**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM.**

**(CORAM: NDIKA, J.A., MWANDAMBO, J.A., AND KENTE, J.A.)**

**CIVIL APPEAL NO. 265 OF 2021**

**MLIMANI HOLDINGS LIMITED ..... APPELLANT**

**VERSUS**

**THE COMMISSIONER GENERAL ..... RESPONDENT**

**(Appeal from judgment and decree of the Tax Revenue Appeals Tribunal at Dar es Salaam.)**

**(Haji, Vice Chairperson)**

**dated the 30th day of April, 2021**
**in**
**Tax Appeal No. 66 of 2020**

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## JUDGMENT OF THE COURT

5th & 18th July, 2022

**MWANDAMBO, J.A.:**

The issue for our determination in this appeal is narrow but with significant importance. It involves a challenge on the interpretation of an agreement between two contracting states viz. the Governments of the Republic of South Africa and the United Republic of Tanzania. The dispute is centered on Article 7 of the Agreement for Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, henceforth the DTA, yet again before the Court for

determination on its interpretation. The tale behind the dispute is easy enough to comprehend.

Between the year 2013 and 2016, the appellant made payments to a South African entity, to wit, MDS Architecture, henceforth, the foreign consultant in the sum equivalent to TZS 1,500,549,808.00 as service fees for architectural services to its project in Tanzania. In terms of section 83(1) (b) of the Income Tax Act, (the Act), the appellant had an obligation to deduct 15% from the amount paid as withholding tax and remit it to the respondent. As the appellant did not make the deduction, it did not account for the said amount to the respondent by way of withholding tax returns for the relevant period.

Sometimes in 2017, the respondent conducted a tax audit on the appellant's affairs which revealed that the appellant had paid the foreign consultant an un-accounted sum of TZS. 1,500,549,808.00 as fees for the services rendered without deducting 15% from that amount and remitting it to the respondent on account of withholding tax. Whilst admitting that ordinarily, such amount was liable to 15% withholding tax, the appellant contended that it was exempt from deduction by reason of Article 7 of the DTA. The respondent contended that notwithstanding the DTA, such payment was liable to deduction because it did not constitute part of the business profits of the foreign payee

service provider falling within the scope of Article 7 of the DTA. Eventually, the respondent issued three withholding tax certificates demanding a total sum of TZS. 346,492,916.00 for the period 2013 to 2016.

Following an unsuccessful objection against the demand, the appellant appealed to the Tax Revenue Appeals Board (the Board). The appellant's case before the Board was that, it was not obliged to deduct the invoiced amount on the strength of Article 7 of the DTA which exempted the foreign consultant payee from withholding tax in Tanzania in which it had no permanent establishment and thus taxable in South Africa in which it was resident. The respondent's stance was that the DTA had no avail to the appellant in so far as the service fees paid to a foreign consultant was outside the scope of Article 7 of the DTA because it did not form part of its business profits and thus liable to withholding tax in Tanzania.

In its decision, the Board sustained the respondent's position. It held that the service fees were not embraced in the definition of business profits of the payee in the carrying of its business neither did it fall under any of the categories of the specific articles in the DTA. The Board reasoned that the service fees fell under Article 20 of the DTA which subjected such payment to withholding tax and, since the

appellant defaulted in accounting for it, the respondent was entitled to demand it as he did. On appeal, the Tax Revenue Appeals Tribunal (the Tribunal) concurred with the Board sustaining its decision resulting into dismissing the appeal.

Aggrieved, the appellant is now before the Court in this appeal predicated on one ground of appeal. She is faulting the Tribunal for the alleged erroneous interpretation of the DTA and holding that service fees paid to MDS Architecture were not covered under section 128 of the Act read together with Article 7 of the DTA.

Mr. Juvenalis Joseph Ngowi, learned advocate from Dentons EALC East African Law Chambers represented the appellant in this appeal and filed his written submissions in support of the appeal raising two interrelated issues. One, whether the service fees paid by the appellant to MDS Architecture in the years 2013 to 2016 ordinarily subject to tax under section 83(1) of ITA fell under Article 7 of the DTA. Two, whether the withholding tax certificates issued by the respondent reflecting a withholding tax liability were justified.

Mr. Hospis Maswanyia, learned Senior State Attorney, filed the respondent's written submissions in reply resisting the appeal urging the Court to dismiss it. We are indebted to both learned counsel for their industry unveiling valuable material in support of their respective

positions in their submissions. We shall be excused for our inability to make reference to each of them in the determination of this appeal not as a result of lack of courtesy to them, but due to the dictates of the issue involved in this appeal.

Essentially, the appellant's submission faults the Tribunal's approach in the interpretation of the DTA which is said to be erroneous. The learned advocate impressed upon the Court that the DTA traces its origin to the OECD Model Tax Convention and UN Model Treaties and thus their interpretation of the relevant articles by the courts in other jurisdictions has based on the Model Convention and Commentaries having a persuasive guidance to the interpretation of the relevant articles in the DTA. The learned advocate contended that a proper interpretation of the DTA should have followed the approach taken in other jurisdictions which have interpreted similar double taxation agreements.

A great deal of the history of the double taxation agreements and development in their interpretation occupied a significant space in the submissions of the learned advocate. This was meant to justify why it was wrong for the Tribunal to hold as it did that the term profits did not include service fee of the payee in the carrying out of its business within the context of Article 7 of the DTA. Reference was made to the

principles governing interpretation of tax treaties citing an excerpt from the judgment of Lord Denning in **Bulmer Limited v. S.A Bollinger** [1972] 2 All. ER 1226 for the proposition that such interpretation must look at the purpose as opposed to the words used in meticulous detail or be concerned about the precise grammatical sense. In addition, the learned advocate made reference to Article 3(1) of the Vienna Convention on the Law of Treaties of 1969 on the approach towards interpretation of international conventions based on good faith in accordance with the ordinary meaning used in their context in the light of its objects and purpose.

Further reference was made to the decision of the Supreme Court of South Africa in **Commissioner for the South Africa Revenue Service v. Tradehold Ltd** 2012, 3 All SA 15 to reinforce the application of the approach to the interpretation of the conventions based on giving effect to their purpose in a manner which is in harmony with the words used. In that case, the Supreme Court was interpreting a double taxation agreement between the Republic of South Africa and Luxembourg based on OECD Model Tax Convention. The learned advocate underlined an excerpt in the judgment underscoring that the DTAs use wording of a wide nature aimed at encompassing the various taxes generally found in the OECD member countries.

From the foregoing line of argument, the learned advocate sought to persuade the Court that the fees the appellant paid to MDS Architecture were for professional services or other activities of an independent character to the tax payer earning the income in her resident state who has the right to tax such income and not the state of the recipient of services considering that the payee had no permanent establishment so as to attract tax in Tanzania.

Mr. Ngowi could not mince words responding to the Court's question on the correctness of the approach he was championing in the light of the decision in **Kilombero Sugar Company Limited v. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 218 of 2019 (unreported). He was unrelenting in his oral address that the decision was erroneous. Even though he did not give notice under rule 106(4) of the Tanzania Court of Appeal Rules, 2009 (the Rules), he invited the Court in the course of hearing to depart from **Kilombero** for having taken a narrow approach in interpreting the DTA. Justifying his standpoint, the learned advocate contended that the Court's attention was not drawn to the OECD commentaries on the relevant Articles from the OECD Model Tax Convention from which the DTA traces its route as a result of which the Court gave a narrow view in interpreting the DTA. By reason of such approach, Mr. Ngowi argued,

the Court erroneously concluded that the service fees paid to the foreign consultant fell under Article 20 of the DTA subjecting it to withholding tax. Mr. Ngowi invited us to be persuaded by the foreign decisions which, according to him, have correctly interpreted similar agreements based on the OECD Tax Convention model to give effect to the DTA.

Resisting the appeal, Mr. Maswanyia stuck to his written submissions in reply in support of the decision of the Tribunal urging the Court to dismiss the appeal. Stripped off the nitty gritty of his submissions, the learned Senior State Attorney argued that the Tribunal rightly interpreted the DTA by holding that the service fees paid to the foreign consultant were not part of the payee's business profits envisaged under Article 7 of the DTA justifying the respondent's demand for the payment of the withholding tax from the appellant as he did. It was his further argument that as the service fees did not fall in any of the specific articles, it fell under Article 20. He was emphatic that except for interpretation of anti-avoidance tax provisions, it is trite law that tax statutes must be interpreted strictly. We think the latter argument is not necessarily correct in the context of the instant appeal considering that the Tribunal was not interpreting a tax statute per se but an international treaty. Otherwise, the learned Senior State Attorney was unmoved by the invitation to rely on foreign decisions in

interpreting the DTA considering that the Court had already pronounced itself on a similar issue in **Kilombero** followed subsequently in **Mantra (Tanzania) Ltd v. Commissioner General TRA**, Civil Appeal No. 430 of 2020 (unreported).

In his rejoinder, Mr. Ngowi reiterated his submissions and added that, the term service fees should be given a wider interpretation to be accommodated under the term business profits within the scope of Article 7 of the DTA. He reiterated that even though the appellant had not properly moved the Court to depart from its previous decisions in **Kilombero** and **Mantra** (supra) it had discretion to do so to give a proper interpretation to the DTA, subject of the appeal.

Having examined the written submissions and heard oral arguments for and against the appeal, the critical issue for our determination is whether the service fees paid to the foreign consultant constituted part of the business profits covered by Article 7 of the DTA. An affirmative answer to the issue attracts an inevitable holding that the appellant had no obligation to deduct from the fees paid to the foreign consultant withholding tax payable to the respondent, hence, the demands in the withholding tax certificates in the amount of TZS. TZS 346, 462,916.00 were invalid and vice versa.

As alluded to earlier on, the interpretation of the DTA is not new before this Court. It featured as one of the interrelated issues for the Court's determination in **Kilombero** where the appellant challenged the decision of the Tribunal which, like here, made a similar interpretation of the DTA. That case involved a dispute over the liability to remit withholding tax on service fees paid to a South African entity who had provided management services to her. Like in the instant appeal, Kilombero was caught up in a demand for withholding tax which it failed to deduct from the service fees it had paid to her foreign service provider. Again, as it is the case in the instant appeal, Kilombero argued that the service fees it paid constituted part of the business profit of the South African consultant payee which were not liable to withholding tax.

It is apparent from the judgment that, the learned counsel for Kilombero had reinforced his arguments on the OECD commentaries as well as a book titled: **International Tax Policy and Double Taxation Treaties,** 2nd edition 2014 by Kevin Homes with a view to persuading the Court to hold that the service was covered under Article 7 of the DTA. The Court took a different view. It endorsed the Tribunal's decision which had held that the service fees were outside the scope of Article 7 (1) rather, Article 20 of the DTA. After revisiting the two articles the Court stated:

> *"Flowing from the above, as service fee is an item which does not feature anywhere in the Double Taxation Agreement, Article 20 becomes handy, .....it is our considered view that, as per the Double Taxation Agreement, service fees by a South African entity for provision of professional services to a Tanzanian entity, do not form part of business profits provided for under Article 7 of the Double Taxation Agreement which is not taxable in Tanzania but fall under Article 21 of the Double Taxation Agreement and thus subject to withholding tax in terms of section 83 (1) (b) of the ITA, 2004."* [At page 25].

Few months later, a similar issue involving a dispute on the liability to withholding tax by another South African entity which had rendered services to a Tanzanian entity, arose in **Mantra (Tanzania) Limited** (supra). The Court reaffirmed its position in **Kilombero** and dismissed Mantra's argument for being untenable.

We heard Mr. Ngowi arguing with deep conviction that **Kilombero** was decided without the benefit of arguments based on OECD Model Tax Convention Commentaries hence taking a narrow interpretation of the DTA. It is against that argument that the learned advocate championed for a departure from **Kilombero.** With unfeigned respect,

Mr. Ngowi's argument falls on the face of the very judgment he wants us to depart from. As seen earlier, the OECD Commentary in the Materials on International TP and EU Tax Law and International Tax Policy and Double Tax Treaties (supra) were placed by Kilombero's counsel to persuade the Court accept the argument that the service fee was not liable to withholding tax it was caught up by Article 7 (1) of the DTA. The Court felt unmoved to interpret the DTA in line with the learned counsel for the appellant in that appeal. Mindful of the doctrine of precedent, the Court rejected the arguments by the learned advocate and sustained the Tribunal's decision.

Quite unfortunate to the appellant, the Court is bound by its decision in **Kilombero** reaffirmed in **Mantra** on similar factual setting except for the parties involved. In any case, despite Mr. Ngowi's submission and invitation to depart from the position taken in the two cases, the Court has not been properly moved to take that route if we were minded to agree with his argument. The learned advocate conceded as much on the noncompliance with rule 106 (4) of the Rule which states:

> *"(4) Where the parties intend to invite the Court to depart from one of its own decisions, this shall be clearly stated in a separate paragraph of the*

*submissions, to which special attention shall be drawn, and the intention shall also be restated as one of the reasons."*

That has not been done in the written submissions neither did Mr. Ngowi intend to do so before the commencement of the hearing of the appeal. He did so in answer to the Court's question. Be that as it may, it is now settled that departing from a previous decision cannot be undertaken by an ordinary court rather, a full bench empaneled by five justices which may entail overruling the previous decision if the Court sees justification to depart. See: **Freeman Aikaeli Mbowe v. Alex O. Lema & Another**, Civil Appeal No. 84 of 2001 (unreported), **Abually Alibhai Aziz v. Bhatia Brothers Ltd** [2000] T.L.R. 288, **National Microfinance Bank v. Commissioner General, TRA**, Civil Appeal No. 168 of 2018 and **Ophir Tanzania (Block 1) v. Commissioner General, TRA**, Civil Appeal No. 58 of 2020 (both unreported).

It is thus obvious that despite Mr. Ngowi's urging, it would not have been opportune for us to accept his invitation and consider departing from **Kilombero** in the manner he submitted.

The above said, consistent with our decision in **Kilombero,** we hold that the service fees the appellant paid to MDS Architecture did not constitute part of the business profits of the payee and thus liable to

withholding tax in Tanzania. Consequently, as the appellant did not remit the withholding tax in accordance with section 83 (1) (b) of the Act, the respondent was entitled to issue the impugned withholding tax certificates as he did.

In the event, we find no merit in this appeal and dismiss it with costs.

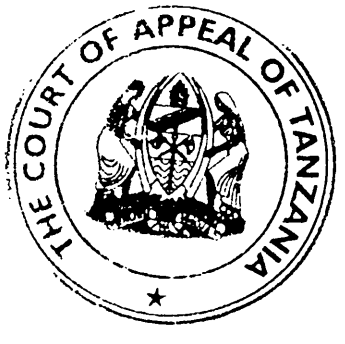
**DATED** at **DAR ES SALAAM** this 15th day of July, 2022.

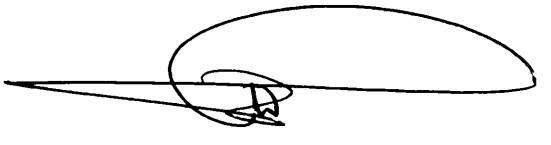
G. A. M. NDIKA
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO
**JUSTICE OF APPEAL**

P. M. KENTE
**JUSTICE OF APPEAL**

The Judgment delivered this 18th day of July, 2022 in the presence of Mr. Walter Massawe, learned counsel for the Appellant and Mr. Andrew Francis, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



J. E. FOVO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**