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MEMORANDUM

SIROCCO ENTERPRISES LIMITED
VERSUS
ZAMBIA REVENUE AUTHORITY
APPEAL NO 11 OF 2020

Tax Law decisions
- Supreme Court -

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MEMORANDUM ON SIROCCO ENTERPRISES LIMITED VERSUS ZAMBIA REVENUE AUTHORITY APPEAL NO 11 OF 2020

BACKGROUND

On 14th April 2021, the Supreme Court ("the Court") rendered its judgment on the Customs and Excise Act, Chapter 322 of the Laws of Zambia ("the Act") regarding what amounts to consumption of a locally manufactured product which is subject to excise duty and in respect of section 108 (5) of the Act, whether or not excise duty is payable on bulk cement used as input in the production of blocks and ready-made concrete. This judgment upheld the ruling of the Tax Appeals Tribunal ("the Tribunal"), to the extent expressed in this memorandum.

In this matter, the Zambia Revenue Authority ("ZRA") and Scirocco Enterprises Limited ("Scirocco") were at variance as to whether consumption is limited to the sale of locally manufactured products to customers or if it extends to the use of such products by a manufacturer in the manufacture of other products.

Scirocco is a manufacturer of Portland cement, a product which it uses for two purposes: it bags and sells some of it and uses the rest in bulk for the manufacture of blocks and ready-made concrete. The blocks and readymade concrete, though sold on a retail basis, do not attract excise duty. In 2018, the ZRA conducted an audit on the tax affairs of Scirocco and assessed the excise duty and penalties at K2,419,432.24. The penalties arose from the ZRA's allegation that of the 25,677.86 tonnes of cement produced by Scirocco, only 2,482.72 tonnes was declared for excise duty purposes while 23,195.14 tonnes was not declared. The ZRA proceeded to raise an assessment on the 23,195.14 tonnes of cement, in the sum of K927,085.80 as excise duty and K1,531,626.44 as penalties. Scirocco objected to the assessment by contending that the 23,195.14 tonnes bulk cement was not excisable because it was not sold but merely used as input in the production of blocks and ready-made concrete (which are not subject to excise duty).

1. APPEAL TO THE TRIBUNAL

Unhappy with the ZRA's assessment, Scirocco launched an appeal before the Tribunal.

Scirocco's position before the Tribunal
Scirocco launched the appeal to the Tribunal on the following grounds;

- that the ZRA's decision to uphold the assessment of K2,479,432.24 as excise duty on bulk cement produced by Scirocco and used as input in the manufacture of blocks and ready-made concrete (which products do not attract excise duty) was illegal because it is not supported by any law; and

- that the ZRA erred in law and fact when it ignored the fact that excise duty is a consumption tax which is paid by the final consumer and not a cost to Scirocco, thereby acting outside the principles of excise tax.

The ZRA's position before the Tribunal
In response, the ZRA contended that;

- its actions were supported by law and it acted within the provisions of the Act when it upheld the assessment of K2,479,432.24 excise duty; and

- excise duty was levied and collected on the cement which was produced and not the cement which was actually disposed of after production. (Scirocco did not pay excise duty on cement it produced and used in the manufacture of blocks and ready-made concrete).

The Tribunal's analysis and decision
The Tribunal began by determining whether there is a difference between cement that is bagged and bulk cement produced as input for making blocks and ready-made concrete, for excise duty purposes. In doing so it considered the provisions of Sections 2 and 76 of the Act and concluded that they point to the fact that bulk cement produced by Scirocco and used in the manufacture of blocks and ready-made concrete is subject to excise duty.

Having found that Sections 2 and 76 provided a basis for the charging of excise duty on bulk cement, the Tribunal reinforced its decision by interpreting the provisions of Section 108(5) to mean that inputs (manufactured in licensed premises) used to manufacture excisable goods on the same premises will not be subject to excise duty. It went on to hold that the converse is also applicable thus where non exercisable goods are manufactured in licensed premises using goods manufactured in the same licensed premises, those goods, used as input are subject to excise duty. Therefore, the bulk cement that was manufactured in Scirocco's licensed premises and used as input to manufacture blocks and ready made concrete (which products are not exercisable) in the same licensed premises was subject to excise duty.

2. APPEAL TO THE SUPREME COURT

Unhappy with the decision of the Tribunal, Scirocco launched an appeal to the Supreme Court challenging the interpretation given by the Tribunal to Section 108 (5) of the Act and challenging the imposition of excise duty, as it is a manufacturer and not a consumer of the final product.

On appeal, Scirocco and the ZRA agreed on the following:

(a) that excise duty is charged on goods or products produced in or imported into Zambia;
(b) that excise duty is a consumption tax which is an indirect tax, borne by the eventual consumer of the products or goods produced or imported into Zambia;
(c) that the condition precedent to the levying of excise duty is that the taxable event and chargeability must have occurred.

The taxable event, here, being the manufacture of the goods or products in licenced premises, locally or importation of goods into the country, which is specifically legislated under Sections 76 and 76A of the Act, and that chargeability occurs at consumption stage of the goods.

The latter position in paragraph (c) was the bone of contention in this matter.

Scirocco's case on appeal
Scirocco contended that;

(a) the taxable event occurred because the 23, 195.14 tonnes bulk cement was manufactured in Zambia but chargeability did not occur because the cement was not sold by Scirocco, and therefore not consumed, but rather used as input in the manufacture of blocks and ready-made concrete, which are not subject to excise duty.

(b) since excise duty is a consumption tax it is only charged, levied collected and paid at consumption i.e., when the goods or products are sold and only payable by the consumer or purchaser, because the sale price has a component of excise duty fused into it. As Scirocco is no such consumer or purchaser, and neither has the cement been sold, there can be no self-consumption and neither is such a term provided for in the Act. It cannot, therefore, be liable to pay excise duty.

(c) the Tribunal erred in its interpretation of Section 108(5). Scirocco argued that the meaning to be given to the section is that where an excisable product is used as an input, before it is sold, in the production of another excisable product, it shall not be subject to excise duty. The emphasis here being that what triggers the charging or levying of excise duty is the sale of excisable products and not their use as an input.

The ZRA's case on appeal

The position taken by the ZRA was that;

(a) excise duty comes in two forms. The manufacturer's excise duty and the retail excise duty. The manufacturer's excise duty is imposed on the producer or importer and included in the price paid by the purchaser of the goods.
Retail excise tax is imposed at the point of sale to the ultimate purchaser; and

(b) when as in this case, a manufacturer of goods uses excisable goods manufactured on licenced premises to manufacture other goods which are not excisable, the manufacturer is subject to excise duty. However, where a manufacturer uses excisable goods produced in his licenced premises to produce other excisable goods on the same or partially same premises he will not be liable in excise duty. This, the ZRAargued, is an exception to excise duty pursuant to Section 108(5) of the Act.

Supreme Court's analysis and decision

The Court agreed that in order for excise duty to be chargeable both the taxable event and chargeability must occur. <u>The taxable event must be provided for by statute</u> which must specifically state the products which are subject to excise duty upon production within the country or importation into the country.

In this case, to the extent that Section 76 of the Act specifically legislates that *"[there] shall be charged, levied, collected and paid in respect of goods manufactured or produced within Zambia excise duty . . .",* the taxable event occurred by virtue of Scirocco's manufacturing the bulk cement. This was reinforced by Section 2 of the Act which, in defining excise duty, provides for payment of such duty, upon goods produced within or imported in Zambia. Section 2 states in part that *"excise duty means a tax on particular goods or products or on a limited range of products, whether imported or produced domestically, <u>which may be imposed at any stage of production or distribution</u> ..."* The underlined portion reveals that Section 2 is not only a definition section but one which prescribes the payment of the duty.

What is the interpretation of section 108(5)?

Section 108 (5) of the Act states as follows:

> *"Except as provided under this Act or in regulations or rules made thereunder, excise duty or surtax shall not be payable on goods manufactured or partially manufactured in licenced premises that are before sale or disposal used on those premises as inputs in the manufacture of products that are themselves subject to excise duty or surtax."*

The Court rejected the Tribunal's interpretation of Section 108(5) of the Act and what constitutes consumption. The Court held that section 108 (5) of the Act cannot be construed in favour of the State, that is, input which is manufactured and used in the same premises to manufacture non-excisable goods in the same premises shall be subject to excise duty. In holding so, the Court relied on the cases of Zambia Revenue Authority v Balmoral Farms Limited SCZ Judgment No 34 of 2019 and Professional Insurance Zambia Limited Zambia Revenue Authority Appeal No 34 of 2017 where it held that a charging provision in a tax legislation must be specific as to its intention to tax an individual or entity and any ambiguity will be resolved against the State.

The Court stated that Section 108(5) of the Act is an exception to the general principle enshrined in the Act of charging or imposing excise duty on goods manufactured locally in licensed premises and should not have been interpreted as if it were the general principle. **Section 108(5) of the Act simply means that there shall be no excise duty charged on excisable goods used as input in the production of other excisable goods.**

In addition, Section 108 (2) of the Act compliments Section 108(5) in that, it is a means by which a manufacturer can claim a refund on excise duty paid at the point of manufacturing excisable products using excisable inputs. The refund is in respect of the input and the rationale is, not only the need to avoid two tax points, but also promote the manufacturing industry in Zambia by making locally manufactured products competitive in price terms as against imports.

When does chargeability occur?

The Court held that the general rule is that the provisions of Sections 2 and 76 of the Act impose excise duty on products manufactured in Zambia or imported into Zambia and this sets the taxable event, however, this does not answer the issue of chargeability.

The Court stated that **chargeability occurs at the point of sale or disposal of the products so manufactured or imported and the consumption of the products.** This must be distinguished from the taxable event because if the fate of the product manufactured locally is that it is to be exported, there is no requirement for collection of excise duty. If it is collected, it would be subject to refund. The point here being that consumption will not have occurred locally entitling the State to collect the tax. An example of wine was given in that it is not immediately taxed as there is a requirement for it to ripen or mature. Pending this process it may be held in tax warehouses.

What constitutes consumption?

The Court was of the firm view that **consumption as referred to in the Act is not restricted to the sale and purchase of a product but extends to use or disposal of the excisable product by the manufacturer.** As a starting point, consumption is defined to mean "Consumption or use in Zambia" in Section 2 of the Act. The Act does not distinguish between self consumption or third party consumption because all that matters is that the product has been consumed or used in one way or the other in Zambia. Therefore, to the extent that the Scirocco used the bulk cement in the manufacture of the blocks and ready-made concrete, it consumed the cement and was consequently liable to excise duty. The fact that it is a manufacturer does not change the situation.

The Court stated that the definition of the phrase "consumption tax" in **Blacks Law Dictionary** refers to the tax as being in respect of the sale of goods and the definition of the word *"excise"* in the same dictionary defines the tax as being one imposed on the manufacture, sale or use of goods. These definitions together with the definition of the word *"consumption"* in Section 2 of the Act, convey or carry the notion that even if the goods are not sold but used, excise duty is payable. This is in line with Sections 108(2) and 108(5) of the Act which refer to 'use of goods' and 'disposal' along with 'sale'.

Scirocco had also argued that the Sixth Schedule reinforces the argument that excise duty is only chargeable when goods are sold. The Sixth Schedule under 1(1) states that, *"for the purpose of Section Eight-eight A, the value of goods sold on the open market by a person licenced under Section night-seven shall be the price at which the goods are sold exclusive of excise duty, surtax and value added tax".*

The Court held that the Sixth Schedule should not be interpreted in isolation from Section 88A of the Act which provides that the amount of excise duty or surtax shall be determined in accordance with the Sixth Schedule. The Court's understanding of Section 88A and the Sixth Schedule was that the two prescribed the manner in which excise duty chargeable will be determined, which is, pegged to the value that such goods are sold on the open market exclusive of tax. Therefore, these provisions do not prescribe when excise duty will be charged but rather the formula for computing excise duty.

The Court concluded by stating that consumption is not restricted to sale of goods but extends to the use or disposal of such goods, irrespective of the manner in which either arises.

OUR LIMITATIONS

Kindly note that this brief is not exhaustive and does not constitute legal advice. In the event that you would like us to render a comprehensive legal opinion, kindly contact our

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