IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SLAAM

(CORAM: MUNUO, J. A., KIMARO J. A., AND MANDIA J. A.)

CIVIL APPEAL NO. 8 OF 2007

M/S SKYLINK TRAVELS & TOURS (T) ..... APPELLANT

VERSUS

THE COMMISSIONER GENERAL

TANZANIA REVENUE AUTHORITY (TRA) ..... RESPONDENT

(Appeal from the Judgment and Decree of the

Tax Revenue appeals Tribunal,

At Dar es Salaam)

(Mackanja, J.)

Dated 26th May, 2006

In

The VAT Appeal No. 1 of 2006

JUDGMENT OF THE COURT

16 April & 11 May, 2012

Mandia, J. A.:

This is an appeal against the decision of the Tax Revenue Appeals Tribunal in VAT Appeal No. 1 of 2006. The appellant in this appeal is represented by Mr. Dilip Kesaria,

learned Advocate, while the respondent is represented by Mr. Juma Beleko, learned Advocate.

The appellant filed filed a memorandum of appeal containing three grounds, namely:-

"1. That the Honourable Tribunal erred in law in holding that the services of the Appellant which are done on behalf of an exempt principal, were changeable to VAT.

2. On any other ground as the Honourable Court may find sufficient to warrant the reversal of the decision of the Tribunal.

3. That the whole of the said decision is otherwise and generally wrong and faulty in law.

The undisputed background this matter shows that the respondent, the Commissioner General of the Tanzania Revenue Authority, charged the appellant, an airline travel agency, Skylink Travel and tours Ltd, Value Added Tax on airline travel tickets to the tune of Shs. 230,366,425/=. The appellant objected to the tax assessment and filed an appeal with the Tax Revenue Appeals Board, Dar es Salaam (hereinafter referred to as the Board). The Board upheld the appeal and vacated the tax assessment made by the respondent.

The respondent was dissatisfied with the findings and ruling of the Board and preferred an appeal to the Tax Revenue Appeals Tribunal at Dar es salaam (hereinafter referred to as the Tribunal). In its ruling, the Tribunal allowed the appeal and quashed the decision of the Board

with costs. The decision of the Tribunal resulted into the present appeals.

At the hearing of the appeal both Advocates agreed that there was only one issue before this Court, and this is whether or not a commission earned by an airline travel agent for issuing a travel ticket is the kind of taxable supply which is covered by the Value Added Tax Act and therefore chargeable to Value Added Tax. This issue was decided in favour of the respondent in the Tax Appeals, Tribunal. The ratio decidendi of the decisions of the Tribunal is found at page 107 of the record, and it goes thus:-

> "Both zero rated and exempt supplies be it of goods or services are not chargeable to VAT. In our considered opinion, respondent company i.e issuing of tickets to travelers **on behalf of the airlines** do not at all fall under the category of supplies which are described under the first Schedule to the VAT Act, 1997 to be

> zero rated supplied. Also they do not at al fall under the category of supplies which are described under the Second Schedule to the act to be exempt supplies. Had it been that the respondent Company was instructed by the airlines who are its principals to render transport services on their behalf, then the services on their behalf, then the services which were rendered by it during the relevant period would qualify to be exempt supplies under the Second Schedule to the Act. The respondent Company had no such instructions and therefore its services do not so qualify" (underscoring ours).

The underscored words show that the Tribunal found it as a fact, and held so, that the appellant was an agent of and acting on behalf of an airline or airlines in its job of issuing airline travel tickets. Despite holding as it did, the Tribunal

went on to hold that the services which the appellant company was performing were neither zero rated nor exempt so as to fall under the First and Second Schedule respectively of the Value Added Tax and, as such did not qualify for zero-rate taxation or exemption. The Tribunal inevitably found that the appellant company was a taxable person offering services which are taxable supplies within the meaning of sections 2 and 5 of the Value Added Tax Act, and was therefore liable to pay tax as assessed by the Commissioner General, Tanzania Revenue Authority.

Arguing the appeal before this Court, Mr. Kesaria put up the argument that under the Value Added Tax Act, tax liability arises under Section 3 (1) of the act in respect of the supply of all goods and services in mainland Tanzania, and that under Section 4 (1) of the Act the scope of the liability is defined as lying on every taxable person (as define in

section 2) dealing in taxable supplies as defined in section 5 as read together with section 2 which removes exempt supplies from the list of taxable supplies. Mr. Kesaria further argued that airline travel is an exempt supply by virtue of Section 2 of the Act as ready together with Item 7 of the Second Schedule of the Act. In his view the appellant is an agent of an airline, and since Item 7 exempts air transport, selling tickets on commission by an airline necessarily means the service by an airline agent, as defined in Section 2, is also an exempt supply. He clarified this position further by showing that the travel agent does not issue an invoice to the customer and sells the ticket fro the same price as that charged by the airline, and it is the airline which issues an invoice to the customer. The travel agent is therefore not an agent of the customer but an agent of the supplier of an exempt supply, i.e. the airline. Mr. Kesaria referred us to a letter from the Kenya Revenue Authority to the Kenya

Airways Limited and also a pamphlet from the Australian Tax Office of The Australia Government entitled "GST- travel agents and commissions" as authority that air travel arrangements made by a travel agent are exempt supplies which are not liable to Value Added Tax. He argues that it is only when an air travel agent engages in non-air travel arrangement that he can raise an invoice and subject himself to value added tax.

On his part Mr. Juma Beleko, learned Advocate argues that Value Added Tax is a consumption tax which is paid by the customer Mr. Beleko further argues that the travel agent receives a consideration in the of tickets so under Section 5 (4) he is a supplies of services and a taxable person who should keep records and accounts under Section 25 of the Act, and who should also file tax returns with the Commissioner under Section 26 of the Act. According to Mr.

Beleko, since the appellant is a company registered in Tanzania he has an obligation to issue tax invoice to buyers of tickets a table person. In his view tax law should be interpreted strictly, and to bring the Second Schedule into play in the case before us is wrong interpretation and can lead to absurdity. In his view the Tax Appeals Tribunal acted properly in excluding the appellant from the ambit of the Second Schedule of the Value Added Tax Act because issuing tickets is not part of transportation.

We have examined both arguments presented to this Court, and are of the view that the centre of the controversy is ticketing business conducted by airlines. We start by defining an airline in ordinary English. The New Oxford Advanced Learner's dictionary defines the word thus:-

> "airline – a company that provides
>
> regular flights to take passengers

and goods to different places.

The same dictionary also defines the words "airliner" thus:-

"airliner – a large plane that carries passengers.

Both Advocates are in agreement that the appellant in his job as a travel agent, carries on the business of selling airline tickets on behalf of the principal who is the airline itself but does not receive cash from the customer. Instead the agent receives a commission after the sale of batch of tickets given to him by the airlines. Mr. Kesaria has put forth the argument that the ticket prize charged by the airline is the same as that charged by the travel agent, and Mr. Juma Beleko has not contradicted this argument.

"5 (1) .....

(2) .....

(3) .....

(4) Unless otherwise provided in this Act or Regulations made thereafter, anything which is not a supply of goods, but is done for a consideration, including the grating, assignment or surrender of all or part of any right is a supply of services.

(5) .....

By the agent charging the same ticket prize was as that which would have been charged by the airline, the agent is not receiving any financial advantage for each individual ticket sale made. Since there is no advantage within the meaning of Section 5 (4) of the Value Added Tax Act, the ticket sale by an agent is not a supply of services within the meaning of Section 5 (4) of the Act. If the airline makes the ticket sale itself and not the travel agent, the ticket sale

becomes a supply of services within the meaning of the Act. It is therefore not correct, as submitted by Mr. Juma Beleko, that the appellant, as an agent, is a supplier of services who receives consideration and who should keep records of accounts and file tax returns as provided in Section 25 and 26 respectively of the value added Tax.

Mr. Dilip Kesaria, faulted the reasoning of the Tax Revenue Appeals Tribunal where it held that the services rendered by the appellant Company do not fall either under the first schedule or the Second schedule. He argues that the tribunal mixed up the requirements under the First and Second Schedules respectively. Mr. Juma Beleko, on the other hand adopts the reasoning of the Tribunal.

We have examined the provisions of the value Added Tax as they relate to the First and Second Schedule. To our mind, the tax regime set up by the value Added Tax Act

declares, under Sections 3 (1) and 5 (1), that the supply of goods and services in Mainland Tanzania are taxable as from the first day of July, 1998. There are three categories of goods and supplies that the same law declares as non-taxable. These are **zero-rated** goods and services under Section 9 (1) and the First Schedule of the act, **Exempt** supplies under Section 10 and the Second Schedule to the Act and special Reliefs under Section 11 and the third Schedule to the Act. For the purpose of this appeal the relevant Schedule is the first Schedule, Item 7 of which reads thus:

> "7. Transportation of persons, by any means of conveyance including air charter, but not including taxi cabs, rental cars, boats or boat charters"

In all the three schedules it is only Item 7 of the Second Schedule which is specific to transportation of

person. What item 7 says is that **transportation of persons by any means of conveyance including air charter is exempt** from value added tax. The item however excludes transportation of persons using taxicabs, rental cars, boats or boat charters from the exemption, so these modes of transportation as subject to value added tax. Each one of the three schedules is a separate category and cannot be mixed up with another category.

We interpret the words in Item 7 of the Second Schedule "transportation of persons by any means of conveyance including air charter to be inclusive of selling tickets for airline travelers. The dictionary definition of the word "airline" we quoted above supports our argument. If any airline's duty is to ferry passengers and goods from one place to another, the ferrying of passengers by air is transportation within the meaning of item 7 of the Second

Schedule. This means airlines are exempted from Value Added Tax. If airlines are exempt, an agent of the airline is necessarily exempt, since Section 2 defines an agent as "*a person who acts on behalf of another person in business.*" For an airline to transport a passenger, the passenger needs to buy a ticket. If the airline sells the ticket, the transaction is exempt supply. If an agent of the airline sells the ticket the transcript is also exempt. The Tribunal in the transcript we quoted above, reasoned that rendering transport services by an airline is different from issuing a ticket. This is evident from the words:-

> "Had it been that the Respondent Company was instructed by the airlines who are its principals to render transport services which were rendered by it during the relevant period would qualify to be

exempt supplies under the Second Schedule to the Act".

This is a wrong interpretation of Item 7. To render transport, an airline or its agent must sell tickets to the passengers, so selling tickets for air travel and flying from one point to another by the passenger using the ticket bought are part and parcel of the same transaction. We are satisfied that the divorcing of selling tickets and using the tickets to travel by air is a misdirection which is the root of the ruling being appealed from. Accordingly we find that the service rendered by the appellant is exempt supply within the meaning of Section 10 of the value Added Tax Act as read together with the Item 7 of the same Act. The appeal is allowed with costs.

DATED at **DAR ES SALAAM** this 27th day of April, 2012.

E. N. MUNUO

JUSTICE OF APPEAL

N. P. KIMARO

JUSTICE OF APPEAL

W. S. MANDIA

JUSTICE OF APPEAL

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

J. S. MGETTA

DEPUTY REGISTRAR

COURT OF APPEAL