IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KWARIKO J.A., KEREFU, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 370 OF 2021

COMMISSIONER GENERAL (TRA).....APPELLANT

VERSUS

CRJE ESTATE LIMITED.....RESPONDENT

(Appeal from the decision of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Mjemmas, Chairperson:)

dated the 7th day of September, 2021
in
Tax Appeal No. 67 of 2019

.....

JUDGMENT OF THE COURT

30th September, & 7th October, 2022

MAIGE, J.A.:

The respondent, CRJE Estate Limited, a construction company duly incorporated under the laws of Tanzania, entered into an agreement, in 2008 with Mwalimu Nyerere Foundation for construction of a commercial building in Dar es Salaam. It is common ground that, the project, the subject of the dispute, was registered with the Tanzania Investment Centre (TIC) in December, 2008 and a certificate of incentive under section 17 of the Tanzania Investment Act [Cap. 38 R.E. 2019], (the TIA) was granted to the respondent in January 2009 and which was subsequently, extended as per exhibits A4 and A7, to November, 2018.

In carrying out the project, the respondent imported various deemed capital goods unto which the appellant approved 100% import duty exemption pursuant to the respective certificate. Of significance to note is the fact that; until 2009 when the certificate of incentive in exhibit A3 was being issued, the law in terms of section 19 (1) of the TIA read together with section 4(4) (a) of Customs Tariff Act, 1976 (CTA) provided for zero import duty for deemed capital goods in respect of an investor with a certificate of incentive. Besides, under section 19(2) of the TIA, the benefits attached with the certificate could neither be amended nor modified during the five years period of the certificate. In 2012, section 19 of the TIA was amended by the Finance Act No. 8 of 2012 to the effect of introducing the provision of subsection (4) which restricted the import duty exemption granted to deemed capital goods to 90%. Again, the same provision was further amended by Finance Act No. 4 of 2013, so that the exemption granted to an investor holding a certificate of incentive in respect of deemed capital goods was restricted to 75%.

In 2017, having procured the extension of the certificate as per exhibit A7, the respondent wrote to the TIC on the status of the

exemption after the amendment. The latter officially informed the former as per exhibit A8 that, the amendment did not affect the investors who were already implementing their projects. On further inquiry to the appellant, the respondent was informed that under the amendment brought by Finance Act of 2013, the respondent was obliged to pay 25% import duty. As a result, the appellant served the respondent a demand notice in exhibit A10 for payment of TZS 2,268,636,778.63. The appellant maintained the same position notwithstanding the respondent's application for review. Being aggrieved, the respondent appealed to the Tax Revenue Appeals Board (the Board). The Board having heard the appeal and considered the provision of section 19(2) of the TIA in line with the amendment, was of the opinion that, the amendment in question did not affect the benefits created before its coming into forth. In particular, it observed as follows:

> " *Thus, as no amendments either through legislative enactment or otherwise made within five years from the date of issuance of the certificate of incentives could affect the benefits granted to the appellant (the investor), then we are satisfied that , the amendment of section 19(2) of the Tanzania Investment Act, 1997 as introduced by the Finance Act 2013 does not apply*

to the project that was registered on 8th January, 2009."

The appellant was not pleased with that decision. She thus appealed, to the Tax Revenue Appeals Tribunal (the Tribunal), raising in essence three complaints. **One**, the Board was wrong in holding that the respondent's tax benefits under the certificate of incentive in question were not affected by the amendment of the law. **Two**, the Board was wrong in holding that the respondent was entitled to the respective benefits under the TIA and the CTA without due regard that, the latter phased out of existence in 2004 when the East African Community Customs Management Act, 2004 (EACCMA) became operational in Tanzania. **Three**, the Board was wrong in not taking into account that, the benefits under section 19(1) of the TIA was meant for strategic and major investors as per section 20 of the same Act. In its well -reasoned decision, the Tribunal dismissed the appeal and upheld the decision of the Board.

On the first complaint, the Tribunal upheld the decision of the Board on three grounds. **First**, the certificate of incentive issued to the respondent constituted an agreement between the respondent and the Government which could not, in terms of section 19(2) of the TIA, be

amended or modified during its five years at the detriment of the investor. **Second**, the changes brought by the Finance Act, 2013 could not operate retrospectively as to take away the benefits that the respondent was already enjoying. **Three**, the certificate could not be affected by the changes which introduced the concept of strategic and major investors because the intention of the amendment was merely to provide for additional benefits. On the second complaint, the Tribunal having held as a fact that, the provisions of EACCMA was binding and was to take precedence over the domestic laws, was of the view that, its existence did not render the provisions of CTA which has been consolidated with Customs (Management and Tariff) Act, [Cap. 203 R.E. 2019], (CMTA), non- existent. If we can quote, the Tribunal observed as follows:

> "*We have read and re-read the above quoted provisions of the law and we entirely agree with the submission of the appellant's counsel that following Tanzania's membership in the East African Community, it is mandatory to apply the East African Community Customs Management Act, 2004 in all importation of goods and where there is an inconsistency it is the said Act which shall take precedence. We however, wish to insist that the*

precedence of the said Act is only on matters to which its provisions relate".

Having observed as above, the Tribunal further stated that:

> "*As correctly submitted by the respondent's counsel the EACCMA, 2004 does not have or contain provisions relating to exemptions granted to capital goods or deemed capital goods and even the learned counsel for the appellant did not refer us to any such provisions. It follows that the provisions relating to exemptions granted to capital goods or deemed capital goods are contained in the Partner State's respective custom laws which did not cease to exist when the EACCMA, 2004 came into force*".

On the third complaint, the Tribunal reiterated its resolution of the first complaint and added:

> "*As correctly opined by Mr. Gonzi, Member of the Tribunal, that each certificate of incentive is a separate agreement between the investor and the government and it has its own terms and conditions as well as privileges granted to the investor or the given project for the given time. Further that the certificate of incentive issued under the law must be protected by the law and if subsequent laws have added more benefits to strategic and major investments (investors) holding certificate of incentives, that would not operate*

retrospectively to deprive the rights and privileges legally acquired and enjoyed prior to the laws being passed."

The appellant, still unhappy with the concurrent decision of the Board and the Tribunal lodged the instant appeal. In the memorandum of appeal, the appellant criticized the decision of the Tribunal on seven grounds. However, at the hearing, the appellant abandoned the third, sixth and seventh grounds and as a result, the appeal is now founded on the following grounds:

1. *The Tax Revenue Appeals Tribunal erred in law in holding that the amendments of section 19(4) of the Tanzania Investment Act by the Finance Act, 2013 could not apply to the respondent who was a holder of a Certificate of Incentive issued by the Tanzania Investment Centre on 8th January, 2009 in contravention of section 19(4) of the Tanzania Investment Act (Cap. 38) (as amended by the Finance Act, 2013.*

2. *The Tax Revenue Appeals Tribunal erred in law and fact in holding that each Certificate of Incentive is a separate agreement between the investor and the Government and it has its own terms and conditions as well as privileges granted to the investor of the given project for the given time, in contravention and disregard of section 19(1) and 19 (4) of the Tanzania Investment Act (Cap.38) as well as Clause B. 12 (1) of the Public Standing Orders, 2009 in which it is required that,*

all Government Contracts should be scrutinized and drafted by the Attorney General's Office.

3. *The Tax Revenue Appeals Tribunal erred in law and fact in holding that the respondent is entitled to 100% import duty exemption under the Customs Tariff Act, 1976 in total reliance of the certificate of incentive granted to the respondent in 2009, thus contravening article 39 (2) of the East Africa Community Customs Union Protocol, 2004 and section 253 of the East African Community Customs Management Act, 2004 which requires Tanzania to apply the East African Community Customs Management Act, 2004 in all customs matters.*

4. *The Tax Revenue Appeals Tribunal erred in law and fact in holding that the appellant has no power to take away the benefits granted to the respondent under the Tanzania Investment Act, 1977 and the Customs Tariffs Act, 1976 and thereafter proceeding to grant the respondent with the benefits granted to Strategic and Major Investors while the respondent is neither of the two, contrary to section 19(2) and 19(4) of the Tanzania Investment Act.*

At the hearing of the appeal, the appellant was represented by Mr. Moses Kinabo, learned Principal State Attorney whereas the respondent was represented by Dr. Erasmo Nyika and Ms. Hadija Kinyaka, both learned advocates. Unlike the respondent, the appellant did not file any written submissions as he opted to address the Court in terms of rule

106(10) (b) of the Tanzania Court of Appeal Rules, 2009. In his oral submissions, Mr. Kinabo reduced the grounds of appeal into two issues and submitted accordingly. The first issue is whether the amendment brought by the Finance Act, 2013 applied to the tax demand in question and second is whether the TIC in granting the certificate acted for and on behalf of the Government. For the respondent, Ms. Kinyaka who made the oral submissions adopted the written submissions and briefly addressed the two issues. We commend the counsel for their brilliant submissions which have been very instrumental in composition of this judgment. Having so remarked, we shall hereunder direct our mind to the two issues raised, starting, for obvious reasons, with the second issue.

Addressing the second issue, Mr. Kinabo started by criticizing the Tribunal in holding that, a certificate of incentive is an agreement while in law such a document constitutes a mere evidence of illegibility of an investor to enjoy tax exemptions. In the alternative, it was his contention that, if at all, a certificate of incentive under discussion was an agreement as observed by the Tribunal, yet it would be invalid and ineffectual for want of involvement of the Attorney General as per the provisions of clause B-12 (1) of the Public Service Standing Orders, 2009

which requires all agreements involving the Government to be scrutinized and drafted by the Attorney General. In addition, it was his argument that, since Tanzania is governed by the rule of law, the agreement in the certificate of incentive, in so far as it was violative of the amendment brought by the Finance Act, 2013, was void. The counsel finally urged us to answer the issue negatively.

Submitting in rebuttal on the issue, Ms. Kinyaka who made the submissions for the respondent supported the decision of the Tribunal that a certificate of incentive is an agreement between the Government and the investor. She substantiated her argument with section 17 (7) of the TIA and the principle in **Vodacom Tanzania Public Limited Company vs. Commissioner General, TRA**, Civil Appeal No. 107 of 2020 (unreported). She did not agree with the appellant's submissions that, the Attorney General was not involved because under section 5(2) (c) of the TIA, the Attorney General is a part of the TIC. In any event, she submitted, a certificate of incentive being conclusive evidence of validity of its contents, it was upon the appellant to adduce evidence in proof of non- involvement of the Attorney General.

In rejoinder, Mr. Kinabo maintained the same position that a certificate of incentive is not an agreement. He urged the Court not to rely on the **Vodacom** case (supra), because the issue therein, unlike in the instant one, pertained to Income Tax Act.

We have tentatively followed the counsel's submissions on the issue. It raises two questions. **First**, whether a certificate of incentive is an agreement between the Government and an investor. **Second**, whether the Attorney General was consulted before issuance of the certificate. The first question should not detain us because it was conclusively addressed in the **Vodacom** case (supra) where, it was observed:

> *"In the same vein, the issuance of new certificates, that is certificate No. 110016/01 dated 14/3/2005 and No. 110016/01 dated 14/3/2006 by the TIC in our settled opinion, constituted a new agreement under the provisions of the above subsection of the 2004 Act. Therefore, as rightly held by the Tribunal, the certificates were clearly in respect of a new investment, separate from the initial one under which the first sets of certificate were issued. Thus, with the issuance of new certificates by the TIC under section 17(1) of the TIA and section 143 (4) of the 2004 Act, the parties (Appellant and Respondent) had entered*

into a new agreement concluded in the pendency of the 2004 Act."

Much as it is true, as Mr. Kinabo submitted that, the benefits involved in the said authority were in respect of deduction of expenditure under the Income Tax Act, 2004, while the one at issue is exemption of import duty in respect of deemed capital goods under CTA, we are of the view that, in as long as it deals with a certificate of incentive under section 17 of the TIA, the authority is relevant in the instant case. Therefore, just like the Tribunal, we hold that, the certificate of incentive in dispute constituted an agreement between the Government and the respondent as an investor.

Whether the Attorney General was involved in making of the certificate in question, we agree with Ms. Kinyaka, is a new factual issue which is coming for the first time in this appeal and, therefore, does not qualify as a ground of appeal to the Court. This is in accordance with Section 25(2) of the Tax Revenue Appeals Act which requires appeals to the Court in tax matters to be confined to legal points only. In any event, the TIC being a statutory institution owned by the Government, whether the requirement under the Public Service Standing Orders was complied with or not, is an administrative and management affairs within

the Government which would perhaps fall under the domain of administrative law. It cannot, as rightly contended for the respondent, be resolved by having a look at the certificate itself in isolation of other relevant information within the knowledge of the appellant and the TIC itself. We shall therefore, not take the said complaint into our account. As a result, we answer the second issue against the appellant.

We now turn to the first issue as to the applicability of the amendment brought by the Finance Act, 2013 in the respondent's importation of deemed capital goods between 2014 and 2018 as per the appellant's demand notice in exhibit A10. In determining the issue, Mr. Kinabo has invited us to apply a strict rule of statutory interpretation. He has placed reliance on our authority in **Pan African Energy Tanzania Limited vs. Commissioner General TRA**, Civil Appeal No. 426 of 2020 (unreported). The principle in question and its relevancy in the instant case, it would appear to us, have not been doubted by the counsel for the respondent both in their written submissions and oral arguments. We shall thus be guided by the said principle in our resolution of this particular issue wherever appropriate.

The submissions of Mr. Kinabo on the issue was brief but precise. It was to the effect that; since the tax in dispute was in respect of the

goods imported between 2016 and 2018 when the amendment law was already in force, the appellant was not only entitled but obliged to collect the respective import duties in accordance with the amended law. In that regard, the counsel strongly contended that, the issue of the said law being applied retrospectively does not arise as it is express in the Finance Act, 2013 that, the same was operational as of 31st July, 2013. In the same spirit, he submitted that, the five years protection in the old law, cannot apply because they were intended for strategic and major investors under section 20 of the TIA. In any event, he submitted, the CTA under which the exemption was granted, had ceased to apply in Tanzania on 2nd March, 2004 when the country signed the Protocol on the Establishment of the East African Customs Union, 2004 (the Protocol).

To the contrary, Ms. Kinyaka was of the contention that section 19(4) as amended by the Finance Act, 2013 did not apply to the certificates of incentive issued before the operational date on 1st July, 2013, since under section 19(2) of the TIA, the benefits granted to the investor under the respective certificate could not be taken away by legislative changes. She relied on the interpretation of the said provision by the Tribunal in the case of **Commissioner General, TRA vs.**

Vodacom Tanzania Limited, Civil Appeal No. 17 of 2010 where it was held as follows:

> *"We agree entirely with these propositions. The Appellant had no power to take away the benefits granted to an investor under section 19(1) of the TIA. Indeed even a legislative amendment cannot do so."*

In rejoinder, Mr. Kinabo submitted that, the amendment protected under section 19 (2) is in respect of a certificate itself and not the tax benefits. The issue of retrospective effect of the amendment, he submitted, is irrelevant because the tax demand was in respect of importation made after the amendment. As the amendment was in force when the importation was being made, he added, the application of the amendment law was not a matter of discretion.

We agree in the first place that, under section 19(2) of the TIA, the benefits granted in a certificate of incentive to an investor can neither be amended nor modified during five years of the certificate at the detriment of the investor. The rationale behind is express in the provision. It is "to create predictable investment climate" which is necessary in promoting capital investment.

From the record, there appears to be three certificates of incentive in this case. The first certificate was granted on 8th January, 2009 (exhibit A3). The second one was granted on 13th March, 2013 (exhibit A4) whereas the last one was issued in September, 2016 (exhibit A7). The submissions by Ms. Kinyaka on this issue is that, the three certificates in law constitute one certificate. To her, the certificates in exhibits A4 and A7 constituted mere extension of the project in exhibit A3. This is why, she submitted, the period of implementation of the project in all the three certificates is dated way back in 2008 when the project was registered. This, she clarified, is implied by the fact that, the two subsequent certificates bear the same registration number with the original certificate in exhibit A3. She thus urged us to take it that, the certificate of incentive in question has been in existence since 2009 and, therefore, the appellant was already enjoying its benefits, when the new law was being enacted.

We have considered the rival submissions very carefully in line with the law. The issue, in our view, revolve around the benefits an investor enjoys under section 19(1) of the TIA and its protection under section 19(2) of the same law. The two provisions under which the two rights are provided for, had kept the same wordings notwithstanding the 2012

and 2013 amendments. They are reproduced hereunder for easy of reference:

> *"19(1) A business enterprise in respect of which a certificate is granted under this Act shall be entitled to the benefits which are applicable to that enterprise under the provisions of the Income Tax Act, the Customs Tariffs Act, the Valued Added Tax Act, or of any other written law for the time being in force".*
>
> *(2) For the purpose of creating a predictable investment climate, an investor to whom a Certificate has been issued shall be entitled to the benefits referred to under subsection (1) and such benefits shall not, during the period of five years from the date of issuance of such Certificate be amended or modified to the detriment of the investor".*

In 2012 and 2013 amendments, it is undeniable, the benefits under subsection (1) was amended, by the new provisions of subsection (4), by restricting the exemptions for import duties in deemed capital goods to 90% in the 2012 amendment and 75% in the 2013 amendment. That is where the dispute lies. The protection under subsection (2) was not expressly altered by the 2013 amendment. Mr. Kinabo contents that, the said provision has implicitly been affected in that; the benefits and protection therein are only available to strategic

and major investors under section 20 of the TIA. With all respects to the learned counsel, we have repeatedly examined the two amendments and we could not find any provision through which we could imply discriminatory application of the benefits between strategic and major investors on the one hand and ordinary investors with certificates of incentive on the other. We, therefore, share the same view with the Tribunal that, the benefits introduced under section 20 of the TIA for strategic and major investors were, until 2013, merely additional and not derogatory to those created under section 19(1) and (2) of the TIA.

Parties appear to have a common understanding as to when the 2013 amended law came into operation. They both agree that, it was on 1st July, 2013. Equally so, they are not, at least, at this particular juncture, in dispute that, a law affecting substantive rights like this, does not operate retrospectively unless it is express in the amendment law, which is not. This is in line with the authority in **Municipality of Mombasa vs. Nyali Ltd** (1963) E.A. 371 which was referred in **Bidco Oil and Soap Ltd vs. Commissioner General**, Tanzania Revenue Authority, Civil Appeal No. 89 of 2009 (unreported), where it was observed:

"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it would not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary".

We are, therefore, of the considered opinion that, the amendment brought by the Finance Act, 2013 did not operate retrospectively as to affect the respondent's prior benefits under section 19(1) as protected under section 19(2) both of the TIA. The Tribunal was, thus, quite right in holding that, the benefits attached with the respondent's certificate of incentive could neither be amended nor modified during the five years period of the certificate.

The obvious question that follows and onto which the parties are contentious is when do we count the five years protection period from. The discussion here involves, in our view, the question of whether the certificates in exhibit A4 and A7 constituted an integral part of the

certificate in exhibit A3 or each of them constituted a separate and different agreement. Admittedly, there is no clear expression in the TIA as to the status of the original certificate and what the respondent calls extended certificates. Ms. Kinyaka has urged us to have a look at the provisions of section 17(2) of the TIA. Our reading of the provisions does not resolve the question however. For, section 17 (2), (3) and (4) speaks of three kinds of investments for which a certificate of incentive can be sought namely; new investment, rehabilitation or expansion of an existing investment and equity investment.

Perhaps, an extension of the implementation period of a certificate of incentive would fall under amendment and/ or modification of a certificate by the TIC under section 17(12) of the TIA which provides as follows:

> *"(12) Where the Centre is satisfied that a change or variation has occurred as provided in subsection (8) in respect of a certificate issued under this Act, the Centre shall amend the certificate to take into account the change or variation."*

In light of the above provision, we would agree with Ms. Kinyaka that, the certificates in exhibits A4 and A7 amended the initial certificate in exhibit A3 with the effect of extending the implementation period of

the project to November, 2018. In **Vodacom Tanzania Public Limited Public Limited Company** (supra), we distinguished between an expansion and extension of the project in relation to a certificate. In a former situation, we remarked, a new and separate contract is created while in the latter the same certificate remains. In particular, we stated as follows:

> *"Regarding the above position, in our opinion, the Tribunal rightly determined the application of the Certificate of Incentives granted to the appellant under section 17(1) of TIA as an extension of 2000 agreement while others created a new agreement entered in 2005. Certificate No. 110016/01 dated 14/3/2005 and No. 110016/01 dated 14/3/2006 were in relation to incentives under the 2004 Act. Therefore, Certificate of Incentive issued in 2005 was a new certificate and not an extension of the previous ones as contended by the appellant. This is evidenced by the wording of the certificate itself as it uses the word "expansion" and not "extension" as it appears in the previous certificates. This position is supported by the provision of section 3 of the TIA which defines investment to mean and include "the expansion, restructuring or rehabilitation of an existing enterprise".*

Applying the above principle in the instant case, we hold that, since the certificate of incentive in exhibit A4 which was issued in March, 2013 extending the implementation of the project in exhibit A3, preceded the Finance Act, 2013 which came into force in July, 2013, the said amendment did not operate retrospectively as to affect the benefits attached to the said certificate under section 17(1) of the TIA. Neither did the Finance Act, 2012 do to the original certificate of incentive in exhibit A3. As the five years period protected under section 17(2) of the TIA was still intact when the importation under discussion took place, the respondent, as rightly advised by the TIC in exhibit A8, was entitled to 100% exemption under the old law as concurrently held by the Board and the Tribunal.

There was also a submission that, the CTA under which the relevant tax benefits were applicable, had ceased to apply from March, 2004 when Tanzania signed the Protocol with the effect of binding itself to the provisions of the EACCMA on all issues pertaining to import and export duties. On this, Ms. Kinyaka did not have much to say than, capitalizing to what the Tribunal held. She did so having considered that, the counsel for the respondent has not referred to any provision in the EACCMA providing for import duties on deemed capital goods as it is the

instant case in as much he could not refer to any provision rendering the CTA disapplied. The Tribunal, we have noted, having held that the provisions of the EACCMA is applicable in Tanzania and takes precedence to the extent of the matters its provisions relate observed at page 1582 as follows:

> *"As correctly submitted by the respondent's counsel, the question which arises is whether the EACCMA, 2004 contains provisions relating to exemptions granted to capital goods or deemed capital goods? Again, as correctly submitted by the respondent's counsel, the EACCMA, 2004 does not have or contain provisions relating to exemptions granted to capital goods or deemed capital goods and even the learned counsel for the appellant did not refer us any such provisions. It follows that the provisions relating to exemptions granted to capital goods or deemed capital goods are contained in the Partner States respective customs law which did not cease to exist when the EACCMA, 2004 came into force"*

We have taken time to very carefully examine the relevant provisions of the law. Just as the Tribunal, we are of the position that; as the CTA which has been consolidated with the CMCTA, has never been repealed and because the EACCMA does not have any provision

relating to import duty exemption in respect to deemed capital goods by a holder of a certificate of incentive under the TIA, the certificate of incentive in question was not invalid as alleged by the appellant's counsel.

In the final result and for the foregoing reasons, therefore, this appeal is devoid of any merit. It is accordingly dismissed. We shall not give an order as to costs in the circumstances.

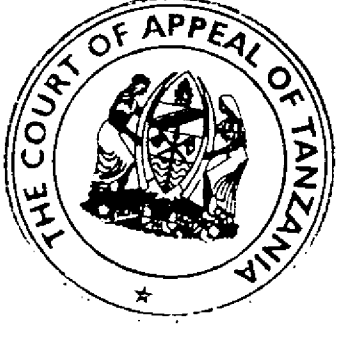
DATED at **DAR ES SALAAM** this 6th day of October, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 7th day of October, 2022 in the presence of Mr. Moses Kinabo, Principle State Attorney, for the appellant and Mr. Yohanes Konda, learned counsel for the respondent, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL