IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CIVIL APPEAL NO. 392 OF 2020

SHANA GENERAL STORE LIMITED.....APPELLANT

VERSUS

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

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

(Mjemas, J. - Chairperson)

Dated the 12th day of August, 2020
in
Tax Appeal No. 38 of 2018
.....

JUDGMENT OF THE COURT

25th October, 2021 & 3rd November, 2021

MAIGE, J.A.:

Under section 111 (1) of the East African Community Customs Management Act, 2004 (the EACCMA), goods originating from Partner States are accorded preferential tariff treatment in accordance with the Rules of Origin provided for under the Protocol on the Establishment of the East African Customs Union (the Protocol). The motive behind the Rules of Origin, it would seem to us, is to promote intra-state trade among the Partner States by ensuring that it is only goods originating

from the EAC custom territory which enjoy tax relief under the single customs territory arrangement. Tanzania and Kenya are irrefutably among the Partner States of East African Community Customs Union (EACCU).

The appellant is a company duly incorporated under the laws of Tanzania dealing with retail and wholesale trade. In the course of its ordinary business, the appellant imported, between January to December 2012, assorted edible oil fresh and soap from Pwani Oil Products Kenya Limited, a company based in the Republic of Kenya ("the supplier"). It is not in dispute that, the supplier was the beneficiary of the duty remission scheme under Article 25(1) of the Protocol as per the Legal Notice No. EAC/45/2011 (exhibit A4). It is express under sub-article (2) as well as in exhibit A4 that, finished goods that benefit from the duty remission scheme are intended for exportation outside the EAC and that, in the event they are sold within EACCU, the same shall attract full duties, levies and other charges provided in the Common External Tariff.

In understanding that, the imported goods benefited from the scheme, the respondent imposed duties to the appellant at the rate of

TZS 855,697,789.00 By way of review, the appellant challenged the imposition of the tax by the respondent on account that, the imported goods originated from Kenya as per the certificate of origin issued by the Kenyan Revenue Authority under section 111(2) of the EACCMA read together with rule 12(1) of the EAC Rules of Origin 2009 which was applicable by then. The respondent confirmed its decision but only that, it adjusted the quantum of the import duty to TZS 457,855,601.25.

Being aggrieved, the appellant appealed to the Tax Revenue Appeals Board (the Board) on the ground that, the imported goods were eligible for preferential tariff treatment and that; the decision of the respondent was in violation of the provisions of section 111 of the EACCMA read together with rule 4(1) of the EAC Rules of Origin. The respondent was blamed in not taking into account that the certificate of origin was a conclusive evidence that, the imported goods originated from Kenya.

In its decision dismissing the appeal, the Board was of the opinion that, as the manufacturer was a beneficiary of the duty remission scheme, the importation of goods to Tanzania could not be

duty free. On whether the certificate of origin was a conclusive evidence on the originality of the imported goods, the Board observed as follows:-

> *"In no way either can a certificate of origin be used as a bar to the Respondent from doing its role of collecting taxes. After all, the certificate of origin does not contain a declaration to the effect that the goods imported by the Appellant were manufactured by materials obtained from Kenya. The declaration merely states that the goods are of Kenyan origin having been produced in Kenya."*

Further aggrieved, the appellant appealed to the Tax Revenue Appeals Tribunal (the Tribunal) on three grounds. **First,** that the Board erred in law and fact in holding that the certificate of origin does not contain a declaration to the effect that the goods imported by the appellant were manufactured using materials obtained from Kenya. **Second,** that the Board erred in law and facts by holding that, the imported goods were manufactured from materials which were shipped to the East African Community under the duty remission scheme. **Third**, that the Board erred in law and fact by holding that

the respondent's decision to enforce collection of the duties in question was proper.

The appellant's argument before the Tribunal in support of the first and third grounds of appeal was that, the certificate of origin raised a rebuttable presumption on the originality of the goods which could only be impeached in exceptional circumstances, through the verification procedure under rule 12(3) of the EAC Rules of Origin. On the second ground, the contention was that, the Legal Notice was not sufficient evidence to invalidate the certificate of origin. On the issue of conclusiveness of the certificate of origin, the Tribunal guided by its previous decision in **Tanzania Revenue Authority vs. Bright Choice Limited**, Tax Appeal No. 38 of 2013 (unreported), was of the opinion that, since the Rules of Origin intended to regulate importation of goods within the EACMU, it could not be harmonized with the duty remission scheme under the Protocol. In particular, it remarked as follows:-

> *"We find no reason to differ with the Tribunal's holding as reproduced herein above. In fact the Tribunal made it clear that the Rules of Origin and the duty remission provisions of the*

Protocol and the EAC Common Market Act, 2004 are mutually exclusive because they were intended to serve different purposes. That answers all the arguments by the appellant's counsel that there was need to carry out verification exercise".

As to whether the legal notice was sufficient evidence to invalidate the certificate of origin, the Tribunal was of the position that, although the former could not invalidate the latter, it constituted sufficient evidence to prove that the seller of the goods was the beneficiary of the scheme and therefore, her goods could not be sold within the EAC territory without paying the relevant duties. If we can quote, the Tribunal remarked as follows:-

"It is not in dispute in this matter that Pwani Oil Products Limited which supplied the goods to the appellant was listed in the Legal Notice No. EAC/45/2011 as one of the beneficiaries of the duty remission scheme. The appellant's counsel argues that that is not sufficient evidence but he does not say why. The Legal Notice does not in any way invalidate the certificate of origin which showed that the goods originated in Kenya. The Legal Notice

simply showed that the seller of the goods is one of the beneficiaries of the duty remission scheme. That being the case the goods which were sold to the appellant were not supposed to be sold to another country within East African Community customs territory without payment of taxes".

Once again aggrieved, the appellant has preferred a second appeal to the Court. In her memorandum of appeal, the appellant has faulted the decision of the Tribunal in holding that, under Article 25(3) of the Protocol, goods sold to the appellant by the supplier are subject to payment of duty and for failure to carefully consider the provisions of Rule 12(3) of the Rules of Origin.

At the hearing of the appeal, the appellant was represented by Messrs. Wilson Mukebezi, Alan Kileo and Stephen Axwesso, learned advocates whereas Ms. Consolatha Andrew and Juma Kisongo, leaned Principal State Attorneys represented the respondent. In their oral submissions which for the appellant was submitted by Mr. Axwesso and for the respondent Ms. Andrew, each of the parties adopted its written submissions earlier on filed with some clarifications. We sincerely appreciate for the counsel's well researched and focused

submissions. They have been very instrumental in preparation of our judgment.

In his submissions, Mr. Axwesso faults the Tribunal in not holding that, the appellant was wrongly subjected to payment of duties under Article 25(3) of the Protocol despite the evidence in the certificate of origin that the goods originated from Kenya. He submits that, in accordance with rule 12 (1) of the Rules of Origin, the certificate of origin is a rebuttable presumption that the goods in question are produced using raw materials from Kenya. He submits therefore that, upon producing such a certificate, the burden of proof shifted to the Respondent. The counsel placed heavy reliance on the case of **Insignia Limited vs. Commissioner General (TRA)** Civil Appeal No. 7 of 2007 (unreported) to the effect that, where the respondent in exercise of its duty seizes the documents of a tax-payer and makes use of them to compute the tax-payer's VAT liability, the taxpayer is deemed to have made out a *prima facie* case such that the evidential burden shifts on the respondent.

He submits further that, since the certificate of origin was issued by the Kenyan Revenue Authority (KRA) which is a competent

authority, it was conclusive such that it could only be rebutted in exceptional circumstance and only through a verification exercise under rule 12(2) of the Rules of Origin 2009 which was applicable at that juncture. He submits further that, by unilaterally disregarding the certificate of origin, the respondent committed an act of fundamental breach of the EAC laws which seek to harmonize trade among the Partner States.

In rebuttal, it was submitted that, since under Article 25 of the Protocol, duty remission scheme is intended to promote exportation of finished goods outside the EAC, mere production of certificate of origin cannot justify selling of such goods within the territory without paying duties. In the opinion of the counsel for the respondent, the certificate of origin is relevant for other purposes and not for determining taxability of goods when sold within EAC. It is their case therefore that, a certificate of origin is not a conclusive evidence on the originality of goods if the same are covered under duty remission scheme. For that reason, it is the submission for the respondent that, the authority in **Insignia case** *supra* is distinguishable and therefore inapplicable. In the final result, the Court is urged to dismiss the appeal with costs.

In his rejoinder submission, Mr. Axwesso did not raise any new issue apart from reiterating his submissions in chief.

With the above exposition of the nature of the controversy, it may be desirable to consider the merit or otherwise of the appeal. Parties appear not to be in dispute that the supplier of the goods under discussion is a beneficiary of the duty remission scheme. They are as well not at issue on the position of law that, subject to the rules of origin, goods covered under the scheme cannot enjoy preferential tariff treatment under section 111 of the EACCMA. The dispute, it would appear, is whether the certificate of origin is a conclusive evidence that, the goods in question are manufactured using raw materials originated from Kenya.

For the appellant, it is submitted, the same is conclusive evidence that, the goods in question originates from Kenya. Reliance was placed on the provisions of rule 12 (1) of the Rules of Origin. For the respondent, it was submitted that the same is not relevant where the goods are covered by the remission scheme because the rules of origin and the remission scheme are mutually exclusive.

We propose to start by remarking that, whether certificate of origin is a conclusive evidence on the originality of the goods for the purpose of preferential tariff treatments is a question of law and must have its answer founded on law and not mere logical arguments. This being a tax dispute, the burden of proof is, according to section 18(2) (b) of the Tax Revenue Appeals Act, [Cap. 408, R.E., 2019], on the appellant. Therefore, in **Insiginia case** *(supra)* it was held:-

> *"**The burden of proof in tax matters has often been placed on the tax-payer**. This indicates how critical the burden rule is, and reflects several competing rationales: the vital interest of the government in getting its revenues; the tax payer has easy access to the relevant information and the importance of encouraging voluntary compliance by giving tax-payers incentives to self-report and to keep adequate records in case of disputes". [Emphasis added].*

It is also the law that, in interpreting tax statutes, the correct approach is to apply the plain meaning rule. It is to the effect that, when a provision is in specific language that admits no doubt or ambiguity in its application, it should be applied strictly as it is, without interpolation.

See for instance, **Resolute Tanzania Limited vs. The Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 125 of 2017 (unreported). Other rules of interpretation such as mischief rule come in where the words of the statute are not clear or where strict application of the same would lead to an obvious absurdity. Thus, in **Republic vs. Mwesige Godfrey and Another**, Criminal Appeal No. 355 of 2014 (unreported) which was quoted in **Commissioner General Tanzania Revenue vs. Aggreko International Project Ltd**, Civil Appeal No. 148 of 2018, it was observed as follows:-

> *"But this only holds true in the clearest of cases. Where there is an obvious lacuna or omission and/ or ambiguity the courts have a duty to fill in the gaps or clear the ambiguity".*

In accordance with item 2.1 of the **Manual on the Application of the East Africa Community Rules of Origin, 2006**, EAC Rules of Origin is defined as:-

> *"a set of criteria that is used to distinguish between goods that are produced within the EAC Customs territory and are eligible to community tariff treatment against those*

produced outside the EAC customs territory that attract import duties specified in the Common external tariff."

It is also the law under Rule 4(1) of the EAC Rules of Origin, 2009 that, the mere fact that goods are consigned directly from a Partner State, does not qualify them to be classified as goods originating from the EAC customs territory for the purpose of preferential tariff treatment. They have to meet either of the two criteria set out in items (a) and (b). Thus:-

"Goods shall be accepted as originating in a Partner State where they are consigned directly from a Partner State to a consignee in another Partner State and where:

(a) They have been wholly produced as provided for in Rule 5 of these Rules; or

(b) They have been produced in a Partner State wholly or partially from materials imported from outside the Partner State or of undetermined origin by a process of production which affects a substantial transformation such that:

(i) the c.i.f value of those materials does not exceeds sixty per centum of the total cost of the materials used in the production of the goods; and

(ii) the value added resulting from the process of production accounts for at least thirty five per centum of the ex-factory cost of the goods as specified as specified in the Fifth Schedule to those Rules; and

(iii) the goods are classified or become classifiable under a tariff heading other than the tariff heading under which they were imported as specified in the Second Schedule to these Rules."

The preferential tariff treatment is created under section 111 (1) of the EACCMA according to which goods originating from the Partner States are accorded with preferential tariff treatment in accordance with the Rules of Origin provided for under the Protocol. In our view, for goods to be categorized as originating from EAC customs territory, they must pass the test of originality set out in rule 4(1) of the EAC Rules of Origin as above stated. Section 111 (2) of the EACCMA which is read together with rule 12 (2) of the Rules of Origin, 2009 provides for the procedure through which the Customs within the member states may determine originality for the purpose of preferential tariff treatments. It provides as follows:-

"(2) Customs shall require production of a Certificate of Origin and ***other documents*** *as proof of origin of goods referred to in subsection (1) above." [emphasis supplied].*

Under the above provision, it is clear and unambiguous to us that, certificate of origin though a relevant document in proving originality of goods for the purpose of preferential tariff treatment, is not a conclusive evidence. That is why, in addition to it, Customs are mandated by the law to, for the purpose of determining originality of the goods, require others documents in addition to the certificate. In this case, the respondent having established that, the seller of the goods was a beneficiary of the scheme, required the appellant to produce other documents in proof that the goods were not manufactured using raw materials that enjoyed duty remission under the scheme. The basis of so requiring is that under the express provision of Article 25(3) of the Protocol, the importation of goods under duty remission scheme within the EACCU without paying duties is generally prohibited . We are of the view that, what the respondent did was within the parameters of the respective provision. There being evidence of specification of the supplier in the Legal Notice as the

beneficiary of the scheme, it was expected for the respondent to so demand considering the fact that, the certificate did not indicate that the goods in question were produced using raw materials produced in Kenya.

In our opinion therefore, the tribunal was right in holding that the certificate of origin alone would not suffice to establish originality of the goods for the purpose of preferential tariff treatment.

The complaint by the appellant that, the respondent would have invoked the verification procedure under rule 12 (3) of the Rules of Origin appears to be irrelevant since the question was not that the certificate was doubtable but that on top of the certificate, the appellant was expected to produce other relevant documents to substantiate that the goods were not manufactured using raw materials imported under the scheme. The decision, as we said, is within the parameters of the provision of section 111 (2) of the EACCMA and the Tribunal cannot be blamed for violating any law of the EAC customs management.

In the final result, the appeal is dismissed with costs.

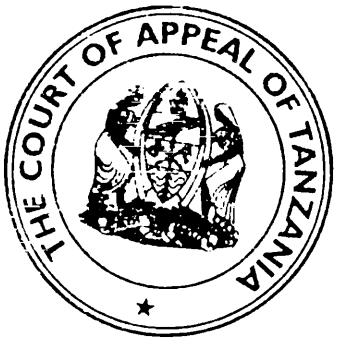
DATED at **DODOMA** this 2nd day of October, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of November, 2021 in the presence of Mr. Primi Telesphori, Principal State Attorney for the Respondent also holds brief for Mr. Stephen Exwesso, learned counsel for the Appellant is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL