IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MWARIJA, J.A., KENTE, J.A. And ISMAIL, J.A.)

CIVIL APPEAL NO. 436 OF 2023

WILLIAMSON DIAMONDS LIMITED..... APPELLANT

VERSUS

COMMISSIONER GENERAL,
TANZANIA REVENUE AUTHORITY.....RESPONDENT
(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Ngimilanga, Vice Chairman.)

Dated 18th day of February, 2022

in

Tax Appeal No. 44 of 2020

JUDGMENT OF THE COURT

23rd June & 14th July, 2025

KENTE, J.A.:

The dispute that animated the present appeal, traces its origins from a comprehensive tax audit undertaken by the respondent, the Tanzania Revenue Authority (TRA) pursuant to its statutory functions and mandate, on the appellant's (Williamson Diamonds Limited) mining business affairs for the years of income 2013, 2014 and 2015. Following the said audit which was largely intended to verify if the appellant had accurately reported and paid proper taxes, and while suspecting that the

appellant's self-assessments were incorrect, the responded issued and served on the appellant its amended tax assessments relating to corporate income tax which, not unexpectedly, the appellant strongly objected. After vainly going through the procedure obtaining under the respondent's internal dispute resolution mechanism dealing with objections to tax assessments, the appellant lodged in the Tax Revenue Appeals Board (the TRAB or the Board), tax appeals No. 246,247 and 248 of 2018 which were later on consolidated and determined as one.

The key claims by the appellant in its appeal to the Board were on the following areas: -

> (i) *That the respondent erred by incorrectly adjusting the appellant's income upwards by deeming that fuel sold to a contractor (Caspian Limited), was under -charged;*
>
> *ii) That the respondent erred by wrongfully disallowing deductions for loan facility fees, transaction costs, management fees, marketing fees, project management fees and plant modification fees as these were legitimate business expenses;*
>
> *iii) That the respondent erred by incorrectly reclassifying some assets (in-pit shaping*

recovery upgrades and tailings) which led to a lower depreciation allowance; and

iv) Incorrectly charging penalty for the late filing of tax returns.

In an endeavour to prove its claims, the appellant presented the following key evidential exhibits: **One,** a Technical Services Agreement with Caspian Limited which was intended to establish that the arrangement for fuel provision by the appellant at a specified price (USD 0.61 per litre) was a contractual obligation and part of a larger service agreement and not a simple sale of fuel; **Two,** Loan and Guarantee Agreements between her (appellant's) parent companies namely Willcroft Company Limited and Petra Diamond Limited on one hand, and the International Finance Corporation (IFC) on the other hand, as well as the Capital Expansion Facility Loan Agreement between Willcroft and the appellant. This last documentary evidence was meant to demonstrate that, although the loan was not directly extended by the IFC to the appellant, its ultimate aim was for the benefit of the appellant in its operational and mining expansion; **Three,** the Intra – Group Services Agreement and Transfer Pricing Documentation which were intended to establish the appellant's alleged expenditure on the

contested management and marketing fees. In this regard, it was the appellant's contention that, the fees paid thereunder, were for actual centralized services provided by the associated companies such as Petra Diamonds South Africa and they were charged in line with the arm's length principle; and **finally,** were the invoices and payment vouchers which were intended to prove that, indeed the appellant had incurred expenses for various services and assets' acquisition.

With regard to the Technical Services Agreement entered into by the appellant and Caspian Limited, the appellant contended that, as opposed to the respondent's position, the fuel supply to Caspian Limited was not a scheme for evading tax but rather, as the appellant was at pains to point out, it was a practical necessity and since the parties were not associates as defined under the Income Tax Act, 2004 (the ITA), the arm's length principle as provided for in section 33 of the ITA did not apply. It was accordingly contended that, the fees disallowed by the respondent were legitimate expenses incurred wholly and exclusively in the production of income as required by section 11(2) of the ITA. To that end, it was argued that, the legal wording of the transactions should not be interpreted as to override the economic substance and intention of the transaction.

Regarding assets classification, the appellant contended that, items such as in-pit shaping were in the category of development costs (class 4) and that "tailings" referred to capital equipment such as conveyors and spreaders (Class 2) and were by themselves, not waste products.

On the other hand, the respondent's position before the Board and the Tribunal, was based on its audit findings and it accordingly stood by its adjusted assessments and the final determination of the objection. In support of its position, the respondent relied on the Tax Audit Report, the Notices of Amended assessments and its determination of the objection in which it had given the reasons for upholding the contested assessments. With regard to the appellant's contention that the fuel supply to Caspian Limited was not a tax evasion scheme but a practical necessity, the respondent argued that, by selling fuel to Caspian Limited below the purchase price and then claiming full purchase price as an expense, the appellant was in effect reducing its taxable income. Moreover, it was the respondent's contention that, the appellant had failed to give sufficient evidence showing that the management, marketing and facility fees were incurred to cater for the services that were really rendered. The respondent's argument was based on the

contention that, these costs were intended by the appellant to relocate profit so as to pay less tax than it should or "profit shifting" as it is otherwise called in interpreting tax provisions, a tax evasion scheme which, if not tamed, leeches money from the country's economy.

With regard to the costs related to the IFC loan transaction, the respondent's position was that, the said loan was extended to Petra Diamonds and Willcroft who are the appellant's parent companies and therefore, all costs related to the processing, obtaining and maintaining the said loan encompassing both upfront fees and ongoing interest together with other charges which can be simply categorized as the fees charged by lenders to cover the costs associated with evaluating, approving and disbursing a loan and which are ordinarily charged upfront, were not the responsibility of the appellant but the actual borrowers. As for the reclassification of assets, the respondent challenged the appellant arguing that, items like in-pit shapings were incorrectly classified as they were permanent structures (class 6) and that tailings, are waste assets and not depreciable assets as erroneously alleged by the appellant.

With regard to the services allegedly provided to the appellant by various service providers, it was the respondent's contention that, when the audit was conducted, the appellant failed to specify and quantify the actual services provided together with stating the price for every service claimed to have been rendered. Accordingly, the appellant's plea that it had actually incurred the disputed expenses which should have been accepted as having been incurred wholly and exclusively in the production of its taxable income in a manner consistent with section 11(2) of the ITA, was strongly disputed by the respondent.

After examining the parties' pleading's their respective oral and documentary evidence together with the arguments marshalled by each party, the Board was not convinced by the appellant's claim and it therefore, found in favour of the respondent. The Board held that, the appellant had failed to lead sufficient evidence including the submitting of correct documentation in support of its position and as such, it did not discharge the burden of proving why its self-assessment was correct. Consequently, the Board went on dismissing the appeal preferred by the appellant for want of merit.

Being displeased with the decision of the Board, the appellant appealed to the Tax Revenue Appeals Tribunal (the TRAT or the Tribunal). Upon considering, the judgment of the Board, the evidence on record and the submissions by counsel, the Tribunal went on upholding the decision of the Board. In the main, the learned chairman of the TRAT and his Tribunal members, made the following findings of fact;

> *i) That, the loan agreement between Wilcrof Company Limited and Petra Diamond Limited on one hand, and IFC on the other hand,did not apply to the appellant; and*
>
> *ii) That, there was no evidence showing that the appellant had paid performance and marketing fees, project management fees and plant modification fees to prove that, recovery upgrade expenses were really incurred, and if incurred, whether they were incurred wholly and exclusively in the production of the appellant's taxable income.*

Still dissatisfied with the decision of the Tribunal, the appellant has now appealed to this Court, advancing seven grounds of appeal alleging errors and misdirections on the part of the TRAT. The said grounds were formulated as follows:

1. *The Tribunal erred in law in sustaining the holding by the Board that the weighing scale of any transaction of sale for purpose of taxation, is on whether the transaction was made at arm's length;*

2. *The Tribunal erred in law in holding that the arrangement between the Appellant and Caspian Limited was not entered at arm's length;*

3. *The Tribunal erred in law in failing to appreciate the cardinal principle of accounting for tax purposes that requires economic substance to prevail over any legal form in any business transaction when holding that the Respondent had correctly disallowed the loan facilitation fees and transaction cost.*

4. *The Tribunal erred in law in holding that, the Appellant's failure to provide evidence of actual performance and payment of marketing fees, management fees, project management fees and plant modification fees, disqualified her from deductibility under section 11(2) of the Income Tax Act, 2004.*

5. *The Tribunal erred in law in holding that, the Respondent was correct to classify in-pit shaping under class 6 of depreciable assets.*

6. *The Tribunal erred in law in holding that the Appellant failed to prove that the recovery upgrades expenses were incurred wholly and exclusively for production of income in business in line with section 11(2) of the Income Tax Act, and that;*

7. *The Tribunal erred in law in upholding the position taken by the respondent that tailings cannot be depreciable assets.*

We must state at the outset that, though differently crafted, the bottom line of the appellant's complaint in this matter, is in essence, a rehash of its arguments before the Board and the Tribunal. However, in view of what will unfold shortly, we need to quickly observe that, it seems to us, from the concurrent decisions of the Board and the Tribunal that, as opposed to the appellant who wanted to make the impression that the appeal before us raised only legal points in line with section 25(2) of the Tax Revenue Appeals Act (the TRAA), the impugned decisions were largely based on the lower courts' findings of fact. For

this reason, we perceive the appellant's grievances in respect of grounds three, four and six of the appeal as consisting principally of an attack of the Tribunal's findings of fact and on this, we hardly need to insist on the all important requirement that, appeals from the TRAT to this Court shall always lie on matters involving questions of law only.

It follows therefore that, upon appeal, this Court will consider the points of law presented for determination but will not reappraise the evidence, as that is the duty of the Tribunal which is enjoined, where the need arises and the particular occasion prompts, to reconsider the evidence tendered by the parties before the Board and reach to its own conclusive findings of facts. That is the main principle governing the exercise of this Court's jurisdiction in tax appeals.

As it will be noted at once, some of the grounds of appeal proferred by the appellant in this appeal, were either cherrypicked or conveniently phrased to omit the large chunks of the factual findings made by the TRAB and the TRAT ostensibly with a view to meeting the requirements of section 25(2) of the TRAA. In this connection, we have in mind grounds number three, four, and six all of which raise the issues whose determination by the lower Tribunals was solely based on the

evidence led by the parties. As we have already intimated, since in substance, the third, fourth and sixth grounds of appeal attacked the lower tribunals' findings of fact, and as such, in terms of section 25(2) of the TRAA, appeals from the Tribunal to this Court are taken on matters of law rather than fact as this Court is required to only review the legal issues arising out of a tax dispute, we will desist from entertaining the said grounds in as much as they are based on the factual errors allegedly committed by the lower courts. Put in other words, this Court has no jurisdiction to entertain appeals from the decisions of the TRAT that are based on matters of fact.

As regards grounds one and two to which it is now the opportune time to revert, Mr. Thomson Luhanga, learned Advocate for the appellant and Mr. Hospis Mwasanyia learned Principal State Attorney, representing the respondent appeared before us and addressed the Court. They synonymously submitted to the effect that, the appellant and Caspian Limited were not related as to require the observation of the arm's length principle in their business transactions. In the circumstances, we reach the conclusion hands down, that the first and second grounds of appeal are wholly misconceived. Save for what we

will hereinafter canvass in respect of the allegedly underpriced fuel, we discard them.

Moving forward to the remaining grounds of appeal, the legal issues that fall to be resolved are in respect of the allegedly undercharged fuel income and denial of depreciation allowance. In relation to the fuel income, counsel for the appellant submitted that, the arrangement for fuel supply to Caspian Limited served more than just the appellant selling fuel to the said company. That, the arrangement was a contractual obligation and part of a larger service agreement and therefore, the TRAT strayed into error by upholding the trial Board's position that it was correct for the respondent to categorize the arrangement as a deliberate tax evasion resulting from the appellant's underreporting of income from fuel sales.

Submitting in reply, counsel for the respondent begun from the premise that, the adjustment for fuel income was made by the respondent pursuant to section 96 of the ITA which deals with impermissible tax avoidance arrangements read together with section 48 of the Tax Administration Act, Chapter 438 of the Revised Laws which empowers the respondent to adjust an assessment with a view to

ensuring that the taxpayer is liable for the correct amount of tax in the circumstances to which the relevant assessment refers. The main point in counsel for the respondent's submission on this aspect was that, forasmuch as there is no dispute that under the arrangement the appellant had been selling fuel to Caspian Limited at a price that was lower than the purchase price, the said arrangement made the appellant to pay less taxes and therefore the respondent was justified to make the impugned adjustments as the appellant's self-assessment was incorrect. It was thus contended that, the appellant's complaint against the undercharged fuel income, had no basis both in law and in fact.

We have looked at the decision of the TRAT and considered the submissions filed by both parties, the authorities relied on, together with the brief oral submissions augmenting them. We wish to state right away that, we entirely agree with the respondent's counsel. Having conducted a tax audit which involved a detailed examination of the appellant's financial records and income statements showing, **inter alia,** that the appellant was buying fuel at a higher price but selling it to Caspian Limited at a lower price, the respondent was entitled to raise a redflag and come to the conclusion that there was tax evasion which

ordinarily comes in different forms, underreporting of income being one of them.

While we are mindful that in some instances the "buy high, sell low" principle might be beneficial as an investment strategy of riding the wave of market movement, there is no gainsaying that the "buy low, sell high" principle is ordinarily a surefire way of getting profit and avoiding losses in business. That is why, like the TRAT, we find it rather unfathomable that the appellant would buy fuel at USD 1.40 per litre and sell it to Caspian Limited for USD 0.61 per litre. It follows in our judgment that, whatever explanation was given by the appellant which, obviously escapes the practice in financial context regarding arbitrage opportunity, it sounds perversely counter-intuitive as to justify the respondent's position that the arrangement between the appellant and Caspian Limited smelt fishy. We find it rather odd and in some way unusual that the appellant would buy fuel at a higher price and sell it to Caspian at a lower price. In the circumstances, we find no merit in this ground of appeal which we accordingly dismiss.

Another contestable issue that beg our determination is whether the Tribunal was correct to hold that the respondent was right to classify

in-pit shaping under class 6 of depreciable assets. The learned chairman of the TRAT and his Tribunal members preferred the respondent's version rather than that of the appellant and consequently took the view that indeed, it was correct for the respondent to classify the in-pit shaping under category 6 of the classification. The learned chairman reasoned that, considering the weight and sizes of the trucks as well as their frequent movements to and fro the pit, the in-pit shaping must be of a sturdy-built surface structure of a permanent nature as to amount to an asset.

For his part, in what appears to us to be essentially a response to a factual matter, Mr. Luhanga submitted in reply that, the fact that the in-pit shaping is a well-built surface structure as held by the Tribunal, does not necessarily make it a structure of a permanent nature. The learned counsel contended that, in-pit shaping, refers to the process of modifying the shape and contours of the mining pit or excavation area where the terrain or landscape is altered in order to optimize safety stability and access for, among other things, mining equipment and personnel. That, the in-pit shaping is carried out with the understanding that, it shall be for temporary use as new or access routes shall be created in future to continue optimizing mining operations. According to

Mr. Luhanga, after cessation of the mining operations, the pit area is restored to a condition that can be repurposed for other uses and therefore it was not correct for the respondent to classify it as a permanent structure.

We readily take note that from the above submissions, Mr. Luhanga was doing the best in the circumstances but we do not accept his arguments inasmuch as they are on the edge of leading evidence from the Bar a practice from which Advocates are debarred. In the alternative, assuming that what was said by the learned Advocate were true, as we have already intimated, we cannot go into discerning from the evidence whether or not the in-pit shaping is a permanent or temporary structure. Even, at the risk of being repetitious, we have to emphasize for the benefit of the legal fraternity that, in so far as tax appeals are concerned, in terms of section 25(2) of the TRAA, this Court has no jurisdiction to reverse the findings of fact made by the TRAT. In this connection, it should be needless to say that, even with the advent of the much cherrished overriding objective principle, this Court has no power to enlarge its jurisdiction and it has to exercise such jurisdiction in accordance with the law.

Worthwhile to note here, is the fact that, this is not the first time we are being called upon to pronounce ourselves on this question. We carried similar sentiments in the cases of **Atlas Copco Tanzania Limited v. Commissioner General, Tanzania Revenue Authority,** Civil Appeal No. 167 of 2019 [2020] TZCA 317 (17 June 2020, TANZLII) and **Commissioner General Tanzania Revenue Authority v. Coca Cola Kwanza,** Civil Appeal No. 201 of 2023 just to mention but a few.

Upon the above discourse of the law, we cannot fault the learned Chairman of the TRAT together with his honorable Members for not deciding that the in-pit shaping was not a temporary structure. The appellant can only blame itself for lamentably failing to lead evidence before the Board showing that the in-pit shaping was a temporary structure classifiable under class 4 of the classes of depreciable assets. We thus find no merit in the appellant's complaint which we accordingly dismiss.

Lastly is the complaint that the TRAT erred in law in holding that tailings cannot be depreciable assets. As to this complaint, we were temporarily mesmerized by Mr. Luhanga who, at first expressed no qualms with the fact that, from the mining perspective, tailings contain

traceable amounts of valuable minerals or metals that, when processed, they become economically viable to extract and therefore in the mining industry, their potential value makes them assets in terms of resource availability.

But then, in a blink of an eye, the learned counsel turned around and submitted that, the tailings that the appellant had actually meant here, were the tailing conveyors and spreaders used in mining operations which are capital in nature and qualify for depreciation allowance as the expenses expended on them were incurred wholly and exclusively in the production of income. According, to Mr. Luhanga, an error in the description of an entry in the financial statement, cannot form the basis of subjecting a tax payer to the disallowance of the expenditure duly incurred especially where, as in this case, there is an explanation or evidence regarding the correct nature of an item. We were accordingly referred to the old case of **Sittending v. Commissioner of Inland Revenue, 80 f 2D** 939 (4th Cr.1936) cited in **Marquette Law Review,** Volume 48 Issue 1 of 1964, to underscore the point that, where there is no question of bad faith with regard to the book-keeping entries, the rights of the parties can neither be established nor impaired by the book-keeping methods employed; and that, mere

book-keeping entries cannot preclude the Government from collecting revenues, nor are such entries conclusive upon the taxpayer and further that, mere book keeping, creates nothing and the question must be decided according to proven and established facts.

What we can scrape together from the appellant's arguments is that, there is a clear evidentiary issue here with two contending positions on the question as to whether as a matter of fact, the term "tailing" referred to the residue of ore in the appellant's mining area as found and held by the TRAT or, it referred to the conveyors and spreaders used by the appellant in mining operations as vehemently contended by her. While our understanding is that in mining terms "tailings" are a by-product of mining in that, after the intended commodity of value such as diamond in this case, is extracted from the ore material, the resultant waste is termed "tailings", it appears to us that, in view of the appellant's taking an unexpected twist arguing that what tailings meant in the context of the present dispute, were conveyors and spreaders used in mining operations, that turns out to be an issue of fact into which, by parity of our earlier reasoning, we have no jurisdiction to probe.

The net result of what we have endeavored to say here inabove is that, this appeal is bereft of merit and is accordingly dismissed with costs.

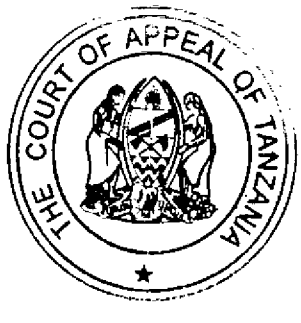
DATED at **DODOMA** this 11th day of July, 2025.

A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

Judgment delivered this 14th day of July, 2025 in the presence Messrs. Yohanes Konda and Thomson Luhanga, learned counsel for the Appellant and Mr. John Mwacha, learned State Attorney for the Respondent, through video link, is hereby certified as a true copy of the original.



D.P. KINYWAFU
DEPUTY REGISTRAR
COURT OF APPEAL