IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MASSATI, J.A, ORIYO, J.A., And MUGASHA, J.A.)

CONSOLIDATED CIVIL APPEALS NO. 89 & 90 OF 2015

BULYANHULU GOLD MINE LIMITED ....APPELLANT

VERSUS

COMMISSIONER GENERAL (TRA) .... RESPONDENT

(Appeal from the Judgment of the Tax Revenue Appeals Tribunal, at Dar es Salaam)

(Mattaka – Vice Chairperson)

dated the 26th day of November, 2014
in
Consolidated Tax Appeal No. 27 of 2013

....

JUDGMENT OF THE COURT

22nd & 08th February,2016

MASSATI, J.A.:

This judgment is in relation to two appeals, namely Civil Appeal No. 89 of 2015, and Civil Appeal No. 90 of 2015 which were decided by the Tax Appeals Tribunal (the Tribunal) as Tax Appeals No. 26 and 27 of 2013 respectively. Since they arise from the same subject matter between the same parties, we decided to consolidate them under Rule 110 of the Court of Appeal Rules,, 2009, and dispose of them together.

The genesis of the appeal(s) lies in the the Commissioner General's respondent decision to disallow certain expenditures, in assessing income taxes due from the Appellant company for the years of income 2000 to 2006. The bones of contention in the present appeal are:-

(i) Capital expenditure incurred by the appellant on the purchase of a Dash 8 aircraft.

(ii) 15% additional capital expenditure claimed by the Appellant on the basis that the tax payer calculated the allowance on a compound basis instead of doing so on a simple basis.

(iii) Premiums paid for insurance in respect of political risk.

(iv) Losses arising from foreign exchange fluctuations.

(v) Expenditure incurred on community development activities for areas and communities around the mines;

(vi) 15% capital expenditure on certain capital expenditure which the Respondent claimed were not capital expenditure fit for 15% capital allowance.

(vii) Deduction of expenditure provided to defray expenses for rehabilitation of environment upon cessation of mining operations.

The indisputable facts leading to the appeal(s) are that the Appellant is a mining company incorporated in Tanzania operating the Bulyanhulu Gold Mine in Kahama Shinyanga. It operates under a Special Mining License granted pursuant to a Mining Development Agreement signed between it and the United Republic of Tanzania. Following completion of a tax audit on the Appellant's Company for the years of income 2000 – 2006, the Respondent issued notices of adjusted assessments for each of the respective years of income. It was in the course of the said tax audit, that the Respondent disallowed the aforesaid deductions. It was the disallowances which led to the present tax dispute.

Following the said dispute, the parties found themselves battling before the Tax Appeals Board (the Board) and then the (Tax Appeals) Tribunal (the Tribunal) and now in this Court.

In this Court, the Appellant fronted three grounds of appeal, in respect of Civil Appeal No. 89/2015:-

a) That the Tax Revenue Appeals Tribunal erred in law when it held that the Board's decision to disallow deduction for capital expenditure allowance on Dash 8 aircraft was correct.

b) That the Tax Revenue Appeals Tribunal erred in law when it upheld the Board's decision to disallow deductions for premium paid for political risk insurance incurred by the Appellant in the production of income; and

c) That the Tax Revenue Appeals Tribunal erred in law when it held that the Board's decision to disallow the expenditure on community development in support of communities around the mine was correct.

Out of the said grounds of appeal, the Appellant proposed three issues, which were:-

(i) Whether the Tribunal was right in law when it held that the Board's decision to disallow deduction for capital expenditure allowance on Dash 8 aircraft was correct.

(ii)Whether the Tribunal was right in law when it upheld the Board's decision to disallow deductions for premiums paid for political risk insurance incurred by the Appellant in the production of income; and

(iii) Whether the Tribunal was right in law when it held that the Board's decision to disallow the expenditure on community development in support of communities around the mine was correct.

From Civil Appeal No. 90 of 2015, the Appellant raised four grounds of appeal, which were:-

a) That the Tribunal erred in law when it held that the Board wrongly interpreted paragraph 18 (5) of the Second Schedule of the Income Tax Act, 1973.
b) The Tribunal erred in law when it held that the Tanzania Revenue Authority was correct to disallow deduction for expenditure on motor vehicles, dump trucks, drilling equipment, caterpillars and staff camp site.
c) The Tribunal erred in law when it held that the Board's decision to allow the Appellant's deduction claim on funds set aside for environmental rehabilitation closure of the mine was wrong.
d) The Tribunal erred in law when it held that the Board's decision to allow deduction claim on foreign exchange losses was wrong and illogical.

And from these grounds, four issues for determination by this Court were proposed; which are:-

(i) Whether the Tribunal was right in law when it held that the Board wrongly interpreted paragraph 18 (5) of the Second Schedule to the Income Tax Act, 1973.

(ii) Whether the Tribunal was right in law when it held that the Tanzania Revenue Authority (TRA) was correct to disallow deduction for expenditure on motor vehicles, dump trucks, drilling equipment, caterpillars, and staff camp site.

(iii) Whether the Tribunal was right in law when it held that the Board's decision to allow the Appellant the deduction claim on funds set aside for environmental rehabilitation on closure of the mine was wrong; and

(iv) Whether the Tribunal was right in law when it held that the Board's decision to allow deduction claim on foreign exchange losses was wrong and illogical.

After the consolidation of the two appeals, there were therefore a total of seven grounds of appeal, giving rise to seven issues which were argued before us. We shall treat them as grounds one to seven in that order.

At the hearing of the appeals, the Appellant was represented by Dr. Kibuta Ongwamuhama, learned counsel, assisted by Mr. Allen Kileo, learned counsel. The Respondent was represented by Ms. Joyce Sojo, learned counsel. Each adopted their written submissions and went on to elaborate on them orally. We are deeply indebted to them for their incisive and focused written and oral submissions.

We have found it apt to begin our discourse with a caveat. In ordinary life, taxes are in fact as complex as life itself. They are in derogation of personal rights and property interests worldwide. Therefore, no tax can be levied and collected without the authority of law.

Since these appeals rotate around the interpretation of the Income Tax statutes, we would like to begin our deliberations first, by examining the rules of interpretation that could be most appropriate to guide us.

In his book, "**INCOME TAX LAW IN TANZANIA SOURCE BOOK**," DUP (1996) Ltd 2000. at pp 35 – 47, Professor Florens Luoga has disclosed several rules for construction of taxing statutes generally but we think seven of those may be appropriate in the present case. These include:-

1) **The strict construction Rule** (**KILMAN vs WINKWORTH** (1933) 17 TC 569.
2) **Considering the Statute** as a whole – where there is an irreconcilable conflict, in that, two provisions on the surface appear irreconcilable, each has to be interpreted in a manner which will not negate the other.
3) **Words of the Statute must be read in their context**.

   The main rule is that, words and phrases are to be construed in the sense in which they are ordinarily used, but where they have a

technical meaning in law they must be construed in accordance with that meaning.

4) **Departure from the literal construction of statutory language.**

The main rule of construing taxing statutes is that one should look simply at what is clearly said. However, courts may sometimes depart from literal construction, where such construction leads to an absurd result which cannot have been contemplated. For instance where such literal construction can lead to unfair and highly inequitable results.

(AG vs HALLET 2H & N. 368.

Secondly, throughout the hearing of this appeal the Respondent has predominantly and invariably premised her response on the wording of section 16 (1) and (2) of the Income Tax Acts. So, a few remarks on that provision would be apposite.

It is true that section 16 (1) and (2) of the Income Tax Acts sets out the principle guideline in claims for deductions of expenditures. It is

therefore important to have a clue of what the terms *"wholly" and exclusively* incurred used in that provision, connote. Once again we found Professor Luoga's sourcebook useful here.

According to the learned scholar, the terms "wholly" and "exclusively" in section 16 (1) of the ITA, 1973, refer to two different things. Whereas "wholly" refers to the quantum of the expenditure, in that, the whole of the expenditure must be for the trade and not only part of it; the term "exclusively" refers to the purpose of expenditure, which implies that the sole purpose of the expenditure must be for trade. The learned author then goes on to set out seven principles that are commonly used in determining whether expenditure has been incurred "wholly" and "exclusively" for the purpose of producing income. (pp. 122 – 125).

These are:-

1) The Assessee's capacity

-whether the expenditure was incurred by the tax payer in his/her capacity as a trader or in some other capacity.

2) Commercial Expenditure

Whether the expenditure is voluntarily incurred on grounds of commercial expediency, in order to facilitate the carrying on of the business.

3) Reasonableness

Allowable expenses are not subject to the subjective test of reasonableness, but to be determined objectively from the circumstances of the expenditure and common business practice.

4) Business Purpose

Whether the direct purpose of the expenditure is to facilitate trade.

5) Production of Tax payer's own income

Deductions are only allowed for expenditure on the production of the assesses's own income, not for personal use, such as food.

6) Incidental Benefit to a Third Party

Expenditure incurred wholly and exclusively for the purpose of a trader's business will not be disallowed merely because a third party incidentally obtains advantage from the expenditure.

7) Expenditure for Future Income

It is not necessary that the expenditure allowable in a particular year should result in any profits at all in that year.

We think that those tests are sound, workable and in practice, followed in Tanzania.

With that background we shall now move on to examine the grounds of appeal.

The **first** ground of appeal relates to the disallowance for capital expenditure on the Dash 8 aircraft. The Tribunal agreed with the decision of the Board in the said disallowance. So, the issue is whether the Tribunal's decision was correct.

The background giving rise to this issue is that, before it began its mining operations, the Appellant received a Dash 8 aircraft from Barrick Gold Exploration Inc, a sister/related company, to enable it simplify transport to and from the mine. After "buying" it for USD 1, the Appellant then sought allowance for its wear and tear under paragraph 8 (2) of Part II of the 2nd Schedule to the Income Tax Act, 1973. The claim was disallowed by the Respondent because the capital expenditure could not be verified, in the absence of any documentary evidence to ascertain its price.

This argument was accepted by the Board and later by the Tribunal.

It was submitted by Dr. Kibuta that under paragraph 8 (2) of the 2nd Schedule to the Income Tax Act, 1973, the Appellant was entitled to use the market value which the aircraft would have fetched if it were sold in open market. That is the value at which the Respondent should have used to determine the written down value of the aircraft. So, it was wrong for the Respondent to have wholly disallowed it and for the Tribunal to have allowed that decision to stand, he argued.

But Ms. Sojo, argued that under section 16 (1) and (2) of the Income Tax Act, 1973, for an expenditure to qualify for deduction, it must first be established that it was wholly and exclusively incurred for the production of an income. With regard to the Dash 8 aircraft, the learned counsel submitted that the real issue in controversy was what amount was to be allowed, not whether or not there should be any deduction. However, she submitted that it was upon the Appellant to prove the real purchase price of the aircraft, not to come up with imaginary prices as the Appellant did before the Board.

In our judgment, there is no dispute here that the Dash 8 aircraft was used by the Appellant in its mining operations. This means that it was used wholly and exclusively for the production of an income. This was in compliance with the provisions of section 16 (1) and (2) of the Income Tax Act, 1973 (the ITA 1973). As Ms. Sojo has rightly put it, the only issue was the amount of deductible allowance.

To resolve that issue, Dr. Kibuta has relied on paragraph 8 (2) Part II of the Second Schedule to the ITA 1973 but Ms. Sojo, has relied on the test of burden of proof. She had strenuously argued that the Appellant should have produced more credible documentary evidence to the Respondent.

Apparently Ms. Sojo's reasoning found purchase with the Board, and later by the Tribunal on appeal. In agreeing with the Respondent in disallowing the deduction of USD 3,915,617 as purchase price of the aircraft, the Board said:-

> *"If the appellant claims deduction of USD 3,919,617 as purchase price of the aircraft, we think he is*

bound to substantiate whether he actually incurred such expenditure. The simple way to do so is by producing the sale agreement as he did for the other aircraft...

As it was submitted by counsel for the respondent, it is not possible to allow such claim without a clear proof of expenditure. It is our view that the respondent was right to disallow such expenditure because of lack of proof."

We have considered this reasoning in the light of the circumstances of this case. There is, we think, no dispute here, that the Appellant is the rightful registered owner of the aircraft DASH 8 which was purchased from a related company at USD 1. There is also no dispute that the aircraft was used in the production of an income and so meets the tests under section 16 (1) and (2) of the ITA 1973. The only reason for not allowing the deduction was that the USD 1 purchase price was unrealistic, and the claimed deduction allowance was not proved.

The question is, in view of these realities, would it be fair, equitable and reasonable to disallow the whole amount claimed because there was no documentary proof? Inversely, even if there was documentary evidence, was the Respondent bound to accept such documents at face value?

We do not think that this is the position of the law. This is where paragraph 8 (2) Part 11 of the Second Schedule to the ITA 1973 comes in. The said paragraph reads:-

> *"Subject to this part where machinery is brought into use for the purpose of trade without being purchased or ceases permanently to be used without being sold it shall be deemed to have been purchased or sold as the case may be and the cost or amount realized shall be deemed to be the price which it would have fetched if sold in the open market."*

The Appellant relies on this provision and contends that it entitles her to wear and tear deductions based on the market value of the machinery if it were sold or purchased if the true price could not be determined. But the Respondent thinks that the provision applies to cases where there was no purchase price or sale of the machinery.

We are compelled to observe generally that the most common rule of interpretation is that every part of a statute must be understood in a harmonious manner by reading and constructing every part of it together. For our present purpose, we also take it to be an established principle of statutory interpretation that in interpreting the Income Tax Act, the whole Act must be considered in relation to the particular section and especially with reference to the interpretation section and the methods set out in the Act to arrive at what is the chargeable income. (See **INCOME TAX vs HOLDINGS LTD** (1972) 1 E.A. 128 (CAN).

Since the Respondent did not seriously dispute that the aircraft was used in generating income and fell under s. 16 (1) and (2) of the Act, and since the Respondent and the Board and the Tribunal in effect, found that

the Appellant failed to discharge its burden of proof on whether it sold the aircraft for USD 2.4 million and bought another for USD 9 million it was incumbent upon them to find that the Respondent should have assessed and determined the market price of the aircraft and proceed to ascertain a deemed expenditure that would have turned out to be deductible. It was totally wrong, in terms of paragraph 8 (2) of Part 11 of the Second Schedule to the ITA, 1973 for the Respondent to have wholly disallowed the deduction. The Respondent should now determine the market value of the Dash 8 aircraft, determine its depreciated value in accordance with accepted accounting principles and arrive at a reasonable deemed expenditure. To that extent we allow this ground of appeal. We order that the Respondent undertake a reevaluation and assess a deemed purchase price and thereafter make the necessary adjustments in the Respondent's respective year of income.

In the second ground, the Appellant's complaint is that it was wrong for the Tribunal to have disallowed deductions for premiums for political risk insurance incurred by her in the production of income.

For the appellant, it was submitted that it was necessary for the Appellant to take out insurance as part of its performance in a loan agreement for USD 200 million from several financial institutions to ensure that the mine is insured against all risks, including political. It also acknowledged that the policy was issued to Barrick Gold Company, who was the owner of the mine by 100%. The argument was that this was used to secure money that was used for the production of income; and therefore, an allowable deduction.

The Respondent, however, submitted that in terms of section 16 (1) and (2) of the ITA, 1973, which sets out three conditions for ascertaining a tax payer's total income, the Appellant did not meet any. **Firstly**, apart from a stipulation in the Loan Agreement there was no evidence that the Appellant actually paid the premiums. A mere obligation to pay does not amount to expenditure, in law. After all, even in terms of the Agreement itself it was also possible for a trustee to pay. **Secondly**, if, the insurance was taken out by Barrick Gold Corporation, it was a different legal person, although a holding company. It was the beneficiary of the insurance

policy, not the Appellant. **Thirdly**, necessity was not a condition precedent for allowing deductions under the law.

In his brief rejoinder, Dr. Kibuta submitted that much as the insurance was taken out by Barrick Gold Corporation, it was nevertheless reflected in its budget and accounts as an expenditure which was incurred.

We shall premise our discussion on this ground by echoing the principle sounded earlier on above that the Income Tax Act must be read as a whole and it is dangerous to read it in piecemeal.

Ms. Sojo's argument that a deductible allowance can only be determined by looking at the three conditions precedent for the assessment of taxable income is a result of looking only at section 16 (1) of the ITA 1973. If section 16 (1) and (2) is read as a whole, and in context, it will be noted that an expenditure may qualify on two conditions. **Firstly**, if it is incurred wholly and exclusively in producing an income and **secondly**, if it is necessarily incurred in carrying on a business for the purpose of gaining or producing income. Such are as those itemized in

section 16 (2) of the Act. But as shown above the terms "wholly" and "exclusively" should not be interpreted narrowly. It takes several tests to determine and categorize an expenditure one way or another. So with respect, to Ms. Sojo, we cannot accept that necessity as such is not a condition for allowing deductions, under the law. What is to be decided in each case is the nexus between the alleged claim for deduction and the particular head under which it is claimed. If the claim is made under section 16 (1) and (2) of ITA 1973 the Appellant must establish sufficient nexus between the expenditure and its wholesomeness and exclusivity in the production of income as well as its necessity and reasonableness.

From the submissions of the parties we understand that while the Appellant was claiming that the expenditure of insurance premiums was necessarily incurred, the Respondent's claim was that the doctrine of necessity does not apply, and that, only section 16 (1) applies and the Appellant has failed to show the nexus. To get a complete picture and the true intention of the Parliament, section 16 (1) and (2) must be read together with the Second Schedule, (Part III) which sets out deductions in respect of mining operations.

On reading the statute as a whole and on the basis of the evidence on record and the submissions of the parties we cannot see any nexus between the payment of insurance premiums, and either the whole and exclusive production of the Appellant's income, or any necessity for it to incur the sum for the production of income. This is because as admitted by the Appellant, the expenditure was not incurred by the Appellant but by Barrick Gold Corporation. On the premises we find that the finding of the Tribunal cannot be faulted. We thus dismiss this ground of appeal.

The **third** ground of appeal raises the issue whether contributions on community development around the mine were an allowable expenditure? The Appellant claimed that these were deductions under section 16 (2) (x) of ITA 1973 as well as section 16 (1) (a) and (c) of the Income Tax Act, 2004 (ITA 2004). The Respondent on their part submited that although community development was entailed in the Mining License, and that, if not executed, it could impact negatively on the mine, nevertheless, it was not an allowable deduction under section 16 (1) and (2) of the ITA 1973 because the expenditure was not one that could be

said to have been wholly and exclusively engaged in the production of an income in both the 1973 and 2004 ITAs.

Sections 16 (2) (x) of the ITA 1973 and 16 (1) (a) of ITA 2004 are worded differently. Section 16 (2) (x) of the 1973 ITA reads as follows:-

> *"16 (2) Without prejudice to subsection (1) of the section, in computing for any year of income the gains as profits chargeable to tax with paragraph (a) the following amounts shall be deducted.*
>
> *(x) any sum not exceeding two percent of the chargeable gains or profits of a business contributed in such year of income to a public institution, or charitabe or religious institution for the purposes of provision of general public health, education, water and road construction or maintenance."*

Section 16 (1) (a) and (c) of the ITA 2004 provides as follows:-

> *"16 (1) for the purpose of calculating a person's income for a year of income from any business, there shall be deducted.*
>
> *(a) Amounts contributed during the year of income to a charitable institution or social development project and*
>
> *(b) ... (not applicable)*
>
> *(c) amount paid to local government authority which are statutory obligations to support community development projects."*

But subsection (2) is also relevant:-

> *"(2) The deduction available under subsection (a) for a year of income shall not exceed two percent of the person's income from the business calculated without a deduction under that subsection."*

In the wording of the 1973 ITA, only contributions made to public institutions, charitable or religious organizations in the fields of public health, education, water, road construction and maintenance, are allowed from not more than 2% of the gains and profits of a business. In the 2004 ITA, the list of beneficiaries is wider. They include charitable institutions, or for any social development project; but also local governments to support community development projects, provided, such contributions should not exceed 2% of the total income from a business.

From the clear wording of the two provisions, we are certain in our minds that as a matter of law such expenditures are without doubt deductible if the conditions are met.

In rejecting this claim, the Tribunal found that the provisions could not work in the Appellant's favour because such deductions could only be made out of profits, and there was no evidence that the Appellant had made any profits during the respective years of income.

With respect, that was a narrow interpretation of the provision, particularly to the phrase "gains and profits" in paragraph (x) of section 16 (2) of the ITA 1973. Reading the Act as a whole, that phrase must, in our view, be taken to mean the same thing as that defined in section 2 (a) of the Act, which provides:-

> *"(2) Subject to this Act income upon which tax is chargeable under this Act, is income in respect of:*
>
> *(a) **Gains and profits** from*
>
> *(i) Business for whatever period of time carried on."*

The phrase "gains and profits" is not defined anywhere else in the Act, but it has been judicially considered in other Commonwealth jurisdictions with similar provisions. In his book "**INCOME TAX LAW IN TANZANIA: SOURCE BOOK**" (*supra*) Professor Florens Luoga, reviews a number of those cases. He concludes that before determining whether there were any gains, the court must determine if there were any capital goods that were resold for the purposes of making profits. If so, the income therefrom is a **gain**. On the other hand, the **profits** of a business venture is the profit

revealed by the commercial accounts by using ordinary acceptable accounting principles.

In short, "gains and profits" referred to in paragraph x of section 16 (2) of the ITA 1973, is just a source of chargeable income of a business. **Gains** come about where capital goods are bought and resold, if they we not part of a core business of a person. Profits arise from ordinary commercial transactions (core business) of the person. It was therefore wrong on the part of the Tribunal, to have looked and decided this issue only on the basis of **profits**. This is as far as the 1973 ITA is concerned.

But the ITA 2004 avoids the use of the phrase "**gains and profits**".

Section 16 (2) sets out the formula:-

> *"(2) The deduction available under subsection (1) (a) for a year of income shall not exceed two percent of the person's income from the business calculated without a deduction under that subsection."*

In our view therefore, in the ITA 2004, what counts is the total income of the business and not "gains and profits". But under the 1973 ITA deductions are to be made even without proof of profits, if there is evidence of sale of capital goods.

It was therefore wrong for the Tribunal to have lumped deductions claimed by the Appellant from 2004 onwards, together with those claimed for the previous years, because the tests were different. But even under the 1973 ITA, it was not "profits" alone which counted, but also "gains". In our view a business could make "gains" in a year without necessarily posting "profits" in its balance sheet at the end of the year.

That takes us to the next category of qualifying test; the institutions. As observed above, under the 1973 ITA, the allowable deductions were confined to public institutions, charitable or religious institutions and for the purpose of provision of general public health, education, water, road construction and maintenance. But in the 2004 ITA, the beneficiaries include charitable institutions, or for any social

development projects, as well as local governments, to support community development projects.

These are questions of fact, and therefore require evidence. The burden of proof was on the Appellant to show that she made the declared contributions, in the respective years of income. However we note that in her written submission, Ms. Sojo does not dispute that the Appellant incurred the expenditure to support the community development. With that admission, and in the light of our analysis of the law above we have to conclude that it was wholly wrong for the Respondent to disallow such expenditure, and for the Tribunal to have upheld the said decision. We accordingly allow this ground of appeal.

The issue for determination in the **fourth** ground of appeal is whether a deduction of 15% as capital allowance is allowable only in the first year of business or carried forward, each year until it is redeemed?

The Appellant's submission was that reading paragraph (1), (3) and (5) of Part III Second Schedule to the ITA 1973, as a whole, the true

interpretation is that by the presence of the term "unredeemed qualifying capital expenditure" in these provisions, the intention of the Parliament was that this capital expenditure deduction be deducted every year until it is fully recovered.

On the other hand Mrs. Sojo, strenuously submitted that such deduction could only be treated as expenditure only once in the subsequent year of income, and not carried forward every year. She found support, in the wording of section 18 (5) which qualifies the previous subsections.

Dr. Kibuta's brief rejoinder was that the 15% allowance was available to a tax payer every year.

At stake in this issue is the interpretation of paragraph 18 of Part III of the Second Schedule to the ITA, 1973. For ease of reference we reproduce it below:-

18. (1) For the purpose of deduction of development capital expenditure in ascertaining the income of a person derived from mining operations, an additional capital allowance of fifteen per centum per annum shall be applied to the balance of unredeemed qualifying capital expenditure forming part of any deficit brought forward and allowable as a deduction for such person at the commencement of each year of income:

Provided that the provision of this subparagraph shall apply where at any time before the 1st day of July, 2001 the Minister responsible for mining has entered into an agreement binding on the government with any person carrying on mining operations, the provision of paragraph 16 and 18 of this Part shall, unless otherwise agreed, apply to mining operations carried on by that person as would have applied immediately before the 1st day of July, 2001.

(2) "Qualifying capital expenditure" for the purpose of the additional capital allowances shall mean development capital expenditure and shall not include prospecting capital expenditure or any interest of financing charges.

(3) The accumulated qualifying capital expenditure in relation to a mine at the end of a year of income for the purpose of application of the additional capital allowance that is, the "allowance base" which is the sum of:

a) Unredeemed qualifying capital expenditure brought forward from the year preceding the year of income;

b) Plus the additional capital allowance calculated thereon;

c) Plus qualifying capital expenditure incurred during the year of income;

d) Minus any such qualifying capital expenditure set off against the income of another mine;

e) Minus gains or profits chargeable to tax in relation to such mine for the year of income calculated before any deduction in respect of qualifying capital expenditure and including any proceeds of disposal of assets previously included as qualifying capital expenditure.

(4) Where at the end of any year of income the allowance base becomes negative the unredeemed qualifying capital expenditure carried forward to the subsequent year of income shall be set at zero.

(5) *Where unredeemed qualifying capital expenditure is carried forward from any year of income, to the subsequent year of income, additional capital allowances shall be applied to qualifying capital expenditure incurred during such year of income, provided that the additional capital allowance so applied shall be treated as expenditure only in such subsequent year of income.*

(6) *Where a person ceases to carry on mining the balance of unredeemed qualifying capital expenditure including additional capital allowance accumulated to the date of such cessation may be carried forward for deduction against other income derived from mining operations, if any, of such person provided that no further additional capital allowance shall be applied to such balance unless such person is engaged in commercial production of minerals from a mine.*

(7) *Additional capital allowance shall not be applied to the qualifying capital expenditure incurred in respect of any mine during any period when mining operations in relation to such mine are suspended other than for reason of force majeure.*

The raging controversy is whether, read as a whole, this provision allows the Appellant to carry forward the additional capital allowance each year until the qualifying capital is fully redeemed. The Respondent thinks that subparagraphs 1, 2, 3 and 4, are qualified by sub paragraph 5, which must be taken to mean that what is authorized by the law was allowance for only one, "the subsequent year of income".

The Board had observed below that there was no limitation imposed under paragraph 18 (5) in the computation of allowable additional capital allowance. The Tribunal, however, observed that the paragraph requires that additional capital allowance be treated as expenditure only in the subsequent year of income, and not beyond.

It is a trite cardinal rule of statutory construction that a statute is to construed from its four corners and not by singling out a particular word or phrase. (**Commonwealth Natural Resources Inc. v Commonwealth** 219 vol. 529, 536, 248 SE 201 (1973) p 195).

From our own reading of paragraph 18 as a whole, we agree with the Respondent, that paragraph 18 (5) has the effect of qualifying the capital redemption to only the first subsequent year of income. The use of such words as "to the subsequent year of income" "provided" and "only in such subsequent year of income" in paragraph 18 (5) clearly shows the intention of the Parliament. The Tribunal was therefore right in our view and as a matter of statutory interpretation, to read paragraph 18 (5) as having the effect of qualifying the preceeding provisions.

The **fifth** ground of appeal was whether the Tribunal was right in law in disallowing the Appellant's claim for additional capital allowance on equipment.

The learned counsel for the Appellant contended that it was wrong for the Respondent to have disallowed expenditure in the purchase of motor vehicles dump trucks, drilling equipment, caterpillars and camp site, on the ground that they were not mining equipment. He submitted that by the definition of the term "mining operations" under section 2 (1) (a) of the ITA, 1973, those qualify for use in mining operations. Therefore, it was

wrong for the Respondent and the Tribunal to have disallowed such expenditure.

In response, Ms. Sojo submitted that to qualify for deduction under section 16 (1) and (2) of the ITA, 1973 any expenditure must have been wholly and exclusively used for the production of the tax payer's income. In this case, there was no evidence that such equipment were so used and so qualified under section 16 (1) and (2) of the ITA 1973. The Tribunal's decision could not be faulted, she argued.

In its decisions, the Tribunal held that 15% additional capital allowance was only applicable to "qualifying capital expenditure" which excludes prospecting capital expenditure or any interest of financial charges, and should be used wholly and exclusively for the purposes of mining operations. The Tribunal further held that the Appellant did not adduce evidence that the equipment in question were used for the purposes of mining operations.

We think that, it is beyond controversy that under both section 16 (1) and (2) of the ITA 1973 as well as paragraphs 16, 17 and 18 of Part III of the Second Schedule to the ITA 1973 "development capital expenditure" was deductible under paragraph 18 (1). There was also, we think, no serious dispute, that the Appellant had, during the material time purchased some vehicles, dump trucks, caterpillars and drilling equipment, which according to the Appellant, were used, during the mining operations. The only issue is whether those were "qualifying capital expenditure" as defined in paragraph 18 (2) of Part III of the Second Schedule? The paragraph defines "qualifying capital expenditure" for the purpose of additional capital allowance" to mean "development capital expenditure and not including prospecting capital expenditure or any interest or financing charges".

We agree with the Tribunal that this was a question of fact. In terms of section 18 (2) (b) of the Tax Revenue Appeals Act, the burden of proof was on the Appellant to prove that the said equipment were used wholly and exclusively for purposes of mining operations. In the finding of the Tribunal, the Appellant had failed to discharge that burden. This being a question of fact, it ends there. This is so, because under section 25 (2)

of the Tax Revenue Appeals Act (Cap 408 R.E. 2002) appeals to this Court lie only on matters involving questions of law. So, we find that the fifth ground is devoid of substance and we dismiss it.

The **sixth** issue that calls for determination in this appeal, is whether a provision for rehabilitation of environment at the close of the mining operations was an allowable expenditure.

It was submitted by Dr. Kibuta that this obligation was imposed by sections 44 (d) of the Mining Act 1998 as well as section 102 (1) of the Environment Management Act, 2004, and part of the conditions in the Mining License and it was a matter of legal necessity. According to him this qualifies as an allowable deduction under section 16 (1) and (2) of the ITA, 1973.

But Ms. Sojo, was not impressed. She argued that although it was a requirement of the law, there was no law expressly allowing such expenditure to be deductible. She went on to point out that the rationale

for such position was that such expenditure could not be said to have been wholly and exclusively used for the production of income.

Dr. Kibuta in his rejoinder, referred us to section 23 of the ITA, 2004, which introduces an accounting principle that accruals could be considered as expenditures. We think this issue should not detain us.

It is true that under section 44 (a) and (d) of the Mining Act, a mining license may carry conditions requiring the miner to rehabilitate the mine upon termination of its mining operations. It is also true that section 102 (1) of the Environmental Management Act No. 20 of 2004 imposes a duty on a miner to rehabilitate the environment of a mining site, upon cessation of mining operations. It is further true that both Section 16 (2) (b) of the ITA 1973 and section 15 (1), (2) and (3) of the ITA 2004, provide that any amount in relation to mining operations which during the year of income, has, either actually been expended or in a manner approved by the Commissioner of Income Tax , was used in order to provide funds at a future date to defray expenses in connection with remedying, or rehabilating environment to the satisfaction of the Minister

responsible for minerals upon cessation of mining operations, is deductible. The proviso is that such expenditure shall be carried forward in the following year of income. This means that such expenditure is deductible if it is actually incurred, or provided for, with the approval of the Commissioner of Income Tax.

In the present case there is no evidence that the Appellant has actually expended on the cost of rehabilitation, but Dr. Kibuta has submitted that in terms of section 23 (1) (b) of the ITA 2004, it is enough if it set aside, and payable by the tax payer. We do not think it is that simple. If this section is read as a whole along with subsections (3) and (4) and section 16 (2) (b) (iii) of the ITA 1973 which requires the Appellant to have obtained the approval of the Commissioner, for the provision to come into operation, the expenditure must actually have been incurred.

So, much as the Appellant bears a statutory obligation to rehabilitate the environment after the termination of the mining operation, there was no evidence that the conditions under sections 16 (2) (b) (iii) of the ITA 1973 or ss 15 (2) and 23 (1), (3) and (4) of the ITA, 2004 were met. So the

expenditure did not quality for deduction, as it were. This ground therefore fails.

In the last ground of appeal the Appellant complains about the loss of revenue caused by the Respondent's delay in refunding the Value Added Tax excess inputs claimed by and payable to the Appellant.

Dr. Kibuta has argued that this claim was justified because to the knowledge and authority of the Respondent, the Appellant carries on its transactions in USD accounts, and makes remittances to it in such currency, but the Respondent makes the refunds in local currency. But the refunds come in very late and so are affected by the fluctuations in the foreign currency exchange rates. This leads to a loss, and a loss is a deductible expenditure under section 16 (4) of the ITA, 1973.

On her part Ms. Sojo submitted that although both the ITA Act and the VAT are operated by the Respondent, the statutes operate on different principles. Under the Income Tax Act, deductions are allowed only if the expenditures are wholly and exclusively used in the production of income.

But under the VAT Act, delays in refunds are compensated by way of interests to the tax payer. Refunds under VAT cannot be used to set off allowable deductions under section 16 (1) of the ITA Act. It was the Appellant's duty to claim for the refunds, and the Respondent's obligations to refund, however, delayed they could be.

In disallowing this deduction the Tribunal's decision was that it was illogical for the Appellant to turn the claim for delayed refunds of VAT inputs converted in foreign exchange, into a tax issue.

In our view although both the Income Tax statutes and VAT statute are under the same management of the Respondent administratively, the schemes of management of the said statutes are different.

Dr. Kibuta has relied on section 16 (4) of the ITA, 1973. But section 16 (4) of the ITA, 1973 only allows deficits for any particular year of income to be carried over to the following succeeding years. It does not apply to the situation at hand, where the Appellant is seeking that the Respondent apply the losses in foreign exchange losses caused by delays in refunds of VAT inputs to be treated as expenditures, deductible under

section 16 (1) of the ITA, 1973. The two situations are not compatible. We thus agree with the Tribunal that this ground of appeal lacks merit and we dismiss it.

Finally, we come to the conclusion that this appeal succeeds only in part. Ground one is allowed in part. The third ground is also allowed. The second, fourth, fifth, sixth and seventh grounds of appeal are dismissed. The Respondent shall have 75% of it taxed costs.

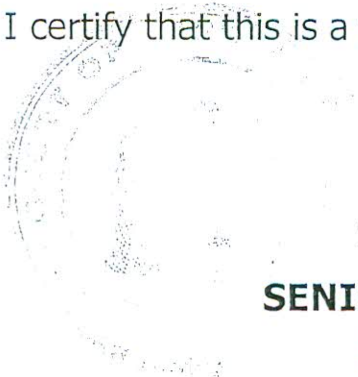
DATED at **DAR ES SALAAM** this 4th day of March, 2016.

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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



P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL