IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL, CIVIL DIVISION
ACCRA GHANA
A.D. 2022

Suit No.: H1/247/2020
Date: 7th APRIL, 2022

CORAM: **HENRY A. KWOFIE, JA (PRESIDING)**
GEORGE K. KOOMSON, JA
RICHARD ADJEI-FRIMPONG, JA

IN THE MATTER OF ORDER 54 OF THE HIGH COURT IVIL PROCEDURE RULES 2004 (AS AMENDED) CI 47

AND

IN THE MATTTER OF AN APPEAL AGAINST TAX ASSESSMENT BY THE COMMISSIONER
GHANA REVENUE AUTHORITY

BETWEEN

FAN MILK GHANA LIMITED

VRS

THE COMMISSIONER GENERAL
GHANA REVENUE AUTHORITY

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COURT OF APPEAL

0090522
13-4-2022

JUDGMENT

KOOMSON J.A,

This is an appeal from the judgment of the High Court (Commercial Division), dated 29th April, 2019 in which the Court affirmed the tax decision of the Respondent herein.

The background to this appeal is that, Appellant/Appellant ('Appellant') an ice cream and dairy products manufacturing company, had its accounts for the accounting periods in 2014, 2015 and 2016, audited for tax purposes by the Respondent. It is to be noted that Respondent is the statutory body, that is, the Ghana Revenue Authority, responsible for tax administration in Ghana. Respondent, based on the tax audit report, imposed a tax liability of Gh¢7,655,676.22 on Appellants for failure of Appellants to withhold taxes from its distributors, who received '*discounts*' from Appellants.

Dissatisfied with the decision of Respondent, Appellant paid 30% of the disputed tax liability imposed on it and exercised its right under section 42 of the Revenue Administration Tax 2016 (Act 915) to object the tax decision. However, the objection was dismissed by Respondent and the Appellant requested to pay the outstanding 70% of the tax liability imposed on it by Respondent.

Appellant aggrieved by the propriety of the tax decision of Respondent, further appealed to the High Court for a reversal of the tax decision made by Respondent on the following grounds:

a. The Ghana Revenue Authority (GRA) which is headed by the Respondent, erred in law when it re-classified the existing relationship between the Appellant and entities who out of their own resources, purchased products from the Appellant in bulk quantities hereinafter (Independent Purchases/Distributors), as one of principal-agent relationship.
b. The GRA erred in law when it disallowed discounts from the Appellant to the Independent Purchases/Distributors and re-classified as 'commissions', the discounts granted and paid to them by the Appellant.
c. The GRA erred in law when based on its re-classifications indicated in grounds a and b above, it imposed a withholding tax liability on the Appellant in the sum of GH¢7,655,676.22.
d. The GRA erred in law when it ignored its own practice of treating discounts under the Appellant's Model as exempt from tax which practice the GRA subsequently confirmed by its Practice Notes issued on October, 2016 and which by its definition of 'commissions' does not include "discounts".

The High Court, upon a perusal of the affidavit evidence and written submissions filed by the parties, affirmed the tax decision of the Respondent and dismissed the tax appeal in its entirety.

It is against this decision of the High Court, that the Appellant has mounted this appeal to this Court on the following grounds:

A. The Learned Trial Judge erred in law and thereby occasioned a substantial miscarriage of justice to the Appellant when she held that the Appellant's business model was a tax avoidance scheme thereby tagging the Appellant a tax avoider when no evidence was adduced by the Respondent in support of such a serious and far reaching allegation;

B. The Learned Trial Judge erred in law when she held that the new law which came into effect and required for discounts to be indicated on invoices, applied retrospectively to invoices issued by the Appellant prior to the coming into force of the new law;

C. The Learned Trial Judge erred in law when she ruled that in order for discounts the Appellant granted to be upheld as such, the discounts must first appear on the invoices issued by Appellant to distributors;

D. The Learned Trial Judge erred in law when she held that the payments made by the Appellants were neither cash nor trade discounts but commissions subject to withholding tax;

E. The Learned Trial Judge erred in law when she upheld the tax liability of GH¢7,655,676.22 imposed on the Appellant by the Respondent;

F. The Judgment is against the weight of evidence.

We have considered the above grounds of appeal and in our opinion the fundamental issue which we have to determine is whether Respondent was justified in its tax decision against Appellant, resulting from failure to withhold taxes on payments made by Appellant to its Independent Purchasers/Distributors from 2014 to 2016.

Imbedded in this fundamental issue is whether those payments were in substance 'discounts' or 'commissions'.

Counsel for Appellant in relation to the substance of what constitutes a *discount* and a *commission* relied on the definitions in the **Black's Law Dictionary, 8th Edition**. Counsel submitted that whereas as the validity of a *commission* depends on the existence of an agent or employee as the recipient of the fee being paid, the validity of a *discount* does not depend on agency or employment relationship. Discounts denotes a reduction from the full amount or value of the price of a thing, per **Black's Law Dictionary, 8th Edition**.

Appellant contends further that, the business model that existed between Appellant and the Independent Purchasers/Distributors was not that of a principal and agent relationship but rather, it was a system where '***indicative discounts at the end of every month were implemented in favour of Independent Purchasers/Distributors by computing the discounts based on purchases made by them under invoices raised for the month***'. To the extent that these payments are discounts

and not service fees paid to sales agents (the Independent Purchasers/Distributors) they are not subject to withholding tax as contained in section 116(1)(a)(v) of the Income Tax Act, 2015 (Act 896) and Respondent's Practice Note Number: DT/2016/001. Therefore, it was erroneous for Respondent to treat the payments as *commissions* instead of *discounts* thereby surcharging Appellants for failure to withhold tax on those payments. Based on this submission, Appellant concludes that, the trial judge therefore erred in upholding the decision by Respondent to treat the discounts as commissions.

Respondent, essentially reiterated the findings of the High Court on the distinction between *discounts* and *commissions* and submitted that the High Court was right in affirming the decision by Respondent to regard the payments as *commissions* instead of *discounts* as termed by Appellant.

This is an appellate Court that is enjoined by law to review the whole evidence led on record and to come to our own conclusion and to make a determination as to whether both on the facts and the law, the findings of the lower court were properly made and were supportable.

The appellate court, so far as appeals are concerned, is virtually in the same position as if the rehearing were the original hearing and may review the whole case and not merely the points as to which the appeal was brought. See the cases of **Mamudu Wangara v. Gyato Wangara [1982-83] GLR 639**, **Achoro and anor V. Akanfela [1996-97] SCGLR 209** and **Koglex Ltd (NO.2) V. Field [2000] SCGLR 175**.

This being a tax matter, section 92 (1) and (2) of Act 915 places the burden of proof on the Appellant, in a case of an action to recover tax and on the Respondent, in a case of an imposition of a penalty or recovery of a penalty.

Section 92 (1) and (2) provides:

> (1) Subject to subsection (2), in proceedings on appeal under section 41 to 45 or for recovery of tax under a tax law, the burden of proof is on the taxpayer or the person making an objection to show compliance with the provisions of the tax law.
>
> (2) With respect to the imposition of a penalty, including proceedings on appeal under or for recovery of a penalty, the burden of proof is on the Commissioner-General to show non-compliance with the provisions of the tax law.

As indicated earlier in this judgment, the main issue to be resolved by this Court is whether Respondent was justified in its tax decision against Appellant resulting from failure to withhold taxes on payments made by Appellant to its Independent Purchasers/Distributors from 2014 to 2016.

The crux of that issue is whether the payments by Appellant to its Independent Purchasers/Distributors were '*discounts*' or '*commissions*', in substance. The ordinary meaning of *discount* for purposes of sales is that there is a reduction in the original price of the product either for prompt payment or bulk payment. As rightly stated by the learned High Court Judge, *'the Black's Law Dictionary, 9th ed. Defines a 'Discount' as 'a*

reduction from the full amount or value of something'. The implication is that once a seller offers a discount to a purchaser for products being purchased, the original price of the products is reduced.

According to the ***Black's Law Dictionary, 9th ed.***, commission '***is a fee paid to an agent or employee for a particular transaction, usually as a percentage of the money received from the transaction***. Commission regarding sales transactions, also, implies a fee paid to a salesperson in exchange for services in facilitating or completing a sale transaction. The commission may be structured as a flat fee, or as a percentage of the revenue, gross margin, or profit generated by the sale.

It is to be noted that, the desire for tax avoidance is a means by the citizenry to resist tax. Tax avoidance, as Professor Wheatcroft, said in **"The Attitude of the Legislature and the Courts to Tax Avoidance" (1955) MLR 209, is "the act of dodging tax without breaking the law."** However, our legislature, recognizing the desire of people to devise schemes to avoid paying tax, have made adequate provisions in the Revenue Administration Act, 2016 (Act 915) and the Income Tax Act, 2015, Act 896 as a means of checking tax avoidance. It is therefore illegal for any person to design a means to avoid the payment of tax.

It is worthy to make reference to a statement Lord Reid made in **GREENBERG v IRC [1971] 3 All ER 136; 3 WLR 386**, when dealing with a scheme for tax avoidance that:

"We seem to have travelled a long way from the general and salutary rule that the subject is not to be taxed except by plain words. But I must recognize that plain words are seldom adequate to anticipate and forestall the multiplicity of ingenious schemes which are constantly being devised to evade taxation. Parliament is very properly determined to prevent this kind of tax evasion and, if the Courts find it impossible to give very wide meanings to general phrases, the only alternative may be for Parliament to do as some other countries have done, and introduce legislation of a more sweeping character which will put the ordinary well-intentioned person at much greater risk than is created by a wide interpretation of such provisions as those which we now considering..."

It is to be observed that, rights and liabilities created by sham transactions will always be disregarded by the tax authorities and the Courts, as was done in the case of **JOHNSON v JEWITH [1961] 40 TC 231**, in which a flagrant attempt to create an artificial loss was rejected as a cheap exercise of **"fiscal conjuring and bookkeeping fantasy"**

Section 34 of the Income Tax Act, 2015 (Act 896) defines 'service fee' as:

> **'a payment to the extent to which, based on market values, it is reasonably attributable to service rendered by a business of a person, but excludes interest, royalties and rent.'**

Therefore, in substance, commissions are simply fees paid by a person who enjoy a service rendered to another person for some service provided.

For purposes of sales, discounts are either cash discounts or trade discounts, see *the* ***Black's Law Dictionary, 9th ed.*** A review of literature on commercial transactions relative to cash or trade discounts reveal that trade discount refers to the reduction in list price known as discount, allowed by a supplier to the purchaser while selling the product generally in bulk quantities to interested purchasers, whereas, cash discount is discount given by the supplier on its cash payments to recover the cash debts on time as it motivates the buyer to pay cash early as they are given discount if they pay within the stipulated time.

In accounting practice and as discussed in the renowned and famed accounting book ***Frank Wood's Business Accounting Volume 1, 13th ed.***, trade discount is executed when a buyer is initiating a buy order. Trade discount is not recorded, as the amount payable is calculated after deducting the discount from the invoice itself. On the other hand, a cash discount is executed when the buyer initiates payment. Cash discount is recorded at the debit side on the cash book.

The Learned High Court Judge was therefore correct in her analysis of how cash discounts are recorded for book keeping purposes when she stated:

> **'To add on, a seller will record a cash discount given, with a debit to the accounts – sales discounts, and credit the purchaser's account so that there will be a reduction to the**

cost of the item recorded in the inventory. So, a cash discount should be a reduction to an expense. This is a basic accounting principle'.

Any simple audit of the accounts book of a trader who provides cash discount must clearly indicate an entry of cash discount given to a buyer.

In this present appeal, Appellant contends that the payments made to their Independent Purchasers/Distributors was cash discounts. Exhibit FM 3 which is the agreement between Appellant and their distributors and found on page 48 of the record is titled 'TRADE TERMS CONTRACT FOR AGENTS'. The sub heading is 'CASH DISCOUNT RATES EFFECTIVE FERUARY 2015'. Exhibit 3 indicates that *'cash discounts shall be paid to all qualifying Agents based on the table indicated below;...* The said table provides the volume of sales and the corresponding '*discount*' rate to be received by the Agent. For instance, in the table, where an agent makes a net sale of between Gh¢50,000.00 and above at the end of the month the 'cash discount' payable is 9.5% of Gh¢50,000.00.

Appellant contends that the decision to give cash discount is made known to a distributor prior to contracting. The business model as described by Appellant is that these distributors purchase the products from appellants by making instant payments as in the case of first time distributors or within eight days for long term existing distributors. At the end of every month the Appellant sums up the purchases made by the respective distributors from Appellant and '**pays back as discounts to the Independent Purchasers/Distributors portions of the monies paid**

to Appellant by the Independent Purchasers/Distributors for delivery of products during the month'.

In the opinion of this Court, the model operated by Appellant cannot be regarded as cash discounts. A cursory revision of Exhibit FM 3 shows that what an agent receives as 'discount' is not based on an incentive to pay for the products promptly to Appellant as per the meaning of cash discount but rather it is an incentive for the Distributor for being able to sell off volumes of products of Appellant. It is for this reason that the cash back to the distributor is only made at the end of the month to determine the volume of sales made by a Distributor. In plain terms, the more a distributor sells products of Appellant the more money a distributor receives as an incentive. This is without a doubt, in substance, a 'commission'. Assuming for a moment that, they were indeed cash discounts, Appellant was enjoined to make the relevant entries in its accounting books and this would have been obvious upon the auditing of these books.

However, upon careful review of the entire record of appeal, we were unable to find any evidence clearly indicating that Appellant had made the necessary entries in its books regarding the cash discounts in accordance with the standard accounting practise summarised above. We therefore hold that the payments by Appellant to its Distributors were in substance "commissions" but not 'discounts'.

Furthermore, the EXH. FM3, shows that this is an agreement or an arrangement that the Appellant executed with its Agents but not ordinary

independent purchasers of the products of the Appellant *per se.* An examination of this agreement clearly reveals that, the Appellant intended these payments to these agents as a motivation for the attainment of set targets. It has been said that, where the term "agent" is used in a formal document, it may be presumed that the word is used in its proper legal connotation, unless there are strong indications to the contrary: see **SHELL COMPANY OF AUSTRALIA LTD v NAT SHIPPING BAGGING SERVICES LTD (1988) 2 Lloyd's Rep 1.** In the instant case, the Appellant has not led sufficient evidence on record to convince us that, the word "Agents" which is used in its EXH. FM3, is not to be used in its proper legal connotation. We do not lose sight of the fact that, though these agents deal with the outside world in their own names, their respective obligations are to the Appellant. For example, Appellant fixes the price at which these products are to be sold. The arrangement specified under EXH. FM3 appears to be an "indirect agency" which is similar to the contract of 'commission." It is our view that, the arrangement specified in EXH. FM3 is a sham, put in place by the Appellant, to avoid the withholding tax obligation imposed by the law.

We therefore affirm the findings made by the High Court Judge at page 135 of the record that:

> **'The Respondent has told the Court that the Tax Audit did not find any price adjustments in the books of the Appellant. The Appellant has also not demonstrated to this Court that the necessary adjustments were made in its books**

concerning the so-called discounts given to its distributors. If the monies so paid were discounts, why were the necessary price adjustments not made as is always the case in commercial or business transactions? If the Appellant had given cash discounts, and had recorded the same in the usual way, there would not have been any basis for the Respondent to re-characterize them as commissions'.

The tax laws in Ghana permits a person making payments as commissions to withhold tax on those payments to a sales agent. It is enacted in section 116(1)(a)(v) of Act 896 that:

'Subject to subsection (3), a resident person shall withhold tax at the rate provided for in paragraph 8 of the First Schedule where that person pays a service fee with a source in the country to a resident individual as a commission to a sales agent'.

As we earlier found that the payments regarded as *discounts* were in fact and in substance "commissions" (service fees enjoyed by Appellant's Distributors), we hold that Appellant was by law required to withhold tax on the payments to its Distributors, since those payments were in substance commissions. The Appellant thus did not discharge the burden on him under section 92(1) of Act 915 that, it complied with the law. For failing to do this, Respondent by virtue of section 117 (3) of Act 896 imposed a liability of Gh¢7,655,676.22 as the withholding amount that ought to have been paid by Appellant. Section 117 (3) of Act 896 provides:

'A withholding agent who fails to withhold tax in accordance with this Division shall pay the tax that should have been withheld in the same manner and at the same time as tax that is withheld'.

Respondent in accordance with Act 896 and Act 915 having power to re-classify the arrangement between Appellant and its Distributors did indeed treat the *cash discounts* as *commissions*. Respondent further, communicated to Appellant its tax decision on 25th August, 2017 which was received by Appellant on 29th August, 2017.

Therefore, this Court finds that Respondent was justified in its tax decision to impose a withholding tax liability on Appellant for failing to pay withholding tax on payments which were actually commissions but not discounts to its distributors for the years 2014, 2015 and 2016.

In conclusion, having examined the entirety of the record and more particularly the submissions by both Counsel for Appellant and Respondent, we find no merit in the appeal and hereby affirms all the conclusions reached by the High Court. The Appeal is hereby dismissed in its entirety.

GEORGE K. KOOMSON
(JUSTICE OF APPEAL)

H. A. Kwofie, JA I agree

HENRY A. KWOFIE
JUSTICE OF APPEAL

R. Adjei-Frimpong, JA I also agree

RICHARD ADJEI-FRIMPONG
JUSTICE OF APPEAL

COUNSEL:

- **KWADWO OHENE-BOAKYE WITH BERNICE NUERKEY NARH FOR APPELLANT/APPELLANT**
- **FREEMAN SARBAH FOR RESPONDENT/RESPONDENT**

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SGD.
GEORGE K. KOOMSON
(JUSTICE OF APPEAL)

SGD.

H. A. Kwofie, JA I agree **HENRY A. KWOFIE**
JUSTICE OF APPEAL

SGD.

R. Adjei-Frimpong, JA I also agree **RICHARD ADJEI-FRIMPONG**
JUSTICE OF APPEAL

COUNSEL:

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