

**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA**

(CORAM: JUMA, CJ., MWARIJA, J.A., And MZIRAY, J.A.)

CIVIL APPEAL NO. 21 OF 2018

THE SCHOOL OF ST. JUDE LIMITEDAPPELLANT

VERSUS

THE COMMISSIONER GENERAL

TANZANIA REVENUE AUTHORITY.....RESPONDENT

**(Appeal from the Judgment and Decree of the
Tax Revenue Appeals Tribunal)
At Arusha**

(G.J.K. Mjemmas, Chaiman)

dated the 4th day of December, 2017

in

Income Tax Appeal No. 29 of 2016

JUDGMENT OF THE COURT

29th June & 10th July ,2018

MWARIJA, J.A.:

The appellant, School of St. Jude Limited has appealed against the decision of the Tax Revenue Appeals Tribunal in Tax Appeal No. 29 of 2016 which arose from the decision of the Tax Appeals Revenue Board in Consolidated Income Tax Appeals No. 124 and 125 of 2015.

Briefly stated, the facts leading to the appeal are as follows: On 23/8/2012, the appellant, which is registered as a company limited by guarantee, was issued by the respondent, The Commissioner General, Tanzania Revenue authority (the Commissioner), income tax assessment

No. F. 420570023 and F.420570024. Through the two assessments, the respondent demanded payment of tax in the sum of Tshs. 1,991,672, 238.90 and Tshs. 2,251,655,919.90 derived from the surplus from the appellant's expenditure for the years 2009 and 2010 respectively.

The appellant objected to the assessment through two letters dated 30/8/2012 on the ground that, the company was not doing business or conducting either investment or employment and did not therefore, have any income chargeable to tax. The respondent replied to the appellant's letters informing it that, after having reviewed its grounds of the objection, the former was satisfied that the latter was doing business and therefore, was liable to pay the assessed tax.

The appellant was further dissatisfied and on 28/8/2012, it applied for to the Commissioner's ruling under S. 131 of the Income Tax Act, No. 11 of 2004 (the Act) on contention that the appellant was a charitable organization. In its ruling dated 8/2/2013, the respondent refused to give the sought ruling. The appellant was informed that it did not meet the requirements of S.64(8) of the Act so as to be recognized as a charitable organization for income tax purposes. According to the letter, the

respondent arrived at its decision after it had considered the objectives of the respondent school as per its Memorandum and Articles of Association. As a result, the appellant was on 2/9/2015, served with a notice of affirmation of the two assessments.

Aggrieved further by the decision of the respondent, the appellant instituted the above stated consolidated appeals before the Board. It prayed for a declaration that the notices of confirmation of assessments were null and void on the ground that the respondent was wrong in assessing the appellant to corporation tax while it was not doing business. In the statement of appeal, the appellant contended as follows:-

"That the Respondent erred in assessing the Appellant to corporation tax on grants, donations and sponsorship income which is neither business investment nor employment income."

The appeal was resisted by the respondent maintaining its position that the appellant was doing business and therefore, it was liable to pay

the assessed tax. In its reply to the statement of appeal, the respondent stated as follows:-

"that there was no error in assessing the Appellant as Appellant was doing business and the issued assessment was based on income of the appellant ."

At the hearing of the appeal before the Board, the appellant relied on the evidence of Gemma Sisia (PW1), the member of the School's Board and the founder of the School. It also relied on the submission of its counsel, Mr. Nicholous Duhia. Her evidence was to the effect that the School provides free education to students from poor families and in so doing, it depends on donations and sponsorships.

It was her evidence also that the School had other minor sources of revenue derived from school fees, visitors' income and miscellaneous incomes. She admitted further that at the assessment, the audited accounts of the school had a surplus. She tendered the company's Memorandum and Articles of Association and the Certificate of Incorporation as Exhibit A1, collectively to show that the appellant is a company limited by guarantee not having a share capital.

In his submission before the Board, Mr. Duhia argued that since the appellant did not have any income chargeable to tax under S.8 of the Act, it was not liable to pay tax as assessed by the respondent. According to the learned counsel, grants and sponsorships are exempt from tax under paragraph 1(k) of the Second Schedule to the Act. He argued further that since the appellant provided free education to the student from poor families using donation and sponsorships, from the definition of "business" under S. 3 of the Act, the Tribunal erred in deciding that the appellant was conducting a profitable business.

On its part, the respondent relied on the submission of its advocate, Mr. Primi Manyanga, learned counsel. He submitted before the Board that from the statement of appeal, evidence and the submission, in disputing the assessments, the appellant pleaded exemption to tax liability firstly, on the basis of the benefits provided by the Act to charitable organizations and secondly, that it is conducting a non profit making business.

As for appellant's reliance on being a charitable organization, Mr. Primi argued that since the appellant did not fulfill the conditions stated

under S. 64 (8) (b) of the Act, it did not get the ruling of the Commissioner under S. 131 of the Act and therefore that benefit is not available to it. With regard to the claim that the appellant is not liable to pay tax because it is not doing a profit making business, Mr. Primi argued that, such claim was new to the appeals because it did not form part of the pleadings. He submitted however, that from the nature of its activities, the appellant was doing business. He argued that the 2009 and 2010 financial statements show that the appellant had taxable income arising from bank interest, school fees and surpluses derived from donations and sponsorships.

In its decisions, the Board held firstly, that the appellant is not a charitable organization because it did not satisfy the conditions stated under S. 64 (8) of the Act. Secondly, after having considered the provisions of S. 8(1) and (2) of the Act, it held that since the appellant earned school fees and because it also generated surplus, it is not a non-profit making organization and is thus liable to pay the assessed tax. As a consequence, the Board dismissed the appeals with costs.

The appellant was dissatisfied by the decision of the Board and consequently appealed to the Tribunal. The Tribunal upheld the findings of the Board and as result, dismissed the appeal. In its decision, the Tribunal held that the appellant is not a charitable organization, and according to its activities, it engaged in a profit making business of training students whose fees were paid by third parties through donations and sponsorships.

Against that decision of the Tribunal, the appellant has preferred this appeal raising six grounds of appeal as follows:-

- 1. That the Honourable Tax Revenue Appeals Tribunal erred in law by holding that the Appellant was generating profits merely because he had surpluses for the years of income 2009 and 2010 and earned other sources of income such as school fees, visitors' income and miscellaneous income.*
- 2. That the Honourable Tax Revenue Appeals Tribunal erred in law by holding that the Appellant received monetary consideration from sponsors for services offered by him, hence the training activity and the principal occupation of the Appellant are carried on with a view to deriving profits.*

3. *That the Honourable Tax Revenue appeals Tribunal having acknowledged that the Appellant demonstrated that it has provided free education to 96% of pupils enrolled in the years of income 2009 and 2010 erred in holding that the Appellant was engaged in a business activity and is not excluded in the definition of the word business under section 3 of the Income Tax Act CAP. 332 of the Laws of Tanzania Revised Edition 2006.*
4. *That the Honourable Tax Revenue Appeals Tribunal erred in law by failing to discern the difference between not doing business and not being a charitable organization under section 64(8) of the Income Tax Act, *ibid*.*
5. *That the Honourable Tax Revenue Appeals Tribunal contradicted itself and erred in law in that, while it acknowledged that the Appellant's financial statements for the years of income 2009 and 2010 shows, among other things, sponsorship and donations, it upheld the Board's holding that there was nowhere in the financial statements that there were gifts, bequests of inheritance.*
6. *That the Honourable Tax Revenue Appeals Tribunal erred in law by holding that donations and sponsorship income received by the Appellant were not exempted from income tax under item 1(k) of the Income Tax Act, *ibid* because*

they were received by the appellant company in respect of its business of providing education.

At the hearing of the appeal, the appellant was represented by Mr. Nicholous Duhia and Mr. Elvaison Maro, learned advocates. On the other hand, the respondent had the services of Mr. Primi Manyanga, learned advocate. The learned counsel for the parties had, prior to the hearing, filed their respective written submissions as required by Rule 106(1) and (8) of the Tanzania Court of Appeal Rules, 2009. They thus utilized the time allowed for oral submission to clarify the crucial points which were raised in their written submissions.

Mr. Maro started by stating the factual background giving rise to the appeal as has been summarized above in this judgment. He submitted that the parties' dispute is centred on corporation tax assessed against the appellant for 2009 and 2010 financial years. He submitted that the appellant is not liable to pay tax and thus challenges the decision of the Tribunal on the grounds raised in the memorandum of appeal.

Mr. Duhia took over and proceeded to submit in support of the grounds of appeal. With regard to the 1st, 3rd and 4th grounds, the learned counsel challenged the decision of the Tribunal contending that it erred in upholding the decision of the Board mainly on the basis that, from the surplus and other incomes, the appellant was doing business. According to the learned counsel, not every surplus on the financial statement of a company is chargeable to tax. He said that it is chargeable only if it is derived from either business, employment or investment, which is not the case with the appellant. He said that the appellant's income is not intended for making profit and thus not chargeable to tax, particularly where the Tribunal had agreed that the appellant provides free education to students from poor families.

To bolster his argument that the appellant was not doing profitable business, the learned counsel submitted that the amount of school fees, visitor's income and miscellaneous income was insignificant and the same was not derived with a view of making profit. He argued further that the finding of the Board which was upheld by the Tribunal that the appellant was engaged in business on account that it had surplus of Tshs.

3,006,347,431 and 4,114,741,021 for the years 2009 and 2010 respectively, is erroneous. The appellant challenged also the decision that, from the nature of its activities, its incomes are not excluded in the definition of the word "business" under S. 3 of the Act and the failure to find that it does not carry out any trade or concern with the purpose of generating profit.

He contended that since from its Memorandum and Articles of Association, the appellant is registered as a company limited by guarantee not having a share capital and because it provides free education to 96% of the enrolled students using donation and sponsorships, it was an error on the part of the Tribunal to uphold the finding that the appellant was doing business. He relied on the case of **Ransom v. Higgs (and Associated Appeals)** HL 1974 and 50 TC page 1.

With regard to the 2nd ground of appeal, Mr. Duhia argued that the students did not pay any fees as they were provided with free education. For this reasons, he went on argue, both the donors and the donee (the appellant) derived no benefit from them (the students) as consideration.

As for the 4th ground, the learned counsel faulted the Tribunal for upholding the decision of the Board while it failed to comprehend the difference between doing business and being a charitable organization. He pointed out that the appellant did not rely on being a charitable organization because it did not possess the ruling of the Commissioner. It rather relied on the ground that it was not doing business.

On the 5th and 6th grounds, Mr. Duhia argued that the Tribunal erred in failing to find that sponsorships and donations fall in the definition of "gift" under S.3 of the Act because they are payments without consideration thus exempted from tax under item 1 (k) of the Second Schedule to the Act. He argued further that the sponsorships and donations received by the appellant are not connected to any business and do not therefore, under S. 8(2) (f) of the Act read together with item 1(k) of the Second Schedules to the Act, exempted from tax.

In reply, Mr. Primi argued that the appellant was properly assessed to pay the disputed tax because it had the income which is taxable under S. 8(2) (f) of the Act. He supported the decision of the Tribunal which upheld the Board's finding that the appellant was doing business of

training students whose school fees are covered by third parties by way of donations, sponsorships, visitors' income, miscellaneous income. He argued further that the appellant earns income also from bank interest as well as from few students whose fees are paid by their parents. He supported the finding that the appellant was, for that reason, being paid consideration by third parties on behalf of the parents whose children's fees were covered by donations and sponsorships out of which the appellant gained from the excess amount. Mr. Primi submitted further that in the circumstances, such income is chargeable to tax unless it is excluded from taxation under S. 8(3) of the Act.

On the contention that the appellant is registered as a company limited by guarantee having no share capital, Mr. Primi argued that such registration status does not in itself, preclude the applicant's income from being chargeable to tax. He stressed that the determining factor is whether or not the company is doing business. He thus submitted that the case of **Ransom v. Higgs** (supra) cited by the appellant's counsel is not applicable. Basing on his submission, the respondent's counsel prayed to the Court to dismiss the appeal with costs.

We have given due consideration to the submissions made by the learned counsel for the parties. We wish to state at the outset that the parties are not at issue as regards the position that the appellant is not charitable organization. In his written submission, Mr. Duhia states as follows on that aspect:

"The appellant has submitted extensively in the 1st and 3rd grounds that she is not doing business. She also wishes to submit that she is also not a charitable organization because, although she is established and functioning solely for the advancement of education, she does not possess the ruling of the Commissioner to that effect." [Emphasis added].

From the proceedings, it was after the appellant had failed to obtain the Commissioner's ruling that it challenged the assessment both in the Board and the Tribunal on the ground that it was not doing business.

Now, from the grounds of appeal and the submissions made by the learned counsel for the parties, the issue is whether or not the Tribunal

erred in upholding the decision of the Board to the effect that the appellant was liable to pay the assessed tax. As shown above, the rival arguments centred on whether or not the appellant was doing business. The submissions were extensively based on the interpretation of S.8(1),(2) and (3) read together with item1(k) of the Second Schedule to the Act. Section 8(1) and (2) (f) of the Act provides as follows:-

“ 8 (1) A person’s income from a business for a year of income is the person’s gain or profits from conducting the business for the year of income.

2. Subject to the provisions of subsection (3), there shall be included in calculating a person’s gains or profit from conducting a business for a year of income, the following amounts derived by the person from conducting the business during the year of income.

(a)....

(b)....

(c)....

(d)....

(e)....

*(f) gifts and other ex-gratia
payments received by the person
in respect of the business."*

Sub-section (3) of that section provides for gains or profits which are exempt from a person's income. They are:-

*"(a) exempt amounts and filial withholding payments; and
(b) amounts that are included in calculating the person's
income from any employment."*

As shown above, under S. 8(1) and (2) (f) of the Act payments derived from gifts and ex-gratia payments are income, thus chargeable to tax. It was for this reason that the appellant applied for the Commissioner's ruling under S. 131(1) of the Act on the ground that the appellant is a charitable organization. The provision states as follows:-

*" 131(1) The Commissioner may, on application in writing
by a person, issue to the person, by notice in writing
served on the person, a private ruling setting out the
Commissioner's position regarding the application of this*

Act to the person with respect to an arrangement proposed or entered into by the person.”

It was after its application was refused by the Commissioner that the appellant initiated the proceedings leading to the present appeal, contending that it is not doing business in the meaning of that word as defined under S. 3 of the Act. The main argument is that the appellant is not carrying out its business with a view of deriving profit.

With respect, we think that this ground is not tenable because in essence, it reverts to the ground upon which the appellant applied for the Commissioner’s ruling. As shown above, under S. 8(1) and (2) (f) of the Act, the payments received by the appellant are income. It is for this reason that, in its decision, the Tribunal wondered:-

“ If at all the appellant company is not a business or doing business and it is not a charitable organization under section 64(8) of the Income Tax Act .. then what is it.”

In that context, we agree with the Tribunal that free education provided by the appellant is paid by third parties and so the surplus shown in the appellant's bank statement is a profit derived from business. The same is therefore chargeable to tax.

In the final analysis, we do not find merit in the appeal. The same is hereby dismissed with costs.

DATED at **DODOMA** this 7th day of July, 2018.

I.H. JUMA
CHIEF JUSTICE

A.G.MWARIJA
JUSTICE OF APPEAL

R.E. MZIRAY
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




S.J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL