THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL NO 09 OF 2006

(ARISING OUT OF TAT NO. 22 OF 2005)

UGANDA REVENUE AUTHORITY}…… APPELLANT

VERSUS

TEMBO STEELS LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

This is an appeal from the decision of the Tax Appeals Tribunal delivered on 18 May 2007. This matter arose from an assessment of the Respondent for VAT. In a letter dated 14 October to 2005, Uganda Revenue Authority notified the respondent that it had assessed VAT arrears of Uganda shillings 491,786,679/= and the Respondent had to make arrangements to have it paid by the 13th of October, 2005. The Respondent was also notified that the tax arrears accrued interest as long as it remained unpaid. The Respondent was aggrieved by the assessment and wrote a letter to the Commissioner Domestic Taxes Department Uganda Revenue Authority, dated 28 October, 2005. In that letter the Respondent wrote inter alia "we also would like to bring to your attention that the company has from inception disputed the method used to arrive at the tax. We strongly disputed the tax and shall continue to prove that it is not legally tenable." On the 7th of November, 2005, the Respondent filed an application for review under sections 16 of the Tax Appeals Tribunals Act and rule 10 of the regulations there under. The application indicates the date of the taxation decision as the 14 of October 2005. The facts in support of the application were

that “an audit team from the Uganda Revenue Authority conducted an interview with three staff of Tembo Steels Uganda Ltd. During which, Uganda Revenue Authority claimed that it had discovered under declarations of sales of Steel Products to the tune of 10,378 tons. Uganda Revenue Authority stated that the basis of the under declaration was determined from electricity consumption of the applicant. The applicant’s protested the method used to remove or dispose values in spite of the various audit findings by other Uganda Revenue Authority teams that had been availed all the records of the Applicant. The respondent maintained her position that tax was assessed based on electricity consumption. The issues on which decision were sought:

1. Whether the methods used to arrive at taxable supplies is legally acceptable.

2. Whether the respondent had sufficient grounds to estimate the sales of the applicant when all the records of the applicant were availed.

3. Remedies available to the applicant.

The tax appeals tribunal found in favour of the Respondent and held that the assessment was wrong in law and the respondent was not liable to pay the tax assessed. The appellants subsequently filed an appeal to the High Court under section the 27 of the tax appeals tribunal act cap 345 Laws of Uganda. The grounds of the appeal in the notice of appeal are as follows:

“1. That the tribunal erred in law when it made a ruling that the taxpayer had no tax liability.

2. That the tribunal erred in law when it failed to evaluate all the evidence thereby reaching a wrong conclusion that the assessment raised on the taxpayer had no merits.

3. That the tribunal erred in law when it held that the input/output method of assessment had no legal basis.”

The appellant prays that the ruling and order of the Tribunal be set aside with costs. They also pray that the assessment of the Respondent by the Appellant be upheld with interest.

The parties filed written submissions and submitted orally before me on the highlights of the written submissions.

In the written submissions of the Appellants, the grounds of appeal are as follows:

1. Whether the tribunal members erred in law when they held that the input/output ratio is an illegal method under the VAT Act.

2. Whether the tribunal members erred in law when they held that the assessment had no merit.

3. Whether the tribunal members failed to evaluate the evidence before them thereby reaching a wrong conclusion.

The Respondent objected to the grounds of appeal contending that they were different from the grounds contained in the notice of appeal. He referred to the notice of appeal cited above and the grounds argued to make this point. He submitted that an appeal was commenced by Notice of Appeal under section 27 of the Tax Appeals Tribunal Act. He referred to the case of **Uganda Revenue Authority versus Toro Mityana Tea Company Ltd High Court Civil Appeal 4 of 2006,** where Honourable Mr. Justice Lameck Mukasa held that an appeal to the High Court is commenced by the lodgement of a notice of appeal with the Registrar of the High Court under section 27 of the Tax Appeals Tribunal Act. Counsel for the Respondent further referred to the Judgment of Honourable Mr. Justice G. Kiryabwire in **Uganda Revenue Authority versus ShopRite Checkers (U) Ltd High Court Civil Appeal No. 15 of 2008**, where he held at page 5 that, "an appeal from TAT means an appeal within the meaning of section 27 (2) of the Tax Appeals Tribunal Act.

Counsel for the Respondent prayed that the Court finds that it is a miscarriage of justice to amend the grounds contained in the notice of appeal without leave and

disregard the whole record in as far as making submissions on such amended grounds will result in arguing a different case altogether . He pointed out that arguing “whether the input/output method is illegal”, is quite different from arguing that the method has no legal basis. The ground in the appellants written submissions "whether the tribunal members erred in law when they held that the assessment had no merit" is not at all reflected in the notice of appeal.

In Rejoinder Counsel for the Appellant agreed that he was bound to argue the grounds of appeal contained in the Notice of Appeal lodged under section 27 of the TAT Act. He impliedly agreed that the wording of the grounds he argued were different but in substance grounds 1 and 2 of the notice of appeal were substantially similar to issues 2 and 3 of the Appellants written submissions. And that ground 3 arose from ground of the notice of appeal and no prejudice had been occasioned by the re-arrangement of the grounds which was purely for logical flow of the arguments.

The answer to the question raised by the Respondent addresses whether the Appellant has argued the grounds of appeal notified in the notice of appeal. This is a fundamental question that has to be resolved at the beginning of the court’s judgment as it would affect whether to proceed with any or all the grounds of appeal at all. I will also have to examine whether the grounds in the written submissions flow from the notice of Appeal or are alien to it and whether they disclose points of law giving jurisdiction to the High Court to entertain the grounds of appeal on “questions of law” as envisaged by section 27 of the TAT Act. I agree with the above cited authorities of **Uganda Revenue Authority versus Toro Mityana Tea Company Ltd High Court Civil Appeal 4 of 2006 and Uganda Revenue Authority versus ShopRite Checkers (U) Ltd High Court Civil Appeal No. 15 of 2008,** that an appeal to the High Court from the Tax Appeals Tribunal Act cap 345 is commenced under section 27 of the said Act. Section 27 provides as follows:

27. Appeals to the High Court from decisions of a tribunal.

(1) A party to a proceeding before a tribunal may, within thirty days after being notified of the decision or within such further time as the High Court may allow, lodge a notice of appeal with the registrar of the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party to the proceeding before the tribunal.
(2) An appeal to the High Court may be made on questions of law only, and the notice of appeal shall state the question or questions of law that will be raised on the appeal.
(3) The High Court shall hear and determine the appeal and shall make such order as it thinks appropriate by reason of its decision, including an order affirming or setting aside the decision of the tribunal or an order remitting the case to the tribunal for reconsideration.

An appeal under section 27 (1) is lodged only on questions of law and by a party to a "proceeding" before a tribunal under the Act. A "proceeding" is defined by section 1 (h) of the TAT Act as: (i) "an application to a tribunal for review of a taxation decision; (ii) an application to a tribunal for an extension of time under section 16(2); or (iii) an application to a tribunal for reinstatement of an application under section 25(4);" In the case before me there was an application from a *taxation decision*. The distinction between a "*taxation decision*" *and an "objection decision"* is important because it has different legal ramifications as to the remedies sought and consequently the questions of law that may be lodged for appeal purposes under section 27 of the TATA. A "**taxation decision**" is further defined by section 1 (k) of the TAT Act as *any assessment, determination, decision or notice*; On the other hand an ***objection decision*** means under section 1 (g): "*a taxation decision made in respect of a taxation objection*."

Section 1 (2) further makes this distinction clearer. It provides that "(2) for the purposes of this Act, where a taxing Act provides that a person dissatisfied with a taxation decision may object against the decision, such an objection is referred to as a ***taxation objection***. It follows that an ***objection decision*** is the consequence of a ***Taxation Objection*** under the taxing Act. This matter having arisen under the Value Added Tax Act further makes the nature of the proceeding before the Tribunal clearer and beyond doubt. Section 33A (ii) of the VAT Act defines an "*Objection decision*" as a decision made by the Commissioner under section 33B (4) or (6). Section 33B (1) of the VAT Act provides that an aggrieved taxpayer may lodge an objection to the Commissioner from an assessment within forty five days

of receipt of the notice of assessment. The Value Added Tax Act (VATA) further provides under section 33C (1) that a person aggrieved by an objection decision of the Commissioner may within 30 days lodge an application for review of the objection decision with the Tax Appeals Tribunal. The limitation period for an application for a review of a taxation decision is six months (See section 16 (7) TAT Act "(7) an application for review of a taxation decision shall be made within six months after the date of the taxation decision.") while that from an objection decision is 30 days and is an equivalent of an appeal. The different limitation periods under section 16 (1) and 16 (7) appear contradictory unless this perspective is adopted.

We need to take note that in this case, the matter before the tribunal was an application for review of a "taxation decision" and not an "objection decision" which application was brought under section 16 of the TATA. The taxation decision was namely an assessment of VAT payable by the Respondent made by the Commissioner. The wording of section 18 of the TAT Act makes this distinction crucial. Section 18 sets out the burden of proof of the applicant and gives a different legal consequence to cases where there is an application for review of an "objection decision" from cases where there is an application for review of a "taxation decision". We will later on examine how this distinction affects the kind of point of law that may come to the high court upon an appeal by an aggrieved person under section 27 of the Tax Appeals Tribunal Act (TATA).

Section 18 of the TATA provides that:

> "In a proceeding before a tribunal for review of a taxation decision, the applicant has the burden of proving that—
> (a) Where the taxation decision is an objection decision in relation to an assessment, the assessment is excessive; or
> (b) In any other case, the taxation decision should not have been made or should have been made differently."

The reading of section 18 (a) shows that where there is an objection to assessment lodged with the Commissioner, and there is an objection decision of the Commissioner, the applicant before the tribunal has to prove that the assessment was excessive. On the other hand, if it is an application for review of a taxation decision such as an assessment, the applicant has the burden of proving that the assessment should not have been made or that it should have been

made differently. The matter before me involves application for review of a ***taxation decision*** wherein the Respondents burden was to prove that the assessment should not have been made or that it should have been made differently. An appeal to the High Court should be only on questions of law that would flow from the decision of the tribunal upon trial of the issue of whether the assessment should not have been made or should have been made differently. The practical consequences of these two kinds of application are reflected in case law which will be examined when considering ground 2 of the notice of appeal.

As noted above the written submission s of the Appellant and the notice of appeal are as follows:

In the written submissions of the appellant, the first ground is "*whether the tribunal members erred in law when they held that the input/output ratio is an illegal method under the VAT act."* In the notice of appeal the first ground of appeal is *"That the tribunal erred in law when it made a ruling that the taxpayer had no tax liability"*.

The ground in the written submission does not logically flow from the first ground of the notice of appeal. Instead, the first ground is closer to ground 3 of the notice of appeal which is to the effect that: **"That the tribunal erred in law when it held that the input/output method of assessment had no legal basis."** I agree with the counsel for the Respondent that the formulation of the ground as being without legal basis is different from its being formulated as being illegal. Being *without legal basis* may mean that the output/input method could be used lawfully only where certain factors or variables were in place or are lawfully founded whereas **illegality** by implication imports the meaning that the input/output method is outlawed, or a nullity, or not founded or authorised by law or is contrary to law.

In dealing with the competence of the grounds of appeal argued, the crucial question is whether in substance the Appellant has argued the grounds of appeal irrespective of whether the issue therein takes the form of different wordings or formulation of grounds in the written submissions. As noted above the wording of the grounds in the appellants written submissions vary from the grounds in the

notice of appeal. In substance if any ground in the notice of appeal has substantially been addressed by the parties in their written submissions, then a conclusion can be validly made that it is more of a question of form and not substance and therefore that failure by the Appellant in his written submissions to follow the wording in the notice of appeal did not prejudice the Respondent nor occasion a miscarriage of justice. In other words a question of the form or heading of the submission is a curable defect where no prejudice has been occasioned to the Respondent and provided the Respondent has had full opportunity to respond or reply to the substance of the submissions. Where the submissions argue a different case, then it is not a question of form but of substance and the ground argued would be incompetent because it addresses a different case not notified in the notice of appeal. In reaching the above position it has become apparent that a conclusion on this issue cannot be made without assessing the submissions for substance notwithstanding the form. The second point that evolves from the above analysis is that the notice of appeal and the grounds therein should contain only questions of law. Is it competent for instance for the High Court to exhaustively review the evidence on record as suggested by the Appellant? Does an appeal on points of law involve an evaluation of all the relevant evidence? If so under what circumstances would an evaluation of evidence flow from a question or questions of law in the circumstances of this case?

Before I address myself to the submissions I will further set out the remaining two grounds from the written submissions and the notice of appeal. Ground 2 of the written submission is *"Whether the tribunal members erred in law when they held that the assessment had no merit*." On the other hand ground 2 in the notice of appeal is *"That the tribunal erred in law when it failed to evaluate all the evidence thereby reaching a wrong conclusion that the assessment raised on the taxpayer had no merits."* It will be noted that ground 2 of the notice of appeal is closer in substance to ground 3 in the written submissions. Ground 3 in the written submissions is "*Whether the tribunal members failed to evaluate the evidence before them thereby reaching a wrong conclusion*."

It is mandatory that the questions of law for consideration by an appellate court are formulated as explicit grounds in the notice of appeal. This gives fair notice of what is to be argued to the Respondent and the Court. Secondly it complies with the limitation period within which to file an appeal on a question or questions of law. The appeal was filed in 2007 and the written submissions thereon made in 2011. A new ground cannot be argued because it would be out of time under section 27 of the TATA and VATA which both prescribe a period of 30 days to lodge an appeal to the High Court. The fact that the grounds in the written submissions of the Appellant have a different wording from those in the notice of appeal is not contested by the Appellant as a question of fact. The difference in wording is spelt out above and speaks for itself.

A question or point of law taken under section 27 of the TATA must give rise to a controversy of law and not fact. This can be deduced from several authorities, which deal with appeals on "points or questions of law". Where an appeal lies only on questions of law, the appellate court's jurisdiction is restricted and may only be exercised where a point of law has been raised. I find it necessary to review authorities on appeals from tribunals on questions of law only on how such appeals are handled in terms of jurisdiction to try "points or questions of law. In East Africa it is a second appellate court which only entertains appeals on questions of law.

In the case of **Shah V Aguto [1970] 1 EA 263**, the Court of appeal at Mombasa reviewed the appellate jurisdiction on points of law only. The ground of appeal was that *"The learned Judge erred in law in not directing himself sufficiently, properly or at all to the principles to be applied on an appeal against findings of fact of the Court of First instance*." The court noted that this ground of appeal is on a question of law. A Court of first appeal usually has a right to interfere with the findings of fact of the trial Court; but this is a limited right which has to be exercised judicially and it is not just the substitution of the opinion of the appeal court for the finding of fact made by the trial Magistrate or Judge who has had the opportunity of hearing and assessing the credibility of the witnesses. The court noted that generally speaking appellate courts have the same powers as the court which exercised original jurisdiction on the matter. A first appellate court

has powers to subject the trial courts evidence to fresh and exhaustive scrutiny. These principles are laid out in the case of **Peters v. Sunday Post, [1958] E.A. 424 at 429** and **Selle v. Associated Motor Boat Co. Ltd., [1968] E.A.** 123 at 126

However the court went on to note that in the case before it the Judge of the High Court reversed the findings of fact of the trial Court and it is a question of law as to whether he has acted judicially in doing so. If the first appeal court has not acted in accordance with the principles which have been laid down then that court would have acted contrary to law and the court of appeal had jurisdiction to hear the appeal in accordance with s. 72 (1) (a) of the Civil Procedure Act . At page 265 the court noted:

> This question was considered by this court in the appeals of **Fazelabbas Sulemanji v. Reg (1955), 22 E.A.C.A. 395** and also in **Merali v. Uganda, [1963] E.A.C.A. 647**. In the Sulemanji appeal this Court said:
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> > "A second appeal lies only on grounds of law, and it was submitted that the Crown's appeal was on issues of fact. We overruled this objection on two grounds, the first being the record indicated that the Crown would contend that the learned Chief Justice had in certain respects misdirected himself as regards the effect of the evidence. The other was the wider ground that, where the High Court has reversed a judgment of a subordinate court, it must always, in our view, be a question of law whether there are sufficient reasons for reversal. The situation is of course quite different where the High Court has dismissed the first appeal."

There has to be a question of law or a controversy of law for determination. In the above case, the Court of Appeal was interpreting a similar section as section 72 of the Uganda Civil Procedure Act which provides that a second appeal shall only lie on the grounds that "*(a) the decision was contrary to law or some usage having the force of law; (b) the decision has failed to determine some material issue of law or usage having the force or law; or (c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which mat possibly have produced error or defect in the decision of the*

case upon merits." Obviously under the above provisions, a second appeal lies only on questions of law and the case law applies analogously to section 27 of the TATA.

The second case is **Githuku v Republic [2007] 1 EA 83** (CAK) where the Court of Appeal of Kenya at Nairobi held that the appellant's appeal to the Court of Appeal was a second appeal and *can only be allowed by this Court if it finds that the Superior Court erred on a point of law*. (Emphasis added). In other words if there is no point of law the appeal would not be allowed.

In the case of section 27 of the TATA the analogy of a second appeal applies because it specifically provides that an appeal will be on questions of law only. It does not have to be a second appeal for this point to be made. The statute is clear and unambiguous that every appeal to the High Court may be made only on questions of law. There is a wealth of common precedents to the effect that where there is no point of law for determination the appellate court would have no jurisdiction to determine the appeal. In other words the appeal would be dismissed. Before I proceed to determine whether all or any of the grounds disclose points of law for trial I will refer to some of these authorities where appeals on questions of law from decisions of a tribunal are considered.

In ACT Construction Ltd v Customs and Excise Commissioners [1979] 2 All ER 691, Drake J held at page 694 paragraph H that where a tribunal, in considering the meaning of an ordinary English word, purported to define it for the purpose of applying a statute and in so doing gave an incomplete or otherwise unsatisfactory definition, that misinterpretation involved an error of law. Accordingly, there was a right of appeal. Drake J stated:

> The first question I have to decide is whether this appeal raises any point of law. ...Where a tribunal in considering the meaning of an ordinary word purports to define it for the purpose of a statute and does so in an incomplete or otherwise unsatisfactory way, I have no doubt that the misinterpretation of an ordinary word involves a point of law.

It is very clear from Drake J's approach that if there was no point of law he would not entertain the appeal. In **Esso Petroleum Co Ltd v Minister of Labour [1968] 3 All ER 425** the Court of Appeal Civil Division dealt with the same issue. Lord Denning MR held that the jurisdiction of the Divisional Court was derived from section 9 of the Tribunal and Inquiries Act, 1958, and was confined to cases where a party was dissatisfied in point of law with the decision of the tribunal; and accordingly there was no right of appeal in regard to the activities of the sixteen out of the twenty-five Esso employees at the depot, as the tribunal had given no decision on that point.

AT page 429 Para I

> "One word as to the principles. The task of classification is not entrusted to the courts of law. It is entrusted by Parliament to the industrial tribunal, which is a body far better fitted for it than the courts. In the first place, it is more knowledgeable, being composed in the main of industrialists. In the second place, the Standard Industrial Classification is not drawn up by lawyers for interpretation by lawyers. It is drawn up by economists and statisticians for use by government departments. In the third place, the headings are illustrative, and not exhaustive. They are not to be construed in legalistic fashion, according to the letter, but broadly according to the general intent. In the fourth place, the task of classification is not a matter of law. It is a matter of fact and degree. The courts of law will not interfere with the decision of the tribunal unless it is a decision to which it could not reasonably come.

It is clear that the intention of Legislature in the above instance is to leave questions of fact such as assessment to professionals and reserve to the courts only points of law for determination. In the case of **Gillies v Secretary of State for Work and Pensions [2006] 1 All ER 731**, the dispute went to the House of Lords.

One of the issues was whether a decision of a Disability Appeal Tribunal in that case had been erroneous in point of law. The House of Lords held that the question whether a tribunal was properly constituted or was acting in breach of the principles of natural justice was a question of law and accordingly it was open

for determination by the House. The crucial question which the court considered was whether the appeal raised questions of law so as to give jurisdiction to the appellate court to determine the appeal. LORD HOPE OF CRAIGHEAD at pages 734 - 735 took this approach and stated:

> "IS THERE A QUESTION OF LAW?
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> I am conscious that a consequence of putting the issue in this way is to invite the question whether this is a question of law or a question of fact. Section 14(1) of the Social Security Act 1998 provides that an appeal lies to a commissioner from any decision of an appeal tribunal under ss 12 and 13 of the 1998 Act on the ground that the decision of the tribunal was erroneous in point of law. That was the route by which this case reached the tribunal of commissioners, as a direction was given under s 16(7) that it be heard not by a commissioner sitting alone but by a tribunal of three commissioners on the ground that the appeal involved a question of law of special difficulty. .... any further appeal to this House as well, the question is the same as that which was before the commissioner. *It is whether the decision of the disability appeal tribunal was erroneous in point of law*....
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> ... But the question whether a tribunal was properly constituted or was acting in breach of the principles of natural justice is essentially a question of law. *It requires a correct application of the legal test to the decided facts.* As Mr Campbell QC for the respondent said, there can be only one correct answer to the question whether the tribunal was properly constituted. *So to answer the question incorrectly is an error of law. If that argument is accepted, it must follow that there was an error of law which was open to correction by the appellate court*.
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> ... The question was raised whether there was a real possibility of unconscious bias on the part of the law member or lay members. This was treated throughout as a question of law for decision by the Employment Appeal Tribunal which was open to review in the Court of Appeal and in the House of Lords by the statutory appeal process. *So I think that it is safe to*

proceed on the basis that a question of law has been raised in this case which is open for determination by your Lordships. (Emphasis added)

Last but not least a review of two further cases would suffice. In **O'Brien and Others v Associated Fire Alarms Ltd [1969] 1 All ER 93** the Court of Appeal constituted by LORD DENNING MR, SALMON AND EDMUND DAVIES LJJ held that the question whether a term was to be implied in a contract was a question of law and, accordingly, was open to review by an appellate tribunal. In **Priddle v Fisher & Sons [1968] 3 All ER 506** the Queen's Bench Division per LORD PARKER CJ held at page 508 paragraph C and I that the exercise of judicial discretion on wrong principles amounted to a point of law under s 9(1) of the Tribunals and Inquiries Act, 1958, and was properly a matter within the appellate jurisdiction of the High Court rather than the subject of an application for certiorari. With the above authorities as a guideline the question is whether the grounds in the notice of appeal disclose "questions of law" with the meaning and intent of section 27 of the Tax Appeals tribunal Act so as to confer jurisdiction on the High Court to determine the ground.

Ground 1 of the notice of Appeal

Ground 1 of the notice of appeal is problematic. Can it be sustained in argument as a ground of appeal on a point of law? What for instance is the legal issue for resolution i.e. whether the tribunal made an error of law for ruling that the Respondent had no legal liability? It reads "*That the Tribunal erred in law when it made a ruling that the tax payer had no liability*". It suggests that the tribunal erred in law to find that there was no tax liability on the part of the Respondent. Yet a critical examination of the record shows that the ruling of the tribunal is premised on their findings that a wrong methodology was used to arrive at the assessment. What is the point of law here? Is it that the tribunal had no powers to find that the Respondent had no tax liability? Or that they were wrong from the evidence to find that the Respondent had no tax liability? Points of law by their nature involve a controversy about law. There must be misdirection on the part of the tribunal or an error of law which must be stated in the grounds contained in the notice of appeal. For instance the tribunal has jurisdiction to make a finding

that the tax payer had no tax liability. So this cannot be a point of law that engages the jurisdiction of the High Court to "hear and determine a question or questions of law". Where there is no question of law or controversy of law section 27 of the Tax Appeals Tribunal does not give the High Court jurisdiction to entertain the ground of appeal or the appeal if no other point of law is raised.

Counsel for the Respondent submitted that there was no ruling to the effect that the Respondent had no liability. He argued that because there was no such ruling, this ground of appeal should fail. He referred to the minority ruling to the effect that the Respondent was liable to pay tax but this had to be assessed.

The Appellant in rejoinder submitted that the majority ruling was that the assessment was unjustified. That it was incorrect and "***should not have been made and if made should have been made differently***". I find this problematic to argue on ground 1 of the notice of appeal. The substance of the finding as summarised by the Appellants counsel is that the tribunal found that the assessment was wrong in law and therefore the applicant is not liable to pay tax of 491,742,042/=. As I had noted earlier what the Applicant took to the tribunal was a taxation decision and not an objection decision. Consequently, the tribunal had powers to decide that the assessment should not have been made or should have been made differently in terms of section 18 of the TATA which provides inter alia that: "Section 18 of the TATA provides that:

> "(a) where the taxation decision is an objection decision in relation to an assessment, the assessment is excessive; or
> (b) in any other case, *the taxation decision should not have been made or should have been made differently*." (Emphasis added)

There is clear jurisdiction to decide that the assessment should not have been made. It would have been different if it was an objection decision where the tribunal would have to decide whether the assessment was excessive. This is not the point of law intended or argued by appellant. The appellant's argument is on another point that the tribunal ought to have remitted the case for re-assessment of the correct tax. This point could not have arisen from ground 1 of the notice of appeal and in any case it is argued elsewhere in ground 2 of the notice of appeal. There is no argument from the appellant that the tribunal

misdirected itself or wrongly applied the law that there is no tax liability. Last but not least holding that an assessment is wrong in law leads to a finding that there is no tax liability as far as the assessment is concerned. This does not imply that a reassessment cannot be done.

In conclusion the consideration of whether a point of law is raised in the notice of appeal under section 27 of the Tax Appeals Tribunals Act is a preliminary inquiry which has to be made at the commencement of the hearing of the appeal or specific ground of appeal. Secondly, where there is no arguable question of law for trial in a ground or appeal, there is no jurisdiction to entertain the ground or appeal and the same would be struck out or dismissed preliminarily. It is my finding that ground 1 of the notice of appeal does not raise a question or questions of law meriting judicial consideration at an appellate level. Secondly, that a question or questions of law arising there from if any have not been argued on this ground. Consequently I cannot entertain ground 1 of the notice of appeal under section 27 of the TATA. Moreover, it has not been argued as a legal controversy in terms of whether the tribunal erred to exercise its powers to establish whether the assessment should not have been made or ought to have been made differently. Ground 1 of the notice of appeal fails and is hereby dismissed.

Ground 2 of the notice of appeal

Ground 2 of the notice of appeal is that “The tribunal erred in law when it failed to evaluate all the evidence thereby reaching a wrong conclusion that the assessment raised on the tax payer had no merits.”

On the second ground the Respondent submits at page 5 of their written submissions that the burden of proving that the tribunal did not evaluate the evidence falls squarely on the Appellants but that the Appellants have not discharged their burden because they have not pointed out which evidence they have adduced that was overlooked or wrongly evaluated. In rejoinder the Appellants counsel submits that this ground is addressed as issue or ground 3 in the main written submissions of the Appellants. That the issue of evaluation of evidence was addressed at page 3 of the written submissions of the appellant

when dealing with the basis of the use of the input/output method on ground 1. That the tribunal erred in law when they held that section 32 (3) of the Value Added Tax Act regarding the use of best information does not apply when it was applicable. That the honourable members believed that once a tax payer files returns, then the Commissioner General cannot issue an assessment based on the best information within the meaning of section 32 (3) of the VATA. The Appellant submitted that the Commissioner General may issue an assessment even after returns have been filed based on the best information available where she is not satisfied with a return lodged by a person or where there are reasonable grounds in the opinion of the Commissioner to believe that a person had become liable to pay tax but is unlikely to pay the amount due. That there was evidence that the Appellant was dissatisfied with the tax affairs of the Respondent.

There is a serious setback with the rejoinder of Counsel for the Appellant. Page 3 of his written submissions to which he referred court deal with a different ground though reference is made to the evidence. Secondly the question of evaluation of evidence in the written submissions of the Appellant is clearly stipulated and addressed in ground 3 of the appellant's written submissions under the heading, issue or ground "*Whether the tribunal members failed to evaluate the evidence before them thereby reaching a wrong conclusion*". This is approximate to ground 2 of the notice of appeal. Though the written submissions of the Appellant are not page numbered, I have endeavoured to page number the same for purposes of reference. As far as the written submissions of the appellant are concerned, the ground in question is addressed at pages 12 – 16 of the said submissions. At page 12 Counsel for the Appellant very clearly writes and I quote:

> "Ground 2 and 3 whether the tribunal members erred in law when they held that the assessment had no merit and whether members failed to evaluate the evidence before them thereby reaching a wrong conclusion. It is the appellants submission that indeed the majority members erred in law when they held that the assessment had no merit and failed to evaluate the evidence before them thereby reaching a wrong conclusion that the assessment had no merit consequently quashing it."

It is confusing and muddled up to refer court back to page 3 of the written submissions of the appellant. This is because at page 3 the Appellate states and I quote: "*We shall address the grounds in the following manner; Ground 1 will be addressed first while ground 2 and 3 will be addressed jointly*". Counsel at page 3 of his written submissions then proceeded to address ground 1 spelt out in his written submissions. Ground 1 thereof is *"whether the tribunal members erred in law when they held that the input/output ratio is an illegal method under the VAT Act.* Having found that page 3 is on another ground what is the Appellants submission on ground 2 of the notice of appeal? Perusal of ground 1 of the written submissions, however show that it also deals with evaluation of evidence. I am therefore required by counsel to address all the grounds in his written submissions to answer ground 2 of the notice of appeal. This is not only tedious but gives the court a bigger burden than it may have had, had the issues been set out succinctly for trial. It implies that grounds 2 and 3 of the written submissions also should incorporate argument on issue 1 of the written submissions.

Firstly, I must express disappointment at the way Counsel for the Appellant has jumbled up the grounds expressly pleaded in the notice of appeal in his written submissions. Court and the parties should proceed from an explicit question or questions of law which are stated in the notice of appeal. These questions or question of law may then be broken down into sub issues arising there from for purposes of argument. Grounds of appeal cannot be restated and argued for the convenience of the appellant. A ground is like an examination question. The student is not entitled to rephrase the question differently (Unless the substance is the same and with leave of court in case it amounts to an amendment) and answer a question he/she formulates himself or herself. As I have stated above, the grounds give notice to court and the opposite side. Secondly new grounds cannot be introduced without offending the rules of limitation. An appeal is lodged within 30 days from the decision of the tribunal. An amendment of the grounds cannot be considered after the 30 days without extension or enlargement of time. It is trite law that amendments introducing a new cause of action cannot be allowed so as to defeat the law of limitation. (See Auto Garage vs. Motokov (1971) EA 512). Notwithstanding where the grounds in the notice of

appeal are substantially argued under a different heading, I will endeavour to consider the same as it would not occasion any prejudice to the Respondent who has had opportunity and did respond to the same.

I find that the submissions of the Appellant on ground 2 are initially intended to be contained in the appellants written submissions between pages 12 – 16 thereof. However the Appellant in rejoinder incorporated submissions on ground 1 of his written submissions in further support of ground 2 of the notice of appeal. The question of whether the tribunal failed to evaluate the evidence is a question of law in the circumstances stated in the submissions. Moreover in substance it arises from interpretation of provisions of two statutes namely the VAT Act and the TAT Act as we shall note presently. The tribunal is supposed to give its reasons in writing including its findings on material questions of fact and reference to evidence or other material on which the findings are based (See section 19 (1) and (2) TATA). Moreover the tribunal has all the powers and discretions of the taxing authority and has a duty to examine all the relevant materials before coming to a conclusion.

The Appellant's counsel argued grounds 2 and 3 together and I will try to consider them jointly as well. This leaves another ground being the ground of whether the input/output method was an illegal method or correctly applied. He submitted that it was erroneous to hold that the assessment had no merit and that the Tribunal failed to evaluate the evidence before them thereby reaching a wrong conclusion. It is the appellants submission that indeed the majority members erred in law when they held that the assessment had no merit and that they failed to evaluate the evidence before them thereby reaching a wrong conclusion that the assessment had no merit consequently quashing it. He referred to the specific holding of the majority that: "*having found in favour of the applicant that the assessment was wrong in law, the applicant is not liable to pay the tax of 491,742,042 in tax. The application is allowed and assessment quashed*." On the other hand the minority ruling was that it was not whether there was no tax liability but rather that the method used for the assessment was wrong. The input/output method was not properly applied to arrive at the tax assessed. It is the gist of the Appellants contention is that having reached the conclusion that a

wrong method had been used, the tribunal, ought to have addressed its mind to the evidence by using the correct method or remitting the matter back to the Commissioners for re-assessment.

The Appellants counsel supported the minority ruling and referred court to authorities when the Commissioner may assess tax based on “best judgment”. He cited **Hindle and Another v. Customs and Exercise Commissioners [2004] STC 412 at 422** which dealt with a case where the commissioners did not have sufficient records from the tax payer to make an assessment based on it.

Quoting from Neuberger J;

> "as a matter of common sense and common sense is a very dangerous yardstick in the field of VAT, it seems to me that it would be surprising if an assessment such as that was invalid. The commissioners were faced, on the findings of the tribunal, with the traders who should have been registered and were not, and with traders who were to put it bluntly, preparing false accounts, leaving it to the commissioners to do the best they could in difficult circumstances.

The Appellants counsel further referred to **C and E Commissioners versus Pegasus Birds** [1998] STC 826 at 835 judge Carnwath LJ pointed out that;

> "the practice is to consider whether the assessment was made according to the best judgement of the commissioners; if not the assessment fails, and at stage two consideration whether the amount of the assessment should be reduced by reference to further evidence or further argument available at the tribunal."

The gist of the Appellants submission is that even if an assessment can be faulted, it should not be quashed without a substitution of the assessment with a proper one or reference of the matter for reassessment. An assessment not based on documents filed is based on the best judgment of the Commissioner from the available materials. His submissions amount to saying that this may not be a perfect method but is the best that can be done where the usual materials on which an assessment has to be based may be missing. Where a review tribunal

disagrees with how the Commissioners exercised their “best judgment” they should not merely set aside the assessment or hold that it is invalid. To do so they have to have made a strong finding that the “best judgment of the commissioner was in the words of **C and E Commissioners versus Pegasus Birds** cited above *“reached "dishonestly or vindictively or capriciously"; or is a "spurious estimate or guess in which all the elements of judgement are missing"; or is "wholly unreasonable"*.

The gist of Counsel for the Appellants submission is further to the effect that section 19 of the TATA permits the tribunal no avenue to merely quash a decision. They have to either (a) affirm the decision under review or (b) vary the decision under review or (c) set aside the decision under review and when they do so they must either (i) made a decision in substitution of the decision set aside or (ii) remit the matter back to the decision maker for reconsideration in accordance with the tribunals findings or directions. Merely quashing the decision was in breach of section 19 above. From the above premises, it is the Appellants contention that had the tribunal evaluated the evidence they were empowered to exercise all of the powers under the taxing act and had discretion to determine the correct tax position or even refer the matter for review but they shied away from their duty and simply quashed the assessment. Counsel for the Appellant further referred the court to the guidelines In **C and E Commissioners versus Pegasus birds citing Rahman [1998] STC 826** that

1. The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be diverted into an attack on the Commissioners exercise of judgement at the time of assessment.

2. Where the taxpayer seeks to challenge the assessment as a whole on "best of their judgement" ground, it is essential that grounds are clearly and fully stated before the hearing begins.

3. In particular the tribunal should insist at the outset that any allegation of dishonesty or other wrongdoing against those acting for the commissioners should be stated unequivocally; that the allegation and the basis for it should be fully particularised; and that it is responded to in writing by the commissioners.

Counsel referred to the duty of a first appellate court spelt out in the case of **Pandya verses R [1957] EA** 336 to subject the evidence of the trial court to fresh exhaustive scrutiny. On the assessment of the Respondent for VAT based on "best judgment" of the Commissioner, Counsel for the Appellant, if I understood him correctly meant to say that the use of "best judgment was correct in the circumstances because the Appellant had adduced evidence which showed on the balance of probabilities inter alia:

1. That the respondents VAT returns were wanting in material particular;

2. that the appellant carried out several audits on the respondent to establish the veracity of its returns;

3. That audit audits were inconclusive due to lack of material documents and failure to establish the audit trail.

4. That in the circumstances the appellant invoked its powers in section 32 (3) reviews the best information available, with an assessment of the true tax position of the respondent.

5. That had the majority members of the tribunal directed their minds property, they would have found the assessment justifiable.

Furthermore it is the appellant's case on the evaluation of evidence on ground 1 of his written submissions and beginning on page 3 thereof that the Commissioner was entitled to use the "best judgment" approach to make an assessment in the circumstances of the case. For the alleged failure to evaluate the evidence correctly counsel as a prelude to his arguments premised on his

ground 1 of the written submissions referred to section 31 (1) of the Valued Added Tax Act. My understanding of the gist of the submissions is that section 31 (1) of the VATA directs a taxable person to lodge tax returns for each tax period with the commissioner in the prescribed form. The returns include the amount of tax payable for the period and the input tax credit refund claimed. These forms or returns are used to assess VAT. The Commissioner may also require the taxable person to file further returns or supply additional information. Counsel for the Appellant then submitted on section 32 (1) of the VATA which permits the Commissioner to estimate tax based on best information available for purposes of making an assessment where returns have not been filed, or where the Commissioner is not satisfied with the return or for some other reasonable ground the commissioner believes that the tax payable is unlikely to pay tax.

The import of the appellant's reference to page 3 of his submissions is that the Commissioner was justified in invoking section 32 of the VATA to make an assessment of VAT based on "best information" rather than on returns of the Respondents. This assertion is intertwined with submission on justification for the use of the input/output method.

From the Appellants submissions, it can be gleaned that the appellant's assertion relating to evidence was inter alia that:

1. The Respondent for the years 2001 to 2004 was liable to be assessed for VAT.

2. The Appellant was not satisfied with the returns of the Respondent which make the Appellant liable to refund tax (page 217 was referred to).

3. An audit of the Respondent was conducted which resulted in a claim of VAT of 14,465,509/= for the period 2002 January to March 2003 (page 198,).

4. By the 31st of August 2004 SRPS informed the Respondent that it had failed to include in the monthly returns documents for exempt sales, zero rated

sales and export sales. Secondly its VAT claim on export sales for the period under audit was questionable (page 217).

5. There was an intention to further carry out a VAT issue audit for the period March 2001 to June 2004 (page 218).

6. That the tax returns of the Respondent were not going to yield correct results

The Respondent without prejudice replied to the appellants written submissions on grounds 2 and 3 on *"whether the tribunal members erred in law when they held that the assessment had no merit and whether the tribunal members failed to evaluate the evidence before them thereby reaching a wrong conclusion*."

On the question of whether the minority ruling should be the correct ruling, counsel for the Respondent submitted that the said ruling does not hold that the assessment of Uganda shillings 491,742,042/= should be upheld. That in case the court is inclined to evaluate the evidence on record, the Respondent refers the court to its submissions on pages 62 – 74 of the record on the scientific tests required to use the input – output ratio. This reference is on a textbook extract on a complex statistical (mathematical equation) methodology for analysing variance or "variables". My understanding is that variables are used in statistical methodologies to assess and establish the likely occurrence or value of subject or question of investigation. [Counsel further referred to the alleged use of the material balance equation by the appellants at page 49 paragraph 4 of the record].

He asked court to decide whether indeed it can evaluate evidence which the appellant had rejected and which is not part of the record.

The gist of the Respondent's submission on evaluation of evidence is that the Commissioner ignored all the information that was available to them and could not properly resort to assessment based on the "best information" approach or "best judgment" approach and using some scientific theories that were not properly understood, illustrated or applied. He referred court to the Respondents

submissions on this point before the tribunal at page 40 paragraphs 22, 23 and pages 97 to 101 on the applicability of the theory. Page 40 he referred to states:

> "22. Statistically, for any sample to be relied upon an accepted different measures of "central tendencies" that is to mean, median, mode and range, must be applied on the sample data and measures of liability/dispersion established and compared or a null hypothesis tested.…
>
> 23. The input – output method is not supported by any tested scientific or accounting standards and the respondent did not adduce any literature about the assessment of the tax. The Respondents witness Justine Nkurunziza is a food scientist could not confirm what academic discipline the method has been approved in but maintained that it is a common technique called "material balance". She however could not and did not explain what "material balance" was."

Counsel for the Respondent criticised the basis of correlation between power consumption and volume of steel produced based on theoretical laws of physics.

With reference to the case of **R vs. Commissioner of Income Tax Ex parte SDV Transami (K) LTD** counsel supported the proposition in the case that the Commissioner notwithstanding its mandate to establish tax due "*must not apply methods that are random and wanting in regularity*…"

The Respondent's counsel's submissions on ground 1 on evaluation of evidence in the issue of whether the input/output method was illegal or lawfully applied is relevant in light of the Appellants submission adopting his ground 1 in the written submissions in support of the ground on evaluation of evidence. On this issue the Respondent's counsel contended that the appellants have not addressed themselves to the point which the tribunal addressed, that for the Commissioner to apply section 32 (3) of the VAT Act 349 it must first be established that one of the two conditions in section 32 (1) are fulfilled namely (a) that the taxpayer did not lodge returns; (b) that the Commissioner is not satisfied with the returns lodged or (c) that the person is unlikely to pay the amount due. He strongly submitted that the Commissioner cannot make assessments based on the "the

best information available" when it has overlooked information that is statutory required to be supplied. He referred to the testimony of the Commissioners witnesses that all the statutory returns required of the Respondent had been availed but were not considered by the Appellants officials.

Consequently it is the Respondents contention that the Commissioner cannot resort to using the input/output ratio on the assumption that it was better when information in the form of purchases and sales records were available. The gist of this submission is that where information statutorily required of the taxable person has been availed to the appellant, it is the material that should be used to make the assessment for VAT and resort cannot be made to “best judgment” approach.

It is the Respondents contention that the appellants witness testimonies is to the effect that had never applied the input/output ratio method to VAT assessments and that the method was not documented. That in any case the input/output ratio is *not information* but *a method*. The law empowers the Commissioner to use *best information* but does not provide for *best method*.

Counsel cited **Bhagwanji & Co. Ltd vs. Commissioner for Customs & Excise [1969] EA 184 at 188** and **Maha Enterprises vs. Uganda Revenue Authority HCCA 2 of 2001** for the general principles of tax law. In the **Maha Case** Hon. Justice James Ogoola J. (as he then was) interpretation of tax legislation citing the decision of Slade J. in **Attorney General vs. Bugishu Coffee Marketing Association Ltd (1963) EA 39** to the effect that tax legislation is strictly applied and interpreted according to its language with no implied meanings or presumptions. Further citing **Kanjee Narajee v Income Tax Commissioner (1964) EA 257 at 258** where the language is obscure the tax payer has a right to demand that his or her liability to a higher charge be made out with reasonable clarity before he is adversely affected.

The Respondents counsel criticised the use of the input/output ratio on the basis of information on power consumption. He contended that the appellants nowhere attempted to show that power consumption is the best method to determine VAT the liability. VAT he submitted is not assessed by using electricity meter readings of the taxpayer. It would be absurd to read the electricity bills of a

law firm and determine that one who uses most electricity generates most revenue. He further criticised the appellants for "abandoning sales and purchase records" of the Respondent in favour of assessment based on the quantity of electrical units used to determine sales.

Counsel for the Respondent further contended that the appellants illustration of how VAT operates and its arguments that it is a multistage tax only confirm why using the input/output ratio as was used in arriving at the disputed tax is far-fetched and capricious. With reference to the cases of **Rahman (trading as Khayam Restaurant) vs. Customs and Excise Commissioners (No.2) [2003] STC 150, citing Van Boeckel vs. Customs & Excise Commissioners [1981] STC 290, Rahman (No.1) and McNicholas Construction Co. Ltd v Customs Commrs [2002] STC 553** that a taxpayer must show that the assessment made to best judgment is wrong in a material respect, and that the mistake is such that the only inference to be made is that the assessment was arbitrary, or dishonest, vindictive or capricious or is based on a spurious estimate or guess, or is wholly unreasonable. Counsel contended that in the case at hand the assessment was indeed arbitrary and capricious guess work. He contended that it was not sufficient for the Appellant to demonstrate how VAT is charged; it had to show how it was appropriate in the circumstances. The illustrations that Appellant made have the basis of tax returns and are not relevant.

Counsel for the Respondent submitted that the authorities quoted by the Appellant are cases where the taxpayer either kept no records at all or had confessed to several criminal offences committed related to keeping of tax records. Therefore these authorities are distinguishable from the current scenario. Even where records were lacking in the case of **Public and Commercial Services Union v. Customs and Exercise Commissioners [2004] STC;** the commissioners still applied methods that were legally provided for in the European Union Rules namely; market value of attribution and cost method value of attribution (I.e. not input/output method not provided for)

It is the further contention of the Respondents counsel that the VAT Act in Uganda in the absence of records under section 32 thereof as "best information"

as opposed to "best judgement" which wording is different from that on which the European cases cited such as in **C and C Commissioners versus Pegasus Birds Ltd 2004** is based. He contended that the “best judgment” test is more subjective than the “best information” test. As I understand it, the Respondents contention is that the “best information” test is more of an objective test whereas the “best judgment” test is subjective and based on how the commissioner exercised his or her judgment based on the materials available. Counsel further contended that the tests required to be applied to the case by the tribunal was not in issue at the trial in the tribunal.

Counsel for the Respondent further contended that if units of electricity consumed are used to total steel produced by the company, it will be used to input tax while output tax would be determined by using the volume of sales. He faulted the appellants for not showing that all steel that was produced was sold or proving what would be the adjusted sales price of what is produced. The documents produced to prove sales were rejected by the tribunal and therefore he contended that the tribunal could not be expected to arrive at the correct tax.

Last but not least Counsel for the Respondent submitted that the VAT analysis on page 204 is incorrect in that it does not give input tax credit. It makes assumptions about power usage, sales and the selling price but does not consider whether if the assumptions made were correct what the corresponding input tax would be. Nevertheless, Counsel contended that the assumptions are wrong and baseless as the correct records were available to prove all transactions of the Respondents and that those records were ignored.

As far as ground 2 of the notice of appeal is concerned, my duty is firstly to determine whether an assessment based on “best information” method was validly made and if so whether the assessment was proper and not capricious, malicious etc.

It is not in dispute that an assessment was made under the powers of the Commissioner to make assessment provided for under section 32 of the VATA. I would first set out the relevant provisions of the VATA.

The Value Added Tax Act cap 349 at section 31 provides as follows:

> "31 (1) A taxable person shall lodge a tax return for each tax period with the Commissioner General within 15 days after the end of the period.
>
> (2) A tax return shall be in the form prescribed by the Commissioner General and shall state the amount of tax payable for the period, the amount of input tax credit refund claimed, and such other matters as may be prescribed.
>
> (3) In addition to any return required under subsection (1), the Commissioner General may require any person, whether a taxable person or not, to lodge (whether on the persons own behalf or as agent or trustee of another person) with the commissioner General such further or other return in the prescribed form as and when required by the commissioner General for the purposes of this Act.
>
> (4) Upon application in writing by a taxable person, the Commissioner General may, where the taxable person shows good cause, extend the period in which a tax return is to be lodged."

Section 31 cited above in summary provides for the following matters:

1. That a taxable person shall lodge tax returns for each tax period within 15 days after end of period (monthly)
2. A return shall be in the form prescribed by the commissioner and shall contain the amount of tax payable for the period and the amount of input tax credit claimed and any other prescribed matters.
3. Thirdly, the commissioner may request for a person to provide further information in the prescribed manner.
4. The Commissioner has power to extend the time to lodge returns upon application of the taxable person.

Both counsels quoted section 31 to show that the Respondent was a taxable person who was obliged to file returns in the prescribed form with the Commissioner on a monthly basis. What is in controversy is the adequacy of the

returns filed by the Respondent. The Respondent contends that the returns were availed but not examined or taken into account to make the disputed assessment and instead a wrong method of input/output analysis was used to determine the disputed tax. On the other hand the Appellants contention is that the returns were not to the satisfaction of the Commissioner and therefore the appellant was entitled to make an assessment based on "best judgment".

The ruling of the tribunal on this matter can be found at pages LL – NN of record. To quote:

> " the first observation concerns the facts. *The parties generally agree on the facts with the exception of two vital aspects, namely the number of units of power consumed to produce a ton of steel from scrap metal, and the selling price of a ton of steel produced*.
>
> The second observation concerns the method used to determine the tax. What otherwise the respondent refers to as the input/output ratio. The respondent also wants the tribunal to believe that the tax was estimated on the basis of the "best information available" prescribed in section 32 (3) of the VAT Act....
>
> The fourth observation is that there were three audits carried out by the respondent at different times with different results. The first audit favoured the taxpayer with a refund of Uganda shillings 40,465,509/=. The third audit yielded a PAYE tax liability of Uganda shillings 35,491,158/=. As this tax is not in issue it is disregarded.
>
> The audits appear to have yielded no definitive results against which any assessment if at all could lean.
>
> What followed then was an interview or a reconciliation meeting arranged by the respondent *at which the applicant unwittingly disclosed the number of power units consumed to produce a ton of steel*. With this information the respondent went ahead to make an assessment of Uganda shillings 681,500,089/= claiming that it was based on the input/output ratio method and/or estimated on the basis of the best available information rule.

No doubt an assessment should never be presumptuous or speculative. An assessment should create a tax liability with reference to the law. The respondent has cited section 32 of the VAT Act as the relevant law to which we shall allude later.

The above observations and comments definitely have impact on the outcome of this application. What follows is a resolution of the issues by the tribunal.

Issue number one is whether the method used to arrive at taxable supplies namely the input/output ratio method is legally acceptable. Looking at the submissions of the two parties on this issue what comes out clearly and is in contention is the use of the input/output ratio method and the selling price of U.S. dollars 528. The tribunal has already found that the selling price of U.S. dollars 528 per tonne cannot be relied on because the documents introducing it are or have been faulted to justify the VAT liability of the taxpayer.

Counsel for the applicant submits at length that section 32 of the VAT Act is inapplicable. Counsel for the respondent equally submits that the input/output ratio method is to be read in the said section 32 to justify the assessment.

The relevant legal provision governing assessments under sections 32 and subsection (1) and (3) of VAT Act and are reproduced hereunder: -

“Section 32 (1) where: -…

Counsel for the applicant made submissions and raised points in paragraphs 1 to 9, which the tribunal finds valid. Unfortunately counsel for the respondent did not refute these points. As such the tribunal finds that on the facts and evidence adduced this assessment is unjustifiable under section 32 (1) and (3) of the VAT Act. Because the conditions set out therein are not applicable in the instant case.

The assessment is therefore found to be incorrect and should not have been made, and if it was made, it should have been made differently.

... Issue number two is related to issue number one and is whether the respondent had sufficient grounds to estimate the sales of the applicant by using the best information available clause set out in section 32 (3) of the Act. This subsection cannot be applied in isolation or without reference to section 32 (1) of the Act. In other words under the circumstances section 32 (3) of the Act cannot be applied independent of section 32 (1) of the same Act. As a result petition number two is so decided and without going into the nitty gritty of the submissions of both counsel, on the same issue..." (Emphasis added)

The relevant part of section 32, namely subsections 1 – 3 is quoted for ease of reference. It provides:

"32 (1) Where –

(a) A person fails to lodge a return as required by section 31;
(b) The Commissioner General is not satisfied with a return lodged by a person; or
(c) The commissioner General has reasonable grounds to believe that a person shall become liable to pay tax is unlikely to pay the amount due'

The Commissioner General may make an assessment of the amount of tax payable by that person.

(2) An assessment under subsection (1) –

(a) Where fraud, or gross or wilful neglect has been committed by, or on behalf of, the person, may be made at any time; or

(b) In any other case, shall be made within 5 years after the date on which the return was lodged by the person.

(3) The Commissioner General may, based on the best information available, estimate the tax payable by a person for the purpose of making an assessment under sub section (1)."

The Respondents contention can be deduced from section 32 (1) (a) that it has not failed to file returns. It is the appellant who failed to examine the returns to make a correct assessment for VAT. The Appellant disputes that the returns are to the satisfaction of the Commissioner hence the audits and correspondence referred to in the written submissions above.

Section 32 provides for the different scenarios where assessment or estimates based on the best information may be made. I will summarise them below.

1. The first scenario is where a taxable person fails to lodge a return as directed by section 31 (1). This provision caters for situations where the returns have not been lodged within the time prescribed and the taxable person has not applied to the Commissioner to extend the time within which to file the return. The requirement to file tax returns for VAT in the prescribed form under section 31 (1) of the VATA is mandatory. Failure to lodge a tax return within 15 days is an offence under section 53 (1) of the VATA. In this case the Respondent has lodged returns and subsection 1 (a) of section 32 will not be applied.
2. The second scenario deals with the satisfaction of the Commissioner. Concerns a situation where returns in terms of section 31 (1) have been filed but the Commissioner is not satisfied with these returns. The Appellants submissions about the returns not being satisfactory fall under this provision.
3. The third scenario deals with the belief of the commissioner that a person who will become liable to pay tax is unlikely to pay the amount due. IN such cases an assessment is made and enforcement mechanism of the Appellant is engaged to avert the anticipated tax evasion.

Subsection 2 of section 32 of the VATA deals with limitations for assessments. It provides that in cases (a) where fraud or gross or wilful neglect have been committed by or on behalf of the taxable person, the assessment may be made at

any time. The provision gives no limitation as to when the assessment may be made. However, in any other case an assessment has to be made within 5 years after the date on which the return was lodged. I need to note that where there is fraud or wilful neglect obviously a return made would not be to the satisfaction of the Commissioner and the case may as well fall under section 32 (1) (b).

As far as subsection 32 (1) (b) is concerned, what is material and the proper question under this provision is whether the Commissioner was satisfied with the returns of the Respondent. The issue for trial under this heading is not whether he or she ought to have been satisfied with the returns. The returns shall be to the satisfaction of the Commissioner. I have perused page 217 – 225 of the record. The correspondences therein show that the Commissioner was dissatisfied with the records of the Respondent. This is exemplified by letter addressed to the Respondent by the Appellant dated 31st August 2004 at page 217 of the record requesting for documents on exempt sales, zero rated sales and export sales. Page 218 dated 13th September 2004 is a notice to carry out a VAT issue audit addressed to the Respondent by the Appellant. The correspondences referred to give the inference that the Commissioner was not satisfied with the returns. The question as I have noted is not whether the appellant was justified in not being satisfied with the returns of the Respondent. In those circumstances, it is my humble finding without deciding the issue of whether the assessment was proper that the Commissioner was not satisfied with returns of the Respondent as a question of fact and indeed the Commissioner looked for other materials to estimate the disputed tax. What is pertinent to note is that returns are lodged with the Commissioner. Can it be assumed that the Commissioner does not read these returns and only wait to be availed the same documents by the taxable person? Evidence also shows that the Appellant requested for more information from the taxable person (the Respondent)

In light of the above simple finding the Commissioner was entitled to make an estimate of tax based on the best information available as prescribed by section 32 (3) of the VAT Act. This holding at this stage does not decide the question whether use of the input/output method was proper in the circumstances. Neither does it define what the “best information” available would be. As will be

noted from the precedents that best information available, is inclusive of the returns lodged by the taxable person. Evidence also shows that the returns indicated that the Respondent was owed input tax credit over and above VAT owed to the Appellant. Obviously again the Appellant was not satisfied with the returns or the above state of affairs.

The appellant criticised the Tribunal on the ground that they ought not to have interfered with the assessment of the Commissioner made on the "best information" or "best judgment available" without a finding that the Commissioner's assessment was arbitrary, or dishonest, vindictive or capricious or is based on a spurious estimate or guess, or is wholly unreasonable. That because there was no such finding, the assessment could not be interfered with as has been done by the Tribunal by quashing the same in this case. I agree with the Respondents counsel to the extent that the authorities relied on by the Appellant dealt with the provisions of a statute whose wording is slightly different and may be distinguished. I do not however agree that the entire provisions interpreted in the cases cited by the Appellant on "best judgment" are irrelevant. What is distinguishable is the wording "best judgment" as contradistinguished from the phrase "best information" yet their meanings is approximately the same. The cases referred to by the Applicant and Respondent are English cases namely **Hindle and Another v. Customs and Exercise Commissioners [2004] STC 412 at 422, C and E Commissioners versus Pegasus Birds** [1998] STC 826, **Public and Commercial Services Union v. Customs and Exercise Commissioners [2004] STC.** Analysis of the provisions interpreted show that while there may be some difference, this is of not much significance. The cases refer to different English enactments over the years, whose wording may not have changed much. The relevant statutory provision considered in the English cases is **the Value Added Tax Act 1994 section 73 (1)** or the previous provisions (Section 31) repealed by that Act. The previous provisions which are similar are exhaustively considered in **Van Boeckel v Customs and Excise Commissioners [1981] 2 All ER 505** by Woolf J. The equivalent provision was Section 31(1) of the Finance Act 1972 of the UK.

In the above case an appeal arose from the decision of the London Value Added Tax Tribunal which decided that the assessment of VAT made by the

Commissioners of Customs and Excise for the sum of £2,656 should be recomputed and an allowance should be made of £50 per week throughout the three year period of assessment for pilferage of stock. The appellant/taxable person contended on appeal that the assessment which led to the appeal before the tax Tribunal should be quashed because it was made ultra vires.

Woolf J quotes the relevant statutory provision which empowered the Commissioners to make the assessment:

> The power of the commissioners to assess value added tax which is due is contained in s 31(1) in these terms:
>
> > 'Where a taxable person has failed to make any returns required under this Part of this Act or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect they may assess the amount of tax due from him to the best of their judgment and notify it to him.'

It is very clear that these provisions are the same or similar to the Ugandan provision save for use of the phrase "best judgment" as distinguished from the Ugandan phrase "best information". According to Woolf J the provision sets out various preconditions to an assessment using "best judgment" These preconditions are the same as the Ugandan preconditions and are relevant. The judge stated:

> Section 31(1) sets out various conditions which have to be fulfilled before the right to assess arises. Some of those conditions are ones which depend on an objective state of affairs such as the taxable person failing to make returns. Others are ones which depend on the judgment of the commissioners, for example, the judgment of the commissioners when it appears to them that the returns which were made were incomplete. If the conditions or one of the conditions are fulfilled which give the right to make an assessment, then the power of the commissioners is to make an

assessment of the amount of tax due from the taxpayer to the best of the commissioners' judgment.

The *issue which arises on the appeal before this court is whether or not the commissioners, in making their assessment, complied with the requirement that the assessment must be for the amount of tax which, to the best of the commissioners' judgment, is due from the taxpayer.* There is no issue as to the compliance with the conditions which have to be fulfilled before the right to make an assessment arises. (Emphasis added)

The appellant's contention in the case was that the assessment in question was not valid because the commissioners had taken insufficient steps to ascertain the amount of tax due before making the assessment. At page 508 Woolf J held:

"As to this, the very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. *Clearly they must perform that function honestly and bona fide*. It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then to leave it to the taxpayer to seek, on appeal, to reduce that assessment.

Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.

Thirdly, it should be recognised, particularly bearing in mind the primary obligation to which I have made reference, of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain that information without carrying out exhaustive investigations. In my view, the

use of the words 'best of their judgment' does not envisage the burden being placed on the commissioners of carrying out exhaustive investigations. What the words 'best of their judgment envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them." (Emphasis added)

The case is persuasive for taking the view that the Commissioners should examine materials placed before them and if they are not satisfied, assess or estimate tax according to their best judgment. Woolf J further quotes from a Privy Council case from India:

> The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. *He must not act dishonestly, or vindictively or capriciously, because he must exercise judgment in the matter*. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate: *and though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary.* Their Lordships think that the section places the officer in the position of a person whose decision as to amount is final and subject to no appeal; but whose decision, if it can be shown to have been arrived at without an honest exercise of judgment, may be revised or reviewed by the Commissioner under the powers conferred upon that official by s. 33.'

Because of the element of guesswork or estimate there is some arbitrariness in the assessment. However these must come out of a default by the taxable person to supply the necessary materials to make the assessment. It should not be capricious or vindictive or without the element of judgment as to what would be the proper tax payable.

Reference was also made to the Privy Council holding in **Argosy Co Ltd v Inland Revenue Comr [1971] 1 WLR 514,** where the words 'to the best of his judgment' was considered per Lord Donovan, at pages 516–517):

> "Once a reasonable opinion that liability exists is formed there must necessarily be guess-work at times as to the quantum of liability. A resident may be known to be living well above the standard which his declared income would support. The commissioner must make some estimate, or guess, at the amount by which the person has understated his income. Or reliable information may reach the commissioner that the books of account of some particular taxpayer have been falsified so as to reduce his tax. Again the commissioner may have to make some guess of the extent of the reduction. Such estimates or guesses may still be to the best of the commissioner's judgment—a phrase which their Lordships think simply means to the *best of his judgment on the information* available to him. The contrast is not between a guess and a more sophisticated estimate. It is between, on the one hand, an estimate or a guess honestly made on such materials as are available to the commissioner, and on the other hand some spurious estimate or guess in which all elements of judgment are missing. The former estimate or guess would be within the power conferred by section 48(4): the latter without." (Emphasis added)

What is pertinent to note is that the words best of judgment or best of his information are used approximately with the same meaning in the above case. Secondly an estimate should be based on all available records and materials and an honest assessment or estimate should be made based on these materials. I agree with counsel for the Respondent that the consumption of electricity leads to the computation of input tax credit. However, I will further examine the use of

units of electricity in the production of steel in the last ground on the output/input methodology of assessment. It is my finding in this case that the Appellants Commissioners were entitled to make an assessment based on the best information available to them in the circumstances of the case. I find that had the Tribunal taken into account the correspondence of the Appellant and the efforts to audit the Respondent (whatever the result of the audit). The tribunal would have found that the Commissioner was not satisfied with the Respondents returns as a question of fact and was entitled to make an estimate of tax payable. They would have found that the Commissioner was entitled to use section 32 (3) of the VAT Act. Whether the Commissioner exercised this discretionary power arbitrarily, or dishonestly, vindictively or capriciously or whether their estimate was spurious or wild guesswork or is wholly unreasonable is in my view another question to be decided on the ground dealing with the validity of assessment itself best handled in the ground dealing with the validity of the input/output methodology that was used. It is for the above reasons that ground 2 of the notice of appeal succeeds.

Ground 3

Ground 3 of the notice of appeal is that *the tribunal erred in law when it held that the input/output method of assessment had no legal basis*." This ground was argued as ground 1 in the written submissions.

From the outset it must be noted that the Respondents Counsel does not contend that the use of input/output methodology to arrive on tax due is illegal per se. On the contrary the Respondents submissions deal with the question of whether the method was properly used in the circumstances of the case. As I have noted on ground 1 I am only entitled to deal with the grounds or questions of law stated in the notice of appeal. The first question is whether the tribunal did hold that the input/output method had no legal basis. This is a narrower issue than argued by the parties. The ruling of the tribunal on this issue is at page NN – OO which I hereby quote:

> "further nowhere in the VAT Act is the input/output ratio prescribed as a method of determining value added tax.

It is noted that input/output ratio which has been called the method by the respondent is a result of the number of units of electricity consumed to produce a ton of steel from scrap.

The words “input” and “output” in the relation to tax act clearly defined in the VAT Act. It appears there is some element of confusion on how to use and apply these words. Nevertheless in the absence of legal backing, the use of the two words variously or interchangeably so as to conveniently create tax liability for a citizen is improper.

Before coming to a conclusion reference is to be made to the assertion that the information available was not sufficient. The evidence adduced shows that all the documents required to be kept under the VAT Act were made available. The respondent ought to have used them to the best of its ability, come out with an assessment which is legally acceptable instead the respondent preferred a shortcut the materials input/output ratio which has no legal backing. Moreover if the method is convenient to the respondent or is generally used then it is used wrongly hence the need to amend the law. In reaching its decision the tribunal has followed the authorities cited by counsel of the applicant of…

By virtue of these court decisions the finding of the tribunal is that the input/output ratio method of materials is none existent under the VAT Act, and finds the assessment to have no merits.”

The unfortunate use of words in the Tribunal’s ruling is that because the method of assessment of tax using input/output ratio is none existent under the VAT Act, it cannot be used in the assessment of tax. That if it is used it is used wrongly. The authorities cited deal with the rules for strict interpretation of tax legislation. I have already referred substantially to the submissions of counsel when dealing with grounds 2 and 3. Contrary to the submissions of the Respondent’s Counsel the issue is not whether the consumption of electricity cannot be used to assess VAT payable. I have already found that the Commissioner was not satisfied with the tax returns of the Respondents and were therefore entitled to estimate tax under section 32 (3) of the VAT Act.

I have carefully considered the critique of how the Appellant could not have properly used this method and his conclusion that it is arbitrarily used in this case. Among other things, that consumption of units is for assessment of input credit rather than output tax. This is with reference to section 10 of the VAT Act which makes VAT chargeable on electricity supply. It also means that the VAT paid by the Respondent on the Electricity supplied for production of steel should be assessed and refunded as an input credit. I agree but find further analysis as to how the volume of steel produced can be estimated using the units of electricity consumed to be a very separate issue or point.

The Appellant is entitled to take into account all available information under section 32 (3) of the VAT Act in making an assessment of tax. The relevance of the information must be considered as to whether it can give inference on the volume of production of steel. This must be scientifically proven. It is a method used to estimate the volume of production but not to calculate VAT. The volume of production is just an element in an assessment. The use of consumption of units of electricity in a factory cannot be dismissed off hand. It is an indicator of productive activity. Other factors like when the production machines for smelting steel are turned on and how many unit they consume per hour or any measurable period as opposed to when they are not is relevant. This can be rationally and scientifically measured to assess the volume of production. This would also be a question of fact and need not be based on the complex statistical methodology referred to by Counsel for the Respondent. Moreover further information can be obtained from the records of the Respondent by correlating the tonnage of steel produced within a period T with the units consumed over the same period to estimate volume. In the tribunal's words, this information was "unwittingly given" to the appellant by the respondents officials. It is my finding that from the materials on record it cannot be said that the method is irrational or capricious per se. Its irrationality arises from use of the units consumed in relation to the tonnage of steel without taking into account all available relevant evidence. I agree with the tribunal's finding that the method was improperly applied.

In my view the method should be used in conjunction with all other relevant and available records this include:

- All available returns, sales records, input tax credit etc.
- Secondly, other information should also be used to triangulate or estimate the approximate tonnage of steel produced within the period under review.

Without this, the method would be arbitrary. I will not therefore for the above reasons interfere with the conclusion of the tribunal that the assessment should have been made differently.

Secondly even if units of electricity consumed can be used to assess input it does not rule out the fact that it can be used to assess output when the same information is used to assess volume of production. Input credit will be assessed by looking at the VAT bill paid on the electricity supplied to the Respondent to produce steel. The tribunal would like the method used to be prescribed in the Act itself. In my opinion methods used must have a rational basis which may be proven mathematically as likely to arrive at a correct figure of assessment. In this regard the question of whether the sales price of steel was true or not or whether there were sales of the products is a secondary issue and can be established after assessing volumes of products supplied. Even if sales records are relevant as submitted by the Respondents counsel, the Commissioner may not be satisfied with the sales records though the basis of the dissatisfaction has to be established. I must add that the trial at the tribunal left a lot to be desired. I find the submission that the witnesses did not properly understand the input/output method curious if not strange in view of my findings herein below.

Under section 1 (L) of the VAT Act, “input tax” means tax paid or payable in respect of a taxable supply to or an import of goods by a taxable person while “output tax” under section 1 (o) means the tax under Section 4 in respect of a taxable supply. “Taxable supply” under section 1 (y) has the meaning in section 18 of the VAT Act.

The simple mathematical equation that I have understood from the Appellants illustrations and submissions on the point is that VAT is mainly established by balancing “Output” tax with “input tax credit”. Before I put this simple understanding in more words, we need to examine a few more sections.

A taxable supply means under section 18. (1) of the VAT Act a "supply of goods or services, other than an exempt supply, made by a taxable person for consideration as part of his or her business activities." This means that the supply of products such as the Respondents steel for consideration can qualify for charge of VAT provided the supply of the product is not an exempt supply. Secondly the Act sets out the method for calculating tax payable by a taxable person in section 25 of the VAT Act. Section 25 provides that ***"subject to section 26, the tax payable by a taxable person for a tax period is calculated according to the formula specified in section 1 (b) of the Fourth Schedule*** as X - Y. When you examine section 1 (b) of the 4th Schedule it is very clear that VAT is established by calculating the total tax payable in respect of taxable supplies made by the taxable person during the tax period. This is termed Y. When the total is determined, it is subtracted by X which is the total credit allowed to the taxable person in the tax period under the Act.

The above method can loosely be termed the input/output methodology. It is pertinent to further define X in the above statutory formula. X is input tax credit and means what is defined under section 28 (1) of the VAT Act which provides:

> "28 (1) Where section 25 applies for the purpose of calculating the tax payable by a taxable person for the tax period, a credit is allowed to the taxable person for the tax payable in respect of –
>
> (a) All taxable supplies made to that person during the tax period; or
> (b) All imports of goods made by that person during the tax period,

If the supply or imports is for the use in the business of the taxable person.

(2) where section 26 applies for the purpose of calculating the tax payable by a taxable person for a tax period, the credit is allowed to the taxable person for any tax paid in respect of the taxable supplies to, or imports by, the taxable person where the supply or imports is for the use in the business of the taxable person.

(3) A credit is allowed to a taxable person on become registered for input tax paid or payable in respect of –

(a) all taxable supplies of goods, including capital assets, made to the person prior to the person becoming registered; or

(b) All imports of goods, including capital assets, made by the person prior to become registered,

Where the supply or import was for use in the business of the taxable person, provided the goods are on hand at the date of registration and provided the supply or occurred not more than six months prior to the date of registration.

(1) An input tax credit –
    (a) Under subsection (1) arises from the date the goods or services and supplied to or imported by, the taxable person;
    (b) Under subsection (2) arises on the date this tax is paid; or
    (c) Under subsection (3) arises on the date of registration.
(2) A taxable person under this section shall not qualify for input tax credit in respect of a taxable supply or import of -…"

It is clear then that input/output methodology is a statutory method for arriving at VAT. Where the input credit is more than the VAT assessed on taxable supplies (Y), the taxable person is entitled to a refund of that part in excess of the amount of VAT charged on the taxable supply.

The tribunal erred in law to make a blanket and sweeping holding that can be misunderstood to mean that the input/output method is not statutory and therefore has no merit or that the law should be amended. Their quarrel is that the assessment could not be made as it was done in this case because not all the materials availed by the Respondent had been examined. Consequently they erroneously did not proceed to estimate the correct tax. I found that the Commissioner was not satisfied with the returns of the Respondent and sought to assess tax using the best information available. Consequently the Commissioner has the right to estimate tax. Secondly the use of units of electricity in a factory as one of variable approaches to assess the volume of production is not illegal per se.

Thirdly because the Commissioners were entitled to assess, the duty of the tribunal was to establish the correct amount of tax payable which duty they did not perform by merely quashing the assessment without regard to the mandate under section 19 of the Tax Appeals tribunal Act. I agree with the interpretation offered by the appellants Counsel. Section 19 of the Tax Appeals tribunal Act cap 345 laws of Uganda, does not permit the quashing of a decision without additional orders to follow. The relevant provision under which the Tribunal acted is section 19 (1) (c). Section 19 (1) provides as follows:

"

(1) For the purpose of reviewing the taxation decision, the tribunal may exercise all the powers and discretions that are conferred by the relevant taxing Act on the decision maker and shall make a decision in writing –

(a) Affirming the decision under review;

(b) Varying the decision under review; or

(c) Setting aside the decision under review and either –

a. Making a decision in substitution of the decision to set aside; or

b. Remitting the matter to the decision maker for reconsideration in accordance with any directions or recommendations of the tribunal."

In this case the Tribunal did not affirm or vary the decision under review. They set the decision aside. Consequently proceeding under section 19 (1) (c) they had either to substitute the decision with the own or remit the matter back to the decision maker with any directions or recommendations on how to handle. The spirit of section 19 gives the Tribunal its main objective as being to establish the tax payable. In this regard the judgment in the case of **Customs and Excise Commissioners versus Pegasus Birds Ltd [2004] STC 1509** being a Judgment of the UK Court of Appeal Civil Division is very persuasive as to the mandate of the tribunal where the decision challenged is an assessment using the "best judgment approach". Carnwath LJ held that the first duty of the tribunal is to establish

whether the assessment was made under the powers of the Commissioners to assess within the statutory provision allowing for best judgment. Where the tribunal finds that the commissioners were entitled to make an assessment under the statutory provision, their second duty is to establish whether the amount of the assessment is the correct amount for which the taxpayer is accountable. (See page 1516) referring to numerous authorities, his lordship found that that the underlying purpose of the legislative provisions is to ensure that the taxable person accounts for the correct amount of tax. This implies that an appeal would normally be either against the assessment itself or against the amount. In going about its duties, the tribunal has to determine whether the defect in the assessment is so grave that the justice of the occasion requires the whole assessment to be set aside or whether that justice can be done by simply correcting the amount toward what the tribunal finds to be a fair figure on the evidence before it. In cases of a serious defect the assessment would be treated as a nullity. While in other cases where it is to be merely corrected the tribunal is not required to treat the assessment as a nullity. At page 1526:

> "in summary the question is whether it was sufficient, as the tribunal thought, to find that the assessment, viewed objectively, was 'wholly unreasonable', or that there had been a failure fairly to consider all the relevant material; or whether, as the judge held, it was necessary to find or infer that there had been no 'honest and genuine attempt' to arrive at a reasoned assessment."

According to Chadwick LJ at page 1529 "the power conferred by the statute can be exercised only for the purpose for which it is given; that is to say it can be exercised only for the purposes of assessing the amount of VAT due to the best of the Commissioner's judgment. To purport to assess an amount of VAT due from the taxable person which is not the amount due to the best of the Commissioner's judgment is an improper exercise of the power." At page 1533 "in the usual case the tribunal will have the material before it from which it can see why the commissioners made the assessment which they did; and may have further material which was not available to the commissioners when the assessment was made. In such cases, as it seems to me, the tribunal will be well

advised to concentrate on the question "what amount of tax is properly due from the taxpayer?" taking the material before it as a whole and applying its own judgment."

Section 19 of the Tax Appeals Tribunal Act subsection 1 (c) under which the tribunal moved left them only two alternatives of either establishing the tax payable or remitting the case back for reassessment by the Commissioner. I will for the reasons stated above not interfere with the conclusions of the Tribunal that the assessment in dispute should be set aside. Because no attempt was made by the tribunal to establish the correct amount of tax, this court has no option but to remit the case back for assessment of the correct tax payable. Finally I wish to note that the re-assessment taking into account all relevant materials may lead to any position generated by the materials including a no tax position.

In conclusion, it is the order of this court that the Appellants appeal succeeds in part in the following terms:

1. Ground 1 of the notice of appeal is dismissed.

2. Ground 2 of the notice of appeal succeeds to the extent stated in the judgment that the Commissioner was entitled to assess the Respondent for VAT based on section 32 (3) of VAT Act.

3. Ground 3 succeeds in part on points of law. However, the order of the Tribunal setting aside the assessment is affirmed for the reasons of the court given on ground 3 of the notice of appeal.

4. In light of the provisions of section 19 (1) (c) of the Tax Appeals Tribunal Act, the dispute is remitted back to the Tribunal for reassessment of the correct tax payable by the Respondent.

5. The Tribunal may in its discretion further refer the matter back to the Commissioner for reassessment after giving the Commissioner directions to follow in conducting the reassessment.

6. The Respondent shall be paid one third of the taxed costs of the Appeal.

Judgment read and signed in open court the 25th of February 2011

Hon. Mr. Christopher Madrama

Judge

Judgment delivered in the presence of:

Golooba Rodney for Appellant

Birungye Cephas for Responddent

Patricia Akanyo Court Clerk.

Christopher Madrama

Judge