IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: JUMA, CJ., MUGASHA, J.A., NDIKA, J.A.)

CIVIL APPEAL NO. 251 OF 2018

NATIONAL BANK OF COMMERCE.. APPELLANT

VERSUS

COMMISSIONER GENERAL TANZANIA,
REVENUE AUTHORITY..RESPONDENT

(Appeal from the Judgment and Decree of the Tax Appeals Tribunal at Dar es Salaam)

(Mjemmas, Chairman.)

dated the 11th day of October, 2018

in

Tax Appeal No. 28 of 2016

JUDGMENT OF THE COURT

8th & 16th June, 2020

MUGASHA, J.A.:

The appellant, the National Bank of Commerce Limited (NBC) is a financial institution engaged in the provision of banking, financial services and related matters. Between 2012 and 2013, the respondent, the Commissioner General of Tanzania Revenue Authority (CGTRA) conducted an audit on the appellant's tax affairs covering the years of income 2008, 2009 and 2010. Following the audit, the respondent issued to the appellant adjusted assessment for the respective years and disallowed among others, impairment of loan losses and bad debt claims written off. The appellant unsuccessfully objected the assessment whereas the respondent maintained its stance to disallow the deduction on impugned items and demanded tax for the respective years of income. The appellant was not amused and lodged appeals Nos. 44 and 46 of 2014 before the Tax Revenue Appeals Board (the Board). The appeals were consolidated into one. However, the appellant was unsuccessful in both the Board and the Tax Revenue Appeals Tribunal (the Tribunal).

Before the Board, among the controlling issues relevant to the present appeal were: **One**, whether the respondent was correct in law to disallow impairment on loan losses for the years of income under dispute. **Two**, whether the respondent was correct in law to disallow loan losses actually written off for the year of income of 2010. **Three,** whether the demanded interest on the tax liability was proper.

As reflected at page 205 and 206 of the record of appeal, the Board confirmed that the respondent was correct in law to disallow impairment loan losses for the years of income under dispute.

Moreover, relying on previous decisions of the Tribunal on a similar scenario the Board concluded that:

> *"We see logic in what is submitted by counsel for the respondent. The appellant has to exercise laid down legal requirements which include taking recovery measure and Board approval before writing the debt off as bad. We as the Board concur with the Respondent that the decision to that effect came way back on 2011 as per the famous Barclays and CRDB appeals 2005 and 2011. The Finance Act of 2014 just confirmed the already decided position of the Tribunal."*

Before the Tribunal on the appeal, issues for determination on the subject matter in the present appeal were as framed before the Board. Consequently, relying on ITA, 2004, The Tribunal agreed with the Board as reflected at page 393 of the record of appeal having said thus:

> *"From the foregoing, we are of the view that mere approval of impaired loan losses by the Bank of Tanzania does not qualify the same to be allowable deductions. To qualify for*

deduction, the financial institution should meet the requirements of section 39 (d) of the Income Tax Act quoted above."

In determining the propriety or otherwise of the Board's decision to disallow loan losses actually written off for the year of income 2010, relying on its previous decisions on a similar matter and the decision of the Court in **TULLOW TANZANIA BV VS COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY**, Civil Appeal No. 146 of 2015 (unreported), the Tribunal concluded that, the purposive approach was correctly invoked by the Board to interpret the ITA 2002.

This is what precipitated the present appeal to the Court whereby the appellant has fronted four grounds of complaint as follows:

1. *The Tax Revenue Appeals Tribunal erred in law by failing to correctly interpret the provisions of section 39(d) of the Income Tax Act 2004 and held that an approval of impaired loan losses by the Bank of Tanzania does not quality the same for deduction.*
2. *The Tax Revenue Appeals Tribunal erred in law in holding that the Board was right to reply in the decision of the Tax Tribunal in Appeal No. 3 of 2011 Barclays Bank Tanzania*

vs Commissioner General which correctly used purposive approach in interpreting the Income Tax Act, 2014.

3. *The Tax Revenue Appeals Tribunal erred in law in endorsing the decision of the Board that a financial institution could not qualify for deduction on impaired loan losses unless it proves that it has taken recovery measures and written off the debt and that this requirement did not come following the enactment of the Finance Act 2014; and*
4. *The Tax Revenue Appeals Tribunal erred in law in holding the Respondent decision to impose interest is correct in law."*

Parties filed written submissions for and against the appeal respectively, in compliance with Rule 106(1) and sub-rule (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Also in its submissions, the appellant invited the Court to depart from its previous decisions in **NATIONAL BANK OF COMMERCE VS THE COMMISSIONER GENERAL, TANZANIA REVENUE AUTHORITY,** Civil Appeals Nos. 52 of 2018 and **ACCESS BANK (TANZANIA) VS COMMISSIONER GENERAL**, 314 of 2017 (both unreported). The reason availed by the appellant is that, since the Court had observed that there was no evidential proof on arriving at the amount of losses of allowable deductions or impairment provisions, this was viewed as a determination on factual matters as opposed to the requirement under section 25 (2) of the Tax Revenue Appeals Act [CAP 408 RE.2002] which mandates the Court in tax disputes to determine only questions of law.

At the hearing the appellant had the services of Messrs. Wilson Mukebezi, Allan Nlawi Kileo and Nobert Mwaifwani, learned counsel. The respondent was represented by Mr. Evarist Mashiba Principal State Attorney and Messrs. Amandus Ndayeza and Noah Tito, learned counsel from the respondent's office.

We have gathered that the grounds of appeal and the written submissions revolve on four major issues namely**:** **One**, Whether Tribunal's decision in holding that an approval of impaired loan losses by the Bank of Tanzania (the BOT) is the only evidence of bad debts claims qualifying deduction in terms of section 39 (d) of the ITA, 2004. **Two**, whether the Tribunal's holding that a financial institution cannot deduct impaired loan losses prior to proving that it has in vain taken recovery measures is not in accordance with section 39 (d) of ITA

2004. **Three,** whether it is opportune for the Court to depart from its earlier decisions in the cases of **NATIONAL BANK OF COMMERCE VS COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY**, (supra) and **ACCESS BANK TANZANIA LIMITED VS COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY** (supra) and **four,** whether interest is justified on the tax liability as against the appellant.

In addressing the appeal before us, Mr. Kileo submitted that, the impaired loan losses which have been calculated and approved according to the standards established by the BOT, qualify for deduction. In this regard, he argued that, both the Board and the Tribunal failed to correctly interpret the provisions of section 39(d) of the ITA, 2004, having held that the BOT 's approval of impaired loans losses does not qualify for allowable deductions.

In addition, it was contended that, the Tribunal wrongly imposed a requirement that, prior to the bad debt claim being written off, the tax payer must embark on recovery measure and demonstrate that such measures have failed was introduced by the Finance Act of 2014 which was not applicable at the time of filing returns in 2005 and 2006, as the law was not in existence. In this regard, it was argued that, a condition that the impaired loan losses qualify for deduction after meeting the requirements under section 39(d) of ITA, 2004 is inapplicable and the Tribunal misconstrued the decision of the Court in **NATIONAL BANK OF COMMERCE VS COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY** (supra) and ended up in making a wrong decision.

On her part, it was the respondent's submission that, a person can enjoy deduction on losses arising from bad debts claims only when the debt has been actualized and in respect of a financial institution, the debt must be realized in terms of section 39(d) of ITA, 2004 and written off after all recovery measures have failed. To back up the proposition, the case of **NATIONAL BANK OF COMMERCE VS COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY** (supra) was cited. In addition, it was contended that, the provision of bad debts claims which the appellant had sought to be deducted, had not been realized in accordance with sections 39 and 18 of the ITA and as such, did not qualify for deduction.

Pertaining to the conditions that a financial institution may qualify for deduction on impaired loan losses, besides obtaining approval from the BOT, it was contended that the requirement of taking recovery measures before writing off the bad debt claim was introduced under the Financial Act of 2014 and thus not applicable to the years of income prior to the said Financial Act. In this regard, it was argued that, since article 138(1) of the Constitution of the United Republic of Tanzania, 1997 (the Constitution) bars any kind of tax without any legislation, the Tribunal's holding seeking to subject to the appellant to taxation under a non-existent legislation is without the authority of the law and the Court should not condone it.

In response, it was submitted for the respondent that, the Finance Act 2014 codified the principle enunciated in the **BARCLAYS BANK VS COMMISSIONER OF INCOME TAX**, Tax Appeal No. 3 of 2011. Besides, on the same matter in the case of **ACCESS BANK TANZANIA LIMITED VS COMMISSIONER GENERAL** (supra) the Court said that the Tribunal did not rely on section 25 (5) of the Finance Act, 2014 which emphasized that, the applicable procedure on the deductibility or otherwise for any loss requires presenting to the Commissioner General evidentiary proof on existence of any loss for it to be deductible under the ITA, 2004.

Finally, the respondent concluded that, in the present matter, since a bad debt claim is not allowable deduction under ITA, 2004 and considering that a financial institution cannot write off a debt from its books of account until when it has taken measures to recover the debt in vain, the interest imposed on tax uncollected is inevitable.

On account of the said submissions, the respondent urged the Court to dismiss the appeal with costs.

Having carefully considered the grounds of appeal and the submission of the parties, the issue for consideration is whether this appeal is merited.

We begin with the position of the law regulating deduction of loss of the person's calculated income whereby section 18 (b) of ITA, 2004 which provides as follows:

> *"For the purposes of calculating a person's income for the year of income from any business, there shall be deducted any loss of the person as calculated under Division III of this part, from the realization during the year of income of: -*
>
> *(b)* ***a debt obligation incurred in borrowing money****, where the money is or was*

employed or an asset purchased with the money is or was wholly and exclusively in the production of income from business;

Division III which covers sections 36 to 41 provide guidance to the respondent in the calculation of gains and losses, costs of assets, incomings for an asset and realization. A financial institution seeking deduction on impaired loan losses must comply with the requirements prescribed under section 25 (5) of the ITA which stipulate:

> *"A person may disclaim the entitlement to receive an amount or write off as bad debt claim of a person:*
>
> *(a) In case of a debt claim of a financial institution, only after the debt claim has become a bad debt as determined in accordance with the relevant standards established by the Bank of Tanzania;"*

Section 39 (d) of the ITA which stipulate as follows:

> *"A person who owns an asset shall be treated as realizing the asset-*
>
> *In the case of an asset that is a debt claim owned by a financial institution, when the debt claim becomes a bad debt as determined in accordance with the relevant standards*

established by the Bank of Tanzania and the institution writes the debt off as bad".

Apart from the similarities in the prescribed conditions in the determination of a bad debt claim, after such determination, in addition, under section 39 (d) of ITA, the financial institution must write off the bad debt claim. Prior to writing off a bad debt claim, a financial institution must prove that it has in vain embarked on recovery measures. See: **THE NATIONAL BANK OF COMMERCE VS COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY** (supra) and **KCB BANK TANZANIA LIMITED VS COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY** (supra).

Apart from sections 25 (5) and 39 (d) of ITA, 2004 improvising as to when the debt claim becomes a bad debt, it as well embraces the standards established by BOT in making the requisite determination and besides, it imposes a condition on the ultimate writing off of the debt in question whereas section 18 (b) of the ITA, 2004 directs on measures to be pursued by both the tax payer and the tax authority who is given leverage to receive returns and accounts from tax payers and enjoy finality in the assessment, allowing and disallowing deductions. See - **THE NATIONAL BANK OF COMMERCE VS COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY** (supra).

Parties locked horns on the propriety or otherwise of subjecting a financial institution which has obtained approval of the BOT on the impairment of loan losses to be subjected to the provisions of ITA on what is allowable deduction. The Court was confronted with a similar scenario in the case of **ACCESS BANK TANZANIA VS COMMISSIONER GENERAL**, TRA (supra) and it observed as follows:

> *"...If it is taken that the issues of approval on what is allowable/deductible amount under ITA are left with BOT after the tax payer has complied with the GAAP, this, in our view, would be preventing the respondent (TRA) who is responsible for Tax administration from making considerations of justification behind the declared losses and the actual chargeable income tax of the payer."*

This decision was followed by the Court in the case of **KCB BANK TANZANIA LIMITED VS THE COMMISSIONER GENERAL TANZANIA**

REVENUE AUTHORITY, Civil Appeal No. 19 of 2018 (unreported) whereby the Court made a following observation:

> *"The appellant's argument that the respondent ought to allow deduction on the basis of impairment loans and advances approved by the Bank of Tanzania, in our view, is not correct. We say so because the BOT is not mandated on issues relating to taxes. It is concerned with regulation of the financial institutions on among other issues, realization of debts..."*

We are guided by the said decisions and in addition, we add that both the BOT and the TRA are creatures of different statutes with distinct objectives and mandates. The objectives and mandate of the Tanzania Revenue Act, No. 11 of 1995 can be discerned from long title of the respective legislation which reads as follows:

> *"An Act to establish the Tanzania Revenue Authority as a* ***central body for assessment and collection of specified revenue, to administer and enforce the law relating to such revenue and to provide for the related matters."***

On the part of the Bank of Tanzania Act No. 1 of 1995 its long title reads *inter alia* as follows:

> *"....to provide for currency of Tanzania...and shall have certain powers in relation to other Banks and financial institutions and to provide for other matters incidental to or connected with those purposes."*

Since, the objectives and mandates of each institution are quite distinct in a nutshell, it is the TRA which is mandated to impose, assess and collect tax. This is not the business of the BOT. In this regard, the appellant's argument that once BOT's approval is obtained on impairment of loan losses, the ITA, 2004 is not applicable is with respect, misconceived. This is regardless of the ITA having embraced the application of the BOT standards when it comes to determining and approving impairment of loan losses or bad debt claims by the BOT. However, as already pointed out this is not the only requirement because such claims must as well qualify for deduction in terms of section 39 (d) of the ITA, 2004. This answers the first issue in the negative and as such, the first ground of appeal is not meritorious.

That apart, in the case at hand, as observed by both the Board and the Tribunal, the appellant did not furnish evidence to have complied with the conditions to the letter and instead, is complaining that the requirement of taking reasonable steps in pursuing the payment until it is reasonably believed that the debt claim will not be satisfied was not in existence prior to the enactment of the Finance Act 2014. With respect we found this argument wanting. We are fortified in that account because, for the year 2008, Regulations 4 (3) (i) and (ii), 7 and 15 (4) (c) of the revoked Management of Risk Assets Regulations of 2001 made under the Banking and Financial Institutions Act of 1991, which came into effect on 1/5/2001 are applicable having stipulated as follows:

Regulation 4 (3) (i) and (ii):

> " *(i) Section 15 (a) of the Act requires every bank and financial institution to calculate its annual provision for bad and doubtful debts and to obtain approval of the Bank before annual accounts are finalized.*
>
> *(ii) Such approval will not be given upon the bank or financial institution concerned presenting to the Bank its balance sheet and*

profit and loss account, including detailed account of the provisions made for bad and doubtful debts and for other assets and the Bank is satisfied that these provisions are realistic and adequate."

Regulation 7

"Every bank and financial institution shall charge off or write off all loans classified at the end of every quarterly review. Recoveries out of the charged off accounts shall be recognized as per requirement of the National Board of Accountants and Auditors (NBAA) accounting standards and guidelines."

Regulation 15 (4) (c) provided as follows:

"Losses should be taken in the periods in which they surface as uncollectible. The basic characteristics of loans subject to loss classification are as follows:

(c) Loans considered as absolutely uncollectible."

The said Regulations were revoked by the Banking and Financial Institutions (The Management of Risk Assets) Regulations of 2008

Government Notice No 374 of 12/2/2008. The 2008 Regulations cover the years of income 2009 and 2010 whereby Regulations 7, 19 (c) as of 12/12/2008 gave the following guidance to the financial institutions:

> *"At every quarterly review, every bank and financial institution shall charge off all credit accommodations and other risks assets have remained in the loss category for four consecutive quarters."*

Regulation 19 (c) stipulated as follows:

> *"Credit accommodation having the following basic characteristics shall be classified as loss:*
>
> *(c) Credit accommodations considered as absolutely uncollectible."*

Besides, Regulations and 32 (1) and (2) provided:

> *"32 (1) Every bank or financial institution shall seek prior approval of the Bank for its proposed annual provisions for probable losses before finalization of the annual accounts.*
>
> *(2) A bank or financial institution shall submit to the Bank its draft balance sheet, profit and loss account, including a detailed account of the*

provisions made when seeking approval under sub-regulation (1)."

The said Regulations were crucial in characterizing loss as doubtful or classifying them as absolutely uncollectible. Thus, in a nutshell, before proceeding to deduct loss from realization of income; it must not only be ascertained that, a debt claim is bad. In addition, it must be established that, recovery measures were taken but the debt claim is absolutely uncollectible and finally written off from the books of accounts. Therefore, the BOT standards are not a stand-alone requirement as viewed by the appellant. As such, the evidence presented to the Bank in seeking approval of impaired loan losses and bad debt claims constitutes the evidence to be presented to the respondent for it to determine as to whether to allow or disallow the deduction.

As earlier indicated, it is settled that a financial institution seeking deduction on impaired loans must comply with the requirements prescribed under sections 18 (b), 25 (5) and 39 (d) of the ITA, 2004 See: **THE NATIONAL BANK OF COMMERCE VS COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY** (supra) **and KCB BANK TANZANIA**

LIMITED VS COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY (supra).

In view of the settled position of the law, we are satisfied that, it was incumbent on the appellant to establish that it did comply with the requirements of the law governing the impairment of loan losses. However, this was not the case. Apparently, we have gathered at page 189 of the record of appeal that, before the Board, apart from the appellant's counsel acknowledging the position of the law on deductible loan impairment losses and bad debt claims in terms of section 39 (d) of the ITA, 2004, and decided cases, yet he insisted that his client has a right of appeal. Apart from this leaving a lot to be desired, it really taxed our minds as to how can one seek equity on one hand while its hands are tainted having failed to comply with the law.

Therefore, since the appellant did not adduce evidence on having taken the required measures as stipulated under ITA 2004, it is estopped from complaining that the Tribunal was wrong to disallow the deductions. Besides, the appellant's complaint that the Tribunal relied on non-existent law is apart from being untrue, has been raised out of context and article 138 of the Constitution was not in any way violated.

We are thus satisfied that, both the Board and the Tribunal were justified to disallow the deductions. This answers issue number two in the negative rendering the 2nd and 3rd grounds of appeal not merited.

In view of what we have endeavoured to discuss, the cases of **NATIONAL BANK OF COMMERCE VS COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY**, (supra) and **ACCESS BANK TANZANIA LIMITED VS COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY** (supra) are still good law having interpreted the ITA, 2004 on conditions warranting allowable deductions on loan impairment losses or what constitutes bad debt claims. In addition, on account of the record which was before the Court in both appeals, the Court was to justified to observe the appellants' failure to discharge the onus on having taken recovery measures and if the loans were absolutely uncollectible as it transpired before both the Board and the Tribunal. We thus, with respect, decline the invitation to depart from the previous decisions as the appellant has not demonstrated cause to do so.

Finally, the complaint on imposition of interest on the tax liability is inevitable consequence and the appellant is liable to pay the same in addition to the tax liability.

All said and done, we do not find any cogent reason to fault the decisions of both the Board and the Tribunal. We accordingly dismiss the appeal in its entirety with costs.

DATED at **DODOMA** this 15th day of June, 2020.

I. H. JUMA
CHIEF JUSTICE

S. E. A. MUGASHA
JUSTICE OF APPEAL

G.A.M NDIKA
JUSTICE OF APPEAL

The Judgment delivered on 16th day of June, 2020 in the presence of Mr. Yohana Ndila holding brief of Wilson Mukebezi, learned counsel for the Appellant and Mr. Yohana Ndila, learned counsel for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL