IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KITUSI, J.A And MDEMU, J.A.)

CIVIL APPEAL NO. 47 OF 2022

TOTAL TANZANIA LIMITED..... APPELLANT

VERSUS

COMMISSIONER GENERAL (TRA).....RESPONDENT

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

(Haji, Vice Chairman, Qamdiye & Gonzi, Members)

dated the 15th day of October, 2021
in
Tax Appeal No. 77 of 2020
.....

JUDGMENT OF THE COURT

16th & 30th August, 2023

MDEMU, J.A.:

This appeal intends to challenge the decision of the Tax Revenue Appeals Tribunal (TRAT) which affirmed the decision of the Tax Revenue Appeals Board (TRAB) upholding the decision of the respondent herein which required the Appellant to pay Railway Development Levy (RDL) following importation of JET A1 aviation fuel for home consumption.

Facts giving rise to this appeal as per the record of appeal are that; the appellant, Total Tanzania Limited imported aviation fuel JET A1 and

declared it to be for home consumption. The said aviation fuel was consumed by international airlines fuelled in Tanzania. Following that declaration, on 15th November, 2015 the respondent issued a demand note requiring the appellant to pay RDL amounting to TZS 436, 459, 459.00. The demand was in terms of the provisions of section 20A of the Railways Act, Cap.170. The appellant appealed to the TRAB resisting such tax liability by the respondent's final decision dated 3rd April, 2017. The main focus of the appeal was that, the said aviation fuel was not meant for free circulation locally thus could not attract RDL. The said appeal was however dismissed, so was a further appeal to the TRAT. In both TRAT and TRAB, the main thrust hinges on one major concern namely; whether the declared aviation fuel attracts RDL. Aggrieved further by the latter's judgment and decree, the appellant preferred the instant appeal on the following grounds:

1. *The Tax Revenue Appeals Tribunal erred in law in holding that the respondent was correct in law to impose Railway Development Levy on the appellant for the period 2015 to 2017.*

2. *The Tax Revenue Appeals Tribunal erred in law in holding that the fuel imported by the appellant was consumed in Tanzania in terms of the Law.*
3. *The Tax Revenue Appeals Tribunal erred in law by failing to hold that in terms of Chapter 1 of Annex B of the World Customs Organization Protocol of 2008, the fuel imported by the appellant was not for home consumption.*

On 16th August, 2023 when this appeal was called on for hearing, the appellant company was represented by Mr. Alan Kileo, learned counsel whereas the respondent had the services of Mr. Hospias Maswanyia, learned Senior State Attorney. At the inception of his submission in support of the appeal, Mr. Kileo adopted his written submission filed earlier on and thereafter submitted all the grounds of appeal in two-fold. **One**, that JET A1 imported by the appellant and sold to international airlines is non RDL taxable and **two**, that the act of the respondent to impose RDL under the circumstances was in total ignorance and in violation of fundamental principles of taxation.

The appellant's counsel amplified further that, the appellant's wisdom guided him to declare JET A1 for home consumption because other available options such as on transit, for export or for temporary use were not feasible under the circumstances. He thus faulted both the TRAT and TRAB to base tax liability on that declaration because, to him, that will not change the fact that the fuel was not used in Tanzania. The learned counsel took that view on the understanding that, fuel filled in international aircrafts at the airport in Tanzania was consumed abroad and therefore the provisions of section 20A of the Railways Act and section 2(2) of the East African Community Customs Management Act, 2004 [R.E 2019] (the EACCMA) are inapplicable. The learned counsel thus implored us to borrow a leaf from the **International Convention on the Simplification and Harmonization of Customs Procedures (as Amended), Customs Co-operation Council (World Customs Organization), B-1210 Bruxelles (the Convention)** regarding the definition of goods declared for free circulation. Basing on that submission, the leaned counsel urged us to allow this appeal.

In resisting the appeal, along with the contents of the adopted written submission, the leaned Senior State Attorney submitted that, an important component initiating any tax regime is the declaration by the taxpayer which

in the instant appeal, the appellant declared JET AI for home consumption. It is following that declaration by the appellant, out of the available options such as on transit, for export or for temporary use, the respondent demanded RDL taxable under the provisions of section 20A of the Railways Act. On this observation, his understanding of fuel pumped into international aircrafts is one mode of consumption and therefore consumables other than for export purposes. His stance hinges on the fact that, if such fuel was meant for export, then it would not have been declared for home consumption and instead, the provisions of section 34 of the EACCMA on procedures for export of goods would follow suit.

The learned counsel concluded by submitting that, the appellant's move of borrowing a leaf from "the Convention" on the definition of the phrase **goods in free circulation** is unnecessary because, the definition provided for under the provisions of section 2(2) of the EACCMA suffices and is exhaustive on that aspect. He thus implored us to consider the declared JET A1 subject to RDL under section 20(A) of the Railways Act.

Having heard from the parties and upon our consideration of the entire record, we find to be uncontested that, the appellant imported JET A1 in

Tanzania; declared the consignment for home consumption and sold to international aircrafts of various destinations commencing their trips from Tanzania Mainland. It is following that declaration, as said, is when the respondent imposed RDL at the tune of TZS 436,459,459.00. As stated earlier, which also parties are at one, is that, RDL is levied under the provisions of section 20A of the Railways Act as of 1st July, 2015. Parties however parted their ways on one aspect which gave rise to the issue as to whether the declared JET A1 for home consumption is non-exempt or exempted from RDL. The TRAT, so was the TRAB, interpreted the provisions of section 20A of the Railways Act and Section 2(2) of the EACCMA thus subjected JET A1 to RDL. For clarity, we reproduce the relevant provisions as hereunder:

> *20A (1) There shall be charged a levy known as Railway Development Levy.*
>
> *(2) The levy referred to under subsection (1) shall be charged –*
>
> *a) At the rate of 1.5 percent at customs value on importation of goods; and*

b) On goods entered for home consumption in Mainland Tanzania in accordance with procedures appiicabie under the East African Community Customs Management Act"

At the outset, we are mindful to outrightly pronounce ourselves on the import of section 34 of the EACCMA regarding exportation of the consignment (JET A1) pointed out by both counsels. This is also so particularly as hinted in their submissions regarding options available at the door of the appellant during declaration of the consignment. They both alleged that, the appellant chose to declare JET A1 for home consumption out of the available options such as, for export etc. With this, they zeroed in in "goods for export" hence their import into application of section 34 (1) of the EACCMA. For clarity, we reproduce the said section as hereunder:

34 (1) Save as otherwise provided in the customs laws, the whole of the cargo of an aircraft, vehicle or vessel which is unloaded or to be unloaded shall be entered by the owner within twenty-one days after the commencement of discharge or in the case of

vehicles on arrival or such further period as may be allowed by the proper officer either for-

(a) Home consumption.

(b) Warehousing.

(c) Transshipment.

(d) Transit. or

(e) Export processing zones.

Our interpretation of the quoted section above is that, unless what is in the aircraft, vehicle or vessel is a cargo, it cannot be anything other than for home consumption making the quoted section inapplicable. We interpreted so as in the instant tax dispute, JET A1 fueled in international aircraft is not a cargo for it was not loaded or meant to be unloaded in those aircrafts. Having ruled out on the import of section 34 of the EACCMA, we now turn to the crux of the matter, that is whether the declared JET A1 does not attract RDL.

The appellant averment on this is that, the respondent wrongly subjected JET A1 to RDL basing on the declaration made that it is for home consumption. His stance hinges on two aspects: **one** that, the consignment

was declared for home consumption because that was the only feasible mechanism for the imported JET A1 and **two**, that the JET A1 imported and sold to international aircrafts was not consumed in Mainland Tanzania hence, it wasn't meant for free circulation.

Beginning with the declaration of goods for home consumption, parties are at one, and we also observed so that, JET A1 was declared for home consumption. Section 20A of the Railways Act is clear that such goods are RDL taxable. The TRAB at page 547 of the record had this observation in the following words:

> *The general perception of this provision is that in order for goods to be charged RDL, one condition becomes apparent. That is the goods must be entered for home consumption. However, the term good* ***entered for home consumption*** *is not explicitly defined in the Railways Act, Cap.170. But the meaning of the said term is described under the East African Community Customs Management Act (EACCM) 2004 which was referred by section 20A of the Railways Act. Section 2 (2) of EACCM, 2004 provides that .....With this provision, it is*

cogent that any imported goods declared for use of Mainland Tanzania, shall be for home consumption and chargeable for RDL.

That being the position of the TRAT, our observation is that, it is a correct interpretation and we do not have sounding reasons to question otherwise. We are saying so because the appellant declared JET A1 for home consumption thus complying with the dictates of section 20A (2)(b) of the Railways Act. With respect, we do not find the appellant's counsel's explanation plausible as he intimated in his written submissions that he was forced to declare JET A1 for home consumption out of the available tax declarations mechanisms because the Tanzania Customs Integration System (TANCIS) was not configured to charge RDL. We found this wanting. The appellant made a choice out of available options, as such, he is estopped to decline. TANCIS is a system and RDL is chargeable by operation of the law, it is inconceivable to hold that the appellant was forced to declare JET A1 for home consumption while in his mind the intention was for something else. This is an afterthought. Since we ruled out that JET A1 was not cargo for export purposes, then we hold such a consignment to be for home consumption. The reason would be that the appellant did not submit what

was the consignment for if not for taxation purposes on what was declared. We hold so because the appellant simply alleged that the mode "for home consumption" was deployed for that was the only suitable way of declaring goods for tax purposes. We find this to be a narrow approach of the way facts are comprehended. This therefore resolves ground one of the appeal which we find unmerited.

Regarding the second component of the appeal that JET A1 imported and sold to international aircrafts was not consumed in Mainland Tanzania hence not for free circulation, again the approach taken by the appellant's counsel is narrow. As orally submitted by Mr. Masanyiwa and also as per the written submissions of the respondent, JET A1 was for free circulation and consumed locally. In our considered view, the fact that JET A1 was pumped to international aircrafts thus consumed in international airspace, meaning that it was consumed outside the Tanzanian airspace, in itself does not connote that such fuel was for export. If we go by the appellant's interpretation that fuel consumed by international aircrafts in Tanzania is not for home consumption so as to attract RDL, then, JET A1 would not be subjected to tax. We have this observation because; **one**, the appellant has not stated besides RDL which tax the consignment was subjected to. **Two**,

JET A1 will not be the subject of RDL or any tax in the international airspace the plane is flying or even at the international destination. **Three**, reasons for not choosing other available tax declaration options are not apparent on the record. **Four**, as international aircrafts commencing their journey in Tanzania Mailand normally fuel before commencement of the international trips, it is obvious that fuel pumped into them would be those declared for home consumption, no more no less.

For the foregoing, we are in all fours with Mr. Masanyiwa's contention that the appellant declared JET A1 for home consumption and that is what he meant, the reason why it was pumped in international aircrafts commencing their journey in Mainland Tanzania.

We are now turning to the import of "the Convention" regarding the definition of goods declared for free circulation. In his written submissions, the appellant implored us to consider the meaning of goods for home consumption within the dictates of "the Convention." In his view, goods entered for home consumption must be for free circulation in partner states. We understood him that, as the TRAB and TRAT deployed section 2(2) of EACCMA, then the section should not apply because international aircrafts

fuelled in Mailand Tanzania have their destinations outside member states to the East African Community. It was in that understanding he urged as to deem JET A1 to have not entered in free circulation in Tanzania and therefore not for home consumption in terms of "the Convention" definition of goods in free circulation. This proposition was resisted by the respondent. Let the section speak by itself as hereunder:

> *2(2) For purposes of this Act,*
>
> > *(b) goods shall be* ***deemed to be entered for home consumption when they have been declared for use in a partner state*** *other than temporary use, and the provisions of paragraph (a) have been fulfilled. [emphasis supplied]*

In our view, the respondent is right. It is conceived so because section 2 (2) of the EACCMA on goods deemed to be entered is expressly clear and the need to borrow a leaf from "the Convention" definition suggested by the appellant's counsel is uncalled for as there is no lacuna. The appellant imported JET A1; declared it for home consumption; is therefore estopped to say otherwise. It was consumed in Mailand Tanzania, a partner state to

EAC by fuelling in international aircrafts commencing their journey in Tanzania Mainland, as such, it was harmless for the respondent to subject that consignment to RDL under section 20A of the Railways Act. This therefore answers grounds two and three of the appeal. They are thus dismissed forthwith. In all therefore we find the appeal is devoid of merits and we accordingly dismiss it with costs.

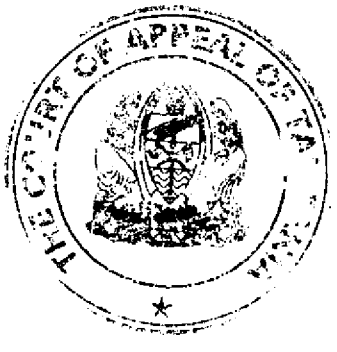
DATED at **DAR ES SALAAM** this 30th day of August, 2023

S. E. A. MUGASHA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 30th day of August, 2023 in the presence of Ms. Emma Lyamuya learned counsel for the Appellant and Mr. Marcely Kanoni learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL