IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And LEVIRA, J.A.)

CIVIL APPEAL NO. 9 OF 2019

GEITA GOLD MINING LIMITED..... APPELLANT

VERSUS

COMMISSIONER GENERAL TANZANIA,
REVENUE AUTHORITY.....RESPONDENT

(Appeal from the Judgment and Decree of the Tax Revenue Tribunal

at Dar es Salaam

(Twaib, Chairman.)

dated the 10th day of November, 2017

in

Tax Appeal No. 10 of 2016

JUDGMENT OF THE COURT

3rd & 10th June, 2020

MUGASHA, J.A.:

The appellant, Geita Gold Mining Limited (GGML) has lodged this appeal challenging the decision of the Tax Revenue Appeals Tribunal (the Tribunal) which dismissed its appeal against the decision of the Tax Revenue Appeals Board (the Board), in favour of the respondent, the Commissioner General, Tanzania Revenue Authority the (CGTRA).

The background underlying the present appeal is briefly as follows: The appellant is a Gold Mining Company dealing in mining industry in Geita region. On June 24th, 1999 the appellant through its shareholders entered into a Gold Mine Development Agreement (the MDA) with the Government of the United Republic of Tanzania pursuant to which the appellant was entitled to enjoy tax incentives stipulated therein. Between 2009 and 2011, the appellant claimed to have engaged various non-resident persons to perform technical services in connection with its mining activities and as consideration, the appellant paid fees for such services which were provided by affiliate companies namely; AngloGold Ltd, AngloGold Ashanti Ltd, AngloGold Australia and AngloGold. Moreover, during the period in question, the appellant paid insurance premiums to cover personal injury or incapacitation. In addition, the appellant made payments for various goods and services supplied to it by persons who did not have Tax Identification Number registration.

In 2013 the respondent conducted a tax audit on the appellant's business affairs covering years of income 2009 to 2011 with the objective of ascertaining the appellant's compliance in payment of various taxes. As a result, on 29th July, 2013 the audit findings communicated to the

appellant were to the effect that, it was required to remit the withholding tax at the rate of 15% from payments made to third parties. The respondent alleged that, the appellant was not implementing the withholding tax scheme as required under the Income Tax Act, 2004 having withheld tax at the rate 3% instead of 15%. In protest, the appellant contended that, in terms of clause 4.5.2 of the MDA Agreement, it was obliged to withhold only 3% of the gross amount of payment in respect of technical services and management fees availed to it irrespective of the changes on the rate pursuant to the amendment or repeal of the law.

On 2nd September, 2013 the appellant responded and agreed that the withholding tax scheme on payments for technical services was not implemented as required by section 34 (1) of the Income Tax Act, 1973 but maintained that, in terms of paragraph 4(2) in the Third Schedule to Income Tax Act, 1973 and clause 4.5 of the MDA Agreement, the rate to be withheld is 3% and not 15% as contended by the respondent. The appellant also clarified to the respondent that, the respondent's computation included items which cover insurance premium covering personal injury risk and payments to individuals without tax payer

identification number (TIN) which do not attract withholding tax. However, the appellant maintained that, the withheld rate of 3% from the gross amount paid in respect of technical services and management fees was correct in accordance with clause 4.5.2 of the MDA Agreement.

On 31st December, 2013 the appellant vide a letter of finalization of the Tax Audit issued to the respondent a withholding tax certificate demanding TZS. 1,819,002,183 as principal sum and TZS.1,123,875,027 as interest making a total of TZS. 2,942,877,210.00. Before the Tax Revenue Appeals Board (the Board) the appellant's appeal was partly allowed to the extent that, the respondent was ordered to vacate the computations made for the year 2009 in relation to payments made by the appellant to non-TIN holders. However, the rest of the respondent's claims were sustained.

Still aggrieved the appellant unsuccessfully appealed to the Tax Revenue Appeals Tribunal (the Tribunal) vide Tax Appeal No.10 of 2016. Finally, as earlier stated, the appellant has preferred the present appeal challenging the decision of the Tribunal raising the following grounds of complaint:

1. The Tax Revenue Appeals Tribunal erred in law in holding that the obligation to withhold income tax

under clause 4.5 of the Mining Development Agreement depends on the law applicable at any point in time and that the appellant is not exempted from adverse changes in law.

2. The Tax Revenue Appeals Tribunal erred in law in holding that the documents presented by the appellant do not clearly categorize the services rendered as technical or managerial.

3. The Tax Revenue Appeals Tribunal erred in law in holding that the services for which withholding tax was remitted by the appellant cannot be termed as technical or managerial and that the applicable withholding tax rate for such services is 15%.

4. The Tax Revenue Appeals Tribunal erred in law in holding that the BUPA contract did not meet the conditions for life insurance as defined under section 3 of the Income Tax Act, 2004.

The parties filed written submissions containing arguments for and against the appeal which were adopted by the respective learned counsel at the hearing of the appeal.

At the hearing, the appellant was represented by Messrs. Allan Nlawi Kileo, Wilson Kamugisha and Nobert Mwaifwani, learned counsel whereas the respondent had the services of Mr. Evarist Mashiba, learned Principal State Attorney, Ms. Consolatha Andrew, Ms. Juliana Ezekiel and Mr. Leyan Sabore, from the respondent's office. It is Ms. Andrew from TRA who addressed the Court.

In addressing the 1st ground of appeal, Mr. Kileo faulted the Tribunal to have wrongly concluded that the appellant was not exempted from adverse changes in the law on the rate applicable on the tax to be withheld by the appellant when making payments to third parties. On this he contended that, the appellant's obligation to withhold tax is regulated by section 34 (2) (e) of the Income Tax Act 1973 (the ITA 1973) and clauses 4 and 10 of the MDA Agreement. He argued this stance to be geared at stabilizing the tax regime for the entire lifespan of the mine until its closure. As such, he maintained that the appellant is not obliged to withhold a sum greater than 3 % from the payments made to third parties. This submission as well covers the 2nd and 3rd grounds of appeal since it

was contended that, the appellant was obliged to withhold 3 % from the payment made in respect of technical services availed by third parties. In addition, it was submitted that the Tribunal erred to hold that the supply of materials and equipment to the appellant were not directly related to the extraction of minerals as they did not meet the threshold of managerial or technical services under section 2 (1) of ITA 1973 which defines what constitute technical services. On that account, it was argued that since the appellant was provided with technical services, it was obliged to withhold 3% and not 15% as wrongly concluded by the Tribunal.

In respect of the 4th ground of appeal, the appellant faulted the Tribunal holding to the effect that, BUPA Insurance contract in respect of which the appellant paid insurance premium was a year to year contract and thus subject to withholding tax at a rate of 15 %. On this, it was argued that, **one,** the premium was paid to a company incorporated in United Kingdom which is a non-resident person and not subject to tax in the United Republic of Tanzania. **Two,** the appellant's obligation to withhold tax arises only when the insurance premium has a source in Tanzania. **Three,** although under clause 2 the contract of insurance cover is pegged to a period of twelve months' which necessitates an update in

order to ascertain the level of risk which does not require entering into a new contract; under clause 1 the commencement date is 22/11/2004 which accommodates the BUPA Insurance contract which qualifies to be a life insurance contract as stipulated under section 3 of the ITA, 1973.

On the basis of the said submissions, Mr. Kileo urged the Court to allow the appeal with costs.

On the other hand, the respondent challenged the appeal. In that regard, Ms. Andrew submitted that, in terms of clause 4.5 of the MDA Agreement, the appellant was obliged to withhold tax from the payments made to third parties at the rate prevailing at any point in time under the existing law. She so argued contending that the MDA was not intended to protect third parties because they are not privy to the MDA Agreement. As such, the appellant was obliged to withhold tax at the rate of 15 % from the payments in question and thus, the respondent was justified to demand from the appellant the withholding tax at the prescribed rate.

As to whether or not services rendered to the appellant were technical or managerial, Ms. Andrew argued this to be a factual issue which ought to have been raised and resolved conclusively before the Tribunal. However, the appellant did not discharge that burden as required under

section 18 (2) (b) of the Tax Revenue Appeals Act CAP 408 RE: 2002 (the TRAA). In this regard, it was argued that the appellant cannot be heard at this stage to raise such factual issues in the wake of the provisions of section 25 (2) of the TRAA which mandates the Court to consider only questions of law and not facts. Besides, Ms. Andrew submitted that, the Tribunal was justified to hold that, the services rendered to the appellant were neither managerial nor technical and were not directly related to the extraction of minerals as envisaged under the provisions of section 2 (1) of ITA, 1973 as amended in 1997.

On the question as to whether the premiums paid by the appellant related to life insurance or not, Ms. Andrew countered the same arguing that, the agreement did not meet the criteria of life insurance which is prescribed under section 3 (b) of ITA, 2004. Instead, it was a general insurance agreement whose paid premium had a source in the United Republic of Tanzania, which attracted withholding tax at the rate of 15% in terms of the provisions of sections 83 (b) and 69 (f) of the ITA 2004. It was further argued that, since the appellant did not discharge the evidential burden on the type of insurance, such evidence cannot be adduced at this stage because in terms of section 25 (2) of the TRAA, the

Court is mandated to entertain and determine appeals on only questions of law. Finally, Ms. Andrew urged the Court to dismiss the appeal with costs.

In rejoinder, Mr. Kileo urged the Court to invoke the purposive approach to interpret services availed to the appellant to be directly related to the extraction of minerals and in the same vein, interpret BUPA insurance agreement as a life insurance contract under section 3 (b) of ITA, 2004. To back up the propositions, he urged us to invoke the purposive approach in line with what we said in the case of **TULLOW TANZANIA BV VS THE COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY**, Civil Appeal No. 24 of 2018 (unreported).

We have carefully considered the submissions by the learned counsel and the entire record before us. In disposing this appeal, we are aware that, the obligation to pay tax is a creature of statute under section 6(1) (a) and (b) of the Income Tax Act whereby, in case of a resident person the criterion is the chargeable income for the year of income from employment, business or investment. A similar criterion is applicable to a non-resident person, but only to the extent that the income has a source in the United Republic of Tanzania. We are equally aware that, though a right of appeal to the Court is a creature of statute under section 25 (1) of the

TRAA, in terms of section 25 (2) of the TRAA, the Court is mandated to entertain and determine questions of law only because the task of conclusively resolving factual questions ends at the Tribunal. We shall be guided by this statutory principle in resolving the appeal before us.

It is not in dispute that, according to the MDA Agreement, the appellant is entitled to enjoy the tax incentives stated therein. Also, the appellant is as well obliged to withhold tax at the rate of 3% from payment made to third parties who supplied technical services to the appellant as prescribed under the ITA 1973. The parties locked horns on the applicable clauses of the MDA Agreement and propriety or otherwise of the applicability of the Income Tax Act of 2004 which had changed the rate of tax to be withheld from 3% to 15%. Therefore, in disposing the first ground of appeal, the issue for our determination is whether or not the obligation to withhold income tax under clause 4.5 of the MDA Agreement is static regardless of the new rate of 15 % subsequent to change of the law. This takes us to scrutinizing Article 4 clause 4.5 paragraphs 4.5.2 of the MDA which stipulates that:

> *"The Companies shall be liable to withhold taxes from payments to third parties* ***as may be required by law from***

time to time, *save that the Companies shall not be obliged to deduct:*

4.5.1 (not applicable)

4.5.2 any amount greater than 3% from the gross amount of payments in respect of technical services and management fees, provided, however, that where in the case of management fees the gross payment exceeds 2% of the operating costs, the amount withheld shall not exceed 20 %."

In terms of the cited clause, it is common ground that the appellant who was privy to the agreement was legally obliged to withhold taxes from the non-resident third parties who provided services to the appellant. While Mr. Kileo relied on clause 4.2 of the MDA Agreement arguing that the rate was intended to be static during the lifespan of the mine. To the contrary, Ms. Andrew argued that the rate was subject to changes made in the law from time to time.

At the outset we asked ourselves, if following the repeal of the Income Tax Act 1973, the withholding tax at the rate of 3% as stated in the MDA Agreement continued to exist. In our jurisdiction which is the practice in the Commonwealth jurisdictions, the effect of repealing a Legislation is that, unless the contrary intention appears the repeal does

not revive anything not in force or existing at the time at which the repeal takes effect. (See section 32 (1) (a) of the Interpretation of Laws Act [CAP 1 RE.2002].) However, Mr. Kileo was of the view that, clause 4.2 of the MDA Agreement bars the application of new rates of withholding tax which were intended to be static throughout the lifespan of the mine. The said clause 4.2 states as follows:

> *" Any tax, duty, fee or other fiscal impost imposed on the Companies jointly or severally or on their shareholders in respect of income, including dividend income, derived from Mining operations conducted under the Contract Area, or in respect of any property held or thing done for any purpose authorized or contemplated by the Mining Licence or this Agreement shall be in accordance with the Income Tax Act No. 33 of 1973 and Customs tariff Act No. 12 of 1976, as amended by the Financial Laws (Miscellaneous Amendments) Act, No. 27 of 1977."*

It is crystal clear that the tax and duties referred to in the cited clause are those imposed on the companies including the appellant whereas under clause 4.5.2 the appellant is obliged to withhold tax from payment made to third parties and remit the same to the respondent. Therefore, the change in the rate of withholding through amendment or

repeal of the law, does not in any way affect the appellant who collects such tax on behalf of the respondent.

Another question which taxed our minds is how was the appellant affected by the change of rate considering that its role is to withhold the tax from the payments made to third parties. In our considered view, we are satisfied that the appellant cannot be affected in any way being an agent who withholds the requisite tax on behalf of the respondent. At this juncture, apart from agreeing with Ms. Andrew that the MDA Agreement was not intended to protect third parties, we also agree with the Tribunal which emphasized that withholding tax is never a burden to the payee because the payer's obligation is to withhold tax and remit it to the tax authority. Thus, the appellant's complaint that the rate of 3% was intended to be static is unfounded, because the MDA Agreement had envisaged changes in the rate of withhold tax from third parties as may be required from time to time. In this regard, since what was paid by the appellant to third parties for services supplied has a source in the United Republic, the appellant was obliged to withhold tax at the rate of 15% as prescribed by sections 83 (1) (b) and 69 (i) (i) of the ITA, 2004. Sections 83 (1) (b) stipulates as follows:

" Subject to subsection (2), a resident person who pays a service fee with a source in the United Republic of Tanzania to a non-resident shall withhold tax from the payment at the rate provided in paragraph 4 (e) of the First Schedule."

What constitutes payments that have a source in the United Republic of Tanzania in terms of section 69 (i) (i) of the ITA are payments including service fees attributable to service rendered in the United Republic of Tanzania. See – **BP TANZANIA VS THE COMMISSIONER GENERAL OF TANZANIA REVENUE AUTHORITY,** Civil Appeal No. 125 of 2015 and **SHELL DEEP WATER TANZANIA BV VS COMMISSIONER GENERAL TRA,** Civil Appeal No. 123 of 2018 (both unreported).

In view of what we have endeavoured to discuss, as correctly concluded by the Tribunal, the appellant was obliged to withhold tax from payments made to third parties at the rate applicable in terms of the current law in force relating to Income Tax. We thus find the 1st ground not merited.

On the second and third grounds of appeal the appellant faulted the Tribunal which on the basis of the evidence adduced, concluded that the

appellant did not clearly categorize the services rendered as technical or managerial. The Income Tax Act, 2004 defines the technical services and managerial services to be those related directly in the extraction of minerals as stipulated under section 3 of the ITA, 2004 which states:

> *"Technical services in respect of mining operations, means services in respect of earth moving, engineering, construction and includes, geological, geotechnical and metallurgical services or any other like services."*

It was incumbent on the appellant to adduce the evidence on the nature of services it was provided before both the Board and the Tribunal so as to facilitate a conclusive determination on the nature of services provided. We have gathered that, apart from the Tribunal stating the appellant's failure to clarify what constituted technical and managerial services, it went further to scrutinize Exh. A5 which enlists the contracts entered by the appellant, and concluded that, those services were not directly related to the extraction of mineral because: **One,** the contract for supply of fire detection and suppression system was installed in a power station and not in the processing plant as alleged by the appellant. **Two,** the supply of materials and equipment do not constitute technical services

as envisaged by the ITAs 1973 and 2004 and thus, the applicable rate of the tax to be withheld by the appellant is 15%. In a nutshell, since the appellant failed to establish if the services were technical or managerial, before the Board and the Tribunal this being a factual issue, can the complaint be entertained by the Court at this stage? Our answer is in the negative. This is not the first time the Court has dealt with that point. The Court was confronted with a similar scenario in among others, the cases of **MBEYA CEMENT COMPANY LIMITED VS COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY,** Civil Appeal No. 160 of 2017 of **BULYANHULU GOLD MINE LIMITED V. COMMISSIONER GENERAL (TRA) ,** Consolidated Civil Appeals Nos 89 and 90 of 2015 (unreported). In the latter case, the Court was called upon to determine whether or not the equipment was used wholly and exclusively for the purposes of mining operation. We declined to entertain the issue having observed as follows:

> *"We agree with the tribunal that this was a question of fact in terms of section 18 (2) (b) of the Tax Revenue Appeals Act, the burden of proof was on the appellant to prove that the said equipment was used wholly and exclusively for purposes of mining operations. In the finding of the Tribunal, the Appellant had failed to discharge that burden, this being a question of fact it ends there. This is so*

because under section 25 (2) of the Tax Revenue Appeals Act, (CAP 408 RE 2002) appeals to this Court lie only on matters involving questions of law...."

In the light of said settled position of the law, we agree with the respondent that the issue relating to the nature of services provided to the appellant by third parties was sufficiently dealt with by the Tribunal and, it being a matter of fact; not one of law, it cannot be entertained any further.

Therefore, since the services in which the appellant remitted 3% of income tax to the respondent, are neither technical nor managerial, in terms of section 83(1) (b) of the Income Tax Act, 2004 and paragraph 4 (c) of the First Schedule, the appellant as a resident person who paid fees for service was obliged to withhold 15 % income tax from payment made to third parties. This renders the 2nd and 3rd grounds not merited.

On the last ground of appeal, rival arguments were marshalled by learned counsel on whether or not BUPA Insurance contract was a life insurance contract. What constitutes life insurance is defined under section 3 of the ITA which provides that:

"life insurance" means insurance of any of the following classes:

(a) insurance where the specified event is the death of an individual who is the insured or an associate of the insured; (b) insurance where (i) the specified event is an individual who is the insured or an associate of the insured sustaining personal injury or becoming incapacitated; and

(ii) the insurance agreement is expressed to be in effect for at least five years or without limit of time and is not terminable by the insurer before the expiry of five years except in circumstances prescribed by the regulations;

(c) .....

(d) ....."

The plain meaning of the cited provision clearly shows that, a contract of life insurance should be in effect for at least five years without limit and not be terminable by the insurer before the expiration of five years. A twelve-month BUPA insurance agreement was not at all envisaged to be life insurance contract. In this regard, we do not agree with the appellant's counsel that BUPA agreement which commenced in 2004

embraces the twelve months' agreement being envisaged by section 3 of ITA 2004. We say so because clause 1 of the agreement prescribes the validity period to be twelve months. Besides, the existence of life insurance for the years of income falling under the scope of the audit in question rendered the claim unproven. On that account, such a claim being purely a factual issue cannot be raised at this stage because as earlier intimated, the Court on appeal in tax matters, it entertains only questions of law as stipulated by section 25 (2) of the TRAA. That being the case, the respondent was justified to assess and demand withholding tax at the rate of 15% from the premium paid in respect of the twelve-month insurance as per dictates of section 83 (1) (b) of the ITA, 2004.

In the premises, we decline Mr. Kileo's invitation to invoke the purposive approach in interpreting the definition of life insurance under the ITA 2004 so as to embrace the BUPA agreement. Before giving our reasons, we borrow a leaf from a Book on the Law and Practice of Income Tax by Kanga, Palkhivala and Vyas Volume 1 ninth Edition which contains a collection of principles on tax cases based on Indian Tax Law discussing rules of construction of taxing statutes. From page 26 to 27 of that Book the author among other things, states as follows:

"A plethora of judgments of Supreme Court and various High Courts have firmly laid down the rule that a provision for deduction, exemption or relief should be interpreted liberally, reasonably and in favour of the asessee, ***and it should be so construed as to effectuate the object of the legislature and not to defeat it...****the interpretation should lead only to the logical end; it cannot go to the extent of reading something that is not stated in the provision.* ***Full effect should be given to the language used in the provision...*** *The provision should be assigned such meaning as would enable the assessee to secure the benefit intended to be given by the legislature to the assessee* ***but it would not be reasonable or permissible for the court to rewrite the section or substitute words of its own for the actual words employed by the legislature in the name of giving effect to the supposed underlying object. A construction leading to absurd results should be avoided.....".***

[Emphasis supplied]

The said quotation is in line with the familiar canon of statutory construction of plain language because it is elementary that, the meaning

of a statute must in the first instance, be sought in the language in which the act is framed. If it is plain, the courts must presume that the legislature says in a statute what it means and means in a statute what it says there and the sole function of courts is to enforce it according to its terms and duty of interpretation does not arise. See – **BP TANZANIA VS THE COMMISSIONER GENERAL OF THE TANZANIA REVENUE AUTHORITY** (supra) and **RESOLUTE TANZANIA LIMITED VS COMMISSIONER GENERAL, TANZANIA REVENUE AUTHORITY,** Civil Appeal No. 125 of 2017 and **REPUBLIC VS. MWESIGE GEOFREY & ANOTHER,** Criminal Appeal No. 355 of 2014 (both unreported). In view of the settled position of the law in our considered view, the definition of what constitutes life insurance under section 3 of ITA 2004 is in its plain and clear language one which is not be terminable by the insurer before the expiration of five years. Thus, the construction proposed by Mr. Kileo stretching the definition to include a twelve-month insurance agreement apart from being unwarranted, does not give effect to the underlying object of the Income Tax Act, 2004. Thus, the 4th ground of appeal is unmerited and it equally fails.

In view of what we have stated herein above, the appeal is not merited. We uphold the decision of the Tribunal, order the appellant to pay

the demanded withholding tax at the prescribed rate plus interest thereon. In the result, the appeal is dismissed with costs.

DATED at **DODOMA** this 10th day of June, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered on 10th day of June, 2020 in the presence of Mr. Allan Kileo, learned Counsel for Appellant and Mr. Primi Telesphori, learned Senior State Attorney for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL