IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., GALEBA, J.A., And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 146 OF 2021

TANGA CEMENT PUBLIC LIMITED COMPANY..... APPELLANT

VERSUS

THE COMMISSIONER GENERAL,
TANZANIA REVENUE AUTHORITY ..... RESPONDENT

[Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunals at Dar es Salaam]

(Haji, Vice Chairperson)

dated the 15th day of December, 2020
in
Tax Appeal No. 14 of 2020

.....

JUDGMENT OF THE COURT

7th & 17th June, 2022

GALEBA, J.A.:

Prior to 1st July 2014, Tanga Cement Public Limited Company, a Tanzanian cement manufacturer, the appellant, had hired her wholly owned subsidiary called Cement Distributors East Africa Limited (CDEAL) to provide services of marketing and distribution of her products, namely cement. CDEAL was the major distributor of the appellant's products during the time of their agreement. However, responding to

market challenges and dynamics of the appellant's product in the same year 2014, the appellant made a business decision to terminate CDEAL's marketing and distributorship services, such that cement marketing and distribution, would from then, be carried out by the appellant herself without CDEAL's involvement. Following cessation of the dealership, the appellant paid TZS. 1,270,298,73.00 (the disputed amount) to CDEAL.

In April and May 2016, Tanzania Revenue Authority, whose principal officer is the respondent, under the tax revenue laws, carried out a tax audit in respect of the appellant's business and investment affairs. Following that exercise and after numerous communications and consultations between the appellant's tax consultants and the respondent's representatives, on 31st May 2017 the respondent issued a notice of adjusted assessment, under the law, disallowing the disputed amount because, according to her, the money was not wholly and exclusively expended in the production of the appellant's income.

According to the appellant in its notice of objection to the respondent and its statement of facts and grounds to support her

appeal in the Tax Revenue Appeals Board (the Board), at pages 15 and 253 of the record of appeal respectively, this payment was compensation for CDEAL's loss of customers and business opportunity following the appellant's operational decision to terminate CDEAL from its marketing and distributorship role.

The respondent's clear position was that compensation to a third party for the latter's loss of customers or opportunity, cannot, in any way, as alleged by the appellant, be deemed to be payment for advertisement or marketing for the appellant's products, which would be otherwise an allowable expenditure.

The treatment of the said disputed amount by the respondent as an expense not spent wholly and exclusively on the production of the appellant's income, led the appellant to file Income Tax Appeal No. 226 of 2018 in the Board, and the first issue for resolution in that tax dispute was whether the respondent's decision to disallow the disputed amount was legally correct.

In addition to the above dispute between the parties, there was yet another tax issue in the same year of income 2014, which was whether the respondent's decision to imposed underestimated interest of TZS. 730,534,130.30 was, in law, a correct action to take. This issue arose because there was in the year of income 2014 an underestimated taxable amount. The appellant's argument was that imposing the tax was arbitrary because upon discovery of the error, in early January 2015, she wrote a letter contained at page 378 of the record of appeal, dated 7th January 2015 informing the respondent of the anomaly but the latter did not respond to that letter.

The Board heard parties on the two issues and finally resolved both in favour of the respondent. Being deeply aggrieved with the decision of the Board, under section 16 (4) of the Tax Revenue Appeals Act [Cap 408 R.E. 2002] (the TRAA), the appellant filed Tax Appeal No. 14 of 2020 in the Tax Revenue Appeals Tribunal (the Tribunal). The grounds upon which the appeal was based were a replica of its complaints that had been lodged in the Board and dismissed. The

Tribunal heard the parties on the appeal and at the end, like the Board, it dismissed it in its entirety for want of merit. This appeal is against that decision. The appeal is based on two grounds of appeal. The first ground was amended with leave of the Court such that the two grounds of appeal, that we will deal with in this matter are as follows:

> *"1. The Tax Revenue Appeals Tribunal erred in law for failing to hold that under section 11(2) of the Income Tax Act, the advertising and marketing costs paid to Cement Distributors East Africa Limited for loss of customers is an allowable expense for tax purposes.*
>
> *2. The Tax Revenue Appeals Tribunal erred in law for failing to hold that the Board was wrong to analyze the evidence before it and upholding that the respondent was justified to impose underestimated interest."*

At the hearing of this appeal on 7th June, 2022, the appellant was represented by Mr. Wilson Kamugisha Mukebezi learned advocate,

whereas the respondent had the services of Messrs. Harold Gugami and Cherubin Chuwa both learned Senior State Attorneys.

As written submissions for the appellant and the respondent had been filed under rule 106 (1) and (6) respectively, they were adopted at the hearing by the respective counsel.

In orally elaborating on what is contained in the appellant's written submissions, in respect of the first ground of appeal, Mr. Mukebezi argued that the disputed amount which was paid to CDEAL, was wholly and exclusively spent on the production of the appellant's income because, with that payment, CDEAL was able to hand over customers to the appellant, meaning that securing those customers was a marketing activity done by CDEAL.

In reply, Mr. Gugami submitted that before 2014 the appellant had an agreement with CDEAL for advertisement and marketing in which case he was being paid a service fee recognized under section 83 of the Income Tax Act [Cap 332 R.E. 2019] (the ITA) and the amount would be deemed to have been wholly and exclusively expended in the

production of income of the appellant. However, after termination of the agreement, the appellant cannot be paid any money in respect of advertisement and marketing. In any event, he added, the appellant's own witness at page 181 of the record of appeal, testified that the amount was a compensation to CDEAL following termination of the service agreement with the appellant.

With the advantage of the record of appeal and the submissions of parties, we trust we are in a position to determine the first ground of appeal. To do so, we will start with section 11(2) of the ITA on which kind of expenditure is allowable in business for income tax purposes. That section provides as follows:

> *"(2) Subject to this Act, for purposes of calculating a person's income for a year of income from any business or investment, there shall be deducted all expenditure incurred during the year of income, by the person wholly and exclusively in the production of income from the business or investment."*

Our determination point is whether the disputed payment to CDEAL was expended wholly and exclusively by the appellant in the production of income from its business or investment. In the case of **Bulyanhulu Gold Mine Limited v. Commissioner General TRA,** Consolidated Civil Appeals No. 89 and 90 of 2015 (unreported), this Court highlighted on what should be taken as a criteria in deciding whether an expenditure is wholly and exclusively spent for production of income:

> *"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 made is under section 16(1) and (2) of the 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."*

In respect of Mr. Mukebezi's argument that CDEAL handed over customers to the appellant, we inquired from him whether CDEAL had

identifiable customers that he had control over, such that, she (CDEAL) could hand them over to a third party like the appellant. Although his response was prolonged and mouthful, it was incomprehensible and non-directional. What we remotely gathered from his submission was that the nature of the cement industry demands arrangement where an outgoing distributor like CDEAL needed to be compensated for loss of customers to whom he was supplying the cement during the time he was serving them. Nonetheless, we did not get it right from the appellant's side, as to why and how would one company (CDEAL in this case), give customers to another company (the appellant in this case) at a price, while the giver had no verifiable pool of customers, upon whom she had clear mandate to command as from which cement company should those customers purchase the product. In this case, there was no proof that CDEAL had in possession of a specified market segment or a cluster of customers who she would hand over to the appellant, upon cessation of their marketing contract.

In any event, consistently, in the notice of objection, in exhibit A5 and the evidence of Emmanuel James, AW1 at pages 253, 261 and 181 of the record of appeal, respectively all from the appellant's side, it is clear that the money which was paid to CDEAL was to compensate that company for loss of customers and business opportunity. For instance, AW1 in his evidence at the above page stated thus:

> *"... Tanga Cement took over the duties which were being made (sic) by CDEAL and dealt itself to the customers. Therefore, it was found that it could not leave it without compensation and also to maintain their status..."*

The question we asked ourselves is how payment to a third party in order to maintain its status could be taken to have been expended wholly and exclusively on the production of income of the appellant. As held in **Bulyanhulu Gold Mine** case (supra), we did not see any nexus clearly established between the expenditure and its wholesomeness and exclusivity in the production of income as well as its necessity and reasonableness to the production of the appellant's income. Actually,

the nexus, that is the contract for marketing and advertising between CDEAL and the appellant, according to available records, had been terminated around the same time.

That is why we do not agree with Mr. Mukebezi when pressing on us to equate the concept of payment to CDEAL in compensating for her loss of customers and business opportunity with advertising and marketing in favour of the appellant. Further, we do not agree that the disputed amount which was paid to CDEAL was a service fee within the meaning of section 83 of the ITA, particularly because the appellant and CDEAL had just terminated the agreement for advertising and marketing, where the section would have been applicable and therefore the amount, an allowable expense. In our view, the respondent was right to disallow the expenditure, for it did not fall within the purview of section 11(2) of the ITA. We accordingly uphold the decision of the Tribunal on that aspect, in which we find no merit in the first ground of appeal which we are constrained to dismiss.

In respect of ground two, the appellant had two paragraphs of submissions. First, the appellant's side was in agreement that indeed, the appellant underestimated the income tax payable in the year of income 2014. That was the first premise. The reason why the appellant was not supposed to be charged the underestimated interest, according to the appellant's counsel, is because when she discovered the anomaly in early January 2015, she voluntarily rectified it *vide* a letter to the respondent dated 7th January 2015. Mr. Mukebezi added that the respondent was supposed to respond to that letter, otherwise, charging the underestimated interest of TZS. 730,534,130.30 was arbitrary, hence unlawful. If we understood Mr. Mukebezi well, he treated the appellant's above letter as an application under section 79(2) of the ITA for extension of time to pay tax which was otherwise not paid within the time provided by statute. With those few contentions, he moved the Court to fault both the Board and the Tribunal on that point.

In reply, Mr. Gugami submitted that the alleged tax was paid in January 2015 after expiry of the relevant year of income on 31st

December 2014, because the appellant's year of income 2014 started on 1st January of that year. He contended further that the revision was sought outside the relevant year of income, so imposing the underestimated interest by the respondent was a lawful action. He argued that the said letter dated 7th January 2015 was analyzed by both the Board and the Tribunal and in both instances, findings were made, refusing to give any effect to the letter.

We have considered the arguments of both learned counsel and have also reviewed the necessary exhibits in question and the issue for our consideration, we think, is whether the respondent was wrong to impose tax in respect of interest for understated installment income tax in the year of income 2014. The relevant law is section 99 (1) of the ITA with the side notes "Interest for Understating Tax Payable by Installments." That section provides as follows:

> *"99 (1) This section applies where:*
>
> *(a) An installment payer's estimate or revised estimate of income tax payable for a year of income under*

section 89 which shall be used to calculate an installment of income tax for the year of income payable under section 88; shall be less than;

(b) 80 percent of the income tax payable by the payer for the year of income under section 4(1) (a) and (b) ("the correct amount)."

According to the records, in this case the amount of tax paid by way of installments was a total of TZS 10,700,000,000.00 and the correct amount of the income tax was TZS 15,016,157,980.70. The undisputed calculations that were made by the Board, the instalment tax was 71.3% of the actual tax. The amount self-assessed being less than 80% of the actual amount, the respondent was right to invoke his statutory powers to charge the tax as she did.

Secondly, Mr. Mukebezi challenged the respondent for not having considered and replied to the letter dated 7th January, 2015. His point was that, by failure to reply to the appellant's application contained in

that letter, and instead imposing the tax was an arbitrary act, hence illegal.

Mr. Gugami's reaction was that the letter, if it was aiming at seeking extension of time to pay the tax due, it ought to have been written in the relevant year of income, in this case the year 2014. Having been written in 2015, the letter was irrelevant and would not be treated as an application under section 79 (2) of the ITA, he insisted. His point was that the respondent could only be held responsible for having failed to attend to the letter had it been an application under the law, written and received in the year 2014.

We will start with section 79 (2) of the ITA which provides that: -

> *"(2) On **written application by a person,** the Commissioner,*
>
> *(a) **may, where good cause is shown extend the date on which tax or part of tax is payable including by permitting payment of the tax***

by instalments of equal *or varying* ***amounts;*** *and*

(b) shall serve the person with written notice of the Commissioner's decision on the application."

[Emphasis supplied].

Under the above section upon a written application by the tax payer, the Commissioner may extend the day for payment of tax upon application showing good cause supporting the prayer for extension of time. With that understanding we will proceed to the letter that the respondent is challenged for not having attended to presumably under section 79 (2) (b) of the ITA. The relevant substance of the letter dated 7th January, 2015 reads as follows:

"Dear Sir/Madame,

RE: REVISION OF AMENDED PROVISIONAL TAX

Reference is made on the caption above.

In the course of finalizing year end accounts for 2014 it was noted that there was omission of TZS. 6,872,398,077.56/= related to impairment of financial investment which was done after filing provisional tax leading to reduction of taxable income.

We are now amending provisional tax for quarter four from TZS. 2,000,000,000/= which is already paid to TZS. 2,900,000,000/= after taking into account the amount impaired and the same will be paid accordingly.

Your faithfully,

TANGA CEMENT COMPANY LIMITED."

With respect to Mr. Mukebezi, we read nothing in the above letter which would have compelled the respondent to respond to it. A careful reading of the letter reveals that it was informing the respondent of the omission the appellant had noticed while finalizing year end accounts which had led to the reduction in her taxable income. The letter further informs the respondent that the appellant would amend provisional tax

for quarter four. That letter has no request to the respondent for any extension of time to effect any payment of any tax. It is only an informative letter rather than a statutory application under section 79 (2) (a) of the ITA which would have necessitated action of the respondent under section 79 (2) (b) of the ITA. In a nutshell, the appellant usurped the respondent's power under the latter provision of the law.

In the circumstances, we find no offence with the silence of the respondent after receiving the above letter. In any event, Mr. Mukebezi did not refer us to any provision of law that the respondent breached by not replying to the letter, other than contending that she acted in an arbitrary manner which is, in our view, an unwarranted accusation. It is our considered opinion therefore, that the respondent was right for acting, presumably under section 99 of ITA, to impose the tax as appropriate. In the circumstances, the second ground of appeal fails; and we dismiss it.

In the event, this appeal has no merit, we hereby dismiss it with costs.

DATED at **DAR ES SALAAM** this 16th day of June, 2022

S. E. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

This Judgment delivered this 17th day of June, 2022 in the presence of Mr. Method Nestroy, learned counsel for the Appellant, Mr. Achileus Karumuna, Andrew Kombo and Trofmo Tarimo, learned State Attorneys for the Respondent, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL