

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., MROSO, J.A. AND MUNUO, J.A.)

CIVIL APPEAL NO. 27 OF 2008

TANZANIA PORTS AUTHORITYAPPELLANT

VERSUS

COMMISSIONER GENERAL (TRA)RESPONDET

(Appeal from the judgment of Tax Revenue Appeals Tribunal

at Dar es Salaam)

(Shangwa, J.)

dated the 5th day of February, 2008

in

VAT Appeal No. 14 of 2007

JUDGMENT OF THE COURT

2 May & 20 June, 2008

MUNUO, J.A.:

The appellant, Tanzania Ports Authority, is challenging the decision of the Tax Revenue Tribunal in VAT Appeal No. 14 of 2007, before Shangwa, J. in which the said Tribunal dismissed VAT Appeal No. 5 of 2006 from Tax Revenue Appeals Board at Dar es Salaam. Having been unsuccessful in the first and second appeal, the appellant lodged this third appeal seeking to reverse the decisions of the lower Tribunals.

Mr. Kibuta, learned advocate, represented the appellant. The Respondent was represented by Mr. Primi, learned advocate.

During the months of July to December, 2003, the Respondent, Commissioner General (TRA) assessed Tsh. 3,073,554,420/= Value Added Tax (VAT) payable by the Appellant, Tanzania Ports Authority, on stevedoring services for foreign ships at the Dar es Salaam harbour. The appellant unsuccessfully challenged the assessment in the Tax Revenue Appeals Board in VAT Appeal No. 5 of 2006 whereafter he lost VAT Appeal No. 14 of 2007 giving rise to this appeal. It is the case of the appellant that stevedoring services fall under the category of "handling" goods for export so the tribunals below should have held that stevedoring of services are zero-rated under Section 9(1) of the VAT Act, 1997 as amended, Cap 148 R.E. 2002.

Mr. Kibuta, learned advocate for the appellant, lodged three grounds of appeal namely that -

- 1. the Tax Revenue Appeals Tribunal misdirected itself in law in holding that stevedoring services are no longer zero-rated under the First Schedule of the VAT Act following the*

1999 amendment to the VAT Act.

2. *The Tax Revenue Appeals Tribunal misdirected itself in law in failing to hold that stevedoring services are zero-rated under the First Schedule to the VAT Act because they fall within the bundle of over-side services provided by a foreign ship in relation to export cargo.*
3. *The Tax revenue Appeals Tribunal misdirected itself in law in failing to hold that the amendment to the VAT Act made in 1999 did not make stevedoring variable because the word "handling" still used by the VAT Act is wide enough to include stevedoring services.*
4. *The Tax Revenue Appeals Tribunal misdirected itself in law in failing to hold that upon a collective reading of Section 9(1) of the VAT Act and Paragraphs 1,2,3 and 4 of the First Schedule to the VAT Act the VAT assessment on stevedoring services is untenable.*
5. *The Tax Revenue Appeals Tribunal misdirected itself in law in failing to accept that the VAT Act provisions ought to be interpreted in line with the policy objectives for zero-rating*

export services.

6. *The Tax Revenue Appeals Tribunal erred in law in dismissing the appeal and ordering the appellant to pay costs".*

On the above grounds, Mr. Kibuta prayed that the decision of the learned judge be reversed and the appeal be allowed with costs.

In his submission, counsel for the appellant defined stevedoring services as the loading and unloading of a cargo ship. In his opinion, stevedoring services should be included in the category of handling goods for export and would thence be zero rated under the Provisions of Section 9(1) of the VAT Act, 1997 as amended, Cap 148 R.E. 2002, read together with the First Schedule item 3.

Counsel for the appellant observed that the VAT Act, Cap 148 R.E. 2002 was amended by Section 69 of the Finance Act No. 8 of 1998 which states, *inter-alia*:

"69. The principal Act is mended in the First Schedule by deleting item 3 and substituting for it the following provisions:

NOTES:

*For purposes of this schedule,
goods or services are treated
as exported from the United
Republic of Tanzania if –*

*(a) in the case of goods, goods
are delivered to or made
available at an address
outside the United Republic of
Tanzania as evidenced by
documentary proof accepted
to the Commissioner.*

*(b) in the case of services, the
service is supplied for use or
consumption outside the
United Republic of Tanzania
as evidenced by documentary
proof acceptable to the
Commissioner.*

*3. The supply which comprise the
transport of or any ancillary transport
service of loading, unloading,
wharfage, shore handling, storage,
warehousing and handling supplied in
connection with goods exported from
the United Republic of Tanzania or*

goods in transit through the United Republic of Tanzania or goods in transit through the United Republic of Tanzania whether such services are supplied directly or through an agent to a person who is not a resident of the United Republic of Tanzania.

4. *The supply of services which comprise the handling, parking, pilotage, salvage or towage of any foreign going ship or aircraft while in Tanzania.*

Counsel for the appellant conceded that the First Schedule, item 3 of the VAT Act, Cap 148 R.E. 202, was further amended by the Finance Act No. 12 of 1999 thus:

- (a) *deleting item 3 under the First Schedule substituting the following:*

3. *The supply which comprise of the transport of or any service ancillary to transport of or loading, unloading, wharfage shore handling, storage,*

*warehousing and handling,
supplies in connection with
goods exported from the United
Republic of Tanzania or goods in
transit through the Republic of
Tanzania or goods in transit
through the United Republic of
Tanzania whether such services
are supplied directly or through
an agent to a person who is not
a resident of the United Republic
of Tanzania;"*

Mr. Kibuta argued that as before year 2003, stevedoring services were zero rated and thence exempt from VAT under the VAT Act, Cap 148. Deleting stevedoring services from the respective amendments vide the Finance Act NO.8 of 1998 and Act No. 12 of 1999 was inadvertent; so stevedoring should be listed under handling of goods, which as reflected above, is zero-rated. He further contended that the handling of goods for aircraft is not charged VAT so the same should apply to stevedoring services in foreign ships. Such interpretation would be correct under the ejusdem generis rule, Mr. Kibuta contended, saying it would be in line with the policy objectives of the provisions of Section 9(1) of the VAT Act as amended, Cap

148 R.E. 2002 which is, to promote the export of goods within the spirit and letter of item 1 of the First Schedule to the VAT Act, 1997 which states verbatim:

"FIRST SCHEDULE

(Section 9)

ZERO RATED SUPPLIES,

- 1. Exportation of goods and services from the United Republic of Tanzania provided evidence of exportation is produced to the satisfaction of the Commissioner":*

All in all, counsel for the appellant contended that stevedoring services are zero rated within the context of handling of goods for export, and, or transit so we should reverse the decision of the learned judge and allow the appeal with costs.

For the Respondent, Mr. Primi, learned advocate, initially raised a preliminary objection contending that the appeal is incompetent for lack of leave to appeal. Upon the intervention of the Court, however, counsel for the respondent conceded that Section 24(1) of the Tax Revenue Appeals Act, 2001 Cap 408 R.E. 2002 gives a dissatisfied party a right of appeal to the Court of Appeal by stating:

"24(1) Any person who is aggrieved by

*the decision of the Tribunal shall
be entitled to appeal to the
Court of Appeal of Tanzania".*

Mr. Primi then abandoned the preliminary objection on the competence of the appeal. Indeed the appellant has a right of appeal to this Court under the provisions of Section 24(1) of the Tax Revenue Appeals Tribunal Act, 2001 Cap 408 R.E. 2002 and section 5(2) (c) of the Appellate Jurisdiction Act, 1979 Cap 141 Principal Legislation R.E. 2002. As the appeal is properly before the Court, Mr. Primi, learned counsel, rightly abandoned the preliminary objection.

On the merits of the appeal, counsel for the respondent contended that stevedoring services are not zero-rated under Section 9(1) of the VAT Act, Cap 148 and the First Schedule item 3 thereto, so the Court should uphold the decision of the learned judge.

Furthermore, counsel for the respondent referred to the provisions of section 69 of the Finance Act NO.8 of 1998 and section 35 of the Finance Act No. 12 of 1999, which amended the First Schedule to the VAT Act, Cap 148 by specifying zero-rated goods and services under item 3 to 5 of the First Schedule. Stevedoring services are not listed as zero-rated, counsel urged, so counsel for the appellant's contention that

stevedoring services fall under the item of handling goods for export is untenable, he maintained. Had the legislature intended to zero-rate stevedoring of services for foreign ships it would have done so specifically, counsel for the respondent argued. The appeal, Mr. Primi contended, is lacking in merit so it should be dismissed with costs.

The issue is whether stevedoring services are zero rated under the First Schedule item 3 to the VAT Act, Cap 148 R.E. 2002.

The learned judge resolved the issue negatively by observing that:

"Under the VA T Ace the services which may be treated as exported are listed under subparagraphs (aa) and (bb) of the Notes to the First Schedule. We have looked at those subparagraphs and found that stevedoring services are not listed as one of the services which may be treated as exported..... Stevedoring services are not listed as one of those services which may be treated as exported, item 1 of the First Schedule to the Act does not apply in this case as it does not zero-rate the supply of services of this nature.

As for the policy implications of not zero-rating stevedoring services

under Section 9 (1) of the VAT Act Cap 148 R.E. 2002 and the First Schedule thereto, the learned judge correctly stated that -

"the Government Policy objective for zero-rating export services under Section 9 (1) of VAT Act and the First Schedule to the Act is to encourage exports and to make our ports cheaper so that they can compete with shipping business with the ports of *Mombasa, Maputo and Durban**we do not think that the 1999 amendment of item 3 of the First Schedule to the Act by the Finance Act No. 12 of 1999 which removed stevedoring services to foreign ships from the types of services that are zero-rated, does not affect the said policy in any way, because exportation of goods and services from the United Republic of Tanzania provided evidence of exportation is produced to the satisfaction of the Commissioner is still zero-rated under item 1 of First Schedule to the Act.*

Learned counsel for the appellant vehemently argued that stevedoring services fall under "handling" goods for export so they are zero-rated though not specifically so listed under items 3,4 or 5 of the VAT Act, Cap 148 R.E. 2002.

With respect, we are not persuaded that stevedoring services are zero-rated under the First Schedule to the VAT

Act, Cap 148. The listed zero-rated items are specifically enumerated to exclude doubtful interpretations.

In terms of the provisions of Section 9 (1) of the VAT Act, Cap 148 it is stated that-

9(1) Any supply of goods or services is zero-rating by virtue of this subsection if the supply is of a description specified in the First Schedule to this Act.

The First Schedule to the VAT Act, Cap 148, was amended by the Finance Act No.8 of 1998 and the Finance Act No. 12 of 1999, sections 69 and 35 respectively. Neither amendment listed stevedoring services so there is no ambiguity in these amendments. Under the circumstances we think it would be remote and far-fetched to categorize stevedoring services with the handling of goods. Having omitted to specifically list stevedoring services as zero-rated the legislature intended, and, intends it should remain so. We therefore find merit in counsel for the respondent's assertion that a literal interpretation of amendments to the VAT Act, Cap 148 does not zero-rate stevedoring services. We have no ground for zero-rating the said excluded item.

In view of the above, we uphold the decision of the learned judge. We accordingly dismiss the appeal with costs.

DATED at DAR ES SALAAM this 20th day of June, 2008.

D.Z. LUBUVA

JUSTICE OF APPEAL

J. A. MROSO

JUSTICE OF APPEAL

E.N. MUNUO

JUSTICE OF APPEAL

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

(F.L.K. WAMBALI)

REGISTRAR