IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 426 OF 2020

PANAFRICAN ENERGY TANZANIA LIMITED.....APPELLANT

VERSUS

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

(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Ngimilanga, Vice Chairperson)

Dated the 28th day of August, 2020
in
Tax Appeal No. 16 of 2019

JUDGMENT OF THE COURT

27th October & 2nd November, 2021

KEREFU, J.A.:

This appeal arises from the decision of the Tax Revenue Appeals Tribunal (the Tribunal) rendered on 28th August, 2020 in Tax Appeal No. 16 of 2019. In that appeal, the Tribunal upheld the decision of the Tax Revenue Appeals Board (the Board) dated 8th February, 2019 in Tax Appeal No. 50 of 2016 which decided the matter in favour of the respondent, the Commissioner General Tanzania Revenue Authority (the TRA).

The material background facts obtained from the record of appeal are straight forward and mostly not in dispute. They go thus: The appellant is a registered company in Tanzania whose primary activities include production and marketing of natural gas produced in Songo Songo gas fields under the Production Sharing Agreement (PSA) executed in October, 2001 between the Government of United Republic of Tanzania, the Tanzania Petroleum Development Corporation (TPDC) and the appellant. The appellant operates the gas processing plant owned by Songas Limited under the Operatorship Agreement entered between them.

In 2013, the respondent conducted tax audit on appellant's accounts which covered the period of 2008 to 2012. In the said audit, the respondent raised a number of queries including, over-claimed input tax, unaccounted VAT on imported services under Songo Songo operatorship services. Subsequently, on 19th December, 2013, the respondent issued an assessment No. VAT 312 for additional VAT payable of TZS 12,263,250,914.00 comprising principal tax of TZS 6,012,588,034.00 and interest of TZS 6,250,662,880.00.

On 24th January, 2014, the appellant objected the respondent's assessment for the additional VAT on account that (i) she is entitled to claim half of the input tax that has been assessed as over-claimed by the respondent, (ii) that, on the imported services, the respondent has assessed output tax without allowing corresponding input tax deduction and has wrongly imposed interest on the corrected VAT on imported services and (iii) that the materials, equipment and services procured by the appellant on behalf of Songo Songo attracted no taxable supply. As such, the appellant proposed to only pay TZS 1,897,409,090.00. The respondent and the appellant exchanged several correspondences to iron out their differences on the tax dues where some of the calculations were revised but the respondent maintained its position on most of the issues and thus confirmed the audit assessment No. VAT 312 that the total liability on the appellant was TZS 12,263,250,914.00.

Aggrieved, the appellant unsuccessfully challenged the decision of the respondent to both the Board and the Tribunal as indicated above. Undauntedly, the appellant has preferred the current appeal on the following grounds: -

(1) *That, the Tax Revenue Appeals Tribunal grossly erred in law by holding that the arrangement between the appellant and Songas Limited under the Songas Operatorship Service constitutes a supply for VAT purposes;*

(2) *That, the Tax Revenue Appeals Tribunal grossly erred in law by holding that the respondent was justified to impose VAT (output tax) without allowing corresponding input tax on imported services;*

(3) *The Tax Revenue Appeals Tribunal grossly erred in law by holding that the Board was correct not to take into account the voluntary correction of errors made by the appellant on omission to account VAT on imported services; and*

(4) *That, the Tax Revenue Appeals Tribunal grossly erred in law and fact by holding that the respondent was justified to impose interest on the disputed VAT amounts.*

It is noteworthy that counsel for the parties had earlier on filed their written submissions for and against the appeal as required by Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

At the hearing of the appeal, the appellant was represented by Messrs. Rwekamwa Rweikiza and Dr. Abel Mwiburi, both learned counsels whereas the respondent had the services of Ms. Gloria

Achimpota and Mr. Hospis Maswanyia, both learned Senior State Attorneys.

Dr. Mwiburi who took the floor to argue the appeal, fully adopted his written submission earlier on lodged and prayed to argue the first and fourth grounds of appeal separately and then the second and third grounds jointly as they are interrelated.

Starting with the first ground, Dr. Mwiburi argued that the reimbursement of costs by Songas to the appellant in terms of the arrangement between the appellant and Songas Limited under the Songas Operatorship Agreement, does not constitute a taxable supply for VAT purposes. He argued further that the supplies, equipment, parts and services which were involved in this appeal were not owned by the appellant but were only procured on behalf of Songas and at Songas' expenses. He insisted that, since the appellant did not own the said equipment and materials, she cannot be a supplier of the same thus there is no supplies for VAT purposes in terms of section 5 (1) of the Value Added Tax Act, 1997 (the Act).

He argued further that, for there to be a taxable supply, there must be value addition to the transaction between the supplier and

the recipient. He said that, in the matter at hand, the appellant (an agent) purchased the equipment and materials from the suppliers (third parties) and transferred the same to Songas (the principal) at cost. That, there is no markup which the appellant charged to Songas which may be calculated to be a value added to trigger the imposition of VAT, he added. He thus invited the Court to find that the said transaction was not done in the course of or in furtherance of the appellant's business. To buttress his position, he referred us to the case of **Institute of Chartered Accountants in England and Wales v. Customs and Excise Commissioners, All ER 1999 Vol. 2** and a book by G. Morse and D. Williams Davies, titled '*Principles of Tax Law*, Sweet & Maxwell, 6th Edition 2008. He then faulted the decision of the Tribunal which concluded that since the appellant is a taxable person, the purchase of the said items by its own name and transferring the same to Songas amounted to a taxable supply.

He further faulted the Tribunal for having categorized the appellant as an independent agent which he said it was not correct because the appellant only acted as an agent of Songas.

He further argued that, supplies by a taxable person are evidenced by tax invoices or other documentation and thus, since in this case none of those documents existed, it was wrong for the Tribunal to find that the respondent was justified to impose VAT on disbursement received by the appellant from Songas under the Operatorship Agreement. He thus faulted the Tribunal for failure to observe the doctrine of *stare decisis* as in **Geita Gold Mining Ltd v. Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 89 of 2019 (unreported), where this Court held the appellant liable to VAT on the ground that in their arrangement the tax invoice was issued which is not the case in this appeal. He therefore invited us to be guided by our decision in **Geita Gold Mining Ltd** (supra).

As regards the second and third grounds, Dr. Mwiburi admitted that the appellant accidentally omitted to account for VAT on imported services but subsequently corrected the errors as required by Regulation 4 of the Value Added Tax (Correction of Errors) Regulations, 2000 (the Regulations). He insisted that, the said corrections were voluntarily made by the appellant. He thus blamed the respondent for having accepted the output VAT entry made by

the appellant in the correction of errors without considering the corresponding input VAT entry contrary to the principle of Invoice-Credit VAT. It was his argument that, if the respondent could have adopted that approach, the liability of the appellant for VAT on imported services would be zero. He added that the law provides that voluntary correction of errors exonerate the appellant from the liability to penalty and interest.

Upon being prompted by the Court on whether the appellant voluntarily corrected the said errors or the same was corrected after she was contacted by the respondent. Dr. Mwiburi, though admitted that the appellant received the audit notice from the respondent on 25th November, 2011 and made the said corrections on 29th November, 2011, four days after receipt of the said notice, he maintained that the corrections were made voluntarily as the respondent's audit notice does not amount to '*physical contact*' envisaged under Regulation 4 (2) of the Regulations.

As for the fourth ground, Dr. Mwiburi argued that since there was no payable tax on the said transaction, it was improper for the Tribunal to hold that the respondent was justified to impose interest

on non-existent tax liability. As such, he urged us to allow the appeal with costs.

In reply, Ms. Achimpota, similarly, fully adopted her written submission and attacked the appeal with equal force by supporting the decision rendered by the Tribunal. Specifically, on the first ground, Ms. Achimpota argued that the Tribunal was correct in holding that the appellant was an independent agent in supplying goods to Songas and that the arrangement between them under the Operatorship Agreement constituted a supply for VAT purposes. She insisted that, since the appellant as an agent of Songas procured the said equipment and materials in his own name, the respondent is empowered, under section 59 (3) of the Act, to treat the same as a supply made by the appellant. She then argued that, the issue whether the said transaction was not done in the furtherance of the appellant's business is a question of fact which, under section 25 (2) of the Tax Revenue Appeals Act, [Cap 408 R.E. 2019] (the TRAA), cannot be considered by this Court at this stage. As such, she implored us not to deal with the appellant's argument on that aspect as, she said, the Tribunal had already considered all the factual

evidence and established that, the said transfer was done in furtherance of the appellant's business.

Ms. Achimpota, equally distinguished the case of **Institute of Chartered Accountants in England and Wales** (supra) relied upon by Dr. Mwiburi by arguing that, the facts and the circumstances in that case are not relevant to the current appeal. She also added that the provisions of the law relied upon by the House of Lords in that case are different from the provisions in the Act, hence not applicable in this appeal.

As regards the decision of this Court in **Geita Gold Mining Ltd** (supra), Ms. Achimpota challenged the claim by Dr. Mwiburi that since there was no issuance of tax invoice in this appeal there was no taxable supply. She referred us to section 29 (1) of the Act and argued that the fact that the appellant did not issue a tax invoice to Songas when transferred the said items procured by her in her own name, does not mean that there was no taxable supply. She thus urged us to find that, both the Board and the Tribunal were correct to find that the arrangements between the appellant and Songas amounted to a taxable supply.

As regards the second and third grounds, Ms. Achimpota cited Regulation 4 (2) of the Regulations and disputed the claim by Dr. Mwiburi that the word '*contact*' in the said Regulation means '*physical visitation*' and presence of a tax officer in the appellant premises for the purpose of checking the appellant's account to be a misconception of the law. She insisted that the fact that the respondent contacted the appellant through a letter informing her that she would be subjected to a tax audit is sufficient contact envisaged under Regulation 4 (2) of the Regulations. Ms. Achimpota argued further that, since the said corrections were made after that notification, it was involuntarily made, hence liable for interest in terms of that Regulation.

She further added that, since the appellant under the provisions of section 16 (6) of the Act (prior to the amendment in July, 2011) was prohibited to claim input tax on imported services after expiry of one year from the date of relevant fiscal receipt, she cannot claim the same after expiry of that period. To bolster her position, she cited the case of **Mbeya Cement Company Limited v. Commissioner General Tanzania Revenue Authority,** Civil Case No. 19 of 2008 (unreported).

As for the fourth ground that the interest has been computed on a wrong principal amount, Ms. Achimpota contended that the same is a matter of fact which cannot be raised at this stage. It was her argument that, since the said matter was properly considered and determined by the Board and the Tribunal, this Court has no jurisdiction to reconsider the same on the strength of section 25 (2) of the TRAA. Finally, she urged us to dismiss the appeal with costs.

In a brief rejoinder, Dr. Mwiburi reiterated what he submitted earlier and insisted his previous prayer that the appeal be allowed with costs.

Having carefully considered the rival submissions made by the counsel for the parties in support and against the appeal, we have noted that in her submission, Ms. Achimpota had invited us not to consider the issues on whether the transaction in question was done in the furtherance of the appellant's business and whether the interest imposed against the appellant has been computed on a wrong principal amount, on account that they are raising purely factual matters which cannot be entertained by this Court in terms of section 25 (2) of the TRAA. Section 25 (2) of the TRAA provides that:

> *"**Appeals to the Court of Appeal shall lie on matters involving questions of law only** and the provisions of the Appellate Jurisdiction Act and the rules made thereunder shall apply mutatis mutandis to appeals from the decision of the Tribunal." [Emphasis added].*

The above provision has been considered by this Court in several occasions and there are numerous decisions of this Court to that effect. See for instance cases of **Insignia Limited v. Commissioner General, Tanzania Revenue Authority,** Civil Appeal No. 14 of 2007 and **Shell Deep Water Tanzania BV v. Commissioner General Tanzania Revenue Authority,** Civil Appeal No. 123 of 2018 (both unreported). Specifically, in **Insignia Limited** (supra) when faced with an akin situation, the Court stated that: -

> *"It is therefore evident that appeals to this Court from the Tribunal should involve only questions of law. The appellant is not permitted to reopen factual issues in support of the appeal. The appeal should be decided upon a consideration of the law only and nothing else. We are therefore not persuaded that the first and fourth grounds of appeal concern points of law. The first and fourth*

grounds of appeal relate to an evaluation of the fact in exhibits RE 2; RE 3 and RE 4. For instance, exhibit RE 2 concerns a determination of whether or not the figures therein are actual sales or projections."

Being guided by the above authorities and having considered the decisions of the Board and the Tribunal on the said issues, we agree with Ms. Achimpota that the appellant's complaint was sufficiently dealt with by the Tribunal and the said issues being on factual matters, ought to end there. We thus decline the appellant's invitation on those matters and we will therefore determine the appeal on the remaining issues under the first ground together with the second and third grounds of the appeal.

Starting with the first ground, we wish to note that it is not in dispute that the appellant is a registered company in Tanzania whose activities include production and marketing of natural gas, thus a taxable person and a registered tax payer. It is also on record that, under the Operatorship Agreement, the appellant procured equipment and materials in his own name and then transferred the same to Songas who is another taxable person. In return the

appellant received reimbursements on the said transaction. It is again not in dispute that the appellant failed to account and make returns for VAT on the imported services.

As regards the said transaction, it was the argument of Dr. Mwiburi that the same did not constitute a taxable supply for VAT purposes on account that there was no value added or issuance of a tax invoice. On her part, Ms. Achimpota maintained that, the said transaction amounted to a supply which is taxable with VAT. Therefore, the issue for our determination is whether the reimbursement of costs by Songas to the appellant under the Operatorship Agreement constituted a taxable supply for VAT purposes under the law.

Section 5 (1) (a) – (c) of the Act provides that: -

> *"For purpose of this Act, and unless otherwise provided in this Act or regulations made under it,* ***"taxable supplies" means any supply of goods or services made by a taxable person in the course of*** *or in furtherance of his business after the start of the VAT and includes –*
>
> *(a) the making of gifts or loans of goods;*
> *(b) the leasing or letting of goods on hire;*

(c) the appropriation of goods for personal use or consumption; by the taxable person or by any other person." [Emphasis added].

It is clear from the cited provisions of the law that, a taxable supply is the one which is being made by a taxable person. Therefore, in the appeal at hand, since there is no dispute that the said transaction was made by the appellant, a taxable person, in her own name in the course of her business, it constituted a taxable supply. With respect, it is not correct, as argued by Dr. Mwiburi that the said transaction was done by the appellant (an agent) on behalf of Songas (the principal). The record bears out that the same was done by the appellant in her own name, hence an independent agent.

We are also mindful of the fact that, Dr. Mwiburi urged us to be guided by our previous decision in **Geita Gold Mining Ltd** (supra) and find that, since in the current transaction there was no issuance of tax invoice, there was no taxable supply. Again, with profound respect we are unable to agree with Dr. Mwiburi on this point. As correctly argued by Ms. Achimpota that, in terms of the provisions of section 29 (1) of the Act, the appellant, as a taxable person, was

required to issue a tax invoice in respect of that transaction. The said section provides that: -

> *"**A taxable person supplying goods or services to another taxable person shall provide him with an invoice** (known for the purposes of this Act as a "tax invoice.") containing such information about the supply, the supplier, the recipient and the VAT as the Minister may by regulations published in the Gazette prescribe."* [Emphasis supplied].

In view of the above provisions of the law, there is no doubt that the appellant was under legal obligation to issue a tax invoice for the said transaction. As such, we agree with the submission of Ms. Achimpota that the submission made by Dr. Mwiburi is misconceived as it does not reflect the proper position of the law. It is therefore our considered view that the appellant cannot be allowed to benefit from an omission which is illegal in the first place. We even find the case of **Institute of Chartered Accountants in England and Wales** (supra) relied upon by Dr. Mwiburi on this ground to be distinguishable from the facts and circumstances of this appeal. In that case the provisions of the law relied upon by the House of Lords

are not applicable in this appeal. We thus find the first ground of appeal to be devoid of merit.

The second and third grounds of appeal should not detain us, as both parties are at per that the appellant omitted to account for VAT on imported services but subsequently, on 29th November, 2011 she corrected the errors. This is the fourth day after receipt of the audit notice on 25th November, 2011 from the respondent. The parties locked horns on whether the audit notice issued by the respondent amounted to a *'contact'* envisaged under Regulation 4 (1) and (2) of the Regulations and whether the said corrections were made *'voluntarily' or 'involuntarily'* liable to interest. Regulation 4 (1) and (2) provides that: -

> *"4 (1) Errors voluntarily disclosed shall not be liable to any penalty or interest provided that there is no evidence of intention to delay accounting for any payment of the tax.*
>
> *(2)* ***Errors disclosed after the contact by the proper officer for the purpose of checking the records and accounts of the business shall not be deemed to be voluntary and shall be liable to interest.*** *" [Emphasis added].*

Upon reading of the above Regulation, we find the argument by Dr. Mwiburi that the word *'contact'* used therein means physical visitation and/or physical presence of a tax officer in the appellant's premises for purposes of checking the appellant's account to be unfounded. In our considered view, the notice issued on 25th November, 2011 by the respondent to the appellant notifying her on the tax audit to be conducted on her business was a sufficient contact envisaged under that Regulation. It therefore goes without saying that, since the appellant effected the said corrections after that notification, the same was involuntarily made, hence liable for interest.

In addition, it is also a requirement of the law under Regulation 6 (1) of the Value Added Tax (Imported Services) Regulations, 2001, that every taxable person is required to lodge tax returns containing relevant information in relation to the supply of goods or services supplied to him as well as recording of the imported services as output tax and then claim the same as input tax. We clearly stated this position in our previous decision in **Mbeya Cement Company Limited** (supra).

It is therefore our settled position that the Tribunal at page 1140 of the record of appeal properly determined this matter by making reference to our decision in **Mbeya Cement Company** (supra) and correctly affirmed the decision of the Board. We thus also find the second and the third grounds of appeal devoid of merit.

In totality, and for the foregoing reasons, we do not find any cogent reasons to disturb the concurrent findings and the decisions of the Board and the Tribunal.

In the event, we uphold the decision of the Tribunal and dismiss the appeal with costs.

DATED at **DODOMA** this 2nd day of November, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of November, 2021 in the presence of Mr. Noah Tito, learned Senior State Attorney for Respondent and also holding brief for Dr. Abel Mwiburi, learned counsel for the Appellant is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL