IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And KITUSI, J.A.)

CIVIL APPEAL NO.35 OF 2020

COMMISSIONER GENERAL
TANZANIA REVENUE AUTHORITY..... APPELLANT

VERSUS

ECOLAB EAST AFRICA (TANZANIA) LIMITED..... RESPONDENT

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

(Mjemmas, J Rtd Chairman.)

dated the 13th day of January, 2020
in
Tax Appeal No. 7 of 2017

JUDGMENT OF THE COURT

23rd April, & 2nd July, 2021

MUGASHA, J.A.:

The appellant, Commissioner General of Tanzania Revenue Authority (CGTRA), is challenging the decision of the Tax Revenue Appeals Tribunal (the Tribunal) which upheld the respondent's appeal and reversed the decision of the Tax Revenue Appeals Board (the Board).

In order to understand what precipitated the present matter before us, it is crucial to briefly narrate the underlying facts as follows: The respondent is a company incorporated in Tanzania involved in the sale of

industrial detergents and sanitizing systems. In May, 2012, the respondent did sell its properties on Plots No. 33 and 34 Block 'A' covering an area of 39,090 square meters located at Makuburi Industrial area, Nyerere Road in Dar-es-salaam held under one certificate of title No. 18607/4.The respondent paid capital gain tax and value added tax (VAT) in respect of the said disposition.

Following an audit conducted by the appellant in 2014 in respect of the respondent's tax affairs for the years of income 2010 to 2012, on 2/2/2014 the appellant issued among others, an assessment for additional VAT of TZS. 664,877,960.00 constituting the principal sum of TZS. 585,811,573/= plus interest thereon at TZS. 79,066,387/= for the sold buildings on the land in question. Discontented, the respondent unsuccessfully lodged an objection contesting the assessment on the additional VAT. Ultimately, the objection was determined against the respondent and the appellant issued a notice confirming the assessment on additional VAT plus interest thereon.

Aggrieved, the respondent unsuccessfully lodged an appeal before the Tax Revenue Appeals Board (the Board) challenging the decision of the appellant fronting among other things, a complaint that the additional VAT

demanded by the appellant was not justified because the sale of an interest in land is an exempt supply envisaged by section 10(1) of the VAT Act. On the other hand, the appellant challenged the appeal on account that, although land and the building were sold as a whole, the prescription of the VAT Act in the second schedule separated the single transaction into two and as such the respondent was obliged to pay the additional VAT in respect of the buildings on the respective land. Having considered what is exempt supply of goods and services under section 10 (1) of the VAT Act and item 8 (1) and (2) of the second Schedule and "notes" thereto, the Board observed at page 179 of the record of appeal as follows:

> *"According to the quoted provisions above they provide exemption of goods and services to the description specified in the second schedule to the VAT Act, 1997. It Is also clear that it provides for VAT exemption on Land but it shall not be exempt if the land includes a building thereon.*
>
> *Under the provisions of section 10 (1) of the VAT Act, 1997 read together with paragraph 8 (1) of the second schedule to the VAT Act 1997* ***whenever land sold as bare is an exempt supply but once building erected thereon the same is not exempt supply,*** *hence when the property (land) sold it is obvious that the same should be sold as a*

whole and it cannot be separated. You cannot separate the land and building as the supply becomes one and the entire consideration becomes VAT chargeable".

The Board finds the appellant is contradicting himself in such a way that on one hand according to the deed of sale signed between the appellant (seller) and Muhsin Gulam Hussein Somji (Buyer) on 28th May, 2012, when it is referred that the land together with the buildings were sold as a whole for USD 1,192,668 inclusive of VAT while tax invoice which is appendix 18 shows that the land and the building were not sold as one item. This makes the Board to concur with the respondent's argument that there was an intention to evade taxes by separating the two items in the invoices.

Though the appellant's counsel in his submissions claims that the sale between the appellant and purchaser indicates that the parties intended to effect the sale of the right of occupancy separately from the building erected therein on the ground that the buildings were old and dilapidated but as we have already said the deed of sale clearly shows that the appellant sold the land and buildings as a whole. Even if the two items were shown to have been separated in the deed of sale does not eliminate the

fact that both are subject to taxation because when the land has a building on it then the two become inseparable under the iaw. ... the appellant was wrong when he separated the land and the building charging VAT only on the building and left land uncharged".

Thus the Board concluded as follows:

Therefore, the VAT that the appellant paid on the building is just a portion of what ought to be paid. It follows that the respondent acted lawful when demanded for additional VAT on the sale of the land and building, hence additional assessment issued was proper."

We shall at a later stage, consider the bolded expression in relation to the propriety or otherwise of the Board's observation that whenever bare land is sold it is VAT exempt supply but once it has a building thereon, it is not VAT exempt supply.

The respondent was not happy with the verdict of the Board and preferred an appeal to the Tribunal which reversed the decision of the Board and allowed the respondent's appeal in terms of what is reflected at pages 288 - 289 of the record of appeal as follows:

*"... **the correct interpretation of section 10 of the Value Added Tax Act, 1997 is that supply of goods or services is an exempt supply if it is of a description specified in the second schedule to the Act, and item 8 (1) to the schedule mentions the sale or lease of an interest in land, therefore sale or lease of an interest in land is exempt supply.** Item 8(2) of the second schedule mentions sale of used or leased residential building, in other words sale of used or leased residential buildings is an exempt supply. There is a note under item 8(2) which reads:*

"For the purposes of this item does not include any building thereon."

I entirely agree with the submission by the appellant's counsel that in ordinary or plain meaning the whole item 8(1) and 8(2) show that the Legislature intended to separate land and buildings..."

Before I conclude, I wish to comment on the issue or argument on separating land and building in the tax invoices by the appellant. It is my considered opinion that what matters is what the law says and what it required the appellant to do as a tax payer. Nothing more."

[Emphasis supplied]

The appellant is discontented with the decision of the Tribunal and has preferred an appeal to the Court. In the Memorandum of Appeal, the appellant has fronted three grounds of complaint as follows:

1. That the Tax Revenue Appeals Tribunal grossly erred in law by wrongly interpreting the provision of section 10 of the Value Added Tax 1997 read together with item 8 (1) of the second schedule to the Act to mean sale or lease of interest of land is exempt supply without considering a note under item 8 (2) of the second schedule to the Act.

2. That the Tax Revenue Appeals Tribunal erred in law by overturning the decision of the Tax Revenue Appeals Board.

3. That the Tax Revenue Appeals Tribunal erred in law in ordering the appellant to vacate the demand notice for payment of additional value added tax.

To bolster their arguments for and against the appeal, parties filed written submissions which were adopted by the respective learned counsel at the hearing of the appeal. At the hearing, the appellant was represented by Messrs. Harold Gugami, Hospis Maswanyia and Ms. Alice Mtulo, learned Senior State Attorneys whereas the respondent had the services of Dr. Alex Nguluma, learned counsel.

The appellant's counsel argued the three grounds of appeal together faulting the Tribunal's decision which overturned the decision of the Board. On this, it was contended that, **one,** the Tribunal wrongly interpreted the provisions of section 10 (1) of the VAT Act and item 8 (1) of the second schedule thereto without considering the 'notes' under item 8 (2) thereto because the respondent had paid a portion of the tax payable. As such, the additional tax demanded by the appellant is justified. **Two,** since the respondent sold landed property with fixed improvements and buildings thereon as a whole at a sum of USD 1,192,668, what is exempt supply is bare land and not that which contains any building thereon as per the dictates section 10 (1) of the VAT Act read together with item 8 (1) of the second Schedule and the 'notes' under items 8 (2). It was further amplified that once a piece of land disposed has any building thereon, it is not land for the purpose of VAT exemption under the Act. In this regard, it was submitted by the appellant that, on account of the plain language used in the notes, a strict rule of interpretation should be invoked to construe such notes in accordance with the principle which was laid down in the celebrated case of **CAPE BRANDY SYNDICATE VS INLAND REVENUE COMMISSIONERS** [1921] 1 KB 64 and emphasized in the cases of **CHARLES HERBERT WITHERS BROTHERS – PAYNE VS THE COMMISSIONER OF INCOME TAX,** Civil Appeal No. 55 of 1968 EACA

and **PAN AFRICAN ENERGY TANZANIA LIMITED VS COMMISSIONER GENERAL,** Civil Appeal No. 81 of 2019 (unreported). It was further emphasized that, on account of unambiguous wording of section 10 of the Act and item 8 (1) and (2) of the second schedule, the buildings on land sold by the respondent were not exempt which is cemented by the respondent's clear admission that bare land is an exempt supply for VAT purposes. Finally, the appellant's counsel urged the Court to allow the appeal with costs and order the respondent to pay the demanded additional VAT.

On the other hand, the respondent opposed the appeal. In addressing the grounds of appeal the respondent's counsel challenged the appellants' propositions that once a parcel of land sold has a building, it does not qualify for VAT exemption because he submitted, that is an erroneous interpretation of the law regulating land use and disposition thereof in Tanzania. It was also argued by the appellant's counsel that land with any building thereon is sold the two cannot be separated and the entire consideration is VAT chargeable. On this, it was the respondent's argument that the appellant's demand on additional VAT on the sale of the land and building is not justified. Moreover, it was contended that the Legislature did not intend to provide exemption on bare land which has no

property or buildings on it or else it would have clearly stated so in the VAT Act by categorizing sale of bare land or undeveloped land. Besides, it was the respondent's argument that the 2nd schedule does not give an elaborate description of what land or part of it when sold is VAT exempted and as such, the term exemption under the said schedule should be interpreted in favour of the tax payer who sold an interest in land and demonstrated proof of his interest by demolishing the old buildings therein. In this regard, it was the respondent's argument that since the cited provisions do not give a clear plain meaning on the tax payable, the appellant's argument inviting the Court to invoke strict rule of interpretation thereof is baseless. To back up the propositions, we were referred to the cases of **KEROCHE INDUSTRIES LIMITED VS KENYA REVENUE AUTHORITY AND OTHERS** [2016] 3 and **COMMISSIONER OF INCOME TAX VS WESTMONT POWER (K) LIMITED** [2006] 1 E.A. 54. In the latter case it was observed that:

> *"Taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens.....must be interpreted with great caution... any ambiguity in such a law must be resolved in favour of the tax payer and not the public revenue authorities which are responsible for their implementation".*

It was thus the respondent's submission that, the Tribunal was justified in looking at the true intention of the parties considering that the buildings had no value on the land in question and that is why they were separated and compensated for book value. Finally, the respondent urged the Court to confirm the decision of the Tribunal and dismiss the appeal with costs.

In the course of deliberations, we were inclined to believe that the resolution of the issue before us hinged on the effect of 'notes' under item 8 of the second schedule to the VAT Act. Having considered that we were not adequately addressed on the issue as to whether the 'notes' can be invoked in statutory interpretation, we invited the parties to address the Court on the issue in question.

It was the appellant's submission that, in terms of section 25 (2) of the Interpretation of Laws Act [CAP 1 RE.2002], notes form part of the written law and are internal aid to construction of statutes as they serve as explanatory to the provisions of the law. It was further amplified that it is common to find such notes in statutes which give clarity on the provisions of the law. In this regard, it was the appellant's contention that, notes appearing under item 8 in the second schedule can be invoked in the

statutory interpretation as internal aid to construction. On the part of the respondent, apart from intimating that notes are part of written law in terms of section 25 (2) of Cap 1, she reiterated that land and buildings cannot be separated and that item 8 in the second schedule does not give an elaborate description of what land or part of it when sold is VAT exempted.

Having carefully considered the submission of learned counsel for either parties it is not in dispute that the respondent sold the land in question together with buildings thereon and paid capital gain tax on the two plots and VAT. What is in dispute is the additional tax of TZS. 664,877,960/= demanded by the appellant which constitutes principal amount and interest thereon in respect of the buildings on the sold piece of land.

We begin with the position of the law on the VAT taxable supply of goods and services and what is exempt. While the scope of VAT is prescribed under the provisions of section 4, what is chargeable under VAT is a supply of goods and services as prescribed under the provisions of section 5 of the Act which stipulates as follows:

"(1) For the purpose of this Act, and unless otherwise provided in this Act or regulations made under it, "taxable supplies" means supply of goods or services made by a taxable person in the course or in furtherance of his business after the start of the VAT and includes–

(a) the acceptance of a wager or stake in any form of betting or gaming including lotteries, bingo, and gaming machines;

(b) the making of gifts or loans of goods;

(c) the leasing or letting of goods on hire;

(d) the appropriation of goods for personal use or consumption by the taxable person or by any other person;

(e) barter trade and exchange of goods.

(2) Where a person produces goods by processing or treating the goods of another person the supply shall be regarded as a supply of goods.

(3) The supply of any form of power, heat, or ventilation shall be regarded as a supply of goods.

(4) Unless otherwise provided in this Act or regulations made thereunder, anything which is not a supply of goods, but is done for a consideration,

including the granting, assignment or surrender of all or part of any right is a supply of services.

(5) The Minister may make regulations providing for any description of transaction to be treated as–

(a) a supply of goods; or

(b) a supply of services; or

(c) neither a supply of goods nor a supply of services.

(6) Where–

(a) goods are neither supplied by a person to another person nor incorporated in other goods produced in the course of the business of the first person but are used by that person for the purposes of furtherance of his business; or

(b) a person in the course of his business does anything for the purposes of furtherance of his business which is not a supply of services but, if done for a consideration, would be a supply of services, the goods or services are regarded for the purposes of this Act as being both supplied to him for the purpose of the business and supplied by him in the course of that business".

The supply of goods and services which are VAT exempt are regulated by section 10 (1) of the Act which categorically stipulates as follows:

> *"A supply of goods or services is an exempt supply if it is of a description specified in the Second Schedule to this Act".*

What is the rule of construction to be invoked in the interpretation of the cited provision? The Courts are enjoined to look at what is clearly said in the language used in tax statute and interpret the statute in the letter of the law because there is no room for looking at the intention of the statute. This is what is envisaged in applying the strict rule of interpretation as it was emphasized in the case of **CAPE BRANDY SYNDICATE VS INLAND REVENUE COMMISSIONERS** (supra) as it was held:

> *" .... In taxing clear words are necessary in order to tax the subject. Too wide and fanciful construction is often given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts.* ***It simply means that in taxing one has to look merely at what is clearly said. There is no room for intendment. There is no equity about tax.***

There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied...."

[Emphasis supplied]

The said position was emphasized in the case of **CHARLES HERBERT WITHERS BROTHERS- PAYNE VS THE COMMISSIONER OF INCOME TAX,** (supra) and **KEROCHE INDUSTRIES LIMITED VS KENYA REVENUE AUTHORITY AND OTHERS** (supra) 3 E.A 205. In the latter case as it was observed that:

"Taxation can only be done on clear words and that taxation cannot be based on intendment."

Here at home, the Court has taken a similar stance having invoked the strict rule of interpretation where the language of words used in a statute is plain including the case of **PAN AFRICAN ENERGY TANZANIA LTD VS COMMISSIONER GENERAL TRA** (supra) which was cited to us by the appellant's counsel. It was held thus:

"...in the familiar canon of statutory construction of plain language, when the words of a statute are unambiguous, judicial inquiry is complete because the courts must presume that a legislature says in a statute what it means and means in a statute what is says there. As such, there is no need for

interpolations, iest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation."

[See- also **REPUBLIC VS MWESIGE GEOFREY AND ANOTHER,** Criminal Appeal No. 355 of 2014, **RESOLUTE TANZANIA LIMITED VS COMMISSIONER GENERAL, TRA**, Civil Appeal No. 125 of 2017, **MBEYA CEMENT COMPANY LIMITED VS COMMISSIONER GENERAL TRA,** Civil Appeal No. 160 of 2017 (all unreported)].

We thus wish to emphasise that, if the words of a taxing statute are clear, effect must be given to them irrespective of the consequences. In this regard, neither can the language of taxing legislation be so stretched as to do favour to the State nor can it be narrowed to benefit the person sought to be taxed because a taxing enactment does not apply by implication and logical extensions are prohibited. In this regard, with respect, we found wanting the observation of the Board at page 179 that, whenever land is sold as bare is an exempt supply but once sold with a building thereon, the same is not an exempt supply. This had the effect of reading what is not stated in the law and it negates the principle of giving full effect to the language used in statute. See - **PAN AFRICAN ENERGY TANZANIA LIMITED VS COMMISSIONER GENERAL OF TRA** (supra).

In the light of the stated position of the law and as correctly found by the Tribunal, we are of settled mind that, in view of the clear and plain language used in section 10 (1) of the VAT Act, it requires only exempt supply of goods and services to be described in the second schedule to the Act and not more. In other words, the supply of goods and services which are not VAT exempt as addressed under section 5 of the Act are not envisaged in the second schedule to the Act.

This takes us to considering notes stated under item 8(1) and (2) in the second schedule. At the outset, we agree with both parties that in terms of section 25 (1) of the Interpretation of Laws Act, 'notes' are part and parcel of written laws and as an internal aid to construction of statute it serves to explain and clarify what is contained in the statute. As to how this can be achieved, we have deemed it pertinent to borrow a leaf for what is reflected at pages 39 to 41 of the book Kanga and Palkhivala's **Law and Practice of Income Tax** by Arvind P Datar, Volume 1 11th Edition which contains a collection of principles on tax cases based on Indian Tax Law discussing the magnitude and effect of 'explanations' in statute as one of the internal aids to construction in the following manner:

> "The *object of an Explanation has been explained in an earlier case as follows: -*

(a) To explain the meaning and intendment of the Act itself.

(b) Where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to sub serve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming a hindrance in the interpretation of the same.

An Explanation is intended to either explain the meaning of certain phrases and expressions contained in a statutory provision or, depending upon its language, to take away something from the content of a provision, and at times, by way of

abundant caution, to clear any doubt regarding the meaning of a statutory provision. ***Ordinarily, an Explanation is not a substantive provision and is inserted to clear up an ambiguity in the section and it should be so read as to harmonise it with the section because it is an integral part of the section and has no independent existence apart from the section. Such explanations are intended more as a legislative exposition or clarification of the existing law than as an amendment or change in it. But cannot be construed to override statute or render the substance and core nugatory. Explanation is not to enlarge the scope of the original section that it is supposed to explain, if on a true reading of an explanation it appears that it has widened the scope of the main section, effect should be given to the legislative intent notwithstanding the fact that the Legislature named that provision as an explanation. In rare cases, it may even widen the scope of the main provision. But merely because a provision attached to a section bears the nomenclature 'Explanation', it cannot always be considered as conveying the true and natural meaning of the words or the provisions of the statute. An***

Explanation has to be read and understood only in the context for which it has been introduced and cannot be expanded to bring within Its fold aspects beyond the realm of the provision."

[Emphasis supplied]

We fully subscribe to the above quotation. We have now to consider the 'notes' under item 8 of the second schedule *vis a vis* the demanded additional VAT. At this juncture it is pertinent to reproduce item 8(1) and (2) and the 'notes' therein as follows:

"Housing and land

(1) The sale or leased of an interest in land.

(2) The sale of used or leased residential buildings.

Notes: For the purposes of this item "iand" does not include any buildings thereon."

The appellant's counsel faulted the Tribunal in not considering the notes together with section 10 (1) of the Act and item 8 (1) and (2) in the second schedule. The appellant seems to suggest that the liability of the respondent to pay additional VAT is founded on such 'notes'. Any tax imposed on a subject is dictated by the terms of legislation and a taxing

authority must satisfy itself that the transaction fits within the definition of the statute. See - **JAFERALI ALIBHAI VS COMMISSIONER OF INCOME TAX [1961] EA** 610.

Since it is settled that, section 10 (1) of the Act requires only exempt supply of goods and services to be stated in the second schedule, and considering that 'notes' in a statute serve for clarificatory purposes because they are not independent from the section in the law, the follow up question is whether 'notes' under the stated item 8 can salvage the appellant's plight. Our answer is in the negative because, such 'notes' in suggesting another category of VAT taxable supply, overrides and enlarges the scope of the legislation and it is not compatible with the dictates of section 10 (1) of the VAT Act, which strictly requires only exempt supplies required to be mentioned in the second schedule. In a nutshell, section 10 (1), items 8 (1), (2) and notes read together have created an ambiguity on the tax liability of the respondent in respect of the buildings on the sold plot in question. We are fortified in that account because the subject is not to be taxed unless the words of taxing statute unambiguously impose the tax upon him. - See the dictum of Lord Simonds in **RUSSELL (INSPECTOR OF TAXES) VS SCOTT** [1948] 2 ALL ER 5 which was cited in the case of

REPUBLIC VS KENYA REVENUE AUTHORITY EX PARTE COOPER K-BRANDS LIMITED [2016] e KLR where it was held:

> *"...in tax cases .... the Court is not entitled to attempt discovery at the intention of the Legislature but must restrict itself to the clear words of the statute".*

In the case at hand, apart from the additional VAT tax demanded by the appellant not being clearly defined, it cannot be classified or determined on the basis of the 'notes' which apart from being beyond the intended scope of the realm of the enabling provision under which the second schedule is made, they do not convey the true and natural meaning of section 10 (1) of the Act. In other words, the 'notes' are not harmonius with the provisions of the law creating the VAT exempt and non-exempt supply of goods and services. In this regard, notwithstanding that a taxing statute must receive a strict construction it is incumbent on the taxing authority to establish that its claims come within the very words used in the statute and if there is any doubt or ambiguity, the benefit thereof must go to the assesse. The said ambiguity can be cured by legislation: See - **ADAMSON VS ATTORNEY GENERAL** [1933] AC 257.

In view of what we have endeavoured to discuss, the case of **PAN AFRICAN ENERGY TANZANIA LIMITED VS COMMISSIONER GENERAL OF TRA** (supra) cited by the appellant is distinguishable and it cannot salvage the appellant's plight. In that case, the Court looked at what was clearly stated under the taxing provisions of the Income Tax Act which categorically stipulate that the Pay as You Earn has to be deducted from the employee's salary and remitted to the tax authority, instead of the employer' paying from own pocket. Thus, the Court held:

> *".... we are of settled mind that, in view of the clear language used in the provisions of sections 7, 81, and 84 of the Income Tax Act, the employer is mandatorily required to withhold the employees chargeable tax from the employment earnings and remit the same to TRA. Thus, the appellant's suggestion on non-prohibition of the grossing up method is interpolations of what is not stated in law. Besides, the appellant's argument on there being no harm on the appellant using own sources to pay PAYE on behalf of the employees in effect is reading what is not stated in the law and it negates the principle of giving full effect to the language used in the law."*

In view of the aforesaid, we are satisfied that the Tribunal was justified to reverse the decision of the Board and we do not find any cogent reasons to vary its decision. Thus the appeal is not merited and it is hereby dismissed with costs.

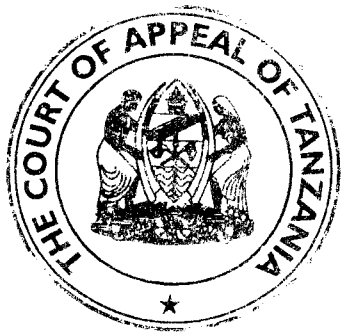
DATED at **DAR ES SALAAM** this 30th day of June, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

The judgment delivered this 2nd day of July, 2021 in the presence of Mr. Carlos Mbingamno, learned Principal State Attorney for the appellant, who also hold brief for Dr. Alex Nguluma, learned counsel for the respondent, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL