IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE (COMMERCIAL DIVISION), ACCRA
HELD ON TUESDAY, THE 31ST DAY OF JANUARY, 2023 BEFORE HER LADYSHIP, JANE HARRIET AKWELEY QUAYE (MRS.), JUSTICE OF THE HIGH COURT

SUIT NO. CM/TAX/0099/2022

MAERSK RIGWORLD GHANA LTD - APPELLANT

VRS

THE COMMISSIONER –GENERAL (GRA) - RESPONDENT

JUDGMENT

Notice of a Tax appeal against the final objection decision of a tax assessment by the Commissioner General of the Ghana Revenue Authority (hereinafter referred to as the Respondent) was filed in the Registry of this Court on 8th of November, 2021 by the Maersk Rigworld Ghana Ltd. (hereinafter referred to as the Appellant).The grounds are as follows:

1. The Respondent erred in Law by disallowing Withholding Tax Credit Certificates amounting to US$291,174.81 issued in the name of Appellant.
2. Without any legal basis, the Respondent misstated the Value Added Tax and the National Health Insurance Levy (VAT/NHIL) amount (as captured on the Appellant's VAT returns) in its audit findings to the detriment of the Appellant
3. The Respondent erred in Law by rejecting some of the figures in a section of the Appellant's audited Financial Statements prepared in accordance with generally accepted accounting principles.
4. The Respondent erred in Law by disallowing the input VAT amount to US$3,888,216.60 claimed by the Appellant on its VAT/NHIL Returns in contravention of Section 48(1) of the Value Added Tax Act, 2013 (Act 870).
5. The Respondent erred in Law by rejecting the VAT Relief Purchase Orders issued to the Appellant for services actually rendered to ENI Ghana Exploration and Production Limited under a subcontract agreement for the provision of Deepwater DP Drilling Rig dated 30th January 2015.

Grounds 2 and 3 were later abandoned by the Appellant.

BACKGROUND

The Appellant is a Limited Liability Company duly incorporated under the Laws of Ghana and engaged in the business of offshore drilling and associated services in the petroleum industry. The Respondent is the Head of the Ghana Revenue Authority, a statutory body responsible for tax administration and revenue collection in Ghana. The Government of the Republic of Ghana, Ghana National Petroleum Corporation and Heliconia Energy Ghana Limited entered into a Petroleum Agreement (referred to as PA) in respect of Offshore Cape Three Point Contract Area, in the Republic of Ghana.

Subsequently, Heliconia assigned its interest under the Petroleum Agreement (PA) ENI Ghana Exploration and Production Limited (ENI) as the new Petroleum Contractor under the PA. Pursuant to the provisions of the PA, ENI entered into a Subcontract Agreement dated 30th January 2015 with Maersk Drillship IV Singapore Pte Limited Deepwater DP Drilling and the Appellant herein for the provision of services at the Deepwater DP Drilling for a period of two (2) years.

As a subcontractor to ENI, the Appellant rendered, among other services, car rental services, transportation services, internet services, inspection services and payroll services all connected with the petroleum operations.

Sometime in 2018, the Respondent commenced a tax audit into the affairs of the Appellant for the period 2015 to 2017 years of assessment and issued a Final Tax Audit Report dated 20th November 2020 with a total tax liability of US$423,573.67 comprising a direct tax liability of US$ 396,879.93 and an indirect tax liability of US$ 26,693.74.

The Appellant being dissatisfied with the tax assessment of the Respondent filed an objection on 15th January 2021 and 3rd February 2021 against the said tax assessment and indicated that it has Withholding Tax credit certificate amounting to US$ 291, 174.81 and an accumulated input VAT amount of US$ 3,888,216.60.

After several meetings, discussions, and exchange of correspondence between the Appellant and the Respondent, the Respondent issued its Objection Decision on 30th

September 2021 and served it on the Appellant on 8th October 2021 maintaining its position that the Appellant's total tax liability was US$ 423,573.67.

Aggrieved and dissatisfied with the Respondent's Objection Decision, the Appellant hereby appeals against the said Objection Decision dated 30th September 2021 in whole to this Honorable Court for the reliefs set out in the Notice of Appeal.

Ground 1

The Respondent erred in Law by disallowing Withholding Tax Credit Certificates amounting to US$291,174.81 issued in the name of Appellant.

Articles 12.1 and 12.3 of the Petroleum Agreement provide as follows:

> **Article 12 (Taxation and other Imposts)**
>
> *"12.1* ***No tax, duty, fee or other impost shall be imposed by the State or any political subdivision on Contractor, its Subcontractors*** *or its Affiliates* ***in respect of activities related to Petroleum Operations*** *and to the sale and export of Petroleum* ***other than as provided in this Article.***"
>
> "12.3 **Save for Withholding Tax at a rate of five percent (5%) from the aggregate amount due to any Subcontractor if and when required by Section 27(l) of the Petroleum Income Tax Law**, Contractor **shall not be obliged to withhold any amount in respect of tax** from any sum due from Contractor to any Subcontractor."

Article 26.2 of the Petroleum Agreement which provides as follows:

> **Article 26 (Miscellaneous)**
>
> *"26.2 The State, its departments and agencies, shall support this Agreement and shall take no action which prevents or impedes the due exercise and performance of rights and obligations of the 'Parties hereunder. As of the Effective Date of this Agreement and throughout*
>
> *its term, the State guarantees Contractor the stability of the terms and conditions of this Agreement as well as the fiscal and contractual*

framework hereof specifically including those terms and conditions and that framework that are based upon or subject to the provisions of the Laws and regulations of Ghana (and any interpretations thereof) including, without limitation, the Petroleum Income Tax Law, the Petroleum Law, the GNPC Law and those other Laws, regulations and decrees that are applicable hereto. This Agreement and the rights and obligations specified herein may not be modified, amended, altered or supplemented except upon the execution and delivery of a written agreement executed by the Parties. Any legislative or administrative act of the State or any of its agencies or subdivisions which purports to vary any such right or obligation shall, to the extent sought to be applied to this Agreement, constitute a breach of this Agreement by the State."

Sections 27(1) and 27(3) of the Petroleum Income Tax Act, 1987 (PNDCL 188) which was the applicable Law at the time the parties signed the PA provides as follows:

"27. Withholding Tax on amounts due to subcontractors

(1) Where under the terms of a contract an amount due to a subcontractor in respect of work or services for or in connection with a petroleum agreement the person liable under that contract to make payment to the subcontractor shall withhold from the aggregate amount due to the subcontractor the percentage of the aggregate amount due that may be specified in the petroleum agreement and the amount so withheld shall be paid to the Commissioner and payment of that amount shall have the effect provided for in subsection (3).

Subsection (3) provides as follows:

(3) When an amount has been withheld from an aggregate amount due to a subcontractor pursuant to subsection (1), the subcontractor is not liable, in respect of that aggregate amount, for tax under any other Law in force in the Republic."

Argument of Appellant

It is the position of the Appellant that being a Subcontractor under the PA between the Government of the Republic of Ghana, GNPC and ENI – as assigned by Heliconia, it is subject to a final Withholding Tax of 5% pursuant to Articles 12(1), 12(3) and 26 of the PA and Sections 27 and 39(3) of the PNDC Law 188.

The combined effect of Articles 12.1, 12.3 and 26.2 of the PA is that, for the term of the PA, regardless of any change in the tax Laws, the State through the Government of Ghana or any of its political subdivisions (including the Respondent) is prohibited from imposing a tax, duty, fee or other impost on ENI as a Contractor or the Appellant as a Subcontractor other than as provided in Article 12 of the PA.

Furthermore, Appellant argued that regarding the guarantee of rights and obligations under Article 26.2 of the PA, in **TSATSU TSIKATA v. TULLOW GHANA LTD [2019] DLCA7824,** the Court of Appeal relying on the decision in **HOSSAIN v. JMU PROPERTIES, LLC, 147 A.3D 816 (D.C. 2016),** illustrated when a third party is considered an intended beneficiary that can enforce a contract. The Court explained that:

> ***"[a] third party to a contract 'may sue to enforce its provisions if the contracting parties intend the third party to benefit directly thereunder.*** **The Court further explained that intent may be proven expressly or by implication. To be intended, a beneficiary need not be named in the contract, as long as he or she is ascertainable from the contract and the circumstances of the contract."**

According to the Appellant, this position is consistent with the position of the Courts as established in several decisions that a contract is an integrative framework with its different parts being intertwined and intermingled. *"Its various branches influence each other. In interpreting a contract, a Judge should on one hand view it historically as a whole, but on the other hand evaluate the connections between its various provisions as part of the attempt to formulate the parties' joint intent." See* **ATA TEXTILE CO. v.**

ESTATE OF ZOTOLOV 41 (1) P.D. 282; THE REPUBLIC v. NANA OSEI KWADWO II [2008] DLSC6238.

That even though the Respondent applied a 5% Withholding Tax to the income of the Appellant as found in Appendix 1 of its Final Objection Decision, the Respondent failed to consider all the Appellant's Withholding Tax Credit Certificates LTO10338[illegible], LTO10338764, LTO302147[illegible]3, and totaling **USD196,360.4[illegible]**. Therefore, Respondent erred in law for failing to consider some of the Appellant's Withholding Tax Credit Certificates and prayed the Court to rectify the error.

Argument by Respondent

The Respondent contends that the stability terms granted to the contractor under the PA does not extend to cover the subcontractor because the subcontractor is neither a party nor a contractor within the meaning and context as prescribed and defined in the PA. The Stability Clause was exclusively granted to the Contractor who is the party to the agreement within the meaning of Article 26.2 of the PA.

Respondent argued that an agreement sets out the rights and obligations of the parties. Under the PA, one of the obligations of the contractor is to withhold 5% tax from payments made to the sub-contractors (the Appellant) under Article 12(3) of the PA. It is this withholding obligation of the contractor that has been stabilized by the State under Article 26.2. Therefore, it is only by an express provision of the law that payment can be made final or otherwise. This was the situation under Section 27(2) of PNDCL 188 until 2015 when the Law was changed. Accordingly, to appreciate the construction of Article 12(1) of the PA, it must be read in conjunction with other articles namely, articles 12(3) and 26(2) since reading Article 12(1) alone may lead to a misleading conclusion, and this is in accord with the basic rules of construction of documents and deeds as stated by our Courts.

Respondent's case is that as espoused by the Supreme Court in the case of **REP v. HIGH COURT, ACCRA; EX-PARTE: EXPANDABLE POLYSTYRENE PRODUCTS LTD [2001-2002] 1GLR 98**, espoused that the provisions in a statute are to be read as a whole and should be considered in both its internal and external context, but

not in pieces, in order to effectuate the intention of the Lawmaker. Thus, reading Article 12(3) together with Article 26(2) reveals that, it was only the clauses in respect of the contractor that the State stabilized, and not the subcontractor.

It is Respondent's contention also that with the coming into force of the Income Tax Act (Act 896) and its Regulations of 2016, (L.I. 2244) as well as the Petroleum Exploration and Production Act, 2016 (Act 919), all resident Subcontractors including non-resident Subcontractors with Permanent Established (PE) in Ghana, as in this case the Appellant, are required to treat Withholding Taxes as non-final (on account) instead of final as used to be the case under PNDCL 188, and as such they are obliged to prepare and file their annual tax returns with the Ghana Revenue Authority and pay the appropriate Corporate Income Tax (CIT) in accordance with Act 896 and Section 87 of Act 919. This is what the Respondent did by imposing Corporate Income Tax on the Appellant after 2015 when Act 896 and its Regulations, (L.I.2244) as well as Petroleum Exploration and Production Act, 2016 (Act 919) came into force.

Again, in its Written Submission, Appellant avers that Respondent did not consider all the Withholding Tax Credit Certificates provided by the Appellant. However, the Withholding Tax Credit Certificates with the reference numbers LTO10335497, LTO10335764 and LTO30214713 that Appellant claims were not considered were taken into account and included in the assessment of their tax liability. Attached herewith and marked as Exhibit 'GRA 8' is a copy of the working papers of the assessment with highlights showing the inclusion of the stated Withholding Tax Credit Certificates reference numbers to arrive at the figures stated on the assessment in Exhibit 'GRA 5'.

Analysis

The Court finds as a fact from the evidence which is Exhibit 'GRA 8' (working papers) that the Respondents included the Withholding Tax Certificates with reference

numbers, LTO10335497, LTO10335764 and LTO30214713 and these are reflected also in Exhibit 'GRA5' in the assessment of the tax liability of the Appellant.

However, it is also a fact that upon consideration of the WTCC, the Respondent dealt with the Withholding Tax as non-final, thereby imposing further tax, including the Corporate Income Tax, after the 5% Withholding Tax on the Appellant as a subcontractor from 2016 when the Income Tax Law, 2015 (Act 896) came into force. The parties expressed varied opinions on the Withholding Tax to be applied to the Appellant as a subcontractor in the Notice of Appeal and Response thereto as well as the Written Submissions filed. There were arguments as to which Law should be applicable in the imposition of Withholding Tax in respect of the Appellant as a subcontractor, whether it is the Petroleum Income Tax Act, 1987 (PNDCL 118) which was in force at the time the PA was reached or the Income Tax Law, 2015 (Act 896).

Considering the Respondents contention that the Stabilisation Clause in 26 of the PA was not applicable to the Appellant because the Appellant, being a subcontractor was not in the contemplation of the stabilisation clause in Article 26 of the PA. The Court is of a considered opinion that that position does not support the Law as well as the spirit behind the purposive approach to interpretation.

Section 5(1) of the Contracts Act, 1960 (Act 25) provides as follows:

> ***"Any provision in a contract made after the commencement of this Act which purports to confer a benefit on a person who is not a party to the contract, whether as a designated person or as a member of a class of persons, may, subject to the provisions of this Part, be enforced or relied upon by that person as though he were a party to the contract."***

In the book **THE LAW OF CONTRACT IN GHANA** by Christine Dowuona-Hammond, she averred that:

> ***"Section 5(1) of the Contracts Act recognizes a ins quaesitum tertio arising by way of contract where there is an intention to confer a benefit on a third***

party. A careful reading of section 5(1) of the Contracts Act reveals that the intention to confer some benefit on the third party by the parties to the contract is an important prerequisite for the enforceability of third party rights. A person who seeks to enforce some rights under a contract of which he is not a party (third party) can only do so if the contract purports to confer some benefit on him, either as a designated person or as a member of a class persons. On the face of it this means that the parties to the contract must have had the third party within their contemplation as someone or a member of a group on whom they purport to confer some right or benefit arising from the contract, and such intention or contemplation must be evident in the contract itself."

The memorandum to the Interpretation Act, 2009 Act, 782 states:

"The Purposive Approach to interpretation takes account of the words of the Act according to their ordinary meaning as well as the context in which the words are used. Reliance is not placed solely on the linguistic context, but consideration is given to the subject-matter, the scope, the purpose and, to some extent, the background. Thus with the Purposive Approach to the interpretation of legislation there is no concentration on language to the exclusion of the context. The aim, ultimately, is one of synthesis."

The Court therefore by the purposive approach leans favourably towards arguments by the Appellant that while Article 26.2 of the Petroleum Agreement did not specifically mention the subcontractor as in the case of Article 12, the obligations of the Contractor guaranteed under Article 26.2 includes the Contractor's obligation to withhold tax not more than 5% Withholding Tax from the subcontractor; as well as the Contractor's right under Article 7.2(h) to engage such subcontractors as are necessary. Therefore, the guarantees and prohibitions under Article 26.2 which affects the Contractors' responsibilities and benefits directly affect the Appellant as a subcontractor under the PA. Hence, based on the provisions of the PA as a whole; the guarantees under Article 26.2 equally apply to the Appellant herein.

Therefore, contrary to the Respondent's assertion, when the PA is read as a whole the stabilisation clause in 26 of the PA applies to the Appellant because the Appellant, being a subcontractor was in the contemplation of the stabilisation clause in Article 26 of the PA.

Importantly also, Article 1(2) of the 1992 Constitution superseded Section 136 of Act 896. Hence, the applicable Law in this instance would be Act 188, even though it has been repealed because Act 896 is not to operate with a retroactive effect and the contract was made with Act 188 in force at the time. Thus the Withholding Tax is final by virtue of Section 27(3) of Act 188.

Article 107 of the 1992 Constitution provides that Parliament shall have no power to pass any Law -

> ***"(a) to alter the decision or judgement of any Court as between the parties subject to that decision or judgement; or***
>
> ***(b) which operates retrospectively to impose any limitations on, or to adversely affect the personal rights and liberties of any person or to impose a burden, obligation or liability on any person except in the case of a Law enacted under articles 178 or 182 of this Constitution."***

Further, Article 1(2) of the 1992 Constitution of Ghana provides that:

> ***"The Constitution shall be the supreme Law of Ghana and any other Law found to be inconsistent with any provision of this Constitution should, to the extent of the inconsistency, be void."***

In the case of **ADJEI- AMPOFO v. ATTORNEY-GENERAL AND THE PRESIDENT OF THE NATIONAL HOUSE OF CHIEFS [2011] 2 SCGLR 1104,** the Supreme Court held that Section 63(d) of the Chieftaincy Act, 759 was made in contravention of the Constitution and hence declared void.

It is trite that Laws do not operate retrospectively except in procedure, evidence, declaratory Laws, revise and consolidation. Article 1(2) of the 1992 Constitution superseded Section 136 of Act 896. Hence, the applicable Law would be Act 188, even though **it has been repealed because Act 896 is not to operate with a retroactive effect and the contract was made with Act 188 in force at the time.**

In the case of **YEW BON TEW v. KANDERAAN BAS MARA [1982] 3 ALL ER 833,** the Court per Lord Brightman held that:

> ***"A statute is retrospective if it takes away or impairs a vested right acquired under existing Laws or creates a new obligation, or impose a new duty, or attaches a new disability in regard to events already past."***

The right of the subcontractor to enjoy final Withholding Tax as stated in the PA by virtue of the specific mention of Act 188 had accrued before the passing of Act 896. As a general rule, statutes are generally prospective except the ones which are declaratory or related to matters of procedure and evidence as stated in the case of **FENUKU AND ANOTHER v. JOHN TEYE AND ANOTHER [2001-2002] SCGLR 985.** Act 896 can therefore not operate to affect the rights already acquired by the Appellant as a subcontractor under the PA.

Again, under Clause 7.3 of the PA, there is the recognition of the existence of subcontractors in the performance of the duties and obligations of the Contractor under the Agreement. There is again the recognition of subcontractors under Clause 12 of the PA. Subcontractors were clearly within the contemplation of the parties as beneficiaries under the PA. Hence by virtue of Section 5(1) of Act 25, the subcontractors can sue under the Agreement as third party beneficiaries within the contemplation of the parties.

Subcontractors also derive their rights from the Contractors as aids in the performance of the duties of the contractor. The fiscal stability clause under Clause 26 can therefore be interpreted to include the subcontractors whose contracts derive validity from the existence of the PA.

Pursuant to the decision in **ACCESS BANK LTD v. MARKET DIRECT AND OTHERS (2018) JELR 63866 (HC)** the Income Tax Act 2015 (Act 896) cannot be deemed to be

retrospective simply because it affects existing rights nor was it retrospective merely because part of the requisites for its action was drawn from a time antecedent to its passing. The Petroleum Agreement was made under PNDCL 188 before the coming into force of Act 896. By this, the Appellant's rights was accrued under PNDCL 188 and not the Act 896. The Appellant's rights under PNDCL 188 is the 5% withholding final tax even after 2016. Therefore, reading the agreement as a whole, the Appellant as a subcontractor can enjoy the stability granted the Contractor. **It was therefore erroneous for Respondent to impose further tax including the corporate income tax on Appellant from 2016 when Act 896 came into force. The tax liability resulting from the further imposition ought to be reversed after the 5% Withholding Tax on the Appellant and the Court holds that same must be reversed.**

Appellant succeeds in part on Ground 1 of this Appeal.

Ground IV

The Respondent erred in Law by disallowing the input VAT amounting to US$3,888,216.60 claimed by the Appellant on its VAT/NHIL Returns in contravention of section 48(1) of the Value Added Tax Act, 2013 (Act 870).

Counsel argued under this ground that pursuant to Section 48(1) of Act 870, a taxpayer is allowed to deduct input tax from its output tax subject to some conditions: that the taxpayer's supply is a taxable supply, the taxable person has a tax invoice with respect to purchases made in Ghana, and in respect of import or removal of goods from a bonded warehouse, the taxable person has the relevant customs entries indicating that tax was paid.

However, pursuant to section 48(5) of Act 870 a taxable person does not qualify for deductible input tax in respect of a taxable supply or import of a motor vehicle or vehicle spare parts unless the taxable person is in the business of dealing in or hiring motor vehicles or selling vehicle spare parts, and the vehicle or spare parts are for use in that business.

Furthermore, under Section 48(6) of Act 870, a taxable person does not qualify for deductible input tax in respect of a taxable supply relating to entertainment including restaurant, meals and hotel expenses unless the taxable person is engaged in a taxable activity of providing entertainment, and the entertainment is for use in that taxable activity.

It is the contention of the Appellant that the Respondent wrongly disallowed some input tax claims which did not fall under Sections 48(5) and (6) of the Act 870. The Respondent disallowed some input tax claims in respect of visa processing fees, professional service fees relating to payroll services, internet services and inspection services among others, even though they were used wholly, exclusively, and necessarily in the Appellant's taxable supply.

That by virtue of Sections 166 and 167 of Evidence Act, 1975 (NRCD 323) photocopied invoices are not rendered any less verifiable or authenticable since they still have their unique serial numbers to be verified as well as the Suppliers' addresses and details. Therefore, the fact that an invoice is a photocopy should not in itself be grounds for its rejection. To the extent that the Respondent has not raised any genuine question as to the authenticity of the photocopies and yet, tax invoices for some inputs were disregarded because they were photocopies as indicated in the referenced schedule is wrong in Law.

Arguments by Respondent

Respondent refuted the assertion of the Appellant that Respondent disallowed the input VAT amounting to US$3,888,216.60 claimed by the Appellant on its VAT returns in contravention of Section 48(1) of the Value Added Tax Act, 2013 (Act 870).

Respondent states that for the 2015 to 2017 years of assessment, it was established that most of the Customs entries forming the basis for the other local input VAT/NHIL did not bear the name of the Appellant and referred to Exhibit 'GRA5'.

The Respondent again stated that it disallowed the Appellant's own invoices on the ground that the Appellant could not provide evidence to the effect as required in Section 41 of the Value Added Tax Act, 2013 (Act 870) and Regulation 21 of the Value

Added Tax Regulations, 2016 (L.I. 2243), neither was the Appellant able to prove that it had authority of the Commissioner-General to issue its own invoices in accordance with Section 41(3) of the Value Added Tax Act, 2013 (Act 870) and regulation 22 of L.I. 2243. There were also no original Input VAT/NHIL invoices and related documents on some of the input invoices hence the disallowance

Furthermore, the VAT deduction allowed under Section 48(1) of the Value Added Tax Act, 2013 (Act 870), as amended, is not absolute but subject to the condition that, the Taxpayer is in possession of a tax invoice or sales receipt issued in accordance with the VAT Act and these VAT invoices or Sales Receipts relate to the taxable supply. For the 2015 to 2017 years of assessment, the total VAT/NHIL input that was claimed was US$4,230,340.64. The VAT/NHIIL amount that was assessed was US$2,465,327.33 and this amount represents an annual average rate of 22.15% of the total cost of the Appellant, which is a local company and Maersk Drillship Singapore PTE, which is an external company. The project revenue of the Appellant and Maersk Drillship Singapore PTE were apportioned 15% and 85% respectively, and the amount assessed was abated to 15%, thereby bringing the assessed amount to US$1,600,543.92. The resultant amount of US$2,629,796.72 was therefore disallowed as input VAT/NHIL. Attached hereto and marked as 'Exhibit GRA 6' is a copy of the Input Tax Computation Schedule. The alleged input VAT amounting to US$3,888,216.60 that the Appellant claims has been disallowed is therefore false.

Analysis

Section 41 (1-4) of the Value Added Tax Act, 2013 (Act 870) provides as follows:

> **"Issue of tax invoice or sales receipt**
>
> *41. (1) A taxable person shall, on making a taxable supply of goods or services, issue to the recipient, a tax invoice in the form and with the details that are prescribed by the Commissioner General.*

(2) A taxable person on issuing a tax invoice shall retain a copy of the invoice in a sequential identifying number order.

(3) The Commissioner-General may authorise a taxable person who makes a taxable supply to issue a sales receipt instead of a tax invoice in accordance with the conditions and procedures specified in Regulations made under this Act.

(4) A person shall not provide a tax invoice or sales receipt in circumstances other than those specified under this section

Regulation 21 of the Value Added Tax Regulations, 2016 (L.I. 2243) under sub-regulation 3 provides as follows:

Regulation 21—Tax invoices

(3) Unless a registered person is authorised by the Commissioner General in writing to print that person's own invoice similar to the invoice prescribed by the Commissioner-General, ***the tax invoice issued by a registered person shall be the invoice printed by the Commissioner-General."***

By Law therefore the Respondent cannot, therefore, allow similar invoices from the Appellant without any evidence of an approval in writing by the Commissioner-General.

Section 48(1) of the Value Added Tax Act, 2013, (Act 870) provides as follows:

"Deductible input tax

(1) Subject to section 49, at the end of the tax period provided for in this Act or prescribed by the Regulations, a taxable person may deduct the following fromthe output tax due for the period:

(a) tax on goods and services purchased in the country and goods imported by that person and used wholly, exclusively and necessarily in the course of the taxable activity of that person subject to the condition that

(i) the supply is a taxable supply;

(ii) in respect of purchases made in Ghana, the taxable person is in possession of a tax invoice issued under this Act;

(iii) in respect of import or removal of goods from a bonded warehouse, the taxable person is in possession of relevant customs entries indicating that tax was paid;

(b) input tax deduction allowed under sections 45 and 46 for the tax period;

(c) an amount equal to the tax fraction of an amount paid during the tax period by the taxable person as a prize or winnings to the recipient of services under section 22(2);

(d) an amount equal to the tax fraction of any amount paid during the tax period by the taxable person to indemnify another person under a non-life insurance contract where

(i) the supply of the non-life insurance contract is a taxable supply;

(ii) the payment is not in respect of the supply of goods or services to the taxable person or the importation of goods or services by the taxable person;

(iii) the supply of the non-life insurance contract is not a supply charged with tax at a rate of zero percent under section 36; and

(iv) the payment does not result from a supply of goods or services to that other person where those goods are situated outside Ghana or those services are physically performed elsewhere than in Ghana at the time of the supply; and

(e) an amount equal to the tax fraction of any amount paid during the tax period by the taxable person to a supplier in respect of the redemption of a token, voucher, gift certificate, or stamp referred to in section 43(16)."

(2) The tax deducted from the output tax under subsection (1) is known as deductible input tax or an input tax deduction.

(3) Unless otherwise provided in this Act, an input tax deduction shall not be allowed on purchases or imports in respect of exempt supplies by the taxable person.

(4) An input tax deduction shall not be made

(a) more than once; or

(b) after the expiration of a period of six months after the date the deduction accrued.

(5) A taxable person does not qualify for deductible input tax in respect of a taxable supply or import of a motor vehicle or vehicle spare parts unless the taxable person is in the business of dealing in or hiring motor vehicles or selling vehicle spare parts, and the vehicle or spare parts are for use in that business.

(6) A taxable person does not qualify for deductible input tax in respect of a taxable supply relating to entertainment including restaurant, meals and hotel expenses unless the taxable person is engaged in a taxable activity of providing entertainment, and the entertainment is for use in that taxable activity.

(7) A taxable person does not qualify for deductible input tax on fees or subscriptions paid by the person in respect of membership of a club, association, or society of a sporting, social, or recreational nature by any person.

The Appellants stated in paragraphs 33, 34 and 35 that the disallowed input taxes did not fall under the exceptions provided in Sections 48(5) and 48(6) but the respondent disallowed it anyway:

> ***"35. However, the Respondent wrongly disallowed some input tax claims which did not fall under sections 48(5) and (6) of the Act 870. The Respondent disallowed some input tax claims in respect of visa processing fees, professional service fees relating to payroll services, internet services and inspection services among others, even though they were used wholly, exclusively, and necessarily in the Appellant's taxable supply."***

The Respondents on the other hand justified disallowing the said input taxes by virtue of the fact that the Appellant had not conformed to the dictates of Section 41(1) of Act 870 neither were they able to prove that they had the authorisation of the Commissioner-General under section 41(3) of Act 870.

'Section 41- Issue of tax invoice or sales receipt

> ***(1) A taxable person shall, on making a taxable supply of goods or services, issue to the recipient, a tax invoice in the form and with the details that are prescribed by the Commissioner-General."***
>
> ***"41 (3) The Commissioner-General may authorise a taxable person who makes a taxable supply to issue a sales receipt instead of a tax invoice in accordance with the conditions and procedures specified in Regulations made under this Act."***

Regulation 21 of the Value Added Tax regulations 2016 (L.I. 2243) provides the format in which a tax invoice should be in as follows:

"Regulation 21—Tax invoices

> ***(1) A taxable person shall, in accordance with subsection (1) of section 41 of the Act, on supply of taxable goods or service to a customer issue to the customer a tax invoice.***
>
> ***(3) Unless a registered person is authorised by the Commissioner General in writing to print that person's own invoice similar to the invoice prescribed by the Commissioner-General, the tax invoice issued by a registered person shall be the invoice printed by the Commissioner- General.***
>
> ***(4) Where under sub regulation (3), a person is authorised, the authorisation shall be for a period determined by the Commissioner General and authorisation may be renewed.***
>
> ***(5) An original tax invoice shall not be provided in any circumstance other than that specified in sub regulation (1).***

(6) In the case of supplies made at the retail stage where recipients are not taxable persons, the tax may be charged in accordance with regulations 22 to 28.

(7) In the case of import of goods, the appropriate customs forms and receipts certifying payment of the tax shall be used as the control document for establishing eligibility for input tax credit."

The Appellant did not challenge the assertion by the Respondent that for the 2015 to 2017 years of assessment, it was established that most of the Customs entries forming the basis for the other local input VAT/NHIL did not bear the name of the Appellant. Having not challenged this assertion same is deemed to have been admitted by the Appellant.

The Court finds as a fact that the Appellants have not been able to prove that they had the authorization of the Commissioner General to present an invoice in a form other than what has been stated in Section 41(1) of Act 870 or Regulation 21 of the VAT Regulations. Therefore, it was not because they did not fall under the exceptions provided in Section 48 of Act 870, or that they were photocopies, rather it is because the Appellants brought different tax invoices which did not conform to the Law. If the Appellants want the said invoices to be considered, they have to prove that they had the consent or authority of the Commissioner-General or they must present the tax invoices in their prescribed form. Or that the duplicate invoices were in their name or even if not in their name, had been procured with the consent or authority of the Commissioner-General

Ground 4 of appeal fails

Ground 5

The Respondent erred in Law by rejecting the VAT Relief Purchase Orders issued to the Appellant for services actually rendered to ENI Ghana Exploration and Production Limited under a subcontract agreement for the provision of Deepwater DP Drilling Rig dated 30th January 2015.

Argument by Appellant

An assessment of all the Appellant's VRPOs show that the Respondent either refused or failed to consider VRPOs which were obtained in relation to some supplies made to ENI. That the Appellant's total VRPOs amounted to USD9,788,453.72 but the Respondent only granted VRPOs in the amount of USD9,453,145.48 thereby resulting in disallowed VRPOs in the amount of USD335,308.24.

Appellant contended that the Respondent in its Objection Decision dated 30th September, 2021 which was attached to the Notice of Appeal and marked as Exhibit 'MRG 5', indicated under the caption "Vat Relief Purchase Order Assessed" that where the analysis of the VRPO schedules established that the amount relieved on the face of some of the VRPOs exceeded the underlining VAT invoiced amount, the Respondent restricted the assessed amount to the associated VAT invoice amount. However, in other instances where the analysis of the VRPO schedule revealed that the associated VAT' invoice amount exceeded the amounts relieved on the face of some of the VRPOs, yet the Respondent restricted the allowed VRPO to what was stated on the face of the VRPO, thereby sinning against the cardinal principle of Law in respect of approbating and reprobating. After providing a detail schedule of Appellant's total VRPOs of USD 9,788453.72, Appellant contends that to the extent that all the VRPOs were issued to the Appellant by only ENI, the VRPOs are easily reconcilable with the records of ENI to ascertain the veracity of the Appellant's claim.

That even assuming there were indeed discrepancies between the underlying invoices and amounts stated on the face of the VRPOs, an objective assessment of the allowable VRPOs could have been made by reconciling with the issuer of the said VRPOs, but the Respondent rather choose an arbitrary selection of VRPOs only where the results favoured the Respondent. In the circumstance, a proper assessment of the VRPOs issued to the Appellant would require an objective reconciliation of the VRPOs and their underlying VAT invoices.

Argument by Respondent

The Respondent denies this assertion and states that it was established from the tax audit conducted by the Respondent that the VAT amount relieved on the face of all the VRPOs made available to Respondent amounted to US$9,456,625.09 for the 2015 to

2017 years of assessment. The VAT amount associated with the invoice values underlying the VRPOs amounted to US$9,873,498.49.

The analysis of the VRPO schedules revealed that, the associated VAT invoice amount exceeded the amounts relieved on the face of some of the VRPOs, therefore the assessed amount was restricted to the amount on the face of the associated VRPOs and the excess disallowed. Thus, the net effect of the overstatements resulted in an assessed VRPO amount of US$9,453,145.48.

The Respondent argued that it did not approbate and reprobate as alleged by the Appellant in its Written Submission. Under Section 2 of Act 870, as amended, the obligation of payment of VAT is imposed on the Taxpayer, in this case, the Appellant. The Taxpayer is also required to issue VAT invoice to cover every taxable transaction as prescribed in Section 41 of the same Act, failure of which sanctions are imposed on such Taxpayer per Section 58 of the Act.

Under Article 12(5) of the PA, the Contractor has been granted VAT exemption in the form of reliefs. In order to benefit from these reliefs, the Respondent issues Administrative Forms in the nature of VRPOs which the taxpayer is also required to issue to cover any reliefs they are entitled to.

During the audit, it was discovered that the invoices which purported to be the actual VAT charged by the Appellant on ENI for which ENI was required to issue VRPOs to cover were inconsistent. In some instances, the VRPOs issued were more than the VAT charged and therefore the auditor had to restrict the amount on the VRPOs to the VAT charged and the excess disallowed. In the same vein, where the VRPOs issued were less than the actual VAT charged, the Taxpayer was restricted to the VRPO figure on the basis that it was not the full amount on the VAT invoice that the ENI is entitled for reliefs.

The VAT deduction allowed under Section 48(1) of the Value Added Tax Act, 2013 (Act 870) as amended is not absolute but subject to the condition that, the Taxpayer is in possession of a tax invoice or sales receipt issued in accordance with the VAT Act and those VAT invoice or Sales Receipt relate to the taxable supply. In the instant case,

some of the VRPO values did not correspond to the VAT/NHIL invoices and figures captured on the Appellant's ledger. Similarly, for some of the VAT invoices issued, the Appellant could not provide VRPOs to relief them from VAT. In line with Section 2(1) of VAT Act 870 the Appellant was surcharged for failing to obtain VRPO. It is therefore, misleading on the part of the Appellant to claim that, the Respondent did not recognize and consider VRPOs issued to the Appellant by the Contractor (ENI).

Analysis

The parties herein are not disputing that indeed some VRPOs were issued. However the dispute borders on the amount for the VRPOs issued.

In support of its assertion of understatement, the Appellant produces a list of the various VRPO issued by ENI, identifiable by their individual VRPO numbers with their corresponding date of issuance and the relief amount. The VRPOs could therefore be easily verified by the Respondent.

None of these listed VRPOs were disputed by the Respondent to warrant a reduction in the total VRPOs listed. Respondent however, relying on Section 48(1) of the VAT Act 2013 (Act 870) stated that some of the VPROs did not correspond to the VAT invoices and figures captured on the Appellant's ledger. Respondent further avers that similarly, some of the VAT invoice issued, the Appellant could not provide VRPOs to relieve them from VAT.

Section 48 (1) of Act 870 provides as follows:

> *Subject to Section 49, at the end of the tax period provided for in this Act or prescribed by the Regulations, a taxable person may deduct the following from the output tax due for the period:*
>
> *(a) tax on goods and services purchased in the country and goods imported by that person and used wholly, exclusively and necessarily in the course of the taxable activity of that person subject to the condition that (i) the supply is a taxable supply;* ***(ii) in respect of purchases made in Ghana, the taxable***

person is in possession of a tax invoice issued under this Act; *24 (iii) in respect of import or removal of goods from a bonded warehouse, the taxable person is in possession of relevant customs entries indicating that tax was paid;*

The Court is of the considered opinion that the issuance of a VRPO is based on the existence of a VAT invoice. It is therefore important that the VAT invoice be the basis for VRPO allowed in the assessment. Where the amount stated on the VAT invoice exceeds the amount on the VRPO, the Respondent is right to restrict the assessed amount to the VAT invoice amount. In the same vein, it is clear that where the amount on the VRPO exceeds the amount on the VAT invoice, the Respondent ought to restrict the assessed amount to the VAT invoice amount which, as already stated, forms the basis for the issuance of the VPROs. The Court considers further that, where VRPOs were issued to reflect an existing VAT invoice, the assessment ought to be restricted to the amount on the VAT invoice since the VRPO is borne out of the corresponding VAT invoice. However, in circumstances where no VRPO is issued, the party cannot enjoy any such exemptions since the relief is enjoyed because of the existence of a VRPO.

Per Section 92 (2) of Act 915 as stated above, *with respect to the imposition of a penalty, including in proceedings on appeal under or for the recovery of a penalty, the burden of proof is on the Commissioner-General to show non-compliance with the provisions of the tax Law.* In view of the above, the burden of proof is on the Respondent to prove the non-compliance of the Appellant with the provisions of the Law. Since the Appellant provided detailed verifiable list of the VPROs to prove the existence of same, the Court deems it fit for a reconciliation exercise to be conducted to determine the amount for the VPRO's issued.

Ground 5 is upheld, Court orders reconciliation

Determination by Court

Ground 1

The tax certificates listed by Appellant were considered by the Respondent, however it was erroneous for Respondent to impose further tax including the Corporate Income Tax on Appellant from 2016 when Act 896 came into force. The tax liability resulting from the further imposition ought to be reversed after the 5% Withholding Tax on the Appellant.

Ground 2

Respondent rightly disallowed the said tax invoices because if the Appellants want the said invoices to be considered, they have to prove that they have presented the tax invoices in their prescribed form or that they had the consent or authority of the Commissioner-General to present it the way they did, or that the duplicate invoices were in their name or even if not in their name, had been procured with the consent or authority of the Commissioner General. All these Appellant failed to do.

Ground 5

Court orders reconciliation.

CERTIFIED TRUE COPY
.....REGISTRAR
HIGH COURT
COMMERCIAL DIVISION, LLC-ACCRA

(SGD.)

H/L JANE HARRIET AKWELEY QUAYE (MRS.)
(JUSTICE OF THE HIGH COURT)

Representation

Appellant absent

Respondent absent

Counsel for Appellant– Ismail Ibn Ibrahim with Wisdom Ankah and Dr. Nana Gyamera Afful led by Benedict Asare with for Dr. Abdallah Ali-Nakyea present

Counsel for Respondent – Rebecca Eduafo-Abraham for Cephas Odartey Lamptey present