<u>THE REPUBLIC OF UGANDA</u>

<u>IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA</u>

<u>APPLICATION NO. 154 of 2020</u>

GOLDSTAR INSURANCE COMPANY LIMITED.......................... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY...RESPONDENT

BEFORE: DR. ASA MUGENYI, MR. GEORGE MUGERWA, MS. CHRISTINE KATWE

RULING

This ruling is in respect of withholding tax (WHT) and Value Added Tax (VAT) assessments of Shs. 1,683,949,537 and Shs. 376,815,272 respectively issued on premiums ceded.

The applicant is a company incorporated in Uganda whose main business activity is the provision of insurance services. The applicant cedes parts of its business to re-insurance companies. The applicant pays withholding tax (WHT) to the respondent based on the premium ceded minus purported commission as alleged by the respondent or purported discount as contended by the applicant plus claims made. The respondent conducted an audit on the applicant for the period January 2014 to December 2018. As a result, it issued an additional WHT assessment of Shs. 1,683,949,537 on the applicant on the ground that the latter receives commissions. The applicant objected on the ground that it obtains discounts. Also, as a result of the audit the respondent issued a VAT assessment of Shs. 376,815,272 on the ground that the applicant ought to have apportioned exempt and taxable supplies which it did not. The applicant objected on the ground that it properly accounted for VAT.

Issues

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

The applicant was represented by Ms. Bruce Musinguzi, Mr. Thomas Kato and Ms. Mercy Makabai while the respondent by Mr. Tony Kalungi.

The applicant's first witness, Mr. Azim Tharani, its managing director testified that the applicant is involved in the business of general insurance. It takes on different types of insurance as part of its business. The applicant cedes a portion of the risks it undertakes. The applicant will insure a risk and cede up to 75% of the risk to one or more insurers. The re-insurers will thus be entitled to premiums amounting to 75% of the risk. The applicant retains the responsibility of meeting claims. When the applicant reinsures a risk, it is given a discount on the premiums it pays to the reinsurer. The discount is a cost re-imbursement to the insurer for administrative work that the primary insurer undertakes in ceded polices. This policy is applied across the industry. The applicant withholds tax on the net premium it cedes to the reinsurer less of the discount and any recoveries claimed by the insured. This discounted amount is interchangeably referred to as a commission as a mechanism for re-insurers to give an allowance for the costs incurred by the primary insurer in acquiring and maintaining the reinsured policy.

Mr. Azim Tharani stated that the respondent further assessed the applicant VAT of Shs. 376,915,272. It stated that applicant deals in both taxable and exempt sale. The respondent contended that input tax was not apportioned for the period under review. The respondent claimed that the applicant earns commissions from its reinsurance business, rental income from residential houses and facultative fees which are exempt. He stated that at the time the policy is then ceded for reinsurance, the VAT has already been charged and since the reinsurance is exempt no VAT is paid. The commission/discount is agreed upon as a result of a treaty. He stated that the applicant does not provide any services to the reinsurance company for it to be paid a commission. Since there are no taxable supplies that are being made, there cannot be VAT charged. If any service is offered, which is denied the service is consumed and used outside Uganda, this would mean that the commission is as a result of an exported service and therefore zero rated and not exempt. The respondent contended that the applicant is required to treat the reinsurance commissions as a separate transaction and apportion input tax as required under the VAT Act.

The applicant's second witness, Mr. Sameer Thakkar, its external auditor stated that the dispute arises from two issues. These are computation of WHT and non-apportionment of input tax. The applicant is involved in the business of general insurance. It cedes a portion of the risk it undertakes with various insurance companies. He stated that when the applicant reinsures a risk it is given a discount on the premiums it pays to the re-insurer. The applicant withholds taxes on the gross premiums it cedes and pays to the re-insurer. The reinsurers' ceded premium is reduced by a discount recognized as a commission earned. It is on this ceded re-insurance premium that the applicant withheld taxes. Mr. Sameer Thakkar stated that the applicant did not withhold tax on the discount because it does not form part of the ceded premium received by the re-insurer. The applicant recognized the discount/commission of Shs. 4,318,723,000 in its income tax return for 2017 against which it paid corporation taxes. He admitted that its firm was not the auditor of the applicant for the period 2017.

The applicant's third witness, Mr. Alex Munyi, the regional head financial reporting officer of Continental Reinsurance Company Limited stated that the applicant obtains clients to whom it issues policies. Given the nature of insurance business on risk, the insurance companies contract companies that carry part of risk on their behalf. The companies that share the risk for the insurance companies are called reinsurance companies. As a global standard practice, re-insurance companies give the insurance companies a discount on the premiums due to the reinsurer, to take care of the administrative costs that the insurance company incurred in procuring this business for the share that is passed to them. He stated that the discount is between 15 % to 35% of the total amount. Mr. Alex Munyi stated that the reason this is called a commission and not a discount is because international accounting best practices in the insurance industry recognize it as a commission and not a discount. This explains why reinsurances contracts /treaties will have the word commission and not discount.

The respondent's witness, Ms. Racheal Katende a tax officer in its domestic department testified that she conducted a return examination on the applicant for the period 2014 to 2018 in respect of VAT, WHT and Pay As You Earn. The audit established that the applicant was withholding on net premiums paid to reinsurance companies after adjusting for commissions earned and claims settled on behalf of the reinsurers. She adjusted the net premiums to gross premiums and the variance was taxed as undeclared withholding tax. As a result, she raised WHT of Shs. 2,493.915,140 against the applicant. During the objection process, the respondent corrected errors and the additional WHT was reduced to Shs. 1,683,949,537.

She established that the applicant had exempt income from facultative fees received, rental income from residential houses and commission earned from reinsurance which were not declared in VAT returns for 2014 to 2018. She accordingly apportioned input tax including the above underdeclared sales. As a result, she raised additional VAT of Shs. 376,915,271 on overclaimed input tax due to non- apportionment of the undeclared exempt sales. The applicant declares amounts received from reinsurance as commission earned in its financial statements and not discount which makes it income. She contended that the commissions received by the applicant on reinsurance premiums are exempt income because it is incidental to reinsurance premiums which are VAT exempt.

The applicant submitted that S.118D of the Income Tax Act provides that; "a resident person who makes a payment of premium for reinsurance/re takaful services to a non-resident person shall withhold tax on the gross amount of the payment at a rate prescribed in Part XI of the Third Schedule". Under Part XI of the 3rd Schedule, the applicable rate is 10%.

The applicant submitted that reinsurance is defined as a contract whereby one, for a consideration, agrees to indemnify another wholly or partially against loss or liability by reason of a risk the latter has assumed under a separate and distinct contract as insurer of a third party. (See *Stickel v. Excess Ins. Co.,* 136 Ohio St. 49, 52 (Ohio 1939). Reinsurance is a transaction between two insurers: one purchases insurance from the other to cover part or all of the risks that the purchasing insurer does not wish to carry in full. S. 2 of the Insurance Act defines "reinsurance business to mean "The business of undertaking liability as a reinsurer under reinsurance contracts: The same Section defines "reinsurance contract to mean

> "An insurance contract under which one insurer, called the reinsurer, indemnifies, or otherwise compensates, another insurer, called the cedant, against losses on one or more contracts of insurance entered into by the cedant".

The applicant submitted that *Black's Law Dictionary* 11th Edition p 1539 defines 'reinsurance' as; "insurance of all or part of one's insurer's risk by a second insurer, who accepts the risk in exchange for a percentage of the original premium". It submitted that the concept is elaborated by the OECD in its 2007 Report titled; Report on The Attribution of Profits to a Permanent Establishment Part IV (Insurance) 200, at p. 10 as follows:

> "20. A reinsurance contract is an agreement between an insurer and a reinsurer. The insurer writes the policy for the policyholder and is contractually responsible for any payments to the policyholder that come due under the policy, even if those insured risks are ultimately met by a reinsurer as part of a reinsurance contract. The insurer markets the policy, bears the costs of its sale and ongoing administration and receives the premium income associated with the policy. In a reinsurance contract, the insurer (cedant) cedes the insurance risk to a reinsurer in return for the payment of the reinsurance premium. In return, the cedant receives a payment (referred to as a ceding commission) intended to cover the portion of the costs that it incurred in obtaining the policy and to produce a profit. Generally, the result is a net payment made by the cedant to the reinsurer. However, it is acknowledged that reinsurance contracts may in certain market conditions create a loss where ceding commission paid by the reinsurer does not cover the insurer's costs or where a negative ceding commission is paid to the reinsurer."

The applicant submitted that S. 118D of the Income Tax Act applies to the payments made by the ceding company to the reinsurer on the proportion of risk passed over by the insurer to the reinsurer. The insurer is required to withhold the rate of 10% on the gross payment it makes to the reinsurer. S. 2 of the Income Tax Act defines payment to mean; "amounts paid or payable to another person".

The applicant submitted that WHT is a form of income tax that is deducted/withheld at source by one person upon making payment to another person. It submitted that it takes on different types of risks as part of its general insurance business and in certain instances, it cedes a portion of the risks it undertakes with various re-insurance companies. When the applicant reinsures a risk, it is given a discount on the premiums it pays to the re-insurer. This is a principle applied across the industry. The applicant withholds taxes on the premiums it cedes and pays to the re-insurer.

The applicant submitted that the type of reinsurance contracts it entered into is the proportional reinsurance (or quota-share reinsurance) which is an insured risk sharing arrangement where the reinsurer reinsures a certain percentage of each of the policies written by the ceding company during the term of the contract. The applicant submitted that according to the nature of reinsurance business, it receives a discount to cater for administrative costs of the insurance. The only amount subject to WHT is the ceded portion of the premiums excluding the discount which is referred to as a "commission" due to industry practice. The applicant submitted that S. 118D does not require insurers to withhold on ceded premiums but rather on payments made to the reinsurers. The applicant deducts a discount allowed to it by the reinsurance companies to cater for administrative expenses before making a payment to the reinsurers. Under the treaty, the reinsurer would only be entitled to a payment of the amounts less the discount. The reinsurer can never claim the discounted amount. The applicant submitted that however, before the insurer can remit the ceded premium to the reinsurer, the insurer deducts a portion of the ceded premium to cater for its administrative expenses. This is what is known as the ceding commission. It is a discount that the reinsurer gives to the insurer. Therefore, the insurer does not make a payment on the whole premium ceded to the reinsurer. The reimbursement of expenses by the reinsurer to the insurer cannot be taxed as forming part of the premium passed on to the reinsurer by the insurer because no such premium is actually paid to the reinsurer. Therefore, the gross payment envisaged under S. 118D of the Income tax Act is the premium paid to the reinsurer by the insurer.

The applicant submitted that its witness, Alex Munyi testified that ceding commission is an expense that is customary in the reinsurance business wherein the reinsurer re-imburses the cedants for administrative, underwriting and business acquisition costs incurred by them, either in whole or part. This practice arises out of the fact that insurance operates on principles of risk sharing. Therefore, insurance companies are reluctant to take on risks beyond their underwriting capacity. As such, an insurance company will keep only that portion of risk it can manage within its capacity and pass on the rest of the risk to other insurers or reinsurers.

The applicant submitted that that for the financial year ended 31st December 2017, it had gross written premiums of Shs. 20,808,684,000. Shs. 14,387,325,000 was ceded to a reinsurer leaving the applicant with net written premiums of Shs 6,421,359,000. However, the reinsurers' ceded premium is reduced by a discount given to the applicant. As per the Profit or Loss, this discount is recognized as a commission. In this case, the ceded premium was reduced by a discount granted to the applicant at Shs. 4,318,723,000. This left the reinsurer with a ceded premium of Shs. 10,068,602,000 which is the gross premium paid to the reinsurer by the insurer. This is the amount upon which WHT applies.

The applicant submitted that it cannot withhold on amounts which it has not paid, and will not pay, to the reinsurer as this would be in contravention of S. 118D which clearly specifies that withholding shall apply to the gross amount paid to the non- resident reinsurers. Applying WHT on the entire ceded premium and not the actual payment made would be contrary to the law. Tax can only be imposed as prescribed by the law as it was held in *Okello Okello v The Commissioner General URA* (supra) while citing *Warid Telecom (U) Ltd v Uganda Revenue Authority*, HCCS 24 of 2011 to wit:

> "Under Article 152(1) of the Constitution, no tax is to be imposed except under the authority of an Act of Parliament... In determining the actual tax position, the relevant provisions of the taxing statute should be considered. Any tax imposed in a manner not authorized by an Act of Parliament is contrary to the constitutional principles for the imposition of tax."

The applicant submitted that it neither solicited nor procured any insurance business on behalf of the reinsurer. There would therefore be no basis for the reinsurer to pay a commission to the applicant when the applicant is not the reinsurer's agent. What the applicant is allowed to deduct before making payments to the reinsurer is not a commission in the strict sense of the word but in the nature of compensation towards cost of procurement incurred by the applicant. Whereas the respondent thinks that the applicant withholds on net premiums, what the reinsurer is paid is what amounts to gross payment upon which WHT applies.

The applicant submitted that *in General Insurance of Corporation of India v Assistant Commissioner of Income Tax* (TDS) 1(2) Mumbai, the Income Tax Appellate Tribunal had the occasion of construing the commission provided for in the reinsurance treaties and held as follows:

"Ceding companies incur certain costs which their reinsurers do not have to bear, that is, commissions paid to agents plus other expenses incurred in acquiring the original business and administering the business ceded. Therefore, reinsurers allow from their share of the original premiums payable by the cedants a discount in the form of a reinsurance commission, which should not be confused with the brokerage paid by a reinsurer to an intermediary who introduces the business..."

The Court thus concluded as follows:

In final conclusion we hold that judging from the nature of business, the insurance companies have not provided any service of soliciting or procuring of insurance business for the assessee company. On the other hand, the assessee company has provided reinsurance to the insurance companies. The insurance companies do not get business from the insured for the assessee. The said insurance companies have got business for themselves and not for the assessee company. The insurance companies get business either directly or through agents. If any commission is paid to the agents by them, that attracts provisions of section 194D as the same is paid for services rendered for soliciting or procuring insurance business. If the insurance companies reduce the premium directly from the premium payable by the insured on account of no claim bonus etc., such a deduction will not attract the provisions of S. 194D."

The applicant submitted that according to the UK VAT Manual, reinsurance commissions and ceding commissions are just deductions to recover costs paid by the insurer in connection with the initial policy and not with any supply, and so are not subject to VAT. The VAT Manual explains as follows: "VATIN[illegible]3230 Types of insurance: reinsurance: overriding or ceding commissions

"Frequently there can appear to be a payment from the re-insurer to the insurer (or it can look as if the insurer has deducted amounts from the premiums, it pays the re-insurers). These deductions are normally in relation to proportional or facultative treaties (rarely excess of loss) and are reimbursements to the insurer of the cost of obtaining the original insurance, and is quite sensible because the re-insurers are now feeling the benefit deriving from the original insurance business. Therefore, reinsurers are paying a commission to the insured to compensate them for expenses incurred in obtaining and administering (e.g. retail brokerage, taxes, fees, home office expenses) the original business. There can also be ceding commission when retrocession has occurred. As with discounts, there is no supply to the re-insurer in respect of this deduction and so there is no liability to be determined."

The situation is well explained by the Circular No. 120 (a)/2/2010-ST from the Central Board of Excise and Customs, Department of Revenue, Ministry of Finance, Government of India where it is stated as follows:

> "Every insurer dealing in insurance business is required to re-insure a specified percentage of sum assured with another insurance company. The insurance company pays premium to the reinsuring company for this service. However, a part of such premium is deducted and kept by the insurance company for meeting the administrative expenditure. In other words, the insurance company and the re-insurance company jointly bear the expenses for running the insurance/reinsurance business. This shared expense is commonly known as 'commission' though strictly it is not in the nature of a commission. It may be pertinent to mention that the customer/beneficiary deals only with the insurance company and may not even be aware of the role of re-insurer and the backroom operations between the insurance company and the reinsurer...The arrangement between the insurance company and the reinsurer is only sharing of expenses and there is no service provided by the insurance company to the re-insurer for a consideration. In fact, it is the reinsurer which provides insurance service to the insurance company. As both the insurance company and reinsurer pay service tax on the entire amount of premium charged by them, the question of charging service tax under any other taxable service does not arise".

The applicant submitted that S. 118D clearly requires the insurer to withhold on gross payments made on premiums for reinsurance. It does not require the insurer to withhold on the ceded premium as a whole. Where no payment is made, then there is nothing to withhold. Withholding is only applicable to the gross amount payable and paid to the reinsurers, and not the gross amount ceded. The applicant prayed that the tribunal finds that the applicant is not liable to pay WHT of Shs. 1,683,949,537.

On the issue of whether the applicant is liable for the VAT of Shs. 376,915,272, the applicant submitted that S. 19(1) of the VAT Act provides that a supply of goods or services is an exempt supply if it is specified in the Second Schedule. Paragraph 1(d) (iv) of the Second Schedule specifies the supply of re- insurance services as an exempt supply. S. 28(7) of the VAT Act provides that the input tax that may be credited by a taxable person for a tax period -

> "(a) Where all of the taxable person's supplies for that period are taxable supplies, the whole of the input tax specified in subsection (1), or (2); or

(b) Where only part of the taxable person's supplies for that period are taxable supplies, the amount calculated according to the formula specified in S. 1(f) of the 4th Schedule".

The applicant submitted that the assessment states that it had "exempt income" in the form of facultative fees received, and commission earned from reinsurance which were not declared in the VAT returns for the period 2014 to 2018. However, after the objection the respondent included rental income as being a basis for the apportionment yet the same did not form a part of the management letter. Accordingly, the respondent apportioned the input tax after including undeclared sales and as a result raised an additional VAT assessment against the applicant. The respondent insisted that the applicant should have treated the reinsurance commission as a separate transaction and apportioned input tax.

The applicant submitted that it is in the business of "insurance" as opposed to "re-insurance". The ceding of premiums to the re-insurers cannot be construed as a supply of re-insurance services by the applicant. If at all, it is the re-insurers who made a supply (re-insurance) to the applicant. It cited *General Insurance of Corporation of India v Assistant Commissioner of Income Tax* (TDS) 1(2) Mumbai, where the Income Tax Appellate Tribunal held that,

> "... judging from the nature of business, the insurance companies have not provided any service of soliciting or procuring of insurance business for the assessee company. On the other hand, the assessee company has provided reinsurance to the insurance companies".

Accordingly, the applicant supplied no "re-insurance" services to the reinsurers such as to qualify for VAT exemption under Paragraph 1(d)(iv) of the 2nd Schedule.

The applicant submitted that it objected to this assessment on the ground that it did not provide any services to the reinsurers upon which it could have earned a commission. The respondent erroneously treated the discount granted to the applicant as reinsurance commission earned which is not the case. As such, the respondent demanded that the applicant apportion tax. The applicant disputed the assessed VAT as it does not make any supplies to the reinsurance companies such as to earn commission. Applying the above provisions of the VAT Act to the facts at hand leads to one conclusion, which is that the applicant does not provide reinsurance services. Neither does it make a supply of services to the reinsurers such as to be paid a commission.

The applicant submitted that in *General Insurance of Corporation of India v Assistant Commissioner of Income Tax* (supra), the Income Tax Appellate Tribunal observed

> "If the insurance company gets business directly from the insured, no payment would be required to be made by the insurance company to the insured by way of commission or otherwise for soliciting or procuring the business for the assessee. If any discount is allowed by the insurance company to the insured, that will not fall within the definition of brokerage or commission paid for soliciting or procuring insurance business, that payment, in our view, would fall within the category of a discount offered to the insured for giving the business to the insurance company. Even otherwise the payment or deduction would neither be a reward nor remuneration for any services like soliciting or procuring insurance business for the assessee. The assessee-company may be said to have solicited business from the insurance companies in certain cases but the commission credited/paid is not by way of remuneration or reward for soliciting or procuring of insurance business. As noted earlier, remuneration or reward would be related to services rendered in connection with soliciting or procuring business. In this case the payment or discount is made to companies but the payee companies have not solicited or procured insurance business for the assessee.... Considering the nature of the payment or deduction made by the assessee company to the insurance companies by way of commission, we are of the view that the same does not fall within the category of the payments by way of remuneration or reward for soliciting or procuring insurance business from the insurance companies. In our considered view, it is a deduction allowed by the assessee company to the insurance companies from the Original Gross Rate in order to compensate the insurance companies for the brokerage and other costs incurred in procuring the business by the ceding company for themselves. Taking the totality of facts and circumstances of this case into consideration, we hold that the commission paid or allowed as a deduction from gross rate to the insurance companies does not fall within the category of remuneration or reward for soliciting or procuring insurance business".

The Tribunal concluded as follows:

> "In final conclusion we hold that judging from the nature of business, the insurance companies have not provided any service of soliciting or procuring of insurance business for the assessee company. On the other hand, the assessee company has provided

reinsurance to the insurance companies. The insurance companies do not get business from the insured for the assessee. The said insurance companies have got business for themselves and not for the assessee company. The insurance companies get business either directly or through agents. If any commission is paid to the agents by them, that attracts provisions of section 194D as the same is paid for services rendered for soliciting or procuring insurance business. If the insurance companies reduce the premium directly from the premium payable by the insured on account of no claim bonus etc., such a deduction will not attract the provisions of section 194D".

The applicant submitted that the above decision was quoted in *Axa France Vie, New Delhi vs Acit Circle Int. Tax* 1(1) (1) ITA No.411/Del/2023 where it was held that; "a ceding commission does not fall within the category of the payments by way of remuneration or reward for soliciting or procuring insurance business from the insurance companies."

The applicant submitted that it is not an insurance broker who sources insurance business on behalf of the reinsurers. If the applicant was doing the aforesaid, then it would be said to be earning a commission from provision of services. However, the applicant's witness testified that the discount that is agreed upon between the insurer and the reinsurer is as a result of a treaty. The applicant does not provide any services to the reinsurance company for it to be paid a commission. Since the applicant makes no supplies to the reinsurers, then VAT cannot also be charged.

The applicant submitted that the deduction made by the applicant, sometimes referred to as a commission, is strictly not in the nature of a commission. It is for meeting the administrative expenditure. In other words, the insurance company and the re-insurance company jointly bear the expenses for running the insurance/reinsurance business, as was well explained by the Central Board of Excise and Customs (CBEC or the Board), Department of Revenue, Ministry of Finance, Government of India in their Manual. The applicant submitted that the respondent wrongly referred to the aforesaid deduction as "exempt income in the form of facultative fees received and commission earned from reinsurance". On that basis, the respondent wrongly concluded that it should have been declared in the VAT returns for the period 2014-2018 and input tax credit apportioned. On the contrary, there was no supply of services (exempt or not) from the applicant to the re-insurers. Therefore, the law on apportionment of input tax credit does not apply to the facts at hand. Accordingly, the assessment which was raised by the respondent under the pretext that there was non-apportionment is untenable.

The applicant further submitted that even if it were to be concluded that the applicant provides some sort of services to the reinsurers (which is not the case), such services would be consumed and used outside Uganda. In such circumstances, any commission purportedly earned by the applicant would be as a result of an exported service and it would therefore be zero rated. The applicant submitted that S. 24(1) of the VAT Act provides for the rate of tax payable on a taxable transaction. Under subsection 4, the rate of tax imposed on taxable supplies specified in the Third Schedule is zero. Paragraph 1(a) of the 3rd Schedule provides that a supply of goods or services where the goods or services are exported from Uganda as part of the supply is zero-rated. Under paragraph 2(b) of the 3rd Schedule, goods or services are treated as exported from Uganda if the services were supplied for use or consumption outside Uganda as evidenced by documentary proof acceptable to the Commissioner General.

The applicant submitted that its reinsurance treaties indicate that the recipients of the reinsurance sums are located in Kenya and India. Whereas the risks insured are in Uganda, the ceded premium is obtained and used by reinsurers outside Uganda. Since insurance is a cover for future events without any degree of certainty of occurrence, consumption of the reinsured sums is complete upon receipt by the reinsurers. The reinsurers who were outside Uganda obtained and utilized the reinsured premiums outside Uganda. Therefore, if we are to assume that the applicant made any supplies to the reinsurers, such supply would be of exported services which are zero rated, hence attracting no requirement for apportionment.

The applicant submitted that it did not make any supplies (exempt or not) to the re-insurers and did not earn any commission from the reinsurers for the tax period in question. The so-called commission is in fact a discount meant to reimburse the applicant for costs incurred during the process of finalizing the insurance policy with the insured. The applicant prayed that the tribunal finds the applicant not liable to pay VAT of Shs. 376,915,272, an order of refund of the tax paid and costs of this application.

In reply, the respondent submitted that S. 2 of the Insurance Act, defines insurance business" to mean "the business of undertaking liability as an insurer or a reinsurer under an insurance contract". Reinsurance business is defined to mean the business of undertaking liability as a reinsurer under reinsurance contracts. S. 2 of the Insurance Act, defines

> "Reinsurance contract to mean an insurance contract under which one insurer, called the reinsurer, indemnifies, or otherwise compensates, another insurer, called the cedant, against losses on one or more contracts of insurance entered into by the cedant".

The respondent submitted that in *British Dominions General Insurance Co Ltd v Duder* [1915] 2 KB 400 it was stated that; "a contract of reinsurance in relation to property is a contract under which a reinsurer insures property that is subject of the primary insurance". *Black's Law Dictionary* 10th Edition p. 920 defines insurance as "A contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage or liability arising from the occurrence of some specified contingency." It states that "An insured party usually pays a premium to the insured in exchange for the insured's risk". At p. 1477 it defines re-insurance as "insurance of all or part of one's insurer's risk by a second insurer, who accepts the risk in exchange for a percentage of the original premium."

The respondent submitted that S. 118D of the Income Tax Act states that;

> "(1) A resident person who makes a payment of premium for reinsurance/retakaful services to a non-resident person shall withhold tax on the gross amount of the payment at a rate prescribed in Part XI of the Third Schedule.

It submitted that Section does not apply to re-insurance services provided by Uganda Reinsurance Company Limited, African Reinsurance Corporation and PTA Reinsurance Company. The respondent submitted that under Part XI of the Third Schedule, the rate applicable is 10%. When S. 118D applies, the resident person ought to apply a withholding tax rate of 10% on the gross amount of the payment.

The respondent submitted that S. 10(a) of the Income Tax Act provides that; "a company is a resident company for a year of income if it is incorporated or formed under the laws of Uganda and has its management and control exercised in Uganda at any time during the year of income". The respondent submitted that it is not in dispute that the applicant is a resident person. The applicant agrees that it made payments to nonresident persons for the provision of re-insurance services. Its witness, Mr. Azim Tharani confirmed that Ghana Continental EIC, Kenya Continental and Swiss Reinsurance companies all of which are non-resident persons were contracted by the applicant for the provision of re-insurance services. The contracts between the applicant and re-insurance companies indicate that the applicant made payments to them. The respondent submitted that+ S.118D(1) does not apply to services provided by Uganda Reinsurance Company Limited; African Reinsurance Corporation; and PTA Reinsurance Company. The applicant fulfills the requirements of S. 188D of the Income Tax Act, it ought to have applied a WHT rate of 10% on the gross amount of the payments made to these reinsurance companies resulting into tax of Shs. 1,683,949,537.

The respondent submitted that Mr. Azim Tharani contended that WHT is deducted on the net amount after deducting the discount from the gross re-insurance premium. The respondent contended that if it was the intention of Parliament that deductions should be permitted under S. 118D then the Income Tax Act it would have made provision for them as has been provided for elsewhere in the Act.

The respondent submitted that pursuant to an audit, it informed the applicant on 17th February 2019, that the latter was computing WHT wrongly on net reinsurance premiums paid out to the reinsurance companies after adjusting for claims recoveries and commissions earned instead of computing it on the gross reinsurance premiums. In addition, for some periods tax was withheld at a lower rate of 5% instead of the stipulated 15% and 10%. The respondent submitted that when the applicant objected, the respondent made an objection decision stating that in accordance with S. 118D of the Income Tax Act, WHT on payments of re-insurance premiums is on the gross amounts and not net amounts.

The respondent submitted that the applicant's argument that it receives a discount and not a commission is erroneous. The reinsurance treaty between the applicant and Bharat Reinsurance Brokers Paragraph 4 provides.

> "9. Commission: Flat Commission as follows:
>
> **Quota Share: 32.5% for all Classes**
>
> **1st Surplus: 33%**
>
> **2nd Surplus:27.5%**

10.Over-ridding Commission: Nil

11. Profit Commission:

25.00% on combined results.

Unearned Premium Provision: 35.00%

Outstanding Loss Provision: 100.00%

Management Expenses: 75.0%

Basis of Calculation: Losses/Deficits carried forward to extinction.

Profit Commission shall be calculated on the combined results of all the classes of business covered under the treaty.

Profit Commission statements shall be rendered by the Reinsured with the statements of accounts of the fourth quarter every year."

The Reinsurance Treaty between the applicant and Bharat Reinsurance Brokers Paragraph 4 provides as follows:

"9. Commission:

Quota Share: 36%

First Surplus: 35%

Second Surplus: 33%

10. Profit Commission:

22.50% Combined for 1st & 2nd Surplus ME 7.5. LCFTE "

The reinsurance treaty between the applicant and Bharat Reinsurance Brokers provides

"9. Commission:

30.00% for Quota Share Treaty

29.00% for the Surplus Treaty

10. Profit Commission:

22.00% on combined results

Reinsurer's Management Expenses: 7.5%

Losses carried forward to Extinction

Profit Commission statements shall be rendered by the Reinsured with the statements of accounts of the fourth quarter of every year."

The Reinsurance Treaty between the applicant and Bharat Reinsurance Brokers, provides :

"9. Commission:

a) Flat Commission of 29.00%

b) Sliding Scale Commission: Not applicable

10. Profit Commission:

22.00%

Unearned Premium Provision: Nil

Outstanding Loss Provision: 100.00%

Management Expenses: 7.50%

Basis of Calculation: Losses/Deficit carried forward to Extinction

Profit Commission statements shall be rendered by the Reinsured with the statements of accounts of the fourth quarter of every year."

The reinsurance treaty between the applicant and Bharat Reinsurance Brokers for the class of business indicated in paragraph 4 provides.

"9. Commission: Commission: 22.5%

10.Profit Commission:

10%, Management Expense 7.50%,

carried forward to Extinction"

The respondent submitted that the audited annual report on financial statements ending 31 December 2017 state that the applicant receives commission from the reinsurance companies and not a discount. The commission earned is recognized as Shs. 4,318,728,000 for 2017 and Shs. 5,528,176,000 for 2016. There is no discount indicated in the audited financial statements. If there was a discount, it would have been in the financials as discount received. The report indicates reinsurance gross premium ceded. This is the figure that the applicant ought to withhold 10% on, in compliance with S. 118D of the Income Tax Act. The respondent contended that contrary to S. 118D of the Income Tax Act, the applicant argued that it ought to first deduct "discount" which is commission as it is referred to in the reinsurance treaties and audited financials and claims paid from reinsurance gross premium. This leads to net premium ceded yet S. 118D of the Income Tax Act refers to gross amount of payment (gross premium ceded). The applicant withheld on the balance paid to the reinsurers companies after removing commissions and claims paid instead of the gross premium ceded.

The respondent cited *Platinum Credit v URA* Application 28 of 2018, where the Tribunal stated:

> "Taxes are determined by what is stated in the audited financial accounts as it is signed by directors as a true and fair position of the company's state of affairs. The directors acknowledge that they are free of material misstatement, whether due to fraud or error. **In the circumstances, in absence of any other amended financial statement and returns, the respondent ought to go by what is stated in the financial statements and returns".**

The respondent submitted that the applicant's audited financials indicate that it received commissions and not discounts and the former ought to rely on that. The respondent submitted that in *M-Kopa Limited v URA* Application 23 of 2019 the Tribunal stated

> "In the instant case the financial statements were prepared by the applicant. It is to be expected that the applicant took due care and caution in preparing the statements and that the applicant looked after its own interests. In determining how to interpret the evidence set out in the financial statements we will rely on the contra proferentem rule and interpret the Statement of Cash flows against the applicant".

The respondent submitted that the applicant was a party to the reinsurance treaties and prepared the financial statements and it was indicated that it was receiving commission and not discount. The respondent submitted that in *Britam Insurance Company Uganda Ltd v URA*, Application 69 of 2018, Mr. Francis Kamulegeya, a partner and director at PricewaterhouseCoopers testified that, among others, that for accounting purposes, fronting and facultative commission is treated as a receivable -commission income. In the same decision of *Britam Insurance Company Limited v URA*, (Supra) the Tribunal held that a taxpayer dealing in similar business like the applicant in this matter charges commission. The Tribunal held as follows:

> "From the evidence adduced it is not difficult to discern that the applicant is an insurance company. It is not a reinsurance company. However, the applicant receives business which it remits to reinsurance companies. It charges a fee or commission. The said words are used interchangeably..."

The respondent submitted that in *Ostheimer v United States* 264 F. 2d 789 - Court of Appeals, 3rd Circuit 1959, the court held inter alia that in insurance business, commissions were not really discounts. "That calling a discount a commission does not change its character as a discount. See *Okello Okello v the Commissioner General URA*, HCCS 229 of 2010." The respondent prayed that the applicant is liable to pay WHT assessed of Shs. 1,683,949,537.

On the Issue whether the applicant is liable to pay the VAT assessed, the respondent submitted that S. 28(7) of the VAT Act states

> "(7) Subject to subsections (8) and (9), the input tax that may be credited by a taxable person for a tax period is-
>
> (a) where all of the taxable person's supplies for that period are taxable supplies, the whole of the input tax specified in subsection (1) or (2); or

(b) where only part of the taxable person's supplies for that period are taxable supplies, the amount calculated according to the formula specified in S. 1(f) of the Fourth Schedule."

The respondent cited S. 1(f) of the 4th Schedule which provides as follows:

"(f) For the purposes of Section 28(7) (b), the following formula shall apply-

Ax B/C

where,

A is the total amount of input tax for the period; and

B is the total amount of taxable supplies made by the taxable person during the period; and

C is the total amount of all supplies made by the taxable person during the period other than an exempt supply under paragraph 1(k) of the Second Schedule".

The respondent submitted that in *Britam Insurance v URA* (supra) the Tribunal held that fronting fees and facultative commission earned in respect of reinsurance services is VAT exempt. The respondent submitted that the applicant deals in both taxable and exempt sales. The respondent noted that input tax was not apportioned for the period under review. Exempt sales such as rental, facultative premiums and reinsurance commissions had been omitted from the output tax schedules. The applicant ought to have apportioned its income since it was dealing in both taxable and exempt sales under S. 27(8) of the VAT Act, thus the additional VAT assessment of Shs. 376,915,272.

The respondent submitted that the applicant faults the respondent for non-inclusion of rental income in the management letter and then its inclusion in the objection decision. The respondent referred to the minutes of the meeting between URA and applicant's representatives held on 24th January 2020, where it is provided that; "rent from residential properties is to be separated from rent on commercial properties." This shows that the applicant was aware of the rental income issue and cannot fault the respondent for not including it in the management letter.

The respondent submitted that S. 68(c) of the Tax Procedure Code Act provides that;

"The validity of a tax decision, a notice of a tax decision, or any other document purporting to be made or executed under a tax law is not-affected by reason of any mistake, defect, omission or commission in it:"

Therefore, the non-inclusion of rental income in the management letter and its inclusion in the objection decision does not affect the validity of the objection decision.

The respondent submitted that it was justified to treat the commission as exempt income and require apportionment of input tax in accordance with S. 27(8) of the VAT Act. Therefore, the applicant is liable to pay VAT assessed of Shs. 376,915,272. The respondent prayed that this application is dismissed, WHT of Shs. 1,683,949,537 and VAT of Shs. 376,915,272 is upheld and costs of this application be awarded to it.

In rejoinder, the applicant reiterated that ceding commission is an expense that is customary for insurance business where the re-insurer reimburses the cedants for administrative, underwriting and business acquisition costs incurred. It submitted that the use of the word "commission" in the treaties and the financial statements is a matter of industrial practice. It cited *France Vie, New Delhi v Acit Inc. Tax* 1(1)(1) ITA 411/De/2023 where it was stated that ceding commission cannot be considered as paid for soliciting or procuring insurance business. It also cited *Central Board of Excise and Customs (CBEC or the Board), Department of Revenue, Ministry of Finance, Government of India* where it was stated that

> "In other words, the insurance company and the re-insurance company jointly bear the expenses for running the insurance/reinsurance business. This share expense is commonly known as 'commission'. Though strictly it is not in the nature of a commission."

The applicant distinguished its case from *Britam Insurance Company Uganda Limited v URA.* It contended that the evidence of Mr. Francis Kamulegeya does not amount to an authority. The said case did not determine the issue of WHT on fronting fees. The tribunal noted that the words 'fee' and 'commission' are used interchangeably. It said that applicant's choice of the word 'commission' gave the impression that the insurance companies act as brokers. However, the insurance companies contend that said commission is used to cater for administrative costs and expenses. The applicant argued that the Tribunal should look at the substance of the ceding commission which is in fact a discount.

In respect of VAT, the respondent reiterated its submission that if there was an supply made, It was an export of service which attract VAT at a zero rate. Under the reinsurance treaties the recipients of the reinsurance sums are located in Kenya and India. Whereas the risks insured are in Uganda, the ceded premium is obtained and used by reinsurers outside Uganda.

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

The applicant is a company incorporated in Uganda whose main business activity is the provision of insurance services. It cedes parts of its business to re-insurance companies. It pays WHT to the respondent based on the premium ceded minus what the respondent calls 'commission' but the applicant calls a 'discount'. The applicant contends that the alleged commission or discount is allowed to it by the reinsurance companies to cater for administrative expenses. The applicant submitted that it cannot withhold on amounts which it has not paid, and will not pay, to the reinsurer as this would be in contravention of S. 118D of the Income Tax Act which clearly specifies that withholding shall apply to the gross amount paid to the non- resident reinsurers. Applying WHT on the entire ceded premium and not the actual payment made would be contrary to the law. According to the respondent, a discount or commission granted to the applicant forms part of the gross amount paid to the reinsurers and therefore the applicant ought to withhold inclusive of it

The applicant is a company that provides insurance business. *Black's Law Dictionary* 10th Edition p. 920 defines insurance as. "A contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage or liability arising from the occurrence of some specified contingency." It further states that; "An insured party pays a premium to the insurer in exchange for the insurer's assumption of the insured's risk." In order to mitigate risk and meet insurance claims insurance companies including the applicant reinsure the risks. They cede part of the business risks to reinsurance companies. *Black's Law Dictionary* (supra) p. 1477 defines re-insurance as; "insurance of all or part of one's insurer's risk by a second insurer, who accepts the risk in exchange for a percentage of the original premium." S. 2 of the Insurance Act defines "reinsurance business to mean;

> "a business of undertaking liability to pay money to insurers or reinsurers in respect of contractual liabilities in respect of insurance business incurred by insurers or reinsurers and includes retrocession."

The term 'ceded' is defined in *Black's Law Dictionary* (supra) p. 268 to mean; "To surrender or relinquish". This means that the applicant surrenders a portion of its insurance risks or business to the re-insurer for an amount known as premium. The dispute arises from the premium the applicant pays to reinsurance companies. Is it required to pay WHT on the said premiums minus the amount the reinsurance companies pay to it?

In order to understand the the dispute, one needs to look at S. 118D of the Income Tax Act which imposes WHT on payment of reinsurance premiums. It states that.

> "a resident person who makes a payment of premium for reinsurance retakaful services to a non-resident person shall withhold tax on the gross amount of the payment at a rate prescribed in Part XI of the Third Schedule."

Part XI of the 3rd Schedule states that the applicable rate is 10%. S. 124 of the Income Tax Act states that;

> "(1) A withholding agent who fails to withhold tax in accordance with this Act is personally liable to pay to the commissioner the amount of tax which has not been withheld, but the withholding agent is entitled to recover this amount from the payee.
>
> (2) The provisions of this Act relating to the collection and recovery of tax apply to the liability imposed by subsection (1) as if it were a tax".

The tribunal has to determine on what amount the applicant was liable to withhold tax on.

The applicant contends that the payment for premium for reinsurance services should not include what it calls is a 'discount'. The respondent calls it a 'commission'. There are two disputes from the arguments of the parties. The first is whether the payment of premium should not include what is called a 'discount' by the applicant, or a 'commission' by the respondent. So, is the premium paid to the reinsurance company a 'discount' or 'commission.? The second dispute is irrespective of whether there is a commission or discount, is S. 118D is targeting the gross amount the applicant paid? All the Tribunal is required to look at would be the gross amount.

It is not in dispute that the applicant was paying premium to reinsurance companies. It is not also in dispute that the applicant deducted what it called a discount but the respondent deems it a commission. The dispute is whether it is a discount or a commission. The applicant submitted that when it reinsures a risk, it is given a discount on the premiums. The discount is to cater for administrative costs of the insurance. *Black's Law Dictionary* (supra) p. 564 defines a discount as a "reduction from the full amount or value of something, esp. a price." discount is defined in *Cambridge Advanced Learners Dictionary* 4th Edition p. 432 as; "a reduction in the usual price." Of course, it is not disputed that the applicant when it cedes part of its business it is allowed a portion of the premium to cater for its administrative costs. The only problem that arises is that whereas a discount is a reduction from the full amount or value of something, a price, it is not usually given to cater for administrative costs of a buyer. Discounts are usually given to cater for customer loyalty, increase sales, acquire new customers, increase the perceived value of a product, improve reputation of a product, or free up storage space etc. This does not seem to be in the case of the applicant. *Cambridge's Advanced Dictionary* mentioned usual price. If customers are given perpetual discounts, year in year out, then it becomes something else. The Igbo have a saying that "when a handshake goes beyond the elbow, we know it has turned to another thing." If a customer is always given back a portion of its price to meet its expense, calling it a discount may not be appropriate. A discount is given at the discretion of a seller or recipient but what the applicant was is given is an entitlement. If the reinsurance company does not give the applicant the purported 'discount' it can look for other companies that will pay it to enable it meet its costs.

Though the applicant used the word 'discount', at times it was used interchangeably with commission. The respondent noted that the agreements between the applicant and the reinsurance companies used the word 'commission.' The audited financial statements used the word 'commission.' The applicant submitted that the 'discount' is referred to as a 'commission' due to industry practice. The evidence of the applicant seemed contradictory. The applicant's first witness, Mr. Azim Tharani, its managing director testified that the applicant is given discount as a cost re-imbursement to the insurer for administrative work that the primary insurer undertakes in ceded polices. It's other witness, Mr. Alex Munyi stated that the reason this is called a commission and not a discount is because world over it is known as such based on international accounting best practices in the insurance industry. Maybe the insurance companies are convinced that what was paid to them was more of a commission than a discount.

The respondent called the payment a 'commission'. *Black's Law Dictionary* (supra) p. 327 defines a commission as "A fee paid to an agent or employee for a particular transaction, usu, as a percentage of the money received from the transaction." It is a payment to an employee or agent. Insurance companies are not employees of reinsurance companies. Are they agents? *Black's Law Dictionary* defines an agent as "2. Someone who is authorized to act for or in place of another; a representative." Our understanding of insurance business, is that an insurance company is not an agent of a reinsurance company. So, in the strict English sense, when the reinsurance company pays insurances companies for ceding a portion of its insurance, it is not paying a commission. The Tribunal would agree with *Central Board of Excise and Customs (CBEC or the Board), Department of Revenue, Ministry of Finance, Government of India* where it was stated that

> "In other words, the insurance company and the re-insurance company jointly bear the expenses for running the insurance/reinsurance business. This shared expense is commonly known as 'commission'. Though strictly it is not in the nature of a commission."

In *General Insurance of Corporation of India v Assistant Commissioner of Income Tax* (supra), the Income Tax Appellate Tribunal observed

> "Considering the nature of the payment or deduction made by the assessee company to the insurance companies by way of commission, we are of the view that the same does not fall within the category of the payments by way of remuneration or reward for soliciting or procuring insurance business from the insurance companies."

In *Britam Insurance Company Uganda Limited v URA* the tribunal noted that the applicant's choice of the word 'commission' gave the impression that the insurance companies were brokers whereas they were not. The amount was to cater for administrative expenses. A commission is usually given to brokers or agents.

The more appropriate word would be fee. *Black's Law Dictionary* (supra) p. 732 defines a fee as "A charge or payment for labour or services, especially professional services." It mentions a referral fee which it defines as "Compensation paid by one professional service provider for directing a client to the payer's service." What the reinsurance company is paying the insurance company is more of compensation for ceding part of its insurance risk to it. So, calling it a fee would be more appropriate. Shakespeare once said "A rose by any other name would smell as sweet." Does the name the parties give the payment affect its nature?

The second question the Tribunal has to ask itself is. Does it make any difference if the applicant was given a discount, a commission, or a fee? S. 118D of the Income Tax Act requires a resident person to withhold tax on the gross amount of the payment at the rate prescribed in the 3rd Schedule. It does not mention discount, commission or fee. The tax should be withheld on the gross amount. Black's Law Dictionary (supra) p..818 defines 'gross' as "2. Undiminished by deduction; entire." In *Comfort Homes Uganda Limited v URA* Application 66 of 2020, this tribunal cited *AON (U) Limited v URA* MC 66 of 2000, where Justice Kiryabwire stated that.

> "It is trite law that where the language of the statute is plain an unambiguous, the words of the statute should be given unambiguous meaning."

In *Cape Brandy Syndicate v Inland Revenue Commissioners* [1920] 1 KB 64 which was cited in *Uganda Revenue Authority v Kajura* SCCA 9 of 2015 and other authorities it was stated that:

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

As soon as one removes a discount, commission, fee or whatever one may want to call it from the gross amount, it ceases being gross and becomes net. So, calling the amount a discount, commission or fee is diversionary. In *Placer Dome Inc v Canada* [1992] 2 CTC 98 at 109, the Canadian Supreme Court held that.

> "It is the substance of a transaction that must be looked at in order to determine the true legal rights and obligations of the parties. Similarities, it is the commercial and practical nature of the transaction, the true legal rights and obligations flowing from it that must be looked at to determine its tax implications".

The Section requires that gross amount should not be diminished. There is an obligation not to diminish the gross amount.

In order to ascertain whether the applicant diminished on the gross amount one needs to look at its returns and financial statements. In *Uniworks Transporters and Logistics Ltd v Uganda Revenue Authority* Application 62 of 2018, the tribunal held that;

"The purpose of a financial audit is to provide assurance that financial statements are accurately presently and in conformity with generally accepted accounting principles (GAAP) allowing business owners to make confident business decisions. They are supposed to be relied on by third parties who want to make decisions in respect of the company."

In *M-Kopa Limited v URA* Application 23 of 2019 the Tribunal stated that.

"In the instant case the financial statements were prepared by the applicant. It is to be expected that the applicant took due care and caution in preparing the statements and that the applicant looked after its own interests."

In *Platinum Creditv URA* Application 28 of 2018, the Tribunal stated

"Taxes are determined by what is stated in the audited financial accounts as it is signed by directors as a true and fair position of the company's state of affairs. The directors acknowledge that they are free of material misstatement, whether due to fraud or error. In the circumstances, in absence of any other amended financial statement and returns, the respondent ought to go by what is stated in the financial statements and returns".

The audited financial statements of 2017 show the gross written premiums, the reinsurance gross premium ceded, the net written premiums and income earned. The financial statements show that the applicant was deducting commissions. If it was deducting commissions, why is it calling them discounts now? The doctrine of estoppel comes into play. S. 114 of the Evidence Act states where one person has by his declaration or act intentionally caused or permitted another person to believe a thing to be true and to act on that belief, that person shall not be permitted to deny the truth of that thing. The applicant made deductions in the financial statements which it called commissions. If a commission is deducted from the gross premium, it ceases being gross amount. Therefore, it should be added back. WHT should be applied on the gross amount. Since the applicant refers to its purported discounts as commissions in the financial statements, the Tribunal will go by what is used in the statements as that is what the directors refer as a true and fair position of the company's affairs. The applicant ought to have withheld tax on the gross amount. it should not deduct claims paid. In this case, the applicant is liable to pay WHT of Shs.. 1,683,949,537.

The second dispute between the parties revolved on whether the applicant is liable to pay the VAT assessed? The applicant submitted that the respondent, wrongly referred to the aforesaid deduction as; "exempt income in the form of facultative fees received and commission earned from reinsurance". The respondent wrongly concluded that it should have been declared in the VAT returns for the period 2014 to 2018 and input tax credit apportioned. The applicant contended that there was no supply of services (exempt or not) from the applicant to the re-insurers. Therefore, the law on apportionment of input tax credit does not apply to the facts at hand. The respondent on the other hand argued that the applicant provided reinsurance services which are exempt and conclude that the applicant ought to have apportioned its supplies under S. 28(7) of the VAT Act which led to an additional VAT assessment of. 376,915,272.

S. 28(7) of the VAT Act provides for apportionment of VAT. It reads.

> "(7) Subject to subsections (8) and (9), the input tax that may be credited by a taxable person for a tax period is-
>
> (a) where all of the taxable person's supplies for that period are taxable supplies, the whole of the input tax specified in subsection (1) or (2); or
>
> (b) where only part of the taxable person's supplies for that period are taxable supplies, the amount calculated according to the formula specified in S. 1(f) of the Fourth Schedule."

The respondent cited S. 1(f) of the 4th Schedule which provides as follows:

> "(f) For the purposes of Section 28(7) (b), the following formula shall apply-
>
> Ax B/C
>
> where,
>
> A is the total amount of input tax for the period; and
>
> B is the total amount of taxable supplies made by the taxable person during the period; and
>
> C is the total amount of all supplies made by the taxable person during the period other than an exempt supply under paragraph 1(k) of the Second Schedule".

Item C provides for inclusion of exempt services.

S. 19(1) of the VAT Act which provides that "A supply of goods or services is an exempt supply if it is specified in the Second Schedule." Paragraph 2 (vi) of the 2nd Schedule provides that a supply of reinsurance service is specified as an exempt supply for the purposes of S. 19. It is without doubt that the applicant ceded risks to reinsurance companies which provided reinsurance services. In *Britam Insurance v URA* Application 69 of 2018, the Tribunal held that fronting fees and facultative commission earned in respect of reinsurance services is VAT exempt Therefore, the deductions were made in respect of exempt supplies.

The applicant contended that reinsurance services were provided by companies that were non-resident outside Uganda. It contended further that this were exported services. S. 2(K) of the VAT Act defines "import" to mean "to bring, or cause to be brought into Uganda from a foreign country or place." It is not in dispute the by seeking reinsurance services from companies abroad, the applicant was importing the said services. S. 24(4) of the VAT Act provides for zero rated supplies. It reads the rate of tax imposed on taxable supplies specified in the Third Schedule is zero. The 3rd Schedule Item 1(a) states that a supply of goods or services where the goods or services are exported from Uganda as party of the supply. The Schedule does not mention import. There is a difference between import and export. The applicant imported reinsurance services to Uganda and did not export them. The items insured and the insurers are in Uganda. the applicant was providing insurance and receiving reinsurance services. The reinsurance companies by providing services to the applicant in Uganda, the former were exporting their services while the latter was importing therm. Therefore, the Third Schedule is not applicable to the instant case.

However, the VAT regime applicable to the reinsurance services for premium paid to the reinsurance companies is where the services are provided. That is abroad. It is not clear whether VAT is exempt, zero or standard rated abroad on the premium paid to the insurance companies abroad. The fee or amount that is paid in Uganda by the applicant to reinsurance companies abroad, the VAT regime appliable is the VAT law in Uganda. For the 'fee', 'commission' or 'discount', whatever it is called, paid to the applicant it is exempt because under the Second Schedule item 1(d)(iv) reinsurance services are exempt supplies. The said fees were paid in respect of re-insurance services. If the Tribunal were to argue that the applicant was not providing re-insurance services but was a recipient, it would mean it would have charged VAT at the standard rate which would have increased its VAT liability. However, this was not the respondent's contention and we cannot entertain what is not before us. We still maintain that the fee was paid in respect of reinsurance services whether the applicant was receiving the said services and not supplying them. Where exempt supplies are made with standard or zero-rated supplies there is need to apportion under S. 28(7) of the VAT Act. When the respondent apportioned it come with a VAT liability of Shs. 376,815,272. Therefore, the Tribunal states that the respondent was justified to issue an additional VAT assessment of Shs. 376,815,272.

Taking all the above into consideration, the Tribunal dismisses this application with costs to the respondent. The Tribunal makes the following orders.

1) The applicant is liable to pay WHT of Shs. Shs. 1,683,949,537
2) The applicant is liable to pay VAT of Shs. 376,815,272.
3) The applicant pays costs of the application.

Dated at Kampala this 21st day of December 2023.

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