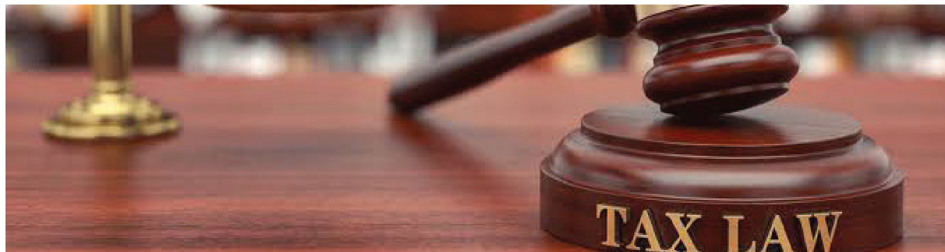
# LEGAL UPDATE

FB ATTORNEYS

10 June 2020




## Court of Appeal quashes tax proceedings on technicalities

- **Rules Appellant filed incompetent appeal**
- **However uses revisionary powers to quash all decisions and proceedings**
- **Rules Tax Board had no jurisdiction**
- **Brings in notion of 'reference'**

### Background

The appeals stemmed from the TRA imposing capital gains tax and stamp duty on a non-resident buyer of shares in an off-shore jurisdiction 9 years ago, when taxation on indirect transfer of shares had not yet started under section 56 (amongst others) the Income Tax Act, 2004. The main thrust of the buyer of the shares was that capital gains tax, if at all applicable, does not apply to a buyer, which the Tax Revenue Appeals Board (Board) and the Tax Revenue Appeals Tribunal (Tribunal) fully agreed with. Similar arguments on the stamp duty on the instrument used for the transfer were also agreed to by the Board and Tribunal, ruling in favour of the taxpayer.

Still aggrieved by these decisions, the TRA appealed to the Court of Appeal.

### The Appeal

On 9 June 2020, in Consolidated Civil Appeals Nos. 78 (income tax) and 79 (stamp duty) of 2018 between Tanzania Revenue Authority (Appellant) v. ARMZ (Respondent), the Court of Appeal ruled that the Board had no jurisdiction to entertain the Respondent in its initial appeals lodged at the Board about 9 years ago.

In a ruling authored by Honorable Justice of Appeal S.E. Mugasha with other members comprising of Honorable Justices of Appeal G.A. Ndika and M.C. Levira, the Court first upheld preliminary objections that were filed by the Respondents on the competency of the Appeal, meaning that an Appeal did not thence exist before the Court.

Normal practice when preliminary objections are upheld for matters arising from the Tribunal (including the High Court) is for an appeal to be struck out, but this time around, and which is a big blow to taxpayers, the Court raised a suo motu point on the propriety or otherwise of the Respondent's appeal before the Board that was lodged 9 years ago.

The Court referred the parties to section 14(2) of the Tax Revenue Appeals Act which states the following:

> *(2) Notwithstanding subsection (1), a person who objects a notice issued by the Commissioner-General with regards to the existence of liability to pay any tax, duty, fees, levy or charge may refer his objection to the Board for determination. (emphasis ours)*

The Court questioned why the Respondent, who has all along won its case against the TRA on its merit, preferred an appeal and not a reference to the Board, and whether the Board had jurisdiction to hear such an appeal.

For further information on legal updates please contact:

E: info@fbattorneys.co.tz

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**FB Attorneys**
8th Floor, Amani Place, Ohio Street
P. O. Box 19813
Dar es Salaam, Tanzania
T: +255 22 2135994/5
E: info@fbattorneys.co.tz
W: www.fbattorneys.co.tz

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The Respondent argued that the suo motu point raised by the Court was already a ground of appeal and the Court could not be raising it when there is an incompetent appeal before it. In the alternative, the Respondent argued that the words 'refer his objection' to the Board does not mean it is to be filed by way of a reference as there was no reference procedure at the Board.

Notwithstanding the above, the Court went ahead and used its revision powers under section 4(3) of the Appellate Jurisdiction Act to rule that the Board had no jurisdiction and it embarked on a nullity to entertain the Respondent's appeals. It thus quashed all proceedings at the Board and Tribunal.

## Observation

This decision is a big blow for all Appellants who were directly appealing to the Board based on certificates (not assessments) issued by TRA on PAYE, SDL and withholding taxes. Subsequently, the law was changed and now all such taxes must be objected to first to the TRA, where the 1/3 payment of deposit amounts gets triggered.

In its ruling, for issues that were raised suo motu on an incompetent appeal and without notice to the Parties, the Court has not mentioned or even considered the Tax Revenue Appeals Board Rules (Rules) that existed at the time which have no such 'reference' procedure in place. In fact, the word reference does not even appear in the Rules. The connotation of 'refer his objection to the Board' to mean 'reference' is the Court's latest interpretation and will affect many taxpayers.

In fact, rule 4 of the Rules provides that a person who wishes to appeal to the Board shall issue to the Board a written notice of intention to appeal. The Rules do not provide for a reference procedure or a notice of reference if that is what was envisaged under section 14(2) as interpreted by the Court. Further, rule 4(2) states that a notice of intention to appeal (not notice of intention to reference) shall be issued within thirty days from the date of service of the notice of final determination of the assessment of Tax or a decision referred to under section 14 of the Act. This leaves very little ambiguity on whether or not a reference procedure does exist, which all indications seem to lead to it does not.

This Court decision is not welcome news to the business community or other taxpayers. It also brings in great uncertainty on how the Court will continue to interpret tax matters.

To read a copy of the Ruling please click here.

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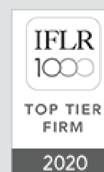

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