THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL NO. 37 OF 2019

(Arising from TAT Application No. 53 of 2018)

A BETTER PLACE UGANDA LIMITED :::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY :::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

JUDGEMENT

This is an appeal from the decision of the Tax Appeals Tribunal (hereinafter called ***TAT***) that preliminarily dismissed the Appellant's application for review of a taxation decision of the Respondent.

The brief facts of the case are that on the 10th October 2018, the Appellant filed Application No. TAT 53 of 2018 against an assessment by the Respondent of UGX 8,300,438,951/= for the period February 2017 to October 2017. On 18th October 2018, upon the application by the Appellant, the TAT issued a temporary injunction restraining the Respondent from collection of the assessed tax and ordered the parties to agree on how the 30% of the assessed tax shall be paid. On the 2nd April 2019, the parties entered into a partial consent settlement order wherein it was agreed that the parties conduct and conclude a comprehensive reconciliatory exercise within two months; that the Appellant pays UGX 250,000,000/= towards reduction of the disputed taxes assessed by the Respondent; and that the Respondent does not enforce recovery of the tax assessed during the said period of two months.

The Appellant paid the tax amounting to UGX 250,000,000/= to the Respondent who in turn complied with the consent order by halting all enforcement measures against the Appellant pending final reconciliation of the matter. When the matter came up before the Tribunal on the 5th August 2019, no progress report of the reconciliation exercise had been filed by the parties. The Respondent instead prayed to the Tribunal to enforce payment of the 30% of the tax in dispute, failure of which the application should not proceed. The Tribunal allowed the Respondent's prayer and dismissed the Appellant's application for failure to pay the 30% of the tax in dispute.

The Appellant being dissatisfied with the decision of the TAT lodged this appeal on the following grounds:

1. The Honorable Tribunal erred in law in not hearing the Appellant's case when it should have ordered for furnishing security for due performance in lieu of the cash constituting 30% of the tax in dispute; thereby denying the Appellant a right to access justice.
2. The Honorable Tribunal erred in law in not recognizing that the additional UGX 250,000,000/= was paid by the Appellant and agreed to by the Respondent in lieu of 30% of the tax in dispute.
3. The Honorable Tribunal erred in law in enforcing 30% tax in dispute not provided for in the substantive tax legislation; the Tax Procedure Code Act, the Income Tax Act and the VAT Act.
4. Whether the Tax Appeals Tribunal Act Cap 345 takes precedence over the Tax Procedure Code Act, 2014 in tax dispute resolution.

The Appellant prayed to Court to allow the appeal and order that the Ruling or Decision of the TAT be set aside; the TAT is ordered to hear the case or, in the alternative, this Honorable Court be pleased to review the case and determine it; the Appellant is awarded the costs of this appeal.

At the hearing, the Appellant was represented by Mr. Bernard Olok and Mr. Gerald Agaba. The Respondent was represented by Mr. Ronald Baluku Masamba, Mrs. Barbra Ajambo Nahone and Mr. Aliddeki Ssali Alex.

It was agreed that the matter would proceed by way of written submissions. Both Counsel made and filed their respective submissions except that no submissions in rejoinder were filed by Counsel for the Appellant. I will consider the Counsel's submissions in the course of handling the respective grounds of appeal.

In their submissions, Counsel for the Respondent raised a preliminary objection to the Appellant's case as argued by the Appellant. Therefore, before delving in the merits of the appeal, I will first consider this point of objection.

Counsel for the Respondent submitted that the Appellant's submissions, and in essence this appeal, is a departure from the issues framed for determination in the TAT in as far as the Appellant seeks to adduce additional grounds on questions of law, which were not matters for determination before the TAT. Counsel submitted that this was in blatant contravention of the established rules of procedure. Counsel submitted that this appeal arose out of the ruling of the TAT by which the Appellant's application was dismissed on ground of non-payment of the mandatory 30% of the disputed tax. Counsel submitted that the substantive case of the Appellant was never canvassed by the Tribunal and therefore cannot form part of the grounds to be resolved in this appeal. Counsel submitted that the grounds of appeal in the Appellant's Notice of Appeal and written submissions were alien as they were never determined by the TAT.

Counsel for the Respondent further submitted that the departure from pleadings and introduction of additional grounds of appeal that were not part of the issues for determination before the TAT falls short of the

provisions under section 27 (2) of the TAT Act which provides that an appeal to the High Court shall be made on questions of law only, and the Notice of Appeal shall state the questions of law that will be raised on appeal.

Counsel further submitted that the issue of payment of 30% of the tax in dispute before the matter can be determined is a requirement of the law under section 15 of the TAT Act and this became a matter of contention when the Appellant failed to pay the same, thus compelling the Tribunal to dismiss the matter. Counsel argued that, accordingly, there ought to be one issue for determination in this appeal, namely, whether the Honorable Tribunal erred in law when they dismissed the Appellant's application for failure to pay 30% of the tax in dispute.

Counsel concluded that the Appellant's decision to depart from the questions raised for determination before the TAT was contrary to the TAT Act and should therefore be disregarded by the Court. Counsel invited the Court to expunge these new issues which form the grounds on appeal and consider the main issue of law as proposed above by the Respondent.
As indicated above, Counsel for the Appellant filed no submissions in rejoinder. As such they made no response to the preliminary objection raised by Counsel for the Respondent.

I must begin by pointing out that this preliminary point of objection was smuggled into these proceedings by the Respondent. A scheduling conference was held and Counsel for both parties filed scheduling notes. Nowhere in the course of the scheduling did the Respondent indicate that they intended to raise any preliminary objection in regard to the grounds of appeal, of which they were fully aware of. The Appellant's grounds of appeal as argued in the submissions are similarly stated in the Memorandum of Appeal. Counsel for the Respondent cannot therefore claim that the objection was prompted by any change in the grounds of appeal as argued in the submissions by Counsel for the Appellant. Even more intriguing is the

fact that in the Respondent's scheduling notes, Counsel for the Respondent set out the same grounds of appeal and raised no contestation to their being argued as the agreed questions of law for consideration in the instant appeal.

I therefore find that by Counsel for the Respondent turning around and raising such an objection as they did, amount to smuggling this matter into the proceedings and also to inducing a trial by ambush. Ideally I would have disregarded an objection raised in such a manner but since it raises some crucial aspects pertaining to the complete and just determination of the matter before the Court, I will go ahead to determine the point of objection, my above finding notwithstanding.

To my understanding, the preliminary point of objection raised by Counsel for the Respondent raises three matters, namely:

(i) That the Appellant's grounds of appeal and submissions are a departure from the issues framed for determination in the Tax Appeals Tribunal (TAT);

(ii) That the grounds of appeal as raised delve into the substance of the application yet the TAT never considered the merits of the application; and

(iii) That the ground of appeal is only one and should have been framed differently.

On the first matter, namely, that the Appellant's grounds of appeal and submissions are a departure from the issues framed for determination in the TAT, Counsel for the Respondent argued that the Appellant sought to adduce additional grounds on questions of law, which were not matters for determination before the TAT. Counsel submitted that this was in blatant contravention of the established rules of procedure.

With due respect to Counsel for the Respondent, I believe this argument is misleading. This appeal cannot be based on the issues as framed for determination by the TAT. This is simply because the TAT never heard and determined the case on its merits. As stated by Counsel for the Respondent within this same submission, the TAT dismissed the application without hearing it owing to the failure by the Appellant to pay the mandatory 30% of the tax in dispute. This being the case, there is no way this appeal can be pegged on the issues that were up for determination by the Tribunal, which issues have not come up for determination.

What is true and what should happen is that the Appellant's grounds of appeal and arguments should arise from the decision of the Tribunal; in this case, the decision of 5th August 2019. But this is not the argument of Counsel for the Respondent. Counsel for the Respondent's argument is that the grounds and arguments of the Appellant should have been in line and not in departure from the issues that were up for determination by the TAT. This, in my view, is not only erroneous but is also a misleading argument. It is not true that the Appellant was bound to base his grounds and arguments on matters that were up for determination before the TAT. This arm of the preliminary point of objection bears no merit and is dismissed accordingly.

The second matter was that the grounds of appeal as raised delve into the substance of the application yet the TAT never considered the merits of the application. From the grounds of appeal as framed in the Memorandum of Appeal and as set out in the submissions of Counsel for the Appellant, it is clear to me that they criticize the TAT for dismissing the application for reason of non-payment of the 30% of the tax in dispute without giving the Appellant the opportunity to furnish security or in any other way waive the requirement to pay the said 30% so as to ensure that the Appellant's access to justice is not hampered. As I understand it, this is the thrust of the Appellant's grounds and arguments in the instant appeal. That being the

case, it cannot be true as argued by Counsel for the Respondent that the Appellant delved into the substance of the application which had not been considered by the TAT.

In case during the course of the submissions the Appellant's Counsel traversed matters that go to the merits of the application, which in my view is a different argument, such does not go to the competence of the appeal. Such matters touching on the merits of the application as may have been included in the Appellant's arguments shall be safely ignored by the court and are deemed expunged from the record which, I believe, will not affect the substance of the appeal. This arm of the objection also has no merit and it fails.

The third matter was that the ground of appeal ought to have been only one and should have been framed differently. With due respect to learned Counsel for the Respondent, I find this manner of argument overly intrusive to the Appellant's right to present their case in a manner of their choice, provided the approach used does not offend the procedural rules. Secondly, if the grounds of appeal as laid out in the Memorandum of Appeal were offensive to the law, Counsel for the Respondent would have been expected to raise the matter during scheduling so that the Appellant was given opportunity either to amend the grounds or drop such grounds that are offensive. Counsel for the Respondent did not do so. Nevertheless, close scrutiny of the grounds of appeal as laid out does not reveal any obvious defect in form or substance in respect of the grounds. I have therefore found no merit in this arm of the objection either and it fails.

In all therefore, the entire preliminary point of objection raised by Counsel for the Respondent has been found devoid of merit. It is accordingly dismissed.

Turning now to the merits of the appeal, both Counsel argued each ground of appeal separately. I will handle the grounds of appeal in the order they were argued by Counsel.

<u>Ground 1</u>: The Honorable Tribunal erred in law in not hearing the Appellant's case when it should have ordered for furnishing security for due performance in lieu of the cash constituting 30% of the tax in dispute; thereby denying the Appellant a right to access justice.

It was submitted by Counsel for the Appellant that at the time the matter was before the TAT, the Appellant had paid the undisputed tax of UGX 246,000,000/= and an additional UGX 250,000,000/= had been paid to the Respondent through mutual consent on condition that the parties will conduct a tax reconciliation exercise, which reconciliation had not been done by the time of dismissal of the application. Counsel contended that by the Tribunal ignoring such payments and proceeding to simply dismiss the application occasioned a serious miscarriage of justice. Counsel submitted that rather than insisting on the payment of 30% in cash, the Tribunal ought to have considered an option of ordering the Applicant (Appellant herein) to furnish security in lieu of payment of cash.

Counsel for the Appellant relied on the case of ***Elgon Electronics vs URA HCCA No. 11 of 2007*** wherein Kiryabwire J. (as he then was) held:

> ***... it may be useful if TAT has not already, as a matter of discretion to consider the use of some other security other than cash as one way of accommodating tax payers while applying Section 15 (1) of the Tax Appeals Tribunal Act. This is what this court did in allowing this appeal to be heard thus giving the Appellant a chance to state their case.***

Counsel for the Appellant further cited the decision of the Constitutional Court in ***Uganda Projects Implementation & Management Centre vs***

Uganda Revenue Authority, Constitutional Petition No. 18 of 2007 (Reference) wherein it was held that:

> ***The requirement to pay 30% of the tax assessed before a tax payer files an appeal with the Tax Appeals Tribunal may be likened to an intended Appellant who may be required to furnish security for the due performance of the decree or to deposit the decretal amount in court before proceeding with the appeal process.***

Counsel for the Appellant submitted that had the Tribunal taken recourse to the decisions in the two above cited authorities, it would have enabled the Appellant an opportunity to state their case and to access justice. Counsel submitted that by the Tribunal failing to extend the application of the 30% requirement under section 15 of the TAT Act to acceptance of security in lieu of a cash payment thereof, the TAT occasioned an injustice to the Appellant.

Counsel for the Appellant further submitted that the TAT also failed to look at the merit of the consent order accepting payment of UGX 250,000,000/= and the conduct of the tax reconciliation exercise between the parties which in the view of Counsel would have resolved the entire question of assessment and would have eased the work of TAT.

In reply, Counsel for the Respondent submitted that the Appellant had misdirected themselves on this ground of appeal. Counsel submitted that the reason the TAT did not order for furnishing of security for due performance in lieu of the 30% payment was because the Appellant did not make any such prayer before the Tribunal. Counsel submitted that to the contrary, the Appellant had intimated that they were willing to pay 30% of the tax in dispute and even prayed for more time to make the payment. Counsel submitted that the Tribunal had indeed granted the Appellant's request for more time within which to pay the said sum to the Respondent but the Appellant failed to make the payment in time. Counsel submitted

that the record of proceedings before the TAT clearly indicate this position. Counsel for the Respondent therefore asserted that the Appellant was estopped from claiming that the Tribunal erred by not making an order for furnishing of security for due performance in lieu of the 30% payment.

Counsel for the Respondent pointed out that the case of ***Uganda Projects Implementation & Management Centre vs Uganda Revenue Authority (supra)*** that was relied upon by the Appellant's Counsel was further considered by the Supreme Court on appeal vide ***Supreme Court Constitutional Appeal No. 2 of 2009*** whereby the Supreme Court, while upholding the decision of the Constitutional Court which itself was in favour of the Respondent, held that payment of tax is a duty of every citizen and tax is considered as a debt due to Government. The Court further held that the requirement to pay 30% is not arbitrary, unreasonable or unjustifiable. Counsel for the Respondent submitted that as such, the Appellant ought to have paid the 30% of the dispute in accordance with the above decision.

Counsel for the Respondent further submitted that the claim by the Appellant that the TAT disregarded the Appellant's payment of the tax not in dispute and the additional sum of UGX 250,000,000/= was completely false. Counsel submitted that the consent settlement entered into by the parties did not exonerate the Appellant from settling the outstanding tax, but rather categorically stated that "… during the two months reconciliation exercise, the Respondent shall not enforce recovery of the tax assessed …" Counsel pointed out that the said consent was signed on 2nd April 2019 and, as such, the two months grace period ended on 2nd June 2019. Counsel submitted that in compliance with the said order, the Respondent halted all recovery measures and only demanded for 30% on 5th August 2019, 4 months later, when the matter came up for hearing before the Tribunal.

The Respondent's Counsel further submitted that Section 15 of the TAT Act is clear to the effect that a taxpayer must pay 30% of the tax assessed or

that part of the tax assessed not in dispute, whichever is greater. In the instant case, the 30% of the tax assessed amounted to UGX 2,490,131, 685.30/= which the Appellant had not paid and was thus in contravention of the said provision. Counsel prayed that the first ground of appeal is dismissed by the Court.

Section 15 of the TAT Act is headed **"Deposit of portion of tax pending determination of objection." Sub-section (1)** thereof provides as follows:

> *"A taxpayer who has lodged a notice of objection to an assessment shall, pending final resolution of the objection, pay 30 percent of the tax assessed or that part of the tax assessed not in dispute, whichever is greater."*

My understanding of the above provision is that the requirement to pay the 30% of the tax assessed or the part of the tax not in dispute, is set in motion when the taxpayer lodges with the Commissioner a notice of objection to an assessment. What this means is that the said portion of the tax is payable before resolution of the objection by the Commissioner. If the portion of the tax is collected at that level, there would not be a requirement to make a further payment when the matter comes up before the Tribunal upon an application for review of a tax decision that may have been made by the Commissioner. Where the portion of the tax was not collected at the time the objection was considered by the Commissioner, as was the case in the instant matter, the TAT is obliged to enforce that payment.

By this ground of appeal, the Appellant is not disputing the fact that 30% of the assessed tax was greater than the tax not in dispute. Neither is the Appellant disputing their liability to pay the 30% of the tax as assessed. What the Appellant is claiming is that they should have been allowed by the Tribunal to furnish security for due performance rather than having their case dismissed as it was. The Respondent opposes this claim on the ground

that the Appellant had made no such application before the Tribunal and, as such, the Tribunal cannot be faulted for not making such an order.

I believe I need to lay out a bit of the background that preceded the dismissal of the Appellant's case by the TAT. Before the case came up for hearing by the Tribunal, the Appellant (then Applicant) sought and the Tribunal granted an order of a Temporary Injunction dated 18th October 2018 in the following terms (quoted in part):

IT IS HEREBY ORDERED THAT;

1. *An interim is hereby issued restraining the Respondent, its agents and servants from enforcing further collection of assessed taxes worthy UGX 8,300,438,951/= for the period February 2017 to October 2018.*
2. *It is further ordered that the Applicant pays 30%.*
3. *That the Applicant and the Respondent shall sit down and agree on how 30% shall be paid within one month from today.*
4. *Each party shall bear its own costs."*

When the case came up for hearing on 5th December 2018, it was pointed out that the Applicant had not yet paid the 30%. Counsel representing the Applicant stated that they had been holding discussions with the Respondent with a view of resolving how the amount in issue was to be paid. Counsel indicated that the issue will have been resolved within two months. The Tribunal directed as follows:

> *"… The respondent does not have to write to the Tribunal that the applicant has failed to pay the 30%. The respondent can go ahead and attach. The 30% should be paid, you can issue your agency notice. … You just go ahead and execute because the applicant has failed to abide by the court order."* [Page 20 of the record of appeal]

The Tribunal further pointed out that the temporary injunction was given on the grounds that the 30% was to be paid and, as such, if the Applicant did

not pay, the Respondent could execute. But the Applicant also had the opportunity to keep negotiating with the Respondent.

The matter next came up on 24th January 2019. Counsel for the Respondent still pointed out their concern over non-payment of the 30% by the Applicant. Counsel holding brief for the Applicant's Counsel stated that he was informed that there was some money that the applicant had paid as 30% to the tune of 246,246,450/=. Counsel asserted that the applicant was willing to pay more. On that occasion, the Tribunal directed as follows:

> *"The parties should sit down and agree on 30% payment. Counsel for the applicant tell your client to pay 30%. We are going to give you one last adjournment. Next time come ready to proceed …"*

On 5th March 2019, the matter came up for scheduling. Counsel for the Respondent sought for guidance of the Tribunal over the issue of non-payment of the 30% by the Applicant before scheduling could proceed. Counsel for the Applicant replied as follows:

> *"Shortly after we left this Tribunal, URA blocked our clients' accounts. We wrote to them … that we need to comply with payment of 30% before 5th March. We requested them to open the account to enable out client fulfill that condition. They only opened the accounts last evening. We don't know whether it was intended to defeat us from not complying. We are ready to pay. We had already paid 246 million shillings. We request for more time to be able to comply. … What we need is more time like 30 days to enable us pay the money."* [Page 24 of the record of appeal]

The tribunal directed as follows:

> *"We are giving the applicant 30 days within which to pay 30%. In case the money does not reach within 30 days then you can raise the complaint. Please tell your client to pay the 30%."* [Page 24 supra]

The matter next came up on 3rd April 2019 when Counsel for the Applicant informed the Tribunal that they had made good progress on negotiations with the Respondent and requested to be accommodated with at least two months by which they would be through with an audit review. Counsel asked for a date for mention after the requested period. The Tribunal allowed and adjourned the matter for mention on 4th June 2019. The case however came up on 15th July 2019 when the Tribunal was informed that the matter had been undergoing reconciliation but since Counsel in personal conduct of the matter on behalf of the Applicant had lost a brother, they sought for an adjournment. The adjournment was granted to 5th August 2019.

When the case came up on 5th August 2019, Counsel holding brief for the Respondent's Counsel made the following submission:

> *"Mr. Chairman, the 30 percent deposit has not been paid. We cannot proceed. According to Section 15 of the Tax Appeals Tribunal Act, it is a prerequisite for the 30 percent to be paid. We are praying that the applicant produce(s) the evidence of the 30 percent deposit."* [Page 36 of the record of appeal]

Counsel for the Applicant responded:

> *"Mr. Chairman …, I think Counsel is not properly briefed since she is holding brief. The matter was resolved in respect of the 30 percent. Consent was entered on 3rd April 2019."* [Page 36 supra]

The Tribunal looked at the consent and observed:

> *"… It does not mention payment of 30 percent … Where is the evidence of payment of the 30 percent? The application shows that the tax in dispute is Ushs 8,300,435,951/=. 30 percent is Ushs 2,490,131,685/=. Where is evidence to show the payment?"* [Page 36 supra]

Counsel for the Applicant then acknowledged that the issue of 30% did not come up in the settlement order. Counsel for the Applicant then argued that the parties had agreed and put their terms by way of a settlement; one of which was that there would be no enforcement. Counsel argued that, as such, the case should proceed for determination upon payment on the terms of the settlement order. Counsel further argued that in case the parties do not agree upon reconciliation, the case would then proceed. Counsel further argued that the settlement order provided that it superseded the order of temporary injunction which provided for payment of 30 percent.

Counsel for the Applicant also raised another argument to the effect that the requirement to pay 30 percent is only in the Tax Appeals Tribunal Act. That the Tax Procedure Code Act no longer provides for the payment of 30 percent of the tax in dispute, having been deleted from the VAT Act and the Income Tax Act. Counsel therefore invited the Tribunal to determine the question whether the parties could agree on payment of the amount which is less than the 30% stated in the law; and further whether the Tribunal could apply the 30% requirement rigidly without considering the Respondent's agreement to the contrary.

In response, Counsel for the Respondent submitted that Section 15 of the Tax Appeals Tribunal was very clear on the payment of 30% before a matter can be adjudicated upon in the Tribunal. Counsel submitted that the TAT Act is a statute that governs the procedure in the Tax appeals Tribunal. The fact that the provision for 30% is not in the Tax Procedure Code Act does not do away with the mandatory payment provided for under the TAT Act. Counsel argued that none of the other statutes referred to by the Applicant's Counsel contains the procedure to be followed by the TAT. Counsel for the Respondent further argued that under the law, the consent order cannot supersede an order of the Tribunal.

In its Ruling, the Tribunal held as follows:

> *"The tribunal notes that no final consent has been filed before it. It is apparent that the reconciliation exercise did not take place. The terms of the partial settlement order have not been implemented nor fulfilled. When the matter came up today … for hearing, the respondent demanded for payment of 30 percent of the tax in dispute which amounts to Ushs. 2,490,131,595/=.*
>
> *The applicant contends that the tribunal should not enforce the payment of the 30 percent tax in dispute because of the partial consent settlement order. The tribunal has pursued the order (sic). There is no mention of the payment of the 30 percent tax in dispute in the order. The consent order only required the applicant to pay Ushs. 250,000/= (sic) before its premises could be opened. It stated that the amount shall be applied towards settling the taxes reconciled. No reconciliation took place. No final consent was filed in the tribunal, meaning that the parties failed to agree, thus re-opening the dispute before the tribunal. When the parties came back to the tribunal, they were required to comply with the statutory requirements in the Tribunal Act.*
>
> *Counsel for the applicant argued that the requirement to pay 30 percent tax in dispute is not in the Tax Procedure Code Act. However the tribunal notes that the requirement … is still in the Tax Appeals Tribunal Act … The Tax Procedure Code Act does not amend nor delete Section 15 of the Tax Appeals Tribunal Act. In Uganda Revenue Authority v. Uganda Projects Implementation and Management Centre, Constitutional Petition No. 2 of 2009, the Supreme Court held that the requirement to pay 30 percent of the tax in dispute is not unconstitutional.*
>
> *… The Tax Appeals Tribunal is governed by the Tax Appeals Tribunal Act. It is the duty of the tribunal to enforce the said section unless it is amended, deleted or otherwise. This application is therefore allowed with*

costs. The application of the applicant is dismissed on failure to pay 30 percent of the tax in dispute."

The partial consent settlement order entered into by the parties on 2nd April 2019 and filed in the Tribunal on 3rd April 2019, in which the current Appellant was the Applicant and the Respondent herein was the Respondent, inter alia, provided as follows:

IT IS HEREBY AGREED that a partial consent is entered between the parties in the following terms;

1. *The parties undertake to conduct and conclude a comprehensive reconciliation exercise within 2 months from the date of this order, for purpose of determining the indisputable tax payable by the applicant for the period February 2017 to October 2017.*
2. *The Respondent undertakes to open the Applicant's premises upon execution of this consent and upon the Applicant paying UGX 250,000,000 to the Respondent, towards reduction of the disputed taxes assessed.*
3. *During the two months reconciliation exercise, the Respondent shall not enforce recovery of the tax assessed … against the Applicant.*
4. *The Applicant shall respect the outcome of the joint tax reconciliation exercise and shall take the tax amount arrived at, as the final tax payable.*
5. *The amounts already paid by the Applicant shall be applied towards settling taxes reconciled and found due at the end of the exercise.*
6. *The parties shall lodge a final consent in the Tax Appeals Tribunal, at the conclusion of the reconciliation exercise.*
7. *The parties agree that the Tribunal stays further hearing of the application for two months, from the date of execution of the consent, to allow reconciliation exercise.*
8. *This consent supersedes the order of a temporary injunction issued by the Tribunal on 1st October 2018, which hereby lapses …"*

From the above background, it is clear to me, to begin with, that at no point in time did the Appellant apply to the Tribunal to enforce any alternative means of payment of the 30% tax in dispute, specifically by way of furnishing security for due performance of the requirement, as the Appellant claims in the first ground of appeal. The Tribunal could not be expected to grant a remedy that was neither sought before them nor contemplated from the pleadings or proceedings before them. The tribunal cannot therefore be faulted in that regard.

However, it is also clear that from the start of the proceedings in the Tribunal, starting with the order of a temporary injunction, the Appellant was given an opportunity to negotiate with the Respondent on how the 30% of the tax in dispute was to be paid. It is further clear that the proceedings before the Tribunal kept building upon this understanding, culminating into the partial consent settlement order of 3rd April 2019. By this partial consent settlement order, a joint reconciliation exercise was supposed to be done and a final consent settlement filed, within a period of two months; meaning latest by 4th June 2019. It is crucial to note that after the said agreed period elapsed, neither the final consent settlement nor any report of progress of the reconciliation exercise was filed before the Tribunal. Even when the case came up before the Tribunal on 5th August 2019, no such report was availed to the tribunal. Instead, the Respondent made a stern demand for payment of the 30% of the assessed tax.

The record further shows that even in its ruling, the Tribunal simply speculated as to the result of the reconciliation exercise; by concluding that since the parties did not file the final consent within time as agreed, the parties must have failed to agree. Given that the position in the partial consent settlement was reached by way of a formal consent order, it was not proper, in my view, to simply brush off the consent order especially when both parties were before the Tribunal and they could be put to task as to what had happened to the reconciliation exercise. It may be argued that the

time given in the consent had elapsed but this, still, did not negate the duty of both parties to report to the Tribunal on the progress of the exercise that had been endorsed by a consent order.

In my view therefore, when the matter came up on 5th August 2019, and arguments were made by both Counsel in the manner they did, the expectation from the Tribunal was not of an order disposing of the application; but rather a direction on how and when the 30% requirement shall be complied with. This is because, the Tribunal had not anywhere on record made an unequivocal order to this effect. As seen from the record, every time the issue of the 30% payment came up, the Tribunal left room for the parties to agree on how the requirement should be complied with. The obvious legal implication of negotiations is that when parties fail to agree, the court makes an appropriate order in the circumstances. It is not proper, in my view, to rely on the assumed failure by the parties to agree for the court to impute a position leading to disposal of a matter.

In the instant case, there was neither a report of the negotiations between the parties nor an unequivocal order or direction of the Tribunal as to when and how the 30% of the tax in dispute was to be paid. In my considered view therefore, pursuant to the arguments made by either Counsel before the Tribunal on 5th August 2019, once the Tribunal was convinced that the negotiations between the parties had failed, the Tribunal was obliged to take away the matter from the realm of negotiations and then pass a clear order or direction on how the statutory requirement was to be complied with, within which time and possibly the consequences of non-compliance. Then the Appellant would have been on notice clearly that non-compliance would lead to certain consequences.

In the circumstances therefore, the consequence of the decision from the proceedings of 5th August 2019 should not have been a dismissal of the application but rather a definitive order of the Tribunal regarding

compliance with the requirement for the payment of the 30% of the tax in dispute. It was therefore not proper for the Tribunal to make a finding and an order disposing of the matter when they ought to have made a definitive order for compliance with the requirement in issue. This was an error on the part of the Tribunal which occasioned a denial of the Appellant's right to a fair hearing and access to justice.

In the result therefore, the first ground of appeal succeeds in part; not for reason of failure of the Tribunal to order for furnishing of security for due performance of the requirement, but for failure to accord the Appellant a fair hearing and access justice thereby leading to a wrong conclusion.

<u>Ground 2</u>: The Honorable Tribunal erred in law in not recognizing that the additional UGX 250,000,000/= was paid by the Appellant and agreed to by the Respondent in lieu of 30% of the tax in dispute.

Counsel for the Appellant submitted that the additional UGX 250,000,000/= was paid by the Appellant and agreed to by the Respondent in lieu of 30% of the tax in dispute. Counsel argued that by dismissing the application, TAT acted prematurely and impractically thereby causing a miscarriage of justice. Counsel submitted that the position would have been different if TAT had ordered the Respondent to comply with the terms of the consent which was the right thing to do. Counsel argued that prior to the consent by the parties, TAT had issued a temporary injunction which required the Applicant to pay 30% within a specified time which time was consequently extended owing to hardship. Counsel submitted that the partial consent settlement under paragraph 8 specifically indicated that the consent superseded the terms of the temporary injunction.

Counsel for the Appellant therefore submitted that the TAT erred in law when they failed to reconcile paragraph 2 and paragraph 8 of the partial consent order to mean that the additional UGX 250,000,000/= was considered by the parties to enable the Appellant's case to be heard and

determined on its merits. Counsel argued that the agreement between the parties to accept the additional UGX 250,000,000/= and to conduct a reconciliation exercise was a just decision of the parties looking at the strength and weaknesses of the case before the TAT. Counsel concluded that the TAT therefore caused a miscarriage of justice to the Appellant by failing to uphold the parties' position in the consent order.

In reply, it was submitted by Counsel for the Respondent that it was not true that the additional tax of UGX 250,000,000/= was paid by the Appellant in lieu of 30% of the tax in dispute. Counsel submitted that the partial consent agreement entered into between the parties does not expressly state that the above amount was being paid in lieu of payment of the 30%. Counsel submitted that this contention by the Appellant was both misguided and misconceived since the partial consent order was clear in paragraph 2 as to its express provision. Counsel further submitted that the partial consent did not exonerate the Applicant from paying the 30% of the tax in dispute but simply put a hold on all enforcement measures for a period of two months to allow parties conduct a reconciliation. Counsel for the Respondent concluded that the TAT Act expressly provides for the payment of the 30% of the tax in dispute and, as such, the Tribunal acted lawfully by dismissing the matter for non-payment of the said tax. Counsel prayed that this ground of appeal is disallowed.

I have already set out herein verbatim the relevant paragraphs of the partial consent settlement order. From a reading and interpretation of the said consent order, it is not anywhere expressed therein that the payment of the additional sum of UGX 250,000,000/= was made in lieu of payment of the required 30% of the tax in dispute. This sum is called additional because earlier on, the Appellant had made payment of the sum of UGX 246,000,000/= as the portion of the tax not in dispute. Neither by express provision nor by import does the partial consent order reveal any linkage between the payment of the said additional sum and the payment of the

30% of the tax in dispute. The consent order clearly states the reason the said sum was being paid, i.e. *The Respondent undertakes to open the Applicant's premises upon execution of this consent and upon the Applicant paying UGX 250,000,000 to the Respondent, towards reduction of the disputed taxes assessed.* This definitely cannot be said to fall in place of the payment of the 30% of the tax in dispute as the Appellant would want the Court to believe.

I also find as superfluous the argument that the partial consent settlement order superseded the temporary injunction order of the Tribunal. To begin with, the insertion of clause 8 of the consent order therein was superfluous and uncalled for. The parties cannot sit and agree to set aside an order of a court. It is clear on record that the members of the Tribunal who issued the temporary injunction order did not approve the terms of the partial consent settlement order. It therefore cannot be said that they were bound by clause 8 of the said consent order. But secondly, and more important, the Appellant was bound to pay 30% of the tax in dispute primarily <u>not</u> because of the order of temporary injunction issued by the Tribunal but because of a statutory requirement. Therefore even if it were possible for the consent settlement order to set aside the order of the Tribunal, that would not affect the statutory obligation on the part of the Appellant to pay 30% of the tax in dispute before their case could be heard.

It is therefore my considered finding that the Tribunal was not in error when it rejected the argument by the Appellant that the payment of the additional sum of UGX 250,000,000/= was in lieu of payment of 30% of the tax in dispute. The second ground of appeal therefore has no merit and it is dismissed.

<u>Ground 3</u>: The Honorable Tribunal erred in law in enforcing 30% tax in dispute not provided for in the substantive tax legislation; the Tax Procedure Code Act, the Income Tax Act and the VAT Act.

Counsel for the Appellant submitted that the removal of application of 30% from the Income Tax Act and the VAT Act and its non-inclusion in the Tax Procedure Code Act 2014 left the provisions in the Tax Appeals Tribunal Act redundant. Counsel submitted that the intention of the legislation was not to unduly encumber the taxpayer since the VAT Act and the Income Tax Act have interest and heavy penalties levied to discourage non-payment of tax. Counsel also submitted that procedural laws like the TAT Act cannot take precedence over substantive tax laws. Counsel argued that where substantive tax laws do not provide for the payment of 30% of tax in dispute, TAT should use their power wisely and on a case by case basis before dismissing an application for non-payment of 30%.

Counsel for the Appellant further submitted that by the TAT failing to exercise justice in the instant case through determining when and how the 30% tax in dispute could be paid, including the acceptance of security in lieu of the 30%, the decision of the Tribunal had the effect of promoting injustice upon the taxpayers which could lead to closure of businesses. Counsel argued that the flexible and wise use of the 30% rule by the TAT would ensure justice to either party before the Tribunal. Counsel further argued that the Respondent may have an assessment which has no basis in the law and TAT should be able to ascertain these facts and use it as a basis to decide the application of the 30% rule.

The Appellant's Counsel further submitted that there is no more requirement to pay 30% of the tax in dispute in the High Court. As such the logical argument would be that when the Tribunal dismisses an application for non-payment of 30% tax in dispute, the applicant is at liberty to appeal to the High Court on points of law and the High Court will handle the case without requiring the appellant to pay 30% of the tax in dispute. Counsel

argued that this was the intended effect of the elimination of the 30% requirement in the substantive laws. Counsel submitted that the High Court can still handle all issues of law arising from a tax dispute and grant parties any orders sought if the court deems it fit.

In reply, Counsel for the Respondent submitted that the requirement to pay 30% of the tax in dispute is provided for under Section 15 of the TAT Act and is further buttressed by the decision of the Supreme Court in the case of ***Uganda Projects Implementation and Management Centre vs Uganda Revenue Authority, Supreme Court Constitutional Appeal No. 2 of 2009***. Counsel submitted that in the said case, the Supreme Court held that the requirement to pay 30% is not unconstitutional and is in line with the principle of *"pay now and argue later"*. The Respondent's Counsel argued that indeed the Appellant was aware of this and thus requested the Tribunal for more time to meet the requirement. Counsel submitted that the Appellant was therefore estopped from arguing that the requirement to pay 30% is unlawful. Counsel further submitted that the Tax Appeals Tribunal is governed by the TAT Act, a legislation enacted by Parliament which the Tribunal is mandated to implement. Counsel prayed that this ground of appeal be dismissed by the Court.

Counsel for the Appellant raised this same argument in the Tax Appeals Tribunal and the Tribunal made a decision on the same. The Tribunal had this to say:

> *"Counsel for the applicant argued that the requirement to pay 30 percent tax in dispute is not in the Tax Procedure Code Act. However the tribunal notes that the requirement … is still in the Tax Appeals Tribunal Act … The Tax Procedure Code Act does not amend nor delete Section 15 of the Tax Appeals Tribunal Act. In Uganda Revenue Authority v. Uganda Projects Implementation and Management Centre, Constitutional Petition No. 2 of 2009, the Supreme Court held that the requirement to pay 30 percent of the tax in dispute is not unconstitutional.*

… The Tax Appeals Tribunal is governed by the Tax Appeals Tribunal Act. It is the duty of the tribunal to enforce the said section unless it is amended, deleted or otherwise."

It is true as stated by Counsel for the Appellant to the extent that the requirement to pay 30% of the tax in dispute was also contained in the Income Tax Act and the VAT Act but the respective provisions were removed from the said Acts through repeal. But the provision in Section 15 (1) of the TAT Act was not touched. It still provides for the requirement to pay 30% of the tax in dispute. Counsel for the Appellant did not argue that the provision in Section 15 of the TAT Act was saved by omission or through mistake on the part of the legislature. However, even if Counsel had made that argument, I would not be prepared to allow the same. I also find no reason to think that Section 15 of the TAT Act was amended by the Tax Procedure Code Act by implication or infection. That being the case, the provision in Section 15 (1) of the TAT Act is still law and the Tribunal has mandate to enforce that law. Had the legislature intended to repeal the provision, it would have stated so expressly as it did in the case of the Income Tax Act and the VAT Act.

In the premises, the Tribunal was right in holding the way they did on this point. In any case, upon an earlier challenge of the requirement to pay the 30% of the tax in dispute in the Constitutional Court, both the Constitutional Court and the Supreme Court upheld the requirement as not being unconstitutional, arbitrary, unreasonable or unjustifiable. See ***Uganda Projects Implementation and Management Centre vs Uganda Revenue Authority (supra)***. The Appellant cannot therefore be seen to re-open a matter that has been well settled by the highest Court of the land. This ground of appeal therefore bears no merit and is dismissed as well.

<u>Ground 4</u>: Whether the Tax Appeals Tribunal Act Cap 345 takes precedence over the Tax Procedure Code Act, 2014 in tax dispute resolution.

Counsel for the Appellant submitted that the Tax Procedure Code Act was enacted to provide for all procedural matters in relation to tax enforcement as per the long title of the said Act which states:

> *"An Act to provide for a code to regulate the procedures for the administration of specified tax laws in Uganda; to harmonize and consolidate the tax procedures under existing tax laws; and to provide for related matters."*

Counsel submitted that Section 25 of the Tax Procedure Code Act does not provide for payment of 30% of the tax in dispute in case a taxpayer prefers an appeal from the objection decisions. Counsel argued that the Code Act was a recent legislation that coincided with the removal of sections dealing with the application of 30% from all the substantive tax laws. Counsel therefore argued that the TAT Act was therefore inferior to the Tax Procedure Code Act. Counsel submitted that it is in the interest of justice that an aggrieved applicant is heard without being subjected to hardship that has been intentionally left out of the substantive tax laws.

In reply, Counsel for the Respondent submitted that the TAT Act and the other tax laws such as the Income Tax Act, the VAT Act and the Tax Procedure Code Act, work hand in hand and are not in contravention with each other. Counsel submitted that indeed the Tribunal is governed by the TAT Act which categorically provides for payment of 30% of the tax in dispute. Counsel argued that a tax payer who does not wish to pay the said sum may opt not to lodge an application in the Tribunal. Counsel further argued that since the Court has ruled in ***Uganda Projects Implementation and Management Centre vs Uganda Revenue Authority (supra)*** that the requirement to pay the 30% is not unconstitutional, this implies that it is

good law which is not in contravention with other tax laws and or with the Constitution and ought to be complied with.

Counsel for the Respondent further submitted that the issue of precedence does not arise since the said laws are not in contravention with each other. Counsel prayed to court to disallow this ground of appeal.

Like I pointed out under the third ground of appeal, Counsel for the Appellant does not tell the Court why he believes the provision of Section 15 of the TAT Act was left intact if the legislature intended to affect it by the enactment of the Tax Procedure Code Act, 2014. Section 77 of the Tax Procedure Code Act expressly sets out the provisions of the tax laws that were affected by the Code Act specifically by way of repeal. As I already pointed out, I am unable to impute an intention upon the legislature to affect the TAT Act by implication or infection when they were in position to and ought to have expressly said so.

Regarding the argument on precedence between the two legislations, I am unable to appreciate the argument of Counsel for the Appellant that the TAT Act is inferior to the Tax Procedure Code Act. As submitted by Counsel for the Respondent, the two legislations are not in conflict with each other. As such the issue of precedence does not arise in the course of their interpretation. Each of the legislations provide for its area of domain and the areas do not conflict. I do not think Counsel for the Appellant intended to argue that with the enactment of the Tax Procedure Code Act in 2014, the operations of the TAT are expected to be governed by the Code Act because it is the more recent legislation and it provides for procedures for tax administration. The TAT Act is a specific legislation which according to its long title is "*An Act to establish tax appeals tribunals pursuant to article 152(3) of the Constitution".* **Article 152(3) of the Constitution** provides that *"Parliament shall make laws to establish tax tribunals for the purposes of settling tax disputes".* The object of the Tax Procedure Code Act according to

its long title is: *"An Act to provide for a code to regulate the procedures for the administration of specified tax laws in Uganda; to harmonize and consolidate the tax procedures under existing tax laws; and to provide for related matters."*

From the above, it would be too far-fetched to argue that the Tax Appeals Tribunal is more bound to implement the Tax Procedure Code Act than the TAT Act which specifically provides for its mandate. The argument as to precedence between the two legislations therefore does not arise and, as such, bears no merit. Accordingly, the 4th ground of appeal also bears no merit and is dismissed.

In the result, the 1st ground of appeal has partly succeeded while the 2nd, 3rd and 4th grounds have failed. The consequence is that the appeal shall be allowed to the extent that the Tribunal shall be ordered to hear the parties and make an order as to when and how the Appellant shall make payment of 30% of the tax in dispute, including stating the consequences of non-compliance with the order of the Tribunal. If the Appellant complies with the order of the Tribunal, the Tribunal shall then go ahead to hear the application on its merits. Accordingly, the order of the tribunal dismissing the application of the Appellant is accordingly set aside to that extent. In all other respects, the appeal by the Appellant is dismissed.

The orders of the Court are therefore as follows:

1. The appeal partly succeeds and the order of the Tribunal dismissing the application of the Appellant is accordingly set aside.
2. The Tax Appeals Tribunal is ordered to hear the parties and make orders as to when and how the Appellant shall make payment of 30% of the tax in dispute, including stating the consequences of non-compliance with the order of the Tribunal

3. In the event of the appellant complying with the orders of the Tribunal issued as per clause 2 above, the Tribunal shall proceed to hear and determine the application on its merits.
4. The appeal on the other grounds of appeal is dismissed.
5. The Appellant shall pay half of the costs of the appeal to the Respondent.

It is so ordered.

Signed, dated and delivered by email this 18th day of June, 2020.

BONIFACE WAMALA
JUDGE