

*Tax Decision: The Position of the Board on Applicability of Withholding Tax on Commissions/Fees paid to Insurance Agents and Brokers*

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From our Tax Desk

**Tax Decision:**

- ✦ *The Board cements on the position of the law on the binding nature of Practice Notes under section 130 (1), (2) and (3) of the Income Tax Act 2004 that Practice Notes remain binding until revoked by the Commissioner General (TRA).*
- ✦ *The Board rules that Tanzania Insurance Regulatory Authority (TIRA) is not a professional body but a regulatory authority.*
- ✦ *Insurance Agency and Brokerage Services are not professional services within the meaning of section 83(1) (c) (ii) and 83 (3) of the Income Tax Act, 2004 as amended by section 28 of the Finance Act 2016.*

**1. Brief Background of the Appeals:**

Jubilee Life Insurance Corporation of Tanzania Limited (Jubilee) who was the Appellant in the Appeals is an insurance company incorporated under the laws of Tanzania providing insurance services. The Commissioner General of Tanzania Revenue Authority (TRA) who was the Respondent in the Appeals is a government institution with mandate to administer revenue laws set under the First Schedule to the Tanzania Revenue Authority Act. Upon conclusion of audit for the years 2013 to 2018, TRA issued Jubilee with assessments for Withholding Tax on professional service fees for the years 2015, 2016, 2017 and 2018. The basis for issuance of the assessments was TRA's contention that commissions or fees paid by Jubilee's insurance agents and brokers are professional services within the meaning of section 83(1) (c) (ii) and (3) of the Income Tax Act, 2004 as amended by section 28 of the Finance Act 2016.

Jubilee's notices of objection to TRA's assessments were not determined until the expiry of six months from the date of admission of the notices of objection. Pursuant to the requirement of section 52 (10) and (11) of the Tax Administration Act, 2015 (the TAA) as amended by section 72 of the Finance Act, 2020, Jubilee appealed to the Tax Revenue Appeals Board (the Board) on the deemed



confirmation of the assessments upon TRA's failure to determine the notices of objection within the period of six months.

## 2. Summary of the Contended Matters:

Before the Board, Jubilee's case was that the insurance agents and brokers are not professionals within the meaning of section 83(1) (c) (ii) and (3) of the Income Tax Act 2004 and the commissions/fees that Jubilee pays to them does not attract withholding tax. Jubilee argued further that for the period of January 2013 to June 2016 prior to the amendment of section 83 of the Income Tax Act 2004 made by section 28 of the Finance Act 2016, withholding tax does not apply based on the TRA's guidance provided in the Practice Note No. 1 of 2013 that the insurance agents and brokers are excluded from the ambit of withholding tax under section 83 (1) (c) of the Income Tax Act 2004. On the other hand, TRA's stance was that the insurance agents and brokers are professionals within the meaning of section 83(1) (c) (ii) and (3) of the Income Tax Act 2004 who are regulated by the Tanzania Insurance Regulatory Authority (TIRA). TRA maintained that despite the existence of her Practice Note No. 1 of 2013 which excluded insurance agents and brokers from the scope of withholding tax, the imposition of withholding tax on insurance agents and brokers for the period of January 2013 to June 2016 was correct at fact and law in view of 83(1) (c) of the Income Tax Act 2004.

For ease of reference, section 83(1)(c) of the Income Tax Act 2004 before the amendment by section 28 of the Finance Act 2016 states:

*Subject to subsection (2), a resident person who-*

*(a) N/A*

*(b) N/A*

*(c) pays to-*

*(i) a non-resident a service fee with a source in United Republic; or*

*(ii) a resident person a service fee for provision of professional services*

*shall withhold income tax from the payment of the rate provided for in paragraph 4(c) of the First Schedule.*

The amendment of section 83 of the Income Tax Act 2004 by section 28 of the Finance Act 2016 added paragraph (ii) to section 83 (1) (c) and paragraph 3 to section 83 of the Income Tax Act 2004 which states:

*For purposes of subsection (1)(c)(ii), "professional service" means services rendered by a person licensed as a practitioner by any recognised professional body and shall include other services or activities of an independent business character including consultancy, legal,*



*architectural, engineering, supervisory, accounting, auditing, medical, artistic, survey, theatrical performance, sports, exhibition, private security services, private investigation and consultancies in various disciplines or any entertainment held or given other than those for remuneration under contract of employment: Provided that, where the service referred in subsection (1)(c)(ii) involves construction works, the payment which is subject to withholding shall be based on the ratio of 3:2 for materials and services respectively.*

### **3. Issues for Determination:**

The Board was set to determine the following issues:

- (a) Whether the Respondent's (TRA) assessment of withholding tax on services to residents for the period of January 2015 - June 2016 is valid at law;
- (b) Whether the insurance agency or brokerage services are professional services within the meaning of section 83 (1) (c) (ii) of the Income Tax Act 2004;
- (c) Whether the Respondent's (TRA) Assessment of withholding tax on commissions paid to insurance agents /brokers for the period of July 2016 to 2018 is valid at law; and
- (d) To what reliefs are the parties entitled.

### **4. The Board's Holding:**

The Board made the following holdings in its decision delivered on 10<sup>th</sup> June 2022:

- (a) TRA's withholding tax assessments for the period of January 2013 to June 2016 are invalid on the basis of the Respondent's interpretation of section 83 (1) (c) of the Income Tax Act 2004 through Practice Note No. 1 of 2013 which excluded fees payable to insurance agents and brokers from the scope of withholding tax and which has neither been revoked nor amended;
- (b) That an insurance agency is not a professional service within the meaning of section 83(1) (c) (ii) read together with subsection (3) of the Income Tax Act 2004 as the functions of TIRA which is to promote and maintain an efficient, fair and stable insurance market for the benefit and protection of policy holders, does not make TIRA a professional body like the National Board of Accountants and Auditors (NBAA) and others which are not only licensed to regulate the professionals but also monitor and set performance standards of each licensed person;
- (c) The fact that TIRA issues licenses to the agencies and brokers and offers a minimum education and practice standards to qualify for the license, cannot be taken as a professional



Board but a regulatory body that regulates insurance practice for the benefit and safety of the public. Contrary to what TIRA does, Professional bodies provide professional development and education opportunities for its members for the betterment of its members and the profession as a whole and thus, the Board is of the settled view that TIRA is not a professional body but a regulator;

- (d) Based on the holding that insurance agency and brokerage are not professional services, and the insurance agents and brokers are not professional service providers, commissions and fees paid to insurance agents and brokers are not subject to withholding tax. TRA's withholding tax assessments on commissions/fees paid to insurance agents or brokers for the period of July 2016 to 2018 are invalid at law based on section 83(3) of the Income Tax Act 2004.

## **5. Our Take:**

The Board's interpretation of section 83 (1) (c) (ii) read together with subsection (3) of the Income Tax Act 2004 brings positive impact to the insurance business and its operations especially the unavoidable relationship with insurance agents/brokers in soliciting business. Although the agents and brokers will ultimately pay tax on earning from agency/brokerage services, but the inapplicability of withholding tax reduces the costs of compliance of withholding obligations to both the insurance companies and agents/brokers as well as sustains the agents/brokers' operations from deductibility of their earned commissions/fees at source.