

IN THE TAX REVENUE APPEALS TRIBUNAL

AT DARE S SALAAM

APPLICATION NO. 18 OF 2011

M/S BARCLAYS BANK TANZANIA LTDAPPELLANT

VS

COMMISSIONER GENERALRESPONDENT

PROCEEDINGS

14/12/2011

QUORUM:

Hon. Hussein M. Mataka	V/Chairman
Mr. W. N. Ndyetabula	Member
Mr. N. Shimwela	Member
For the Applicant	Absent
For the Respondent	Absent

ORDER:

Upon the fact that this matter was heard ex-parte and this Tribunal issued an interm order on 4th November, 2011 it is convenient for all parties to appear before the Tribunal on 19th December, 2011 for the matter to be heard inter parties. Let all parties be summoned to appear on the above mentioned dates.

Hon. Hussein M. Mataka **V/Chairman, Sgd**

14/12/2011

19/12/2011

QUORUM:

Hon. Hussein M. Mataka	V/Chairman
Mr. W. N. Ndyetabula	Member
Mr. N. Shimwela	Member
For the Applicant	Pamela Ringo, Legal Officer for the Applicant
For the Respondent	Miss Consolata Andrew, Advocate for the Respondent
Miss J. Gogadi	Ps.

Today the Tribunal is fixed for hearing inter – party Application No 18 of 2011 between Barclays Bank (T) Ltd herein after referred to as the Applicant and Commissioner General TRA hereinafter referred to as the Respondent.

The Hearing is opened.

Pamela:

Your honour the Applicant Counsel attend funeral of his further who passed away last week. We therefore pray for adjournment.

Miss. Consolata:

I have no objection to the prayer in addition we seek to file counter affidavit your honour.

Order:

The prayer for adjournment is granted. The Respondent to file its counter Affidavit on 30th December, 2011. The hearing will be on 9th, 10th, and 11th January, 2012 at 2.00 pm.

It is so ordered.

Hon. Hussein M. Mataka	V/Chairman, Sgd
Mr. W. N. Ndyetabula	Member, Sgd
Mr. N. Shimwela	Member, Sgd

19/12/2011

10/01/2012

QUORUM:

Hon. Hussein M. Mataka	V/Chairman
Mr. W. N. Ndyetabula	Member
Mr. N. Shimwela	Member
For the Applicant	Dr. Kibuta assisted by Mr. Alan Kileo, Advocate for the Applicant
For the Respondent	Mr. Haule, Advocate
Halima Said	RMA

Today the Tribunal is fixed for hearing an Application no. 18 of 2011 between MS/Barclays (T) Ltd and Commissioner General TRA the Respondent.

However due to the absence of one member Mr. Ndyetabula who went to the funeral of the one member of his family who passed away yesterday, the Tribunal can not proceed with hearing today as the quorum is not reached. I therefore postponed the hearing until further notice likely, after Mr. Ndyetbula returned to Dar es salaam.

Hon. Hussein M. Mataka V/Chairman, Sgd

10/1/2012

2/2/2012

QUORUM:

Hon. Hussein M. Mataka	V/Chairman
Mr. W. N. Ndyetabula	Member
Mr. N. Shimwela	Member
For the Applicant	Dr. Kibuta assisted by Mr. Alan Kileo, Advocate for the Applicant
For the Respondent	Mr. Felix Haule, Advocate for the Respondent.
Miss J. Gogadi	PS

Today the Tribunal is fixed for hearing Application No. 18of 2011. Between Barclays Bank Tanzania and Commissioner General TRA. We call you to hear inter park this application.

Dr. Kibuta

This Application was filed on 2 November, 2011, the Applicant seeks to restrain TRA from enforcing collection of disputed Tax 4.7 Bill. Shillings. Together with our main application, an Application for interim order was made to prevent TRA from proceeding with collection of the said tax before this Application is determined. An application is granted ex parte interim order on 4th November, and the inter parte Application was fixed for hearing. This is a hearing inter parte Application. In this juncture I would invite you to attend to the chamber summons.

The Inter parte Application seeks two orders:

1. To restrain the Respondent from enforcing collection because that act contravenes the provision of Tax Revenue Appeals Tribunal Rules 2001. Rule 23(1) requires that execution of a decision of the Tribunal must be enforced by Application for execution to the Tribunal.

According to Rule 23(1) where the Tribunal is persuaded that it is proper to proceed with execution the Tribunal must issue a decree authorizing execution. This was not done by the TRA.

2. Is an order for stay of execution pending the determination of Appeal to the Court of Appeal made by Barclays.

In the affidavit supporting the Application filed by Elizabeth Olilo that the deponent says that an Appeal has been preferred to the Court of Appeal and a copy of Notice of Appeal together with memorandum of Appeal served and acknowledged by TRA. For that reason execution ought to wait for appeal to the Court to be determined.

Those are two order are sought to this Application for stay. And to same extent the reasons that has been advise to stay mired the order that have been sought.

The first reason is that a law full Appeal has been referred to the Court of Appeal. And therefore the execution must be wait or the Appeal by Barclays will be render neglected (i.e. no meaning)

But the other reason for stay of this matter the Applicant has complied with Sec. 12(3) of the Tax Revenue Appeals Act Cap 408, that Barclays has paid 1/3 of the undisputed amount equal to 970,169,961/=.

The Applicant wored the Appeal at the Board level but under standably did not seek immediate refund of the paid amount after the Board decision been aware that TRA appealed to the Tribunal.

TRA wored at Tribunal level and awared that Barclays appealed to the Court of Appeal still wanted to execute, that can not be right to do what TRA want to do.

I am aware of the case of Karibu Textile Vs. TRA appeal no. 10 of 2010 concerning the stay of execution. In that case the Tribunal examine Rule 11(2) (d) (i) (ii) and (iii) order three conditions which mentioned in that Rule.

Satisfied in this Application as shown in the Affidavit of Elizabeth Olilo. In the circumstances we pray for order of stay be granted by the Hon. Tribunal. That's all your honour.

Hon. Hussein M. Mataka

V/Chairman, Sgd

02/2/2012

Order

The Tribunal will continue tomorrow 10.00 am when the Respondent make his Reply submission thereafter the Applicant will make his rejoinder.

Hon. Hussein M. Mataka **V/Chairman, Sgd**

Mr. W. N. Ndyetabula **Member, Sgd**

Mr. N. Shimwela **Member, Sgd**

02/02/2012

3/2/2012

QUORUM:

Hon. Hussein M. Mataka

V/Chairman

Mr. W. N. Ndyetabula

Member

Mr. N. Shimwela

Member

For the Applicant

Dr. Kibuta assisted by Mr. Alan Kileo, Advocte for the Applicant

For the Respondent

Mr. Felix Haule, Advocate for the Respondent.

Miss J. Gogadi

PS

Mr. Haule:

Reply submission:

Hon. Vice Chairman and Members of Tribunal as stated by Counsel for the Applicant that this interparte application seeks two orders;

The first order to restrain the Respondent from collecting monies from Applicant through demand notice dated 27th October, 2011, which according to the

Applicant that demand Notice contravenes the provision of the Tax Revenue Appeals Tribunal Rules, the specific rules referred here is Rule 23(1) red by the counsel here.

Hon. Vice Chairman and Members of the Tribunal it is my humble submission that the counsel for the Applicant wrongly interpreted these provisions. It is my submission that, the Application of this Rule depend upon the decision of Commissioner General which led tax payer appealing to the Tax Revenue Appeals Board. Those decisions are contained under Sec.12 (1) of Cap 408 which under these sections the decision relates to tax assessment. There are other decisions which are also appealable under Cap 408 before the Board. These are Sec. 14(1) of the same Act Cap 408.

The enforcement of the Board or Tribunal decision arising from those two sections are different. Not all of them required executed order. Sec. 14(1) are dealing with the decision which are not related to tax assessment eg. Sec. 14(1) (a) dealing with refund, drawback etc.

Treatment when it comes to enforcement of the Board or Tribunal decision are differently. If a person appealing against decision under Sec. 14(1) upon his appeal being allowed he can enforce it. Using the provision of Rule 23(1) of Tax Revenue Appeals Tribunal Rules.

If a person appeals against Sec.23 (1) he can apply for an application for execution so that the Commissioner General can be compelled to do what he refused or omitted to do. That is in respect of decision allowed under Sec.23(1), but the Appeal is disallowed i.e the decision is in favour of TRA and a tax payer is not interested further Appeal the tax payer can not do any thing he would have to remain silence. And even the Commissioner General TRA can not do anything as it wont be anything executed. So, the decision of the Commissioner will remain as it is.

The Commissioner decision under Sec. 12(1) which relate to tax assessment as it was in our case. If the Board or Tribunal decision infavour of the Tax payer i.e. the assessment is quashed. The Commissioner General does not intend to Appeal than this Rule 23(1) will remain enactive that is the Tax Payer wont have any need to execute the decision as they wont be anything for him to enforce. But if the decision of the Board or Tribunal will be enfavour of Commissioner General, even if the Tax payer will refere further Appeal that would not be a bar for the Commissioner General to demand his taxes. It means that the Board or Tribunal will confirm the assessment. That confirmation will put the two parties at the level they were before went to the Board. That level tax payer is indebtedness by the Commissioner General to pay the taxes.

Under normal circumstances if the Commissioner General has informed the tax payer of his liability to pay tax what follows is the Commissioner to apply the various taxes recoveries measures and those recoveries measures all are provided by revenue law administered by TRA. Normaly we start by issuing demand notice, if it doesn't work, we go to another recovery measure i.e. to go Agency Notice provided by law. If that also not working we go to another measure called distress warrant. Once the decision of the Board or Tribunal enfavour Commissioner, the Commissioner do not need to apply anything under Rule 23(1) that decision will bring all matters to normal as if nothing happen and that the only remedy available to the Commissioner General will be to apply recovery measures provided under the relevant revenue law. That is how it works. That situation has been so since ten years ago when these institution i.e. Board and Tribunal established.

This is what I could say with regard to the first order. Now I beg to go to second order that the Tribunal is pleased to make an order for stay of execution pending an Appeal to the Court of Appeal.

To support this Application Dr. Kibuta while relying on Affidavit of one Elizabeth Olila. The Applicant has preferred an Appeal to the Court of Appeal by filing the Notice of Appeal and Memorandum of Appeal which are already served to TRA. Assuming that every thing is on order one I asked my self that an appeal can act as a bar to an execution?

This is answered by the Court of appeal, although the Tribunal is not bound by the Court of Appeal. The Court of Appeal had its own rules Rule 11(2) "provides subject to provision of sub rule (1) the Institution of an Appeal shall not operate to suspend any sentence or to stay execution". Counsel for the Applicant try to convince the Tribunal, that when his client got decision at Board level and upon been served a notice of Appeal they resinded the enforcement of the Board decision knowing that an Appeal has been preferred. He wonder why TRA wants to recover the Taxes while his client already filed an appeal. To answer this question. May I going back to explain, when person using sec 23(1) of Cap 408, . there at the Board the decision was than the assessment was quashed. Now to the Tax payer has he has any thing to do with execution?

The Applicant stated two reasons the first as I was submitted lawful appeal has already been filed to the Court of Appeal .

To answer this is that, there mere filing of Appeal to the Court of appeal can not be bar to the execution i.e. the execution can carry on.

Secondly: The immediate recovery of disputed tax can not rendered the Applicant's Appeal negoratory as there are means of refusing the Applicant of any thing that has been collected once the Appeal decided on favour of the Applicant. Counsel argued that the Applicant had complied with Sec. 12(3) of Cap 408 which requires a person to deposit one third before his objection being determine. The Applicant paid 1/3 of the disputed tax equal to 970,169,961/=

In the case of KARIBU TEXTILE.

This decision of the Tribunal, I think it is bound by its own decision. So pray that it applies in the case of KARIBU TEXTILE. The remain part of the disputed tax of the Respondent it should be secured by financial institutor. To that end Hon. Vice Chairman and Members of the Tribunal I humble submit.

Hon. Hussein M. Mataka

V/Chairman, Sgd

03/2/2012

REJOINDER:

DR. KIBUTA:

Hon. Vice chairman, I will address in three aspect of the reply by TRA

- a) Interpretation of Rule 23(1)
- b) The condition which were said by this Tribunal for stay of execution in case of KARIBU TEXTILE and
- c) The effect of filing of an Appeal for execution.

In the first aspect, counsel agrees before you that my submission is wrongly interpretation of this rule. His words is that the Application of the rule depend on the decision of the Commissioner, he seems to suggest some decision are quite to the rule and other are not, one point I want to make, as a matter of law all laws are made by Parliament not by TRA. Rule 23 (1) has been made by Parliament, it is very plain it used language not ambiguous. Rule 23(1). The decision of the Tribunal shall be enforced by making the Application to the Tribunal which shall issue a decree or order authorizing execution. "as you will notice Rule 23(1) contains a series of command words. Compelling a judgment holder to apply for a decree or an order for execution before proceedings to execution. The words used are cristal clear and they leave no doubt of what intended. So when counsels suggest that Rule 23(1) applies only to certain

situation not all you will be right to wonder where he has got from, it is not the words which parliament used it, you should ignore it.

Second point;

Whether the mere filing of an appeal is a bar to execution you are referred to Rule 11(2) of the Court of Appeal rule, Rule 11(2) Counsel read. There is reference in paragraph (b) to stay of execution of a decree or order appeal. There is a need to be a decree or order to allow him to execute the decree. I pray to read together with Rule 24(4) of the Tribunal Rule a notice of intention to appeal to court of appeal, is not a barred for decree or order for execution.

So the Commissioner is not barred to file an application for execution of decree, TRA is not done that, this is non compliance of the Act by TRA. You will also notice in Rule 11(2) (c) of the Court of Appeal Rule 11(2) the High Court or Tribunal is allowed for stay of execution in good cause.

When counsel for TRA say once TRA hold the judgment it can proceed with any of the three measures that be referred without refence to this Tribunal that is also not the intention of the Parliament. On those two points you have a good basis for granting an order for stay of execution that I am applying for. For the sack of completeness I will address the case of Karibu Textile in my open submission yesterday I said that Karibu Textile did not apply in this case. I have good reason to state.

Even if this Tribunal were set conditions for stay those conditions was already certified, the one third has already been paid, and that seems the primary condition to which J. Fauz attribute a lot of words.

The second is the execution of bonds. You can immediately see why this condition is not apply to this case.

The Appellant is a Bank, as a Bank that it must provide as much confort in addition Barclays has an Account with BOT as required to any Financial Institution that provide double confort, therefore the risk which existed in the Karibu case does not exist here. On those three points I request this Tribunal allows the Application for stay of execution. I am very much oblige for your patience.

Hon. Hussein M. Mataka	V/Chairman, Sgd
Mr. W. N. Ndyetabula	Member, Sgd
Mr. N. Shimwela	Member, Sgd

03/02/2012

Order:

The Tribunal will sit for deliberation on 21st March, and ruling will be delivered on 27th March, 2012 at 10.00.

Hon. Hussein M. Mataka	V/Chairman, Sgd
Mr. W. N. Ndyetabula	Member, Sgd
Mr. N. Shimwela	Member, Sgd

03/02/2012

IN THE REVENUE APPEALS TRIBUNAL**AT DAR ES SALAAM****INCOME TAX APPLICATION NO. 18 OF 2011****M/S BARCLAYS BANK (T) LTD APPLICANT****VERSUS****COMMISSIONER GENERALRESPONDENT****RULING****HON. HUSSEIN M. MATAKA – VICE CHAIRMAN**

This is an application made by the Applicant BARCLAYS BANK (T) LTD against the Respondent Commissioner General (TRA). The Application was brought under certificate of urgency lodged by the Applicant Counsel Mr. Allan Kileo who prayed to proceed ex –parte. Because, the Respondent had issued a demand Notice which would take effect on 07th November, 2011. The Applicant received the said notice on the 1st November, 2011 at 3.30 pm for payment of Tshs. 4,752,995,038.60. In fact, it would appear apparently to us to be a short notice before the due date which is 7th November 2011. The Applicant lodged it just two days latter and more worse on his part the Counsel had only this 4/11/2011 remaining. As the subsequent 5th and 6th days were a saturday and Sunday. Both the non working days. if the Respondents were able to take that amount it would cause financial difficulty to the Applicant Mr. Allan Kileo stressed. The Applicant moreover, has lodged his Notice of intention to Appeal to the Court of

Appeal against the decision of this Tribunal delivered on 13th September, 2011.the latter submitted further.

Based on the above fact, we are of the unanimous opinion and make an order that this application should be heard ex-parte. As we hereby do.

Coming now to the grounds of this application, the Applicant Counsel submitted that this demand notice has been issued by the Respondent, while full aware of the facts that the Applicant intends to appeal to the Court of Appeal, and therefore, the legality of the said tax liability is yet to be established.

Having received the demand Notice on 1st November, 2011, the Applicant rushed to this Tribunal seeking for an order to restrain the Respondent from collecting the said tax dispute. Therefore, the Applicant lodged this Application seeking for an order of the Tribunal, to restrain the Respondent from collecting the said amount.

The Applicant argued that the demand notice contravened the Tax Revenue Appeals Tribunal Rules 2001 specifically Rule 23 (1) which states that "the decision of the Tribunal shall be enforced by making application to the Tribunal, which shall issue a decree or order authorizing execution".

This means therefore, and infact we agree with Mr. Allan Kileo that for the Respondent to be able to issue the said demand notice he must first make an application to this Tribunal, and the Tribunal will then issue a Decree or order to authorize the execution. The Applicant tells us that he is not aware of any such application by the Respondent. Therefore the Demand notice can not be justified under the law, because, there is no order or Decree of this Tribunal authorizing execution.

After considering the arguments of Applicant's Counsel, and with Rule. 23(1) of the Tribunal Rules, 2001, cited, leave alone our thorough perusal in our records, we did not find and we are convinced that there is no any application made by the Respondent seeking the Decree or Order for execution of this Tribunal. Moreover, therefore, we are of the firm view that the Respondent's demand notice is null and void liable to be set aside. Because, it was issued prematurely contrary to Rule 23 (1) of the rules of the Tribunal. Therefore, we hereby restrain the Respondent from collecting the said disputed amount of Ths. 4,752,994,038.60 or any other part of it at this stage.

It is so ordered.

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Hon. H. M. Mataka)

Vice Chairman

..... Mr. W. N.Ndyetabula
Member

..... Mr. N. Shimwela
Member

04th November, 2011

Delivered on this 4^h day of November, 2011, in the presence of Allan Kileo, counsel for the Appellant, and in the absence of the Respondent.

..... Hon. H. M. Mataka
Vice Chairman

..... Mr. W. N.Ndyetabula
Member

..... Mr. N. Shimwela
Member

04th November, 2011

We certify that is a true copy of the original.

..... Hon. H. M. Mataka
Vice Chairman

..... Mr. W. N. Ndyetabula
Member

..... Mr. N. Shimwela
Member

04th November, 2011