IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

CORAM: NDIKA, J.A., MWANDAMBO, J.A. And KAIRO, J.A.

CIVIL APPEAL NO. 181 OF 2020

GEITA GOLD MINING LIMITED..... APPELLANT

VERSUS

COMMISSIONER GENERAL,
TANZANIA REVENUE AUTHORITY ..... RESPONDENT

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

(Twaib, J.)

dated the 1st day of October, 2012
in
Tax Appeal No. 4 of 2012

JUDGMENT OF THE COURT

18th October & 2nd November, 2021

MWANDAMBO, J.A.:

Geita Gold Mining Limited, the appellant, is before the Court faulting the decision of the Tax Revenue Appeals Tribunal (the Tribunal) which upheld the decision of the Tax Revenue Appeals Board (the Board) holding the appellant liable to remit Value Added Tax (VAT) on fuel supplied to her contractor in the course of executing her mining activities in Geita Region.

The facts giving rise to the instant appeal are not in dispute. To the extent they are material to the instant appeal, the facts run as follows: The appellant is a holder of a mining licence for the operation of a gold

mine in Geita Region. As part of the incentives to the holders of mining licences, the Value Added Tax Act, 1997, Cap. 148 R.E. 2002 (now repealed) [the VAT Act] granted to such companies some tax reliefs set out in the schedule thereto. One of such reliefs was exemption from payment of VAT on fuel imported for exclusive use in their mining activities. Besides, the appellant had entered into a Mining Development Agreement (MDA) with the Government of Tanzania (GoT) granting some tax reliefs in her favour for the purpose of the mining activities.

Acting under the tax reliefs as aforesaid, the appellant imported fuel for the intended purpose. It is common ground that in the course of her operations of the gold mine, the appellant outsourced some of the activities to contractors. Such contractors included Geita Power Limited (GPL) who was contracted to operate an electricity power station. DTP Terrassment (DTP) was contracted to provide mining services on behalf of the appellant. Through specific agreements with its contractors, the appellant had an obligation to supply fuel to GPL and DTP whose charges were not included in the rate charged by the contractors for the services rendered.

At one time, the respondent conducted a tax audit in the affairs of the appellant which revealed that she supplied fuel to GPL and DTP for which VAT was chargeable but not remitted. Consequently, the

respondent made an assessment for additional VAT in the sum of TZS 6,256,005,237.00 which the appellant objected contending that no VAT was payable for the fuel she supplied to the contractors by reason of exemption from such liability. The respondent rejected the objection maintaining that the exemption from payment of VAT for imported fuel did not extend to the appellant's contractors. He maintained the same stance before the Board in an appeal by the appellant. The Board sustained the respondent's contention in its judgment appearing at pages 144 -149 of the record of appeal.

The appellant's attempt to overturn the Board's decision before the Tribunal was barren of fruits. The appellant faulted the Board's decision on three grounds; **one**, disregarding the **MDA** she had with the GoT; **two**, holding that there was a taxable supply to the Contractors in respect of fuel she supplied for exclusive use in the mining activities; and **three**, failing to rule that the appellant enjoyed relief from VAT pursuant to the Third Schedule to the VAT Act. The Tribunal did not find purchase in any of the grounds. In its judgment (appearing at pages 197 – 207 of the record of appeal), the Tribunal sustained the Board's decision and dismissed the appeal. The Tribunal's reasoning in ground one was that despite the Board disregarding the MDA, such approach did not have any bearing on the ultimate decision in the appeal. With regard to ground

two, the Tribunal concurred with the Board that there was a taxable supply of fuel to the appellant's contractors which was chargeable with VAT. It held thus that the appellant was liable to charge VAT for fuel she supplied to her contractors the more so, because, according to a sample invoice to GPL (exhibit R1) that invoice reflected VAT which was not remitted to the respondent. With regard to ground three, the Tribunal held that guided by the principles commanding strict interpretation of tax statutes, the VAT relief did not extend to contractors irrespective of the fact that such contractors were delivering mining services on behalf of the appellant.

In this appeal, the appellant has preferred four grounds. The first ground faults the Tribunal for making a contradictory finding that the MDA was binding and yet holding that the Minister responsible for Minerals and Energy had no power to enter into agreements which provides fiscal/tax reliefs under section 15 of the Mining Act, 1979. Ground two faults the Tribunal for holding that the fuel supplied to the contractors for exclusive use in the appellant's mining activities constituted a vatable supply. In ground three, the appellant contends that the Tribunal made an error of law by wrongly invoking the provisions of section 58 of the VAT Act. Finally, the appellant criticises the Tribunal for

reading and interpreting section 11 of the VAT Act without regard to Article 6 of the MDA.

At the hearing, the appellant deployed as team of three learned advocates composed of Messrs. Allan Nlawi Kileo, Wilson Mukebezi and Stephen Axwesso, whereas, the respondent had a consortium of three learned Senior State Attorneys; Mr. Hospis Maswanyia, Ms. Gloria Achimpota and Mr. Thomas Buki resisting the appeal.

Mr. Kileo who took the lead, adopted the written submissions he had filed earlier on pursuant to rule 106(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) before addressing us orally on a few issues for emphasis. The learned advocate's focus in his oral submission was on the relevance of our judgment in **Geita Gold Mining Limited v. Commissioner General, TRA**, Civil Appeal No.89 of 2019 (*unreported)* (hereinafter to be referred to as the GGML case) delivered on 15/06/2020; two months before the filing of the appellant's written submissions. That judgment arose from grounds which appear to be similar to the facts in the instant appeal but was not referred by the learned advocates for the appellant in their written submissions. A copy of the judgment features in the respective lists of authorities by the appellant and respondent filed few days before the hearing of the appeal.

To start with, Mr. Kileo was candid that the decision in GGML had features common to those obtaining in the instant appeal; supply of fuel to third parties contracted to render mining services on behalf of the appellant who enjoyed tax relief on imported fuel for the exclusive use in her mining services. However, the learned advocate pointed out some features which, according to him, distinguished that decision from the facts in the instant appeal to wit; existence of an uncancelled tax invoice for fuel supply in the former whereas the invoice in the instant appeal through exhibit R1 had no such VAT element for fuel supplied to GPL.

The learned advocate argued that in the circumstances, the supply of fuel the appellant made to GPL was for the exclusive mining services rendered by such contractor on her behalf and so it was wrong for the Tribunal to hold as it did that there was a vatable supply within the purview of section 58 of the VAT Act. Taking the argument further, the learned advocate contended that no VAT liability accrued as held by the Tribunal because, the business was not for the supply of fuel and, in so far as the fuel the supplied was meant for the exclusive use in the mining services covered by section 11 and the third schedule to the VAT Act regardless of whether it was her or the contractors who performed such services. On those arguments, Mr. Kileo urged the Court to hold the

Court's decision in GGML involving the same parties was not applicable to the instant appeal and thus the appeal ought to be allowed with costs.

After adopting the written submissions in reply, Mr. Maswanyia invited us to follow GGML case because it was decided on facts similar to the instant appeal. He down-played the distinction pointed out by Mr. Kileo on the invoice (exhibit R1) and argued that the said invoice was merely a sample invoice which proved that the appellant was back-charging the supply of fuel to her contractors. According to him, back-charging was the same as selling fuel to the contractors and so, section 58 of the VAT Act was rightly relied on by the Tribunal. The learned Senior State Attorney wound up his oral submissions urging the Court to dismiss the appeal on those submissions as well as the written submissions in reply.

Submitting in rejoinder, Mr. Kileo had three arguments. **One**, the factual setting in GGML case was different from the instant appeal. **Two**, Back-charging was meant to account for the fuel as held by the Tribunal because, no VAT liability accrued for fuel supplied to the contractors which explains why VAT was not charged and thus section 58 of the VAT Act was inapplicable considering that exhibit R1 reflects nil charge for VAT on fuel. **Three**, the contention on exhibit R1 being a sample has been

raised for the first time in this appeal and so the onus of proof that it indeed was, lies on the respondent.

For a start, we wish to state that having examined the contents of the written submissions for and against, the counsel's oral submissions in the light of the grounds of appeal, we think the issue for our consideration and determination is narrow. It revolves around the correctness or otherwise of the Tribunals' decision holding that the fuel supplied to the contractors was a taxable supply to which section 58 of the VAT Act applied.

We shall begin our discussion with the merit of grounds one and four conjointly. Even though the appellant faults the Tribunal for the alleged contradictory finding on the MDA, we do not think that there is any such contradiction in the judgment. We say so because, upon our closer examination of the Tribunal's decision at page 202 and 203 of the record of appeal, all that the Tribunal said was that despite the Board disregarding the MDA, there was nothing suggesting that the MDA created an automatic right in the appellant to enjoy fiscal reliefs without more. The criticism against the Tribunal on the treatment of the MDA was misplaced because, as rightly held by the Tribunal, the MDAs were to be followed by specific legal instruments to operationalise them on the relevant aspects. In the course of our research, we landed upon our

decision in **Resolute Tanzania Limited v. Commissioner General, Tanzania Revenue Authority,** Civil Appeal No 125 of 2017 (*unreported*) which appears to support the Tribunal's decision on that aspect. It is plain that the MDAs were given legal effect through the relevant Government Notices (GNs) discussed in the decision that is to say; The Excise Tariff (Remission) (Fuel Imported by Mining Companies) Order, GN. No.480 of 2002 and Road Fuel Tolls (Remission) (Holders of Mining Licence for Gold) Order, GN No. 99 of 2005. Accordingly, we do not see any serious issue in the MDA in the manner the Tribunal treated it as a basis for the tax relief but not an end in itself as it were.

In any event, it is our view that with or without the MDA, the dispute did not relate to the appellant's entitlement to VAT relief on imported fuel rather, whether that exemption extended to her contractors regardless of the purpose of the use of the fuel supplied to such contractors. Apparently, the respondent does not dispute the fact that in terms of section 11 of the VAT read together with item 8 of the Third Schedule thereto, the appellant was relieved from VAT on importation of fuel. He only disputes the appellant's contention that such relief extended to supplying the exempted fuel to her contractors engaged to perform certain mining services on her behalf free from VAT. Consequently, we do not see any merit in the argument in support of issue (i) and (iv) on the

power of the Minister for Energy and Minerals to enter into MDAs neither is there any dispute whether the MDA was binding or not. We thus dismiss grounds one and four for being devoid of merit which takes us to our discussion on ground two.

Ground two faults the Tribunal for holding as it did that the fuel supplied to contractors for exclusive use on the appellant's mining activities constituted a vatable supply. We have taken note of the contents of the written submissions supported by formidable authorities from foreign jurisdictions on what constitutes a vatable supply for the purposes of VAT in other countries whose legislation is similar to ours. We have also taken into account the respondent's submissions in reply. With respect, we do not think we need belabour with any of the authorities since there is no disagreement on the general principle as to what constitutes a vatable supply in the light of the issue for our consideration and determination; whether the fuel the appellant supplied to her contractors constituted a vatable supply.

Our starting point will be section 11 of the VAT Act which provided as follows:

> *"The persons and organisations listed in the Third Schedule to this Act shall be entitled to relief from VAT within the limits and conditions prescribed in that*

Schedule subject to procedures which may be determined by the Minister."

The relevant provision in the third schedule is paragraph 8 which granted reliefs targeted to *importation by or supply to a registered licensed drilling, mining, exploration or prospecting company of equipment to be used solely for drilling, mining, exploration or prospecting activities.* It is common ground that paragraph 8 of the third schedule applied to the appellant. In its judgment, the Tribunal made reference to the provisions of section 11 of the VAT Act and stated:

> *"The section is clear: it talks of relief from VAT on "importation by" and "supply to" a registered mining company. As the Board correctly found, the section does not cover "**supplies by**" such company to any other person, including its contractors, as is the case herein". [at page 204 of the record].*

We respectfully agree with the above being satisfied that it reflects a correct interpretation of the law. Having so said, we shall proceed to a discussion on the application of GGML case to the instant appeal.

As alluded to earlier, the learned counsel made no reference to our decision in GGML case in their respective written submissions but did so in their oral address. Briefly the facts in that case were that, like in

the instant appeal, a dispute arose as to the appellant's failure to remit VAT to the respondent on the supply of excessive fuel to M/s Golden Construction Company Ltd who was contracted to run the Geita Gold Mine Power Station for the generation of electricity to her mine. The appellant's objection premised on the tax relief was rejected by the respondent maintaining that the appellant was liable to charge and remit VAT on invoices for fuel supplied to her contractor. The Board sustained the respondent's stance and dismissed the appeal so did the Tribunal. The appellant appealed to this Court on four grounds. Ground one faulted the Tribunal for holding that the VAT was payable on excess fuel utilized by M/s Gold Construction Company Limited to run her power station whereas in ground two, she criticised the Tribunal's decision for holding that the supply of fuel to the operator of the power station was a vatable supply.

From grounds one and two, the Court framed one issue; whether or not there was a vatable supply of fuel between the appellant and Gold Construction Limited (GCL). In determining the issue, the Court took cognisance of the undisputed fact that the appellant had prepared an invoice for fuel reflecting VAT which was subsequently cancelled even though the amount claimed as VAT was not remitted to the respondent. Before coming to the conclusion on the issue, the Court agreed with the

Tribunal and the Board on two pertinent findings; **One**, there was no dispute that the appellant supplied fuel to GCL in the furtherance of her business. **Two**, the appellant supplied fuel to GCL in pursuance of an agreement in which she was not privy; such supply amounted to a vatable supply evidenced by an invoice and thus the appellant was not exempt from payment of VAT in terms of sections 4 (1) and 58 of the VAT Act. Having been satisfied that the appellant had issued an invoice without remitting the relevant VAT on a vatable supply as required by section 58 of VAT Act, the Court concluded that there was no room for a contrary interpretation of the law exempting her from VAT liability.

There is no dispute that the Court's decision in the above stated case was influenced by, as shown above, existence of an invoice reflecting VAT for the fuel supplied to GCL in agreement in which the appellant was not privy. It is clear from the judgment that considering the undisputed existence of an invoice reflecting VAT, the appellant was bound to remit VAT to the respondent. Apparently, this is not the case in the instant appeal where, the supply of fuel was made to contractors under undisputed agreements. Besides, unlike in that case, exhibit R1 shows vividly that there was nil charge for VAT on fuel as can be seen from page 129 -134 of the record of appeal. To that extent, we would respectfully agree with Mr. Kileo that there are some features in the two

cases which may limit the application of the decision to the instant appeal. All the same, the pertinent question remains, did the supply made to the appellant's contractors constitute a taxable supply?

Fortunately, we are not traversing in a virgin territory in relation to supplies of fuel made by holders of mining licences such as the appellant. A similar issue arose in **Resolute Tanzania Limited** (supra). That case involved a dispute on the refund to the appellant of excise duty on fuel as well as road and fuel toll in relation to fuel used by contractors and sub-contractors employed by Resolute in its mining operations premised her argument on not only the MDA with the GoT but also specific Government Notices. G. N. No.480 of 2002 remitted the whole of the excise duty payable on fuel imported or purchased prior to clearance through customs by or on behalf of mining companies for use solely for mining of minerals meant for export. On the other hand, para 2 of G.N No. 99 of 2005, made the order applicable to holders of mining licences for gold who had entered into MDAs with the GoT. Resolute was such a holder of mining licence for gold to which the order applied. In terms of para 3 (1) of G. N. No. 99 of 2005, the road and fuel tolls payable on imported or purchased gas oils exceeding United States Dollars 200,000 were remitted in favour of a holder of a mining licence for gold which is required exclusively for use in the production of gold minerals. In the course of its

gold mining operations, Resolute supplied fuel to her contractors and sub-contractors employed to do mining activities on her behalf. In terms of G. N. No. 99 of 2005, Resolute sought a refund on the remitted fuel to which the respondent refused. On appeal, the Board ruled in favour of the appellant holding that the remission on the fuel that Resolute supplied to her contractors for exclusive use in the mining operations extended to apply to her contractors. It thus ordered the respondent to make the refund. On appeal by the respondent, the Tribunal overturned that decision which resulted into an appeal to this Court. The critical issue for the determination of the appeal was whether or not the contractors and sub-contractors enjoyed the remission relief in terms of the GNs to entitle Resolute to the refund she obtained from the respondent. Rejecting the arguments by the advocate for Resolute premised on purposive approach of statutory interpretation, the Court stated: -

> *"...we are of settled mind that, the language used in GNs is unambiguous having clearly permitted sorely the appellant to use the remitted fuel and oil for mining subject to a strict condition that, where the remitted fuel is used by those not entitled, the remission order shall cease to have effect... the remission under the GNs solely covered the appellant and not her agents and contractors..."* [at page 14].

It is common ground that both Resolute and the appellant had entered into MDAs with the GoT and thus covered by the GNs. Besides, both enjoyed special tax reliefs under the VAT Act read together with the Third Schedule thereto; remission on VAT for imported fuel for the exclusive use in the mining activities. In **Resolute's** case (supra), the Court refused to extend the remission to the contractors in relation to road toll and fuel toll enjoyed in pursuance of G. N No.99 of 2005. The instant appeal relates to a special relief on VAT for imported fuel used solely by the appellant's mining activities. In our view, in so far as the appellant supplied fuel to her contractors who had no similar exemption, we are, with respect, in agreement with the Tribunal that the special relief by way of exemption from payment of VAT on imported fuel did not cover the appellant's contractors. As rightly held by the Tribunal, the supply of fuel to the appellant's contractors constituted a taxable supply for which the appellant was bound by section 58 of the VAT to charge VAT from the contractors for the supply and remit it to the respondent. In our view, the fact that the appellant's invoice by way of exhibit R1 did not reflet VAT on fuel compared to what transpired in GGML case does not by itself absolve her from the liability in so far as the supply of fuel to her contractors was a taxable supply under the VAT Act.

In the upshot, we are constrained to dismiss ground two for being devoid of merit. Having dismissed ground two, there will be no useful purpose discussing ground three premised on the application of section 58 of the VAT Act. That ground is devoid of merit and is likewise dismissed.

In fine, we find no merit in the appeal and we dismiss it in its entirety with costs.

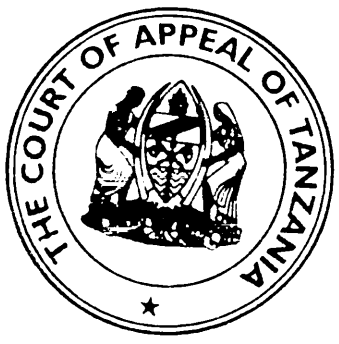
DATED at **DODOMA** this 1st day of November, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of November, 2021 in the presence of Mr. Noah Tito, Senior State Attorney for the respondent and also holding brief of Mr. Allan Nlawi Kileo for the appellant, is hereby certified as true copy of the original.



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