IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANGESI, J.A., MWAMBEGELE, J.A. And LEVIRA, J.A.)

CIVIL APPEAL No. 107 OF 2020.

VODACOM TANZANIA PUBLIC Limited Company
(Formerly known As Vodacom Tanzania Ltd) .... APPELLANT

VERSUS

COMISSIONER GENERAL TRA .... RESPONDENT

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

(Twaib, J. - Chairman)

Dated the 6th April, 2011
in
Tax Appeal No. 17 of 2016

....

JUDGMENT OF THE COURT

22nd July, & 5th October, 2020

LEVIRA, J.A.:

The appellant, VODACOM TANZANIA PUBLIC LIMITED COMPANY (the VTPLC) appeals against the decision of the Tax Revenue Appeals Tribunal (the Tribunal) in Tax Appeal No. 17 of 2010 delivered on 6th April, 2011. In that decision, the Tribunal reversed the decision of the Tax Revenue Appeals Board (the Board) in Consolidated Income Tax Appeals No. 18 and 19 of 2010 where the appellant had successfully appealed

against the respondent's assessment of income tax in respect of the years of income 2006 and 2007.

For a better understanding of this matter, a brief background is to the effect that, the appellant was not satisfied with the amount of tax liability assessed by the respondent in tax audit conducted on the appellant's tax affairs for the years of income 2006 and 2007 as introduced above. Therefore, she filed an objection to the respondent against that assessment. Eventually, after correspondences between the two, the respondent issued a Notice of amended final assessment to the appellant on 23rd February, 2010. The respondent disallowed the appellant's claim of deduction of capital expenditure at a rate of 100% basing on the Income Tax Act, 1973 and Interest on shareholder's loan on accrual basis as provided by the Income Tax Act, 2004.

The appellant maintained her stance that, she was entitled to 100% deduction of capital expenditures incurred for the years of income 2006 and 2007 and deduction of interests on the shareholders' loan for the year of income 2006 on accrual basis. This stance was contrary to the respondent's contention that interest on shareholders' loan for the year 2006, is to be deducted on payment basis. The appellant's claim was

premised on the Certificates of Investment Incentives issued on the appellant by the Tanzania Investment Centre (TIC) pursuant to section 17(1) of the Tanzania Investment Act, Cap 38 R.E 2002 (the TIA) as amended.

The said Certificates are the following: Certificate No. 110016, No. 110016, No. 1100166-01, No. 110016-06 and No. 110016-01 issued on 21st February 2000, 15th April 2004, 14th March 2005, 14th March 2006 and 10th March 2008 respectively. Being aggrieved by the amended final assessment, the appellant appealed to the Board and on 27th August 2010, the Board delivered its judgment in the appellant's favour. Aggrieved by that decision, the respondent successfully appealed to the Tribunal and hence, the current appeal by the appellant challenging that decision.

In her amended memorandum of appeal lodged on 16th July, 2020 the appellant has raised seven grounds, claiming that:-

1. The Tax Revenue Appeals Tribunal erred in law in holding that the appellant was not entitled to 100% deduction of the expenditure incurred.
2. The Tax Revenue Appeals Tribunal erred in law in its interpretation of section 16(2)(w) of the Income Tax Act, 1973.

3. The Tax Revenue Appeals Tribunal erred in law in holding that the appellant was not entitled to the continued entitlement to utilize the incentives granted to them prior to the coming in force of the income Tax Act, 2004 in respect of certificate of incentives No. 110016 issued by the Tanzania Investment Centre on the 21st February 2000.

4. The Tax Revenue Appeals Tribunal erred in law in its interpretation of section 16(2)(w) of the Income Tax Act, 1973 read together with section 19(2) and (3) of the Tanzania Investment Act, Cap 38 R:E 2002 as amended by the Written Laws (Miscellaneous Amendments) Act, 2005 (Act No. 5 of 2005).

5. The Tax Revenue Appeals Tribunal erred in law in holding that the two certificates of Incentives Nos. 110016/01 issued on 14th March 2005 and 110016/01 issued on 14th March 2008 by the Tanzania Investment Centre were intended to expand and not to extend the unutilized benefits conferred and granted on the appellant under the Income Tax Act, 1973.
6. The Tax Revenue Appeals Tribunal misdirected itself in law on the law applicable in considering the deductibility of interest and the attendant mode of allowing the

deduction that is, whether to apply the accrual basis or the actual payment basis.

7. The Tax Revenue Appeals Tribunal erred in law by failing to comply with the mandatory provision of Rule 14(5) of the Tax Revenue Appeals Tribunal Rules, 2001 (GN No. 57 of 2001) by the tribunal chairman failing to record the opinion of one of the members of the Tribunal namely, Mr. W. N. Ndyetabula who dissented in respect of part of the Tribunal's judgment and also by failing to record reasons for his disagreement with the opinion of the dissenting member.

At the hearing of this appeal, the appellant was represented by Mr. FAyaz Bojan, Ms. Hadija Kinyaka and Timon Vitalis, all learned advocates, whereas the respondent had the services of Mr. Amandus Ndayeza, learned Senior State Attorney, assisted by Mr. Harold Gugami, learned State Attorney.

In arguing this appeal, Mr. Bojan adopted first the appellant's written submissions as part of his oral submissions. He preferred to start with the seventh ground and grounds one to five combined. The sixth ground was argued by Ms. Kinyaka.

deduction that is, whether to apply the accrual basis or the actual payment basis.

7. The Tax Revenue Appeals Tribunal erred in law by failing to comply with the mandatory provision of Rule 14(5) of the Tax Revenue Appeals Tribunal Rules, 2001 (GN No.57 of 2001) by the tribunal chairman failing to record the opinion of one of the members of the Tribunal namely, Mr. W.N. Ndyetabula who dissented in respect of part of the Tribunal's judgment and also by failing to record reasons for his disagreement with the opinion of the dissenting member.

At the hearing of this appeal, the appellant was represented by Mr. FAyaz Bojan, Ms. Hadija Kinyaka and Timon Vitalis, all learned advocates, whereas the respondent had the services of Mr. Amandus Ndayeza, learned Senior State Attorney, assisted by Mr. Harold Gugami, learned State Attorney.

In arguing this appeal, Mr. Bojan adopted first the appellant's written submissions as part of his oral submissions. He preferred to start with the seventh ground and grounds one to five combined. The sixth ground was argued by Ms. Kinyaka.

Mr. Bojan submitted that the seventh ground of appeal is based on Rule 14 (5) of the Tax Revenue Appeals Tribunal Rules, 2001 (the Tribunal Rules) which requires the chairman of the Tribunal to record the opinion of the member whom he disagrees with and the reasons for his disagreement if it so happens. He argued that in the current appeal the chairman neither recorded the partial dissenting opinion of Mr. W. N. Ndyetabula who was one of the members nor assigned reason(s) in that regard for not doing so. He referred us on pages 639 to 641 of the record of appeal where the opinion of the said member is found. He highlighted that Mr. Ndyetabula was in disagreement with other members on the issue concerning accrued amount of Tshs. 600,000,000/= which he opined that, it should be re-contested by the respondent (the appellant herein) before the Board within six months of the ruling.

He insisted that since the word used in Rule 14(5) of the Tribunal Rules is "shall" it was mandatory for the Chairman to record the dissenting opinion and the reasons for departing from such opinion. He cited decisions of the Court which decided to the effect that, failure to record assessor's opinion vitiates proceedings and nullified the decisions of lower courts, including, **Ameir Mbaraka and Another v. Edga Kahwili,** Civil Appeal

No. 154 of 2015; **Emmanuel Christopher Lukami v. Juma Omar Mrisho,** Civil appeal No. 21 of 2013; **Richard Lucas @ Leonard and 3 Others v. Republic,** Criminal Appeal No. 72B of 2016 and **Chiriko Haruni David v. Kangi Lugora & 2 Others,** Civil Appeal 36 of 2012 **John Masweta v. General Manager MIC (T) Ltd,** Civil Appeal No. 113 of 2015; **Awiniel Mtui & 3 Others v. Stanley Ephata Kimambo (Attorney for Ephata Mathayo Kimambo),** Civil Appeal No. 97 of 2015; **Sikuzani Saidi Magambo & Another v. Mohamed Roble,** Civil Appeal No. 197 of 2018; **Y. S Chawalla & Co. Ltd v. Dr. Abbas Teharali,** Civil Appeal No. 70 of 2017 and **Josephine Mumbi Waithera v. The Republic,** Criminal Appeal No. 72 'B' of 2016; (all unreported).

Submitting on grounds one to five of appeal, Mr. Bojan stated that the main contention in these grounds is the duration of the certificate of incentive and the law applicable. As such, he said, the certificate of incentive subject of this appeal was issued under section 17 of the TIA. According to him, way back in 2000 the appellant applied and submitted a feasibility study to the Tanzania Investment Centre (the TIC) to register her project under the TIA and was accordingly issued with a certificate of incentive number 110016 under the above provisions of the law.

However, the issue arose because in 2004 the Income Tax Act, 2004 (the 2004 Act) came into force while the appellant had already been issued with a certificate of incentive in 2000 which he claimed could not be affected by the change of law. His argument based on the feasibility study of the project which was of fifteen years. As a result, while in one hand the appellant thought that the law applicable throughout is the Income Tax Act of 1973 (the 1973 Act), on the other hand, the respondent insisted that the assessment done in the years of income 2006 and 2007 fell under the 2004 Act as the applicable law in the said respective years of income.

Mr. Bojan argued further that, the application for the first certificate of incentive issued in 2000, was one for a 15 years' project with an investment of USD 508.5 Million. According to him, it was wrong for the Tribunal to extract excerpts of witnesses and come up with the holding importing the idea of implementation periods, expansion and extension contrary to the 15 years' project. He insisted that, since the appellant had already been issued with a certificate of incentives under the 1973 Act which allowed her a deduction of expenditure at 100%, the subsequent certificates issued from the year, 2005 automatically entitled her to

continue enjoying those benefits as a matter of law. Therefore, he urged us to allow those grounds of appeal.

In regard to the sixth ground of appeal, Ms. Kinyaka submitted that the dispute is centered on section 16(3)(a) of the 1973 Act on the deductible interest and the mode of allowing the deduction, whether to apply accrual basis or actual payment basis. According to her, modalities of eligibility of certain deductions may change from time to time. The appellant had not previously claimed any deduction of interest because under the then existing section 16(3)(a) of the 1973 Act, such claim could only be laid on paid basis. She added that, the change of International Financial Reporting Standards (the IFRS) that subsequently became dominant, led to the departure from the previous practice. Therefore, the law in keeping pace with the IFRS adopted the accrual basis. However, she stated that the appellant had not laid any claim before coming into force of the 2004 Act and therefore, section 16(3)(a) of the 1973 Act is inapplicable to the matter at hand.

In addition, she stated that during the year of income 2006 argued, was the first year of applicability of the new law to the appellant who had prepared accounts and reported her liabilities on accrual basis in

compliance with the IFRS as required by the law; that is, section 21(1) and (3) of the 2004 Act. Therefore, she argued that, it was wrong in law for the Tribunal to hold that in submitting income tax returns and the accompanying accounts for the years of income 2006 and 2007, the appellant was required to account for interest on paid basis.

She argued further that, the Tribunal was wrong to hold that the appellant was not entitled to claim interest (Tshs. 600,000,000/=) on accrual basis in respect of the interest that was payable at the time when the 1973 Act was in force because the interest had not yet become payable. She submitted that, based on the requirements of the IFRS and section 23(1) & (3) of the 2004 Act, the appellant was required to comply with the new laws under which interest expense is claimed on accrual basis and not on a paid basis. She urged us to hold that, the appellant had properly claimed a deduction in respect of accrued interest of Tshs. 600,000,000/= during the year of income 2006, reverse the decision of the Tribunal and allow this appeal in its entirety with costs.

In reply, Mr. Ndayeza adopted the respondent's written submissions and supported the Tribunal's decision. His submissions in respect of the first to fifth grounds of appeal was to the effect that, the appellant was not

entitled to 100% deduction of expenditure incurred and to continued entitlement to utilize the incentives granted to her prior to the coming into force of the 2004 Act, in respect of certificate of incentive issued by the Tanzania Investment Centre (the TIC) on 21st February, 2002; two certificates of incentives Nos. 110016/01 issued on 14th March 2005 and 110016/01 of 14th March, 2008 which intended to expand and not to extend the benefits conferred on and utilized by the appellant under the 1973 Act.

According to him, the second set of certificates issued on 14th March, 2005 and 14th March, 2006 were new agreements which related to a new project of expansion. He thus argued that, the Tribunal was correct to hold that, the second set of certificate does not confer upon the appellant the benefits of the 1973 Act. He made reference to the second set of Certificate of incentives where clause 12(ii) of the said certificate states categorically that, the eligibility for capital allowance is as per the 2004 Act which does not provide for 100% capital expenditure deduction.

He was categorical that, section 17(2) of the TIA provides for certificate of expansion which is the difference from the other certificates. He argued that, a certificate or right which was not in existence prior to the

enactment of the 2004 Act cannot be conferred in terms of section 143 of the said Act. Further that, a certificate of incentive represents a binding agreement between the Government and the investor, therefore, the terms and conditions provided in the certificate of incentives must be complied with. As such, he said, the implementation period stipulated in the certificate of incentive is a life time of the agreement in which tax benefits cannot be enjoyed beyond that time. Thus he argued that, if the appellant was aggrieved by the conditions enshrined in new certificate she ought to have opted to dispute settlement method envisaged under section 23 of the TIA. He emphasized that, the 1973 Act does not apply to the new set of certificate issued in the year 2005 but the 2004 Act. In addition, he said, the license issued and the feasibility study conducted have nothing to do with tax exemption, the only document is certificate of incentive.

Responding on the sixth ground of appeal, Mr. Ndayeza submitted that the Tribunal was also correct to hold that the applicable principle is the accounting principle of the year 2003. He added that, in terms of the 1973 Act, interest deducted needed proof of payment. However, he argued that in the case at hand, the income interest was due before the 2004 Act came into force and thus the accrual basis stated by the counsel

for the appellant cannot apply. He elaborated that interest which accrued and carried forward from the 1973 Act is not deductible on accrual basis under the 2004 Act.

In regard to the seventh ground of appeal, the counsel for the respondent, Mr. Gugami submitted that from page 633 to 644 of the record of appeal the opinions of both members were recorded. However, it was his argument that, failure by the chairman to record in the judgment the reason(s) for his disagreement with the second limb of one of the member's opinion was not fatal. He argued that the substantial part of members' opinion was considered by the chairman as a result, the omission does not go to the root of the matter. Besides, he said, the Tribunal was duly constituted, members signed the proceedings and the chairman is not bound by the opinion of members.

Regarding the decisions cited by the counsel for the appellant, he argued that they are distinguishable from the current case because in those cases the issue was whether assessors were fully involved in the trial, but in the current case the issue is on part of the opinion of one member. He urges us to invoke Rule 115 of the Tanzania Court of Appeal Rules, 2009 (the Rules) to find that the merit of the case was not

prejudiced and proceed to determine the appeal. Finally, he urged us to dismiss this appeal with costs.

In rejoinder, Mr. Bojan reiterated his submission in chief regarding member's opinion in respect of ground seven of appeal. He insisted that the Tribunal chairman did not record the opinion of one member in the judgment and did not give the reason(s) for not recording the same. In the circumstances, he said, the question of prejudice does not arise, instead Rule 22 of the Tribunal Rules needs to be interpreted strictly. As such, he said, Rule 115 of the Court Rules cannot supersede the whole Tax statute and that the Tribunal is not the High Court which is referred under the said Rule. He added that all the authorities he cited are relevant to the matter at hand.

Regarding grounds one to five of appeal, he insisted that there was only one project under 15 years feasibility study and not multiple projects as stated by the counsel for the respondent.

On ground six, Ms. Kinyaka rejoined that the obligation to pay interest before 2004 Act was not there and section 16(3)(a) of the 1973 Act required payment when there was actual payment not when there was an obligation to pay. She insisted that, it was right for the appellant to account

on accrual basis under the 2004 Act. Therefore, she urged us to allow this appeal with costs.

We have respectfully considered the rival submissions by the counsel for parties, the grounds of appeal and the entire record. We find it apposite at the outset to ascertain the period of tax assessment in connection with the Certificate of Incentives issued to the appellant by the TIC under section 17(1) of the TIA in respect of the first to fifth grounds of appeal. As it can be gathered from the record, the period for tax assessment in question was in respect of the years of income 2006 and 2007. The bone of contention between the appellant and the respondent was on the respondent's disallowance of deductions (that is, capital expenditure and shareholders' interest on loan) in the respective years of income. In the light of that background, the issue that follows is, whether the appellant was entitled to 100% deduction of Capital Expenditure.

Section 16(2)(w) of the Income Tax Act, 1973 provided for deductibility of capital expenditure at the rate of 100% to the investor who qualifies for the award of investment incentives. This provision was the basis of the appellant's claims for deductions of capital expenditure at the

Board and before the Tribunal. However, on 4th June, 2004 the 1973 Act was repealed and replaced by the 2004 Act.

The counsel for parties differed in their arguments regarding the law to be applicable in the circumstances as earlier on intimated. However, regarding the repealed law, we are of the opinion that, the Tribunal reasoned rightly on the principles of statutory interpretation at page 650 of the record of appeal that:

> *"...where a law has been amended, all references to the amended law, unless the contrary intendment appears, shall be read as references to that law as amended. A reference to a law that has been repealed, on the other hand, would depend on the saving provisions (if any) of the new law."*

Section 143(1) of the 2004 Act which was much relied by the appellant as a saving provision of section 16(2)(w) of the 1973 Act provides that:

> *"Subject to the provisions of subsection (2), where the Government of the United Republic has concluded a binding agreement with a person (whether before or after the commencement of this Act) such that certain provisions of the repealed legislation or provisions of this Act that are*

later repealed will continue to apply or not be altered to the detriment of the person,

(a) the provisions of the repealed legislation shall continue to apply,

(i) to the extent provided for in the agreement, for the duration of the agreement; or

(ii) until such time as the person relinquishes the right to apply those provisions, whichever is earlier..."

The above provision of the law implies plainly that, the existence of a binding agreement between the Government and an investor will continue to apply the provisions of the repealed law, and the same would not be altered to the detriment of the investor in that respect. But the application of subsection (1) of section 143 of the 2004 Act is subject to the provisions of subsection (2) of the same section. Hence, in order for an investor to continue enjoying the benefits provided for under section 16(2) (w) of the 1973 Act, must fulfill the condition set forth under section 143(2) of the 2004 Act, which states:

"(2) An agreement referred to in subsection (1) has no effect on the application of this Act until such time as it shall be

incorporated in a register to be kept by the Minister and known as the Register of Tax Agreements."

Regarding the above position, in our opinion, the Tribunal rightly determined the implications of the Certificate of Incentives granted to the appellant under section 17(1) of TIA as an extension of 2000 agreement while others created a new agreement entered in 2005. Certificate No. 110016/01 dated 14/3/2005 and No. 110016/01 dated 14/3/2006 were in relation to the incentives under the 2004 Act. Therefore, Certificate of Incentive issued in 2005 was a new certificate and not an extension of the previous ones as contended by the appellant. This is evidenced by the wording of the certificate itself as it uses the word "expansion" and not "extension" as it appears in the previous certificates. This proposition is supported by the provisions of section 3 of the TIA which defines investment to mean: *"The creation or acquisition of new business assets and includes the* ***expansion,*** *restructuring or rehabilitation of an existing business enterprise."* [Emphasis added].

Also section 143(4) of the 2004 Act provides that:

"For the purposes of this section, an agreement concluded by the Government of the United Republic ***includes a certificate of incentive*** *issued by the Tanzanian*

Investment Centre under the Tanzania Investment Act, 1997." [Emphasis added].

In the same vein, the issuance of new certificates, that is certificate No. 110016/01 dated 14/3/2005 and No. 110016/01 dated 14/3/2006 by the TIC in our settled opinion, constituted a new agreement under the provisions of the above subsection of the 2004 Act. Therefore, as rightly held by the Tribunal, the certificates were clearly in respect of a new investment, separate from the initial one under which the first sets of certificate were issued. Thus, with issuance of new certificates by the TIC under section 17(1) of the TIA and section 143(4) of the 2004 Act, the parties (Appellant and Respondent) had entered into a new agreement concluded in the pendency of the 2004 Act.

Since the new agreement was entered into after the coming into force of the 2004 Act, we entertain no doubt that the same could not be governed by the provisions of the repealed 1973 Act. Besides, the certificate itself expressly mentioned the 2004 Act as the applicable law. Therefore, in the circumstances, the applicable law is the 2004 Act. Section 143(2) & (3) of the 2004 Act provides that:

"(2) An agreement referred to in subsection (1) have no effect on the application of this Act until registered by the Minister in the Register of Tax Agreements.

(3) A person seeking the benefit of an agreement referred to in subsection (1) shall apply to the Minister for inclusion of the agreement in the Register of Tax Agreements.

In our settled view, it was correctly decided by the Tribunal that, for the appellant to legally enjoy the benefits of section 143(1) of the 2004 Act, she had to apply to the Minister for Finance under subsection (3) of the said section for the inclusion of the agreement in the Register of Tax Agreements, but this was not the case herein and thus the appellant cannot rely on the provisions of section 143 of the 2004 Act. Therefore, we are settled that: **First,** the appellant was not entitled to 100% deduction of capital expenditure as the same is not provided for, under the 2004 Act. **Second,** the Tribunal properly interpreted the provisions of section 16(2)(w) of the 1973 Act. **Third,** it was correct in law for the Tribunal to hold that the appellant was not entitled to the continued entitlement to utilize the incentives granted to them prior to the coming in force of the 2004 Act in respect of certificate of incentives No. 110016 issued by the TIC on 21st February 2000. **Fourth,** the Tribunal was correct in law in holding that the

two certificates of Incentives Nos. 110016/01 issued on 14th March 2005 and 110016/01 of 14th March 2008 intended to expand and not to extend the unutilized benefits conferred upon and granted on the appellant under the 1973 Act. Therefore, these grounds of appeal are without merit and dismissed.

Now reverting to the sixth ground of appeal, the pertinent issue to be determined is whether the appellant was entitled to deduction on shareholders' loan interest basing on payment or accrual basis. In the aspect of interest allegedly incurred by the appellant on the shareholder's loan for the year of income 2006, the counsel for the appellant maintained that the same should be taken on accrual basis; that is, without actual payment of the same. This position was strongly contested by the counsel for the respondent. Section 16(3)(a) of the 1973 Act provided that interest was deductible only when actually paid as opposed to section 17 of the 2004 Act which provides for a deduction in respect of depreciation allowance for depreciable assets (accrual basis).

The appellant's stance was that, the 2004 Act was applicable on deduction of interest on shareholder's loan on accrual basis whereas, the respondent has relied on the provisions of section 16(3)(a) of the 1973 Act,

section 142(1) of the 2004 Act and sections 31 and 32 of the Interpretation of Laws Act, [Cap 1 RE 2002] in support of his argument. Going through all those provisions of the Laws cited above, it appears that where an obligation to pay tax arises at a particular point in time, that obligation is to be handled in accordance with the law applicable at that particular time, even if the said law is subsequently repealed and not in accordance with the new law that comes into force after the obligation has arisen.

Therefore, as correctly held by the Tribunal, in our view, section 142 (1) of the 2004 Act saves the application of the 1973 Act beyond the coming into force of the 2004 Act for the relevant years of income. The section provides that:

> *"Subject to the provisions of subsection (6), the repealed legislation continues to apply* ***for years of income commencing prior to the date*** *on which this Act comes into effect."* [Emphasis added].

We agree with the decision of the Tribunal that, since the appellant was supposed to have paid the interest before the enactment of the 2004 Act, the governing law was the 1973 Act even if actual payment of the same is made after its repeal. In the circumstances, we also agree with the

counsel for the respondent that the appellant was not entitled to claim interest on accrual basis in respect of interest that was payable at the time when the 1973 Act was in force. As such, we are settled in our mind that, the appellant's obligation to provide proof of payment first before claiming deduction remained intact as if the 1973 Act was still in force. The appellant was not entitled to deduction of interest on shareholder's loan basing on accrual basis enshrined under the 2004 Act, but on payment basis as provided for by the 1973 Act as the interest claimed was supposed to be paid by the appellant before the repeal of the 1973 Act. Instead, the same was being carried forward up to the disputed period of tax assessment. Having stated so, this ground of appeal also fails.

Lastly, in the seventh ground of appeal the main contention by Mr. Bojan was that the chairman of the Tribunal did not record the dissenting opinion of Mr. W. N. Ndyetabula who was one of the members and failed to assign reasons for not doing so as per the requirements of Rule 14 (5) of the Tribunal Rules. This omission, he said, vitiates proceedings as decided in various decisions of the Court which were earlier on indicated. His arguments were opposed by Mr. Gugami who argued that, failure by the chairman to record the reasons for his disagreement with part of one

of the member's opinion in the judgment was not fatal because it did not go to the root of the matter. He argued further that, all the cases cited by the counsel for the appellant are distinguishable from the current case because in those cases, the issue was whether assessors were fully involved in trial which is not the case herein.

In dealing with this ground of appeal, we consider it important, at first, to determine whether or not there was a dissenting opinion of a member of the Tribunal. Section 20 of the Tax Revenue Appeals Act [Cap 408 RE 2010] read together with Rule 14(5) of the Tribunal Rules, 2001 provide that, a Chairman of the Tribunal is not bound by the opinion of members of the Tribunal save when he disagrees with the opinion of any member (s), he shall record the opinion of such member (s) differing with him and reasons for his disagreement.

In the light of the above position of the law we are constrained to consider what were the issues placed before the Tribunal for determination. According to the record, the issues before the Tribunal were as follows:

i. Whether the respondent (Appellant herein) was entitled to 100% deduction of capital expenditure.

On this issue we note that according to the record of appeal, there was no disagreement between the Chairman and members of the Tribunal as they all agreed that, the appellant was not entitled to 100% deduction of capital expenditure as the law applicable was the Income Tax Act, 2004.

ii. Whether the respondent (the appellant herein) was entitled to a deduction of interest allegedly incurred on the shareholder's loan for the year of income 2006 on accrual basis without actual payment of the same.

Regarding the above issue, one member of the Tribunal (Prof. Doriye) opined that, the appellant was not entitled to deduction of interest on accrual basis as the law applicable was the 1973 Act. On his side, Mr. W. N. Ndyetabula who was also a member was in agreement with Prof. Doriye's opinion that, the disputed amount of interest seems to have accrued for the years 2001 to 2006. He was of the further opinion that, the amount of Tsh. 600,000,000/= include an amount of interest deduction on actual payment basis as well as on accrued basis.

In our considered view, Mr. Ndyetabula's opinion did not differ substantially with that of the other member as the issue remained to be how the said substantial amount would be deducted. In this respect

therefore, we observe that the holding of the Tribunal was substantially in agreement with what its members had opined. Had it been that, Mr. Ndyetabula's opinion was that, the appellant was entitled to deduction of the claimed interest on accrual basis and the Tribunal's holding was on the opposite, that could have been a substantial difference in which the provisions of section 20 of the Tax Revenue Appeals Act and Rule 14(5) of the Tribunal Rules could come into play.

We are fortified in this position in view of the fact that at pages 659 and 660 of the record of appeal, on 6th April, 2011 Mr. Ndyetabula signed the decision of the Tribunal together with the other member and the Chairman. This signifies that he was in agreement with the contents of that Judgment by endorsing it otherwise he would not have signed it. For clarity, at page 640 of the record of appeal Mr. Ndyetabula had stated that:

> *"The disputed amount of interest seems to have accrued for the years 2001 to 2006.* ***This implies to include an amount of interest deduction on actual payment basis as well as on accrued basis.*** *This should have had been specifically indicated by either the appellant or the respondent herein as to how much is actual amount and that of the accrued category. The appellant should have been in a better position to clearly substantiate the specific amount of*

accrual status and the amount considered to be actual payment basis. As the amount in reference is substantial, to be just accorded to either party do appear to be inequitable. ***I am of the opinion that the subject accrued amount of Tsh. 600,000,000/= be recontested by the respondent herein before the Board within six month of the ruling*** *(sic).* ***The appeal be allowed save for the reservation made with regard to the stated accrued sum and each party to bear its own costs."*** [Emphasis added].

It is our further observation that, the difference in opinion between Mr. Ndyentabula and Prof. Doriye is that, Mr. Ndyetabula having agreed that the appellant was entitled to actual payment basis, he added that, the accrued basis as well is applicable after having considered that the amount in question (Tshs. 600,000,000/=) was substantial, he opined further that, the same be re-contested by the respondent (the appellant herein) before the Board within six months of the judgment and the appeal be allowed save for that reservation.

The position of the law is very clear that the Chairman is not bound by the opinion of members, all what is required of him is to assign reasons in case of departure which is not the case herein. The law does not require

the Chairman to take whole sale the members' opinion. The opinion of Mr. Ndyetabula was partly considered by the Tribunal. We have thoroughly perused the impugned decision of the Tribunal and observed that, there is nowhere the Chairman stated categorically that he was specifically referring to a certain member's opinion. The decision was crafted in such a way that members' opinion was considered and the decision was not of the Chairman alone. However, the law does not envisage a situation where there is partial consideration of member's opinion. Therefore, we cannot fault the decision of the Tribunal in that regard as the Chairman was not bound to give reasons for partial consideration of member's opinion. In the circumstances, we think, it is not safe to conclude that Mr. Ndyetabula had a dissenting opinion. While we agree that the Chairman did not make specific reference or pronouncement of the different opinion of Mr. Ndyetabula on the issue reproduced above, we think in the judgment he correctly arrived at a conclusion.

In the interest of substantial justice we are of the view that, practicability of the disputed part of Mr. Ndyetabula's opinion was problematic due to a number of reasons: **One**, the parties did not pray for the said relief in line with Mr. Ndyetabula's opinion at the Tribunal; how

then the Tribunal could grant a relief which is not sought? That apart, the reasoning of the Chairman's decision suggests that he was aware of what was opined by the said member. **Two**, the Board had already given its decision on a matter which was placed before it; therefore, there was no way the said matter could be sent back to the Board by the respondent for it to decide. **Three**, Mr. Ndyetabula did not state how the respondent could go back to the Board while the matter was already before the Tribunal; whether by revision or review, whether the Tribunal could return it or the respondent make an application. **Four**, Mr. Ndyetabula had opined that the appeal be allowed, how then could it be possible for the matter to be returned to the Board for determination? Certainly not legally practicable. **Five**, we see that there was no dissenting opinion as stated above, Mr. Ndyetabula was having different opinion and not dissenting opinion. **Six**, the Chairman agreed with the opinion of Prof. Doriye and part of Mr. Ndyetabula's opinion as earlier on indicated; in the circumstances, he was not obliged to record and give reasons for not considering different opinion of Mr. Ndyentabula. **Seven**, it cannot be legally said with certainty that Mr. Ndyetabula gave a dissenting opinion because he is not a decision maker; what he gave was a different opinion. Therefore, in the circumstances and

for the reasons stated above, the obligation of the Chairman to record the dissenting opinion does not arise.

We had an opportunity to peruse all the authorities cited by the counsel for the appellant and we agree with Mr. Gugami that, all of them are distinguishable from the current case. We shall demonstrate. All cases cited revolved around the following issues: Non-involvement of assessors in a trial; failure to record opinion of assessors; change of assessors in the mid of trial without assigning reason(s); conducting trial in the absence of assessor; misdirection or non-direction of assessors on vital points of law; failure to record dissenting opinion of assessor; and, the effect of allowing assessor to give opinion without hearing witnesses while testifying as was decided in the cases cited.

As earlier on intimated, all the cases cited above are distinguishable from the circumstances of the present case. In the current case there was, in our considered view, no dissenting opinion. Therefore, basing on what we have endeavoured to discuss above, we decline the invitation by Mr. Bojan to find that the Tribunal Chairman erred by not recording the member's dissenting opinion. In our well-considered view, since the opinion of Mr. Ndyetabula was considered by the Chairman to the extent

explained above, the decision of the Tribunal was not vitiated as suggested by the appellant's counsel. We thus find the seventh ground of appeal baseless and accordingly dismiss it as well.

For the reasons stated above, we are settled in our mind that this appeal is without merits. Consequently, we dismiss it in its entirety with cost.

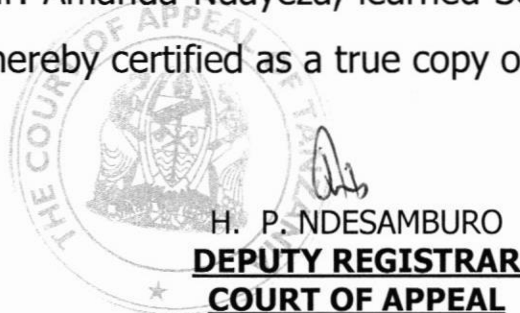
DATE at **DAR ES SALAAM** this 01st day of October, 2020

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 5th day of October, 2020 in the presence of Mr. Rwekamwa Rweikiza and Ms. Hadija Kinyaka, learned Counsels for the Appellant and Mr. Amanda Ndayeza, learned Senior State Attorney for the Respondent, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL