



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & GATEMBU, JJ.A)

CIVIL APPEAL NO. 85 OF 2014

BETWEEN

MJENGO LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAX.....RESPONDENT

(An Appeal from the entire Judgment & Decree of the High Court of Kenya at Nairobi, (Hon. D. Musinga, J.) delivered on the 25th day of January, 2013

in

H.C. COMMERCIAL & ADMIRALTY DIVISION INCOME

TAX APPEAL NO. 1 OF 2011)

JUDGMENT OF THE COURT

1. This is an appeal from a decision of the High Court (Musinga, J, as he then was) upholding a decision by Nairobi Area Local Committee that machinery in respect of which the appellant had claimed investment deduction did not qualify for such tax deduction.

Background

2. The appellant, Mjengo Limited, carries on the business of importing rice into Kenya. Upon importation, it says that it cleans that rice; sorts and sizes it; fumigates it for preservation; brands it and then packages it. With a view to enhancing its operations, the appellant imported into Kenya new machinery worth Kshs. 1,513,752.00 in year 2006. The appellant then deducted, as Industrial Building Allowance, that expenditure from its profits for the year 2006.

3. The Commissioner of Domestic Taxes, the respondent, an organ of the Kenya Revenue Authority, subsequently undertook a tax audit of the appellant and disallowed the appellant's claim for Industrial Building Allowance. Accordingly, the respondent assessed additional tax payable by the appellant. The respondent asserted that the appellant would only have been entitled to deduct that expenditure from its profits if it was engaged in "manufacturing" within the meaning of para 24 Part (v) of the 2nd Schedule to

the Income Tax Act.

4. The appellant challenged the assessment for additional tax before the Local Committee of Nairobi Area. During the hearing before that Committee, the appellant stated that it had erred in claiming Industrial Building Allowance instead of claiming an Investment Deduction which, it contended, is what it was entitled to. The Committee was not persuaded. In its decision given on 25th November 2010, the Committee concluded that the appellant did not qualify for the deduction because it was not engaged in “manufacturing” within the meaning of para 24 Part (v) of the 2nd Schedule to the Income Tax Act.

5. The appellant was not satisfied. It appealed to the High Court where it contended that “the appellant’s processing and packaging of the partly manufactured rice...clearly fits within the definition of manufacture as the resultant rice product is of a different form, quality and property.” To buttress its argument, the appellant asserted that the Kenya Bureau of Standards jointly with Kenya Revenue Authority had compelled it to register and pay Standards Levy that is charged to „manufacturers? under the Standards Act. The respondent on its part maintained that it inspected the appellant’s premises and established that all the appellant was doing was packaging rice; that there was no manufacturing that was taking place at the appellant’s premises because there was no making of any goods or any activity that could be construed to be manufacturing.

6. Upholding the decision of the Nairobi Area Local Committee, the learned Judge had this to say:

“26. I have already stated the definition of the word “manufacture” under the Income Tax Act. Although in its statement of facts the appellant alleged that it is involved in the importation of “partly manufactured rice”, it is not clear to the court what that means. Rice is not manufactured, it is grown. The respondent contended that he had inspected the appellant’s premises and ascertained that there was no manufacturing that was taking place at all. I have no reason to doubt that. The machine in question was being used for sizing and packaging rice only and such packaging alone did not amount to “manufacture”.

27. For purchase of new machinery to qualify for Investment Deduction under the Act, that machinery must be used for the purposes of manufacture as defined under the Act.

28. Even if packaging of rice were to be construed to include manufacture as contended by the appellant, I do not agree that the appellant was making or packaging anything from raw or partly manufactured materials. The appellant imports rice, which is neither raw nor partly manufactured material, then processes, cleans and packages the same. That cannot amount to “manufacture” under the Act.”

7. Dissatisfied, the appellant lodged the present appeal.

The appeal and submissions by counsel

8. Learned counsel for the appellant, Mr. Mutoro, referred us to the grounds of appeal in the memorandum of appeal. He submitted that under Paragraph 24(1) Part V of the 2nd Schedule to the Income Tax Act, Investment Deduction is claimable by tax payers who are engaged in manufacturing. Manufacturing, he argued, includes making of goods or material from raw or partly manufactured material and includes packaging; that the machine and buildings in respect of which the Investment Deduction was claimed, were indeed used for manufacturing process.

9. In counsel’s view, the definition of the word “manufacture” as set out in Paragraph 24(3)(e) of Part V of the 2nd Schedule to the Income Tax Act should be enlarged so as to include other processes and activities, such as packaging, that would not ordinarily be regarded as “manufacture”. In that regard, counsel called to his aid; **Dilworth v Commissioner of Stamps (1899) AC 99** and **Reynolds v Income Tax Commissioner for Trinidad and Tobago [1966]1 WLR 1**. He faulted the High Court for failing to appreciate that the “process of cleaning, sorting, sizing, chemical treatment (fumigation) for preservation,

branding and packaging of the rice” was rightfully part of “manufacture” as defined in the Income Tax Act. He accordingly urged us to nullify the assessment for additional tax by the respondent.

10. Opposing the appeal, learned counsel for the respondent, Mr. P. M. Mutuku, stated that the appellant’s premises were inspected; that upon inspection it was established that no “manufacturing”, in the sense of making of any goods takes place in those premises; that packaging, per se, cannot amount to manufacture for purposes of Paragraph 24(3)(e) of Part V of the 2nd Schedule to the Income Tax Act; that the definition of word “manufacture” in the Standards Act is different from the definition of the same word in the Income Tax Act as the two statutes are legislated for different purposes.

11. Counsel submitted that the machine in respect of which the appellant sought to claim the Investment Deduction only performs the function of sizing and sealing packages; and that the machine does not perform any function of cleaning, sorting or fumigating as the appellant claimed. Counsel sought to distinguish the circumstances in this case from those in the case of **Commissioner of Income Tax v Kenya Seed Company Ltd, High Court Income Tax Appeal No. 284 of 1986**, where the High Court (Aluoch, J. as she then was), held that “sizing of the seed and chemical treatment, then packaging...are processes which change the state of the raw or ordinary seed to a marketable seed for planting” and therefore fall within the definition of “manufacturing process.” According to counsel, the whole process undertaken by the appellant “starts with the rice and ends up with the same rice though in smaller packages for the convenience of customers.” With that, counsel urged us to dismiss the appeal.

Determination

12. We have considered the appeal and the submissions by counsel. Based on the record of appeal and the submissions, the question that arises for our determination is this: whether the machine in respect of which the appellant claimed to be entitled to Investment Deduction, was being used “for the purposes of manufacture” within the meaning of Paragraph 24(3)(e) of Part V of the 2nd Schedule to the Income Tax Act so as to entitle the appellant to deduct the expenditure incurred in the acquisition of that machine from the gains or profits for the relevant year of income. The answer to that question is dependent upon an interpretation of Paragraph 24 (1) and 24(3)(e) of Part V of the 2nd Schedule to the Income Tax Act.

13. Paragraphs 24(1) of Part V of the 2nd Schedule to the Income Tax makes the provision for Investment Deduction and provides:

“24. (1) Subject to this Schedule, where capital expenditure is incurred –

(a) on the construction of a building and on the purchase and installation therein of new machinery, and the owner of that machinery, being also the owner or lessee of that building, uses that machinery in that building for the purposes of manufacture; or

(b) on the purchase and installation of new machinery in a part of a building other than a building or part thereof previously used for the purposes of manufacture, and –

(i) the owner of the new machinery subsequently uses that machinery in that building for the purposes of manufacture; and

(ii) the machinery has not been installed substantially in replacement of machinery previously in use in an existing business carried on by the owner of that new machinery;

(c) ...

(d)...

(e) ...

there shall be deducted, in computing gains or profits of the person incurring that expenditure for the year of income in which they were first used (hereinafter referred to as "the year of first use"), either both the building and machinery referred to in sub paragraph (a) or both the machinery and, for the purpose of manufacture, the part of the building in which that machinery has been installed referred to in subparagraph (b), or the building referred to in subparagraph (c), provided that, prior to its first being used for manufacture after its completion, it has been used for no other purpose, or the machinery referred to in subparagraph (d), or the building referred to in subparagraph (e), as the case may be, a deduction referred to as investment deduction."

14. There is no dispute that the appellant acquired the machine to which it claims to be entitled to the Investment Deduction. The question is whether the appellant was using that machine "for the purposes of manufacture." The term "manufacture" is defined under Paragraph 24(3)(e) of Part V of the 2nd Schedule to the Income Tax Act as follows:

"manufacture" means the making (including packaging) of goods or materials from raw or partly manufactured materials or other goods, or the generation of electrical energy for supply to the national grid but does not extend to any activities which are ancillary to manufacture, such as design, storage, transport or administration;" [Emphasis added]

15. As already indicated, the argument by the appellant is that the words "including packaging" as appearing in that definition extend the otherwise restrictive meaning of the word "manufacture" to include, not only making but also packaging and other activities. In other words, the word "manufacture" is not expressed in a complete form. It is not, the argument goes, "a hard and fast definition". Packaging in itself, it is contended, amounts to manufacture for purposes of that provision.

16. It is noteworthy that the definition of the word "Manufacture" in Paragraph 24(3)(e) begins with the words, "Manufacture" **means...**". It does not, as counsel for the appellant suggested begin with the words, "Manufacture" **includes...**". The distinction is significant. In his book, Legislative Drafting, to which we were referred, Professor G C Thornton says that:

"'Means' is appropriate where the stipulated meaning is expressed in a complete form and no part of the intended meaning is omitted. The significance to be attached by the reader to the word defined is limited to the stipulated meaning. 'Means' may be appropriate for delimiting, extending or narrowing definitions. The vital element is that the definition must give a complete meaning." [Emphasis]

17. The same point is captured in **Stroud's Judicial Dictionary of Words and Phrases** where the word "mean" is defined in terms that:

"When a statute say that a word or phrase shall "mean" - not merely that it shall "include" - certain things or acts, "the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in the definition."

18. In our view therefore, a complete meaning is assigned to the term "manufacture" in Paragraph 24(3)(e) of Part V of the 2nd Schedule to the Income Tax Act beyond which we must not look.

19. However, within the meaning assigned to the word "manufacture" under that provision are the words, "**the making (including packaging) of goods or materials from raw or partly manufactured materials or other goods**". The effect, is to extend the meaning of the word "making" to include packaging. It does not however equate "packaging" on its own without "making" to manufacturing.

20. As noted by Professor G C Thornton: "Includes' is appropriate only where the expression of the stipulated meaning is incomplete **and part only of the intended meaning is expressed**. Includes may be appropriate for extending definition". In **Dilworth v Commissioner of Stamps [1899] A. C. 99**, at page 105 Lord Watson of the House of Lords stated:

“The word “include” is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those thing which the interpretation clause declares that they shall include. But the word “include” is susceptible of another construction, which may became imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions. It may be equivalent to

“mean and include,” and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.”

21. In our view, the words in brackets, “including packaging” appearing after the word “making” in Paragraph 24(3)(e) of Part V of the 2nd Schedule to the Income Tax Act extend or enlarge the meaning of the word “making”, which we regard as the governing activity, to embrace „packaging?. It does not equate „packaging?, in itself, to „making?, in the sense of an act or process of producing something.

22. In Commissioner of Income Tax v Kenya SeedCompany Ltd, High Court Income Tax Appeal (supra) the High Court was called upon to interpret Paragraph 24(3)(e) of Part V of the 2nd Schedule to the Income Tax Act and to determine whether, in the circumstances of that case, the respondent therein, Kenya Seed Company Ltd was entitled to Investment Deduction. That in turn depended, as in this case, on whether it was „manufacturing? within the meaning of Paragraph 24(3)(e) of Part V of the 2nd Schedule to the Income Tax Act. In finding that it was, the Judge concluded thus:

“From the above evidence, I find that the process through which the seed goes, a process which involves selection, drying the seed at a controlled temperature, shelling, grading the seed, sizing the same and chemically treating it are processes which change the state of the raw or ordinary seed to a marketable seed for planting, and this in my considered opinion fall within the definition of manufacturing process.”

23. There was, in that case, evidence on which the court relied, of a technical manager, including pictures of the machinery and buildings that were used by Kenya Seed Company Ltd in the process of converting the raw seed, in concluding that the process resulted in a change of the state of the seed.

24. In the present case, there was no evidence that beyond importing, sorting and packaging the rice as imported, there was any change in its state as a result of any process undertaken by the appellant. We are therefore in agreement with the decision of the lower court that “packaging alone did not amount to manufacture.”

25. In our judgment therefore, the appeal fails. It is dismissed with costs to the respondent.

Orders accordingly.

Dated and delivered at Nairobi this 2nd day of December, 2016

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is a true copy of original.

DEPUTY REGISTRAR