IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 307 OF 2020

SHOPRITE CHECKERS (T) LIMITED.....APPELLANT

VERSUS

THE COMMISSIONER GENERAL, TANZANIA

REVENUE AUTHORITY .....RESPONDENT

(Appeal from the decision of the Tax Revenue Appeals Tribunal Sitting at Dar es salaam)

(Ngimilanga, Vice-Chairperson)

Dated the 30th day of January, 2020
in
Tax Appeal No. 11 of 2019

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JUDGMENT OF THE COURT

20th & 29th October, 2021

MAIGE, J.A.:

Until 2008, income tax in Tanzania Mainland was chargeable for each year of income to every person who earned total income for a year of income or he who received a final withholding payment during the year of income. Unrelieved loss of the year of income and of a previous year of income was, under section 19(1) (a) and (b) of the Income Tax Act of 2004 (the Act), deducted in calculating income without any discrimination. In 2008, section 4(1) of the Act was amended by the Finance Act No. 13 of 2008 so as to introduce

alternative minimum tax (the AMT) in respect of a corporation which has a perpetual unrelieved loss for the year of income and previous two years of income attributable to tax incentives. In 2012, the Act was further amended, by the Finance Act No. 8 of 2012, with the effect of among others, omitting the phrase "attributable to tax incentives" in the respective provision. The equity behind the introduction of the AMT, it would appear to us, was to reduce the possibility of business establishments avoiding income tax payment by using tax preferences available under the regular tax system. The main question that we are called upon to determine in this appeal is whether the respondent rightly applied these two amendments in imposing AMT to the appellant in respect of her unrelieved perpetual loss for 2012 and 2013 years of income.

The appellant, it is undeniable, is a strategic investor in terms of the Tanzania Investment Act, 1997 and is, on that account, in possession of a Certificate of Incentive No. 060031 issued by the Tanzania Investment Centre (the TIC) on 24th May, 2001 under section 17 of the Tanzania Investment Act. It is equally irrefutable that, under the respective certificate, the appellant which was operating a chain of

retail stores in Arusha and Dar Es Salaam, enjoyed special incentives on import duties, withholding taxes and eligibility of capital allowances. Further not in dispute is the fact that, the appellant though utilized the tax incentives in the initial two years of investment, she did not, throughout the period of her operation, declare any profit. As such, the appellant had been a loss-making business establishment from her inception to the closure of her business.

In 2014, the respondent, having conducted a tax audit in respect of 2012 and 2013 years of income, made assessments number F. 13730 for 2012 and F. 13731 for 2013 and subjected the appellant to AMT at the rate of 0.3% on her turnovers for the respective years of income. Aggrieved, the appellant preferred objections against the aforesaid assessments on the common ground that, her perpetual unrelieved loss in the respective years of income was not attributable to tax incentive but normal operational loss. The objections were refused and the appellant preferred appeals to the Tax Revenue Appeals Board (the Board) against each of the decisions.

In the Tax Appeal Nos. 133 and 136 of 2016, the Board consolidated the two appeals and framed two main issues for

determination namely; whether the respondent's decision to subject the appellant to AMT was correct in law and whether the imposition of interest on the assessed tax was correct in law. In respect of the first issue, the Board was of the opinion that, since losses are ordinarily cumulative and always hard to demarcate a line for causes of the same, and, in so far as there was no profit for the whole period of the investment, the AMT was rightly imposed. Justifying its finding, the Board observed as follows:-

> *"Our finding is based on the fact that, whereas the certificate provided special incentives on import duties, withholding taxes and eligibility of capital allowances, no evidence was adduced on part of the appellant that she did not utilize the incentives, or that she paid the taxes referred to in condition 12 of the certificate. We neither received evidence of failure to commence implementation within two years of the grant of the certificate that would have invalidated the certificate. The appellant was duty bound to report her failure to operate the investment to Tanzania Investment Centre if at all there was such a failure. The appellant never reported. That*

goes to negate the appellant's argument of nonuse of the certificate of incentive".

On the second issue, the Board took the view that, in as long as the imposition of the AMT was correct, the decision to impose interest on the assessed amount was equally correct. The consolidated appeal was henceforth dismissed.

Once again displeased, the appellant appealed to the Tax Revenue Appeals Tribunal (the Tribunal) on three grounds. **One,** the Board erred in law and fact in holding that in circumstances where there was no profit for the whole period of the investment, it was right for the appellant to be subjected to alternative minimum tax. **Two,** the Board erred in law and facts in holding that, the appellant failed to adduce evidence that she paid taxes referred in condition 12 of the certificate. **Three**, the Board erred in law and fact in holding that the imposition of interest by the respondent was correct in law.

In its reasoned decision, the Tribunal was of the view that, the undisputed appellant's perpetual unrelieved loss throughout her business operation was attributable to tax incentives. In reaching to such a conclusion, the Tribunal considered the fact that, despite being

a loss-making company from 2001 when she procured the certificate of incentives until the closure of her businesses, the appellant did not adduce any evidence demarcating between loss attributable to tax incentives and that which was not. Neither did she adduce any evidence of non-utilization of the incentives or failure to commence implementation of the investment within two years. In its own words, the Tribunal observed as follows:-

> *"Therefore in the absence of such certification, it proves that the Appellant enjoyed investment incentives as the certificate was operational and the Appellant as the holder of the certificate must pay tax accordingly. Moreover, in the absence of evidence to separate losses that were caused by incentives or not before July 2012, there is no way that the Respondent and later the Board could exonerate the Appellant from the disputed tax liability. Thus the Board was correct in holding that the Appellant failed to adduce evidence that she did not utilize the incentives or that she paid taxes referred in condition 12 of the certificate"*

On the issue of interest, it was the opinion of the Tribunal that, the respondent correctly imposed the same pursuant to section 101(1), (2) and (3) of the Act. The Tribunal, therefore, dismissed the appeal and upheld the decision of the Board and hence the instant appeal wherein the decision of the Tribunal is faulted on the following grounds:-

1. *The Tax Revenue Appeals Tribunal erred in law in failure to address the issue whether the Board was correct in holding that the Respondent's decision to subject the Appellant to alternative minimum tax which was one of the issues framed for determination.*
2. *The Tax Revenue Appeals Tribunal erred in law in holding that the Appellant was supposed to separate the losses and prove beyond reasonable doubt that he had utilized tax incentive or not as required by section 18 (2) (b) of the Tax Revenue Appeals Act, Cap. 408.*
3. *The Tax Revenue Appeals Tribunal erred in law in holding that the appellant was supposed to bring evidence on deductions on import duties, withholding taxes, and eligibility of capital allowances and on capital expenditures of a plant and machinery incurred in the respective year of income for it to be exonerated from being subjected to alternative minimum tax under Income Tax Act, 2004.*

4. *The Tax Revenue Appeals Tribunal erred in law by holding that the Board was correct in its holding that the Respondent correctly subjected the appellant to alternative minimum tax because the appellant failed to provide evidence that she did not utilize tax incentive or that she paid taxes referred under the certificate of incentive.*
5. *The Tax Revenue Appeals Tribunal erred in law by failing to hold that the Board was wrong to hold that the respondent was correct to impose interest on the assessed amount.*

At the hearing of the appeal, the appellant was represented by a team of three learned advocates namely, Mr. Wilson Mukebezi, Mr. Alan Kileo and Mr. Stephen Axwesso. The respondent was also represented by a team of three States Attorneys namely; Mr. Juma Kisongo, learned Principal State Attorney, Ms. Gloria Achimp ota, learned Senior State Attorney and Ms. Samia Nyakunga, learned Senior State Attorney. In their oral submissions which for the appellant was submitted by Mr. Axwesso and for the respondent Mr. Kisongo, each of the parties adopted its written submissions earlier on filed with some clarifications.

In address of the first ground, Mr. Axwesso submitted in the first place that, since the amendment omitting the phrase "attributable to

tax incentives" was made in 2012, it could not operate retrospectively as to affect the loss in respect of 2012 and 2013 years of income. The basis of his argument was that, in accordance with the relevant provision, it is not only the turnover of the respective year of income which is taken into account in determining liability to pay AMT but unrelieved loss for previous two years of income as well. In his view therefore, for the unrelieved loss of 2012 and 2013 years of income, it is the turnover of 2015's years of income which would be taxable.

In the second place, it was Mr. Axwesso's submission that, to establish that the loss was attributed to tax incentives, it was necessary for the respondent to produce empirical evidence to that effect. In his further submissions, Mr. Axwesso was of the contention that, contrary to the Tribunal's expression, there was ample evidence on the record to the effect that the loss in question resulted from other factors such as poor sales, theft, insufficient parking lot for customers and wrong business cites.

The complaint in the second ground of appeal is that, the Tribunal introduced a new principle of law when it held that the appellant had a burden to prove beyond reasonable doubt that, she

did not utilize tax incentives. Nonetheless, when we requested him to show where such a finding appears in the judgment of the Tribunal, Mr. Axwesso was quick to admit that the same is not in the judgment. Our reading of the judgment also suggests so. In the circumstance, the second ground of appeal is dismissed for being misplaced.

In support of the third and fourth grounds, Mr. Axwesso criticized the Tribunal for determining the matter basing on an incorrect assumption that, once a holder of a certificate of incentives suffers loss, the same is deemed to have been attributable to tax incentive unless proved otherwise. In his understanding of the law, the burden to establish that the unrelieved loss was attributable to tax incentives was on the respondent. The respondent, he submitted, completely failed to discharge the duty. To the contrary, he submitted further, the appellant adduced sufficient evidence to disassociate the loss in question from tax incentives.

On the fifth ground, it was his submission that, since the principal tax was wrongly imposed, interest was consequently wrongly imposed. The appellant therefore urged the Court to allow the appeal and set aside the judgment and decree of the tribunal.

In opposition to the first ground of appeal, it was Mr. Kisongo's submission that, in as much as there was no proof of non-use of the tax incentives throughout the years of her unrelieved perpetual loss, the appellant was properly subjected to AMT. On whether or not the 2012 amendment was applicable, it was his argument that, the same has been misconceived as the imposition of AMT by the respondent was based on the 2008 amendment. It was submitted further or in the alternative that if, which is not, the AMT was imposed basing on 2012 amendment, the decision of the Tribunal would remain correct because ATM was charged on the appellant's turnovers for 2012 and 2013 years of income. The unrelieved perpetual loss for the previous two years of income, he submitted, was only the precondition for the imposition of the same.

On whether the respondent was required to adduce empirical evidence to establish that the loss was attributed to tax incentive, it was his submission that, the same was a pure factual issue which did not qualify as a ground of appeal at this level. In the alternative, it was submitted that, under the express provision of section 18 (2) (b) of the Tax Revenue Appeals Act, [Cap. 408 R.E. 2019] the burden of

proof lies on the appellant. In the further alternative, it was submitted that, the issue cannot be relevant because it is being raised for the first time in this appeal.

On the fifth ground, it was the submission for the respondent that, since the imposition of AMT was correct, the charge of interest was in the same way correct. Finally, the counsel urged the Court to dismiss the appeal with costs.

In his rejoinder submission, Mr. Axwesso did not raise any new issue apart from reiterating his submissions in chief.

We have taken time to carefully study the rival submissions and examine the record. With all respects to the counsel for the appellant, we are of the view that this appeal is devoid of any merit. We shall rationalize our opinion gradually as we go on.

The subjects of this appeal are tax assessments numbers F. 13730 for year 2012 and F. 13731 for the year 2013. These were apparently made under section 4 (1) (a) of the Act as amended by the Finance Act No. 13 of 2008 which provides as follows:-

> *"4-(1) Income tax shall be charged and is payable for each year of income in accordance with the procedure in Part VII by every person-*

(a) Who has total income for the year of income or is a corporation which has a perpetual unrelieved loss determined under section 19 for the year of income and the previous two consecutive years of income attributable to tax incentives."

For a corporation to be subjected to AMT under the above provision, two conditions must be established. First, the unrelieved loss must have been accumulated for three consecutive years of income. Two, the said loss must be attributable to tax incentives. We have noted from the record that, whether the first condition has been established has never been doubted. Neither has there been any dispute that, the appellant has since her inception been the holder of a certificate of incentives in terms of the Tanzania Investment Act. The line of contention is whether the unrelieved loss in the respective years of income was attributable to tax incentives.

As apparently revealed in the record, the appellant was subjected to AMT because despite enjoying tax incentives in the initial years of her investments, she had accumulated unrelieved loss for the whole period of her business operation. The respondent maintained the same position in its decision refusing the objection. Just as it was for the

Board, the tribunal, in its decision, was of the considered opinion that, in the absence of concrete evidence demarcating between loss attributed to tax incentive and that which is attributed by other factors, it cannot be said that the appellant has proved that the same was not attributable to tax incentives. The appellant complains in the first and third grounds that, it was the respondent who was required to adduce empirical evidence that the loss was attributable to tax incentives. In our considered view the appellant is quite wrong because in accordance with section 18(2) (b) of the Tax Appeals Tribunals' Act, the burden of proof in tax matters lies on the tax-payer. The equity behind the law was explained in details in the case of **Insiginia Limited vs. The Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 14 of 2007 (unreported) in the following words:-

> "***The burden of proof in tax matters has often been placed on the tax-payer***. *This indicates how critical the burden rule is, and reflects several competing rationales: the vital interest of the government in getting its revenues; the tax payer has easy access to the relevant information and the importance of*

encouraging voluntary compliance by giving tax-payers incentives to self-report and to keep adequate records in case of disputes". [Emphasis added)

In this case, the appellant though does not dispute the fact that she was in possession of a certificate of incentives and that she had utilized the tax incentives at least in the initial years of her investment, she did not adduce any evidence that during the entire life of her business operation, she either ceased using the incentives or paid the taxes referred to in condition 12 of the certificate. Considering the fact that the unrelieved loss was perpetual from the inception to the closure of the business, evidence of non-use of the tax incentive or payment of the relevant taxes, was inevitable in drawing a line of demarcation between loss attributable to the incentives and that attributable to other factors. We do not think that, in taking such an approach, the two Board and the Tribunal misdirected themselves on any principle of law.

There was yet a complaint that because the amendment deleting the words "attributable to tax incentives" came into operation in July 2012, it could not retrospectively operate as to cover the loss under

discussion. The contention appears to have been misplaced since the tax in question was imposed under section 4(1) (a) of the 2008 amendment.

In view of the foregoing discussions therefore, the first and third grounds of appeal are devoid of any substance and they are henceforth dismissed.

The correctness of the concurrent decision of the Board and the Tribunal on the attribution between the loss and incentives was also questioned in the fourth ground of appeal. In the view of the counsel for the appellant, there was both oral and documentary evidence on the record to establish that the loss in question was related to other factors. Whether the Tribunal was right in holding that the appellant failed to prove connection between the loss and tax incentive is, as rightly submitted for the respondent, a pure point of fact. In accordance with section 25(2) of the Tax Revenue Appeals Act, Cap. 408, R.E., 2019, (the TRAA), the decision of the Tribunal on that issue was final and conclusive. It could not be open for a further appeal to the Court. Therefore, in **Bulyanhulu Gold Mine Limited vs. Commissioner General, TRA**, Consolidated Civil Appeals Nos. 89

and 90 of 2015 (unreported), this Court made the following pronouncement which we entirely associate with:-

> *"We agree with the Tribunal that this was a question of fact. In terms of section 18(2) 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 because 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".*

Applying the above principle therefore, we hold that, since under section 25 (2) of the TRAA appeals to this Court lie only on points of law, the finding of the Tribunal under discussion in so far as it constitutes a pure point of fact, cannot be a subject of appeal to this Court. The fourth ground of appeal is thus dismissed.

The contention by the counsel for the appellant on the fifth ground was based on the presupposition that, the imposition AMT was

incorrect. With rejection of the presupposition in our first four grounds, the fifth ground of appeal remains with no leg on which to stand. It is consequently dismissed.

In the final result, the appeal is dismissed in its entirety with costs.

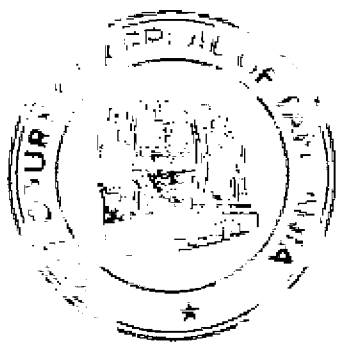
DATED at **DODOMA** this 28th day of October, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 29th day of October, 2021, in the Presence of Mr. Stephen Axwesso, learned counsel for the appellant who also holds brief for Mr. Juma Kisongo, Principal State Attorney for the Respondent, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL