

IN THE TAX REVENUE APPEALS BOARD
AT DAR ES SALAAM
INCOME TAX APPEAL NO DSM. 16 OF 2015

**THE BOARD OF TRUSTEES OF THE NATIONAL SOCIAL SECURITY
FUND (NSSF) APPELLANT**

VERSUS

COMMISSIONER GENERAL.....RESPONDENT

JUDGMENT

This is an appeal by the Board of Trustees of the National Social Security Fund herein referred to as the appellant against Commissioner General, Tanzania Revenue Authority (the respondent) challenging the notice of tax assessment number F. 420703532 of tax amounting to Tshs. 22,505,487,588.17 for the year of income 2011.

The appeal is made under section 16(1) of the Tax Revenue Appeals Act Cap 408 of the laws of Tanzania Revised Edition 2006 and Rules 6(2) and 7(2) of the Tax Revenue Appeals Board Rules GN 57 of 2001 and Tax Revenue Appeals Board (amendment) Rules GN number 366 of 2009.

The appeal is based on the two grounds.

1. That the respondent erred in taxing interest received on government Bonds in total and blatant disregard and ignoring the binding and unchallenged decision of the Tax Revenue Appeals Board in the case of the Registered Trustees of the Parastatal Pensions Fund versus

Commissioner General, TRA, Income Tax Appeal number Dsm. 48/2012 (unreported).

2. The Respondent having not appealed against the decision of the Board *ibid* and in the absence of material change in circumstances, the decision is final and binding to the parties and the respondent is barred from re- opening the matter in subsequent years and subjecting the appellant to endless and costly litigation.

The background of this tax dispute is that, the appellant is a social security fund established under section 3 of the National Social Security Fund Act number 28 of 1997 and its main activity is the provision of social security services to its members and ancillary activities of conduction investments in real estates and financial assets. On 4th July 2013 the respondent issued and served to the appellant with notice of tax assessment number F. 420703532 for the year of Income 2011.

Following the said notice on the 10th July 2013 the appellant objected to the assessment on the ground that the respondent erred in taxing interest received on Government Bonds which is exempt from tax.

On 26th July 2013 the respondent wrote a letter (annexture C) acknowledging receipt of the appellant's notice of objection and confirmed that the objection was being attended. Further that on 24th June 2014 the respondent wrote a letter to the appellant (annexture D) informing him that the issue of income from Government Bonds and securities will be settled in accordance with the

objection hence the disputed assessment is being amended and the amended assessment will be dispatched to the appellant under a separate cover.

On 16th July 2014 the appellant made a submission in writing (annexture E) signifying his agreement with the respondent's proposal to amend the assessment in accordance with the objection, on 10th September 2014 the respondent wrote another letter to the appellant (annexture F) informing him that he was withdrawing his letter dated 24th June 2014 because it came to his knowledge that they made an error in issuing the notice under section 13(3) of the Tax Revenue Appeals Act Cap 408 and that a fresh notice under section 13(5) of the Tax Revenue Appeals Act Cap 408 was under preparation and would be dispatched to the appellant under separate cover.

On 13th October 2014 the respondent wrote a letter to the appellant (annexture G) setting out a proposal to determine the objection in accordance with section 13(5) of Tax Revenue Appeals Act Cap 408 RE 2006 Respondent disagreed with the appellant's submission and explained that interest received from Government Bonds was not exempt from Income Tax. He stated that in view of miscellaneous Tax exemptions and Remission Revocation Act number 1992 interest received from Government Bonds is not exempt from tax vide GN number 409 of 1991 together with GN number 177 of 1993 which amended GN number 409 of 1991.

On 1st November 2014 the appellant made a submission in writing (annexture H) expressing his disagreement with the respondent's proposal on the ground that as per the law settled on the taxation of interest from government bonds as per the decision of the Registered Trustees of the Parastatal Pension Fund

versus Commissioner General, TRA, Income Tax Appeal number 48/ 2012 (unreported).

On 18th December 2014 the respondent wrote a letter to the appellant (annexture I) setting out a final determination maintaining his position on the taxation of interest from Government Bonds and securities.

Therefore on 19th December 2014 the respondent issued and served the appellant with a notice of confirmation of assessment number F. 420703532 (annexture J). Being dissatisfied with the Commissioner General's final determination the appellant has now appealed to this Board to seek the following redress:-

- (a) For an order to declare the final determination and notice of confirmation of assessment null and void and to vacate the said confirmation notice.
- (b) For the costs of appeal.
- (c) For any other relief as the Honourable Board deems fit to grant.

On the other hand the respondent disputes the appellant's appeal and states that the position of the law supersedes any decision of the court.

The appellant was represented by Ms. Nicholas Duhia and Mr. Elivalson Marwa learned advocates while the respondent was represented by Mr. Noah Tito the learned counsel. The appeal was argued the way of written submissions.

Mr. Duhia contended that the respondent was not justified in making the impugned Income Tax assessment number F 420703532 for the year of Income 2011. There is a binding previous decision made by this Honourable Board in the case of the Registered Trustees of the Parastatal Pension Fund versus the Commissioner General TRA, Income Tax Appeal number 48/2012 (unreported) whereby the decision has not been appealed against and in the absence of material change the matter is res judicata and the decision is final and binding to the parties and the respondent is barred from re-opening the matter in subsequent years and in similar circumstances. In relation to the principle of re-judicata he referred the case of the **Commissioner of Income Tax versus M/S. Excel Industries Ltd** the supreme court of India affirming the authority in the case of **parashuram pottery works limited versus Income Tax Officer (1977) 106 ITR (SC)**.

He also cited the case **of Radhasoami Satsang versus CIT (1992) ITR 321 (SC)**. He insisted that the declaration by the Honourable Board in appeal number 48/2012 that the interest earned from Investment in Government bonds is exempt from Income Tax is a fundamental aspect permeating for different years and is applicable to assessments for all years from 1993 and subsequent years and to any person who earns interest from Investment in Government Bonds.

He insisted that there has not been an appeal against the appeal number 48/2012 and no emergence of fresh facts to justify departure by the respondent from the binding decision of the Board which was arrived after

due inquiry. The respondent is not justified in subjecting to Income Tax assessment interest earned from Investment in Government Bonds.

In the alternative Mr. Duhia submits that interest earned from investment in government bonds is exempt from income tax by virtue of Government notice number 177 of 1993 read with section 141(2) of the Income Tax Act Cap 332 RE 2006 which still recognizes orders made under the old Income Tax Act number 33/1973 including GN number 177/93 as it is still valid and has not been amended or revoked. He explained that the stated notice read as one with the Income Tax Act (remission) (Government Bonds) order GN number 409 of 1991 which states that:-

“ All of the principal amount earned on any Government Bond, Government securities and stocks and the accrued interest thereon, shall be exempt from tax”

The said notice shall derive its exemption from section 141(2) of the Income Tax Act 1973. He explained that GN number 177 of 1993 is among the orders and notices made under the old Income Tax Act which are still in force as there has no amendment or revocation of the same under the new Income Tax Act. He referred the case of Registered Trustees of the Parastatal Pensions Fund versus Commissioner General TRA Appeal number 48/2012.

He prays for an order to declare the final determination and notice of confirmation of assessment number F 420703532 for the year 2011 as null and void and to vacate the same and also for the costs of the appeal and any other relief as the Honourable Board deems fit to grant.

Submitting in rebuttal Mr. Noah Tito the legal counsel for the respondent contended that the rule of res-judicata does not apply to this appeal. He stated that the Board has not decided the current appeal which relates to a different year of income and assessment of tax. The decision in appeal number 48/2012 relates to a different year of Income and assessment. If the respondent was to re-issue an assessment in relation to the year of income for which the Board made decision in appeal number 48/2012 then the rule on res-judicate could have merits. He states that there is a pending proceeding number 13/2012 in the Tax Revenue Appeals Tribunal in relation to appeal number 48/2012 hence the decision of the Board is not final and conclusive hence this Board is not bound by the said appeal.

He argued that the appellant has misapplied the rule on res-judicata. The court is prevented from trying a same civil case which was previously heard and finally decided by the same court or another court with the same jurisdiction. Section 9 of the civil procedure code cap 33 RE 2002 provided that no court shall try any suit that has been heard and finally decided by the court. He further submits that the Tax Revenue Appeals Act Cap 408 RE 2010 and the rules thereto provides for procedures for the Tax Revenue Appeals Board and the Tribunal in handling disputes arising from revenue laws but there is no provision which enshrines the rule of res-judicata. As the appellant did not cite any provision or rule then his submissions lacks merit.

He insisted that in Tanzania the rule of res-judicata is a statutory procedural rule, is not based on case laws. The appellant reliance on Indians cases of excel industries and Radhasoami as a basis is misconceived.

Mr. Noah Tito learned legal counsel insisted that interest earned from government bonds is chargeable to income tax. He elaborated that in 1991 all investors including the appellant who earned income by way of interest from Government bonds did not pay tax on the basis of Government notice number 409 of 1991 issued under section 15 of the Income Tax Act 1973 but in 1992 the General Tax exemption and other tax exemptions issued under various tax laws were revoked by section 2 of the Miscellaneous tax Exemptions and Remission Revocation Act number 16 of the 1992 hence GN number 409 of 1991 was revoked. Therefore the tax exemption was no longer available to the most investors including the appellant except for few beneficiaries specified under section 3(a) and (b) of the Miscellaneous Tax Exemptions and Remission Revocation Act, 1992.

He insisted that tax exemption on interest from Government bonds granted by GN number 409 of 1991 in terms of section 15 of the Income Tax Act 1973 was revoked in 1992 hence the appellant is not entitled to exemption and explained further that the powers of the minister for finance to issue exemptions under section 15 of the Income Tax Act 1973 was not repealed by the Revocation Act. That the minister did not issue either a general or specific tax exemption to the appellant in relation to income on Government bonds.

Mr. Noah also submitted that the Board in appeal number 48/2012 made interpretation that section 2 of the Revocation Act number 16 of 1992 revoked the tax exemptions and remissions previously granted but not the subsidiary legislation which the exemption and remission were granted. They differ with the Board's interpretation that by virtue of GN number 177/1993 the interest

earned by the appellant from the investment in Government Bonds is exempt because the interpretation and conclusion defeated the reason underlying enactment of the Revocation Act which the Bill stated that was to increase Government revenue. He insisted that according to the law subsidiary legislation cannot override a principal legislation. Therefore GN number 177/1993 cannot override the Revocation Act which revoked GN number 409/1991, it is an error to interpret that GN number 177/1993 confirmed the existence of GN number 409/1991. The subsidiary legislation could not exist if the tax exemption which was the core subject matter of such legislation was revoked.

Moreover that the Minister who issued GN number 177/1993 was not the one who issued GN number 409 of 1991 hence he made an error of not being aware of the revocation Act of 1992. After revocation of the tax exemptions in 1992 the other investors started to pay tax on Income from Government bonds and never complained.

He insisted that the Board is not bound by interpretation on in appeal number 48/2012 hence is free from departing from such interpretation and make proper interpretation of the Revocation Act 1992. They pray the appeal be dismissed with costs and be ordered to pay additional statutory and commercial interest on the tax liability from the date upon payment of the tax liability.

In rejoinder submission Mr. Duhia insisted the existence of the case of the Registered trustees of the Parastatal Pensions Fund versus the Commissioner General, TRA, income tax appeal number 48/2012 which was decided by the

Board and which has not been appealed against. He insisted that the Board ruled that interest earned by the appellants from investment in Government Bonds is exempt from income tax by virtue of GN number 177/1993.

He states that it is true that the current appeal relates to a different year of income and assessment of tax. it was a principle of law stated in the case of the **commissioner of income Tax v. M/S Excel Industries LTD** **"Where a fundamental aspect permeating through different assessment years has been found as a fact of one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be challenged in a subsequent year"**.

He contended that the alleged pending proceedings number 13/2012 in the Tax Revenue Tribunal is not an appeal but a mere application for leave to file notice of intention to appeal out of time. He reiterates that in the absence of a different decision on appeal the decision of the Board constitutes the current position of the law and binding to the parties and respondent is barred from re-opening the matter in similar circumstances.

He avers that as GN Number 409/1991 was made by the Minister for finance it is the same minister who under the law can revoke amend or repeal. This has not happened and no wonder in 1993 vide GN number 177/1993 he amended GN number 409/1991. Further there is nowhere in Act number 16 of 1992 GN number 409/1991 is been revoked. The respondent if they are offended by GN number 409/1991 and GN number 177/1993 they should take appropriate measure of having the same nullified by the High Court. He

insisted that GN Number 177/1993 is amending instrument which extended the scope of GN number 409/1991 by adding securities and stocks. That in the absence of an appeal against the decision of the Board in the Income Tax Appeal number 48/2012 then the same is final and binding and the Board having made a decision on the legality of GN number 177/1993 and its exemption authority cannot reverse its decision except through proper proceedings but not of the nature in the current appeal. They reiterated their prayers made in their statement of appeal submissions in chief.

Before the commencement of hearing parties had agreed on the two issues namely:

1. Whether the respondent was justified in assessing tax on interest from government bonds.
2. What reliefs are the parties entitled.

During the hearing the appellant raised the issue of res-judicata to the effect that the Honourable Board is binding to the previous decision made in the case of the Registered Trustees of the Parastatal Pensions Fund versus the Commissioner General TRA, Income Tax Appeal number 48 of 2012 the decision which has not been appealed against hence in the absence of material change the matter is res-judicata and the decision is final and binding to the parties and the respondent is barred from re-opening the matter in subsequent years and in similar circumstances.

Resisting Mr. Noah told the Board that the rule of res-judicata does not apply to this appeal due to the effect that the decision of the Board in Appeal

number 48 of 2012 relates to a different year of income and tax assessment and there is a pending proceeding number 13 of 2012 in the Tax Revenue Appeals Tribunal in relation to appeal number 48/2012 hence the decision of the Board is not final and conclusive hence the Board is not bound by the decision of the said appeal.

Now let us examine section 9 of civil procedure code cap 33 RE 2002 under which the principle of re-judicata is provided it states

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in court competent to try such subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by such court”

In the case of **Registered Trustees of Chama Cha Mapinduzi versus Mohamed Ibrahim versi and Sons and Ali Mohamed Mohamed versi Civil appeal number 6/2008** the Court of Appeal had this to say:-

“ it is well settled law and leading authorities are at one that in order for the plea of res-judicata to successfully operate the following conditions must be proved namely:-

- i. The former suit must have been between the same parties litigating parties or between parties under whom they or any of them claim.

- ii. The subject matter directly and substantially in issue in subsequent suit must be the same matter which was directly and subsequently in the issue in the former suit either actually or constructively.
- iii. The party in the subsequent suit must have litigated under the same title in the former suit.
- iv. The matter must have been heard and finally decided.
- v. That the former suit must have been decided by court of competent jurisdiction.

Therefore as per the provisions of section 9 of the civil procedure code Cap 33 RE 2002 and also as per the cited case above in relation to the instant case this Board is with due respect that the ingredients of res judicata were not fulfilled for the Board to have applied it. That the former and the subsequent suits are not the same.

That the appellant in the former suit was PPF and the party in the subsequent suit is NSSF and also the subject matters at issue in two suits were different. The subject matter in appeal number 48/2012 was for the year of income 2005 and the assessment tax was Tshs. 1,586, 662, 896.60 while the subject matter in this instant appeal is of the year of income 2011 and the assessed tax was 22,505,487,588.17 in fact the appellant in his rejoinder admits that the current appeal relates to different year of income and assessment. Further that res- judicata was not met as the matters in the subsequent suit were not heard and finally determined by the Board.

Therefore the appellant's argument that the rule on res-judicata applies in this subsequent appeal is misconceived hence lack merits. Therefore the subsequent suit could not have been hit by res-judicata as alleged by the appellant.

Now let us examine the issue of whether the respondent is justified in assessing tax on interests from Government Bonds. The appellant in his submissions stated that the interest earned from investments in government bonds is exempt from Income Tax by virtue of Government notice number 177 of 1993 read together with section 141(2) of the Income Tax Act Cap 332 RE 2006 which still recognizes orders made under the old Income Tax Act number 33 of 1973 including GN number 177 of 1993.

The respondent's legal counsel opposes the appellant's learned advocate assertion and went on to argue that the interest earned from Government Bonds is chargeable to Income Tax for the reasons that the Government notice number 409 of 1991 which was issued by the Minister for Finance under the powers vested to him under section 15 of the Income Tax Act 1973 were revoked by section 2 of the Miscellaneous Tax exemption and Remissions Revocations Act number 16 of 1992 hence such GN number 409 of 1991 which granted tax exemption to investors in government bonds was revoked therefore the tax exemption was no longer available to the most investors including the appellant except for few beneficiaries specified under section 3(a) and (b) of the revocation Act,1992.

The respondent's legal counsel went ahead stating that the GN number 177 of 1993 relates to Government stocks and securities which was not relevant to the instant appeal and it was issued by the Minister for finance to increase the scope of section 2 of GN number 409/1991 the section which was already revoked by the miscellaneous Tax exemption and Remission Revocation Act 1992.

Upon carefully hearing arguments by both parties this Board concur with the respondent's arguments that according to GN number 409 of 1991 issued under section 15 of the Income Tax Act 1973 all investors including the appellant who earned income by way of interest from government bonds were exempt from Income Tax. However by virtue of section 2 of the miscellaneous tax exemptions and Remission Revocation Act number 16 of 1992 the GN Number 409/1991 which granted tax exemption to the investors including the appellant was revoked hence no longer available to the most investors and the appellant except for few beneficiaries who are specified under section 3(a) and (b) of the Revocation Act, 1992.

Let us examine section 2 of the miscellaneous Tax Exemptions and Remissions Revocation Act 1992. It states "Subject to section 3 of this section, the tax exemptions or remissions granted pursuant to or under the provisions of the written laws specified in the schedule to this Act is hereby revoked".

The Board also carefully perused the stated schedules and tax exemption on interest from Government bonds granted by GN number 409 of 1991 and

noted that, these exemptions issued under section 15 of the Income Tax Act 1973, were among the tax exemptions revoked.

The Board perused the appellant's submissions as well as the documentations filed but found no evidence by the appellant to show that the power of the Minister for Finance to issue exemption under section 15 of the Income Tax Act 1973 was repealed by the Revocation Act, 1992 or there is either a general or specific tax exemption issued by the Minister in relation to income on Government Bonds they also noted that the GN Number 409 of 1991 was issued by the Minister of Finance by then S.A. Kibona and GN Number 177/1993 was issued by another Minister Prof. Kighoma A. Malima who increased the scope of GN number 409/1991 using 15 of Income Tax Act 1973 the section which was already revoked by the miscellaneous Tax exemption and Remission Revocation Act 1992. The basic principle of law is clear that subsidiary legislation cannot override a principal legislation whereas Government notice number 177/1993 in which the appellant relied on which is subsidiary legislation cannot override the Revocation Act, 1992 which revoked GN number 409 of 1991.

The Board noted that the subsidiary legislation that is the GN number 409 of 1991 could not continue to have effect if the tax exemption which is the core subject matter of this legislation were revoked. This implies that the GN Number 409/1991 was not in existence.

The appellant in his submission insisted on the decision of the Board in the appeal number 48/2012 on the legality of GN number 177 of 1993 having not been challenged is final and binding and it cannot reverse its decision except

through proper proceedings but not of the nature in the current appeal. On the other hand respondent opposed the appellant's assertions to the effect that the Board is not bound by interpretation in appeal number 48/2012. The Board is free from departing from such interpretation and makes proper interpretation of Revocations Act 1992.

Basing on the above submissions by the parties and with due respect the Board is of the findings that such appellant's assertions are misplaced and misconceived. The Board concur with the respondent to the effect that this Board is not bound by the interpretation in appeal number 48/2012. The Board is bound by the decisions of the Tax Revenue Appeals Tribunal and of the court of appeal of Tanzania and not otherwise so the Board is free from departing from any interpretation made by the Board and makes a proper interpretation of any Law.

In the course of examining appeal number 48/2012 which the appellant relied the Board noted the existence of pending proceedings number 23/2012 in the Tax Revenue Appeals Tribunal in relation to appeal number 48/2012 hence the decision in the stated appeal is not final and conclusive.

Therefore this Board is not bound by the decision issued on appeal number 48/2012 and it is hereby satisfied that the Respondent is justified in assessing tax on interest from Government bonds as the same is no longer exempt from Tax.

This appeal number 16/2015 between NSSF and Commissioner General has no merits hence hereby dismissed. Each party to bear its own cost.

Hon. A.W. Mmbando, Vice Chairperson- Sgd

Mr. D.K. Pabari, Board Member- Sgd

Ms. V.U. Lyapa, Board Member- Sgd

10/11/2015

Judgment delivered this 10th November, 2015 in the presence of Mr. Duhia and Mr. Maro for the appellant and in the presence of Ms. Rose Sawaki and Mr. Marcel Busegano, for the respondent.

Hon. A.W. Mmbando, Vice Chairperson- Sgd

Mr. D.K. Pabari, Board Member- Sgd

Ms. V.U. Lyapa, Board Member- Sgd

10/11/2015

BOARD: Right to appeal fully explained.

Hon. A.W. Mmbando, Vice Chairperson- Sgd

Mr. D.K. Pabari, Board Member- Sgd

Ms. V.U. Lyapa, Board Member- Sgd

10/11/2015

Certified Copy of the Original
Proceedings, Judgement, rulling, Order

Chairperson

V/Chairperson *[Signature]*

Board members (1) *[Signature]*

(2) *[Signature]*

Date: *26/11/16*