

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUNUO, J.A. MSOFFE, J.A. and BWANA, J.A.)

CIVIL APPEAL NO. 89 OF 2009

BIDCO OIL AND SOAP LTD. APPELLANT

VERSUS

COMMISSIONER GENERAL

TANZANIA REVENUE AUTHORITY RESPONDENT

(Appeal from Judgment and Decree of Tax Revenue Appeals

Tribunal of Tanzania at Dar es Salaam)

(Shangwa J. Chairman)

Delivered on 19th June, 2006 in Tax Appeal No. 2 of 2006

JUDGMENT OF THE COURT

30th June, 2010 & 5 August, 2010

MUNUO, J.A.:

The appeal is against the decision of the tax Revenue Appeal tribunal – appeal No. 2 of 2006 before Shangwa, J. the dispute commenced when the respondent Commissioner General of the Tax Revenue Authority levied 10% suspended duty in the sum of Tshs.64,,628,226/= on imported crude palm oil consigned to the appellant, BIDCO Oil and Soap LTD in August, 2002. The appellant

resisted the taxed import duty on the ground that it was illegal in that it had not been listed under Government Notice No. 309 of 2002 which enforced Finance Bill, 2002.

The trial Tax Revenue Appeals Board in Customs and Excise Tax Appeal No. 6 of 2005, held that the suspended duty levied on the appellant was null and void for lack of a supporting Government Notice Order. Dissatisfied with the decision of the trial tribunal, the respondent Commissioner General lodged Tax Revenue Appeals, Tribunal No. 2 of 2006, before Shangwa, J. The respondent won the appeal. Hence **BIDCO** was held liable to pay Tsh.64,628,226/= suspended duty to the respondent tax authority. Not satisfied with the decision of the Tax Revenue Appeals Tribunal, **BIDCO** filed this appeal.

Mr. Matunda, learned advocate, represented BIDCCO. He filed 3 grounds of appeal, namely:-

1. That the Tax Revenue Appeals Tribunal erred in law in holding that the Finance Act, 2002 had retrospective effect

in respect of the suspended duty on the imported crude palm oil.

2. That Tax Revenue Appeals Tribunal erred in law in holding that the appellant was liable to pay Tsh. 64,628,226/= suspended duty to the respondent.
3. That the Tax Revenue Appeals Tribunal erred in law in holding that at the time of importing the crude palm oil, the appellant was liable to pay 10% suspended duty although the Finance Bill published on the 11th July, 2002 was not accompanied by the Provisional collection of Taxes and duties Order.

At the hearing Mr. Matunda contended that as long as crude palm oil was not listed as a taxable commodity under the 1st Finance Bill, 2002 and under Government Notice No. 309 of 2002, which the President assented on the 1st July, 2002, there was no legislation empowering the respondent to impose the suspended tax in dispute because crude palm oil was not listed for taxation under any

Government Notice Order. He further observed that the provisions of Article 138 (1) of the Constitution of the United Republic of Tanzania, 1977 Cap. 2 R. E. 2002, prohibit unlawful taxation. Article 138 (1) states in Kiswahii, and we quote:-

“138 (1) Hakuna kodi ya aina yoyote itakayotozwa isipokuwa kwa mujibu wa sheria iliyotungwa na Bunge au kwa mujibu wa utaratibu uliowekwa kisheria na uliotiwa nguvu ya kisheria na iliyotungwa na Bunge.”

It is the contention of counsel for the appellant that the levied Tsh.64,628,226/= suspended duty on the crude palm oil consigned on the 12th August, 2002 was not listed for taxation by any Finance Act or order so it is unlawful and the appellant should not be held liable to pay unlawful taxes. Asserting that the Constitution prohibits unlawful taxation, counsel for the appellant further observed that the 2nd Finance Bill, 2002 was a reprint of the 1st Finance Bill, 2002 so it too did not list the crude palm oil imported in August, 2002 for taxation. Thence, the 2nd Finance Bill which the President assented on the 2nd October, 2002 would not retrospectively authorize the

suspended duty on crude palm oil imported on 12th August, 2002. Counsel for appellant cited the case of **S.S Makorongo versus Severino Consiglio Civil Appeal No. 6 of 2003 (CA) unreported**) wherein the Court dealt with the issue of the retrospective effect of legislation, in that case, the amendment to section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 Cap. 141 R. E. 2002.

On the retrospective effect of legislation, in the case of Makorongo cited supra, the Court considered the provisions of section 10 (2) of the Interpretation of Laws and General Clauses Act, 1872 Cap. 1 R. E. which states:-

10 (2) Subject to the provisions of subsection (1) every Act shall come into operation on the date of its publication in the Gazette or, if it is provided either in such Act any other written law that it shall come into operation or some other date, on that date.

On the retrospective effect of legislation, the Court held that –

The general rule of law is that unless there is a clear indication either from the subject matter or from the wording of the Act of Parliament, that Act should not be given a retrospective construction.

The Court cited, among others, the case of **Yew Bon Tew versus Kndaraan Bas Mar** (1983) I AC 553 in which the Privy Council held:

“... Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used.....”

The East Africa Court of Appeal considered the issue of the retrospective effect of legislation in the case of *Municipality of Mombasa versus Nyali Ltd* (1963) E. A. 371. Newbod, J.A. held at page 374:

“Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it would not be construed to have retrospective operation unless a clear intention to the effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention.....”

We are satisfied that the 2nd Finance Bill, 2002 of 11th July, 2002 has no retrospective clause for taxing the crude palm oil imported on the 12th August, 2002.

Mr. Juma Salim Beleko, learned counsel for the Commissioner General of the Tanzania Revenue Authority, hereinafter referred to as the Commissioner General, supported the decision of the Tax Revenue Appeals Tribunal and urged us to do the same. He contended that the tax in dispute was levied under the provisions of section 2 (1) of the Collection of Taxes and Duties Act, 1963 so the appellant is liable to pay the due suspended duty on crude palm oil imported on the 12th August, 2002. He conceded that the 1st Finance Bill, 2002 was gazetted by Government Notice No. 309 of 2002 and that by design or default, crude palm oil was not itemized for suspended duty payment under the said 1st Finance Bill, 2002 and, or G. N. 309 of 2002. In view of the fact that the 2nd Finance Bill, 2002 came into effect on 2nd October, 2002 the suspended duty on the crude palm oil imported on the 12th August, 2002 had to be taxed under G.N 309 of 2002, counsel for the respondent contended. Hence the appeal lacks merit and it should be dismissed with costs, he urged.

The issue before us is whether the appellant is liable to pay the suspended duty imposed on the crude palm oil imported on the 12th August, 2002.

There is no dispute that the said imported crude palm oil was neither listed for suspended duty payment under the 1st Finance Bill, 2002 nor under the subsequent enforcing order, namely, Government Notice No. 309 of 2002. It is furthermore, not in dispute, that the 2nd Finance Bill, 2002 a reprint of the 1st Finance Bill, 2002, was assented by the President on the 2nd October, 2002. No order or amendment was effected under the 2nd Finance Bill to impose suspended duty on the crude palm oil the appellant imported on the 12th August, 2002. In that regard, we are of the settled view that the crude palm oil imported on the 12th August, 2002 was by design, default or inadvertence, not listed for taxation under any specific legislation within the context of the preamble to the Provisional Collection of Taxes and Duties Act no. 10 of 1963, Cap 515. The said preamble to the material Act, states, *Inter alia*.

An Act to give statutory effect for limited periods to orders of the President imposing any new tax or duty, or rate of tax or duty, creating any new allowance, or varying or removing any existing tax or duty, or any such allowance, and to repeal the Customer and Excise Duties (Provisional Collection) Ordinance.

Hence section 2 (1) of the Provisional Collection of Taxes and Duties Act, 1963 gives the President power to impose new taxes and duties by statutory legislation. This power is firmly entrenched under the provisions of Article 138 (1) of the Constitution of the United Republic of Tanzania, Cap 2 R. E. 2002 which we quoted (supra.)

The President's power to impose taxes is provided for under section 2 (1) of the Provisional collection of Taxes and duties Act, 1963 which states verbatim:-

2 (1) If the President at any time approves of the introduction into the National assembly of a Bill

whereby, if such Bill be passed into law, any tax or duty, or rate of tax or duty, or any allowance in respect of such tax or duty, would be imposed or created, or whereby any tax, duty, rate or allowance would be varied or removed, he may, subject to the provisions of this Act and notwithstanding the provisions of any other written law, make an order that there shall be charged, levied and collected the tax or duty which would become payable if such Bill were passed into law in lieu of the tax or duty (if any) which would otherwise be payable or, as the case may be, that there shall cease to be charged, levied and collected the tax or duty which would cease to be payable if such Bill were passed into law.

(2) References in subsection (1) to the imposition or creation of any tax, duty, rate or allowance shall be deemed to include a reference to the reimposition or renewal of such tax, duty, rate or allowance.

We have already noted that imported crude palm oil was not listed for suspended duty payment under the 1st Finance Bill, 2002 and the enforcing Order under Government Notice No. 309 of 2002. Had imported crude palm oil been listed under the two legislations the Tsh.64,628,226/= suspended duty would have been lawfully supported by legislation as stipulated under the provisions of section 2 (1) of the Provisional Collection of Taxes and duties Act, 1963, Cap. 515.

If the respondent inadvertently omitted to list the imported crude palm oil for taxation, the omission could have been remedied under the provisions of the same section 2 (1) of the provisions of the Provisional Collection of Taxes and duties Act, 1963 because it gives the President discretion to-

...make an order that there shall be **charged, levied and collected the Tax or duty which would become payable if such Bill were passed into law in lieu of the tax or duty (if any) which would otherwise be payable**, or as the case may be, that there shall cease to

be charged, levied and collected any tax or duty which would cease to be payable if such Bill were passed were passed into law. (emphasis added).

We are of the view that there being no a specific legislation or order as required under the provisions of sections 1 (2) (2) of the Provisional Collection of Taxes and duties Act, 1963, the respondent had no mandate to impose suspended duty on the crude palm oil imported on the 12th August, 2002. No attempt was made by the respondent to rectify the omission by legislation to support the suspended duty in dispute. Thence, since there is no legislation to support the suspended duty on crude palm oil imported on the 12th August, 2002, the said suspended duty is not sustainable in law.

In view of the above, the appeal has merit. We accordingly quash and set aside the decision of the Tax Revenue Appeals Tribunal. We hereby restore the decision of the Tax Revenue Appeals Board principally because there is no law to support the suspended duty of Tsh.64,628,226/= imposed on the crude palm oil

imported on the 12th August, 2002. In the result, we allow the appeal with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 6th day of July, 2010.

E. N. MUNUO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

J. S. Mgetta
DEPUTY REGISTRAR