IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: SEHEL, J.A., KIHWELO, J.A And MDEMU, J.A.)

CIVIL APPEAL NO. 364 OF 2021

AGGREKO INTERNATIONAL PROJECTS LIMITED.....APPELLANT

VERSUS

COMMISSIONER GENERAL (TRA).....RESPONDENT

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

(Kamuzora, Vice Chairperson)

dated the 21st day of April, 2021

in

Tax Appeal No. 34 of 2020

.....

JUDGMENT OF THE COURT

16th August & 6th September, 2024

MDEMU, J.A.:

The appellant company appealed unsuccessfully to the Tax Revenue Appeals Board (the TRAB) challenging the decision of the respondent for disallowing input VAT claimed by the appellant. The appellant's further appeal to the Tax Revenue Appeals Tribunal (the TRAT) was not successful on account that, the appellant was not entitled to be refunded input VAT. The appellant is now before this Court faulting the concurrent findings of

both the TRAB and the TRAT for their alleged wrong interpretation of the provision of section 16 of the Value Added Tax Act, 1997 (the VAT Act). We will come to this later when resolving the grounds of complaint which we will also reproduce at that later stage.

As of now, we find it appropriate to provide a brief background of the appeal before us. The appellant operates in Tanzania as a branch of Aggreko International Projects Limited based in the United Kingdom. The major operation of the branch in Tanzania is in respect of the generation of electricity power during emergency. Sometimes in 2011, the appellant and its sole customer, the Tanzania Electric Supply Company Limited (TANESCO) agreed on the installation of 100MW generation power by the appellant. It was executed and concluded. The record of appeal reveals more on the unsuccessful negotiations between the appellant and TANESCO regarding the additional installation of 50MW. That besides, the appellant went ahead to import generators and paid input tax amounting to TZS 3,560,042,981.00.

In the year 2014, the respondent conducted audit in order to examine the tax affairs of the appellant for the years 2011 and 2012. The audit findings revealed that the appellant had claimed a refund of input

VAT on account that, the imported generators were for business carried on or to be carried on. The respondent on the other hand was of the contrary view, thus it disallowed the input VAT claimed. Aggrieved by the decision of the Commissioner General, the appellant moved the TRAB on appeal which, in the end, it concurred with the respondent's action of disallowing input VAT to the appellant. When dismissing that appeal, the TRAB made the following observations at page 757 of the record of appeal:

> *"The reasons stated were not, in our considered opinion, for the purpose of business. The imports were not going to produce any income and the reasons for the imports at the point of paying the input tax were not for the purpose of business, that is, no profitable consideration was to come out of the imports. Examining at the TRA assessment issue and paid for by the appeliant for the goods, some were paid up to December, 2011. Indeed, this was two months later after the project was cancelled."*

We stated that, the foregoing decision did not please the appellant. He thus preferred a second appeal to the TRAT. The main ground in the statement of appeal was that, the TRAB erred in holding that the generators were not imported for business purposes thus disallowing input

VAT. Like the TRAB, the TRAT also had a similar conclusion that the imported generators were not for business purposes, thus it was proper to disallow input VAT claims. The record of appeal at page 848 in this regard speaks as follows:

> *"It is therefore our conclusion that the appellant did not comply with the provision of section 16 (1) (b) of the VAT Act, 1997. No proof that the goods were used or were to be used for the purpose of business carried on or to be carried on by the appellant as per the requirement of section 16 (1) (b) of the VAT Act, 1997."*

Again, the appellant was in discontentment of the TRAT's findings, hence, the instant appeal on the following grounds:

1. *That, there is misapprehension of evidence on record by the Tax Revenue Appeals Tribunal in holding that the generators imported by the appellant were not for business purpose hence do not qualify deduction as required under section 16 (1) (b) of the Value Added Tax Act, 1997.*
2. *That, the Tax Revenue Appeals Tribunal erred in law in holding that the time of importation is immaterial for purposes of claiming input tax*

under section 16 (1) (b) of the Value Added Tax Act, 1997.

3. *That, the Tax Revenue Appeals Tribunal erred in law in holding that the respondent was justified to disallow input VAT claims of the appellant."*

At the hearing of the appeal on 16th August, 2024, the appellant company had the services of Messrs. Allan Nlawi Kileo and Norbert Mwaifwani, both learned advocates, whereas the respondent was ably represented by Messrs. Juliana Ezekiel, Athuman Mruma and Andrew Komba, Principal State Attorney and State Attorneys respectively.

Mr. Kileo who argued the appeal for the appellant intimated to stand by the written submissions he had filed in support of the appeal. The main thrust in both oral and written submissions was on the imported generators to be for the furtherance of business thus calling for deductions of the input tax. He firmly argued so, and if it is not, as was the position in both the TRAB and the TRAT, he then asked us to resolve as to what was the input tax paid for. The logical conclusion he made was this, that, the imported goods were for the furtherance of business thus allowable for input tax deductions.

He argued further that, the appellant's branch core business in Tanzania was for generation of electricity power during emergency, TANESCO being its sole customer. Basing on the negotiations for the additional 50MW between TANESCO and the appellant, the latter therefore had to import generators with the legitimate expectation of furtherance of business of power generation. This, to the learned counsel, and given the nature of business, that is, generation of power during emergencies, it was commercially sensible to mobilize resources by importing generators. This one, in the learned counsel's argument, does not require contractual arrangement as long as the imported generators were for power generation and also because the appellant's business was a registered one.

Another component which compelled the appellant to believe that the imported generators were for the furtherance of business was that, at the time of cessation of the negotiations for additional 50MW project, the appellant had already imported the said generators. According to the learned counsel, the generators reached the Dar es Salaam port on 17th November, 2011 and five days later, that is on 21st November, 2011, TANESCO cancelled the negotiations. It meant to the learned counsel that,

there was expectation of furtherance of business, more so TANESCO being the sole customer.

The learned counsel finally submitted that, the appellant imported generators for furtherance of business, paid the requisite input VAT and in terms of section 16 (1) (b) of the VAT Act, the said input tax is liable for deductions. He therefore argued that, the decisions of both the TRAB and the TRAT blessing the act of the respondent to disallow input tax claims did not have any basis, thus urged us to allow the appeal.

On her part, Ms. Ezekiel resisted the appeal. She as well relied on the written submissions filed earlier on and also made a few oral elaborations in rebuttal. She readily conceded on the conclusion of the installation of 100MW project between TANESCO and the appellant, so was the negotiations of additional generation of 50MW which did not materialize.

Regarding furtherance of business being the only condition for input VAT remission, the learned Principal State Attorney submitted that, not all payable input VAT are allowable for deductions. It is only those related to imports for furtherance of business which are amenable for input VAT deductions and not those for personal or home consumption. She added

that, the appellant paid input VAT as a legal requirement because the imported generators were for home consumption and not in the furtherance of business which would entitle it to benefit with the exceptions under section 16 (1) (b) of the VAT Act. She referred us to pages 723 and 726 of the record of appeal arguing that, there was no business or prospects of business between the appellant and TANECSCO following abortive negotiations for the 50MW project. The appellant therefore paid the input VAT while aware that there is no business in Tanzania between the appellant and TANESCO.

Regarding the alleged imported generators being part of the mobilization exercise for the installation of the additional 50MW under negotiations, it was her submission that, in the absence of any concluded arrangement regarding the installation of additional 50MW, there was no any justification for the appellant to go on with that mobilization merely on prospects of recurrence of business. It was her further argument that, there ought to be a concluded negotiations between the parties which would have informed the commencement of the mobilization on the part of the appellant.

She therefore concluded that, since the TRAT found that the appellant had no any ongoing business or any future business at the time the input VAT was paid on the imported generators, then those are the findings on matters of fact which came to finality as this Court stated in **Bulyanhulu Gold Mine Limited v. Commissioner General,** Consolidated Civil Appeals No.89 and 90 of 2015 (unreported). She thus invited us to refrain from dealing with factual issues. She, in the end, urged us to dismiss the appeal with costs.

In his brief rejoinder, Mr. Kileo submitted that, the requirement of section 16 (1) (b) of the VAT Act is not conditional upon the existence of a contract for business. According to the learned counsel, the importation of generators clearly depended on the expectation of successful negotiations which was however cancelled by TANESCO while all the shipment were already at the port. He thus said, both the TRAB and TRAT erred in their findings that there was no any business between the appellant and TANESCO.

We have taken into account the submissions by the learned counsel, both written and oral, and the entire record of appeal. We think the above quoted grounds of appeal boil down to the interpretation of section 16 (1)

(b) of the VAT Act which, for ease of reference, we find it appropriate to reproduce as hereunder:

> *"16 (1) The amount of any tax (in this Act referred to an input tax which is-*
>
> *(a) N/A*
>
> *(b) paid by a taxable person on the importation, during a prescribed accounting period of any goods or services used or to be used for the purposes of business carried on or to be carried on by him, and for which the taxable person is registered; may, so far as not previously deducted and subject to exceptions contained in or prescribed under this section, be deducted from his tax liabiiity or otherwise credited to him in respect of that prescribed accounting period or a later prescribed accounting period."*

Before we go to the alleged interpretation of the section, we note that, the appellant imported generators and paid all the dues, input VAT inclusive. It is also clear in the record of appeal that, at the time of the importation of those generators, the 100MW project between TANESCO and the appellant had already been completed. Regarding the additional 50MW power generation project, the record of appeal at page 314 clearly

indicates that, there were ongoing negotiations between the appellant and TANESCO which did not materialize. This followed the cancellation of the additional 50MW power generation project by TANESCO. Let the record of appeal speak by itself as hereunder regarding such state of affairs:

> *"In 2011, AIPL TZ established a 100MW emergency power plant for TANESCO in Dar es Salaam. After having successfully installed that, AIPL TZ was negotiating an additional 50MW power generation project with TANESCO. The potential cites were to be based in Morogoro, Arusha and Dodoma. As it was emergency power requirement by TANESCO and* ***the negotiations were progressing positively, AIPL TZ imported generators and other plants and equipment into the country read to execute these projects as soon as all formalities had been concluded.*** *Please find attached in Appendix 1 relevant correspondences in this regard which clearly show* ***that there was a very strong likelihood of the contract being signed.*** *Although the generators were imported in Tanzania before they could be cleared through customs,* ***TANESCO cancelled the contract*** *due to certain internal issues and the project did not materialize."* [emphasis supplied]

Basing on the foregoing, we note that, there was no furtherance of business or prospects of any business suggestive to create contractual arrangement between the appellant and TANESCO regarding the importation of those generators. We are saying so because, **one**, as per the record of appeal, the installation of 100MW power generation project was complete and **two**, the additional 50MW power generation project which was under negotiations, was fruitless because the negotiations between the appellant and TANESCO were not concluded. This was so because TANESCO cancelled the deal prior to the conclusions of the alleged negotiations. It is therefore not correct as submitted by Mr. Kileo that the additional 50MW power generation project did not require contractual arrangement under the circumstances. As we note in the record, the said negotiations intended to create contractual arrangement leading to the signing of a contract for the installation of additional power of 50MW.

We note further that, the evidence regarding absence of business was in the knowledge of the appellant. We are of that view because the appellant's decision to import generators according to exhibit AG6 was

based on two aspects. **One** that, it was an emergency power requirement and **two**, that, negotiations were progressing positively.

Next is what Mr. Kileo urged us to deliberate as to what was the input VAT paid for if at all it was not for the furtherance of business? Mr. Kileo invited us to resolve this, while at the same time maintaining his stance that, there were prospects of business which compelled the importation of the alleged generators. We begin with the legal position by reproducing section 2 of the VAT Act on definitions of "import" and "input tax" as follows:

As to import it means the;

> *"Bringing or causing goods to be brought from outside the United Republic into Mainland Tanzania."*

With respect to input tax on taxable imports, the law provides;

> *"Value added tax imposed on a taxable import of goods by the person"*

Our understanding of the VAT Act on imports is that, the liability to pay VAT on taxable import arises by operations of the law. We see that, as long as there is importation of goods within the meaning of section 2 of VAT Act, then such goods have to be taxed. **Baraka Melami Saiteu**

(2023), Tax Law and Practice in Tanzania, 3rd Edition, Juris Publishers Ltd. while discussing the application of section 2 of the VAT Act on taxable imports states at page 248 of his work that:

> *"The VAT Act also imposes VAT on taxable imports. Import is defined under section 2 of the VAT Act to mean bringing or causing goods to be brought from outside the United Republic into Mainland Tanzania. The law requires taxable import be paid where goods are entered for home consumption in Mainland Tanzania."*

Given the foregoing passage, we agree with the learned Principal State Attorney in her argument that, the obligation to pay input VAT at the time of importation of the generators was a legal one. It did not base, in our view, on the advice of the respondent as the learned counsel invites us to believe. We further note that, page 332 of the record of appeal also responds to the reasons of paying such input VAT. It is in this way:

> *"Following the news on Tanzania yesterday, you are advised to put the import process on hold. After checking all options, I recommend that we continue the import process, paying the necessary charges as forecasted and take the cargo to a secure warehouse."*

The above position therefore resolves two basic issues; **one** is in respect of the paradox raised by Mr. Kileo on the reason to pay input VAT if at all it had no connection with the furtherance of business as observed by the TRAB and the TRAT. **Two** is in respect of what we alluded earlier on that, at the time of importing the alleged generators, there was no any furtherance of business or expectation of the occurrence of business between the appellant and TANESCO. That suffices to state therefore that, the appellant was obliged to pay input tax as a statutory obligation. This latter was the firm position of the TRAT at page 836 of the record of appeal that:

> *"That, even if the appellant would have no option to export the good, as the law stands and was forced to pay the input taxes, yet, much as the goods were not intended to be used for the purposes of business, the input tax credit would be rightly disallowed as well."*

Now, having found the want of any furtherance of business between the appellant and TANESCO, the question that follows is whether it was proper for the respondent to disallow the input VAT claims of the appellant. We hinted earlier on that; this takes us to the interpretation of section 16

(1) (b) of the VAT Act which we reproduced above. As said, Mr. Kileo relied on business prospects given the ongoing negotiations at the time regarding the additional 50MW power generation which however did not materialize. That besides, he fronted to have commenced the mobilization basing on those negotiations before it was cancelled. Ms. Ezekiel was of a different opinion. Hers was that, the appellant was aware of the non-availability of any business, thus it cannot benefit on the operation of the section on input tax credit claims.

Basing on the facts of this tax dispute, both TRAB and TRAT came up with the position that section 16 (1) (b) of the VAT Act cannot apply because claims of input VAT is allowed only on importation of goods, generators in this tax dispute, used or to be used for purpose of business carried or to be carried on. As observed by TRAT at page 846 of the record of appeal, which we find to be the correct position, there was neither business nor prospects of business between TANESCO and the Appellant regarding the addition of 50MW emergency power generation. For that matter, reliance on the outcome of the ongoing negotiations, which later became frustrated, wrongly formed the basis of mobilization on the part of the appellant.

We finally find nothing to fault in the findings of the TRAT that section 16(1) (b) of the VAT Act cannot apply to credit input VAT to the appellant because the imported generators were not for the furtherance of business between TANESCO and the appellant in respect of generation of the additional 50MW.

The appeal therefore fails on that account. We thus dismiss it with costs.

DATED at **DAR ES SALAAM** this 5th day of September, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 6th day of September, 2024 in the presence of Mr. Mahmoud Mwangia, learned counsel for the Appellant and Mr. Achileus Charles Kalumuna, learned State Attorney for the Respondent is hereby certified as a true copy of the original.

J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL