THE REPUBLIC OF UGANDA

IN THE MATTER OF THE TAX APPEALS TRIBUNAL

MISC. APPLICATION NO TAT 06/2011

HERITAGE OIL & GAS ……APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY …… RESPONDENT

RULING

This ruling is in respect of an application brought under Sections 5 and 71 of the Arbitration and Conciliation Act Cap 4, Rule 30 of the Tax Appeals Tribunal (Procedure) Rules and Section 101 of the Civil Procedure Act seeking to stay the legal proceeding before the Tax Appeal Tribunal and referring the matter to arbitration.

Briefly the facts of the application are that the applicant entered into a Production Sharing Agreement with the Government of Uganda. In the said agreement both parties agreed that in the event of any dispute it would be referred to arbitration. The applicant sold its participating interest to Tullow under a purchase agreement and a supplemental agreement thereto. As a result of the said sale the respondent issued tax assessments which the applicant objected to and filed two applications in the Tribunal.

The applicant contended that under S. 5 of the Arbitration and Conciliation Act, where there is a proceeding which is a subject of arbitration, the court shall refer the matter to arbitration. The applicant contended that the dispute arising under the Production Sharing Agreements have been referred to arbitration and that

both the applicant and the Government have engaged themselves in the arbitration proceedings.

The applicant further contended that under S.2 (3) of the Uganda Revenue Authority Act the respondent is an agent of the Government of Uganda. Under S.2 (i) of the Arbitration and Conciliation Act, a party to arbitration includes a person claiming through or under a party. The applicant submitted that the respondent falls within this definition.

The applicant cited the Case of *Mungereza V PricewaterhouseCoopers Africa Central* (2002) 1 EALR 174 where the Court of Appeal held that where parties clearly, voluntarily and willingly subscribe to an arbitration agreement as a means of solving their differences, to depart from it the appellant has to show good reason. The court further held that in this case the trial judge was justified in ordering a stay of proceedings.

Counsel for the applicant further referred to the Halsbury's law of England 3rd Edition Vol.2 p.26 para.60 which states that the court must be satisfied that there must be sufficient reason why the matters should not be referred to arbitration in accordance with the Agreement. The applicant contended that the defendant has not shown any sufficient reason as to why the matter should not be referred to arbitration.

The applicant also cited the case of *Riechhold Norway ASA and another V Goldman Sachs International* [2000] 2 ALL ER 679 where the Court of Appeal affirmed the decision that subject to only statutory restrictions the jurisdiction to stay proceeding is unfettered and depends only on the exercise of the court's discretion.

The respondent opposed the application on the ground that it did not meet the test of being referred to arbitration under the Arbitration and Conciliation Act. The respondent contended that the Production Sharing Agreement was not attached. If it was attached, the Tribunal would be in a position to assess whether it binds the respondent.

The second ground of objection was that the Production Sharing Agreement binds the Government of Uganda and not the respondent. The Government is represented by the Attorney General in legal disputes and not the Commissioner General. The respondent contended that whereas the applicant was correct in noting that the respondent is an agent of the Government, it omitted conveniently to note that the Uganda Revenue Authority is a body corporate with perpetual succession, capable of suing and being sued. The respondent contended that it is not a party to the arbitration proceeding, nor the Agreement and it should have been sued in its corporate names.

The respondent further contended that the Tax Appeal Tribunal was established to resolve tax disputes between the taxpayers and the respondent. The Tribunal confirmed this in ruling in the matter of *Tullow Uganda V Uganda Revenue Authority and Heritage Gas & Oil* TAT Misc. Application 4/2011 where is stated that it can only entertain tax disputes in pursuit of the Constitution. The Tribunal noted that it does not have original jurisdiction over all disputes including contractual disputes. The jurisdiction of the Tribunal to stay proceedings is encumbered by statutory restrictions.

The respondent further contended that the dispute before the Tribunal was a result of the assessments issued by the respondent. An arbitration agreement is

not one of the avenues for resolving tax disputes listed under the Income Tax Act nor Tax Appeals Tribunal Act.

The respondent further contended that the applicant acquiesced or waivered its rights when it decided to pursue their objections and appealed to the Tribunal. They deposited the thirty (30%) percent of the tax and submitted itself to the internal objection mechanism which must be exhausted before recourse to the international arbitration mechanism.

The respondent contended that the applicant filed this application because it lacked interest in prosecuting the main applications. It contended that this application is an attempt in its scheme to delay the expeditious resolution of the tax dispute.

The applicant emphasized that Section 5 of the Arbitration and Conciliation Act requires the proceeding to be brought subsequent to the signing of the arbitration agreement. The respondent contended that legal proceeding sought to be stayed were commenced prior to any arbitration proceedings. Section 5 is inapplicable because the matter of legal proceeding is not the subject of an arbitration agreement between the parties to the agreement.

The respondent also contended that the subject matter of the legal proceeding before the Tribunal arose out of the respondent exercising a statutory mandate. The mandate cannot be brought before arbitration. Any contract to arbitrate would be ultra vires. Counsel for the respondent referring to the cases cited by the applicant stated that the Tribunal has to exercise it discretion in the interest of justice.

Counsel for the applicant in reply noted that the Production Sharing Agreement was attached to the main applications. S. 2(1) of the Arbitration and Conciliation Act makes the respondent a party. Counsel contended that the applicant is not challenging the jurisdiction of the Tribunal. There are no statutory or constitutional restrictions which bar the Tribunal from referring the matter to arbitration.

There are a number of questions which arise from the submissions of both parties and the Tribunal would wish to ask itself in order to reach a decision in the above application. What is the dispute that was referred to the arbitral body? Did the Government of Uganda bind the respondent in the Production Sharing Agreement? Can contractual provisions in an agreement override the statutory mandate of the respondent? Can the Tribunal surrender its constitutional mandate to resolve tax disputes to an arbitral body provided for in a contract?

The Arbitration and Conciliation Act provides

(1) A judge or magistrate before whom proceedings are being bought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defence, and both parties having been given a hearing, refer the matter back to arbitration unless he or she finds-

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

S. 2 of the said Act define Court to mean “High Court”.

The Tribunal notes that though the applicant stated that it and the Government of Uganda referred their dispute to an arbitral body, the nature of the dispute was not revealed. Was it in relation, as per the title of the Agreement, to

Production Sharing, a breach of a contractual obligation or was it a tax dispute? The Affidavit of Patrick Sawczysn does not state so. It merely states in paragraph 10 that “The dispute arising under the Production Sharing Agreement has been referred to arbitration by the applicant”. Is the dispute before the Tax Appeals Tribunal and the Permanent Court of Arbitration sitting at the Hague the same? The Tribunal cannot tell. It would be a matter of speculation. The terms of reference of the dispute to the Hague were not submitted nor evidence adduced to that effect.

S. 2 of the Arbitration and Conciliation Act provides that a party means a party to an arbitration agreement and includes a person claiming through or under a party. The Production Sharing Agreement was made between the Government of Uganda and the applicant. Uganda Revenue Authority is established under the Uganda Revenue Authority Act as stated in the preamble

> “ ...as a central body for the assessment and collection of specified revenue, to administer and enforce the laws relating to such revenue and to provide for related matters.”

S. 2 of the Act provides

> “(1) There is established an authority to be known as the Uganda Revenue Authority.
>
> (2) The authority shall be a body corporate with perpetual succession and a common seal and shall be capable of suing and being sued in its corporate name and, subject to this Act, may borrow money, acquire and dispose of property and do all such other things as a body corporate may lawfully do.
>
> (3) The Authority shall be an agency of the Government and shall be under the general supervision of the Minister.
>
> .....”

S.1 of the Act defines “Minister” to mean the Minister responsible for Finance.

The applicant submitted that though the Government signed the Production Sharing Agreement with the applicant Uganda Revenue Authority is an agent of

government and is bound by it. Counsel for the respondent objected to the application on the ground that the respondent was not party to the Production Sharing Agreement nor the Arbitral proceedings. Whereas the Tribunal agrees with the applicant that Uganda Revenue Authority is an agent of Government this is only in respect of collecting and remitting revenue to the latter and enforcing the laws thereto. The relationship between the Government of Uganda and the Uganda Revenue Authority should be understood within the context of the Uganda Revenue Authority Act. Uganda Revenue Authority falls under the docket of Ministry of Finance to which it reports. Outside the Act, the Government of Uganda is like any other taxpaying person as provided in the various laws. When it comes to assessing and collection taxes, this is the sole preserve of Uganda Revenue Authority until provided for otherwise. To enable it to collect taxes Uganda Revenue Authority is a body corporate with the capacity to sue and be sued.

What is important to note is that the Production Sharing Agreement was not signed by the Minister of Finance. It was signed by the Minister of Energy and its Permanent Secretary on behalf of government. The preamble of the Agreement shows that it was in respect of “exploring for and producing petroleum”. It is not a “Tax Collection” Agreement but a “Production Sharing” agreement. Uganda Revenue Authority does not have the mandate to explore and produce petroleum. It cannot be said that Uganda Revenue Authority is claiming or is acting under the Government in the said Agreement or vice versa. The said Agreement was signed outside the Uganda Revenue Authority Act. It is inconceivable to hold that when the Government of Uganda entered into the Production Sharing Agreement it was doing so as a Principal for the respondent. The Government entered the said Agreement like any taxpayer entering a business or commercial venture and if any tax liability accrued from it the

respondent should not hesitate to collect the said revenue. Since Uganda Revenue Authority was not a party to the Production Sharing Agreement and is not claiming under it S.5 of the Arbitration and Conciliation Act cannot come into play. The said section is inoperable.

The dispute before the Tribunal arose from the assessments issued by the respondent on the applicant. The said assessments were issued under S. 95 of the Income Tax Act. The applicant objected under S. 99 of the Act and filed an application before the Tax Appeals Tribunal under S.100 of the Act. The Income Tax Act does not mention government of Uganda in its interpretation section. However it merely states that the 'Minister" means "Minister responsible for Finance". Once an assessment is issued under a statutory provision it cannot be fettered by a contractual provision. The mandate of the Uganda Revenue Authority is conferred by a statutory provision and not a contractual obligation. Though Article 14 of the Production Sharing Agreement provides that taxes and other lawful impositions shall be paid in accordance with the laws of Uganda in a timely provision, with or without the said article tax obligations are imposed by the Parliament in accordance with the Constitution of the country. The claim by Uganda Revenue Authority arises from an Act of Parliament.

The Tax Appeals Tribunal was specifically set up to listen to tax disputes. It is a specialised institution in the sense it is composed of members who are knowledgeable in tax, finance, accounting and legal matters as provided for under S. 5 of the Tax Appeals Tribunal Act. The Tax Appeals Tribunal refers to the decision it made in *Tullow Uganda Limited V Uganda Revenue Authority and Heritage Oil and Gas* (supra). In the said application the Tribunal referred to the case of *Rasanen V Rosemont Instruments Ltd*. (1994) 17 O.R. (3d) 267(C.A.)

where it stated that the reasoning of Abella in respect of administrative tribunals is persuasive:

> [Administrative tribunals] were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly.

The Tax Appeals Tribunal is established in accordance with the 1995 Constitution of Uganda which states in article 152 (3) that "Parliament shall make laws to establish tax tribunals for the purposes of settling tax disputes".

In line with the above cited case, in order to exercise its mandate the Tax Appeals Tribunal Act provided for an independent Tax Appeals Body. S.14 (3) of the Tax Appeals Tribunal Act provides that "A tribunal shall in the discharge of its functions be independent and shall not be subject to the direction or control of any person or authority." The applicant prayed that the proceedings before the Tribunal be referred to an arbitral body. In the event the Arbitral Body makes a decision, is the Tax Appeal Tribunal required to adopt it or take it into consideration? If so, would this not amount to the Tribunal exercising its mandate under the influence or direction of another person? The 1995 Constitution clearly provides that Parliament shall establish a Tax Appeal Tribunal to listen to tax disputes. The constitutional mandate to listen to tax disputes cannot be fettered by a contractual provision in an agreement.

One of the reasons a tribunal is set up is to listen to matters expeditiously. The Tribunal has clearly stated in Miscellaneous Application 23 of 2010 *Habumugisha Innocent V MTM Catering and Uganda Revenue Authority* that it is very reluctant to stay its own proceedings as to do so would prejudice the

need to expeditiously hear tax disputes. The Tax Appeals Tribunal Act does not explicitly provide for any section where the Tribunal can stay its own proceedings. The Tribunal referred to Halsbury's Laws of England Volume 37 paragraph 926 page 290 which stated that an order for stay of proceedings is made very sparingly and only in exceptional circumstances.

The applicant made its application under Rule 30 of the Tax Appeals Tribunal (Procedure) Rules. The said rules were made by the Tribunal under S. 22 of the Tax Appeals Tribunal Act which allowed the Tribunal to apply rules of practice and procedure of any court subject to such modifications as the tribunal may direct. Firstly the said rules give the Tribunal discretion to apply rules of practice and procedure of any court. However the Tribunal cannot apply rules which enable it to abdicate from its constitutional mandate to listen to tax disputes. Not all rules and procedure of the High Court are applicable in the Tribunal. The Tribunal is required to exercise its discretion in line with the Constitution and the Tax Appeals Tribunal Act.

Tax matters are very important. In some jurisdictions tax matters take precedence after constitutional matters. A Tax dispute should be resolved expeditiously to allow the taxpayer to continue its business normally. At the same time this would enable the collecting body remit its collections timely to the Government to enable it meet its expenditures. The Tribunal was set up to offer speedier, cheaper and more accessible justice in respect of resolving tax disputes. Justice delayed is justice denied. It would not be in the interest of justice for the Tribunal to surrender its mandate to resolve tax disputes expeditiously. Exercising its discretion in the interest of justice the Tribunal shall not allow the application before it. It is thereby dismissed with costs to the respondent.

Dated at Kampala this …….day of……2011

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Asa Mugenyi	**Stephen Akabway**	**Pius Bahemuka**
Chairman	**Member**	**Member**