IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: OTHMAN, C.J., NSEKELA, J. A., and KALEGEYA J. A.)

CIVIL APPEAL NO. 49 OF 2008

ROSHANI MEGHJEE & CO. LTD. ..... APPELLANT

COMMISSIONER GENERAL

TANZANIA REVENUE AUTHORITY ..... RESPONDENT

(Appeal from the judgment and decree of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Shangwa, J.)

Dated the 28th day of January, 2008

in

Tax Appeal No. 11 of 2007

JUDGMENT OF THE COURT

15th October, 2010 & 18th July, 2011

NSEKELA, J. A.:

This appeal originates from VAT Tax Appeal No. 8 of 2007 before the Tax Revenue Appeals Board (the Board) in which the appellant was Roshani Meghjee & Co. Ltd. and the

respondent was the Commissioner General of the Tanzania Revenue Authority. The respondent was ordered to make a VAT refund amounting to Shs. Tanzania 59,345,168.00 to the appellant. The respondent was aggrieved by the Board's decision and appealed to the Tax Revenue Appeals Tribunal (the Tribunal) in VAT Appeals No. 11 of 2007. The Tribunal allowed the appeal hence this appeal preferred to this Court by Roshani Meghjee & Co. Ltd., the appellant. The respondent is the Commissioner – General of the Tanzania Revenue Authority.

At the hearing of the appeal, the appellant was represented by Mr. Martin Matunda learned Advocate, and the respondent was represented by Mr. Juma Beleko, learned Advocate. The appellant preferred four grounds of appeal, namely:-

1. *The Tax Revenue appeals tribunal erred in law in holding that the respondent is not bound by the incorrect advice given by his office in view of the express provisions of section 70 of Value Added Tax Act, Cap. 148 R. E. 2002;*
2. *The Tax Revenue Appeals Tribunal erred in law in holding that the respondent has discretion under section 70 of the Value Added Tax Act, Cap. 146 R. E. 2002 to refund or refuse a refund pursuant to his wrong advise;*
3. *The Tax Revenue Appeals Tribunal erred in law in holding that the general position to the effect that estoppel cannot operate to prevent the operation of law was applicable to the circumstances of this case in view of the clear provision of section 70 of the Value Added Tax Act, Cap. 148 R. E. 2002;*

4. *The Tax Revenue Appeals Tribunal erred in law in holding that the costs incurred by the appellant in transporting, cotton wharfage, handling container yard expenses and warehouse rent are non reimbursable costs.*

At the ourtset, Mr. Martin Matunda learned Advocate for the appellant, consolidated the first three grounds and argued them together, followed by the 4th ground of appeal. He submitted that one of the functions of the respondent in implementing revenue laws was to advise, advocate and give directions to tax-payers. In the exercise of this function, the appellant sought clarification from the respondent on whether the appellant was entitled to claim refund of VAT paid on transport, warehousing, and port handling on behalf of the appellant's principals where the principals did not refund the VAT. This clarification was

sought in view of the Finance Bill of 2003. The respondent confirmed the interpretation advanced by the appellant by its letter dated 3/11/2003 to one Christopher Msuya. Managing Director, Grant Thornton Tax Consultants Ltd, who were acting on behalf of the appellant. However, by its letter dated 29/03/2005 to the appellant, the respondent had a change of mind.

They informed the appellant that their earlier communications to them on the matter were erroneous and should not be relied upon. This was the cornerstone of the appellant's case. Mr. Matunda contended that the respondent should have invoked section 70 of the Value Added Tax Act, Cap. 148 R. E. 2002 and interpreted it liberally in favour of the appellant. The respondent was expected to act fairly and equitably in its dealings with the public. Mr. Matunda concluded by submitting that no

reimbursable costs are refundable by the respondent since these costs are always borne by the appellant. The clarification that the appellant sought was in respect of the re-imbursable costs. The learned advocate added that the respondent gave incorrect advice upon which the appellant acted upon. He was of the view that section 70 of the VAT Act as amended applied to the appellant and therefore should be refunded Tanzania Shs.59,345,169/=.

On his part, Mr. Juma Beleko learned Advocate for the respondent, submitted that the letter in question were between the respondent and one Mr. Msuya, and therefore the appellant, as he put it, is a stranger. He added that the appellant was a commission agent and therefore did not qualify for exemption under the 1st schedule of Act 15 of 2003. Mr. Beleko added that in the letter that sought

clarification on the law from the respondent, the appellant did not seek a refund from the respondent.

A convenient starting point for the purposes of this appeal is a letter dated 17/10/2003 from one Christopher Msuya, Managing director of grant Thornton Tax Consultants Ltd addressed to the Commissioner for VAT. This letter is central to this appeal and we reproduce it in extensor. It provides as follows:-

RE: CLARIFICATION ON THE AMENDMENT OF VAT ACT, 1997

Our client, M/S Roshan Meghjee Co. Ltd. is an agent for overseas buyers of cotton.

Our client earns commission on services performed for the principals, including but not limited to, overseeing

transportation (if the cotton is brought exginnery), storage and handling at the port.

In the process our client pays for these costs on behalf of the principals and is eventually reimbursed.

As stated earlier, apart from the reimbursement, the client also charges commission for the work done. On the basis of the foregoing our client was a regular repayment trader as all his services were considered as exported prior to the finance bill 2003.

It is our understanding that by the introduction of the said finance bill, the commission earned by our client is considered as not having been exported, and therefore has to suffer VAT.

It is also our understanding that our client will be entitled to claim refund of VAT paid on transport,

warehousing, and port handling on behalf of the principal, so long as such VAT is not reimbursed by the principals.

Kindly confirm the correctness of our understanding so that we may advise our client to properly comply with the law. *Your earliest response in this regard will be highly appreciated" (emphasis added).*

The response from the respondent in a letter to the appellant dated 3/11/2003 in material part reads as under:-

"We would like to confirm that according to the amendments of the VAT Act 1997 made through the Finance Bill, 2003, your submission as regard to export of services as well as VAT on transport, warehousing

and port handling serviced is quite proper and you may advice your client accordingly".

On the 29/3/2005, the respondent, in his letter to the appellant stated as follows:-

Re: PREVIOUS CORRESPONDENCES ON VAT ISSUES

Reference is made to the above mentioned subject.

You will recall that M/S Grant Thornthon who are your Tax Consultants, wrote us a letter with Ref. No. GTT/J – 5 dated 17th October, 2003 which sought to confirm that:-

(i) Following the amendments introduced to the VAT ACT, 1997 vide the Finance Act of 2003, the commission earned by RMCL is liable for VAT at the standard rate.

(ii) *VAT incurred by M/S RMCL, which is not reimbursed by principals qualifies to be input tax to M/S RMCL, hence entitled to deduction/claim for VAT repayment.*

We replied to the above mentioned enquiries vide our letter with Ref. No. CVAT/VAT/10/01370 dated 3rd November, 2003.

We wish to inform you that our clarification and advice were based on the contents of the letter from your tax consultants. However, on audit which was conducted to your company by the department of Large Taxpayers revealed that our letter with Ref. No.CVAT/VAT/10/01370/30 of 3rd November,

2003 gave an incorrect advice as far as the enquiry in (ii) above is concerned.

The final accounts of M/S RMCL which were availed to the Large Taxpayers Department gave a clear narration of the types of direct reimbursable by the as well as non reimbursable costs. The findings by the Large Taxpayers Department has led us to conclude that the non-reimbursable costs cannot be claimed back as input tax by M/S RMCL because they are not part of the costs which were supposed to be incurred by Principals. In addition, even the principals could not have been entitled to claim them because they are not registered for VAT in Tanzania. On the basis of this fact, we have

been compelled to rescind our earlier advice which granted you the entitlement to input tax deductions on VAT relating to the costs which are not re-imbursable to M/S RMCL".

The thrust of the three consolidated grounds of appeal revolve around the doctrine of promissory estoppel. The contention of the appellant is to the effect that the respondent's officials should always be gentleman and that taxpayers expect and are entitled to receive ordinary fair play from tax officials. The appellant in effect received written assurances from the respondent's officials on the interpretation of VAT law under dispute and relied upon such assurances. The appellant was in effect setting up an estoppel against the Value Added Tax Act.

There is a well-known maxim that there can be no estoppel against statute. It is on the basis of this maxim

that tax authorities are able to get away quite often from the consequences of ill – advised letters/circulars it issues purporting to explain the law.

As stated before, one Christopher Msuya, Managing Director of Grant Thornton Tax Consultants Ltd, sought clarification on behalf of the appellant on amendments to the VAT Act, 1997 regarding, inter alia, entitlement to refund of VAT paid on transport, warehousing, and port handling on behalf of the appellant so long as VAT is not reimbursed by the appellant's principals. An official of the respondent, one Mr. P. J. Kiatu, responded positively to this enquiry. Then followed the respondent's contrary advice on the 29/3/2005 in which the Commissioner for VAT rescinded the earlier letter. The issue then before us is whether this latter communication to the appellant, can be enforced in a court of law.

Taxation is a sovereign power to realize revenue to enable the Government to discharge its obligations. The power to do so is derived from Article 138 (1) of the Constitution of the United republic of Tanzania. It provides as follows:-

> *"138 (1) No tax of any kind shall be imposed save in accordance with a law enacted by Parliament or pursuant to a procedure lawfully prescribed and having the force of law by virtue of a law enacted by Parliament".*

The VAT Act, Cap. 148 R. E. 2002 was enacted by Parliament. In the case of **Income Tax Commissioners v. AK [1964] EA 648 at page 652 H**, it is stated as under:-

"I understand the law to be that no estoppel whatever its nature, can operate to annual statutory provisions and a statutory person cannot be stopped from performing his statutory duty or from denying that he entered into an agreement which was ultra-vires for him to make. A statutory person can only perform acts which he is empowered to perform. Estoppels cannot negative the operation of a statute and it is a public duty to obey the law…."

(See also: Chatrath v Shah [1967] EA 93); Tarmal Industries Ltd v Commissioner of customs and Exercise [1968] E.A 479.)

It is self – evident from these cases that the appellant's submissions on this issue cannot succeed. It is now settled law that there is no estoppel against the performance of a

statutory duty. This disposes of the consolidated three grounds of appeal**.**

The fourth grounds of appeal is essential based as well on the respondent's letter to the appellant dated the 29/03/2005 which has been reproduced before. The relevant part reads as follows:-

> *"The findings by the Large Taxpayers Department had led us to conclude that the non-reimbursable costs cannot be claimed back as input – tax by M/S RMCL because they are not part of the costs which were supposed to be incurred by the principals. In addition, even the Principals could not have been entitled to claim them because they are not registered for VAT in Tanzania On the basis of this fact, we have been compelled to rescind our earlier advice which granted*

you the entitlement to input tax on VAT relating to the costs which are not re-imbursable to RMCL"

This view was endorsed by the tribunal in its judgment on appeal from the Board (see: page 295 of the record of appeal). This ground of appeal is closely connected with the consolidated three grounds of appeal. It is however differently crafted. The issue concerns that what is termed "non-reimbursable costs". It appears to us that the refund of these costs was not considered as such by the Board and the Tribunal. In our view, what amounts to non-reimbursable costs cannot be determined without evidence being given to that effect to establish the facts. The issue as to whether the reimbursement of costs included VAT was not one of the issues framed for determination by the Tax Revenue Appeals Board. It is not surprising that on appeal to the Tribunal, it was dismissed on this point. Again, this is

the same issue being cleverly introduced on appeal to this court. With respect, we cannot entertain it for this will necessitate re-evaluating the evidence which is non-existent on the record, assuming we had the power to do so, having in mind Section 25 (2) of t5he Tax Revenue Appeals Act, Cap. 408 R. E. 2002.

For the above reasons, we dismiss the appeal with costs. It is accordingly ordered.

DATED at **DAR ES SALAAM** this 12th day of July, 2011.

M. C. OTHMAN
CHIEF JUSTICE

H. R. NSEKELA
JUSTICE OF APPEAL

L. B. KALEGEYA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL