

## TAX ALERT

20<sup>th</sup> March 2020

### Tax Revenue Appeals Tribunal rules Commissioner's decision on waiver applications not appealable

On 27<sup>th</sup> January 2020, Tax Revenue Appeal Tribunal ("TRAT"), sitting at Arusha, delivered a remarkable decision in the case of *Denafro Investment Limited v Commissioner General (TRA)*, in Consolidated Tax Appeals No. 22 & 23 of 2019, on whether the Commissioner's decision on tax deposits are appealable to the Tax Revenue Appeals Board ("TRAB"). In its decision, TRAT emphasized that it was bound by the decision of the Court of Appeal of Tanzania in the case of *Panafrican Energy Tanzania Limited v. Commissioner General (TRA)*, Civil Appeal No. 121 of 2018, holding that after the amendment of Section 16(1) of the Tax Revenue Appeals Act, Cap 408, appeals to the TRAB are limited to **objection decisions** of the Commissioner General.

This tax alert presents a brief analysis of the decision of TRAT on whether the Commissioner's refusal to grant waiver is appealable.

#### Facts of the Case

The Appellant, a company that deals with real estate, was assessed and issued with notices of assessment by the Respondent. Being dissatisfied with the assessment the Appellant raised an objection and simultaneously applied for waiver of tax deposit. The Application for waiver was rejected and thus the notice of objection was not admitted. Aggrieved by this decision, the Appellant preferred an appeal to the TRAB. Before the TRAB, the Respondent raised a preliminary objection on the competency of the appeal for want of proper citation. The preliminary objection was upheld by the TRAB. Discontented with the decision of the TRAB, the Appellant appealed to the TRAT on the ground that, there was no wrong citation of the law by the Appellant. Both appeals before the Board were made under section 16(2) of the Tax Revenue Appeals Act, which is a proper enabling provision to appeal to the Board against the Commissioner's decision. Additionally, even if there was wrong citation of the law as stated by the Board in its decision, the proper remedy was not to dismiss the appeals but strike them out.

#### Arguments by Counsel for Appellant (Denafro Investment Limited)

Counsel for the Appellant submitted that there was no wrong citation of the law by the Appellant because the two appeals filed under the provisions of section 16(2) of the Tax Revenue Appeals Act, which allows a person aggrieved by an objection decision of the Commissioner to appeal to the TRAB. On the second ground, the Counsel for the Appellant submitted that even if there was wrong citation of the law the proper remedy was not to dismiss the appeals but rather to strike them out. In his rejoinder, the Counsel for the Appellant submitted that the decision of the Court of Appeal in *Panafrican case* was made *per incuriam* (wrongly made without reference to a statutory provision or earlier judgment which would have been relevant), as it was based on a glaring oversight as the decision only considered section 16(1) of the Tax Revenue Appeals Act,

and ignored other provisions such as section 6 of the Tanzania Revenue Authority Act, Cap 399, section 7 of the Tax Revenue Appeals Act, and section 53 (1) of the Tax Administration Act, Cap 438.

### **Arguments by Counsel for TRA**

The Counsel for Respondent submitted that the contention by the Appellant that there was indeed an objection decision is wrong and misleading. The decision that the Appellant was referring to, was a letter notifying the Appellant that his notice of objection was not admitted for failure to pay 1/3 of the assessed tax. It was therefore, wrong to say that there were objection decisions while the objections were not accepted. The Counsel for Respondent further argued that the Court of Appeal in *PanAfrican case* was correct in holding that section 16(1) of the Tax Revenue Appeals Act limits the appeals to TRAB to those related to objection decisions and therefore, the TRAB has no jurisdiction to entertain appeals other than those emanating from objection decisions. On the second ground of appeal, the Counsel for Respondent agreed that, a proper remedy for failure to cite the proper provision of the law is to strike out the appeals and not to dismiss them. However, in this case the Board had no jurisdiction to entertain the matter as it arose from a decision other than objection decision; therefore dismissal was the correct decision.

### **Tribunal's Decision**

The Tribunal held that:

- Under the doctrine of precedents, only the decisions of the Court of Appeal prevail as correct interpretation of the law and all courts subordinate to the Court of Appeal are bound by its decisions. In this regard, neither the High Court nor TRAT can declare a decision of the Court of Appeal *per incuriam*. What High Court or TRAT can do, is to distinguish the decision when it seems to center on different matters in issue.
- The Court of Appeal reserves powers to depart from its own decisions, therefore where there is a misconception or disregard or glaring oversight by the Court of Appeal, such omissions can only be addressed by the Court of Appeal itself.
- In terms of the decision of the Court of Appeal in the *PanAfrican case*, the TRAB is seized with jurisdiction to entertain and determine appeals emanating from objection decisions only.
- Given that the letter claimed to be an objection decision by the Appellant was simply information to the Appellant that notices of objection were not admitted, it cannot be considered as an objection decision.
- Since the Appellant's objections were neither admitted nor determined by the Respondent (TRA), it follows therefore that there was no objection decision to warrant an appeal by the Appellant to the TRAB.
- In cases where a litigant cites a wrong provision of the law, the proper procedure is striking out the appeal (not dismissing it). Dismissal of the appeal is only when the matter has been determined on merit.

## Significant takeaways

This decision creates further confusion on the position taken by the Court of Appeal in the *Panafrican case*. In *Denafro's* decision, the TRAT is asserting that the jurisdiction of the TRAB is limited to only appeals emanating from the objection decisions. This is a very restrictive interpretation of the law. In another instance, the TRAB takes a more pragmatic approach in the case of *Sunshine Group Limited v Commissioner General (TRA)*, Income Tax Appeal No. 327 of 2018, dated 10 October 2019. In this case, it was held that the TRAB has jurisdiction to entertain appeals against decisions of the Commissioner General on waiver as per section 7 of Tax Revenue Appeals Act read together and harmoniously with section 53(1) of the Tax Administration Act. The TRAB further distinguished the *Panafrican case* on grounds that section 7 of the Tax Revenue Appeals Act, which confers sole jurisdiction to the TRAB in all proceedings of a civil nature in respect of disputes arising from revenue laws administered by TRA, was not the subject of interpretation by the Court of Appeal in *Panafrican case*.

The *Denafro's* decision means that both the TRAB and TRAT are in agreement that in terms of section 16(1) of the Tax Revenue Appeals Act, the TRAB does not have jurisdiction to deal with appeals emanating from non-objection decision such as refusal to grant application for waiver of tax deposit. This holding contravenes express wording 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 Commissioner General under this Part may appeal to the Board in accordance with the provisions of the Tax Revenue Appeals Act”. As it can be seen from the facts of this case, there is a clear conflict between 16(1) of the Tax Revenue Appeals Act and section 53(1) of the Tax Administration Act. Unfortunately, this conflict can only be resolved by the Court of Appeal itself. The question remains, what will happen to the appeals against refusal of applications for waiver pending before the TRAB and TRAT?

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