred on the Commissioner under the provisions of the East African Community Customs Management Act 2004 and specifically section 131 (1) (b) thereof which empowers the Commissioner to appoint any person an agent for collecting duty under the Act. The decision was prompted by the fact that the Applicant owed monies to Uganda Revenue Authority as a result of VAT deferment facilities enjoyed on the imports and based on credible information that they were about to close business in Uganda. The Respondent additionally demanded Uganda shillings 839,476,873/= from the Applicant and concluded that there was nothing extraordinary or done in violation of any provision of the law as intimated in the objection letter.

Finally the affidavit in rejoinder alleges that there was no previous assessment made against the Applicant or the liquidator in the winding up process. The Applicant was exempted from any obligation to pay VAT and secondly the Applicant was discharged of the taxes according to declarations and discharge notices attached. The Applicant therefore owes no money to the Respondent.

The agency notice was not issued in accordance with the East African Community Customs Management Act 2004 or any other legal provision whatsoever. Attached documents prove that

the Applicant is the holder of an Investment Licences issued by the Uganda Investment Authority on 27 November 2007. Secondly the Applicant attached response of the Respondent to the Applicants application for tax exemption for TMP (Uganda) Ltd. Attached are also documents issued by the Respondent to TMP (U) Ltd entitled "discharge notice" for VAT. The particulars of the documents include the customs entry numbers specifying the particular transaction involved. Several discharge notices are attached and will be considered in due course.

I have carefully considered the written submissions of Counsels and I must note from the outset that whereas the Applicant started with issue number two which he framed as issue number one, the Respondents Counsel dealt with issue number one in the joint scheduling memorandum and secondly whether the attachment of the deferred VAT by the Respondent was proper. He tackled the two issues together. A careful consideration of the issues indicates that the Respondents Counsel never addressed the issue of whether the Respondent ought to have proved its debts before the Applicant's liquidator. His submissions relate to the question of legality of the recovery measures.

I will deal with the issues as framed by the Applicant's Counsel which in the main are consistent with the issues framed in the joint scheduling memorandum while at the same time considering the points that are relevant in the issues raised by the Respondents Counsel.

Whether the Respondent ought to have proved its debts before the Applicant's liquidator?

On this issue the Applicants Counsel relies on section 313 of the Companies Act Cap 110 which provides that:

> "313. Debts of all descriptions may be proved.
>
> In every winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act of the law of bankruptcy), all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value."

The Applicant suggests that by virtue of section 313 the Respondent which is Uganda Revenue Authority is obliged to appear before the liquidator and prove the taxes that are due and owing. An analysis of the provision however shows that section 313 of the Companies Act is permissive. First of all the head note provides that "Debts of all descriptions may be proved." The heading of the section of the Act provides that it deals with the provisions applicable to every mode of winding up. Consequently it provides that in every winding up, all debts payable on a contingency and all claims against the company, present or future, etc shall be admissible. It deals with the kind of debts that may be proved against the company in a winding up. It is even

subject to the application of the law of bankruptcy. In my opinion the provision does not suggest that every debt has to be proved before the liquidator as it deals with a different subject matter namely the subject matter of the kinds of debts that may be proved in a winding up. That being the case I do not have to consider the section for purposes of the submission that the Respondent had to prove the taxes before the liquidator and will continue to consider the question on the basis of other provisions of law.

It is a difficult proposition of law to submit that the Commissioner/Commissioner General or the Commissioner of Customs of the Revenue Authority has to appear before the liquidator to prove its taxes. From the wording of the provisions of the Companies Act, the fact that all debts have to be proved seems to be the apparent meaning. Taxes are supposed to be ranked with other claims of creditors according to a list of priority but this does not necessarily mean that they have to be proved before the liquidator. Perhaps they have to be presented for consideration in some cases. That proposition of law though plausible seems to conflict with the provisions of the Value Added Tax Act cap 349 laws of Uganda which has specific provisions for the recovery of VAT from a liquidator. There is no controversy about the conclusion of fact that the taxes in question are value added tax alleged to be outstanding by the Respondent.

The Value Added Tax Act Cap 349 clearly prescribes when a debt is due and payable. Section 34 (1) provides that in the case of a taxable supply by a taxable person in respect of a tax period, the taxes due for payment on the date the return for the tax period must be lodged. In case of an assessment issued under the VAT Act, on the date specified in the notice of assessment or in any other case on the date the taxable transaction occurs as determined by the VAT Act.

Where the value added tax is due and payable, it is a debt to the government of Uganda and is payable to the Commissioner General by the person specified as liable to pay under section 5 of the VAT Act according to section 35 thereof. Where a person fails to pay the tax when it is due and payable, the Commissioner General has several options to recover the tax. The recovery measures include the procedure where the Commissioner General files with a court of competent jurisdiction tax certified by the Commissioner General setting forth the amount of tax due which statement may be treated for all purposes as a civil judgment lawfully given in a court in favour of the Commissioner General for the debt in the amount specified. Thirdly section 37 of the Value Added Tax Act cap 349 provides that from the date on which the tax is due and payable, the Commissioner General has a preferential claim against other claimants upon the assets of the person liable to pay the tax until the tax is paid. The preferential claim is supported by powers of the Commissioner to levy distress on the property of the taxpayer under section 38 through seizure of goods or through seeking security for due payment of the taxes under section 36 or to close the business and bring distress proceedings under section 39, all of which sections are options under the Value Added Tax Act.

The Commissioner General may also recover the tax from any third party who owes the taxpayer some money by giving that person a notice in writing requiring the person to pay the money to the Commissioner General on the date set out in the notice up to the amount of the tax due.

Last but not least section 41 of the Value Added Tax Act cap 349 spells out the duties of receivers. The first duty under section 41 (1) provides that a receiver shall notify the Commissioner General within 14 days after being appointed to the position of the receiver or taking possession of an asset in Uganda, whichever occurs first. Secondly under section 42 (2) of the Value Added Tax Act the Commissioner General may in writing notify a receiver of the amount which appears to the Commissioner General to be sufficient to provide for any tax which is or will become payable by the person whose assets are in the possession of the receiver. Thirdly under section 42 (3) of the Value Added Tax Act the receiver shall not part with any asset in Uganda, which is held by the receiver in his or her capacity as a receiver without the prior written permission of the Commissioner General.

Under section 41 (4) of the VAT Act, the receiver shall set aside, out of the proceeds of sale of an asset, the amount notified by the Commissioner General under subsection (2), or such amount as is subsequently agreed on by the Commissioner General. Secondly a receiver is liable to the extent of the amount set aside for the tax of the person who owned the assets; and may pay any debt that has priority over the tax referred to in subsection notwithstanding any provisions of that section. Section 41 subsection 4 (c) of the Value Added Tax Act only gives discretionary power on the receiver to pay any debt that has priority over the tax notified by the Commissioner General. However the receiver remains liable as provided for by section 41 (5)

Section 41 (5) provides that a receiver is personally liable to the extent of any amount required to be set aside under subsection 4 for the tax referred to in subsection 2 if and to the extent that, the receiver fails to comply with the requirements of the section. Under section 41 of the VAT Act, the term "receiver" includes a liquidator of a company and a receiver appointed out of court or by a court. Some conclusions can be made from the provisions of section 41 of the Value Added Tax Act. The first conclusion is that it is the duty of the receiver to notify the Commissioner of the appointment as liquidator or receiver. From the evidence the agenda for appointment of a liquidator was to be considered on 19 December 2011. The agency notice was issued even from the objection letter of the Applicant's lawyers presumably without proof on the basis of his submissions on 9 December 2011. Even if it was backdated, one fact is that it was issued before the appointment of a liquidator.

From the above provisions, the Commissioner General may notify the receiver in writing of the amount which appears to the Commissioner General to be sufficient for any taxes. The duty is upon the receiver to notify the Commissioner General within 14 days of appointment. There is no letter in evidence other than the letter of the agents attached to the affidavit in reply as annexure "B" dated 3rd of December 2011. These are the agents of the Applicant Messieurs St. Mark Clearing and Forwarding International Company Uganda Ltd. This letter was written

before 9 December 2011 and 19 December 2011 when the agenda for the appointment of the liquidator was to be considered by the Applicant Company. Interestingly the Gazette notice dated 9th of December 2011 general notice number 683 of 2011 was notice to all creditors of TMP Uganda limited. There is no evidence of when the winding up process began. However agenda number 1 is worth making reference to because it deals with communication of the company's proposal to windup voluntarily. In other words the company intended to windup voluntarily. The notice to all creditors is dated at Kampala on 6 December 2011. In conclusion if the submissions of the Applicants Counsel are anything to go by, the Respondent issued the third party notice on 9 December 2011 (though alleged to be backdated to 3 November 2011) before any voluntary winding up or even the appointment of a liquidator or receiver.

Secondly where a tax has been assessed, the production of any notice of assessment or certified copy of the notice of assessment is conclusive evidence in any proceedings under section 33 (1) of the VAT Act of the taxes due. There is an apparent conflict between the provisions for preferential claim to assets under section 37 of the Value Added Tax Act and the ranking of the list of priority under the Companies Act found under section 315 thereof. I will however consider this issue under a separate heading.

As far as the first issue is concerned, it is the Applicants case that the Respondent acted unlawfully by issuing a third party notice upon getting to know of the Applicants winding up process. However upon reading section 41 (4), the receiver is required to set aside out of the proceeds of sale of any asset, the amount notified by the Commissioner General or such lesser amount as is subsequently agreed on by the Commissioner General. The requirement to set aside an amount equivalent to the amount notified does not render the acts of the Commissioner General to issue third-party notice unlawful per se but irregular. The irregularity would be the failure of the Commissioner, if any, to communicate the taxes due to the liquidator. However from the Applicant's evidence, the notice was issued before the appointment of a liquidator and therefore this renders the argument on the basis of proof of debts before the liquidator untenable if it is based on the timeliness of the third-party notice.

Coupled with the specific provision for preferential treatment of the claims of the Commissioner General on the assets of the taxpayer, it is a requirement under the Companies Law to notify the liquidator of the amounts due and owing. It is upon the liquidator to take up proceedings to challenge the claims of the Commissioner General in any assessment. Perhaps the question ought to be whether the liquidator was notified of the claims of the Commissioner General to the asset of the taxpayer/Applicant. All the questions become academic because the Applicants lawyers objected to the third party notice. Though not section was cited by the Applicant's lawyers in the objection to the notice of assessment and third-party notice, the apparent evidence is that there was a notice of assessment issued to the Applicant.

Secondly there was a third party notice. Thirdly it was alleged in the objection letter that the Respondent had on 9 December 2011 issued a backdated third-party agency notice to Messieurs

Standard Chartered Bank Uganda Limited. The objection specifically was that the third-party notice was issued contrary or in contravention of the winding up rules. Section 315 (1) (a) of the Companies Act Cap 110 was relied upon. Secondly that there is no authority under section 108 and 109 of the East African Community Customs Management Act to issue third-party agency notices which was irregular and ultra vires. On questions of fact, issue number one cannot be sustained because the agency notice and assessment notices were issued before the appointment of the liquidator.

As far as the provisions of the East African Community Customs Management Act are concerned, I will not for the moment deal with the merits of the grounds because the Applicant has relied on the provisions of the East African Community Customs Management Act which prescribes the procedure for challenging any decision made under that Act.

Without dealing with the merits of the objection, where the Applicant has opted to object to a taxation decision of the Respondent to enforce Value Added Tax which schedule was attached to the third party notice, then they cannot apply for review. The fact that where a specific statutory provision has been prescribed as a remedy pursuant to an objection decision of the Respondent, the application for judicial review is untenable was considered in my decision following previous judicial precedents on the point in **Miscellaneous Cause No 14 of 2014 Kawuki Mathias vs. Commissioner General Uganda Revenue Authority** where I rejected an application for release of goods against the Commissioner of customs upon an application by notice of motion when there were specific provisions in the East African Community Customs Management Act that prescribed the remedy for the Applicant to follow. I would adopt my decision which is relevant to the point that the application for judicial review in the circumstances of the Applicant's application is not the appropriate remedy:

> "The **East African Community Customs Management Act** prescribes a specific procedure for the Applicant to follow. That procedure is for the Applicant to apply for review to the Commissioner under section 229. Where the Commissioner renders a decision, the Applicant as an aggrieved person has a right of appeal to the Tax Appeals Tribunal under section 231 of the **East African Community Customs Management Act, 2004**. The High Court enjoys appellate jurisdiction from decisions of the Tax Appeals Tribunal under the **Tax Appeals Tribunal Act cap 345** laws of Uganda. **Section 27 of the Tax Appeals Tribunals Act** provides that a party who is aggrieved by a decision of the Tax Appeals Tribunal may appeal to the High Court. Finally appeals to the High Court are made on questions of law only.
>
> In the premises I agree with the last point in objection. … On the last point of objection, there are statutory provisions on how and by which authority tax matters are to be handled and the High Court should not exercise its inherent original jurisdiction because it enjoys appellate jurisdiction from decisions of those bodies. The cases cited of **R v Chief Constable of the Merseyside Police, ex parte Calveley and others [1986] 1 All**

ER 257 and Ashmore v Corp of Lloyd's [1992] 2 All ER 486 House of Lords were relied on by the Respondent's Counsel for the proposition that where the law prescribes a special procedure and forum, it should be exhausted before filing an action in court. I have found one of the cases to be directly relevant to the objection and it is to the effect that where a specific procedure have been provided for, parties should exhaust that procedure or other remedies before filing an action in Court. In **R v Chief Constable of the Merseyside Police, ex parte Calveley and others [1986] 1 All ER 257 May L.J**. held at 263 as far as is relevant that:

> "I respectfully agree with the Divisional Court that the normal rule in cases such as this is that an Applicant for judicial review should first exhaust whatever other rights he has by way of appeal. In **Preston v IRC [1985] 2 All ER 327 at 330, [1985] AC 835 at 852** Lord Scarman said:
>
> > 'My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge; it is not an appeal. *Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision.*'" (Emphasis added)
>
> Though the case dealt with applications for judicial review, the principle embodied in it is relevant. The principle is that where Parliament has prescribed a procedure for reviews or appeals before another judicial or quasi judicial body, the court should not allow another process to be used to attack the decision. ..."

The above decision applies with full force to the Applicant's application for judicial review. Notwithstanding its application in case I am wrong on the question of procedure, I will still consider issue number two further on this matter.

Issue number two is whether the Respondent's attachment of monies after the commencement of the winding up process was lawful?

From the evidence of the Applicant, the third-party notice was issued around 9 December 2011. However the liquidator of TMP (U) Ltd could only have been appointed after 19 December 2011 and issue two depends on an assertion of fact that the winding up proceedings commenced before the attachment of monies. The submission is however not supported by the Applicant's own evidence. The notice for winding up relied upon in the Uganda Gazette is a notice to creditors and on the agenda were the following items for consideration in the meeting:

1. Communication of the company's proposal to windup voluntarily.

2. Review of the Company's statement of accounts, list of creditors and the amount of the respective claims.
3. Appointment of a liquidator.
4. Any other business

The notice is dated at Kampala on 6 December 2011 by order of the Board and is signed by the Board Secretary of the Applicant. The notice was issued to the general public on 9 December 2011 for a meeting to take place on 19 December 2011. It is addressed to: "All Creditors of TMP Uganda Limited" and reads as follows:

> "NOTICE is hereby given that the meeting of the creditors of the company will be held on the 19th day of December, 2011 at two o'clock (14 hours) at Golf Course Hotel.
>
> The agenda will be:"

As far as the provisions of the Companies Act Cap 110 laws of Uganda is concerned, the Gazette notice issued to the Creditors of TMP Uganda Limited give the inference that TMP Uganda limited was being wound up in a voluntary creditors winding up. Section 290 prescribes the provisions which shall apply in a creditor's voluntary winding up. It provides that:

> "290. Provisions applicable to a creditors' winding up.
>
> Sections 291 to 298 shall apply in relation to a creditors' voluntary winding up."

As far as section 291 is concerned a meeting of creditors is convened under section 291 (1) and (2) of the Companies Act which provides that:

> "291. Meeting of creditors.
>
> (1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day following the day, on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the meeting of the company."

Secondly under section 291 (2) of the Companies Act the company shall cause: *"notice of the meeting of the creditors to be advertised once in the Gazette and once at least in a newspaper circulating in Uganda*."

This is exactly what the notice attached to the Applicant's application implies. A notice was issued in the Gazette and in the New Vision for a meeting of the creditors for purposes of considering a creditor's voluntary winding up proposal. In a creditor's voluntary winding up, the directors of the company are obliged to disclose the state of affairs of the company to the

creditors inclusive of giving a list of all the creditors and the amounts owed to them. Section 291 (3) and (4) provides that:

> "(2)
>
> (3) The directors of the company shall—
>
> (a) cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting of the creditors to be held as aforesaid; and
>
> (b) appoint one of their numbers to preside at the meeting.
>
> (4) It shall be the duty of the director appointed to preside at the meeting of the creditors to attend the meeting and preside at it."

Under section 291 (2) a notice shall be published of the proposed meeting and for emphasis I will quote section 291 (2) of the Companies Act which provides:

> "The company shall cause notice of the meeting of the creditors to be advertised once in the Gazette and once at least in a newspaper circulating in Uganda."

At the meeting of the creditors it is expected that a liquidator shall be appointed and section 292 of the companies act provides as follows:

> "292. Appointment of a liquidator.
>
> (1) The creditors and the company at their respective meetings mentioned in section 291 may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and if no person is nominated by the creditors, the person, if any, nominated by the company shall be liquidator.
>
> (2) If different persons are nominated, any director, member or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors or appointing some other person to be liquidator instead of the person appointed by the creditors."

From the above provisions it is clear that the Applicant complied with the provisions for the commencement of winding up voluntarily by creditors. However a liquidator could not have been appointed by 18th December 2011 and the appointment was supposed to be considered on the 19th of December 2011. A voluntary winding up brings into operation the statutory scheme

for winding up which includes vesting of the estate of the company in the liquidator. The effect of a voluntary winding up was considered by the House of Lords in the case of **Ayerst (Inspector of Taxes) v C & K (Construction) Ltd [1975] 2 All ER 537** where Lord Diplock between pages 240 and 241 said:

> "The procedure to be followed when a company is being wound up varies in detail according to whether this is done compulsorily under an order of the court or voluntarily pursuant to a resolution of the company in general meeting, and, in the latter case, whether it is a members' voluntary winding-up or a creditors' voluntary winding-up; but the essential characteristics of the scheme for dealing with the assets of the company do not differ whichever of these procedures is applicable. They remain the same as those of the original statutory scheme in the Companies Act 1862. For the sake of simplicity, in stating the essential characteristics of the statutory scheme I propose to refer only to those sections of the Companies Act 1948 which apply in a compulsory winding-up and to omit those sections which have a corresponding effect in the case of a voluntary winding-up." On the making of a winding-up order: (1) The custody and control of all the property and choses in action of the company are transferred from those persons who were entitled under the memorandum and articles to manage its affairs on its behalf, to a liquidator charged with the statutory duty of dealing with the company's assets in accordance with the statutory scheme (s 243). Any disposition of the property of the company otherwise than by the liquidator is void (s 227). (2) The statutory duty of the liquidator is to collect the assets of the company and to apply them in discharge of its liabilities (s 257(1)). If there is any surplus he must distribute it among the members of the company in accordance with their respective rights under the memorandum and articles of association (s 265). In performing these duties in a compulsory winding-up the liquidator acts as an officer of the court (s 273); and if the company is insolvent the rules applicable in the law of bankruptcy must be followed (s 317). (3) All powers of dealing with the company's assets, including the power to carry on its business so far as may be necessary for its beneficial winding-up, are exercisable by the liquidator for the benefit of those persons only who are entitled to share in the proceeds of realisation of the assets under the statutory scheme. The company itself as a legal person, distinct from its members, can never be entitled to any part of the proceeds. On completion of the winding-up, it is dissolved (s 274)."

The provisions of the Ugandan Companies Act cap 110 (repealed) but which is applicable are essentially in *pari* materia with the English Companies Act of 1948 referred to by Lord Diplock. However before the resolution of the company to windup the company, and before the appointment of the liquidator, it cannot be established whether the company is insolvent or not and whether the provisions relating to insolvency have to be applied. Consequently before the act proposed in the meeting of 19 December 2011, the actions of the Respondent cannot be impeached. Furthermore the facts pleaded militate against the Applicants contention that the

Respondent ought to have filed its claim with the liquidator considered together with the fact that the Applicant's application was filed one day after the meeting notified in the Gazette. The Applicant's Applicant for judicial review was filed on the 21st of December 2011 according to the minute on the court file on the payment of fees. The question of whether the company should be voluntarily wound up was still a proposal to be presented at the meeting of creditors. Furthermore a liquidator appointed had the obligation to notify the Commissioner of his appointment under section 41 of the Value Added Tax Act within 14 days of appointment. There is no evidence that the Commissioner General was notified after the meeting which was notified to take place on 19th December 2011 and moreover the Applicant filed an application on the 21st of December 2011. The affidavit of Perry Muhebwe in support was sworn on the 20th of December 2011 supposedly one day after the meeting of creditors notified to consider appointment of a liquidator. Finally the question of whether the Applicant should be wound up had not been considered by the 9th of December 2011 when the third party notice was allegedly issued.

Issuance of a third-party notice on 9 December 2011 cannot therefore be in contravention of the Companies Act per se. This is because it was still on the agenda whether the company should be wound up at all. Lastly the Applicant's case is not a case alleging fraudulent preference under the provisions of section 315 of the Companies Act by the act of the Respondent issuing a third party notice. If the monies paid to the Respondent were remitted by the third-party between the time of the issuance of the third-party and the time of the effective voluntary winding up procedure by way of vesting of the company assets in the liquidator, the issue has not been sufficiently addressed the evidence or submissions of Counsel and I will not deal with it.

In the premises, the submissions based on the timing of the attachment of the monies of the Applicant cannot be sustained on the basis of the provisions of the Companies Act. What could have been considered is the question of priority of the vesting of the property and when the property is deemed to have vested in the liquidator as well as question of whether any money is owed to the Respondent.

Finally a review of the law has demonstrated that the High Court enjoys appellate jurisdiction under the East African Community Customs Management Act. Secondly the High Court enjoys appellate jurisdiction on points of law only under section 33D of the Value Added Tax Act from appeals emanating from the Tax Appeals Tribunal. The Applicant did not appeal to the Tax Appeals Tribunal from the objection decision of the Respondent. Secondly the Applicant could not have appealed from any decision of the Tax Appeals Tribunal to the High Court since there was no appeal preferred to the Tax Appeals Tribunal. In case the applicable law is the East African Community Customs Management Act 2004, the Applicant being aggrieved had a right of appeal to the Tax Appeals Tribunal under section 231 of thereof. The High Court enjoys appellate jurisdiction from decisions of the Tax Appeals Tribunal under the **Tax Appeals Tribunal Act cap 345** laws of Uganda. **Section 27 of the Tax Appeals Tribunals Act** provides

that a party aggrieved by a decision of the Tax Appeals Tribunal may appeal to the High Court and on questions of law only.

The Applicant's application was filed on 21 December 2011. It was not issued by the registrar until 19 April 2012. The Respondent as earlier noted did not object to the procedure and agreed to file written submissions on the basis of agreed facts.

On the basis of the affidavit in rejoinder, the Applicant forwarded to the court several discharge notices with respect to discharge from liability for the taxes contained in the Respondent's third-party notice. I have considered all the factors that are relevant and have come to the conclusion that the application is incompetent.

The question of whether the Applicant has been discharged is however a question of fact. Where the Applicant has been discharged, he cannot be charged again for the same VAT. The question is whether the court can ignore an assertion that the VAT in question was discharged. The Respondents Counsel submitted that none of the cited entries by the Applicant were included in annexure "C" to the affidavit in reply which annexure is the third-party notice and schedule of taxes and which forms the basis for the demand of the taxes. The fundamental question has constitutional implications under article 152 (1) of the Constitution of the Republic of Uganda which provides that no tax shall be imposed except under the authority of an Act of Parliament. Similarly the authority prescribed by Parliament under article 152 (2) of the Constitution of the Republic of Uganda may waive or vary a tax imposed by the law. Where the tax has been waived by the authority prescribed by Parliament, the tax cannot be lawfully imposed under article 152 (1) of the Constitution. The implication is that the tax was imposed as prescribed by law or under the authority of Parliament and then subsequently waived. It cannot be re-imposed and to do so would be unconstitutional and article 152 of the Constitution. In the premises despite the incompetence of the Applicant's application for review, the court has powers to intervene in a limited sense to avoid any illegality through imposition of taxes after the tax was imposed and waived by authority prescribed by Parliament. As to whether the taxes were waived is a question of fact that can be investigated.

In the premises the Respondent will investigate the discharge notices under customs entry number C41889 of 17th of December 2008 attached to the affidavit of the liquidator, discharges notices numbers C43626, dated 23rd of December 2008, number C31189 dated 30th of September 2009, number C24246 of 5th August 2009, number C25444 of 19 August 2009, C25643 of 13 August 2009, C24432 of 5 August 2009, C11454 of 16 April 2009, C13579 of 5th of May 2009, C4408 of 16th of February 2009, C3977 of the 2 February 2009, C552 of 9 January 2009 and any other discharge notices issued to the Applicant for purposes of discharging the Applicant from liability from taxes proven to be remitted.

The Respondents Counsel on this question submitted that the Commissioner General has no powers to discharge anybody from the tax liability. That it is the Minister under section 67 of the

Value Added Tax Act who may discharge the taxpayer on the grounds stipulated in section 67 (1) thereof. Section 67 (2) of the Value Added Tax Act provides as follows:

> "Where the taxpayer's case has been referred to the Minister under subsection (1) and the Minister is satisfied that the tax due cannot be effectively recovered, the Minister may remit or write off, in whole or in part, the tax due from the taxpayer."

I cannot comment about the legality of the discharge notices. Obviously where the relevant authority has discharged the Applicant, it cannot be charged again for the VAT. The question of whether the Applicant was discharged was not mentioned directly in the objection of the Applicant in the letter of its Counsel dated 13th of January 2012 addressed to the Commissioner Customs. It was only indicated as one of the grounds of objection that TMP Uganda Ltd paid all taxes due and owed no taxes to Uganda Revenue Authority and any monies that were not directly paid were exempted. No particulars of the exemption were given. In the objection decision of the Respondent communicated to the lawyers of the Applicant in the letter dated 8th of February 2012 annexure "E" to the affidavit of Timothy Malinga in reply to the application, the question of whether the Applicant was exempted was not addressed. In the premises, the issue is referred back to the Commissioner General for investigation and review of whether the Applicant's taxes were discharged. Each party will bear its own costs of the application.

Judgment delivered in open court the 4th day of July 2014

Christopher Madrama Izama

Judge

Judgment delivered in the absence of both parties:

Neither the applicant nor counsel is present in court

Neither the Respondent nor Counsel is present in court

Joan Nalikka Legal Assistant to Judge present

Charles Okuni: Court Clerk present

Christopher Madrama Izama

Judge

4th July 2014