IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CIVIL APPEAL NO. 255 OF 2020

THE HELLENIC FOUNDATION OF TANZANIA LTD
t/a ST. CONSTANTINE'S INTERNATIONAL SCHOOL ..... APPELLANT

VERSUS

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

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

(Kamuzora, Vice Chairperson)

dated the 28th day of January, 2020
in
Tax Appeal No. 17 of 2019

JUDGMENT OF THE COURT

18th October & 4th November. 2021

KAIRO, J.A.:

This is an appeal against the judgment and decree of the Tax Revenue Appeals Tribunal (the Tribunal) dated the 28th day of January, 2020 in Tax Appeal No. 17 of 2019. The factual background culminating to this appeal is as follows:-

The appellant is a corporate body engaged in providing education to the public. It owns and operates nursery, primary and secondary schools in the name of St. Constantine's International School in Arusha.

On 20th June, 2017, the respondent served the appellant with a letter indicating that it had defaulted in the payment of Skills and Development Levy (hereinafter SDL) for years of income 2013 through 2017. Thereafter, it proceeded to issue certificates of assessment of the SDL for the years in question plus interests thereon. Upon receipt of the said certificates, on 29th November, 2017, the appellant lodged notices of objection against the assessments made. After some exchange of proposals for the settlement on the adjusted assessments, on 10th April, 2018, the appellant received Notices of Confirmation of Assessment which it was asked to settle.

Aggrieved, the appellant lodged Tax appeals Nos. 209, 210, 211 and 212, all of 2018 before the Tax Revenue Appeals Board (the Board) complaining against the imposition of SDL to the appellant for the reason that it was exempted from such liability.

The issues before the Board were **one**, whether the SDL assessments were lawful and justifiable; **two**, whether the appellant qualified for SDL payment exemption. The appeals were later consolidated, argued and determined together as appeal No. 209 of 2018. The Board dismissed the appeal after finding that the appellant was not a charitable organization, thus liable to pay the SDL. The Board also found that, the respondent had

conducted due diligence on the status of the appellant and satisfied that the appellant's entity did not qualify as an exempted charitable organization under the provisions of section 19 (2) of the Vocational Education and Training Act, Cap. 82 R.E. 2006 [as amended by the Finance Act, 2014] (the VETA Act).

The appellant was further aggrieved and lodged an appeal before the Tax Appeals Tribunal (the Tribunal) which sustained the Board's decision, hence this appeal on three grounds of appeal as follows: -

1. *That the Honourable Tribunal erred in both law and fact by holding that the appellant is not a charitable organization in terms of section 19 (2) of the Vocational Education and Training Act, Cap.82 R.E. 2006 as amended by the Finance Act, 2014 regardless of an admission by the respondent in the pleadings to the contrary.*
2. *That the Honourable Tribunal erred in law in holding that the appellant is liable for the payment of Skills and Development Levy on the basis of an assumption that the respondent had conducted due diligence without any proof and without any pleading on that regard by the respondent.*
3. *That having held that there is no any procedure for conducting due diligence on the status of the appellant in respect of chargeability of SDL, and having held that there was no proof that due diligence was conducted by the respondent, the Honourable Tribunal erred in*

law by holding that the appellant is liable to pay SDL without clear provision of the law.

When the appeal was called on for hearing, the appellant was represented by Mr. Edward Peter Chuwa, learned counsel while the respondent had the services of Messrs. Harold Gugami and Amandus Ndayeza, together with Ms. Grace Makoa, all Senior State Attorneys.

Mr. Chuwa adopted the appellant's written submissions in support of the appeal before addressing us orally on some of the aspects of the appeal.

In essence, the submissions of Mr. Chuwa on the 1st ground, revolves around the issues whether the respondent by noting some of the appellant's statements of facts in the appeal amounted to an admission and whether the appellant is a charitable organization in terms of section 19 (2) of the VETA Act as amended by the Finance Act, 2014.

Mr. Chuwa argued that by noting the appellant's pleadings before the Board and Tribunal, the respondent admitted that the appellant is a charitable organization doing business for the public good and thus eligible for SDL exemption under the VETA Act. He impressed on us on the cherished legal principle that parties are bound by their pleadings citing the case of **Pauline Samson Ndawavya v. Theresia Thomas**

Madaha, Civil Appeal No. 45 of 2017 (unreported) to back up his argument.

In his reply, Mr. Gugami who had adopted the contents of his written submissions conceded that the respondent's noting the contents of paras 3.1.1, 3.1.2 and 3.1.3 of the statements of the appeal filed by the appellant at the Board did not amount to admission of the assertions therein. He argued that the two words are not synonymous. In elaboration, Mr. Gugami stated that, the word "noted" was an evasive answer which means that the respondent neither admitted nor disputed the asserted facts. Alternatively, even if he did, his admission did not supersede the requirement of section 19 (2) of the VETA Act.

We are mindful of the principle that parties are bound by their own pleadings as reiterated in many cases including, **Pauline Samson Ndawavya** (supra). However, in the appeal at hand we do not agree that by noting the appellant's averments in the statements of appeal, the respondent admitted that the appellant was exempted from paying SDL. We think that by noting the contents of the aforesaid paragraphs, the respondent did not dispute the appellant's assertions that it was a registered international school providing nursery, primary and secondary education; that the appellant was a registered charitable organization;

and that its business was for the public good. However, we note that in paragraph 7 of its replies to the statements of appeal, at pages 145 through 148 of the record of appeal, the respondent pleaded that the appellant was liable to pay SDL. This averment crucially negated any impression that the respondent admitted the claimed exemption from SDL. That said, we find no merit in the 1st ground of appeal and we dismiss it.

As for the 2nd and 3rd grounds of appeal, Mr. Chuwa's contention was that it was an error for the Tribunal to hold that the appellant is liable to pay SDL basing on assumption that due diligence was conducted while there is no proof to that effect nor any procedure for conducting it in place. The crux of his submission was two pronged: **one,** what was pleaded and submitted, **two,** on the principles of interpretation of tax statutes.

Mr. Chuwa faulted the Tribunal in upholding the Board's decision that due diligence was done despite its finding that section 19 (2) of the VETA was silent on the modality of conducting the same. According to him, that reasoning was not backed by the pleadings, neither any evidence on record while the fact that it was not done is supported by the pleadings of the appellant. It was his further submission that the mere

fact that the respondent was in possession of the appellant's business documents could not be the basis of holding that due diligence was conducted. He argued that, if due diligence would have been done on the basis of the said documents, the respondent would have confirmed that the appellant was providing education for the public good, thus not subject to SDL payment. He also contended that neither the Board nor the Tribunal considered exhibit A1; a certificate of registration of the appellant and exhibit A2; a letter from the Ministry of Education and Vocational Training addressed to the Permanent Secretary, Ministry of Finance dated 26th March, 2014. Had they done so, he argued, they would not have reached wrong decisions as they did. In addition, he contended that having found that section 11 of the Tax Administration Act, 2015 which provides for private ruling and the Income Tax Act, 2004 were not applicable, the Tribunal should not have concluded that the final assessment of the SDL verified that the respondent had conducted due diligence.

Mr. Chuwa submitted further that the decisions of the Board and Tribunal were based on assumptions and incorrect understanding of the law which was an error on their part. He elaborated that, the legal provisions which creates tax liability have to be strictly adhered and

should there be any ambiguity or uncertainty, the same has to be interpreted in favour of the taxpayer. He referred us to the cases of **North Mara Gold Mine Limited vs. Commissioner General (TRA),** Civil Appeal No. 78 of 2015 and **Bulyanhulu Gold Mine Ltd vs. Commissioner General (TRA)**, Consolidated Civil Appeals Nos. 89 & 90 of 2015 (both unreported) to bolster his argument. Mr. Chuwa concluded by urging the Court to allow the appeal with costs.

In rebuttal, Mr. Gugami refuted the appellant's argument that the respondent did not address the legal points in his submission before the Board. He elaborated that the respondent thoroughly submitted before the Board on the applicability of the VETA Act as well as section 11 of the Tax Administration Act, 2015 while addressing the legal points raised by the appellant. He also refuted the appellant's submission that the respondent did not conduct due diligence.

Regarding the appellant's contention that neither the Board nor the Tribunal considered exhibits A1 and A2, the learned counsel submitted that the said evidence had nothing to do with proof of the status of the appellant as a charitable organization for the purpose of exemption from SDL. He argued that the determining factor on the status of the appellant is stipulated in section 19 (1) and (2) of the VETA Act which deals with

the SDL exemption regime and which is at the centre of contention in the appeal. He rebutted the appellant's submission that the Board and the Tribunal's decisions to subject the appellant to SDL payment were based on assumptions and argued that the decisions hinged on section 19 (2) of the VETA Act whereby the respondent was satisfied that the appellant was not eligible for exemption from SDL liability. He also added that the Tribunal sustained the Board's decision on the ground that, issuance of the final assessments by the respondent after the objection settlement verified that the respondent was satisfied that the appellant was not a charitable organization eligible for SDL exemption. He concluded that the position of the law in this matter particularly section 19 (1) and (2) of the VETA Act is clear and free from any ambiguity or uncertainty to warrant its interpretation in favour of the appellant. As such, he argued the cited cases of **North Mara Gold Mine Limited and Bulyanhulu Gold Mine Limited** (supra) are distinguishable to the instant appeal.

In his brief rejoinder, Mr. Chuwa repeated what he had submitted in chief and prayed the Court to allow the appeal with costs.

Having examined the competing arguments on the 2nd and 3rd grounds, the issue for our determination is whether the Tribunal was

correct in upholding the Board's finding that the appellant was liable to pay SDL as assessed by the respondent.

It is trite that the chargeability of SDL regime is governed by the VETA Act. Section 14 (1) the VETA Act provides:

> *"14.-(1) Subject to the provisions of this Part, there shall be charged, levied and payable to the Commissioner at the end of every month, from every employer who has in his employment four or more employees, a levy to be known as the skills and development levy."*

However, the Act exempts some organizations from payment of SDL including a charitable organization under the provisions of section 19 (1) of the VETA Act which stipulates:

> *"19(1). The provision of section 14 shall not apply to:*
>
> **(f) *Charitable organizations,***

The term charitable organization has been defined under section 19 (2) of VETA Act as hereunder: -

> *"19(2).* ***For the purpose of this section,*** *charitable organization means resident entity of a public character registered as*

such and performs its functions solely for:

-

(a) N/A

(b) Provision of education or public health, and the ***Commissioner General is upon due diligence making, satisfied that the*** *business conducted by such entity is* ***for public good."*** *[Emphasis supplied]*

The appellant's case has been that it is involved in providing education to the public, thus a charitable organization exempted from paying SDL. However, from the quoted provisions, for a charitable organization to be so treated for the purpose of SDL exemption, the condition set out under section 19 (2) of the VETA Act has to be satisfied. We have found no evidence in the record of appeal proving that the appellant met the condition. Thus, Mr Chuwa's argument that the appellant was subjected to pay SDL basing on uncertain or ambiguous provision of the law, holds no water. In the same vein, the cited cases of **North Mara Gold Mine Limited** (*supra*) and **Bulyanhulu Gold Mine Limited** (*supra*) are irrelevant.

We noted a sharp disagreement between the learned counsel for the parties on whether or not the respondent conducted due diligence

pursuant to section 19 (2) of the VETA Act to determine if the appellant was an exempted organization within the meaning of the said provisions. In our view, the issue in the context of this matter is not whether or not due diligence was conducted. We think since the appellant was an employer within the meaning of section 14 (1) of the VETA Act who has in its employment four or more employees was liable to pay SDL at the end of every month unless it had satisfied the respondent that it was entitled to an exemption from paying the levy pursuant to section 19 (2) of the VETA Act. We are also of the view that section 19 (2) has no automatic application to exempt employers from payment of SDL. In order for the respondent to be satisfied that the appellant as an employer was not liable to pay SDL it was incumbent upon the appellant to furnish necessary documentation or other evidence to establish that it is a charitable organization providing education for the public good.

As the appellant was in existence when the law on SDL came into force, logic and common sense would dictate that evidence ought to have been furnished to the respondent as soon as possible. In this appeal, there is no proof that the appellant furnished any evidence, at least until when the assessments were made by the respondent. Regardless of the finding by the Board that there exists no procedure for conducting due

diligence under section 19 (2) of the VETA Act, the issue whether or not due diligence was conducted on the appellant does not arise in the present circumstances. On that basis, we find no merit in the 2nd and 3rd grounds of appeal. They stand dismissed.

Having so found, we find nothing to fault the decision of the Tribunal. Consequently, we dismiss the appeal in its entirety with costs.

DATED at **DODOMA** this 4th 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 4th day of November, 2021 in the presence of Ms. Consolatha Andrew, learned Principal State Attorney for the respondent and also holding brief of Mr. Edward Chuwa, learned counsel for the appellant, is hereby certified as true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL