Legal Brief

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From our Tax Desk

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Court of Appeal renders a Pro-Investment Decision

The Court of Appeal of Tanzania (the Court) has on 7th October 2022 decided against the Taxman in a tax dispute worth TZS 2.2 billion. This was in ***Civil Appeal No. 370 of 2021 between Commissioner General, Tanzania Revenue Authority and CRJE Estates Limited*** where the Court: -

- ***Cements on necessity of protection of benefits granted to an investor through a Certificate of Incentives.***
- ***Faults the Taxman's attempt to demand import duties on exempted deemed capital goods.***
- ***Rules that amendments of the Tanzania Investment Act by the Finance Act 2013 cannot operate retrospectively to deprive benefits granted to a holder of a Certificate of Incentives issued prior to the amendments.***
- ***Finds that extension of an investor's project implementation period under a Certificate of Incentives by the Tanzania Investment Centre grandfathers the same benefits granted at the time the project was initially registered; and***
- ***Supports the TRAB's and TRAT's decision that ordered the Taxman to pay TZS 2.2 billion wrongly collected from the taxpayer as import duties on exempted deemed capital goods.***

Background of the case

CRJE Estate Limited (CRJE), was a holder of a Certificate of Incentives No. 060712 issued by the Tanzania Investment Centre on 8th January 2008 (the TIC Certificate), and which was subsequently extended to cover up to November 2018. Under the TIC Certificate CRJE was granted, among others, 100% import duty exemptions on deemed capital goods. CRJE imported various consignments of deemed capital goods from 2014 to 2018 for construction of the Mwalimu Nyerere Square. All the importations were approved for a 100% exemption from import duties by the Commissioner General, Tanzania Revenue Authority (TRA) in line with the TIC Certificate. On 26th September 2018, TRA issued a Demand Notice (the demand) in respect of short-levied duty of TZS 2,268,636,778.63 to CRJE covering the period from 2014 to 2018. In the Demand, TRA claimed that CRJE did not pay correct import duty contrary to law. TRA's basis was that amendments effected by the Finance Act, 2013 which restricted exemptions on deemed import capital goods to only 75% applied to CRJE's project. Consequently, TRA demanded from CRJE the payment of 25% on all deemed capital goods imported from 2014 to 2018.

Aggrieved by the demand, CRJE applied for review against the demand on the ground that it was entitled to 100% import duty exemptions *vide* the TIC Certificate. CRJE's application for review was determined in the negative by TRA on the basis that Section 19 (4) of the Tanzania Investment Act 1997, as amended by Finance Act 2013 required CRJE to pay 25% import duty on deemed capital goods with effect from 1st July 2013 when the said Act became operational. Aggrieved by TRA's decision, CRJE preferred an appeal to the Tax Revenue Appeals Board (TRAB), where the TRAB found the Appeal to have merit and allowed it in its entirety.

Dissatisfied with the decision of the TRAB, TRA appealed to the Tax Revenue Appeals Tribunal (TRAT) whose appeal was dismissed in its entirety. The TRAT concurred with the Board's finding that the Certificate entitled CRJE to 100% import duty exemption on deemed capital goods and therefore the

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subsequent amendment of the law could not operate retrospectively to deprive CRJE of the benefits (rights) granted under the certificate of incentives. TRA was further dissatisfied with the TRAT's decision and preferred a further appeal to the Court. Having heard the parties, the Court concluded that TRA's appeal lacked merit and dismissed the appeal in its entirety.

Appellant's Arguments at the Court of Appeal

In prosecuting the appeal, TRA put forward the following arguments: -

a) That a certificate of incentive is not an agreement as decided by the TRAT, rather it is mere evidence of an investor's eligibility to enjoy tax exemptions set out in the Certificate. In the alternative, if at all the certificate of incentive was an agreement as observed by the TRAT, the same would be invalid and ineffectual for want of involvement of the Attorney General as per the provisions of Clause B-12 (1) of the Public Service Standing Orders, 2009 which require all agreements involving the Government to be scrutinized and drafted by the Attorney General.

b) Section 19 (4) of the Tanzania Investment Act, 1997 as amended by section 55 of the Finance Act, 2013 restricting import duty exemption on deemed capital goods to 75% applied to CRJE's project registered in December 2008 and that was granted a Certificate of Incentives on 8th January 2009.

c) The amendments effected by the Finance Act 2013 apply to all holders of certificates of incentives from 1st July 2013 onwards and therefore CRJE was bound to pay 25% import duties on deemed capital goods imported between 2016 to 2018.

d) That since the tax dispute related to importations made between 2016 and 2018 when the amendments effected in 2013 were in force, TRA was mandated to collect the respective import duties and therefore the issue of retrospective application of law is out of context.

e) That the Customs Tariff Act, 1976 under which the exemption was granted, had ceased to apply in Tanzania on 2nd March 2004 when the Tanzania signed the Protocol on the Establishment of the East African Customs Union, 2004 (the Protocol).

f) That section 19 (4) of the Tanzania Investment Act, 1997 must be interpreted strictly.

Respondent's Submissions

The Respondent, CRJE on its part, argued that: -

a) A certificate of incentives is an agreement between the Government and the investor as supported by section 17 (7) of the Tanzania Investment Act and the principle enunciated by the Court in *Vodacom Tanzania PLC vs Commissioner General*, TRA, Civil Appeal No. 107 of 2020.

b) The argument that the Attorney General was not involved in the agreement between the Government and the investor lacks merit since the Attorney General is part of the TIC Steering Committee in terms of section 5 (2) of the Tanzania Investment Act, 1997. In any event, a certificate of incentives being conclusive evidence of validity of its contents, it was upon the Appellant to adduce evidence in proof of non-involvement of the Attorney General.

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c) The fact whether the Attorney General was involved or not in issuing the certificate of incentive, is a new factual issue raised for the first time on a second appeal at the Court of Appeal contrary to section 25 (2) of the Tax Revenue Appeals Act which requires appeals to the Court to be confined to points of law only.

d) Section 19 (4) of the Tanzania Investment Act 1997 as amended by the Finance Act 2013 did not apply to the certificates of incentives issued before the operational date on 1st July 2013, since under section 19 (2) of the Tanzania Investment Act 1997, the benefits granted to the investor cannot be taken away by subsequent legislative changes. A certificate extending the implementation period of the investor's project is not a new certificate but rather the same and it only has the effect of extending the implementation period with the same benefits initially granted.

e) With regards to the applicability of Article 39 (2) of the Protocol and section 253 the EACCMA, 2004, TRA had been contradicting itself. On one hand, TRA accepts the applicability of Partner State's laws on matters not provided for under the EACCMA, 2004, and on the other hand, TRA resists the application of Partner State's laws on matters not provided for in the EACCMA, 2004.

f) TRA's position that Article 39 (2) of the Protocol and section 253 of the EACCMA, 2004 are to the effect that the EACCMA, 2004 takes precedence over the Partner State's laws; at the same time, TRA's reliance on section 19 (4) of the TIA, 1997 which is a Partner State's law that provides for a restriction of 75% exemptions on deemed capital goods from 1st July 2013 is a self-defeating argument. The question is, why is TRA relying on section 19 (4) of the TIA 1997 while at the same time arguing that the EACCMA, 2004 takes precedence?

g) TRA did not tell the Tribunal and the Court as to where in the EACCMA, 2004 exemptions on deemed capital goods are provided; and if they are provided, where did Tanzania get the mandate to restrict it to 75% only. This question is based on a simple logic that, had the EACCMA, 2004 made provisions providing for 100% exemptions on deemed capital goods, then the TIA 1997 could not restrict the entitlement to 75% in 2013; and similarly, if the EACCMA, 2004 did contain provisions on deemed capital goods which do not provide exemptions, then the TIA 1997 could not provide 75% exemptions.

h) Neither the TIA 1997 nor the EACCMA provide for import duty exemptions on deemed capital goods. There is no single provision in the TIA, 1997 that exempts deemed capital goods. Exemptions on deemed capital goods are provided for under the customs laws, in this case the CTA 1976.

i) TRA's contradictions highlighted above arise from the TRA's lack of appreciation of which customs law applies in Tanzania in respect of matters not dealt with by the EACCMA, 2004. The EACCMA, 2004 does not contain provisions that deal with "**deemed capital goods**". In this regard, section 253 of the EACCMA, 2004 is very clear that, it takes precedence only on matters to which its provisions relate. Where it doesn't provide for certain matters, the Partner State's customs laws apply. This is the logic of leaving the Partner States' customs laws to operate parallel with the EACCMA, 2004; and

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j) That understanding the above position, the Parliament in its wisdom retained reference to the Customs Tariff Act under section 19 (1) of the TIA 1997 up to date. Why? Because it is the Customs Tariff Act, 1976 that provide for incentives/benefits with respect to deemed capital goods. Section 19 (1) of the TIA, 1997 does not refer to the EACCMA, 2004 because the EACCMA, 2004 does not have provisions on exemptions of deemed capital goods, and consequently Partner State's laws, specifically the CTA 1976, comes into operation. This means that, TRA's argument that there is no legal option to apply the CTA 1976 is misconceived and raised out of context. As long as the EACCMA, 2004 does not contain provisions on deemed capital goods, the CTA 1976 is the applicable law on exemptions on deemed capital goods. That is why section 19 (1) of the TIA 1997 refers to the CTA 1976 when it comes to import duty exemptions on deemed capital goods.

The Court's Reasoning & Decision

The Court reasoned and decided as follows:

(a) A certificate of incentives constitutes an agreement between the Government and an Investor consistent with the Court's decision in *Vodacom Tanzania PLC vs Commissioner General*, TRA, Civil Appeal No. 107 of 2020. The issue whether the Attorney General was involved in making the certificate or not as required in the Public Service Standing Orders stood as a factual question, relating to the administrative and management affairs of the Government which is a domain of administrative law and outside the parameters of section 25(1) of the Tax Revenue Appeals Act which requires appeals to be confined to points of law only.

(b) The benefits granted to an investor in a certificate of incentives can neither be amended nor modified during the five years of the certificate to the detriment of the investor. The rationale is "to create predictable investment climate" which is necessary in promoting capital investment.

(c) The amendment by the Finance Act 2012 and 2013 had no discriminatory application of benefits between strategic and major investors on one hand and ordinary investors with certificate of incentives on the other hand. As such the benefits introduced under section 20 of the Tanzania Investment Act (TIA) were until 2013 merely additional to but not derogatory of benefits under section 19(1) and (19(2) of the TIA.

(d) The Finance Act 2013 did not operate retrospectively to affect the Respondent's prior benefits granted since 2008 under section 19(1) and as protected under section 19(2) of the TIA. This is because the amendment introduced by the Finance Act 2013 were of a substantive nature. In line with the Court's decision in *Bidco Oil and Soap Limited v. Commissioner General TRA,* Civil Appeal No. 89 of 2009; 'a law affecting substantive rights does not operate retrospectively unless expressly stated in the amending legislation'.

(e) The certificate that was issued in March 2013 extending implementation of the investor's project was in the nature of an extension of the original certificate. Since it preceded the Finance Act, 2013 which came into effect on 1st July 2013, then the Finance Act 2013 could not apply retrospectively and even so, the Finance Act 2012 could not apply since the five years prohibition from modification or amendment of a certificate of incentives applied.

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(f) The law applicable on import duty exemptions on deemed capital goods is, notwithstanding the Protocol on East Africa Community Customs Union, the Customs Tariff Act (CTA) but not the East African Community Customs Management Act. This is because the CTA has never been repealed and the EACCMA does not contain any provisions on import duty exemption on deemed capital goods.

Our Assessment of the Court's Decision

Lawhill echoes the Courts decision amidst the ongoing legal and policy initiatives to support investments in Tanzania. The decision sets value for a certificate of incentives as constituting an agreement between an investor and the Government, hence capable of creating binding and enforceable legal obligations. It provides the called for essential certainty and predictable of investment climate in the country. The Decision aligns with the ongoing Government's initiative reflected in the tabled Tanzania Investment Bill, 2022 and the Written Laws (Financial Provisions) (Amendment) Bill, 2022 seeking to promote investment in Tanzania.

In essence the decision fortifies the relationship between law and policy. Laws must be interpreted in a way that fosters the countries policy aspirations. The argument raised by TRA is jeopardy to the country's resolve to ensure that Tanzanian investment regime remain stable and practicable. It would be counterproductive to offer investors certain incentives and subsequently take away such benefits after substantial investments have been made. We underscored this point when arguing the appeal at the TRAT by pointing out the awful consequences if one adopted TRA's line of thinking. We specifically emphasized that: -

(a) There are hundreds of businesses out there which are holders of the TIC Certificate issued under the Tanzania Investment Act, 1997. Under all those Certificates, the businesses are entitled, in respect of deemed capital goods, to exemptions available to them under the Customs Tariff Act, 1976, and the restrictions provided under the Tanzania Investment Act, 1997 at the time the Certificates are issued. A decision to the effect that the Customs Tariffs Act, 1976 ceased to operate when the EACCMA, 2004 became operational, which of course, is not the correct position of the law, would throw this country and investors in an uncalled havoc not sanctioned under the law.

(b) The Tanzania Investment Centre is still issuing Certificates of Incentives to potential investors on the promise that deemed capital goods will be entitled to the benefits provided under the Customs Tariff Act, 1976 and restrictions provided under the Tanzania Investment Act, 1997. For instance, for investors being issued with the TIC Certificate after 1st July 2013, they are entitled to import duty exemption to the tune of 75%. The legal basis for this is section 19 (1) of the TIA, 1997; section 4 (4) (a) of the CTA 1976, and amendments introduced in 2013 to section 19 (4) of the TIA 1997. A decision to the effect that the Customs Tariffs Act, 1976 ceased to operate when the EACCMA, 2004 became operational, which of course, is not the correct position of the law, would throw this country and investors in an uncalled havoc not sanctioned under the law.

(c) While arguing as it did, the very TRA is busy out there approving applications for exemptions from import duty on deemed capital goods based on the TIC Certificates issued under the TIA 1997. These exemptions are based on section 19 (1) of the TIA, 1997 and section 4 (4) (a) of the CTA 1976. A decision to the effect that the Customs Tariffs Act, 1976 ceased to operate when the EACCMA, 2004 became operational in 2004, which of course, is not the correct position of the law, would throw this country and investors in an uncalled-for havoc; and

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(d) The decision that the Customs Tariff Act, 1976 ceased to operate in Tanzania when the EACCMA, 2004 became operational, which is not the correct position of the law, means that all the TIC Certificates are a nullity in so far as they provide for import duty exemptions on deemed capital goods. Even the restrictions of the 75% exemptions introduced in section 19 (4) of the TIA 1997, shall be a nullity as the EACCMA, 2004 do not provide for such exemptions on deemed capital goods.

We therefore welcome this decision of the Court which puts the law in its correct perspective and sends a clear message to investors that once granted with certificate of incentives, the same cannot be altered to their detriments during the subsistence of the certificate.

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