

**THE REPUBLIC OF UGANDA**  
**IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA**  
**APPLICATION NO. 127 OF 2019**

**WELT MACHINERY ENGINEERING LIMITED .....APPLICANT**

**VERSUS**

**UGANDA REVENUE AUTHORITY.....RESPONDENT**

**BEFORE: DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MR. GEORGE MUGERWA,**

**RULING**

This ruling is in respect of an income tax assessment of Shs. 5,576,178,448 arising from income received from a court award involving mining of granite.

On 20<sup>th</sup> December 2017, the respondent issued an assessment of Shs. 5,576,178,448 on the applicant as income tax due for the period July 2016 to June 2017. The assessment arose from a court award of Shs. 20,744,711,490 to the applicant and the Attorney General. Shs. 16,298,000,000 was awarded to the applicant who received Shs. 9,068,023,116. The matter giving rise to the court award is subject of an appeal before the Supreme Court. On 19<sup>th</sup> June 2018, the applicant objected to the respondent's decision. On 14<sup>th</sup> September 2018, the respondent partially allowed the objection and revised the assessment to Shs. 2,568,064,146. On 31<sup>st</sup> May 2019 and 7<sup>th</sup> August 2019, the respondent demanded Shs. 5,576,178,448.

**Issues**

1. Whether the tax assessed by the respondent against the applicant is due and lawful?
2. What remedies are available to the parties?

The applicant was represented by Ms. Damalie Tibugwisa while the respondent by Mr. Ronald Baluku and Ms. Barbara Ajambo Nahone. .

The applicant's witness, Mr. Francis Loyok Lokeris, its director testified that the applicant is a holder of a mining license for granite in Nakapiripirit. A company called China Road and Bridge Corporation illegally mined granite from the applicant's licensed area. The applicant sued in High Court Civil Suit (HCCS) 16 of 2014. On 17<sup>th</sup> February 2016, judgment was delivered but the court ordered the value of the granite to be paid to the Attorney General. The applicant sued the Attorney General for its due share in High Court Civil Suit 278 of 2016. The court directed Uganda National Road Authority which was in possession of monies belonging to China Bridge Corporation to pay Shs. 15,768,678,999. Subsequently the applicant obtained Shs. 9,068,023,116 from Uganda National Road Authority

The witness testified that on 20<sup>th</sup> December 2017, the respondent issued a tax assessment of Shs. 5,576,178,448 in respect of the court award in HCCS 16 of 2014. The applicant objected to the assessment. The respondent issued an objection decision partially allowing the applicant's objection by reducing the amount to Shs. 2,176,325,548. However contrary to the objection decision the respondent issued a distress notice of Shs. 5,576,178,448. The respondent collected Shs. 444,900,000.

Mr. Lokeris stated that the applicant objected to the respondent's decision because the assessment was premised on the entire court award yet the applicant was entitled to receive only Shs. 16,298,000,000 and of which it was paid Shs. 9,068,023,116 on 23<sup>rd</sup> March 2017. Secondly, the assessment did not consider the expenses incurred by the applicant in obtaining the monies from which the liability arose. The applicant had entered into a commission arrangement with Mr. Andrew Muhwezi and Ms. Nuwahereza Princess who advanced monies to it. The agents were paid 40% of the gross court award totaling to Shs. 5,690,610,399. The applicant was left with a balance of Shs. 3,388,000,000. The applicant incurred a further Shs. 1,016,223,815 in respect of pre-licensing and licensing process. The witness admitted that its expenses were not in its return. The expenses were not in the objection. The witness testified further that China Road and Bridge Corporation appealed to the Court of Appeal and then Supreme Court.

The respondent's witness, Mr. Albert Muhwezi, a tax officer in its Domestic Taxes Department testified that the applicant acquired a licence to mine granite in Nakapiripirit District. China Road and Bridge Construction Limited mined and used the granite from the concession area. The applicant filed a case against it in the High Court. On 17<sup>th</sup> February 2016, the court awarded the applicant Shs. 21,084,537,000. The respondent conducted an audit on the applicant for the period July 2016 to June 2017 which established that the latter did not file any returns. On 20<sup>th</sup> December 2017, the respondent issued an assessment of Shs. 5,576,178,448 against the applicant for the period July 2016 to June 2017. The assessment arose from the award. On 19<sup>th</sup> June 2018, the applicant objected. On 14<sup>th</sup> September 2018, the respondent partially allowed the objection and revised the assessment to Shs. 2,568,064,146 on the ground that the applicant had received income of Shs. 9,068,023,116. The witness stated that the expenses of the applicant were estimated to be 20% of the income as the respondent did not have any information from the former. The applicant did not provide any financial statement on which the respondent would rely.

The applicant submitted that it received Shs. 9,068,023,116 from the award in HCCS 278 of 2016 against China Road and Bridge Corporation which is not in dispute. The applicant was aggrieved by the respondent issuing a demand notice of Shs. 5,576,178,448 when it had revised the assessment to Shs. 2,176,325,548. The applicant contended that this irregularity amount to a reversal, variation and setting aside of the objection decision. The applicant was also aggrieved by the respondent's failure to consider the expenses it incurred in the generation of the income. The respondent did not deduct commissions paid to the agents. The respondent was furnished with proof of payment. The respondent did not consider other general expenses. The applicant further submitted that the case giving rise to the revenue is pending appeal in the Supreme Court. The applicant prayed that the Tribunal stays the execution of its decision pending the appeal. The expenses it incurred should be considered. It also prayed that the assessment be set aside.

In reply, the respondent submitted that the assessment of Shs. 5,576,178,448 was on the Shs. 20,744,711,490 earned by the applicant. The respondent submitted further that there is no evidence that the applicant was entitled to only Shs. 16,298,000,000. The

respondent contended that it rightfully increased the amount of the objection decision from Shs. 2,176,325,548 to Shs. 5,576,178,448. The respondent submitted that S. 23 of the Tax Procedure Code allows the Commissioner to make an additional assessment if fraud, gross, or wilful neglect has been committed by or on behalf of the taxpayer. The respondent cited *Weiss v Stearn*, 2id at 254 where the court stated that when applying income tax laws regard must be made to substance and not mere form. The respondent also cited *Intertek Testing Services International Limited v Uganda Revenue Authority* Civil Appeal 5 of 2002 where the Court held that the substance of a tax obligation must be considered over form.

The respondent submitted that S. 29 of the Tax Procedure Code Act provides that a tax payable under a tax law is a debt due to government. The respondent cited *Semakula Augustine v Commissioner General HCMA 321 of 2011* where the court held that the Commissioner General has powers to issue a warrant of distress. The respondent argued that the Commissioner General was justified in issuing a warrant of distress against the applicant.

The respondent submitted that it did not deduct the 40% commission paid to the agents by the applicant because it was not declared during the assessment. The applicant did not provide the expense to the respondent at the time of objection. The respondent contended that the applicant has the burden of proving that an assessment is incorrect.

In respect of the appeal pending, the respondent submitted that this does not bar it from executing a court award. The respondent cited Order 43 Rule 4 of the Civil Procedure Rules which states that an appeal to the High Court shall not operate as a stay of proceeding under a Decree or Order. The respondent cited *Equity Bank Uganda v Nicholas Were* MA 604 of 2013 where the court stated that any person who wishes to prefer an appeal shall institute a stay of proceeding on sufficient cause shown to court. .

In rejoinder, the applicant contended that the respondent had departed from its pleading. The applicant admitted that it received Shs. 9,068,023,116 which was the basis of the assessment of Shs. 2,568,064,146 and the amount in the objection decision. The

applicant contended that the Commissioner cannot exercise his discretion to issue an additional assessment arbitrarily.

The applicant contended that it availed the respondent with evidence of the expenses it incurred. It provided that the respondent with bank statements and other correspondences on the Shs. 1,016,223,815 incurred. The applicant argued that it is unfair and unreasonable for the respondent not to have considered the expenses in the revised assessment.

Having listened to the evidence and read the submissions of the parties, this is the ruling of the tribunal:

The applicant obtained a licence to mine granite in Nakapiripirit district. Another company, China Road and Bridge Construction mined and used the said granite. The applicant filed HCCS 16 of 2014 against the company. Eventually the applicant filed HCCS 278 of 2016 against the Attorney General where it received an award which was computed to Shs. 21,084,537,000. The respondent reviewed the tax affairs of the applicant and issued it an assessment of Shs. 5,576,178,448. The applicant objected and the assessment was revised to Shs. 2,568,064,146. On 31<sup>st</sup> May 2019 and 7<sup>th</sup> August 2019, the respondent issued a warrant of distress of Shs. 5,576,178,448.

It is not in dispute the applicant obtained a court award of Shs. 21,084,537,000. It is also not in dispute the applicant was paid 9,068,023,116. Basing on the award the applicant received an assessment of Shs. 5,576,178,448. The applicant objected and the assessment was revised to Shs. 2,568,064,146. S. 24(1) of the Tax Procedure Code Act provides that

“A person who is dissatisfied with a tax decision may lodge an objection with the Commissioner within forty five days after receiving notice of the tax decision.”

S. 24(5) of the Act provides that:

“(5) The Commissioner may make a decision on an objection –

(a) to a tax assessment, affirming, reducing, increasing or otherwise varying the assessment to which the objection relates; or

(b) to any other tax decision, affirming, varying, or setting aside the decision.”

In the applicant's case the Commissioner revised the assessment downwards to Shs. 2,568,064,164. The respondent later issued a warrant of distress of Shs. 5,576,178,448. The respondent contended that the Commissioner has powers to issue an additional assessment under S. 23 of the Tax Procedure Code if fraud, gross, or willful neglect has been committed by or on behalf of the taxpayer. There is no evidence that there was fraud, gross, or wilful neglect committed by applicant to warrant an additional assessment. Once a commissioner has issued an objection decision, he becomes *functus officio*. He does not have powers to issue an additional assessment as his powers have ceased when he issues an objection decision. He cannot exercise powers he does not have. In *Cable Corporation v Uganda Revenue Authority* Civil Appeal 1 of 2011 the court noted:

“Generally the commissioner would after communicating the objection decision exhausted its jurisdiction on the matter and further jurisdiction is vested in the High Court or the Tax Appeals Tribunal.”

The court further noted:

“**BLACK'S LAW DICTIONARY** Revised Fourth Edition Pg 802 defines the term *functus officio* as “a task performed.” Referring to the case of **Blanton Banking Company vs. Taliaferro** defines it as: “Having fulfilled the function, discharged the office, accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired, and who has consequently no further official authority; and to also an instrument, power, agency, etc which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect”

Therefore, the warrant of distress was issued in excess of the powers the Commissioner had. It is null and void as it was ultra vires the powers of the commissioner. It is set aside.

The applicant contended that the respondent did not consider its expenses. The agents were paid 40% of the gross court award totaling to Shs. 5,690,610,399. The applicant incurred a further cost of Shs. 1,016,223,815 in respect of pre-licensing and licensing process. The respondent contended that the applicant did not raise the issue of the expenses in its objection

The Tribunal had the opportunity to peruse the objection. In respect of expenses, an interesting portion of the objection reads:

"2. Whereas our company was paid 9,068,023,116,00/= (Uganda Shillings Nine billion, sixty eight million, twenty three thousand and sixteen) our Managing Director Felix Apomoma with one Andrew Muhwezi connived and defrauded the company of Uganda Shilling Eight billion three hundred million shillings (8,300,000,000/=). The matter was reported to Jinja Road Police under SD REF: 28/17/04/2017 and later handled by Kampala Metropolitan Police Under REF: KMP/GEF/9917."

The respondent did not address the above issue when it made its objection decision. During the hearing of the application, the applicant's witness testified that the applicant entered a commission arrangement with Mr. Andrew Muhwezi and Ms. Nuwahereza Princess who advanced monies to it. The agents were paid 40% of the gross court award totaling to Shs. 5,690,610,399. It is not clear how someone who was reported to the police as a thief became a commission agent. The amount defrauded in the objection is not the same as 40% of the commission. Such blatant contradictions make it difficult for the Tribunal to believe that the applicant actually incurred the said expenses.

The story in the objection is different from the testimony adduced during the hearing. If the Tribunal was to consider the version of the objection, money that was defrauded from the applicant cannot be deemed as expenses incurred in the production of income. If the Tribunal were to consider the version of the commission arrangement it is difficult to comprehend why the applicant would use a commission agent to invest in a civil matter at an exorbitant rate. The amounts of the cheques given to Mr. Andrew Muhwezi totaling to Shs. 700,000,000 in exhibit 12 does not correspond to the 40% of the gross award in the commission arrangement. It is difficult to state whether the amounts paid to the commission agents were a return on investment or an expense incurred in the course of production of income. The starting point for the Tribunal to ascertain the expenses the applicant incurred in the course of production of income would be by looking at its audited financial statements for the fiscal years in issue. The auditors have to verify the expenses. The directors sign the statement showing, it states the true affairs of the company. In this case no audited financial statements nor returns were adduced in evidence.

The applicant did not tender its audited financial statements to show its expenses. These expenses include 40% of the gross court award of Shs. 5,690,610,399 and Shs. 1,016,223,815 for the licensing process. The said expenses were not filed in its returns

to the respondent. S. 16 of the Tax Procedure Code Act requires a person to furnish a return in the prescribed form. In the absence of an audited financial statement and returns filed, and the failure to explain the above contradictions, the Tribunal is not convinced that the applicant incurred the alleged expenses. The respondent was justified to estimate the expense of the applicant and issue an assessment. The expense of Shs. 1,016,228,815 was not raised in the objection nor addressed in the objection decision. Under S. 16 of the Tax Appeals Tribunal Act, the Tribunal is limited to the grounds stated in the objection decision unless it so orders. The applicant did not seek leave to include the expense among the grounds to be tried by the Tribunal. The commission was 40% of the gross award and not net income. The Tribunal notes that a contractual obligation does not extinguish a statutory liability to pay taxes.

Lastly, the applicant contended that China Road and Bridge Corporation appealed against the court award in Civil Appeal 88 of 2018 to the Supreme Court. There is no order staying execution of the court award pending the appeal. The Tribunal would not want to speculate on the status of the applicant's payments in the absence of an order staying proceedings.

Taking all the above into consideration, the Tribunal will allow the application partially. The warrant of distress of Shs. 5,576,178,448 is set aside and the amount in the objection decision of Shs. 2,568,064,164 is reinstated. The respondent being partially successful is awarded half the costs of the application

Dated at Kampala this \_\_\_\_\_ day of \_\_\_\_\_ 2022.

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**DR. ASA MUGENYI**  
**CHAIRMAN**

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**DR. STEPHEN AKABWAY**  
**MEMBER**

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**MR. GEORGE MUGERWA**  
**MEMBER**