TAX APPEALS TRIBUNAL

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION 56 OF 2019

STANBIC BANK HOLDINGS LIMITED :::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY :: RESPONDENT

BEFORE DR. ASA MUGENYI, MRS. CHRISTINE KATWE, MR. GEORGE MUGERWA

RULING

This ruling is in respect of an application challenging a stamp duty assessment of Shs. 9,950,531,938 arising from the determination of whether performance bonds, advance payment bonds, guarantees and bid bonds are liable to pay stamp duty.

The applicant issues performance bonds, advance payment bonds, guarantees and bid bonds at the request of its customers in favour of third party beneficiaries.

Item 16 of Schedule 2 to the Stamp Duty Act 2014 provided for stamp duty of Shs. 5,000 for bonds (not being a debenture). Item 36 of Schedule 2 provided for a stamp duty at a rate of 1% for indemnity bonds. Item 36 was subsequently amended in 2019.

In 2019, the respondent decided to treat performance bonds, guarantees advance payment bonds and bid bonds as indemnity bonds chargeable at a stamp duty rate of 1% of the value. It issued an assessment of Shs. 9,950,531,938 which the applicant objected to and contended that the said instruments should be treated as bonds.

Issues

1. What is the stamp duty payable by performance bonds, advance payment bonds, bid bonds and guarantees during the period in dispute?

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2. Whether the applicant is liable to pay stamp duty of Shs. 9,950,531,398 for the period in dispute?
3. What remedies are available to the parties?

The applicant was represented by Mr. Brain Kalule and Mr. Allan Katangaza while the respondent by Ms. Barbara Nahone Kasibante, Mr. Donald Baluku and Mr. Alex Aleddeki Sali.

This dispute revolves around the interpretation of stamp duty in relation to its application to performance bonds, advance payment bonds, guarantees and bid bonds.

The applicant's first witness, Mr. Jonathan Wamara, the Universal Head of Trade, Finance at Stanbic bank testified that the applicant is a licensed financial institution. It issues performance bonds, advance payment bonds, guarantees and bid bonds at the request of its customers in farvour of third-party beneficiaries. Each of the instrument serves a different purpose.

He testified that a performance bond is issued by the bank in favour of a third-party beneficiary where it undertakes to pay a stated sum of money usually 10% of the value of the contract in the event of default in performance of a contractual obligation. He testified that it is not a payment to reimburse actual loss. It provides that no change or variation of the terms of the contact shall release the bank from liability.

He testified that an advance payment bond or security is issued by the bank to a third party whereby the bank guarantees the proper and faithful reimbursement of all advance payments, usually 20% of the contract value. It secures repayment of advance payments should there be a failure to perform on the contract. It also provides that no change or variation of the terms of the contact shall release the bank from liability.

He also testified that a bid bond is issued by a bank in farvour of a third-party beneficiary by which it guarantees to pay a bid security sum usually 2% of the contract value should

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the applicant fail to fulfill its contractual obligations. The obligation is triggered by a default by the bidder. It does not reimburse any actual loss suffered.

Mr. Wamara testified that a payment guarantee is issued by the bank to a third-party beneficiary to guarantee payment of the sums due under the contract by the applicant. The bank promises to be responsible for settlement of all sums due from the applicant of its obligations if it fails to perform. The guaranteed amount is not the actual loss suffered but that specified before the actual breach.

The witness tendered in samples of the said instruments. He stated that it is the applicant who bears the cost of stamp duty. The applicant collects the stamp duty in the instruments from the customers.

The applicant's second witness, Mr. Andrew Ahabwe, its Finance- Tax Manager testified that the Stamp Duty Act 2014 sought to consolidate and amend the law relating to stamp duty. He testified that Item16 of Schedule 2 of the Act provided for stamp duty of Shs. 5,000 for bond not being debenture. Currently the duty is Shs. 15,000 following an amendment of 2018. Item 36 of the Schedule provided for a stamp duty of 1% of the value for indemnity bonds.

The witness testified that on 23rd November 2016, the respondent wrote to Uganda Bankers Association, of which the applicant is a member, informing it that bid securities, bid bonds, and bid securities attracted stamp duty of Shs. 10,000 as bonds. In the same letter the respondent treated performance bonds, guarantees and advanced payment bonds as indemnity bonds attracting stamp duty of 1% of the value which the applicant disputed. On 23rd March 2019, the respondent issued the applicant with an assessment of Shs. 9,950,531,398 for unpaid stamp duty on the said instruments for the period January 2014 to December 2015. The witness contended that the assessed figures were based on the wrong rate pf 1% and should have been based on the rate of Shs. 5,000 and later Shs. 10,000.

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The respondent's witness, Mr. Hamudan Hibbombo, an acting manager in the large Taxpayer's Office testified that the applicant belongs to an umbrella association known as Uganda Banker's Association. On 6th September 2016, the respondent requested the Association for a sample of instruments issued by banks for the purpose of determining stamp duty applicable to them. On 29th September 2016, the Association submitted a list of instruments. These included deeds of lien, assignment of deeds, bonds, finance leases, bid securities and bid bonds. Having examined the documents, the respondent purportedly established that performance bonds and guarantees attract a stamp duty rate of 1% of the value as they fall under the category of indemnity bonds under the Stamp Duty Act. He contended that performance bonds and guarantees indemnify a third party for non-performance of contractual obligations. He gave illustrations of the instruments.

The applicant submitted that its performance bond, advance payment bonds, bid bonds and guarantees are bonds and not indemnity bonds and therefore ought not to attract stamp duty. The applicant contended that there was a distinction between bonds and indemnity bonds. It contended that S. 2 of the Stamp Duty Act defined a bond as an instrument to which a person obliges him to pay money to another on condition that an obligation is void or is not performed. The applicant contended that the Act does not define "indemnity bond." The applicant argued that courts may have recourse to other sources. It cited *Crane Bank Limited v URA* HCCA 18 of 2010, *Bank of Baroda v Commissioner General* HCCS 238 of 2009 and *St. Aubyn v Attorney General* [1951] 2ALL ER 4723

The applicant contended that S. 69 of the Contracts Act defines a contract of indemnity to mean one where one party promises to save the other party from the loss caused to that other party by the conduct of the former. An indemnity means an undertaking by which a person agrees to reimburse another upon occurrence of an anticipated loss. The applicant contended that a contract of guarantee is defined to mean one to perform or discharge the liability of a third party in case of default of that third party. The applicant argued that whereas under a guarantee a promise undertakes to discharge the liability of a third party, under an indemnity a loss need not be caused by a third party.

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The applicant cited Bryan A. Garner *Black's Law Dictionary* 8th Edition p. 189 which defines an indemnity bond to mean a bond to reimburse the holder of any actual or claimed loss caused by the issuer or other person's conduct. Indemnity at p.783 was defined to reimburse for a loss suffered because of a third party or one's own conduct or default. A guarantee at p. 723 means to agree to answer for a debt or default. The applicant cited *Yeoman Credit Ltd. v Latter and another* [1961] 2 ALL ER 294 where it was stated that "An indemnity is a contract by one party to keep the other harmless against loss, but a contract of guarantee is a contract to answer for the debt, default, or miscarriage of another who is to be primarily liable to the promises." The applicant also cited *Western Credit Ltd. v Alberry* [1964] 1 WLR 945 where the court noted that word "indemnity" is used but the sentence is descriptive in its context. It cannot be said to be an indemnity against any loss or damage as a result of the termination of the contract. The applicant further cited *Scottish & Newcastle PLC v Raguz* [2003] EWCA Civ 1070 where the court stated that in a contract of indemnity the indemnifier undertakes an independent obligation which does not depend on the existence of any other obligation of any other person. He agrees to keep the other harmless against loss whether or not a third party is liable for that. The applicant also cited *Halsbury's Law of England* 4th Edition Volume 20 p. 109 on the distinction between contracts of guarantee and contracts of indemnity.

The applicant submitted that a performance bond is a promise by one party to pay a beneficiary a stated sum in case of default in performance by another party under a given contract. The applicant cited *Daniel Matthew Simc and others v New South Wales Land and Housing Corporation and Others* [2016] HCA 47 where it was stated that a performance bond takes the form of a promise by the issuing institution that it will pay to the beneficiary named in the bond, an amount to the limit set out in the bond unconditionally or on specified conditions and without reference to the contract. The applicant contended that it issued advance payment guarantee to guarantee the proper performance of contractual obligation to third parties. It was not an indemnity contract. The documents do not have the word 'indemnity'.

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The applicant contended that bid bonds attract a nominal stamp duty rate because they are not indemnity bonds. It contended that it was erroneous for the respondent to assess stamp duty of Shs. 3,586,335,586 when it had indicated the applicable rate was Shs. 10,000. The applicant contended that a bid bond is one filed in public construction projects to ensure that the bidding contractor will enter a contract.

The applicant argued that because performance bonds, advance payment bonds, bid bonds, and guarantees are bonds they are chargeable with a stamp duty of Shs. 10,000 under Item 16 of Schedule 2. The applicant argued that the assessed figure of Shs. 9,950,531,398 was based on the wrong rate of 1% of the value of the instrument. Without prejudice, the applicant also stated it was erroneous to include Shs. 3,586,335,586 for bid bonds. The applicant also contended that the computation included duplicated sum of Shs. 91,746,341.

In reply, the respondent contended that performance bonds, guarantees and advance payment bonds are indemnity bonds chargeable at a stamp duty rate of 1% of the value under Item 36 of the Second Schedule of the Stamp Duty Act. The respondent also contended that its private ruling that stated that bid bonds attract a stamp duty of Shs. 10,000 was erroneous.

The respondent contended that *Stanbic Bank Uganda Limited and 7 others v Uganda Revenue Authority* HCT-00-Cc-CA-170-2007 and 792-2006 Halsbury's Laws of England stated that "… the character of the instrument must be ascertained by reference to its legal effect when it is executed." The respondent submitted that the character of an instrument can be ascertained from the definition of the instrument and secondly from the purpose of which it is executed.

The respondent contended that S. 2 of the Stamp Duty Act defines a bond to include an instrument by which a person obliges himself to pay money to another on conditions, an instrument attested by a witness which a person obliges to pay money to another, or to deliver grain or other agricultural produce to another.

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The respondent contended also that the Act does not define indemnity bond. It argued that where that Act does not define a term it must be given its ordinary meaning. The respondent cited *Black's Law Dictionary* p. 219 which defines an indemnity bond to mean one to reimburse the holder of any actual or claimed loss caused by the issuer or some other person's conduct. The respondent contended that an indemnity bond can take the following forms: a performance bond, an advance payment bond, a guarantee, and a bid bond. The respondent did not agree with the limited definition of a bid bond by the applicant. The respondent gave definitions of the instruments and illustration on how the various instruments are used. The respondent contended that the difference in wordings and titling of the instruments does not change their nature as indemnity bonds. The respondent contended that that according to principle of statutory interpretation *Generalia Specialibus Non Derogant*, i.e., General laws do not prevail over special laws the above instruments ought to be taxed at the rate in Item 36 of the Second Schedule of the Stamp Duty Act. The respondent noted that Item 16 is general compared to the description of instrument in Item 36 of the Second Schedule to the Stamp Duty Act which is specific

The respondent further argued that the applicant ought to be precluded from relying on any communication between the former and Stanbic Bank Limited because it is not a party to this suit and is a different legal entity. The applicant is not a member of the Association.

In rejoinder, the applicant contended that the respondent ignored the difference between an indemnity agreement, a guarantee, an indemnity bond and a bond. The applicant contended that an indemnity agreement is a primary obligation while a guarantee is a secondary obligation triggered by default of a third party. The applicant cited *Stadium Finance Co. Ltd v Helm* (1965) 109 Sol. Jo. 471 CA where it was held that:

> "The test is whether, as between two people, one of the two is under a primary liability to perform the obligation, while the other's obligation is secondary only. If so, it is a contract of guarantee and not of indemnity."

The applicant argued that it follows that performance bonds, advance payment bond, guarantees and bid bonds cannot be indemnity bonds.

The applicant argued that it is erroneous for the respondent to submit that bonds are of several types and are the same. It argued that it was erroneous for the respondent to contend that an indemnity bond includes performance bonds, advance payment bonds, guarantees and bid bonds. The applicant argued that all these instruments when properly analyzed are guarantees. It argued further that since they are not indemnity bonds, they cannot fall under item 36 and S. 6(1) of the Stamp Duty Act.

The applicant reiterated its submission that the respondent is bound by its communication to Uganda Banker's Association that bid bonds or bid securities are bonds and attract a stamp duty rate of Shs.10,000. The applicant argued that the Uganda Bankers Association is an umbrella association representing its member financial institutions including the applicant. The applicant argued further that S. 114 of the Evidence Act estops the respondent from denying in its various engagements it was dealing with banks including the applicant.

The applicant contended that the Tribunal should appreciate the overall implication on the economy if a stamp duty rate of 1% of the value is paid by the applicant's customers but collected by the applicant on behalf of the respondent. It has serious economic implications. It is prohibitive and would constrain economic activities. It would affect immediate cash flow.

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Having listened to the evidence, perused through the exhibits, and read the submissions of the parties this is the ruling of the Tribunal.

The applicant issues performance bonds, guarantees, advance payment bonds and bid bonds at the request of customers to third party beneficiaries. The respondent issued the applicant a stamp duty assessment of Shs. 9,950,531,938 as a result of treating performance bonds, guarantees and advance payment bonds as indemnity bonds which attract a stamp duty rate of 1% of the value. The applicant objected and contended that the said instruments should be treated as bonds which attract a fee of Shs. 5,000 and

later Shs. 10,000. On 23rd November 2016, the respondent had written to Uganda Bankers Association informing it that performance bonds, guarantees and advance payment bonds are indemnity bonds attracting a stamp duty rate of 1% of the value while bid securities and bid bonds are bonds chargeable at a rate of Shs. 10,000.

To understand what rate is applicable, one needs to look at the Stamp Duty Act. S. 3(1) of the Act provides that:

> ”(1) Subject to the Act, the following instruments shall be chargeable with duty in accordance with Schedule 2.
>
> (a) every instrument mentioned in Schedule 2 which, not having been previously executed by a person, is executed in Uganda and relates to property situated, or to a matter or thing done or to be done, in Uganda.”

During the period in dispute, Item 16 of Schedule 2 of the Stamp Duty Act 2014 provided for stamp duty of Shs. 5,000 for bonds (not being a debenture). Item 16 was amended to Shs. 10,000 in 2016 and later to Shs. 15,000 in 2018. Item 36 of Schedule 2 provided for a stamp duty at a rate of 1% of the value for indemnity bonds. Item 36 was subsequently amended in 2019.

Though the parties contended that the Stamp duty Act defined what a bond is, it merely states what a bond includes. S. 2 of the Act states:

> "bond" includes-
>
> (a) an instrument by which a person obliges himself or herself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be.
>
> (b) an instrument attested by a witness and not payable to order or bearer, by which a person obliges himself or herself to pay money to another; and
>
> (c) an attested instrument by which a person obliges himself or herself to deliver grain or other agricultural produce to another.”

This said criterion is not exclusive. Since the Act merely stated what a bond includes one needs also to look at the ordinary meaning of a bond. The relevant portion for this matter in *Black’s Law Dictionary* 10th Edition p. 211 defines a bond as

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> "2. A written promise to pay money or do some act if certain circumstances occur or a certain time elapse, a promise that is defeasible upon a condition subsequent…"

The ordinary meaning of a bond will imply a promise to pay money if certain circumstance occurs or time elapses. The effect of S. 2 of the Stamp duty Act is to emphasize that a bond includes where an obligation is void if an act is performed or not. It also includes payment to third parties and deliverance of grain or other agricultural produce to another. The ordinary meaning of bonds would extend it to treasury bonds, bail bonds, statutory bonds, annuity bonds, arbitrage bonds. The list is endless. Item 16 only excludes debenture bonds.

Item 36 of Schedule 2 provided for stamp duty at a rate of 1%of value for indemnity bonds. Item 36 of the Schedule is specific. While Item 16 refers to bonds generally, Item 36 applies specifically to indemnity bonds. The applicant cited the Latin maxim "*Generalia Specialibus Non Derogant"* which *Black's Law Dictionary* 10th Edition p. 1918 states as "Things general do restrict (or detract from) things special." However, the more specific Latin maxim would be "*Generalibus specialia derogant*" which is stated on the same page as "Things special restrict things general." The effect of Item 36 would be, to apply the rate of 1% of the value of the instrument to indemnity bonds specifically while Item 16 would apply the rate of Shs. 5,000 and later Shs. 10,000 to all other bonds generally. Item 36 would curve out the application of item 16 to indemnity bonds. S. 6(1) of the Stamp Duty Act provides that "subject to Section 4, an instrument so framed as to come within two or more of the descriptions in Schedule 2 to this Act shall, where the duties chargeable under whose descriptions are different, be chargeable only with the highest of the duties."

Item 36 of Schedule 2 nor does the Stamp Duty Act define what an indemnity bond is. Where an Act does not define a word or term, it must be given an ordinary literal meaning. In *Bank of Baroda v The Commissioner General Uganda Revenue Authority* CS 238 of 2009, Justice Helen Obura stated that:

> "The golden rule of interpretation of statutes is that in interpreting a statute the courts must adhere to the grammatical and ordinary sense of the words unless that adherence would lead to some manifest absurdity."

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In determining an ordinary meaning recourse must be made to a dictionary. The word "indemnity" is defined by *Black's Law Dictionary* 10th Edition p. 886 as "A duty to make good any loss, damage or liability incurred by another*."* To 'indemnify' is not restricted by *Black's Law Dictionary* to loss only but also applies to damage, and liability. Liability is defined by *Black's Law Dictionary* p.1053as "The quality, state, or condition of being legally obligated or accountable; legal responsibility to another in society, enforceable by civil remedy or criminal punishment…" *Black's Law Dictionary* 10th Edition p. 212 defines an indemnity bond as "A bond to reimburse the holder for any actual or claimed loss caused by the issuer's or some other person's conduct. This definition does not limit the bond to actual loss, but it extends it to claimed loss. Our understanding of the term "indemnity bond", giving it an ordinary meaning and taking into consideration the definitions stated, it would apply to where an institution undertakes to make good any loss, damage or liability incurred by a party caused by the issuer of the bond or by some other person's conduct.

A contract of indemnity has been held to be a contract by one party to keep the other harmless against loss. It is contended that an indemnity bond enables an institution guarantee to pay for any default of contract or performance that may result in actual loss. The yardstick to determine actual loss is not clear. When there is a default in a contract or on performance, an aggrieved party usually but not always suffer loss. At times loss may not be monetary. It may be on reputation, delivery of service in time, increase in costs of the project resulting from default etc. A party maybe be held accountable or responsible for an action where loss may not have been occasioned but may in future result in loss. An indemnity bond also allows for indemnity where there is a claim for loss but may not necessitate proof of loss. The parties do not go to court to prove the loss. The amount to be paid or limit is set at the time the bond is executed. If the Tribunal were to hold that actual loss must have been occasioned by default of the third party or non-performance it would create an absurd scenario where Item 16 of the Second Scheule would be inoperative because there are situations where no claims occur and where if so, bonds are payable on default or non- performance without the need to prove loss.

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Having stated what an indemnity bond is, the Tribunal will look at different bonds and samples provided. The Tribunal is cognizant that the definition of an instrument may not necessary imply what it is. In determining what an instrument is, one may need to look not only at the definition but also its character. In *Stanbic Bank Uganda Ltd. and 7 others v Uganda Revenue Authority* HCT-00-CC-CA-170-2007 and 792-2006 (consolidated) it was stated that the character of an instrument must be ascertained by reference to its legal effect when it is executed.

The first document in issue is the performance bonds or performance securities. In *Daniel Matthew Simc & others v New South Wales Land and Housing Corporation and other* HCA 47 it was stated that:

> "Performance bonds, sometimes misleading called "bank guarantees" are typically issued by a financial institution at the request of one party to a contract in favour of another party pursuant to a requirement of the contract. They are frequently used in relation to construction contracts. They take the form of a promise by the issuing institution that it will pay to the beneficiary named in the bond, an amount up to the limit set out in the bond unconditionally or on specified conditions and without reference to the terms of the contract between the parties."

The court went to say that "A performance bond represents payment on default or in lieu of performance."

Exhibit A57 was issued as an illustration of a performance bond between the applicant and Amatheon Agri (the provider) where the latter undertook to supply 2000 metric tonnes of maize to World Food Programme. The bank undertook on behalf of the provider to pay up to US$ 30,000 upon the provider being in default of the contract. A sample of other performance bonds were exhibited. It is difficult to say that a bond can physically ensure performance of a contract which has been breached. It is not an order for specific performance. The applicant argued that the said bonds were not to indemnify loss. From the contracts exhibited and above definitions, the bank undertook to make good any breach of contract or default in performance by another party. Performance bonds seek to compensate where there is non – performance or default on a contract. Whether the compensation is for loss or a non-loss is a question of semantics. It is usually unlikely that

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a party may claim under a performance bond when there is default on contract or performance, and it has not suffered loss. We already stated that an indemnity is not limited to loss but also may apply to damage, liability (accountability and responsibility) or a claim for loss. One must look at the effect of the document. The said performance bonds make a defaulting party accountable for its default enabling an aggrieved party to claim. The fact that the amount to be paid is stated and known or claim is limited in the bond does not deprive of the bond's intention of providing indemnity to World Food Programme or other beneficiaries. Taking the above into consideration it is the considered opinion of the Tribunal that a performance bond is an indemnity bond as it meets the criteria of one.

The second item in contention was a guarantee. At times the word "guarantee" is used interchangeably with "indemnity". A guarantee is defined by *Black's Law Dictionary* 10th Edition p. 820 as: "To assume a suretyship obligation to agree to answer for a debt or default. 2. To promise that a contract or legal act will be carried out. 3. To give security to." Because of its wide interpretation there is a thin line between a guarantee and an indemnity bond. The gist of the applicant's argument is that a guarantee is issued to provide for where there is a default by a party to a contract, to promise a contract will be carried out, there is no need for loss to have occasioned, while an indemnity is to cater to loss caused by default.

Halsbury's Laws of England 4th Edition Reissue Volume 20 p. 109 states that:

> "Contracts of guarantee and contracts of indemnity perform similar commercial functions, in providing compensation to the creditor for the failure of a third party to perform its obligation."

In *Yeoman Credit Ltd. v Latter and another* [1961] 2 ALL ER 294 there was an attempt to make a distinction between a contract of guarantee and indemnity as follows:

> "An indemnity is a contract by one party to keep the other harmless against loss, but a contract of guarantee is a contract to answer for the debt, default or miscarriage of another who is to be primarily liable to the promises."

The Court further made the point to decide whether a document is an indemnity or a guarantee, regard must be made to the essential nature of the document irrespective of

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the label. The applicant, in this matter argued that its guarantees do not bear the word indemnity. In the above case, the court stated:

> "The document in question is headed and described as" Hire- Purchase Indemnity and undertaking". It is clear from the wording of the document and the surrounding circumstances that it was intended to be something more than a mere guarantee. This tells in farvour of its being in truth an indemnity."

In *Western Credit ltd. v Alberry* [1964} 1 WLR 945, under a higher purchase agreement, a surety guaranteed the finance company the payment of installments agreed by the hirer for the performance of the agreement. The word indemnity was used. The court noted:

> "The obvious obligation of the surety is to answer only for the failure of the hirer to carry out his part of the contract, the liability primarily falling on him… The word "indemnity" is used, but the sentence is descriptive in its context of the kind on non-performance or non-observance which might arise under the guarantee, following as it does the guarantee of the performance and observance by the hirer under the agreement. I cannot read it as an indemnity against any loss or damage as a result of the termination of the contract by the hirer when the contract of hirer has been fully performed by him according to its tenor."

This spells out the need to look at the essential nature of the document irrespective of its label.

Halsbury's Laws of England 4th Edition Reissue Volume 20 p. 109 on the distinction between a guarantee and indemnity contract concluded:

> "However, there is a conceptual distinction between a contract of guarantee and a contract of indemnity, in that under a contract of indemnity, the indemnifier undertakes an independent obligation which does not depend upon the existence of any other obligation of any obligor. A contract of indemnity is a contract by one party to keep the other harmless against loss. It has no reference in law to the obligation of any third persons. By contract, there can be no contract of guarantee unless there exists or is contemplated some other, principal, obligation of some other, principal, obligor, to which the guarantee is ancillary and subsidiary. Under a contract of guarantee, the guarantor assumes a secondary liability to the creditor for the default of another who remains primarily liable to the creditor."

Taking the above into consideration, a guarantee is best explained for instance where a person guarantees to pay loan installments on default by a borrower. In such a case, the bank is the beneficiary. However, where the bank guarantees to pay a third party who is

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a beneficiary on breach of contract or default on performance by a party to the contract, we may have a contract of indemnity any loss or claim agreed in the indemnity contract where the default results into loss.

The parties tendered in a generic guarantee, exhibit A19, where the applicant V.G Keshwala and Sons Ltd. agrees to supply goods on credit to Bidco Uganda Ltd, the beneficiary. Stanbic Bank Ltd. agreed to guarantee any payment for goods supplied. The liability includes any payment by cheques, promissory notes and bills of exchange. The Tribunal also had the opportunity to peruse the other generic guarantees tendered in as exhibits A94 to exhibit A117. The theme that runs through the said guarantees is the applicants have contracted with the beneficiaries for supply of goods or services. Stanbic Bank Ltd undertakes to indemnity or guarantees to make good to the beneficiary any breach of contract or non-performance There exists no other obligation on the part of any other person. The said guarantees are indemnity bonds.

The third item in contention was advance payment bond or security. The term "advance payment" is defined by *Black's Law Dictionary* 10th Edition p.1309 as "A payment made in anticipation of a contingent or fixed future liability or obligation." The applicant submitted that an advance payment bond or security secures the payment, and a surety undertakes to pay it back in the event it is misused. An illustration was given in exhibit A36 where there was an advance payment guarantee between Babcon Uganda Limited (the contractor) and Busitema University (the Employer or beneficiary). It was for the construction of a laboratory and lecture complex at Mbale campus for the University. The Contractor agreed to deposit with the Employer a bank guarantee to guarantee its proper and faithful performance of the obligations in the contract. Stanbic Bank Uganda Ltd. agreed to guarantee as primary obligor the payment to the Employer. The word guarantee though used shows that the bank was willing to indemnify the Employer for any loss or claim resulting from a breach in contractual obligations. The Advance payment guarantee executed was actually an indemnity bond. This is because it allowed the employer a right to claim for any loss upto the limit in the instrument arising from breach of contractual obligations. The word guarantee is used interchangeably with indemnify. We have also

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perused exhibits A9 to A48 which are advance payment guarantees. They all guarantee the proper and faithful performance of the contracts and undertake to make good the payment of the advance payment in case of breach of contract. Therefore, the Tribunal holds that advance payment bonds or security, or guarantees should be considered as indemnity bonds.

The last item in contention are security bids or bid bonds. A bid bond is defined by Halsbury's Laws of England 10th Edition p. 212 as "A bond filed in public construction projects to ensure that the bidding contractor will enter into the contract." The respondent cited Black's Law Dictionary 11th Edition p. 199 where a bid bond was referred to as a written promise to pay money or do some act if certain circumstances occur at a certain time elapses; a promise that is defeasible upon a condition subsequent. The Tribunal had the opportunity to look at the bid bonds, exhibits A118 to A168. The tribunal notes the said bids show that bids must be supported by a bid guarantee. The bank guarantees the execution of the contract. In some case the security becomes payable if the bid is withdrawn or fails to execute the contract. The Tribunal notes that such bid bonds cannot be said to be indemnity bonds. They do not attempt to indemnify the third party against any loss or claim arising from a breach of contract. In any case, bid bonds are issued before a contract is awarded. Therefore, it cannot preempt obligations in a contract. In the circumstance bid bonds should be considered as bonds under Item 16 of Schedule 2 of the Stamp Duty Act and not item 36.

Exhibit A8 shows computation of the taxes by the parties as follows:

Type of instrument	**URA Assessment**	**Stanbic Bank computation**
Bid bonds	3,586,335,585	10,370,000
Advance payment guarantees	2,958,069,614	1,250.000
Performance bonds	2,605,373,234	1,460,000
Generic guarantees	800,752,964	945,000
Total	**9,950531,398**	**14,025,000**

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The computation of the tax on each instrument in the event they were considered as indemnity bonds was not in dispute. The dispute was whether the said instruments were indemnity bonds. The Tribunal has already held that bid bonds are not indemnity bonds. Advance payment bonds which assessed Shs. 2,958,069,614, performance bonds assessed Shs. 2,605,373,234 and generic guarantees assessed Shs. 800,752,964 were considered as indemnity bonds. Therefore, the total stamp duty payable by the applicant in respect of the said indemnity bonds is Shs. 6,364,195,812.

The applicant also contended that the computation included a duplicated sum of Shs. 91,746,341. However, this came up in submissions and not during the trial. It difficult for the Tribunal to address it when no evidence was led on it.

Lastly, the applicant argued that imposing stamp duty on the above instruments may have serious economic implications. However, no evidence was adduced to show the economic implications. Stamp duty of 1.5% is charged on transfer of lands but this does not seem to have deterred land transactions. Despite that, the function of the Tribunal is to interpret laws but not to legislate.

The Tribunal therefore allows the application partially or dismisses it partially, depending on which side of the fence one is. The applicant is found to be liable to pay Shs. 6,364,195,812. The respondent is awarded half the costs of the application.

Dated at Kampala this day of 2022

DR. ASA MUGENYI	**MS. CHRISTINE KATWE**	**MR. GEORGE MUGERWA**
CHAIRMAN	**MEMBER**	**MEMBER**

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