

IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., KAIRO, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 11 OF 2020

COMMISSIONER GENERAL

TANZANIA REVENUE AUTHORITY..... APPELLANT

VERSUS

AFRICAN BARRICK GOLD PLCRESPONDENT

**(Appeal from the Judgement and Decree of the Tax Revenue
Appeals Tribunal at Mwanza)**

**(Mr. Justice Dr. F. Twaib, Chairman, Prof. Doriye, Member and
Mr. W. Ndyetabula)**

**dated 1st Day of October, 2012
in
Tax Appeal No. 5 of 2012).**

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JUDGMENT OF THE COURT

14th & 17th March, 2022

MUGASHA, J.A.:

The appellant, the Commissioner General of Tanzania Revenue Authority (the CGTRA) is challenging the decision of the Tax Revenue Appeals Tribunal (the Tribunal) which sustained the decision of the Tax Revenue Appeals Board (the Board).

From what can be discerned in the record before us, the background to the present appeal is briefly as follows: the respondent is a company incorporated in the United Kingdoms (UK) and registered to carry on

mining and exploration business in Tanzania through its subsidiaries among them being the Nyanzaga Gold Exploration (Nyanzaga Project) located in Sengerema District, Mwanza Region operated by Nyanzaga Exploration Company Limited. The project was initially jointly owned by Tusker Gold Limited incorporated in Australia through its subsidiary company named Sub-Sahara Resources Limited registered in Tanzania on one hand, and the respondent through Barrick Exploration African Limited, a company registered in Tanzania on the other hand. Tusker Gold Limited owned 49% interest in the Nyanzaga Project, whereas, the respondent owned the remaining 51% interest in the project.

Sometimes in 2010, the respondent through its subsidiary company registered in UK named BUK Holdco Limited acquired 49% interest owned by Tusker Gold Limited on Australian Stock Exchange under a compulsory acquisition scheme. Following the acquisition, the Nyanzaga Project became wholly owned by the respondent through BUK Holdco Limited. Having gathered that the transaction involved acquisition of interest in Nyanzaga Project located in Tanzania and it attracted tax in Tanzania, the appellant drew this to the attention of the respondent who in return, disputed the tax liability on the ground that, the share sale transaction was

between the companies registered outside the United Republic of Tanzania. Thus, the appellant invoked the provisions of section 35 of the Income Tax Act [CAP 332 R.E. 2002] and notified the respondent that, the share sale transaction was a tax avoidance arrangement and required her to settle the unpaid tax immediately upon receipt of the notice. It is the said letter which prompted the respondent to lodge an appeal to the Board.

Before the Board, the appeal was confronted with a notice of preliminary objection premised on one ground that, the appeal was bad in law for being instituted prematurely before issuance of a Tax Assessment. The preliminary objection was heard alongside the substantive appeal. Ultimately, the Board was satisfied that the notice of the appellant was appealable having being couched in a manner constituting an assessment and imposed tax liability on the respondent. As to the substantive appeal, the Board held that, since the share sale transaction took place outside Tanzania involving two foreign companies registered abroad, it was not subject to tax under the laws of Tanzania.

Undaunted, the appellant unsuccessfully lodged an appeal to the Tribunal which sustained the decision of the Board and this is what

prompted the appellant to lodge the present appeal. In the Memorandum of Appeal, the appellant has fronted the following grounds of complaint:

- 1. That the Tax Revenue Tribunal erred in law in refusing to admit documentary evidence submitted by the appellant.*
- 2. That the Tax Revenue Tribunal erred both in law and fact in holding that the notice issued by the appellant under section 35 of ITA constituted an appealable decision or act under section 14(2) of the Tax Revenue Appeal Act, Cap 408 R.E 2006 and section 6 of the Tanzania Revenue Authority Act, Cap 399 R.E 2006.*
- 3. That the Tax Revenue Appeals Tribunal erred both in law and fact when it held that the transaction related to this case was not taxable under the Income Tax Act.*

To bolster their arguments, parties filed written submissions for and against the appeal. At the hearing, the appellant was represented by Messrs. Deodatus Nyoni, learned Principal State Attorney, Hospis Maswanyia, Harold Gugami, learned Senior State Attorneys and Ms. Salome Chamboi, learned State Attorney. The respondent had the services of Mr. Allan Kileo, learned counsel. Both learned counsel adopted their respective submissions earlier on filed.

We have gathered that the 2nd ground of appeal involves a question of law which has a bearing on the propriety or otherwise of the proceedings and decisions of both the Board and the Tribunal and subject of the appeal before us. Thus, it shall be addressed first.

At the outset, we have noted that, before the Board and the Tribunal parties parted ways on the status of the appellant's letter as to whether it constituted an assessment imposing a tax liability on the respondent. The letter in question which is at page 12 of the record of appeal is reproduced hereunder:

**" TANZANIA REVENUE AUTHORITY
F-TID-704-003-C (ii)
TAX INVESTIGATIONS DEPARTMENT
LAKE ZONE
P.O. Box 1116, MWANZA, TANZANIA.**

Ref. No. TRALZINQ/06/1427

20th June, 2011

*Kevin Jennings +44 (0)207 655 5581
African Barrick Gold PLC 5th Floor
No.1 Cavendish Place London W1G 0QF
United Kingdom
Fax +44 207 129 71807185
Telephone: +44(0)2071297150*

Dear Sir/Madam,

***NOTICE UNDER SECTION 35 OF THE INCOME TAX ACT, CAP
332 (R.E. 2006).***

In pursuance of the powers conferred upon the Commissioner by the provisions of section 35 of the Income Tax Act, CAP. 332 (R.E.2006)

you are hereby notified that your company is held liable to tax in the United Republic of Tanzania (URT) on investment income that accrued on sale of interest in land on Nyanzaga project which is located in the United Republic of Tanzania. The arrangement of sale and acquisition of the said property involved appointment of one associate company of ABG to transact on her behalf.

African Barrick Gold (ABG) initiated a process of compulsory acquisition on Tusker shares in Australia stock exchange with a view of owning Nyanzaga Gold Project which is located at Nyanzaga Sengerema District Mwanza Region in Tanzania. The process of acquisition involved a series of transactions using a subsidiary company of ABG which was commissioned to handle the acquisition of shares of Tusker Gold Limited in the stock exchange share transfer and ultimately the ownership of Nyanzaga landed into the hands of ABG.

The company had interest of acquisition of Nyanzaga project and it did not acquire it directly, but employed a scheme which made the transaction to be seen as a foreign transaction rather than a local one by involving a subsidiary company which is located outside Tanzania.

The purchase of the property was structured in such a way that the transaction was to be seen as a sale and purchase of shares by offshore companies, but in substance what was acquired was the property in Tanzania and not sale of shares per se. In actual fact what was acquired was the property located in Tanzania that is Nyanzaga.

Following completion of the compulsory acquisition process, African Barrick Gold plc's interest in the Nyanzaga project increased to 100%. Nyanzaga is now indirectly wholly owned by African Barrick Gold plc.

The whole arrangement was meant for externalization of the acquisition of the property, though-the said property is located in the United Republic of Tanzania: The process was structured in a way that investment income taxation will be avoided.

In light of the above Tanzania Revenue Authority (TRA) is intending to issue an assessment on investment income as provided for under Sections 9, 39 and 55 of the Income Tax

Act as ABG was owning the Nyanzaga Project as a partner to Tusker. BUK Holding the associate company was only a nominee of Barrick in the process of acquisition of shares. The transaction could have been done by ABG itself which had presence in Tanzania. The adjustment done is based on the sale price of the property which is US \$ 71,123,103 times a rate of 30%, therefore the tax payable is US\$ 21,336,931.

Please, you are required to settle the unpaid tax immediately after receipt, of this notice.

Yours faithfully,

*E.M. Makala
Manager Tax Investigations
LAKE ZONE-MWANZA"*

It seems to us that in the said letter of the appellant, the bolded expressions are not in harmony. We say so because, although initially, the appellant had invoked the provisions of section 35 of the Income Tax Act expressing intendment to issue an assessment on investment income, this is negated by the appellant's demand on the respondent to settle unpaid tax immediately after receipt of the notice. Thus, as correctly found by the Board, the appellant's notice was couched in a manner constituting an assessment and it imposed tax liability on the respondent. In the circumstances, the contentious issue here is whether the Board had jurisdiction to entertain the appeal against the Commissioner General's letter.

It was Mr. Maswanyia's submission that, even if the notice is assumed to constitute existence of liability, the respondent was not entitled to appeal to the Board considering that, an objection on existence of tax liability has to be lodged with the Commissioner General or placed before the Board by way of reference in terms of section 14 (2) of the TRAA. In this regard, it was argued that the Board embarked on a nullity to entertain the respondent's appeal because it had no jurisdiction to do so. It was Mr. Maswanyia's contention that, the proper course which ought to have been taken by the respondent was to forward the objection by way of reference to the Board as per the dictates of the provisions of section 14 (2) of the TRAA. To support his proposition, Mr. Maswanyia urged us to be guided by the case of **COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY VS JSC ATOMREDMETZOLO (ARMZ)** Consolidated Civil Appeals Nos 78 and 79 of 2018 (unreported). He contended the said case to bear a similar factual situation with the matter under scrutiny. Ultimately, Mr. Maswanyia urged the Court to allow the appeal, nullify the proceedings of the Board and Tribunal, quash the respective judgments and subsequent orders.

On the other hand, Mr. Kileo opposed the appeal and commenced by distinguishing the case of **COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY VS JSC ATOMREDMETZOLO (ARMZ)** (supra) arguing that, in the present matter the gist of the dispute is a demand letter to pay tax and not a tax assessment as prescribed by the law. He submitted that, the appeal before the Board was filed under section 6 of the Tanzania Revenue Authority Act [CAP 399 R.E.2002] read together with section 14 (2) of the TRAA. We probed Mr. Kileo on the respondent's written submissions noting the appellant's contention that the proper remedy was to seek remedy to the Board by way of reference and not an appeal. On this, Mr. Kileo was of the view that, section 14 (2) of the TRAA has a *lacuna* as it does not provide for the procedure of reference of objection to the Board and as such, he argued the appeal to be the appropriate remedy and which has been the practice by other tax payers aggrieved with the appellant's notification on existence of tax liability. On being further probed by the Court if the respondent had objected to the tax liability, Mr. Kileo replied that she never did so be it before the appellant or the Board but maintained that recourse to appeal was proper considering that, the appellant was not prejudiced in any manner. Finally, he urged the Court to dismiss the appeal with costs.

In a brief rejoinder, Mr. Maswanya submitted that, since the jurisdiction of the Board is a creature of statute which as well, stipulates the manner of dealing with objections to tax liability, the respondent had no choice as she was obliged to forward the objection of the notice on tax liability by way of reference to the Board and not by an appeal. On this, he argued that the case of **COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY VS JSC ATOMREDMETZOLO (ARMZ)** is still good law and thus, reiterated his earlier prayer that the appeal be allowed and what transpired before the Board and the Tribunal be annulled.

Having carefully considered the record before us and the submissions of the learned counsel, the issue for our determination is whether the Board was clothed with jurisdiction to entertain and determine the respondent's appeal against the appellant's notice on existence of tax liability. At the outset, it is crucial to point out that, the subject under scrutiny was before the amendment of the TRAA and we shall rely on the law as it was by then.

We have no qualms that the Tanzania Revenue Authority, is a creature of the TRA Act. This is among the statutes which create a right of

appeal to the Board because the provisions of section 6 of the TRA Act stipulates as follows:

*"Any person who is aggrieved by the decision of the Commissioner-General in relation to any act or omission in the course of the discharge of any function conferred upon him under the law set out in the First Schedule to this Act, **may appeal to the Board in accordance with the provisions of the Tax Revenue Appeals Act.**"*

[Emphasis supplied]

Although, the cited provision creates a right of appeal to a person aggrieved by the decision of the Commissioner General, the bolded expression directs such appeal to be made in accordance with the provisions of the TRAA which entails the modality of resolution of tax disputes and regulates the processes and procedures on appeals to the Board. In the premises, section 6 of the TRA Act should not be read in isolation and instead, together with the TRAA which continues to stand out as a major statute regulating the resolution of tax related disputes. This takes us to Part IV of the TRAA as it was in 2010 whereby section 16 (1) and (2) stipulated as follows:

“16 (1) Any person who is aggrieved by the final determination by the Commissioner General of the assessment of tax or a decisions referred to under section 14 of this Act may appeal to the Board.

(2) Notwithstanding the provisions of subsection (1), an appeal shall not lie in respect of: -

(a) a determination made by the Commissioner General in accordance with section 13 (1) (a);

(b) a determination made by the Commissioner General in accordance with section 13 (5) (a); or

(c) a determination made by the Commissioner General in accordance with section 13 (5) (b) to the extent that the submission is made by the objector.

It is glaring that, the cross referencing in section 16 (1) shows that the subsection was not a stand-alone because sub section (2), subjected the prescribed right of appeal to the provisions of section 13 which mandated Commissioner General to receive and determine objections filed by tax payers disputing tax liability. Moreover, in terms of section 16 of the TRAA, it is significantly discernible that an appeal to the Board is narrowed

down to an objection decision made by the Commissioner General. This can be discerned from the nature of documents which must accompany the appeal as enumerated under Rule 7 of the Tax Revenue Appeals Board Rules,2001 (the Rules) which among other things, stipulate as follows:

"7. -(1) A person who institutes an appeal to the Board shall attach all material documents which are necessary including appealable decision, for the proper determination of the appeal.

(2) Without prejudice to sub-rule (1), the appeal shall contain the following documents-

(a) where the appeal is against objection decision of the Commissioner General-

(i) a copy of a notice of assessment of tax;

(ii) a copy of notice of objection to an assessment submitted to Commissioner General by the appellant;

(iii) a copy of the final objection decision of assessment of tax or any other decision by the Commissioner General being appealed against;

(iv) a copy of a notice issued by the Commissioner General regarding the

- existence of liability to pay tax, duty, fees, levy or charge;*
- (v) a copy of the notice of proposal on how the Commissioner wants to settle the objection (if any);*
- (vi) a copy of submission made by taxpayer in response to the notice of appeal, (if any);*
- (b) where the appeal relates to refusal by the Commissioner General to admit a notice of objection, a copy of the decision of the Commissioner General to admit a notice of objection;*
- (c) where the appeal relates to-*
- (i) refund, drawback or repayment of any tax, fee, duty, levy or charge, a statement showing the calculation by the appellant of the amount due for refund, drawback or repayment of any tax, fee, duty, levy or charge;*
- (ii) refusal by the Commissioner General to make any refund or repayment; a copy of the decision of the Commissioner General refusing to refund”.*

Drawing inspiration from the cited rule listing documents accompanying the appeal to the Board, it is clear that the notice on

existence of tax liability by the Commissioner General is certainly not among the decision envisaged to be appealable to the Board. In our considered view, the exclusion was deliberate so as to enable the tax payer before invoking the remedy of an appeal, to exhaust the available remedy of lodging an objection to the Commissioner General or forward the matter to the Board by way of reference. Therefore, in the absence of an objection decision of the Commissioner General, no appeal could lie to the Board. This takes us to considering the respondent's claim that the appeal was lodged under the provisions of section 14 (1) and (2) of the TRAA. We shall examine the provision in order to ascertain if it creates a remedy of appeal against the notice on existence of tax liability. It stipulated as follows:

"14 (1) Any person aggrieved by-

- (a) the calculation by the Commissioner-General of the amount due for refund, drawback or repayment of any tax, duty, levy or charge;*
- (b) a refusal by the Commissioner-General to make any refund or repayment; or*
- (c) an apportionment of any amount or sum by the Commissioner-General under the Second Schedule to the Income Tax Act which*

affects, or may affect, the liability to tax of two or more persons; or

(d) a determination by the Commissioner-General under paragraph 32(4) of the Second Schedule to the Income Tax Act;

(e) the decision by the Commissioner-General to register, or refusal to register, any trader for the purpose of the Value Added Tax Act,

may appeal therefrom to the Board.

*(2) Notwithstanding subsection (2), a person who objects a notice issued by the Commissioner-General **with regards to the existence of liability to pay any tax, duty, fees, levy or charge may refer** his objection to the Board for determination.*

In the light of the bolded expressions, the investment income tax which is a subject at hand, fell squarely under the category of existence of liability to pay any tax. The question to be answered is whether section 14 of the TRAA clothed the Board with jurisdiction to entertain and determine appeals against notice on existence of tax of tax liability. In its reasoning from page 209 of the record of appeal, the Tribunal was satisfied that the wording of the appellant's notice at the bottom part of page 2 established

that it was both a decision as well as an act by the appellant which was appealable to the Board under section 6 of the Tanzania Revenue Authority Act and 14(2) of the TRAA. It held further that, the import of the provisions was to enable any taxpayer who is aggrieved by the decision of the appellant to file an appeal to the Board irrespective of whether or not the decision or act constituted an assessment. With respect, we do not agree with the decision of the Tribunal and we shall give our reasons in due course.

The appellant is faulting the Tribunal's decisions while on the other hand, it was Mr. Kileo's contention that the respondent had to file an appeal because the law does not prescribe any procedure of filing a reference. As earlier pointed out, section 6 of the TRA Act must be read together with the provisions of sections 12, 13, 14 and 16 of the TRAA which by then clothed the Board with jurisdiction to entertain appeals arising from objection decisions of the Commissioner General. That said, the Court had the occasion to consider the mandate of the Board as articulated under the provisions of section 14 (2) of the TRAA in the case of **COMMISSIONER GENERAL TRA VS JSC ATOMREDMETZOLO** (supra) and it stated as follows:

"... subsection (1) limits the circumstances in which one may seek redress by way of an appeal to the TRAB against the decision of the Commissioner. Under subsection (2), a person who objects a notice issued by the Commissioner General with regards to the existence of liability to pay tax, duty, fees, levy or charge may refer his objection to the Board for determination. Thus, the remedy on the objected notice before the Board is by way of reference and not an appeal as suggested by Dr. Mwiburi. "

In the present matter, it is settled that the appellant's letter found at page 12 of the record of appeal constituted notice on existence of liability to pay tax amounting to USD 21,336,931 on investment income that accrued on the sale of interest in land on Nyanzaga project located in the United Republic.

At this juncture, it is worthy to restate the obvious that the jurisdiction of courts or tribunals is a creature of statute. Therefore, the question of jurisdiction is so fundamental and as a matter of practice, at the commencement of the trial, the courts or tribunals must be certain of their jurisdictional position, determine whether vested with requisite jurisdiction because it goes to the very root of the authority. This has been

emphasized by the Court in a number of decisions including: **RICHARD JULIUS RUKAMBURA VS ISSACK NTWA MWAKAJILA AND ANOTHER**, Civil Application No. 3 of 2004, **TANZANIA REVENUE AUTHORITY VS. TANGO TRANSPORT COMPANY LTD**, Civil Appeal No. 84 of 2009, **FANUEL MANTIRI NG'UNDA VS HERMAN MANTIRI NG'UNDA AND 20 OTHERS**, Civil Appeal No. 8 of 1995 (all unreported) and **COMMISSIONER GENERAL TRA VS JSC ATOMREDMETZOLO** (supra). In the latter case, relying on the former decisions the Court held:

"What was said in the above decisions... applies with equal force to an appellate Board and Tribunal considering that, before an appeal is determined on the merits on issues not touching on the jurisdiction (s) of the court (s) below, it must be certain that the proceedings giving rise to the appeal were competently before that court or those courts. This is because a judgment in an appeal from proceedings which were a nullity is also a nullity."

In the light of the cited decisions, another question to be addressed is what was the remedy available to the respondent? It is glaring that, section 14 (2) of the TRAA vest with the Board jurisdiction to entertain a reference on objection of a notice on existence of liability to pay tax issued

by the Commissioner General. Nowhere is it stated that, such mandate becomes inoperative merely because of the absence of the requisite procedure as suggested by Mr. Kileo. Besides and as earlier pointed out, the remedy of an appeal to the Board, does not extend to appealing against the Commissioner General's notices on the existence of tax liability. On this account, we subscribe to what the two learned authors observed in their book titled: **Introduction to Interpretation of Statutes**, Avtar Singh and Harpreet Kaur, 4th Edition at page 23 as follows: The learned Authors observed as follows:

"When the language of a statute is plain, words are clear and unambiguous and give only one meaning, then effect should be given to that plain meaning only and one should not go in for construction of the statute.... Courts should not be overzealous in searching for ambiguities or obscurities in words which are plain."

From the above excerpt, it is glaring that where the language is clear, the intention of the Legislature is to be gathered from the language used and attention should be paid to what has been said as also to what has not been said. Therefore, the courts should not busy themselves with supposed intention or with the policy underlying the statute. Thus, with

respect, the Tribunal faulted and went beyond what is not prescribed under the law to hold that the notice on existence of liability to pay tax was appealable to the Board under the provisions of sections 6 of the TRA Act and 14 (2) of the TRAA.

In the circumstances, we agree with Mr. Maswanyia that our decision in the case of **COMMISSIONER GENERAL TRA VS JSC ATOMREDMETZOLO** (supra), remains to be good law to the effect that, the objection on existence of tax liability is not appealable to Board. In the event the respondent ought to have approached the Board by way of reference as stated under the provisions of section 14 (2) of the TRAA. Thus, it was irregular for the respondent to lodge an appeal to the Board against the notice on existence of tax liability. Thus, as the Board had no jurisdiction to entertain the appeal against the existence of tax liability, it embarked on a nullity and its proceedings and judgment cannot be spared. A similar fate befalls the proceedings and judgment of the Tribunal which arose from a nullity.

On the way forward, we nullify the proceedings of both the Board and the Tribunal, quash and set aside the respective judgments and subsequent orders. Thus, the 2nd ground is merited, the appeal is allowed

with costs. Since this ground suffices to dispose the appeal we shall not determine the remaining grounds considering that all what transpired stem on null proceedings. If the respondent so desires, can pursue remedy available in compliance with the law and not otherwise.

DATED at DAR ES SALAAM this 17th day of March, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 17th day of March, 2022 in the presence of Ms. Adelaida Ernest and Salome Chambai, learned State Attorneys for the Appellant and Ms. Catherine Mokili, learned counsel for the Respondent, is hereby certified as a true copy of the original.



C. M. Magesa
C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL