IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MUGASHA, J.A., NDIKA, J.A. And LEVIRA, J.A.)

CIVIL APPEAL NO. 89 OF 2019

GEITA GOLD MINING LTD ..... APPELLANT

VERSUS

COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY ... RESPONDENT

(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal at Mwanza)

(Shangwa, J.)

Dated 10th day of October, 2012
in

Tax Appeal No. 14 of 2006

JUDGMENT OF THE COURT

3rd & 15th June, 2020

LEVIRA, J.A.:

The appellant, GEITA GOLD MINING LIMITED (GGML) owns and operates a gold mine in Geita. For smooth running of mining activities at the mine site, the appellant decided to build its own power station to produce electricity. Therefore, she entered into an agreement with Golden Construction Limited (GCL) for construction of the said power plant, supply and installation of 7 big generators and Geita Power Plant Limited (GPPL) to manage and operate the power plant.

The GCL supplied the said generators but on installation they collapsed. As a result, the holding company of GCL by the name Rolls Royce had to enter into a hire Agreement with Aggreko International Project Ltd (AIPL) to install 24 small generators to the appellant's mines as an alternative to the 7 collapsed generators.

The agreement between the appellant and GPPL permitted the operator of power house to use fuel efficiently and fuel consumption rate was imposed. It was further agreed that excessive fuel consumption was subject to penalty by mines owner, the appellant.

However, it was so unfortunate that the 24 installed generators consumed more fuel and exceeded the contractual fuel limit, a fact which triggered the appellant to invoice the contractor (GCL) for the excess fuel for the period from January, 2001 to September, 2002 to the tune of USD 5,527,553.85 and 20% Value Added Tax (VAT) amounting to USD 1,105,510.77. During the tax audit, the respondent's officers found the said invoice in the appellant's books of accounts and as such, demanded the charged VAT to be paid to the respondent. The appellant objected claiming that the excessive fuel supplied was not subjected to VAT and thus, the appellant was not liable to pay the demanded amount by the respondent.

Aggrieved, the appellant unsuccessfully challenged the decision of the respondent to both the Tax Revenue Appeals Board (the Board) vide VAT Tax Appeal No. 8 of 2004 and the Tax Revenue Appeals Tribunal (the Tribunal) vide VAT Appeal No. 14 of 2006. Undauntedly, the appellant has preferred the current appeal. The Memorandum of Appeal contains four grounds challenging the decision of the Tax Revenue Appeals Tribunal as follows:-

1. The Tax Revenue Appeals Tribunal erred in law when it held that Value Added Tax (VAT) is payable on the excess fuel utilized by M/S Golden Construction Company to run the Geita Gold Mine Power Station.
2. That the Tax Revenue Appeals Tribunal erred in law and fact when it held that there was a vatable supply of fuel between Geita Gold Mine Limited and Golden Construction Company operating the Geita Gold Mine Power Station.
3. The Tax Revenue Appeals Tribunal erred in law in relying on the un-issued invoice to hold that VAT is payable by reason only of the existence of the invoice without giving due regard to section 4 and 5 of the VAT Act, 1997.
4. The Tax Revenue Appeals Tribunal erred in law in dismissing the appeal and ordering the appellant to pay costs.

The parties filed written submissions for and against this appeal in compliance with Rule 106 of the Tanzania Court of Appeai Rules 2009 (the Rules).

At the hearing of the appeal, the appellant was represented by Mr. Alan Kileo, learned advocate, assisted by Mr. Wilson Mukebezi and Mr. Norbet Mwaifwani, both learned counsel; whereas the Respondent had the services of Mr. Evarist Mashiba, learned Principal State Attorney assisted by Mr. Hospis Maswanyia, Mr. Harold Gugami and Mr. Yohana Ndila, learned State Attorneys.

Mr. Kileo adopted the written submissions filed earlier on as part of his submission at the hearing. In addition, he submitted that the correctness of the assessment by the respondent is answered on whether or not there was vatable supply between the appellant and the GCL. According to him, there was no vatable supply because the fuel in question was consumed by the appellant. He, however, admitted that the GCL breached the terms of contract and the appellant issued invoice as a penalty for excess fuel utilised. It was his argument that, the fact that there was an invoice indicating the VAT should not sway the Court from what transpired because the end user of the fuel is the appellant. He insisted that the appellant imported the fuel and consumed it and this

amounted to self-supply in terms of section 5(1) (c) of the Value Added Tax Act, 1997 (the VAT Act). He thus argued that any invoice issued by the appellant for fuel indicating VAT as if there was supply was wrong because there was no supply.

He argued further that section 57 (now 58) of the VAT Act which demands VAT to be recoverable whenever there is an invoice showing that VAT, must be read together with section 5 of the same Act because fundamentally, VAT is a tax on transaction. As such, he said, section 57 assumes that there is supply but in the current matter there was no supply and the said section becomes irrelevant. According to him, even the question as to whether the invoice was cancelled becomes irrelevant because there was no supply and hence no transaction.

Upon being prompted by the Court to state whether or not the appellant was privy to the contract between the GCL and Rolls Royce Company which supplied 24 generators, his response was in the negative. However, he maintained that there was no supply of fuel so it was not right for the respondent to claim for VAT. Finally, he urged us to allow this appeal.

In reply, Mr. Maswanyia, learned State Attorney adopted the written submissions and stated that there is no doubt that the appellant supplied

fuel to GCL, raised an invoice and proceeded to charge VAT as it can be seen at page 14 of the record of appeal. He also said that, there is no dispute that the invoice subject to this dispute was never cancelled todate. He referred to section 4(1) of the VAT Act and said that, VAT is chargeable to any supply of goods made to a taxable person. He went on stating that, the appellant supplied fuel to the GCL, so the supply is taxable. In addition he said, section 5 of the VAT Act defines taxable supply to mean a supply made by a taxable person in furthering his business. Thus, he said, there is no dispute that the fuel, a taxable supply was supplied to a taxable person by the appellant who is conducting mining business.

He revealed that at the Board and the Tribunal it was proved that the appellant sold fuel to GCL. Therefore, he said, since it was concluded at the Tribunal that the appellant sold the fuel, this fact should not be further entertained by the Court in terms of section 25(2) of the Tax Revenue Appeals Act, Cap 408 RE 2002.

According to Mr. Maswanyia, the remaining question to be determined is whether the amount raised as back charge is supposed to be collected by the respondent under section 57 of the VAT Act. He added that the said section 57 should be strictly construed and the appellant be ordered to pay what it charged as VAT. In support of his position the

learned counsel cited the case of **Resolute Tanzania Limited v. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 125 of 2017 (unreported) in which the Court cited with approval the case of **Cape Brandy Syndicate v. Inland Revenue Commissioners** (1921) 1 KB 64; where it was stated that, in taxing one has to look merely at what is clearly said.

Mr. Maswanyia submitted further that, the invoice has to be taxed in terms of section 57 of the VAT Act because the supply was supposed to be made to the appellant and not as what the appellant did in this matter. He therefore prayed that the decisions of lower tribunals be upheld, the appeal be dismissed and the appellant be ordered to pay VAT.

In a very brief rejoinder, Mr. Kileo urged us to construe the provisions of the VAT Act purposively and harmoniously instead of invoking a strict interpretation rule as requested by the respondent's counsel. He said, if sections 4 and 5 of the Act will so be construed, it will be realised that there was no taxable supply. He added that, both the Board and the Tribunal did not rule out that there was sale of fuel. According to him, the case cited by the respondent is distinguishable because it talked about tax exemptions prescribed in the Government Notices and this is irrelevant in

the present matter. He thus reiterated his prayer that this appeal be allowed.

We have considered the submissions by the parties and the entire record of appeal. It is quite clear that the appellant entered in an agreement with GCL under which the latter had to install 7 big generators at the appellant's power plant. It is undisputed fact that the said generators were installed as per the agreement but they did not work as expected. Following that failure, the GCL had to find an alternative where through its holding company, Rolls Royce Company had to enter into an agreement with AIPL to install 24 small generators. The appellant supplied the GCL fuel to run the said generators. Therefore, in this appeal the main contention centres on the fuel supplied by the appellant to the GCL to run the 24 small generators.

The appellant has presented four grounds of appeal as indicated above. We wish to determine the first and second ground together and the remaining two grounds separately.

In the first and second grounds of appeal the appellant is faulting the Tax Appeals Tribunal for holding that the appellant is required to pay VAT for the fuel supplied to the GCL. The issue calling for our determination is whether or not there was a vatable supply of fuel between the appellant

and GCL. On the one hand, the appellant's position is that, the supply of fuel by the appellant is not vatable because the fuel in question was consumed by the appellant. On the other hand, the respondent argued that the appellant made a supply which is taxable because she sold fuel to GCL.

We note that the counsel for the appellant did not dispute the fact that the appellant issued an invoice for fuel indicating VAT to GCL, although he said, it was wrong because there was no supply and the respondent was not supposed to claim VAT.

We further note that the appellant was not privy to the subsequent agreement between Rolls Royce Company Limited (as a parent Company of GCL) and AIPL which supplied 24 generators consuming excessive fuel. The appellant demanded payment for the fuel supplied for the running of the said generators from Golden Construction Limited and issued a tax invoice of USD 5, 527,553.83 and charged VAT of 20% but did not remit the same to the respondent. According to the record, the invoice was debited and it appears in the appellant's audit report for the year 2002 - 2003. The invoice which the counsel for the appellant claimed that it was cancelled, which was found to be untrue both before the Board and the Tribunal.

Section 5(1) of the VAT Act defines "taxable supplies" as any supply of goods or services made by a taxable person in the course of or in furtherance of his business. Therefore, since there is no dispute that the appellant supplied fuel to the GCL to enable the 24 generators to run for furtherance of business; and since the said generators were installed under an agreement in which the appellant was not a party, we agree with the Board and the Tribunal that the supply of fuel made by the appellant to GCL amounted to "vatable supply" which was evidenced by the issued invoice and hence, the appellant is not exempted from paying Tax in terms of section 4(1) of the same Act.

Besides, section 57 of the VAT Act provides that:-

> *"Any amount shown on an invoice, a receipt, or similar document as VAT chargeable on a supply of goods or services shall be recoverable as VAT due from the person issuing the invoice, regardless as whether:-*
>
> *a) The invoice is a tax invoice as prescribed in the Act;*
>
> *b) Tax is chargeable in respect of the supply to which the invoice relates; or*
>
> *c) The person issuing the invoice is a taxable person."*

In view of the above provision, it is crystal clear that whenever an invoice issued as VAT chargeable for a supply of goods or service shall be recoverable as VAT due from the person issuing the invoice. Therefore, in the current matter, since the counsel for the appellant does not dispute the fact that the appellant issued an invoice for the fuel supplied to GCL, we decline the invitation extended to us by Mr. Kileo that we should interpret the law purposively and find that the appellant is not required to pay VAT. The language of the law in the above quoted provision is plain, so we do not see the need of construing it purposively. Having so stated, we agree with the respondent that since the appellant supplied fuel to GCL and subsequently demanded payment including VAT as per the invoice, she was liable to remit the same to the respondent in terms of section 57 of the VAT Act. Therefore, the first and second grounds of appeal fail.

In the third ground of appeal, the appellant claimed that the Tribunal did not give due consideration to provisions of section 4 and 5 of the VAT Act in reaching its decision, instead it based on the existence of the invoice. Mr. Kileo submitted in respect of this ground to the effect that, the fact that there was an invoice indicating the VAT should not sway us from the reality. Fuel is an input to the appellant and thus imported and consumed the fuel in question. On other hand, the learned counsel was

suggesting that the existence of the invoice should be disregarded. The respondents' counsel while referring to section 4(1) of VAT Act he said that, VAT is chargeable to any supply of goods where it is a taxable supply made to a taxable person.

This ground of appeal need not detain us much, the issue as to whether or not the Tribunal considered section 4 and 5 of the VAT Act is easily answered by what is found at page 195 through 196 of the record of appeal. Both sections together with section 11 were considered by the Tribunal. However, the Tribunal was of the view that, the said provisions could not save the appellant from being charged VAT. The Tribunal had this to say:-

> *"In our view, there is nothing in the provisions of sections 4,5 and 11 which saves the appellant from being charged VAT on the supply of excess fuel to Golden Construction Limited from January, 2001 to September, 2002."*

Therefore, it is not true that the said provisions of the law were not considered by the Tribunal and this ground of appeal also fails.

In the fourth ground of appeal, the appellant is faulting the Tribunal for dismissing the appeal and ordering the appellant to pay costs. It is common ground that in prosecuting tax disputes parties do incur some

costs which are supposed to be paid by a losing party. We do not see any justifiable reason of faulting the Tribunal for ordering the appellant to pay costs after having turned a loser.

In the circumstances, we find no merit in this appeal. Consequently, we uphold the decision of the Tribunal and dismiss this appeal in its entirety with costs.

DATED at **DODOMA** this 12th day of June, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered on 15th day of June, 2020 in the presence of Mr. Yohana Ndila, learned State Attorney holding brief for Mr. Wilson Mukebea, learned counsel for the Appellant and Mr. Yohana Ndila, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL