THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPEAL N0.09 OF 2015

            UGANDA REVENUE AUTHORITY …………………………………APPELLANT

VERSUS

SIRAJE HASSAN KAJURA…………………………………………RESPONDENT

(CORAM: ARACH-AMOKO, NSHIMYE, OPIO-AWERI, MWONDHA, TIBATEMWA JJ.S.C)

(Appeal against Judgment of Court of Appeal before Bossa, Kakuru and Kiryabwire JJA given on the 7th day of June 2013.)

JUDGMENT OF OPIO-AWERI (JSC)

Introduction

This is a second appeal by the appellant, Uganda Revenue Authority, against the decision of the Court of Appeal which ruled that terminal benefits paid to the respondents were not taxable under Section 19 of the Income Tax Act.

Brief Facts

The brief facts forming the background to this appeal as contained in the judgment of the Court of Appeal dated 12th March 2015 are as follows:-

The respondent and one hundred and sixty (160) other former employees of the defunct Diary Corporation Ltd were retrenched with effect from 31st August 2006.

The Privatization Unit, Ministry of Finance paid the respondent terminal benefits which comprised of salary, gratuity, long service award, transport, home allowance, leave allowance, settlement allowance and payment in lieu of notice. The privatization unit sought advice from the appellant tax authority about tax payable on the benefits due to the respondent. The appellant then computed the sum of UGX.1, 171,778,314/-(one billion, one hundred and seventy one million, seven hundred seventy seven thousand, three hundred fourteen shillings) as Pay as You Earn (PAYE) tax which was remitted to the appellant.

The respondent in representative capacity then filed High Court Civil Suit No.117 of 2009 challenging the assessment and payment of the said sum. The respondent further claimed that what was paid to them was not employment income but rather a ‘thank you’ following the  privatization of M/s Diary Corporation. This payment, the respondent argued was akin to gratuity and hence not liable to tax under Section 19 of the Income Tax Act, Cap.340.

The High Court decided in favour of the respondent and stated that the appellant unlawfully charged PAYE upon the terminal benefits of the  respondent. It was ordered that Shs.1.171,778,314/- be paid to the plaintiff as special damages with interest of 8 percent per annum thereon from the date of filing the suit till payment in full and general damages of Shs.2,000,000/- to each respondent with interest of 8 percent per annum.

       Aggrieved by the decision of the High Court the appellant appealed to the Court of Appeal only on one ground namely;

Whether the appellant unlawfully charged PAYE upon terminal benefits of the respondents.

The Court of appeal in agreement with the trial judge’s findings answered the question in affirmative. The appellant was aggrieved by the findings of the justices of the Court of Appeal, hence this appeal.

This appeal is based on three grounds of appeal, namely;

1. The learned Justices of the Court of Appeal erred in law and in fact when they held that the benefits received by the  respondent were not taxable.

2. The learned Justice of the Court of Appeal erred in law when they held that the character of the packages given to the respondent was not such as those envisaged under the provisions of the Income Tax Act.

         3. The learned Justices of Court of Appeal erred in law when they held that the appellant unlawfully taxed the respondent on the payments received.

The appellant invited this Court;

* To allow the appeal and set aside the Orders of the Court of Appeal in Civil Appeal No. 26 of 2013.
* To Order the respondent to pay costs of this Court and in the Courts below.

Representation

The appellant was represented by Mr. George Okello while the  respondent was represented by Mr. Asaph Agaba. Both counsel filed written submissions.

Submissions for the Appellant on Grounds 1, 2, & 3

Mr. Okello contended that all the 3 grounds of appeal relate to the finding of the learned Justices of Appeal that terminal benefits paid to the respondent were not taxable under the provisions of section 19 of the Income Tax Act and as such, argued them together.

He submitted that the holding of the Court of Appeal that the retrenchment packages as were given to the respondents are not expressly or by necessary implication provided for under section 19 (1) (a) of the Income Tax Act was erroneous since some items listed in the appellant’s Written Statement of Defence are taxable. Mr. Okello implored court to read section 19(1) together with Section 19 (2) (a), (b), (c), (d), (e), (f), (g), and (h) which provisions make exceptions to subsection (1) in so far as taxability of some of the items mentioned therein was concerned.

Mr. Okello further submitted that their lordships in their considerations ignored the clear wording of section 19 (1) (a) of ITA, especially that providing that “any income derived by an employee from any employment.” He contended that the justices erred when they reasoned that to be taxable, such payments as itemized in section 19 (1) (a) must relate to the payment made or earned while the tax payer is still in employment and not while out of it. Counsel argued that the above reasoning was erroneous since if such interpretation is to be taken, the section would have been worded differently with words such as “subsisting” or “existing” employment.

Mr. Okello argued that the meaning of the provision that “any income derived by an employee from any employment” as envisaged in Section 19(1) was found in subsection (6) of the same section which clearly defines it to include any amount or benefit derived in respect of employment if it is provided in respect of past, present, or prospective employment.

Mr. Okello argued that their lordships appreciated the literal rule but failed to apply it while interpreting the Income Tax Act when they read 15 words into the clear interpretation of section 19 (1) of the Income tax Act.

Mr. Okello relied on the case of The Registered Trustees of Kampala Institute v. Departed Asians Property Custodian Board, SCCA no.21 of 1993, (followed by the Court of Appeal in Crane Bank v. URA CA no.96 of 2012 where it was held that;

“It is a wrong thing to read into an Act of Parliament words which are not there and in the absence of clear necessity. It is a wrong thing to do so...”

Counsel accordingly contended that it was erroneous on the part of their Lordships not to consider the provisions of Section 19 (6). Mr. Okello concluded that had the respondent not been an employee of the Diary Corporation, the privatization unit would not have paid them.

Counsel further submitted that the amounts paid to the respondent also properly qualified as compensation payments under section 19 (1)(d) of the Income tax Act. He relied on Collins Concise Dictionary which defines compensation at p.342 to mean;

   “that act or process of making amends for something: something given as reparation for loss, injury etc.”

Mr. Okello disagreed with the learned Justices when they relied on the case of Patrick Nabiryo & 117 Ors v. Uganda Electricity Board, HCCS No.67 of 2008 to hold that compensation has some element of proportionality between what has been lost and what is being provided to replace the loss. Mr. Okello added that since compensation is not defined in the Income tax Act, then the literal meaning from the dictionary should have been adopted.

        Mr. Okello contended that the Income tax Act is a law made by Parliament in the exercise of its constitutional mandate under Article 79 (1) pursuant to Article 152 (1) of the Constitution. That its enactment was to impose taxes as per Section 4 of Income tax Act payment of which it is a duty of every citizen according to Article 17(g) of the Constitution. He further argued that all persons and items exempt from tax are provided for either under the Constitution or under Section 21 of Income Tax Act. He relied on the case of Crane Bank v. URA C.A No.96 of 2012 where court stated that;

“laws which permit tax exemption must be construed strictissimi juris  against the entity claiming the same. Thus, the law does not look with favor at tax exemptions and he who seeks to be this privileged must justify it by words too plain to be mistaken and so categorical to be misinterpreted.”

Mr. Okello added that compensation is envisaged under the Public Enterprise Reforms Divesture Act Cap.98, Section 21 which mandates the minister responsible for finance to make provisions for payment of compensation of employees declared redundant as a result of restructuring of public enterprises. Mr. Okello further argued that the only way to save compensation packages from taxation is when it is exempt which is not the case in the instant matter.

Counsel noted that their lordships deplored lack of evidence on the specific terms of the employment contract when they noted that such evidence would have assisted them in resolving the matter. He was however of the view that since no employment contract was submitted in court by the respondents, they failed to prove that their packages going by the terms of their contracts were not liable for income tax and therefore court should have held in favor of the appellant.

Counsel concluded that the learned Justices of Appeal erred when they upheld the decision and orders of the High court which lacked basis and  that there was no evidence or precedent adduced before the High Court to justify the award.

He prayed this Court to set aside the decisions of the lower courts and allow the appeal with costs. In the alternative, he prayed that upon allowing the appeal, court may order a retrial of the dispute on the basis of evidence that may be adduced in the trial court.

Respondents’ Submissions on grounds 1, 2, & 3 In reply to the above arguments, Mr. Agaba submitted for the respondent that the taxation of the retrenchment benefits was elaborately resolved by the lower courts and that section 19 (1) of the Income Tax Act is inapplicable to the taxing of the respondent’s terminal benefits.

       Mr. Agaba argued that when interpreting tax statutes, the literal approach of interpretation has to be strictly applied. He stated that the court gives force and life to the interpretation of statutes having regard to the wording of the statutes and the particular facts. That section 19 (1) (a) of ITA relates to payment earned when the tax payer is still in  employment and not out of employment and especially after retrenchment. Counsel agreed with the holding in the case of the registered Trustees of the Kampala Institute v. Departed Asians Property Custodian Board SCCA No.21 of 1993 as relied on by the appellant which is to the effect that it is wrong to read into an act of Parliament words which are not there especially the words “retrenchment benefits.”

Mr. Agaba submitted that the Learned Justices of Appeal concluded correctly when they stated that a retrenchment benefit, whether gratuity or allowance or/given any other name cannot be lawfully covered by the  provisions of section 19 (1) (a) of the Income Tax Act and therefore the deductions were done unlawfully.

Mr. Agaba also contended that the terminal benefits under section 19(1)(d) of the Income Tax Act are very clear and do not constitute compensation since the section provides for amounts derived as  compensation for the termination of any contract of employment as taxable. He submitted that the nature of payments in the current appeal do not fall under section 19(1) (d) of the Income Tax Act. He relied on the decision of Kanyeihamba, JSC in Barclays Bank of Uganda Ltd. v. Godfrey Mubiru (1999-2000) HCB 18 where it was stated that compensation is a penalty for loss of employment. He submitted that retrenchment packages following government restructuring programme cannot be seen as compensation within the meaning of the section. He argued that compensation always has an element of proportionality as to what has been lost and what is being provided for to replace the loss. He submitted that in the instant case, the retrenchment benefit did not even in the stretch of imagination amount to compensation as envisaged under the Income Tax Act.

Mr. Agaba further contended that the arguments that section 19 (6) (c) was applicable was also untenable because the appellant had taxed PAYE from the respondent up to 31st August 2006. He added that the respondent having paid PAYE out of all the monthly payments could not be taxed on the terminal benefits which were like a “thank you” token. He defined the term to “retrench” per the Oxford Learner’s Dictionary to mean to spend less money; to reduce costs or to tell somebody that they can’t continue working for you. Counsel also relied on the case of  Samuel Lubega & Anor. V UCBL SCCA No.24 of 2010 where Justice Bart Katureebe, JSC (as he then was) stated that;

“The purpose of retrenchment package was to ameliorate their loss of a job.”

Mr. Agaba defined amelioration to mean “the act of improving something; a state of being made better.” He argued that this was different from compensation which is defined by the same dictionary to mean “remuneration and other benefits received in return for their services rendered; especially salary and wages”. He asserted that the retrenchment packages do not fall under the ambit of section 19 of the  ITA.

On the alternative prayer by the appellant that court orders retrial of the dispute on the basis of evidence that may be adduced in the trial court, Mr Agaba disagreed arguing that the main issue in the dispute was delved into and discussed extensively by both lower courts therefore  there was no error on the part of the Justices that occasioned a miscarriage of justice that should warrant a retrial.

In conclusion, counsel prayed to this Court to disallow the appeal, uphold the judgment of the Court of Appeal and the trial Court that the benefits were unlawfully taxed and should be paid back and the costs  here and below be paid by the appellant.

Rejoinder by the Appellant.

In rejoinder, counsel for the appellant reiterated his earlier submissions and prayers.

I have perused the record of proceedings and the submissions of both counsel.

The question at hand is whether retrenchment packages are taxable under the provisions of the Income Tax Act.

      The above question raises two issues:-

1. Do retrenchment packages amount to employment income as provided for under Section 19 of the Income Tax Act.
2. Do retrenchment packages amount to compensation as provided for under the Income Tax Act.

       Before I resolve the above issues, it is important to lay some background on our tax system as relevant to this case.

The Supreme Law on taxation is the Constitution of Uganda.

Article 152 (1) of the Constitution provides:-

“No tax shall be imposed except under the authority of an Act of  Parliament”

The above Article clothes Parliament as the only authority to create taxes. The Income Tax Act is one of the statutes governing taxes created by Parliament pursuant to Article 79 (1) of the Constitution which provides:-

     “Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda”.

The duty to pay tax is also provided for in the Constitution under Article 17 (1) (g) which states as follows:-

       “It is the duty of every citizen of Uganda to pay taxes”.

The obligation to pay Income Tax is provided under Section 4 of the Income Tax Act.

A cardinal principle of the interpretation of taxing statutes was laid down by Rowlatt in Cape Brandy Syndicate v IRC (1921) K.B 64 where he 35 held that:- “In a taxing Act, clear words are necessary in order to tax the subject       In a taxing Act, one has merely to look at what is clearly said. There is no room for an intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in it, nothing is to be implied. One can only look fairly at the  language used”.

The principle propounded in the above case is the literal rule which is to the effect that when words of a statute are clear and unambiguous, they should be given their plain meaning and that Courts should not read into the Sections of a taxing statute words that are not there so as to meet  the minds of the legislators. The rationale for the literal rule was stated as far back in the case of R v The Judge of City of London Court [1892] 1 and 13, 273, thus

“To prevent Court’s from delving into the political arena, in order to pressure the dichotomy between the functions of Parliament and  Courts, the former creating the law and the latter in theory applying the law”.

In other words, the fundamental role of the Court is to give force and life to the interpretation of a statute having regard to the language of the statute and the particular facts of the case.

a. Do retrenchment packages amount to employment income as provided under Section 19 (1) of the Income Tax Act?

This question raises a need to interpret Section 19 of the Income Tax Act in its entirety. The Section provides as follows:-

“Subject to this Section, employment income means any income  derived by an employee from any employment and includes the following amounts, whether of a revenue or capital nature,

A) Any wages, salary, lease pay, payments in lieu of lease, overtime pay, fees, commission, gratuity, bonus or the amount of any traveling , entertainment, or utilities, cost of living,housing, medical or other allowances.

B) The value of any benefit granted.

C) The amount of any discharge or reimbursement by the 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 employment.

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 amount due under any contract of employment.

E) Any amount by a tax exempt employer as premium for insurance on the life of the employer or any of his or her dependants.

            F) Any amount derived as consideration of the employee’s agreement to any conditions of employment or to any changes in his/her conditions of employment.

           G)The amount by which the value of shares issued to an employee under an employee share acquisition scheme at the date of issue exceeds the consideration, if any, given by the employee for the shares including any amount given as consideration for the grant of a right or option to acquire the shares.

H) The amount of any gain derived by an employee on disposal of a right or option to acquire shares under an employee share acquisition scheme”.

It was the contention of counsel for the appellant that the Learned Justices of the Court of Appeal ignored the clear wording of Section 19(1), of the Income Tax Act specifically that providing. “Any income derived by an employee from any employment” and instead read into the provisions of the ITA when they reasoned that to be taxable, such payment must be earned or made while the tax payer is still in the  employment and not while out of it. In deriving so, the Learned Justices of the Court of Appeal read into the provisions, words that were not there. The Court of Appeal while interpreting Section 19 held as follows:-

“The learned trial Judge held that, with regard to Section 19 (1) (a) of the ITA, such payments must relate to payments earned or made while the tax payer is still in employment and not while he/she is out of employment.

       We agree, we find that it is untenable to assert that the package is taxable merely because of the manner in which it has been described and itemized. Further the retrenchment packages as were given to the respondents are not expressly or by necessary implication provided for under Section 19 (1) (a) of the ITA. We *15* agree with the trial judge that that provision is clear and unambiguous and only provides for employment income inclusive of the heads expressly provided for.    ”

While it is very true that the term retrenchment packages is not expressly provided for under the ITA, however retrenchment benefits 20 received by the respondents by necessary implication fall squarely within the ambit of Section 19 (1) (a).

The key words in the definition of the term employment income envisaged in Section 19 (1) (a) of the Income tax Act have to be defined. The provision reads “Any income derived by any employee from any employment.” The term derive is defined by the Oxford Learners Dictionary to mean “arise or originate from” Therefore for income to be termed as employment income, it has to originate or arise from an employer to the employee.

Section 19(6) of the Income tax Act provides as follows;

     “For the purposes of this Section, an amount or benefit is derived in respect of employment if it:-

* Is provided by an employer or a third party under an arrangement with the employer or an associate of the employer.
* Is provided to an employee or to an associate of an employee and

      c) Is provided in respect of past, present, or prospective employment.

All the above elements exist in the packages paid to the respondents.

In the instant case, the respondents were employees of the Defunct Diary Corporation who were laid off (retrenched) after their employer was privatized under the Privatization Unit (third party since Defunct Diary Corporation had been privatized. They were paid because they were employees of Defunct Diary Corporation and they were paid those benefits in a bid to make better what they had lost. They were paid in respect of their past employment with the Corporation.

       It is therefore my considered view that the packages paid to the respondents properly fall under employment income. I accordingly agree with the appellant that the trial court and the learned Justices of the Court of Appeal read unto Income Tax Act words which are not there while interpreting the Section 19 (1) (a) of Income Tax Act that to be  taxable these payments must relate to payments earned while the tax payer was still in employment and not while out of it. The above interpretation is erroneous as it is not supported by the wordings of the Income Tax Act. If that was the intention of Parliament, it would have inserted words such as subsisting or existing employment. It is therefore my conclusion that the retrenchment packages envisaged in Section 19 of the income tax are liable for taxation. For the above reasons, I find that the authorities relied on by the respondents which are Samuel Lubega &ors Vs UCBL SCCA No. 24 of 2010 and Barclay Bank of Uganda Limited Vs Godfrey Mubiru [1998-2000] HCB 18 were quoted  out of context. The former case was about miscalculation of severance pay and the effect of a waiver statement among others while the latter case entailed wrongful dismissal and neither of the two cases discussed the taxability of retrenchment benefits.

     b. Do retrenchment packages amount to compensation as provided for under the Income Tax?

Section 19 (1) (d) of the Income Tax Act provides as follows:-

   “Any amount derived as compensation for the termination of any contract of employment whether or not provision is made in the contract for payment of such compensation, or any amount derived which is in commutation of amounts due under any contract of employment”.

      Counsel for the appellant contended that the terminal benefits could be properly referred to as compensation as envisaged under the provision of section 19 (1) (d) since they were given to an employee after termination of their contract. Counsel for the respondents on the other hand argued that the nature of payments received by the respondents did not fall  within the purview of Section 19 (1) (d) of the ITA.

The Justices of the Court of Appeal on this issue held that:-

“considering the nature of payments in this appeal, it is our finding that they do not fall within the purview of Section 19 (1) (d) of the ITA Retrenchment packages following a government  restructuring programme cannot be seen as compensation within the meaning of that Section”.

Compensation is not defined under the Income Tax Act therefore Court has to resort to the Dictionary meaning of the term. In the Cambridge Advance Learners Dictionary, compensation is defined as money that is  paid to someone in exchange for something that has been lost or damaged or for some problem or something that makes you feel better when you have suffered something bad.

Section 19 (1) (d) is very clear and unambiguous and is literally to the effect that any amount given to an employee as compensation for the  termination of his or her contract of employment whether stipulated in the terms of contract or not, amounts to employment income which is taxable. In the instant case, the respondents who were employees of M/S Diary Corporation lost their jobs due to privatization of their employer company  and were given packages in exchange of their jobs. Those packages amounted to compensation within the preview of Section 19 (1) (d).

       Compensation is also provided for under the Public Enterprises Reforms Divestiture Act Cap 19 under section 21 which mandates the Minister responsible for Finance to make provisions for payment of compensation of employees declared redundant as a result of restructuring of Public Enterprises. Pursuant to the above law, the respondent and his colleagues were paid retrenchment packages by way of compensation.

I further find that the learned Justices also wrongly read into the clear wordings of Section 19 (1) (d) when they ruled that the retrenchment packages paid to the respondents could not be compensation within meaning of Section19 (1) (d) of the Income Tax Act.

        According to the case of the Registered Trustees of Kampala Institute V DAPCB SCCA 21/1993 which was relied on by both Counsel, it is a wrong thing to read into the Act of Parliament words which are not there and in the absence of clear necessity.

Another grave error committed by the trial court and the learned Justices of the Court of Appeal was to brand the packages taxed as PAYE. This confusion led to a misinterpretation of the provisions of Section 19 (6) of ITA when the courts observed that by taxing the respondents up to 31st August 2006, their income had already been taxed and so their terminal benefits could not later be taxed. With greatest respect, it is true that the appellant taxed PAYE from the respondents up to 31st August 2006 under the normal circumstances while the respondents were earning monthly income. However the packages which were taxed after retrenchment were employment income which accrued to the respondents from their past employment. This was very different from  PAYE which was taxed up to the end of 31st August 2006. The above packages were not exempt from taxation. Tax exemptions are provided for under the Constitution and the Income Tax Act.

Section 19 of the Income tax Act provides for employment income which are exempt from taxation. They do not include retrenchment packages.  Further exemptions are provided under Section 21(1) of the Income Tax Act.

Section 21(1) provides as follows;

(1) The following amounts are exempted from tax;

    a. The income of a listed institution;

* The income tax of any organization or person entitled to privileges under the Diplomatic Privileges Act to the extent provided in the regulations and orders made under that Act;
* The official employment income derived by a person in the public service of the government of a foreign country if -
* The person is either a non resident person or is a resident individual solely by reason of performing such service;
* The income is payable from the public funds of that country; and

                     (iii) The income is subject to tax in that country;

* Any allowance payable outside Uganda to a person working in a Ugandan foreign mission;
* The income of any local authority;
* The income of an exempt, other than-

               (i) Property income, except rent received by an exempt organization in respect of immovable property which is used by the lessee exclusively for the activities of the organisation specified in paragraph (bb) (i) of the definition of “exempt organisation” in section 2 ;or

            (ii) Business income that is not related to the function constituting the basis for the Organization’s existence;

* Any education grant which the commissioner is satisfied has been made bona fide to enable or assist the recipient to study at a recognised educational or research institution;

             h. Any amount derived by way of alimony or allowance under any judicial order or written agreement of separation;

i. Interest payable on treasury bills or Bank of Uganda bills;

              j. The value of any property acquired by gift, bequest devise or inheritance that is not included in business, employment or property income;

k. Any capital gain that is not included in business income ;

l. Employment income derived by an individual to the extent provided for in a technical assistance agreement where-

* A short term resident of Uganda;
* The minister has concurred in writing with the tax provisions in the agreement ;

        m. Foreign - source income derived by-

 (i) A short term resident of Uganda;

  ii)A person to whom paragraph (c) or (l) of this subsection applies or

 iii) of this subsection applies;

or

A member of the immediate family of a person referred to in sub paragraph (i) and (ii) of this paragraph;

 n. A pension

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 ;

p. The proceeds of a life insurance policy paid by a person carrying on a life insurance business; or

q. The official employment income of a person employed in the Uganda people’s defence Force, or the Uganda police, or the Uganda Prisons Service, other than a person employed in civil capacity.

Retrenchment packages are not part of any clause in the above provision 30 and therefore not exempt.

In conclusion, the duty to pay taxes is sanctioned by the Constitution.Unless exempted, the obligation to pay income tax is mandatory. As was held in the case of Crane Bank V URA (Supra), laws that permit tax exemptions must be construed strictissimi juris against the entity claiming the same. The law does not look with favor at tax exemption and he who seeks to be this privileged must justify it by words too plain to be mistaken and so categorical to be misinterpreted.

In the instant case, it is my view that the words in Section 19 of the 10 Income Tax Act regarding taxable employment income are too plain to be mistaken. The language used in Section 19 of the Income Tax Act, does provide for exempt employment income. Retrenchment packages are not included on the list of exempt income. The appellant was right and had the mandate to tax the same.

By way of emphasis, the issue before this court - is not a rare area of litigation. There are several persuasive precedents within Uganda and foreign jurisdictions in respect to whether terminal benefits or retrenchment packages are liable for taxation. The Courts have rightly in my view reasoned that such packages are liable for taxation as  employment income. See; Katureebe Eridad & Anor V URA, HCCS No. 107 of 2010 (Eldad Mwangusya J as he was then), Lugeya Samuel & Anor V URA, HCCS No. 0156 of 2010 (V.T Zehurikize J); Namatiti Patrick Bukene and Anor V Civil Aviation Authority & URA, HCCS NO.203 of 2013 (Nyanzi J), Nkote Charles & Anor V URA & Anor, *25* HCCS NO. 107 of 2009 (Eldad Mwangusya J as he was then), Omondi Martin V URA, Claim No. 003 of 2014 (Industrial Court of Uganda), Eric Timbigamba V URA. TAT Application No. 13 of 2003 (Tax Appeals Tribunal of Uganda).

In the case of Nkote Charles & Anor V URA & Anor, (Supra), Mwangusya J (as he then was) observed as follows;

“The consent decree already cited in this judgment recognized that two categories of emoluments accrue at the termination of somebody’s employment. The Income Tax Act cited by both Counsel also makes the distinction between gratuity which is 35 included in the definition of Employment income under S. 19(1) and pension which, under S.21(1)(n) of the same Act is exempt from tax. This distinction made under the Act and recognized by the consent Decree is the key to determining the issue as to whether the taxation by PAYE from the Plaintiffs was lawful. This distinction is 40 a clear indication that while Terminal Benefits are taxable under the

 by the PAYE from the Plaintiffs’ Terminal benefits was lawfully done.... " (Emphasis mine)

Further in Namtiti Patrick Bukene & Anor Vs URA & Anor (Supra), Nyanzi. J held that;

    “I am therefore persuaded to rely on those sections and the authorities cited to hold that terminal benefits or golden handshakes are in other words gratuity and they are compensation from a terminated contract and are taxable under S. 19(1)(d) of the ITA. If they were exempt, the legislature would have expressly stated so under S.21 of the ITA   For the above reasons, I

find that the plaintiff’s terminated benefits in issue were subject to taxation. The taxation of Pay as you Earn from the terminal package was lawfully done by virtue of S. 19(1)(a) & (d) of Income Tax Act..” (Emphasis mine.)

The above opinion stretches to other jurisdictions like Tanzania. See;

MR. Eliza Kisimbo & Anor Vs Commissioner General [2005]1 TLR 138 (Tax Revenue Appeals Board). In that case, it was held as “the long service awards and golden hand shake payments should be treated as gratuitous payments and taxed”

Further in Zimbabwe, retrenchment benefits are deemed employment income and are taxable. Section 8 (1) of the Income Tax Act of Zimbabwe follows defines what constitutes “gross income” and retrenchment packages are brought into taxation under this section.

      Section 73 of the same Act provides for the payment of employee tax including tax on retrenchment packages with held by employers. The same Act in Section 14 as read with Paragraph 4(p) of the Third Schedule to the same Act exempts the greater of Us Dollars 5000 or one third of up to US Dollars 4500 of the amount of any severance pay,

        gratuity or similar benefit received on cessation of employment due to retrenchment, under the scheme approved by the Minister responsible for Labor.

The implication of this is that retrenchment packages are taxable except the exempted portion of the packages which is expressly provided for.

       In Malaysia, loss of employment packages are taxed under S. 13 (1) of the Income Tax Act of 1967. The amount paid on the termination of an employment may consist of the following elements;

. It is attributable to loss of employment such as redundancy (compensation). It is attributable to the past services of the employee (gratuity).

Therefore redundancy payment is considered to be taxable salary.

In conclusion, I find that the claim by the Respondents that their packages were exempt from taxation and was a “thank you” payment was not based on law but on mere sentiments.

       For the above reasons this appeal is allowed. All the decisions and orders of the lower courts are set aside and quashed. Considering the circumstances of this case, parties are to bear own costs.

Dated At Kampala this...20th.day of .December....2017.

         HON. JUSTICE OPIO RUBY AWERI, JSC.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

 CIVIL APPEAL NO. 09 OF 2015

(Coram:Arach-Amoko, Nshimye, Opio-Aweri, Mwondha and Tibatemwa- Ekirikubinza; JJ.S.C)

     BETWEEN

UGANDA REVENUE AUTHORITY………………………. APPELLANT

                                                                                AND

SIRAJE HASSAN KAJURA.............................................................. RESPONDENT

[Appeal against the judgment of the Court of Appeal at Kampala (Bossa, Kakuru and Kiryabwire, JJA), Civil Appeal No. 26 of 2013 dated 12thMarch, 2015].

JUDGMENT OF PROF. TIBATEMWA-EKIRIKUBINZA.

Introduction

The pivotal issue on which the above appeal hinges is: whether a retrenchment package is taxable under the Income Tax Act of Uganda.

Background

I have had the benefit of reading in draft the judgment of my learned brother, Hon. Justice Opio-Aweri, JSC and I agree with him that the appeal should succeed. I also agree with him on the orders proposed as to costs.

The full facts of this appeal are set out in the judgment of Justice Opio-Aweri, JSC. I will only give a brief background to the matter.

The respondent was an employee in Dairy Corporation, which was a government corporation. Following the Government Policy for Public Enterprise Reform and Divestiture of 1991, Dairy Corporation was restructured. This led to the respondent, Mr.Siraje Kajura, together with 160 other employees being declared redundant.

    Section 21 of the Public Enterprises Reform and Divestiture Act

Cap 98, provides that the Minister of Finance would ensure that provision is made for payment of compensation to employees

who are declared redundant as a result of the restructuring of public enterprises. Resulting from this, Mr.Kajura and the other  employees were given a terminal package.

Uganda Revenue Authority (URA) subjected the packages to Pay As You Earn Tax. As indicated on the record of the High Court, the package was said to have been comprised of salary, gratuity, long service award, transport, home allowance, leave allowance, settlement allowance and payment in lieu of notice. This led Mr. Kajura to bring a representative action against URA in the High Court contending that the package was not taxable. The High Court held in favour of Mr.Kajura. URA appealed against the High Court decision to the Court of Appeal. The Court of Appeal upheld the decision of the High Court and also found in favour of Mr.Kajura. Dissatisfied with that decision, URA made a further appeal to this Court.

Before this Court, URA argued that the package was derived by virtue of the respondent’s previous employment in the defunct Diary Corporation and therefore qualified as employment income subject to Pay As You Earn tax. The appellant relied on Sections 4(1) and Section 19 (1) of the Income Tax Act.

On the other hand, the respondent argued that the package was a ‘thank you’ from Dairy Corporation and not derived by virtue of  being in employment. That the money was received upon his employment contract being terminated and he thus did not qualify as an employee as defined in Section 2 (x) and Section 2 (z) of the Income Tax Act respectively.

Court analysis Section 2 (x) defines an employee as: “an individual engaged in employment.”

Section 2 (z) defines employment inter alia as:

* the position of an individual in the employment of another person;

(iii) ................ or

(iv) the holding or acting in any public office;

To determine whether the package received by the respondent is taxable, a tax Statute ought to say so.

Section 19(1) of the Income Tax Act stipulates different  categories of income derived from employment which are taxable. These among others include:

* Any wages, salary, leave payment, payment in lieu of leave, overtime payment, fees, commission, gratuity, bonus, travelling allowance, entertainment, utilities, cost of living, housing allowance, medical allowance or other allowance.

c) ..

d) Amounts derived as compensation for termination of employment contracts. (My emphasis)

Further categories of taxable employment income are provided for in Section 19 (6) of the Income Tax Act as follows:

a) Any amount derived in respect of employment provided by the employer, his associate or by a third party having an agreement with the employer.

* Any amount provided to an employee or employee’s associate. (for example: relative, partner, partnership)

c) Any amount provided in respect of past, present or prospective employment. (My Emphasis)

According to Section 4 (1) of the Income Tax Act, a tax is imposed on every person with a chargeable income. This Section provides as follows:

         Subject to, and in accordance with this Act, a tax to be known as income tax shall be charged for each year of income and is imposed on every person who has chargeable income for the year of income. (My emphasis)

Chargeable Income is defined in Section 15 of the Income Tax Act as the gross income of the person for the year less total deductions allowed under the Act for the year. Gross income includes employment income. (See: Section 17 of the Income Tax Act.)

From the facts outlined above, it is clear that the respondent received the package by virtue of his past employment with the Diary Corporation. Consequently, in line with Section 19 (6) (c) (supra), the argument by the respondent that the package which was received was not taxable because he was no longer in a subsisting employment relationship is untenable in law.

Furthermore, I opine that retrenchment is just but one way of bringing a subsisting contract of employment to an end. Under Section 21 of the Public Enterprises Reform and Divestiture Act, the Minister of Finance was obliged to ensure that provision is made for payment of compensation to employees who are declared redundant as a result of the restructuring of a public enterprise. It is under this section that the respondent was paid what is referred to as a retrenchment package. It follows that the payment was taxable under Section 19 (1) (d) supra which provides for taxation of amounts derived as compensation for termination of employment contracts.

As already stated in this judgment, to determine whether the package received by the respondent is taxable, a tax Statute ought to specifically say so. I must add that on the other hand, if money received by an individual is to be exempted from tax the exemption must also be specifically provided for in the law.  Iam alive to the fact that under Regulation 24 of the Pensions Regulations (under the Pensions Act), if an officer holding a pensionable office ceases to hold that office as a result of the abolition of that office under the Public Service Reform Programme, that officer is entitled to severance pay. And according to Section 8 of the Public Service Act, income tax is not to be charged on payments under the Pensions Act. The Section provides that: “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.” (My Emphasis).

Analysis of the above law would lead to the conclusion that severance pay received by a Public Servant as a result of being laid off as part of government’s restructuring would not be subject to tax. I must emphasize that this is because the law provided for that exemption. In contrast to this, the Public Enterprises Reform and Divestiture Act did not exempt recipients of payments referred to therein as “compensation” from taxation. I therefore find that the argument of Mr.Kajura that the package received was akin to that of Public Servants under the Public Service Act is not tenable. Indeed as the Court of Appeal noted in their judgment, the retrenchment packages do not qualify as pension.

      As stated by the Court of Appeal, the employment contracts of the respondent was terminated by operation of law. I am in no doubt that this would also be true of pensionable officers whose employment may be terminated under the Public Service Reform Programme. However,it is a trite principle of taxation that in tax matters, one has to look at the language of the tax statute to determine the taxability of the tax payer. On the one hand, the severance pay has been specifically exempted from taxation. On the other hand, there is no statute that has exempted the compensation payable under Public Enterprises Reform and Divestiture Act from   taxation. I am persuaded by the decision of AG vs. Bugishu Coffee Marketing Association Ltd [1963] EA 39.  in which Justice Slade not only held that, for a taxing Act one must look at the language used to ascertain the nature of the obligation created but also cited with approval the words of Rowlatt J in Cape Brandy Syndicate vs. Inland Revenue Commissioners (1921) KB 64 at page 71 that:

“In a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax.” (My emphasis)

Arising from the preceding discussions, I respectfully disagree with the Court of Appeal finding that the character of the package given to Mr. Kajura was not such as those envisaged under the provisions of the Income Tax Act.

Conclusion and Orders

I come to the conclusion that the compensation package received by  the respondent was taxable.

Therefore, the appeal succeeds.

Consequently, I would set aside the orders and judgments of the lower courts.

Costs

Each party prayed that costs be granted in this Court and in the courts below. The rule is that costs follow the event. However, the special circumstances of this appeal dictate that the respondent is not condemned in costs. The respondent was retrenched from employment and has been trying to claim that which was taxed off the compensation package based on his interpretation of the law. The purpose of the compensation package was to ameliorate the respondent’s loss of his job. This purpose would be defeated if the respondent is condemned to costs. I would therefore exercise my judicial discretion not to award costs to the appellant.

Instead, I would order that each party bears its own costs in this Court and in the courts below.

Dated at Kampala this ...20th Day of December 2017.

PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA

         JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA.

(CORAM: ARACH-AMOKO, NSHIMYE. OPIO AWERI, MWONDHA, TIBATEMWA JJSC)

       CIVIL APPEAL N0.09 OF 2015 BETWEEN

UGANDA REVENUE AUTHORITY...................................................... APPELLANT

AND

SIRAJE HASSAN ................................................................................. RESPONDENT

[Appeal against the judgment of Court of Appeal before Bossa, Kakuru and Kiryabwire, JJA. given on the 7th day of June of 2013]

JUDGMENT OF A.S. NSHIMYE. A.G. JSC.

I have had the benefit of reading the lead judgment of my brother, Hon Justice Opio Aweri JSC. I agree with his evaluation of the issues and conclusion.

In his judgment, he sets out the background of the dispute all through from the High Court to the Court of Appeal, before it reached this Court. I need not to reproduce the same in detail.

However, for the sake of emphasis, the respondent and 160 others whom I will refer to in the judgment as "respondents" who were the plaintiffs in the High Court, were retrenched employees of the then Dairy Corporation Ltd, which Government Privatized in 1991 under the Public Enterprises, Reform and Divestiture (PERD) Act Cap 98.

The respondents lost their employment and income they were deriving or had accrued to them from the defunct Corporation. They were rendered redundant.

Parliament, in the Public Enterprises Reform and Divestiture Act Section 21, obliged the Minister for Finance to make payment of compensation to employees who lost their jobs as a result of the Government's policy decision to divesture its Enterprises, Diary Corporation Ltd having been one of them.

Section 21 of the said Act provides:

"The Minister responsible for finance should ensure that provision is made for payment of

compensation to employees who are declared redundant as a result of the restructuring or liquidation of public enterprises through the establishment and operation of redundancy account to be opened at a commercial bank approved by the Minister responsible for finance". (Underlining is mine)

The word "compensation" in the above section was not defined. However, by its literal meaning in the Dictionary it means, In the Black's Law Dictionary 9th Ed Page 322

 "Compensation paid ........... to an employed person especially one who has been laid off".

In my view, such money would put a retrenched employee in such a position he/she would have enjoyed, as if, he/she was on the job and earning within the ambit of the contract of employment which was terminated.

In compliance with the above quoted section of the law, the respondents were each given a terminal retrenchment package. In the package, there was salary that was due and payable, salary in lieu of notice, gratuity, long service award, transport home allowance and settlement allowance.

Bearing in mind section 19(1) of the Income Tax Act, the appellant considered the items or lamp-sum constituting the retrenchment package, to be taxable income subject to exemptions. It collected tax totaling to Shs 1,171,778,314 (One Billion one hundred and seventy one million seven hundred and seventy eighty thousand three hundred and fourteen) from the respondents, hence the dispute.

It was the case for the respondent in the two Courts below that, the money received as retrenchment package was not taxable in accordance with the Income Tax Act. On the other hand, the case for the appellant was that the terminal benefits were not except under the law and therefore, they were taxable.

Both the trial and appeal Courts upheld the submission of the respondents that their benefits were not taxable.

Being dissatisfied with both concurrent decisions of the Courts below, the appellant appealed to this court on three grounds namely:

* That the learned justices of the Court of Appeal erred in law and in fact when they held that the benefits received by the respondent are not taxable.
* That the learned justices of the Court of Appeal erred in law when they held that the character of the package given to the respondent was not such as those envisaged under the provision of the Income Tax Act.
* That the learned justices of the Court of Appeal erred in law when they held that the appellant unlawfully taxed the respondents on the payments they received.

The consideration and disposal of the above three grounds of appeal boil to the issue whether, what the respondents received was employment income or compensation. It was certainly not the former because they were redundant and not working at the time of receipt of the money.

The appellant is mandated and empowered by both the Constitution Article 79(1) and the Income Tax Act Section 4 (1) to levy tax on employment incomes of citizen.

Equally Article 17 (1) (g) places an obligation on every citizen to pay taxes in accordance with laws made by Parliament.

Section 19(1) (a) (b) (c) (d) (e) (f) (g) and (h) of the Act is clearly reproduced in the lead judgment. It spells out those incomes, compensations and other benefits that attract taxation. It is clear from the record and submission of both counsel that the money that was paid to the respondents and named "retrenchment package" was compensation within the meaning of Section 19 (1) (d) of Income Tax Act.

It provides:

19(1) d

"Any amount derived as compensation for the termination of any contract of employment,

within or not provision is made in the contract of employment of such compensation or any among amount derived within communication of amounts due under any contract of employment''.

Section 21 of the PERD Act (Supra) did not specifically exempt the compensation mentioned therein. It follows therefore, that the retrenchment package that was paid was compensation within the meaning of section 19(1) (d) of the Income Tax Act and was taxable because it was not exempted from tax.

As court, however sympathetic we may be, the rules of interpretation of statutes prohibit us from adding or subtracting anything in a statute which was sealed by Parliament.

I adopt and agree with the authorities of RV the judge of the city of London court [1892] 10B 273 and The Registered Trustees of Kampala institute vs Departed Asians property custodian board, SCCA No. 21/1993 which both Counsel relied on, on this point.

For that reason, I would agree with counsel for the appellant on the three grounds of appeal that their Lordships of the Court of Appeal and of the original court erred in law when they held that the retrenchment money was not taxable.

I would concur with the lead judgment that the appeal be allowed and the judgment of the Court of Appeal be set aside.

I would also order that each party bears its own costs

Dated at Kampala, this —20th — day of ---December--- 2017.

A.S. NSHIMYE

A.G. JUSTICE OF SUPREME COURT

IN THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ARACH-AMOKO, NSHIMYE, OPIO-AWERI, MWONDHA, TIBATEMEMWA-EKIRIKUBINZA)

CIVIL APPEAL NO 09 OF 2016

BETWEEN

UGANDA REVENUE AUTHORITY:::::::::::::::APPELLANT

AND

SIRAJE HASSAN KAJURA::::::::::::::::::::::RESPONDENT

(Appeal from the decision of the Court of Appeal before Bossa, Kakuru and Kiryabwire, JJA dated 7th June, 2013 in Civil Appeal No 26 of 2013).

JUDGMENT OF ARACH-AMOKO, JSC

I have had the benefit of reading in draft, the judgment prepared by my learned brother; the Hon. Justice Opio-Aweri, JSC and I agree with his conclusion that this appeal be allowed with no order as to costs.

The appeal calls on us to decide whether the retrenchment packages that were paid to the respondents by the Privatisation Unit of the Ministry of Finance are liable to taxation under the taxation laws of Uganda. The High Court held that they are not subject to tax. The Court of Appeal agreed with the High Court. Hence this appeal.The facts of the case are not in dispute. The respondent together with 160 others are former employees of the former Diary Corporation Ltd. They were retrenched with effect from 31st August, 2006 as a result of the divestiture of the said parastatal under the Public Enterprises Reform and Divestiture Act, (Cap 98) of the laws of Uganda. Consequently, the Privatisation Unit of the Ministry of Finance paid the respondents retrenchment packages comprising of: salary, gratuity, long service award, transport, home allowance, leave allowance, settlement allowance and payment in lieu of notice.

Before effecting payment, the Privatisation Unit, on the advice from URA, deducted from the respondents’ retrenchment packages a total of Shs. 1,171,778,314(one billion, one hundred and seventy seven million, seven hundred and seventy eight thousand, three hundred and fourteen shillings only) , and remitted it to URA as Pay as You Earn (P.A.Y.E) tax.

The respondents were aggrieved and successfully sued URA in the High Court for unlawful taxation. URA’s appeal to the Court of Appeal was unsuccessful. The Court of Appeal held that the retrenchment packages as were paid to the respondents are not “expressly or by necessary implication” provided for under section 19 (1) (a) of the Income Tax Act. Hence this appeal.

As it was before the High Court and the Court of Appeal, the broad summary of the case for URA in this Court is that the retrenchment packages paid to the respondents by the Privatisation Unit after the divestiture of Diary Corporation Ltd, their former employer, were “employment income” within the meaning of section 19 of the Income Tax Act and were therefore taxable. The position of the respondents is, on the other hand, that the said payments were not taxable under the Income Tax Act because they were more like a “thank you.”

The resolution of this appeal required the interpretation of the laws relevant tothe dispute, namely the Constitution, the Income Tax Act and the PERD Act. The cardinal principles for the interpretation of tax statues is well laid out by the Court of Appeal and the trial judge in the word of Rowlett J, in Cape Brandy Syndicate vIRC (1921) KB 64 as follows:

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

As Platt JSC observed in the Registered Trustees of Kampala Institute vs Departed Asians Property Custodian Board SCCA No. 21 of 1993 at page 13:

“It is against the usual canons of construction to add word which are not there, unless there is a necessity to do so. The wall known words of Lord Bramwell come to my mind when he said:

“The words of a statue never should in interpretation be added or subtracted from without almost a necessity.”

The starting point is the Constitution which prohibits in Article 152(1), the imposition of tax on anyone except under an Act of Parliament. It reads:

“(1) No tax shall be imposed except under the authority of an Act of Parliament.”

Article 17(1) (g) provides that:

“It is the duty of every citizen of Uganda to pay tax.”

The law made by Parliament in respect of income tax is known as the Income Tax Act found in chapter 340 of the laws of Uganda. Section 4 thereof reads:

“4. Income Tax

... a tax to be known as income tax shall be charged for each year of income and is imposed on every person who has a chargeable income for the year of income.”

Section 15 of the Income Tax Act reads as follows:

“15.Chargeable Income

Subject to section 16, the chargeable income of a person for a year of income is the gross income of the person for the year.” (Underlining was added)

Section 17 of the Act defines “gross income” as follows:

“17. Gross Income

(1) Subject to this Act, the gross income of a person for a year of income is the total amount of---

* and
* Property income,

Derived during the year by a person, other than income exempt from tax.”

Section 19 of the Act defines “employment income”.

The issue is what amounts to employment income. The relevant section is section 19 of the Income Tax Act.

The case for URA Is that the payment to the respondents is covered under section 19(1) (a),(d) and (6) which defines employment income follows:

“19. Employment Income

* Subject to this section, employment income means any income derived by an employee from any employment and includes the following amounts, whether of a revenue or capital nature—
* Any wage, salary, leaves pay, payment in lieu of leave, overtime pay, fees, commission, gratuity, bonus, or any amount of any travelling, entertainment, utilities, cost of living, housing, medical or other allowances.”

(c) ...

* any amount derived as compensation for the termination of any contract of employment, whether or not provision is made in the contract of employment of such compensation , or any amount derived which is in commutation of amounts due under any contract of employment;”

Under section 19(6) of the Income Tax Act provides:

“For the purposes of this section, an amount or benefit is derived in respect of employment if it---

* is provided to the employee or to an associate of the employee;
* is provided in respect of past, present or prospective employment.”

Opio -Aweri JSC has agreed with URA’s submission in his lead judgment. I agree with him but for a slightly different reason.

Firstly, although the payments were itemized as salary, gratuity, long service award, transport, home allowance, leave allowance, settlement allowance and payment in lieu of notice, they were paid as a lump sum or a retrenchment package. That is why the Court of Appeal rightly held, in my opinion, that the said payments did not qualify as employment income described under section 19(1) (a) of the Income Tax Act.

Secondly, and most importantly, on a closer examination of the circumstances under which the payments were made and the reasons for the said payment, I am of the considered opinion that the payments were actually made as compensation and therefore fall squarely under the provisions of section 19(1)(d) of the Act. This is because the payments were made by the Privatisation Unit under an arrangement by the Government of Uganda that had wholly owned Diary Corporation Ltd. The basis of the payments was section 21 of the PERD Act which provides as follows:

 The Minister responsible for finance shall ensure that provision is made for payment of compensation to employees who are declared redundant as a result of the restructuring or liquidation of public enterprises through the establishment and operation of a redundancy account to be opened at a commercial bank approved by the Minister responsible for finance.” (under lining was added)

Further, Section 26 of the PERD Act provides that:

“26. Use of proceeds of divestiture

* The Minister responsible for finance may use the proceeds of divestiture in the divestiture account to meet—
* Costs and expenses associated with termination of contracts of employment between a public enterprise classified in class 11, 111, or 1V of the First Schedule to this Act and its employees as a result of the divestiture of that enterprise.


* 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 the divestiture of that enterprise in priority to all other liabilities, costs and expenses referred to in subsection (1).” (underlining emphasis was added)

Diary Corporation was listed under class 111 in the Schedule to the PERD ACT. It should be noted that sections 21 and 26 describe the payments as “compensation of redundant employees” and “costs and expenses associated with termination of contracts of employment between a public enterprise and its employees”, respectively.

Clearly, this is the language used in section 19(1) (d) of the Income Tax Act reproduced above which defines employment income to include any amount derived as compensation for the termination of any contract of employment, whether or not provision is made in the contract of employment of such compensation, or any amount derived which is in commutation of amounts due under any contract of employment;”

Thirdly, and as counsel for the respondents rightly argued, retrenchment payment is post employment payment. The payments were made to the respondents after termination of their contacts, that is, in respect of past employment, since they were already retrenched at the time of payment. This falls squarely under section 19(6) of the Income Tax Act reproduced above.

The payments were accordingly, in my opinion gross income and therefore chargeable under section 15 read together with section 19(1) (d) and (6) of the Income Tax Act. In the premises, I find that the URA lawfully taxed the respondents’ retrenchment packages since they were being compensated for the termination of their employment with Diary Corporation Ltd. For this reason, I would answer the ground of appeal in the negative and would allow the appeal.

Before taking leave of this matter, I think that the issue of the formula used need to be addressed by the URA to the satisfaction of the respondents. Section 19 (4) of the Income Tax Act provides that;

“(4) Where the amount to which subsection (1)(d) applies is paid by an employer to an employee who has been in the employment of the employer for ten years or more, the amount included in the employment income is calculated according to the following formula A x 75%

I raise this issue because of the different figures being used by counsel for the respondents. In the plaint, the figure claimed is shs. 1,171,778,314(one billion, one hundred and seventy seven million, seven hundred and seventy eight thousand, three hundred and fourteen shillings only). And this is the figure used by the trial judge in the judgment. In his reply to the submissions of the URA in this Court is 1,130,294,980 (one billion, one hundred and thirty million, two hundred and ninety four thousand and nine hundred and eighty shillings only.

In the result, and since Hon. Justice Nshimye JSC, and Hon. Justice Tibatemwa-Ekirikubinza JSC, also agree, by a majority of 4 to 1, this appeal is allowed. Since the respondents have been out of work as a result of the retrenchment, the justice of the case demands that each party should bear its own costs.

Dated at Kampala this ....20 th day of December. 2017

M.S ARACH-AMOKO

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

 IN THE SUPREME COURT OF UGANDA AT KAMPALA

(Coram Arach-Amoko, Nsimye, Opio Aweri, Mwondha, Tibatemwa- Ekirikubinza)

CIVIL APPEAL NO 09 OF 2015

 Between

UGANDA REVENUE AUTHORITY...................................................... APPELLANT

And

SIRAJE HASSAN KAJURA & OTHERS........................................ RESPONDENTS

(Appeal against the judgment of the Court of Appeal at Kampala before Bossa, Kakuru, and Kiryabwire JJA delivered on the 7th day of June, 2013)

JUDGMENT OF MWONDHA JSC (DISSENTING)

I have had the opportunity to read in draft the judgment of my learned brother Opio-Aweri JSC, I respectfully do not agree with his reasoning and conclusion.

The facts as set out according to the record are as hereunder:-

The respondents are one hundred and sixty (160) former employees of the defunct Diary Corporation on Limited. They were retrenched with effect from 31st of August 2006. The Privatisation Unit (PU) Ministry of Finance Planning and Economic Development, paid terminal packages to the respondents which comprised of salary, gratuity, long service award, transport, home allowance, leave allowance, settlement allowance and payment in lieu of notice. The Privatisation Unit sought advice from the Appellant Tax Authority about tax payable on the benefits due to the respondents. The Respondent claimed a sum of Shs1,171, 778, 314/= (one billion, one hundred and seventy one million, seven hundred and seventy eight thousand, three hundred and fourteen shillings) PAYE which the trial Judge awarded as special damages.

The appellant (defendant) in the written statements of defence did not specifically deny that figure in the plaint of the respondents. Instead in the 2nd defence written submissions the appellant submitted that it deducted Shs1,130,294,980/= PAYE which it computed. The respondents filed High Court Civil Suit No. 117 of 2009 challenging the assessment and payment of the said amount. The respondents further claimed that what was paid to them was not employment income but a: "thank you” following the privatisation of Ms Diary Corporation Ltd. They argued that the payment was akin to a gratuity and hence not liable to tax under S. 19 of the Income Tax Act Cap 340. The High Court and the Court of Appeal decided in favour of the respondents hence this appeal.

The appellant raised three grounds of Appeal as follows:-

2. The Learned Justices of the Court of Appeal erred in law when they held that the character of the packages given to the respondents was not such as those envisaged under the provisions of the Income Tax Act.
3. The Learned Justices of the Court of Appeal erred in law when they held that the appellant, unlawfully taxed the respondents on the payment received.

The appellant prayed that:-

2. Order the respondent to pay costs of this Court and the Courts below.

This is a second appeal and a Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible or even probable, that it would have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law. See Kifamunte Henry v. Uganda. Criminal Appeal No. 10 of 1997.

In order for a second appellate Court to interfere with the concurrent findings of fact by the trial Court and the first appellate Court, it has to be shown that the first appellate Court erred in law or in mixed fact and law, to justify an intervention see Rex v. Hassan Bin Said alias Kimani Somali [1942] 9 EACA 62, Okeno v. Republic [1972] EA 32.

I had the liberty to peruse the Court of Appeal and High Court records of proceedings and read the judgments as well. It was clear that, the question to be determined considering the three grounds of appeal was:-

“Whether the appellant unlawfully taxed the respondents retrenchment benefits”

The question as above stated doesn’t only call for the interpretation of S. 19 of the ITA but all the provisions of the Income Tax Act which are related to S. 19 taking due regard the Constitution of this country.

It is therefore important to state the principles governing interpretation of constitution and or statutes. These were laid down in various cases of this Court and other Commonwealth jurisdictions...

The recent case of Wesley Tusingwire v. Attorney General Constitutional Appeal No. 04 of 2016, this Court cited the case of Attorney General vs Susan Kigula & Others Constitutional Appeal 03 of 2006, Paul Semwogerere and Others Vs Attorney General Constitution Appeal No. 01 of 2002 among others.

In the case of Wesley Supra, this Court reproduced some of the principles and I will reproduce them here for clarity, those which are relevant to this particular case as follows:-

1. The Constitution is the Supreme Law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of its inconsistency Article (2) (2) of the Constitution. See Presidential elections petition No. 2 of 2006 SC Rtd. Col. Kiiza Besigye v. Y. K. Museveni.
2. The entire Constitution or Statute has to be read together as an integral whole with no particular provision destroying the other. But each sustaining the other. This is the rule of harmony, the rule of Completeness and exhaustiveness. (see P. K. Semwogerere & Anor v. Attorney General Constitutional Appeal 01 of 2002.
3. Where words or emphasis are clear and unambiguous they must be construed in its natural and ordinary sense.
4. Where the language of the Constitution/Statute sought to be interpreted is imprecise or ambiguous, a liberal generous or purposeful interpretation should be given to it.
5. The National objectives and Directives Principles of State Policy in the Constitution provide:-

I. The following objectives and principles shall guide all organs and agencies of the state, all citizens and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.

Principle XIV of the National objectives foresaid provide:-

The state shall endeavor to fulfill the fundamental rights of all Ugandans to social justice and economic development and shall in particular ensure that;

* All development efforts are directed at ensuring the maximum social and cultural wellbeing of the people and Article 8 A National interest

1. Uganda shall be governed based on principles of national interest and common good enshrined in the National objectives and directive principles of state policy.

(2)

My learned brother’s draft judgment and submissions of Counsel for the appellant relied on the case of Rowlatt in Cape Brandy Syndicate v. JRC (1921) KB 64 as applicable and therefore still good law in Uganda.

The Cardinal principle arising from lit and quoted “In a taxing Act, clear words are necessary in order to tax the subject ...................................................  In

a taxing Act one has merely to look at what is clearly said. There is no room for an intendmat. There is no equity about tax................................... cannot be applicable in our situation today.

The principles of interpretation some of which have been reproduced above clearly prove, that, that principle cannot be good law in Uganda. The Taxing act is a legislation which is subject to the Constitution. It has to be consistent with the Constitution so, it cannot be interpreted any different.

The principle arising from the case of Rowlatt in Cape Brandy Supra in addition to being merely persuasive, it was made long before the 1995 Constitution was promulgated. There are so many cases which have stated the principles of interpretation. In short the principle has been superseded.

The other case by Counsel for the appellant relied on was R v. The Judge of City of London Court [1892] I and 13 373,which propagated the rationale of the literal rule as "To prevent Courts from delving into political arenas, in order to pressure the dichotomy between the functions of Parliament and Courts, the former creating the law and the latter in theory applying the law.” For the same reasons given in the Cape Brandy Case with respect cannot be good law in Uganda.

With respect I do not agree, with both the pronouncement that the Courts role is to apply the law made in theory which the Parliament makes. The Courts role is to give life to theory embedded in the Statute and consequently give the Statute life not the other way round. In the case of Unity Dow v. Attorney General of Botswana [1992] LRC Const. 632 at page 668 it was stated the Constitution is the Supreme Law of the land and it is meant to serve not only this generation but yet unborn. It cannot allow being lifeless museum piece, on the other hand Courts must breathe life into it as occasion may arise to assure the health growth of the state through it.” My view is that the Courts when interpreting a legislation promotion must do it in light of the Constitutional provisions, where all these legislations emanate from. I find the reasoning therefore superfluous which is based on a case decided in 1892 and in total disregard of the clear provisions of the Constitution. Article 126 (I) and 2 (e) of the Constitution instructive.

In the preamble of the Constitution and for clarity I have to reproduce it here. "We the people of Uganda recalling our History which has been characterised by political and Constitutional instability, recognising our struggles against the forces of tyranny, oppression and exploitation, (emphasis is mine) committed to building a better future by establishing a constitutional order based on the principles of unity, peace equality, democracy, freedom, social justice and progress, exercising our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the constitution making process among others     ”

The cited cases relied on have no relevancy or applicability now in the Uganda situation.

There is no dispute that Article 152 (I) of the Constitution provides for “no tax to be imposed except under the authority of an Act of Parliament”. There is obviously no dispute about the legislative powers of Parliament as provided in Article 79 (I) of the Constitution and imposition of a duty on every citizen to pay taxes. The issue is not whether the Constitution provides to pay tax or whether Parliament has power to make laws. The issue is whether the act of taxing the respondents on the retrenchment packages PAYE was lawful in the context of the law and the provisions reproduced herein. That is why we have to carefully look at the Constitutional provisions to guide the interpretation of the ITA the law provisions in issue.

The answer is obviously in negative for the following reasons:-

With due respect my learned brother based the conclusions on the issue by relying on only interpretation of Section 19 (I) (a) (b), (c), (d), (e), (f), (g) and (h) of the Income Tax Act.

In order to appreciate the input of Section 19 (a) of ITA, it has to be read together as an integral whole with no particular provision destroying the other but each sustaining the other. (Semwogerere Paul K. (Supra)

The National objectives (Part XIV) have to be born in mind and the preamble to the Constitution. The imposition of the duty to every citizen to pay tax by the Constitution, as a development effort is aimed at ensuring maximum social ... well being of the people not the vice versa of aiming at diminishing the social wellbeing of the people. All provisions connected there to have to be considered or read together.

In the instant case the starting point is to determine whether the respondents at the time of taxation, Privatisation Unit was the employer of the respondent since Dairy Corporation Ltd had been divested by Government under the PERD Act (Public Enterprises Reform and Divesture Act Cap. 98, for the retrenchment benefits to be construed as employment income or not with the context of ITA?

The relevant provisions of the Income Tax Act Cap 340 in my view are Section 2(y) which defines an employer as a person who employs or remunerates an employer.

There was no evidence on record to show that (Privatisation Unit Ministry of Finance and Economic Planning) was at any one time the employer of the respondents. Ms Dairy Corporation Ltd. was no more since it had been divested so PU had no basis for withholding the Shs.1,171,778,314/= PAYE. In connection to this is S. 116 of the ITA which provides for with holding tax by employers.

“(I) every employer shall withhold tax from a payment of employment income to an employee prescribed by regulations under Section 164.

1. the obligation of an employer to withhold tax under subsection (I) is not reduced or extinguished.

It is very clear that reading Section 2(y) S. 19 and 116 of the ITA it is employment income if the respondents were employees of P.U. In the instant case there was no such relationship of employer and employee. Ms Diary Corporation Ltd was a public enterprise with different Board of Directors.

So there is no way the retrenchment benefit would by necessary implication fall squarely within the ambit of S. 19 (I) (a). One can only withhold the tax if he or she is in employment of a known employer. The words any income derived by any employee from any employment. The term derive has to be understood in the context of Section 2 (y) and Section 116 (I) of the ITA.

* Much as section 19 (6) provides “For purposes of this section an amount or benefit by an employer or by a third party under an arrangement with the employer or an associate of the employer.
* Is provided to an employee or to an associate of an employee and
* Is provided in respect of past, present or perspective employment.”

Again with respect I disagree with the conclusion of my learned brother when he asserts that all the above elements exist in the packages paid to the respondents. There was no evidence of P.U. being a third party or associate of Ms Diary Corporation Ltd which was divested. Not even in the PERD Act. He just assumed on his own that P.U. was a third party but the above provision is clear. If it’s a third party associate there ought to have been evidence that Diary Corporation relinquished its obligation to PU Ministry of Finance & Economic Planning. As he states it’s the defunct Diary Corporation which was the employer of the respondents and they were laid off or retrenched. If the Ministry of Finance & Economic Planning was a third party, the 1st or 2 nd defendant ought to have pleaded in the WSD, so and evidence ought to have been adduced at the trial. This was not the case. Counsel for the appellant, in his submissions at page 7 he stated “but as the Corporation had been privatised, the responsibility of paying the Respondent was taken over by the Privatisation Unit under the Ministry of Finance. The package was under a government arrangement whereby the employer of the respondents, having become defunct could not herself be availed funds to pay off its employees.”

First of all I have to state that this was submission from the bar because there was no pleading to that effect and there was no evidence adduced at all to support the submissions. Second but most important, it’s clear that P.U. or Ministry of Finance could not be on the facts of the case be employers, to qualify to be third party or associates in law. The law is clear on how one can be a third party. The Memorandum and Articles of Association of Ms Diary Corporation were not adduced in Evidence. Not even the Act which established it as a public enterprise.

It is trite law that a second appellate Court to interfere with the concurrent findings of fact by the trial Court and the first appellate Court, it has to be shown that the first appellate Court erred in law or in mixed fact and law to justify an intervention which is not the case in this instant case.

The facts of this case are peculiar to retrenchment package where the employees were ejected out of employment or work not out of their own fault. The objectives of PERD Act under S. 2 (2) are clear. Included (a) the reduction of Government equity holding in the Public Enterprise and thereby inter alia relieving the Government of the financial drain on its resources and burden of their administration and raising revenue by means of divesture, including where necessary liquidation or dissolution of Public Enterprises and by the promotion, development and strengthening of a private sector ...

* From the above extract of the objectives of PERD, I am of the view that the Government was not divesting or privatising the Public Enterprises so that they increase revenue by taxing the retrenches to support the private sector. This would mean that Government would be doing nothing but oppressing and exploiting the respondents. This therefore cannot be correct.

Reading the preamble which is instructive on fighting the forces of tyranny and exploitation among others together with National Objectives, of the Constitution on Article 8A(I), Section S. 2(y) and 116 (I) and Section 4 (1) of ITA it becomes clear to me that past employment does not even arise in the circumstances of this case.

Other provisions of the ITA which ought to be considered and used to guide in resolving the issue is S. 2 (yy) which gives the word “person” an inclusive definition “person includes:-

An individual, a partnership, a trust, a company, a retirement fund, a government, a political subdivision of a government and a listed institution.

S. 2 (z) defines employment in the following terms:- Employment means

* the position of an individual in the employment of another person.
* A directorship of a company
* A position entitling the holder to a fixed or ascertainable remuneration.
* the holding or acting in the public office

S.15 defines chargeable income and states:- subject to S. 16 the chargeable income of a person for a year of income is the gross income of the person for the year less total deductions allowed under this Act for a year.

S. 17 (i) subject to this Act, the gross incomes of a person for a year of income is the total amount or

* business income
* employment incomes and
* property income

Derived during the year by the person other than income exempt.

It is on record and in the judgment of the Court of Appeal that the respondents were terminated from work with effect from 31st August 2006.

It is clear that starting from 1st September, 2006 the respondents were no longer employees of the defunct enterprises and were not in employment. One wonders how the respondents were deriving income from employment and from which years!!?

PU has never been their employer already discussed in this judgment so PAYE deduction was for what. Up to 31st August, 2006 their earnings were subjected to PAYE.

The Court has to interpret it in the context of the facts and circumstances of each case guided by not only that provision and law but the Constitution as stated above.

Accordingly considering the facts and circumstances of the instant case together with the relevant provisions of the law in light of the above provisions of ITA and the Constitution as reproduced in this judgment the respondents were unlawfully taxed.

Turning to the question as to “whether the retrenchment packages amounted to compensation as provided under the Income Tax Act.”

Obviously S. 19 (I) (d) refers to compensation derived from termination of any contract for the payment of such compensation or any amount derived which is in computation of the amount due under any contract of employment.

I am unable to accept Counsel for the appellant’s submission and also with what my learned brother concluded. The fact that the compensation is not defined in the ITA and the fact that PERD Act provided for compensation under S. 21 thereof does not mean in the least that the benefits were subject to tax. This is so because of my earlier discussion in resolving the first question as to whether the respondent’s benefits were lawfully taxed. I will add that the retrenchment package was the States fulfilment of the fundamental rights of these Ugandans who had lost the right to work in the Public Enterprise.

The learned Justices of the Court of Appeal canvassed this issue as indeed the trial Judge did. They said, agreeing with what the trial Judge found that the terminal benefits do not constitute compensation. It is clear that the provision provides for amounts derived as compensation for the termination of any contract of employment. I agree with the finding of the Court of Appeal that retrenchment packages were as a result of Government restructuring programmes and it can not be seen as compensation within the meaning of S. 19 (I) (d) of the ITA. The authority of the case of Samuel Lubega, Lawrence Kamulegeya Richard Olet Pule v. UCBL SCCA No 024 of 2010. Justice BM Katureebe JSC as he then was stated “The purpose of the retrenchment package was to amelioratate their loss of a job...” Thus a retrenchment package is akin to an amelioration.

Counsel for the respondent submitted that the Black’s Law Dictionary 8th Edn. at page 89 defines Amelioration to mean, the act of improving something: the state of being better or an improvement. The facts of that case are similar in respect of retrenchment issue but the appeal had been dismissed. In that case the employees of the Banks signed a document accepting the package which had a condition that when you sign you waive all the rights to any claim. The rentended package was assessed basing on a salary they didn’t agree to. So they sued UCDL but of course they had waived their right so their appeal was dismissed. Both parties had prayed for costs. His Lordship declined to grant costs because in his view he said "The normal rule is that costs follow the event but in peculiar circumstances of this case where the appellants were retrenched from their employment and have been trying to claim a little more based on their own interpretation of the terms, it would defeat the whole purpose of the retrenchment package were these people to be condemned in costs. The purpose of retrenchment package was to emeliorate their loss of a job. ... I believe this is a case where the Court should exercise its inherent powers to do substantive justice and not award costs against the appellant. I would order that each party bears its own costs in this Court and the Courts below.”

I agree with that conclusion and equating to the instant case it’s related in that material particular with the decision. This instant case is distinguished from compensation which is defined in the same dictionary at page 301 as remuneration and other benefits received in return for services rendered especially salary and wages. Compensation is payment for work. They had already been paid for work by 31st August 2006 the issue of compensation could not arise.

I find the case relied on like Nkobe Charles and Another v. URA HCCS No. 0156 of 2010 and the other cases applicable to the facts of this case.

For the reasons given in this judgement I do not find any justification for interfering with the concurrent findings of the trial Court and the 1st Appellate Court. The judgment of the Court of Appeal is upheld.

I dismiss this appeal with costs of this Court and the Courts below.

Dated at Kampala this ...20th.day of December 2017

 Mwondha JSC

 JUSTICE OF THE SUPREME COURT