IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE , J.A., MAIGE, J.A. And KHAMIS J.A.)

CIVIL APPEAL NO. 265 OF 2023

COFFEE EXPORTERS LIMITED ..... APPELLANT

VERSUS

COMMISSIONER GENERAL

TANZANIA REVENUE AUTHORITY..... RESPONDENT

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

(Ngimilanga, Vice Chairperson)

dated the 18th day of September, 2020

in

Tax Appeal No. 26 of 2019

JUDGMENT OF THE COURT

6th & 26th November, 2025

MAIGE, J.A.:

The appellant is a juristic person duly incorporated under the laws of Tanzania dealing with, among others, sale and purchase of coffee related products both domestically and internationally. In the course of doing its business during the years 2009, 2010 and 2011, it received some cash advances from Taggart S.A., a company which is domiciled in Switzerland (the foreign company), allegedly for facilitating procurement process of high quality coffee.

In 2013, the appellant received from the respondent corporate tax assessments for each of the three years as above mentioned against which, she objected on account that she was wrongly assessed as a foreign permanent establishment and that, the cash advanced to her by the foreign company was incorrectly treated as current assets rather than liability. For the reasons which may not be relevant in this appeal, the respective objections were not determined which prompted the appellant to initiate appeals numbers 68,69 and 70 of 2013 to the Tax Revenue Appeal Board (the Board). On 23rd November, 2013, the said appeals were consolidated to read as Consolidated Tax Appeals Nos. 68,69 and 70 of 2016. However, on the same day, the appellant withdrew the said appeals upon an undertaking by the respondent that it would determine the objections without payment of one third of the assessed tax as deposit.

This was followed by the respondent issuing a tax proposal for the objections in question. In that proposal, much as it agreed that the appellant was neither a domestic permanent establishment (DPE) nor a foreign permanent establishment (FPE) of the foreign company, and that, the cash advanced by the foreign company for coffee purchase facilitation did not, unless the coffee was delivered in respect thereof, amount to sales; the respondent established that as the appellant had

controlled transactions with the foreign company, she was subject to transfer pricing assessment as per section 33 (2) of the Income Tax Act. It, therefore, proposed for transfer pricing adjusted income at the tune of TZS 390,282,447, TZS 540,938,331 and TZS 220,087, 559, for the years under discussion, respectively; and foreign exchange loss at the tune of TZS 223, 844,623, TZS 272,211,041 and TZS 456,445,705, for the respective three years, respectively.

In response to the proposal, the appellant, in the first place, expressed her satisfaction with the respondent's findings that she was neither a DPE nor a FPE of the foreign company and that, the advances under scrutiny were not taxable unless goods in respect thereof were delivered. Conversely, she was in doubt with the applicability of the transfer pricing assessment as there was no any level of control in the transactions between her and the foreign company which was essential in determining existence of associate relationship as per the definition under the Organization for Economic Co-operation and Development (the OECO).

In its subsequent final determination, the respondent maintained the same position and argued that, in applying the transfer pricing principle, it relied on the statutory definition under section 3 (d) of the Income Tax Act. Under the said provisions, the term "associate" in

relation to a person means another person where the relationship between the two is; "*such that one may reasonably be expected to act, other than as employee, in accordance with the intention of the other.*" Under the transfer pricing principle, therefore, it adjusted the appellant's income and subjected it to corporate tax in respect of the periods under discussion as per the proposed tax assessment above.

Aggrieved, the appellant appealed to the Board questioning the respondent's treatment of the transactions in question as controlled transactions and the refusal to exclude foreign exchange losses from the tax liability. In addition, it questioned the tax assessment for the year 2009 on account that it was time barred. The appeal partly succeeded to the extent that the tax passement for 2009 was time barred, but failed in respect of the other complaints which were dismissed. The appellant unsuccessfully appealed to the Tax Appeal Tribunal (the Tribunal). Once again aggrieved, the appellant has further appealed to the Court faulting the decision of the Tribunal on the following grounds:

1. *The Tribunal erred both in law and fact by holding that the transactions between the foreign company and the appellant were controlled transactions.*
2. *The Tribunal erred both in law and fact by holding that the appellant and the foreign company were associates.*

3. *The Tribunal erred in law and fact by failing to invoke its powers as requested by the appellant under rule 15(3) and (5) of the Tax Revenue Appeals Tribunal Rules 2018, to get proof of the fact whether the appellant and the foreign company were associates or not.*

4. *The Tribunal erred both in law and fact by holding that the respondent was justified to disallow foreign exchange losses.*

5. *The Tribunal erred both in law and fact by relying on the Respondent's submissions on the contract document that was not admitted as exhibit and therefore was not part of the proceedings.*

6. *The Tribunal erred both in law and fact by holding that the foreign company was the only buyer of coffee from the appellant without any evidence from the respondent to that effect.*

At the hearing, the appellant was represented by Mr. Michael Lugaiya, learned advocate, whereas, the respondent was represented by Ms. Jane Mgaya, also learned Senior State Attorney who teamed up with Mr. Brian Magoma, learned State Attorney.

Before the hearing commenced, we invited the parties to address us on whether the first, second and fourth grounds of appeal constituted points of law as per the requirement of section 25 (2) of the Tax Revenue Appeals Act (now section 26 (2). On his part, Mr. Lugaiya was

of the contention that each of the grounds of appeal constitutes points of law. He admitted, however that, the words "in fact" in each of the grounds were inserted by mistake and urged us to ignore them. In opposition, Mr. Magoma submitted, with all forces that, the respective grounds raise pure points of fact or mixed points of fact and law which is contrary to the requirement under the provisions just referred.

As it may be apparent from the rival submissions, the fact that an appeal to the Court in tax matters is limited on points of law is not debatable. Nevertheless, whether the grounds under discussion raise pure points of law is that which the counsel are vehemently contentious. For the appellant, it is contended, with the omission of the words "in fact" in each of the grounds, the complaints therein would raise pure points of law while for the respondent, it has been argued to the contrary.

Much as what amounts to a point of law has not been statutorily defined, case law provides for some tests in determining whether an appeal raises a point of law. For instance, in **Atlas Copco Tanzania Ltd v. Commissioner General, Tanzania Revenue Authority** (Civil Appeal No. 167 of 2019) [2020] TZCA 317 (17 June 2020, TANZLII), it was said that an appeal raises a point of law that which complains on any of the following:

> *"**First**, an issue on the interpretation of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine on tax revenue administration. **Secondly**, a question on the application by the Tribunal of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine to the evidence on record. **Finally**, a question on a conclusion arrived at by the Tribunal where there is failure to evaluate the evidence or if there was no evidence to support it or that it is so perverse or so illegal that no reasonable tribunal would arrive at it".*

To demonstrate existence of either of the above elements in the appeal, the appellant is obliged as a matter of principle, to specifically plead such an element and the same must, as held in **Sunshare Investment Limited v. Commissioner General Tax Revenue Authority** (Civil Appeal No. 620 of 2023) [2025] TZCA 964 be apparent on the face of the Memorandum of Appeal and, it should not be in such a way as to invite the Court to reopen the factual issues.

The first and second grounds of appeal when viewed in line with what are in the record and the counsel's submissions, raise one pertinent issue namely; whether the appellant and the foreign company were associated enterprises. For the reason which shall be apparent as we deliberate on the respective grounds, we are satisfied that they do

raise a point of law. In relation to the fourth ground, however, we have a different position. In the said ground, the finding by the tribunal that the respondent was justified to disallow foreign exchange losses is challenged to be incorrect. The ground, the way it is framed, does not lay as a ground that, the alleged error emanated from wrong application of the principle of law or non-application of a pertinent principle of law or misapprehension of evidence. It would follow, therefore that, whether the tribunal was wrong or right in reaching to such a conclusion, depends on evaluation of evidence which is a question of fact. In our view, therefore, the fourth ground of appeal does not raise any issue of law as to qualify for an appeal to the Court. It shall not, therefore, be the basis of determination of this appeal.

With the above observations, it is desirable to consider the remaining five grounds of appeal. For obvious reason, we find it prudent to start with the third ground which faults the Tribunal in not considering the appellant's request for leave to produce additional documents in terms of rule 15 (3) and (5) of the Tax Revenue Appeals Tribunal Rules, 2018 (the Rules). In support of the complaint, Mr. Lugaiya submitted that, as the determination of the issue of the existence of associate relationship between the appellant and the foreign company was based on the finding that the latter was the only

buyer of the former, an issue which was not raised from the beginning, it was necessary for the Tribunal to exercise its powers under the provisions just referred and allow the appellant to introduce additional evidence. To the contrary, Mr. Magoma submitted, as there was no formal application for grant of such order, the Tribunal cannot be faulted. His contention was based on rule 26 of the Rules which requires applications to the Tribunal to be by way of Chamber Summons supported by an affidavit. In rejoinder, it was submitted, in as much as the issue arose in the course of entertaining the appeal, the formality under the respective provisions was impracticable.

We are in agreement with Mr. Lugaiya that under rule 15(3) and (5) of the Rules, the Tribunal may, either on application or in its own motion, order for additional evidence. It is notable that, in her memorandum of appeal, the appellant prayed but in the alternative, for an order to produce additional documents. That was, as rightly submitted for the respondent, not in order because under the express provisions of rule 26 of the Rules, the Tribunal was to be moved by way of chamber summons supported by an affidavit and not by memorandum of appeal. Mr. Lugaiya claims that as the documents intended to be produced were necessary in determining a new issue, that should have been treated as a special circumstance. With respect,

we cannot agree with that contention. The reason being that the alleged special circumstance was not brought to the attention of the Tribunal during the hearing of the appeal or at all. In any event, as the issue was part of the decision of the Board, the appellant was aware of its existence when she was lodging the appeal. There is, therefore, no justification as to why the appellant did not, simultaneously to the memorandum of appeal, lodge the relevant formal application so as to make her prayer legally tenable.

Even if we assume, for the sake of argument that, the Tribunal was properly moved to adjudicate upon the request, it is our opinion that, such a prayer was to be made before the parties had addressed the Tribunal on the grounds of appeal. In this matter, however, it is apparent that, when the appeal came for hearing on 20th November, 2019, Mr. Lugaiya prayed that it be heard by way of written submissions. As there was no objection from the respondent, the Tribunal ordered as such and directed that judgment would be on notice. That being the case, it can reasonably be inferred that, the appellant had no intention to adduce additional evidence because, as a matter of law, additional evidence cannot be brought by written submissions which are mere arguments from the bar. We think that, if the appellant and her counsel had intended to rely on additional

evidence to advance her appeal, that would have been the first prayer. The request to have the appeal argued by way of written submissions was expected to come afterwards and, in that way, parties would have been able to address the Tribunal through the written submissions, on the position of such additional evidence in the merit or otherwise of the appeal.

With the above discussions, therefore, we find the third ground of appeal without merit and dismiss it.

We shall now proceed with the fifth ground of appeal which criticizes the Tribunal in placing reliance on a contract which was never admitted into evidence in determining existence of associate relationship between the appellant and the foreign company. We note from the submissions that, counsel have a common understanding of the settled principle of law that, unless admitted into evidence, a document does not form part of the record as to be worthy of being relied upon. The major concern is whether the concurrent factual finding of the Board and the Tribunal on the existence of associate relationship between the appellant and the foreign company was based on the contents of such unadmitted contract. In the course of his submission, we requested Mr. Lugaiya to show us where in particular, did the Tribunal in its decision, place reliance on the said contract. In response, Mr. Lugaiya drew our

attention to page 333 of the record. In our careful reading, however, there is nothing therein to support the claim. There is, instead, contrary suggestion apparent from the record. The finding of the Board, for instance, which appears at page 181 of the record, was to the effect that; since the appellant had undeniably been receiving cash advances from the foreign company in the material time for facilitating procurement process of high quality goods, in the absence of clear explanations to the contrary, it was right for the respondent to imply existence of associate relationship. Indeed, that was the rationale behind the Tribunal upholding the decision of the Board. In particular, the Tribunal observed at page 333 of the record as follows:

> *"Without even having Agreement document which the respondent's counsel alleged it was not admitted by the trial Board, these incidences indicate that the Appellant acted in compliance with the directive of Taggart SA and indeed they were truly associates entities with regards to the definition of the word associate."*

With the above observations, we think, neither the decision of the Board nor of the Tribunal can be faulted for being based on a contract which was never admitted into evidence. The fifth ground of appeal is, therefore, without merit and is dismissed.

We now proceed with the first and second grounds of appeal which in essence fault the Tribunal for incorrectly construing the term associate in total disregard of the widely used OECD definition according to which, an associate relationship would only exist if an enterprise participates directly or indirectly in the management, control or the capital of another; or the same persons participate directly or indirectly in the management, control or capital of the two enterprises. We note that, in defining the term associate, the Tribunal, much as it was the Board, relied on the provisions of section 3 (d) of the Income Tax Act. Mr. Lugaiya suggested in his submission that, proper construction of the provision required consideration of the international agreement's definition. This being a pure point of law, we requested Mr. Lugaiya to provide us with any authority in support of his claim. Alas, he could not cite any authority. On his part, Magoma submitted that, the respondent was entitled to take guidance from the above statutory definition in ascertaining the meaning of the term associate for the purpose of transfer pricing tax adjustment.

We wish to introduce our discussions on this point by a necessary remark that in accordance with article 138(1) of the Constitution of the United Republic of Tanzania, imposition of tax must strictly be based on a statute and should be carried out in due compliance of the lawful

procedure. The issue at hand pertains to transfer pricing, a mechanism used by tax authorities in many of the jurisdictions, including Tanzania, to determine the amount of profit attributable and taxable to a foreign non-resident permanent establishment with a taxable presence within a given tax law regime. Under section 33 (1) of the Income Tax Act, any persons who are associates are required to quantify, apportion and allocate amounts to be included or deducted in calculating income between them as is necessary to reflect the total income or tax payable that would have been arisen for them if the arrangement had been conducted at arms' length. In the event of failure to comply with the above requirement, the Commissioner is empowered under subsection (2) to make adjustments consistent therewith.

It can be seen in view of the foregoing that, the powers of the Commission to impose tax based on transfer pricing is conditional upon existence of associate relationship between a domestic permanent establishment and a foreign company. While when an associate relationship is said to exist is a question of law; whether such a relationship exists, is a question of fact which has to be determined upon evaluation of the available evidence. It is in respect of the second question that, the decision of the Tribunal is final and conclusive. It has to be noted, however, that, the correctness of determination of the

second aspect is dependent upon the correctness of the determination of the first aspect so that, an incorrect apprehension of the nature of the relationship will render the factual finding on the existence of the same incorrect.

From the grounds of appeal and the rival submissions, the scope of the contention on what constitute an associate relationship is very narrow. It indeed, revolves around what should be the source of law. As we said above, in treating the appellant and the foreign company as deemed associated enterprises, the respondent was guided by the statutory definition of the term associate as per item (d) of section 3 of the Income Tax Act. That has, throughout the dispute, been viewed by the appellant as an incorrect approach. In that respect, Mr. Lugaiya blames the Board and Tribunal for not taking into account the definition of the term associate set out in the OECD. This is an intergovernmental organization founded in 1961 to stimulate economic progress and world trade. As his submission suggests, in effect that, the statutory interpretation of the term associate in our domestic tax law is inferior to that of the international agreement he cited, we asked Mr. Lugaiya to provide us with the authority in support of such a proposition. Unfortunately, however, he did not cite any.

As we said above, imposition of tax is, as a general rule, within the domain of domestic law. The assessment of tax under scrutiny was based on section 33 (2) of the Income Tax Act. The basis of the assessment was existence of an associate relationship between the appellant and the foreign company. Determination of the relationship was based on statutory definition under section 3 (b) of the same Act. Though ordinarily, an associate relationship exists where a non-resident permanent establishment or an individual whether directly or through one or more interposed entities, controls or is likely to benefit from fifty percent or more of the rights of income or capital or voting power of the domestic permanent establishment; under the provisions just referred, existence of such relationship can be implied where the relationship between the two is such that "*one may reasonably be expected to act, other than as employee, in accordance with the intention of the other*".

Mr. Lugaiya thinks that the respondent should have been guided by the **OECD** definition of the term associate. No evidence has been provided that Tanzania is a party to that agreement. Besides, the agreement does also not fall under section 128 of the Income Tax Act which could have, in case of conflict, prevailed over our domestic laws. Neither does it fall under any of the agreements envisaged under section 10 (3) of the Income Tax Act. Therefore, much as the definition

can be relevant as an additional tool of interpreting the phrase "associate" for the purpose of transfer pricing, it cannot prevail over the definition set out in our statute or subsidiary legislation. In our view, therefore, the Tribunal cannot be faulted for construing the term associate based on the statutory definition even if such definition could be contradictory to the said agreement. It is for those reasons that, we dismiss the first and second grounds of appeal.

We now proceed with sixth ground of appeal. The complaint there is that the Tribunal made a factual finding that the appellant could not sell coffee to another buyer without there being evidence to that effect from the respondent. In the first place, Mr. Lugaiya submitted that, there was no evidence because the contract between the appellant and the foreign company in which their relationship is defined, was not produced in evidence. We have already held in relation to the determination of the fifth ground of appeal that, existence of the said relationship was inferred based on the common knowledge between the parties that the appellant was receiving advances from the foreign company in relation to promotion of the sale. In the second place, it was submitted that, as the respondent was availed with all relevant documents pertaining to the issue during assessment, the burden to prove existence of such relation was on him. In support of this, Mr.

Lugaiya relied on **Insignia Limited v. the Commissioner General (TRA),** Civil Appeal No. 14 of 2007 (unreported). In response, it was submitted for the respondent that, it being an issue on tax assessment, the burden of proof is always on the tax payer and that is the position in the authority just referred.

This issue cannot consume much of our time. It is an elementary position of law as per section 28(2) of the Tax Revenue Appeals Act that, the burden of proof in tax cases is on the tax payers. The rationale behind cannot be explained much better than in the following words of the Court in **Insignia Limited v. TRA** (supra):

> *"The burden of proof in tax matters has often been placed on the tax payer. This indicates how critical the burden rule is, and reflects several competing rationales: the vital interest of the government in getting its revenues; the tax payer has easy access to the relevant information and the importance of encouraging voluntary compliance by giving tax-payers incentives to self-report and to keep adequate records in case of disputes. The evidence which settle the final liability lies solely within the knowledge and competence of the aggrieved tax-payer."*

It may be necessary to mention that, in observing as herein above, the Court was inspired by a commentary by the learned author,

Richard A. Toby in his book entitled, **The Theory and Practice of Income Tax (1978)**, thus;

> *"The various authorities have settled the question that the mere making of assessment by the Revenue is prima facie evidence of liability and is sufficient to demand the payment of tax."*

We have taken time to repeatedly read the authority under discussion and we could not find anything in support of Mr. Lugaiya's claim. We note that, in the said case, the burden was deemed to have been shifted to the respondent because in the course of tax investigation, it seized the appellants' documents, and, therefore, the latter was not in possession of the said documents as to be capable of producing them in evidence. In the current case, the document involved is a contract between the appellant and the foreign company. Much as the respondent might have produced a copy thereof in the course of assessment, that by itself could not, as it was in the authority just referred, discharge her from the legal burden of proof under the law. Therefore, since the burden of proof on tax issues is on the tax buyer, the Tribunal cannot be blamed in determining existence of associate relationship between the appellant and the foreign company based on failure of the appellant to adduce evidence to justify that the said transactions did not amount to an implied controlled transaction as per

section 3 (d) of the Income Tax Act. The sixth ground of appeal, is, therefore, devoid of any merit and is dismissed.

In the final result and for the foregoing reasons, we hold that the appeal is without merit. It is, therefore, dismissed. Considering the circumstances of the matter, we shall not give an order as to costs.

DATED at **DAR ES SALAAM** this 24th day of November, 2025.

R. K. MKUYE
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The judgment delivered this 26th day of November, 2025 in the presence of Mr. Brayan Magoma, also holding brief for Mr. Michael Lugaiya for the Appellant, Mr. Brayan Magoma learned State Attorney for the Respondent and Mr. Ladislaus Msuba, Court Clerk via Virtual Court; is hereby certified as a true copy of the original.

A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL