

Legal Alert

Lawhill & Co. Advocates – Premier Tax & Corporate Attorneys



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From our Tax Desk

Tax decisions: Board's Jurisdiction yet in Dilemma!

- ⬇ *The Court of Appeal nullifies the Board's and Tribunal's decisions on grounds that the same had no jurisdiction to entertain an appeal against the Commissioner's General's Notice of existence of a tax liability;*
- ⬇ *The Court of Appeal holds that its decision in the Consolidated Civil Appeals No 78 and 79 of 2018 (Unreported) between the Commissioner General, TRA and JSC Atomredmetzoloto (ARMZ) remains a good law on procedures for challenging the Commissioner's Notice of existence of a tax liability;*
- ⬇ *A Taxpayer's remedy in challenging the Commissioner General's notice of existence of a tax liability is two-fold i.e. the taxpayer may either prefer a reference to the Board or lodge an objection with the Commissioner General. An appeal direct to the Board is out of scope.*

On a further consistency with the previously established position, the Court of Appeal of Tanzania cements its holding in **Commissioner General, TRA vs JSC Atomredmetzoloto (ARMZ)** that the Tax Revenue Appeals Board (Board) has no jurisdiction to entertain an appeal originating from the Commissioner General's notice to a taxpayer on the existence of a tax liability. This was in **Civil Appeal No. 11 of 2020 between the Commissioner General TRA hereinafter "TRA") and African Barrick Gold PLC (hereinafter "ABG")** wherein TRA challenged the Board's and Tribunal's exercise of powers to entertain the appeal preferred by ABG on grounds that the same was premature having been filed before the issuance of a Tax Assessment.

Brief Background of the Appeal

ABG is a company incorporated in the United Kingdom registered to carry on mining and exploration business in Tanzania through its subsidiaries among them being Nyanzaga Gold Exploration in Sengerema District, Mwanza - Tanzania. The Nyanzaga Project was initially jointly owned with Tusker Gold Limited incorporated in Australia with 49% interest in the project through its subsidiary company named Sub Sahara Resources Limited registered in Tanzania on one hand and on the other hand, ABG owned the project through Barrick Exploration African Limited having 51% interest. In 2010, ABG through its subsidiary company registered in UK named BUK Holdco Limited acquired 49% interest owned by Tusker Gold Limited on Australian Stock Exchange hence acquiring full control of the Nyanzaga project. Following this acquisition, TRA drew its attention believing that there existed a tax liability on ABG since the purchase of the Nyanzaga Project was structured in a way that the transaction was to be seen as a sale and purchase of shares by offshore companies, while in substance what was acquired was the property and/or project in Tanzania. However, this was disputed by the ABG on a firm argument that the share sale transaction was between companies registered outside the United Republic of Tanzania.

In that regard, TRA, vide a notice dated 20th June 2011 informed ABG on her tax liability in line with the share sale transaction on the project and a requirement to settle the same immediately. Aggrieved by the Notice, ABG lodged an appeal to the Board. At the Board, the appeal was faced with a preliminary objection to the effect that it was instituted prematurely before the issuance of a Tax Assessment. Nevertheless, the preliminary objection was overruled and the appeal proceeded on merit both at the Board and later at the Tax Revenue Appeals Tribunal (TRAT) in that since the share sale transaction took place outside Tanzania involving two foreign companies registered abroad, it was not subject to tax under the laws of Tanzania. Further aggrieved, TRA appealed to the Court of Appeal of Tanzania (CAT).

The main issue tabled for scrutiny before the CAT was to determine the second ground of appeal which centred on “*the appropriate taxpayer’s channel to challenge TRA’s Notice of existence of tax liability*”. As such, the CAT examined whether TRA’s notice issued to ABG constituted a tax assessment imposing a tax liability on to ABG and whether the same was appealable to the Board. During the hearing of the Appeal, it was the TRA’s position that ABG, being aggrieved with the notice ought to have preferred an objection to the Commissioner General, TRA or refer the matter to the Board by way of a “reference” as per Section 14(2) of the Tax Revenue Appeals Act CAP 408, R.E. 2006 (TRAA). On the other hand, the Appellant was of the firm argument that the Appeal was filed before the Board in terms of Section 6 of the Tanzania Revenue Authority Act, CAP 339 R.E. 2002 (TRA Act) read together with Section 14(2) of the TRAA.

In determining the above issue, the Court of Appeal’s holding pointed to the following:-

- (i) The provisions of section 6 of the TRA Act despite directing exercise of the right to appeal to the Board, do require that the right be pursued in accordance with the provisions of the TRAA. That in terms of Section 16 of the TRAA as it was in 2010, an appeal before the Board was narrowed down only to an objection decision made by the Commissioner General.
- (ii) That under Rule 7 of the Tax Revenue Appeals Board Rules, 2001, a notice by the Commissioner General, TRA on existence of a tax liability is not listed as part of the material documents that are required to accompany an appeal to the Board. What is required, is an objection decision.
- (iii) A notice of an existence of a tax liability has been deliberately excluded from the Board Rules as a mandatory document to accompany an appeal in order to enable a taxpayer to exhaust all the available remedies of either lodging an objection with the Commissioner General before lodging an appeal or forward the matter for the Board’s attention by way of reference. It was irregular for the Respondent to lodge an appeal to the Board against the notice on existence of tax liability.
- (iv) As articulated in the case of **Commissioner General, TRA vs JSC Atomredmetzoloto**, the only remedy against a notice of existence of a liability to pay tax, fees, levy or charge is by way of reference to the Board instead of an appeal.
- (v) Section 14(2) of the TRAA vests the Board with jurisdiction to entertain a reference by a taxpayer aggrieved by the Commissioner’s notice on existence of liability to pay. Further, the Board’s mandate to determine a reference by taxpayer does not cease by reason of the absence of requisite procedures in the Board Rules stipulating the manner of referring and determination of proceedings on a reference.

The Court of Appeal proceeded to nullify all the proceedings of the Board and Tribunal.

Our take

Lawhill & Co. Advocates understands that ABG’s appeal before the Board was preferred under the provisions of section 6 of the TRA Act and section 14(2) of the TRAA. The provisions are reproduced below: -

6-“Any person who is aggrieved by the decision of the Commissioner General in relation to any act or omission in the course of the discharge of any function conferred upon him under the law set out in the first schedule to this Act, may appeal to the Board in accordance with the provisions of the Tax Revenue Appeals Act”(Emphasis is ours)

And

14(2)-“Notwithstanding subsection (2), a person who objects a notice issued by the Commissioner General with regards to the existence of liability to pay any tax, duty, fees, levy or charge may refer his objection to the Board for determination.” (Emphasis is ours)

From the Court of Appeal's interpretation in this case, the provisions of section 6 of the TRA Act only create the right of appeal to the Board by any taxpayer aggrieved by the decision of the Commissioner General. However, such right of appeal has to be exercised in accordance with the provisions of TRAA. This means, the taxpayer's right to knock the doors of the Board under section 14(2) of the TRAA, is in two-folds exercisable in mutually exclusive alternatives, to wit:-

- a) First, it confers a right of appeal to any person aggrieved by the decision of the Commissioner General exercisable only after such person has objected to the notice of existence of liability to pay any tax, duty, fees, levy or charge issued by the Commissioner General to the Commissioner General himself and upon receipt of the Commissioner's objection decision. The aggrieved taxpayer shall then appeal to the Board in accordance with section 16(1) of the TRAA; or
- b) Second, a taxpayer in receipt of a notice of existence of tax liability may refer his/her dissatisfaction to the Board for determination. To borrow from the Court of Appeal's holding, this is exercisable by way of "reference" as opposed to an appeal.

Way Forward.

We urge all taxpayers who seek to challenge notices issued by TRA on the existence of liability to pay any tax, duty, fees, levy or charge for the period before 1st August 2015 when the Tax Administration Act (TAA) came into force and repealed sections 12, 13 and 14 of the TRAA to do so by way of an appeal only after objecting to the Commissioner General and finally being issued with a final determination by the Commissioner or by way of preferring reference to the Board for determination. You will note that after the TAA came into force, the scope of appeals is narrowed down and the right of appeal against the Commissioner General's decision only lies against an objection decision and not otherwise. This means all notices of existence to pay a tax liability shall only be appealable once the Commissioner General issues an objection decision made under the TAA.

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