# IN THE TAX REVENUE APPEALS TRIBUNAL

# AT DAR ES SALAAM

# IN COME TAX APPEAL NO. 6 OF 2011

## COMMISSIONER GENERAL (TRA) ..... APPELLANT

## VS

## BRAEBURN SCHOOL(T) LTD..... RESPONDENT

## PROCEEDINGS

**19.05.2011**

**QUORUM:**

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| **Hon. H.M. Mataka** | **-** | **V/Chairman** |
| **Prof. J. Doriye** | **-** | **Member** |
| **Mr. W.N. Ndyetabula** | **-** | **Member** |
| **For the Appellant:** | **-** | |
| **For the Respondent:** | **-** | |
| **Mrs. Halima Said** | **-** | **RMA** |

**Order:**

This Appeal is fixed for hearing on 20th, 21st and 22nd June, 2011. The hearing will start at 10:00am, Members of the panel and parties to be notified the date and time for hearing.

**Hon. H.M. Mataka V/Chairman,Sgd**
**09/05/2011**

**19.05.2011**

**QUORUM:**

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| **Hon. H.M. Mataka** | **-** | **V/Chairman** |
| **Prof. J. Doriye** | **-** | **Member** |
| **Mr. W. N. Ndyetabula** | **-** | **Member** |
| **For the Appellant** | **-** | **Mr. Haule Advocate, for the Appellant** |
| **For the Respondent** | **-** | **Mr J. Manase, Tax Consultant for the Respondent Accompanied by Mr. Waziri Magendo, Tax Consultant.** |
| **Ms. Grace Ntamuturano** | **-** | **Ps** |

The Hearing is opened, Mr. Haule may proceed.

**MR HAULE:**

Hon. V/Chairman and Members of the Tribunal, the Appellant in this Appeal submits as follows:

I will start with part A which is the facts as stated in the statement of appeal.

The Appellant is Government Agent for collection of its taxes, whose agency has been granted under sec. 4 of the Tanzania Revenue Authority Act (TRAA) Cap 399 of Laws of Tanzania R.E. 2006. While the Respondent is a limited liability Company owning two Education Institutions in Arusha, namely:

1) Braeburn St. Georges International Primary School and,

2) Braeburn St. Georges International Secondary School.
On 08th day of March 2010 the Respondent filed with the Tax Revenue Appeals Board an Application for Reference No. 2 of 2010 seeking the following declaration.

a) That PAYE Certificate issued by the Appellant as to the existence of the liability being under payment of PAYE tax plus interests amounting to Tshs. 95,871,863.96 for the year 2006 – 2008 as null and void for having been issued contrary to the provisions of Income Tax Act (ITA) 2004 and other enabling provision of the law;

b) Compelling the Respondent to vacate the PAYE Certificate / Interests.

The said Appeal was heared by the Board and judgment was delivered on 24/02/2010. The Tax Revenue Appeals Board allowed the Appeal by holding that:

i) School fees concession of 85% granted to the parent staff for their children as an Education Institution is not a taxable benefit under ITA of 2004;

ii) The school fees concession granted to parent staff for their children who are schooling in the appellant's schools is exempted from income tax under item 1 of para 1 to the second schedule of the income tax act 2004 RE 2006;

iii) The impugned tax assessment was arrived at without any legal basis and that the applicant was justified to contest it.

Hon. V/Chairman and Members it is from this holding of the Tax Revenue Appeals Board that the Appellant having been with dissatisfied with the Board's decision submits this appeal before the Tribunal for determination.

Having summarised the facts now I beg to go to part B which are grounds of the Appeal.

Starting with ground No. 1 a) The Board erred in law and in fact by holding that school's fees concession granted to parent staff for their children at an education is not taxable benefit under ITA Cap 332 of the law R.E 2006.

Hon. V/Chairman and Members of the Tribunal as earlier started the born of contention in this Appeal emanates from the arrangement by the Respondent as an employer of granting benefits to its staff of 85% concession of school's fees, for their children were enrolled with employer. For example if the fees per child is one million shillings then the staff who has his/her child schooling/studying in that school pays only 150,000/=, the 850,000/= is granted by the Employer as concession now I am told the school fees payable is almost Tshs. 4 million, giving a concession of almost 3,400,000 per child. The concession is granted for up to 4 children per staff per year.

This is the basis of the dispute between the TRA and Respondent. The Appellant's position is that such a grant is a benefit in kind, subject to Income Tax under Sec. 7(1) and (2) (a) of ITA of 2004 R.E. 2006.

Generally Sec. 7 talk income from employment, subsection (1) provides "*an individual income from employment for a year of income shall be the individual gains or profits from the employment of the individual for the year of income*".

This is an allowance for employment; it amounts to giving an individual employee cash to pay school fees for his children, so what the Respondent was to do is to take the normal salary of the staff and to add these school fees concession and calculate tax and remit the tax to TRA.

Now before the Board, the Counsel for TRA emphatically submitted that the 85% concession of school fees granted to the teaching members of teaching staff was emolument of employment chargeable to tax under sec. 7 (1) and (2) (a) ITA Cap 332 of 2004 RE 2006.

The counsel cited three authorities at page 24 of the Board's proceedings. One is the case of NICO Vs. AUSTIN (1925) 19 Tax. Cases at page 52; In that case it was held that domestic bills of employee paid by the employer are taxable benefits in the hands of the employee. It is a benefit in kind.

In HARTLAND Vs. DIGGINESS (1926) Vol. 10 Tax. Case 247; it was held that where a salary is paid "free of tax" the liability paid by the employer, that is the tax advantage, is taxable as an emolument of employment.

In GEITA GOLDMINING LIMITED VS. COMMISSIONER GENERAL (2004) vol. 2 of TTLR 76 it was held that salaries and benefits received by an employee are subject to tax deductions.

Hon. V/Chairman despite of all authorities the Board in its judgment kept queit and came with pre conceived idea that school fees concession that are granted to the school staff are not taxable under ITA. No particular provision of ITA was cited to support that holding.

Hon. V/Chairman, the Appellant is of the humble opinion that the school fees concession granted by the employer in our case is one of the kind granted by the employer in the GEITA case above cited.

By granting schools fees concession for their children it is as if the employer has added some money in the employees salary. The Appellant wonders why that amount should not be taxed.

The Tax Revenue Appeals Board in-stead of addressing what the law says became overzealous in being advocating the promotion of Educational Policy by stating that, such charging benefits/concession is tantamount to eroding Education sector by discouraging people who would like to invest in the education sector; what one wonders here is that, by charging that benefit in the hands of the employees, how is the employer being affected.

It is the humble opinion of the Appellant that the Respondent became affected by introducing such a scheme for its employees with-out including such benefits in the employees salaries and deduct the tax. So it is from that premise that the Appellant is of humble opinion that the

Board erred in law and in fact by holding that the school fees concession granted to parent staff for their children at an educational institution is **not** a taxable benefit under the I TA Cap 332.

**GROUND NO. 2**

The Tax Revenue Appeals Board erred in law and in fact when it held that school fees concession granted to parent staff for their children who are schooling in appellant's school is exempt from income tax under item (i) of paragraph 1 to the second schedule of the ITA Cap 332 RE 2006.

Under Sec. 7(3) in calculating an individual gains or profits from employment the following shall be excluded:-

(a) Exempt amount and final with holding payments;

Now second schedule: Exempt Amounts. Para 1(i) a scholarship or education grant payable in respect of tuition fees for full time instruction at on educational institution.

Hon. V/Chairman, before the Board, Counsel for the TRA strongly disputed the invocation of (i) provisions as fas as this dispute is concerned. Counsel for TRA categorically stated that to be exempted in the name of scholarship or Educational grant the said grant must be given to the employee himself who is studing at Educational Instruction and not otherwise. In our case, the beneficiary of the grant is not the employee but his child. It was stated in the Board that the employer has no contractual obligation to the employee's children to warrant the said

deduction of school fees being as scholarship to the staff. Despite all these strong arguments the Board dis regarded every thing and at page 5 of its judgment, it continued to hold the way it held at para one at page 5.

The Board held that concession of school's fees granted to parent staff for their children are exempted under para graph 1 of (i) of the Second Schedule under ITA. Cap 332.

**GROUD NO. 3**

The Tax Revenue Appeals Board erred in law and in fact when it held that the impugned tax assessment was arrived at with out any legal basis and that the Appellant was justified to contest it.

At page 7 of the Board's judgment at second para Mr. Haule read.

In its judgment the Board at page 7 held that "*the impugned tax assessment was arrived at with out any legal basis and that the applicant was justified to contest it".*

The disputed assessment in this Appeal was arrived at on the basis of provisions of Sec. 7(1) and Sec. 7 (2) (a) which inter alia states that the payment of wages, salary in lieu of leave, fees, commissions, bonuses, gratuity, intertainment all other allowances receive in respect of employment or service rendered are taxable gains or profit of the individual.

The amount of money which the staff is relieved from paying fees in the Respondent's school as a result of him being employed by the school is

an income in the hands of the employee, and it can be equated to any allowance received by an individual in respect of any employment as provided for in sec. 7(2) (a) above cited.

Had the staff not being employed by that Employer who runs those schools he would not be relieved. He is getting that concession because he is an employee, hence the concession is a taxable benefit. Holding the way the Board held we lead to lost of the huge government revenues taking into account a number of private schools we have in Tanzania. It is from this that the Appellant submits that the Board erred in law and in fact when it helds that the impugned tax assessment was arrived at with out any legal basis and that the applicant was justified to contest it.

**GROUND NO. 4**

The Tax Revenue Appeals Board erred in law and in fact by importing some aspects in its judgment which were neither raised nor argued by the parties during the proceedings.

Hon. V/Chairman, the Board in its judgment used much time talking politics in-stead of concentrating on the framed issues the Board went on advocating the need to encourage investment in private education institution sector as it is at page 5 paragraph 2 of its judgment. Mr. Haule read.

These are the question of investment on Education which was not an issue.

Hon. V/Chairman the dispute in this Appeal was not relating to investment in Education but the main born of contention is whether schools fees concession granted to staff for their children was an income chargeable to tax on the part of the Employee. By much dweling and promoting private education sector investment the Board with due respect that it is our humble opinion that the Board went astray of what was before it. At page 6 of the judgment the Board took even time to advise the legislature to amend the law so as to allow the schools fee 3 concession not to be taxed. By so advising it means that the Board knew that the school's fees concession were not exempted asit held at page 5 of its judgment hence amendment to exempt school's fees concession.

If this was the position why hold that same school fees concession were exempted under item (i) paragraph 1 of the second schedule of the ITA Cap 332 RE 2006. It is the humble submission of the Appellant that the Board misdirected itself.

Hon. V/Chairman and Member of the Tribunal, with all that I come to the end of my submission in chief and humbly pray that, this appeal be allowed, judgment and all orders of the Tax Revenue Appeals Board be set a side, costs of this Appeal be provided for, and any further orders that this Tribunal may see fit or just to grant. I humbly submit.

**Hon. H.M. Mataka V/Chairman,Sgd**
**20/06/2011**

**ORDER:**
The hearing will continue tomorrow 21st June, 2011 at 2:00pm where the Respondent will make his reply submission.

**Hon. H.M. Mataka V/Chairman,Sgd**
**Prof. J. Doriye Member,Sgd**
**Mr. W.N. Ndyetabula Member,Sgd**
**20/06/2011**

**21/06/2011**

**QUORUM**

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|---|---|---|
| **Hon. H.M. Mataka** | **-** | **V/Chairman** |
| **Prof. J. Doriye** | **-** | **Member** |
| **Mr. W.N. Ndyetabula** | **-** | **Member** |
| **For the Applicant** | **-** | **Mr. Haule Advocate, for the Appellant** |
| **For the Respondent** | **-** | **Mr J. Manase, Tax Consultant for the Respondent** |
| **Ms. Grace Ntamuturano** | **-** | **Ps** |

To day the Tribunal is fixed for hearing the reply submission from the Respondent.

The hearing is opened

**Mr. Manase**
Hon. V/Chairman and Members of the Tribunal in reply to the Appellant submission, I wish to reply as follow: First I would like to draw attention of this Tribunal to the provision of Rule 15 (4) of the Tribunal Rules, which

prohibit the Appellant to introduce new issue which were not previously argued before the Board.

Therefore on those premise the issue of quantum loss per staff of more than Tshs. 13.6mil. and that there are over hundred such schools in Arusha and that the government stand to lose lot of money in revenue has been introduced by the Appellant contrary to the Tribunal Rules. Secondly it is in the record of the Appeal at page 2 of the Board proceedings Anexture TRA 1 of the Appellant, item 4 under the heading of Audit findings at page 2 under PAYE. Under this item the Appellant in the last line clearly stated that the 85% deduction of school fees availed to parent teaching staff is considered to be payment inkind and therefore taxable supplies under sec. 7 (2) (b) of the income Tax Act 2004 R.E 2006.

The Appellant herein has moved to the provision of sec. 7(2) (a) of ITA. The Appellant unreasonably made uturn to the provision of sec. 7(2) (a) to the disputed matter at the appeal level at the Board and Tribunal, instead of sec. 7(2)(b) he went to sec.7(2) (a). sec. 7(2) (b) provides that". Respondent read.

So this is inconsistency and abuse of office and intended to frustrate" the tax payer community. As I said, upon being assessed under sec. 7(2)(b) of the ITA 2004, the Respondent Braeburn School preferred appeal to the Board to challenge the assessment, hence this appeal.

It is in the records of the Board proceedings that TRA made the counter affidavit in which he confirmed that the assessment was correctly made under sec. 7(2) (b) of the ITA 2004.

Hon. V/Chairperson and Members, the matter went to the Board and the appellant submitted its case before the Board for determination; Witnesses were called before the Board and testified, later on it was decided that submission to be made in writing. The Appellant (TRA) submitted their written submission on 24th December, 2010. In his written submission, went off line or astray by shifting to S. 7(1) and 57(2)(a) of the ITA 2004. In support of his literature the Appellant relied on the provision of sec. 5(2) (b) ITA of Repealed ITA 1973.

Appellant TRA, cited two cases in defence of his argument. Further to that the appellant, TRA, having known that he has no basis to support his arguments as earlier indicated in the basis which gave rise to assessment continued to bring 57(2)(a) and leaving 57(2)(b).

Along this book the TRA cited two case yesterday mentioned in his defence. Further to that the Appellant having known that he has no basis to support his argument as earlier indicated in the basis which give rises to the assessment continued to bring in sec. 7(2)(a) as a basis and leaving a major sec. 7(2)(b) which coursed the dispute, went to sec. 7(2)(a).

Hon. V/Chairman having outlined the back-ground of this despute, let us now move to my submission start with the First Ground.

On the first ground which the Appellant has cited ground (a) I wish to reply as follows: that the Hon. Board was correct in law and in fact by holding that school fees concession in question is no a taxable benefit.

As earliar stated in the Board records that there are two types of benefits under the Income tax law.

1) Taxable benefits
2) Non taxable benefits

This means that not all benefits are taxable under the law.

Coming to the first category of taxable benefits both under the Repealed Income tax Act 1973 as well as ITA 2004, taxable benefits are those which have been clearly provided in respective Statutes or Acts. This means non-taxable benefits to include all benefits not brought into the taxable brackets (not mentioned in the Acts) and these include school fees concessions, rations given to plantation workers by employers such as sugar plantations, coffee plantations ect, the list is big to include Air ticket discounts and even the discounts TRA gives to its staff in terms of VAT exemptions when buying vehicles.

For purposes of assisting this Tribunal taxable benefits under the current ITA Cap 332 of the law of Tanzania are based on the provision of Sec. 7(2) (f) ands 27 (1) clearly provides guidelines on how to calculate the tax under the law.

Under Sec. 130 of the ITA Cap 332 of 2004 deals with practice notice.(see Income Tax Booklet R.E. 2009).

According to Guide line the benefits are not tax able under the principle of exclusion not mentioned.

Provision of Sec. 7(2) (a) of ITA and the provision of the Repealed Act Sec. 5(2)(a) 1973. And further Sec. 5(2) (b) 1973 ITA. The provision of old Act is wider than the new Act.

The Appellant while guiding the employers the A,B,C of Tax Laws is guiding the Employer on how to comply the law of the land of this country, the same Commissioner guiding the tax payer that the concession of school fees are not taxable.

By virtue of Sec. 130 (2) of current ITA the practice notice shall be binding on the Commissioner until published.

The Geita Mining case was based on the ITA 1973 not on the new Act and has no relevance to the instant case. In view of the above we submit that it is not true as submitted by the appellant that the Board in its judgment and came up with preconceived ideas that school fees concessions are not taxable.

Also it is not true that the Board did not address itself to what the law says as alleged by the appellant.

It is not true that the Hon. Board became overzealous in advocating promotional policies submitted by the appellant yesterday.

The Respondent submits that the Board was quite right and fair in given the word of advice at page 5 of the Board's Judgment and on the need for harmonised the laws page 7 of its judgment.

Thus being the case the Board was not overzealous, but it was rather the Appellant (TRA) who was biased and overzealous by subjecting into tax the alleged benefits in question which are not taxable under the law, while at the same time leaving his staff enjoying benefits as earlier stated.

Hon. V/Chairman, I wish to submit that the Board did not any way erred in law and in fact as ellaged (see at page 4 of its judgment) in which it said that individual gain or profit under Sec.7(2)(a) of ITA is dependent on payment or receipts on specific dues such as, payment of wages, salaries, allowances etc.

**Coming to second** ground of Appeal we wish to submit as follows: It is not true that the Board held in the way the Appellant had stated in the second reason. The true position of the holding as per para one at page 5 of the Board's judgment. In support of my argument, I wish to move this Tribunal to take note of the provision para (i) item five. Under provision of sec. 10 of the new Act Cap 332 of the second schedule of the Act, the general exemption for the Public made by the Minister for Finance.

The Appellant has taken the wrong view, in the sense he submits that for one to be exempt under the said Paragraph (i) item (1) grant or scholarship, the said grant must be given to the Employee and not otherwise.

This is wrong interpretation, if was the Intention of the parliament, it could have provided so in clear term without ambiguity. This is a narrow view of the Appellant, bearing in mind that the second schedule para 1 the provision of sec. 10 without limitation. Mr. Haule is tried to make law without having the power to do so. He is entitled to administering them.

By limiting the benefits which are exempt to the employees only is not proper in the common sence and at law. It is so because when individual employment has been computed by the Appellant it does not and or limit itself to wagies or allowances only includes employee and further extend even a family.

**Example: Employer of the private sector when employee goes on leave he gives his employee salary, and allowance to the employee.** This being the case it terns to be ridiculous and a biased act or unfair that when it comes to giving out deduction or exemption from total income, appellant is shifting from total income concept inclusive of family members and wants to deduct all allowances relating to individual employee only without regard employee's members like children. In support my argument that these school fees concession are taxable at para 1 item (1) of the second schedule of ITA, I cited the case the recent case PEPPER (Inspector of tax) Vs. HART (1993) AC 593, see at page 6 of the proceeding.

It was held that in the case of all in house benefits the costs of benefits to the Employer is additional or marginal costs only and not the average cost incurred in providing the services both for public and the Employee. In the

long analysis, the Appellant is wrong when submitted that the beneficiary of this grant are not employee. Itself but the children.

This is not true because if the same employee who is the beneficiary in the final analysis by the act of the Employer granting the school fees concession. For example if the same school fees concession is granted to an orphan, would TRA raise assessment to an orphaned child?

**GROUND NO. 3:**

It is our submission that the Board was correct when it held that the impugned tax assessment was arrived at without any legal basis and that the Respondent herein was justified to contest it.

This is so, because for the tax assessment to be a valid one in the eyes of law, it must be based or have a clear legal basis and not changing the legal basis. As stated earlier, the Board after finding that the disputed assessment was arrived at by virtue of sec. 7(2) (a) at the same time in a contradictory manner by provision of sec. 5(2) (b) of the repealed Act 1973, it was right for the Board to state the way it did, bearing in mind the inconsistency on part of the Appellant from the start when making the initial disputed assessment using sec. 7(2)(b) of the current ITA 2004, which is irrelevant. Further to that on appeal proceedings the Appellant changed the position to sec. 7(2) (a) of the current Act; thus this is inconsistencey of the highest level in administration of the tax law. That is my submission on the 3rd ground of Appeal.

**GROUND 4**

Comming to the last ground in which the Appellant attacked the Board that the Board used much time in preaching politics instead of concentrating on the issues it was not true that the Board went astray.

Actually. It is our humble submission that what the Board did was in line with the principle of suo motu. Under this principle the Board has got un limited and inherent powers or jurisdiction to exercise its powers. Thus, the Board by comparing with other economy of the world, and by comparing different treatments as far as taxation is concerned by the TRA to various employers and employees etc. there was no harm for the Board to get informed from getting information. By so doing the Board did not erred in law and in fact in importing some aspects of policy in its judgment. The Respondent submit that the Hon. Board correctly allowed their Appeal.

Hon. V/Chairman and Members of Tribunal, the Respondent pray for judgment and decree as follow:

1) This Appeal be dismissed with cost
2) Any further or order which Tribunal may be deem fit to grant. End of my submission.

**Hon. H.M. Mataka V/Chairman,Sgd**
**21/06/2011**

**ORDER:**

The hearing will continue tomorrow at 11:00 am where the Appellant will make his rejoinder submission

**Hon. H.M. Mataka V/Chairman,Sgd**
**Prof. J. Doriye Member,Sgd**
**Mr. W. Ndyetabula Member,Sgd**
**21/06/2011**

**22/06/2011**

**QUORUM**

| | | |
|---|---|---|
| **Hon. H. M. Mataka** | **-** | **V/Chairman** |
| **Prof. J. Doriye** | **-** | **Member** |
| **Mr. W.N. Ndyetabula** | **-** | **Member** |
| **For the Applicant** | **-** | **Mr. Felix Haule, Advocate** |
| **For the Respondent** | **-** | **Mr Julius Manase, Tax Consultant for the Respondent** |
| **Mrs. Halima Said** | **-** | **RMA** |

The hearing is a opened:

The Appellant counsel: Mr. Haule.

Hon. V/Chairman and Members of the Tribunal, the Appellant having heard the Respondent's submission wishes to start as follow; starting with preamble:

My colleague stated that the Appellant had introduced new issue when he gave example of quantum of money which can fall under the school fees concession and the amount of revenue being lost.

In a reply to this allegation, I wish to submit that this was not new issue but a mere example aimed at cementing my submission so that the Tribunal would understand what was transpiring in the school fees concession arrangement. So it is not contrary to the Tax Revenue Tribunal Rules as alleged by the Tax Consultant.

Secondly, the Consultant stated that in the document refered as TRA 1 at second page. The 85% reduction in school fess available to teaching staff (parents) is considered to be a benefit in kind (refer to para 7 of the Employers, guide to PAYE) taxable under the provision of sec.7 (2) (b) of the ITA 2006 on revised edition. So the Consultant stated that under TRAT the school fees concession was charged under Sec. 7(2) (b) of ITA 2004, while before the Board the Appellant relied on sec. 7(2) (a) of ITA hence as alleged this leads to inconsistency. Hon. V/Chairman and Members of the Tribunal, let it be noted that sec. 7(2)(b) as reported in this TRA 1 was in advertently mentioned by the Appellant's tax Auditors in their audit report whose consumption was internal to the institution and not for public consumption.

The report was not communicated to the Respondent, so it is quite irrelevant to rely on this report. What the Respondent need to know is the Appellant submission before the Board and this Tribunal, and nothing else.

The third aspect in the preamble relates to appellant's citing of sec.5(2) (b) of ITA 1973. It was alleged that I cited the provision of a repealed law, at page 24 of the Board's proceedings. This section was cited merely to

support what is being stated by Luoga Makinyika titled " *a Source book of Income Tax Laws in Tanzania*" that traditionally benefits inkind are chargeable to tax so, by citing sec. 5(2) (b) of the ITA 1973, it was not meant to say that the assessments of tax which were served upon the Respondent were made under provision of the repealed law. That was an error on the part of the Board and the Tax Consultant, on page 3 and 4 of the Board's judgment resulting from narrow interpretation of my submission in chief before this Tribunal.

I Now turn to the grounds of Appeal, starting with ground number 1, which relates to error by the Board in holding on schools fees concession. Much as it is appreciated that not all benefits are taxable, the Appellant insists that for school fees concession like the one in our case that benefit is taxable. To support this position, I revert back to the case cited by the Tax Consultant himself in his rejoinder submission page 6, of the written submission in rejoinder to the appellant reply. The summary of the facts of this case of Pepper (Inspector of Tax Vs Hart, (1993) AC 593. In this case, the dispute was at what portion /ratio was indispute.

The summary of the fact of this case before going to issue at page 7 states and I quote " *It was not indispute that the education of the children at reduced fees was a taxable benefit under sec. 61(1) and sec. 63(1) and (2) of the UK Finance Act 1976*". In view of the above, it goes without saying that school fees concession as it is in this case is a taxable benefit contrary to what the Board said.

If the Respondent wanted to contest he should have contested the quantum payable and not its taxability.

Hon. V/Chairman, The Tax Consultant was trying to mislead this Tribunal, by saying that school fees concession are chargeable to tax under sec. 7(2)(f) of ITA 2004 and not under this Sec. 7(2)(a) of ITA 2004 in the first place, it means the tax Consultant on behalf of the Respondent herein do admit that school fees concession is taxable contrary to what the Tax Consultant was insisting that school fees concession is not taxable reading sec. 7(2)(f), it refers to those benefits that are quantified in accordance with sec. 27 of ITA 2004.

See. 27 provides that quantification according to market value. 27(1) mention three quantifications (a) use of motor vehicles (b) It relates payment for service loans and (c) accommodation including furniture.

In all the three benefits above mentioned, school fees concessions are not there. So what the consultant was telling this Tribunal is false.

Regarding the Commissioner's Practice Notes though school fees concession are not specifically mentioned under heading 2.0, monthly pay, school fees concessions fall under heading "7.0".

With regards to the case of GEITA GOLD MINING LTD VS COMMISSIONER GENERAL (2004) 2 TTLR 76 The Tax Consultant submitted that this case is not relevant, simply because the case was decided based on the repeal law i.e. ITA 1973.

We wish to state that the principle of Income Tax or Taxation with regards to income from employment have not changed. Benefits inkind such as school fees concession are also taxable under the new Act. Hence the case is relevant.

Hon. V/Chairman and Members of the Tribunal, the Tax Consultant has also tried to equate the school fees concession granted to the Respondent staff children like the tax exemption on motor vehicle granted to public officials like the Appellant staff, to answer this I wish to make distinction between the two senerios that, the tax exemption on motor vehicle to the public official is the creature of the law, it is the Parliament has enacted the law to grant that exemption. While the school fees concession, as it is in this case is a private arrangement between the employer and employees without any blessing of the law, so they can not be equated.

**Ground Number 2:**

Hon. V/Chairman, the Consultant accused the Appellant for narrowed down the scope iterm 5 of paragraph 1 of the second schedule to the ITA 2004 to cover the employees only and states, the Consultant stated that the said exemption is a general exemption mean to any member to the Public. The Appellant dispute this contention and further states that since the issue at hand is taxation of income from employment, it goes without saying that an employer can not grant scholarship to a person with whome he/she is not interested. The Respondent being an employer, is interested with his employees not their children to reach and extent of him granting

Educational scholarship for what benefits. To qualified for the exemption they must be granted to the employees.

That being the case therefore I wish to repeat my submission in chief that a school fees concession could only be a scholarship if it would be granted to the employees who under going studing overseas in Educational Institution not their children.

There is no need for the Parliament to state each and every thing but logic dictates so.

Regarding the orphans children, that could not be regarded as a benefit in kind, because in that situation there is no employees whose salary and other allowance are subject to tax.

**Ground No. 3:**

The tax Consultant repeatedly complained about the inconsistence under which school fees concession was charged to tax.

Hon. V/Chairman this point is clearly been dealt with in the preamble to this rejoinder submission. Where it was started that there was no inconsistence what so ever as what was stated before the Board, was that the tax on school fees concession was charged based on see. 7(2) (a) of ITA and not hing else. This mark the end of ground number 3.

**Ground No. 4**

Hon. V/Chairman and Members of the Tribunal, in this point it also covered during my submission in chief, and the Appellant would not want to add

any thing, because by so doing would amount to tantamount the flavaur contained in the main submission regarding this point. I leave it to the Tribunal to decide.

Hon. V/Chairman and members of the Tribunal this marks the end of my rejoinder submission.

**PRAYERS:** The Appellant pray for judgment and decree as was prayed in the main submission. I humbly submit.

**Hon. H.M. Mataka V/Chairman,Sgd**
**22/06/2011**

**Order:**

The Tribunal will sit for delebaration on 28th and 29th June, and 04th July members to submit their opinion. On 08th July, Delivery of the Judgment at 10;00 am.

**Hon. H. M. Mataka V/Chairman,Sgd**
**Prof. J. Doriye Member,Sgd**
**Mr. W.N. Ndyetabula Member,Sgd**
**22/06/2011**

**IN THE TAX REVENUE APPEALS TRIBUNAL**

**AT DARE S SALAAM**

**APPEAL NO. 6 OF 2011**

**COMMISSIONER GENERAL (TRA) ……APPELLANT**

**VS**

**M/S BRAEBURN SCHOOL (T) LTD ……RESPONDENT**

**J U D G M E N T**

***Hon. H. M. Mataka- Vice chairman.***

This is an appeal by Commissioner General (TRA) herein after refers to as the Appellant. It is against the whole decision of the Tax Revenue Appeals Board on Appeal No. 6 of 2011 delivered on 24th February, 2011. In its decision the Board allowed the appeal by M/S Braeburn School (T) Ltd who was the Appellant therein, holding that:

a) School fees' concession granted to parent staff for their children at an educational institution is not a taxable benefit under the Income Tax Act Cap. 332 of the laws (R. Edition 2006);

b) The school fees concession granted to parent staff for their children who are schooling in the appellant's schools is exempted from income tax under item (i) of paragraph 1 to the Second Schedule of the Income Tax Act (ITA) cap. 332 (R. Edition 2006); and

c) The impugned tax assessment was arrived at without any legal basis and that the Applicant was justified to contest it.

Before examining the grounds of this appeal, it is worth to remind ourselves of the facts of this case as hereunder.

It all started in 2009, when Tanzania Revenue Authority (TRA) conducted an audit exercise in respect of the Respondent's tax affairs for the year of income 2006, 2007 and 2008. The said audit revealed that the Respondent operated a concessionary fees scheme enabling its staff who are tax payer to have their children educated at a lower rate of 15% of school fees payable by parents who are not employees of the Respondent. On the basis of that audit findings, the Appellant TRA issued a final assessment of income tax bearing "underpayment" of Pay AS You Earn (PAYE) amounting to TShs. 66,133,159.17 and TShs. 29,738,704.79 in interests; that brought a total tax liability of TShs. 95,871,863.96.

Coming now to examine the first ground of appeal, that school fees' concession granted to parent staff for their children at an educational institution is not a taxable benefit under ITA cap 332 R. Edition 2006.

Mr. Haule who is the Appellant's counsel submitted that the bone of contention in this appeal emanates from the arrangement by the Respondent as an employer of granting benefits to its staff of 85% concession of school's fees, for their children who were enrolled with

the school. The concession is granted for up to four children per staff per year.

According to the Appellant, such a grant is a benefit in kind, and is subject to ITA under sec 7(1) and (2) (a) of ITA 2004 R. Edition 2006. Section 7(1) provides that "an individual income from employment for a year of income shall be the individual gains or profit from the employment of the individual for the year of income."

Mr. Haule argued that this is an allowance for employment, it amounts to giving an individual employee cash to pay school fees for his children, so what the Respondent was supposed to do is to take the normal salary of the staff and to add these school fees concessions and calculate tax and remit the tax to TRA.
In strengthening his argument, the Appellant counsel invited the Tribunal to examine three authorities, which were also submitted before the Board; among those the recent one is GEITA GOLD MINING LIMITED VS. COMMISSIONER GENERAL (2004) 2 TTLR 76, it was held that "salaries and benefits received by an employee are subject to tax deduction".

In replying to this ground, Mr. Manasseh the Tax Consultant who represented the Respondent strongly contested that the Board was correct in law and in fact by holding that schools fees concession in question is not taxable benefit. He submitted that there are two types of taxable benefits under the ITA.

1. Taxable benefits
2. Non taxable benefits.

According to Mr. Manasseh, taxable benefits both under the repealed ITA 1973 as well as ITA 2004, are those which have been clearly provided for in the respective Statutes. This means that non taxable benefits include all benefits not brought into the taxable bracket (i.e. not mentioned in the Statutes) and these include school fees concessions, rations given to plantation workers by employers such as sugar plantations, coffee plantations etc.

The Respondent argued that taxable benefits under the current ITA cap 332 of the law of Tanzania are based on the provisions of sec 7(2)(f) and sec 27(1) which clearly provide guidelines on how to calculate the tax under the law. According to the EMPLOYER'S GUIDE TO "PAY AS YOU EARN" the benefits are not taxable under the principle of exclusion not mentioned.

Mr. Manasseh further countered that the GEITA GOLD MINING case is based on the old ITA 1973, not on the new Act and that it has no relevance to the instant case. It is the Respondent's contention that it is not true as submitted by the Appellant that the Board in its judgment came up with preconceived ideas that school fees concessions are not taxable.

On the other hand, the Appellant in his rejoinder submission accused the Respondent that he was trying to mislead the Tribunal,

by saying that school fees concessions are chargeable to tax under sec 7(2) (f) of the ITA 2004 and not under sec 7(2) (a) of ITA 2004.

Mr. Haule repeatedly, submitted that GEITA GOLD MINING case is relevant to this case in our hands. This is because the principles of income tax or taxation with regards to income from employment have not changed, and that benefits in kind such as school fees concessions are also taxable under the new ITA Cap. 332 of 2004.

We are of the firm view that, the Respondent's contention that taxable benefits under the current ITA are based on the provision of sec. 7 (2) (f) and sec 27, which provide guidelines on how to calculate the tax under the law is incorrect. Section 7 (2) (f) provides that "in calculating an individual's gain or profit from an employment for a year of income the following payments made to or on behalf of the individual by the employer or an associate of the employer during that year of income shall be included, as well as other payments made in respect of employment including benefits in kind quantified in accordance with sec.27."

Thus, in contending the way he did, the Respondent unwittingly confirmed the position of the Appellant; and undermined that the Board which held that "the school fees concessions in question is not a taxable benefit under ITA as there was no cash payment or receipt which is requisite condition to make the benefit taxable under the law."

In fact, the provision of sec 7(2)(f) subjects benefits in kind to taxation by assigning to them cash value under sec. 27. It is therefore clear that the Respondent has unwittingly conceded this ground to the Appellant. In addition to that, we have not seen any problem to use the principle applied in GEITA GOLD MINING which I think is relevant to this case.

The position is also confirmed by universally accepted principle of social accounting. The latter are embodied in national income accounts prepared by United Nations member States under the United Nations System of National account. Under this framework what is called individual income or gain is recognized as personal income which includes incomes from employment, business, landed property and transfer in money terms and in kind. In this context personal tax is a tax on personal income as defined, resulting in after tax income which in this framework becomes personal disposable income, meaning that portion of income which is available to an individual for spending.

After the foregoing submissions, we are of the collective opinion that the first ground of this appeal has merit and is hereby allowed.

Coming to the second ground of appeal, that the Board erred in law and in fact when it held that school fees' concessions granted to parent staff for their children who are schooling in the Appellant's school is exempted from income tax under item (i) of paragraph 1 to the Second Schedule of the ITA Cap 332 (R. Edition 2006).

The Appellant in his submission in chief strongly disputed the invocation of item (i) of paragraph 1 of the Second Schedule of the ITA, Cap 332, as far as this dispute is concerned. He categorically stated that to be exempted in the name of scholarship or educational grant, the said grant must be given to the employee himself who is studying at Educational Institution and not otherwise. In our case, the beneficiary of the grant is not the employee but his child.

The Appellant maintained his position as he stated before the Board that the employer who is the Respondent has no contractual obligation to the employee's children to warrant the said deduction of school fees being as scholarship to the staff.

The Respondent's Tax Consultant in replying to this ground contested that it is not true that the Board held in the way the Appellant had stated in the second ground or reason. He moved the Tribunal to take note of the provision of paragraph (i) item 1. Under sec 10 of the new ITA Cap 332 the Second schedule of the Act, the general exemption for the Public made by the Minister for Finance. And that the Appellant has taken the wrong view, in submitting that for one to be exempted under paragraph (i) item 1, grant or scholarship must be given to the employee in person and not otherwise.

According to Mr. Manasseh, this is wrong interpretation. If it was the intention of the Parliament, it could have provided so in clear terms

without ambiguity. In support of his argument, the Tax consultant cited the case of PEPPER (Inspector of Tax) Vs. HART (1993) AC 593, in this case it was held that "in the case of all in house benefits the costs of benefits to the employer is additional or marginal costs only and not the average cost incurred in providing services both for public and employee."

In the final analysis, the Appellant is wrong when he submitted that the beneficiaries of this grant are not employees themselves but their children.

On the other hand, the Appellant in his rejoinder submission insisted that for the school fees concession like the one in our case, is taxable. To support his position, he reverted back to the case cited by the Respondent himself in his rejoinder submission at page 6 of the written submission in the rejoinder to the Appellant reply, the case of PEPPER (Inspector of Tax) Vs. HART (1993) AC 593, where it was held that "it was not in dispute that the education of the children at reduced fees was a taxable benefit under section 61(1) and section 63(1) and (2) of the United Kingdom Finance Act 1976."

The Appellant concluded that in view of what he submitted above, it goes without saying that school fees concession as it is in this case is a taxable benefit contrary to what the Board said. And that, if the Respondent wanted to contest, he should have contested the quantum payable and not it taxability.

It is our collective opinion and with due respect to the Board's holding, we noted that the said item (i) of paragraph 1 provides exempt amounts as scholarship or education grant payable in respect of tuition fees for full time instruction at an educational institution.

According to (Chambers 21st Century Dictionary R. Edition) the word "a scholarship" is defined as sum of money awarded usually to an outstanding student for the purpose of further study …."

The question arises herein is whether or not the school fees concession granted to parent staff for their children amounted to a scholarship. According to the above definition an award must be to a student or in this case pupil and not to anybody else. However, in the instance case the school fees concession was given to the staff parents and not pupils. The latter only benefited by the mere fact that their parents worked for the school as an employer who in turn is granted incentives in the form of school fees concession. It could have been some other incentives.

In view of our above observation, we are of the opinion that so long as this concession is within the staff employment contract and only extended to children whose parents are staff members and not otherwise, it is obvious that this particular concession of the fees that should have been paid by the parents is a benefit in kind to the school's staff members and not otherwise. It is an income that is indirectly earned by the Respondent's staff by virtue of having their

children schooling at the Respondent's schools. The second ground of appeal has merit and we allow it.

Let us examine ground no. 3 that the Board erred in law and in fact when it held that the impugned tax assessment was arrived at without any legal basis and that the Appellant was justified to contest it.

The Appellant counsel in his submission in chief stated that, the disputed assessment in this appeal was arrived at on the basis of provisions of section 7(1) and sec 7(2) (a) which inter earlier states that "the payment of salary, in lieu of leave, fees, commissions, bonuses, gratuity, entertainments, all other allowances received in respect of employment or service rendered are taxable gains or profit of the individual."

The Appellant argued that the amount of money which the staff is relieved from paying fees in the Respondent's schools as a result of him being employed by the school is an income in the hands of employee. It can be equated to any allowance received by an individual in respect of an employment as provided for in sec 7(2) (a).

Mr. Haule maintained that had the staff not been employed, the employer would not be relieved. He is getting that concession because he is an employee; hence the concession is taxable benefit.

Mr. Manasseh countered this argument, by stating that for the tax assessment to be a valid one in the eyes of law, it must be based on, or have a clear legal basis and not changing the legal basis. He went further to concur with the Board's findings that the disputed assessment was arrived at by virtue of sec 7(2) (a). At the same time in a contradictory manner in terms of the provision of sec 5(2) (b) of the repealed Act of 1973, it was right for the Board to state the way it did.

We are of the firm view that the dispute in this case rests on the facts that the Respondent deducted PAYE on staff wages plus cash allowance; excluding the bills settled on behalf of staff which in this case is sum total of school fees concession. It is therefore, our opinion, that to treat the latter as other than staff bills settled by the employer, as the Board did is clearly erroneous. The value of the bills settled by the employer on behalf of the employee is subject to income tax charge under sec. 7 (2) (f) read together with sec 27 of ITA Cap 332 R. Edition 2006.

Consequently, the Board's assertion that the impugned tax assessment was arrived at without any legal basis and that the Appellant therein was justified to contest it was ill considered and should be set aside. Therefore, the third ground of this appeal is allowed too.

Let us examine the final ground of appeal that the Board erred in law and fact by importing some aspect in its judgment which were neither raised nor argued by the parties during the proceedings.

I think this ground carries little weight, and even if it is examined, it cannot change our verdict. We therefore ignore it, and we allow this appeal, and the judgment and order of the Tax Revenue Appeals Board is hereby set aside and each party to bear its own costs.
It is so ordered.

There is no order as to cost of this appeal.

**…… (H.M. Mataka)**
**Vice Chairman**

**…….. (Prof. J. Doriye)**
**Member**

**…… (Mr. W.N. Ndyetabula)**
**Member**

Delivered this 01st day of August, 2011 in the presence of Mr. Marcel Busigano, Legal Officer for the Appellant and Mr. J. Manasseh, Tax Consultant for the Respondent.

**…… (H.M. Mataka)**
**Vice Chairman**

**…….. (Prof. J. Doriye)**
**Member**

**…… (Mr. W.N. Ndyetabula)**
**Member**

We certify that is a true copy of the original.

**…… (H.M. Mataka)**
**Vice Chairman**

**…..…… (Prof. J. Doriye)**
**Member**

**…… (Mr. W.N. Ndyetabula)**
**Member**