IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., LEVIRA, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 22 OF 2022

GAME DISCOUNT WORLD TANZANIA..... APPELLANT

VERSUS

THE COMMISSIONER GENERAL TANZANIA

REVENUE AUTHORITY..... RESPONDENT

(Appeal against the decision of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Kamuzora, Vice Chairperson)

dated the 12th day of August, 2021

in

Tax Appeal No. 26 of 2020

.....

JUDGMENT OF THE COURT

2nd June & 13th October, 2023

LEVIRA, J.A.:

The appellant, Game Discount World Tanzania Limited, a company trading in both locally made and imported goods lost before the Tax Revenue Appeals Tribunal at Dar es Salaam (the Tribunal) where she had appealed in Tax Appeal No. 26 of 2020 (subject of this appeal) against the decision of the Tax Revenue Appeals Board at Dar es Salaam (the Board). Before the Board, the appellant unsuccessfully challenged the respondent's assessment and decision on tax demand of TZS.2,766,872,664.92 advancing three grounds; to wit, underevaluation of imported goods; split of head office costs recoveries

and warehousing costs; and, undeclared foreign transport costs. As intimated above, the Tribunal upheld the decision of the Board where it stated that, the Board was right in holding that the respondent was justified to assess and demand payment of tax liability of TZS. 1,589,305,287.57 on warehousing costs and additional duties on import VAT amounting to TZS. 1,218,440,122.62 on foreign transport costs.

A brief background of this matter according to the record of appeal and as introduced above is that, the appellant is a company incorporated in Tanzania as subsidiary of Masstores Proprietary Limited based and registered in South Africa. The appellant being a company trading as a super store in both locally manufactured, produced and imported goods is subject to respondent's tax audit.

The dispute between the parties herein arose when the respondent conducted a post clearance tax audit covering years of income 2012, 2013 and 2014 and prepared a report which was objected by the appellant. The audit was aimed at verifying the appellant's tax compliance. After completion of the audit, the respondent issued a demand notice for payment of short levied duties amounting TZS. 3,890,948,213.78. However, the appellant was not satisfied and thus lodged a complaint with the respondent where that amount was reviewed and the demand was reduced to TZS. 2,886,323,526.41. The

appellant paid TZS.119,450,861.49 remaining with a balance of TZS.2,766,872,664.92 allegedly resulting from underdeclared warehousing costs and foreign transport costs. It transpired that, the appellant disputed the said balance and thus unsuccessfully appealed to the Board and Tribunal; hence, the present appeal. The appellant has presented before us five grounds of appeal, which for the reasons to come into light shortly, we shall not reproduce all of them herein except the first ground, which reads:

> *"1. The Hon. Vice Chairperson erred by misinterpreting the application of paragraph 9 (2) (b) of the Fourth Schedule to the East African Community Customs Management Act in connection with head office costs recoveries subject of the disputed customs and excise taxes leading to erroneous finding that head office costs are part of warehousing costs which ought to have been declared by the Appellant as part of customs value of stock, that is, goods for valuation of imported goods for tax purposes, resulting in undervaluation of vatable supplies."*

At the hearing of the appeal, the appellant was represented by Dr. Alexander J. Nguluma, learned advocate, whereas the respondent had the services of Ms. Consolatha Andrew, learned Principal State Attorney

assisted by Mses. Grace Makoa and Juliana Ezekiel, both learned Senior State Attorneys.

Before hearing of the appeal could take place in earnest, we engaged the parties in a brief dialogue regarding the propriety of appeal in terms of section 25 (2) of the Tax Revenue Appeals Act, Cap 408 R.E. 2019 (the TRAA). Dr. Nguluma was quick to realize and respond that four grounds of appeal out of five presented were not pure points of law; a position which was also shared by Ms. Andrew. He therefore abandoned the said four grounds. As a result, the parties agued only the first ground of appeal which was on pure point of law as quoted above.

Dr. Nguluma adopted the appellant's written submissions and the list of authorities he had filed in Court on 18th March 2022 and 29th May 2023 respectively, to form part of his oral arguments. Thereafter, he submitted that the contentious issue in this appeal is the interpretation of paragraph 9 (2) (b) of Fourth Schedule to the East African Community Customs Management Act, 2004 (the EACCMA) which was relied upon by the Tribunal holding that head office recoveries and warehousing costs are one and the same while evaluating the appellant's tax liability. According to him, that interpretation was wrong. He referred us to page 1452 of the record of appeal where the Tribunal

observed that Head office costs recoveries are part of warehousing costs and as such, ought to have been declared by the appellant as part of costs of goods for valuation of imported goods for customs purposes as required by the above paragraph. He argued that the finding by the Tribunal was wrong because the appellant provided her head office's account to the respondent to justify how the warehousing costs were derived by showing her new treatment of warehousing costs and the applicable supplier's rebates.

He submitted further in respect of costs incurred in running the warehouse; including, rebates through which the appellant received her goods for the Tanzania market. He said, according to the evidence on record, Jonathan Bastow (AW2) testified on how the arrangement was structured. He elaborated that, when the respondent's Tax Audit Department carried out an audit of the books of accounts, it did not request the cost for running the center from South Africa. In the circumstances, he argued, the appellant discharged her burden of proof contrary to the observation made by the Board and Tribunal on that issue and thus she cannot be faulted. He argued further that, it was equally wrong for the Tribunal to address the warehousing costs in terms of their recovery and calculation, the split of Head office costs recoveries and the warehousing costs, the appellant's trial balance and

the new method for charging warehousing costs to claim that these costs were undeclared and that foreign transport costs (loading, unloading and handling) should be included in the dutiable customs value or value of stock/goods. In support of his argument, he cited two persuasive foreign authorities from Uganda and Kenya, respectively. These were: **Auto Express Limited v. The Commissions of Customs and Border Control,** Appeal No. 119 of 2018**, Kenya Revenue Appeals Tribunal and Testimony Motors Limited v. The Commissioner of Customs, Uganda Revenue Authority,** Civil Suit No. 212 of 2012.

Dr. Nguluma emphasized that the matter before us involves interpretation of the EACCMA, 2004 as related to the interpretation of goods imported in Tanzania. According to him, the Tribunal failed to consider the method of valuation used to determine tax payable to goods imported in Tanzania. He submitted further that, section 122 (1) of the EACCMA provides for conditions as it stipulates that customs valuation for imported goods liable to *ad valorem* duty shall be determined in accordance with the Fourth Schedule. In addition, he stated, Paragraph 2 of Part 1 of the Fourth Schedule specifies that the customs value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export to

the Partner State. Paragraph 2 provides that the customs value shall be the transaction value and it also spell out the adjustments to be made to the value.

Therefore, it was the argument by Dr. Nguluma that although Grace Julius Tibanywana (RW1) in her evidence doubted the values declared by the appellant, however she did not place any evidence before the Tribunal to support her claim on record but merely asserted at page 1062 of the record of appeal that, "*the treatment by the appellant of these costs, together with foreign charges of transport cost formed part of the computation of the duties and taxes under the custom laws. Then based on that we correctly computed duties and taxes on transport costs.*" This, he said, is contrary to the requirements of section 110 of the Evidence Act, Cap 6 R.E. 2019 (the Evidence Act).

He referred us to pages 11 to 14 of the appellant's written submissions where, he said, the appellant demonstrated how she discharged her burden of proof as she established the costs and recoveries. Therefore, he argued that both the Board and Tribunal failed to interpret head office recoveries, warehouse recoveries and transport costs, as a result the Tribunal misinterpreted the costs to be paid. According to him, these were distinct. In the circumstances, Dr. Nguluma argued that the Board and Tribunal erred in finding that the

appellant was not entitled to costs recovery on the three items mentioned above. In fact, they were entitled, he insisted. Finally, he prayed for the appeal to be allowed with costs.

Responding to the appellant's arguments, Ms. Andrew submitted that the dispute between the parties herein started when the respondent conducted a post clearance tax, covering years of income 2012, 2013 and 2014. The audit aimed at verifying the appellant's tax compliance. The respondent discovered that there was noncompliance and thus issued a demand notice for payment of short levied duties which the appellant disputed before the Board and Tribunal unsuccessfully. She adopted the whole decision of the Tribunal and the respondent's written submissions as part of her submission. She went on to submit that this appeal raises three issues, to wit, first, whether the Tribunal erred by misinterpreting the application of paragraph 9 (2) (b) of the Fourth Schedule to the EACCMA in connection with Head Office Costs recoveries subject of the disputed customs and excise taxes leading to the finding that Head Office Costs recoveries are part of warehousing costs which ought to have been declared by the appellant as part of customs value of stock. According to the respondent, the Tribunal did not error and it did not misinterpret paragraph 9 (2) (b) of the Fourth Schedule to the EACCMA which requires loading, unloading

and other handling charges associated with transport of imported goods to be part of the value of stock. According to her, although the appellant claimed that the Tribunal erred in its finding, she did not adduce evidence to prove the actual agreements, actual warehousing costs and the applicable supplier's rebate, but it is also true that the appellant did not prove the allegation that there was a rebate or that she incurred costs contrary to the requirements of section 111 of the Evidence Act. In support, she cited the case of **Attorney General and 2 Others v. Eligi Edward Massawe and 104 others,** Civil Appeal No.86 of 2002 (unreported).

Ms. Andrew contended that the respondent was justified to assess and demand payment of TZS. 1,589,305,287.57 which resulted from underdeclared warehouse costs of goods imported by the appellant during the period under review. According to her, the appellant use of the term "Head Office Cost Recoveries" is just a matter of semantics which should not distort the actual meaning. The nature of expenses are warehousing costs which were not shown and stated as such. She referred us to page 1723 of the record of appeal and stated that the Tribunal was correct in its finding that, warehousing costs incurred by the appellant in importing goods are part of costs of goods or value of imported goods.

Regarding the appellant's complaint that the Tribunal did not follow the sequence of the method of customs valuation provided for under the Fourth Schedule to the EACCMA 2004, Ms. Andrew supported what was stated by the Tribunal in that respect. Indeed, she added, that is how the respondent has been applying those valuation methods and the same were considered while making valuation of the appellant's imported goods and finally decided to make adjustment to the value of imported goods in accordance with paragraph 9 (2) because the costs were incurred for the benefit of the seller but they were not included in the price actually paid or payable. She thus urged us not to consider the decisions of Uganda and Kenya cited by the appellant because they are distinguishable from the facts of the current matter. According to her, valuation of imported goods was done in accordance with the Fourth Schedule as required by section 122 of the EACCMA.

Ms. Andrew challenged the appellant's submission in respect of Head Office costs, where it was claimed that the appellant discharged the burden of proving that the Head Office costs recoveries do not include warehousing costs, which the respondent included in the total costs for valuation of imported goods to be purely factual matters which should not be considered by the Court. However, without prejudice, she said, the ascertainment by the appellant in that respect is incorrect

because there was no evidence whatsoever from the appellant's witness to prove that there was a rebate which was higher than the warehousing costs owed to Tanzania Game branch.

Emphatically, Ms. Andrew submitted that the appellant has treated the warehousing costs twice differently and contradictorily. First, by showing that the costs are included in the invoice of the stock before being exported from South Africa to Tanzania and second, that the costs were not paid at all as there was rebates on the years under review as per the notice of intention to amend demand note and the appellant's letter with reference to the notice to amend the demand note (Exhibits A1 and A4 respectively). She went on to state that in 2012 the respondent conducted an audit covering the period from 2007 to 2012 which revealed that the appellant did not declare warehousing costs as part of the costs for the stock imported during the period of audit and finally admitted the undervaluation and paid the resultant duties and taxes. In addition, she said, in 2015 during an audit, it was revealed that there were undeclared warehousing costs as usual, but, this time without any proof, the appellant called them Head Office costs recoveries. According to Ms. Andrew, this was another tax avoidance plan.

As regards the second issue, whether the Tribunal was correct to hold that the respondent was justified to assess and demand payment of tax liability on Head Office costs recoveries, it was her submission that the respondent was justified to assess and demand payment of tax liability of TZS. 1,589,305,287.57 on Head Office costs recoveries as it was correctly found by the Tribunal, that foreign transport costs are dutiable costs of imported goods. This, she said, is because the law requires loading, unloading and handling charges to be added to costs and form part of value of imported goods. Finally, Ms. Andrew urged us to dismiss the appeal with costs.

In rejoinder, Dr. Nguluma reiterated his submission in chief and insisted that Head Office costs recoveries are not part of warehousing costs; therefore, it was wrong for the respondent to think that the appellant changed the name to avoid tax. He urged us to allow the appeal with costs.

We have carefully considered the ground of appeal, parties' submissions and the entire record of appeal. The main issue calling for our determination is, whether the Tribunal erred by misinterpreting the application of paragraph 9 (2) (b) of the Fourth Schedule to the EACCMA in connection with the Head Office costs recoveries subject of the disputed customs and excise taxes leading to the finding that Head

Office costs recoveries are part of warehousing costs which ought to have been declared by the appellant as part of customs value of stock. It was the appellant's contention that warehousing costs were part and parcel of the Head Office costs recoveries and thus could not be taken in assessing the value of stock of imported goods. This averment, however, was strongly disputed by the respondent as she maintained that warehousing costs must be considered in assessing value of the stock of imported goods for duty purposes.

According to Email printout found at page 1015 of the record of appeal (Exhibit R1), costs relating to warehouse service were charged and pegged to the Head Office but was not declared for duty and tax purposes during importation of the goods. The appellant's trial balance (Exhibit R2) for the respective years under review reflected the amount incurred as warehousing costs and costs recovery, but such amount was shifted to the Head Office costs recovery account while the former account remained Nil, the same act is seen in Exhibit R3 where the warehousing costs were shifted to Head Office costs recovery account.

It is undisputed fact that the appellant is a subsidiary of Masstores Proprietary Limited with its Head Office located in Durban, South Africa. The goods were imported in Tanzania (her subsidiary company) but the warehousing costs subject of this dispute were accounted for in South

Africa (the Head Office) forming part of the Head Office costs recovery. Paragraph 9 (2) of the EACCMA, 2004 provides as follows:

> *(2) In determining the value for duty purpose of any imported goods, there shall be added to the price actually paid or payable for the goods:*
>
> *(a) the cost of transport of the imported goods to the port or place of importation into the Partner State; Provided that in case of imports by air no freight cost shall be added to the price paid or payable;*
>
> *(b) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation into the Partner State; and*
>
> *(c) the cost of insurance.*

The above provision indicates clearly that the value of any imported goods for duty purposes is determined by adding to the price actually paid or payable for the goods the cost of transport of the imported goods to the port or place of importation into the Partner State. Also, the cost of loading, unloading and handling associated with the transport of the imported goods to the port or place of importation into the Partner State add to the value of the said goods. It should be noted that when the language of statute is clear, it is not open to further interpretation. This position has been stated in a number of our decisions including **Standard Chartered Bank (Hong Cong) Ltd. v**

Mechmar Corporation (Malaysia) Berhad & 7 Others, Civil Revision No. 1 of 2012 (unreported), where the Court quoted with approval the decision of the Supreme Court of Canada in **R. Multiform Manufacturing Co.** (1990) 2 S. C. R. 624 where it stated:

> *"When the courts are called upon to interpret a statute, their task is to discover the intension of Parliament. When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament. There is no need for further construction when Parliament has clearly expressed its intention in the words used in the statute."*

In the instant case, we are settled that the language used in the provision under consideration is plain and thus it did not require any further interpretation.

It is worth noting that the cases cited by the appellant of **Testimony Motors Ltd** (supra) and **Auto Express Limited** (supra) of Uganda and Kenya, respectively, are distinguishable from the circumstances of the current case. In the case of **Testimony Motors Limited**, the issues before the High Court of Uganda were, whether the suspension of the operation of the transaction value method by the defendant contravened the provisions of section 122 of the EACCMA and if the first issue is answered in favour of the plaintiffs, whether the

plaintiffs are entitled to reassessment in accordance with the law. The High Court of Uganda mainly dealt with the applicability of Order 37 Rule 6 of Civil Procedure Code of Uganda in determining the first issue. It went further stating that it is supposed to determine the question whether the directive of the Commissioner of Customs of Uganda Revenue Authority to suspend the operation of the transaction value method set out under section 122 and the Fourth Schedule of the EACCMA is lawful. This is a question of enforcement of the Act and not construction of section 122 of the EACCMA and thus distinguishable from the facts of current matter as alluded to above.

Likewise, in the latter case of Kenya, the court dealt with the issue as to whether the respondent's act of departing from transactional value method in evaluating the appellant's goods without affording the appellant an opportunity to justify the values declared was lawful. While, in the present case, the Court is enjoined to interpret paragraph 9 (2) (b) of the Fourth Schedule to the EACCMA as quoted above in determining the custom value of imported goods by the appellant.

We are aware that in terms of section 25 (1) of the TRAA appeals to the Court against the decisions of the Tribunal are on matters of law only. However, although the appellant's complaint hinges on the misinterpretation of the application of paragraph 9 (2) (b) of the Fourth

Schedule to the EACCMA which is a point of law, the appellant has raised factual issues which were finally dealt with before the Tribunal and this should not have been reopened before the Court.

Without prejudice to the aforesaid, in the instant case, the appellant undeclared warehousing costs and further shifted the same as it appears in her trial balance to the Head Office recovery costs. Thus, it is obvious that the appellant did not declare the warehousing costs as part of the cost of the imported goods for duty purpose.

Also, regarding the cost of imported goods on foreign transport. It is the appellant's argument that the cost of transport of imported goods (stock) as seen in the trial balance were in respect of the goods imported in previous period and sold during the years under review. However, the respondent disputes this averment on the ground that the appellant has not given any proof on such contention. For example, she has not stated the closing balance of the stock for the respective years, what were added to the stock and what part of the previous stock was sold during the years under review. So, in the absence of cogent proof in terms of section 110 of the Evidence Act, the respondent was justified to assess and demand tax on undeclared foreign transport costs.

In the circumstances, the raised issue is negatively answered and the appeal is without merit. We dismiss it with costs.

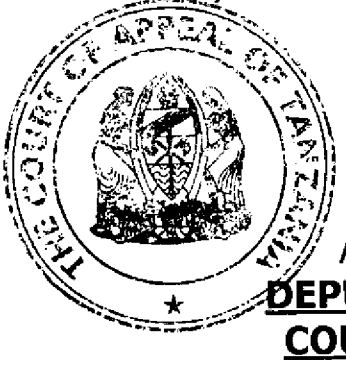
DATED at **DAR ES SALAAM** this 12th day of October, 2023.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 13th day of October, 2023 in the presence of Ms. Norah Marah, learned Counsel for the Appellant and Mr. Trofmo Tarimo, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



A. L. Kalegeya
DEPUTY REGISTRAR
COURT OF APPEAL