IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: JUMA, C.J., MWARIJA, J.A. AND MZIRAY, J.A.)

CIVIL APPEAL NO. 314 OF 2017

ACCESS BANK TANZANIA LIMITED ..... APPELLANT

VERSUS

COMMISSIONER GENERAL (TRA) ..... RESPONDENT

(Appeal from the judgment of Tax Revenue Appeals Tribunal at Dar es Salaam)

(G.J.K. Mjemmas, Chairperson.)

dated the 29th day of June, 2017
in
Tax Appeal No. 25 of 2015

JUDGMENT OF THE COURT

3rd & 30th July, 2018

MZIRAY, J.A.:

This is an appeal that was filed herein on 22nd day of December, 2017 by **Access Bank Limited** in respect of the Judgment of the Tax Revenue Appeals Tribunal at Dar es salaam dated 29th day of June 2017 in Tax Appeal Case No. 25 of 2015.

The brief background of the appeal is that the appellant, a limited liability company incorporated in Tanzania dealing with banking services in the United Republic of Tanzania received from the

The appellant objected to the assessment and consequently filed an Appeal before the Tax Revenue Appeals Board (the Board) at Dar es salaam on 13th March, 2014. The Board rendered its decision on 26th August, 2015, in favour of the respondent. The appellant was aggrieved and thus appealed to the Tax Revenue Appeals Tribunal (the Tribunal). The appellant was unsuccessful as the appeal was dismissed. Aggrieved further, the appellant lodged the instant appeal herein on the following grounds:

1. *That the Honourable Tax Revunue Appeals Tribunal erred in fact in finding that the making of the provision for impairment of doubtful debts are not allowable deductions under the law.*
2. *That the Honourable Tax Revenue Appeals Tribunal erred in law in its finding that the making of the provision for reserves are not allowable deductions under the law.*
3. *That the Honourable Tax Revenue Appeals Tribunal erred in law in its finding that the facts and issues in appeal No. 3 of 2011 between Commissioner General (TRA) and Barclays Bank Limited and Appeal No. 19 of 2013 between Commissioner General (TRA) and National*

assessment by the Commissioner General in accordance with section 13, the appellant did not respond to the letter dated 25th November, 2013 pursuant to section 13(4) and therefore appeal could not lie against an assessment issued under sub-section 6 of section 13 as it was a final assessment as prescribed under section 15 of The Tax Appeal Act (Cap 408).

Ms. Kinyaka for the appellant was of the view that, non-filing of a reply under section 13(4) of Cap 408 does not lead to a final assessment. Circumstances of finality of assessment are provided for under section 15 of Cap 408, she submitted. Making reference to pages 23 and 55 of the record of appeal, Ms. Kinyaka submitted further that, the respondent abandoned his preliminary objection at the level of the Board and therefore cannot raise it at this stage.

Section 13 of Cap 408 deals with general powers of the Commissioner General on receipt of notice of objection. It provides:

> *"13.-(1) The Commissioner General shall, upon admission of an objection within section 12, determine the objection as filed, or call for any evidence as may appear necessary for the*

(a) determine the objection in the light of the proposed amended assessment or proposed refusal and any submission made by the objector; or

(b) determine the objection partially in accordance with the submission by the objector; or

(c) determine the objection in accordance with the proposed amendment or proposed refusal."

6) Where the objector has not responded to the Commissioner General's proposal to amend the assessment or proposal to refuse to amend the assessment served in accordance with subsection (3), the Commissioner General shall proceed to make the final assessment of tax and accordingly serve the objector with a notice thereof."

The pertinent question at this stage is whether non-filing of the submission under section 13(4) of the Cap 408 is fatal leading to an issuance of a final assessment by the Commissioner (TRA) which is not subject to appeal.

the initial correspondences between the Commissioner and a tax payer, after the admission of the notice of objection under section 13 of Cap 408, are meant to facilitate a smooth and correct evaluation of the Tax payer's filed returns in establishing a tax payer's taxable income towards calculating the tax payable in respect of that income. Thus, as rightly submitted by counsel for the respondent, non-compliance with the provision of section 13(4), gives an inference that, the tax payer is essentially, in agreement with the adjusted tax assessment and therefore is precluded from complaining to the assessment of which she /he had time to offer explanation for or against. The assessment therefore issued under the provision of section 13(6) of Cap 408 are final in terms of section 15 (1) (b)(ii) of the same Act and cannot be appealed against as per the wording of that provision. In the case at hand, the records are to the effect that, the learned counsel for the respondent had raised this objection before the Board at page 32 and submitted on it in its written submission at pages 41 -42 of the record of appeal. He however, later on, prayed to withdraw it at page 55 lines 20-23, of the record of appeal, the prayer which was acceded to by the Board.

We now draw our attention to the grounds of appeal as argued by Dr. Nyika, learned counsel. Grounds 1, 2 and 3 were argued together as they are interrelated. The main complaint was directed to the Tribunal's findings that supported the respondent's disallowance of impairment provisions and reserve provisions for not being allowable deductions under the ITA, 2004. It was Dr. Nyika contention that, the preparation of the tax payer's returns account is regulated by the General Accepted Accounting Principles (GAAP) as provided for under section 21(1) of the ITA. He stressed that, while section 25(4) of ITA deals with the deductibility of the written off debts, it does not provide for the modalities of accounting for bad debts. Section 21 authorizes such accounting to be done in accordance with the accepted accounting principles. Dr. Nyika went on submitting that, section 25(4) of ITA has a very restrictive application to Banking Institutions on a reason that banks do not normally write off debts. The reason behind this, said Dr Nyika, debts comprise a trading stock of the banks and therefore, writing off debts may affect the banks liquidity position and its nature as a going concern. This makes it necessary for the BOT to regulate all

(a) in the case of a debt claim of a financial institution, only after the debt claim has become a bad debt as determined in accordance with the relevant standards established by the Bank of Tanzania ; and

(b) *in any other case, only after the person has taken all reasonable steps in pursuing payment and the person reasonably believes that the entitlement or debt claim will not be satisfied." (Emphasis supplied).*

The way we construe sub-section 5 of section 25, which we think is the right way, it provides specifically that, a Financial Institution may disclaim the entitlement to receive an amount or write off as bad debt claim only after the debt claim has become a bad debt as determined in accordance with the relevant standards established by the BoT. Basically, the section deals with the time when the Financial Institution can actually account for the losses of that nature, this is understandably because the sections falls under **Part III, Division II Sub-division A** of the ITA, which deals with Tax Accounting and Timing.

On the point by the appellant that at the Board, the question of presentation of evidence to prove whether appellant's provisions for bad debt, and doubtful debts and reserves qualify for deduction was not at issue, Mr. Primi submitted that the issue in dispute had been all along, whether the provisions in question qualify to be recognized as bad debt, doubtful debts or reserves. Appellant failed to avail the proof before the Board and the Tribunal, he stressed. On the allegation that the appellant did comply with the BoT regulations and therefore fulfilled the requirements of the law, Mr. Primi was quick to reply that, appellant neither attempted to demonstrate how these laws and regulations were complied with nor exhibited any approval by the BoT. He concluded that, the Board and the Tribunal correctly decided in favour of the respondent for failure by the appellant to prove the existence of the said provisions and that losses were realized and therefore deductible. As stated earlier, in disallowing the provision for impairment, the respondent, Board and the Tribunal were of the conclusion that the provision for impairment for loans were not realised in accordance to s.18 and 39 (d) ITA. Section 18 reads;

requirement in our view **requires a taxpayer to demonstrate evidentially to the respondent/tax collector how the same have been realised.**

S.39 (d) gives clarification on what amount to a realization of an asset by a taxpayer. It says:

> " *S. 39. A person who owns an asset shall be treated as realizing the asset-*
>
> *(a) ...N/A*
>
> *(b) ...N/A*
>
> *(c) ...N/A*
>
> *(d) In the case of an asset that is a debt claim owned by a **financial institution**, when the **debt claim** becomes a **bad debt** determined in accordance with the relevant standards established by the Bank of Tanzania and the institution writes the debt of as bad;.."(Emphasis supplied)*

The provision above talks of two important aspects of a debt in regarding a Financial Institution. ***One***, is a debt claim and ***two,*** a bad debt. A **debt claim** is defined under s.3 of the ITA to mean an asset representing a right of one person to receive a payment from another person and includes a deposit with a Financial Institution, account receivable, note, bill of exchange or bond. A **bad debt** is

are not of capital in nature. They are part of the financial institutions' ***trading stock which are not part of the business assert as described under s. 3 of ITA 2004 .*** He further submitted that, impairments involve an accounting of the diminution or accretion in the value of the debt and do not entail the writing off of a debt. They are evaluated in each reporting year and the amounts recovered are reversed and reported as income while the amount not recovered is adjusted under s. 13 of ITA 2004. It was Dr. Nyika's further submission that, when a doubtful debt is under impairment, it is yet to became a bad debt for income tax purposes and therefore not ripe for being written off. He faulted the Board and the Tribunal for upholding the respondent's disallowance of impairment provisions on the basis of section 39(d) of ITA 2004. When responding on this point Mr. Primi for the respondent was of the view that, ***trading stocks*** and ***business assets*** are synonymous. For the loss to be deductible, the tax payer is required to prove the stated loss by evidence. Appellant in this matter, submitted Mr. Primi, failed to discharge that duty.

"S. 13:-

(1) For the purposes of calculating a person's income for a year of income from any business, there shall be ***deducted in respect of the trading stock*** *of the business the allowance determined under subsection (2).*

(2) The allowance shall be calculated as:-

(a) the opening value of trading stock of the business for the year of income; ***plus***

(b) Expenditure incurred by the person during the year of income that is included in the cost of trading stock of the business; **less**

(c) the closing value of trading stock of the business for the year of income

(3) The opening value of trading stock of a business for a year of income shall be the closing value of trading stock of the business at the end of the previous year of income.

(4) The closing value of trading stock of a business for a year of income shall be the lower of –

(a) the cost of the trading stock of the business at the end of the year of income; or

(b) the market value of the trading stock of the business at the end of the year of income.

It is clear therefore that, when a doubtful debt is under impairment, it is yet to become a bad debt for income tax purposes and therefore not ready for being written off.

Being a trading stock, impairment provisions do not form part of the business assets deductible under the provisions of s. 18 and 39 (d) of the ITA. It was therefore wrong **on this aspect**, for the Board and Tribunal to uphold the respondent disallowances of impairment losses on loan relying on that s.18 and 39 (d) of ITA. The item under scrutiny should have been evaluated in line with s.13 of ITA and not otherwise. This ground succeed to that extent.

The above conclusion notwithstanding, we do not buy Dr. Nyika assertion that proof on how the allowable /deductible amount in the areas explained above is arrived at is not required. If it is taken that the issues of approval on what is allowable/deductible amount under the ITA are left with the BoT after a tax payer has complied with the GAAP, this, in our view, would be preventing the respondent (TRA) who is responsible for Tax Administration, from making

Tribunal, entitled the respondent to disallow the claimed deductions/allowances.

Furthermore, the appellant is complaining against the decision of the Tribunal in disallowing the provision for reserves. According to Dr Nyika, regulatory reserves are legal prescribed reserves and provided for in accordance with the GAAP applicable to Banking and Financial Institutions under the regulatory laws recognized under s.21 (1) of ITA. The amount is not available for distribution and therefore allowable deduction. He elaborated that, both the Board and the Tribunal had grossly mixed the provision for reserves with the claims for deductible expenditure. Mr. Primi counsel for the Respondent was brief on this aspect. He supported the Tribunal's finding on the ground of the appellant's failure to provide proof to justify the amounts itemized as reserves for deduction purposes under the law. Mr. Primi observed that, having found that no evidence adduced before the Commissioner General at the time of determination of the objection and before the Board at the hearing of the appeal to justify the appealed reserve provisions, the Tribunal was justified to support

nothing was discussed on how allowances for provisional doubtful debts and bad debts are to be treated. In trying to differentiate the issues which were before the Tribunal in **Barclay's case** and the present matter, Dr. Nyika said, in our case, the Board and Tribunal was invited to look into whether respondent was justified in disallowing the appellant's provisions for impairment (doubtful debt) and regulatory reserves which are permissible under the law and that no claim for deductibility of the said provisions were brought for determination. It is the appellants view that, the Board and the Tribunal were wrong in holding that the Barclay's decision is binding upon the present case. On his part, Mr. Primi learned counsel for the respondent opposed the ground of appeal on the reasons that both cases dealt with similar facts relating to provisions for tax deductions on bad, doubtful debts and reserves. He, generally, supported the decision by the Tribunal.

The Board and the Tribunal in the **Barclay's case** (supra) were essentially invited to look into the proper accounting treatment for provisions of doubtful debts and bad debts and whether they are allowable deductions under the ITA. In arriving at their decisions,

"In our view the Board was correct in its holding that for a bad debt to be deductible two legal requirements must be met. A debt claim must become a bad debt as determined in accordance relevant standards established by the Bank of Tanzania and the institution write the debt off as bad. That is the position which was taken by this Tribunal in Appeal No 3 of 2011 between Commissioner General and M/S Barclays Bank Tanzania Ltd [Unreported]. The tribunal stated-

"it is our respectful opinion that indeed, in the case of debt claim of a financial Institution, only after the debt claim has become a bad debt as determined in accordance with the relevant standards established by the BoT that it becomes eligible for writing off as a bad debt and thereafter the bank can lawful claim a deduction...." *The same position was taken by this Tribunal in* ***Commissioner General (TRA) Vs National Microfinance Bank PLC.*** *Appeal No.19 of 2013 [Unreported]."*

With due respect to the submission by the appellant's counsel on this matter, our examination of the complained cases reveals

Finance Act, 2014. It only emphasized on the procedure applicable for any loss to be deductible, that is, a need to present to the Commissioner General evidentiary proof on existence of any loss for it to be deductible under the ITA 2004. This ground is baseless.

On the fifth ground of appeal, appellant faults the Tribunal's finding that the losses claimed by the appellant in the year of income 2009 are not deductible in accordance with section 11(2) of the ITA. Appellant's counsel submitted that the Tribunal erred in confirming the respondent's decision to disallow written off operating assets costs on two reasons that: **1)** they are normally recoverable through insurance and that **2)** appellant failed to adduce evidence of indemnification contrary to the tests set forth under the provision of s.11(2) ITA. The respondent disputes this ground. He is of the view that the Tribunal had properly determined this issue. Making reference to page 21 of the Tribunals' Judgment where the Tribunal quoted with approval the decision of the Board, Mr. Primi for the respondent elaborated that the decision of the Tribunal was based on the ground that the appellant failed to prove that the claimed loss was really incurred in the course of production of income.

for losses due to loans amounting to Tshs. 95,289, 310/57, for bad and doubtful debts of Shs.8,962,267/92 and for officers tax of Tshs.216,892,786/65 were correctly disallowed and lawfully included in the appellants income for tax computation in the year in question. We therefore uphold the decision of the Tribunal and dismiss with costs this appeal in its entirety.

DATED at **DODOMA** this 24th day of July, 2018

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL