IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KEREFU, J.A, FIKIRINI, J.A. And MASOUD, J.A.)

CIVIL APPEAL NO. 413 OF 2022

DIAMOND TRUST BANK TANZANIA LIMITED..... APPELLANT

VERSUS

COMMISSIONER GENERAL,

TANZANIA REVENUE AUTHORITY (TRA)..... RESPONDENT

(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal, at Dar es Salaam)

(Mjemmas, Chairman.)

dated the 10th day of March, 2022

in

Tax Appeal No. 4 of 2020

.....

JUDGMENT OF THE COURT

24th & 28th February, 2025.

FIKIRINI, J.A,:

At stake in this appeal are the concurrent decisions of the Tax Revenue Appeals Board (the Board) and Tax Appeal Tribunal (the Tribunal) against the appellant, Diamond Trust Bank Tanzania Ltd on taxation on interest in suspense and disallowance of written-off loans. The divergent positions held by the parties triggered this appeal before the Court.

A summary of the facts is necessary to appreciate the genesis of the controversy. The respondent, Commissioner General Tanzania

Revenue Authority (TRA), in 2015 conducted a tax audit on the appellant's company for various tax liabilities, including corporate income tax, value added tax (VAT), withholding tax, employment taxes, excise duty, and stamp duty for the years covering 2012, 2013 and 2014. The respondent issued tax assessments from the audit findings, which the appellant objected to. Despite the correspondences between the parties, the respondent refused to adjust the assessments, and, in 2017, proceeded to issue tax assessments Nos. F421106471 for the year of income 2012 of TZS 15,540,587 and tax to be paid of TZS 4, 662, 176,232; F421106477 for the year of income 2013 of TZS 19, 964, 403, 518 and tax to be paid of TZS 5, 989,321,055; and F421106480 for the year 2014 of TZS 26,197,173,725 and payable tax of TZS 7,859,152. disallowing the loans written off as bad debts and interest in suspense.

Discontent, the appellant appealed to the Tax Revenue Appeals Board (the Board). The appeal was dismissed, concluding that the appellant failed to prove that the loans were absolutely uncollectable, warranting to be written-off as bad debts. This led to the lodgement of an appeal to the Tax Revenue Appeals Tribunal (the Tribunal).

In its decision, the Tribunal was called to determine the following issues:-

1. *Whether the appellant should account for the interest in suspense on an accrual basis under section 21 (3) of the Income Tax Act, 2004 (the ITA, 2004).*
2. *Whether the appellant had properly complied with loan write off regulations before claiming tax deductions.*
3. *Whether the Board of Directors' resolution was required to approve loan write-offs.*
4. *Whether the appellant had taken sufficient recovery measures before classifying the loans as bad debts.*

Before the Tribunal, the appellant argued that the Bank of Tanzania (BOT) Regulation, namely Banking and Financial Institutions (Management of Risk Assets) Regulations, 2008 (the BOT Regulations) allowed the appellant to treat interest in suspense on a cash basis, contrary to the respondent's stance that the interest in suspense must be taxed on an accrual basis and not cash basis as had been considered by the appellant.

While the appellant alleged to have met all the requirements before the said loans were written-off as bad debts, the respondent was not satisfied that was the case. The respondent raised the following issues: (i) that the appellant failed to prove that the written-off loans were collectable as per section 39 (d) of the ITA, (ii) that it was necessary to have a Board of Directors resolution approving the write-

offs, which the appellant deemed not necessary, (iii) that the appellant did not submit adequate evidence to justify loan write-offs for tax deductions, and (iv) that the appellant had to prove that recovery measures were applied. Refuting all these, the appellant contended that the requirement came into effect in 2014 and should not apply retrospectively to tax years 2012 – 2014. The Tribunal dismissed this argument by saying the requirement existed even before 2014.

Based on the parties' submissions, the Tribunal dismissed the appellant's appeal entirely, upholding the Board's decision that the appellant must account for interest in suspense on an accrual basis pursuant to section 21 (3) of the ITA, 2004. The Tribunal went further by saying that the appellant failed to prove, as required by law, that the bad debts claimed were absolutely uncollectable. Similarly, the Tribunal affirmed the respondent's position that the Board of Directors' resolutions were necessary to approve loan write-offs. The appeal was thus dismissed, and the respondent's tax assessment was upheld.

Displeased with the decision, the appellant came to this Court on eight (8) grounds of appeal which are:-

1. *That, the Tribunal erred in law by holding that the interest in suspense recognized by the appellant is not a deductible*

expenditure in terms of section 25 (1) of the Income Tax Act, 2004.

2. *That, the Tribunal erred in law in holding that the appellant did not comply with the standards under regulation 19 of the BOT (Management of risk asset) Regulations before writing off loans as bad debts.*

3. *That, the Tribunal erred in law by failing to consider the provisions of section 39 (d) of the Income Tax Act, before the 2014 amendments and holding that the appellant failed to prove that the loans and advances were absolutely uncollectable for the years of income 2012 – 2014.*
4. *That, the Tribunal erred in law in relying on the* ***National Bank of Commerce's*** *case and rule that the appellant had a duty and onus of proving that the loans advances were absolutely uncollectable per section 18 (2) (b) of the Tax Revenue Appeals Act.*
5. *The Tribunal erred in law in disregarding the ruling in the* ***Osmanabad Jantasal Bank Ltd vs. Department of Income Tax,*** *2012 and conclude that the recognition of interest in suspense in the appellant's books of accounts was an entitlement in terms of section 23(3) of the Income Tax Act, 2004 and hence the amount was required to be subjected to tax.*
6. *The Tribunal erred in law when it relied on the* ***Access Bank's*** *case to conclude that the Bank of Tanzania regulations/laws do not apply when taxing the income of a bank such as the appellant while at the same time making determination of some of the grounds of appeal using the provisions of the same laws.*

7. *The Tribunal erred in law in holding that the issue between the parties was not that steps were taken to recover the loans, but proof that the said steps had failed, and the debt was no longer deductible.*
8. *The Tribunal erred in law in assuming that writing off of the loans from the books of accounts does not mean actual loss since the appellant was still employing recovery measures.*

When this appeal was called on for hearing on the date scheduled, in attendance were Messrs. Wilson Kamugisha Mukebezi and Alan Nlawi Kileo, learned counsel appearing for the appellant, whereas the respondent's team consisted of Misses Juliana Ezekiel, Consolatha Andrew, Gloria Achimpota, all learned Principal State Attorneys and Mr. Victor Joseph Mhana, learned State Attoney.

Getting the ball rolling was Mr. Mukebezi, apart from adopting the written submissions lodged on 8th November, 2022 and list of authorities lodged on 18th February, 2025, he posed two issues he wished to submit on:

1. *Whether the interest in suspense on non-performing loan is deductible or not; and*
2. *Whether the appellant had to prove the write-offs of the bad debts to be eligible for deduction.*

Expounding on the above, Mr. Mukebezi argued that at the time of the controversy, the applicable law was the ITA, 2004. In contrast, the

Tribunal seemed to employ the position after the amendments. Admitting that both the respondent and BOT had stressed the interest in suspense point, the appellant strongly believes that before being subjected to tax in the interest in suspense, the BOT should approve the same. The learned counsel relied on Regulation 30 (2) of the BOT Regulations, which guided that the interest in suspense must be on a cash basis, not an accrual basis, as illustrated by the respondent relying on section 23 (1) of ITA, 2004. The learned counsel also submitted that the appellant complied with both the BOT Regulations and ITA, 2004 provisions, taking refuge on section 25 of ITA, 2004, which provides for reversal of amounts including bad debts.

Challenging the Tribunal findings on that the appellant was only required to prove the interest in suspense cash instead of an accrual basis, was contrary to what section 25 (5) of ITA, 2004 provided which brings the two laws in harmony.

On the second issue, Mr. Mukebezi disputed the Tribunal's findings as indicated on page 943 of the record of appeal that the appellant should have proved that the credit accommodation was considered absolutely uncollectable. His take on this was that it was not a requirement before 2004. Pursuant to section 25 (5) of ITA, 2004, the

requirement of reasonable steps was not in place. This came after the amendments. He underscored that the steps required were not itemized, making it difficult for taxpayers to know what to provide as evidence. Fortifying his submission, he referred to the **Kenya Subsidiary Legislation, 2011: Legal Notice No. 37 The Income Tax Act, Guidelines on allowability of bad debts**.

Before winding up, Mr Mukebezi invited the Court to depart from its previous decisions due to the position taken in **Ophir Tanzania (Block 1) Limited v. Commissioner General, Tanzania Revenue Authority**, **(**Civil Appeal No. 58 of 2020) [2021]TZCA 350 (6th August, 2021; TANZLII), that this Court has no jurisdiction to depart from the decision of the same Court, however erroneous it might be. He urged us to allow the appeal, quash the Tribunal judgment and set aside the orders.

Ms. Andrew, on behalf of the respondent's team, prefaced her reply submissions by first adopting the written submissions filed on 8th December, 2022. She considered the Tribunal decision correct that interest on suspense is not deductable expenditure, in terms of sections 21 (3) and 23 (2) of the ITA, 2004. On the submissions that regulation 30 of the BOT Regulations was an exception, Ms. Andrew disagreed with

the conclusion that it was not. She went on to submit that even the position the appellant took, that requirements to prove were not in existence before 2014, was incorrect. The requirement existed under section 39 (d) of ITA, 2004. Moreover, that was the standard put in place by the BOT Regulations. Buttressing her submissions, she referred us to the case of **KCB Bank Tanzania Limited v. The Commissioner General, Tanzania Revenue Authority**, (Civil Appeal No. 19 of 2018) [2020] TZCA 309 (16th June, 2020; TANZLII), which was before the amendment, and which made it clear that it was necessary to take reasonable steps. Accentuating that, the decision in **Access Bank Tanzania Limited v. Commissioner General, Tanzania Revenue Authority,** (Civil Appeal No. 314 of 2017) [2018] TZCA 385 (30th July, 2018; TANZLII) on page 23 echoed the position when it affirmed that the appellant needed to take reasonable steps. The appellant had failed to do so, as no evidence was submitted proving the alleged bad debts, which would have warranted a deduction in tax.

On the Kenyan Subsidiary legislation, she considered it to be in line with the Tanzanian Income Tax laws, which require reasonable steps. Section 39 (d) of the ITA, 2004, 2004, in her view, was similar to paragraph 2 (f) of the Kenyan Subsidiary legislation, which, in the

present case, the appellant had failed to satisfy the respondent that she had complied, she stressed. She finally prayed for the appeal to be dismissed for lack of merit.

Rejoining, Mr. Mukebezi, invited us to read sections 23 (2) and 25 (5) of ITA, 2004 for more comprehension. On the issue of write-offs, he contended that all the decisions maintained that the requirement on the reasonable steps was after the amendments, and that is why there are different steps considered in each decision. He recommended that all the requirements should be in the law.

He wound up his submission by maintaining that this was the proper forum to consider and depart from the previous decisions.

In determining this appeal, we will consider two main issues: one, whether the interest in suspense on the non-performing loan is deductable or not, and two, whether the appellant had to prove the write-offs of the bad debts to be eligible for deduction. We believe the two will cover all the issues raised in this appeal.

Commencing with the first issue, on taxability of interest in suspense on the non-performing loan, the appellant contends that the Tribunal incorrectly found that the interest in suspense is not deductible

expenditure in terms of section 25 (1) of ITA, 2004, while the respondent considered otherwise.

Interest in suspense is uncollected income already accrued. Under the BOT Regulations, the bank must place such interest in a suspense account for non-performing loans. The respondent treats the said income as taxable since it has been recorded as an entitlement in terms of section 23 (1) of ITA, 2004 of 2004, which provides as follows:-

> *"23. (1) Subject to this Act, a person who accounts for income tax purposes on an accrual basis—*
>
> *(a) derives an amount when it is receivable by the person; and*
>
> *(b) incurs expenditure when it is payable by the person."*

The provision clearly stipulates that income must be accounted for on an accrual basis, meaning once the interest in suspense has been recognized as an entitlement, it is taxable. The appellant was thus required to account for it on an accrual basis, as recoverable entitlement, subject to tax under section 23 (3) of ITA, 2004.

We say so because, whereas the appellant had an option of disowning the entitlement to charge off or write-offs of the interest as bad debt, which in the present appeal is what occurred, based on

approval by the BOT, the approval which the respondent reminded could not go contrary to the requirement of the provisions in the ITA, the later being vested with the statutory authority and power to collect taxes. Since the appellant recognized the interest in suspense in its books of accounts as an entitlement, the same was an entitlement envisaged under section 23 (2) of ITA, 2004 2004, and thus subject to tax. Section 23 (2) reads as follows:-

> "(2). *Subject to this Act, 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 instalments."*

Mr. Mukebezi's reliance was on BOT Regulations 30 and 30 (2) of the Regulations, which provides that:-

> "30. *Every bank or financial institution shall place on a non-accrual basis all accommodations which are classified as substandard, doubtful or loss..."*
>
> *(2) Any accrued but uncollected interest on credit accommodation placed on a non-accrual basis shall be reversed and placed in suspense."*

Correctly observed that the appellant had to follow BOT Regulations in financial reporting and that Regulations 30 and 30 (2) give the appellant guidelines to that effect. However, as rightly argued by the respondent, it did not oust or supersede ITA provisions. As we have stated in our previous decision in the case of **Access Bank of Tanzania Limited** (supra), though contested by the appellant regarding taxation and deductibility of a person's income, the applicable law is the Income Tax Act.

The appellant's reliance on the case of **Osmanabad Jantasah Bank Ltd** (supra) could not be declined. Still, the Tribunal didn't need to agree with the appellant, and it gave reasons for its stance. We acknowledge that the BOT Regulations have stipulated that banks and financial institutions place on a non-accrual basis all credit accommodations as specified under Regulation 19 (c), as we have stated earlier on in this judgment and pronounced ourselves explicitly that the BOT Regulations cannot override the ITA when it comes to tax collection. Since section 23 of the ITA, 2004, requires the appellant to account for income tax on an accrual basis, the interest in suspense recognized by the appellant in its books of accounts as an entitlement is liable to tax under section 23 (1) of ITA, 2004. The BOT Regulations

while significant, but its aim is to give guidelines, and not to take precedence over ITA. We conclude this issue by concurring with the respondent that interest in suspense if the loan is not ruled as bad debt, the said income is taxable. Against that discussion, we endorse the Tribunal's position on refraining from borrowing a leaf from **Osmanabad Jantasah Bank Ltd** (supra) the referred case by the appellant.

The second issue is whether the appellant had to prove the write-offs of the bad debts to be eligible for deduction.

As a financial institution, both the BOT Regulations and ITA, 2004 applied to the appellant. Before writing off any bad debt, the appellant is required to get approval from the BOT. Under the Regulations, the categories have been listed, with a specific requirement under Regulation 19 (c) of the Regulations that the debt has to be absolutely uncollectable for the write–off to be approved. After that exercise, the appellant was required to resort to the provision in ITA, 2004, specifically section 39 (d).

Section 39 (d) of ITA, 2004, has clearly illustrated the manner of deducting bad debts for uncollectable loans and justifying the claim for deduction. However, for the benefit to be enjoyed financial institution

involved, such as the appellant, has to fulfil two conditions provided under the provision. Section 39 (d) provides as follows:-

> "39. *(d) in the case of an asset that is a debt claim owned by a financial institution, when the debt claim becomes a bad debt as determined in accordance with the relevant standards established by the Bank of Tanzania and the institution writes the debt off as bad after such institution* ***had taken all reasonable steps in pursuing payment and the institution reasonably believes that the debt claim will not be satisfied****;"* [Emphasis added]

From the provision, one can gather that the two conditions are: *one,* that all reasonable steps should be taken and two, that the financial institution/appellant has to prove that the bad debts were absolutely uncollectable, meaning the appellant can no longer pursue and realize by any measure such as auctioning of the collateral in respect of the claimed bad debt. We agree with Mr. Mukebezi's submission that the requirements are not itemized as in the Kenyan Subsidiary legislation; nonetheless, we think the appellant was not left in total darkness by the requirement of accounting for reasonable steps taken. This is because, even with the BOT Regulations, the appellant

was required to follow certain guidelines under Regulation 19 (c), which states:-

> *"19. A credit accommodation having the following basic characteristics shall be classified as loss-*
>
> *(a) credit accommodation classified as doubtful in the last quarterly review without any significant improvement since then;*
>
> *(b) credit accommodation to borrowers whose whereabouts are unknown, or who are insolvent, whose earning power is permanently impaired and the guarantors or co-obligors are insolvent, or that whose guarantees are not financially supported; or*
>
> *(c) credit accommodation is absolutely uncollectible.*

In our view, the requirements provided under the BOT Regulations 19 (c) and those under section 39 (d) of ITA, 2004 are similar in the sense that there was no itemization of the to-provide list, but parameters within which the financial institution such as the appellant, can logically provide evidence to support the bad debt alleged. In the case of **National Bank of Commerce v. Commissioner General,**

Tanzania Revenue Authority, (Civil appeal No. 52 of 2018) [2020] TZCA 83 (9th July, 2018; TANZLII), faced with an akin situation the Court pronounced itself by saying:-

> *"...Thus, in a nutshel, before proceeding to deduct loss from realization of income; it must not only be ascertained that, a debt claim is bad. In addition, it must be established that, recovery measures were taken but the debt claim is absolutely uncollectable and finally written off from the books of accounts...."*

It is therefore not rational for the appellant to take refuge under the BOT Regulations, which we have stated, **one**, cannot supersede the ITA, and **two,** ITA is self-sufficient and has well provided for the appellant as far as bad debts or non-performing loans are concerned.

Moreover, the appellant, as a taxpayer, once the respondent has issued a tax assessment, the burden of proof as to the incorrectness of the assessment lies with the taxpayer as per section 18 (2) of the Tax Revenue Appeals Tribunal, Cap. 408. Without proper records, a taxpayer may be unable to challenge any tax assessment successfully.

In this appeal, the appellant was logically required to provide evidence or proof of the measures taken to recover the loans. The

rationale behind this requirement is clear: It ensures that the loan is genuinely uncollectable. Once it is established as such, the loan can be classified as a bad debt and written off as a loss. Examples of actions the appellant could take to meet this requirement include documenting written-off debts in the client's account, providing communication regarding the write-off, and presenting resolutions from the Board of Directors authorizing the appellant to write off the loans. These steps would support the appellant's eligibility for a deduction.

The appellant's assertion that the requirement for steps taken is a current position is, with due respect to Mr. Mukebezi, a misconception. The requirement that the measures taken must be demonstrated is noticeable under Section 39 (d) of ITA, 2004, albeit without itemization of the steps to be taken.

Before we wind up, we wish to touch on the invitation extended to the Court that it departs from its previous decision in the **National Bank of Commerce** (supra), **Access Bank Tanzania Limited** (supra); **CB Bank Tanzania Limited** (supra) and **National Bank of Commerce v Commissioner General, Tanzania Revenue Authority**, (Civil Appeal No. 52 of 2018) [2018] TZCA 83 (9th July, 2018; TANZLII), as per rule 106 (4) of the Tanzania Court of Appeal

Rules, 2009. Our response to that is that this Court cannot depart from its own decisions without following up on a procedure to do so. At most, at this juncture what we can do is just to distinguish our decisions from one another.

Having discussed the issues in this appeal at length, we find no reasonable ground to disturb the findings of the Tribunal. The appeal is thus dismissed for lack of merit with costs.

DATED at **DODOMA** this 28th day of February, 2025.

R. J. KEREFU
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 28th day of February, 2025, in the presence of Ms. Suleina Salim, learned counsel for the Appellant linked via Video Conference from Dar es Salaam and Mr. Athuman Mruma, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL