THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 16 OF 2011

BIRUNGYI BARATA & ASSOCIATES ……..……..... APPLICANT

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UGANDA REVENUE AUTHORITY……..……..…….. RESPONDENT

RULING

This application was filed by the applicant on 9th December 2011 challenging the respondent's decision declining to give a private ruling to the applicant.

The brief facts of the case are as follows: The applicant is a legal and tax consultancy firm which was engaged by Crane Bank Ltd to obtain a private ruling from the respondent in the name of one of Crane Bank Ltd's shareholders, Mr. Sudhir Ruparelia. On the 13th January 2011 the applicant wrote to the respondent to obtain a private ruling in respect of the application of Section 54(1)(c) of the Income Tax Act (Cap 340) to a transaction involving a forced sale of shares in compliance with Section 18 of the Financial Institutions Act 2004 and a Bank of Uganda directive.

The respondent replied on 28th January 2011 seeking further information on the transaction in question which the applicant provided in their response dated 7th June 2011. The respondent sought further particulars on the 17th June 2011 to which the applicant responded on 28th June 2011.

However, on 19th October 2011 the respondent declined to make the ruling or provide any guidance on the application of Section 54 (1) (c) of the Income Tax Act (Cap 340) on the

grounds that the said transaction had already been concluded. On 7th November 2011, the applicant objected to the grounds given by the respondent and on the same date, the respondent informed the applicant that the Commissioner has discretion to issue or not to issue a private ruling.

At the hearing the applicant was represented by Mr. Cephas Birungyi while the respondent was represented by Mr. Mathew Mugabi. During the scheduling, the following issues were agreed:-

1. Whether the respondent lawfully declined to make a private ruling?
2. Whether the Tax Appeals Tribunal can make the ruling where the respondent declines to do so?
3. What other remedies are available to the applicant?

The parties also agreed to file written submissions.

The applicant submitted that the role of the respondent is to collect tax which should not be absconded from by refusing to make a decision as to whether or not tax is due. According to the applicant, by declining to make a private ruling, the respondent is failing to perform one of its functions listed under Section 3 of the Uganda Revenue Authority Act (Cap 196) which provides:

(1) The functions of the Authority are:

a) "To administer and give effect to the laws or the specific provisions of the laws in the First Schedule to this Act, and for this purpose to assess, collect and account for all revenue to which those laws apply;"

The applicant further submitted that the reason given by the respondent for declining to make the ruling is not valid and bad in law. This is because the respondent declined to make a ruling because the transaction in question had already been concluded. This gives the false impression that a concluded transaction is outside the ambit of Section 161 of the Income Tax

Act (Cap 340) which provides for a private ruling to be issued by the respondent. This is because the Act allows the respondent to give a ruling in case of a "proposed transaction" or "a transaction entered into". The applicant submitted that the Act provides for both transactions that are yet to be entered into and those that have already been entered into. Consequently the respondent's reason that they cannot give a ruling because the transaction was already concluded was not a valid reason.

The applicant further submitted that the exercise of discretion must be done judiciously. The applicant submitted that the respondent indicated its willingness to make the ruling by asking for additional information in their letters dated 28th January 2011 (A3) and 17th June 2011 (A5) which were supplied by the applicant on 7th June 2011 (A4) and 28th June 2011 (A6) respectively. The applicant submitted that by declining to make a ruling in the letter dated 7th December 2011 without giving any reason, the respondent did not act judiciously. The applicant cited several cases in support of the argument that discretion must be exercised judiciously. In *Katamba Phillip & 3 others Vs Magala Ronald* (Arb. Cause No. 03 of 2007), Hon. Lady Justice Irene Mulyagonja Kakooza defined "discretion" to mean "cautious discernment, prudence, and individual choice".

In *the Republic V. Minister for Agriculture, Exparte Njuguna & others* [2006] 1 EA 356, where Ojwang J. ruled that "the correct perception of a discretion donated by law is that such discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria".

In the case of *Sam Kutesa & 2 others V. The Attorney General* Constitutional Petition No. 45 of 2011 the Constitutional Court stated that discretionary powers must not be exercised on the basis of a personal opinion or feeling but it must be exercised judiciously and with due regard to substantial justice.

It was therefore the applicant's submission that having engaged the applicant to submit additional information which the applicant complied with, the respondent did not exercise the discretion under Section 161 of the Income Tax Act judiciously by declining to give a private ruling to the applicant without giving any reason.

On issue number 2, the applicant submitted that under Section 14(1) of the Tax Appeals Tribunal Act (TAT Act), a person aggrieved by a decision made under a taxing Act by the Uganda Revenue Authority may apply to the Tribunal for a review of the decision. Under Section 19(1) of the TAT Act, the Tribunal may exercise all the powers and discretions that are conferred by the relevant taxing Act on the decision maker. The applicant consequently submitted that the Tribunal is authorized under Section 19(1) of the TAT Act to exercise the discretion of the respondent under Section 161 of the Income Tax Act and issue the private ruling.

The respondent on the other hand submitted that they acted within the law when they declined to make a private ruling. The respondent relied on Black's law Dictionary, 8th Edition page 902 where lawful is defined as "not contrary to law; permitted by law". A lawful act is authorized, sanctioned and/or not forbidden by law.

The respondent submitted further that Section 161 of the Income Tax Act (ITA) which provides for a private ruling gives discretionary powers/authority to the Commissioner to make a private ruling by the use of the word "may".

The respondent again relies on Black's Law Dictionary that defines the word "may" as "to be a possibility". This definition does not connote a mandatory requirement. The respondent

therefore contended that discretionary powers do not impose an obligation on a decision maker to exercise them or to exercise them in a particular manner.

The respondent also submitted that private rulings are a way of a taxpayer knowing in advance what the tax implications of a transaction are before they are concluded. In this particular case the transaction was concluded before the ruling was given. This means that if there are any taxes due, the Commissioner would simply raise an assessment to which the taxpayer may raise an objection or appeal if dissatisfied. The respondent therefore submitted that the Act does not spell out conditions/situations under which the Commissioner may choose to make or not to make a private ruling. Therefore when the Commissioner chose not to make a ruling he acted lawfully.

On whether the Tribunal can make the ruling where the respondent declines to do so the respondent submitted that the applicant relies on Section 19(1) of the TAT Act which gives the Tribunal powers to exercise the powers and discretions of the decision maker under the relevant taxing Act and Section 14(1) of the TAT Act which allows a person aggrieved by a decision made under a taxing Act by Uganda Revenue Authority to appeal to the Tribunal for a review of the decision. The respondent contended that Section 19 of the TAT Act does not in any way address issue 2. This is because under Section 161 (1) of the Income Tax Act the power to make a private ruling is vested in the Commissioner and the private ruling sought is meant to set out the Commissioner's position regarding the application of the Act to a transaction proposed or entered into by the taxpayer. If the Tribunal made the private ruling, that would be the position of the Tribunal and not that of the Commissioner. The respondent therefore contended that a private ruling can only be made by the Commissioner.

With respect to Section 14(1) of the TAT Act the respondent submitted that there was no private ruling made by the Commissioner and hence no taxation decision for the Tribunal to

review. The respondent submitted further that under Section 14(1) of the TAT Act it is only a person aggrieved by a taxation decision that can apply for a review of the decision by the Tribunal. The respondent submitted that in this case the aggrieved person would be the taxpayer and not the applicant who is merely his legal representative. The respondent relied on the cases of *Re Nakivubo Chemists* [1979] HCB 12 and *Exparte Side Botham* (1880) 14 Ch D 458 at 465 where Jams L. J. states "A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully affected his title".

Finally the respondent submitted that the applicant in this case does not have a cause of action against them. The respondent relied on the case of *Auto Garage v Matokov* [1971] EA where the three essential ingredients of cause of action are that:-

1. The plaintiff had a right
2. The right was violated
3. The defendant is liable

The respondent submitted that in the present case the applicant is a tax advisor/consultant who was merely engaged by a taxpayer to obtain a private ruling. This engagement did not confer upon the applicant the rights and liabilities of the taxpayer as far as tax implications were concerned.

The respondent therefore prayed that the application be dismissed with costs to the respondent.

After reading through the pleading and submissions of the parties, the Tribunals findings and ruling are as follows:

On the first issue, the Tribunal notes that the respondent declined to give a private ruling on two grounds. The first ground was that the transaction was concluded. The second ground was that it was not necessary or mandatory for the Commissioner to issue rulings. In a letter dated 7th November, 2011, the respondent communicated to the applicant that the Commissioner had discretion to issue or not to issue a private ruling and they chose the latter. The Tribunal shall address the second ground first. That is, is it mandatory or optional for a Commissioner to issue a private ruling?

Private rulings are provided for in Section 161 (1) of the Income Tax Act which says:

> "161(1) The Commissioner may upon application in writing by a taxpayer, issue to the taxpayer a private ruling setting out the Commissioner's position regarding the application of this Act to a transaction proposed or entered into by the taxpayer".

The respondent contended that the word "may" as defined in Black's Law Dictionary means "to be a possibility". Hence from the wording of the Section, it argued it is clear that it is not mandatory for the Commissioner to issue the private ruling once a taxpayer has made a written request to do so. However the respondent does not tell the Tribunal which edition of the Black's Law Dictionary it is referring to. The Tribunal has had the opportunity to look at Black's Law Dictionary 8th Edition page 1000 which defines the word "may" as follows:

> "1. To be permitted to < the plaintiff may close>. 2. To be a possibility <we may win on appeal> 3. Loosely, is required to; shall; must <if two or more defendants are jointly indicted, any defendant who so requests may be tried separately>. ● In dozens of cases, courts have held may to be synonymous with shall or must, usu. in an effort to effectuate legislative intent."

Using the above definitions, depending on the angle one looks at the word "may" it may have multiple meanings or different functions. It may have a directory function which connotes possibility and is optional or it may impose a mandatory duty.

Under S. 3(1)(a) of the Uganda Revenue Authority Act the functions of the respondent include to administer and give effect to the laws or the specified provisions of the laws set out in the

First Schedule to this Act, and for this purpose to assess, collect and account for all revenue to which those laws apply. The Income Tax Act is included in the First Schedule. The purpose of the Income Tax Act is to enable the taxpayers know and pay their income tax liability. It is the intention of the Income Tax Act so as to enable the taxpayer clarify on their tax liability allow them seek for private rulings from the Commissioner. It would defeat the intention of the legislature if the Commissioner abdicates from his statutory duty because he or she is not in the right mood. In order to give effect to the intention of the Income Tax Act the word "may" under S.166 imposes a mandatory duty on the Commissioner to issue private rulings and is synonymous with the word 'shall' as stated in Black's Law Dictionary.

The Tribunal wishes to clearly state that once a statutory duty is conferred on a public officer, it is mandatory that he or she must perform it. A statutory duty is not like an ordinary duty or one that is delegated. The legislature would not go through the trouble of conferring a duty to a public officer in vain. The Tribunal agrees with the applicant's citation of *Halsbury's Law of England*, 2001, Vol. 1 para. 20 page 29 which reads:

> "The usual remedy for failure to exercise a statutory discretion when the condition have arisen for it to be exercised is a mandatory order to compel performance of the duty to act. A wrongful failure to exercise a discretion may occur because the deciding body has misconstrued the scope of its own powers, believing it lacks the discretion vested in it, or… An abuse of discretion may however, be, in another aspect, a failure to excise the discretion conferred:"

As also stated in *Padfield V Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, at page 15

> "…a decision of the Minister stands on quite a different basis; he is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly."

Likewise the Commissioner should exercise the duty conferred to him or her by the legislature. The Commissioner should not abdicate from the statutory duty under the pretext of "possibilities and probabilities".

The word "may" simply means that the Commissioner has to exercise the duty granted to him or her with discretion. It is trite law that discretionary powers must be exercised judiciously. The Tribunal agrees that the authorities cited by the applicant support this proposition. In *Katamba Philip & 3 others V. Magala Ronald* (Arb. Cause No. 03 of 2007), Hon. Lady Justice Irene Mulyagonja Kakooza defined discretion to mean "cautious discernment, prudence, and individual choice". In the *Republic V Minister for Agriculture, Exparte W. Njuguna & others* [2006] 1 EA 356, Ojwang J. ruled that "the correct perception of a discretion donated by law is that such discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria". H.W.R. Wade in "Administrative Law" 5th Edition p.353 refers to the case of R V Wilkes (1770) 4 Burr 2527 at 2539 states

> "For discretion is a science of understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colorable glosses and pretences, and not to do according to their wills and private affections: for one saith, talis discretio discretionem confundit."

This means the law has given power to the Commissioner to use his or her best judgment in the particular circumstances and make a decision.

A question arises as to where a statute gives a public officer discretion to perform a duty can a tribunal interfere with that discretion? Halsbury's Law of England 3rd Edition Vol. 30 p. 687 para. 1326 states that

> "Where public bodies are given a discretion in the exercise of powers conferred upon them by statute, the courts will not interfere with the exercise of that discretion so long as it is exercised bona fide and reasonably; nor will the decision of an administrative body be interfered with by the courts if there is anything on which that body could reasonably have come to its conclusion."

In *Breen V Amalgamated Engineering Union* [1971] 2. Q.B 1 Lord Denning underlined the importance of an unfettered discretion by stating that:

> "The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant consideration and not by irrelevant. If its decision is influenced by extraneous consideration which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside.

In the present case the duty of the Tribunal is to determine whether or not the respondent acted judiciously in using its discretion to decline to make a private ruling under Section 161 (1) of the Income Tax Act. When the applicant wrote on 13th January 2001 requesting for the private ruling, the respondent by letters dated 28th January 2011 and 17th June 2011 wrote to ask for additional information from the applicant. The information was provided by the applicant by letters dated 7th June 2011 and 28th June 2011. The mere fact that the respondent asked for additional information showed that they were preparing to give the private ruling. The respondent has not shown in their pleadings and submissions that some information they required was not submitted. However, on 19th October 2011 the respondent wrote declining to make the ruling on the grounds that the transaction had already been concluded.

It is important to note that the relevant words in Section 161(1) are …."transaction proposed or entered into…". This means that the Commissioner is required to give private rulings in respect of transactions that are "proposed" or already "entered into". The purpose of a private ruling is for the taxpayer to know in advance the tax consequences of a transaction it intends to enter into or a transaction it has already entered into before the Commissioner issues an assessment in relation thereto, or whether not to take into account any profits/or losses arising there from in its returns of income. It therefore follows that the reason given by the

Commissioner is declining to give the private ruling because the transaction was already concluded was invalid.

Having ruled that the reason give by the respondent in the letter dated 19th October, 2011 was invalid; it means that the respondent declined to make a ruling under Section 161(1) of the Income Tax Act without giving any reason. In these circumstances can it be said that the Commissioner used the discretion under Section 161 (1) judiciously? The Tribunal does not think so. The Commissioner did not exercise his or her discretion reasonably.

In respect of the letter of 7th November the Tribunal further notes that it is not sufficient for a Commissioner to decline to give a ruling without reasons. In *R.V. Secretary of state for the Home Department Exparte Pegg* [1993], the House of Lords suggests that there is a duty to give reasons for decisions. Hence where the Commissioner declines to give a private ruling reasons ought to be given. Such reasons should be valid. From the authorities cited earlier to exercise discretion judiciously means cautious discernment, guided by transparent, regular, reliable and just criterion to be exhibited in the reasons for the decision. The Tribunal therefore finds that the respondent did not exercise its discretion in this case judiciously when it declined to give a private ruling without giving any reasons. Issue no. 1 is therefore answered in the negative.

On the second issue the applicant's submission is that where the Tribunal has been moved under Section 14 of the TAT Act to review a decision made under a taxing Act the Tribunal may under Section 19 of the TAT Act exercise all the powers and discretions of the respondent. The respondent's case is that the respondent did not make the private ruling requested for and therefore there was no taxation decision for the Tribunal to review. The respondent also submitted that if there was any person aggrieved by their decision it would be

the taxpayer and not the applicant. Therefore the applicant has no cause of action against the respondent.

The phrase "taxation decision" as used in section 19 is defined in Section 1(k) of the TAT Act to mean: - "any assessment, determination, decision or notice". The letter of the respondent dated 19th October 2011 conveyed to the applicant its decision not to make a private ruling under Section 161 (1) of the Income Tax Act. Consequently there is a decision within the meaning of Sections 1 (k), 14 and 19 of the TAT Act for which the Tribunal has been correctly moved by the applicant for review.

Whereas the Tribunal agrees that under Section 19 of the TAT Act, it can exercise all the powers and discretions of the respondent in reviewing decisions of the respondent, the Tribunal exercises these powers where it finds the respondent has made a decision which is wrong in fact and /or in law. In the matter before the Tribunal the Commissioner did not listen to the private ruling on its merits. The Commissioner dismissed the application on technical grounds which were erroneous. The respondent did not make the private ruling as requested. The Tribunal would not like to turn itself into a tax collecting agency by giving the private ruling in the first instance.

The duty to give the private ruling is the responsibility of the respondent in the first place. If the respondent makes a faulty ruling, the Tribunal can be moved to make corrections to the ruling. If the respondent wishes to use its discretion to decline to make a ruling under Section 161 (1) it must do so judiciously.

In the present case the Tribunal has found that the respondent did not act judiciously. In the circumstances the Tribunal directs, under Section 19 (1) (ii) of the TAT Act, that the matter is remitted back to the respondent to give the private ruling.

It is not enough to argue as the respondent does that if there was tax due the respondent would simply issue an assessment. The taxpayer is entitled to know before an assessment is issued what the tax implications will be, otherwise the enactment of Section 161 (1) of the Income Tax Act would be nugatory.

As regards locus of the applicant the Tribunal notes that Section 161 requires the Commissioner to issue a private ruling setting out the Commissioner's position regarding the application of this Act to a transaction proposed or entered into by the taxpayer. From the said Section it is clear that an application for a private ruling should be by the taxpayer who is involved in a transaction. In this case it is not the applicant who is engaged in the transaction but Mr. Sudhir Ruparelia. The applicant purports to be its legal representative. However it is not the taxpayer.

On issue 3, it usually follows that a successful party is entitled to costs. Issue 1 was decided in favour of the applicant, issue 2 is answered in the negative but not on the grounds submitted by the respondent. The applicant in the circumstances would be entitled to part of the costs which the Tribunal however declines to award for the following reasons:

The respondent submitted at length on the issue of locus standi of the applicant. We respectfully agree with the submissions of the respondent on this matter though we have not taken it into account in resolving the two main issues because the respondent ought to have raised it as a preliminary objection before or after the scheduling. These are points it could have addressed it in its private ruling and not at this stage. Without prejudice, the locus standi in respect of the private ruling should have been vested in the aggrieved tax payer and not the applicant, his attorney. The applicant is merely instructed to act on behalf of the taxpayer. The applicant does not carry the rights and obligations of the taxpayer. Tax matters are not

only personal but are also confidential. One wonders also whether Crane Bank had the authority to instruct a firm of lawyers to act on behalf of a shareholder. However what is surprising is that in Exhibit A1 Mr. Ajay Kumar stated that

> "We trust the above information is sufficient to obtain a private ruling in the name of Dr. Sudhir Ruparelia. Kindly contact the Undersigned should you require any further clarification on the matter".

As to why the applicant did not follow the said instruction and file the application in the names of the rightful applicant is still a mystery.

The right applicant in this case should have been the aggrieved taxpayer. It is a legal requirement that a power of attorney should be made to the agent. A matter that is filed on behalf of an aggrieved tax payer or principal by an attorney should always be in the names of the aggrieved party and not the attorney. A person holding a power of attorney can only bring proceedings in the name of the donor. In *Kajubi V Kanyana* (1967) EA 301 it was held that the power of attorney held by the respondent did not authorize him to institute the proceedings in his personal name and capacity; and doing so made the proceedings fundamentally and incurably irregular. A question may arise as to who may be liable to pay costs in the event an application is dismissed. Would it be the attorney or the unsuspecting 'alleged' donor?

For these reasons we decline to grant the applicant costs. This application is partly allowed and remitted back to the respondent to issue a private ruling under Section 161(1) of the Income Tax Act. Each party should bear their own costs.

Dated at Kampala this ……. day of …… 2012.

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Asa Mugenyi	**Martin Fetaa**	**Pius K. Bahemuka**
Chairman	**Member**	**Member**