THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA REGISTRY

APPLICATION NO.9 OF 2013

GOLD STAR INSURANCE COMPANY LTD ==================APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ========================RESPONDENT

RULING

This ruling is in respect of an application challenging additional income tax assessments totaling to Shs. 699,319, 467/= issued by the respondent on the applicant. The breakdown of the tax income assessments is as follows: for the year of income 2008 - Shs. 66,419,544/=. for the year of income 2009 - Shs. 97,610,898/=; year of income 2010 - Shs. 169,255,741/=; year of income 2011- Shs. 187,723,104/=; and for year of income 2012- 178, 310180/=.

The facts giving rise to this application are as follows; The applicant is an Insurance company duly incorporated in Uganda. An audit carried out by the respondent on the applicant in respect of corporation tax for the period 2008-2012 established that contingency reserves amounting to Shs. 1,815,897,000/= for that period, had been claimed as deductions by the applicant which resulted in the understatement of the applicant's taxable profits/chargeable income.

The above findings were communicated by the respondent to the applicant on 2nd October, 2013. The applicant objected to these findings on 11th October, 2013. In response to the applicant's objection, the respondent made an objection decision on 28th October, 2013, maintaining its tax position that contingency reserves which are provided to cover fluctuations in securities and variations in statistical estimates are not allowable deductions. Based on the audit findings, the respondent raised corporation additional tax assessments of Shs. 699,319,467/= against the applicant.

The tax on the above assessments was fully paid by the applicant. The applicant applied to the Tax Appeals Tribunal for a review of the decision.

The following issues were set down for resolution by the tribunal:

1. Whether the applicant is liable to pay the tax as assessed?
2. What remedies are available to the parties?

The applicant was represented by Mr. Cephas Birungi and Ms. Belinda Nakiganda, while the respondent, by Ms. Nakku Mwajuma and later Mr. George Okello.

The applicant's first witness, Mr. Akankwasa testified that in October, 2013, the respondent carried out an audit on the applicant and issued a report that disallowed contingency reserve expenses as allowable deductions. Mr. Akankwasa stated that under S. 47 of the Insurance Act there are three reserves namely, reserves for unexpired risks, reserves for outstanding claims and contingency reserves to cover fluctuations in securities and variations in statistical estimates. Mr. Akankwasa testified that all the three reserves set out under S. 47 of the Insurance Act are estimates and are all related to expired risk. His view was that all the three reserves should be treated collectively as unexpired risk.

The applicant's second witness, Mr. Azim Tharani explained to the tribunal the complexities of the insurance business and the various reserves that insurance companies are required to keep in accordance with the provisions of S. 47 of the Insurance Act. He testified that in his opinion there was no difference between the three types of reserves. He was of the view that contingent reserves were part of unexpired risks. Under cross examination Mr. Tharani explained that the applicant does not keep separate accounts for the three different reserves. He said that "they are all clubbed together; this is standard practice throughout the world".

Mr. Tharani further testified that contingency reserves should not be taxed because they neither constitute income nor profits. He stated that contingency reserves could be converted into income in the event the insurance company went out of business. He indicated that the applicant used contingency reserves to invest.

No witnesses were called by the respondent. He did not see the need to call any witness as he contended that the matters in issue needed only interpretation of the law.

In its written submissions, the applicant disputed the assessment by the respondent of UGX. 699,319,467/= for the period 2008 – 2012. The applicant contended that contingency reserves are allowable deductions under Paragraph 3 of the 4th Schedule of the Income Tax Act and are a statutory requirement under S. 47 of the Insurance Act. The applicant asserted that the taxation of insurance business is governed by S. 16 of the Income Tax Act, which provides as follows; "The chargeable income of a person for a year of income arising from the carrying on of a short term insurance business is determined in accordance with the 4th Schedule to this Act". Paragraph 3 (c) of the 4th schedule states that "a deduction is allowed for a year of income in the production of income from the carrying on of a short-term insurance business is the sum of the amount of expenditures and losses incurred by the person during the year of income in carrying on that business which are allowable as a deduction under this Act, other than expenditures or losses referred to in Paragraphs (a) and (b)". Relying on Paragraph 3(c) of the 4th schedule the applicant submitted that in addition to expenditures and losses provided for in Paragraph 3 (a) and 3 (b) of the 4th schedule, Paragraph 3 (c) allows a deduction for other losses and expenditures incurred in carrying on short-term insurance business.

The applicant further submitted that any expenditure or loss incurred in the production of income is an allowable deduction in insurance business under Paragraph 3(c) of the Income Tax Act and that in this instant case, the expenditure allowed as a deduction are the reserves deducted from gross premium since they are business expenses.

The applicant concluded by stating that the requirement to establish a contingency reserve is statutory and that once funds are reserved as contingency, they become an expense to the company since the money is no longer for the company but reserved for future expense. Such funds, the applicant stated, constitute expenses and are allowable as a deduction for the year of income.

The applicant objected to the respondent’s treatment of contingency reserves as based on the respondent’s interpretation of the International Accounting Standard (IAS) No. 37 (provisions, contingent liabilities and contingent assets). The applicant submitted that the IAS 37 does not apply to accounting and disclosure provisions arising in insurance entities from contracts with policy holders or those covered by another standard. The applicant further submitted that financial reporting for insurance contracts are governed by IFRS (International Financial Reporting Standards) and not the IAS No. 37 and that IAS No. 37 is not binding as it is only of persuasive effect and does not prevail over the domestic laws of a country. It was the applicant’s submission that the IAS 37 has no application to the circumstances of this case and that the respondent ought to have based its decision on the provisions of the Insurance Act and the Income Tax Act alone.

The applicant contended that under S. 95 of the Income Tax Act the assessment made by the respondent was made outside the five year period permitted under the law. Consequently, the applicant submitted, that the tax and penalty paid by the applicant as a consequence of the said assessment be vacated and the tax paid back to the applicant with interest.

The applicant prayed for declarations that it is a statutory requirement in the Insurance Act for reserves to be deducted as a business expense, that contingency reserves are business expenses and are thus allowable deductions under S. 16 and Paragraph 3(c) of the Income Tax Act. The applicant prayed that the assessment of 2008 be vacated since it is not within the scope of the law and the tax paid be refunded with interest and that the respondent’s assessment of 2008-2012 is not justified and should therefore be vacated and for the Tribunal to allow the objection by the applicant. The applicant also submitted that it was entitled to general damages and to the costs of the application.

In its rebuttal, the respondent submitted that the applicant's witnesses attempted to use the terms "reserves for unexpired risks/unearned premiums" and 'contingency reserves" interchangeably. The respondent singled out AW1, Mr. Ronald Akankwasa, who had testified during examination in chief, that all the three broad categories of reserves must be treated as unexpired risk. The respondent submitted that Mr. Akankwasa had no basis for making the claim that the category of reserves, which he on the one hand agrees as being three broad categories could at the same time be treated as the same as the reserve for unexpired risks. It was the respondent's submission that the above was an attempt by the applicant to read words into the clear provisions of S. 47 of the Insurance Act and Paragraph 3(d) of the 4^{th} schedule of the Income Tax Act.

The respondent cited the decision of the Supreme Court in *Registered Trustees of Kampala Institute vs. Departed Asians Property Custodian Board* SCCA No. 21/1993 for the proposition that the law, in the absence of a clear necessity, does not permit to be read into an Act of Parliament "words which are not there". The respondent submitted that if it was the intention of Parliament that the other two categories of reserves mentioned in S. 47 of the Insurance Act should mean the same thing as the reserves for "unexpired risk/reserves for unearned premium" and vice versa it would have stated so.

The respondent highlighted the difference between the three reserves by submitting that the threshold for each reserve is distinctly prescribed by the Act, and by way of illustration, the respondent indicated that in the case of reserves for unexpired risks/unearned premiums, an Insurance company must maintain not less than 40% of the total net premiums (or the amount the Commission may prescribe). In the case of reserves for "outstanding claims" it must be a sum equal to the total estimated amount of all outstanding reported claims, plus an additional amount of not less than 15% of the total amount of outstanding reported claims. The respondent submitted that the distinction between the various reserves were clear as the threshold for the first category was based on premiums while the threshold for the second category was based on outstanding reported claims.

The respondent further submitted that under category (c) the threshold of the reserve is also premised on premiums but in the case of category (a), it is based on net premiums alone (or other amount as the Commission may decide), while under category (c), it is based on gross premium or net profits. Additionally, under category (a), the percentage is "not less than 40% while under (c) it is not less than 2% of the gross premium income or 15% of the net profits". Further, under category (c), the reserve can accumulate until it reaches the minimum paid up capital or 50% of the net premiums, whichever is the greater. The respondent submitted that this latter requirement (for contingency reserves) is not applicable to any other category of reserves, thus further supporting their submission that all the three categories of reserves are distinct.

The respondent refuted the contention made by the applicant that the Income Tax Act provides for contingency reserves. The respondent stated that the applicant's claims were based on the premise that reserves for unexpired risk are the same as contingency reserves. The respondent argued that since reserves for unexpired risk are mentioned under paragraph 3 of the 4th Schedule of the Income Tax Act, the applicant thereby erroneously formed the view that the said reserves for unexpired risk also included contingency reserves. The respondent cited the decision of the Court of Appeal in *Crane Bank Ltd v. Uganda Revenue Authority* (supra) where the court set out the position of the law in respect of tax refunds and exemptions.

The respondent conceded that IAS 37 is not applicable to Insurance business and went on to state that its concession did not imply that the respondent was left with no basis for rejecting the applicant's claims that contingency reserves are allowable as deductions for income tax purposes. The respondent submitted that its rejection of the applicant's claim was also based on the fact that the 4th schedule to the Income Tax Act does not provide for contingency reserves.

The respondent submitted that the applicant's assertion that the income tax assessment for the year 2008, was time barred, had been raised for the first time in the applicant's written submissions. The respondent stated that the issue had not been raised by the applicant in the course of its objection to the tax assessment. Therefore the respondent had not been in any position to address the claim in its objection decision. The respondent further submitted that the issue had also not been raised before the tribunal for determination. The respondent asserted that the applicant's action in raising the issue during submissions was an affront to its constitutional right to a fair hearing as prescribed by Articles 28 and 44 (c) of the Constitution and was in bad faith. The respondent prayed that the applicant's submissions on this point be disregarded.

In the alternative the respondent submitted that the limitation period imposed under S. 95(1) of the Income Tax Act did not apply as the information that led to the assessment had only been obtained during the audit exercise and not before.

The respondent further submitted in the alternative that S. 97(2) of the Income Tax Act allows the Commissioner General to make an additional assessment on account of fraud, gross or willful neglect by or on behalf of the tax payer or upon the discovery of new information. The respondent submitted that the new tax position communicated to the applicant after the audit amounted to an "additional assessment" upon the discovery of new information within the meaning of section 97(2) of the Income Tax Act.

The respondent submitted that the applicant has not made out a case to justify any award of the reliefs prayed for. The respondent submitted in respect of the claim for general damages that no case had been made out by the applicant to support an award of general damages but proceeded to add that even if a case had been made the tribunal has no powers to award general damages. The respondent submitted that the Tax Appeals Tribunal Act does not grant the tribunal powers to award general damages.

The Tribunal having listened to the testimony of witnesses, perused the record of evidence and read the submissions wishes to rule as hereunder.

The dispute between the applicant and respondent arose from an assessment of Shs. 699,319,467/= for an expenditure of Shs. 1,815,897,000/= the applicant paid in its contingency reserves. The respondent considered it as taxable income while the applicant contends that the expenditure was an allowable deduction and or an unexpired risk which is an allowable deduction.

In order to understand the dispute one has to comprehend how insurance business is done. Insurance business as defined under S. 16 (3) of the Insurance Act to mean:

> "the business of, or in relation to the issue of, or the undertaking of liability under, life policies, or to make good or indemnify the insured against any loss or damage, including liability to pay damages or compensation contingent upon the happening of a specified event."

In order for a person to get insured, he or she has to pay a premium to the insurance company. A premium is defined by the *Black's Law Dictionary* 8th Edition p. 1219 as the "periodic payment required to keep an insurance policy in effect." It is from the premiums collected that an insurance company indemnifies an insured against any loss or damage including the liability to pay damages or compensation upon the happening of a specified event. An insurance company also receives income from the said premiums to meet its operation costs. In the event the income exceeds expenditure it makes profits.

There is need to streamline how the premium is rationed, in order to balance the payment of the insured claims, costs and profitability so that the insured are not left at the mercy of the insurers. In order to protect the customers of the insurance company the Insurance Act was passed to govern the insurance sector. The Insurance Act Cap 213 was governing the transactions of the applicant from 2008 to 2011. In 2011 the Insurance Act Cap 213 was amended. In its preamble the Insurance Act (Cap 213) was passed inter alia to regulate the business of insurance. The Insurance Act (Cap 213) S. 47 required the insurance companies to provide for reserves in order to meet claims of the customers in the event the insured risks occur. S.47 reads as follows

> (1) An insurer shall establish and maintain in respect of each class of insurance business the following reserves –
>
> (a) reserves for unexpired risks;
>
> (b) reserves for outstanding claims;

(c) contingency reserves to cover fluctuations in securities and variations in statistical estimates.

S. 47(2) of the Act provides for the thresholds to be maintained by a non-life insurance company. It provides as follows:

> "(2) An insurer shall maintain with respect to non-life insurance business, the following reserves-
>
> (a) reserves for unexpired risks, amounting to not less than 40 percent of the total net premiums or such other amount as the commission may decide;
>
> (b) reserves for outstanding claims, a sum equal to the total estimated amount of all outstanding reported claims together with an amount of not less than 15 percent of the total outstanding reported claims, in respect of claims incurred but not reported at the end of the last preceding year; and
>
> (c) a contingency reserve, which shall not be less than 2 percent of the gross premium income or 15 percent of the net profits, whichever is the greater, or such other amount as the Commission may decide: and the reserve shall accumulate until it reaches the minimum paid-up capital or 50 percent of the net premiums, whichever is the greater.

It is these reserves that are at the bone of contention. The applicant contends that the expenditure it made to the contingency reserve fund should be treated as allowable deductions. It also contends that the expenditure on the contingency reserve fall within the description of unexpired risk under the Income Tax Act which is an allowable deduction.

The Insurance Act did not define "unexpired risks" and "contingency reserves". The applicant's witness AW1 Mr. Ronald Akwansa used the words "unexpired risk" and "contingency reserves" interchangeably. Before we can go into the definitions of both terms we have to ask ourselves whether they are the same. Under the Insurance Act (Cap 213) they could not have been the same as they are given different thresholds under S. 47(2) of the Act. Before we can also consider what the terms could mean one has to take into consideration that the Insurance Act (Cap 213). S. 47(1) (a) and (2) (a) of the Insurance Act was amended by S. 28 of the Insurance (Amendment} Act 2011. The words "unexpired risks" was replaced with the words "unearned premiums". The

Insurance Amendment Act did not define the words “unearned premiums”. Would the said words “unexpired risks” and “unearned premiums” be the same? Does the word “unexpired risk” under the Income Tax Act convey a different meaning from that of the Insurance Act so as to include expenses to “contingency reserve fund”?

Before we can look at the definitions of the terms, we have to look at the Income Tax Act and ask ourselves whether the said terms in the Insurance Act would be applicable to the Income Tax Act. The applicant contends that the payments to the contingency reserves under the Insurance Act are allowable deductions under the Income Tax Act.

It is not in dispute that insurance business is taxable under the Income Tax Act. S. 4 of the Income Tax Act imposes income tax on every person who has chargeable income for each year of income. The relevant Section in the Income Tax Act which determines insurance income is taxed is S. 16 of the Income Tax Act which reads:

> “(1) The chargeable income of a person for a year of income arising from the carrying on of a short-term insurance business is determined in accordance with the Fourth Schedule to this Act.”

S.16 (3) (c) defines short-term insurance business to mean any business that is not a life insurance business. The evidence on record shows that the applicant is engaged in short-term insurance. Therefore the relevant Section to the applicant’s application would be S. 16 of the Income Tax Act.

The 4th Schedule to the Income Tax Act shows how the computation of income tax for short term insurance company is arrived at. The Tribunal will not go into the details on how the computation of income is done as it is not in dispute. We shall only refer to Paragraph 2 (c) of the 4th Schedule dealing with income of unexpired risks to explain the treatment of the deductible allowances of unexpired risks.

What is in dispute is the expenditure of the applicant to its contingency reserve fund. The applicant contends that they are deductible allowances. The relevant Paragraph that deals with total deductions is Paragraph 3 of the Schedule which reads as follows:

> The total deduction allowed for a year of income in the production of income from the carrying on of a short-term insurance business is the sum of—
>
> (a) the amount of the claims admitted during the year of income in the carrying on of such a business, less any amount recovered or recoverable under any contract of reinsurance, guarantee, security or indemnity;
>
> (b) the amount of agency expenses incurred during the year of income in the carrying on of such a business;
>
> (c) the amount of expenditures and losses incurred by the person during the year of income in carrying on that business which are allowable as a deduction under this Act, other than expenditures or losses referred to in paragraphs (a) and (b); and
>
> (d) the amount of a reserve for unexpired risks referable to such a business at the percentage adopted by the company at the end of the year of income.

The applicant contends that their expenses on the contingency reserves fall under clauses (c) and (d) of the 4th Schedule. Before the Tribunal can discuss under which of the clauses the applicant's expenses fall we have to ask ourselves what are contingency reserves and unexpired risks. Are unexpired risks under the Income Tax Act the same as those under the Insurance Act?

The Income Tax Act does not define "contingency reserves" nor does it define "unexpired risks"? The Insurance Act also does not define the said terms. One wonders whether the application of the reserves under the Insurance Act would apply to the Income Tax Act.

The term "unexpired risks" is not a term one would expect an ordinary man on the street to be conversant with. It is a term used mostly by insurers, tax lawyers and taxmen. To get a working definition of the term "unexpired risks" one would have to look at the words separately.

The Tribunal shall begin by look at the word "risk". The work "risk" is defined by *Black's Law Dictionary* 8th *edition p. 1353* as:

> "1. The uncertainty of a result, happening, or loss, the chance of injury, damage, or loss, esp., the existence and possibility of harm <many feel that skydiving is not worth the

risk> … 2. Liability for injury, damage, or loss if it occurs < the consumer – protection statute placed the risk on the manufacturer instead of the buyer>. 3. Insurance. The chance or degree of probability of loss to the subject matter or matter of an insurance policy < the insurer undertook the risk in exchange for a premium>… 4. Insurance. The amount that an insurer stands to lose <the underwriter took steps to reduce its total risk>. 5. Insurance. A person or thing that an insurer considers a hazard… 6. The type of loss covered by a policy; a hazard from a specified source < this homeowner's policy covers fire risks and flood risks>…"

From the above definitions while one may view a "risk" as the amount one would stand to lose while another would view the risk as the amount the insured pays to cover the risk. There are many other written definitions on risks. In order to streamline the ambiguity arising from the various definitions one has to use the purposive approach to get a functional definition of unexpired risk. In *Crane Bank v Uganda Revenue Authority* HCT-00-CA-18-2010 his Lordship Kiryabwire stated that:

"The position of the law is that if any doubt arises from the words used in the statute where the literal meaning yields more than one interpretation, the purposive approach may be used, to determine the intention of the law maker in enacting of the statute. (See Justice Choudry in the case of UGANDA REVENUE AUTHORITY V. SPEKE HOTEL (1996) LTD (CA No. 12 of 2008).

The purposive approach has been used in several cases. In the case of Sussex Peerage (1844) 8 ER at 1057, it was held that

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the law giver but if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention to call in aid the grounds and cause enacting the statute and to have recourse to the preamble which according to Dire CJ is 'a key to open the minds of the makers of the Act and the mischiefs they intend to redress."

Lord Griffiths in the case of *Pepper v Hart* [1993] 1 ALL ER 42 at p 50, also held that:

"The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt a literal meaning of the language. The court must adopt a purposive approach which seeks to give effect to the true purpose of the legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted."

Therefore for the Tribunal to effectively give a meaning of the term "unexpired risk" meaning we have to ask ourselves what was the intention of the legislature. The Income Tax Act is interested in collecting taxes for services rendered. To a tax man his interest in a risk can only be viewed in monetary terms, something that can be taxed. Using the purposive approach, to a tax man a "risk" is the amount of monies an insured pays to insure a risk, in other word a "premium".

"Unexpired" is the antonym for "expired". The word "expiration" is defined by the Black Law Dictionary 8th Edition page 619 to mean "coming to an end". In order to understand the relevance of the term "unexpired" in insurance to the income tax Act one has to look at the period of an insurance policy in relation to that of a financial year of income under the Income Tax Act. An insurance policy may run for a period of up to one year or more. Under the Income Tax Act a financial year of income is for one year, ending for most companies on the 30th June of each year. Insurance policies may be obtained at any time of the year. The Income Tax Act has to synchronize the differences in the time periods of a financial year of income and that of insurance policies for taxation purposes. When a financial year comes to an end an insurance policy may still be running. The insurance company has to carry forward its policies into the next financial year in order for its business to continue. Therefore in the event that an insurance policy is running and the financial year of income comes to an end, the spill-over of the insurance policy into the next financial year is what is referred to as unexpired. Therefore an "unexpired risk" is the amount on the premium or premiums that is carried into the next financial year of income when one financial year of income comes to an end. The mischief the Income Tax Act Paragraph 3(d) of the 4th Schedule was to address the amount of premium that is still outstanding at the end of the financial year of income of any insurance company. The insurance company would still have to meet claims from the premiums received and under the policies in the previous year of income.

In interpreting particular sections of a taxing Act, it is necessary to consider other Sections of the same Act. In order to understand the term expired risk under Paragraph 3(d) one has to look at Paragraph 2(d) of the 4th Schedule. In *Commissioner of Inland Revenue v Alcan New Zealand Limited* {1994} 3NZLR 139 it was observed by his Lordship Mackay that: "…the true meaning must be consonant with the words used, having regard to their context in the Act as a whole and to the purpose of the legislation to the extent that it is discernible." The Income Tax Act provides for expired risks to be deducted under Paragraph 3 (d) as an expense for the financial year coming an end and carried forward as income for the new financial year of income under Paragraph2 (c) of the 4th Schedule which reads as follows:

> "2. The total income derived by a resident person for a year of income in carrying on a short-term insurance business is the sum of—
>
> (a) the amount of the gross premiums, including premiums on reinsurance, derived by the person during the year of income in carrying on such a business in respect of the insurance of any risk, other than premiums returned to the insured;
>
> (b) the amount of any other income derived by the person during the year of income in carrying on such a business, including any commission or expense allowance derived from reinsurers, any income derived from investments held in connection with such a business and any gains derived on disposal of assets of the business; and
>
> (c) <u>the amount of any reserve deducted in the previous year of income under paragraph 3(d)</u>.

It is clear from reading the Income Tax Act as a whole that the term "Unexpired Risk" refers to the premiums that are carried forward from one financial year of income to another to allow the insurance business to continue.

The Tribunal will give an illustration. An insured insures his premises for Shs. 12 million (i.e. a monthly premium of Shs. 1,000,000/=) on the 1st March 2015 for one year. The insured financial year of income ends on the 30th June of each year. At the end of June 2015, 4 months would have expired using Shs. 4,000,000/= of the premium leaving a balance of Shs. 8,000,000/= which would be considered as the "unexpired risk". The insurance company will deduct Shs. 8,000,000/= as expenses for the financial year ending 30th June 2015. The said Shs. 8,000,000/= will be carried forward as income in the year of income 2016 so that the insurance policy may continue running.

The Insurance Act amended the term "unexpired risk" in 2011 to read "unearned premium". The Insurance Act does not defined "unearned premium". *Black's Law Dictionary 8th Edition* p.1334 defines unearned premium reserve as "An insurance company's reserve that represents premiums that have been received but not yet applied to policy coverage." This may not be the same as "unexpired risk" under the Income Tax Act. This does not affect the Income Tax Act. While "unexpired risk" under the 4th Schedule of the Income Tax Act deals with that portion of premium that should be carried forward into a new financial year of income S. 47 of the Insurance Act deals with statutory reserves an insurance company should maintain. A taxman is not interested in statutory reserves unless for taxation purposes. The Insurance Act is not *pari materia* with the Income Tax Act. Each is set up for a different purpose although one may have a bearing on the way items are treated in another. So whether an item is called "unearned premium" or not under S. 47 of the Insurance Act, it does not affect "unexpired risk" under the Income Tax Act.

The applicant contends that expenditure to contingency reserve constitute an unexpired risk. As already noted, neither the Income Tax Act nor the Insurance Act define "contingency reserve". The term "contingency" is defined by Black's Law Dictionary 8th Edition p.338 as "1. An event that may or may not occur. 2. The condition of being dependent on chance, uncertainty." It defines reserve at p. 1334 as an "Something retained or stored for future use, especially a fund of money set aside by a bank or an insurance company to cover future liabilities."

A clear picture of what a contingency reserve from the Insuranceeopedia.com https://www.insuranceopedia.com /definition/1341/ contingency -reserve) though not authoritative is that:

> "A contingency reserve, in the context of insurance, is the amount of money insurers set aside above the legal requirements to cover unexpected or unforeseen losses. It may be

> used to pay out claims or other underwriting expenses in the event that the money brought in from premiums and the loss reserves are not enough to cover costs. It is also sometimes called a contingency surplus."

The contingency reserve by the applicant was a statutory requirement. The article further states that:

> "Contingency reserves essentially act as a sort of emergency fund that can be called upon in times of great need. For example, if a property insurance company does business in an area that suddenly experiences a great hurricane, it may need to dip into its contingency reserves to help pay for some expenses. Although contingency funds can be used to balance risk, reinsurance policies are also taken out for the same purpose."

Merely for explanation purposes, the above comments are useful. Therefore one would not be wrong to say that a contingency reserve is a fund of money where money is put aside to meet unforeseen circumstances in the future.

From the above definitions, it is clear that a contingency reserve expense is as different from an "unexpired risk" as a pin is different from a needle. While a contingency reserve is concerned with monies being set aside for unforeseen circumstances, an unexpired risk under the Income Tax Act is concerned with the balance of a premium that is carried forward in another financial year of income. The relationship between an unexpired risk under the Income Tax Act and a contingency fund is remote. The Income Tax Act does not even bother to define contingency fund. In the circumstance the Tribunal finds that the applicant's expenses to the contingency fund reserve do not fall under Paragraph 3 (c) of the 4th Schedule of the Income Tax Act that makes unexpired risks deductible allowances.

The Tribunal still has to resolve whether expenditure to a contribution fund reserve are deductible expenses under Paragraph 3 (c) of the 4th Schedule which deals with the amount of expenditures and losses incurred by the person during the year of income in carrying on that business which are allowable as a deduction under the Income Tax Act. Expenses to a contingency reserve fund are not among those that are listed under the Income Tax Act.

Therefore the Tribunal has to ask itself whether expenses to a contingency reserve fund are other expenditure incurred in the production of income. The Tribunal does not think so. Insurance business unlike gambling is about managing losses and unforeseen circumstances. Insurance companies use actuaries to estimate possible losses. However there are times when the estimates may not be useful. In order to meet the unexpected contingency reserves are set up. Contingency expenses are reserves that are put aside to enable an insurance company meet an unexpected or unforeseen claim in the event that the monies from the premiums and the loss reserves are not sufficient to cover costs. One would equate to this to a farmer who has a bumper harvest and decides to put aside a portion of his harvest in the granary for unforeseeable situations like famine, floods. The reserves in the granary cannot be said to be used in production of other crops or farming. They remain reserves. Likewise the Tribunal cannot say that the expenses by the applicant to the contingency reserves are used in the production of income. The money put in the reserve is not expenditure or even used in the production of income. It remains intact unless invested elsewhere.

Under the Insurance Act S. 47 an insurance company is required to make a contingency reserve, which shall not be less than 2 percent of the gross premium income or 15 percent of the net profits. By the time a company makes a contingency reserve of 15 per cent of the net profits it means that taxes have already been paid. Therefore using the rule of thumb, monies that are put aside for a Contingency Reserve Fund are done after profits have been taxed. The Financial Dictionary on http://financial-dictionary.thefreedictionary.com/Contingency+Reserve states that contingency reserve funds are a company's retained earning that are not reinvested but set aside to protect against future losses. An insurance company has many options on how to treat its net profits. It may issue them as dividends, re-invest it or put it in the contingency reserve fund. Monies put in a contingency reserve fund cannot be taxed as they have already been taxed before net profits. Once again the tribunal holds that the applicant's expenses to the contingency reserve fund are not deductible allowances within the meaning of Paragraph 3 (c) of the 4th Schedule of the Income Tax Act. The applicant loses Issue 1.

Before the issue of the remedies can be discussed, the applicant raised an objection to the Income Tax Assessment of 2008 which was for the amount of Shs. 46,063,800/= being income tax and penal tax of Shs. 20,355,744 totaling to Shs. 66,419,544/=. The applicant contended that the said assessment was time barred. The respondent responded that the said matter was not raised by the applicant in its objection and pleadings and would infringe on its constitution right to a fair hearing. The respondent contended it obtained additional information at the time of audit which was five years later. Where additional information is obtained the time limits would not work.

The respondent contends that the applicant did not raise the issue of time limits in its objection. A perusal of the applicant's objection dated 11th October 2013 does not disclose the issue of the time limit. The additional assessments were issued on the 24th October 2013 when responding to the applicant's objection. The objection decision was made on the 28th October 2013. By the time the applicant made its objection the assessments had not been made. Therefore the applicant could not have raised the issue of time limit in its objection. The applicant filed their application on the 19th November 2013.

Under S. 16(4) of the Tax Appeals Tribunal Act, an applicant is, unless the Tribunal orders otherwise, limited to the grounds stated in the taxation objection. The respondent also contended that the applicant did not raise the issue of time limits in its application. The Tribunal agrees that the object of pleadings is to ensure that the parties know the other's case and points in issue. However issues of time limits are issues of substantive law. They are not mere procedural technicalities. In *Uganda Revenue Authority v Uganda Consolidated Properties Limited (1997 -2001) UCL 148* Failure to comply with time limits renders an action unlawful. Hence once an illegality is brought to the attention of court it takes precedence over all pleadings. In *Mukula international Ltd V His Eminence Cardinal Nsubuga* 1982 [HCB] 11 it was held that a court of law cannot sanction what is illegal and an illegality once brought to the attention of the court, overrides all questions of pleading or any admission made thereon. Hence the Tribunal has to consider the objection of time limit raised by the applicant.

The applicant cited S. 95 of the Income Tax Act. The applicant contended that the Section stipulates that the Commissioner shall make an assessment within 5 years from the date the return was furnished. S. 95 of the Income Tax Act reads:

> (1) Subject to section 96, the commissioner shall, based on the taxpayer's return of income and on any other information available, make an assessment of the chargeable income of a taxpayer and the tax payable thereon for a year of income within seven years from the date the return was furnished.
>
> (2) Where—
>
> (a) a taxpayer defaults in furnishing a return of income for a year of income; or
>
> (b) the commissioner is not satisfied with a return of income for a year of income furnished by a taxpayer, the commissioner may, according to the commissioner's best judgment, make an assessment of the chargeable income of the taxpayer and the tax payable thereon for that year.
>
> (3) Where the commissioner has made an assessment under subsection (2)(b), the commissioner shall include with the assessment a statement of reasons as to why the commissioner was not satisfied with the return.

The said section allows the Commissioner to make an assessment within seven years for the date a return is furnished. A perusal of the applicant's financial statement show that its financial years of income ended on the 31st December. The assessment issued by the respondent were made around the 24th October 2013. The reason given was that the applicant was understating its provisional tax estimates. If we are to apply the above section for the applicant's income assessment for 2008 OIt would not be time barred as the respondent still had time to 6 months after 31st December 2013.

Counsel for the respondent rushed to rely on S. 97 of the Income Tax Assessment. S. 97 of the Income Tax Act allows the Commissioner General to make an additional assessment on account of fraud, gross or willful neglect by or on behalf of the tax payer or upon the discovery of new information in relation to the tax payable. S. 97 of the Income Tax Act reads:

> (1) Subject to subsections (2) and (3), the commissioner may, within three years after service of a notice of assessment, make an additional assessment amending an assessment previously made.
>
> (2) Where the need to make an additional assessment arises by reason of fraud or any gross or wilful neglect by, or on behalf of, the taxpayer or the discovery of new information in relation to the tax payable for any year of income, the commissioner may make an additional assessment for that year at any time.

There is a difference between S. 95 and S.97 of the Income Tax Act. While S. 95 of the Income Tax Act limits the time to 5 years for an assessment S. 97 limits it to 3 years for an additional assessment. A perusal of the assessments issued by the respondent, exhibits RE5 and RE6, does not show that there are additional assessments. There are no previous assessments issued by the respondent or self assessments that were adduced in evidence. The Tribunal is not convinced that there is sufficient evidence to show that the assessment for the year of income 2008 was time barred. On second thoughts if the applicant had raised the issue of time limit and evidence had been adduced to that effect the Tribunal would have made a satisfactory decision in its farvour. In the circumstance the objection by the applicant is dismissed.

This application is thereby dismissed with costs to the respondent. The applicant was obliged to pay Shs. 699,319,467/= as income tax for the years of income 2008 to 2012.

Dated at Kampala this day of 2016

DR. ASA MUGENYI	**DR. STEHEN AKWABWAY**	**MR. ALI SIRAJ**