IN THE TAX REVENUE APPEALS BOARD

AT DAR ES SALAAM

APPEAL NO. 36 OF 2018

CRJE ESTATE LIMITED..... APPELLANT

VERSUS

COMMISSIONER GENERAL (TRA)..... RESPONDENT

JUDGMENT

The parties in the present appeal are CRJE Estate Limited, the appellant and the Commissioner General of Tanzania Revenue Authority (TRA), the respondent.

The facts that prompted the filing of the appeal before the Board are as follows:

Mwalimu Nyerere Foundation (herein referred to as the Foundation) contracted CRJE to construct 30 storey building (Mwalimu Nyerere Square) at Plot No. 60 and 61, Sokoine Drive in Dar es Salaam allocated to it by the government of Tanzania. To that effect, on 8th January 2009 TIC (Tanzania Investment Centre) granted the appellant a certificate of incentives No. 060712 pursuant to the provisions of section 17 of the Tanzania Investment Act, 1997 for the construction project to be implemented from December 2008 to December 2011. Later, the government of Tanzania re-

allocated the Mwalimu Nyerere Foundation Plot No. 2217/1/168 for the construction of Mwalimu Nyerere Square instead of Plots No. 60 and 61. The appellant entered into various agreements with the Foundation for the construction of the buildings, that is, a memorandum of understanding to build, operate and transfer a commercial property on Plot. 227/1/168 Block "A" CBD Ilala Dar es Salaam of 26th October 2012; and the Lease Agreement of 25th May 2017.

Due to the re-allocation of the Plot, TIC granted an extension of the Certificate of Incentive No. 060712 for the construction project which extended the implementation period of the project from December 2008 to November 2016. Still the construction of the project could not commence in 2013 due to various disputes related to the ownership of Plot No. 2217/1/168, whereby it was handed to the Foundation on 28th September 2014. Again, due to the delay in the commencement of the project, the appellant applied to TIC on 31st August 2016 for extension of the Certificate of Incentive No. 060712 which was granted by TIC on 26th September 2016 and the implementation period was extended from December 2008 to November 2018. Thereafter, the appellant imported consignments of capital goods for the construction between 2014 to 2018 which were approved by the respondent in line with the TIC incentive certificate for the 100% exemption from import duties and value added tax on imports, and TIC clarifications to the respondent dated 15th September 2017 on import duty exemption on deemed capital goods for the Foundation square - Certificate of Incentives No. 060712.

On 26th September 2018, the respondent issued upon the appellant a Demand Notice demanding payment of Tshs. 2,268,636,778.63 comprising short levied import duty covering the period from 2014 to 2018 on the ground that the appellant did not pay correct import duty contrary to law. Aggrieved by the demand notice, the appellant applied for review against the demand notice on 1st October 2018 on the ground that the appellant was granted 100% import duty exemption with grant fathering clause system. The respondent made his decision on the appellant's application for review on 22nd October 2018 that, it was devoid of merits on the ground that, section 19 of the Tanzania Investment Act 1997 as amended by the Finance Act 2013 required the appellant to pay 25% of the import duty payable.

Aggrieved further with the decision of the respondent, the appellant appealed to the Board; and the grounds of appeal are:

1. The respondent grossly erred in law and fact in holding that the amendments of section 19 of the Tanzania Investment Act, 1997 as introduced by the Finance Act 2013 applied to the appellant in respect of the project that was granted a 100% import duty exemptions.
2. The respondent erred in law and fact in holding that the appellant is required to pay 25% in respect of deemed capital goods contrary to law and the Certificate of Incentive granted to the appellant; and
3. The respondent erred in law in disregarding the grand fathering of the Certificate of Incentives issued to the appellant on 8th January 2008, which was subsequently extended to November 2018.

The appellant craves for redress as follows:

1. That the Board be pleased to hold that the amendments of section 19 of the Tanzania Investment Act, 1997 as introduced by the Finance Act 2013 do not apply to the appellant in respect of the project that was granted a 100% import duty exemption.
2. That the Board be pleased to hold that the appellant is entitled to a 100% import duty exemptions on deemed capital goods.
3. That the Board be pleased to hold that the respondent's decision is bad at law and hence be vacated in its entirety.
4. That the Board be pleased to direct the respondent to refund any import duties demanded and paid by the appellant on deemed capital goods that were entitled to a 100% import duty exemptions.
5. That the respondent be ordered to pay costs of these proceedings; and
6. Any other orders or reliefs the Board may deem fit and just to grant.

The respondent strongly disputes the appellant's claims, he contends that, the demand for the short levied import duties on importation transactions has been done according to the prevailing law at the time of importation and the imposition of 25% import duty is a requirement of the law. The respondent, as tax administration body, she is bound to enforce tax laws and other laws including the Tanzania Investment Act, 1997. Also, the exercise of granting exemption is governed by the law. He contends further that, the letter written by TIC on import duty exemption on capital goods is misconceived on account of the facts that the appellant, the holder of the

certificate of incentive, can only enjoy exemption subject to the rates and conditions specified in the Tanzania Investment Act 1997 (that is 75%), and other laws in force.

The respondent contended further that, the application for review was found to be devoid of merits on the ground that section 19 of the Tanzania Investment Act, 1997 as amended by the Finance Act, 2013 required the appellant to pay 25% of the import duty payable. He prayed the Board to dismiss the appellant's appeal and grant the orders sought in the reply to the statement of appeal.

At the hearing of appeal, Dr. Erasmo Nyika and Ms. Hadija Kinyaka learned Advocates, appeared for the appellant; and Ms. Salome Chambai, learned counsel, appeared for the respondent. The issues for determination of the Board are:

1. Whether the amendment of section 19 (2) of the Tanzania Investment Act, 1997 as introduced by the Finance Act 2018 applies to a project that was registered on 8th January 2009.
2. Whether the demand for short levied duty of Tshs. 2,268,636,778.63 is valid at law.
3. To what reliefs are the parties entitled to.

It appears that, the appellant brought two witnesses to support her case while the respondent had none. Briefly stated, below is the evidence of the witnesses for the appellant on the record:

AW.1 Edgar Atubonekisye Mwandemani a Program Officer at Mwalimu Nyerere Foundation testified that, the foundation entered into contracts with the appellant to develop Plots No. 60 and 61 located at Sokoine Drive that were allocated to the foundation by the government of Tanzania during the reign of President Mwinyi to enable the foundation to construct an building for investment.

In 2008, the foundation was granted a building permit to construct a building not exceeding 6 floors (storey) despite the demand by the foundation to construct two buildings with 14 and 20 storey respectively for security reasons. As such, the government of Tanzania granted the foundation given the appellant a new Plot No. 2217/1/168 located at the junction of Morogoro, Sokoine and Zanaki Drive, a site which was handed to the appellant CRJE in September 2014 (Exhibit A-1).

The new Plot, according to AW.1, was involved in a dispute with BRT project, and apart from that, the building permit was delayed, and there were cases in courts of law all of which delayed the construction of the building, and affected the execution or enforcement of the certificates of incentives issued for the project (Exhibit A-2).

AW.1 further testified that, the foundation assisted the appellant to secure the certificates of incentives from TIC and permits form the government. The certificate for incentives was issued from 2008 to 2011, but was renewed from 2011 to 2016, from 2016 to 2018, and from 2018 to 2019 when the project is expected to be completed. The foundation, also lodged

complaints to the government against the levies and import duties which the appellant was required to pay contrary to the certificate of incentives issued in 2008 and which was renewed from time to time by TIC and agreed by TRA.

AW.2 Mingying Zeng, a Marketing Manager of the appellant responsible for the daily works of the Mwalimu Nyerere Foundation (foundation) project testified that, in 2008 the appellant and the foundation signed a Memorandum of Understanding (MOU) involving the project. Thereafter, she applied for certificates of incentives for the project which were granted by TIC and the implementation period was from 2008 to 2011 (Exhibit A-3). In 2011, the government barred the appellant to construct a high rise building at the plot for security reasons and promised to find another plot which the appellant would construct a twin tower building with 20 floors and 14 floors respectively instead of the initial building permit which allowed construction of a building with 6 floors. The appellant thus, applied for extension of the certificate of incentive which was granted and the new implementation period was extended from December 2008 to November 2016 (Exhibit A-4). The government granted the foundation a new plot of land, which was involved in disputes that were not resolved until September 2014 when the appellant took over the site. The appellant signed an amended MOU with the foundation (Exhibit A-5) and began the construction work, but with two years left for the certificate of incentives. On 31st August 2016, the appellant applied for extension of certificate of incentives which was granted in November 2016 (Exhibit A-6) and the new

implementation period was from December 2008 to November 2018 (Exhibit A-7). The appellant started to utilize the implementation of the certificate of incentives, and lodged to the Commissioner of Customs and Excise for approval of the incentives whereby TRA approved the 100% exemption on capital goods from 15th March 2013 to 15th May 2018 (Exhibit A-8).

AW.1 testified that, in 2017 due to the new amendments to the Finance Act, they sought clarification from TIC on the legal position on the exemptions whereby TIC responded separately to the appellant and the respondent raising three points (Exhibit A-9).

(i) The project was registered in 2008 and had 100% import duty exemption.

(ii) The investment is guaranteed to enjoy incentives as it was during the time the project was registered.

(iii) TRA and TIC joint committee had resolved the issue and jointly concluded that CRJE is entitled to 100% import duty exemption.

On 26th September 2018 the respondent issued a demand notice requiring the appellant to pay Tshs. 2.2 billion (approximately) for the short levied import duties of 2014 to 2018 (Exhibit A-10) whereby the appellant applied for review on 1st October 2018 (Exhibit A-11) and on 19th October 2018 TRA made his decision that the application for review was not successful and demanded the appellant to pay the short levied taxes (Exhibit A-12). On 1st November 2018 the appellant paid under protest and appealed to

the Board. According to AW.2, the incentives granted in 2008 should not be affected by the subsequent amendments to the law, and hence TRA is not correct to demand 25% import duty on the same project which was granted 100% incentives.

In his final submissions Dr. Erasmo Nyika submitted on the first issue that, the amendment of the provision of section 19 (4) of the Tanzania Investment Act 1997 by the Finance Act 2012 and 2013 affected the application of section 19 (2) relied by the respondent in his determination of the application for review, thus the focus should be the amendments of section 19 (4) as opposed to section 19 (2). He argued that, the project was registered with TIC in December 2008 and was granted 100% import duty exemption as testified by AW.1 and AW.2 and evidenced in Exhibit A-3, A-4, A-7 and A-9, and its implementation period was extended to November 2018. On the reasons for the delay of the implementation of the project that necessitated TIC to grant the extension of the implementation period, he referred to the testimony of AW2, Exhibit A-1 and A-2, facts which are not disputed by the respondent.

The only dispute, he submitted, revolves around the question as to whether the subsequent amendments to the law in 2012 and 2013 providing for a 90% and then 75% import duty exemptions respectively applied to an investor who had the certificate of incentive issued before the amendments that entitled the investor to 100% import duty exemptions. Referring to clause 12 of certificate of incentive no. 060712 (Exhibit A-3)

and the subsequent extensions (Exhibit A-4 and A-7), he submitted that, the Board should direct its mind to the laws in force at the time of registration and issuance of the certificate of incentive, quoting section 19 (1) (2) of the Tanzania Investment Act, 1997 (as amended by the Written Laws (Miscellaneous Amendments) Act, 2005) and section 4 (4) of the Customs Tariff Act, 1976 (as amended by section 16 of the Financial Laws (Miscellaneous Amendments) Act, 1997 and section 11 (a) of the Finance Act, 2002.

He argued that, in terms of the provisions of the Customs Tariff Act, 1976 commercial building, is one of the priority sectors that was granted a zero import duty on capital goods, hence at the time of issuance of the certificate of incentive no. 060712 on 8th January 2009, the applicable import duty on capital goods for the holder of a certificate of incentive issued by TIC was zero percentum (Exhibit A-3, A-4 and A-7).

He added that, the appellant was granted a certificate of incentive under the applicable law, the Tanzania Investment Act, 1997 and Customs Tariff Act, 1976, to construct and operate a commercial property with 100% import duty exemptions referring to the provisions of section 4 (4) (a) of the Customs Tariff Act, 1976 as amended by section 16 of the Financial Laws (Miscellaneous Amendments) Act, 1997, and section 11 (a) of the Finance Act, 2002 which provided for import duty exemptions to holders of certificate of incentive issued by TIC, and which charged import duty at the rate of zero percentum for persons engaging in priority sectors, the appellant's sector commercial building, inclusive. He submitted that, this position of law is not disputed by the respondent.

He further argued that, the respondent relied on the amendments introduced by the Finance Act 2012 and 2013 in determining the application for review, his arguments being, the amendments of section 19 (4) of the Tanzania Investment Act, 1997 applied to the appellant's project notwithstanding the fact that the position of the law at the time of registration of the project and the issuance of the certificate of incentive entitled the appellant among other benefits, to a 100 % import duty exemptions.

Quoting the amendments introduced by the Finance Act, 2012 in which section 19 (3) of the TIA 1997 was deleted and substituted with a new section 19 (3), and the amendments introduced by the Finance Act, 2013 in which paragraph (c) to section 19 (3) was added, and the figures 90% and 10% in section 90 (4) were deleted and substituted with figures 75% and 25% respectively, he submitted that, the respondent argues that the amendments apply to the appellant's project which was registered in December 2008 and the certificate of incentive being issued on 8th January 2009, an argument which is a misconception at law and fact. According to him, the amendments, did not apply to the appellant. He added that, under section 19 (1) and (2) of the TIA 1997 as it were at the time of registration of the project and issuance of the certificate of incentive in 2008 and 2009 respectively, no amendments whether through a legislative enactment or otherwise, made within a period of five years from the date of the issuance of the certificate of incentive, would affect the benefits granted to an investor under section 19 (1) of the TIA, 1997.

He argued that, the certificate of incentive no. 060712 was issued on 8th January 2008, which means that, the benefit granted could not be amended or modified to the detriment of the appellant for the period of five years from January 2008 to January 2014. He added that, the only amendments that could apply to the detriment of the appellant are those that would have been made after 7th January 2014, and those made before the expiration of five years period could not operate retrospectively to the appellant's project, hence the respondent's application of the amendments to the appellant's project is illegal. This position, he elaborated that, was firmly accepted by the TIC and TRA joint committee which deliberated the issue of change of tax laws which should have not affect investors already implementing projects, and the appellant's project was entitled to 100% import duty remission on capital goods (Exhibit A-8) and the respondent approved 100% import duty exemption on all capital goods (Exhibit A-8). Therefore, he rgued that, the respondent was aware that the appellant was entitled to 100% import duty exemption before granting approval of exemption, hence claiming now that the appellant is not entitled to the same, is a misuse of statutory powers. He referred the case of **Commissioner General, TRA vs. Vodacom Tanzania Limited Appeal No. 17 of 2010 TRAT (unreported)** which was to the effect that, the Commissioner General has no powers to take away the benefits granted to an investor under section 19 (1) of the TIA, even a legislative amendment cannot do so.

He submitted that, the respondent had no power to take away the benefits granted to the appellant under section 19 (1) of the TIA, 1997, and even

the legislative amendments that is the Finance Act 2012 and the Finance Act 2013 cannot take away the benefits granted to the appellant under section 19 (1) and stabilized under section 19 (2) of the TIA 1997. He prayed the first issue to be resolved in favour of the appellant.

On the second issue, Dr. Erasmo Nyika submitted that, as the issue depends entirely on the first issue, and having submitted that the amendments to the TIA 1997 by the Finance Act 2013 did not operate retrospectively to an investor holding a certificate of incentive, the appellant, then the demand for short levied duty of Tshs. 2,268,636,778.63 was and is invalid and illegal by virtue of section 19 (1) and (2) of the TIA 1997 which grant fathered the benefits that were granted to the appellant. On the third issue, Dr. Erasmo Nyika prayed in respect of the first and second issue, the Board to grant all the prayers prayed for by the appellant in its statement of appeal; order the respondent to refund any amount demanded for and paid during the implementation of the project, that is duties illegally demanded contrary to the exemption granted to the appellant from 2014 to November 2018, that is, Tshs. 2,268,636,778.63; and costs of appeal.

In her final submissions, Ms. Salome Chambai submitted on the first issue that, section 19 (4) of the Tanzania Investment Act, 1997 as amended by the Finance Act 2012 and Finance Act 2013 which introduced the requirement to pay 25% of the import duty assessed started to apply on 1st July 2013, which means that, all importations made by the appellant attract 25% of the import duty due which is payable to the respondent. Quoting

section 19 (4) of the TIA 1997 (as amended), she argued that, the 100% import duty exemption for TIC investors ceased to operate from 1st July 2012 a date when the requirement to pay 10% import duty assessed with 90% import duty exemption, amounts which were substituted with 25% import duty payable and 75% import duty exemption through the amendments made to section 19 (4) of the TIA, 1997 by the Finance Act 2013. The ultimate effect of the amendments, she argued that, was to reduce the amount of exemption by 75% and not to remove the exemption granted to investors who hold certificates of incentives by the TIC. She added that, the appellant's assertion that she was denied the exemption by the respondent is not correct as the same existed at the rate of 25% and the amount claimed is based on the provisions of the law.

Referring to the testimony of AW.2 and Exhibit A-9, she argued that, the evidence of AW.2, argument of the appellant and letter of TIC on the import duty exemptions is void, illegal and does not have force of law, should not be given validity against the Act of Parliament. She submitted that, TRA and TIC have no powers to disregard the provisions of the Finance Act, 2012, the Finance Act, 2013 or section 19 (4) of the TIA, 1997 quoting section 19 (2) and 19 (4) of the TIA, 1997 which came into operation on 1st July 2013 in terms of the provisions of section 14 and 15 of the Interpretation of Laws Act, Cap. 1. Hence, from the date of the commencement of the Finance Act, 2013 the appellant's imported deemed capital goods were subject to 25% of the assessed import duty, and the respondent was justified to inform the appellant of the payment of 25% of the assessed import duty. According to her, the use of the words

"notwithstanding the provisions of subsection (2)" used in section 19 (4) of the TIA, 1997 are unambiguous and plainly and literally means that the provision is not subject to any other subsection in its application. She quoted the case of **Commissioner General, TRA vs. Mamujee Products Limited and 2** Others, Civil Appeal No. 10 of 2018 CAT (unreported) at page 18 which quoted with approval the case of **Keroche Industries Limited v. Kenya Revenue Authority and 5 others [2007] eKLR**; and the case of **Cape Brand Syndicate v. Inland Revenue Commissioner [1921] 2 KB 403** which are persuasive authorities on the interpretation of tax statutes.

She submitted further that, the TIA, 1997 applies to all investors including the appellant, and the Finance Act, 2012 and 2013 came into operation on 1st July 2013 hence, the respondent had no option than to execute the law. Thus, the amendments of section 19 (2) of the TIA, 1997 as introduced by the Finance Act, 2013 applies to import transactions from 2014 to 2018 made by the appellant whose project was registered on 8th January 2009.

On the second issue, Ms. Salome Chambai submitted that, the demand for short levied duty of Tshs. 2,268,636,778.63 was correct and justifiable in law as per section 19 of the TIA, 1997 as introduced by the Finance Act, 2012 and subsequently by the Finance Act, 2013 which provided for payment by the investor of 10% and 25% of import duty due respectively. She added that, the Exhibit A-8 with the respondent's approved list of items to be 100% exempted from import duty was issued contrary to the law that clearly provided payment of 25% of the import duty. Such a decision, she argued, cannot stop the respondent from imposing tax where

the law clearly provides quoting the case of **Roshani Meghjee & Co. Ltd v. Commissioner General, TRA, Civil Appeal No. 49 of 2018 (unreported)** at page 15 which quoted the case of **Income Tax Commissioner v. AK [1964] EA 648** at page 652H.

She submitted that, the respondent acted in accordance with the law by demanding the payment of Tshs. 2,268,636,778.63 being import duty short levied on import transactions from 2014 to 2018.

On the third issue, Ms. Salome Chambai prayed the Board to dismiss the appellant's appeal with costs, and to order the appellant to pay the disputed import duty amounts for the respective importation.

That is briefly the evidence, and submission of the parties which the Board is invited to consider in its findings and determination of the present appeal.

To start with the first issue, **"whether the amendments of section 19 (2) of the Tanzania Investment Act, 1997 as introduced by the Finance Act, 2013 applies to a project that was registered on 8th January 2009"** that relates to the three grounds of appeal. Before we embark on the provisions forming the points of contention between the parties, it is imperative to point out the facts which are not in dispute between the parties. These are sufficiently proved and substantiated by the testimony on record of AW.1 and AW.2 and documentary evidence, Exhibit A-3 through to A-9 respectively.

It is undisputable fact that, the appellant registered its building project with the TIC in December 2008 and was granted with certificate of incentive no. 060712 on 8th January 2009 as evidenced in Exhibit A-3, which due to delays of the implementation of the project, that we think, were beyond control of the appellant, was extended from 2008 to 2016, and from 2008 to 2018 as evidenced in Exhibit A-8.

It is also undisputable fact that, at the time of registration of the project in dispute, that is, December 2008; and at the time of issuance of the certificate of incentive no. 060712 by the TIC to the appellant on 8th January 2009, the law applicable was the Tanzania Investment Act, 1997 and Customs Tariff Act, 1976.

We now revisit the provisions of law, to see what they entailed at the time of registration of the project, the issuance of the certificate of incentive, and after the amendments introduced to section 19 (4) of the TIA, 1997 respectively which the basis of the dispute lies squarely. For easy of reference, the provisions of section 19 (1) (2) of the TIA as amended by the Written Laws (Miscellaneous Amendments) Act, 2005 is reproduced, it provides:

> "(1) A business enterprise in respect of which a certificate is granted under this Act shall be entitled to the benefits which are applicable to that enterprise under the provisions of the Income Tax Act, the Customs Tariff Act, the Value Added Tax

Act, or of any other written law for the time being in force.

(2) For the purposes of creation a predictable investment climate, an investor to whom a certificate has been issued shall be entitled to the benefits referred to under subsection (1) and such benefits shall not, during the period of 5 years from the date of issuance of such certificate be amended or modified to the detriment of the investor".

A plain and literal interpretation of the provisions quoted above connotes that:

Firstly, business enterprises granted certificates of incentives are entitled to benefits applicable to the enterprise under the law, specifically the Income Tax Act, the Customs Tariff Act, and the Value Added Tax Act, or any law enforce for the time being.

Secondly, when a certificate of incentive is issued to an investor, such benefits cannot be amended or modified to the detriment of the investor during the period of 5 years from the date the certificate is issued to the investor.

The intention of the legislature in enacting the provisions, is made clear in subsection (2) to section 19 of the Act, it is to create a predictable investment climate to investors.

On the other hand, the provisions of section 4 (4) (a) of the Customs Tariff Act, 1976 as amended by section 16 of the Financial Laws (Miscellaneous Amendments) Act 1997 and section 11 (a) of the Finance Act, 2002 provides:

> "Notwithstanding subsection (1), the import duty and suspended duty on capital goods imported (a) by the holder of a certificate of incentive issued by the Tanzania Investment Centre pursuant to the Tanzania Investment Act, 1997, for the use in investments in the priority sectors specified in the Fourth Schedule to this Act, shall instead of being charged on importation of capital goods under the First Schedule to this Act, be charged at the rate of zero percentum".

Under the wording of the provisions quoted above, it is clear that, import duty and suspended duty on capital goods imported by holders of certificate of incentive issued by the TIC under the TIA for the use in investments in the priority sectors, which are listed in the Fourth Schedule to the Act (Customs Tariff Act) inclusive of commercial building, are charged at the rate of zero percentum.

It is crystal clear in terms of the law, that is the provisions of TIA, 1997 and the Customs Tariff Act 1976 as amended, at the time the appellant registered its project with the foundation, that is, in December 2008, and when TIC issued to the appellant a certificate of incentive no. 060712 on

8th January 2009, the appellant was entitled to 100% import duty exemption, and import duty was charged at zero percentum to investors, including the appellant.

There is no dispute that, section 19 of the TIA, 1997 was amended by the Finance Act, 2012. In the said amendments, section 19 (3) was deleted and substituted with a new section 19 (3) which now excluded the application of the benefits conferred under subsection (2) to section 19 to motor vehicles manufactured more than eight years before importation; and non-utility motor vehicles exceeding 3000cc. Also, section 19 (4) was introduced, it provided that:

> "Notwithstanding the provisions of subsection (2) import duty exemption granted to deemed capital goods be restricted to 90% whereby the investor shall pay 10% of the import duty due".

Subsequent, to the amendments introduced to section 19 (3) of the TIA, 1997 by the Finance Act, 2012, a year later the Finance Act, 2013 further amended section 19 (3) by adding paragraph (c) in section 19 (3) and deleting the figure 90% and 10% in section 19 (4) substituting them with figures 75% and 25% respectively. Under the said amendments, the law excluded the application of the benefits to motor vehicles manufactured more than eight years before importation; non-utility motor vehicles exceeding 3000cc; and office equipment, stationeries, furniture, sugar, beverages, spirits, tiles, non-utility motor vehicles, crockeries, air

conditioners, fridges, petroleum products, cutleries, beddings and electronic equipment. Section 19 (4) which in the basis of the dispute provided:

> Notwithstanding the provisions of subsection (2) import duty exemption granted to deemed capital goods be restricted to 75% whereby the investor shall pay 25% of the import duty due.

The point of contention now between the parties is on the application of section 19 (4) of the TIA, 1997 as amended by the Finance Act, 2013 to the applicant's project that was registered in December 2008 and a certificate of incentives issued on 8th January 2009.

On this issue, the appellant relies on the applicable law at the time, that is section 19 (1) and (2) of the TIA, 1997 and he is of the view that, as the certificate of incentive was issued on 8th January 2009, then the benefits granted to the appellant could not be amended or modified to the detriment of the appellant for the period of 5 years from 8th January 2008 to 7th January 2014. According to the appellant, the only amendment that could apply to the detriment of the appellant, are those that would have been made after 7th January 2014. Thus, the application of the amendments by the respondent to the appellant's project retrospectively, is illegal as far as the appellant's certificate of incentive, and the law applicable is concerned.

On his part, the respondent argues that section 19 (4) of the TIA, 1997 (as amended) which introduced the requirement to pay 25% of the import duty assessed started to apply on 1st July 2013, which means all importation made by the appellant after 1st July 2013 attracted 25% of the import duty due which is payable to the respondent by the appellant. According to the respondent, the 100% of the import duty exemption for TIC investors ceased to operate from 1st July 2012 and 2013 respectively following the requirement to pay 10% and 25% import duty due and 90% and 75% import duty exemption respectively. She is of the view that, the provisions of the law are unambiguous, and given a plain and literal meaning, neither TIC nor TRA could disregard the same, hence the amendments are applicable to the appellant's project for all importation transactions made after 2014 to 2018.

In our view, before we make a finding on the issue, one significant point which we need to make clear, is on the time the demand notice on the short levied import duties was raised by the respondent, and the specific period it covered.

It is admitted by AW.2 and correctly pleaded by the appellant in the statement of appeal that the capital goods for construction of the project were imported between 2014 and 2018. These were approved by the respondent in line with the TIC incentive certificate for the 100% exemption from import duties and value added tax on imports. This fact is corroborated by the respondent that, the demand notice was issued by the

respondent on 26th September 2018, and it was for payment of Tshs. 2,268,636,778.63 in respect of short levied import duty covering the period from 2014 to 2018. Thus, we are satisfied that, the demand notice subject to the present appeal covers the period between 2014 and 2018.

Now, going back to the arguments of the parties, we concur in the first place with the argument of Dr. Erasmo Nyika that the amendments of section 19 (4) introduced by the Finance Act, 2013 did not apply to the appellant's projects that was registered on 17th December 2008 and by virtue of the certificate of incentive issued by the TIC on 8th January 2009. We say so because by the time the appellant registered its project, and the TIC issued a certificate of incentives to the appellant, the law applicable was the TIA 1997 and the Customs Tariff Act 1976. In terms of the provisions of section 19 (2) of the TIA 1997 and section 4 (4) (a) of the Customs Tariff Act 1976 as amended, the entitlements or benefits granted to the appellant under the certificate of incentive no. 060712 could not be amended or modified for a period of five (5) years from 8th January 2009 to 7th January 2014 to the detriment of the appellant, the investor in the Mwalimu Nyerere Foundation Project. Also, during the period under dispute, the import duty on capital goods imported by the appellant by virtue of the certificate of incentive granted to the appellant by the TIC for use in the Mwalimu Nyerere Foundation Project was charged at the rate of zero per centum. Section 19 (2) of the TIA 1997, is in conformity with Clause 14 (ii) of the Certificate of Incentives No.060712.

We pointed out earlier that, the intention of the legislature when enacting the provisions of section 19 (2) of the TIA 1997 was to create a predictable

investment climate to investors. We also note from the provisions of section 19 (2) of the TIA 1997 and section 4 (4) (a) of the Customs Tariff Act 1976 (as amended) that, the determining factor of the enjoyment of the benefits (exemption on import duty on imported capital goods) by an investor, like the appellant, is the certificate of incentive granted by the TIC for use in investment sector, inclusive of the appellant's investment with the Mwalimu Nyerere Foundation.

In the case at hand, the certificate of incentives was granted to the appellant at first on 8th January 2009 and ought to be implemented for the period of five years to 7th January 2014. However, for reasons beyond control of the appellant, the TIC extended the period of implementation of the certificate of incentives by the appellant from 8th January 2009 to November 2018, a period during which the amendments of section 19 (2) of the TIA 1997 that were introduced by the Finance Act, 2013 were in force.

On the question whether or not the amendment could affect the benefits attached to the investor under a certificate of incentives granted or issued before the amendment came into force, but whose implementation period was extended to the period after the amendment came into force, we think the law cannot in the circumstances be interpreted to the detriment of the investor. The words **"a certificate"** and **"certificate of incentive"** as used in section 19 (2) of the TIA 1997 and section 4 (4) (a) of the Customs Tariff Act 1976 as amended respectively, in our view, include certificate of

incentive extended by the TIC in accordance with the law for the use by the investor in the investment sector.

Thus, as no amendments either through legislative enactment or otherwise made within five years from the date of issuance of the certificate of incentives could affect the benefits granted to the appellant (the investor), then we are satisfied that, the amendment of section 19 (2) of the Tanzania Investment Act, 1997 as introduced by the Finance Act 2013 does not apply to the project that was registered on 8th January 2009. We find the appellant's grounds of appeal to have merits and we resolve the first issue negatively.

Coming to the second issue **"whether the demand for the short levied duty of Tshs. 2,268, 636, 778.63 is valid at law"** we think the issue cannot detain us any longer, because it is consequential to the first issue. We made a findings in the first issue that, the amendments of section 19 (2) of the Tanzania Investment Act, 1997 as introduced by the Finance Act, 2013, does not apply to the appellant's project which was registered on 8th January 2009 by virtue of the certificate of incentives granted by the TIC on the appellant for use in the Mwalimu Nyerere Foundation Project or investment. The certificate of incentive No. 060712 which was granted by TIC to the appellant had the effect of exempting the appellant from payment of import duty on capital goods imported by the appellant for use in the intended investment, that is, construction of the commercial building of the Mwalimu Nyerere Foundation.

Also, we made a finding that, in terms of the provisions of the Customs Tariff Act, 1976 as amended, import duty on capital goods imported by the appellant under the certificate of incentive granted by the TIC, for use in the investment, was charged at the rate of zero per centum. All these means that, no duties were short levied by the appellant as the respondent claims, hence the demand for short levied duties of Tshs. 2,268,636,778.63 was wrongly issued by the respondent, it was not valid at law; we resolve the second issue negatively.

On the third issue **"To what reliefs are the parties entitled to",** and to the extent we have stated above, we find the appellant's appeal to be full of merits and we allow it accordingly.

We set aside the Respondent's decision and demand for short levied duty of Tshs. 2,268,636,778.63 for being issued contrary to the law, and we proceed to order the Respondent to vacate it and refund the import duty taxes incorrectly demanded and paid by the appellant on deemed capital goods which we held that were entitled to 100% import duty exemption. We make no order as to costs, hence each party to bear his or her own costs of appeal.

Hon. G.J. Mhini, Vice Chairperson.....

Mr. G.E. Mkocha, Board Member.....

Mrs. G.P.K. Mulebya, Board .....

26/09/2019

Judgment delivered this 29th September, 2019 in the presence of Dr. Erasmo Nyika and Mr. Thomson Luhanga counsel for the Appellant and Mr. Kolman Hipoliti Makoi counsel for the Respondent.

Right of appeal is fully explained.

Hon. G.J. Mhini, Vice Chairperson.....

Mr. G.E. Mkocha, Board Member.....

Mrs. G.P.K. Mulebya, Board .....

26/09/2019

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

Hon. G.J. Mhini, Vice Chairperson.....

Mr. G.E. Mkocha, Board Member.....

Mrs. G.P.K. Mulebya, Board .....

26/09/2019