**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA**

**COMMERCIAL DIVISION**

Reportable
Civil Appeal No. 0030 OF 2021

In the matter between

**UGANDA REVENUE AUTHORITY** **APPELLANT**

**And**

**WHISTLEBLOWER (REF. TID 170819150)** **RESPONDENT**

**Heard: 28 March, 2022**
**Delivered: 16 January, 2024**

***Tax Appeals —*** *Retrospective application of statute — where the right to recover or to insist on enforcing that which is to cause loss to another, is contingent and comes wholly from the statute, it must necessarily cease to exist the moment the statute is repealed. — The repeal of the statute takes away the foundation of the right. — It being a mere statutory right not yet enforced, it cannot have force or vitality beyond that of the statute itself.*

***Whistle-blower Rewards —*** *Are considered to be a species of contract, specifically a unilateral contract and in a unilateral contract, acceptance is achieved by completing the specified task or performance outlined in the offer.*

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**JUDGMENT**

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**STEPHEN MUBIRU, J.**

Introduction:

[1] During or around December, 2017 the respondent provided information to the appellant that led to the recovery of shs, 2,200,000,000/= out of the established tax obligation of shs. 4,408,865,821/= from M/s Royal Van Zanten Uganda Limited. Consequently, the respondent was on 4th August, 2020 paid shs. 118,624,679/= being 5% of the recovered amount in tax. The respondent received the amount but protested contending that it should have been 10% which was the rate applicable at the time he provided the information. The appellant instead contended that the applicable rate is that in force at the time of payment rather than at the time of provision of the information. Being dissatisfied with that position, the respondent filed an application before the Tax Appeals Tribunal.

The ruling of the Tax Appeals Tribunal;

[2] In its ruling delivered on 22nd April, 2021 the Tax Appeals Tribunal decided that by virtue of section 8 of *The Finance Act*, the informer's right to the reward accrues at the time the information is provided but not at the time of recovery of the tax. The Tribunal therefore found that the respondent was entitled to a payment representing 10% of the amount recovered in tax, hence a sum of shs. 118,642,679/= and awarded interest thereupon at the rate of 24% per annum from the date of the ruling until payment in full, and the costs of the application. The appellant field a notice of appeal on 21st May, 2021.

The grounds of appeal.

[3] Being dissatisfied with the decision, the appellant appealed to this Court on the following grounds, namely;

1. The honourable members of the Tax Appeals Tribunal erred in law in holding that an informer's right to a reward under the repealed section 8 of The Finance Act is created immediately upon provision of information and not at the time the tax is recovered, pursuant to the information provided, whereas not.

2. The honourable members of the Tax Appeals Tribunal erred in law in holding that section 74A of The Tax Procedure Code (Amendment) Act, 2019 does not apply to information given by an informer before the Act became effective, whereas not.
3. The honourable members of the Tax Appeals Tribunal erred in law in holding that the respondent is entitled to a reward of 10% of the taxes recovered pursuant to the information provided to the appellant.
4. The honourable members of the Tax Appeals Tribunal erred in law in awarding the respondent interest of 24% which was excessive in the circumstances, and without basis.

Submissions of Counsel for the appellant;

[4] Counsel for the appellant submitted that section 8 of *The Finance Act, 2014* was repealed by section 74A of *The Tax Procedure Code (Amendment) Act,* 2019. Whereas the former fixed the rate at 10% the, latter reduced it to 5%. The applicable rate is the one ion force at the time the tax recovery is made, not the one in force at the time the information is provided. The informer has no casus of action until the recovery is made. In *John Musisi alias Joseph Musiitwa v. Commissioner General, Uganda Revenue Authority, H. C. Civil Suit No. 72 of 2005* it was decided that the reward is for information for tax that is "recovered" not for tax that is "discovered as due." It was also decided in *Matagala Vincent v. Uganda Revenue Authority, H. C. Civil Suit No. 274 of 2008* that there should be evidence provided that the information provided led to the tax recovered. The process begins with the provision of information which culminates in the recovery of tax. The principle of retrospective application of legislation does not apply since at the time of the amendment no right to payment had accrued in favour of the respondent. Where there is no agreement between the parties as to interest, the Tribunal is required to exercise its discretion to award interest judicially. To award interest at the rate of 24% per annum without explaining why, the Tribunal did not exercise

its discretion judicially. If any inters were to be awarded, it should have been at the court rate.

Submissions of Counsel for the respondent;

[5] Counsel for respondent, argued that section 8 of *The Finance Act, 2014* mandated the respondent to pay 10% of the principal duty recovered as a result of information provided by an informer. The respondent supplied information that led to the recovery of shs. 2,200,000,000/= in tax. *The Tax Procedure Code (Amendment) Act, 2019* came into force on 1st July, 2019 yet the information was provided during the year 2017. Section 74A of the latter Act reduced the rate to 5% of the tax recovered. The respondent had fully discharged his obligation in the year 2017, when he provided the information at the risk of his own personal safety. According to section 13 of *The Interpretation Act*, repeal of a statute does not affect any right, privilege, obligation or liability acquired, accrued, or incurred under the enactment so repealed. The Tax Appeals Tribunal was persuaded by the decision in *Pioneer Association Limited v. Ziwa [1974] EA 161* in the interpretation of that provision. The respondent's right accrued before the amendment and therefore it was not affected by the amendment. It was a contingent right dependent on recovery. Although the tax was eventually recovered during the year 2020 after that amendment, the respondent's right had accrued much earlier. Section 74A of *The Tax Procedure Code (Amendment) Act, 2019* cannot be given retrospective effect. In providing the information he did, the respondent acquired a property right of which he could not be deprived by subsequent legislation. The Tribunal was justified in awarding interest considering the inconvenience suffered by the respondent.

The decision;

[6] The appeal raises issues of the retrospective application of statute to events that commenced before the amendment but concluded after. It is the duty of this Court, as the first appellate court to re-hear the case by subjecting the evidence

presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236*). In a case of conflicting evidence this court has to make due allowance for the fact that it neither saw nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*). It may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness, or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that she clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

i. Preliminaries.

[7] Under section 74 (2) of *The Tax Appeal Tribunal Act*, an appeal may be made to this Court from decisions of the Tax Appeals Tribunal on questions of law only. Appeals on questions of fact are precluded. In appellate proceedings on questions of law, this Court determines whether the law has been properly applied to a case, rather than whether the facts support one outcome or another. This Court may determine the question of law arising, confirm, vary or set aside the decision of the Tribunal or remit the matter to the Tribunal for reconsideration.

[8] Questions of law can be difficult to distinguish from questions of fact or mixed questions of law and fact. Put briefly, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. The dominant view amongst legal theorists is that the law/fact distinction tracks or maps on to the distinction between normative and empirical questions. On this view, normative questions, i.e.

questions concerning what ought to happen or how persons ought to behave, are necessarily legal; while all and only empirical questions, i.e. those concerning (roughly) what happened in the world, are factual. Questions of fact are empirical or historical questions concerning who did what, where, when, how, why, with what intent or motive, while questions of law are normative questions involving the establishment, disestablishment, modification, or interpretation of legal rules. However, if a type of normative question is more likely to be convention-independent, i.e., if it is more likely to implicate fundamental moral norms, then it is reasonably classified as a question of fact. On the other hand, types of normative questions that are likely to be essentially convention-dependent are ordinarily classified as legal. Conventions can be understood as social practices, roughly "what we do around here" or what norm we actually follow; there are business conventions, conventions of legislators and judges, and conventions of various other sorts.

[9] In the instant case, the question whether or not section 74 (2) of *The Tax Appeal Tribunal Act,* should or should not be given retrospective effect, is a normative question that is essentially convention-dependent, and therefore properly classified as a question of law; it involves the interpretation of legal norms using well established rules of statutory interpretation.

ii. Non retrospectivity applies only to vested rights.

[10] Every Statute, it has been said, which takes away or impairs vested rights acquired under existing law, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect (see *Re, Pulborough Parish School Board Election, Bourke v. Nutt (1894) 1 Q.B. 725; Secretary of State for Social Security v. Tunnicliffe [1991] 2 A.E.R. 712 at 724 per.* Staughton L.; *L'Office Cherifen v. Ymashita-Shinnihon Steamship Company Limited [1994] 1 A.C. 486 at 574G – 528C* per. Lord Mustill*; Mahbub Alam and Others v. Secretary for State for*

*the Home Department [2012] E.W.C.A. Civ. 960*, para. 33, per. Sullivan L.J.; *Hamilton v. Hamilton [1982] I.R. 466;* and, *Wilson v. secretary of State for Trade and Industry [2003] U.K.H.L. 40*, per. Lord Nicholls of Birkenhead, paras. 19 and 20 and Lord Rodger of Earlsferry, paras. 198 to 201).

[11] The above common law position is also reflected in section 13 (2) (c) of *The Interpretation Act,* which provides that where any Act repeals any other enactment, then unless the contrary intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. Retrospective operation should not be given to an amending 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."

[12] 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*). The presumption is against legislative retrospective interference with vested rights. The word vested denotes; "fixed;" "accrued;" "settled;" "absolute;" "complete;" or "subject to no contingency." Thus, "vested right" is an absolute, complete and unconditional to the exercise of which no obstacle exists and which is immediate and perfect in itself and not dependent on any contingency (see *State v. Hackman, 199 S. W. 991 (Mo. 1917*). It is a full, unalterable, irrevocable and completed right without any reservation or qualification.

[13] The salient features of vested interest include: – (i) an immediate right that 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. 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.

[14] 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.

[15] 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.

[16] It follows therefore that where the right to recover or to insist on enforcing that which is to cause loss to another, is contingent and comes wholly from the statute, it must necessarily cease to exist the moment the statute is repealed. The result is inevitable, since such a right is not property, and the right to it is not in the nature of a contract, the power to take it away is not inhibited by any provision of The Constitution, the legislative power of repeal is unquestionable; the repeal of the statute takes away the foundation of the right. It being a mere statutory right not yet enforced, it cannot have force or vitality beyond that of the statute itself.

iii. Whether before the amendment came into force, the respondent had a vested right as opposed to a vested interest to the payment of 10% of the principal tax to be recovered.

[17] A legal right to sue is a chose in action: it is a property right. Choses in action comprise all personal rights of property which cannot be taken by possession of a physical object. When factual events satisfy the elements of the substantive law, i.e. its “essential ingredients” that have to be proved in order to obtain relief, one is said to have a legal right to sue for a remedy. Where a right of action results from a statutory provision, and has once become fixed and vested, it should be considered inviolable on account of non-retrospectivity, in the absence of a clear provision in the amending statute, to the contrary.

[18] There is 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 they become enforceable by Courts. Such contractual relationships and understandings concerning property remain interests if they are 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. Retroactive legislation could destroy expectancies but not vested rights.

[19] The whistle-blower bounty scheme that pays individuals a cash "bounty" for surfacing information about illegal conduct in tax matters is regulated by statute. Section 8 of *The Finance Act, No. 10 of 2014* provided as follows;

> 8. Payment to informers;
> The Commissioner General shall pay to a person who provides information leading to the recovery of a tax or duty, the equivalent of ten percent (10%) of the principal tax or duty recovered.

[20] A basic rational choice perspective of schemes of this nature is that whistle-blowers gamble the personal and professional cost of reporting misconduct against potential pay-outs. Where rewards are too low or uncertain or retaliation protections too anaemic, the system will not generate enough tips. On the other hand, providing too many incentives or protections, risks of false accusations fabricated information, and overloading the system. It was partly for achieving a proper balance that the above provision was amended by section 74A of *The Tax Procedures Code (Amendment) Act, 2019* which came into force on 1st July, 2019 providing as follows;

> 74A. Payment of informers;
> The Commissioner General shall pay to a person who provides information leading to the recovery of a tax or duty, the equivalent of five percent (5%) of the principal tax or duty recovered.

[21] Clearly from the provision before and after the amendment, the bounty is in the nature of a derivative pay-out, i.e. a cash award separate from any compensable harm the individual may have suffered. It provides cash for information by guaranteeing a whistle-blower an automatic reward at a pre-determined rate of any monetary tax recoveries made consequent to that information. It is contingent in nature in that it pegs the percentage payable to "the principal tax or duty recovered," meaning that the whistle-blower is not entitled to any payment if the information supplied does not lead to any recovery of tax or duty.

[22] Rewards are considered to be a species of contract, specifically a unilateral contract. Most contracts are bilateral contracts in that the contracting parties each exchange a promise for a promise. In a unilateral contract one party offers a promise to anyone who accepts the contract by doing something specified in the contract (i.e. acceptance by performance). The whistle-blower regime under section 74A of *The Tax Procedures Code (Amendment) Act, 2019* is a unilateral contract, the terms of which are stated therein, and anyone who fulfils those terms can claim the stated reward. Acceptance of a unilateral offer of this sort is only possible through performance. Since a unilateral contract is not formed until the offer is accepted by the required performance, that performance must be done by someone who is aware of the offer.

[23] It is noteworthy that the potential informant's expected bounty payment may be the single most important factor in ensuring optimal disclosures, thus drawing sympathy for the argument that performance of the whistle-blower stops with provision of the information. This is because if the amount is too low, few informants will risk their careers and even their own lives to "do the right thing." If bounties are low, informants might only offer information about low-level crimes. Yet on the other hand if bounties are high, every potential informant with a crumb of information might crawl out of the woodwork hoping to hit the bounty jackpot. The administrative cost of wading through such a tide of applications might very well exceed the benefit gained from enticing a few risk-averse informants with

excellent information on high-level crimes. Therefore, the fact that a person furnishes information to the appellant and is subsequently denied a reward is no basis for an enforceable claim; the basis of an enforceable claim only arises once there is proof that as a result of the information so provided, a specified amount of "principal tax or duty [was] recovered." Hence, performance of the unilateral contract created by under section 74A of The *Tax Procedures Code (Amendment) Act, 2019* is not achieved until some specified amount of principal tax or duty is recovered by the appellant, on basis of the information provided by the claimant whistle-blower.

[24] Alternatively, one could argue, as the respondent seems to suggest, that in those cases where it is on basis of the information provided by the claimant whistle-blower that some specified amount of principal tax or duty is recovered in the future, the whistle-blower's performance of the unilateral contract should relate back to the date when such information was provided. However, this argument runs counter to the concept of vested rights. Just like a cause of action which crystallises only when every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court, a "vested interest" converts into a "vested right" only when it becomes fixed and established, and is no longer open to doubt or controversy. That doubt cannot be cleared retrospectively. It follows therefore that at the time of enactment of section 74A of *The Tax Procedures Code (Amendment) Act, 2019* the respondent had not acquired any vested right that was unlawfully taken away by that amendment.

iv. Whether the Tax Appeals Tribunal came to the correct conclusion;

[25] In its ruling, the Tax Appeals Tribunal relied on the decision in *Pioneer Association Limited v. Ziwa [1974] EA 161*, a case in which the right of action had accrued at the time of amendment of the relevant legislation, but the determination of the insurer's liability was dependent upon judgment being entered against the insured and the Court found that the amendment of the statute that took away a third

party's right of action against the insurance company did not affect the claim. With dew respect, the Tribunal misdirected itself regarding the applicability of the *ratio dicidendi* of that case to the facts of the claim before it.

[26] In that case, every fact which it would be necessary for the respondent to prove, if traversed, in order to support his right to the judgment of the court, occurred on the date of the accident such that the respondent had a right of action against the appellant by the time of the repeal, which could not and was not affected by the subsequent repeal of the Act. In short, the respondent's cause of action had crystallised by the time of the repeal and the appellant's liability had arisen on the date of the accident, before repeal of the provision which granted a right of relief against the insurer. In the instant case, the respondent's cause of action crystallised long after the amendment.

[27] Although the Tribunal correctly observed that the whistle-blower's claim is contingent upon recovery of tax, it misdirected itself when it related back the respondent's right to claim for a reward to the date the tax recovered fell due, arguing that there can be no recovery unless there is tax due. The Tribunal clearly failed to distinguish between a vested interest and a vested right. Had the Tribunal properly directed itself, it would have found that the respondent in the instant case had no enforceable claim by the time *The Tax Procedures Code (Amendment) Act, 2019* was enacted and therefore had no vested right taken away by the amendment. The appellant was under an obligation to apply the law in force at the time the respondent's claim became enforceable, which was section 74A of *The Tax Procedures Code (Amendment) Act, 2019* and not section 8 of The Finance Act, 2014 which had been repealed. The Tribunal's decision is entirely erroneous.

[28] It is for those reasons that the appeal succeeds on all grounds and is accordingly allowed. Consequently, the ruling of the Tax Appeals Tribunal is hereby set aside and instead judgment entered for the appellant against the respondent dismissing

the claim. The costs of this appeal and of the proceedings before the Tribunal are awarded to the appellant.

Delivered electronically this 16th day of January, 2024 ……Stephen Mubiru……

Stephen Mubiru
Judge,
16th January, 2024.

Appearances

For the appellant : Legal Services and Board Affairs Department

For the respondent : M/s Elau & Ochom Advocates and Legal Consultants