THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL No. 0178 OF 2021

(Arising from Civil Suit No. 0034 of 2015).

THE COMMISSIONER GENARAL }
UGANDA REVENUE AUTHORITY } …… APPELLANT

VERSUS

1. EDULINK HOLDINGS LIMITED } …… RESPONDENT
2. STANBIC BANK (U) LIMITED } …… 1ST GARNISHEE
3. DIAMOND TRUST BANK } …… 2ND GARNISHEE

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a. Background.

By a plaint filed on 28th January, 2015 the respondent sued the appellant for recovery of shs. 392,168,204/= being money paid in taxes over a period of two years, in respect of plant, machinery and supplies used in the education and health sectors, in respect of which no Value Added Tax was actually payable under the law. These supplies were in respect of two institutions operated by the respondent; Victoria University and Victory University Medical Centre. The plant, machinery and consultancy services in respect of which tax had been paid were in fact listed as exempted under item 1 (a) of the schedule to *The Value Added Tax Act*. By a letter dated 28th May, 2012, the respondent sought a refund of the tax. The respondent later on 18th October, 2012 lodged a formal claim for a refund. The appellant rejected the claim and by a letter dated 16th October, 2014 stated that the plant, machinery and consultancy services in issue were not VAT exempted.

In its written statement of defence, the appellant refuted the respondent's claim and contended that under *The Value Added Tax Act*, for plant, machinery and consultancy services such as were claimed by the respondent to be exempt, they must be of a type that is peculiar to the education and health sectors, which the respondents were not. The respondent failed to supply documentation sufficient to satisfy the appellant that the plant, machinery and consultancy services in issue

qualified for tax exemption. The appellant contended therefore that its collection of Value Added Tax on those items was justified and the suit should be dismissed.

Evidence in the suit was closed on 4th September, 2017 and the respondent filed its final submissions on 12th December, 2017 while the appellant filed theirs on 11th January, 2018. The court undertook to deliver its decision on notice. In a judgment delivered on 20th August, 2019 the appellant was ordered to refund shs. 392,168,204/= unlawfully collected as Value Added Tax since the items in issue were tax exempt. The court awarded the respondent interest thereon at the rate 2% per month compounded from 18th November, 2012 "until payment in full." Following the decision, the appellant computed the decretal sum and interest and on 6th November, 2019 paid the total sum in full to the respondent. The appellant caped the interest payable at shs. 392,168,204/= in accordance with section 44 (5) of *The Value Added Tax Act*.

Being dissatisfied with that computation and contending that what was paid by the appellant did not satisfy the decree fully, the respondent sought recovery of additional accumulated interest by way of a Garnishee Order, contending that the total amount owing from the appellant as at 7th November, 2019 was shs. 2,069,601,866/= yet the appellant had paid only shs. 784,336,408/= The interest on the outstanding balance had since accumulated further and stood at shs. 1,536,011,198/= as at 7th September, 2020. On top of this, the respondent claimed shs. 15,175,000/= as taxed costs of the suit, hence a total of shs. 1,551,186,198/= The appellant opposed the application on grounds that the respondent's computation of the amount payable in interest was inconsistent with section 44 (5) of *The Value Added Tax Act*. The appellant contended that it had fully satisfied the decree, save for the taxed costs which could not be processed due to the nationwide covid-19 lock down that ensued soon after the taxation.

In a ruling delivered on 3rd February, 2021 the learned Deputy Registrar allowed the application for recovery of shs. 1,536,011,193/= by way of garnisheeing funds on the appellant's accounts with the above named garnishees, in satisfaction of the decree. In her decision, the learned Deputy Registrar observed that the submissions in the underlying suit were closed during the year 2017 yet the judgment was delivered during the year 2020. In the meantime *The Value Added Tax Act* had been amended during the year 2018, introducing a cap on the amount recoverable as interest,

which cap was not existent at the time the suit was filed. She construed the expression "until payment in full" stated in the decree as not being affected by the statutory cap on interest and that the trial Judge might have had the provision in mind and disregarded it in light of the fact that the suit was filed in the year 2012, when he directed interest to be recoverable "until payment in full."

b. The appeal.

The appellant is dissatisfied with the ruling of the learned Deputy Registrar, hence this appeal. The appellant contends that the ruling of learned Deputy Registrar in issuing the Garnishee Order Nisi in the circumstances, was erroneous to the extent that it results in execution of a decree that had hitherto been fully satisfied by the appellant. The learned Deputy Registrar thereby misinterpreted the law by allowing the recovery of interest on the principal amount over and above the cap established by section 44 (5) of *The Value Added Tax Act*.

c. Submissions of counsel for the appellant.

The Assistant Commissioner, Litigation from the appellant's Department of Legal Services and Board Affairs submitted that the Registrar ought not to have entertained execution of the decree. In her ruling, she noted that before her was a decree of the court which had awarded interest on the principal sum at 2% per annum compounded until payment in full. She concluded that it would be executed as it is; "may be the Judge was alive that the case was filed in 2012." She refused to strike out the application for attachment. It orders attachment of a sum of over 1.5 billion shillings from the appellant's bank accounts.

The court is bound under section 34 of *The Civil Procedure Act* to determine whether or not the decree had been fully satisfied by the appellant. If the court harboured a doubt, it should have referred the issue to the court that passed the decree under Order 50 rule 7 of *The Civil Procedure Rules*. The court was in doubt as to whether more remained to be paid as interest. Section 44 (5) of the VAT Act was relevant to the decision. It was inserted by an amendment of 2018. Its effect is to cap the amount payable in interest. It is a mandatory provision. The interest should not exceed the principal tax. It was in force at the time of the decision on 20th August, 2019. The appellant

had to satisfy the decree of the court in accordance with the law in force. A court is supposed to act in conformity with the law. The legislation pursuant to which the court made its decision commanded a limit on the amount recoverable as interest.

The court did not purport to assail that provision of the law. Silence of the court leaves no room for doubt in ascertaining its intention. The respondent cannot recover over and above the capped amount. This was overlooked by the Deputy Registrar. Had she considered it the Deputy Registrar would have found the appellant had complied fully and there was nothing left to recover.

In *Simba K. Ltd and 3 others v. UBC, S.C Civil Appeal No. 3 of 2014* the court construed section 34 of *The Civil Procedure Act* and held that it covers all questions relating to the execution of decrees. He prayed that the appeal is allowed. The decision and the orders of the registrar be set aside. The court finds that the decree was fully satisfied by the appellant. He prayed for the costs of this court and of the proceedings before the Deputy Registrar.

d. <u>Submissions of counsel for the respondent</u>.

M/s ABMAK Associates, Advocates and Legal Consultants submitted that. "Payment in full" must be according to the law. The question is whether that should be the law at the time of judgment or at the time of filing the suit. There was an implied repeal, i.e. an irreconcilable conflict. Section 44 (1) at the time the suit was filed had no limit on the amount recoverable as interest. According to *Odgers*, the rights vest at the time of cause of action. It is only procedural provisions that affect pending proceedings. The suit was filed in 2015 and the law introducing the capping came in three years after the evidence had been closed, and the submissions closed. The respondent should not suffer prejudice due to the delayed judgment. Under section 34 of *The Civil Procedure Act* the issue of interpreting a decree could not arise.

When a law is altered by amendment, the law as it was at the time of the act is what prevails. Both the right and the remedy are governed by the law at the time the cause of action accrues. The presumption against retrospectively applies. Counsel for the appellant's position is not backed by authority. The appeal has no merit.

e. Submissions in reply of counsel for the appellant

Taxing Acts are interpreted strictly. *URA v. Siraje Hassan Kajura*, sets out the key principles to be followed in the interpretation of tax legislation. It is a legislation that applies prospectively. It was effective 1st July, 2018. *The Tax Procedure Code Act, 2020* section 40 (c) waived interest and penalties outstanding. Section 136 (7) of *The Income Tax* too caps interest recoverable by URA. The relief crystallises at the time of pronouncement. It is not due at the time of suing. In *AON v. URA* it was held that interest is not a cause of action, it is consequential. The case of *UTODA v. URA* too is relevant.

f. The decision.

According to section 34 (1) of *The Civil Procedure Act*, all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. The scope of this provision is very wide as exclusive jurisdiction is conferred on the executing court in respect of all matters relating to execution. For the provision to apply; (i) the questions must have arisen between the parties to the suit or their representatives; (ii) they must arise in the suit in which the decree was passed; (iii) they must relate to the execution, discharge or satisfaction of the decree; and (iv) they must be determined by the execution court.

This provision is intended to provide an inexpensive and expeditious remedy for determination of certain questions that arise in the course of execution, so as to avoid a multiplicity of suits. Such questions usually include; whether a decree is executable? Whether the property attached is liable to be sold in execution of the decree? Whether a decree is fully satisfied? Whether a particular property is included or not in decree? and generally questions regarding attachment, sale or delivery of property. The question arising in this appeal is whether or not the decree was fully satisfied when the appellant refunded the principal tax erroneously collected, and capped the interest payable thereon at an amount not exceeding the principal tax. Determination of the question depends on whether or not the judgment was rendered subject to the 2018 amendment.

An enactment has a retrospective effect when it attaches benevolent consequences to a prior event; attaches prejudicial consequences to a prior event; or imposes a penalty on a person who is described by reference to a prior event, where the penalty is not a consequence of the event. It includes a statute that takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed. To the extent that they attach prejudicial consequences to prior events, the question of how far amendments to *The Value Added Tax Act* should be made applicable to past acts and events is attended with the utmost difficulty.

i. <u>Generally retrospectivity is not permitted</u>.

There are three components of a taxing statute, namely the subject of the tax; the person liable to pay tax; and the rate at which the tax is to be levied. If there is any ambiguity in understanding any of the components, no tax can be levied till the ambiguity or defect is cleared. It is trite that every taxing statue including, charging, computation and exemption sections therein should (at the threshold stage) be interpreted strictly. In the case of ambiguity in charging provisions, the benefit must necessarily go in favour of the taxable person, but the same is not true for an exemption provision wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue Authority / State. A person invoking an exception or an exemption provision to relieve him or her of the tax liability must establish clearly that he is covered by the said provision.

It is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute, so as to take away or impair an existing right, or create a new obligation or impose a new liability otherwise than as regards matters of procedure (see *Halsburys Laws of England*, 3rd Ed. Vol. 36; *Langan Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 12th Ed, (1969) p 215; *Maxwell v. Murphy (1957) 96 CLR 261at 267; Municipality of Mombasa v. Nyali Ltd. [1963] E.A. 371 at p. 374 and 375;* and *Wainwright v. Home Office [2002] QB 1334, 1345F, at para 27*), hence the Latin maxim; *Nova constitution futuris formam imponere debet non praeteritis* (a new law ought to regulate what is to follow, not the past).

Therefore, all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence, are *prima facie* prospective. It is well settled that procedural amendments to a law apply in absence of anything to the contrary, retrospectively in the sense that they apply to all suit after the date they come into force even though the suit may have begun earlier or the claim on which the suit may be based may be of an anterior date. A procedural statute though should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

Accordingly retrospective operation should not be given to a statute so as to effect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. In *Secretary of State for Services v. Tunnicliffe [1991] 1 All ER 712, 724,* Stoughton L.J. held that;

> The true principle is that Parliament is presumed not to have intended to alter law applicable to past events and transactions in a manner which is unfair to those who are concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a manner of degree. The greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.

Express retrospective intent or necessary implication is a pre-requisite for validity of retrospective statutes. The presumption against retrospectivity is rebutted by express intention that an enactment will affect the pre-enactment conduct. Rights and obligations which arose in the pre-enactment period should not be affected by the new law, save by "express intention" of the Legislature or where by "necessary implication" it appears that such was the intention of the Legislature (see *Phillips v. Eyre [1870] LR 6 QB 1 at p. 23* and *Maxwell on The Interpretation of Statutes*, 12th ed (1969), p 215). "Expressly" means what it says; there will be a section somewhere in the Act which states that the legislation (or a part of it) operates from a date prior to the enactment. "Necessary implication" means that the courts recognise cases in which, even when an Act remains silent on the subject, its terms as a whole, interpreted in context, require the conclusion that Parliament intended it to attach consequences to a prior event.

ii. The "necessary implication" exception.

The general rule of statutory interpretation is that statutes are not to be construed as having retrospective operation unless required expressly or "by necessary implication" or "necessary intendment" as found in the language of the statute. Implication is an inference of something not directly declared, but arising from what is expressed. A meaning is derived "by necessary implication" from the language of a statute where it is a matter of actual necessity or of so strong a probability of the intent of the Legislature that a contrary intent is not reasonably to be inferred (see *Worrall v. Commercial Banking Co of Sydney Ltd [1917] HCA 67; (1917) 24 CLR 28, 32*). It is not sufficient that the implication would be desirable, reasonable or sensible; such implication must not only be a possible or probable one, but it must be plain and necessary that is, so strong a probability of intention that an intention contrary to that imputed to the Legislature cannot be supposed. The type of case in which a necessary implication arises is typically one in which the statutory purpose would be wholly frustrated were it not to attach consequences to a prior event.

An example of a necessary implication arising in just these circumstances is *R (Commissioners of HM Revenues and Customs) v. HM Coroner for the City of Liverpool, [2014] EWHC 1586 (Admin)*. In that case, *The Coroners and Justice Act, 2009* allowed coroners to obtain information of relevance to their inquiries, but Parliament had failed to state that the Crown was bound to provide this information. The court found that a fundamental purpose of the Act was to empower coroners to conduct effective investigations, and so ensure that the UK was compliant with Article 2 of *The European Convention on Human Rights*. If coroners had no right to demand information from the Crown, that purpose would be frustrated. The court was therefore willing in that case to imply into the legislation, of necessity, a provision that it was binding on the Crown. Parliament really intended that the Act would bind the Crown. It both could and should have written that fact down, but somehow neglected to do so. This was a mistake. The courts corrected this error for the unpalatable alternative was that the entire purpose of the legislation would otherwise be frustrated.

Similarly in *City of Manila and Treasurer v. Judge Gomez [G.R. No. L-37251. August 31, 1981]*, section 64 of *The Revised Charter of Manila, Republic Act No. 409*, which took effect on 18th June 1949, fixed the annual realty tax at one and one-half percent. On the other hand, Section 4 of *The*

Special Education Fund Law, Republic Act No. 5447, which took effect on 1st January 1969, imposed "an annual additional tax of one per centum on the assessed value of real property in addition to the real property tax regularly levied thereon under existing laws" but "the total real property tax shall not exceed a maximum of three per centrum." That maximum limit provided the basis upon which the municipal board of Manila fixed the realty tax at three percent, by way of Ordinance No. 7125, approved by the city mayor on 26th December 1971. Effective beginning the third quarter of 1972, the board imposed an additional one-half percent realty tax.

Esso Philippines, Inc. paid under protest and later filed a complaint in the Court of First Instance of Manila for the recovery of it. It contended that the additional one-half percent tax is void because it is not authorised by the city charter nor by any law (Civil Case No. 88827). After hearing, the trial court declared the tax ordinance void and ordered the city treasurer of Manila to refund to Esso the said tax. The City of Manila and its treasurer appealed under Republic Act No. 5440 (which superseded Rule 42 of the Rules of Court) with the ruling of Judge Gomez brought about the jurisdiction to the Supreme Court. The issue on appeal was whether or not the additional one-half percent realty tax is legal and valid. The court answered in the affirmative finding that to be so by necessary implication.

The Supreme Court relied on the doctrine of implications in statutory construction and sustained the City of Manila's contention that the additional one-half percent realty tax was sanctioned by the provision in Section 4 of *The Special Education Fund Law*. The court found that it was true, as contended by the taxpayer, that the power of a municipal corporation to levy a tax should be expressly granted and should not be merely inferred. But in this case, the power to impose a realty tax is not controverted. What was disputed was the amount thereof, whether one and one-half percent only or two percent. The doctrine of implications means that "that which is plainly implied in the language of a statute is as much a part of it as that which is expressed." The obvious implication was that an additional one-half percent tax could be imposed by municipal corporations. Inferentially, that law (the ordinance) fixed at two percent the realty tax that would accrue to a city or municipality. Section 4 of *The Special Education Fund Law*, as confirmed by *The Real Property Tax Code* (later), in prescribing a total realty tax of three percent impliedly

authorised the augmentation by one-half percent of the pre-existing one and one- half percent realty tax.

From the above and similar decisions it can therefore be deduced that every statute is understood by implication to contain all such provisions as may be necessary to effectuate its object and purpose, or to make effective rights, powers, privileges or jurisdictions which it grants including all such collateral and subsidiary consequences as may be fairly and logically inferred from its terms. What is implied in a statute is as much a part thereof as that which is expressed (*ex necessitate legis*).

iii. Necessary implication derived from contextual considerations.

Determination of the issue as to whether the amendment was intended to apply to or exclude its application to a particular situation, is an exercise in interpretation. This is a question whose answer can only be sought in ascertaining the intention of the Legislature. It is a well-settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent. However in the instant appeal account must be taken of the object of the amendment in light of the statement of Lord Denning in *Escoigne Properties Ltd v. Inland Revenue Commissioners [1958] 1 All ER 406 (BL) at 414D* that:

> A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used; and what the object was, appearing from those circumstances, which Parliament had in view. That was emphasised by Lord Blackburn in *River Wear Comrs v. Adamson ((1877) 2 App Cas 743 at 763-5* and by the Earl of Halsbury LC in *Eastman Photographic Materials Co v. Comptroller-General of Patents [1898] AC 571 at 575, 576* in passages which are worth reading time and again.

It is the duty of this court to ascertain the true intention of the Legislature from the terms of the statute understood in context. The process of construction combines both literal and purposive approaches. In doing so, the court generally takes into account four parameters, namely; - (i) what was the law prior to enactment of the statute in question; (ii) what was the defect or mischief for

which the earlier law did not provide (iii) what remedy had the Legislature intended to remedy the defect; (iv) the true Legislative intent behind the remedy. Legislative intent is gathered from the words used by Parliament, considered in the light of their context and their purpose. The true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed.

Statutes should be interpreted with the logical implications necessary to make their implementation fully effective, such as will prevent its purpose from being rendered nugatory. Tax laws have to be interpreted reasonably and in consonance with justice. The test is whether, in the light of the words used, their context and the purpose of the legislation, Parliament must have meant the amendment to attach consequences to prior events.

A necessary implication may be deduced pursuant to the principle of effectiveness, to give effect to the object and purpose of the statute, to avoid an absurd result, or to conform to the intentions of the Legislature. It is one which under the circumstances, is compelled by a reasonable view of the statute, and the contrary of which would be improbable and absurd. This doctrine may not be used to justify the inclusion in a statute of what to the court appears to be wise and just, unless it is at the same time necessarily and logically within its terms. The test for necessary implication is not satisfied merely by showing that the legislation cannot operate with reasonable efficiency in absence of the proposed implication but rather whether the statutory purpose of the enactment would be frustrated were it not to attach consequences to a prior event.

It is accepted that *The Value Added Tax Act* as amended does not contain any express words render amendments to it as attaching consequences to prior events. The question therefore becomes whether there is a necessary implication to that effect. A necessary implication is not the same as a reasonable implication as was pointed out by Lord Hutton in *B v. DPP [2000] 2 AC at 481*. A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must

have included. A necessary implication is a matter of express language and logic not interpretation (see *Regina v. Special Commissioner and Another, Ex P Morgan Grenfell & Co Ltd. [2002] 2 WLR 1299; [2003] 1 AC 563; [2002] 3 All ER 1*). Necessity defines what may properly and logically be inferred from and read into the statute.

The position appears to be that whenever the operation of a statute depends upon the doing of something or the happening of some event, the statute will not operate in respect of something done or in respect of some event that took place before the statute was passed; but if the operation of the statute depends merely upon the existence of a certain state of affairs, the being rather than the becoming, the statute will operate with respect to a status that arose before the passing of the statute, if it exists at the time the statute is passed. Consequently, if a statute is passed for the purpose of protecting the public against some evil or abuse, it will be allowed to operate retrospectively, although by such operation it will deprive some person or persons of a vested right (see *Acme (Village) School District No. 2296 v. Steele Smith - [1933] SCR 47; West v. Gwynne [1911] 2 Ch. 1* and *Craies on Statute Law*, 3rd ed., at page 336).

The contextual aspects of the amendment include the fact that a taxable person is eligible to receive a tax refund when the taxable person has paid more tax to the government than their actual tax liability or tax that should not have been collected in the first place. This usually happens when the advance tax, self-assessment tax paid and /or deducted of the taxable person is higher than the total tax liability of a taxable person or when exempted goods or services are erroneously taxed, as happened in the case at hand.

Value Added Tax (VAT) is collected by registered vendors on the supply of goods and services in Uganda and on the importation of goods and services to Uganda. VAT is therefore concerned with the consumption of goods and services in Uganda. In terms of the VAT system, the vendor may deduct: tax incurred on enterprise inputs (input tax) from the tax collected on supplies made by the enterprise (output tax). This has the effect that a vendor acts as an agent by collecting tax on behalf of the government and paying the balance, being the difference between the input and output tax, over to the Uganda Revenue Authority (URA). This balance is calculated by means of self-assessment.

It is, however, possible that URA may furnish the vendor with an assessment when a taxable person does not furnish a return as required or if URA is not satisfied with the furnished return. If a taxable person is aggrieved by an assessment issued by URA, the taxable person may lodge an objection to the assessment. The commissioner may then either alter the assessment or disallow the objection and inform the taxable person of the decision. Thereafter, if the taxable person is dissatisfied with the commissioner's decision, he or she may appeal against the decision.

According to section 31 (1) of *The Value Added Tax Act*, a taxable person is required to lodge a tax return with the Commissioner General for each tax period within fifteen days after the end of the period (hence by 15th July). The Financial Year immediately succeeding a financial year is the relevant assessment year for that Financial Year.

Section 42 (1) of *The Value Added Tax Act*, provides that if, for any tax period, a taxable person's input tax credit exceeds his or her liability for tax for that period, the Commissioner General shall refund him or her the excess within one month of the due date for the return for the tax period to which the excess relates, or within one month of the date when the return was made if the return was not made by the due date. Under this provision, the statutory right is conferred on the taxable person to get refund of the excess tax paid and such refund shall be made to the taxable person even without his having to make any claim in that behalf.

On the other hand, section 42 (3) to (5) of *The Value Added Tax Act*, provide that a person may claim a refund of any output tax paid in excess of the amount of tax due under this Act for a tax period. In such cases, the taxable person is entitled to a refund immediately the Commissioner General is satisfied that the person has paid an amount of tax in excess of the amount of tax due. Under this provision, the statutory right is conferred on the taxable person to get refund of the excess tax paid upon the taxable person making a claim for refund. In both cases, interest is payable from the date of payment of tax.

According to section 44 (1) of *The Value Added Tax Act*, where the Commissioner General is required to refund an amount of tax to a person as a result of a decision of the reviewing body, he or she is required to pay interest at a rate of five percentage points higher than the prevailing

official bank rate of the Bank of Uganda on the amount of the refund for the period commencing from the date the person paid the tax refunded and ending on the last day of the month the refund is made. At the time the suit was filed, section 44 (1) of *The Value Added Tax Act* provided as follows;

> 44. Interest on overpayments and late refunds.
>
> (1) Where the Commissioner General is required to refund an amount of tax to a person as a result of a decision of the reviewing body as defined in section 28 of *The Tax Appeals Tribunal Act*, he or she shall pay interest at a rate of five percentage points higher than the prevailing official bank rate of the Bank of Uganda on the amount of the refund for the period commencing from the date the person paid the tax refunded and ending on the last day of the month the refund is made.

That section was amended by *The Value Added Tax (Amendment) Act, 2018* by way of introduction of section 44 (5), which came into force on 1st July, 2018 providing as follows;

> (5) Notwithstanding sub-sections (1), (2) and (4) the interest due and payable on over payments and late refunds shall not exceed the principal tax.

On the other hand, section 28 (2) of *The Tax Appeals Tribunals Act*, provides that;

> Where the decision maker is required to refund an amount of tax to a person as a result of a decision of a reviewing body, the tax shall be repaid with interest at the rate specified in the relevant law on the amount of the refund for the period commencing from the date the person paid the tax refunded and ending on the last day of the month in which the refund is made.

It is not in doubt that the principle remains that a refund in case of a monthly return, is paid within thirty (30) days beyond which interest accrues. Consequently, the amount payable in interest can be significant, sometimes higher than the actual principal tax, in cases where the appellant is required to refund an amount of tax to a person as a result of a decision of a reviewing body. The cap on interest is based on the notion that it will protect tax collection and administration from excessive interest, considering that the appellant's general policy is that the cost of collection and administration of taxes to the collecting agent should not exceed 5% of the tax revenue.

In the *Wealth of Nations* published in 1776 Adam Smith argued a tax system should have four characteristics: equity, certainty, convenience, efficiency. In addition to administrative costs,

interest paid on overpaid taxes is one of the potentially significant areas where the cost of collection and administration of taxes may be disproportionate to the tax revenue. Without the cap, the tax system would potentially be too costly for the tax collectors in cases where they are required to refund an amount of tax to a person as a result of a decision of a reviewing body. The cap thus was introduced to ensure that the cost of collecting Value Added Tax should be very small in relation to the amount collected, and in any event should not exceed the amount collected. It is as well designed to prevent a taxable person from gaining excessive earnings therefrom as to constitute a windfall.

The Value Added Tax (Amendment) Act, 2018 is a remedial statute to the extent that it was designed to correct an existing law, redress an existing grievance, or introduce rules conducive to the public good. Remedial Statutes are those statutes which provide the remedy for a wrongful act in the form of damages or compensation to the aggrieved party but do not make a wrongdoer liable for any penalty. Considering that the mischief for which the Legislature was providing a remedy was a presently existing evil which the Legislature proposed to cure by making the right to recover interest to be capped at an amount not exceeding the principal tax, I am of opinion that this rebuts the presumption that the amendment was intended only to be prospective in its operation. Once rebutted, an amendment, though affecting substantive rights, applies retrospectively (barring any impediment of a constitutional nature) and so can affect existing proceedings.

The amendment thus should be construed in conformity with the well-established rule that all cases within the mischief aimed at by that statutory provision are, if the language permits, to be held to fall within its remedial influence. The court cannot adopt a construction which limits the operation of the section so as to make the remedy given by it not commensurate with the mischief which it was intended to cure. Therefore, whenever amendment enters into force, whether substantive or procedural, it applies to all cases of which the court is then or may in future be seised, the sole qualification being that the amendment, of whatever kind, must not operate to prejudice the vested rights of the parties in any pending suit. So, the real and only question under this appeal, is whether the 2018 amendment to section 44 (1) of *The Value Added Tax Act* operates to prejudice the vested rights of the respondent.

iv. Non retropsectivity applies only to vested rights.

Retrospective operation should not be given to a statute so as to effect, alter or destroy existing rights. The law does not operate retrospectively as to affect "rights and obligations which arose pre-enactment." A right accrues when all events have occurred necessary to fix the liabilities of the parties concerned therewith and to determine the amount of such liabilities; i.e. when it becomes capable of being enforced. The general rule is that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them (see *In re Joseph Suche & Co Ltd (1875) 1 Ch D 48 at p. 50*). For pending suits to be affected by retrospective legislation, the language of the enactment must be such that no other conclusion is possible than that that was the intention of the Legislature (see *Zainal bin Hashim v. Government of Malaysia [1980] AC 734 at 742C*).

The word "vested" denotes; "fixed;" "accrued;" "settled;" "absolute;" "complete;" or "subject to no contingency." Thus, "vested right" is a right independent of any contingency. It is a full, unalterable, irrevocable and completed right without any reservation or qualification. Salient features of vested interest include: – (i) a vested interest creates an immediate right and is not subject to any condition; (ii) it is both transferrable and heritable right; (iii) even when the transferee dies before actual possession or enjoyment, it passes on to his or her heirs; (iv) enjoyment can be postponed to a future date; (v) income derived from the property can be accumulated until the time of enjoyment arrives; (vi) it is not defeated by the death of the transferee before he or she obtains actual possession; and (vii) the interest is not defeated even if prior interest in the same property is given to some other person. The notion of "vested rights" hence focuses on the property interests of a taxable person and the consequential lack of governmental power to take such property away.

The presumption against interference with vested rights applies whether the legislation in question is retrospective or retroactive. The presumption is against legislative retrospective interference with vested rights. The presumption applies where new legislation alters the effects of an ongoing contract, where it would take away a cause of action after a proceeding has commenced, or where a business venture, which was previously legal, is deemed illegal. It is easy enough to understand

the abstract principle that laws have no retroactive effect because vested or acquired rights should be respected. But what are vested or acquired rights? Vested rights are defined in *Black's Law Dictionary,* (4th Ed. P. 1735) as:

> Rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of any other private person, and which it is right and equitable that the government should recognise and protect, as being lawful in themselves, and settled according to the then current rules of law……Such interests as cannot be interfered with by retrospective laws; interests which it is proper for the state to recognise and protect and of which the individual cannot be deprived arbitrarily without injustice.

The Philippine Supreme Court *in Benguet Consolidated Mining Co. v. Pineda, G.R. No. L-7231, [March 28, 1956], 98 PHIL 711-739)* explained that a vested right is "some right or interest in the property which has become fixed and established, and is no longer open to doubt or controversy;" it is an "immediate fixed right of present and future enjoyment;" it is to be contradistinguished from a right that is "expectant or contingent." The court explained further that;

> Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. The right must be absolute, complete and unconditional, independent of a contingency, and a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right. So, inchoate rights which have not been acted on are not vested.

For a right to be considered vested, all events must have occurred necessary to fix the liabilities of the parties. However, the beneficiary of the right must have done something to avail himself or herself of it before the law is changed (see *Abbott v. Minister for Lands, [1895] AC 425*). It follows that a cause of action becomes a full, unalterable, irrevocable and completed right without any reservation or qualification, hence a vested right, at the time of filing suit; while the remedy accruing therefrom being contingent upon the decision of court, does not become a vested right until the judgment of court is rendered.

For example in *Nadeau v. Cook [1948] 2 D.L.R. 783,* a statute provided that:

> Where any person recovers in any court in the province a judgment for an amount exceeding one hundred dollars, exclusive of costs, in an action for damages resulting from bodily injury to, or the death of, any person occasioned by, or arising out of, the

> operation or use of a motor vehicle by the judgment debtor, upon the determination of all proceedings including appeals . . . such judgment creditor may . . . apply by way of originating notice to a judge of the Supreme Court of Alberta for an order directing payment of the judgment out of the [Unsatisfied Judgment] fund….

Judgment for damages was recovered after the statute was enacted, but the accident giving rise to the action occurred before. The court held that the application of the statute to the judgment was not a retrospective one. Ford J. said that the words "damages resulting from . . . the operation or use of a motor vehicle" defined the cause of action and did not have a limiting effect. The fact-situation on which the enactment operated was the recovery of the judgment.

There is thus a difference between "vested interests" and "vested rights." The former are claims and expectations based on private contractual relationships and upon a property owner's understanding of the privileges, immunities, and responsibilities associated by law with the property in question. Interests become "rights" when courts agree to enforce such contractual relationships and understandings concerning property to take effect only if a specified uncertain event takes place or the specified uncertain event does not take place. As the saying goes, "don't count your chickens before your eggs have hatched." Until vesting occurs, an interest is a mere expectancy. Some of the salient features of vested rights as contingent interests, are: – (i) it is acquired on the happening of a specified uncertain event or on it becoming impossible if that is the required contingency; (ii) when the specified uncertain event does not happen or becomes impossible then the interest fails; (iii) it does not create a present right, but a promise of right if the condition of contingency matures, otherwise fails; (iv) it cannot take effect if the transferee dies before the condition is met; (v) it is transferable but not heritable; and it is incapable of descending to heirs. A person must have acquired a right to receive the same or that a right to the income, profits or gains has become vested in him or her though its valuation may be postponed.

Therefore the right to take advantage of an enactment is not a vested interest. One cannot have mere abstract right but only an accrued right. Until an award is made, no party to a civil litigation has an accrued right. Until the award is made nobody, knows their rights. The "mere right, existing at the date of a repealing statute, to take advantage of provisions of the statute repealed is not a "right accrued" (see *Abbott v. The Minister for Lands, (1895) AC 425*). It follows that the

respondent herein did have an existing interest or cause of action on the date of amendment but such interest cannot be treated as "vested right" or immuned from legislative intervention or interference. The effect of amending a statute is to consider it as a law that never existed in its original form except for the purpose of those suits which were commenced, prosecuted and concluded while it was an existing law. If any new or further step is needed to be taken under the Act, that cannot be taken except in accordance with the amendment.

In fact, no right derived from any statutory provision can be said to be a vested right in the strict sense of the term inasmuch as it is always open to the Legislature to amend or delete or repeal an existing law having the effect of taking away or affecting a statutory right or privilege. The Legislature can, due to changed circumstances curtail, modify, alter or even take away such rights. No statutory right can be said to be permanent and it can be modified, withdrawn or rescinded by appropriate enactment. A legal right derived from or under any statutory provision subsists so long as the particular legal provision conferring such right remains unchanged. In the field of public law and in our Constitutional scheme all rights except fundamental rights can be affected by the Legislature through appropriate legislation. No person has a vested interest in any provision of the law entitling him or her to insist that it shall remain unchanged for his or her benefit.

Since the purpose of legislation is to alter the existing legal situation, there is no presumption that it will not alter rights which individuals have, but have not exercised. The only restriction is that the Legislature cannot change the remedy if it be in effect to destroy the right. In the instant case, the amendment of section 44 of *The Value Added Tax Act* affected only the remedy, not the right, and there can be no vested rights in a mere remedy or form of procedure by which rights are enforced. The Legislature has the power to alter or change remedies. The right which had accrued at the time of the amendment was the right to sue. Nothing was recoverable until the determination of the suit. It is at the decision of the suit that the right to recover a specified amount accrued. This court rejects the contention that interest on tax refunds granted by the State gives rise to a vested right. Instead, it is a kind of concession and a concession can be withdrawn at any time and no time-limit can be insisted upon before a concession is withdrawn.

What I understand from the claim of a "vested right" set up by the respondent is that on the basis of section 44 (1) of *The Value Added Tax Act*, as applicable to his case on the date of filing the suit, it had a "legitimate" or "settled expectation" to obtain a judgment in its favour. In my considered opinion, such "settled expectation," if any, did not create any vested right to recover interest on the principal tax. True it is that the respondent had no control over the manner of processing of suit cannot be blamed for delay but during pendency of the judgment, but equally there is no showing in this case that the appellant did anything to cause a delay in the proceedings in order to take advantage of the effective date of the amendment of the Act.

In the circumstances, when the Legislature, in exercise of its rule making power, amended *The Value Added Tax Act* and imposed restrictions on the amount recoverable as interest, such "settled expectation" was rendered impossible of fulfilment due to a change in the law. The claim based on the alleged "vested right" or "settled expectation" cannot be set up against public interest which was sought to be served by amendment. In the matter of recovery of interest on tax refunds, the paramount consideration is public interest and not the interest of a particular person or a party.

For example in *Gustavson Drilling (1964) Ltd v. Minister of National Revenue [1977] 1 SCR 271* an oil exploration company was entitled to deduct certain drilling and exploration expenses when computing its income for tax purposes, but it did not do so. In 1962 the legislation was changed to disallow such deductions. Subsequently, a successor company nonetheless sought to deduct those accumulated expenses and invoked the presumption against legislation having retrospective effect. The majority of the Supreme Court of Canada rejected the argument. Dickson J said, at pp 279 - 280:

> The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively. Superficially the present case may seem akin to the second instance but I think the true view to be that the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time. The section as amended by the repeal does not purport to deal with taxation years prior to the date

> of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as the appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of the amending statute.

There is thus no general presumption that legislation does not alter the existing legal situation or existing rights: the very purpose of Acts of Parliament is to alter the existing legal situation and this will often involve altering existing rights for the future. So, as Dickson J went on to point out in *Gustavson Drilling [1977] 1 SCR 271, 282 - 283*, with special reference to tax legislation:

> There is no one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxable person may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed."

Since the potential injustice of interfering with the rights of parties to actual proceedings is particularly obvious, this narrower presumption will be that much harder to displace. In *Zainal bin Hashim v. Government of Malaysia [1980] AC 734; [1979] 3 All ER 241*, the Privy Council held that the language of the provision in question compelled the conclusion that it was intended to apply even to pending proceedings. “The degree of unlikelihood that this is what Parliament intended [i.e. to have retrospective effect], will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by parliament cannot have been intended to mean what they might appear to say” (see *L’Office Cherifien Des Phosphates and Another v. Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486, [1994] 1 All ER 20, [1994] 1 Lloyds Rep 251, [1994] 2 WLR 39*).

By way of illustration, in *Zainal bin Hashim v. Government of Malaysia [1980] AC 734; [1979] 3 All ER 241* the appellant, a police constable in the Malaysian police force, had been convicted of an offence and dismissed from the Force by a chief police officer on 20th January 1972. The Police Force Commission, under power conferred on it by the Constitution, had delegated to chief police officers power to dismiss but no power to appoint. The appellant brought an action against

the Government claiming a declaration that his dismissal was void and inoperative. On 21st March 1975, the trial Judge found in his favour on the ground that the dismissal contravened art 135(l) of the Constitution, because a chief police officer had no power to appoint constables.

One year later, article 135 (l) was amended by the addition of the proviso: "that this clause shall not apply to a case where a member (of the police force) is dismissed ... by an authority in pursuance of a power delegated to it by (the Police Force Commission), and this proviso shall be deemed to have been an integral part of this clause as from Merdeka Day" (i.e. 31 August 1957). Relying on the amendment, the Government appealed against the decision of the trial Judge to the Federal Court. It allowed the appeal on the ground that the proviso operated to validate the appellant's dismissal. In a further appeal to the Judicial Committee of the Privy Council, it was contended that the amendment could not apply as the appellant's action had been commenced, and judgment given on his claim, before the amendment came into force. In dismissing the contention, Viscount Dilhorne, speaking for the Judicial Committee, posed the question at 244g:

> Did the Legislature mean by the amendment to the Constitution to go so far as to deprive the appellant of his entitlement to a declaration that his dismissal was void and, consequently, to the pay and emoluments which but for his dismissal he would have received? Recognising that the amendment has a retrospective effect, is it possible and right to draw a distinction between a case where a dismissed constable has such a claim, a case where he has commenced an action to establish his entitlement and a case where he has obtained judgment on the trial of such a claim?'

and provided the answer at 245f-g:

> The effect of the amendment was to deprive a constable dismissed for misconduct by a chief police officer, to whom power to dismiss him had been properly delegated, of the right to maintain that his dismissal was invalid owing to the omission to delegate to the chief police officer power to appoint constables. If the appellant had started his action after the operative date of the amendment, their Lordships think that in consequence of the amendment it would have been bound to fall. Otherwise the reference to Merdeka Day would have no legislative content. Can the amendment be construed so that a different result would follow if such an action had been started by a wrongly dismissed constable before the Constitution was amended? In the Lordships' opinion the answer must be in the negative. If this is right, it can make no difference that the action started had got to the stage of judgment being given for the constable and under appeal when the amendment was made. In their Lordships' view the

> conclusion is inescapable that the Legislature intended to secure that no such actions started after Merdeka Day, whether proceeding, or not started, when the amendment was made, should succeed on the ground that the power to dismiss had not been exercised by someone with power to appoint.

Similarly in *Odelola v. Secretary of State for the Home Department, [2009] 1 WLR 1230, [2009] 3 All ER 1061* the appellant had applied for leave to remain as a postgraduate doctor. Before her immigration application was determined, the rules changed. She argued that her application should have been dealt with under the rules applicable at the time of her application. The appeal failed. It was held that the decision was to be taken under the Rules applying at the time of the decision and not when the application was made.

It follows that no one has a vested right to continuance of the law as it stood in the past. A future interest based on an enactment is not vested but rather is contingent while the person in whom, or the event upon which, it is limited to take effect remains uncertain. If a claimant's right accrues and vests without him or her prevailing in court, it would qualify as a vested interest regardless of the date of commencement of the suit. Taken a step further, a claimant would "own" the property in question without ever filing a suit. However, as in the instant case, where a claimant's right accrues and vests only upon him or her prevailing in court, then at the date of commencement of the suit, the claimant has no vested interest beyond the cause of action, and only acquires a vested interest in the outcome upon a determination in his or her favour. Any new or further steps needed to be taken under the Act, could therefore not be taken except in accordance with the amendment.

v. <u>There is no vested right in the process of litigation; the right vests upon the award.</u>

Since vesting is the process of gaining full legal rights to something, statutory contingent interests subject to litigation should not be construed as vested rights by the courts. While a cause of action is a vested property right which may not be impaired by legislation such that the repeal or amendment of a statute should not be construed to affect existing causes of action, yet save for vested rights, all statutory remedies are pursued with the full realisation that the Legislature may at any time abolish or modify the right to recover. It is a rule of almost universal application, that, where a right is created solely by a statute, and is dependent upon the statute alone, and such right

is still inchoate, and not reduced to possession, or perfected by final judgment, the amendment of the statute affects the remedy, unless the amending statute contains a saving clause. The filing of a suit vests in a party no right to a particular decision; and his or her case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered.

The successful litigant earns a right to a present or future payment, asset, or benefit only upon the final outcome of the litigation. In such cases, a statute in effect when a case is decided should not be ignored in favour a pre-adjudication statute. Moreover, retroactive effect confined to short and limited periods is typically given to provisions that are meant to shut down egregious tax loopholes. In such situations, backdated implementation is often important to ensure that taxable persons do not take advantage of the lengthy legislative process to rush through transactions exploiting the loopholes they know they are about to lose. Unless the taxation is so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property, backdated implementation supported by a legitimate legislative purpose furthered by rational means, will not be a violation of any vested rights.

In my judgment, the intention of the Legislature in enacting section 44 (5) of *The Value Added Tax Act* is plain; it was intended to cap the maximum interest recoverable on a refundable tax credit at the value of taxable person's refundable tax credit that exceeds tax liability. Interest may be awarded only to the extent permitted in the taxing statute. At the time the amendment came into force, establishment of the respondent's right to a refund was contingent upon the court finding in its favour, therefore only a contingent interest was held prior to the decision. The final relief necessary for a vested right occurs when the award is final and any appeals have been concluded by a final judgment. Therefore the respondent's right to a refund was not vested because it had not been reduced to a final judgment before the amendment to section 44 of *The Value Added Tax Act*. Until judgment is entered and the appellate process or other proceedings are completed, the matter is not final, and there is no vested right.

The decision vesting the right to interest on the principal tax refund was delivered on 20th August, 2019. For assessments that had not yet closed at the time the applicable legislation was enacted, the statute operates with respect to a status that arose after the passing of the statute. Where the

legislature has conferred a remedy and withdraws it by amendment or repeal of the remedial statute, the new statutory scheme may be applied to pending suits without triggering retrospectivity concerns. Only in those cases in which the decision on the refund was final before the amendment would the parties be able to enforce the award, for which reason a subsequent amendment would not operate to prejudice that vested right.

On the other hand, when a remedial statute is amended or repealed before a final judgment is entered in the pending suit, the court will apply the law in force at the time of the decision. Although the suit was filed on 28th January, 2015 the decision on the refund was not made until 20th August, 2019. The right to a refund involved was inchoate until then and it can therefore be said that the amendment of the law is not being applied retrospectively. Having considered the statutory purpose and context of the amendment and since provisions which affect existing rights prospectively are not retrospective, the presumption against retrospectivity does not apply to this case. By the time the respondent's claim crystallised by the judgment of 20th August, 2019, section 44 (5), of *The Value Added Tax Act,* which came into force on 1st July, 2018, was the law applicable and it affected that decision prospectively.

Therefore when in his judgment the trial Judge stated that interest was recoverable "until payment in full," this meant that the decree would be and was satisfied when the payment of an amount, not exceeding the principal tax, was paid as accumulated interest, and this occurred on 6th November, 2019. It follows that when the learned Deputy Registrar issued a Garnishee Order Nisi on 3rd February, 2021 attaching funds on the appellant's bank accounts in satisfaction of the decree, the order was made in error since the decree had been fully satisfied over a year previously, save for the taxed costs which were paid subsequent to the lifting of the lock-down. For the forgoing reasons, the appeal succeeds. Consequently the Garnishee Order Nisi issued on 3rd February, 2021 is hereby set aside. The costs of the appeal and of the proceedings before the Deputy Registrar are awarded to the appellant.

Dated at Kampala this 22nd day of April, 2021

……..
Stephen Mubiru
Judge,
22nd April, 2021.