THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 173 OF 2021

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

1. **SALIM ALIBHAI**
2. **MALEK BHALOO**
3. **AZIM VIRJEE**
4. **ABDUL SAMJI**
5. **WILMONT INTERNATIONAL LTD**
6. **RASUL SHARIFF**
7. **FIROZ SHARIFF**
8. **NOORDIN SHARIFF**
9. **CHRIS NUGENT**
10. **JEANAL LTD ::: APPLICANTS**

VERSUS

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

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by the Applicants by Notice of Motion under *Articles 28(1), 42, 44(c), 50(2) of the Constitution; Sections 36 and 38 of the Judicature Act; Rules 3 & 6 of the Judicature (Judicial Review) Rules, 2009 and Rule 3A of the Judicature (Judicial Review) (Amendment) Rules 2019*. The application seeks for the following orders and declarations:

a) An order of Certiorari issues against the Respondent quashing the decision to revoke the Private Ruling Ref: URA/DTD/BP06/1000026502 dated 9th March 2018 (hereinafter referred to as **"the Private Ruling"**) vide Letter Ref: URA/CG/8.0 dated 6th May, 2021 (hereinafter referred to

as the **"Revocation Decision"**) plus all actions arising there from, to wit, issuance of all assessments and enforcement actions taken in respect of the sale of shares by the Applicants to Kansai Plascon EA Proprietary Ltd (hereinafter referred to as **"KPEAPL"**).

b) An order of Prohibition prohibiting the Respondent, its agents and officials from enforcing the impugned Revocation Decision and any other actions affecting the rights and/or interests of the Applicants arising there from, and/or from other enforcement measures levied by the Respondent against the Applicants vide court proceedings in the Tax Appeals Tribunal (hereinafter referred to as **"TAT"**) and other for a to which the Applicants are not party.

c) An order of **Certiorari** quashing the Respondent's null and void **Notice of Direction** dated 8th of September 2020 directing the Commissioner of Lands registration to register the Respondent's interest in Ashbury Investments Limited's leasehold registered in Volume 345 Folio 21 as security for the Capital Gains Tax claimed from the Applicants herein, based on the Respondent's initial revocation decision dated 22nd April 2020, which revocation decision was subsequently quashed by the High Court on 17th August 2020.

d) A Permanent Injunction restraining the Respondent, its agents, servants and officers from taking any steps that are in contravention of the said Private Ruling or doing anything that is in furtherance of the impugned Revocation Decision.

e) An order of **Certiorari** quashing the **Temporary Injunction** obtained by the Respondent in Miscellaneous Application No. 117 of 2020, purporting to prohibit the payment of the contractual sums due to the Applicants herein from Kansai Plascon Uganda Limited (hereinafter referred to as **"KPUL"**) and their related companies, on account of the Capital Gains Tax purportedly claimed by the Respondent as against the Applicants.

f) An order of **Prohibition** issues prohibiting the Respondent, its agents and officers from taking any steps against any or all of the Applicants

herein in violation of the Respondent's own **Private Ruling** on account the impugned **Revocation Decision**.

g) A declaration that the Respondent's decision to revoke the Private Ruling and all actions arising there from lack any merit, are unfair, illegal, biased, unreasonable, unenforceable, irrational, null and void, and of no legal effect.

h) A declaration that any steps and/or actions taken by the Respondent, including the Notice of Direction dated 8th September 2020, any injunction and similar orders obtained by the Respondent in contemplation of, and/or in furtherance of the revocation of the Private Ruling, are contemptuous, illegal, irregular, un-procedural and to that extent void ab initio.

i) A declaration that the Respondent having issued the Private Ruling on 9th March 2018 in compliance with the Income Tax Act, confirming that the sale of shares by the Applicants to **KPEAPL** is not subject to tax in Uganda as it did not give rise to income sourced in Uganda under Section 79(g) of the Income Tax Act, is bound by the said Private Ruling and any attempt to revoke the said Private Ruling offends the principle of legitimate expectation and should be quashed.

j) A declaration that any proceedings and/or decisions made by the Tax Appeals Tribunal arising out of the Respondent's decision to revoke the Private Ruling, whether made prior to the Revocation Decision dated 6th May 2021 or afterwards are illegal and should be quashed.

k) A declaration that the Respondent's Revocation Decision purporting to revoke the Private Ruling for the second time is unfair, unlawful, illegal, biased, unreasonable and irrational.

l) An order for payment of the costs of the application.

[2] The application is supported by two affidavits, one deposed by **Azim Virjee** (the 3rd Applicant) on behalf of himself and of the other Applicants and the second by **Chris Nugent** deposed on behalf of himself and for the 10th

Applicant. The Notice of Motion and the said affidavits set out the grounds of the application in detail. The averments in the said affidavits also lay out in considerable detail the background to the matter before this Court. For brevity, I will first lay down the background to this application before I point out the grounds of the application.

Background to the Application

[3] In or about the year 2016, Kansai Plascon East Africa (Propriety) Ltd (**KPEAPL**), a company incorporated and registered in accordance with the laws of Mauritius, sought to acquire shares from the respective Shareholders of Sadolin Paints Uganda Ltd, among other Sadolin Group of Companies. At the material time, the shareholding of Sadolin Paints Uganda Ltd comprised of Shalvik Investments Ltd with 85% and Jeanal Ltd with 15%. Shalvik Investments Ltd was a company owned by the 1st to the 8th Applicants herein. As such, on 7th February 2017, **KPEAPL** entered into a Share Purchase Agreement with the 1st to 8th Applicants herein for purchase of 100% shares they respectively held in Shalvik Investments Ltd, a company incorporated and registered in the Island of Guernsey, with no office, operations or representation in Uganda. The Shareholders (the 1st to 8th Applicants) were also all resident outside Uganda. Simultaneously, on the same date, 7th February 2017, **KPEAPL** entered into another Purchase of Shares Agreement whereby it undertook to acquire the 15% shares that Jeanal Ltd held in Sadolin Paints Uganda Ltd. The purchase was to be in two tranches of 7.5% under agreed timelines. Jeanal Ltd is a company also incorporated and registered in the Island of Guernsey with no office, operations or representation in Uganda. The 9th Applicant is a Shareholder in Jeanal Ltd. Sadolin Paints Uganda Ltd later changed its name to Kansai Plascon Uganda Ltd (**KPUL**).

[4] On 17th October 2017, the selling Shareholders (the Applicants) through Kansai Plascon Uganda Ltd instructed their Tax Advisor, RSM (Eastern Africa) Consulting Ltd, to apply for a Private Ruling from the Respondent in respect of

the disposal of 100% shares in Shalvik Investments Ltd by the 1st to 8th Applicants herein and of the 15% shares by Jeanal Ltd to **KPEAPL**. An application to that effect was duly filed. On 9th March 2018, the Respondent responded allowing to issue a Private Ruling confirming that the above said sale of shares did not give rise to income sourced in Uganda under the Income Tax Act and was therefore not taxable in Uganda. Based on the said Private Ruling, the Applicants proceeded with the subject transaction.

[5] The Applicants claim that on 12th December 2019, over two years after the transaction was completed and the proceeds distributed, the Respondent wrote a demand letter to the Applicants demanding payment of tax and interest on late payment on account of alleged income sourced upon disposal of shares subject of Purchase of Shares Agreements referred to above. On 22nd April 2020, the Respondent wrote a letter notifying Kansai Plascon Uganda Ltd (**KPUL**) of the revocation of the Private Ruling. On 23rd April 2020, the Respondent affirmed the demand for tax on the said transaction. On 4th May 2020, the Respondent issued assessments against each of the Applicants arising out of the revoked Private Ruling. The Applicants objected to the assessment. On 19th June 2020, the Applicants filed an application for judicial review in the High Court Civil Division vide M.C No. 123 of 2020 challenging the revocation of the Private Ruling and seeking orders of Certiorari to quash the said revocation decision. On 17th August 2020, the High Court delivered a Ruling allowing the application for judicial review and quashing the decision of the Respondent revoking the Private Ruling.

[6] Upon receiving the Ruling of the High Court above mentioned, the Respondent lodged a Notice of Appeal indicating that they were aggrieved and dissatisfied with the Ruling and Orders of the Trial Judge and intended to appeal to the Court of Appeal. The Respondent also applied for a record of proceedings to enable them formulate the grounds of appeal. A number of correspondences were exchanged between the Respondent and the Applicants

through their lawyers which culminated into the Respondent issuing a Notice to Show Cause why the Private Ruling should not be cancelled for the second time. The Notice was dated 16th March 2021. On 18th March 2021, the Applicants through their lawyers sought further and better particulars on one of the grounds disclosed in the Notice to Show Cause. The Respondent responded to this request by letter dated 23rd March 2021. The Applicants had been required by the Respondent to reply to the Notice to Show Cause by 22nd March 2021, which they did through their lawyers. On 24th March 2021, the Respondent held a hearing which was followed with a decision revoking the Private Ruling on 6th May 2021. On 17th May 2021, the Respondent issued tax assessments against each of the Applicants arising out of the decision revoking the Private Ruling. The Applicants thus brought the present application for judicial review claiming that the Revocation Decision dated 6th May 2021 is unlawful, irregular, improper, unreasonable and reached in breach of the rules of natural justice. The Respondent wholly opposes the application.

Grounds in Support of the Application

[7] It was stated by the Applicants that without regard to the Ruling of the High Court in M.C No. 123 of 2020, on 8th September 2020, the Respondent issued a Notice of Direction to the Commissioner Land Registration directing him to register the Respondent's interest in the property comprised on Leasehold Register Volume 345 Folio 21 Plots No. 10 and 12 Second Street, Kampala in the name of Ashbury Investments Ltd, a company owned by the 1st to 9th Applicants as security for an existing tax liability. Similarly, without regard to the above said court Ruling and without prosecuting the appeal or taking additional essential steps with regard to the appeal, the Respondent on 28th August 2020, made an application to the Tax Appeals Tribunal (**TAT**) seeking orders including a temporary injunction order which was granted restraining Kansai Plascon Uganda Ltd (**KPUL**) from paying out monies held by the company to any of its former shareholders following the sale of shares.

[8] The Applicants further stated that having taken adverse steps against the Applicants that were directly contemptuous of the Ruling of the High Court, the Respondent sent a Notice to Show Cause why the Private Ruling should not be revoked and proceeded to revoke the said Private Ruling unlawfully, unfairly and unreasonably, in circumstances that clearly show that the Respondent had already pre-determined the matter and was biased and partial in its determination. The Respondent also took into account extraneous and irrelevant matters so as to unfairly justify its wrong actions. The Respondent has, therefore, not treated the Applicants justly and fairly, not complied with the principles of natural justice and has failed to exercise its powers judiciously and reasonably.

Grounds in Opposition of the Application

[9] The Respondent opposed the application through an affidavit in reply deposed by **Robert Luvuuma**, the Manager International Tax and Transfer Pricing, in the Domestic Taxes Department of the Respondent. He stated that the Respondent intended to raise a number of preliminary objections with a prayer for dismissal of the application with costs. He further stated that the prayers by the Applicants seek to deter the Respondent from performing its statutory duties of tax collection and the same ought to be rejected.

[10] The deponent further stated that the Respondent complied with the decision of Justice Musa Ssekaana in High Court M.C No. 123 of 2020 by providing the Applicants a fair hearing before revocation of the Private Ruling and the revocation of the Private Ruling dated 6th May 2021 was fair, lawful, unbiased, reasonable and rational in accordance with the law. He further stated that in issuing the Notice of Direction to the Commissioner Land Registration dated 8th September 2020, the Respondent was exercising its statutory powers provided under Section 34 of the Tax Procedure Code Act, 2014 (hereinafter referred to as the **"TPCA"**). It was also stated that the

Applicants were not party to the proceedings in M.A No. 117 of 2020 (in the TAT leading to the issuance of an order of a temporary injunction) and have no locus to challenge the same. The Applicants did not apply to be joined to the said proceedings which right they had under the law.

[11] The deponent further stated that the Respondent issued tax assessments basing on the share sale transaction by the Applicants and not on the revoked Private Ruling in issue. The revocation of the Private Ruling followed the process of a fair hearing as guided by the decision of the High Court in M.C No. 123 of 2020. The revocation of the Private ruling was occasioned by a review of the tax affairs of Kansai Plascon Uganda Ltd (**KPUL**) for the period 2012 to 2017 when the company was under the management of Sadolin Paints Uganda Ltd. Upon conclusion of the review, the Respondent found out that the Applicants and the then Sadolin Paints Uganda Ltd had been engaged in tax evasion schemes for the said period 2012 to 2017. The Respondent obtained relevant information, reviewed and established that contrary to its Private Ruling which was based on insufficient and incorrect information availed to it by the Applicants and Sadolin Paints Uganda Ltd, the Applicants had derived gains from their share disposals which were actually taxable under the law. This is what led to revocation of the Private Ruling for the first time.

[12] When the first revocation decision was quashed by the High Court, the Respondent was initially aggrieved with the decision and filed a notice of appeal but did not apply for stay of execution of the orders. It was later decided by the Respondent's Management not to pursue the appeal and no memorandum of appeal was lodged. The Respondent accepted to respect the decision and orders of the High Court; in compliance with which, the Respondent commenced the process of giving the Applicants a hearing on whether or not to revoke the Private Ruling through issuance of a Notice to show Cause. The Respondent conducted a hearing and rendered its decision on 6th May 2021 revoking the

Private Ruling dated 9th March 2018. The Respondent avers that the revocation of the Private Ruling was done in accordance with the law.

[13] The Respondent further stated that having revoked the Private Ruling, the share disposal by the Applicants became taxable. The Respondent accordingly issued assessments to which the Applicants have a right to object. The Respondent does not intend to recover the tax before completion of the objection procedure. The Applicants have not taken benefit of the available statutory remedies which would lead to resolution of the matter by the Tax Appeals Tribunal (TAT) which is the only forum of first instance in the tax dispute resolution, which this case is. The Respondent averred that the Applicants wish to use the High Court process of judicial review to frustrate the due and merit based determination of the tax dispute. The present application is therefore baseless, an abuse of court process and the same ought to be dismissed with costs in the interest of justice.

Other Affidavits

[14] The Respondent filed a Supplementary Affidavit in Reply deposed by the same deponent (**Robert Luvuuma**) on 9th July 2021. The Applicants filed an affidavit in rejoinder deposed by **Azim Virjee** on the 12th July 2021 and an affidavit in rejoinder to the Respondent's supplementary affidavit in reply filed on 26th July 2021 deposed by **Rebecca Nambi**. Counsel for the Respondent by letter dated 3rd August 2021 complained that the Applicants' affidavit in rejoinder was not served upon the Respondent within time as directed by the Court and was only served on 30th July 2021 after the Respondent had filed their submissions in reply; which they contended was prejudicial to the Respondent's case. Counsel further complained that the affidavit in rejoinder to the Respondent's supplementary affidavit deposed by Rebecca Nambi had discrepancies between the date of deposition and the date of filing. Since these matters were not taken into submissions and the Applicants' Counsel had no opportunity to respond to them, I am unable to make a determination on them.

I will take these affidavits as filed and only rely on them in as far as they do not prejudice the interests of justice and of the other party.

Representation and Hearing

[15] At the hearing, the Applicants were represented by Mr. Tusingwire Ronald while the Respondent was represented by Mr. Kalungi Tonny. It was agreed that the hearing proceeds by way of written submissions which were duly filed. I have reviewed the respective submissions and the dearth of authorities supplied by Counsel; and I have given them ample consideration in the course of resolution of the issues that are before the Court for determination.

Issues for Determination by the Court

[16] Counsel for the Respondent raised five preliminary points of objection which were framed into issues as follows:

1. Whether this Court lacks original jurisdiction to entertain this Application?

2. Whether the Application is out of time in respect Orders 3 and 8 challenging a Notice of Direction dated 8th September, 2020 and Order 5 challenging a temporary injunction order dated the 11th of September, 2020 issued by the Tax Appeals Tribunal (TAT) in Miscellaneous Application No. 117 of 2020?

3. Whether the Applicants have locus standi to challenge the Notice of Direction and the temporary injunction order?

4. Whether the application is premature for failure by the Applicants to exhaust existing remedies under the law?

5. Whether the application is an abuse of the court process?

[17] Two issues were agreed upon for determination by the Court on the merits of the application, namely:

1. Whether the decision communicated on 6th May, 2021 revoking the Private Ruling dated 9th March, 2018 is tainted with illegality, bias,

irrationality, unreasonableness, unfairness, and procedural impropriety?

2. Whether the Applicants are entitled to the remedies sought in the Application?

[18] I will first deal with the issues on the preliminary points of objection and, in case they do not dispose of the matter before the court, I will proceed to consider the issues on the merits. It is noteworthy that Counsel for the Applicants initiated the submissions on the objections making a response to the same as raised in the pleadings. The correct procedure ought to have been that the Applicants' Counsel awaits the objections to be formally raised in the Respondent's submissions and then the Applicants would respond to the objections in their submissions in rejoinder. What this occasioned was that the Applicants' Counsel had to file another reply after being served with the Respondent's submissions. This was unconventional and an un necessary multiplicity of proceedings. Be that as it may, I will consider both submissions of the Applicants' Counsel as the response to the Respondent's submissions on the objections. I will then consider the second submissions of the Respondent's Counsel as the rejoinder thereof.

Resolution by the Court

<u>Preliminary Issue 1:</u> Whether this Court lacks original jurisdiction to entertain this Application?

Submissions by Counsel for the Respondent

[19] It was submitted by Counsel for the Respondent that the application in substance challenges ***<u>a tax decision</u>*** of the Respondent. Counsel argued that the application is disguised as a judicial review application but its intention is chiefly to have this Court stop the Respondent from enforcing capital gains tax assessments issued against the Applicants. Counsel submitted that a tax decision is defined under Section 3 of the Tax Procedure Code Act, 2014

(**TPCA**). Counsel stated that from the Applicants' pleadings, paragraph 1 of the orders sought makes clear the intentions of the Applicants – they want the tax assessments quashed by the High Court, in a judicial review proceeding, so that it puts an end to the capital gains tax issue arising from their share disposals in a company situate in Uganda (Sadolin Paints (U) Ltd). Once entertained, Counsel argued, the Government of Uganda stands to be deprived of tax revenue, without the question of taxability of the Applicants' share disposals ever being judicially determined on merit, yet it is the duty of all citizens (and non-citizens liable to pay tax in Uganda) to pay tax, under Article 17 (g) of the Constitution of Uganda, 1995, and under the tax laws, unless expressly exempt.

[20] Counsel submitted that this Court is not clothed with jurisdiction to hear the matter, the *tax assessments* sought to be quashed being a tax decision which is only challengeable in the Tax Appeals Tribunal, a forum of first instance constitutionally and statutorily empowered and mandated to resolve all tax disputes in Uganda, with the High Court entertaining the matters from the Tribunal on appeal only, under Section 27 of the Tax Appeals Tribunals Act, Cap 345 (**the TAT Act**.) Counsel submitted that, by the authority of Article 152 (3) of the Constitution of Uganda, 1995, which empowered Parliament to make laws to establish the tax tribunal **for the purpose of settling tax disputes**, and by the authority of the Supreme Court in **Uganda Revenue Authority Vs. Rabbo Enterprises (U) Ltd and Mt. Elgon Hardwares Ltd, Civil Appeal No. 12 of 2004 (SCU)** wherein the Court unanimously held that *"the seizure of goods arose from **a tax assessment** of customs duty **and qualifies as a tax dispute**, **it follows that it is the Tax Appeals Tribunal that had original jurisdiction to handle the matter**"*; accordingly, the *assessment* in the present matter sought to be quashed in a judicial review proceedings, is ***a tax decision***, and only entertainable by the Tax Appeals Tribunal, which is clothed with jurisdiction to determine its propriety. The

tribunal is well suited to decide whether that assessment was properly issued or not, and in so doing the Tribunal would be required to resolve the issue of whether the share disposals by the Applicants are taxable or not, under the Income Tax Act.

[21] Counsel for the Respondent argued that the present judicial review application seeks to circumvent the pursuit of that course and the actual determination of the real tax dispute by the Tribunal, for certainty on the matter. This fact is deposed by Robert Luvuuma and has not been rebutted by the Applicants. Counsel argued that if the application is allowed, the Revenue administration and Government on the one side, and the Applicants on the other, would never get a judicial determination of whether the income/consideration derived from the Applicants' share disposal are taxable in Uganda. This is because, as authorities have held, judicial review does not delve into the merit of a dispute, and in this matter would not resolve issues about the tax assessment.

[22] Counsel further submitted that in regard to the challenge of the Respondent's revocation decision dated May 06, 2021, the critical question that arises is ***whether a decision revoking a private ruling is 'a tax decision' or not***. Counsel submitted that if it is a tax decision, then a tax dispute springs therefrom and thus not amenable to judicial review but challengeable by way of review before the Tax Appeals Tribunal. Counsel invited the Court to make a finding on this point, arguing that no higher Court has decided on this point and thus there is no binding decision on the matter. Counsel disagreed with the Applicants' reliance on the decision of the High Court in **Misc. Cause No. 123 of 2020: Salim Alibhai and 9 Others Vs. Uganda Revenue Authority** for the holding that revocation of a Private Ruling is not a tax decision. Counsel argued that the said decision followed the Court's reliance on Section 45 (9) of the Tax Procedure Code Act which provides that ***"A private Ruling is not a tax decision for the purposes of this Act."***

[23] Counsel submitted that the holding of the Court that since a private ruling is not a tax decision, then the decision to revoke it is not a tax decision is, with respect, not supported by Section 45 of the TPCA. Counsel submitted that before reaching the said decision, the Court did not give the entire enactment touching on the subject-matter a holistic treatment, contrary to the rules of statutory interpretation. The Court instead read into Section 45 what is not there. Counsel cited the decisions in ***Uganda Revenue Authority Vs. Siraje Hassan Kajura and Others, Civil Appeal No. 09 of 2015*** and ***Registered Trustees of Kampala Institute Vs. Departed Asians Property Custodian Board (DAPCB), SCCA No.21 of 1993*** for the holding that ***"it is a wrong thing to read into the Act of Parliament words which are not there and in the absence of a clear necessity"*** (Per Opio Ruby Aweri, JSC). Counsel also relied on the decisions in ***AG Vs. Bugishu Coffee Marketing Association Ltd [1963] EA 39*** and ***Cape Brandy Syndicate Vs. Inland Revenue Commissioners (1921) KB 64*** on the same subject.

[24] Counsel further submitted that since the TPCA is silent on whether revocation of a private ruling is also a tax decision, the court has to resort to the rules of statutory interpretation as cited above. Counsel argued that if the legislature wished that a decision to revoke a private ruling should not be a tax decision, it would have stated so in clear terms as it did with respect to the making of a private ruling. Counsel thus submitted that the decision revoking a private ruling comes within the meaning of a tax decision under Section 3 of the TPCA which does not expressly exclude it. Counsel prayed that the Court upholds the first preliminary point of law and dismisses the application, a tax dispute, for being in the wrong Court, under the guise of judicial review.

Submissions by Counsel for the Applicants

[25] For the Applicants, it was submitted that the application is challenging the process leading to the revocation of the Private Ruling dated 6th May, 2021 as

being unfair, unreasonable, biased, irrational, unlawful and illegal. The Respondent did not accord the Applicants a hearing on the grounds of revocation making the whole process ultra vires. Counsel submitted that the application is in line with the provisions under Article 42 of the Constitution and the Judicature (Judicial Review) Rules 2009 as amended in 2019. Counsel also relied on the decision in ***Miscellaneous Cause No. 123 of 2020: Salim Alibhai and 9 Others Vs. URA***, a case on similar facts, where it was held that;

"*The applicant is challenging the process of revocation of the private ruling made by the respondent and this is purely an administrative matter that is challengeable by way of judicial review.*"

[26] Relying on Section 45 (9) of the Tax Procedures Code Act which provides that a Private Ruling is not a tax decision for purposes of the Act, Counsel argued that it follows therefore that the revocation of the Private Ruling is also not a tax decision. The Application before court is dealing with the decision to revoke a Private Ruling which is an administrative decision and not a tax decision. Counsel submitted that the tax assessments issued to the Applicants were a result of an administrative decision revoking the private ruling and the relief sought by the Applicants against the tax assessment are consequential reliefs arising from the main prayer against the administrative decision to revoke the Private Ruling. Counsel asserted that this Court has powers to quash any actions arising from a decision made illegally, irrationally and in breach of principles of natural justice. The tax assessments arise from the illegal and irrational decision to revoke the private ruling and Court has powers to quash the same.

[27] Counsel further submitted that the silence by Section 45 of the TPCA on whether revocation of the Private Ruling is a tax decision or not creates an ambiguity. It is trite law that whenever there is any ambiguity in tax legislation, it should always be interpreted in favor of the tax payer. The ambiguity created by Section 45 should, therefore, be interpreted in favor of the Applicants who

are the tax payers. Counsel relied on ***Uganda Revenue Authority v. Uganda Taxi Operator and Drivers Association Civil Appeal No. 13 of 2015*** and **CIT v. Vegetable Production** cited in ***ATC Uganda Limited v KCCA Civil Suit No. 323 of 2020***. Counsel concluded that the matter is therefore properly before the Court and the Court has the original jurisdiction to entertain the same.

[28] Counsel for the Respondent made submissions in rejoinder on the preliminary objections which I need not summarize here but I have taken into consideration and will refer to them where appropriate and necessary.

Court Determination

[29] It is not in dispute that the jurisdiction to handle matters of judicial review lies with the High Court. It is also not in dispute that in matters regarding review of tax decisions, original jurisdiction lies with the Tax Appeals Tribunal. As such, the contention raised under this point of objection turns on whether revocation of a Private Ruling is or is not a tax decision.

[30] *Section 45 (1) of the Tax Procedure Code Act, 2014* (**TPCA**) provides as follows:

> *"Subject to subsection (2), the Commissioner may, upon application in writing by a taxpayer, issue to the taxpayer a private ruling setting out the position of the Commissioner regarding the application of a provision in a tax law to a transaction entered into or proposed to be entered into by the taxpayer".*

[31] Sub-section (2) thereof lays down the circumstances under which the Commissioner may reject an application for a Private Ruling. In terms of Section 45 (1) of the TPCA, it is, therefore, true that a private ruling basically sets out the position of the Commissioner regarding the application of a provision in a tax law to a transaction entered into or proposed to be entered

into by the taxpayer. Section 45 (3) of the TPCA sets out the circumstances under which the Private Ruling is binding on the Commissioner in the following terms:

> *"Where a taxpayer has made a full and true disclosure of the nature of all aspects of the transaction relevant to the ruling and the transaction has proceeded in all material respects as described in the taxpayer's application for the ruling, the ruling is binding on the Commissioner in relation to the taxpayer to whom the ruling has been issued."*

[32] But sub-section (4) of Section 45 of the TPCA sets out that *"A private ruling is not binding on the taxpayer to whom it is issued"*. Sub-section (8) thereof provides that; *"The Commissioner may revoke a private ruling in whole or in part by written notice served on the taxpayer to whom the ruling is issued"*. While Sub-section (9) thereof provides that; *"A private ruling is not a tax decision for the purposes of this Act"*.

[33] The cumulative effect of the relevant provisions pointed out above, in my opinion, espouse the notion that a Private Ruling is an opinion of the Commissioner on interpretation of a specific provision in a tax statute in respect of a specific taxpayer(s) and a specific transaction. It has no general application in relation to other provisions in a tax statute or in relation to other taxpayers or other transactions. It is only binding on the Commissioner under specific circumstances. It is not binding on the taxpayer(s) to whom it is issued. The Commissioner has discretion to revoke the Private Ruling. While the provision expressly states that a Private Ruling is not a tax decision for purposes of the Act (TPCA), it is silent as to whether revocation of the Private Ruling is or is not a tax decision. This, actually, is the source of the controversy before the Court.

[34] In view of such silence on the part of the Act, the Court has to resort to seeking the intention of the legislature over the matter. On the one hand, it was argued for the Applicants that since a Private Ruling is not a tax decision, it follows that its revocation is also not a tax decision. On the other hand, it was argued for the Respondent that since it is expressly stated in the Act that a private ruling is not a tax decision, in absence of an express provision that its revocation is not a tax decision, it follows that it is not a tax decision. In my view, either of the two arguments is not sufficient enough to point to the true construction of the relevant provisions of the law on this point. I believe the proper course is to look at the nature and purpose of a private ruling.

[35] It has elsewhere been stated that the practice (of issuing private rulings) exists because *"it is of assistance to the administration of a complex tax system and ultimately to the benefit of the overall tax yield"*. See: ***R Vs. Commisisoner of Inland Revenue ex parte MFK Underwriting Agencies [1989] BTC 561***. In the case of ***Commissioner of Taxation Vs. Brian John McMahon (1997) 79 FCR 127 at 133***, a case cited by Counsel for the Respondent, it was held that *"the private ruling provisions were introduced to assist taxpayers who are uncertain about the tax effect of an arrangement that is proposed, commenced or completed and who wish to obtain a ruling from the Commissioner on this question before the assessment process is complete. It enables a taxpayer to order their affairs with a degree of certainty about their tax implications before they embark or whilst they are embarking, upon courses of conduct, the tax implications of which may not be known for a considerable time"*.

[36] Counsel for the Respondent also relied on the decision of the Tax Appeals Tribunal in ***The Registered Trustees of Freemasons Hall Vs. Uganda Revenue Authority, Application No. 51 of 2019***, where the Tribunal stated that the purpose of a private ruling is to *"promote simplicity in the law and certainty."*

[37] Taking the foregoing into consideration, it is clear to me that the process of dealing with private rulings as between the Authority and the taxpayer was meant to be flexible, and geared at achieving simplicity, certainty and effective assessment and recovery of taxes. It is an administrative measure geared at achieving the above stated objects. The fact that it is not binding on the taxpayer means that even after it is given, the tax payer has an option and, indeed, a right to opt out of it or to ignore it completely. The Commissioner is also only bound by it under a few specified circumstances and may choose to revoke it. In my considered view, the process and intent of revoking the ruling ought to have the same characteristics as the issuance of the same. Just as the issuance of the ruling is an administrative measure, it follows that its revocation is equally an administrative measure geared at achieving the same objects.

[38] Secondly, and equally important, the matter also has to be looked at from the point of view of the consequences of issuing and revoking a private ruling. When a private ruling is issued confirming that no tax is payable, it negates a tax obligation in respect of the particular tax payer(s) and transaction. On the other hand, when the ruling is revoked, the consequence of the revocation is to place a tax obligation on the part of the taxpayer(s) in respect of a particular transaction. As such, a private ruling and its revocation are by themselves not tax decisions; rather, their consequences lead to tax decisions. Consequently, when a private ruling is revoked, the act of revoking it is an administrative step and decision which gives way for assessment of taxes. The assessment of taxes is a tax decision consequent to the revocation; while the act of revocation of the ruling is itself not a tax decision.

[39] I am fortified in the above conclusion by considering the impact of sub-section (4) of Section 45 of the TPCA which states that the tax payer is not bound by the Ruling. This, in my view, means that there may be situations

when a private ruling is made and is either not favourable or not effectual for the taxpayer. The taxpayer may disregard it and go on with other provisions that may be more favourable or effectual for them. If such a ruling is revoked by the Commissioner, it will occasion no consequence upon the taxpayer. The taxpayer would not be aggrieved by the revocation and would not need to challenge the same. In effect there would be no tax decision. This goes to signify further that by itself, the act of revoking a private ruling is not a tax decision; although its consequence may occasion a tax decision. The definition of a tax decision under Section 3 of the TPCA would not change this construction. It does not include a revocation decision either expressly or by necessary implication. Neither does it speak to the intention behind the relevant provisions under Section 45 of the TPCA.

[40] In that regard, I am in agreement with the decision of my learned brother, **Ssekaana J.** in the decision in ***Salim Alibhai and 9 Others Vs. URA HC Miscellaneous Cause No. 123 of 2020***. It is not true as contended by the Respondent's Counsel that the said decision was made *per incuriam*. As I have stated before, it is not open to a party to declare a decision of a court *per incuriam* simply because they disagree with it. See: ***Male Mabirizi v AG HC M.C No. 194 of 2021***.

[41] Given the finding that revocation of a private ruling is an administrative decision by URA which is a public authority, it follows that where a taxpayer is aggrieved with the process by which the said ruling was revoked, such a person has the right to challenge such exercise of power by way of judicial review alleging grounds of either illegality, irrationality or procedural impropriety in the way the public authority exercised its power. This is the nature of the application that is before the Court. It is therefore my finding that this application is properly before this Court as a judicial review application and is not a tax dispute as claimed by the Respondent. The Court therefore is seized

with original jurisdiction to entertain and determine this application. The first point of objection therefore bears no merit and is overruled.

<u>Preliminary Issue 2</u>: Whether the Application is out of time in respect Orders 3 and 8 challenging a Notice of Direction dated 8th September, 2020 and Order 5 challenging a temporary injunction order dated the 11th of September, 2020 issued by the Tax Appeals Tribunal (TAT) in Miscellaneous Application No. 117 of 2020?

Submissions by Counsel for the Respondent

[42] It was submitted by Counsel for the Respondent that the thrust of this point of objection is that the purported challenge of the above administrative action of the Respondent, and the judicial proceeding of the Tribunal ought to have been taken within three (3) months, from the date of the said actions, unless time was extended by Court, on an application for extension of time, which was not. Counsel referred to **Rule 5 (1) of the Judicature (Judicial Review) Rules**, **2009**, which requires that an application for judicial review be made **within three months** from the date <u>when the grounds of the application first arose</u>, unless the Court considers extending the period, <u>for good reasons.</u>

[43] Counsel submitted that in the present matter, the application for judicial review was lodged in Court on 29th June, 2021. The Notice of Direction was issued on 8th September, 2020, while the temporary injunction order was issued by the Tax Appeals Tribunal on 11th September, 2020. Counsel submitted that the purported grounds for challenging the said action and order arose on the above dates respectively. The Applicants therefore had up to 8th December, 2020 and 11th December, 2020 respectively to have filed the judicial review action. Thus by waiting until 29th June, 2021 and then purporting to slot the alleged matters within the application in an omnibus fashion, and combining/mixing them with matters touching on the decision revoking the private ruling dated 6th May 2021, renders their actions stale.

[44] Counsel relied on the decision in the case of **IP Mugumya VS. Attorney General, HCMC No. 116 of 2015** for the submission that an application for judicial review filed after three months when the ground of application first arose shall not be allowed unless there is an application for extension of time. Counsel therefore prayed that this objection be upheld and the said grounds and orders be struck out for being time-barred. Counsel also prayed that the paragraphs of the affidavits deposing to and supporting those averments should collapse as well.

Submissions by Counsel for the Applicant

[45] It was submitted by Counsel for the Applicants that the Application is not out of time in respect of the orders to quash the Temporary Injunction issued by the Tribunal as well as the Notice of Direction issued by the Respondent attaching the property belonging to Ashbury Properties Limited. Counsel submitted that the Respondent filed and obtained a temporary injunction without notice to the Applicants well knowing that they were the primary victims of the injunction. The Applicants were not accorded a hearing before a determination was made in Miscellaneous Application No. 117 of 2020 arising out of TAT Application No. 64 of 2020 which is a matter filed by the Respondent against the Kansai Plascon Uganda Limited but injuncting proceeds due to the Applicant.

[46] Counsel also submitted that the Notice of Direction was issued on 08th day of September, and the Temporary Injunction issued on 11th day of September 2020, when there was no liability on the part of the Applicants for any taxes; the revocation decision having been quashed by an Order of the High Court in Miscellaneous Cause No. 123 of 2020. Counsel argued that this rendered the actions of the Respondent null and void and of no effect. Counsel further submitted that the said actions undertaken by the Respondent after Court had quashed the revocation of the Private Ruling and before affording the

Applicants a hearing are some of the events that prove that indeed the Respondent's revocation of the private ruling was illegal, unreasonable and procedurally improper. Counsel prayed that the Court finds that the notice of direction and the temporary injunction obtained by the Respondent from the Tribunal are part and parcel of the process of the revocation of the private ruling which is subject to this application and that this Application is not time barred in respect of the same and accordingly dismiss the preliminary objection raised by the Respondent.

[47] Counsel for the Respondent made a rejoinder to the above submissions which I have also taken into consideration.

Court Determination

[48] The relevant provision on time within which an application for judicial review may be commenced is *Rule 5 (1) of the Judicature (Judicial Review) Rules, 2009* which provides as follows:

> *"Time for applying for judicial review*
>
> *(1) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application first arose, unless the court considers that there is good reason for extending the period within which the application shall be made."*

[49] The position of the law is that time limitations are substantive provisions of the law and limitation of actions is not concerned with merits of the case. In ***Dawson Kadope vs Uganda Revenue Authority, HC MA. No. 40 of 2019*** while citing the decision in ***I.P Mugumya vs Attorney General, HC M.A No. 116 of 2015***, the court held that from the clear wording of the rule [5 (1)], failure to bring the application within the prescribed time and the failure to seek and obtain the court's order extending the time renders the application for judicial review time barred and therefore not amenable for judicial review. The

court added that the general effect of the expiration of the limitation period is that the remedy is also barred.

[50] The above holding represents the true position of the law. This is because it is a long settled position of the law that provisions as to time limitation are usually strict and inflexible; such that litigation is automatically stifled after the fixed time has elapsed, regardless of the merits of a particular case. See: ***Hilton vs. Steam Laundry [1946] 1 KB 61 at p.81.***

[51] In the instant case, it has been shown to Court by the Respondent that the Notice of Direction which is being challenged and sought to be quashed under orders 3 and 8 in the Notice of Motion was issued on 8th September, 2020. Similarly, the impugned order of a temporary injunction was issued by the Tax Appeals Tribunal on 11th September, 2020. Counsel for the Respondent asserted that the purported grounds for challenging the said action and order arose on the above said dates respectively. The Applicants therefore had up to 8th December, 2020 and 11th December, 2020 respectively to have filed the judicial review action. They, however, only filed the application in Court on 29th June, 2021, which was way out of time.

[52] The Applicants adduced no ground excepting them from the application of the above rule. There was no application for extension of time within which to bring an action challenging the impugned Notice of Direction and order of a temporary injunction. I am in agreement with the Respondent's Counsel that in both instances, the grounds of the application first arose when the Notice of Direction and the temporary injunction order were issued. An action based on the said grounds is therefore out of time and incompetent before the Court. Once a matter is found incompetent, nothing can be done under it. Irrespective of the merits of such a ground of the application, the same cannot be investigated.

[53] That being the case, orders 3, 5 and 8 of the application and the grounds of the application in support of the said orders are incompetently before this Court and are struck out. For avoidance of doubt however, this finding and order do not affect the Applicant's reliance on averments related to those grounds in as far as they constitute evidence in support of the other grounds that are properly before this Court. This is because the time bar herein in issue does not apply to evidence. There is no time limit within which a matter can be used in evidence. As such, while the cause of action based on orders 3, 5 and 8 cannot be investigated by the Court on account of the time bar, the Applicants are not precluded from relying on the averments related to the issuance of the Notice of Direction and the order of a temporary injunction in as far as they constitute relevant evidence in the matter in support of the grounds that are legitimately before the Court.

[54] The second point of objection is therefore upheld save for the prayer to strike out all the averments in the affidavits that are related to the issuance of the Notice of Direction and the order of a temporary injunction. The Applicants are entitled to rely on such averments in support of the grounds that are properly before the Court.

***Preliminary Issue 3*: Whether the Applicants have locus standi to challenge the Notice of Direction and the temporary injunction order?**

[55] Having found that the orders and grounds of the application based on the Notice of Direction and the temporary injunction order are incompetently before the Court, and that nothing can be done under them, it therefore becomes inconsequential to investigate the *locus standi* of the Applicants in regard to those orders and grounds. This point of objection is therefore accordingly disregarded.

Preliminary Issue 4: Whether the application is premature for failure by the Applicants to exhaust existing remedies under the law?

[56] It is true that under *Rule 7A (1) (b) of the Judicature (Judicial Review) (Amendment) Rules No. 32 of 2019*, in applications for judicial review, the court must be satisfied that the aggrieved party has exhausted the existing remedies available within the public body or under the law before the same can be entertained by the court. It was argued by Counsel for the Respondent that the Applicants have moved to this Court without first fully exhausting the internal appeal mechanisms, and thereafter, appeal to the Tribunal, if aggrieved.

[57] However, in light of the finding on the 1st preliminary issue, the rule on exhaustion of existing remedies cannot apply. It has already been found that the Applicants are not in this Court to challenge a tax decision but rather an administrative decision of the Respondent as a public authority on account of the legality, rationality and propriety of the process undertaken by the public body before making the impugned decision. In light of this position, the Applicants could not have been expected to explore existing remedies that are intended to challenge a tax decision. In the instant case, no existing remedies were available to the Applicants before they could bring the action for judicial review. As already underscored herein above, the issuance of assessments by the Respondents and the filing of objections thereto by the Applicants are consequences of the revocation decision. They cannot constitute existing alternative remedies to the judicial review action. The 4th ground of objection is also without merit and is overruled.

Preliminary Issue 5: ***Whether the application is an abuse of the court process?***

[58] Abuse of court process involves "the use of the process for an improper purpose or a purpose for which the process was not established." See ***Attorney***

General vs. James Mark Kamoga & Anor, SCCA No. 8 of 2004, (**Mulenga JSC**) quoting the ***Black's Law Dictionary (6th Ed)***.

[59] On the case before the Court, the basis of the Respondent's claim that the Applicants are acting in abuse of the court process is that the Applicants have engaged in double acts of objecting to the tax assessment under Section 24 of the TPCA and, at the same time, lodging the judicial review application on substantially the same matters objected to, without exhausting the objection process. It is clear, however, that in view of my finding on preliminary points 1 and 4, this claim by the Respondent is without basis. Having found that the judicial review application is properly before this Court and that the existing remedies upon tax assessment were not a bar to the judicial review action, it cannot be said that the Applicants, by bringing this application, have engaged use of the court process for an improper purpose or a purpose for which the process was not established. The 5th preliminary point of objection is also devoid of merit and is overruled.

[60] In all therefore, only the second preliminary point of objection has been found partly successful as per the finding and order under issue two. The other points of objection have been found to be devoid of merit and are accordingly dismissed. I will now proceed to deal with the merits of the application.

Issues on the Merits of the Application

<u>Issue 1:</u> Whether the decision communicated on 6th May, 2021 revoking the Private Ruling dated 9th March, 2018 is tainted with illegality, bias, irrationality, unreasonableness, unfairness, and procedural impropriety?

[61] Let me begin by pointing out that judicial review is concerned not with the decision itself but with the decision making process. Essentially, judicial review involves an assessment of the manner in which a decision is made. It is not an

appeal against the decision and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. The duty of the court, therefore, is to examine the circumstances under which the impugned decision or act was done so as to determine whether it was fair, rational and/or arrived at in accordance with the rules of natural justice. See: ***Attorney General vs Yustus Tinasimiire & Others, Court of Appeal Civil Appeal No. 208 of 2013*** and ***Kuluo Joseph Andrew & Others vs The Attorney General & Others, HC MC No. 106 of 2010***.

[62] The *Judicature (Judicial Review) (Amendment) Rules 2019,* set out the factors to be considered by the Court when handling applications for judicial review. *Rule 7A thereof* provides as follows:

> *(1) The court shall, in considering an application for judicial review, satisfy itself of the following –*
>
> *(a) That the application is amenable for judicial review;*
>
> *(b) That the aggrieved person has exhausted the existing remedies available within the public body or under the law; and*
>
> *(c) That the matter involves an administrative public body or official.*
>
> (2) *The court shall grant an order for judicial review where it is satisfied that the decision making body or officer did not follow due process in reaching a decision and that, as a result, there was unfair and unjust treatment.*

[63] For a matter to be amenable for judicial review, it must involve a public body in a public law matter. In my view, therefore, the conditions under *paragraphs (a) and (c) of sub-rule (1) of Rule 7A* above may be considered concurrently. The Court must, therefore, be satisfied; first, that the body under challenge must be a public body whose activities can be controlled by judicial review; and secondly, the subject matter of the challenge must involve claims based on public law principles and not the enforcement of private law rights.

See: **Ssekaana Musa, *Public Law in East Africa*, p. 37 (2009) LawAfrica Publishing, Nairobi**.

[64] In the case of ***Arua Kubala Park Operators and Market Vendors' Cooperative Society Ltd vs Arua Municipal Council, HC MC No. 003 of 2016***, **Mubiru J.** expressed the opinion that in order to bring an action for judicial review, it is a requirement that the right sought to be protected is not of a personal and individual nature but a public one enjoyed by the public at large. The "public" nature of the decision challenged is a condition precedent to the exercise of the courts' supervisory function.

[65] On the case before me, there is no dispute that the revocation decision sought to be challenged was made by a public body. The Respondent is a public body established under the Uganda Revenue Authority Act Cap 196 with the mandate to administer and give effect to tax laws, among other functions. It is also apparent that the impugned decision involved a public law matter. It is thus clear that the subject matter of the challenge involves claims based on public law principles and the rights sought to be protected are not merely of a personal or individual nature but comprise matters of public interest. I am therefore in position to conclude that this application is amenable for judicial review.

[66] I have already made a finding on the condition for exhaustion of existing remedies. I will therefore proceed to examine on merit the application for judicial review before the Court. The duty of the Applicants is to satisfy the Court, on a balance of probabilities, that the decision making body, subject of their challenge, did not follow due process in making the impugned decision and that, as a result, there was unfair and unjust treatment of the Applicants which is likely to put the rights of other members of the public at peril.

[67] Under the law, the court may provide specific remedies under judicial review where it finds that the named authority has acted unlawfully. A public authority will be found to have acted unlawfully if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of unreasonableness or irrationality); or without observing the rules of natural justice (unlawful on grounds of procedural impropriety or unfairness). See: ***ACP Bakaleke Siraji vs Attorney General, HC MC No. 212 of 2018***.

[68] It is alleged by the Applicants in the instant case that the impugned decision was made illegally, irrationally or unreasonably, and/or with procedural impropriety or unfairness. I will consider each ground under a separate head.

The Ground of Illegality

Submissions by Counsel for the Applicants

[69] It was submitted by Counsel for the Applicants that one of the grounds upon which the decision taken by the Respondent was being challenged was on the ground of illegality. Counsel relied on the definition of illegality given by **Lord Diplock** in ***Council of Civil Service Unions & Others vs. Minister for the Civil Service [1985] AC 374*** thus; "*"illegality" as a ground for judicial review, means that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it"*. Counsel submitted that illegality is divided into two categories: one, is where it is proved that the public authority was not empowered to take action or make the decision it did; and two, is where it is proved that the authority did not exercise its discretion properly.

[70] On the question whether the Respondent was empowered to take the action or make the decision it did, it was submitted that the Respondent was not empowered to take the decision. Counsel submitted that whereas Section 45 (8) gives discretion to the Commissioner to revoke a Private Ruling, the same section does not provide grounds upon which the Commissioner will rely when making the decision to revoke the Private Ruling. It was the Applicants' contention that while implementing the provisions of Section 45 (8) of the Tax Procedures Code Act to revoke the Private Ruling, the Respondent could not unilaterally pursue the Applicants to revoke the Private Ruling when the law did not provide for the grounds for revocation.

[71] On the question whether the Respondent exercised the discretion to revoke the Private Ruling properly, it was submitted that it did not. Counsel submitted that the Applicants rely on Section 45 (3) which states that the Private Ruling is binding on the Respondent. The same statute also states that the Commissioner may revoke the Private Ruling under Section 45 (8) of the Act. Counsel submitted that it was the Applicants' contention that the words "binding on the Commissioner" used in Section 45 (3) and "the Commissioner may revoke" used in Section 45 (8) are ambiguous for the Respondent cannot "revoke" that which is "binding on her" without clear grounds provided for in the Statute.

[72] Counsel relied on the decision of Court in ***Lafarge Midwest Inc. v City of Detroit State of Michigan Court of Appeals No. 289292*** cited in ***Crane Bank v Uganda Revenue Authority (HCT-00-CC-CA-2010/18)*** to submit that in determining when a tax statute is ambiguous, <u>the provision in the statute must irreconcilably conflict with another provision, or be susceptible to more than one meaning</u>. Counsel concluded that Section 45(8) creates irreconcilable conflict with Section 45 (3) TPCA. The Respondent cannot revoke a Private Ruling which is binding on her, thereby making Section 45(8) on revocation ambiguous. Counsel further submitted that where there is ambiguity in a tax

statute, such ambiguity must be interpreted in favor of the taxpayer. Counsel prayed that the ambiguity in Section 45 (8) and Section 45 (3) must be interpreted in favor of the Applicants. Counsel relied on the decision in ***ATC Uganda Limited & Anor v Kampala Capital City Authority Civil Suit No. 323 of 2018*** and ***URA Vs. Uganda Taxi Operators and Divers' Association, Supreme Court Civil Appeal No. 13 of 2015***.

Submissions by Counsel for the Respondent

[73] In response, it was submitted by Counsel for the Respondent that on the ground of illegality, as per the authorities cited by the Applicants' Counsel, the Respondent as the decision maker correctly understands the law regulating its decision making power, in this case, Section 45 (8) of the TPCA, the Constitution of Uganda, and all other enabling laws, and fully gave effect to it, as evidence abundantly shows.

[74] On the submission that ambiguity exists between the provisions under Section 45(3) and (8) of the TPCA, it was submitted that there is no such ambiguity in and contradiction between the two sub-sections. Counsel submitted that Section 45 (3) gives the *sine qua non* for a binding private ruling, namely, a taxpayer must have made a full and true disclosure of the nature of all aspects of the transaction; the disclosure must be relevant to the ruling; and the transaction must have proceeded in all material respects as described in the taxpayer's application for a private ruling. Counsel further submitted that where any of the conditions above have not been satisfied, the Commissioner would have reason for revoking the private ruling under Section 45 (8). Counsel concluded that Section 45 (3) not only makes a private ruling duly issued binding on the Commissioner but provides the Commissioner with the basis for revoking one under Section 45 (8). As such, the two provisions do not conflict with each other, are in harmony, and are clear and unambiguous.

[75] Counsel further submitted that the mere fact that Section 45 (8) does not list grounds upon which a private ruling could be revoked does not mean that a private ruling can never be revoked, as that would defeat the intention of the legislature, which was to cure the lacuna in the then Section 161 of the Income Tax Act which provided for the making of a binding private ruling but was silent on the Commissioner's powers of revocation. In any case, the grounds for revocation are to be found elsewhere, such as in Section 45 (3) of the TPCA, without limitation to others, as may be developed by case law, such as *an erroneous interpretation of the law,* provided a hearing is accorded to the taxpayer. See ***Gordon Sentiba & others Vs. URA, Misc. Cause No. 35 of 2010*** (**Madrama J**, as he then was). Counsel prayed to Court to find for the Respondent on this ground.

Applicant's Submissions in Rejoinder

[76] In their submissions in rejoinder, Counsel for the Applicants submitted that whereas the Respondent knew the true nature of the Applicants' transaction and whereas the Applicants made a full and true disclosure of the nature of all aspects of the transaction relevant to the ruling and the transaction proceeded in all material respects as described by the Applicants, the Respondent revoked the Private Ruling on manifestly wrong grounds not relevant to the transaction entered into by the Applicants. Counsel therefore concluded that all the grounds considered by the Respondent to revoke the Private Ruling have no basis or connection with the transaction entered into by the Applicants contrary to section 45 (3) of the TPCA relied on by the Respondent. As such, it was an illegality for the Respondent to have relied on the said grounds to revoke the private ruling.

[77] Counsel for the Applicants maintained their contentions that the relevant provisions were ambiguous and the Respondent had committed an improper exercise of discretion. Counsel relied on the case of ***Associated Provisional Picture Houses Vs Wednesbury Corporation [1948] 1 KB 223*** for the

submission that it is trite that an administrative body abuses their discretionary power when it considers irrelevant considerations or fails to consider relevant factors. Counsel insisted that the power to revoke the private ruling cannot be deemed to be exercised properly if the Respondent relied on matters that were not relevant to the grant of the private ruling in the first place. Counsel concluded that in absence of evidence by the Respondent to show the relevancy of the information as alleged by the Respondent, this Court ought to find in favour of the Applicants that the Respondent did not exercise its discretion properly.

Court Determination

[78] Illegality has been described as the instance when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires* or contrary to the provisions of the law or its principles are instances of illegality. In the famous case of ***Council of Civil Service Unions v. Minister for the Civil Service (1985) AC 375***, **Lord Diplock** made the following statement, that has often been quoted, on the subject:

> ***"By 'Illegality' as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulated his decision-making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercised."***

[79] A public authority will be found to have acted unlawfully if it has made a decision or done something without the legal power to do so. Decisions made without the legal power are said to be made *ultra vires*; which is expressed through two requirements: one is that a public authority may not act beyond its statutory power; the second covers abuse of power and defects in its exercise. In ***Dr. Lam – Lagoro James vs Muni University, HC M.C No. 007 of***

2016, **Mubiru J.** held that such decisions include "decisions which are not authorized; decisions taken with no substantive power or where there has been a failure to comply with procedure; decisions taken in abuse of power including, bad faith (where the power has been exercised for an ulterior purpose, that is, for a purpose other than a purpose for which the power was conferred); where power not exercised for purpose given (the purpose of the discretion may be determined from the terms and subject matter of the legislation or the scope of the instrument conferring it); where the decision is tainted with unreasonableness including duty to inquire (no reasonable person could ever have arrived at it); and taking into account irrelevant considerations in the exercise of a discretion or failing to take account of relevant considerations. It may also be as a result of failure to exercise discretion, including acting under dictation (where an official exercises a discretionary power on direction or at the behest of some other person or body. An official may have regard to government policy but must apply their mind to the question and the decision must be their decision)".

[80] It is also the position of the law that where discretionary power is conferred upon legal authorities, it is not absolute, even within its apparent boundaries, but is subject to general legal limitations. As such, discretion must be exercised in the manner intended by the empowering Act or legislation. The limitations to the exercise of discretion are usually expressed in different ways, such as the requirement that discretion has to be exercised reasonably and in good faith, or that relevant considerations only must be taken into account, or that the decision must not be arbitrary or capricious. See ***Smart Protus Magara & 138 Others vs Financial Intelligence Authority, HC M.C No. 215 of 2018***.

[81] In the case of ***R v Commission for Racial Equality ex p Hillingdon LBC [1982] QB 276***, Griffiths LJ stated;

"Now it goes without saying that Parliament can never be taken to have intended to give any statutory body a power to act in bad faith or a power to abuse its powers. When the court says it will intervene if the particular body acted in bad faith, it is but another way of saying that the power was not being exercised within the scope of the statutory authority given by Parliament. Of course it is often a difficult matter to determine the precise extent of the power given by the statute particularly where it is a discretionary power and it is with this consideration that the courts have been much occupied in the many decisions that have developed our administrative law …"

[82] In the instant case, the first allegation of illegality made by the Applicant is that the Respondent was not empowered to take the decision on the ground that whereas Section 45 (8) gives discretion to the Commissioner to revoke a Private Ruling, the same section does not provide grounds upon which the Commissioner will rely when making the decision to revoke the Private Ruling. It was the Applicants' contention that while implementing the provisions of Section 45 (8) of the Tax Procedures Code Act to revoke the Private Ruling, the Respondent could not unilaterally pursue the Applicants to revoke the Private Ruling when the law did not provide for the grounds for revocation.

[83] Section 45 (8) of the TPCA provides that; *"The Commissioner may revoke a private ruling in whole or in part by written notice served on the taxpayer to whom the ruling is issued"*. It is clear to me that this is a legal provision endowing discretion on the Commissioner. It is not true that every time Parliament grants discretion in a statute, it must include grounds upon which such discretion has to be exercised. Counsel for the Applicants pointed out no legal basis for this line of argument. In the case of ***Sharp v Wakefield [1891] AC 173***, the court observed that;

"… *'discretion' means, when it is said that something is to be done within the discretion of the authorities, that something is to be done according the*

rules of reason and justice, not according to private opinion … It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.”

[84] As such, when discretion is given, an Authority has the power to act within the boundaries of such discretion provided it does so reasonably, justly, legally and regularly. The basis of a proper exercise of discretion is not based on presence or not of grounds for such exercise of discretion within the statute; rather it based on the manner of exercise. It follows, therefore, that even where the statute makes no provision for grounds upon which such discretion is to be exercised, the Authority is guided by the principles of reasonableness, justice, legality and regularity. Contrary to the argument by Counsel for the Applicants, the mere fact that the statute makes no provision for grounds for exercise of discretion by the Respondent cannot lead to a conclusion that the Respondent was not empowered to make the decision it did. In any case, as I will show herein later on, it is not true that the relevant provisions of the law do not provide for any grounds upon which the Respondent could rely to exercise discretion on the matter. A reading of sub-sections (2) and (3) of Section 45 of the TPCA shows that certain considerations are provided for that may guide the Respondent in that regard.

[85] The other argument by the Applicants is that the Respondent made an improper exercise of discretion since the provision they relied on (Section 45 (8) of the TPCA) is inconsistent with Section 45 (3) of the TPCA which creates an ambiguity that ought to have been resolved in favour of the taxpayer according to decided authorities. Counsel for the Applicants correctly relied on the decision in ***Lafarge Midwest Inc. v City of Detroit State of Michigan Court of Appeals No. 289292*** cited in ***Crane Bank v Uganda Revenue Authority (HCT-00-CC-CA-2010/18)*** to submit that in determining when a tax statute is

ambiguous, the provision in the statute must irreconcilably conflict with another provision, or be susceptible to more than one meaning.

[86] Looking at the two sub-sections referred to by the Applicant's Counsel, however, I can discern neither any irreconcilable conflict nor susceptibility to more than one meaning in relation to the provisions under Section 45 (3) and (8) of the TPCA. As noted herein above in paragraph 37 when considering the first preliminary objection, the two sub-sections, together with the other provisions under Section 45, were meant to put in place an administrative measure geared at achieving certain objects, namely; flexibility, simplicity, certainty and effective assessment and recovery of taxes. The Commissioner is only bound by the private ruling in the circumstances specified under sub-section (3) and may choose to revoke the ruling under sub-section (8). I do not find any irreconcilable conflict or any kind of ambiguity in these provisions. To the contrary, my opinion is that when given the proper construction, the two sub-sections are consistent and in harmony with the intention of the legislature in enacting Section 45 of the TPCA. I am therefore not in agreement with the submission by the Applicant's Counsel on this point. No ambiguity existed that could have affected the Respondent's exercise of discretion on this matter.

[87] The other allegation of illegality by the Applicants was that the Respondent revoked the Private Ruling on manifestly wrong grounds not relevant to the transaction entered into by the Applicants. A reading of Section 45 (3) of the TPCA discloses that a private ruling is only binding on the Commissioner in relation to the taxpayer to whom it has been issued where a taxpayer has made a full and true disclosure of the nature of all aspects of the transaction relevant to the ruling and the transaction has proceeded in all material respects as described in the taxpayer's application for the ruling. Sub-section (2) of Section 45 TPCA, to which sub-section (1) is subject, sets out the circumstances under which the Commissioner may reject an application for a private ruling. In my

view, the Commissioner is at liberty to rely on the circumstances under either sub-section (2) or (3) of Section 45 of the TPCA when exercising his/her discretion to revoke a private ruling. In this case, the Respondent relied on the ground of failure on the part of the Applicants to make a full and true disclosure of the nature of all aspects of the transaction relevant to the ruling. As submitted by the Respondent's Counsel, it not true that the Act discloses no grounds upon which the commissioner may exercise discretion.

[88] As to whether the grounds relied upon by the Respondent were manifestly wrong and not relevant to the transaction entered into by the Applicants, it was shown by the Respondent in evidence and argued by the Respondent's Counsel that the aspects communicated to the Applicants in the Notice to Show Cause and the letter communicating Further and Better Particulars as requested for by the Applicants were relevant not only to the transaction executed by the Applicants but also to the manner in which the transaction proceeded in accordance with the ruling. Under the law, where a Public Authority is given discretion, it has the primary power to determine what considerations are relevant or not in the exercise of such discretion. The duty of the court under judicial review is only supervisory to check whether such discretion is exercised in accordance with the law. The court is not to act as an appellate court. The Authority as the expert on such a subject is to be given a leeway to properly act without undue intrusiveness on the part of the court. It is only when the court is satisfied that the considerations taken by the Authority were manifestly irrelevant or that relevant considerations were manifestly disregarded by the authority that the court would intervene.

[89] On the case before me, I have not seen any evidence from the Applicants capable of proving that the considerations taken by the Respondent were manifestly irrelevant. What I can see is that the Applicants have an argument to justify that the considerations were irrelevant, which argument was rejected by the Respondent, with reasons. Once reasons were assigned, the

presumption is that the decision maker exercised his/her discretion judiciously. I have already pronounced myself herein above on the argument concerning the relevance or lack of it of the considerations employed by the Respondent. I further find that if the argument by the Applicants is that the reasons are not satisfactory to the Applicants, that goes to the merits of the matter which cannot be the subject of judicial review. The arguments based on the merits of the matter are for another forum and not this Court in an application for judicial review. Equally, it does not go to the legality of the decision and neither does it point to improper exercise of discretion by the Respondent.

[90] That being the case, the Applicants have not led any evidence to satisfy the Court either that the Respondent was not empowered to make the revocation decision or that the Respondent acted in improper exercise of discretion which would make the resultant decision illegal. The challenge of the revocation decision on the ground of illegality has therefore not been made out.

The Ground of Irrationality or Unreasonableness

Submissions by Counsel for the Applicants

[91] It was submitted by Counsel for the Applicants that the Respondent acted irrationally and unreasonably when they made the decision to revoke the private ruling. Counsel relied on the definition of irrationality given by **Lord Diplock** in ***Council of Civil Service Unions & Others vs. Minister for the Civil Service [1985] AC 374*** and on the case of ***Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223*** for the definition of reasonableness in relation to exercise of statutory discretion. Counsel further relied on the statement of **Mubiru J.** in ***Dr. Lam – Lagoro James Vs. Muni University (HCMA No. 0007 of 2016)*** on the subject. Counsel then submitted that in the circumstances of this case, the most appropriate test to be applied in testing the reasonableness or rationality of the

decision-making process by the Respondent in revoking the private ruling is the balancing test since it will give the Court an opportunity to investigate the ends which the Respondent's decision sought to achieve as against the means/reasons that were applied and employed by the Respondent to achieve the ends.

[92] Counsel submitted that it was shown by Azim Virjee in his affidavit in support that the Respondent's reasons for the revocation of the private ruling had no bearing or any relevance or impact on the transaction that was the subject of the Private Ruling but was a mere excuse contrived by the Respondent in order to proceed with its stated intention to revoke the Private Ruling. Counsel submitted that the grounds/reasons relied on by the Respondent to revoke the private ruling had no bearing on the share sale transaction of the Applicants, nor do they have a bearing on the information provided to the Respondent prior to making the Private Ruling. The said grounds were not true and of no relevance to the Private Ruling; and in any case, the Respondent did not provide any evidence to prove any tax evasion on the part of the Applicants.

[93] Counsel concluded that consequently, the grounds as relied upon by the Respondent were unfair, irrational, and unreasonable; and a decision reached to revoke the Private Ruling based on such irrationality must be quashed.

Submissions by Counsel for the Respondent

[94] In response, Counsel for the Respondent submitted that according to the case of ***Dr. Lam Lagoro vs Muni University (supra)***, **Justice Stephen Mubiru** explained the term *"reasonable"* as meaning that <u>*the reasons*</u> (for a decision) <u>*do in fact or in principle support the conclusion reached*</u>. Counsel submitted that the revocation decision is supported by reasons. Counsel further submitted that they have, however, submitted against the temptation to discuss those reasons, as they touch on the taxation question and the merit of the decision

and not the process. Counsel submitted that the decision of 6th May, 2021 is defensible in fact and law and was transparently rendered after a due process. Counsel also submitted that whereas judicial review is not concerned with the merit of the decision but the process, the Applicants purported to discuss the merits of the decision which the Respondent contends amounts to stretching beyond the purview of judicial review. Counsel prayed that the Court holds that the allegations of irrationality and unreasonableness on the part of the Respondent have not been proved.

[95] Counsel for the Applicants made submissions in rejoinder which I have also taken into consideration.

Court Determination

[96] The terms irrationality and unreasonableness, in as far as they are used when testing decisions of public authorities, are often used interchangeably, alternatively or sequentially. The principles followed to disclose and/or prove existence of any or both of them in a decision are actually the same. Thus in the words of **Lord Diplock** in ***Council of Civil Service Unions & Others vs. Minister for the Civil Service [1985] AC 374*** irrationality refers to arriving at ***"a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"***. In fact, Lord Diplock refers to it as "what can by now be succinctly referred to as "Wednesbury unreasonableness". This was in reference to the decision of **Lord Green M.R** in the case of ***Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223***.

[97] In ***Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (supra)***, **Lord Green M.R** stated that the term ***"unreasonable … is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to***

speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. ... In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith ..."

[98] Borrowing the words of **Mubiru J.** in ***Dr. Lam – Lagoro James Vs. Muni University (HCMA No. 0007 of 2016)***, "in judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Decision-makers remain free to take whatever decision they deemed right in their conscience and understanding of the facts and the law, and not be compelled to adopt the views expressed by other members of the administrative tribunal. 'Reasonable' means here that the reasons do in fact or in principle support the conclusion reached. When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum; the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference is the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc. the concept of "deference as respect" requires of the court's respectful attention to the reasons offered or which could be offered in

support of a decision and not submission. The fact that there may be an alternative decision to that reached by the tribunal does not inevitably lead to the conclusion that the tribunal's decision should be set aside if the decision itself is in the realm of reasonable outcomes. On judicial review, a judge should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful."

[99] Applying the above principles to the case before me, the Court is being invited to decide that the decision revoking the private ruling in the present case was irrational or unreasonable in the terms set out above. The main reason advanced by the Applicants is that the Respondent relied on irrelevant considerations and did not use the balancing test of means and ends before reaching the decision it did; thus leading to an improper exercise of discretion which in turn led to the revocation decision being irrational. I have already pronounced myself on the manner in which the Respondent exercised its discretion in this matter and I have found no occasion of improper exercise of discretion. After reviewing the affidavit evidence of the Applicants, I have also found that there is no evidence before the Court that the considerations taken by the Respondent were manifestly irrelevant to the matter subject of the decision. As set out in the above cited cases, this Court should not be expected to replace the Authority's decision with its own decision.

[100] On the facts, evidence and circumstances of this particular case, I have not found the decision of the Respondent anywhere near what is described as "Wednesbury Unreasonableness". The decision of the Respondent was based on clear and intelligible reasons. As I have already pointed out, if the Applicants were not satisfied with those reasons, that is a different matter and goes to the merits of the decision. It neither points to unreasonableness nor does it call for judicial review of the decision on the ground of irrationality. In all therefore, the Applicants' case based on this ground fails.

The Ground of Procedural Impropriety

Submissions by Counsel for the Applicants

[101] Counsel for the Applicants submitted that the term "procedural impropriety" has been defined by Lord Diplock to mean "*the failure to observe basic rules of natural justice or failure to act with procedural fairness toward the person who will be affected by the decision."* See: ***Council of Civil Service Unions & Others vs. Minister for the Civil Service (supra)***. Counsel submitted that the rule against bias in exercising quasi-judicial powers is an element of natural justice and falls under the ground of procedural impropriety as emphasized in **Tweyambe Johnas & Anor v Attorney General & Anor Miscellaneous Cause No. 39 of 2019 and Marvin Baryaruha Vs. UNRA**. Counsel further submitted that the Respondent in exercising its mandate in this instance was biased as it acted as prosecutor and judge. Counsel drew the Court's attention to the definition of bias by **Graham Taylor** in his book **Judicial Review: A New Zealand Perspective (3rd ed, LexisNexis, Wellington, 2014) at 461** where he succinctly describes bias as **"a predisposition to decide a cause or an issue in a certain way which does not leave one's mind properly open to persuasion**." Counsel also referred to the decision in ***Dr. Lam – Lagoro James Vs. Muni University (HCMC No. 0007 of 2016)*** on the matter.

[102] Counsel submitted that in the instant case, a reasonable apprehension of bias would be established if the Respondent, or its agent(s) conducting the decision-making process pre-judged the matter to such an extent that any representations to the contrary would be futile. Therefore, any evidence pointing to the fact that the Respondent or its agents had a pre-determined disposition of the matter must result in nullifying the decision to revoke because it violates well established principles of natural justice. The Applicants listed a number of adverse steps that were taken by the Respondent prior to

the commencement of the "purported hearing" which, the Applicants assert, were prejudicial to the Applicants and are evidence of bias and procedural impropriety. Counsel concluded that any reasonable person, considering the actions of the Respondent at the time, would conclude that the Respondent had preconceived opinion and a predisposition to revoke the Private Ruling regardless of the merits.

[103] Counsel for the Respondent further challenged the decision of the Respondent for being in breach of the Applicants' legitimate expectation which the Applicants argue is another element of the ground of judicial impropriety. Counsel argued that the revocation of the Private Ruling by the Respondent breached the Applicants' legitimate expectation that they did not source income from Uganda out of the share sale transaction and that the Respondent would not seek to collect any taxes in relation to the transaction in the future. Counsel relied on the decision in ***NSSF Vs. URA, HC Civil Appeal No. 29 of 2020*** for the interpretation of the doctrine.

Submissions by Counsel for the Respondent

[104] It was submitted by Counsel for the Respondent that the allegation of the Respondent acting as ***"a prosecutor and Judge"*** is nowhere pleaded and not supported by affidavit of the Applicants. Raising it in the submission offends the rule of pleading and trial by ambush, contrary to Article 28(1) and 44 (c) of the Constitution which provides for a non-derogative right to a fair hearing. Without prejudice to the above objection, Counsel submitted that the Applicants' Counsel had not demonstrated how the Respondent acted as *"a prosecutor and a judge"* in the matter; since there was no prosecution in this case or the appearance of it. There was also no trial either or the equivalent of it. Rather, following the decision in MC No. 123 of 2020 (*supra*), a due process was engaged by the Respondent, resulting into a hearing and the consequent decision.

[105] In response to the submission by the Applicants' Counsel that the Respondent was biased against the Applicants owing to the fact that the Respondent took steps with respect to the leasehold land of Ashbury Investments Ltd on 8th September, 2020, Counsel submitted that this is no proof of bias. Counsel argued that the claims about the actions of the Respondent against the property of a non-party to the present proceedings cannot amount to bias against the Applicants. The Applicants have not adduced proof that they hold shares in Ashbury Investments Ltd. There are no certified company documents to that effect in evidence. Moreover, the action was under Section 34 (6) of the TPCA as an interim measure against the company, to protect Government revenue interests at stake. The step did not result into a tax recovery which would have crystallized with distress proceedings under Section 34 (4). Counsel submitted that invoking a statutory power is no evidence of bias.

[106] Turning to the temporary injunction order of the tribunal dated 11th September, 2020, Counsel submitted that the issuance thereof followed a judicial hearing and it was issued by a competent forum, not the Respondent. Thus, it would be stretching the allegation of bias too far if a party in whose favour a court order is issued is assumed to be biased against a non-party to that order. Counsel maintained that there is no proof that during the hearing on a notice to show cause on 24th March 2021, the Respondent was biased against the Applicants in any way. Counsel further submitted that the revocation of the private ruling followed due consideration of the matters raised in the notice to show cause, which were responded to by the Applicants, and nothing more.

[107] On the issue of legitimate expectation, Counsel for the Respondent submitted that the issue is *res judicata* having been considered by Ssekaana J. in HCMC No.123 of 2020. Counsel also submitted that the principle of legitimate expectation is not applicable to a private ruling because Section 45

(8) of the Tax Procedure Code Act provides for revocation of a private ruling. The principle could only be relevant where none is revoked which is not the case here. Counsel further submitted that the allegation of inordinate delay is unfounded, as the Applicants had to enjoy the full due process accorded by the Respondent.

[108] Counsel for the Applicants made submissions in rejoinder on this ground which I have also taken into consideration.

Court Determination

[109] The position of the law on procedural impropriety is as aptly put by Counsel for the Applicants and conceded to by the Respondent's Counsel. According to **Lord Diplock** in ***Council of Civil Service Unions & Others vs. Minister for the Civil Service (supra)***, "procedural impropriety" has been defined to mean **"*the failure to observe basic rules of natural justice or failure to act with procedural fairness toward the person who will be affected by the decision.*"** Procedural impropriety encompasses four basic concepts; namely (i) the need to comply with the adopted (and usually statutory) rules for the decision making process; (ii) the requirement of fair hearing; (iii) the requirement that the decision is made without an appearance of bias; (iv) the requirement to comply with any procedural legitimate expectations created by the decision maker. See: ***Dr. Lam – Lagoro James Vs. Muni University (HCMC No. 0007 of 2016)***.

[110] Procedural propriety calls for adherence to the rules of natural justice which imports the requirement to hear the other party (*audi alteram partem*) and the prohibition against being a judge in one's cause. The latter essentially provides against bias. Natural justice requires that the person accused should know the nature of the accusation made against them; secondly, that he/she should be given an opportunity to state his/her case; and thirdly, the tribunal

should act in good faith. See: ***Byrne v. Kinematograph Renters Society Ltd, [1958]1 WLR 762***.

[111] The major complaint by the Applicants under this ground is that the Respondent did not conduct a proper hearing and acted with bias when they made the revocation decision of 6th May 2021. It is settled law that the rule against bias in exercising quasi-judicial powers is an element of natural justice and falls under the ground of procedural impropriety. See: ***Tweyambe Johnas & Anor v Attorney General & Anor Miscellaneous Cause No. 39 of 2019***. **Graham Taylor** in **Judicial Review: A New Zealand Perspective (3rd ed, LexisNexis, Wellington, 2014) at 461** defines bias as "**a predisposition to decide a cause or an issue in a certain way which does not leave one's mind properly open to persuasion**."

[112] The rule against bias therefore calls for impartiality on the part of the decision maker. According to **Mubiru J.** in ***Dr. Lam – Lagoro James Vs. Muni University (supra)***, *"Impartiality connotes absence of bias, actual or perceived. Impartiality of the decision-making body is a critical feature of the right to a fair hearing which is captured by the Latin maxim, nemo judex in causa sua debet esse (no one should be the judge in his own cause). There are many different factual settings which could place the impartiality of a decision-making body in question; among such contexts are situations where the decision-makers have or are perceived to have a pecuniary interest, either direct or indirect, in the outcome of the hearing before them. Another such context is where the relationship of the decision-maker to one of the parties or counsel is sufficiently close to give rise to a reasonable apprehension of bias"*.

[113] In ***R. v. Architects' Registration Tribunal [1945] 2 All E. R. 131 (K.B.D.), at p. 138***, cited in the case of ***Dr. Lam – Lagoro James Vs. Muni University (supra)*****, Lewis J.** observed as follows:

"Where a decision maker has preconceived opinion and a predisposition to decide a cause or an issue in a certain way, or where one does not leave the mind perfectly open to conviction, and one's inclination clearly appears bending towards one side, it all shows an attitude of bias. The presence of bias thus leaves a reasonable person in doubt as to the impartiality of the decision making process. In these circumstances courts have quashed such decisions where it is obvious that a decision maker stood tainted by bias. (See: ***R. v. Governor of John Banco School [1990] C.O.D 414).***

[114] In the case of ***Republic v. Commissioner of Domestic Taxes Exparte Sony Holdings Limited [2019] eKLR***, it was stated that;

Bias, whether actual or apparent, connotes the absence of impartiality." Bias may take many different forms but the main distinction is between <u>actual</u> and <u>apprehended</u> bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand. A claim of apprehended bias requires a finding that a fair-minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind. Apprehended bias has been variously referred to as "apparent," "imputed", "suspected" or "presumptive" bias".

[115] On the case before me, it was shown in evidence by the Applicant and submitted by Counsel that prior to the commencement of the "purported hearing" the Respondent took a number of adverse steps which were prejudicial to the Applicants and are evidence of bias and procedural impropriety, namely; one, on 8th September 2020, the Respondent sought to attach property of a third-party company in which the Applicants are

shareholders, on the basis of a tax liability which did not exist at that material time; two, on 11th September, 2020, the Respondent filed and obtained a temporary injunction against a Third Party aimed at attaching money purportedly belonging to the Applicants without notifying the Applicants nor adding them as parties. This was irrespective of the fact that there was no existing liability owing from the Applicants and a few days after the Ruling of the High Court. Three, immediately after the first revocation decision was quashed by the Court, the Respondent invited the Officers of Kansai Plascon Uganda Ltd for meetings to discuss the tax liability over the same transaction yet no such liability existed at the time. For the Respondent, it was stated that such allegations do not point to any bias and prayed that these allegations be dismissed.

[116] I will start with the point raised in the submissions by Counsel for the Applicant to the effect that as evidence of bias, the Respondent acted as Judge and Prosecutor to the prejudice of the Applicants. As submitted by Counsel for the Respondent, this allegation was both un-pleaded and devoid of merit. It is devoid of merit because the Respondent is seized with statutory powers under an Act of Parliament to perform the functions including the subject of this matter. The law is alive to the fact that in such a matter, the Commissioner has the power to issue a private ruling and to revoke it. The requirement of the law is that before it is revoked, the taxpayer has to be afforded a fair hearing. The fair hearing has to be afforded by the Respondent, the same body whose Commissioner undertook the impugned decision. In my view, as long as a fair hearing is afforded and conducted, the issue of the Respondent being both a Judge and Prosecutor does not arise.

[117] The real issue in my view is whether the conduct of the Respondent exhibited actual and/or apprehended bias. Evidence on record shows that after the first revocation decision was quashed by the Court pursuant to the decision in **HC M.C No. 123 of 2020: Salim Alibhai & Others vs URA**

delivered on 17th August 2020, the Respondent expressed dissatisfaction with the said decision and took the initial steps to appeal, namely, lodging a Notice of Appeal and a letter requesting for a certified record of the court. This was well within the Respondent's right and occasions no prejudice. What is alleged to have occasioned prejudice to the Applicants is that the Respondent took steps which indicated that in their mind, the private ruling still stood revoked and tax liability existed on the part of the Applicants. I will proceed to examine this allegation in detail.

[118] By letter dated 20th August 2020, the Respondent invited the Managing Director of Kansai Plascon Uganda Ltd for a meeting to discuss tax obligations arising from sale of shares, the subject of the matter before the Court. The letter is Annexture "P" to the affidavit of Azim Virjee. The letter refers to the quashing of the revocation of the Private Ruling but went ahead to invite the said official for the meeting whose purpose was clearly set out in paragraph 2 as being the discovery that the transaction gave rise to capital gains tax. As argued by the Applicants, it is questionable why the Respondent still held such a view well knowing that the Private Ruling still stood which had cleared the transaction as not giving rise to capital gains tax.

[119] The next incident questioned by the Applicants is that on 8th September 2020, the Respondent's Commissioner issued a Notice of Direction to the Commissioner Land Registration registering the Respondent's interest on land described therein as "security for tax liability amounting to UGX 205,455,376,853/=". The said property is said to belong to Ashbury Investments Ltd, a company in which the Applicants are said to be shareholders. According to the Applicants, this was evidence of a predetermined mind on the part of the Respondent to recover the tax irrespective of the decision of the court quashing the revocation decision. It was argued for the Respondent that the Applicants had not proved that the said property belonged to them. It was further argued for the Respondent that the

said notice was only an interim measure and did not amount to collection of tax. The other argument was based on the preliminary objection which was already decided upon.

[120] As I stated in my holding under the second preliminary point of objection, although this allegation was time barred as a ground of this application, its evidential value is not affected by the time bar. On the argument regarding lack of proof by the Applicants on ownership of the property subject of the Notice of Direction, I believe there was no much contention on that issue. A reading of the affidavit evidence for both sides indicates this contention did not arise. It was only raised by Counsel for the Respondent during submissions which would not rebut the evidence in the affidavit of the Applicants deposing that the said property belongs to the Applicants. The affidavit in reply for the Respondent in paragraphs 13, 14, 15 and 16 which are relevant to this issue raised no such contention. In light of the other evidence on record, there was no way the Applicants would have been expected to produce proof for matters that were not in dispute. The other evidence I am making reference to is the fact that the sum indicated in the Notice of Direction was the cumulative sum demanded from the Applicants in the impugned assessments. This made it clear that the Notice was in pursuit of the same transaction and the interest of the same Applicants. The question raised by the Applicants, which I have found pertinent, is why the Respondent continued levying measures if it had no pre-determined mind that the Applicants were liable to pay tax on the transaction in issue irrespective of the then outstanding Private ruling?

[121] The other matter that was raised by the Applicant was the application for a temporary injunction before the Tax Appeals Tribunal by the Respondent against Kansai Plascon Uganda Ltd vide M.A No. 117 of 2020 restraining the said company from paying out any monies due as consideration to third parties/former shareholders for the sale of shares until the final determination by the Tribunal of the taxability of those consideration/payments. Upon

scrutiny of this action, I note that this application and resultant order arose from a main cause No. 064 of 2020 between URA and Kansai Plascon Uganda Ltd. The Applicants were not parties to that Cause. There was no way they could have been part of the temporary injunction proceedings. There is no evidence that it was imperative on the part of the Respondent (URA) to make them parties to the said Cause. There is nothing to satisfy me that the Respondent intentionally omitted to include the Applicants in that Cause so as to impute any bad faith on the part of the Respondent in that regard. As such I have not found any validity in the questions put by the Applicants over the application and issuance of the order of temporary injunction.

[122] The other aspect which, actually, I have found to consist of the main thrust of the allegation of bias is contained in the allegation that the Respondent indicated that it had made a review of the tax affairs of Kansai Plascon Uganda Ltd for the period 2012 to 2017 and the review had indicated that the Applicants and the Company (then Sadolin Paints Uganda Ltd) had been involved in tax evasion schemes. This allegation is reiterated by the Respondent itself in paragraphs 25, 26 and 27 of the Affidavit in Reply deposed by Robert Luvuuma. Surprisingly, on perusal of the record, I have not seen evidence that this allegation was ever clearly put to the Applicants or the Company, or otherwise indicated as one of the grounds that necessitated or occasioned revocation of the Private Ruling and against which the Applicants needed to raise a defence. The grounds communicated in the Notice to Show Cause did not disclose that the Respondent was investigating allegations of tax evasion.

[123] In light of the above glaring omission, which I find gross, I would agree that the Applicants and any other reasonable bystander are entitled to conclude that while the Applicants were defending themselves against alleged partial and untrue disclosure over irregular conduct of business by their former company, the Respondent was conducting the hearing with a mind

directed against persons involved in tax evasion schemes. Needless to say, an allegation of tax evasion does not only point to gross misconduct but is also an offence. Having such an allegation on record and not giving an opportunity to the Applicants to defend themselves against such an allegation is definitely prejudicial to the process of hearing and revocation of the Private Ruling by the Respondent. It also lends credence to the Applicants' allegation that the Respondent embarked on hearing the Notice to Show Cause Why the Private Ruling should not be cancelled for the second time with a pre-meditated and pre-determined mind. I agree that this conduct by the Respondent is indicative of not just imputed but also actual bias.

[124] The above finding, being corroborated by the relevant questions put by the Applicants regarding the letter of 20th August 2020 and the Notice of Direction referred to above, sufficiently prove the Applicants' allegation of bias. I am convinced that when the Respondent embarked on the issuance and hearing of the Notice to Show Cause, they were simply satisfying the order of the High Court to give the Applicants a hearing but they already a pre-determined decision. On basis of the authorities reviewed herein above, such a hearing does not pass the impartiality test. It leads to the conclusion that the process undertaken by the Respondent was such that the decision maker had a preconceived opinion and a predisposition to decide the matter in a certain way, and did not leave the mind perfectly open to conviction, and their inclination clearly appeared to have been bent towards one side, which all shows an attitude of bias.

[125] As was stated in ***R. v. Architects' Registration Tribunal (supra)***, the presence of bias leaves a reasonable person in doubt as to the impartiality of the decision making process. In these circumstances courts have quashed such decisions where it is obvious that a decision maker stood tainted by bias. I am convinced that this is one such decision that ought to be quashed on the

basis of lack of compliance with the principles of fair hearing and thus procedural impropriety.

[126] The last point I will deal with relates to the Applicants' reliance on the principle of legitimate expectation. The position of the law and the authorities cited on the subject are quite settled. I should however quickly add that in a judicial review matter such as this one, the legitimate expectation on the part of the Applicants is not and cannot be that the Private Ruling would never be revoked. This is because the relevant law (Section 45 (8) of the TPCA) makes provision for revocation of a private ruling. Under such circumstances, it is correct as pointed out by the Respondent's Counsel, that a party cannot hold a legitimate expectation against a clear provision of the law. For purpose of judicial review, the principle is limited to procedural legitimate expectations. See: ***Dr. Lam – Lagoro James Vs. Muni University, HCMC No. 0007 of 2016.***

[127] In the instant case, the legitimate expectation the Applicants were entitled to was that they would be accorded a hearing that was in accord with the principles of natural justice. As such, by conducting a hearing tainted with bias, the Respondent is in breach of the principle of legitimate expectation to that extent only. I have not found it necessary to consider the arguments on the aspect of delay as they are not based on any clear law and I find them catered for, by necessary implication, by my finding on the issue of legitimate expectation.

[128] In all, therefore, the application by the Applicants has only succeeded on the ground of procedural impropriety and particularly on the elements of bias and procedural legitimate expectation. The allegations on the other grounds have failed. Nevertheless, the ground of procedural impropriety is by itself sufficient to invoke the prerogative remedies envisaged under the law and as claimed and proved by the aggrieved party. In answer to issue one therefore,

my finding is that the decision communicated on 6th May, 2021 revoking the Private Ruling dated 9th March, 2018 is tainted with unfairness and procedural impropriety.

Issue 2: Whether the Applicants are entitled to the remedies sought in the Application?

[129] The law is that grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds for questioning any decision, action or omission, then the court must issue any remedies available. The court may not grant any such remedies even where an applicant may have a strong case on the merits; so the courts must weigh various factors to determine whether any remedies should lie in any particular case. See: ***R vs Aston University Senate ex p Roffey [1969] 2 QB 558*** and ***R vs Secretary of State for Health ex p Furneaux [1994] 2 All ER 652*** cited in ***Salim Alibhai & Others vs URA, HC M.A No. 123 of 2020***.

[130] In the present case, faced with a decision reached by the decision maker in absence of impartiality and procedural fairness, the Court cannot deny the prerogative writs that are made out on the evidence. I will therefore allow this application. For avoidance of doubt, the declarations and orders that appear in the Notice of Motion but are not mentioned below are accordingly denied. Regarding costs, the Applicants will have half the costs of the application since a considerable part of the allegations have been successfully defended by the Respondent and have failed. I have, therefore, granted the following declaration and orders:

1. A declaration that the Respondent's decision to revoke the Private Ruling dated 9th March 2018 by letter dated 6th May 2021 and all actions arising there from is unfair and tainted with procedural impropriety.
2. An order of **Certiorari** doth issue against the Respondent quashing the decision to revoke the Private Ruling dated 9th March 2018 by letter dated 6th

May, 2021 plus all actions arising there from, to wit, issuance of all assessments and enforcement actions taken in respect of the sale of shares by the Applicants to Kansai Plascon EA Proprietary Ltd.

3. An order for payment by the Respondent to the Applicants of half the costs of the application.

It is so ordered.

Dated, signed and delivered by email this 28th day of September, 2021.

Boniface Wamala
JUDGE