**IN THE TAX REVENUE APPEALS TRIBUNAL**

**AT DAR ES SALAAM**

**TAX APPEAL NO. 8 OF 2012**

**COMMISSIONER GENERAL (TRA)……………………APPELLANT**

**VS**

**MALAREX AGENCY (T) LTD …………………….. RESPONDENT**

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**PROCEEDINGS**

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**29.05.2012**

**QUORUM:**

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|---|---|---|
| **Judge. F. Twaib** | **-** | **Chairman** |
| **Mr. Shimwela** | **-** | **Member** |
| **Mr. K. Bundala** | **-** | **Member** |
| **For the Appellant** | **-** | **Absent** |
| **For the Respondent** | **-** | **Absent** |
| **Mrs. Halima Said** | **-** | **RMA** |

**Order**

Hearing on 16/07/2012 at 14 hours. Notify parties.

**Judge. F. Twaib Chairman,Sgd**

**29/05/2012**

**16.07.2012**

**QUORUM:**

| | | |
|---|---|---|
| **Judge. F. Twaib** | **-** | **Chairman** |
| **Mr. Shimwela** | **-** | **Member** |
| **Mr. K. Bundala** | **-** | **Member** |
| **For the Appellant** | **-** | **Absent** |
| **For the Respondent** | **-** | |
| **Mrs. Halima Said** | **-** | **RMA** |

**Order**

Hearing on 27/8/2012. Notify parties.

**Judge. F. Twaib Chairman,Sgd**

**16/08/2012**

**30.08.2012**

**QUORUM:**

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|---|---|---|
| **Judge. F. Twaib** | **-** | **Chairman** |
| **Mr. Shimwela** | **-** | **Member** |
| **Mr. K. Bundala** | **-** | **Member** |
| **For the Appellant** | **-** | |
| **For the Respondent** | **-** | |
| **Mrs. Halima Said** | **-** | **RMA** |

**Order**

Hearing on 20/9/2012 at 14 hours.

**Judge. F. Twaib Chairman,Sgd**

**30/08/2012**

**25.09.2012**

**QUORUM:**

| | | |
|---|---|---|
| **Judge. F. Twaib** | **-** | **Chairman** |
| **Mr. Shimwela** | **-** | **Member** |
| **Mr. K. Bundala** | **-** | **Member** |
| **For the Appellant** | **-** | |
| **For the Respondent** | **-** | |
| **Mrs. Halima Said** | **-** | **RMA** |

**Order**

Hearing on 8/10/2012 at 14 hours.

**Judge. F. Twaib Chairman,Sgd**

**01/10/2012**

**08.10.2012**

**QUORUM:**

| | | |
|---|---|---|
| **Judge. F. Twaib** | **-** | **Chairman** |
| **Mr. Shimwela** | **-** | **Member** |

**Mr. K. Bundala - Member**

**For the Appellant -**

**For the Respondent -**

**Mrs. Halima Said - RMA**

**Mr. Beleko**

We have spoken to each other. Both counsels would lodger written submission's.

**Mr. Ndyetabula**

That's true.

**Order**

(1) Appeal to be disposed of by way of written submissions

(2) Submissions to be filed as follows:-

a) The Appellant to file on or before 29/10/2012

b) The Respondent to file on or before 19/11/2012

c) Rejoinder, if any, on or before 26/11/2012.

(3) Hearing (for clarifications) on 13/12/2012 at 14 hours.

**Judge. F. Twaib Chairman,Sgd**

**Mr. Shimwela Member,Sgd**

**Mr. K. Bundala Member,Sgd**

**08/10/2012**

## APPELLANT'S WRITTEN SUBMISSION

**My Lord** Chair person and Honourable members of the Tribunal. The Appellant wish to submit as here below:

**INTRODUCTION**

1. The background of the dispute between the parties has been summarized by the Tax Revenue Appeals Board at pages 1 and 2 of the judgment. The genesis of the dispute is an erroneous refund of Tshs. 3,594,883,825.40 being excise duty arising from Respondent's purchase of fuel free of excise duty alleging that he quality under the ***Excise Tariff(Remission) (Fuel Imported by Mining Companies) Order 2002 Government Number 480*** published on 25th October, 2002 which is not true.

2. **My Lord** and members of Tribunal the Respondent was appointed by an association called Arusha Region Mining Association (AREMA) to supply mining materials and equipment to small scale miners in Arusha and Manyara regions- see the testimony of AW1 Henry Nyiti at pages 2 and 3 of the Bond proceedings. The agreement between the Respondent and AREMA was admitted as exhibit. A1 has a list of goods to be supplied by the Respondent to AREMA. The list did not include supply of fuel. At a later stage the Respondent without any consent from AREMA by way of addendum to exhibit A1, purporting to act on behalf of AREMA applied to be supplied fuel under Government Notice No. 480 of 25th October, 2002. The fuel was

supplied to him. Respondent proceeded to apply for refund of excise duty and was refunded a total of Tshs. 3,594,883,825.40. The Appellant's auditors found that the Respondent was not entitled to the tax refund because he was not a mining company as envisaged under Government Notice No. 480 of 25th October, 2002. See exhibit A4

3. My Lord and members of the Tribunal the Board framed two issues as follows: (see page 3 of the judgment).

   a) Whether or not the Respondent is exempted from payment of tax under the law;

   b) Whether or not the tax demand notice served by the Appellant to the Respondent is lawful.

   The Board decided that the Respondent was entitled to the refund and the tax demand notice was unlawful. The Appellant disagrees with the whole judgment of the Board hence this appeal. Appellant has raised ten grounds of appeal.

4. My Lord Chair person and member of the Tribunal we now wish to submit in support of the appeal as hereunder; Ground No. 1 That the Board errored in law and fact for failure to give a summary of all relevant evidence produced before it and the reasons for accepting or rejecting the evidence. We submit that Rule 20(1) (b) of Tax Appeal Board Rules, Government Notice No. 57 of 20th April, 2001 reqire the Board to give a summary of all relevant evidence produces before it and give reasons for accepting or rejecting the

evidence. During the hearing a total of eight exhibits (A1 to A8)- see pages 6, 7 and 14 of the proceedings were produced. Two witnesses were called by parties AW1 Henry Nyiti-Pges 2-9 of the proceedings and RW1 Aubrew Amon – pages 11 – 16 of the proceeding. In the judgment there is no summary of relevant evidence produced by witnesses and reasons for accepting or rejecting the same. The Board never considered at all the evidence of the appellant's witness Aubrew Amon. Exhibit A1 which is an agreement between the Respondent and Arusha Region Mining Association did not provide for supply of fuel to members of AREMA. Exhibit A3 which shows names of alleged members of AREMA who are said to have received the tax exempt fuel have no signatures of the alleged beneficiaries. Authenticity of this document is doubtful. The Board never addressed itself to relevant evidence including the evidence that neither the Respondent nor the AREMA were mining companies to enjoy tax remitted fuel as given Appellant's witness.

5. **My Lord** Chair Person and Tribunal members the Appellant submit in Ground No. 2 that the Board errored in law for finding that the Respondent is entitled to tax remission under Government Notice No 480 of 25th October, 2002 and Section 4B of the **Customs Tariff Act** of 1976. The Board in its judgment at page 4 page 4 page 4 has reproduced Government Notice No. 480 of 25th October, 2002 as follows;

> "***subject to the conditions specified in paragraph 3 and the procedure for remission specified in the schedule***

***to the order, the whole of the excise duty payable on the fuel imported or purchased prior to clearance through Customs by or on behalf of mining companies that will be used solely for mining of minerals meant for export is hereby remitted***"

For a person to enjoy the excise duty remission the purchase made must be for on behalf of mining companies and the fuel must be solely for mining of minerals meant for export. In its judgment at page 4 paragraphs 2. The Board admitted that the Respondent is not a mining company. No evidence was produced before the Board to prove that the Arusha Region Mining Association is a mining company to entitle itself to acquire tax remitted fuel. The Respondent never summoned any mining company which carries on mining of minerals meant for export to justify the excise duty remission.

6. **My Lord** and members of Tribunal the Board at page 5 of its judgment has reproduced section 4B of the **Customs Tariff Act, 1976** as follows:

"**Any Person engaged in mining operations which are not mining operations in respect of any mine after the first anniversary of the commencement of commercial production from that mine or any person subcontracted by that person for the purpose of those mining operations shall be entitled to import without**

**the payment of customs duty explosive, fuels, lubricants, industrial items and other supplies, machinery vehicles and other capital equipments where such equipments have been verified to the satisfaction of the Commissioner after consultation with the minister responsible for minerals to be reasonable necessary for and for use solely in carrying mining operations relating to that mine"**

In the case before the Board there was no evidence given to prove that there was a mine which had reached first anniversary of commencement of commercial production from that mine or a sub contracting by owner of such mine to qualify the tax remission. Exhibit A1 which is a contract between the Respondent and the Arusha Region Mining Association did not provide for the provision of fuel. The Respondent does not fit anywhere in the above provision to entitle him to the refund of excise duty erroneously refunded to him for lack of legal backing.

7. **My Lord** Chair person and Tribunal members, grounds of appeal number 3,4,5 and 8 have been covered while arguing ground No. 2 above. We need not repeat submitting them.

8. **My Lord** Chair person and members of the Tribunal with regard to Ground No. 6 of the appeal we submit that since the Respondent did not quality for excise duty remission under Government Notice No.

480 of 25th October, 2002 or Section 4B of the **Customs Tariff Act,** 1976 his application for the refund of tax was fraudulently made. In the circumstances it was proper for the Appellant to demand for the recovery of erroneously refunded taxes through exhibit A4. Since the Respondent is not a mining company and similarly the AREMA had no mines of its own it was wrong in law for the Respondent to claim and receive a refund of excise duty. Appellant did not dispute that he applied for and obtained the refund from the Appellant. Since the Respondent refused to refund the Appellant of the erroneously paid refund the Appellant was right to distrain the Respondent's property by way of a warrant of distress. This answers ground number 7.

9. My Lord Chair person and Tribunal members in ground No. 9 we submit that the evidence before the Board did not prove that the Respondent was contracted by any mining company or person having a mine that had reached 1st anniversary of commercial production to supply fuel. Neither in exhibit A1 or Government Notice No. 480 of 25th October, 2002 or Section 4B of the **customs Tariff Act** 1976 did quality the Respondent to enjoy the tax remission/exemption as concluded by the Board at page 7 of the judgment.

10. **My Lord** the Chair person and Tribunal members with regard to Ground No. 10 where the Board stated that the Appellant did **"hide"** some evidence (see page 7 paragraph 1 of the judgment) the Appellant brought Aubrew Amon who did the audit as their witness (see page 11 of the proceedings). The witness was cross examined

by the counsel for the Respondent (see page 14 of the proceedings). The Board was at liberty to ask the witness questions on unclear areas if any or summon any witness as per Rule, 17(1) of Tax Revenue Appeals Board Rules Government Notice No. 57 of 2001. The witness brought was the relevant witness. The Respondent did not complain of his testimony because he audited the respondent.

In view of the above we pray for the Tribunal to set aside the Judgment of the Board, order the Respondent to refund the Appellant a total of Tshs. 3,594,883,825.40 plus interest at Bank rate and costs.

We humbly submit.

## RESPONDENT'S REPLY TO THE APPELLANT'S WRITTEN SUBMISSION

## INTRODUCTION

1. **May it please your Lordship and members of the Tribunal,** the Respondent is a limited liability company engaged in mining business as a service provider to other business people the Small Scale Miners within the same mining industry at Mererani, Simanjiro, in Manyara Region. In carrying on its business, the Respondent entered into an agreement with ARUSHA REGIONAL MINERS ASSOCIATION (AREMA) a duly registered society, whose members are small scale miners in which the Respondent was contracted to provide/supply materials, equipments, fuel and other allied serviced for use in mining business of the small scale miners. A Memorandum of Agreement between

AREMA and the Respondent was admitted by the Board as Exh.AI. by the Board.

2. **My Lord and members of the Tribunal,** the main focal point leading to contention in this case is tax exemption (excise duty) on fuel used by the small scale miners in their mining operations. In an effort to promote mining industry, the government, through various laws, grants tax exemptions to various equipments used in mining operations. However, to qualify for an exemption on mining equipments, the applicant of the exemption must pass the test in respect of having adequate and reliable facilities including fuel storage tanks, explosive magazines, huge store for the equipments and facilities which need big capital. All these must be inspected and approved by the Ministry of Minerals & Energy and TRA, the Appellant, to their satisfaction as required under the law (sect. 4B of the customs Tariff Act, 1976). Procurement or purchase of fuel is specifically directed to be made at the Bonded Oil Installations (BOI) in Dar es Salaam only.

3. **My Lord and members of the Tribunal**, the above mentioned conditions attached to the grant of tax exemption on fuel to small scale miners could not be met by such small scale miners in their isolation. Therefore, an arrangement were made through AREMA, a duly registered society whose members are small scale miners to appoint and subcontract a company to be a one stop centre for the acquisition of fuel, explosives and other mining equipments on behalf of AREMA members and later sell the said items to small scale members – hence, an agreement with MALAREX AGENCY (T) LTD, the Respondent in this case, to act for and on behalf of AREMA members, that is the small scale miners. The agreement was approved by the Appellant and the Ministry of Mineral &Energy who proceeded to grant exemption to the Respondent on behalf of the Small Scale Miners

4. **My Lord and members of the Tribunal,** with an agreement with AREMA in hand, the Respondent applied to the Appellant through Ministry of Energy & Minerals for the grant of tax exemption facility of

materials, equipments, fuel and other services as an incentive in mining business to small scale miners which is granted under the law. In response there to the Appellant granted the requested exemption. Copies of the Exemption letters dated 3rd January 2002 and that of 9th March 2005 were admitted by the Board as Exh. A2 and A8 respectively

5. **My Lord and Members of the Tribunal**, the tax exemption were granted under the arrangement that tax on fuel have to be paid on purchase of fuel (i.e up front tax payment) before fuel is cleared through the Customs by the Respondent and later on claim for refund of the tax paid after making an account to the satisfaction of the Appellant that the fuel reached the intended small scale miners – as provided for under Item I and 2(g) of the Schedule to the GN 480/2002. In this regard, the Appellant monitors so closely the utilization of the tax exempted fuel before authorizing refund of the upfront paid taxes. A sample of the Appellant's Approval of sales made to small scale miners was admitted by the Board as Exh. A3

6. **My Lord and Members of the Tribunal,** as was submitted before the Board, subcontracting the Respondent to act for and on behalf of the small scale miners have multiple advantages both to the small scale miners and the Appellant as well which includes:
   (i) Enabling small scale miners to benefit with the tax exemption on fuel as one of the business incentives.
   The small scale miners holds Primary Mining Licences (PML) which allows the holder to own a plot measuring 50m x 50m which is unfit to construct requisite requirements to qualify for tax exemption as already mentioned. It is on this stand that AREMA found it economical and reasonable to have one service provider to act on behalf of its members, the small scale miners

   (ii) Having one company acting on behalf of small scale miners enables the Appellant efficient, effective and sufficient control of the tax exempted fuel in order to protect the government revenue as was clearly stated by the RW1, who testified before

the Board that fuel is constantly monitored by the Appellant (the Respondent then) and that all refunds must be approved by the Appellant (see page 15 of the proceedings of the Board). It could have been cumbersome to monitor almost 1,000 plus small scale miners if they all purchase tax exempted fuel in their total isolation.

(iii) Most of the small scale miners would not have benefited from the mining incentives like tax exemptions since it is a requirement that fuel must be purchased from a Bonded Oil Installation (BOI) in Dar es Salaam, loaded in a tanker which must be constantly monitored by the Appellant to the point of destination. It is clear that small scale miners who utilizes fuel in small quantities and with no storage facilities could not afford this arrangement.

(iv) Overhead costs are reduced by having one service provider to all small scale miners.

7. **My Lord and Members of the Tribunal,** In March 2009 the Appellants officers visited the Respondents business premises to conduct an audit and came out with a tax liability of Tshs. 3,594,883,825.40 said to be Excise Duty erroneously refunded in respect of fuel supplied by the Respondent to the small scale miners. The gist behind the demand of tax is that the Respondent is not a mining company hence not entitled to enjoy tax exemption under the law. A tax Demand Note was admitted by the Board and market as Exh. A4

8. **My Lord and Members of the Tribunal,** upon being served with a Demand Note of
Tshs. 3,594,883,825.40 on 8th June 2009, the Respondent objected the same on 12th June 2009 but to date the objection had never been dealt with, instead on 26th October 2009 the Respondent issued a DISTRESS WARRANT to the Respondent thus restraining its business. A copy of the Warrant of Distress was admitted by the Board and marked as Exh. A6.

9. **My Lord and Members of the Tribunal,** failure by the Appellant to deal with the Notice objection made the Respondent fail to lodge the Notice of Appeal and Statement of Appeal in time, a fact which made the Respondent seek the Boards, intervention where upon the Board allowed lodging the same out of time in a Ruling on Application No. 1 of 2011 between the same instant parties.

10. **My Lord and Members of the Tribunal,** upon lodging the Tax Appeal, case No. 11 of 2011 which is subject to this appeal, three issues were framed which are

    (i) Whether the Appellant (Now Respondent) is exempted from payment of tax under the law
    (ii) Whether the Demand, Notice served to the Appellant (new Respondent) is lawful
    (iii) To what reliefs are the parties entitled to

11. **My Lord and Members of the Tribunal,** after scrutinizing the testimony of witnesses, adduced evidences and counsel's legal arguments, the Board allowed the appeal and made the following orders.
    (i) That the claim by the respondent for Ths. 3,594,883,825.40 from the appellant (now Respondent) has no basis in law.
    (ii) The warrant of distress issued against the appellant (now Respondent) should be vacated
    (iii) Costs to follow the event.

12. Being aggrieved by the Board's decision, the Appellant have appealed to this Hon. Tribunal, hence, this appeal – which is supported by its various reasons and explanations in its written submissions upon which we wish to reply in the following paragraphs.

13. That the Honourable Board after scrutinizing all the adduced evidence and facts together with legal arguments was correct to hold that the case before it was in favour of the Respondent.

14. That the Honourable Board was correct by holding that Government Notice 480 of 2002 and section 4B of the Customs Tariff Act, 1976 extend exemption to the Respondent.

**My Lord and Members of the Tribunal,**

We wish to submit on Ground No. 2 of the Appellants written submission that the gist behind claim for the demanded tax is that the Respondent is not a mining company.

However, by virtue of section 4B of the Customs Tariff Act of 1976 and the Government Number 480 of 2002 not only mining companies may enjoy tax exemption, but also other persons sub- contracted by or on behalf of persons in mining of minerals may be granted tax exemption on their behalf. Section 4B of the customs Tariff Act of 1976 clearly states that:-

> **" A person engaged in mining operations which are not mining operations in respect of any mine after the first anniversary of the commencement of commercial production form that mine, or any person sub-contracted by that person for the purpose of those mining operations shall be entitled to import without payment of customs duty explosives, fuels, lubricants, industrial items and other supplies, machinery, vehicles and other capital equipment and spare parts for those equipment where such equipment have been verified to the satisfaction of the commissioner after consultation with the Minister responsible for minerals to be reasonably necessary for and for use solely in carrying on mining operations relating to that mine." (emphasis supplied).**

**My Lord and Members of the Tribunal,** by virtue of the said section 4B of the customs Tariff Act 1976, it is not necessary that for tax exemption on imported fuel to be granted the applicant must be a mining company or a person engaged in mining activities; even the sub-contracted person qualifies to apply and be granted tax exemption so long as there is a contract with a person engaged in mining operations. In this instant case the Respondent have a contract with

small scale miners through their association known as Arusha Regional Miners Association (AREMA) and its activities were constantly monitored by the Appellant in ensuring that the tax exempted fuel reaches the intended beneficiaries

Moreover, even the G.N 480 of 2002 amplifies that importation of tax exempted fuel may be made by or on behalf of mining companies as it states that:

> **2. "Subject to conditions specified in paragraph 3 and the procedure for remission specified in the schedule to this order, the whole of the excise duty payable on fuel imported or purchased prior to clearance through customs <u>by or on behalf</u> of mining companies that will be used solely for mining of minerals meant for export is hereby remitted"(Emphasis added)**

**My Lord and Members of the Tribunal,** from the dictated of the said GN. 480 of 2002; it is not necessary for mining companies to import fuel in order to quality for tax emption, but that can be done on its behalf by another company as it was done in this instant case that the Respondent acted for and on behalf of AREMA members. It is from this premise that Government Notice No. 480 of 2002 and the Customs Tariff Act of 1976 extend exemption to the Respondent.

15. **My Lord and Members of the Tribunal,** we submit on Ground No. 3, 4 and 8 of the Appellant's written submission that AREMA is a duly registered society whose members are small scale miners. In this regard, it was correct for AREMA to contract the Respondent to act on behalf of its members. The contract between the Respondent and AREMA were blessed by the Appellant who granted the tax exemption. Therefore, it is absurd for the appellant to swallow its words and come back to demand the correctly refunded tax monies – which was capital on the part of the Respondent.

16. **My Lord and Members of the Tribunal,** we submit on Ground No. 5 of the Appellant's written submission that the agreement between the Respondent and AREMA include supply of equipments. It is our submission that equipments includes fuel. The Oxford Advanced Learner's Dictionary defines the word "Equipment" to mean "**the things that are need for a particular purpose or activity".** It follows therefore that since fuel is needed in mining operations it falls within the purview of the meaning of the term equipment. Thus purchase of tax exempted fuel is within the agreement between the Respondent and AREMA.

17. **My Lord and Members of the Tribunal,** we submit on Ground No. 6 of the Appellant's
    Written submission that since the Respondent was lawfully acting for and on behalf of mining companies; it was correct for it to claim for and be refunded the tax which were paid up front on purchase of fuel. The whole process were constantly monitored and approved by the Appellant. There was no fraud involved in the process. Therefore the Board was correct to hold that the Demand Note served to the Respondent is unlawful.

18. **My Lord and Members of the Tribunal,** we submit on Ground 7 of the Appellant's written submission that since the Respondent's Notice of objection were not worked upon then it was premature to distrain the Respondent's business by way of DISTREES WARRANT. Moreover, the Respondent, being the *bona fide agent* of AREMA members was not supposed to be demand tax which it did not benefit out of it. Therefore the Board was correct to hold that the warrant of distress should be vacated.

19. **My Lord and Members of the Tribunal,** we submit on Ground No. 9 of the Appellant's written submission that according to what was tendered before the Boards, the Board was justified to hold that both the evidence and applicable law were in favour of the Respondent.

20. **My Lord and Members of the Tribunal, we** submit on Ground No. 10 of the Appellant's written submission that for the sake of justice it would have been proper for the Appellant to bring to the Board's attention its employees who closely monitor the Respondent's affairs in Arusha. Failure to do so, the Board was justified to comment that the Appellant was selective in bringing crucial evidence upon which to rely.

21. **My Lord and Members of the Tribunal,** we conclude our submissions by stating that

    (i) Excise Duty is indirect tax. One of the essential elements of an indirect tax is that tax is borne by the ultimate consumer of the goods. Had it been that the Respondent was not granted tax exemption, the tax incidence and impact would have fallen to the ultimate consumers of fuel, in this regard the small scale miners. The appellant's claim of this tax from the Respondent is in total disregard of its own granted exemption and is tantamount to turning indirect tax to direct tax at the detriment of the Respondent contrary to the spirit of the statute imposing the tax. The Respondent could have supplied tax paid fuel and the tax be borne by the small scale miners; but since it was acting in total compliance of the exemptions granted by the Appellant it will be unjust to punish the Respondent for mistakes, if any, of the Appellant since it is a principle of law that one cannot make his own mistake and expect others to suffer the consequences.

    (ii) One of the principles /canons in taxation is certainty. Taxpayers expect certainty in tax administration. It is absurd for the Appellant to grant tax exemption and later on claim that it was mistakenly granted. This is to cause uncertainly in tax administration.

    (iii) The legislators foresaw that some people may not benefit out of the tax exemptions; hence the inclusion of the words **"by or on behalf"** of person in the mining operations in the charging sections of the statutes. This need to be upheld in determining who is entitled to be granted tax exemption even if that person is not

engaged in mining business but sub contracted by a person and engaged in mining business.

(iv) The statute states clearly that for refunded tax to be claimed back, the tax exempted person must either sell or transfer the tax exempted fuel to a person who does not enjoy similar privileges. That is section 4C of the Customs Tariff Act, 1976 and Paragraph 3 of GN 480 of 2002. The Respondent had never sold nor transferred fuel to other persons. Therefore claiming back the refunded tax have no legal backing.

(v) The question whether the Respondent is entitled to exemption or not were supposed to be considered by the Appellant BEFORE and not AFTER grand of exemption. If the Appellant is of the opinion that small scale miners do not qualify to enjoy exemption, then tax should be demanded from such small scale miners who enjoyed the exemption and not the Respondent who were a mere service provider who by all standards did not benefit from tax exemption.

**My Lord and Members of the Tribunal,** from what is stated above **we pray that the Judgment of the Board be upheld with costs.**

We humbly submit.

**13.12.2012**

**QUORUM:**

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| **Judge. F. Twaib** | **-** | **Chairman** |
| **Mr. Shimwela** | **-** | **Member** |
| **Mr. K. Bundala** | **-** | **Member** |
| **For the Appellant** | **-** | **Mr. Beleko, Advocate** |
| **For the Respondent** | **-** | **Absent** |

**Mrs. Fortunata Mwise - RMA**

**Mr. Beleko**

I have been two occupied with done cases in the regions and could not file rejoinder submissions. I communicated with Mr. James Ndeyetabula and he has no objection to my being granted extension of time.

**ORDER**

(1) Extension of time to file Rejoinder submissions is granted. The same to be filed on or before 28/12/2012

(2) Deliberations on 10/1/2013

(3) Opinions on 24/1/2013

(4) Judgment 20/2/2013 at 14 hours.

**Judge. F. Twaib Chairman,Sgd**

**13/12/2012**

**04.02.2013**

**QUORUM:**

**Judge. F. Twaib - Chairman**

**Mr. Shimwela - Member**

**Mr. K. Bundala - Member**

**For the Appellant - Absent**

**For the Respondent - Absent**

**Mrs. Fortunata Mwise - RMA**

**ORDER**

Deliberations on 13/2/2013 at 14 hours.

**Judge. F. Twaib Chairman,Sgd**

**04/02/2013**

**22.03.2013**

**QUORUM:**

| | | |
|---|---|---|
| **Judge. F. Twaib** | **-** | **Chairman** |
| **Mr. Shimwela** | **-** | **Member** |
| **Mr. K. Bundala** | **-** | **Member** |
| **For the Appellant** | **-** | **Absent** |
| **For the Respondent** | **-** | **Absent** |
| **Mrs. Fortunata Mwise** | **-** | **RMA** |

**ORDER**

Deliberations on 3/5/2013 at 10am.

**Judge. F. Twaib Chairma, Sgd**

**Mr. Shimwela Member,Sgd**

**Mr. K. Bundala Member,Sgd**

**22/03/2013**

**3.05.2013**

**QUORUM:**

| | | |
|---|---|---|
| **Judge. F. Twaib** | **-** | **Chairman** |
| **Mr. Shimwela** | **-** | **Member** |
| **Mr. K. Bundala** | **-** | **Member** |

**ORDER**

Due to the absence of Mr. Shimwela, Member of the Tribunal, Deliberations are adjoined to 17/5/2013.

**Judge. F. Twaib** **Chairman,Sgd**

**03/05/2013**

**17.05.2013**

**QUORUM:**

| | | |
|---|---|---|
| **Judge. F. Twaib** | **-** | **Chairman** |
| **Mr. Shimwela** | **-** | **Member** |
| **Mr. K. Bundala** | **-** | **Member** |

**TRIBUNAL**

Deliberations conducted further deliberations on 24/5/2013 at 10am.

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| **Judge. F. Twaib** | **Chairma, Sgd** |
| **Mr. Shimwela** | **Member,Sgd** |
| **Mr. K. Bundala** | **Member,Sgd** |

**17/05/2013**

**24.05.2013**

**QUORUM:**

| | | |
|---|---|---|
| **Judge. F. Twaib** | **-** | **Chairman** |
| **Mr. Shimwela** | **-** | **Member** |
| **Mr. K. Bundala** | **-** | **Member** |

**TRIBUNAL**

Deliberations concluded.

**ORDER**

(1) Opinions (in writing) by 7/6/2013.

(2) Judgment on 28/6/2013 at 10am.

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| **Judge. F. Twaib** | **Chairma, Sgd** |
| **Mr. Shimwela** | **Member,Sgd** |
| **Mr. K. Bundala** | **Member,Sgd** |

**24/05/2013**

**IN THE TAX REVENUE APPEALS TRIBUNAL**
**AT DAR ES SALAAM**

**APPEAL NO. 8 OF 2012**
**(Appeal from the judgment and decision of the Tax Revenue Appeals Board in VAT Tax Appeal No. 11 of 2011 (P.M. Kente, Chairman) dated 5th March 2012)**

**COMMISSIONER GENERAL ................................. APPELLANT**

VERSUS

**MALAREX AGENCY (T) LTD. ................................. RESPONDENT**

## JUDGMENT

**F. Twaib, J, Chairman**

The facts material to the present appeal may be briefly stated. Malarex Agency (T) Ltd. ("the Respondent") is a limited liability company incorporated in Tanzania. It deals, among other things, with the importation and supply of mining and prospecting equipment. On the 1st day of July 2001, Malarex entered into an Agreement with the Arusha Regional Mining Association ("AREMA"), which was based at Mererani. Under the Agreement, Malarex undertook to import and supply mining equipment to AREMA.

On the strength of its Agreement with AREMA, Malarex invoked section 4A of the Customs Tariff Act, 1976, read together with the Third Schedule to the **Value Added Tax Act**, Cap 148 (R.E. 2006), and was granted an exemption on excise duty in respect of fuel the Appellant alleged to have supplied to the miners, who used it exclusively in mining activities, and thus in compliance with GN No. 480 of 2002.

In February 2009, the Appellant Commissioner General conducted a post-clearance audit in the business of the Respondent Malarex. The purpose was to verify compliance with the law in relation to fuel imported by the Respondent supposedly for use solely in the mining industry. The Commissioner General found the Respondent not eligible for the benefits given under the GN for three reasons:

1. Malarex is not a mining company;

2. The fuel that Malarex sold to small scale miners included excise duty which was thereafter erroneously refunded to the Respondent; and

3. The amount refunded was not reflected in Malarex' financial statements for the period under audit.

For these reasons, the Appellant issued a Tax Demand Note for the sum of TShs. 3,594,883,825.40. The Respondent refused to comply with the Demand Note, whereupon the Appellant issued a Warrant of Distress against it.

Aggrieved by this decision, the Respondent filed Appeal No. 11 of 2011 at the Tax Revenue Appeals Board. The Board found for the Respondent, holding that Malarex was entitled to the refund and that the Appellant Commissioner General's claim under the Tax Demand Note had no basis. The Board thus further ordered that the Appellant's Warrant of Distress be vacated.

The Board's decision did not satisfy the Commissioner General, who preferred the present appeal. Counsel for the Appellant has raised ten grounds of appeal.

In his written submissions, Mr. Juma Beleko for the Appellant began with a background account of the dispute. He referred the Tribunal to the evidence of AW1 Henry Nyiti, and submitted that under Exhibit A1, the Respondent's Agreement with AREMA did not include the supply of fuel. However, Mr. Beleko contends, the Respondent later unilaterally and

purporting to act on behalf of AREMA without its consent, introduced an addendum to the Agreement and applied to be supplied fuel under GN No. 480. The Respondent took supply of the fuel and then successfully applied for refunds of excise duty. The now disputed sum (TShs. 3,594,883,825.40) was refunded. However, following the audit, the Appellant found that the Respondent was not entitled to the tax refund.

Arguing in support of Ground No. 1, Appellant's counsel submitted that the Board erred in law and fact for failing to give a summary of all relevant evidence produced before it and the reasons for accepting or rejecting the evidence. He referred to rule 20 (1) of the Tax Appeal Board Rules, which require the Board to give a summary of all relevant evidence produced before it and give reasons for accepting or rejecting any piece of evidence.

During the hearing of this case, the Board admitted a total of 8 exhibits (Exhs. A1 to A8). Two witnesses gave evidence, one for each party. They were, respectively, AW1 Henry Nyiti and RW1 Aubrey Amon. Counsel Beleko submitted that apart from Exh. A1 (the Agreement), Exh. A3 which shows the names of alleged members of AREMA who are said to have received the tax exempt fuel, have no signature of the alleged beneficiaries. Counsel viewed the document's authenticity as doubtful. He concluded that neither the Respondent nor AREMA were mining companies to enjoy tax-remitted fuel as the Respondent's witnesses maintained.

Counsel for the Respondent has briefly responded to this argument by saying that the Board did take into account all the evidence available and thus reached a correct decision.

We think we need not be detained by this point. The Board did take into account, though in rather brief terms, the evidence as produced before it and as it appears in the documents presented by the parties during the hearing. What one may probably take issue with the Board is whether the Board was right in its analysis of the evidence. To that question, we now turn.

As we said, the Appellant has raised 10 grounds of appeal. Counsel Beleko has argued each and every one of them *seriatim*. We propose not to take this approach. We believe that we can do adequate justice to all the remaining nine grounds of appeal by consolidating them and determining them together, as we now proceed to do.

Generally, the appellant's counsel has argued that the Board erred in law in finding that the Respondent is entitled to tax remission under GN No. 480 and section 4B of the **Customs Tariff Act** of 1976. At this juncture, a reference to the two legal provisions is apposite. GN 480 states:

> Subject to the conditions specified in paragraph 3 and the procedure for remission specified in the schedule to the order, the whole of the excise duty payable on the fuel imported or purchased prior to clearance through customs by or on behalf of mining companies that will be used solely for mining of minerals meant for export is hereby remitted.

Section 4B of the Customs Tariff Act states:

> A person engaged in mining operations which are not mining operations in respect of any mine after the anniversary of the commencement of commercial production from that mine, or any person sub-contracted by that person for the purposes of those mining operations shall be entitled to import without payment of customs duty explosives, fuels, lubricants, industrial items and other supplies, machinery, vehicles and other capital equipment and spare parts for the equipment where such equipment have been verified to the satisfaction of the Commissioner after consultation with the Minister responsible for minerals to be reasonably necessary for and for use solely in carrying on mining operations relating to that mine."

From the above legal provisions, a taxpayer who wants to enjoy relevant tax remissions in respect of fuels (as is the case herein) must prove certain facts. With respect to the case at hand, those facts include:

- The taxpayer must be a person engaged in mining operations or a person sub-contracted by a mining company for purposes of such mining operations;

- The mining operations must not be in respect of any mine after the anniversary of the commencement of commercial production from that mine;

- The mining operations must be meant for export;

In its judgment, the Board found it for a fact that the Respondent was not a mining company. And, as the Appellant argues, there was no evidence that AREMA was a mining company to entitle it to an exemption under GN 480.

On the other hand, it has been argued on behalf of the Respondent, that it was because small-scale miners could not meet the heavy capital investment required for a taxpayer to qualify for tax exemption on fuels used for mining operations, that the small scale miners, through their lawfully registered association, AREMA, entered into an Agreement with the Respondent for the supply of fuels, which were used solely for mining operations by the said miners. This Agreement received the approval of the Appellant Commissioner General and the Ministry of Energy and Minerals. The exemption was thus granted. On the basis of the Agreement, the Respondent successfully applied for exemption from the Appellant. The exemption was granted on the arrangement provided for under item 1 and 2 (g) of the schedule to GN No. 480/2002.

As proof of these facts, the Respondent relied on various pieces of documentary evidence, including the Agreement, Letters of Exemption and Approvals, all of which were tendered in evidence at the Board.

It would appear to us, upon a careful analysis of the law as applied to the facts according to evidence, that certain basic facts are not disputed, including:

1. That the Respondent is not, in itself, a mining company, and neither is AREMA.

2. That the customs tax in dispute was in respect of fuels allegedly used exclusively for mining operations by AREMA members, who were small scale miners in Arusha Region.

3. The Agreement between the Respondent and AREMA did not specifically include fuels.

Counsel for the Respondent has argued at length about the purposes and rationale for the promulgation of GN No. 280 of 2002 and the benefits it is meant to deliver to small scale miners. It is clear from Exh. A1 that fuels were not specifically mentioned in the Agreement between the Respondent and AREMA. Indeed, this part of the Agreement, according to the Respondent's own witness at the Board, was concluded orally and not in writing.

That being the case, the Respondent should have brought sufficient evidence to prove that fact and, more significantly, their application for refund to the Commissioner General should have been based on the alleged oral submissions. Relying, instead, on the written Agreement which did not include fuel, without any explanation, is tantamount to misleading the Commissioner General to grant exemption where none is due. Hence, it was wrong for the Respondent to rely on the written Agreement to apply for tax exemptions.

Counsel for the Respondent has also relied on the definition of the word "equipment" to include fuel as per the Oxford Advanced Learners Dictionary. It defines "equipment" to include "the things that are need [sic!] for a particular purpose of activity". Hence, according to counsel, since fuel is needed in mining operations, it falls within the purview of the meaning of the term equipment.

This definition is, with due respect, too general. If accepted, something we are not prepared to do, it can include just about anything used for a particular purpose. Food can be an "equipment" at a dinner party. A bus

ticket can be an "equipment", since one needs it in order to travel. The list will be endless.

In the case at hand, this definition cannot be accepted. It is even more so because the law has mentioned both "fuel" and "equipment" among items whose customs duty can be exempted if the other conditions exist. If the legislature had intended them to be covered by one word only ("equipment") there would have been no need for mentioning all the other items in specific terms. And there is, indeed, no reason (and the Respondent has not attempted to offer any) why the parties to Exh. A1 did not use the word "fuel" and instead used "equipment" in their Agreement. One can only discern from all this that the parties to Exh. A1 never intended their Agreement to cover fuel. It was wrong for the Respondent to pretend that it did. The refunds made to them were thus erroneously made.

If we got Mr. Beleko well, what the Appellant contends is that for the particular transactions relevant to this appeal, the Respondent was not entitled to the refund since, it being not a mining company, AREMA not being one such company, and there being no evidence from the miners that they were the recipients of the said fuel, or that the minerals extracted by them were meant for export and were actually exported, the transactions could not qualify for the said exemption.

Though Mr. Beleko seems to put a lot of emphasis on the fact that neither the Respondent nor AREMA nor, for that matter, the small scale miners, are mining companies, that argument cannot, with due respect, hold water because the wording of section 4B of the Customs Tariff Act, Cap ,,, is clearly meant to cover non-mining companies. The word used is "any person", which is not confined to mining companies but includes natural persons such as the small scale miners. With this finding, the argument that only mining companies can enjoy the benefits of exemption under GN 280 of 2002 cannot stand and are consequently rejected.

However, the rest of the arguments advanced in support of this appeal, and especially those relating to the lack of evidence that the Respondent really qualified for exemption on fuels, are meritorious.

Indeed, it would appear to us that the dispute herein lies not in the law, as the law is quite clear and unambiguous. Rather, it is in the facts: Whether or not the transactions in question would fall under the exemptions provided by law. Perhaps for this reason, counsel for the Appellant has relied heavily on the evidence adduced at the level of the Board and argued, both before us and at the level of the Board, that there was no evidence proving the Respondent's alleged entitlement. Counsel also reminded us that, in terms of section 18 (2) (b) of the **Tax Revenue Appeals Act**, Cap 408, the onus lies on the taxpayer to prove that she is entitled to benefit from any tax relief. Did the Respondent sufficiently discharge this onus?

The evidence relied upon by the Respondent, both here and at the Board, consist of documentary information contained in Exhs. A1 and A3.

Having found as we have done above, we are of the settled view that the Commissioner General was right in revoking his approval for exemption in favour of the Respondent. The refunds to the Respondent were, therefore, erroneously made. Under sections 110 and 130 (1) of the **East African Customs Management Act**, 2004, the Appellant Commissioner General is entitled to recover customs duty erroneously paid to a taxpayer. The warrant of distress was thus properly issued.

In the upshot, we allow the appeal, set aside the orders of the Board, and affirm the Appellant's decision to issue a Tax Demand Note for the disputed sum. The Appellant shall also have the costs of this appeal.