IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CIVIL APPEAL NO. 167 OF 2019

ATLAS COPCO TANZANIA LIMITED .... APPELLANT

VERSUS

COMMISSIONER GENERAL, TANZANIA REVENUE AUTHORITY... RESPONDENT

(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Twaib, J. – Chairman)

dated the 6th day of August, 2013
in
VAT Tax Appeal No. 21 of 2012

....

RULING OF THE COURT

10th & 17th June, 2020

NDIKA, J.A.:

This ruling resolves a threshold question raised by the Commissioner General, Tanzania Revenue Authority ("the respondent") by way of a preliminary objection against the appeal lodged by Atlas Copco Tanzania Limited ("the appellant") that it has been instituted on matters of fact in contravention of section 25 (2) of the Tax Revenue Appeals Act, Cap. 408 RE 2006 ("the TRAA").

Before determining the above question, it is essential that we provide a brief account of the background as succinctly summarized by the Tax

Revenue Appeals Tribunal ("the Tribunal") whose decision is the subject of this appeal.

The appellant is part of Atlas Copco Group, a conglomerate of multinational companies headquartered in Sweden. Apart from supplying generators in Tanzania on its own, the appellant sold generators as an agent of its sister companies which had no presence in the country. For the latter type of sales, known as "indent sales", the appellant earned commission.

Being oblivious that the commission income attracted Value Added Tax ("VAT"), the appellant did not file any VAT returns on indent sales until its external auditors, KPMG, informed it of the requirement. By then, the appellant had posted in its sales ledgers commission income amounting to TZS. 134,413,682,281.00 for the years of income 2007 and 2008. The appellant then accounted for VAT on the commission for the years 2007 and 2008 amounting to TZS. 5,692,574,000.00, which was paid through the VAT returns filed in 2009. Certainly, this amount was much smaller than the sum of TZS. 13,413,682,281.00 originally booked in the sales ledgers for the two accounting years. The appellant had reduced the amount on the ground that there was an overstatement of the commission by TZS.

7,721,108,281.00, which was then corrected through an accounting reversal based on ordinary accounting practices.

The respondent did not agree with the appellant's grounds of objection, disputing the alleged overstatement and reversal. In the end, it issued a notice of additional assessment No. DNA/02/11/2010 of 28th November, 2011 for the sum of TZS. 2,118,115,834.00 representing the outstanding VAT plus interest. The appellant unsuccessfully appealed to the Tanzania Revenue Appeals Board ("the Board"). In its decision, the Board held as follows: **one**, that the appellant did not provide evidence that the commission income was properly reversed as the law required; **two**, that there was equally no evidence of overstatement of commission income or how the figure was arrived at; and **three**, that there was no convincing evidence that the alleged reversal was a result of adjustment intended to comply with the Atlas Group's transfer pricing policy. In particular, the Board took the view that the alleged adjustments effected cumulatively in 2009 were a smokescreen for tax evasion as the appellant did not do any adjustments for the accounting years 2007 and 2008 despite its avowed transfer pricing policy requiring adjustments to be made twice or thrice a year.

On appeal, the Tribunal substantially upheld the Board's decision. It ruled that the alleged errors in the appellant's books were materially doubtful because the appellant ought to have been aware of its group's pricing policy. If it failed to comply with its transfer pricing policy at the material time, it could not invoke it retrospectively to effectively reduce its tax liability. Furthermore, the Tribunal was categorical that the appellant's explanations as to what happened after learning that the commissions earned from its sister companies were taxable to VAT were unconvincing.

In this Court, the appellant has filed a Memorandum of Appeal raising four grounds of grievance as follows:

1. *The Tax Revenue Appeals Tribunal erred in law when it held that the appellant cannot invoke the group's transfer pricing policy retrospectively;*
2. *The Tax Revenue Appeals Tribunal erred in law when it held that the appellant earned the reversed income;*
3. *The Tax Revenue Appeals Tribunal erred in law by confirming the decision of the Tax Revenue Appeals Board that:*
    i. *there was no evidence showing that the reversed amounts specifically relate to the commission income previously earned and booked in the appellant's ledgers for the year of income under review;*

ii. the commission reversal seems more like a frantic endeavour by the appellant to reduce the huge and staggering tax liability rather than a genuine adjustment executed with a view to rectifying an accounting error; and

iii. disputed VAT and interest were properly imposed and therefore legally due and payable; and

4. The Tax Revenue Appeals Tribunal erred in law when it held that the judgment of the Tax Revenue Appeals Board was legal and sound and failing to uphold the appeal and award costs to the appellant.

As intimated, the respondent contends by way of a preliminary objection that the appeal is based upon matters of fact in contravention of section 25 (2) of the TRAA, which enacts the right of appeal to this Court only on points of law. The section reads:

> ***"Appeal to the Court of Appeal shall lie on matters involving questions of law only*** *and the provisions of the Appellate Jurisdiction Act, 1979 and the rules made thereunder shall apply mutatis mutatis to appeals from the decision of the Tribunal."* [Emphasis added]

At the hearing of the matter, Mr. Wilson K. Mukebezi, learned counsel, teamed up with Mr. Allan N. Kileo and Mr. Norbert Mwaifwani, both learned advocates, to represent the appellant. On the other hand, Ms. Alicia Mbuya,

learned Principal State Attorney, together with Mr. Primi Telesphory and Mses. Juliana Ezekiel, Samia Nyakunga and Grace Letawo, learned State Attorneys, appeared for the respondent.

The preliminary objection was canvassed by Mr. Telesphory on behalf of the respondent. His essential oral submission, based on the written submissions that the respondent had filed in advance in terms of Rule 106 (2) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), was that none of the four grounds of appeal presented by the appellant in the Memorandum of Appeal discloses a question of law, but a factual controversy. He illustrated this stance by examining each ground of appeal.

Beginning with the first ground, learned counsel referred to the Tribunal's decision at page 266 of the record of appeal by which it upheld the Board's conclusion at pages 223 and 224 of the record that the appellant could not be allowed to invoke the group's transfer pricing policy retrospectively to reduce its tax liability. He was categorical that this ground of appeal contests a factual finding and that it raises no legal or interpretational question. Referring to the same conclusions of the Board and the Tribunal, he similarly characterized the second ground of appeal as one fronting a factual controversy. While both the Board and the Tribunal

confirmed that there was no VAT on reversed income, they concurred that in this case there was no proof that there was a reversal of commission income and thus VAT was payable. It is contended that the challenge of that concurrent finding is not an interpretational issue.

Learned counsel went on to address the third ground of appeal. He similarly argued that the contentions in all three limbs in that ground were based on matters of fact. We understood him, in effect, to be suggesting that the assailed concurrent factual findings of the Board and the Tribunal in the third ground were final and conclusive. These findings are: **one**, that based on evidence on record there was no proof of the reversal of the commission income; **two**, that there was no genuine adjustment intended to rectify an accounting error, and **finally** that the additional assessment for the sum of TZS. 2,118,115,834.00 as VAT plus interest was justified.

Finally, Mr. Telesphory assailed the fourth ground of appeal. His argument was that since the conclusions of the Board and Tribunal were made upon evidence (finding of facts), the complaint that the Tribunal erred "when it held that the judgment" of the Board was "legal and sound" was a factual contention. In other words, it was claimed that the fourth ground was no more than a plea for this Court to overturn the Tribunal's

decision based on a fresh review of the evidence on record. Accordingly, counsel urged us to find that the appeal contravened the mandatory provisions of section 25 (2) of the TRAA and proceed to strike out the appeal with costs.

Resisting, Mr. Mukebezi contended that the preliminary objection was misconceived. Initially, he conceded to the obvious position that an appeal to the Court from a decision of the Tribunal lay in terms of section 25 (2) of the TRAA on "matters involving questions of law only" subject to the provisions of the Appellate Jurisdiction Act, Cap. 141 RE 2019 ("the AJA") and the Rules. Having acknowledged that Rule 90 (1) (a) of the Rules requires the filing of a memorandum of appeal as one of prerequisites for instituting an appeal, he referred to Rule 93(1) arguing that it does not state how the grounds in the memorandum of appeal should be crafted so as to differentiate a point of law from other grounds of appeal.

Learned counsel went on to argue that it was thus impossible for the Court to determine whether a particular ground of objection to an impugned decision was a point of law or not without hearing the parties on the appeal or considering the parties' respective written submissions. We understood him as suggesting that, a preliminary objection could not be

taken on the premises that section 25 (2) of the TRAA was violated where, as in this appeal, no written submissions on the appeal have been filed.

Mr. Mukebezi then referred to page 264 of the record where the Tribunal upheld the appellant's contention that income reversal done in accordance with normal practice was the proper way where, as happened in this case, the supplier was a non-VAT registered person to whom Regulation 11(1) (c) of the Value Added Tax (General) Regulations, GN No. 177 of 1998 did not apply. He then wondered why the Tribunal went ahead to uphold the Board's decision against the contention that the appellant's reversal of income was based on normal accounting procedures. It was thus his contention that findings such as this one by the Tribunal raise points of law for the Court's attention. He concluded his argument by urging us to dismiss the preliminary objection.

We interpose here to remark that Mr. Mukebezi did not specifically examine each ground of appeal, as did his learned friend, to counter the contention that they raise no more than factual disputations.

Rejoining, Mr. Telesphory reiterated that the appeal lay on factual matters. He disagreed that there was no specific guidance on crafting a ground of appeal. It was also his submission that the Court can determine

whether a particular ground of appeal raises a question of law or not by testing or examining it against the decision appealed against. He further contended that the appellant's failure to file written submissions in support of the appeal or in opposition to the preliminary objection cemented the respondent's position. Lastly, learned counsel maintained his prayer that the appeal be struck out with costs for contravening section 25 (2) of the TRAA.

Having closely examined the record of appeal as well as the memorandum of appeal and after full consideration of the respondent's written submissions in tandem with the parties' oral arguments, we think two issues arise for our determination. First, as both parties agree that in terms of section 25 (2) of the TRAA an appeal to this Court from a decision of the Tribunal lies on matters involving questions of law only, then, it behoves the Court to determine what a question of law is. Secondly, whether the four grounds of appeal raised in the present appeal involve questions of law.

As a starting point on what a question of law entails, we wish to acknowledge that it is not the first time that the Court is confronting this subject. For instance, in the case of **Insignia Limited v. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 14 of 2007

(unreported), the Court accentuated that appeals to it from the Tribunal should involve questions of law only:

> *"It is therefore evident that appeals to this Court from the Tribunal should involve only questions of law. The appellant is not permitted to re open factual issues in support of the appeal. The appeal should be decided upon a consideration of the law only and nothing else. We are therefore not persuaded that the first and fourth grounds of appeal concern points of law. The first and fourth ground of appeal relate to an evaluation of the fact in exhibits RE 2; RE 3 and RE 4. For instance, exhibit RE 2 concerns a determination of whether or not the figures therein are actual sales or projections."*

In the above case, the Court declined to consider the first and fourth grounds of appeal, which it found to be raising factual issues as opposed to questions of law. Although the Court did not define expressly what was meant by a question of law, it considered and applied that phrase as a term of art.

In **Meenakshi Mills, Madurai v. The Commissioner of Income Tax, Madras** (1957) AIR 49, 1956 SCR 691, the Supreme Court of India surveyed a number of Indian and foreign decisions on what amounts to a

question of law, as opposed to a matter of fact, within the meaning of section 66 (1) of the Indian Income Tax Act that restricted questions of law only for reference to the High Court for its decision. 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 Court also stated 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."*

Perhaps, more relevant for our discussion is the position in the Kenyan case of **Gatirau Peter Munya v. Dickson Mwenda Kithinji & Three Others** [2014] eKLR where the Supreme Court Kenya defined the phrase "matters of law only" under section 85A of the Elections Act for the purpose of electoral dispute resolution. Before doing so, the Court reviewed the position taken in **Meenakshi Mills, Madurai** (supra) along with those taken in a myriad of foreign decisions in Canada, England, the Philippines, South Africa, United Kingdom and United States. In the end, the Court summed up the position as follows:

> *"[W]e would characterize the three elements of the phrase "matters of law" as follows:*
>
> *a. **the technical element:** involving the interpretation of a constitutional or statutory provision;*
>
> *b. **the practical element:** involving the application of the Constitution and the law to a set of facts or evidence on record;*
>
> *c. **the evidentiary element:** involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."*

Apart from subscribing to the above position, we take inspiration from how the said Court applied the above definition for the purpose of electoral dispute resolution in Kenya.

Thus, for the purpose of section 25 (2) of the TRAA, we think, a question of law means any of the following: **first**, an issue on the interpretation of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine on tax revenue administration. **Secondly**, a question on the application by the Tribunal of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine to the evidence on record. **Finally**, a question on a conclusion arrived at by the Tribunal where there is failure to evaluate the evidence or if there no evidence to support it or that it is so perverse or so illegal that no reasonable tribunal would arrive at it.

We find it ineluctable, at this point, to state that in appealing to the Court from a Tribunal's decision, an intending appellant must craft his grounds of appeal in line with the terms of section 25 (2) of the TRAA read together with Rule 93 (1) of the Rules, which Mr. Mukebezi referred to. For ease of reference, we extract Rule 93 (1) as follows:

"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]

As intimated, Mr. Mukebezi contended that there was no guidance on how the grounds in the memorandum of appeal should be crafted so as to differentiate a point of law from other grounds of appeal. With respect, we do not go along with him. We think that Rule 93 (1) of the Rules provides such guidance. In so far as tax appeals to the Court are concerned, an intending appellant must specify the **grounds of law** upon which the decision appealed against is objected in terms of section 25 (2) of the TRAA. He must specify the **points of law** which are alleged to have been wrongly decided. It should be emphasized that, in an appeal from the Tribunal, matters of law must be evident on the face of the Memorandum of Appeal.

We are also inclined to agree with Mr. Telesphory that the question whether a particular ground of appeal is a question of law or not may be

determined as a threshold issue by examining that ground against the decision appealed from. The absence of written or oral submissions of the parties on the merits or otherwise of the appeal concerned will not render such issue indeterminable in terms of Rule 106 (10) (b) of the Rules.

Guided by the above principles, we now answer the question whether the four grounds raised in this appeal involve issues of law.

The first ground of appeal faults the Tribunal for holding that the appellant could not invoke the group's transfer pricing policy retrospectively. We think that this ground is the principal complaint in the appeal and we intend to treat it in detail. At the heart of this ground is an attack on the Tribunal's holding and reasoning, captured at page 266 of the record, thus:

> *"... the appellant was supposed to have been aware of its Group Pricing Policy and if it did not, or failed to comply with it at the material time, it cannot invoke it retrospectively to effectively reduce its tax liability."*

As rightly submitted by Mr. Telesphory, the above holding was clearly based on the finding of fact by the Board, at pages 223 and 224 of the record, which we take the liberty to reproduce at length thus:

"... whereas the appellant contends that under the Atlas Copco transfer pricing policy, commissions for indent sales among affiliate companies were restricted to a percentage ranging between 1.9% - 7%, the appellant did not produce evidence to show the actual percentage which was applied on each transaction, and as a result, how much commission was overpaid to the appellant and subsequently recovered by the payer. ***The appellant's case is rather vague lacking sufficient particulars because it does not specify the transactions, amounts overpaid, percentage used to compute the commission payable and as we said, the amount which was finally recovered.*** *It would make a lot of sense if one wanted to convince this Board to come to a positive finding that indeed commission in dispute was not earned by the appellant and therefore properly reversed under the law. Moreover, we cannot bring ourselves to believe that the appellant's officials were not aware that such details were important and ought to have been made available to the respondent with a view to putting him into a proper perspective. We regret to say that in the absence of such evidence* ***it is hard for any sober person to believe that the appellant had been able to demonstrate to***

> ***the respondent that indeed the disputed commission income was reversed.*** *We consider that, in the circumstances, the respondent was right not to trust what the appellant says."* [Emphasis added]

The Board's reasoning and finding of fact go further, at page 224, that:

> *"We are aware that the exhibit R6 shows that Atlas Copco normally does its transfer pricing adjustments two to three times per year and that such transfer adjustments are supposed to be done by every division controller. Bearing in mind that the appellant did not do any adjustments for the entire period of the years i.e., 2007 and 2008 and that as a result, the said adjustments were effected cumulatively in 2009 well after the audit by the external auditors, we remain unconvinced that the alleged reversal was a result of adjustment which was intended to comply with the pricing policy."*

It is evident that the ground under consideration raises no question of construction or application of a constitutional or statutory provision. Nor does it present any element involving misapprehension of the evidence such as failure to consider the evidence or considering extraneous matters not

supported by the evidence on record. It is our respectful view that the contention that the Tribunal erred to hold that the appellant could not apply the group's pricing policy retrospectively to reduce its tax liability is plainly a question of fact. This impugned finding of fact is binding on this Court and cannot be appealed against under section 25 (2) of the TRAA.

Indeed, we took the same view in **Bulyanhulu Gold Mine Limited v. Commissioner General, Tanzania Revenue Authority**, Consolidated Civil Appeals No. 89 and 90 of 2015 and **Mbeya Cement Company Limited v. Commissioner, Tanzania Revenue Authority**, Civil Appeal No. 160 of 2017 (both unreported) where we confronted an akin situation. In the former case, we held as follows:

> *"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]

Similarly, the complaint in the second ground that the Tribunal *"erred in law when it held that the appellant earned the reversed income"* raises no interpretational or application of law issue. Nor does it posit that the finding that the impugned finding that the "reversed income" was earned was based on no evidence or that it was a perverse finding. We would reiterate that the Tribunal upheld the Board's finding as reproduced above based on the fact that there was no proof of the alleged reversal of earned commission income.

The same fate befalls all the three limbs of the third ground of appeal. The first limb, faulting the Tribunal's finding that there was no evidence showing that the reversed amounts specifically relate to the commission income previously earned and booked in the appellant's ledgers for the year of income under review, is clearly an improper invitation to this Court to review the evidence. The second limb, attacking a factual inference that the commission reversal was not a genuine adjustment executed with a view to rectifying an accounting error, does not raise any valid evidentiary element

of law. Equally objectionable is the last limb that faults the Tribunal for holding that the disputed VAT and interest amounts were properly imposed and therefore legally due and payable. It is not hard to see that at the heart of this contention is a plea for reopening the case on the impugned finding that the claimed amount of VAT plus interest was payable. There is no basis for the Court to re-examine the concurrent factual finding of the tribunals below that the appellant produced no evidence to prove the reversal of the commission income earned.

The fourth ground of appeal assails the conclusions and outcome of the case as determined by the Tribunal. Like the first three grounds, it is quite problematic. It raises no questions on the practical application of provisions of the law; nor is it premised on a challenge of evidentiary issues such as misapprehension of the evidence on record. We are firmly of the view that the disposition of the case in favour of the respondent was predicated on findings which, apart from being amply supported by the evidence on record, were eminently reasonable, logical and consistent.

We would thus conclude that the present appeal presents no question of law but matters of fact that do not merit the attention of the Court in terms of section 25 (2) of the TRAA.

Before we take leave of the matter, we find it in order to take further cue from **Gatirau Peter Munya** (supra) on the rationale of use and application special procedures for specialized litigation. It was observed in that case that:

> *"Election petitions, not surprisingly, come up for special legislation that prescribes the procedures and scope within which Courts of law have to resolve disputes. Thus, judicial resources should be utilized efficiently, effectively and prudently. By limiting the scope of appeals to the Court of Appeal to matters of law only, Section 85A restricts the number, length and cost of petitions and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes."*

The above observation, we think, equally applies to tax litigation in the country. The restriction of appeals from the Tribunal to this Court to questions of law only is intended to achieve an overarching objective of timely resolution of tax disputes. Proper utilization of limited judicial resources for resolution of only deserving appeals will lead to gains in efficiency and effectiveness in tax litigation. We can only hope that litigants

will ensure that only appeals raising questions of law will find their way to the Court.

In the final analysis, we hold that the Memorandum of Appeal raises no question of law contrary to section 25 (2) of the TRAA rendering the appeal incompetent. In consequence, we strike out the appeal with costs.

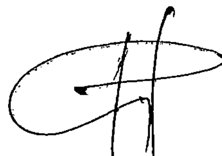
DATED at **DODOMA** this 15th day of June, 2020

I. H. JUMA
CHIEF JUSTICE

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Ruling delivered on 17th day of June, 2020 in the presence of Ms. Gloria Achimpota, learned Senior State Attorney holding brief for Mr. Wilson Mukebezi, learned counsel for the Appellant and Ms. Gloria Achimpota, learned Senior State Attorney for the Respondent, is hereby certified as a true copy of the original.



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DEPUTY REGISTRAR
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