IN THE TAX REVENUE APPEALS TRIBUNAL
AT DAR ES SALAAM

INCOME TAX APPEAL NO. 14 OF 2012

COMMISSIONER GENERAL ……. APPELLANT

VERSUS

AIRTEL TANZANIA LIMITED…… RESPONDENT

PROCEEDINGS

19/6/2012

QUORUM:

Hon. Dr. F. Twaib, J	**Chairman**
Mr. N. Shimwela	**Member**
Mr. K. Bundala	**Member**
For the Appellant	**Absent**
For the Respondent	**Absent**
Mrs. H. Said	**RMA**

Order:

Hearing on 31/7/2012 at 14.00 hours.

Hon. Dr. F. Twaib, J Chairman, Sgd

19/6/2012

14/8/2012

QUORUM:

Hon. Dr. F. Twaib, J	**Chairman**
Mr. N. Shimwela	**Member**
Mr. K. Bundala	**Member**
For the Appellant	**mrs. Sojo, Advocate**
For the Respondent	**Dr. Ringo, Advocate assisted by clara Mramba, Advocate**
Ms. G. Ntamuturano	**PS**

Mrs. Sojo:

I propose we file written submissions

Dr Ringo:

I agree

Order:

1. Appeal to be argued by way of written submissions as follows:

a) By the appellant on 23/8/2012

b) By the Respondent on 30/8/2012

c) Rejoinder if any on 6/9/2012

d) Hearing of clarifications on 10/9/2012

Hon. Dr. F. Twaib, J Chairman, Sgd

14/8/2012

APPELLANT'S SUBMISSION

May it please your Lordship and Honourable members of the Tribunal, the Appellant herein would wish to make brief background of the matter as hereunder:

Background

The Appellant is the Government Agent charged with the duty of assessing and collecting government revenue as provided for under section 4 of the Tanzania Revenue Authority Act – Cap 399 of the Laws of Tanzania- Revised 2006. The Respondent is a limited Company incorporated under the laws of Tanzania and their major business is in telecommunication providing mobile phones services.

My Lord and Hon members of the Tribunal, in the year 2008 -2009 the Appellant conducted audit into the business of the Respondent. The audit covered the period of **January 2003 – December 2005.** The result of the audit revealed inter alia that, the Respondent had not paid Excise duty on interconnection expenses contrary to the requirement of the Excise Tariff Ordinance Cap 332. Consequently and after finalization of Objection proceedings the Appellant raised and demanded T. Shs 2,468,259,161/=as excise duty payable on interconnection expenses.

My Lord and Honourable Members of the Tribunal, the Respondent does not dispute on the chargeability of the tax, but among the disputes which were before the Honourable Board based on the grounds that:

(i) That the demand notice and the assessment were issued wrongly based on repealed law, and

(ii) That the excise duty claimed is time barred.

The Tax Revenue Appeals Board allowed the Appeal by holding that:

(a) The impugned assessment based on an invalid law, and
(b) That, Section 58 of the Excise (Management and Tarriff) Act, (Cap147R.E.2002) provides for a twelve month time limit within which a claim on a short levy must be raised, now since TRA raised the claim beyond the time limit prescribed by the law, in the circumstances the claim is hopelessly time barred.

My Lord and Honourable Members of the Tribunal, based on the above holding of the Honourable Board the appellant got much and gravely aggrieved and hence this appeal before you.

The Appellant my Lord and Honourable members of the Tribunal, will not only explain but also authenticate as to why she says the law she applied to assess the respondent was a valid law and effective to assess the tax. Further will clearly explain why the assessment and claim was within time.

Starting with the first ground of the appeal and with Leave of this Honourable Tribunal I beg to make brief explanation on the existence of the laws which are pertinent to this case.

Before the year 2002, there existed and was in operation of the two legislations, one is the **"Excise Tariff Ordinance- Cap 332"** and the second is the **"Excise Management Act"**. The two laws operated independently. In the year 2002 there enacted another Law in the citation of **"The Excise (Management and Tariff) Act". Cap147.** This new Law was a resultant of amalgamation of the former two laws, being the Excise Tariff Ordinance and the Excise Management Act.

However, the new law did not come into operation until the month of September 2004, when it was proclaimed by his excellence, the then the President of the United Republic of Tanzania William Mkapa. With Leave of this Honourable Tribunal I quote the wording of the proclamation as hereunder:

> ***"In exercise of the powers conferred upon me by section 12 of the Law Revision act, 1994, I Benjamin Mkapa do hereby approve the Revised Edition, 2002, and Order that it shall be deemed to have come into force on the 1st day of September, 2004".***

My Lord and Honourable Members of the Tribunal, it is this proclamation over which the respondent as seen on page 9 of the proceedings contends that since the new law of the Excise (Management and Tariff) Act, Cap 147 was among the Laws operationalized on 1st September 2004, it became effective thereon and automatically rescinded the operation of the old legislation of the Excise Tariff Act and the Excise Management Act. This contention by the Respondent has been supported and upheld by the Honourable Board as seen on page 5 of the judgment where the Board said that, I quote:

> "……*indeed the Respondent (i.e the appellant in this matter) was wrong in making reference to an invalid law i,e the Excise Tariff Ordinance of 1989 instead of the Excise (Management and Tariff) Act Cap 147……..reference to the old Act is in the circumstances improper. In the premise, it is obvious from the statement that the impugned assessment is based on the invalid law."*

My Lord and Honourable Members of the Tribunal the Appellant as much aggrieved, strongly submits that the proclamation by the then his excellency president William Mkapa had in **no way** had effect to rescind the operation of

the former law. The wording of the proclamation as quoted here in above have nothing to invalidate the old law. The wordings are just clear as they are just putting into force the revised edition. There is nowhere expressly stated that the former legislation is invalidated. **My Lord** it is in the understanding of the Appellant that it is a common practice, and out of preference that lawyers would tend to cite a new citation (the revised law) rather than citing the old law inclusive of all amendments.

Further to the above, there is a specific legislation governing revisions. This is **The Laws Revision Act, Cap 4 Revised edition 2002.** Under this law, Section 8 of the Act provides for the scope of the powers for revision. The powers are enumerated from **clause 8 (1) (a) to clause 8(1) (o)** but there is no clause which is to the effect of stopping the operation of the old legislation. Thorough reading between lines of the whole provision of section 8 (1) (a) - (o) is to the effect of accommodating the changes brought by the revision. This is where the changes are for the amendments, alterations, changing the arrangement of wording of the section, consolidating the two laws into one, dividing the consolidated enactment into parts; altering the marginal notes and so on. **My Lord** the powers under this law absolutely does not involve invalidation of the former existing law.

Section 12 of the Laws Revision Act provides for the effect of proclamation. The provision states clearly that the Revised Edition or annual supplement described in such proclamation shall be deemed to be and shall be noted, in all courts of law, as proper law of Tanzania in respect of the laws included there in. My Lord such wording does not need definition or clarification. It is very clear that it is to the effect of recognizing anything revised to be a proper law in all Courts of law. It is thus the Appellants submission that the contention by the respondent and the holding by the Honourable Board that the proclamation invalidated or rescinded the operation of the old law is unfounded and has no legal backing and therefore a mere misconception of the true legal position. The pages of the Law

Revision Act which contain the provisions referred to are appended herewith and cumulatively **marked TRA 1**

My Lord and the Honourable Members of the Tribunal, It is **a firm position** of the law that since the laws are enacted by the parliament, it is the only body mandated to amend or repeal them. This is clearly provided for under Section 24 0f **The Interpretation of Laws Act.** This Law provides that, I quote

> "***S24 An Act may be amended or repealed in the same session of the Parliament as that in which it was passed."***

My Lord With the above quoted provision, it is very explicit that, the proclamation in this instant case would not have the effect of repealing, or rescinding the operations of the former laws but rather to legally put into effect the revision done to the laws.

In showing that the former law of the **Excise Tariff Act,** Cap 332 was still in existence and operational, the Legislature in the preceding years after proclamation, went on to amend this Law. This is witnessed in the Year 2005 where the amendments were done to the Excise Tariff Ordinance vide **Finance Act No: 13 of 2005.** The copy of this piece of amendment is hereby appended and marked **TRA 2.** It is thus in the submission of the Appellant that had the Excise Tariff Ordinance been repealed by the Proclamation, the Legislature wouldn't have wasted time to amend it. We strongly reiterate and put much emphasis that, the proclamation is only to the effect of putting into effect of all changes brought in by revision and not repealing the former law and after all proclamation is not a legal process of repealing the law

My Lord and Honourable Members of the Tribunal, had the proclamation had an effect of repealing the former law, yet the Honourable Board ought to have judiciously examined the material facts before it. It was thoroughly made clear before the Board that the tax assessed covers the period of **January 2003** up to **December 2005.** Further, it was also before the Board that the proclamation was put in effect on **the 1st day of September 2004** and this is the fact not disputed

by both parties. Now**,** the discontent arising from the Appellant is that, if the Honourable Board takes proclamation to amount to repealing the former law then, it should be to the extent when the proclamation became effective. Surprisingly the Honourable Board did not consider the time when the proclamation was not done but was under the assessment. This is the period of January 2003 to 31st August 2004. These are 20 solid months which are not covered by the proclamation which is almost 56% of the total tax assessed. My Lord, the tax involved is colossal; it is more than two billion. The 56% of the total tax demanded which is not covered by proclamation wouldn't have been left out by the Board without any justification. It is thus in our submission that would this Honourable Tribunal find out that, proclamation amounts to repealing the former law, then the tax covering the twenty(20) months before proclamation, accordingly be paid to the Appellant

My Lord and Honourable Members of the Tribunal the second ground of this appeal is based on the time limit to make an assessment. The Appellant is aggrieved by the holding that in view of section 58 of the Excise (Management and Tariff) Act Cap 147 Revised edition 2002, the assessment was hopelessly time barred. Foremost my Lord, the two former laws were just amalgamated and nothing substantial was changed. The Respondent is trying to seek avenue in the new act to exonerate her from the tentacles of paying the taxes assessed. This provision had before amalgamation, existed in the other former statute of the Excise Management Act. However my Lord, with great emphasis I do submit that this provision of section 58 of the new Act, the Excise (Management and Tariff)Act, provides time limit **only to excisable goods, and not the excisable services**. The provision provides and I quote:

> **"……*on demand by the proper officer, pay the amount short-levied or repay the amount erroneously refunded, as the case may be and, any such amount may be recovered as if it were duty to***

which the excisable goods in relation to which the amount was short levied or erroneously refunded as the case may be, were liable:

Provided that the proper officer shall not make any such demand after twelve months from the date of such short levy or erroneous refund as the case may be……"

My Lord we further submit that it was erroneous for both the respondent and the Honourable Board to make reference to the provision of section 58 of the Excise (Management and Tariff) Act, which sets time limit of twelve months, but specifically for the excisable goods **and not** the excisable services. My Lord it is clear that the excisable goods are far different from the excisable services. The Respondent ought to have gone further to see the definition of the term 'excisable goods'. It has been clearly defined to mean ***"any goods manufactured in any partner states……"*** **My lord** our item here is excisable services. Services cannot at any point of time be manufactured goods. Even the treatments in taxation of excisable goods which are tangible items are quite different from the treatment of the excisable services which are actually intangible. **My Lord and Honourable Members of the Tribunal** had the legislature intended to include excisable services in the provision it could not have hesitated to do so. The Appellant brought to the attention of the Honourable Board that, in taxation there is no room for any intendment, or presumption as to tax; words must be expressly and clearly stated. In support of this assertion before the Board the Appellant produced an authority of the case of **Cape Brandy Syndicate V. Inland Revenue Commissioner ([1921] 1K.B. 64 at p. 71) which states, I quote:**

"In the words of the late Rowlatt, J. whose outstanding knowledge of this subject was coupled with a happy conciseness of the phrase, 'in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in,

nothing is to be implied. One can only look fairly at the language used".

The page containing the quoted prase of the above cited case is herewith appended and marked **TRA 3**

Notwithstanding this position of the law, the Honourable Board went on to rely on this provision of Section 58 of the Excise (management and Tariff) Act to allow the Appeal and order the Appellant herein to vacate the assessment and tax demanded

My Lord and Honourable members of the Tribunal, the appellant in conclusion vehemently submits that the law of Excise Tariff Ordinance had not at the time the Appellant raised a demand of payment of tax been repealed unless the Respondent proves to that effect. Further the provision of Section 58 of the Excise (Management and Tariff) act Cap 147 is just irrelevant provision to rely upon in invoking time limit. There is no time limit set by the law in demanding due excise duty not paid to the government.

WHEREFORE, the Appellant prays in this appeal for judgment and decree for the following Orders

(i) That this Appeal be allowed,
(ii) Judgment and all Orders of the Tax Revenue Appeals Board be set aside,
(iii) Cost of this Appeal be Provided for,
(iv) Any other relief or Orders that this Honourable Tribunal may deem fit and just to grant.

RESPONDENT'S SUBMISSION TO THE STATEMENT OF APPEAL

(*Made pursuant to the Tribunal's Ruling of 14th August, 2012*)

May it please Your Lordship and Honorable Members of the Tribunal,

ORDER OF THE TRIBUNAL

On the 14th August, 2012, this hon. Tribunal ordered that the parties make written submissions. It was directed that the Appellant file its submissions by or on 23rd August 2012 and the Respondent file its Reply on 30th August 2012 and the Appellant file a Rejoinder, if any, on 06th September, 2012

EXECUTION OF THE ORDER

The Appellant filed in written submissions on 24th August, 2012, but served the Respondent on 31st August, 2012, which was AFTER the ordered date. Thus it was served outside time. The Respondent has filed it on 7th August 2012.

LIST OF AUTHORITIES RELIED UPON BY THE RESPONDENT

1. Section 12 (2) of The Law revision Act Cap 4 [RE 2002] (**Annex 1**)
2. Section 14 of The Interpretation of Laws Act Cap 1 [RE 2002] (**Annex 2**)
3. Section 34 of The Interpretation of Laws Act Cap 1 [RE 2002] (**Annex 3**)
4. Hornby A (1996) Oxford: Advance Learners Dictionary of Current English (5th ed), OUP. (**Annex 4**)
5. Online - Collins English Dictionary – Complete and Unabridged, HarperCollins Publishers (2003) (**Annex 5**)
6. TRA Public Brochure at http://invest-in.tanzania.ru/downloads/TAXATION%20IN%20TANZANIA.pdf(**Annex 6**)
7. Section 58 of the Excise (Management & Tariff) Act Cap 147 [RE 2002] (**Annex 7**)

8. INCOME TAX OFFICER vs. UMENDRAM in the Income Tax Appellate Tribunal –Jaipur (1995) unreported. (**Annex 8**)
9. Hezron Nyachiya vs. Tanzania Union of Industrial and Commercial Workers (Civil Appeal No. 79 of 2001) [2005] TZCA 66 (19 October 2005). (**Annex 9**)

ARGUMENTS & SUBMISSIONS ON ISSUE NO. 1

Issue 1: The impugned Tax Assessment was based on an invalid law

1. It is our respectful submission for the Respondent on this issue that the demand notice and assessment are based on an invalid law and inoperative in law – the Excise Tariff Ordinance of 1989 and barred by limitation. Grounds for making such assertions are:

    a. The Excise Tariff Ordinance of 1989 was replaced by the Excise (Management & Tariff) Act Cap 147 [RE 2002]) upon the issuance of a **Presidential Proclamation** made in GN 312 of 3 Sept. 1994 the date of which relevant here.

    b. What is the legal import and effect of A Presidential Proclamation? Our search on this questions of the law revealed:

        i. Section 2 of Cap 1 RE 2002 The Interpretation of Laws Act states: Proclamation means "*a proclamation made by the President and published in the Gazette*."

ii. Section 14 of Cap 1 RE 2002 The Interpretation of Laws Act states: *Every Act shall come into operation on the date of its publication in the Gazette or, if it is provided either in that Act or in any other written law, that it shall come into operation on some other date, on that date.*

iii. Section 12 (2) of The Law Revision Act Cap 4 [RE 2002] states: *from the date specified in the Proclamation….be deemed and shall be noted, In all courts of law, as the proper law of Tanzania in respect of the laws included therein*

The contention by the Appellant made in its submission on page 4 refers to section 8 of The Law Revision Act Cap 4 [RE 2002]. This is an irrelevant section as those powers are not in issue in this appeal. The real question is what is the effect of the proclamation by the President?.

WE SUBMIT THAT from the interpretation of the law cited above it is proper to state that *the proper law of Tanzania* is from **3 Sept. 2004** the Excise (Management & Tariff) Act Cap 147 [RE 2002]) and not The Excise Tariff Ordinance of 1989. The reliance by the Appellant on the latter is wrong and from that date could not be cited in any court of law and including this hon. Tribunal which is headed by a judge of the High Court. There cannot be 2 parallel laws on the same subject from that date.

2. The argument that The Excise Tariff Ordinance of 1989. Was not repealed by the Excise (Management & Tariff) Act Cap 147 [RE 2002]) does not suffice when one reads Section 34 of Cap 1 RE 2002 The Interpretation of

Laws Act which states that : *upon the expiry or lapse of any enactment….as if that enactment had been repealed. – the same effect.*

Expiry and Lapse are common English words, so using Hornby A (1996) Oxford: Advance Learners Dictionary of Current English (5th ed), OUP. These are defined as:

a. ***Expiry*** *- To come to an end; terminate, to cease; come to an end, become invalid*
b. ***Lapse*** *-* ***To be no longer valid or active****; (Law) Law the termination of some right, interest, or privilege, as by neglecting to exercise it or through failure of some contingency; (Law) Law (of a devise or bequest)* ***to become void****, as on the beneficiary's predeceasing the testator*

WE THUS SUBMIT THAT from the date of the Proclamation in GN 312 was made, that is, 3 Sept. 2004, the Excise Tariff Ordinance of 1989 had lapsed and or expired so was no longer valid law in Tanzania despite there being no repealing provisions in the new act - Excise (Management & Tariff) Act Cap 147 [RE 2002]). To decide otherwise will create an absurdity in law that one can continue citing the law previous to the Proclamation in court!! That is what the Appellant is erroneously contending in its submissions.

WE FURTHER SUBMIT THAT for the Respondent that to interpret the law as per the Appellant's position leads to an absurdity and is inequitable because there cannot be two taxing legislation on the same tax, same matter at the same time if so, then it could lead to arbitrariness of the CG Tax as to which law applies at

what time against the taxpayer. This would run contrary to a cardinal tax principle, namely- *Certainty*. The tax rules should clearly specify when the tax is to be paid, how it is to be paid, and how the amount to be paid is to be determined.

This would also be contrary to the principles espoused by the TRA itself as publicly stated in its documents. See: http://invest-in.tanzania.ru/downloads/TAXATION%20IN%20TANZANIA.pdf see paragraph 2.0 in Tanzania Tax Structure 3rd bullet point which include fairness.

WE PRAY THAT the decision by the Tax Appeals Board in respect of the invalidly of the tax demand notice issued on the Respondent by the Appellant in June 2011, seven years after the fact, based on an invalid law be upheld.

ARGUMENTS & SUBMISSIONS ON ISSUE NO. 2

Issue 2: Whether the Claim by TRA is within the time limit set by section 58 of the Excise (Management & Tariff) Act Cap 147 [RE 2002]).

Respondent contends that:

The facts are that (i) a Demand Notice for 2,468,259,161/- was issued by the Appellant on the 28th May, 2010 *more than 6 years after the tax event in 2003-2005.* (ii) Duties for 2004 and 2005 had already been paid by the Respondent taxpayer. (iii) Section 58 of the Excise (Management & Tariff) Act Cap 147 [RE

2002]) provides for a time limit on the Commissioner's ability to demand short levied excise duty to 12 months.

WE SUBMIT THAT the decision by the Tax Appeals Board was correct and should be upheld. The liability to pay was limited by law and was not subsisting nor was it saved by the new law nor is there any provision that removes the limitation set by Section 58 of the Excise (Management & Tariff) Act Cap 147 [RE 2002])or enlarged that period of limitation. The submissions made by the Appellant before this hon. Tribunal do not deny either the effect of this provision or assert that the reliance of it by the Tax Appeals Board is erroneous in law. They now seek this hon. Tribunal to hold otherwise. Such holding would run contrary to another fundamental tax principle - *Convenience of Payment*. A tax should be due at a time or in a manner that is most likely to be convenient for the taxpayer.

Where a period of limitation for any proceeding is prescribed by any other written law, the provisions of the Law of Limitation apply as if such period of limitation had been prescribed by the Law of Limitation Act. This is the position stated by the Court of Appeal in Hezron Nyachiya vs. Tanzania Union of Industrial and Commercial Workers (Civil Appeal No. 79 of 2001) [2005] TZCA 66 (19 October 2005). The Court was espousing Section 46 of the Law of Limitation which states:-

> *Where a period of limitation for any proceeding is prescribed by any other written law, then, unless the contrary intention appears in such written law, and subject to the provisions of Section 43, the provisions of this Act shall apply as if such period of limitation had been prescribed by this Act.*

WE FURTHER SUBMIT THAT when a law stipulated that an action had to take place within a stipulated period of time and such period lapsed without the action having taken place, then this could lead to a declaration of nullity unless the law made provision for delay. Legal time limits, as a rule, had to be observed. It was only in exceptional cases that the law provided for certain instances when time limits could be extended. The wording of section 58 Excise (Management & Tariff) Act Cap 147 of the Excise (Management & Tariff) Act was such that it was obvious that the law was dealing with a period of time within which the Commissioner had to act.

The submission made by the Commissioner that the assessments had been worked out under the previous law is irrelevant, was important is that the tax payer was informed of the assessment raised within a reasonable time, which at law amounted to twelve months and not six years. Any other interpretation of the law would give rise to uncertainty and a state of absurdity. It was not only the tax payer who was bound to pay tax according to law but the commissioner was also bound to fulfill his duties in a diligent manner. the omission on the part of the Commissioner to issue claim within the period stated in section 58 of the Excise (Management & Tariff) Act cannot be a procedural irregularity and the same is not curable or rectifiable given section see INCOME TAX OFFICER vs. UMENDRAM in the Income Tax Appellate Tribunal –Jaipur (1995). Where the Income Tax Appellate Tribunal – Jaipur on the issue – was the assessment made within the period of limitation prescribed… it stated:

> *But we noticed that the curable irregularity committed by the ITO is not issuing a notice under section 148 or under 142(1)*

to…cannot now be cured by issuing the said notices due to the relevant provisions governing the period of limitation…" (emphasis mine).

Since issuance of claim is an essential requirement for making the assessment, such notice has necessarily to be issued with the time prescribed under section 58. Thus, the service of claim within a period of twelve is *sine qua non* for proceeding with the assessment. If not is issued within the prescribed period, the Commissioner cannot be allowed to go ahead with the assessment. If an assessment, in contravention of the provisions of section 58 Excise (Management & Tariff) Act Cap 147 is made, the same will be a nullity and not an irregular assessment. The Commissioner failed to appreciate that notice under Section 58 Excise (Management & Tariff) Act Cap 147 could be issued only within 12 months and, therefore, the notice issued after that set period was bad in law, null and void and Claim was issued without jurisdiction.

WE FURTHER SUBMIT THAT the assertions by the Appellant in its submissions that it should be given 56% of the amount assessed (i.e. 2 billion/-) are a further error on its part. It seeks this Tribunal to undertake an irregularity by circumventing the fact of limitation under section 58 Excise (Management & Tariff) Act Cap 147. The lapse by the Appellant is not curable as per the persuasive decision in INCOME TAX OFFICER vs. UMENDRAM in the Income Tax Appellate Tribunal –Jaipur (1995).

We further submit, at the time of the old law 'services' were not taxable by that legislation as it was not covered therein and it was due to the '*agreement*' that was entered between the Appellant and the taxpayer in that sector when TRA

started charging for services under that law – unfortunately Respondent could not produce such minutes of the agreement so it could not be relied upon at the Board, that services were taxed due to that agreement. Limitation under section 58 Excise (Management & Tariff) Act Cap 147 is a fetter on taxation by the Appellant and not on whether such tax is on excisable '*goods*' and or '*services*'.

IT IS OUR PRAYER that this Tribunal confirms the decision of the Tax Appeals Board hold that the demand of tax was made beyond the normal period of limitation is not justified and set aside the demand notice by Appellant.

APPELLANT'S REJOINDER SUBMISSION

My Lord and Honorable members of the Tribunal, at the time of making clarifications, the Appellant herein, would pray before your lordship to apologize and give reasons which occasioned the Appellant's failure to file and serve the submissions to the Respondent within the time limit set by the Tribunal.

However, the Appellant would wish to react to the reply submission as hereunder:
The Appellant, having gone through the Respondent's Submission came to realize that probably the bases for the appellant's contentions have not been properly conceived. **My Lord**, this perception is derived when the Respondent appears to have addressed to only one aspect and leaving two others unattended. The three issues upon which the Appellant made her submission were chronologically as follows:-

(i) That the appellant had been aggrieved by the holding of the Honorable Board that the assessment was issued based on repealed law

(ii) That the Appellant had also shown in her submission that the Honorable Board failed to consider the assessed amount which covers the period of **January 2003 to December 2005 (this is the assessment period before operationalization)**

(iii) Also, the Appellant has shown in her Submission in chief that reliance by the Board on the provision of Section 58 of the Excise (Management and Tariff) Act –Cap 147 Revised Edition 2002, was erroneous since the provision is irrelevant as it covers only excisable goods and **not** Services which is the item at hand.

My Lord and Honorable Members of the Board, the Respondent has only addressed to the first ground above and left the subsequent two unattended or attended by just deviating from the gist of the Appellants contentions.

In reply submission when addressing to the first ground above, the respondent has found the provision of Section 8(1) (a) to 8(1) (o) which was referred to by the Appellant as irrelevant. The Appellant in her Rejoinder therefore would put it clear as to why this provision is relevant.

Essentially, all the arguments emanate from Proclamation which was done by his excellence the then president William Mkapa. The said proclamation was done to the revised laws and as explained in the submission in chief, the effect of the proclamation is to put into force all what had been revised. Now, as to what is covered by the Revision is what made the Appellant to invoke the provision of Section 8(1) (a) – (0) to see if **'repealing'** is also inclusive. Unfortunately repeal is out of the scope. Being out of the scope the Appellant vehemently submits that Repealing of the former law was not included in the proclamation and what

was proclaimed is the consolidation of the two laws into one law as vividly seen under section 8(1) (a).

The Respondent on page 4 of the Reply Submission has invoked Section 34 of Cap 1 RE. 2002 The Interpretation of Laws Act and thereby quoted that "*upon the expiry or lapse of any enactment …….as if that enactment had been repealed. – the same effect*." **My Lord** the phrase **'upon expiry'** implies the situation where expiry is already there while in our instance case the argument or the contentious issue is whether there was expiry or not. In other words it is in dispute if Proclamation amounts to expiry, repealing, or lapse of the former law. It is in our submission therefore that, the respondent is referring to a provision which is irrelevant and hence the definition of 'expiry' and 'Lapse', though are correct are quite irrelevant. Being the case the question of whether proclamation amounts to expiry, rescind, repealing, or lapse of the previous Act, remains unanswered by the Respondent.

The second aspect of the failure by the Honourable Board to consider the assessment covering the period where proclamation had not been operationalized, had not at all been touched by the respondent. **My Lord** the Appellant had shown earlier that in event Proclamation is held to amount to repealing the former Law, the amount of Tax assessed before operationalization be paid by the Respondent. Being the situation the Appellant reiterate on her submission in chief.

Further, the Respondent, in reacting to the aspect of invoking Section 58 of the Excise (Management and Tariff) Act –Cap 147 Revised Edition 2002, has totally deviated from the concern of the Appellant. The appellant does not dispute the imposition of time limit to demanding tax. The time limit is truly imposed by the provision to be twelve months, but the time limit has **no blanket coverage.** The said time limit is specifically for the **Excisable goods** and **not** the excisable

services. At our in hand case, the item with **great emphasis** is Excisable services, and thus not covered by the provision of section 58 (ibid).

My Lord on the third paragraph of page 9 the respondent has submitted that Services were not taxable in the old law. This is a wrong position of the law. The submission that the services were taxed upon agreement between the parties seems by the Appellant as vindictive assertions. The Appellant knows what he does. He can't impose tax where the law doesn't. It could be wealthy and healthy had the Respondent asked under which law does the Appellant demand tax rather that making wrong assertions. Taxation of telephone services were imposed by Act No 11 of 2002. This Act amended the Tariff Ordinance Cap 332. We thus vehemently submit that the tax demanded is legal and due.

My Lord and Honourable Members of the Tribunal, the Respondent on page 6 and last but one paragraph, has raised a very new issue which had never risen before and for that matter was subject to proof. This issue is the assertion that the Respondent had already paid duties for 2004 and 2005.This aspect my Lord cannot be entertained at this stage. It is a factual issue which needs to be proved otherwise we strongly submit that the same remains a mere allegation without any basis and we pray that be disregarded it its entirety

We thus conclude by adopting the same prayers as put in the submission in chief

01/10/2012

QUORUM:

Hon. Dr. F. Twaib, J	**Chairman**
Mr. N. Shimwela	**Member**
Mr. K. Bundala	**Member**
For the Appellant	**Absent**
For the Respondent	**Absent**
Mrs. H. Said	**RMA**

ORDER:

Hearing on 8/10/2012 at 14.00 hours.

Hon. Dr. F. Twaib, J Chairman, Sgd

01/10/2012

8/10/2012

QUORUM:

Hon. Dr. F. Twaib, J	**Chairman**
Mr. N. Shimwela	**Member**
Mr. K. Bundala	**Member**
For the Appellant	**mrs. Sojo, Advocate**
For the Respondent	**Absent**
Mrs. H. Said	**RMA**

Tribunal:

We have no need for any clarifications.

Order:

1) Deliberations on 15/10/2012
2) Opinions on 29/10/2012
3) Judgment on 17/12/2012 at 14.00 hrs.

Hon. Dr. F. Twaib, J **Chairman, Sgd**

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

Mr. K. Bundala **Member, Sgd**

8/10/2012

IN THE TAX REVENUE APPEALS TRIBUNAL

AT DAR ES SALAAM

TAX APPEAL NO. 14 OF 2012

(Appeal from judgment and decision of the Tax Revenue Appeals Board in Customs & Excise Tax Appeal No. DSM 12 of 2011 delivered on 10th May 2012)

THE COMMISSIONER GENERAL,

TANZANIA REVENUE AUTHORITY ..... APPELLANT

VERSUS

AIRTEL TANZANIA LTD. ..... RESPONDENT

JUDGMENT

F. Twaib, J., Chairman

In the years 2008 and 2009, the Appellant Commissioner General conducted a tax audit into the business of the then Celtel (Tanzania) Ltd., now Airtel Tanzania Ltd. ("Airtel" or "the respondent") covering the period from January 2003 to December 2005. The audit revealed that the Respondent had not paid excise duty on interconnection charges. This, the Appellant concluded, was contrary to the requirements of the **Excise Tariff Ordinance**, Cap 332. He thus raised a tax demand for Tshs. 2,468,259,161/=.

Airtel was aggrieved. They filed Customs & Excise Tax Appeal No. DSM 12 of 2011 in the Tax Revenue Appeals Board. Their case was founded on two main assertions:

1. That the assessment and demand notice were issued wrongly as they were based on a repealed law;

2. The excise duty claimed for the years of income 2003 to 2005 was time barred.

At the start of the proceedings, the Board framed three issues for determination. Two of them related to the two main assertions brought up by Airtel. These were matters of law. The other was a matter of fact: whether or not there was an agreement between the parties in respect of excise duty arising from the treatment of interconnection expenses for the period 2003-2005 and subsequent thereto.

The Board answered the last question in the negative. It found that there was no proof of such agreement. In resolving the other two issues, the Board agreed with Airtel's position. It held that the assessments in question were made on the basis of a law that was no longer valid, and that the tax claim was in any case time-barred. The Board thus allowed the appeal.

The Commissioner General was not satisfied with these findings. He has now appealed to this Tribunal. His grounds are basically a challenge of the Board's findings in regard to the two issues last mentioned. They run thus:

1. That the Board erred in law and fact by holding that the impugned assessment was based on an invalid law;

2. That the Board erred in law and fact by invoking and referring to section 58 of the Excise (Management and Tariff) Act (Cap 147, R.E. 2002) and thereby holding that the claim on short levy was time-barred.

The Commissioner General therefore prays that the judgment and orders of the Board be set aside, with costs. Through the services of Dr. Fredrick Ringo, learned counsel from Adept Chambers (Advocates), Airtel has firmly resisted the appeal.

Mrs. Sojo, learned Advocate, represented the Appellant Commissioner General. In her written submissions in support of the appeal, Mrs. Sojo strongly argued that the law upon which the Appellant's assessment was based was valid and effectual despite its revision and the proclamation of the **Laws Revisions Act** in 2002 and that the said assessment was not time-barred.

A brief historical backdrop is necessary at this point: before 2002, there existed two separate, though related, legislations, namely, "**The Excise Tariff Act, Cap 332**" and "**The Excise Management Act, 1977**". In the 2002 revised edition of the laws, the two legislations were, among other things, consolidated into one. Subsequently, the revised laws were proclaimed by the then President, Benjamin William Mkapa (vide GN No. 312 of 20th July, 2004), to be "deemed to have come into force on the 1st day of September, 2004".

The revision (which consolidated the two laws) and its subsequent proclamation have given rise to a sub-issue that the Tribunal finds critical in determining the first ground of this appeal. It will provide the key as to the true effect of the proclamation in regard to the two "old laws", and whether one could cite the old laws (or any of them) instead of the "new" (consolidated) law. It might also be pertinent to ask whether the Commissioner General's alleged wrong citation of the relevant law would render a tax assessment invalid even where a taxing law exists.

The Board found that a presidential proclamation under section 12 of the **Laws Revision Act** had the effect of repealing the old laws and replacing them with the new (revised) law, and that the citing of that invalid law was fatal to the assessment and subsequent demand for payment of the said tax.

It has been contended on behalf of the Commissioner General that the Board was manifestly wrong in so holding. Mrs. Sojo argued that a proclamation simply brings the revised edition into force. It can neither invalidate nor rescind the existing law.

Counsel Sojo had a number of points to support her assertion. She submitted that only Parliament can amend or repeal a law. She cited section 24 of the **Interpretation of Laws Act**, which, with due respect, is not relevant. It only allows Parliament to amend or repeal a law in the same session as that in which it was passed. The mandate that learned counsel referred to is actually a constitutional mandate. It is provided for by article 4 (1) and (2), article 63 (3) (d) and article 64 (1) of the **Constitution of the United Republic**, 1977.

In further support of her position, Mrs. Sojo contends that there is no provision in section 8 of the Law Revision Act that has the effect of stopping the operation of the old law. She draws examples of laws passed after the revised edition in

2002, in which the Parliament has amended one of the old laws. She cited the **Finance Act**, No. 13 of 2005. Under section 6 of that Act, the legislature amended section 3 and the First Schedule to the **Excise Tariff Ordinance**, Cap 332.

As we have seen, the latter Act had already been revised in the **2002 Revised Edition** of the Laws and consolidated with the **Excise Management Act** to make the **Excise (Management and Tariff) Act**, Cap 147 (R.E. 2002). Mrs. Sojo thus maintains that if presidential proclamation of revised laws had the effect of repealing or invalidating the old laws, Parliament could not have amended that no-longer-valid law.

Mrs. Sojo's submission raises some interesting legal points. Indeed, how could Parliament amend a legislation that no longer exists? What would be the effect of such an amendment? Would it be effectual to bring about change in the relevant law and/or in the revised law? Though counsel has brought up this issue merely as an example to support a related point, we hope that our answer to the questions before us would resolve this question as well. This we will do as we determine the crucial legal point relating to the effect, in terms of its legal validity, of a revision, proclamation and consequent coming into force of a "new" revised law.

While still at this point, we need only point out that we are mindful of a serious contention by a resourceful advocate and author, Mr. Audax Vedastus, on the legal validity of the Revised Laws of 2002, and various legal questions arising out of the process of laws revision leading up to the Revised Laws. The debate relates to how that process was conducted, published, proclaimed and gazetted [see his works in the book, **Revision of Laws and the Revised Edition of the Laws of Tanzania** (2011) IDEA International Publishers, Dar es Salaam

and his Case Note entitled "*The Andrew Dominic v TRA High Court Ruling: A Confirmation that the Revised Edition 2002 had not yet come into Force?"*, in **The Tanzania Lawyer** (2011) Vol. 1, No. 1]. We do not have to directly address those issues in resolving this case. We would leave such discussion when the opportunity arises in an appropriate forum.

Mrs. Sojo's further point is that there is no direct provision that states that the proclamation repeals or invalidates the revised law.

Though Dr. Ringo for the Respondent does not dispute this contention, he is of a different view as regards his learned friend's conclusion. He opines that if the old laws were to continue to exist beyond the coming into force of the Revised Laws, we would be having two laws that apply simultaneously and which cover the same subject matter. Counsel relies on section 14 of the **Interpretation of Laws Act**, Cap 1 (R.E. 2002) which states:

> "Every Act shall come into operation on the date of its publication in the Gazette or, if it is provided either in that Act or in any other written law, that it shall come into operation on some other date, on that date."

Dr. Ringo further relies on subsection (2) of section 12 of the **Laws Revision Act**. It stipulates:

> "(2) From the date specified in the proclamation, the part or section of the Revised Edition or annual supplement described in such proclamation shall, subject to the provisions of section 13, be deemed to be and shall be noted, in all courts of law, as the proper law of Tanzania in respect of the laws included therein."

If we got Dr. Ringo correctly, he seems to argue that once a particular law has been revised, the Courts (as well as Tribunals such as this one) are enjoined to

recognize the revised law as the proper law of Tanzania. He also faulted the Appellant's reliance on section 8 of the **Laws Revision Act** as irrelevant, saying that the powers set out therein are not in issue in this appeal.

With due respect, though we entirely agree with his proposition that we are bound to recognize the revised laws as proper, we think that the powers granted by section 8 and the **Laws Revision Act** are relevant in the determination of this appeal. We are of the considered view that in certain instances (this case being one of them), resort to the provisions of section 8 is necessary. We also think that the recognition of a Revised Law does not necessarily render the old law inoperative or invalid.

We have also taken time to consider the import of sub-section (3) of section 12 of the **Laws Revisions Act**. It states:

> "(3) Except in so far as concerns any law omitted from the Revised Edition under section 6 on and after the date referred to in subsection (1), **the Revised Edition is the authoritative text of the laws of Tanzania according to the respective tenors."**

These provisions, in our view, and especially subsection (3) last quoted, are clear: The authoritative text in respect of any revised law is the revised law. All the Courts in the country (in this context including Tribunals such as the one in which we are sitting) are bound to apply. But we also agree with the Appellant's counsel that there is nothing in the Law Revisions Act (specifically section 8 thereof) that empowers the Chief Parliamentary Draftsman ("the CPD") to repeal or even amend an existing law.

We are thus of the considered view that the exercise of the powers granted to the CPD by the **Law Revision Act** to revise the laws, and/or to the President to issue a Notice of Proclamation of revised laws do not include the power to repeal

any legislation—be it subsidiary or principal. These are pure editorial powers, intended to bring the laws up to date and make necessary alterations as stipulated in section 8 of the Act. This, we respectfully hold, is what the true construction of section 9 (1) of the Act prescribes:

> "Nothing in the provisions of section 5, 6, 7 or 8 shall be construed as implying any power in the Chief Parliamentary Draftsman **to make any alteration in the matter, substance or effect of any law**, but this provision is directory." [emphasis added]

As earlier intimated, our Constitution vests supreme legislative powers in the Parliament. But Parliament has itself, by statutes, delegated this power to various persons, organs and authorities. When exercising those powers, all these other persons or bodies simply enact subsidiary legislation, subject always to the enabling principal legislation and other relevant laws.

One of the most unique of such enabling statutes is the **Laws Revision Act**, 1994. It gives the CPD certain powers that may at first sight appear legislative, akin to law-making powers of amending principal legislations. But, on a true construction of sections 8 and 9 of the **Laws Revision Act**, one is left with no doubt that these powers are essentially editorial and restricted to the doing of certain acts that are expressly prescribed by law. The exercise of these powers are also subject to the qualification that the CPD may not make "**any alteration as to the matter, substance or effect of any law**" [emphasis added]. See section 8 (1) and (2) and section 9 (1) of the **Laws Revision Act**].

We would, for the reasons we have endeavoured to provide, hold that the Board erred in finding that the effect of a presidential proclamation under section 12 of the **Laws Revision Act** is to render the old law invalid. It follows, therefore,

that it was not fatal for the Appellant to cite the old laws, even though the appropriate citation should have been the Revised Law.

As for Dr. Ringo's assertion that two laws providing for the same thing could not co-exist, we think that that worry is, with due respect, misplaced. The proper thing to do would be to cite the new, revised law, but this would not render invalid any citation of the old law. Indeed, it has been held by the High Court in ***Yamungu Kaburu v Republic***, Criminal Appeal No. 175 of 2011 (unreported) (per Utamwa, J.) that in the event of a conflict between a revised law and its respective original Act of Parliament, the latter must prevail. This is in recognition of the limited nature of the powers of revision granted to the CPD. By any stretch of imagination, sections 8 and 9 of the **Laws Revision Act** cannot be construed to include powers of repealing or invalidating the original parliamentary legislation.

This finding would uphold the first ground of appeal.

Before we move to the second ground, we feel obliged to determine another limb of the submissions in support of the first ground put forward by counsel for the Appellant—if only in terms *obiter,* given our holding on the ground as a whole. It would also provide guidance as to the legal position where such a question arises in the future. Counsel contended that even if the Board was right to find that the Revised Laws had replaced the old laws, it should have distinguished that part of the assessment covering the period from 1st September 2004 (when the Revised Laws entered into force) and 31st December 2005. That would mean that the amount assessed for the period up to 31st August 2004 should have been allowed, as it was still being governed by the old law, namely, the **Excise Tariff Ordinance**, Cap 332, and was thus properly raised.

The Respondent did not respond to this second limb of the Appellant's submissions. That notwithstanding, we would, on merit, agree with Mrs. Sojo that despite its finding on the lack of validity of the law relied upon, the taxes assessed for the period before the coming into force of the Revised Laws were properly assessed and demanded under the old laws. We would also add that even if the citation was wrong, such as, for instance, where the Commissioner General cites a provision of the law other than the proper provision, that alone would not invalidate the assessment and the Notice of Demand for payment of a tax where the enabling provision exists. In other words, non-citation of the proper law would not render the assessment or demand defective.

We thought we should clarify this position in order to avoid the possibility of a situation where such acts by the Commissioner General are equated to judicial proceedings, where non-citation can result in an application being dismissed for what has come to be known in our jurisdiction as "incurable defect". A tax assessment or demand is not a judicial proceeding. It would thus be wrong to apply to the process of assessment and issuance of demand notices, such technicalities as they apply to judicial proceedings. Indeed, the Appellant's notice to the Respondent did not cite any legal provision, and only later (after being prompted by the Respondent's Tax Advisors, PriceWaterhouseCoopers, that the Commissioner General mentioned the **Excise Tariff Ordinance**, Cap 332.

Hence, even with its finding on the invalidity of the "old" law, the Board ought to have allowed the part of the assessed tax relating to the period before 1st September 2004. The same was in any case payable under the "old" law, and whatever changes that might have been brought under the "new" law would not affect the previous operation of the repealed law, or any right, interest or duty existing prior to the repeal: Section 32 (1) and (2) of the **Interpretation of Laws Act**, Cap 1 (R.E. 2002) is clear on this point.

In sum, we find the first ground of appeal to have merit, and we would uphold it.

The second ground of appeal challenges the Board's finding that the assessment and subsequent demand for tax was time-barred. It has been argued in support of this ground that the Board was wrong in relying on section 58 of the **Excise (Management and Tariff) Act**, Cap 147 (R.E. 2002) to hold that the assessments were time-barred. It is common ground that section 58 of that Act puts the time limit within which the Commissioner General may make a demand for payment of excise duty under the Act at twelve months. It is also common ground that the provision also existed in the old law (the **Excise Tariff Ordinance,** Cap 332). We are thus looking at the same wording with regard to the issue of time limitation, whichever law we would be referring to.

The bone of contention, between the parties is that section 58 of the Excise (Management and Tariff) Act, Cap 147 (and even the Ordinance, Cap 332) only provides a time limit to ***excisable goods, and <u>not</u> excisable services*****.** The issue, therefore, is whether there is indeed a period of limitation within which the Commissioner General must raise a demand for excise duty on services and if so, what is it? To answer that question, we need to also decide whether the limitation provisions contained in section 58 of Cap 147 can be read to cover ***excisable services*** and not only ***excisable goods,*** such that the demand for excise duty on services under the Ordinance or Act can and should only be made within a period of twelve months.

In their Tax Advisor's letter of 25th June 2010, the Respondent stated that they were treating the demand as "an intended assessment issued under section 58 of the Excise (Management and Tariff) Act, Cap 147". They also maintained that the demand was time-barred under section 58 of the said Act. The Commissioner General simply responded (vide letter dated 14th January 2011) by saying that

the demand was made under the **Excise Tariff Ordinance, Cap 332**. The Commissioner General also contended (without citing any authority) that the Ordinance does not prescribe for a time limit for raising a demand for payment of excise duty on services. He thus must have assumed, as is now being argued on his behalf, that his demand was not limited by any law.

Hence, the Appellant maintains, the Board was wrong to apply section 58 of the **Excise (Management and Tariff) Act** to this case and hold that the Commissioner General was time-barred because his demand must have been made within twelve months. Counsel has further argued that the omission by the legislature to expressly provide for time limit in respect of services must mean that the legislature did not intend to impose any such limit. Counsel has relied on the now famous case of *Cape Brandy Syndicate v. IRC* (1923) 1 KB 64, to support the contention that a taxing statute has to be construed strictly. She maintains that a strict interpretation of section 58 should mean that demands for excisable services can be made at any time.

Dr. Ringo has countered with a submission to the effect that at the time of the old law, services were not taxable by the relevant legislation as there was no provision therein, and that they only became taxable after the alleged "agreement" (which was not proved at the Board). It was then, maintains counsel, that the Appellant began charging excise duty on services.

On this point, Dr. Ringo may be quite right. Indeed, if one were to strictly construe the **Excise (Management and Tariff) Act**, Cap 147, there is not a single provision therein that covers services. Counsel's argument is thus supported by the very law that is at issue in this case. For, if "goods" in Cap 147 did not include "services", why then would the Commissioner General be charging excise duty on interconnection expenses on that law?

The Tribunal conducted an electronic search, which revealed that the word "goods" appears 209 times in Cap 147. The word "services" does not appear even once! Even the short title to the Act only mentions "…manufacture of excisable goods…". Services are not mentioned in whatever form or manner! It also is not mentioned in the Ordinance (Cap 332).

Consequently, if one were to read into the word "goods" as used in the Act to include services, as the Appellant suggests, then the word "goods" as used in section 58 must necessarily also include "services". Having construed the word "goods" to cover services and thereby levy excise duty on interconnection charges in respect of the Respondent's services, the Appellant cannot avoid the inference that that same word as used in section 58 must necessarily cover services as well, thereby giving the benefit of the limitation provisions of the said section to the taxpayer.

With this finding, we see no reason to fault the Board for applying section 58 to the case at hand, and to consequently hold that the Commissioner General's demands to the Respondent for excise duties in respect of interconnection expenses for the entire period in question (January 2003 to December 2005) was time-barred.

In the final analysis, therefore, even though we have allowed the first ground of appeal, our findings on the issue of limitation constituting the second ground of appeal would result in an order dismissing the appeal. The appeal is thus dismissed.

As the Appellant has succeeded in one of his two grounds of appeal, we would let the parties bear their own respective costs.

Hon. Fauz Twaib **.....**
Judge/Chairman

Mr. N. Shimwela **.....**

Member

Mr. J.K. Bundala **.....**

Member

22nd November, 2013

Judgment delivered in the presence of Mr. Laswai, learned Advocate for the Appellant, and Mr. Kidaya, learned Advocate for the Respondent, this 22nd day of November 2013.

Hon. Fauz Twaib, **.....**

Judge/Chairman

Mr. N. Shimwela **.....**

Member

Mr. J. Kalolo-Bundala **.....**

Member

22nd November 2013

We certify that this is a true copy of the original.

Hon. Fauz Twaib **.....**
Judge/Chairman

Mr. N. Shimwela **.....**

Member

Mr. J. Kalolo-Bundala **.....**

Member

22nd November 20123