THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 51 OF 2019

THE REGISTERED TRUSTEES OF FREEMASONS HALL …… APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY……..RESPONDENT

RULING

This ruling is in respect of an application challenging an income tax assessment of Shs. 3,343,400,000 in respect of capital gains issued on the applicant arising from the disposal of its property.

The applicants are the registered trustees of the Freemason Hall under a trust deed registered in the Ministry of Lands and Physical Planning. The applicants were the registered owners of the Freemason Hall located at Plot 18 Nakasero Road, Kampala. On 28th March 2018, the respondent issued a private ruling that the disposal was exempt from income tax. Sometime later in 2018, National Social Security Fund (NSSF) purchased the property. After the disposal of the property, the respondent issued an assessment of Shs. 3,343,400,000 on the applicant as capital gains tax. The applicant objected to the assessment which was disallowed by the respondent.

The following issues were set down for resolution:

1. Whether the sale of the suit premises attracted capital gains tax?
2. If so, whether the applicant is liable to pay Shs. 3,343,400,000?
3. What remedies are available to the parties?

The applicant was represented by Mr. Cephas Birungi and Ms. Dorothy Bishagenda while the respondent was represented by Ms. Gloria Twinomugisha and Mr. George Ssenyomo and Mr. Alex Ssali Aliddeki.

This dispute revolves around the disposal by the applicant of its property located in Nakasero, Kampala. The respondent issued a private ruling before the disposal that it would not attract income tax. After the disposal, the respondent issued the applicant with an assessment of capital gains tax.

The applicant's first witness, Mr. Pradip Karia, one of the registered trustees of the Free Mason Hall, testified that on 14th April 2018 the applicants sold the Freemason temple to NSSF at Shs. 10,600,000,000. Prior to selling the Hall, the applicant had written to the respondent seeking for a confirmation as to whether capital gains tax would arise from the transaction. The Commissioner, Domestic Taxes Department, wrote to the applicants confirming that no capital gains tax would arise from the sale of the property. On 3rd May 2019, the applicants received an assessment of Shs. 3,180,000,000 from the Commissioner Domestic Tax as capital gains tax arising from the sale of the property. The capital gains tax charged was 30% of the value of the property. He testified that the applicants wanted to purchase another temple or land to replace it.

The applicant's second witness, Mr. Paul Baingana, a registered valuation surveyor testified that he was instructed to value premises at Plot 18 Nakasero Road. He carried out a physical inspection of the property to ascertain the damage and depreciation of the building. He stated that the fair market value of the building as at 24th April 2018 was Shs. 11,000,000,000. He testified further that the building was sold at Shs. 10,600,000,000 and so there was no gain from the sale. He also stated that a new property can only be bought at Bugolobi, an inferior location because of the affordability. He stated that the property was bought in 1949 at Shs. 575,000.

The respondent called one witness, Ms. Resty Kaitesi, its supervisor in charge of Kampala Metro Block B. She testified that the applicant was assessed Shs. 3,434,400,000 for failure to declare income tax from the disposal of its asset worth Shs. 10,600,000,000 to NSSF. The gain on the disposal was taken to be the sale

value as the applicant did not provided evidence to the respondent's audit team for costs incurred to be computed in the cost base. Income tax was computed at 30% of sale value, giving principle tax due of Shs. 3,180,000,000 and interest of Shs. 254,000,000. She testified that the respondent did not revoke the private ruling. She testified that there was a ruling to the effect the property sold of the applicant was a business asset. The witness contended that the said ruling superseded the private ruling.

In its submissions, the applicants contended that they obtained a private ruling under S. 45(1) of the Tax Procedure Code Act. They applied by a letter dated 5th February 2018 to ascertain whether the sale of Plot 18 would attract any tax. The applicants cited *R v Commissioner of Inland Revenue ex parte MFK Underwriting Agencies* [1989] BTC 561 where the court stated that: "Sometimes advice is given in answer to a request from an individual taxpayer. The practice exists because the Revenue has concluded that it is of assistance to the administration of a complex tax system and ultimately to the benefit of the overall tax yield." The applicants also cited *Commissioner of Taxation v Brian John McMahon* NG 282 of 1997 where the court stated that the private ruling provisions were introduced to assist taxpayers who are uncertain about the tax effect of an arrangement proposed. It enables taxpayers to order their affairs with a degree of certainty.

The applicants contended that the private ruling was binding. The applicants cited S. 45(3) of the Act where it is stated that the ruling in binding on the Commissioner in relation to the taxpayer to whom the ruling to whom it has been issued. The applicants acted on the authority of the private ruling to sell the property. The applicants also cited S. 45(8) of the Act which provides that a Commissioner may revoke a private ruling in part or whole. The applicants contended that the ruling of 28th March 2018 had not been revoked. As a result the assessments raised in contravention of the ruling should be vacated. The applicants cited *Biira Udear Co. Ltd. v Commissioner General* URA HCCS 400 of 2015 where the court noted that since the private ruling had not been reversed it was still binding on the

Commissioner General. The applicants also cited *Salim Alibhai & others v Uganda Revenue Authority* HCMA 123 of 2020 where the High Court held that the respondent acted unfairly when it revoked the applicant's private ruling without observing the rules of natural justice.

Without prejudice to the foregoing, the applicants argued the sale of Plot 18 Nakasero did not attract capital gains tax as it was not a business asset and therefore qualified for exemption under S. 21(1)(k) of the income tax Act which provides that any capital gain that is not included in business income is exempt for tax save for gains on sale of shares in a private limited liability company and on the sale of a commercial building. The applicant argued that the Masonic temple is not a commercial building. The applicants contended that a ruling of the Tribunal in TAT 20 of 2017 between the same parties did not have a bearing on this application as it was concerned with rental income. The Income Tax Amendment Act 2014 separated rental income from business income.

The applicants also argued that under S. 18(1) of the income tax Act for a gain to amount to business income it must arise from the disposal of a business asset. S. 2(h) of the Act defines business asset to mean an asset which is used or held ready for use in a business and includes any asset held for sale in a business, any asset of a partnership or company. The applicants contended that their activity did not fall under the meaning of a business. The applicants also contended that the definition of a company under S. 2(n) of the Act does not include a trust or partnership. The applicants are a trust registered with ministry of lands. They are also not a partnership.

The applicant also argued that it was not liable to pay the tax assessed as it was not correctly assessed or computed. The applicants contended that the respondent simply extracted the consideration they received and applied 30%. 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 for the cost base of the asset

at the time of disposal. The applicants contended that the respondent did not use the formula as provided for under S. 166(9) of the Income Tax Act. The respondent also did not take steps to ascertain the cost base, therefore its assessment was not correctly raised.

The applicant also contended that though the assessment showed it was due to non-declaration of gains on sale of property the transaction was brought to the attention of the respondent prior to the sale.

In reply, the respondent first raised a preliminary objection that the applicants had not paid 30% of the tax. The respondent cited *Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd.* [1969] EA 696 to support its argument that a preliminary point of law can be made at any time during the hearing of the case. The respondent contended that S. 15 of the Tax Appeals Tribunal Act provides for the payment of 30% of the tax in dispute or the tax not in dispute whichever is greater. The respondent cited *Uganda Projects Implementation and Management Centre v Uganda Revenue Authority* Constitution Petition 2 of 2009 where the Supreme Court held that the requirement to pay 30% deposit of the tax in dispute is not unconstitutional. The respondents also cited *A Better Place Uganda Limited v Uganda Revenue Authority* Civil Appeal 37 of 2019 where the High Court held that the requirement to pay 30% of the tax assessed should be when the taxpayer lodges with the Commissioner a notice of objection.

The respondent contended that S. 45(3) of the Tax Procedure Code Act requires a taxpayer to make a full and true disclosure of the nature of the transaction. The respondent contended that the applicant did not make a full disclosure. The respondent cited *Black's Law Dictionary* 11th Edition where disclosure was defined as "the act or process of making known something that was previously unknown." The respondent cited *Gordon Sentiba and others v Uganda Revenue Authority* Misc. cause 35 of 2010 where the court noted that where a full disclosure is made a private ruling is binding. The respondent contended that the applicant disclosed that it was

selling a Masonic temple whereas it was disposing of a Masonic Hall. The respondent submitted that the applicant did not make a complete revelation of all material facts of the transaction. The respondent cited *Matrix- Securities Ltd. v IRC* [1994] 1 ALL ER 769 where the court found an applicant's letter to be inaccurate and misleading. The respondent contended it was not bound by the private ruling on the basis that the applicant did not make a full and true disclosure.

The respondent submitted that S. 45(8) of the Tax Procedure Code Act provides that the Commissioner may revoke a private ruling in whole or part. The respondent contended that the use of the word 'may' means that the Commissioner is not mandated to revoke a private ruling. The respondent cited *IOOF Holdings Ltd. v FCT* [2014] 224 FCR 535 where the court stated *that a private ruling is binding up to a change on the law. The respondent also cited Republic v Commissioner of Domestic Taxes Exparte Sony Holdings Limited* Misc. Civil Application 363 of 2018 where the High Court of Keny stated in respect of a private ruling that the fear in protecting legitimate expectation substantively is that administrators may be forced to act ultra vires. The respondent also cited *Registered Trustees of Freemasons Hall v URA* 20 of 2017 where the Tribunal noted that the Freemasons Hall is not an exempt item under the Income Tax Act. The respondent contended that fact that the applicant was a party to the decision in the said application there was no need for the respondent to write to it revoking the private ruling. The respondent cited *Republic v Commissioner Domestic Taxes ex parte Sony Holdings Limited* Civil Application 363 of 2018 where the court upheld a revocation of a private ruling after Kenya Revenue Authority had visited the applicant and requested for documents before the decision to revoke was made.

The respondent submitted S. 17 of the Income Tax Act provides for gross income to include business income derived during a year by a person. S. 18 provides that business income includes the amount of any gain as determined by Part VI of the Act derived by a person on the disposal of a business asset. S. 2(h) provides that a business asset means an asset which is used or held ready for use in a business.

The respondent cited *Robert Muhumuza v Uganda Revenue Authority* TAT 2 of 2015 where the Tribunal held that as long as income is derived from premises it is commercial. The respondent contended that the applicants were hiring out the Masonic Hall. By earning rental income before its disposal, the premises qualified to be a commercial premise. Therefore, any capital gain arising from the disposal is not exempt for tax under S. 2(1)(k) of the Income Tax Act.

The respondent contended that the burden is on the taxpayer to prove that an assessment is incorrect and it is not liable to pay the taxes assessed. The applicants did not discharge the said burden. The respondent submitted that its witness testified that the applicants' returns filed the period 2015 to 2018 did not show any non-current asset. The gain on the disposal was taken to be the sale amount as there was no evidence of costs provided to the audit team.

In rejoinder, the applicants in respect of the preliminary objection submitted that on 28th June 2019 it wrote a letter to the Tribunal forwarding proof of payment of 30% of the tax not in dispute, in the form of a bank guarantee. On 1st July 2019, the respondent acknowledged receipt of the bank guarantee. The applicants contended that S.15 of the Tax Appeals Tribunal Act provides that 30% shall be made pending the final resolution of the dispute. The applicant contended that a bank guarantee can be accepted as proof of payment of 30% of the tax in dispute. The applicants cited *A Better Place v URA* (supra) to support its argument that a bank guarantee can accepted as payment of 30%. The applicant also cited *EABLI v URA* TAT 14 of 2017 and *UBL v URA* TAT 38 of 2019 where bank guarantees were accepted as proof of payment of 30% of the tax in dispute.

The applicants contended that in *Registered Trustees of the Free Masons v Uganda Revenue Authority* TAT 20 of 2017 the tribunal did not make finding that the Masonic Temple was a business asset. The applicants also contended that the issue of disclosure in respect of the private ruling was not the basis of the objection decision in this matter. Without prejudice, the applicants contended that they made a full and

true disclosure of the transaction before the private ruling. The applicants reiterated their submission that the respondent did not revoke the private ruling. No fair hearing was accorded to the applicants.

Having listened to the evidence and read the submissions of the parties this is the ruling of the Tribunal.

The Tribunal shall first address the preliminary objection raised by the respondent. The respondent contended that the applicants did not pay 30% of the tax in dispute. S. 15 of the Tax Appeals Tribunal Act provides that a tax payer shall pay 30% of the tax in dispute or the amount not in dispute, whichever is greater. The applicants contended that they paid the 30% of the tax in dispute by means of a bank guarantee. They attached two letters to that effect. In a letter of 1st July 2019, the Assistant Commissioner –Litigation of the respondent wrote to the Registrar of the Tax Appeals Tribunal where he indicated that the bank guarantee was at variance with the order of the Tribunal. However, he indicated that the respondent was amenable to having the matter discussed and resolved before the next tribunal appearance. The Tribunal notes that there are instances where the respondent has allowed taxpayers to pay the 30% by use of a bank guarantee. If the parties consent, the Tribunal will not interfere with the consent.

The respondent brought the preliminary objection at the end of the trial during submissions. Though the Tribunal agrees with the respondent that a preliminary objection can be raised at any time of the trial. However, at times a preliminary objection should be raised at the appropriate time for it to be considered appropriately. In this case, the applicants contend that they paid 30% of the tax in dispute by form of a bank guarantee. The respondent indicated the matter can be resolved. By raising the preliminary objection at the end of the trial during submissions, the Tribunal is not in a position to ascertain whether the matter was ever amicably resolved. By proceeding to have the matter heard after ‘the next tribunal appearance’ one would assume that the matter was amicably resolved.

Raising the preliminary objection at the end of the trial deprives the Tribunal a chance from ascertaining what was actually agreed by the parties. The Tribunal cannot confirm whether the respondent accepted or rejected the bank guarantee. Therefore the Tribunal is not in a position to state with certainty that the applicants did not pay or refused to pay the 30% of the tax in dispute. In the circumstances, the preliminary objection is overruled.

The second contention between the parties was in respect of the private ruling. Around 5th February 2018, the applicants applied for a private ruling in respect of a prospective sale of premises at Plot 18 Nakasero Road, Kampala. S. 45(1) of the Tax Procedure Code Act provides that:

> "(1) Subject to subsection (2), the Commissioner may, upon application in writing by a taxpayer, issue to the taxpayer a private ruling setting out the position of the Commissioner regarding the application of a provision in a tax law to a transaction entered into or proposed to be entered into by the taxpayer."

In the Australian case of *Commissioner of Taxation v Brian John McMahon* (1997) 79 FCR 127 at 133 the court stated:

> "The private ruling provisions were introduced to assist taxpayers who are uncertain about the tax effect of an arrangement that is proposed, commenced or completed and who wish to obtain a ruling from the Commissioner on this question before the assessment process is complete. It enables a taxpayer to order their affairs with a degree of certainty about their tax implications before they embark or whilst they are embarking, upon courses of conduct, the tax implications of which may not be known for a considerable time."

The purpose of private rulings is to promote simplicity in the law and certainty.

On 28th March 2018, the respondent issued a private ruling stating that the sale of Plot 18 Nakasero Road to NSSF was exempt from tax. S. 45(7) of the Tax Procedure Code Act provides that

> "(7) A private ruling is issued by serving a written notice of the ruling on the applicant and the ruling shall set out the matter ruled on, identifying –
>
> (a) the taxpayer;

(b) the tax law relevant to the ruling;

(c) the tax period to which the ruling applies;

(d) the transaction to which the ruling relates; and

(e) any assumptions on which the ruling is based."

The ruling by the Commissioner stated:

> "From the facts and above provisions, any gains derived from the intended sale of the Masonic Temple by the Registered Trustees of the Freemasons Hall shall not be treated as business income within the meaning of Section 18(1) of the ITA since the said Temple is not a business asset and any gains from the disposal thereof would be exempt from tax under Section 21(1)(k) of the Act.
>
> However, RTF will be required to charge Value Added Tax (VAT) on the sale of the said Temple and account accordingly."

The private ruling did not indicate the tax period to which it related. However, basing on the said private ruling the applicants did not pay income tax on the disposal of Plot 18, Nakasero Road as they considered it exempt.

After the disposal of the property, the respondent issued an assessment of Shs. 3,343,400,000 on the applicant as capital gains tax. The applicants objected to the assessment. The applicants contended that the private ruling was binding and was not revoked by the respondent. S. 45(3) of the Tax Procedure Code Act provides that:

> "(3) Where a taxpayer has made a full and true disclosure of the nature of all aspects of the transaction relevant to the ruling and the transaction has proceeded in all material aspects as described in the taxpayer's application for the ruling, the ruling is binding on the Commissioner in relation to the taxpayer to whom the ruling has been issued."

S. 45(8) provides that:

> "(8) The Commissioner may revoke a private ruling in whole or part by written notice served on the taxpayer to whom the ruling is issued."

Private rulings can be revoked where the Commissioner erred in interpreting the law and or where the applicant did not make a full and true disclosure of the transaction and or the transaction did not proceed as described in the application. The tribunal

therefore has to ask itself whether the private ruling was binding and what the effect of the respondent not revoking it is.

The respondent contends that the applicants did not make a full and true disclosure of the nature of all the aspects of the transaction relevant to the ruling. The respondent contends that the applicants indicated that what was for sale was a Masonic temple yet it was actually a Masonic hall. There tribunal thinks that there is nothing that prevents a hall from being a temple or vice versa. Premises may have multi functions. However what is important is that if the applicant did not make a full and true disclosure of the nature of the transaction this is a ground for revoking the private ruling. It is not clear why if that came to the attention of the Commissioner why he did not revoke the private ruling.

The respondent contended that use of the word “may” in S. 45(8) means that it is not mandated to revoke a private ruling in writing. With all due respect to the respondent’s submission, the word “may” connotes that the Commissioner ought to use his discretion in revoking a private ruling. The said discretion should be exercised rationally and legally. In *Kansai Plascon v Uganda Revenue Authority* Application 135 of 2020 the Tribunal noted that the word “may” connotes that the Commissioner is given discretion to grant an application if he is satisfied. Likewise the Commissioner is given discretion to revoke a private ruling if he is satisfied that there was no full and true disclosure of all aspects of the transaction or there was an error in his interpretation of the law. If the Commissioner does not exercise his discretion and revoke the private ruling, it means it still stands and is binding on him. He has the discretion to revoke the private ruling in whole or in part. He should exercise his powers with discretion. The Commissioner has nothing to lose when he revokes a private ruling. The aggrieved party can seek legal redress under the taxing laws. One wonders how the Commissioner may issue an assessment when he is still bound by his private ruling. Therefore it only logical that the Commissioner ought to revoke his private ruling before issuing an assessment so as to have certainty in tax planning and tax collection.

The respondent contended that the Tribunal made a ruling in *Registered Trustees of Freemasons Hall v URA* Application 20 of 2017 where it noted that the Freemasons Hall is not an exempt item under the Income Tax Act. The respondent argued that having made the ruling it was not necessary to give the applicants notice or revoke the private ruling. The requirement to revoke a private ruling is set by a statute. A court decision cannot override the need to fulfil a statutory obligation.

Having stated that the Commissioner ought not to have issued an assessment without first revoking the private ruling, addressing the issue whether the property the applicant sold was a business asset would serve only academic purposes. As already stated above, this should have been addressed at the time of revocation. If the applicants were to be aggrieved by any revocation the said issue would be addressed at appeal. While S. 45(9) of the Tax Procedure Code Act states that a private ruling is not a tax decision for the purposes of the Act, it does not indicate that a revocation is not one.

Another contention raised by the applicants was that the assessment of the capital gains tax of Shs. 3,343,400,000 was not correctly computed. The respondent imposed a tax of 30% on the sale value of Shs. 10,600,000,000. The applicants are contending that it was wrongly computed.

Capital gains tax is a tax imposed on business income resulting from a gain on disposal of a business asset. S. 18(1) 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 – 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."

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 disposal. S. 52(2) of the 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 the date of acquisition of any consideration in kind given for the cost. The applicants' witness, Mr. Paul Baingana, stated that the property was bought in 1949 at Shs. 575,000. The respondent ought to have considered the acquisition value of 1949 in computing the gain. It should have considered what the value of the said amount would be today taking into consideration 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 value of the property, it was imposing a sale tax on the sale of property and not capital gains tax. An assessment issued without taking into consideration the gain a taxpayer has obtained cannot be said to be one of capital gains tax. The respondent contended that its audit team was not availed costs on the cost base by the applicants. It is difficult for the applicants to have availed costs to the respondent when it had not revoked its private ruling. Therefore, the assessment by the respondent was wrongly computed.

This application is allowed with costs to the applicants.

Dated at Kampala this 29th day of July 2021.

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