IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: JUMA, C.J., MUGASHA, J.A. And NDIKA, J.A.)

CIVIL APPEAL NO. 144 OF 2018

AFRICAN BARRICK GOLD PLC..... APPELLANT
VERSUS

COMMISSIONER GENERAL
TANZANIA REVENUE AUTHORITY ..... RESPONDENT

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

(Dr. Twaib J.-Chairman)

dated the 31st day of March, 2016
in
Tax Appeal No. 16 of 2015

JUDGMENT OF THE COURT

2nd June, 2020, 3rd August 2020 & 31st August, 2020

JUMA, C.J.:

This second appeal pits the AFRICAN BARRICK GOLD PLC as the appellant, against the COMMISSIONER GENERAL OF THE TANZANIA REVENUE AUTHORITY as the respondent. The appellant is a company incorporated in the United Kingdom and holding shares in three mining entities in Tanzania. The three entities are Bulyanhulu Gold Mine Limited; North Mara Gold Mine Limited; and PANGEA Minerals Limited. PANGEA operates the Tulawaka Gold Mine and the Buzwagi Gold Mine. The respondent is a statutory body corporate that was established

under section 4 of the Tanzania Revenue Authority Act (Cap 399) for purposes of assessment and collection of taxes and other revenues.

The bottom-line issue for determination by this Court is whether the Tax Revenue Appeals Tribunal ("the Tribunal") which heard the appellant's first appeal, is correct as a matter of law, to hold that the Certificate of Compliance which the Registrar of Companies issued under section 435 of the Companies Act, 2002 (Cap. 212); amounted to the appellant company becoming "formed" for purposes of income taxation in Tanzania under section 66(4)(a) of the Income Tax Act, 2004 ("the ITA 2004").

The pleadings which the parties filed in the trial Tax Revenue Appeals Board at Dar es Salaam ("the Board") in exercise of its original jurisdiction, provides a precise backdrop to the dispute leading up to this second appeal.

It all began sometime in November 2012, when the respondent's tax investigation department conducted an audit on the business activities of the appellant. As part of that investigation, the respondent issued a notice under section 138 of the Income Tax Act 2004 ("the ITA 2004") which required the appellant, to produce various documents to assist that tax investigation. Later, on 19/11/2012, the respondent

issued yet another notice under section 139(1)(b) of the ITA 2004, requiring Mr. Deodatus Mwanyika, the appellant's Vice President-Corporate Affairs; to present himself at the respondent's office in Dar es Salaam for an interview regarding the appellant's tax affairs. The interview was meant to determine whether, in terms of section 66(4) (a) (b) of the ITA 2004, the appellant company was a resident company in Tanzania for taxation purposes. The interview was also done in the context of a Certificate of Compliance which the Registrar of Companies had earlier on 11th March 2010 issued to the appellant company to manifest the UK Company's compliance with the provisions of section 435 of the Companies Act of Tanzania.

It seems clear from the pleadings, the respondent was satisfied despite being a company incorporated in the United Kingdom, the appellant was a resident company in Tanzania for purposes of income taxation. On 8/10/2013, the respondent issued the appellant with a notice that the appellant had been registered and issued with Taxpayer Identification Number (TIN-120-840-916) under Section 133 of the ITA 2004. The notice similarly confirmed that the appellant had been issued with a Value Added Tax Registration Number (VRN 40-015846-L) under Section 19(4) of the VAT Act, 1997. And as a consequence of these tax

registrations, the respondent obliged the appellant to comply with its statutory tax obligations in Tanzania which include, filing of statutory returns prescribed under the ITA, 2004 and VAT Act, 1997.

As a tax resident in Tanzania, the appellant was asked to remit withholding taxes on dividend payments amounting to USD 81,843,127 which the company allegedly made for the years 2010, 2011, 2012 and 2013 (this sum was subsequently reduced to USD 41,250,426). The appellant was also required to remit withholding taxes on payments which the appellant's mining entities in Tanzania made out to the appellant, together with payments which the appellant made to other non-resident persons (its shareholders) for the service rendered between 2010 up to September 2013. The respondent also demanded stamp duty on instruments that were executed relating to the conducting of the appellant's business activities in Tanzania.

Inevitably, the appellant was dissatisfied with the demand to pay withholding tax on dividend which the appellant allegedly paid to its shareholders. On 21/11/2013, the appellant filed its Statement of Appeal to initiate an appeal to the trial Board.

In its pleadings to the Board, the appellant was resolute that, being a holding company incorporated in the United Kingdom, it was

neither a resident company in Tanzania, nor did it conduct any business in Tanzania to attract the income tax which the respondent demanded. The respondent's Reply to Statement of Appeal on the other hand, was as resolute, insisting that as long as the appellant has its regional offices in Dar es Salaam, and had a Certificate of Compliance issued by the Registrar of Companies of Tanzania, and given that the appellant is also listed on the Dar es Salaam Stock Exchange; the appellant is as much a resident company doing business in Tanzania as any other company incorporated under the Companies Act of Tanzania. Further, the respondent also pleaded that the appellant is also a resident company in so far as it conducts its business in Tanzania through its gold mining entities of Bulyanhulu Gold Mine Limited, North Mara Gold Mine Limited, Tulawaka Gold Mine and the Buzwagi Gold Mine.

In its Statement of Appeal to the Board, the appellant listed seven grounds of complaints against the respondents. Firstly, that the respondent was wrong in fact and in law, to forcibly register the appellant and allocate it with Tax Identification and Value-Added Registration numbers. The second complaint faulted the respondent's decision to demand tax from the appellant using section 139(1)(a) of the ITA 2004 and section 38 of the Value Added Tax Act, 1997. Thirdly,

the appellant faulted the respondent for demanding withholding tax on dividend which the appellant, as a non-resident company, paid to its offshore shareholders.

The appellant complained that the respondent's act of demanding payment of unspecified taxes for items such as payments for management services by the appellant and other non-resident persons, to be wrong both in law and fact. Similarly, the appellant faulted the respondent's demand of PAYE and SDL as arbitrary and wrong in law. The appellant was not at all pleased with the way the respondent demanded returns of income in respect of Mr. Mwanyika (Vice President-Corporate Affairs), contending that it was wrong in law. Finally, the appellant complained about the respondent's decision to demand stamp duty on instruments alleged to have been executed.

Before dismissing the appeal for lack of merit and directing the appellant to pay its taxes transparently, the Board made several pertinent findings. The Board made a finding that the Certificate of Compliance which the Registrar of Companies issued to the appellant, had the effect of vesting the appellant with a legal status to conduct business in Tanzania. To that extent, the Board concluded, the appellant is a resident company in Tanzania for the purpose of income

taxation. Further, the Board could not help but express its surprise that, while on the one hand, the financial statements of the appellant's entities in Tanzania indicate that these entities were not making any profit in the period 2010, 2011, 2012 and 2013 and therefore paid no dividend to anybody; yet on the other hand, the appellant's financial statements in the United Kingdom had *declared dividends on the income coming from its business in Tanzania amounting to USD 818,431,285 and gave it to its overseas shareholders.*

Dissatisfied with the decision of the Board, the appellant appealed to the Tribunal. Standing out, amongst the three grounds of appeal to the Tribunal, is the complaint that the Board had erred in law and fact to hold that the appellant is resident in Tanzania for income tax purposes.

Just as the appellant's appeal had been dismissed earlier by the Board; the Tribunal concluded that the appellant is a resident company for tax purposes and similarly dismissed the appellant's first appeal. The Tribunal stated:

> *"Applying the purposive method of interpretation, which we have just endorsed, we think it is quite in order that the word 'formed' in section 66(4)(a) of the Income Tax Act, 2004 can be construed to include the registration*

of the company under the Act. That means the issuance of the Certificate of Compliance under section 453 of the Companies Act, would be included. .... Hence even though it does not amount to the incorporation (or re-incorporation, for that matter) of the company in Tanzania, it is correct to conclude that registration amounted to the company's formation in Tanzania as a foreign company."

Still determined, the appellant has come to this Court on second appeal.

Jurisdiction of this Court over appeals from Tax Revenue Appeals Tribunal derives from section 25 (2) of the Tax Revenue Appeals Act Cap. 408 ("the TRAA"). This jurisdiction is restricted to matters involving questions of law only.

The memorandum of appeal which the appellant preferred to us discloses four grounds of appeal. In the first ground of appeal the appellant takes issue with the Tribunal for holding that the appellant is liable to pay withholding tax. The second ground faults the Tribunal for holding that the appellant, a foreign incorporated company, was "formed" in Tanzania and is a resident for tax purposes. In his third ground of appeal the appellant faults the Tribunal for justifying the TIN and VRN registration certificates which the respondent issued to the appellant. In the fourth ground of appeal, the appellant faults the

Tribunal for interpreting the word "formed" broadly regardless of whether there had been a scheme of tax evasion by the appellant.

For reasons which will become clear in the course of this judgment, this appeal was heard in Dodoma and later in Dar es Salaam.

At the hearing of this appeal in Dodoma on 2nd June 2020, the appellant was represented by Dr. Abel Mwiburi, learned counsel. The respondent was represented by four learned counsel led by Mr. Evarist Mashiba, Principal State Attorney, the others being Mr. Noah Tito, Ms Juliana Ezekiel and Ms Gloria Achimpota, all learned counsel from the respondent's office.

When we called upon Dr. Mwiburi to submit on the grounds of appeal, he prayed for an adjournment of the hearing of this appeal to wait for what he described as conclusion of a "Framework Agreement" between the appellant and its mining entities in Tanzania, and the Government of Tanzania. He explained that the parties were working on the finer details of the "Framework Agreement", which in the learned counsel's estimation, was to result in an out-of-court settlement of all disputes between parties not only before this Court, but also those still pending at the trial Board and the first appellate Tribunal. Dr.

Mwiburi also sought adjournment because the Civil Application No. 350/01/2019 which the appellant had earlier filed to move this Court to review its earlier decision, was then still pending to be heard. The learned counsel urged us to follow the established practice of the Court to adjourn the hearing of the appeal to wait for the outcome of the application for review which might affect how this appeal turns out.

Mr. Tito opposed the prayer for adjournment. He wondered why Dr. Mwiburi did not inform him earlier about his intended prayer for adjournment. And because team of the respondent's learned counsel had travelled from Dar es Salaam to Dodoma well prepared for this appeal, this appeal should proceed as planned. The learned counsel referred us to Rule 38A of the Tanzania Court of Appeal Rules, 2009 ("the Rules") which obliges parties seeking adjournments of hearings of appeals to show good cause. In so far as Mr. Tito was concerned, Dr. Mwiburi had not shown any such good cause. He added that Dr. Mwiburi had not even presented a copy of the Framework Agreement before this Court. According to Mr. Tito, delaying tactics have been the trend of the appellant's learned counsel all along up to this second appeal.

With regard to the pending application for review, Mr. Tito wondered why, after the Registrar had fixed the date of hearing of this appeal, Dr. Mwiburi did not find it appropriate to inform the Court and the respondent about his intended prayer for adjournment, and why the appellant's counsel had to wait until the date of hearing, to seek an adjournment on ground of a pending application for review.

On our part, after hearing the two learned counsel on prayer for adjournment, we directed the hearing of appeal to proceed on the understanding that before we hand down our judgment we will hear the parties on the outcome of the pending application for review in Civil Application No. 350/01/2019 through which the appellant had applied to the Court to review its earlier decision in Civil Application No. 177/20 of 2019.

Having declined to adjourn the appeal in Dodoma, we invited Dr. Dr. Mwiburi to make his submissions. He made oral submissions and relied on written submissions which the appellant had filed earlier on 26/10/2018. He submitted that the appellant who was incorporated in the United Kingdom, is aggrieved by the decision of the Tribunal which confirmed the Board's decision that the appellant is liable to pay withholding tax to the respondent. The appellant is challenging the

Tribunal for agreeing with the Board that the appellant is a resident company for income tax purposes under section 66(4)(a) of the ITA 2004, consequence of which the appellant is chargeable to withholding tax under section 82 read together with Para 4(b)(i)(bb) of the First Schedule to the ITA 2004. Dr. Mwiburi submitted that the Tribunal erred in law when it invoked these provisions to conclude that the appellant, though incorporated in the United Kingdom, became "formed" under the Companies Act of Tanzania thereby became is a resident company in Tanzania for purpose of taxation.

Dr. Mwiburi contended that the conclusion by the Tribunal that the appellant is a resident company in Tanzania for income taxation is not borne out of proper understanding of the phrase **"incorporated or formed"** appearing under paragraph (a) of section 66(4) of the ITA 2004 which states:

> *"66(4) A corporation is a resident corporation for a year of income if-*
>
> *(a) it is **incorporated or formed** under the laws of the United Republic;"*[Emphasis added].

As long as the appellant company was incorporated in the United Kingdom, he submitted, the appellant can neither be regarded to have been "incorporated" nor "formed" under the laws of the United Republic

of Tanzania. He supported his position by referring to the definition of "corporation" under section 3 of the ITA 2004 which provides:

> *"corporation" means any company or body corporate established, incorporated or registered under any law in force in the United Republic or elsewhere, an unincorporated association or other body of persons, a government, a political subdivision of a government, a parastatal organisation, a public international organisation and a unit trust but excludes a partnership;"*

The learned counsel submitted that the Tribunal misinterpreted the word "formed" appearing in section 66(4)(a) of the ITA 2004 to conclude that the appellant is a resident company that had participated in a tax evasion scheme. He further took exception to the way the Tribunal concluded that the appellant became a resident by virtue of the Certificate of Compliance which the Registrar of Companies issued to the appellant under the Companies Act, 2002. This way of acquiring tax residence through the back of Certificate of Compliance, Dr. Mwiburi submitted, went beyond the normal meaning of the word "formed" under section 66(4)(a) of the ITA 2004.

Still contesting the Tribunal's conclusion that the appellant is a resident company, the learned Counsel for the appellant submitted that the ITA 2004 and the Companies Act 2002 are distinct and mutually exclusive in so far as they address different matters. Specifically, he submitted that neither the ITA 2004 nor the Companies Act, stipulate that issuance of certificate of compliance under section 435 of the Companies Act results in a foreign incorporated company becoming "formed" in Tanzania for purposes of tax residency.

It was not possible, the learned counsel added, for the appellant who had already been "formed" in the United Kingdom; to be formed again in Tanzania under the certificate of compliance issued by the Registrar of Companies. In any case, the counsel argued, had the legislator intended that certificate of compliance under the Companies Act 2002 to automatically "form" a foreign incorporated company into a tax resident under ITA 2004, the legislator would have made this very clear in either Companies Act or the ITA 2004.

To underscore his contention that the Tribunal had over-stretched the meaning of the word "formed" thereby encroaching the law-making power of the Legislature, the learned counsel for the appellant cited several authorities, including **R. V. MWESIGE GEOFREY,** CRIMINAL

APPEAL NO. 355 OF 2014 (unreported), where this Court had restated that when the words of a statute are unambiguous, judicial inquiry is complete, and there can be no need for interpolations. Dr. Mwiburi faulted the Tribunal for construing the word "formed" in section 66(4)(a) of the ITA 2004 to include the registration in Tanzania of a company like the appellant, that had earlier been incorporated abroad.

Relying on the decision of the Court in **NORTH MARA GOLD MINE LIMITED V. COMMISSIONER GENERAL OF THE TANZANIA REVENUE AUTHORITY**, CIVIL APPEAL NO. 78 OF 2015 (unreported), he urged us to strictly interpret the taxing provisions of section 66(4)(a) of the ITA 2004, and ambiguity arising from the scope of the word "formed" should be resolved against imposition of the withholding tax against the appellant.

To cement his exhortation that section 66(4)(a), being a taxing provision which should be construed strictly; Dr. Mwiburi referred us to our decision in **COMMISSIONER GENERAL AND ANOTHER V MAC ARTHUR AND BAKER INTERNATIONAL (MBI)** [2000] 1 EA 33 which dealt with section 34 (1) of the ITA 1973 regarding tax payable by a corporation which is not a resident, and which has no permanent establishment in Tanzania. He submitted that this decision stated that

the word "incorporated" under section 2(b)(i) of ITA 1973 is not the same as the word "registered" used in the same 1973 Act. He submitted that the word "registered" no longer appears in section 66(4)(a) of ITA 2004, instead the words— "incorporated" and "formed" now appear. He submitted that guided by spirit underlying the case of **COMMISSIONER GENERAL AND ANOTHER V MAC ARTHUR AND BAKER INTERNATIONAL (MBI)** (supra), "incorporated" and "formed" do not mean the same thing.

He argued that, in its natural meaning, of the word "formed" does not envisage a Certificate of Compliance issued under section 435 of the Companies Act would mean "registration" of the appellant in Tanzania. Instead, the word "formed" is intended to cover other entities like trade associations which would otherwise fall outside the ambit of "incorporated". He urged us to find that the word "formed" envisage other body entities other than incorporated bodies. This word should not be extended to apply to simple registration and issuance of certificate of compliance to a foreign incorporated company like the appellant.

The learned counsel for the appellant next addressed the significance of the certificate of compliance which was issued to the

appellant. He submitted that it confirms that a company that was incorporated in another jurisdiction has complied with the Companies Act. The learned counsel insisted that when the appellant, on 19/02/2010, applied and obtained a Certificate of Compliance under section 435 of the Companies Act 2002, it was for the sole purpose of allowing Tanzanian investors to participate in an Initial Public Offering of the appellant's shares when those shares were admitted to trading on the London Stock Exchange. The Certificate of Compliance also satisfied certain legal requirements for the cross-listing of the appellant's United Kingdom shares on the Dar es Salaam Stock Exchange (DSE). That, in order to meet the requirements of the DSE, the appellant had to indicate its place of business in Tanzania even though it never conducted any business or trade in Tanzania. The learned counsel insisted that the appellant was already incorporated and formed in the United Kingdom when it was issued with a Certificate of Compliance.

The learned counsel for the appellant next took issue against the way the Tribunal supported the Board's conclusion that the appellant was part of the tax evasion scheme. He referred us to page 2539 of the record of proceedings where the Tribunal wonders, if the appellant's

mining entities in Tanzania failed to declare profits for four years of mining operations in Tanzania, how come they managed to send huge net profits sufficient for the appellant to distribute to its shareholders.

Dr. Mwiburi complained that although the Board only referred to possible tax avoidance, he did not understand why the Tribunal decided to bring out a more serious accusation of tax evasion against the appellant, and which did not originate from the Board. He urged us not to allow the Tribunal to level against the appellant, the accusation of tax evasion which is a criminal offence in Tanzania.

Opposing the appeal, Mr. Tito supported the way the Board and the Tribunal had adopted the purposive method of interpretation to interpret the word "formed" in section 66(4)(a) of the ITA 2004 to conclude that the appellant as a resident in the United Republic of Tanzania for purposes of income taxation. The word "formed" appearing under paragraph (a) of section 66(4) of the ITA 2004, he submitted, should not pose difficulty because it envisages the appellant who was incorporated in the United Kingdom. He added that having been incorporated earlier in the United Kingdom, the appellant is regarded as formed in Tanzania after receiving its Certificate of Compliance. The aim of this word, he added, is to bring foreign

companies which have places of business in Tanzania under the taxation brackets.

Contrary to what learned counsel for the appellant submitted about **COMMISSIONER GENERAL AND ANOTHER V MAC ARTHUR AND BAKER INTERNATIONAL (MBI)** (supra), Mr. Tito submitted that to the extent that the certificate of compliance issued to MBI under sections 320A and 321 of the repealed Companies Ordinance amounted to registration conferring on the company the status of residence within the meaning of subsection (2)(b)(i) of the ITA 1973. Mr. Tito expounded that the case of MBI is relevant to this appeal on the point that a foreign company registered under the Tanzanian Company law is a resident in Tanzania for income tax purposes and such residence is by virtue of the law and not fact.

Learned counsel for the respondent went on to assert that on determination of the issue of residence for taxation purposes, there is a relationship between the ITA 2004 and other laws of Tanzania. He explained that by section 66(4)(a) of ITA 2004 clearly providing that a corporation is a resident for a year of income if it is incorporated or formed under the laws of the United Republic of Tanzania shows that there are other laws by which foreign incorporated companies can be

deemed incorporated or formed in Tanzania, rendering them residents for income tax purposes. One such law is the Companies Act, 2002 under which both domestic and foreign companies are registered hence becoming resident for tax purposes under section 66(4)(a) of the ITA 2004. Mr. Tito asserted that the certificate of incorporation or certificate of compliance under the Companies Act, 2002 confirm tax residency of companies.

Mr. Tito submitted that the implications for the appellant being regarded as a resident, is that the dividend which the appellant paid to its foreign shareholders was required under section 54(1)(a) of the ITA 2004 to be subjected to withholding tax. Because the appellant failed to withhold that tax, he added, the appellant was liable to pay the same under sections 82(1)(a)(b) and 84(3) of the ITA 2004.

In his oral submissions, Mr. Tito referred to the record of proceedings in the trial Board to elaborate how the dividends, which the appellant paid out to its overseas shareholders, were sourced from Tanzania. He referred to page 40 of the record of appeal where the appellant's consolidated financial statements for the year which ended on 31/12/2012. Mr. Tito submitted that only the appellant's entities in

Tanzania were operating gold mines. Other subsidiaries were at that time not producing because they were still in mining exploratory stage.

Mr. Tito referred to pages 119 to 125 of the record where on 10/05/2015, the appellant went to the offices of the Business Registration and Licensing Agency (BRELA) to register its place of business under section 434(1) of the Companies Act, 2002. This Form was admitted as evidence before the Board (Exhibit R4) to indicate the appellant's place of business is at *Plot No. 1736, Hamza Aziz/Kahama Road, Msasani Peninsula Dar es Salaam.*

As a further proof that the appellant was in the mining business in Tanzania, the appellant referred to page 125 of the record where there is a statutory declaration which Mr. Gregory Paul Hawkins, the Director of the appellant made on 19/02/2010. Director Hawkins declared the appellant's established its place of business in Tanzania and indicated the nature of the appellant's business to be mining business. Mr. Tito similarly referred us to page 626B of the record of appeal where the appellant furnished financial highlights for the year 2009. It was highlighted that the appellant's net income was USD 218 million. The appellant recommended dividend of USD 3.7 cents per share and a total dividend of USD 5.3 cents per share to be paid out to its

shareholders. Bulyanhulu and North Mara were highlighted as showing consistent production and cost performance throughout the highlighted year.

According to Mr. Tito, the appellant's own financial statements confirm that all of its mining operations, and hence source of income, are all in Tanzania. He insisted that no other countries contributed to the appellant's income, and Tanzania was the sole source of the appellant's dividends which the appellant paid out to its overseas shareholders.

Mr. Tito submitted that the respondent presented ample evidence before the trial Board, to prove that while the appellant's mining entities were declaring losses in Tanzania for the years 2010, 2011, 2012 and 2013, their holding company (the appellant) whose mining operations are in Tanzania, was distributing dividends to its overseas shareholders. As an example, he gave the appellant's financial statement for 2010 that was presented before the Board appearing from page 2744 to 2746. While the appellant was distributing dividends sourced from Tanzania, he submitted, in 2010, her entities in Tanzania were declaring losses: *North Mara Gold Mine USD 22,456,980*, *Bulyanhulu USD 1,075,114,831*, and *Pangea USD 256,090,966*.

In so far as Mr. Tito was concerned, this amounted to tax evasion. He failed to understand why having earned so much income from Tanzania, the appellant still failed to pay a withholding tax of only 10%. He supported the Board's and Tribunal's decisions to attribute the appellant's income was sourced from Tanzania. The Board's and the Tribunal's conclusions, he added, were backed with documentary evidence in exhibits R5-R8. The evidence proved income and costs which the appellant reported for each year from 2010 to 2013 from sale of gold, copper and silver produced by the appellant's entities in Tanzania (Exhibits R5 to R8).

Mr. Tito did not accept the explanation fronted by Dr. Mwiburi to the effect that the appellant paid dividends to its shareholders from its capital investments. He asserted that the documentary evidence presented before the Board (exhibits R5-R8) do not support the appellant's claims that dividends to its overseas shareholders were paid out of its capital investments. In Mr. Tito's understanding, the Laws of England prohibit payment of dividends out of capital investments. He submitted that the appellant did not discharge the burden of proving that dividends it paid out were not sourced from Tanzania. He pointed out that the appellant had the chance at the Board, to demonstrate

procedures under the UK Companies Act 2006 which justified the distribution of dividends out of IPO proceeds or reduction of capital. He urged us not to allow the attempt by the appellant's counsel belated attempts to turn this second appellate Court into a trial court of facts.

Mr. Tito justified the way the Tribunal accused the appellant for evading its tax obligations. He submitted that the words tax avoidance and tax evasion were interchangeably used by the Board and Tribunal to mean methods taxpayers employ to minimize or escape tax payments. He argued that because both parties addressed the issues of avoidance and evasion, the Board and the Tribunal were justified to make findings thereon. He added that this issue was factual and was in the Board supported by documentary evidence in exhibits R5 to R12.

In so far as the respondent's counsel is concerned, the issues of tax avoidance or tax evasion being matters of fact and not matters of law, is not appealable to this Court in terms of section 25(2) of the Tax Revenue Appeals Act Cap. 408. Mr. Tito hastened to add that the appellant failed to discharge the burden under section 18(2)(b) of the Tax Revenue Appeals Act Cap. 408 to prove that it did not engage in tax avoidance or tax evasion.

With regard to the TIN and VAT registration numbers, Mr. Tito submitted that the appellant is obliged to file tax returns, just like any other resident tax payer. He urged us to answer in the affirmative the question whether the respondent had any legal basis to issue the appellant with Taxpayer Identification and Value Added Tax Registration Numbers.

After hearing the submissions from the learned counsel for the parties, we found it appropriate to consider if the outcome of the application for review (Civil Application No. 350/01/2019) had any bearing on this appeal.

At the resumption of the hearing of the appeal in Dar es Salaam on 3rd August 2020, Dr. Abel Mwiburi and Mr. John Kamugisha appeared for the appellant while Mr. Noah Tito, assisted by Ms. Grace Letawo; appeared for the respondent.

We invited the parties to submit on what prevents this Court from determining this appeal after the Court had earlier on 29th July 2020, delivered its decision with respect to the appellant's application for review in Civil Application No. 350/01/2019.

Dr. Mwiburi submitted that with the dismissal of the application for review in Civil Application No. 350/01/2019, the appellants are still determined to apply for leave to present additional evidence to this Court. He submitted that the appellant's request for additional evidence is guided by the direction which this Court in Civil Application No. 177/20 of 2019 to the effect that the present appeal (Civil Appeal No. 144 of 2018) is the proper forum for the appellant to pray for additional evidence. Dr. Mwiburi asked us to allow his colleague, Mr. Kamugisha, to submit on the prayer for additional evidence under Rule 36(1)(b) of the Rules.

We indicated to Mr. Kamugisha, that we wanted him to first address us on what legal basis the appellant relies on, to move the Court sitting on a second appeal, to allow additional evidence. The learned counsel referred us to Rule 36(1)(b) of the Rules which was also referred to by the Court in **AFRICAN BARRICK GOLD PLC VS COMMISSIONER GENERAL (TRA)**, CIVIL APPLICATION NO. 177/20 OF 2019 as his legal basis to pray for additional evidence. We prodded him to have another look at Rule 36(1)(b) of the Rules, and confirm to us whether this Rule is helpful to his prayer. He briefly paused, before he came around to concede that power of this Court to order additional

evidence under Rule 36(1)(b) covers situation where this Court sits to hear a first appeal from decisions of either the High Court or the Tribunal in exercise of their original jurisdictions. The Rule does not extend the jurisdiction to receive additional evidence where the Court sits to hear a second appeal like this present appeal is.

Realizing that Rule 36(1)(b) of the Rules does not provide any avenue to the appellant to present additional evidence, Mr. Kamugisha changed tact and placed his reliance on Rule 4(2)(a) and (b) of the Rules. When we referred him to our decision in CIVIL APPLICATION NO. 177/20 OF 2019 which specifically stated that an application for additional evidence cannot be predicated on Rule 4(2)(a) of the Rules, the learned counsel reiterated that this Rule serves the best interests of substantive justice which will be served if the appellant is allowed to adduce additional evidence to this Court on second appeal.

In reply, Mr. Tito urged us to reject the request for additional evidence because neither Rule 36(1)(b) nor Rule 4(2)(a)(b), provide the avenue for the appellant bring additional evidence to a court sitting on second appeal. In rejoinder, Mr. Kamugisha reminded us that as long as this Court in CIVIL APPLICATION NO. 177/20 OF 2019 directed

the appellant back to this Court, the appellant should be heard on its application to adduce evidence.

We had the advantage of reading our decision in Civil Application No. 177/20 OF 2019 dated 17th June 2019 wherein the appellant herein had relied on Rule 4(2)(a) of the Rules to seek leave of the Court to adduce additional evidence in respect of this instant appeal (Civil Appeal No. 144 of 2018). We stated that the proper forum for the appellant to request additional evidence is Civil Appeal No. 144 of 2018 by relying on Rule 36(1)(b) of the Rules instead of Rule 4(2)(a). We must hasten to point out that by referring the appellant to the avenue provided by Rule 36(1)(b), the Court in Civil Application No. 177/20 OF 2019 did not imply that this Court while hearing a second appeal can automatically allow additional evidence without determining its jurisdiction to that. The Court in Civil Application No. 177/20 OF 2019 stated, "***Three***, *since what is sought by the applicant can be addressed at the hearing of the pending appeal under the specific Rule 36(1)(b) of the Rules, the present application predicated under Rule 4(2)(a) of the Rules is indeed misconceived."*

Now that the appellant has formally placed reliance on Rule 36(1)(b) of the Rules to seek additional evidence, we can unhesitatingly restate that because this Court is now sitting as the second appellate court, Rule 36(1)(b) of the Rules does not allow the appellant to introduce additional evidence to this Court. The relevant Rule states:

> *"36. -(1) On any* ***appeal from a decision of the High Court or Tribunal acting in the exercise of its original jurisdiction****, the Court may—*
>
> *(a)...*
>
> *(b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner."* [Emphasis added].

It is clear from the scope of Rule 36 (1)(b) although leave to adduce additional evidence is purely at the discretion of the Court; that discretion is circumscribed by condition under sub-rule (1) restricting additional evidence to when this Court sits to hear first appeal from a decision of the High Court or Tribunal acting in the exercise of their respective original jurisdictions.

Therefore, in so far as this is a second appeal, Rule 36(1)(b) of the Rules does not confer jurisdiction to this Court to entertain belated additional evidence.

Section 25 (2) of the Tanzania Revenue Appeals Act (TRAA) which regulates what type of appeals are to be referred to this Court from the Tribunal, stands as another insurmountable jurisdictional barrier preventing this second appellate Court from allowing additional evidence. Section 25 (2) prohibits appeals to this Court on matters of facts, in other words evidential matters. The right of appeal to this Court from first appellate Tribunal is restricted to points of law only, states:

> *"**Appeal to the Court of Appeal shall lie on matters involving questions of law only** and the provisions of the Appellate Jurisdiction Act, 1979 and the rules made thereunder shall apply mutatis mutandis to appeals from the decision of the Tribunal."* [Emphasis added].

In **ATLAS COPCO TANZANIA LIMITED V. COMMISSIONER GENERAL, TANZANIA REVENUE AUTHORITY,** Civil Appeal No. 167 of 2019 (unreported) this Court dismissed the appeal because it did not

present any question of law but raised matters of fact that do not merit the attention of the Court in terms of section 25 (2) of the TRAA. In the present appeal before us, the learned counsel for the appellant ought to have known that in second appeal, like this present appeal is, this Court is not to be concerned with matters of fresh evidence because section 25(2) of the TRAA restricts the jurisdiction of the Court to appeals from the Tribunal on matters of law only.

With resolute language used in section 25 of the TRAA, it is misconception and untenable, for Mr. Kamugisha to invoke Rule 4(2)(a)(b) of the Rules, to turn a blind eye on section 25 of the TRAA and seek to present additional evidence to this Court.

We as a result dismiss the appellant's prayer for additional evidence for being misconceived.

After disposing of the prayer for additional evidence, we revert back to the submissions made by the learned counsel on the grounds of appeal.

We think that the bone of contention arising from the first ground of appeal is whether the appellant, a company incorporated outside the United Republic of Tanzania is liable to pay withholding tax during

years of income subject of this appeal. This issue is predicated on the interpretation of the scope of a resident company under section 66(4)(a) of the ITA 2004. On the appellant's behalf, Dr. Mwiburi has argued that in as long as the appellant was incorporated in the United Kingdom, it cannot be regarded to have either been "incorporated or formed" under the laws of the United Republic.

On behalf of the respondent, Mr. Tito, supported the purposive interpretation the word "formed" appearing in section 66(4)(a) of the ITA 2004 which, he submitted, leads to the inevitable conclusion that the appellant is a resident in the United Republic of Tanzania for purposes of income taxation. He added that although the appellant was indeed incorporated earlier in the United Kingdom; but after receiving its Certificate of Compliance from the Registrar of Companies, the appellant company is regarded as having been formed in Tanzania.

On our part, we think section 66(4)(a) when read together with definition of "corporation" under section 3 of the ITA 2004, complements with the provisions of Part XII of the Companies Act Cap 212 governing establishment of places of business in Tanzania by foreign companies. Subsection (4) of section 66 of the ITA 2004 provides the circumstances when a corporation, can be regarded as a

resident corporation in any year of income for taxation purposes. For our purpose, the appellant can only be regarded as a resident company for purposes of income taxation under section 66(4)(a) of ITA 2004 if it is "incorporated" or "formed" under any laws of United Republic:

> *"66 (4)* ***A corporation*** *is a resident corporation for a year of income if—*
>
> > *(a)-it is* ***incorporated or formed*** *under the laws of the United Republic; or"*
> > [Emphasis added].

Section 3 of the ITA 2004 has defined "corporation" to mean:

> *"...any company or body corporate* ***established, incorporated*** *or* ***registered*** *under* ***any law in force in the United Republic or elsewhere,*** *an unincorporated association or other body of persons, a government, a political subdivision of a government, a parastatal organisation, a public international organisation and a unit trust but excludes a partnership;"* [Emphasis added].

With due respect, we do not agree with Dr. Mwiburi's contention that section 66(4)(a) of the ITA 2004 which provides for when a company is regarded as a resident for income tax purposes, and the

provisions of section 435 of the Companies Act which confers power to the Registrar of Companies to issue Certificate of Compliance to foreign companies; are mutually exclusive. We think, the legal effect of the Certificate of Compliance is to vest legal status to a foreign company to conduct business in Tanzania. In terms of the definition of the "corporation" under section 3 of the ITA, 2004, the certificate of compliance issued by the Registrar of Companies conferred upon the appellant "a business establishment status" in Tanzania for among other purposes, income taxation.

In our reckoning, the phrase "...*any company or body corporate* ***established,...*** *under* ***any law in force in the United Republic or elsewhere...***" in the definition section 3 of the ITA, 2004 has cast the net so wide that it includes as tax residents, any foreign company that is issued with a Certificate of Compliance under section 435 of the Companies Act, 2002. The plain meaning of the words "**or elsewhere**" under section 3 of the ITA 2004 envisage the likes of the appellant company, which, though incorporated in the United Kingdom, as long as the Registrar of Companies had issued them with Certificates of Compliance, these foreign registered companies attain statutory

footholds to establish places of business in Tanzania thereby attracting income tax liability.

It cannot escape our minds that Part XII of the Companies Act is deliberately titled ***"Companies Incorporated Outside Tanzania"*** with a sub-title of ***"Provisions as to Establishment of Place of Business in Tanzania"*** covering sections 433 to 443. It seems clear to us that a Certificate of Compliance issued under Part XII bears a special significance because it provides for how, companies that were incorporated outside Tanzania can acquire places of business in Tanzania.

We agree with the Tribunal's purposive method of interpretation of section 66(4)(a) of ITA 2004 to the effect that once the appellant was issued with a Certificate of Compliance under section 435 of the Companies Act, the appellant not only acquired a place of business in Tanzania, it was also deemed to bear all the statutory obligations under Companies Act. We can dare say that after obtaining a Certificate of Compliance, the appellant's its income tax obligations can only cease when it gives notice in writing to the Registrar of Companies about closing of its place of business in Tanzania under section 441 (1) of the Companies Act which states:

> *"441.-(1)* ***If any foreign company ceases to have a place of business in Tanzania it shall immediately give notice in writing of the fact to the Registrar*** *for registration* ***and as from the date on which notice is so given*** *the obligation of the company to deliver any document to the Registrar shall cease* ***and the Registrar shall strike the name of the company off the register.*** *"*[Emphasis added].

In light of the provisions of Part XII of the Companies Act we have outlined above; we do not agree with the appellant's explanation that the Certificate of Compliance which was issued to the appellant, was for the sole purpose of being listed in the Dar es Salaam Stock Exchange. In the eyes of section 66(4)(a) of the ITA 2004, the Certificate of Compliance which the Registrar of Companies issued to the appellant on 11th day of March 2010, had much deeper and wider income tax implication beyond mere trading in the Dar es Salaam Stock Exchange.

From the complementarity and mutual supporting, between section 66(4) of the ITA 2004 and Part XII of the Companies Act, we are prepared to hold that the word "formed" appearing under paragraph (a) of section 66(4) and the phrase "*established, incorporated or registered under any law in force in the United Republic or elsewhere*"

under section 3 of the ITA 2004, include foreign incorporated companies like the appellant, which become resident companies for income tax purposes on the basis of their Certificates of Compliance issued under the Companies Act.

We would like next, to address the complaint raised by Dr. Mwiburi that the appellant was condemned of criminal offence of tax evasion without being afforded a hearing. We agree with Dr. Mwiburi that the trial Board neither addressed itself to the question of tax evasion as against the appellant nor did the trial Board record any actionable finding against the appellant in respect of tax evasion. However, the Board raised concern over the spectre of tax avoidance. The Board wondered how come, the tax returns from the appellant's subsidiary mining companies in Tanzania showed that these companies neither made profits nor paid dividends in the period of 2010, 2011, 2012 and 2013; yet, the appellant who relied on mining sourced in Tanzania, was still able to declare profits and to pay dividends to its overseas shareholders. The Board had observed:

> "...*While the financial statements of Barrick entities in Tanzania that...* ***The directors do not recommend the payment of a dividend****...On the other end ABG PLC in the UK* ***declared dividends on***

the income coming from its business in Tanzania amounting to USD 818,431,285 and gave it to its overseas shareholders *(see page 130 (2010 & 2011). Page 144 and page 164 (2012 & 2013) respectively of the consolidated annual accounts of the appellant as availed to the Board. The Board wonders how that could be possible.*

All the companies in Tanzania which are claimed by the appellant to be the sole sources of income are loss making and not paying dividends to its stakeholders. This unfamiliar situation needed clarification and conviction with proof by the appellant of which the Board could make an informed decision but the said proof did not surface. Even Mr. Deo Mwanyika whom we thought could assist us declined to do so! ***We were forced to believe as correctly observed by counsel for the respondent that, the appellant company has serious plans to avoid tax.****"*[Emphasis added].

The Tribunal shared the Board's concern over possible scheme to avoid tax:

"Indeed, we share the Board's surprise as to how could this be possible. It is inconceivable that the appellant could pay so much in dividends for four consecutive years, while its only assets are the three

loss-making entities incorporated in Tanzania that do not make profit at all, and do not pay any dividends. The Board expected some clarification of this rather strange state of affairs, and proof as to how it could be possible. That proof, unfortunately, was not forthcoming from the appellant, and its witness' and counsel's explanation fell short of an adequate discharge of the relevant burden.'"

Our agreement with the Tribunal's purposive interpretation of section 66(4)(a) of the ITA, 2004 is designed to plug tax avoidance loopholes to ensure foreign companies holding certificates of compliance issued by the Registrar of Companies are regarded as tax resident companies in Tanzania. On this, this Court is not unique because, the Supreme Court of the United Kingdom in **UBS AG V HMRC AND DB GROUP SERVICES (UK) LIMITED V HMRC** [2016] UKSC 13 regarded purposive construction of tax statute to be especially appropriate, to use the words of Lord Reed (with whom Lord Neuberger, Lord Mance, Lord Carnwath and Lord Hodge agreed); *"...where in our society, the most sophisticated attempts are made to avoid tax and great deal of intellectual effort is devoted to tax avoidance."*

We think, the Board and the Tribunal were justified to employ purposive construction of section 66(4)(a) of the ITA 2004 in circumstances where, while the appellant's mining entities of Bulyanhulu Gold Mine Limited, North Mara Gold Mine Limited, and PANGEA Minerals Limited failed to declare profits for four years of their respective mining operations in Tanzania, yet these same entities still managed to send net profits to the appellant, sufficient for the appellant to distribute dividends its shareholders without so much as deducting withholding tax. Like what the UK Supreme Court stated in **UBS AG V HMRC AND DB GROUP SERVICES** (supra), the Board and the Tribunal were fully entitled to invoke the purposive construction of section 66(4)(a) of ITA 2004 to ensure the appellant paid withholding tax.

Now, having found that the appellant became a resident company in Tanzania or taxation purposes from 11th March 2010 when it was issued with a Certificate of Compliance, section 66(4)(a) of the ITA 2004 is clear that as resident company who has a source of income from its mining entities in Tanzania, the appellant is chargeable to withholding tax under section 82 read together with Para 4(b)(i) (bb) of the First Schedule to the ITA 2004. And with the concurrent finding of

facts by the two courts below that the source of the appellant's dividends were sourced from its mining entities in Tanzania; the two courts below were correct to hold that the appellant is chargeable to withholding tax under the provisions of the ITA 2004 with respect to the years 2010, 2011, 2012 and 2013.

We, therefore, dismiss the first and second grounds of appeal.

Submitting on the third ground of appeal, the appellant's learned counsel took great exception to the decision of the respondent issued the appellant with Taxpayer Identification Number (**TIN-120-840-916**) under Section 133 of the ITA 2004 and Value Added Tax Registration Number (**VRN 40-015846-L**) under Section 19(4) of the VAT Act, 1997. In light of our earlier finding that the appellant is a resident company with sources of mining income from its mining entities in Tanzania, this ground need not detain us long. We shall dismiss this ground because assignment of TIN and VRN registration numbers are legal consequences of the appellant's tax residence in Tanzania. From the premise of our conclusion that the appellant became a resident company from 11th March 2010 when it was issued with a Certificate of Compliance for purposes of registering its place of business in Tanzania, the appellant had statutory obligation to apply to

the respondent for a tax identification number within 15 days of beginning to carry on the business. This obligation is made clear by subsection (2) of section 133 which states:

> *"133 (2) Every resident person who carries on a business anywhere* ***and non-resident person who carries on a business in the United Republic*** *shall apply, in the prescribed form, to the Commissioner for a tax identification number within 15 days of beginning to carry on the business."* [Emphasis added].

Since the appellant failed to apply for tax registration number, it was open to the respondent to invoke the provisions of section 133 (1) of the ITA 2004 to issue the appellant with Taxpayer Identification Number (**TIN-120-840-916**). The relevant section 133 (1) provides:

> *"133.-(1)* ***For the purposes of identifying persons liable to tax under this Act, the Commissioner may*** *and, in the case of an applicant under subsection (2), shall, by service of a notice in writing on a person,* ***issue the person with a number to be known as a tax identification number.***" [Emphasis added].

The same consequence of becoming a tax resident entitled the respondent to assign the appellant with the Value Added Tax

Registration Number (**VRN 40-015846-L**) under Section 19(4) of the VAT Act, 1997.

With regard to the fourth ground of appeal, the appellant is still concerned with the decision of the Tribunal to endorse the Board's broad interpretation of the word "formed" under section 66(4)(a) of the ITA 2004 so as to not only include the appellant as a resident, but to also accuse the appellant of taking part in a wide scheme of tax evasion scheme.

We shall not trouble ourselves with the way the Board and the Tribunal interchangeably discussed "tax avoidance" and "tax evasion" while these courts were determining the salient question as to whether the dividend the appellant received from its Tanzanian entities and which was paid out to the appellant's shareholders abroad was subject to withholding tax. As we pointed earlier, neither the Board nor the Tribunal made any actionable criminal finding against the appellant in respect of tax evasion.

Otherwise, we agree with Mr. Tito in his submission that since the dividend which the appellant paid to its foreign shareholders had a source in the United Republic in terms of section 69(a) of the ITA 2004, the appellant had a statutory duty under section 54(1)(a) of the ITA

2004 to withhold tax from such dividends. Because the appellant failed to withhold that tax, the appellant is liable to pay that withholding tax in terms of sections 82(1)(a)(b) and 84(3) of the ITA 2004.

Like the other grounds of appeal, the fourth ground too suffers from lack of merit and hence, the same is similarly dismissed.

In the upshot of all above, the appeal is devoid of merit. It is dismissed with costs to the respondent. Ordered accordingly.

DATED at **DAR ES SALAAM** this 31st day of August, 2020.

I. H. JUMA
CHIEF JUSTICE

S.E.A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 31st day of August, 2020 in the presence of Mr. Baraka Msana, learned Counsel for the Appellant and Mr. Noah Tito, State Attorney for the Respondent is hereby certified as a true copy of the original.

G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL