IN THE SUPERIOR COURT OF JUDICATURE IN THE HIGH COURT OF JUSTICE, HELD AT ACCRA, COMMERCIAL DIVISION ON TUESDAY, THE 19TH DAY OF JULY, 2022 BEFORE HER LADYSHIP JANE HARRIET AKWELEY QUAYE, JUSTICE OF THE HIGH COURT

SUIT NO. CM/TAX/0118/2022

IN THE MATTER OF APPEAL TAX ASSESSMENT BY THE COMMISSIONER-GENERAL

ORICA GHANA LIMITED - APPELLANT

VRS

THE COMMISSIONER–GENERAL - RESPONDENT

JUDGMENT

A notice of appeal against tax assessment was filed in the Registry of this Court on 15th of November, 2021 by Orica Ghana Limited (hereinafter referred to as the Appellant) against the Commissioner General of the Ghana Revenue Authority (hereinafter referred to as the Respondent),claiming the following reliefs: -

i. A declaration that the Respondent erred in law by apportioning the Appellant's business income into manufacturing and management service contrary to paragraph 3(6) of the First Schedule to the Income Tax Act, 2015 (act 896) and Article 296 (c) of the 1992 Constitution of the Republic of Ghana.

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ii. A declaration that the Respondent erred in law by depriving and/or denying the Appellant location incentive as a manufacturing business.

iii. A declaration that the Respondent erred in law by depriving the Appellant of Value Added Tax (VAT) credits of US$653,412.69 which had accrued prior to the 2013 year of assessment.

iv. A declaration that the Respondent erred in law by depriving the Appellant of Income Tax Credits of US$591,404.79 arising from overpayment of tax due to the Appellant in the 2010 year of assessment.

v. A declaration that the photocopies of the VAT Relief Purchase Orders (VRPOs) are admissible in accordance with Section 91 of the Revenue Administration Act, 2016 (Act 915) and Section 166 of the Evidence Act, 1975 (NRCD 323).

vi. An order directing the Respondent to consider the VAT Relief Purchase Orders (VRPOs) of an amount of US$6,620,789.87 in the computation of the Appellant's tax liability.

vii. An order granting the direct tax credit of US$591,404.79 and indirect tax credit of US$653,412.69 due the Appellant for the tax audit period.

viii. An order for the Respondent to issue a revised tax assessment of the Appellant for the 2010 to 2016 years of assessment taking into consideration all the reliefs granted by this Honourable Court.

ix. An order directing the Respondent to refund any tax credits owing to the Appellant as a result of the revised audit within 90 days from the date of final judgement, failing which the Respondent shall pay interest on any ensuing tax credits.

x. Costs, including Lawyer's fees.

xi. Any other order(s) that the Court may deem fit.

The Appellant brought this Appeal against the objection decision of the Respondent under Section 44 of the Revenue Administration Act, 2016 (Act 915) on the following grounds:

I. The Respondent erred in law by denying the Appellant its full entitlement of location incentive under paragraph 3(6) of the First Schedule to the Income Tax Act, 2015 (Act 896).

II. The Respondent erred in law by apportioning the Appellant's business income into manufacturing and management service contrary to Article 296(c) of the 1992 Constitution of the Republic of Ghana.

III. The Respondent erred in law by denying the Appellant the use of Value Added Tax (VAT) credits which had accrued prior to the 2013 year of assessment.

IV. The Respondent erred in law by denying the Appellant the use of its legitimate income tax credits.

V. The Respondent erred in law by rejecting photocopies of the VAT Relief Purchase Orders (VRPOs) contrary to Section 91 of the Revenue Administration Act, 2016 (Act 915) and Section 166 of the Evidence Act, 1975 (NRCD 323).

<u>Case of the Appellant</u>

The Appellant is engaged in the business of manufacturing, assembling and selling of bulk commercial explosives. Whilst the Respondent is the head of the Ghana Revenue Authority (GRA) a statutory body responsible for tax administration and revenue collection in Ghana. Sometime in June 2017, the Respondent conducted a tax audit into the affairs of the Appellant for the period 2010 – 2016 years of assessment and issued a Tax Audit Report dated 21st December, 2017 with direct tax liability of USD3,065,131.67 and an indirect tax liability of USD11,412,075.64. The Appellant objected to the tax assessment and applied for a waiver of the requirement to pay 30% of the tax in dispute. Subsequently, the direct tax liability of the Appellant was re-assessed by the Respondent at USD1,772,069.22 and the indirect tax liability at USD9,897,621.59. This was again revised and the Applicants had its direct tax liability now as USD1,772,069.22 and the indirect tax liability at USD9,897,621.59. The Appellant being dissatisfied with the tax re-assessment by the Respondent objected to the decision and particularly drew the Respondent's attention to the statutory limitation against raising an assessment on a taxpayer after three years of filing a VAT return, the rejection of the VAT Relief Purchase Orders (VRPO) relative to the 2016 year of assessment. The Appellant objected to the Respondent's decision and in the said objection, referred to payment in the amount of USD404,789,00 and an additional payment of GHC593,246.35 to the Respondent's bank account. The Respondent replied to the Appellant's objection letter wherein based on a retrospective application of the Revenue Administration Act, 2016 (Act 915), the Respondent sought to disregard the statutory limitation under Section 30 of the VAT Act, 1998 (Act 546). The Respondent's reply also agreed to include in the computation of the Appellant's VAT liability; a credit of USD637,562.61 in relation to the 2016 year of assessment. Subsequently, the Respondent accepted the argument of Appellant regarding the statutory limitation under Act 546 and revised the tax liability of the Appellant to show a credit of USD755,411.32.

Furthermore, in a letter dated 9th November, 2020 the Appellant reiterated its objection to the Respondent's position on the benefit of location incentives particularly the objection raised were with the following:

- The non-recognition of the Appellant's VAT credits prior to the 2013 year of assessment after it had been recognized in the Appellant's tax computation in previous correspondence regarding the audit covering the 2010 to 2016 years of assessment.

- The denial of the Appellant's overpayment in the amount of USD592,404.79 in the 2010 year of assessment after it had been recognized in the Appellant's tax computation in previous correspondence regarding the audit covering the 2010 to 2016 years of assessment

In further reply to the Appellant's correspondence, the Respondent stated that it had reckoned with liabilities and credits up to the 2013 assessment year owing to the statutory limitation under Section 30 of Act 546 which prohibited an assessment of a taxpayer after 3 years of filing a VAT return. Similarly, the Respondent stated that the Appellant's direct tax overpayment in the amount of USD591,404.79 in the 2010 year of assessment had been denied owing to the six year limitation regarding assessment of a taxpayer. Parties reached a stalemate concerning the position regarding the location incentives and the credits in respect of direct and indirect tax payment. Appellant being aggrieved and dissatisfied by the Respondent's objection decision hereby appealed.

<u>Case of the Respondent</u>

The Respondent is generally tasked with the auditing of Appellant's business in order to ascertain their tax liabilities. Flowing from an audit conducted; some controversies associated with the auditing were unearthed. Both Appellant and Respondent went back and forth on the proper structures to be followed in relation to the conduct of the audit. The said controversy occurred as a result of a contract Appellant had with its client Newmont Ghana Company Ltd., basically to supply manufactured explosives for blasting of ore. Appellant was further contracted by the latter again to transport the manufactured explosives to the site of their client and fill the drilled holes with the said explosives as a service fee. The service fee per the records is separated from the initial contract sum agreed on with regards to the manufacturing of the explosives. Consequently, Respondent came up with its audit report which audit report issued Appellant with a direct tax liability of USD3,065,131.67. Appellant not being satisfied with the position of the Respondent per Section 44 of the Revenue Administration Act, 2016 (Act 915), invoked the jurisdiction of this Court by bringing this action.

ONUS OF PROOF IN TAX MATTERS/LITIGATION

Section 92(1) of Act 915, the taxpayer (Appellant) bears the burden of proof in respect of tax appeals brought under Section 41 to 45 of Act 915. It provides as follows:

> ***"92(1) Subject to subSection (2), in proceedings on appeal under Section 41 to 45 or for the recovery of tax under a tax law, the burden of proof is on the taxpayer or person making an objection to show compliance with the provisions of the tax law."***
>
> ***"92(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."***

Therefore, to challenge successfully an objection decision, the taxpayer (Appellant) must show that it has complied with the provisions of the tax laws. In other words, the Appellant must either establish that the Respondent's assumptions of fact were incorrect/inaccurate or that the Respondent has wrongly applied the tax laws to the facts.

INTERPRETATION OF TAX STATUTE

The general principle is that tax statute is to be construed strictly and nothing is to be read in and nothing is to be implied. The Supreme Court, speaking through Georgina Wood (Mrs.) CJ (as she then was), in the case of **MULTICHOICE GHANA LTD. v. INTERNAL REVENUE SERVICE [2010-11] SCGLR 783**, said:

"Our conclusion has been dictated by the strict constructionist approach to the interpretation of statute reserved for fiscal legislation. The general principle is that tax statute is to be construed strictly."

Also, in the case of **CAPE BRANDY SYNDICATE v. IRC [1921] KB 64 AT 71, ROWLATT J** held as follows:

"In a taxing Act, 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 tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

This general principle was applied in the recent cases of **MOVELLE COMPANY LTD. v. GHANA REVENUE AUTHORITY (SUIT NO. CM/RPC/0499/2020) Unreported Judgment dated 25th October, 2021** and **AFRICAN MINING SERVICES (GHANA) PTY LTD. v. THE COMMISSIONER-GENERAL, GHANA REVENUE AUTHORITY (SUIT NO. CM/MISC/0245/2021) Unreported Judgment dated 14th October, 2021.**

WHETHER THE APPELLANT HAS SATISFIED THE STATUTORY PRE-CONDITIONS FOR LODGING THE APPEAL?

It is provided under Order 54 Rule 4 (1) and (2) of the High Court Civil Procedure Rules, 2004, C.I. 47 that:

"Payment of Tax

4. (1) An aggrieved person who has filed an appeal against an assessment, decision or order of the Commissioner under Rule 1 of this Order shall, pending the determination of the appeal, pay an amount not less than a quarter of the amount payable in the first quarter of that year of assessment as contained in the notice of assessment.

(2) An appeal shall not be entertained by a Court under these rules unless the Appellant has paid the amount set out in sub rule (1) of this rule."

It is also provided under Section 42 (1) and 42 (5) (b) of the Revenue Administration Act 2016 Act 915 as follows:

"Section. 42 (1) Subject to a tax law to the contrary, a person who is dissatisfied with a tax decision that directly affects that person may lodge an objection to the decision with the Commissioner-General within thirty days of being notified of the tax decision.

Section.42 (5) (b) An objection against a tax decision shall not be entertained unless the person has in the case of other taxes, paid all outstanding taxes including 30% of the tax in dispute.

Section 42(6) Despite subSection (5) the Commissioner –General may waive, vary or suspend the requirements of subSection (5) pending the determination of the objection or take any other action that the Commissioner-General considers appropriate including the deposit of security."

Concerning the averment in paragraph 21 of its Reply to the third ground of the Appellant's Notice of Appeal that the Appellant had failed to comply with the requirement to pay 30% of the tax in dispute, the Appellant stated that as at the date of the Appeal, the Appellant had a credit of US$755,411.32 with the Respondent and is admitted by the Respondent in its certified tax decision dated May 14, 2021, with reference DTRD/AUD/05/2021 and marked as "Exhibit OGL 17". In view of the Appellant's tax credit, it did not have any outstanding tax liability to pay a 30% of it as a deposit before challenging the decision of the Commissioner-General.

Respondent however contended that the taxpayer is required to go through the procedure in Section 42 of Act 915 for the liability to be established before being converted to a credit. Again Order 54 Rule 4(1) and (2) of the High Court (Civil

Procedure) Rules, 2004 (C.I.47) has also not been complied with. The 30% is therefore mandatory for the objection to be entertained.

Analysis

'Exhibit OGL 17', the Appellant had total over payment of US$755,411.32 with the Respondent for the period 2010 to 2016 year of assessment of Appellant. After Appellant objected to the assessment of its tax liability, it applied for a waiver of the requirement of 30% of the tax in dispute. In 'Exhibit OGL3', Appellant wrote to Respondent to exercise its discretionary power pursuant to Section 42(6) of Administration Act, 2016 (Act 915) of the Revenue to waive the payment of the 30% of the disputed taxes until the final tax liability is determined. The Section 42(6) reads:

> ***"the Commissioner may waive, vary or suspend the requirements of subSection (5) pending the determination of the objection or take any other action that the Commissioner- General considers appropriate including the deposit of security"***

There is no evidence on record of denial by Respondent of 'Exhibit OGL3'. Also no evidence that Respondent granted the waiver. However, available evidence show that the parties continued the assessment exercise after 'Exhibit OGL3' until eventually there was a stalemate and Appellant being aggrieved and dissatisfied with the Respondent's objection decision filed this Appeal. Therefore, by its own conduct the Respondent applied its discretion in favour of Applicant under Section 42(6) of Act 915 and waived the payment of 30% of the tax in dispute pending the determination of the tax liabilities of the Appellant.

Furthermore, Order 54 Rule 4(1) makes it mandatory for a tax payer who has appealed against an assessment to pay 25% of the assessed tax liability for that year before the appeal can be heard. So in this instance where from the facts in issue from 'Exhibit OGL17', it's about assessed credits and not assessed liability, what is the position?

The Court finds that Respondent's argument that the Appellant is required to go through the procedure in Section 42 of Act 915 for the liability to be established before being converted to a credit does not correlate with 'Exhibit OGL 13' dated 13th October, 2020, 'Exhibit OGL 14' dated 19th February, 2021 and 'Exhibit OGL 17' dated 14th May, 2021. The aforementioned Exhibits are Respondent's own correspondences to Appellant for the 2010 to 2016 year of assessment and in all of them, the Respondent admits or concluded that the Appellant had a total credit of US$755,411.32. The Court is of the view that the assessment has already been done and Appellant has credits to its account with zero liability. Applying Order 54 Rule 4(1), what then will 25% of no assessed tax liability be? The answer is by no means none. The statutory precondition has not been violated and the Appeal is properly before this Court. The Court will now proceed to go into the merits of the case.

GROUND II

THE RESPONDENT ERRED IN LAW BY APPORTIONING THE APPELLANT'S BUSINESS INCOME INTO MANUFACTURING AND MANAGEMENT SERVICE CONTRARY TO ARTICLE 296(C) OF THE 1992 CONSTITUTION OF THE REPUBLIC OF GHANA.

Arguments by Appellant (paragraphs 1-45 of Written Submissions)

According to the Appellant, the Respondent in its Report dated 21st December, 2017 indicated that the Appellant's manufactured explosives formed 78% of revenue from sales and therefore apportioned the Appellant's revenue between manufacturing activities and non-manufacturing activities. In this regard, the Respondent indicated that 64.49% of the Appellant's total revenue would qualify for location incentive whilst 35.51% would be taxed at the normal rate of 25%. That Respondent also stated in paragraph 12 of its reply to the second ground of the Appellant's Notice of Appeal that;

> *"...Provision of services such as transportation and delivery by the manufacturing entity does not constitute manufacturing activity and therefore does not fall within the definition of paragraph 3(6) of the First Schedule to Act*

896 which relates to the chargeable income of a company from a manufacturing business..."

To this, the Applicant submits that it is clear that the basis for dividing the Appellant's manufacturing business into manufacturing activity and non-manufacturing by the Respondent arose from wrongly construing "manufacturing business" as stated in paragraph 3(6) of the Income Tax Act, 2015 (896) to mean "manufacturing activity", hence the apportioning of the income of the manufacturing business into manufacturing per se and non-manufacturing activity.

However, such apportionment is completely contrary to the intent and purpose of Section 58(4) of the Income Tax Act, 2015 (Act 896) which clearly states as follows:

"(4) Subject to this Act, all activities of a company are treated as conducted in the course of a single business of that company".

By this provision therefore, the services which are integral to the manufacture of explosives cannot be treated as separate from the manufacturing business. Applicant argues that paragraph 3(6) of the First Schedule to Act 896 does not require the exercise of such discretion to divide manufacturing business into manufacturing and service management as the Respondent did. The exercise of such discretion is only warranted by Section 34 of the Income Tax Act, 2015 (Act 896) by which the Respondent could re-characterise or disregard an arrangement that is entered into or carried out as part of a tax avoidance scheme which is fictitious or does not have substantial economic effect; or whose form does not reflect its substance. In the case of the Appellant's manufacturing business, no charge of fictitious transaction was labelled against it by the Respondent. It is therefore a capricious use of discretion for the Respondent to re-characterize the Appellant's manufacturing business into manufacturing and service management. Appellant submits that even if the Respondent purportedly exercised its discretion under the general anti-avoidance rules, the Respondent did not comply with the requirements of Section 34 of Act 896 which is a general anti-avoidance provision as there was no evidence of the Appellant's operation being fictitious, lacking substantial economic effect or the fact that the business form did not reflect its substance. It could therefore not be re-characterized as done by the Respondent.

Notwithstanding the above, if the Court were to hold that the Respondent was entitled in the circumstances to exercise a discretionary power, such discretion must be exercised in compliance with Article 296 of the 1992 Constitution which Respondent did not.

Arguments by Respondent (paragraphs 1-39 of Written Submissions)

Respondent submitted that they did not err in law by apportioning Appellant's business income into manufacturing and management service. After their audit had obtained a documentary confirmation of Appellant as a manufacturing concern; which obviously qualified them for tax rebate for location incentive; the team upon a further review of Appellant's records and other accompanying documentations, realized that Appellant has two separate income streams; income from sale of explosives manufactured by Appellant (manufactured explosives) and another income from management services (non-manufacturing activity).

The team subsequently apportioned the chargeable income of the Appellant between sale of manufactured explosives and the income derived from management services and taxed them appropriately and restricted the rebate to income generated from the manufactured explosives and denied Appellant a rebate on management services income in view of the fact that provision of service is distinct from manufacturing activities.

According to the Respondent, since the audit spanned the period 2010 to 2016 years of assessment, the 2016 period was audited in accordance with the provisions of the Income Tax Act, 2015 (Act 896) as amended and the 2010 to 2015 period was equally audited in accordance with Act 592 (now repealed).

Respondent's reaction to paragraph 35 of Appellant's Written Submission, is that tax incentives are deliberate exemptions or concessions from a tax liability enacted in law (example is location incentives) or secured through special agreement (example is

VAT Relief Purchase Order(s) (VRPOs). Tax incentives provide exceptions to the general tax law. The intention is to lower the tax burden of firms investing in particular sectors. Location incentives are therefore given to Investors in the manufacturing and agro-processing companies located in business areas outside Tema, Accra and Kumasi. These incentives are considered as generous fiscal concessions on investments in Ghana. To this end, therefore Respondent states that Section 58(4) of Act 896 quoted by Appellant; in relation to tax incentives is misplaced. Section 58(4) of Act 896 is on general taxation of companies whiles location incentives are concessions which are industry specific and absolutely different from general taxation of companies. Respondent said they did not in any way re-characterize Appellant's tax position as stated by Appellant in paragraph 36 of their Written Submission. Respondent only applied the law where concessions enjoyed by a business is wholly, exclusively and necessarily incurred for that particular income. Again, Appellant's claim in paragraph 50 of its Written Submission that Respondent's interpretation of paragraph 3(6) of the First Schedule of Act 896 is improper and would lead to wide absurdity is absolutely preposterous.

The Respondent recognizes that tax legislation, being fiscal legislation, must be constructed strictly and nothing must be read into it as espoused in many decisions.

Respondent's position is that, distinguishing the chargeable income of "manufactured explosives" and that of "management services" (non-manufactured activity), does not lead to a redraft of paragraph 3(6) of the First Schedule to Act 896. Provision of services such as transportation and delivery by the Manufacturing entity does not constitute manufacturing activity and therefore does not fall within the definition of paragraph 3(6) of the First Schedule to Act 896 which relates to chargeable income of a company from a manufacturing business. Income derived from the provision of service is therefore not treated as income from manufacturing.

Respondent contends that where a Manufacturing entity earns income from management services; and which earning has become a regular source of income of the business, then it stands to reason that the income from that Management services becomes ineligible for the location incentive. Meaning that it stands alone and separate from the Manufacturing activity, hence the inability of the Respondent to grant location incentive to same. Respondent made reference to the invoices exhibited as 'Exhibit 3(a) and 3(b)', which shows a clear distinction between income from service activity and income from manufactured explosives for the 2015 and 2016 years of assessment. To this end, the segregation of incomes by Appellant can be considered as two separate regular sources of income of the Appellant. In the light of the above, where the activity (service) in relation to the manufacturing business is one that was not wholly, exclusively and necessarily incurred by the person in the production of the manufacturing income, then that income will be exclusively assessed.

Respondent contends that the said manufacturing process is absolutely complete when the explosives are produced; and therefore, the process of transportation and delivery of the product to the client is a completely different and separate activity. Again, the service of transporting the manufactured explosives to sites and filling the drilled holes with same to allow blasting of ore to take place could as well have been done by a separate entity. Additionally, invoices raised for work done by Appellant on Newmont, its client herein, have been done separately; one for manufactured explosives and another for service activity. This action by Appellant begs for the question. "*Why did Appellant separate the invoices if the whole process is inseparable and considered one process?*" Yet, evidence of the separation of these activities are manifestly present as contained in the manufacturing invoices and marked as 'Exhibit GRA 3' annexed to the reply of the Respondent. Respondent contends that if these two activities were inseparable as being purported by Appellant, Appellant would not have separated the two activities and invoiced them separately.

To buttress its point the Respondent used the recent explosion that occurred at Appietse, Bogoso, in the Western Region, where Maxam Ghana Limited (Maxam), a manufacturing company located in Tarkwa doing similar business as Appellant produced the explosives for Chirano Gold Mines; had in turn subcontracted Jocyderk Logistics to undertake the clearing, warehousing and transportation of the said explosives on behalf of Maxam. Respondent concluded that this operational arrangement of Maxam subcontracting its service activity to another company, rendered the management service absolutely separate from the manufacturing activity of Maxam.

<u>Analysis</u>

The term 'manufacturing' has not been defined by the Income Tax Act, 2015, (Act 896) and so Respondent used the definition by the International Standard Classification of all Economic Activities, 2020 (ISIC) which reads:

> ***"The physical or chemical transformation of materials of components into new products, whether the work is performed by power-driven machines or by hand, whether it is done in a factory or in a worker's home, and whether the products are sold at wholesale or retail. Included are assembly of components parts of manufactured products and recycling of waste materials."***

Respondent then concluded that it was clear that the meaning of 'manufacturing' here does not include management services and transportation of the final produce/product.

Paragraph 3(6) of the First Schedule to the Income Tax Act, 2015 (Act 896) provides as follows:

> *"The chargeable income of a company for a year of assessment from a manufacturing business not included in subparagraphs (1) and (3), other than a manufacturing business located in Accra or Tema is taxed at the rates indicated below:" (Emphasis ours)*

Location	Rate of Income Tax
a. **Manufacturing business** located in the regional capitals of the country	75 percent of the rate of income tax applicable to other income under subparagraph (1)
b. **Manufacturing business** located elsewhere in the country	50 percent of the rate of income tax applicable to other income under subparagraph (1)

The Court finds as a fact that the definition of manufacturing as quoted supra by the Respondent influenced it greatly in its interpretation of Paragraph 3(6) of the First Schedule to the Income Tax Act, 2015 (Act 896) as well as the other provisions. To the Respondent, that meaning did not include management services and transportation of the final produce/product. They therefore separated manufacturing services from other income streams and construed such services as ancillary which can be subcontracted just like Maxam Ghana did. And also concluded that the law intended for such separation between manufacturing exclusively and management services.

The Court is of the considered opinion that if the law makers intended to give a definition of manufacturing they would have done so. Since they did not give a definition of manufacturing then one is not to look for external aid to interpret the law. It is trite that tax legislation, being fiscal legislation, must be constructed strictly and nothing must be read into and nothing is to be implied. See the already mentioned cases of **MULTICHOICE GHANA LTD supra, CAPE BRANDY SYNDICATE supra and MOVELLE COMPANY LTD supra**

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

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

The purposive approach to interpretation is what is reiterated by the Supreme Court in OSEI v. GHANAIAN AUSTRALIAN GOLDFIELDS LTD [2003-2004]1 SCGLR 69 and it stated that:

"the above construction does in my view conform to the basic rules of interpretation of documents, namely that the interpretation must be nearly a close to the mind and intension of the maker as is possible, and the intention must be ascertained from the document as a whole, with the words used being given their plain and natural meaning and within the context in which they are used."

We shall now turn to the particular tax laws in issue

The Minerals and Mining Regulations, 2012 (L.I. 2177). Regulation 15(4)(a)(iii) and (b) of L.I. 2177 provides as follows:

"A certificate of competency which may be issued under sub regulation (2) is

(a) an explosives certificate of competency, in the form of

(iii) a certificate of competency ***to handle explosives for storage and transportation****; and*

(b) an explosives manager's certificate of competency which authorises an explosives manager to

(i) supervise the use of explosives in a mine, quarry or works;

(ii) operate an explosives manufacturing or mixing plant; and

(iii) store, transport and to deal commercially with explosives."

Thus the Minerals and Mining Regulations, 2012 (L.I. 2177). Regulation 15 of L.I. 2177 which regulates the issuance of certificates of competency, business licences and permits specifically authorizes a holder of a certificate of competency to operate an explosives manufacturing, store, transport and deal commercially with explosives. The Court finds that the Minerals and Mining Regulations, 2012, Regulation 15 of L.I. 2177 defines manufacturing to include not only the manufacturing of explosives but all the other activities such as storage, transport and dealing commercially with; and based on that, the Appellant were given certification. The Minerals and Mining Commission knew as a component to the manufacturing that the Appellant will also transport and deal commercially with explosives and granted licences for such thereby treating the manufacturing and management services as activities conducted in a single business. This explanation is in tandem with Section 58(4) of the Income Tax Act, 2015 (Act 896), under taxation of companies, which states that:

> ***"subject to this Act, all activities of a company are treated as conducted in the course of a single business of that company"***

Where the Act intends for any activity of the company in manufacturing business to be set out as separate in Sections 87, 89 and 90 or delineated as in the provisions of paragraphs 3(3),(4) and (5) of the First Schedule to Act 896, the Act had specifically and clearly stated so. Again, the Respondent relies on Section 134(5) of Act 896 which states that:

> ***"where a provision of the sixth schedule applies to a grant of concession to a person with respect to a particular type of business(a) the business is construed narrowly and only the person's activities devoted wholly and exclusively and necessarily to that business are treated as part of the business"***

Section 134(1) states:

> ***"the provisions of the sixth schedule provide for concessions of a temporary nature"***

The sixth schedule of Act 896 provides temporary concession for businesses such as agriculture, rural banking, waste processing, residential premises etc. whilst its (Amendment Act 1007) provides for registered manufacturers and assemblers of automobiles under the Ghana Automotive Manufacturing Development Programme. It is obvious that the sixth schedule provides specific concession for specified businesses. Specifically, automobile manufacturers and assemblers of automobiles under the Ghana Automotive Manufacturing Development programme is mentioned to the exclusion of all other manufacturing businesses. The appropriate canon of interpretation, expresio unius est exclusio alterius which simply means that the express mention of one implies the intended exclusion of another in a pair or group not so mentioned applies here. See the case of **KASSAR v. COMPTROLLER OF**

CUSTOMS AND EXCISE [1963] 1 GLR 109-122. Respondent's reliance on Section 134(5) of Act 865 is therefore misconstrued.

The Court will therefore lean favourably towards arguments made by Counsel for Appellant that a strict construction of paragraph 3(6) of the First Schedule to the Income Tax Act, 2015 (Act 896) would mean that where a company is engaged in manufacturing business and any activity of the company is not set out as separate by the Act as in Sections 87, 89 and 90 or delineated as in the provisions of paragraphs 3(3),(4) and (5) of the First Schedule to Act 896, "all such activities" of the company, are treated as conducted in the course of a single business pursuant to Section 58(4) of Act 896.

Article 296 (c) of the 1992 on discretionary power, states:

> *"Where in this Constitution or in any other law discretionary power is vested in any person or authority -*
>
> *(a) that discretionary power shall be deemed to imply a duty to be fair and candid;*
>
> *(b) the exercise of the discretionary power shall not be arbitrary, capricious or biased wither by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and*
>
> *(c) where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power."*

The Respondent's conduct of dividing Appellant's manufacturing business into manufacturing and service management amounts to exercising its discretion under Section 34 of the Income Tax Act, 2015 (Act 896) to re-characterise their business. Having exercise such use of discretionary power without following due process of law as required under Article 296 of the 1992 Constitution; the Respondent acted contrary to the provisions of Article 296 of the 1992 Constitution. See: **REPUBLIC v. MINISTER FOR THE INTERIOR; EX-PARTE: BOMBELLI [1981] DLHC990.** The Court so holds.

GROUND I

THE RESPONDENT ERRED IN LAW BY DENYING THE APPELLANT ITS FULL ENTITLEMENT OF LOCATION INCENTIVE UNDER PARAGRAPH 3(6) OF THE FIRST SCHEDULE TO THE INCOME TAX ACT, 2015 (ACT 896).

Arguments by Appellant (paragraphs 41-61 of Written Submissions)

According to the Appellant, the important question to be resolved here is whether the activities of the Appellant, being transportation of explosives and their installation for its customers should be treated as being conducted in the course of a single business (manufacturing business) in the context of paragraph 3(6) of the First Schedule to Act 896.

