IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A. AND KEREFU, J.A.)

CIVIL APPEAL NO. 57 OF 2020

SINGITA TRADING STORE (EA) LIMITED.....APPELLANT

VERSUS

COMMISSIONER GENERAL
TANZANIA REVENUE AUTHORITY ..... RESPONDENT
(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Mjemmas, Chairperson.)

Dated the 1st day of November, 2019
in
Tax Appeal No. 16 of 2018

JUDGMENT OF THE COURT

21st April & 6th May, 2021

KEREFU, J.A.:

The appellant, Singita Trading Store (EA) Limited has lodged this appeal challenging the decision of the Tax Revenue Appeals Tribunal (the Tribunal) which dismissed its appeal against the decision of the Tax Revenue Appeals Board (the Board) in favour of the respondent, the Commissioner General Tanzania Revenue Authority (the TRA).

Most of the facts forming the background of the appeal as obtained from the record are, fortunately, not in dispute. They go thus: The appellant is a registered company having its place of business in Mara Region. Specifically, the appellant operates retail shops in rented premises within the tourists' hotels owned by Grumeti Reserve Limited in Serengeti National Park where it sells luxurious items with distinctive character.

On 1st July, 2007, the appellant entered into a management agreement with Singita Trading Stores (Pty) Ltd based in South Africa (sister company) to manage its retail business. Later, in 2013, the respondent conducted an audit on various tax affairs of the appellant's income for the years 2010, 2011 and 2012, respectively. The respondent found that the appellant had not paid withholding tax on management fees for the services rendered in Tanzania to its sister company in the said years. Thus, on 4th October, 2013, the respondent issued Withholding Tax Certificates to the appellant demanding withholding tax and interests to the tune of TZS 12,573,422.59, TZS 20,153,424.45 and TZS 33,693,792.15 for the years 2010, 2011 and 2012, respectively.

Dissatisfied, the appellant lodged three statements of appeal in the Board which were later consolidated into Income Tax Appeal Case Nos. 123, 124 and 125 of 2013. The appellant's grounds of appeal before the Board in each appeal were as follows; -

> *(1) That, the demand issued by the respondent is both wrong at law and fact for containing arithmetical errors; and*
>
> *(2) That, the respondent's act of issuing the demand for withholding tax is arbitrary for failure to provide the appellant an opportunity to be heard with regard to the various tax queries raised by the respondent.*

The respondent disputed both grounds and the Board determined the appeal based on parties' submissions on the following three issues: -

> *(1) Whether the respondent's demand was legally and factually correct;*
>
> *(2) Whether the appellant was given the opportunity to respond to tax queries raised by the respondent; and*
>
> *(3) To what reliefs are the parties entitled.*

The Board considered the parties' submissions and rendered its decision on 27th April, 2018 in favour of the respondent. Aggrieved, the appellant unsuccessfully appealed to the Tribunal. Still unsatisfied, the appellant has lodged the current appeal with four grounds which, for reasons that will shortly come to light, we need not recite them herein.

At the hearing of the appeal, Mr. Allan Nyaki Kileo, learned counsel represented the appellant whereas the respondent was represented by Ms. Alice E. Mtulo and Mr. Hospis Maswanyia, both learned Senior State Attorneys. The counsel for the parties had earlier on filed their respective written submissions in accordance with Rule 106 (1) and (7) of the Court of Appeal Rules, 2009 the contents of which each adopted before addressing us orally.

When invited to amplify on the grounds of appeal, Mr. Kileo sought and obtained leave to abandon the second, third and fourth grounds of appeal and submit only on the first ground. The said ground is to the effect that: -

> *"The Tribunal erred in law and in fact in holding that the Board was correct to hold that the respondent* ***used correct currency*** *in computing*

withholding tax liability alleged to be due on the appellant."

In his written submission, in respect of the above ground, Mr. Kileo faulted the Tribunal's decision upholding the Board's decision that the payments made between the parties in respect of the management agreement was in United States Dollars (US$) despite the fact that some of the invoices issued did not indicate the type of currency used while others were issued in South African Rands (ZAR). Mr. Kileo argued further that during the audit exercise, the respondent acknowledged that some of the invoices were issued in ZAR. However, after perusing the management agreement and the financial statement, the respondent arrived at the conclusion that the invoices issued were in US$ currency, hence issued withholding tax demand also in US$. It was his further argument that, it was wrong for the Board and the Tribunal to agree with the respondent on this point.

However, in his oral submission, Mr. Kileo impressed upon us that the appellant's claim on that ground is not in relation to the type of currency used by the respondent but the amount of withholding tax demanded by the respondent, which he said, it was on the high side

by reason of arithmetic errors. He specifically referred us to the Withholding Tax Certificates/Interest (exhibit A1) issued by the respondent demanding withholding tax and interests amounting to TZS 12,573,422.59, TZS 20,153,4g24.45 and TZS 33,693,792.15 for the years 2010, 2011 and 2012, respectively. He then argued that computing the 15% withholding tax from the payments made for the said years, the resultant liability against the appellant will be US$ 1800, US$ 900 and US$ 907.5, respectively. According to him, the total amount the appellant was supposed to pay as withholding tax for the said years was US$ 3,607.5 and not TZS 54.6 Million claimed by the respondent. He contended that, if the Board and the Tribunal could have considered the evidence on record and critically analyzed exhibits A1, A2, R3 and R4, they would have found that the management fee demanded by the respondent had an arithmetic error. As such, Mr. Kileo invited us to re-evaluate the said exhibits and specifically the figures and calculations made thereto to arrive at an appropriate amount which the appellant is obliged to pay.

To justify his proposition, he cited the case of **Deemay Daati and 2 Others v. Republic,** Criminal Appeal, No. 80 of 1994 (unreported) where the Court restated the principle that second

appellate court is empowered to re-evaluate the evidence on record and make its own findings of fact when there is misdirection or non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence. He then concluded that this Court should revisit the evidence on record and come to its own finding.

In his response, Mr. Maswanyia strongly disputed the above oral submissions advanced by Mr. Kileo that it has introduced a new issue which was never raised and considered by the Board and the Tribunal. He referred us to the appellant's written submission before the Board found at page 83 of the record and argued that before the Board and the Tribunal the appellant submitted that the arithmetic error was occasioned by the use of wrong currency and not otherwise. He said, since the oral submission is introducing a new aspect in this case, the same should be disregarded by this Court.

As regards the appellant's written submissions, Mr. Maswanyia argued that there is no dispute that the invoices availed by the appellant did not disclose the types of currency used. Therefore, to ascertain the type of currency and the amounts contained in the said invoices, the respondent resorted to the management agreement

(exhibit R2) found at page 122 of the record of the appeal where under para 4 of the said agreement, it is clearly indicated that payments between the parties are supposed to be in US$. Mr. Maswanyia also referred us to the notes to the appellant's financial statements (exhibit R3) found at page 143 of the record, where the accounting system of the appellant is in US$. He then argued that, the Board and the Tribunal considered exhibits A1, A2, R2 and R3 and were satisfied that the appellants payments of the management fees to its counterparts was in US$.

It was the strong argument of Mr. Maswanyia that the issue of proving whether the invoices were in US$ or otherwise is a factual issue which needs to be ascertained by evidence. He contended that, since the said issue was properly considered and determined by the Board and the Tribunal this Court has no jurisdiction to reconsider the same on the strength of section 25 (2) of the Tax Revenue Appeals Act, [Cap 408 R.E. 2019] (the TRAA). He emphasized that, since under that section the appellant is only required to appeal on matters of law, she cannot be heard at this stage on a factual finding by the Board and the Tribunal. He distinguished the case of **Deemay Daati and 2 Others** (supra) relied upon by Mr. Kileo by arguing that the

facts in that criminal case are not applicable to the current tax appeal. Based on his submissions, Mr. Maswanyia urged us to dismiss the appeal with costs.

On our part, before we consider the submissions made by the counsel for the parties in respect of the above ground, we wish to put the record straight in the light of the appellant's oral submissions. We have noted that all along, the appellant's claim before the Board, the Tribunal and even this Court in respect of the above ground was predicated on an arithmetic error occasioned by the use of wrong currency by the respondent in its withholding tax demands. This can be evidenced by the appellant's written submissions before the Board on this aspect found at page 83 of the record where she argued that:

> *"As regards arithmetic correctness, it is our respectful submission that it is factually wrong for containing arithmetical error and currency errors. In its email dated 24th October, 2013, the appellant informed the respondent that the currency used in computing withholding tax was incorrect. While the appellant management fee invoices value was in South African Rands (ZAR), the TRA have considered the values as US Dollars. In a response through email dated 24th October, 2014, the*

respondent conceded that indeed the currency used in computing the withholding tax is wrong. We pray that the appellant's letter dated 25th October, 2013 and the respondent's email of 24th October, 2013 attesting to this fact be collectively admitted as exhibits in this appeal. These documents are attached to this submission marked annexures 2 and 3, respectively."

The respondent's response to that ground as per the written submissions found at pages 92 – 93 of the record of appeal goes thus: -

"The appellant's management invoices values were in unspecified currency. To attest to this position, we attach the copies of the respective invoices to this submission and pray that the said invoices be collectively admitted as exhibit in this Appeal. Looking at the said invoices you will clearly note that the said invoices only show the amount (figures) of the management fee charged, but do not specify the type of currency to be paid by the appellant to the service providers...Thus to ascertain the type of currency used by the appellant to pay management fees to the service provider, we examined other documents produced by the appellant during the audit exercise. These other documents included the management agreement

entered into between the appellant and Singita Trading Stores (Pty) Ltd of South Africa and financial statements (Accounts) submitted by the appellant for tax purposes for years of income 2010, 2011 and 2012."

The Board considered the above submissions and concluded at page 166 of the record of appeal that: -

"We are convinced that there is evidence that suffices to prove that the appellant was paying management fees billed by Ms. Singita Trading Stores (Pty) Ltd of South Africa in US Dollars. exhibit R3 proves this fact. Equally, exhibit R2 is clear that it had been agreed that management fees would be payable in US Dollars. The appellant's advocate contention that the respondent's offices had admitted usage of wrong currency cannot outweigh clear terms of an agreement signed by the appellant leave alone the appellant's own notes of financial statements."

The same line of arguments by the parties featured again before the Tribunal where they argued the appellant's first ground of appeal that, "*the Board was wrong in fact by failing to hold that the respondent used the* ***wrong currency*** *in computing the withholding*

tax allegedly to be due." The Tribunal considered the parties' submissions on that ground and upheld the decision of the Board as indicated above.

It is also evident that, in his written submission, Mr. Kileo argued the first ground of appeal in the same manner disputing the currency used by the respondent in the withholding tax demands.

There is no doubt that the oral submission made by Mr. Kileo before us do not match with his written submission. With respect, we find the move taken by Mr. Kileo to be irregular and a surprise to the respondent, because instead of highlighting on his written submissions, Mr. Kileo introduced a new issue which was never considered and determined by the Board and the Tribunal. This kind of practice is nothing less than introducing a fresh litigation between the parties which cannot be permitted at this stage. Accordingly, we are constrained to decline to consider the oral submissions made by Mr. Kileo before us. In doing so, we find solace in our previous decision in **Blue Line Enterprises Limited v. East African Development Bank,** Civil Application No. 21 of 2012 (unreported) where we quoted with approval an old decision in **Haystead v.**

Commissioner of Taxation [1920] A.C 155 at page 166 whereby Lord Shaw observed that: -

> *"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new version which they present so as to what should be a proper apprehension, by the Court of the legal result... **If this were permitted, litigation would have no end except when legai ingenuity is exhausted."** [Emphasis added].*

[See also the cases of **Georgio Anagnostou and Another v. Emmanuel Marangakis and Another,** Civil Application No. 464/01 of 2018 and **Chacha Jeremiah Murimi & 3 Others v. Republic,** Criminal Application No. 69/08 of 2019].

We need not overemphasize the principle that litigants should not be allowed to change their goal posts when new views are discovered in the course of litigation. We may go further and add that permitting the appellant's counsel ingenuity to prevail over the relevant law including the rules regulating the procedure before this Court does not accord with the smooth conduct of litigation depriving the other party from pursuing his case free from surprises. With the

above, we will now turn our attention to the first ground of appeal indicated above.

Back to the first ground of appeal, we think Mr. Maswanyia is correct in submitting that tax appeals to this Court are only on matters of law and not facts. This is in accordance with section 25 (2) of the TRAA which state that: -

> *"**Appeals to the Court of Appeal shall lie on matters involving questions of law only** and the provisions of the Appellate Jurisdiction Act and the rules made thereunder shall apply mutatis mutandis to appeals from the decision of the Tribunal." [Emphasis added].*

There are several decisions of this Court to that effect. See for instance cases of **Shell Deep Water Tanzania BV v. Commissioner General Tanzania Revenue Authority,** Civil Appeal No. 123 of 2018, **Geita Gold Mining Limited v. Commissioner General Tanzania Revenue Authority,** Civil Appeal No. 9 of 2019 and **Atlas Copco Tanzania Limited v. Commissioner General Tanzania Revenue Authority,** Civil Appeal No. 167 of 2019 (all unreported). In the latter case, the Court

considered the applicability of section 25 (2) of TRAA and expressly defined what was meant by a question of law: -

> *"Thus, for the purpose of section 25 (2) of the TRAA, we think, a question of law means any of the following:* ***First,*** *an issue on the interpretation of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine on tax revenue administration.* ***Secondly,*** *a question on the application by the Tribunal of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine to the evidence on record.* ***Finally,*** *a question on a conclusion arrived at by the Tribunal where there is failure to evaluate the evidence or if there no evidence to support it or that it is so perverse or so illegal that no reasonable tribunal would arrive at it."*

We shall be guided by the above authorities to determine whether the ground canvased by the appellant's learned counsel passes the test of a question of law which the Court has jurisdiction in terms of section 25 (2) of the TRAA.

The appellant's complaint in respect of the first ground of appeal relates to the Tribunal's decision upholding the decision of the

Board that the respondent used correct currency in computing withholding tax liability due to the appellant. It is on record that, the appellant submitted before the Board invoices which did not specify the type of currency used to pay the service providers. Therefore, to ascertain the type of currency used by the parties, the Board and the Tribunal resorted to paragraph 4 of the management agreement (exhibit R2) between the parties where it is clearly indicated that payment between the parties should be in the US$. In addition, the Board and the Tribunal scrutinized Exhibits A1, A2, R3 and R4 to arrive at their decisions. Specifically, at pages 302 – 304 of the record, in upholding the decision of the Board on this aspect, the Tribunal stated that: -

> *"The invoices do not specify the currency of the value they carry; what evidence is better than the management agreement entered between the appellant and its counterparts to explain the missing thing."*

On that account, we are of the settled view that the appellant's complaint on this matter raises purely a factual matter which cannot be entertained by this Court at this stage in terms of section 25 (2) of TRAA. Going through the record, and having considered the decision

of the Tribunal on this aspect, it is clear that the appellant's complaint was sufficiently dealt with by the Tribunal and it being on factual matters, it ought to end there. In the case of **Insginia Limited v. Commissioner General, Tanzania Revenue Authority,** Civil Appeal No. 14 of 2007 (unreported) when faced with an akin situation, the Court stated that: -

> *"It is therefore evident that appeals to this Court from the Tribunal should involve only questions of law. The appellant is not permitted to reopen factual issues in support of the appeal. The appeal should be decided upon a consideration of the law only and nothing else. We are therefore not persuaded that the first and fourth grounds of appeal concern points of law. The first and fourth grounds of appeal relate to an evaluation of the fact in exhibits RE 2; RE 3 and RE 4. For instance, exhibit RE 2 concerns a determination of whether or not the figures therein are actual sales or projections."*

In the above case, the Court declined to consider the first and fourth grounds of appeal, which it found to be raising factual issues as opposed to questions of law.

Similarly, in the appeal at hand, since the appellant is inviting us to re-evaluate the evidence on record and specifically, exhibits A1, A2, R3 and R4 to arrive at different calculations and amount to be paid by the appellant as withholding tax, we decline the invitation.

In the circumstances, we uphold the decision of the Tribunal and dismiss the appeal with costs.

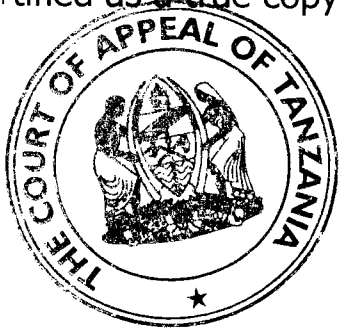
DATED at **DAR ES SALAAM** this 4th day of May, 2021.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 6th day of May, 2021 in the presence of Mr. Alan Kileo, learned counsel for the Appellant and Ms Rose Sawaki, learned State Attorney for the Respondent, is hereby certified as a true copy of original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL