IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA

CORAM: ERIC KYEI BAFFOUR JA (PRESIDING)
NOVISI ARYENE JA
STEPHEN OPPONG JA

SUIT NO.H1/42/2023

DATE: 25TH JANUARY, 2024

BLUE SKY PRODUCTS (GHANA) LTD. ..... APPELLANT

VRS

COMMISSIONER OF GRA (DOMESTIC TAX) ..... RESPONDENT

J U D G M E N T

NOVISI ARYENE JA:

At page 23 of the 5th edition of the book **Taxation in Ghana**, the learned authors Benjamin Kunbuour, Abdallah Ali-Nakyea and William Kofi Owusu Demitia made a profound statement, which shall guide us in our discourse in this appeal.

They stated thus;

> *"Unlike other branches of law, revenue law is purely a creation of statute, – legislation being its main source. The judicial function is therefore confined to interpretation. There is therefore no equity*

(legally speaking) in tax statute, and liability cannot be implied under any principle of equity but must be found in the express language of a statutory provision."

This is an appeal against the decision of the High Court Accra, dated 23rd November 2021, which decision dismissed the appeal brought by Blue Sky Products (Ghana) Ltd (hereinafter referred to as the appellant) against the Final Objection Decision of the Commissioner General of the Ghana Revenue Authority (hereinafter referred to as the respondent). The objection is in respect the interpretation of section 28(2) of the Free Zones Act 1995, (Act 504) and paragraphs 3(3) and 4 of the first schedule of the Income Tax Act, 2015 (Act 896).

Section 28(1) of the Free Zones Act 1995 (Act 504) exempts Free Zone Enterprises from payment of income tax on profits for the first ten years from the commencement of operation of business. It is the case of appellant that section 28(2) of the Act provides that after the ten year concession period, agro-processing companies engaged in export of non-traditional products, shall be assessed income tax at the rate not exceeding 8%. And that based on the Act, appellant (an agro-processing company engaged in the export of non-traditional products) self-assessed its tax liability for the half yearly period ending 30th June 2020, at £88,549.27.

However, applying the higher tax rate of 15% under paragraph 4 of the first schedule of the Income Tax Act, 2015 (Act 896), respondent assessed tax for appellant for the same period at £166,029.88.

Dissatisfied and aggrieved with the tax assessment of the respondent, by a letter dated 8th July 2020, appellant lodged an objection to the tax decision with respondent, on the following grounds:

I. *That paragraph 4 of the first schedule to the Income Tax Act is inconsistent with the statutory provisions of section 28 of the Free Zones Act.*

II. *That as an exporter of non-traditional products, appellant is by virtue of paragraph 3(3) of the first schedule of the Income Tax Act, subject to tax liability at the rate of eight percent.*

Respondent maintained that the tax rate applicable to appellant was 15% under paragraph 4 of the first schedule of Act 896, and not 8% under paragraph 3(3) of the first schedule of Act 896, and by tax decision dated 10th September 2020, dismissed the objection.

Dissatisfied with respondent's decision, appellant filed an appeal at the Commercial Division of the High Court on 7th October 2020, under Order 54 rule 2(5) of the High Court Civil (Procedure) Rules 2004, CI 47 challenging the following findings of respondent:

a. *The finding by the Tax Commissioner that the concessionary rate of 8% granted to exporters of non-traditional goods is applicable solely to such companies other than a company registered as a Free Zone Enterprise.*

The particulars of error were stated as follows:

i. *The finding by the Tax Commissioner that the concessionary rate of 8% granted to exporters of non-traditional goods is applicable solely to such companies*

other than a company registered as a free zone enterprise, is not justifiable by reference to any legal principle.

ii. *The finding by the Tax Commissioner that the concessionary rate of 8% granted to exporters of non-traditional goods is applicable solely to such companies other than a company registered as a Free Zone Enterprise is inconsistent with the provisions of Articles 23 and 296 of the 1992 Constitution.*

iii. *The finding by the Tax Commissioner that the concessionary rate of 8% granted to exporters of non-traditional goods is applicable solely to such companies other than a company registered as a free zone enterprise, is inconsistent with the provisions of Article 17 of the 1992 Constitution.*

Per judgment delivered by the High Court on 23rd November 2021, the appeal was dismissed and the tax decision of respondent affirmed. The learned judge rejected appellant's submission that the appellant company falls within two tax regimes. He ruled that free zone companies and exporters of non-traditional goods have two distinct and separate tax regimes with their distinct tax incentives. And that even though appellant is a free zones company which is involved with production and exportation of non-traditional goods, the applicable law was paragraph 4 of the Income Tax Act 2015, (Act 896).

The learned trial judge continued thus;

"To hold otherwise will amount to the applicant enjoying two categories of freebees to the detriment of the Ghanaian economy. For purposes of this appeal, the applicant I hold is a FZE entity and must be treated as such. This is so because the applicant took advantage of section 28(1) of the Free Zone Act, 1998 (Act 504) and consequently enjoyed the tax holiday of ten years without paying any tax on its profits. Having enjoyed the said tax holiday, the section 28(2) of Act 504 kicks in after the concessionary period and to me, the applicant cannot and should not be allowed to move to a different tax regime with more advantages than provided under section 28(2) of Act 504. Again, it is not the respondent that fixed or attached this tax regime to the applicant as they would want this court to believe. It is a choice that the applicant made by themselves at the inception of business and must be estopped from denouncing same."

Referring to the antecedent to paragraph 4 of the first schedule of Act 896, the court noted thus:

"It is the case of the respondent which was never challenged that the 8% tax concessionary rate granted companies after the concessionary period of 10 years was provided for in the free zones (Exclusive and Concessionary) Regulations, 2007, (LI 1834) and Free Zone (Tax Concession) Regulation 2010 (LI 1963). This concessionary rate of not more than 8% was inserted into the Internal Revenue Act, 2000 by the Internal Revenue (Amendment) Act, 2013, (Act 871). This rate was subsequently

amended to fifteen percent by the Internal Revenue (Amendment) Act 2014 (Act 885) which revoked and amended the Free Zone (Exclusion and Concessionary) Regulations 2007 (LI 1834) and the Free Zone (Tax concession) Regulation 2010, (LI 1963). This rate of fifteen (15) percent was further re-stated in paragraph 4 of the first schedule to the Income Tax Act 2015, (Act 896).

With respect to the alleged discrimination and breach of the 1992 Constitution, the court below held thus;

"Discrimination under Article 17 of the 1992 Constitution will only come to play when two or more separate entities within the same tax regime/bracket are made to enjoy separate tax incentives. It is not applicable to instances such as this when the entities are given the option to choose and cannot be taken as discrimination when each entity is allowed to enjoy the exclusive benefits within its domain. The argument about discriminatory treatment is obviously without merit and same is dismissed as such."

Aggrieved with the decision of the High Court, appellant is before this second appellate court praying for a reversal of the tax decision. The ruling of the lower court is challenged on the following grounds:

I. *The High Court erred in law when it held that because appellant is a free zones enterprise and had previously enjoyed the benefits of the tax regime applicable to free zone enterprises, appellant is not entitled as a producer and exporter of non-traditional products to the more favourable tax regime enjoyed by producers and exporters of non-traditional products even*

though appellant is undoubtedly a producer and exporter of non-traditional goods.

The conclusion reached by the court below flies in the face of the basic distinction in tax law between tax evasion and tax avoidance.

II. *The High Court erred in law when it held that Article 17 of the 1992 Constitution is not applicable "in instances such as this" where entities are given the option to choose and enjoy exclusive benefits within its domain.*

Particulars of Error

a) *There is nothing in the text of the provision of Article 17 of the 1992 Constitution which justifies the exception purportedly made by the court below.*

b) *To the extent that the statutory provision under which the appeal was determined offended the provisions of Article 17 of the 1992 Constitution, they must have been deemed amended to the extent of the inconsistency or else declared null and void by reason thereof.*

ARGUMENTS OF APPELLANT

GROUND 1

Submissions on this ground was presented under two heads: The first being that statutes must be read as a whole. The second leg of the submission is that it is a rule of tax law and practice that a tax

payer is entitled to order his/her affairs in such a way as to pay the least possible tax. Accordingly, the decision of the trial court flies in the face of the principle of tax avoidance. Further, that the conclusion by the court below that, having enjoyed ten years tax concession under section 28(1) of the Free Zones Act 504 and paragraph 9 of the sixth schedule of the Income Tax Act, appellant cannot be assessed income tax under paragraph 3(3) of the first schedule to the Income tax Act, is erroneous. And that as a company which exports non-traditional agro products, at the expiry of the tax concession, section 28 (2), which provides *".....tax rate after ten years shall not exceed a maximum of eight percent of the profit"* kicks in.

Section 28 (2) of the Free Zones Act provides that subsequent to the ten years during which the Free Zones Enterprise (FZE) enjoyed tax indemnity, FZE shall then be required to pay tax income at a rate not exceeding a maximum of eight percent of the profit.

Counsel further submitted that section 28(2) of the Free Zones Act is inconsistent with paragraph 4 of the first schedule to the Income Tax Act 896, which provides thus;

> *"The chargeable income of a free zone enterprise after the concessionary period from the export of goods and services outside of the national customs territory for a year of assessment is taxed at the rate of fifteen percent."*

It was argued that there is no express repeal of section 28(2) of Act 504 by the Income Tax Act and that the principle of implied repeal does not apply in this case since section 28(2) of Act 504 is consistent

with the provisions of paragraph 3(3) of the first schedule of Act 896. And that reading paragraphs 3(3) and 4 of the first schedule of Act 896 as a whole would reveal that paragraph 4 applies to free zone enterprises which are not engaged in the export of non-traditional products. Counsel contended that reading the Act as a whole would reveal that the law treats the various categories of taxpayers differently. However, with respect to exporters of non-traditional goods, paragraph 3(3) of the first schedule makes no such distinction between the different types of taxpayers, and there is nothing in the wording of paragraph (3) which excludes free zone enterprises which export non-traditional goods, from taking benefits under its charging provisions.

Further, paragraph 4 of the First Schedule to the Income Tax Act deals with the general requirement to pay tax on income derived from export of goods and services, but paragraph 3(3) refers specifically to export of non-traditional goods.

Counsel submitted further that it was within the rights of individuals and corporate entities to adopt tax avoidance arrangements with a view to minimizing their tax liability. In support of this submission counsel relied on the English case of **IRC v Fisher's Executors [1926] AC 395 at 412**, and the Ghanaian case of **Republic v Commissioner of Income Tax Ex parte Maatschappij De Fijlmhouthandel v [1974] 1 GLR 28** and contended that having arranged its affairs to take advantage of tax benefits under the law,

respondent cannot interpret the law to deprive appellant of that benefit.

In response, it was submitted on behalf of respondent that the position canvassed by appellant on tax avoidance was legally untenable. And that paragraph 3(3) of the first schedule to Act 896 has to do with companies outside the free zone enclave operating within the domestic economy which are engaged in the export of non-traditional products. And that paragraph 4 of the schedule applies to free zone enterprises which export goods or services outside the national customs territory. And that appellant being a free zone company engaged in the export of non-traditional goods, fell under paragraph 4 of the first schedule of Act 896.

It was submitted further that the alleged inconsistences in section 28(2) of Act 504 and paragraph 4 of the first schedule of Act 896 was untenable in law. And that unlike paragraph 3(3), paragraph 4 makes reference to "*concessionary period*" and also *"chargeable income of a Free Zone enterprise after the concessionary period for the export of goods and services.....*" And that when read as a whole, no inconsistencies exist.

With respect to submissions on tax avoidance, it was submitted in response that the Commissioner General is empowered under section 34(2) of Act 896 when determining a tax liability, to disregard a tax avoidance arrangement where it is found that the arrangement was fictitious or does not have a substantial economic effect or the form of the arrangement does not reflect its substance.

Counsel argued further that the anti-avoidance provision in Act 896 is repeated in section 99 of the Revenue Administration Act, 2016 (Act 915). And that the courts have applied the anti-avoidance provisions in the tax law, to block or reverse the effects of such tax avoidance arrangements and imposed the applicable taxes on tax payers.

In a Reply filed on 24th March 2023, counsel for appellant described the response that anti- avoidance arrangement gives respondent an unfettered power to disregard all anti-avoidance schemes, as misguided.

ANALYSIS BY THIS COURT ON GROUND 1

Section 92(1) of the Revenue Administration Act, 2016, (Act 915) imposes on the person objecting to the assessment, the onus or burden of proving on the balance of probabilities the extent to which the Tax Assessment was erroneous or excessive. Accordingly, the onus is on the appellant to satisfy this second appeal court that it is entitled to the relief sought.

This appeal turns on the interpretation of tax law. We are invited to determine the applicable tax rate in respect of a free zone enterprise engaged in the production and export of non-traditional products, which company has enjoyed tax holidays under section 28(1) of Act 504 for the first ten years of commencement of business. We are to ascertain whether such a company is taxable under paragraph 3(3) of the first schedule of the Income Tax Act, (Act 896) or paragraph 4 of the same schedule of the Act.

In other words, is appellant which is a producer and exporter of non-traditional products, excluded from enjoying the tax regime applicable to producers and exporters of non-traditional products under paragraph 3(3) of the first schedule of Act 896.

Like all legislation, fiscal statutes are subject to the general rules of statutory interpretation. It is a basic principle of construction that statutes must be read as a whole and not in piecemeal. See the Supreme Court case **of Amidu (No. 3) v Waterville Holding BVI Ltd. & Woyome (No 2) [2013-2014] 1 SCGLR 606,** where the apex court ruled that statutory rules must be read as a whole and not piecemeal, and construed purposively to advance rather than defeat the legislative purpose and by implication justice. See also the third edition of the book **Modern Approach to the law of INTERPRETATION in Ghan**a by Dennis Dominic Adjei at page 130.

In the English case of **Mangin v IRC [1971] All ER 179 at 182,** Lord Donovan outlined the following rules of statutory interpretation as being applicable to tax legislation.

> *"First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices..... Secondly, ... 'one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is*

no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.' (Per Rowlatt J in Cape Brandy Syndicate v IRC [1921] 1 KB 64 at 71, approved by Viscount Simons LC in Canadian Eagle Oil co ltd v Regem.) Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted. Fourthly, the history of an enactment and the reason which led to its being passed may be used as an aid to its construction."

Applying the rules outlined above, in **Multichoice Ghana ltd v Commissioner IRS [2011] 2 SCGLR 783,** the Supreme Court speaking through Wood CJ (as she then was) stated at page 794 that their decision was dictated by the strict construction approach "*which was reserved for fiscal legislation*". Referring to the pronouncement of Rowlatt J in the Cape Brandy case (supra), the eminent jurist ruled that as a general principle of law, tax statutes are to be construed strictly.

Commenting on the phrase "general principle" used by the eminent jurist in the Multichoice case (supra), in his **BOOK CONTEMPORARY TRENDS IN THE LAW OF IMMOVABLE PROPERTY IN GHANA**, the learned author, Yaw D Oppong Esq. gave an exposition on exceptions to the strict construction approach

under the topic **"Emerging Exceptions to the Strict Constructionist Model"** at page 548, which in our view is quite insightful.

The learned author posited that as an exception to the rule, where the language used in the fiscal legislation is ambiguous thereby requiring the court to resort to other aids of interpretation, the strict constructionist approach was not applicable. The author further stated that another exception to the strict constructionist approach to interpretation of tax law is where the court was of the view that the transaction was entered into for the sole purpose of evading tax.

Happily, counsel for the parties agree that the instant suit being one involving interpretation of tax legislation, the literalist approach adopted in the Multichoice (supra) case, applies.

ANALYSIS OF PARAGRAPHS 3(3) & 4 OF THE FIRST SCHEDULE OF ACT 896.

Paragraph 3(3) of the first schedule of Act 896 provides;

> *"The chargeable income of a company from the export of non-traditional goods for the year of assessment is taxed at the rate of eight percent."*

Paragraph 4 of the first schedule of Act 896 reads;

> *"The chargeable income of a Free Zone Enterprise after the concessionary period from the export of goods and services outside of the national customs territory for a year of assessment is taxed at the rate of fifteen percent."*

Reading the Act as a whole, and applying the literalist approach, we rule that there is no inconsistencies between paragraph 4 of the First Schedule to the Income Tax Act, Act 896 and section 28(2) of the Free Zones Act, (Act 504). We have come to this conclusion having also considered the history of the current rate of 15% imposed on free zone enterprises engaged in the export of non-traditional goods under paragraph 4 of the first schedule to Act 896 referred to supra. Indeed any inconsistency, to the extent of the inconsistency, is deemed repealed by the provisions of Act 897. Sections 136(1) (b) and section 7(5) of Act 896 refers.

It would also be noted that paragraph 4 of the first schedule of the Act, unlike paragraph 3(3), specifically mentions the rate of income tax payable by free zone enterprises "***after the concessionary period***". It is our view that the phrase "after the concessionary period" is critical in making a determination. Reading paragraph 4 as a whole, it is clear that that provision specifically refers to free zone companies which have enjoyed the concessionary period mentioned under paragraph 9 of the sixth schedule of the Act and section 28(1) of Act 504.

It seems to us that appellant fell into error when regardless of its status as a Free Zones entity, it sought to take advantage of provisions under paragraph 3(3) on an assumption that it applied to all companies engaged in the export of non-traditional goods regardless of their status. The error is due to a misconception which arose from failure to appreciate that having taken advantage of

benefits that come with its status as a free zone enterprise under section 28(1) of Act 504, appellant cannot be entitled to further concessions under paragraph 3(3) which concession applies to non-free zone enterprises.

It bears emphasis that under Act 504, the status of a free zone enterprise is triggered by a formal application to the Free Zones Authority, if the company meets the threshold of exporting more than 70% of its products. The application when approved, cloths the applicant with a special restricted tax regime and a bouquet of tax benefits, both direct and indirect including repatriation of funds. See sections 24 and 26 of Act 504.

My understanding from reading Act 504, is that with the exception of the imposition of 15% tax, at the expiration of the ten year concession period, a registered free zone enterprise continues to enjoy all other indirect tax benefits. Accordingly, where the company elects to be treated as an exporter qua exporter, it must take steps to deregister as a free zone entity. In other words, if a company elects to be registered as a free zones entity, then after the expiry of the ten years tax free period, it cannot opt for the lower rate of 8% under paragraph 3(3) which is incentives provided for exporters of non-traditional products which are not free zone entities, (and therefore are not entitled to benefits of free zone companies under Act 504). Being a free zone company which has enjoyed a zero rated tax for a period of ten years under section 28(1) of Act 504, the tax rate

applicable to appellant is 15%, under paragraph 4 of the first schedule of Act 896.

Having benefited from the concessionary period under Act 504, it cannot be the intention of the legislature that appellant should benefit from further concessions. If it were so, same would have been specifically provided for in the Act. We totally agree with the first appellate court's interpretation of the law and hold that being a free zone entity which has enjoyed the ten year concession period under section 28(1) appellant falls squarely within the ambit of paragraph 4 and we so hold. Appellant failed to demonstrate the error in the tax decision of the respondent.

SUBMISSIONS ON TAX AVOIDANCE

Section 34(2) of Act 896, defines tax avoidance to include "an arrangement the purpose of which is to avoid or reduce tax liability".

Tax arrangement is defined in section 99(4) and (5) of Act 915 as

a) *an arrangement that has as its main purpose, the provision of tax benefits for a person, or*
b) *an arrangement where the main benefit that might be expected to accrue from the arrangement is a tax benefit for a person.*

A tax benefit in relation to a person means-

a) *Avoiding, reducing or postponing a tax liability of the person;*
b) *Increasing a claim of the person for a refund of tax, or*
c) *Preventing or obstructing collection of tax from the person*

The second leg of submissions on ground 1 of the appeal is to the effect that the conclusion by the court below flies in the face of the basic distinction in tax law between tax evasion and tax avoidance. Having held that appellant failed to demonstrate that the respondent's tax decision is erroneous, we must be quick to add that the position presented by the appellant cannot be described as tax avoidance arrangement.

It was submitted that it was within the rights of individuals and corporate entities to arrange their affairs in order to make the best use of various tax exemptions, deductions and benefits with the view to minimizing their tax liability. And that the tax avoidance method employed by the appellant in the instant case was "not *an elaborate scheme with an ulterior motive but is merely the selection, out of two applicable options, of the more favourable tax category under which the appellant, by virtue of the business that it carries out, genuinely falls.*"

As earlier discussed in this judgment, having elected to be a free zone company and having enjoyed the tax holidays under Act 504, it was not open to appellant to decide which tax regime to come under. Its status as a free zone entity by election, placed it under paragraph 4.

Explaining the concept of tax avoidance under sections 99(44) and (5) of the Revenue Administration Act 2016, (Act 915), in their book **Law of Taxation in Ghana, (supra)** the learned authors, stated at page 234 that, an arrangement is a tax avoidance arrangement only if it involves a misuse or abuse of a tax law provision having regard

to the purpose of the provision and the wider purpose of the law in which the provision is situated.

Section 34 of Act 896 empowers the Commissioner General to re-characterize or disregard an arrangement that is entered into or carried out as part of a tax avoidance scheme, where the arrangement is fictitious or does not have a substantial economic effect; or the form of the arrangement does not reflect its substance. It can be inferred from the Act that while the taxpayer is at liberty to adopt tax planning methods with the view to minimizing its tax liability, this does not debar the Commissioner General from looking into the arrangement and disregarding it if found to be abusive.

Both the Income Tax Act and the Revenue Administration Act do not define what constitutes abusive tax avoidance. We however find the exposition on the topic by the learned authors of **The Law of Taxation in Ghana** useful. They observed at pages 235 to 236 that there is a distinction between tax planning; which involves arranging a person's tax affairs by making the best use of the various exemptions, deductions and benefits in order to minimize tax liability; and tax avoidance arrangements which from the definition of "tax avoidance arrangements" under the laws of Ghana, constitute misuse or abuse of tax law and therefore unacceptable and illegitimate. In some jurisdictions, tax avoidance foreseen by the legislature, is distinguished from tax avoidance involving exploitation of loopholes in the law. There is therefore a difference between responsible tax planning and abusive avoidance.

The test as to what constitutes abuse of tax avoidance arrangements was outlined by the Canadian Supreme Court in the case of **Copthorne Holdings ltd v Canada [2011] 3 SCR 721** as follows:

> *"In order to determine whether a transaction is an abuse or misuse of the Act, a court must first determine the object, spirit or purpose of the provisions that are relied on for the tax benefit, having regard to the scheme of the Act, the relevant provisions and permissible extrinsic aids.....The analysis will lead to a finding of abusive tax avoidance; (1) where the transaction achieves an outcome the statutory provision was intended to prevent; (2) where the transaction defeats the underlying rationale of the provision; or (3) where the transaction circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose. These considerations are not independent of one another and may overlap."*

Commenting on the test outlined above within the context of the definition of tax benefit and tax avoidance arrangement under the laws of Ghana, the learned authors of the **Law of Taxation in Ghana** (supra) noted at page 235 of their authoritative book thus; *"From the definitions of the term tax avoidance in the tax laws of Ghana, one cannot help but conclude that under the Ghanaian law, tax avoidance is used in a limited or narrow sense to refer to something unacceptable or illegitimate (but not in general illegal)."*

My research on the topic shows that where the tax legislation reflects a clear policy of providing tax relief or other specified outcomes,

reasonable steps taken by the tax payer to achieve those outcomes or to prevent benefits from being inappropriately denied, will not be considered abusive because it can be reasonably inferred that the legislature contemplates that the tax payer can exercise a range of tax planning options, each involving consequences reasonable for the taxpayer. This may include the use of loopholes in the legislation to cut down on tax obligations. Tax minimization schemes that are outside the spirit of the law may be disregarded by tax authorities.

Where the claimant establishes a prima facie case on the existence of a tax avoidance arrangement, the onus will shift on the respondent to demonstrate that the tax avoidance arrangement was abusive.

Where as in the instant case appellant's status as a free zone entity places it in a specific tax regime, the concept of tax avoidance does not come into play at all. It is our respectful opinion that given the facts and circumstances of this case, what appellant described as tax avoidance arrangement, rendered thus by counsel in his written submissions, "*.....merely the selection, out of two applicable options, of the more favourable tax category under which the appellant, by virtue of the business that it carries out, genuinely falls.*" is a misconception and does not qualify as a tax arrangement under the law.

We affirm the decision of the lower court that the concessionary rate of 8% under paragraph 3(3) is applicable solely to companies other than those registered as free zone enterprises. As earlier discussed in this judgment, reading the relevant sections of Acts 504 and 896 as

a whole, it is clear that while the object of section 28 (1) of Act 504 was to provide concessions for free zone companies, the legislative intent for the charging sections of paragraph 4 of the first schedule of Act 896 was to impose the higher rate of 15% on the free zone enterprises which had benefited from tax holidays of a period of ten years.

The appeal fails on this ground.

GROUND 2 OF THE APPEAL was rendered thus;

ii The High Court erred in law when it held that Article 17 of the 1992 Constitution is not applicable "in instances such as this" where entities are given the option to choose and enjoy exclusive benefits within its domain.

Particulars of Error

c) There is nothing in the text of the provision of article 17 of the 1992 Constitution which justifies the exception purportedly made by the court below.

d) To the extent that the statutory provision under which the appeal was determined offended the provisions of article 17 of the 1992 Constitution, they must have been deemed amended to the extent of the inconsistency or else declared null and void by reason thereof.

It was argued that the definition of discrimination by the court below was in error and that appellant was discriminated against because it is a foreign company. It was further submitted on behalf of appellant

that the finding that Article 17 of the 1992 Constitution is not applicable to the circumstances contended by the appellant, is erroneous. And that as a company involved in export of non-traditional goods, appellant is entitled to any tax benefit that companies producing and exporting non-traditional products enjoy. Counsel cited the unreported case of T.T Nartey Gati J6/1/2010 where the SC held that when interpreting the concept of discrimination under Article 17 of the Constitution, the crucial issue is whether the differentiation (in rights of persons in Ghana) is justifiable by reference to an object that is sought to be served by a particular statute, constitutional provision or some other rule of law.

ANALYSIS BY THE COURT ON GROUND 2:

Article 17(2) of the 1992 Constitution provides thus:

> *"A person shall not be discriminated against on grounds of gender, race, ethnic origin, religion, creed or social or economic status"*

Clause 3 of Article 17 defines 'discrimination' as follows;

> *"For purposes of this article, discrimination means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinion, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not*

made subject or are granted privileges or advantages which are not granted to persons of another description."

The onus was on appellant to bring his case and the company within the ambit of the law.

We uphold the submission by learned counsel for respondent that appellant failed to prove the alleged discrimination. We also uphold the submission that the clear provisions of chapter 5 of the Constitution refer to human beings and individuals and not artificial persons as counsel has urged on us.

We find the following cases cited in response by counsel for respondent insightful and apply same to issues before this court. **Asare Baah III & Ors v The Attorney General & Electoral Commission [2010] SCGLR 463**, Wood CJ explained thus at page 470

"A court's duty is to determine the real matters in controversy between parties effectually. It is therefore imperative in actions of this kind as indeed, in other civil causes or matters, that all alleged acts of statutory and constitutional invalidity, breaches or violations, inconsistencies or non-compliance be identified with sufficient particularity, with nothing being left to chance or conjecture. It is equally crucial that the relevant constitutional requirement alleged by a party to have been violated, be sufficiently identified, to enable the court effectively measure the allegations against the confines of the relevant constitutional provisions. Therefore unless the circumstances clearly warrant it,

a general reference to an entire article or provision is insufficient. This just requirement of the law, which is based on plain good sense, serves the interest of justice well in all civil actions.....

Thus in constitutional litigation, two important principles make it imperative that particulars of invalidity or want of constitutionality be clearly stated: They are the presumption of validity or constitutionality in favour of legislation and the principle of severability of impugned legislation..... The presumption is that every enactment by the legislature is presumed to be valid and constitutional, until the contrary is proven. A law would not be adjudged unconstitutional, unless the case is so clear as to be devoid of any doubts. The principle is so hallowed that it has been observed that to doubt the constitutional validity of a law is to resolve it in favour of its validity. In other words, doubts are resolved in favour of constitutionality and not the person challenging it."

See also the recent case **of Kwasi Afrifa v Ghana Revenue Authority & the Attorney General J1/23/2021 dated 30th November 2022.**

Reading sections 8 and 12 of Act 504, it is clear that all free zone companies (whether foreign or local) are first and foremost, body corporates or partnerships registered under the law of Ghana. It will be noted that it is after incorporation that the company can apply under section 11 of Act 504 for licence to operate as a free zone company.

The thrust of the allegation of discrimination is that as a company involved in export of non-traditional goods, appellant is entitled to any tax benefit that companies producing and exporting non-traditional products enjoy. Appellant makes this allegation oblivious of its status as a free zones entity. We have held in this judgment that paragraph 3(3) of the first schedule of Act 896, refers to producers and exporters of non-traditional products who are not free zone entities. We rule that having elected to operate as a free zone entity, with all the attendant benefits under the law as hereinbefore discussed, appellant cannot allege discrimination.

On the contrary, acceding to appellant's prayer means granting it additional freebees which are unavailable under the law to producers and exporters of non-traditional products which are not free zone enterprises. A condition which could never have been the intent of the legislature.

CONCLUSION

The law draws a clear distinction between the tax regime applicable to producers and exporters of non-traditional products on one hand and free zone enterprises engaged in the production and exportation of non-traditional products who enjoyed zero rated tax under section 28(1) of Act 504, on the other hand. The ruling of the first appellate court that free zone enterprises and exporters of traditional goods have two distinct and separate tax regimes with their distinctive tax incentives is sound in law. Accordingly, we hold that the respondent is justified under section 34 of Act 896 in disregarding the so-called

tax avoidance arrangement. The alleged discrimination against appellant is dismissed as unmeritorious.

The findings and conclusions of the court below and reasons given for its decision are sound in law and will not be disturbed. The appeal fails in its entirety and the judgment of the court below dated 23rd November 2021which affirmed the tax decision of respondent is hereby affirmed.

Costs of GH¢10,000.00 is awarded in favour of the Respondent against the Appellant.

SGD

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JUSTICE NOVISI ARYENE
(JUSTICE OF THE COURT OF APPEAL)

I AGREE

SGD

.....

JUSTICE ERIC KYEI BAFFOUR
(JUSTICE OF THE COURT OF APPEAL)

I ALSO AGREE

SGD

.....

JUSTIEC STEPHEN OPPONG
(JUSTICE OF THE COURT OF APPEAL)

COUNSEL:
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MAXWELL OWUSU BOADI FOR RESPONDENT