IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MZIRAY J. A., KOROSSO, J. A. And KITUSI, J. A.)

CIVIL APPEAL NO. 132 OF 2017

GEITA GOLD MINING LIMITED ..... APPELLANT

VERSUS

COMMISSIONER GENERAL TANZANIA

REVENUE AUTHORITY ..... RESPONDENT

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

(Twaib, J.)

dated the 23rd day of February, 2017
in
Tax Appeal No. 24 of 2015

.....

JUDGMENT OF THE COURT

10th & 25th June, 2019

KITUSI, J.A.:

This appeal arises from a dispute over taxes imposed by the respondent on fuels and lubricants that were imported by the appellant. Tanzania Revenue Authority, henceforth referred to as TRA or respondent, raised a demand for payment of a total of TZS. 2,039,696,116.00 to be made by Geita Gold Mining Limited, the

appellant, being road toll and fuel levy for the said fuel for the years 2013, 2014 and 2015.

The appellant has been disputing the demand and unsuccessfully appealed to the Tax Revenue Appeals Board, vide Consolidated Customs and Excise Appeals Nos 4,9,16, and 21 of 2013; Nos 4,11,19, and 27 of 2014 and; Nos 2,7, and 8 of 2015. The appellant's appeal to the Tax Revenue Appeals Tribunal was equally unsuccessful. This, therefore, is a third appeal.

Most of the facts forming the background of this case are, fortunately, not in dispute. They go thus: -

The appellant is a Mining Company operating within the District of Geita now in the newly established Geita Region, formerly Mwanza Region. By virtue of its operations, it is a party to a Gold Mine Development Agreement (MDA) signed between it and the Government of the United Republic of Tanzania. Under Article 6 of the MDA, the appellant is entitled to import all items required for the design, construction, installation and operation of the gold mine, fuels inclusive. The details and relevancy of that agreement form a basis for considerable discussion in due course.

The appellant is also a holder of what is known as Special Mining for Gold Licence. On 29th June 2009 the Government issued the Road and Fuel Tolls (Remission) (Holders of Special Mining for Gold Licence) Order, 2009, GN. No 218 of 2009. Under this GN, holders of Special Mining for Gold Licences, like the appellant, are exempted from paying road tolls and fuel levy provided the same is used in the mining operation of the licenced areas. On 30th July 2010 another Government Notice was issued by the Government. This is Excise (Management and Tariff) Remission Fuel Imported by Mining Companies Order, 2010, GN. No. 268 of 2010, which exempted the appellant as a Mining Company from paying excise duty on fuel imported solely for use in mining activities.

Thus, the appellant enjoys exemption to taxes under Article 6 of the MDA as shown above, but such enjoyment is subject to conditions set out in the two GNs, that is, GN. No. 218 of 2009 and GN No 268 of 2010. Later these GNs were amended respectively by GN. No. 190 of 2010 and GN. No. 191 of 2011. The major condition relevant to the facts of this case is that the remission on the fuel is only valid as long as there is no transfer, sale or disposition of the said fuel in any way to

a person other than those entitled to the exemption. Though this fact is not disputed, the interpretation as to what it entails is a cornerstone to the parties' rival arguments.

So much for the matters of common ground.

It was contended by the appellant that its mode of operation involves use of various contractors to perform its mining activities and that to these contractors the appellant has an obligation, specified under the contracts, to supply inputs, including fuels and lubricants. It was further contended that the applicant gave fuel to the contractors to perform mining activities on its behalf and that there was no transfer or sale or disposition of the fuel such as to invalidate the remission under the MDA and GNs.

It is on the above background that the appellant found surprising and unjustified the respondent's series of demands for payment of the said TZS. 2,039,696,116.00 in total. The two contentions are strongly disputed by the respondent who maintains that the exemption was solely for the party to the MDA and as the fuels in question were consumed by persons other than the appellant, the exemption was unavailable.

Both the Board and the Tribunal concluded that by allowing the contractors who did not enjoy similar privileges to use the tax- remitted fuel, the appellant violated the condition stipulated in the GNs for enjoyment of the remission and was liable to pay the taxes as demanded by the respondent. Aggrieved, the appellant has appealed hereto on the following grounds;

1. *The Tax Revenue Appeals Tribunal erred in law by holding that among the conditions set out in GN No 218 of 2009 and GN No 268 of 2010 as amended by GN No 190 of 2010 and GN No 191 of 2011 respectively for a mining company to enjoy fuel exemption under the Mining Development Agreement with the Government of Tanzania is that the fuel must be used solely by a mining company in its mining activities;*
2. *The Tax Revenue Appeals Tribunal erred in law in holding that as long as the contractors were not enjoying similar privileges as those granted to the mining company the mining company's act of allowing the fuel to be used by the contractor cannot be tax exempt as that would run contrary to the condition that the*

exemption would cease the moment any disposition is made to a non-exempt, and;

3. *The Tax Revenue Appeals Tribunal erred in law and in fact by holding that the act of Respondent of issuing demand notices for requiring the appellant to pay excise duty and fuel levy on the grounds that the fuel imported was consumed by persons other than the appellant was correct in law.*

When the appeal was called for hearing, the parties entered appearance through counsel. Mr. Wilson Mukebezi and Mr. Allan Kileo, learned advocates, represented the appellant whereas Mr. Salvatory Switi, learned advocate, represented the respondent. They had earlier filed written submissions in accordance with Rule 106 of the Rules, the contents of which each adopted before addressing us orally.

To start, Mr. Mukebezi proposed to deal with the three grounds of appeal by addressing the following issues;

1. Whether the Tribunal was correct in law in holding that among the conditions set out in GN. No. 218 of 2009 and GN No. 268 of 2010 as amended by GN. No. 190 of 2010 and GN. No. 191 of 2011 respectively, for a mining company to enjoy fuel exemption

under the Mining Development Agreement with the Government of Tanzania the fuel must be used solely by a mining company in its mining activities;

2. Whether the Tribunal was correct in law in holding that as long as the contractors were not enjoying similar privileges as those granted to the mining company, the mining company's act of allowing the fuel to be used by the contractors cannot be tax exempt as that would run contrary to the condition that the exemption would cease the moment any disposition is made to a non- exempt and;
3. Whether the Tribunal was correct in law in holding that the respondent's act of demanding excise duty and fuel levy on fuel given to appellant's contractors is lawful and justiciable.

The learned counsel submitted as regards the first issue, that the appellant and the contractors are exempted by Article 6 of the MDA from paying taxes on materials or goods imported solely for the mining, so the conclusion by the Tribunal that the validity of the exemption ceases when the user of the fuel is not the mining company itself, is wrong. He submitted further that at the appellant's site there is

constantly an officer of the respondent who observes and takes note of every activity and that this officer knows that the fuel in dispute was given to the contractors and utilized by them solely for the appellant's mining activities. The submissions draw the attention of the Court to the two Government Notices none of which, it is contended, provides that the exemption is conditional upon the user being the mining company. The learned advocate emphasized that, all the appellant was supposed to do was to see to it that the fuel is utilized for the intended purpose in its mining activities.

Interestingly, Mr. Mukebezi submitted that he was aware of our decisions in the cases of; **Resolute Tanzania Limited V. Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 125 of 2017 and; **Geita Gold Mining Limited V. Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 103 of 2017 (both unreported). In the two cases we held that by giving the tax-exempt fuel to its contractors, a Mining Company enjoying remission abuses the attendant conditions regardless of whether or not the fuel is used solely for its mining activities.

However, Mr. Mukebezi has invited us to depart from our earlier decisions in the two cases on the ground that our view on the matter did not take into consideration that the fuel was not disposed of or sold or transferred to the contractors. He went on to point out that there was no sale, transfer or disposal of the fuel because the appellant did not cease to be the owner of the same and it/she did not receive payment in exchange.

In response to the submissions on the first issue Mr. Switi, learned counsel submitted that the Board and the Tribunal concluded that what the appellant is referring to as "giving of fuel" to the contractors amounted to sale. The learned counsel referred to page 770 – 771 of the record and submitted that this Court cannot consider matters of fact that have been conclusively and concurrently dealt with by the Board and the Tribunal. For that, he cited section 25(2) Tax Revenue Appeals Act cap 408 of the **ITA** for the principle that appeals to this Court are only on points of law.

On the suggestion by the appellant's counsel that we depart from our earlier decisions, Mr. Switi submitted that there is no justification

for us doing so because in the **Geita Gold Mining** case (supra) we concluded that even "giving" of the fuel is disposition.

The appellant's arguments as regards the second issue is that the Tribunal erred in holding that on the basis of Article 6 of the MDA the contractors should have imported the fuel for themselves. Mr. Mukebezi submitted that although the GNs do not mention the Contractor, the Court should take a purposive approach by reading the said GNs together with the MDA. He asked us to consider the analogy of a person who buys building material for his house and hires a contractor to build the house by using those materials. Submitting further, the learned counsel said the appellant had legitimate expectation that the contractors working in its mines would be covered by the remission.

On the other hand, Mr. Switi countered the submissions on the second issue by submitting that the MDA simply says that the Mining Company and contractors may import without restrictions but the said MDA, he argued, is subject to laws. The learned counsel submitted in addition, that the remission under the MDA does not mean that the contractors should not pay taxes when they are due.

The third issue is a concluding issue the answer to which will automatically flow by disposing of the first and second issues. To which we now turn.

As our starting point we think Mr. Switi is correct in submitting that tax appeals to this Court are only on matters of law and not facts. This is according to Section 25(2) of the Tax Revenue Appeals Act, Cap 408 RE 2002, as submitted by Mr. Switi, and there are several decisions of this Court to that effect. See; **Shell Deep Water Tanzania BV V. Commissioner General (TRA)**, Civil Appeal No. 123 of 2018 and; **Bulyanhulu Gold Mine Limited V. Commissioner General (TRA),** Consolidated Civil Appeals Nos 89 and 90 of 2015, (both unreported). The latter case was cited in the former. In a way that principle applies to other matters also coming to us on second appeals in terms of Section 5 (2) (c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002. Therefore, we are satisfied that what is before us for decision is whether the relevant instruments, that is, the MDA and the GNs were correctly interpreted by the Board and the Tribunal.

First of all, we ask ourselves; what do the rules of statutory interpretation in general require of us? This question was deliberated

upon at length in **BP Tanzania V. The Commissioner General of the Tanzania Revenue Authority**, Civil Appeal No. 125 of 2015 referring to our earlier decision in **Republic V. Mwesige Godfrey and Another**, Criminal Appeal (both unreported). The bottom-line consideration is the language of a particular statute and that when its language is plain, the Court need not go out of its way and interpolate.

Here we may only repeat what we said in the **Mwesige case** that:-

> *"Courts must presume that the legislature says in a statute what it means and means what it says:* ***CONNECTICUT HAT'L BANK V. GERMAIN, 122 s. it 1146, 1149 (1992)."***

In the **Resolute Tanzania case** (supra) the discussion on the rules of interpretation was more specific on tax statutes citing the case of **Cape Brandy Syndicate V. Inland Revenue Commissioner** (1921) 1 KB 64, which Mr. Switi has also cited to us. The following paragraph was reproduced in the case of Resolute, and we see no harm in reproducing it here;

"It simply means that in taxing one has to look merely at what is clearly said. There is no room for intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied ..." (at pg 15)

We now turn to the application of those principles to the case at hand, and here we reproduce the relevant Article 6.1 of the MDA:-

> *"The Companies and their Contractors will incorporate as much locally produced material, equipment, and supplies as possible in the construction and operation of the gold mine and any infrastructure. Nonetheless,* ***the companies and their Contractors shall be entitled to import without restriction, all items required for the design, construction, installation and operation of the gold mine, including fuels, spare parts*** *and replacements to the spare parts inventory,* ***subject to compliance with any restrictions imposed by the Laws of***

Tanzania. Provided that any imposts applicable to the importation of fuel including road toll will be subjected to an annual limit of us $ 200,000."

The relevant Rules under GN No. 218 of 2009 read:-

"2. (1) This Order shall apply to a holder of a special mining licence who has entered into Mining Development Agreement with the Government before first of July, 2009.

(2) [not relevant]

3. (1) Subject to the conditions specified in paragraph 4, the road and fuel tolls payable on imported or purchased gas oils for any sums exceeding US Dollars 200,000 per annum by a holder of a mining licence for gold and which is required exclusively for use in the production of minerals in the licensed areas is remitted.

(2) [not relevant]

*4. **The remission granted under this Order shall cease to have effect** and the road and fuel tolls shall become due and be payable in full as if this Order had not been made in the said gas oils if the said gas oils are **transferred, sold or disposed of in any way to another person or are used for purposes not entitled to enjoy similar privileges as are conferred under this Order."***

Those of GN No. 268 of 2010 read:-

"2. Subject to the conditions specified in paragraph 3 and the procedures for remission specified in the Schedule to this Order, the excise duty payable on fuel imported or purchased prior to clearance through customs by mining companies having a Mining Development Agreement (MDA) with the Government of Tanzania which provides for

remission of excise duty on fuel to be used solely for mining activities is hereby remitted.

3. ***The remission granted under this Order shall cease to have effect*** *and the excise duty shall become due and be payable in full as if this Order has not been made if the* ***said fuel is used for other purposes or sold or disposed of in any way to another person not entitled to enjoy similar privileges as are conferred under this Order."***

Two important features are clear from our reading of the MDA and the GNs. One, the MDA expressly mentions both the company and the contractors as beneficiaries. However, under the GNs only the holder of a mining licence, that is the company, is mentioned. In due course we shall discuss whether this omission to mention the contractors in the GNs is accidental and should be implied, or not. Two, what the MDA gives to both the company and the contractor is the unrestricted right to import fuel. We shall resolve the question whether

this right to import extends to cover the right on the part of the contractor to use tax- exempt fuel imported by the company.

We now venture to consider those two features. We are decided that since the MDA mentions both the company and the contractor, the exclusion of the contractors in the GNs must have been intentional. We therefore do not accept Mr. Mukebezi's suggestion that we should imply the GNs as including the contractors. In a **Ghanaian case of X-TRA Gold Mining Limited V. Attorney General,** Writ No. J1/23/2015 of 28 July, 2016 (http//ghalii.org/gh/judgment/supreme-court/2016/57 dated 14th June, 2019), the Supreme Court was faced with the issue whether an Act that had been enacted to repeal certain statutes repealed even statutes which it did not expressly mention. The court resolved the issue in the following manner:-

> *"The principle is that when an Act, in this case Act 793, contains a repealing section mentioning the Acts which it expressly repeals, the presumption against implied repeal of other laws becomes fortified on the principle 'expression unius est exclusion alterius.' In the*

words of Lord Blackburn in the case of ***GARNETT V. BRADLEY*** *(1877-78) 3 App. Case 944 at 965.* ***In as much as there are certain statutes enumerated which are repealed. Expression unius est exclusion alterius, and accordingly those statutes and those alone are repealed..."***

Although not in all fours with our case nor binding on us, the principle in that case is applicable in supporting our conclusion that the express mention of the company in the GNs excludes the contractors that are not mentioned thereunder. We also feel satisfied that the Tribunal's observation that the contractors should have imported the fuel for themselves, was based on the MDA which gives the said contractors unrestricted right to do so, same as the company.

Mr. Mukebezi also submitted that nowhere do the GNs set a condition that the fuel must be used by the company itself. That is indeed true, but we do not think it was necessary. Under Order 4 reproduced above, there are two conditions to be met by the importer of fuel. The first is that the fuel should not be transferred, sold or

disposed of in any way to another person. The second condition is that the fuel must be used for the intended purpose. We think since these two conditions exclude the unintended beneficiaries such as the contractors, it need not have gone further to state that the fuel must be used by the mining company itself.

The above discussion leads us to conclude that the act of the appellant giving the fuel to the contractors amounted to disposition, which is a breach of the condition under the GNs, and we see no justification for reading into the MDA and the GNs a meaning other than what is clear from the plain language of those instruments. This disposition in our firm view rightly triggered of the respondent's demand for payment of the taxes. We thus uphold the Tribunal's decision in that respect.

We have been invited to depart from our earlier decisions in **Resolute** (supra) and **Geita Gold Mine** (supra). We note that in the latter case a similar invitation was extended to the Court to depart from the **Resolute** Case. We think departing from an earlier decision should be more solemn and justified than it is in this case. Even the Rules of this Court make it clear that when a party intends to suggest a

departure by the Court from its earlier decision, such intention must be reflected in the Written Submissions and special attention to it must be drawn. That is Rule 106 (3) of the Tanzania Court of Appeal Rules, 2009, as amended. It provides;

> *"If the parties intend to invite the Court to depart from one of its earlier decisions, this shall be clearly stated in a separate paragraph of the submissions to which special attention shall be drawn, and the intention shall also be restated as one of the reasons".*

In the recent amendment to the Rules made by Government Notice No. 344 of 2019, published on 26 April 2019, this provision has been re-enacted as sub Rule (4).

But even assuming that the omission to indicate in the written submission would not render the prayer invalid, we are not persuaded that there are grounds for departing from the said earlier decisions of the Court. More importantly, even if there were grounds sufficient to justify a departure from our previous decisions, we would still consider whether it is proper for us to do so in view of what we stated in

Abually Alibhai Azizi V. Bhatia Brothers Ltd. [2000] T.L.R 288 citing **PHR Poole V. R** (1960) 1 EA 62.

> *" A full court has no greater powers than a division of the court... but if it is to be contended that there are grounds, upon which the court could act, for departing from a previous decision of the court, it is obviously desirable that the matter should, if practicable, be considered by a bench of five judges."*

For the reasons we have shown in this case, we answer the first and second issues in the affirmative, that is, the Tribunal was correct in holding that the tax-exempt fuel must be used by the company in the mining activities. Also, the Tribunal was correct in holding that the appellant's act of allowing the contractors use of the remitted fuel was a disposition and contrary to the set conditions. The transfer would only have been permissible if it had been done to another holder of a mining licence, as we held in our previous decisions. And lastly as regards the third issue, the Tribunal was correct in holding that the respondent's demand for payment of the taxes was lawful. As earlier intimated, after answering the first and second issues in the affirmative, the last issue naturally follows suit.

In fine, we dismiss this appeal in its entirety, with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 20th day of June, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

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

THE COURT OF APPEAL OF TANZANIA

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL