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Tax Certainty? The Private Rulings Regime in Uganda in Comparative Perspective

Samuel Kahima, Solomon Rukundo and Victor Phillip Makmot

January 2021

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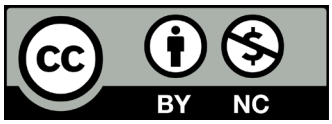

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Summary

Taxpayers sometimes engage in complex transactions with uncertain tax treatment, such as mergers, acquisitions, demergers and spin-offs. With the rise of global value chains and proliferation of multinational corporations, these transactions increasingly involve transnational financial arrangements and cross-border dealings, making tax treatment even more uncertain. If improperly structured, such transactions could have costly tax consequences. One approach to dealing with this uncertainty is to create a private rulings regime, whereby a taxpayer applies for a private ruling by submitting a statement detailing the transaction (proposed or completed) to the tax authority. The tax authority interprets and applies the tax laws to the requesting taxpayer's specific set of facts in a written private ruling. The private ruling offers taxpayers certainty as to how the tax authority views the transaction, and the tax treatment the taxpayer can expect based on the specific facts presented. Private rulings are a common feature of many tax systems around the world, and their main goal is to promote tax certainty and increase investor confidence in the tax system. This is especially important in a developing country like Uganda, whose tax laws are often amended and may not anticipate emerging transnational tax issues.

Private rulings in Uganda may be applied for in writing prior to or after engaging in the transaction. The Tax Procedures Code Act (TPCA), which provides for private rulings, requires applicants to make a full and true disclosure of the transaction before a private ruling may be issued. This paper evaluates the Ugandan private rulings regime, offering a comparative perspective by highlighting similarities and contrasts between the Ugandan regime and that of other jurisdictions, including the United States, Australia, South Africa and Kenya.

The Ugandan private rulings regime has a number of strengths. It is not just an administrative measure as in some jurisdictions, but is based on statute. Rulings are issued from a central office – instead of different district offices, which may result in conflicting rulings. Rather than an elaborate appeals process, the private ruling is only binding on the URA and not on the taxpayer, so a dissatisfied taxpayer can simply ignore the ruling. The URA team that handles private rulings has diverse professional backgrounds, which allows for a better understanding of applications.

There are, however, a number of limitations of the Ugandan private rulings system. The procedure of revocation of a private ruling is uncertain. Private rulings are not published, which makes them a form of 'secret law'. There is no fee for private rulings, which contributes to a delay in the process of issuing one. There is understaffing in the unit that handles private rulings. Finally, there remains a very high risk of bias against the taxpayer because the unit is answerable to a Commissioner whose chief mandate is collection of revenue.

A reform of the private rulings regime is therefore necessary, and this would include clarifying the circumstances under which revocation may occur, introducing an application fee, increasing the staffing of the unit responsible, and placing the unit under a Commissioner

who does not have a collection mandate. While the private rulings regime in Uganda has shortcomings, it remains an essential tool in supporting investor confidence in the tax regime.

Keywords: private rulings; Uganda; Africa; tax administration; tax law; tax advice; tax certainty; investor confidence.

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Acronyms

AC-BAPR	Assistant Commissioner Board Affairs, Policy and Rulings
AC-BP	Assistant Commissioner Business Policy
ATO	Australia Tax Office
BAPR	Board Affairs, Policy and Rulings
BPD	Business Policy Division
CDT	Commissioner Domestic Taxes
CG	Commissioner General
CO	Case Officer
DTD	Domestic Taxes Department
EU	European Union
HMRC	Her Majesty's Revenue and Customs
IMF	International Monetary Fund
ITA	Income Tax Act
KRA	Kenya Revenue Authority
OECD	Organisation for Economic Co-operation and Development
SARS	South African Revenue Service
SMMEs	Small, Medium and Micro Enterprises
TAT	Tax Appeals Tribunal
TPCA	Tax Procedures Code Act
UK	United Kingdom
URA	Uganda Revenue Authority
VAT	Value added tax

Introduction

Taxpayers sometimes engage in complex transactions, such as mergers, acquisitions, demergers and spin-offs, whose tax treatment is uncertain. With the rise of global value chains and the proliferation of multinational corporations, such transactions increasingly involve transnational financial arrangements and cross-border dealings, making the tax treatment even more uncertain. If improperly structured, such transactions could have costly tax consequences. One approach to dealing with this uncertainty is the creation of a private rulings regime as part of a country's tax system. A taxpayer applies for a private ruling by submitting a statement detailing the transaction (proposed or completed) to the tax authority. The tax authority interprets and applies the tax laws to the requesting taxpayer's specific set of facts in a private ruling. A private ruling is therefore advice given by a tax authority upon request from a taxpayer in relation to the application of the tax law to a particular transaction (Waerzeggers and Hillie 2016). Private rulings are a common feature of many tax systems around the world. A 2012 study of 61 tax jurisdictions by the global network of law firms, Lex Mundi, found that only four jurisdictions lacked anything akin to a private rulings system (Lex Mundi 2012).[1] A 2015 study of 34 Organisation for Economic Co-operation and Development (OECD) countries found that 33 allow taxpayers to request a private ruling (OECD 2015). A 2015 study of tax rulings in European Union (EU) countries found that all 28 countries had some form of private rulings regime in place (Van de Velde 2015). African countries such as South Africa,[2] Kenya,[3] Tanzania,[4] Malawi,[5] and Zimbabwe[6] all have a private rulings regime. Private rulings may be known as advance tax rulings or binding rulings in other jurisdictions (Waerzeggers and Hillie 2016).

Depending on the jurisdiction, private rulings may be binding or non-binding, written or oral, pre- or post- transaction, statutory or administrative. However, in the Ugandan context and for the purposes of this paper, private rulings are defined as a statutory mechanism through which the taxpayer may seek written advice from the tax authority before or after entering into a transaction regarding the tax treatment of that transaction. The advice given is binding on the tax authority, but not on the taxpayer.[7] The benefit accruing from relying on a private ruling is personal to the taxpayer to whom that ruling is issued, such that the tax authority is not bound by its position in regards to other taxpayers in the same or similar circumstances. Uganda uses a self-assessment regime, where taxpayers are expected to file their returns and account for tax due from their transactions (URA 2020). However, there may be instances in which the law is ambiguous, or its application to a particular taxpayer's transaction is otherwise uncertain. It is in these instances that a taxpayer may apply to the URA for a private ruling.

Globally, private rulings regimes have proliferated in the last three decades. This is a result of a shift in approach within tax authorities, which now aspire for a higher degree of tax compliance and economic investment, and taxpayers who pursue greater legal certainty

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1 These jurisdictions were Serbia, Isle of Man, Cayman Islands and China (with the exception of Hong Kong).

2 'Binding Private Rulings' SARS 30 April 2020, www.sars.gov.za/Legal/Interpretation-Rulings/Published-Binding-Rulings/Binding-Private-Rulings/Pages/default.aspx.

3 Section 65 of the Kenya Tax Procedures Act No. 29 of 2015 available at https://kra.go.ke/images/publications/TaxProceduresAct29of2015.pdf.

4 Section 11 of the Tanzania Tax Administration Act 2015 available at www.tra.go.tz/tax%20laws/Tax%20Administration%20Act%202015%20English%20Version.pdf.

5 Malawi Revenue Authority, *Taxpayer Charter: Your Rights and Obligations* (October, 2017) available at www.mra.mw/assets/upload/downloads/Taxpayer_Charter.pdf.

6 Section 34D of the Zimbabwe Revenue Authority Act Chapter 23:11 available at https://zimlii.org/zw/legislation/num-act/1999/17/revenue%20authority%20act%202311updated.pdf.

7 Section 45(1) of the Tax Procedures Code Act (Hereinafter TPCA).

(Van de Velde 2015). Private rulings have received considerable attention from tax scholars and practitioners in Europe, America, Australia and Asia in recent years (Givati 2009). However, there is very little literature on the subject in Africa. This paper seeks to remedy this, by comprehensively documenting and evaluating the administration of the private rulings regime in Uganda. The purpose of this paper is:

1. To describe the current law and practice relating to private rulings in Uganda.
2. To highlight the shortcomings of the current private rulings regime in Uganda.
3. To develop possible means of improving the current private rulings regime in Uganda.

This paper is a descriptive study employing various qualitative methods, including textual analysis, interviews and auto-ethnography. The textual analysis covered both primary and secondary literature, including academic articles, parliament Hansards, domestic tax statutes, foreign tax statutes, and case law from Uganda and other jurisdictions. Statutes and case law from other jurisdictions including the United States, Australia, New Zealand, Kenya and South Africa were used for comparative purposes. The authors conducted 20 interviews within and outside the Uganda Revenue Authority (URA), the country's tax authority. In the URA, we interviewed 12 people – two Assistant Commissioners, two managers, four supervisors and four officers. Outside the URA we interviewed four people from audit firms, and four from tax advisory law firms. Finally, the first two authors drew from their personal experience in administering the private rulings regime in Uganda. The first author worked with the URA for 25 years, 10 of which were spent as a supervisor in the Rulings and Interpretations unit of the Business Policy Division (BPD) in the Domestic Taxes Department (DTD) of the URA, during which time he participated in the drafting and issuing of over 200 private rulings. The second author has worked as an officer in the Rulings and Interpretations unit of the BPD in the DTD of the URA for 2 years, during which time he participated in the drafting and issuing of 20 private rulings.

The paper proceeds in four parts. Part 1 examines the rationale for a private rulings regime, particularly highlighting justifications given by commentators in academic literature and judges in case law. Part 2 analyses the current private rulings regime in Uganda, describing the relevant law, practice and procedures involved, and the three potential outcomes of rejection of the application, a favourable ruling and an unfavourable ruling. Part 2 also examines the law relating to the revocation of a private ruling in light of the fact that the central rationale of this mechanism is to create certainty in tax law. Part 3 provides an evaluation of the private rulings regime, highlighting its strengths and weaknesses, and recommending possible ways of improving it. Finally, Part 4 provides the conclusion of the paper, which acknowledges the merits of the current system but calls for reform in order to improve it.

1 Rationale for the private rulings regime

1.1 Promote certainty in tax law

Private rulings are intended to provide taxpayers with certainty regarding the Commissioner General's (CG's) interpretation of tax laws. Uncertainty in tax law arises when there are questions that a taxpayer cannot definitively resolve based on the available tax law authority. This negatively impacts investor confidence. As the New Zealand tax scholar, John Prebble, states: 'Doubts as to the tax effects of one's proposals can mean that to put them in train is to embark on a hazardous journey across a fiscal minefield, guided by maps that are misleading, or non-existent' (Prebble 1993: 94).

Tax laws are often drafted in complex language, resulting in uncertainty about the tax treatment of some transactions. Incredibly complex tax rules may have small loopholes that leave their application uncertain (Field 2018). Further, some provisions are drafted in broad and general terms, making their application uncertain. For example, anti-avoidance provisions are often drafted in general terms, so that a literal interpretation of their words would catch entirely innocent transactions (Banoff 1995). There may also be uncertainty in tax law, where certain decisions are left at the discretion of the tax authority. Uncertainty in tax law may also be due to the frequency with which tax laws are amended. For example, in Uganda the VAT Act that came into force in 1996 and the Income Tax Act Cap 340 that came into force in 1997 have both been amended a total of 20 times, with at least 1 amendment taking place every year since 2008. The excessive rate of amendment of tax laws creates undue complexity, unpredictability, and uncertainty in the private sector. The frequent amendments may create apparent conflict between new amendments and existing provisions of the law, making it difficult for even tax advisors to be certain of the URA's interpretation of the law without clear guidance from the authority. As one Ugandan tax practitioner has put it, 'the rapid pace of tax law changes creates more tax risk and controversy since taxpayers find themselves always aiming at a moving target in their tax compliance agenda' (Baliraine 2019).

While courts do fill part of the void of uncertainty through clear pronouncements in tax cases before them, they have a circumscribed role and require considerable resources and time on the part of the taxpayer, and therefore cannot suitably replace administrator guidance. The important role of tax administrator guidance was highlighted in the English case of *R v Commissioners of Inland Revenue ex parte MFK Underwriting Agencies* (*Ex parte MFK Underwriting Agencies*),[8] where the court acknowledged: 'the long-established practice by which the Revenue gives advice and guidance to taxpayers. This is sometimes done by public statements of the Revenue's approach to a particular fiscal problem. Sometimes advice is given in answer to a request from an individual taxpayer. The practice exists because the Revenue has concluded that it is of assistance to the administration of a complex tax system and ultimately to the benefit of the overall tax yield'.

Clear communication from the tax authority regarding interpretation of tax statutes is therefore necessary, so that taxpayers can know which side of the line their transactions may fall even before they engage in them. As Francis Kamulegeya, one of the leading tax practitioners in Uganda states: 'Private rulings are an effective way for a taxpayer to establish, at an early stage, the URA's position on a proposed transaction or business arrangement, before the taxpayer decides to proceed with the transaction or not. This enables the taxpayer to assess in advance what the potential tax liability may be if they were to proceed with the proposed transaction or arrangement. This would enable them to take into consideration the tax implications of the transaction as they contract with the other party' (Kamulegeya 2010).

Similarly, in the Australian case of *Commissioner of Taxation v Brian John McMahon*[9] the court stated: 'The private ruling provisions were introduced to assist taxpayers who are uncertain about the tax effect of an arrangement that is proposed, commenced or completed and who wish to obtain a ruling from the Commissioner on this question before the assessment process is complete. It enables a taxpayer to order their affairs with a degree of certainty about their tax implications before they embark or whilst they are embarking, upon courses of conduct, the tax implications of which may not be known for a considerable time'.

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8 *R v Commissioners of Inland Revenue ex parte MFK Underwriting Agencies & Others* [1990] 1 All ER 91 at 113.

9 *Commissioner of Taxation v Brian John McMahon* (1997) 79 FCR 127 at 133.

It is crucial to note that the 'certainty' referred to here is certainty as to how the CG interprets and applies tax law for particular transactions, and not certainty as to the operation of the law itself (Scolaro 2006). Private rulings provide only the URA's interpretation of the law (Parliament 2014). This recognises that there may be other interpretations of the law that remain valid and arguable, despite being inconsistent with the ruling.

1.2 Promote simplicity in tax law

The private rulings regime promotes simplicity in the tax system, which ideally would enhance compliance. The absence of simplicity tends to invite tax avoidance. Changes in tax law will lead taxpayers to respond by rearranging their affairs in order to reduce their liability under the new laws. They do this even though the underlying economic nature of the activities remains unchanged. This tax avoidance activity then tends to invite a complex set of rules to close loopholes. Tax avoidance is thus a game of cat-and-mouse played between the tax authority and taxpayers. Every change to the tax system is soon followed by the invention of new avoidance schemes, which in turn lead to further changes in the tax system. The perpetual revision of tax law and constant litigation in an effort to curb avoidance adds to the complexity of tax laws. For the taxpayer, compliance costs are increased by the constant search for new avoidance schemes, and as a result of litigation. The private rulings regime is meant to promote simplicity, which minimises avoidance activities and reduces the total economic cost of taxation (Mirrlees 2012).

However, the relevance of private rulings in curbing tax avoidance should not be overstated. Despite the option to apply for a private ruling, a taxpayer might prefer to engage in tax avoidance without requesting a private ruling. Moreover, private rulings may be used to support tax avoidance. Taxpayers could use the system to legitimise tax avoidance activities, by seeking confirmation from the tax authority that a tax avoidance scheme works – thereby turning the private rulings system into 'the approval centre for tax-planning ideas' (Williamson and Bryant 1998: 279). Nonetheless, the potential for private rulings to promote simplicity in tax law should be acknowledged.

1.3 Improve the relationship between the URA and the taxpayer

The private rulings regime is part of the horizontalisation of tax administration, or adoption of a co-operative compliance regime. This is a result of a general shift in approach among tax administrations away from the traditional top-down vertical approach (Van de Velde 2015; Deák 2004).[10] In a co-operative compliance regime, the taxpayer is treated as a customer who deserves good service. Where the taxpayer voluntarily reveals information about potential tax risk positions, the taxpayer is entitled to a comprehensive response from the tax authorities (Van de Velde 2015). The high degree of disclosure by the taxpayer deserves a quick, fair and efficient response and treatment. The tax authority in turn endeavours to understand the taxpayer's business and tax strategy, and act fairly without the traditional revenue-oriented mindset (Van de Velde 2015). Where a taxpayer can access a ruling, drafted on the basis of consistent application of tax principles and binding on the tax authority, there may be less need for tax avoidance efforts, and therefore a less antagonistic relationship between the tax authority and the taxpayer. As Seiden and Russell state: 'The existence of a rulings system reduces the attraction of games of 'cat and mouse' by offering the mouse a morsel of the tastiness of the cheese on offer while affording the cat advance notice of the size of the mouse population and its unfolding stratagems' (Seiden and Russell 2018: 439).

[10] An example of the horizontal approach is the system of 'horizontal monitoring' used as an alternative to 'vertical tax audits' of multinational enterprises in the Netherlands.

The private rulings regime thus strengthens the taxpayer/tax authority relationship through enhanced cooperation, resulting in a more efficient tax system. In this regard, the private rulings regime works to complement general cooperative compliance programmes (Waerzeggers and Hillie 2016).

1.4 Support the self-assessment regime

The private rulings regime is a necessary ancillary of a system of self-assessment (Chan 1997). One result of a self-assessment regime is that taxpayers will be uncertain, sometimes for long periods, whether what they have filed, and the assumptions that they have made, are accepted by the URA. If the taxpayer finally turns out to be wrong, back taxes, interest and penalties will be levied in respect of financial years that are long past.

The private rulings system is therefore helpful to the taxpayer, who may wish to know if their tax return will meet with the tax authority's agreement. The self-assessing taxpayer can determine early through post-transaction rulings whether the tax authority will be satisfied with the tax return. This is useful to the taxpayer in forward planning in the light of known future cash flows. The private rulings process can also alert tax practitioners or tax authorities to tax issues that may not have previously been considered. Such rulings therefore ensure that the taxpayer knows their liabilities and legal position, so as to avoid any penalties associated with an incorrect self-assessment.

1.5 Reducing litigation

A reduction in controversy and conflict is one of the benefits of a private rulings regime. This is because private rulings can be used as a means of resolving technical tax issues before a formal dispute arises (Waerzeggers and Hillie 2016). Taxpayers have the opportunity of discovering in advance the opinion of the tax authority, and are therefore less likely to fight the results in court (Prebble 1993).

Tax litigation in Uganda is particularly challenging for taxpayers. Before proceeding to the Tax Appeals Tribunal (TAT), a taxpayer is required to deposit 30 per cent of the tax assessed or part of the tax assessed not in dispute, whichever is greater.[11] Further, tax litigation is fraught with challenges, such as delays. A 2019 study of the tax litigation process in Uganda found that 84 per cent of tax cases in TAT take longer than 12 months to be resolved (Sserunjogi and Lakuma 2019). Moreover, on appeal to the High Court, interest continues to run on the tax assessed at a rate of 2 per cent on the unpaid amount, from the date the tax ought to have been paid to the date it is actually paid (Sserunjogi and Lakuma 2019).[12] The challenge of undue delay remains even at the High Court, where a backlog of cases is also encountered (The Judiciary 2016).

Private rulings are an alternative to litigation that can be cheaper and faster for a taxpayer with constrained resources or a time-sensitive transaction.

1.6 Keep URA up to date

A private rulings regime can also be useful in the enforcement of tax laws. Tax authorities often face some challenges in keeping up with the latest practices in commercial and tax planning. Formal requests for rulings on proposed arrangements constitute one way for tax

11 Section 15 of the Tax Appeals Tribunal Act Cap 345.

12 This position was successfully challenged in *Airtel Uganda Ltd v URA* CACA No 40 of 2013; however, URA has appealed the matter.

authorities to keep up to date (Prebble 1993). They are a mechanism to improve information flows to the tax authority on current developments in the business sector involving tax avoidance schemes (Sawyer 2002b).

Private rulings can also be useful to URA in profiling a taxpayer, to determine the level of risk they pose. Due to the high level of disclosure they require, private rulings can function as a window into the different arrangements and commercial practices of a particular taxpayer. With very little effort on the part of URA, it acquires information with which to build up intimate tax profiles of taxpayers.

2 The current private rulings legislative scheme

The private rulings regime in Uganda was first introduced in the Income Tax Act (ITA), which came into force in 1997. Section 161 of the ITA provided that a taxpayer could apply in writing for a private ruling setting out the CG's position regarding the application of the ITA to a transaction proposed or entered into by the taxpayer. In 2005 a similar provision was created in the Value Added Tax Act.[13] Significantly, other domestic tax statutes, such as those governing excise duty[14] and stamp duty[15] did not contain any provisions for private rulings. In 2014 the Tax Procedures Code Act (TPCA) repealed the private rulings provisions in the ITA and the VAT Act, and replaced them with another more elaborate provision on private rulings applicable to all domestic tax laws.[16]

The DTD in URA is responsible for planning, management and coordination of registration, audit, assessment, collection and accounting of domestic taxes. The Commissioner Domestic Taxes (CDT) has six Assistant Commissioners, including the Assistant Commissioner Business Policy (AC-BP) – who is in charge of private rulings (URA 2020). In administering the regime the DTD is assisted by the Legal Services and Board Affairs Department, which is headed by a Commissioner responsible for policymaking, advising URA on legal matters and overseeing URA's operations (URA 2020).

2.1 Application for a private ruling

2.1.1 Application must be in writing

A taxpayer seeking a private ruling must apply in writing to the CG.[17] This application is in the form of a formal letter addressed to the CG or the CDT requesting a private ruling. The letter may be written and signed by the taxpayer,[18] tax representative[19] or tax agent.[20] As with most jurisdictions (Prebble 1993), URA does not entertain anonymous applications for private rulings. Considering that one of the justifications of the private rulings regime is

13 Section 3 of the Value Added Tax (Amendment) Act, 2005.

14 The East African Excise Management Act, 1970 and the Excise Tariff Act, Cap 338.

15 Stamps Act Cap 342.

16 Section 45 of the TPCA.

17 Section 45(1) of the TPCA.

18 Section 45(1) of the TPCA.

19 Section 14(1) of the TPCA. A tax representative is a guardian or manager for an individual under a legal disability, the chief executive officer, managing director, or any director of the company for a company, a partner in a partnership, a trustee of the trust, the accounting officer in the case of a ministry, government department or agency or a foreign government, and in the case of a non-resident person, the individual controlling the person's affairs in Uganda.

20 Section 8(3)(b) of the TPCA.

intelligence-gathering by the tax authority, allowing a taxpayer to obtain a ruling without revealing their identity is an unreasonable advantage.

2.1.2 Rulings may be pre- or post-transaction

The TPCA refers to 'a transaction entered into or proposed to be entered into'.[21] The taxpayer can therefore seek a private ruling either before or after a transaction. This is in marked contrast to certain jurisdictions, where the taxpayer can only seek a ruling after engaging in the transaction (Van de Velde 2015).[22] Pre-transaction private rulings give taxpayers certainty about how the URA will apply the tax laws in respect of transactions that have not yet occurred. In some jurisdictions, notably Canada, post-transaction private rulings in respect of completed transactions cannot be obtained (Prebble 1993). Such an approach seems to undermine many of the benefits of private rulings in a self-assessment regime, where the taxpayer may remain uncertain for years whether their returns were accepted. In *Birungyi, Barata & Associates v URA,*[23] the URA declined to give a private ruling on the grounds that the transaction was already concluded. In its ruling, the TAT found that the URA erred in refusing to give the private ruling.

