



# CORPORATE TAX RESIDENCY IN TANZANIA: A COMMENTARY ON THE JUDGMENT OF THE COURT OF APPEAL IN AFRICAN BARRICK GOLD PLC VS. COMMISSIONER GENERAL & TANZANIA REVENUE AUTHORITY, CIVIL APPEAL NO. 144 OF 2018

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## Abstract:

*In determining Corporate Tax Residency most advanced countries use place of effective management, sometimes along with the place of incorporation as a criterion for defining the residence of a company. This article aims at analyzing the tests that are used to determine corporate tax residency in Tanzania in line with the recent controversial Court of Appeal of Tanzania's decision in African Barrick Gold Plc Vs. Commissioner General & Tanzania Revenue Authority, Civil Appeal No. 144 of 2018.*

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## 1.0 LEGAL CONTEXT

Corporate tax residency in Tanzania is governed by the Income Tax Act,<sup>1</sup> whereby the provision of Section 66 (4) of the Act in a nutshell, provides that a corporation is a resident corporation for a year of income if it is incorporated or formed under the laws of the United Republic of Tanzania or at any time during the year of income the management and control of the affairs of the corporation are exercised in the United Republic. The provision provide for two tests which are enshrined therein. They are the Place of Incorporation test (POI) and the Control and Management of the Affairs test (C&M).

1 Cap: 332 R:E 2019

## 2.0 Brief Facts of the case

The Judgment of *African Barrick Gold Plc vs. Commissioner General and Tanzania Revenue Authority*<sup>2</sup> arises from an appeal originating from the Judgment and Decree of the Tax Revenue Appeals Tribunal (TRAT) at Dar es Salaam chaired by Dr. Twaib J. dated 31st day of March, 2016 in Tax Appeal No. 16 of 2015. It is a decision of the second appeal by the AFRICAN BARRICK GOLD PLC, as the appellant, against the Commissioner General of The Tanzania Revenue Authority, as the respondent.

African Barrick Gold Plc is the company duly incorporated in the United Kingdom and holding shares in three mining entities in Tanzania. The three entities are Bulyanhulu Gold Mine Limited; North Mara Gold Mine Limited; and PANGEA Minerals Limited. PANGEA operates the Tulawaka Gold Mine and the Buzwagi Gold Mine. The respondent is a statutory body corporate that was established under section 4 of the Tanzania Revenue Authority Act<sup>3</sup> for purposes of assessment and collection of taxes and other revenues within United Republic of Tanzania.

The facts constituting this dispute started sometime in November 2012. It started when the respondent's tax investigation department conducted an audit on the business activities of the appellant. As part of that investigation, the respondent issued a notice under section 138 of the Income Tax Act 2004 ("the ITA 2004") which required the appellant, to produce various documents to assist the tax investigation. Later, on 19/11/2012, the respondent issued yet another notice under section 139(l) (b) of the ITA 2004, requiring Mr. Deodatus Mwanyika, the appellant's Vice President- Corporate Affairs; to present himself at the respondent's office in Dar es Salaam for an interview regarding the appellant's tax affairs.

The interview was meant to determine whether, in terms of section 66(4) (a) (b) of

the ITA 2004, the appellant company was a resident company in Tanzania for taxation purposes. The interview was also done in the context of a Certificate of Compliance which the Registrar of Companies had earlier on 11th March 2010 issued to the appellant company to manifest the UK Company's compliance with the provisions of section 435 of the Companies Act of Tanzania. In fact, the respondent was satisfied that despite being a company incorporated in the United Kingdom, the appellant was a resident company in Tanzania for purposes of income taxation.

Consequently, as a tax resident in Tanzania, the appellant was asked to remit withholding taxes on dividend payments amounting to USD 81,843,127 which the company allegedly made for the years 2010, 2011, 2012 and 2013. The appellant was also required to remit withholding taxes on payments which the appellant's mining entities in Tanzania made out to the appellant, together with payments which the appellant made to other non-resident persons (its shareholders) for the service rendered between 2010 and September 2013. The respondent also demanded stamp duty on instruments that were executed relating to the conducting of the appellant's business activities in Tanzania.

Dissatisfied with the decision, the appellant preferred an appeal to the Tax Revenue Appeals Board on the ground that, being a holding company incorporated in the United Kingdom, it was neither a resident company in Tanzania, nor did it conduct any business in Tanzania to attract the income tax which the respondent demanded. The respondent replied, insisting that as long as the appellant has its regional offices in Dar es Salaam, and had a Certificate of Compliance issued by the Registrar of Companies of Tanzania, and given that the appellant is also listed on the Dar es Salaam Stock Exchange; the appellant is as much a resident company doing business in Tanzania as any other company incorporated under the Companies Act of Tanzania. the

2 Civil Appeal No. 144 of 2018 dated 2nd June, 2020, 3rd August 2020 & 31st August, 2020

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Board made, *inter alia*, a finding that the Certificate of Compliance which the Registrar of Companies issued to the appellant, had the effect of vesting the appellant with a legal status to conduct business in Tanzania. To that extent, the Board concluded, the appellant is a resident company in Tanzania for the purpose of income taxation.

Dissatisfied with the decision of the Board, the appellant appealed to the Tribunal. The appellant kept on insisting that the Board erred in law and in fact to hold that the appellant is a resident in Tanzania for income tax purposes. The Tribunal concluded that the appellant is a resident company for tax purposes and similarly dismissed the appellant's first appeal. The Tribunal stated:

*“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 be included. .... Hence even though it does not amount to the incorporation (or reincorporation, for that matter) of the company in Tanzania, it is correct to conclude that registration amounted to the company’s formation in Tanzania as a foreign company.”* Hence, the Appeal to the Court of Appeal of Tanzania.

### 3.0 ANALYSIS OF THE CASE

The issue for determination by the Court of Appeal of Tanzania was whether the Tax Revenue Appeals Tribunal which heard the appellant's first appeal, was correct as a matter of law, to hold that the Certificate of Compliance which the Registrar of Companies issued under section 435 of the Companies Act<sup>4</sup> amounted to the appellant company becoming “formed” for purposes of income

<sup>4</sup> Cap: 212

taxation in Tanzania under section 66(4)(a) of the Income Tax Act, 2004 (“the ITA 2004”). In resolving the issue, the Court of Appeal of Tanzania insisted that the provision of section 66(4)(a) should not be read in isolation. Rather, it should be read together with the definition of “corporation” under section 3 of the ITA 2004, and complemented with the provisions of Part XII of the Companies Act Cap 212 governing establishment of places of business in Tanzania by foreign companies. Subsection (4) of section 66 of the ITA 2004 provides the circumstances when a corporation, can be regarded as a resident corporation in any year of income for taxation purposes. It provides thus:

*“66 (4) A corporation is a resident corporation for a year of income if—*

*(a)-it is incorporated or formed under the laws of the United Republic; or”* in order to avoid ambiguity the Act provides the meaning of corporation under Section 3 of the ITA 2004 has defined “corporation” to mean:

*“...any company or body corporate established, incorporated or registered under any law in force in the United Republic or elsewhere*

...

In this regard therefore, both the provision of section 66(4) (a) and section 3 of ITA, should be read together with the provisions of section 435 of the Companies Act which confers power to the Registrar of Companies to issue Certificate of Compliance to foreign companies. The legal effect of the Certificate of Compliance is thus to vest legal status to a foreign company to conduct business in Tanzania.

In our reckoning, the phrase “...any company or body corporate **established, under any law in force in the United Republic or elsewhere...**” in the definition under section 3 of the ITA, 2004 has cast the net so wide that it includes as tax residents, any foreign company that is

issued with a Certificate of Compliance under section 435 of the Companies Act, 2002. The plain meaning of the words “**or elsewhere**” under section 3 of the ITA 2004 envisage the likes of the appellant company, which, though incorporated in the United Kingdom, as long as the Registrar of Companies had issued them with Certificates of Compliance, these foreign registered companies attain statutory footholds to establish places of business in Tanzania, thereby, attracting income tax liability.

With afore reasoning, the Court of Appeal of Tanzania upheld the decision of the tribunal. By agreeing with the Tribunal’s purposive method of interpretation of section 66(4)(a) of ITA 2004 to the effect that once the appellant was issued with a Certificate of Compliance under section 435 of the Companies Act, the appellant not only acquired a place of business in Tanzania, but it was also deemed to bear all the statutory obligations under Companies Act. It went further to say that after obtaining the Certificate of Compliance, the appellant’s income tax obligations can only cease when it gives notice in writing to the Registrar of Companies about closing of its place of business in Tanzania under section 441 (1) of the Companies Act.

Therefore, the Court of Appeal of Tanzania was prepared to hold that the word “formed” appearing under paragraph (a) of section 66(4) and the phrase “*established, incorporated or registered under any law in force in the United Republic or elsewhere*’ under section 3 of the ITA 2004, include foreign incorporated companies, which become resident companies for income tax purposes on the basis of the issuance of their Certificates of Compliance under the Companies Act.

#### 4.0 PRACTICAL SIGNIFICANCE

The judgment of *African Barrick Gold Plc Vs. Commissioner General & Tanzania Revenue Authority* is celebrated as the victory to the tax authorities in Tanzania and the government at large. The decision of the Court of Appeal makes remarkable jurisprudence in so far as corporate tax residency in Tanzania is concerned. Before the decision of this case which is binding to all lower courts and tribunals respectively, the provision of section 66 (4) (a) of the Income Tax Act, 2004 was applied in a narrow manner to the effect that for a foreign corporation to be a residency in Tanzania for tax purpose it has to have the control and management of its affairs in Tanzania. But after the purposive interpretation of the statute in this case, if the corporation is incorporated outside Tanzania but have a place of business in Tanzania within the meaning of section 435 of the Companies Act, it is considered a resident in Tanzania and has liability to pay tax to the relevant authorities. After this decision therefore, the provision of section 66 (4) (a) of the Income Tax Act, is understood to all corporations incorporated in Tanzania and all those corporations though not incorporated in Tanzania in the sense that a company or body corporate incorporated or registered elsewhere as per section 3 of the Income Tax, but formed in Tanzania has residency in Tanzania and liable to pay tax within the meaning of section 66 (4) of the Income Tax Act, 2004.