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IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MKUYE, J.A., KAIRO, J.A. And MDEMU, J. A.)

CIVIL APPEAL NO. 505 OF 2022

MLIMANI HOLDINGS LIMITED .....APPELLANT

VERSUS

COMMISSIONER GENERAL (TRA) ..... RESPONDENT

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

(Kamuzora, Vice Chairperson; Kasekwa & Gonzi-Members)

Dated the 17th day of August, 2022

in

Tax Appeal No. 129 of 2021

.....

JUDGMENT OF THE COURT

14th March & 9th April, 2025

MDEMU, J.A.:

In the tax appeal before us, the appellant company is challenging the decision of the Tax Revenue Appeals Tribunal (TRAT) which upheld the decision of the Tax Revenue Appeals Board (TRAB) that declined to exempt withholding tax because the appellant never proved to qualify for such exemption in terms of the law. It was thus ordered to pay the assessed withholding tax for years of income 2013 to 2016 amounting to TZS 2,360,462,598.00 as per the withholding tax certificate issued by the respondent on 21st September, 2017.

It is in the record of appeal regarding this tax dispute that, the appellant is a company transacting in property investment. In such business transactions, the appellant entered into a Performance Contract with the Government of Tanzania granting it a strategic investor status in accordance with section 20 (1) of the Tanzania Investment Act, Cap. 38 (the Investment Act) and outlining various investment incentives, including exemption from withholding tax on foreign loan interest. In the year 2017, the respondent conducted tax audits on the appellant affairs for the income years 2013 to 2016. The audit discovered that the appellant had failed to withhold withholding tax on interest for payments on foreign lenders. This compelled the respondent to issue a certificate of tax assessment amounting to TZS 2,360,462,589.00, the principal tax being TZS 1,573,547,541.00 and the rest was interest charges amounting to TZS. 786,915,048.00.

The Appellant objected the said tax assessment and it thus appealed to the TRAB arguing that the Performance Contract granted them a withholding tax exemption in accordance with clause 1.1(i) of the agreement and section 82 (2) (e) of the Income Tax Act, 2004. The TRAB heard the appeal and in the end of it found that the appellant may not benefit from such exemption for want of Government Notice by the

Minister for Finance, being an unreconcilable requirement in the Performance Contract. The TRAB went further to state at page 000560 of the record of appeal that:

> *"Thus, based on the evidence available on the record, it is clear that the appellant does not meet the conditions for the enjoyment of the exemptions granted under the provisions of section 82 (2) (e) of the ITA, 2004, the provision, we are satisfied that is not applicable in the facts presented and in the circumstances of the present case."*

As was to the respondent's decision, the TRAB's decision refusing exemption of withholding tax again aggrieved the appellant. It thus rushed to the TRAT on appeal. The latter heard the parties and on 17th August, 2022 it dismissed the appeal for want of merits. It held at page 000684 of the record of appeal in this regard that:

> *"We therefore conclude that, non-compliance of the terms of the performance agreement which required the publication of the exemption, cannot be blamed on the respondent. We therefore subscribe to the Board's holding that the exemption under article 1.1 of the performance contract fall within the spirit of section 10 of the Income Tax Act as they both*

allow exemption where there is Government Notice to that effect."

The TRAT went ahead at page 000686 of the record of appeal to state that:

> *"As well argued by the respondent and captured by the Board at page 17 of the judgment and not disputed by the appellant that, it is clear that the loan was taken by the appellant from the appellant's shareholder and related party Turnstar Holdings Limited. Section 82 of the ITA deals with withholding tax from investment returns and under section 82 (1) (e) of the Act, there is no exemption given on interest payable to a non-resident bank by a strategic investor. However, the said provision does not exempt interest payable on any loan taken by a strategic investor from an associated or related company."*

To the appellant, again, this was not pleasant. It thus thought justly to invoke the jurisdiction of the Court on appeal fronting the following two grounds:

1. *THAT, the Tax Revenue Appeals Tribunal erred in law and fact for failure to hold and determine that, under the relevant provisions of the Tanzania Investment Act, Cap. 38 relating to strategic investors, the appellant had fulfilled all*

the criteria necessary to qualify for tax exemptions accorded to strategic investors.

2. *THAT, the Tax Revenue Appeals Tribunal erred in law and fact by holding that the appellant was not eligible for exemption of withholding tax under the Income Tax Act, Cap. 332 [RE 2019].*

On 14th March, 2025 we heard the counsel for the parties arguing the appeal. The appellant was represented by Messrs. John Ignas Laswai and Luka Elingaya, learned counsel. On the respondent's side, Ms. Gloria Achimpota and Messrs. Chizaso Minde and Octavian Kichenje, learned Principal State Attorney and State Attorneys respectively, appeared to represent it. Parties had earlier on filed their written submissions of which, each prayed to stand by it forming part of their respective submissions with a few oral clarifications thereafter.

Mr. Laswai commenced to submit for the appellant. In both written submissions and the subsequent oral clarifications, three main areas formed the basis of complaint, which in his argument, the two tribunals did not take into account. **One** is the requirement of the Government Notice. Making reference to pages 571 to 572 of the record of appeal, that is, the written submissions of the appellant before the TRAT, Mr. Laswai conceded on the requirement of the Government Notice as a pre-

condition towards exemption from withholding tax. He however thought that was not the responsibility of the appellant but rather was of the respondent through the Project Facilitation Team (the PFT) established under clause 2.1 of the Performance Contract. He specifically drew our attention to clause (iv) (d) of the Performance Contract which charges the PFT with the function of overseeing the implementation of the project on matters of compliance which includes the publication and renewal of the Government Notice referred to under clause 1.2 of the Performance Contract. He thus thought that it was wrong for the respondent to raise the certificate of tax assessment basing on non-compliance while the responsibility to secure the said Government Notice resided on the respondent perse.

Two, since the refusal of withholding tax exemption based on the fact that the loan was not from the foreign bank, then the appellant may benefit with that exemption under section 82(2) (e) of the Income Tax Act, 2004 because they are grantable in terms of clause 1.1 of the Performance Contract.

His **last** concern was the requirement of publication of the Government Notice. He was of the argument that section 20 (1) of the Investment Act does not make it mandatory to publish the Government

Notice for it to effect exemption of withholding tax by an investor who has acquired a strategic investor status. He had such argument basing on the use of the word "may" in the section. He also cited to us the following cases regarding interpretation of the words "may" and "shall" in which the word "may" do not connote mandatory: **Goodluck Kyando v. Republic** [2006] TLR 363 and **Dominion Oil and Gas Limited v. Logistics (T) Limited** [2015] TLR 222. He, in the end, urged us to allow the appeal with costs.

Ms. Achimpota came in reply arguing that, exemption from withholding tax on interest from foreign loan is conditional on the issuance of Government Notice as required by both the law and the Performance Contract. She added that, the responsibility to have the Government Notice in place lies to the appellant. Neither the respondent nor the PFT is charged with that responsibility as alleged by the appellant's counsel. Her further argument was that, the role of the PFT is a facilitative one, and could only act in that facilitative role upon application by the respective strategic investor and the subsequent publication of the alleged Government Notice. In other words, the responsibility for application and the assurance that the Government Notice is issued and ultimately published is of the appellant.

Regarding application of section 20 (1) of the Investment Act to exempt withholding tax on interest, the learned Principal State Attorney submitted that the said provision does not provide exemption, but rather it is the respective law, that is, the Income Tax Act in this case which provides exemption on withholding tax.

As to legitimate expectations towards withholding tax exemption, the learned Principal State Attorney distinguished the Kenyan case of **Kenya Revenue Authority and Commissioner of Domestic Taxes v. Republic (Ex parte) Kenya Nut Company Limited**, Civil Appeal No. 58 of 2015 (unreported) that, legitimate expectation cannot apply in a clear provisions of the law, as in the instant case, which require the issuance and publication of the Government Notice to effect exemption of withholding tax on foreign loan interest. She thus urged us to dismiss the appeal for being unmeritorious. She also pressed for costs.

In rejoinder, Mr. Laswai was brief and to the point. He was frightened by the holding of the TRAT at page 683 of the record of appeal to exonerate the respondent from the responsibility of procuring the Government Notice because that to him was not the responsibility of the appellant. He referred us to section 4 (3) of the Tanzania Revenue Authority Act, Cap. 399 arguing that, the respondent or through the PFT

was responsible to assist the Minister for Finance regarding the assessed tax, as such, the certificate for tax assessment would not have been issued. In other words, Mr. Laswai submitted that, the appellant was supposed to be advised by the respondent on the procedure to follow in order to procure the alleged Government Notice. This was all from the parties.

For a start, we find the record to be clear and straight forward that, the appellant was granted a strategic investor status which made it eligible to certain incentives, exemption from withholding tax on interest from foreign loan inclusive. It is again clear that, the appellant executed the Performance Contract with the Government in which, clause 1.1 (i) exempted it from withholding tax on foreign loan interest by way of Government Notice. We note further that, until the issuance of the withholding tax certificate by the respondent on 21st September, 2017, there was no any Government Notice issued by the Minister for Finance as required by the law and the Performance Contract exempting the appellant from withholding tax.

These undisputed facts narrowed down our discussion to two main components. **One** is in respect of who between the appellant and the respondent was legally responsible to ensure the issuance of

Government Notice and its subsequent publication and **two**, if at all the said Government Notice was a mandatory one in terms of section 20 (1) of the Investment Act. We have taken that route because, reading the written submissions of the appellant and also through the oral presentation made in clarification thereof, we note the appellant casting responsibility on the respondent or through the PFT to have the Government Notice in place. The respondent on the other hand refutes that responsibility. We note further that, the counsel for the appellant tries to implore us to hold that the appellant was to be treated under section 20 (1) of the Investment Act in which, as he put it, the issuance of Government Notice is not mandatory for it to benefit from withholding tax exemption. The respondent on the contrary view ousts the provisions of section 20 (1) of the Investment Act on tax exemption.

We are mindful to begin with the former regarding the responsibility to ensure the Government Notice on tax exemption is issued and subsequently, published. As we stated above, the appellant's counsel interpreted clause 2.1 and (iv) (d) of the Performance Contract and concluded that the respondent or through the PFT was responsible for ensuring compliance of the law, including the issuance of the Government Notice. The learned Principal State Attorney, on the other

hand, did not comprehend any substance to that assertion arguing that, the responsibility for application and the assurance that the Government Notice is issued and subsequently published was on the appellant. On the side of the TRAT, the following was observed at page 000683 of the record of appeal:

> *"There is no doubt that under the performance agreement the Minister for Finance was supposed to issue the Government Notice for the incentive to have effect and the parties undertook to act in good faith to comply with the terms of the agreement and support each other in giving effect to the agreement.* ***We however do not agree that the respondent was bound to ensure the issuance of the Government Notice. The respondent in the administration of the tax laws is only bound to ensure compliance to the law.***"
> [emphasis supplied]

We have also read and interpreted closely clauses (iv) (d) and 1.2 of the Performance Contract regarding the role of the PFT and the appellant regarding the issuance of the Government Notice and in whose responsibility the role rests. In clear terms, and as was held by the TRAT, we hardly observe any responsibility lying on the respondent or

the PFT. Let the two clauses speak by themselves for ease of reference. Beginning with clause (iv) (d) at page 000047 of the record of appeal, it is provided that:

> "*To establish a Project Facilitation Team (hereinafter referred to as PFT) to be charged with* ***functions and powers) to oversee the implementation of the Mlimani City Project and the compliance wlth the terms and conditions of this agreement.***"
> [emphasis supplied]

It is clear in the above quoted clause of the Performance Contract that the PFT is charged with the role of overseeing the implementation of the project. In our humble stance, the overseeing role includes the component of ensuring compliance of all the terms and conditions stipulated in the Contract. One of the terms and conditions, in our view, is the fact that the appellant would only benefit with exemptions from withholding tax on loan interest if, and only if, there is in place a Government Notice issued and published on that behalf. This condition in the Performance Contract is provided for under clause 1.1 (i) in the following words:

> *"Exemption of withholding tax on foreign loan interest by way of a Government Notice until*

such time as the last of any loan taken for any phase of the Mlimani City Project is fully repaid."

As to clause 1.2 of the Performance Contract, the record of appeal at page 000050 provides that:

> *"1.2. Publication and Renewal of the Government Notices.*
>
> *Where under this agreement a grant, exemption, relief or any benefit is to be effected by the Government through the issuance and publication of, or the extension of, a Government Notice, it shall be the responsibility of the PFT to timely procure the Minister of Finance to effect any such implementation."*

Guided by that clause of the Performance Contract, the TRAT observed nothing that required the respondent or the PFT to procure the Government Notice in question. We find that interpretation is sounding and we have no reason to fault it. We however add that, Clause 1.2 of the Performance Contract should not be read in isolation to clause (iv) (d) of the same Contract which mandates the PFT with the overseeing functions of the project regarding compliance of the terms and conditions of the Contract. We are therefore of the firm view that, the procurement of the Government Notice envisaged under clause 1.2 is

part of the overseeing role of the PFT in clause (iv) (d) of the Contract. We are saying so because the PFT cannot on one hand initiate the issuance and publication of the Government Notice and on the other hand oversee the implementation and compliance of the terms, including the issuance and publication of the same Government Notice. We find this to be impracticable in the circumstances.

As Ms. Achimpota urged, and as was to both the TRAB and the TRAT, we also find the appellant's complaint that the respondent was charged with the responsibility of ensuring the issuance and publication of Government Notice for tax exemption is without substance. We also find the appellant's counsel argument that the respondent was required to guide the appellant on the required procedure to follow in order to benefit from tax exemption following their ignorance on investment procedure regarding tax exemptions is again misplaced in the circumstances. The appellant did not therefore meet the criteria necessary for it to qualify for tax exemption. Accordingly, this ground of complaint stands to be dismissed, as we hereby do.

Regarding the second ground of appeal, we note in the first place that the said ground was raised and abandoned in the appeal to the TRAT. The latter however decided to deliberate on the abandoned

ground following the manner upon which parties made their submissions before it. It seemed to the TRAT that the argument of the parties appeared to have merged the two grounds. At pages 000668 to 000669 of the record of appeal, it is recorded on this matter, thus:

> *"... the appellant opted to abandon the second ground of appeal with a view of submitting only on the first ground as to whether the appellant is exempted from withholding tax based on the Performance Contract between the appellant and the Government. We however discovered that the argument by both counsel for the parties did not actually disregard or abandon the second ground, rather, merged the two grounds."*

We note in the record of appeal at page 000668 where the said abandoned ground of appeal was reproduced as hereunder:

> *(b) That the Board erred in law in holding that the appellant is not eligible for tax exemption provided under section 82 (2) (e) of the Income Tax Act, 2004.*

In the appeal before us, the said ground, as we fore reproduced, was twisted by the appellant by simply omitting the words *"section 82 (2) (e) of the Income Tax Act 2004".* That notwithstanding, the import of section 82 (2) (e) of the Income Tax Act in the instant tax dispute

was in respect as to whether it applies to exempt tax on interest to loans taken by the strategic investor from associated or related company. It is clear in the record of appeal that the appellant secured a debenture loan from Turnstar Holdings Limited, which is a related company. According to exhibit R2 and R-3, Turnstar Holdings Limited is a shareholder of the appellant. On noting this, and having reproduced the said section, the TRAT made the following findings at page 000686 of the record of appeal:

> *"As well argued by the respondent and captured by the Board at page 17 of the judgment, and not disputed by the appellant that, it is clear that the loan was taken by the appellant from the appellant's shareholder and related party Turnstar Holdings Limited. Section 82 of the ITA deals with withholding tax from investment returns and under section 82 (1) (e) of the Act, there is no exemption given on interest payable to a non-resident bank by a strategic investor. However, the said provision does not exempt interest payable on any loan taken by a strategic investor from an associated or related company."*

We had the benefit of reading section 82 (1) and (2) (e) of the Income Tax Act. We thus find the interpretation of both the TRAB and the TRAT was well founded and more so the appellant had duly conceded to have taken loan from Turnstar which is a related company. We do not think any need arises for more emphasis in that regard. This also calls for the legitimate expectations towards withholding tax exemptions, which we think should not detain us. As well argued by the learned Principal State Attorney and properly interpreted by both the TRAB and the TRAT, legitimate expectation cannot apply in a clear provision of the law, as in the instant case which require the issuance and publication of the Government Notice for one to benefit from exemption of withholding tax on foreign loan interest. We were blessed to go through a book by **Baraka Melami Saiteu (2023), Tax Law and Practice in Tanzania**, 3rd Edition Juris Publishers in which before deliberating on the best approach to interpret tax provisions, observed the following at page 50 of the book:

> *"There is no strict rule of law that tells which of the methods to use and therefore the choice is left to an individual judge. Since there are several rules governing the interpretation of statutes, it is for the court to select the most appropriate rule to aid the understanding of a particular*

provision. Some approaches have been more prominent than others at different points in history but there has never been any compulsion as to how judges tackle issues of statutory interpretation. A person opting a certain rule or approach of interpretation may be creative in addressing the court that the proposed interpretation has some logical basis and therefore credible enough to be employed in interpreting a particular section or provisions of the statute in question."

Specific to the interpretation of tax statutes and the provisions thereto, we are persuaded with what **Baraka Melami Saiteu** (supra) at page 50 through 51 stated on the strict rule of interpretation, that:

"The rule provides that tax statutes should be construed or interpreted in a strict manner without adding words or reducing words from the section or provision of the law imposing a particular tax or charge or fee. This means that the words or phrases used in the statutes should be given their plain meaning. The court should consider their plain, ordinary and everyday meaning of the word or the phrase used. The court in this rule appear to be recognizing their limitations by following the wishes of the

parliament as expressed in the words of the legislation under consideration. It is possible to reconcile the use of plain rule and the golden rule as the golden rule can be used only where there are two or more literal meanings or where use of literal rule would lead to absurdity. In most cases even where literal rule is used, the court will be applying what it deems to be a literal meaning exists."

This Court in **Commissioner General v. Pan African Energy Tanzania Limited** (Civil Appeal No. 146 of 2015) [2016] TZCA 807 (16 May 2016; TanzLII) observed that as, section 69 (1) (i) of the Income Tax Act is clear that income tax is chargeable for service fee received for services rendered in Tanzania, then the section be interpreted in its plain and true perspective and no more.

Given the foregoing principles, we agree with Ms. Achimpota that the TRAB and the TRAT properly interpreted section 20 (1) of the Investment Act as not applicable to exempt withholding tax on interest, but rather it is the Income Tax Act. Equally, it is the interpretation that exemption of withholding tax on interest is not applicable where the loan to a strategic investor was secured from a related company. More importantly, is the interpretation by the two tribunals that exemption of

withholding tax on foreign loan interest is through Government Notice issued by the Minister for Finance in that regard. That is the law, and we find nothing calling for our intervention.

In the light of the foregoing, we find the appeal before us devoid of merits, accordingly, it stands to be dismissed. Parties to the appeal to bear own costs.

DATED at **DODOMA** this 7th day of April, 2025.

R. K. MKUYE
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 9th day of April, 2025 in presence of Mr. John Laswai, learned counsel for the appellant and Ms. Juliana Ezekiel, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL