IN THE SUPERIOR COURT OF JUDICATURE IN THE HIGH COURT OF JUSTICE (COMMERCIAL DIVISION) ACCRA HELD FRIDAY THE 8TH DAY OF JULY, 2022 BEFORE HER LADYSHIP AKUA SARPOMAA AMOAH J. (MRS.) JUSTICE OF THE HIGH COURT

SUIT NO.: CM/TAX/0100/2022

MAERSK DRILLSHIP IV SINGAPORE PTE LTD

.... APPLICANT

VS.

THE COMMISSSIONER GENERAL ..... RESPONDENT

PARTIES: **OSMAN KWAKU ETUAFUL REPRESENTING APPELLANT PRESENT**

RESPONDENT – ABSENT

COUNSEL: **BENEDICT ASARE WITH DR. NANA GYAMERA AFFUL HOLDING BRIEF FOR DR. ABDALLAH ALI-NAKYEA FOR APPELLANT – PRESENT**

MOHAMMED IBRAHIM HOLDING BRIEF FOR CEPHAS ODARTEY LAMPTEY FOR RESPONDENT – PRESENT

J U D G M E N T

Introduction

This is an Appeal from the Final Objection Decision of the Commissioner General of the Ghana Revenue Authority (GRA) dated the 27th September, 2021. The Appellant, ***Maersk Drillship IV Singapore PTE LTD*** (***Maersk Drillship***) rests its Appeal on the following grounds:

i) ***The Respondent wrongly construed Articles 12(1), 12(3) and 26 of the Offshore Cape Three Points Petroleum Agreement (OCTP) and Sections 27 and 39 (3) of the Petroleum Income a Tax Law, 1987 (PNDCL 188) by applying the provisions of the Internal Revenue Act, 2000 (Act 592) and the Income Tax Act, 2015 (Act 896) to the Appellant***

ii) ***The Respondent erred in law by subjecting the Appellant's income to further taxes after the 5% final withholding tax***

iii) ***The Respondent is liable for breach of the provisions of the OCTP Agreement by assessing the Appellant to Corporate Income Tax (CIT) and Branch Profit Tax (BPT) under Act 592 and the Income Tax, 2015 (Act 896)***

iv) ***The Respondent wrongly imposed tax of US $103,300.22 on the Appellant in respect of PAYE taxes when in fact the Appellant had a tax overpayment of $ 129,165.72.***

v) ***The Respondent erred in law by rejecting some of the VAT Relief Purchase Orders (VRPOs) in the amount of US$ 6, 978,174.88 which resulted in a tax liability of US$ 8, 44,764.18 to the Appellant***

vi) ***The Respondent erred in the reconciliation of the figures for which reason the Appellant demands a proper reconciliation of the figures in issue herein.***

FACTUAL BACKGROUND

A factual background of the dispute leading the Appellant to approach this Court pursuant to ***Section 44*** of the ***Revenue Administration Act, 2016 (Act 915)*** and ***Order 54 of the High Court (Civil Procedure) Rules (CI 47)*** will be necessary to put the arguments canvassed by both sides into proper perspective and context.

The Appellant is a company incorporated under the laws of Singapore and registered under the laws of Ghana as an External Company. It is engaged in the business of providing services to the Upstream Petroleum Industry in Ghana. Appellant brings the instant Appeal per its lawful Attorney, Jorgen Schaffer who is the Appellant's Resident Local Manager.

The Respondent on the other hand is the head of the Ghana Revenue Authority (GRA), the state entity responsible for tax administration and revenue collection in Ghana.

In or about the year 2005, the Government of the Republic of Ghana, (GoG) and the Ghana National Petroleum Corporation (GNPC) of the one part and Heliconia Energy Ghana Limited (Heliconia) of the other part entered into a Petroleum Agreement (the PA) in respect of the OCTP Contract Area.

Heleconia subsequently assigned its interest in the PA to ENI Ghana Exploration and Production Limited (ENI) as a new Petroleum

Contractor under the PA, a fact which the Appellant says is known to the Respondent.

Pursuant to the terms of the said PA, ENI entered into a Subcontract Agreement, dated 30th January, 2015 with Maersk Rigworld Ghana Limited (Maersk Rigworld) and the Appellant herein for the provision of services at the Deepwater DP Drilling Rig for a period of 2 years.

During the period of January 2015 to December 2017 the Appellant obtained a Petroleum Commission Permit to provide services to the Upstream Petroleum Industry in Ghana. As a Petroleum Subcontractor to ENI, the Appellant used Rigs and a Rig team to operate in the OCTP block in Ghana for the period January 2015 to December 2017 and continues to use these rigs to perform work as a Subcontractor in the Petroleum Industry in Ghana.

In the year 2018, the Respondent commenced a tax audit into the affairs of the Appellant and issued a Final Tax Audit Report dated 20th November, 2020. The said Report raised an amount of ***Twenty-Eight Million Six Hundred and Twenty-Seven Thousand Two Hundred and Ninety-Five Dollars Fifty-Four Cents (US$ 28,627,295.54)*** as the total tax liability of the Appellant. This comprised a direct tax liability of ***Twenty Million One Hundred and Eighty-Five Thousand Five Hundred and Thirty-One Dollars Thirty-Six Cents (US$ 20,185,531.36)*** and an indirect tax liability of ***Eight Million Four Hundred and Forty-One Thousand Seven Hundred and Forty-Six Dollars Eighteen Cents (US$ 8,441,746 .18).***

Dissatisfied with the said assessment, the Appellant attempted unsuccessfully to resolve the matter with the Respondent directly. When these attempts failed, the Appellant filed an Objection against the said tax assessment on the 15th of January, 2021.

On the 27th of September, 2021, the Respondent issued its Final Objection Decision, imposing on the Appellant a total tax liability of ***Twenty-Eight Million Three Hundred and Fifty-Seven Thousand and Sixty-Five Dollars Seventeen Cents (US$ 28, 357,065.17)*** comprising a direct tax liability of ***Nineteen Million Nine Hundred and Fifteen Thousand Three Hundred and Eighteen Dollars Ninety-Nine Cents (US$ 19,915,318.99)*** and an Indirect Tax Liability of ***Eight Million Four Hundred and Forty-One Thousand Seven Hundred and Forty-Six Dollars Eighteen Cents (US$ 8, 441,746.18),*** which was served on the Appellant on the 8th of October, 2021.

With respect to Direct Tax, the Respondent assessed the Appellant on the following items:

i. ***Underpayment of PAYE – One Hundred Three Thousand Three Hundred Dollars Twenty-Two Cents (US $ 103,300.22)***
ii. ***Penalty for failure to pay PAYE on due date – Four Hundred and Twenty-Seven Dollars Seventy-Five Cents (US$ 427.75)***

iii. ***Withholding taxes – Three Hundred and Thirty-Six Thousand Seven Hundred and Eight Dollars Forty-Nine Cents (US$336, 708.49)***

iv. ***Corporate Income Tax Liability - Two Million Three Hundred and Seventy Thousand Nine Hundred Fifty-Nine Dollars Thirty-Three Cents (US$ 2,370, 959.33)***

v. ***Branch Profit Tax – Seventeen Million One Hundred and Three Thousand Nine Hundred and Twenty-Three Dollars Twenty Cents (US$ 17,103,923.20).***

In terms of Indirect Tax, the Respondent granted the Appellant

i) ***Input VAT / NHIL – Seven Hundred and Eighty-Nine Thousand Six Hundred and Ninety-Seven Dollars Twenty-Two Cents (US$ 789,697.22)***

ii) ***VAT Relief Purchase Order Fifty-One Million Five Hundred and Forty-Four Thousand Nine Hundred and One Dollars Twenty-Three Cents (US$ 51,544,901.23)***

iii) ***Output VAT NHIL - Sixty Million Seven Hundred and Seventy-Six Thousand Three Hundred and Sixty-Two Dollars Sixty-Three Cents (US$ 60,776,362.63)***

vi. ***VAT /NHIL Liability – Eight Million Four Hundred and Forty-One Thousand Seven Hundred and Sixty-Four Dollars Eighteen Cents (US$ 8,441.764.18).***

<u>Underpayment of Pay As You Earn (P.A.Y.E.)</u>

Appellant complains about the Respondent's imposition of a tax liability of ***One Hundred and Three Thousand Three Hundred Dollars Twenty-Two Cents (US $103,300.22)*** as underpayment of P. A.Y E. Appellant says that the said amount arose from the failure of the Respondent to recognize two tax receipts in the respective amounts of ***Four Thousand Nine Hundred and Twenty-Seven Dollars Thirty-Eight Cents (US$ 4,927.38), Twenty Thousand Six Hundred and Fifty-Five Ghana Cedis Nineteen Pesewas (GH₵ 20,655.19)*** and ***Two Hundred and Twenty-Seven Thousand Nine Hundred and Sixty-Six Dollars Thirty-Two Cents (US$ 227,966.32), One Million Ghana Cedis (GH₵ 1,000,000.00)***. Had the said receipts been recognized, argues the Appellant, it would have been put in a tax credit of an amount of ***One Hundred and Twenty-Nine Thousand One Hundred and Sixty-Five Dollars Seventy-Two Cents (US$ 129,165.72).***

Withholding Tax

The Appellant further takes issue with Respondent's imposition of an amount of ***Three Hundred and Thirty-Six Thousand Seven Hundred and Eight Dollars Forty-Nine Cents (US $ 336,708.49)*** as Withholding Tax and prays for an order for reconciliation of figures to ascertain its actual liability.

