

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MWARIJA, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CIVIL APPEAL NO. 118 OF 2018

ALLIANCE ONE TOBACCO TANZANIA LIMITED APPELLANT

VERSUS

COMMISSIONER GENERAL (TRA) RESPONDENT

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

(Mjemmas, Chairman)

Dated the 16th day of February, 2018

in

Tax Appeal No. 16 of 2016

JUDGMENT OF THE COURT

27th March & 7th August, 2019

WAMBALI, J.A.:

This appeal is against the decision of the Tax Revenue Appeals Tribunal (the TRAT) in favour of the respondent, Commissioner General of Tanzania Revenue Authority (TRA) against the appellant, Alliance One Tobacco Tanzania Limited delivered on 16th February, 2018 in Tax Appeal No. 16 of 2016. In the impugned decision, the TRAT confirmed the decision of the Tax Revenue Appeals Board (the TRAB) that dismissed with costs the appellant's appeal contesting the respondent's disallowance of

the costs on direct sales incurred by her wholly and exclusively in the production of its income. Dissatisfied with that decision, the appellant has appealed to this Court. The appellant therefore prays for the appeal to be allowed, reversal of the decision of the TRAT on disallowed costs on direct sales and costs of the appeal.

However, to appreciate the background which led to the dispute between the parties, we deem appropriate to briefly restate the facts as found by the TRAB and the TRAT.

It is not disputed that on 31st December, 2003; 30th September, 2004 and 30th September, 2008, the appellant filed its income tax returns for the years of income 2003, 2004 and 2008 respectively. In response to the tax returns, the respondent on 1st September, 2005 conducted an audit and issued notices of adjusted assessment for the 2003 and 2004 years of income. The respondent also in 2011 conducted another audit for the years of income 2009 and 2010. In that assessment, the respondent disallowed several corporate tax items relating to capital expenditure, inventory costs, loss of input stock and bad debt written off. Moreover, a significant transfer pricing adjustment was made on the price from the appellant to its sister company Alliance One International AGA. The

respondent also imposed interest for under estimation of chargeable income.

It is in the record that as a result of that assessment that led to the disallowance of direct costs, among others, the appellant lodged with the respondent a formal notice objecting to the said assessment. She strongly contended that the disallowed costs were deductible as they were wholly and exclusively incurred in the production of the income. However, the respondent did not agree with the explanation of the appellant as the earlier assessment was confirmed.

As an immediate reaction to the refusal to reconsider the assessment, the appellant lodged several appeals to the TRAB. These were Appeals Nos. 120, 121 and 122 of 2013 and Nos. 26 and 27 of 2014 for the years of income 2009 and 2010 respectively which were consolidated at the hearing before the TRAB. Nevertheless, in the end, the TRAB ruled in favour of the respondent. Aggrieved, the appellant appealed to the TRAT which overturned the decision of the TRAB substantially as it allowed the appeal in respect of the 1st, 2nd and 4th grounds of appeal, but confirmed its decision in respect of the disallowed direct sales costs and therefore dismissed the 3rd ground of appeal.

Still dissatisfied, the appellant has come to the Court armed with four grounds of appeal. However, at the hearing of the appeal it was agreed that essentially, the appeal is premised on only one ground, that is, whether the TRAT was right in law and in fact to uphold the decision of the respondent to disallow costs on direct sales. The appellant strongly maintains that it was wrong for the respondent to disallow the costs on direct sales incurred by her wholly and exclusively in the production of its income. On the other hand, the respondent defends the decision of the TRAT.

When the appeal was called on for hearing, Mr. Alan Kileo assisted by Mr. Norbert Mwaifwani, both learned counsel appeared for the appellant while Ms. Gloria Achimpota, also learned counsel appeared for the respondent.

Learned counsel for both parties adopted their respective written submissions they filed in Court earlier on for and against the appeal. However, in view of the fact that only one issue is to be resolved by this Court, not every argument in the written submissions would be applicable in resolving this appeal.

In his submission in support of the appeal, Mr. Kileo strongly criticized the TRAT for supporting the decision of the TRAB which, in his view, failed to realize that the respondent did not comply with the provisions of section 97 (c) of the Income Tax Act, 2004 (the ITA) which requires provision of reasons for any assessment made by the Commissioner General. Mr. Kileo firmly submitted that as there were no reasons that were given by the respondent for disallowing direct sales costs, the appellant could not provide any meaningful evidence during the audit, assessment and even at the hearing of the appeal before the TRAB and the TRAT as required under section 17 (1) (b) of the Tax Revenue Appeals Act, Cap. 408 (the TRAA). He argued that absence of the reasons for the assessment left the appellant not knowing what aspects she was required to prove to challenge the assessment made by the respondent.

The learned counsel for the appellant maintained that absence of the respondent's reasons for the disallowance of direct sales costs was fatal as the appellant was deprived of the opportunity to object to the assessment on specific matters. He stated further that even the issue of importance of the appellant to provide evidence to the respondent to justify that the disallowance of those costs was improper was raised by

the respondent for the first time at the hearing of the appeal before the TRAB. According to his submission, as a result of lack of reasons from the respondent for the disallowed costs, the appellant was left unprepared to provide the relevant evidence to discharge the burden of proof properly. He added that the appellant reminded the respondent on the need to provide her with the reasons for the disallowed costs but there was no response hence she lodged an appeal before the TRAB. Moreover, he argued that unfortunately, in its decision on appeal, the TRAT wrongly differed with the opinion of one member who supported the appellant's stand on the importance of the respondent's reasons for the assessment.

In the circumstances, Mr. Kileo prayed for the Court to allow the appeal with costs and overturn the decision of the TRAT that confirmed the decision of the TRAB on that issue.

In response, Ms. Achimpota for the respondent supported the decision of the TRAT that confirmed the findings and decision of the TRAB on the disallowed costs by the respondent. She argued that the burden of proof lied on the appellant to show directly by documentary evidence how she arrived at those costs which she wanted to be allowed as direct sales as required by law. While she did not disregard the importance of

the provisions of section 97 (c) of the ITA, she quickly submitted that as the dispute between the parties was referred on appeal to the TRAB after the disputed assessment was issued by the respondent, the appellant was supposed to tender relevant evidence at that stage to show that the same was erroneous. She argued further that the requirement to substantiate the claim is in line with the provision of section 18 (2) (b) of the TRAA which imposes a legal duty on a person disputing the assessment to prove that the same is erroneous or excessive at the hearing before the TRAB or the TRAT to secure the decision in her favour. To support her contention, she referred us to the decision of this Court in **Insignia Limited v. Commissioner General (TRA)**, Civil Appeal No. 14 of 2007 (unreported).

The learned advocate for the respondent, therefore, concluded that as the appellant did not utilize the opportunity provided by the law to adduce sufficient evidence to neither the TRAB nor the TRAT, she cannot seek refuge under section 97 (c) of the ITA before this Court as the assessment has been finally determined substantially with only one issue left. She thus urged us to dismiss the appeal with costs.

Having heard the counsel for the parties and considering their respective submissions, we think the issue to be determined is whether the TRAT was right in law to uphold the decision of the TRAB in support of the respondent who disallowed the appellant's costs on direct sales.

We note that the center of complaint of the appellant in supporting the sole ground of appeal to be determined by this Court is on the failure of the respondent to comply with the provision of section 97 (c) of the ITA. At this juncture, we deem appropriate to reproduce the relevant provisions of section 97 (c) hereunder: -

"Where the Commissioner makes an assessment under section 94 (3) and (4), 95 (2) or 96, the Commissioner shall serve a written notice of the assessment on the person stating: -

(a) N/A;

(b) N/A;

(c) The reasons why the commissioner has made the assessment;

(d) N/A;

(e) N/A.

It is not doubted that Ms. Achimpota for the respondent did not disregard the requirement imposed by law under section 97 (c) of the ITA. However, she argued that since the appellant appealed to the TRAB against the respondent's assessment as required by the law, she was bound to tender sufficient evidence before the TRAB or the TRAT on appeal to show why she thought the respondent allegedly improperly disallowed the said direct sales costs. She argued that the onus to prove that the disallowance of the direct sales costs was erroneous lied on the appellant's door. In this regard, she supported the decision of the TRAB and that of the TRAT which confirmed the disallowed direct sales costs.

In order to appreciate the decision of the TRAB in respect of this issue, we reproduce the relevant passages thus:-

"... Therefore, failure to submit those documents created difficult to respondent to determine taxable income for both AOTTL and AOIG, which mean that AOTTL did not show which costs are related to direct costs of goods sold

hence lack of evidence of actual costs incurred and corresponded payment.

In claiming inventory costs on direct sales the claimant must produce proper tax invoices against each costs and evidence or actual payment made by the Appellant. Therefore since the appellant did not produce evidence of a proper tax invoice on each costs and evidence of actual payments made its claim for inventory costs on direct sales was properly rejected”.

The TRAB concluded further that:

“...it goes without saying that it was proper for the respondent to disallow the appellant’s costs on direct sales due to lack of supporting invoices against each costs and evidence of actual payments made by the appellant.”

Admittedly, the issue of adherence to section 97 (c) of the ITA which requires provision of the reasons for the assessment made by the respondent was not raised as one of the grounds in the statement of

appeal at the TRAB. The relevant issue which was framed and agreed by the parties before the hearing and dealt upon by the TRAB in respect of the disallowed costs was; **“whether the Respondent was right in law in disallowing the inventory costs on direct sales”**. This was issue number six which was supposed to be determined at the end after the submissions of the parties on the same. However, at the hearing before the TRAB, the appellant consistently submitted that there were no reasons provided by the respondent for the disallowed costs. Nevertheless, no evidence was tendered in support of the appellant’s position that the disallowed costs on direct sales were incurred wholly and exclusively in production of its income. As a result, the TRAB found in favour of the respondent as stated above.

On its part, the TRAT upheld the finding and decision of the TRAB on that issue when it dismissed ground three of the appellant’s appeal in respect of the disallowed costs. For avoidance of doubt we have to point out that ground three of the appeal was to the effect that:-

“That the Board erred in law and fact when it held that the Respondent was correct to disallow the Appellant’s costs on direct sales due to lack of supporting invoices.”

In its decision, the TRAT agreed with the counsel for the respondent that the appellant failed to produce the required evidence to substantiate her claim. The TRAT emphasized that the appellant could have provided that evidence during the audit stage, during the objection or during the hearing of the case at the level of the TRAB.

We have to observe that while the complaint of the appellant before the TRAB on this issue was whether the respondent rightly disallowed the said direct sales costs on production of its income, at the TRAT the complaint remained substantially the same as reflected in the reproduced ground three above. However, we entertain no doubt that the need for the TRAB to address and decide upon the respondent's non-compliance with the provisions of section 97 (c) of the ITA was not vividly presented by the appellant during the submission of the argument in support of issue number six. For purpose of clarity, we better reproduce the relevant submission of Mr. Kibuta, the appellant's counsel in respect of this issue:

*"Issue number six also related in the income year 2008
which inventory costs were disallowed in deduction.
There are no clear reasons provided by TRA for*

disallowing the inventory costs. And the failure to state the reasons for disallowing is on itself an act of arbitrary. There is a second reason why you should find in favour of the tax payer in this point. In making the transfer pricing adjustment the costs of inventory is automatically adjusted. When you disallow the costs of inventory separately you are doing a double disallowance which is not proper in accounting perspective. For those two reasons we submit that disallowing the inventory costs is wrong."

In response to the submission of Mr. Kibuta, Mr. Adelard, Legal Officer for the respondent stated as follows: -

*"Issue number six regarding disallowance of inventory costs on direct sales, **the disallowance of this item was based on lack of evidence on actual costs alleged to have been incurred and correspondent payments. TRA was in need of appropriate invoice against each costs and evidence of actual payment made by the appellant. They have failed to***

discharge that obligation. The allegations that there was no clear reason for disallowing this item is unfounded. The reason for disallowance was based on lack of evidence on actual costs incurred. With regard to allegation that pricing adjustments automatically adjusts the inventory costs from accounting perspective is not true, because transfer pricing is on related part arrangements where direct sales in this item is [sic] relates to sales made locally. So the two cannot be/go together."

[emphasis added].

We also think that it is not out of place to point out that in his rejoinder to the submission of Mr. Adelard, as reflected at page 1185 of the record of appeal, Mr. Kibuta emphasized, among others, that: -

"...If the reason for disallowing for failure to provide evidence this should have been said by

TRA by the time and the company would have provided then

From the above quoted submissions of counsel for the parties, it is clear that the issue that the TRAB was called upon to determine is whether the appellant proved the actual costs incurred on inventory costs on direct sales to be entitled to the requisite tax relief as required by law. As we have demonstrated through the quoted paragraphs above, it is conceded that there was no direct reference to section 97 (c) of the ITA when counsel for the parties made their respective submissions at the TRAB. In this regard, no one can doubt the fact that in view of the submissions of the parties, the TRAB was called upon to decide whether there was sufficient evidence to show that the assessment in respect of the disallowed costs was erroneous. Therefore, to come to a different conclusion other than the one the TRAB arrived at, the appellant had the onus to prove to the contrary.

On the other hand, there is no doubt that the first reference to the provisions of section 97 (c) of the ITA was made by Mr. Alan Kileo, learned advocate for the appellant in his submission in support of ground three of appeal before the TRAT when he briefly stated as follows;

"... You will find that in section 97 of the Income Tax Act, 2004 an assessment without reasons is not assessment. In terms of the law the assessment the respondent issued ought to have explained why this costs was disallowed. Further the appellant during the objection stage sought explanation from the respondent why this costs was disallowed so that the appellant could respond positively..."

On her part, the respondent's counsel, Ms. Achimpota responded and emphasized that the appellant had a burden of proving that she incurred the expenditure to be entitled to the tax deductions she sought as it had a significant impact on their tax liability.

In this regard, we think that as during the submission of counsel before the TRAB it was plain that the dispute between the parties on the issue was on the lack of evidence on supporting invoices of which the appellant had claimed to possess, it is only the requisite evidence which could have guided the proper decision on the issue. In the circumstances, the appellant would have requested the TRAB to take fresh evidence

concerning the actual costs she incurred to prove that the respondent's assessment on the disallowed direct sales costs was erroneous as the burden of proof was still squarely on her part. In the event, she could have urged the TRAB to allow her to tender that evidence under the provisions of section 17 (1) (2) of the TRAA which provides as follows:-

"(1) The Board and the Tribunal shall respectively have the power: -

(a) To take evidence on oath

(2) Notwithstanding subsection (1), the Board or the Tribunal shall have the power to summon and hear any witness and receive evidence in the manner and the same extent as if it were a court exercising civil jurisdiction in a civil case and the provisions of the Civil Procedure Code relating to summoning of witnesses, the taking of testimony on oath, and non-compliance with a witness summon shall apply in relation to an appeal before the Board but the Tribunal may not admit any fresh evidence save in the

circumstance in which, the High Court may admit fresh evidence on a first appeal in a civil case."

[emphasis added].

Thus since the appellant did not urge the TRAB to take the relevant evidence after the respondent's submission and her rejoinder in respect of issue number six, but she instead, appealed to the TRAT against the finding and decision of the TRAB in respect of the same issue, her complaint on that ground is unfounded. She could have applied under section 17 (1) (a) and (2) of the TRAA for the TRAT to admit fresh evidence in respect of the said disallowed costs as the burden of proof still rested on her shoulder. As she did not do so, she cannot complain at this stage of the second appeal. We are settled that the relevant question before the TRAT was whether the appellant offered tangible evidence on the actual costs she incurred on direct sales to be entitled to the tax reliefs. We are of the firm opinion that at that stage if the TRAT could have been properly moved to grant the requisite leave, it could have legally invoked the provisions of section 17 (1) (a) and (2) of the TRAA to take fresh evidence as it was dealing with the first appeal from the TRAB.

It follows that as the issue of the necessity of provision of evidence to prove that the respondent's assessment was erroneous arose clearly at the TRAB and later at the TRAT, the appellant had the burden of showing that the respondent improperly disallowed the said costs as required by section 18 (2) (b) of the TRAA. For the sake of emphasis, we feel compelled to reproduce the said section hereunder: -

"(b) the onus of proving that the assessment or decision in respect of which an appeal is preferred is excessive or erroneous shall be on the appellant."

We are thus of the settled opinion that as the appellant had preferred an appeal in which the crucial issue before the TRAB and the TRAT was whether the respondent improperly disallowed the costs on direct sales, and whether the assessment was erroneous, she was duty bound to prove the same. For at that stage the assessment had been finally issued by the respondent and therefore no longer into her hands for further consideration. It is in this regard that we subscribe to the decision of this Court in **Insignia Limited v. The Commissioner General (TRA)**, (supra) where it was emphasized that: -

"The burden of proof in tax matters has often been placed on the tax-payer ... The evidence which settles the final liability lies solely within the knowledge and competence of the aggrieved tax-payer."

Therefore, in the circumstances obtaining in this appeal, as the appellant had appealed to TRAB and later to the TRAT contesting the entire assessment made by the respondent, but did not utilize the provisions of the law referred above to seek to be given leave to adduce evidence in support of her claim and to challenge the alleged improper assessment, she cannot currently take refuge under the provisions of section 97 (c) of the ITA. We are fully satisfied that after the respondent had issued the final determination on the disputed assessment, the appellant legally contested it through an appeal before the TRAB as required under section 16 (1) of the TRAA. Similarly, the appellant also rightly appealed to the TRAT against the decision of the TRAB as required by section 16 (4) of the TRAA. It was therefore her duty to show that the assessment made by the respondent in respect of the disallowed costs on direct sales was erroneous.

In the circumstances, if the intention of the appellant from the outset was to challenge the assessment of the respondent in respect of the disallowed direct sales costs based on the issue of non-compliance of the respondent with section 97 (c) of the ITA, she would have indicated so directly in her statement of appeal at the TRAB and later at the TRAT to enable them to deliberate and decide upon that legal question. As that was not done and the issue before the TRAB or TRAT remained that of whether there was evidence on actual costs incurred on direct sales, the appellant was duty bound to prove through cogent evidence (supporting invoices) that the disallowance of the said costs was erroneous. Otherwise, we think that the TRAB and the TRAT cannot be blamed as the question which they were called upon to adjudicate required sufficient proof and the burden lied on the appellant as provided under section 18 (2) (b) of the TRAA.

In the event, we agree with the learned counsel for the respondent that the TRAT properly confirmed the decision of the TRAB on the issue of disallowance of the direct sales costs as no cogent evidence was tendered by the appellant to the contrary. We do not therefore, think,

with respect, that the TRAT wrongly held against the appellant on this point as stated by her learned counsel.

In the final analysis, in view of the reasons we have stated above with respect to the sole ground of appeal, we have to conclude that this appeal is bound to fail. The consequence that follow is to dismiss it in its entirety with costs.

DATED at DAR ES SALAAM this 26th day of July, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The judgment delivered this 7th day of August, 2019 in the presence of Mr. Wilson Mukebezi counsel for the Appellant and Mr. Leyan Sabore, counsel for the Respondent, is hereby certified as a true copy of the original.


E.Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL