

**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA**

(CORAM: NDIKA, J.A., MWANDAMBO, J.A., And KAIRO, J.A.)

CIVIL APPEAL NO. 369 OF 2020

SHANA GENERAL STORES LIMITED APPELLANT

VERSUS

COMMISSIONER GENERAL (TRA) RESPONDENT

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

(H.A. Haji – Vice Chairperson)

dated the 13th day of August, 2020

in

Tax Appeal No. 13 of 2019

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JUDGMENT OF THE COURT

22nd October & 4th November, 2021

NDIKA, J.A.:

On appeal is the decision of the Tax Revenue Appeals Tribunal (“the Tribunal”) dated 13th August, 2020 in Tax Appeal No. 13 of 2019 holding that the Tax Revenue Appeals Board (“the Board”) had no jurisdiction to determine an appeal against a refusal of waiver or reduction of tax deposit by the respondent, the Commissioner General, Tanzania Revenue Authority.

The background to the appeal is, briefly, as follows: the appellant, Shana General Stores Limited, is a company incorporated in Tanzania engaged in wholesale and retail trade. The respondent conducted a tax audit on the appellant for the years 2011 through 2013, which climaxed with the

issuance of eleven assessments dated 5th March, 2015 demanding a total of TZS. 2,757,169,591.00 in taxes. Disputing some of the assessments, the appellant lodged seven notices of objection (Exhibit A-8) challenging the assessed taxes totalling TZS. 2,392,863,987.30. In terms of section 12 (3) of the Tax Revenue Appeals Act, Cap. 408 R.E. 2010 ("the TRAA"), which was subsequently repealed by section 108 of the Tax Administration Act, 2015 (now Cap. 438 R.E. 2019) ("the TAA"), the appellant was required to deposit TZS. 797,621,329.10 being one-third of the assessed taxes for the objections to be admitted and considered. Unable to satisfy the aforesaid condition, the appellant requested the respondent pursuant to section 12 (4) of the TRAA to grant her a waiver of the said obligation primarily citing her precarious financial difficulties. The respondent denied the request vide letters dated 1st April, 2015 (Exhibit A-11).

Discontented, the appellant approached the Board with seven appeals against the respondent's decision. By its decision dated 7th September, 2018, the Board dismissed the appeals, which it had consolidated and heard conjointly. On further appeal, the Tribunal dismissed the appellant's quest on the ground that the Board had no jurisdiction to hear any appeal against the respondent's refusal of waiver. Relying on this Court's decision in **Pan African Energy Tanzania Limited v. Commissioner General (TRA)**,

Civil Appeal No. 121 of 2018 (unreported) (henceforth to be referred to as "**Pan African Energy I**"), the Tribunal reasoned in its judgment at, page 337 of the record of appeal, that:

*"It has been firmly decided by the Court of Appeal of Tanzania ... in **Pan African** case ... that the appeal before the Board which did not result from an objection decision of the Commissioner General was incompetent. This is the position of the Court of Appeal in which all other subordinate courts and other bodies like quasi-judicial bodies vested with statutory powers to deal with rights are strictly [bound] to follow."*

The present appeal is predicated upon three grounds of appeal as follows:

- i. That the Tax Tribunal erred in law in holding that the appeal was incompetently placed before the Board and in failing to consider section 7 of the Tax Revenue Appeals Act;*
- ii. That the Tax Tribunal wrongly interpreted the case of **Pan African Energy Tanzania Limited v. Commissioner General (TRA)**, Civil Appeal No. 121 of 2018 (unreported) in holding that the appeal before the Board without objection decision is incompetent; and*
- iii. That the Tax Tribunal erred in law for failure to consider grounds of appeal against the Board.*

At the hearing of the appeal before us, Mr. Alan Nlawi Kileo, learned counsel, together with Messrs. Wilson Kamugisha Mukebezi and Stephen Axwesso, learned advocates, stood for the appellant. The respondent had the services of Mr. Cherubin Ludovick Chuwa and Ms. Grace Makoa, learned Senior State Attorneys.

It was Mr. Axwesso who argued the appeal for the appellant. Having fully adopted the written submissions lodged in support of the appeal, Mr. Axwesso faulted the Tribunal for relying on **Pan African Energy I** contending that the said decision was inapplicable to the instant matter. Elaborating, he argued that the said decision did not interpret and apply the old section 16 (1) of the TRAA which was existing at the time the appeals were lodged in the Board. The said provision at the time read as follows:

*"Any person who is aggrieved by **the final determination by the Commissioner General of the assessment of tax or a decision referred to under section 14 of this Act** may appeal to the Board."*[Emphasis added]

The learned counsel elaborated further that the Court in that case construed section 16 (1) of the TRAA, which, as amended by section 110 of the TAA, currently reads as follows:

*"Any person who is aggrieved by **an objection decision of the Commissioner General made under the Tax Administration Act** may appeal to the Board."*[Emphasis added]

Mr. Axwesso referred us to page 13 of the typed judgment in **Pan African Energy I** where the Court interpreted the above provision, as amended, thus:

*"From the provision, it is significantly discernible that **an appeal to the Board is presently narrowed down to an objection decision of the CG [Commissioner General] made under TAA**. It is beyond question that, in the situation at hand, there is, so far, no objection decision of the CG and, to say the least, going by the specific language used in section 16 (1), the purported appeal before the TRAB which did not result from an objection decision of the CG was incompetent."*[Emphasis added]

In the premises, Mr. Axwesso argued that since the appellant's appeals to the Board, lodged on 21st April, 2015, predated the TAA, which came into force on 1st August, 2015 vide Government Notice No. 304 of 2015, **Pan African Energy I** was inapplicable to the instant matter.

Mr. Mukebezi weighed in referring to the statement of appeal to the Board at page 6 of the record that the appellant instituted the appeals pursuant to, inter alia, section 6 of the Tax Revenue Authority Act, Cap. 399

R.E. 2002 (“the TRA Act”), which provided for the right of appeal to the Board in accordance with the provisions of the TRAA against any decision of the Commissioner General in relation to any act or omission in the course of discharge of any function conferred upon him under the law set out in the First Schedule to the TRA Act. While acknowledging that the aforesaid section 6 was subsequently repealed by section 102 of the TAA, he maintained that the appeals to the Board were lodged when the said provision was still in force.

We should interpose here and observe that the above oral argument presented on behalf of the appellant is largely in stark contrast to what was argued in the written submissions on record. Unquestionably, in the written submissions the appellant’s counsel went a considerable distance essentially reviewing the provisions of sections 50, 51, 52 and 53 of the TAA (on tax decisions, objections to tax decisions, decisions on tax decisions and appeals against objection decisions respectively). To be sure, these provisions underpin the current structure providing the avenue for appeals from all tax decisions made by the respondent. We understood the written submissions as being aimed at anchoring the proposition that section 7 of the TRAA vests in the Board “inherent jurisdiction” to deal with all matters of civil nature in the administration of tax laws in the country. Certainly, the appellant’s

counsel did not dispute that following the promulgation of the TAA with the attendant amendment of section 16 (1) of the TRAA, a non-objection decision was non-appealable as held in **Pan African Energy I**. In the premises, we do not find the written argument based on sections 50, 51, 52 and 53 of the TAA relevant given that it was forcefully contended in the oral argument that the TAA was inapplicable to the instant dispute.

Replying, Mr. Chuwa strongly disagreed with his learned friends. Having adopted the written submissions in opposition to the appeal, he contended that the position in **Pan African Energy I** interpreting section 16 (1) of the TRAA as amended by the TAA was applicable to the instant matter on the ground that the TAA, being a procedural law, had a retrospective effect. However, he did not cite any authority to support his submission. That aside, he contended that the old section 16 (1) of the TRAA did not allow an appeal against a refusal of waiver or reduction of tax deposit because such a decision did not constitute a "final determination" by the respondent. He then distinguished the cases of **Pan African Energy Tanzania Limited v. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 172 of 2020 (henceforth to be referred to as "**Pan African Energy II**") and **Commissioner General, Tanzania Revenue Authority v. New Musoma Textiles Limited**, Civil Appeal No. 119 of 2019 (both unreported),

which Mr. Axwesso had cited as the basis for the proposition that the Board had requisite jurisdiction in terms of section 7 of the TRAA to entertain and adjudicate disputes of a civil nature relating to the tax laws administered by the respondent. Specifically on the latter decision, he contended that it did not deal with an appeal against refusal of waiver but that it was only relevant to the state of the law prior to the promulgation of the TAA in 2015 following which an appeal in terms of section 16 (1) of the TRAA is restricted to objection decisions only.

In a brief rejoinder, Mr. Axwesso submitted that the respondent's refusal of a waiver or reduction of the payable tax deposit is a final determination, hence appealable in terms of the old section 16 (1) of the TRAA and that the TAA had no retrospective effect to deny the appellant the said right of appeal. He maintained that the two cases his learned friend sought to distinguish from the instant case aptly supported the contention that the Board had requisite jurisdiction in terms of section 7 of the TRAA to entertain and adjudicate disputes of a civil nature relating to the tax laws administered by the respondent the matter at hand being one such dispute.

Having examined the record of appeal and taken account of the oral and written submissions for and against the appeal, we think the appeal principally turns on the question whether the Tribunal rightly held that the

Board had no requisite jurisdiction to hear and determine the appellant's appeal against the rejection of the application for tax deposit waiver.

It is common ground that the Court in **Pan African Energy I** interpreted section 16 (1) of the TRAA, as amended by the TAA, to the effect that an appeal to the Board only lies against an objection decision by the respondent made under the TAA and that a refusal of waiver or reduction of the quantum of the tax deposit is non-appealable. That position was recently cemented by the Court in **Pan African Energy II** referred to by both parties. It is undoubted that the appellant's appeals to the Board, lodged on 21st April, 2015, predated the TAA, which came into force on 1st August, 2015 vide Government Notice No. 304 of 2015. However, as indicated earlier, the learned counsel disagreed on whether the said decision had any bearing on the present dispute.

We find it apt to cite with approval a holding made by the High Court (Hamlyn, J.) in **Benbros Motors Tanganyika Ltd. v. Ramanlal Haribhai Patel** [1967] HCD n. 435 that:

"When a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away, but when it deals with procedure only, unless the contrary is expressed, the enactment applies to all actions,

whether commenced before or after the passing of the Act.”[Emphasis added]

The Court in **Makorongo v. Consiglio** [2005] 1 EA 247 took the same position, quoting with approval the statement of principle made by Newbold, J.A. of the defunct East Africa Court of Appeal in the case of **Municipality of Mombasa v. Nyali Limited** [1963] EA 371, at 374 that:

*"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by legislation. In seeking to ascertain the intention behind the legislation the Courts are guided by certain rules of construction. **One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary.** But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention.”[Emphasis added]*

See also the **Director of Public Prosecutions v. Jackson Sifael Mtares & Three Others**, Criminal Application No. 2 of 2018; and **Felix H.**

Mosha & Another v. Exim Bank Tanzania Limited, Civil Reference No. 12 of 2017 (both unreported).

The essence of the old and current section 16 (1) of the TRAA is the same: both provide for the right of appeal against specified decisions of the respondent. We think it is too plain for argument that such provision is not merely procedural but substantive. For it enacts a specific statutory right of appeal, which, being a right of action, is substantive in nature. Thus, the right of appeal under the old provision could not be taken away upon the presumption that the new enactment operates retrospectively. Since the TAA does not expressly provide for retroactivity of the new section 16 (1) of the TRAA, we agree with Mr. Axwesso that **Pan African Energy I** had no bearing on the present dispute. In the premises, we hold that the Tribunal slipped into error in following and applying **Pan African Energy I** to the instant matter wholesale.

The foregoing finding takes us to consider whether the Board had jurisdiction to hear and determine the appeals under the law as it was at the material time.

It is convenient at this stage to excerpt section 12 of the TRAA so far as it governs the tax deposit waivers in relation to the procedure for objecting to an assessment:

"12.-(1) Any person who disputes an assessment made upon him may, by notice in writing to the Commissioner General, object to the assessment.

(2) [Not relevant]

(3) Where a notice of objection to an assessment is given, the person objecting shall, pending the final determination of the objection to an assessment by the Commissioner General in accordance with section 13, pay the amount of tax which is not in dispute or one third of the assessed tax, whichever amount is greater.

(4) The Commissioner General may, upon being satisfied that there exist good reasons warranting reduction or waiver of tax payable in accordance with the requirement of subsection (3), direct that a lesser amount be paid or waive the required tax deposit.

(5) On receipt of the notice of objection, the Commissioner General shall -

(a) admit the notice of objection to assessment of tax; or

(b) refuse to admit the notice of objection to assessment of tax.

(6) The Commissioner General shall not refuse to admit the notice of objection to assessment of tax unless -

(a) the notice does not comply with the requirements of subsections (1), (2) or (3);

(b) the notice does not raise any question of law or fact in relation to the assessment;

(c) the relief sought cannot be granted in law or equity;

(d) the objection is time barred; or

(e) the objection is otherwise misconceived.

(7) [Not relevant]

(8) Any person who is aggrieved with the refusal by the Commissioner General to admit the notice of objection may, on depositing with the Commissioner General the amount of tax assessed which is not in dispute or one third of the amount of tax assessed, whichever is greater, together with the interest due as a result of late payment of the tax in respect of which the notice of late payment of the tax in respect

of which the notice of objection is issued, appeal to the Board against the refusal and the decision of the Board on whether or not the notice of objection be admitted by the Commissioner General shall be final.

(9) [Not relevant]

(10) [Not relevant]"

It is unmistakable that while subsection (3) above enacts the one-third tax deposit precondition for admission of a notice of objection to an assessment, subsection (4) vests the respondent with power to direct, where good reason exists, that a lesser amount be paid or waive the required tax deposit. In terms of subsection (6), the respondent is empowered to refuse to admit a notice of objection on account of failure to comply with the tax deposit requirement. Refusal of waiver is appealable to the Board in terms of and subject to the condition stated by subsection (8). The Board's decision is expressly stated as being final.

At this point, two observations are pertinent. First, based on the record of appeal, it does not appear that the appellant appealed to the Board pursuant to section 12 (8) of the TRAA. Secondly, even if that were so, the Board's dismissal of the appeal should have been final, meaning that the appellant would have had no recourse to appeal to the Tribunal.

We recall that Mr. Mukebezi underlined that the appeals to the Board were made pursuant to section 6 of the TRA Act, which provided for the right of appeal to the Board against any decision of the Commissioner General in relation to any act or omission in the course of discharge of any function conferred upon him under the law set out in the First Schedule to the TRA Act. The aforesaid section, repealed by section 102 of the TAA, provided at the material time a broad and general right of appeal exercisable "in accordance with the provisions" of the TRAA. In terms of section 7, the Board is vested with the sole original jurisdiction in all proceedings of a civil nature in respect of disputes arising from revenue laws administered by the Tanzania Revenue Authority. Nevertheless, the Board was precluded by section 7A of the TRAA from entertaining any appeal arising from an assessment of tax unless the requirements of section 12 of the Act were complied with. It is our respectful view that the appellant's appeals, arising from tax assessments, were caught up by the web of section 7A of the TRAA.

So far as this matter is concerned, the appellant's appeals were governed by section 16 (1) of the TRAA whose text we reproduced earlier in this judgment. This provision enacted that an appeal would lie to the Board against any *"final determination by the Commissioner General of the assessment of tax"* or *"a decision referred to under section 14 of the Act."*

Certainly, the phrase “final determination by the Commissioner General of the assessment of tax” is not defined by the TRAA but its meaning can be deduced by examining section 13 of the TRAA as it was before being repealed by the TAA in 2015. The said provisions vested in the respondent powers exercisable upon his receipt of the notice of objection to determine the objection. For clarity, we reproduce at length the text of section 13 thus:

"13.-(1) The Commissioner General shall, upon admission of an objection with section 12, determine the objection as filed, or call for any evidence as may appear to be necessary for the determination of the objection, and may, in that respect –

- (a) amend the assessment in accordance with the objection;*
- (b) amend the assessment in the light of any further evidence that has been received; or*
- (c) refuse to amend the assessment.*

(2) Where the Commissioner General agrees to amend the assessment in accordance with the objection, he shall serve a notice of the final assessment to the objector.

- (3) Where the Commissioner General -*
- (a) proposes to amend the assessment in accordance with the objection and any further evidence; or*
 - (b) proposes to refuse to amend the objection, he*

shall serve the objector with a notice setting out the reasons for the proposal.

(4) Upon receipt of the notice pursuant to subsection (3), the objector shall, within thirty days make submission in writing to the Commissioner General on his agreement or disagreement with the proposed amended assessment or the proposed refusal.

(5) The Commissioner General may, after the receipt of the submissions by the objector made pursuant to subsection (4) –

(a) determine the objection in the light of the proposed amended assessment or proposed refusal and any submission made by the objector; or

(b) determine the objection partially in accordance with the submission by the objector; or

(c) determine the objection in accordance with the proposed amendment or proposed refusal.

(6) Where the objector has not responded to the Commissioner General's proposal to amend the assessment or proposal to refuse to amend the assessment served in accordance with subsection (3), the Commissioner General shall proceed to make the final assessment of tax and accordingly serve the objector with a notice thereof "

Having carefully examined the above provisions, it is our respectful view that the phrase "*final determination by the Commissioner General of the assessment of tax*" meant a final decision by the respondent on an objection to amend or refuse to amend an assessment of tax. On that basis, a decision by the respondent on an application for waiver of a tax deposit made under section 12 (4) of the TRAA would not fit within that definition.

It is equally evident that the second limb of 16 (1) of the TRAA enacting the right of appeal against "*a decision referred to under section 14 of the Act*" had no bearing on the respondent's decisions on applications for tax deposit waiver. For easy reference, we reproduce section 14 of the TRAA thus:

"14.-(1) Any person aggrieved by –

- (a) the calculation by the Commissioner General of the amount due for refund, drawback or repayment of any tax, duty, levy or charge;*
 - (b) a refusal by the Commissioner General to make any refund or repayment; or*
 - (c) the decision by the Commissioner General to register, or refusal to register, any trader for the purpose of the Value Added Tax Act,*
- may appeal to the Board.*

(2) Notwithstanding subsection (1), a person who objects a notice issued by the Commissioner General with regards to the existence of liability to pay any tax, duty, fees, levy or charge may refer his objection to the Board for determination.

(3) [Not relevant]."

The above text speaks for itself. The envisaged right of appeal to the Board concerned matters enumerated under section 14 (1) (a), (b) and (c), none of which included a decision on tax deposit waiver. It is, therefore, our finding that the Board had no jurisdiction under section 16 (1) of the TRAA as it was at the material time to take cognizance of the appellant's appeal against the respondent's rejection of waiver.

It was also contended for the appellant that the right of appeal against any decision by the respondent is also predicated on the constitutional right envisaged under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 providing that:

"To ensure equality before the law, the state authority shall make procedures which are appropriate, or which take into account the following:

(a) when the rights and duties of any person are being determined by a court or any other

agency, the person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or other agency concerned.”

So, it was argued that the respondent’s refusal entitled the appellant as a taxpayer to obtain legal redress in the form of a right of appeal. That right is inherent and cannot be taken away by a discretion of any judicial or administrative body because it is tantamount to depriving one of his private property, which, in the present case, is money sought to be collected as government revenue before its legality is established. It should be remarked that the respondent did not offer any specific counter argument.

Pertinent to our discussion is the case of **Athuman Kungubaya & 482 Others v. Presidential Parastatal Sector Reform Commission & Another**, Civil Appeal No. 56 of 2007 (unreported) where the Court grappled with the question whether appeals lay to the High Court from the decisions of the defunct Industrial Court of Tanzania. The Court observed in that case, on the import of Article 13 (6) (a) of the Constitution, that while the said constitutional provision guaranteed, among others, the individual right of appeal, such right would be ensured by appropriate statutory provisions. It is imperative to extract the relevant passage from that decision, at pages 8 and 9 of the typed judgment:

*"... it is at once clear to us that the Constitution provides and guarantees the individual right of appeal and being heard fully. The further question arises as to how can the right to appeal be achieved in this case which is the central issue in this appeal. In our view, the answer is not far to seek. As seen from the first part of sub-article 6 (a), **the right to a full and fair hearing as well as the right to appeal would be ensured by an appropriate procedural machinery put in place by the State Authority.**"*

[Emphasis added]

The Court went on to hold, at page 12 of the typed judgment, that:

*"we are settled in our minds that in Tanzania ... **in the absence of a specific provision in the law providing for appeals** from the Industrial Court to the High Court, the appeal could not be entertained in the High Court by invoking the provisions of Article 13 (6) (a) of the Constitution."* [Emphasis added]

In the same vein, we hold that the appellant herein could not challenge the respondent's rejection of the application for a tax deposit waiver by invoking the above constitutional provisions on their own in the absence of specific statutory provisions.

That said, we hold that the Board had no jurisdiction to hear and determine appeals against the respondent's decisions on applications for tax deposit waivers. Accordingly, all the grounds of appeal fall by the wayside.

In the final analysis, we hold that the appeal is unmerited. We dismiss it with costs.

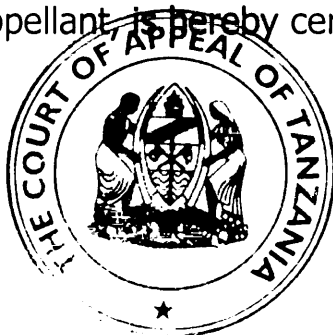
DATED at **DODOMA** this 3rd day of November, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2021 in the presence of Ms. Consolatha Andrew, learned Principal State Attorney assisted by Mr. Cherubin Ludovick Chuwa, learned Senior State Attorney for the Respondent and also holding brief of Mr. Stephen Axwesso, learned counsel for the Appellant, is hereby certified as true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL