THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

TAT APPLICATION NO. 17 OF 2019

ATC UGANDA LIMITED ==========APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ==========RESPONDENT

BEFORE DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MR. GEORGE MUGERWA

RULING

This application arises from a withholding tax assessment of Shs. 24,232,558,369 by the respondent on the applicant on deferred interest accrued or paid to a non-resident company.

In June 2012 the applicant received a 7-year loan of US$ 124,500,000 at an interest rate of 6.56% p.a. from its parent company, Uganda Tower Interco BV (UTI), incorporated in the Netherlands, to fund the purchase of communication business towers from MTN Uganda. The Shareholder Loan Agreement between the applicant and UTI, provided that interest shall accrue and such accrued interest will be added to the principal loan amount outstanding. For 54 months, the accrued interest was added to the principal loan. The applicant did not pay withholding tax to the respondent for 54 months and the accrued interest was added to the principal loan. The respondent issued an assessment of Shs. 24,232,558,369 to the applicant as withholding tax on the purported accrued interest added to the principal loan for the period 2012 - 2017. The applicant objected to the assessment.

The agreed issues are:

1. Whether withholding tax is payable on the purported accrued interest which was added to the principal loan?
2. What remedies are available to the parties?

The applicant was represented by Mr. Festus Akunobera and Mr. Walter Bakirana while the respondent was represented by Mr. Ronald Baluku and Ms. Christa Namutebi.

The dispute between the applicant and the respondent involves the imposition of withholding tax on interest on loans between inter group companies. The applicant did not pay interest to its parent company for a period of time. The interest was added to the loan. The respondent contended that the applicant ought to have charged withholding tax to which the applicant objected to.

The applicant's witness, Ms. Dorothy Kabagambe Ssemanda, its Chief Finance Officer, testified that the applicant, incorporated in Uganda, is engaged in the leasing and operation of communication sites. It is a subsidiary of Uganda Tower Interco B.V. (UTI) a company incorporated in the Netherland which owes 99% of the applicant's share capital. The applicant obtained a 7 year loan of US$ 124,536,227.35 from UTI, at an interest rate of 6.56% p.a. to facilitate purchase of communication towers from MTN Uganda. Clause 3.3 of the Shareholder Loan Agreement, between the applicant and UTI, provided that for the initial 30 months, interest would accrue on the outstanding loan principal and such accrued interest would be added to the principal loan and be paid to UTI at a future date. Clause 3.4 stated that the parties agreed that interest accruing in the subsequent period would be payable unless the applicant experienced insufficient cash flow in which case it would pay UTI at a future date. She testified that from 2012 – 2017 the applicant never made any interest payment to UTI. In February 2018 the first payment was made. When the responded examined the applicant's income tax returns for the period 2012 – 2017 in 2018 it contended that the applicant had never withheld tax on the accrued interest. The respondent consequently raised a withholding tax assessment of Shs. 24,232,558,369 for the period under review.

The respondent's witness, Mr. Muyingo Hassan Mohmood, a Tax Examiner in its Large Taxpayers Department testified that an audit carried on the applicant in 2017-2018 revealed it had not withheld tax on interest payments to its parent company, UTI. The

audit also revealed that UTI had acknowledged income from Uganda by including it as income in its audited statement for the period January 2012 – December 2017. The accounts of UTI showed that this income was recognized and tax paid on it in the Netherland for two years. The respondent accordingly assessed withholding tax under S. 83 of the Income Tax Act, which provides that a resident person who makes any interest payment to a non-resident person has to pay withholding tax. The assessment was based on interest income derived by the non-resident UTI from Uganda.

The applicant contended that this dispute revolves are at what point in time does the obligation to pay tax in respect of deferred interest arise; is it at the point of accrual or at the point of remittance of the interest ? The applicant contended that it should have paid withholding tax at the point not when it accrued and was added to the principal loan, that is 2012 to 2017, but when the applicant remitted money to UTI in discharge of its interest obligation.

The applicant submitted that S. 2 (xxx) of the Income Tax Act defines the term "payment" to include "any amount paid or payable in cash or kind, and any other means of conferring value or benefit on a person." The phrase "paid or payable" encompasses amount paid as well as amount accrued. The applicant argued that the respondent's reliance on the definition of payment in S. 2(xx) of the Income Tax Act as to include an amount paid or payable was in disregard of S. 47 of the Income Tax Act. The applicant argued that the opening statement in S. 2 reads: "In this Act, unless the context otherwise requires..." No single provision of the statute should be read in isolation of other provisions of the Statute. The applicant cited **NLRB v Federbush co**., 121 F.2d 954, 957 where Judge Learned Hand stated: "Words are not pebbles in alien juxtaposition; they have only a communal existence and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used..." S. 47 (1) of the Income Tax Act provides that interest in the form of any discount, premium or deferred interest shall be taken into account as it accrues. However S. 47(2) provides that "where the interest referred to in Subsection 1 is subject to withholding tax it shall be taken to be derived or incurred when paid." The

applicant argued that interest in S. 47(2) of the Income Tax Act is derived or accrues when it is paid. Therefore the context of the phrase "when paid" used at the end of the Section means "when remitted". The applicant argued that the respondent also failed to consider that the specific provision in S. 47(2) of the Income Tax Act supersedes the general provision in S. 47(1) of the Act. The applicant argued that the statutory language is clear and unambiguous – S. 47(1) is a general principle that interest should be taken into account at the point of time when it is accrued. Where interest is subject to withholding tax, S. 47(2) prescribes an exception that is interest should be taken as derived when paid. The applicant contended that it is a rule of statutory interpretation that a specific provision in a statute takes precedence over a general provision; S. 47(2) is a specific provision and therefore takes precedence over S. 47(1). The applicant cited **J.K. Cotton Spinning & Weaving Mill Co. Ltd. v The State of Utha Pradesa & Others** *(1961) AI 1170* and **Uganda Revenue Authority v Siraji Hassan Kajura** *Civil Appeal No.09 of 2015* to support its case.

The applicant argued that S. 47(1) cannot have the same meaning and effect as S. 47(2) of the Income Tax Act. It argued further that it is a time-honoured rule of statutory interpretation that courts should not interpret any provision in any way that would render another part of the statute inoperative or redundant. The applicant cited **Colenti v Franklin**, 439 *U.S 379, 392* and **P.K. Ssemwogerere v Attorney General** *Appeal No. 1 of 2002*.

On the financial statements of UTI showing that it recognized interest income it accrued and not when the applicant remitted the funds to UTI, the applicant contended that the application of Ugandan tax law does not depend on what a taxpayer does with its books of accounts but from the language of a statute.

In reply, the respondent submitted that interest paid or payable to UTI was subject to withholding tax under S. 83(1) of the Income Tax Act which imposes tax on every non-resident person who derives interest from Uganda. The respondent submitted that S. 47(1) provides that interest in the form of discount, premium or deferred payment shall

be taken into account as it accrues. But S. 47(2) provides that where interest referred to in S. 47(1) is subject to withholding tax, the interest shall be taken to be derived or incurred when paid. The respondent argued that S. 2(xx) of the Income Tax Act defines "payment in" to include any amount "paid or payable" in cash or kind and any other means of conferring value or benefit on a person." The respondent contended that the definition of 'when paid' should not be given an ordinary meaning but rather a contextual meaning in accordance with the Act. The respondent cited **Kenya Revenue Authority v Republic (Ex Parte Fintel Ltd)** *Civil Appeal No. 311 of 2013* where the court stated that: "the words upon payment in their colloquial and ordinary parlance suggest payment or paid, that is, to be given money for something in exchange, it is our considered view that the relevant statute, the income tax must be the source of the meaning attached to it. The interpretation must be contextual."

The respondent submitted that the applicant's witness, Ms. Dorothy Kabagambe Ssemanda testified that the latter obtained a loan from UTI. In its books of account, UTI acknowledged receipt of interest from the applicant as income. Exhibit A8, UTI's statement of income acknowledges receipt of income from the applicant for the year 2016 to 2017.

The respondent also argued that in **Kenya Revenue Authority v Republic (Ex parte Fintel Ltd)** (supra) the Kenyan Court of Appeal held that the strict interpretation of the word 'paid' includes any amount credited in the interest or on behalf of a person in this case of the contractor. The respondent concluded that the applicant was liable to pay withholding tax because UTI had constructively received the interest.

Having listened to the evidence and read the submissions, the Tribunal gives its ruling as below:

Uganda Tower Interco B.V. (UTI) is a non-resident company incorporated in the Netherlands and owning 99% of the shareholding in the applicant. It lent US$ 124,500,000 to the applicant at an interest rate of 6.56% for a period of 7 years. Under

the Shareholding Loan Agreement of 29th June 2012 between the parties, Clause 3.3 stipulated:

> "During the initial period, interest shall accrue during each interest period on the principal amount outstanding and such accrued interest will automatically be capitalized and added to the Principal Amount outstanding on the date which is the end of each interest period"

According to the agreement, Initial Period means 30 months period beginning on the effective date. Clause 3.4 of the agreement provided:

> "During the Subsequent Period the interest shall accrue during each interest period on the Principal Amount outstanding and such accrued interest will be payable by the Borrower to the Lender in arrears on the last day of the Interest Period unless there is insufficient cash flow to pay the entire amount of accrued interest for such period (in which case the entire amount of accrued interest in respect of the relevant Interest Period will automatically be capitalized and added to the Principal Amount)."

The agreement defines Subsequent Period to mean the period beginning on the date which is the 30 month anniversary of the Effective Date and ending on the payment date.

The respondent examined the records of the applicant in 2017 to 2018. The examination revealed that the applicant never accounted for withholding tax on interest accrued but added it to the principal loan during the period 2012 -2017. The respondent issued a withholding tax assessment of Shs. 24,232,558,369 for the period 2012 – 2017. According to the applicant, it never made any interest payment to the lender. So the question is: was the applicant obliged to pay withholding tax?

The Income Tax Act imposes tax on activities of non- resident persons involving international payments. S. 83(1) of the Income Tax Act provides:

> "Subject to this Act a tax is imposed on every nonresident person who derives any dividend, interest, royalty, rent, natural resource payment, or management charge from sources in Uganda"

S. 120 of the Income Tax Act requires that: "Any person making a payment of the kind referred to in Section 83, 85 or 86 shall withhold from the payment the tax levied under

the relevant Section." Therefore under the law, the applicant is obliged to withhold tax from interest it pays to UTI. The applicant argued that it never paid any interest to UTI, which the respondent disputes. The respondent contends that the withholding tax is due as soon as the interests accrues or becomes payable to UTI.

This raises the question: At what point in time should withholding tax be charged? Is it at the time of accrual or at remittance? S.47 of the Income Tax Act provides for payment of taxes on debt obligations with discount or premium. It reads:

> "(1) Subject to subsection (2), interest in the form of any discount, premium, or deferred interest shall be taken into account as it accrues.
>
> (2) Where the interest referred to in subsection (1) is subject to withholding tax, the interest shall be taken to be derived or incurred when paid."

The word "defer" is defined in Black's Law Dictionary 10th Edition page 513 to mean "To postpone; to delay until a later date". The interest payable by the applicant was payable on later dates, making S. 47(1) applicable. According to S. 47(2) which is specific and overrides the general provision under S. 47(1), where interest is subject to withholding tax, interest is taken to be derived when it is paid. This means where interest is not subject to withholding tax or taken into account as it accrues. S. 47(2) provides specifically for withholding tax payable which is in respect of international payments; it requires that it is taken into account when it is paid.

The respondent contended that S. 2(xx) of the Income Tax Act is applicable. S. 2(xx) reads: ""Payment includes any amount paid or payable in cash or kind, and any other means of conferring value or benefit on a person." The respondent argued that payment includes an amount that is payable. According to the respondent, withholding tax becomes due when the interest accrues. The Tribunal does not agree with that line of thinking. The respondent's contention seems to be founded on convenience; it is difficult to ascertain when interest has actually been paid when dealing with loans involving inter-group companies especially where there may not be dealing at arm's length. The Tribunal agrees with the applicant that the opening statement in S. 2 of the Income Tax Act is: "In this Act, unless the context otherwise requires..." The context in S. 47(2)

requires withholding tax to be charged when interest is paid. A specific provision, in this case S. 47(2), in a statue overrides general provisions, these are S. 2 and S. 47(1). In **Cooper Motors v Uganda Revenue Authority** *TAT 67 of 2018*, the Tribunal stated:

> "The Tribunal notes that S. 2 of the Income Tax Act that defines payment is an interpretation section. The word payment is defined to include payment of any amount paid or payable in cash. In essence when interest accrues WHT becomes payable. On the other hand, S. 47(2) states that interest subject to withholding tax shall be taken to be derived or incurred when paid. In other words WHT tax on interest accrues when the interest is paid. If S. 2 of the Income Tax Act had been read as a whole one would have noted that S. 2 begins with "In this Act, unless the context otherwise requires..." S. 2 of the Act applies until the context so requires. The context in S. 47(2) requires that WHT on interest be withheld when it is paid. S. 2 is in consonance with S. 47(2). It does not conflict with S. 47(2) of the Act. It gives room for S. 47(2) to apply. It is just a question of reading the whole Section without limiting oneself to only the definition of the term "payment". "

Therefore the Tribunal holds that withholding tax should be due on interest when it is paid and not when it accrues.

Having stated that withholding tax is due when interest is paid, the Tribunal has to look at the Shareholding Agreement and determine: Was interest ever paid and if so, when was it paid? According to Clause 3 of the agreement, interest accrued during each interest period on the principal amount and such accrued interest was automatically capitalized and added to the principal amount outstanding on the date which is the end of each interest period. S. 2 of the Income Tax Act defines 'payment' to include "any amount paid or payable in cash or kind, and any other means of conferring value or benefit on a person'. *Black's Law Dictionary* 10th Edition page 1309 defines "payment" as "performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation."

When interest is converted into capital and added to the principal loan the applicant is paying the interest. We should not confuse the issue of 'paid' or 'accrued' with 'mode of payment'. The parties should read the agreement and understand fully understand the

terms. The issue is not about whether withholding tax should be paid when interest is accrued or paid. The issue should have been: Did the applicant pay the interest. It is about mode of payment. How was the applicant paying the interest? Clause 3 is clear. At the end of each interest period the interest was automatically capitalized and added to the principal loan.

The respondent's limited perception of 'payment', restricts it to an exchange of physical cash or where there is a transfer of monies from a debtor to a creditor. The world has evolved. Payment is no longer restricted to physical exchange of cash over a counter and a receipt is issued. These days one can have a payment without a physical exchange of cash or transfer of monies. A payment can be made by conversion of a debt into equity, a relief of a debt, or a swap of a debt with an obligation, a digital or an electronic payment and so many other means involving the conferring of value or benefit to a creditor. S. 2(xx) of the Income Tax Act mentions "any other means of conferring value or benefit on a person." In this case it involved converting an interest payment into a loan obligation. By converting the interest into a loan obligation, the applicant was discharging it obligation to pay the interest in issue. After converting the interest into the principal loan at the end of each interest period, UTI has no further claim, legal or whatsoever against the applicant. In short, the applicant was paying the interest. The loan amount the applicant owed to UTI increased. It was adding value or conferring a benefit to UTI as envisaged by S. 2(xx) of the Income Tax Act. When the loan is increased it automatically means that the applicant would pay more interest in future.

It is therefore understandable why UTI included interest in its statement of account or audited books in 2017. When the applicant converted interest into loan, UTI received income. This is made convenient where one inter group company lends to another. The Tribunal does not agree with the applicant when it submits that the application of the law should depends on the language used in a statute and not the books of accounts. The audited books indicate a true reflection of a company's financial affairs. They are signed by the company's directors and auditors. The law does not operate in isolation. The

facts on the ground determine the operation of the law. That is why under S. 91 of the Income Tax Act, a Commissioner may re-characterise a transaction to reflect the substance or to avoid an anti-tax avoidance scheme. The parent company UTI paid tax on the income it received in another jurisdiction, Netherlands. This was not controverted. A query would arise as to how in the jurisdiction where the income was sourced taxes are not due. Was the interest deemed paid in the foreign jurisdiction but when it came to local jurisdiction it was accrued or payable? This does not seem so. The evidence points otherwise. Payment of interest involving inter group companies involve transfer pricing issues. Was the interest by the parent company to the subsidiary company at arm's length? This was not looked at. We are not concerned with that.

The Tribunal finds that by converting the interest and adding it to the principal loan under clauses 3.3 and 3.4 of the Shareholder Loan Agreement, the applicant fully discharged its obligation to UTI the lender as far as interest payments was concerned. The accrued interest became part of the principal loan, meaning that UTI, the lender, increased the loan amount to the borrower, the applicant. The Tribunal finds that to be in line with S. 47(2) of the Income Tax Act which provides "Where the interest referred to in subsection (1) is subject to withholding tax, the interest shall be taken to be derived or incurred when paid." The interest was paid at the end of each interest period when it was converted into the loan. The Tribunal therefore finds that the applicant is liable to pay the assessed withholding tax including the penalty. The application is dismissed with costs to the respondent.

Dated at Kampala this 26th day of May 2020.

DR. ASA MUGENYI	**DR. STEPHEN AKABWAY**	**MR. GEORGE MUGERWA**
CHAIRMAN	**MEMBER**	**MEMBER**