IN THE TAX REVENUE APPEALS TRIBUNAL

AT DAR ES SALAAM

APPEAL NO. 2 OF 2011

M/S TANZANIA BREWERIES LTD .....APPELLANT

VERSUS

COMMISSIONER GENERAL-TRA ..... RESPONDENT

PROCEEDINGS

7/3/2011

QUORUM:

Hon. Hussein M. Mataka	**V/Chairman**
Mr. N. Shimwela	**Member**
Mr. J. Kalolo-Bundala	**Member**
For the Appellant	**Absent**
For the Respondent	**Absent**
Mrs. Halima Nongwa	**RMA**

Order:

This case is fixed for hearing from 11th April, to 13th April 2011 at 2:00. Please notify the parties on the dates and time for hearing.

Hon. Hussein M. Mataka V/Chairman

7/3/2011

11/4/2011

QUORUM:

Hon. Hussein M. Mataka	**V/Chairman**
Mr. N. Shimwela	**Member**
Mr. J. Kalolo-Bundala	**Member**
For the Appellant	**Mr. Malima Beatus, Advocate assisted by Cecilia Assey for the Appellant**
For the Respondent	**Mrs Joyce Sojo, Advocate for the Respondent**
Miss J. Gogadi	**PS**

Today Tribunal is fixed for hearing Appeal no. 2 of 211 between M/S Tanzania Breweries Ltd, the Appellant vs. Commissioner General TRA, the Respondent.

Your Hon. the Appellant has filed statement of Appeal, it contains eight grounds against Board's decision delivered on 23rd December 2010. Your Hon. that decision emanating out of two consolidated appeals those were appeal no. 11 of 2009 which involved Excise Duty and Appeal no. 22 of 2009 which concerned VAT, because both of the Appeals involved both parties and the same the tax assessment led to the Board to consolidated those appeals.

Your Honour, the first ground of appeal is that: the Board failed to consider the evidence which was before it. If you go through the record you will find that the Appellant tendered exhibits 13 and 7 exhibits were tendered by the Respondent. However, when you go through the judgment you will find that none of exhibits were considered. There was only one exhibit considered that is exhibits A4 but the rest of exhibits were not considered.

It is my humble submission that such an error is fundamental to vitiate the decision of the Board. In that submission I am referring to Sec. 19 (1) of TRAA Chap. 408 as Revised in 2006 and Rule 20(1) of Para (b) and (c) of Tax Revenue Appeals Board Rules. Your Hon. Rule 20(1) (b) that provision " a summary of all relevant evidence produced before the Board and the reasons for accepting or rejecting the evidence."

Your Hon. under this provision the Board must put the summary of all evidence adduced before the Board and furthermore, the reasons for either accepting or rejecting the evidence must be provided for.

Your Hon. in the decision of the Board there is no evidence or reasons is provided by the Board to say which exhibit has been accepted and why it has been accepted and which exhibit has been rejected and why it has been rejected.

Your Hon. as I have already stated that there were 20 exhibits tendered before the Board 13 from the Appellant and 7 from the Respondent. However, when you read the judgment only can find that there is no exhibit tendered that has been accepted or rejected. There were no reasons for accepting or rejecting it.

It is my humble submission that since those requirements were fundamental to the decision of the Board, and since they were not met by the Board, it is my humble submission the decision was incurable defective for failure to meet a mandatory requirement. On the basis of that it is within the powers of this Tribunal to annul that decision of the Board.

I am now moved to argue the second ground:
The Hon. Board used or employed a wrong test led the Board to rendered a wrong decision. The Board having heard the parties proceeded to frame the issues to be determine by it in the followings words. "Whether there was exportation or non exportation of Beer in question". That is on page 5 of the Board's judgment.

Your Hon. the Board having posed that question, it proceeded to find that the condition which must be made that goods must be imported or not imported.

The Board correct in my humble opinion referred to clause 2 of the first schedule of VAT Act or R.E 2006, that clause provides test for importation of goods outside Tanzania. It provides 3 conditions. Those conditions are:

1. The goods must be delivered or made available to a person outside Tanzania
2. There must be documentary evidence to that effect.
3. Such document must be acceptable to the Commissioner.

Those conditions are at page 6 of the Board's judgment. After those conditions have been stated the Board rather than seek evidence of delivery of goods outside Tanzania, the Board jumped to the submission of the Respondent and stated that since these goods were sold at ex-gate that itself were sufficient evidence that the goods were exported.

Tribunal: Was the Board duty bound to seek evidence or the Appellant have to produce evidence?

Appellant: it was the duty of the Board to look at the adduced evidence. There was evidence before the Board that the Respondent

accepted that there were acknowledgment by the Respondent see exhibit A10.

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Assuming for the sake of argument that there was no evidence of exportation, the fundamental question was the test which is provided for by the statute.

As i have already submitted that three things must be shown that the goods were sold out of Tanzania, the document has to show that the goods were exported and accepted by Commissioner.

The Board used the modality of how the goods were sold which is wrong test, that was the test that Board used to determine that the goods were exported. It is my humble submission that the Board held wrong test.

The second problem your Honour is that, at commencement of framing issues from the Board, the Board did not examine other 3 issues framed. It is our humble submission that when the parties framed the issues the Board had to examine and make ruling on all the four issues framed. For example on issue No. 3 there was an issue of allegation of forgery. There is exhibit A12 which was tendered before the Board as evidence to the allegation. That issue was not determined. There is another issue that the Respondent having determine that the goods were exported outside Tanzania. See exhibit A6 and A7 but that issues were not determine by the Board either.

TRIBUNAL: Evidence was adduced before the Board and have been rebuted, could that be still be examined by the Board?

Mr. Malima: The Appellant could not know who is the buyer and transporter.

The seller of the goods was not the transporter.

Hon. Hussein M. Mataka V/Chairman

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There is issue No.1 that the Respondent has basis to lodge the assessment. On this issue there is evidence tendered before the Board and the Respondent's witness No. 2 was asked specifically what was the basis of the assessment as seen at page 56 last page to page 57. The witness said that the records in the register of the Respondent, that was the basis used to assess tax on the goods exported through Namanga.

The issue is very critical because other witness testified that Customs declaration form (CDF) was the basis of assessment, thus contradicting the first Witness.

It is my humble opinion that the Board should have determine this contradiction into account and determine that issue accordingly, because it was important to clear the confusion as to whether the Beer had been exported or not.

If the Board had deliberated that issue, it would have seen that the goods were exported. The Board should have examined the documents which have been tendered to Commissioner whether the Commissioner's reasons for accepting or rejecting the document. So the fact that the Board just kept quite on this issue i think that was an error.

The fourth ground:

The Board held that the document issued by the Appellant were of questionable authenticity.

It is my humble submission that, this finding does not tally with the evidence adduced before the Board. Your Hon. the Respondent had produced before the Board 7 exhibits. Among those 7 your honour there was not any one of them found and declared not genuine by the Commissioner.

To be fair to your Hon. to Honourable Board the Respondent had adduced exhibit R.3 which had contained for custom declaration form which the Respondent was contesting, arguing that they have inconsistencies which cannot be accepted. But such inconsistence your Hon. I submit the Appellant in his submission before the Board was able to show that even accepted the difference in the assessment would have been negligible at around 133.3m (last para on page 96 of proceedings).

It was evident that this exhibit R.3 was covering CDFs for the year of assessment were 2005 to 2007 but these exhibit R.3 covered one more year which was not due.

My submission is this, there is no document that presented by the Respondent. Since there was no such evidence. Where the Board found that these documents were questionable or authentic value? It was un fair and not justified for the Board to make such findings.

The six ground:

That the Board erred by asserting that the documents tendered were questionable authentic without identified exactly which were those documents.

The reason for appeal is that the Commissioner did not inform. The Exhibit No. A.12 in this exhibit it was a letter from the Respondent regarding final assessment. It is here the Respondent raised a matter of forgery. The Respondent never mentioned as to which documents were forged and which one were genuine. Evidence adduced before the Board and the Respondent failed to show which document were forged. But before the Board there was exhibit A10 which showed that the Commissioner was satisfied with the authenticity of the large part of the evidence and on the basis of that the Commissioner refuted the Commissioner's initial assessment and therefore the assessment was amended.

These documents which were alleged to be authentic were never submitted before the Board.

TRIBUNAL: why the Commissioner should have brought those documents which were not disputed.

MALIMA: The Commissioner had to present those documents which are genuine and led to reduction of assessment.

TRIBUNAL: Why you are arguing that the Board should have disputed the genuine document and not the one in dispute.

MALIMA: In fact all documents were in dispute because they covered for all year in disputed.

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It is my humble submission that because there was no evidence before the Board to show which documents were genuine and which one were not genuine and since there was no evidence from the Respondent to fault the

document submitted by the Appellant other than Exhibit R.3 which was pointed on CDF it was an error for the Board to find that documents were not authentic.

The seventh grounds:

The Board erred by holding that the Appellant cannot compel the Commissioner to the evidence which were questionable.

It is my submission that the Board entitled to scrutinise the Respondent's decision otherwise the Commissioner would have been given a blank cheque. The Appellant asked the Board to look at the documents alleged to be a forged. However reading the entire judgment one finds that the trial Board failed to discharge its duty to look at those documents to find out if they were forged or not forged. The record shows there was no evidence adduced by the Respondent to prove that those documents were not genuine.

It is my submission therefore, that the failure of the Board to find out whether such documents were genuine was serious error, and my opinion led to injustice to the face of the Appellant. Perhaps if those documents had been made available to the Appellant this case could not have been brought here.

TRIBUNAL: If these documents were not genuine so does the Board has to consider the authenticity of the documents?

MALIMA: The general principle is that the one who alleged must prove. So it the Board has to examine the evidence adduced to prove whether the Respondent's allegation was true or not.

Hon. Hussein M. Mataka V/Chairman

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The last ground:

The last ground is similar to the second ground so I am adopting my submission for ground No. 2 here as well.

My prayer to the Tribunal, having stated all grounds.

a) The Tribunal annuls the Board's decision. In alternative.
b) If not the liability, be reduced by TZS. 133,315,000/=. That is all your Honour.

Hon. Hussein M. Mataka V/Chairman

11/4/2011

Order:

The hearing will continue tomorrow at 2.00 p.m. When the Respondent will make her reply submission.

Hon. Hussein M. Mataka V/Chairman, Sgd

Mr. N. Shimwela Member,Sgd

Mr. J. Kalolo-Bundala Member, Sgd

11/4/2011

12/4/2011

QUORUM:

Hon. Hussein M. Mataka	**V/Chairman**
Mr. N. Shimwela	**Member**
Mr. J. Kalolo-Bundala	**Member**
For the Appellant	**Mr. Malima Beatus, Advocate assisted by Cecilia Assey for the Appellant.**

For the Respondent	**Mrs Joyce Sojo, Advocate for the Respondent.**
Mrs. MG. Ntamuturano	**PS**

Today the Tribunal is fixed for hearing reply submission from the Respondent Counsel. The hearing is opened, the Counsel may proceed.

Hon. Vice Chairman and Members of the Tribunal, the learned counsel for the Appellant yesterday started by challenging the decision of the Hon. Board. He made observation on the requirement of the law. He referred to Sec. 18(1) of TRAA Cap 408 which states that **"the proceedings shall be of judicial nature".** He went further to referred to Rule 20(1) clause (b) and (c) of the Tax Revenue Appeals Board Rules which provides.

"The decision of the Board shall be in writing and shall contain (a) summary of all relevant evidence produced before the Board, (b) the reason for accepting or rejecting the evidence, and (c) the reason for decision".

Your Hon. The law referred to by the learned counsel requires the Board to deal with relevant evidence. The counsel submitted that the Board only touched exhibit No. A4 and left all other evidence un touched (exhibits).

I do submit that pursuant to requirement of the law under Rule 20(1) clause (b) requires the Board to deal with relevant issue. For that matter the Board considered exhibit No. A4 which it felt was relevant to the case, without touching on its authenticity because at least that document related to the beers imported into Kenya and not exportation of beers from Tanzania.

TRIBUNAL: Do you mean exhibit A4 is only related to beer from Kenya is that correct?

JOYCE: Yes

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JOYCE: The rest of documents your Hon. related to communication between the parties. So it was nothing to do with exportation. For that matter I do submit that the rest of exhibits were quite irrelevant, so they could not be considered by the Board. Otherwise your Honour, it would be ridiculous for Hon. Board to address itself to communication letters not dealing with issues of exportation.

On page 5 of the judgment the Hon. Board expressly confined itself to one issue which was basic and that was the exportation.

On page 8 of the judgment in the last sentence the Board clearly put it that the law requires the exporter to produced evidence to prove exportation and yet he wants the Hon Tribunal to have considered the communication letters between the parties as proof of exportation.

My emphasis is that the issue before the Board was whether there was exportation or not. Therefore, I submit that the letters tendered as exhibits A1 to A13 exclusive of exhibit A4, were quite relevant to prove exportation.

You Hon. I do further submit that the Board rightly put forward the reasons for its decision as required by Rule 20(1) (c) of Tax Revenue Appeals Rule.

The Board on page 9 of its judgment in the second paragraph, state and I quote:

"now it appears to us in this case, the procedure which was adopted and applied by the Appellant company to export the beer products ex-gate was so volatile and pone to malpractices as it appears to us that it could easily lead to non – delivery of the goods in question to the intended destinations".

Your Hon. These are the reasons given by the Board to sustain its decision. Furthermore in the following (last) paragraph the Board added;

"The Appellant chose not to maintain ownership of the beer products in question until they crossed the border. As a result they could not produce sufficient and genuine documentary evidence to the satisfaction of the Commissioner to show that the said beer products were duly exported. That being the case they cannot be heard today to compel the Commissioner to accept evidence the authenticity of which is highly questionable".

The Board said that because of clear evidence shown. It considered that there was exportation of beers.

The evidence adduced was in relation to export. The other 12 exhibits were not evidence: rather they were simply communication documents between the parties.

Exhibit No. 4 dealt with importation into Kenya which the Commissioner General, TRA could not verify because they were from foreign country.

TRIBUNAL: there was also oral evidence before the Board. What do you say about that?

JOYCE: The Board was overly pertinent and listened to hearsay, not real evidence from the witnesses brought by Appellant.

At page 19 of the proceeding, the witness No. AW1said " according to our agreement it was upon them (the buyers) to ship the beers at their own expense to Congo on condition that they would return to us the documents evidencing export." At page 28 of the Board proceedings AW 1 admitted that yes the Appellant sold the beers ex-gate.

The second ground of appeal.

On the second ground of appeal the learned counsel submitted that the Board applied a wrong test which led to a wrong decision. He went further to say instead of seeking evidence of delivery of goods outside Tanzania, the Board based its decision of the respondent's averment that since the Respondent sold beer at the ex-gate there was no exportation.

The law clearly requires delivery of the goods to be made to the address outside Tanzania. This is according to clause 2 of the First Schedule of VAT Act. Cap. 148.

As I have said before the first witness of the Appellant categorically explained that they were selling their goods outside their gate. Can this amount to a delivery of goods outside Tanzania?

The Appellant from their own mouth said they never exported disputed consignment of beer.

TRIBUNAL: Is the word "delivery" defined in the first schedule?

Joyce: They transfer the ownership of goods to their customers at the gate.

How could prove exportation at all if that exportation is no longer belong to them?

Under clause 2 of the first schedule of the VAT Act, the law requires that there must be documentary evidence to that effect, one can ask to which effect? The effect is delivery outside Tanzania.

Your Honour, exportation entailed a long process and different documents are involved. As regards the exportation through Namanga Border the Appellant did not at any time bring a single document to prove exportation. He wanted the Commissioner and later the Board to rely on Kenyan documents, over which the Commissioner has no mandate whatsoever to verify. In considering exportation through Tunduma Border, it was evident before the Board that the documents submitted were not genuine. This is the evidence provided by RW1 on pages 42, 43 and 44 of the Board's proceedings.

The evidence adduced by RW1 proved that all documents were dubious (not genuine) to that effect.

Your Honour all documents adduced by RW1 were dubious see at page 44 the of Board's proceedings last para (counsel red it).

TRIBUNAL: Were these registers signed by those drivers?

Joyce: The Drivers signed those forms C12. Your Hon. having proven those documents were dubious so the Board was not entitled to examine irrelevant evidence. I do submit

that the Board could not have basis to believe that documents from Kenya were genuine.

The learned counsel went further state that the Board only consider one issue rather than all the three issues framed. Your Hon. the Board rightly considered one issue which was relevant and did not need to examine other irrelevant issue.

On the third ground, the counsel submitted that there were issues of allegation of forgery. And they were exhibit No. 12 that was rebuted not examine.

The issue of forgery was well address during Board's proceedings. That is why the Respondent took trouble to make comparative analysis between the genuine one and forgery documents.

You Hon. Having considered such evidence adduced by the Respondent's witness the Board in its judgment held that documents were highly questionable.

The Respondent to prove the extent of forgery or dubious, called two Clearance and Forwarding Agents to prove the dubious nature of documents, witness RW3 at page 59.

Tribunal: Could the Board heard the evidence of Clearing and Forwarding Agency without calling a forensic expert?

Joyce: The two cleaning and forwarding agents were RW4 and 5.

The said Clearing and Forwarding Agents clearly said they have never transacted with the Appellant.

My learned friend, insisting about his position of evidence of clearing Agencies, he said the Appellant did not associated with clearing agency. This is impossible because you cannot import goods without associate with clearing agents. There were exhibit 5 combined with exhibit No. A.4 listed numbers of clearing and forwarding agencies.

The appellant brought that document from exhibit A4 some of them were from Kenya. The Respondent's witness AW2 was asked the basis of assessment on pages 56 to 57 of the proceedings. The basis was the register at Namanga, to him exportation could be proved without doubt.

It is upon the Appellant to prove the importation. So far the document produced to the Board some of them were from Kenya which could not be verified by the Commissioner, as the law says it is the Appellant to prove the authenticity of the document not Respondent.

TRIBUNAL: Some of these documents came from Kenya Breweries. What the law say regarding the examination of documents which were from outside Tanzania.

JOYCE: The Commissioner does not have mandate to verify the genuine of these documents.

Hon. Hussein M. Mataka V/Chairman

The fourth ground:

Stated that the Commissioner failed to show which documents were genuine and which one were not.

The Commissioner had no duty to bring genuine documents. Those genuine were not part of the dispute. The Board rightly delivered its judgment that the documents tendered were highly questionable. Hon Board correctly delivered its judgment by dealing only with all relevant evidence and thereby leaving all irrelevant documents which could not prove exportation. And it proved that some of the documents were not genuine and no single document proved exportation. Therefore, i pray to this Honourable Tribunal to dismiss this appeal in its entirety with cost.

Hon. Hussein M. Mataka V/Chairman

12/4/2011

Order:

The hearing will continue tomorrow at 2.00 pm where the Appellant Counsel will make his rejoinder submission.

Hon. Hussein M. Mataka V/Chairman, Sgd

Mr. N. Shimwela Member,Sgd

Mr. J. Kalolo-Bundala Member, Sgd

12/4/2011

13/4/2011

QUORUM:

Hon. Hussein M. Mataka V/Chairman

Mr. N. Shimwela Member

Mr. J. Kalolo-Bundala	Member
For the Appellant	Mr. Malima Beatus, Advocate assisted by Cecilia Assey
For the Respondent	Mrs. Joyce Sojo, Advocate for the Respondent
Mrs. Halima Said	RMA

Today the Tribunal is fixed for hearing a rejoinder submission from the Appellant's Counsel. The hearing is opened the Counsel may proceed.

Your Honour the Counsel for the Respondent when making reply on ground no. One submitted that the Board considered exhibit A4 and therefore the Board was complied with Rule 20(1) (b) of Tax Revenue Appeals Board Rules. She said that is relevant under Rule 20(1) (b).

That was in response to my submission on Monday which i submitted that the Board was not complied with Rule 20(1) (b) and (c). This is my rebuttal to this submission. Rule 20(1) (b) requires the Board to make a summary of all evidence educed before the Board.

Therefore, the question is what is relevant evidence? The answer as provided for under Sec. 8 and 9 of the Evidence Act Chap. 6 1967 RE 2002. The provision states that **"any fact which is an issue is relevant one".**

That being the case it follows that all documents delivered before the Board were relevant evidence and ought to have been considered by the Board.

Your Honour it is my humble submission that there was an obligation on the part of the Board to examine all 20 exhibits tendered before it. To do otherwise it was not complying with Rule 20(1) (b) which requires in the

second limb that the reasons for accepting or rejecting must be summarised. This means that to be compliant all documents must be summarised whether they were accepted or rejected.

TRIUBUNAL: By virtue of Evidence Act Cap 6 is the Board and Tribunal bound to apply the Rule of Evidence?

MALIMA: The rule in evidence can also apply to this Tribunal.

I submit that Rule 20(1) (b) requires the Board to state the reasons as whether to accept or reject the other 19 exhibits. The Respondent submitted that the Board did not have to consider other exhibit as they were just communication.

To that your Hon. I have two rebuttals.

1. That, if the document were irrelevant that is precisely the Board has to say, but it did not say that. The Board by failing to state the reason, it did not comply with Rule 20(1) (b).
2. That, the contention that there was just communication between the parties did not appear at any place before the Board.
3. That exhibit A4 consisted of documents of beers from Kenya. Your Hon. Exhibit A4 consisted of CDF through Namanga, Kasumulu and Tunduma.

That exhibit also included additional documents (custom declaration forms), bank receipts from the Bank, correspondence from Nile Breweries and Kenya Breweries, acknowledgement from Bank that payment was made, and there was reconciliation of containers of Beers. So it was not correct as the counsel stated that exhibit A4 contained only relevant documents. There is question

as to what did the Board consider as relevant evidence. Was there any reason that was assigned that others were rejected?

My learned friend skipped this issue of whether the Board assigned exhibit A4. It is my humble submission that the Board seems to have rejected exhibit A4. However on page 10 of the Judgment (Appellant reads) you will realised that the Board reached that conclusion that the appellant sold its goods at ex-gate. I said this is different thing.

Your Honour i will fortify my argument by calling the attention of Tribunal to page 7 and 8 of the judgment of the Board. There you will see at page 7 second paragraph (Appellant read) here I am saying the Board did not give reason why it accepted exhibit A4 or rejected others. Instead it jumped to another thing: that is how the sale of beers was conducted.

The question relates to whether this provision of the Rule. My learned counsel stated that Board complied with Rule 20(1) (c) and she cited paragraph 2 on page 9 of the Judgment.

My humble submission is that there was no reason given by Board. The said paragraph 2 at page 9 concerned procedures of sale of goods which was not an issue before the Board.

It is my humble submission in terms of Rule 20(1) (b) and (c) that it is a mandatory and should be complied with and not to nullity.

Now, I am going to 2nd ground relating to a wrong test to determine the exportation of goods. My learned friend supported the test supported by the

Board, that it was justified to use the mode of sale is a right test to determine mode of exportation.

It is my submission that wherever a statute has provided for the test to be used it is not within the right of the Board to substitute the test.

Yesterday the counsel cited page 8 of the judgment to support the test employed. However, if you read page 8 you will find that the Board is employing the control of importation of goods as test of importation. See para 2 at page 8 of the Judgment (the Appellant read). Your Honour, this test was not provided by the statute, control has not been stated by statute to be test of determining exportation.

My learned friend recited para 2 at page 9 to state that the Board applied correct test. I submit that test is wrong because the test provided by statute is whether the goods were delivered or made available to an address outside Tanzania. The statute does not say the exporter or seller shall delivered the goods outside Tanzania rather it states the goods are treated as exported if they are delivered or available outside Tanzania. This is in accordance to para 2(a) first schedule of VAT Act 148 as Revised Ed. 2006.

The law does not say who should deliver or make the goods available outside Tanzania.

The law requires documents must be supplied to show the goods are supplied outside Tanzania. I strongly submit that if any one insists that the seller must delivere the goods outside Tanzania that will be enactment of new law. There is no owner ship or control test, the test is to deliver or make available outside

Tanzania. My humble submission that there is no ambiguity. If there is an ambiguity the law of tax requires to construe in favour of the tax payer.

In the case MANDAVIA VS. CIT reported in EAT case at page 5. There is another case CIT VS. U, vol. II EAT case page 1 at page 12 of that decision.

While on that issue of wrong test, i am also submitting that if the Tribunal finds that the Board was entitled to use that test my prayer is that the Respondent should be estopped to deny wrongful the procedure where the Appellant used to export the goods. It is my humble submission that since the procedures adopted by the Appellant had the consent of the Respondent, the Respondent cannot dispute now. The Respondent stated that the Appellant had no control of goods because the goods sold at ex-gated and therefore there was no exportation of goods.

It is my humble submission that there is controlled to ensure that goods are exported outside Tanzania. I refer to pages 19, 25, 26 and exhibit A6 of the Board proceedings. There you will see the Respondent demanded deposit of the value of money equivalent to the sale of goods and that money would be repaid once the buyer proved by brought the documents which show that the goods were exported outside Tanzania.

Ground no. 3

The Board held that the Appellant did not tender sufficient evidence while the evidence was not considered by the Board. My learned friend submitted that the Board was not entitled to consider the documents which were forged or non- genuine.

My rebuttal is that, the Board should have stated that we have considered your exhibits and found that they were not relevant but the Board failed to do that.

It is my humble submission that since it had not given reason to reject our evidence it has no duty to reject our evidence.

Ground no. 4

The Board held the documents were of questionable authenticity. My learned friend submitting many things but let me start with this one: the Commissioner could not have authority to demand documents from Kenya, my submission is that, that argument does not hold water because sec. 10(1) of the East Africa Community Customs and Management Act the Commissioner has the right to require documents imported from Kenya but did not do that. I humbly ask the Tribunal to have a look at page 42 of proceedings where RW1 stated that he was sure the East A.C. Act was complied with.

Second my learned friend stated that documents tendered did not have their contents featured in the register of the Respondent.

My humble submission is that the registers of the Respondent were not conclusive evidence of exportation. I humbly asked the Tribunal to have a look at pages 45, 46 and 47 of proceedings and ask as to why the Register should be considered but yet the Board did otherwise. Because the year of assessment commenced in April 2005 and ended in March, 2007, see Exhibit A9. But the Register which were produced commenced on 25th October 2005 and ended 23rd March, 2007. There are 5 months which these exhibits did not

include. Also there was an exhibit for the month of June, 2006 which was missing.

The Registers were under full control of the Respondent, the Appellant could not do anything and therefore the Respondent could not rely on his Register. You Hon. My learned counsel also submitted that documents must be to the satisfaction to the Commissioner and therefore the Commissioner must drop the dubious ones. I agree the document must be to the satisfactory of the Commissioner, but all these documents were stamped and sealed by the Respondent's employees. It is my submission that if these documents are dully signed by the Respondent, no witness was called to denial the signatures of the Respondent's staff or stamp. The RW3 confirmed that those documents were signed by the Respondent's employees. It is my submission that it is incorrect and there is no basis to state that those documents were not genuine.

RW1 stated that the document had no cargo manifesto which made the documents to be dubious. If my rebuttal that cargo manifest is not conclusive evidence. It is also noted that RW1 and RW2 are contracting each other. If you see at page 81 of the proceedings, the attention was drawn to the fact that the Board had already ruled out that cargo manifest was not provided by law so that cannot prove exportation.

Finally, that the Respondent stated the tracts cannot cross the border without particulars of the Register.

Your Honour that is before the Board, there was exhibit No. 13 shows that goods were crossing the Border without being captured in the Register. Your Honour exhibit A13 tendered by the first witness by Appellant, this witness

was not cross examine on that exhibit. The Respondent tactically avoided examining him so the evidence was left unchallenged.

My learned friend submitted that the forgery was address by the Board and that the Respondent made comparative analysis.
I am saying that was wrong because Exhibit R3 was question transaction which was not cross the Border. The Tribunal will have opportunity to examine exhibit R3.

Finally, my learned friend submitted that the purported clearing and forwarding agents were not dealing with the Appellant.

My humble submission is that there were not witnesses of the Appellant. And these clearing agents had no contract with the Appellant.

Most important I would ask the Tribunal to look at pages 65 and 67 of the proceedings, their witness were shown exhibit A5 which dealt not of transfer of goods. It is my humble submission that the evidence before the Board, if considered, would have proved that the Appellant did all what he had to do. But because the Board did not consider the evidence before it reached a decision which it ought not to have reached.

I humble pray you to submit.

Order

The judgment will be on 16/05/2011.

Hon. Hussein Mataka V/Chairman, Sgd

Mr. N. Shimwela Member, Sgd

Mr. J. Kalolo-Bundala Member, Sgd

13/4/2011

IN THE TAX REVENUE APPEALS TRIBUNAL

AT DARE S SALAAM

APPEAL NO. 2 OF 2011

M/S TANZANIA BREWERIES LTD .....APPELLANT

VS

COMMISSIONER GENERAL .....RESPONDENT

J U D G M E N T

Hon. H. Mataka- Vice chairman.

This is an appeal by M/s. Tanzania Breweries Ltd herein after refers to as (TBL) as the Appellant. It is against the whole decision of the Tax Revenue Appeals Board in Exercise Duty and Value Added Tax (VAT) consolidated Appeal case no.11 and 22 2 of 2009. The Board's decision was delivered on 23rd day of November 2010. In its decision the Board dismissed the Appellant's appeal in its entirety against the demanded payment of corresponding excise duty amounting to TZS 1,505, 245,823.00.

After hearing both parties and their witnesses the Board found hereunder I quote "…. The declared exports of beer were not made and therefore the Respondent had the legal basis upon which he gauged the assessment which is now being challenged" and accordingly, dismiseds the appeal with costs.

The Appellant (TBL) now appeals to this Tribunal to anul the Board's decision on the grounds/reasons that the Board;

1. Failed to consider the full evidence of exportation which was before it rendering its judgment incurably defective.
2. Used the wrong test of exportation, namely how the goods were sold ex-gate argument, that led it to render a wrong decision;

3. Did not address the three other issues it framed;
4. Held wrongly that the documents issued by the Appellant were of questionable authenticity;
5. Erred by not saying specifically which of those documents were of questionable authenticity;
6. Erred by holding that the Appellant can not compel the Commissioner to accept (questional) evidence;

Prior to examining the grounds of this appeal, we wish to state that the appellant in his statement of facts and reasons in support of his appeal raised eight grounds. The said grounds can be reduced to one main ground that is whether on the evidence on record, the Appellant satisfied the requirements of the First Schedule, of the VAT Act clause 2 which provides for the test to be applied so as to prove exportation.

It is therefore for the sake of this judgment we dropped grounds no 4, 5, 6, 7 and 8 as these grounds interrelate and do not carry any weight. Coming now to examine the first ground of appeal that the Board failed to consider the full evidence of exportation which was before it, i.e. only one exhibit out of 20 exhibits was considered.

In his submission in chief, the appellant's counsel Mr. Malima submitted that the Board in its judgment only considered one exhibit i.e. exhibit A4 but the rest of exhibits were not considered. He strongly submitted that such an error is fundamental to vitiate the decision of the Board. He relied on Sec. 19(1) of Tax Revenue Appeals Act (TRAA) Cap 408 R. Ed 2006 and Rule 20(1) of para (b) and (c) of the Revenue Appeals Board Rules.

> Rule 20(1) (b) provides that **"a summary of all relevant evidence produced before the Board and the reason for accepting or rejecting the evidence"**

The Appellant argued that under this provision the Board must make a summary of all evidence adduced before the Board and the reasons for either accepting or rejecting the evidence must be provided. He went further to submit that in the decision of the Board, there is no evidence or reasons provided by the Board to say which exhibit has been accepted and why it has been so accepted, and which exhibit has been rejected and why it has been rejected.

On the other hand the Respondent's counsel Mrs. Joyce Sojo submitted by referring to Rule 20(1) clause (b) of the TRAT Rules to mean that the Board is only required to deal with relevant issues, and for that matter the Board considered Exhibit No. A4 which it felt was relevant to the case, without touching on its authenticity because that document related to the beers imported into Kenya and not exportation of beer from Tanzania.

We are of the firm view that the Respondent counsel having determined that proof of exportation was the key issue, the Board rightly focused its mind on evidence that would help to prove the fact at the standard requirement by law namely at preponderance of probability we believe that the draftsman of this Rule phrased "relevant evidence" under Rule 20(1) (b) so as to exclude irrelevant evidence, and that is what the trial Board did. Therefore, the first ground of appeal cannot stand and should be dismissed.

This leads us to the second ground of this appeal, that the Board used a wrong test of exportation, namely how the goods were sold(ex gate) instead of applying the test provided for in clause 2 of the First Schedule to the VAT Act Cap 204 R.E 2006 that :

1. The goods must be delivered or made available to a person outside Tanzania;
2. There must be documentary evidence to that effect; and
3. Such documentary evidence must be accepted by the Commissioner.

Mr. Malima contested that the Board instead of seeking evidence of delivery of goods outside Tanzania, jumped to the submission of the Respondent and found that since these goods were sold ex-gate that itself was sufficient evidence that the goods were not exported.

In replying to this argument, the Respondent Counsel countered that by Appellant's own admission through their 1st witness, the beer in dispute was sold ex-gate thereby transferring ownership to the transporters at the gate of the Brewery and they were required to furnish export documents to the Appellant upon delivery of the goods to the consignee.

After going through the Board's proceedings on pages 60 to 63, the Respondent witness RW3 explained in depth and very clearly the export procedure and documentation such as proper CDFs, serial numbering, document handling etc. The best practice should involve professional clearing and forwarding agents in handling export and import trade, but no clearing and forwarding agent was employed in the instant case.

It is our collective view that since the Appellant did not even wish to call the exporter so as to explain the circumstances under which he is alleged to have engaged the clearing agents who turned against him, it cannot be said that a case was made by the Appellant.

In other words, there was no evidence of delivery of the goods, (beer) to an address outside the United Republic of Tanzania. We therefore do not have any option rather than dismiss the Appellant's second ground of appeal.

Let us examine the third ground of appeal, that at the commencement of the hearing four issues were framed but the Board addressed only one of them. Mr. Malima submitted that the Board should have examined and made its ruling on all four issues framed. Given the example of issue no. 3 which relates to allegation of forgery. There is also Exhibit A12 which was tendered before the Board as evidence

to prove the allegation. There is another issue that the goods were not exported outside Tanzania, he refers to exhibits A6 and A7, and that issues were not determined by the Board either.

The Respondent counsel strongly denied that allegation. She submitted that the issue of forgery was well addressed during proceedings. That is why the Respondent took trouble to make a comparative analysis between the genuine and forged documents. In order to show the extent of forgery or dubiousness the Respondent called two clearing and forwarding agents who are RW4 and RW5 to prove the dubious nature of documents. Witness RW3 at page 59 to 60 of the record of proceedings clearly verified the said documents. The Respondent concluded that having considered such evidence adduced by the Respondent's witnesses the Board, in its judgment held that the documents were highly questionable.

On the other hand, the Appellant in his rejoinder submission contested that the registers of the Respondent were not conclusive evidence of exportation. This is because of the differences of the year of assessment commenced in April 2005 and ended in March 2007 see Exhibit A9, and that the said Registers are an internal matter of the Respondent and not form part of the requirement for proof of exportation. The Registers which were produced commenced on 25th October and ended 23rd March 2007.

It is our opinion that indeed the Registers cannot be said to be conclusive evidence of exportation. However taken together with other documents of export, it is our conclusion that the Appellant failed to prove exportation. We therefore find that the third ground of appeal does not have leg to stand on and is hereby dismissed.

Let us examine the final ground of appeal that the Board held wrongly that the documents issued by the Appellant were of questionable authenticity.

The Appellant argued that the Respondent had, after all, accepted a majority of the documents served as a basis for the tax assessment made. Skipping ground no. 5, he submitted in relation to the 6th and 7th grounds that the Board should have compelled the Respondent to bring their set for comparison. In fact the last 4

grounds of Appeal relate to the genuiness and availability of documents and have been argued interchangeably.

In her reply the Respondent's counsel submitted that her client had no obligation to bring the said genuine documents to the Board, because they were not in dispute. It was only those whose authenticity was questionable that were relevant to and therefore tendered before the Board to assist it to arrive at a just decision. After the foregoing submissions we thought and believed that the additional documents even if examined, would not have changed the principal findings by the Board as to whether or not there was exportation of beer by the Appellant.

It is therefore our collective decision that the Board findings and decision cannot be faulted as indeed the Appellant did not prove exportation and we hereby uphold the Board's decision and dismissed the Appeal in its entirely and order that the Appellant must pay the assessed tax of Tshs. 1,505,245,823.00 and that each party shall bear its costs.

It is so ordered.

..... H. M. Mataka

Vice Chairman

..... B. Kalolo

Member

..... N. Shimwela

Member

Delivered this 27th day of May, 2011 in the presence of Mr. Shuma Kisenge, Advocate for the Appellant and Mrs. Joyce, Advocate for the Respondent.

..... H. M. Mataka

Vice Chairman

..... B. Kalolo

Member

..... N. Shimwela

Member

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

..... H. M. Mataka

Vice Chairman

..... B. Kalolo

Member

..... N. Shimwela

Member