IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPEAL NO. 174 OF 2019

TANZANIA TOBACCO PROCESSORS LIMITED ..... APPELLANT

VERSUS

THE COMMISSIONER GENERAL (TRA) ..... RESPONDENT

(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Mjemmas - Chairman)

dated the 25th day of April, 2019

in

Tax Revenue Appeal No. 21 of 2016

JUDGMENT OF THE COURT

12th February & 17th May, 2021

LEVIRA, J.A.:

The appellant, Tanzania Tobacco Processing Limited (the TTPL) is a company dealing with green tobacco processing. In the years of income 2006, 2007 and 2008 the respondent had conducted an audit on the appellant's tax affairs and came out with a tax assessment report in which, the respondent disallowed the interest on loan allegedly paid by the appellant to the Universal Leaf Tobacco Co. Inc. of the United States of America (the ULTC) in terms of a Loan Agreement. The decision of the respondent to disallow the said interest came as a result of Additional Final

Assessments Nos. F. 420213027 dated 29th September, 2009, F. 420287599 dated 17th May, 2010 and F. 420287605 dated 17th May, 2010 for those respective years in question.

The appellant was aggrieved by that assessment plus the interest charged under section 99 of the Income Tax Act, 2004 (the ITA). Therefore, it unsuccessfully lodged with the respondent a notice of objection which was determined against it. As a result, it instituted appeals in the Tax Revenue Appeals Board (the Board) in respect of those assessments which were consolidated as Tax Appeal No. 48, 49 and 50 of 2013. The Board's decision come out on 28th June, 2016 in favour of the respondent. Still aggrieved, the appellant unsuccessfully appealed to the Tax Revenue Appeals Tribunal (the Tribunal) vide Tax Appeal No. 21 of 2016; hence, the current appeal.

To appreciate the present appeal, we find it appropriate to narrate albeit briefly the factual background leading to this appeal. On 16th August, 2000, the appellant signed a 10 years Loan Agreement of US Dollars 15,000,000.00 with the ULTC. The lender (ULTC) had contracted with equipment vendors and placed deposits in order to get processing equipment built for the borrower (TTPL). It was further agreed that the

lender would invoice the borrower the cost of his equipment as well as any installation, shipping; loading, freight, or other related costs incurred by the lender as the equipment is shipped to Tanzania. Another term in the Agreement was that the borrower would not actually draw down funds from the loan repayable over ten years, but was required to record the invoices received from the lender for the cost of the equipment as a long-term obligation to the lender. The loan was also to cover the cost of crews contracted by the ULTC and sent to Morogoro to install the new equipment. The interest of the loan was agreed to be 2% per annum as was quoted in US Dollar loans by Standard Chartered Bank.

On 29th September, 2006, 28th September, 2007 and 30th September 2008 the appellant filed with the respondent her income tax returns accompanied with financial statements for the years of income 2006, 2007 and 2008 respectively. As intimated above, the respondent conducted assessment of the appellant's business affairs and issued notices of adjusted assessments for the said years of income. As earlier stated, the appellant was aggrieved with the adjustments made by the respondent and therefore lodged notices of objections against the three issued assessments. The objections were considered and the respondent issued

amended income tax assessments whereby some items were reviewed as per the appellant's objections. However, the respondent maintained disallowance of interest expenses in the years under consideration. The appellant was aggrieved but he unsuccessfully appealed to both, the Board and the Tribunal as indicated above. In this appeal, the appellant has presented six grounds as follows:

1. *Upon finding at page 14 of the Judgment that the issue of interest rate not being at arm's length was not part of the Commissioner's decision which was the subject of the Appellant's appeal to the Board, the Tax Revenue Appeals Tribunal erred in law and fact in upholding the decision of the Tax Revenue Appeals Board. In doing so the Tribunal failed to note that:-*
    i. *In dealing with the appeal the Board was exercising appellate jurisdiction and not original jurisdiction.*
    ii. *The Board had no jurisdiction to deal with any other matter other than those contained in the grounds raised by the appellant by way of appeal.*

iii. *There was no opportunity for the appellant to amend the statement of appeal to include grounds or matters which did not arise from the decision of the Commissioner.*

iv. *The respondent had no opportunity in law to bring a new case by way of reply to the appellant's statement of appeal.*

v. *The respondent had abandoned the issue of interest rate not being at arm's length in his decision.*

vi. *The appellant submissions in reply to the interest rate not being at arm's length was made under protest; and*

vii. *The appellants and or respondent submissions could not give the Board jurisdiction to deal with a matter which did not arise from the Commissioner's decision.*

2. *Upon finding at page 14 of the Judgment that the issue of interest rate not being at arm's length was not part of the Commissioner's decision the Tribunal erred in law and fact in dismissing ground 6 of the appeal.*

3. *The Tax Revenue Appeals Tribunal erred in law and fact in failing to hold that the Tax Revenue Appeals Board had no jurisdiction to deal with the question of whether instalments taxes had been paid or not*

because such issue was not part of the appellant appeal and did not arise from the Commissioner's decision subject of the appeal before the Board.

4. *The Tribunal erred in law and fact in upholding the finding by the Board that the respondent was justified to disallow the interest on loan paid by the Appellant to Universal Leaf Tobacco Company on the ground that it was not wholly and exclusively incurred for the production of income.*
5. *Upon finding that the Commissioner failed to comply with section 35 of the Income Tax Act, 2004 the Tribunal erred in law and fact in failing to conclude that the issue of interest rate not being at arm's length was wrongly raised by the Commissioner and entertained by the Board because one can only find that the interest rate is not at arm's length after complying with section 35.*
6. *The Tax Revenue Appeals Tribunal erred in law in holding that there was no reason to interfere with the Boards decision in not ordering the Commissioner to adjust the interest to the rate considered to be at arm's length.*

At the hearing of this appeal, the appellant was represented by Mr. Gaspar Nyika, learned advocate, whereas the respondent enjoyed the services of Ms. Gloria Achimpota, Mr. Noah Tito and Mr. Harold Gugami, all learned Senior State Attorneys.

The counsel's submissions were preceded by Mr. Nyika's prayer to amend the grounds of appeal and add two new grounds which were indicated in the appellant's written submissions in terms of Rule 106(3)(b)(ii) of the Tanzania Court of Appeal Rules (the Rules). There was no objection to the prayer from the respondent's side. We granted the prayer and the parties made their submissions accordingly.

Mr. Nyika commenced his submission in support of the appeal after having adopted the appellant's written submissions. Regarding the first ground of appeal, he submitted that the main issue in this appeal and the appeal before the Tribunal is that the Board's decision was based on interest rate which was not an issue before the Board. He pointed out that the Notice of Additional Final Assessment found at page 1093 of the record of appeal indicated that the interest was charged above market rate which made the appellant to object against Corporate Tax Additional Assessment No. F. 420213027, year of income 2006 with the respondent as it can be

seen at page 1096 of the record of appeal. Following that objection, the respondent came up with a proposal to settle the objection (Statement of Changes in Equity 31st March, 2008) as it can be seen at page 1031 of the record of appeal. However, the appellant was not satisfied with the said proposal contending that it was not correct because the issue of invoice and interest was improperly raised. It was argued that the respondent did not consider the appellant's explanation to that effect. This made the appellant to lodge her appeal to the Board and categorically stated that the subject matter of the appeal before the Board was the Amended Notice of Assessment dated 21st February, 2013.

He added that among the grounds were that the sum of Tshs. 1,495,712,912/= which the appellant had claimed as interest paid to the ULTC, is genuine because the assets purchased by the Appellant through the loan on which the interest was charged were utilised wholly and exclusively for the production of the company's income. In this regard it was argued that the amount is therefore tax deductible/allowable as provided for under sections 11 and 12 of the ITA. He added that, the loan drawdown was in accordance with a signed agreement between the ULTC and the appellant, which agreement was registered with the Bank of

Tanzania (the BOT) and Tanzania Investment Centre (the TIC). He submitted further that another ground was that the assets acquired in terms of the loan would be productively used in the production of the appellant's income and that, the Commissioner for Income Tax had no power to deem the loan not at arm's length and disallow the interest expense.

Mr. Nyika also argued that the respondent brought back the issue of interest when replying to the statement of appeal as it can be seen under paragraph 5 of the said reply where the Respondent stated that the interest rate charged on the loan was deemed not to be at arm's length.

The learned counsel argued further that the counsel for the respondent submitted before the Board on interest rate and said that the loan drawdown was not an issue, the appellant challenged it and urged the Board not to deal with the issue of interest rate but his argument was not considered by the Board. However, the Board went on deciding on the interest rate issue in favour of the respondent, a decision which was upheld by the Tribunal despite its observation that the interest rate was not part of the respondent's decision but it said, the appellant was supposed to amend the statement. According to Mr. Nyika, it was an error

for the Tribunal to find that although the issue of interest rate was not before the Board, still, it was right to deal with it.

As regards other grounds of appeal, Mr. Nyika adopted what is stated in appellant's written submissions with no more. Finally, the learned counsel urged the Court to allow the appeal with costs.

Suffices here to state that, we shall not reproduce the appellant's submissions in relation to other grounds of appeal, but in appropriate time relevant parts of it will be referred to while discussing related issues to be raised herein.

In reply, Ms. Achimpota adopted the respondent's written submissions, combined and argued grounds of appeal 1, 2, 4, 5 and 6 together. Ground 3 was argued separately. While responding to the clustered grounds of appeal, she submitted that the central point in controversy in this appeal is the respondent's disallowance of interest in three years which emanated from an arrangement between the appellant and the ULTC related to the appellant under section 3 of the ITA.

She submitted further that, the appellant was required to pay interest charged at a rate quoted by Standard Chartered Bank and 2% of that rate. She cited section 33 (1) of the ITA and insisted that, any arrangement to

related persons is to be conducted at arm's length and any transaction between parties to be done similarly to parties which are not related. According to her, had it been that the appellant borrowed from a local Bank they would be charged lesser interest than if borrowed from a company. She argued that borrowing from the company, they violated section 33 of the ITA because the appellant was paying lesser tax. The respondent disallowed the interest expense because the appellant violated section 33 (2) of the ITA by charging above the market rate and thus, it was not at arm's length. The tax assessment by the respondent was communicated to the appellant through a letter found at pages 1094 – 1095 of the record of appeal. She went on stating that after receiving the letter, the appellant lodged an objection which is found on page 1096 of the record of appeal.

Ms. Achimpota argued that, contrary to the appellant's counsel's submission, the appellant did not substantiate that the interest was at arm's length. She insisted that the appellant never produced any evidence to prove that the interest charged was at arm's length, an obligation which they had under section 18 (2) (b) of the Tax Revenue Appeals Act, Cap. 408 (the TRAA).

To support her argument, she cited the case **Insignia Limited v. Commissioner General, Tanzania Revenue Authority,** Civil Appeal No. 14 of 2014 and **Alliance One Tobacco Tanzania Limited v. Commissioner General TRA,** Civil Appeal No. 118 of 2018 (both unreported) in which the Court pressed on the appellant's duty to prove the case. The learned counsel submitted that in the current appeal, the appellant did not prove that the interest charged was at arm's length be it before the Commissioner, Board or Tribunal.

It was her further submission that before the Board, the respondent submitted that, the appellant violated both sections 33 (1) and 35 of the ITA. According to her, both sections have the same effect that the tax payer ends paying lesser tax. However, she clarified that the case at hand centres on violation of arm's length principle under section 33 (1) of the ITA, and that is why even when the Tribunal found that the respondent had not complied with section 35, it also found that the appellant did not comply with section 33(1). Vehemently, Ms. Achimpota argued that the base of Tribunal's decision under section 35 is that the respondent did not issue a notice and it is not that there was no tax arrangement. She

however stated that section 35 of the ITA uses the word "may", which means, it was not mandatory for the respondent to issue a notice.

According to her, although the appellant claimed that the loan was used to buy equipment, there was no proof to that effect. As a result, she said, the Board relied on section 33 (1) in its decision which was also upheld by the Tribunal. Ms. Achimpota urged us to uphold that decision.

Responding to the appellant's claim that the Board was wrong to decide on a matter brought by the respondent during hearing of the appeal, Ms. Achimpota argued that the Board has the mandate to hear and determine cases presented by both parties in terms of Rule 15 (3) and (5) of the Tax Revenue Appeals Rules (the TRAR). According to her, this procedure was followed by the Board from page 299 through 344 of the record of appeal.

She argued further that, nonetheless, the issue of interest not being at arm's length was not new as it was the basis of the objection decision and the appellant never brought the evidence on that ground to prove otherwise. The learned counsel emphasized that, if the appellant did not raise the issue of interest rate, the law does not preclude her from addressing it. After all, she argued, the appellant was aware of what the

respondent was going to present during appeal, so she cannot claim that the right to be heard was violated.

Ms. Achimpota contended that the appellant's right to be heard was not violated as she referred us at page 311 of the record of appeal, where the appellant submitted in chief willingly and not under protest about the interest rate before the Board. According to her, the Tribunal considered this fact and held that the appellant was not condemned unheard. In the circumstances, she urged us to find that grounds of appeal 1, 2, 4, 5 and 6 are devoid of any merit and dismiss them accordingly.

As far as the third ground of appeal is concerned, Ms. Achimpota submitted that, this is a factual issue regarding tax payment. The said issue was determined by the Tribunal and urged the Court not entertain it because appeals to the Court are on matters involving questions of law only in terms of section 25 (2) of the Tax Revenue Appeals Act, cap 408 (the TRAA). Finally, she urged us to dismiss this ground of appeal as well.

In addition to what was presented by Ms. Achimpota, Mr. Tito submitted in respect of the issue of interest rate to the effect that, the said issue was raised and communicated to the appellant by the Commissioner while giving the assessment from page 1094 to 1095 of the record of

appeal. He also stated that there is no difference between interest rate and loan drawn down, these are one and the same thing. The decision of the respondent that the interest was not at arm's length is found at page 1031 of the record of appeal and this was one of the grounds to refuse the interest rate. Particularly, he added that since there was no proof that the appellant was given the loan, the issue of tax avoidance surfaced. He went on submitting that there was no proof that the appellant bought equipment from outside and hence section 11 of the ITA came into play. He argued that the appellant did not discharge her burden in terms of section 18 the TRAA to prove that they were supplied with equipment instead of funds and thus the respondent was right to refuse the interest rate. He concluded by urging us to dismiss this appeal with costs.

In his brief rejoinder, apart from reiterating his earlier submission, Mr. Nyika stated that the respondent appeared to abandon the issue of interest rate because his decision based on loan drawn down, which he said, is different from interest rate. According to him, loan drawdown is to take a loan while interest rate is just an interest. He also argued that the appellant proved that the equipment was supplied that is why the respondent allowed the depreciation of the same. He referred us to page

323 of the record of appeal and emphasized that the issue before the Board was not interest rate. He argued that the respondent violated section 35 (1) of the ITA and that section 35 (2) of the same Act was quoted out of context. Mr. Nyika insisted that the appellant was not accorded the right to be heard in respect of the interest issue. According to him, the respondent was required to issue notice to the appellant as the respondent had no other option regardless of the word "may" appearing under the provisions of section 35 of the ITA.

Regarding the third ground of appeal, he submitted that the same is a pure point of law on jurisdiction of the Board which can be entertained by the Court. Finally, Mr. Nyika reiterated his submission in chief and urged us to allow the appeal.

We have dispassionately considered the submissions by the counsel for both sides and the record of appeal. In determining this appeal, we shall combine the 1st, 2nd, 4th, 5th and 6th grounds of appeal because they relate and the 3rd ground separately just as they were argued by the counsel for parties. The main issue calling for our determination in the combined grounds is whether the Tribunal erred in upholding the decision of the Board on interest rate issue which was allegedly improperly raised

by the respondent before it in the absence of a requisite notice to the appellant.

As indicated above, it was the argument by the counsel for the appellant that the Board was not justified to deal with the issue of interest rate because, one, the Board had no justification to deal with the issue of interest rate because neither was it the basis of respondent's decision on objection nor was it appealed against by the appellant. Two, the Tribunal's decision to uphold the Board's decision on account that the appellant ought to have amended the statement of appeal was improper. On the other hand, Ms. Achimpota for the respondent opposed the contention. She argued that the appellant did not prove that the interest rate was at arm's length. Besides, she submitted that, the Board is empowered under the law to hear both parties while entertaining an appeal.

Section 16 of the TRAA which empowers the Board to hear appeals against the decision of the Commissioner General reads:

> *"Any person who is aggrieved by the final determination by the Commissioner General of the assessment of tax or a decision referred to under section 14 of this Act may appeal to the Board".*

In the current appeal, the appellant was aggrieved by the decision of the Commissioner General and therefore she appealed against it before the Board. As intimated above, the appellant was challenging the respondent's disallowance of interest expenses for the years of income 2006, 2007 and 2008; among the grounds of appeal before the Board as appearing at page 18 of the record of appeal was as follows:

> *"12 (h) The Commissioner for Income Tax* ***does not have the power to deem the loan is not at arm's length and therefore disallow the interest expenses.*** *The interest expense is allowed in terms of section 11(2) and 12(1)(a) of the Income Tax Act, 2004".* [Emphasis added].

In the course of hearing the appeal before the Board, the following issues were framed:

1. *Whether the interest on loans is an allowable deduction under the Income Tax Act, 2004;*
2. *Whether the Commissioner was legally justified to disallow interest on the loan paid by the Appellant to Universal Leaf Tobacco Company;*
3. *Whether the Commissioner was correct in charging interest under section 99 of the Income Tax Act, 2004; and*

4. To what reliefs are the parties entitled to.

Having considered the grounds of appeal and the issues raised, the Board dismissed the appeal for lack of merits. Aggrieved, the appellant unsuccessfully appealed to the Tribunal where the following ground was lodged as the first ground:

1. *"That the Tax Appeals Board erred in law and fact* ***in determining the Appeal on the basis of the question of whether the rate of interest charged was at arm's length."*** [Emphasis added].

In this ground the main complaints which are also complaints herein are: **First,** the appellant was denied the right to be heard on the issue of interest rate because the same did not form a basis of respondent's decision on objection. **Second,** the ground concerning interest rate was not raised by the appellant in her grounds of appeal but the respondent in her reply to statement of appeal.

We wish to state at the outset that, parties are bound by their pleadings – see: **Barclays Bank (T) Limited v. Jacob Muro**, Civil Appeal No. 357 of 2019 and **Samwel Kimaro v. Hidaya Didas**, Civil Appeal No. 271 of 2018 (both unreported). It can be observed from the above quoted statement of facts and reasons in support of the appeal before the Board

that, the appellant in ground '12(h)' was faulting the decision of the respondent on her objection to the effect that the respondent does not have the power to deem the loan is not at arm's length and to disallow the interest expenses. In responding to the appellant's claim is when the respondent stated under paragraph 5 of the reply as follows: -

> *"5. That the contents of paragraph 12(h) of statement of facts and reasons in support of appeal are vehemently disputed and Respondent further states that* ***It is the interest rate charged on the loan that was deemed not to be at arm's length.*** *The Commissioner is empowered under the law to make adjustments and disallow the interests if he is of the opinion that the interests rates applied were not at arm's length."* [Emphasis added].

We also observe from the statement of appeal to the Board that the appellant gave a background of her complaints as follows:

> *"2. In a letter dated* ***29th September, 2009,*** *the Respondent informed the Appellant, inter alia, the following:*
> *a) that the Respondent would disallow the sum of Tshs. 1,628,883,334 which the Appellant had claimed as interest paid by the Appellant to Universal Leaf Tobacco Company in terms of a loan agreement entered with the Appellant. The said loan agreement and registration with Bank of Tanzania are attached and marked TTPL2, and*

b) that the Respondent would charge interest of Tshs. 481,340,093.60 in terms of section 99 of the Income Tax Act 2004.

7. In a letter dated ***14th June 2012, the Respondent stated that 'We are of the view that the loan interest is not at arm's iength*** *due to the fact that Tanzania Tobacco Processors Limited had* ***not actually drawn funds from the loan*** *rather they record invoice received from the lender for the cost of the equipment as a long-term obligation. The respondent also stated that under section 99 of the Income Tax Act interest was imposed as the Appellant had filed NIL assessment of tax payable by Instalment and therefore interest of Tshs. 428,124,406 was due. The interest calculations is attached and marked TTPL7.*

8. The appellant once again wrote to the respondent on ***18th July 2012*** *disputing the disallowed interest expenses of Tshs. 1,628,883,334* ***as the loan arrangement was an accepted business arrangement practiced globally*** *and that the loan agreement had been accepted by both the Bank of Tanzania and Tanzania Investment Centre. The appellant's letter is attached and marked TTPL7.*

9. In a letter dated 23rd January 2013, the Respondent informed the Appellant that after reviewing the arguments contained in the letter of 18th July 2012, ***they were unable to agree with the Appellant's submission in respect of***

the interest expenses and therefore they still maintained their position on this item....

10. The Respondent issued a ***Notice of Amended Assessment F 420213027 dated 21st February 2013****. The Amended Notice showed that the Income Tax due from the Appellant for the 2006 year of income was Tshs. 1,905,514,640.10, interest (pursuant to section 99) of Tshs. 570,906,199.70 and total tax paid as Nil. The Notice of Amended Assessment F 420213027 dated 21st February 2013 is attached and marked TTPL9.*

11. Being aggrieved with the Amended Notice of Assessment, the Appellant filed a Notice of Intention to appeal the Respondent's decision on 21st March 2013 with the Tax Appeals Board....

12. It is this ***Amended Notice of Assessment dated 21st February 2013,*** *which is the subject matter of the present appeal on the grounds set out hereunder and detailed in this statement of appeal."* [Emphasis added].

In determining the appellant's complaint regarding the first issue, the Tribunal made an observation that the issue of interest rate was not part of the respondent's decision. However, it went further to find that the appellant was supposed to establish that the interest rate was at arm's length before the Board. The basis of the Tribunal's decision was that the respondent did not issue the

appellant notice to that effect. Whether the appellant was issued with a notice to that effect or rather, whether she was notified, we need to consider what does it refer by notice and the purposes of it. The Concise Law Dictionary, 4th Edition, 2012 defines the term "notice" as follows:

> *"information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent to knowledge in its legal consequences."*

In the light of the above definition, the question that follows is whether the appellant was made aware or had knowledge of interest rate not being at arm's length in the correspondents between them. According to the record of appeal, the issue of interest rate not being at arm's length was not new to the appellant and the same was not raised in the Board for the first time by the respondent in the reply to the statement of appeal as claimed by the appellant. With respect, we are unable to agree with the appellant and both the Board and the Tribunal that the said issue was only raised by the respondent in the reply to the statement of appeal.

It can be observed from paragraph 7 of the appellant's statement of appeal to the Board that through the letter dated 14th June 2012, the respondent informed the appellant that the loan interest is not at arm's length due to the fact that TTPL had not actually drawn funds from the loan rather they recorded invoice received from the lender for the cost of the equipment as a long-term obligation. Being aggrieved, the appellant filed the objection with the respondent in that regard but it was declined. The respondent issued an Amended Assessment in which the said issue was not repeated. As indicated under paragraphs 11 and 12 of the statement of appeal to the Board, being aggrieved with the Amended Notice of Assessment, the appellant filed a Notice of Intention to Appeal against the Respondent's decision on 21st March, 2013 with the Tax Appeals Board which was the subject matter of the appeal.

Looking at the sequence of events holistically, it is clear that the issue of interest rate not being at arm's length was raised by the respondent to the appellant even before the respondent issued the Amended Notice of Assessment. However, as it can be observed, in responding to the same, the appellant disputed the disallowed interest on account that the loan arrangement was an arrangement accepted by both,

the BOT and TIC. As correctly argued by the counsel for the respondent, in our considered view, the appellant's response to that issue did not establish to the respondent that the said interest rate was at arm's length.

We wish to observe further that, the fact that the respondent issued a Notice of Amended Assessment after informing the appellant that she maintained her position in regard to the interest rate and that the appellant was aggrieved by that assessment, is a clear indication that the said decision of the respondent triggered the appellant's dissatisfaction and eventually led to an appeal to the Board. We are aware of the requirement of the law under section 97 of the ITA that where the Commissioner makes an assessment is required to serve the written notice of the assessment on the person who was assessed. However, in our view, the fact that the respondent's Amended Notice of Assessment of 21st February, 2013 did not mention categorically as it was the case in the first Notice of Assessment (see the letter of 29th September, 2009) that the interest rate was not at arm's length, in itself did not mean that the respondent had excused the appellant from proving that the interest rate was at arm's length as required under the law - see: **Kilombero Sugar Company Ltd v.**

Commissioner General (TRA), Civil Appeal No. 261 of 2018 (unreported).

We do not agree with the appellant that the respondent had abandoned the issue of interest rate simply because the subsequent notice did not mention it categorically. In the light of the record before us, the said issue was still pending and it was incumbent upon the appellant to prove that the interest rate was at arm's length or not. In the premises, we find that the appellant failed to discharge her obligation under the law. By stating that the loan arrangement was an accepted business practised globally and that it had been accepted by the BOT and TIC, in our view, was not sufficient to prove that indeed the interest rate was at arm's length. We are fortified in this finding by the respondent's letter of 18th July, 2012 informing the appellant that they still maintained their position regarding the interest rate after receiving the appellant's objection. A close reading of the record of appeal reveals that what was maintained by the respondent was the issue of interest rate through the letter of 29 September, 2009 referred by the appellant above. The said letter is found at page 430 of the record of appeal and also at page 63 attached to the statement of appeal by the appellant; the relevant part of it reads:

"Note(s) to schedule A:

1. Tax avoidance - operations financed by debt from related party (Holding Company), **interest is charged above market rate."** [Emphasis added].

It is therefore clear that the above issue of interest rate remained pending and the appellant did not substantiate that the interest charged is not above the market rate as required by law under section 33(1) of the ITA which provides that:

> *"In any arrangement between persons who are associates, the persons shall quantify, apportion and allocate amounts to be included or deducted in calculating income between the persons as is necessary to reflect the total income or tax payable that would have arisen for them if the arrangement had been conducted at arm's length."*

In the circumstances, we do not find any purchase in the appellant's complaint that the Board was moved by the respondent through its reply to the statement of appeal to deal with the issue of interest not being at arm's length, instead of grounds of appeal raised by the appellant in his statement of appeal. We proceed to demonstrate that at page 358 of the record of appeal the Board recorded the appellant's first ground of appeal which was crafted as hereunder:

"(a) The sum of Tshs. 1,495, 712, 912/=; 1,534,130,360/= and 727,780,690/= for the years of income 2006, 2007 and 2008 respectively, which the appellant had claimed as interest paid to Universal Leaf Tobacco Company (ULT) is genuine because the assets purchased by the appellant through loan on which the interest were charged are wholly and exclusively employed in production on the company's income. The amount therefore is deductible under the provisions of sections 11 and 12 of Income Tax Act, 2004."

Moreover, at page 364 of the record of appeal the Board noted that the appellant was informed about interest. We wish to reproduce the relevant part of the Boards decision hereunder:

"The respondent also informed the appellant that in respect of the year 2006 he would charge interest of Tshs. 481,340,093.60 in terms of section 99 of the Income Tax Act, 2004."

The above excerpts are clear evidence that the appellant was aware of interest charged even before lodging of her appeal to the Board and in fact she was the one who raised it before the Board.

It was the appellant's claim that she responded under protest on the issue of interest rate as raised by the respondent during hearing of the appeal before the Board. However, as submitted by the counsel for the

respondent, we could not discern that the submission which the appellant's counsel made his submission in chief in this regard was under protest. This is cemented by part of the submission as hereunder reproduced:

> *"It therefore follows that the interest rate for instance charged for the year 2006 was at the prime rate of the Standard Chartered Bank would have been 8.7 if we were to take 10.7% interest rate charged for 2006 minus 2% that was added on top of the Standard Charted Bank Tanzania rate.* ***It is therefore clear that based on the interest rate charged the loan interest was at an arm's length."*** [Emphasis added].

In our view, the cited version is a concession and clear evidence that the appellant was informed about the interest rate not being at arm's length. It is our considered view that, the appellant had an obligation to prove before the respondent that the interest rate was at arm's length an obligation which she did not discharge until when she took the matter to the Board.

We note that in dealing with this ground of appeal, the Tribunal was of the view that the Board was wrong in its interpretation of section 35 (1) of the ITA by stating that the requirement of a notice being issued by the respondent was optional as the provision uses the word "may". We are

unable to agree with the Tribunal's conclusion in this regard because following the correspondences between the appellant and the respondent as intimated above, the issue of notice could not arise in the circumstances.

We also note that the Tribunal's stance was based on the fact that tax avoidance is a serious matter so the appellant ought to have been accorded the right to be heard. Part of the Tribunal's decision found at page 810 of the record of appeal is reproduced hereunder:

> *"The second reason for our interpretation is that the allegation of tax avoidance is a serious matter so the tax payer has to be properly informed of the tax avoidance arrangement and the adjustment made. This would enable the tax payer to challenge the Commissioner's decision if he has any reasons against the decision and therefore get an opportunity to be heard on the matter.* ***If no notice was issued and no specification explained on the alleged tax avoidance arrangement and the adjustments made how would the tax payer defend himself.*** *The end result would be that the tax payer has been condemned unheard and the Commissioner's decision would be arbitrary which is contrary to the principle of natural justice*

enshrined in the Constitution of the United Republic of Tanzania, 1977 as amended from time to time. ***With those observations we hold that the respondent acted ultra vires and the Board was wrong in upholding its decision".***
[Emphasis added].

However, we take note that although the Tribunal held that the respondent acted *ulta vires* by not according the appellant the right to be heard on interest issue and that the Board was wrong in upholding its decision, it had a quite different view while dealing with the appellant's first ground of appeal on the claim that the Board erred in law and fact in determining the appeal on the basis of the question whether the rate of interest charged was at arm's length. At page 801 of the record of appeal, the Tribunal had this to say:-

"With respect to the respondent's counsel, we do not agree with his submission that the issue of interest rate not being at arm's length was raised in his final decision. We agree with the appellant that the issue of interest rate not being at arm's length was specifically on account of the fact that the appellant had not drawn funds from the loan and not because of the interest rate. We however, agree with the respondent's submissions that ***the issue of interest rate***

not being at arm's length was pleaded in their reply to the appellant's statement of appeal". [Emphasis added].

Having made that observation, the Tribunal considered the fact that the appellant was accorded the right to be heard before the Board in that regard.

As we have intimated above, the issue of interest rate was pleaded by the appellant in his pleadings and the respondent in her reply to the statement of appeal. In the circumstances, we find that, the appellant's claim that the Board dealt with a matter which was not decided by the respondent is unfounded. We are as well settled in our mind that it was incumbent upon the appellant to prove to the respondent that all expenditure incurred during the years of income under consideration were wholly and exclusively in the production from the business, but that was not the case. We think, if the appellant thought that the assessment of the respondent was erroneous, she had an obligation to prove the same before the Board in terms of section 18 (2) (b) of the TRAA. Therefore, the first, second, fourth, fifth and sixth grounds of appeal are without merit and dismissed.

Regarding the third ground of appeal, Ms. Achimpota argued that this is a factual issue regarding tax payment. The same was determined by

the Tribunal and thus it cannot be entertained by the Court. The counsel for the appellant opposed the submission by the respondent's counsel and he argued that this ground is a point of law. We have thoroughly gone through the record of appeal and we are unable to find the appellant's ground before the Tribunal challenging the jurisdiction of the Board in taxation. We observe that at page 426 of the record of appeal, the appellant raised almost a similar ground to the effect that:

> *"(h) The Tax Appeals Board erred in law in holding that the appellant had failed to prove that it paid the sum of Tshs. 1,175,464,257/= and Tshs. 360,270,088/=. The Tax Appeal Board erred in:*
>
> *(i) Failing to note that the Respondent did not address the issue of payments which was raised in the notice of objection in its letter dated 14th June 2012 and is therefore considered to have accepted the appellant objection on the point.*
>
> *(ii) That the respondent denied for the first time during the hearing of the appeal of having not received the tax paid by the appellant.*
>
> *(iii) That the Tax Appeal Board arrived at the decision by considering extraneous matters.*
>
> *(iv) That the Tax Appeal Board was misled by the respondent receipt which was stamped on the annexures accompanying the letter dated 29th October 2009."*

In this appeal the said ground has been presented in the following terms:

> *"(3) The Tax Revenue Appeals Tribunal erred in law and fact in failing to hold that the Tax Revenue Appeals Board had no jurisdiction to deal with the question of whether instalments taxes had been paid or not because such issue was not part of the appellant appeal and did not arise from the Commissioner's decision subject of the Appeal before the Board."*

As it can be seen from the quoted ground before the Tribunal, the issue of jurisdiction did not feature as it is raised in the current appeal. However, in this appeal although the appellant mentions the term "jurisdiction", the same focuses mainly on factual issue on payment of taxes on instalment which was considered and determined by the Tribunal. This being a factual issue, it cannot be entertained by the Court because the same was conclusively dealt with by the Board and the Tribunal. This is due to the reason that appeals to the Court are only on points of law in terms of section 25(2) of the TRAA – see: **Geita Gold Mining Limited v. Commissioner General Tanzania Revenue Authority,** Civil Appeal No. 132 of 2017; **Shell Deep Water Tanzania BV v. Commissioner General (TRA),** Civil Appeal No. 132 of 2017 and **Bulyanhulu Gold**

Mine Limited v. Commissioner General (TRA), Consolidated, Civil Appeals Nos. 89 and 90 of 2015 (all unreported)).

For the above stated reasons, we find the appeal non meritorious. Accordingly, we dismiss it with costs.

DATED at **DAR ES SALAAM** this 13th day of May, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 18th day of June, 2021 in the presence of Mr. Gaspar Nyika, counsel for the Appellant and also holding brief of Ms. Gloria Achimpota learned counsel for the Respondent is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL