

THE REPUBLIC OF UGANDA
IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA
TAT APPLICATION NO. 14 OF 2017

EAST AFRICAN BREWERIES INTERNATIONAL LIMITED =====APPLICANT
VERSUS
UGANDA REVENUE AUTHORITY =====RESPONDENT

BEFORE DR. ASA MUGENYI, MR. GEORGE MUGERWA, MR. SIRAJ ALI

RULING

This application arises from an income tax assessment of Shs. 9,780,243,983 by the respondent on the applicant for income purportedly received on transactions involving group companies.

The applicant is a wholly owned subsidiary of East African Breweries Limited, and is incorporated in Kenya. In July 2015 the respondent audited Uganda Breweries Limited, also a subsidiary of East African Breweries Limited and found information relating to transactions with the applicant for the period May 2008 to June 2015. The respondent issued an assessment of income tax of Shs, 9,780,243,983 for the period 30th June 2009 to June 2015 on the ground that the applicant was resident in Uganda for tax purposes.

The agreed issues are:

1. Whether the applicant is a taxable person in Uganda under the Income Tax Act?
2. Whether the applicant obtained income from Uganda for the period in issue?
3. What remedies are available to the parties?

The applicant was represented by Mr. Cephas Birungyi, Ms. Belinda Nakiganda and Ms. Lydia Namugoma while the respondent was represented by Mr. Alex Aliddeki Ssali, Ms. Mwajumah Nakku Mubiru and Mr. Ronald Baluku.

The dispute between the applicant and the respondent revolves around transactions between group companies that are purportedly in different jurisdictions. It is contended that the applicant incorporated in Kenya was marketing products for group companies in Uganda. The respondent contends that the applicant sourced income in Uganda which the latter denies.

The applicant's witness, Ms. John Kambo, the Group Tax Manager for East African Breweries Limited, testified that his employer is a holding company operating in Kenya with subsidiaries in East Africa and South Sudan. He testified that the applicant is one of the subsidiaries of East African Breweries Limited. He ensures that all group companies operate in a tax compliant manner. He oversees the operations of the subsidiaries on a micro level. He testified that the respondent issued an income tax assessment on a company that is not in Uganda. There was no audit done on the applicant. He stated that the applicant was involved in developing the markets of the companies in countries that did not have manufacturing operations. He testified that the applicant was assessed because of documents obtained in an audit of Uganda Breweries Limited which showed transactions between the latter and the applicant. Mr. Kambo stated that the applicant did not have an employee in Uganda. He stated that one Robert Isaale was not an employee of the applicant but was an import and export coordinator working with Uganda Breweries Limited. He stated that the applicant does not carry out marketing services in Uganda. It was doing nothing for companies in Uganda. It did not issue tax invoices in Uganda. It has no activities in Uganda. He said the applicant was marketing Ugandan products outside Uganda. After sourcing customers, they pay to the applicant. A portion is remitted to Uganda Breweries Limited. The applicant adds a markup on the products obtained from Uganda Breweries Limited sold to customers in other countries. There was no audit on the applicant.

The respondent called one witness, Mr. Siraj Kanyesige, its Assistant Commissioner, Large Tax Payer's Office. He testified that Uganda Breweries Limited is the manufacturer of Bell beer and other brands. He testified further that the respondent received information that Uganda Breweries Limited was no longer making sales. It was no longer declaring exports since 2008. Where sales were made there were expenses by a sister company.

There was no withholding tax, VAT and management fees between sister companies being paid. The applicant and Uganda Breweries Limited are related. They share ownership and management. The witness testified that he went to Nairobi to understand how the business was being run. He was informed that the exports of Uganda Breweries Limited was being handled by the applicant which sourced for customers outside the borders. It obtained orders from Congo, Rwanda and South Sudan. Uganda Breweries would issue invoices to the applicant. The applicant would use a company called Bollore to export the goods. He testified that the documents obtained showed that one Robert Isaale was an executive of the applicant located in Uganda. The applicant would pay a markup of 7.5 % to Uganda Breweries and then sell the items at a markup of 70 to 90%.

In its submissions, the applicant cited S. 4 of the Income Tax Act which imposes income tax on the chargeable income of every person. S. 15 of the Act provides that income tax chargeable is the gross income for the person less deductions. While S. 17(2) of the Income Tax Act provides that taxation of the gross income of a resident person includes income from all geographical sources that of a non-resident person includes income only from sources in Uganda. The applicant submitted that under S. 10 of the Income Tax Act a resident person is one if it (a) is incorporated or formed under the laws of Uganda; (b) has its management and control exercised in Uganda at any time during the year of income; (c) undertakes the majority of its operation in Uganda. The applicant cited **De Beers Consolidated Mines Ltd. v Howe** [1906] AC 455 where the company carried on business of diamond mining in South Africa but its main functions were in England. The court stated that "the real business is carried on where the central control and management actually abides, not where the trading operations are taking place, but where the central management and control take place." The court held that although mining was in South Africa, the real management and control was in England, and thus the company was resident in England. The applicant contended that the management and control of a company is by its board of directors. The applicant argued that all its directors reside in Kenya and not Uganda. The applicant submitted that the majority of its operations are in Kenya. The evidence adduced in the trial bundle show that the applicant was filing its tax returns in Kenya. The applicant submitted that it therefore does not meet the requirements of a resident person in Uganda.

The applicant argued that though there existed transactions between it and Uganda Breweries Limited, it did not source income from Uganda as it has no place of business in Uganda. It did not conduct any marketing activities in Uganda. The applicant argued that the respondent's position that it sourced income from Uganda because Mr. Robert Isaale was employed in Uganda and carried operations on its behalf by creating a branch is not correct. There are no minutes of meetings showing that the applicant employed Mr. Robert Isaale. It argued that the Income Tax Act as of 1st July 2015 did not make provision for income derived by a non-resident person carrying on business through a branch in Uganda. It further argued that S. 78(a) of the Income Tax Act defined a branch to include a place where a person is carrying on business through an agent rather than a general agent acting in the ordinary course of business. The applicant argued that S. 78(a) is not applicable because the applicant has no equipment or substantial machinery in Uganda. It therefore prayed that its application be allowed, declaratory orders be made and it is awarded monies spent on a bank guaranty, general damages and costs of the suit.

In reply, the respondent argued that S. 4 of the Income Tax Act imposes tax on every person whether it is a resident or non-resident person. The respondent contended that S. 18(1)(c) of the Income Tax Act defines business income to mean any income derived by a person carrying on a business and includes the gross proceeds from the disposal of trading stock. Under S. 2(iii) trading stock includes anything produced manufactured, purchased or otherwise acquired for manufacture, sale or exchange. The respondent contended that the applicant was carrying on the business of purchase and disposal of trading stock. The respondent argued that the applicant purchased goods from Uganda Breweries Limited at a cost plus markup of 7.5 % which was confirmed by Mr. John Kambo in his testimony. The applicant sold the goods to external customers at a cost plus a markup between 70 to 90%. The goods were dispatched from the applicant's address situated with the Uganda Breweries Limited's premises. The clearing company of the goods sold by the applicant, Bollore Africa Logistics International, is located in Uganda. The respondent submitted that under S. 17(2) of the Income Tax Act the gross income of a non-resident person includes only income derived from sources in Uganda. The respondent further submitted that S. 79(s) of the Income Tax Act provides that income is derived from sources in Uganda to the extent to which it is attributable to an activity

conducted through a branch. S. 78 of the Act defines a branch to be a place where a person is carrying out business and includes a place where a person is carrying on business through an agent other than a general agent of independent status acting in the ordinary course of business. The respondent cited **AB LLC and BD Holdings LC v Commissioner of the South African Revenue Services** Case No. 13276 where a permanent establishment included a place of management, a branch, an office, a factory. In the said case some employees moved from one area to another. The appellant was present in the boardroom during the tenure of the contract. The court stated that there was no doubt that the appellant had established a fixed place of business in South Africa. The respondent argued that the applicant had an agent in Uganda known as Robert Isaale who was responsible for preparing the export of goods. The said Robert Isaale executed its duties from its office premises located within those of Uganda Breweries Limited. In exhibit PEX 2 the applicant admitted that Robert Isaale was assigned to it for the period May 2010 to December 2014.

The respondent argued further that the applicant should be liable to income tax since it derived its income from sources in Uganda. The respondent cited **Heritage Oil and Gas Limited v Uganda Revenue Authority** TAT 26 of 2010 where the Tribunal stated that: "Residence is not a necessary condition for tax liability if there is sufficient connection between the source of income, profit or gain and the taxing jurisdiction then such income, profit or gain maybe taxable." The respondent also cited **Offshore International S.A v Federal Board of Inland Revenue** frc/1/36/175: 2 All Nigerian Tax cases 67 where the Federal Court found that a company is not exempted from tax simply because it is not incorporated or resident in Nigeria or because it has no office or place of business in Nigeria. The respondent argued that it has an unlimited powers to tax the profits of any company accruing in or derived from Uganda. The respondent further cited **Rhodesia Metals Limited (Liquidator) v Commissioner of Taxes** (1941) 9 ITR 45 where the Privy Council stated that "source means not a legal concept but something which a practical man would regard as a real source of income." The respondent argued that S. 79 of the Income Tax Act provides that income is derived from sources in Uganda to the extent to which it is attributable to any activity which occurs in Uganda including an activity conducted through a branch in Uganda. The respondent cited **Vodafone International**

Holding B.V v Union of India and another Writ petition 1325 of 2010 where an agreement of sale of an asset was signed outside India. The court considered that the nexus was provided in the business connection in India and the situs of the property in India. The respondent also cited **Shell Petroleum International Mattschappij B.V v Federal Board of Inland Revenue** Court of Appeal Lagos CA/ LI&/200, 5 All Nigerian Tax cases 85 where the court held that the fact that a company is non- Nigerian and therefore not resident in Nigeria is not a sufficient excuse that it does not have a fixed base in Nigeria. Basing on the said decisions the respondent argued that the applicant is liable for income tax sourced in Uganda

The respondent argued further that the applicant was involved in a fraudulent tax avoidance scheme. The applicant fraudulently used Uganda Breweries Limited's Tax Identification Number (TIN) in its customs process when exporting goods. The goods sold to external customers were dispatched from the warehouses of Uganda Breweries Limited. The invoices tendered in showed that though the applicant was the owner of the goods, Uganda Breweries Limited was the exporter. It ensured that Uganda Breweries Limited's tax returns did not reflect the sale to external customers where the markup was between 70 to 90%. Uganda Breweries Limited instead declared direct sales to the applicant where the markup was 7.5%. Uganda Breweries Limited did not declare and or include any export sales in its Value Added Tax (VAT) returns. The respondent cited **Akinsete Syndicate G.M v Senior Inspector of Taxes Akure** F.S.C 164/63 All Nigerian Tax cases 161 where the court stated: "It is trite that a person may use lawful means to avoid tax; what he may not do is to try to evade it. What he does should be genuine- not merely a veil to hide or dissemble the reality of things." The respondent argued that under S. 91(1) of the Income Tax Act it can re-characterize a transaction or an element of a transaction that was entered into as part of a tax avoidance scheme. S. 91(2) of the Income Tax Act defines a tax avoidance scheme to include any transaction, one of the main purpose of which is the avoidance or reduction of liability to pay tax.

The respondent contended that in its tax returns filed in Kenya, the applicant declared Uganda Breweries Limited as its associated enterprise. S. 90 of the Income Tax Act deals with transactions involving associates. It allows the Commissioner to apportion income

tax for purposes of tax in transactions of associates. S. 3(1) of the Income Tax Act defines an associate.

Lastly, the respondent contended that the applicant has not discharged the burden placed on it and therefore its application should be dismissed. The respondent also contended that the applicant never applied for general damages in its application. The applicant did not show that the former acted illegally when it forcefully registered it. The applicant has not proved that it is entitled to damages and costs. The respondent prayed that the Tribunal finds that the applicant is a taxable person.

In rejoinder, the applicant submitted that the burden of proof shifts in civil matters. The applicant cited **Steel Corporation of East Africa v URA** GCT CA 2010 and **J.K. Patel v Spear Motors Ltd.** SCCA 4/199. It argued that the standard of proof for fraud is higher than that in other civil matters. The applicant contended that the respondent never pleaded fraud in its application. The applicant further contended that the respondent introduced the matter of fraud at submission level. The respondent ought to have brought it in as a counterclaim. Without prejudice, the applicant contended that the respondent did not adduce documentary evidence to show that applicant used Uganda Breweries Limited's TIN. The applicant further submitted that the respondent failed to show that former ensured that Uganda Breweries Limited's tax returns did not reflect the sale to external customers. The applicant argued that the respondent did not prove that the applicant carries on business in Uganda. The respondent also did not prove that the applicant disposed of any goods in Uganda. The applicant's witness testified that the goods are sold to third parties in Congo, South Sudan and other countries. The goods are sold from Kenya to the third parties. Therefore any profits earned is derived in Kenya and not Uganda.

The applicant submitted that there are differing principles in taxation of resident and non-resident persons under S. 17(2) of the Income Tax Act. A resident person is charged on all income derived from all geographical sources while a non-resident person is charged only for income derived from sources from Uganda. The applicant argued that the respondent's contention that it had a branch in Uganda by virtue of the existence of one

Robert Isaale is not substantiated. The applicant submitted that Isaale was being paid by Uganda Breweries Limited at all times. Isaale was never an agent of the applicant. The applicant submitted that it has no place of business in Uganda, no office in Uganda Breweries Limited's premises.

The applicant reiterated that it is a non-resident person and may only be subject to tax sourced in Uganda, if any. The applicant submitted that S. 79(s) of the Income Tax Act provides that income is derived from sources in Uganda to the extent that it is attributable to any other activity which occurs in Uganda. The applicant argued that the word 'other' implied that the income should be sourced in any other situation not envisaged above. The applicant argued that creating a company to source for markets outside Uganda does not qualify to be an activity which occurs in Uganda.

In respect of the invoices issued, the applicant contended that they were issued from Kenya and payment was made there. The applicant submitted that it is not in dispute the applicant received payments from external customers for sale made from Uganda Breweries Limited. What is in dispute is whether the activity of receiving payment was carried out in Uganda. The payments were made to the applicant's accounts in Kenya. The applicant argued further that the respondent went to the offices of Uganda Breweries Limited and never found any office allocated to the applicant.

The applicant contended that the respondent should pay general damages for forcefully registering it and for the financial strain in accessing bank guarantees and for inconvenience.

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

The applicant is a company incorporated in Kenya. It is a subsidiary of East African Breweries Limited. The respondent audited Uganda Breweries Limited, another subsidiary of East African Breweries Limited and discovered that it was transacting with

the applicant. The respondent issued an income tax assessment of Shs. 9,780,243,983 on the applicant for purported income it obtained.

The first issue that arose was whether the applicant was a resident person in Uganda. S.4 of the Income Tax Act imposes a tax known as income tax on every person who has chargeable income for the year of income subject to the Act. S. 15 of the Act states that 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. S. 17 of the Act states that the gross income of a person for the year is the total amount of business income, employment income and property income. S. 17(2) of the Act differentiates which gross income of a resident person and non- resident person will be chargeable to tax. Under S. 17(2) (a) for a resident person the gross income includes income derived from all geographical sources. Under S. 17(2)(b) the gross income of a non-resident person chargeable to tax includes only income derived from sources in Uganda. While the respondent contends that the applicant is a resident person, the latter contends it is non- resident person. The applicant argued that its income was received outside Uganda and cannot be taxed.

So the first question the Tribunal has to ask itself is whether the applicant was a resident or non- resident person. S. 10 of the Income Tax Act provides for resident companies. It reads

“A company is a resident person for a year of income if it –

(a) Is incorporated or formed under the laws of Uganda;

(b) Has its management and control exercised in Uganda at any time during the year of income; or

(c) Undertakes the majority of its operations in Uganda during the year of income.”

S. 14 of the Act states that a person is a non-resident person for the year of income if the person is not a resident person for that year.

It is not in dispute that the applicant is not incorporated or formed under the laws of Uganda. What is in dispute is that the applicant has its management and control exercised in Uganda and that it carries a majority of its operations in Uganda. In **De Beers Consolidated Mines Limited v Howe** [1906] Ac 455, the company carried on the

business of diamond mining in South Africa but its management function was in England. The court held that the question of where a company resides was one of fact. A company resides for purposes of income where its real business is carried on. The real business is carried on where the central control and management actually takes place. In **Bullock v Unit Construction Co. Ltd** (1959) 38 TC 712 at 739 -730 the court said though the board of directors were in Kenya they had no powers. The key management and the decision makers were in the United Kingdom where the real business was carried on. Since the questions of where management and control is, as well as where the majority of operation is carried out are ones of facts, the only way the Tribunal can resolve them is by looking at the evidence adduced by the parties.

The applicant's witness, Mr. John Kambo testified that the applicant was involved in developing and growing the market activities of group companies in countries where they did not have manufacturing operations. The evidence adduced showed that the applicant was involved in the purchase of goods from Uganda Breweries Limited in Uganda and their sale in other countries. Mr. John Kambo did not tell the tribunal this. The Tribunal has to ask itself: was that omission deliberate or accidental? Was Mr. John Kambo a truthful witness? The Tribunal thinks one cannot find fault with Mr. John Kambo's evidence. He is an employee of East African Breweries Limited which is a different legal entity from the applicant, though they share a similar name. Mr. Kambo did not even have a power of attorney authorizing him to testify on behalf of the applicant. Somewhere during his testimony, the tribunal told the applicant's counsel. "You cannot ask him on a company he does not work for." Mr. John Kambo told the Tribunal that he oversees the operations of the subsidiaries on a micro level. Why would the applicant bring a witness working for another company who has limited knowledge of its operations to testify on it when it ought to have brought one of its officers or employees to testify on its behalf? Though Mr. Kambo was a competent witness on the incorporation of the applicant, his testimony in some aspects on the activities of the applicant was immaterial as it bordered on hearsay evidence. Using Mr. Kambo to testify for another group company may give credence to the respondent's allegations that the companies were sharing staff.

As regards management and control, the dispatch notes and invoices show the address of the applicant is in Nairobi, Kenya. The memorandum of association shows that the applicant is situated in Kenya. It filed tax returns in Kenya. The management and control of the applicant, in the absence of evidence to the contrary appears to be in Kenya. While it appears that the management and control of the applicant is in Kenya, there is no evidence as to where it carries a majority of its operations. In its submission, the applicant admitted that it purchased goods from Uganda Breweries and sold them to customers in Sudan, Rwanda and Congo. It is not clear whether the major operations of the applicant was to export goods or to develop the markets of the group companies as alleged by Mr. John Kambo. The failure by the applicant to call one of its officers or employee to testify on where the majority of its operations were carried out means that the Tribunal is not in a position to state accurately whether the applicant is a resident of Uganda.

There is also doubt as to how the applicant was able to purchase goods from Uganda Breweries Limited in Uganda and export it without having presence in Uganda. This doubt is exacerbated by the invoices and dispatch notes tendered in evidence that show that they were issued in Uganda. They had the address of the applicant as also in Kampala. How was the applicant stamping the said documents if it did not operate in in Uganda?

If the Tribunal were to state that the applicant was a not a resident person, then it would have to address whether its income derived from sources in Uganda. In **Vodafone International Holding B.V v Union of India and another** (supra) it was stated that the nexus connecting a person to the jurisdiction which seeks to tax it may arise as result of the physical presence of the non-resident. The nexus may arise where the source of income originates in the jurisdiction.

The provisions relating to sourcing of income is found in S. 79 of the Income Tax Act. Both parties cited S. 79(a) of the Income Tax Act. The period in contention is June 2009 to June 2015. Before it was amended in July 2015, S. 79(a) of the Income Tax Act provided that:

“Income is derived from sources in Uganda to the extent to which it is:-

(a) derived from the sale of goods –

- (i) in the case of goods manufactured, grown, or mined by the seller, the goods were manufactured, grown, or mined in Uganda; or
- (ii) in the case of goods purchased by the seller, the agreement for sale was made in Uganda, where such goods are to be delivered.”

The said Section is inapplicable to the dispute before July 2015 as the applicant was not the seller of the goods it manufactured. The manufacturer was Uganda Breweries Limited. There is no evidence that an agreement for sale was made in Uganda or the goods were to be delivered in Uganda.

S. 79(a) was amended in July 2015. Both parties cited the new S.79 (a) (ii) of the Income Tax Act which provides that income is derived from sources in Uganda to the extent to which it is derived by a non-resident person carrying on business through a branch in Uganda. The word 'branch' is defined in S. 78 of the Income Tax Act to mean a place where a person is carrying on business through an agent, other than an agent of independent status acting in the ordinary course of business as such. The respondent contended that Mr. Robert Isaale being an agent of the applicant implies it had a branch in Uganda. Exhibit D4, the letters of 16th July 2007 and 4th May 2010, the appointment letters of Mr. Robert Isaale show him as an employee of firstly Uganda Breweries Limited and then later East African Breweries Limited respectively. The memorandum of 28th September 2010 shows that Mr. Robert Isaale was appointed to the role of Uganda Export Coordinator within the Supply Chain Department of the applicant. However discussing the new S. 79(a)(ii) of the Income Tax Act as a means of determining whether the applicant sourced its income from Uganda serves only academic purposes. This is because for the period in issue, June 2009 to June 2015, the new amendment had not been inserted in the Income Tax Act. Therefore all the discussion in respect of Mr. Isaale being an agent and or a branch of the applicant as a means of determining whether the applicant sourced income in Uganda at this stage is moot.

The fact that the applicant may not be in Uganda while carrying on business creates a similar situation as in **Offshore International S. A v Federal Board of Inland Revenue** (supra) where the plaintiff sought a declaration that it was not liable to pay tax because it was not a foreign company resident in Nigeria and had no office or place of business in

Nigeria. The court found that it was not exempt simply because it was not incorporated or resident within Nigeria. The court held that

“Although there is no clear definition of “fixed base”, it must not be equated to residence or ordinary residence. The fact that a company is non-Nigerian and therefore not resident in Nigeria is not a sufficient excuse that it does not have a fixed base in Nigeria. The appellant using of office facilities provided by another company in Nigeria [SPDC] would it make hard to suggest that the Appellant did not have a fixed base in Nigeria at SPDC. Therefore, the finding by the courts that the Appellant had a permanent establishment in Nigeria was correct.”

The court was concerned with the concept of permanent establishment which is a principle in international taxation law as opposed to the concept of residency in domestic law. The tribunal already asked: how was the applicant able to purchase goods in Uganda without a physical presence? Was the applicant using the facilities of its sister companies, Uganda Breweries Limited and East African Breweries Limited? If so and if we are to go by that decision it would mean that the applicant had a permanent establishment in Uganda. The concept of permanent establishment is different from that of residency. International law is not concerned with the residency of a company as long as it has a permanent establishment in the jurisdiction seeking to tax.

A permanent establishment is important in determining whether tax is liable on income from a jurisdiction. In **Target Well Control Uganda Limited v Commissioner General, Uganda Revenue Authority** HCCS 751 of 2015 the court cited **Nokia Networks v JCIT June a Commentary Article 5(7) of the Model Convention** where the court said: It could only be a permanent establishment if it met the physical or representative presence. While the concept of residency under domestic law is concerned with physical presence that of permanent establishment may also look at representative presence or whether a base was established for the operation of the activities of the person being sought to be taxed.

S. 79 (s) of the Income Tax Act provides that income is derived from sources in Uganda to the extent to which it is attributable to any other activity which occurs in Uganda, including an activity conducted through a branch in Uganda. One has to ask whether a

non-resident person needs to have a branch in Uganda under the said Section. In **AB LLC and BD Holdings LC v Commissioner of the South African Revenue Services** (supra) it was stated that "the word "include" used in a statute is often used to extend or enlarge the meaning of a thing or concept. It brings within the scope of the thing or concept others that are not ordinarily or naturally part of the thing or concept." The old S. 79(a) of the Income Tax Act did not mention a branch in respect of a non-resident person. The old S. 79(a) dealt with sale of goods. When comparing the old S. 79(a) with the current one, our understanding of S.79(s) would be that any income attributable to any other activity, other than the sale of goods in Uganda by a person whether conducted through a branch or not is considered as derived from Uganda. In short, it may not be necessary for a resident or non-resident person to have a branch in Uganda for income to be attributed to sources in Uganda other than sale of goods.

We also have to ask ourselves which activities is S. 79(s) concerned with. S. 79(s) remained unchanged in the new amended Section. The word 'any other' activity refers to any activity which is not mentioned in the provisions preceding S. 79(s). The intention of the legislature was to widen the tax net of to include income from all activities that occur in Uganda. The export of goods can be considered as any other activity within the meaning of S. 79(s) of the Income Tax Act.

This brings us to the final question: Did the applicant obtain income that was attributable to activities that occurred in Uganda? In resolving this question, we shall be determining all the issues raised. The respondent contended that the applicant obtained income from the export of beer which was sold to third parties or customers at a cost plus markup of 70 to 90%. Apart from the submissions of counsel of the applicant, the applicant did not adduce evidence to the contrary. The applicant's witness, Mr. John Kambo, though not competent to testify on the applicant's affairs did not testify on its activities in Uganda. His main testimony was the applicant was incorporated to develop the market of the goods for the group companies. He said when he would visit the countries they would advertise, promote and source customers. He did not mention that the applicant was involved in the export of goods. The evidence adduced by the respondent, which included invoices and dispatch notes show that the applicant was involved in selling goods to customers at a

cost plus markup in South Sudan, Congo and Rwanda. The respondent contended that export sales of Uganda Breweries Limited decreased because the applicant was exporting its goods. This information does not seem to have been in the knowledge of Mr. Kambo as he was not an employee of the applicant. The applicant did not call any of its officers or employees nor any officer from Uganda Breweries Limited to testify on the activities between the two companies. What the Tribunal see are invoices and dispatch notes bearing the stamps of Uganda Breweries Limited and the applicant. On p. 2 of the trial bundle the invoice shows that the goods were "despatched (sic) from: EABL International Uganda, Ship. Pt, PO Box 7130, Kampala" to Juba Sudan. On pages 5, 7 and 8 of the trial bundle it shows that goods were "despatched (sic) from ... plant description: EABL International (Uganda), Plant City, Kampala. Though the dispatches were on the letters of the applicant they bear the stamps of Uganda Breweries Limited. This gives the impression that while the applicant was invoicing the customers from other countries in Kenya, the goods were being dispatched from Uganda.

The applicant's counsel in its submission submitted that the goods were being sold by the applicant in Kenya. This conflicts with Mr. Kambo's testimony which was to effect that the applicant was an intermediary and the goods were being sold by Uganda Breweries Limited. The applicant's exhibits p. 128 to p.164 show that Uganda Breweries Limited was selling to customers in other countries. The respondent alleged that the applicant was using the TIN of Uganda Breweries Limited which the latter did not rebut. The applicant did not adduce evidence to show that the TIN it was using belonged to it. This gives credence to the suspicion that the applicant was using Uganda Breweries Limited to export directly to other countries while the former was invoicing them from Kenya. Whatever the role played by the applicant, whether as an intermediary or a seller, it derived income from an activity involving goods situated in Uganda. The role played by an applicant whether as an intermediary or as a seller would fall under 'any other activity' under S. 79(s) of the Income Tax Act. In the absence of evidence rebutting the allegations of the respondent, the Tribunal notes that the applicant did not discharge the burden placed on it by S. 18 of the Tax Appeals Tribunal Act to prove that the income the applicant is challenging was not attributable to activities that occurred in Uganda.

The respondent raised issues of fraud against the applicant. The applicant contended that the said issues were not raised in the pleadings. The Tribunal notes that the respondent did not file a counterclaim. The Tribunal also notes that the respondent is not seeking for damages for fraud. S. 91 of the Income Tax Act allows the Commissioner General to re-characterize a transaction where there is a tax avoidance scheme. S. 91(2) of the Income Tax Act defines a "tax avoidance scheme" as one where the main purpose is the avoidance or reduction of liability to tax. Some of the mechanism involved in reducing tax may amount to fraud or tax fraud. It becomes difficult to explain the means a taxpayer took to reduce its tax liability without mentioning fraud. The only reason the Tribunal may accept such allegations is to ask: was the Commissioner justified in re-characterizing a transaction? If it is not pleaded nor is there a counterclaim the Tribunal will not allow it as a basis for awarding general damages to the respondent.

In the matter before the Tribunal the respondent alleged that there suspicious activities of the applicant which warranted the Commissioner to re-characterize transactions. The export sales of Uganda Breweries Limited took a nose dive when it started transacting with the applicant. The respondent also contended that the applicant was using the TIN of Uganda Breweries Limited. This was not rebutted by the applicant. The invoices and dispatch notes issued had the stamps of Uganda Breweries Limited, the applicant and at times East Africa Breweries Limited. All the three companies are part of the same group. From the invoices and dispatch notes tendered in as exhibits, it was not clear who the exporter of the goods was. There was no explanation why the names of the parties were crossed out and replaced with others in some of the invoices and dispatch notes. While the applicant contended it did not have an office or presence in Uganda it was exporting goods. In the absence of satisfactory explanations, the Tribunal would not fault the Commissioner's powers to re-characterize transactions where there is a tax avoidance scheme. The arrangement may not only be a tax avoidance scheme but also one where the form does not reflect the substance. The markup the applicant was paying Uganda Breweries was extraordinarily low compared to what the applicant was obtaining from its sale to third parties. Once again in the absence of good reasons, the form does not reflect the substance. If the Commissioner re-characterized such transactions, the Tribunal will


not fault him or her. The Commissioner cannot be said to have acted grossly irrationally for the Tribunal to set aside the decision.

The Tribunal notes that the activities of the group companies were overlapping. It is not clear whether they were actually sharing TIN, premises and staff. The witness who came to testify on behalf of the applicant was from East African Breweries Limited. Despite the applicant selling goods to many than countries it does not have an employee or officer to testify on its behalf. The markup of the sale of the goods by Uganda Breweries Limited to the applicant was far lower than that between the applicant and the final consumers in Sudan, Congo and Rwanda. While Uganda Breweries Limited was charging the applicant a markup of 7.5% the applicant was charging its customers 70 to 90%. This is part of a transfer pricing arrangement where the companies are dealing with each other not at arm's length. The arm's length principle requires inter-company transactions to conform to a level that would have applied had the transactions taken place between unrelated parties, all other factors remaining the same. Under S. 90 of the Income Tax Act, in any transaction between associates, the commissioner may distribute, apportion or allocate income, deductions between the associates as is necessary to reflect the income realized by the taxpayer in an arm's length transaction. An associate is defined in S. 3 of the Income Tax act. In making any adjustments the commissioner may determine the source of income and the nature of any payment or loss. The transfer pricing arrangement originated in Uganda. The Commissioner apportion taxes according to the income received by the applicant. In **Uniliver Kenya Limited v CIT** Income Tax Appeal No. 753/2003 (High Court of Kenya) Unilever Kenya Limited (UKL) and Unilever Uganda Limited (UUL) were both subsidiaries of Unilever PLC, a UK multinational group. Pursuant to a contract, UKL manufactured goods on behalf of and supplied them to UUL, at a price lower than UKL charged to unrelated parties in its domestic and export sales for identical goods. The Commissioner raised an assessment against UKL in respect of sales made by UKL to UUL on the basis that UKL's sale to UUL were not at arm's length prices. In that matter it was held that in the absence of guidelines under Kenya law, the taxpayer was entitled to apply OECD transfer pricing guidelines. In this application, the issue is not about which rules to apply. What the Tribunal can note is that the Commissioner has powers to apportion income on an intergroup company and issue an assessment. In this

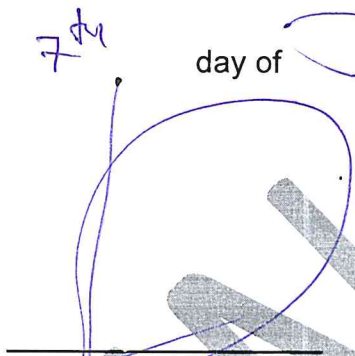
case the Commissioner chose the applicant over Uganda Breweries Limited. The Tribunal feels that the Commissioner was acting within his discretion and was justified to do so.

Taking all the above into consideration, the Tribunal finds that the applicant did not discharge the burden placed on it to prove the respondent ought to have made the decision differently. This application is dismissed with costs.

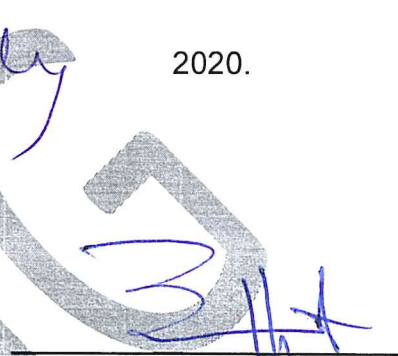
Dated at Kampala this ^{7th} day of July 2020.



DR. ASA MUGENYI
CHAIRMAN



MR. GEORGE MUGERWA
MEMBER



MR. SIRAJ ALI
MEMBER

RULING