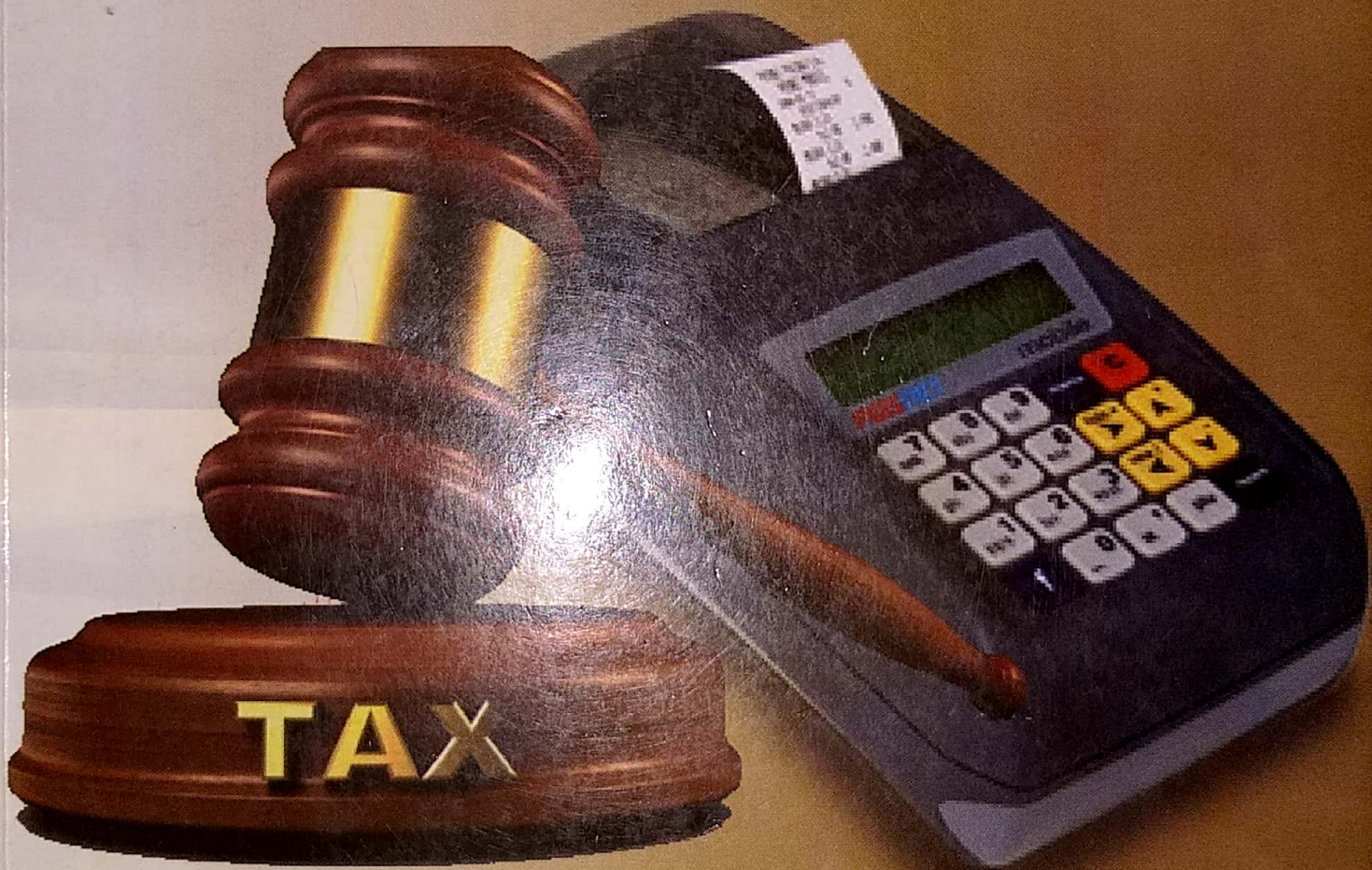


TAX LAW AND PRACTICE IN TANZANIA



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CHAPTER ONE

GENERAL INTRODUCTION, THEORIES AND BRIEF HISTORY OF DEVELOPMENT OF TAXATION IN TANZANIA

1.1 Introduction

This chapter addresses the meaning of tax, historical development of taxation, features and objectives of taxation, classification, bases and theories as well as principles governing taxation in Tanzania.

1.2 Meaning of Tax

There are two approaches in defining the term tax:-

1.2.1 Definition of Tax According to Various Pieces of Legislation

Section 3 of the Income Tax Act¹, defines the term tax as follows:-

Tax has the meaning ascribed to it under section 78 of the Income Tax Act. Section 78(1) of the ITA 2004 defines tax to mean:-

- (i) Income tax.²
- (ii) Interest and Penalties imposed by the Commissioner.³
- (iii) Amount required to be paid to the Commissioner by a tax debtor.⁴
- (iv) Amount required to be paid to the Commissioner in respect of tax liability of a third party.⁵

¹ Cap 332 of 2004.

² Section 3 of the Income Tax Act defines income Tax as having a meaning ascribed to it under section 4 of the Income Tax Act. Section 4 provides for the imposition of the Income Tax.

³ Sections 75 to 92 of the Tax Administration Act, Cap 438 of 2015. Interest and penalties were provided by sections 98 to 109 of the Income Tax Act, Cap 332 of 2004 as amended. Section 124 of the TAA, 2015 has repealed the sections of the Income Tax Act, from section 93, 95 up to 127, 129 up to 140.

⁴ Generally, a tax debtor refers to a taxpayer who has failed to pay the required taxes when is due according to different revenue laws. The Commissioner General is empowered by the law to collect taxes from third parties having or expecting to have or keep the tax debtor money or assets. Section 67 and 68 of the Tax Administration Act, Cap 438 of 2015 provides for third party debtors and guarantors, and compliance with notice or security. Section 117 of the Income Tax Act which provided recovery of tax from person owing money the debtor has been repealed by section 124 of the TAA 2015.

⁵ Section 65 and 66 of the TAA 2015.

The term tax is also defined by section 3 of the Tax Administration Act⁶ as amended by section 44 of the Written Laws (Miscellaneous Amendment), Act No.7 of 2017 as follows:-

Tax for the purpose of administration of tax includes tax, charges, fees, tolls, rates, levies, duties, penalty and interest imposed in any other law and any additional profits tax payable under any agreements or arrangement. Section 54 of the Tax Administration Act, Cap 438 as amended by section 45 of the Written Laws (Miscellaneous Amendments) Act, Act No. 7 of 2017) provides that additional profits tax payable under any agreements or arrangement shall be paid to the Commissioner General on the due date specified by the arrangement or agreements, or in the absence of such specified due date, as the Commissioner General shall by notice in writing direct.

The two sections indicated above do not define the term tax however the two provides for the types of taxes and methods of payment. Therefore, it is necessary to consider other definitions provided by different authors so as to understand better the meaning of the term tax.

1.1.2 Definition of Tax According to Different Authors

According to Crowe⁷:-

Tax is defined as a compulsory contribution to the government imposed in common interest of all, for the purpose of defraying the expenses incurred in carrying out the public functions or imposed for the purpose of regulation without reference to the special benefits conferred on the one making payment.

The definition by Crowe is fairly comprehensive since it includes not only charges that are imposed to raise revenue but also charges that are imposed to regulate other aspects such as tariffs, liquor, and tobacco taxes. The definition further separates those who pay from those who benefit, since those who pay may not be the people benefiting from the taxes paid.⁸ Apart from the fact that the definition by Crowe is comprehensive it has to be noted that tax is not necessary to be imposed for common interest of all, even for special interest also tax can be imposed e.g tariffs on foreign clothing to protect domestic textile manufacturers from foreign competition at the expense of the millions of consumers who would otherwise pay less for clothes.⁹

According to Adam Smith¹⁰ the term tax is defined as a compulsory payment levied by the government on individuals or companies to meet the current expenditure which is required for public welfare.

6 Cap 438 of 2015.

7 R.W.McGee., *The Philosophy of Taxation and Public Finance*, Kluwer Academic Publishers, New York, 2004 p.16.

8 Ibid., p.17.

9 Ibid.,

10 D.N,Mahangila.,M.M.Nchimbi.,*Income Tax in Tanzania*, KH Publishers, Kampala Uganda, 2013,p.1.

The definition given by Adam Smith is narrow based since tax can be imposed also for regulatory purposes and not necessarily for the purpose of meeting expenditure incurred by the government for public welfare. It can be imposed also on other matters/issues/items apart from companies and individuals.

Taxation must be legally provided for by the law and not otherwise. This implies that no tax should be imposed if it is not provided for by the law. In the Constitution of the United Republic of Tanzania Article 138(1) prohibits taxation except in accordance with laws duly enacted by the legislative authority. It provides that no tax of any kind shall be imposed save in accordance with a law enacted by the Parliament or pursuant to a procedure lawfully prescribed and having the force of law or by virtue of a law enacted by the Parliament.

Tax is also among the union matters as provided for by paragraph 10 of the first schedule of Cap 2. The paragraph provides for income tax payable by individuals and by corporations, customs duty and excise duty on goods manufactured in Tanzania collected by the Customs department. The union taxes in most cases are collected by Tanzania Revenue Authority (TRA) whereas non-union taxes or consumptions taxes applicable in Zanzibar are collected by Zanzibar Revenue Board (ZRB). This implies that there are some taxes which are not union taxes and hence collected by the relevant authority i.e TRA or ZRB.

1.3 Brief History of Taxation in Tanzania

The tax system in Tanzania (the then Tanganyika) was introduced by Germans and British colonial powers for the purpose of forcing Africans to participate in the monetary economy so as to finance the colonial administration in the colonies.¹¹ Before independence taxes were not the main source of revenue for colonial government since the colonies were financed by their imperial government.¹²

The Germans introduced direct form of taxes in Tanganyika i.e hut tax and poll tax. These forms of taxes were collected by the Germans administration in a very brutal way and consequently there was massive and sustained resistance from the colonies which led to the fall of Germans administration. The resistance against payment of taxes among other things was caused by the notion that colonial taxation was a foreign encroachment to African people traditions and culture.¹³

11 Brett., **Colonialism and Underdevelopment in East Africa**, p.9.

12 V.M., Nongwa, **Tax Avoidance In Tanzania Mainland: The Law And Practice Of Anti – Avoidance Provisions Under The Income Tax Act No.11 Of 2004**, LL.M Dissertation, Mzumbe University, 2013, p.20.

13 Shivji, I., **Semi-proletarian Labor and the use of penal sanctions in the labor law of colonial Tanganyika (1920-1938)**, Paper Presented at the Criminology Conference at the University of Cambridge, July 1979, p.4.

The era of English rule began after the defeat of Germans in World War I. The British prolonged the same dual economy with property tax as a means of integration.¹⁴ After the end of the first world war Tanganyika was declared as a trustee territory of the League of Nations and handed over to the British (as trustees on behalf of the League of Nations 1920-1961). The British established institutions that shaped Tanzania's legal and tax structures.

The first income tax legislation to be introduced in Tanganyika was based on a model of Colonial Income Tax Ordinance which was essentially a simplified version of the United Kingdom tax legislation that existed in the 1920s with modification to meet the needs of colonialist in the territory.¹⁵ Under the British Income Taxation was primarily intended for the European portion of the population. The Africans were taxed through import and excise duties mainly because of their low income and illiteracy levels.¹⁶

The earliest colonial measure was to subject African people to the crude form of property tax which was referred as to the hut¹⁷ tax (was payable in cash or in kind (i.e cattle, crops or labor). Hut tax was a type of tax which was payable depending on the number of huts the person owned (per hut or household basis).¹⁸ Tax was imposed on the hut rather than specifically on the owner but in reality it was the men who had the obligation to pay it and this applied throughout the protectorate.¹⁹ Following the amendment of the 1910 ordinance women who were living in their own huts were also required to pay hut tax.

The rate which was payable for huts varied from one year to another for example in 1902 the figure was raised from one to three rupees and by 1906 it was raised to six rupees and by 1907 it was further raised to seven rupees and in 1910 it went down to five rupees.²⁰

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- 14 Alexander. K., Andrew H., **Essay in Economic Globalization, Transnational Policies and Vulnerability**, IOS Press, Netherlands, 1999, p.210.
- 15 Luoga. F., **A Source Book of Income Tax in Tanzania**, Dar es Salaam University Press, 2000, p.12.
- 16 Ibid.,
- 17 The Native Hut and Poll Tax Ordinance define hut as any hut, building or structure of a description used by natives as dwelling.
- 18 Hut Tax Regulations of 1901.
- 19 Dorothy. K.I., **Tax Reform in Uganda: A Case Study of the Reform of Direct Taxation of Business Profits in the Formal and Informal Sector**, Cambridge Scholars Publishing, United Kingdom, 2016, p.54.
- 20 Pepper.H.W.T., **Poll Taxes, Payroll Taxation and Social Security**, Bulletin for International Fiscal Documentation, 1969, p.23.

The payment of hut taxes was literally viewed as a punishment to the polygamous families. This caused a lot of discomfort to polygamous families' and African communities in general. The imposition of hut tax caused overcrowding in the dwelling houses. This implies that the adults/people/peasants were no longer building new huts which otherwise attract additional taxes. Crowding in one hut was an early form of tax avoidance.

In order to address the problem of overcrowding, the colonial powers introduced the poll tax. This was a type of tax levied upon individuals rather than on income or property (was imposed to men above the age of 18 years). Poll tax and hut tax were all operating parallel, this implies that individuals who were not paying the hut tax were required to pay the poll tax and vice versa.

The British in 1948, created East African Commission as a statutory organ to administer and provide inter-territorial services (for Kenya, Uganda and Tanganyika).²¹ The Commission decided to enact a single law to the whole of East Africa to govern tax matters leaving each territory to legislate separate legislation to govern tax rates and allowances.

The Commission enacted the East African Income Tax (Management) Act, No. 8 of 1952 (it operated retrospectively from January 1st 1951). This Act repealed all the Ordinances which were applicable in the colonies. The Act was also amended several times i.e Act No. 2 of 1954, Act No. 14 of 1954, and Act No. 11 of 1955.²²

The East African Income Tax (Management) Act, No. 8 of 1952 was repealed by the East African Income Tax (Management) Act of 1958. The Act of 1958 remained in force until 1971 when the East African Income Tax (Management) Act of 1971 was enacted. After the collapse of East African Community each country enacted its own tax laws. Tanzania in particular enacted the Income Tax Act of 1973 which replaced the East African Income Tax (management) Act of 1971.²³

The Income Tax Act, Act No. 33 of 1973 remained in force until 2004. The Income Tax Act, Cap 332 of 2004²⁴ repealed the Income Tax Act of 1973. The tax reforms were the outcome of the recommendations by the Tax Commission which was appointed by the government in 1989 to review the central and local government tax system and its administration and make recommendations to the government. The Commission report was submitted

21 The East African (High Commission) Order in Council of 1947.

22 Luoga, op.cit., p.13.

23 Ibid.,

24 Section 141.

to the government in December 1991.²⁵ The commission among other things recommended that there was a need to widen the tax base; enhance revenue collections; and promote greater efficiency of production in the economy.²⁶

In 2004, the Government enacted the Income Tax Act, Cap 332 of 2004. The Act has been amended several times therefore it has to be read together with its amendments which are provided under different finance Acts of different financial years and also under different miscellaneous amendments.

Generally, the tax system in Tanzania is governed by different revenue laws which are administered by Tanzania Revenue Authority. The first schedule of the Tanzania Revenue Authority Act, Cap 399 of 1995 as amended by the Finance Acts of 2016 and 2017 provide the list of revenue laws which are administered by TRA. TRA collects revenue accordingly to both tax and non-tax laws.

The revenue laws which are administered by TRA have been amended several times by different Finance Acts and written miscellaneous amendments, therefore, it is important when making reference to any revenue law to consider whether the same has been amended or not. Besides, there are regulations which have been made under these revenue laws which also form part of tax laws. Agreements also concluded by Tanzania with other countries or agencies are recognized by the law and form part of tax law in Tanzania.

1.4 Objectives of Taxation

Taxation refers to the act of levying or charging taxes according to mandate given by the law enforced in a particular country or state. This implies that taxation should be levied according to the law and not otherwise. The following are the objectives of taxation:-

1.4.1 Raising Revenue for Public Expenditure

This is the primary objective of taxation. The government collects revenue for the purpose of financing public expenditure²⁷ such as social services, building infrastructure and also for national defense. Effective collection of revenue is important in any state for the purpose of financing government expenditures otherwise if there is deficit in revenue collection the state will have to resort to other sources such as borrowing from financial institutions or from development partners.

25 C.K.Patel(ed)., **Fiscal Reforms in the Least Developed Countries**, Edward Elgar Publishing Limited, United Kingdom, 1997, p.169.

26 Ibid.,

27 R.S.Avi-Yonah., **Corporations and the State: A Defense of the Corporate Tax**, University of Michigai, Public Law and Legal Theory, Research Paper No.40, 2006, p.3.

1.4.2 Capital Mobilization for Investment Purpose

Capital formation or mobilization is important for economic development in any country since the same is used to mobilize revenue/capital from the people by imposing different taxes so as to obtain capital for investment purposes. The investment to be carried out by the government should be productive and sustainable for the benefits of state and the citizens in general. For example in Tanzania the government has invested tax money in a number of investment opportunities e.g Air Tanzania.

1.4.3 Fair Resource Allocation/Distribution

Imposition or charging of taxes can be used as a means to redistribute or reallocate resources in the country.²⁸ The distribution can be done by providing exemptions or concessions for industries established or activities carried out in backward areas. This will help to increase economic activities in those areas and ultimately regional economic disparity will be minimized or reduced to a large extent. Redistribution can also be done by charging high taxes upon people so as to reduce the gap between the poor and rich.

1.4.4 Economic Stabilization

Tax is an instrument which can be used to make sure that the economy is stable and efficient.²⁹ This can be done in various ways, for example imposing high taxes on imported goods and services for the purpose of protecting local industries against competition in the production and selling the similar products in the market. This approach will assist to stabilize our local industries and hence economic growth and sustainability.

1.4.5 Regulatory Objective/Correcting Negative Externalities

This measure aims to regulate or control private expenditures for the purpose of correcting negative tendencies in the society.³⁰ This form of taxation is referred to as sumptuary taxation³¹. The negative tendencies include restrictions on consumption of alcohol or smoking of cigarette. This control can be done by levying high excise duty on these products so as to discourage the consumption or use of the same in the market.

28 J.F.J Toye(ed)., **Taxation and Economic Development: Twelve Critical Studies**, Frank CASS and Company Limited, USA, 1978, p.3.

29 Lisa M., **The Politics of Retirement Savings Taxation: A Trans-Tasman Comparison**, CCH Australia Limited, Australia, 2010, p.5.

30 M.Bowler Smith., **The Taxing Road to Sustainable Growth: Resource Productivity and Corporate Taxation**, IBFD, Netherlands, 2013, p.95.

31 Sumptuary refers to laws limiting private expenditure on food and personal items.

1.5 Essential Characteristics/Features of Tax

The following are the essential characteristic of tax³²:-

(a) It is an Enforced Contribution.

The payment of tax is not voluntary instead it is mandatory. The law provides for enforcement mechanisms by the tax authority in administering the tax laws. For example sections 82 to 92 of the Tax Administration Act, provide for offenses and penalties for failure to pay tax accordingly or failure to comply with the tax laws.

(b) It is Normally Proportionate in Character.

Tax in most cases depends on the principle of ability to pay. This implies that the higher the income the higher the tax rate and vice versa. For example taxation of income from employment depends on the principle of ability to pay since the amount of tax to be paid by one employee is different from another employee because of variation in tax rates on the basis of the income of person. This is reflected under Section 32 of the Finance Act 2016 which amended paragraph 1(I) of the Income Tax Act, Cap 332 of 2004.

(c) It is Generally Payable in Money Form.

Generally, payment of tax is in money form since it is the medium of exchange acceptable through the world and different countries recognize it as a legal tender as provided in their respective domestic laws. It is rare to find taxes being paid in kind; however, if a person gives in kind services to another person, the same can be quantified for the purpose of tax liability basing on the market forces.

(d) It is Normally Required to be Paid in a Regular Period or Interval or in a Certain Duration.

The time or interval or period for payment of tax depends on the type of tax. The time of payment of tax is reflected under section 79 of the Income Tax Act, and also section 20 of the same Act. Other revenue laws also provide time for payment of different type of taxes.

32 B.K.G.Gabay et al., **Economics: Its Concepts and Principles (with Agrarian Reform Taxation)**, Book Store, Philippine, 1st Ed. 2007, p.285-286.

- (e) It is charged or levied by a state having the taxing rights over the transactions or residents or a non resident person. This is reflected under section 6 of Income Tax, Cap 332 of 2004.

1.6 Principles or Canons of Taxation

Adams Smith³³ is believed to be the first writer who attempted to provide principles or canons which govern any sound system of taxation. He discussed four canons of a sound system of taxation; however additional principles were later formulated by other economists:-

(a) Equality/Ability

This canon of taxation provides that persons should be taxed according to their ability to pay taxes. Adam Smith stated that the subjects of every state ought to contribute towards the support of the government as nearly as possible, in proportion to their respective abilities that is proportionate to the revenue which is enjoyed under the protection of the state. In tax context equality does not mean equal amount of tax but what is required is equality in tax burden basing on progressive tax principle.

(b) Certainty

This principle provides that the tax which each individual is bound to pay ought to be certain and not ambiguous. This implies that the time of payment, the manner of payment, the quantity to be paid ought to be clear and plain to the contributors and every other person. The rationale behind this canon is the protection of taxpayers from unnecessary harassment by the tax officials and also to enable the state to calculate how much revenue it expects to get and thereby it assisting in prevention of corrupt practices.

(c) Convenience

This canon state that every tax ought to be levied at the time or in a manner which is most likely to be convenient for the contributor to pay it. The major focus of this canon is on time of payment of tax, for example income tax should be deducted monthly on installment basis from salaried taxpayers; Agricultural tax should be collected soon after harvest. The time for payment of tax in Tanzania is reflected under Section 79³⁴ of the Income Tax Act, 2004.

³³ Adam Smith, *The Wealth of the Nations* 1776, Book V, Chapter II, Part II.

³⁴ As amended by Section 119 of the TAA 2015.

(d) **Economy**

This canon states that every tax ought to be contrived as both to take out and to keep out of people's pockets as little as possible over and above what it brings to the public treasury of the state. This implies that collection cost should be minimized and also tax should not hinder development of trade and industry in any manner. If tax hinders trade and development of industry it means tax has violated the principle of economy. Taxes should be established in such a manner as to minimize the real cost of collection, in terms of resources required to collect taxes and comply with the tax laws on the part of the tax payers.

(e) **Other Canons**

The modern economy and economic reforms which have taken place in different parts of the world necessitate need to supplement Adam Smith's canons of taxation. The following are few principles which supplement Adam Smith's main principles of taxation:-

(i) **Fiscal Adequacy/Productivity**

This principle provides that the tax system should sufficiently yield the revenue needed to meet the requirements of the nation. This implies that the law must provide sufficient or adequate sources of income for the purpose of raising revenue to finance government expenditure. The sources identified/ the base must be enough to make sure that adequate revenues are collected.

If the sources are not adequate, the government therefore will resort to other sources of revenue such as borrowing from different sources. Sections 7, 8, 9 of the Income Tax Act, Cap 332 provides for main sources of income in Tanzania, which are income from employment, business and investment.

Generally, the tax system should not discourage production by introducing multiplicity of taxes which at the end generate small revenue to the government and hinders development of trade and industries.

(ii) **Simplicity**

The tax system should be simple and plain so as to be understood by common tax payers for compliance purpose. This implies that the laws enacted should be simple and clear to all the tax payers for compliance as well as administrative purpose by the tax authority. If the tax system is complex this will cause uncertainty to the tax payers and also may cause several disputes between tax payers and the tax authority because of different interpretations of the words or phrases used in the revenue laws.

(iii) **Flexibility**

The principle provides that the tax system should be easily adjustable to new conditions or economic reforms so as to meet the expected tax objectives. In an adjustable tax system a new tax can be imposed or an old tax can be withdrawn to match the changed situations or to take care of any economic reform which has taken place.

(iv) **Diversity and Coordination**

This principle provides that there should be a well coordinated, united and consistent tax system with varieties of taxes touching all sections of the people in the society. The authorities imposing these taxes should be well coordinated so as to avoid contradictions in the process of collection of taxes.

1.7 Classification of Taxes

Tax can be classified in different ways:-

(a) **Classification as to Subject Matter**

This type of classification depends on the subject matter³⁵ upon which tax is levied or the items or property upon which tax is imposed. This implies that the name of tax bears the name of the property or subject matter for example property tax, poll tax etc.

(b) **Classification as to who Bears the Burden of Tax**

There are two categories under this classification:-

(i) **Direct Tax**

A direct tax is imposed directly on the tax payer and paid directly to the government by the persons (juristic or natural) on whom it is imposed.³⁶ The burden of direct tax cannot be shifted by the taxpayer to someone else. Direct taxes are progressive in nature which implies that they are based on the principle of ability to pay. This implies that higher rates of taxes are paid by people having a higher ability and vice versa. Examples of direct taxes include Income Tax, corporate tax, property tax, withholding tax on dividends, interest, royalties, etc

³⁵ S.Barkoczy et al., **Australian Tax Casebook**, CCH Australia Limited, Australia, 10th Ed, 2010, p.403.

³⁶ M.N.Hiregange et al., **Student's Handbook on Indirect Taxes**, Notion Press 2015, Chennai, 2015, p.7.

(ii) **Indirect Tax**

An indirect tax is one whose incidence is borne by consumers who ultimately consume the products or the services, while the immediate liability to pay the tax falls upon another person such as the manufacturer of goods or seller of goods or provider of services.³⁷ The burden of indirect tax can be shifted by the taxpayer to another person. Indirect taxes are regressive in nature, which implies that all consumers, including the economically challenged one bear the burden of indirect taxes equally. Examples of indirect taxes are excise duty, customs duties, Value Added Tax etc.

(c) **Classification as to Determination of Account**³⁸

- ❖ **Specific Tax**-This tax is fixed or determined by the number or some standard of weight measurement that requires no assessment beyond a listing and classification of the object to be taxed e.g taxes on wines.
- ❖ **Ad Valorem Tax**-It is a tax of a fixed proportion of the value of the property in respect of which the tax is assessed and requires the intervention of assessors to estimate the value of such property before the amount due from each taxpayer can be determined. Example includes real estate tax.

(d) **Classification as to Purpose**³⁹

- ❖ **General Tax**-It refers to a tax levied on an individual for a general public purpose. Almost all taxes are examples of this classification.
- ❖ **Specific Tax**-This is a type of tax imposed on an individual for a particular or a specific purpose e.g regulatory purpose to discourage certain behaviors in the society and also to protect local industry against imported goods from overseas.

(e) **Classification as to Scope**⁴⁰

- ❖ **National tax**-This tax is imposed by the state itself and is effective within the entire jurisdiction thereof. Example includes the national revenue taxes.

37 Ibid., p.7-8.

38 Gabay, op.cit., p.288.

39 Ibid.,

40 Ibid.,

- ❖ **Local Tax**-This tax is imposed by a political subdivision of the state and is effective only within the territorial boundaries thereof.

1.8 Principles/Theories of Tax Distribution

There are number of theories/ principles which have been put forward for the purpose of guidance as how on just or equitable taxation can be achieved. These theories/principles are used to determine or select the rates and bases upon which taxation should be levied or charged.

1.8.1 Ability to Pay Principle/Theory

This is a progressive taxation principle which provides that tax should be levied/charged basing on ability of a person or income of the person to pay tax.⁴¹ This implies that taxation should be levied /charged depending on the income of the person not otherwise. The amount of tax payable should be proportional to the income of the person. The ability to pay principle has been justified on the grounds of fairness and diminishing marginal utility of income (as income grows the marginal utility derived from additional unit of money decreases and as income decreases the marginal utility of income increases) and faculty (economic surplus).⁴² This requires that in order to make the tax burden equal on rich and poor, the rich should be taxed more and the poor less.⁴³

The measurement of ability of the person to pay tax is based in two main approaches⁴⁴:-

(1) Objective Approach/Faculty Theory

This approach consider various factors to determine a person ability to pay tax like income, property, consumption etc. The greater the capacity implies the greater ability of the taxpayer to pay taxes. According to objective approach the following factors affect the ability of the taxpayers:-

(a) Income

The greater the income a person earns, the greater ability, to pay taxes. The focus is on the net income and not gross income of an individual.

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- 41 John.S.M., Rae J.B.G., **Advanced Placement Economics: Teacher Resource Manual**, (3rdEd), National Council on Economic Education, America, 2003, p.320.
- 42 Ibid.,
- 43 S.N.Chand., **Public Finance, V.1**, Atlantic Publishers, and Distributors(P) Ltd, New Delhi, 2008, p.80.
- 44 Ibid., p.81.

In considering the income of the person there should be regards also to the source of income, the nature of income, exemptions and deductions provided by the law etc.

(b) Price Level

The higher the prices, the lower is the income on which the taxes can be paid and vice versa. Therefore, the prices also affect the ability of the person to pay taxes provided by different revenue laws.

(c) Consumption Expenditure

The person's spending power rather than income is the true index of his taxable capacity. Higher consumption means people are rich to afford a higher tax burden whereas low consumption standard implies that people are poor. Consumption expenditure differ from one family to another basing on their status and also size, therefore to tax one alternative of disposal of income and exempt others, would be unjust and also accentuate inequalities as this would encourage people to divert their income from consumption to savings and building up of properties through savings would breed inequality.⁴⁵

(d) Ownership of Property

Early economist believed that property acquired and accumulated was an index of ability to pay tax. In reality, instead of being an index of ability, it is a supplementary index of ability due to the following reasons:-

- (i) Though property is an important source of income, on the other hand the fact is all properties do not produce income.
- (ii) The Income from property does not always flow continuously.
- (iii) Income from properties varies with the changes in place etc.
- (iv) Since the property is taxed according to its capital value, and if the property does not yield any income, it would be unjust to tax the property.

Property must be considered while imposing taxes because of the following reasons:-

- (i) The person who owns property has greater ability to pay tax since the possession of property increases his ability.

45 J.R.Gupta., **Public Economics in India: Theory and Practice**, Atlantic Publishers and Distributors Ltd, New Delhi, 2007, p.204.

- (ii) Income received from property enables a high degree of tax paying ability than income received from personal services like wages and salaries.
- (iii) Income from inherited property increases high potentiality of ability to pay tax.

(2) Subjective Approach

This is another approach which is used to determine ability of the person to pay tax. The ability to pay tax is measured in terms of sacrifice of utility made by the taxpayers.⁴⁶ In this approach each tax involves a certain sacrifice on the part of the tax payer. Each tax payer should be expected to make equal sacrifice for the common benefits.⁴⁷ The approach rest on three general premises that the utility of a unit of money to an individual diminishes as his stock of money increases; the utilities can be compared interpersonally and thus can be summed up, subtracted; and that everyone has the same utility of the money schedule.⁴⁸ The marginal utility of money does diminish, but it is impossible to compare one person's utilities with another, let alone believe that everyone's valuations are identical. Utilities are not quantities, but subjective order of preference.⁴⁹ Any principle for distributing the tax burden that rests on such assumptions must therefore be declared fallacious.

1.8.2 Benefit Principle/Theory

This theory states that individuals/citizens should be taxed in proportion to the benefits they receive from the government.⁵⁰ This implies that the more benefit a person derives from the government, the more tax he should pay and vice versa. There are critics regarding the application of benefit principle and these are as follows:-

- (i) The principle is against the basic principle that tax is compulsory contribution to the government to meet its expenditure, no reciprocal benefits required.
- (ii) The expenditure incurred by the state is for the general benefit of its citizens. It is difficult to estimate the benefit enjoyed by a particular individual every year.

⁴⁶ S.K Singh., **Public Finance in Theory and Practice**, (9th ed), Scand and Company PVT Ltd, New Delhi, 2015, p.125-126.

⁴⁷ Ibid.

⁴⁸ M.N.Rothbard., **Power and Market: Government and the Economy** (4th ed.), Ludwig Von Mises Institute, Spain, 2006, p.185-186.

⁴⁹ Ibid., p.185-186.

⁵⁰ H. Peyton Young., **Equity: In theory and Practice**, Princeton University Press, United Kingdom, 1994, p.102.

- (iii) If we apply this principle in practice the poor will have to pay the heaviest taxes because they benefit more from the services of the state, This proposition is unjust and unacceptable.
- (iv) Most of the services provided by the state are indivisible and beneficiaries are unidentified e.g national defence, not possible to divide this benefit.

1.8.3 Sacrifice Theory/Principle

This theory rests on the assumption that payment of taxes involves a certain burden or sacrifice on the part of the tax payers and as such justice in taxation demands that taxes should be so imposed that equality of sacrifice among tax payers is brought about.⁵¹ This approach further assumes that taxes impose sacrifice, the marginal utility of income is cardinally measurable, all persons have the same relationship between their units of income and units of marginal utility whatever be their levels of income i.e everybody rich or poor has the same capacity to derive utility out of all the levels of income.⁵² The critics in respect of this theory are as follows⁵³:-

- (i) The sacrifice undergone by a taxpayer is a psychological phenomenon as it concerns the state of minds and it is not possible to measure a person's state of mind or compare it with another person's state of mind. Hence interpersonal comparisons of utility or sacrifice cannot be made and as such it is very difficult to equalize the sacrifice of all the tax payers.
- (ii) The sacrifice that a taxpayer undergoes depends not only on the amount of tax paid but also on the source and character of income earned. For example earned income will have greater utility to an individual than income not earned.
- (iii) It is not possible to measure exactly the decline in the marginal utility of money as income increases and the progression involved in the rate of taxation is all arbitrary and hence it fails to secure equal sacrifice for all.
- (iv) The assumption that the income utility function of every individual has exactly the same characteristics is untenable because all people do not possess equal capacities for the payment of incomes.

51 J.R.Gupta., **Public Economics in India: Theory and Practice**, Atlantic Publishers and Distributors Ltd, New Delhi, 2007, p.197.

52 Ibid.,

53 Ibid., p.202.

1.9 Tax Structure

The tax structures of an economy in most cases depend on its base and the tax rates and how the tax rate varies. Different countries have employed various mechanisms in their tax structures so as to achieve the goal of imposing tax according to ability to pay principle. The mechanisms are as follows:-

1.9.1 Proportional Taxation

This is a type of structure whose percentage of tax remains the same regardless of the size of income. Every taxpayer has to pay a fixed proportion of his income as tax.⁵⁴ Examples of proportional taxation are excise duties, customs duties, value added tax etc. Consider a case which involves income tax. Suppose the income tax rate is fixed as 10 percent, and then all persons shall have to pay the income tax rate at this rate as there is no change in the rate of tax with the increase or decrease in income.⁵⁵ It is easy to administer proportional tax. The criticism regarding the application of proportional taxation is that the burden of tax goes to the low income earners.

1.9.2 Progressive Taxation

This is a system of tax whereby the rate of taxation increases as the tax payer's income increases. This implies that the rate of tax goes on increasing with every increase in income. A good example is imposition of tax on income from employment which depends on progressive taxation system. Progressive taxation is justified because it embodies the ability to pay principle, social justice, promotion of stability growth and also it is economical.⁵⁶ The criticism about this system is that it encourages tax evasion; it is arbitrary and also it affects savings and investment.

1.9.3 Regressive Taxation

This is a system of taxation whereby the lower income is taxed at a higher rate whereas the higher income is taxed at a lower rate. The system collect more from the poor people compared to rich people. A good example of regressive taxes is sale tax and value added tax.

1.10 Tax Bases

It refers to what is taxed by the state for the purpose of generating revenue to finance government expenditure. The choice of the tax base for the purpose of imposing tax is the most contentious issue in the tax system. The following are the contending tax bases:-

54 M.M.J.Kennedy., **Public Finance**, Asoke K.Ghosh, PHI Private Limited, New Delhi, 2012, p 71.

55 Ibid.,

56 Ibid.,

1.10.1 Wealth Tax Base

This base provides that tax should be imposed on the wealth possessed by individual after deducting the liabilities.⁵⁷ This implies that tax is imposed on the net wealth of a person after assessment. The assessment is based on the market value of the assets that a person owns for example cash, bank deposits, shares, housing, trust and so forth. The assets can be current assets i.e are those assets which can be used within twelve months, otherwise if the asset can be used beyond twelve months is known as non-current assets. Some countries tried to use this base but later on it was abolished. Those countries include Austria, Denmark, Sweden, Spain, Finland, Iceland and Luxemburg etc.

The criticism about this base is that it is difficult to ascertain the value of certain assets for the purpose of taxation and also this base affect economic growth i.e affecting the level of investment and allocation of saving.⁵⁸

1.10.2 Expenditure Tax Base

An expenditure tax base is a broad based consumption tax that uses annual consumption as the starting points for tax calculations of a person.⁵⁹ An expenditure tax base doesn't attempt to measure consumption transaction by transaction because that would be impractical, rather consumption is measured as the difference between income and savings over a year. The base is total annual consumption. This base uses different devices such as exemptions, deductions, and graduated marginal tax rates to adjust for ability to pay or to create incentives.⁶⁰ The critics about consumption taxes state that they are difficult to be tailored to ability to pay since most consumption taxes are transaction based and it is nearly impossible to make such taxes explicitly progressive because the same rates generally apply to all the purchases regardless of the purchaser's economic capacity. It should be noted that expenditure tax rates cannot be directly compared to income tax rates because income tax rates are tax inclusive rates that apply to both tax and the residual after the tax while consumption tax rates are tax exclusive rates that apply only after tax residual.⁶¹

1.10.3 Income Tax Base

There is no one common definition of income since the definition of the term varies from one tax jurisdiction to another but also has different meaning in different fields. Economists have their way of defining income likewise the accountants and also tax legal practitioners.

57 B.B. Lal., **Direct Taxes: Income Tax, Wealth Tax and Tax Planning** (29th ed.), Kindersley (India) Pvt Ltd, New Delhi, 2008, p.40.

58 OECD, **Taxation and Household Saving**, Head of Publication Service, OECD, France, p.55.

59 Joseph J.C et al., (ed), **The Encyclopedia of Taxation and Tax Policy**, (2nd ed), The Urban Institute Press, Washington, 2005, p.127.

60 Ibid.,

61 Ibid.,

Some definitions include a definition given by Hicks (1939) that income is the maximum value which a man can consume during the period and still expect to be as well off at the end of the period as he was at the beginning.⁶² The term to be well off (equity) as at the beginning refers to capital maintenance which calls for inflation adjustment of the earlier figure. Economists define income also as any increase in economic prosperity or any net addition to wealth received by a taxpayer.⁶³ Economists generally define income for economic purposes as a taxpayer's personal consumption during the year plus increase in wealth during the year.⁶⁴ The income can be classified into cash income and income in kind, exempt income and income exempt, earned income and an unearned income and total income.⁶⁵

In Tanzania, Section 3 of Income Tax Act, Cap 332 defines income basing on the sources of income i.e income from business, income from employment and income from investment. Irrespective of the definitions given in different fields it has to be noted that not every income is taxable. This implies that a person may earn income but if it is not recognized or included in a relevant revenue law the same will not be taxable.

For the purposes of tax liability income refers to inclusions or payments or amounts earned or obtained or realized by a person from a particular source of income minus allowable deductions and exemptions. In this aspect what remains is a taxable income.

Generally, Income base is the base which provides that tax should be levied or charged basing on the income or ability of the person to pay tax. This is a widely accepted base as being just and fair in determining the tax liability of a person.

62 Mahangila and Nchimbi, op.cit., p.14.

63 World Bank, C.W.Gary, **Issues in Income Tax Reform in Developing Countries**, Policy, Planning, and Research Working Papers, 1989, p.9.

64 D.S.Goldberg., **The Death of The Income Tax: A Progressive Consumption Tax and the Path to Fiscal Reform**, Oxford University Press, New York, 2013, p.11.

65 Mahangila and Nchimbi, op.cit., p.14-15.

CHAPTER TWO

INTERPRETATION OF TAX STATUTES

2.1 Introduction

*"Statutory construction is not a mechanical task, where a court's jurisdiction is invoked; it requires judicial analysis and assessment of many factors"*⁶⁶

Interpretation refers to assigning meaning or interpreting a particular word or phrase or section of the law according to the context required in the process of dispensation of justice.⁶⁷ It is an art of finding out the true sense of any form of words, that is, the sense the author intent to convey and enables others to derive from the same idea the author wants to convey.⁶⁸ The distinction between interpretation and construction are more of academic than practical since it is hard to disentangle the two in common usage. The two words are usually understood as having the same significance and the two expressions are used in the books and other literatures as synonymous.⁶⁹

It is the primary duty of the court to interpret the statutes enacted by the parliament.⁷⁰ The interpretation is normally made by the court when adjudicating different matters in the process of dispensation of justice. Interpretation of statutes can be made also by the court when it is moved by any person to interpret a particular provisions of the law or where the matter is referred to by subordinate courts for directives or interpretation of the superior court.

For the purpose of tax matters the institutions which are mandated to interpret tax laws are the Commissioner General, The Tax Revenue Appeals Board (TRAB)⁷¹, The Tax Revenue Appeals Tribunal (TRAT)⁷² and the Court of Appeal of Tanzania. However, for criminal cases involving tax matters like tax evasion and other tax offenses, normal courts may also interpret tax statutes when adjudicating different matters in the process of dispensation of justice.

66 Attorney General(WA) v.Marquet(2003),202 ALR 233(Kirby J).

67 S.Corcoran and S.Bottomley(ed)., **Interpretation of Statutes**, The Federation Press, Sydney, 2005,p.8.

68 B.B. Lal., **Direct Taxes:Income Tax,Wealth Tax and Tax Planning**(29th ed.),Kindersley(India Pvt Ltd,New Delhi,2008, p.3.1.

69 Ibid.,

70 Grasim v. ACIT 245 ITR 677.

71 Established under section 4 of the Tax Revenue Appeals Act, Cap 408.

72 Established under section 8 of the Tax Revenue Appeals Act, Cap 408.

Before analyzing different rules or principles or approaches governing interpretation of tax statutes it is important to know the sources of tax law so as to understand what is to be interpreted by the court or the tax authority.

2.2 Sources of Tax Law

The word sources refer to where to find tax laws governing different tax matters in Tanzania. The following are the sources of tax law in Tanzania:-

2.2.1 The Constitution

The Constitution of the United Republic of Tanzania⁷³ under Article 138(1) prohibits taxation except in accordance with laws duly enacted by the legislative authority. It provides that no tax of any kind shall be imposed save in accordance with a law enacted by the Parliament or pursuant to a procedure lawfully prescribed and having the force of law or by virtue of a law enacted by the Parliament. All the revenue laws derive validity and enforceability from the Constitution for the purpose of collection of revenue by the tax authority. The financial laws enacted must be pursuant to the lawfully prescribed procedure set under Article 99 of the Constitution governing enactment of financial matters legislation.

2.2.2 Statutes

The statutes governing tax matters in Tanzania are provided under the first schedule to the Tanzania Revenue Authority Act⁷⁴ as amended by Section 51 of the Finance Act, Act No. 2 of 2016 and Section 46A of the Finance Act.⁷⁵ The amendment of 2016 designated all the statutes found under the first schedule to the TRA Act as Part A and adds Part B immediately after part A. This implies that the first schedule now to the TRA Act is divided into Part A and Part B. Part A comprises of tax laws whereas Part B comprises of non-tax laws.⁷⁶ The laws found under Part A includes The Income Tax Act Cap 332, The Value Added Tax Act Cap 148, The East African Customs Management Act, (No.1 of 2005), The Excise (Management and Tariff) Act Cap 147, The Stamp Duty Act Cap 189, The Road and Fuel Tolls Act Cap 220, The Airport Services Charges Act Cap 365, The Motor Vehicle (Tax on Registration and Transfer) Act Cap 124, The Ports Service Charges Act Cap 264,

73 Cap 2 R.E 2002.

74 Cap 399 of 1995.

75 Act No.4 of 2017.

76 Section 47 of the Finance Act 2016.

The Cashewnut Board of Tanzania Act Cap 203, Vocational Education and Training Act Cap 82, The Foreign Vehicles Transit Charges Act Cap 84, The Gaming Act Cap 41, The Tax Administration Act Cap 438, The Road Traffic Act Cap 168, and any other law authorizing the authority to administer or collect revenue.⁷⁷ Part B of the First schedule to the TRA Act as amended by the Finance Act 2016 and Finance Act 2017 comprises also other revenue laws.⁷⁸

All these revenue laws are administered by TRA either directly or indirectly through different authorities or agencies mandated to collect revenue on behalf of TRA. The laws identified have been amended several times, therefore, it is important when reading a particular law to make reference to different Finance Acts of respective financial years to find out whether such a law has been amended or not. Besides, there are regulations which have been made under these laws which need to be read as part of the principal Act.

2.2.3 Case Law

This is another source of tax law. There are different cases decided by the Tax Revenue Appeals Board, The Tax Revenue Appeals Tribunal and the Court of Appeal of Tanzania.

⁷⁷ Section 105 of the Tax Administration Act amended the first schedule of TRA Act.

⁷⁸ The Local Government Finance Act Cap 290, The Oil and Gas Revenue Management Act Cap 328, The Rural Energy Act Cap 321, The Treasury Registrar (Powers and Functions) Act Cap 370, The Urban Authorities (Rating) Act Cap 289, The Petroleum Act Cap 392, The Immigration Act Cap 54, The Citizenship Act Cap 375, The Police Force and Auxiliary Services Act Cap 322, The Motor Vehicle Driving School Act Cap 163, The Firearms and Ammunition Control Act Cap 223, The Tanzania Passports and Travel Documents Act Cap 42, The Registration of Documents Act Cap 117, The Land Registration Act Cap 334, The Chattels Transfer Act Cap 210, The Units Titles Act Cap 416, The Land Act Cap 113, The Land Survey Act Cap 324, The Mining Act Cap 123, The Explosives Act Cap 45, The Electronic and Postal Communications Act Cap 302, The Tourism Act Cap 65, The Deep Sea Fishing Authority Act Cap 388, The Tourist Agents (Licensing) Act Cap 65, The Transport Licensing Act Cap 317, The Forest Act Cap 389, The Beekeeping Act Cap 224, The Antiquities Act Cap 333, The Civil Aviation Authority Act Cap 80, The Aerodromes Control and (Licensing) Act Cap 92, The Road Traffic Act Cap 168, The Airport Services Charges Act Cap 365, The Executive Agencies Act Cap 245, The Ferries Act Cap 173, The Land Disputes Courts Act Cap 216, The Surface and Marine Transport Regulatory Authority Act Cap 413, The Energy and Water Utilities Regulatory Authority Act Cap 414, The Tanzania Communications Regulatory Authority Act Cap 172, The Tanzania National Parks Act Cap 282, The Fire and Rescue Forces Act Cap 427, The Fair Competition Act Cap 285, The Business Activities Registration Act, No.1 of 2007, The Business Names (Registration) Act Cap 213, The Standards Act Cap 130, The Food, Drugs and Cosmetics Act Cap 219, Insurance Act Cap 394, The Ports Act Cap 166.

The selected cases from these institutions are normally reported in the special tax law report called Tanzania Tax Law Reports (TTLR) divided into different volumes.⁷⁹ There are both reported cases and also non-reported cases from these institutions which can be used as precedents in deciding future cases.

2.2.4 Practice Notes

Section 9(1) of the Tax Administration Act⁸⁰ provides that the Commissioner General may issue practice notes with a view to ensure consistency in the administration of tax laws and to provide guidance to persons affected by tax law. In practice, the practice notes provide interpretation of certain sections or part of any revenue law for the purpose of ensuring consistence in collection of revenue from the taxpayers but also to assist tax officers in collection of revenue. The practice notes should be consistent with the Parent Act; otherwise the practice note shall be revoked by the Parent Act in respect of such inconsistency.⁸¹ The Commissioner General is mandated by the law to revoke in part or whole the practice note at any time.⁸²

Practice note should be differentiated from private ruling⁸³ by the Commissioner General. Private ruling refers to the commissioner's position upon application in writing by a person over a particular arrangement or transactions entered or proposed to be entered by that person as to whether such arrangement will be subject to tax or not.⁸⁴ The commissioner will have to rule out after obtaining true full disclosure of the arrangement from the applicant or the class of persons who have applied for the private ruling. The private ruling shall not have a binding effect on the Commissioner General with respect to any person other than the applicant or persons in the specified class.⁸⁵

2.2.5 Tax Agreements

Tanzania has entered into various tax agreements with different countries like Canada, Denmark, Finland, India, Italy, Norway, South Africa, Sweden, Switzerland, Zambia, Burundi, Rwanda, Burundi, Kenya, and Uganda. These agreements are recognized by the law and form part of the tax laws.

79 At present there is TTLR 2002 Volume 1 & 2; TTLR 2003 Volume 1 & 2; TTLR 2004 Volume 1 & 2; TTLR 2005 Volume 1-3; TTLR 2006 Volume 1 & 2; TTLR 2007 Volume 1-3; TTLR 2008 Volume 1-4.

80 Cap 438 of 2015.

81 Section 10(2) of the TAA 2015.

82 Section 10(1) of the TAA 2015.

83 Rule 22-28 of The Tax Administration (General) Regulations 2016.

84 Section 11(1) of the TAA 2015.

85 Section 11(4) to section 14 of the TAA 2015.

Section 3 of the Tax Administration Act, defines tax law to include any international agreements concluded under Section 7 of the TAA 2015.⁸⁶ Further, Section 143 of the Income tax Act recognizes tax agreements entered by Tanzania with other countries. Normally these agreements are registered in a tax agreements register available in the relevant ministry. Section 7 of the Value added Tax Act⁸⁷ also recognizes treaties entered by Tanzania with other countries and also international agencies listed under the Diplomatic and Consular Immunities and Privileges Act.

2.3 Reasons for Interpretation of Tax Statutes

The following are the reasons as to why there is a need to interpret tax statutes:-

- (i) There are phrases/words used in the tax statutes which do not have ordinary meaning, therefore, there is a need to interpret them depending on their context or use.
- (ii) To ascertain the intention of the legislature. The intention of the legislature is normally ascertained by looking at the language which has been used in a statute.
- (iii) To conform with economic reforms such as E-commerce and technological development taking place in different parts of the world.
- (iv) To ascertain the meaning of some of the phrases or words used in the tax statute which are ambiguous in their context.

2.4 Rules and Aids Governing Interpretation of Statutes

There are general rules or guides governing interpretation of statutes. These rules apply also to tax statutes however there are additional rules which apply specifically to tax statutes. In the process of interpretation of statutes there is a need to consider the following:-

2.4.1 Intrinsic/Internal Aids

Internal aids refer to those aids which are found within the statutes and their interpretative roles. This implies that before resorting to other aids of interpretation there is a need to consider internal aids first and if they are of no assistance then that necessitates a need to consider other aids of statutory interpretation.

⁸⁶ Section 7(2) define international agreements to mean a treaty or other agreement which the United Republic signed with foreign government for the purpose of providing reciprocal assistance for the administration or enforcement of tax laws. Section 7(1) of the TAA provides that the provisions of the agreement shall prevail over tax laws where there is inconsistency.

⁸⁷ Cap 148 of 2014.

A statute can sometimes be the best instrument to employ in interpreting itself through the use of internal aids. The internal aids include:-

(a) Short Title

Traditionally, short titles have little relevance to the meaning of the statutes for brevity rather than precision. In other jurisdictions a short title can be used to resolve ambiguities in statutory provisions while others consider short title as unhelpful since its object is identification and not description.⁸⁸

(b) Long Title

Long title is part of the legislation and is included in the debate by the parliament and it provides the general scope of the statute. It is used to resolve ambiguity in the text of the statute.⁸⁹

In the Case of *Bello and Ors v. Oyo State*⁹⁰ *White J.S.C Said:-*

“The Long title of a statute is now accepted as an important part of it and may be relied upon as explaining its general scope and aids in its interpretation....where the meaning of the words used in the section are clear and unambiguous that meaning governs, resort is only had to the long title to resolve ambiguity”.

The long title usually delimits the purpose of the statute and may be relied upon as explaining its general scope, however, it can never be allowed to affect or restrain the plain meaning of the statute.

(c) Preamble

This is an amendable, descriptive component of a statute and it is generally placed after the long title and before the enacting words and the substantive section.⁹¹ It is a useful guide to the intention of the parliament in that it may detail the mischief to which the statute is directed, explain the reason, object and scope of the Act and details facts which are relevant to the statute. The preamble has contextual role and constructive role in statutory interpretation. The contextual role is where the preamble assists in confirming the ordinary meaning of the enactments and assist with determining if there is any ambiguity in the statute. The constructive role is where the preamble is effectual in clarifying or modifying the meaning of ambiguous amendments. There is a substantial consensus on the function of a preamble in relation to the constructive role; the contextual role of preamble has had a more contested history.⁹²

88 L.Madhuku., *An Introduction to Zimbabwean Law*, Weaver Press, Harare, 2010,p.173

89 H.O.Ijaiye., *Judicail Approach to the Interpretation of the Constitutions in Nigeria*, Australia, Canada and India, Malthouse Press Limited, 2017, Nigeria, p. 65.

90 (1986) 5 NWLR 828 at 871.

91 Ijaiye,op.cit., p. 66.

92 Ibid., p .67.

The preamble does not constitute an operative part of the statute. Preambles are relevant to interpretation of statutes where there is ambiguity or difficulty in ascertaining the intention of the statute.

The legal effect of a preamble have been set out by Tindall C.J in *Sussex Peerage Claim* as follows:-

"If doubt arises from the terms employed by the legislature it has always been held a safe means of collecting the intention to call in aid the ground and cause in making the statute and to have recourse to preamble which according to Chief Justice Dyer in *Stowe v. Lord Zouch* is to open the minds of makers of the Act and the mischief which they intended to redress"⁹³

(d) Interpretation Section

This part normally defines key terms used in the legislation according to the context required.⁹⁴ These words used are interpreted or defined to meet the purpose and the goal in which the statute is enacted for example a statute may define a word animal to mean cat or dog. The definition given here is restrictive interpretation since the meaning of the word animal is wide but restricted only to dog and cat and also to avoid the repetition of the words cat and dog.⁹⁵ Section 3 of the Income Tax Act, Cap 332 define various terms as per the context required. The rationale behind is to restrict the meaning of those words or phrases used in realization of the mischief behind the enactment of the Income Tax Act and also the intention of the parliament.

(e) Marginal Notes

This refers to a brief abstract of the matter to which the section provides. The marginal notes are not part of the statute, not being considered or deliberated by the legislature.⁹⁶ It is nothing more than an abstract of the clause intended to draw attention and inserted merely to facilitate reference to the statute and promote the convenience of the reader in examining it. Marginal notes never control the construction of the statute.

In the case of *Chandler V DPP*⁹⁷ Lord Reid had this to say:-

"Side notes cannot be used as an aid to construction. They are mere catchwords and I have never heard of its being supposed in recent times that amendment to alter a side note could be proposed in either house of parliament. Side notes in the original Bill are inserted by the draftsman. So side notes cannot be enacted in the same way as the long title or any part of the body of the Act."

93 See also *Income Tax Commissioner v Persel* (1981) AC 531 at p542, *Commissioner General of Lands v. Oniru* (1961) 2 NLR 72.

94 A. Burrows., *English Private Law*, Oxford University Press, (3rd Ed.), United Kingdom, 2013, p.12.

95 V.C.R.A. Crabbe, *Understanding Statutes*, Cavendish Publishing Limited, London, 1994, p.67.

96 H.C. Black., *Handbook on the Construction and Interpretation of the Law*, The Law book Exchange Limited, New Jersey, 2008. p.184.

97 [1962] UKHL 2.

Section 26(2) of the Interpretation of laws Act⁹⁸ provides that marginal notes or footnote to a written law notwithstanding a heading to a section, regulation, rule, by-law or clause of a written law shall not be part of written law. The implication of this section is that marginal notes are not part of the statutes in Tanzania.

(f) Schedules

The Acts of parliament often contain one or more schedules. They are always placed at the end of the statute and are usually used for prescribing forms, furnishing illustrations, listing repeals effected in the Act, and setting out transitional provisions.⁹⁹ Schedules cannot be regarded as altering the ordinary meaning of words used in the Act but that they may be considered in cases of ambiguity¹⁰⁰ or uncertainty about one of the sections in the Act itself.¹⁰¹

2.4.2 Extrinsic Aids

This refers to materials or aids which are found outside the statute.¹⁰² The court normally makes reference to these aids in the process of interpretation of statutes where relevant and necessary. These aids are not binding to the court however are only persuasive in the process of interpretation of relevant sections of the law.

(a) Historical Background of the Statute

It is permissible to invoke the historical setting of a statute as an aid to the interpretation of ambiguous or unclear provisions. The circumstances that may be taken into consideration are those that the courts may take judicial notice of rather than where evidence of historical circumstances is required to be led.¹⁰³ The circumstances must be such that the court can say that they are matters of general knowledge.

For the purpose of interpretation of revenue laws, each statute is having the historical background for its enactment, therefore, when the court or the tax authority is interpreting such a particular statute regard should be given to the circumstances that led to such enactment so as to achieve the objective or goal of the a particular statute.

98 Cap 1.

99 R.Ward and A.Akhtar., *Walker and Walkers English Legal System*(11th Ed), Oxford University Press, New York,2011, p.61.

100 Ibid.,

101 J.Hill., *A Practical Guide to Mooting*, Palgrave Macmillan, New York, 2009, p.53.

102 A. Govindjee et al., *Fresh Perspective: Commercial Law 2*, Lynn Koch, South Africa,2007,p.6.

103 L.Madhuku., *An Introduction to Zimbabwean Law*, Weaver Press, Harare, 2010,p.174.

(b) Dictionaries and Law Books

Dictionaries and law books can be of guidance in interpretation of statutes especially where there is no judicial guidance or authority over the matter in question. The Dictionaries can be consulted to find out the meaning of a particular word or phrase used in the statute. The court also can make reference to credible text books where relevant in interpreting a particular provision of the law in question.

In the case of *Commissioner of Income Tax v. Binoy Kumar Sahas Roy*,¹⁰⁴ the Supreme court stated that it is for the court to interpret the statute as best as it may. In so doing the courts may have no doubt in assisting themselves in the discharge of their duty by any literary help they can find, including of course the consultation of standard authors and reference to well known authoritative dictionaries, though dictionaries are not to be taken as authoritative exponents of the meaning of the words in Acts of Parliament, but it is a well known rule of courts of law that words should be taken in their ordinary sense or in common parlance.

In another case of *Bolani Ores Ltd v. State of Orissa*,¹⁰⁵ the Supreme Court observed that the shade of meaning of a word, its different connotations and collocations which one finds in a dictionary does not relieve one of the responsibilities of having to make ultimate choice of selecting the right meaning. One chooses that meaning which is most apt in the context, color, and diction in which the word is used.

(c) Statute in Pari Materia

This refers to Acts relating to the same subject matter, the same person or thing or the same class of persons or things or that relates to the same scheme of law.¹⁰⁶ The principle of interpretation is that an Act must be read as whole permitting the grouping of statutes relating to the same subject matter and their comparison as aid of construction. The courts are of the view that statutes in *pari materia* though made separately at different times, even expired and not referring to each other, they should be taken and construed together as one system and as explanatory to each other,¹⁰⁷ however, it must be kept in minds that each statutory provision has to be construed on its own language unless the provision is ambiguous and needs explanation from the general scheme of legislation like statutes in *pari materia*.¹⁰⁸

104 AIR 1957 SC 44.

105 AIR 1975 SC 17.

106 A.G v. HRH Prince Ernest Augustus of Hanover, (1957) 1 ALL ER 49 (HL).

107 J.K Steel Ltd v. Union of India. AIR 1970 SC 1173.

108 State of Punjab v. Okara Grain Buyers Syndicate Ltd, AIR 1964, SC 669.

This aid of interpretation can be modified to suit the context of interpretation by the court since the presumption is that the parliament while enacting a law has in contemplation the existing statutes on the same subject matter and the current law is made with reference to existing statutes.

As for interpretation in reference to statutes in *pari materia*, consideration can be given also to foreign legislation. In the case of *Sterling General Insurance Company Ltd v. Planters Airways Pvt Ltd*,¹⁰⁹ the Supreme Court of India held that where there is no decision of Indian High Courts or Supreme Court then interpretation of foreign court on provisions *pari materia* with our statutory provision will be relevant.

(d) Tax Treaties

The majority of these treaties are based in large part on the United Nations Model Double Taxation Convention between Developed and Developing Countries,¹¹⁰ and the Organization for Economic Co-operation and Development Model Tax Convention on Income and on Capital.¹¹¹ These treaties provide a brief introduction to the basic aspects of tax treaties and also other issues such as the types of treaties dealing with tax matters, as well as the legal nature, purposes and interpretation of treaties, rather than on their substantive provisions. These model laws are relevant in interpretation of tax statutes since the court or the tax authority can make reference to them when there is ambiguity in particular provisions of the tax statutes which need to be interpreted for the purpose of resolving the matter in question. In Tanzania tax agreements are part of the tax law and in case of conflict between an article in the agreement and the section in the domestic law, the article prevails or takes precedent over the provisions of the statutes.¹¹²

(e) Hansard and Finance Minister's Speech

Hansard¹¹³ can be used as one of the aids when interpreting statutes subject to certain qualifications. In the case of *Pepper (Inspector of Taxes) v Hart*¹¹⁴ the House of Lords held that Hansard can be used when interpreting statutes as the same will throw light on the parliamentary intention and purpose.

¹⁰⁹ AIR 1975 SC 515.

¹¹⁰ United Nations, Department of Economic and Social Affairs, United Nations Model Double Taxation Convention between Developed and Developing Countries (New York: United Nations, 2011).

¹¹¹ Organization for Economic Co-operation and Development, Model Tax Convention on Income and Capital (Paris: OECD, 2014).

¹¹² Section 7(1) of the Tax Administration Act, Act No.10 of 2015.

¹¹³ It is an official report of the proceedings and debates of the parliament. Named after Thomas Curson Hansard 1752-1828 and his descendants, who compiled the report. until 1889 (Collins English Dictionary, 12th Edition 2014).

¹¹⁴ [1992] UKL 3.

However, in the case of *Thet v DPP*¹¹⁵ the court observed that harsard should not be called in aid of criminal prosecution as it could lead to a situation in which a person was made criminally liable not on the basis of the words in a statute but rather on the basis of supporting material that extended the ambit of liability in the nature.

The speech of the Minister or the mover of the Bill can be taken into consideration to ascertain the legislative intent or the purpose behind the legislation.¹¹⁶ However, in the absence of ambiguity in a provision, the Minister's speech can not be used as an aid to the interpretation of the statute.¹¹⁷ During the debate in the parliament about the passing of the Bill the minister's responses to question asked by the members of parliament are not binding on the court when interpreting a particular provision of the statute.¹¹⁸

(f) Official Reports

The court can make reference to credible reports when interpreting a provision of a statute in question. The reports may include reports that preceded the Act which identified the defects in the law before the making of a new legislation.¹¹⁹ These reports may be relevant in assisting the court to realize the mischief behind the enactment of a particular legislation or assisting to resolve interpretation of ambiguous provisions. In Tanzania there are various institutions which normally prepare credible reports on various legal matters for example The Law Reform Commission Reports, The Commission for Human Rights and Good Governance reports, etc.

2.4.3 Rules Governing Interpretation of Tax Statutes

There is no strict rule of law that tells judges which of the methods to use and therefore the choice is left to an individual judge. Since there are several rules governing the interpretation of statutes, it is for the court to select the most appropriate rule to aid the understanding of a particular provision.¹²⁰ Some approaches have been more prominent than others at different points in history but there has never been any compulsion as to how judges tackle issues of statutory interpretation.¹²¹ A person opting a certain rule or approach of interpretation may be creative in addressing the court that the proposed interpretation has some logical basis and therefore credible enough to be employed in interpreting a particular section or provisions of the statute in question.

115 [2006] All ER (D) 09(Nov).

116 Kerala SIDC v CIT 259 ITR 51(SC).

117 Escort v.Uol 189 ITR 81.

118 Builders Association v.Uol 209 ITR 877(SC).

119 Keith v Texaco 1977,SLT(Lands Tr), 16.

120 Muddeereswara v.CIT 204 ITR 550.

121 J.Hill., *A Practical Guide to Mooting*, Palgrave Macmillan, New York, 2009, p.55-56.

However, in the case of *Thet v DPP*¹¹⁵ the court observed that harsard should not be called in aid of criminal prosecution as it could lead to a situation in which a person was made criminally liable not on the basis of the words in a statute but rather on the basis of supporting material that extended the ambit of liability in the nature.

The speech of the Minister or the mover of the Bill can be taken into consideration to ascertain the legislative intent or the purpose behind the legislation.¹¹⁶ However, in the absence of ambiguity in a provision, the Minister's speech can not be used as an aid to the interpretation of the statute.¹¹⁷ During the debate in the parliament about the passing of the Bill the minister's responses to question asked by the members of parliament are not binding on the court when interpreting a particular provision of the statute.¹¹⁸

(f) Official Reports

The court can make reference to credible reports when interpreting a provision of a statute in question. The reports may include reports that preceded the Act which identified the defects in the law before the making of a new legislation.¹¹⁹ These reports may be relevant in assisting the court to realize the mischief behind the enactment of a particular legislation or assisting to resolve interpretation of ambiguous provisions. In Tanzania there are various institutions which normally prepare credible reports on various legal matters for example The Law Reform Commission Reports, The Commission for Human Rights and Good Governance reports, etc.

2.4.3 Rules Governing Interpretation of Tax Statutes

There is no strict rule of law that tells judges which of the methods to use and therefore the choice is left to an individual judge. Since there are several rules governing the interpretation of statutes, it is for the court to select the most appropriate rule to aid the understanding of a particular provision.¹²⁰ Some approaches have been more prominent than others at different points in history but there has never been any compulsion as to how judges tackle issues of statutory interpretation.¹²¹ A person opting a certain rule or approach of interpretation may be creative in addressing the court that the proposed interpretation has some logical basis and therefore credible enough to be employed in interpreting a particular section or provisions of the statue in question.

115 [2006] All ER (D) 09(Nov).

116 Kerala SIDC v CIT 259 ITR 51(SC).

117 Escort v.Uol 189 ITR 81.

118 Builders Association v.Uol 209 ITR 877(SC).

119 Keith v Texaco 1977,SLT(Lands Tr), 16.

120 Muddeereswara v.CIT 204 ITR 550.

121 J.Hill., *A Practical Guide to Mooting*, Palgrave Macmillan, New York, 2009, p.55-56.

The following are the rules:-

(a) **The Strict Rule**

This rule provides that tax statutes should be construed or interpreted in a strict manner without adding words or reducing words from the section or provision of the law imposing a particular tax or charge or fee. This implies that the words or phrases used in the statute should be given their plain meaning. The court should consider their plain, ordinary and everyday meaning of the word or the phrase used. The court in this rule appears to be recognizing their limitations by following the wishes of parliament as expressed in the words of the legislation under consideration.¹²² It is possible to reconcile the use of plain rule and the golden rule by saying that the golden rule can be used only where there are two or more literal meanings or where use of literal rule would lead to absurdity.¹²³ In most cases even where literal rule is used the court will be applying what it deems to be a literal meaning even though other meaning exist.

In the case of *Cape Brandy Syndicate v. IRC*¹²⁴ Rowlatt J stated that:-

"In a taxing statute, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."¹²⁵

Also in the case of *Goodyear v. State of Haryana*¹²⁶ the court held that a taxing statute cannot be construed by making assumptions and presumptions.

Strict rule has been also reflected in the case of *Commissioner General v. Pan African Energy Tanzania Limited*¹²⁷ where the Court of Appeal held that:-

"That is actually what took place but with respect to the learned advocates for the appellant, we do not think that they have grasped the real meaning of section 69(i)(i) of the Income Tax Act. The section is clear that income tax chargeable for service fee received for services rendered in Tanzania.....the Court is bound to interpret the law in its true perspective."

122 G.Slander and D.Kelly., **The English Legal System**(10th ed), Routledge Cavendish, New York, 2009, p.82.

123 F.Cownie et al., **English Legal System in Context**, United Kingdom, Oxford University Press, 2013, p.108.

124 1921 1KB 64. This position has been upheld also in the case of *Commissioner of Income Tax v. Doaba Cooperative Sugar Mills Ltd* (1998) 230 ITR 774(P& H).

125 See also the case of *Geita Gold Mining Limited v. The Commissioner General Tanzania Revenue Authority*, Tax Appeal No.4 of 2012(TRAT).

126 188 ITR 402 (SC).

127 Civil Appeal No.146 of 2015. The strict has been also reflected in other cases like in the case of *Hon. Attorney General and the Board of Trustees of PPF v Nasoro Athunaman Gogo and Sessy William*, Consolidated Appeal No.105 and 81 of 2006.

Further, in the case of *Caminetti V. United States*,¹²⁸ the court categorically ruled that:-

"It is elementary that the meaning of a statute must in the first instance be sought in the language which the act is framed, and if it is plain..... the sole function of the court is to enforce it according to its terms."

In *Republic Versus Mwesige Geoffrey And Another*,¹²⁹ the Court ruled that when the words of a statute are unambiguous judicial inquiry is complete, there is no need for interpolations, lest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation. This is because courts must presume that a legislature says in a statute what it means and means in a statute what it says (*Connecticut Nat'l Bank V Germain*, 112 S. Ct 1146, 1149 (1992)).

In the case of *Duport Steel v Sirs*¹³⁰ Lord Diplock observed that:-

"Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give meaning because they consider consequences for doing so would be inexpedient or even unjust or immoral."

Further, in the case of *Bp Tanzania Versus the Commissioner General of the Tanzania Revenue Authority*¹³¹, in citing the case of *Consumer Products Safety Commission Et. Al v. Gte Sylvania, Inc. Et. Al* 227 U.S. 102 (1980):-

"The Court stated that with the familiar canon of statutory construction the starting point for interpreting the statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. If a statute's language is plain and clear the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."

Further in the case of *North Mara Gold Mine Limited v. Commissioner General (TRA)*¹³², the court pointed out as follows:-

- (i) Tax statutes are clearly in derogation of personal rights and property interests and are therefore, subject to strict construction, and any ambiguity must be resolved against imposition of the tax (*Billings V Us*, 232 Us 261).

128 242 U.S. 470 (1917).

129 Criminal Appeal No. 355 of 2014.

130 [1980] 1 All ER 529.

131 Civil Appeal No. 125 of 2015 (CA).

132 Civil Appeal No. 78 of 2015 (CA).

- (ii) If the strict interpretation of a taxing statute is likely to lead to a manifest absurdity, then the golden rule of construction implies that the meaning of the words should be so effected that such an absurdity is avoided, otherwise the literal rule has precedence over the golden rule (*See Grey V Oearsib (1857) 6 Hl 61.*)

For the purpose of charging tax especially under section 4 of the Income Tax Act Cap 332 of 2004, strict rule is applicable since a person must be brought within the ambit of the section for the purpose of tax liability. This implies that if a person cannot be placed within the ambit of section 4 of Cap 332 he cannot be subjected to tax or a particular transaction cannot be subject to tax.

This rule is criticized by a number of scholars since it does not favor liberal construction of statutes and also does not consider the intention of parliament during the interpretation of the statutes.

(b) The Golden Rule

This rule requires the court to apply the plain meaning of the words in a statute and correct any absurdity of injustice arising out of such interpretation which violates the intention of the legislature.

This rule was formulated in the case of *Beck v. Smith*¹³³ but was also reiterated in *Gray v Pearson* by Lord Wensleydale¹³⁴ thus:-

“.....the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistent with the rest of the instrument in which case the grammatical and ordinary sense of the word may be modified so as to narrow the absurdity and inconsistency but not further.”

The golden rule can only be invoked when there is internal disharmony in the statute. This rule allows the departure from the literal rule when the application of the statutory words in the ordinary sense would be repugnant to or inconsistent with some of the other provisions in the statute or even when it would lead to what the court considers to be absurdity. The golden rule seems to apply in three types of cases¹³⁵:-

- (i) Where alternative interpretations are possible, the court should choose the one that will avoid absurdity.
- (ii) A statutory provision may be amended by interpretation to prevent it being unintelligible, totally unreasonable, and unworkable or totally irreconcilable with the rest of the statute.

133 50 ER 724.

134 (1964) 6 HCL 106.

135 Ijaiye, op.cit., p 54-55.

- (iii) A statute may be read against the background of presumptions and general principles, which may be used both to qualify it and to extend it beyond its words.

In the case of *S versus De Abreu*,¹³⁶ the accused was charged with and convicted of contravening the statutory provision contained in the Arms and Ammunition Act, 75 of 1969. The provision required a license for the possession of a firearms in South Africa. De Abreu was travelling from Botswana to Portugal and had to spend a few hours at Johannesburg airport in the transit lounge before catching his connecting flight. In his Luggage, he had two firearms. He was not a South African citizen and he had no intention of staying in South Africa except for a few hours while waiting for his next flight.

On appeal, the court using the golden rule found that it was absurd that a person in the position of De Abreu need a license to possess a firearm in South Africa. The literal meaning of the statute was therefore disregarded and the conviction was set aside.

(c) The Mischief Rule

This rule focuses on the circumstances leading to the provision in the statute and the mischief the legislature wanted to avoid or suppress. If the facts of a matter don't amount to the mischief that the statute is aiming at, then the statute will not apply. The classic formulation of the mischief rule appears in the 1584 English case of *Heydons (3 COREP 7A)*¹³⁷. It was resolved that for true interpretation of all statutes in general (be the penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:-

- (i) What was the common law before the making of the Act?
- (ii) What was the mischief and defect for which the common law did not provide?
- (iii) What remedy the parliament hath resolved and appointed to cure the disease?
- (iv) The true reason of the remedy and then the office of the judge is always to make such construction as shall suppress the mischief and advance the remedy.

In the case of *R versus Chitsa*¹³⁸, the accused had smashed some windows in a hostel with a club. He was convicted of throwing or propelling or preparing to throw or propel any an article or thing likely to cause damage or injury at any building or structure.

136 1981(r) SA 417(T).

137 Madhuku, op.cit., p.151.

138 1966(2) SA 34 (R).

On review, the court applied the mischief rule. The Court concluded that the mischief that the legislature wanted to prevent was throwing of stones or articles or the propulsion of stones or article from catapult or sling. This definition did not include striking with a club. The conviction was set aside, although the High court did note that the Attorney General could re-open the case and charge the accused with malicious injury to property.

For the purpose of interpretation of tax statutes among other things the mischief rule is relevant in interpretation of provisions governing tax evasion and tax avoidance. The court should consider the mischief behind the enactment of these provisions for the purpose of making sure the goal and objective of collecting revenue is met by suppressing tax avoidance techniques which can be employed by different tax payers in reducing or escaping their tax liability imposed by the law.

(d) The Ejusdem Generis Rule

It is Latin for "of the same type". This rule provides that where particular words describing a category or genus of persons or things are followed by general word, then the general words will be confined to persons, or things of the same class as the particular words.

In the case of *Powell v. Kempton Park Race Course*,¹³⁹ the court had to decide whether a place within a racecourse known as Tattersall's Ring was covered by the words "other place" in the phrase "house, office, room or other place". The Court decided it did not because the words house, office, room created a genus (type) of indoor places within which a racecourse as it was outdoors did not fall.

In another case of *S v. Kohler*,¹⁴⁰ which was an appeal against the conviction by a magistrate court, Kohler was convicted of keeping a peacock within the Heidelberg municipal area. The Municipal regulation did not allow the keeping of any fowl, duck, goose, turkey, guinea fowl, partridge, pheasant, pigeon and other bird in that area without permit. The court referred to the dictionary which defined peacock as chicken like decorative bird. The court held that a peacock was a species of the genus and dismissed kohler's appeal.

(e) Expressio Unius Est Exclusio Alterius Rule

This is Latin for "the expression of the one is the exclusion of the other". The rule provides that the express mention of one thing or more items or things of particular class may be taken as tacitly excluding others of the same class which are not mentioned.

139 [1897] 2 QB 242.

140 1979 1 SA 1(T).

CHAPTER THREE

THE OVERVIEW OF THE TAX SYSTEM AND IMPOSITION OF INCOME TAX IN TANZANIA

3.1 Introduction

This chapter addresses the criteria for determination of the tax liability of a person, rules governing the imposition of income, the principles and procedures thereto governing the calculation of the chargeable income of the person.

3.2 Criteria for Determination of Tax Liability of a Person

There are established rules or principles or justifications governing the tax liability of a person. In order to be in a position to justify that a particular person is subject to tax, one or more of the following criterion must be established as a basis for taxation:-

3.2.1 Nationality/Citizenship of a Person

This is a basis of taxation used by some countries to impose tax on their citizens. In countries where this basis of taxation is adopted, nationality of individuals or citizenship is used to determine whether he or she is a resident for tax purposes.¹⁶⁵ Whether a person is a citizen or a national of a particular country is determined under the domestic law of the relevant country. The best known example of a country that uses citizenship as a basis of taxation is the United States of America. In US, not only is the world-wide income of US residents is taxed but also that of non-resident citizens.¹⁶⁶

The difference is drawn between domestic tax payers (US citizens, residents, Domestic Corporation, partnerships and trusts) and other tax payers, that in line with international precedent, domestic tax payers are taxed on their worldwide income and other taxpayers on US-sourced income.¹⁶⁷ The justification for taxing domestic taxpayers is to be found in their personal connection to the US (i.e residence), non-resident US Citizens are included in this category. The justification for taxing other tax payers on their US Source of income is to be found in their territorial connection to the US (i.e Source).¹⁶⁸

165 L.Olivier, M.Honiball., *International: A South African Perspective*(5th ed.),Siber Ink, South Africa, 2011 Tax p.47.

166 Ibid.,

167 Ibid.,

168 Ibid.,

The right to tax its citizens on their worldwide income, irrespective of whether they actually live in US or in another country was upheld by the US Supreme Court in the case of *Cook v. Tai*,¹⁶⁹ on the basis that the US provides benefits to its citizens irrespective of where they live. It was held that imposing tax on taxpayers from property situated outside the US is not unconstitutional.

In Tanzania this basis is also applicable but with limitations as provided under section 6 of the Income Tax Act that the chargeable income of a person for a year of income from any employment, business or investment shall be in the case of a resident person, the person's income from employment, business or investment for the year of income irrespective of the source of the income; and in the case of a non-resident person, the person's income from the employment, business or investment for the year of income, but only to the extent that the income has a source in the United Republic.

3.2.2 Domicile of a Person

In the case of *Waicker v. Hume*,¹⁷⁰ Lord Chelmsford defined domicile as:-

".....That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special or temporary purpose but with a present intention of making it his permanent home..."

Also in the case of *Aniceto G. Saludo, Jr v. Merican Express International, Inc., And/Or Ian T. Fish And Dominic Mascrinas*,¹⁷¹ The Supreme Court held that:-

"There is a difference between domicile and residence. Residence is used to indicate a place of abode, whether permanent or temporary; domicile denotes a fixed permanent residence to which when absent, one has the intention of returning. A man may have a residence in one place and a domicile in another. Residence is not domicile, but domicile is residence coupled with intention to remain for an unlimited time. A man can have one domicile, but he may have numerous places of residence."

Generally, domicile refers to the country you regard as your natural home. Domicile can be of origin, choice or dependency. Domicile is more used in reference to person's rights, duties and obligations. It is a combination of two factors namely; residence and intent to remain. A person can have multiple residences but only one domicile. The most common type of domicile is domicile of origin¹⁷² i.e the country that your fathers domiciled and where you either live or intend to return to at some point in future.

169 265 US 49(1924).

170 [1858] 7 HL 124.

171 G.R. No. 159507, April 19, 2006.

172 Unlike nationality no person can be without a domicile even if stateless (UDNY V UDNY, 1869 LR 1 HL 441.); Domicile can be distinguished from nationality in that one can have a dual nationality but not more than one domicile at a time as it was held in the case of ODIASE V ODIASE (1965 NNLR,196) ; In BELL V KENNEDY(1868 L.R 1 SC & DIV 307), per Lord Westbury- The domicile of origin adheres until a new domicile is acquired.

For the purpose of tax liability, domicile can be used as a basis of taxation¹⁷³ in respect of inheritance tax on the entire estates wherever it is in the world, income tax and capital gains tax. This basis is also applicable in Tanzania and it is reflected under residence basis especially when determining residence of persons by considering the aspect of having a permanent home in Tanzania. This implies that some taxpayers who are having permanent homes in Tanzania may consider it as their domicile, however, this may not be the case especially where a tax payer is having many residences and consider one as his domicile in another tax jurisdiction not necessarily the United Republic of Tanzania.

3.2.3 Taxing Right or Tax Jurisdiction

The taxing right of a state can be justified if there is a sufficient link between the state and a taxpayer. There are two distinct types of such links, first, the taxable occurrence (an activity, income, property) is located within the territory of the sovereign, second, the taxable person (the taxpayer) belongs to the sovereign (citizenship, domicile).¹⁷⁴ The two types of link form the conceptual basis of the principles of source and residence, respectively. Under international tax law, whose role is to allocate taxing rights among states, the source principle considers state's connection with the activities and the assets subjected to tax, whereas the residence principle refers to the concepts of an economic link between the taxpayer and the state levying the tax. Thus, international tax law is based on the concept of sufficient nexus of a state with the item subject to tax.

3.2.4 Residence of a Person

Section 3 of the Income Tax, Cap 332 define a person to mean an individual or entity. The same section defines entity to mean partnership, trust and corporation. The term residence has been defined under Section 3 of the Income Tax Act as having the meaning as provided or ascribed to it under section 66 of the ITA 2004 as amended. The section divide categories of persons for the purpose of determination of their residence as follows:-

(a) Residence of an Individual

Section 66(1) of the Income Tax Act provides for rules or principles governing residence of an individual for the purpose of tax liability as follows:-

- (a) An individual is a resident in the United Republic for a year of income if the individual has a permanent home in the United Republic and is present during any part of the year of income.

173 R.L.Doernberg., *Electronic Commerce and International Taxation*, Kluwer Law International, London, 1999, p.12.

174 Michael L.et al., *Value Added Tax and Direct Taxation: Similarities and Differences*, IBFD, Netherlands, 2009, p 1039.

The year of income of a person is provided under section 20 of the Income Tax Act¹⁷⁵ to mean the calendar year or as approved by the Commissioner General upon application made by an entity. This implies that the calendar year runs from 1st January to 31st December of the same year or as approved by the Commissioner General. The key elements for the application of this test are permanent home and being present within the tax jurisdiction of the United Republic. The duration of stay is not considered in calculating the residence of an individual, the mere fact that an individual is having a permanent home and is present during any part of the year of income suffice to establish that the individual is resident for the purpose of tax liability.

Illustration

Mr. T who maintains a permanent home in Tanzania was abroad between 1.1.2010 and 8.12.2011, came back to Tanzania between 8.12.2011 and 25.12.2011. Since he maintains a permanent home in Tanzania and was present for the period between 8.12.2011 and 25.12.2011, Mr. T will be regarded resident in Tanzania" for the year of income 2011. During the year 2011 Mr. T was physically present in Tanzania between 8.12.2011 and 25.12.2011 i.e. for 17 days only. Mr. T will be treated as resident in the United Republic for the year of income 2011 since he has a permanent home in Tanzania. His residential status is not affected by whether or not he is a resident elsewhere during the year of income.¹⁷⁶

- (b) An individual is resident in the United Republic for a year of income if the individual is present in the United Republic during the year of income for a period or period amounting in aggregate to 183 days or more.

Illustration

Mr. A who was living abroad, returned to Tanzania on 11.3.2011 and again left Tanzania on 31.01.2012. Since his stay in Tanzania during the year 2011 was for over 183 days, he will be regarded resident in the United Republic during the year of income 2011.¹⁷⁷

- (c) An individual is resident in the United Republic for a year of income if the individual is present in the United Republic during the year of income and in each of the two preceding years of income for periods averaging more than 122 days in each such year of income.

¹⁷⁵ Cap 332 of 2004.

¹⁷⁶ Practice Note on Residence, Scope of Income Tax Liability and Source of Income And Loss, Practice Note No. 10/2013.

¹⁷⁷ Practice Note on Residence, Scope of Income Tax Liability and Source of Income And Loss, Practice Note No. 10/2013.

Illustration

Mr. B does not maintain a permanent home in Tanzania. He came to Tanzania on 1.2.2012 and left on 15.8.2012 i.e after staying for over 122 days. Prior to 1.02.2012 he was in Tanzania in years 2010 and 2011 for 126 and 123 days respectively. Mr. T was present in Tanzania for more than 122 days in 2012 and the two preceding years i.e years 2010 and 2011. Therefore, is treated as being "resident in the United Republic" for the year 2012 since he was present in the United Republic for the year of income and in each of the two preceding years of income for periods averaging more than 122 days in each such year of income.¹⁷⁸

The average is calculated by adding the number of days in each year of income and divide by three (3). If the average is more than 122 days, then the person will be regarded as resident in the United Republic for the purpose of tax liability. If the average is less than 122 days the person will be regarded as non-resident for the purpose of year of income.

- (d) An individual is resident in the United Republic for a year of income if the individual is an employee or an official of the Government of the United Republic posted abroad during the year of income.

Illustration 1

Mr. C is employed by the Tanzania Government and has been posted at the Tanzania Embassy in Geneva, Switzerland since 1.2.2011. Mr. C did not come to Tanzania during the year of income 2012. Since Mr. C is an official of the Government of the United Republic posted abroad he is treated as "resident in the United Republic" during the year of income 2012.¹⁷⁹

Illustration 2

Mr. Amani is employed by TBA company limited and has been sent for special tasks in South Africa since 2016. Mr. Amani did not come to Tanzania during the year of income in 2017. Since Mr. Amani is not a government official regardless of his nationality he is considered a non-resident in Tanzania during the year 2017.

Generally, the chargeable income of a person is determined on the basis of the residential status of the person as provided for under Section 6 of the Income Tax Act.

178 Practice Note on Residence, Scope of Income Tax Liability and Source of Income and Loss, Practice Note No. 10/2013.

179 Practice Note on Residence, Scope of Income Tax Liability and Source of Income and Loss, Practice Note No. 10/2013.

An individual who satisfies any of the conditions mentioned in items (a) to (d) above is treated as resident in the United Republic for a year of income. An individual who does not satisfy any of the above conditions is treated as non-resident for a year of income.

(b) Residence of Corporation

Section 66(4) of the Income Tax Act, Cap 332 of 2004 as amended provides the rules governing residence of a corporations as follows:-

- (a) A corporation is a resident corporation for a year of income if it is incorporated or formed under the laws of the United Republic.

In Tanzania most corporations are incorporated or formed under the Companies Act,¹⁸⁰ by following the appropriate procedures among other things preparation of Memorandum and Articles of Association which are submitted to BRELA for registration purpose. Upon registration, the entity becomes a corporate body separate from its members. The corporation is regarded as a resident corporation upon registration in Tanzania.

- (b) A corporation is a resident corporation for a year of income if at any time during the year of income the management and control of the affairs of the corporation are exercised in the United Republic.

The focus of this condition is on the management and the control of the affairs of the corporations. This implies that if the corporation is not registered in Tanzania but the management and control of the affairs of the corporation is done in Tanzania, that corporation is a resident corporation for the purpose of tax liability.

The two conditions were tested in the case of *African Barrick Gold Mine Plc v. Commissioner General*¹⁸¹, and the tribunal stated as follows:-

"Applying the purposive method of interpretation, which we have just endorsed, we think it is quite in order that the word "formed" in section 66(4)(a) of the Income Tax Act, 2004 can be construed to include the registration of the company under the Act, that means the issuance of the Certificate of Compliance under section 453 of the Companies Act, would also be included. The date of that registration is the date of the certificate. Hence, even though it does not amount to the incorporation (or re-incorporation, for that matter) of the company in Tanzania, it is correct to conclude that registration amounted to the company's formation in Tanzania as a foreign company."

180 Cop 212 of 2002.

181 Tax Appeal No.16 of 2015(TRAT).

The Tribunal further stated that:-

"We agree with the appellant's position on the point that exercising management and control means supervision of the company's operations and the making of management decisions on a continual basis. That position is supported by the Organization for Economic Co-operation and Development (OECD Model Tax Convention) and the UN Model Convention on Double Taxation. The two institutions suggest that when examining where the management of a company is exercised, one should look at the place of effective management, namely, the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made..... In our view, the mere fact that the company's Board of Directors occasionally meets in Tanzania or that they have a resident member of senior management in Dar es Salaam does not necessarily mean that its management is exercised in Tanzania. However, in all fairness, that was not the only criterion the Board used in arriving at its conclusions. We would quote its holding, which runs thus, the appellant counsel submitted that, the fact that the company conducted a meeting of the Board of Directors in 2011 is immaterial because other meetings were conducted in UK with due respect, we do not buy that idea. There is a lot of other independent activities in Tanzania... the appellant company recognizes Mr. Deo Mwanyika as being in the senior management team. He holds the position of the Vice President corporate affairs... and has a work force of 140 employees. (Emphasis added)."

Generally, where a corporation does not satisfy either of the above conditions is treated as a non-resident but it is not necessary for both conditions to be satisfied, one condition suffices to justify the residence of a corporation in the United Republic.

(c) Residence of a Partnership

Section 66(2) of the Income Tax Act provides that a partnership is a resident partnership for a year of income if at any time during the year of income any partner is a resident of the United Republic. This implies that the residence of a partnership is determined basing on the partners that if one partner is a resident in the United Republic, then a partnership is also a resident irrespective of whether other partners are outside the United Republic. A partnership that does not satisfy this condition for a year of income is treated as non-resident for the year of income.

(d) Residence of a Trust

Section 3 of Cap 332 defines trust to mean an arrangement under which a trustee holds assets but excludes a partnership and a corporation. Section 66(3) of the Income Tax provides tests for residence of a trust as follows:-

- (i) A trust is a resident trust for a year of income if it was established in the United Republic; i.e. incorporated or formed under the laws of the United Republic.
- (ii) A trust is a resident trust for a year of income if at any time during the year of income, a trustee of the trust is a resident person.

- (iii) A trust is a resident trust for a year of income if at any time during the year of income a resident person directs or may direct senior managerial decisions of the trust, whether the direction is or may be made alone or jointly with other persons or directly or through one or more interposed entities.

Therefore, a trust that does not satisfy any of the above conditions is treated as non-resident.

Illustration 1

Mwambao Trust, which was incorporated in Tanzania on 02.03.2012, has four trustees. During the year 2012 only one trustee was a resident in Tanzania and the other three were non-resident. Since the Trust was formed in Tanzania, by registration under Tanzanian laws, and one of the trustees was residing in Tanzania during the year of income the Trust is treated as a resident trust for the year of income 2012.

Illustration 2

Mlima Trust was incorporated in Tanzania on 15.04.2012 with four foreign-based trustees who were not residents in Tanzania during the year of income 2012. In the absence of the trustees, the Chief Executive Officer, who was resident in Tanzania during the year of income, directed the affairs of the trust including making senior managerial decisions of the Trust. Since the trust was formed in Tanzania and a resident person, though not a trustee directed the trust, the trust is treated as a resident trust during the year of income 2012.

Illustration 3

Bara Trust was incorporated in Kenya in 2011 with three trustees who were all resident in Tanzania during the year 2012. The trust conducted business and its affairs were managed and controlled in Tanzania during the year of income. Since the trustees were resident and the trust was controlled and managed in the United Republic for the year 2012 hence the trust was resident during the year of income.

3.3 Imposition of Income Tax

Section 4 of the income Tax Act is a charging section which provide the rules governing imposition of the income tax. A person must be brought within the ambit of this section for the purpose of tax liability. The following are the charging rules governing tax liability of every person in the year of income:-

- (a) Income tax shall be charged and is payable for each year of income by every person who has total income for the year of income or is a corporation which has a perpetual unrelieved loss¹⁸² determined under Section 19 for the year of income and the previous three consecutive years of income.¹⁸³

Section 3 of the income Tax Act defines a person to mean natural person, partnership, trust and corporations. Therefore, whoever is having a total income in a calendar year, which runs from 1st January to 31st December of the same year or as approved by the Commissioner General upon application made is required to pay income tax.¹⁸⁴ The section also covers income earned by a corporation which has perpetual unrelieved loss as determined by section 19 of the Income Tax Act. The income tax payable by a corporation with perpetual unrelieved loss for three consecutive years of income under paragraph (a) of subsection (1) shall not apply to a corporation conducting agricultural business or engaged in the provision of health or education.

- (b) Income tax shall be charged and is payable for each year of income by every person who has a domestic permanent establishment that has repatriated income,¹⁸⁵ for the year of income.

Section 3 of the Income Tax defines permanent establishment to mean a place where a person carries on business and includes a place where a person is carrying on business through an agent, other than a general agent of independent status acting in the ordinary course of business as such; a place where a person has used or installed, or is using or installing substantial equipment or substantial machinery; and a place where a person is engaged in a construction, assembly or installation project for six months or more, including a place where a person is conducting supervisory activities in relation to such a project.

182 Unrelieved loss refers to amount of loss that has not been deducted in calculating a person's income under subsection (1) of section 19 or section 26(3) of the Income Tax Act.

183 Section 14 of the Finance Act, Act No.13 of 2008 and section 20 of Finance Act of 2012.

184 The income Tax Act provides that the income tax payable with respect to section 4(1)(a) by a resident individual who is not required to file a return of income under Section 92(a)(ii) (and who does not elect to file a return) shall be equal to the sum of the amounts to be withheld under section 81 by the individual's employer or employers from payments made to the individual during the year of income and the sum of installments paid by the person under section 90(1) with respect to gains realized during the year of income.

185 Refers to the process whereby earned profits or income by a person from a foreign country is transferred or taken back to his/her own country. This transfer or conversion is normally subject to special tax rules.

The income tax payable by a person with respect to section 4(1)(b) of the ITA 2004 shall be calculated by applying the rate of income tax mentioned in paragraph 3(3) of the First Schedule to the permanent establishment's repatriated income for the year of income as provided by the Income Tax Act Cap 332 of 2004.

- (c) Income tax shall be charged and is payable for each year of income by every person who receives a final withholding payment during the year of income.

Subject to section 86(4) of the Income Tax Act, the income tax payable by a person with respect to section 4(1) (c) of the ITA 2004 shall be the sum of the amounts calculated by applying the relevant rates of income tax determined under paragraph 4 of the First Schedule to the amount of each final withholding payment received by the person during the year of income.

3.4 Chargeable Income

Chargeable income refers to gross income or adjusted gross income minus any deductions or exemptions or relief allowed by the law. This include among other things income from business, income from employment and income from investment. Section 6 of the Income Tax Act provides for the rules governing the chargeable income of a person as follows:-

- (a) The chargeable income of a person for a year of income shall be in the case of a resident person, the person's income from employment, business or investment for the year of income irrespective of the source of the income.

This rule covers residents who are charged basing on worldwide system of taxation irrespective of their source of income. This implies that they pay tax on their domestic income and also foreign income basing on residence principle. The state is having economic connection as well as personal connection with the taxpayer, therefore, the state is vested with taxing right over the taxpayer and any transaction carried out by the tax payer within the tax jurisdiction of the state in question. The tax charged is unlimited since the taxpayer is charged irrespective of his/her source of income.

- (b) The chargeable income of a person for a year of income shall be in the case of a non-resident person, the person's income from employment, business or investment for the year of income, but only to the extent that the income has a source in the United Republic.

This rule in most cases applies to non-residents who are having the source of income in the United Republic. The state has connection with the source of income rather than the taxpayer since the state has prepared policy and

economic opportunities for the tax payer to be in a position to generate income, therefore, the state is vested with taxing right over the income earned by a non-resident. The principle which is used to impose tax on non-residents is source principle or territorial principle. The imposition of tax is limited to the income which has only the source in the United Republic and not otherwise.

- (c) The chargeable income of a person for a year of income shall be the income of a resident person without a permanent home in Tanzania and who at the end of the year of income has been a resident in the United Republic for two years or less in total during the whole of the individual's life. This rule covers an individual who at end of the year of income has been resident in the United Republic for two years or less in total during the whole of his life time. The individual will be treated as non-resident under section 6(1)(b) of the Income Tax Act for the purpose of tax liability.
- (d) The chargeable income of a person for a year of income shall be in the case of a resident person, the person's income from employment, business or investment and in case of a resident corporation which has perpetual unrelieved losses, the turnover¹⁸⁶ of such corporation for a year of income.

Generally, the chargeable income can be determined by considering the inclusions, exclusions and deductions which are allowed by the law.

186 This refers to amounts to be included in calculating the person's income without deductions (section 3 of the Income Tax Act, 2004).

CHAPTER FOUR

TAX AVOIDANCE AND TAX EVASION

4.1 Introduction

This chapter covers the meaning of tax avoidance and tax evasion, reasons for tax evasion and tax avoidance, methods of tax evasion and tax avoidance, tests for tax avoidance and solution for this problem.

4.2 Meaning of Tax Avoidance

Tax Avoidance is defined as an act of dodging tax without breaking the law.¹⁸⁷ This implies that a taxpayer arranges his financial activities in such a manner that they are within the four corners of the law but takes advantages of loopholes that exist in the tax law for reduction of tax liability.¹⁸⁸ This implies that a tax payer has complied with the letter of law but not the spirit behind the law. Examples of tax avoidance modes includes transfer pricing (invoice values), tax deferral plan, tax deductions, tax credits, tax havens, payments in kind, etc.

Tax avoidance has been defined also in the following cases as follows:-

In the case of *IRC v. Willoughby*,¹⁸⁹ Lord Nolan described tax avoidance as a course of action designed to conflict with or defeat the evident intention of parliament.

Further, in the case of *IRC v. Fishers Executors*,¹⁹⁰ Lord Summer stated that the subject is entitled to arrange his affairs as not to attract taxes imposed by the crown since there is nothing sinister in so arranging ones affairs as to keep taxes as low as possible.¹⁹¹

Lord Tomlin in the case of *Inland Revenue Commissioners ("IRC") v. Duke of Westminster*, (1936) AC. 1, stated that:-

"Every man is entitled, if he can, to order his affairs so as the tax attaching under the appropriate acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax."

187 K.K.Agrawal., *Direct Tax Planning and Management: Incorporating, Corporate Tax Planning, Business Tax Procedure and Management*, (5th, Ed,) Atlantic Publishers and Distributors (P) LTD, New Delhi, 2006. p.5.

188 Ibid.,

189 [1997] STC 995(HL).

190 [1926] AC 395.

191 CIR v Newman, 159 F2D 848(CIR.1947).

This principle came to be known as "*The Duke of Westminster Doctrine*", allowed for individuals and corporations to structure financial arrangements so as to minimize tax liability, as long as these structures are within the four corners of the black letter of the law.

Lord Browne-Wilkinson in *MacGuckian's* observed in relation to this principle citing *Pryce v. Monmouth shire Canal Railway Cos. (1879) 4 App. Cas. 197, 2002-203*; *Cape Brandy Syndicate v. IRC [1921] 1 K.B. 64 at 71*; and *IRC v. Plummer [1980] A.C. 896* as follows:-

"Under the influence of the Duke of Westminster doctrine, tax remained remarkably resistant to the new non formalist methods of interpretation. It was said that the taxpayer was entitled to stand on a literal construction of the words used regardless of the purpose of the statute.... Tax law was by and large left behind as some island of literal interpretation."

Lord Wilberforce in *W. T. Ramsay* did not stop there, he went on to state that the Duke of Westminster Doctrine did not compel the Court to look at documents or transactions in blinkers, isolated from the context in which they properly belonged. He concluded that:-

".... While the techniques of tax avoidance progress and are technically improved, the courts are not obliged to stand still. Such immobility must result in loss of tax.... To force the Courts to adopt, in relation to closely integrated situations, a step by step, dissecting, approach which the parties themselves may have negated would be a denial rather than an affirmation of the true judicial process.... "[Emphasis added].

Hence, Lord Wilberforce described the duty of the Court in tax avoidance schemes in the following words:-

"It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions intended to operate as such, it is the series or combination which may be regarded. "

Hence, the current position in England as expressed in *MacGuickan* appears to have harmonized the two approaches by retaining the Westminster Doctrine as a general rule but at the same time allowing the courts to adopt a parallel rule of statutory construction to unravel the true nature of a transaction, but only for the purpose of the relevant statute and to assess whether the transaction fell into the category of what the statute intended to tax.¹⁹²

Generally, tax avoidance has been described by reference to certain observable criteria and functional characteristics, which include:-

192 See also *Macniven v. Westmoreland Investments [2001] UKHL 6* and *Craven v. White [1988] 3 All ER 495*.

- (i) The Extent to which the transaction was influenced or actuated by the prescribed taxation purpose.¹⁹³
- (ii) Whether the transaction was artificial or contrived.¹⁹⁴
- (iii) Whether the transaction sought to exploit statutory loopholes or weaknesses.¹⁹⁵
- (iv) Whether the transaction lacks economic reality.¹⁹⁶

In Tanzania, tax avoidance was provided under section 35 of the Income Tax Act of 2004. This section has been repealed by section 116 of the Tax Administration Act.¹⁹⁷ Tax avoidance is now covered by section 8 of the Tax Administration Act which covers among other things schemes for obtaining undue tax benefits.

Section 3 of the TAA 2015 define tax benefits in relation to a person to mean a benefit earned by avoiding, reducing or postponing liability of that person; increasing a claim of the person for a refund of tax; preventing or obstructing collection of tax from the person; any other act for which the Commissioner General is of the opinion that it might results into the reduction of a person's tax liability.

Section 8(1) of the TAA 2015 as amended by the Finance Act 2017 provides that where the Commissioner General is satisfied that any scheme that has the effect of conferring tax benefits on any person was entered into or carried out solely or mainly for the purpose of obtaining that benefit by means or in a manner that would not normally be employed for bona fide business purpose or by means or in any manner of the creation of rights or obligation that would normally be created between persons dealing at arm's length the Commissioner General may determine the tax liability for any tax imposed by the law and its amount as if the scheme has not been entered into or carried out or in such manner as in the circumstances of the case, he considers appropriate for the prevention or diminution of the tax benefits sought to be obtained by the scheme.

Section 53 of the Finance Act, 2016 provides that where the Commissioner General, after making findings that in a particular area or locality within a local government authority area, lease agreement between landlords and tenants do not reflect authentic or actual transactional values, the Commissioner General

193 N.Orow., **General Anti-Avoidance Rules: A comparative International Analysis**, Bristol, 2000.

194 G.S.A., Wheatcroft., **The Attitude of the Legislature and the Courts to Tax Avoidance**, Modern Tax Review, 1955.

195 Y.Grbich, A.J., Bradbrook, K. Pose, **Revenue Law Cases and Materials**, Sydney, 1990.

196 Radcliffe Commission, **Royal Commission on the Taxation of Profits and Income**, Final Report, 1955.

197 Cap 438 of 2015.

shall publish in the Gazette predetermined minimum rental values for such locality or area based on actual average rental values obtained in the locality or area provided that such predetermined rental values shall only apply to properties considered to be of the same quality or standard and independent valuers were involved in advising the Commissioner General.

Therefore, the amendment made covering schemes for obtaining undue tax benefits under Section 8 of the TAA 2015 is broad when is compared with section 35 of the Income Tax Act 2004 which covered only tax avoidance arrangement.

4.3 Meaning of Tax Evasion

This refers to illegal means of evading or escaping the payment of taxes.¹⁹⁸ It implies that the taxpayer employs various illegal ways which are contrary to the revenue laws for the purpose of evading the tax liability. Examples of illegal means include concealing the income, claiming excessive expenditure, falsification of accounts, willful violation of rules.

In the case of *African Barrick Gold Mine Plc versus Commissioner General*,¹⁹⁹ the tribunal held as follows in describing the issue of tax evasion.

"The conclusion that can be drawn is that the explanation offered by ABG as the source of dividends, i.e., distributable reserves and IPO proceeds are far from being plausible. In the circumstances, it is fair to conclude that the respondent's argument that the transactions were simply a design created by the appellant aimed at tax evasion was justified. One also wonders as to how part of IPO proceeds, a one-off event, even if those proceeds were distributable as dividends (which in law they are not), could explain the payment of four-years, back-to-back dividends to the appellant's shareholders. Since ABG's only entities that carry on business anywhere in the world are the three Tanzanian gold-mining companies, ABG's only source of revenue that could create net profits or retained earnings would be the three Tanzanian companies (or one or more of them). While none of them was allegedly making any profits, and since the appellant has no other subsidiary anywhere in the world engaged in business, one is compelled to further conclude that at least one, if not more or all, of the appellant's three gold producing subsidiaries in Tanzania was making profit. We see no other plausible explanation. Ultimately, the fact that none of ABG's subsidiaries is declaring any profit that could provide its holding company with such huge net profits sufficient to distribute to its shareholders four years in a row is what in our respectful opinion constitutes the evidence of a sophisticated scheme of tax evasion. To borrow the words of Lord Browne-Wilkinson, this Tribunal cannot accept to be relegated to a mere spectator, mesmerized by the moves of the appellant's game, oblivious of the end result."

198 Agrawal, op.cit., p.8.

199 Tax Appeal No. 16 of 2015(TRAT).

The circumstances remind one of the wise words of Justice Benjamin Cardozo in *Re Rouss*, 116 N.E. 782 at 785, who stated:

"Consequences cannot alter statutes, but may help to fix their meaning." We are thus of the respectful view that the Board was entitled to go beyond the mere plain meaning of the provisions of section 66 (4) (a) of the Income Tax Act. The circumstances fully justified the application of the purposive approach rule in construction of tax statutes, as promulgated by Lord Wilberforce in *W. T. Ramsay* and more elaborately explained by Lord Browne-Wilkinson in *McGuckian*. Hence, by recognizing the scheme behind that ultimately enabled it to uncover the true source of the dividends that ABG was able to pay to its shareholders for four consecutive years, the Board took the correct view of the law."

The tax laws like Tax Administration Act, 2015 have pointed out these methods of tax evasion as offenses and provided the punishment therefore. This is reflected under different section such as sections 82-91 of the TAA 2015. Tax evasion methods are categorized as criminal offenses, however the law under Section 92 of the TAA 2015 allow the Commissioner General to compound an offence and order the person to pay a sum of money to be specified by the Commissioner General. The commissioner compounds an offence when a person admits in writing that he has committed the offence and accepts the proposed terms of compounding. The law provides that where the Commissioner General compounds an offence, a person whose offence is compounded shall not be liable for prosecution for that offence, however, if he refuses the offence to be compounded the person will face criminal charges as provided by Rule 102 of the Tax Administration (General) Regulations.²⁰⁰ The procedures for compounding an offence are provided under Rules 99-101 of GN 101 of 2016.

4.4 Effects of Tax Avoidance and Tax Evasion

The following are the effects of tax avoidance and tax evasion²⁰¹:-

- (i) Substantial loss of needed public revenue.
- (ii) It encourages generation of black money, thereby directly increasing the inflation.
- (iii) It results to increase in tax disputes.
- (iv) Revenue gain for tax avoiders and ultimately, an increasing tax burden falls on those tax payers not engaging in tax avoidance.
- (v) Increasing complexity in tax laws for the purpose countering tax avoidance mechanisms.
- (vi) Application of scarce resources to tax avoidance activities.

²⁰⁰ GN 101 of 2016.

²⁰¹ R.A.Tooma., *Legislation Against Tax Avoidance*, IBFD, Netherlands, 2008, p. 24-25.

- (vii) Taxpayers alter their employment and investment choices in order to take advantages of tax avoidance activities.
- (viii) Affect tax morale(values that individuals hold about paying their taxes). Where avoidance is perceived as being widespread, taxpayer morale may be expected to deteriorate as taxpayers feel less inclined to pay tax while they believe that other taxpayers are actively engaging in tax avoidance schemes.

4.5 Reasons for Tax Evasion and Avoidance

In order to develop effective mechanism of addressing the problem of tax evasion and tax avoidance it is important to understand the reasons for tax evasion and tax avoidance. They are as follows²⁰²:-

- (i) Low level of voluntary tax compliance. This may have been caused by the following:-
 - ❖ Low quality of the service in return for taxes.
 - ❖ Tax system and perception of fairness.
 - ❖ Low transparency and accountability of public institutions.
 - ❖ High level of corruption.
 - ❖ Lack of rule of law and weak fiscal jurisdiction.
- (ii) High compliance costs.²⁰³
- (iii) Weak enforcement of tax laws by the responsible authority.

The responsible authority is expected to enforce the tax laws by identifying the provisions which addresses the problem of tax evasion and avoidance in different revenue laws and apply them accordingly in line with the mischief behind and the intention of the parliament which pushed the enactment of those provisions. The capacity of the tax authority in terms of manpower and technology is important towards enforcement of tax laws since some of transactions are carried out in a very sophisticated way and hence become difficulty for a tax authority to detect tax avoidance and evasion for appropriate measures. If the tax institution is weak in terms of manpower and technology even the enforcement of revenue laws will be weak as well.

202 Deutsche Gesellschaft., **Addressing Tax Evasion and Tax Avoidance in Developing Countries**, ITC,2010,p.11.

203 This refers to costs incurred by the taxpayer to effect the payment of taxes or for meeting the statutory compliance requirements for such payment. This includes the value of taxpayer's time and resources used to facilitate the payment of tax or to comply with the statutory requirements. If these costs are high it will discourage compliance of the law, as result tax avoidance and tax evasion.

4.6 Methods of Tax Evasion

The following are the methods or mechanisms used by taxpayers to evade the payment of taxes as required by the law:-

4.6.1 Misreporting and Non-Declaration of Income

This is one of the mechanism which taxpayers uses to evade the payment of tax where a taxpayer opt to declare false or incorrect information to the tax authority in respect of his income or may opt not to declare at all his income for the purpose of tax liability.

Section 37(1) and 37(2) of the Tax Administration Act, 2015 requires an individual and entity to file return²⁰⁴ to the tax authority for the purpose of tax liability. The return filed shall **be complete and accurate** and must be signed by the person responsible. This implies that it is the requirement of the law that a taxpayer should not misreport his income or fail to declare his income since the law requires complete and accurate return. The Commissioner General under section 41 of the TAA 2015 is empowered to seek further information in respect of the return and where necessary he may adjust the assessment made by the taxpayer.

Section 78(1) of the TAA 2015 provides that a person who fails to file return or pay tax on due date as required by the law is liable for a penalty for each month or part of a month during which the failure continues.²⁰⁵ Section 79 of the TAA 2015 imposes penalty for a person who makes false or misleading statement to a tax officer either made orally or in writing. The statement made includes statement made in any document or information required to be filed under a tax law; in a document furnished to the tax officer otherwise than under tax law; in an answer to a question put to a person by the tax officer; to another person with knowledge or reasonable expectation that the statement shall be passed to the tax officer.

4.6.2 Misclassification of Commodities

Misclassification of commodities refers to the process whereby goods or commodities are declared under a lower duty category than its real duty of category or classifying goods as exempted goods or goods which requires tax reliefs because of the way the goods have been assembled or packed or because of their description.²⁰⁶ The way goods are classified is important for the purpose of tax liability.

204 Tax return is as prescribed under the First schedule of the TAA 2015. This refers to the standard forms or documents including electronic documents filed by the taxpayer to the tax authority reporting his taxable income with permitted deductions and exemptions allowed by the law.

205 Section 78(2) of the TAA 2015 provides for the penalties.

206 S. Rose-Ackerman, *International Handbook on the Economics of Corruption*, Edward Elgar Publishing Limited, United Kingdom, 2006, p.491.

*In the case of North Mara Gold Mine Limited Versus Commissioner General,*²⁰⁷ the issue of classification was discussed since it had effect in either imposition of duty or exemption.

The material facts of the case is that North Mara Gold Mine Limited, a limited liability company incorporated in Tanzania and carrying out mining activities at Nyamongo Tarime, appealed under section 25 of the Tax Revenue Appeals Act Cap. 408 R.E. 2002, and Regulation 24 of the Tax Revenue Appeals Tribunal Rules, 2001, against the decision of the Tax Revenue Appeals Tribunal dated 26th May, 2015 in Tax Appeal No. 3 of 2014, (the decision). By the said decision, the Tribunal had affirmed the earlier decision of the Tax Revenue Appeals Board in Customs Excise Tax Appeal No. 16 of 2015, which had dismissed its appeal against the decision of the Tanzania Revenue Authority (TRA) that had disagreed with the appellant in its bid to have the two dump trucks it had imported in June 2013, be classified as "unassembled" under Code 8704.10.10 of the Harmonized Commodity Description and Coding System of 2012 (the HS Code) whose duty rate is zero percent. Instead, TRA classified the dump trucks under HS Code 8704.10.90 under which the duty rate is 10%.

Issues

- (a) Whether the dumper trucks imported by the appellant and declared by the appellant as unassembled, are chargeable with any duty, and if so, at what rate?
- (b) Whether, the dumper trucks call for exemption as machinery under item 30B of the Fifth Schedule to the East African Community Custom Management Act of 2004.

The Court held that:-

"In our view, the customs officer was therefore required to be satisfied that the intended goods were vehicles ready for transportation of goods in order for them to fit in the chapter and the section in Code 87.04. That being the case, we think it was impossible for the respondent to determine the character of the "unassembled" goods by using Rule GRI 1 alone. So, Rule 2 which was the next in sequence had to be called in aid. Rule 2 contains two sub rules. Sub rule 2 (a) applies to incomplete or unfinished and unassembled or disassembled articles which are classified as the complete or finished articles if they have the latter's essential character. Sub rule 2 (b) applies to mixtures or combinations of materials or substances. For the purposes of this appeal, it is sub rule 2(a) which is relevant. Since there is no dispute that the dump trucks were packed and imported in an unassembled form, for convenience of transporting them inland, and since it was also admitted by the appellant that once assembled they were to be used to carry goods in the form of rock, the vehicles were for the transport of goods.

²⁰⁷ Civil Appeal No. 78 of 2015(CAT).

Therefore, under this Rule, the trucks fell to be classified and treated as complete. And since they could not be treated as unassembled for purposes of duty, they could only fall under classification 8704.10.90 — which attracts a duty rate of 10% ad-valorem. It is true that, in its decision the Tribunal concluded that the two equipment's were transported in disassembled form for purposes of convenience in transportation but it went on to find that it has no effect on the HS Code whatsoever hence, the use of HS Code 8704.10.90 in determining dutiable value was correct. This finding of the Tribunal does not support the appellant's complaint. At no time did the Tribunal consider as relevant to the classification of the trucks, the mode of their transportation. In any case, the issue of mode of transportation of the trucks was introduced by the appellant themselves in their correspondences with the respondent and the Tribunal was only echoing that statement of fact, but without associating it with the process of classification. It is for the above reasons that we have reached the decision that this appeal lacks merit and is hereby dismissed with costs."

Another case which describe the issue of classification of goods is the case of *Geita Gold Mining Limited versus Commissioner General (TRA)*.²⁰⁸

This appeal emanates from the decision of the Tax Revenue Appeals Tribunal (the Tribunal) dated 3rd June, 2015, in Tax Appeal No.19 of 2014. The impugned decision affirmed the decision of the Tax Revenue Appeals Board dated 30th May, 2014. In May, 2013, the appellant imported two unassembled caterpillar dumper trucks. They entered the country through Kenya/Tanzania border. In the pre-arrival Declaration forms (PAD), the appellant declared the goods under HS Code 87.040.10.10 of Chapter 87 of the Common East African Tariff. Under that code the duty rate for unassembled trucks was zero. The appellant also claimed that it enjoyed an exemption. The respondent, Tanzania Revenue Authority (TRA) challenged the said classification, and reclassified them under HS Code 87.04.10.90 whose duty rate was 10% and also ruled that it did not enjoy any exemption under the law. Aggrieved the appellant lodged an appeal in the Tax Revenue Appeals Board (the Board). The Board dismissed the appeal. On further appeal to the Tribunal, the latter also found the appeal lacking in substance, and dismissed it. In its decision, the Tribunal found not only that the respondent correctly used HS Code 8704.10.90 for classification of the dumper trucks, but also that the appellant did not qualify for exemption under item 30(b) of the schedule to the East African Community Customs Management Act. The appellant appealed.

Issues

- (a) Whether the dump trucks was properly classified for purposes of tax.
- (b) Whether the dump trucks qualify for exemption.

²⁰⁸ Civil Appeal No. 141 Of 2015(CAT).

The Court held that:-

"We agree with Dr. Kibuta together with the observation in the Indian cases he cited of *Modi Xerox Ltd Vs Collector of Customs* (1998) 103 ELT 619, *Glaxo Laboratories (India) Ltd Vs Union of India and Others*, that Rule 1 of the HS Code was the basic canon, and that for legal purposes, the Tariff shall be determined according to the terms of the heading and the relative section notes and chapter notes; and that the end use of a product is irrelevant. But to our understanding that is only so if the section and chapter notes "do not otherwise require". If the notes require otherwise the subsequent Rules come into play in/sequence in determining the appropriate classification. In the present case, the essential character of unassailed goods could not wholly have been determined by looking at the section and chapter notes. The chapter notes describe them as vehicles, other than railways or rail trams. The section notes describe them as vehicles for use of transportation of goods. The word "unassembled" could not easily reveal the essential character of the said trucks..... The answer to this issue is to be found in Rules 1 and 2(a) of the HS Code, which as we have already found above, must be read together to get a solution. It is Rule 2(a) which makes reference the concept of "essential character". If those two Rules are read together must agree with the Appellant that in classifying the imported goods, must look at the character of the goods at the time of their importation. But the form/character of the goods is a matter of evidence. All the circumstances have to be looked at, such as the physical appearance of the goods, the Commercial Invoice, etc., as well as the guidelines, in Rule 2(a), taken in their totality, we are satisfied that in terms of Rules 1 and 2(a) of the HS Code, the respondent properly took into account all the character and form/state in which the dump trucks were imported, and placed them in the correct classification code 8704.10.90."

4.6.3 Smuggling of Goods

It refers to an act of importing or exporting goods secretly in violation of the law which result in not paying different taxes as provided in respective tax laws.²⁰⁹ The taxpayers normally use unauthorized routes or ports in carrying out smuggling of goods. These taxpayers aim is to conceal their income to the tax authority and also benefit out of their fraud acts of not declaring their goods for the purpose of assessment and payment of taxes according to customs laws and other revenue laws which are administered by Tanzania Revenue Authority. Smuggling of goods is treated as tax evasion and it is a criminal offence punishable under the law. The goods which are normally found routed through unauthorized ports may be seized by the tax authority and sold to realize the taxes due or may be distributed to the community for consumption or use or may be destroyed if the goods are restricted goods or prohibited to be imported in the United Republic of Tanzania.

209 A.K.Jain(ed)., *Economics of Corruption*, Kluwer Academic Publishers, New York, 1998, p.114.

4.6.4 Claiming Excessive Expenditure

Section 11(2) of the Income Tax Act, provide that for the purposes of calculating a person's income for a year of income from any business or investment, there shall be deductions of all expenditure incurred during the year of income, by the person wholly and exclusively in the production of income from the business or investment. Allowable deductions are provided under the Income Tax Act, sections 11-19. This implies that the expenditure claimed by the person must fall within those sections and also must have link or nexus with the production of the income of the person and should not be excessive. The claim for any expenditure or expenses which are excessive will be treated as a deliberate action of a taxpayer to shelter his income for deductions, and therefore, will be regarded as tax evasion strategy by the taxpayer since it has been designed for the purpose of deceiving the tax authority so as to reduce or escape the tax liability imposed by respective revenue laws.

4.6.5 Misuse of EFD Machines

Rule 2 of the Tax Administration (General) Regulations 2016 define Electronic Fiscal Device as a device which has been passed through certification and licensing procedures as established by Electronic Fiscal Device Technical Committee. EFD is used to keep the records of sale of the taxpayer and also to smoothen the process of assessment of tax payable by the taxpayer himself and the tax authority.

Rule 29 of GN, No.101 of 2016 provides for the registration of users of EFD Machines as well as the requirements or conditions to be complied to by the user of the machine. The Regulation further in Rule 35 provide the obligation of the users which need to be complied to for effective use of EFD Machines which among others include issuance of fiscal receipts or invoice for the consideration paid or payable to him for any supply he makes to his customers.²¹⁰ Rule 38 of GN No.101 further requires the user of EFD Machine to enter all required information relating to his business transactions and issue fiscal receipts or invoices to his customers.

Apart from the fact that the law requires the users of EFD Machines to issue fiscal receipts to their customers for whatever supply they make it requires also entering of correct information in respect of their business. However, the practice is different since the users of these devices normally do not comply to these obligations for the purpose of reducing their tax liability by declaring lower income to the tax authority. Some of the users also collude with the customers in reducing the prices of goods and services and agree not to be given the receipts. A good example is in VAT refund²¹¹ whereby the VAT traders manipulate the prices of goods and services for the purpose of making sure that the input tax exceeds the output tax, and hence claim refund from the tax authority.

²¹⁰ Rule 35(3) of GN No.101 of 2016.

²¹¹ Refer to PART V of the Valued Added Tax Act of 2014 and also Rule 29-30 of the Value Added Tax (General) Regulations, GN No.225 of 2015.

Generally, misuse of EFD Machines is regarded as an action contrary to the revenue laws and hence affects the collection of revenue since most of these actions are intended to evade the payment of taxes provided in the respective laws.²¹²

4.6.6 Dummy Salary Entries and Use of Black Money

Dummy (fake) salary entries are normally created for the purpose of reducing the profit or income. A good example is where the owner of the company prepare false salary bills purported to have been paid to the contract employees and casual workers while the same owner took this amount for his business opportunities. False salary bills decreases the overall profit of the business since the same is normally treated as expenditure which is wholly and exclusively connected to the production of the income of the person and therefore deduction is allowed by the law.²¹³

Black money,²¹⁴ or unaccounted money can be used also as a way to evade the payment of the different taxes. This can be done by depositing black money into the bank account of a dummy person and documents are created to that effect that the dummy person has loaned the money to the business on interest. In this situation the black money is converted to white money and also the business pays interest to the dummy person which in turn reduces the gross profit of the business and thus the income tax since interest is among the allowable deductions.

4.7 Methods of Tax Avoidance

The following are the methods or strategies or mechanisms that normally taxpayers or different persons employ to avoid or reduce their tax liability:-

4.7.1 Transfer Pricing

Transfer pricing refer to prices in transactions between associated enterprises.²¹⁵ This implies that prices are set for goods and services sold between related or associate entities for example a subsidiary company selling goods to a parent company.²¹⁶

212 Rule 46-51 of GN No.101 2016 provides for different offences and fines relating to the use of EFD Machines. Refer also to Section 59 of the Finance Act 2016.

213 C.Y.U.Chandar, *The Ailing India*, Notion Press 2016, Chennai, 2016.

214 This refers to income acquired illegally usually in cash and not reported to the government so as to avoid payment of taxes on it as provided by respective revenue laws.

215 Jens W., *Transfer Pricing and the Arms Length Principle in International Tax Law*, Kluwer Law International, Netherlands, 2010, p.6.

216 Section 3 of the Income Tax Act define the term associate and Section 33 as amended by Section 21 of the Finance Act 2016 provides for Transfer pricing and other arrangements between associates.

This technique is normally employed to understate profits among related person operating in different jurisdiction; either supply from a higher tax jurisdiction will be under priced or supplies from a lower tax jurisdiction will be over priced.²¹⁷

There is no problem where associate persons or parent company and subsidiaries enters into business transactions, the problem is where the prices agreed is for the purposes of deceiving the tax authority and manipulating the market prices so as to reduce the tax burden.

After realizing the problem of transfer pricing as one of the methods of tax avoidance as well as tax evasion, different countries have taken legislative measures to address this problem.

Tanzania in particular passed the Income Tax (Transfer Pricing) Regulations 2014²¹⁸ and also the Guidelines i.e Tanzania Revenue Authority Transfer Pricing Guidelines.

The Guidelines provide that each transfer pricing arrangement case will be decided on its own factors and circumstances, taking into account the taxpayers' business strategies and commercial judgment. Transfer pricing of goods, services and intangible properties are intercompany pricing arrangements between associated parties in their transactions. When independent parties deal with each other, independent market forces shape the commercial pricing of goods, services and intangibles transacted between them.

However, business transactions between associates may not always reflect the dynamics of market forces.

The Transfer Pricing Guidelines are largely based on the governing standard for transfer pricing which is the arm's length principle as set out under the Organization for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines and the United Nations (UN) Practical Manual on Transfer Pricing for Developing Countries, (hereinafter referred to as OECD/UN Guidelines). TRA abides by this arm's length principle²¹⁹ and believes that this is the most appropriate standard to determine transfer prices of related parties. Although some parts of the Guidelines have been adopted directly from the OECD /UN Guidelines, there may be areas which differ to ensure adherence to the Income Tax Act as well as domestic circumstances.

217 Mhangila and Nchimbi, op.cit., p.194.

218 Government Notice No.27 published on 7th February 2014.

219 Rule 5 of Transfer Pricing Regulations 2014 provides for transfer pricing methods used to determine arms length price of a controlled transactions, ie Comparable uncontrolled Price Method; Resale Method; Cost Plus Method; Profit Split Method; Transactional Net Margin Method; Any other Method as may be determined by the Commissioner General from time to time.

The arm's length principle²²⁰ which is an internationally accepted and preferred basis for determining the transfer price of a transaction between associated persons, is the basis which has been adopted by the Tanzania Revenue Authority. According to the arm's length principle, a transfer price is acceptable if all transactions between associated parties are conducted at arm's length price. The arm's length principle is stated in paragraph 1 of Article 9 of the Organization for Economic Cooperation and Development (OECD) Transfer Pricing guidelines as follows:-

"(where) conditions are made or imposed between two (associated) enterprises in their commercial or financial relations which differ from those which would have been made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but by reason of those condition have not so accrued, may be included in the profits of that enterprise and taxed accordingly".

Business between associates has been also reflected in the case of *Tanzania Leaf Company Limited v. Commissioner General*.²²¹ The Tribunal held that:-

"..... while associated companies are not by law prevented from trading with each other, if they do, the price of goods must be applied to any other company which is not in the group of associated companies. Otherwise it may reduce the price of goods and create an opportunity to reduce the income of the company hence tax avoidance."

Further, the case of *Alliance One Tobacco Tanzania Limited versus Commissioner General*²²², elaborated the principle of arms length and transfer pricing.

This was an appeal which emanates from the judgment of the Tax Revenue Appeals Board in consolidated Income Tax Appeals No. 46 and 47 of 2013 delivered on 21st September, 2013. Appellant, Alliance One Tobacco Tanzania Limited (AOTTL) and Alliance One International AG (AOIAG) are wholly owned subsidiaries of Alliance One Tobacco Inc. (AOTI) of the USA. The former is registered and based in Tanzania and the latter in Switzerland. AOIAG is the global marketing and distribution arm of AOTI. The Tanzanian company purchases cured tobacco leaf from farmers, processes it at Morogoro thereafter sells 96% of its output to its Swiss sister company. The rest of tobacco leaf it sells to domestic manufacturers of cigarette and other tobacco products. AOIAG fully pre-finances the procurement and processing of the tobacco leaf and pays AOTTL an agreed fee calculated as a percentage of the total cost of goods sold.

220 Rule 3 of the Transfer Pricing Regulations 2014 define Arms Length to mean the principle whereby commercial or financial transaction between associates is taking place on the same terms as if such transaction had taken place between independent persons under comparable conditions and circumstances.

221 Appeal No.14 of 2013(TRAT).

222 Appeal No. 33 Of 2013(TRAT).

In September 2005 and November 2006 the Appellant filed its income tax returns for the respective years of business. The Respondent TRA did not respond immediately until March 2008 and March 2009 when it issued two notices of additional assessment for the two years of income. The Respondent objected the assessment on the main ground that it came late and had not taken into account the losses brought forward from previous years. On the other hand, the Respondent TRA conducted an investigation of the Appellant's tax affairs and determined that by reducing the fee paid by the Swiss sister company from 15 to 7 percent since 2003 the Appellant had violated the arm's-length principle governing business relationships between sister companies and that the Appellant was thus engaged in a transfer pricing practice that effectively reduced the magnitude of the tax losses it claimed.

The Appellant disputed this finding, arguing that a 2004 transfer pricing study conducted by Price water house Coopers (PWC) confirmed that the reduced 7% fee on cost of sales was consistent with the arm's length principle and within the range of free market prices ruling at that time. Following TRA's rejection of that study at the urging of the Respondent the Appellant further commissioned international legal consultants Baker and McKenzie (B&M) in 2008 to study the matter again. Its report confirmed that the 7% fee paid by AOITAG to AOTTL met the arm's length trading requirement between sister's entities as earlier found

The tribunal held that:-

"We wish to make it clear that the concept of transfer pricing and arm's length dealing has nothing to do with economic disparity between Tanzania and the other countries studied. It applies to trading relationships between related corporate entities among poor countries, among rich countries and between rich and poor countries. It applies to a business relationship and has nothing to do with state or sovereign relationships per se."

4.7.2 Income Shifting/Splitting

This is a technique used to reduce taxes in which a taxpayer shifts a portion of income to relatives in lower tax brackets²²³ or shift to other ways advantageous to the business. This can be done by creating trusts or custodial accounts or by making outright gifts of income producing property to family members or can be done by employing children or using fringe benefits package to get subsidized health care.²²⁴ It should be noted that careful planning is required to gain the optimal tax advantage from such shifting of income plans. Different tax jurisdictions have enacted legal provisions to address income schemes that lack economic substance but designed purposely for the purpose of avoiding taxes.²²⁵

223 L.J. Gitman et al., *Personal Financial Planning*, Southern Western Cengage Learning, Australia, 2014, p.111.

224 K.E.Murphy and M.Higgins., *Concepts in Federal Taxation*, Thomson South Western, USA, 2008, p.32.

225 Sections 27,7, 8,9,43,44 of the Income Tax Cap, 332 of 2004 as amended.

To shift income to family members in most cases need also the transfer of ownership of income producing property to the children in order to shift the income from the property. If the parents are not willing to transfer ownership of the property, income shifting to children is difficult to realize or achieve.²²⁶ In some jurisdictions even if a valid transfer of property is made, if the child is younger than 18 years, there provisions exist to take away much of the marginal rates advantages of such a shift.²²⁷ This implies that in some jurisdictions there are tax rates which applies to children whenever there is a transfer, however, in other jurisdictions a child under age of majority cannot own a property unless he/she owns it through a guardian.

Section 34 of the Income Tax Act has addressed this method of income shifting or splitting which is normally used by taxpayers to avoid or reduce the payment of tax. The section provides that where a person attempt to split income with another person, the Commissioner may by notice in writing adjust amounts to be included or deducted in calculating the income of that person or re-characterize the source and type of any income, loss or payment to prevent any reduction in tax payable as a result of the income splitting. Income splitting is allowed but the problem is where the reasons or one of the reasons for the transfer is to lower the tax payable by the person or the associate. The commissioner normally considers the market value of any payment made for the transfer.

4.7.3 Tax Deferral Method

This refers to the process of postponing (delaying) the payment of taxes so that the same will be paid in future when the bracket of tax is low by shifting the income to future years.²²⁸ The rationale behind of deferring taxes is to reduce or eliminate taxes today by postponing them to sometime in the future when you may be in lower tax bracket. For example a taxpayer may be in 20% income tax bracket right now, but by the time the person retire the taxpayer may be in 10% bracket. This deferral strategy is even more effective because some states either exempt retirement income from taxation or tax it at a more favorable rate. There is advantage of deferring taxes to a later date even if avoidance is unavailable especially for long term investment because the same will allow the taxpayer to accumulate capital for different investment opportunities.²²⁹

226 K.E.Murphy and M.Higgins, *Concepts in Federal Taxation*, Thomson South Western, USA, 2008, p.32.

227 Ibid.,

228 L.J. Gitman et., *Personal Financial Planning*, Southern Western Cengage Learning, Australia, 2014, p.111.

229 Section 11 of the Value Added Tax Act of 2014.

4.7.4 Use of Tax Havens

This is another method which taxpayers may use to avoid or reduce their tax liability. Tax havens refer to places or countries (not all of them are sovereign states) that have sufficient autonomy to write their own tax, finance and other laws and regulations.²³⁰ They all take advantage of this autonomy to create legislation designed to assist non-resident persons or corporations to avoid the regulatory obligations imposed on them in the places where those non-resident people undertake the substance of their economic transactions. The characteristics that most tax havens share is an environment of secrecy that allows the user of structures created under local law to do so either completely anonymously or largely so.

Further, The OECD indicated that features of tax havens includes no or low taxes, lack of effective exchange of information, lack of transparency, and no requirement of substantial activity.²³¹ Other lists have been developed in municipal laws of different tax jurisdictions to address the issue of tax havens. OECD and other organizations have been publishing the list of the countries which are regarded as tax havens countries. These countries attract the investors to invest in their regions because of the preferential tax treatment given in these countries. A taxpayer may even travel to those countries for the purpose of entering into various transactions since the same attract or no tax liability at all as opposed to if the transactions was to be concluded in the country where tax bracket is high in respect of the transaction entered.

4.7.5 Use of Shell Corporations

Shell corporations refer to a corporation which is not active in doing business or without significant assets.²³² The formation or incorporation of these shell corporations²³³ may be legal but most companies and even individuals use these corporations as a means of avoiding the payment of different taxes which are provided in the tax laws they are subject to. The domestic companies may register offshore corporations in tax havens abroad for the purpose of moving the profits to the registered shells corporation since this will help them to avoid or reduce their tax bracket in the country of registration. A good example where shell companies can be used to avoid the payment of tax is by way of transfer of assets through transfer pricing mechanism.

230 R.Palan et al., **Tax Havens: How Globalization Really Works**, Cornell University Press, London, 2010, p.8-9.

231 Organization for Economic Development and Cooperation, **Harmful Tax Competition: An Emerging Global Issue**, 1998, p. 23.

232 L.Klapper et al., **Entrepreneurship and Firms Formation Across Countries**, Policy Research Working Paper 4313, The World Bank, 2007, p.14.

233 Shell Corporation seeks residency for the sole purpose of reducing tax charges on interest, royalties, dividends, and capital gains income from subsidiary companies (Gravelle 2013; Van Dijk et al. 2007).

4.7.6 Thin Capitalization Method

This method focuses on the size of deductions which entities can obtain for the interest payments since the same need to be subjected to tests of deductibility for tax purposes, otherwise the arrangement will be treated as a strategy for tax avoidance.²³⁴ In most tax jurisdictions there is what is referred as thin capitalization rules which limit the size of deductions where there are excessive levels of debts. Generally, interest payments must satisfy the tests for the deductibility of expenses for tax purposes; this is because thin capitalization rules ensure that the affected entities do not reduce their tax liabilities by using an excessive amount of debt to finance their operations or businesses.²³⁵ The law disallows debt deductions that an entity claim if the entity debt to equity ratio exceeds certain limits provided by the law.²³⁶

4.7. 7 Charitable Contributions Method

A taxpayer may decide to contribute part of his income or business income or profits to charitable institutions or activities in the community. In most tax jurisdiction charitable contribution is regulated by law so as to make sure that taxpayers do not misuse this loophole of charity contributions by transferring their income to charitable organization which they have interest or associated to so as to reduce or avoid their tax liability through claiming deductions.

Section 16(1) of Cap 332 provides that for the purpose of calculating a person's income for a year of income from any business, there shall be deducted amounts contributed during the year of income to a charitable institution referred to in subsection (8) of section 64 or social development project.²³⁷

Also deduction is allowed in any donation made under section 12 of the Education Fund Act Cap 412 of 2001. Section 12 of the Education Funds Act provides that any person who makes a donation of money or equipment to a Fund's Assisted Educational Project or Program; avails Sponsorship or a grant to any student for the purpose of enabling such student to pursue secondary level

234 K.B. Brown(ed)., *A Comparative Look At Regulation of Corporate Tax Avoidance*, Springer, Washington, 2012, p.49-50.

235 Ibid.,

236 Section 12 of the Income Tax Act, Cap 332 of 2004 as amended give details among other things of the debt-equity ratio of 7 to 3.

237 Section 64(8) of the Income Tax Act provides conditions for charitable organization. The section point out that charitable institution should be a resident entity of a public character that satisfies the following conditions:-The entity was established and functions solely as an organization for the relief of poverty or distress of the public, advancement of education, or the provision of general public health, education, water or road construction or maintenance; The entity has been issued with a ruling by the Commissioner under section 131 currently in force stating that it is a charitable organization or religious organization. Section 131 under the Income Tax Act has been repealed by Section 123 of the Tax Administration Act, Act No.10 of 2015. Matters regarding private ruling are now governed by Section 11-14 of the Tax Administration Act.

education or attend tertiary level training, shall be awarded by the Authority a certificate to be known as a Certificate of Educational Appreciation.²³⁸ The person will use the certificate given to apply to the commissioner for deductions in respect of the amount contributed to the education fund. Further, deduction is allowed in amount paid to local government authority, which are statutory obligations to support community development projects. This implies that the amount paid must be that which is a statutory obligation for the support of the community project. The claim for deduction by the person to the commissioner must be supported by the evidence that the contribution has been made as required by the law.

Note:-Section 16(2) of Cap 332 provides a condition in respect of contribution to the effect that the amounts contributed during the year of income to a charitable institution for a year of income shall not exceed two percent of the person's income from the business calculated without a deduction under that subsection. This implies that if the person exceeds 2% of his income, deductions will not be allowed for the amount in excess of the amount stated by the law, which is 2% of the business income calculated before deductions.

4.7.8 Dividend Stripping Strategy

This refers to the acquisition of the shares just before a dividend is paid or distributed and sale of those shares after the dividend payment by an entity.²³⁹ The purpose of dividend stripping among other things include receiving the dividend distributed, imputation of credit and capital gain through the sale of shares.²⁴⁰ This arrangement may be treated as tax avoidance arrangement since the entity or person holds shares within a very short time on expectation that dividend will be received and immediately the shares will be disposed or transferred to the entity or corporations, hence the person will receive capital gain which is normally subject to tax.

238 The Certificate of Educational Appreciation shall give full particulars of the awardee, the amount of money to which he is eligible for tax relief, the taxes and the mode to which relief may be elected and be signed by both the Director General, and the Commissioner General of the Tanzania Revenue Authority and shall bear the respective seals of the signatories' organizations. Every awardee of a Certificate of Educational Appreciation shall be entitled at his option, to either apply the amount stated in the Certificate of Educational Appreciation as an allowable deduction under section 16(2) of the income Tax Act, 1973; apply the amount stated in the Certificate of Educational Appreciation as a deduction against the vatiable turnover under the Provisions of the Value Added Tax Act 1997 or apply the amount stated in the Certificate of Educational Appreciation as a relief for the, purposes of customs or import duties, by way of a deduction against the dutiable value. Note:- At present the law has changed the Income Tax Act of 1973 has been repealed by the Income Tax Act of 2004 as emended. Matters on donation are now provided under Section 16 of the Income Tax Act 2004. Besides, The Value added Tax Act of 1997 has been repealed by the Value Added Tax Act Cap 148 of 2014.

239 W.Schon(ed)., **Tax and Corporate Governance**, Springer, Munich, 2008, p.130.

240 R.Murray., **Tax Avoidance**(1st ed), Sweet & Maxwell, London, 2012, p.236.

The problem is where the person has already received distributed dividend and the moment he wants to transfer the shares the price of shares has gone down as a result he will suffer loss out of the sold shares (no capital gain). In most tax jurisdiction²⁴¹ where a person has received dividend through dividend stripping arrangement and the price of shares has gone down he will not be allowed to claim loss during the disposition of shares since the same will affect the capital gain tax over the sold shares but also the person has obtained income out of the distributed dividends. The consideration normally is on the purpose of acquiring the shares but also the time spent by the entity or acquirer of shares before distribution of dividend and disposition of shares after distribution of dividends.

4.7.9 Conversion of Dividends Into Capital of an Entity

The entity and the shareholders may resolve that the dividends to be distributed to them should be converted as capital of the entity. This strategy will be considered as tax avoidance since if there are no tax provisions taking care of this situation the amount will remain untaxed since there is no distribution which has taken place instead conversion of dividends to form part of the capital of the entity.

Section 180 of the Companies Act,²⁴² provides that a company may, in general meeting, declare dividends in respect of any accounting period or other period. A company may pay a dividend out of its realized profits less its realized losses, or out of its realized revenue profits less its revenue losses, whether realized or unrealized, provided the directors reasonably believe that immediately after the dividend has been paid the company will be able to discharge its liabilities as they fall due, and the realizable value of the company's assets will not be less than the amount of its liabilities. An open ended investment company may pay such dividends as may be permitted in regulations made by the Minister for the time being responsible for finance, or by the Capital Markets and Securities Authority or such other authority designated for the purpose. It seems that under section 180 of the Companies Act declaration of dividend by a corporation is not mandatory however for the purpose of tax law a company cannot capitalize the profits before the payment of tax, therefore if a company opts not to declare dividend it will be required to pay the tax due before converting its profits into capital or other means per the company programs or activities.²⁴³

241 Section 57 of the Income Tax Act, Cap 332 of 2004 as amended addresses the issue of dividend stripping arrangement in Tanzania.

242 Cap 212 of 2002.

243 Section 54 of the Income Tax Act as amended by the Section 24 of the Finance Act, 2016 provides for taxation of shareholders; Section 8 of TAA 2015 addresses schemes for obtaining undue tax benefits. If the entity decided not to declare dividends this will be considered as tax avoidance strategy and the Commissioner General is mandated to take appropriate measures to determine the tax liability and prevent the tax benefits intended to be obtained.

Generally, tax avoidance can be established or determined by looking at a number of factors or criteria among others includes the business purpose of the transactions, the consideration given or agreed, arms length principle, amount of deductions claimed by the taxpayer etc. Most of these tests have been exhausted under the methods of tax avoidance.

4.8 EAC and Tax Evasion and Avoidance

East African Community partner states after realizing the problem of tax avoidance and tax evasion in the region decided to take various measures. The notable measure taken by the partner states was to enter into an agreement to address the problem of tax evasion and avoidance as well as double taxation. The agreement is between the Governments of the Republic of Kenya, Uganda, Burundi, Rwanda, and the United Republic of Tanzania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on income. This agreement (EAC-DTA) was signed by all the partner states on 30th November 2011 and in a large extent it based on OECD model law and UN Model law. In order to ensure uniform interpretation and application of the DTA in the EAC region, the EAC secretariat developed the Double Taxation Avoidance Agreement of the East African Community Handbook.

Generally, the agreement and the handbook among other things address the taxes covered, method for eliminating double taxation, special provisions on non-discrimination, procedure and exchange of information, anti-avoidance rules, residence, transfer pricing methods etc. It is important to go through the agreement and the handbook for detailed information about each article.

4.9 Strategies for Tax Evasion and Avoidance

The following are measures or strategies that can be adopted to address the problem of tax evasion and avoidance:-

- (a) Tightening of General Anti-avoidance Rules²⁴⁴ and Specific anti avoidance Rules (SAAR).²⁴⁵
- (b) Formalization of entities or persons doing business in an informal sector. Section 22 of the TAA, 2015 as amended by section 49 of the Finance Act, 2017 provides for registration of small vendors and service providers. The section provides that the Commissioner General shall recognize and register small vendors and service providers conducting business in an informal sector.

244 General Anti-avoidance Rule is a concept which generally empowers the Revenue Authority to deny tax benefits of any transaction entered or expected to be concluded which do not have any commercial purpose but intended to achieve the tax benefit (Section 8 of the TAA 2015).

245 This refers to provisions which address specific circumstances of tax avoidance. Refer to Sections 33, 34, 43, 44, 57 of the Income Tax Act, 2004.

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A person registered shall be issued with an identification card by the Commissioner General. Small vendors and service providers include hawkers (machinga), caterers, event managers, masters of ceremony and such other small vendors or service providers as the Minister may prescribe. The aim of this approach is to make sure that those who are operating their business and services in an informal sector are recognized for the purpose of payment of taxes as provided by respective revenue laws governing their activities or businesses

- (c) Signing of tax treaties with other countries for the purpose of exchange of information regarding tax matters.
- (d) Joining of different tax forums in various trade blocs.
- (e) Strengthening the capacity of tax disputes settlement machinery in terms of manpower and technology.
- (f) Imposition of heavy punishment to violators of revenue laws.
- (g) Establishment of a friendly tax system which reduces the tax compliance burden to the taxpayer.
- (h) Guarantee and respect to taxpayers rights²⁴⁶
- (i) Strengthening the capacity of the tax authority in terms of manpower and technology.

246 Section 26 and Section 27 of the TAA 2015.

CHAPTER FIVE

TAXATION OF PARTICULAR TYPES OF PERSONS AND SPECIAL INDUSTRIES IN TANZANIA

5.1 Introduction

This chapter addresses the taxation of particular types of person's i.e corporations, trusts and partnership and also special industries like insurance business, retirement's savings, charitable organization, clubs and trade organizations, minerals and petroleum operations.

5.2 Particular Types of Persons

The following are particular types of persons as provided by different revenue laws and their tax liability:-

5.2.1 Corporations

Corporation means any company or body corporate established, incorporated or registered under any law in force in the United Republic or elsewhere, an unincorporated association or other body of persons, a government, a political subdivision of a government, a public authority, public institution, a public international organization and a unit trust but does not include partnership.²⁴⁷

This definition is broad since it covers body corporate incorporated in Tanzania or elsewhere and also unincorporated association both private and public institutions or organizations with international status²⁴⁸. The definition also considers a unit trust as a corporation.

Taxation of a corporation is governed by the following rules or principles:-

- (a) A corporation shall be liable to tax separately from its shareholders.²⁴⁹
- (b) The amounts derived and expenditure incurred jointly or in common by the managers or shareholders for the purposes of a corporation that lacks legal capacity shall be treated as derived by the corporations and not any other persons.

247 Section 3 of the Income Tax Act, Cap 332 of 2004 as amended by the Finance Act 2014.

248 Controlled foreign trusts and corporations and their members shall be taxed in accordance with subdivisions B and C of Part IV of the Income Tax Act, 2004; Sections 73-77 of the Income Tax Act, 2004.

249 Section 53 of the Income Tax Act, Cap 332 of 2004.

- (c) Assets owned and liabilities owed jointly or in common by the managers²⁵⁰ or shareholders for the purposes of a corporation that lacks legal capacity shall be treated as owned or owed by the corporation and not any other person.
- (d) Where the underlying ownership of an entity changes by more than fifty percent as compared with that ownership at any time during the previous three years, the entity shall be treated as realizing any assets owned and any liabilities owed by it immediately before the change.²⁵¹ The law restricts deduction of losses to a corporation which its ownership has changed by more than fifty percent.²⁵²

Paragraph 3 to the First schedule of the Income Tax Act, 2004 provides for the rate of tax applicable to entities as follows:-

- ❖ The total income of a corporation, trust, unapproved retirement fund or domestic permanent establishment of a non-resident person for a year of income shall be taxed²⁵³ at the rate of 30 percent.
- ❖ Newly listed company with the Dar es Salaam Stock Exchange with at least thirty percent of its equity ownership issued to the public shall be taxed at a reduced corporate rate of twenty five percent for three consecutive years from the date of listing.²⁵⁴
- ❖ A corporation with newly established plant for assembling motor vehicles, tractors, fishing boats or out boats engine and having a performance agreement with the Government shall be taxed at a reduced corporate rate of ten percent for five consecutive years from the year of commencement of production.²⁵⁵
- ❖ Income of a corporation with perpetual unrelieved loss for three consecutive years shall be taxed at the rate of 0.3 per centum of the turnover of the third year of perpetual unrelieved loss.²⁵⁶

250 Section 3 of the Income Tax Act define manager in relation to an entity to mean any councilor, director, manager, member, officer or other person who participates or may participate, whether alone or jointly with other persons, in making senior management decisions on behalf of the entity; and includes a partner of a partnership, a trustee of a trust and a person in accordance with whose directions and instructions the entity or a person described in paragraph (a) is required or accustomed to act.

251 Section 56 of the Income Tax Act, 2004 as amended by Section 25 of the Finance Act, 2016.

252 Section 56(2) of the Income Tax Act, 2004 as amended.

253 Under the income tax law a company is required to submit tax returns even if it has no taxable income.

254 Section 27 of the Finance Act 2017.

255 Section 27 of the Finance Act 2017.

256 Paragraph 3(3) to the first schedule to the Income Tax Act, 2004 as amended by Section 27 of the Finance Act 2017.

- ❖ The repatriated income of a domestic permanent establishment of a non-resident person for a year of income shall be taxed at the rate of 10 percent.
- ❖ The total income of a person from conducting mining operations shall be taxed at the rate of thirty percent.²⁵⁷
- ❖ The total income of a person from conducting petroleum operations shall be taxed at the rate of thirty percent.²⁵⁸

Generally, entities which include corporation pays corporation tax which is charged on the taxable income(profits) from business undertakings, profits from investments(except dividends which are taxed differently as final taxes) and tax paid out of turnover of companies with perpetual unrelieved losses for three consecutive years.

5.2.2 Trusts

Section 3 of the Income Tax Act defines trust to mean an arrangement under which a trustee,²⁵⁹ holds assets but excludes a partnership and a corporation.

The following are the rules governing the taxation of trusts in Tanzania²⁶⁰:-

- ❖ A trust or unit trust shall be liable to tax separately from its beneficiaries.
- ❖ Separate calculations of total income shall be made for separate trusts regardless of whether they have the same trustees.
- ❖ The distribution of a resident trust or unit trust shall be exempt in the hands of the trust's beneficiaries.
- ❖ The distribution of a non-resident trust or unit trust shall be included in calculating the income of the trust's beneficiaries.
- ❖ Amounts derived and expenditure incurred by a trust or a trustee in the capacity of trustee (other than as a bare agent), whether or not derived or incurred on behalf of another person and whether or not any other person is entitled to such an amount or income constituted by such an amount, shall be treated as derived or incurred by the trust and not any other person.

²⁵⁷ Section 32(b) of the Finance Act, 2016.

²⁵⁸ Section 32(b) of the Finance Act, 2016.

²⁵⁹ Section 3 of the Income Tax Act, define trustee to mean an individual or body corporate holding assets in a fiduciary capacity for the benefit of identifiable persons or for some object permitted by law and whether or not the assets are held alone or jointly with other persons or the individual or body corporate is appointed or constituted trustee by personal acts, by will, by order or declaration of a court or by other operation of the law; and includes any executor, administrator, tutor or curator; any liquidator, receiver, trustee in bankruptcy or judicial manager; any person having the administration or control of assets subject to a usufruct, fideicommissum or other limited interest; any person who manages the assets of an incapacitated individual; and any person who manages assets under a private foundation or other similar arrangements.

²⁶⁰ Section 52 of the Income Tax Act, 2004.

- ❖ Assets owned and liabilities owed by a trust or a trustee in the capacity of trustee (other than as a bare agent) shall be treated as owned or owed by the trust and not any other person.
- ❖ Where a receiver referred to in section 66(5) of the Tax Administration Act²⁶¹ is a trustee the trust shall be treated as conducting or continuing the activities of the person whose assets come into the possession of the receiver.
- ❖ Where a receiver referred to in section 66(5)²⁶² of the Income Tax Act is a trustee the amounts derived and expenditure incurred by the trust shall be included in calculating the income of the trust in the same manner as they would have been included in calculating the income of the person if they were derived or incurred by the person prior to the event resulting in the appointment of the receiver.

Paragraph 3(1) to of the first schedule of the Income Tax Act, 2004 provides among other things that the total income of a trust for a year of income shall be taxed at the rate of 30 percent.

5.2.3 Partnership

Section 3 of the income Tax Act define a partnership to mean any association of individuals or bodies corporate carrying on business jointly, irrespective of whether the association is recorded in writing. The implication of this definition is that a partnership can be oral or written form. In most cases as a matter of practice partnership are recorded in writing in a partnership deed and also registered in the relevant authorities.²⁶³ In a partnership each person contributes money, property, labor or skill and expects to share in the profits and losses of the business. The partnership normally files annual return to report the income, deductions, gains and losses from its operations but it doesn't pay income tax instead it passes through any profits or losses to its partners. Each partner is required by the law to include his or her share of the partnership income or loss on his or her return.²⁶⁴

261 Section 116(5) of the Income Tax Act has been substituted by section 66(5) of the Tax Administration Act, 2015 as provided under section 117 of TAA 2015.

262 Section 116(5) of the Income Tax Act has been substituted by section 66(5) of the Tax Administration Act, 2015 as provided under section 117 of the TAA 2015.

263 They are normally registered at the Business Registration and Licensing Agency (BRELA).

264 A tax payer is required to submit the statement of estimated tax payable-It is a provisional return which a taxpayer is required to complete and file to the Commissioner General within three months from the beginning of the year of income. The Tax payer is supposed to pay the estimated tax in a maximum of four installments each falling due after three months. The due date are on or before 31st March; on or before 30th June; on or before 30th September; on or before 31st December. A tax payer is required to file a final return to TRA within six months after the end of each tax year (between 1st January and 30th June).

5.2.3.1 Rules Governing Taxation of a Partnership

The rules governing taxation of a partnership in Tanzania are as follows²⁶⁵:-

- ❖ A partnership shall not be liable to pay income tax with respect to its total income and shall not be entitled to any tax credit with respect to that income.
- ❖ Partnership income or a partnership loss of a partnership shall be allocated to the partners.
- ❖ Amounts derived and expenditure incurred by partners in common shall be treated as derived or incurred by partnership and not the partners.
- ❖ Assets owned and liabilities owed by partners in common shall be treated as owned or owed by the partnership and not the partners.
- ❖ All activities of a partnership shall be treated as conducted in the course of the partnership business.
- ❖ Arrangements between a partnership and its partners shall be recognized other than the following, which are taken into account in determining a partner's share under section 50(4) of the Income Tax Act; loans made by a partner to a partnership and any interest paid with respect thereto; and services provided by a partner to a partnership, including by way of employment, and any service fee or income from employment payable with respect thereto.
- ❖ Subject to any consequences under section 56 of the Income Tax Act if on the change of partners in a partnership at least two existing partners continue, the partnership shall be treated as the same entity both before and after the change.
- ❖ Partnership income from a business of a resident or non-resident partnership for a year of income shall be the chargeable income of the partnership for the year of income from the business calculated as if the partnership were a resident partnership.
- ❖ A partnership loss from a business of a resident or non-resident partnership for a year of income shall be the loss of the partnership for the year of income from the business calculated under section 19(4) of the Income Tax Act of 2004.
- ❖ The partners are charged income tax on the profits distributed from the partnership basing on the agreed sharing ratio. The partner's share is equal to the partner's percentage interest in any income of the partnership as set out in the partnership arrangement.

²⁶⁵ Sections 48-51 of the Income Tax Act, 2004.

- ❖ The payment made to a partner whether described as interest, salary, interest on capital, or profits or otherwise is assessable as trading income.

5.3 Special Industries

The following are special industries and their tax liability as provided by different revenue laws:-

5.3.1 Insurance Business

The insurance business can be categorized into two major categories:-

(a) General Insurance Business

- ❖ General insurance business should be treated separately from the life insurance business for tax purposes. The rule governing insurance business is that a person's activities conducting a general insurance business shall be treated as a business separate from any other activity of the person and the person's loss from the business for any year of income shall be calculated separately.²⁶⁶
- ❖ Section 58(2) of the Income Tax provides that the general insurance business shall include, any other amounts; premiums derived during the year of income by the person as insurer, including as re-insurer, in conducting the business; and proceeds derived during the year of income by the person under any contract of re-insurance in respect of proceeds.
- ❖ The amount to be deducted together with any other amounts deductible includes proceeds incurred during the year of income by the person as insurer, including as re-insurer, in conducting the business; and premium incurred during the year of income by the person under any contract of re-insurance.

(b) Life Insurance Business

- ❖ The rule governing taxation of life insurance business²⁶⁷ is that a person's activities in conducting a life insurance business shall be treated as a business separate from any other activity of the person and the person's income or loss from business for any year of income shall be calculated separately.²⁶⁸
- ❖ In calculating the income of a person for a year of income from life insurance business there shall be included any amounts to be included under other provisions of the income Tax Act, 2004.

²⁶⁶ Section 58(1) of the Income Tax Act, Cap 332 of 2004.

²⁶⁷ Section 3 of the Income Tax Act; define life insurance business to mean the business of an insurer in effecting, issuing and carrying out life insurance.

²⁶⁸ Section 59(1) of the Income Tax Act, Cap 332 of 2004.

- ❖ The amounts which are not included and which are not considered as income of the person includes premium derived during the year of income by the person as insurer, including as re-insurer, in conducting the business; and proceeds derived during the year of income by the person under any contract of re-insurance.
- ❖ The expenses which are allowed to be deducted include the expenses of managing the business investments (including commission).
- ❖ The gains of an insured²⁶⁹ from life insurance shall be in the case where the proceeds are paid by a resident insurer, exempt in the hands of the insured; and in the case where the proceeds are paid by a non-resident insurer, included in calculating the income of the insured.

5.3.2 Retirements Savings

This can be categorized into two major groups:-

(a) Retirement Contributions to Approved Retirement Fund

- ❖ Section 3 of the Income Tax Act define retirement contribution to mean a payment made to a retirement fund for the provision or future provision of retirement payments and retirement payment means a payment, by way of a lump sum, pension or commuted pension, made by a person to an individual in the event of the individual's retirement; or a relative of an individual in the event of the individual's death.
- ❖ Retirement fund means any entity established and maintained solely for the purposes of accepting and investing retirement contributions in order to provide retirement payments to individuals who are beneficiaries of the entity. The Commissioner General upon request in writing by a resident fund may give a private ruling that the fund is an approved retirement fund.
- ❖ The rule governing the taxation of retirement fund is that for the purposes of calculating the income of a retirement fund retirement contributions received by the fund shall not be included in the calculation and shall not be an incoming of the fund and retirement payments shall not be deductible and are not included in the cost of any asset or liability of the fund.²⁷⁰

²⁶⁹ Gains of an insured from life insurance means the extent to which proceeds from life insurance paid by an insurer exceed premiums paid to the insurer with respect to the insurance (Section 60(3) of the Income Tax Act 2004.

²⁷⁰ Section 62(2) of the Income Tax Act, 2004.

- ❖ The situation where the approved fund is subject to tax is where an approved retirement fund ceases to be an approved retirement fund during a year of income. The income tax payable under section 4(1)(a) of the Income Tax Act for the year of income shall be increased by an amount equal to the income tax rate applicable to corporations applied to all retirement contributions received by the fund from or on behalf of resident individuals and total income of the fund during the period from its most recent approval as an approved retirement fund to when it ceased to be so approved, less all retirement payments made by the fund from its most recent approval as an approved retirement fund to when it ceased to be so approved in respect of individuals who were resident during that period.²⁷¹

(b) Retirement Contributions to Unapproved Retirement Fund

- ❖ It refers to the fund which has not been approved by the Commissioner General. The Commissioner General normally upon request gives a private ruling²⁷² to the effect that the fund will be subject to tax or not when receiving retirement contributions to be used for payment of retirement payments to the employee or other beneficiaries upon retirement of the employee or the happening of any other event. This implies that apart from contributions which are made by the employer on behalf of the employee to approved retirements fund the employee if he wishes may join unapproved retirements funds.
- ❖ The rule governing taxation of retirement payments is that gains from an interest in an unapproved retirement fund shall be in the case where the retirement payments are paid by a resident fund, exempt in the hands of the payee and in the case where the retirement payments are paid by a non-resident fund, shall be included in calculating the income of the payee.²⁷³ The gain from an interest in an unapproved retirement fund means the extent to which retirement payments made by an unapproved retirement fund in respect of an interest in the fund exceed retirement contributions paid to the fund in respect of the interest.

5.3.3 Charitable Organizations

Section 3 read together with Section 64(8) of the Income Tax Act, 2004 provides that charitable organization means a resident entity of a public character²⁷⁴ that satisfies the following conditions:-

²⁷¹ Section 62(3) of the Income Tax Act, 2004.

²⁷² Section 11-14 of the Tax Administration Act, 2015.

²⁷³ Section 63 of the Income Tax Act, 2004.

²⁷⁴ Section 17 of the Finance Act 2017 define an entity of a public character to mean an entity established and functions solely for a public purpose and which operates in such a way that its membership is open to the general public or is an identifiable group of a community with common interest; it operates for purposes other than driving profit or gain; it does not allow any distribution or deemed distribution of profits generated out of its charitable business; its profits is ploughed back and used solely for improving or expansion of the original charitable purpose or function.

- (a) The entity was established and functions solely as an organization for the relief of poverty or distress of the public, advancement of education, or the provision of general public health, education, water or road construction or maintenance.
- (b) The entity has been issued with a ruling by the Commissioner under section 11 of the Tax Administration Act 2015²⁷⁵ stating that it is a charitable organization or religious organization.

The two conditions are paramount to be fulfilled by an entity to be regarded by the Commissioner General as charitable organization for the purpose of tax liability. Charitable organization may be subject to tax or not subject when reference is made to requirements provided in different revenue laws in respect of taxation of charitable organizations.

5.3.3.1 Rules Governing Taxation of Charitable Organizations

The following are the rules governing taxation of charitable organizations in Tanzania:-

- (a) In calculating the income of a charitable organization or religious organization for any year of income from its charitable business there shall be included, together with any other amounts required to be included under other provisions of the Income Tax Act, all gifts and donations received by the organization.²⁷⁶
- (b) Deductions are allowed which are provided under the Income Tax Act and together with amounts applied in pursuit of the organization or religious organization's functions referred to in section 64(8) of the Income Tax Act by providing reasonable benefits to resident persons or, where the expenditure on the benefits has a source in the United Republic, person's resident elsewhere.²⁷⁷
- (c) The law also allows deductions of 25 percent of the organization or religious organization's income from its charitable business calculated without any deduction and any investments.²⁷⁸
- (d) The charitable organization will be regarded as engaging into business if it acts beyond its normal charitable business.²⁷⁹

²⁷⁵ Private ruling used to be governed by Section 131 of the Income Tax Act but the section has been repealed by Section 124 of the Tax Administration Act 2015. Private ruling is now provided by sections 11-14 of the Tax Administration Act 2015; Refer also to section 118 of TAA 2015.

²⁷⁶ Section 64(2)(a) of the Income Tax Act, 2004.

²⁷⁷ Section 64(2)(b) of the Income Tax Act, 2004.

²⁷⁸ Section 64(2)(b)(ii) of the Income Tax Act, 2004.

²⁷⁹ Section 64(4)(a) of the Income Tax Act, 2004.

- (e) Notwithstanding the provision of section 19 of the Income Tax Act, 2004 as amended a charitable organization or religious organization may not set any loss from its charitable business against its income from any other business.²⁸⁰ This implies that the organization may only set losses from any other business against income from any such other business.
- (f) Where a charitable organization or religious organization ceases to be a charitable organization or religious organization during a year of income the organization or religious organization shall be treated as conducting a business other than its previous charitable business.²⁸¹
- (g) Where a charitable organization or religious organization wishes to save funds for a project that is detailed in material particulars and which the organization is committed to, the organization or religious organization may apply to the Commissioner and the Commissioner may approve the saving as meeting the requirements of carrying out charitable business.²⁸²

Generally, charitable organization subject to the requirements and other conditions provided by the law is also subject to corporate tax at the rate of 30%.

5.3.4 Clubs and Trade Associations

Section 65(3)(b) of the Income Tax Act provides that trade association means any association of persons that are all separately engaged in a particular type of business and formed with the main object of safeguarding or promoting the business interests of such persons or members. Members in the case of a trade association refer to persons who are entitled to vote at a general meeting of the association.

Clubs refers to a club or similar institution which all the assets are owned in common or held in trust for the members thereof. This implies that there can be a board of trustees which can hold assets in trust of the members of the club. The member in the case of a club or similar institution, a person who, while a member, is entitled to an interest in all the assets of the club or institution in the event of its liquidation or who is entitled to vote at a general meeting of the club or institution.

The rules and principles governing the taxation of clubs and trade association in Tanzania are as follows:-

280 Section 64(5) of the Income Tax Act, 2004.
 281 Section 64(6) of the Income Tax Act, 2004.
 282 Section 64(7) of the Income Tax Act, 2004.

- (a) The activities of a club, trade association or similar institution shall be treated as a business and for the purposes of calculating the club, association or institution's income for a year of income from that business there shall be included, together with any other amounts to be included under other provisions of the Income Tax Act, 2004, entrance fees, subscriptions and other amounts derived from members during the year of income.²⁸³
- (b) Where three-quarters or more of the amounts to be included in calculating the income of a members club or trade association for a year of income from the business are derived from members of the club or association, the income from that business shall be exempt and shall not constitute chargeable income of the club or association.²⁸⁴

Generally, clubs and trade associations subject to the requirements and other conditions provided by the law are also subject to corporate tax at the rate of 30%.

5.3.5 Minerals

Section 4 of the Mining Act²⁸⁵, define mineral to mean any substance whether solid, liquid or gaseous form occurring naturally in or on the earth or in or under the seabed formed by or subject to a geological process but does not include petroleum or surface water. The Mining Act covers different matters among other things include prospecting²⁸⁶ for mineral, mining, processing and dealing in mineral rights²⁸⁷, payment of royalties, fees and other charges.

5.3.5.1 Principles Governing Taxation of Minerals

The principles discussed in this part are those governing taxation of minerals specifically mining operations carried out by a person without a separate license solely for processing, smelting or refining of minerals. Section 4 of the Mining Act as amended by section 4 of the Written Laws (Miscellaneous Amendment), Act No.7 of 2017 defines mining operations to mean operations carried out in the course of undertaking mining activities.

²⁸³ Section 65(1) of the Income Tax Act, 2004.

²⁸⁴ Section 65(2) of the Income Tax Act, 2004.

²⁸⁵ Cap 123 of 2010.

²⁸⁶ Refers to search any mineral by means and to carry out any such works and remove such samples as may be necessary to test the mineral bearing qualities of land and includes the conduct of reconnaissance operations.

²⁸⁷ Refers to licenses referred under section 7 of the Mining Act, 2010; Prospecting license, gemstone license, retention license, special mining license, mining license, primary mining license, processing license, smelting license, refining license.

The following are the principles:-

- (a) A person conducting mining operations shall be subject to income tax with respect to those operations.²⁸⁸
- (b) The total income of a person from conducting mining operations shall be taxed at the rate of thirty percent (30%).²⁸⁹
- (c) In calculating a person total income from mining operations each separate mining shall be treated as an independent business and the persons must prepare accounts for that business from any other activity of the person.²⁹⁰ This implies that the principle of ring fencing²⁹¹ apply in calculating income of the person carrying out more than one mine.
- (d) The person shall calculate chargeable income and income tax liability for the business independently for each year of income.
- (e) The principles governing transfer pricing among associates persons for the purpose of tax liability applies also to arrangement between separate mining operations and other activities of the person under different mineral rights.²⁹²

5.3.5.2 Inclusions

Section 65D of the Income Tax Act, 2004 as amended by section 26 of the Finance Act 2016 provides that in calculating a person income from a separate mining operation for a year of income there shall be included together with any other amounts required to be included under other provisions of the Income Tax Act, 2004 the following:-

- (a) Incomings derived from the disposal of minerals produced from the license area.²⁹³

288 Section 65B (1) of the Income Tax Act, 2004 as amended by section 26 of the Finance Act 2016.

289 Section 32(b) of the Finance Act 2016 amended the first schedule to the Income Tax Act, 2004 by adding immediately after subparagraph (4), subparagraph 3(5) and 3(6).

290 Section 65B (4)(b) and Section 65C(1) of the Income Tax Act, 2004 as amended by section 26 of the Finance Act, 2016.

291 Section 65C (4) of the Income Tax Act, 2004 as amended by section 26 of the Finance Act, 2016.

292 Section 65B (5) of the Income Tax Act, 2004 as amended by section 26 of the Finance Act, 2016; and Section 33 of the Income Tax Act, 2004.

293 Section 3 of the ITA 2004 as amended by section 17 of the Finance Act 2017 defines license area with respect to mining operations to mean the area covered by mineral right in question

- (b) Amounts received in respect of sale of data or information pertaining to mineral operations or mineral reserves.
- (c) Amounts required to be included under paragraph 5 of the Third Schedule of ITA 2004 including from the assignments or other disposal of an interest in the mineral right with respect to which the operation is conducted after commencement of production.
- (d) Amounts required to be included under section 65I of the Income Tax Act, 2004 in respect of surplus in the rehabilitation fund.²⁹⁴

5.3.5.3 Deductions

Section 65E(1) of the Income Tax Act as amended by the Finance Act, 2016 provides for allowable expenses or expenditures in calculating a person income from separate mining operations for the year of income. Apart from deductions which are allowed under the Income Tax Act, which are provided under sections 11-19, the following deductions specifically apply for mining operations:-

- (a) Annual charges incurred by the person under the Mining Act or Mining Development Agreements with respect to the mineral rights. Section 64E of the ITA 2004 has been amended by section 34(a) of the Written Laws (Miscellaneous Amendments), Act No.7 of 2017.
- (b) Provided that, depreciation basis for purposes of depreciation allowance shall not exceed the cost of investment as determined by the commission under section 22 of Mining Act. Section 64E of the ITA 2004 has been amended by section 34(b) of the Written Laws (Miscellaneous Amendments), Act No.7 of 2017.
- (c) Contributions to and other expenses incurred in respect of rehabilitation fund for the operations as required by the law or approved under the Mining Development Agreements by the Minister responsible for mining.
- (d) Expenses incurred in respect of acquisition of rehabilitation bond.
- (e) Deduction of losses is allowed from mining operations subject to the conditions stipulated under section 65F(1) of the Income Tax Act as amended by the Finance Act, 2016 and also section 19 of the Income Tax Act, 2004.

²⁹⁴ Rehabilitation fund with respect to mining operations or with respect to processing, smelting or refining minerals means a fund required by law, a mineral right or under a development agreement and approved for that purpose by the Minister responsible for mining; which is established to meet expenses to be incurred in the course of rehabilitation of the operations including expenses under approved mine closure plan; where contributions to the fund are placed beyond the control of the person conducting the operations (Section 3 of the Income Tax Act, 2004 as amended by the Finance Act 2016 and section 17 of the Finance Act, 2017; refer also to Section 65I(1) of the Income Tax Act, 2004 as amended by the Finance Act, 2016.

- (f) Deductions under sections 15, 16, 17 or 26 of the Income Tax Act, 2004 are not allowed in calculating income of a person in mining operations.

5.3.6 Petroleum

Section 3 of the Petroleum Act²⁹⁵ define petroleum to mean any naturally occurring hydrocarbon whether in gaseous, liquid, solid state or any naturally occurring mixture of hydrocarbons, whether in a gaseous, liquids or solid state or mixture of one or more hydrocarbons whether in a gaseous, liquid or solid state and any other substance and include petroleum that has been returned to a natural reservoir but shall not include coal or any substance that may be extracted from coal or other rock. In taxation of petroleum regards should be to the categorization of activities²⁹⁶ namely upstream²⁹⁷ activities, midstream²⁹⁸ activities and downstream²⁹⁹ petroleum activities.

This part focuses mainly on the taxation principles governing petroleum operations. Petroleum operations refer to any or all operations and activities in connection with reconnaissance, exploration, appraisal, development, production, processing or liquefaction, and include activities in connection with decommissioning of petroleum facilities.³⁰⁰

5.3.6.1 Principles Governing Taxation of Petroleum Operations

The following are the taxation principles governing the tax liability of petroleum operations:-

- (a) The person conducting petroleum operations pursuant to license granted shall be subject to the income tax.
- (b) The total income of a person from conducting petroleum operations shall be taxed at the rate of thirty percent (30%).³⁰¹
- (c) In calculating a person income from petroleum right each separate petroleum right shall be treated as an independent business and the person shall prepare accounts for that business separate from any other business of the person.³⁰²

295 Cap 392 of 2015.

296 Section 65S (1) of the Income Tax Act, 2004 as amended by section 26 of the Finance Act, 2016.

297 Upstream activities means and comprising of geophysical exploration, exploration for and development of petroleum, constructing and operating of wells, production of petroleum, construction, operating and use of storage reservoir, construction and operating of pipelines and other special infrastructure for petroleum (Section 3 Cap 392 of 2015).

298 Midstream activities means activities related to petroleum processing, refining, liquefaction, storage and transportation to the point of supply or loading as commodity (Section 3 Cap 392 of 2015.)

299 Downstream activities means transportation, distribution, storage, regasification marketing of gas and petroleum products (Section 3 Cap 392 of 2015).

300 Section 3 of the Petroleum Act, 2015.

301 Section 32(b) of the Finance Act 2016 amended the first schedule to the Income Tax Act, 2004 by adding immediately after subparagraph (4), subparagraph 3(5) and 3(6).

302 Section 65K(4) of the Income Tax Act, 2004 as amended by section 26 of the Finance Act, 2016.

- (d) A person shall calculate chargeable income and income tax liability for the business independently for each year of income.
- (e) The principles governing transfer pricing among associates persons for the purpose of tax liability applies also to arrangement between separate petroleum right and other activities of the person conducting petroleum right including other petroleum right or midstream or downstream activities of the person.³⁰³
- (f) Petroleum operations pertaining to each petroleum right shall constitute a separate petroleum operations.³⁰⁴
- (g) The principle of ring fencing,³⁰⁵ applies also in calculating income of a person from petroleum operations.

5.3.6.2 Inclusions

Section 65M(1) of the Income Tax Act, 2004 as amended by section 26 of the Finance Act 2016 provides that in calculating a person income from a separate petroleum rights for a year of income there shall be included together with any other amounts required to be included under other provisions of the Income Tax Act, 2004 the following:-

- (a) Incomings derived from the disposal of petroleum obtained from the license area valued at the delivery point identified in the production sharing agreement and in the case of contractor under PSA a contractor full share of petroleum from profit oil and profit gas. Section 65M of the ITA 2004 has been amended by section 35 of the Written Laws (Miscellaneous Amendments), Act No.7 of 2017.
- (b) Amounts received in respect of the sale of data or information pertaining to the operations or petroleum reserves.
- (c) Amounts required to be included under paragraph five of the Third Schedule including from the assignment or other disposal of an interest in the petroleum right with respect to which the operations is conducted after the commencement of production.

³⁰³ Section 65K (5) of the Income Tax Act, 2004 as amended by section 26 of the Finance Act, 2016; and Section 33 of the Income Tax Act, 2004.

³⁰⁴ Section 65L (1) of the Income Tax Act, 2004 as amended by Section 26 of the Finance Act, 2016.

³⁰⁵ Section 65K(4) of the Income Tax Act, 2004 as amended by section 26 of the Finance Act, 2016.

5.3.6.3 Deductions

Section 65N(1) of the Income Tax Act as amended by section 26 of the Finance Act, 2016 provides for allowable expenses or expenditures in calculating a person income from separate petroleum right for the year of income. Apart from deductions which are allowed under the Income Tax Act, which are provided under sections 11-19, the following deductions specifically apply for petroleum operations:-

- (a) Annual fees incurred by the person with respect to petroleum rights under section 114 of the Petroleum Act. Section 65N of the Income Tax Act has been amended by section 36(a)(i) of the Written Laws (Miscellaneous Amendments) Act, No.7 of 2017.
- (b) Depreciation allowances in respect of depreciable assets other the assets whose cost are recouped from the from the cost oil or cost gas under PSA granted with respect to the operations and calculated in accordance with paragraph six (6) of third schedule of ITA 2004. Section 65N of the Income Tax Act has been amended section 36(a)(ii) of the Written Laws (Miscellaneous Amendments) Act, No.7 of 2017.
- (c) Amounts deposited in respect of the decommissioning,³⁰⁶ fund,³⁰⁷ for petroleum operation.

The following deductions are not allowed in calculating income from a separate petroleum right:-

- (a) Expenditure/expenses under sections 15, 16 and 26 of the Income Tax Act, Cap 332 of 2004. Section 65N(2) has been amended by section 36(b)(i) of the Written Laws (Miscellaneous Amendments) Act, No.7 of 2017.
- (b) Any expenditure and depreciation allowance in respect of assets covered by cost petroleum under a Production Sharing Agreement Section 65N(2) has been amended by section 36(b)(ii) of the Written Laws (Miscellaneous Amendments) Act, No.7 of 2017.
- (c) For an unrelieved loss under section 19 of the Income Tax Act except as permitted by section 65O of the Income Tax Act, Cap 332 of 2004.
- (d) Expenses incurred by the person in implementing the decommissioning plan for the operation in excess of deposits in the decommissioning fund.
- (e) Any bonus payment.

306 Decommissioning refers to removal or disposal of structures, facilities and installations and includes pipeline, platforms and other property used in petroleum operations in an area, cleaning up of the area, plugging and secure of wells, restorations of land, safety clearance of an area, in connection with abandonment or cessation or partial cessation of petroleum operations in area or part of an area (Section 4 of the Petroleum Act, 2015).

307 Section 65N(1) of the Income Tax Act, 2004 as amended by section 26 of the Finance Act 2016 and the Written Laws (Miscellaneous Amendments) Act, No.7 of 2017.

CHAPTER SIX

TAXATION OF INCOME FROM EMPLOYMENT IN TANZANIA

6.1 Introduction

This chapter provide in details the meaning of employee, meaning of employment, tests to determine whether a person is an employee or independent contractor or self-employed, source of payment attributable to an employment, general rule for taxation of income from employment, inclusions, exclusions and deductions.

6.2 Employee

Section 3 of the Income Tax Act,³⁰⁸ defines an employee,³⁰⁹ to mean an individual who is the subject of an employment conducted by another person. An employee has been defined further under section 4 of the Employment and Labour Relations Act,³¹⁰ to mean, an individual who:-

- (a) Has entered into a contract of employment; or
- (b) Has entered into any other contract under which:-
 - (i) The individual undertakes to work personally for the other party to the contract; and
 - (ii) The other party is not a client or customer of any profession, business, or undertaking carried on by the individual; or
- (c) is deemed to be an employee by the Minister under section 98(3).

The implication of these sections is that an employee must be a natural person or individual³¹¹ in the employment conducted by an employer. An employer can be any person including the Government and executive agency who employs an employee.³¹²

308 Cap 332 of 2004.

309 It includes a permanent employee, part time, manager, director and casual employees. Employees may be employed by one or more employers (Primary and Secondary Employment).

310 Cap 366 of 2004.

311 This individual may be working on part-time or full time under a contract of employment whether oral or written, express or implied and has recognized rights and duties. The court or the tax authority examine the nature of contract if is of service(Employment) or is for services(Self-employed/independent contractor).

312 Section 4, Cap 366 of 2004.

The Income Tax Act under section 3 further defines an employer to mean a person who conducts, has conducted or has the prospect of conducting the employment of an individual. The business entity concept provides that the owner of the business and the business are two different persons. This implies that a person can be employed by his own business and paid the salary or other benefits by his business which will be subject to tax³¹³ as provided by the Income Tax Act 2004.

It is important to establish whether a person is an employee or independent contractor for the purpose of tax liability because the tax principles governing the taxation of independent contractor are different from those governing taxation of an employee.

In the case of *Niselow v Liberty Life Association of Africa Ltd* (1998) 19 ILJ 752 (SCA), the Supreme Court dealt with a matter that concerned the contract of an insurance sales agent who was contracted to canvass full time and exclusively for the respondent for applications for contracts of insurance. The Court held that:-

"It was common cause between the parties that an independent contractor was not an employee as envisaged by the Act. An independent contractor undertakes the performance of certain specified work or the production of a certain specified result. An employee at common law, on the other hand, undertakes to render personal services to an employer. In the former case it is the product of the result of the labour which is the object of the contract and in the latter case the labour as such is the object (see *Smit v Workman's Compensation Commissioner* 1979 (1) SA 51 (A) at 61B). Put differently, 'an employee is a person who makes over his or her productive capacity to produce to another; an independent contractor, by contrast, is a person whose commitment is to the production of a given result by his or her labour (per Brassey 'The Nature of Employment') (1990) 11 ILJ 889 at 899."

6.3 Employment

Employment is defined under Section 3 of the Income Tax Act to mean:-

- (a) a position of an individual in the employment of another person;
- (b) a position of an individual as manager of an entity other than as partner of a partnership; or
- (c) a position of an individual entitling the individual to a periodic remuneration in respect of services performed; or
- (d) a public office held by an individual, and includes a past, present and prospective employment;

313 Section 7 and First Schedule to the ITA 2004.

The definition given focuses on the position of an individual³¹⁴ in the employment of another person. The position which the person possess determines also the payment and other benefits associated to it. An individual may be employed as a normal employee or as a manager of an entity.³¹⁵ The manager of an entity apart from the salary paid he may be entitled to other benefits such as responsibility allowance, housing allowances, transport allowance, entertainment allowance etc. These benefits may be subject to tax depending on the type of benefits and compliance to the requirements of revenue laws governing such particular benefits.

6.4 Employment Tests

There are different tests which have been established through case law which assist the court or tax authority in ascertaining whether a person is an employee or independent contractor/Self-employed. Herein below are the tests:-

6.4.1 Common Law Test/Multi-Factor Test

The factors to be considered under common law test or multi-factor test include right to control, type of business, supervision, skill level, tools and materials, continuing relationship, method of payment, Integration, Intent, employment by more than one firm.

The above factors have been demonstrated in the following cases:-

In the case of *Freestone v Morris & Partners Pty Ltd*,³¹⁶ A company claimed that a woman, who performed office duties, including bookkeeping, was a contractor. The woman's engagement had been terminated, and she sought compensation because she had not been given statutory notice of termination. The company resisted the claim on the basis that she was not an employee, and therefore not entitled to statutory notice. It argued that the woman had no written contract, she issued invoices on a monthly basis via her registered business name, and she operated other various businesses.

314 The individual has to perform the work personally. In the case of *Express and Echo Publications Ltd v. Tanton* (1999, IRLR 36), the Court of Appeal held that because the driver's contract said he did not have to do the work personally, it could not be a contract of employment.

315 Section 3 of the Income Tax Act define manager in relation to an entity - (a) means any councillor, director, manager, member, officer or other person who participates or may participate, whether alone or jointly with other persons, in making senior management decisions on behalf of the entity; and (b) includes a partner of a partnership, a trustee of a trust and a person in accordance with whose directions and instructions the entity or a person described in paragraph (a) is required or accustomed to act.

316 [2009] AIRC 223).

The Australian Industrial Relations Commission found that she was, in fact, a part-time employee. Some of the factors that influenced that decision were that she did not advertise her bookkeeping duties to the world at large or maintain separate business premises, she worked under the direction of one of the business owners, she did not provide or maintain significant tools or equipment, her work could not be delegated or subcontracted and she was remunerated for hours of work (not completion of tasks).

Another case is the case of *Frank's v. Reuters Ltd*³¹⁷ in this case Mr Franks had been working for one client for six years, as an agency worker. The Court of Appeal held that he had effectively been integrated into the employer's organization. Although the length of the assignment was significant, the court stressed that length of service would not always mean that there was an implied contract.

Further in the case of *Fair Work Ombudsman v. Metro Northern Enterprises Pty Ltd*,³¹⁸ A company which engaged consultants to sell kitchenware products claimed that the consultants were contractors. The consultants would approach members of the public at public venues, such as shopping centers, and invite them to enter a competition to win products. They then contacted the individuals and performed demonstrations of the products with a view to selling them. They signed contracts calling them 'independent agents', which expressly stated that they were not employees.

The Federal Circuit Court found them to be employees. It said that their arrangement of work was not consistent with them being independent contractors. For example, the company exercised control in a broad sense over the manner in which they did their work. The consultants had little independent control over how they did their work, particularly the demonstrations. They were an integral part of the company's business. In practice, they could not delegate their work. They were not engaged for a result or a product, but for their labour in following the steps that would produce a result. The company was liable under the sham contracting provisions of the Fair Work Act 2009 (Cth) and was liable for employee entitlements that should have been paid under the relevant modern award.

Also in the case of *Vizcaino v. Microsoft*,³¹⁹ Prior to 1990, Microsoft hired "freelancers" to perform various services for the company over a continuous period, in some cases extending in excess of 2 years. Upon joining Microsoft, the former freelancers executed agreements which specifically

317 2003, IRLR 423.

318 [2013] FCCA 216.

319 97 F.3d 1187 (9th Cir. 1996).

stated that they were independent contractors and not employees and that nothing contained in the agreement would be construed to create an employer-employee relationship. Despite the agreements, the workers were fully integrated into Microsoft's workforce, working under nearly identical circumstances as Microsoft's regular employees. The erstwhile freelancers worked the same core hours at the same location and shared the same supervisors as regular employees. The only distinction between the freelancers and regular employees was that the freelancers were hired for specific projects. Microsoft neither paid the employer's share, nor withheld the worker's share, of FICA taxes and did not allow the workers to participate in the company's pension plans, on the basis of the agreements the workers had signed stating that they were independent contractors.

The IRS investigated Microsoft and determined that the workers were employees, not independent contractors, and that Microsoft should have been withholding taxes for them. Accepting the IRS' determination, Microsoft conferred employee status on certain of the workers, but dismissed others from employment. Those who were dismissed then filed a class-action suit seeking to have the court declare that they were eligible to participate in Microsoft's pension plans. The district court determined that the workers were employees, not independent contractors. On appeal, Microsoft conceded that the workers were employees, but argued that they had waived their right to participate in the company's pension plans by executing the agreements which specifically stated that they were independent contractors and not employees and that nothing contained in the agreement could be construed to create an employer-employee relationship.

The court of appeals rejected Microsoft's argument, finding that the company's pension plan administrator had acted arbitrarily and capriciously in denying the workers' claim that they were entitled to participate in the pension plans.

In conclusion U.S. Court of Appeals for the Ninth Circuit held that a class of workers for the leading U.S. computer software company were employees who were entitled to participate in Microsoft's various pension and welfare plans, despite the fact that the workers had signed an agreement that labeled them as independent contractors.

6.4.2 Economic Realities Test

The factors to be considered under the economic realities test include Integration, Investment in facilities, risk, and skill etc. This test has been demonstrated in the following cases:-

In *Brock v. Superior Care*,³²⁰ the U.S. Court of Appeals for the Second Circuit found that an employer had violated the Fair Labor Standard Act's overtime-pay protections by not paying overtime to nurses who were employees under the Act. Superior Care referred nurses for temporary assignments to hospitals, nursing homes, and individual patients. The company would assign nurses as work opportunities became available, and the nurses were free to refuse an assignment for any reason. If a nurse accepted an assignment, the nurse reported directly to the patient, and Superior Care provided minimal supervision through visits to job sites approximately once or twice a month. Patients contracted directly with Superior Care, which paid them an hourly wage. The nurses could hold other jobs, including jobs with other health care providers.

The court found that the nurses were employees under the economic realities test. As a preliminary matter, the court rejected the company's contention that the trial court had used evidence outside of the six factors that make up the test. Superior Care had two sets of payrolls, one for taxed employees and one for non-taxed employees, despite the fact that the nurses on both payrolls did exactly the same work. The workers on the non-taxed payroll did not receive overtime pay for their work. The trial court relied in part on that evidence in finding that those workers were not independent contractors.

The appeals court noted that the factors of the economic reality test are not exclusive and that any relevant evidence can be considered as part of the totality of the circumstances surrounding the employment relationship. The court also stated that an employer's "self-serving" labeling of workers as independent contractors is not controlling. Turning to the application of the economic reality factors, the court found that:-

- (a) The nurses had no opportunity for profit or loss, because Superior Care set their wages and prohibited them from entering into privately paying contracts with patients.
- (b) The nursing services that were provided were the most integral part of Superior Care's business of providing health care personnel on request, and
- (c) Despite a quantitatively calculated lack of visits by Superior Care supervisors, the company retained the right to supervise the nurses and exerted control over them in that regard. Although the nurses obviously were skilled workers and also had the opportunity to work for other health care employers besides Superior Care, the court found those factors non-dispositive. According to the court, the weight of the evidence indicated that when all the circumstances of the employment relationship were considered, the nurses were employees and not independent contractors.

320 840 F.2d 1054 (1988).

Another case is the case of *Brock v. Mr. W Fireworks*,³²¹ the Court of Appeals for the Fifth Circuit found that operators of fireworks stands in south Texas were employees under the economic realities test, subject to the protections of the Fair Labor Standards Act, because:-

- (a) Mr. W controlled the method of selling fireworks and made a substantial investment in the business operations.
- (b) The operators lacked skill and independent initiative, and
- (c) The duration of the employment relationship was lengthy.

According to the parties' testimony, Mr. W acquired land for fireworks stands, procured materials to build the stands, hired workers to construct the stands at its warehouse, recruited operators to run the stands during the two short periods in each year that Texas permits the sale of fireworks, employed workers to supply the stands with fireworks, and advertised the sale of fireworks through the stands. Mr. W paid the operators of the stands on a commission basis. The appeals court rejected the trial court's finding that the operators were independent contractors, ruling that Mr. W exerted control over the operators by determining the location and size of the stands, by suggesting the retail price of the fireworks and preprinting price tags, by requiring operators to attend to the stands for 24 hours a day to avoid the loss of inventory, by providing display instructions that were almost uniformly followed by the operators, by supplying a substantial portion of advertising, and by determining how the operators would be paid.

The court also found that the operators had little opportunity to determine their own profit or loss, because the commission for the sale of the fireworks was set by Mr. W, that the operators made little or no investment in the operation of the stands, whose construction was always financed by Mr. W, and that the operators, while good salespersons, did not exhibit a degree of independent skill or initiative sufficient to conclude that they were independent contractors. Finally, the fact that the fireworks stands were seasonal was simply an operational characteristic unique to the particular business, and the permanency of an employment relationship could accordingly be determined by whether the operators worked for the entire operative period of a particular season. Because the operators were economically dependent on Mr. W for their continued employment as sellers of fireworks, the operators were deemed employees under the economic realities test, entitled to the protections of the Fair Labor Standards Act.

321 814 F. 2d 1042.

In conclusion, the economic realities test, while similar to the common-law test, focuses on the ultimate concern of whether the economic reality, as illuminated by several factors, is that a worker depends on someone else's business for his or her continued employment, in which case the worker is an employee. If a worker operates an independent business, the worker is classified as an independent contractor under the economic realities test.

6.4.3 Hybrid Test

The hybrid test is the combination between common law test and economic realities test. The test combines elements of the common law test and the economic realities test, in keeping with the accepted view that the totality of the circumstances surrounding the relationship between worker and employer should be examined to determine whether the worker is an employee or an independent contractor. In practice, the hybrid test considers the economic realities of the work relationship as a critical factor in the determination, but focuses on the employer's right to control the work process as a determinative factor.

The following are some cases which demonstrate the application of hybrid test.

In the case of *Butler v. Drive Automotive Industries of America*,³²² the Plaintiff, Brenda Butler, was hired by Resource MFG, a temporary employment agency, to work at Drive Automotive in Piedmont, South Carolina. Butler sued Resource MFG and Drive Automotive alleging sexual harassment under Title VII of the Civil Rights Act of 1964. She alleged that her supervisor made constant, inappropriate comments about her body. Additionally, she alleged that after she reported an altercation in which Butler's supervisor called her an inappropriate name and told her to go home; she was referred to Resource MFG for termination. Further, Butler alleged that her supervisor called before she was terminated and suggested that he could save her job if she performed sexual favors for him. Soon thereafter, she was terminated by Resource MFG. The key issue in the case was not whether the temporary agency, Resource MFG, was Butler's employer – that was undisputed – but was whether Drive Automotive also was considered her employer.

The District Court for the District of South Carolina, where the case was originally filed, dismissed Butler's claims against Drive Automotive, finding that Drive Automotive was not Butler's employer under Title VII because it did not exercise sufficient control over Butler's employment

322 No. 14-1348, 2015 WL 4269615 (4th Cir. 2015).

On appeal, the Fourth Circuit formally adopted the joint employer doctrine for Title VII claims. The Fourth Circuit stated that two parties can be considered joint employers and therefore both be liable under Title VII if they share or co-determine those matters governing the essential terms and conditions of employment over the same employees.

Additionally, the Fourth Circuit adopted a nine-factor hybrid test to determine who qualifies as an employer for Title VII. The test is based on traditional common-law elements of control, as well as an economic realities test which has long been a factor used by the Department of Labor in issuing determinations in this area. The nine factors are as follows:

- (a) Authority to hire and fire the individual.
- (b) Day-to-day supervision of the individual, including employee discipline.
- (c) Whether the potential employer furnishes the equipment used and the place of work.
- (d) Possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes.
- (e) The length of time the individual has worked for the potential employer.
- (f) Whether the potential employer provides the individual with formal or informal training.
- (g) Whether the individual's duties are similar to a regular employee's duties.
- (h) Whether the individual is assigned solely to the potential employer.
- (i) Whether the individual and potential employer intended to enter into an employment relationship.

According to the Fourth Circuit, the first three factors are most important. However, the Court added that no one factor is determinative and courts can alter the test to fit specific industry contexts. In doing so, the Court said, the amount of control over the individual remains the principal guidepost in the analysis, with the first factor the ability to hire and fire being the most important to determine ultimate control. The Court observed that the use of a form which disclaims an employment relationship will not defeat a finding of a joint employer relationship.

After setting out the new test, the Fourth Circuit concluded in Butler's case that, while control remained the most important factor in the analysis, Drive Automotive was also Butler's employer despite not having authority to hire, fire, discipline, or pay Butler. In so concluding, the Fourth Circuit considered the aggregate circumstances, and found important the fact that Drive Automotive was responsible for determining Butler's work schedule, training Butler, and supervising Butler's work.

Another case is the case of *Alexander v. Avera St. Luke's Hospital*,³²³ the pathologist had contracted with the hospital to provide pathological services beginning in 1994. Consistent with the contract, the pathologist was to be a member of the hospital's medical staff and adhere to the hospital's bylaws and procedures. The initial and all of the subsequent contracts explicitly stated that the pathologist was an independent contractor. The hospital terminated the contract with the pathologist in 2011 and entered into an employment contract with two new pathologists. According to the opinion, the pathologist had suffered a heart attack in 2008, had undergone heart surgery in 2009, and was hospitalized for bipolar disorder in 2010. The hospital sought to dismiss the various discrimination claims against it. The lower court determined that the pathologist was not an employee of the hospital, but was an independent contractor, and dismissed the claims because the statutes do not protect independent contractors. The pathologist appealed.

The court affirmed the lower court's ruling, holding that no reasonable jury would find that the pathologist was an employee. The hospital had no right to control the manner in which the pathologist rendered his services, including his work schedule or hiring of assistants. Furthermore, the agreement explicitly referred to him as an independent contractor, he received no employment benefits, and he reported his income as a self-employed independent contractor.

6.5 Source of Payment Attributable to an Employment

The source of payment attributable to an employment is provided under Section 69(i) of the Income Tax Act.

The Act provides the source rules for payments attributable to employment exercised or forbearance from exercising employment as follows: -

- (a) Payments attributable to employment exercised or forbearance from exercising employment have a source in the United Republic where the employment or the forbearance is exercised in the United Republic, regardless of the place of payment. Exercising in this sense means the actual carrying out of the employment activities which may include physical presence of the employee at the place of employment.³²⁴

323 No. 13-2592 (8th Cir. Sept. 30, 2014).

324 Practice Note on income from Employment, No.11 of 2013.

- (b) Payments attributable to employment exercised or forbearance from exercising employment have a source in the United Republic where the payer for the exercising of the employment or the forbearance is the Government of the United Republic, including the Revolutionary Government of Zanzibar (SMZ) or any Tanzania local authority³²⁵.

The major focus of this section is the source of payment in respect of the employment carried out in the United Republic of Tanzania. This implies that the payment made in respect of employment exercised in Tanzania will be considered as having source in Tanzania irrespective of the place of payment. Besides, where the payer is the Government of the United Republic of Tanzania (Including the Revolutionary Government of Zanzibar and the Local Government) the source of payment will be regarded as the United Republic of Tanzania.

6.6 General Rule for Taxation of Income from Employment

The general rule for taxation of income from employment is provided under Section 7(1) of the Income Tax Act. The rule is that the income shall be the individual's gains or profits from any employment for a year of income. The payments made to an employee in respect of employment activities are regarded as income and therefore subject to tax as provided by the Income Tax Act. The year of income for employment income shall be the calendar year irrespective of the date in which the employment commenced.³²⁶ Where the employment commences on dates other than 1st January, the year of income for employment purposes will be the period ending on 31st December of the same year.

6.7 Basis of Assessment

The individual shall account for income tax on employment income on a cash basis and the tax payable calculated based on a twelve months period ending on 31st December of each year regardless of the period the employment is exercised. Section 21(2) of the Income Tax Act provides that an individual shall account for income tax purposes on a cash basis in calculating the individual income from employment or investment.

³²⁵ Ibid.,.

³²⁶ Section 20 of the Income Tax Act provides that the year of income is the calendar year. The calendar year runs from 1st January to 31st December of the same year. The Commissioner General is mandated upon application by an entity to change the year of income of an entity if the entity justify that there are compelling need to change the entity's year of income.

The cash basis accounting is accounting method that recognizes revenues and expenses at the time physical cash is actually received or paid out. This is reflected under Section 22(a) and (b) of the Income Tax Act, 2004. The section provides that a person who accounts for income tax purposes on cash basis derives an amount and therefore shall include the amount in calculating the person's income when payment is received or made available to the person. The section also allows the deductions of expenditure incurred. The expenditure is normally deducted when it is wholly and exclusively connected to the income of the person.

6.8 Inclusions

Section 7(2) of the Income Act provides for the payments to be included in calculating the individual's gains or profits from an employment for the year of income.

6.8.1 Payment of Wages

Section 4 of the Employment and Labour Relations Act, Cap 366 of 2004 define basic wage to mean that part of an employee's remuneration,³²⁷ paid in respect of work done during the hours ordinarily worked but does not include allowances, whether or not based on the employee's basic wage or pay for overtime worked in terms of section 19(5)³²⁸. The basis of payment of wage includes employees whose basic wage is set by the hour, employees whose basic wage is set by the day, employees whose basic wage is set by the week, and employees whose basic wage is set by the month.

The rates applicable for each category has been provided under section 26 of Act, Cap 366 of 2004 read together with the first schedule as follows:-

"Section 26(1) the provisions of this section apply, when, for any purpose of this Act, it is necessary to determine the applicable hourly, daily, weekly or monthly rate of pay. (2) The hourly, daily, weekly or monthly wage rates shall be determined in accordance with the Table provided for in the First Schedule.(3) Where an employee is employed on a basis other than time worked, that employee shall be considered, for the purposes of this section, to be paid on a weekly basis and that employee's basic weekly wage shall be calculated on the amount earned -(a) over the immediately proceeding 13 weeks, or(b) if the employee has been in employment for less than 13 weeks, that period."

The tax rates applicable to wages paid to employees are provided under the First Schedule of the Income Tax Act 2004 paragraph 1(1) as amended by the Section 32 of the Finance Act 2016.

327 Remuneration means the total value of all payments, in money or in kind, made or owing to an employee arising from the employment of that employee (Section 4 of Act No.6 of 2004).

328 Section 19(5) of Act Cap 366 of 2004 provides that an employer shall pay an employee not less than one and one half times the employee's basic wage for any overtime worked.

6.8.2 Salary

Salary is a fixed amount of money agreed between an employee and employer under the contract of employment paid in most cases at end of each month. This payment made in respect of employment is normally regarded as income and therefore subject to tax.

The principle which is applicable in imposing tax on income from employment is progressive income taxation in the sense that the higher the income the higher the tax rates. In order to know the rates of tax applicable to an employee the consideration is normally given to his total income in the year of income (due to the nature of employment (accrue based and monthly) rates are applied monthly, the annual income is therefore normally divided into monthly income to determine the rate)

The taxation of income from Employments is according to the table below provided under paragraph 1(1) of the first schedule of the Income Tax Act, as amended by section 32 of the Finance Act, 2016.

	Total Income	Rate Payable
1	Where the total income does not exceed 2,040,000/=	NIL
2	Where the total income exceeds 2,040,000 but does not exceed Tsh 4,320,000/=	9% of the amount in excess of Tshs 2,040,000/=
3	Where the total income exceeds 4,320,000/= but does not exceeds 6,480,000/=	Tshs 205,200/= plus 20% of the amount in excess of Tshs 4,320,000/=
4	Where the total income exceeds 6,480,000/= but does not exceeds 8,640,000/=	Tshs 637,200/= plus 25% of the amount in excess of Tshs 6,480,000/=
5	Where the total income exceeds 8,640,000/=	Tshs 1,177,200 plus 30% of the amount in excess of Tshs 8,640,000/=

The table indicated in most cases applies to resident employees whereas for non-resident employees (e.g. temporary employees from abroad) tax is withheld at a flat rate of 20% of the gross income from employment.³²⁹ Directors other than full time service directors, the tax are withheld at a rate 15%³³⁰ to fees paid to directors other than full service director. The tax payable is non-final withholding tax. Besides, in general High Commissions, Embassies and Diplomatic missions are not obliged to pay any tax, as covered under The Diplomatic and Consular Immunities and Privileges Act.

³²⁹ Paragraph 1(4), First schedule to the ITA 2004.

³³⁰ Paragraph 4(a)(iii), First schedule to the ITA 2004.

In this regard those bodies are not bound to operate PAYE schemes. Although some other bodies opt to operate in order to keep their records properly and help their employees to avoid wasting time in complying with their tax affairs so as to enable them concentrate with their duties at their offices.³³¹ Therefore if a local employee is employed in these institutions, and the institutions opt not to operate PAYE system, he shall do the following:-

- (i) Register as taxpayers by acquiring Taxpayer Identification Number (TIN).
- (ii) File a statement of estimated income at the beginning of the year based on his monthly income.
- (iii) File final returns.

How to Calculate PAYE

(a) 170,000 Tsh= Tax Free

(b) Above 170,000 -360,000= 9% of the amount exceeding 170,000Tsh

Assume the basic salary is Tsh 350,000

Calculate the amount of tax to be paid.

$$(350,000-170,000)9\%=16,200 \text{ Tsh}$$

(c) Above 360,000-540,000= 17,100 + 20% of the amount exceeding 360,000

Assume the basic salary is 520,000 Tsh

Calculate the amount of tax to be paid

$$17,100+ (520,000-360,000) 20\%= 49,100\text{Tsh.}$$

(d) Above 540,000 -720,000=53,100+ 25% of the amount exceeding 540,000

Assume the basic salary is 650,000 Tsh

Calculate the amount of tax to be paid

$$53,100 + (650,000-540,000) 25\%=80,600 \text{ Tshs.}$$

(d) Above 720,000 Tsh= 98,100+ 30 of the amount exceeding 720,000

Assume the basic salary is 950,000 Tsh

Calculate the amount of tax to be paid

$$98,100 + (950,000-720,000) 30\% =167,100 \text{ Tshs}$$

Note: The calculations above excluded retirement benefits.

³³¹ <http://www.tra.go.tz/index.php/payee/131-local-staff-working-to-high-commissions-embassies-and-diplomatic-missions>(Accessed on 5th February 2017).

6.8.3 Payment in Lieu of Leave

Section 31(1) of the Employment and Labour Relations Act provides that an employer shall grant an employee at least 28 consecutive days' leave in respect of each leave cycle, and such leave shall be inclusive of any public holiday that may fall within the period of leave. Besides, Section 31(6) of the Act provides that an employer shall not require or permit an employee to work for the employer during any period of annual leave. The Act further provides that an employer shall not pay an employee an amount of money in substitution for the annual leave to which that employee is entitled, whether or not the employee agrees to such payment.

Apart from the fact that the labour laws prohibit payment instead of leave to the employees, the Income Tax Act under Section 7(2)(a) recognizes compensation or payment made to the employee by the employer in lieu of leave. The basic question to ask is what happens if there is inconsistency between tax laws and other laws. The position of the law has been provided in the case of *Commissioner General versus M/S Barclays Bank(T) Limited*,³³² In this case the tribunal held that:-

"Tax matters must be guided by the revenue laws, except where the other laws unambiguously provide for a mechanism not inconsistent with the parent revenue law. We agree with that argument, for that is the law. It is also our collective understanding that TRA cannot simply ignore what the other laws provide in relation to specific trades or industries, yet in order for the Taxpayer to enjoy a specific relief provided for in the said laws, it is necessary that the said laws must be consistent with the revenue laws and must further recognize the supremacy, or otherwise of the revenue laws. In the present situation, the BAH provision does not suggest that an approval by the BOT is also an automatic approval for deduction under the Income Tax Act. In our view, an approval by BOT provides a basis for a Tax payer to enjoy a deduction but that is different from saying that the approval is absolute and that TRA must honor it irrespective of anything to the contrary."

The conclusion which can be drawn from this decision is that revenue laws prevail encase there is inconsistent with other laws. This implies that other laws should be consistent with revenue laws and where there is ambiguity or any contradictions revenue laws prevail.

6.8.4 Annual Director's Fees

Director's fees refer to fees paid by a corporation to its directors for providing services to the corporation. The remuneration paid to the Director includes annual retainer, committee chair fee, meeting fee, etc. The payment made to directors can be either to full time directors or directors not on full time basis. Directors who are on full time basis are taxed as employees of a corporation whereas those who are not on full time basis are taxed in respect of directors fees paid to them e.g annual director's fees.

332 Income Tax Appeal No.3 of 2011(TRAT).

Section 7(2)(h) of the Income Tax Act provides that annual director's fees is the fee(payment) paid to a director other than a full time service director. This fee which is paid to the director's annually is subject to tax.³³³

The remuneration of the directors shall be determined by ordinary resolution of the company and, unless the resolution otherwise provides, such remuneration shall be deemed to accrue from day to day. The directors may also be paid travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings or separate meetings of the holders of any class of shares or of debentures of the company or otherwise in connection with the business of the company.³³⁴ The directors on behalf of the company may be paid a gratuity or pension or allowance on retirement to any director who had held any other salaries office or place of profit with the company or to his widow or dependants and may make contributions to any fund and pay premiums for the purchase or provisions of any such gratuity, pension or allowance.³³⁵

6.8.5 Commissions

Commissions are the way to remunerate employees (salespeople) for securing the sale of a product or service. The intent is to create a strong incentive for the individual to invest the maximum effort into their work. It is usually calculated as a percentage of the sale of the product or service. Payment may be either straight commission (no base salary) or a combination of base salary and commission.³³⁶ In general, the commission structure is based on reaching specific targets or quotas that have been previously agreed upon by management and the employee.³³⁷ These targets or quotas are typically tied to sales revenue, unit sales or some other volume-based metric. Many commission-based salaries also pay a base salary, although the percent of salary made up of commission can vary from just a few percent to almost the entire salary. Sales jobs that are commonly paid with a commission-based salary include real estate, computing and technology systems, automobiles etc.

The commission paid in respect of employment either straight commission (no base salary) or a combination of base salary and commission are regarded as income from employment and therefore subject to tax as provided by the Income Tax Act read together with first schedule paragraph I(1) as amended by section 32 of the Finance Act 2016.

333 Directors other than full time service directors the tax is withheld at a rate 15% to fees paid to directors other than full service director.

334 Rule 81 of Table A of the Companies Act, Cap 212 of 2002.

335 Rule 82 of Table A of the Companies Act, Cap 212 of 2002.

336 Butteriss, M. (1999). **Help Wanted: The Complete Guide to Human Resources for Canadian Entrepreneurs**. Toronto: John Wiley & Sons. pp. 99-120.

337 Ibid.,

6.8.6 Bonuses

A bonus is a reward or payment given to an employee for achieving specific goals set by an entity or corporations. Bonus can be contractual or non-contractual. A contractual bonus is paid in accordance with the terms of a contract of service and cannot be withdrawn by the employer without legal consequences whereas non contractual bonus is discretionary bonus which is given by the employer and it can be withdrawn at any time. The employer may decide whether to implement the discretionary bonus plan and how much to be paid and when to pay. The example of bonuses includes guaranteed Bonus, performance-related Bonus, over performance bonus, Executive performance Bonus etc

The word discretionary has been defined in the case of *Small and others v. Boots Co.*³³⁸

The EAT Slade J) held that:-

“The ET had erred by determining the question of whether Cs had any contractual entitlement to a bonus by simply regarding the use of the word “discretionary” as determinative. The ET had failed to recognise that the extent of the employer’s discretion in relation to a bonus scheme is relevant to the determination of whether and to what extent the scheme has contractual content. So, the use of the term “discretionary” in a bonus scheme may be attached to the decision whether to pay a bonus at all, its calculation, when it should be paid, or other factors. Merely use of the word “discretionary” does not mean that a bonus scheme is non-contractual”.

In practice the bonuses to be given by the employers to the employees are normally provided in clauses which are found in the contract of Employment or separate contract. These clauses are drafted in the way that the employers do exonerate themselves from legal consequences encase of failure to pay the bonus indicated. This caused difficulties when enforcing bonus clauses in the court of law. In some situations it is possible to enforce bonus clauses especially where the bonus is guaranteed under the contract of employment and also where there is separate agreement with regards to the payment of bonus.

The income Tax Act recognizes bonus as gain or profit in respect of income from employment and therefore subject to tax.

6.8.7 Gratuity

It is a lump sum of money paid in most cases to an employee at the end of contract of employment. The employee is not required to contribute to the portion of the lump sum paid since the total lump sum is paid by the employer. It is important to note that gratuity is given at the discretion of the employer,

³³⁸ [2009] IRLR 328.

especially in cases where the employer has registered with a pension scheme and is contributing on behalf of the employees. In Tanzania gratuity depends on the voluntary agreement between the employee and the employer. The same agreement normally provides the amount of gratuity payable and the mode of calculation.

The Income Tax Act under section 7(2)(a) recognize gratuity as income from employment and therefore subject to tax. The Finance Act 2016 under section 33 amended the second schedule of the Income Tax Act by deleting paragraph I(r) which exempted gratuity paid to members of parliament. The implication of this amendment is that the gratuity paid to members of parliament upon completion of their term is now subject to tax.

6.8.8 Allowances

Allowances paid in respect of employment may be subject to tax or not subject to conditions provided by the law. The Practice Note on Payment of Allowances, Gifts, and Tips from Employment, Practice Note No.12 of 2013 provide details about allowances, gifts and tips.

The law imposes tax on any subsistence, travelling, entertainment or other allowances received in respect of employment or services rendered except subsistence, travelling, entertainment or other allowances that represent solely the reimbursement to the recipient of an amount expended by the recipient wholly and exclusively in the production of his employer's income.

Businesses bear directly certain expenses of their employees, and in case of directors and senior employees a fixed expense allowance is often paid in addition to the salary. It is frequently a matter of practice whether such payments and allowances are treated as part of the emoluments of the office or employment. Where an individual's disbursements in the exercise of the employment are borne or reimbursed by the employer, the disbursements are not treated as forming part of the emoluments of the employee, although they may have the effect of saving the employee's expense or providing an amenity.

Note: Where the allowance is established to be excessive considering the amount of the actual expense, the excess amount is assessable as forming part of the emoluments, in which case the employee can deduct the portion of the payment qualifying as an expense wholly and exclusively incurred in the production of the employee's income from the employment.

Sitting allowance payable to a member of a board of directors of a public institution is reimbursement or compensation for the extra costs incurred by the member in order to perform the member's board duties. Such allowance is not taxable.

In the case of *Bulyanhulu Gold Mine Limited Versus Commissioner General (TRA)*,³³⁹ the word "wholly" and "exclusively" has been discussed.

The Court of Appeal referred to Professor Luoga's Sourcebook as provided herein below:-

According to the learned scholar, the terms "wholly" and "exclusively" in section 16 (1) of the ITA, 1973, refer to two different things. Whereas "wholly" refers to the quantum of the expenditure, in that, the whole of the expenditure must be for the trade and not only part of it; the term "exclusively" refers to the purpose of expenditure, which implies that the sole purpose of the expenditure must be for trade. The learned author then goes on to set out seven principles that are commonly used in determining whether expenditure has been incurred "wholly" and "exclusively" for the purpose of producing income. (pp. 122 - 125):-

These are:-

1. The Assessee's Capacity

- ❖ whether the expenditure was incurred by the tax payer in his/her capacity as a trader or in some other capacity.

(2) Commercial Expenditure

- ❖ Whether the expenditure is voluntarily incurred on grounds of commercial expediency, in order to facilitate the carrying on of the business.

(3) Reasonableness

- ❖ Allowable expenses are not subject to the subjective test of reasonableness, but to be determined objectively from the circumstances of the expenditure and common business practice.

(4) Business Purpose

- ❖ Whether the direct purpose of the expenditure is to facilitate trade.

(5) Production of Taxpayer's Own Income

- ❖ Deductions are only allowed for expenditure on the production of the assessee's own income, not for personal use, such as food.

(6) Incidental Benefit to a Third Party

339 Consolidated Civil Appeals No. 89 & 90 of 2015 (Court of Appeal).

- ❖ Expenditure incurred wholly and exclusively for the purpose of a trader's business will not be disallowed merely because a third party incidentally obtains advantage from the expenditure.

(7) Expenditure for Future Income

- ❖ It is not necessary that the expenditure allowable in a particular year should result in any profits at all in that year.

The Court of Appeal concluded that those tests are sound, workable and in practice, followed in Tanzania.

6.8.9 Payment of Gift and Tips

The Practice Note on Payment of Allowances, Gifts, and Tips from Employment, Practice Note No.12 of 2013 consider tips and gifts,³⁴⁰ as other payments derived by the individual in respect of the employment and therefore may be subject to tax or not subject to the requirement provided by the law.

A payment may have no direct connection with the employee's remuneration or employment at all, and therefore not be in the nature of an emolument. The fact that there is a link between the payment and the employment, and that the payment would never have been made but for the employment, is not sufficient to render the payment taxable. It will however, be taxable if it is paid to the employee as a reward for or in return for acting as or being an employee. Gifts and voluntary payments made by an employer or similar interested person with definite reference to an employment held by the recipient and by virtue of his office are taxable. The gift paid may be:-

- Gifts in Kind-** Gifts in kind to employees are not taxable if they cannot be turned into money, unless the employee is a director or highly paid employee when the cost of the gift to the employer will be the value of the gift to the employee.
- Gifts for Special Services-** Gifts for special services will be taxable if they are received in respect of an office or employment notwithstanding that there is no enforceable right to receive the payments, that they are received after the employment has terminated and that they are paid by way of gift. Payments made, however, not in virtue of the office or employment but by way of testimonial or in recognition of the personal qualities of the recipient will not be taxable.

340 Section 3 of the Income Tax Act define gift to mean a payment without consideration or payment with consideration to the extent that the market value of the payment exceeds the market value of the consideration.

Tips to employees in certain trades receive tips which form a substantial part to their income. The payments of tips received from the employer or a third party as a reward for services rendered in the course of the employment are taxable. Payments given as a present in appreciation of the recipients' personal qualities, such as faithfulness, and consistency and readiness to oblige, would not be taxable. Under an incentive scheme, prizes may be awarded by an employer to his employees, for the efficient performance of their work, such as for time-keeping, production, sales, etc. Such payments are taxable on the employees.

6.8.9 Payments Providing Discharge/Reimbursement

It is provided under section 7(2) (b) of the Income Tax Act. This refers to payments providing any discharge or reimbursement (refund) of expenditure incurred by an individual or an associate,³⁴¹ of the individual. These include expenditure incurred by the employee in the maintenance of himself, his family or establishment or for any other domestic purpose.

6.8.10 Payments to Conditions of Employment

It is provided under section 7(2)(c) of the Income Tax Act. This refers to payments for the employee's agreement to any conditions of the employment. The conditions may include working in certain environment or restrictions to be employed by other employers. The payment also includes payment made to the employees before the commencement of the employment.

6.8.11 Retirement Contributions and Retirement Payments

Retirement contributions means a payment made to a retirement fund,³⁴² for the provision or future provision of retirement payments and retirement payment means a payment, by way of a lump sum, pension or commuted pension, made by a person to an individual in the event of the individual's

³⁴¹ Section 3 of the Income Tax Act defines associate in relation to a person, means another person where the relationship between the two is - (a) that of an individual and a relative of the individual, unless the Commissioner is satisfied that it is not reasonable to expect that either individual will act in accordance with the intentions of the other; (b) that of partners in the same partnership, unless the Commissioner is satisfied that it is not reasonable to expect that either person will act in accordance with the intentions of the other; (c) that of an entity and - (i) a person who - (aa) either alone or together with an associate or associates under another application of this definition; and (bb) whether directly or through one or more interposed entities, controls or may benefit from 50 percent or more of the rights to income or capital or voting power of the entity; or (ii) under another application of this definition, is an associate of a person to whom subparagraph (i) applies; or (d) in any case not covered by paragraphs (a) to (c), such that one may reasonably be expected to act, other than as employee, in accordance with the intentions of the other.

³⁴² Retirement fund means any entity established and maintained solely for the purposes of accepting and investing retirement contributions in order to provide retirement payments to individuals who are beneficiaries of the entity. Retirement funds are normally approved by the Commissioner General as approved retirement funds to receive retirement contributions.

retirement or a relative of an individual in the event of the individual's death. This contribution or payment may be considered as inclusions at the same time exclusions subject to the conditions provided by the law.³⁴³

Section 61 of the Income Tax Act provides for the taxation of retirement contributions to approved retirement funds. The section provides that an individual may claim a reduction in calculating total income for a year of income equal to retirement contributions made during the year of income by the individual or an employer of the individual where the contribution is included in calculating the individual's income from the employment to an approved retirement fund in respect of an interest of the individual or a spouse of the individual in the fund. The reduction claimed by an individual for any year of income shall be the actual contribution or the statutory amount required whichever is lesser.

The implication of this section is that the claim on retirement contributions paid by an employer on behalf of the employees towards approved retirement funds shall be subject to the limit of the actual contribution or the statutory amount. If the employer decided to contribute over and above the statutory rate such difference between the statutory rate and amount contributed will be regarded as income from employment and therefore subject to tax.

6.8.12 Payment for Redundancy or Termination of Employment

It is provided under section 7(2)(e) and sections 7(4) and 7(5) of the Income Tax Act.

Payments on termination are not taxable on the general earnings rule (cash basis) because they are not in return for the services rendered. However they are taxable. Receipts on termination both cash and in kind should be taxed. In calculating an individual's gains or profit from payment for redundancy or loss or termination of employment, any payment received in respect of a year of income which expired earlier than five years prior to the year of income in which it was received, or which the employment or services ceased, if earlier such payment shall, for the purposes of calculation of the tax payable thereon, be allocated equally between the years of income in which it is received or, if the employment or services ceased in an earlier year between such earlier year of income and the five years immediately preceding such year of income in which such payment is so received or as the case may be, such earlier year of income in which the employment or services ceased, and each such portion, allocated to any such year of income shall be deemed to be income of that year of income in addition to any other income in that year of income.³⁴⁴

343 Section 3 of the Income Tax Act.

344 Section 7(4) of the Income Tax Act and the Practice Note, No.11 of 2013.

6.8.13 Benefits in Kind

Benefits in kind refer to payment made by an employer for the personal needs of an employee through providing the employee with goods or services (as opposed to money). Taxable benefits in kind typically include those benefits which are for the personal use or consumption needs of the employee (e.g. employer providing housing for employee, employer providing for education of the employee's children, employer giving goods or services free or at a cost lower than the market value to the employees).³⁴⁵

In general, the value of benefit in kind is quantified according to market value of the benefit; that means the amount that an independent person would have to pay in the market to receive the same good or service. However, special quantification rules apply to provision of motor vehicle, subsidized loans and provision of housing.

Where an employer provides a benefit which is chargeable on the employee which is not easily attributable to a particular month, then for the purposes of taxation, the amount of the benefit shall be treated as paid to the employee proportionately over each month during the year of income the payment or benefit is provided.

6.8.13.1 Provision of Motor Vehicle for Personal use by the Employee

Where an employer provides a motor vehicle for the private use of the employee, this is a taxable benefit to the employee. "Private use" includes home to work place travel. However, where the employer does not claim a deduction in relation to ownership, maintenance or operation of the vehicle the benefit is not taxable on the employee³⁴⁶. Where the benefit is taxable, it is quantified using the fifth schedule of the Income Tax Act, 2004.

Engine Size of the Vehicle	Vehicles less than 5 years old	Vehicle more than 5 years old
Not exceeding 1000cc	TZS. 250,000	TZS. 125,000
Above 1000cc but not exceeding 2000cc	TZS. 500,000	TZS. 250,000
Above 2000cc but not exceeding 3000cc	TZS. 1,000,000	TZS. 500,000
Above 3000cc	TZS. 1,500,000	TZS. 750,000

The age of the motor vehicle is calculated from the date of the first registration of the vehicle in Tanzania.

³⁴⁵ Practice Note, No. 11 of 2013.

³⁴⁶ Section 27(1)(a) of the Income Tax Act read together with fifth schedule.

Illustration

An employer provides a new self drive car for the employee's private use, which is 3000 cc. The company claims expenditure on the car maintenance and ownership against their taxable income. The car benefit is calculated as follows:

Engine capacity is 3000 cc, Age is less than 5 years.

Annual value of the benefit is TZS 1,000,000/=

Monthly car benefits $(1,000,000 \div 12)$

TZS 83,333/= per month

6.8.13.2 Loans Provided by Employer

It is provided under section 27(1)(b) of the Income Tax Act. An employer is not responsible for provision of loans to its employees. However as an incentive to the employees, employer may undertake the function of providing softer terms loans to its employees compared to what a free market may offer. Where an employer provides a loan to the employee and where the term of the loan is twelve months or more and the aggregate amount of the loan and any other similar loans outstanding at any time during the previous twelve months exceeds three months basic pay, with no interest or interest rate below the statutory rate; the foregone interest amount on the loan is a taxable benefit.

The benefit for the year of income is quantified as the difference between the interest the employee pays (if any) and the interest that would have been paid using the applicable statutory interest rate. Statutory rate means the prevailing discount rate as provided by the Bank of Tanzania.

Illustration

An employer provides an interest free loan of TZS.3,000,000 payable in 24 monthly installments (Assume the applicable statutory rate was 12%, and the aggregate amount of the loan and any other similar loans outstanding at any time during the previous twelve months exceeds three months basic pay)

Loan interest

$$\begin{aligned}\text{Interest per statutory rate} &= \frac{12\% \times 3,000,000}{12} \\ &= \text{TZS } 30,000/\end{aligned}$$

Less interest paid NIL

Loan Interest benefit = TZS. 30,000/=per month

Beneficial loans include any amount the loan written off by the employer, unless the employee has died. Beneficial loans include any amount the loan written off by the employer, unless the employee has died.

6.8.13.3 Provision of Residential Premises

It is provided under section 27(1)(c) of the Income Tax Act. The value of premises for residential occupation, including any furniture or other contents, is calculated as the lesser of -

- i) The annual market value of the rental of the house; or
- ii) The greater of 15% of the employee's total income for the year excluding the housing benefit component and the expenditure claimed as a deduction by the employer in respect of the premises during the year of income. Where the premises are occupied by the employee for only part of the year of income, the benefit is apportioned as appropriate, that is the portion of the period the premises are occupied over the year of income.

Illustration

Where an employer provides residential premises to the employee whose salary is TZS. 60,000,000/= per year, for which market rental value is TZS. 12,000,000/= per year and the employer claims a deduction of TZS. 15,000,000/= per year housing benefit is calculated as follows:

i) Market rental value: TZS 12,000,000

ii) 15% of the salary: TZS 9,000,000

Deduction claimed: TZS 15,000,000

The value of the benefit is TZS 12,000,000 reduced by any rent paid and greater of 9,000,000 and TZS 15,000,000 i.e. the lesser of TZS 12,000,000 and TZS.15,000,000. Hence the value of housing benefit is TZS 12,000,000 for the year of income, which is TZS 1,000,000 per month less rent paid by the employee.

6.9 Exclusions

Section 7(3) of the Income Tax Act provides that in calculating gains or profits from an employment of an individual for a year of income, not all payments will be included as some payments are excluded. Exempts amount under section 10 read together with the second schedule of the Income Tax Act,³⁴⁷ are also excluded in calculating gains or profits from employment. Herein below are provided:-

- (a) Any allowance that represents solely reimbursement to the employee of expenditure spent wholly and exclusively in the production of the income of the employer. For example refund of travel expenses incurred by the employee.

³⁴⁷ Section 10 of the Income Tax Act has been amended by section 26 the Written Laws (Miscellaneous Amendments), Act 2 of 2017.

- (b) Medical services, payment for medical services and payment for insurance for medical services provided to the employee, the employee's spouse and up to four of the employee's children and such services or payments are available on a non-discriminatory basis to all employees of the employer. Such services or payments must be available to all employees and provided without discrimination. If this benefit is given on a discriminatory basis it will be taxable and also if given to more than four children of the employee it will be subject to tax.
- (c) Benefits derived from the use of motor vehicle by the employee for the employee's personal use is generally taxed as a benefit in kind provided the employer claims relief or deduction in relation to ownership, maintenance or operation of the vehicle. However, if the employer does not claim the deduction or relief the benefit is excluded from the income of the employee. Since the Government does not pay income tax from business activities that are the functions of the government and therefore does not claim deductions. Government employees do not pay tax on this benefit.
- (d) Benefit derived from the use of residential premises by an employee of the Government or any institution whose budget is fully or substantially out of Government budget subvention.
- (e) Where an employer makes payment for providing travelling for the employee, the employee's spouse and up to four children between the place of work and the place of domicile which is more than 20 miles away, the payment is not included in calculating the employee's income from the employment provided that the employee is recruited or engaged for employment solely in the service of the employer at the place of employment. For example an employer provides passage costs for the employee to commence the employment or to go on leave for the employee and the employee's family; the payment for the passages is not included in calculating the employee's income subject to meeting those requirements.
- (f) On premises cafeteria services available on a non-discriminatory basis to all employees of an employer are not taxable as a benefit in kind. For the purpose of Income Tax Act, if employees are provided different types of cafeteria services based on seniority e.g. management staff consume different food stuff from the rest of the staff, this should not be construed as discrimination. For this benefit not to be taxable it must offered on premises of the employer otherwise if the employer pay food allowance to employees it will taxable since it is not on premises cafeteria.
- (g) Benefits or payments that are unreasonable or administratively impracticable for the employer to account or allocate to their recipients are also excluded in calculating income from employment eg sports facilities.

- (h) Allowance payable to an employee's offering intramural (Internal) private service to patients in a public hospital eg Allowances paid to Doctors offering private services to patients in public hospitals. These allowances are not subject to tax.
- (i) Housing, transport, responsibility, extra duty, overtime, hardship and honoraria allowances payable to an employee of the Government or an institution whose budget is fully or substantially paid out of Government budget subvention.
- (j) Retirement contributions paid by an employer on behalf of the employees towards approved retirement funds, subject to the limit of the actual contribution or the statutory amount.
- (k) All exemptions provided under the Second Schedule of the Income Tax Act, Cap 332 of 2004.

6.10 Deductions

Refer to expenses or expenditure which are wholly and exclusively connected to the production of the income of the person. In calculating an individual's income from an employment deductions are hard to find. Herein below are few deductions allowed under the Income Tax Act.

- (i) Travel expenses e.g. travelling in the performance of duties of the employer. The travel allowances are not subject to tax if paid and where there are not excessive.
- (ii) Other expenses the employee is obliged to incur and pay as holder of the employment which are incurred wholly, exclusively and necessarily in the performance of the duties of the employment.
- (iii) Donation made under section 12 of the Education Fund Act, Cap 412 of 2001. An employee who makes a donation to the Fund may apply to the Commissioner for deduction.

CHAPTER SEVEN

TAXATION OF INCOME FROM BUSINESS IN TANZANIA

7.1 Introduction

This chapter provide in details the taxation of income from business in Tanzania as well as the tax implications of the same as provided in different cases decided in Tanzania and other tax jurisdictions. It point out the meaning of business, principles governing gains or profits from business, badges of trade, inclusions, exclusions and deductions. The chapter reflects the current amendment of the revenue laws in relation to taxation of income from business in Tanzania.

7.2 Meaning of Business

Section 3 of the Income Tax Act,³⁴⁸ defines business to include:-

(i) Trade and Concern in the Nature of Trade

Trade refers to exchange of goods and services for other goods and services or for money.³⁴⁹ In most cases trade is a repetitive transaction, however for the purpose of tax liability trade is not necessarily to be a repetitive transaction since even a single or isolated transaction can be subjected to tax under isolated transaction doctrine. The term concern in the nature of trade is not synonymous to trade but includes any operation carried out with business character.³⁵⁰ Section 6(3)(a) of the Fair Competition Act,³⁵¹ provides the transactions or activities which they don't constitutes trade when carried out or conducted as follows:-

- ❖ The Imposition or collection of taxes.³⁵²
- ❖ The grant or revocation of licenses, permits and authorities.
- ❖ The collection of fees for licenses, permits and authorities.
- ❖ Internal transactions within the Government, state body or local government.

348 Cap 332 of 2004 as amended by section 17 of the Finance Act, 2017.

349 Carolyn, A., **What is Trade**, Crabtree Publishing Company, Canada, 1951, p.6.

350 Practice Note on Income from Business, No.5 of 2013.

351 Act No.8 of 2003.

352 Section 4 and Section 78 of the Income Tax Act, Cap 332 of 2004.

(ii) **Manufacture**

The term manufacture or manufacturing is defined to include any artificial process which transforms goods in order to add value to them for the purpose of resale and any operation of packing or repacking not linked to a form of transportation within a single enterprise.³⁵³ It implies that the processed goods are transformed into another form which will make the goods more marketable. This process of manufacturing is regarded as business since the goods are produced in a large scale or in another form for business purpose.

(iii) **Profession**

The profession is generally understood because it has recognizable characteristics that everyone more or less comprehends because it has credentialing and certification requirements which control professional standing and enforcing standards that guide individual performance and professional advancement.³⁵⁴ A professional is prepared to apply the knowledge obtained and exercise his or her skills in the interest of others.³⁵⁵ Professionals are accountable to their clients, professional bodies/institutions and to the society in general. The professionals provide professional services to the public. Professional service has been defined to mean a service rendered by a person licensed as a practitioner by any recognized professional body and shall include other services or activities of an independent business character including consultancy, legal, architectural, engineering, supervisory, accounting, auditing, medical, artistic, survey, theatrical performance, sports, exhibition, private security services, private investigation and consultancies in various disciplines or any entertainment held or given other than those for remuneration under contract of employment.³⁵⁶

(iv) **Vocation**

Vocation refers to the type of work that you feel you are suited to and to which you should give all your time and energy, or feeling that a type of work suits you in a particular way.³⁵⁷ The concept of vocation which is a call,³⁵⁸ is based on the idea that each individual person has unique strengths and gifts which can be used by that person to make a positive contribution to the community and the nation at large.

353 Section 2 of the Fair Competition Act, Act No.8 of 2003.

354 Robert, S., **Emergency Management and Sustainability: Defining a profession**, Illinois, USA, Charles C. Thomas Publisher Ltd, Illinois, 2013, p.4.

355 Abbott, A., **The System of Professions: An Essay on the Division of Expert Labour**, The University of Chicago Press, Chicago, 1988, p.16.

356 Section 28(b) of the Finance Act 2016.

357 <http://dictionary.cambridge.org/dictionary/english/vocation> (Accessed on 25th May 2017).

358 Batholomew, C.O., **Finding Meaning in Business: Theology, Ethics and Vocation**, Palgrave Macmillan, USA, 2012, p.14.

For the purpose of tax liability where a person utilizes his or her talents or gifts to earn income the same will be subject to tax since it will be regarded as income from business or income from another source if it does not fall under income from business. The principle is that where a person does not fall under profession or trade he can fall under vocation and hence will be subject to tax. Most of the pastors fall under this category of vocation. If the person is utilizing his talents or gifts to perform the tasks of his employer, his income will be treated as income from employment, therefore, rules governing income from employment will be applicable.

(v) **Past, Present or Prospective Business**

Income from the past, present and future business forms part of business and therefore subject to tax for example a person may cease to do business or convert the business into another form of business, the converted business or ceased business may be referred to as past business. A business person may also secure Tax Identification Number³⁵⁹ and Vat Registration Number for prospective business.³⁶⁰

359 Sections 22-25 of the Tax Administration Act, Cap 438 of 2015 provide matters relating to TIN.
360 A good example of prospective business is by the intending trader. Rule 2 of the Value Added Tax (General) Regulations 2015 defines intending trader to mean any person who is in the process of setting up an economic activity with the intention of making taxable supplies with a turnover in excess of the value added tax registration threshold prescribed under Regulation 14 but not yet commenced to make taxable supplies. This implies that a person can be registered for Value added Tax even if that person has not commenced the business of making taxable supplies. The conditions for registration as an intending trader are provided under section 29(3) of Value Added Tax Act, Cap 148 of 2014 as follows:-The person should provide sufficient evidence to satisfy the Commissioner of his intention to commence an economic activity, including contracts, tenders, building plans, business plans, bank financing; The person makes or will make supplies that will be taxable supplies if the person is registered; The person specifies the period within which the intended economic activity commences production of taxable supplies; A registered person shall use Taxpayer Identification Number and a Value Added Tax Registration Number on all documents required to be issued under this Act. The registration by a person under the Value added Tax Act shall be a single registration, which shall cover all economic activities undertaken by that person's branches or divisions.

7.3 Gains or Profits from Business

Amount treated as gains or profits from a business is the total of the amounts coming into the business for sale of goods³⁶¹ and services,³⁶² (including sale of trading stock)³⁶³ and any other amount derived by the person in doing the business.³⁶⁴ Profits and gains of any business are chargeable to tax provided the business is carried out by a person in that year of income.

In the case of *Bulyanhulu Gold Mine Limited versus Commissioner General (TRA)*³⁶⁵, the Court of Appeal discussed the difference between "profits" and "gains", the Court held that:-

"The phrase "gains and profits" is not defined anywhere else in the Act, but it has been judicially considered in other Commonwealth jurisdictions with similar provisions. In his book "A Source Book of Income Tax Law in Tanzania" by Professor F.Luoga, reviews a number of those cases. He concludes that before determining whether there were any gains, the court must determine if there were any capital goods that were resold for the purposes of making profits. If so, the income there is a gain. On the other hand, the profits of a business venture are the profit revealed by the commercial accounts by using ordinary acceptable accounting principles. In short, "gains and profits" referred to in paragraph (x) of section 16 (2) of the ITA 1973, is just a source of chargeable income of a business. Gains come about where capital goods are bought and resold, if they are not part of a core business of a person. Profits arise from ordinary commercial transactions (core business) of the person. It was therefore wrong on the part of the Tribunal, to have looked and decided this issue only on the basis of profits. This is as far as the 1973 ITA is concerned."

This is the position provided in this case but it has to be noted that the Income Tax Act, 1973 has been repealed by the Income Tax Act of 2004.

361 Section 2 of the Value Added Tax Act, 2014 define goods to mean all kinds of tangible moveable property, excluding shares, stocks, securities, or money. Goods is defined also under section 2 of the Sale of Goods Act, [Chapter 214 R.E 2002] to include all chattels personal other than things in action and money, emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

362 Section 2 of the Value Added Tax Act, Cap 148 of 2014 define Services to mean anything that is not goods, immovable property or money including but not limited to a provision of information or advice; a grant, assignment, termination, or surrender of a right; the making available of a facility, opportunity, or advantage; an entry into an agreement to refrain from or tolerate an activity, a situation, or the doing of an act; and an issue, transfer, or surrender of a license, permit, certificate, concession, authorization, or similar right.

363 Trading stock is defined under Section 3 of the Income Tax Act, Cap 332 of 2004 as amended to mean an asset owned by a person that is sold or intended to be sold in the ordinary course of a business of the person, work in progress on such assets and inventories of materials to be incorporated into such assets and includes, in the case of a person carrying on a banking business, loans made in the ordinary course of that business.

364 Section 8(1) of the Income Tax Act 2004.

365 Consolidated Civil Appeals No. 89 & 90 of 2015.

7.4 Basis of Accounting for Tax Purposes

The business income of a sole proprietor is calculated either on:-

(i) Cash Basis

This is the basis of accounting which recognizes revenue when the cash is received and recognizes expenses when the cash is paid.³⁶⁶ The rule governing cash basis as a mode of accounting is that a person who accounts for income tax purposes on a cash basis derives an amount and, therefore, shall include the amount in calculating the person's income or otherwise account for the amount as required by the law when payment is received or made available to the person and incurs expenditure and, therefore, may deduct the expenditure in calculating the person's income or otherwise account for the expenditure as required by the law when payment is made.³⁶⁷ The main focus of this rule is on payment received or made to the person and expenditure incurred which are wholly and exclusively connected to the production of the income of the person, hence, allowed to be deducted under the Income Tax Act or any other law. Under this basis, revenue is earned when cash are received and expense is incurred³⁶⁸ when cash is paid.

(ii) Accrual Basis

This is the accounting basis which recognize revenue and the related assets when earned rather than when received and recognizes expenses when the obligation is incurred rather than when paid.³⁶⁹ Accrual basis is governed by the rule that a person who accounts for income tax purposes on an accrual basis derives an amount when it is receivable by the person and incurs expenditure when it is payable by the person. This implies that an amount is receivable by a person when the person becomes entitled to receive it, even if the time for discharge of the entitlement is postponed or the entitlement is payable by installments and an amount shall be treated as payable by a person when all the events that determine liability have occurred and the amount of the liability can be determined with reasonable accuracy, but not before economic performance with respect to the amount occurs. Under this basis revenue are recognized when are earned even if cash have not been received, hence, a person income basing on accrual might include receivable and payable items.

366 John P. Q., **Law Firm Accounting and Financial Management**, Law Journal Press, New York, 2001, p.1-4.

367 Section 22 of the Income Tax Act, Cap 332 of 2004.

368 Section 24 of the Income Tax Act provide that for the purposes of sections 22 and 23, an amount shall be treated as derived or expenditure incurred by a person notwithstanding that the person is not legally entitled to receive the amount or liable to make the payment, if the person claims to be legally entitled to receive, or legally obliged to pay the amount.

369 John, op.cit. p.1-4.

7.5 Badges of Trade

This refers to different rules or principles developed through case law which assist the tax authority or courts or other stakeholders to know whether trading has taken place or not in a particular transaction for the purpose of tax liability. These badges of trade are not conclusive evidence that trade has taken place but they are guides in assessing whether a particular transaction amounts to trade or not for the purpose of tax liability. The following are badges of trade³⁷⁰:-

7.5.1 Profit Seeking Motive

Profit seeking motive indicates trading activity but by itself is not enough to prove that a transaction amounts to trade for the purpose of tax liability. A person may engage into trade but suffers loss, the implication is that the absence of profit does not guarantee that no trade was carried out by the entity or person.

In the case of *Salt v. Chamberlain*,³⁷¹ a research consultant made a loss on the Stock Exchange after trying to forecast the market. The loss was made after several years and over 200 transactions. This was not seen as trade and capital in nature. It was concluded that share trading by a private individual can never have the badges of trade pinned to them. These transactions could have been subject to capital gains tax if it were proved that trading activity existed.

In another case of *Rutledge v. CIR*,³⁷² the taxpayer was on a business trip to Germany and purchased one million toilet rolls. On returning to the UK the sole consignment of toilet rolls were sold to one individual for a profit. The profit made on this large quantity single purchase and resale item was an adventure in the nature of trade. The case was decided on the fact that the purchase was not made for own use or investment purposes.

7.5.2 The Number/Frequency of Transactions

It provides that where the same person engages into the same transaction or different transaction within a certain period of time there is an indication that the transaction entered suggests the existence of trading activity. A single transaction can amount to a trading activity and it is more indicative if there are repeated and systematic transactions. The transaction is not necessary to be repetitive, even a single transaction can amount to trade and hence subject to tax.

370 Peter.R., **Taxation and Self Assessment: Incorporating the Finance Act 2004**, Thomson Learning, London, 2005, p.94.

371 Ch D 1979, 53 TC 143; [1979] STC 750.

372 CS 1929, 14 TC 490.

In the case of *Pickford v Quirke*,³⁷³ A syndicate purchased a cotton-spinning mill with the intention of using it in a trade, however, on purchase of the mill it was in a worse state than first anticipated. The syndicate then decided to strip the mill of its assets and sell it piecemeal, making a profit. This was repeated in a number of times with a number of mills. Due to the repeated nature of the transactions the court held that the profits were trading profits and therefore taxable.

Another case is that case of *CIR v. Fraser*,³⁷⁴ In this case the taxpayer was a woodcutter who bought a consignment of whisky in bond. He subsequently sold the whisky through an agent at a profit. In this case the judge stated that:-

"the purchaser of a large quantity of a quantity of a commodity like whisky, greatly in excess of what could be used by himself, his family and friends, a commodity which yields no pride of possession, which cannot be turned to account except by a process of realization, I can scarcely consider to be other than an adventurer in a transaction in the nature of a trade. Most important of all, the actual dealings of the respondent with the whisky were exactly of the kind that take place in ordinary trade."

Also in the case *CIR v. Livingston and Others*³⁷⁵ which involved three unconnected individuals that together bought a cargo vessel, the vessel was converted into a steam-drifter and sold for a profit. The purchase was the first vessel the three individuals bought. An assessment was raised on the profit which was upheld as a trading profit. The judge stated that:-

"I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, in the nature of "trade", is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristics of ordinary trading in the line of business in which the venture was made."

7.5.3 The Nature of the Asset

The principle focuses on the nature of assets and consider whether the assets per its nature is for an investment that has the ability to generate income, personal assets (personal enjoyment) or assets to be used in trade such as plant and machinery. After making this categorization of assets it become easy to determine whether the assets is for investment, personal use or for business purpose.

373 CA 1927, 13 TC 251.

374 [1942] 24TC498.

375 11TC538.

The case of *Marson v. Morton*,³⁷⁶ demonstrate the nature of assets. In this case the land was purchased with the intention to hold it as an investment. No income was generated by the land; however, it did have planning permission. The land was sold latter following an unsolicited offer. As the transaction was far removed from the taxpayer's normal activity (potato merchant) and was similar to an investment, it was not a trading profit. The transaction was not an adventure in the nature of a trade.

Another case is *Wisdom v. Chamberlain*,³⁷⁷ which looked at the principle of "pride of possession" assets that generate no income. A taxpayer purchased two large quantities of silver bullion to counter the effects of the devaluation of the pound. The purchase was made following the advice and was partly financed by loan. The purchase was done on a short term basis in order to realize profit. There was an adventure in the nature of trade and was therefore assessed as trading profit.

7.5.4 Supplementary Work and Marketing

This principle provides that if a supplementary work is done in respect of the assets such as modification, repairing of an assets, advertising, there is an assumption that all these supplementary work are to make the asset more marketable, therefore the transaction to be concluded in respect of the asset may attract the tax liability, since all these activities suggest the existence of trading activity.

In the case *Cape Brandy Syndicate v. CIR*³⁷⁸, members of a wine syndicate joined in a separate syndicate to purchase brandy from South Africa. Some was shipped to the East with the remainder being sent to London to be blended with French brandy, and sold at a profit. The taxpayer tried to argue that the transaction was of a capital nature from the sale of an investment. The court held that a trade or business was carried on and was assessable as a trading profit.

7.5.5 The Source of Finance

Determining the source of finance is important when deciding whether trade has been carried out or not this is because in most cases finance taken out to purchase an asset, in the first instance may indicate that to repay the debt the asset would have to be sold.

³⁷⁶ Ch D 1986, 59 TC 381; [1986] STC 463; [1986] 1 WLR 1343.

³⁷⁷ CA 1968, 45 TC 92; [1969] 1 WLR 275; [1969] 1 All ER 332.

³⁷⁸ CA 1921, 12 TC 358; [1921] 2 KB 403.

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7.5.6 The Length of the Period of Ownership

The length of time an asset is held is an important indicator of trade. The longer the period of ownership the greater the chance of it been seen as an investment rather than a trade. The short period of ownership between the date of acquisition and disposition suggest the existence of trade.

Make reference to the case of *Wisdom v. Chamberlain* – CA 1968, 45 TC 92; [1969] 1 WLR 275; [1969] 1 All ER 332 and *Marson v Morton* – Ch D 1986, 59 TC 381; [1986] STC 463; [1986] 1 WLR 1343 both mentioned above.

7.5.7 Method of Acquisition

This principle focuses on how the asset was acquired. If it is inherited or was obtained by way of gift it is a good indication that trade was not carried out, although this is not always the case. An asset acquired at the market could indicate that it has either been purchased for a trade or an investment.

The case of *Taylor v. Good*,³⁸⁰ discusses the method of acquisition. This case is concerned a taxpayer who purchased a house with the intention of using it as a family home. The taxpayer's partner did not approve the house and refused to move in, which forced the taxpayer to sell the house immediately. The purchaser genuinely had the intention of not buying the property for a profit motive. In this case the judge stated that:-

'Even if the house was purchased with no thought of trading, I do not see why an intention to trade could not be formed later. What is bought or otherwise acquired (for example, under a will) with no thought of trading cannot thereby acquire immunity so that, however filled with the desire and intention of trading the owner may later become, it can never be said that any transaction by him with the property constitutes trading. For the taxpayer a non-trading inception may be a valuable asset: but it is no palladium. The proposition that an initial intention not to trade may be displaced by a subsequent intention, in the course of the ownership of the property in question, is, I think, sufficiently established...'

379 CA 1968, 45 TC 92; [1969] 1 WLR 275; [1969] 1 All ER 332.

380 CA 1974, 49 TC 277; [1974] STC 148; [1974] 1 WLR 556; [1974] 1 All ER 1137.

7.6 Inclusions

This part addresses what constitute income from business for the purpose of tax liability. Section 8(2) of the income Tax Act provides that in calculating a person's gains or profits from conducting a business for a year of income³⁸¹ the following amounts derived by the person from conducting the business during the year of income shall be included:-

7.6.1 Service Fees

It is provided under Section 8(2)(a) of the Income Tax Act. Section 3 of the Income Tax Act define service fee to mean a payment to the extent to which, based on market values, it is reasonably attributable to services rendered by a person through a business of that person or a business of any other person and includes a payment for any theatrical or musical performance, sports or acrobatic exhibition or any other entertainment performed, conducted, held or given. The service fee should be for provision of professional or consultancy services or other such services of an independent business character i.e. other than remuneration for employment.

Section 28 of the Finance Act 2016 amended section 83 of the Income Tax Act to the effect that paragraph (c) of section 83(1) of cap 332 has been deleted. The amendment focuses now on a resident person who pays a non-resident a service fee with a source in the United Republic or resident person a service fee for the provision of a professional service.³⁸²

Section 83(1)(c)(ii) of The Income Tax Act as amended provides further that where the service involves construction works the payment which is subject to withholding shall be based on the ratio of 3:2 for materials and services respectively.

The law requires a person (Withholding agent) who is paying service fee for the services performed or rendered by the other person to withhold the tax due and remit to the tax authority. Paragraph 4(c) of the first schedule of the Income Tax Act provides for the rates applicable for service fee paid

³⁸¹ Section 20 of the Income Tax Act provides that a year of income for every person shall be the calendar year, however, an entity may apply, in writing, to the Commissioner for approval to change the entity's year of income from the calendar year; or a twelve-month period previously approved by the Commissioner.

³⁸² The professional service means services rendered by a person licensed as a practitioner by any recognized professional body and shall include other services or activities of an independent business character including consultancy, legal, architectural, engineering, supervisory, accounting, auditing, medical, artistic, survey, theatrical performance, sports, exhibition, private security services, private investigation and consultants in various disciplines or any entertainment held or given other than those remuneration under contract of employment (Section 28(b) of the Finance Act 2016).

for services rendered or performed. Paragraph 4(c)(iii) of the first schedule provides that in case of services rendered under section 83(1)(c) of cap 332 the rate applicable is 5% for resident and 15% for non-resident. Besides, in the case of service fees referred under section 83(1)(a) of cap 332 of 2004, the rates applicable is 5% for resident person and 15% for non-resident person.

The landmark case which demonstrate the issue of service fee in Tanzania and later amendment of the law in 2016 through the Finance Act 2016, Section 28 which amended section 83(1)(c) of cap 332 is the case of *Commissioner General versus Pan African Energy Tanzania Limited*.³⁸³

In this case a dispute arose between the appellant and the respondent in respect of an omission by the respondent to withhold tax for technical fees paid to its non-resident consultants. Samples were drilled and sent to non-resident consultants in the United Kingdom for analysis and issuance of report. This was done and the non-resident consultants paid. In the course of doing an audit on the respondent, the appellant discovered that the respondent omitted to withhold tax on technical fees that was paid to the non-resident consultants for the analysis of the drilled samples and report writing, work that was done in the United Kingdom. The appellant was of the opinion that since the samples were drilled in Tanzania and payment originated from Tanzania, the respondent was required to withhold tax on such payment. The appellant issued a withholding tax certificate to the respondent demanding payment of Tshs.3,640,903,416/=. The respondent on the other hand consistently believed that withholding of tax on their consultants for work that was done outside the country, in the United Kingdom, was not applicable under the income Tax Act because the services performed by the consultants were done outside the United Republic of Tanzania. The parties failed to resolve the dispute.

The respondent lodged an appeal in the Tax Revenue Appeals Board. The Board was divided on its decision. The majority opinion which included the Chairman of the Board was that payments made by the respondent to non-resident consultants have a source in Tanzania because the services of the analysis of the -samples done in the United Kingdom cannot be dissociated from the drilling activities that were carried out in Tanzania. Further aggrieved, the appellant went to the Tax Appeals Revenue Tribunal, The Tax Appeals Revenue Tribunal differed with the decision of the Tax Appeals Board.

It held that the appellant was not liable to withhold tax for the service fees it paid to its non-resident consultants abroad because the work was done in England and the consultants were residents in England. The Tribunal relied on

383 Civil appeal no. 146 of 2015(CA).

section 69 (i)(i) of the Income Tax Act 2004. In support of its decision the Tax Appeals Tribunal relied on the persuasive case of *Ishikawajima-Harima Heavy industries V Director of Income Tax*, (2007) ITR 408 (SC). The case was decided in India. The Tribunal said it was persuasive because section 9(i)(vii) of the Indian Income Tax Act, is in "*pari materia*" with section 69 of the Income Tax Act, 2004. In the Indian case, the Supreme Court held that tax is paid for services that are not only utilized in India but are rendered in India.

The issues for determination in this case were:-

- (i) Whether or not the payments made by the respondent to non-resident persons are liable to withholding tax.
- (ii) Whether or not the respondent is liable to pay withhold tax not withheld.

The court in this made analysis as follows:-

The Consultants render services of analysis of sample drilled from Tanzania and write a report in relation to gas exploration. There is no dispute that the respondent paid for the services. There is also no dispute that in the process of making payment the respondent did not withhold tax for the payment it made to the non-resident consultants. This brings us to the first issue agreed upon by the parties in this appeal. That is whether or not the payments made by the respondent to the non-resident persons are liable to withholding tax. The parties advocates agreed that chargeable income of non-resident is regulated by section 6 (b) of the income Tax Act which provides:-

"In case of non-resident person, the person's income from the employment, business or Investment for the year of income only to the extent that the income has source in the United Republic of Tanzania."

Section 83(1)(c) of the ITA 2004 on the other hand imposes an obligation for withholding tax on payments to non-residents. Did the service fee that the respondent paid to the non- resident consultants have source in Tanzania? The answer is found in section 69 of the Income Tax Act. Section 69(i)(i) provides as follows:

"The following payments have a source in the United Republic Payments including service fee, of a type not mentioned in paragraphs (g) or (h) or attributable to employment exercised, service rendered or a forbearance from exercising employment or rendering service —in the United Republic, regardless of the place of payment; or where the payer is the Government of the United Republic, irrespective of the place of exercise, rendering of forbearance."

Payments in paragraphs (g) of section 69 are related to payments received by a person who conducts a business of land, sea, or air transport operator, or charterer in respect of carriage of passengers, who embark on cargo, mail, or other movable tangible assets that are embarked in the United Republic other than as a result of transshipment or rental of containers and related equipment which are supplementary or incidental to carriage referred to in subparagraph (i). Payments in paragraph (h) are those received by a person who conducts a business of transmitting messages by cable, radio, optical fibre or satellite or electronic communication in respect of transmission of messages by apparatus established in the United Republic whether or not such messages originate in the United Republic of Tanzania.

The cited paragraph (g) and (h) of section 69 are only relevant for purposes of showing what other payments is subject to payment of income tax which is spoken of in section 69 (i)(i). In this appeal what is at issue is the payment of service fees paid by the respondent to non-resident consultants. As already indicated the respondent did not withhold tax for the said payment. Was the respondent liable for withholding such income tax? Dr. Kabuta says no she was not because the services were not rendered in the United Republic. The appellant agrees that the services were not rendered in Tanzania but says the services were rendered in connection to samples drilled from Tanzania and payment made in Tanzania. That is actually what took place but with respect to the learned advocates for the appellant, we do not think that they have grasped the real meaning of section 69 (i)(i) of the Income Tax Act.

The section is clear that income tax is chargeable for service fee received for services rendered in Tanzania. What is stressed in the section is that the services must be rendered in Tanzania. This could be a leeway for tax evasion for unfaithful businessmen or for unlawful transactions. All the same the Court is bound to interpret the law in its true perspective. The cases of *Cape Brandy Syndicate* (supra) and that of *Commissioner General v. Mac Arthur and Baker International* (supra) guide the court on interpretation of the statutes. We cannot create a situation in the statute that was not intended by the Legislature. Section 69(i)(i) makes a distinction between payments made by an individual person and that made by the government under section 69(i) (ii).

Where the government is the payer, income tax is chargeable regardless of the place where the services are rendered. It is chargeable even when it is rendered outside the United Republic. This is not the case with section 69(i) (i). A private company like the respondent has no obligation to withhold tax where the services fee paid were for services rendered outside the country. We think that the best way to remedy the situation of allowing loss of income to the government is to amend the law to cater for such situations as it happened in this case.

Other jurisdictions, like the government of India changed the law and are now in a position to charge income even for services rendered outside India but payment made in India.

The first ground related to the construction of section 83 (1) (c) of the Income Tax Act that it was erroneously construed by the Tax Appeals Tribunal. The construction of the section was tied to the place where the services for the respondent were rendered. Services were rendered in United Kingdom by persons resident in the United Kingdom. Section 69(i)(i) does not impose a liability on an individual company to withhold tax where service fee is paid in relation to services rendered out of the United Republic regardless of the fact that payment is made by a company registered in and is doing business in Tanzania. The situation would have been different if the respondent was government. This also answers the issues that were raised by the parties that the payments that were made by the respondent to non-resident consultants were not liable for withholding tax. Since the payments were not liable for withholding tax, the respondents are not liable for payment of the tax that was withheld.

In this case the court recommends to the Attorney General as the Advisor of the Government to look into the possibility of amendment of the law³⁸⁴ to remove leeway for loss on income to the government as it will be found appropriate. The appeal was dismissed

7.6.2 Incomings from Trading Stock

It is provided under section 8(2) (b) of the Income Tax Act. Section 3 of the Income Tax Act defines trading stock to mean assets owned by a person that are sold or intended to be sold in the ordinary course of a business of the person, work in progress on such assets and inventories of materials to be incorporated into such assets and includes, in the case of a person carrying on a banking business, loans made in the ordinary course of that business.

The trading stock is sometimes referred as to inventory. They form core part of the business of the person which is to be sold in the ordinary course of the business. Out of sale of inventory or trading stock the business person receive incomings or revenue which is regarded as income from business. For example where a person owns a supermarket what is regarded as inventory are assets which form core part of business of the person eg wood, metals, plastics, chemicals, liquids or food ingredient etc. Incomings out of trading stock or inventory are subject to tax.

³⁸⁴ **Note:** As advised by the Court Section 83(1)(c) of the Income Tax Act 2004 as amended has been amended now by Section 28 of the Finance Act 2016.

The rates or amount applicable to persons who are subject to presumptive taxes are provided under section 15(b) of the Finance Act 2015. The table below indicate the rates and amount required to be paid to the tax authority

Annual turnover	Tax payable when records are incomplete (Section 80 of cap 332 not complied)	Tax payable when records are complete (Section 80 of cap 332 is complied)
Where turnovers does not exceed TSHS 4,000,000	NIL	NIL
Where turnover exceeds TSHS 4,000,000 but does not exceed TSHS 7,500,000	TSHS 150,000	3% of the turnover in excess of TSHS 4,000,000
Where turnover exceeds TSHS 7,500,000 but does not exceeds TSHS 11,500,000	TSHS 318,000	TSHS 135,000+3.8% of the turnover in excess of TSHS 7,500,000
Where turnovers exceeds TSHS. 11,500,000 but does not exceed TSHS 16,000,000	TSHS 546,000	TSHS 285,000+4.5% of the turn-over in excess of TSHS11,500,000
Where turnover exceeds TSHS 16,000,000 but does not exceed TSHS 20,000,000	TSHS 862,500	TSHS 487,000+5.3% of the turnover in excess of TSHS 16,000,000

Section 80 of the Income Tax Act is about maintenance of documentation regarding the business. Those with no records or incomplete records and those with complete records pay tax as provided in the table above.

It has to be noted that Section 80 of cap 332 has been repealed by Section 120 of the Tax Administration Act.³⁸⁵ The issue of documentation is now provided under section 35 of the Tax Administration Act

The system which is used to impose tax to individuals with no proper business documentation is called presumptive tax system. This is a tax system where individuals are taxed based on their annual turnover. The Taxpayers under this system are not obligated to prepare and submit audited accounts to the Tanzania Revenue Authority. However, the tax payer may opt not to apply the system and prepare audited accounts and pay tax based on profits.

385 Cap 438 of 2015.

The Conditions which qualify to be in Presumptive tax system includes:-³⁸⁶

- (i) The Taxpayer must be a resident individual.
- (ii) The annual turnover of the business does not exceed the threshold of TSHS 20 million.
- (iii) The individual does not elect to display this provision for the year of income.
- (iv) The individual's income for any year must consist exclusively of income from business with sources in the United Republic of Tanzania

7.6.3 Gains from Realization of Business Assets or Liabilities

It is provided under section 8(2)(c) of the Income Tax Act. Section 3 of the income Tax Act provides that realization of an assets has the meaning ascribed to it by section 39 and of liabilities has the meaning ascribed to it under section 40 of cap 332. The general rule governing realization of an asset is that a person's gain from the realization of an asset is the amount by which the sum of the incomings for the asset exceeds the cost of the asset at the time of realization.

The focus is on business assets,³⁸⁷ and not all the assets. The Business assets is defined under section 3 of Cap 332 to mean an asset to the extent to which it is employed in a business and includes a membership interest of a partner in a partnership but excludes trading stock or a depreciable asset, an interest in land held by an individual that has a market value of less than 10 million shillings at the time it is realized and that has been used for agricultural purposes for at least two of the three years prior to realization; the beneficial interest of a beneficiary in a resident trust; shares in a corporation where receipt of a dividend in respect of the shares is exempt in the hands of the shareholder under section 54(2); and shares and securities listed on the Dar es Salaam Stock Exchange that are owned by a resident person or by a non resident person who either alone or with other associates controls less than 25% of the controlling shares of the issuer company.

³⁸⁶ First schedule of ITA 2004, paragraph 2(1).

³⁸⁷ Business assets are itemized and valued on the balance sheet, which can be found in the company's annual report. Business assets are listed on the balance sheet at historical cost and not market value.

Business assets are divided into two sections on the balance sheet, current assets and non-current assets. Current assets are business assets that will be turned into cash within twelve months, such as cash, marketable securities, accounts receivable and inventory.³⁸⁸ These assets may only have value for a short while, but they are still treated as business assets. Non-current assets, or long-term assets, are assets that are expected to provide value for more than twelve months. In other words, the company does not intend on selling or otherwise converting these assets in the current year. Non-current assets are generally referred to as capitalized assets since the cost is capitalized and expensed over the life of the asset in a process called depreciation. This includes assets such as property, buildings and equipment.³⁸⁹

The general principle applicable during realization (includes sale, exchange, transfer, surrendered, distributed, redeemed, expired, destroyed, lost, cancelled etc) of business assets is that where the incomings exceeds the cost of the asset there is gain and hence regarded as income. Where there is gain it will be subject to capital gains tax. A good example is realization of real property such as land which is owned by the business.³⁹⁰ This will be subject to capital gains tax which is normally pegged on the valuation report.

7.6.4 Amounts to be Included on Realization of Depreciable Assets

It is provided under section 8(2)(d) of the Income Tax Act. Section 17 of the Finance Act 2016 which amended section 3 of the Income Tax Act, Cap 332 defines depreciable assets to mean asset employed wholly and exclusively in the production of income from a business and which is likely to lose value because of wear and tear, obsolescence or the passage of time but excludes goodwill, mineral or petroleum rights and other interest in land, an interest in an entity and trading stock.

The list of depreciable assets,³⁹¹ are provided under the third schedule of the income Tax Act, Cap 332 of 2004. The list is given in classes, from class 1 to class 8. Paragraph 4 of the Third Schedule of Cap 332 provides for realization of depreciable assets of the business. The principle is that mounts required

388 Clyde P. et al., *Financial Accounting: An Introduction to Concepts, Methods and Uses*, Cengage Learning, Canada, 2010, p.366.

389 <http://www.investopedia.com/terms/b/business-asset.asp> (Accessed on 9th February 2017).

390 The Practice Note on Taxation of Gains from the Realization of Interest in Land or Buildings, Practice Note No.3 of 2013.

391 Example of depreciable assets includes Computers and data handling equipment together with peripheral devices; automobiles, buses and minibuses with a seating capacity of less than 30 passengers, goods vehicles with a load capacity of less than 7 tonnes; construction and earth-moving equipment, Buses with a seating capacity of 30 or more passengers, heavy general purpose or specialized trucks, trailers and trailer-mounted containers; railroad cars, locomotives, and equipment; vessels, barges, tugs, and similar water transportation equipment; aircraft; other self-propelling vehicles; plant and machinery used in agriculture manufacturing or mining operations; specialized public utility plant, equipment, and machinery irrigation, installations and equipment (Third schedule to the Income Tax Act 2004).

to be included in calculating income from a business are amounts which are excess of incomings derived from the realization over the depreciation basis or the written down value of the pool as appropriate based on the type of class of the depreciable assets.

Illustration

An entity D Corp Limited's balance of depreciable basis of its Class 2 pool of depreciable assets at the end of the year 2011 was TZS 7,500,000/=. The entity transferred in year 2012 one of its assets in the pool to its resident subsidiary for TZS 8,000,000 being the market value calculated in consistence with the Act. The amount to be included in calculating the entity's income from the business for year of income 2012 in respect of the realization is the excess of the incomings over the depreciation basis of the pool, calculated as follows:-

Incomings TZS 8,000,000

Less:

- Depreciation basis 2011 - 7,500,000

- Depreciation for year 2012- 1,875,000

Depreciation basis end of 2012 TZS 5,625,000

The excess to be included TZS 2,375,000

Note-If the asset was realized for a value (incomings) of less than the depreciation basis of the pool at the end of the year, in this case TZS 5,625,000 the entity would have incurred a loss. The loss is not deductible in calculating the entity's income since section 18 of the ITA 2004 allows only deduction of loss from realization of a business asset of the business.

7.6.5 Amounts Derived as Consideration for Restriction on Conducting the Business

It is provided under section 8(2)(e) of the Income Tax Act. These are amounts paid to a person whether in lump sum or periodically as consideration for accepting a restriction on the person's capacity to conduct the business. Such payments are made so that the person conducts less business purposely and usually for the advantage of another person interested in the performance of that business be below capacity.³⁹²

³⁹² Practice Note on Income from Business, No.5 of 2013.

7.6.6 Gifts and other Ex Gratia Payments

It is provided under section 8(2) (f) of the Income Tax Act. Section 3 of Cap 332 defines gifts to mean a payment without consideration or a payment with consideration to the extent that the market value of the payment exceeds the market value of the consideration. Ex-gratia (Latin for out of good will) payment is a sum of money paid when there was no obligation or liability to pay it.³⁹³ A good example of gifts is getting assets from exhibition for free or with low consideration in respect of the business. This is regarded as income and hence subject to tax.

The law considers that any amounts of gifts or ex-gratia payments received by a person in respect of the person's business are taxable amounts. Therefore, whoever receives any gifts or ex-gratia payment in respect of the business must declare for the purpose of tax liability since it is regarded as income from business and hence taxable.

7.6.7 Amounts Effectively Connected with Business

Amounts that are derived from conducting an investment are taxed in accordance with the provisions of section 9 of the Income Tax Act, Cap 332. However, where such amounts are effectively connected with a person's business the amounts shall be treated and taxed as income from the business of the person for example rent for subletting part of the business premises is part of business income, interest on current account³⁹⁴, sales of information, etc.

7.6.8 Other Amounts

Section 8(2)(h) of the Income Tax Act as amended by section 33 the Written Laws (Miscellaneous Amendments) Act, Act No.7 of 2017 provide other amounts included in calculating income from business. This amount is the amount of tax benefit or advantages quantified under section 27 of ITA 2004 or other amounts required to be included under Division II of ITA, parts iv, v or vi of ITA 2004.

7.7 Exclusions

Section 8(3) of the Income Tax Act provides that in calculating a person's gains or profits from conducting a business the following shall be excluded:-

393 Stephen B., **Australian Tax Casebook**, (10th ed). Australian, CCH Australian Limited, 2010, p.959.

394 Mahangila and Nchimbi M.M, op.cit., p.24.

7.7.1 Exempt Amounts

This refers to amounts which are statutorily excluded from tax liability. This implies that these payments are not subject to tax.³⁹⁵ A comprehensive list of these payments is provided under the second schedule which is made under section 10 of Cap 332.

Section 10 of the Income Tax Act has been amended by section 26 of the Written Laws (Miscellaneous Amendments') Act,³⁹⁶ to the effect that no exemption shall be provided from tax imposed by the Income Tax Act and no agreement shall be concluded that affects or purports to affect application of the Income Tax Act except for the provision of the Income Tax Act or by agreements on strategic project and public interest as may be approved by the cabinet. The implications of this amendment is that no exemption shall be granted except as provided under the Income Tax Act and if exemptions is to be granted by way of agreement that agreement must be on strategic project and for public interest as may be approved by the cabinet.

7.7.2 Final Withholding Payments

Withholding tax refers to the amount of tax retained by one person when making payments to another person in respect of goods supplied or services rendered by the payee.³⁹⁷ A person receiving or entitled to receive a payment from which income tax is required to be withheld is a withholder while a person required to withhold income tax from a payment made to a withholder is referred to as the Withholding Agent. A withholding agent shall prepare and serve on a withholder a withholding certificate setting out the amount of payments made to the withholder and income tax withheld from those payments.³⁹⁸ Withholding tax applies to specific payments including payment that is to be included in calculating the chargeable income of an employee from the employment,³⁹⁹ payment of investment return including dividend, interest, natural resource payment, rent or royalty, payment in respect to service fee and contract payments and payment in respect to supply of goods to the government and its institutions.⁴⁰⁰

395 Section 10 read together with the second schedule to the Income Tax Act, 2004 as amended by Section 26 of the Written Laws (Miscellaneous Amendments) Act, Act No.2 of 2017 provides that no exemption shall be provided from tax imposed by the law and no agreement shall be concluded that affects or purports to affect the application of the Income Tax Act, 2004 except as provided by the provisions of the income Tax Act; By an agreement on strategic project and on public interest as may be approved by the cabinet. The second schedule provides the list of items which are exempted from taxation.

396 Act No.2 of 2017.

397 Section 4(1)(c) of Cap 332 of 2004.

398 Section 85 of Cap 332 of 2004.

399 Section 81 82 and 83 of the Income Tax Act, Cap 332 of 2004 .

400 Section 86(1) of Cap 332 of 2004.

The final withholding payments received by the withholder are subject to tax according to the rates provided under paragraph 4 of the first schedule of the Income Tax Act. Most of these payments are excluded in income from business since they are regarded as gains or profits in the hand of the withholder (Income from Investment) whereas to the business may be treated as expenditure, hence excluded.

7.7.3 Amounts Included in the Income from Employment

Section 5(1) of the Income Tax Act provides that the total income of a person shall be the sum of the person's chargeable income for the year of income from each employment, business and investment less any reduction allowed for the year of income under section 61 relating to retirement contributions to approved retirement funds. The total income of each person shall be determined separately. When determining income of a person it has to be determined separately in the sense that the income included in income from employment cannot be included at the same time in income from business. They have to be treated separately.

7.8 Deductions

This refers to expenditure or incurred expenses which are wholly and exclusively connected to the production of income of the person.⁴⁰¹ Most of these deductions are applicable in income from business and income from investment. There are deductions which are allowed under the law and others which are not allowed.

7.8.1 Criteria Governing Deductions

There are rules or principles or criterion guiding the tax authority or court to consider whether deductions should be granted or not in a given particular situation⁴⁰²:-

- (a) **Nexus or Link Between the Expenditure or Loss and Production of Income.** An allowable deduction, a loss or outgoing must be incidental and relevant to the gaining or production of income. This implies that the expenditure and loss must have an essential character of an income producing and it must have been incurred for the purpose of producing income.
- (b) **Apportionment of Expenditure.** Expenditure which is incurred for trade and other purposes may not be deductible unless it is capable of allocation into distinct purposes, one or more of which can be said to have been incurred wholly and exclusively in the production of income.

401 Section 11(2) of the Income Tax Act, 2004.

402 Practice Note on income from Business, Practice No.5 of 2013.

- (c) **Expenditure to Earn Future Profits.** If the requisite purpose for incurring the expenditure is established there is no further enquiry whether that expenditure actually produced or increased profits. The fact that the expenditure can only produce a return in the future, if at all, does not prevent it from being incurred for the purpose of the trade.
- (d) **Duality of the Purpose for Expenditure.** The question whether expenditure is incurred for the purpose of a trade is a question of fact, so the question whether that was the only purpose or whether there were other purposes in the person's mind when he incurred the expenditure is a question of fact. However, the fact that the incurring of the expenditure achieves more than one result is a factor to be considered and taken into account.
- (e) **Expenditure to Promote the Business or Improve Profitability.** Expenditure incurred with a view to promoting the business or improve profitability of the business such as advertising expenditure is normally deductible. The fact that such expenditure does not secure any immediate benefit or does not secure benefit at all does not prevent deduction to be made.

7.8.2 Disallowed Deductions

These are deductions or expenses which are not allowed to be deducted because they are not wholly and exclusively connected to the production of the income of the person. They are as follows:-

(a) Consumption Expenditure

Consumption expenditure is defined under section 11(5) of Cap 332 to mean any expenditure incurred by any person in the maintenance of himself, his family or establishment, or for any other personal or domestic purpose. The business entity concept provides that the business and the owners, and his associates are distinct persons hence consumption expenditure by the owner cannot be allocated to the business or investment since there is no nexus between the expenditure and the production of the income. The expenditure by the owner of the business is normally recorded in drawings account and not sale account. Besides, salaries paid to family members should not be excessive otherwise deductions will not be allowed. The owner will be required to account for consumption expenditure himself but he cannot be allowed to deduct such expenditure from the income of business or investment. Article 14,⁴⁰³ provides for the right to life, this means that even if the business or investment could have not been there, the owner of the business and his associates could have looked for other means and the manner of sustaining their living.

⁴⁰³ The Constitution of the United Republic of Tanzania, 1977 [Cap 2 R:2002].

(b) Excluded Expenditure

Section 11(5) of the Income Tax Act stipulates clearly some of the expenditures which are excluded. The implication is that a person cannot claim deductions in respect of these deductions since they are excluded by the law. The excluded expenditures includes:-

- (i) Tax payable under the law.
- (ii) Expenditure incurred in corrupt practices.
- (iii) Fine and Penalties payable to the government or political subdivision of any government for violation of the law.
- (iv) Expenditure incurred by the person in deriving exempted amount or final withholding tax.
- (v) Distribution by an entity.

Note:-Section 11 of the Income Tax Act Cap 332 has been amended by Section 18 of the Finance Act 2016. Section 11(4) has been deleted. Also item (f) which is under the excluded expenditure have been deleted.

(c) Expenditure of Capital Nature

Section 11(5) of the Income Tax Act as amended by 18 of the Finance Act 2016 defines expenditure of capital nature to mean expenditure that secures benefit lasting longer than twelve months. The definition which was under the Income Tax Act which defined expenditure of capital nature has been replaced by the definition under the Finance Act 2016. Examples of expenditure of capital nature includes cost of registration of patents and trademarks, self-education expenses of the business owner etc.

(d) Environmental Expenditure in Conducting a Resource Extraction Business

This expenditure was allowed under Section 15 of the Income tax Act, Cap 332. The Finance Act 2016 under section 19 amended Section 15 of cap 332 to the effect that expenditure incurred in connection with remedying any damage caused by natural resource extraction operations to the surface of or environment on land is no longer allowed under the law.

7.8.3 Allowed Deductions

These are expenditures or expenses which wholly and exclusively connected to the production of income of the person from business or investment hence deductible. This implies that there is nexus between the income and the expenditure incurred by the person. Herein below are deductions which are allowed by the law:-

(a) Interest Expense

Section 3 of the Income Tax Act define interest to mean a payment for the use of money and include a payment made or accrued under a debt obligation that is not a repayment of capital, any gain realized by way of a discount, premium, swap payment or similar payment, amounts treated as interest under section 32, amounts recognized as interest under section 71(6) (b)(ii) and interest imposed under Division I of Part VIII.

Section 12 of the Income tax Act, Cap 332 provides that interest incurred by a person during a year of income under a debt obligation shall be incurred wholly and exclusively in the production of income from a business or investment and hence deductible. This section provides the condition for this deduction to be allowed that interest incurred by a person during a year of income under a debt obligation shall be treated as incurred wholly and exclusively in the production of income from a business:-

- (i) if the debt⁴⁰⁴ obligation was incurred in borrowing money employed in the business; or
- (ii) The money was used to acquire an asset that is employed during the year of income in the production of the income.

(b) Trading Stock Allowance

Section 13 of Cap 332 provides that for calculating a person's business income for a year of income there shall be deducted trading stock allowance.

The allowance is calculated as= The opening value of trading stock of the business for the year of income + expenditure incurred by the person during the year that is included in the cost of the trading stock minus the closing value of the trading stock of the business for the year of income.

The closing value of trading stock of a business for a year of income shall be the lower of the cost of the trading stock of the business at the end of the year of income or the market value of the trading stock of the business at the end of the year. When the closing value of the trading stock is determined on the basis of the market value the cost of the trading stock shall be reset to that value.

404 Debt means any debt obligation excluding a non-interest bearing debt obligation; a debt obligation owed to a resident financial institution; a debt obligation owed to a non-resident bank or financial institution on whose interest tax is withheld in the United Republic. The total amount of interest that an exempt-controlled resident entity may deduct for a year of income shall not exceed the sum of interest equivalent to debt-to-equity ratio of 7 to 3. exempt-controlled resident entity is an entity which is resident during the year of income and at any time during the year of income 25 percent or more of the underlying ownership of the entity is held by entities exempt under the Second Schedule, approved retirement funds, charitable organizations, non-resident persons or associates of such entities or persons.

Illustration

The trading stock position of company J Ltd as at the end of the year of income is shown in the Trading Account as follows:

Opening Stock	TZS 15,000,000
Purchases and costs	TSZ 60,000,000
	TZS 75,000,000
Closing stock	TZS 30,000,000
Trading stock allowance	TZS 45,000,000

However, at the end of the year the market value of the stock is determined to be TZS. 22,000,000.

Revised Trading Stock Allowance

Since the closing stock value is adjusted at market value the adjusted stock allowance is reset as:

Opening stock value	TZS 15,000,000
Add Purchases and cost	TZS 60,000,000
	TZS 75,000,000
Less: revalued closing stock	TZS 22,000,000
Adjusted Trading Stock allowance	TZS 53,000,000

The trading stock allowance for the year of income is taken as TZS. 53,000,000 and not TZS. 45,000,000. Note that the opening stock value for the next year of income will now be TZS 22,000,000 and not TZS. 30,000,000.

(c) Repair and Maintenance Expenditure

It is provided under section 14 of Cap 332 of 2004 as amended by section 19 of the Finance Act 2017. The principle is that for the purposes of calculating a person's income for a year of income from any business, there shall be deducted all expenditure to the extent incurred in respect of the repair and maintenance of depreciable assets owned and employed by the person wholly and exclusively in the production of the person's income from the business. Note that no deduction shall be allowed for expenditure of improving a depreciable asset, which may be included in the cost of the asset and allowed either in calculating gains or losses on realization or depreciation allowances.

The concept of repair and maintenance is based on the following⁴⁰⁵:-

- (i) The essence of repair is the restoration of the asset to its previous condition it formerly had without changing its character.
- (ii) The asset must be in need of the restoration before it can be repaired, and
- (iii) Repair or maintenance involves a replacement of a part of an asset, not the entire asset.

Note that initial expenditures carried out in order to make good defects which existed at the time the asset was acquired and which prevented the person's use of the asset when acquired is not allowable. Such expenditure is part of the cost of the asset.

(d) Agricultural Improvement Expenditure

Agricultural improvement expenditure means expenditure incurred by the owner or occupier of farm land in conducting agriculture, livestock farming or fish farming business. The expenditure is allowed where the expenditure is incurred in:-

- (i) Clearing the land and excavating irrigation channels or
- (ii) Planting perennial crops or trees bearing crops.

In practice this deduction focuses on those who engage in agriculture for business purpose and also they are registered and issued with Tax Identification Number (TIN). Besides, they have to provide evidence in respect of expenditure incurred in clearing the land and also planting of perennial or trees bearing crops.

(e) Environmental Expenditure

Section 19 of the Finance 2016 amended section 15 of the Income Tax Act to the effect that deduction which is allowed in environmental expenditure is expenditure incurred by the owner or occupier of farmland for the prevention of soil erosion only. The amendment under the Finance Act 2016 deleted deduction with connection in remedying any damage caused by natural resource extraction operations to the surface of or environment on land.

(f) Research and Development Expenditure

Research and development expenditure refers to expenditure incurred in the process of developing the person's business and improving business products or process and includes expenditure incurred by a company for the purposes of an initial public offer and first listing on the Dar es Salaam Stock Exchange.

⁴⁰⁵ The Practice Note on Income from Business, Practice Note No.5 of 2013.

This expenditure exclude any expenditure incurred that is otherwise included in the cost of any asset used in any such process, including an asset consisting expenditure incurred by a person in the person's business in respect of natural resource prospecting, exploration and development.

(g) Gifts to Public and Charitable Institutions

Section 16(1) of Cap 332 provides that for the purpose of calculating a person income for a year of income from any business, there shall be deducted:-

- (i) Amounts contributed during the year of income to a charitable institution referred to in subsection (8) of section 64 or social development project. Section 64(8) of the Income Tax Act provides conditions for charitable organization. The section point out that the charitable institution should be a resident entity of a public character that satisfies the following conditions:-
 - ❖ The entity was established and functions solely as an organization for the relief of poverty or distress of the public, advancement of education, or the provision of general public health, education, water or road construction or maintenance.
 - ❖ The entity has been issued with a ruling⁴⁰⁶ by the Commissioner under section 131 currently in force stating that it is a charitable organization or religious organization. Section 131 under the Income Tax Act has been repealed by section 123 of the Tax Administration Act of 2015. Matters regarding private ruling are now governed by sections 11-14 of the Tax Administration Act.
- (i) Any donation made under section 12 of the Education Fund Act 2001. Section 12 of the Education Funds Act, 2001 provides that any person who makes a donation of money or equipment to a Fund's Assisted Educational Project or Program; avails sponsorship or a grant to any student for the Purpose of enabling such student to pursue secondary level education or attend tertiary level training, shall be awarded by the Authority a certificate to be known as a Certificate of Educational Appreciation.⁴⁰⁷ The person will use the certificate given to apply to the commissioner for deductions in respect of the amount contributed to the education fund.

406 Private ruling issued by the Commissioner refers to the Commissioner's position or decision in respect of a certain transaction which a person has entered or is expecting to enter whether such transaction will be subject to tax or not.

407 The Certificate of Educational Appreciation shall give full particulars of the awardee, the amount of money to which he is eligible for tax relief, the taxes and the mode to which relief may be elected and be signed by both the Director General, and the Commissioner General of the, Tanzania Revenue Authority and shall bear the respective seals of the signatories' organizations. Every awardee of a Certificate of Educational Appreciation shall be entitled at his option, to either apply the amount stated in the Certificate of Educational Appreciation as an allowable deduction under section 16(2) of the income Tax Act, 1973; apply the amount stated in the Certificate of Educational Appreciation as a deduction against the vatiable turnover under the Provisions of the Value Added Tax Act 1997 or apply the amount stated in the Certificate of Educational Appreciation as a relief for the, purposes of customs or import duties, by way of a deduction against the dutiable value.

Note: At present the law has changed, the Income Tax Act of 1973 has been repealed by the Income Tax Act of 2004. Matters on donation are now provided under section 16 of the Income Tax Act 2004. Besides, The Value Added Tax Act of 1997 has been repealed by the Value Added Tax Act, Act No.5 of 2014.

- (ii) Amount paid to local government authority, which are statutory obligations to support community development projects. This implies that the amount paid must be that which a statutory obligation for the support of the community project. The claim for deduction by the person to the commissioner must be supported by the evidence that the contribution has been made as required by the law.

Section 16(2) of Cap 332 provides that the amounts contributed during the year of income to a charitable institution for a year of income shall not exceed two percent of the person's income from the business calculated without a deduction. This implies that if the person exceeds 2% of his income, deductions will not be allowed for the amount in excess of the amount stated by the law, which is 2% of the business income calculated before deductions.

(h) Depreciation Allowances for Depreciable Assets

It is provided under section 17 of Cap 332. Depreciation allowances are allowed in respect of depreciable assets. A depreciable asset is an asset employed wholly and exclusively in the production of income of a business and which is likely to lose value because of wear and tear, obsolescence or the passing of time. Land, shares and trading stock are excluded.⁴⁰⁸

When a person purchases and start using a depreciable asset, or makes an improvement to a depreciable asset, the person cannot deduct the full amount of the expenditure in the first year, except for depreciable assets used in agriculture and mining business, but can deduct portions of the expenditure for a number of years until the full expenditure amount has been exhausted. The deduction system can be straight-line method or reducing balance method depending on the type (Class) of the asset.⁴⁰⁹ The conditions for entitlement to depreciation allowances are that the asset should be owned by the person and the asset should actually be used wholly and exclusively in the production of the income for a year of income.

(i) Losses on Realization of Business Assets and Liabilities

It is provided under section 18 of the Income Tax Act. The principle is that in calculating a person's income for any year of income from any business, losses from the following realizations shall be deducted:-

⁴⁰⁸ Section 17 of the Finance Act 2016.

⁴⁰⁹ Paragraph 3 of the third Schedule of the Income Tax Act, Cap 332 of 2004.

- ❖ Business asset,⁴¹⁰ of the business that was employed wholly and exclusively in the production of the income from the business.
- ❖ A debt obligation incurred in borrowing money which was employed or an asset purchased with the money is or was employed wholly and exclusively in the production of the income; or
- ❖ A liability of the business other than a debt obligation incurred in borrowing money, where the liability was incurred wholly and exclusively in the production of the income from the business.

(j) Losses Incurred from Conducting a Business or Investment

It is provided under section 19 of cap 332 as amended by the Finance Act 2016 and Finance Act 2017. The rule is that in calculating the income of a person from a business other than the income of a partnership or a foreign permanent establishment, any unrelieved loss of the year of income of the person from any other business and any unrelieved loss⁴¹¹ of a previous year of income of the person from business shall be deducted subject to the following conditions:

- ❖ Foreign source losses shall be deducted only in calculating the person's foreign source income from investment.
- ❖ Other losses from investment only deductible in calculating a person's income from investment.
- ❖ Losses incurred on agricultural business shall be deducted only in calculating the person's income derived from agricultural business.
- ❖ In the case of loss incurred in dealing with speculative transaction, allowed only in calculating the person's income derived from speculative transaction⁴¹²

Note: Section 19 of the Income Tax Act has been amended by Section 20 of the Finance Act 2016. Section 19(2)(d) and (e) of cap 332 has been deleted.

410 Section 3 of Cap 332 define business assets as assets which are used in a person's business and includes a membership interest of a partner in a partnership but excludes trading stock or depreciable assets. The following assets are not business assets hence loss incurred from their realization is not deducted in calculating income from the business, Interest in land held by an individual that has a market value of less than shillings 10 million at the time it is sold and that has been used for agricultural purposes for at least two of the three years prior to sale; Shares or securities listed on the Dar es Salaam Stock Exchange.

411 Unrelieved loss means the amount of a loss that has not been deducted in calculating a person's income under subsection (1) or section 26(3) of Cap 332.

412 Speculative transaction means a transaction which is a contract for sale or purchase of a commodity including stocks and shares settled otherwise than actual delivery or transfer of the commodity or any agreement for repurchase or resale, forward sale or purchases, futures contract, options or swap contract (Section 19 of the Income Tax Act, Cap 332 of 2004 as amended by section 20 of the Finance Act, 2017).

(k) Carry Forward of Losses

The principle which governs carry forward losses is that if a person made a loss from the person's business in the previous year, the loss can be carried forward and deducted from the current year's business income. Losses can be carried forward from year to year indefinitely. However, loss carry forward is subject to the following limitations: -

❖ Limits on Losses of Entities where there is Ownership Change

- ✓ Section 56 of the Income Tax Act provides that where the underlying ownership of an entity changes by more than fifty percent as compared with that ownership at any time during the previous three years⁴¹³, the entity shall be treated as realizing any assets owned and any liabilities owed by it immediately before the change. Where there is a change in ownership of the entity after the change the entity shall not be permitted to deduct a loss under section 19(1) of cap 332 that was incurred by the entity prior to the change. The exception is where for a period of two years after the change in the ownership, the corporation conducts no business other than that conducted at any time during the twelve-month period before the change

❖ Limits of Losses from Agricultural Business. If a person makes a loss from agricultural business, the person can offset only gains from agricultural business assets.⁴¹⁴

❖ Foreign Losses. Foreign business losses can offset only foreign business income; losses on the sale of foreign business assets can offset only gains on sale of foreign business assets.

❖ Losses from Mining. Losses incurred from mining business are ring fenced based on licensed areas.⁴¹⁵

❖ Losses from Petroleum Contract Areas. Losses from petroleum contract areas are ring fenced based on distinct contract areas.⁴¹⁶

(L) Bad Debt

It is provided under section 25 of the Income Tax Act. The principle is that for the purposes of calculating income of a person from any business deduction is allowed in respect of any debt or part thereof, which has become bad or irrecoverable during the year of income subject to the following conditions:-

413 Section 25 of the Finance Act 2016.

414 Section 19(2)(f) of the Income Tax Act.

415 Section 65(F) Finance Act 2016.

416 Section 65(O) Finance Act 2016.

- ❖ In the case of a debt claim of a financial institution, only after the claim has become bad debt as determined in accordance with the relevant standards established by the Bank of Tanzania.
- ❖ In any other case, only after the person has taken all reasonable steps in pursuing payment and the person reasonably believes that the debt claim will not be satisfied.
- ❖ The debt amount must have been included in calculating the person's income for the year of income.
- ❖ The debt must have been written off as irrecoverable in the books of accounts of the person for that year of income in which the debt is claimed to have become bad.

The case of *Commissioner General versus M/S Barclays Bank (T) Ltd*,⁴¹⁷ discusses about bad debts. This is an appeal by the Commissioner General (TRA) herein referred to as the Appellant. It is against the whole decision of the Tax Revenue Appeals Board of 7th February, 2011 in consolidated Income Tax Appeals No. 33 and 34 of the year 2010. In its decision the Board allowed M/S BARCLAYS BANK TANZANIA LIMITED objection, and the Commissioner General was aggrieved, and has preferred this Appeal.

In this case the tribunal is of the collective opinion that, even though the TRA recognizes the provisions of the Banking and Financial Institutions Act and the Regulations made there under in relation to bad debts, there is nothing in these legislation and subsidiary legislation which suggests that TRA cannot question BOT approval, especially where it is obtained in non-compliance with the Rules and regulations or where it is patently inconsistent with the TRA.

In other words, the Banking and Financial Institutions Act read together with the Management of Risk assets Regulations do not prohibit the TRA from lifting the veil so as to satisfy itself as to the correctness of the approval granted by BOT to a Financial Institution. Instead, the approval in our view lays good ground for a Financial Institution to be accorded the benefit of deduction. It is different from saying that such approval is final and cannot be questioned by TRA.

Mr. Tito argued that tax matters must be guided by the revenue laws, except where the other laws unambiguously provide for a mechanism not inconsistent with the parent revenue law. We agree with that argument, for that is the law. He stated the obvious.

⁴¹⁷ Income Tax Appeal No. 3 of 2011 (TRAT).

It is also our collective understanding that TRA cannot simply ignore what the other laws provide in relation to specific trades or industries, yet in order for the Taxpayer to enjoy a specific relief provided for in the said laws, it is necessary that the said laws must be consistent with the revenue laws and must further recognize the supremacy, or otherwise of the revenue laws. In the present situation, the BAHA provision does not suggest that an approval by the BOT is also an automatic approval for deduction under the Income Tax Act.

In our view, an approval by BOT provides a basis for a Tax payer to enjoy a deduction but that is different from saying that the approval is absolute and that TRA must honor it irrespective of anything to the contrary. Section 25(4) of ITA suggests that the Taxpayer must have first included the amount he is entitled, then when such amount constitutes a debt claim, he must write it off as a bad debt, and may then deduct the amount disclaimed or written off in calculation of the person's income for that year and if the tax payer is a bank, like in the instance case, he must first obtain BOT approval. See especially Section 25(5)(a) of ITA. In the light of our view above, we find that the 1st and 2nd grounds of appeal have merit and we allow them.

Coming to the 3rd ground of appeal, which relates to erroneous interpretation of Section 25(5) (a) of the income Tax Act on the technical meaning in accounting of the word "provision" for bad or doubtful debt being different from actual debt, the Appellant's Counsel submitted that, in tax accounting when referring to a provisioning of bad or doubtful debt, it means those debts which actually have not become bad, but a person anticipates that out of these debts some of them are not likely to be recovered.

According to Mr. Tito, under Section 25(5)(a) of ITA, what is allowed as deduction are debt claims which actually become bad or in other words which have been proved to be uncollectable, and not anticipated to be uncollectable or in anticipation of becoming bad in the future. This is because Financial Institutions do not issue loan on charitable basis. They issue loans under security or collaterals which are intended to protect those loans. In the event the borrower fails to repay the loans, then financial Institutions may recover them through disposal of security which has been issued by the borrower. It is only upon disposal of these securities that the Financial Institution can know and actualize the loss and can be said to have made a loss in relation to that transaction, whose cumulative effect may lead to a total general loss, that is where no profit has been realized as a whole by the Institution in that whole year of income.

In reply to Appellant's counsel, Dr. Kibuta, Counsel for Respondent submitted that the deduction claims which were disallowed by TRA are loans which were classified under Regulation 15(4) of the Management of Risk Assets Regulations as losses, which provides that losses should be taken in the period they occurred as uncollectable when they have not shown any significant improvement. Dr. Kibuta went further to state that all unrecovered losses

which BARCLAYS Bank claimed deduction and provisions were covered in 2005 and 2006. In both years, 5ARCLAYS sought approval from BOT to satisfy the requirements of Section 25(5)(a) of BAFIA and Reg. 4(3)(i) of the BOT Regulations. The approval was given and the BOT approval letter was tendered as exhibits in the Board. He also countered that the Appellants Counsel argument that a bad debt can only be allowed for deduction after being written off is not consistent with the wording of Section 25 (5) of ITA.

Dr. Kibuta insisted that, according to BOT Regulations, a bank cannot provision a bad debt unless the same has been classified as a loss. Therefore, the only requirement for Financial Institution is that they should obtain approval of BOT. this is obviously a simplistic approach, and we do not buy it.

It is our respectful opinion that indeed, in the case of debt claim of Financial Institution, only after the debt claim has become a bad debt as determined in accordance with the relevant standards established by the BOT that it becomes eligible for writing off as a bad debt and thereafter the Bank can lawfully claim a deduction. A provision for bad debt cannot be said to be a bad debt as it has not been actualized. It is only after recovery measures have failed that the debt/loan/loss becomes bad and cannot be realized. It has to be a bad debt. We are therefore of the firm view that the third ground of Appeal has merit and we allow it.

Let us examine the fourth ground of Appeal, which relates to application of BOT Regulations.

The Appellant submitted that, Section 25(5) (a) of ITA requires that a bad debt must be determined by the ROT before TRA can allow it as a deduction. The standard upon which the BOT determines a debt claim as bad are referred to as the Management of Risk Assets Regulations 2001 made under Section 12 of the BAFIA 1991.

Under these Regulations, there is classification of loans, and Regulation 15, is relevant whose sub regulation (4) relates to losses. Mr. Tito for the TRA submitted that, in order for a loan to become classified as loss or debt claim, it has to meet the conditions indicated under paragraph (a) (b) and (c) of Regulation 15 (4). Once the loan has been classified as a loss, the effect goes to Regulation 7 for which now the loan/loss is required to be charged off or written off, hence the loan is classified as a loss that it has met the auditing, at the end of quarterly review.

On the other hand, Dr. Kibuta for the Respondent argued that the deduction claims which were disallowed by TRA are loans which were classified under Regulation 15 (4) as 'loan losses'. Regulation 15 (4) requires that losses should be taken from a period they suffered as uncollectable and according to Regulation 15 (4) (a) they become uncollectable when they have not shown any significant improvement.

After what we have observed here and above, we are of the opinion that this Appeal must succeed as the approval by BOT was conditional upon TRA satisfying itself as to its correctness, and in this case TRA has demonstrated that the bad debts or losses had not been written off in compliance with the provisions of Section 25 (4) (b) of the Income Tax Act. Therefore, the decision of the Tax Revenue Appeals Board is hereby set aside and we order no costs.

In conclusion, taxation of income from business is easy to administer especially where businesses are formalized and the tax authority is having a tax register in respect of these businesses for the purpose of tax liability, otherwise, where large part of the economy is characterized by the informal sector the administration of taxation of income from business, become difficult as a result little revenue will be collected by the tax authority. It is a call for the government and other stakeholders to make sure that businesses are formalized for the purpose of tax liability and other economic benefits attributable to formalization of business.

CHAPTER EIGHT

TAXATION OF INCOME FROM INVESTMENT IN TANZANIA

8.1 Introduction

This chapter provides in details the meaning of investment, asset, and investment assets, rule governing income from investment, inclusions, exclusions, and deductions.

8.2 Investment

Section 3 of the income Tax Act defines investment to mean the owning of one or more assets of a similar nature or that are used in an integrated fashion, on similar terms and subject to similar conditions, including as to location and includes a past, present and prospective investment, but does not include a business, employment and the owning of assets, other than investment assets, for personal use by the owner.

In this definition there are key matters to note in respect of the meaning of investment:-

- (i) Asset owned can be one or more assets.
- (ii) The assets must be of similar nature subject to similar conditions.
- (iii) The investment can be past investment, present and prospective investment.
- (iv) Assets owned must be for investment purpose and not personal use by the owner.
- (v) Exclude business and employment.

8.3 Asset

An asset is a resource with economic value that an individual, corporation or country owns or controls with the expectation that it will provide future benefit. Section 3 of Cap 332 defines asset to mean a tangible or intangible asset and includes currency, goodwill, know-how, property, a right to income or future income and a part of an asset. The categories of asset can be tangible (physical) assets such as currency, property, cash at bank and in hand, inventory and intangible (non-physical) asset such as goodwill, know-how, right to income, brand name, domain names or computerized databases, patented technology, software, website, etc.

Apart from the fact that assets can be tangible or intangible they are normally categorized into two major groups:-

(i) **Current Assets**

This refers to assets that the business owns or controls that will be consumed or converted into cash within twelve months eg cash at bank and in hand, inventory, right to income etc

(ii) **Non-Current Assets**

These are the company long-term investments assets that the full value will not be realized within the accounting year (twelve months) e.g goodwill, brand recognition and intellectual property, and property, plant and equipments.

8.4 Investment Asset

Section 3 of Cap 332 defines investment asset,⁴¹⁸ to mean:-

(i) **Shares**

Section 2 of the Companies Act,⁴¹⁹ defines share to mean share in the share capital of a company, and include stock except where a distinction between stock and shares is expressed or implied. Where a person owns shares in a company authorized share capital or registered share capital of the company he becomes part and parcel of the company. He is the owner of the company in respect of the portion or numbers of shares he owns in the share capital of the company. For the purpose of tax law, shares are regarded as investment assets since the owner is expecting to receive profits or gains out of dividend declared by the company to be distributed to the shareholders according to their classes of shares.

⁴¹⁸ Section 3 of Cap 332- Investment asset does not include business assets, depreciable assets and trading stock; business assets, depreciable assets and trading stock; private residence of an individual that has been owned continuously for three years or more and lived in by the individual continuously or intermittently for a total of three years or more, other than a private residence that is realized for a gain in excess of 15,000,000 shillings; an interest in land held by an individual that has a market value of less than 10,000,000 shillings at the time it is realized and that has been used for agricultural purposes for at least two of the three years prior to realization; shares or securities listed on the Dar es Salaam Stock Exchange that are owned by a resident person or a non-resident person who either alone or with other associate controls less than 25% of the controlling shares of the issuer company.

⁴¹⁹ Cap 212 of 2002.

(ii) **Securities in a Corporation**

Securities refers to financial instruments issues by corporations for different purpose such as to raise capital to finance the programs or activities of the organizations. A good example is debt instruments such as bonds. Debt instruments when issued different investors may take them as securities and invest in the corporation basing on the value of each debt instrument. A person who invests in a corporation by purchasing debt instruments will be regarded as a creditor/investor to a corporation. The investor will be expecting to receive the principal sum plus interest during a defined period of time per the contract entered. The interest received by the investor is regarded as income from investment and hence subject to tax.

(iii) **Beneficial Interest in a Non-Resident Trust**

Section 3 of the Income Tax Act defines membership interest in an entity to mean a right, including a contingent right and whether of a legal or equitable nature, to participate in any income or capital of the entity and includes the interest of a partner in a partnership, the interest of a beneficiary in a trust and shares in a corporation. A beneficial interest is the right to receive benefits on assets held by another party. Beneficial interest is often referred to in matters concerning trusts. For example, most beneficial interest arrangements are in the form of trusts, whereby one has a vested interest in the trusts assets. The beneficial interest in a trust is regarded as investment and whatever distribution made to a member by a trust it will be subject to tax.

(iv) **Interest in Land and Interest in Buildings**

A person who is having interest in land or building such as units title in a condominium property is regarded as having an investment since he may decide to dispose off his interest and out of such disposition there will be gain which will be subject to capital gains tax. Gains from property such as land and building are regarded as gains from investment and hence subject to tax as provided by the Income Tax Act⁴²⁰. A person may decide also to lease his property and out of it he will be receiving rent which is also subject to tax because it is regarded as income from investment.

420 Section 90 of Cap 332 of 2004 provides that where a person (an "instalment payer") derives a gain in conducting an investment from the realization of an interest in land or buildings situated in the United Republic, share or securities held in a resident entity, the person shall pay income tax by way of single instalment equal to in the case of a resident person, ten percent of the gain; or in the case of a non-resident person, twenty percent of the gain. The instalment referred shall be paid before the titles to an investment asset is transferred and the appropriate authorities for registration, transfer or approval shall not register such transfer or change of name without the production of a certificate of the Commissioner certifying that the instalment has been paid or that no instalment is payable.

8.5 Rule Governing Income from Investment

Section 9(1) of the Income Tax Act provides that a person's income from an investment for a year of income is the person's gains or profits from conducting the investment for the year of income. A person whose activities consist wholly or partly in making or managing investments is treated as conducting an investment.⁴²¹

8.6 Inclusions

Section 9(2) of Cap 332 provides that in calculating a person's gains or profits from conducting an investment for a year of income the following amounts derived by the person from conducting the investment during that year of income shall be included, namely:-

8.6.1 Dividends

Section 3 of Cap 332 define dividend of an entity means a distribution by the entity to the extent that it is not a repayment of capital.

In the case of *African Barrick Gold Mine Plc Versus Commissioner General, Tax Appeal No. 16 of 2015 (TRAT)* dividend has been defined as:-

"a distribution to its shareholders or a class of its shareholders of a portion of a company's income from business. It is derived from the company's net profits, or retained earnings. Wharton's Concise Law Dictionary (2012 reprint), Universal Law Publishing Co., New Delhi (at 317-8) defines the word "dividend" as "... the share of profits of a company payable to each shareholder" [Emphasis added]. Black's Law Dictionary., 2009 defines "dividend" as: 'portion of a company's earnings or profits distributed pro rata to its shareholders, usually in the form of cash or additional shares. [Emphasis added]."

Section 180 of the Companies Act, Cap 212 of 2002 provides that a company may, in general meeting, declare dividends in respect of any accounting period or other period. A company may pay a dividend out of its realized profits less its realized losses, or out of its realized revenue profits less its revenue losses, whether realized or unrealized, provided the directors reasonably believe that immediately after the dividend has been paid the company will be able to discharge its liabilities as they fall due, and the realizable value of the company's assets will not be less than the amount of its liabilities. An open ended investment company may pay such dividends as may be permitted in regulations made by the Minister for the time being responsible for finance, or by the Capital Markets and Securities Authority or such other authority designated for the purpose.

⁴²¹ Practice Note on Income from Investment, Practice Note No.6 of 2013.

It seems that under section 180 of the Companies Act declaration of dividend by a corporation is not mandatory. For the purpose of tax law a company cannot capitalize the profits before the payment of tax, therefore if a company opts not to declare dividend it will be required to pay the tax due before converting its profits into capital or other means per the company programs or activities.

A person who buys shares in corporations is expecting to receive dividends out of the declared portion of the profits of the company. The declared dividend is regarded as income from investment and therefore subject to tax.

Section 54 of the Income Tax Act provides for taxation of shareholders who receive dividend as income from investment. Section 86 of Cap 332 provides among other things that dividend is regarded as part of final withholding payments. Section 82 further provides withholding of investment returns.

The rate of tax applicable to dividend paid to the shareholders is provided in paragraph 4(b) of the first schedule of the Income Tax Act. The rate applicable to payments to which section 82 applies in the case of dividends of a corporation listed on the Dar es Salaam stock Exchange or to which section 54(2) applies it is 5 percent; or of any other corporation it is 10 percent.

8.6.2 Distribution of a Trust

Section 3 of Cap 332 defines trust to mean an arrangement under which a trustee holds assets but excludes a partnership and a corporation. The distributions by an entity which includes trusts, corporation and partnership includes:-

- (a) A payment made by the entity to any of its members, in any capacity to the extent that the amount of the payment exceeds the amount of any payment made by the member to the entity in return for the entity's payment.
- (b) Any re-investment of dividends which enhances the value of shares.
- (c) Any capitalization of profits.
- (d) A payment made by the entity to one of its members on cancellation, redemption or surrender of a membership interest in the entity, including as a result of liquidation of the entity or as a result of the entity purchasing a membership interest in itself.

A membership interest in a trust is regarded as an investment and hence where a trust make distribution to its members in whatever arrangement the distribution made will be regarded as income from investment as hence subject to tax.

8.6.3 Gains of an Insured from Life Insurance

Life insurance is defined under Section 3 of Cap 332 to mean insurance of any of the following classes:-

- ❖ Insurance where the specified event is the death of an individual who is the insured or an associate of the insured.
- ❖ Insurance where the specified event is an individual who is the insured or an associate of the insured sustaining personal injury or becoming incapacitated; and
- ❖ Insurance where the insurance agreement is expressed to be in effect for at least five years or without limit of time and is not terminable by the insurer before the expiry of five years except in circumstances prescribed by the regulations.
- ❖ Insurance under which an amount or series of amounts is to become payable to the insured in the future.

Section 60(2) of Cap 332 provides that subject to the provisions of sections 58 and 59, gains of an insured from life insurance shall be in the case where the proceeds are paid by a resident insurer, exempt in the hands of the insured; and in the case where the proceeds are paid by a non-resident insurer, included in calculating the income of the insured.

Section 60(3) of the income Tax Act defines gains of an insured from life insurance to mean the extent to which proceeds from life insurance paid by an insurer exceed premiums paid to the insurer with respect to the insurance.

For the purpose of tax liability in respect of life insurance the proceeds paid should exceed the premium paid to the insurer. The premium is normally paid by the insured to the insurer in respect of the insurance policy whereas proceeds are paid by the insurer to the insured upon the happening of insured event. Where the proceeds exceed the premium paid the excess will be regarded as gain and therefore subject to tax because it is regarded as income from investment.

8.6.4 Gains from an Interest in an Unapproved Retirement Funds

Section 3 of Cap 332 defines unapproved retirement fund to mean a retirement fund that is not an approved retirement fund. Section 3 of Cap 332 define approved retirement fund to mean a resident retirement fund having a ruling under section 11 of the Tax Administration Act 2015⁴²². The private ruling is normally issued by the Commissioner General in respect of the transaction which a person has entered or is proposing to enter. It gives the Commissioner's position as to whether a particular arrangement or transaction is subject to tax or not. The Commissioner General must give a ruling in respect of a retirement fund that it is approved retirement fund for purpose of tax liability. Where the Commissioner General have given a private ruling in respect of retirement fund such retirement fund will not be subject to tax as regarding to the contributions made to the funds if they are made per the statutory rate provided by the law.

Section 63(1) of Cap 332 provides that gains from an interest in an unapproved retirement fund shall be in the case where the retirement payments are paid by a resident fund, exempt in the hands of the payee and in the case where the retirement payments are paid by a non-resident fund, included in calculating the income of the payee.

The condition for gains from an interest in an unapproved retirement funds is provided under section 63(2) of Cap 332 to the effect that gain from an interest in an unapproved retirement fund means the extent to which retirement payments made by an unapproved retirement fund in respect of an interest in the fund exceed retirement contributions paid to the fund in respect of the interest. This implies that where the interest paid exceeds retirement contributions there is gain as hence subject to tax because it is regarded as income from investment.

8.6.5 Interest

Section 3 of the Income Tax Act defines interest to mean a payment for the use of money and includes a payment made or accrued under a debt obligation that is not a repayment of capital, any gain realized by way of a discount, premium, swap payment or similar payment, amounts treated as interest under section 32 of ITA 2004, amounts recognized as interest under section 71(6) (b)(ii) and interest imposed under Division I of Part VIII.

⁴²² The private ruling was provided under section 131 of the Income Tax Act. Section 131 of the ITA 2004 has been repealed by section 124 of the TAA 2015. Private ruling is now covered by sections 11 to 14 of the TAA 2015.

Section 82 of Cap 332 provides for withholding of tax from income from investment. The Section among other things treat interest paid as income from investment and therefore subject to tax. Section 86(1)(b) of Cap 332 provides interest paid by financial institution to a resident individual where the interest is paid with respect to a deposit held with the institution. This implies that where a person is having a deposit account or any other type of account such as fixed account in a financial institution and such financial institutions pays interest in respect of such deposits, the interest paid by such financial institutions will be regarded as income from investment and therefore subject to tax. The rate of tax applicable is 10% of the total amount of interest paid as provide by paragraph 4(b) (ii) of the first schedule of the Income Tax Act.

The case of *The board of trustees of The National Social Security Fund (NSSF) versus Commissioner General, Income Tax Appeals No.16 of 2015(TRAB)* describe interest from government bonds and as to whether it is subject to tax.

This is an appeal by the Board of Trustees of the National Social Security Fund herein referred to as the appellant against Commissioner General, Tanzania Revenue Authority (the respondent) challenging the notice of tax Assessment number F. 420703532 of tax amounting to Tshs. 22,505,487,588.17 for the year of income 2011. The appeal is made under section 16(1) of the Tax Revenue Appeals Act Cap 408 of the laws of Tanzania Revised Edition 2006 and Rules 6(2) and 7(2) of the Tax Revenue Appeals Board Rules GN 57 of 2001 and Tax Revenue Appeals Board (amendment) Rules GN number 366 of 2009.

Issues

- Whether the respondent was justified in assessing tax on interest from government bonds.
- What reliefs are the parties entitled?

Analysis and Decision of the Board is as follows:-

During the hearing the appellant raised the issue of res-judicata to the effect that the Honourable Board is binding to the previous decision made in the case of the Registered Trustees of the Parastatal Pensions Fund versus the Commissioner General TRA, Income Tax Appeal number 48 of 2012 the decision which has not been appealed against hence in the absence of material change the matter is res-judicata and the decision is final and binding to the parties and the respondent is barred from re-opening the matter in subsequent years and in similar circumstances.

Resisting Mr. Noah told the Board that the rule of res-judicata does not apply to this appeal due to the effect that the decision of the Board in Appeal number 48 of 2012 relates to a different year of income and tax assessment and there is a pending proceeding number 13 of 2012 in the Tax Revenue Appeals Tribunal in relation to appeal number 48/2012 hence the decision of the Board is not final and conclusive hence the Board is not bound by the decision of the said appeal.

Section 9 of civil procedure code cap 33 RE 2002 under which the principle of res-judicata is provided it states

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in court competent to try such subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by such court"

In the case of *Registered Trustees of Chama Cha Mapinduzi versus Mohamed Ibrahim versus and Sons and Au Mohamed Mohamed*, Civil appeal number 6/ 2008, the Court of Appeal had this to say:-

It is well settled law and leading authorities are at one that in order for the plea of res-judicata to successfully operate the following conditions must be proved namely:-

- (a) The former suit must have been between the same parties litigating parties or between parties under whom they or any of them claim.
- (b) The subject matter directly and substantial in issue in subsequent suit must be the same matter which was directly and subsequently in the issue in the former suit either actually or constructively.
- (c) The party in the subsequent suit must have litigated under the same title in the former suit.
- (d) The matter must have been heard and finally decided.
- (e) That the former suit must have been decided by court of competent jurisdiction.

Therefore as per the provisions of section 9 of the Civil Procedure Code, Cap 33 RE 2002 and also as per the cited case above in relation to the instant case this Board is with due respect that the ingredients of res judicata were not fulfilled for the Board to have applied it. That the former and the subsequent suits are not the same.

That the appellant in the former suit was PPF and the party in the subsequent suit is NSSF and also the subject matters at issue in two suits were different. The subject matter in appeal number 48/2012 was for the year of income 2005 and the assessment tax was Tshs. 1,586, 662, 896.60 while the subject matter in this instant appeal is of the year of income 2011 and the assessed tax was 22,505,487,588.17 in fact the appellant in his rejoinder admits that the current appeal relates to different year of income and assessment. Further that res-judicata was not met as the matters in the subsequent suit were not heard and finally determined by the Board.

Therefore the appellant's argument that the rule on res-judicata applies in this subsequent appeal is misconceived hence lack merits. Therefore the subsequent suit could not have been hit by res-judicata as alleged by the appellant.

The appellant in his submission stated that the interest earned from investments in government bonds is exempt from Income Tax by virtue of Government notice number 177 of 1993 read together with section 141(2) of the Income Tax Act Cap 332 R.E 2006 which still recognizes orders made under the old Income Tax Act number 33 of 1973 including GN number 177 of 1993.

The respondent's legal counsel opposes the appellant's learned advocate assertion and went on to argue that the interest earned from Government Bonds is chargeable to Income Tax for the reasons that the Government notice number 409 of 1991 which was issued by the Minister for Finance under the powers vested to him under section 15 of the Income Tax Act 1973 were revoked by section 2 of the Miscellaneous Tax exemption and Remissions Revocations Act, Number 16 of 1992 hence such GN number 409 of 1991 which granted tax exemption to investors in government bonds was revoked, therefore, the tax exemption was no longer available to the most investors including the appellant except for few beneficiaries specified under section 3(a) and (b) of the revocation Act, 1992.

The respondent's legal counsel went ahead stating that the GN number 177 of 1993 relates to Government stocks and securities which was not relevant to the instant appeal and it was issued by the Minister for finance to increase the scope of section 2 of GN number 409/1991 the section which was already revoked by the miscellaneous Tax exemption and Remission Revocation Act 1992. Upon carefully hearing arguments by both parties this Board concur with the respondent's arguments that according to GN number 409 of 1991 issued under section 15 of the Income Tax Act 1973 all investors including the appellant who earned income by way of interest from government bonds were exempt from Income Tax. However, by virtue of section 2 of the miscellaneous tax exemptions and Remission Revocation Act number 16 of 1992 the GN Number 409/1991 which granted tax exemption to the investors including the

appellant was revoked hence no longer available to the most investors and the appellant except for few beneficiaries who are specified under section 3(a) and (b) of the Revocation Act, 1992.

Section 2 of the miscellaneous Tax Exemptions and Remissions Revocation Act 1992 states that,

"Subject to section 3, the tax exemptions or remissions granted pursuant to or under the provisions of the written laws specified in the schedule to this Act is hereby revoked".

The Board also carefully perused the stated schedules and tax exemption on interest from Government bonds granted by GN number 409 of 1991 and noted that, these exemptions issued under section 15 of the Income Tax Act 1973, were among the tax exemptions revoked.

The Board perused the appellant's submissions as well as the documentations filed but found no evidence by the appellant to show that the power of the Minister for Finance to issue exemption under section 15 of the Income Tax Act 1973 was repealed by the Revocation Act, 1992 or there is either a general or specific tax exemption issued by the Minister in relation to income on Government Bonds they also noted that the GN Number 409 of 1991 was issued by the Minister of Finance by then S.A. Kibona and GN Number 177/1993 was issued by another Minister Prof. Kighoma A. Malima who increased the scope of GN number 409/1991 using section 15 of Income Tax Act 1973, the section which was already revoked by the miscellaneous Tax exemption and Remission Revocation Act 1992. The basic principle of law is clear that subsidiary legislation cannot override a principal legislation whereas Government notice number 177/1993 in which the appellant relied on which is subsidiary legislation cannot override the Revocation Act, 1992 which revoked GN number 409 of 1991.

The Board noted that the subsidiary legislation that is the GN number 409 of 1991 could not continue to have effect if the tax exemption which is the core subject matter of this legislation were revoked. This implies that the GN Number 409/1991 was not in existence.

The appellant in his submission insisted on the decision of the Board in the appeal number 48/2012 on the legality of GN number 177 of 1993 having not been challenged is final and binding and it cannot reverse its decision except through proper proceedings but not of the nature in the current appeal. On the other hand respondent opposed the appellant's assertions to the effect that the Board is not bound by interpretation in appeal number 48/2012. The Board is free from departing from such interpretation and makes proper interpretation of Revocation Act 1992.

Basing on the above submissions by the parties and with due respect the Board is of the findings that such appellant's assertions are misplaced and misconceived. The Board concur with the respondent to the effect that this Board is not bound by the interpretation in appeal number 48/2012. The Board is bound by the decisions of the Tax Revenue Appeals Tribunal and of the court of appeal of Tanzania and not otherwise so the Board is free from departing from any interpretation made by the Board and makes a proper interpretation of any Law.

In the course of examining appeal number 48/2012 which the appellant relied, The Board noted the existence of pending proceedings number 23/2012 in the Tax Revenue Appeals Tribunal in relation to appeal number 8/2012 hence the decision in the stated appeal is not final and conclusive.

Therefore, this Board is not bound by the decision issued on appeal number 48/2012 and it is hereby satisfied that the Respondent is justified in assessing tax on interest from Government bonds as the same is no longer exempt from Tax.

This appeal number 16/2015 between NSSF and Commissioner General has no merits hence hereby dismissed. Each party to bear its own cost.

8.6.6 Natural Resources Payment

Section 3 of Cap 332 defines natural resource to mean minerals, petroleum, water or any other non-living or living resource that may be taken from land or the sea. Natural resource payment is defined under Section 3 of the Income Tax Act to mean any payment, including a premium or like amount, for the right to take natural resources from land or the sea or calculated in whole or part by reference to the quantity or value of natural resources taken from land or the sea.

Section 82(1) of the Income Tax Act provides that where a resident person pays a dividend, interest, natural resource payment, rent or royalty and the payment has a source in the United Republic the person shall withhold income tax from the payment at the rate provided for in paragraph 4(b) of the First Schedule of the Income Tax Act. The rate of tax provided under paragraph (4) (b)(iii) is 15% of the payment made.

The natural resources in Tanzania are owned by the Government. This implies that where a resident person pays natural resource payment for the right to take natural resources from land or the sea, the payment will be subject to withholding tax as provided under the first schedule to the Income Tax Act.

8.6.7 Rent

Section 3 of Cap 332 defines rent to mean any payment made by the lessee under a lease⁴²³ of a tangible asset including any premium and any other payment for the granting of the lease but excludes a natural resource payment and a royalty. Rent paid to the landlord by the lessee is regarded as final withholding payment under section 86(1) of Cap 332. The section provides that rent is among the final withholding payments rent paid to a resident individual under a lease of land or a building and associated fittings and fixtures, other than rent received by an individual in conducting a business; or foreign source rent paid to an individual referred to in section 6(2) of Cap 332.

The Income Tax Act has provided exceptions in respect of rent paid for residential purposes. Section 86(4) of Cap 332 provides that where a resident individual (landlord) receives rent during a year of income in respect of residential premises situated in the United Republic that are leased by another individual as the residence of that other individual and the rent is not received by the landlord in conducting a business; and also the total of the rent received by the landlord under the lease during the year of income does not exceed Tshs. 500,000, then the landlord shall not have tax liability under section 4(1) (c) of the income Tax Act with respect to receipt of the rent.

The rate of tax applicable for rent paid under the lease agreement is 10% as provided by paragraph 4(b)(iii) of the first schedule of the Income Tax Act, 2004 as amended.

Calculation

Total Amount of rent Tsh 2000, 000/= per year.

calculate the amount of withholding tax

$$\frac{10}{100} \times 2,000,000 = 200,000$$

Therefore, the amount of tax required to be withheld by the tenant is 200,000Tshs.

It is the duty of the withholding agent (tenant in this purpose) to withhold the tax due when paying rent to the landlord and remits the same to the tax authority within the prescribed period.⁴²⁴

423 Section 3 of cap 332 of 2004 defines lease to mean an arrangement providing a person with a temporary right in respect of an asset of another person, other than money, and includes a license, *profit-a-prendre*, option, rental agreement, royalty agreement and tenancy.

424 Section 84 of the Income Tax Act.

8.6.8 Royalty

Royalty is defined under section 3 of Cap 332 to mean any payment made by the lessee under a lease of an intangible asset and includes payments for the use of or the right to use, a copyright, patent, design, model, plan, secret formula or process or trademark; the supply of know-how including information concerning industrial, commercial or scientific equipment or experience; the use of or right to use, a cinematography film, videotape, sound recording or any other like medium; the use of, or right to use, industrial, commercial or scientific equipment; the supply of assistance ancillary; or a total or partial forbearance but excludes a natural resource payment.

This section focuses on payment made in respect of intangible assets and not tangible assets. Section 69(e) of the Income Tax Act provides that royalties paid for the use of, right to use or forbearance from using an asset in the United Republic have a source in the United Republic and therefore subject to tax.

Section 82(1)(a) of Cap 332 provides that where a resident person pays a dividend, interest, natural resource payment, rent or royalty; and the payment has a source in the United Republic the person shall withhold income tax from the payment at the rate provided for in paragraph 4(b) of the First Schedule to the ITA 2004 as amended. Paragraph 4(b)(iii) of the first schedule to the ITA 2004 as amended provides that the rate of tax applicable in respect of payment of royalty is 15% of the amount of royalty paid.

The case of *BP Tanzania Versus The Commissioner General, Civil Appeal No.125 of 2015(CA)* discusses tax matters in respect of payment of royalty.

Material facts of this case is that the appellant BP Tanzania Ltd is a licensed oil company which markets and distributes petroleum products. On 24th November, 2009, the Respondent's Large Tax Payers Department conducted a tax audit on the appellant. The audit covered among other things, withholding tax for the financial years 2007 to 2008 regarding payments made by the appellant to non-resident companies in respect of services rendered to her. Payments were made to BP International and BP South Africa as follows:-

ISP Global Charges in respect of Accounting Package that was used by BP globally which had the server in London and the appellant's employees accessed the server by using a pass word and a satellite dish supplied by a local provider.

Application System Support based and provided by BP South Africa whereby, in case of any technical difficulty the appellant's employee would make a phone call to South Africa and be assisted on how to sort out the problem.

4. Application System Licenses fees paid to suppliers of accounting packages installed in the server in London and were accessed by the appellant using a satellite dish from Dar- es- Salaam.
5. Information technology service fees to the BP International internet system which has a server in London and accessible to BP employees worldwide.

Also the appellant paid consulting professional fees to AON South Africa which availed the appellant support in respect of a Fund to which employees were contributing their salaries. The Fund was managed in South Africa and on monthly basis the Fund would send emails to AON South Africa to do the accounting of the Fund. Pursuant to the 2007 - 2008 audit exercise, the respondent concluded that, the appellant had withholding tax liability of Tshs. 477,776,665/= constituting principal tax liability of Tshs. 340,041,024/= and interest of Tshs. 137,735,641/=. The appellant was issued with a withholding Tax Certificate/Interest number WHT/MAT/4/9/10 thereupon the respondent demanded the respective withholding tax be paid by the appellant.

The appellant challenged the demand to the withholding tax liability on ground that, services were rendered by non-resident companies and payment effected by the appellant was not subject to withholding tax because payments and the services in question were on licence fees and sourced outside Tanzania. The appellant was not successful in both the Tax Appeals Board (The Board) and the Tax Revenue Appeals Tribunal (The Tribunal) hence this appeal.

Issues

- Whether payment by the appellant to non-resident companies for services rendered to her is royalty.
- whether the royalty payment has a source in the United Republic so as to attract withholding tax as claimed by the respondent.

Analysis and Decision of the Court is as follows:-

In the United Republic of Tanzania, the obligation to pay tax is a creature of section 6 (1) (a) (b) of the Income Tax Act 2004, which states that:-

“ 6(1)-Subject to the provisions of subsection (2), the chargeable income of a person for the year of income from any employment, business or investment shall be:-(a)in the case of a resident person, the persons income from employment, business or investment for the year of income irrespective of the source of income; and (b) in the case of a non-resident person, the persons income from employment, business or investment for the year of income, but only to the extent that the income has a source in the United Republic. ... “

According to the cited provision, a non-resident person can be charged tax from an undertaking provided that the income has a source in the United Republic. Section 69 of the ITA 2004 defines and enlists what constitutes payments that have a source in the United Republic. The relevant provision in this case is section 69(e) which states:-

The following payments have a source in the United Republic of Tanzania Republic of Tanzania:-

69(e) Royalties paid for the use of, right to use or forbearance from using an asset in the United Republic.

Section 3 of the Income Tax Act, 2004, which is the interpretation provision defines words 'royalty' as follows:-

Royalty means any payment made by the lessee under a lease of an intangible asset and includes payment for:-

- (a) The use of, or the right to use, a copyright, patent, design, model, plan, secret formula or process or trade mark;
- (a) The supply of know how including information concerning industrial, commercial or scientific equipment or experience;
- (a) The use of or right to use, a cinematography film, video tape, sound recording or any other like medium;
- (a) The use of or right to use, industrial, commercial or scientific equipment;
- (b) The supply of assistance ancillary to a matter referred to in paragraphs (a) to (d)
- (c) A total or partial forbearance with respect to a matter referred to in paragraphs (a) to (e) but excludes a natural resource payment.

A similar definition of royalty is found in Article 12 of July, 2008 Edition of the UN Organization for Economic Development and Cooperation (OECD) Model Convention on Income and on Capital as follows:-

"The term 'royalties' ... means payments of any kind received as consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience"

In the Indian case of *CIT v. Ahmedabad Manufacturing Andcalico Printing Co* (1983) 139 ITR 06, royalty is defined a sum payable for the right to use some one else's property/ asset for the purpose of gain.

In a nutshell, royalty is a payment for the use of or the right to use something that does not belong to the payer and this may well relate to the right to use intangible property as defined under section 3 of the Income Tax Act.

In the matter at hand, except for the professional consulting professional fees, in terms of sections 3 and 69(e) of the Income Tax Act, the appellant who is the resident tax payer in the United Republic paid royalty to foreign companies which rendered services to the appellant. The contentious remaining issue is whether the royalty payment has a source in the United Republic so as to attract withholding tax as claimed by the respondent.

In an article titled International Taxation-Royalty and Fees for Technical Services by Chhaya Desai, discusses sections 5 and 9 of the India Income Tax on the overall taxability under domestic law in that, nonresidents are liable to tax on:-

- (a) Income received or deemed to be received in India, and
- (b) Income which accrues or arises or deemed to accrue or arise in India.

Furthermore, income by way of Fees for Technical services would be taxable in India if payable to the non-resident. This position is further clarified in an Article by Deloitte International on Positive Developments for corporate withholding Tax in India which states:-

“When a non-resident company provides services to a local company, the invoiced amount will often be subject to a tax withholding applied at source by the customer. This withholding is the remitted to the local tax authorities”

The taxability of technical, managerial or consulting services provided by foreign companies to the Indian clients performed outside India was an issue before the Supreme Court of India in the case of *Ishikawajirna Harima Heavy Industries* (288 ITR 408). Foreign Companies were taking a stand that such services should not be taxable in India, since they were not performed in India and had no territorial nexus with India. The apex Court held that:-

“Services should be rendered as well as used in India for being taxed in India. If both conditions are not fulfilled, the fees for the technical services are not chargeable to tax in India.”

The exemption to charge withholding tax in India is where there is a Treaty with the Country where the foreign companies are resident. In in Kenya, Royalties if paid to a non resident are subject to withholding tax of 20%/o (Delloitte International).

Thus, in a nutshell, payment of royalty to a non resident and subjecting the same to withholding tax is a well-established phenomenon at the global level in a specified legal framework. We have deliberately cited some examples to amplify that subjecting payment of royalties to withholding tax for the obvious reason of ensuring that income derived from business is taxed at the source and the Local Tax Collection Authority imposes and collects the requisite taxes and that this issue is a global issue.

In the United Republic of Tanzania, such practice is structured in statute whereby royalty and technical service fee paid to non-residents is subject to withholding tax if the payment is sourced in the United Republic of Tanzania. This is pursuant to sections 82(1)(a) and 83(1)(b) of the Income Tax Act, 2004. Similarly, the duty is imposed on a resident tax payer to withhold tax under sections 82(1)(b) and 83(1) (b) of the Income Tax Act, 2004 at a rate specified in the First Schedule to the Act.

There is no dispute that, the servers of non-resident companies which rendered services to the appellant are physically located in London and the Republic of South Africa. The appellant accessed and enjoyed the requisite services while in Tanzania. The contentious issue is that since the servers/assets are not in the United Republic, Ms. Karume argues that imposition of withholding tax is not according to the law. With due respect, the contention put forward by Ms. Karume that because the servers/assets are not in the United Republic no withholding tax is payable has no legal basis. Like it was the case in the Tax Appeals Board and the Tax Appeals Tribunal, before us, Ms. Karume reiterated that, the interpretation of section 69 (e) of the Income Tax Act is to the effect that servers ought to have been situated in the United Republic so as to attract withholding tax when paying for service rendered by the non-residents companies.

Ms. Karume repeated what she submitted in the Tribunal as to what constituted true construction of section 69(e) of the Income Tax Act. It is imperative to reproduce what is contained at page 237 of the record:-

"Section 69(e) of the Income Tax Act 2004, does not contain the word "situated in" but in its true construction/meaning the section means "withholding tax is due on royalties paid for the use of, right to use or forbearance from using an asset inside or within the United Republic" and clearly there is little difference in the English language between saying that an asset is in the United Republic; or an asset is inside the United Republic; or an asset is within the United Republic or an asset is situated in the United Republic".

Having carefully examined section 69(e) of the Income Tax Act, 2004 and the couched immediate quoted submission, we are not in agreement with the interpretation given by Ms. Karume for what will be unveiled in the due course.

For the sake of clarity, it is imperative to make a comparison of items which under section 69(1) (a) to (e) constitute payments which have a source in the United Republic to see if the word "situated", which does not appear in section 69 (e) was intended or it was deliberately omitted for a purpose.

As the word "situated" is not in section 69(e) as presupposed by Ms. Karume, the physical presence of the servers or assets in the United Republic is not necessary for payment to access right to use to qualify as sourced in the United Republic.

In *Republic Versus Mvjesige Geoffrey and Another, Criminal Appeal No 355 Of 2014 (Unreported)* when discussing the familiar canon of statutory construction this Court quoted with approval the decisions of the US Supreme Court as follows:

In *Consumer Products Safety Commission Et. Al v. Gte Slyvania, Inc. ET. AL* 227 U.S. 102 (1980) with the familiar canon of statutory construction the starting point for interpreting the statute is the language of the statute itself. Absenting a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. The same Court went further and held that it a statute's language is plain and clear, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion".

In *Caminetti versus United States*, 242 U.S 470 (1917) the court categorically ruled that:

"It is elementary that the meaning of a statute must in the first instance/ be sought in the language which the act is framed, and if it is plain..... the sole function of the courts is to enforce it according to its terms"

In *Republic Versus Mwesige Geoffrey And Another*, this Court ruled that when the words of a statute are unambiguous judicial inquiry is complete, there is no need for interpolations, lest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation. This is because courts must presume that a legislature says in a statute what it means and means in a statute what it say (*Connecticut Nat'l Bank v. Germain*, 112 S. CT 1146, 1149 (1992).

In the light of cited decisions, section 69(e) does not require physical presence of the non-resident service provider in the United Republic. In our considered view, in section 69(e) the word 'situated' was not intended and that is why it is not in that provision. The word situated was intended in 69(c) and (d) and that is why it is expressly stated in that provision. The wording of section 69(1)(e) lists down services obtained from outside and utilized in the United Republic of Tanzania which requires the user to pay for the use did not envisage the physical presence of the service provider as an asset in the United Republic of Tanzania. What is required to be proved is use of, or the right to use the software including the grant of a licence irrespective of whether any right or property is located in the United Republic.

In the premises, the focus in the construction of section 69(e) of the Income Tax Act is whether the payment of a royalty was for the purposes of business, or earning any income from any source in the United Republic or services

are utilized in Tanzania. The moment these conditions are met, irrespective of whether payment is done by a resident or non-resident, the income would be taxable in the United Republic. Also irrespective of the place of rendering services, if utilized in United Republic shall be taxable in the United Republic. Besides, royalty is payable for the right to use someone else's property for the purpose of gain as reiterated *Cit v. Ahmedabad Manufacturing And Calico Printing Co. (1983) 139 ITR 806*.

The word "situated" as solicited by Ms. Karume is indeed contrary to the interpretation of Tax Legislation which requires Tax Law to be read as it is and one should not attempt to smuggle in the words not intended to avoid setting dangerous precedents. In the premises, the Tribunal erred to determine that the asset in question for the purposes of section 69(1)(e) is BP Tanzania (the appellant company). The assets in the context of the law are servers in Britain and Republic of South Africa where non-resident companies are located from which the appellant accessed and enjoyed services in the United Republic to do his business.

In the premises, we are satisfied that, the appellant made payments of royalty to BP International and BP South Africa have a source in the United Republic and as such, the appellant ought to have withheld tax of in the financial years 2007 to 2008 in respect of ISP Global Charges; Application System Support; Application System Licences and IT Service Fees. As the appellant did not withhold tax he must pay the unwithheld tax.

Regarding payments for other consulting professional fees, the non-payment of the withholding tax it was not contested by the respondent as correctly deliberated by the Tribunal but had the entire appeal dismissed. Considering that, the Provident Fund to which the employees made contributions was managed in South Africa where the consulting professional services were rendered then; the withholding tax was wrongly demanded.

Therefore, the grounds that payments by the appellant to non-resident companies were not subject to withholding tax because the payments for the services in question were sourced outside the United Republic and on licence fees is not merited are hereby dismissed.

Another issue is in respect of the withholding of the BP Provident Fund. As correctly submitted by Ms. Karume in her submission before the Appellate Tribunal, it is true that the Tanzania Revenue Authority did not dispute that it was not correct to withhold tax in respect of the BP Provident Fund.

Notably, as rightly submitted by the appellant's counsel in the appeal before the Appellate Tax Tribunal, the Provident Fund is a collection of employees' money for the welfare of the employees. Normally, Provident Funds is a portion channeled for employees' benefits after taxing the employee's basic salary. In other words, a remittance to the Provident Fund arises after the

basic salary is taxed. Even though the money accumulated in the Provident Fund may be invested elsewhere, the right to impose tax only arises at the point when such investment is landed in the United Republic or rather revolves within the United Republic as a royalty in respect of payments which have a source in the United Republic. In the event this issue was conceded by the respondent, the dismissed ground of appeal succeeds to that extent in the interest of justice.

It is in that ground we hold improper to withhold tax in respect of the Provident Fund. Such ground dismissed by the Appellate Tax Tribunal succeeds to that extent in the interest of justice. In view of the aforesaid, we partly allow the appeal. Payments by the appellant to BP International and BP South Africa have a source in the United Republic and are subject to withholding tax payable in the United Republic. As such, the appellant must pay the withheld tax of in the financial years 2007 to 2008 in respect of ISP Global Charges; Application System Support; Application System Licenses and IT Service Fees. The two grounds of appeal raised by the appellant are hereby dismissed.

8.6.9 Net Gains from Realization of Investment Assets

Section 3 of Cap 332 provides that net gains from the realization of investment assets of an investment of a person for a year of income has the meaning ascribed to it by section 36 of the Income Tax Act. The principle in respect of gain under section 36 is that a person's gain from the realization of an asset or liability is the amount by which the sum of the incomings for the asset or liability exceeds the cost of the asset or liability at the time of realization. This implies that where there is realization of investment assets such as shares, interest in land or buildings, securities and where the sum of incomings exceed the cost of the asset at the time of realization, there will be gain which is income from investment and hence subject to tax.

8.6.10 Amount Derived as Consideration for Accepting Restrictions

These are amounts paid to a person whether in lump sum or periodically as consideration for accepting a restriction on the person's capacity to conduct the investment. Such payments are made so that the person conducts less investment purposely and usually for the advantage of another person interested in the performance of that investment be below capacity. The payment which is paid is regarded as income from investment and therefore subject to tax.

8.6.11 Other Amounts

Section 9(2)(d) of the Income Tax Act as amended by section 32B of the Written Laws (Miscellaneous Amendments) Act, Act No.7 of 2017 provide other amounts included in calculating income from investment. This amount is the amount of tax benefit or advantages quantified under section 27 of ITA 2004 or other amounts required to be included under Division II of ITA, parts iv, v or vi of ITA 2004.

8.7 Exclusions

Section 9(3) of Cap 332 provides that in calculating a person's gains and profits from conducting an investment the following amounts shall be excluded, namely –

(a) Exempt Amounts

This refers to amounts which are statutorily excluded from tax liability. This implies that these payments are not subject to tax. A comprehensive list of these payments is provided under the second schedule which is made under section 10 of Cap 332.

(b) Final Withholding Payments

The payments derived by a person in conducting an investment shall be taxed in the hands of the person in the form of a final withholding tax. The payer is required to withhold tax from the payment and remits the tax to the tax authority. The payments subjected to final withholding shall be excluded from calculation of income from the investment as the total tax liability of that income has already been satisfied and such payments do not form part of total income under section 4(1)(a)⁴²⁵. The payments includes:-

- (i) Dividends paid by a resident corporation.
 - (ii) Dividends paid by a non-resident person to a resident individual other than dividends received by an individual in conducting a business.
 - (iii) Interest paid by a financial institution to a resident individual where the interest is paid with respect to a deposit with the institution; other than interest received by an individual in conducting a business or foreign source interest.
 - (iv) Interest paid to a unit trust.
 - (v) Rent paid to a resident individual under a lease of land or a building and associated fittings and fixtures other than business rent or foreign source rent paid to an individual.
- (c) **Amounts that is Included in Calculating the Person's Income from any Employment or Business.**

8.8 Deductions

Refer to chapter Seven. Details have been given in respect of deductions. Take note that there are deductions which are applicable to income from business and others which are applicable to income from investment and income from employment.

⁴²⁵ Practice Note on income from Investment, Practice No.6 of 2013.

CHAPTER NINE

VALUE ADDED TAX IN TANZANIA

9.1 Brief History

The Value Added Tax (VAT) was introduced in mainland Tanzania through the enactment of the Value Added Tax Act of 1997. The Act was assented on 21st October 1997 and came into operational on 1st July 1998. VAT was mainly introduced to replace the Sales Tax Act of 1976⁴²⁶ which was Unable to generate sufficient revenue as it was narrow based. The Act also amended the Hotel Levy Act, Cap 105, Entertainment Tax Act, Cap 104, and Stamp Duty Act Cap 189.

Zanzibar, which is part of the United Republic of Tanzania, has its own Value Added Tax Act⁴²⁷ governing VAT matters in Zanzibar which in many aspects is similar to that of the mainland Tanzania Mainland.

The weaknesses or the shortcomings of the Value Added Tax Act, 1997 forced the government to enact a new VAT law. The new law is the Value Added Tax Act⁴²⁸. There are also regulations made under this Act among them include the Value Added Tax (General) Regulations 2015⁴²⁹, G.N 225 of 2015

The objectives of the new enactment is to broaden the tax base, to link the value added tax law with the international best practices, to reduce the powers of the Minister for Finance in the administration of VAT, to address intra union trade issues between Mainland and Zanzibar, simplify the imposition, collection, administration and management of VAT and other related matters.

426 Section 72 of the Value Added Tax Act, 1998.

427 Act No.4 of 1998.

428 Cap 148 of 2014.

429 Government Notice No.255 of 2015. Rule 37 revokes all the regulations which were made under the Value Added Tax Act 1998.

9.2 Meaning of Value Added Tax

Section 2 of the Value Added Tax Act, define Value Added Tax to mean the tax imposed on taxable supplies or taxable imports, and includes an interest, fine or penalty payable in accordance with the provisions of the Value Added Tax Act.⁴³⁰

This definition apart from the fact that it define VAT as tax imposed on taxable supplies or taxable imports it went further to treat interest and penalties imposed under the Value Added Tax Act for whatever reasons such as error in filing returns or delay in filing return to be part Value Added Tax.

The definition given under the Value Added Tax Act does not define exactly what do we mean by VAT, hence there is a need to resort to other definitions given by different authors:-

According to Mahangila. D., and Nchimbi M.I,⁴³¹ VAT is a tax assessed against businesses at each stage of the production and distribution process; usually whenever a product is resold or value is added to it. VAT is levied on the differences between the purchase cost of an asset and the price at which it can be sold i.e the amount of the value added to it.

The implication of this definition is that each registered person in the chain between the first supplier and the final purchaser or user is charged tax on taxable supplies made to him (input tax) and charges tax on taxable supplies made by him (output tax). He pays to the TRA the excess of output tax over input tax, or recovers the excess of input tax over output tax from the Authority. The broad effect of the scheme is that businesses are not affected by VAT except in so far as they are required to administer it, and the burden of the tax falls to the final consumer.⁴³²

Input Tax is defined in relation to a taxable person to mean value added tax imposed on a taxable supply made to the person, including value added tax payable by the person on a taxable supply of imported services; and value added tax imposed on a taxable import of goods by the person; and input tax charged under the law governing administration of value added tax applicable

430 Section 2 of VATA 2014 defines taxable supply to mean a supply, other than an exempt supply that is made in Mainland Tanzania by a taxable person in the course or furtherance of an economic activity carried out by that person; or a supply of imported services to a taxable person who is the purchaser and acquires the services in the course of an economic activity if had the supply been made in Mainland Tanzania by a taxable person in the course of furtherance of an economic activity- it would have been taxable at a rate other than zero; and the purchaser would not have been entitled to a credit for ninety percent or more of the value added tax that would have been imposed on the supply. Taxable person means a registered person or a person who is required to be registered for value added tax under this Act; taxable import means an import of goods, other than an exempt import.

431 Mahangila and Nchimbi, op.cit.; p.261.

432 <http://www.tra.go.tz/> (accessed on 17th February 2017).

in Tanzania Zanzibar.⁴³³ In simple words this is a type of VAT paid where a taxable person supplies goods or services to another taxable person in the course of furtherance of business. Output tax is defined in relation to a taxable person to mean value added tax payable by the person in respect of a taxable supply made; and a taxable supply of imported services acquired. This is a type of VAT paid by the final consumer when purchasing goods or services from the VAT Registered person. The VAT taxable person is required by the law to collect VAT from the final consumer and remit to TRA by filing return within a prescribed period by the law.⁴³⁴

9.3 Calculation of VAT on Purchases and Sales

The Tax Fraction (VAT Fraction) = $R(\text{Rate of Value})$

$$\frac{100 + R(18)}{118}$$

• Example 1

Diviness bought goods worthy TZS 50,000/=-, VAT included. The value of VAT can be determined as follows: - By using the VAT fraction

$$\text{VAT} : \frac{18}{118} \times 50,000 = \text{TZS } 7,627.11 \text{ (Input Tax)}$$

The actual value of goods shall be obtained by subtracting VAT inclusive price minus VAT.

Value inclusive of VAT - VAT

$$= \text{TZS } 50,000 - \text{TZS } 7627.11 = \text{TZS } 42,372.89 \text{ (Actual value of the goods)}$$

Therefore:-

• VAT on goods shall be TZS 7627.11 (Input tax)

• Actual value of goods is TZS 42372.89

⁴³³ Section 2 of the Value Added Tax Act. In Zanzibar the Finance (Public Revenue Management) Act 2016, Section 8 amended Section 16 of the Value Added Tax Act, Act No.4 of 1998 by defining input tax as tax paid on the supply to a taxable person in Zanzibar for any taxable goods or services to be used by that taxable person for the purpose of his business; and tax paid by a taxable person on the importation of goods or services to be used by that taxable person for the purpose of his business.

⁴³⁴ Section 98 of the Finance Act 2016 provides that the prescribed period for filing return is 20th day of a month after the end of the tax period to which it relates, whether or not that person has a net amount of value added tax payable for that period.

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⁴⁴ Section 98 of the Finance Act 2016 provides that the prescribed period for filing return is 20th day of a month after the end of the tax period to which it relates, whether or not that person has a net amount of value added tax payable for that period.

NOTE: When a VAT trader (taxable person) purchases goods they incur **INPUT TAX** and when they sell them they produce an **OUTPUT TAX**, the difference is used to determine VAT payable/repayable.

9.4 Advantages of VAT

The following are the advantages of Value added Tax:-

- (i) It is selective in respect of goods and services which are subject to Value Added Tax.
- (ii) It is transparent because of use of EFD Machines. The VAT trader and TRA are in a position to see the sales for the purpose of assessment and payment of the appropriate tax.
- (iii) It has broadened the tax base by covering different goods, services and different persons in the chain of production and distribution.
- (iv) The businesses are not affected since the VAT traders are agent of TRA in the collection of VAT.
- (v) It avoids double taxation since VAT is charged only where the value is added to the goods or services rendered or performed.
- (vi) It reduces the chances of tax evasion and avoidance because of the manner of administration of VAT.

9.5 Disadvantages of VAT

The following are disadvantages of VAT:-

- (i) It is regressive since it is imposed at a flat rate of 18% without considering the principle of ability to pay tax. This implies that it collect more revenue from the poor people.
- (ii) It is cumbersome and complex when computing input tax, output tax and filing of return every month.
- (iii) The process of filing returns is prone to errors which may attract penalties and interest from the tax authority.
- (iv) It may causes inflation in the economy because of value added to the goods and services in every chain of production and services.

- (v) The threshold set excludes many traders from VAT system.
- (vi) The burden of VAT fall on the final consumer as a result if not well regulated it will affect saving opportunities and investment.

9.6 Applicable VAT Rates

VAT is chargeable on the taxable supplies of goods and services. The rates applicable are:-

(i) Standard rate of 18%

Section 5(1) of the VATA 2014 provides that the amount of value added tax payable shall be calculated by multiplying the value of the supply or import by the value added tax rate, which shall be eighteen percent (18%).

(ii) Zero rate (0%). The rules governing zero rate are as follows:-

- Where the supply or import is zero-rated, the value added tax rate shall be zero percent.
- Where a supply is both exempt and zero-rated, the supply shall be zero-rated.
- Where the supply is both exempt and taxable at standard rate, the supply shall be taxable at the standard rate.⁴³⁵
- A supply of locally manufactured goods by a local manufacturer shall be zero rated if goods are supplied to a taxable person registered under the Value Added Tax law administered in Zanzibar and such goods are removed from Mainland Tanzania without being effectively used or enjoyed in Mainland Tanzania.⁴³⁶

9.7 Imposition of Value Added Tax

The imposition of Value Added tax can be discussed under the following categories:-

9.7.1 VAT on Taxable Supplies

Section 2 of VATA 2014 define taxable supplies to mean a supply⁴³⁷, other than an exempt supply, that is made in Mainland Tanzania by a taxable person in the course or furtherance of an economic activity carried out by that person; or a supply of imported services to a taxable person who is the purchaser

⁴³⁵ Section 91 of the Finance Act 2016.

⁴³⁶ Section 94 of the Finance Act 2016.

⁴³⁷ Section 2 of the value Added Tax Act define a supply to mean any kind of supply whatsoever

and acquires the services in the course of an economic activity if had the supply been made in Mainland Tanzania by a taxable person in the course of furtherance of an economic activity it would have been taxable at a rate other than zero; and the purchaser would not have been entitled to a credit for ninety percent or more of the value added tax that would have been imposed on the supply.

Section 12(1) of VATA 2014 provides that anything capable of being supplied by any person other than money shall be the subject matter of a supply. Every supply that is, or capable of being made shall be recognized as:-

(a) A Supply of Goods

Goods means all kinds of tangible moveable property, excluding shares, stocks, securities, or money. A supply of goods includes a sale, transfer of the right to dispose of goods as owner, including under a hire purchase agreement; and a lease, hire or other right of use granted in relation to goods including a supply of goods under a finance lease.

(b) A Supply of Immovable Property

Immovable property includes an interest in or right over land; a personal right to call for or be granted an interest in or right over land; a right to occupy land or any other contractual right exercisable over or in relation to land; the provision of accommodation.

(c) A Supply of Services

Services means anything that is not goods, immovable property or money including but not limited to a provision of information or advice; a grant, assignment, termination, or surrender of a right; the making available of a facility, or advantage; an entry into an agreement to refrain from or tolerate an activity, a situation, or the doing of an act; and an issue, transfer, or surrender of a license, permit, certificate, concession, authorization, or similar right.

In the process of imposing VAT on taxable supplies there are important matters to take into concern such as consideration of supply, number of supplies (single or multiples), when value added tax becomes payable, value of taxable supplies, exceptions for supplies to connected persons, progressive or periodic supply, sale of economic activity, tax treatment on rights, vouchers and options, pre-payments for telecommunication services, in kind employees benefits, sale of property of a debtor.⁴³⁸

9.7.2 VAT on Imports

Import is defined under section 2 of VATA to mean bringing or causing goods to be brought from outside the United Republic into Mainland Tanzania. The principles or rules⁴³⁹ governing the Value Added Tax on imports are as follows:-

- (i) The value added tax payable on a taxable import shall be paid where goods are entered for home consumption in Mainland Tanzania, in accordance with the Value Added Tax Act and procedures applicable under the East African Customs Management Act.
- (ii) The value added tax payable on a taxable import shall be paid in any other case, where goods are imported for use in Mainland Tanzania, on the day the goods are brought into Mainland Tanzania and in the manner prescribed by the regulations.
- (iii) The liability to pay value added tax on a taxable import shall arise by the operation of the Value Added Tax and shall not depend on the making of an assessment by the Commissioner-General of the amount of value added tax due.
- (iv) The Commissioner General shall collect value added tax due under the Value Added Tax Act on a taxable import at the time of import.
- (v) The provisions of the East African Customs Management Act shall, for the purposes of this Act, apply as if the value added tax payable on taxable imports were customs duty payable under the East African Customs Management Act.

In considering Value Added Tax on imports there are other matters which are important to be taken into considerations as follows:-

- (i) The value of imported goods⁴⁴⁰
- (ii) The Value of returning goods⁴⁴¹
- (iii) Deferral (postponement) of Value Added tax on imported capital goods⁴⁴²

9.7.3 VAT on Different Persons

The person liable to pay value added tax, in the case of a taxable import, the importer; in the case of a taxable supply that is made in Mainland Tanzania, the

439 Section 8 of VATA 2014.

440 Section 9 of VATA 2014 and Section 92 of Finance Act 2016.

441 Section 10 of VATA 2014.

442 Section 11 of VATA 2014 and Rule 2 and 4 to 9 of the Value Added Tax (General) Regulations 2015.

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supplier, in the case of a taxable supply of imported services, the purchaser.⁴⁴³ The person includes individual, a company, an association of persons, a Government entity, whether or not that entity is ordinarily treated as a separate person, a foreign government or a political sub of a foreign Government, a non government organization or a public international organization.⁴⁴⁴

9.8 Exemptions

Section 2 of the VATA 2014 define exempt in relation to a supply or import, to mean a supply or import that is specified as exempt under the law or a supply of a right or option to receive a supply that will be exempt. This implies that the import or supply is excluded from Value Added Tax. There are three main categories of exemptions:-

(a) Exemptions Provided by the Act

Section 6(1) of VATA 2014 provides that except as otherwise provided for under the Value Added Tax Act or the schedule a supply shall not be exempted or persons shall not be exempted from paying Value Added Tax. The first schedule of VATA 2014 provides a comprehensive list of supplies and imports which are exempted from Value Added Tax. This implies that for exemption to be granted it must be provided by the law and not otherwise.

(b) Exemptions Given by Order of the Minister

Section 6(2) of the Value Added Tax Act as amended by section 34 of the Written Laws (Miscellaneous Amendments) Act, Act No.9 of 2017 provides that the Minister may by order published in the Gazette grant value added tax exemption on imports by a Government entity or supply to a Government entity of goods or services to be used for:-

- ❖ Implementation of a project funded by the Government or concessional loan or grant through an agreement between the Government of the United Republic of Tanzania and another Government donor or lender of a concessional loan provided that such agreement provides for value added tax exemption on such goods or services
- ❖ Relief of natural calamity or disaster

⁴⁴³ Section 4 of VATA 2014.

⁴⁴⁴ Section 2 of VATA 2014.

The law provides the condition for this exemption to the effect that the exemption granted shall cease to have effect and the value added tax shall become due and payable as if exemption had not been granted if the said goods or services are transferred, sold or otherwise disposed off in any way to another person not entitled to enjoy similar privileges conferred the Value Added Tax Act. The order issued by the Minister shall specify goods or services that are eligible for exemption, commencement and expiry date of the exemption. The Minister is also empowered by the law to appoint a technical committee which shall advice him on the granting and monitoring of exemption.

(c) Exemptions Given by Way of Agreement

Section 7 of VATA 2014 as amended by section 35 of the Written Laws (Miscellaneous Amendments) Act, Act No.9 of 2017 provide exemption by way of agreement entered between the Minister responsible and international agency listed under the Diplomatic and Consular Immunities and Privileges Act. The exemption shall be effected under the Value Added Tax Act by exempting the import of goods imported by the person or refunding the value added tax payable on taxable supplies made to the person upon application by the person.

9.9 Value Added Tax Registration

There are three main types of VAT registration namely:-

9.9.1 Normal Registration

This is a type of registration which requires persons with appropriate threshold which is hundred million⁴⁴⁵ and others regardless of their threshold to register for the Value Added Tax. Section 28 of VATA 2014 provides that a person shall, in respect of any month, be registered for value added tax from the first day of that month, if there is reasonable ground to expect that the person's turnover in the twelve months period commencing at the beginning of the previous month will be equal to or greater than the registration threshold.

The law have set conditions for registration that:-

A person is required, in respect of any month, to be registered for value added tax from the first day of that month if the person's turnover is equal to or greater than the registration threshold in the period of twelve months ending at the end of the previous month. This implies that the turnover⁴⁴⁶ can be 100 Million or more than in the period of twelve months ending at the end of the previous month.

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Rule 14 of the Value Added Tax (General) Regulations 2015.
Section 28(5) of VATA 2014 provides that the turnover shall be the sum of total value of supplies made, or to be made, by the person in the course of an economic activity carried out during that period; and total value of supplies of imported services made, or to be made, to the person during the period that would be taxable supplies if the person was a taxable person during that period.

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- (iv). A person is required, in respect of any month, to be registered for value added tax from the first day of that month if the person's turnover is equal to or greater than one half of the registration threshold in the period of six months ending at the end of the previous month. This implies that if the turnover is equal or greater than half of threshold i.e 50 Million or greater than in the period of six month a person can register for Value Added Tax.

Section 28(6) of VATA 2014 provides exceptions in respect of calculations of turnover of the person. The following amounts shall be excluded when calculating the person's turnover:-

- ❖ The value of a supply that would not be a taxable supply if the person were a taxable person.
- ❖ The value of a sale of a capital asset of the person.
- ❖ The value of a supply made solely as a consequence of selling an economic activity or part of that economic activity as a going concern.
- ❖ The value of supplies made solely as a consequence of permanently ceasing to carry on an economic activity.

The persons required to register for the Value Added Tax regardless of their threshold are:-

- (i) Persons who are approved and licensed to provide professional services. Section 29(1) of VATA 2014 provides for registration of professionals who carries on an economic activity involving the supply of professional services in Mainland Tanzania whether those professional services are provided by the person, a member or employee of that person. Examples of professionals who are covered in this category are advocates, engineers, accountants, tax consultants etc. They are required by the law to secure EFD machines for collection of Value Added Tax and remit the same to TRA as prescribed by the law. The registration of advocates for VAT has raised concerns in respect of provision or access to justice by the public since the imposition of VAT to legal fees is expected to increase the rate of fees charged by the advocates and the burden will fall on the final consumer.
- (ii) A Government entity or institution which carries on economic activity.⁴⁴⁷ Government entity means the Government of the United Republic or a Ministry, Department, or Agency of that Government; a statutory body, authority, or enterprise owned or operated by the Government of the United Republic or a local government authority.⁴⁴⁸ The procedures for registration for Value Added Tax are provided under Rule 11 and Rule 12 of the Value Added Tax (General) Regulations 2015.

447 Section 29(2) of VATA 2014.
448 Section 2 of VATA 2014.

9.9.2 Compulsory Registration

This is a type of registration whereby the Commissioner General is mandated to register any person for Value Added Tax irrespective of the turnover of the person and where the persons failed to register for Value Added as required by the law. Section 33 of VATA 2014 provides the conditions for compulsory registration by the Commissioner General:-

- ❖ Where the Commissioner General is satisfied that a person is required to be registered for value added tax and that person has not applied for registration, subject to section 30 of VATA 2014 the Commissioner General shall register the person and, not later than fourteen days after the day on which the registration is done, notify the person on the registration.
- ❖ Where the Commissioner General is satisfied that there is good reason including protection of Government revenue, may register the person for Value added tax regardless of the person's turnover.

Case

African Barrick Gold Mine PLC Versus Commissioner General, Tax Appeal No. 16 of 2015 (TRAT) (Cited and discussed in the previous chapters).

9.9.3 Intending Trader Registration

Rule 2 of the Value Added Tax (General) Regulations 2015 define intending trader to mean any person who is in the process of setting up an economic activity with the intention of making taxable supplies with a turnover in excess of the value added tax registration threshold prescribed under Regulation 14 but not yet commenced to make taxable supplies. This implies that a person can be registered for Value added Tax even if that person has not commenced the business of making taxable supplies.

The conditions for registration as an intending trader are provided under section 29(3) of VATA 2014 as follows:-

- (i) The person should provide sufficient evidence to satisfy the Commissioner of his intention to commence an economic activity, including contracts, tenders, building plans, business plans, bank financing.
- (ii) The person makes or will make supplies that will be taxable supplies if the person is registered.
- (iii) The person specify the period within which the intended economic activity commences production of taxable supplies.

9.11 Time

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A registered person shall use Taxpayer Identification Number and a Value Added Tax Registration Number on all documents required to be issued under this Act. The registration by a person under the Value added Tax Act shall be a single registration, which shall cover all economic activities undertaken by that person's branches or divisions.

9.10 Deregistration for Value Added Tax

Deregistration can be made in two ways:-

(a) Application Made by a Registered Person

Section 39 of VATA 2014 provides that a registered person who permanently ceases to make taxable supplies or a registered person who fails to maintain the registration threshold may apply for the cancellation of his registration. He shall apply for the cancellation of its registration in the manner prescribed under rule 15 of the Value Added Tax (General) Regulations 2015. The application shall be made within fourteen days after the date on which the person permanently ceased to make taxable supplies.

(b) Suo Motto by the Commissioner General

Section 41 of VATA 2014 provides that the Commissioner General may, by notice, cancel the registration of a person who is no longer required to be registered for value added tax. The conditions or the circumstances to be considered by the Commissioner General for deregistration are as follows:-

- ✓ The Commissioner General is satisfied that the person obtained registration by providing false or misleading information.
- ✓ The person is not carrying on an economic activity.
- ✓ The person has ceased to produce taxable supplies.
- ✓ The person's taxable turnover falls below registration threshold.

9.11 Time of Supply

It is important to establish a time of supply for the purpose of value added tax. This is because the time of supply also is the time for imposition of value added tax. The following are the principles governing the time of supply⁴⁴⁹:-

- (i) In relation to a supply of goods, the time at which the goods are delivered or made available.
- (ii) In relation to a supply of services, the time at which the services are rendered, provided, or performed.
- (iii) In relation to a supply of immovable property, the earlier time at which the property is created, transferred, assigned, granted, or otherwise supplied to the customer, or delivered or made available.

⁴⁴⁹ Section 2 of VATA 2014.

9.12 Place of Taxation

This refers to the place where Value added tax can be administered or imposed. The place of taxation can be categorized into the following:-

(a) Supplies of Goods and Services Made in Mainland Tanzania

The following are the rules or principles governing place of Taxation⁴⁵⁰:-

- (i) A supply of goods shall be treated as a supply made in Mainland Tanzania, if the goods are delivered or made available in Mainland Tanzania.
- (ii) Goods installed or assembled in Mainland Tanzania by, or under a contract with the supplier shall be treated as a supply made in Mainland Tanzania.
- (iii) A supply of goods shall be treated as a supply made in Mainland Tanzania if the goods are dispatched or transported from Mainland Tanzania to a place outside the United Republic.
- (iv) A supply of immovable property situated in Mainland Tanzania or a supply of services directly related to land situated in Mainland Tanzania shall be treated as a supply made in Mainland Tanzania.
- (v) A supply of services directly related to land situated outside Mainland Tanzania shall be treated as a supply made in Mainland Tanzania if the supplier is a non-resident who is operating through a fixed place in Mainland Tanzania.
- (vi) Where water, gas, oil, electricity, or thermal energy is supplied through a pipeline, cable, or other continuous distribution network and delivered to a place in Mainland Tanzania or from a place in Mainland Tanzania to a place outside the United Republic such supply shall be treated as a supply made in Mainland Tanzania.
- (vii) A supply of services by a non resident who is a registered person to a customer who is a registered person shall be treated as a supply made in Mainland Tanzania.
- (viii) A supply of telecommunication services shall be treated as a supply made in Mainland Tanzania, if a person in Mainland Tanzania, other than a telecommunications service provider, initiates the supply from a telecommunications service provider, whether or not the person initiates the supply on his own behalf.

(b) **Supplies of Goods and Services for use Outside the United Republic**
The rules governing supplies of goods and services for the use outside the United Republic focuses on the following areas⁴⁵¹:-

- ❖ Zero rating of immovable property and zero rating of supply of goods.
- ❖ Leased goods used outside mainland the United Republic and goods used to repair temporary imports.
- ❖ Supply of goods and services and supply to non-resident warrantor.
- ❖ Goods for use in international transport.
- ❖ Services supplied for use outside the United Republic.
- ❖ Services connected with temporary imports.
- ❖ Intellectual property rights for use outside the United Republic.
- ❖ Inter-carrier telecommunication services.

(c) **Special/Specific Rules Governing Place of Taxation**

There are special or specific rules governing place of taxation in respect of the following⁴⁵²:-

- ❖ Value Added Tax representatives of non-residents.
- ❖ Services from a foreign branch.

9.13 Value Added Tax on Insurance Business

Rule 35 of the Value Added Tax (General) Regulations 2015 provides that an insurer shall account for value added tax on net premium amount received by him in relation to a contract of insurance. The net premium received means the total premium received in a given tax period less payments made for settlement of any claim arising from a contract of insurance and amounts of premium paid for that period to another insurer for the purpose of reinsurance. In accounting for the value added tax between the insured and insurer issues of output tax and input⁴⁵³ are also applicable for return and refunds purposes. An insurer when collecting premium from the insured in respect of the contract of insurance is required by the law to collect the value added tax and remit to the tax authority.

451 Sections 54-63 of VATA 2014; Sections 94-96 of the Finance Act 2016.

452 Sections 64-65 of VATA 2014 and Section 97 of Finance Act 2016.

453 Section 77 of VATA and Rule 35(3) and (4) of Value Added Tax (General) Regulations 2015.

The Finance Act 2016 under Section 100 amended Part I of schedule to the Value Added Tax Act by deleting paragraph 13 and substituting that insurance premiums for air craft, life insurance or health insurance, and insurance for workers compensation are not subject to value added tax.

9.14 Value Added Tax on Supply of Financial Services

Paragraph 13 of the schedule to the Value Added Tax Act, exempted supply of financial services from the value added tax. This was the position of the law before the amendment through the Finance Act 2016. Section 100 of the Finance Act 2016 amended Part I of the schedule by deleting paragraph 13 which was under exemptions and replaced by supply of financial services free of charge. The implication of this amendment is that where the financial services are offered for free value added tax cannot be imposed but where the financial services are offered with the a fee, the financial services will be subject to value added tax.

The approach adopted by the Government to impose value added tax on financial services created serious concern to the banks and different stakeholders. The international accepted principles governing value added tax is that the burden of tax falls on the final consumer and not businesses. The attempt by the Government to impose value added tax on the fee imposed by the banks on the financial services is against the principles governing value added tax worldwide that the burden of tax falls on the final consumer and not the businesses (Intermediaries in this respect). The attempt also will affect the operations cost and the burden will be shifted to the customers since the Government will not be in a position to control the fee imposed by the banks on financial services.

The Government issued a notice in respect of value added tax on financial services. The notice is reproduced herein below for reference purpose.

TANZANIA REVENUE AUTHORITY

ISO 9001:2008 CERTIFIED

PUBLIC NOTICE APPLICATION OF VALUE ADDED TAX ON FINANCIAL SERVICES

The Parliament of the United Republic of Tanzania has passed the amendments to the Value Added Tax Act, 2014 ("The Act") that has the effect of imposing Value Added Tax on fee based financial services by deleting item 13 of the exemption Schedule to the Act. The objectives of this press release are to: a) Inform the general public, banks, financial institutions and other stakeholders on the intention and operationalization of the above amendment imposing Value Added Tax on fee based financial services; b) Clear misunderstandings or misinformation regarding application of the Value Added Tax imposed with effect from 1 July 2016; and c) Provide the correct applications of the Value Added Tax on financial services. The implication of the amendment is to impose VAT at 18% on all fees raised by the bank or any financial institution on services offered by the same as per section 38 of the VAT Act 2014. For instance, assume the fees on a financial service is TZS 1,000/=, VAT thereon would be TZS 152.50 and the bank will remain with TZS 847.50. The VAT amount of 152.50 will be collected by the bank or financial institution supplying the service and shall follow normal rules of VAT accounting as per the Act.

There has been widespread reports in social media that customer deposits will also be charged VAT at 18% resulting from these amendments. Kindly be informed that, this is incorrect, as VAT at 18% is only levied on charges received by the bank or financial institution after rendering financial services to their customers. Furthermore, we have been informed that one of the banks operating in the country has instructed her customers to pay the expected VAT in cash over the counter if the customer does not have an account with the bank and the respective transaction did not pass through it. TRA insists that VAT shall be charged and collected in a normal way as fees on financial services are currently collected. Tanzania Revenue Authority will shortly issue directives regarding operationalization of the VAT mechanism and in particular, how fiscalized receipts on the above should be issued, and VAT return submission by the industry players. The Banks, Financial Institutions or any other person, are hereby urged, through this press release, to refrain from issuing to the public, misleading statements aimed at bringing turmoil in tax compliance or else, shall face strong legal action against them. All the Banks and Financial Institutions involved in issuing misleading statements are urged to correct their notification to the public immediately.

"Together we Build our Nation"

A.J. Kidata

COMMISSIONER GENERAL
TANZANIA REVENUE AUTHORITY

9.15 International Transport Services

- (a) Section 59 of the Value added Tax Act as amended by section 67 of the Finance Act 2017 provides for the principles or rules or conditions governing international transport services as follows:-
- (b) A supply of goods for use in repairing, maintaining, cleaning, renovating, modifying, treating, or otherwise physically affecting an aircraft or ship engaged in international transport services shall be zero-rated.
- (c) A supply of aircraft's stores or ship's stores, for an aircraft or ship shall be zero-rated, if the stores are used for consumption or sale on the aircraft or ship during a flight or voyage that constitutes international transport services.
- (d) The supplies of services which shall be zero-rated are a supply of international transport services, a supply of insuring the international transport of goods; and a supply of the services of repairing, maintaining, cleaning, renovating, modifying, treating, or otherwise physically affecting an aircraft or ship engaged in international transport services; a supply, to a non-resident who is not a registered person, of services that consist of the handling, pilotage, salvage, or towage of a ship or aircraft engaged in international transport services; or are provided directly in connection with the operation or management of a ship or aircraft engaged in international transport services.
- (e) A supply of ancillary transport services of goods in transit through Mainland Tanzania in circumstances where the service is an integral part of the supply of an international transport services and in respect of goods stored at the port, airport, or a declared customs area for not more than thirty days while awaiting onward transport shall be treated as zero rated.

Generally, the amendment introduced by the Finance Act, 2017 by treating a supply of ancillary transport services of goods in transit as zero rated supply resolved a conflict which was there before between Tanzania Revenue Authority and transporters (service provider) i.e TATO, TAFFA and TASAA that the supply was subject to the value added tax.

9.16 Value Added Tax on Tourism Business

The schedule to the Value Added Tax Act 2014 paragraph 21 exempted supply of tourist guiding, game driving, water safaris, animal or bird watching, park fees, and ground transport services from value added tax. This was the position of the law before the amendment which has been introduced by the Finance Act 2016. Paragraph 21 of the schedule to the Value Added Tax Act has been deleted as provided under section 100 of the Finance Act 2016 which amended Part I of the schedule of the Value Added Tax Act. Paragraph 21 is deleted and renumbering items 22 to 23 as items 21 to 22. The implications

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of this amendment is that tourism business is now subject to value added tax. The amendment raised concerns from different stakeholders to the effect that others argued that this will affect tourism business in Tanzania and also the value added tax will affect those who had existing contracts with tourist companies which did not foresee the introduction of value added tax. Besides, all these concerns, the amendment is still valid and the tourism business is subject to value added tax at the rate of 18% which is standard rate applicable to different services and goods in Tanzania.

9.17 Tax Returns and Payments

Tax return is defined under Section 3 of the Tax Administration Act, Act No.10 of 2015 to mean a return prescribed in the first schedule. The first schedule define return in respect of different laws such as the return under the income Tax Act, Vocational Education and Training Act, Gaming Act, The Excise(Management and Tariff)Act, Value added Tax Act.

Under the new Value Added Tax Act tax return⁴⁵⁴ is provided under section 66(1) as amended by section 98 of the Finance Act 2016. A taxable person shall lodge a value added tax return in the form and manner prescribed by the Minister on the 20th of a month after the end of the tax period to which it relates, whether or not that person has a net amount of value added tax payable for that period. Section 66 of the Value Added Tax Act as amended by section 68 of the Finance Act, 2017 provides that where the 20th day falls on a Saturday, Sunday or a public holiday, the value added tax return shall be lodged on the first working day following a Saturday, Sunday or public holiday.

Rule 20(2) of The Value Added Tax (General) Regulations 2015 provides that tax return shall be filled in two ways:-

(i) Paper Form

- ❖ The return is lodged using form ITX240.02.B as provided by the schedule accompanied by a declaration of details in form ITX241.02.B provided by the schedule.
- ❖ A return filled in paper form shall be lodged to the Commissioner General in the manner prescribed under section 33 of the Tax Administration Act.

(ii) Electronic Form

- ❖ The return is lodged using form ITX240.02.B as provided by the schedule accompanied by a declaration of details in form ITX241.02.B provided by the schedule.

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This is a document filed by the taxpayer to the tax authority declaring his taxable income and permitted deductions or exemptions for the purpose of tax liability.

- ❖ A return filled in electronically shall be lodged to the Commissioner General in the manner prescribed under section 34 of the Tax Administration Act.

The law allows amendment of original VAT return, correction of minor errors and adjustment.⁴⁵

Section 67 of the Value Added Tax Act provides the principles governing output and input tax in respect of the return filed by the persons as follows:-

- ❖ The net amount of value added tax payable by a taxable person in relation to a tax period shall be calculated by adding all output tax that becomes payable by the person in that tax period subtracting all input tax credits⁴⁶ allowed in that tax period and adjusting the resulting amount by adding all increasing adjustments required to be made in that tax period and subtracting all decreasing adjustments allowed in that tax period.
- ❖ Where the amount of output tax payable in a tax period is nil, it shall not prevent the subtraction of input tax credits or the addition and subtraction of adjustments.
- ❖ Where the net amount for a tax period is a positive amount it shall be accounted for and paid by the taxable person at the time when the value added tax return is due to be filed; and the liability to pay the net amount shall arise by operation of this section and shall not depend on the making of an assessment of the amount due by the Commissioner General.
- ❖ Where the net amount for a tax period is a negative amount, shall be carried forward into one or more subsequent tax periods in accordance with section 81, unless an immediate refund is allowable under section 82 of the Value Added Tax Act 2014.

9.18 Value Added Tax Refund

Refunds refers to money paid back to the trader or a taxable person where in a particular prescribed accounting period his tax liabilities are not exhausted.

⁴⁵ Rules 21-28 of the Value Added Tax (General) Regulations 2015; Sections 71-74, 76-80 of VATA 2014.

⁴⁶ Section 68(1) of VATA 2014 provides that a taxable person shall be allowed a credit for an amount of input tax incurred by the person if: (a) the goods, services, or immovable property on which the input tax was incurred were acquired or imported into Mainland Tanzania by the person in the course of the person's economic activity and for the purpose of making taxable supplies; (b) in the case of a supply, the person paid, or is liable to pay, the consideration for the supply; and (c) in the case of an import, the person paid, or is liable to pay, the value added tax imposed on the import under this Act or input tax paid under the value added tax law applicable in Tanzania Zanzibar, where the respective.

by allowable deductions or where its returns,⁴⁵⁷ for prescribed accounting periods regularly result in excess credits. The refund once is processed is paid to the taxpayer through Interbank Settlement System (TISS) or through his or her bank account. The refund is normally paid where the input tax exceeds the output tax. There are other circumstances where refund can be paid such as refund for overpayment,⁴⁵⁸ refund without carry forward.⁴⁵⁹

The refund can be made to the following:-

(i) Refund to Diplomats, International Bodies and Non-Profit Organization

The Commissioner General may refund part or all of the input tax incurred on an acquisition or import,⁴⁶⁰ by:-

- ❖ A public international organization, a nonprofit organization, foreign government, or other person prescribed by regulations⁴⁶¹, to the extent that the person is entitled to exemption from value added tax under an international assistance agreement.
- ❖ A person to the extent that such person is entitled to exemption for value added tax under the Vienna Convention on Diplomatic Relations or under any other international treaty or convention having force of law in the United Republic, or under recognized principles of international law.
- ❖ A diplomatic or consular mission of a foreign country established in Mainland Tanzania, relating to transactions concluded for the official purposes of such mission.

(ii) Refund to VAT Traders

- ❖ Rule 29 the Value Added Tax (General) Regulations 2015 provides that application for refund under section 81 and 82 of the Value Added Tax Act 2014 shall be made using form ITX260.02.E accompanied by certificate of genuineness, computation of refund amount, checklist for the applicants' value added tax repayment and other information as the Commissioner General may require.
- ❖ The certificate genuineness shall be issued by an auditor who has been registered by National Boards of Accountants and Auditors and who is registered as a tax consultant,⁴⁶² by Tanzania Revenue Authority.

⁴⁵⁷ Sections 81-84 of VATA 2014.

⁴⁵⁸ Section 83 of VATA 2014.

⁴⁵⁹ Section 82 of VATA 2014.

⁴⁶⁰ Section 85 of VATA 2014.

⁴⁶¹ Rule 30 the Value Added Tax (General) Regulations 2015.

⁴⁶² Rule 3 to 12 of the Tax Administration (General) Regulations 2016.

9.19 EFD Machines and Value Added Tax

The seventh schedule of the Tax Administration (General) Regulations 2016⁴⁶³ paragraph 1 provides that the costs incurred by a user for the acquisition of an EFD from an approved supplier for the first time shall be borne by the Government. Paragraph 2 provides that the cost incurred by taxable person shall be deductible as input tax in the VAT turn.

The cost of EFD machines for non-taxable persons shall be treated as expenditure deductible under section 11(2) of the Income Tax Act 2004 as amended. For presumptive tax payers the cost shall be deductible from the tax payable in the year of income in which EFD is acquired and if not fully deducted will be deducted in the subsequent year of income.

The taxable person is required to have EFD machine for the purpose of registration as a VAT Trader. EFD machines are also used by other traders who are not VAT traders. The machines among other things help them to keep records of their businesses which will assist them during assessment and also will help them to reduce disputes between TRA and a tax payer since everything is transparent as can be viewed by the tax authority as well as the tax payer.

Cases

- ❖ *Bidco Oil and Soap v. Commissioner General (1)*...[2008] 4 TTLR 20- Credit notes — Whether or not a taxable person is permitted to issue credit notes based on volume discounts — Whether or not a taxable person can claim for a refund of excess credits based on such discounts - VAT Act and the VAT (General) Regulations.
- ❖ *Tanzania Ports Authority v. Commissioner General* (2008] 4 TTLR 128- Stevedoring services to foreign going ships - Whether zero rated.
- ❖ *Commissioner General v. Shivacom (T) Ltd* [2008] 4 TTLR 105- Tax audit Whether the Commissioner is justified to compute additional assessment by using mark-up ratios where a taxable person is doing different businesses.
- ❖ *Commissioner General v. East Africa Commercial Shipping Co. Ltd.* [2008] 4 TTLR 37- Zero rated supplies - Whether transportation of containers, stuffing and tallying to foreign going ships are zero rated.
- ❖ *Celtel Tanzania Limited v. Commissioner General* (No. 2 [2005] 1 TTLR 86- Limitation period to claim input tax — section 16 (5) of VAT Act, 1997.
- ❖ *Geita Gold Mining Ltd v. Commissioner General* [2005] 1 TTLR 161- VAT Assessment - Tax invoice — Effect of a tax invoice.

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Rule 105 revoked all the regulations which were governing EFD machines such as The Value Added Tax (Electronic Fiscal Devices) Regulations 2010, the Excise (Management and Tariff) General Electronic Filing and Payment Regulations 2011, the Value Added (General Electronic Filing and Payment) Regulations 2011, the Income Tax General Electronic (Filing and Payment) Regulations, 2011, and the Income Tax (Electronic Fiscal Devices) Regulations 2012.

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CHAPTER TEN

TAX DISPUTES SETTLEMENT MECHANISMS IN TANZANIA

10.1 Brief History

The government in the year 2000 decided to establish a unified tax dispute settlement machinery for all disputes arising out of different revenue/tax laws administered by Tanzania Revenue Authority. Before the establishment of the unified tax machinery tax disputes were settled in different mechanisms established in different revenue laws for example there was the Tax Revenue Appeals Board and Tax Revenue Appeals Tribunal established under the Income Tax Act of 1973 (Are hereby dissolved under section 34 of Cap 408.) The Board and Tax Tribunal were responsible only in determining tax disputes arising from the Income Tax Act and not other revenue laws.

There were other tax mechanisms which were provided under different tax laws such as the Stamp Duty Act, Cap 189 and the Value Added Tax Act, 1997⁴⁶⁴. The mechanisms provided under these laws were designed for the purpose of settling disputes arising from the respective laws.

Following the legal reforms made in 2000 the mechanisms which were provided in different revenue laws were dissolved and replaced by a unified tax disputes machinery which has been established to settle disputes arising from all the revenue laws administered by Tanzania Revenue Authority.

At present the institutions responsible in settlement of tax disputes are the following:-

- (a) Commissioner General
- (b) Tax Revenue Appeals Board (TRAB)
- (c) Tax Revenue Appeals Tribunal (TRAT)
- (d) Court of Appeal of Tanzania (CAT)

The laws governing the settlement of tax disputes in Tanzania are as follows:-

- (a) Tax Revenue Appeals Act, Cap 408 R.E. 2010
- (b) The Tax Administration Act, Cap 438 of 2015

⁴⁶⁴ This law has been repealed by the Value Added Tax Act, 2014.

- (c) The Civil Procedure Code, Cap 33 R.E 2002
- (d) The Appellate Jurisdiction Act, Cap 141 R.E 2002
- (e) The Written Laws (Miscellaneous Amendment), Act No.2 of 2016
- (f) The Tanzania Revenue Authority Act, Cap 399 of 1995.
- (g) Tax Revenue Appeals Board Rules of 2001
- (h) Tax Revenue Appeals Tribunal Rules of 2001
- (i) Tax Revenue Appeals Board (amendment) Rules of 2009
- (j) Tax Revenue Appeals Tribunal (amendment) Rules of 2009
- (k) The Court of Appeals Rules, GN No. 368 of 2009
- (l) The Tax Administration (General) Regulations, GN No.101 of 2016

0.2 Salient Features of Tax Disputes

The following are the salient or main features of tax disputes:-

- (a) Tax disputes emanate from the exercise of statutory powers by the tax authority for example the Commissioner General is mandated by the law to make assessment of tax (adjusted assessment or jeopardy assessment). The assessment made by the Commissioner General may be objected by the tax payer for various reasons one being it is excessive or it is made erroneously. In this situation there will be a dispute between the Commissioner General and the tax payer; hence the dispute need to be resolved.
- (b) There is urgency in resolving tax disputes. Some of the tax disputes involve perishable goods and hence dispute is required to be resolved to avoid loss to the tax payer and also loss to the tax authority in collection of revenue in respect of the dispute. Besides, there is a need to resolve dispute within time so as to ensure the flow of revenue to the Government for the provision of social services and also for the growth of the economy of the country in general.
- (c) The exercise of power are extra-judicial hence may be abused if there are no limitations or institutions which may be used to challenge the exercise of those powers which may results into tax disputes.

10.3 Unified Tax Machinery

The following are the institutions which are responsible in settlement of tax dispute in Tanzania:-

10.3.1 Commissioner General

Section 16(1) of the Tanzania Revenue Authority Act, 1995 as amended provides that the President shall appoint a Commissioner General of the Authority on the recommendation of the Minister. This implies that the appointment of the Commissioner General by the President of the United Republic of Tanzania shall be on the recommendations given by the Minister responsible i.e the minister of finance.

The Commissioner General of TRA among other things is mandated to resolve disputes arising from the administration of revenue laws by his office. This implies that disputes arising from administration of revenue laws by the Commissioner are to be handled by the Commissioner General himself. The rationale behind is not to make the Commissioner General the judge of his own cause but is to give him a chance to reconsider the matter and correct or decide otherwise where necessary and appropriate. In other tax jurisdiction there is a division of tax experts to handle tax objection from the tax payers. The division to handle tax disputes is important since the duty is only to handle tax disputes leaving out the issue of meeting with tax payers with other tax officers. This will assist them also to be impartial in resolving tax disputes filed before the division by the tax payers.

Section 50(1) of the Tax Administration Act, Cap 438 of 2015 provide that the Commissioner General may make any tax decision including assessment, or other decision or omission on a matter left to the discretion, judgement, direction, opinion, approval, consent, satisfaction or determination of the Commissioner General under a tax law that directly affects a person.

Section 50(2) of Act No.10 of 2015 provides further that the assessment or decision made under section 50(1) shall not include:-

(a) A practice note or decision or omission to issue, refuse or revoke a practice note.

✓ It is provided under Sections 9 and 10 of the Tax Administration Act 2015.

(b) A decision or omission that affects a person as a tax officer or employee or agent of the Authority.

(c) The compounding of an offence under any tax law

✓ The Procedures for compounding of an offence is provided under Part xi of The Tax Administration (General) Regulations, GN No.101 of 2016.

The objection to tax decisions is provided under Section 51(1) of the TAA 2015. The Act provides that objection to tax decision⁴⁶⁵ is made by filing an objection to the Commissioner General within thirty days (30) from the date of service of the tax decision. The objection shall be in writing stating the grounds upon which it is made

It has to be noted that an objection to any tax decision shall not be admitted unless the tax payer has paid the amount of tax which is not in dispute⁴⁶⁶ or one third of the assessed tax whichever amount is greater. The payment of any tax not in dispute or one third of the assessed tax shall be made on or before the due date for lodging the objection.⁴⁶⁷ It is clear from the law that where a person has lodged a notice of objection without paying amount of tax which is not in dispute or one third of the assessed tax whichever amount is greater, the Commissioner General shall not admit the objection and the objection shall be deemed to have not been filed.⁴⁶⁸ This amount is normally paid back where the decision has been made in favor of the tax payer.

The Finance Act 2016 under section 56 has amended 51(5) of TAA 2015 to the effect that an objection to any tax decision shall not be admitted unless the tax payer has within a period of thirty days from the date of service of tax decisions paid the amount of tax which is not in dispute or one third of the assessed tax whichever amount is greater. The condition which the law has set is that where the tax payer fails to pay the amount of tax as stated within thirty days the assessed tax decision shall be confirmed as final tax assessment and therefore required to be paid accordingly.

The issue of time for payment of the amount of tax which is not in dispute or one third of the assessed tax whichever amount is greater was introduced recently through the Finance Act of 2016 since it was not there in our laws.

This requirement of time and the consequences of failure to comply with it are regarded by many tax practitioners as being unfair and unjust since it bars many tax payers from accessing justice. Access to justice is a constitutional right of every citizen and therefore should not be restricted or putting in place conditions which oust many from accessing justice.

465 Rule 92(2) provides that an objection to a tax decision shall be made to the Commissioner General in prescribed form set out in the eleventh schedule to The Tax Administration (General) Regulations, GN No.101 of 2016.

466 Tax not in dispute with respect to an assessment or any tax decision means the amount that ought to be charged where the assessment or a tax decision is amended in accordance with the objection, and the whole of duty or any tax assessed on imports (Section 51(3) of TAA 2015).

467 Rule 93(1) of the Tax Administration (General) Regulations 2016.

468 Rule 93(2) of the Tax Administration (General) Regulations 2016.

The requirement of payment of the amount of tax which is not in dispute or one third of the assessed tax whichever amount is greater applies only to assessment objection and not all the objection.⁴⁶⁹

Rule 93(4) of the Tax Administration (General) Regulations 2016 provides that where in any circumstances the objection relates to assessment of tax or any liability to pay tax and the time limit to lodge the objection has expired and no extension of time to object the tax decision has been lodged the Commissioner General shall be entitled to recover the tax. The Commissioner General decision to recover tax shall not be subject to objection.⁴⁷⁰

The law provide that where the Commissioner General is satisfied that there exist good reasons warranting reduction or waiver he may waive the amount to be paid or accept a lesser amount. Where a tax payer files an objection and makes payment as required by the law the liability to pay the remaining assessed tax shall be suspended until the objection is finally determined. An application for waiver of payment of tax shall be made within fifteen days (15) before expiration of the time limit for lodging the notice of objection.⁴⁷¹ The Commissioner General shall on or before expiration of objection, determine the application for waiver of payment of the tax⁴⁷².

Extension of time to file an objection against a tax decision can be applied to the Commissioner General by stating reasonable grounds warranting extension of time⁴⁷³. Rule 92(3) the Tax Administration (General) Regulations 2016 provides that where the Commissioner General decides to extend time to file an objection such extension shall not exceed a period of thirty days (30). The application for extension of time to lodge a notice of objection shall be made within seven days before the expiration of the time limit for lodging the notice of objection and shall be made in the prescribed form set out in the Twelveth Schedule to the Tax Administration (General) Regulations 2016.⁴⁷⁴

10.3.1.1 Decisions on Objection

The Commissioner General may upon admission of an objection have two main options⁴⁷⁵ :-

(a) Make a decision by determining the objection

- 469 Rule 93(3) the Tax Administration (General) Regulations 2016.
- 470 Rule 93(5) of the Tax Administration (General) Regulations 2016.
- 471 Rule 95 of the Tax Administration (General) Regulations 2016.
- 472 Rule 96 of the Tax Administration (General) Regulations 2016.
- 473 Section 51(2) of TAA 2015.
- 474 Rule 94.
- 475 Section 52 of TAA 2015 as amended by section 51 of the Finance Act of 2017.

- (b) Determination of the objection by calling for any evidence or any other information as may appear necessary.

The Commissioner General may do the following over the objection made:-

- (a) Amend the assessment or other tax decisions in accordance with the objection and any further evidence that has been received.
- (b) Refuse to amend the assessment or other tax decisions.

The law provide that where the Commissioner General agrees to amend the assessment or other tax decisions in accordance with the objection he shall serve a notice of the final assessment or other tax decisions to the objector. Besides, where the Commissioner General intends to amend the assessment or other tax decisions in accordance with the objection and any further evidence or refuse to amend the assessment or other tax decisions he shall serve the objector with notice setting out the reasons for the intention or decision.

The objector shall within thirty days from the receipt of the notice make a submission in writing to the Commissioner General on his agreement or disagreement with the amended assessment or other tax decisions or the refusal.

The Commissioner General may after the receipt of the submissions by the objector may do the following:-

- (a) Determine the objection in the light of the amended assessment or refusal and any submission made by the objector.
- (b) Determine the objection partially in accordance with submission by the objector and proceed to issue a notice of final determination of objection.

There is a requirement that the Commissioner is obliged to give reasons for his decision as described in the case of *Hon. Nimrod E. Mkono Versus Commissioner General, Income VAT, Tax Appeal Case No. 6 Of 2004*.

The material facts of this case is that on 5th January, 2004 the appellant received from the respondent a notice of assessment of tax appearing as (Annexure 'C') in the statement of appeal. That on 13th January, 2004 the appellant lodged a notice of objection (Annexure V) of the statement of appeal against the additional assessment. That on 13th January, 2004 the appellant submitted a written request to the respondent for waiver of the requirement upon the appellant to pay the tax assessed pending the determination of the notice of objection. On 20th January, 2004 the respondent under (Annexure 'A') to the statement of appeal informed the appellant that his request for waiver has

not been successful and no reasons were given for the refusal for the request for waiver. The appellant lodged a notice of intention to appeal against the respondent's decision (Annexure 'G') to the statement of appeal. On 18th February, 2004 under (Annexure TRA 2') to the respondent's statement of reply, the respondent assigned reasons for refusing a grant of waiver. On 3rd March, 2004 the appellant filed the statement of Appeal in this Board.

Issue

- Whether the Commissioner is bound to give reasons for his decision

The Board stated that:-

"We have even turned to the concept or principles of "Natural Justice" under the principles if one has a right to be heard then he or she should know the basis of the decision that has been taken. This principle goes hand in hand with the well-known legal maxim that "justice should not only be done but should be seen to be done". It follows therefore that the respondent had a legal obligation to give reasons for his refusal for waiver of 1/3 of the assessed tax. Failure to this we find and appreciate the fear by the appellant that the decision could have been given out maliciously or willful befitting norms of "fair justices" and in the course it becomes a nullity. This brings us to our settled decisions that with no reasons advanced by the respondent who was making an administrative decision then the decision is a nullity"

Any person who is aggrieved by the objection decision or other decision or omission of the Commissioner General may appeal to the Board in accordance with the provisions of the Tax Revenue Appeals Act.⁴⁷⁶ The Board shall be deemed to be the Tax Appeals Tribunal established under section 231 of the East African Community Customs Management Act 2004 (Decision made under the customs laws)⁴⁷⁷. This implies that a person who is aggrieved by the decision made under customs laws after following the procedures provided in those laws of resolving disputes shall appeal to the Tax Revenue Appeal Board (TRAB) which will be deemed as the Tax Appeal Tribunal established under section 231 of the East African Community Customs Management Act 2004.

Make reference also to the following cases:-

- ❖ M/s Wartsila (T) Ltd v. Commissioner General [2008] 2 TTLR 107- (Service of tax assessment - When is tax assessment said to be properly served to the taxpayer).
- ❖ Commissioner General v. Shivacom (T) Ltd [2008] 4 TTLR 105 (Additional VAT assessment - Grounds for raising assessment).

⁴⁷⁶ Section 53(1) of TAA 2015.

⁴⁷⁷ Section 53(3) of TAA 2015.

- (b) Determination of the objection by calling for any evidence or any other information as may appear necessary.

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not been successful and no reasons were given for the refusal for the request for waiver. The appellant lodged a notice of intention to appeal against the respondent's decision (Annexure 'G') to the statement of appeal. On 18th February, 2004 under (Annexure TRA 2') to the respondent's statement of reply, the respondent assigned reasons for refusing a grant of waiver. On 3rd March, 2004 the appellant filed the statement of Appeal in this Board.

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Make reference also to the following cases:-

- ❖ M/s Wartsila (T) Ltd v. Commissioner General [2008] 2 TTLR 107- (Service of tax assessment - When is tax assessment said to be properly served to the taxpayer).
- ❖ Commissioner General v. Shivacom (T) Ltd [2008] 4 TTLR 105 (Additional VAT assessment - Grounds for raising assessment).

⁴⁷⁶ Section 53(1) of TAA 2015.
⁴⁷⁷ Section 53(3) of TAA 2015.

- ❖ *DHL Tanzania Ltd v. Commissioner General* [2005] 1 TTLR 110 (When limitation period to issue an assessment begins to run).
- ❖ *Karibu Textile Mills Ltd v. Commissioner General* [2008] 2 TTLR 197- (Commissioner's discretion to grant waiver of payment of tax assessed - Commissioner's discretion must be exercised judiciously).
- ❖ *Al-Adawi Co Limited v. Commissioner General* [2008] 3 TTLR 1- (Refusal to grant waiver to pay tax assessed - The Commissioner must adduce reasons for such refusal).
- ❖ *Njake Enterprises & Oil Transport Co. v. Commissioner General* [2008] 4 TTLR 200- (Admission of notice of objection - Commissioner entertains an objection without demanding a deposit — Effect).
- ❖ *Geita Gold Mining Ltd v. Commissioner General* [2005] 2 TTLR 169- (Notice of objection to assessment — Whether such notice may be inferred from the circumstances of the case).
- ❖ *Akiba Commercial Bank Ltd v. Commissioner General* [2008] 2 TTLR 148 (Powers of the Commissioner General — (The Commissioner is mandated to call for any evidence when disposing of an objection)).
- ❖ *M/s Fine Thread (T) Ltd v. Commissioner General* [2008] 3 TTLR 92- (Appeals against non assessment - Whether appealable straight to the Board).
- ❖ *Dr. Wilbert B. Kapinga v. Commissioner General* [2005] 2 TTLR 7- (Waiver of requirement to pay deposit before appeal is determined - Refusal to waive - Duty to give reasons for the refusal - Consequences of failure to give reasons).
- ❖ *Majengo Star Service Station v. Commissioner General* [2008] 3 TTLR 115- (Appeal directly to the Board - Taxpayers aggrieved by the existence of liability to pay tax can appeal directly to the Board).
- ❖ *B.P. Markert Squire Service Station v. Commissioner General* [2008] 3 TTLR 20- (Right of appeal to the Board - When does the right to appeal to the Board accrue to the taxpayer).
- ❖ *Mount Meru Petroleum Limited v. Commissioner General* [2008] 3 TTLR 135- (When time starts to run against the appellant).
- ❖ *Williamson Diamonds Ltd v. Commissioner General* [2008] 4 TTLR 167- (Burden of proof on erroneous or excessive assessment lies on the aggrieved taxpayer).
- ❖ *Ihembe Industries Ltd v. Commissioner General* [2005] 1 TTLR 175- (Practice and procedure - Requirement to pay deposit before lodging an appeal).

10.3.2 Tax Revenue Appeals Board (TRAB)

TRAB is a quasi-judicial institution established under section 4(1) of Cap 408. Its core function is to hear and determine civil dispute arising from revenue laws administered by TRA. The board also have a duty of providing public education regarding their functions and mechanisms on how to resolve the tax disputes. The Composition of the Board is provided under section 4(2) of the Tax Revenue Appeals Act, CAP 408 [R.E 2010] as amended by Section 24 of the Written Laws (Miscellaneous Amendment) Act, Act No.3 of 2016. The Board shall consist of the chairman who shall be appointed by the Minister, three vice-chairmen who shall be appointed by the Minister one of whom shall be from Tanzania Zanzibar, not more than twelve other members who shall be appointed by the Minister from each region who shall sit in the Board for the purpose of hearing and determining any appeal originating in the region from which they are appointed.

Section 4(3) of Cap 408 provides that a person may be appointed to be a chairman of the Board if he is a principal legal officer or a person having adequate knowledge of taxation. For the member of the Board if he posses knowledge of and experience in taxation, law, commercial or financial matters.⁴⁷⁸

The implication of these qualifications is that even a person who is not trained in law can be a chairman or vice-chairman of the Board. This is a serious concern since advocates are allowed to appear before the Board when representing their clients. Advocates are well trained in law and appearing before persons who are not trained in law; this may affect effective administration of justice in terms of substantive and procedural matters.

10.3.2.1 Jurisdiction of the Board

Section 7 of Cap 408 as amended provides for the jurisdiction of the Board:-

a) Original Jurisdiction

The Board shall have sole original jurisdiction in all proceedings of all civil nature in respect of disputes arising out from revenue laws administered by Tanzania Revenue Authority. The Finance Act 2016 under section 51 amended the First schedule of the Tanzania Revenue Authority Act 1995 to the effect that TRA is mandated now to administer revenue from tax laws and non-tax laws. This implies that disputes arising from administration of these laws by TRA are also within the jurisdiction of the Board.

⁴⁷⁸ Section 4(3)(b) of CAP 408 as amended by Section 24 of the Written Laws (Miscellaneous Amendment) Act, Act No.3 of 2016.

In the case of *Resolute Tanzania Limited V. Commissioner General* [2005]2 TTLR 200, The Board held that;

"in terms of section 7 and 40 of the Tax Revenue Appeals Act 2000 and section 5A of Tanzania Revenue Authority Act the Board has been conferred with jurisdiction in all proceedings of a civil nature in respect of disputes arising from revenue laws administered by the Tanzania Revenue Authority subject to the procedure laid down under section 12 of the Tax Revenue Appeals Act 2000"

It has to be noted that section 12 of Cap 408 has been repealed by Section 108 of the Tax Administration Act, Act No.10 of 2015. The procedures for disputes settlement are now provided under PART VII of TAA 2015.

(b) Appellate Jurisdiction

The Board has mandate to entertain appeals arising from assessment of tax by TRA. The appeal shall not be entertained by the board until PART VII of the TAA 2015 has been complied. (Section 7A of cap 408 has been amended by section 107 of TAA 2015). This implies that a person should comply with the requirement of sections 50 to 53 of the TAA before lodging an appeal to the Board. Among other things the person must have paid the amount of tax which is not in dispute or one third of the assessed tax whichever amount is greater as the requirement of the law. This is the condition which must be complied before lodging an appeal to the Board.

There are different issues/matters which have been discussed through different cases regarding the jurisdiction of the board:-

(a) Whether the board has jurisdiction over criminal matters

The following cases provides the position of law in respect of this matter:-

M/S Manika Ltd V. Commissioner General [2008]3 TTLR 98; In this case the Respondent in May 2007 through Computer system discovered that many VAT registered persons were claiming VAT as input tax through their monthly VAT returns stating that the same had been collected by the appellant from various goods and services the appellant had supplied them. After cross-checking, the same was not reflected, it then arouse a suspicion of a foul play. The respondent wrote to the appellant to bring its business records, but the appellant never conceded, instead it wrote back that the requested documents could not be traced because they were misplaced during the city cleaning exercise whereby some buildings were demolished. The appellant however, did not inform the respondent of its new business premises following the demolition exercise.

The respondent went to streets to trace the claimants of input tax allegedly collected by the appellant; they succeeded to collect a number of tax invoices and receipts bearing the name, TIN and VAT Registration Number of the

appellant showing that the appellant had supplied a variety of goods and services to the claimants. When compared to the appellant's own declarations of its monthly VAT returns, the numbers of the tax invoices collected from these input tax claimants could not be reflected.

This act of the appellant had elements of fraud and tax evasion which is a criminal offence.

Hence, when the Board determined the matter on that point, it held that:

"The appellant's submission that they had already found elements of fraud done by the companies involved in the alleged transactions and already reported the matter to the police and it is undergoing police investigation, is purely a matter of criminal nature which ousts the jurisdiction of the Board which is vested with jurisdiction on matters of a civil nature related to taxation."

The position of the law was also given in the case of *Rungwe Freight (T) Ltd V. Commissioner General* [2005]2 TTLR 86. In this case the appeal was over a claim for refund of additional taxes. The additional taxes were raised following a compoundment order. The appellant was seeking to challenge by way of appeal to the Board payment of the additional taxes. It was decided that the imposition of the additional taxes by respondent was proper and that the Board had no jurisdiction to entertain the appeal.

The holding of the Board was that:-

"Since compounding of an offence is criminal in nature, in compliance with section 7 of the Tax Revenue Appeals Act, 2000 the hands of this honorable Board are tied, as it lacks to question the punitive powers of the Commissioner"

(b) Whether the board jurisdiction extend to giving legal guidance to the parties before it.

In the case of *Majengo Star Service Station V. Commissioner General* [2008] 3 TTLR 115 the appellant was ordered by the respondent to close the business of selling adulterated petroleum products. The appellant was not satisfied and rushed to the Resident Magistrate Court whereby he was granted an ex-parte restraint order. He then continued with the business. The civil case was later dismissed on the ground that the court had no jurisdiction to entertain the matter. The respondent later served the appellant with a demand letter demanding taxes on the adulterated fuel; the appellant strongly objected. The appellant claimed before the Board that, the respondent's decision to assess him to tax was wrong for failure to either compound the offences or prosecute him before the courts of law. Thus, the appellant sought legal guidance or directive from the Board on what procedure ought to have been followed by the respondent. On the part of the respondent, they submitted that, the appeal be dismissed because the Board has no jurisdiction to advise the parties before it.

Baraka Saiteu

The Board held that:-

"The appellant's prayer seeking for legal guidance or directive on what procedure ought to be followed by the respondent cannot be granted because the main function of the Board is to adjudicate upon disputes or resolve matters relating to tax assessments and not legal consultancy."

- (c) Whether the board has jurisdiction to entertain appeals arising from the administration of the East African Community Customs Management Act of 2004/Customs laws.

Previously there was a problem in respect of whether the Board is vested with jurisdiction to determine appeal from customs laws. The position is now settled under Section 53(3) of TAA 2015. The Section provides that the Board shall be deemed to be the Tax Appeals Tribunal established under Section 231 of the East African Community Customs Management Act 2004. This implies that decision or omission made under customs laws is subject to appeal to the Board which is deemed to be the Tax Appeals Tribunal established under section 231 of the East African Community Customs Management Act 2004. The Board is deemed to be the Tax Appeals Tribunal in respect of customs laws only and not otherwise. The Tax Appeals Tribunal should not be confused with the Tax Revenue Appeals Tribunal (TRAT) established under Cap 408. These are two different institutions with different mandate. As pointed out the Tax Revenue Appeals Board (TRAB) is deemed to be the Tax Appeals Tribunal in respect of customs laws and appeal from this Board goes to the Tax Revenue Appeals Tribunal (TRAT).

- (d) Whether the Board has a jurisdiction to extend time to file an appeal out of time.

This was decided in the case of *Simon H. Steven V. Commissioner General* [2005] *TTLR* where the issue was whether the Board has jurisdiction to entertain an application for extension of time to file an appeal out of time.

It was held that:-

"The Board has jurisdiction to entertain the application for the extension of time to file an appeal out of time as applied by the appellant"

10.3.2.2 Institution of Appeal Before the Board

The following are the procedures of instituting an appeal before the Board:-

- (a) Issuance of a written notice of intention to appeal to the Board.

A notice of intention to appeal shall be issued within 30 days from the date of the service of the notice of final determination or assessment of tax or a decision referred to under section 14 of CAP 408. The notice shall be made

in form TRB 1 as provided under the first Schedule to the Tax Revenue Appeals Board Rules of 2001 as amended by the Tax Revenue Appeals Board (Amendment) Rules 2009. This implies that there is a sample of the notice of intention to appeal which is provided under TRAB (Amendment) Rules of 2009. Make reference to rule 4 of TRAB Rules 2001 as amended by rule 2 of TRAB (amendment) Rules of 2009.

- (b) Serving of the notice of intention to appeal to the parties concerned
- (c) Lodging a statement of appeal within 45 days.

The statement of appeal shall be lodged at the registry of the Board within 45 days from the date of service of the notice of final determination of the assessment of tax or decision referred to under section 14 of CAP 408. The sample of the statement of appeal is provided under TRAB Rules 2001, Rule 6 as amended by Rule 3 of TRAB (Amendment) Rules of 2009. It is Form TRB 2.

It is the requirement of the law that a person who institutes an appeal to the Board shall attach all the material documents which are necessary for the proper determination of the appeal. The list of documents to be attached to the appeal is provided under Rule 7(2) of TRAB Rules 2001 as amended by G.N No.366 of 2009. Payment of appropriate fees is also another requirement when lodging an appeal to the Board.

- d) Serving a copy of appeal to the commissioner General. Rule 6(3) of TRAB Rules of 2001 as amended by TRAB (Amendment) Rules 2009, Rule 3(b).

10.3.2.3 Extension of Time to Institute an Appeal

Rule 9 of TRAB Rules 2001 provides that the Board may upon application in writing by a party and depending on the circumstances of each case and after the opposite party has been given an opportunity to be heard extend the time for instituting an appeal within a specified time limit. This implies that if the party present reasonable grounds before the Board the Board may extend time for instituting an appeal. The application is normally made by way of Chamber Summons supported by an affidavit.

10.3.2.4 Attendance of Parties

The notice of hearing is normally issued within a period of not less than fourteen days before the date fixed for hearing of an appeal. The notice of hearing is served by way of summons as prescribed in Form TRB 3 provided in the first schedule of TRAB Rules 2001⁴⁷⁹. It is served to the parties and their witnesses. The summons shall specify the time, date and place where the intended hearing is going to take place.

⁴⁷⁹ Rules 10 and 11 of TRAB Rules 2001.

The appellant may appear in person or be represented by a person registered as a tax consultant, accountant, auditor or advocate and the Commissioner may be represented by the person dully authorized in that behalf.⁴⁸⁰ This implies that at the Board even persons who are not advocates are allowed to represent the parties provided they have requisite qualifications. The attendance to the Board in pursuant to the summons issued is mandatory and whoever ignores the summons issued by the Board, arrest warrant will be issued for procuring attendance of that person.⁴⁸¹

10.3.2.5 The Proceedings of the Board on Appeal

The proceeding of the Board shall be of judicial nature and shall be conducted on such occasion and at a place directed by the chairman. They are open for public unless otherwise directed by the Board. Besides the board proceedings shall be conducted as little formality and technicalities, this implies that the board shall not be bound by the rules of evidence but may inform itself on any matter as it thinks appropriate. Where the Act and rules are silent in relation to any practice or proceeding the procedure of the Board shall be conducted in accordance with such rules and practice as the board may direct. The appellant shall appear in person or by his authorised agent on the day and time fixed for hearing of the appeal.

The appellant shall state the ground for his appeal and he may support them with relevant evidence, except with the consent of the Board and upon such terms and condition as the Board may determine the appellant may not at the hearing rely on any ground other than the ground stated in the appeal and may not adduce any evidence other than the evidence which was previously made available to the commissioner in the notice of objection.⁴⁸²

After the conclusion of the statement and evidence by the appellant, the respondent shall be allowed to make his/her submission supported by such relevant evidence as may be necessary.

After the respondent submission the appellant is allowed to reply but may not rely on any ground or evidence other than grounds or evidence adduced at the earlier stages of the proceedings.

In hearing the appeal, the board may determine the matter through mediation, conciliation or arbitration but the rules of proceeding under the Civil Procedure Code of 1966 as amended and the Arbitration Act with regard to conduct of mediation and arbitration shall not apply in relation to proceedings under these rules⁴⁸³.

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- 480 Rule 12 of TRAB Rules 2001.
481 Rule 13 of TRAB Rules 2001.
482 Rule 15 of TRAB Rules 2001.
483 Rule 15(10) of TRAB Rules 2001.

Upon conclusion of hearing the evidence and submission of the parties the Board shall as soon as practicable make a decision in the presence of the parties or their representatives and shall cause a copy duly signed and certified by the members of the Board who heard the appeal to be served on each party to the proceedings.⁴⁸⁴

The determination of any matter before the board shall be by majority of the votes of the members present. Where there is descending opinions of a member or members the decision of the chairman or any other person presiding at the proceeding shall be final and conclusive. This implies that the chairman or the vice chairman is not bound by the descending opinion of any member or members but what is required to do is that he has to record the differing opinion and reasons for his disagreement with the opinions of such member(s).⁴⁸⁵

10.3.2.6 Execution of Decision of the Board

The decision of the board shall be enforced by making application to the Board and the Board shall issue a decree or order authorising execution. The execution of the decree or order issued by the Board shall be carried out in accordance with the provision of the Civil Procedure Code of 1966 as amended. The application for execution shall be made upon expiry of thirty days from the date on which the decision or order of the Board was made.⁴⁸⁶

Any person who is aggrieved by the decision of the Board may appeal against the decision of the Board to the Tax Revenue Appeals Tribunal (TRAT).⁴⁸⁷ An appeal shall not operate as a bar for execution of any decree or order of the Board or Tribunal as the case may be.⁴⁸⁸ The tax payer is required to make an application for stay of execution, the alternative is to seek a restraint order to prevent TRA from collecting the disputed tax and this can be made by way of application supported by an affidavit. The affidavit must state the reasons for seeking the restraint order. Considering such application is only made where there is real threat of enforcement, it is good to file the same under the certificate of urgency so that the hearing is scheduled promptly.⁴⁸⁹

⁴⁸⁴ Rule 20(2) of TRAB Rules 2001.

⁴⁸⁵ Section 20 of Cap 408.

⁴⁸⁶ Rule 21 of TRAB Rules 2001 as amended by Rule 7 of TRAB Amendment Rules 2009; Section 24(3) of CAP 408.

⁴⁸⁷ Section 16(4) of Cap 408.

⁴⁸⁸ Section 24(4) of Cap 408.

⁴⁸⁹ Kibuta O., et al., *Tax Dispute Resolution: A Manual for the Tax Practitioners*, Mkuki na Nyota, Dar es Salaam, 2015, p.148-149.

10.3.3 Tax Revenue Appeals Tribunal (TRAT)

TRAT is established under Section 8(1) of Cap 408 and it consist of the Chairman who is appointed by the President after consultation with the Chief Justice, two vice Vice-Chairmen who shall be appointed by the President, one of whom shall be from Tanzania Zanzibar, four other members who shall be appointed by the Minister responsible. A person may be appointed to be the Chairman of the Tribunal if he is a judge of the High Court; whereas a member of the Tribunal to be appointed is required to posses knowledge of and experience in taxation, commercial or financial matters. The qualification of Vice-Chairman is not provided by the law therefore it is possible a person who is not a judge of the High Court or a person not trained in law to be appointed as a Vice Chairman of the Tribunal.

10.3.3.1 Jurisdiction of the Tribunal

The Tribunal is vested with⁴⁹⁰:-

(a) Appellate Jurisdiction

The Tribunal is vested with sole jurisdiction in all appeals arising from the decision of the Board when exercising original jurisdiction.

(b) Supervisory jurisdiction

The tribunal may call for and inspect the record of any proceeding before the board and may revise any decision thereof.

10.3.3.2 Institution of Appeal to the Tribunal

The following are the procedures of instituting appeal to the Tribunal⁴⁹¹:-

(a) Notice of intention to appeal

- ✓ The notice shall be issued within 15 days from the date in which the decision in respect of which it is intended to appeal against was made.
- ✓ Notice to appeal shall be filed in the tribunal.
- ✓ The Notice of Intention to appeal shall be made in Form TRT 1 Prescribed in the First Schedule to the TRAT(Amendment) Rules 2009

(b) Serving the notice of the intention to appeal to all parties (including the Board and Respondent) who are likely to be affected by the decision of the tribunal.

490 Section 11 of Cap 408.

491 Rules 4 to 7 of TRAT Rules 2001 as amended by TRAT(Amendment) Rules 2009.

(c) Lodging the statement of appeal.

- ✓ The statement of appeal shall be filed at the registry of the tribunal within 30 days from the date of service of the decision and the proceeding of the Board in respect of which it is intended to be appealed against.
- ✓ The appeal shall be made in Form TRT 2 Prescribed in the first schedule to TRAT Rules 2001.
- ✓ The appeal shall be accompanied by a certified copy of the proceedings of the Board, A certified copy of the decision of the Board, A copy of the notice of intention to appeal to the Tribunal.
- ✓ The appeal shall be accompanied also by payment of appropriate fees as set in the regulation.

10.3.3.3 Extension of Time to Institute an Appeal

A party may lodge an application with the Tribunal to seek extension of time to file an appeal. The tribunal where it deems just and equitable and having regard to the nature of the intended appeal and after the opposite party has been given an opportunity to be heard, by order extend the period within which the appellant may institute the appeal to the Tribunal.⁴⁹² The application is normally made by way of Chamber Summons supported by Affidavit.

10.3.3.4 Attendance of Parties

Attendance of parties to the Tribunal is procured by issuing a fourteen day's notice of hearing (Summons) to all parties to an appeal. The summons shall be in Form TRT 3 as prescribed in the first schedule to TRAT Rules 2001. The Tribunal is given power to issue a warrant of arrest to procure attendance before it of a person who being served with summons to appear and without reasonable excuse fails to appear.⁴⁹³

The appellant may appear in person or be represented by a person registered as a tax consultant, accountant, auditor or advocate and the Commissioner may be represented by the person duly authorized in that behalf. This implies that at the Tribunal even persons who are not advocates are allowed to represent the parties provided they have requisite qualifications.

⁴⁹² Rule 8 of TRAT Rules 2009 as amended by rule 5 of TRAT (Amendments) Rules 2009.
⁴⁹³ Rule 10 and 13 of TRAT Rules 2001.

10.3.3.5 Proceedings Before the Tribunal

The proceedings before the tribunal shall be open to the public, however the tribunal has mandate to direct the hearing be closed to the public, the tribunal can do so suo motto or upon request by either party.⁴⁹⁴ During the hearing the appellant shall state the grounds of the appeal which he wants to rely in order for the tribunal to decide on his favour. The proceeding is like that of the Board. There should be a little regard to the technicalities and formalities. This implies that the tribunal is not bound by the rules of evidence but may inform itself on their existence and may refer to them when they deem so. In hearing the appeal, the Tribunal may determine the matter through mediation, conciliation or arbitration but the rules of proceeding under the Civil Procedure Code of 1966 as amended and the Arbitration Act with regard to conduct of mediation and arbitration shall not apply.

The appellant is precluded/ excluded without the consent of the tribunal to adduce any evidence which was not previously present or made available before the board for determination of the matter.

After the conclusion of the statement and any evidence by the appellant, the respondent shall be allowed to make such submission supported by relevant evidence.

The appellant is allowed to reply the respondent submission but may not rely on ground or evidence adduced at earlier stage of hearing. The tribunal after hearing the evidence and submission of both parties it will make a decision in the presence of the parties or their representatives.

The determination of any matter before the tribunal shall be by the majority of members present and where there is descending opinion of a member(s), the decision of the chairman or other person presiding at the proceeding shall be final and conclusive.

The chairman and vice chairman is not bound by the descending opinion of the any member(s) but the law requires him to record the differing opinion and reasons for his disagreement.

10.3.3.6 Execution of the Decision of the Tribunal

The decision of the tribunal shall be enforced by making application to the tribunal which shall issue a decree or order authorising execution.⁴⁹⁵ The execution shall be in accordance of the Civil Procedure Code of 1966. The application for execution shall be made upon expiry of thirty days from the date on which the decision of the tribunal was made.

494 Rules 14 to 16 TRAT Rules 2001 as amended by TRAT (Amendment) Rules 2009.

495 Rule 23 of TRAT Rules 2001.

Any party aggrieved by the decision of the Tribunal shall appeal to the Court of Appeal of Tanzania.⁴⁹⁶

10.3.4 The Court of Appeal of Tanzania

An appeal to the Court of Appeal shall be on matters of law only and the provisions of the Appellate Jurisdiction Act and the Court of Appeal Rules 2009 shall apply mutatis mutandis.⁴⁹⁷

The following are the procedures of appealing to the Court of Appeal of Tanzania:-

(a) Lodging a notice of Appeal

- ✓ Rule 24(2) of TRAT Rules 2001 provides that a notice of appeal shall be filled in triplicate at the tribunal within fourteen days and the Registrar of the Tribunal shall forward the same to the Court of Appeal
- ✓ The requirement to file a notice of appeal is also provided under Rule 83(1) of the Court of Appeal Rules 2009
- ✓ Rule 83(2) of the Court of Appeal Rules 2009 provides that a notice of appeal shall be lodged within thirty days from the date of the decision of the Tribunal
- ✓ TRAT Rules 2001 provide that the time given to file a notice of appeal is fourteen days whereas the Court of Appeal Rules 2009 provides that the time given is thirty days from the date of the decision of the Tribunal. This is the issue which needs attention for those who are in the legal practice as to whether they have to comply with the fourteen days requirement under TRAT Rules 2001 or thirty days as provided in the Court of Appeal Rules 2009.
- ✓ In the Case of *Elnasr Export Port Company v. Nahd Trading Co*, the Former Chief Justice Samatta said the notice of appeal is the gear to move the court. Without engaging this gear properly the appeal is doomed to fail.⁴⁹⁸ It is arguable that if the appeal is deemed to commence only after the notice of appeal is lodged, then the time period for lodging an appeal must be governed by TRAT Rules not the Appellate Jurisdiction Act and the Court of Appeal Rules 2009. This view highlights the need to comply with the fourteen days limit rather than thirty days provided under the Court of Appeal Rules 2009.⁴⁹⁹

⁴⁹⁶ Rule 24(1) of TRAT Rules 2001.

⁴⁹⁷ Section 25 of Cap 408.

⁴⁹⁸ Kibuta O., et al., *Tax Dispute Resolution: A Manual for the Tax Practitioners*, Mkuki na Nyota,

Dar es Salaam, 2015, p.178.

⁴⁹⁹ Kibuta, op.cit., p.178.

- ✓ The format of the notice of appeal is Form D as provided under the first schedule to the Court of Appeal Rules 2009.
- (b) Service of the Notice of Appeal
- ✓ Rule 84(1) of the Court of Appeal Rules 2009 provides that the lodged notice of appeal must be served on the opposite party within fourteen days. The failure to serve the notice of appeal to the other party invalidates the appeal. Rule 86(1) of the Court of Appeal Rules requires the respondent within fourteen days when served with a notice of appeal to lodge a notice of address of service providing the address of service providing the address the Court will use to serve court documents.
 - ✓ Rule 89(1) of the Court of Appeal Rules gives mandate to a party to withdraw the notice of appeal. The respondent may also apply for the notice of appeal to be struck out by the Court if following the lodgment of notice, the memorandum of Appeal was not filled within a prescribed period.⁵⁰⁰
- (c) Obtaining Certified Copy of the Proceedings, the judgment and the decree
- ✓ The request to obtain the certified proceedings from the Tribunal must be made within thirty days and must be served to the other party.
 - ✓ Appellant is entitled to get a certificate of delay if the certified proceedings were not provided timely and the sixty days period expired before the appeal is lodged.⁵⁰¹ The period for which the certified documents were under preparation will be excluded in computing the sixty days limit.
 - ✓ If the appellant did not request for the certified proceedings from the Registrar and the time for lodging an appeal has expired the delay by the Registrar cannot be an excuse, hence the appellant is required to apply for extension of time to file an appeal.
 - ✓ Rule 90 of the Court of Appeal Rules, 2009 has been amended by Rule 14 of the Court of Appeal (Amendments) Rules 2017, GN No. 362 to the effect that the Registrar is required to serve a copy of the proceedings within 90 days from the date the appellant requested for such copy and the appellant shall take steps to collect a copy on being informed by the registrar to do so, or after the expiry of 90 days.
- (d) Instituting the Appeal by filing the memorandum of appeal and record of appeal
- ✓ Instituting an appeal before the Court of Appeal must be made within 60 days from the date of lodging the notice of appeal. It is regulated by Rule 90(1) of the Court of Appeal Rules 2009.

500 Rule 89(2) of the Court of Appeal Rules 2009.

501 Rule 90(1) of the Court of Appeal Rules 2009.

- ✓ The memorandum of appeal contains the grounds in distinct paragraphs without arguments upon which the appellant challenges the decision of the tribunal. Rule 93(1) of the Court of Appeal Rules provides that the memorandum of appeal must specify the points of laws alleged to have been wrongly decided by the Tribunal and the relief (or orders) the appellant request the Court to pronounce.
- ✓ The format of the memorandum of appeal is Form F as prescribed in the First schedule to the Court of Appeal Rules 2009.
- ✓ Rule 11 of the Court of Appeal Rules, 2009 has been amended by Rule 2 of the Court of Appeal (Amendments) Rules 2017, GN No. 362 to the effect that in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; but the Court, may upon good cause shown, order stay of execution of such decree or order. This implies that an appeal to the Court of Appeal does not bar TRA from executing the decision of the Tribunal, therefore, it important to make an application to stay the execution of the decision of the Tribunal. It is normally made by lodging a notice of motion supported by affidavit. It is advised that the application for stay of execution should be made under a certificate of urgency. The appellant may apply for an interim order for maintenance of status quo which can be given as an ex-parte order while waiting for the stay of application to be heard and determined inter-parties. A single judge of the Court may make an ex parte order for stay of execution pending hearing of the appeal or application.
- ✓ An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution.
- ✓ No order for stay of execution shall be made unless the Court is satisfied that substantial loss may result to the party applying for stay of execution unless the order is made; the application has been made without unreasonable delay; and security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.
- ✓ An application for stay execution shall be accompanied by a copy of a notice of appeal; a decree or order appealed from; a judgment; and a copy of a notice of the intended execution.
- (e) Service of the Record of appeal to the other party.
 - ✓ Rule 97(1) of the Court of Appeal Rules 2009 provides that the service of record of appeal to the other party shall be made within seven days from the date of lodging the record of appeal.
- (f) Filing supplementary record of appeal to rectify the omission.

- ✓ Rule 96(6) of the Court of Appeal Rules 2009 provides that the supplementary record of appeal shall be filed within fourteen days from the date of lodging the record of appeal. The supplementary record can also be copies of documents or any additional parts of documents which in the opinion of the appellant are important in determining the appeal.⁵⁰² The preparation of supplementary record shall be prepared in the same manner as the record of appeal.⁵⁰³ Filing of supplementary record of appeal does not require leave of the Court.

(g) Amendment of the filed documents.

- ✓ Rule 111 of the Court of Appeal Rules 2009 provides that where a party desires to amend a filed document contained in the record of appeal binder or in the supplementary record or relating to the cross appeal he must apply to the Court of Appeal to amend the document. The application can be made orally at the start of hearing or can be written and filed prior to the commencement of hearing.⁵⁰⁴

10.3.4.1 Hearing before the Court of Appeal

- ✓ Rule 106(1) of the Court of Appeal Rules 2009 requires the appellant within sixty (60) days after lodging the record of appeal or filing the Notice of Motion to file in the appropriate registry a written submission in support of or in opposition to the appeal or the cross-appeal or application, if any, as the case may be.
- ✓ Every written submission shall contain a concise statement of the case containing the facts material to the appeal or application; a statement of what are, in the appellant's or applicant's view, the issues arising in the appeal or application. If the appellant or applicant, is abandoning any point taken in the memorandum of appeal or notice of motion, this shall be so stated in the submission, equally, if the appellant or applicant, intends to apply for leave to introduce an additional ground not taken in the memorandum of appeal or notice of motion, this shall be indicated in the submission; a statement of the issues or questions which the appellant or applicant, would like the Court to consider, expressed in the terms and circumstances of the case but without unnecessary details, which statement will be deemed to include every subsidiary question comprised therein. Only the questions set forth in the submission or comprised therein will be considered by the Court; a direct and concise argument amplifying the reasons relied upon; the enactments or subsidiary legislation, if any which are relevant to the appeal or application.⁵⁰⁵

502 Rule 99(1) of the Court of Appeal Rules 2009.

503 Rule 99(3) of the Court of Appeal Rules 2009.

504 Kibuta O., et al., *Tax Dispute Resolution: A Manual for the Tax Practitioners*, Mkuki na Nyota, Dar es Salaam, 2015, p.194.

505 Rule 106(2) of the Court of Appeal Rules 2009.

- ✓ If the parties intend to invite the Court to depart from one of its own decisions, this shall be clearly stated in a separate paragraph of the submission, to which special attention shall be drawn, and the intention shall also be restated as one of the reasons.⁵⁰⁶
- ✓ Failure on the part of an appellant or applicant to present the submissions with clarity, accuracy, brevity and precision whatever is essential to the clear and adequate understanding of the question which requires consideration by the Court may be sufficient reason for refusing to entertain the submission.⁵⁰⁷
- ✓ A copy of the written submissions shall be served upon the Respondent within 14 days from the date of filing.⁵⁰⁸
- ✓ A respondent shall file a copy of a reply to the submissions of the appellant or applicant not later than thirty (30) days from the date of service by the appellant or applicant upon him.⁵⁰⁹
- ✓ A copy of the respondent's written submissions shall be served upon the appellant or applicant within 14 days from the date of filing.⁵¹⁰
- ✓ Failure to file written submission under sub-rule (1) of Rule 106 or a reply under sub-rule (8) of Rule 106 shall not be a ground for applying for additional time for oral submission.
- ✓ After the schedule of written submissions has been completed, the Court shall fix a date of hearing and shall notify the parties or their advocates.⁵¹¹
- ✓ No advocate shall have the right of audience in the Court unless he has practiced for a period of not less than five years in the High court and courts subordinate thereto. Provided that an advocate who has not practiced for five (5) years in the High Court and Courts subordinate may apply for a waiver in a particular matter. The application shall be in writing to the Chief Justice or Presiding Justice, as the case may be, and shall be made within a period of not less than 7 days to the date of hearing of the particular matter, showing good grounds for seeking the waiver.⁵¹²

⁵⁰⁶ 106(3) of the Court of Appeal Rules 2009.

⁵⁰⁷ Rule 106(4) of the Court of Appeal Rules 2009.

⁵⁰⁸ Rule 106(7) of the Court of Appeal Rules 2009.

⁵⁰⁹ Rule 106(8) of the Court of Appeal Rules 2009 as amended by Rule 15 of the Court of Appeal Rules (Amendments) Rules, GN No.362 of 2017.

⁵¹⁰ Rule 106(9) as amended by Rule 15 of the Court of Appeal Rules (Amendments) Rules, GN No.362 of 2017.

⁵¹¹ Rule 106(11) of the Court of Appeal Rules 2009.

⁵¹² Rule 33(3) of the Court of Appeal Rules 2009.

- ✓ The parties or their advocates shall be required to appear and may present oral arguments and unless otherwise directed, half an hour (30 minutes) on each side will be allowed for arguments. Any request for additional time shall be made to the Court in writing not later than fifteen (15) days to the date the appeal or application is called for hearing. The request, a copy of which shall be served upon the other part, shall state clearly and in precise terms the reasons why the argument cannot be presented within the time limit.⁵¹³
- ✓ Unless additional time has been granted, only one advocate or legal practitioner will be heard for each side. By the special permission of the Court, more than one advocate or legal practitioner may be heard for each side when there are several parties to the same side. The court will look on divided arguments with favour.⁵¹⁴
- ✓ Save with leave of the Court, no oral argument will be entertained in support of any argument not raised in the written submission on behalf of any party for whom the submission has been filed.⁵¹⁵
- ✓ When an appeal is called and no party or any legal practitioner appearing for him appears to present oral argument, but submissions have been filed on time by the parties concerned, the appeal will be treated as having been argued and will be considered as such and also when an appeal is called for hearing and neither the appellant nor his advocate appears to present an oral argument, the respondent may apply to the Court to strike out the appeal for want of prosecution. The situation is different where the respondent does not appear. The position of the law is that when an appeal is called for hearing and neither the respondent nor his advocate appears to present an oral argument, though written submissions have been filed, the Court may proceed to determine the appeal *ex parte*.⁵¹⁶

10.3.4.2 Decision of the Court

After concluding the hearing before the Court, the decision will be made to that effect. The judgment or ruling may be delivered promptly or may be reserved to be delivered within ninety days from the date of hearing.⁵¹⁷

Herein below are some of the current cases decided by the Court of appeal of Tanzania which describes different tax matters in practice.

⁵¹³ Rule 106(12) & Rule 106 (13) of the Court of Appeal Rules 2009.

⁵¹⁴ Rule 106(14) of the Court of Appeal Rules 2009.

⁵¹⁵ Rule 106 (15) of the Court of Appeal Rules 2009.

⁵¹⁶ Rule 106(16), Rule 106(17) and Rule 106(18) of the Court of Appeal Rules 2009.

⁵¹⁷ Rule 39(1) of the Court of Appeal Rules 2009.

1. Commissioner General Tanzania Revenue Authority *Versus* Parastatal Pensions Fund, Civil Application No. 78 Of 2005(CA) (Stay of Execution pending hearing of an appeal, Limitation of time, attachment of order to an Application).

Material Facts

The applicant, The Commissioner General of the Tanzania Revenue Authority, is applying for an order that the execution of the orders in Tax Revenue appeals Tribunal Application No. 8 of 2003 be stayed pending the hearing and determination of an appeal to this Court.

Arguments by the Respondent on Preliminary Objection

At the hearing of the application Mr. E. Maro, learned advocate, represented the respondent. On the 25.6.2005 the respondent, Parastatal Pensions Fund, through Maro & Company, Advocates, filed under Rule 100 of the Court of Appeal Rules, notice of preliminary objection challenging the competency of the application on three grounds, namely –

1. That the application is hopelessly time barred.

Alternatively

2. That the Notice of Motion is totally defective both in form and substance.

Alternatively

3. That the application is incompetent for want of order sought to be stayed.

Mr. Maro abandoned the second ground of complaint but argued the remaining two grounds. As regards the first ground of complaint, Mr. Maro submitted that the basis of the applicant's instant application has its genesis in a Ruling by the Tax Revenue Appeals Tribunal in Revision Application No. 8 of 2003 ("TRA 1") which was delivered on the 13.9.2004. The Notice of Motion by the applicant was filed on the 2.6.2005, that is eight months nineteen days late reckoned from the 13.10.2004.

The learned advocate conceded that both the Appellate Jurisdiction Act and Rules made thereunder have not prescribed the period within which an application for stay execution should be filed. He added however that through decided cases, this Court has now prescribed a period of limitation of sixty days from the date on which the decision sought to be stayed was made. (See: *James Masanja Kasuka v. George Humba*, Civil Application No. 2 of 1997 (unreported); *Suleman Ally Nyamategi & Two Others v. Mwanza Engineering Works Ltd*, Civil Application No. 138 of 2002; *Commissioner General, Tanzania Revenue Authority v. National Social Security Fund* (unreported).

According to Mr. Maro's computation of time, the current application should have been filed not later than the 12.11.2004, and since it was filed on the 2.6.2005, it was time-barred.

The second alternative ground of complaint was to the effect that the order sought to be stayed was not annexed to the Notice of Motion. Mr. Maro again submitted that there is no specific rule governing this aspect but this has been the result of decided cases by this Court.

Arguments by the Applicant on Preliminary Objection

Mr. Lugaiya learned advocate represented the applicant. The response by Mr. Lugaiya, learned advocate for the applicant was understandably brief. He readily conceded the first ground of complaint and had nothing useful to add. As regards the second ground of complaint, the learned advocate submitted that the Ruling in Revision Application No. 8 of 2003 between the same parties was attached to the Notice of Motion. It was Mr. Lugaiya's view that the inclusion of this Ruling was sufficient compliance with the practice as evolved by the Court.

Analysis and Decision of the Court

Let me commence with the second ground of complaint. Admittedly, the requirement that a copy of the decree or order sought to be stayed should accompany an application for stay of execution is a mere practice of the Court and not a statutory requirement. In Civil Application No. 84 of 2003, *Hassani Ramadhani v. Saada Mussa* (unreported), a single Judge of this Court, (Mroso, J.) stated thus –

"It is the practice of the Court and not the requirement of the rules to require the attachment of the order to the application. Nonetheless, it is also common ground in my view that the practice and procedure evolved by the Court in connection with appeals or applications has the same legal force as the express provisions of the rules."

In Civil Reference No. 1 of 2005, *Sugar Board of Tanzania v. 21st Century Food & Packaging Ltd. and Two Others*, the Court discussed a number of decisions, including *Blue Star Service Station v. Jackson Musetti* (1997) TLR 310; (CAT) Civil Application No. 138 of 2003, *Consolidated Holding Corporation v. Rajani Industries* (unreported); (CAT) Civil Application No. 12 of 2000, *Dunhill Motors Ltd v. Tanzania Revenue Authority* (unreported). The Court quoted with approval the above-quoted extract from *Mussa's case* and said –

"That statement on the practice of the Court which has now acquired the force of law was expressed by a single Judge of the Court but we endorse it and confirm that that is the current legal position in the country to which parties to an application for stay of execution must conform. It is therefore now settled that attaching a Ruling to an application for stay of execution will not do."

In the result, I sustain this preliminary objection and strike out the application with costs as incompetent. Having reached this conclusion, it is not necessary for me to consider and determine the first ground of complaint.

Delivered at Dar es Salaam on 3rd May, 2006.

Note: Make reference to the Court of Appeal Rules 2009

2. G. S. Contractors Limited *Versus* Commissioner General, Civil Appeal No. 80 Of 2015(CA)(*Status of TRAB and TRAT, Appeal involving questions of law, certificate that a point of law is involved, Record of Appeal*)

The appellant is challenging the decision of the Tax Revenue Appeals Tribunal dated 3rd February, 2015 in Tax Appeal No. 22 of 2014. However, before the appeal came up for hearing, the respondent lodged a notice of Preliminary Objection, in terms of Rule 107 (1) of the Tanzania Court of Appeal Rules, 2009, (the Rules), as follows:- That the appeal has been brought- to this Court in contravention of Section 25(2) of the Tax Revenue Appeals Act, R.E, 2006 read together with Rule 96(2) of the Tanzania court of Appeal Rules, 2009; Therefore, the counsel for Respondents pray for the Appeal to be struck out with costs.

For ease of reference, section 25 (2) of the Tax Revenue Appeals Act, Cap 408, R.E. 2002 provides:-*Appeals to the court of Appeal shall lie on matters involving questions of law only and the provisions of the Appellate Jurisdiction Act, Cap141 and the rules made there under shall apply mutatis mutandis to appeals from the decision of the Tribunal.*

The crux of the objection by the respondent was the absence from the record of appeal, a copy of the decree issued- by the Tax Appeals Board. The rationale given by the respondent being that in the event the decision of the Tax Appeals Tribunal on record is for some reason vacated, it would follow that the decree of the Tax Appeals Board on record would then be available for enforcement. Apparently, Mr. Godwin, learned counsel for the appellant was not persuaded that the Board was the first appellate court, but rather to him, it was the Court of first instance after a decision of the Commissioner General.

He submitted that the omission cited is not fatal because Rule 96(2) relates to the first appellate court; and not the court of first instance. However, the learned counsel made a prayer that in the event the Court finds it necessary to have a decree of the Board on record; for the interest of justice; the appellant be allowed to amend the Record of Appeal to include the missing record; in terms of Rules 4(1) (2) (b) and 111; of the Rules.

Rule 96(2) of the Rules provide that for the purposes of any appeal from the High Court in its appellate Jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sub-rule(1) and shall contain also the following documents relating to the appeal to the first appellate court :-

(a) The order if any giving leave to appeal.

(b) The memorandum of appeal.

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- (c) The record of proceedings.
- (d) The judgment or ruling.
- (e) The decree or order.
- (f) The notice of appeal.

and in the Case of a third appeal shall contain also the corresponding documents in relation to the second appeal and the certificate of the High Court that a point of law is involved.

Our starting point is to make a general observation that the Tax Revenue Appeals Board and the Tax Revenue Appeals Tribunal are both appellate bodies in tax disputes; but at different levels. In our view the Tax Revenue Appeals Board is the first appellate Court from the Decision of the Commissioner General and the Tax Revenue Appeal Tribunal being the second appellate court from the decision of the Tax Revenue Appeals Board. In view of the legal status of the two Tax Appellate institutions; the provisions of section 25 (2) Of the Tax Revenue Appeals Act R.E.2006, mac together with Rule 96(2) of the Rules, make it mandatory that the Record of Appeal contains among others, the documents listed in Rule 96 (2)(a) to(f),(supra). Further, this being a third appeal, the record has in addition, to contain a certificate that a point of law is involved; absence of which renders the appeal incompetent. In the event, we think that this point of objection sufficiently disposes of the matter. Accordingly, the appeal is struck out, Each party to bear own costs.

Delivered at Dar es Salaam on 22nd March, 2016.

3. SBC Tanzania Limited *Versus* The Commissioner General of Tanzania Revenue Authority,(CA), Civil Appeal No. 32 Of 2007(*effect of judgment of the Tax Appeals Tribunal not certified by all the members of the Tribunal*).

Material Facts

The appellant was aggrieved by the decision of the Tax Revenue Appeals Tribunal of Tanzania sitting at Dar es Salaam, dated 6th February, 2007, and filed an appeal in this Court on the 5th April, 2007. The respondent resists the appeal. On 22/3/2010 he filed a notice of preliminary objection, as to the competency of the appeal. The Preliminary Objection had two limbs; namely:

- (a) Non-compliance with Rule 21 of the Tax Revenue Appeals Tribunal Rules, 2001 GN 56 of 2001.
- (b) Non-compliance with Rule 83(2) of the Tanzania Court of Appeal Rules, 1979.

However, in the course of hearing of the said preliminary objection, the respondent abandoned the second limb of the objection.

Issue

- What is the effect of judgment of the Tax Appeals Tribunal not certified by all the members of the Tribunal?

Arguments by the Appellant

At the hearing of the appeal Dr. Wilbert Kapinga, learned counsel appeared for the appellant. Dr. Kapinga, initially resisted the preliminary objection, but on reflection, he later conceded to it, and prayed that the appeal be struck out.

Arguments by the Respondent

Mr. Felix Haule learned counsel represented the respondent. Mr. Haule's submission on the first and remaining preliminary objection was that the judgment of the Tax Appeals Tribunal was not certified by all the members of the Tribunal, but by only the Chairman. His view was that, this was contrary to Rule 21 of the Tax Revenue Appeals Tribunal Rules, 2001, (GN 56 of 2001). As the rule was couched in mandatory terms, its contravention was fatal, he argued. Mr. Haule cited to us the decision of this Court in *AMI PORT OPERATIONS (T) LIMITED v THE COMMISSIONER FOR INCOME TAX*, Civil Appeal No. 28 of 2005 (unreported) on the point.

Analysis and Decision of the Court

There is no dispute that the judgment of the Tax Revenue Appeals Tribunal of 6/2/2007 that is on record, is signed by the Chairman and two other members of the Tribunal, but certified only by the Chairman. Rule 21 of the Tribunal Rules, provides:

"After conclusion of the hearing of the evidence and the submissions of the parties, the Tribunal shall, as soon as practicable make a decision in the presence of the parties or their advocates, or representatives and shall cause a copy duly signed and certified by the members of the Tribunal which heard the appeal to be served on each party to the proceeding." (emphasis supplied)

As this Court observed in *AMI PORT OPERATIONS (T) LIMITED* case (supra) the law therefore requires all members of the Tribunal, not only to sign, but also to certify the copy of the decision, and that the omission affected the validity of the copy of the judgment which appeared in the record of appeal. Mr. Haule is therefore on firm grounds; that the copy of

the judgment contained in the record of appeal was faulty. As we held in the AMI PORT case, the defective copy of the judgment has the effect of infecting the record of appeal, because Rule 89(2)(iv) of the then Court of Appeal Rules, 1979 required that the record of appeal contain a: "*judgment or order*" from which an appeal is sought. It is implicit that such a copy of judgment or order should be a valid one. As the copy of the judgment in the present appeal is not valid, it follows that the record of appeal is also incurably defective. The appeal is therefore incompetent.

In the result, we uphold the preliminary objection, and proceed to strike out the appeal with costs.

Delivered at Dar es Salaam on 4th July, 2012.

Note: Make reference to the Court of Appeal Rules 2009

4. Pembe Flour Mills Limited *Versus* Commissioner General (TRA)
Civil Appeal No. 50 Of 2015(CA) (*Effect of Decree not signed by all the members of the Tribunal*)

Material Facts

The parties in this appeal had a dispute on exemption of VAT taxability for bran and pollard. The Tax Revenue Appeals Board held that bran and pollard is outer layer of wheat realized after machine processing of wheat. As such it is not wheat, and therefore it is not exempted from VAT taxation. The Tax Appeals Tribunal confirmed the decision of the Tax Revenue Appeals Board. Being aggrieved by decision of the Tax Revenue Appeals Board, the appellant filed several grounds of appeal contesting the propriety of the decision of the Tax Revenue Appeals Tribunal. Following a preliminary objection filed earlier on by Mr. Haule, under Rule 107(1) of the Court of Appeal Rules, 2009, the Court decided to dispose of the preliminary objection first.

Issue

- Whether the Decree not signed by all the members of the tribunal is defective

Arguments by the Respondent

Mr. Felix Haule, learned advocate, represented the respondent, his employer. In support of the preliminary objection the learned advocate said Rule 21 of the Tax Revenue Appeals Tribunal requires the Chairman or Vice Chairman of the Tribunal and the members of the Tribunal to sign the decision of the Tribunal. He said an omission by any of the members of the Tribunal to sign the decree renders the decree invalid. Since in this appeal the decree at page 167 of the record

of appeal is only signed by the Vice Chairman of the Tribunal, said the learned advocate, and none of the other members signed it, the decree is defective and hence the appeal is incompetent. He prayed that the preliminary objection be upheld and the appeal be struck out with costs.

Arguments by the Appellant

Mr. Michael Ngalo, learned advocate, entered appearance for the appellant. In reply, Mr. Ngalo submitted that under Rule 96(2) of the Court of Appeal Rules, 2009 a mandatory document forming part of the record of appeal is the decision of the Tribunal and not the decree. He said Rule 21 of the Tax Revenue Appeals Tribunal makes it mandatory for the decision of the tribunal to be signed by all the members but it does not talk of the decree. He said the preliminary objection is one which does not go to the root of the matter. He urged the Court to invoke article 107A of the Constitution and dismiss the preliminary objection and order the appeal to be heard on merit.

A brief rejoinder by Mr. Haule was that the Court has made several authorities in which it has insisted that a decree from the Tax Appeals Tribunal should be signed by all members. The decree in this case, said the learned advocate, has nothing to exempt it from that procedure. He reiterated his earlier prayer that the preliminary objection should be upheld and the appeal be struck out with costs.

Analysis and Ruling of the Court

The preliminary objection challenges the decree that was issued by the Tax Revenue Appeals Tribunal that it is defective. It is not signed by all members of the Tribunal, hence there is no compliance with Rule 21 of the Tax Revenue Appeals Tribunal Rules, 2001 (Government Notice No. 56 of 2001) regarding the signing and certification of the judgment and the decree. The issue involved in the preliminary objection raised by the learned advocate for the respondent need not detain us. The learned advocate submitted correctly that there are a lot of authorities decided by the Court on the matter. The learned advocate for the appellant submitted correctly that Rule 21 of the Tax Appeals Tribunal requires only the decision of the Tribunal to be signed by all members of the Tribunal.

That is true from the wording of Rule 21. It says:-

"After conclusion of the hearing of the evidence and submissions of the parties the Tribunal shall, as soon as practicable, make a decision in the presence of the parties or their advocates or representatives and shall cause a copy duly signed and certified by the members of the Tribunal which heard the appeal to be served on each party to the proceedings."

But the Tribunal by issuing a decision is not the end of the matter. A party who wishes to get the right that has been given in the decision of the Tribunal has to obtain a decree in order to be able to carry out execution. Similarly, an aggrieved

CHAPTER ELEVEN

INTERNATIONAL TAXATION

11.1 Introduction

The chapter addresses the meaning of international taxation, double taxation, and forms of double taxation, causes and methods of eliminating double taxation, objectives of treaties and tax model laws.

11.2 Meaning of International Taxation

International taxation refers to a discipline of study and practice that centers on the application of taxes and tax laws in the international community as it relate to individuals, businesses and government agencies conducting cross-border commerce.⁵¹⁸ International taxation focuses on tax treaties, territorial laws and their effects on foreign income of residents and domestic income of non-residents. The rationale behind is to make sure that there is no double taxation for the purpose of promoting trade and investment opportunities among the international community. Under international taxation there are two main concepts which are important:-

(a) Concept of Source

Refers to a country or place that a person earns his income or it is a place where the income is generated. The state in one way or another should have connection to the production of the income in question in order to be entitled to impose tax over the income (taxing right of the state).⁵¹⁹ Difficulties has arisen in establishing the type of connection the state should have in respect of the income. In establishing the connection needed to establish source, reference has been made to historical basis which refers to the concept of economic allegiance in establishing the connection between the income and the state. Georg Von Schanz and his theory of Economic allegiance stated as follows.⁵²⁰

"Economic allegiance to a state can be based on mere consumption or it can be based on business activities including investment activities. To the extent economic allegiance is founded on consumption, residence would constitute a suitable criterion but it could be the only controlling principle. Where a person is economically bound not only to the state of his or her residence, but also to another state through business activities or by way of income arising in the other state. Schanz deems the allegiance to this other state, the source state, to be more important than that to the state of residence."

518 www.businessdictionary/definition/international-taxation.htm (accessed 18th September 2017).

519 D.Pinto., **E-Commerce and Source Based Income Taxation**, Doctoral Series, Academic Council, IBFD, Netherlands, 2002, p.48.

520 Ibid., p.49.

The economist reasoned that in order to determine which countries have a right to tax income; it was first necessary to ascertain the countries in which a person economic interests are to be found. Mitchell B. Carroll notes that in determining where a person economic interest lay, the following four questions should be posed:-

- (a) Where is the yield physically or economically produced?
- (b) Where are the final results of the process as a complete production of wealth actually to be found?
- (c) Where the rights to the handing over these results can be enforced?
- (d) Where is the wealth spent or consumed or otherwise disposed of?

Generally, from historical perspectives, source has been defined by reference to the concept of economic allegiance, which turns on income economic location or the place where the income is produced. In modern taxation, the meaning of concept of source can be determined through the combination of domestic laws and treaty laws ie bilateral treaties, multilateral treaties and multilateral agreements.⁵²¹ This implies that the definition of source may be found in country domestic laws, which normally includes a country domestic tax legislation, case law and taxation rulings issued by taxation administration. While some common elements in defining source can be found in domestic laws of various countries, great variances are also evident among domestic laws reflecting in part the diversity of tax systems around the world.⁵²²

(b) Concept of Residence

Residence is almost invariably central concept in the international tax rules of the domestic tax law of a country, with residents taxed on their worldwide income.⁵²³ The basic idea behind residence concept is that a person is a resident of a country if the person has close economic and personal ties to the country.⁵²⁴ It is possible for a person to be a resident of more than one country because of great diversity of tax systems around the world and also the principles governing determination of residence of a person. In Tanzanian tax system there are various principles governing residence of individuals, corporations, trust and also partnership.⁵²⁵

521 Ibid., p.53.

522 Section 6 and 66 of the Income Tax Act, Cap 332 of 2004 as amended. In Tanzania non-residents are taxed to the extent that their source of income is in the United Republic of Tanzania (Source principle/territorial principle).

523 V. Thuronyi (ed.), *Tax Law Design and Drafting*, Volume 2, IMF, Washington, 1998 p.729.

524 Ibid., p.729.

525 Section 66 of the Income Tax Act, 2004.

Section 6(1)(a) of the Income Tax Act, 2004 provides that the chargeable income of a person for a year of income from any employment, business or investment shall be in the case of a resident person, the person's income from employment, business or investment for the year of income irrespective of the source of the income. This implies that a person is taxed basing on residence principle or worldwide system of taxation i.e taxing a person irrespective of the source of the income (taxing both foreign income and local income).

11.3 Meaning of Double Taxation

Refers to the situation whereby income taxes are charged or levied twice on the same source of earned income.⁵²⁶ This problem may occur at domestic or international level whereby the same income is taxed twice in two different countries.

11.4 Forms of Double Taxation

There are two main forms of double taxation:-

11.4.1 Juridical Double Taxation

This refers to cases whereby the same income is being taxed twice in the hands of the same taxpayer.⁵²⁷ For example, the dividend is being taxed in the country of source by a way of withholding tax and then one more time in the country of residence of the shareholder by a way of tax assessment.

11.4.2 Economic Double Taxation

Refers to the situation where by the income is taxed in the hands of different persons.⁵²⁸ A good example is the taxation of income generated through a company or similar business vehicle regarded as taxable person. If the taxation follows the classical system which represents a straightforward form of economic double taxation, the income will be taxed first in the hands of the entity (corporate taxation) and then additionally in the hands of the owner (shareholder)(dividend taxation).⁵²⁹

11.5 Causes of Double Taxation

The following are the causes of double taxation:-

(a) Concurrent Application of Residence and Source Based Principle⁵³⁰

Most countries exercise both their jurisdiction to tax residents on worldwide income and their jurisdiction to tax non residents in respect of local source

526 M.Rasmussen., **International Double Taxation**, Wolter Kluwer Law International, Netherlands, 2011, p.1.

527 Ibid., p.1.

528 J.Barenfeld., **Taxation of Cross-Border Partnerships: Double Taxation Hybrid and Reserve Hybrid Situations**, Doctoral Series, Academic Council, IBFD, Netherlands, 2005 p.86.

529 Ibid., p.86.

530 R.Doernberg et al., **Electronic Commerce and Multijurisdictional Taxation**, Kluwer Law International, London, 2001, p.85.

income, as a result, a resident of one state who receives income from a source in another country will often be subject to tax in respect of the earned income (this is double taxation).⁵³¹

(b) Dual Residence (Residence-Residence Conflict)

This occurs when a taxpayer is deemed as a resident of more than one nation and each asserts the right to tax on the income or person basing on residence basis.⁵³² Residence of a corporation can be determined also basing on registration or incorporation in one state, while in another state residence of the corporation is determined basing on the management and control of the affairs of the corporation. If this situation happens, one country may impose tax on a corporation basing on issue of incorporation (residence basis) whereas another country impose tax on the same corporation basing on management and control of the affairs of the corporation (residence principle),⁵³³ hence double taxation.

(c) Source-Source Conflict⁵³⁴

This happens due to different interpretation given by states in determining source principle to tax the same earned income of the person. For example if sale is done in state A by a non-resident corporation and transfer of possession of goods sold takes place in state B. Both states have taxing rights over the income of a non-resident corporation involved in this transaction basing on source principle as defined in their domestic laws.⁵³⁵ The conflict in application of source principles causes double taxation.

11.6 Elimination of Double Taxation

Double taxation can be eliminated using the following methods⁵³⁶:-

(a) Exemption Method⁵³⁷

This is one of the methods used to eliminate double taxation whereby the residence state by way of a treaty or provisions in domestic law does not tax the income which has been already taxed by the state of source. The exemption in domestic laws may be given even without reference to other states laws.

⁵³¹ Sections 6 and 66 of the Income Tax Act, 2004 as amended.

⁵³² S.Basu., *Global Perspectives on E-Commerce Taxation Law*, Ashgate Publishing Limited, England, 2007, p.42.

⁵³³ Section 66(4) of the Income Tax Act, also make reference to the case of African Barrick Gold Mine Plc versus Commissioner General, Tax Appeal No.16 of 2015 (TRAT).

⁵³⁴ K.Holmes., *International Tax Policy and Double Tax Treaties: An Introduction to Principles and Application*, IBFD, Netherlands, 2007, p.23.

⁵³⁵ Sections 67 and 69 of the Income Tax Act, 2004.

⁵³⁶ S.Kamal., *Individual Tax Residence*, Sweet and Maxwell, London, 2011, p.233.

⁵³⁷ Article 23A of the Articles of the Model Convention with Respect to Taxes on income and on Capital, 2014 (update).

Article 23 of UN Model Law 2011 provides that under the principle of exemption, the State of residence R does not tax the income which according to the Convention may be taxed in State E or S (nor, of course, also income which shall be taxable only in State E or S).

The principle of exemption can be categorised into two main methods:

(i) Full Exemption

The income which may be taxed in State E or S is not taken into account at all by State R for the purposes of its tax; State R is not entitled to take the income so exempted into consideration when determining the tax to be imposed on the rest of the income.

(ii) Exemption with Progression

The income which may be taxed in State E or S is not taxed by State R, but State R retains the right to take that income into consideration when determining the tax to be imposed on the rest of the income.

In Tanzania section 10 read together with the second schedule to the Income Tax Act, 2004 as amended by Section 26 of the Written Laws (Miscellaneous Amendments) Act, Act No. 2 of 2017 provides that no exemption shall be provided from tax imposed by the law and no agreement shall be concluded that affects or purports to affect the application of the Income Tax Act, 2004 except as provided by the provisions of the income Tax Act; By an agreement on strategic project and on public interest as may be approved by the cabinet. The second schedule provides the list of items which are exempted from taxation.

Tanzania has entered into various bilateral tax agreements,⁵³⁸ which among other things provides for ways of eliminating double taxation. The tax agreements includes:-

- (i) Canada-Tanzania Income and Capital Tax Treaty (1995)
- (ii) Denmark-Tanzania Income and Capital Tax Treaty (1976)
- (iii) Finland-Tanzania Income and Capital Tax Treaty (1976)
- (iv) India-Tanzania Income Tax Treaty (1979)
- (v) Italy-Tanzania Income Tax Treaty (1973)
- (v) Norway-Tanzania Income and Capital Tax Treaty (1976)

538 Section 143 of the Income Tax Act, 2004 as amended.

- (vi) South Africa-Tanzania Income Tax Treaty(2005)
- (vii) Sweden-Tanzania Income and Capital Tax Treaty(1976)
- (viii) Switzerland-Tanzania Income Tax Treaty(1963)
- (ix) Tanzania-Zambia Income Tax Treaty(1968)

(b) Tax Credit Method⁵³⁹

This is a method whereby the state of residence calculates its tax on the basis of the taxpayer's total income including the income from the state of source which according to the relevant treaty or domestic law, may be taxed by the state of source (but not including income which shall be taxable only to the state of source). It then allows a deduction from its own tax for the tax paid to the state of source.⁵⁴⁰

There are two ways which the credit method could be applied⁵⁴¹:-

(i) Full Credit⁵⁴²

The state of residence allows the deduction of the total amount of tax paid in the other state of income which may be taxed in that state.

(ii) Ordinary Credit⁵⁴³

The deduction given by the state of residence is restricted to such part of its own tax which is levied on the same income which may be taxed in the other state.

Generally, the difference between the two methods is that the exemption method looks at income, while the credit methods look at tax.

11.7 Objectives of Tax Treaties

The general objectives of tax treaties are as follows⁵⁴⁴:-

- (a) Protection of taxpayers against double taxation with a view of improving the flow of international trade and investment and the transfer of technology.

539 Article 23B of the Articles of the Model Convention with Respect to Taxes on income and on Capital, 2014(update).

540 Section 77 of the Income Tax Act, 2004 as amended provides for foreign tax relief.

541 Kamal, op.cit.,p.234.

542 See Article 23 of the United Nations Model Double Taxation Convention between Developed and Developing Countries 2011.

543 See Article 23 of the United Nations Model Double Taxation Convention between Developed and Developing Countries 2011.

544 The United Nations Model Double Taxation Convention between Developed and Developing Countries 2011.

- (b) They also aim to prevent certain types of discrimination as between foreign investors and local taxpayers.
- (c) To provide a reasonable element of legal and fiscal certainty as a framework within which international operations can confidently be carried on.
- (d) To improve cooperation between taxing authorities in carrying out their functions, including by the exchange of information with a view to preventing avoidance or evasion of taxes and by assistance in the collection of taxes.

11.8 Tax Model Laws

The tax model laws which are commonly known and applied by different nations when concluding treaties and enacting or amending their domestic laws are UN Model law and OECD Model law. These Models, particularly the United Nations Model Convention and the OECD Model Tax Convention on Income and on Capital (the OECD Model Convention) have had a profound influence on international treaty practice, and have significant common provisions. The similarities between these two leading Models reflect the importance of achieving consistency where possible. On the other hand, the important areas of divergence exemplify, and allow a close focus upon, some key differences in approach or emphasis as exemplified in country practice. Such differences relate, in particular, to the issue of how far one country or the other should forego, under a bilateral tax treaty, taxing rights which would be available to it under domestic law, with a view to avoiding double taxation and encouraging investment.

(a) The Articles of the Model Convention with Respect to Taxes on Income and on Capital, 2014 (Version)

The Organization for European Economic Cooperation (OEEC) was established in 1948 to run the US-financed Marshall Plan for reconstruction of a continent ravaged by war. By making individual governments recognize the interdependence of their economies, it paved the way for a new era of cooperation that was to change the face of Europe. Encouraged by its success and the prospect of carrying its work forward on a global stage, Canada and the US joined OEEC members in signing the new OECD Convention on 14 December 1960. The Organization for Economic Co-operation and Development (OECD) was officially born on 30 September 1961, when the Convention entered into force. Other countries joined in, starting with Japan in 1964. The US has seen its national wealth almost triple in the five decades since the OECD was created, calculated in terms of gross domestic product per head of population. Other OECD countries have seen similar, and in some cases even more spectacular, progress. The OECD brings around its table 39 countries that account for 80% of world trade and investment, giving it a pivotal role in addressing the challenges facing the world economy.⁵⁴⁵

545 www.oecd.org(accessed on 20th September 2017).

OECD Among other things adopted a convention which guides the members when concluding tax treaties. The Convention shall apply to taxes on income and on capital imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied. The convention provides that there shall be taxes on income and on capital imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation. The Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their taxation laws.

(b) The United Nations Model Double Taxation Convention between Developed and Developing Countries 2011

The United Nations Model Double Taxation Convention between Developed and Developing Countries (the United Nations Model Convention) forms part of the continuing international efforts aimed at eliminating double taxation. These efforts were begun by the League of Nations and pursued in the Organization for European Economic Co-operation (OEEC) (now known as the Organization for Economic Co-operation and Development (OECD)) and in regional forums, as well as in the United Nations, and have in general found concrete expression in a series of model or draft model bilateral tax conventions.

The United Nations Model Convention generally favors retention of greater so called "source country" taxing rights of the host country of investment as compared to those of the "residence country" of the investor. This has long been regarded as an issue of special significance to developing countries, although it is a position that some developed countries also seeks in their bilateral treaties.

The United Nations Model Convention represents a compromise between the source principle and the residence principle, although as noted it gives more weight to the source principle than does the OECD Model Convention. The United Nations Model Convention is not intended to be prescriptive, but to equip decision-makers in countries with the information they need to understand the consequences of these differing approaches for their country's specific situation. The provisions of the Model Convention are not themselves enforceable and are not binding. The Convention is intended to facilitate the negotiation, interpretation and practical application of bilateral tax treaties based upon its provisions.

Articles of the Convention are based on recognition by the source country that:-

- (a) Taxation of income from foreign capital should take into account expenses allocable to the earnings of the income so that such income is taxed on a net basis.
- (b) Taxation should not be so high as to discourage investment.
- (c) Taxation should take into account the appropriateness of the sharing of revenue with the country providing the capital.
- (d) It would be appropriate for the residence country to extend a measure of relief from double taxation through either a foreign tax credit or an exemption, as is also the case with the OECD Model Convention.

In drawing upon the United Nations Model Convention for guidance, a country should bear in mind the important relationship between treaties and domestic law, the nature of which may vary from country to country. In general, the provisions of tax treaties prevail over the provisions of domestic law in the event of a conflict between those provisions. More specifically, tax treaties establish which Contracting State shall have jurisdiction to tax a given item of income or capital and under what conditions and subject to which limitations it may do so. Consequently, countries wishing to enter into bilateral tax treaty negotiations should analyze carefully the applicable provisions of their domestic tax laws in order to assess the implications of applying the treaty. They should also discuss the relevant domestic laws of potential treaty partners, as part of the preparation for and negotiation of a treaty.

Generally, domestic tax laws in their turn exert a substantial influence on the content of bilateral tax treaties. They are an important reason for many of the differences between treaties, as countries seek to preserve domestic taxing rights in their treaty networks. Such domestic laws, and the treaty practice reflecting them, form the basis for the policy positions found in the various Models. Conversely, if countries do not exert certain taxing rights in domestic law, and see no likelihood of that changing, they generally do not seek to retain the ability to exert that taxing right under their treaties. Should their policy change, the domestic law may later be introduced to exert the domestic taxing right, but it would only operate to the extent that it was consistent with the treaty relationships.