

Legal Brief

Lawhill & Co. Advocates – Premier Tax & Corporate Attorneys

Issue No. 6, June 16th 2020.

From our Tax Desk

Court of Appeal rules that VAT shown in an Invoice is Recoverable

The Court of Appeal of Tanzania sitting in Dodoma has on 15th June, 2020, in ***Civil Appeal No. 89 of 2019 between Geita Gold Mining Limited and Commissioner General, TRA*** hold that:

- *Where an invoice has shown VAT component, such VAT shown on an invoice is recoverable in terms of section 57 of the Value Added Tax Act, 1997;*
- *In terms of section 5 (1) of the Value Added Tax, 1997, the Appellant had made a taxable supply;*
- *When the words of a statute are clear, purposive and harmonious interpretation is uncalled for;*
- *Court sees no reason to fault the Tribunal for ordering costs;*

Brief facts of the Dispute

The Appellant, Geita Gold Mining Limited (GGML), the Appellant, 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) and the Tax Revenue Appeals Tribunal (the Tribunal).

Appellant's Key Arguments before the Court of Appeal

1. That, in terms of section 5 (1) (c) of the Value Added Tax Act, 1997 (the VAT Act 1997), there was no supply that should be subjected to VAT. The invoice issued by the Appellant for fuel indicating VAT as if there was supply was wrong because there was no supply;

2. Section 57 of the VAT Act 1997 (now section 58), which provided for demanding VAT to be recoverable whenever there is an invoice showing VAT, must be read together with section 5 of the same Act. As there was no supply, section 57 should not be invoked to demand VAT wrongly indicated in the invoice; and,
3. That, as long as there was no supply, the question as to whether the invoice was cancelled or not becomes irrelevant.

The Respondent's Key Arguments before the Court of Appeal

1. That, there was no dispute that the invoice, the subject of the dispute had never been cancelled, as such the Appellant had made a taxable supply in terms of section 4 (1) of the VAT Act 1997;
2. That section 5 of the VAT Act defines taxable supply to mean a supply made by a taxable person in furthering his business, and that, no doubt, the fuel was a taxable supply supplied by a taxable person who is conducting mining business;
3. That, it was proved at the Board and Tribunal that the Appellant sold fuel to GCL, and in terms of section 25 (2) of the Tax Revenue Appeals Act, such fact should not be further entertained by the Court of Appeal; and
4. In terms of section 57 which should be interpreted strictly, the mount shown in an invoice as VAT is recoverable.

The Court's Reasoning and Decision

The Court in its judgment reasoned as follows:

- That, it was not in dispute that an invoice was issued for fuel to GCL indicating VAT, and that the Appellant was not privy to a contract between Rolls Royce Company Limited and AIPL which supplied the 24 generators consuming excessive fuel. The invoice of USD 5,527,553.83 charged VAT at 20%, but the VAT amount was not remitted to the Respondent;
- The claim that the invoice was cancelled is not true and therefore in terms of section 5 (1) of the VAT Act, the supply was a taxable supply evidenced by the issued invoice;
- Besides, section 57 of the VAT Act 1997, is crystal clear that VAT is recoverable for any amount shown on an invoice, a receipt or similar document regardless as to whether the invoice is a tax invoice; whether tax is chargeable in respect of the supply to which the invoice relates; or a person issuing the invoice is a taxable person.
- That, costs are supposed to be paid by a losing party and there is no justifiable reason of faulting the Tribunal for ordering the appellant to pay costs after having turned a loser.

Our assessment of the Court's Decision

Lawhill & Co. Advocates observes that the decision makes important observations: first, on the applicability of section 57 on a document, whether be it a tax invoice, or receipt or any other document which shows VAT component, then such VAT shall be recoverable irrespective of whether there had been a supply or not; second, that much as under section 5 (1) of the VAT Act, 1997, the appellant, under the arrangement with GCL would be treated as making a self-supply, which in any way, is a taxable supply, and by virtue of section 11 read together with the Third Schedule, the supply would be a specially relieved supply, the fact that an invoice was issued indicating the VAT component, makes section 57 to come into play. It reminds taxpayers that, under section 57 (now 58) of the VAT Act, 1997, any amount shown in an invoice as VAT is recoverable even if, the issuer is not a taxable person; regardless as whether tax is chargeable in respect of the supply to which the invoice relates.

The decision also reminds taxpayers on the proper drafting of commercial agreements and their interpretation thereof. In this case, the fact that the agreement provided for a penalty for excessive consumption of the fuel, issuance of a tax invoice completely changed the nature the penalty into a consideration for the excessive consumption of the fuel. Had the penalty clause been properly invoked, and no invoice issued indicating VAT amount, the decision would have probably been different, or, in the first place, the Respondent would not have probably raised a VAT issue on a penalty.

***Disclaimer!** This brief is issued for general information purposes and does not in any way constitute a legal opinion by Lawhill & Co. Advocates. Lawhill & Co. Advocates shall not be liable for any injury and/or loss arising from relying on this brief. Should you have issue relating to the brief or any other issue, kindly contact our office for an opinion that suits your particular needs.*

For inquiries on this or any other legal issue contact us through our below contact details or visit www.lawhill.co.tz