THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO.229 OF 2010

JOHNLIVINGSTONE OKELLO OKELLO ---------------------- PLAINTIFF

VS

THE COMMISSIONER GENERAL, U.RA. ------------------- DEFENDANT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

Facts of the case:

Sometime between 2003 and 2008, the Plaintiff and eleven other Consultant Surveyors were contracted by the Ministry of Local Government and various Municipal and Town Councils, under a World Bank Project (Financial Support to Local Governments for Property Rating –LDDP 11), to provide consultancy services in the preparation of rating lists for the said Councils.

In the course of execution of the said World Bank funded contracts and other professional work, the Plaintiff incurred tax liabilities in respect of which he filed annual tax returns with the Defendant and paid the assessed taxes.

In 2009, several Tax officers under the authority of the Defendant carried out a **"Comprehensive Audit"** of the Plaintiff's tax affairs for the period of 2003 to 2008. On 31.07.09, at the end of the exercise, the Defendant's Officers issued the following assessments to the Plaintiff:

- **Income tax of Shs. 96,458,786/-**, **VAT of Shs. 339,335,178/-** amounting to a total **of UGX Shs. 435,790,946/-.**

The Plaintiff objected to the assessments on the grounds set out in the letter dated 18.08.09 and other supporting documents in respect of VAT payments.

The Defendant partially allowed the objection and re-assessed the taxes owed by the Plaintiff to Shs. 51,564,184 for income tax and Shs. 43,386,802 as VAT, amounting to a total of **SHs. 94,950,868/-.**

By letter dated 15.10.09, the Plaintiff objected to the re-assessment and provided more evidence in respect of VAT, from Kampala City Council.

In response, the Defendant's Officers insisted that the VAT and income tax liability that had been re-assessed was payable. On 101.12.09, the Defendant issued third party notices to the various Plaintiffs' Bankers to collect the said VAT and Income Tax.

On 03.12.09, the Plaintiff wrote to the Defendant requesting for a tax credit of Shs. 14, 247, 680/- from the withholding tax which had not been accounted for in the tax computation.

On 11.12.09, the Plaintiff submitted to the Defendant receipts and vouchers including those from Pader and Moroto, amounting to Shs. 21,431,974/-; for further consideration of the tax credit of withholding tax.

The Defendant thereafter revised the tax to UGX 123,318,489/- and sent a letter to the Plaintiff dated 28-01-10, demanding payment.

Subsequently, the Defendant issued the Plaintiff with another assessment dated 22.05.10, amounting to Shs. 142,056,677/-. Of that amount, Shs. 54,878,534/- was VAT (inclusive of Penal Taxes) and income tax of Shs. 87,177,143/-. Again the Defendant issued third party notices to the Managing Directors of Stanbic Bank and Barclays Bank, the Plaintiff's bankers, to collect the disputed taxes.

The Plaintiff filed this suit seeking the declarations and orders set out in the Plaint.

In its written statement of defence, the Defendant denied the claim, contending that the Plaintiff was indebted in the sum claimed as tax liability for the years 2003 to 2008. The Defendant stated that the Plaintiff made deductions that were not allowable such as travelling and transport, telephone, wear and tear, and commission expenses and the undeclared income on his part.

After the suit was filed, the parties held meetings, entered into negotiations/discussions and exchanged correspondences that resulted into a revised assessment under which the Defendant is demanding Shs.32, 249,782/= as income tax payable by the Plaintiff.
Under the revised assessment, the Defendant agreed that VAT of Shs. 54,879,534/= is payable by the Ministry of Local Government.

In his testimony, the Plaintiff went through the facts as agreed and tendered exhibits to support his claim, without any objection by Counsel for the Defendant. The Plaintiff emphasised that the valuation work given to him was labour intensive and therefore necessitated employment of a number of people to assist him in the different areas; and various payments including commission were made.

He pointed out that, with effect from 2005- 2008, he was filing returns with the Defendant and the taxes were paid as assessed by the Defendant. During all that period, the Defendant never complained that the Plaintiff was not paying enough taxes.
The Plaintiff was first informed of the tax issues in 2009, while he was a Member of Parliament of Chua Constituency, Kitgum and the Defendants' officers met him at Parliament.
In a meeting that was later held at his private office, he was informed that the Defendant was to carry out a special audit. All his files were carried away by the Defendant's officers in total disregard of his plea for the audit to be done at his office. Neither the Plaintiff nor his accountant was involved in the audit.

It is the Plaintiff's contention that he was discriminated against, as none of the other valuers who carried out who carried out the same exercise were ever subjected to a comprehensive audit. He asserts that he was singled out because he was a Member of Parliament and the matter was only brought out when the 2011 elections were coming up.

Further that, during the campaigns, he was informed by some of his supporters that one of his opponents who eventually replaced him in Parliament, went on informing voters that the Plaintiff owed Government money and would be arrested and that they should therefore not waste their votes on him.

The Plaintiff prayed court to grant him the remedies sought in the Plaint.

PW2 Eddy Nsamba Gayiiya, a Valuer by profession took court through the process of valuation rating purposes. He recalled the project undertaken by Kampala City Council and other Urban Authorities in the year 2003 to 2008. The witness was one of the Registered Valuers who together with the Plaintiff participated in the project.

He confirmed that the exercise is labour intensive and requires many Valuers and Assistant Valuers to go around inspecting the properties. He added that, in some instances Land Valuers are needed to identify properties and boundaries of the rating area. And that the Valuers and Assistant Valuers hired are paid on commission basis. That is, as per the work done and delivered; they are not paid a salary.

And that any objections raised in respect of the valuation are resolved by the Valuation Tribunal.

The witness was not aware of the withholding that comes with payment of commission.

PW3 Simon Tolit Aketcha one time worked with the Defendant as Assistant Commissioner in charge of Audit Complaints. He explained to Court what the word **"Audit"** means in Uganda revenue Authority terms. Tax payers are required to file returns and audited accounts of their businesses. The documents are then examined by the Defendant's Officers to ascertain whether they conform to the Income Tax Act and other laws like VAT.

If there are no queries, assessment is issued to the tax payer. Any queries are raised with the Tax Payer who is then requested to respond. After the response, the Defendant either amends the assessment or maintains it.

In instances where a Tax Payer does not respond, a comprehensive audit is carried out at the Tax Payer's premises. A report is then made and submitted to the Tax Payer or his agent, for confirmation of the findings. If the Tax Payer objects, he sits down with the Defendant's Officers

to try and reach an acceptable position. If there is no agreement, the matter is taken for mediation or to the Tax Tribunal.

The witness stated that he got to know of the dispute between the parties in 2010. He attended some of the meetings the Defendant held with the Plaintiff. During those meetings, the witness identified the following 3 problems:

1. The comprehensive audit of the Plaintiff's books was carried out at the Defendant's premises and not at the Plaintiff's premises.

   No report was written after verification of records and accounts, instead, assessments were issued to the Plaintiff.

The Plaintiff raised several objections and to date 7 amendments have been made to the original assessments, eventually reducing the figure claimed by the Defendant to about Shs.32, 249,782/-.

Going through exhibits P6 – P9 and P11, the witness observed that no explanations were ever given as to how the figures were arrived at, adding that this was not proper.

The witness also commented about Exhibit P13, where the Commissioner General's assessment was revised without any reason being given. He said that the contradictions in exhibit P15 2 were also a departure from the earlier communication of the Commissioner General.

Referring to Exhibit P23 (A) the rate that is due and payable by the Ministry of Works; the witness explained that since the project was funded by the World Bank, the taxes were payable by Government.

And that while the income tax was reduced to Shs. 32,249,782/- -exhibit P23 (A), no other comprehensive audit or report were ever made before the new figures were brought up.

2. The method of accounting was not proper. The Tax Payer accounts on a cash basis while the Defendant accounts on approval basis.

The schedule given by the Defendant, shows Shs.32, 249,782/- as outstanding tax. Exhibit P23 B indicates undeclared income from cash flow analysis on which the final figure was based. Yet the cash flow analysis was never presented at the last meeting with the Plaintiff and therefore the tax based on it cannot be demanded.

Commenting about Exhibit P23 B in respect of travelling, transport, sub-contract commissions and depreciation; the witness insisted that the depreciation issue was resolved. Also that, the Defendant adding 20% on transport and travelling as income was not proper.

He clarified that, the Income Tax Act sets out expenses which are allowable and those which are not allowable; arguing that the basis of 20% is not within the law. Personal use, he said, would include travelling from home to office but that in the Plaintiff's case it was travel upcountry, adding that no breakdown was given as to how the Defendant arrived at 20%.

The witness also pointed out that it was not proper to add back the subcontract commissions. He explained that by the nature of the assignment, sub-contractors were necessary for completion of the job; and that the commissions payable to them are allowable expenses under the Income Tax Act. The Defendant disallowed the whole amount paid yet supporting documents were submitted. - Vouchers 8, 9, 10 and 11. All payments reflected on the vouchers were tax deductible.
Further that, if commission is disallowed as undeclared income, yet the Tax payer is not liable, it amounts to over taxation and the Defendant in this case is entitled to refund of about 11,000,000/-.

Remarking about Exhibit P23 B, he stated that table 2 shows the final position of the Tax payer. The Plaintiff over paid tax by Shs. 11, 430, 894/-. The figure he explained is arrived at as follows:

1. The cash flow analysis of undisclosed income was not shown by the Defendant.
2. It was not indicated why Defendant added back 20% of the travelling and transport expenses or the law under which they were doing so.
3. All payment vouchers for the subcontract commissions which the Defendant claimed had no supporting documents were availed by the Plaintiff.
4. There should not have been any additional assessment raised by the Defendant's staff for the years of income of 2003 – 2004. This is because under S. 97 (1) of the Income Tax Act, additional assessment should be raised within 3 years from the date of the year of income. In the present case, the additional assessment was made 6 -5 years respectively, after the years of income. The document was admitted as Exhibit P 24.

The Defendant called one witness Paul Mubeezi, a Tax Auditor, who participated in the audit of the Plaintiff's Company in respect of corporation tax, VAT and PAYE.
He testified that after the initial meeting with the Plaintiff at Parliament, he referred them to his Tax Auditor one Kalibbala. The said auditor organized some of the information requested and took it to the Defendant's offices at Crested Towers.
After the verification of the information, the audit was concluded with assessment of both VAT and PAYE amounting to Shs. 432, 000, 000/-. The figure was communicated to the Plaintiff and

all findings were put in an audit report. However, the report was not availed to the Plaintiff as it is an internal document for the Defendant's purposes.

To arrive at the income tax, the Defendant's Officers looked at the contracts and the expenses 5 incurred by the company in performing the contracts. Some of the expenses like commissions, bank charges, telephone expenses, transport and travel and sub-contracting were not supported by any documents; to show that the company had incurred them. That is the reason they were added back to the income tax computation to make the total figure of Shs. 96, 459, 768/-. Instead of paying, the Plaintiff objected to the assessment.

10 When reconciliation was done after a meeting, it was found out that some tax on VAT from 2003 - 2006 had been paid through the Ministry of Finance. The VAT was accordingly reduced from Shs. 339,333, 578/- to Shs. 51, 000,000/- for the period 2005 – 2008. The current liability of the Plaintiff is Shs. 32, 249, 782/-.

15 After a meeting with the lawyer and auditor of the Plaintiff, most issues with respect to income tax were resolved apart from commissions, transport, travel expenses and undeclared income, as a result of cash flow method.

The commissions remained outstanding as the Plaintiff failed to provide sufficient audit evidence on the people who earned the commissions. The only proof availed to the Defendant were payment 20 vouchers, on which people received money for chasing payment for work, and for rent while carrying out the survey. Other payment vouchers indicated that legal fees were paid for work done for the company. Yet, no contact details were given to the Defendant's team to enable the Defendant recover the taxes from the people who did the work.

25 Contrary to the earlier testimony that the Defendant's officers looked at the contract, the witness asserted that no contracts were availed apart from the payment vouchers with one name and the sums received. This was added to income until supporting documents were availed.

Transport ad travels are still pending, the witness said, as the Plaintiff did not have documents to 30 support the expenses incurred while doing the work. And that since there was only one Bank Account for both business and personal issues, it was agreed that 80% be allowed as business expenses and 20% be added back to the income tax computation for personal use. This was indicated in the audit report.

The witness explained that the Auditor used the cash flow method during the audit because no invoices or fee notes issued by the Plaintiff's Company during the time the work was carried out were ever availed.

5 Further that, the Plaintiff's financial statement self declarations had a lot of errors and misstatements. The cash flow was reconstructed by use of the financial statements. The Plaintiff's assets were looked at Vis a Vis the liabilities, whereby all the debit entries must have corresponding credit entries.

The financial statements for the period ending 31.02.08, compared to those of 2007, indicated an 10 increment in assets without any indication as to where the money to finance the assets came from.

The liabilities in the year 2007 also increased from Shs. 17,000,000/- to Shs. 20,000,000/- without any explanation as to what led to the increase in liabilities. The financial statement could not support increase in personal or business liabilities. It was consequently agreed that this be treated 15 as undeclared income. No supporting documents have ever been availed by the Plaintiff, he emphasised.

The comprehensive audit report and financial statements for the period ending December, 2008 were admitted in evidence as Exhibits D1 and D2 respectively.

The following were the agreed issues for determination:

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1. **Whether the Plaintiff is liable to income tax of Shs. 32,249,783/- assessed by the Defendant.**
2. **Whether in the circumstances the Plaintiff has been unfairly discriminated against by the Defendant; and**

25 3. **What remedies are available to the parties?**

The issues shall be dealt with in the order that they were set out.

Both Counsels filed written submissions.

Whether the Plaintiff is liable to income tax of Shs. 32,249,783/- assessed by the Defendant:

It was submitted by Counsel for the Plaintiff that the Plaintiff is not liable to pay the income tax of 30 **Shs. 32,249,783/-.** He argued that Exhibit P22 illustrates that the tax is derived from **"income"** added backwards as follows:

(i) Undeclared income for 2007 and 2008 allegedly added on the basis of cash flow analysis;

(ii) Depreciation for 2003 to 2008 not allowed;

(iii) Travelling and transport for 2003 to 2008 where 20% of the expenditure was added back because it was **"non business use"**; and

5 (iv) sub-contract commission for 2004 to 2008 added back as taxable income because there were **"no supporting documents".**

Counsel argued however that, there was no evidence to support the Defendant's final tax assessment.

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In respect of "**undeclared income"**, it was submitted that the schedule to Exhibit P.22 referring to cash flow analysis was agreed on at the meeting on 22nd May, 2014. The cash flow analysis was to be availed to the Plaintiff as per paragraph 2 of Exhibit P.21, but this was not done as indicated by the evidence of PW1 & PW2. He argued that in the absence of the cash flow analysis the 15 Defendant cannot prove that there was undeclared income. Counsel relied upon S.101 of the Evidence Act that casts the burden of proof upon the person who asserts a fact and wants Court to believe the existence of those facts. He insisted that the Defendant had failed to prove the undeclared income under S. 103 of the Evidence Act.

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On the other hand, Counsel for the Defendant referred to the testimony of DW1 in respect of the cash flow analysis and to Exhibit D2 the Plaintiff's financial statement for the period ended 31. 12. 08. She stated that the evidence was to the effect that variances in assets and liabilities indicated that there was cash coming into business but there were no supporting documents. The Plaintiff 25 was not raising fee notes, and the bank statements were not supporting the increase in earnings and this could not be explained by the Plaintiff.

She argued that as pointed out by DW1 the Defendant had to use cash flow because the Plaintiff's financial statements had many errors, without supporting documents such as fee notes or invoices which could be based on to rectify the errors; and that the commissions, transport and travel 30 expenses were also not supported by or receipts.

In rejoinder, Counsel for the Plaintiff reiterated the earlier submissions**.**

Under S.17(2)(a) of the Income Tax Act (ITA), the basis of charge to tax under sub-section (i) , is that the gross income of a resident person includes income derived from all geographical sources. Under S.4(1) of the ITA, income tax is charged on total chargeable income for the year of income,
5 at rates prescribed in the Act; and chargeable income under S.15 of the ITA for a year of income is the gross income for the year less total deductions allowed under the ITA for the year.

It is the Defendant's contention in this case that there was undeclared income the Plaintiff did not include in the gross income for the years 2003 -2008.

10 **"Undeclared income"** is defined as ***"failure by a taxpayer to include certain income on his/her tax return in order to avoid paying taxes on the income"***.**- BusinessDictionary.com**

The burden of proof that the Plaintiff declared all his income in the returns is on the taxpayer and it is on the balance of probabilities to the extent that the assessment made by the Commissioner is
15 excessive or erroneous...**- S.102 ITA**

The Defendant in the present case asserts that, looking at Exhibit D.2 the Plaintiff's financial statement for 2008, there were variances in assets and liabilities which could not be explained as per the cash flow analysis.

20 However, the Plaintiff insists that the cash flow analysis was not availed to him to prove the undeclared income.

It was the duty of the Defendant under **S.17 (1) & (2) ITA** to prove that the Plaintiff received income from any source while carrying on trade, profession, business or vacation, which the
25 Plaintiff failed to report to the defendant while filing his income tax returns.

The evidence available is that the Plaintiff made the 2008 tax return under S.92 (1) ITA, together with the statement of income and expenditure and statement of assets & liabilities- Exhibit D.2, as required by S.92(5) ITA. And the Defendant maintains that it was on the basis of Exhibit D.2
30 that the Plaintiff was re-assessed under S.95(1) ITA due to variances in assets and liabilities as reflected in the 2007 and 2008 financial statements. The assessment was not based on any other information as alleged by DW1.

It is evident that the Defendant was not satisfied with the returns made by the Plaintiff for the year 2008.

Under S.95(2)(b) ITA, where the Commissioner is not satisfied with a return of income for a year of income furnished by the Tax Payer, the Commissioner has a discretion according to the Commissioner's best judgment, to make an assessment of the chargeable income of the taxpayer and the tax payable thereon for that year.

And S. 95 (3) ITA, where the Commissioner makes an assessment under sub-section (2) (b); the Commissioner **shall** include with the assessment of reasons as to why the Commissioner was not satisfied with the return.

In the present case, the Defendant as per the evidence of DW1 claims that because of the errors and misstatements in the Plaintiff's financial statements, the Defendant had to reconstruct the cash flow using the financial statements for the period ended 31.12.08, by looking at the Plaintiff's assets vis-à-vis his liabilities. According to the Defendant, the debit entries there ought to have had a corresponding credit entry. But that it was found that between 2007 & 2008, there was increment in assets from Shs. 15,000,000/- to Shs. 18,000,000/- an indicator that the Plaintiff received income; there was no explanation as to where the money to finance the assets came from.

In respect of current liabilities that, there was an increment from Shs. 17,000,000/- to Shs. 20,000,000/- which could also not be explained.

According to case law, the Commissioners determination of tax liability is ordinarily presumed correct.- See the case of **Nelson M. Blohm & Joann M Blohm -V- Commissioner of Internal Revenue, 994 F.2d 1542 (11th Cir. 1993**. The taxpayer therefore, bears the burden of proving that the determination is erroneous or arbitrary. For the presumption to adhere in cases involving the receipt of unreported income, however, the deficiency determination must be supported by **"some evidentiary foundation linking the taxpayer to the alleged income-producing activity."** Once the Tax Court has found that this minimal evidentiary showing has been made, the deficiency determination is presumed correct, and it becomes the taxpayer's burden to prove it as arbitrary or erroneous.

The Plaintiff in the present case contends that he was paying taxes as assessed by URA and there was no complaint that he was underpaying taxes, until in 2009 when URA subjected him to a

special audit claiming that he owed the Defendant money. As per Exhibit P.6 (Annexure B) he was required to pay UGX 435,790,946/= which he objected to as per Exhibit P.7 (Annexure J), and the figure was revised to Shs. 94,950,986/- as per Exhibit P.8 (Annexure L); which the Plaintiff was required to pay and he objected as per Exhibit P.9 (Annexure O)

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The Plaintiff also objected to VAT because the terms of the contracts signed with the Urban Authorities excluded VAT, because the money was from World Bank which does not pay tax to URA. The responsibility to pay VAT was with the Local Authorities. - Refer to Exhibit P11 (A-C) (Annextured R1) from the Defendant revising the assessments to UGX 123,318,489/= in which

10 VAT was Shs. 43,386,801/= and income tax was Shs. 79,931,688/=. Again the Plaintiff objected to this assessment as per Exhibit P.12 (Annexure R2).

The Plaintiff revised the assessment to Shs. 142,065,677/- See letter dated 21st/May/201 (Annexure S) but no explanation was given as to why the tax was revised upwards. See Exhibits P.13

15 (Annextures T1 to T7). The Plaintiff objected- Exhibit P.14. The suit was filed when all attempts to settle the matter failed. The Plaintiff insisted that VAT was payable by the Ministry of Local Government- Exhibit P 16, and it that it contained what Defendant regarded as undeclared income. When the letter Exhibit P.17 was written, there was no immediate response from the Defendant after being informed to prepare for hearing of the case.

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As earlier pointed out in this judgment, after the suit was filed, the Plaintiff continued objecting and several meetings were held with the Officers of the Defendant. As a result of these meetings, the Defendant eventually conceded that VAT of Shs. 54, 879, 534/- was payable by the Ministry of Local Government, while income tax of Shs. 32, 249, 782/- was due from the Plaintiff.

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In the instant case, the Defendant sought to rely on the comprehensive audit report marked Exhibit D.1 at page 4 under the head **'undeclared income'** (i) as per the contract reconciliation; and (ii) as per cash flow analysis. The same information is reflected in Exhibit P.1K. But both the contract reconciliation and cash flow analysis referred to in the comprehensive audit report and the income

30 tax computation are not on record.

The Defendant did not show that the cash out flow for each year in review was greater than the cash inflow for that year, which would be the basis for indicating that there was unreported income

based on the cash flow analysis. The Defendant also conceded that the Plaintiff provided the contract documents he had with the Local Government bodies he worked for in which valuation of property rates was carried out. That is therefore, not the basis for the assessment of income tax said to be due from of the Plaintiff. According to DW1 that they looked at the contracts and expenses incurred in carrying on the contracts. This means that the Defendant identified the income sources, and there is no evidence to show that the information got from those records as sources of income were not recorded in the income tax returns.

Court finds that from the time the comprehensive audit was carried out and several assessments made, the Plaintiff rebutted the basis for the re-assessment. It is on record that the Plaintiff tendered copies of the contracts he had with the local authorities, showing how much he earned from each. And by filing and paying taxes on the sums indicated, the taxpayer discharged his burden of production of documents to show the source of income an indicator that there was no unreported income. The claim of the Defendant that, the Plaintiff did not avail the sources of income; and had undeclared income, was thereby destroyed. Consequently, the burden of proof was shifted to the Defendant, to prove that there was unreported income.

It would appear that the Defendant used the net worth to determine unreported income. That is, deducting total liabilities from the total value of assets. Refer to the article **"Where is the Money"** By Joe Epps.

The Defendant considered the financial statement showing the assets and liabilities- Exhibit D2 and concluded that there were increases in assets and liabilities during the tax year 2007 to 2008 which could not be explained.

However, the Plaintiff asserts that some of the accounts were operated jointly with the wife. This evidence was not refuted. The bank statements showing that some of the accounts were jointly held with the Plaintiff's wife are contained in the scheduling memorandum (No. IXV). The Plaintiff was also a Member of Parliament representing Chwa Constituency, in Kitgum District.

Without any evidence to the contrary, the increase in assets could be attributed to the Plaintiff's remuneration as a Member of Parliament, cash on hand or significant bank deposits at the beginning of the net worth, that were not taken into account.

The Defendant in either the direct or indirect method of searching for unreported income seems not to have followed the Financial Accounting criteria to uncover unreported income. The Plaintiff filed returns that were never rejected either for being inadequate or even challenged for being incorrect or incomplete. Court therefore agrees with Counsel for the Plaintiff that the Plaintiff declared his income from known sources and paid his tax liability. The Commissioner was accordingly not justified to resort to variance of assets and liabilities for the period 2007 and 2008 to, conclude that there was undeclared income.

Court observes that, from the time the assessment for both VAT and income tax were made, the subsequent discussions and attendant amendments to the assessments where the amount went on varying; up to the time of filing the suit and thereafter after; show that the assessments for the said unreported income were arbitrary since the sources of income were known and returns for that income tax year had been submitted to the Defendant.

Travelling and transport expenses for 2003 to 2008:

Counsel for the Plaintiff submitted that the Defendant added back to the Plaintiff's income 20% of the travelling and transport expenses on the ground that it was for **"non business use".** Yet, he pointed out, DW1 conceded in his evidence that the Plaintiff regularly filed tax returns and paid the taxes assessed. Referring to page 3 of Exhibit D1 under records availed and examined; he argued that since the returns for 2003 and 2004 were filed in 2005, the travelling and transport expenses for those years could not be subject to re-assessment in view of S.97 (1) ITA which provides that additional assessment amending a previous assessment may only be made by the Commissioner within **three years** after service of an assessment. That therefore, the re-assessment made in 2009, after the comprehensive audit was out of time.

Counsel acknowledged that the only exceptions under S.97 (2) and (3) ITA are where there is new information or fraud, and or gross and wilful neglect by the tax payer. He pointed out that DW1 conceded in cross examination that he had no information alleging any fraud, gross or wilful neglect or non compliance by the Plaintiff. And the evidence of the Plaintiff and PW3 with regard to travelling and transport expenses for 2005 to 2008, reveals that the Plaintiff's returns were

filed by URA approved auditors and the accountants had already removed the non business travel and transport expenses from the taxpayer's business expenses.

Further that DW1 did not in his evidence; cite any legal authority that authorised the Defendant to arbitrarily add back the 20% expenses on travel and transport. The Defendant only relied on the agreement with the Plaintiff's auditors. Nonetheless, he argued, the assertion is contradicted by Exhibit D2 at page 4, where the alleged agreement to allow only 30% of the telephone expenses does not feature in the final assessment. He concluded that it was only proper in those circumstances that the 20% added back on travelling and transport expenses be rejected.

Counsel for the Defendant on the other hand cited S.22 (1) ITA; which is to the effect that subject to the Act, for purposes of ascertaining the chargeable income of a person for a year of income, there shall be allowed as deductions: (a) all expenditures and losses incurred by the person during the year of income to the extent to which the expenditure or losses were incurred in the production of income included in gross income. She said that S.22 (2) (a) ITA provides that no deductions are allowed for any expenditure or loss incurred by a person ***to the extent to which it is of a personal nature.***

Further that DW1's testimony is that 80% of the Plaintiff's claim of travel expenses was allowed and 20% added back to his taxable income reason being that the business vehicle on which the claims were made was also being used for private/personal purposes; and that this was admitted by the Plaintiff that he indeed used the same vehicle for both business and personal activities.

Counsel cited S.129 (1) ITA that provides that unless otherwise authorised by the Commissioner, a tax payer shall maintain in Uganda such records as may be necessary to explain the information provided in the return or in any other document furnished in terms of S.92 ITA or to enable an accurate determination of the tax payable by the taxpayer; and that under S.129 (3) ITA, such record of evidence shall be retained for five years after the end of year of income to which the record relates. She contended that DW1 explained that since the Plaintiff did not have documentary evidence to support his transport expenses, it was agreed between the Defendant's and Plaintiff's auditors, that 20% should be added back as the percentage of personal use. He contended that PW1 confirmed to court that he did not have any documents to support the claim, and the audit was for the period of 2004 to 2008 which was carried out in 2009. She argued that

the Plaintiff should have kept the records and that no reasonable excuse was given as to why he could not have them.

S.129 (2) ITA was relied upon for the stipulation that the Commissioner may disallow a claim for deduction if the taxpayer is unable without any reasonable excuse to produce a receipt or other record of transaction relating to the circumstances of a claim for deductions. Adding that without evidence of receipts, the Commissioner was entitled to disallow the Plaintiff's claim for deductions, but found it prudent to allow the 80% of the claim since there was evidence of carrying on business using the same motor vehicle that was being used for private purposes.

It was declared that S.97 (1) ITA relied on by Counsel for the Plaintiff does not apply to the present case as it relates to a situation where the Commissioner initiates an assessment at her own instance not based on the taxpayer's self assessment, and this does not bar the Commissioner from raising an assessment within five years from the date the return was furnished. S.96 (1) ITA was relied on for the assertion 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.

While S.96 (3) ITA was relied upon to maintain that notwithstanding subsection (i), the Commissioner may make an assessment under S.95 on a taxpayer, in any case the Commissioner considers necessary.

And S.95 (1) ITA was referred to, to emphasise that, subject to S.96 ITA, the Commissioner shall based on the tax payer's return of income and any other information available, make an assessment of the chargeable income of a taxpayer and the tax payable on it for a year of income within five years from the date the return was furnished.

While S. 2(b) ITA states that where the Commissioner is not satisfied with the return of income for a year of income furnished by the taxpayer, the Commissioner may, according to the Commissioner's best judgment, make an assessment of the chargeable income of the taxpayer and the tax payable thereon for that year.

Counsel then argued that through the audit findings carried out on the Plaintiff's business within the five years, the Commissioner was not satisfied with the returns that had earlier been made by the Plaintiff and therefore raised an assessment, and the reasons for the dissatisfaction were communicated to the Plaintiff and hence his objection to the assessment.

In rejoinder, Counsel for the Plaintiff relied upon S.22 (3) ITA that defines expenditure of a domestic or private nature incurred by a person to include: ***(b) the cost of commuting between a person's residence and work;*** among other things.

It was accepted that the Plaintiff stated that he uses the same vehicle for both business and personal activities, but that PW3 clarified that when preparing and auditing the books of accounts, the auditor's work was to post only expenditures relating to business account. The expenditure relating to private expenses of the taxpayer were left out and not included in the final accounts and returns of the taxpayer. It was affirmed that all expenditures concerning private use of the Plaintiff's vehicle were removed and final audited accounts and returns submitted to the Defendant and taxes thereon paid. Claiming that S.129 (3) ITA provides that such record of evidence shall be retained for 5 years after the end of the year of income to which the record or evidence relates; Counsel argued that the Plaintiff was right to say that records of 2003 and 2004 were not available during the audit date, since they were not required by law.

Bearing the submissions of both Counsels in mind, Court sets out to determine ***whether the travel and transport expenses incurred by the Plaintiff were deductible.***

The General rule under S.22 (1) (a) ITA is that expenses are allowed to the extent to which they are incurred in the production of income included in gross income. Whereas under S.22 (2) (a), expenditure that is of a private or domestic nature is not allowable as a deduction.

The question therefore is, ***whether the travel and transport expenses of the Plaintiff were incurred wholly and exclusively in the production of income.***

That the Plaintiff used his car for a dual purpose is not disputed. However, the Plaintiff contends that the returns filed by his auditors do not reflect the non business travel and transport expenses. This is confirmed by PW3 who testified that if the Tax Payer has no documents to support expenditure, the Tax Payer is asked to apportion the expenditure and what goes to the final books

of accounts is what relates to business, and what does not appear relates to personal use. The apportionment is done according to the explanation given by the Tax Payer and is recorded down in accordance with the accounting principles. But DW1 insisted that the transport and travel expenses are issues still outstanding because the taxpayer has no documents to support the
5 expenses incurred in doing the work as required by S.129 (3) ITA and that such claim could not be allowed by the Commissioner because the taxpayer lacked reasonable excuse.

Case law has established that, where the trade is of an itinerant (travelling) nature, the Tax Payer is entitled to claim travelling expenses to and from the base. That is, the base of operation. See
10 **Horton -V- Young (1971) 47 TC 60 (CA).** Horton was a self employed brick layer who worked on different sites during the year of income. He operated from home. He collected the rest of the brick laying team in his car and took them to the site. His travel expenses had been disallowed. It was held by the Court of Appeal that *"Horton's base of operation was his house and he was therefore entitled to claim travelling expenses to and from the base. Great emphasis was placed on*
15 ***"the itinerant nature of his trade****."*

The Plaintiff in this case has an office in Kampala and normally moves from home to office, and was therefore not entitled to claim travel expenses to and from work. However, in the circumstances of this case the rates valuation exercise by its very nature was outside the Plaintiff's
20 office. The transport and travel expenses from the Plaintiff's office in Kampala to the Districts of Kitgum, Pader, Moroto, and Bukwo and in and around Kampala City were expenses incurred in the course of doing business and which ought to be allowed.

Am fortified in my decision by the case of **Sean Reed -V- HMRC [2011] UKFTT 92 (TC)**. The tax payer was a self employed scaffolder who lived in Grimsby, did his work in York area but part
25 of his work was done in Birmingham area. HMRC disallowed the travel, subsistence and accommodation costs on the basis that his business was in Birmingham.

However, the First Tier Tribunal (FTT) disagreed and found that Mr. Read's base of operation was in Grimsby that he was an itinerant work, and that his travel, subsistence and accommodation costs should be allowed. It is the same with **'occasional'** travel outside the normal pattern of travel that
30 satisfies the wholly and exclusive test as well.

The Plaintiff in the present case made income tax returns accompanied by financial statements prepared in accordance with the generally accepted accounting principles, showing only the business expenses that excluded personal or domestic expenses. Since business expenses are an allowable deduction the "**wholly and exclusivity"** test was met.

The next sub-issue is **whether the defendant was justified to add back the 20% deductions of expenses to the Plaintiff's taxable income**.

The evidence of the Plaintiff was that travelling and transport expenses of 20% was added back to the figure of UGX 87,129,316/= including the VAT conceded and the income tax of UGX 32,249,782/=. He stated that he employed an accountant approved by URA to determine how they arrived at the assessment. PW3 testified that the Defendant acted improperly in adding back 20% as income since the ITA sets out expenses which are allowable and not allowable. The Defendant failed to show why and under what law 20% was added to the travel and transport of 20%; and why the sub-contract commission was added back despite that payment vouchers were availed.

DW1 stated that for income tax purposes they looked at the contracts and the expenses incurred by the company in carrying on the contracts and that some of the expenses like commission, bank charges, telephone, expenses, travel and transport and sub-contracting were not supported by documents to prove that the company incurred the expenses and were therefore added back to the income tax computation and that is how they arrived at the figure UGX 96,455,768/=. It was confirmed that when the Defendant had a meeting with the Plaintiff's lawyers and auditors and most issues of income tax were resolved apart from commissions, transport and travel expenses and undeclared income that came as a result of the cash flow.

And that because there were no supporting documents with regard to expenses incurred in doing the work, it was verbally agreed with the Plaintiff's former Accountant 80% be allowed as a business expense and 20% be added back to income tax computation for personal use.

The general test of deductibility of an expense under S.22(1) (a) ITA is that the expenditure must be incurred by the tax payer for the purpose of producing income, that is related to the taxpayer's

business. S.22 (2) and (3) ITA provides for the disallowable expenses incurred in the production of income.

What this Court has to determine is **if commission payments, telephone expenses, and sub-**
5 **contracting costs are disallowable expenses under the above cited provisions.**

The evidence of PW3 is to the effect that the non-business expenses were not included in computing the income statement of the Plaintiff and the balance sheet for the year ended 31st
10 December, 2008,- Exhibit D.2. In doing so, the Plaintiff's Auditors were guided by the statements of Accounting Practice/Principles accepted by the Accounting Standards Board at page 1 and 4 of the Accountant's Report, which is recognized under S.40(1) ITA.

DW1 insisted that the 20% expenses were added back to income because there was no
15 documentation to prove that the taxpayer incurred the said expenses. The Defendant relied on S.129 (1), (2) & (3) ITA.

Decided cases have established that once credible evidence of the amount of the expenses paid or incurred is given, the sums are allowable deductions as business expenses.- See **George Cohan -**
20 **V- Commissioner, 39 F.2d 540 (2d Cir.1930); The Federal Appeals Court ,Judgment of *Hand* J.**

The Plaintiff in the present case showed that he engaged rating assistants, surveyors and other staff in carrying out the property rates evaluation exercise in five different municipalities/Councils. He
25 used his car to transport them most of the time, paid telephone expenses, and sub-contracted other persons to do the same work on his behalf at different times. The Defendant admitted that contracts relating to the valuation rating exercise carried out in the five Town Councils/Municipalities, Bank statements, vouchers and other financial statements- Exhibit D.2, which summarise the transactions, were also availed.

30 In the circumstances, the Defendant could only exercise discretion under S.129(2) ITA, to disallow a claim for deduction if the Plaintiff had been unable without reasonable excuse to

produce receipts or other records of the transaction, or evidence relating to the circumstances giving rise to the claim for deduction.

According to the case of **Wrights' Canadian Ropes Ltd -V- The Minister of National Revenue [1946] SCR 139**, ***"the exercise of discretion .... to disallow a claim for deduction should be exercised on proper legal principles".***

The evidence of the Plaintiff, PW2 and DW1, in this case was that the amount added back does not comprise of only travel and transport expenses. There was no break down, and the combination of expenses that were added back to arrive at the taxable income, were not for a single year.
Yet the 20% added back to the taxable income tax of the Plaintiff ought to have been arrived at in the computation of business profits as expenses wholly and exclusively incurred and necessarily expended in the earning of business income.
Consequently, Court finds that the discretion of the Defendant was not appropriately exercised, and that the Defendant was not justified to add back the 20% expenses to the Plaintiff's taxable income.

Limitation Period:
It is the Plaintiff's contention that the Commissioner's reassessment was also time barred.
To determine whether or not this was the case, Court finds it necessary to look at the provisions of the ITA providing for assessments and reassessments:

Under S. 95(1) ITA subject S. 96, the Commissioner shall based on the taxpayer' 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 **7 (5)** years from the date the return was furnished.

Subsection (2) Where --------

(a) A tax payer defaults in furnishing a return of income for a year of income; or
(b) The Commissioner is not satisfied with a return of income for a year of income furnished by the tax payer;

the Commissioner may, according to the Commissioner's best judgment, make an assessment of the chargeable income of the taxpayer and the tax payable thereon for the year.

Subsection (3) Where the Commissioner has made an assessment under subsection (2) (b), the Commissioner shall include with the assessment a statement of reasons as to why the Commissioner was not satisfied with the return.

Section 96 ITA concerns **Self-assessment:**

Subsection (1): Where a taxpayer 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.

Subsection (2): Where subsection (1) applies, the taxpayer's return of income is treated as a notice of an assessment served on the tax payer by the Commissioner on the date for furnishing of the return or on the actual date the return was furnished, whichever is later.

Subsection (3): Notwithstanding subsection (1), the Commissioner may make an assessment under section 95 in any case the Commissioner considers necessary.

Subsection (4): Where the Commissioner raises an assessment in accordance with subsection (3); the Commissioner shall include with the assessment a statement of reasons as to why the Commissioner considered it necessary to make such an assessment.

Section 97 is in respect of **Additional Assessments:**

Subsection 1: Subject to subsections (2) and (3), the Commissioner may, within 3 years after service of notice of assessment, make an additional assessment amending an assessment previously made.

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

Subsection (3): The Commissioner shall not make additional assessment amending an assessment in respect of an amount if any previous assessment for the year of income in question

has, in respect of that amount, been amended or reduced pursuant to an order of the High Court or the Court of Appeal unless such order was obtained by fraud or any gross or wilful neglect.

Subsection (4): An additional assessment shall be treated in all respects as an assessment under this Act.

5 The undisputed evidence of the Plaintiff in this case shows that he was filing returns to URA from about 2005 and was paying taxes as assessed by URA and did not get any complaint that he was not paying enough taxes until in 2009. It was also confirmed by PW3 that the tax payer is required to file returns and audited business accounts and documents are received and examined by an officer of the Defendant to ascertain whether they conform to the ITA or VAT. If there are no 10 queries, assessments are issued to the taxpayer, and in case of any query, the officer handling the file writes back to the taxpayer raising the query on the return and the tax payer is required to respond to the queries. Further that after the response, the officer will take note and either amend the assessment or maintain the assessment already communicated to the taxpayer. If the taxpayer has not responded, then URA carries out a comprehensive audit by going through the taxpayer's 15 books and a report is to be submitted to the taxpayer for confirmation of the report or objection.

The Plaintiff furnished returns of income for each year of income which were accepted and approved by the Defendant save for the year 2008. The first return was made 21st March, 2006 yet communication to pay additional tax or re-assessment claiming VAT and income tax for the years 2003, 2004, and 2005, was made by the letter of 31st July, 2009, **-** paragraph 1, Exhibit P.6; four 20 months after the three year limitation period had passed.

It follows therefore that, the discretionary powers of the Commissioner to make additional assessments under S.97 (1) ITA for the above three years was barred by law. The Defendant did not adduce any evidence of fraud or gross or wilful neglect by or on behalf of the taxpayer or that there was discovery of new information in relation to the tax payable that year.

25 While the Commissioner may make an assessment under section 95 in any case the Commissioner considers necessary, the assessment must be made within 3 years from the date of the self assessment.

******(Recheck)** I would disagree with Counsel for the Defendant that the five year limitation period applies to a taxpayer whose return has been accepted and approved by URA where no 30 estimates by the Commissioner have been made under S.95(1) & (2) of the ITA.

Sub-contract commissions for tax years 2004 to 2008:

As emphasized by Counsel for the Plaintiff, PW1's evidence is that he used Assistant Valuers and other workers whom he paid commission as they were not his employees. The Assistant Valuers were to identify various properties, make physical measurements of each, draw sketches and make draft valuation reports. The Plaintiff also engaged Land Surveyors to demarcate boundaries of the zones and several people to travel to various Local Authorities to assist him in following up delayed payments. Advocates were hired to defend the Plaintiff in Court during objections to the assessments made. The evidence of PW2 collaborated that of the Plaintiff in that respect. Payment vouchers for the commission payments were availed to the Defendant during the comprehensive audit. - Exhibit D1, and Exhibit P16 reflected as Exhibits P1, 2, 3, 4 & 5. But using Exhibit P18 the Defendant under the head **"commission",** disallowed such items for lack of supporting documents.

Counsel further submitted that all vouchers for payment of commission were signed for by people who received the money and the Defendant never asked for other supporting documents. Nonetheless that DW1 maintained that the Plaintiff did not produce sufficient audit evidence on the people who received the money although it was needed to tax the recipients. He wondered how the information could be produced when it was not asked for as the Defendant issued no notice to the Plaintiff under S.132 (1) ITA and there was no certificate issued under S.132 (3) & (4) ITA to prove it was asked for.

In response, Counsel for the Defendant sub-divided the issue of commission in three categories, namely:

(i) Commission payment to professionals, that is rating officers, lawyers and surveyors;

(ii) Commission payment for transport; and

(iii) Commission payment for chasing payments, and getting the said contracts.

In respect of payments to professionals, Counsel for the Defendant submitted that the Plaintiff denied having any employees at his business yet the payment vouchers show that the same Rating Officers were paid from January to December, 2004 - 2008 and no PAYE was paid. Yet the Plaintiff contended that no tax was withheld by him in regard to payments to Surveyors and Assistant Surveyors.

She contended that this was contrary to S.119A (1) ITA that requires a resident person who pays management or professional fees to a resident professional to withhold tax on the gross amount of payment at the rate prescribed in Part VIII of the 3rd Schedule. The provision is mandatory. Counsel asserted that under S.124 (1) ITA a withholding agent, who fails to withhold tax in accordance with the Act, "***is personally liable to pay to the Commissioner the amount of Tax which has not been withheld***…"

Counsel relied on the evidence of DW1 that the Plaintiff through his auditors was on several occasions asked to avail other supporting documents like contracts to the payment vouchers which did not provide sufficient audit evidence to reflect details of the people who received the money and yet had tax implications. And maintained that the testimony of the Plaintiff that no communication with regard to supporting documents was ever made is not true since attachment Q9 to the Plaint- letter from Okumu and Associates dated January, 2010 to Manager Domestic Taxes, and attachment R1- letter of 28th January, 2010 from Commissioner General to the Plaintiff indicate otherwise.

She contended that the two attachments to annextures Q9 & R1 titled **"tentative income Tax computation, Lagoro Property Consultants",** in the 10th row that indicates "***sub-contract commissions"*** and the column with remarks states ***"avail supporting documents".*** Counsel admitted that the payment vouchers were availed to the Defendant, but it was communicated to the Plaintiff that the same were not sufficient for audit purposes. And that the Plaintiff testified that except payment vouchers, there were no other documents to support the payments.

Commission payments for car hire/transport: Counsel submitted that the Plaintiff's evidence was that, Exhibits 5(j) and (k) were payments for car hire; while Exhibit 5(h) was for delivery of letters. She contended that the Plaintiff could not make deductions for transport calling it **"commission"** after he had been granted 80% deductions claimed under transport expenses.

In respect **of commission payments for "getting payments" and obtaining the said contracts:** It was contended for the Defendant that these expenses claimed by the Plaintiff could not be treated as allowable deductions for tax purposes under S.22 of ITA. She argued that the Plaintiff testified that it was not easy to be awarded such contracts by the Local Governments, and informed

court that he offered money to Amos who helped him get the contracts, "***by talking to people awarding the contracts".*** And that when payments were delayed, he used people like Magombe, Komakech Latigo, and Musa "***to influence payments by the Local Governments"*** and he claims he gave a **"thank you"**. Though the Plaintiff clearly indicated that the said people were not debt
5 collectors.

It was declared that Local Government tenders are awarded through public procurement by way of competitive bidding as spelt out in Part VII of the Local Governments (Public Procurement & Disposal of Public Assets) Regulations, 2006. Counsel then argued that using people to influence
10 the tender awarding teams to award the Plaintiff the tenders and later pay them was not only corrupt and illegal but criminal as well. And that therefore the Defendant cannot be seen to condone such actions and consider the bribes allowable deductions.

In Rejoinder, with respect to **payments to professionals:** Counsel reiterated that the Defendant
15 rejected the commission paid to Assistant Valuers, Surveyors and lawyers on the ground that the Plaintiff did not produce supporting documents to prove deductions of PAYE and remit it to URA, and it is on that account that the Defendant cites S.119A (1) & 124 ITA. He insisted that the issue of PAYE was never raised before. And that although the Defendant refers to letters Q9 & R1 which merely refer to **"avail supporting documents in respect of sub-contract commission";**
20 He argued that the supporting documents were the payments vouchers availed.

He maintained that the Plaintiff on 11th December, 2009, sent to the Defendant receipts and vouchers including those from Pader & Moroto amounting to UGX 21,431,974, for further consideration of tax credit of the withholding tax. The vouchers were in respect of contract
25 commissions.
The Defendant did not raise the issue of withholding tax under S.119A (1) and 124(1) ITA to the Plaintiff during the audit process. And that if S.124 (1) ITA was to be applied to the Plaintiff, the Defendant should have determined the amount of which withholding tax at 6% should have been withheld and asked the Plaintiff to pay. He argued that the Defendant should not have disallowed
30 the whole expenditure under the guise of SS.119A (1) and 124 (1) ITA and taxed it at a rate of 30%; as this is against the principle of equality and fairness to all as it is illegal to tax withholding at 30%.

As regards documents to support the vouchers issued by the Plaintiff, it was argued that ITA does not specify the nature and type of documents to be issued when a taxpayer makes payments for services rendered.

In this case the Plaintiff was accounting for taxes on cash basis; hence payment by way of cash
5 vouchers duly signed by the recipient and the payer.

Commission payments for car hire/transport: Counsel for the Plaintiff submitted that vouchers were availed to the Defendant, and if the expenditures were posted under commission payment, then the Defendant ought to have highlighted it so that it could be posted to the right expenditure
10 heading, and maintained that it was wrong to disallow the whole amount under sub-contract commission payments.

As for **commission payments for "chasing payments and to help the Plaintiff to get the said contracts:** While Counsel agreed that under the Local Government, tenders are awarded through
15 public procurement by way of competitive bidding as spelt out in part VII of the PPDA Regulations 2006; he contended that when the contractor/supplier of goods or services pre-qualifies and is called to defend their price quotations or for negotiation during evaluation in order to select the best bidder, he sends someone to defend or negotiate during the evaluation process and that person has to be paid.

20

In this case he stated, the Plaintiff was up and down and had to send people to collect payments from Moroto, Pader, and other places which was necessary and those persons travel expenses, accommodation and upkeep had to be paid and that, he insisted does not amount to corruption, illegal or criminal acts on part of the Plaintiff. That these are allowable expenditures incurred in
25 the process of earning income.

The issues will be dealt with under the same headings.

1. **Payments to professionals:** The testimony of the Plaintiff was that the majority of the
30 team employed in the valuation exercise were Assistant Valuers and were not his employees, and he was paying them commission based on the work done.

   The payments in Exhibit P1 are payment voucher summary for 2004, marked Exhibit A-Z & P1A2.

For 2005, N2 is summary for work done in Kitgum Town Council which covered a large area and Plaintiff had to hire Land Surveyors to carry out the proper demarcations. The payments for 2005 were tendered as Exhibit P.2A.

For 2006, the summary is for payment to people who assisted the Plaintiff in rating work in
5 Kitgum, Pader, and Moroto. The payment vouchers are tendered as exhibit P.3A.

For 2007, the payment vouchers show a summary of payments for work involved in inspecting buildings, measuring and drawing their sketches and rating them as well. Annexure K indicates that there were rating objections and Plaintiff had to be represented by Counsel and he hired legal services of F.K Sengendo & Co. Advocates. - Exhibit P.4A.

10 For 2008, the summary of payment vouchers is for, measuring, inspecting, and drawing sketches and evaluation.-Exhibit P.5A (Annextures A, D, F1 and F2).

The Plaintiff indicated that the terms between him and the workers were to help him to do the job and the Plaintiff to pay them commission. The workers were not permanent- Exhibit P.1-5, some worked on one contract and left and he had to get other workers. After the contracts, all workers
15 ended their services and he never withheld and paid PAYE for any one of them. PW2 confirmed that the Valuers and Assistant Valuers are normally hired out on a commission basis.

In the circumstances, the court has to decide, whether the Assistant Valuers, Land Surveyors, Rating Officers, Lawyers and other persons retained by the Plaintiff in executing the work were employees of the Plaintiff.

20 The uncontroverted evidence of the Plaintiff in this case is that the individuals providing services were not employees but independent contractors. According to the case of **Ready Mixed Concrete (South East) Ltd -V- Minister of Pensions and National Insurance [1968] 2 Q.B 497**, ***"there is a distinction between a contract of service and a contract for services".***

The Court stated that some of the factors to consider for either relationship include: ***does the***
25 ***employer have a right of control over what the worker does and how it is done; are the financial aspects controlled by the payer; does the employer provide tools; does the employer have a pension plan; does the employer pay NSSF; does he pay for leave or vacation; will the relationship continue; and is the work performed a key aspect of the business. If no, there is no contract of employment".***

30 In that case, it was held that ***"because the drivers' contracts with Ready Mixed Concrete allowed the employer to get someone else to do the work, then the drivers were not employees".***

(a) The tax implications for the contractual relationship are different in both situations. Where a worker is an independent contractor, the hiring party is not required to make a withholding tax under S.116 ITA which applies to employees. However, where the hiring party hires both professionals and non professionals, then:

(b) Under S.119 (1) of the ITA and The Income Tax (Designation of Payers) Notice, 2006 and 2007, the Plaintiff was not designated as a payer to withhold any money paid to the workers who were not professionals**.**

In this case, the taxpayer was not entitled under the law to withhold the payments made to Assistant Valuers and other workers to whom payments were made in excess of UGX 1,000,000/= for the services rendered.

(c) Under S.119A (1) of the ITA, a resident person who pays management or professional fees to a resident professional **shall** with hold tax on the gross amount payable at a rate prescribed in part VIII of the 3rd Schedule to the ITA.

In this case, it is an admitted by both parties that there were payments made to some professionals such as lawyers/counsel, Surveyors and Valuers. It is also an admitted that no money was withheld from any of the payments to the above category of professionals.

The amount paid for the services rendered was an obligation imposed on the taxpayer by a valid contract. The amount paid is an allowable deduction as an expense incurred in the production of income. But, neither the Plaintiff nor the Defendant calculated how much was paid to the professional Land Surveyors or Valuers, and Lawyers.

I therefore agree with the submissions of Counsel for the Defendant that the Plaintiff failed to withhold tax on payments made to the resident professionals. However, as seen from the Defence this issue was not raised in Defendant's pleadings and no evidence was led on it either. It only appears in the submissions of Defendant's Counsel thereby making it evidence from the bar.

However, Section 119A (1) ITA is couched in mandatory terms. And according to the case of **Makula International Ltd -V- His Eminence Cardinal Nsubuga & Another [1982] HCB 11**, ***"A court of law cannot sanction what is illegal and once an illegality is brought to the attention of Court, it overrides all questions of pleadings including any admissions made thereon".***

Court finds that failure to withhold tax on payments to the resident professionals was irregular, **and the Plaintiff has to make good the tax not withheld by him.** Though Counsel for the Plaintiff argued that the matter was not raised during the audit process, it was admitted unequivocally by the Plaintiff, and he had opportunity to explain why he did not withhold tax from payments made to the professionals.

As already indicated, any payment made to the professional Land Surveyors, Valuers and Lawyers is subject to withholding tax. A review of the amounts paid to those professionals should be made same at a meeting of both the Plaintiff's and the Defendant's auditors/accountants to determine the tax due and payable.

Commission payments for transport: This issue was dealt with earlier in this judgment under the heading of transport and travel expenses. Calling the expenses for car hire as commission does not change its character as an expense for travel and transport. Annexure F shows that the Plaintiff's vehicle was not in good working condition and the Plaintiff hired transport to Bukwo from Augustine Kikomeko.

In my view, expenses that have a travel or transport character whether by use of personal car, private, public means, hire or lease, are of the same genus and the expenses incurred can only be consolidated for the different periods to arrive at a lump sum.

The absence of single document is not the standard measure to determine whether there was a contract or not. Under S.10 (1) of the Contracts Act, a contract can be made by free consent of the parties with capacity to contract, for lawful consideration, with lawful object, with intention to be legally bound; and (2) a contract may be oral or written or partly oral and partly written or may be implied from conduct of the parties.

Once it is established that work was done and expenses incurred in the production of income, then the Plaintiff was only required to show that the expenses were reasonable in the circumstances, which he did; and for the Defendant to show that the expenses were unreasonable, which it failed to do. These payments were allowable deductions.

Commission payments obtaining contracts and getting payments: Two payment vouchers K & L; K show that commission paid to Olinga Amos who helped the Plaintiff get the contract for Kitgum, Pader and Moroto as indicated by Annexure F. While voucher L, shows commission paid to Martin Opira who delivered information from Kitgum to Kampala.

5

Annexure K is payment to Musa S - Exhibit P.3A, who was sent to negotiate the delayed payment. And annexture C is payment in respect of collection of money from Pader and Moroto where there was a problem in securing payment and Ongom Francis secured some payments for Pader. Annexure G is payment to Magombe who was sent to Moroto twice to secure payment, and he

10 went there another time after Moroto failed to meet its terms of the payment. Annexure K was facilitation to Komakech Latigo to secure payment for the Plaintiff from Kitgum when it was not forthcoming. Annexure T is the contract with Bukwo, where they were supposed to make first payment for starting fieldwork but did not do and Sakwa D.K was sent to collect the payment. All the vouchers were tendered and marked Exhibit P.4A

15

DW1 testified that some of the expenses like commissions; bank charges etc were not supported by documents to prove expenses incurred, and the taxpayer failed to provide sufficient audit evidence on workers who earned commissions. The only proof was the payment vouchers with no contract details which the Defendant needed to recover taxes from the workers and that is why commission

20 amount was added back to income.

Section 22(1)(a) of the ITA gives the general rule that subject to the Act, expenses are allowed to the extent to which they are incurred in the production of income included in gross income; and subsection 2 gives a list of items of disallowable expenses.

25

In this case, the Defendant disallowed the deductions made by the Plaintiff for commissions paid to those who secured for him some of the contracts and payments for the services rendered thereto, and called it not only corrupt and illegal but criminal as well and categorically stated that such bribes/commissions could not be considered as allowable deductions.

30

The question that arises is **whether the Commissioner was right to disallow the said deductions:**

To determine this question, Court has to consider whether the payment of commission was wholly and exclusively for the purpose of obtaining income or whether the payments were bribes.

According to the case of **Bentleys, Stokes & Lowless -V- Beason (Inspector of Taxes) [1952] 2 ALLER 82; 33 TC 491**, **"wholly"** ***is in reference to quantum of the money expended for the purpose of trade or profession; and the question whether the expenditure in question was exclusively laid out for business purposes; that is, what was the motive or object in the mind of the two individuals responsible for the activities in question, and that is a question of fact…"*** Romer L J; Court of Appeal.

In this case, courts has to determine whether the payment of commission to Olinga Amos who helped the Plaintiff get contracts in Kitgum, Pader, and Moroto Municipalities, was solely for the purpose of doing business to earn profits or was to bribe the officials of the Contracts Committees in the Municipalities.

The Plaintiff insists that the payments made were not to influence award of contracts but to defend the price quotations after prequalification and for negotiation during evaluation to select the best bidder. And that as regards collection of payments, the Plaintiff was too busy to do this himself and had to send other people to collect the payments from the various Town Councils already mentioned herein; and therefore their travel expenses, up keep and accommodation had to be paid. He asserts that these payments were not illegal but were allowable expenses incurred in the process of earning income.

The law requires fraud to be specifically proved. And in this case, evidence was led by the Defence to show that that the payments made to the people retained by the Plaintiff were used to bribe the officials in the respective Municipalities; thereby leaving the Plaintiff's evidence explaining the payments uncontested.

In the circumstances court finds that contrary to the submissions of Counsel for the Defendant, the deductions are allowable. This is because when there is a business purpose, the whole of the deduction is allowable. There was no evidence of by the Defendant that payments were made for a non business purpose. Section 22(2) of the ITA does not apply to such payment as Olinga Amos worked as self employed intermediary to negotiate and conclude the contract on behalf of the Plaintiff.

Counsel for the Defendant also submitted that the payments to Olinga Amos, Martin Opira, Musa, Ongom Francis, Magombe, Komakech Latigo and Sakwa to collect the payments from the Municipalities were illegal. This submission was supported by the provisions of S.22 (2) and (3) of the ITA which are restrictive in nature.

5 That the Plaintiff was involved in a trade/ business that was not illegal is not disputed. The payments made to the various individuals set out above were made in the course of or were incidental or relevant to enable the Plaintiff get payment for work done. According to the case of **Magna Alloys & Research Pty Ltd -V- FC of T (1980) 80 ATC 4542, 11 ATR 276**, Brennan J. ***"the phrases in the course of; incidental and relevant, and the occasion of,… import a***
10 ***connection between the incurring expenditure on the one hand and the gaining or production of assessable income or the carrying on of a business on the other."***

In the instant case, the payments were to enable collection of money for the contract already performed. In the above case, Dean & Fisher J.J., at page 4359, ATR 295 said that '***the outgoing***
15 ***must be reasonably capable of being derivable in the pursuit of the business ends of the business being carried on for the purpose of earning assessable income'. They added that business outgoing may be properly and necessarily incurred in the pursuit of indirect and remote as well as direct and immediate advantage. The fact that the business advantage sought is indirect or remote will not of itself preclude the pursuit of that advantage from characterizing the outgoing***
20 ***necessarily incurred on the relevant business".***

In the instant case, the payment of commissions to Olinga Amos to obtain contracts for the Plaintiff and payments for collection of money owed to the Plaintiff by the Local Authorities/Municipalities are allowable deductions. If there were any incidental illegal payments
25 to the main purpose of the business, it was too remote to disentitle the deduction as an expense. The workers employed to collect the money need not be debt collectors for the expense to be an allowable deduction.

True tax position:

30 Considering all the above findings of court in respect of the sub-issues, what is left for court to determine is the true tax position of the Plaintiff. Whether he owes the Defendant the Shs. 32,249, 783/-

Counsel for the Plaintiff submitted that PW3 explained the flaws in the comprehensive audit report including the carrying out audit away from the taxpayer's premises, failure to give the Plaintiff a written report and add back of various expenditures. He contended that PW3 prepared Exhibit P24
5 which clearly shows that if you remove the added back expenditures on the alleged undeclared income, 20% travelling and transport expenses and sub-contract commissions, the Plaintiff made an overpayment of UGX 11,430,894/= in taxes. He further submitted that DW1 was silent on Exhibit P24 about its contents. He prayed that court accept Exhibit P24 as the correct tax position and hold that the Plaintiff does not owe the defendant UGX 32, 249,783/= in taxes; and that
10 instead court holds that the Plaintiff over paid to the Defendant UGX 11,430,894/= in taxes and the same should be refunded to the Plaintiff.

On the other hand, Counsel for the Defendant submitted that the Plaintiff's prayer for a refund of UGX 11,430,894/= based on the document prepared by PW3, does not form any part of the issues
15 to be resolved by court as agreed by the parties and no counter claim was brought. However, he submitted that:

(i) All the taxes paid were based a self assessment, after doing his own calculations and deductions, which were found to be lacking in accuracy after the audit by the Defendant. He
20 argued that PW3 ought to know under S.15 of the ITA that chargeable income is gross income of the person for the year less total deductions allowed, which meant that the Plaintiff's auditor in the returns had already made deductions, so he cannot turn around and claim payment in excess;

25 (ii) Removing the added back expenditure from the tax already paid by the Plaintiff is an absurdity because the added back expenditures in the tax is in dispute and the Plaintiff has not yet paid and arose out of an audit which in essence was not agreeing to the returns earlier filed by the Plaintiff. In his earlier return, the Plaintiff had considered those ***"added back expenditures"*** as deductibles and had included them in his computation making his tax liability less than what he
30 was actually supposed to pay.

She prayed that based on the above, court finds the Plaintiff liable to income tax of UGX 32,249,783/= as assessed by the Defendant.

S.40 (1) of the ITA provides for the methods of accounting and states that a taxpayer's method of accounting shall conform to generally accepted accounting principles. Exhibit D.2 at page 4 shows that the generally accepted accounting principles were followed; under subsection 2 of section 40,
5 a taxpayer may account for tax purposes on cash or accrual basis. The evidence of PW1 corroborated by that of PW3 shows that the taxpayer exercised his discretion and accounted for tax purposes on cash basis, yet the Defendant employed both cash and accrual methods. DW1's evidence was that the figure of UGX 32,249,783/= came as a result of the cash flow analysis in respect of commission, transport & travel and undeclared income.

10 The cash flow analysis relied on by the Defendant was not attached to the defence or even tendered in as an Exhibit for the reason that it was an internal (URA) working document, a reason I find not convincing. According to **Black's Law Dictionary, 8th Edition at page 230**, ***"cash flow"*** is defined as (1) the movement of cash through a business, as a measure of profitability or liquidity; (2) the cash generated from a business or transaction; (3) cash receipts minus cash disbursements
15 for a given period.

In this case, the evidence of DW1 and as per Exhibit D1 the reconstruction of the taxpayer's unreported income by comparing the amount spent as expenses during a given period with the income reported for that period, it was not proved that the expenditures exceeded the reported income, so as to treat the difference as undeclared income, thus being taxable. What was shown
20 was that assets as well as liabilities increased in 2008 than they were in 2007.

As discussed earlier, the expenses that were disallowed by the Commissioner were through exercise of discretionary powers, which Court found that were irregularly exercised.

Under Article 152(1) of the Constitution, no tax is to be imposed except under the authority of an
25 Act of Parliament. In the case of **Warid Telecom (U) Ltd -V- Uganda Revenue Authority, High Court Comm. Div. CS No. 24 of 2011**, it was stated that ***"in determining the actual tax position, the relevant provisions of the taxing statute should be considered. Any tax imposed in a manner not authorised by an Act of Parliament is contrary to the Constitutional principles for the imposition of tax".***

30

In the present case, the tax submissions of the Plaintiff were accepted by the Defendant and the reassessments done by the Defendant have been found to have been made out of time. The relevant provisions of the Tax Law were not followed and some deductions that were allowable were included in the assessment. Court therefore, finds that the Plaintiff does not owe the Commissioner taxes in the sum of UGX 32,249,783/= for the period of 2003 to 2008.

Whether the Plaintiff is entitled to a tax refund of UGX 11,480,894/-: Counsel for the Plaintiff relied on Exhibit P.24 prepared by PW3 the auditor and submitted that its contents were not challenged by DW1 in his testimony and that it should be taken as the correct tax position of the Plaintiff. While for the Defendant it was submitted that the refund is not possible as the taxpayer was self assessed and never raised it as an issue.

Under S.113(1) of the ITA, the taxpayer is given discretion to apply to the Commissioner for a refund, in respect of any year of income, of any taxes paid by withholding, instalments or otherwise in excess of the tax liability assessed to or due by the taxpayer for that year.

This means that once it is established that any tax was paid or collected in excess in any particular year, the Commissioner must refund the money collected to the taxpayer.

In the instant case, Court considered several provisions of the ITA and found that the Plaintiff's claim was proved on the balance of probabilities, except the payment of withholding tax in respect of the payments to professionals. According to the Supreme Court of India, while interpreting the expression ***"authority of law"*** in the case of **Salanah Tea Company Ltd -V- Superintendent of Taxes, Nowgoing (AIR 1990 SC 772) = [1988 (33) ELT 249 (SC)]** it was held that ***"in a society governed by rule of law, taxes should be paid by citizens as soon as they are due in accordance with the law. Equally as a corollary of the said statement of law, it follows that taxes collected without the authority of law should be refunded because no state has the right to receive or to retain taxes or monies realised from citizens without the authority of law…"***

In the instant case, it was admitted by both parties that the amount of the added back deductions raised the figure to UGX 32,249,783/= as the outstanding tax payable by the Plaintiff. Without the added back expenses, commissions, then the tax over paid is UGX 11,430,894/=. Relying on the

authority cited above, the Defendant has no power to retain the amount of tax paid in excess and the same should in normal circumstances have been refunded to the taxpayer as over paid tax.

However, having found that the Plaintiff owes tax to the Defendant from the payments made to the
5 professionals, and having directed that the amount due ought to be determined by the parties and paid by the Plaintiff; the overpaid tax cannot be refunded until what the Plaintiff owes to the Defendant has been deducted.

10 The next issue for court to determine is **whether in the circumstances outlined in this case the Plaintiff was unfairly discriminated against by the Defendant**:

It is the Plaintiff's contention that he was discriminated against, as none of the other Valuers who carried out who carried out the same exercise were ever subjected to a comprehensive audit. He asserts that he was singled out because he was a Member of Parliament and the matter was only
15 brought out when the 2011 elections were coming up.

Further that, during the campaigns, he was informed by some of his supporters that one of his opponents who eventually replaced him in Parliament, went on informing voters that the Plaintiff owed Government money and would be arrested and that they should therefore not waste their
20 votes on him.

Counsel for the Plaintiff submitted that the Plaintiff has been unfairly discriminated by the Defendant contrary to Articles 21(1) & (2) of the Constitution and was unfairly and unjustly treated under Article 42 of the Constitution by being subjected to harassment on account of taxes
25 which he did not owe by being tracked down at Parliament and singly targeting him with a comprehensive audit, yet DW1 conceded that the taxpayer was filing tax returns and paying taxes.

Counsel further submitted that no notice was given to the Plaintiff before his documents were be taken by URA officials. He relied upon S.131 (1) of the ITA to contend that the records were taken
30 without authorisation from the Commissioner, and the comprehensive audit was carried out contrary to law. He contended that the value of the subject of the audit was **UGX 496,860,000/=**, VAT payable on the above sum at 18% is UGX 89,434,800/=, but after the audit VAT was assessed at UGX 339,335,178/= which translated into 68.3% of the gross income which is

evidence of harassment. He referred to Exhibit P.7 that the Plaintiff objected to the assessment and under Exhibit P8, the Commissioner partly allowed VAT up to June, 2006, which was uncertain and intended to harass the Plaintiff.

Counsel referred to the Plaintiff's letter marked Exhibit P.10 about the harassment. The Commissioner in reply in Exhibit P.11 put the tax liability at UGX 123,318,489/= an amount which under Exhibit P.13 was raised to UGX Shs. 142,056,677/= by the Defendant. Counsel submitted that the Plaintiff complained to the Commissioner under Exhibit P.14 but there was no response, instead the Plaintiff's bankers were appointed as collection agents as per Exhibit P.15 and that under Exhibit P.18 the Defendant insinuated that there was undeclared income of UGX 135,404,650/= on which tax was due. He contended that for the VAT, the Defendant did not concede as per Exhibit P.20, but was conceded as per Exhibit P.22; where it was stated that VAT due is payable by Ministry of Local Government. He submitted that the Plaintiff was put under a lot of stress, anguish and expense to defend him.

Counsel prayed that the issue be resolved in favour of the Plaintiff and substantial damages be awarded to him to atone for his suffering due to the Defendant's high handedness.

On the other hand, Counsel for the Defendant submitted that the Defendant is not a political party or a sympathiser of any party but a body established by an Act of Parliament to collect and account for revenue in Uganda. She argued that according to DW1, as a policy the Defendant conducts tax compliance checks on taxpayers; and that by DW1 not knowing any other surveyor that was audited was not conclusive as his work was restricted to what he was assigned to do. Further that DW1 testified that efforts to trace the Plaintiff at his office were futile yet they had to get him as business owner. And that all documents were availed to the Defendant by the Plaintiff's auditors and the authorization requirement was complied with though none was availed to Court.

Regarding VAT, Counsel submitted that the issue was resolved and that the Defendant was only acting under the law, as the Local Government had on several occasions denied owing any VAT in regard to the contracts executed in 2006. She referred to the letter of 5th April, 2011, to the Commissioner General, where the Ministry of Local Government claimed that it paid Lagoro Property Consultants all monies inclusive of VAT and that URA should pursue the Plaintiff to recover the taxes.

S.5 (a) of the VAT Act was relied upon for the provision that ***"except as provided in the Act, the tax payable in case of a taxable supply is paid by the taxable person making the supply".*** It was argued that the Plaintiff is a taxable person who made a supply and was therefore liable to taxes. And that until the Local Government accepted to pay the taxes; the liability could not shift from the Plaintiff to the Local Government.

Contending that the Plaintiff had not substantiated his claims of discrimination, Counsel applied that the issue be dismissed.

The Plaintiff insisted nonetheless that he objected to the VAT because the terms of the contracts signed with various urban authorities excluded VAT as the money came from the World Bank which does not pay taxes and that that was a decision taken before signing the contracts, and the responsibility was for the Ministry of Local Government to pay VAT to URA and not the taxpayer. He stated that he put the position clear to URA but they continued to demand for VAT. He referred to annexure Q.11 marked Exhibit P.10 that he wrote to the Commissioner complaining about harassment by URA. He stated that the letter in reply marked Exhibit P11 (A-c) it varied slightly from what he had with her in a telephone conversation and revised the amount assessed to UGX 123,318,489/= where VAT was UGX 43,386,801/= and UGX 79,931,688/= as income tax which he objected to. Another letter marked P.13 revised the assessment by the Commissioner General to UGX 142,056,677/= without any explanation. He further testified that letter V1-4 marked Exhibits P15(1-4) were written to the MD, Stanbic Bank and Barclays Bank of Uganda Ltd to collect any money on his account for the benefit of URA, but the banks did not deduct any money.

The term ***"discrimination"*** is not defined in the ITA. But Article 21 of the Constitution which provides for Equality and freedom from discrimination, the term **"discrimination"** is defined under (3) to mean ***"to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, ethnicity, tribe, birth, creed or religion, social or economic standing, political opinion or disability".***

Under Article 21(1) & (2) all persons are equal under the law, and enjoy equal protection of the law without being discriminated against.

According to the **Uganda Revenue Authority Tax Payers' Charter, Revised Edition, July, 2009, paragraph D, P. 8**, the rights of a taxpayer include: (1) Equity- promote equity by; applying tax laws and procedures uniformly, handling all taxpayers' affairs with impartiality presuming the tax payers and their agents honest until proven otherwise; collecting only fair and correct taxes; (2) Confidentiality – ensures secrecy of every taxpayer's affairs and use tax information in URA possession in accordance with the law;

(3) Facilitation of tax compliance- provide tax payers and their authorised agents with clear, precise and timely information; ensure that courtesy and considerate treatment is extended unconditionally to all tax payers; Responding expeditiously to every tax payer's inquiry, complaint or request; explaining the grounds for and derivation of every tax assessment and providing proper technical advice to the taxpayer…

And according to the case of **R -V- IRC Ex parte National Federation of Self Employed and Small Business Ltd [1982] AC 617 at 651; [1981] UKHL 2**, Lord Scarman: "…. ***case law recognises a legal duty owed by the Revenue to the general body of tax payers to treat tax payers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of tax payers and another does not arise; to ensure that there are no favourites and no sacrificial victims."***

Political leanings: The Plaintiff contends that the audit was aimed at him as an opposition politician. The people who are alleged to have told the Plaintiff that they were urged by a rival Member of Parliament not to vote for him because he owed Government money never testified to substantiate these claims; and there is no indication that the information allegedly used by the rival politician was provided by the Defendant. Consequently, what court is left with is only hear say. The Plaintiff failed to prove that he was discriminated against because of his political leanings.

The Plaintiff also claims that the other eleven Rates Valuers were not subjected to similar audits. And that he was discriminated against by being harassed to pay VAT which was payable by the Ministry of Local Government and being made to pay income tax on items for which expenses were properly incurred in the process of earning income that they were not deductible compared to his counterparts who also did valuation rating exercises.

As regards unequal treatment of equal cases, the classification requirement for every tax payer places a special burden or benefits of the law and do apply to all persons. In this case, the demand for equality is confronted with the right to classify. The principle of equality does not require that all persons, regardless of their circumstances, should be treated identically before the law, as though they were the same. The principle of equality however requires that those who are similarly situated be similarly treated. Consequently, a classification must be reasonably justified. Similarity of situations determines the reasonableness of classification.

The second element is the absence of reasonable and objective grounds for unequal treatment. Article 21(1) & (2) of The Constitution does not prohibit every unequal treatment of equal cases, but only the type of unequal treatment that must be considered to be discriminatory because there is no objective and reasonable ground for unequal treatment.

In the present case, the Plaintiff did not adduce evidence to confirm that the other Valuers who carried out similar work were not subjected to comprehensive audits.

To determine whether the payment of VAT and payment of income tax on items for which expenses were properly incurred in the process of earning income that they were not deductible amounted to discrimination; Court must take into account whether there was a legitimate aim of the Defendant being pursued; and whether there was a reasonable relationship of proportionality between the means employed to collect taxes and the aim sought to be realized (principle of proportionality).

After the comprehensive audit of the Plaintiff, out of the contract sum of UGX 496,860,000/= the Plaintiff was assessed VAT of UGX 339,335,178/= and income tax of UGX 96,458,786/= giving a total of UGX 435, 790,946/=. After scrutiny of the agreements and reconciliations, the amount went on varying and finally the Defendant conceded that VAT was payable by the Ministry of Local Government, and that income tax payable was in respect of the added back items that had been deducted as allowable expenses.

By claiming VAT from the taxpayer which was clearly stated in the contracts availed to the Defendant to be payable by The Ministry of Local Government which had not refused to pay, and

being assessed at 68.3% over and above the 18% legal rate, coupled with treating the said expenses as non-allowable deductions yet they are not prohibited by the ITA provided the expenses were justified and reasonable, was prejudicial to the Plaintiff.

(a) Nonetheless, the Defendant relied on information from the Local Government that the VAT had been remitted to the Plaintiff. And after several meetings and reconciliation of documents the Defendant conceded to the error and the re-assessments were also reduced to the Shs. 32,249,782/=.

Court finds that although errors were made by the Defendant they were made in pursuit of its legitimate duty to do what was deemed correct in the circumstances. It did not amount to discrimination.

As regards the removal of the Plaintiffs documents from his office to the Defendants offices, it is the Defendants contention that this was done with permission from the Plaintiff's auditors. And while Article 27(2) of the Constitution provides that no person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property; S.131 (1) & (2) of the ITA allows the Commissioner or any officer authorised by the Commissioner in writing to have access to the books, records or computer of the taxpayer; but not to exercise that power without authority from the Commissioner.

In the instant case, DW1 admitted by implication that he did not have the authorization at the time the URA officials carried away the Plaintiff's documents that were in the office and there was no acknowledgement. Similarly, there was no notice given as by under S.132 of the ITA so as to obtain information or evidence until during the comprehensive audit process.

Court finds that the Plaintiff was inconvenienced by the conduct of the officers of the Defendant.

Court is left to determine **the remedies are available to the parties in the circumstances:**

The Plaintiff prayed that judgment be entered in the following terms:

(b) A declaration that the Plaintiff is not liable to pay to the Defendant income tax of UGX 32,249,782/=;

(c) A declaration that the Plaintiff has been unfairly targeted, treated and discriminated by the Defendant;

(d) An order that the Defendant refunds to the Plaintiff UGX 11,430,894/= which was over paid as tax;

(e) An order cancelling third party notices issued by the Defendant to the MD Barclays and Stanbic Banks Ltd to collect taxes from the Plaintiff;

(f) A permanent injunction restraining the Defendant whether by herself, officers, agents or otherwise from collecting the said UGX 32,249,782/= by whatever means;

(g) General damages of UGX 150,000,000/= for all the anguish, suffering and inconvenience suffered by the Plaintiff as a result of the illegal and high handedness of the Defendant or herself/officers;

(h) Interest on (c) and (f) at a rate of 25% per annum from the date of judgment till payment in full; and

(i) Any other and better relief under Section 33 of the Judicature Act.

On the other hand, counsel for the Defendant insisted that the Plaintiff is liable to pay tax amounting to UGX 32,249,782/=; should be denied all declarations and orders sought; and the suit be dismissed with costs.

The prayers shall be dealt with in the order set out above:

- **Tax liability of UGX 32,249,782/=:** As already found in this judgment the Plaintiff does not owe to the Defendant the sum of UGX 32,249,782/= in taxes for the period 2003 to 2008.

The declaration is accordingly allowed.

- **Unfair targeting and discrimination:** because of political leanings was not proved by the Plaintiff. Nor did the Plaintiff prove that other valuers who did the same work were treated in a preferential manner or that the demand for payment of taxes as required by law was based on unreasonable grounds. While the Officers of the Defendant were overzealous in the manner they conducted the special audit the inconvenience occasioned to the Plaintiff can be atoned for by damages.

- **Tax refund of UG. Shs. 11,430,894/=, over paid taxes:** to be repaid less the withholding taxes which the Plaintiff failed to deduct from the payments to the professional land valuers, surveyors and lawyers.

  Therefore, the balance to be refunded to the Plaintiff if any shall be subject to the amount determined as withholding tax that ought to have been deducted by the Plaintiff from the payments made to the professionals.

- **Cancellation of third party notices:** these were issued when the issues of tax liability for VAT and income tax had not been resolved. As already pointed out, VAT is no longer an issue in this case. As for income tax liability, court has found that the Plaintiff is not liable to pay the sum of UGX 32,249,782/= in taxes. It therefore follows that the third party notices issued to the Plaintiff's bankers should be cancelled.

- **Issuance of a permanent injunction against the Defendant and its agents to collect UGX 32,249,782/=:** Having come to the conclusion that the Plaintiff is not liable to pay tax of UGX 32,249,782/=, it follows that the Defendant should be restrained from collecting the said sum. But it should be noted that the injunction is not meant to restrain the Defendant from collecting any other taxes that may lawfully be due from the Plaintiff.

- **General damages of UGX 150,000,000/-:** the general principle of law is that damages are compensation in monetary terms through a process of law for a loss or injury sustained by the

Plaintiff at the instance of the Defendant. General damages are awarded by court at large and after due court assessment. They are compensatory in nature in that they should offer some satisfaction to the injured party. Refer to the case of **Kampala District Land Board and George Mitala -V- Venansio Babweyana, SCCA No. 2 of 2007**.

5

In the instant case, while court found that the Plaintiff suffered some inconvenience at the hands of the Defendant, the degree of injury suffered cannot not translate into compensation in the sum of UGX 150,000,000/= proposed by the Plaintiff. The amount is excessive.

10 Therefore, the Court will exercise its discretionary powers to award the Plaintiff a nominal sum of Shs. **5,000,000/=** which is a reasonable amount in the circumstances.

- **Interest on refund and damages:** Plaintiff prayed for interest at the rate of 25% from the time of judgment till payment in full.

15

Under section 113(4)(c) of the ITA, a refund of any tax paid by the tax payer attracts simple interest of 2% per month or 24% per annum from the time the taxpayer makes an application for a refund. In the case of **Woolwich Building Society -V- Inland Revenue Commissioners [1993] AC 70**, the majority of the House of Lords emphasised that ***"the refund of tax over paid by the***
20 ***taxpayer would attract interest".***

In the present case, there has never been an application for a refund, for interest to accrue from an earlier date. Therefore, the refund of the balance after deduction of withholding tax due from the payment to the professionals in this case; will attract interest rate of 24% per annum from date of
25 judgment till payment in full.

Under S.26 (2) of the Civil Procedure Act, this Court has discretion to award interest that has not been agreed upon by the parties. The court will accordingly award interest at a rate of 6% per annum to the Plaintiff on general damages from the date of judgment until payment in full.

30

- **As regards any other relief:** under S.33 of the Judicature Act, and I would add S.27 (1) of the Civil Procedure Act, that the Plaintiff being the successful party in this case, he is entitled

to costs of the suit. However, owing to my conclusion in (C) above, court directs that the Plaintiff be paid two thirds (2/3) of the taxed costs.

5

FLAVIA SENOGA ANGLIN

JUDGE

04.09.15