2.1.3 Requirement of full disclosure

The application should be 'a full and true disclosure of the nature of all aspects of the transaction relevant to the ruling'.[24] This means that the taxpayer should reveal all the necessary information for the CG to properly understand the transaction at issue. As Bingham LJ stated in the English case of *Ex parte MFK Underwriting Agencies Ltd*,[25] to amount to full disclosure, 'it is necessary that the taxpayer should have put all his cards face upwards on the table'. All relevant details of the transaction should be communicated to the CG. The courts in Australia have repeatedly emphasised the importance of providing detailed information in an application for a private ruling. For instance, in *Bellinz v FCT,*[26] court noted that 'it is imperative that an applicant give full details to the Commissioner either in the initial application or in response to requests by the Commissioner for additional facts'. In *National Speakers Association of Australia Inc v FCT,*[27] Emmett J noted that: 'It is, of course, clearly in the interests of a prospective taxpayer or applicant to set out with sufficient particularity the arrangement in respect of which a ruling is sought ... an arrangement which will bear as much resemblance as possible to an arrangement which might actually come into operation'.

In *Commissioner of Taxation v Brian John McMahon,*[28] Emmett J stated: 'It would be of utility to a Taxpayer to obtain a ruling only if the Taxpayer were diligent to ensure that the arrangement which was the subject of the application reflected either actual facts and circumstances or facts and circumstances which would be likely to occur in the future'.

The CG may reject the application if the information provided therein is insufficient to make a private ruling.[29] The CG may, however, sometimes write requesting more information rather than rejecting the application. As a matter of practice, an applicant may be contacted formally (in writing) or informally (via phone call) and asked for some additional information after the

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21 Section 45(1) of the TPCA.

22 e.g. rulings in the United Kingdom are generally not binding on the tax authority, and only become binding under the administrative law principle of legitimate expectation.

23 *Birungyi, Barata & Associates v URA* [2017] UGCOMMC 94.

24 Section 45(3) of the TPCA.

25 *R v Board of Inland Revenue, ex p MFK Underwriting Agencies Ltd* [1990] 1 All ER 91 at 110.

26 *Bellinz v FCT* (1998) 84 FCR 154.

27 *National Speakers Association of Australia Inc v FCT* (1997) 37 ATR 447 at 449-50.

28 *Commissioner of Taxation v Brian John McMahon* (1997) 79 FCR 127 at 149F.

29 Section 45(2)(f) of the TPCA.

initial application is filed. Further, where the ruling relates to a scheme that has not yet begun to be carried out, the applicants may not be able to provide all the relevant information required to make a ruling. In such instances issuing a private ruling may involve making assumptions about a future event on which the position in the ruling hinges. Any such assumptions made by the CG must be communicated to the taxpayer in the private ruling.[30] However, in light of the fact that there is a statutory requirement for the applicant to provide full disclosure, the CG ought not to make an assumption as to information that the applicant might be given the opportunity to provide. As a matter of good practice, the applicant ought to be notified about any proposed assumptions and given a reasonable opportunity to respond prior to issuing the private ruling (Seiden and Russell 2018).

2.1.4 Transaction must not be hypothetical

The application must not relate to a hypothetical transaction that the applicant is unlikely to engage in. Where there are reasonable grounds to believe that the transaction will not be carried out, the CG may reject the application.[31] This is in line with the practice of most jurisdictions (Prebble 1993). General tax queries relating to the applicant's general affairs or to speculative transactions are usually rejected on these grounds. Other compliance programmes, such as taxpayer education and general communications, are used to address such concerns. In the Australian case of *Commissioner of Taxation v Brian John McMahon*[32] the court noted that: 'Private rulings may be … sought upon hypothetical facts. The Commissioner is, however, empowered to decline to deal with an application for a private ruling … thus ensuring that he is not dealing with purely academic exercises that may have no practical significance and deterring any person who seeks to abuse the system and waste public resources … The private ruling system rests on the premise that the taxpayer will not abuse the system and will genuinely seek to obtain rulings in relation to anticipated facts or facts which are in fact known'.

Determining that a transaction may not be entered into or is hypothetical is not always straightforward. All applications relating to transactions not yet entered into are in a certain sense hypothetical. The likelihood of a particular applicant engaging in a particular proposed transaction is therefore the test to apply. This appears to be a purely subjective test. Where the application is by an experienced tax agent, it would ordinarily be easy for the tax agent to draft the application to ensure that the proposal at least looks possible. Applications are more likely to be rejected as purely hypothetical when a taxpayer with no technical tax experience drafts the application on their own. Tax practitioners reported that this provision has sometimes been abused by the URA, to reject a valid application when it is inconvenient for them to respond.

2.1.5 Why some taxpayers may not apply

Where the law is ambiguous, a taxpayer may still have strategic reasons for opting not to apply for a private ruling. First, applying for a private ruling may increase the probability of further scrutiny from URA where it attracts its attention to questionable transactions. Even taxpayers in industries subject to relatively high audit rates may expect some legally ambiguous tax issues to go undetected. A taxpayer applying for a private ruling raises 'red flags' regarding ambiguous legal issues, increasing the chance that URA will consider them. Private rulings are issued by the URA's national office, while tax audits may be conducted by district offices. Taxpayers may generally assume that officers at the national office have more expertise than officers at the district offices, and are less likely to err in their

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30 Section 45(7)(e) of the TPCA.

31 Section 45(2)(e) of the TPCA.

32 *Commissioner of Taxation v Brian John McMahon* (1997) 79 FCR 127 at 133.

interpretation of the law. Taxpayers may sometimes prefer more errors of interpretation, because they may benefit from the mistakes that result in a lower tax obligation, while mistakes that result in a higher tax obligation can be corrected (Givati 2009).

2.2 Review of an application for a private ruling

2.2.1 Rulings and Interpretations unit

In Uganda, as in most common law jurisdictions (Prebble 1993), the private rulings procedure is administered by the tax authority, as opposed to an independent or semi-independent organisation. Private rulings are managed by the URA, and specifically handled by the BPD within the DTD of the URA. The BPD is headed by an Assistant Commissioner, AC-BP. The Rulings and Interpretations unit in the BPD is in charge of private rulings. The unit is headed by a manager in charge of a team of four supervisors, each of whom oversees the work of two officers. Personnel deployed in the Rulings and Interpretation unit usually have at least five years' experience in operational work in other divisions of the DTD, with some experience in interpretation of the tax laws prior to being deployed in the unit.

Although it is not a requirement to be a lawyer to work in the unit, the unit always has at least 5 lawyers out of its 13 personnel. These usually have operational experience as opposed to a purely legal experience – they have previously been deployed in an operational capacity in a different DTD division. The operational experience is considered essential because it gives one a practical approach to interpretation of the statutes, as opposed to the purely theoretical view of an armchair analyst. The lawyers are particularly helpful when the assignment involves extensive reference to case law or interpretation of non-tax statutes, such as the Companies Act,[33] Partnerships Act[34] and Business Names Registration Act,[35] which may sometimes be relevant. No particular academic qualification is considered essential for a non-lawyer deployed in the Rulings and Interpretations unit. Nonetheless, the non-lawyers usually have professional qualifications, such as being certified public accountants or certified tax advisors or holding an Advanced Diploma in International Taxation.

The personnel in the Rulings and Interpretations unit is often given training on interpretation of tax statutes, tax avoidance schemes and emerging areas of interest in taxation and business. This training is provided by internal facilitators, such as fellow URA staff with particular skill and experience in these areas, or by external facilitators, such as tax scholars and tax practitioners. The training is scheduled at the beginning of each financial year, but ad hoc training can be organised if an urgent need is discovered.

2.2.2 Drafting the private ruling

An application for a private ruling is transmitted from the office of the CDT or the CG to the AC-BP, who assigns it to the Manager Rulings and Interpretations, who in turn assigns it to a supervisor, who also assigns a Case Officer (CO) to handle it. The assignment of the task is usually based on the particular skill set a CO or supervisor may have. For example, international tax-related matters will be assigned to the team with the most skill or training in that field. This specialisation is not intentional, but arises inevitably because the CO with the greatest capacity in a particular field will likely handle an assignment fastest. At least three technical personnel of the Rulings and Interpretations unit will review the draft of a private ruling before it is transmitted to the CDT for final consideration and signature. The first is the CO who has primary responsibility for the ruling, and will ordinarily have the highest level of

[33] Companies Act, 2012.

[34] Partnerships Act, 2010.

[35] Business Names Registration Act Cap 109.

involvement in the process. The depth of analysis by the CO with respect to a ruling application will range from very extensive to cursory, depending upon the nature of the subject matter and tax laws upon which the ruling is sought. In preparing the draft private ruling, the CO consults reference material such as tax statutes, practice notes, explanatory memoranda, Hansards, and previous private rulings where applicable. Copies of all previous private rulings are accessible to the Rulings and Interpretations unit. Between 2014 and 2016 these private rulings were made available to URA staff in an electronic format accessible through the URA intranet. However, the practice of uploading them ceased in 2016. This practice was revived in September 2020, and there are plans to upload all previously issued private rulings.

In formulating their draft, the CO may also consult their supervisor and may invite the applicant for discussions to get a better understanding of the proposed or completed transaction or applicant's understanding of the applicable law. The CO may make a site visit to the applicant's premises where necessary, or request a nearby URA branch to send a field officer to inspect the taxpayer's premises if they are too far away from the URA headquarters. The CO may also consult personnel in operational departments who may have more experience with a particular issue raised in the application. Where technical matters such as those of a scientific nature are raised, the CO may consult with the Science Team in the Tax Investigations Department. External consultants or experts are never consulted, even when the expertise is lacking within the URA, due to resource constraints. Instead the taxpayer may be required to provide independent expert verification of their assertions at their own cost, or the private ruling may be rejected due to the amount of resources required to issue it.

The CO's draft is transmitted to the supervisor, who usually also has technical input. The supervisor is usually more experienced than the CO, and is expected to draw on this experience in critiquing and adding value to the draft. The supervisor then transmits the draft to the Manager Rulings and Interpretation, who provides general direction and guidance to the supervisor and CO. The manager then transmits the draft to the AC-BP, who usually has only general oversight or involvement with a particular issue. Prior to 2019, the AC-BP would critique the draft private ruling, then send it to the CDT for signature. However, since September 2019 AC-BP is required to send the draft private ruling to the Assistant Commissioner Board Affairs, Policy and Rulings (AC-BAPR) for concurrence before forwarding it to the CDT. This step was added as an additional level of quality assurance, to ensure that the private ruling is in line with tax law. Where the AC-BAPR concurs, the draft private ruling is then forwarded to the CDT for signature. Where AC-BAPR does not concur, engagements are held between the Rulings and Interpretations team and the BAPR team to arrive at a harmonised position before the private ruling is forwarded to the CDT for signature.

Comprehensive data relating to private rulings could not be accessed. However, interviews with Rulings and Interpretations staff revealed that private ruling applications usually relate to mergers and acquisitions, demergers, spin-offs, cross-border transactions, income splitting, transfer of shares, branch taxation, re-characterisation of transactions, and implications of change of residence on the taxpayer's assets. Novel issues that have arisen in recent months include tax relief, public/private partnerships, hazardous waste disposal, unitisation projects, and oil- and gas-related transactions. It is estimated that about 12 private rulings are issued every month.

2.2.3 Timeframe for delivery of private rulings

There is sometimes a delay in issuing private rulings. There is no statutory time limit within which to respond to applications. However, both URA personnel and tax practitioners acknowledged that there is occasionally a delay. The URA personnel estimated that on average they take six weeks to respond to private rulings, but tax practitioners estimated four months. The challenge of delays in issuing private rulings is commonplace among tax authorities. Lack of timeliness in delivery of private rulings by the ATO is a common complaint in Australia (Waerzeggers and Hillie 2016). Delay in issuing a private ruling may be because of the complexity of applications, the CO's inexperience, applicant delays in providing necessary information, protracted discussions and engagement with applicants, or shortage of qualified COs.

2.2.4 Other roles of the Rulings and Interpretations unit

Although private rulings account for about 80 per cent of the Rulings and Interpretations team's work, they also engage in other related activities. Besides private rulings, the unit also provides technical support to the operational divisions of the DTD. This is usually done by the manager issuing guidelines or internal memoranda on their own initiative, or upon request from a particular division or unit of the DTD. The unit also prepares practice notes, which are issued by the CG. In fulfilment of URA's mandate of advising the Minister of Finance on revenue implications, tax administration and aspects of policy changes relating to all taxation,[36] the Rulings and Interpretations unit serves as the DTD's technical liaison team with the Ministry of Finance, Planning and Economic Development. The Rulings and Interpretations unit also participates in the tax amendment process, by collecting and vetting tax amendment proposals from URA personnel and assisting First Parliamentary Counsel in the drafting of the provisions of tax bills (MoJ 2020).

Information collected through private ruling applications has resulted in a number of tax amendments. In 2019 and 2020 amendments were introduced to the provisions of the domestic tax laws relating to tax incentives after the Rulings and Interpretations team noted frequent rejections of applications due to the restrictive wording of the law. In 2018 the rules for income sourced from Uganda were amended to include income derived from the direct or indirect change of ownership by 50 per cent or more of an entity located in Uganda. This followed the issuance of a private ruling in which the Rulings and Interpretations team noted a loophole in the law that was being exploited by that taxpayer.

2.3 Decision on the private ruling

There are three possible results of an application for a private ruling:

1. The CG may reject the application.
2. The CG may issue a favourable private ruling.
3. The CG may issue an unfavourable private ruling.

Where the CG issues a private ruling, whether favourable or not, the private ruling is issued in writing, contains the matter ruled, and identifies the taxpayer, the tax law relevant to the ruling, the tax period to which the ruling applies, the transaction to which the ruling relates, and any assumptions on which the ruling is based.[37] In practice the CDT generally issues all private rulings on behalf of the CG.

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[36] Section 3(1)(b) of the Uganda Revenue Authority Act.

[37] Section 45(7) of the TPCA.

2.3.1 Commissioner rejects an application for a private ruling

An application for a private ruling may be rejected by the CG. This takes the form of a letter in response declining to issue the private ruling and stating the reason why.[38] Section 45(2) of the TPCA lists the circumstances under which the CG may reject an application for a private ruling. Some of these, such as where insufficient information is provided and where the application is hypothetical, have already been considered. Below are other instances in which the CG may reject an application for a private ruling.

Tax assessment already in place. Where the CG has already decided the matter that is the subject of the application in a tax assessment, the CG may reject the application.[39] The rationale for this is that the taxpayer has recourse to the objections and appeals process as an alternative remedy.[40]

Practice note already in place. Where the CG is of the opinion that an existing practice note adequately covers the matter that is the subject of the application, the CG may reject the application.[41] A practice note is a document setting out the CG's understanding of the application of a provision in a tax law.[42] Once issued, a practice note, like a private ruling, is binding on the CG until they revoke it, but it is not binding on the taxpayer.[43] Practice notes sometimes arise as a result of frequent private ruling applications relating to a particular provision or set of provisions. When a number of applications regarding the interpretation of a particular provision arise, the CG instructs the AC-BP to create a practice note interpreting that provision. The CG then issues the practice note by publishing it in the Gazette and on the URA website.[44] Where a private ruling is inconsistent with an existing practice note, the private ruling has priority over the practice note to the extent of the inconsistency.[45] Therefore where the CG is satisfied that the practice note adequately addresses the issues raised by the application, it will be rejected.

Tax audit or objection in place. Where the application relates to a matter that is the subject of a tax audit or an objection, the CG may reject the application.[46] This is probably because audits and objections involve greater investigation into the facts of a particular transaction, and are therefore better suited to resolve any questions that arise therein.

Frivolous or vexatious. The CG may reject an application that is 'frivolous or vexatious'.[47] In *R v Ajit Singh,*[48] court defined frivolous as 'Paltry, trumpery; not worthy of serious attention; having no reasonable ground or purpose'. In *Musuku v Bugiri Municipal Council,*[49] the court defined a frivolous application as 'one which has no serious purpose or value and carries little weight or importance'. A frivolous application is therefore one without any legal basis or merit. An application may be frivolous even when the applicant genuinely believes that their application raises serious questions of law and interpretation. On the other hand, a vexatious application has been defined as 'one that is filed when a party is not acting bona

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38 Section 45(6) of the TPCA.
39 Section 45(2)(a) of the TPCA.
40 Section 24 of the TPCA.
41 Section 45(2)(b) of the TPCA.
42 Section 44(1) of the TPCA.
43 Section 44(3) of the TPCA.
44 Section 44(2) of the TPCA.
45 Section 45(5) of the TPCA.
46 Section 45(2)(c) of the TPCA.
47 Section 45(2)(d) of the TPCA.
48 *R v Ajit Singh* [1957] 1 EA 822 at 825.
49 *Musuku v Bugiri Municipal Council* HCMA No 207 of 2017 at 3.

fide and is not calculated to lead to any practical result'.[50] An application is vexatious when the applicant deliberately seeks to embarrass or distract the CG to no reasonable end.

Resource-intensive. The CG may reject an application where they are of the opinion that it would be unreasonable to comply with the application having regard to the resources needed to comply.[51] This may arise, for example, where extensive investigation into a multinational transaction is necessary before a private ruling can be issued. Such an investigation may require dedication of a lot of personnel over an extended period of time. In such an instance the CG may reject the application in order not to tie up staff on one application, while ignoring many others that may be equally urgent and important but less complicated. Alternatively, a proper understanding of the transaction may require the hiring of external experts or consultants, for which URA may lack resources.

Pending before court. Although not provided for by statute, private rulings will generally not be issued in situations where the question of law involved is currently before the courts or TAT, whether in respect of the same or another taxpayer. This avoids the possibility of an absurd outcome where a private ruling is issued that contradicts a court decision. However, for this rule to be properly applied there ought to be greater linkages between the URA litigation team and the Rulings and Interpretations team. Very often the Rulings and Interpretations team does not know which cases are pending before the courts. Further, although this rule seems to be a reasonable limitation, it undermines one of the touted advantages of the private rulings regime – that it is more rapid than typical judicial proceedings. Further, it is patently unfair when the transactions of the many are held up while a particular case is waiting to be heard in court or before the TAT.

2.3.2 Commissioner issues a favourable private ruling

Where a taxpayer has made a full and true disclosure of the nature of all aspects of the transaction relevant to the private ruling, and the transaction has proceeded in all material respects as described in the taxpayer's application, the ruling is binding on the CG in relation to the taxpayer to whom the ruling has been issued.[52] This means that where the applicant receives a favourable private ruling, they will ordinarily be protected from additional tax, penalties and interest when relying on the ruling issued. In *Biira Udear Co Ltd v Commissioner General URA,*[53] the plaintiff had been assessed and paid VAT for the supply of coffee husks and crushed palm kernel. The plaintiff subsequently applied for a private ruling contending that palm kernel and coffee husks were exempt from VAT. The CG issued a private ruling stating that the supply of coffee husks and palm kernel was exempt from VAT. On the strength of this private ruling, the plaintiff requested that the URA vacate its earlier assessments and refund the taxes erroneously paid, but the CG refused. The court held that in the absence of revocation of the private ruling or change of legislation, the plaintiff would enjoy the exemption. The private ruling meant that the plaintiff's earlier payments were done in error, and the URA could not demand any payments.

The binding effect of private rulings on tax authorities is generally accepted in many jurisdictions. In a 2015 OECD study of 51 countries with a private rulings regime, 46 reported that such rulings are generally binding on them (OECD 2015).[54] In Kenya,[55] Tanzania[56] and

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50 *Musuku v Bugiri Municipal Council* HCMA No 207 of 2017 at 3.

51 Section 45(2)(g) of the TPCA.

52 Section 45(3) of the TPCA.

53 *Biira Udear Co Ltd v Commissioner General URA* [2018] UGCOMMC 75.

54 Bulgaria, Hungary, India, Japan and Malta offer non-binding rulings.

55 Section 65(4) of the Kenya Tax Procedures Act No 29 of 2015.

56 Section 11(3) of Tax Administration Act, 2015.

Zimbabwe,[57] private rulings are binding on the tax authority. In its technical note on private rulings, the IMF recommends that 'A private tax ruling should take the form of legally binding advice which a taxpayer may seek from the tax authority' (Waerzeggers and Hillie 2016).

However, the TPCA provides that 'the ruling is binding on the Commissioner in relation to the taxpayer to whom the ruling has been issued'.[58] This means that the private ruling is personal to the taxpayer; other taxpayers, even if in the same or similar circumstances, cannot derive legal rights from it. Equity and the need for uniform application of tax law would suggest that it would be unreasonable for one taxpayer to be treated more generously than another in similar circumstances simply because the first happened to have obtained a favourable private ruling. However, the Rulings and Interpretation personnel are only human. Private rulings may be issued in the context of a time-sensitive transaction and therefore processed in an expedited manner – increasing the potential risk of error. An error in interpretation by an officer in settling a ruling could result in huge losses of revenue if taxpayers other than the applicant could rely on the ruling. Other taxpayers wishing to benefit from that ruling can make applications themselves. Where enough consistent rulings have been issued a practice note could be issued, making further individual applications unnecessary. In Kenya, the 2015 Tax Procedures Act originally provided that private rulings were to be published, and any person could rely on a published ruling.[59] However, in April 2020 this provision was deleted, meaning that private rulings can now only be relied upon by the applicant.[60]

The personal nature of private rulings means that they generally have no precedential effect. However, URA will endeavour to apply tax law uniformly. As already noted the CO may consult previous private rulings when reviewing an application. Further, private rulings may gain some precedential effect by the public getting to know about them. This is obvious in jurisdictions where private rulings are published in redacted form. In Uganda, the details of private rulings are protected by confidentiality, which applies to all information relating to taxpayers.[61] However, even where they are not published they may have some precedential effect as they are likely to become generally known to taxpayers through the tax advisory community.

2.3.3 Commissioner issues an unfavourable private ruling

The CG may issue a private ruling that is unfavourable to the applicant. A private ruling is not a tax decision for the purposes of the TPCA, therefore the applicant cannot object to it under the normal objections procedure.[62] This restriction is meant to prevent a flood of objections based on rejected private rulings. However, despite being binding on the CG, a private ruling is not binding on the taxpayer to whom it is issued.[63] The rationale for this approach requires one to consider that there are two persons: the applicant, who argues that a transaction be taxed a certain way (or not taxed at all); and the URA, who represent a conflicting interest that may not necessarily lead to a conflicting point of view. Where the URA agrees with the applicant, it is simply saying that it shares the same view of the law as the applicant. As the main rationale for private rulings is the assurance of certainty, clearly the URA must be bound by its rulings. URA is thus bound to the applicant's view, because the applicant will act

57 Section 34D and Paragraph 4 of the First Schedule to the Zimbabwe Revenue Authority Act Chapter 23:11.

58 Section 45(3) of the TPCA.

59 Section 69(2) of the Kenya Tax Procedures Act No 29 of 2015.

60 Tax Laws (Amendment) Act 2020 available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2020/TaxLaws_Amendment_Act_No.2of2020.pdf.

61 Section 47 of the TPCA.

62 Section 45(9) of the TPCA.

63 Section 45(4) of the TPCA.

upon it. On the other hand, if the URA disagrees with the applicant, they are simply saying that their opinion is different from that of the applicant. It follows that the applicant should be allowed to carry out the transaction in a manner of their choosing, and to object to any assessment that may follow. Therefore, the taxpayer could simply ignore the unfavourable private ruling and proceed with their transaction as if it was never issued.

However, as Francis Kamulegeya has cautioned in relation to unfavourable private rulings issued by URA, 'if you decide to ignore what they say, then prepare for a tough battle ahead, because they will not back down easily' (Kamulegeya 2010). Where a taxpayer ignores an unfavourable private ruling, the URA is likely to raise an assessment in relation to the taxpayer's transaction to which the taxpayer can object through the normal objections procedure. In *Warid Telecom Uganda Ltd v URA,*[64] the appellant sought a private ruling on the interpretation of VAT regulations. The taxpayer received an unfavourable ruling and soon received an assessment to which they objected, and eventually appealed against the objection decision. Similarly in *Livingstone International v URA*[65] the applicant received an unfavourable ruling relating to taxation of employees. Following the assessment from URA, the applicant objected to the assessment and subsequently appealed to the TAT. Rulings and Interpretations officers noted that it is fairly uncommon for an unfavourable ruling to result in litigation.

2.4 Rectification of a mistake in a private ruling

Where the CG is satisfied that an issued private ruling 'contains an error which is apparent from the record and that the error does not involve a dispute as to the interpretation of the law or facts of the case,' the CG may, for the purpose of rectifying the error, amend the ruling at any time before the expiry of three years from the date of making that ruling.[66] The error may be one of law or of fact, but it must not be a disputable one. If it is an error of law, the law must be definite and capable of ascertainment.[67] The type of error that can be altered by the CG must be manifest and clear – that is, 'apparent from the record'.

Rectification cannot be used to cure an erroneous decision or position taken in a private ruling. In the case of *Nyamogo and Nyamogo Advocates v Kogo,*[68] the Court of Appeal of Kenya stated:

> An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature … There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record.[69]

The error must be one that is clear to any reasonable person reading the private ruling without recourse to any other document or information. In *Kanyabwera v Tumwebaze,*[70] the

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64 *Warid Telecom Uganda Ltd v URA* [2012] UGCOMMC 63.

65 *Livingstone International University v URA* TAT Application No 71 of 2018.

66 Section 69 of the TPCA.

67 *Al-Shafi Investment group LLC v Ahmed Darwish & Another* [2017] UGHCCD 205.

68 *Nyamogo and Nyamogo Advocates v Kogo* [2001] 1 EA 173 cited with approval in *Kassaga v Barclays Bank* HCMA No 0112 of 2009.

69 *Nyamogo and Nyamogo Advocates v Kogo* [2001] 1 EA 173 at 174.

70 *Kanyabwera v Tumwebaze* [2005] 2 EA 86 at 92.

Supreme Court of Uganda defined an error apparent on the record as 'an evident error which does not require any extraneous matter to show its incorrectness'.

Rectification cannot be used to alter the interpretation of the law given in a private ruling. In *Biira Udear Co Ltd v Commissioner General URA,*[71] the CG had issued a private ruling stating that the supply of coffee husks and palm kernel by the plaintiff was exempt from VAT but denied them a refund on VAT paid on the same. Court held that there was no error apparent on the record, but rather a dispute as to the interpretation of the law – therefore the CG was *functus officio* and could not rectify the private ruling. Rectification is therefore a tool best suited to correcting clerical and other similar errors that do not involve a dispute as to the facts or law in issue.

2.5 Revocation of a private ruling by the Commissioner

The TPCA provides that the CG may revoke a private ruling in whole or in part by written notice served on the taxpayer to whom the ruling is issued.[72] Circumstances under which the private ruling may be revoked, though not explicitly stated in the TPCA, can be inferred from the provisions and an understanding of the rationale for private rulings. The purpose of a private ruling, as we have seen, is to give the taxpayer a level of certainty about how the tax authority will treat their transactions. The TPCA also provides that private rulings are binding on the CG where the applicant has made a full and true disclosure of the nature of all aspects of the transaction relevant to the ruling, and the transaction has proceeded in all material respects as described in their application.[73] Private rulings can therefore be revoked by the CG in only two instances:

1. Where the CG erred in interpreting the law.
2. Where the applicant did not make full and true disclosure of the transaction and the transaction has not proceeded as described in their application.

Once revoked, the private ruling cannot be relied upon by the taxpayer. Consequently, the CG may issue an assessment contrary to the revoked private ruling.

2.5.1 Commissioner misinterprets the law

Situations arise where the CG may interpret the law in an incorrect manner. For example, the private ruling may be issued in ignorance of a court decision that gives a contrary view, or a court may subsequently hold the position in a private ruling to be an incorrect application of the relevant tax law, or the private ruling may be issued in a manner that is inconsistent with international legal obligations under existing tax treaties (Waerzeggers and Hillie 2016). In such scenarios, the private ruling should ideally be revoked. However, a challenge arises regarding what interpretation to adopt for the period during which the ruling was in force where the private ruling relates to a series of transactions. Would the transactions that took place while the private ruling was in force or after it has been revoked remain governed by the CG's initial interpretation? It has been argued that in order to ensure certainty and fairness in tax administration, the private ruling must be considered as binding on the CG even where the law had been misinterpreted (Scolaro 2006). A question also arises regarding a one-off transaction entered into by a taxpayer, following the issuance of a private ruling that is subsequently found to have been based on a misinterpretation of the law. In such a case, should the private ruling be revoked?

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71 *Biira Udear Co Ltd v Commissioner General URA* [2018] UGCOMMC 75.

72 Section 45(8) of the TPCA.

73 Section 45(3) of the TPCA.

A public body that makes an undertaking in conflict with its statutory duty can, in principle, go back on the essentially illegal undertaking.[74] However, where in reneging on its previous assurances the public body exercises its statutory power in a manner that causes unfairness, that exercise is an abuse of power and the otherwise illegal undertaking may be upheld by the courts. In *R v Commissioners of Inland Revenue ex parte MFK Underwriting Agencies & Others,*[75] the Revenue had issued a general press release in 1982 applying capital gains tax to redemption of index-linked bonds and restated the same to the applicants on inquiry. In 1988, however, the Revenue decided to levy ordinary income tax on the bonds. The applicants contended that it was unfair and an abuse of power. The court held that the general statements made by the Revenue could not be relied on as creating a legitimate expectation that it would not tax the bonds in question on the correct principles. However, court noted that: 'If however, the taxpayer approaches the Revenue with clear and precise proposals about the future conduct of his fiscal affairs and receives an unequivocal statement about how they will be treated for tax purposes if implemented, the Revenue should in my judgment be subject to judicial review on grounds of unfair abuse of power if it peremptorily decides that it will not be bound by such statements when the taxpayer has relied on them'.[76]

Significantly, however, a Kenyan court has held that the requirement of legality of the position in a private ruling takes precedence over the need for certainty – therefore, where the private ruling misinterprets the law, it should be revoked. In *Republic v Commissioner of Domestic Taxes Exparte Sony Holdings Limited* (*Sony Holdings*)*,*[77] following the destruction of the applicant's mall in a terrorist attack, the applicant sought and received a private ruling from the Kenya Revenue Authority (KRA) confirming that they could claim Commercial Building Allowance on reconstruction costs if they provided roads, water, sewers and other social infrastructure. Relying on this private ruling, the applicant incurred significant costs in constructing, upgrading and improving various roads. Subsequently, KRA denied the applicant the building allowance, arguing that the private ruling was granted subject to the transactions' compliance with the relevant legal provisions, and it did not in any way negate the mandatory provisions of law. The court acknowledged the need for the promotion of legal certainty in private rulings, but considered that certainty must be balanced against legality, stating:

> The fear in protecting legitimate expectations substantively is that administrators may be forced to act ultra vires. That would be the case where an administrator has created an expectation of some conduct, which is beyond his authority or has become beyond his authority due to a change of law or policy. If the administrator were consequently held to that representation, he would be forced to act *contra legem*. It is clear that such representations will not be upheld by the court … The value of legality in law has led to the requirement that the expectation must be one of lawful administrative action before it can be either reasonable or legitimate. Legality therefore seems to take precedence over legal certainty in law.[78]

However, in *Gordon Sentiba & others v Uganda Revenue Authority* (*Gordon Sentiba*),[79] the Ugandan court emphasised the value of certainty over legality. In that case the CG had revoked a favourable private ruling previously issued to applicants after a full disclosure of

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74 *Preston v IRC* [1985] 2 All ER 327.

75 *R v Commissioners of Inland Revenue ex parte MFK Underwriting Agencies & Others* [1990] 1 All ER 91.

76 *R v Commissioners of Inland Revenue ex parte MFK Underwriting Agencies & Others* [1990] 1 All ER 91 at 115.

77 *Republic v Commissioner of Domestic Taxes Exparte Sony Holdings Limited* Judicial Review Division in The High Court of Kenya at Nairobi Misc. Civil Application No. 363 of 2018.

78 *Republic v Commissioner of Domestic Taxes Exparte Sony Holdings Limited* Judicial Review Division in The High Court of Kenya at Nairobi Misc. Civil Application No. 363 of 2018.

79 *Gordon Sentiba & others v URA* [2010] UGCOMMC 27.

the transaction had been made. The court considered that: 'Where full disclosure is made … the private ruling is binding. What is material is whether there was full disclosure. There is no evidence that the Commissioner for Domestic Taxes did not have all the materials. Moreover, the law does not make it clear that the opinion may not be wrong. What happens if the opinion is wrong? In my view, it cannot just be revoked. The tax payer … should be heard'.[80]

In *Sony Holdings* the applicant's argument that it had a legitimate expectation that KRA 'will not issue an incomplete, defective and deceptive private ruling deliberately concealing other applicable and mandatory conditions, with the intention of inducing the applicant to act on the said ruling to its detriment' was ignored by the court, which considered this to be an attack on the merit of the ruling that was outside the purview of judicial review. The legitimate expectation argument was accepted in the Ugandan case of *NSSF v URA,*[81] wherein NSSF wrote to URA and received a letter in response in 2001 clarifying that interest paid to members' accounts by NSSF is an allowable deduction. However, in 2013 URA wrote another letter, communicating that the said interest is not in fact an allowable deduction and sought to recover the previously uncollected tax from NSSF. NSSF argued that the 2001 letter was a private ruling, and created a legitimate expectation of tax treatment of its transactions. Court rejected the argument that the letter was a private ruling as it did not meet the statutory requirements of one, but accepted that legitimate expectation had been created stating:

> A particular interpretation assigned by the Authority to a particular provision of the law is a lawful construction of such a provision unless and until otherwise changed by them or by a higher authority. The Authority has the power and mandate to enforce and adhere to such an interpretation of the law in a bid to give effect to a relevant provision of the law. Such an interpretation does not have to be infallible. It may be a wrong construction of the law but as long as it is made through the right channels and in a proper exercise of jurisdiction, it is lawful and binding upon not only the people who receive and rely on it but also on the Authority itself. It is therefore not a correct position of the law that if the Authority later on discovers that it was wrong in a previous interpretation of the law, and as a result changes its position, that the earlier position is deemed illegal and unreliable. I find that an absurd interpretation of the law. The Authority has the right and power to change its position on a particular interpretation. But when it does so, their new position takes effect from the time it is made and does not render the earlier position illegal or unreliable.[82]

In this case the court found URA to be bound by its previous communication purely on the basis of the doctrine of legitimate expectation, because the communication did not amount to a private ruling. However, in *Gordon Sentiba*, where the communication in issue was a private ruling, the court noted that the argument of the applicants for legitimate expectation was not premised merely on the doctrine of estoppels but rather on the statutory provision as well, which provides that the private ruling is binding. The position in Uganda therefore appears to be that a private ruling is binding even when it amounts to a misinterpretation of the law. Any revocation cannot have retrospective effect due to the legitimate expectation of the applicant arising out of the doctrine of estoppels and the statutory provision which states that the ruling is binding.

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80 *Gordon Sentiba & others v URA* [2010] UGCOMMC 27 at Para 31.

81 *NSSF v URA* High Court Civil Appeal No. 29 of 2020.

82 *NSSF v URA* High Court Civil Appeal No. 29 of 2020 at p 45.

2.5.2 Applicant did not make full disclosure/transaction materially different

A private ruling can be revoked where a taxpayer has not 'made a full and true disclosure of the nature of all aspects of the transaction relevant to the ruling', and the transaction has not 'proceeded in all material respects as described in the taxpayer's application for the ruling'.[83]

The requirement of full disclosure is not fulfilled merely because sufficient information is given to the tax authority. The disclosure must relate to the totality of the transaction and its full tax implications. In *Matrix-Securities Ltd v IRC,*[84] the applicant was the sponsor of a scheme to develop an enterprise zone property that intended to make use of capital allowances available on the purchase of buildings in that zone. The applicant sought clearance from the tax authority in a letter outlining the scheme in general misleading terms, because the tax authority would not clear the scheme for the capital allowances if the details were known. The authority gave assurance regarding capital allowances without qualification. Three months later the tax authority wrote to the applicant effectively revoking the assurance. The applicant sought judicial review of the revocation decision. The court held that it was a sophisticated tax avoidance scheme, and the applicant's letter was inaccurate and misleading. The assurance was therefore given wrongly, and it was not an abuse of power to withdraw it. The fact that sufficient information had been disclosed to enable inferences to be drawn did not amount to full disclosure.

Arguably, insistence on the transaction not having 'proceeded in all material respects' as described limits CG's grounds for revocation considerably. To require anything less would severely undermine the goal of certainty that underpins the private rulings regime. Without the qualification of 'material respects', the capacity to withdraw a ruling would be virtually unbounded. What constitutes material respects is not defined in the statute. In *Carey v Field,*[85] Merkel J considered that something would be 'material' if it would have resulted in a different tax outcome: 'In my view if it is reasonably open to the Commissioner to form the view on the material before him that, because of a difference between the arrangement implemented and that ruled upon, the tax outcome for a taxpayer who is a member of the class of persons to whom the ruling was intended to apply is capable of being, or is or likely to be, different to that provided for in the ruling, that difference is a material difference'.

In *Mount Pritchard & District Community Club Ltd v FCT* (*Mount Pritchard*),[86] the applicant had obtained a private ruling in 2004 stating that the club was exempt from income tax. However, in 2006 the Commissioner determined that the applicant's amalgamation with another club was a material change to the arrangement that had been ruled on in 2004, and assessed the applicant. The Court held that where there has been a material change in the activities of an applicant to those that existed at the time that a ruling was issued, then the ruling does not bind the Commissioner for those years of income where the activities are materially different. The court reasoned that: '[A] private ruling can only bind the Commissioner in respect of the arrangement ruled upon, or where the taxpayer relies upon the ruling by acting in accordance with it. If, in a subsequent period after the private ruling the taxpayer enters into different arrangements, or does not act in accordance with the ruling because of changed circumstances, then the Ruling does not bind the Commissioner. The taxpayer still obtains the protection afforded by the private ruling regime, but only to the extent the taxpayer implements the scheme or arrangements the subject of the ruling'.[87]

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83 Section 45(3) of the TPCA.

84 *Matrix-Securities Ltd v IRC* [1994] 1 All ER 769.

85 *Carey v Field* (2002) 122 FCR 538.

86 *Mount Pritchard & District Community Club Ltd v FCT* 196 FCR 549.

87 *Mount Pritchard & District Community Club Ltd v FCT* 196 FCR 549 at [58]–[59].

Therefore, the position in Uganda is that where a taxpayer has not provided accurate or sufficient information in applying for the private ruling, the ruling can be revoked and the revocation applied retrospectively.

2.5.3 Procedure of revocation by the Commissioner

The TPCA is silent on any procedure to be adopted in revoking a private ruling. However, the CG ought not to revoke a private ruling without first giving the adversely affected taxpayer a fair opportunity to make representations challenging the revocation, because a taxpayer would reasonably expect such a procedural step (Azzi 2016). In the Australian case of *Carey v Field*,[88] a ruling had been issued to a partnership stated to have no more than 20 partners and requiring that olive trees be planted before 30 June 2001. The Commissioner withdrew the ruling because the arrangement was implemented in a manner materially different from the application, because there were in fact seven partnerships and the trees had not been planted by 30 June 2001. Court held that the Commissioner was bound by the rules of natural justice, which required that the partnership be provided an opportunity to be heard prior to withdrawing the ruling.

The requirement of fairness in administrative decisions is rooted in article 42 of the Constitution of the Republic of Uganda, which provides for the right to just and fair treatment in administrative decisions. A presumption of procedural fairness therefore inheres in favour of a taxpayer, even in the absence of clear statutory language establishing it. The taxpayer has a legitimate expectation limiting the URA from validly exercising power without according procedural fairness to those whose interests will be affected. In *Sony Holdings*, one of the court's considerations in upholding the revocation was the fact that there was evidence that KRA officers visited the applicant and requested documents before the decision to revoke the private ruling and raise the assessment was made. Court concluded that this was adequate notice and fair hearing.

The requirement of procedural fairness applies independent of the merits of the revocation. Where the proper revocation procedure has not been followed, Ugandan courts have consistently quashed the revocation without enquiry into the merits. In *Gordon Sentiba & others v URA,*[89] the applicants who had settled a suit for the sum of US$2.7 million and interest as the value of their shares in a company, applied for a private ruling seeking confirmation that the payment was not a taxable gain. The private ruling was issued stating that the income and interest were exempt. Three months later, the private ruling was revoked without any reason and without notice to the applicants. URA wrote to the Privatisation Unit that was to pay the applicants, instructing them to withhold tax. The applicants brought an action for judicial review against the URA. Court held that the applicants' constitutional right to be treated justly and fairly had been infringed. The court stated that:

> It is a cardinal rule of procedural fairness and justice that no party shall be condemned unheard … It is not mere courtesy that a party to a ruling on a pertinent question affecting their tax liability which ruling involves colossal sums of money is at the very least entitled to be heard on the question as to why their liability which had avoided over 2 billion Uganda shillings in the Respondents ruling should be revisited on them. Such a liability should not be imposed without a hearing of the affected persons. Especially since they had been given a favourable ruling showing that the item in question is not taxable.[90]

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88 *Carey v Field* (2002) 122 FCR 538.

89 *Gordon Sentiba & others v Uganda Revenue Authority* [2010] UGCOMMC 27.

90 *Gordon Sentiba & others v Uganda Revenue Authority* [2010] UGCOMMC 27 at para 32.

Where procedural fairness has been breached, it is possible for a party who was not an applicant of the private ruling, but whose interests are affected by the revocation, to seek judicial review. In *Salim Alibhai and Others v URA* (*Salim Alibhai*),[91] the applicants sold their shares in a non-resident company called Shalvik which was the majority shareholder of a resident company called Sadolin, which was subsequently renamed Kansai Plascon Uganda Ltd (KPUL). KPUL applied for and was issued with a private ruling providing that the applicants were not subject to capital gains tax on the sale of their shares. The private ruling was revoked without a hearing and the applicants sought judicial review. URA claimed that they were not parties to the private ruling, and only KPUL could seek judicial review. Court rejected this argument citing the Judicature (Judicial Review) (Amendment) Rules of 2019, which provide that any person who has a direct or sufficient interest in a matter may apply for judicial review. The court stated:

> The interests of the applicants are not in dispute and they are all directly affected by the decision to revoke the private ruling out of which a tax obligation has arisen. The applicants are all directly affected since they were beneficiaries of the respondent Private Ruling … The argument by the respondent that the private ruling was by a different entity is very lame and crippled … The application for a private ruling was for the benefit of all the applicants in order to be informed about their tax obligations before the conclusion of the sale of shares and this fact is not disputed by the respondent.[92]

The court found that the revocation of the private ruling without giving the applicants a hearing was tainted with illegality. Therefore for any revocation of a private ruling to be legitimate, the recipient of the private ruling must be given a fair hearing before the revocation can take place.

2.6 Revocation of a private ruling by operation of law

A taxpayer who is in receipt of a private ruling may find limited utility in it if the relevant tax law applied by the CG in the ruling has changed. This is a considerable risk in a jurisdiction where the tax law is frequently amended. Where the law on which the private ruling is based is amended, the taxpayer ought not to be able to rely on the ruling. This is because allowing the taxpayer to benefit from the private ruling would place them in a more favourable position than other taxpayers in the same circumstances, thereby defeating the principle of equity and fairness in tax administration. In the Australian case of *IOOF Holdings Ltd v FCT,*[93] Robertson J stated: 'a private ruling is only binding up to a change in the law and, apart from a statutory provision providing otherwise, a ruling and therefore an application for a ruling or any accrued rights thereunder does not survive a change in the law'.[94]

Further, in the Australian case of *Pratt Holdings Pty Ltd v FCT,*[95] the legislature had amended a provision on which a private ruling had been based after it had been issued. The court held that the private ruling was not binding on the tax authority.

A change of law in Uganda would therefore amount to a revocation of a previously issued private ruling based on the old law. However, where such a change in law comes into force

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91 *Salim Alibhai and Others v URA* HCMA No 123 of 2020.

92 *Salim Alibhai and Others v URA* HCMA No 123 of 2020 at para 40.

93 *IOOF Holdings Ltd v FCT* (2014) 224 FCR 535.

94 *IOOF Holdings Ltd v FCT* (2014) 224 FCR 535 at [125].

95 *Pratt Holdings Pty Ltd v FCT* (2012) 216 FCR 258.

in the course of that taxpayer's year of income, it would only impact that taxpayer with the private ruling in the next year of income.[96]

3 Evaluating the private rulings regime

3.1 Strengths of the Ugandan private rulings regime

3.1.1 Use of a statutory regime

The Ugandan private rulings regime is founded in statute rather than as a mere administrative creation of the URA. According to the Lex Mundi study of private rulings regimes in 61 jurisdictions, seven jurisdictions have private rulings as a matter of administrative practice by tax authorities with no statutory basis (Lex Mundi 2012).[97] Among the OECD countries, only Ireland, Turkey and New Zealand have administrative private rulings regimes without a statutory basis (OECD 2015: 289). A non-statutory private rulings regime is less reliable for investors, as it is unlikely to confer an enforceable right to seek guidance from the tax authority. Further, the rulings given without a statutory basis are likely to give rise to disputes regarding their binding nature.

A formal system of private rulings was founded in statute in order that the URA's authority to make such rulings be manifestly clear, and in order that the taxpayer's right to access the regime be an enforceable right rather than a discretionary action by the CG. A clear statutory framework supports taxpayers who have to subject themselves to a high standard of disclosure in order to obtain a ruling (Parliament 2014).

3.1.2 Use of a centralised system

The use of a central office, the BPD, minimises the risk of private rulings with differing positions for taxpayers in similar circumstances. A central specialist unit concentrates in one place a body of (documented) knowledge, and staff with experience who can ensure that private rulings are issued speedily and accurately. Jurisdictions such as Australia and Germany, where the private rulings can be issued by different tax districts, are often blighted by conflicting rulings from different district offices on a similar set of facts (Prebble 1993). A decentralised system risks taxpayers 'shopping' for a favourable ruling from different district offices, and attempting to play one local office against another. Centrally-issued private rulings are more consistent in application and quality. Taxpayers also have more confidence in advice from a central office because it is able to demonstrate expert knowledge, leading to fewer objections and disputes (Chan 1997).

3.1.3 Absence of an appeals process

Most jurisdictions with a private rulings system do not provide for a formal appeal process in case of unfavourable private rulings outside of the normal objection process for tax assessments (Sawyer 2002a). Where the private ruling is binding on the tax authority but not on the taxpayer, as is the case in Uganda, it is appropriate not to make the private ruling reviewable or subject to appeal, because the taxpayer can proceed with the transaction despite the adverse ruling and will be able to appeal any subsequent assessment (Waerzeggers and Hillie 2016). In Australia there is the right of objection for taxpayers

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96 *Crane Bank v URA* [2012] UGCOMMC 42 provides that a change in law in the course of a taxpayer's year of income takes effect in the next year of income.

97 China, Isle of Man, Ireland, Nicaragua, Nigeria, Scotland and Turkey.

dissatisfied with a ruling because the taxpayer faces a penalty of 25 per cent on the tax shortfall for departure from the ruling (Sawyer 2006). In the United States and Canada, where rulings do not bind taxpayers, there is no right of appeal (Sawyer 2002a).

Further, courts are likely to be opposed to an appeal process that involves litigation in the case of pre-transaction private rulings, because this will require courts to rule on hypothetical situations (Sawyer 2002a). In *Legal Brains Trust Ltd v Attorney General of the Republic of Uganda,*[98] the court stated: 'A court will not hear a case in the abstract, or one which is purely academic or speculative in nature - about which there exists no underlying facts in contention. The reason for this doctrine is to avoid the hollow and futile scenario of a court engaging its efforts in applying a specific law to a set of mere speculative facts. There must be pre-existing facts arising from a real live situation'.

The current position, where the applicant can simply ignore an unfavourable private ruling, is therefore appropriate.

3.1.4 Limited status of private rulings as law

Private rulings are intended to provide the CG's interpretation of tax law, and are not law. The legal regime governing the private ruling system in Uganda does not contemplate that they will be treated as law, but rather as a supplement to the law. Under the Ugandan constitutional framework the CG cannot create tax legislation, as this power rests solely with parliament.[99] On the other hand, the need for certainty in the application of taxation laws requires that private rulings be given legislative backing to the extent that the CG will be estopped from subsequently denying the position communicated in the ruling.

Nonetheless, private rulings are often so heavily relied upon in practice by taxpayers and tax advisors that they may be said to have acquired the status of 'de facto law'. This is especially the case where there is great uncertainty due to complexity and frequent amendment of tax laws. Private rulings are often meaningful and sophisticated interpretations of law, and may sometimes be the only source of clarification on a significant legal point. Where the law is entirely uncertain or unsettled, a private ruling may amount to private or administrative law making (Waerzeggers and Hillie 2016). Private rulings may also be said to have the force of law, because the taxpayer can rely upon a favourable ruling as if it were the law. However, courts in Uganda have previously disregarded practice notes and would treat private rulings similarly, as constituting no more than the CG's opinion of a tax law.[100]

Their apparent de facto law status notwithstanding, the current treatment of private rulings as mere pronouncements of the CG of their interpretation of the tax law should be maintained. Private rulings are a supplement to, and not a substitute for, clearly drafted legislation. Even if all legislation were clear and concise the private rulings system may still be desirable, even if only to increase taxpayer certainty (Sawyer 2002a). The challenge of frequent amendment of tax laws cannot be papered over by way of private rulings. The private rulings regime should not replace critical tax reform in developing countries (Waerzeggers and Hillie 2016).

3.1.5 Reliance on human resource from diverse backgrounds

The Rulings and Interpretations unit is made up of lawyers, accountants and other personnel specialising in different tax fields. It is helpful to have a diverse group, because private rulings applications often involve analysis of complex transactions, raising legal and

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98 *Legal Brains Trust Limited v Attorney General of Uganda* EACJ Appeal 4 of 2012 at 11-12.

99 Article 152 of the Constitution of the Republic of Uganda.

100 *Crane Bank v URA* [2012] UGCOMMC 42.

accounting issues, and possibly other specialised issues. In *re Bercu,*[101] a United States court noted that 'taxation is a hybrid of law and accounting', acknowledging the role accountants may play in interpretation of the law. In designing transactions such as mergers, demergers or spin-offs, taxpayers may consult a variety of tax experts and advisors of various professional backgrounds. It therefore makes sense that the URA team that analyses these various transactions similarly has a diverse background.

The requirement of at least five years' experience in working in taxation before joining the Rulings and Interpretations team is helpful. The previous experience means the personnel will have adequate knowledge of taxation of different types of transactions, and therefore may be able to better advise the taxpayer. It also means that there will be less time wasted on understanding simple transactions before a ruling can be issued.

3.2 Limitations of the Ugandan private rulings regime

3.2.1 Insufficient revocation procedure

There is need for a more elaborate revocation provision. The current provision does not clearly state the grounds on which a revocation can be made, and the procedure to be followed in revocation. The result is that revocations have been issued on suspicious grounds and without procedural fairness, as is evidenced in the cases of *Gordon Sentiba* and *Salim Alibhai*. Procedural fairness requiring the CG to issue a notice of intention to revoke, and to hold a hearing with the taxpayer prior to revocation, should be placed in the statute to put an end to revocations without due process. Revocations without procedural fairness undermine the rationale for private rulings.

Ordinarily, justice requires that revocation of private rulings should not be retroactive (Prebble 1993). However, where the revocation is by operation of law or due to inadequate information provided by the taxpayer, it may be applied retroactively. Where, however, the revocation is due to a misinterpretation of the law by the URA when issuing the private ruling, it ought not to apply retroactively where the taxpayer has already altered their affairs in reliance on it. While the URA ought not be required to be bound by a position that contradicts its mandate to collect taxes, it is necessary to balance the legal certainty rationale of private rulings and the tax authority's need to uphold its mandate. In the UK, incorrect advice by HMRC will not be binding; however, where the taxpayer can show financial detriment would occur if the correct advice were applied the taxpayer will be protected (Daly 2020: 117). A reasonable position to adopt in Uganda would therefore be that where transactions are continuing, revocation cannot be done retroactively. A taxpayer with a five-year running contract may obtain a private ruling relating to payment of sub-contractors prior to commencement of the contract. The CG may determine that the private ruling was based on a misinterpretation of the law in the second year of the contract. The taxpayer should be able to continue to rely on the private ruling for the remaining three years even after the CG makes that determination (Prebble 1993). As regards one-off transactions, where the arrangement has already been entered into prior to the discovery of the misinterpretation, then a revocation cannot issue. However, if the taxpayer has not yet begun to carry out the specified scheme, the private ruling may be revoked (Seiden and Russell 2018). This would mirror the position on practice notes, which function somewhat similarly to private rulings – except that they provide the CG's interpretation of a tax statute to the general public. They are similarly binding only on the CG. A practice note continues to apply to a transaction

[101] *In re: Bercu* (1948) 273 App. Div. 524, 78 N. Y. S. (2) 209, 220, 9.

commenced before the practice note is revoked, but does not apply to a transaction commenced after the practice note is revoked.[102]
The major drawback of this approach is that, while it promotes certainty and a certain degree of fairness, it infringes the principle of equity – where taxpayers in the same position are treated in the same way. One taxpayer taking advantage of an erroneous private ruling for a number of years may be unfair to other taxpayers unable to access the same treatment. Nonetheless this approach appears to be the most reasonable one. In *Matrix-Securities Ltd v Inland Revenue Commissioners,*[103] in relation to an erroneous private ruling issued by the tax authority, Lord Griffith considered that 'It is part of the human condition that people will make mistakes, but they must not be held to mistaken decisions if the mistake is discovered in time to take effective remedial action'. He, however, went on to note that if the applicant had spent money in promoting the proposed scheme prior to the revocation, 'fairness demands that the applicant should be reimbursed for this out-of-pocket expense and it could be regarded as an abuse of power for the Revenue to refuse to do so'. This challenge can further be mitigated to some extent by providing for time limits within the private rulings themselves. For example, a transaction may be exempted from tax only if it is carried out within, say, 24 months. After expiry of that period a new ruling would be necessary. This approach has the merit of attempting to balance the certainty of tax law against the reality of constant change in legislation or interpretation of the law. Alternatively, the tax implications of a certain investment vehicle or course of action may be ruled upon and effective for, say, four years. Taxpayers engage in multifarious transactions and business operations, such that there is no merit in having a fixed specific duration applicable to all private rulings. Where taxpayers have not yet taken advantage of a private ruling, revocation should be possible (Prebble 1993).

3.2.2 Private rulings ought to be published

Given their putative de facto law status, private rulings ought to be published to enhance fairness between taxpayers, and to give all citizens access to sources of tax law and its application. Publication must be subject to the deletion of details that would identify the taxpayer or their commercial secrets (Prebble 1993). While not universally done, publication of redacted private rulings is considered best practice. Publication promotes transparency, and supports the general objectives of certainty and consistency of the tax system as a whole.

Substantial risks exist where confidential private rulings are not published or otherwise reported. If it is accepted that private rulings constitute de facto law yet they remain confidential and personal, they may thereby also constitute a body of secret law (Thompson 1976). The discretion given to URA to issue private rulings could lead to private law-making outside the normal legislative process. Confidential private rulings can result in a parallel method of tax policymaking, thereby creating a hidden source of tax law. This runs counter to normal operation of the rule of law (Waerzeggers and Hillie 2016). Secret law between particular taxpayers and the tax authority is antithetical to transparency and fairness. This can only be adequately cured through publication.

Such secret law would also likely result in secret favouritism, where certain taxpayers receive favourable rulings while similarly situated taxpayers receive unfavourable ones. Taxpayers may be able to rely on political clout or possibly even bribery to access a favourable private ruling. The tax system in Uganda is already perceived by many taxpayers as unjust and favourable to the wealthy and politically connected (Ali et al. 2014). The URA's effectiveness as a tax authority is heavily dependent on public faith in consistent and uniform

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102 Section 44(6) of the TPCA; *Aisha Tumusiime v URA* TAT No 31/2007.

103 *Matrix-Securities Ltd v IRC* [1994] 1 All ER 769 at 780-781.

administration of the tax laws. In the United States, fears of secret favouritism by the Internal Revenue Service in the issuance of private letter rulings prompted demands for disclosure of private letter rulings (Oran 1973; Thompson 1976). The IRS now generally makes private letter rulings public after all identifying information has been redacted (IRS 2020).

Further, failure to publish redacted private rulings denies Ugandan citizens their constitutional right to access information. The right of citizens to access 'information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person' is enshrined in article 41 of the Constitution of the Republic of Uganda and section 5 of the Access to Information Act, 2005. Redacted private rulings therefore ought to be publicly available.

However, publication of private rulings is not without costs. There is a possible loss of privacy for the taxpayer. Publishing a sanitised version of the private ruling, where the identifying details of the taxpayer and their particular transaction have been removed, may not always be sufficient. In developing countries there may be very few players in certain sectors of the economy, such that the private ruling beneficiary is easily identified. This was the rationale for the repeal of the statutory requirement to publish private rulings in Kenya (KRA 2020).[104] A more pragmatic approach would be to publish an abstract or summarised version of the private ruling, omitting even tangential identifying information. It should also be considered that some taxpayers may be indifferent to anonymity, while others might welcome publicity. For example, financial institutions might welcome publication of a favourable private ruling on the tax consequences of a new kind of investment structure or instrument they wish to promote. Optional anonymity could be made part of the application process, so taxpayers ask for it if they desire it.

Another concern in publication of private rulings is that an erroneous ruling involving a misinterpretation of the law by the URA would be available to more taxpayers, instead of just the individual taxpayer to whom it had been issued. As already noted, human error is possible and can result in a private ruling based on wrong interpretation of the law. However, the published private ruling would only remain binding on the CG in relation to the taxpayer to whom it was issued. Other taxpayers would only become aware of the ruling through its publication, but would have to similarly apply and receive such a ruling before they are able to bind the CG to that position.

Further, where sanitised private rulings are to be published, it is likely that the consequence will be fewer and more limited rulings involving a longer review time. It can be presumed that where rulings are published, more applications for private rulings will be accompanied with briefs pointing out the existence of previous similar rulings, and each will require more processing time. Further, the fact that the private ruling will in effect be relied on by more than just the applicant (even though it may not be binding on the CG in regards to those taxpayers) will require more time and effort in the review. This may lead to delay, which defeats one of the major benefits of private rulings. Publication of sanitised private rulings may therefore require adding staff to the Rulings and Interpretations team to ensure that rulings are still handled expeditiously.

Despite the valid privacy and confidentiality concerns, it should be noted that most jurisdictions with private rulings publish them in a sanitised form (Sawyer 2002b). Sanitised private rulings in South Africa are published on the website of the South African Revenue Service (SARS 2020). The URA can follow suit, and publish private rulings on its website.

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[104] Tax Laws (Amendment) Act 2020 available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2020/TaxLaws_Amendment_Act_No.2of2020.pdf.

Content that could identify the taxpayer to whom the relevant ruling has been issued, such as names and description of unique transactions or dealings, should be removed. URA also ought to publish an annual report on private rulings issued. The report would cover the total number of private rulings granted or rejected, and an estimate of their revenue impact. Publication of this report would provide oversight bodies such as the Ministry of Finance, Planning and Economic Development, the Finance Committee of Parliament and the Auditor General's office with necessary information.

Overall it should be considered that the benefits of broader publication outweigh the costs associated with it. Full disclosure of redacted private rulings ensures that neither incompetence, which results in unintentionally erroneous rulings in the applicant's favour that give a competitive advantage, nor deliberate favouritism, is being concealed, and would promote confidence in the rulings regime and the tax system in general. Even if a decision is made not to publish private rulings, they should be made open to inspection. Many rulings may be of little to no importance to the general public, because they are highly specific to the applicant. There would probably be very few applications to see private rulings, and they would still need to be redacted before being made available to members of the public.

3.2.3 Private rulings should not remain free of charge

A fee is charged for private rulings in some jurisdictions as a means of cost recovery. In the European Union 10 countries charge fees, while 15 do not (Van de Velde 2015). An OECD study found 21 out of the 56 countries considered charged a fee to access a tax ruling (OECD 2015). In the United States there was no cost for applying for private rulings until a fee was introduced in 1987. Between 1987 and 1990 it cost US$600; it rose to US$3,966 in 1990 and US$10,000 in 2007 (Givati 2009). Current fees in the United States range from US$6,200 for applications relating to accounting periods, to US$30,000 for applications relating to proposed or completed transactions (IRS 2020). In Canada the fee for a ruling is: for each of the first 10 hours Can$100, and Can$155 for each subsequent hour spent on the ruling request (CRA 2020). In South Africa, SARS charges an application fee of R2,500 (US$150) for small, medium and micro enterprises (SMMEs) and R14,000 (US$860) for all other applicants for private rulings (SARS 2013). In addition, the applicant pays a cost recovery fee that is based on the number of hours that it takes to consider the issues raised in the application, and any direct costs incurred in issuing the ruling, such as visits to the applicant's premises or obtaining the services of a consultant or expert to advise upon technical aspects of a proposed transaction. Cost recovery fees range from R10,000 to R35,000 for standard rulings taking an estimated 20 days to complete, R35,000 to R70,000 for involved rulings taking an estimated 45 days to complete, and R70,000 to R105,000 for complex rulings taking an estimated 60 days to complete (SARS 2013).

A number of reasons are given for charging a fee for private rulings. First, a fee may help the tax authority to overcome implementation challenges, such as limited resources, and limit the demand for rulings that would otherwise exceed the authorities' capacity to deliver them within a reasonable time (Waerzeggers and Hillie 2016). Second, the fee is also justified on the grounds that the private ruling provides the taxpayer with material value in the form of certainty about its transactions, which is likely to far outweigh any costs incurred in terms of the fee paid. Third, tax authorities, including the URA, usually assign the ruling to a team of highly qualified people. Retaining this level of talent, which is often in high demand among tax advisory firms with significantly higher rates of pay than the public sector, may require the tax authority to recover some costs from those who most directly benefit from it. Moreover, where the tax authority absorbs the cost of administering the private rulings regime, resources are likely to be diverted from other tax administration functions to cover this (Waerzeggers and Hillie 2016). Finally, there may be scenarios where the private ruling is

required very urgently, and needs to be prioritised above all others. In such a case it may be appropriate to charge a higher cost-recovery fee from the applicant, who would likely be willing to pay in order to be prioritised (Waerzeggers and Hillie 2016).

However, introducing a fee for private rulings does have its challenges. First there is concern that fees might undermine the neutrality and independence of the private rulings regime – where the taxpayer has paid a considerable sum for the ruling, it is less likely to be unfavourable (Waerzeggers and Hillie 2016). This concern seems far-fetched, and ascribes undue weight to the payment of a statutory fee. Second is a concern that a high cost of access will undermine the equity principle of taxation, by denying taxpayers with limited resources access to the private rulings service. However, this inequity might be mitigated by the publication of private rulings, allowing them to provide value to other taxpayers in similar circumstances.

We recommend the introduction of a fee for private rulings in a similar structure to SARS, where a more complex transaction that requires more time for consideration pays a higher sum. An option for a higher fee for an expedited private ruling would also be appropriate. This would be an equitable approach, especially if balanced with the publication of private rulings, allowing less affluent taxpayers access to the same ruling.

3.2.4 Delays in issuing private rulings

The process of issuing a private ruling may get delayed, especially when the matters dealt with are complex and/or significant. Lengthy delays may, however, undermine the key objective of providing certainty of tax treatment for a taxpayer's particular transaction on a timely basis (Waerzeggers and Hillie 2016). These delays may lead to businesses losing opportunities – there is often a restricted window in which to sign off a project, and this may be missed if there is a delay in obtaining a private ruling. The danger in excessive delay in issuing private rulings was highlighted in *IOOF Holdings Ltd v FCT,*[105] where the Commissioner delayed to issue a private ruling and a few months later there was a change in the law. IOOF contended that it had an accrued right to have its private ruling application determined according to the law prior to the amendment. Court held that IOOF had an accrued procedural right to have its application for a private ruling determined by the Commissioner. However, IOOF did not have a substantive right to have its application determined according to the law as it applied prior to the amendments.

However, it should be noted that sometimes the delay might be justified. Where the matter is particularly complex, the tax authority may need time to consider it. In April 2020 the Kenya Tax Procedures Act was amended to extend the time limit in which a private ruling can be issued from 45 days to 60 days.[106] The purpose was to ensure that adequate time is dedicated to dealing with complex issues in private rulings. In *Matrix-Securities Ltd v IRC*,[107] Lord Jauncey stated: 'In my view, the Revenue when asked for clearances or other views should never feel pressurised by importunate taxpayers or their prestigious advisers. Rather should they take such time as is reasonably necessary for them to give full consideration to the problems placed before them. Taxpayers and their advisers should appreciate this when asking the Revenue for their view'.

One solution to the challenge of delays is to institute a time limit for issuing a private ruling after an application has been lodged. The 2015 OECD study found that over two-thirds of tax authorities providing private rulings reported the existence of statutory or administrative time

105 *IOOF Holdings Ltd v FCT* (2014) 224 FCR 535.

106 Tax Laws (Amendment) Act, 2020.

107 *Matrix-Securities Ltd v Inland Revenue Commissioners* [1994] 1 All ER 769 at 790.

limits for issuing rulings, with some indicating additional time requirements for complex cases or where further information is required from taxpayers. The time limits varied widely, ranging from 28 days to one year (OECD 2015: 290). We propose a 120-day time limit within which the private ruling must be issued after the application has been lodged. Where there is delay beyond the 120-day limit, the applicant can seek judicial review to compel the CG to issue the private ruling. While it is acknowledged that some private ruling applications may be considerably complex and may therefore require time for document review and consultation, and while it is also acknowledged that the Rulings and Interpretations unit is understaffed, a 120-day time limit appears reasonable and fair to both the taxpayer and tax authority. The tax authority has a 90-day time limit in which to consider an objection to an assessment.[108] A 120-day time limit for a private ruling is therefore reasonable and fair. As with objections to assessments, the time limit for issuing a private ruling may be extended after notifying the taxpayer where an extensive review of voluminous taxpayer records is necessary.[109] In the event of judicial review due to delay, the URA may seek to justify the delay on the basis of resource constraints. In this instance the court would presumably reject the argument, just as it would reject a similar argument made for a delay in issuing an objection decision.[110]

3.2.5 Human resource challenges

The 13 personnel of the Rulings and Interpretations unit are not enough to attend to all private ruling applications from across the country and also offer internal advice to different divisions within the DTD. Depending on the nature of the transaction, some private ruling applications may involve bulky contract documents and financial information, all of which needs to be perused before the ruling can be drafted. The Rulings and Interpretations team also provide responses to internal queries from staff of other divisions, and liaise with the Ministry of Finance, Planning and Economic Development during the tax amendment process. The Rulings and Interpretations staff are often plagued with backlog, and some private rulings have been known to be delayed for six months. Further, some applications can be incredibly complex or novel – requiring a specialised skill in order to make a proper determination of the tax consequences, which may be lacking in the unit.

It is recommended that there should be at least 25 personnel in the Rulings and Interpretations Unit. This will help to deal with the challenge of backlog and speed up transactions. It is also recommended that external consultants be hired when necessary. If a fee is introduced for private rulings, this can be used to remunerate such consultants. This could result in higher quality private rulings based on the consultant's expertise.

3.2.6 High risk of bias against the taxpayer

It has been questioned whether the CG, whose primary role is tax collection, can have the necessary independence required to operate a private rulings regime fairly for taxpayers (Scolaro 2006). As the URA's primary role is to collect tax revenue,[111] the case can justifiably be made that the CG has a pecuniary interest in the private rulings they issue. It is probable that the URA will err on the side of revenue when interpreting law for the purpose of issuing private rulings. This may be considered a form of inherent pro-revenue bias within the private rulings regime, whether perceived or actual (Scolaro 2006).

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108 Section 24(6) of the TPCA.

109 Section 34(9) of the TPCA.

110 Courts in Uganda strictly uphold the 90-day requirement for objection decisions *URA v Uganda Communications Commission* [2007] UGCOMMC 4.

111 Section 3(1)(a) of the Uganda Revenue Authority Act Cap 196.

There is unlikely to be large-scale actual bias in the current private rulings regime, particularly concerning smaller amounts of tax and non-complex tax matters. However, there may be actual bias where the ruling is complex and involves ambiguous but important provisions of the law. Tax practitioners claimed that where the law is relatively clear, there is little risk of bias. However, where the law is unclear, there is heavy bias towards collection. This bias towards collection is explained by the fact that BPD is under the office of the CDT, who is primarily a revenue collector. A more empirical study would be necessary to verify these claims of bias. Significantly, a 2008 report by the Australian Inspector-General examining ATO bias in issuing private rulings finds that, while there are significant perceptions of bias in the tax community, a close examination of the instances cited reveals that the ATO had simply adopted the 'interpretations that best promoted the "policy intent" of the law, as the Tax Office understands it' (Inspector-General of Taxation 2008: 3). Nonetheless, the risk of bias is worth examining.

One of the ways that Uganda's current private rulings regime has mitigated bias is through the requirement of concurrence by AC-BAPR. AC-BAPR is answerable to the Commissioner Legal Services and Board Affairs (CLSBA), who is not primarily a collector. This serves as a countervailing force, with presumably less bias in favour of collection. Nonetheless, even the CLSBA may be more likely to favour collection where the law is uncertain. Moreover, it can be argued that the requirement of concurrence by AC-BAPR adds to delay in the process of issuing private rulings.

The most practicable solution would be for the Rulings and Interpretation unit to be semi-autonomous and answerable to the URA Board of Directors, rather than the CDT or CGs who have a pro-revenue collection bias. This would make the unit a semi-independent arbiter in a more equitable system (Scolaro 2006).

4 Conclusion

The chief rationale for a private rulings regime is legal certainty to increase taxpayer confidence in how their transactions will be treated. This has significant implications for investor confidence and increased foreign direct investment, which is crucial for a developing country. The current regime in Uganda goes a long way towards achieving this goal. The private rulings regime confers statutory rights on the taxpayer, provides procedural safeguards and is administered by a highly qualified team. However, as seen above, certain challenges remain. These include: the status of private rulings as de facto law, the challenge of delays in issuing rulings, the lack of transparency in issuing them, and disregard for procedural fairness in their revocation. Further research in these areas is necessary for a fuller and clearer picture of the private rulings regime in Uganda. Empirical research is necessary to examine the frequency of issuing private rulings, their consistency and most common tax issues that arise.

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