POINTS OF LAW

C.I.T. liability and B.P.T tax

The Appellant argues that in terms of ***Article 12.1*** and ***12.3*** of the PA and ***Section 27.1*** and ***27.3*** of the ***Petroleum Income Tax Law, 1987 (PNDCL 188,)*** the Respondent erred in law when he raised an assessment of ***Two Million Three Hundred and Seventy Thousand Nine Hundred and Fifty-Nine Dollars Thirty-Three Cents (US$ 2,370,959.33)*** as CIT and ***Seventeen Million One Hundred and Three Thousand Nine Hundred and Twenty-Three Dollars Twenty Cents (US$ 17,103,923.20)*** as BPT on the Appellant.

According to the Appellant the combined effect of the said provisions is to create a fiscal enclave for ENI and its subcontractors (including the Appellant) by which the jurisdiction of the general tax laws of Ghana is ousted as far as ENI and its Subcontractors (including the Appellant) is concerned. Consequently, only the provisions of ***PNDCL 188*** should apply in determining whether or not the Appellant as Subcontractor is entitled to the fiscal stability regime under the PA. These provisions have however been disregarded by the Respondent in assessing the Appellant to CIT and BPT.

Indirect Tax

Appellant contends on the basis of ***Section 48*** of the ***Value Added Tax Act, 2013 (Act 870)*** that:

> *"A taxable person is allowed to deduct the output tax due, for the period 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".

Respondent however claims he relied on VAT/NHIL invoices and the ledger of Applicant to increase the revenue of the Appellant and by extension, the tax liability of the Appellant. The Respondent also had no legal basis for rejecting the Vat Relief Purchase Orders (VRPOS) to the tune of ***Six Million Nine Hundred and Seventy-Eight Thousand One Hundred and Seventy-Four Dollars Eighty-Eight Cents (US$ 6,978,174.88)*** issued to the Appellant by ENI

Appellant therefore seeks the following reliefs:

i) ***A declaration that upon a true and proper interpretation of Article 12(1) and (3) of the OCTP Agreement and Sections 27 and 39(3) of the Act 188, the Appellant's income is exempted from further taxes after the 5% withholding tax***

ii) ***A declaration that, upon a true and proper interpretation of Article 12(1) and (3) of the OCTP Agreement and Sections 27 and 39(3) of PNDCL 188, the provisions of the Internal Revenue Act, (Act 592), and the Income Tax Act, (Act 896) is not applicable to the Appellant***

iii) ***A declaration that the assessed BPT of US$ 17,103,923.20 is not applicable to the Appellant and therefore the assessment is extinguished***

iv) *A declaration that the additional Corporate Income Tax assessment of US$ 2,370,959.33 is inapplicable to the Appellant and therefore the assessment is extinguished*

v) *A declaration that the Respondent is erred in law when he unjustifiably assessed the Appellant to additional Corporate Income Tax in the amount of US$ 2,370,959.33*

vi) *A declaration that the Respondent is barred from imposing any income tax under any tax law on the Appellant' s income emanating from its services carried out in the OCTP block under the PA except under the tax provisions of the ENI's Petroleum Agreement.*

vii) *A declaration that the Respondent erred in law by rejecting the VAT Relief Purchase Orders in the amount of US$ 6, 978,174.88 and wrongly imposing a VAT/ NHIL tax liability of US$ 8,441,764.18 on the Appellant*

viii) *An order for reconciliation of the figures in respect of the figures in respect of the PAYE, withholding tax, VAT/ NHIL figures by an independent Court Appointed Auditor or the Chartered Institute of Taxation*

ix) *An Order for the annulment of the whole tax liability assessed in the Final Objection of the Appellant*

x) *An order for the Respondent to issue a revised tax assessment of the Appellant for 2015 to 2017 years of assessment taking into consideration all the reliefs granted by this Court*

xi) ***An order for the refund of monies (if any) previously paid by Appellant to the Respondent based on the annulment of the Final Tax Objection Decision***

xii) ***General Damages for breach of the provision of the OCTP Agreement***

xiii) ***Costs***

In my considered opinion, the present Appeal revolves mainly around the correct interpretation to be placed upon certain provisions of the PA entered into between the GoG, GNPC and ENI, the repealed ***PNDCL 188,*** as well as ***Act 896,*** the Income Tax Law currently in force. IN my view, the specific provisions in so far as are relevant to this appeal are ***Sections 27(1)*** and ***(2)*** of ***PNDCL 188, Articles 12(1)*** and ***12(3)*** and ***26*** of the PA and ***Sections 135 (1) (2) and (3)*** of ***Act 896***.

It will however be helpful to note as a starting point that neither party disputes the fact that despite the repeal of ***PNDCL 188***, ***Section 135*** of ***Act 896*** preserves certain provisions of the repealed law which seek to modify the manner in which tax is imposed, in so far as they relate to a concluded Agreement between the GoG and a person, until the earlier occurrence of the events set out under ***Section 135 (2)*** of ***Act 896.*** What has divided the Parties from the date of the Respondent's assessment and continues to divide them before this Court, is whether or not the Appellant is or should be a beneficiary of those provisions which are otherwise referred to in ***Section 135 (5)*** of ***Act 896*** as fiscal stability clauses.

Having set the scene by stating the background of the dispute, I now proceed to consider the Appellant's grounds of Appeal. I propose to consider with Grounds ***(i)*** and ***(ii)*** together because they deal essentially with the question as to whether by law, the Respondent erred in subjecting the Appellant's income to further taxes after the 5% withholding tax.

1. ***Grounds (i) and (ii)***

i) *Wrongfully construing* ***Articles 12(1), 12(3)*** *and* ***26*** *of the* ***Offshore Cape Three Points Petroleum Agreement (OCTP)*** *and* ***Sections 27*** *and* ***39 (3)*** *of the* ***Petroleum Income a Tax Law, 1987 (PNDCL 188)*** *and subjecting the Appellant's income to further taxes after the 5% final withholding tax*

Now, ***Section 27(1)*** of ***PNDL 188*** states that:

> ***"(1) Where under the terms of a contract, any 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 such percentage of the aggregate amount due as may be specified in the Petroleum Agreement and the amount so withheld shall be paid to the Commissioner and payment thereof shall have the effect provided for in subsection 2".***

It is clear from the wording of ***Section 27(1)*** that it must be read in conjunction with ***Section 27(2)*** to gather its true meaning and effect. What then does ***subsection 2*** provide?

It provides as follows:

> "(2) ***When an amount has been withheld from an aggregate amount due to the subcontractor pursuant to subsection (1) of this section, the subcontractor shall not in respect of that aggregate amount be liable for tax under the provisions of any other law in force in the Republic of Ghana.....***"

As the above provisions make specific reference to amounts due to a subcontractor from a person liable to make payments in respect of work or services under a "Petroleum Agreement", it should be necessary to resort to the relevant provisions in the PA attached to the Notice of Appeal as ***Exhibit MDS 2***. ***Article 12*** is the provision in the PA which deals with ***"TAXES AND OTHER IMPOSTS."*** I shall reproduce the relevant portions of this Article for the sake of clarity.

Article 12 (1) states as follows:

> ***"No tax, duty, fee or other impost shall be imposed by the State or any political subdivision on the Contractor, its subcontractors, or its affiliates in respect of activities related to***

Petroleum Operations and to the sale and export of petroleum other than those provided in this Article."

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(1) 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".

The Appellant's position is that on a true and proper interpretation of ***Articles 12.1*** and ***12.3*** of the PA and ***Sections 27(1)*** and ***27(3)*** of ***PNDCL 188*** a fiscal enclave is created for ENI and its Subcontractors by which the jurisdiction the tax laws of Ghana is "ousted" as far as ENI and its Subcontractors including the Appellant are concerned.

They argue that this position is further strengthened by ***Sections 27(4)*** *and* ***27(5) of PNDCL 188*** which provide that the repealed ***Internal Revenue Act, 2000 (Act 592)*** does not apply to a contract for the supply of goods or the provisions of work or services in connection with Petroleum Operations.

The Respondent for his part, contends that the Appellant's view is misconceived. He says that under ***Section 39 (5)*** of ***PNDCL 188,*** which was the law in force at the time the PA was executed between the GoG, GNPC and Heleconia, the Respondent was vested with power

to apply the general tax laws such as ***Act 592*** in addition to ***PNDCL 188*** to all persons unless a person was specifically exempted under ***Section 41*** of ***PNDCL 188.***

He argues further that ***Article 12(1)*** of the PA does not preclude the state or its political subdivisions from imposing tax on the Contractor or its subcontractors. What ***Article 12 (1)*** seeks to do is to only restrict the state or its political subdivisions from imposing other taxes that are not specifically mentioned in ***Article 12*** on activities related to Petroleum Operations as well as the sale and export of petroleum. Those taxes, Respondent argues do not include CIT.

Now, the point worth noting first and foremost is that the provisions or the terms of the PA or any other contract for that matter, cannot "oust" the applicability of the general tax laws of Ghana to any person natural or juristic, as the Appellant seeks to contend. By ***Article 11*** of the ***1992 Constitution,*** the tax laws of Ghana are enactments made under the authority of Parliament. I therefore agree entirely with the contention of the Respondent that the provisions of any tax law are superior to those of the PA and that the provisions of the former will prevail in the event of any inconsistency between the two. The provisions of the PA are therefore to be read as subject to ***PNDCL 188*** which give teeth to ***Article 12 (1)*** and ***(3)*** of the PA.

That said, I think a combined reading of the above quoted provisions presents a clear and unassailable meaning that once 5% of the payments due the Subcontractor for work and services provided under the PA, is

withheld by the Contractor, the Subcontractor is not liable to pay tax under any other law, on that aggregate amount unless and until the occurrence of any of the events listed under ***Section 135(2)*** of ***Act 896***, namely;

a) ***The end of the agreement or relevant clauses in the agreement***
b) ***The first alteration of the agreement after the commencement of this Act and***
c) ***The relinquishment by the person of the person's right to modified tax treatment***

Consequently, I am unable to agree with the Respondent that the Appellant was not within the contemplation of the Parties to the PA and therefore cannot claim any benefits thereunder.

I am fortified in this view by ***Section 5*** of the ***Contracts Act, 1960 (Act 25)*** which is the enactment that regulates contractual relationships in this country. It provides that:

> ***"A 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 this section and sections 6 and 7, be enforced or relied on by that person as though that person were a party to that contract".***

I must say that I have no quarrel with the Respondent's contention that the Appellant is not a party to the PA. However, ***Article 12(3)*** of the PA specifically names Subcontractors as persons who are linked to the Parties' contract by virtue of the works and services they provide under the PA.

In his article titled ***"THE CASE FOR THE ENFORCEABILITY OF THIRD PARTY CONTRACTUAL RIGHTS IN GHANA [1971] VOL. VIII 2 UGLJ 76-79*** "the eminent jurist Date -Bah observed that;

> ***"It is an important function of the law of contract to build up confidence in businessmen that they can depend on the courts to enforce promises made for their benefit. To refuse to enforce such promises on behalf of third party beneficiaries is thus to undermine the important function of contract law".***

It is conceded that the doctrine of privity of contract concretizes the right of a contracting party to only deal with persons he voluntarily chooses to deal with. As noted by ***Date – Bah*** in his article (supra), in the absence of this doctrine, unforeseen persons otherwise described as "incidental beneficiaries" could emerge to claim or sue a contracting party on some benefit they could have received had he performed his side of the bargain. It is for such reasons that the doctrine seeks to exclude incidental beneficiaries from enforcing the terms of a contract to which they are not Parties. But the Appellant in this case cannot be described as such. Having been expressly mentioned in ***Article 12 (1)***

and *(3)* of the PA, the Appellant, even though not a Party is clearly an "intended" and not an "incidental" beneficiary under the PA and I indeed have no doubt that the Appellant was within the contemplation of the Parties at the time of signing the PA.

To that extent, I agree with the Appellant that ***Article 12 (1) and (3)*** of the PA created a legitimate expectation that no tax or impost will apply to the income of the Appellant other than the 5% withholding tax for works and services rendered as Subcontractor under the PA. This I believe would have minimized the grossing up of the cost imposed on the Contractor for the services provided by the Appellant.

Another provision in point is ***Article 26 (2)*** of the PA which solidifies the fiscal stability clauses as far as they relate to the Contractor and by extension the Appellant as Subcontractor in the following terms:

> "***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 and 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 between the Parties. Any legislative or administrative act of the State or any of its agencies and 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".

Consequently, any legislative change or administrative act that adversely affects the rights or obligations of the Contractor and by extension its Subcontractors by virtue the above provisions amounts to a breach of the PA by the State.

Also instructive is the fact that ***Section 135*** of ***Act 896*** seeks to insulate the provisions of ***PNDCL 188*** that are covered by a binding Agreement from the general provisions of ***Act 896*** ,in so far as that Agreement has not ended, been altered or relinquished as stated in ***Section 135 (2)*** above.

It is based on the foregoing that I must agree that the Respondent cannot impose income tax under any tax law on the Appellant's income emanating from services or work carried out in the OCTP block under the PA.

It is however important to emphasize the reach of the Fiscal Stability Clause embodied in ***Article 12 (1)*** and ***(2)*** of the PA. This is highlighted in the wording of ***Section 27(1)***. The said section makes it clear that what is to be withheld is any amount due to a Subcontractor *"in respect of work or services for or in connection with a Petroleum Agreement"*. [Emphasis mine]

What this means is that the amount to be withheld by the Contractor and paid to the Respondent as Final Tax on behalf of the Appellant as Subcontractor, relates solely to the amount or aggregate amounts due the Appellant specifically for *"work or services"* provided by Appellant under the PA as Subcontractor for that specific period. I do not think the provisions of ***Section 27 (1)*** and ***(2)*** absolve the Appellant as an Entity or even as a Subcontractor from liability under the general income tax laws of the country just by reason of having performed a service under the PA during the period of assessment.

It has not been the contention of the Appellant that it was incorporated exclusively to provide services as a Subcontractor to ENI under the PA. On its own showing, it is "*a company incorporated under the laws of Singapore and registered under the laws of Ghana as an External Company and engaged in the business of providing services to the Upstream Petroleum Industry in Ghana*". It therefore goes without saying that any income accruing to the Appellant in Ghana that is unrelated to its activity as Subcontractor under the PA is subject to tax.

These taxes by necessary implication, include taxes imposed on the Appellant as a Corporate Entity i.e. CIT. Once it is income generated from Ghana, the Respondent is authorized to assess same and to impose tax in deserving cases. As an External Company engaged in the business of providing services to the Upstream Petroleum Industry in Ghana, the Appellant is not a Contractor within the meaning of the PA but a Permanent Establishment in this Country and therefore falls under the general tax laws of Ghana. It is only when the Subcontractor wears that garb of Subcontractor under the PA that it may seek shelter under the favourable provisions accorded the Contractor under ***Section 27*** of ***PNDCL 188***.

To my mind, the privileges afforded under ***Section 27(1)*** and ***(2)*** of ***PNDCL 188*** and ***Article 12(1)*** and ***(3)*** of the PA are specifically designed to ultimately mitigate the cost exposure of the Contractor and not the Subcontractor, who in any event is not a party to the PA. The Appellant only comes in to perform a temporary service for the Contractor under the PA. It is then and only then that it can seek shelter under the provisions of ***Section 27*** of ***PNDCL 188*** and ***Article 12*** of the PA. It therefore goes without saying that any income accruing to the Appellant in Ghana that is unrelated to its activity as Subcontractor under the PA is subject to tax.

This fact is made clear by Section ***3 (1)*** of ***Act 896*** which provides that:

"The assessable income of person for each year of assessment is the income of that person from any employment, business or investment....

b) In the case of a non- resident person,

i) The income of that person from the employment , business or investment for the year , to the extent to which that income has a source in this ***country and***

ii) <u>Where the person has a Ghanaian permanent establishment income for the year that is connected with the permanent establishment, irrespective of the source of income</u>"

Indeed ***Section 1*** of ***PNDCL 188*** (on which the Appellant heavily relies) states that:

> ***"Every person carrying on petroleum operations shall subject to the provisions of this Law, pay for each year of assessment a tax on his chargeable income calculated in the manner provided in this Part."***

It bears emphasis that the fact that the Appellant provides services as a Subcontractor under a PA or is engaged in Petroleum Operations does not change its status as a Permanent Establishment in this country.

In their elucidating book on the '***LAW OF TAXATION IN GHANA' [5th Edition]*** the authors ***Kunbuor, Ali-Nakyea and Owusu Demitia*** explain at Page 88 that:

> ***"...Act 896 imposes taxes on the income of a non-resident if the income either has a source in Ghana or if the non-resident has a Ghanaian permanent establishment, income that is connected with that permanent establishment irrespective of source of income ...".***

Having been assessed for the period 2015 to 2018, it was fit and proper for the Respondent to apply the provisions of ***Act 896*** in its assessment of the Appellant.

In any event ***Section 39 (5)*** of ***PNDCL 188*** (which I do not agree is spent as far as the provisions relating to withholding tax under the PA is concerned) provides that the general tax laws of Ghana will continue to apply unless the then Secretary excluded a contractor by legislative instrument. I note that the said provision specifically mentions Contractor and not Subcontractor, but even if it is interpreted to include Subcontractors, there is no evidence that the Appellant was so exempted.

Indeed one wonders how the Appellant can reasonably argue that "*its whole income is subject to final withholding tax per the provisions of the PA and PNDL 188 and that the Appellant is not liable to pay CIT and BPT*". ***[See Paragraph 25 of Notice of Appeal]***

I say so because under ***Section 1*** of ***PNDCL 188*** which was the law which was in force at the time the PA was executed (and on which the

Appellant heavily relies), even the Contractor was made liable for the payment of Petroleum Tax. The said section provided as follows:

> ***"Every person carrying on petroleum operations shall subject to the provisions of this Law, pay for each year of assessment a tax on his chargeable income calculated in the manner provided in part 1".***

This tax obligation imposed on the Contractor is reinforced by ***Article 12 (2) (ii)*** of the PA which provides that:

"12.2 Contractor shall be subject to the following:

i) Royalty as provided for in Article 10.1 (a)

ii) Income Tax in accordance with the Petroleum Income Tax law 1987 (PNDCL 188)...."

Perhaps, it will be useful to state in passing that Petroleum Income Tax is the Petroleum sector version of CIT imposed on Contractors involved in Petroleum Operations.

It cannot therefore be reasonably argued that the gross income of the Appellant, (who relies on the benefit conferred on the Contractor under the PA) is free from further taxes after the final 5% withholding tax.

As earlier noted the Appellant as a Permanent Establishment in this country, is liable to be routinely assessed and taxed by Respondent in deserving cases and like every other corporate entity in Ghana, the

Appellant is liable for the payment of CIT and/ or other taxes not connected services under that specific PA.

Even assuming without necessarily admitting that the law specifies that the Appellant's whole income is subject to final withholding tax of 5% under the PA and no more, the income of the Appellant is still liable to be assessed as that is the only way by which the Respondent can verify whether or not the Appellant's income is exclusively related to that specific service under the PA under consideration here.

Unfortunately, the Appellants arguments, particularly those canvassed in its ***Paragraphs 21*** to ***25*** seem to suggest that upon the Contractor, withholding 5% of the aggregate amount due, the Appellant should by law be deemed to have discharged all its tax obligations as an entity in this country. That however cannot be right as the 5% withheld on behalf of Appellant as Subcontractor of ENI cannot constitute the be all and end all of the Appellant's tax obligations.

Based on the foregoing I find that it was well within the rights of the Respondent to assess and to impose other taxes (including CIT and BPT) which are not specifically covered by ***Section 27(1)*** and ***(2)*** of ***PNDCL 188*** on the Appellant.

It is also necessary to point out that I fail to see how ***Sections 27(3)*** and ***(4)*** of ***Act 188*** helps the case of Appellant, as all it seeks to do is to exclude the applicability of the relevant provisions of the ***Income Tax Decree, 1975 (SMCD 5)*** to the Appellant's tax liabilities, with specific

reference to *"work or services"* provided in connection with petroleum operation under the PA **only**.

As a Permanent Establishment in Ghana, the Appellant comes under the general tax laws of this Country first and foremost and it is only after he performs a service which entitles him to seek shelter under ***Section 27*** of ***PNDCL 188*** and ***Article 12*** of the PA that he can demand for that service to be treated as such. Ground ***(i)*** of the Appeal therefore only succeeds to the extent that the Respondent is barred from imposing any income taxes under any other law on the Appellant's income emanating from services rendered in the OCTP block under the PA.

2. Ground (iii)

Wrongful assessment of Appellant to Corporate Income Tax (CIT) and Branch Profit Tax (BPT) under Act 592 and the Income Tax, 2015 (Act 896)

Under this ground the Appellant complains that the Respondent breached the PA by subjecting it to the assessment and subsequent imposition of CIT and BPT.

I have already noted that the Appellant is not exempt from being assessed by the Respondent in respect of CIT under any circumstance. The same applies to BPT in my considered opinion. For it is only upon such assessment that the Respondent will be in the position to determine whether or not Appellant is liable to pay these taxes.

The Respondent relying on ***Sections 5,6,7,8*** and ***9*** of ***Act 592*** and ***Sections 2,3,4 5*** and ***6*** of ***Act 896*** argues that any income attributable to business, employment, or investment which has a source in Ghana is subject to tax and is taxed separately. According to the Respondent, BPT is tax imposed on a non-resident person that has a permanent-establishment in Ghana. This tax is treated like dividend tax and taxed in the same manner as tax on dividend paid by a resident company incorporated in Ghana to its shareholders on the returns of their investments.

At ***page 55*** of their book ***LAW OF TAXATION IN GHANA*** (supra) the authors explain that a person's chargeable income is, by virtue of ***Section 2*** of ***Act 896,*** the person's total assessable income for the year from investment, employment and business respectively less the total amount of allowable deductions. They further observe at ***Page 87*** that ***Section 6*** of the law makes a person's gains and profits from investment part of that person's income for tax purposes.

Section 6(2) of ***Act 896*** provides that:

A person who is ascertaining the profits and gains of that person or another person from an investment for a year of assessment or for part of the year shall

(a) Include in the calculation of an amount specified in respect of dividends.....'

Now, once branch profit earned by the shareholders of Appellant is income connected with the Appellant as a Permanent Establishment registered under the tax laws of Ghana and the same accrues in or is derived from Ghana, it stands to reason that the same should be taxable just as dividends paid to the shareholders of a Ghanaian registered company are taxable. The trap the Appellant seems to have fallen in with respect, is the misapprehension that the tax imposed on the Appellant in respect of its specific business activities (under the PA) extends cover taxes payable by its shareholders.

It is trite learning that a company is an entity, separate and distinct from its owners for this reason tax imposed on shareholders of a company cannot be deemed taxes levied on the company as an entity. Ground ***(iii)*** is therefore dismissed as lacking merit.

3. Grounds (iv)(v) and ***(v)***

Wrongful computation and imposition of PAYE taxes, rejection of VRPOs and erroneous reconciliation of figures

These grounds will also be considered together as the pith of the Appellant's complaints under these grounds is the failure of the Respondent to take into account certain payments and overpayments resulting in an undue increase in the Appellant's tax liability.

In respect of these particular grounds, I am in total agreement with the Appellant that an Independent Auditor be appointed to reconcile the figures as that is the only means by which the veracity of the

Appellants' claims may be ascertained. Thankfully this Court is empowered under ***Order 54 Rule 9*** of ***CI 47*** to make orders in this regard. Grounds ***(iv)(v)*** and ***(v)*** are therefore allowed.

Conclusion

Based on the foregoing, the instant Appeal is allowed in part. But before I conclude, a few comments about the Reliefs sought by the Appellant. Firstly, I think it is quite obvious from my analysis so far that I do not think the declaratory reliefs sought in ***Reliefs (i) (ii) (iii)(iv)(v)(ix)*** are maintainable. I therefore see no need to rehash reasons for coming to this conclusion here. Likewise, I believe it is quite clear that the merits of ***Reliefs (x)*** and ***(xi)*** can only be effectually determined after receipt of the Auditor's Report.

Turning to the Appellant's prayer for damages for breach of the provisions of the OCTP, I must confess my uncertainty as to whether the Appellant as a third party to the OCTP can claim damages for a breach of its provisions. This uncertainty exists despite my finding that the Appellant is an intended beneficiary of the PA. But even if the Appellant can properly do so, I think this Court should be slow in awarding damages against Respondent for mistakes committed (if at all) in the ordinary course of his duties. The reason for this view should not be too hard to discern- a tax audit is a process adopted by the Respondent to ensure a fair assessment and imposition of taxes. It is not calculate to inconvenience the taxpayer. Just like the Appellant, the Respondent is entitled to ensure that that the appropriate taxes are paid.

Consequently, except in cases where the Respondent's conduct is found to be clearly arbitrary, unreasonable and calculated to oppress the taxpayer, damages should not be awarded. In my opinion, that is one of the surest ways by which to ensure that the Respondent effectively performs his statutory functions without fear that such legal consequences could flow from genuine errors committed in that process.

DECISION

In the premises,

1. ***Relief (i) dismissed***
2. ***Relief (ii) dismissed***
3. ***Relief (iii) dismissed***
4. ***Relief (iv) dismissed***
5. ***Relief (v) dismissed***
6. ***In respect of Relief (vi), it is hereby declared that the Respondent is barred from imposing any income tax under any other tax law on the Appellant's income emanating from its services carried out in the Offshore Cape There Points Block under the Petroleum Agreement except under the relevant provisions of the Petroleum Income Tax Law, 1987 (PNDCL 188) and ENI's Petroleum Agreement (PA).***
7. ***In respect of reliefs (vii) and (viii) it is hereby Ordered that an independent auditor to be agreed upon by the Parties in***

consultation with the Registrar of this Court be and is hereby appointed to reconcile f accounts between the parties in respect of the Appellants VAT/NHIL liability PAYE, and Withholding Tax figures, in order to ascertain the Appellant's actual tax liability (if at all) The parties are hereby Ordered to furnish the Registrar of this Court with all relevant documents, within 7 days of the Auditor's appointment for onward transmission to the Auditor to enable them commence their work. The Auditor upon being furnished with the said documents is afforded 21 days within which to complete their work. Upon such completion the Auditor is ordered to file their report at the Registry of this Court and the Registrar is to cause copies of same to be served on the parties. The Registrar is to serve Hearing Notice on Parties to appear before this Court upon submission of Auditor's report.

9. ***Relief (ix) is dismissed.***
10. ***Determination of reliefs (x) and (xi) are deferred until submission of Auditor's report.***
11. ***Relief (xii) is dismissed.***

Issue of Costs is deferred until submission of Auditor's report.

(SGD)

AKUA SARPOMAA AMOAH (MRS)

JUSTICE OF THE HIGH COURT

Statutes referred to:

High Court, Civil Procedure Rules (CI 47)

The 1992 Constitution of Ghana

The Petroleum Income a Tax Law, 1987 (PNDCL 188)

The Revenue Administration Act, 2016 (Act 915)

The Value Added Tax Act, 2013 (Act 870)

The Internal Revenue Act, 2000 (Act 592)

The Income Tax Decree, 1975 (SMCD 5)

The Contracts Act, 1960 (Act 25)

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HIGH COURT
COMMERCIAL DIVISION LCC-ACCRA