IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CIVIL APPEAL NO. 261 OF 2018

KILOMBERO SUGAR COMPANY LTD ..... APPELLANT

VERSUS

COMMISSIONER GENERAL (TRA) ..... RESPONDENT

(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal at Dar es Salaam)
(Mjemmas, J. – Chairman)

dated the 25th day of October, 2018
in
Tax Appeal No. 19 of 2016
.....

JUDGMENT OF THE COURT

8th & 19th June, 2020

NDIKA, J.A.:

On appeal is the judgment and decree of the Tax Revenue Appeals Tribunal ("the Tribunal") dated 25th October, 2018 in Tax Appeal No. 19 of 2016. The said judgment substantially affirmed the decision of the Tax Revenue Appeals Board ("the Board") dated 1st July, 2016 in Consolidated Income Tax Appeals No. 74 and 75 of 2015.

The brief background to this appeal is as follows: The Commissioner General, Tanzania Revenue Authority ("the respondent") conducted an audit on the tax affairs of Kilombero Sugar Company Limited ("the appellant") for

the years of income of 2011 and 2012. The respondent came up with an audit report dated 13th February, 2013 accompanied by assessments for both years of income (Exhibits A-5 and A-6). Having received the report and the assessments, the appellant objected to the assessments by lodging notices of objection dated 28th March, 2012 for the two years of income (Exhibits A-7 and A-8). The respondent, having reviewed the notices, issued a proposal as per two letters both dated 20th May, 2014 for the two years of income (Exhibits A-9 and A-10). The appellant responded to the proposal by letters dated 25th June, 2014 and 22nd August, 2014, which were admitted, respectively, as Exhibits A-11 and A-12. The respondent, in response, made final decisions by way of two letters dated 8th January, 2015 followed up by assessments. The decisions and assessments were admitted as Exhibits A-1 and A-2 respectively.

The appellant was aggrieved by the assessments. Thus, it lodged two appeals in the Board – Appeal No. 74 of 2015 for the year 2011 and Appeal No. 75 of 2015 for the year 2012. The Board consolidated the appeals and and determined them as one appeal vide its judgment of 1st July, 2016. Although the consolidated appeal was partly allowed, the appellant was still aggrieved, hence its appeal to the Tribunal.

It is instructive to note that in the aforesaid appeal to the Tribunal, the appellant raised eight grounds of complaint which, in effect, contended that: first, that the Board sustained the disallowance of 15% of the cost of invoices from Illovo Sugar Limited ("ISL") without considering the entire evidence on record. Secondly, that findings on whether the appellant submitted six out of ten invoices were not backed by any evidence. Thirdly, that the disallowance alluded to earlier was based on wrong construction of sections 33 and 34 of the Income Tax Act, 2004. Fourthly, that the Board erroneously ordered the appellant to pay withholding tax on management fees paid to Zambia Sugar Limited ("ZSL"). Fifthly, that the Board misread the evidence on record and misconstrued the objection proceedings procedure under section 13 of the Tax Revenue Appeals Act, Cap. 408 RE 2010 ("the TRAA") when determining an issue on unreconciled Value Added Tax ("VAT") amount of TZS. 709,874,107.00. And finally, that documents availed by the appellant to the respondent during objection proceedings should have formed the basis for reducing the above unreconciled VAT amount to TZS. 52,149,791.00.

The Tribunal partly allowed the appeal. Being aggrieved by a part of the Tribunal's decision, the appellant now appeals to this Court on six grounds as follows:

1. By holding that it was correct for the Tax Revenue Appeals Board (Board) to rely on Exhibit R-1 based on the quotation that "once admitted in evidence without objection from the other side, the contests (sic) of a document are also held proved ..." the Honourable Tax Revenue Appeals Tribunal (Tax Tribunal) erred in law by misinterpreting or misapprehension of the position of the law in the admissibility of evidence;

2. The holding of the Honourable Tax Tribunal which suggests that failure to object the admission into evidence of Exhibit R-1 by the counsel for the appellant rendered the contents of Exhibit R-1 as proved, the Honourable Tax Tribunal erred in law by not making a specific finding on whether or not Exhibit R-1 was actually a proof of a request of 10 invoices from the respondent to the appellant, an issue which was fundamental in the appeal;

3. The conclusion that "from the foregoing if the appellant was not comfortable with Exhibit R-1 he should have produced what he considered to be the correct sample items/invoices requested by the respondent ... instead of complaining that Exhibit R-1 is a mere internal document of the respondent which came up in the WSD as Annexure TRA-2," the Honourable Tax Tribunal erred in

law by misinterpreting and or ignoring the provisions of section 13 of the Tax Revenue Appeals Act, 2000 on the procedures for handling objection proceedings;

4. In determining whether or not the Honourable Board was correct in citing and applying the provisions of sections 33 and 35 of the Income Tax Act, 2004 while disallowing 15% of the costs of invoices, the Honourable Tax Tribunal erred in law by relying only on documents of the respondent issued at the earlier stages of the objection proceedings and not considering documents supplied by the appellant at a later stage of the proceedings as per section 13 of the Tax Revenue Appeals Act, 2000;

5. Having held that "we are in agreement with the learned counsel for the parties that it is a settled principle that decisions of public authorities must be accompanied with reasons," the Honourable Tribunal erred in law for not assessing evidence and coming up with its decision or position on whether or not it was proper for the Board to hold that reasons were given through the request of documents as opposed to the decision and whether the decision of the respondent had sufficient reasons; and

6. By holding that the Board was correct to hold that "it was a collective view of this Honourable Board that three years given by the appellant (sic) to reconcile the figures in its records is

more than enough," to justify the disallowance of T.Shs. 709,874,107.00, the Honourable Tax Tribunal erred in law by not considering the procedures of objection proceedings as provided under section 13 of the Tax Revenue Appeals Act, 2000 and failed to make determination on a number of issues raised in the appeal against a decision of the Board.

At the hearing of the appeal, Mr. Ayoub Mtafya, learned advocate, appeared for the appellant whereas Mr. Evarist Mashiba, learned Principal State Attorney, appeared for the respondent with the assistance of Messrs. Harold Gugami, Hospis Maswanyia and Yohana Ndila, learned State Attorneys.

Mr. Mtafya began his quest by adopting the written submissions he had lodged in support of the appeal, which he then highlighted generally. His primary submission was that the Tribunal erred in misinterpreting or misapprehending the position of the law on admissibility and veracity of documentary evidence. Elaborating, he contended that the Tribunal wrongly held that the contents of Exhibit R-1, which was admitted without any objection from the appellant, were effectually proved on account of absence of any objection. This exhibit contained a list of ten invoices which the respondent alleged to have requested from the appellant. The appellant's

position was that it was only requested to submit sampled invoice and that it met the request by submitting six invoices and therefore, Exhibit R-1 was not proof that all ten invoices therein were requested.

Learned counsel argued further that during objection proceedings, the appellant submitted all necessary documents in terms of section 13 of the TRAA. However, neither the Board nor the Tribunal bothered to refer to the aforesaid sequenced documents. The appellant, he added, was denied by the respondent an opportunity to be heard on the documents by giving required clarification. He then complained that the assessments were issued without any reasons being assigned, which was a breach of the duty for any public body to give reasons for its decisions. Learned counsel insisted that the respondent ought to have given reasons to justify its assessments.

Replying, Mr. Mashiba contended that the appeal was misconceived in that it was wholly based on matters of fact contrary to section 25 (2) of the TRAA. He further argued that the appellant failed to produce evidence on the arm's length transactions between it and its associates. As regards Exhibit R-1, he argued that the Tribunal rightly concluded that its contents were proved because the appellant did not controvert its veracity before the

Board. Mr. Gugami took over from Mr. Mashiba, maintaining that the second to the sixth grounds of appeal raise no point of law but matters of fact. He urged us to disregard them all.

Mr. Gugami went on submitting that the respondent assigned reasons in its assessments (Exhibits A-1 and A-2) and that the appellant was fully accorded an opportunity to be heard before the assessments were issued. He elaborated that the appellant was given an opportunity for settling the objection when it was sent a proposal to which it responded by making a counter proposal. Finally, learned counsel denied that the Tribunal shied away from its duty to re-evaluate the evidence as the first appellate forum. To illustrate this fact, he referred us to page 1300 of record where the Tribunal stated, in its determination, that it had carefully read and examined the record before it.

In a brief rejoinder, Mr. Mtafya maintained that the appeal raises clear points of law notably the Tribunal's failure to re-appraise the evidence, the Tribunal's misapprehension of the evidence on admissibility and veracity of Exhibit R-1 as well as the contention that no reasons were assigned for the respondent's assessments.

Having carefully examined the record and bearing in mind the lucid submissions of learned counsel for the parties, we now proceed to deal with the merits or otherwise of the appeal by considering the grounds seriatim.

At the outset, we wish to underline, first, that in our determination we are cognizant that in terms of section 18 (2) (b) of the TRAA, the onus of proving that the assessment or decision in respect of which an appeal is preferred is excessive or erroneous lies on the appellant. Secondly, we think that the Indian decision in **Meenakshi Mills, Madurai v. The Commissioner of Income Tax, Madras** (1957) AIR 49, 1956 SCR 691, can provide us with a useful guide as to what a question of law would entail in consonance with the terms of section 25 (2) of the TRAA. In that case, the Supreme Court of India defined what a question of law is in terms of section 66 (1) of the Indian Income Tax Act that restricted references to the High Court on questions of law only. The Court summed up the position by stating the following as questions of law:

> *"(1) When the point for determination is a pure question of law such as construction of a statute or document of title ....*

(2) When the point for determination is a mixed question of law and fact; while the finding of the Tribunal on the facts found is final its decision as to the legal effect of those finding is a question of law which can be reviewed by the court.

(3) A finding on a question of fact is open to attack, under section 66(1) as erroneous in law when there is no evidence to support it or if it is perverse."

The apex Court also took the view that an inference of fact would remain as such and that its character will not change:

"(4) When the finding is one of fact, the fact that it is itself in inference from other basic facts will not alter its character as one of fact."

Adverting to the merits or otherwise of the appeal, we begin with the first ground of appeal, which contends that the Tribunal erred in misinterpreting or misapprehending the position of the law on the admissibility and veracity of documentary evidence, which in this case is Exhibit R-1.

We note from the record that it was the appellant's main contention all along that there was no proof that the respondent specifically asked for

ten invoices to establish its arm's length transactions between it and its associates. Exhibit R-1 was claimed to be an internal document but not a request addressed to the appellant requesting for the ten invoices. On that basis, the Tribunal's finding that *"once admitted in evidence without objection from the other side, the contents of a document are also held proved"* is attacked as being a misapprehension of the law on admissibility and veracity of documentary evidence.

It is indeed true that the Tribunal based the aforesaid holding upon its citation with approval of an Indian decision in **Bhagyarathi v. Agadhuchan Das** (1986) 62 Cut LT 298 which it had referred to in its past decision in **Samson Ng'walida v. Commissioner General, TRA,** published at page 430 in Dr. Fauz Twaib's *"A Casebook on the Tax Law of Tanzania,"* Volume 2, LawAfrica, Nairobi, 2018. We have read the above cited Indian case. What it says is that whenever a document is admitted in course of trial 'without objection' it unquestionably goes to say that the contents of the document are also admitted. More significantly, however, the Court in that decision acknowledged the principle enunciated by the Supreme Court of India in the case of **P.C. Purushottama Raddiar v. S. Perumal**, AIR 1972 S. C. 608 thus:

> *"... where certain reports were marked without any objection it was not open to the respondent to object to their admissibility and that once such document was properly admitted,* ***the contents of the document were also admitted into evidence though these contents may not be conclusive evidence.****"* [Emphasis added]

We are cognizant that sections 63 to 67 of the Evidence Act, Cap. 6 RE 2002 govern proof of contents of a document, by primary or secondary evidence. Admittedly, admission of a document is not conclusive proof of its contents; it does not entail any adjudication as to its proof.

In the instant case, however, we do not think that the Tribunal in its impugned holding above acted on the assumption that the contents of Exhibit R-1 were conclusive evidence of the matter in dispute just because its admissibility was not objected. It is noteworthy that at page 1,300 of the record, the Tribunal observed, rightly so in our view, that the Board was justified to rely on Exhibit R-1 along with all other exhibits A-1 to A12 in its decision. Its probative value had to be weighed against the rest of the evidence on the record. Furthermore, we note that at page 1,301 of the record, the Tribunal was alive that the veracity of Exhibit R-1 was

unchallenged as there was no evidence to the contrary from the appellant. We are, therefore, satisfied that there was no misapprehension on the part of the Tribunal. At any rate, it is not our task at this stage to re-examine the probative value of Exhibit R-1.

The above apart, it is evident from pages 1,301 to 1,302 of the record of appeal, the Tribunal marshalled capable arguments based on the evidence on record that culminated in its conclusion that the appellant was requested to produce ten sample invoices but that it produced six invoices only. It concluded that the respondent's auditors could not, therefore, establish that the transaction between the appellant and ISL was at arm's length. We reiterate our view that this conclusion is not borne out of any misapprehension of the law on admissibility and veracity of documentary evidence.

Finally, we wish observe in terms of the provisions of section 94 and 96 of the Income Tax Act, 2004 the appellant was expected to provide at the earliest all necessary information to clear the issues on the intercompany transactions and that the respondent was entitled to adjust the assessment based on its best judgment and information reasonably

available. In the premises, the appellant's claim that it was not asked to provide the ten invoices would not advance it case. That said, the first ground of appeal fails.

The complaint in the second ground of appeal is that the Tribunal erred by not making a specific finding whether or not Exhibit R-1 was actually proof of a request of ten invoices from the respondent to the appellant. It is Mr. Mtafya's contention here, on the authority of the decision of the defunct Court of Appeal for East Africa in **Okeno v. Republic** [1972] EA 32, that the Tribunal, being the first appellate forum, should have re-appraised the evidence and drawn its own conclusion particularly on the question whether Exhibit R-1 was, indeed, proof of the alleged request of ten invoices from the appellant by the respondent. On the other hand, Mr. Gugami countered that the ground under consideration presents question of law but a factual disputation contrary to section 25 (2) of the TRAA.

With respect, we think that the allegation that the Tribunal failed to re-appraise the evidence on record or that it misapprehended it would naturally raise a valid question of law. However, in the instant matter we are inclined to agree with the respondent that the Tribunal was alive to its

duty to re-examine the evidence on record. It examined Exhibit R-1 in tandem with the other exhibits. Its conclusion on the issue was not exclusively based upon one documentary exhibit only. We wish to let its conclusion, at page 1,300 of the record, speak for itself:

> *"The trial Board was therefore correct in its decision to rely* ***on Exhibit R-1 and ail other Exhibits A-1 to A-12*** *and also to make reference to ten (10) invoices which were to come from the ten (10) sampled entries identified by the respondent's auditors and requested to be availed for verification."* [Emphasis added]

In consequence, we find the second ground of appeal lacking in merit. We dismiss it.

In respect of the third ground, it is contended that the Tribunal misinterpreted section 13 of the TRAA on the procedures for handling objection proceedings when it held at 1,301 of the record that:

> *"From the foregoing if the appellant was not comfortable with Exhibit R-1 he should have produced what he considered to be the correct sample of items/invoices requested by the*

respondent's auditors instead of complaining that Exhibit R-1 is a mere internal document which came up in the WSD as Annexure TRA-2."

It is submitted for the appellant that before the Board, the appellant produced all documents that had been subject of the objection proceedings (that is, Exhibits A-1, A-2, A-9, A-10, A-11 and A-12) but Exhibit R-1 was not one of the documents. The latter document only surfaced during the proceedings before the Board well after the objection proceedings had been concluded. It is thus argued that the Tribunal's view that the appellant should have produced what it considered to be the correct sample invoices to counteract Exhibit R-1 ignored the fact that the appellant only became aware of that document upon being served with a copy of it as an annexure to the Written Statement of Defence in the Board.

For the respondent, it was posited that Exhibits A-12 and A-17 indicate that a request for sample invoices by the respondent from the appellant was made so as to clear the issue whether the intercompany transactions were at arm's length. That the correspondences involved were done during the objection proceedings and hence in accordance with

section 13 (1) of the TRAA. It is thus disputed that Exhibit R-1 was not part of the objection proceedings.

On our part, we do not find any basis for the complaint that the Tribunal misconstrued or misapprehended the procedure for objection proceedings. In any case, the thrust of this ground is an attack on the veracity or cogency of Exhibit R-1, implying that it raises a factual question. With respect, we cannot entertain it at this stage as it will necessitate a review of the evidence on the record. We think that this impugned finding of fact is binding on this Court and cannot be appealed against under section 25 (2) of the TRAA. In **Bulyanhulu Gold Mine Limited v. Commissioner General, Tanzania Revenue Authority**, Consolidated Civil Appeals No. 89 and 90 of 2015 where we confronted an akin situation, we held that:

> *"We agree with the Tribunal that this was a question of fact in terms of section 28(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 the 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.*** *So, we find that the fifth ground is devoid of substance and we dismiss it."* [Emphasis added]

In consequence, we hold that the third ground of appeal lacks merit. We dismiss it.

The essence of the fourth ground of appeal is the grievance that in applying the provisions of sections 33 and 35 of the Income Tax Act, 2004 while disallowing 15% of the costs of invoices, the Tribunal erred by relying only on documents of the respondent issued at the earlier stages of the objection proceedings and not considering documents supplied by the appellant at a later stage of the proceedings as per section 13 of the TRAA. It is claimed that the clarifications provided by the appellant at the later stage (Exhibits A-11 and A-12) were not considered.

For the respondent, it is submitted that the disallowance was based on the consideration by the Tribunal of Exhibits A-1, A-2, A-9 and A-10 that

the issues raised in Exhibits A-9 and A-10 were not cleared sufficiently for settling the objections pursuant to Exhibits A-11 and A-12.

The fourth ground of appeal need not detain us. Like the preceding ground, this ground cannot be entertained at this stage as it seeks to reopen the concurrent findings of the tribunals below on the disallowance by seeking a review of the evidence on the record. The fourth ground too is unmerited.

Next we deal with fifth ground. It is argued that the Tribunal erred for not assessing evidence and coming up with its decision or position on whether or not it was proper for the Board to hold that reasons were given through the request of documents as opposed to the decision and whether the decision of the respondent had sufficient reasons. This grievance stems from the complaint before the Board that the respondent did not give reasons on the assessments given to the appellant. It is argued for the appellant that although the Tribunal acknowledged the imperative for decisions by public bodies such as the respondent to give reasons for their decisions (see, for example, **Tanzania Air Service Ltd. v. Minister of Labour and Two Others** [1996] TLR 217), it should have been insufficient

for the respondent simply saying that the arrangements between the appellant and ISL were not at arm's length price.

On the other hand, the respondent acknowledges the importance of public authorities giving reasons for their decisions. However, it is contended that the assessments (Exhibits A-1 and A-2) were justified as they were backed up with reasons. It was not necessary that the reasons be sufficient or not. It was added that the sample invoices from third party suppliers submitted by the respondent were not submitted or cross-referenced to ISL, resulting in the disallowance of 15% of the cost invoices.

With respect, we are at loss as to why this complaint has been rehashed as a specific ground of appeal before this Court. Having examined the impugned assessments (Exhibits A-1 and A-2), we noted that they were backed up with reasons. Whether the assigned reasons were justified or not was a matter that had to be heard and determined by the tribunals below. At any rate, we agree with the respondent that the main justification for the disallowance complained of was the absence of sample invoices from third party suppliers to clear the issue as to whether the intercompany

transactions in question were at arm's length. The fifth ground of appeal stands dismissed.

It is argued in the final ground of appeal that the Tribunal erred by not considering the documents supplied by the appellant at a later stage of the objection proceedings thereby failing to make a determination on a number of issues. That the Tribunal wrongly justified a disallowance of TZS. 709,870,107.00 on which it did not consider all issues raised in the appeal and that the respondent denied the appellant the right to be heard. Having considered this matter, we hold that it was fittingly answered by the respondent. The disallowance complained of arose from the appellant's own failure to submit the source of information having been requested to do so. Thus the proposal objection settlement (Exhibit A-9) was upheld. We also hold that the alleged denial of the right to be heard is without merit. It is evident from the respondent's proposal for settlement of objection (Exhibit A.10) at page 732 that reasons were assigned, which allowed the appellant to respond vide a letter of 25th June, 2014, at page 735 of the record. Like the previous grounds of appeal, this one too is devoid of substance. We dismiss it.

In a nutshell, the appellant's complaints basically invited the Court to reconsider, reexamine and review the evidence received and examined by the Board and the Tribunal. In the absence of any misapprehension of evidence as we have demonstrated above, we cannot venture into the waters due to the bar under the express provisions of section 25 (2) of the TRAA.

By way of a postscript, we feel enjoined to remark on somewhat inapt manner in which the grounds of appeal were framed. The grounds are evidently discursive with unnecessary narratives and quotations. This style adopted by the appellant, in our view, flies in the face of the express provisions of Rule 93 (1) of the Tanzania Court of Appeal Rules, 2009, which stipulate that:

> *"93-(1) A memorandum of appeal shall* ***set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided****, and the nature of the order which it is proposed to ask the Court to make."* [Emphasis added]

The use of narratives and quotations in the present appeal has had no useful purpose other than clouding the thrust of the grounds of complaint against the challenged decision of the Tribunal.

The upshot of the matter is that the appeal is without merit. It stands dismissed with costs.

DATED at **DODOMA** this 18th day of June, 2020.

I. H. JUMA
CHIEF JUSTICE

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

This Judgment delivered on 19th day of June, 2020 in the presence of Mr. Fred Kalonga holding brief for Mr. Ayoub Mtafya, learned counsels for the appellant and Ms. Rose Sawaki, learned 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