IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 430 OF 2020

MANTRA (TANZANIA) LIMITED.....APPELLANT

VERSUS

THE COMMISSIONER GENERAL, TANZANIA REVENUE AUTHORITY .....RESPONDENT

(Appeal from the decision of the Tax Revenue Appeals Tribunal, at Dar es Salaam)

(Mjemmas, Chairperson)

Dated the 12th day of August, 2020
in
Tax Appeal No. 2 of 2019
.....

JUDGMENT OF THE COURT

27th October, 2021 & 5th November, 2021

MAIGE, J.A.:

The appeal at hand seeks to fault the decision of the Tax Appeals Tribunal (the Tribunal) in Tax Appeal No. 2 of 2019. In the said decision, the Tribunal confirmed the decision of the Tax Appeals Board (the Board) to the effect that, payment for service rendered to the appellant by non-resident service providers had its source in the United Republic of Tanzania and thus liable for withholding taxes and that; the rule against double taxation stipulated under Article 7 of the Double Taxation Agreement (the DTA) between South Africa and

Tanzania was inapplicable in so far as the withholding taxes were deducted on payments in respect of business transactions as opposed to business profits.

In order to appreciate the nature of the contention, we find it useful to narrate, albeit briefly, the factual materials underpinning the background of this appeal. The appellant is a company duly existing under the laws of Tanzania. Its area of business operation is mineral exploration. In carrying out its business, the appellant procured services from non-resident service providers mostly from South Africa. It is not in dispute that, under Article 7 of the DTA, profits of an enterprise in the contracting states are only taxable if the business is carried out in the respective contracting state through a permanent establishment.

On 31st July, 2014, the appellant wrote to the respondent requesting for a refund of withholding taxes of USD 1,450,920.00 incorrectly paid in relation to services that were performed outside Tanzania by non- resident service providers for the period between July, 2009 and December, 2012. The appellant alleged that, the services in question were not liable for withholding taxes because they

were not rendered in the United Republic of Tanzania and further that, the service providers being residents of the Republic of South Africa, were exempted under Article 7 of the DTA from paying taxes. The respondent refused the request maintaining that, the services in question were rendered in Tanzania and Article 7 of the DTA was irrelevant in as much as it was limited to business profits and not business transactions.

The appellant was unhappy with that decision and therefore, appealed to the Board on two grounds. First, the imposition of withholding tax was in violation of the provisions of sections 6(1)(b), 69(i) (i) and 83 of the Income Tax Act, Cap. 332 [R.E. 2019], (the Act). Second, the assessment of the withholding tax on services performed in South Africa by South African entities was in breach of the provisions of the DTA. The Board, guided by our authority in **Tullow Tanzania BV v. Commissioner General Tanzania Revenue Authority,** Civil Appeal No. 24 of 2018 (unreported), made the following statement and proceeded to dismiss the appeal:-

> *"In terms of the above holding of the Court of Appeal, in a matter similar to the one before us , we are entitled to hold as we hereby do that,*

payment for services rendered in the matter before us had sources in the United Republic of Tanzania, thus, the first issue receives an answer in the affirmative that, withholding tax was payable given the fact that the withholding agent withholds tax on business transactions, we do not find that Article 7 of the DTA would apply in the circumstances of this case".

Being aggrieved by the decision of the Board, the appellant unsuccessfully appealed to the Tribunal. In determining the appeal, the Tribunal was guided by two issues. First, what does the clause "service rendered" in section 69(i) (i) of the Act means in determining if payment has its source in the United Republic of Tanzania. Second, what is the correct interpretation of Article 7 of the DTA. In addressing the first issue, the Tribunal, while noting the existence of conflicting opinions of the Court on the issue in its decision in the **Commissioner General, TRA v. Pan African Energy Tanzania Limited,** Civil Appeal No. 146 of 2015 (unreported) on the one hand and **Tullow Tanzania BV** (*supra*) which was also followed in **Shell Deep Water Tanzania BV v. the Commissioner General (TRA),** Civil Appeal No. 123 of 2018 and **Commissioner General (TRA) v. Aggreko**

International Projects Ltd, Civil Appeal No. 148 of 2018, both unreported on the other, opted to follow the latter decision for the reason that it was based on the modern view approach of construing provisions which, like the instant one, deal with anti- tax avoidance.

On the second issue, it was the opinion of the Tribunal that, as the DTA provides for tax exemption treatment of various specified transactions and exclude from exemption those which are not covered, the withholding taxes under discussion being in respect of business transactions, the clause which is not covered in the exemption, was subject to taxation. In particular it stated as follows:-

> *"From the foregoing Article 20 quoted above, we find the argument by the appellant's counsel that the amount (payment of service fee) is exempted from any tax including withholding tax in Tanzania to have no merit at all. We therefore uphold the decision of the trial Board in respect of this ground of appeal and dismiss it".*

Still aggrieved, the appellant lodged the instant appeal faulting the decision of the Tribunal on the following grounds:-

1. *That the Tax Revenue Appeals Tribunal grossly erred in law by holding that the Board was correct in holding that payments for services rendered/ performed abroad by non-resident suppliers had a source in the United Republic of Tanzania;*

2. *That the Tax Revenue Appeals Tribunal grossly erred in law by holding that Article 7 of the Double Taxation Agreement does not apply on the Appellant's case; and*

3. *That the Tax Revenue Appeals Tribunal erred in law by holding that the Appellant was not justified to claim refund of incorrectly paid withholding tax.*

In the conduct of this appeal, Dr. Abel Mwiburi and Mr. Rwekamwa Rweikiza, both learned advocates, appeared for the appellant whereas Messrs. Cherubin Chuwa and Harold Gugami, both learned Senior State Attorneys, joined forces to represent the respondent. As it is the procedure, each of the parties had, before the date of hearing, filed written submissions which are on the record. In their oral submissions supplementing the written submissions which

for the appellant was made by Dr. Mwiburi and for the respondent by Mr. Chuwa, each of the parties fully adopted its respective written submissions to read as part of the oral submission. We commend both counsel for their well -focused and instructive submissions which have been extremely useful in composing this judgment.

In support of the first ground of appeal, Dr. Mwiburi had his starting point on section 6(1) (b) of the Act which obliges a non-resident to pay tax if only the payment in question has its source in the United Republic of Tanzania. The criteria for establishing source of income, the counsel submitted, is if the respective service was rendered in Tanzania. Reference was made to the provisions of section 69 (i) (i) of the Act read together with section 83(i) (b) thereof. He therefore, faulted the Tribunal in basing its decision on place of utilization rather than of performance as the basis for determining source of income. As the words of the statutes clearly stipulate place of performance as the basis of determination, it was wrong for the Tribunal to use the purposive approach and thereby implying that, the intention was the place of utilization of the service, he further submitted. In his view, this being a tax dispute, the Tribunal was

expected to use strict rule of interpretation. The counsel placed reliance on the English authority in **Cape Brandy Syndicate vs. IRC** [1921] 1 KB 64 which is in support of that proposition.

The counsel did not agree with the Tribunal's conceptualization of the phrase "render" to mean "deliver." He, to the contrary, equated it with the phrase "perform." He substantiated his contention with the definition of the respective term in the Black's Law Dictionary as well as the definition of the term "perform" in section 2 of the Interpretation of Laws Act, Cap. 1 [R.E., 2019]. In his conclusion therefore, the clause " services fees attributed to service rendered in the United Republic of Tanzania" means " services performed in the United Republic of Tanzania". The counsel supported his contention with the Indian authority in **Ishikawajima-Harima Heavy Industries Limited vs. Director of Income Tax** (288 ITR 408) where the Supreme Court of India observed:

> *"For purposes of section 9(i) (VII) of ITAA, the service must not only be utilized in India, they must also be rendered in India so that all of the income from fees become taxable in India. The law in India was changed in April 2010,*

whereby after the amendment, service fees paid to non-residents for service utilized (without necessarily being performed in India) in India were deemed to have a source in India."

In Tanzania, he submitted, the scope of the application of the respective provision was made clear in the case of **Commissioner General (TRA) vs. Pan African Energy Tanzania Limited** *(supra)* where it was held that, a private company has no obligation to withhold tax where the service fee paid is for service rendered outside Tanzania.

Remarking on the recent position in **Tullow Tanzania BV** *(supra)*, it was his humble submission that, the said decision and the subsequent decisions which followed it, is bad in law for overstepping the intention of the legislature by implying what was not intended. In any event, he submitted, the said decisions did not overrule the authority in **Pan African Energy Tanzania Limited** *(supra).*

On the second ground, the counsel faulted the Tribunal in distinguishing between business profits and business transactions without taking into account that withholding tax is in law part of the income tax. He clarified that, since the transactions under discussion

have their end result into an income and ultimately profit, it cannot be isolated with business profit. He submitted further that, since the service was rendered in South Africa and the service providers did not have permanent establishments in Tanzania, the imposition of withholding tax violated the provisions of Article 7 of the DTA and Article 138(1) of the Constitution of the United Republic of Tanzania, 1977.

On the third ground, it was his submission that, since the tax was wrongly paid, it ought to have been refunded to the appellant. It cannot be refunded to the taxpayers as claimed by the respondent because the same have no Tax Identification Number certificates with the respondent which is the criteria for refunding, he argued. Finally, the counsel urged the Court to dismiss the appeal with costs.

In his response, Mr. Chuwa started by admitting that, indeed the services in controversy were physically performed outside Tanzania. He further concurred with the appellant's submission that, under section 69(i) (i) of the Act read together with section 83 (1) (b) thereof, determination of whether a payment has its source in Tanzania for purpose of withholding tax against a non-resident service provider,

depends on whether the respective service was rendered in Tanzania. It was his submission however that, for the service to be said to have been rendered in Tanzania, it is not necessary that it must have been physically rendered in Tanzania. It suffices in his view, if the same was delivered or utilized in Tanzania. His submission was not unsubstantiated. It was founded on the authority in **Tullow Tanzania BV** *(supra)* which judicially considered the word "rendered" used under the respective provision to mean "supplied" or "delivered". In the respective decision which was consistently followed in **Shell Deep Water Tanzania BV***(supra)* and **Aggreko International Project Ltd** *(supra*), the counsel submitted, purposive rather than strict rule of construction was applied because the provisions contain anti- tax avoidance rule whose construction, under the modern approach, requires purposive rule. In the presence of precedents from the highest Court of the land, the counsel contended, correctly in our view, this Court is not justified to opt for foreign precedents as invited by the counsel for the appellant.

As regards the decision in **Pan African Energy Tanzania Limited** *(supra),* the counsel viewed it to be distinguishable in so far

as it was influenced by a foreign authority discussing foreign law which was not at par with our law.

On the second issue, the counsel contended that, the Tribunal rightly differentiated between the two clauses. In his view, business profit entails a financial benefit which is realized when the amount of revenue gained from business activities exceeds the expenses, costs and tax needed to sustain the respective business. He submitted that, since business transaction was not among the transactions for which exemption was provided under the DTA, by virtue of Article 20 of the same, it was open for tax.

On the third issue, it was his submission that, since the tax was rightly paid, the issue of refund does not arise. In the alternative, it was his submission, if there was any refund, the same would have been paid to the taxpayers and not the appellant. In the final result, the counsel urged the Court to dismiss the appeal with costs.

In his brief rejoinder, Dr. Mwiburi reiterated his submission in chief and added, in respect to the third ground that, refund cannot be made against the taxpayers in South Africa because they are not in possession of TIN certificate. According to him, the refund, should in

law, be paid to the appellant as the withholding tax agent who in turn will remit the same to the taxpayers.

Having heard the arguments for and against the appeal, and upon carefully examining the record, we find it appropriate to consider the substance of the appeal. We shall start with the first ground which in our view, pertains to interpretation of the clause "service rendered" used in section 69(i) (i) of the Act as a criteria for determining taxability of a non-resident person on the income which has its source in the United Republic of Tanzania and the obligation of a person dealing with mining business in Tanzania to, under section 83(1) of the Act, withhold income tax from the payment of service fee to such person.

From the counsel's concurrent submissions, it would appear to us that this is not the first time this Court is construing the clause "service rendered" in section 69(i) (i) of the Act to determine if the income has a source in Tanzania. In the first time, such issue was considered in **Pan African Energy Tanzania Limited** *(supra).* In the said case just like in the instant one, the services for whose fees withholding taxes were deducted, were performed outside Tanzania by non-resident persons. In the first appeal, the Board treated the

payment to have a source in Tanzania for the reason that, the analysis of samples done in the United Kingdom which constituted the service, could not be disassociated with the drilling activity in Tanzania. On appeal to the Tribunal, the decision of the Board was reversed. The Tribunal, having been persuaded by the Indian authority in **Ishikawajima Harima Heavy Industries Limited** *(supra)*, took the view that, in as long as the work was done in England and the consultants were the residents of England, the appellant was not obliged to withhold tax. The respondent further appealed to the Court which upheld the decision of the Tribunal. It opined as follows:-

> *"Having given our views on what we consider to be the proper interpretation of the law relevant in our case at hand, we proceed now to answer the grounds of appeal raised. The first ground related to the construction of section 83(1) (c) of the Income Tax Act that it was erroneous construed by the Tax Appeals Tribunal. In our respective view, we do not think so. The construction of the section was tied to the place where the services of the respondent was rendered. Services were rendered in the United Kingdom by persons*

resident in the United Kingdom. Section 69(i) (i) does not impose a liability on an individual company to withhold tax where service fee is paid in relation to services rendered out of the United Republic regardless of the fact that payment is made by a company registered in and doing business in Tanzania. The situation would have been different if the Respondent was government".

Subsequently, a similar issue arose in **Tullow Tanzania BV** (supra). In this case, the Court construed the phrase "rendered" to mean "delivered" or "supplied" and held that, the test for determining source of income is not the place of performance but of utilization of the service. In its own words, the Court stated as follows:-

"It is our strong view that the word rendered under section 69(i) (i) is synonymous to words "supplied" or "delivered". In this regard, a non-resident who provides services to a resident, has delivered/ supplied services to a resident of the united Republic of Tanzania. The recipient of the service is actually the payer for such services, in which case, "source of payment" cannot be any other place except where the payer resides. In other words as the services of which the payments were made were consumed or utilized in the United Republic of Tanzania, for the purpose of earning income in the United Republic of Tanzania, then the

payments made for such services had a source in the United Republic of Tanzania"

It is worth of note that, just as it is in the instant case, in the said case, the Court was strongly urged to follow the position in **Pan African Energy Tanzania Limited** *(supra).* The Court held the respective case distinguishable and therefore inapplicable for the reason that, it was influenced by an Indian authority which considered a statute in India which was worded differently with the statute in our jurisdiction. In particular, the Court, having reproduced the relevant Indian statute, observed that:-

> *"It is clear from the wording of the provisions above that they are substantially different from section 69(i) (i). While the Indian Act talks the source of income, on the other hand section 69(i) (ı) talks of source of payment. The case of Pan African Energy (supra) is therefore distinguishable as it relied on the interpretation of section 9(1) (vii) (c) of the Indian Income Tax Act to arrive at a finding that the said provision, as it was, was in pari materia with section 69(i) (i) of the Act".*

The above position has been constantly followed as we said, in **Shell Deep Water Tanzania BV** (*supra)* and **Aggreko International Project Ltd** (*supra)* relied upon by the counsel for the respondent.

On our part, we fully subscribe to this recent position of law and differ with the previous position in **Pan African Energy Tanzania Limited** *(supra)* for two main reasons. First, as correctly held in **Tullow Tanzania BV** *(supra),* the respective authority, much as it was based on an Indian decision construing a statute which is not worded similarly to ours, is distinguishable and thus inapplicable in the instant case. Second and more importantly is the fact that, the position in **Tullow Tanzania BV** *(supra)* is the more recent position. The settled position as it stands today is such that, where there are two conflicting decisions of the Court on the similar matter, the Court, unless otherwise justified, is expected to follow the more recent decision. (See for instance, **Ardhi University vs. Kiundo Enterprises (T) Limited,** Civil Appeal No. 58 of 2018, **Geita Gold Mining Ltd vs. Jumanne Mtafuni,** Civil Appeal No. 30 of 2019 and **Mabula Damalu & another vs. the Republic** Criminal Appeal No. 160 of 2015, (all are unreported))

In view of the foregoing discussion therefore, we dismiss the first ground of appeal.

We now proceed with the determination of the second ground on the applicability of Article 7 of the DTA. It was submitted for the appellant that, the provision is applicable since the service in question was carried out in South Africa and the service providers had no permanent establishment in Tanzania. It was submitted further that, the distinction between business profits and business transaction is irrelevant. For the respondent, it was argued that, the provision is not applicable as what is exempted from payment of taxes in the respective provision is business profit of an enterprise and not business transaction. A similar issue was considered in **Kilombero Sugar Company vs. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 218 of 2019 (unreported) where this Court made the following observation to which we fully subscribe:-

> *"Flowing from the above, as the service fee is an item which does not feature anywhere in the Double Taxation Agreement, Article 20 becomes handy. The costs incurred by Illovo and reimbursed by the appellant (which we have already found and held to be part of*

service fee) will be taxable in Tanzania as per Article 21 of the Double Taxation Agreement. Put differently, it is our considered view that, as per Double Taxation Agreement, service fee by a South African entity for the provision of professional services to a Tanzanian entity, do not form part of business profits as provided under Article 7 of the Double Taxation Agreement which is not taxable in Tanzania but fall under Article 21 of the Double Taxation Agreement and thus subject to withholding tax in terms of section 83(1)(b) of the ITA, 2004".

Guided by the above authority therefore, it is our firm opinion that the Tribunal was right in holding that the exemption under Article 7 of the DTA was not applicable to the appellant's business transactions. We thus dismiss the second ground for want of merit.

Since we have held in relation to the first and second grounds that, the charging of withholding taxes was correct, there is consequently nothing to refund and, therefore, the third ground becomes redundant because there remains no withholding tax to refund.

In the circumstance therefore, the appeal is devoid of any substance and it is hereby dismissed with costs.

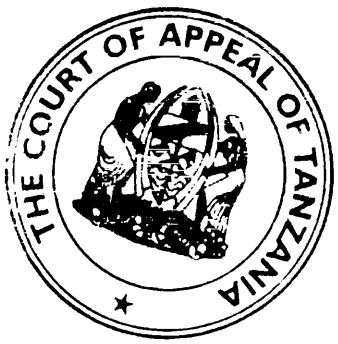
DATED at DODOMA this 4th day of November, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 5th day of November, 2021 in the presence of Ms. Consolatha Andrew, learned Principal State Attorney for the Respondent and also holds brief for Dr. Abel Mwiburi, learned Counsel for the Appellant is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL