IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM

TAXATION REFERENCE NO.01 OF 2020

(Arising from the decision of the Taxing Officer (Hon. M. N. Ntandu-DR) in Taxation Cause No.53 of 2019, dated 27th day of January 2020)

ANAND SATYAVAN CHANDE.....1st APPLICANT
ALKESHWAR ANAND CHANDE.....2nd APPLICANT
AND

EXIM BANK ..... RESPONDENT

Last Order, 21/07/2020.
Ruling, 25/09/2020.

RULING

NANGELA, J.:

This is a reference to this Court from a ruling of a taxing officer, Ms. M.N. Ntandu, in a taxation cause No.53 of 2019 which was before her. It has been preferred under Order VII rule (1) and (2) of Advocates Remuneration Order, 2015, GN. No. 264 of 2015, and, was filed by way of Chamber summons supported by an affidavit of Mr. Joseph Sang'udi, an advocate of this Court. Mr. Sang'udi had represented the Applicants before the taxing officer where he had submitted a bill of costs amounting to TZS. 8,320,000/=. The taxing officer taxed that amount at TZS 250,000/= and TZS 8,070,000/= was taxed off. The Applicants

were aggrieved by that ruling and have made a reference to this Court, seeking for the following orders:

1. That, this Court be pleased to quash the ruling and findings of the Taxation Officer in Taxation Cause No.53 of 2019 dated 27th day of January 2020 and appropriately, fairly and legally tax the bill of costs presented by the Applicants.
2. Costs of this Application be provide for.

The facts of this case can be briefly stated as follows: Sometime in 2018, the Respondent herein filed Commercial Review Application No.4 of 2018. In the said review application, the Respondent was seeking review of the decision of this Court (B.K Phillip, J.,) which struck out the paint in Commercial Case No.152 of 2017. The Respondent herein was the Plaintiff in that suit and was claiming a total sum of TZS 800 Million. However, when the review application was set for its hearing after all necessary pleadings were filed, the Applicant therein (Respondent herein) prayed to have its application for review be marked withdrawn from the Court. The Court readily granted the prayer but with costs to the Applicants herein. The Applicants thereafter filed Taxation Reference No.53 of 2019 seeking to be reimbursed the costs incurred.

In the said Taxation Reference No.53 of 2019, the Applicants' bill of costs had eight (8) items for taxation. The first item, which was termed as instruction costs amounted to TZS 8, 000, 000/=. Items 2, 3, 4, 5, 6, and 7 were terms as costs of attendance in court. However, item 5 was dropped in the course of the hearing before the Taxing officer.

The Taxing officer taxed item no.2,3, 4, 6 and 7 at TZS 50,000/- per item hence a total of TZS 250,000/= were taxed as attendance cost.

On the other hand, Item No.8 was costs for filing skeleton arguments. The amount claimed under this item was TZS 20,000/=. The same was approved and taxed as presented. However, the taxing officer declined the submissions on Item No.1 and taxed it off. This item has thus been to bone of contention between the parties herein. On 28th of July 2020, a day fixed for orders of this Court, the Applicant was represented by Mr. Rutaihwa, learned Advocate. The Respondent was absent. Since the Respondent was absent on that date, the parties were ordered to argue this application by way of written submissions. They duly filed their submission as per the dates ordered by this Court. I will thus consider their submissions.

In his submission, Mr. Theodor Primus, learned counsel for the Applicants who file the written submissions, argues that the Hon. Taxation Officer acted erroneously when she taxed off Item No.1 from the bill of costs submitted before her. The basis for such submission is that, that item was an instruction fee based on the amount involved in the suit, which amount was 800million. He argued that TZS 8million which constituted the instruction fees was reasonable as it was less that 3% of the amount involved in the suit.

Mr. Primus submitted that, the Taxing Officer taxed off Item No.1 on the basis of lack of EFD receipt and relied on the decision of this Court in the case of **Prof. Emmanuel A. Mjema v Managing**

Editor Dira ya Mtanzania Newspaper and 2 Others, Ref.No.7 of 2017, (unreported), and other decisions that insists on the need to submit EFD receipts.

Referring to this Court the provisions of Order 46 of the *Advocates Remunerations Order, 2015 (GN. No. 264 Of 2015)* the learned counsel insisted that, the order requires the Taxing Officer to tax the bill presented to her as per the scales provided under the law. For ease of reference, Order 46 of the Advocates Remunerations Order, 2015, provides as here below:

> "All bills of costs shall be taxed on the prescribed scale, unless a judge of the High Court, for special reasons to be certified, allows costs in addition to the costs provided by the scale or refuses to allow costs or allows costs at lower rate than provided by the scale."

Mr. Primus argued that, item No.1 of the bill was charged in accordance with the *Ninth Schedule* which provides scales for contentious proceedings for liquidated sum, and what was charged was less than the scales provided in the *Ninth Schedule to the GN. No. 264 Of 2015.* He contended further that, the *GN. No. 264 Of 2015* does not contain a provision requiring for the proof of receipt on the instruction fees, and, that, the requirement for such is in regards to disbursements as provided for under *Order 58(1) of GN. No. 264 Of 2015*, and not otherwise. For that reason, it was argued that the Taxing Officer misdirected herself when she taxed off item No.1 for which, as a matter of law under *GN. No. 264 Of 2015*, such item does not require proof of an *Electronic Fiscal Device* (**EFD**) *receipt* to be presented.

Mr. Primus submitted that, as a matter of precedents applicable to guide the Court, there is no settled position regarding submission of *EFD receipt* as yet and, in place, there remain two schools of thoughts. The learned counsel, however, did not expound on the two schools but invited this Court to take on board its decisions in the case of **Salehe Habib Salehe v Manjit Gurmukh Singh & Another, Ref. No. 7 of 2019 (unreported)** (which quoted with approval the decision in the case of **Bukreef Gold Ltd v Tax Plan Associates & Another, Misc.Com. Reference No.3 of 2017 (unreported)**).

In view of the above submission and authorities cited in support thereof, the learned counsel for the Applicant has urged this Court to make a finding that the learned Taxing Officer erred as she ought to have taxed Item No.1 of the bill of costs as presented. He implored this Court to allow this reference with costs.

In her rebuttal submission, Ms Doreen Chiwanga, learned counsel for the Respondent, submitted that the decision of the Taxing Officer in *Taxation Cause No.53 of 2019* was proper, fair and in all respects made in accordance with the law. She insisted that the Taxing Officer did not err or misdirect herself when she taxed off Item No.1 of the bill of costs presented to her. She argued that, the *Ninth Schedule to GN. No. 264 Of 2015*, which the learned counsel for the Applicant relied upon in defence of the Item No.1.

She further contended that that, since Commercial Review No.4 of 2018 was a matter arising from Commercial Case No. 152 (the main

suit), as an application in its nature, the correct and applicable schedule and provision was the *Eleventh Schedule, Item 1 (m)(ii) of GN. No. 264 Of 2015* which provides for a fee of TZS 1,000,000/=.

To further support her submission, Ms Chiwanga referred this Court to pages 10 and 7 of the decision of Hon. Makani. J., in the case of **Salehe Habib Salehe v Manjit Gurmukh Singh & Another, (supra)** and argued that, where the fees are over and above the prescribed scale an Applicant will be required to submit necessary proof. She contended, therefore, that, the Applicants herein did not submit any proof to show why they charged TZS 8,000,000/= and yet they contend that their claim was a fair and reasonable while it was above the prescribed scales. For that reason, she distinguished the case of **Salehe Habib Salehe (supra)** as being inapplicable in favour of the Applicant's side of the story.

In conclusion to her submission, Ms Chiwanga submitted that, in the course of making her decision, the Taxing officer was also entitled under the law to consider other factors such as the nature of the matter at hand and the general conduct of the proceedings, among others a provide for under the *Eleventh Schedule, Item (aa) of GN. No. 264 Of 2015.* She argued that, from paragraph 4 of the Applicant's affidavit, and the Respondent's Counter affidavit and further on the basis of the Applicant's written submissions, it is an undisputed fact that the Application for Review, from which these proceedings emanated, was withdrawn from the Court prior to its hearing. Since the Applicants

were reimbursed their filing costs, she finally urged this Court to dismiss the Application with costs.

In a brief rejoinder, the learned counsel for the Applicants rejoined that the Respondent's submission should be rejected as being devoid of merits. He reiterated his submission in chief that the TZS 8000,000 indicated under Item No.1 of the Applicants' bill of costs ought to have been taxed as presented. He insisted that, the amount was in accordance with Item *1 (m) (ii) of Ninth Schedule to GN. No. 264 Of 2015* given that, in an application for review, the court was moved by the memorandum of review and not otherwise and Item *Eleventh Schedule, Item (aa) of GN. No. 264 Of 2015* does not include a Memorandum of reviewing the decision of the Court.

The learned counsel for the applicant contended that, Item *1 (m) (ii) of GN. No. 264 Of 2015* should be interpreted based on the principle of *expressio unius est exclusio alterius* which means that explicit mention one (thing) is the exclusion of another. He was argued that, applications falling under Item 1 (m) (ii) are specifically mentioned.

The Item reads as here below:

> "Item 1 (m) (ii): for applications, notices of Motion or Chamber applications (including appeals from Taxation)"

He contended further that, a memorandum of review is not covered under the above cited item but rather, it falls under the *Ninth Schedule* which applies to proceedings for liquidated sum in original jurisdiction.

In an alternative view, the learned counsel for the Applicant rejoined that, if the Court is convinced that the applicable scale is the one provided for under the *Schedule, Item (m) (ii)* as suggested by the Respondent, then the instruction fees should be TZS 2,000,000/= and not 1000,000/= since the Applicants (Respondents by then) were two. He rejoined further that, even if the application for review was withdrawn, the Respondents (Applicants herein) had already fulfilled their obligation by paying the instruction fees. He contended that the law does not provide for instruction fees for partly heard cases. He thus reiterated the prayer to allow the application with costs.

I have carefully considered the submissions made by the learned counsels for the parties herein. As regards the conditions upon which a taxation reference would be entertained by the Court in which reference is filed, the case of **Asea Brown Boveri Ltd v Bawazir Glass Works Ltd and another [2005] 1 EA 17**, provides guidance. In that case the Court stated that:

> "A taxation reference would be entertained either on a point of law or on the ground that the bill as taxed was manifestly excessive or inadequate.

It is also a general principle governing interference with the exercise of the taxing officer's discretion, as once stated by a South African court, in the case of ***Visser vs Gubb* 1981 (3) SA 753 (C) 754H – 755C**, that:

> "The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it

> improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue. ..."

In this reference, the Applicant's affidavit discloses two grounds as the basis of challenging the decision of the taxing officer. Paragraph 6 (a) and (b) of the affidavit are to the effect, *firstly*, that, the taxing officer erred in law as her decision is alleged to be contrary to the *Advocates Remunerations Order, 2015 (GN. No. 264 Of 2015)*, and, *secondly*, that, her decision and the amount taxed in favour of the Applicants, was not supported by the available evidence or records (i.e., the amount was inadequate). Obviously, these two grounds are in line with the holding in the above cited case and can be entertained by this Court.

What now is the issue for determination in this reference? As it might be noted, this taxation reference challenges the act of taxing off item one which was about instruction fees. The issue which I am called upon to address, therefore, is: ***whether it was appropriate on the part of the taxing officer to tax off the TZS 8,000,000/- claims under Item No.1.*** Put differently, was the Taxing Officer right in law to disallow the 1st Item of costs in the circumstances of this case?

As the submissions summarized above indicate, the Applicants have responded to this issue in the negative while the Respondents have been affirmative to it. Who in that regard holds a correct position? Ordinarily, and as it was stated by the Court of Appeal in the case of **East African Development Bank v Blueline Enterprises Limited [2006] 2 EA 51 (CAT),** *"costs, indisputably, follow the event in favour of the winning party"*. However, such a winning part must itemize and justify his claims constituting costs when he presents a bill of costs for taxation. He must indicate what service was rendered and what disbursements were made.

The above stated position was amplified in the case of **Republic v The Minister for Agriculture *ex parte* W'Njuguna and others [2006] 1 EA 359**. It that case, it was held that:

> "Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot, I will hold, be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for."

Presenting to the Court what amounts to genuine account of costs incurred by an advocate is an essential requirement to enable the taxing officer to exercise his or her discretion properly. This was emphasized in the case of **Mulangwa v Osman [2005] 1 EA 299,** (which referred with approval the case of **Balwantrai D Bhatt v Ajeet Singh and Another [1962] 1 EA 103**).

In the two cases cited herein above, a bill of costs was defined as a factual statement of services rendered and disbursements made." The

Court emphasized that, "*if any of the facts alleged in the bill are shown to be untrue, the relevant item in the bill must be taxed off.*" The truthfulness could be supported by proof since it is a cardinal principle of law that he who alleges must prove.

In the present reference application, the taxing officer taxed off the item No.1, (instruction fees) for lack of proof in the form of an EFD receipt. The Applicants have argued that as a matter of the applicable law under *GN. No. 264 Of 2015*, such item does not require proof of an *Electronic Fiscal Device* (**EFD**) *receipt* to be presented. Both learned counsels for the parties referred to this Court the case of **Salehe Habib Salehe v Manjit Gurmukh Singh & Another, (supra)**. This was, as well, a taxing reference seeking to quash and set aside an impugned award of costs.

In that case, the Court pointed out that, presently, there are two schools of thoughts regarding the need to present EFD receipts when a winning party is seeking to be paid costs incurred in conducting proceedings in courts of law. One school calls for attachment of such receipt as proof to substantiate the claim for instruction fees, (see the decision of I.C. Mugeta, J., in the case of **Prof. Emmanuel A. Mjema v Managing Editor Dira ya Mtanzania Newspaper and 2 Others (supra)**, while the other school, considers that demand for EFD receipt is only relevant if there is a dispute as to whether one pays taxes or not (see **Bukreef Gold Ltd v Tax Plan Associates & Another (supra)**).

Several High Court decisions have followed either of the two schools. See for instance the cases of **Thinamy Entertainment Ltd & 2 Others v Dino Katsapas, Misc.Comm. Case No.86 of 2018, (HC) (Unreported)**; **First World Investment Court Brokers v Buckreef Gold Company Ltd, Misc. Comm. Ref.No.1 of 2019 (HC) Comm. Dvsn Arusha) (unreported)**; **M/S TaxPlan Associates Ltd v Tanscan Mining Co. Ltd. Misc.Comm.Ref.No.02 of 2019, (HC) Comm. Dvsn Arusha) (unreported)**; and **Salehe Habib Salehe v Manjit Gurmukh Singh & Another, (supra)**.

In this latter case of *Salehe Habib Salehe*, (supra) the court followed the position laid down in *Bukreef Gold's case.* In the present reference application, the rejection of or the decision to tax off Item No.1 (instruction fees) was based on the ground that the Item was not supported with proof in the form of EFD receipts. The Taxing Officer based her argument on the case of **Prof. Emmanuel A. Mjema v Managing Editor Dira ya Mtanzania Newspaper and 2 Others (supra)**. That became a source of the controversy leading to this application.

Generally, my reading of the cases which have considered the issue of EFD receipts, brings me to one conclusion, that is to say, as a matter of principle, both schools under which the issue was considered, have one thing in common: they do not rule out the relevancy of EFD receipts. They only differ regarding where would it be needed (i.e., it all

depends with the circumstance of each case; a position reiterated in **Salehe Habib Salehe v Manjit Gurmukh Singh & Another,** (supra).

In the case of **M/S TaxPlan Associates Ltd v Tanscan Mining Co. Ltd, (supra)** the decree holder had submitted a manual receipt instead of an EFD receipt. In that case, my learned brother Hon. Mr. Justice Magoiga, J., when considering section 36(1) of the Tax Administration Act in relation with the taxing of bill of costs, stated as follows:

> "...I find it apposite to give purposive wider interpretation of section 36 (1) of the Tax Administration Act, 2015 by taking cognizance that since, no dispute that the instruction fees were paid, and the service rendered. Therefore, to achieve the interest of justice to the parties and comply with the spirit of tax collection as envisaged above by the relevant Act, I order that the learned counsel for the respondent be paid instruction fees as taxed subject to payment of relevant taxes with penalties, if any for knowing the requirement but opted to do otherwise at the determent of Tanzania Revenue Authority which is casted to collect tax for national development. ... Let me make myself clear that I am not blessing non-issuance of EFD receipts on instruction fees to advocates but I am alive that each case must be decided on its own merits and circumstances. And the circumstances of this reference have made me choose the cheap devil of making sure that taxes are paid and parties get what they deserve without necessarily employing technicalities to circumvent the purpose of the law itself."

As for me, I do share similar views with my learned brother Mr. Justice Magoiga, J., stated. I would however, state that, where, in a demonstrable circumstance, there was no possibility to attach an EFD

receipt, then, as an exception to the norm, a party must provide sufficient explanations, e.g. machines had malfunctioned, accompanied by attachment of a manual receipt, and, on that basis the Taxing officer may appropriately exercise his/her discretion. However, and on the contrary, where there is no such demonstrable explanations and evidence of manual receipt issued by the party claiming to have remunerated by a client, it makes it difficult to decide in his/her favour.

To my understanding, the necessity to provide an EFD receipt (or such other form given the circumstance of a case at hand), does not only lie on the need to ensure that there is proof of what is being claimed, but it also rests on the need to ensure compliance with the underlying public policy and legal requirement of making sure that, service providers, including advocates, take into account the requirements of revenue laws.

In this reference, the Applicants have argued that there are no requirements of proof of payment by an *Electronic Fiscal Device* (**EFD**) *receipt* under the *Advocates Remuneration Order, 2015, GN. No. 264 Of 2015.* Reliance was placed on the cases of **Bukreef Gold Ltd v Tax Plan Associates & Another (supra)** and **Salehe Habib Salehe v Manjit Gurmukh Singh & Another, (supra)**. While it is indeed true, as pointed in those decisions, that, the *GN. No. 264 Of 2015* is silent concerning proof by EFD receipts, the cases did not rule out the relevance of presenting EFD receipts.

In my humble view, that silence does not mean that an advocate who was remunerated by his client should not comply with other requirements of the law as may be provided for in other relevant statutes or regulations applicable in the country. I hold so because, even in other jurisdictions, there is a requirement to consider other public policy issues as may be envisaged in various statutes such as the tax (revenue) related statutes. In the case of **Asea Brown Boveri Ltd v Bawazir Glass Works Ltd and another (supra)**, for instance, certain principles were stated therein regarding instruction fees, which I find helpful and supportive of what I just stated. In that case, the Court stated that:

> "The instructions fee should cover the advocate's work, the taxing master should tax each bill on its merits, the taxing officer should exercise his discretion judiciously and **in accordance with the applicable Schedule**, and **the taxing officer should also consider the public policy**." (*Emphasis added*).

As a matter of principle, the above stated norms or guidelines, if I may also refer to them as such, are meant to provide guidance to a taxing officer. The last two (in bold) are what I find to be relevant to my immediate discussion. In my understanding, therefore, the issue of use of EFD receipts in evincing payments or services rendered is not only a public policy issue (that all good citizens must pay taxes) but one supported by a legal requirement under the appropriate tax laws (in this regard section 36 (1) of the *Tax Administration Act, 2015, Cap.438 [R.E.2019]*).

In view of the above reasoning, the EFD receipt was, therefore, a pertinent issue in the taxing officer's consideration when the claim regarding payment of instruction fees was raised before her. And, since there were no explanations or even a manual receipt attached to support the claims under Item No.1 of the bill of costs, her decision was justified. To add to that, I would also say that, regardless of whether *GN. No. 264 Of 2015* is silent concerning proof by EFD receipts or not, it is a legal principle that he who alleges must prove.

As regards the second ground (regarding the adequacy of the amount and the evidence on record), I find that, since the taxing officer considered the bill of costs and its supporting documents, and given that the bone of contention was the Item No.1, a further consideration regarding whether such item ought to have been considered under the *NINTH* or the *ELEVENTH SCHEDULE* to *GN. No. 264 Of 2015* or not, will be of no relevance having made a finding that the taxing officer was justified to tax off Item No.1.

In view of that, I find it unnecessary to consider that ground since any amount provided for under either of the two schedules must be supported with at least an EFD receipt in compliance with the law and its underlying public policy or a manual receipt accompanied with reasonable explanations as to why it was impossible to attach an EFD receipt.

A reminder is therefore given to all advocates and litigants, as it was made by my sister Judge, Hon. B.K. Philip, J., in the case of

Thinamy Entertainment Ltd & 2Others v Dino Katsapas,(supra), that:

> "a proof of any payment to an advocate has to be by submitting Electronic Fiscal Device receipts (EFD receipts) (see section 36(1) of the Tax Administration Act,2015".

Moreover, and as I stated herein above, where, in a demonstrable circumstance, there was no possibility to attach an EFD receipt, then, as an exception to the norm, a party must provide sufficient and reasonable explanations, accompanied by an attached manual receipt, if the Taxing officer is to appropriately exercise his/her discretion. Contrary to that, the taxing officer will be entitled to tax off an unsupported item in a bill of costs.

In the upshot, I find this reference application as being devoid of merits and, while I will proceed to dismiss it with costs, also I hereby confirm the award by the taxing officer as being appropriate in the circumstances of the application lodged before her. The reference application is, therefore, hereby dismissed with costs.

It is so ordered.

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

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DEO JOHN NANGELA
JUDGE,

High Court of the United Republic of Tanzania
(Commercial Division)
25 / 09 /2020