

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MKUYE, J.A., KWARIKO, J.A. And LEVIRA, J.A.)

CIVIL APPEAL NO. 217 OF 2019

**JOVET TANZANIA LIMITEDAPPELLANT
VERSUS**

**COMMISSIONER GENERAL.....RESPONDENT
TANZANIA REVENUE AUTHORITY**

**(Appeal from the Decision of the Tax Revenue Appeals Tribunal
at Dar es Salaam)**

(Mjemmas, J. – Chairman)

dated the 24th day of June, 2019

in

Tax Appeal No. 8 of 2016

JUDGMENT OF THE COURT

16th February & 1st April, 2021

KWARIKO, J.A.:

The appellant, JOVET Tanzania Limited was aggrieved by the decision of the Tax Revenue Appeals Tribunal (henceforth the Tribunal), (Mjemmas, - Chairman) dated 24th June, 2019 in which, the appellant was found liable to pay taxes and duties on goods not abandoned as assessed by the Commissioner General, Tanzania Revenue Authority (Commissioner) (the respondent).

For better understanding of what transpired, the following brief background of the matter will suffice. The appellant is a dealer in the

business of importation and supply of beverages named Bavaria (the goods). She is also the sole agent for the said goods for its Manufacturer Company known as Bavaria N.V, P.O. Box 1, 5737 ZG Lieshout of Netherlands. Between the month of September and November, 2014 the appellant imported the goods and warehoused at Modern Warehouse No. 570 pending payment of import duties and taxes.

On behalf of the appellant, Modern Holding (EA) Ltd (the bonded warehouse), by a letter dated 2nd May, 2015 written to the respondent, sought extension for warehousing of the goods with TANSAD Reference Number TZDL – 14 – 1135887 where the application was granted. Thereafter, the appellant claimed that some of the goods had developed flakes thus not fit for sale in Tanzania though the Manufacturer certified that the identified flakes were only organic materials and the goods were 100 percent safe for consumption.

On 31st July, 2015 the appellant through the bonded warehouse owner wrote a letter to the Tanzania Food and Drugs Authority (TFDA) and Kinondoni Municipality and copied it to the respondent. In that letter the appellant requested for the addressees to inspect the goods which had developed flakes for destruction purposes. However, on 18th August, 2015 the respondent reminded the appellant to pay duties and

taxes in respect of the said goods before their disposal. On 21st September, 2015 through its advocate, the appellant applied to the respondent for remission of custom duties in respect of the goods alleged to be unfit for sale in order to allow their disposal. This application was declined vide a letter dated 16th November, 2015 assigning reasons that at the time of importation the goods were examined and complied with all requirements before clearance to the bonded warehouse. The appellant was therefore required to pay the custom duties.

Following the said refusal, on 18th November, 2015 the appellant applied for abandonment of the goods which request was also refused. Undaunted, on 1st March, 2016 the appellant unsuccessfully requested for the respondent to review its decision to refuse abandonment of the goods.

On being aggrieved by the refusal, the appellant filed an appeal before the Tax Revenue Appeals Board (the Board) on a claim that the respondent's decision for its refusal to review the decision in respect of the application for abandonment of the goods was without reasons thus illegal and unjustified.

The issue which was framed for determination before the Board was whether the appellant was liable to pay customs duties and taxes for the abandoned goods. In the end of the hearing, the Board decided that the goods were examined and found to comply with all custom requirements before they were cleared to the bonded warehouse so as to give opportunity to the appellant to find means of paying taxes and duties. It was also observed that the goods expired following their overstay in the bonded warehouse due to the appellant's default to pay taxes and duties. The Board found the appellant liable to pay custom duties and taxes since the goods were not abandoned.

The appellant was aggrieved by that decision, hence he unsuccessfully appealed before the Tribunal. In its decision, the Tribunal observed that the appellant's complaint was that the goods were legally abandoned in accordance with section 56 (1) (a) (b) of the East African Community Customs Management Act, 2004 (the EACCMA). However, the Tribunal was of the view that the said provision is invoked where the period for warehousing has expired, when the goods may be sold by public auction or private treaty with a view to recover duties, taxes and other expenses of the sale. The Tribunal found that according to section 16 (3) of the Act and Regulation 143 of the East African

Community Customs Management Regulations, 2010 (the Regulations), abandonment of goods needs to be done with the permission of the Commissioner whereby in this case, he refused to do so hence the appellant was held liable to pay the duties and taxes.

Still aggrieved, the appellant has come to this Court on appeal upon the following three grounds:

- 1. That the Tax Revenue Appeals Tribunal erred in law by holding that the Appellant abandonment of goods without permission of the Commissioner General of Tanzania Revenue Authority was not valid and it is not supported by law.*
- 2. That the Tax Revenue Appeals Tribunal erred in law by holding that no abandonment of the goods and remission of duties and taxes by operations of the law for goods overstayed in the bonded warehouse if the goods are not commercially viable.*
- 3. That the Tax Revenue Appeals Tribunal erred in law by holding that, the appellant was liable to pay taxes and duties on the goods in dispute as they were not abandoned.*

The counsel for the appellant lodged his written submissions in support of the appeal pursuant to Rule 106 (1) of the Rules. On the other hand, in compliance with Rule 106 (7) of the Rules, the respondent's advocate similarly filed their respective written submissions in reply to the appellant's submissions.

At the hearing of the appeal, Mr. Brayson Shayo, learned advocate represented the appellant while Mr. Hospis Maswanyia and Ms. Salome Chambai, both learned State Attorneys appeared for the respondents.

Mr. Shayo adopted his written submissions to be part of his oral arguments. He submitted generally that the Tribunal did not address the framed issue, instead it determined matters which were not in dispute between the parties. He argued that, the Tribunal stepped into the shoes of the Board and its reasoning was based on the issue whether the appellant abandoned the goods within the ambit of the law. The learned advocate argued further that both the Board and the Tribunal failed to interpret sections 56 and 57 of the EACCMA by holding that the appellant did not abandon the goods therefore was duty bound to pay taxes. He contended that the appellant was not liable to pay duties and taxes for the goods which lost their value while were still in the customs bonded warehouse and were destroyed unused.

As regards the first ground of appeal, Mr. Shayo argued that the Tribunal erred to hold that the goods cannot be abandoned without the permission of the Commissioner because the owner can decide to abandon the goods to the customs and the Commissioner may permit such abandonment subject to conditions he deems fit to impose. He wound up the argument in respect of this ground to the effect that, the appellant abandoned the goods by operation of law and voluntarily but he did not accept the conditions for the abandonment set out by the Commissioner.

In respect of the second ground of appeal, Mr. Shayo argued that, the Tribunal's interpretation of section 57 of the EACCMA contemplated a situation where the goods are commercially viable but in the present case, the goods were no longer commercially viable. He argued that the goods were treated as abandoned goods in terms of section 57 of the EACCMA after refusal by the Commissioner to re-warehouse them. That the appellant was prompted to apply for abandonment after the respondent had failed to take action to auction the goods whose warehousing in a private bonded warehouse attracted charges. He argued further that as the goods were treated as abandoned, they were subject to public auction as per section 57 (2) (3) (4) of the EACCMA.

That the respondent being aware of the law notified the owner of the bonded warehouse on 21st September, 2016 that he could auction the goods without further correspondences which means he was geared to exercise the powers under section 57 of the EACCMA.

The learned counsel stressed in the third ground that the goods were abandoned by operation of law after refusal of extension of time to re-warehouse them pursuant to section 57 or by a voluntary abandonment of the appellant under section 56 of the EACCMA. As such, the appellant is not liable to pay custom duties and taxes in respect of such goods.

In addition to the foregoing, Mr. Shayo submitted that it was illogical and illegal for the appellant to pay duties and taxes for the goods which were not cleared out of the custom control. In support of his contentions, Mr. Shayo referred us to our earlier decision in **Commissioner General TRA v. Mamujee Products Limited & Two Others**, Civil Appeal No. 10 of 2018 (unreported) and a Supreme Court of India case of **Nirmal Kumar Parsan v. Commissioner of Commercial Taxes & Others**, Civil Appeal No. 7864 of 2009

In opposition to the grounds of appeal, Mr. Maswanyia first adopted the respondent's written submissions to form part of his oral arguments and subscribed to the decision of the Board and the Tribunal.

The learned counsel argued in respect of the first ground of appeal that abandonment of goods will only exist upon permission by the Commissioner as per section 56 (1) of the EACCMA and that the powers to permit abandonment are discretionary. He submitted that, in this case the Commissioner refused the appellant's application for abandonment of the goods. He argued further that the application for abandonment is provided under regulation 143 of the Regulations and not section 56 of the EACCMA, and that it is upon permission for abandonment where the owner of goods can apply for remission of custom duties and taxes.

The learned State Attorney contended that in this case there was no permission for abandonment from the Commissioner hence there was no abandonment of the goods legally made. He argued that section 57 of the EACCMA is not applicable because the appellant contravened the law when he applied for remission before the permission for

abandonment of goods. He contended that sections 56 and 57 of the EACCMA serve different purposes.

In respect of the second and third grounds of appeal, the learned State Attorney argued that section 57 of the EACCMA was properly applied by the Tribunal since it relates to re-warehousing of goods which are commercially viable, whereas in this case the goods were not commercially viable. He added that the Commissioner could not invoke the provisions of section 57 of the EACCMA because the appellant was still seeking remedies under section 56 of the EACCMA. He argued that there is no automatic abandonment by operation of law under the existing laws.

Mr. Maswanyia contended that the duties and taxes are payable in this case because at the time of importation, the goods were examined and complied with all customs requirements before they were cleared to the bonded warehouse and no permission for abandonment of custom duties and taxes was given by the Commissioner.

In respect of the complaint that there is no law which allows the Commissioner to charge custom duties and taxes on goods which are still in the customs control, Mr. Maswanyia argued that this is a new issue which was not raised as an objection and entertained by the Board

and the Tribunal. He referred us to Rule 113 (1) of the Rules which prohibit a party to argue new grounds. As such, he urged us to disregard this issue. With these submissions, the learned State Attorney urged us to dismiss the appeal with costs.

In his rejoinder, responding to the alleged new issue, Mr. Shayo argued that from the inception of the case the issue which was agreed upon for decision was "*whether the appellant is liable to pay custom duties and taxes in respect of the abandoned goods*". He added that he has explained different provisions of law which prohibit the respondent to charge custom duties on goods which are still in the custom bonded warehouses and abandoned.

Having considered the submissions by the learned counsel for the parties, the crucial issue for our determination is whether goods under consideration were abandoned. Firstly, the appellant's contention is that, the goods were abandoned by the operation of law after refusal by the respondent to extend the time for re-warehousing of the goods in terms of section 57 (2) of the EACCMA. Secondly, through application by the appellant under section 56 of the EACCMA where duties and taxes are remitted. The respondent contended that in the absence of the Commissioner's permission under section 56 (1) (a) of the EACCMA,

which permission was refused, there wouldn't be any abandonment of the goods. The foundation of the appellant's complaint is section 56 of the EACCMA which provides thus:

"56. (1) The Commissioner may, subject to such conditions as he or she may impose-

(a) permit the owner of any warehoused goods to abandon such goods to the Customs;

(b) permit the owner of any warehoused goods which, in the opinion of the proper officer, are not worth the duty payable on them or have become damaged, or are surplus, by reason of any operations in connection with the goods carried out under section 51 to destroy such goods; and in either such case the duty on such goods shall be remitted.

(2) Where under subsection (1) any warehoused goods are-

(a) abandoned to the Customs, then such goods may be destroyed or otherwise disposed of in such manner as the Commissioner may direct and at the expense of the owner;

(b) permitted to be destroyed and such goods were warehoused in a Government warehouse, then the owner of such goods shall nevertheless be liable to pay to the proper officer the rent and other charges due to such goods.”
(Emphasis ours).

According to the cited provisions of law, the Commissioner has discretionary powers subject to conditions he may impose to permit abandonment of warehoused goods. Similarly, under section 16 (3) of the EACCMA and Regulation 143 of the Regulations, the abandonment of goods should be done with the permission of the Commissioner. The question which follows here is whether the Commissioner gave the permission to the appellant to abandon the goods. The answer to this question is in the negative as it is evidenced that the Commissioner refused the appellant’s application for abandonment vide his letter dated 5th January, 2016.

The appellant has also contended that the goods were abandoned relying on the provisions of section 57 of the EACCMA. For ease of reference, we shall reproduce this provision of law as follows:

"57. (1) *All warehoused goods which have not been removed from a warehouse in accordance with this Act within six months from the date on which they were warehoused may, with the written permission of the Commissioner, be re-warehoused for a further period of three months:*

Provided that in case of-

(a) wines and spirits in bulk warehoused by licensed manufacturers of wines and spirits; or

(b) goods in a duty-free shop; or

(c) new motor vehicles warehoused by approved motor assemblers and dealers;

the Commissioner may, in addition to the period of re-warehousing permitted in this subsection, allow for further period of re-warehousing as he or she may deem appropriate.

*(2) Where any goods required to be re-warehoused under subsection (1) are not so re-warehoused, **then they shall be sold by public auction after one month's notice of such sale has been given by the proper officer by***

***publication in such manner as the
Commissioner may deem fit:***

Provided that any such goods which are of a perishable nature may be sold by the proper officer without notice, either by public auction or private treaty, at any time after expiry of the initial warehousing period.

(3) Where any goods are sold under the provisions of this section, then the proceeds of such sale shall be applied in the order set out below in the discharge of-

(a) the duties;

(b) the expenses of the sale;

(c) any rent and charges due to the Customs or to the warehouse keeper;

(d) the port charges; and

(e) the freight and any other charges.”

(Emphasis ours).

While the appellant took refuge under this provision that the goods were abandoned, our understanding of the same is that the provision relates to sale by public auction of the goods which have not been re-warehoused and how the proceeds of the sale are distributed. The

provision does not at all deal with the abandonment of goods as claimed by the appellant.

Furthermore, as correctly stated by the Tribunal, the said provision contemplates a situation where the goods are not re-warehoused and are commercially viable. The situation is different in the case at hand because the goods in question were not commercially viable. It goes without saying that the appellant did not apply and get the Commissioner's permission to abandon the goods and the cited provisions of law do not suggest that there is abandonment of goods by operation of law or voluntarily by the owner. This ground of appeal fails.

The appellant's complaint in respect of the second ground of appeal relates to the Tribunal's decision to the effect that there was no abandonment of the goods and remission of duties and taxes by operation of law for goods overstayed in the bonded warehouse if they are not commercially viable. We are of the decided view that this complaint raises purely factual matters which this Court has no jurisdiction to entertain. This Court is mandated to decide tax revenue matters involving points of law only as clearly provided under section 25 (2) of the Tax Revenue Appeals Act [CAP 408 R.E. 2010] (the Act) thus:

*"Appeal 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."*

Going through the record, we are of the decided view that the appellant's complaint was sufficiently dealt with by the Tribunal and it being on factual matters, it ought to end there.

However, the above position of the law notwithstanding, we have observed the following in relation to this complaint. It is on record that, the goods were examined and found to have complied with all customs requirements and fit for human consumption before they were cleared to the bonded warehouse pending payment of duties and taxes. The goods expired because they overstayed in the bonded warehouse as the appellant failed to pay the taxes within the prescribed period. The record further shows that the appellant communicated with the manufacturer concerning the said goods who confirmed them to be fit for human consumption. Thus, if at all the appellant intended to abandon them it was because he wanted to preserve the brand and not otherwise. In the circumstances, she ought to have followed the proper procedure to get

the Commissioner's permission as stated above. Since there was no such permission, it cannot be said with certainty that the goods were abandoned as correctly, in our view, decided by the Tribunal. This ground too fails.

Before we conclude, we would like to say something about the issue raised by the appellant "*whether there is no law which empowers the Commissioner to charge duties and taxes on goods which are still in the customs control*". We have considered this matter and we are in agreement with the respondent that this is a new issue which was never raised and dealt with by the Board and the Tribunal. The issue which was raised before the Board was "*whether the appellant is liable to pay customs duties and taxes in respect of the abandoned goods.*" This issue is quite different from the one the appellant raised in the course of his submissions, that there is no law which empowers the Commissioner to charge custom duties and taxes on goods which are still under customs control. In the circumstances of this case, since the appellant has raised a new issue which was not determined by the Board and the Tribunal, the Court has no mandate to entertain it in terms of section 25 (1) of the Act. This provision empowers the Court to hear and determine

matters which were first heard and determined by the Tribunal. In this regard, the said issue is accordingly disregarded.

In conclusion, it is our general finding that the appellant is liable to pay custom duties and taxes as the goods were not abandoned which renders the third ground of appeal unmerited.

Consequently, we find the appeal devoid of merit and it is hereby dismissed with costs.

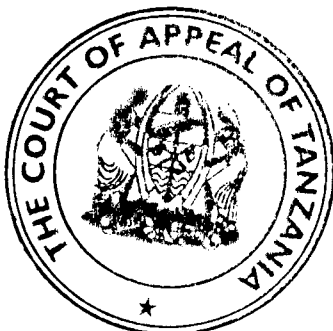
DATED at **DAR ES SALAAM** this 30th day of March, 2021.

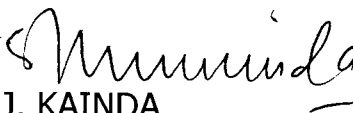
R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 1st day of April, 2021 in the presence of Mr. Brayson Shayo learned counsel for the appellant and Ms. Jane William Mgaya, learned State Attorney for the Respondent is hereby certified as a true copy of the original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL