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IN THE SUPREME COURT OF ZAMBIA **Appeal No. 11 of 2012**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

STALLION MOTORS LIMITED **1st Appellant**

AFRICAN CARGO SERVICES LIMITED **2nd Appellant**

AND

ZAMBIA REVENUE AUTHORITY **Respondent**

Coram: Hamaundu, Wood, JJS and Kaoma Ag. JS.

On 5th June, 2014 and 1st August, 2014

For the Appellants: Mr. J. Jalasi and Mr. L. Linyama - Messrs Eric Silwamba, Jalasi & Linyama Legal Practitioners.

For the Respondent: Mrs. D. B. Goramota-Legal Counsel and Ms. S. Zimba, Legal Officer.

JUDGMENT

WOOD, JS, Delivered the judgment of the Court

CASES REFERRRED TO:

1. **Shilling Bob Zinka v The Attorney–General (1990/1992) Z.R.73.**

2. **Canadian Airlines International Limited v The Commissioner of Customs and Excise, LON/93/587A (1994).**
3. **Nkhata and four others v The Attorney-General of Zambia (1966) Z.R. 147.**
4. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172.**
5. **Kasembo Transport Limited v Zambia Revenue Authority 2007/RAT/AT/11.**

LEGISLATION REFERRED TO:

1. **Companies Act, Cap 388 of the Laws of Zambia.**
2. **Value Added Tax Act, Cap 331 of the Laws of Zambia.**
3. **Customs and Excise Act, Cap 332 of the Laws of Zambia.**
4. **Value Added Tax (General) Rules of Gazette number 86 of 1996.**
5. **Customs and Excise (Ports of Entry and Routes) Order No.16 of 2003.**
6. **Value Added Tax (Zero rating) (Amendment) Order 2003.**
7. **Statutory Instrument No. 109 of 1996.**

The brief facts leading to this appeal are that the 1st appellant is a company incorporated in Zambia under the provisions of the **Companies Act, Cap 388 of the Laws of Zambia**, with an office in Ndola. Its principal business is bulk transportation. The 2nd appellant on the other hand, is a company registered in the United Kingdom with a foreign branch in Zambia called ACS Zambia Limited. ACS Zambia Limited is registered as a branch of a foreign

company with a representative office in Kitwe. It provides freight forwarding services predominantly in Central and Southern Africa, primarily for the export of copper from Mopani Copper Mines (MCM) to various destinations worldwide. The function of ACS Zambia Limited is to coordinate the loading of copper, obtaining customs clearance and providing loading reports. For all intents and purposes, ACS Zambia Limited is simply a liaison office and as such it is not registered for Value Added Tax purposes in Zambia.

The 2nd appellant had a contract with Glencore AG, a company registered and trading in Switzerland, for the movement of copper from the MCM mine site in Mufulira, on Free Carrier (FCA) basis to Free on Board (FOB) vessels anchored at the Tanzanian port of Dar-es-Salaam. In order to meet its contractual obligations to Glencore AG, the 2nd appellant contracted the 1st appellant to transport the copper from the MCM mine site in Mufulira to Kapiri Mposhi, for purposes of transshipment onto Tanzania-Zambia Railways (TAZARA) for onward export through Dar-es-salaam to destinations worldwide.

What gave rise to the appeal before the Revenue Appeals Tribunal was that the respondent undertook a Value Added Tax compliance visit to the 1st appellant's premises in Ndola for purposes of establishing whether or not the 1st appellant was complying with the **Value Added Tax Act, Cap 331 of the Laws of Zambia**. The inspection covered the period November 2004 to April 2006. From the inspection, the respondent established that the invoices that had been issued by the 1st appellant to the 2nd appellant in respect of services rendered by the 1st appellant for the haulage of copper from Mufulira to Kapiri Mposhi were exclusive of Value Added Tax. In other words, the respondent established that the 1st appellant had been zero-rating transportation services of copper from Mufulira to Kapiri Mposhi contrary to the provisions of the **Value Added Tax Act**.

Arising from that inspection, the respondent applied the standard rate to the transportation services and consequently arrived at an assessment of Value Added Tax against the 1st appellant in the sum of K43,689,599.60. Although the 1st appellant raised an objection to the assessment, the respondent confirmed

the assessment on 30th May, 2006 and immediately proceeded to issue a Demand Notice dated 30th May, 2006. The appellants lodged an appeal with the Revenue Appeals Tribunal and obtained a stay.

In its ruling, the Revenue Appeals Tribunal concluded that all activities linked to the export of goods qualified for zero-rating. The tribunal added that the only burden that the taxpayer was obliged to discharge was to adduce evidence to show that the goods in question were exported. Further, the transaction was a single supply of different components chargeable at the rate applying to the main element of supply, which in this case was the transportation of goods meant for export, which was zero-rated. The respondent appealed to the High Court against the decision of the tribunal.

On appeal, the learned Judge held that the tribunal had erred in law and accordingly upheld the appeal and quashed the decision of the tribunal. The learned Judge found that the movement of copper from Mufulira to Kapiri Mposhi was a domestic transportation which ought to be taxable at a standard rate as it is a local supply. He stated that the international journey started from

Kapiri Mposhi where the cathodes were declared for purposes of exportation in accordance with the provisions of **Section 53(1) of the Customs and Excise Act, Cap 332 of the Laws of Zambia**, as evidenced by the bills of entry. He found that since the journey from Kapiri Mposhi to the destination outside of Zambia was by TAZARA, the chain of supply had been broken and therefore, the transportation of the cargo from Mufulira to Kapiri Mposhi was not ancillary to the export of the cargo. The learned Judge also found that the appellants did not produce export documents stamped by the customs authority of the country of destination to enable them claim input VAT for Zero rated supplies in accordance with **Rule 18 (2) of the Value Added Tax (General) Rules of Gazette number 86 of 1996**.

The appellants have now appealed against the decision of the High Court and have filed five grounds of appeal as follows:

1. The learned trial Judge erred in law when he held that for a transport service to be zero-rated, the service must be provided up to the port of exit or exportation.

2. The learned trial Judge erred both in law and in fact when he held that the provisions of the **Value Added Tax (Zero rating) (Amendment) Order 2003**, contained in **Statutory Instrument No. 9 of 2003**, in particular the provisions of Groups C, do not apply to the movement of goods from a place within Zambia to another destination within Zambia before the goods are ultimately transported to the port of export.

3. The learned trial Judge misdirected himself in law and in fact when he held that the supply of transshipment services was not contemporaneous to the export of goods.

4. The learned trial Judge erred in law when he held that the chain of supply was broken at Kapiri Mposhi, when the goods were offloaded and loaded on trains for onward transmission to the port of export.

5. The learned trial Judge erred in law when he held that the 1st appellant's goods must obtain the stamp of a customs authority of the country of destination in accordance with **Rule 18 (2) of the Value Added Tax (General) Rules,** contained in **Gazette Notice Number 86 of 1996**, creating an

extra territorial application of the provisions of the **Value Added Tax Act, Chapter 331 of the Laws of Zambia**.

Counsel for the appellants opted to argue grounds one to four of the appeal as one, we shall accordingly deal with the four grounds of appeal as such.

In support of the first ground of appeal, counsel for the appellants submitted that in the court below, it was not in dispute that **Statutory Instrument No. 109 of 1996** was amended by the provisions of the **Value Added Tax (Zero Rating) (Amendment) Order, 2003,** contained in **Statutory Instrument No. 9 of 2003**. Counsel contended that it was, therefore, an error on the part of the court below to hold that the tribunal based its decision on a repealed provision of the law as the appellants had clearly anchored the appeal in the tribunal on the provisions of the whole of the Second Schedule of the **Value Added Tax (Zero Rating) (Amendment) Order, 2003** contained in **Statutory Instrument No. 9 of 2003** and in particular, the provisions of Group(c) which was not affected by the said amendment. To illustrate the point, counsel quoted the legislation before and after the amendment.

Before the amendment, **Statutory Instrument No. 109 of 1996,** read as follows:

"2. Exports:

(a) Export of goods from Zambia by and on behalf of a taxable supplier, where such evidence of exportation is produced as the Commissioner-General may, by administrative rule, require;

(b) The supply of services, including transport and ancillary services, which are directly linked to the export of goods under sub item (a);

(c) <u>The supply of freight transport services from or to Zambia, including transshipment and ancillary services that are directly linked to the transit of goods through Zambia to destinations outside Zambia.</u>"

After the Amendment Order of 2003, paragraph 2 was amended and the Second Schedule now reads as follows:

"2. Exports:

(a) Export of goods from Zambia by and on behalf of a taxable supplier, where such evidence of exportation is produced as the Commissioner-General may, by administrative rule, require;

(b) The supply of ancillary services which are provided at the port of exportation of the goods under paragraph (a) and includes transport and packaging;

<u>(C) The supply of freight transport services from or to Zambia, including transshipment and ancillary services that are directly linked to the transit of goods through Zambia to destinations outside Zambia.</u>"

Counsel submitted that the underlined words were not affected at all by the amendment and the holding by the court below that the tribunal relied on a repealed provision of the law could not be sustained. Counsel argued that the decision of the tribunal should be understood to have been premised on the provisions of paragraph 2(c) when it interpreted the word "ancillary" services to mean supporting or supplementary to the export of goods, which in this case was transportation from Mufulira to Kapiri Mposhi. Counsel argued that the word ancillary appears in both paragraph 2(b) and 2(c) of the second schedule and that the ruling did not state which paragraph the tribunal was relying upon. Therefore, the argument by the respondent that the tribunal relied on the repealed paragraph 2(b) of the second schedule has no merit.

In the alternative, counsel for the appellants argued that if this Court finds that the tribunal erroneously relied on the repealed paragraph 2(b) of the second schedule, this Court has jurisdiction to determine that the correct provision that should have been relied upon is 2(c) of the second schedule, which captures the transaction in issue. The case of **Shilling Bob Zinka v The Attorney General**[1]

was relied upon in support of this argument. Counsel further argued that according to paragraph 2(c) of the zero-rating schedule, freight transportation to facilitate the export of goods from Zambia was zero-rated. Therefore, the learned Judge failed to give a proper meaning to paragraph 2(c) and accordingly erred when he held that since the domestic supply was broken, it was not contemporaneous with the supply of the services by TAZARA to the 2nd appellant.

We have considered the submissions in support of ground one of the appeal and the authorities cited. We have also considered the ruling of the Revenue Appeals Tribunal and the judgment appealed against. While we accept that the wording in **Statutory Instrument No.109 of 1996** is similar to that contained in **Statutory Instrument No. 9 of 2003**, the submission by counsel for the appellants ignores the fact that paragraph 2(b) was amended to limit ancillary services to services provided at the port of exportation. This is a fundamental amendment as in the repealed legislation paragraph 2(b) was not specific as to where the ancillary services were to be provided. In our view, Paragraph 2(c) should not be read in isolation because the amendment to paragraph 2(b) to

include the words **'at the port of exportation'** was meant to remove the ambiguity in paragraph 2(b) of the repealed legislation and make it more specific on where the ancillary services were to be provided.

With regard to the question of the tribunal relying on a repealed provision of the law, our view is that the learned Judge quite correctly found that at the time the appeal was being heard by the tribunal, paragraph 2(b) of the Second Schedule of **Statutory Instrument No. 109 of 1996** was amended by the **Value Added Tax (Zero-rating) (Amendment) Order), No. 9 of 2003**. Page R10 of the ruling of the tribunal illustrates the point that the tribunal relied on repealed legislation in arriving at its decision without, taking into account the import of the amended paragraph 2(b) of the Second Schedule. The relevant portion of the ruling reads as follows:

> **"The relevant provision which zero-rates exports is paragraph (b) of Regulation 2 of part II of the second schedule of Statutory Instrument No.109 of 1996. It reads as follows:- [Emphasis ours]**
>
> > **"The supply of services, including transport and ancillary services, which are directly linked to the export of goods under sub-item (a).**

We are of the view that the appellants are on firm ground when they argue that the word "include" in paragraph 2(b) connotes that all activities linked to the export of goods qualify for zero-rating"

The above excerpt clearly shows the paragraph that the tribunal relied on in its ruling. The tribunal could not, therefore, have reached its decision premised on the provisions of paragraph 2(c) alone when it interpreted the word ancillary services to mean supporting or supplementary to the export of goods, which in this case, was the journey from Mufulira on the Copperbelt Province to Kapiri Mposhi in the Central Province of the Republic of Zambia.

The appellants' argument in the alternative that they had, in any event, relied on paragraph 2(c) of the second schedule is not helpful to them either because as we have stated above, paragraph 2(c) should not be considered in isolation. The case of **Shilling Bob Zinka v The Attorney–General**[1] on which the appellants relied should be distinguished from the present appeal as in this case, there is no question of tracing the power of the tribunal to a legitimate source.

We will now deal with the argument that the learned Judge erred when he held that the provisions of paragraph 2(c) do not

apply to the movement of goods from a place within Zambia to another destination within Zambia before the goods are ultimately transported to the port of export. We see no difficulty with the manner in which the learned Judge interpreted paragraph 2(c) of the second schedule. Paragraph 2(c) relates to the supply of freight transport services from or to Zambia in an unbroken fashion. In other words, the freight transport services must be provided from a port as recognized by the **Customs and Excise (Ports of Entry and Routes) Order, No.16 of 2003** which lists such ports in Part II of the first schedule. Mufulira or Kapiri Mposhi are not listed as ports of export for goods exported by road. The journey or transportation must not end within Zambia. In this case, the goods were coming from Mufulira and were offloaded in Kapiri Mposhi which is classified as a domestic service and is, therefore, subject to the standard rate. Even if we accepted the appellants' argument that Paragraph 2(c) applied to the appellants, it would, as was correctly submitted by Mrs. Goramota, not be helpful to the appellants because paragraph 2(c) covers the supply of freight transport services of goods leaving or coming into Zambia, as well as goods

transiting through Zambia. The 1st appellant transported goods within Zambia, a supply not envisaged by paragraph 2 (c).

We cannot fault the learned Judge for holding that the supply of transshipment services by the appellant was not contemporaneous to the export of goods. In this case, there was a clear break in the journey as it was in two segments. The first segment was from Mufulira to Kapiri Mposhi at which point the goods were offloaded and loaded onto the TAZARA trains. The second segment was from Kapiri Mposhi to Dar-es-Salaam and beyond. We do not see how the transportation of the goods by road from Mufulira to Kapiri Mposhi could be said to be contemporaneous with the transportation of goods by rail from Kapiri Mposhi to Dar-es Salaam. The two are quite clearly separate and distinct segments of a journey which should be taxed differently. Treating it as a single journey would not only be erroneous, but would lead to unnecessary loss of tax revenue. In our view, the learned Judge properly relied on the case of **Canadian Airlines international Limited v The Commissioner of Customs and Excise**[2]. This case illustrates the distinction between a single

supply and a composite supply for Value Added Tax purposes. Briefly, it was an appeal against assessment that limousine services supplied to full business class passengers on Trans Atlantic Flights formed a separate supply from the zero-rated supply of the flights. The appellant was a scheduled airline, transporting passengers between Canada and the United Kingdom, amongst other destinations. During the period covered by the assessment, the appellant offered its business class passengers paying full fare, a limousine service consisting of a chauffeur driven limousine to transport the passengers and their baggage between their home, hotel or office and Gatwick or Manchester airports. The court held that the supply of the limousine element was a separate supply in the following words:

> **"In our judgment, the consideration was obtained by the appellant in return for supplying two elements, the flight and the transfer option. The transfer available under the option was not contemporaneous with the flight."**

Our considered view is that the supply rendered by the 1st appellant did not qualify for zero-rating under both paragraph 2(b) and 2(c) of the second schedule for the reasons we have given as the service rendered was not directly linked to the export of goods as

envisaged by the second schedule of the **Value Added Tax Act (Zero-Rating) (Amendment) Order of 2003** contained in **Statutory Instrument No. 9 of 2003**. This ground of appeal lacks merit and is accordingly dismissed.

In ground five of the appeal, the appellants have argued that the learned Judge erred in law when he held that an exporter of goods must obtain the stamp of a Customs Authority of the country of destination in accordance with **Rule 18 (20) of the Value Added Tax (General) Rules** contained in **Gazette Notice Number 86 of 1996,** as this was tantamount to creating an extra-territorial application of the provisions of the **Value Added Tax Act, Chapter 331 of the Laws of Zambia.** This is no doubt an ingenious argument but it cannot possibly succeed. The learned Judge held as follows at page J30-J32 of his judgment:

> **"The sum and substance of rule 18 is that a taxable supplier claiming that a supply is zero-rated because it is an exportation of goods must produce documentary proof that the goods have been exported, by way of a certificate of importation into the country of destination."**

He went on further to state that:

"There is no dispute that the copper cathodes left Zambia and no one can fault the Tribunal in making such a finding. However in so far as rule 18 is concerned, a registered supplier must produce export documents stamped by the customs authority of the country of destination to claim input VAT for zero-rated supplies made by a supplier. In the instant case, it is incontrovertible that the respondents did not provide such documents. The bill of entry documents at page 134 to 269 of the record of appeal clearly show that they were neither stamped nor do they bear a certificate of importation provided by the customs authority of the country of destination. Furthermore, the transporter recognized by these documents for purposes of zero-rating is TAZARA and not the 1st respondent and Mopani Copper Mines Plc appears as exporter."

The learned Judge went on to state that:

"I agree with the respondents that it was not the intention of Parliament that the VAT Act and its subsidiary legislation shall have extra-territorial effect. In my considered view, the import of rule 18 is that it does not impose any obligations on the customs authorities of the country of destination. Rather, it imposes an obligation on a Zambian supplier claiming that a supply is zero-rated on the ground that it is an exportation of goods, to have export documents stamped by the customs authority of the country of destination. There is, therefore no way that rule 18 can be considered to have extra-territorial effect. .....The view that I take is that when goods are transported into another country, it is or it ought to be routine procedure to have the export documents stamped by the customs officials at the point of entry. I believe that this is the best way to prove that the goods have left the jurisdiction or have indeed been exported."

We agree with the learned Judge that the **Value Added Tax Act** has no extra-territorial effect. **Rule 18 of the Value Added Tax (General) Rules** contained in **Gazette Notice No. 86 of 1997** makes it mandatory for a taxable supplier claiming that a supply is zero-rated under the second schedule to the Act, on the grounds that the supply is an exportation, to produce to an authorised officer, *inter alia,* copies of export documents for the goods bearing a certificate of shipment. There is a further obligation on the supplier to produce copies of import documents for the goods, bearing a certificate of importation into the country of destination provided by the customs authority for the country. The respondent required these documents for purposes of ensuring that the goods had indeed left the jurisdiction as this was the basis upon which a registered supplier claimed input VAT for zero-rated supplies made by the supplier. The 1st appellant failed to produce the export documents to the authorised officers as required by **Rule 18 (2) (a) of the Value Added Tax (General) Rules contained in Gazette Notice No. 86 of 1997.** The 1st appellant was simply being asked to prove that the goods had crossed the border and the usual way to prove that was by having the documents stamped by the customs

officials at the point of entry. The fact that this was a requirement did not mean that the **Value Added Tax Act** had extra-territorial effect, as it did not impose any obligations on the customs authority of the country of destination.

Counsel for the appellant also argued that since there was no dispute that the goods had left the jurisdiction the learned Judge should have proceeded to hold that the requirement of Rule 18 had been satisfied. Counsel contended that there was, therefore, no need for the learned Judge to engage in what he termed an academic exercise to prove that Rule 18 had been complied with. We do not agree with this argument. As we have already stated, **Rule 18 (2) (a) of the Value Added Tax (General) Rules contained in Gazette Notice No. 86 of 1997** requires taxable suppliers to prove that the goods have been exported and the most common way of doing so, is by having the documents stamped by the customs authority of the country of destination.

We note from the appellants' heads of argument that great reliance was placed on the often cited cases of **Nkhata and four others v The Attorney-General of Zambia**[3] and **Wilson Masauso**

Zulu v Avondale Housing Project Limited[4] to persuade us to reverse the judgment on the basis of findings of fact. It would be inappropriate for us to do so because this case was an appeal from the tribunal to the High Court. The learned Judge was determining the appeal before him on the basis of the ruling and evidence before him. He was, therefore, not making findings of fact as this was for the tribunal to do. In any event, we do not see how the fact that the goods had left the jurisdiction can be used as an argument to circumvent legislation which required the appellants to prove that the goods had been exported.

Counsel for the appellant also advanced a subsidiary argument about the learned Judge not being persuaded by the *obiter dictum* in the case of **Kasembo Transport Limited v Zambia Revenue Authority**[5]. The learned Judge was perfectly entitled to do so as he was not bound by a decision of an inferior tribunal. A perusal of the **Kasembo Transport Limited v Zambia Revenue Authority**[5] case, however, shows that the tribunal, while expressing the view that domestic freight supplies should be zero-rated to encourage exports, dismissed the appeal and found that Rule 18

was not extra-territorial. The fifth ground of appeal is also without merit.

The net result of this appeal is that both grounds of appeal are unsuccessful and are accordingly dismissed with costs to the respondent, to be taxed in default of agreement.

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E.M. HAMAUNDU

SUPREME COURT JUDGE

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A.M.WOOD

SUPREME COURT JUDGE

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R.C.M. KAOMA

SUPREME COURT JUDGE