IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM
(CORAM: MUGASHA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 356 OF 2021

MWENGA HYDRO LIMITED.....APPELLANT

VERSUS

COMMISSIONER GENERAL
TANZANIA REVENUE AUTHORITY.....RESPONDENT

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

(Hon. Ngimilanga - Vice Chairman)

dated the 2nd day of December, 2020
in
Tax Appeal No. 64 of 2019
.....

RULING OF THE COURT

23rd & 29th September, 2022

MUGASHA, J.A.:

In this appeal, the appellant, Mwenga Hydro Limited is challenging the decision of the Tax Revenue Appeals Tribunal. A brief background underlying the present appeal is that, the appellant was involved in the construction of Mwenga 3 Hydro Electricity Plant project together with its partner Mufindi Tea Company (MTC) who had entered into a contract of energy facility grant with the European Community for the implementation. This entailed, construction of the

power plant and ensuring that the institutional settings are in place for the operation and maintenance of the power plant. According to item 2 of the Third Schedule to the Value Added Tax, supplies or importation of goods and services under donor funded schemes are eligible for special reliefs. Since the project in question was donor funded, on 13/1/2011, the Ministry of Finance requested the respondent to exempt the appellant to pay import duty for the goods and services procured under the project in terms of article 31 of Annex IV of the ACP – EU Partnership Agreement of Cotonou.

The response of the respondent was to the effect that, the project was to be exempted import duty in terms of the East African Community Customs Management Act, 2004 paragraph 10 in the 5th Schedule and the 3rd Schedule to the Value Added Tax Act, 1997 (the VAT Act). That apart, on 24/11/2011 it was also brought to the attention of the appellant that as the project was co-financed by European Union and Mufindi Tea Company, entitlement to relief was on the fund from European Union.

Subsequently, in 2014, the respondent conducted a tax audit on the appellant covering the year of income ending 2012 and claimed to have gathered that VAT on imported services from the month of October 2012, was not accounted for. The appellant fronted explanation to the effect that, the company was exempted VAT on procured goods and services for the construction of the hydroelectricity facility and distribution of network. After some engagement with the respondent which involved exchange of several correspondences, the respondent maintained her stance and issued a VAT assessment on imported services for the month of October, 2012 at the tune of TZS. 218,700,000.00 plus TZS. 75,162.899.14 being interest, the reason advanced by the respondent was that the VAT was unaccounted contrary to the dictates of the Value Added Tax (Imported Services) Regulations, 2004.

The appellant unsuccessfully objected the assessment which was turned down by the respondent who confirmed the initial assessment and demanded the appellant to comply and pay the assessed tax. Undaunted, the appellant unsuccessfully appealed to the Tax Revenue Appeals Board (the Board) which dismissed the appeal. Further

aggrieved the appellant preferred an appeal to the Tax Revenue Appeals Tribunal (the Tribunal) fronting five grounds of complaint reproduced hereunder for ease of reference:

1. That the Board erred in law and in fact in holding that the appellant violated the requirements of section 26 of the Value Added Tax Act, 1997 and Regulation 6 of the Value Added Tax (Imported Services) Regulations, 2001.

2. The Board erred in fact and law in holding that the Appellant's correction of error on non- accounting of imported services under Regulation 4(2) of the Value Added Tax (Correction of Errors) Regulations, 2000 was an afterthought.

3. The Board erred in fact and law in holding that the respondent was justified in assessing and demanding the tax due of VAT on imported services in terms of the provisions of section 43(1) of the Value Added Tax 1997.

4. The Board erred in fact and law by failing to hold that the Appellant being entitled to VAT special relief under section

11 and the 3rd Schedule to the Value Added Tax Act, 1997 is not liable to VAT under section 43 (1) of the Value Added Tax Act, 1997.

5. The Board erred in fact and law by failing to make a determination on the reduction of value of services.

The Tribunal purported to have determined only four grounds of appeal and it directed that the case file be remitted to the Board for it to determine the 5th ground of appeal. It is against the said backdrop; the appellant has preferred an appeal against the decision of the Tribunal raising three grounds of complaint. However, on account of what will be apparent in due course we shall not reproduce the grounds of appeal.

At the hearing, the appellant was represented by Wilson Mukebezi, learned counsel whereas the respondent had the services of Messrs. Harold Gugami, Hospis Maswanyia, learned Senior State Attorneys and Mr. Athumani Mruma, learned State Attorney.

Before proceeding to hear the appeal, we wanted to satisfy ourselves on the propriety of the Tribunal's decision which determined

four grounds of appeal and ordered the remaining fifth ground to be remitted to the trial Board for determination. Upon taking floor, Mr. Wilson Mukebezi faulted the course taken by the Tribunal. He submitted that, before proceeding to make any determination on the appeal, the Tribunal could have remitted the case file to the trial Board for it to make a decision on the undetermined matter.

In the alternative, the learned counsel pointed out that, in the absence of prescribed procedure of dealing with the like matter in the Tax Revenue Appeals Act and Rules made thereunder, he argued that, in terms of section 76 (1) and (2) of the Civil Procedure Act [CAP 33 R.E 2019] (the CPC) the Tribunal sitting as first appellate court ought to have stepped into the shoes of the Board to do what ought to have been done by the trial Board. In this regard, he implored on the Court to return the case file to the Tribunal and direct it to determine the remaining fifth ground of appeal. The learned counsel viewed this as the best option to remedy the matter under scrutiny.

On the other hand, initially, the learned counsel for the respondent were not comfortable with the course advanced by Mr.

Mukebezi. Apart from conceding that it was not proper for the Tribunal to remit the matter to the Board, they were of the view that, it is still open for the Court to dispose of the appeal before it. Upon being probed by the Court on the statutory limitation on the Court which is vested with jurisdiction to entertain appeals on questions of law and not fact and given that the respondent did not file any cross appeal, upon reflection they urged the Court to return the case file to the Tribunal for it to determine the remaining ground on complaint.

After a careful consideration of the submission of counsel for either side and the record before us, at the outset, it is crucial to point out that, the matter at hand is a test case to the principle on the role of appellate court in determining a first appeal before it. In terms of the provisions of section 16 of the Tax Revenue Appeals Act [CAP 408 R.E.2019] (the TRAA) the Tribunal is clothed with appellate jurisdiction to determine appeals from the Board which is vested with sole original jurisdiction in all proceedings of civil nature in respect of disputes arising from revenue laws administered by the Tanzania Revenue Authority. See: **section 7 of the TRAA.**

As gathered in the decision of the Tribunal, although the appellant fronted five grounds of appeal, the Tribunal purported to have disposed part of appeal and directed the remaining part to be determined by the Board. The question to be answered is whether this was a proper course considering that the Tribunal sat as a first appellate court on the matter. In the case of **PETER MWAFRIKA VS. REPUBLIC**, Criminal Appeal No. 413 of 2013 (unreported), the Court sitting as first appellate Court having discussed the role of the appellate court, relied on the case of **BERMAX VS. AUSTIN MOTORS COMPANY LTD** [1955] ALL ER 326 the Court held:

> *"An appellate court, on appeal from a case tried before a judge alone, should not differ from a finding of the trial judge on a question of fact. But distinction in this respect must be drawn between the perception of facts and evaluation of facts.* ***Where there is no question of credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in a good position to***

evaluate the evidence as the trial judge..."

[Emphasis supplied]

See also: **PATRICK JEREMIAH VS. REPUBLIC,** Criminal Appeal No. 34 of 2006 (unreported).

In the case at hand, the issue on the reduction of value of imported services was not a question of credibility of witnesses, but rather a question on the proper inference to be drawn from specific facts. This being a factual issue could still have been determined by the Tribunal to finality. However, on account of what transpired before the Tribunal, its decision is surrounded by uncertainty. We say so because initially, at page 365 having addressed the 5th ground of appeal as a factual issue, what had transpired before the Board and case law, at page 365 the Tribunal stated as follows:

"Guided by the above authority, we have the view that ***the trial Board did no wrong for not determining issue/prayer which was posed by the appellant at the start of the hearing.*** *If the appellant found that the issue was very important to be determined by the*

Board, [it] was supposed to ask for amendment of additional issues so that the said issue couid be included in the framed issues for determination."

[Emphasis supplied]

Subsequently, the Tribunal concluded what is reflected at page 368 of the record of appeal as follows:

"Coming back to our matter at hand, we have seen that the Appellant still [is] insisting that the issue of reduction should be determined. As far as the same was not determined by the trial Board, we find it necessary for the said controversy to be determined by the Trial Board.

To this end by virtue of the evidence and arguments adduced in the preceding paragraphs we are of the view that [the]Appellant failed to substantiate his case in the first, second, third and fourth grounds of Appeal. ***As to the fifth ground, we are of the view that the Board be given opportunity for the determination of the taxable value in respect of the imported***

services. *We further order that the case be remitted to the trial Board for hearing on the controversy (sic) issue. Each party to bear his or her own costs."*

[Emphasis supplied]

In the light of the reproduced portion of the decision of the Tribunal it cannot be safely vouched if the appeal before it was determined to finality. Apparently, as correctly submitted by the learned counsel, the TRAA and the Rules made thereunder are silent on the course to be taken which brings to scene the CPC a statute of general application on the procedure and related matters in civil proceedings. This takes us to the provisions of section 76 (1) (a) and (2) which stipulates as follows:

(1) Subject to such conditions and iimitations as may be prescribed, the High Court in the exercise of its appellate jurisdiction shall have power–

(a) to determine a case finally;

(b) N/A;

(c) N/A;

(d) N/A;

(2) Subject to any conditions and limitations prescribed under subsection (1), the High Court shall have the same powers and shall perform, as nearly as may be, the same duties as are conferred and imposed by this Code on courts of original jurisdiction in respect of suits instituted therein.

[Emphasis supplied]

In the light of the bolded expression, it was incumbent for the Tribunal sitting as an appellate court ought to have determined the appeal to finality and with certainty. Thus, in the wake of the uncertainty surrounding the decision of the Tribunal, it cannot be safely vouched that the appeal was determined to finality. This is with respect, not compatible with sound policy in the timely dispensing justice which requires that, litigation must come to an end.

In view of what we have endeavored to discuss, on the way forward, we invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] to cure the anomaly. Given the nature of the dispute, it is in the interest of justice that, the

Tribunal must determine the appeal in its entirety and not in piece meals. We thus quash and set aside the judgment of the Tribunal and remit the case file to the Tribunal for it to compose a proper judgment. Meanwhile, the purported appeal is hereby struck out with no order as to costs. It is so ordered.

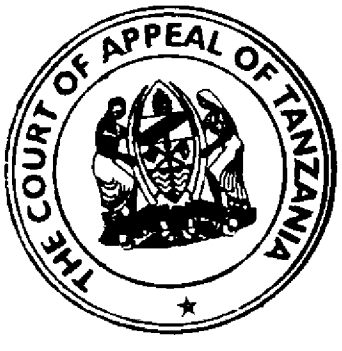
DATED at **DAR-ES-SALAAM** this 27th day of September, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 29th day of September, 2022 in the presence of Mr. Harold Gugami, learned Senior State Attorney for the Respondent, also holding brief of Mr. Wilson Mukebezi, learned counsel for the Appellant, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL