IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A. AND MAIGE, J.A.)

CIVIL APPEAL NO. 391 OF 2020

ETABLISSMENTS MAUREL & PROM.....APPELLANT

VERSUS

COMMISSIONER GENERAL
TANZANIA REVENUE AUTHORITY ..... RESPONDENT

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

(Haji, Vice Chairperson.)

Dated the 6th day of August, 2020
in
Tax Appeal No. 4 of 2019

JUDGMENT OF THE COURT

25th October & 2nd November, 2021

KEREFU, J.A.:

The appellant, Etablissments Maurel & Prom, has lodged this appeal challenging the decision of the Tax Revenue Appeals Tribunal (the Tribunal) dated 6th August, 2020 in Tax Appeal No. 4 of 2019 which dismissed her appeal against the decision of the Tax Revenue Appeals Board (the Board) dated 19th December, 2018 which was decided in favour of the respondent, the Commissioner General Tanzania Revenue Authority (the TRA).

Most of the facts forming the background of the appeal as obtained from the record are, fortunately, not in dispute. They go thus: The appellant is a Tanzania registered branch of Etablissments Maurel & Prom which is an entity incorporated and registered in France conducting exploration activities of oil and gas in Tanzania. The said activities are carried out through a Production Sharing Agreement (PSA) executed on 18th May, 2004 between the Ministry of Energy and Minerals on behalf of the Government of the United Republic of Tanzania, the Tanzania Petroleum Development Corporation (TPDC) and Artumas Group & Partners Limited (GAS). Pursuant to Article 24 (a) of the PSA, the GAS assigned and transferred its rights, privileges, duties and obligations under the PSA to the appellant. As such, the terms and conditions of the PSA are applicable directly to the appellant.

In 2013, the respondent conducted tax audit on the appellant's business for the years of income 2010 and 2011. In the said audit, the respondent found, among other things, that the appellant had not filed returns on imported services received by her from its head office in France as evidenced by invoices issued by the head office to the appellant. As such, on 27th February, 2014, the respondent issued

an assessment for additional VAT due with debit No. 427313449 for the years of income 2010 and 2011. The said tax assessment reflected a total VAT liability of TZS 6,662,076,100.56 comprising principal tax of TZS 4,578,530,140.90 and interest of TZS 2,083,545,959.66.

The appellant objected the respondent's assessment for the additional VAT on account that she is a relieved person by virtue of Article 12 (a) of the PSA read together with section 11 of the Value Added Tax Act, 1997 (the Act) and the Third Schedule to the same Act. The respondent and the appellant exchanged several correspondences to iron out their differences on the matter but without success. Thus, on 2nd December, 2014, the respondent, though admitted that under Article 12 (a) of the PSA the appellant is relieved from paying taxes, confirmed the assessment for additional VAT on imported services as she contended that the appellant is not entitled to the said reliefs on account of failure to comply with the prescribed procedures stipulated under the Act.

Aggrieved, the appellant filed an appeal before the Board where she contended that pursuant to Article 12 (a) of the PSA she is exempted from tax liability. The appellant contended further that the

respondent was incorrect in asserting that the legal procedures for claiming that relief had not been complied with by the appellant while there are no legal procedures to be followed issued by the Minister of Finance. That, in the absence of those procedures or conditions for enjoying special VAT relief, the appellant was under no obligation to comply with the administrative procedures deployed by the respondent. Thus, the appellant contended that, the assessment and procedures issued by the respondent are legally unenforceable and ineffective.

On the other side, the respondent maintained that the services related to reverse charge costs to the head office are chargeable as imported services provided by the head office employees to the appellant which should be accounted as reverse charge under the Act. As such, the respondent urged the Board to dismiss the appellant's appeal with costs.

The Board, though found that the appellant is entitled to the exemption provided under Article 12 (a) of the PSA dismissed the appeal on account of failure by the appellant to record in the VAT account the tax due on imported services as input tax and then claim it as output tax. Thus, the Board found that the respondent was

justified to raise the additional VAT assessment for the respective years of income. In addition, the Board went on to state that since the procedures which were to be stipulated by the Minister of Finance for the relieved persons to enjoy the special relief provided in the law were not in place, the appellant was required to comply with the conditions for special relief attached to the taxable person under the Act.

Still aggrieved, the appellant unsuccessfully appealed to the Tribunal which upheld the decision of the Board. The Tribunal emphasized that, the appellant as a recipient of imported services was required to comply with the mandatory provisions of Regulations 5 and 6 (1) of the Value Added Tax (Imported Services) Regulations, 2001 (the Regulations). That, it was mandatory for the appellant as a taxable person to submit to the respondent VAT returns in respect of the imported services in an accounting period concerning her business as provided under section 26 (1) of the Act. That, failure to comply with any mandatory legal requirement, invites liability under section 43 (1) (b) of the Act.

Undeterred, the appellant preferred this current appeal on the following three grounds: -

(1) *That, the Tax Revenue Appeals Tribunal erred in law in interpretating the provisions of section 26 (1) of the Value Added Tax Act, 1997 read together with Regulations 5 and 6 (1) of the Value Added Tax Regulations, 2001 wrongly upheld that the appellant was required to submit to the respondent a return in respect of the imported services;*

(2) *That, the Tax Revenue Appeals Tribunal erred in law when holding that section 26 (1) of the VAT Act, 1997 provide as to the effect of failure or omission of the recipient of service to record in VAT account for services received; and*

(3) *The Tax Revenue Appeals Tribunal erred in law in concluding that for the appellant to enjoy the reliefs provided under section 11 of the Value Added Tax Act, 1997 it must first have accounted for the imported services under section 26 of the Value Added Tax Act, 1997.*

To support their arguments for and against the appeal, the parties filed their respective written submissions in accordance with Rule 106 (1) and (7) of the Court of Appeal Rules, 2009. In her written submission, the appellant formulated three issues from the grounds of appeal for determination by this Court; **first,** whether the Tribunal was correct in law in holding that the appellant was required to submit to the respondent VAT returns in respect of imported services under section 26 (1) of the Act read together with

Regulations 5 and 6 (1) of the Regulations; **second,** Whether the Tribunal was correct in law in holding that section 26 (1) of the Act provides for the effect of failure or omission of the recipient of service to record in the VAT account for services received; and **third,** whether the Tribunal was correct in concluding that for the appellant to enjoy the reliefs provided under section 11 of the Act it must have first accounted for the imported services under section 26 (1) of the Act.

At the hearing of the appeal, the appellant was represented by Messrs. Wilson Mukebezi, Alan Nlawi Kileo and Stephen Axwesso, learned counsels whereas the respondent had the services of Mr. Juma K. Kisongo, learned Principal State Attorney assisted by Ms. Gloria Achimpota and Mr. Harold Gugami, both learned Senior State Attorneys.

When invited to amplify on the above issues, Mr. Mukebezi prayed to adopt the appellant's written submission to form part of his oral submission. He also prayed to argue the first and second issues jointly as they are intertwined. In respect of the said issues, Mr. Mukebezi argued that section 26 (1) of the Act does not provide any obligation for a taxable person to file VAT returns in respect of

imported services. According to him, the only requirement for filing VAT returns in that section is on importation of goods but not services. Thus, he faulted the Tribunal's decision to uphold the Board's decision which incorrectly interpreted the provisions of section 26 (1) of the Act because the supply of *'goods'* and *'services'* referred to in the first phrase of that section, means *'goods'* or *'services'* which are supplied within Tanzania mainland. That, the law specifically lists, *'importation of goods'* as another item which should be included in the VAT returns. He contended further that importation of services is not listed in the law and even the VAT returns do not have a specific box for imported services, but only for imported goods. To clarify on that point, he cited section 6 of the Interpretation of Laws Act, [Cap. 1 R.E 2019] and argued that it is settled that words of a statute must be given their ordinary meaning.

Mr. Mukebezi also faulted the Tribunal for having erroneously interpreted Regulations 5 and 6 (1) of the Regulations and concluded that the appellant was required to include imported services in the VAT returns. He argued that, under the said Regulations, the appellant was permitted to set off, reverse or counter-balance the output tax on imported services against input tax on the same, and if

the net effect was nil, there would be no additional tax payable. It was his further argument that the Tribunal erroneously invoked the provisions of section 43 (1) of the Act which, he said, is applicable where a taxable person has failed to pay tax. He argued further that, since there was no liability on the part of the appellant to pay tax on imported services, it was wrong for the Board and the Tribunal to impose VAT where that obligation does not exist.

He further faulted the decisions of both, the Board and the Tribunal for making reference to our previous decision in **Mbeya Cement Company Limited v. Commissioner General of Tanzania Revenue Authority,** Civil Appeal No. 19 of 2008. He argued that, in that decision, the Court erroneously referred to the VAT account as VAT returns by holding that the taxpayer in that case should have complied with section 26 (1) of the Act by recording the imported services in the VAT returns. He contended that a VAT return is not a VAT account. A VAT account is kept by the taxpayer in his office and is used to record transactions which attract VAT and the information in VAT account assists the taxable person to prepare VAT returns at the end of the month, he argued. In that regard, Mr. Mukebezi urged us to depart from that decision as it improperly

included imported services as transactions which should be included in VAT returns. He went on to distinguish the case of **Mbeya Cement Company Limited** (supra) by arguing that facts in that case are not relevant to the current appeal. He said, in that case the appellant did not file VAT returns and was not enjoying special reliefs which is not the case herein.

Submitting on the third issue, Mr. Mukebezi referred us to section 11 of the Act read together with item 9 of the Third Schedule to the Act and argued that, since the appellant was listed in that Schedule, she was automatically entitled to be relieved from paying any tax unless the same was limited by specific conditions issued by the Minister of Finance. That, in the absence of such conditions, the appellant was entitled by law to enjoy the special relief. Based on his submission, Mr. Mukebezi implored us to allow the appeal with costs.

In response, Mr. Kisongo vehemently opposed the appeal. He contended that the Board and the Tribunal correctly interpreted section 26 (1) of the Act read together with Regulations 5 and 6 (1) of the Regulations and arrived at the right decision. It was his argument that, since the appellant is a taxable person, she is required to lodge with the respondent VAT returns including that of

the imported services. He thus challenged the submission by Mr. Mukebezi to be misconceived. He argued further that under section 26 (1) of the Act, the appellant is required to file VAT returns containing information in relation to the '*supply by and to him of goods or services and any other matter concerning his business*'. He argued that the VAT account is for the tax payer to record his input and output tax for VAT purposes and it is from this account the taxpayer prepares VAT returns. He thus insisted that section 26 (1) of the Act requires the appellant to file VAT returns and not VAT account as suggested by Mr. Mukebezi.

Amplifying further on this point, Mr. Kisongo cited Regulations 5 and 6 (1) of the Regulations and argued that under the said Regulations it is mandatory for the taxpayer to account for the tax on imported services. He added that section 43 (1) of the Act empowers the respondent to assess the tax and interest payable for failure to pay tax payable by him on account of failure to file returns required under the Act. He argued that the above provisions of the law were correctly interpreted by the Court in **Mbeya Cement Company Limited** (supra) which had similar facts with this appeal. He thus challenged the submission of Mr. Mukebezi to distinguish the said

appeal with the circumstances of the current one, as he argued that in both appeals there was filing of improper VAT returns. On that basis, Mr. Kisongo urged us to be guided by our decision in that case as it is a good law applicable in this appeal.

On the third issue, Mr. Kisongo contended that the reliefs provided under section 11 of the Act is not automatic but subject to the procedures which may be prescribed by the Minister of Finance. He thus argued that, in the absence of those procedures or conditions for enjoying special VAT relief, the Board and the Tribunal were correct to find that the respondent is justified to issue the additional assessment as the appellant was still required to comply with the conditions for special relief attached to the taxable person under the Act. On the strength of his arguments, Mr. Kisongo urged us to dismiss the appeal with costs for lack of merit.

Mr. Mukebezi had nothing useful in rejoinder submission except reiterating what he submitted earlier and insisted his previous prayer that the appeal be allowed with costs.

Having carefully considered the rival submissions made by the counsel for the parties in support and against the appeal, we find that the main issue for our consideration under the first and second

issues is whether the Tribunal erred in holding that the appellant, a taxable person and a recipient of imported services who is exempted under Article 12 (1) (a) of the PSA was under any obligation to file VAT returns on the imported services.

As intimated above, it is not in dispute that the appellant is a Tanzania registered branch of Etablissments Maurel & Prom, an entity incorporated and registered in France conducting exploration activities of oil and gas in Tanzania, thus a taxable person and a registered tax payer. It is also not in dispute that under Article 12 (1) (a) of the PSA, the appellant is relieved from payment of tax subject to the procedures and conditions to be issues by the Minister of Finance. It is common ground that the appellant received services from its head office in France but she did not include the same in his VAT returns for the years of income 2010 and 2011, the fact which prompted the respondent to issue an assessment for additional VAT at the tune of TZS 6,662,076,100.56. The obligation of a taxable person to lodge with the respondent tax returns in respect of each prescribed accounting period is specified under section 26 (1) of the Act which reads: -

> *"Every taxable person shall, in respect of each prescribed accounting period, lodge with the Commissioner a tax return, in a form approved by the Commissioner* ***containing any information which the form requires in relation to the supply by and to him of goods or services, the importation of goods, tax deductions or credits and any other matter concerning his business."*** [Emphasis added].

Furthermore, section 43 (1) (a) and (b) of the same Act, provides for consequences of failure to comply with the above provisions, that: -

> *"43 (1) Where in the opinion of the Commissioner, a taxable person has failed to pay any of the tax payable by him by reason of –*
>
> *(a) his failure to keep proper books of account, records or documents as required under this Act, or the incorrectness or inadequacy of the books, records or documents; or*
>
> *(b) his failure to make, or delay in making any return required under this Act or the incorrectness or indecency of any returns; the Commissioner may assess the tax due and any interest payable on that tax and that interest shall be due for payment within one month of*

the date of assessment, unless a longer period is allowed by the Commissioner or elsewhere in this Act."

In addition, the obligation to account for the tax on imported services is prescribed under Regulations 5 and 6 (1), (a) and (b) of the Regulations that: -

"Regulation 5 - ***The recipient of the services must account for the tax on imported service*** *when –*

(a) the services is performed or completed;

(b) the invoices for the service is issued;

(c) any payment for the service made, whichever is earlier.

Regulation 6 (1) – ***The recipient of the services shall record the VAT account –***

(a) ***the tax due on imported services as output tax*** *in the period in which the services are imported; and*

(b) ***a claim for the accounted tax as input tax*** *in accordance with normal rule." [Emphasis added].*

Admittedly, the Court in **Mbeya Cement Company Limited** (supra) when considered an akin situation on the assessment of additional VAT issued by the Commissioner to the appellant who, like in this appeal, filed improper VAT returns which did not include the

imported services, it made a thorough discussion on the interpretation and applicability of the above cited provisions and extensively stated as follows: -

> *"On a close and combined reading of section 43 (1) of the Act and Regulations 5 and 6 and the available fact, with respect, it would appear to us that the Commissioner General was entitled to invoke section 43 (1) by raising an assessment of the tax due as the appellant, a taxable person, had failed to pay any tax payable by it on the imported services by reason of failure to make any returns. In its legislative purpose and its plain statutory wording, section 43(1)(b) is intended to vest in the Commissioner General the discretion to raise an assessment of any tax due and interest payable where in his judgment a taxable person has failed to pay any of the tax payable by him on account of his, inter alia, failure to make any return required under the Act."*

The Court went on to state that: -

> *"...without having duly filed the proper tax return that were required under the law, the appellant cannot validly contend that there was no tax due and payable by seeking shelter under Regulations 5 and 6. Given that there was admittedly no recording in the VAT account of the output tax in respect of imported services and of any tax claimed as input tax, one*

cannot readily argue that the net effect of all that is that there is no tax due or payable."

Similarly, in the instant appeal, having regard to factual setting in the record of appeal on the dispute between the parties and the settled position of the law on the interpretation of the respective provisions of the Act made above by the Court, we are in agreement with Mr. Kisongo that the proposed interpretation made by Mr. Mukebezi on 26 (1) of the Act that the appellant was not under obligation to record VAT on imported services in the VAT returns but in the VAT account, is unfounded. It is our further view that, given the settled position of the law in this matter, section 26 (1) of the Act contains no ambiguity or uncertainty to warrant its interpretation in favour of the appellant. As such, we do not subscribe to Mr. Mukebezi's understanding of the said provision.

We are also mindful of the fact that in his submission, Mr. Mukebezi tried to distinguish facts of this appeal with those obtained in **Mbeya Cement Company Limited** (supra). Having scrutinized the facts in the two cases, we again find the submission of Mr. Mukebezi to be misconceived as in both cases the appellants who are taxable persons lodged improper tax returns without including

imported services contrary to the law. With profound respect, we hold the firm view that the invitation extended to us by Mr. Mukebezi to depart from our previous decision in **Mbeya Cement Company Limited** (supra) is misplaced. Besides, it is our settled position that the Tribunal properly determined the appeal before it by making reference to that decision and correctly affirmed the decision of the Board. In the event, we answer the first and second issues in the affirmative.

The last issue, is straight forward and should not detain us, as pursuant to section 11 of the Act, the relief provided to the appellant was not automatic but subject to the procedures to be prescribed by the Minister of Finance which were yet in place.

In the circumstances, and in the absence of those procedures or conditions for enjoying special VAT relief, the Tribunal correctly upheld the finding of the Board that the respondent is justified to issue the additional assessment as the appellant was still required to comply with the conditions for special relief attached to the taxable person under the Act. Hence, the third issue is also answered in the affirmative.

In the final analysis, we uphold the decision of the Tribunal and dismiss the appeal with costs.

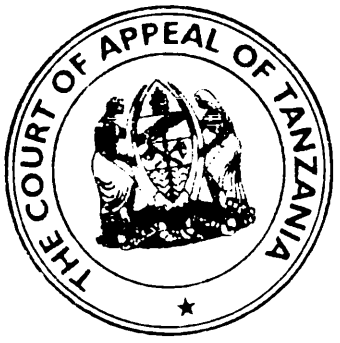
DATED at **DODOMA** this 1st day of November, 2021.

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of November, 2021 in the presence of Mr. Noah Tito, learned Senior State Attorney for the Respondent and holds brief for Mr. Alan Nlawi Kileo, learned counsel for the Appellant is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL