Legal Brief

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From our Tax Desk

The Decision of the Tax Revenue Appeals Board in Tax Appeal No. 36 of 2018 between CRJE Estate Limited and Commissioner General, TRA, settles the legal position with regards to the value of a Certificate of Incentive issued by the Tanzania Investment Centre

The Tax Revenue Appeals Board (TRAB) has held that:

- *Business enterprises granted certificates of incentives are entitled to benefits applicable to that enterprise in force when the certificate is granted;*
- *The intention of the legislature in enacting section 19 (2) of the Tanzania Investment Act, 1997, is to create a predictable investment climate to investors; and*
- *No amendments either through legislative enactment or otherwise made within five (5) years from the date of the issuance of a certificate of incentives can affect the benefits granted to an investor.*

Brief facts of the Dispute

CRJE Estate Limited, was a holder of a Certificate of Incentive No. 060712 issued by the Tanzania Investment Centre on 8th January 2008 (the TIC Certificate), and which was subsequently extended to November 2018. Under the TIC Certificate the Appellant was granted, among others, a 100% import duty exemptions on deemed capital goods. The Appellant 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% exemptions from import duties by the Respondent in line with the TIC Certificate. On 26th September 2018, the Respondent issued a Demand Notice (the demand) in respect of short levied duty of TZS 2,268,636,778.63 to the Appellant covering the period from 2014 to 2018, claiming that the Appellant did not pay correct import duty contrary to law. The Respondent's basis was that, amendments effected by the Finance Act, 2013 which restricted exemptions on deemed import capital goods to only 75% applied to the Appellant's project. Consequently, TRA demanded from the Appellant the payment of 25% on all deemed capital goods imported from 2014 to 2018.

Aggrieved by the demand, the Appellant applied for review against the demand on the ground that it was entitled to a 100% import duty exemptions *vide* the TIC Certificate. The Appellant's application for review was negatively determined by the Respondent on the basis that Section 19 (4) of the Tanzania Investment Act 1997, as amended by Finance Act 2013 required the Appellant to pay 25% import duty. Aggrieved by the Respondent's decision the Appellant preferred an appeal to the Tax Revenue Appeals Board, where the Board found the Appeal to have merit and allowed it in its entirety.

The Appellant's Case

The Appellant in this case supported its appeal by advancing the following arguments;

- That the Appellant's project was registered with TIC in December 2008 and was granted a 100% import duty exemption and therefore subsequent amendments in law could not affect the benefits that were granted to the Appellant;
- That under section 19 (1) & (2) of the Tanzania Investment Act, 1997 as they were at the time of the issuance of the TIC Certificate, the Appellant was entitled to a 100% exemptions on deemed capital goods, and therefore such benefits could not be altered to the detriment of the Appellant;

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- That 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, which was applicable under the TIC Certificate charged an import duty of zero per centum on importation of capital goods;

- The amendments introduced by the Finance Act 2012 and the Finance Act 2013 to section 19 (4) of the Tanzania Investment Act, 1997, cannot operate retrospectively to deny a holder of the TIC Certificate the tax benefits already enjoyed prior to the amendments; and

- That under section 19 (2) of the Tanzania Investment Act, 1997, benefits granted to an investor under the TIC Certificate cannot, during the period of five years from the date of issuance of such certificate be amended or modified to the detriment of the investor.

The Respondent's Case

The Respondent, TRA, on its part, advanced the following arguments;

- That all importations of capital goods made by the Appellant from 1st July 2013 when the Finance Act 2013 came into operation were subject to a 25% of the assessed import duty and the Respondent was justifiable to demand the payment of 25% of the assessed import duties from 2014 to 2018;

- That since section 19 (4) of the Tanzania Investment Act, 1997 was amended by the Finance Act 2013 and the Finance Act 2014 which introduced the requirement to pay 25% of the import duty assessed started to apply from 1st July 2013, then all the importations made by the Appellant attracted 25% of the import duty due;

- That the TIC Certificate that was issued on 8th January 2009 granting a 100% import duty exemptions is void, illegal and does not have a force of law; and therefore should not be given validity; as the 100% import duty exemption for TIC investors ceased to operate from 1st July 2013 as per the amendments made to section 19(4) of the TIA, 1997; and

- That the demand for short levied duty of TZS 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 Finance Act 2013.

Decision of the Board and its Reasoning

The TRAB revisited the provisions of the 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 Tanzania Investment Act, 1997. The TRAB then observed that, a plain and literal interpretation of the provisions connotes that:

- 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 in force for the time being;

- 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 five 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, that is, to create predictable investment climate to investors;

- It is clear that, import duty and suspended duty on capital goods imported by holders of certificate of incentive issued by TIC under the Tanzania Investment Act, 1997 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 per centum.

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Having made the above observations, the TRAB ruled 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. In arriving at that conclusion, the TRAB stated:

> *"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 project 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 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 Incentive No. 060712."*

Our Assessment of the Judgement

Lawhill & Co. Advocates views the decision of the TRAB as a sound and welcoming one. The decision does nothing more than confirming the correct interpretation and application of the clear provisions of the law, in particular, taxing statutes. The decision is a wakeup call to the taxman to adhere strictly to the established legal principles in exercising his statutory powers. Lawhill understands, and is aware of the numerous tax disputes that have arose due to TRA's attempt to abrogate tax incentives granted to an investor, whether through the TIC or under a special agreement between the Government and foreign governments or strategic investors. Further, the decision underscores the cardinal legal principle that, in the absence of a clear stipulation, laws do not operate retrospectively.

What Impact does the decision has to Taxpayers?

Lawhill & Co. Advocates notes that the decision underscores the need for a predictable investment climate. Investors must be able to feel comfortable that concessions offered, are respected and given full effect. Investors should not view tax incentives as a tool to lure them to make investment decisions, and once the investments have been made, the offered concessions are reneged. The decision also is informative to TRA that once certificates of incentives are issued, subsequent amendments to the law, are not meant to affect the holders of the certificates that were issued prior to the amendments in question. In the light of this decision, taxpayers with similar disputes are encouraged, where it is appropriate, to engage TRA to resolve such disputes without necessary engaging in protracted appellate processes.

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