IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 19 OF 2008

MBEYA CEMENT COMPANY

LIMITED .....APPELLANT

VERSUS

COMMISSIONER GENERAL

TANZANIA REVENUE AUTHORITY ..... RESPONDENT

(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal as Dar es Salaam)

(Senkoro, H. K. , Kinabo, D., Mbiese, N.)

Dated the 19th day of September, 2007)

in

VAT Tax Appeal No. 7 of 2007

JUDGMENT OF THE COURT

13th October, 2010 & 14th April 2011

OTHMAN, C. J.:

The appellant, Mbeya Cement Cp. Ltd, appeals against the judgment and decree of the Tax Revenue Appeals Tribunal in VAT Tax Appeals

No. 7 of 2007 delivered on 19.09.2007. The respondent, the Commissioner General Tanzania Revenue Authority (hereinafter referred to as TRA) resists the appeal.

At the hearing of the appeal on 13/10/2010, Dr. Alex Nguluma, learned counsel represented the appellant and Mr. Juma Beleko, learned counsel represented the respondent.

In summary, the background of the appeal was this. An assessment for additional Value Added Tax (VAT) amounting to TZ Shs. 1,017,656,00/= for imported technical and management services which the appellant had received from 01/01/2001 to March, 2005 was made by TRA under section 43 (1) of the Value Added Tax Act, Cap 148 R. E. 2002 (hereinafter referred to as the Act) read together with the Value Added Tax (imported Services) Regulations, 2001 (G.N. No. 249 of 12/10/2011) (hereinafter referred to as the Regulations). The appellant lodged a notice of objection to TRA. On 18/08/2005, TRA declined to withdraw its assessment. The appellant appealed to the Tax Revenue Appeals Board, which on 27/04/2007

held that TRA had no powers under section 43 (1) of the Act to make the assessment.

Dissatisfied, TRA appealed to the Tax Revenue Appeals Tribunal, which on 19/09/2007 reversed the Board's decision. It held that under section 43 (1) of the Act read together with Regulations 5 and 6 of the Regulations, TRA had the powers to make a tax assessment on imported services on the appellant, a registered tax payer and that the failure by it to comply with those provisions of the Regulations occasioned a failure to account for the demanded tax. The appellant, aggrieved, filed this appeal on 18/02/2008.

The Memorandum of Appeal contains two grounds of appeal, namely, that:-

1. The Tribunal erred in law in holding that the Commissioner for VAT has powers under section 43 (1) of the Value Added Tax, 1997 to make a tax assessment on imported services on a registered tax payer.

2. The Tribunal erred in law in holdings that as a result of failure to comply with the mandatory provisions of the Value Added Tax (Imported Services) Regulations, 2001, the appellant failed to account for the demanded tax.

Arguing both grounds of appeal, Dr. Nguluma submitted that the tribunal's interpretation of section 43 (1) of the Act read together with Regulations 5 and 6 was wrong. It assumed that the failure to make tax returns on imported services gave the Commissioner General of TRA an automatic right to make a tax assessment on the same. That under section 43 (1), there must be a factual basis or evidence of a failure by a taxable person to pay any tax payable by it on imported services for the Commissioner General to make an assessment. He is only entitled to make one where there is non payment of tax on imported services and not on the mere failure by a taxable person to account for VAT on imported services or to file proper returns as this does not necessarily create an income for which he is entitled to asses VAT.

In reference to Regulations 5 and 6. the trust of Dr. Nguluma's submission was that the appellant was permitted there under to set off, reverse or counter-balance the output tax on imported services against input tax on the same, the net effect of which was that there was at the end of the day, no additional tax payable to TRA. That the non-accounting of VAT on imported services did not cause any actual underpayment of VAT on which tax could be assessed under section 43 (1).

On his part, Mr. Beleko readily agreed that section 43 (1) had to be read together with Regulations 5 and 6, which govern the modalities of charging the relevant tax. However, he submitted that the key question is whether or not the non-filing of returns mandatorily required under the Act and the Regulations can trigger the application of section 43 (1). The Commissioner General, he submitted, was entitled to asses VAT on imported services as the appellant had failed to file any VAT returns on imported services, it admittedly consumed. This had led to a failure to pay VAT.

A tax assessment, he urged begins with the filing of a return. This allows the Commissioner General to decide whether due tax is to be collected or not. The appellant as a taxable person was required under section 26 (2) (a) to lodge tax returns. It did not. The non filing of returns as required raises a presumption that tax is due or payable. Hence, an assessment is made. In this case, the Commissioner General had scrutinized the appellant's other tax returns and invoked section 43 (1) to levy the additional assessment.

Mr. Beleko also submitted that the issue is not the net effect of the filing or non-filing of the tax returns. The appellant cannot assume that it has no tax liability before the filing of a return. As there was a clear omission by the appellant to file proper returns, there was no way it could conclude that the effect of the non-filling of the returns is nil tax payable.

In a short rejoinder, Dr. Nguluma submitted that the Commissioner General is not a mechanical authority. That the failure to file a return as the law requires cannot create an income for which

he is entitled to assess VAT under section 43 (1) read with Regulations 5 and 6.

Having carefully examined the record and bearing in mind the lucid submissions by learned Counsel, in our considered view, the narrow, but important issue at the core of this appeal, and on which its outcome depends, principally turns on a proper construction of section 43 (1) of the Act read together with regulations 5 and 6 and their application to the material facts of the case. On this, the parties are diametrically opposed.

It is common ground that the appellant is a taxable person and a registered tax payer. Section 3 (1) of the Act imposes VAT on imported services. That tax is payable by the recipient of such services and not the supplier. It was undisputed that the appellant had received taxable imported technical and management services from abroad during the period from 01/01/2011 to March, 2005. It was required by law to file tax returns. These, it conceded were not filed with TRA.

Now, section 26 (1) of the Act requires a taxable person to lodge with the commissioner General a tax return in respect of each prescribed accounting period specified under subsections (2) and (3). It reads:-

> *26 (1). Every taxable person shall in respect of each prescribed accounting period, lodge with the commissioner a tax return, in a form approved by Commissioner containing any information which the form requires in relation to the supply by and to him of goods or services, the importation of goods, tax deductions or credits and any other matter concerning his business".*

Furthermore, sections 13, 14 and 16 deal with tax accounts and deduction modalities.

Section 43 (1) provides:-

> *"43 (1) Where in the opinion of the Commissioner, a taxable person has failed to pay any of the tax payable by him by reason of*

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(a) his failure to keep proper books of account, records or documents as required under this Act, or the incorrectness or inadequacy of the books, records; or

(b) his failure to make, or delay in making any return required under this Act or the incorrectness or indecency of any returns, the commissioner may assed the tax due for payment within one month of the date of the assessment, unless a longer period is allowed by the Commissioner or elsewhere in this Act".

Adverting next to the Regulations, in our considered view, Dr. Nguluma correctly explained that these were introduced in 2001 in order to capture VAT on technical and management services that had otherwise been avoided by certain businesses sourcing such services abroad, instead of obtaining them locally in Mainland Tanzania. Thus, a concept of reverse charge on services was introduced by Regulation 3(1).

Regulation 5 reads.

"5. The recipient of the service must account for the tax on imported service when:

(a) the service is performed or completed;

(b) the invoice for the service is issued;

(c) any payment for the service is made whichever in earlier."

Regulation 6 provides:

"6. The recipient of the service shall record in the VAT account:

(a) The tax due on imported services as output tax in the period in which the services are imported; and

(b) A claim for the account tax as input tax in accordance with normal Rules".

On a close and combined reading of section 43 (1) of the act and Regulations 5 and 6 and on the available fact, with respect, it would appear to us that the commissioner General was entitled to invoke section 43 (1) by raising an assessment of the tax due as the

appellant, a taxable person, had failed to pay any tax payable by it on the imported services by reason of failure to make any returns. In its legislative purpose and its plain statutory wording, section 43 (1) (b) is intended to vest in the Commissioner General the discretion to raise an assessment of any tax due and interest payable where in his judgment a taxable person has failed to pay any of the tax payable by him on account of his, *inter alia*, failure to make any return required under the act.

With respect, it is not correct, as argued by the appellant that there was no factual foundation on which the commissioner General could have made the assessment at issue. The record bears out that the additional assessment was not made out of thin air. It was based on material available to the Commissioner General, namely information on payments for imported technical and management services the appellant had made to La Farge and ten other foreign companies during the relevant accounting period and on which he could exercise the discretion vested in him under section 43. this is disclosed in TRA's letter Reference No. TRA/MB/VAT/VOL II/324/153 dated 20/06/2005 as well as that bearing Reference No. TIN 100-

157-365 of 25/08/2005 (as reflected on pp.13-16 and pp.35-36 of the record of appeal).

That apart, we would agree with Mr. Beleko that without having duly filed the proper tax returns that were required under the law, the appellant cannot validly contend that there was no tax due and payable by seeking shelter under Regulations 5 and 6. Given that there was admittedly no recording in the VAT account of the output tax in respect of imported services and of any tax claimed as input tax, one cannot readily argue that the net effect of all that is that there is no tax due or payable. Accordingly, grounds 1 and 2 of the appeal have no substance.

In the final analysis and for the foregoing reasons, in our considered view there is no cause for us to interfere with the decision of the Tribunal which is hereby affirmed. The appeal, without merit is hereby dismissed with costs.

DATED at **DAR ES SALAAM** this 31st day of March, 2011.

M. C. OTHMAN
CHIEF JUSTICE

J. H. MSOFFE
JUSTICE OF APPEAL

L. B. KALEGEYA
JUSTICE OF APPEAL

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

J. S. MGETTA
DEPUTY REGISTRAR