IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., KEREFU, J.A., And KIHWELO, J.A.)

CIVIL APPEAL NO. 163 OF 2021

Q-BAR LIMITED .....APPELLANT

VERSUS

COMMISSIONER GENERAL,

TANZANIA REVENUE AUTHORITY.....RESPONDENT

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

(Mjemmas- Chairman)

dated 8th December, 2020
in
Tax Appeal No. 65 of 2019

.....

JUDGMENT OF THE COURT

6th & 16th June, 2022

KWARIKO, J.A:

This appeal has been preferred against the decision of the Tax Revenue Appeals Tribunal (the Tribunal), dated 8th December, 2020 in Tax Appeal No. 65 of 2019 that upheld the decision of the Tax Revenue Appeals Board (the Board), which was decided against the appellant, in that it was held liable to pay the tax assessed by the respondent.

The facts which gave rise to this appeal can be recapitulated as follows: the appellant is a dealer in various businesses namely; guest house, bar and restaurant. In the course of execution of his duties, the

respondent was informed by the Commissioner of Domestic Revenue that the appellant was not using Electronic Fiscal Device (EFD) machine in his business. That machine is used to record sales and taxes. Acting on such information, the respondent was prompted to conduct tax audit on the appellant's business for the years 2009, 2010 and 2011. The said audit revealed that the appellant was using both Electronic Cash Register (ECR) machine and EFD machine. It was discovered further that, the ECR machine was used to take the bills and issue receipts on different transactions conducted by the appellant. Since the ECR machine was not recognized by the tax authorities in the country, the respondent took the appellant's ECR machine and sent it to the supplier, the Business Machine Tanzania Limited (BMTL) for the purpose of retrieving data where both parties were involved. The technical team of the BMTL managed to retrieve information which showed that there was about a total of TZS. 334,000,000.00 of undeclared sales from the years 2009 to 2011. It was also discovered that the receipts produced by the ECR machine had the name of the appellant.

Consequently, on 6th December, 2012 the appellant was served with a notice of tax assessment (VAT certificate) amounting to TZS. 160, 427,856.00 and corporate tax of TZS. 66,828,495.58, TZS. 112,490,554.46 and TZS. 76,447,996.00 for the years 2009 to 2011.

Having been aggrieved by the respondent's assessments, on 18th December, 2012, the appellant lodged notices of objection against the assessments which was accompanied by an application for waiver. The objection was admitted, and thereafter, the parties exchanged several correspondences intended to settle the matter amicably but in vain. Following which the respondent issued to the appellant notices of non-agreement amended assessments of TZS. 61,257,761.40, TZS. 51, 309,125.70, TZS. 45,346,736.60 and TZS. 31,385,120.10.

Still dissatisfied, the appellant approached the Board and lodged Income Tax Appeals No.24, 25 & 26 of 2016, and VAT Appeal No. 4 of 2016 which were consolidated.

Before the Board the appellant challenged the assessment on the ground that its financial statements showed each year had its own figures and that the figures covered nine (9) years from 2003 to 2012 unlike what has been stated in the respondent's assessment. She argued, for instance, that in 2009 their accounts showed the total sales of TZS. 33,363,769.00 while the respondent's computation was TZS. 111,377,748.00. Likewise, for the year 2009 its accounts revealed that the total sales were TZS. 39,214,590.00 while the one calculated by the respondent indicated TZS. 111,377,748.00. The appellant adduced further that, he started using the ECR machine in 2003 to June 2012,

and sometimes from the year 2011 to 2012, the kitchen where the machine was used, was leased to one Willex Kabonge. The lease agreement in that regard was admitted as exhibit A-2. Thus, the appellant maintained that from 2011 he was not liable for the tax emanated from sales from the kitchen as it was used and controlled by someone else. Moreover, she challenged that the rental payments to Afriscan Group for the renting of the business premises, though not paid, ought to have been deducted from expenses which were incurred during the year of income wholly and exclusively in the production of income of the appellant.

Two issues for determination were framed by the Board, namely; whether the impugned assessments are valid in law and to what reliefs are the parties entitled. In respect of the first issue, the Board was of the view that the assessment was valid according to the law as the respondent was justified to do so. On the second issue, it observed that the respondent had correctly assessed the sum of TZS. 334,133,244.00. The Board was of the view that in tax matters the onus of proving whether the assessment or decision is excessive or erroneous is on the tax payer. Hence, it found that the appellant failed to prove that the assessments made by the respondent were erroneous hence not valid.

Again, and undaunted, the appellant preferred an appeal to the Tribunal on several grounds. Nevertheless, as afore said, the Tribunal had nothing to fault the decision of the Board henceforth it dismissed the appeal. Undeterred, the appellant has come to the Court on appeal upon the following grounds:

1. *The Honourable Tax Revenue Appeals Tribunal erred in law in its holding that the rental amounts payable to Afriscan Group were not incurred whole and exclusively in the production of income from the business;*
2. *That, the Honourable Tax Revenue Appeals Tribunal erred in law in holding that the appellant did not discharge her burden of proof as required to prove correctness of the figure of TZS. 334,133,244.00;*
3. *That, the Honourable Tax Revenue Appeals Tribunal erred in law in its holding that financial statements alone did not suffice to prove the fact that the assessment raised by the respondent were excessive, erroneous or invalid at law and;*
4. *That, the Honourable Tax Revenue Appeals Tribunal erred in law and fact in holding that the appellant was duty bound to produce her own ECR report and/or ECR sales receipts in order to prove the receipt produced by the respondent were erroneous.*

At the hearing of this appeal, the appellant was represented by Mr. Emmanuel Saghan, learned advocate, whereas the respondent was

represented by Ms. Consolatha Andrew, learned Principal State Attorney assisted by Mr. Hospis Maswanyia and Ms. Hadija Senzia, both learned Senior State Attorneys together with Ms. Maryam Ali, learned State Attorney.

Both counsel for the parties adopted their respective written submissions which were earlier on filed in terms of rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 to form part of their oral submissions.

In his submissions in support of the appeal, the appellant's counsel consolidated the second, third and fourth grounds into one ground featuring in the second ground of appeal. He thus argued the first and second grounds of appeal only.

As regards the first ground of appeal, the appellant's counsel argued that the Tribunal agreed to the fact that the rental amount had already been claimed by the appellant as an expense on accrual basis a conduct which was in compliance with sections 11(2), 21 and 23(1) (b) & (2) of the Income Tax Act, 2004 (the ITA). However, in its decision, it was observed that the rental amounts payable to Afriscan Group were not incurred wholly and exclusively in the production of income from the business. The learned counsel argued that, when it comes to matters of deduction of income, section 11 (2) of the ITA is applicable because it

requires such expenses to be whole incurred in such a particular income. He thus, distinguished the instant case from the case of **National Bank of Commerce v. Commissioner General, Tanzania Revenue Authority,** Civil Appeal No 52 of 2018 (unreported) which was relied upon by the Tribunal to determine the appeal because the facts in the two cases are different. He submitted that, contrary to the instant case where the appellant relied upon sections 21 and 23 of the ITA, in the cited case, the Court dealt with the provisions of bad debts in terms of section 25 of the ITA providing for preparations of accounts, returns and proposal for deductions.

As regards the second ground, it was argued that, the financial statements provided were sufficient to prove that the respondent's assessments were excessive because the appellant had correctly accounted for all her income for all years and the taxes were accordingly paid. He contended that from January 2011 the kitchen/restaurant business had been leased to Willex Kabonge as evidenced by the lease agreement (Exhibit A-2) and therefore, he was the one who was required to pay the taxes arising therefrom.

It was Mr. Saghan's further argument that the Tribunal also erred to disregard the said lease agreement for the reason of contravention of section 47 of the Stamp Duty Act [CAP 189 R. E. 2019]. He contended

that the mere nonpayment of stamp duty tax could not invalidate the lease agreement. The learned counsel fortified his argument with the Court's decision in **Elibariki Mboya v. Amina Abeid** [2000] T.L.R. 122 where it was held that failure to stamp the contract of sale was an irregularity not affecting the jurisdiction of the court and was cured by section 73 of the Civil Procedure Code [CAP 33 R.E. 2019]. On the basis of his submissions, Mr. Saghan implored us to allow this appeal with costs.

When prompted by the Court as to whether this appeal has complied with the provisions of section 25 (2) of the Tax Revenue Appeals Act [CAP 408 R.E. 2019] ("the TRAA"), that an appeal to this Court from a decision of the Tribunal lies on matters involving questions of law only, Mr. Saghan submitted that the appeal is both on matters of facts and law and prayed the Court to decide it on the questions of law.

On the part of the respondent, it was Mr. Maswanyia who addressed the Court. He declared the respondent's stance of not supporting the appeal. In relation to the first ground, he argued that the appellant has invited the Court to determine the applicability of sections 11 (2), 21 and 23 of the ITA. He submitted that sections 21 and 23 of the ITA deal with accounting principles on how the tax payer is supposed to account for his income. He argued that when it comes to

matters of deduction of income, section 11 (2) thereof is inapplicable in this respect because it requires such expenses to be whole incurred in such a particular income. Mr. Maswanyia contended that, equally sections 21 and 23 of the ITA are inapplicable in this case. It was his submission that, the appellant failed to prove that the rental amounts payable to Afriscan Group in renting his business was incurred during the year of income wholly and exclusively in the production of income from business. He substantiated his argument with the decision of the Court in the case of **National Bank of Commerce** (supra), which he submitted that its principle is applicable in the case at hand, contrary to the distinction the appellant's counsel has tried to make.

Regarding the second ground, the learned Senior State Attorney argued that the complaint is purely on the matters of facts as the appellant has called upon the Court to re-evaluate the entire evidence on record to determine the correctness of the figures to find out whether the appellant proved her case before the Board and the Tribunal, which is against the law.

In the alternative, Mr. Maswanyia argued that the lease agreement between the appellant and Willex Kabonge was not considered by the Tribunal because it was not part of the objection proceedings before the Commissioner General. For that reason, he argued that the lease

agreement was not the basis of the Tribunal's decision or even the assessment by the Board. He went on to submit that the basis of the assessment was the ECR machine which the appellant continued to use until the audit was established. The learned counsel contended that, even if the lease agreement could have been considered, still the decision of the Board and the Tribunal would have remained the same. And further that, even if the lease agreement was stamped still the decision of the Board as well as that of the Tribunal could remain the same.

Regarding the issue of the competence of the appeal which was raised by the Court, it was submitted by Mr. Maswanyia that the grounds of appeal have not raised any points of law as required under section 25 (2) of the TRAA. He argued that, instead, the grounds of appeal have raised factual issues which this Court has no jurisdiction to deal with thus renders the appeal incompetent. He submitted further that the appellant has only raised issues of law in the submissions in support of the appeal. He contended that, since issues of facts were properly considered and determined by the Board and the Tribunal, this Court has no jurisdiction to reconsider it on the strength of section 25 (2) of the TRAA. For the foregoing, the learned Senior State Attorney urged us to dismiss this appeal with costs.

In his rejoinder, Mr. Saghan insisted that, if the lease agreement would have been considered by the Board and the Tribunal, the decision would have been different.

We have considered the grounds of appeal and the submissions by the learned counsel for and against the appeal. We shall commence our deliberation with the legal issue that we have raised as to whether the appeal has complied with the provisions of section 25 (2) of the TRAA. For ease of reference, we reproduce this provision thus:

> *"Appeal to the Court of Appeal shall be on matters involving questions of law only and the provisions of the Appellate Jurisdiction Act and the rules made thereunder shall apply mutatis mutandis to appeals from the decision of the Tribunal."*

Essentially, this provision entails that an appeal to this Court from a decision of the Tribunal lies on matters involving questions of law only. This is not the first time that the Court is encountered with this issue; it has been discussed in its various decisions including the cases of **Atlas Copco Tanzania Limited v. Commissioner General, Tanzania Revenue Authority,** Civil Appeal No. 167 of 2019, **Shoprite Checkers (T) Limited v. The Commissioner General TRA** Civil Appeal No 307 of 2020 and **Jovet Tanzania Limited v.**

Commissioner General, Tanzania Revenue Authority, Civil Appeal No. 217 of 2019 (all unreported). For instance, in the latter case where some of the appellant's grounds of appeal raised issues of facts, the Court observed thus:

> *"We are of the decided view that this complaint raises purely factual matters which this Court has no jurisdiction to entertain. This Court is mandated to decide tax revenue matters involving points of law only as clearly provided under section 25 (2) of the Tax Revenue Appeals Act [CAP 408 R.E. 2010]."*

Likewise, in the case of **Atlas Copco Tanzania Limited** cited above, the Court emphasized the need for an intended appellant to specify the points of law which are alleged to have been wrongly decided by the Tribunal. The Court observed thus:

> *"In so far as tax appeals to the Court are concerned, an intending appellant must specify the **grounds of law** upon which the decision appealed against is objected in terms of section 25 (2) of the TRAA. He must specify **points of law** which are alleged to have been wrongly decided. It should be emphasized that, in an appeal from the Tribunal, matters of law must be evident on the face of the Memorandum of Appeal."*

Having gone through the law, the question which follows is whether the grounds of appeal in the instant appeal have met the criterion given thereon. Indeed, going through the record, it is our considered view that the appellant's complaints in all four grounds of appeal raise questions of facts which were sufficiently dealt with and settled by the Board and the Tribunal, thus they ought to end there.

With respect, we find the submissions by both counsel for the parties to be misconceived. This is so because, in his written submissions, the appellant's counsel instead of clarifying issues alleged in the grounds of appeal, he introduced new issues on points of law. We find this to be irregular as, in a written submission, a party to the appeal is expected to only explain and clarify the grounds of appeal before the Court and not to introduce new matters based on new views. We need to emphasize the principle that litigants should not be allowed to change their goal posts when new views are discovered in the course of litigation, unless expressly permitted by the law.

We have already shown the position of the law. It follows therefore that; this Court has no jurisdiction to determine the grounds of appeal which have only raised issues of facts. Since the issue that we have raised disposes of the appeal, we find no need to consider the grounds of appeal.

Consequently, we hold that the memorandum of appeal raises no questions of law contrary to section 25 (2) of TRAA and for the above stated reasons, we find the appeal non meritorious. Accordingly, we dismiss it with costs.

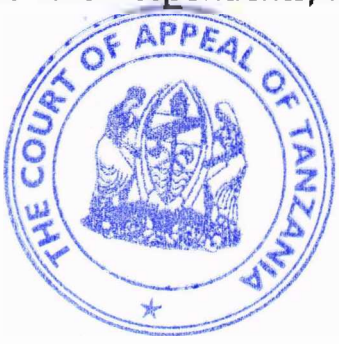
DATED at **DAR ES SALAAM** this 15th day of June, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 16th day of June, 2022 in the presence of Mr. Emmanuel Sagani, learned counsel for appellant and Mr. Trofmo Tarimo and Mr. Achileus Kalumuna, both learned State Attorneys for the Respondents, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL