IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: OTHMAN, CJ., MASSATI, J.A. And MUGASHA, J.A.)

CIVIL APPEAL NO. 78 OF 2015

NORTH MARA GOLD MINE LIMITED.....APPELLANT

VERSUS

COMMISSIONER GENERAL (TRA).....RESPONDENT

(Appeal from the decision of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Mattaka – Vice Chairperson)

Dated the 26th day of May, 2015
in
Tax Appeal No. 3 of 2014

JUDGMENT OF THE COURT

16th February & 1st March, 2016

MASSATI, J.A.:

North Mara Gold Mine Limited, a limited liability company incorporated in Tanzania and carrying on mining activities at Nyamongo Tarime, has preferred the present appeal under section 25 of the Tax Revenue Appeals Act Cap. 408 R.E. 2002, and Regulation 24 of the Tax Revenue Appeals Tribunal Rules, 2001, against the decision of the Tax

Appeals Tribunal (the Tribunal) dated 26th May, 2015 in Tax Appeal No. 3 of 2014, (the decision).

By the said decision, the Tribunal had affirmed the earlier decision of the Tax Revenue Appeals Board in Customs Excise Tax Appeal No. 16 of 2015, which had dismissed its appeal against the decision of the Tanzania Revenue Authority (TRA) that had disagreed with the appellant in its bid to have the two dump truckers it had imported in June 2013, be classified as "unassembled" under Code 8704.10.10 of the Harmonized Commodity Description and Coding System of 2012 (the HS Code) whose duty rate is zero percent. Instead, TRA classified the dump trucks under HS Code 8704.10.90 under which the duty rate is 10%.

At the hearing of the appeal, the appellant was represented by Dr. Kibuta Ongwamuhana, learned counsel, assisted by Ms. Salome Gondwe, and learned counsel. The respondent was represented by Mr. Juma Beleko, learned counsel, assisted by Ms. Gloria Achempota, learned counsel.

The appellant has raised and argued five grounds of appeal, as follows:

"(i). That the Tax Revenue Appeals Tribunal erred in law in holding that unassembled trucks are dutiable because the appellant does not have an assembly plant at the site.

(ii). That the Tax Revenue Appeals Tribunal erred in law by failing to rule that when classifying imported goods one has to look at the character/form in which the goods are imported.

(iii). The Tax Revenue Appeals Tribunal erred in law by failing to interpret rule 1 of the general interpretation rules which require goods to be classified according to the specific tariff code under which they fails.

(iv). That the Tax Revenue Appeals Tribunal erred in law in holding that the dump trucks were transported in dissembled form for purposes of convenience of transportation at that this has no effect on the HS Code.

(v). That the Tax Revenue Appeals Tribunal erred in law in holding that the dump trucks in unassembled form do not form under item 30(b) of the fifth Schedule to the East African Community Customs Management Act which exempts machinery from liability to import duties."

At the hearing, Dr. Kibuta adopted the written submission he had earlier on filed and orally clarified what he termed as possible issues arising from the appeal. On the first issue, the appellant submitted that there was nothing in law which supported the restriction that unassembled trucks were meant to be assembled at a vehicle assembly plant. On the second ground, the appellant started by admitting that goods must be judged on the basis of the nature in which they are at the time of importation. The state of the goods affects the tariff classification. However, the appellant submitted that it was wrong for the respondent and the Tribunal to have treated the trucks as assembled because they would form one unit once assembled. Learned counsel referred us to the Indian case of **UNION OF INDIA AND**

TARACHAND GUPTA AND BROS – to augment his point. The complaint in the third ground is that the Interpretation Rules in the HS Code were disregarded by the Tribunal. Here, the learned counsel also referred to another Indian case of **MODI XEROX LTD. v COLLECTOR OF CUSTOMS**. In the fourth ground of appeal, the appellant complains that the mode of transportation of the trucks had no effect in the classification of the imported dump trucks. It was insisted that the dump trucks should have continued to be treated in their "unassembled", and not "disassembled" state. In the fifth ground of appeal, Dr. Kibuta submitted that the trucks were qualified for exemption under the East African Community Customs Management Act, 2004, item 30 of Part B of the Fifth Schedule.

For the reasons, the learned counsel prayed that the appeal be allowed with costs.

On the other hand, Mr. Beleko, who had also earlier on filed a written submission in reply, adopted it and made an oral response to Dr. Kibuta's oral submission. In response to the first issue, the learned counsel submitted that the dump trucks in question were not in a state

of unassembled dump trucks. They were so arranged in order to facilitate their transportation in the country. As such they do not fall under HS Code 8704.10.10, but rather, under the classification of "other" which falls under HS Code 8704.10.90. In answer to the second issue, Mr. Beleko submitted that while it was true that in classifying imported goods the classification must be on the basis of the state of goods at the time of their importation, the respondent found that the dumper trucks were not in an unassembled form when they were imported. This was according to the evidence tendered before the lower tribunal. He went on to distinguish the Indian case of **UNION OF INDIA Vs TURA CHANDI GUPTA AND BROS** where the Indian Court dwelt on the interpretation of the HS Code. Then Mr. Beleko, went on to address us on the fourth ground of appeal, where he adopted the finding of the Tribunal that the dumper trucks were disassembled for purposes of facilitating their haulage. They were not in an unassembled state. On the fifth and last ground of appeal, the learned counsel submitted that there was no evidence that the appellant had declared the trucks as exempted from duty at the time of importation. He went

on to submit that, the trucks did not fall under the category of machinery and spare parts used in mining.

So, at the end of the day, Mr. Beleko prayed that the appeal be dismissed since the trucks qualified neither a zero rate nor an exemption.

Dr. Kibuta, made a brief rejoinder. He submitted that, it was trite law that, under the Constitution of the United Republic of Tanzania, any tax must be based on a law. The detailed Tariff Book (the Code) which is part of the laws of the land, removes discretion in assessing customs duty rates, and ensures that there was consistency in the administration of tax law. On the premises, Rule 1 of the Code disallows customs officers from classifying goods on the basis of conjecture. So if he does not accepted a declared classification of goods a customs officer must give reasons. In this case the respondent did not give any reasons for not accepting the 0% rate for the imported dumper trucks. On the issue of exemption, the learned counsel, was of the view that the dump trucks were machinery and therefore subject to exemption. So, he once again prayed that the appeal be allowed.

This appeal is really about the interpretation of the Harmonized Commodity Description and Coding System (HS Code) which is part of our tax laws. So we wish to begin by stating some cardinal principles of statutory construction of tax statutes which will guide us in determining the present matter.

> *"(i). Under the Constitution (Article 138) no tax is collectable without the authority of the law.*
>
> *(ii). Tax statutes are clearly in derogation of personal rights and property interests and are therefore, subject to strict construction, and any ambiguity must be resolved against imposition of the tax (**BILLINGS v US, 232 US 261**).*
>
> *(iii). In a taxing Act one has to look merely at what is clearly said. There is no equity about a tax. There is no presumption as to a tax. (See Brandy, **Syndicate v IRC** (1921) 1 KB 64.*

(iv). If the strict interpretation of a taxing statute is likely to lead to a manifest absurdity, then the golden rule of construction implies that the meaning of the words should be so effected that such an absurdity is avoided: otherwise the literal rule has precedence over the golden rule (See ***GREY v OEARSIB*** *(1857) 6 HL . Cas. 61.*

(v). When any provision of a taxing statute is interpreted it must be so construed that the meaning of such provision must harmonise with the intention of the legislation behind the provision in particular and the enactment in general, subject to the fact the provision or particular enactment is not held to be unconstitutional."

Although there are five grounds of appeal, which the learned counsel preferred to call them "issues", we find that there are only two substantial questions of law, which require adjudication.

"(i). Whether the dumper trucks imported by the appellant and declared by the appellant as unassembled, are changeable with any duty, and if so, at what rate?

(ii). Whether, the dumper trucks call for exemption as machinery under item 30 B of the Fifth Schedule to the East African Community Customs Management Act of 2004.

Let us begin with the second issue. In its statement of reasons in support of the appeal in the Tax Revenue Appeal Board, the appellant raised the issue of exemption as one of the complaints against the respondent, arguing that the dump trucks were machines which qualify for such exemption. This claim was disputed by the respondent. In its decision, the Board held that the dump trucks did not qualify as machines; and that in any case, even if they were, the exempted machines were those that were to be used for gas, oil and geothermal exploration intended for energy production. In the opinion of the Board,

gold production could not be used to produce energy. With that conclusion, the Tribunal agreed.

We agree with both the Tax Appeals Board and the Tribunal's findings that item 30 B of the Fifth Schedule to the East African Community Customs Management LN No. 10 was intended to exempt:

> *"Machinery, spares, and, inputs for direct use in Oil, Gas and Geothermal Exploration."*

There is no dispute that the dumper trucks were not meant for direct use in oil, gas and geothermal exploration.

That exemption was therefore not available to the appellant, and we find no substance in the complaint in ground five of the appeal and we dismiss it.

The next issue for determination is which code of classification was applicable in assessing the tariff duty for the dump trucks imported by the appellants. As seen above Dr. Kibuta had argued this issue, mainly in the first ground of appeal, and rallied around grounds two, three, and four, in support of it. In this part, we shall address grounds one, two and three of the appeal together.

The main plank in these grounds, is that, first, the only law applicable for the classification of the dumper trucks was the Tariff Handbook, and that the correct Code was HS Code 8704.10.10, whose duty rate was 0%. Since under this Code, there was no requirement to have an assembly plant it was wrong for the Tribunal to have held that the Code could only be used for those who had assembly plants.

It is true that in its decision, the Tribunal held that:

> *"... the Respondent was correct when submitting that the Appellant required an assembly plant at the mine site. As the law requires, an assembly plant must be licensed by competent authority to do the said works".*

In doing so, the Tribunal must have been referring to the Respondent's submission that:

> *"It is a requirement of the law that an assembly plant must be licensed by competent authorities to do the work. No such evidence was given by the Appellant to prove that the dump trucks were assembled at the mine site upon importation."*

The problem with this finding of the Tribunal is that, although it relied on a law, that law was neither cited to it by the Respondent, nor did the Tribunal satisfy itself of the existence of such law. On that province the decision of the Tribunal was based on conjecture and therefore wrong. But that does not solve the issue whether or not the dump trucks were correctly classified under HS Code 8407.10.90. This takes us to the basics of the General Rules for the Interpretation of the HS Code.

The Harmonized Commodity Description and Coding System, is a goods nomenclature that was developed and maintained by the World Customs Organization and is governed by the International Convention on the Harmonized Commodity Description and Coding System. It has now acquired the reputation of the international trade language. Tanzania ratified the Convention by adopting the said General Rules in the Interpretation of the Fourth Schedule to the Customs (Management And Tariff) Act (Cap. 403 R.E. 2002), by virtue of section 193(3) thereof.

The Fourth Schedule governs "Value of imported goods liable to valorem import duty".

The HS Code provides a logical structure over 1200 headings grouped in 96 chapters, some of which are further sub divided into sub-chapters. The chapters are arranged in 21 sections. Each heading is identified by a four-digit code, the first two digits indicating the chapter, the latter two indicating the position of the heading in the chapter.

Under the HS Convention, the headings, sub headings and numerical codes must be used without addition or modification, and that the General Rules for Interpretation (GRIs) be used for its application. However within those limits textual adaptations are allowed, if necessary to give effect to the HS in domestic law.

There are six General Rules for the Interpretation of the HS Code; GRI 1 to 6. According to the HS Committee's (set up under the HS Convention). **Interpretation of Tariff Headings,** May, 2007), the most important are:

"GRI 1 and GRI 6

GR1 stipulates that classification is determined according to the terms of the headings and of any relevant section or Chapter notes. If classification cannot be so determined, GRI 2, through GRI 5 must be

applied in consequential order. GRI 6 stipulates that GRI 1 through GRI 5 apply mutatis mutandis at subheading level in so far as any subheadings of the same level are comparable.

GRI 2 and GRI 3

GRI 2 effectively contains two rules – GRI 2(a) for incomplete or unfinished and unassembled or disassembled articles, which are classified as complete or finished article if they have the latter's essential character. GRI 2(b) applies to mixtures or combinations of materials or substances, which must be classified in accordance with the principles of GRI 3. For such goods, or whenever goods are prima facie classifiable under two or more headings, GRI 3(a) stipulates that the heading with the most specific description applies.

Where GRI 3(b) cannot be applied, the mixture or combination must be classified under the heading that is last in numerical order among headings that equally merit consideration."

In the present case although Dr. Kibuta has pressed that classification should have been under HS Code 8704.10.10, he has not, with respect specifically pointed out which General Rule for Interpretation was most

suited. He had, however, referred to us two decisions of the Indian Supreme Court.

In **MUDI XEROX LTD. v COLLECTOR OF CUSTOMS**, the Court held:

> *"Rule 1 of the General Rules provides that for legal purposes classification of the goods shall be determined according to the terms of the headings and any relevant section or chapter notes. It is only when such headings or notes do not help in determination of the classification that the provisions of the general rules will apply".*

In that case, applying Rule 1 of the HS Code the Court found that the impugned goods were components for the facsimile machines and would be appropriately classified under the appropriate Heading, for components. So, while the observation on the general rule of interpretation of the Tariff Handbook, was well placed; the facts were distinguishable from the present case.

The other Indian case of **UNION OF INDIA v TARACHAND GUPTA & BROS** was basically on breach of conditions of an import license. The issue in the present case is different.

What sparked the present dispute is the respondent's letter to the appellant dated 9th July 2013, which was tabled before the Tax Appeals Board as Exhibit A4. The essential part of that letter is:

> *"This is to clarify that in the Customs Tariff Nomenclature the goods which are in an unassembled state for convenience of transportation, the unassembled parts are collectively classified as being a complete item. Therefore the Caterpillar Dump Trucks CAT 785C presented unassembled for easy (sic) of conveyance as explained in your letter remained classified as complete truck under HS Code 8704.10.90 and not HS Code 8704.10.10..."*

This was in response to the appellant's letters of 2nd July, 2013 and 8th July 2013 which were received in evidence as Exhibit A1 and A2. In these two letters, the appellant agrees that the dumpers were packed as unassembled for convenience of transport, but argued that the same

are covered by HS Code 8704.10.10. In response, the respondent disclosed that they had to use General Interpretation Rule GRI 2 of the Code, which according to Exhibit A3:

> *"require (sic) imported commodity in unassembled/dissembled state be classified as complete one..."*

The above analysis narrows down the real issue in controversy; and this is whether, the Respondent was correct in using General Interpretative Rule 2, in the classification of the dumper trucks.

We accept Dr. Kibuta's argument that in terms of Rule 1, of the Code, a customs officer can only consider Rule 2 if the goods before him do not fall under a specific tariff heading, and that if there is one, the particular HS Code should be used.

Under the chapter in question, that is, 8407 – headed – **"Motor Vehicles for transport of goods"** "there are only two items – unassembled – 8704-10.10, and "other" 8704.10.10. In determining the proper classification, according to GRI 1, the terms of the heading of the relevant section or chapter must be considered: **Chapter 87**, deals with "**Vehicles, Other than railway or tramways, rolling**

stock and parts and accessories thereof". Section 87.04, deals with "**Motor Vehicles for Transportation of Goods**"

And the sub-section in question covers **"dumpers for off highway use"**.

In our view, under this Rule, the customs officer was therefore required to be satisfied that the intended goods were vehicles ready for transportation of goods in order for them to fit in the chapter and the section in Code 87.04. That being the case, we think it was impossible for the respondent to determine the character of the "unassembled" goods by using Rule GRI 1 alone. So, Rule 2 which was the next in sequence had to be called in aid.

Rule 2 contains two sub rules. Sub rule 2 (a) applies to incomplete or unfinished and unassembled or disassembled articles which are classified as the complete or finished articles if they have the latter's essential character. Sub rule 2(b) applies to mixtures or combinations of materials or substances. For the purposes of this appeal, it is sub rule 2(a) which is relevant.

Since there is no dispute that the dump trucks were packed and imported in a unassembled form, for convenience of transporting them inland, and since it was also admitted by the appellant that once assembled they were to be used to carry goods in the form of rock, the vehicles were for the transport of goods. Therefore, under this Rule, the trucks fell to be classified and treated as complete.

And since they could not be treated as unassembled for purposes of duty, they could only fall under classification 8704.10.90 – which attracts a duty rate of 10% ad-valorem.

It is true that, in its decision the Tribunal concluded that the two equipments were transported in disassembled form for purposes of convenience in transportation but it went on to find that:

> *"it has no effect on the HS Code whatsoever hence, the use of HS Code 8704.10.90 in determining dutiable value was correct."*

This finding of the Tribunal does not support the appellant's complaint. At no time did the Tribunal consider as relevant to the classification of the trucks, the mode of their transportation. In any case, the issue of mode of transportation of the trucks was introduced

by the appellant themselves in their correspondences with the respondent and the Tribunal was only echoing that statement of fact, but without associating it with the process of classification.

It is for the above reasons that we have reached the decision that this appeal lacks merit and must and is hereby dismissed with costs.

DATED at **DAR ES SALAAM** this 26th day of February, 2016.

M. C. OTHMAN
CHIEF JUSTICE

S. A. MASSATI
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

J. R. KAHYOZA
REGISTRAR COURT OF APPEAL