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**THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO 55 OF 2012**

1. KATUREEBE ERIDAD}
2. WANZALA IVAN}.....APPELLANTS

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VERSUS

UGANDA REVENUE AUTHORITY}.....RESPONDENT

**CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA, HON. MR. JUSTICE GEOFFREY
KIRYABWIRE, JA AND HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA**

JUDGMENT

15 The Appellants filed this appeal against the judgment of Hon. Mr. Justice Eldad Mwangusya in High Court Civil Suit Number 107 of 2010 which judgment was delivered on 20th of January 2012. There are 3 grounds of appeal namely:

1. The learned trial Judge erred in law and in fact when he held that the Respondent lawfully taxed PAYE from the Appellant's Terminal Benefits.

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2. The learned trial Judge misdirected himself in the law relating to the taxation of Terminal Benefits thereby reaching a wrong conclusion that the Respondent had lawfully taxed the Appellants Terminal Benefits.

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3. The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and thereby arriving at a wrong conclusion that the Terminal Benefits are taxable under the Income Tax Act.

30 When the appeal came for hearing Counsel Asaph Agaba of Messrs C. Mukiibi Sentamu & Co. Advocates appeared for the Respondents and Counsel Gloria Twinomugisha represented the Respondent. When the matter came for hearing, Counsel for the Appellant abandoned the ground 3 of the memorandum of appeal. He sought leave to file written submissions on one point. The Appellant was directed to file his written submissions by 20th of June 2018 and the Respondent was supposed to file and serve

5 its written reply by 27th June, 2018. By 2nd July, 2018 the Respondent had not yet filed written submissions in reply. We subsequently a

We have considered the written submissions of the Appellant's Counsel and the facts of the appeal are sufficiently contained therein. The Appellants sued the Respondents for declaration that the taxation on terminal benefits was unlawful and illegal. Secondly for
10 an order that the defendant refunds all the money deducted as PAYE totalling to Uganda shillings 291,887,311/= . They also sought payment of interest at 25% per annum from 30th of April 2006 till payment in full. They further sought for costs of the suit. The crux of the matter is that the Appellant's services together with that of 67 other employees were terminated on 30th April, 2006 whereupon the Respondent recovered
15 P.A.Y.E (Pay as you earn income tax) from them. It was agreed by both Counsel that the only issue for determination of the court was whether or not the deduction was lawful.

Learned Counsel for the Appellant submitted that the learned trial Judge misdirected himself on the law relating to taxation of terminal benefits and indeed erred in law and fact when he held that the Respondents lawfully taxed PAYE from the Appellant's
20 terminal benefits. He contended that while the Judge correctly considered the provisions of section 19 (1) (a) of the Income Tax Act cap 340 laws of Uganda, he did not consider the provisions of section 19 (6) of the Income Tax Act. He submitted that section 19 (6) of the ITA provides that:

25 "(6) For the purposes of this section, an amount or benefit is derived in respect of employment if it—

(a) is provided by an employer or by a third party under an arrangement with the employer or an associate of the employer;

(b) is provided to an employee or to an associate of an employee; and

(c) is provided in respect of past, present or prospective employment."

30 The Appellant's Counsel submitted that it is not in contention that the Appellants who were former employees of the British American Tobacco (Uganda) Ltd were paid the terminal benefits by the Privatisation Unit of the Ministry of Finance, Planning and Economic Development and the terminal benefits were taxed by the Respondents. At the trial there was no evidence on record that the Privatisation Unit Ministry of Finance
35 and Economic Planning was at any one time an employer of the Respondents.

5 The Appellant's Counsel submitted that the British American Tobacco (Uganda) Ltd was no more since it had been divested and could not make any more payments to the Appellants. The Privatisation Unit Ministry of Finance and Economic Planning was not an employer of the Appellants at the time and therefore could not withhold tax under the provisions of section 116 of the Income Tax Act that empowers his lawyers to withhold
10 tax. The terminal benefits were paid by privatisation unit "a third party", there was no proof of anything on record at the hearing that the Privatisation Unit made the payment under an arrangement with British American Tobacco (Uganda) Ltd according to the requirements of section 19 (6) of the Income Tax Act. In the premises, learned Counsel for the Appellant submitted that the trial Judge misdirected himself on the law thus
15 arriving at a wrong decision. He prayed that the appeal is allowed with costs to the Appellant.

By the time of writing this judgment, we had not received written submissions of the Respondent in reply which was supposed to be filed by 27th of June, 2018.

In reply the respondent's counsel set out the factual background of the appeal and
20 raised a preliminary objection to the effect that the applicants have sought to introduce new facts in their written submissions filed before this court. The new facts are that the appellants were former employees of the British American Tobacco (Uganda) Ltd and were paid terminal benefits by the Privatisation Unit of the Ministry of Finance, Planning and Economic Development. The terminal benefits were taxed by the respondent when
25 British American Tobacco (U) Ltd was no more since it had been divested and could not make payments to the appellants. The Privatisation Unit of the Ministry of Finance, Planning and Economic Development was not an employee of the appellants at the time and therefore could not withhold tax under the provisions of section 116 of the Income Tax Act that empowers employers to withhold tax.

30 Learned counsel for the respondent submitted that the written submissions of the appellant introduced the Privatisation Unit of the Ministry of Finance, Planning and Economic Development as the entity but paid the Appellants terminal benefits instead of the British American Tobacco (U) Ltd. These facts were not in the pleadings neither were they in the submissions of the appellants in the trial court and it was erroneous
35 and misleading to state the facts as being facts not in contention when novel issues are involved and were never raised or adjudicated upon. The respondents counsel emphasised the power of this court to call additional evidence and submitted that rule 30 (1) (b) of the Judicature (Court of Appeal Rules) Directions does not authorise what

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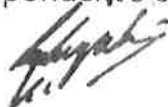


5 the appellant did. The rule empowers this court will reappraise evidence and to take additional evidence upon sufficient reasons been furnished by the applicant. No sufficient reasons were given by the appellants to adduce additional evidence. Furthermore rule 30 (2) provides that the additional evidence ought to be adduced through oral or affidavit evidence.

10 Furthermore, the appellants have not demonstrated that upon exercise of due diligence this facts which were introduced were not within their knowledge at the time of the trial. She relied on **Kyamundu Aggrey v Nanwanga Mary Civil Appeal Number 021 of 2010** for the proposition that departure from pleadings is a good ground for rejecting the evidence. Litigants are bound by their pleadings filed and not depart from them. She
15 invited the court to expunge the new facts from the record.

Without prejudice the respondent's counsel supported the decision of the trial court. Grounds one and two where argued together. The issue addressed was whether the learned trial Judge erred in law and fact when he held that the Respondents lawfully taxed PAYE from the Appellants terminal benefits. Without much ado learned counsel
20 for the respondent relied on the recent Supreme Court decision of **Uganda Revenue Authority v Siraje Hassan Kajura SCCA No 09 of 2015** where the issue of whether terminal benefits was taxable was conclusively settled. One of the issues for determination on appeal to the Supreme Court was whether retrenchment packages amount to employment income as defined by Section 19 of the Income Tax Act. They
25 held that an amount or benefit is derived in respect of employment if it is provided by an employer to an employee in respect of past, present or prospective employment. It followed that payments resulting from any employment relationship whether subsisting or terminated at taxable as employment income under section 19 of the Income Tax Act. It was noted that terminal benefits are not exempt under section 19 (2) or section 21 of
30 the Income Tax Act and the respondent had the mandate to tax that income. She submitted that the Judgement of the Supreme Court is binding on this court.

The crux of the appellant's appeal is whether the Appellant's terminal benefits were lawfully taxed. She reiterated earlier submissions in the lower court that the terminal benefits of the appellants were taxable under section 19 (1) of the Income Tax Act. This
35 is because the income was derived from employment as defined in section. We have considered the other submissions and suffice it to say that there is no need to refer to the detailed submission of the respondent's counsel.



5 **Resolution of the appeal**

We have carefully considered the controversy. The main controversy is whether the taxation of the terminal benefits of the appellants was unlawful. To put it in another way, the issue is whether terminal benefits of the appellants who were plaintiffs in the High Court is taxable income. To resolve the controversy, the court has to decide whether terminal benefits arising from a contract of employment are exempt from tax under section 21 of the Income Tax Act.

We have carefully reviewed record or proceedings and the judgment of the High Court and it demonstrates that the controversy in the High Court was the same and is a point of law. The background to the appeal is that plaintiff had filed an action for declaration that the taxation on terminal benefits was unlawful and illegal. Furthermore, the plaintiffs who are not the Appellants sought consequential orders for refund of any deducted income tax (PAYE) amounting to Uganda shillings 291,887,311/=. As to whether consequential orders can be issued depends on the determination of the point of law as to whether the terminal benefits in question were a taxable income under the Income Tax Act Cap 340 laws of Uganda.

In the High Court, the learned Counsel for the Appellant submitted that terminal benefits/retrenchment packages and retirement benefits are gratuity given to employees on the cessation of his or her employment and is a "thank you" for the period the employee worked for the employer. Secondly, the Appellant's Counsel had submitted that terminal benefits could not be compensation under contracts in terms of section 19 (1) of the Income Tax Act (also referred to as the ITA). He further submitted that retrenchment/retirement benefits are akin to a pension which is an exempt income from taxation. Counsel relied on the provisions exempting pensions from taxation. The defendant's Counsel on the other hand submitted that section 19 (1) (a) of the ITA applies to the plaintiffs and they were properly taxed. The Respondent's Counsel submitted in the High Court that terminal benefits were delayed from employment and they were therefore taxable income as defined by section 19 of the Income Tax Act. Secondly, section 21 (1) of the Income Tax Act specifically exempted the taxation of pension. Pension is the only post contract payment which is exempt from taxation.

35 The learned trial Judge in an earlier decision of **Nkote Charles v Uganda Revenue Authority HCCS No 107 of 2009** cited to him recognised two categories of emoluments which accrue upon termination of an employee's employment. The Income


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5 Tax Act makes a distinction between gratuity which is not included in the definition of section 21 (1) (n) of the ITA as exempt income and pension which is exempted income. He held that while terminal benefits are taxable, pension is not as it is expressly exempted. It is the law which makes the distinction between terminal benefits and pension.

10 The learned trial Judge further held that the plaintiffs were not in the service of the government of the Republic of Uganda but were in the service of the British American Tobacco (Uganda) Ltd and payment made to them was gratuity which does not fall within the ambit of the Pensions Act Cap 286. The income they received is a taxable income under section 19 of the Income Tax Act. The learned trial Judge found that the
15 plaintiff's have been lawfully taxed and resolved the suit against the plaintiff by dismissal with costs.

We have carefully considered the statutory provisions applicable to taxation of employment income and particularly section 19 of the Income Tax Act as well as exempt income under section 21 of the Income Tax Act. We have further reviewed and revisited
20 a decision of this court in **Uganda Revenue Authority v Siraje Hassan Kajura Civil Appeal No 26 of 2013** where this court held that retrenchment packages were not taxable under section 19 of the Income Tax Act. This decision was overturned by the Supreme Court in **Uganda Revenue Authority v Hassan Kajura Supreme Court Civil Appeal No 09 of 2015**. We are therefore no bound to follow our earlier decision which
25 is no longer good law. The Supreme Court whose decisions are binding on this court held that terminal benefits are taxable under Section 19 of the Income Tax Act under similar facts as in this appeal. We respectfully follow the decision of the Supreme Court and consider this appeal in light of that decision.

30 Section 19 defines employment income and is the relevant provision considered in the lower court. We reproduce the sections 19 and 21 here in below for ease of reference. Section 19 is the definition section of employment income under the Income Tax Act:

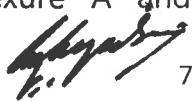


"19. Employment income

(1) Subject to this section, employment income means any income derived by an employee from any employment and includes the following amounts, whether of
35 a revenue or capital nature—

- 5 (a) any wages, salary, leave pay, payment in lieu of leave, overtime pay, fees, commission, gratuity, bonus or the amount of any travelling, entertainment, utilities, cost of living, housing, medical or other allowance;
- (b) the value of any benefit granted;
- 10 (c) the amount of any discharge or reimbursement by an employer of expenditure incurred by an employee, other than expenditure incurred by an employee on behalf of the employer which serves the proper business purposes of the employer;
- 15 (d) any amount derived as compensation for the termination of any contract of employment, whether or not provision is made in the contract for the payment of such compensation, or any amount derived which is in commutation of amounts due under any contract of employment;..”

In light of the guidance from the Supreme Court decision in **Uganda Revenue Authority v Hassan Kajura** (supra), which we respectfully follow, we have gone through afresh sections 19 (1) (a) (b), (c) and (d). Section 19 (1) is the general provision and provides that employee income is “any income derived by an employee from any employment”. What is any income derived by an employee from any employment? The provision is general enough to include any earnings of the employee by whatever name called so long as it is derived from the employment. The subsequent subsections (a) – (d) which we will presently consider are inclusive categories of employment income. It means that whatever the name of the employment income derived from the employment may be, it include those defined under sections (a) – (d) and we have set out the provisions below. It does not however exclude categories not specifically mentioned.

As far as item (a) is concerned, the subsection includes commission and gratuity, bonus and other payments which are not material to this appeal which primarily is concerned with termination of employment and payment thereof. Paragraph 4 of the plaint clearly provides that the plaintiff’s claim is for recovery of monies unlawfully taxed as P.A.Y.E on the terminal benefits of former employees of British American Tobacco (U) Ltd. It is indicated that the services of the plaintiffs were terminated on 30th April, 2006 (paragraph 5 of the plaint). No further details concerning what the terminal benefits are comprised of are averred in the plaint. The payment schedule however is a document attached to the plaint as annexure “A” and has a table which gives the names of the

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5 employees serially and against each name are categories of payment entitlement which
are quantified by an amount of money for each employee under each item. Each column
has the number of years worked, the basic salary, the monthly travel allowance, the final
transport allowance, monthly leave allowance, the total package, deduction of 30% PAYE
10 from the total package and the net final pay. The quantified items do not include
gratuity and for that reason we conclude that section 19 (1) (a) is inapplicable to the
facts and circumstances of the Appellant.

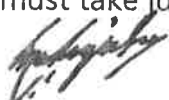
We have further considered the item (b) and it refers to the value of any benefit granted.
The payment cannot be classified as the value of any benefit granted. In the least the
value of the benefits which include basic salary, monthly allowances, final transport, and
15 monthly leave allowance are included.

Going to item (c), it provides for the amount of any discharge or reimbursement by an
employer of expenditure incurred by an employee on behalf of the employer and which
serves the useful business purposes of the employer. The payment referred to above
does not fall under this category.

20 Lastly, we have considered item (d) which provides for any amount derived as
compensation for determination of any contract of employment whether or not
provision is made in the contract for the payment of such compensation or any amount
derived which is in commutation of amounts due under any contract of employment.
We will duly consider the evidence, the submissions and the law before reaching a
25 conclusion as to whether section 19 (1) (d) of the Income Tax Act applies to the
Appellant's facts.

The submissions of the Appellant's Counsel are that the Appellants were paid by the
Ministry of Finance under the privatisation programme of the government. The
respondent's counsel objected to this new information and we have perused the record.
30 The new matter raised concerns divestiture of a Public Enterprise and the payment of
former staff under Public Enterprise Reform and Divestiture Act cap 98 laws of Uganda
(PERD Act). While there is no evidence adduced at the trial about the role of Ministry of
Finance and there is no averment of the necessary fact, the court has power to take
judicial notice of an Act of Parliament under section 56 (1) (b) of the Evidence Act Cap 6
35 laws of Uganda. Section 56 (1) (b) of the Evidence Act provides that:

"56. Facts of which court must take judicial notice.



5 (1) The court shall take judicial notice of the following facts—

(a)...

(b) all Orders in Council, laws, statutory instruments or subsidiary legislation now or heretofore in force, or hereafter to be in force, in any part of Uganda.

10 We take juridical notice of the provisions of the Public Enterprise Reform and Divestiture Act cap 98 laws of Uganda which inter alia is the legal framework for the divestiture of public enterprises. We accordingly overrule the preliminary objection of the respondent. Perusal of the First Schedule which refers to public enterprises shows that British American Tobacco (Uganda) Ltd is a public enterprise which the state was required to fully divest from under Class III of the First Schedule to the PERD Act. Section 22 of the
15 PERD Act *inter alia* provides as follows:

"22. Divestiture.

(1) Subject to this Act, the enterprises specified in the First Schedule to this Act shall be dealt with as follows—

20 (a) the enterprises specified in class I of that Schedule shall be or continue to be fully owned by the State;


(b) as to the enterprises specified in class II of that Schedule, the State shall retain a majority of the shares of each enterprise, and the remainder shall be disposed of to persons other than the State in accordance with this Act;

25 (c) as to the enterprises specified in class III of that Schedule, the State shall totally divest itself by disposal of all the shares in each enterprise to persons other than the State in accordance with this Act; and

...

(3) The divestiture under this section shall be carried out in accordance with the divestiture guidelines set out in the Second Schedule to this Act..."

30 The record of proceedings of the trial court is short because the Counsel represented to court that the necessary facts of the suit were not in dispute and they would address the legal issue of whether deduction of P.A.Y.E. was lawful by way of written submissions. It is written in the defendant's written submissions that the Plaintiff and 67 other former



5 employees of the British American Tobacco (U) Ltd were terminated from employment in 2006. The Solicitor General had relied on section 4A of the Pensions Decree as amended by Pensions Act (Amendment) Decree 1978 to advise that PAYE was not deductible on pension, gratuity and other allowances granted under the provisions of the Pensions Act. Section 4A (1) and (2) provided that:

10 " (1) Notwithstanding any provision in any written law to the contrary, no income tax shall be charged upon any pension, gratuity or other allowance granted under the provisions of this Act.

15 (2) The exemption granted under subsection (1) shall only operate up to a sum of eight thousand shillings and shall be in addition to any other income tax relief provided in any other written law."

The above cited section was repealed by the Pensions (Amendment) Statute No. 4 of 1994 section 6 thereof by renumbering section 4A (1) as section 4A and by deleting subsection 2 which delimited the amount of exemption. For ease of reference section 6 of the Pensions (Amendment) Statute No. 4 of 1994 provided as follows:

20 "(6) Section 4A of the Principal Act is amended –

- (a) By renumbering section "4A (1)" as section "4A";
- (b) By deleting subsection (2). "

The provisions of section 4A are replicated under the revised laws by section 8 of the Pensions Act Cap 286 as follows:

25 "8. Income tax not to be charged upon pension, etc.

Notwithstanding any provision in any written law to the contrary, no income tax shall be charged upon any pension, gratuity or other allowance granted under this Act."

30 The obvious question would be whether the Pensions Act Cap 286 applied to workers employed by British American Tobacco (Uganda) Ltd before it was sold by government of Uganda in its privatisation programme under the PERD Act. The Appellant's Counsel in the lower court addressed the issue at page 26 of the record and submitted that section 8 of the Pensions Act exempted the Appellant's from deduction of PAYE or income tax on their terminal benefits. The reply of the Respondent on the applicability
35 of the Pensions Act can be found at page 46 of the record and they wrote that the

5 pension of the Appellants was not taxed. What were taxed are the terminal benefits. They specifically drew the attention of the court to section 21 (1) (n) of the Income Tax Act which only exempts "pension" from deduction of income tax. They further submitted that one had to hold a pensionable office to benefit from the provisions of Section 8 of the Pensions Act and further defined pensionable officer under section 1 (g) and 1 (j) of the Pensions Act to exclude the Appellants. The submission of the Respondent's Counsel is that pensionable office does not include service in BAT (U) Ltd. Finally the Respondent was of the view that legislature intended to do away with exemption of gratuity and other allowances from income tax by enacting section 21 (1) (n) of the Income Tax Act Cap 340 which is a later enactment than the provisions of the Pensions Act as amended.

The learned Judge of the High Court resolved the controversy by holding that the long title of the Pensions Act demonstrates that it is limited to Public Service Officers. Secondly under the Pensions Act one has to hold a pensionable office to benefit from the Act. Thirdly, the Appellant's were not in the service of the Government of the Republic of Uganda. The terminal benefits paid to them does not fall under the ambit of the Pensions Act but that of the Income Tax Act.

We have duly considered the judgment of the High Court and find that it revolves on the determination of a point of law as to whether the employees of British American Tobacco (U) Ltd were in a pensionable office rather than whether the income is an exempted income under section 21 (1) (n) of the Income Tax Act. We have accordingly considered the definition of "pensionable office" under the Pensions Act Cap 286 which provides inter alia under section 1 (g) and (j) as follows:

"(g) "pensionable office" means—

(i) in respect of public service by a person under the Government, an office—

(A) to which he or she has been appointed, on probation or otherwise, by the authority having power for the time being to make appointments to the public service of Uganda on terms which include eligibility for the grant of a pension under this Act or under any Ordinance repealed by this Act; and

(B) which he or she has not ceased to hold on such terms;

(ii) in respect of other public service, an office which is for the time being a pensionable office under the law or regulations in force in the service;

5 (iii) an office to which a Ugandan national was appointed on probation or otherwise by the authority having power for the time being to make appointments in the East African Community on terms which include eligibility for the grant of a pension under the Pensions Act of the Community and regulations made under it."

10 The Appellants were neither appointed or were under the service of the Government of the Republic of Uganda. The provisions of section 1 (g) A and B are not applicable to the Appellants. There were therefore not holding a pensionable office and we agree with the conclusion of the trial Judge in that respect.

15 We have further considered whether employment of the Appellants was under the public service. Section 1 (j) of the Pensions Act also defines "public service" in the following words:

"(j) "public service" means—

(i) service in a civil capacity under the Government of Uganda or any other country or territory in the Commonwealth or the Republic of Southern Yemen;

20 (ii) service under the East Africa High Commission, the East African Railways and Harbours Administration or the East African Posts and Telecommunications Administration or under the East African Common Services Organisation, the East African Community, the East African Railways Corporation, the East African Harbours Corporation or the East African Posts and Telecommunications Corporation;

25 (iii) superannuable service on the staff of Makerere University College, the Royal College, Nairobi, or the University College, Dar es Salaam;

(iv) service which is pensionable—

(A) under the Oversea Superannuation Scheme;

30 (B) under any Acts relating to the superannuation of teachers in the United Kingdom;

(C) under a local authority in the United Kingdom;

(D) under the administration of a district or an urban authority; or

- 5 (E) under the National Health Service of the United Kingdom;
- (v) any other service that the pensions authority has determined to be public service for the purposes of this Act;
- (vi) except for the purposes of computation of a pension or gratuity and of section 13, service in respect of which a pension may be granted under the
10 Governors' Pensions Act, 1957, of the United Kingdom; and
- (vii) service as the holder of the office of President, Vice President, justice of Appeal, registrar, officer or servant of the Court of Appeal for Eastern Africa or the Court of Appeal for East Africa;"

15 We have considered the above definition of service in the civil capacity in the government of Uganda, in the East African community or its organs, in the universities of East Africa namely Makerere University, Royal College Nairobi, University College Dar es Salaam, service in a local government as defined above and other categories. Our conclusion is that the Appellants do not fall under any of the categories listed under section 1 (j) of the Pension Act. We have further considered the definition of "other
20 public service" under section 1 of the Pensions Act and have come to the same conclusion that the Appellants did not work under "other public service of" which is a service in the words of section 1 (c) of the Pensions Act as:

"(c) "other public service" means public service not under the Government;"

25 Before we make the inevitable conclusion that the Appellants terminal benefits were not paid under the Pensions Act, we have considered the decision of the Supreme Court in **Priamit Enterprises Ltd v Attorney General, Civil Appeal No. 43 of 1995**. Hon Mr. Justice Oder JSC at page 16 of his judgment said:

30 "The first part relates to the application of the decision in the case of Mugenyi & Company advocates (Supra) to the instant case. This is that UTC was an incorporated company with limited liability, and had a capacity to sue and be sued. As such it was an independent legal personality separate from the Uganda Government, which was its sole shareholder. As a result the Government was not and could not be liable for UTC's debts it owed to the Appellant. The Appellant's
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I entirely agree with that holding."



5 The British American Tobacco Company (Uganda) Ltd is a limited liability company and from the above holding, the government was not liable to pay for its debts. It confirms the holding that the personnel of a limited liability company are not employed in the public service and the payment by the Privatisation Unit of the Ministry of Finance has to be placed in context.

10 Before we do that we conclude that the provisions of section 8 of the Pensions Act do not apply to the Appellants and therefore the only applicable provisions to the Appellants in the circumstances is the Income Tax Act Cap 340. The provisions of section 21 (1) (n) and (o) of the income Tax Act are not controversial or ambiguous. They are clear and straightforward. Section 21 deals with income exempted from taxation.

15 "21. Exempt income.

(1) The following amounts are exempt from tax—

(a) the income of a listed institution;

...

(n) a pension;"

20 (o) a lump sum payment made by a resident retirement fund to a member of the fund or a dependent of a member of the fund;"

It is not controversial that under that section 21 (1) (n) pension is an exempted income. What was considered is that pension did not include the payments made by the plaintiff. We agree that pension refers to periodic payments made after retirement and not the gratuity or terminal benefits as paid in the applicant's case. We further considered section 21 (1) (o) which exempts a lump sum made by a resident retirement fund to a member. We deem it fit to consider the issue of whether section 21 (1) (o) of the Pensions Act is applicable to the Appellants together with the submissions of the Appellant's Counsel that the Appellants were paid by a third party who was not an employer or had an arrangement with the employer.

It cannot be said that the plaintiffs/Appellants were paid out of a resident retirement fund in terms of section 21 (1) (o). Secondly, the plaintiffs were not paid by a third party but by British American Tobacco (Uganda) Ltd which was a public enterprise taken over by the Privatisation Unit for purposes of divestiture under the PERD Act Cap 98 laws of Uganda.

5 Section 22 (1) of the Public Enterprises Reform and Divestiture Act cap 98 laws of
Uganda provides that the Enterprises specified in the First Schedule to the Act shall be
dealt with inter alia in four classes. The states shall divest itself by disposal of all the
shares in the Enterprises in class 3 of The First Schedule. It is further provided under
section 22 (4) that the proceeds of all divestiture of public enterprises shall be deposited
10 in the divestiture account to be maintained in commercial banks and development
banks designated by the Minister responsible for finance in consultation with the
Divestiture and Reform Implementation Committee. Furthermore section 26 (1) of the
PERD Act provides as follows:

"26. Use of proceeds of divestiture.

15 (1) The Minister responsible for finance may use the proceeds of divestiture in the
divestiture account to meet—

(a) costs and expenses associated with termination of contracts of employment
between a public enterprise specified in class II, III or IV of the First Schedule to
this Act and its employees as a result of the divestiture of that enterprise;

20 (b) liabilities of a public enterprise specified in any of the classes referred in
paragraph (a) which—

(i) for the purposes of divesting the enterprise in the manner approved by the
committee require satisfaction before that enterprise's divestiture; or

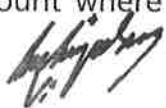
25 (ii) given the mode and terms of divestiture, are directly or indirectly assumed by
the Government at the time of divestiture;

(c) costs and expenses incurred in the process of preparing a public enterprise
specified in any of the classes referred to in paragraph (a) for divestiture; and

(d) costs and expenses of divestiture.

30 (2) Any costs and expenses associated with termination of contracts of
employment between a public enterprise and its employees shall be paid from
the proceeds of divestiture of that enterprise in priority to all other liabilities,
costs and expenses referred to in subsection (1)...

Costs and expenses associated with the termination of contracts of employment are
paid from the divestiture account where it is assumed the proceeds of sale of shares



5 have been deposited. It follows that the costs of termination of employment could only
be met by the ministry of Finance from the sale of shares of British American Tobacco
(U) Ltd. For that reason the payment was not from a third party but by the Government
of Uganda acting on behalf of the British American Tobacco Ltd when it was divesting
itself from ownership thereof. The provisions cited by the Appellants Counsel of section
10 19 (6) for the argument that the Privatisation Unit was not an employer of the Appellant
and could not withhold tax is inapplicable. In any case the withholding of tax is a
method for collecting income tax from employment income. The income tax can still be
assessed and paid even where it was not erroneously withheld by the employer.

In the premises the Appellant's appeal lacks merits and we hereby dismiss it with costs.

15 Dated at Kampala the 17th day of October 2018



HON. MR. JUSTICE KENNETH KAKURU, JA,



20 **HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA**



HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA