IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., LEVIRA, J.A., And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 109 OF 2020

NATIONAL BANK OF COMMERCE LTD ..... APPELLANT

VERSUS

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

(Mjemmas, Chairman)

dated 31st day of January, 2020
In
Tax Appeal No. 34 of 2018

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JUDGMENT OF THE COURT

15th & 24th March, 2022

LEVIRA, J.A.:

The appellant, National Bank of Commerce Ltd (NBCL) is challenging the decision of the Tax Revenue Appeals Tribunal (the Tribunal) in Tax Appeal No. 34 of 2018 which dismissed its appeal against the decision of the Tax Revenue Appeals Board (the Board), in favour of the Respondent. The contention in that appeal was centred on the respondent's imposition of withholding tax on payment made by the appellant in respect of services by non-resident entities as well as rentals paid in respect of various lease agreements.

It is desirable that we look at the facts of the case before we embark on the grounds of appeal presented before us. According to the record of appeal, in the year 2012, the respondent conducted an audit on the tax affairs of the appellant. Upon such audit, the respondent discovered that the appellant made certain payments to non-resident persons in respect of services supplied to the appellant by the non-resident entities as well as on rentals on various sale agreements. As a result, the respondent imposed withholding taxes on those payments and rentals which in essence aggrieved the appellant. Therefore, the appellant preferred an appeal to the Board which was registered as Income Tax Appeal No. 91 of 2013.

Before the Board four issues were raised; to wit, **first,** whether payments made by the appellant for services performed outside Tanzania by non-residents are subject to withholding tax; **second,** whether the respondent took into consideration withholding tax remittances on rental payments when making withholding tax demand; **third,** whether in the circumstances, imposition of interest is correct in law; and **fourth,** what reliefs each party is entitled to. Having heard the appeal, the decision of the Board was partly in favour of the respondent and partly the parties were ordered to reconcile accounts; specifically, remittances allegedly

made by the appellant. Dissatisfied, the appellant appealed to the Tribunal where it was discovered that the Board did not make a specific finding on two issues, namely; whether the payments made by the appellant to its offshore service providers for services performed outside Tanzania are subject to withholding tax and whether the respondent took into consideration withholding tax remittances on rental payments in raising the withholding tax demand. Based on the available evidence and submissions presented before the Board, the Tribunal decided to step into the shoes of the Board to determine the undecided issues together with other grounds of appeal. However, the Tribunal found the appellant's appeal lacking in merits and dismissed it right away.

Still aggrieved, the appellant has preferred the present appeal challenging the decision of the Tribunal. It has to be noted that initially, the appellant filed a Memorandum of Appeal containing five grounds. Later, it sought and obtained leave of the Court to file an Amended Memorandum of Appeal. However, during hearing of the appeal, the counsel for the appellant abandoned other grounds of appeal appearing in the said Amended Memorandum of Appeal and argued only one ground which reads: -

"(1) The Tax Revenue Appeals Tribunal erred in law in stepping Into the shoes of the Tax Revenue Appeals Board and determine the issue relating to imposition of withholding tax for payments made by the Appellant to offshore entities suo motto without affording the parties an opportunity to be heard contrary to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania 1977".

The parties filed written submissions containing arguments for and against the above ground of appeal which were adopted by their respective learned counsel during hearing of the appeal. The appellant was represented by Mr. Wilson Mukebezi, assisted by Mr. Alan Kileo and Ms. Emma Lyamuya, all learned advocates; whereas, the respondent had the services of Mr. Harold Gugami, learned Senior State Attorney, Mr. Hospis Maswanyia, also learned Senior State Attorney and Ms. Salome Chambai, learned State Attorney. Mr. Mukebezi and Gugami, learned counsel argued for and against the appeal respectively.

Submitting in support of the appeal, Mr. Mukebezi stated that the parties to this matter had a dispute regarding withholding tax remittance on rental payments made by the appellant to non-resident persons. He further referred us to page 298 of the record of appeal arguing that, the Board failed to make specific findings on the issue presented before it as

it said, there was a big confusion as to which tax bases are legitimate in respect of the appeal.

He went on submitting that the services were performed in Tanzania where the respondent said, they were remotely being rendered from offshore. In that regard, he argued, the Board ended up saying that the appellant did not adduce evidence to that fact. Ultimately, the Board did not make any finding in that respect, instead, it ordered the parties to sit and find solution.

Following failure by the Board to determine issues presented before it, the appellant filed an appeal before the Tribunal. The appeal was disposed of by way of written submissions filed by the appellant; but the respondent filed none. The counsel for the appellant referred us to page 336 of the record of appeal where the Tribunal made a finding that, the Board did not make a specific finding on the issue whether the payments made by the appellant to its offshore service providers for services performed outside Tanzania are subject to withholding tax and whether the respondent took into consideration withholding tax remittances on rental payments in raising the withholding tax demand. The learned counsel submitted that with that finding, the Tribunal upheld the appeal to that extent and quashed the decision of the Board.

Mr. Mukebezi submitted further that as a way forward, the Tribunal stepped into the shoes of the Board and determine the dispute after having considered that the matter was an old one. Another reason for taking such measure was that the Tribunal was sitting as a first appellate court and thus, was entitled to evaluate the evidence independently and could come to its own conclusion. It was the argument by the counsel for the appellant that, the Tribunal made its own findings and made a decision on a matter which was not before the Board. He referred, us to page 338 of the record of appeal and argued further that, the Tribunal relied on the decision of the Court in **Tullow Tanzania BV. v. Commissioner General (TRA),** Civil Appeal No. 24 of 2018 (unreported) to resolve that the services rendered outside Tanzania are subject to withholding tax while that was not the dispute before the Board.

According to him, the parties were fighting on the place where services were rendered and not whether the withholding tax is paid to the services rendered outside Tanzania. He again referred us to page 139 of the record of appeal and submitted that part of a Memorandum of Discussion found on that page shows that there were various items which were kept together and it shows that some of the services were rendered in Tanzania and others offshore. He was firm that, there was no

discussion regarding withholding tax issues. He further referred us to pages 311-314 of the record of appeal, particularly, at paragraph 8 of the appellant's written submission in support of the appeal before the Tribunal where he said that, the appellant did not argue anything regarding substantive issues. Therefore, it was his argument that the Tribunal erred by not calling the parties to submit on the substantive issues. He distinguished the case of **Hassan Mzee Mfaume v. Republic** [1981] TLR 167 relied by the Tribunal from the present case saying that, in that case, the High Court evaluated the evidence having found that the same was not evaluated properly by the court below; while in the current case, the Tribunal did not evaluate the evidence but applied **Tullow's case** and gave a decision.

The counsel for the appellant went on to argue that the appellant produced documents before the Board to prove remittances, which the Tribunal wrongly determined that they were produced in contravention of Rule 15(4) of the Tax Revenue Appeals Board Rules 2001 G.N. No. 57 of 2001 (now repealed). The said Rule required all the evidence to be relied upon by the Board first to be made available to the respondent in the notice of objection. He thus argued, the Tribunal was not supposed to make such a finding.

It is worth noting that the counsel for the appellant indicated in the written submission presented before us that, the appellant does not dispute the Tribunal's decision to step into the shoes of the Board and determine the dispute. What is disputed is that in stepping into the shoes of the Board, the Tribunal did not bother to call the parties and afford them the right to address it on the issue of withholding tax which was raised *suo motto*. He submitted further that the Tribunal was wrong to determine issues which were not even raised by the parties for determination without giving them an opportunity to be heard. Therefore, he prayed for the appeal to be allowed.

In reply, Mr. Gugami commenced his submission by referring us to page 146 of the record of appeal where issues framed and agreed upon before the Board are found, with a view of showing the Court that the issue of withholding tax was not introduced by the Tribunal but it was among the issues before the Board. The first issue reads: "*Whether payments made by the appellant for services performed outside Tanzania by a non-resident are subject to withholding tax.*" He went on submitting that at page 152 of the record of appeal, the appellant stated in its written submissions to the Board that, the payments for services which were rendered from offshore are not subject to withholding tax in Tanzania.

He thus faulted the submission by the counsel for the appellant who submitted that the main issue before the Board was on the place of performance of the services.

The learned counsel for the respondent insisted that from page 148 to 177 of the record of appeal, the main argument by the parties before the Board was on whether the services were subject to withholding tax. However, he said, when the matter was presented before the Tribunal on appeal, it found that the said issue was not fully determined and is when it stepped into the shoes of the Board and determine it as it can be observed from page 335 to 336 of the record of appeal.

As regards the issue whether the parties were afforded the right to be heard, Mr. Gugami submitted that having stepped into the shoes of the Board, the Tribunal relied on the submissions of the parties before the Board and made its finding from page 336 to 339 of the record of appeal. According to him, it is misleading for the appellant to claim that parties were not given the right to be heard because there was no new issue discussed and or determined by the Tribunal. He insisted that the parties were afforded the right to be heard as the Tribunal evaluated the evidence as indicated at page 340 of the record of appeal where the Tribunal was quoted saying: *"We have seriously considered the rival submissions by*

the learned counsel for the appellant and the respondent respectively. We have also taken note of the documents which the appellant is relying on."

Mr. Gugami insisted, it was sufficient that the Tribunal relied on the evidence tendered before the Board to determine the dispute between the parties as it was in **Hassan Mzee Mfaume v. Republic** (supra) cited with approval by this Court in **The Registered Trustees of Joy in the Harvest v. Hamza K. Sungura,** Civil Appeal No. 149 of 2017 (unreported).

In conclusion, the counsel for the respondent submitted that the Tribunal did not determine issues which were not placed before it and there was no need to recall the parties to make submission because they had already been given that opportunity by the Board. Therefore, he prayed for the appeal to be dismissed with costs.

Mr. Mukebezi made a rejoinder to the effect that the Tribunal ought to have called the parties to make clarification on which services were rendered in Tanzania and which were performed offshore. However, he admitted that from page 173 – 177 of the record of appeal, parties made clarification before the Board but the appellant thought the Tribunal needed more clarification on the issue because the law had already

changed when the Tribunal was deciding the matter. Citing section 17(2) of the Tax Revenue Appeals Act, Cap 408 R.E. 2010, he vehemently submitted that the Tribunal was supposed to call parties so as to reach a just decision. When responding to the question posed by the Court regarding the first issue agreed at the Board found at page 149 of the record of appeal, the counsel for the appellant stated that the Tribunal did not decide it properly. He thus reiterated his prayer that the appeal be allowed.

We have dispassionately considered a relatively long submission by the parties. We appreciate that various issues have been touched, especially, by the appellant's counsel. However, for the purpose of this appeal we shall direct our mind on a sole issue which is a center of the appellant's complaint; whether the Tribunal *suo motto* introduced the issue relating to imposition of withholding tax on payments made to non-resident persons for services performed outside Tanzania and decided it without affording the parties a right to be heard.

To start with, our thorough perusal of the record of appeal together with the submissions by the counsel for parties do not suggest that there was any new issue raised and decided by the Tribunal. The record of appeal is very clear that before the Board parties agreed on four issues for determination as follows: -

(i) *Whether payments made by the appellant for services performed outside Tanzania by non-residents are subject to withholding tax;*

(ii) *Whether the respondent took into consideration withholding tax remittances on rental payments when making withholding tax demand;*

(iii) *Whether in the circumstances, imposition of interest is correct in law; and*

(iv) What reliefs each party is entitled to.

The Board considered the evidence adduced before it and the submissions by the parties to reach its decision where the appeal was partly allowed. However, we agree with the appellant that the Board saw a big confusion as to which tax bases are legitimate in respect of the appeal while dealing with the first issue as it can clearly be seen at page 214 of the record of appeal. As a result, it failed to determine that issue as correctly, in our view, found by the Tribunal. When the appeal was placed before the Tribunal and after having discovered that the Board did not decide on the first issue despite being in possession of the necessary materials which would assist in doing so, the Tribunal decided to step into the shoes of the Board to decide that issue. It should be noted that from

page 148 to 176 of the record of appeal, the parties before the Board got the opportunity to clarify on all the issues which were raised. The appellant filed written submission in which it discussed thoroughly the first issue from page 150 to 152 of the record of appeal. Since the Tribunal was sitting as the first appellate court and after having discovered that the first issue was not determined by the Board, it decided to step into the shoes of the Board and decide on it.

It can further be noted that among the grounds of appeal presented before the Tribunal was that: *"The Board erred in law for failure to properly determine the issues before it."* Constructively, the appellant was inviting the Tribunal to step into the shoes of the Board and determine those issues, a task which we think, was correctly performed by the Tribunal. As intimated above, the appellant is not challenging the act of the Tribunal stepping into the shoes of the Board to decide issues raised before it. The only grievance is that the parties were not given the right to be heard on the issue of withholding tax in respect of services performed outside Tanzania by non-residents. The question that follows is whether it is correct under the circumstances of this case for the appellant to claim that parties were not afforded the right to be heard on the issue which was raised before the Board.

It is settled law that when rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing which is construed to mean a right to be heard - see Article 13(6) (a) of the Constitution of the United Republic of Tanzania 1977 (as amended).

Coming to the issue we have raised, parties to this appeal have raised rival arguments regarding this issue. While the appellant's counsel strongly argued that parties were not given the right to be heard, the respondent's counsel submitted to the contrary. It can be noted from the submission by the counsel for the appellant that, although initially he forcefully argued that the parties were not afforded the right to be heard by the Tribunal on the first issue which was raised before the Board, and that the said issue was raised *suo motto* by the Tribunal, he forgot that the said issue was raised by the appellant as one of the grounds of appeal before it. Also, before the Tribunal the appellant presented three grounds, to wit:

> *(1) That the* ***Board erred in law and in fact by disagreeing with the appellant's arguments*** *that the payments for which the respondent is* ***seeking to impose withholding tax are in respect of services performed offshore by non-residents*** *on mere*

assumption that the services could have been performed in Tanzania.

(2) That the Board erred in law and in fact by failure to hold that the respondent did not take into account ***withholding tax remittance*** *on rentals made by the appellant in making* ***the withholding tax demand*** *after agreeing that the evidence of withholding tax remittance was availed to the respondent and the respondent can easily access it. [Emphasis added].*

(3) That the Board erred in law for failure to properly determine the issues before it.
[Emphasis added].

The only issue proposed by the appellant and determined by the Tribunal in dealing with the above grounds of appeal was: *"whether the Board determined the issues arising from the appeal correctly."* In answering this issue, the Tribunal confined itself on the issues which were raised before the Board. In the course of determining the said issues, it discovered that the Board did not deal with the first issue which was raised before it. Being guided by the decision of defunct East Africa Court of Appeal in **Hassan Mzee Mfaume v. Republic** (Supra) the Tribunal stepped into the shoes of the Board and evaluated the evidence which was tendered before it to arrive to its decision. To appreciate parties'

arguments for and against the issue under consideration we wish to quote part of the Tribunal's decision hereunder: -

> *"From the Board's proceedings and judgment it is revealed that the appellant's contention was that the payments made to its non-resident service providers had no source in the United Republic because the services were performed offshore, that is outside the country. Of course, there was dispute between the appellant and the respondent as regards which services were performed outside the country and which services were performed in the country."*

The Tribunal went on stating that: -

> *"The issue which we have to resolve is whether the payments made by the appellant to its non-resident service providers had a source in the United Republic. That takes us to the provisions of section 69(1) (i) of the Income Tax Act, 2004. That section provides .... We therefore hold that irrespective of the place of rendering service as the payments in this appeal were made by the appellant (NBC), who is a resident in Tanzania for services utilized in the United Republic,* ***then the issue whether payments made by the appellant for services performed outside Tanzania by non-resident are subject to***

withholding tax is answered in the affirmative. *The payments made are subject to withholding tax under the provisions of section 6(1) (b), 69(1) (i) and 83(1) (b) of the Income Tax Act, 2004."*

[Emphasis added].

The decision of the Tribunal was based on the materials which were presented by the parties to answer all the three issues which were raised before the Board. In the circumstances, the appellant cannot claim that it was not accorded the right to be heard; as correctly, in our view, submitted by the counsel for the respondent. We have observed from the arguments of the counsel for the appellant before us that, the appellant was not satisfied with the decision of the Tribunal. In the concluding remarks, as shown above, he ended up saying that the Tribunal was required to receive further clarification from the parties so as to arrive at a just decision. At any rate, dissatisfaction of a party to a suit does not justify a claim of denial of a right to be heard; whether the Tribunal needed further clarification or otherwise does not amount to denial of a right to be heard as the counsel for the appellant would wish us to decide. In our settled view, the appellant's claim is unfounded and it is nothing but an afterthought. To prove this, with respect, it can be observed from the submission by the counsel for the appellant above that he tried to

touch various issues to justify his claim. However, he ended up conceding that the parties were accorded the right to be heard but only fact that, they needed to make more clarification forgetting that the Tribunal did what was supposed to be done by the Board. With this remark, we therefore find that the parties were given the right to be heard and the appeal has no merit.

Consequently, we dismiss the appeal with costs.

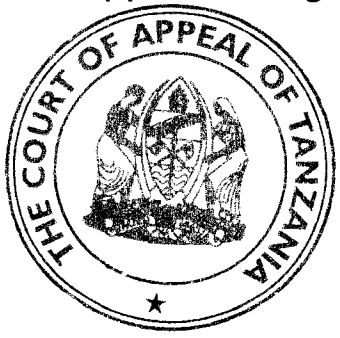
DATED at **DAR ES SALAAM** this 24th day of March, 2022.

R. KMKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 24th day of March, 2022 in the presence of Ms. Emma Lyamuya, learned counsel for the Appellant and Ms. Salome Chambai, learned State Attorney for the respondent is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL