IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: JUMA, C.J., MWARIJA, J.A. And MZIRAY,J.A.)

CIVIL APPEAL NO 52 OF 2018

NATIONAL BANK OF COMMERCE.....APPELLANT

VERSUS

COMMISSIONER GENERAL
TANZANIA REVENUE AUTHORITY.....RESPONDENT

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

(Hon. Fauz Twaib, J.)

dated the 20th day of July, 2017
in
Tax Appeal No. 23 of 2015

JUDGMENT OF THE COURT

27th June & 9th July, 2018

JUMA, C.J.:

The appellant NATIONAL BANK OF COMMERCE is a financial institution engaged in banking business in Tanzania, and for purposes of this appeal this bank is an income tax payer. The respondent, THE COMMISSIONER GENERAL is the Chief Executive Officer of the Tanzania Revenue Authority, a body corporate established under section 4 of the Tanzania Revenue Authority Act (Cap 399) for purposes of assessment and collection of revenues. For purposes of this appeal the respondent is charged with

administration of the Income Tax Act, 2004 (hereinafter referred to as **"the ITA, 2004"**).

The appellant was assessed, by way of Notices of Assessment Nos. F42015050544, F420150547 and F420150227, to pay income tax of Tshs. 4,749,673,077.00 for the years 2005, 2006 and 2007 respectively. Aggrieved with the assessment of tax for those three years of income, the appellant invoked section 12(1) of Tax Revenue Appeals Act (Cap 408) to object to the respondent's decision to treat the appellant's impairment provisions as non-tax-deductible. This treatment, according to the appellant, was based on the respondent's narrow interpretation of section 25 of the ITA, 2004.

The objections were to no avail, because the respondent stuck to the assessment which prompted the appellant to lodge three Appeals to the Tax Revenue Appeals Board at Dar es Salaam (hereinafter referred to as **"the Board"**) in Income Tax Appeal Case DSM Nos. 38, 39 and 40 of 2012. These appeals to the Board were later consolidated into one Tax Appeal No. 38 of 2012.

At the Board the Appellant complained against the decision of the respondent to refuse to deduct the provision for impairment of its bad

debts arising from the assessment of the years of income 2005, 2006 and 2007. According to the appellant, the respondent had wrongly rejected the deductibility of bad debts which the appellant believed warranted to be written off. And in so far as the appellant is concerned, the deductions are allowable under the financial laws as prescribed by the Bank of Tanzania. And by disallowing the deduction, the appellant contended that the respondent has misinterpreted the provisions of section 25(5) of the ITA, 2004.

The parties at the Board raised three main issues for determination by the Board: **first,** whether the making of provisions for impairment of bad debts and doubtful debts is permissible under the law, and whether it qualifies for deductions under the Income Tax Act, 2004 ("**the ITA, 2004**"). **Second,** whether the making of provisions for reserves is permissible under the law; and **third,** whether the Board is bound by the decision of the Tribunal in **Barclays Bank Tanzania v Commissioner General**, Income Tax Appeal No. 3 of 2011.

Hearing at the Board was by way of written submissions. On appellant's behalf it was submitted in the Board that the appellant had earlier reported its bad debts after they had been written off in accordance

with the Banking and Financial Institutions Act, 2006 (Cap 42) and the Banking and Financial Institutions (Management of Risk Assets) Regulations, 2008 (GN No. 374/2008). It was also pointed out that the appellant complied with the applicable accounting principles whereby during every accounting period, existence or otherwise of doubtful or impaired debts are first established, and if impairment exists, the impairment that is established is charged to the account.

On the respondent's behalf, it was submitted before the Board that for income tax purposes, a person can only enjoy a deduction on losses arising from debt claims, when the debt has been actualized and for financial institution, that debt must have been both realized in terms of section 39 of the ITA, 2004, and also written off after all recovery mechanisms have failed. It was argued that the deduction which the appellant was seeking had not been realized in accordance with Section 39 of the ITA, 2004. Those doubtful debts are mere estimates or probable loss which may be recovered if proper measures are put in place for their recovery. It was further submitted that the appellant neither provided the list of accounts which were written off nor evidence to prove that they were uncollectible.

After hearing the opposing submissions, the Board made a finding that the provisions for impairment of bad debts and doubtful debts is permissible under the law, but only when the debts have been actualized and all debt have been realized as well as written off from the books of account after all recovery mechanisms have failed. The Board further held that section 25(a) and (b) of the ITA, 2004 provides two conditions before a tax payer can qualify for deduction of bad debts. The Board went on to note that the appellant, being a financial institution, its bad debt must be in accordance with guidelines issued by the Bank of Tanzania (BOT). The Board further observed that, to compute the income that is taxable, the business losses which the taxpayer incurred are to deductible in accordance with section 11 of the ITA, 2004 read together with sections 18, and 39(d) of the ITA, 2004. The Board also highlighted the burden of proof which section 18(2)(b) of the Tax Revenue Appeals Act, Cap 408 places on the appellant tax payer to prove that the bad debt or loss, over which deduction is sought, had been realized in accordance with sections 18 and 39 of the ITA, 2004. Accordingly the Board dismissed the appeal.

Aggrieved with the decision of the Board, the appellant appealed to the Tax Revenue Appeals Tribunal at Dar es Salaam in Tax Appeal No. 23

of 2015 (hereinafter referred to as **"the Tribunal"**). The appellant relied on the following four grounds:

> *1.-That the Honourable Board erred in law when it held that making of provisions for impairment of bad and doubtful debts is permissible under the law only when the debts have been actualized and all debt have been realized and written off from the books of accounts after all recovery mechanisms have failed.*
>
> *2.- The Honourable Board erred in law when it held that making of provisions for reserve is not permissible under the Income Tax Act, 2004.*
>
> *3.- The Honourable Board erred in law and fact when it held that the Appellant failed to substantiate in the balance of probability how the provisions for regulatory reserves qualify for deduction under the Income Tax Act, 2004.*
>
> *4.- The Honourable Board erred in law when it failed to determine the case before it on its own merits.*

The main issue agreed upon for the determination by the Tribunal was, whether it is necessary for impairment of losses to qualify for deduction, the bank must write them off.

In its decision, dismissing the appeal, the Tribunal determined that the appellant had not shown that its debt had been written off from its books of accounts, which is one of the two conditions before the appellant could rely on section 25(5) of the ITA, 2004. In a nutshell, the Tribunal held that the appellant could not rely on the deductions.

Still determined, the appellant brought this appeal to this Court on three grounds. Standing out is the ground faulting the Tribunal for holding that the Appellant could not have qualified for deduction because it has not shown that the debt had been written off from its books of accounts.

When the appeal came up for hearing three learned counsel, Mr. Allan Kileo, Mr. Wilson Mukebezi and Ms. Salome Gondwe appeared for the Appellant. Mr. Juma Salum Beleko, learned advocate, appeared for the Respondent.

Mr. Mukebezi premised his submissions by explaining why he thought the Tribunal was wrong to rely on the provisions of section 39(d) of ITA, 2004 to conclude that realization of a debt by a financial institution like the appellant is predicated on two conditions. First condition is that the debt must have become a bad debt in accordance with standards set by the Bank of Tanzania (BoT). The second condition is that the financial

institution concerned must have written off the debt as bad. And that the appellant had not shown that the debt had been written off from its books.

Beginning from section 21 (1) of the ITA, 2004, the learned advocate for the appellant demonstrated why he thinks the Tribunal erred. This provision, he submitted, oblige taxpayers to account for their income in accordance with generally accepted accounting principles. Amongst these generally acceptable accounting principles, he continued, include regulation 15 (4) of the Banking and Financial Institutions (Management of Risk Assets) Regulations, 2001 (which he referred to as **"the BoT Regulations"**). According to the BoT Regulations, once a loan is classified as a loss, it has to be taken out in the period in which it appears as uncollectible. In other words, that loss has either to be charged off or written off from the financial statements of the bank as provided for by regulation 7 which states:

> *"(7) Every bank and financial institution shall* ***charge off or write off*** *all loans classified loss at the end of every quarterly review. Recoveries out of the charged off accounts shall be recognized as per requirement of the National Board of Accountants and Auditors (NBAA) accounting standards and guidelines."*

Mr. Mukebezi next submitted on how, guided by the Banking and Financial Institutions (Management of Risk Assets) Regulations, 2001, the appellant charged off loss that arose from "non-performing loss," and in so doing relied on section 25(4) (a) of the ITA, 2004 which states—

> *"25(4) Subject to the provisions of subsection (5), where in calculating income on an accrual basis a person includes an amount to which the person is entitled and the person later—*
>
> (a) *Disclaims an entitlement to receive the amount; or"*

Mr. Mukebezi expressed his regrets on how the respondent, relying on sections 18 (b) and 39 (d) of the ITA, 2004, had refused to allow the charging-off the non-performing loss on the reasoning that the loss must have been written off from the appellant's account. Mukebezi extended his regrets to the Board, which had earlier on supported the respondent's position.

Mr. Mukebezi urged us to accept the appellant's position that section 25(4) and 25 (5) of the ITA, 2004 should be applied and that we should reject the respondent's reliance on sections 18(b) and 39(d) of the ITA, 2004. The learned advocate for the appellant also submitted that it is

wrong to hold that deductable bad debts must be written off. He referred us to regulations 20 and 21 of the BoT Regulations which allow banks to provide for 100% deduction on loans which are classified as loss, and that these BoT regulations are reflected in section 25 (5)(a) of the ITA which provides:

> *"A person may disclaim the entitlement to receive an amount or write off as bad debt claim of a person—*
>
> *(a)-in the case of a debt claim of a financial institution, only after the debt claim has become a bad debt as determined in accordance with the relevant standards established by the Bank of Tanzania."*

According to the appellant's learned advocate, the above-cited section 25 (5) (a) of the ITA, 2004 gave the appellant an option to disclaim an entitlement to receive the amount (charging off) or to write off the loan which in this case had, according to the appellant's learned advocate, already been approved by the Bank of Tanzania (the BoT). That is, in case a taxpayer chooses to disclaim the entitlement to recover the loans in a given year of income, the specific losses approved by the BoT becomes expenditure on the part of the taxpayer for that specific year of income. That, in light of the option the appellant had under section 25(4) (a) of the

ITA, 2004, Mr. Mukebezi argued that the Board, the Tribunal as well as the respondent, were all wrong to demand writing off of the bad debts. He submitted also that the route taken by the respondent through section 18(b) and 39(b) of ITA, 2004 is also wrong.

On his part, Mr. Juma Salum Beleko, the learned advocate for the respondent, came out in full support of the decision of the Tribunal and urged us to dismiss the appeal for want of merit. He stated that it is the respondent, and not the BoT, that has the statutory authority and power to collect taxes, including the administration of the Income Tax Act, 2004.

Mr. Beleko then took time to outline the salient statutory provisions of the ITA, 2004 which are applicable to this appeal as opposed to the provisions cited by Mr. Mukebezi. He highlighted the significance of section 18 of the ITA 2004. This provision is important, he submitted, because it provides guidance in calculating a tax payer's income, and it also guides the calculation the deduction of loss incurred during a year of income from a business. He insisted that this is the provision which guides taxpayers like the appellant, when they incur loss, on how to make deductions for that loss. He referred us to section 3 of the ITA, 2004, which defines what a debt claim is. Mr. Beleko similarly underscored the significance of section

36 of the same Act, which guides taxpayers like the appellant, in calculating gains and losses so important in determining the taxpayers' respective tax liabilities.

Mr. Beleko went on to submit that for a financial institution like the appellant, section 39(d) of the ITA, 2004 provides the ultimate guide for deduction of bad debts. He urged us to find that the provisions of section 25(5) (a) of the ITA, 2004 which was suggested to us by the appellant's learned advocate, are not applicable because no other provision is as significant as section 39(d) of the ITA, 2004 in deductions of bad debts. Section 39(d), he went on, sets out the basic conditions precedent before deductions of bad debts can be accepted by the respondent. In so far as Mr. Beleko is concerned, conditions outlined under section 39(d) are backed by the logic that the appellant bank should not be allowed deduction of debts which they can still pursue and realize by selling off their collaterals. The learned advocate urged us to hold that with the existence of very clear conditions provided under section 39(d) to guide deduction of bad debts, there is no room for the appellant to peg its deduction of bad debts under the BoT Regulations.

Mr. Beleko was emphatic in his submission that the appellant cannot rely on any other laws to guide the determination of bad debts where the ITA, 2004 has prescribed applicable provisions as administered by the respondent. In so far as he is concerned, the BoT Regulations cited by the appellant's learned advocate are not income tax provisions. The provisions of the ITA, 2004 override and take precedence over any other laws, including the BoT Regulations referred to by Mr. Mukebezi. And on that emphatic note, Mr. Beleko urged us to dismiss the appeal in its entirety, and with costs.

Mr. Mukebezi was quick in his rejoinder, to remind Mr. Beleko that section 25(5) (a) of the ITA, 2004 makes a direct reference to the BoT Regulations, and to that extent those BoT Regulations are part of the ITA, 2004:—

> *"25(5) A person may disclaim the entitlement to receive an amount or write off as bad a debt claim of the person—*
>
> *(a) in the case of a debt claim of a financial institution, only after the debt claim has become a bad debt as determined in accordance with the relevant standards established by the Bank of Tanzania;"*

With that remainder, Mr. Mukebezi urged us to ensure that the provisions of the ITA, 2004 and the BoT Regulations are harmoniously constructed to enable the appellant to prepare its books of accounts and make proper claims for deductions of bad debts and losses. The learned counsel urged us to take note of the way Mr. Beleko studiously avoided to submit on the choice of options available to the appellant under section 25 (5) (a) of the ITA, 2004 which is in full compliance with the BoT Regulations.

Once again, Mr. Mukebezi through his rejoinder, urged us to overturn the decision of the Tribunal and allow this appeal with costs.

From the grounds of appeal and submissions thereon, it seems clear to us that this appeal centres on the identification and interpretation of provisions governing losses arising from bad debts which are deductable for income tax purposes. Mr. Mukebezi, the appellant's learned advocate, has on one hand staked a position that if we accept that sections 21 (1), 25 (4), (5) read together with the BoT Regulations are applicable, the appellant bank is entitled to claim a deduction of its bad debt without having to write off the debts concerned from its books of accounts.

Mr. Beleko, the respondent's learned advocate, has on the other hand, urged us to resort to sections 3, 18 and specifically 39(d). While agreeing that section 39 (d) also provides that debt claim may become a bad debt as determined in accordance with the relevant standards established by the Bank of Tanzania, Mr. Beleko was quick to point at a condition in the same section 39 (d) of ITA, 2004 which requires the appellant to write off that debt from the appellant's book of accounts.

After hearing the submissions of the learned advocates of both sides on the grounds of appeal and on the salient background facts, the main area of contention between the two opposing sides which calls for our determination, is which provisions of the Income Tax Act, 2004 are applicable to the deductibility of the Appellant's impairment provisions; that is, between section 25 (5) of the ITA, 2004, on one hand, and sections 18(b) and 39(d) of the ITA, 2004, on the other hand.

This Court considers that the choice between which set of the provisions of the Income Tax Act, 2004 that are applicable to the deductibility of the Appellant's impairment provisions is as much about statute interpretation.

Courts in Tanzania are bound to apply plain language of a Statute to give effect to the intention of the Legislature. In **CHIRIKO HARUNA DAVID V. KANGI ALPHAXARD LUGORA & TWO OTHERS,** Civil Appeal No. 36 of 2012 (unreported), the Full Bench of this Court at page 17, reiterated the need to employ the plain meaning of the words to discover the intention of the Legislature in a Statute:-

> *"...We wish to observe here by way of emphasis, even if it is at the expense of repeating ourselves, that one of the cardinal rules of construction is that courts should give legislation its plain meaning."*

It is noteworthy to observe that the ITA, 2004 is divided into Parts, Divisions and sub-divisions, each is further divided into sections, sub-sections, paragraphs etc, catering for various aspects of the income taxing regime in Tanzania. Every provision under these provisions must be given effect to. As was stated in **COLORADO GENERAL ASSEMBLY, Office of Legislative Legal Services, "Common Applied Rules of Statute Construction:"**

> *"Statutes are to be read as a whole, in context, and, if possible, the court is to give effect to every word of the statute. The court is bound to give consistent,*

harmonious, and sensible effect to all of the parts of a statute, to the extent possible."

In **CHIRIKO HARUNA DAVID V. KANGI ALPHAXARD LUGORA** (supra) the Full Bench of the Court added:

> *"The traditional wisdom is that the search for legislative intent is central to statutory interpretation. And the legislature's intent is normally ascertained from the words it has used. The word used may be found in the title, preamble, chapter headings, marginal notes, punctuations, definitions, etc. of the statute."—page 18.*

Section 25 (5) of the ITA, 2004, on one hand, and sections 18(b) and 39(d) of the ITA, 2004, on the other hand, are all part of the same Statute, the Income Tax Act, 2004. Each provision was intended for distinct purpose, and it is the duty incumbent upon the courts to do just that. As such, these provisions require harmonious construction to give effect to every word used. In **BULYANHULU GOLD MINES LIMITED V. COMMISSIONER GENERAL (TRA),** Consolidated Civil appeals No. 89 & 90 of 2015 (unreported) the Court stated the following on harmonious construction of Tax statute:

"...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. ...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."

Later on page 20, the Court in **BULYANHULU GOLD MINES LIMITED** warned that *"Income Tax Act must be read as a whole and it is dangerous to read it in piecemeal."*

Section 25(5) (a) of the ITA, 2004 which the appellant has placed great reliance on, falls under Part III of sub-division [A] of Division II, which is titled as *"Tax Accounting and Timing"*. We are not in any doubt that the intention of the Legislature is to devote this area of the provisions of the ITA covering sections 20 to 26 for purpose of providing guidance to tax payers like the appellant. These provisions guide in the preparations of tax returns before presenting the same for assessment by the respondent Commissioner General.

In other words our reading of section 25(4) and 25(5) (a) of the ITA shows one gets the impression that in the preparations of its tax accounts to be assessed by the respondent, the appellant is given the opportunity to indicate therein, what debt claim has in the appellant's accounting, become a bad debt ripe for deduction by the respondent and this will also include proof to the respondent that the bad debt the appellant proposes for deduction when the respondent finally makes its final tax assessment. The relevant subsections (4) and (5) (a) of section 25 states:—

> *"25(4) Subject to the provisions of subsection (5), where in calculating income on an accrual basis a person includes an amount to which the person is entitled and the person later—*
>
> (b) *disclaims an entitlement to receive the amount; or*
> (c) *in the case where the amount constitutes a debt claim of the person, the person writes off the debt as bad, the person may, at the time of disclaimer or writing off, deduct the amount disclaimed or written off in calculating the person's income.*
>
> *(5) A person may disclaim the entitlement to receive an amount or write off as bad debt claim of a person—*

(a)-in the case of a debt claim of a financial institution, only after the debt claim has become a bad debt as determined in accordance with the relevant standards established by the Bank of Tanzania."

In so far as "deductions" are concerned, the governing provisions are covered in subdivision I [D] of Part III, expressed under sections 11 to 19. From the plain meaning and harmonious construction shows that the intention of the Legislature here is that, after receiving the accounting reports or returns from taxpayer like the appellant, the respondent makes its own assessment, and has a final word on whether any item is deductible.

In subdivision A of Division III of Part III, there are sections 36 to 41 which include section 39(d), wherein Legislature intended to provide guidance to the respondent in the calculation of gains and losses, cost of assets and realization etc.

We reckon that sections 25(4), (5) of the ITA, 2004 on one hand, and sections 18 and 39(d) of the ITA, 2004 are not in conflicting positions. They are harmonious in so far as they provide for distinct matters. While sections 25(4), (5) provide for the preparation of accounts, returns and

proposal for deductions, sections 18 and 39(d) of the ITA, 2004 gives the respondent the leverage to receive returns and accounts from taxpayers and enjoys finality in the assessment, allowing or disallowing deductions.

Much as the appellant has sought refuge under section 25(5) (a) of the ITA, 2004, we must point out here that the appellant did not discharge its evidential burden to prove that it complied with any one of the two options the appellant claimed to have complied with under section 25 (5) (a) of the ITA, 2004. The appellant has not shown which option it had complied with. There is no evidence to show whether the appellant exercised the option of disclaiming any entitlement to receive the amount (which it described as charge off).

At the Board where the appellant had the opportunity to present evidence to prove its compliance with section 25(5) (a) of the ITA, 2004, only sweeping statements were made by their learned advocates without so much as backing up the same with evidence. An example is where the Board was informed:

> *"Honourable Vice Chairperson and Members of the Board, according to the generally accepted accounting principles, and particularly the generally accepted*

accounting principles applicable to financial institutions and which were previously accepted by the Respondent, the Appellant reported and accounted for, inter alia, the following:

(a)- Bad debts;

(b)-Risk assets (comprising exclusives and doubtful debts); and

(c)-Reserves.

Bad debts were reported after being duly written off as required by the generally accepted accounting principles and as regulated by law in accordance with the ***Banking and Financial Institutions Act, 2006*** *[Cap. 342] and the* ***Banking and Financial Institutions (Management of Risk Assets) Regulations, 2008*** *[GN No. 374 of 2008] (hereinafter collectively referred to as "the Regulatory Laws").*

There is similarly no evidence to justify the appellant's claim that the Bank of Tanzania had approved any loan loss of the appellant to be written off. For instance, on page 14 of the Supplementary Record of Appeal the appellant claims that it had received approval letters from the Bank of Tanzania which is not evidenced on record:

"...For the years of income 2005, 2006 and 2007, total annual amounts of TAS 1,499,000,000, TAS 3,537,000,000, and TAS 5,134,000,000 were established and ***charged to the impairment account after receiving approval from the Bank of Tanzania (BoT) that the ascertained amounts complied with the Regulatory Laws. The BoT approval letters*** *were served upon the respondent together with the notices of objection."* [Emphasis added].

For the foregoing reasons, this appeal is devoid of merit and the same is hereby dismissed in its entirety with costs.

DATED at **DODOMA** this 6th day of July, 2018.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL