

TAX ALERT

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Panafrican Energy Case: Does it mean that Commissioner's decisions on tax deposits not appealable?

On 31 May 2019, the Court of Appeal of Tanzania (CAT) delivered a remarkable decision in the case of *Panafrican Energy Tanzania Ltd v Commissioner General (TRA)*, Civil Appeal No. 121 of 2018, on the competence of an appeal arising from a refusal by the Commissioner General (CG) of TRA to grant a waiver or order payment of a lesser amount of assessed tax. In general, a taxpayer who is aggrieved by a decision of the CG on tax assessment is required to object to such decision. However, the law imposes a requirement on the taxpayer, as a precondition for the CG to entertain an objection, to pay either the tax not in dispute or 1/3 of the tax assessed, whichever is greater. The law further provides a leeway to a taxpayer, where there are reasonable grounds not to make a deposit, to apply to the CG for waiver of the requirement or an order to pay a lesser amount.

This tax alert analyses the decision of CAT on whether the CG's refusal to grant waiver is appealable.

Facts of the case

The Appellant, Panafrican Energy Tanzania Ltd (PAET), is a producer and supplier natural gas in Tanzania. In 2016, the Appellant was served with two tax assessments. The first assessment carried a tax liability of Tshs 46,547,072.80, and the second one carried a tax liability of Tshs 7,071,095,810.33. Aggrieved by the tax imposed, PAET filed a notice of objection and simultaneously request for waiver of tax deposit required to validate the objection. The application for waiver was based on the grounds, among others that, the impugned assessment was based on an incorrect tax base and that the Appellant's cash flow would be seriously impaired if she pays one third of the assessed tax. The CG rejected the application arguing that the Appellant did not adduce good reasons to warrant granting a waiver of tax deposit.

Being aggrieved by the said decision, the Appellant preferred an appeal to the Revenue Appeals Tribunal (TRAB), which ruled for the Appellant to pay 5% of assessed tax as a tax deposit. Dissatisfied with the decision of TRAB, the Appellant approached the Tax Revenue Appeals Tribunal (TRAT), with yet with another appeal. The TRAT upheld the Judgement of TRAB and dismissed the appeal. Discontented with the decision of the TRAT, the Appellant lodged an appeal to the CAT, on the grounds that:

1. The TRAT erred in law and in fact by holding that the assessments in question issued on incorrect tax base does not constitute or be termed as uncertainty on point law or fact in respect of an application of waiver.

2. The TRAT erred in law and fact by holding that the Appellant's evidence submitted was not sufficient to indicate or prove financial condition of the Appellant so as to constitute good reason to warrant waiver of tax deposit.
3. The TRAT erred in fact and law for failing to consider the Appellant's submissions.

At the hearing of the appeal, the Court, on its own directed the parties to address it on the competence of the appeal before TRAB in terms of section 16 (1) of the Tax Revenue Appeals Act (TRAA) as amended by the Tax Administration Act (TAA). Section 16(1) now reads:

“Any person who is aggrieved by an objection decision of the Commissioner General made under the Tax Administration Act may appeal to the Board”

Arguments by Counsel for Appellant (PAET)

Counsel for Appellant did not argue the appeal on merits. Instead, he responded to the Court's directive to address the issue of competence of the appeal before the TRAB. In doing so, he conceded that the appeal was inappropriately predicated under the provisions of section 16(1) of the TRAA. However, he argued that the appeal was tenable under the provisions of section 53(1) of the TAA which provides that “A person who is aggrieved by an **objection decision** or **other decision** or omission of the CG under this part may appeal to the Board in accordance with the provisions of the TRAA”. According to the counsel for the Appellant, the decision of CG such as refusal to reduce or waive an assessed amount is just as well contemplated under this provision.

Arguments by Counsel for TRA

The counsel for Respondent (CG) argued that it is purely upon the discretion of CG to either reduce or waive the assessed tax upon being satisfied that there exist good reasons warranting such decision as per section 51(6) of TAA. He further argued that since the decision sought to be challenged was with respect to the reduction or waiver of the assessed tax, it is final and therefore not appealable. According to him, such decision may only be challenged by way of *judicial review* of administrative decision.

Court's decision

The Court of Appeal held that:

First, the proper provision which govern appeals to the TRAB is section 53(1) of the TAA.

Second, after the amendment of Section 16(1) of the TRAA, an appeal to the TRAB is presently narrowed down to an **objection decision** of the CG made under the TAA.

Third, since in the present appeal did not result from an objection decision of the CG as per specific language used in section 16(1) of TRAA, the appeal before the TRAB was incompetent.

Fourth, the Court invoked its powers of revision under section 4(2) of the Appellate Jurisdiction Act, and struck out the appeal which was laid before the TRAB and nullified proceedings and decisions of both TRAB and TRAT.

Significant takeaways

As it can be garnered from the decision of CAT, the Appeal before TRAB was incompetent for improper citation of the enabling provision. According to the Court, it was fatal for the Appellant, who was appealing against a non-objection decision, to rely on section 16(1) of TRAA, which is restricted to appeals emanating from objection decisions.

It is also notable that, the Court did not respond nor address itself to the submissions made by the counsel for TRA, that CG's decision on waiver is final and not appealable **only** subject to judicial review. This leaves taxpayers in limbo on which appropriate forum to get a remedy against the CG's refusal to grant waiver - is it by way of *judicial review* or *appeals to the TRAB*?

In the case of *A.G v Lohay Akonaay & Another*,¹ the CAT held that a conventional court of law cannot entertain a matter for which a special forum has been established by law, unless the aggrieved party can satisfy it that no appropriate remedy is available in that special forum. As regards to tax appeals, this position was cemented in the cases of *TRA vs. Kotra Company Limited*,² *TRA vs. New Musoma Textile Limited*³ and *TRA v Tango Transport Company Ltd*⁴ where the CAT held that all tax disputes of a civil nature are an exclusive reserve of the TRAB.

In the PAET case, the CAT further indicated that a right of appeal accrues to an aggrieved taxpayer under section 53(1) of the TAA, but such right is exercisable subject to the provisions of the TRAA. In spite of this holding, the CAT did not expound further on what amounts to "subject to the provisions TRAA". One may argue that it means that appeals must be filed and disposed of in accordance with the rules of procedure available under the TRAA. These rules include the requirements that appeals must be filed in prescribed forms, payments of fees, appeals only within the jurisdiction of the TRAB under section 7 of TRAA, filed within prescribed time and places, service of notices, attendance of witnesses, production of evidence and quorum of the TRAB. In this regard, it can be rightly argued that the right of appeal accrues to an aggrieved taxpayer under section 53(1) of the TAA (i.e it is a creature of a statute) and such right cannot be taken away by the provisions of TRAA which is a procedural law.

Moreover, the CAT did not address itself to the provisions of section 33 of the TRAA, which empowers the Minister, in consultation with the Chief Justice, to make rules generally laying down the procedure applicable for the conduct of proceedings by the Board or the Tribunal and the manner in which appeals from the Tribunal may be lodged to the Court of Appeal. It is in this regard, the Tax Revenue Appeals Board Rules, 2001⁵ were promulgated. Rule 6(2) of the TRAB Rules, provides expressly that the appeals must be filed in prescribed form TRB 2. The heading of Form TRB 2, reads thus "STATEMENT OF APPEAL" (Made under section 16(1) (a) and Rule 6(2). In this regard, the use or reliance of section 16(1) of TRAA as an enabling provision in the Statement of Appeal before TRAB was not an invention of the taxpayer but rather a requirement of the law. The PAET appeal was filed in 2017 at the time when the Tax Revenue Appeals Board

¹ (1995) TLR 80

² Civil Appeal No. 12 of 2009, CAT (unreported)

³ Civil Appeal No. 93 of 2009, CAT (unreported).

⁴ Civil Appeal No. 84 of 2009, CAT (unreported).

⁵ GN No. 57 of 2001

Rules, 2001 were in force. However, after its amendments, the new Tax Revenue Appeals Board Rules, 2018⁶ provides under Rule 5(2), that “Every appeal shall be made in the Form TRB. 2 prescribed in the First Schedule to these Rules”. Again, the heading of Form TRB 2, reads as “STATEMENT OF APPEAL” (*Made under rule 5(2)*). This implies that, under the new Rules, the proper provision to move the TRAB in an appeal is Rule 5(2) of the TRAB Rules, 2018.

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⁶ GN No. 217 of 2018 dated 4th April, 2018

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