IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KENTE, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 372 OF 2020

STATOIL TANZANIA AS
(CURRENTLY KNOWN AS EQUINOR TANZANIA AS).....APPELLANT

VERSUS

COMMISSIONER GENERAL,
TANZANIA REVENUE AUTHORITY (TRA).....RESPONDENT

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

(Kamuzora, Vice Chairperson)

dated the 21st day of April, 2021
in
Tax Appeal No. 27 OF 2020

.....

JUDGMENT OF THE COURT

26th September & 24th October, 2022

KIHWELO, J.A.:

This is an appeal by Statoil Tanzania AS (currently known as Equinor Tanzania AS), the appellant, against the judgment and decree of the Tax Revenue Appeals Tribunal (the Tribunal) dated the 21st April, 2021 in Tax Appeal No. 27 of 2020 which quashed and reversed the decision of the Tax Revenue Appeals Board (the Board) that found the Commissioner General, the respondent was not justified in imposing stamp duty on the Farm-Out Agreement between the appellant and ExxonMobil which was executed outside Mainland Tanzania. Aggrieved

by the impugned decision the appellant has come before this Court by way of appeal.

We find it crucial, at the outset, to preface the judgment with a brief historical background which appropriately describes what precipitated this appeal. The appellant is a limited liability company incorporated under the laws of Tanzania and its principal business is exploration of oil and gas in Tanzania since 2007. One of the areas where the appellant was operating was Block 2, situated within Tanzania's Exclusive Economic Zone.

The epicenter of this appeal is the demand notice for stamp duty issued by the respondent to the appellant, following a comprehensive tax audit exercise which the respondent conducted on 19th August, 2013 into the tax affairs of the appellant, covering stamp duty, withholding tax, Value Added Tax (VAT) and Pay as You Earn for the year of income 2011 and came to the conclusions that, there was a tax liability to the tune of TZS. 170, 414, 448.00 arising from the Farm-Out transaction on Block 2 between the appellant and ExxonMobil in which the appellant assigned its petroleum rights under the Production Sharing Agreement (PSA) to ExxonMobil Exploration and Production Tanzania Limited (ExxonMobil). Apparently, on 18th April, 2007, the appellant had signed a PSA with the Government of the United Republic of Tanzania and Tanzania Petroleum

Development Corporation (TPDC) in respect of Block 2 offshore Tanzania Mainland. The appellant claimed that, according to Article 27 (e) of the PSA, the appellant is excepted from any liability connected with assignment and operations of the sites.

The appellant, unamused with the demand notice, lodged an objection before the respondent contesting it. However, the objection was not successful. Meanwhile, during the objection process, the respondent, orally informed the appellant that, the disputed amount had already been deducted from the appellant's VAT refunds which were due.

Aggrieved by the respondent's decision, the appellant knocked the door of the Board challenging it. Upon full determination, the Board in its decision found in favour of the appellant as hinted before, something which triggered the respondent to lodge the appeal before the Tribunal seeking to reverse the decision of the Board. Upon hearing the parties, the Tribunal allowed the appeal in its entirety and quashed the decision of the Tribunal something which precipitated the instant appeal before the Court.

The appellant presently seeks to impugn the decision of the Tribunal upon a Memorandum of Appeal which goes thus;

1. *That the Honourable Tribunal erred in law by holding that the appellant failed to discharge his burden of*

proof that he was exempted from payment of stamp duty as required by the law.

2. *That the Honourable Tribunal erred in law by holding that, under Article 27 (e) of the Production Sharing Agreement (PSA), the Government of Tanzania was not duty bound to take all reasonable steps to give legal effect of the agreed stamp duty exemption.*

3. *That the Honourable Tribunal erred in law by holding that the Farm-Out Agreement between the appellant and ExxonMobil executed outside Mainland Tanzania is chargeable to stamp duty immediately upon execution.*

4. *That the Honourable Tribunal erred in law by holding that the respondent's issuance of Notice of Confirmation of Assessment without issuing the objection determination letter as required by the law did not prejudice the appellant.*

When, eventually, the matter was placed before us for hearing on 26th September, 2022 the appellant had the services of Dr. Fayaz Bhojan who teamed up with Dr. Abel Mwiburi and Ms. Anitha Kimario both learned counsel whereas Mr. Amandus Ndayeza who was assisted by Mr. Yohana Ndila and Nyamtungila Mgune, both learned State Attorneys stood for the respondent. Both the learned counsel for the appellant and the respondent lodged written submissions in compliance with rule 106

(1) and sub-rule (8) of the Tanzania Court of Appeal Rules, 2009, either in support or in opposition to the appeal which they, respectively, fully adopted during the hearing. In the upshot, Dr. Mwiburi invited us to allow the appeal with costs, whereas Mr. Ndayeza urged us to dismiss the appeal with costs.

Dr. Mwiburi prefaced his submission by praying and was granted leave to argue ground one, two and three conjointly as they relate to each other while ground four was argued separately. In arguing the first three grounds, the learned counsel contended that, the Tribunal erred in law in holding that the respondent was justified in imposing stamp duty on the Farm-Out Agreement between the appellant and ExxonMobil executed outside Mainland Tanzania.

The appellant's counsel submitted further that, the appellant entered into a tripartite PSA with the Government of the United Republic of Tanzania and Tanzania Petroleum Development Corporation dated 18th April, 2007 for Block 2 offshore and according to the appellant's counsel, the terms of the PSA constitute a commitment which is binding on the respondent. He cited article 27 (e) of the PSA which exempted the appellant from any tax liability connected to the assignment and operations of the sites. According to the appellant's counsel, it was on the basis of this explicit stamp duty exemption under article 27 (e) which

has never been varied by the Government, that the appellant relied upon in respect of the assignment of part of interest in Block 2 to ExxonMobil. The learned counsel contended that, any attempt to levy the stamp duty on the appellant amounts to breach of the PSA and requested the Court not to turn a blind eye to it.

In further submission, the learned counsel for the appellant argued that section 143 of the Income Tax Act, Cap 332 R.E. 2019 (the ITA) requires persons with binding agreements with the Government to apply to the Minister responsible for Finance for an inclusion of the said agreements in the Register of Tax Agreements and that the appellant attempted to register the PSA with the Minister responsible for Finance as required by section 143 of the ITA and that the appellant had already availed a copy of the PSA to the Minister hence it was wrong for the Tribunal to conclude that the appellant failed to discharge her burden of proof that the PSA was executed, he argued. It was the learned counsel's view that, the absence of the Government Notice neither nullifies the PSA nor makes the provisions on exemption from stamp duty, a nullity and therefore, the appellant discharged the burden of proof under section 18 (2) (b) of the Tax Revenue Appeals Act, Cap. 408 R.E. 2019 (TRAA).

Advancing further his support for the appeal, the learned counsel contended that, stamp duty is charged under the Stamp Duty Act, Cap

189 R.E. 20019 (the Act) and more specifically, he referred to section 5 which gives a rundown of instruments specified in the Schedule to the Act and which are chargeable with stamp duty and submitted that, if none of the conditions stipulated under section 5 (1) (a) and (b) exists, then stamp duty does not arise. In further illustration, the learned counsel submitted that, stamp duty is levied on instruments and not transactions and therefore, according to him since the Farm-Out Agreement between the appellant and ExxonMobil was executed outside Mainland Tanzania, section 26 of the Act, requires that it has to be stamped within thirty (30) days of its arrival in Mainland Tanzania and since the Farm-Out Agreement has not arrived in Mainland Tanzania, then section 26 of the Act does not have effect until such time that the Farm-Out Agreement arrives in Mainland Tanzania, Dr. Mwiburi, argued. Stressing, he contended that tax is payable only where there is a law to that effect and that, it is payable when it is due and not otherwise. He paid homage to the case of **Bidco Oil and Soap Ltd v. Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 89 of 2009 (unreported) in order to facilitate an appreciation of his proposition put forward and rounded off with the argument that the intention of the legislature under section 26 of the Act was to ensure that documents are physically present in Tanzania. In this regard, the learned counsel argued

that, tax statutes have to be strictly interpreted while citing the foreign decision in **Cape Brandy Syndicate v. IRC** [1921] 1 KB 64.

Dr. Mwiburi, insistently, prayed that the Court should hold that the Farm-Out Agreement between the appellant and ExxonMobil executed outside Mainland Tanzania was not chargeable to stamp duty immediately upon execution.

Arguing in the alternative, the learned counsel submitted that, even if we assume that the alleged tax was payable in the instant matter before us, which is disputed by the appellant, according to section 41(d) of the Act, ExxonMobil a grantee in this case was the one liable to pay tax and not the appellant since there is no evidence on record that the appellant agreed to pay the duty instead of the grantee, ExxonMobil. The learned counsel implored us to order the respondent refund the appellant the amount of TZS. 170,414,448.00 which according to him, was wrongly collected through setting off from the appellant's VAT refunds.

The learned counsel for the appellant, finally, argued the fourth ground of appeal whose complaint was based on the fact that, the respondent issued notice of confirmation of assessment without first issuing the objection determination letter as required by the law something which the appellant's counsel argued that it prejudiced the appellant. Arguing further, the learned counsel contended that,

according to the TRAA which was applicable by then, it is a requirement that the respondent must determine or refuse to determine the objection first and proceed to issue a letter of determination before issuing a notice of confirmation of assessment and cited the repealed section 13 (3) of the TRAA which was applicable by then, now section 52 (3) (a) and (b) of the Tax Administration Act, Cap. 438 R.E. 2019 (TAA). The learned counsel, faulted the Tribunal for not finding that the appellant was prejudiced by the respondent's conduct of issuing notice of confirmation of assessment without first issuing the objection determination in compliance with the law.

Upon our prompting, the appellant contended that, failure to receive the letter of determination deprived the appellant's right to know the detailed reasons for refusal and therefore prepare reasoned grounds of appeal to the Board, and that, failure to receive the said letter of determination prejudiced the appellant who was not properly informed on the respondent's reasons for refusal to amend the assessment. In the circumstances, the learned counsel beseeched us to nullify the respondent's notice of confirmation of assessment which according to him, was issued contrary to prescribed procedures under the law. He finally, urged that the appeal be allowed.

In response, Mr. Ndayeza, learned State Attorney strongly disagreed with the counsel for the appellant and argued in response to the appeal in a pattern adopted by the appellant. Essentially, he opposed the appeal by contending that, the appellant did not manage to discharge the burden of proof that it was exempted from paying stamp duty on the Farm-Out Agreement, because at all material times, the appellant did not produce a Government Notice issued by the Minister as required by section 16 (1) of the Act. He went on to submit that, from the clear wording of section 16 (1) above, stamp duty exemption is not automatic but rather, it is granted by an instrument issued by the Minister under section 16 (1) referred to above.

In further opposing the appeal, the learned State Attorney, argued that, the entire claim for exemption was solely based upon the PSA between the appellant and the Government as well as the Farm-Out Agreement executed outside Mainland Tanzania. However, the appellant failed also to produce the said PSA to support its case. Referring to section 18 (2) of the TRAA, the learned State Attorney contended that, the appellant failed to prove its case and therefore, the Tribunal was not erroneous in reversing the decision of the Board.

Arguing further in opposing the appeal the learned State Attorney submitted that, the decision to charge stamp duty on the appellant's

Farm-Out Agreement with ExxonMobil is supported by the provision of section 5 (1) (b) of the Act, which makes it mandatory for every instrument executed outside Mainland Tanzania to be charged stamp duty provided that the instrument relates to a property situated in Mainland Tanzania. Illustrating further, the learned State Attorney, contended that, reading between lines, the combined words of section 5 (1) (b) and section 16 of the Act, the Tribunal was perfectly correct in holding that there was no proof of exemption so granted by the Minister.

Attacking article 27 (e) of the PSA which was repeatedly cited by Dr. Mwiburi, the learned State Attorney argued that normally tax is imposed by the law and equally, tax exemption is granted by the law which imposed tax in the first place. He argued further that, a PSA itself even if it was admitted in evidence cannot warrant tax exemption. He referred us to the case of **Cape Brabdy Syndicate v. Inland Revenue Commissioner** (1921) 2 KB 403 to support his proposition.

In reply to the fourth ground of appeal, the learned State Attorney submitted that, the complaint by the appellant was a mere afterthought since the impugned decision was determined mainly based on substantive issues having the appellant conceded that the notice of confirmation is as good as final determination. He referred us to page 233 of the record of appeal to buttress his point. Elaborating further, the

learned State Attorney argued that, the respondent's decision to confirm the assessment was justified in law and the circumstances of the case as there was no valid objection before the respondent because essential documents for verification on whether the appellant was entitled to exemption or not were not submitted. He further argued that, the appellant was not prejudiced because upon receipt of the notice of confirmation of assessment was able to lodge the appeal before the Board. He rounded off by submitting that the Tribunal was correct in law to hold that by issuing final assessment by necessary implications the respondent disagreed with the objection and urged further that this appeal be dismissed.

In a brief rejoinder, Dr. Bhojan reiterated what was earlier submitted by Dr. Mwiburi, that the respondent did not follow the laid down procedures in tax dispute resolution which are clearly spelt out under the law and which requires that there has to be a proposal to settle first, followed by determination of the objection and finally notice of confirmation of payment. He finally submitted that, the burden of proof was not fair on the part of the appellant, urging further the appeal to be allowed.

After a careful consideration of the entire record and the rival submissions by the parties there remains only one contentious aspect

that needs to be resolved and that is whether or not the Tribunal erroneously decided the appeal before it and therefore came to the wrong conclusion warranting this Court to interfere.

Starting with the first limb of the three grounds of grievance, which were ably argued by the learned trained minds conjointly, we think in an attempt to answer them, we should start by reflection of the provision of section 5 (1) (b) of the Act, which reads:

> *"5-(1) Every instrument specified in the Schedule to this Act and which-*
>
> *(a) N/A*
>
> *(b) if executed outside Mainland Tanzania, relates to any property in Mainland Tanzania or to any matter or thing to be performed or done in Mainland Tanzania, shall be chargeable with duty of the amount specified or calculated in the manner specified in that Schedule in relation to such instrument."*

Clearly, the excerpt above is unambiguous that, any instrument executed outside Mainland Tanzania in relation to any property in Mainland Tanzania is chargeable with stamp duty. It is momentous to observe that parties are not at issue on whether there was a Farm-Out Agreement executed outside Mainland Tanzania which the respondent subjected it to stamp duty. The gravamen of this appeal in the first limb

of the three grounds of complaint seems to lie on the issue whether the appellant was liable to pay stamp duty for the Farm-Out Agreement executed outside Mainland Tanzania and whether the liability if at all for payment of stamp duty was due. The appellant argues that since the Farm-Out Agreement was executed outside Mainland Tanzania, section 26 of the Act, requires that it has to be stamped within thirty (30) days of its arrival in Mainland Tanzania and since the Farm-Out Agreement has not arrived in Mainland Tanzania, then section 26 of the Act does not have effect until such time that the Farm-Out Agreement arrives in Mainland Tanzania. On the other hand, the respondent argues that, the appellant did not discharge the burden of proof that it was exempted from paying stamp duty because the appellant did not produce a Government Notice issued by the Minister as required by section 16 (1) of the Act.

It is convenient at this stage to excerpt section 16 (1) of the Act so far as it governs exemption of stamp duty:

> *"16-(1) The Minister may, by notice in the Gazette, exempt any chargeable instrument, or any category, class or description of such instruments, from stamp duty."*

Clearly, the wording of the above provision is explicit that the Minister has discretion to exempt any chargeable instrument from stamp

duty. However, the most discernible part of that provision is that the Minister has to do so by a notice published in the Gazette and not otherwise. As rightly argued by the learned State Attorney, exemption being part of the tax regime has to be governed by law and section 16 (1) of the Act is the most relevant when it comes to exemption on stamp duty. Put simply, there has to be a law which is permissive and prescribed procedures for one to be exempted and not automatically, as the learned counsel for the appellant sought to convince us believe so, which we are unable to heed.

Quite unfortunate, and for an obscure cause, the appellant did not produce the alleged PSA in evidence nor did it produce the Government Notice issued by the Minister giving the appellant exemption from paying stamp duty which is legally chargeable under section 5 of the Act.

Trying as hard as we can, to follow Dr. Mwiburi's reasoning, we fail to understand how could the respondent exempt the appellant from paying stamp duty in the absence of proof of the Government Notice issued by the Minister giving the appellant exemption from paying stamp duty.

Truly, section 26 of the Act which governs stamping of a chargeable instrument executed out of Mainland Tanzania provides:

"Every chargeable instrument executed out of Mainland Tanzania shall be stamped within thirty days of its first arrival in Mainland Tanzania."

Unquestionably, the appellant has not registered the alleged Farm-Out Agreement executed outside Mainland Tanzania as required by section 143 of the ITA to date. As it can be conspicuously seen, neither the PSA nor the Farm-Out Agreement are part of the record of proceedings to date which further complicates the appellant's reliance on exemption claim.

In these circumstances, we are decidedly of the view that, the appellant did not discharge its burden of proof as required under section 18 (2) (b) of the TRAA. For, the better understanding of section 18 (2) (b) of the TRAA, we think, it is desirable to reproduce the relevant provision. It reads:

"18-(2*) In every proceeding before the Board and before the Tribunal-*

(a) N/A

(b) the onus of proving that the assessment or decision in respect of which an appeal is preferred is excessive or erroneous shall be on the appellant."

In the totality of the above, there can be no better words to express our view and conclude as we do that, the appellant's case was weak to

discharge its burden of proof that it complied with the tax exemption regime as required by the law. It could not ride on the weaknesses of the respondent which in our view is not the case in the instant appeal before us. We are satisfied, as the Tribunal did, that the appellant had no strong case. Consequently, we find that, the Tribunal was right in reversing the Board's decision. To conclude the first three grounds of appeal must fail.

We will next move to the second limb of the appeal which covered the fourth ground on the complaint that the appellant was prejudiced by the respondent issuing notice of confirmation of assessment without first issuing the objection determination letter. In his view, the learned counsel for the appellant argued that, failure to receive the letter of determination deprived the appellant's right to know detailed reasons for refusal and therefore prepare properly their grounds of appeal to the Board.

We should interpose here and observe that, the above submission by the appellant is largely in stark contrast to what transpired on the ground. Record of the proceedings at page 136 bear out that, on 17th December, 2013 the respondent required the appellant to submit documents proving existence and registration of the PSA for the respondent's verification and record as required by section 143 of the

ITA but quite unfortunate the appellant did not heed and in the contrary the appellant wrote a letter at page 173 of the record of proceedings in which, instead of submitting the PSA the appellant spent considerable amount of time explaining about the history behind the existence of the appellant's company, the PSA and the gas discoveries made off the coast of Tanzania. Even in the appellant's letter to the Minister responsible for finance, the appellant did not avail the PSA but rather expressed that they were ready to avail a copy of the PSA should the Minister require it. This is evident at page 176 of the record of proceedings.

We hasten to state that, the appellant's argument as the learned State Attorney termed it, is a mere afterthought since the appellant conceded itself that the notice of confirmation is as good as the final determination. We wish to let records of proceedings at page 233 speak for themselves:

> *"In the instant case the appellant was not served with the determination letter rather was served with notice of confirmation of statement of stamp duty which is good as final decision of the Commissioner General. Normally when the respondent issues the notice of confirmation assessment to the tax payer it means that the determination of the objection by the Commissioner General has reached its finality. So much as there is no determination letter, notice of*

confirmation of assessment issued by the respondent is final decision upon which this appeal is founded."

We are cognizant of the laid down procedures in tax dispute resolution which are meant to ensure due process and fairness in handling tax disputes. However, the instant case presents peculiar circumstances in which the appellant conceded that the notice of confirmation is as good as the final determination. We think, in all fairness to the parties, the appellant cannot be heard now to complain for something it condoned and actually benefited from at the early stages of the proceedings before the Board without which the matter would have been struck out by the Board for being premature. Entertaining the appellant's invitation, would amount to shifting goal posts in order to unfairly benefit the appellant something we are not prepared to extend that far.

It is also momentous to observe that, the respondent requested from the appellant further information including the PSA as alluded above as one of the necessary documents for determination of the objection, but the appellant elected not to heed to the request. In our considered opinion, even if the respondent was to make determination, it had nothing upon which to make determination.

We are however, alert to the fact that every case must be decided according to its own peculiar circumstances obtaining in that case. That said, this ground of appeal too has no merit and therefore it stands dismissed.

In view of the foregoing position, we find no merit in the appeal. Consequently, we dismiss the appeal in its entirety with costs.

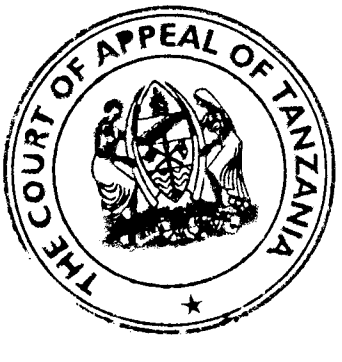
DATED at **DAR ES SALAAM** this 19th day of October, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 24th day of October, 2022 in the presence of Ms. Anitha Kimario learned counsel for the Appellant and Mr. Marcely Kanoni learned State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.



S. J. R. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL