IN THE TAX REVENUE APPEALS TRIBUNAL
AT DAR ES SALAAM

TAX APPEAL NO. 16 OF 2015
[Appeal from the judgment of the Tax Revenue Appeals Board in Tax Appeal No. 22 of 2011 (Fikirini, VC) dated 15th May 2011]

AFRICAN BARRICK GOLD PLC .... APPELLANT
Versus
COMMISSIONER GENERAL .... RESPONDENT

JUDGMENT

F. Twaib, J., Chairman

African Barrick Gold Plc (which since this dispute arose has changed its name to Acacia Plc) ("ABG" or "the appellant)" is a company incorporated in the United Kingdom, with its corporate headquarters in London. It owns several subsidiary companies elsewhere in the world, some of which are incorporated in the United Republic of Tanzania. The Tanzanian companies, which are its only subsidiaries engaged in business, include Bulyanhulu Gold Mining Ltd. (which operates the Bulyanhulu Gold Mine), North Mara Gold Mining Ltd. (which operates the North Mara Gold Mine) and Pangea Minerals Ltd. (which operates the Tulawaka and Bunzwagi Gold Mines). Its activities in Tanzania are operated through its office at Plot No. 1736 Hamza Aziz/Kahama Road, Msasani Peninsula, Dar es Salaam.

On 11th March 2010, the appellant was registered with the Business Registration and Licensing Agency (BRELA) under a Certificate of Compliance. In November 2012, the Commissioner General of the Tanzania Revenue Authority, by a notice issued under section 138 of the **Income Tax Act**, 2004, initiated an inquiry on the tax affairs of ABG. After his investigations, the Commissioner General formed

the view that ABG was a resident of Tanzania; that it carries on business in Tanzania; that it earns income from Tanzania by providing management services to the three Tanzanian entities (Bulyanhulu Gold Mining Ltd., North Mara Gold Mining Ltd., and Pangea Minerals Ltd.) and several other exploration companies operating in Tanzania. It was also the Commissioner General's contention that dividends paid to the appellant's off shore shareholders are directly connected to income earned from the United Republic and thus, the Commissioner General was required to withhold tax when paying dividends to its shareholders in the UK and elsewhere.

On 8th October 2013, following his findings in the tax enquiry that commenced in November 2012, the Commissioner General issued a notice under section 139 of the **Income Tax Act**, 2004 read together with section 38 of the Value Added Tax Act, 2007 ("VAT Act"), confirming that ABG had been registered and issued with a Tax Identification Number (TIN-120-840-916) and a VAT Registration Number (VRN 40-015846-L), pursuant to the provisions of section 133 of the **Income Tax Act**, 2004 and section 19 (4) of the VAT Act. As a consequence of the above, the Commissioner General required the company, within days, to comply with the following matters:

1. File statutory returns as required by the laws quoted;

2. Remit withholding taxes in dividend payments for the years 2010, 2011, 2012 and 2013 amounting to USD 81,843,127 exclusive of penalties and interest (this amount was later reduced to USD 41,250,426);

3. Remit withholding taxes on payments made to Barrick Gold Corporation together with other non-resident persons for services rendered during the period, Pay As You Earn (PAYE) and Staff Development Levy between 2010 and September 2013; and stamp duty on instruments executed relating to conduct of business activities in the United Republic.

The appellant was not happy with the Commissioner General's tax demands, the mechanism used in making them, the company's forcible registration and its issuance with TIN and VRN, and the Commissioner General's decision to demand returns of personal income from its Dar es Salaam-based Vice President (Corporate Affairs), Mr. Deodatus Mwanyika. On appeal to the Board, the Board allowed the appeal with regard to the demand for tax returns from Mr. Mwanyika personally, and the act of demanding information under section 139 (1) (a) of the **Income Tax Act** and section 38 of the VAT Act, which it found improper. The Board however dismissed the substratum of the appellant's appeal by agreeing with the respondent's positions on all the remaining points, which were the most crucial, a position that resulted in the confirmation of the respondent's income tax demand for USD 41,250,426.

Undeterred, the appellant has filed this appeal, citing the following four grounds:

1. That the Board erred in law and fact in holding that the appellant company is resident in Tanzania for tax purposes.

2. That the Board erred in law and fact in holding that the respondent was legally justified to demand various taxes from the appellant;

3. The Board erred in law in finding that the TIN and VRN certificates were legally issued by the respondent and that the appellant was duty bound to file returns from the dates of receipt of the certificates;

4. That the Board erred in law in holding that the act of the respondent demanding taxes under section 139 (1) (a) of the **Income Tax Act** and section 38 of the VAT Act did not occasion injustice to the appellant.

By consent, the appeal has been argued by way of written submissions.

Before going any further, we feel there is need for the Tribunal to discuss, albeit briefly, the evidence adduced by Mr. Mwanyika at the Board relating to the management of ABG's affairs at Dar es Salaam. While the Commissioner General

insists that the office is headed by Mr. Mwanyika, Group Vice President (Corporate Affairs), the appellant maintains that the title is merely ceremonial and that Mr. Mwanyika has no decision-making powers, that he only carries out a co-ordination role, and is an employee of Bulyanhulu Gold Mines Ltd., not ABG. Furthermore, Mr. Mwanyika told the Board that he is not paid any salary or allowances by ABG. It was his further evidence that about 140 employees of ABG's Tanzanian subsidiaries assist him in the co-ordination role, but, like him, they are not remunerated by ABG.

Mr. Mwanyika told the Board that all three Tanzanian companies have been making losses and have never declared any dividends. He however did not give any details of ABG's finances, saying that such details could only be given by ABG UK.

Mr. Mwanyika's evidence before the Board was a reflection of the appellant's response to the Commissioner General's conclusions. That response was a complete denial of those conclusions: It maintained that ABG is neither resident nor does it carry out any business in Tanzania.

The appellant's position is that a certificate of compliance creates an obligation in respect of a matter associated with the regulation of the company by the Registrar of Companies, but does not create an obligation to obtain a Tax Registration Number (TIN) for purposes of income tax or a VAT Registration Number (VRN) for VAT. The appellant denied it has any obligation in respect of Mr. Mwanyika's tax affairs since he is neither employed nor remunerated by it.

However, considering his findings, including his reading of ABG's Information Memorandum, which was prepared and published for purposes of cross-listing on the Dar es Salaam Stock Exchange, the Commissioner General concluded that the appellant was a resident person for tax purposes, and cited several reasons for that position, including:

a) That the appellant has a certificate of compliance and has its regional office in Dar es Salaam;

b) That the appellant was rendering management and coordination services to its three subsidiaries in Tanzania. These operations are carried out at the appellant's Dar es Salaam office.

c) That the appellant has a member of the company's senior management team in the person of Mr. Mwanyika, who heads a 140-strong team of personnel that offers management services to its three local subsidiaries.

d) That the fact that ABG, a holding company, has been declaring and paying dividends to its shareholders at a time when its only subsidiaries that are engaged in business have been declaring losses is merely a scheme designed to enable it to evade tax.

Having so concluded, the Commissioner General required the appellant to register for income tax and VAT. Relevant certificates subsequently issued had errors in the names and the respondent referred the matter to the Regional Manager, Kinondoni Tax Region. That is, however, beside the point.

Submitting in support of the appeal, learned counsel from Ako Law, advocating for the appellant, combined Grounds 1 and 2 together, followed by Ground 3. They abandoned Ground 4, mainly because the Tribunal has already expressed the view in an earlier case to the effect that the Commissioner General's wrong citation of the relevant provision of the law in a tax demand would not, *ipso facto*, occasion a miscarriage of justice. Counsel probably had in mind the Tribunal's decision in the case of ***Commissioner General, Tanzania Revenue Authority v. Airtel Tanzania Ltd.*,** Tax Appeal No. 29 of 2012, where we ruled, *inter alia,* as follows:

> *"It is good practice in tax matters that the taxpayer be made aware, as much as possible, by full citation of the enabling taxing provisions, the legal basis upon which an assessment and/or a tax demand has been*

made. However, failure to do so is not fatal and should not vitiate the demand or assessment, if the relevant legal provision does exist. What is important is to determine whether or not tax liability exists. If it does, it does not have to be demanded upon its full, correct and precise provision of the law. If it does not exist, such citation (or even non-citation) of the law would not make it payable."

The Tribunal further held:

"The Tax Collector cannot take advantage of a mere slip (if any) to demand payment of tax where no tax liability legally exists. Tax liability (or the non-existence thereof) cannot be determined by mere slips of the pen or of the mind."

This puts to rest the issue raised in the abandoned ground of the appeal. We will now address our minds to the three remaining grounds of appeal.

For convenience, we shall begin with a discussion of Ground 3. The appellant challenges the Board's holding which endorsed the respondent's decision to forcibly issue a VRN and a TIN Certificate to the appellant. Counsel for the appellant argued that a TIN is a number allocated by the Commissioner General to every resident person who carries on business anywhere, and to every non-resident person or entity which carries on business in Tanzania: Section 133 (2) of the **Income Tax Act**, 2004. The obligation to apply for TIN lies only where the person concerned carries on business in Tanzania, contended the appellant's counsel. It has thus been argued that the appellant was not required to apply for the two certificates, as it carries no business in Tanzania. Merely holding a certificate of compliance and having subsidiary entities in the country does not amount to carrying on business, submitted counsel.

With regard to VAT registration, it has been argued on behalf of the appellant that VAT registration does not apply to a person who does no business in Tanzania, since only persons who have reached a particular threshold (Tshs. 40

Million in 2011) are registrable (section 19 (1) of the VAT Act, 1997 and Regulations made thereunder). Since, counsel for the appellant maintain, their client is not doing any business in Tanzania, the question of registration for VAT and obtaining a VRN does not arise. The relevant provision in respect of forced registration for VAT is section 19 (4) of the VAT Act, which states:

> *"Where the Commissioner is satisfied there is good reason to do so, on grounds of national economic interest or for the protection of the revenue, he may register any person, whether or not an application to be registered has been made, regardless of the taxable turnover of the person."*

Learned counsel for the appellant opine that, on the grounds their client is challenging the respondent's decision to demand tax (being, in their opinion, neither a resident person nor a person carrying on business in the country) and thus not liable to pay tax, the respondent was wrong to invoke the above provisions and register the appellant for TIN and VRN and issue it the relevant certificates. The Board was therefore wrong, submitted counsel, to endorse the respondent's actions.

We are of the considered view that the answer to this third ground will depend on our answers to the first and second grounds of the appeal which, like counsel, we propose to discuss together. We would thus leave our finding on Ground 3 for the end of this judgment.

Ground 1 revolves around the issue as to whether ABG is a resident person for tax purposes. The second ground may, or may not, necessarily depend on the answer to this question. However, whatever the answer, this ground stretches the issue further to an enquiry as to whether the tax demand was legally justified. Appellant's counsel referred the Tribunal to page 14 of the typed judgment of the Board. The Board discusses the words "formed in Tanzania" as used in section 66 (4) (a) of the **Income Tax Act**, 2004. The subsection stipulates that a company is resident in Tanzania "*if it is incorporated or is*

formed under the laws of Tanzania". It is the appellant's position that the words "incorporated" and "formed" mean the same thing. The Board, however, had a different view. It held:

> *"We have tried to observe the provisions closely. The controversy lies in the words "or formed under the laws of the United Republic"….with respect to the views expressed by Dr. Kibuta, we don't think the words incorporated and formed used in this provision, mean the same thing. We see the words…as wide and can include situations of registration of foreign companies to give them legal status to operate in Tanzania. We should adopt the purposeful approach to interpretation rather than plain meaning. We think one has to check the purpose of obtaining the certificate of compliance, the intended business of the company and the function of the Registrar of Companies….We decline to accept the view that the company went there to comply with legal requirement and had no intesion (sic) of doing business. This statement is not correct and contradicts company mandate…"*

It has been argued on behalf of the appellant that by so holding, the Board fell in error, as the words "incorporated" and "formed" are synonymous, and that by obtaining a certificate of compliance from the Registrar of Companies, it does not mean that a company is to be taken to have been formed in Tanzania. Incorporating a company, argued counsel for the appellant, means bringing a company into existence, which is the same as "forming" a company. They relied on the definition of the word "form" in the **Oxford Advanced Learners Dictionary** (8th edition) which at page 588 defines the word as "to start to exist and develop", while "incorporate" is defined (at p. 761) as "to create a legally recognized company". **Black's Law Dictionary** (9th ed.) defines the word "incorporate" as "to form a legal corporation."

Counsel thus concludes that, *"for all intents and purposes, the two words mean the same thing, namely, to create a company or to bring a company into*

existence". It was also argued that section 3 (1) of the **Companies Act** is helpful, as it uses the word "incorporate" and "form" interchangeably. Further assistance, according to counsel, is in section 435 of the **Companies Act**, which states that the certificate of compliance issued under the section is evidence that the company is registered as a foreign company.

The respondent has countered the foregoing submissions by arguing that the Board was correct in finding that ABG was resident in Tanzania by virtue of section 66 (4) (a) of the **Income Tax Act**, Cap 332, and that the words "incorporated" and "formed" as used in the section have different meanings. Counsel for the respondent further argued that the Parliament *"could not be devoid of such wisdom as to provide for an alternative between two words of the same meaning."* The alternative word "formed" has been used with a broader meaning:

> "…*to accommodate all situations for which a company may be established under the laws of our land hence acquires a residency status in Tanzania for purposes of income tax.*"

The case of **Commissioner General and MacArthur & Baker International** [2000] EA 33 ("***MBI Case***") has been cited to us by both sides in this appeal. Counsel for the appellant sought to rely on the following holding of the High Court in that case:

> *"Tax provisions must be interpreted strictly and according to the clear meaning of what is stated. In line with that approach we are inclined to the view that the word registered as used in section 2 (1) and 2 (b) (i) of the Act must be given its natural meaning, and we cannot see nothing to justify departure from that rule. We reject Mr. Songoro's contention of construing the word 'registered' in subsection (2) (b) (i) ejusdem generis with the words 'incorporated' and 'established'."*

Hence, counsel for the appellant blames the Board for not following the Court of Appeal's guidance and instead adopting a purposive interpretation to expand the meaning of the word "formed" instead of giving it its natural meaning.

Moreover, counsel saw the need to explain why the appellant applied for registration under section 66 (4) (a) of the Act. As a holding company of the three local companies mentioned above, the appellant is an investor in the companies, which own and operate mine sites in Tanzania. At one point, a decision was made for the appellant, which is listed on the London Stock Exchange, to cross-list on the Dar es Salaam Stock Exchange in order to allow Tanzanians to buy the company's shares. For that reason, it became necessary for the appellant, so as to comply with the law, to obtain the said certificate of compliance.

This requirement is also necessary under Regulation 7 of the *Capital Markets and Securities (Foreign Companies Eligibility and Cross-Listing Requirements) Regulations*, GN No. 164 of 2003. ABG relies on this provision to show that cross-listing was the only reason why it had to be registered under a certificate of compliance.

However, the regulation does not, with all due respect, support the contention. On the contrary, it defeats the argument, as it requires every foreign company applying for cross-listing not only to register as a foreign company under the Act, but also to "establish a place of business". It is thus surprising that the appellant argues that it only registered as a foreign company in Tanzania, but did not establish a place of business. It is a separate issue whether it actually carries on business in the active sense, but it belies the legal requirement contained in the said regulation to contend that after complying with all legal requirements and cross-listing, ABG did not establish a place of business in Tanzania.

It has further been argued that the gist of the decision of the High Court in ***Commissioner General v. MacArthur & Baker (MBI)*** is that a company

issued with a Certificate of Compliance under the then applicable **Companies Act** acquired a residence status by virtue of a literal construction of the word "registered" under section 2 (2) (b) (i) of the **Income Tax Act, 1973**, which was then applicable. That decision, in the opinion of the respondent's counsel, supports the Board's decision in this case to the effect that the appellant was a resident person in terms of section 66 (4) of the **Income Tax Act, 2004**, after being issued with a Certificate of Compliance.

However, section 2 (2) (b) (i) of the **Income Tax Act, 1973** was amended subsequent to the decision in ***MBI's Case*** to remove the alternative word "registered" and only retained the word "incorporated". Advocate for the appellant asserts that the amendment confirmed that the alternative word "registered" had a broader meaning than the words "incorporated" and "established", hence resulting in the High Court's conclusion in ***MBI's Case*** that the word "registration" under a Certificate of Compliance conferred on a company a residence status under section 2 (2) (i) of the then **Income Tax Act, 1973**.

That may well be true and correct. However, as counsel for the respondent further submitted, under section 66 (4) (a), the present **Income Tax Act, 2004** still provides an alternative between the words "incorporated" and "formed", which is similar to the old Act before the amendment that followed the ***MBI Case***. Current law has provided a second term ("formed") apart from the word "incorporated". Respondent's counsel also submitted, in the alternative, that the Board was equally right in applying the purposive approach *"to prevent a tax evasion scheme designed and executed by the appellant and it's [sic] subsidiaries in Tanzania."* We shall deal with this issue later on in this judgment.

Respondent's counsel referred the Tribunal to pages 17 and 18 of the judgment of the Board and further submitted that the principle that tax statutes are to be interpreted strictly, is *"no longer a divine principle as celebrated for decades in cases such as **Cape Brandy Syndicate** (1921) 1 KB 63."* Counsel referred the

Tribunal to what he called *"the modern trend in the interpretation of tax statutes"*, which includes the purposive approach, especially in tax evasion cases, aimed at preventing those who may use the words of tax statutes and arrange their affairs to evade tax, contrary to their purposes and intention.

The new trend alluded to by counsel was refined by the House of Lords in the case of ***Commissioner for Inland Revenue v McGuckian*** (1997) WLR 991. To fully understand the principle and the process by which it developed, and in the hope of being acquitted of the charge of over-reliance on the argumentation of Lord Browne-Wilkinson, we can do no better than to partly quote and partly paraphrase his articulate speech in that case.

The process began with a change in the Courts' approach to the construction of statutes generally. Lord Browne-Wilkinson traced the trend to the last years of the 19th Century—a time when Judges, following the guidance of the learned author *Pollock* in his *Essays on Jurisprudence and Ethics* (1882), p. 85—employed the approach that considered the Legislature as *"generally changing the law for the worse"*, and thus leaving *"the business of judges…to keep the mischief of its interference within the narrowest possible bounds"*. This attitude no longer holds true, observed Lord Browne-Wilkinson, considering that:

> *"During the last 30 years* [he was speaking in 1997] *there has been a shift away from the literalist to purposive methods of construction. Where there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it."*

However, when it came to the construction of tax statutes, this trend was not enthusiastically received by the Courts. Court attitude at the time was epitomized by the statement of Lord Tomlin in ***Inland Revenue Commissioners ("IRC") v Duke of Westminster***, (1936) AC 1, where he held:

> *"Every man is entitled, if he can, to order his affairs so as that 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."*

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

Lord Browne-Wilkinson in ***MacGuckian*** observed in relation to this principle (citing ***Pryce v. Monmouthshire 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 <u>Duke of Westminster doctrine</u>, 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."*

The Law Lord identified the second problem as one relating to tax avoidance schemes, where the Courts regarded themselves as compelled to adopt a step by step analysis of such schemes, treating each as a distinct transaction producing its own tax consequences. The thinking was that if the arrangement was genuine (not sham or simulated documents or arrangements), the Court was not entitled to go behind the form of the individual transactions.

The cumulative effect of these two elements—literal interpretation of tax statutes and the formalistic insistence on a separate examination of the steps in a composite scheme—allowed tax avoidance schemes to thrive, to the

disadvantage of the general body of taxpayers. The outcome was, in the words of Lord Browne-Wilkinson, that:

> *"…[T]he Court appeared to be relegated to the role of a spectator concentrating on the individual moves in a highly skilled game: the court was mesmerized by the moves in the game and paid no regard to the strategy of the participants or the end result. The Courts became habituated to this narrow view of their role."*

The breakthrough on both fronts came with the decision of the House of Lords in ***W.T. Ramsay Ltd. v. IRC*** [1982] A.C. 300 at 323C-D. In that case, Lord Wilberforce recognized the general rule that tax statutes are to be construed according to the clear words of the statute. But he posed the question "what are clear words?", and answered it to the effect that the Court is not confined to a literal interpretation. He added:

> *"There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded."*

Lord Browne-Wilkinson in ***MacGuckian*** considered this sentence as critical, as it marked the rejection of pure literalism in the interpretation of tax statutes by the House of Lords. It was a clear departure from the position hitherto as far as the Court's approach to the interpretation of tax statutes was concerned. But Lord Wilberforce in ***W.T. Ramsay*** did not stop there. He went on to state (at 323H) 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:

> *"….**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."*

Inspired by the wisdom of Lord Wilberforce in the passages quoted above, Lord Browne-Wilkinson in ***MacGuckian*** concluded that if it is shown that a scheme was intended to be implemented as a whole, legal analysis permitted the Court, in deciding a fresh question, to consider the composite transaction.

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

We accept the above persuasive exposition of Lord Browne-Wilkinson as the more appropriate way of approaching tax statutes in our jurisdiction as well in cases involving tax evasion and tax avoidance schemes.

The question, then, is: is the case at hand one that involves a tax evasion scheme, such that the Tribunal can be justified in endorsing the Board's approach in applying a purposive interpretation to section 66 (4) (a) of the **Income Tax Act**, 2004?

To answer this question, we need to deliberate on the arrangement that the Commissioner General believes is designed to evade tax, and ABG's explanation to that accusation. This takes us to all the contested issues in this appeal.

At this juncture, we need to point out that in the eyes of the law, the burden was on the appellant to prove that it is not liable to taxation: ***Southcom East Africa Ltd. v. Commissioner General, TRA***, TRAT Income Tax Appeal No. 18 of 2011. It can only shift upon discharge of this primary burden of proof: ***Insignia Ltd. v. Commissioner General, TRA,*** CAT Civil Appeal No. 14 of 2007. The Board noted that even Mr. Mwanyika did not provide that proof. Indeed, he told the Board that he had no details of ABG's finances, and that such details could only be given by "ABG UK". One would have expected the appellant to produce such proof, since it had the burden of proving that it is not liable to taxation. Did the appellant discharge that burden? Could the evidence brought to the attention of the Board, perhaps, have assisted the appellant? With due respect, we do not think so. On the contrary, it seems to us that the evidence on record firmly supports the Board's holding. We will now proceed to explain our position.

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 that registration amounted to the company's *formation* in Tanzania *as a foreign company*.

As earlier stated, one other reason the Board used to conclude that the appellant is a resident of Tanzania was the fact that the appellant had a policy of holding at least one meeting of its Board of Directors every four years in Tanzania. In this regard, it has been argued on behalf of the appellant that:

"It seems the decision of the Board rests on a single Board meeting held in 2011 and the title given to Mr. Mwanyika. On this note we wish to reiterate…as regards the ABG's meeting of 2011…that this cannot be a serious argument. The act of exercising management and control is a serious matter and denotes supervision of company operations and the making of management decisions on a continuous basis.

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].

The Board further held:

> *"…It is our finding and decision that the entire Board sat in Tanzania 2011* ***and continual activities of the company under Mr. Deo Mwanyika, the staff under him…****make the company resident for purposes of tax under section 6 (4) (b) [sic!] of the* ***Income Tax Act****, 2004."* [Emphasis added].

The Board further observed that at page 123 of its Report, ABG states that all its income is derived from mining activities of its subsidiaries in Tanzania. The Report does not show, apart from the mines in Tanzania, any other mines or business operated elsewhere in the world by ABG, which form part of such consolidated income. Hence, while all of its subsidiaries which constitute its only income-generating activities, are making losses and thus no dividends are paid to its shareholders, and have paid no corporate tax throughout the years of their existence, the appellant declared dividends in the UK on the income coming from its business in Tanzania amounting to USD 818,431,285. This money was paid to the appellant's overseas shareholders as dividends (pages 130 for 2010 and 2011, pages 144 and 164 for 2012 and 2014).

Indeed, we share the Board's surprise as to how could this be possible. It is inconceivable that the appellant could pay so much in dividends for four consecutive years, while its only assets are the three loss-making entities incorporated in Tanzania that do not make any profit at all, and do not pay any dividends. The Board expected some clarification of this rather strange state of affairs, and proof as to how it could be possible. That proof, unfortunately, was not forthcoming from the appellant, and its witness' and counsel's explanation fell short of an adequate discharge of the relevant burden.

One important issue and which attracted fierce criticism from the appellant's counsel stems from the Board's acceptance of the respondent's contention that the appellant "has serious plans to avoid tax". The Board reached this conclusion

relying on the fact that all the appellant's subsidiaries in Tanzania are loss-making and therefore not paying dividends to its shareholders, and yet, at the same time, the appellant has consistently been declaring dividends. The Board looked at the tax returns for the three entities, which showed that all of them were making losses. At the same time, the following statements at page 4 of the Annual Reports and Accounts of ABG caught the Board's attention:

> *"Currently, all of ABG's mining operations are in Tanzania. We believe that Tanzania possesses significant mining potential."*

The ABG Report continued:

> *"At present we have four gold producing mines, as in northern Tanzania. These are Bulyanhulu, Buzwagi, Tulawaka and North Mara"*.

ABG maintains that the Board's conclusion that it has serious tax avoidance plans is baseless, because no evidence to that effect existed. ABG's advocates rely on their submission before the Board and reiterated in this appeal, that the dividends paid by their client were sourced from "*distributable reserves created after reduction of the appellant's capital [and] IPO proceeds*", as per letters dated 30th January 2013 and 4th April 2013 and an extract of the appellant's financial statements for the year 2010. These documents were produced at the Board and admitted in evidence. Counsel for the appellant laments that the Board did not address itself to this evidence or their own submission on the point. Counsel calls this "a dangerous precedent" and urges this Tribunal to reverse it.

What is the Tribunal's view of this? We think that even if the Board considered this explanation, its decision could not have been different. With all due respect, we find the explanation rather odd, to say the least. Proceeds derived from an IPO are part of the capital of the company, not profit. They are thus not meant to be distributed to members as dividends. Neither are what counsel calls "distributable reserves created after reduction of company capital". Almost by

definition, these are part of the capital of the company and when the capital is reduced, whatever part of the capital of the company that will proceed from that reduction and distributed to shareholders cannot be termed "dividends".

A dividend is 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**, 9th ed., 2009 defines "dividend" as:

> *"A 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]

The conclusion that can be drawn from the above definitions is that the explanation offered by ABG as the source of dividends, i.e., distributable reserves and IPO proceeds is 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 could 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. 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 the *façade* 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.

With these findings we see no merit in the first and second grounds of appeal, and we would dismiss both of them.

This conclusion would allow us to now determine the third ground of the appeal to the effect that the Commissioner General was justified in invoking his powers under section 133 (2) of the **Income Tax Act**, 2004 and section 19 (4) of the Value Added Tax Act to register the appellant under the two Acts and issue it with TIN and VRN Certificates.

In the ultimate result, we find no merit in this appeal. We dismiss it with costs.

Hon. Fauz Twaib ……………………..
Judge/Chairman

Mr. J. Kalolo-Bundala ……………………..

Member

Mr. D. Mwaibula ……………………..

Member

31st March, 2016

Judgment delivered this 31st March, 2013 in the presence of Mr. Wilson Mukebezi, Advocate for the Appellant and Mr. Noah Tito, Advocate for the Respondent.

Hon. Fauz Twaib ……………………..
Judge/Chairman

Mr. J. Kalolo-Bundala ……………………..

Member

Mr. D. Mwaibula ……………………..

Member

31st March, 2016

We certify that this is a true copy of the original:

Hon. Fauz Twaib ……………………..
Judge/Chairman

Mr. J. Kalolo-Bundala ……………………..

Member

Mr. D. Mwaibula ……………………..

Member

31st March, 2016