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 conclusionthat this appeal be allowed with noorder 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 andwere 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 less total deductions allowed under this Act 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---

(a) ***Business income;***
(b) ***Employment income; and***
(c) ***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) whichdefines employment income follows:

“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 a revenue or capital nature—

(a) 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.”

(b) …

(c) …

(d) 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---

(a) is provided by anemployer or by a third party under an arrangement with the employer or an associate of the employer;
(b) is provided to the employee or to an associate of the employee;
(c) 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 itemised 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 isbecause 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:

"21.compensation for redundant employees.

The Minister responsible for finance shall ensure that provision is made for payment of compensation to employees who are declared redundant as aresult 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." (underlining was added)

Further, Section 26 of the PERD Act provides that:

"26. Use of proceeds of divestiture

(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 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.

(b)…

(c)…

(d)…

(2)Any costs and expenses associated with termination of contracts ofemployment 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 ofredundant employees"*** and "***costs and expenses associated with termination ofcontracts***

ofemployment 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 thenegative 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 ....20th ...day of.....December.....2017

M.S ARACH-AMOKO

JUSTICE OF THE SUPREME COURT