

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUSSA, J. A., MUGASHA, J. A. And LILA, J. A.)

CIVIL APPEAL NO. 121 OF 2018

PANAFRICAN ENERGY TANZANIA LTD APPELLANT

VERSUS

COMMISSIONER GENERAL (TRA)RESPONDENT

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

(Mjemmas, J. Mwaibula & Mandari, Members)

dated the 26th day of March, 2018

in

Tax Appeal No. 11/2017

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JUDGMENT OF THE COURT

29th March & 12th June, 2019

MUSSA, J.A.:

This is an appeal against the judgment and decree of the Tax Revenue Appeals Tribunal (TRAT) dated the 26th March 2018 in Tax Appeal No. 11 of 2017. The factual background giving rise to the appeal is free of controversy and may be recapitulated as follows:-

The appellant, a limited company incorporated in Tanzania, is a producer and supplier of gas for power generation at the Ubungo

Power Plant in Dar es Salaam. She also supplies natural gas to industrial and commercial customers in Dar es Salaam area, just as she also supplies Compressed Natural Gas (CNG) for use in motor vehicles.

On the 30th June, 2016 the respondent issued to the appellant a notice of amended assessment No. F421047198 through which the former informed the latter that her grand tax liability was to the tune of Shs. 46,547,072.80 A copy of the referred notice of amended assessment was adduced into the record of the Tax Revenue Appeals Board (TRAB) as exhibit A5 and is reflected at page 93 of the record of appeal. Contemporaneously, the respondent issued to the appellant a notice of original/adjusted/assessment No. F.13890 through which the former imposed on the latter a tax liability to the tune of Shs. 7,071,095,810.33. The notice of assessment was just as well adduced into the record of the TRAB as exhibit A1 and the same is similarly reflected at page 84 of the record of appeal.

Dismayed by the two notices, on the 14th July, 2016 the appellant wrote two letters to the respondent in which she pointedly

informed her that she intends to object to the assessments in accordance with the provisions of section 51(1) of the Tax Administration Act, No. 10 of 2015 (the TAA). In the premises, the appellant made a formal request to the respondent for a waiver of the assessed tax under Regulation 95 of the Tax Administration Regulations, 2016. The referred letters constituting the waiver request were adduced into the record of the TRAB as exhibits A2 and A6 which are respectively, reflected at pages 85 and 95 of the record of appeal. Subsequently, on the 26th July, 2016 the appellant formally lodged two notices of objection as against assessment Nos. F13890 and F. 421047198. The Notices were adduced into the record of the TRAB as, respectively, exhibits A3 and A7 and the same are, again respectively, reflected at pages 87 and 99 of the record of appeal.

In the meantime, on the 25th and 28th days of July, 2016 in response to the appellant's request for waiver of tax assessment Nos. F13890 and F. 421047198 the respondent wrote and, in both letters, she informed the appellant that the reasons advanced in her quest for waiver will be reviewed at the objection proceedings and, in the upshot, she concluded thus:-

"Therefore, we wish to inform you that the Commissioner has not found good reasons warranting the waiver of tax deposit. Your application for waiver has not been accepted. You are required to make deposit on submission of the objection as required under section 51(5) of the TAA otherwise the objection will not be admitted." [See Exhibits A4 and A8 at pages 91 and 108 of the record of appeal.]

In this regard, it is noteworthy that section 51(5) of the TAA provides that an objection to any tax decision shall not be admitted unless the taxpayer has paid the amount of tax which is not in dispute or one third of the assessed tax, whichever amount is greater.

Dissatisfied by the respondent's refusal to grant her requested waiver, the appellant lodged, in the TRAB, two statements of appeal with respect to assessment Nos. F.421047198 and F.13890 (see pages 22 and 45 of the record of appeal,). In the statements, the appellant

purportedly predicated the appeal under section 16(1) of the Tax Revenue Appeal Act, Chapter 408 of the Laws (the TRAA) as well as Rule 6(2) of the Tax Revenue Appeals Rules comprised in G.N. 57 of 2001. The statements were, respectively, lodged on the 29th July, 2016 and the 3rd August 2016, in consequence whereof Tax Appeals Nos. 126 and 128 were instituted (See pages 22 and 45 of the record of appeal). The two appeals were consolidated and, at the height of the hearing, on the 19th July, 2017 the TRAB handed down its judgment in which, to begin with, it made a finding that the issues raised by the appellant in her application for waiver are to be determined during the objection stage. Nonetheless, in the upshot, the TRAB somewhat reduced the amount to be paid thus:-

"Finally, for justice to take its course and for the objection to be admitted and determined, we order the appellant to pay less amount which is 5% of the assessed tax of Tshs. 46,547,072,764.80 as per exhibit A5 also to pay 5% of the assessed tax of Tshs. 7,071,095,810.33 as per exhibit A1. Thereafter the respondent is ordered to admit, hear and determine the appellant's objection as soon as

practicable so that government taxes (if any) can be collected fairly and legally without any further delays. No order as to costs."

The appellant was discontented, whereupon on the 6th October, 2017 she lodged a statement of appeal in the TRAT which instituted Appeal No. 11 of 2017. Having heard the appeal, the TRAT upheld the decision of the TRAB and, accordingly, the appeal was dismissed.

Still discontented, the appellant presently seeks to impugn the decision of the TRAT upon a memorandum of appeal which goes thus:-

"1. That the Tax Revenue Appeals Tribunal erred in law and in fact by holding that the assessments' in question issued on incorrect tax base does not constitute or be termed as uncertainty on point of law or fact in respect of an application of waiver.

2. That the Tax Revenue Appeals Tribunal erred in law and in fact by holding that the Appellant's evidence submitted was not sufficient to indicate or prove the financial

condition of the Appellant so as to constitute good reason to warrant waiver of tax deposit.

3. That the Tax Revenue Appeals Tribunal erred in fact and law for failing to consider the Appellant's submissions.

We humbly pray to this Honourable Court of Appeal for the following orders:

(i) That this appeal be allowed in favour of the Appellant.

(ii) This Honourable Court be pleased to set aside and quash the decision of the Tribunal.

(iii) This Honourable Court be pleased to grant full waiver of deposit as pleaded by the Appellant.

(iv) This Honourable Tribunal be pleased to direct that the Appellant's notice of objection be admitted and be determined on its merits by the Respondent, without requirement of any deposit.

(v) That the Appellant be granted all costs of this Appeal, costs for the proceedings in the Tax Revenue Appeals Tribunal, the Tax Revenue Appeals Board and costs incurred in objection proceedings.

(vi) Any other further reliefs that the Honourable Court may deem just and fit to grant.”

At the hearing before us, the appellant was represented by Dr. Abel Mwiburi, learned Advocate, whereas the respondent had the services of Mr. Amandus Ndayeza, also learned Advocate. As it were, the learned counsel for the appellant commenced his submission by abandoning the second and third grounds of appeal. He then fully adopted the appellant’s written submissions in support of the appeal. On his part, the learned counsel for the respondent just as well fully adopted his client’s written submissions opposing the appeal.

Aside from the points of contention raised in the memorandum of appeal and the written submissions, we invited the parties to comment on the competency of the appeal before the TRAB. We did so for two main reasons: **First**, it appeared to us doubtful that an appeal lies to the TRAB against the Commissioner’s refusal to grant an application for the reduction or waiver of an assessed amount; and **Second**, whether or not the appeal was appropriately predicated under the provisions of section 16(1) of the TRAA.

In response to the foregoing issues of concern, Dr. Mwiburi readily conceded that the appeal was inappropriately predicated under the provisions of section 16(1) of the TRAA. He was, nevertheless, quick to add that the appeal was tenable under the provisions of section 53(1) of the TAA which goes thus:-

*"A person who is aggrieved by an objection decision **or other decision** or omission of the Commissioner General under this part may appeal to the Board **in accordance with the provisions of the Tax Revenue Appeal Act.**"* [Emphasis supplied.]

Capitalising on the expression; **or other decision** comprised in the foregoing excerpt, the learned counsel for the appellant submitted that a decision of the Commissioner General of the TRA (CG) such as a refusal to reduce or waive an assessed amount is just as well contemplated under the provision.

On his part, Mr. Ndayeza for the respondent had a different view. To him, it is purely upon the discretion of the CG to either reduce or waive the assessed tax upon being satisfied that there exist good reasons warranting such decision. That being so, he further

submitted, the decision of the CG with respect to the reduction or waiver of the assessed tax is final and, therefore, not appellable. The same, he said, may only be questioned by way of judicial review of administrative action. In any event, Mr. Ndayeza added, the reasons advanced by the appellant in support of the waiver to the effect that the assessments are undermined by uncertainties resulting from an incorrect tax base and a failure to consider the already paid tax, are issues which could conveniently be addressed at the objection proceedings.

Having heard the contentious arguments from both ends, we propose to preface our determination with an extraction, in full, of the provisions of section 51 of the TAA which goes thus:-

"51-(1) A person who is aggrieved by a tax decision made by the Commissioner General may object the decision by filing an objection to the Commissioner General, within thirty days from the date of service of the tax decision.

(2) A person who has reasonable ground to warrant extension of time to file an objection

against a tax decision may apply for an extension of time.

(3) Where the Commissioner General is satisfied by the reason stated in the application made under subsection (2), he shall grant the extension of time and serve the notice of his decision to the applicant.

(4) An objection to a tax decision shall be in writing stating the grounds upon which it is made.

(5) An objection to any tax decisions shall not be admitted unless the taxpayer has paid the amount of tax which is not in dispute or one third of the assessed tax whichever amount is greater.

(6) Where the Commissioner General is satisfied that there exist good reasons warranting reduction or waiver, he may waive the amount to be paid under subsection (5) or accept a lesser amount.

(7) Where a taxpayer files an objection and makes payment under subsection (5), the liability to pay the remaining assessed tax shall

be suspended until the objection is finally determined.

(8) In this section, "tax not in dispute" with respect to an assessment or any tax decision means-

(a) the amount that ought to be charged where the assessment or a tax decision is amended in accordance with the objection; and

(b) the whole of duty or any tax assessed on imports."[Emphasis supplied].

As regards appeals before the TRAB the relevant provision is section 53(1) which we have already extracted herein above. It is, however, noticeable that the provision makes a cross reference to the effect that an appeal to the TRAB has to be in accordance with the provisions of the TRAA. Before the enactment of TAA, section 16(1) of TRAA, which regulates appeals to the TRAB, provided as follows:-

"Any person who is aggrieved by the final determination by the Commissioner General of the assessment of tax or a decision referred

under section 14 of this Act may appeal to the Board."

With the promulgation of TAA, sections 12, 13 and 14 of TRAA were repealed and section 16(1) was deleted and substituted for it with the following provision:-

*"Any person who is aggrieved by **an objection decision of the Commissioner General** made under the Tax Administration Act may appeal to the Board."* [Emphasis supplied].

From the provision, it is significantly discernible that an appeal to the Board is presently narrowed down to an objection decision of the CG made under the TAA. It is beyond question that, in the situation at hand, there is, so far, no objection decision of the CG and, to say the least, going by the specific language used in section 16(1), the purported appeal before the TRAB which did not result from an objection decision of the CG was incompetent.

All said, we are minded to invoke our revisional jurisdiction under the provisions of section 4 (2) of the Appellate Jurisdiction Act, chapter 141 of the Laws and, in fine, the incompetent appeal which was laid

before the TRAB is struck out. In consequence thereof, the proceedings and decisions of both Tribunals below are, accordingly nullified. Having so decided, we need not consider the issues of contention raised in the memorandum of appeal. No order as to costs.

DATED at DAR ES SALAAM this 31st day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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




A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL

LIBRARY FB ATTORNEYS