IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 159 OF 2021

DOMINION TANZANIA LIMITED.....APPELLANT

VERSUS

COMMISSIONER GENERAL (TRA).....RESPONDENT

[Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal at Dar es Salaam]

(Hon. D.C. Kamuzora – (Vice Chairman))

dated the 2nd day of December, 2020

in

Tax Appeal No. 54 of 2019

.....

JUDGMENT OF THE COURT

3rd & 28th June, 2022

MKUYE, J.A.:

In this appeal, the appellant Dominion Tanzania Limited, is challenging the decision and decree of the Tax Revenue Appeals Tribunal (henceforth "the TRAT") dated 2nd December, 2020 in Tax Appeal No. 54 of 2019 which upheld the decision of the Tax Revenue Appeals Board (henceforth "the TRAB") in Tax Appeal No. 135 of 2013 dated 3rd April, 2019.

The facts of this case can be briefly stated as follows:

The appellant is a company incorporated in the United Republic of Tanzania (URT) dealing in oil and gas exploration. It operates in one offshore exploration block (Block 7) in Tanzania. Its operation involves acquisition of raw seismic data from the exploration location by a contractor based in Tanzania then sends the raw data oversees mostly at London in the United Kingdom for processing, production and interpretation of the said seismic data together with developing drilling programmes which are sent to the appellant in order for them to engage a sub-contractor to undertake the drilling programme in Tanzania. In doing this, the appellant was charged fees on the basis of time spent by each entity in the process.

On 11th November, 2013 the Commissioner General of the Tanzania Revenue Authority (the respondent) issued a withholding tax certificate with a liability of Tshs. 1,089,269,761/=. The tax liability resulted from payments made by the appellant to a company conducting its affairs in the United Kingdom as fees for processing and interpreting seismic data as according to the respondent the said payments were subject to imposition of withholding tax as so imposed.

On the other hand, the appellant claimed that the said payments were not liable to withholding tax and upon being aggrieved by the decision of the Commissioner General, she appealed to the TRAB. Upon hearing both parties, the TRAB found in favour of the respondent holding that the payments made to a non-resident by a resident having a source in the United Republic of Tanzania (URT) was subject to withholding tax.

Dissatisfied by the TRAB's decision, the appellant appealed to TRAT but his appeal was dismissed. In upholding the TRAB's decision the TRAT held that irrespective of the place of rendering the services, as the payments were made by the appellant for services utilized in Tanzania then the payments made to non-resident **had a source in URT and, therefore,** are subject to withholding tax as per section 6 (1) (b), 69 (i) (i) and 83 (1) (b) of the Income Tax 2004 (the ITA 2004). It went on to hold that the Finance Act 2020 did not change the position of the law in section 69 (i) of the ITA 2004. Still undaunted, the appellant has now appealed to this Court on two grounds of appeal as follows:

> *"1) That the Tax Revenue Appeals Tribunal erred in law in holding that irrespective of place of*

rendering services as payment in this appeal were made by the appellant for services utilized in the United Republic of Tanzania, then the payments made by the appellant for services performed outside Tanzania by non-resident and therefore are subject to withholding tax under the provisions of section 6(1) (b), 69 (i) (i) and 83 (1) (b) of the Income Tax Act, 2004.

2) The Tax Revenue Appeals Tribunal erred in law to hold that the Finance Act 2020 has not changed the position of the law in section 69 (1) (sic) of the Income Tax Act, 2004 and therefore the position in ***Commissioner General TRA vs. Pan African Energy****, Civil Appeal No. 146 of 2015 is not relevant to the appeal at hand".*

At the hearing of the appeal, the appellant was represented by Mr. Wilson Kamugisha Mukebezi, learned advocate whereas, the respondent enjoyed the services of Mr. Harold Gugami and Ms. Fatma Abdallah, both learned Senior State Attorneys.

Ahead of the hearing, both parties filed written submissions as per Rule 106 (1) and (8) of the Tanzania Court of Appeal Rules, 2009 which during hearing, they each sought to adopt to form part of their submissions.

Submitting in support of the appeal, Mr. Mukebezi took off by stating that the dispute was very simple on whether the services rendered outside the URT by non-resident was subject to payment of withholding tax in view of the respondent's stance that as the end result of services rendered was utilized in the URT, they were subject to withholding tax. He contended that, under the law as it used to be the non-residents were not required to pay withholding tax. This was the position taken in the case of **Commissioner General, TRA v. Pan African Energy Tanzania Limited**, Civil Appeal No. 146 of 2015 (unreported) where it was held that:

> *"...This is not the case with section 69 (i) (i). A private company like the respondent has no obligation to withhold tax where the services fee paid were for services rendered outside the country."*

In the same case, the Court went further to hold that:

> *"The construction of the section was tied to the place where services for the respondent were rendered. Services were rendered in United Kingdom by persons resident in the United Kingdom. Section 69 (i) (i) does not impose liability on an individual company to withhold tax*

where service fee is paid in relation to services rendered out of the United Republic regardless of the fact that payment is made by a company registered in and it is doing business in Tanzania..."

This also answers the issues that were raised by the parties that the payments that were made by the respondents to non-resident consultants were not liable for withholding tax".

Mr. Mukebezi argued further that the position was changed in **Tullow Tanzania BV v. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 24 of 2018 (unreported) where the Court while adopting a purposive approach in interpreting section 69 (i) (i) of the ITA, 2004 held that irrespective of the place of rendering services, as the payment was made by a person resident in Tanzania, for services utilized in the United Republic, then the payments made are subject to withholding tax under the provisions of sections 6(1) (b), 69 (i) (i) and 83 (1) (b) of the ITA, 2004.

It was therefore his submission that, since in this case the payments were made before the law was amended, the interpretation adopted by the TRAT was wrong. He referred us to the case of **BIDCO**

Oil and Soap Ltd. v. Commissioner General TRA, Civil Appeal No. 89 of 2009 (unreported) in which the Court while citing the case of **Yew Bon Tew v. Kndraan Bas Mar** (1983) 1 AC 553 stated that:

> *"...there is at common law a prima facie rule of construction that statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used..."*

In that regard, he urged the Court to find that the changes in law did not apply to the appellant and insisted that the payments made by the appellant to the non-residents for services rendered outside the URT were not subject to payment of withholding tax. He therefore, implored the Court to allow the appeal with costs.

In response, Mr. Gugami, apart from the written submission he had sought to adopt earlier on, agreed with Mr Mukebezi on the position of the law before the decision in the case of **Tullow Tanzania BV** (supra) and the amendment of section 69 (i) (i) vide the Finance 2020 (Act No. 8 of 2020) in that it was as was held in the case of **Pan African Energy Tanzania Limited** (supra) in which it was emphasized

that payment to non-residents had no source of payment from the URT as services were rendered outside the URT.

Nevertheless, the learned counsel argued that the case of **Tullow Tanzania BV** (supra) distinguished the case of **Pan African Energy Tanzania Limited** (supra) because in the latter case the decision was based on the interpretation of section 9 (1) (vii) (c) of the Indian Income Tax Act to arrive at its finding considering it to be in *pari materia* with section 69 (i) (i) of the ITA 2004 while they are quite different.

He went on to submit that in 2018, the same issue resurfaced in **Tullow Tanzania BV** (supra) where it was held that sections 68 and 69 of ITA were meant to cater for cross border payments and that they are anti-avoidance provisions in as far as cross-border payments are concerned in respect of place of rendering the services. It was his further argument that the amendment through Act No. 8 of 2020 did not change the law as the amendments were meant to clarify the position taken in **Tullow Tanzania BV's** case (supra) which was followed by other cases in that service rendered or delivered outside the URT which is utilized or consumed in the URT is subject to withholding tax. He went

on submitting that as of now the payment for services provided by a non-resident to a resident of URT who is a payer for such service with the source from URT is subject to withholding tax.

Mr. Gugami further dismissed the appellant's attempt to move this Court to depart from **Tullow Tanzania BV** case (supra) and restore the decision of the case of in **Pan African Energy** (supra). He stressed that in terms of section 69 (i) (i) of ITA 2004, payments have source in Tanzania if a non-resident transmits/delivers services in Tanzania. In the end, he implored the Court to find that the appeal is not merited and dismiss it with costs.

In rejoinder, Mr. Mukabezi contended that the position in **Pan African Energy Limited** (supra) was the correct position arguing that even the amendment of 2020 was in compliance with what was said in that case. He also insisted that the law must be strictly interpreted. He then beseeched the Court to allow the appeal with costs.

We have examined the entire record of appeal, the grounds of appeal and both written and oral submissions from both sides and, we think, the main issues for this Court's determination are two. **One**, whether the payments made by a resident person in the URT to a non-

resident person outside the URT for services rendered outside the URT are subject to withholding tax in terms of section 6(1) (b), 69 (i) (i) and 83 (1) (b) of the ITA, 2004, as opposed to the purported issue, proposed by the appellant's advocate in the written submission "whether the TRAT was right in law when it held that payments made by the appellant to non-resident persons for services rendered outside Tanzania are liable to withholding tax as per section 6(1) (b), 69 (i) (i) and 83 (1) (b) of ITA 2004" as we think, the TRAT did not make any determination to that effect. **Two,** whether the Finance Act 2020 did not change the position of the law in section 69 (i) (i) of the ITA 2004.

With regard to the first issue, our starting point would be to restate the provisions relevant to this issue. Section 6 (1) (b) of the ITA 2004 provides for the income which is chargeable to non-resident as follows:

> *"6 (1) Subject to the provisions of subsection (2), the chargeable income of a person for a year of income from any employment, business or investment shall be -*
>
> *(a) .....*
>
> *(b) in the case of a non-resident person, the persons income from the employment*

business or investment for the year of income, but ***only to the extent that the income has a source in the United Republic****." [Emphasis added]*

According to the above cited provision of the law, the emphasis is placed on the source of income, in that, payment to a non-resident would be subject to taxation if the payment has a source in the United Republic of Tanzania.

On the other hand, section 69 (i) (i) of the ITA 2004 elaborates payments with a source of payment in the United Republic of Tanzania as follows:

"69. The following payments have a source in the United Republic -

(a) to (h) ...
(i) payments, ***including service fee,*** *of a type not mentioned in paragraphs (g) or (h) or attributable to employment exercised,* ***service rendered or*** *a forbearance from exercising employment* ***or rendering service -***
(i) ***in the United Republic, regardless of the place of payment,*** *or ..."*
[Emphasis added]

As regards section 83 (1) (b) of the ITA 2004, it puts an obligation of withholding tax on payments made to non-residents specifically if the source of payment is in the URT. For clarity, we reproduce the said provision as hereunder:

> *"83 (1) Subject to subsection (2),* ***a resident person who*** *-*
>
> > *(a).....*
> > *(b)* ***pays a service fee*** *or an insurance premium* ***with a source in the United Republic to a non-resident person*** *shall withhold income tax from the payment at the rate provided for in paragraph 4 (c) of the First Scheduled."* [Emphasis added]

Luckily enough, this Court had an opportunity of considering all these provisions of the law in the case of **Tullow Tanzania BV** (supra) and observed as follows:

> *"Reading sections 6 (1) (b), 69 (i) (i) and 83 (1) (b) all together gives two conditions for a payment to a non-resident to be subjected to withholding tax. These are:*

(1) The services of which the payment is made must be rendered in the United Republic of Tanzania, and (2) the payment should have a source in the United Republic of Tanzania."

The Court went on to say that under section 83 (1) (b) of the ITA 2004, the withholding obligation applies to a payment for service fee with a source in the United Republic of Tanzania and section 69 explains what payment have a source in the United Republic of Tanzania. A similar position was taken in numerous cases. Just to mention a few, they include **Shell Deep Water Tanzania BV v. The Commissioner General TRA,** Civil Appeal No. 123 of 2018; **Commissioner General TRA v. Aggreko International Projects Limited**, Civil Appeal No. 148 of 2018; **Ophir Tanzania (Block 1) Limited v. Commissioner General TRA**, Civil Appeal No. 58 of 2020; and **Geita Gold Mining Limited v. Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 9 of 2019 (all unreported).

Mr. Mukebezi has invited the Court to rely on **Pan African Energy Company Limited's** case (supra) in which the Court while relying on the interpretation of section 9 (1) (vii) (c) of the Indian Income Tax Act had interpretated section 69 (i) (i) of the ITA 2004 to

the effect that a private company had no obligation to withhold tax if the services fees paid were for services rendered outside the country as in his view is a good law. However, we think, the position on this matter is now well settled following the decision in **Tullow Tanzania BV** (supra) where the Court interpreted the said provision and stated that:

> *"It is our strong view that the word "rendered" used under section 69 (i) (i) is synonymous to words "supplied" or "delivered". In this regard, a non-resident has delivered / supplied services to a resident of the United Republic of Tanzania.* ***The recipient of the service is actually the payer for such services, in which case "source of payment" cannot be any other place except where the payer resides. In other words, as the services of which the payments were made were consumed or utilized by the appellant in the United Republic of Tanzania for purposes of earning income in the United Republic, the payments made for such services had a source in the United Republic of Tanzania, and the respondent had to withhold tax under section 83 (1) (c) of the Act...***

> *From the above therefore, the respondent's learned counsel is right in inviting this Court to opt for a purposive approach which would derive this Court into upholding the decision by the Tribunal in the case at hand,* ***that irrespective of the place of rendering services, as the payment was made by a person resident in Tanzania, for services utilized in the United Republic, then the payments made are subject to withholding tax under the provisions of sections 6 (1) (b), (69) (i) (i) and 83 (1) (b) of the Income Tax Act 2004".*** [Emphasis added]

This position of the law was followed by a number of cases enumerated earlier particularly in relation to the interpretation of section 69 (i) (i) of the ITA 2004. For instance, in **Aggreko International Projects Limited's** case (supra) when the Court was faced with akin scenario it had this to say:

> *"We firmly subscribe to the position held by this Court as expounded in* ***Tullow Tanzania BV*** *case (supra) a position also adopted in* ***Shell Deep Water Tanzania BV*** *(supra) on the issue of "the source" and "service rendered" and also where it was stated that* ***as the recipient of the***

service is the actual payer for such service, "the source of payment" "has to be where the payer resided". *[Emphasis added]*

Although in the opinion of the appellant the decision in **Tullow Tanzania BV's** case is bad law, on the contrary, it is our considered view that is correct position of the law to which we subscribe.

We are mindful of the fact that Mr. Mukebelezi also beseeched the Court to depart from the decision in **Tullow Tanzania BV** (supra) and adopt the decision in **Pan African Energy Tanzania Limited** (supra) which according to him is the right position of the law.

Incidentally, we note that this is not the first time when this argument is advanced to this Court in similar circumstances. It was advanced in the cases of **National Microfinance Bank Limited v. Commissioner General, Tanzania Revenue Authority,** Civil Appeal No. 168 of 2018 and **Ophir Tanzania (Block 1) Limited v. Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 58 of 2020 (both unreported). In the latter case, the Court adopted what was decided in **Tullow Tanzania BV's** case (supra) to which we equally subscribe and stated as follows:

> *"We just as well subscribe to the reasoning of the Court in distinguishing from it the case of* ***Pan African Energy*** *(supra).* ***That being the position, we find no cause to embrace the appellant's invitation to us to depart from the decision in Tullow****. We note that, of recent, a corresponding stance was adopted by the Court in unreported Civil Appeal No. 123 of 2018* ***Shell Deep Water Tanzania BV v. Commissioner General (TRA)".*** [Emphasis added]

Also, the Court in **Ophir Tanzania (Block 1) Limited** (supra) went further to find out that the decision in **Pan African Energy Tanzania Limited** (supra) was correctly distinguished in **Tullow Tanzania BV's** case (supra) and proceeded to decline the invitation by the appellant to depart from **Tullow Tanzania BV Case** (supra) in favour of **Pan African Energy Tanzania Limited,** as good law. More importantly the Court not only found that that was the correct interpretation of the law. (See also **Aggreko International Projects Limited** (supra)).

On our part, applying the above cited authorities, we decline the invitation from the appellant's counsel to depart from the decision of

Tullow Tanzania BV (supra) in favour of **Pan African Energy Limited** (supra) as we are satisfied that the interpretation of the provisions relating to payment of withholding tax to non-residents made in **Tullow Tanzania BV** (supra) was correct and therefore good law. We wish to reiterate that there is no error in the said interpretation of the law and we see no convincing argument to warrant us to do so.

Consequently, since the circumstances of this case are similar to those which obtained in **Tullow Tanzania BV** (supra), **Aggreko International Projects Limited** (supra) and **Ophir Tanzania (Block 1) Limited** (supra) we are of a settled mind that the TRAT was correct to hold that payments made by a resident person in URT to a non-resident person outside the URT for services rendered outside URT and utilized in URT were liable for withholding tax. In this regard, we find that the 1st ground of appeal is unmerited and we hereby dismiss it.

As regards the second issue relating to the amendment of section 69 (i) of the ITA 2004 through the Finance Act 2020, it was Mr. Mukebezi's argument that since it changed the law, it could not operate retrospectively as was held in **BIDCO Oil and Soap Limited** (supra). On the other hand, Mr. Gugami countered that argument by contending

that the amendment of section 69 (i) (i) through Act No 8 of 2020 was intended to make the provision clearer than it was before. We think this issue should not detain us much.

In the first place, we agree with Mr. Mukebezi on the well-established principle of the law that the law should not operate retrospectively. This position is well stipulated under Article 138 (1) of the Constitution of the United Republic of Tanzania, [Cap 2 R.E. 2002] which states:

> *"No tax of any kind shall be imposed save in accordance with a law enacted by Parliament or pursuant to a procedure lawfully prescribed and having the force of law by virtue of a law enacted by the Parliament".*

Yet, amplifying on the same issue in the case of **BIDCO Oil and Soap Limited** (supra) which was rightly cited by Mukebezi, this Court stated that:

> *"Apart from the provisions of the interpretation of statutes, there is at common law a prima facie rule of construction that* ***statute should not be interpreted retrospectively so as to impair an existing right or obligation*** *unless that*

result is unavoidable on that language used..."
[Emphasis added].

In this case, we are aware that in order to clarify the meaning of "service rendered" under section 69 (i) (i) of the ITA the law was amended twice as was correctly submitted by both counsel. It was firstly amended in 2016 through the Finance Act, 2016 whereby the term "service rendered" was defined to mean "transmitting or delivering of service in the United Republic of Tanzania irrespective of the place of performance of service". In 2020, through the Finance Act 2020 (Act No. 8 of 2020) section 69 (i) (i) was again amended as follows:

"The Principal Act is amended:

(a) by deleting sub paragraph (i) and substituting for it the following:

(i) irrespective of the place of exercise, rendering or forbearance and;

(ii) regardless of place of payment: Provided that, the services are consumed in the United Republic

(c) by renaming sub paragraph (ii) as sub paragraph (iii)".

As it is, our examination of the decision in **Tullow Tanzania BV's** case (supra) and amendment by virtue of Act No. 8 of 2020 has revealed that the said amendments amplified the law as it then was by stipulating clearly that the services rendered or delivered by a non-resident irrespective of the place where they are rendered, provided that such services are utilized or consumed in the URT are subject to withholding tax. This goes in tandem with what was stated in **Tullow Tanzania BV case** (supra) that:

> ***"...that irrespective of the place of rendering services, as the payment was made by a person resident in Tanzania, for services utilized in the United Republic, then the payments made are subject to withholding tax under the provisions of sections 6 (1) (b), (69) (i) (i) and 83 (1) (b) of the Income Tax Act 2004".*** [Emphasis added]

In this regard, as the said amendments were just meant to clarify the position of the law that payments made by a resident to a non-resident for services rendered outside the URT for consumption in United Republic Tanzania are subject to withholding tax, it cannot be

said that it changed the law. And, therefore, we are settled in our mind that the TRAT was right to hold that the amendments made in 2016 and 2020 did not change the position of the law.

With the foregoing, we find that the appeal is devoid of merit. We, accordingly, dismiss it with costs.

DATED at **DAR ES SALAAM** this 24th day of June, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 28th day of June, 2022 in absence of the appellant and Mr. Abdillah Mdunga assisted by Marcel Kanoni, Trofmo Tarimo and Aumi Chilamula, both learned State Attorneys for the respondent, is hereby certified as true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL