IN THE TAX REVENUE APPEALS TRIBUNAL

AT DAR ES SALAAM

APPEAL NO. 7 OF 2012

COMMISSIONER GENERAL (TRA).....APPELLANT

VERSUS

JSC ATOMREDMETZOLOTO ..... RESPONDENT

PROCEEDINGS

03.05.2012

QUORUM:

Hon. Dr. Fauz Twaib	**Judge/Chairman**
Prof. J. Doriye	**Member**
Mr. K. Bundala	**Member**
For the Appellant	
For the Respondent	**Absent**
Mrs. Halima Said	**RMA**

Order

Hearing on 27/08/2012 at 14hours notify parties.

Hon. Dr. Fauz Twaib **Judge/Chairman,Sgd**

03/05/2012

17.09.2012

QUORUM:

Hon. Dr. Fauz Twaib	**Judge/Chairman**
Prof. J. Doriye	**Member**
Mr. K. Bundala	**Member**
For the Appellant	**Mr. Switi, Advocate, assited by Mr. Walter Nyoni, Assisted P.T.I.O (Mwanza)**
For the Respondent	**Mr. Fazal Bhojani and G. Ishengoma**
Mrs. Halima Said	**RMA**

Mr. Switi

The Respondent's have raised for points of preaminary objection.

Mr. Bhojani

That's true. We however intend to consolidate them into one since the matter arise out of one mainpoint.

TRIBUNAL

We propose that the P.o. be argued by way of written submissions.

Mr. Switi

We agree

Mr. Bhojani

We also agree.

Order

(1) P.O.s raised by the Respondent to be argued by way of written submissions.

(2) Written submissions to be filed in accordance with the following schedule's

  (a) By the Respondent on 18/09/2012.

  (b) Appellant by 20/9/2012

  (c) Rejoinder if any by 21/09/2012

(3) Hearing (clarifications) on 21/9/2012 at 14 hours.

Hon. Dr. Fauz Twaib Judge/Chairman,Sgd

07/09/2012

(Written submissions by the Respondent on Preliminary Objections raised by the Respondent, filed pursuant to the Orders of the Tax Revenue Appeals Tribunal ["TRAT" or Tribunal"] of September 17th 2012)

My Lord and Honourable Members, this Appeal emanates from the Ruling of the Preliminary Objections ("POs") delivered by the Tax Revenue Appeals Board ("TRAB" or "Board") where the current Respondent was the Appellant, and the current Appellant ("TRA") was the Respondent, whereby TRA's preliminary objections were dismissed at the TRAB. Upon being served with the Notice of Appeal and the Statement of Appeal from TRA, in which the TRA challenges the ruling of the POs at the TRAB, we, the Respondent, raised preliminary objections which are before your Hon Tribunal.

The POs are:

1. The Appeal is incompetent for being based on interlocutory orders.
2. That the Appeal is prematurely before this Hon. Tribunal
3. That the tribunal has no jurisdiction to entertain this appeal.
4. That the decision upon which the Appeal is based is not appealable

We submit on all the four preliminary objections together as they are intertwined.

My Lord and Honourable Members, we begin by referring you to the decision of this very same Honourable Tribunal in the matter of **The Commissioner General (TRA) v New Musoma Textiles Limited, Appeal No 17 of 2011, in the Tax Revenue Appeals Tribunal at Dar es Salaam (Unreported) (Marked as FB-1)("Musoma Textiles").** In this case at the TRAT, TRA was the Appellant, and had appealed a ruling that dismissed TRA"s POs raised at the TRAB, which is exactly the same as this current Appeal taken by TRA against ARMZ, the Respondent. The Tribunal, had this to say on page 8 FB ATTORNEYS 2 **" We also make a general practice guideline that decisions arising from interlocutory matters and on matters which do not terminate substantive proceedings in the Board should not be subjected to an appeal in the Tribunal because tax matters should be expeditiously determined and without undue regard to legal technicalities." (Emphasis ours)**

Our case is on all fours with the Musoma Textiles case cited above. In the present appeal before this Honourable Tribunal, TRA have moved this file to the TRAT in essence to vacate the ruling of the TRAB, where the actual

appeal at the TRAB has not been heard or finally determined. The ruling of the TRAB, the subject matter of this Appeal, did not dispose off the matter; it was a ruling on the POs raised by TRA, just as in the Musoma case (supra). This premature move by the TRA to come to your Honourable Tribunal, similar to what the TRA did in the Musoma case (supra), is the essence of why we have raised these POs.

My Lord and Honourable Members, it is trite law that litigation must come to an end. By allowing appeals to be taken to the Tribunal for orders and rulings that are interim and not a final decision, this Tribunal will not only be flooded with unnecessary appeals but it will lead to a never ending case. For every order the TRAB makes, the aggrieved party will take an appeal. The clerks at the TRAB will be moving files between the first floor of this building where the TRAB is located and the second floor where your Honourable Tribunal is located. It will lead to a case going into an infinite loop- a case that would never end. It will lead to jurisprudence being developed on everything but the substantive tax laws of Tanzania.

As an example if the TRAB rules that the matter is to be adjourned or that the parties should proceed by way of written submissions, that ruling of adjournment or proceeding by way of written submissions, if we go by what the TRA have done in this case, would be appealable and mean that the party dissatisfied with that ruling can appeal to the TRAT. This would not only waste public resources but would lead to a financial crisis in the government"s treasury as cases would always be pending between the TRAB and TRAT and never come to finality. Even worse, when such cases come to finality, there would be another appeal taken on the actual merits of the Appeal to the TRAT and possibly the Court of Appeal, leading to

further delays. Tax cases cannot, should not and have not been delayed in Tanzania for the simple reason that they need expeditious determination for efficient tax collection, for proper tax administration and to ensure that the taxpayer is properly informed, educated and treated.

My Lord and Honourable Members, gone are those days where the tax authority was untouchable and the tax payer considered a slave. TRA has a Tax Payers Service Charter whose mission is to ***ensure an effective and efficient Tax Administration which promotes voluntary tax compliance by providing high quality customer services with fairness and integrity through competent and motivated staff***. The Taxpayer is considered a partner in the development of this nation. The more FB ATTORNEYS 3 delays a tax payer faces in determination of any tax dispute, the more we spoil our business climate in Tanzania. Such appeals, on interim orders and rulings, are not only illogical but will be a step backwards in the development of proper administration of taxes in Tanzania. Such appeals on interim orders and rulings are against public policy. Such appeals on interim orders and rulings are against Tanzanias development vision of 2025 and not in line with the TRA's Taxpayers Service Charter.

To support the notion of expeditious hearing and disposition of cases, the Law came to the rescue. There were various amendments made in in 2002 and 2004 to ensure expeditious, efficient and fair disposal of cases in Tanzania. This is the current spirit of our law in line with public policy- that cases should be heard as expeditiously as possible. That cases should not be delayed and the biggest delay, it was found before these amendments, was when parties appealed based on interim rulings and orders and the

case never ended. Advocates who wanted to delay a case, would move a file to the High Court, or the Court of Appeal, and let it stay there whilst the other affected party wanting the matter to be disposed quickly would suffer. In fact, after the file would be moved to a higher Court, the moving party would not even follow up the file even though it would have moved the file with urgency, because the whole strategy would be that of urgently moving it and then not following it to delay it.

My Lord and Honourable Members, the laws that were amended were as follows:

1. Act No 25 of 2002 The Written laws (Miscellaneous Amendments) Act

i. The Appellate Jurisdiction Act 1979 Cap 141 (R.E. 2002) was amended in subsection (2) of section 5 by deleting paragraph (d) and substituting for it the following:

(d) no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit"

ii. The Civil Procedure Code 1966 Cap 33 (R.E. 2002) was amended

(a) in section 74-

(i) by designating section 74 as section 74(I);

(ii) by adding immediately after subsection (I) the following subsection-

„„(2) Notwithstanding subsection (I), no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit,'

(b) in section 78-

(i) by designating that section as section 78(l);
(ii) by adding immediately after subsection (I) the following – FB ATTORNEYS 4 "(2) Notwithstanding the provisions of subsection (I), no application for review shall lie Against or be made in respect *of* any preliminary or interlocutory decision or order of the Court unless such decision or order has the effect of finally determining the suit.";

(c) in section 79-

(i) by designating that section as section 79(1);
(ii) by adding immediately after subsection (I) the following subsection –
"(2) Notwithstanding the provisions of subsection (I), no application for revision shall lie or be made in respect *of* any preliminary or interlocutory decision or order of the Court unless such decision or order has the effect of finally determining the suit";

iii. The Magistrates' Courts Act 1984 Cap 11 (R.E. 2002) is amended-

(b) in section 43 by-

(i) adding immediately after subsection (1) the following subsection-

"(2) Subject to the Provisions of subsection (3), no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the district court or a court of a resident magistrate unless such decision or order has the effect of finally determining the criminal charge or the suit"

(iii) renumbering subsection (2) as subsection (3),

2. Through Act No 12 of 2004 The Written laws (Miscellaneous Amendments) Act

The Civil Procedure Code 1966 Cap 33 (R.E. 2002) was amended in section 74

(b) by deleting subsection (2) and substituting for it the following-

„„(2) Notwithstanding the provisions of subsection (I), no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District Court, Resident Magistrates Court or other tribunal unless such decision or order has the effect of finally determining the suit,'

From the above, the spirit of our law and public policy is that on interim rulings and orders, no appeal should be taken until the matter is finally

disposed off. The affected party must, and fairly so, wait for the final merit based decision before it made any appeal, review or revision moves.

The above laws put a stop to the practice of files moving to higher Courts when interim rulings and orders were made. My Lord and Honourable Members, this Tribunal is no different. This Tribunal, even more so, should not entertain such appeals as the one that is before you, as it is uneconomical and FB ATTORNEYS 5 unnecessary to do so. This Tribunal adjudicates upon tax disputes- taxes are a country"s engine of growth as it provides the treasury with the necessary funds to progress. Without taxes there cannot be growth. Without taxes there cannot be development. It is through taxes that Tanzania can meet its Development Vision of 2025. My Lord and Honourable Members. The spirit of our law as demonstrated above is expeditious hearing of cases. This is also enshrined in our Constitution where in Article 107A the following is stated:

107A.-(1) The Judiciary shall be the authority with final decision in dispensation of justice in the United Republic of Tanzania.

(2) In delivering decisions in matters of civil and criminal matters in accordance with the laws, the court shall observe the following principles, that is to say -

(a) impartiality to all without due regard to ones social or economic status;

(b) not to delay dispensation of justice without reasonable ground;

(c) to award reasonable compensation to victims of wrong doings committed by other persons, and in accordance with the relevant law enacted by the Parliament;

(d) to promote and enhance dispute resolution among persons involved in the disputes.

(e) to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice. (emphasis ours)
From the above Article of the Constitution, it is clear that the dispensation of justice is not to be delayed.

My Lord and Honourable Members, in the case of **Asha Soud Salim v Tanzania Housing Bank [1983] TLR 270**His Lordship, Ramadhani, CJ had this to say:
I have failed within the scanty collection I have to obtain any authority on the issue of public policy in Zanzibar or elsewhere in East Africa. I have then to resort to assistance from English and Commonwealth cases.
In the case of *Egerton v Brownlow* (1853) 4 H.L Cas. At p. 196 public policy has been defined as:

"that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law"
In the other case *of Re Beard* (1908) 1CH. 383 at p. 342 it has been said that: FB ATTORNEYS 6 "The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time".

This pronouncement was followed in the Australian case of Re Jacob Morris (deceased) (1943) N.S.W.S.R 352. It was propounded that:
"The phrase „public policy" appears to mean the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare; so that anything is treated as against policy if it is generally regarded as injurious to the public interest…"

From the above, one recognises how crucial public policy is. It is this very public policy that drives the legislature in the making of new laws. It is this very public policy that is the guiding principle. Efficient, expeditious and fair administration of tax matters is an underlying public policy issue. Public policy is guided by logic and equitable principles not individual emotions. Not all public policy is translated into law because the law cannot cover everything. Some public policy issues are so obvious that they are never converted to law for the simple reason that any wording in any law would limit public policy considerations. My Lord and Honourable Members, this appeal by TRA is against public policy as it is meant to derail the appeal at the TRAB and delay the hearing of actual merits of the issues raised there.
My Lord and Honourable Members, to support the notion of early disposal of cases, and disallowing appeals on interim rulings and orders, we have the following cases to support us:

1. Haron bin **Mohd Zaid v Central Securities (Holdings) Bhd [1982] 2 ALL ER 48**, marked as **(Marked as FB-2)** on page 48

"The appropriate test for determining whether an order was final or interlocutory was whether the judgment or order, as made, finally disposed of the rights of the parties. If it did, it was a final order, but if it did not, it was an interlocutory order..."

My Lord and Honourable Members, if you look at the ruling of the TRAB delivered on March 13th 2012, based on which TRA has appealed, the following are quite obvious:

a. On page 5 in the last line the TRAB says…"This procedure is what is contested in the Preliminary objection and as such in determining it, this Board will have no reason whatsoever to go into the merits or demerits of the substantive appeal."

b. On page 10 of the Ruling (the last page), the last paragraph reads… "With these observations made, we now declare that the preliminary objection raised by the

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Respondent has no basis in law. It is consequently dismissed but with an order that each party shall bear its own costs. The main appeal shall now proceed to hearing on the date which shall be fixed by the Board and communicated to the parties in due course." (emphasis ours)

My Lord and Honourable Members, on page 5 as mentioned above the TRAB has clearly said that in its ruling it is only considering the submissions on the PO and not the appeal itself. Similarly on page 10, whilst dismissing the POs, the TRAB orders that hearing dates for the

appeal will be fixed. Nowhere has the TRAB disposed the actual appeal. It is only the POs that have been disposed. Nothing more. There cannot be any ambiguity here.

2. **Mahendra Kumar Govindji Monani t/a Anchor Enterprises v TATA Holdings (Tanzania) Ltd & Another, Civil Application No 50 of 2002**, Court of appeal of Tanzania at Dar es Salaam (Unreported**)** marked as **(Marked as FB-3)** on page 7

"……..it will be permissible to appeal against a preliminary or interlocutory decision or order only if that decision or order had the effect of finally determining the case before the court. If it does not finally determine the case, then one has to wait until the final outcome of the case is known and, if dissatisfied, appeal against all the points, including the preliminary interlocutory decision or order, of which one was aggrieved. One of the pertinent reasons for paragraph (d) of section 5 (2) of the Appellate Jurisdiction Act, 1979 is to stop the irresponsible practice by which a party could stall the progress of a case by engaging in endless appeals against interlocutory decisions or orders." (emphasis ours)

3. **Gulamali Shah Bhokari & Another v Director of Public Prosecutions, Criminal Appeal No. 170 of 2007, Court of Appeal of Tanzania at Dar es Salaam** (Unreported) marked as **(Marked as FB-4)** on page 10

"We do note that it was counsel for the appellants who stopped the proceedings before the trial court by appealing to the High Court against that ruling and further on, before the Court. It cannot, therefore, be said that the steps taken by the appellants, did bring to finality the proceedings before the trial court. To the contrary, the criminal case, subject of his appeal is still pending before the trial court. We cannot fault the findings of Mlay, J on this issue. The order by the trial magistrate was unappellable. We therefore dismiss this appeal and order that the trial before the Resident Magistrate's court of Dar es Salaam proceed from where it had reached." (emphasis ours) FB ATTORNEYS 8

4. **Ramadhan Hamisi Mwete v The Director Tanzania Chinese Join Shipping Company, Civil Revision No 20 of 2005,High Court of Tanzania at Dar es Salaam** (Unreported) marked as **(Marked as FB-5)** on page 6

"Since an application for revision does not lie against a interlocutory decision which does not finally determine the employment matter, this application is incompetent. Accordingly this application is struck out." (emphasis ours)

5. **Salma Issa v Dr. Yahaya Mohamed Kapona, Civil Revision No 32 of 2003,High Court of Tanzania at Dar es Salaam** (Unreported) **(Marked as FB-6)** on page no 9

"Clearly, this is a preliminary or interlocutory order. It is an order made in the course of the execution proceedings and which is not final. By its nature and its wording, it presumes that another order will be made after the applicant has appeared before the court and heard by the court as to why the order to commit the Applicant to prison as a civil prisoner, should not be made. The order is therefore clearly a "preliminary or interlocutory order" within the meaning of section 43 (2) of the Magistrate's Courts Act 1984….That being the case, this application is incompetent and therefore improperly before this court. The application is accordingly struck out with costs." (emphasis ours)

6. **Citibank Tanzania Limited & Another v Peter Claver Bakilana (The Liquidator Tri- Telecommunication Tanzania Limited (In Liquidation) Civil Revision No 32 of 2003,High Court of Tanzania at Dar es Salaam** (Unreported) **(Marked as FB-7)** on page 4 and 5

"I am of the considered view that finalization of matter means the pronouncement of decision on all issues including imposition of penalties or sanctions. The matter in the commercial court has not been finally determined…The matter is pending and is yet to be brought to finality…..I accordingly find the application incompetent by virtue of the provisions of Section 5(2)(d) of the Appellate Jurisdiction Act." (emphasis ours)

My Lord and Honourable Members, the judgments and rulings above are clear. These judgments and ruling above use words like "irresponsible practice", "stall the progress" and "endless appeals." This is exactly what

TRA is doing in this matter by "irresponsibly stalling the progress with endless appeals." FB ATTORNEYS 9 Furthermore, in their very own letter to the Secretary to the Board dated 13th April 2012 **(Marked as FB-8)**, TRA has said in the first paragraph as follows:

Much as you are aware, we have been instructed to appeal to the Tribunal against the ruling of the Board on preliminary objection delivered on 13th March 2012. (emphasis ours)

In paragraph 2 of the same letter, TRA have further said:

We kindly request to be supplied with a certified copy of the proceedings of the Board (submissions) on Preliminary Objection to be attached to the statement of Appeal as per Rule 6(2) and (3) of the Tax Revenue Appeals Tribunal Rules 2001 (GN No 56/2001). (emphasis ours)

My Lord and Honourable Members, TRA, the Appellant herein, itself through the letter above, has acknowledged that the Ruling was on preliminary objections meaning that the actual appeal is still pending. We submit, once again, that this ruling of the TRAB is not appealable at this stage. TRA has jumped the gun and is prematurely before this Honourable Tribunal. Even in its Statement of Appeal, TRA has not anywhere said that the Appeal at the TRAB was finally determined, simply because it has not been finally determined.

Finally, My Lord and Honourable Members, we are unsure why TRA is unwilling to proceed with hearing of our Appeal on its merits at the Board. The time TRA has spent in arguing those POs at the Board and the additional time the current appeal is taking and may take at the Tribunal, would have been properly utilised in arguing on the main Appeal we have

lodged so that the Respondent knows whether it is, or is not liable to pay any taxes. The Respondent is asking itself, why is TRA delaying hearing of the main appeal on its merits? But this issue lingers on. And the issue will continue to linger on, as it is quite obvious, that by taking this appeal and having raised POs at the Board, TRA is delaying the main appeal on merits from being heard. We must say that TRA has, atleast for now, been successful in doing so, unless of course this Tribunal intervenes and puts a stop to this practice of moving files from the Board to the Tribunal based on interim orders and rulings.

To sum up our submissions, we pray for the following:

1. On the basis of the Musoma Textiles decision , which is a decision by this same Honourable Tribunal, the Respondent's preliminary objections should be upheld and the appeal dismissed;

2. On the basis of the spirit of our law- expeditious case disposition especially the enactments and amendments by Act No 25 of 2002 and Act No 12 of 2004 and our Constitution the Respondents preliminary objections should be upheld and the appeal dismissed;

3. On the basis of all the authorities cited above, many of which are from the Court of Appeal of Tanzania and binding upon all Courts, boards, judicial bodies and Tribunals, the Respondents preliminary objections should be upheld and the appeal dismissed.

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4. On the basis of Public Policy and early determination of cases and the TRA Service Charter which itself advocates efficiency in tax administration, the Respondents preliminary objections should be upheld and the appeal dismissed.

5. On the basis that it was quite obvious to the Appellant that the Appeal could not be taken at this juncture, we pray that this Tribunal consider our prayer for dismissal of the appeal with costs.

We humbly so submit.

APPELLANT'S REPLY TO THE RESPONDENT'S WRITTEN SUBMISSIONS ON PRELIMINARY OBJECTION

(Pursuant to the order of the Honourable Tribunal dated 17th September, 2012)

MAY IT PLEASE YOUR LORDSHIP AND HONOURABLE MEMBERS OF THE TRIBUNAL that the humble counsel for the Appellant address your Honourable Tribunal and submit as follows in reply to the Respondent's written submissions on preliminary objection.

After reading the Respondent's Notice of preliminary objection and the written submissions, we have noted that the Respondent's preliminary objection is based merely on one ground that the Appeal before this Honourable Tribunal is against an interlocutory decision of the Tax Revenue Appeals Board which is not appealable.

That being the position, the issue involved in this matter is very fine indeed and did not call for the Respondent's Counsel to offer lectures to the Honourable Tribunal on matters which are not relevant to the case at hand.

There is only one crucial issue worth to be considered in this matter. The said issue is whether or not the decision of the Board being appealed against is appealable.

The Respondent's Counsel has submitted that the decision of the Board, subject of this Appeal, is not appealable because it is an interim decision which did not finally dispose of the Appeal before the Board.

My Lord and Honourable members of the Board, it is our humble submission that under the Law and practice governing Appeals from the Board to this Tribunal, interlocutory decisions of the Board are appealable. Appeals from the Board to this Tribunal are governed by section 16(4) of the Tax Revenue Appeals Act [Cap 408 R.E. 2006].

Under the said provisions of the Law, there is no bar to appeal against an interlocutory decision or order of the Tax Revenue Appeals Board. To put it differently, section 16(4) of the Tax Revenue Appeals Act does not prohibit appeals against interlocutory decisions of the Board. And therefore it is our humble submission that section 16(4) of the Tax Revenue Appeals Act allows a party who is aggrieved by an interlocutory decision of the Board to appeal to the Tribunal against that decision if he wishes to do so.

Our proposition is fortified by several decisions of this Tribunal. One of such decisions is contained in the case of **COMMISIONER GENERAL (TRA) VS GLOBAL RUBBER SOCIETE ANONYME (GRSA) VAT TAX APPEAL NO 12 OF 2009 (unreported),** a copy of the ruling of which is annexed for ease of reference. In that case the Commissioner General

appealed to this Honourable Tribunal against an interlocutory decision of the Board. When the Appeal was set for hearing, before this Tribunal, the Respondent's Counsel raised a preliminary objection that the decision of the Board was an interim order and thus not appealable. It was held by this Honourable Tribunal that**, though interlocutory, the decision of the Board was Appealable under the law and practice governing appeals from the Tax Revenue Appeals Board to this Tribunal**. And following that Ruling, the Respondent's preliminary objection was dismissed and the Appeal by the Commissioner General was ordered to proceed on merits.

Therefore there is authority of this very same Tribunal that an interlocutory decision is appealable under the law and practice governing appeals from the Tax Revenue Appeals Board to this Tribunal. On the strength of the law and the authority cited above, we humbly submit that the decision of the Board being appealed against in our instant case is appealable even though it may be an interim decision.

In support of his contention that the decision of the Board is not appealable, the Respondent's Counsel has cited several cases decided by the High Court, the Court of Appeal and this Honourable Tribunal. The Respondent's Counsel also relies on the provisions of the Appellate Jurisdiction Act [CAP 141 R.E.2002], the Civil Procedure Code [CAP 33 R.E 2002], and the Magistrates' Courts Act [CAP 11 R.E 2002] as amended by the written Laws (Miscellaneous Amendments) Act No 25 of 2002 which prohibit appeals, revisions and reviews against interlocutory decisions of courts which have no the effect of finally determining suits and criminal charges.

MY LORD and Honourable members of the Tribunal, the procedural laws and authorities relied upon by the Respondent's Counsel cannot help him in our instant case for the following reasons.

To start with the decision of this Honourable Tribunal in the case of **COMMISIONER GENERAL (TRA) VS NEW MUSOMA TEXTILE'S LIMITED, Appeal No. 17 of 2011 (unreported),** we humbly submit that, that decision is not an authority for the proposition that interlocutory decisions of the Board are not appealable under the law and practice applicable to appeals from the Board to the Tribunal. This is so because in **New Musoma Textile's case,** though the Appeal by TRA was against an interlocutory decision of the Board, this Honourable Tribunal entertained and determined the Appeal on merits. This Honourable Tribunal did not dismiss the Appeal on the ground that it was not appealable, but rather on the ground that the Appeal had no merits. By entertaining, hearing and determining the Appeal on merits, this Honourable Tribunal confirmed the position that interlocutory decisions of the Board are appealable. The statement of the Tribunal in **New Musoma Textile's case** that **decisions arising from interlocutory matters should not be subjected to an appeal in the Tribunal,** was made just in the passing and hence did not form the **Ratio-decidendi** of the decision. Indeed the said statement was merely **Obiter-dictum** which is not the decision of the Tribunal. That being the position, the **New Musoma Textiles case** does not overrule nor provide a departure from the decision of this Honourable Tribunal in **Global Rubber's case** cited herein above. And at any rate, the statement in the **New Musoma Textile's case** is **perincuriam** of the earlier decision of the Tribunal in **Global Rubber's case** and section 16(4) of the Tax Revenue Appeals Act. Thus the **New**

Musoma Textile's case cannot be followed by this Honourable Tribunal in our instant case.

As to the Laws and authorities of the High Court and the Court of Appeal cited and relied upon by the Respondent's Counsel, we humbly submit that the same are not applicable to the appeals from the Board to the Tribunal. The procedure which bars appeals on interlocutory decisions is applicable in ordinary courts of law only. This point was lucidly underscored by this Honourable Tribunal in **Global Bubber's case** at page 9 of the Ruling when this Honourable Tribunal stated thus;

> **"This Honourable Tribunal has opinion that Mr. Switi argument is materially sound. Though as Dr. Nguluma intimates, this may be good practice in ordinary courts of law, it may not be the same case here. Perhaps more importantly, it is simply not the law as far as this Tribunal is concerned" (emphasis ours).**

Therefore there is also authority of this Honourable Tribunal that the procedure, practice and the law which prohibit appeals on interlocutory decisions of ordinary courts of law is simply not the law as far as this Tribunal is concerned. Indeed we humbly submit that there is rationale for the finding of the Tribunal in **Global Bubber's case.**

The rationale is that appeals from the Board to the Tribunal are governed by section 16(4) of the Tax Revenue Appeals Act. This provision of the Law was not amended by the Written Laws (Miscellaneous Amendments) Act No 25 of 2002 which introduced prohibition of appeals on interlocutory decisions under the Civil Procedure Code and the Magistrates' Courts Act.

Therefore since section 16(4) of the Tax Revenue Appeals Act was not amended, the amendments effected under the Civil Procedure Code and the Magistrates' Courts Act cannot be applied to the appeals instituted in this Tribunal under section 16(4) of the Tax Revenue Appeals Act.

So as all the authorities of the High Court and the Court of Appeal cited and relied upon by the Respondent's Counsel were decided in the light of the provisions of the Civil Procedure Code, the Magistrates Courts Act and the Appellate Jurisdiction Act as amended by Act No. 25 of 2002, the said authorities are not relevant to the instant Appeal which is governed by section 16(4) of the Tax Revenue Appeals Act. Therefore this Honourable Tribunal is not bound by the said authorities.

The Respondent's Counsel has also submitted to the effect that our Appeal, the same being based on interlocutory decision of the Board, is against public policy which requires that tax cases should be expeditiously determined. It is our humble submission that public policy does not override the law. We have shown that the law applicable in this Tribunal permits appeals against interlocutory decisions of the Board. Therefore our appeal cannot be said to be against public policy because it has been pursued in accordance with the letter of the Law.

So all in all we humbly submit that the decision of the Board being appealed against is appealable according the governing Law.
MY LORD and Honourable members of the Tribunal we humbly hasten to add that even if the Law and the authorities cited by the Respondent's Counsel were relevant to the instant case, the decision of the Board would

still be appealable because the said decision is not an interim decision **per-se**.

At the Board level; we raised a preliminary objection that Appeal No 26 of 2011 was incompetent for being instituted pre-maturely before issuance of the requisite Tax assessment or any other appealable decision of the Commissioner General. The Board ruled that although there was no assessment of tax, the Taxpayer (Respondent herein) was entitled to appeal to the Board under section 14(2) of the Tax Revenue Appeals Act because the letter (Annexture TRA3) issued by TRA to the taxpayer was a notice of existence of liability to pay tax. The Board proceeded to hold that the said letter was vague and involuted which would put the taxpayer in a life full of uncertainty. The Board did not end there, but it proceeded to impute bureaucracy and even inefficiency in tax officers in tax administration.

It is our humble submission that since the Board has already canvassed on evidential issues and condemned TRA for issuing vague and involuted notices and for being bureaucratic and inefficient, it has constructively decided the Appeal in favour of the taxpayer. In view of what the Board has stated in its Ruling being appealed against, it cannot change its mind and decide any issue in favour of TRA. So for us "the Appeal before the Board is over". Thus it is our humble submission that constructively there is no pending matter before the Board, hence the decision of the Board constitutes final decision which is appealable even under the Civil Procedure Code.

In view of the foregoing submissions, we humbly pray to the Honourable Tribunal to find that the decision of the Board being appealed against is appealable and we further pray that the Preliminary objection raised by the Respondent be dismissed with costs and our appeal be ordered to proceed on merits.

We humbly submit.

(Rejoinder by the Respondent on Appellant's Reply on preliminary Objections raised by the Respondent, filed pursuant to the Orders of the Tax Revenue Appeals Tribunal ["TRAT" or Tribunal"] of September 17th 2012)

Having read the Appellants Reply ("the reply") to the Respondent's written submission on the Preliminary Objections (POs), the Respondent rejoins as under.

My Lord and Honourable Members, it is now clear to the Respondent that the TRA does not dispute that this is an interlocutory decision that it has appealed against. That clearly settles differences, if any, on whether the decision that TRA is appealing against is interlocutory or not.

Learned Counsel for the Appellant cites section 16(4) of the Tax Revenue Appeals Act Cap 408 (R.E. 2006) ("TRAp Act") which he claims does not bar or prohibit appeals against interlocutory decision or orders of the TRAB and therefore since there is no such prohibition, it is tantamount to being allowed to appeal. The learned counsel has failed to cite any authority in law or in any of the tax laws which stipulates that if there is no prohibition then such an act is allowed. For example, there is no prohibition to paying

taxes by personal cheques, but TRA is categorically refusing to accept personal cheques in payment of taxes because of issues of bounced cheques and the cost of tracing such tax payers who issue bounced cheques. This is especially true in the customs taxes where once the taxpayer is allowed to clear his or her container from the port, and the cheque bounces, the recovery becomes challenging. What TRA is stating in its Reply, is that since the law does not prohibit personal cheques, it is automatically allowed whereas in practice TRA, the same Respondent herein, disallows personal cheques for practical reasons.

What is the reason TRA disallows such personal cheques? The response does not require indulgence in any mathematical simulation or reference to any black scholes option pricing model. The reason is that it does not make practical sense to allow a taxpayer to pay by cheque even if such personal cheques are not disallowed by law simply because the TRA will not manage to trace the taxpayer when the personal cheques will bounce. The treasury will suffer. Hence TRA, using this very pragmatic approach, disallows personal cheques. You either remit money to TRA from your bank, or provide a bankers cheque which TRA also wait for to be cleared.

Similarly, from the current position of the law on appeals against interlocutory orders, we submit that one cannot appeal against the Board's decision for example not to adjourn a case simply because the law does not prohibit such an appeal.

My Lord and Honourable Members, the law may be silent on whether on interlocutory orders or rulings, an appeal can be taken. TRA claim since it is not disallowed, it is allowed. We respond by saying that just because it is not disallowed does not mean it is allowed. This Tribunal needs to look

at tax collection holistically. We can also add that in practice the law has been for the Court/Tribunal to follow common sense or to follow what others do in case the law or procedure is silent on that particular issue.

What did the legislature have in mind in enacting the TRAp Act. Efficient adjudication of tax disputes. TRAp Act is there to assist both the taxpayer and TRA. TRAp Act established both the Board and Tribunal to remove the Courts of pressure since the Courts are already overwhelmed with a backlog of cases. It was the speed that is required in Tax cases that was one of the main reasons to establish the Board and the Tribunal. If TRA's blanket assumption of 'since this is not disallowed, it is allowed' is allowed to stand before this Honourable Tribunal, it defeats the purpose of enacting the TRAp Act, and the establishment of the Board and this Honourable Tribunal.

My Lord and Honourable Members, in further response to the statement by TRA that Section 16(4) does not bar appeals, we take you to the persuasive Indian case of **Zenith Ltd V Deputy Commissioner of Income Tax and Another, In the High Court of Bombay Income-Tax Appeal No. 125 of 2003 ("Zenith Case") marked annexure FB 9.** In this Zenith case, the High Court had this to say:

> **The expression <u>"every order passed in appeal" cannot be construed to take in its fold all interlocutory orders</u> that may be passed by the Income Tax Appellate Tribunal, during the pendency of the appeal, particularly such orders which are procedural in nature. By use of the expression "every order passed**

in appeal", the Legislature never contemplated nor intended that appeal may be preferred by an aggrieved party under Section 260A to the High Court challenging the interlocutory orders particularly those which are procedural in nature not affecting the rights or liabilities of the parties.

The order by the Income Tax Appellate Tribunal declining the appellant to add

additional grounds is only an order procedural in nature and cannot be said to affect the rights of such party. More so because it is always open to the aggrieved party to challenge such interlocutory order in the appeal that may be preferred against the final order. The correctness of such interlocutory order being open to be challenged in appeal that may be preferred by the aggrieved person against the final order, there is no hesitation in holding that the present appeal is not maintainable. (emphasis ours)

My Lord and Honourable Members, in the above even though section 260A in India explicitly allows appeals on "every order passed," the High Court has narrowed this down in that the legislature did not intend it to be on "**interlocutory orders particularly those which are procedural in nature not affecting the rights or liabilities of the parties."**

My Lord and Honourable Members, the Law cannot cover everything. Even the new Court of Appeal rules have some areas which are grey areas that

will be improved upon and developed by practice and using basic common sense with the underlying public policy in mind. Whilst the legislature does try its best to cover a vast portion of the law, it cannot cover everything. This Honourable Tribunal should take cognisance of this and support the legislature's efforts in making the Board and this Honourable Tribunal efficient. TRA, in this case, is not advocating this. This appeal is a waste of time for the TRA and for the Respondent herein. It will not lead to collection of taxes but rather building of tax jurisprudence which will serve no purpose. This Tribunal needs to put a stop to such appeals based on interlocutory order or rulings.

My Lord and Honourable Members, TRA claim on page 2 paragraph 5 of the reply that **"...our proposition is fortified by several decisions of this Tribunal."** We wish to point out that there are no several decisions that have been cited by TRA but merely one which is the case of Commissioner General TRA v Global Rubber Societe Anonyme Vat Appeal No 12 of 2009 ("Global Rubber case"). TRA makes it sound like the matter is so obvious that it need not be looked at any further. That is not the case. There is no plethora of authorities that TRA is relying on but merely one.

This Global Rubber Case Ruling was made in October 2010, nearly 2 years ago. In this case, there was an application by the Appellants against the TRA for lifting orders of suspension and there was also an appeal by the Appellants against the TRA. The Preliminary Objections raised by the TRA on the application were dismissed based on which the TRA appealed to the Tribunal. The actual Appeal at the Board was still pending and could continue as it was only the application that had been ruled upon. In the

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> **"We think, with due respect, that his worry is misplaced. The two appeals are still pending in the Board, its files and records are there.**
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> **There is nothing in our current law or even in practical terms to prevent the two appeals from proceeding. We wish to state that the appeal that is before this Tribunal concerns the Agency Notices and the issues therein have no bearing on the substantive issues before the Board. Basically there will be no effect at all to the determination of appeals Nos. 14 and 20 of 2009 pending before the Board. It is therefore wrong to say that an appeal such as this one would put on hold the hearing and determination of the appeal before the Board"**

As stated before, we again reiterate that this case is different and distinguishable to the extent mentioned above. In the case before this Tribunal, the whole file has moved from the Board to this Honourable Tribunal. In the Global Rubber Case, the appeal files were still before the Board and could proceed and would not delay the matter as the ruling by the Board was on an application.

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We draw your attention to Rule 16(3) of the Tax Revenue Appeals Tribunal Rules, GN No 56 of 2001 which provide:

"Where the Act and these Rules are silent in relation to any particular practice or procedure, the proceedings of the Tribunal shall be conducted <u>in accordance with rules of practice and procedure as the Tribunal may specify."</u>

Reading the "practice guideline" as stipulated in the Musoma Textiles case, it is this very same Tribunal that has invoked Rule 16(3) and enunciated that ***matters which do not terminate the substantive proceedings in the Board should not be subjected to an appeal in this Tribunal.***

This Musoma Textiles also case came this year and at a time that the Hon Tribunal has realised that allowing such appeals on interlocutory matters results in delays, just as TRA are doing in this case at hand. It has provided for a clear guideline- no appeals against interlocutory matters in the interest of expeditious tax collection and determination of tax disputes. It is shocking that TRA are so adamant about following this practice guideline. If this Tribunal does not put a stop to such appeals, if it has not

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remark. It is a serious decision by this Honourable Tribunal not to entertain such appeals. TRA are waving past it based on Obiter Dicta. That is not the case as TRA is reading it out of context and sadly so.

My Lord and Honourable Members, to add salt to the wound, TRA adds that the Musoma Textiles Case decision is per incuriam. TRA forgets that it was the same Hon Vice Chairman, who chaired this Honourable Tribunal in both the Global Rubbers Case and the Musoma Textiles Case. It is the same Honourable Vice Chairman who wrote the ruling in the Global Rubbers Case and the most recent Musoma Textiles Case. It is clear that he observed the opening of these floodgates with endless appeals. It is obvious he took cognisance of the spirit of the law in the Appellate Jurisdiction Act, the Magistrates Courts Act and the Civil Procedure Code that cases need to be speedily determined, and tax cases even more so. There is no law that forces a Court or Tribunal or any quasi judicial body from changing its own decision. Times change My Lord. Times have changed and it is quite clear that the judgment in the Musoma Textiles case was written considering and fully recognising the danger of allowing appeals on interlocutory matters.

My Lord and Honourable Members, TRA further states in its reply in paragraph 2 of page 4 that **" As to the laws and authorities of the High Court and the Court of Appeal cited and relied upon by the Respondent's counsel, we humbly submit that the same are not applicable to the appeals from the Board to the Tribunal. The procedure which bars appeals on interlocutory decisions is applicable in ordinary courts of law only."**

Learned counsel for TRA has missed the point here. We were demonstrating to you the spirit of the law. Our legislature wants, and rightly so, that in line with the constitution and public policy, cases should come to an end. What TRA are saying is that this public policy, this fundamental right in the constitution, this spirit, does not apply to the Board or the Tribunal. It is like the Board and the Tribunal are a different category of institutions yet they reside in Tanzania. That is not the case. The Board and Tribunal are quasi judicial bodies and which perform judicial function in the same manner as Courts. They are formed indirectly by virtue of the constitution of this country and are therefore part of the general rules and practice of administering justice in the country. They are not in a different league and serving a different class of people. They are here for the people just like the other courts are. They are implicitly bound by the underlying public policy and the constitution. They are run in parallel with the Court system for efficiency purposes. They have powers just like the Court's do.

Had the Court system been efficient, perhaps the Board and Tribunal would never have been formed. What TRA are saying is that let the Court's, by virtue of the amendments we mentioned in our submissions in chief become more efficient, and let the Board and the Tribunal continue adapting bureaucratic procedures and allow such "interlocutory ruling based appeals" delay matters before them. Instead of helping the Tribunal and the Board to leapfrog and take the country into Tanzania's 2025 vision, TRA is taking this Tribunal backwards into a darkness that has no end.

My Lord and Honourable Members, in our submissions in chief we mentioned all along that this was a delaying technique by the TRA for reasons known to themselves. We wish to bring to your attention that TRA in its reply has not replied on that 'delay statement' of ours in any one of its replies. In fact the word delay does not appear anywhere in its reply. It cannot be a coincidence.

We reiterate that with the current practice in our legal system, we can see nothing to isolate tax cases from other cases in that they should be expeditiously determined and without undue regard to legal technicalities. When one applies the mischief rule of interpretation of statutes, it is our humble submission that the legislature, to curb this "delay mischief", intended to amend all laws in respect of preferring appeals, revision and reviews against interlocutory orders.

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When we read this, we had to reread it as not only was this a bewildering statement but it is shocking coming from TRA. TRA emotionally states on page 6 of its reply that **"So for us the Appeal before the board is over."**

My Lord and Honourable Members, the records before you are crystal clear. The appeal has many grounds and not one of them has been determined. This is so obvious that pondering over this any longer is a waste of this Honourable Tribunal's valuable time. TRA's claim that the appeal before the Board is "over for them" is a sweeping statement which has no truth in it. It is a last resort to try to convince this Honourable Tribunal to accept appeals as this one before you, to delay matters for reasons known to TRA itself.

To sum up our rejoinder, we pray, once again for the following:

1. On the basis of the Musoma Textiles decision , which is a decision by this same Honourable Tribunal, the Respondent's preliminary objections should be upheld and the appeal dismissed;

2. On the basis of the spirit of our law- expeditious case disposition especially the enactments and amendments by Act No 25 of 2002 and Act No 12 of 2004 and our Constitution the Respondent's preliminary objections should be upheld and the appeal dismissed;

3. On the basis of all the authorities cited in our submissions in chief, many of which are from the Court of Appeal of Tanzania and binding upon all Courts, boards, judicial bodies and Tribunals, the Respondent's preliminary objections should be upheld and the appeal dismissed.

4. On the basis of Public Policy and early determination of cases and the TRA Service Charter which itself advocates efficiency in tax administration, the Respondent's preliminary objections should be upheld and the appeal dismissed.

5. On the basis that it was quite obvious to the Appellant that the Appeal could not be taken at this juncture, we pray that this Tribunal consider our prayer for dismissal of the appeal with costs.

We humbly so submit.

(Rejoinder by the Respondent on Appellant's Reply on Preliminary Objections raised by the Respondent, filed pursuant to the Orders of the Tax Revenue Appeals Tribunal ["TRAT" or Tribunal"] of September 17th 2012)

Having read the Appellants Reply ("the reply") to the Respondent's written submission on the Preliminary Objections (POs), the Respondent rejoins as under.

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2. On the basis of the spirit of our law- expeditious case disposition especially the enactments and amendments by Act No 25 of 2002 and Act No 12 of 2004 and our Constitution the Respondent's preliminary objections should be upheld and the appeal dismissed;

3. On the basis of all the authorities cited in our submissions in chief, many of which are from the Court of Appeal of Tanzania and binding upon all Courts, boards, judicial bodies and Tribunals, the Respondent's preliminary objections should be upheld and the appeal dismissed.

4. On the basis of Public Policy and early determination of cases and the TRA Service Charter which itself advocates efficiency in tax administration, the Respondent's preliminary objections should be upheld and the appeal dismissed.

5. On the basis that it was quite obvious to the Appellant that the Appeal could not be taken at this juncture, we pray that this Tribunal consider our prayer for dismissal of the appeal with costs.

We humbly so submit.

21.09.2012

QUORUM:

Hon. Dr. Fauz Twaib	**Judge/Chairman**
Prof. J. Doriye	**Member**
Mr. K. Bundala	**Member**
For the Appellant	**Mr. Switi, Advocate, assited by Mr. Walter Nyoni, Assisted P. Tax In Officer, TRA Mwanza**
For the Respondent	**Mr. Fazal Bhojani and Mr. G. Ishengoma, Advocate**
Mrs. Halima Said	**RMA**

Mr. Bhojani

I wish to further explain a thing or two

Order

(1) Deliberations on 24/9/2012 at 14 hours

(2) Opinions 29/9/2012 (in writing)

(3) Ruling on 22/10/2012 at 14 hours.

Hon. Dr. Fauz Twaib Judge/Chairman,Sgd

21/09/2012

22.10.2012

QUORUM:

Hon. Dr. Fauz Twaib	**Judge/Chairman**
Prof. J. Doriye	**Member**
Mr. K. Bundala	**Member**
For the Appellant	**Mr. J. S. Beleko, Advocate**
For the Respondent	**Mr. Fazal Bhojani**
Mrs. Fortunata	**RMA**

TRIBUNAL

Ruling delivered this 22nd day of October, 2012.

Hon. Dr. Fauz Twaib Judge/Chairman,Sgd
Prof. J. Doriye Member,Sgd
Mr. K. Bundala Member,Sgd
22/10/2012

IN THE TAX REVENUE APPEALS TRIBUNAL

AT DAR ES SALAAM

TAX APPEAL NO. 7 OF 2012

(Appeal from the decision of the Tax Revenue Appeals Board dated 13th March 2012 in Income Tax Appeal Case No. 26 of 2011)

COMMISSIONER GENERAL

TANZANIA REVENUE AUTHORITY ..... APPELLANT

VERSUS

JSC ATOMREDSMETZOLOTO (ARMZ) ..... RESPONDENT

R U L I N G

Judge F. Twaib, Chairman:

The issue that calls for determination in this ruling is both important and intriguing. It is intriguing because it requires this Tribunal to choose between two of its earlier decisions on the same issue: Whether an interlocutory decision of the Tax Revenue Appeals Board is appealable to this Tribunal. It is important because it will clarify the legal position over a matter that finds no clear provision in the Tax Revenue Appeals Tribunal, the law that governs appeals in the Board as well as the Tribunal. In the process of deciding it, the Tribunal also found itself being called upon to discuss the application, in its proceedings, of the doctrines of precedent and *stare decisis*.

On 6th October 2010, in *TRA v Global Rubber Societe Anonyme (GRSA)*, Tax Appeal No. 12 of 2009, the Tribunal answered the question posed above in the affirmative. It held that section 16 (4) of the *Tax Revenue Appeals Act,* Cap 408 (R.E. 2002) does not limit appeals from the Board to its final decisions and that interlocutory orders are also appealable. The Tribunal's reasoning was that the recent amendments effected to several laws that barred appeals from decisions that do not finally determine the rights of the parties did not include amendments to the *Tax Revenue Appeals Act*.

On 9th February 2012, in the *Commissioner General, TRA v New Musoma Textiles Ltd.*, Tax Appeal No. 17 of 2011, the Tribunal answered the same question in the negative. Respondent's advocate in that case had prompted the Tribunal to issue some "guidelines" in the spirit of the *Written Laws (Miscellaneous Amendments) Act*, No. 25 of 2002, that

introduced provisions that prohibit appeals from interlocutory decisions of the Courts. Those amendments were effected to section 74 of the *Civil Procedure Act*, Cap 33, the *Magistrate's Court's Act,* Cap 11, and section 5 of the *Appellate Jurisdiction Act*, Cap 141. No such amendments were made in respect of the *Tax Revenue Appeals Act.*

In *New Musoma Textile*, the Tribunal obliged. It issued the said guidelines, stating that interlocutory matters which do not terminate the substantive proceedings in the Board should not be subjected to appeals in the Tribunal. The reasoning was that tax matters should be expeditiously determined, without undue regard to legal technicalities.

The same issue has arisen, once again, in the matter before us. In the face of the two previous but conflicting decisions of the Tribunal, we are called upon to decide which of the two positions is correct or at least, which is the more desirable in the context of tax litigation. Before we embark on a determination of the issue at hand, we think it is pertinent to set out what we consider to be the position with regard to the how the Tribunal (as well as the Board below it) should apply the principles of precedent and *stare decisis*.

We are of the view that the principles of precedent and *stare decisis* apply to this Tribunal, whose decisions are appealable to the Court of Appeal, as they apply to the High Court. At the same time, the Tribunal is alive to its role to encourage consistency and regard for precedent, which are crucial for the orderly development of tax jurisprudence in Tanzania. In our view, the following are the principles applicable to this Tribunal:

a) The Tribunal and the Board are bound by decisions of the Court of Appeal and the High Court;

b) The Tribunal is not bound by its own previous decisions. However, it is always desirable to observe the doctrine of *stare decisis*. This means, though the Tribunal is free to depart from its own previous decisions, it is important, for purposes of certainty and finality to litigation, that any departure from its previous decisions should be based on very sound reasons.

c) The Tax Revenue Appeals Board is bound by the decisions of the Tribunal, unless there is a contrary decision of the High Court or the Court of Appeal.

Having set out the above, we now return to the case before us.

Mr. Switi, learned counsel for the Appellant, relied on the decision in *TRA v Global Rubber Societe Anonyme* ("*Global Rubber*"). Mr. Switi had appeared for the Appellant Commissioner General in that case and the Tribunal sided with him. In his written submissions in the case presently before us, Mr. Switi reminded us that in *Global Rubber,* we held that there was no law that prohibits appeals from interlocutory decisions of the Board to this Tribunal.

On the Tribunal's decision in *New Musoma Textiles,* on which learned Counsel Bhojani for the Respondent based his argument, Mr. Switi submitted that the relevant statement in that case was *obiter dicta* and not the *ratio decidendi* of the case. He pointed out that despite that statement the Tribunal had in fact determined the appeal on the merits. It was also Mr. Switi's argument that, in so far as the decision was made without considering the decision in Global Rubber, it was *per incurium.*

On the other hand, learned Counsel Bhojani for the Respondent based his argument on, primarily, the decision in *New Musoma Textiles' Case*.

Though counsel also made references to several decisions of the Court of Appeal and the High Court, we find these references not directly relevant to the determination of the issue before us. Mr. Bhojani, however has argued certain matters of policy that we find crucial. He has also cited to us the Indian decision in *Zenith Ltd. v Deputy Commissioner of Income Tax & Anor*, High Court of Bombay Income Tax Appeal No. 125 of 2003. The Court held:

> The expression "every order passed in appeal" cannot be construed to take in its fold all interlocutory orders that may be passed by the Income Tax Appellate Tribunal during the pendency of the appeal, particularly such orders which are procedural in nature. By use of the expression "every order passed in appeal" the Legislature never contemplated nor intended that appeal may be preferred by an aggrieved party under section 260A to the High Court challenging the interlocutory orders particularly those which are procedural in nature and not affecting the rights and liabilities of the parties."

We find this decision, to which we shall soon return, highly persuasive.

The submissions by counsel Switi carry a lot of weight. Contrary to Mr. Bhojani's views, the statement in *New Musoma Textiles* was indeed a *dictum*. The Tribunal decided the appeal on merit and its statement in the last paragraph of the judgment was made "by the way", in response to counsel for the Respondent, who urged it to set guidelines on the matter. It was not the basis upon which the Tribunal's decision rested.

However, being a *dictum* did not diminish the significance of that statement in any way. It was in the nature of a statement of the Tribunal which, having been given in a judgment, must be treated as authoritative. It was in similar circumstances that Law, J.A. laid down the authoritative

statement in *Dodhia v National Grindlays Bank* [1970] 1 EA 195 at 210-212. That statement is now considered the authority on the proper application of the doctrine of precedent and *stare decisis* in all East African jurisdictions. In Tanzania, the Full Bench of the Court of Appeal in *Jumuiya ya Wafanyakazi Tanzania v Kiwanda cha Uchapishaji cha Taifa* (1988) TLR 146 per Nyalali, CJ cited with approval Justice Law's statement in *Dodhia's Case*.

On the other hand, it is clear that in *New Musoma Textiles*, the Tribunal was not averred with the opportunity of considering the decision in *Global Rubber*. As Mr. Kalolo, a Member of the Tribunal in both *New Musoma Textiles* and in this case stated in his Opinion, *Global Rubber* was not cited to them in *New Musoma Textiles*. Perhaps the Tribunal might not have issued that statement if the case was brought to the panel's attention—especially since, being a *dictum*, it did not have to issue it to decide the case before it. However, upon a careful study of the two decisions (*Global Rubber and New Musoma Textiles*) we do not think that the Tribunal's statement in *New Musoma Textiles* was *per incurium*.

Be that as it may, the present case presents a valuable opportunity for the Tribunal to clarify the legal position. It is important for all litigants before the Board and this Tribunal to be certain about the question as to whether they may appeal to the Tribunal in situations such as the present.

Alive to our jurisdiction to determine matters of procedure in cases coming before us, we feel that there is need for the Tribunal to set the position once and for all whether interlocutory decision of the Board are appealable to the Tribunal. We think we should be guided by the following important principles:

1. The desire to ensure that tax cases are disposed of expeditiously. This was one of the main reason why the Legislature decided to establish a separate dispute settlement mechanism through the Board and the Tribunal to [promote a more efficient system of adjudication than the ordinary court system.
2. As an avenue that has a lot of bearing on the system of tax collection, it is important that tax cases are not subjected to undue delays. The main mischief that prompted the enactment of Act No. 25 of 2002 was the tendency of some litigants and their counsel to frustrate the hearing and determination of cases (both civil and criminal) by raising interlocutory matters and, once they are decided against them, to call in aid the appellate process that will ensure inordinate delays as the case finds its way up to the Court of Appeal, only to be ordered to proceed on the merits after years of painful litigation by the opposing parties.

For these reasons, and taking inspiration from the submissions on public policy advanced by counsel for the Respondent, we are inclined to all the view that appeals from the Board on interlocutory matters should not be encouraged.

However, we thought it necessary to look at the other side of the coin. We are aware of certain matters that may desirably be taken on appeal though they may not have finally determined the rights and obligations of the parties. For instance, in Global Rubber, the facts showed that when the matter was pending appeal at the Board, TRA moved to issue an agency notice against Global Rubber. Global Rubber successfully applied for injunction at the Board. TRA was aggrieved. It filed an appeal to this Tribunal. At the same time, the main appeal was still pending at the Board. The appeal proceedings in this Tribunal did not affect the proceedings in the Board. For that reason, among others, the Tribunal thought it proper to hear and determine the appeal.

We are also of the view, inspired by the decision of the High Court of Bombay in Zenith Case, that appeals on interlocutory matters that go to the root of the appeal and are capable, is successful, to terminate the proceeding in the Board, should be appealable. For instance, matter touching in the jurisdiction of the Board, or where there are issues of time limitation. The categories cannot be closed by any pronouncement by us. It will depend on the peculiarities of the particular circumstances.

As far as the instant case is concerned, we are of the considered view that the matters in controversy between the parties are matter that touch upon the jurisdiction of the Board to entertain the matter. The Board had decided that the appeal filed by the Respondent herein was properly before it and not premature. I ruled that it could proceed the hear the same, rejecting the arguments advanced by TRA. This is a jurisdictional question. If TRA succeeds, it would terminate the entire proceedings, unless and until, as TRA proposes, an assessment is made.

We wish to wind up with a caution. This decision does not in any way touch upon the question as whether one could appeal from an interlocutory decision of this Tribunal. In such a case, the applicable law, the *Appellate Jurisdiction Act*, clearly prohibits appeals or revisions from interlocutory decisions of the High Court and Tribunals whose decision are appealable to the Court of Appeal.

In the result, we dismiss the preliminary objection and order that the appeal by TRA proceeds on merit. Costs to be in the course.

Hon. Dr. Fauz Twaib Judge/ Chairman, Sgd
Prof. J. Doriye Member, Sgd
Mr. J. Kalolo Member, Sgd
23rd October, 2012

Ruling delivered this 23th day of October, 2012, in the presence of Mr. Beleko for the Appellant and Mr. F. Bhojani for the Respondent.

Hon. Dr. Fauz Twaib **Judge/ Chairman, Sgd**
Prof. J. Doriye **Member, Sgd**
Mr. J. Kalolo **Member, Sgd**

23rd October, 2012

ORDER

(1) By consent the appeal shall be disposed of by way of written submissions.
(2) Submissions to be filed as accordance with the following schedule
   a) By the Appellant: On or before 12/11/2012
   b) By the Respondent: on or before 3/12/2012
   c) Rejoinder if any, by 10/12/2012

(3) Hearing (for clarifications) on 14/12/2012 at 14 Hours

Hon. Dr. Fauz Twaib **Judge/Chairman,Sgd**
Prof. J. Doriye **Member,Sgd**
Mr. K. Bundala **Member,Sgd**
22/10/2012

APPELLANT'S WRITTEN SUBMISSIONS IN SUPPORT OF THE APPEAL

(Pursuant to the order of the Honourable Tribunal dated 22nd October 2012)

This Appeal emanates from the decision of the Tax Revenue Appeals Board at Dar es Salaam dated 13th March 2012 in Income Tax Appeal Case

No. 26 of 2011. In this Appeal we have advanced four (4) grounds of Appeal. We propose to argue grounds 1 and 3 together because the said grounds are intertwined and then ground 4 singularly. We accordingly abandon ground No. 2 of the Appeal.

1.0. GROUNDS 1 AND 3 OF THE APPEAL

Ground 1 states that the Board erred both in Law and fact in holding that the letter (Annexture FBI to the statement of Appeal in the Board which is Annexture "TRA3" herein) issued by the Appellant (TRA) on 30.11.2011, was a Notice with regard to existence of liability to pay tax and thus appealable to the Board under Section 14(2) of the Tax Revenue Appeals Act [CAP 408 R.E. 2006].

Ground 3 states that the Board erred both in Law and fact in dismissing the preliminary objection raised by the Appellant challenging the competence of the Appeal filed before it.

1.1. SUBMISSIONS ON GROUNDS 1 AND 3

My Lord and Honourable members of the Tribunal, at the Board level we raised a preliminary objection based on two grounds, that:

(i) The Appeal before the Board was incompetent for being instituted pre-maturely before issuance of tax assessment.

(ii) The Appeal was bad in Law as the Appellant was appealing against a decision which did not exist.

The said grounds were argued together as they were more or less interrelated.

After hearing arguments from both sides, the Tax Revenue Appeals Board first found that indeed there was no assessment issued by the Commissioner General and that TRA's letter (Annexture FBI) ("TRA3" herein) was not a Notice of assessment properly so called. **(Please see the findings of the Board at Paragraphs 3 and 4 of page 6 of the Ruling of the Board).**

It is our humble submission that having held that there was no assessment and that TRA's letter mentioned above was not a Notice of Assessment, the Board was supposed to hold further that since there was no assessment, the Appeal before it was incompetent and uphold our preliminary objection.

As stated in Paragraph 6 of the Background of the dispute, TRA had intended to raise an assessment of tax on investment income under the Income Tax Act [CAP 332 R.E. 2006]. Therefore from its inception the matter involved determination of the Respondent's tax liability by assessment. Thus it was a matter in which tax assessment mechanism set-up under the Income Tax Act was applicable.

In terms of Section 16(1) read together with Sections 12 and 13 of the Tax Revenue Appeals Act [CAP 408 R.E. 2006], in cases where tax assessment mechanism is applicable, as it was in the instant case, a right of Appeal to the Board arises after an assessment has been issued, objected to and finally determined. Therefore since no assessment had been issued, nor objected to and nor finally determined by the Commissioner General, the right of Appeal to the Board did not arise. Hence the Respondent's Appeal before the Board was incompetent for being filed pre-maturely. In view of

the above, the Tax Revenue Appeals Board erred both in Law and fact in dismissing our preliminary objection challenging the competence of the Appeal filed before it.

My Lord and Honourable members of the Tribunal, the Tax Revenue Appeals Board dismissed our preliminary objection after it found that the letter (Annexture FBI) ("TRA3" herein) issued by the Commissioner General on 30.11.2011, was a Notice of existence of liability to pay tax and thus appealable to the Board under Section 14(2) of the Tax Revenue Appeals Act [CAP 408 R.E. 2006]. We humbly submit that this holding by the Board was erroneous both in Law and fact.

While we have not lost sight to the position that by virtue Section 16(1) read together with Section 14(2) of the Tax Revenue Appeal Act, a right of Appeal can also arise when a taxpayer is issued with a Notice of existence of liability to pay tax, it is, however our humble submission that the letter (Annexture FBI) ("TRA3" herein) issued by the Commissioner General on 30.11.2011, did not constitute a Notice of existence of liability to pay tax, and hence the said letter did not give rise to the right of Appeal under Section 14(2) of the Tax Revenue Appeals Act as decided by the Board.

As already submitted herein above, in the instant case, the Respondent's tax liability was required to be determined by assessment. Thus the liability to pay tax would have only been constituted by a Notice of assessment issued under Section 97 of the Income Tax Act. Thus only the Notice of assessment would have constituted a Notice of existence of liability to pay tax. As already decided by the Board, the TRA's letter (Annexture FBI) ("TRA3" herein) was not a Notice of assessment and hence, in the circumstances of the present case, the said letter did not constitute a Notice of existence of liability to pay tax.

Even if we assume (without agreeing) that in the instant case the existence of liability to pay tax can be constituted by any Notice other than Notice of assessment, we still humbly submit that the TRA's letter in question is not such Notice.

The issue whether or not a document issued by the Commissioner General is a Notice of existence of liability to pay tax should be decided by making reference to the relevant substantive Revenue Law and not by reference to Section 14(2) of the Tax Revenue Appeals Act [CAP 408 R.E. 2006]. Section 14(2) of the Tax Revenue Appeals Act is a procedural provision which provides for the route to be followed when a taxpayer objects a Notice of existence of liability to pay tax. Therefore the said provision of the Law does not by itself create a Notice of existence of liability to pay tax. The Notices of existence of liability to pay tax are created by substantive Revenue laws.

In the instant case the relevant substantive Revenue law is the Income Tax Act [CAP 332 R.E. 2006]. Under the provisions of Section 78(1) of Part VII of the Income Tax Act, Tax payable under the said Act, means:-

(a) Income tax imposed under Section 4(1), including amounts payable by a withholding agent or withholdee under Division II, by an instalment payer under Division III and on assessment under Division IV of this part;

(b) Interest and penalties imposed by assessment under Division I of Part VIII;

(c) An amount required to be paid to the Commissioner in collection from a tax debtor under Section 112(9) or 128(3), and

(d) An amount required to be paid to the Commissioner in respect of a tax liability of a third party under Sections 115(2), 116(3) or (4), 117(2) or 118(1) or (3).

For every tax payable enumerated under Section 78(1) of the Act, the Law provides for issuance of Notices to create a legal charge and demand for payment of the tax payable as demonstrated hereunder:-

(a) Where tax is payable by withholding agent or withholdee (which means withholding or PAYE Tax) under Division II of Part VII of the Act, a Withholding or PAYE Tax Notice **(practically known as Withholding or PAYEE Certificate)** is issued under the Income Tax Regulations, 2004, to create a legal charge and demand for payment of Withholding or PAYE Tax from the Withholding agent or Witholdee.

(b) Where the tax is payable by an Instalment payer under Division III of Part VII of the Act, a Notice (**practically known as instalment payer's Notice)** is issued under Section 89(8) (b) & (9) of the Act to demand for payment of the tax from the Instalment payer.

(c) Where the tax is payable on assessment under Division IV of Part VII of the Act, a **Notice of assessment** is issued under Section

97 of the Act to create a legal charge and demand for payment of tax from the assessee.

(d) Where the tax payable is interest or penalty imposed under Division I of Part VIII of the Act, a **Notice of assessment of interest or penalty** is issued under Section 103(4) of the Act to create a legal charge and demand for Payment of interest or penalty from the assessee.

(e) Where the tax is payable in collection from a tax debtor, a Notice is issued under Sections 112(9) or 128(3) of the Act requiring the tax debtor to pay the tax payable to the Commissioner.

(f) Where the tax payable is in respect of a tax liability of a third party, a Notice **(practically known as third part Notice)** is issued under Sections 115(2) or 116(2) & (3) of the Act requiring an officer of an entity or receiver to pay tax to the Commissioner.

(g) Where the tax payable is in respect of a tax liability of a tax debtor, a Notice **(practically known as Agency Notice)** is issued under Sections 117(2) or 118(1) or (3) of the Act requiring an Agent or "payer" to pay the tax on behalf of the tax debtor.

From the foregoing, it is our humble submission that the Notices mentioned above are the ones which constitute Notices of existence of liability to pay tax under the Income Tax Act CAP 332 R.E. 2006] and no other Notices. The said Notices once issued and served upon a taxpayer do give rise to the right of Appeal under the Tax Revenue Appeal Act [CAP

408 R.E. 2006]. However, the route of Appeal is determined by the type of Notice issued and served upon the payer. Where a Notice issued is a Notice of assessment under Section 97 or Section 103(4) of the Act, the aggrieved taxpayer cannot Appeal to the Board directly. Instead the taxpayer must first object to the assessment by way of a Written Notice to the Commissioner General under Section 12(1) of the Tax Revenue Appeals Act and comply with requisite conditions imposed under Section 12(2) and (3) of the same Act; whereafter the Commissioner is enjoined to revisit the assessment and make final determination of the assessment under Section 13 of the said Act. If the Commissioner makes a final determination by which the taxpayer is still aggrieved, then the taxpayer can now Appeal to the Tax Revenue Appeals Board under Section 16(1) of the Act to challenge the final determination of assessment.

However, where a Notice issued by the Commissioner is a Notice other than a Notice of assessment; e.g. is a Withholding or PAYE tax Certificate, or is an instalment payer's Notice, or is a third party Notice, or is an Agency Notice, the aggrieved taxpayer can go to the Board directly under Sections 14(2) and 16(1) of the Tax Revenue Appeals Act or Section 6 of the Tanzania Revenue Authority Act [CAP 399 R.E. 2006] to challenge the decision of the Commissioner contained in the respective Notice.

Coming back to our letter (Annexture FBI) ("TRA3" herein) issued by the Commissioner on 30.11.2011 which is subject of the instant case, it is our humble submission that the said letter is not a Notice of existence of liability to pay tax under the Income Tax Act. This is so because the said letter does not fall on any category of Notices of existence of liability to pay tax created under the Income Tax Act as demonstrated hereinabove. The said letter is not a Notice of assessment of tax or interest set-up under

Sections 97 and 103(4) of the Act. (This position is also supported by Board's decision as stated hereinabove); the said letter is not a Withholding or PAYE Tax Certificate created under the Income Tax Regulations; nor is it an Instalment Payer's Notice created under Section 89(8)(b) & (9) of the Act, nor is it a Notice for collection of tax from a tax debtor under Section 112(9) or (128) (3) of the Act, nor is it a third party Notice set-up under Section 115(2) or 116(2) and (3) of the Act and nor is it an Agency Notice set-up under Sections 117(2) or 118(1) or (3) of the Act. Therefore the said letter does not fall within the ambit of Notices of existence of liability to pay tax created under the income Tax Act. Indeed had the board made reference to the provisions of the Income Tax Act exposed herein above, it wouldn't have reached the decision that the said letter was a notice of existence of liability to pay tax. The Board reached a wrong decision because it did not go through the said provisions of the income Tax Act and instead it made a generalised statement that our letter was a Notice of existence of liability to pay tax whilst infact it was not.

It would appear that in reaching the decision that our letter was a Notice of existence of liability to pay tax, the Board was influenced by the words appearing on the 5th line of the last paragraph of the letter couched thus; **"therefore the tax payable is US$ 196,000,000"**. It is our humble submission that the said words did not have the object of conveying information to the Respondent Company that it was liable to pay tax amounting to US$ 196,000,000 as stated by the Board at page 8 of its Ruling. From the outset of the last paragraph of the letter, TRA had categorically stated that it was intending to issue an assessment on investment income. Therefore the phrase **"tax payable is US$ 196,000,000"** simply means that the said tax was payable on

assessment. That is to say that the said tax was payable after issuance of a notice of assessment under Section 97 of the Income Tax Act and thus the Respondent Company was to be legally informed of its liability to pay tax and the date by which the tax was payable through a Notice of assessment which was intended to be issued later. So it was only the Intended Notice of assessment which would have legally conveyed information to the Respondent Company that it was liable to pay tax and not our letter referred to herein above.

Assuming, however, that the said letter conveyed information to the Respondent Company that it was liable to pay tax amounting to US$ 196,000,000 (the fact which we dispute), it is our humble submission that the said letter could not constitute a Notice of existence of liability to pay tax under the Income Tax Act as decided by the Board. This is so because, as already submitted, the said letter is not one of the Notices of existence of liability to pay tax prescribed under the Income Tax Act and Regulations. Therefore the said letter could not create a legal charge and demand of payment of tax from the Respondent Company.

Even if the said letter were one of the Notices prescribed under the Law, the same could not amount to a Notice of liability to pay tax because it did not even embody an element of demand of payment of tax from the Respondent Company. The said letter simply intimated that the tax payable was US$ 196,000,000, but did not go further and require the Respondent Company to pay the said tax. Indeed we could not demand payment of the said tax from the Respondent because we knew that the liability to pay the said tax would be constituted after issuance of assessment and Notice of assessment under Section 97 of the Income Tax

Act. The wording of the same Paragraph after the words **"tax payable"** are related to Stamp Duty which is a different case No. 27 of 2011.

In view of the foregoing, we humbly re-iterate our position that the TRA's letter (Annexture FBI) ("TRA3" herein) was not a Notice of existence of liability to pay tax. Therefore the said letter did not give rise to the right of Appeal under Section 14(2) of the Tax Revenue Appeals Act as decided by the Board. And since there was no right of Appeal, the Respondent Company's Appeal No. 26 of 2011 which was instituted before the Board was legally incompetent for being instituted pre-maturely. The Board ought to have upheld our preliminary objection and dismissed the said Appeal at its threshold.

GROUND NO. 4

Ground Number 4 states that the decision of the Board, if left unreversed, will set a bad precedent whereby taxpayers and/or other persons will be filing Tax Appeals before the Board without there being tax assessments or other appealable decisions by the Commissioner General thereby frustrating the entire Tax Administrative and Appellate machinery set up under the Laws.

SUBMISSIONS ON GROUND 4

My Lord and Honourable members of the Tribunal, the decision of the Board is that our letter dated 30.11.2011 expressing our intention to issue tax assessment was a Notice of existence of liability to pay tax and thus, according to the Board, the said letter constituted an appealable decision under Section 14(2) of the Tax Revenue Appeals Act. We have shown herein above that the said letter was not a Notice of existence of liability to pay tax under the Income Tax Act; and that the said Notice, therefore, did not constitute an appealable decision under Section 14(2) of the Tax

Revenue Appeals Act. That being the case, the decision of the Board which acknowledges the said letter as a Notice of existence of liability to pay tax whilst it is not is bad in Law.

It is our humble submission that the decision of the Board ought to be reversed by this Honourable Tribunal. If left unreversed, the said decision will set a bad precedent, in that it will allow taxpayers to file pre-mature Appeals before the Board. This will not only frustrate Tax Administrative and appellate machinery set-up under the Tax Revenue Laws and the Tax Revenue Appeals Act, but also it will invite anarchy in tax administration in the country.

In view of the foregoing submissions, we humbly pray to the Honourable Tribunal to allow this Appeal and reverse and/or set-aside the decision of the Board dated 13th March 2012 in Income Tax Appeal Case No. 26 of 2011 so as to allow the Commissioner General complete the exercise of making and issuing assessment of tax as he had intended to do before the case was taken to the Board. We also pray to be awarded costs of this Appeal.

We humbly submit.

(Written submissions by the Respondent pursuant to the Honourable Tribunal's order of October 22nd 2012)

My Lord and Honourable Members,

Having read the Appellant's submissions ("TRA"), one of the issues that is the subject matter of the submissions on the Appeal, is whether the letter issued by TRA (Annexure FB 1 in the Tax Revenue Appeals Board which is dated November 30th 2011) is a notice of existence of liability. If it is a

notice of existence of liability, then under s14(2) of the Tax Revenue Appeals Act (Cap 408 R.E. 2006) ("Tax Revenue Appeals Act") TRA have succumbed in paragraph 3 of page 3 of its submissions that a right of appeal exists and the appeal at the Tax Revenue Appeals Board ("the Board" or "Board") was not filed prematurely. For ease of reference this paragraph is copied herein below where TRA clearly states:

> *While we have not lost sight to the position that by virtue Section 16(1) read together with Section 14(2) of the Tax Revenue Appeals Act, a right of Appeal can also arise when a taxpayer is issued with a Notice of Existence of liability to pay tax, it is, however our humble submission that the letter (Annexure FB 1)(TRA3 herein) issued by the Commissioner General on 30.11.2011, did not constitute a Notice of existence of liability to pay tax, and hence the said letter did not give rise to the right of Appeal under Section14(2) of the Tax Revenue Appeals Act as decided by the Board. (Emphasis ours)*

From the above, if Annexure FB 1 is a notice of existence of liability, then the Appeal filed by the Respondents herein at the Board is not premature, not bad in law and was properly before the Board. At this outset we must point out that in its submissions TRA has not stated what FB 1 is if it is not a notice of existence of liability.

My Lord and Honourable Members, before we embark on whether or not FB 1 is a notice of existence of liability, we wish to take you through some general provisions of the Tax Revenue Appeals Act and the Tanzania Revenue Authority Act (Cap 399 R.E. 2006) ("TRA Act") which provide for right to access the Board.

The Respondent herein appealed to the Board under section 14(2) of the Tax Revenue Appeals Act, section 6 of the TRA Act and Rule 6(1) of Tax Revenue Appeals Board Rules GN No 57/2001 ("TRAB Rules").

The Tax Revenue Appeals Act in section 14(2) clearly states:

> *14(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. (emphasis ours)*

From the above, it is clear that under s14(2) of the Tax Revenue Appeals Act, the doors to file an appeal at the Board are open for an aggrieved person who objects a notice by TRA with regards to the existence of liability to pay any tax.

We also wish to take you to Section 6 of the TRA Act which states:

> *Any person who is aggrieved by the decision of the Commissioner-General in relation to any act or omission in the course of the discharge of any function conferred upon him under the law set out in the First Schedule to this Act, may appeal to the Board in accordance with the provisions of the Tax Revenue Appeals Act .* (emphasis ours)

In terms of s6 of the TRA Act above, any person who is aggrieved by any decision in relation to any act or omission of the Commissioner General in the course of discharge of any function conferred on him, may appeal to

the Board. This provision gives a wider scope for an aggrieved person to appeal to the Board.

We can conclude from the above analysis of the provisions of the laws, that there are a number of scenarios an aggrieved person can appeal to the Board as we show below:

1. The first scenario is under s16 of the Tax Revenue Appeals Act following the procedure laid down in s12 of the same Act which includes filing an objection to the Commissioner General and upon admission and determination of the objection, coming to the Board by way of an appeal if still aggrieved.

2. The second scenario is under s14(2) of the Tax Revenue Appeals Act, where an aggrieved party can directly come to the Board if he or she is served with a notice of existence of liability by TRA.

3. The third scenario is under s6 of the TRA Act which also allows an aggrieved party to go directly to the Board.

My Lord and Honourable Members, the Tax Revenue Appeals Acts is a substantive and procedural law that administers dispute settlement arising under the laws administered by the TRA. We have not seen any tax law or regulations that force an aggrieved party to only appeal based on the s16route alone. To allow for checks and balances especially in the administration of justice and in the event TRA and the aggrieved person are in dispute, the Tax Revenue Appeals Act has specifically provided for

this direct mechanism (under s14(2) of the Tax Revenue Appeals Act and s6 of the TRA Act) for the aggrieved person to goto the Board to ensure that Tax matters are resolved expeditiously. As we shall show below, these situations above come into force where TRA has not issued any assessment but has raised a notice of existence of liability or caused an injury to a party by virtue of its acts or omissions as it is in this matter.

The Respondent herein did not go to the Board under s16 of the Tax Revenue Appeals Act and hence there is no tax assessment dispute there. The area of contention is whether the letter that was issued by TRA (Annexure FB 1) is a notice of existence of a liability. If it is, this appeal before the Tax Revenue Appeals Tribunal ("the Tribunal" or "Tribunal") should fail and the matter should be sent back to the Board to determine the Appeal on its substantive merits, which will ultimately determine whether the Respondent is liable or not on the merits of arguments.

Annexure FB 1- notice of existence of liability?

Annexure FB 1 in the last paragraph reads:

> *In light of the above, Tanzania Revenue Authority (TRA) is intending to issue an assessment on investment income as the transaction involved a domestic asset and thus the income earned has a source in the United Republic of Tanzania by virtue of Section 68(1)(a) of the Income Tax Act. The adjustment done is on the sale price of the property which is US$ 980,000,000 times a rate of 20%, therefore the* ***tax***

> ***payable*** *is US $ 196,000,000. Also you are* ***supposed to pay*** *Stamp Duty on conveyance of property under Article 23 of the Stamp Duty Act Cap 189 (R.E. 2006) which is US $ 980,000,000 times a rate of 1%, therefore the tax payable is US $ 9,800,000.* (emphasis ours).

TRA is saying so without taking into account that it has no jurisdiction to tax the Respondent herein as the transaction was carried outside the United Republic of Tanzania and that did not result in any change of shareholding in Tanzania and hence no tax whatsoever applies. TRA raised this notice despite there being a plethora of authorities to that effect. However this remains to be a substantive issue which will be adjudicated upon at the opportune time.

Reading the paragraph from FB 1 above it can clearly be stated that the notice sent by the TRA (Annexure FB 1) is a notice as to existence of a liability. One need not look beyond the plain words that have been used by the TRA in the Annexure FB 1.

TRA has unequivocally stated and decided that "there is an income earned, which has a source in Tanzania." TRA also goes ahead to calculate this liability stating "therefore the tax payable is US $ 196,000,000." Thereafter TRA says that "Also you are supposed to pay Stamp Duty…" meaning that in addition to paying the US$ 196,000,000, the Respondent herein is liable to pay US$ 9,800,000. TRA hasgiven figures of amounts to be paid. It is clearly holding the Respondent herein liable to a total payment of US$ 196M + US$ 9.8M equalling to a total liability of US$ 205.8M. If it is not a

liability that TRA has established and notified the Respondent herein, what is it?

Even if one refers to the first letter TRA ("first letter") wrote to the Respondents herein, dated October 18th 2011 (Annexure FB 2 in the Statement of Appeal to the Board- written prior to Annexure FB 1), in the last paragraph of page 4, TRA states:

> *Following completion of the acquisition process Mkuju River …. However our record does not show if any tax has been paid with reference to the acquisition. Pleasefurnish us with the necessary records to show that relevant taxes were paid in Tanzania."* (Emphasis ours)

My Lord and Honourable Members, one can infer from this first letter that TRA had already established that there is existence of a tax liability and required the Respondent herein to furnish it with "necessary records to show that relevant taxes were paid in Tanzania." One can only pay taxes if one is liable to pay taxes.

FB 1 came after this first letter by TRA was written, in which TRA actually gave amounts of the taxes that were payable further cementing that there was a liability that existed which was notified to the Respondent herein.

When you read the first letter, TRAwas asking the Respondent herein to furnish it with taxes paid. The Respondent herein wrote back through FB Attorneys vide letter dated November 15th 2011 and marked FB-3 (in the Statement of Appellant the Board) that the transaction did not take place in Tanzania and no local shareholding had changed. TRA then responded

with FB 1 and clearly established the exact amount of liability that was payable. TRA in FB 1 has clearly said that the tax payable is US $ 196,000,000 and the tax payable is US $ 9,800,000. This is clearly a notice of existence of liability totalling to US $ 205,800,000. We reiterate that tax can only be payable if one is liable or held liable to pay.

My Lord and Honourable Members, in paragraph 4 of page 3 of TRA's submissions, TRA has in the last sentence said:

> *"As already decided by the Board, the TRA's letter (Annexure FB 1) (TRA3 herein) was not a notice of assessment and hence, in the circumstances of the present case, the said letter did not constitute a Notice of existence of liability to pay tax."*

TRA in the statement above has failed to differentiate between a notice of assessment and a notice of existence of liability. If TRA was going to issue an assessment, it should have proceeded to issue an assessment. However it did not do so. TRA clearly decided to issue a notice of existence of liability to the Respondent herein, and went further to state the amount of tax payable. TRA seems to claim above that a notice of existence of liability to pay can only be by way of a notice of assessment. This argument has no legal basis and TRA have failed to provide one. The Tax Revenue Appeals Act precisely provides for separate sections and routes to be followed by an aggrieved person when there is an assessment and a separate section and route when there is a notice of existence of liability.

These are not one and the same thing and the legislature through the Tax Revenue Appeals Act, in recognising this, has provided for it separately.

The confusion of what is a notice of existence of liability continues in paragraph 3, last line of the TRA submissions where TRA states:

> *"The Notices of existence of liability to pay tax are created by substantive Revenue Laws."*

On page 5 under (c) TRA refer to "Division IV of Part VII of the Act, a Notice of assessment is issued under Section 97 of the Act to create a legal charge and demand for payment of tax from the assesse" and further on page 6 state the following:

> *"From the foregoing, it is our humble submission that the notices mentioned above are the ones which constitute Notices of existence of liability to pay tax under the income Tax Act Cap332 R.E. 2006 and <u>no other notices</u>." (Emphasis ours)*

From the above, TRA has again misdirected itself in saying that a notice of assessment is a notice of existence of liability. We humbly submit that these are two different notices. If they are the same, then no one would ever file objection proceedings to the TRA under s12 of the Tax Revenue Appeals Act. Everyone would come directly to the Board. TRA's own submissions are hence contradictory.

TRA is also concluding that no other notices (other than the ones it has listed on pages 5 and 6 of its submissions) constitute a notice of existence of liability. Again, with due respect to our learned counsel from TRA, this incorrect as we show below.

The word notice of existence of liability is not defined anywhere in the tax statutes. We have also not found anywhere in the Income Tax Act where there is such a limitation on notices as stated by TRA on pages 5 and 6 of its submission. In fact and upon TRA's own admission for withholding tax when tax is payable it is not even called a notice but merely withholding or PAYEE certificate (see TRA's submissions on page 5). Yet TRA are agreeable to this PAYEE certificate being called a notice of existence of liability but not FB 1.

TRA in the last paragraph of page 6 of its submissions has also mentioned that "However, where a notice issued by the Commissioner is a Notice other than a notice of assessment…". We humbly reiterate that FB 1 is not a notice of assessment (as agreed by all parties), hence it is a notice other than a notice of assessment and hence, upon TRA's own admission in its submissions, it is appealable to the Board under S14(2) of the Tax Revenue Appeals Act.

My Lord and Honourable Members, at page 7 of the TRA submissions TRA claims in the 1st paragraph as follows:

> *Coming back to our letter (Annexure FB1)(TRA3 herein) issued by the Commissioner on 30.11.2011 which is subject of*

the instant case, it is our humble submission that the said letter is not a Notice of existence of liability to pay tax under the Income Tax Act. This is so because the said letter does not fall on any category of Notices of existence of liability to pay tax created under the Income Tax Act as demonstrated hereinabove. The said letter is not a …of the Act. Therefore the said letter does not fall within the ambit of notices of existence of liability to pay tax created under the Income Tax Act."(emphasis ours)

As stated before, in response to the above paragraph in the TRA submissions, we respond that the Income Tax Act does not have a specific list of notice of existence of liability. TRA has conveniently transcribed a list that suits this particular appeal. In fact, the Income Tax Act does not use the word notice of existence of liability, we believe, simply because it is a wide word. For example and as stated before, TRA state that a withholding or PAYE tax certificate is a notice of existence of liability but FB 1 is not. There is no formal definition of what constitutes a notice of existence of liability and hence we should interpret this using its plain meaning.

TRA further contends in its submissions that the "tax would only be payable after an assessment."This has no support of the law and we respectfully disagree. TRA has categorically stated that the tax payable is US $ 196,000,000 and on stamp duty the tax payable is US $9,800,000, hence there is a clear existence of a liability that has been established by the TRA which is appealable under s14(2) of the Tax Revenue Appeals Act and s6 of the TRA Act.

In paragraph 1 on page 8 of the TRA submissions, TRA states that "So it was only the intended notice of assessment which would have legally conveyed information to the Respondent Company that it was liable to pay tax and not our letter referred to hereinabove."

We ask ourselves, what and why did TRA issue the letter? TRA could have issued the assessment directly but chose to issue this letter, which is a notice to the Respondent herein that there exists a liability to pay tax. Such a notice is appealable directly to the Board.

In paragraph 2 on page 8, TRA introduces another limb to its argument and says:

> *"Assuming, however, that the said letter conveyed information to the Respondent Company that it was liable to pay tax amounting to US$ 196,000,000 (the fact which we dispute), it is our humble submission that the said letter could not constitute a Notice of existence of liability to pay tax under the Income Tax Act as decided by the Board. This is so because, as already submitted, the said letter is not one of the Notices of existence of liability to pay tax prescribed under the Income Tax Act and Regulations. Therefore the said letter could not create a legal charge and demand of payment of tax from the Respondent Company." (Emphasis ours)*

In response to the above, we reiterate what we stated above- that the Income Tax Act does not have prescribed notices of existence of liability.

TRA in paragraph 3 on page 8 further states:

> *"Even if the said letter were one of the Notices prescribed under the law, the same could not amount to a notice of liability to pay tax because it did not even embody an element of demand of payment of tax from the Respondent Company. The said letter simply intimated that the tax payable was US $196,000,000, but did not go further and require the Respondent Company to pay the said tax…" (Emphasis ours).*

TRA seems to be implying above that a notice can only be a notice of existence of liability if a demand is made for payment. We humbly disagree with that contention. Notification of existence of a liability is different from a demand being made to extinguish that liability. In FB 1 clearly there is a liability of US$ 196,000,000 and US$ 9,800,000 that TRA has said is payable. Annexure FB 1 is very clear- that the Respondent company had a tax liability and the amount was also stated therein. Hence the annexure FB 1 clearly stated existence of a liability, which is exactly provided for under s14(2) of the Tax Revenue Appeals Act as being one of the areas upon which the Respondent herein could appeal. TRA's contention that FB 1 was not a notice of existence of liability has no legs to stand on.

My Lord and Honourable Members, TRAs last ground no 4 is submitted on page 9 of the TRA submissions and states:

"Ground Number states that the decision of the Board, if left unreversed, will set a bad precedent whereby taxpayers and/or other persons will be filing Tax Appeals before the Board without there being tax assessments or other appealable decisions by the Commissioner General thereby frustrating the entire Tax Administrative and Appellate machinery set up under the laws." (Emphasis ours).

We submit that the Appeal by the Respondent herein at the Board was not prematurely filed. Not all appeals to the Board are based on assessments. The Tax Revenue Appeals Act actually allows appeals to be filed under s14(2) where no assessment exist to expedite the process of tax dispute resolution. It is meant to do exactly opposite of what TRA are contending in their 4th ground of Appeal. Infact, TRA appealing to this Honourable Tribunal, is further delaying the Appeal at the Board from being heard on its substantive merit.

The law is clear in that if there is a notice as to existence of a liability, the aggrieved person can come to the Board by way of an appeal. The legislature when enacting this law clearly understood the importance of this provision to expedite the resolution of tax collection in the country. The decision of the Board allowing the Appeal to be heard does not in any way set a bad precedent. It is in conformity with s7 of the Tax Revenue Appeals Act which gives the Board jurisdiction to hear all disputes of a civil nature arising from revenue laws administered by the TRA without any limit. In fact, the bad precedent being set here is TRA not wanting to go into the

merits of the notice issued by itself on the existence of liability, which merit we believe there is none. In fact there are decisions of the Board and this Honourable Tribunal on exactly the same point which have gone against TRA. Perhaps that is the cause of TRA's unwillingness to hear the substantive appeal pending before the Board.

My Lord and Honourable Members, FB 1 was drafted by TRA. The words in FB 1 are chosen by TRA itself and communicated to the Respondent's herein. TRA has failed to show any authority on what constitutes and what does not constitute a notice of existence of liability. FB 1 speaks for itself in clear unambiguous terms and anyone reading FB 1 will see it as a notice of existence of liability to pay tax.

S14(2) of Tax Revenue Appeals Act vis a vis Stamp Duty

My Lord and Honourable Members, in its submissions at the Tribunal in Tax Appeal No. 5 of 2012, TRA stated that "*The 1st schedule to the TRA Act has a list of laws that are administered by the TRA. Under some these laws, there is no provision for assessments. Under the Stamp Duty Act, TRA does not issue a notice of assessment. Such cases were the ones envisaged by s14(2) of the ITA. Where, on the other, the law provides for assessment mechanism, there is no way he can go to the Board. The matter must go through the objection systems. There was thus no right on the part of the Appellant to appeal to the Board.*"

Apart from TRA being totally misguided by making this above statement, we must bring to the attention of this Tribunal that the Respondent herein, in receiving FB 1 from TRA was also held liable to payment of Stamp Duty amount to US $ 9,800,000 which the Respondent appealed to the Board vide Appeal No 27 of 2011 (appeal still pending). In this Appeal No 27 of 2011, TRA has also raised a preliminary objection that the appeal is incompetent for being instituted pre maturely before issuance of tax assessments and that the appeal is bad in law as the Appellant is appealing against a decision which does not exist.

We find it quite shocking that in the Barrick appeal TRA states that for Stamp Duty the S14(2) route applies but in Appeal No 27 of 2011 TRA is raising a preliminary objection that this route does not exists. TRA is clearly coming before the Board and Tribunal with double standards and twisting interpretation to suit its needs. That must be strongly condemned by the Tribunal.

The scenario under Section 6 of TRA Act

My Lord and Honourable Members, the recent decision by this Hon Tribunal in the matter of TRA v African Barrick Gold plc, Tax Appeal No 5 of 2012 ("Barrick case"), has extensively covered the routes open to an aggrieved person to appeal which includes the route open under s6 of the TRA Act.

At the bottom of page 5 of the Judgment of the above matter, the Tribunal stated:

> *"With respect, we are not persuaded to agree with Counsel Switi on this point. We think the notice was both a decision as well as an act by the Appellant. Indeed …" (emphasis ours)*

The Tribunal further states on page 6, para 2, of the Judgment:

> *"These words informed the Respondent in no uncertain terms that a decision had already been made as to the Respondent's liability to tax. And since the decision or act was disputed by the Respondent, it was proper for the Respondent to exercise its right of appeal to the Board. Also, under section 14(2) of the Tax Revenue Appeals Act, it is open to a taxpayer who objects to a notice by the Commissioner General with regards to liability to pay any tax, duty, fees, levy r charge, to refer his objection to the Board for determination." (emphasis ours)*

It is crystal clear from FB 1 that a decision has already been made by TRA as to the Respondent's liability to tax and, being aggrieved, the Respondent herein appealed to the Board under s6 of the TRA Act. TRA may want to distinguish between FB 1 and the Notice of existence of liability issued to Barrick in the Barrick case above, but there is very little to distinguish in as far as the notice and liability is concerned. FB 1 is on all fours with the notice issued to Barrick.

The Tribunal further states on page 6 para 4 line 5 that:

> *"For the same reasons, we agree with the Board that the words were written intentionally and that they created a liability to pay tax." (emphasis ours)*

To reinforce our argument of the various routes to appeal and to reinforce our notion that a tax liability had been made by virtue of FB 1, we refer this Honourable Tribunal to page 9 of the Barrick judgement:

> *"We thus agree with the Board that the Notice issued by the Appellant constituted an appealable decision or act in terms of sections 6(1) and 14(2) of the Tax Revenue Appeals Act. The import of those provisions was to enable any taxpayer who is aggrieved by a decision of the Commissioner General to file an appeal to the Board, irrespective of whether or not the said decision or act constituted an assessment.*
>
> *We are not convinced by the Appellant's view that these provisions only apply where the decision, act or omission is not amenable to assessment. We do not read the law to say so. In any case, the statement in the notice, in bold letters (which we have held not be an error as the Appellant would have us believe), that the moneys mentioned therein were payable immediately, leaved us with no doubt at all that the notice was meant to be acted upon, and that a decision on*

the Respondent's liability to pay the said amount as tax had already been made."

The only difference we see between FB 1 and the Barrick notice is that in the Barricknotice the amounts were to be paid immediately as opposed to FB 1 where the word "immediately" was not used. The force of the statement in this Honourable Tribunal's ruling above is on the Respondents liability to pay tax having been made, which is exactly what FB 1 states, clearly, unambiguously and in simple words that need no further interpretation. Thus, and very humbly so, any attempts by TRA to distinguish the notice in Barrick and FB 1 based on the word "immediately" will hold no strength as in both cases the liability has already been established.

My Lord and Honourable Members, hence FB 1 in addition to being a notice as to existence of liability under s14(2), also constitutes a decision by the TRA in relation to an act or omission in the course of a function conferred upon TRA under s6 of the TRA Act and hence appealable to the Board. TRA's counter argument that FB 1 was merely an intention has thus got no support of the Law. We ask ourselves how can one comply with an intention? FB 1 was a decision by TRA that a tax liability does exist and payable which clearly brings FB 1 under the ambit of s6 of the TRA Act. TRA has decided that a tax liability arose and it clearly communicated so to the Respondent herein. This decision to liability is clearly appealable under s6 of the TRA Act.

My Lord and Honourable members, we conclude as follows:

1. That FB 1 is clearly a notice of existence of liability and appealable to the Board under s14(2) of the Tax Revenue Appeals Act.
2. That FB 1 is also clearly a decision by TRA in relation to an act or omission in the course of a function conferred upon TRA and hence appealable to the Board under s6 of the TRA Act.
3. That both the Board and this Hon. Tribunal have made consistent decisions on Notices like FB 1 (see Barrick case supra amongst others) holding it to be both notice of existence of liability (hence appealable under s14(2) supra) and decisions by TRA (hence appealable under s6 supra).
4. That doors to appeal are not only open when there is an assessment.
5. That there is no dispute whether FB 1 is an assessment- both parties herein agree that it is not an assessment.
6. That s6 of TRA Act creates a very wide right of appeal.
7. That under the Income Tax Act or the Tax Revenue Appeals Act there are no specific list of notices of existence of liability as claimed by the Appellants herein.

My Lord and Honourable Members, based on the foregoing, we pray to this Honourable Tribunal to dismiss the Appeal with costs.

We humbly so submit.

APPELLANT'S REJOINDER SUBMISSIONS

(Pursuant to the Order of the Honourable Tribunal dated 22nd October 2012)

MAY IT PLEASE YOUR LORDSHIP AND HONOURABLE MEMBERS of the Tribunal that the humble Counsel for the Appellant make a Rejoinder to the Respondent's submissions and submit as follows:-

In the first place we would like to clear the cobwebs contained in the Respondent's written submissions as hereunder:-

It is not true, as submitted by the Respondent's Counsel in Paragraph 2 of page 1 of the Respondent's submissions, that TRA has succumbed that a right of appeal exists and the Appeal at the Tax Revenue Appeals Board was not filed prematurely. We humbly state that Paragraph 3 of page 3 of our main submissions does not contain an admission that in the instant case a right of appeal to the Board existed. We stated categorically in the same paragraph (lines 4-8) that Annexture FBI did not constitute a Notice of existence of liability to pay tax under the Income Tax Act, hence did not give rise to the right of appeal under section 14(2) of the Tax Revenue Appeals Act. And that since the right of Appeal did not exist, the Appeal before the Board was filed pre-maturely. We have maintained this position throughout our main submissions and we re-iterate the same here.

We re-iterate the position that from the beginning, the instant case involved tax assessment process which was to be completed by issuance of Notice of assessment under section 97 of the Income Tax Act. Therefore the existence of liability to pay tax would have been created after issuance of Notice of assessment. That is why we stated in Paragraph 3 of Annexture FBI that:-

"In the light of the above Tanzania Revenue Authority (TRA) is intending to issue an assessment ....."

Respondent's Counsel contends in Paragraph 4 of page 6 of the Respondent's written submissions to the effect that TRA did not issue an assessment but decided to issue a Notice of existence of liability to the Respondent.

This contention does not reflect the correct position. The correct position is that the assessment was to be issued after Annexture FBI had been sent and received by the Respondent company. Annexture FBI was issued on 30th November 2011 and received by the Respondent company on 02nd December 2011 as stated in Paragraph 3(b) of the statement of Appeal filed in the Board. On 05th December 2011, the Respondent rushed to the Board and lodged Tax Appeal No. 26 of 2011 and served same upon TRA on the same day. So the Appeal before the Board was instituted and served upon TRA practically within three (3) days from the date Annexture FBI was received by the Respondent and hence preventing TRA from proceeding with issuance of assessment. Surely, this Honourable Tribunal will note that the hurried filing of the Appeal before the Board was calculated to prevent TRA from issuing an assessment and circumventing the Application of section 12 of the Tax Revenue Appeals Act.

We humbly submit that as the case involved tax assessment process, the Respondent company was not entitled to go to the Board and the Board was not vested with jurisdiction to take cognizance of the matter unless and until an assessment had been issued, objected to and finally determined.

In his written submissions, the Respondent's Counsel has vehemently submitted that the Respondent company was entitled to go to the Board

under section 14(2) of the Tax Revenue Appeals Act and section 6 of the Tanzania Revenue Authority Act because Annexture FBI issued by TRA was a Notice of existence of liability. The Respondent's counsel has filled almost twelve (12) pages trying to convince this Honourable Tribunal that Annexture FBI is a Notice of existence of liability.

On our part we re-iterate the position that Annexture FBI is not a Notice of existence of liability to pay tax because the said notice is not specified under the Income Tax Act as one of the Notices of existence of liability to pay tax. The Respondent's Counsel contends at divers of time that the Income Tax Act does not have a specific list of Notices of existence of liability. To this we beg to rejoin and submit as follows:-

Under section 3 of the Income Tax Act, the word **"tax"** has the meaning ascribed to it under section 78 of the same Act. Section 78 lists all types of taxes payable under the Act. Correspondingly, the Act in various sections and Regulations made under it, specify the Notices which can be issued by the Commissioner to signify existence of liability to pay the said taxes. We listed the said Notices at pages 5 & 6 of our main submissions. So it is clear that the Income Tax Act specifies Notices of existence of liability to pay tax which correspond to the taxes payable under section 78. Any Notice or document which does not correspond with taxes payable under section 78, is not a Notice of existence of liability to pay tax under the Income Tax Act. This is so because under the Income Tax Act there is no tax payable other than taxes payable under section 78. So in order for a Notice to be a notice of existence of liability to pay tax, it must correspond to the taxes payable under section 78.

Annexture FBI does not correspond with any tax payable under section 78 of the Act. It does not relate to any tax payable enumerated under the

said provision of the Law. That being the position, it is our humble submission that Annexture FBI is not a Notice of existence of liability to pay tax under the Income Tax Act, and thus the said letter cannot be gone to the Board under section 14(2) of the Tax Revenue Appeals Act nor section 6 of the TRA Act.

Assuming (without agreeing with the Respondent's Counsel) that there is no definition of what constitutes a Notice of existence of liability under the Income Tax Act and hence any document issued by the Commissioner can constitute a Notice of existence of liability, we would still submit that Annexture FBI falls far short from being a Notice of existence of liability to pay tax. This is so because in Annexture FBI, TRA did not require the Respondent Company to pay Income tax. Since in the said letter we did not require the Respondent company to pay tax, the letter does not amount to a Notice of existence of liability to pay tax.

Respondent's Counsel has submitted to the effect that a Notice of existence of liability can be constituted without demand of tax being made. We humbly disagree with that proposition. A Notice of existence of liability to pay tax can only be constituted when payment of tax is demanded from a taxpayer thereby making it incumbent upon the taxpayer to act upon or comply with the Notice. Therefore demand of payment of tax is a necessary ingredient for a notice of existence of liability to pay tax to be constituted. This is also envisaged under section 14(2) of the Tax Revenue Appeals Act which clearly states that a person may go to the Board if he objects **"a notice issued by the Commissioner General with regards to the existence of liability to pay tax, duty, fees, levy or charge...."** (emphasis supplied). So what is envisaged under section 14(2) of the TRAA is not existence of liability alone but existence of

liability to pay tax. Existence of liability to pay tax can only be constituted if a taxpayer is actually asked to pay tax. And thus a Notice of existence of liability to pay tax is constituted when a taxpayer is required to pay tax.

In Annexture FBI, we simply stated that the **"tax payable is US$ 196,000,000....."** we did not go further and require the Respondent company to pay the said amount of tax. Therefore the Respondent Company was not obliged to act upon or comply with the Notice. Thus as far as Income Tax is concerned, Annexture FBI does not constitute a Notice of existence of liability to pay tax. That being the position the said letter did not give rise to the right of Appeal under section 14(2) of the Tax Revenue Appeals Act.

We hasten to add that since the said letter contained no demand of payment of Income tax, and thus did not need to be acted upon or complied with by the Respondent Company, the said letter did not also constitute an appealable decision under section 6 of the TRA Act [CAP 399 RE. 2006].

Annexture FBI, subject of this case, is different from the letter which was issued in the case of **TRA Vs AFRICAN BARRICK GOLD PLC, Tax Appeal No. 5 of 2012.** In **Barrick's case** the letter issued by TRA was couched in the following words:-

".....therefore the tax payable is US$ 21,336,931. Please, you are required to settle the unpaid tax immediately after receipt of this notice".

So in **Barrick's case,** the Respondent Company was required to pay tax and the time to pay the said tax was clearly declared. That is why this Honourable Tribunal found at page 9 of its Judgement in **Barrick's case,** that **"the Notice was meant to be acted upon, and that a decision**

on the Respondent's liability to pay the said amount as tax had already been made".

In our instant case as already submitted, the Respondent Company was not required to pay Income Tax, thus the Notice was not meant to be acted upon and a decision on the Respondent's liability to pay the said tax had not been made by the Commissioner General. Conversely the decision of the Honourable Tribunal in **Barrick's case** on this aspect fortifies our proposition that, with respect to Income tax, Annexture FBI does not constitute a Notice of existence of liability to pay tax because the said letter was not meant to be acted upon and a decision on Respondent's liability to pay the amount of US$ 196,000,000 had not been made. That being the position, Annexture FBI did not constitute an appealable Notice under section 14(2) of the Tax Revenue Appeals Act, nor did it constitute an appealable decision under section 6 of the TRA Act. So when the Tax Revenue Appeals Board took cognizance of Tax Appeal No. 26 of 2011, it did so without jurisdiction.

My Lord and Honourable members of the Tribunal, the Respondent's Counsel has also covered the case which relates to payment of Stamp Duty. We wish to point out that the case relating to Stamp Duty is a separate matter and is being dealt with in a separate Appeal No. 27 of 2011 which is still pending before the Board. Therefore Stamp Duty issues are not before this Honourable Tribunal and thus the Honourable Tribunal cannot make any decision on those issues.

The case which is before you imanates from Board's Appeal No. 26 of 2011 and relates to income tax of US$ 196,000,000. We humbly re-iterate

our submission that in respect of Income Tax, Annexture FBI does not constitute a notice of existence of liability to pay tax, hence the right of Appeal to the Board did not exist under both section 14(2) of the Tax Revenue Appeals Act and section 6 of the TRA Act. That being the case, the Tax Revenue Appeals Board had no jurisdiction to handle the dispute.
In view of the foregoing submissions we re-iterate our prayers that this Appeal be allowed with costs and the proceedings before the Board be nullified and set-aside with a further direction / order that the matter be remitted back to the Commissioner General to complete the process of assessment which he had commenced before the case was taken to the Board.

We humbly rejoin.

14.12.2012

QUORUM:

Judge. F. Twaib	**Chairman**
Prof. J. Doriye	**Member**
Mr. K. Bundala	**Member**
For the Appellant	**Mr. Switi, Advocate, accompanied by Mr. W. Nyoni, Princ Tax Investigation Officer**
For the Respondent	**Mr. Fazal Bhojani**
Mrs. Fortunata Mwise	**RMA**

TRIBUNAL

The Tribunal has gone through the submissions. We need no clarifications.

Mr. Switi

We do not have any clarifications to make. We adopt our written submissions.

Mr. Bhojani

We also have nothing to add. We adopt our written submission.

ORDER

1. Deliberation 11/01/2013 at 14 Hours
2. Opinions on 25/01/2013
3. Judgment on 28/2/2013 at 14 Hours

Hon. Dr. Fauz Twaib Judge/Chairman, sgd

14.12.2012

11.01.2013

QUORUM:

Hon. Dr. Fauz Twaib	**Judge/Chairman**
Prof. J. Doriye	**Member**
Mr. K. Bundala	**Member**
For the Appellant	**Absent**
For the Respondent	**Absent**
Mrs. Fortunata Mwise	**RMA**

TRIBUNAL

Deliberations conducted. Opinions to be submitted in written form on the date earlier scheduled.

Hon. Dr. Fauz Twaib Judge/Chairman, sgd

Prof. J. Doriye Member, sgd

Mr. K. Bundala Member, sdg

11.01.2013

06.03.2013

QUORUM:

Hon. Dr. Fauz Twaib	**Judge/Chairman**
Prof. J. Doriye	**Member**
Mr. K. Bundala	**Member**
For the Appellant	**Mr. Kidaya, Advocate**
For the Respondent	**Mr. F. Bhojan, advocate**
Ms. Fortunata Mwise	**RMA**

TRIBUNAL

Judgment delivered this 6th day of March, 2013.

Hon. Dr. Fauz Twaib Judge/Chairman,Sgd

Prof. J. Doriye Member,Sgd

Mr. K. Bundala Member,Sgd

06/03/2013

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