Reasons which contributed to the success of this case law international essay

Law

Background/History: The dispute started of with the sale of the stake of Exploration Areas 1 and 3A by Herritage to Anglo-Irish company, Tullow Oil PLC which initially was offered to ENI an Italian oil company for a cash consideration of US$ 1. 45 billion. However Tullow asserts its pre-emptive right to buy the Heritage stake in Exploration Areas 1 and 3A on the same terms and conditions that Heritage has agreed with ENI. Heritage received the money of US$ 1. 45 Billion and refused to pay Capital gain tax in the amount of US$ 404 million. According to the Tax Appeals Tribunal Act (Cap 345) (TAT Act) and section 76(d) (1) of the Civil Procedure Act (CPA) the Ugandan Revenue Authority is bound to collect it. Heritage challenged the capital gains tax assessment and argues that the Production Sharing Agreement which was signed by the Government and by Heritage mentioned in case of any legal dispute that it would be referred to arbitration and not to Uganda Tax Tribunal which had already ruled in favour of the Ugandan Government. Furthermore Heritage claims that the Production Sharing Agreement did not make any mention of Capital Gain Tax neither does the Income Tax Act mention anything about immovable property specifically the sale of assets right and therefor the Government of Uganda has no basis to claim it. Thereafter in July 2010 Heritage went on and paid $121. 5 million which is 1/3 to the Ugandan Revenue Authority and deposited the rest of US$283. 4 million in an escrow account in London. The reason for that being is that the funds would only be released from the escrow account after the London tribunal judges in Favour of the Ugandan Government. Tullow went on by selling on the rights in the exploration areas to Total and the Chinese National Offshore Oil Corporation which the government has approved for

$2. 9 billion. However the Tullow-Total-CNOC Transaction has been delayed by the Arbitration and Tullow started to recover its money from Heritage in the London Highcourt as it paid $313 million as security against heritage. Heritage is looking forward appeal against the tax findings at the arbitration in London as Heritage is the opinion that chances are higher winning the case in arbitration, as it hard for the Ugandan tribunal to rule against its country. As mentioned earlier Heritage objected to the tax assessment and filed two applications, (TAT Applications No. 26 and 28 of 2010) before Tax Appeals Tribunal. In order that the two applications can be heard, Heritage compiled another application (Misc. Appl. No. 6 of 2011) before the Tax Appeals Tribunal with the aim to stay the proceedings in those applications have the dispute and having the matter referred to the London Court of International Arbitration. However this Application was heard and dismissed with costs by the Tribunal. Heritage appealed this judgement before the Highcourt of Uganda on September 13. The appeal is based on three grounds, have been responded by the Councel of Ugandan Revenue and judged by High Court of Uganda. Ground 1: The Tribunal erred in law in declining to grant the application to have the legal proceedings under Tax Appeals Tribunal Applications Nos. 26 and 28 of 2010 stayed and referred back to Arbitration. Heritage claims that Section 5 of the ACA (ARBITRATION AND CONCILIATION ACT) is binding in the sense that the Court, meaning in this case the Tax Tribunal has to refer the tax dispute to arbitration and in only two cases the Tribunal shall not refer the dispute to arbitration, are stated in Section 5(1) and (b) of the ACA and that the Arbitration Tribunal should decide if it has jurisdiction in this case according with Article 21(1) of

UNCITRAL Rules. Therefore Heritage claims that the two arbitration agreements which are found within the Production Sharing Agreement are valid and operative. The Counsel for URA disagrees with the fact that Section 5 of the Arbitration and Conciliation Act states that this Act refers to a High Court and Magistrate which is clearly defined in Interpretation Act and not to the Tax Tribunal. The judgement regarding those Arguments is that Section 5 of the ACA is invalid for the reason that as mentioned by the Counsel for URA this Act refers to the Magistrate and High Court, which is clearly defined in section 2 (f) and 2 (h) of the Civil Procedure Act. The judge is of the opinion that if it was the intention of the Legislature that the Tribunal are referred to as a judge or magistrate it would have been clearly stated in the definition of the ACA. Regarding Section 21 of the TAT Act the judge is of the opinion that it is not sustainable to claim that the Tribunals have the right to apply the rule of practise of the High court. Based on the first ground of appeal made by Heritage it is a weak proof stating that the ACA is operable as is based on the fact that the Section 5 of the ACA refers to a Tribunal which can nowhere be found within the ACA definitions. Rather it can be concluded that it refers to the Highcourt and Magistrate as stated in section 2 of f and h that the Act only mentions those two terms and not a Tribunal. (h) " judge" includes a magistrate exercising civil jurisdiction in a magistrate’s court; (http://www. ulii. org/ug/legislation/consolidated-act/71)Therefore I support the judgements opinion that by no means can the ACA refer to a Tribunal rather to a Magistrate or High Court. As mentioned earlier, Heritage argues that by sending legal representatives to the arbitration tribunal in London shows that the tax dispute in the arbitration tribunal in London is a legit one. Regarding

this the judge did not address this argument which does show the concern that the government has over the judgement in the arbitration tribunal, otherwise it would not spend a large amount of money sending legal representatives abroad which is all paid from Ugandan Tax Income. Furthermore Heritage has put forth the Case of " Halsburys Laws of England VOl. 2" stating that the court must be satisfied that there is no solid reason why the matter should not be referred to arbitration according with the agreement. But again, where is the definition in this case that the court is also referring to the Tax Appeals Tribunals? Therefore this case cannot be compared and used as a proof for having the dispute referred back to the arbitration tribunal.

Ground 2

Heritage first claim in ground 2 is that the URA is a body cooperate and agent of the Government of Uganda and is therefore bound to the PSA and not to be looked at separately. Section 2(3) of the URA act states that the URA is an agent of the Government and Heritage claims that therefore the URA cannot take actions which the Government is not able to do either and therefore as an agent, URA is bound to the arbitration clause in the PSA as well. URA on the other hand claims that it is very well a separate entity to the URA body cooperate as it is able to sue the government and can also be sued in its cooperate name and claims that the parties in the arbitration and tribunal proceedings are to be seen separate. The judgements ruling regarding this is that the URA cannot be seen as a separate entity as it works in the interest of the government and the URA Act 2(3) is explicit that URA is a central body and responsible for collecting Tax etc. and must therefore be

included in the PSA. It has to be mentioned in the Ugandan Law what should be done if stakes etc. are sold outside of a country to another country and what law should be implemented and my opinion is that Heritage tried to make use of those legal loopholes. However it cannot be denied that the URA is part and parcel of the government and shares the same interest which is to collect tax and it cannot be denied away that just by being a body cooperate of the government does not make the URA a separate entity. Furthermore Heritage argument is that even though the Minister of Finance, who is a supervisor of the URA, did not sign the PSA personally, but by the Minister of Energy and Permanent Secretary, he is still included and bound to the PSA. The judge agrees with the fact that the Minister of Finance cannot disassociate himself from the PSA as he is part of the government. The third claim made by Heritage is that the Tribunal erred with the ruling that the PSA was not a Tax Collection Agreement and therefore outside the URA Act. He referred to Article 14 which states that any due taxes etc. which are legally imposed to the licensee shall be paid accordingly in a timely fashion by the licensee. Heritage also referred to Article 26. 1 of the PSA which states that any dispute under the PSA which cannot be solved within 60 days shall be referred to arbitration according with the United Nations Commissions for Internal Trade Law (UNCIRAL) and Heritage claims that the Tax dispute being one of them and should be referred to arbitration. URA responses by stating Article 14 of the PSA which was signed by Heritage and is therefore bound to pay arising Tax and that the jurisdiction of the TAT Act enables the tax tribunal to settle any tax dispute and not the arbitration. The judge is of the opinion that taxes are statutorily provided for and cannot be

cancelled by an agreement and Article 14 of the PSA proves that. The judge concludes that any arising tax dispute should be solved by the Ugandan Tax Tribunal or High court and any attempt to solve tax disputes in arbitration would be contrary to Article 14 of the PSA, which states that tax should be paid in a timely fashion and tax disputes cannot be included as disputes which is mentioned in Article 26. 1 of the PSA. It needs to be mentioned that Article 26. 1 and Article 14 are not clear of any arising tax disputes and whether it includes capital gain tax. They are even contradicting each other and clear ruling whether tax disputes should be referred to arbitration, cannot be made clear based on those Articles. Article 14 very well says that any arising Tax should be paid in Accordance to Ugandan Law in a timely fashion but what happens if the sale of the assets as mentioned earlier is outside the boarders of Uganda. Furthermore as mentioned earlier as well does the Ugandan Law not have a statutory definition of immovable property and interestingly Heritage claims that the sale of its rights and interest did not amount to an interest of immovable property under section 79(g) of the Income Tax Act, and therefore no tax can be lodged on the deal.

Ground 3

Heritage claims that it was a wrong decision of the tribunal to claim that a stay of proceedings would be to fetter its mandate, as Courts and Tribunals are allowed to refer a dispute to arbitration as the choice of arbitration based on an arbitration agreement is recognized in Uganda. Therefore as an arbitration agreement is recognized by statue in Uganda it cannot be used to fetter the mandate of the tribunal or court. URA says that Article 152 (3) of the Constitution of Uganda provides that the Parliament to make laws to

establish tax tribunals and the TAT Act was made to settle any tax disputes and therefor the jurisdiction cannot be binding based on the arbitration clause in the PSA. The judgement regarding ground 3 is the tribunal should be guaranteed independency regarding decisions on tax disputes based on Article 128 (1) and independency of the Tribunal would not be guaranteed if the dispute would be referred to arbitration. However this is only valid based on the fact that the ACA and the TAT Act do not provide for the referral of tax disputes. Also here the question arises whether the TAT Act is binding if the sale of the stake has been done outside Uganda. The proof for this is that Paul Richards confirms that the sale of Heritage Assets took place in Holland. Furthermore Heritage says that when the URA set the Tax Assessment, no money has been received by Tullow and no therefore no assessment was due. The Tribunal on the other hand said that there would be no law, which prohibits the taxation of income which has not been received and therefor it is allowed.

Heritages Disagreements

At first URA did not consider the Heritages Operation costs when the Tax Assessment was made but URA claims that it did not receive any invoices as prove from Heritage as prove. However URA went on and said that it did not consider Heritages expensive as they were recoverable by Tullow based on the fact that they took over the Heritages assets and therefor are bound to pay. Moreover Heritages claims that as its office is based in Mauritius, Tax only has to be paid there according to Mauritius tax laws and anything which would have to be paid in Uganda would be considered double taxation. The Tribunal objects this and says that residence is not the only criteria for tax

assessment if there is a solid connection between source of profit and income and puts forth that Heritage did business in Uganda and is therefore qualified as taxpayer. The consequences of arbitration are major for both sides especially for Uganda if Heritages wins. The government of Uganda its citizens would not just have a $450m tax loss and the amount that is being spent on legal representatives for the arbitration in London. But also the loss of Tax Income of the Production Sales from the Tullow Deal as the production was on hold over the tax issue. Heritage would have to suffer a loss which would be the owned tax to URA and the cost for the process of arbitration, Tribunal and High court but this still will not equate to the loss that Uganda would suffer which effects Ugandan citizens and which brings a lack of economic stability and development. On the 04. 04. 2012 the judgement of the Arbitration in London went in favour for URA. The members of arbitration put forth as the matter has been already decided by the Ugandan Tribunal and ruled against the three claims made by Heritage and therefore Heritage has to pay the assessed capital gain tax. The problem was that the Income Tax Act does not mention nor define capital gains tax. Now the question is rises what the reason is why Uganda is spending a large amount of money for legal representatives in London even though when the Ugandan courts have already ruled in favour for the Ugandan Government. The other question is where were the government signatories who endorsed the Product Sharing Agreement on behalf of the government and why could they not harmonise Article 26. 1 with Article 14?