IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: OTHMAN, C.J., NSEKELA, J.A., AND MJASIRI, J.A)

CIVIL APPEAL NO. 14 OF 2007

INSIGNIA LIMITED ..... APPELLANT

VERSUS

THE COMMISSIONER GENERAL

TANZANIA REVENUE AUTHORITY ..... RESPONDENT

(Appeal from the judgment and Decree of

the Tax Revenue Tribunal at Dar es Salaam

(Shangwa, J.)

(Dated 15th day of September, 2006)

in

Tax Appeal No. 11 of 2006

JUDGMENT OF THE COURT

19 March 2011 & 8th June, 2011

NSEKELA, J.A:

This appeal has its origin from the Tax Revenue Appeals Board as VAT Tax Appeals Case No. 16 of 2003. The appellant was **Insignia Limited** and the respondent was **Commissioner General**. The appellant objected pay the respondent Shs. 1,252,893,687/= being allegedly underpayment of Value Added Tax. This was additional assessment. The appellant lodged a notice of appeal

under section 16(2) (a) of the Tax Revenue Appeals Act 2000 challenging this additional assessment. The Tax Revenue Appeals Board decided that the appellant should pay additional tax of Shs. 37,214,114/= with interest instead of the assessed tax of Shs. 1,252,893,687/=. The respondent was dissatisfied with the Board's decision and so lodged an appeal against this decision with Tax Revenue Appeals Tribunal. (the tribunal) This was Appeal No. 11 of 2006. This time around the respondent was the successful party. The Tribunal held that the appellant was liable to pay the additional VAT of Shs. 1,252,893,687/=. It is against this background that insignia Ltd (appellant) has lodged to this Court, Civil Appeal No. 14 of 2007. The appellant before the Tribunal is now the respondent.

The appellant lodged five grounds of appeal, namely-

1. That Tax Revenue Appeals Tribunal erred in law in holding the exhibits RE 2; RE 3; and RE 4 represented actual sales;

2. That the Tax Revenue Appeals Tribunal erred in law in holding that the appellant did not discharge its burden of proof per section 18 of the Tax Revenue Appeals Act, Cap. 408 RE 2002.

3. (Abandoned).

4. That the Tax Revenue Appeals Tribunal erred in law by disregarding the reasoning and findings of the Tax Revenue Appeals Board on the facts and evidence adduced therein;

5. That the Tax Revenue Appeals Tribunal erred in law in holding that the respondent did not have any evidential burden of proof to discharge once it made the assessment of value Added Tax liability and the same was disrupted."

Mr. Matunda, learned advocate for the appellant, at the outset abandoned the third ground of appeal. The remaining four grounds were consolidated into two pairs, the first and the fourth, the second and the fifth. As regards the first and fourth ground of appeal, Mr. Matunda submitted that the

respondent wrongly used the figures in exhibits RE 2; RE 3 and RE 4. The figures contained therein were not actual sales but included business projections. He added that those exhibits cannot form the basis of computing VAT liability. He contended that actual sales would not contain the targets and that there was no evidence that the targets were sales. The learned advocate urged the Court to make its own findings since the Tribunal's findings were not based on cogent evidence.

Submitting on the second and fifth grounds of appeal, Mr. Matunda stated that the evidential burden of proof is on the respondent to establish that its assessment was not erroneous. He contended that the appellant adduced evidence by calling six witnesses including the Managing Director to discharge its burden under section 18 (2) (b) of the Tax Revenue Appeals, Act 2000. He added that the respondent had seized all documents and hence was in a better position to correctly assess the tax payable. A part from that the respondent had a resident employee at the appellant's premises.

Mr. Juma Beleko, learned advocate, represented the respondent. The learned advocate submitted that the burden of proof is on the appellant tax – payer and that the authenticity of the documents was not disputed. He also contended that only questions of law should be canvassed before this Court of appeal. Questions of fact are not to be argued at this stage.

A good starting point is section 25 of the Tax Revenue Appeal Act, Cap 408 R.E. 2002. It provides as follows:

> "25 (1) Any person who is aggrieved by the decision of the Tribunal may prefer an appeal to the Court of Appeal;
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> (2) Appeal to the Court of Appeal shall lie on matters involving questions of law only and the provisions of the Appellate Jurisdiction

Act and rules made there under shall apply **mutatis mutandis to** appeals from the decision of the Tribunal."

It is therefore evident that appeals to this Court from the Tribunal should involve only questions of law. The appellant is not permitted to re open factual issues in support of the appeal. The appeal should be decided upon a consideration of the law only and nothing else. We are therefore not persuaded that the first and fourth grounds of appeal concern points of law. The first and fourth ground of appeal relate to an evaluation of the fact in exhibits RE 2; RE 3 and RE 4. For instance exhibit RE 2 concern with a determination of whether or not the figures therein are actual sales or projections.

The second and fifth ground of appeal revolved around the question of burden of proof in the context of section 18 of the Tax Revenue Appeals Act, Cap.408 RE 2002. This requires the Court to interpret this provision of law and therefore a question of law. The essence of the complaint was to the effect that the Tribunal erred in holding that the appellant did not discharge its burden of proof. The penultimate paragraph of the Tribunal's judgment is in the following terms.-

"In our opinion, the appellants act of seizing the said documents from the respondent does not shift the burden of proof from the respondent to the appellant for (sic) show the additional VAT assessment of Shs. 1,252,893,687/= is excessive or erroneous. The purpose of seizing those documents was to find out as to whether or not the respondent had evaded any VAT during the years 1998, 1999, 2000 ad 2001. It was upon thorough examination of those documents by the appellant's officers who compared them with the monthly VAT returns which had been submitted by the respondent to the Tanzania Revenue Authority that additional VAT of Shs. 1,252,893,678/= was assessed and demanded by the appellant form the respondent."

The burden of proof in tax matters has often been placed on the tax-payer. This indicates how critical the burden rule is, and reflects several competing rationales: the vital interest of the government in getting its revenues; the tax payer has easy access to the relevant information and the importance of encouraging voluntary compliance by giving tax – payers incentives to self-report and to keep adequate records in case of disputes. The evidence which settles the final liability lies solely within the knowledge and competence of the aggrieved tax – payer. In the case of **T. Haythornwaite & Sons Limited V. Kelly (H.M. Inspector of Taxes)** 1926 – 27 T.C. 657, Lord Hanworth, M.R. stated at page 667 -

> "Now it is to be remembered that under the law as it stands the duty of the Commissioners who hear the appeal is this: parties who are entitled to produce any lawful evidence, and if on appeal it appears to the majority of the Commissioners by examination of the appellant on oath or affirmation, or by other lawful evidence, that the appellant is overcharged by an assessment, the Commissioners shall abate or reduce the assessment accordingly but otherwise every such assessment or surcharge shall stand good. **Hence it is quite plain that the Commissioners are to hold the assessment standing good unless the subject – the appellant – establishes before the Commissioners by evidence satisfactory to them, that the assessment ought to be reduced."** (emphasis added)

This is the thrust of section 18(2) (b) of the Tax Revenue Appeals Act, Cap. 408 RE 2002 which provides as follows:-

> "18 (2) In every proceedings before the Board and before the Tribunal-
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> (b) the onus of proving that the assessment or decision in respect of which an appeal is preferred is excessive or erroneous shall be on the appellant." The burden of proving that the assessment is

excessive or incorrect is on the appellant tax-payer. The respondent revenue authority has no burden of proving anything. However, where the appellant produces the documents before the respondent revenue authority, the appellant can be said to have discharged its burden of proof. After that it is up to the respondent to disprove the veracity of all the invoices and other documents. The question is did the appellant discharge that burden?

The learned author, Richard A Toby in his book **The Theory and Practice of Income Tax (1978)** at page 91 had this to say:-

> "The various authorities have settled the question that the mere making of the assessment by the Revenue is prima facie evidence of liability and is sufficient to demand the payment of the tax. However, the onus is not one which remains on the tax – payer throughout. The taxpayer need only give an explanation which appears reasonable in all the circumstances. This having been done, he will be regarded as having discharged that onus. The burden of proof must at that point in time shift to the Revenue who must then satisfy the Court or tribunal as to the justification for maintaining the assessment. Where the Revenue fails to do so, the assessment must be vacated."

The respondent, in the exercise of its statutory powers under the VAT Act, seized the appellants documents, records and apparently used them to compute the appellant's VAT liability. The appellant had made out a prima facie case, and therefore the evidential burden shifted to the respondent who now had to produce evidence to support the assessment made from the seized documents records etc. It was then easy to dispute exhibits RE 2; RE 3 and RE 4. The Tax Revenue Appeals Tribunal in its judgment stated that the respondent had made a thorough verification of the documents. The correctness of the assessment had to be proved by direct or documentary evidence of the actual determination and not by a presumption imposing an evidential burden of proof on the appellant to prove facts which were within the knowledge of the respondent.

In the result, we allow the appeal with costs. We set aside the decision of the Tribunal dated the 15th September, 2006.

DATED at **DAR ES SALAAM** this 30th day of May, 2011.

M.C. OTHMAN
CHIEF JUSTICE

H.R. NSEKELA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL