THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 172 OF 2020

BLANDINA NSHAKIRA…… APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY…..…… RESPONDENT

BEFORE: DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MS. CHRISTINE KATWE.

RULING

This ruling is in respect of an application challenging an assessment of capital gains tax and rental income tax totaling to Shs. 99,226,576 arising from applicant's purported disposal and rent of property.

The applicant was the owner of premises comprised in Plot 85, Buganda Road, Kampala. She used to rent out the said premises. On 19th June 2019, the applicant purportedly sold the above premises to one Innocent Mugisha for US$ 550,000. On 9th July 2020, the respondent issued an assessment of Shs. 99,226,576 on the applicant as capital gains tax on disposal of property and rental income tax. The applicant objected and the respondent disallowed the objection.

Issues:

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

The applicant was represented by Mr. Augustine Kigundu, Mr. Benon Makumbi and Mr. Emmanuel Tumuhaise while the respondent by Ms. Tracy Basiima and Mr. Donald Bakashaba.

The applicant testified that she was a sitting tenant of premises comprised in Leasehold Register Volume 2368 Folio 22, Plot 85 Buganda Road. In 1995, she purchased the property at Shs. 60,000,000. She acquired a lease from Uganda Land Commission at Shs. 25,000,000. She deposited Shs. 2,000,000 as part payment. She obtained a loan of Shs. 23,000,000 from Housing Finance Bank at an interest rate of 5% per annum. She was registered as proprietor on the lease hold title on 12th June 1995. On 9th July 2014, on variation of lease from 49 to 99 years she paid premium of Shs. 35,000,000 and ground rent of Shs. 1,875,000. The premises comprised of a main residential house, boys' quarters, and a parking area. She used the property as her residence until 2015 when she rented it out to Arch Designs. On 19th June 2019, she entered into a sales agreement with Mugisha Innocent. A payment of US$ 50,000 was made on signing of the contract and the balance was split in 3 installments; one of US$ 50,000 on 30th July 2019, another of US$ 50,000 on 31st August 2019 and the last installment of US$ 400,000 on 31st September 2019.The contract provided that the agreement would be rendered null and void in case the buyer defaulted on their payment obligations, and she would be at liberty to resell the property. The applicant testified that the buyer gave her some cheques amounting to US$ 245,000 which were dishonored. Upon failure to pay the balance the applicant lodged a caveat and the buyer has failed to pay the balance up to date.

On 9th July 2020, the respondent issued a capital gains assessment of Shs. 99,226,576 for the purported disposal of the property on the applicant which she objected to stating that she is still the registered proprietor. She stated that the process of selling the property started in 2019 and is still ongoing. She said that she had received U$ 507,372 and there is a balance of US$ 42,628. The buyer has not indicated when he will be paying the balance of US$ 42,629. The applicant also stated that it paid rental tax and personally paid Shs. 2,000,000 on deposit of the lease.

The respondent's witness, Mr. Albert Muhwez1, a tax officer in its Domestic Tax Department testified that the respondent issued an administrative income tax assessment of Shs. 99,226,576 comprising of Shs. 88,419,280 for capital gains tax and Shs.

10,807,296 for rental tax against the applicant. The applicant objected to the assessment on three main grounds.

i. That the transaction had not been completed.
ii. That the assessment was raised in error as it is in respect of an incorrect year of income and that the tax due if any would be paid by 31st December 2020.
iii. The sale was not of a commercial building.

Mr. Albert Muhwezi stated that upon review of the sale agreement it was established that the applicant on 19th June 2019 sold her premises to Innocent Mugisha for a consideration of US$ 550,000. The applicant received consideration and never remitted the capital gains tax upon disposal of the property. Mr. Muhwezi testified that the applicant's income tax returns showed that for the period 1st July 2019, the applicant recorded rental income earned from renting out her premises in Buganda Road. After 1st July 2019, the applicant does not declare rental income from the property.

The applicant submitted that it did not dispose of the property comprised in Plot 85, Buganda Road Kampala as under the Income Tax Act. The applicant contended that the law on taxation on capital gains arising out of disposal of assets is contained in Sections 18, 21(k) and Part VI of the Income Tax Act. The applicant submitted that capital gains tax is derived from realization of disposal of assets which are not part of the trading stock of business.

The applicant submitted that the Income Tax Act does not define the words 'sold' or 'exchanged'. She cited *Cape brandy Syndicate v IRC [1921] 1 kb 64 at 71* where it was stated that:

> "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used".

The applicant invited the tribunal to interpret the words 'sold' or 'exchanged' in the most literal and ordinary sense.

The applicant cited Justice Christopher Izama in *Eaton Towers Uganda Ltd v URA (HCCS 186 of 2013)* who defined the word 'transfer' in accordance with *Osborn's Concise Law Dictionary* 11th Edition at 414 to mean.

> "The passage of the right from one person to another (i) by virtue of an act done by the transferor with that intention as in the case of conveyance or assignment by way of sale or gift, etc. or by operation of law, as in the case of forfeiture, bankruptcy…, or intestacy. A transfer may be absolute or conditional, by way of security, etc."

The applicant concluded that the definition makes it clear that a transfer involves the passage to another. Secondly, there has to be an intention expressed through instrument or any other way to convey that right. Conveyance includes every instrument by which property, whether movable or immovable is transferred.

The applicant cited *Phillip John Underwood v Commissioners for her Majesty's revenue and customs [2008] EWCA Civ 1423* at pg. 39 which she stated exhaustively answered the question "what then is disposal of land for purposes of capital gains tax? Lord Justice Lawrence Collins found that:

> "What is envisaged is a transfer of an asset (i.e., of ownership of an asset) as widely defined by one person to another? *Kirby v Thorn EMI* [9188] 1 WLR 445 at 450, per Lord Nicholls. Except in certain cases where transactions are deemed to be disposals, the word "disposal" bears its normal meaning; Berry v Warnnett [1982]1 WLR 698,701 per Lord Wilberforce.
>
> The expression 'normal meaning' is used in a rather special sense. A house owner who has contracted to sell the house might well regard himself or herself as having disposed of the house. Plainly disposal is used in a special sense to refer to a legal concept (Just as in the familiar discussion of the meaning of possession or ownership in the traditional tests on jurisprudence) and it was common ground on this appeal that it meant disposal of the entire beneficial interest in assets."

The applicant also cited *Law Society of Kenya v The Kenya Revenue Authority &Attorney General (Petition No. 39 of 2017)* where the Court found that.

> "Requiring payment of the tax before registration of the transfer essentially means that the tax is payable before the prerequisites enunciated in Halsbury's laws of England cited earlier. The effect is that a citizen may be called to pay tax before it is legally due, thereby creating an unfair tax burden to the citizens…"

> Paragraph 11A requires that capital gains tax be paid upon presenting the transfer as opposed to upon registration of the transfer. The effect is that the tax will be payable prior to transfer. In practice this means that a vendor must pay the tax before the conclusion of the transaction, thus payment will be required before property is transferred or ownership is legally passed to the purchaser. It is common knowledge that where the sale agreement provides that payment shall be made upon transfer, the vendor who is not financially able will not be able to sale his property and a willing buyer may also not be able to proceed with the transaction."

The applicant submitted that a transfer of property involves the transfer of ownership rights in the land and the mode of transfer is dependent on the nature /class of asset. The applicant submitted that S. 54 of the Registration of Titles Act states that.

> "No instrument until registered in the manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act or to render the land liable to any mortgage; but upon such registration the estate or interest comprised, and the instrument shall pass or as the case may be …"

The applicant submitted that under Clause 2 (b) of the land sale agreement, the parties agreed that the land would only be transferred upon completion of payment of the purchase price by the buyer, but he defaulted on his payment obligations. A search report indicates that that a caveat was registered on the land by the applicant and the buyer has no interest in the land.

The applicant also submitted that the disposal was not of a commercial building as provided for under S. 21(1)(K) of the Income Tax Act which provides that.

> "Any capital gain that is not included in business income, other than the capital gains on the sale of shares in a private limited liability company or the sale of a commercial building is exempt from the income tax."

The applicant testified Clause 2(c) of the lease agreement between the applicant and the Uganda Land Commission prescribes the use of land for residency only. The applicant submitted that the land was used for residential purposes in accordance with the user clause in the agreement and has never changed to commercial.

The applicant submitted that they accounted for rental income for Financial Year FY 2018/2019 in accordance with S. 5 of the Income Tax Act and was duly paid. A rental tax of Shs. 10,807,296 was declared and the respondent seeks to collect rental tax twice for the same period. The applicant stated that during sale there was no occupant in the property and the respondent cannot claim non-compliance of tax obligations by the applicant.

In reply, the respondent submitted that the assessed income tax of Shs. 99,226,576 being capital gains tax for gains on disposal and rental income is due and payable. The respondent cited S. 4 of the Income Tax Act which imposes income tax on every person who has chargeable income for the year of income. The respondent submitted that S. 18(1)(a) of the Income Tax Act provides that:

> "Business income means any income derived by a person in carrying on a business and includes the following amounts, whether of a revenue or capital nature".
>
> (a) The amount of any gain is determined under part VI of this act which deals with gains and losses on disposal of assets, derived by person on the disposal of a business assets, or in the satisfaction or cancellation of a business debt, whether or not the asset or debt was on revenue or capital account."

S. 2(g) states that business includes any trade, profession, vocation or adventure in the nature of trade.

The respondent submitted that S. 50(1) of the income tax Act provides that the amount of any gain arising from the disposal of an asset is the excess of the consideration received for the disposal over the cost base of the asset at the time of the disposal. The tax received from disposal of a business asset or capital gains in trade under S. 18 is capital gains tax. The disposal of a business asset is subject to Income Tax Act under the capital gains regime. The respondent cited *Crane Bank v URA (hct-00-cc-ca-18) [UgCommc 42] while citing Cape Brandy Syndicate v IRA [1992] 1 kb 64 AT 71,* the high court stated that.

> "Where the act does not define a word or term, then the word or term must be given its ordinary literal meaning. The courts may have recourse to dictionaries, though with care".

The respondent also cited *Bryan A Garners' Black's Law Dictionary 8th Edition* p. 1496 which defines capital gains tax as the profit realized when a capital asset is sold or exchanged.

The respondent submitted that the applicant entered into a land sale agreement with a one Mugisha Innocent at a consideration of US$ 550,000. When the applicant failed to provide information relating to the cost base of the property for the capital gains tax, the respondent adopted an industrial profit margin of 12% in the determination of the gain. The profit margin was applied to determine the gain on disposal of Shs. 216,000,000. Consequently, the respondent subjected the computed gain to tax yielding principal tax of Shs. 78,198,820.

The respondent submitted that S. 51(1)(a) of the Income Tax Act provides that a taxpayer is treated as having disposed of an asset if it has been, inter alia, sold by the taxpayer. The respondent submitted that the Income Tax Act does not define the word 'sold', 'sell' or 'sale'. According to *Bryn A. Garner's Black's Law dictionary 11th Edition page* 1634 the word sell means; "to transfer property by sale." The respondent cited *Eaton Towers Uganda Ltd v URA (HCCS 186 OF 2013)* citing *Osborn's Concise Law Dictionary* 11th Edition at pg. 414 defined the word transfer to mean:

> "The passage of the right from one person to another (i) by virtue of an act done by the transferor with that intention, as in the case of a conveyance or assignment by way of sale or gift, etc.…a transfer may be absolute or conditional by way of security, etc.…"

The respondent submitted that according to clause 1(a) of the land sale agreement, the buyer paid US$ 50,000 on signing the agreement while the balance would be paid in the scheduled installments. This was later paid.

The respondent submitted that the payment created a financial interest in the property in favor of the buyer. The applicant executed the land sale agreement in consideration of the purchase price, part of which she received at the signing of the agreement, she transferred at least, equitable rights and interests in the property to the buyer. The respondent cited *Heritage Oil and Gas Ltd V URA* where this tribunal held that:

> "Transfer of rights or interests creates a chose in action. A chose in action is defined by the black's law dictionary to include the right to bring an action to recover a debt, money or thing…"

The respondent submitted that if the applicant was not paid the balance of the purchase price, she would have invoked the Clause 1(c) of the land sale agreement and rescinded the agreement. The respondent submitted that in *Heritage Oil & Gas Ltd v URA (Supra) at page 60.* it was stated that: "The law does not expressly prohibit the Commissioner General from issuing an assessment when income has not yet been received. What the law does not prohibit it usually allows."

The respondent submitted that the applicant disposed of her rights in property. S. 2 (h) of the Income Tax Act defines "business asset as an asset which is used or held ready for use in a business and includes any asset held for the sale in a business and any asset of partnership or company." The respondent stated that the applicant rented out the disposed property to M/S Arc Designs Limited. The sold property was a business asset at the time of its disposal and the gain amounted to capital gain under Sections 4(1), 18(1)(a) and Part VI of the Income Tax Act.

The respondent submitted that tax obligations are created by Acts of parliament not by agreements and according to S. 4, 18(1)(a) of the Income Tax Act. The respondent cited *Heritage Oil & Gas v URA Civil Appeal No. 14 of 2011,* where the learned Judge agreed with the above submission and held that the mandate of the URA to collect tax in accordance with the laws of Uganda cannot be fettered or overridden by an agreement. Engonda J, in *KM Enterprises and others v URA* HCCS No. 599 of 2001 stated that; "The exercise of statutory powers and duties cannot be fettered or overridden by agreement, estoppels, lapse of time, mistake and such other circumstances…"

In rejoinder, the applicant submitted that she has not disposed of her property up to date. There is a mix up in the understanding of interests and rights in land. The applicant has interest in the land but has not transferred those interests. The applicant submitted that the general perspective that creation of an equitable interest upon execution of a sale

agreement does not impute a disposal of a business asset. The sale agreement provides for rescinding in the event of default. The applicant submitted that there was no disposal as envisaged under the Income Tax Act and that the assessment was raised prematurely. The applicant also submitted that the property was not a commercial building nor a business asset.

The applicant cited *Registered trustees of Freemasons v URA (TAT No. 51 of 2019* it was held as follows.

> "The respondent ought to have considered the acquisition value of 1949 in computing the gain. It should have considered the differences in foreign exchange rate and the inflation index at that time as compared currently. The respondent ought also to have considered other incidental expenses incurred in the acquisition of the property. By the respondent applying 30% to the sale vale of the property, it was imposing a sale tax on the sale of property and not capital gains tax."

The applicant contended that the land was not disposed of as subjected to capital gains tax, and was not a commercial building. She prayed that the income tax assessment be vacated

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

The applicant was the owner of premises comprised in Leasehold Register Volume 2368 Folio 22 Plot 85, Buganda Road. On 19th June 2019, the applicant purportedly sold the above premises to one Innocent Mugisha for US$ 550,000. On 9th July 2020, the respondent issued an assessment of Shs. 99,226,576 on the applicant as capital gains tax on disposal of property and rental income tax.

The law of Uganda that governs chargeable income on disposal of immovable property is found in the Income Tax Act. S. 4(1) of the Act imposes income tax on every person who has chargeable income for the year of income. Under S. 15 the chargeable income of a person for a year of income is the gross income of the person for the year less total deductions allowed under the Act for the year. S. 17(1) provides that the gross income of

a person for the year is the total amount of business income, employment income and property income. S. 18 of the Income Tax Act deals with taxation of business income. S. 18(1) of the Income Tax Act provides that.

> "(1) Business income means any income derived by a person in carrying on business and includes the following amounts, whether of a revenue nature
>
> (a) The amount of any gain, as determined under Part VI of this Act which deals with gains and losses on disposal of assets, derived by a person on the disposal of a business asset, or on the satisfaction or cancellation of a business debt whether or not the asset or debt was on revenue or capital account."

For our purpose, business income refers to any income derived by a person carrying on a business and includes the amount of any gain derived by a person on the disposal of a business asset.

Firstly, it is not in dispute that the applicant derived a gain from the purported disposal of her property. In 1995, she purchased the property at Shs. 60,000,000. She acquired a lease from Uganda Land Commission at Shs. 25,000,000. Though in her witness statement she stated that the purchaser had not paid a substantial part of the purchase price, in cross-examination she admitted that the purchaser has so far paid of U$ 507,372 and there is a balance of US$42,628. There was a gain on the purported disposal of the property.

The applicant contended that the property disposed of was not a business asset. Under S. 2(h) of the Income Tax Act, "business asset" means an asset which is used or held ready for use in a business, and includes any asset held for sale in a business and any asset of a partnership or a company. S. 21(1)(K) of the Income Tax Act provides that.

> "Any capital gain that is not included in business income, other than the capital gains on the sale of shares in a private limited liability company or the sale of a commercial building is exempt from the income tax."

The applicant contended that the lease of Uganda Land Commission showed that the premises should be used for residential purposes. While the lease stated that premises should be used for residential purposes, the applicant rented out the property to Arch Designs who deal in designs. S. 51(3)(b) of the Income Tax Act provides that a disposal

of an asset includes where the Commissioner is satisfied that a taxpayer has converted an asset from a non-taxable use to a taxable use. The premises were converted from a residential to a commercial building. A residential premises can still be an asset held for use in business. Once a residential premise is rented out, it becomes a commercial building for purposes of taxation under the Income Tax Act. Therefore, the applicant was using the asset for business purposes, and it is a business asset under S. 2 and a commercial building under S. 21(k) of the Income Tax Act. Converting land from residential to commercial use may result in a capital gain as the value of the land use increases. The applicant argued that the use of the land in the lease was still residential. The mandate of the respondent is to collect taxes and not to enforce the provisions of the lease for the Uganda Land Commission or alter them.

The most contentious dispute was that the applicant did not dispose of the property to attract income tax under the Income Tax Act. Clause 1 of the agreement read. "The buyer and the seller have agreed on a sale price of the above property as US Dollars five hundred and fifty-five thousand (US$ 550,000) only." Clause 1(d) of the agreement read:

> "In the event of the buyer failing to remedy the default, this sale shall become null and void. The seller shall then be at liberty to resell the property to any other interested person and thereupon refund to the buyer the sums of money that will have been received as at the date of termination of the sale agreement; less agreed liquidated damages in the sum of US$ 50,000."

Clause 2(a) read that "The Buyer will take possession, as is, upon completion of payment of the purchase price." According to clause 1(d), the sale agreement will become null and void in case the price was not fully settled.

The applicant argued that the buyer has never completed payment of the purchase price. However, there is no evidence that the applicant rescinded the contract because the purchaser has not completed payment of the purchase price and refunded it. The evidence of the applicant in respect of payment of the purchase price is full of contradictions. In her witness statement, the applicant testified that the buyer gave her some cheques amounting to US$ 245,000 which were dishonored. In cross-examination the applicant stated that the purchaser paid U$ 507,372 and there is a balance of US$

42,628. One may not be wrong to assume that the applicant is using the ploy of failure to complete payment of the purchase price as a pretext to show the transaction never took place. What is relevant is that the applicant has never declared the agreement null and void, reclaimed the property and refunded the purchase price. She merely lodged a caveat as she waited for the purchaser to complete payment.

The applicant further contended that the property has never been disposed of because the purchaser has not been registered as proprietor of property. S. 51(1) of the Income Tax Act provides that.

> "A taxpayer is treated as having disposed of an asset when the asset has been –
> (a) sold, exchanged, redeemed, or distributed by the taxpayer;
> (b) transferred by the taxpayer by way of gift; or
> (c) destroyed or lost."

So, the question is: did the applicant dispose of the property? The applicant cited *Phillip John Underwood v Commissioners for her Majesty's revenue and customs [2008] EWCA Civ* where the court stated that.

> "What, then, is a disposal of land for the purposes of capital gains tax? The capital gains tax legislation does not define what is meant by a disposal. What is envisaged is a transfer of an asset (i.e., of ownership of an asset) as widely defined, by one person to another...

In this case, the Income Tax Act defined disposal to include sold, exchange, redeemed, distributed, transferred destroyed or lost.

For purposes of this dispute, the relevant word would be 'sold'. This is because the applicant does not deny that it sold the property to the purchaser. In *Cape brandy Syndicate v IRC [1921] 1 kb 64 at 71* it was stated that.

> "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used".

The tribunal must interpret the words 'sold' in the most literal and ordinary sense. In *Crane Bank v URA* (supra) while citing *Cape Brandy Syndicate v IRA* (supra) *the* High Court stated that.

> "Where the act does not define a word or term, then the word or term must be given its ordinary literal meaning. The courts may have recourse to dictionaries, though with care".

The word 'sold' is the past tense of 'sell'. *Black's Law Dictionary* 10th Edition p.1567 defines 'sell' as "To transfer (property) by sale." The word 'transfer' is defined on p. 1727 as "1. Any mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance." Christopher Izama J. in *Eaton Towers Uganda Ltd v URA (HCCS 186 of 2013)* defined the word 'transfer' in accordance with *Osborn's Concise Law Dictionary* 11th Edition at 414 to mean:

> "The passage of the right from one person to another (i) by virtue of an act done by the transferor with that intention as in the case of conveyance or assignment by way of sale or gift, etc. or by operation of law, as in the case of forfeiture, bankruptcy…, or intestacy. A transfer may be absolute or conditional, by way of security, etc."

A transfer can be one of physical possession or an interest. An interest maybe an unregistered or equitable interest, or registered or legal interest. On a sale of property, before a transfer is registered the purchaser acquires an equitable interest. In John *Katarikawe v William Katwerimu* 210 1977 HCB it was held that before transfer, the buyer only acquires equitable interest in the suit land. It is an action in rem, that is, it binds the seller and the purchaser and not the whole world. Registration on a certificate of title enables a purchaser to register his interest and obtain protection against the whole world. In *Heritage Oil and Gas Ltd V URA* (supra) the tribunal held that: "Transfer of rights or interests creates a chose in action. A chose in action is defined by the Black's Law Dictionary to include the right to bring an action to recover a debt, money, or thing…" in this case, on completion of payment the purchaser can take possession and or registration of ownership, but in the meantime he has an equitable interest that was transferred to him that included a chose of action. The failure to register a purchaser on a certificate of title does not mean that no transfer took place. There was a transfer of an unregistered interest as an encumbrance. The applicant placed a caveat to protect the remaining interest or balance not paid. There was a sale, and the applicant is liable to pay capital gains tax.

The applicant contended that the sale was ongoing. Parting with property or interest in it on payment of consideration would suffice to amount a sell. A plain understanding of the Section would mean that once a property or interest has been sold then a disposal is effected. If it had intended that a disposal is effected after registration of ownership on the title the Section would have stated so. Registration of title and taking possession are other processes. The applicant has never rescinded the contract of sale and refunded the purchase price paid.

The applicant cited *Phillip John Underwood v Commissioners for her Majesty's revenue and customs [2008] EWCA Civ 1423* at 39 which she stated, answered the question "what then is disposal of land for purposes of capital gains tax? In the case, the court stated that.

> "What, then, is a disposal of land for the purposes of capital gains tax? The capital gains tax legislation does not define what is meant by a disposal. What is envisaged is a transfer of an asset (i.e., of ownership of an asset) as widely defined, by one person to another... Except in certain cases where transactions are deemed to be disposals, the word "disposal" bears its "normal meaning.
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> The expression 'normal meaning' is used in a rather special sense. A house owner who has contracted to sell the house might well regard himself or herself as having disposed of the house. Plainly disposal is used in a special sense to refer to a legal concept (Just as in the familiar discussion of the meaning of possession or ownership in the traditional tests on jurisprudence) and it was common ground on this appeal that it meant disposal of the entire beneficial interest in assets."

The said authority dealt with S. 28(1) of the Taxation of Chargeable Gains Act 1992. The Act deems the disposal and acquisition (once they have occurred) to take place at time of the contract. However, the Act deals only with the question of fixing the time of disposal and not with the substantive liability to tax. Though the Tribunal agrees that the times of disposal took place at the time of the contract, it is not dealing with the time of disposal but with the substantive liability to tax. There is no evidence that the said Act is in Pari Materia with the Income Tax Act. Justice Lawrence stated that "Except in certain cases where transactions are deemed to be disposals, the word "disposal" bears its normal meaning;" using the normal meaning, he stated that "A house owner who has contracted

to sell the house might well regard himself or herself as having disposed of the house." However, using a special meaning, he stated "Plainly disposal is used in a special sense to refer to a legal concept." The circumstances of the case warranted him to find that disposal meant disposal of the entire beneficial interest in assets. There is no reason why the Tribunal should use a special meaning or sense in defining the concept of disposal under the Income Tax Act. The contractual obligations by the parties in that case are different from those before the Tribunal. Justice Lawrence stated that "a central feature of the capital gains regime is that transactions entered into by contracting parties must be respected and given full effect." In this matter according to clause 1(d), the sale agreement will become null and void in case the price was not fully settled. The applicant admitted that the sale process is still ongoing. It means that she is still expecting the purchaser to complete payment. Though she gave us contradictory versions on the amounts outstanding there is no evidence that the applicant rescinded the sale agreement or that the purchaser has failed to fully settle the purchase price. There may be a delay in payment by the purchaser but that does not mean he has failed to settle the purchase price. The Tribunal cannot annul the agreement on behalf of the applicant when she is still expecting payment.

The applicant also cited *Law Society of Kenya v The Kenya Revenue Authority &Attorney General (Petition No. 39 of 2017)* wherein Court found that.

> Paragraph 11A requires that capital gains tax be paid upon presenting the transfer as opposed to upon registration of the transfer. The effect is that the tax will be payable prior to transfer. In practice this means that a vendor must pay the tax before the conclusion of the transaction, thus payment will be required before property is transferred or ownership is legally passed to the purchaser. It is common knowledge that where the sale agreement provides that payment shall be made upon transfer, the vendor who is not financially able will not be able to sale his property and a willing buyer may also not be able to proceed with the transaction."

The said petition dealt with the constitutionality of imposition of capital gains tax. Paragraph 2 of the Eighth Schedule of the Kenyan Act read "the income in respect of which tax is chargeable under section 3(2) is the whole of a gain which accrues "on the transfer" … of property situated in Kenya." The said Law cannot be said to be in *Pari*

Materia with the Income Tax Act. The Income Tax Act provides that a disposal shall be on inter alia on sale or exchange. It does not mention transfer. The case dealt with point of taxation, is it at presenting the transfer or upon registration of the transfer. In this mater the issue before the Tribunal is determining the tax liability of the applicant and not the point of taxation. Parties should be cautious in importing cases from other jurisdictions to interpret the law in Uganda without first determining if the laws are the same.

The Tribunal does not think that the intention of the legislature was that transfer or sale of a property should include or is limited to registration of the purchaser on the certificate of title. This is because in Uganda, we have bibanja holders, bona fide occupants, and owners of other unregistered interests. If the Income Tax Act required that purchasers should be registered as proprietor on certificates of title it would mean capital gain tax cannot be levied on disposal of bibanjas and other unregistered interest. Therefore, to require that a purchaser should be registered would be reading into the Act what is not there. When interpreting the Income Tax Act, one should be cognizant that in Uganda there is rampant disposal of unregistered interests. If the said dispositions are outside the ambit of capital gains tax, there would be inequality in the application of law when capital gains tax is charged only on registrable interests. This would be contrary to the constitutional right of equal protection of the law and the principle of equality in taxation.

The respondent assessed the applicant income tax of Shs. 78,198,820 on the applicant as capital gains tax on disposal of property. S. 50 of the Income Tax Act provides that:

> "Any gain arising from the disposal of an asset is the excess of the consideration received for the disposal of the asset over the cost base of the asset at the time of the disposal".

S. 52(2) Income Tax Act provides that.

> "The cost base of the asset is the amount paid or incurred by the taxpayer in respect of the asset, including incidental expenditures of a capital nature incurred in acquiring the asset and includes the market value at which the date of acquisition of any consideration in kind given for the cost".

The applicant purchased the property at Shs. 60,000,000. She acquired a lease at Shs. 25,000,000 from Uganda Land Commission. On variation of lease from 49 to 99 years she paid premium of Shs. 35,000,000 and ground rent of Shs. 1,875,000. The applicant

sold the property at US$ 550,000. The respondent's witness testified that it considered the price the applicant purchased the said property. Adjustments were made to arrive at the capital gains tax. The respondent adopted an industrial profit margin of 12% in the determination of the gain. The profit margin was applied to determine the gain on disposal of Shs. 216,000,000. Consequently, the respondent subjected the computed gain to principal tax of Shs. 78,198,820. In *Tembo Steels (U) ltd. v Uganda Revenue Authority* Civil Appeal 77 of 2011 Justice Kakuru stated that:

> "… The law does not specify the methods the Commissioner General must use. Therefore, the Commissioner General is at liberty to use any method of assessment he or she considers desirable or justifiable on the basis of the best information available to him…

Therefore, the Tribunal cannot query the method used by the respondent. S. 18 of the Tax Appeals Tribunal Act places the burden on the taxpayer to prove that the assessment was excessive or should not have been made. The applicant did not adduce evidence to show the expenses she incurred on the property since the time she acquired it to the time of disposal and were not considered by the respondent. The applicant has not adduced evidence to show that the assessment was excessive or ought not to have been made.

The respondent contended that after 1st July 2019, the applicant did not declare rental income from the property. An assessment of Shs. 10,807,296 was raised in respect of rental income. The applicant indicated that the property is currently not in occupation because of the sale process. The applicant contended that respondent did not visit the property to establish who is in occupation. The applicant concluded that the respondent cannot impute that it did not comply with the law. A perusal of the exhibits show that the applicant disclosed a chargeable rental liability of Shs. 10,807,296 for the fiscal year 2018 and Shs. 5,589,025 for the fiscal year 2019 in the returns. The applicant stated she paid the rent due. If the applicant paid the rent, it was not necessary for the respondent to issue an additional assessment in respect of the same rent as it would amount to double taxation. After the sale of the premises there is no evidence that there is a tenant is in occupation of the property rent was paid and is due. Taking the aforesaid into consideration the rental income tax assessment of Shs. 10,807,296 is set aside.

Taking the above into consideration, the applicant is only liable to pay income tax on the capital gain of Shs. 78,198,820 and interest of Shs. 10,220460 totaling to Shs. 88,419,280. This application is partially allowed or partially dismissed, depending on which side of the coin one is looking at. The respondent is awarded half the costs of the application.

Dated at Kampala this day of 2022.

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ASA MUGENYI	**STEPHEN AKABWAY**	**CHRISTINE KATWE**
CHAIRMAN	**MEMBER**	**MEMBER**