The Appellant contends that the Respondent's interpretation of paragraph 3(6) of the First Schedule to Act 896 is improper, erroneous and would lead to wide absurdity that any necessary ancillary services (in the case of the Appellant not merely ancillary but integral to the operations) provided by a business to facilitate its core operations must be treated as a separate activity from its core business to be taxed at a different tax rate where applicable. The far-reaching consequence of such interpretation would be that for example, the chargeable income of a manufacturer, distributor, wholesaler or retailer of goods would exclude delivery of its products to its customers as that would be a separate service although ancillary to the business of the manufacturer, distributor, wholesaler or retailer.

According to the Appellant, to prevent such absurd interpretations, Section 58(4) of Act 896 provides that ***"subject to this Act, all activities of a company are treated as conducted in the course of a single business of that company."*** Appellant went on to show instances where the Income Tax Act, 2015 (Act 896) desirous to delineate the income of a business to allow for apportionment, had done so clearly as for example Sections 87, 89 and 90 of Act 896.

Again, the First Schedule of paragraph 896 paragraphs 3(3) to 3(5) provides a clear distinction between incomes eligible for specific tax rates, however when it came to paragraph 3(6) of the First Schedule to Act 896 as amended by Act 902 no such distinction was created in the income of the manufacturing business.

Furthermore, it is the position of the Appellant that the location incentive is granted to a **"manufacturing business" and not the income of a manufacturing business from manufacturing activity only.** The status of the Appellant as a manufacturing business is not in dispute as may be seen in paragraph 3 at page 6 of Respondent's Reply filed on 26th January 2022. Manufacturing of explosives is regulated by the Minerals and Mining Regulations, 2012 (L.I. 2177). Regulation 15 of L.I. 2177 regulates the issuance of certificates of competency, business licences and permits. Regulations 15(4)(a)(iii) and (b) of L.I. 2177 specifically authorizes a holder of a certificate of competency to operate an explosives manufacturing, store, transport and deal commercially with explosives. The Appellant, argues that having obtained the certificates of competence, business licences and permits, is authorised under Regulations 15(4)(a)(iii) and (b) of L.I. 2177 to operate an explosives manufacturing, store, transport and deal commercially with explosives; a fact which at all material times has not been disputed by the Respondent.

Respondent refers to Section 134 (5) of Act 896 in its Reply as its basis for "separating" the activities of the Appellant. However, Appellant submits that the Respondent's reliance on Section 134(5) of Act 896 is misconstrued because, in the first place, the issue in contention is not a provision of the Sixth Schedule to Act 896. Secondly, even if the said provision were to remotely apply, transportation and installation of a highly specialized product such as explosives would be wholly, exclusively, and necessarily devoted to the business.

Also, the Respondent in paragraph 21 of its reply to the Appellant's Notice of Appeal referred to the recent explosion that occurred at Apiete, Bogoso and made further reference to the business set up of Maxam to suggest that the business structure of a company within a particular industry is binding on other businesses to follow suit. We dare say that if the manufacturer of the explosives, with the expertise to handle explosives, had transported the explosives itself, as done by the Appellant, perhaps the Apiete-Bogoso Explosion that occurred would not have happened. Consequently, a strict construction of Paragraph 3(6) of the First Schedule to the Income Tax Act, 2015 (Act 896) would mean that where a company is engaged in manufacturing business and any activity of the company is not set out as separate by the Act as in Sections 87, 89 and 90 or delineated as in the provisions of paragraphs 3(3),(4) and (5) of the First Schedule to Act 896 "all such activities" of the company, are treated as conducted in the course of a single business pursuant to Section 58(4) of Act 896.

<u>Arguments by Respondent (paragraphs 40-45 of Written Submissions)</u>

Respondent stated that it did not err by denying Appellant its full entitlement of location incentive. Appellant manufactures explosives for use in the mining industry. It has its plant located at the site of one of the mining companies where it supplies manufactured explosives to the clients. It is the case therefore that in addition to manufacturing the explosives, it also provides services such as transporting, delivery and pouring of explosives into the drilled holes for blasting of ore to take place. That Appellant contends that Respondent denied them full entitlement of the location incentive under paragraph 3(6) of Act 896. However a review of the company tax returns revealed that Appellant did not separate the income attributable to manufactured explosives and that attributable to services for the purpose of determining location incentive for manufacturing concern. Appellant's contention was that the entire revenue stream made up of income from manufactured explosives and income from management services are inseparable hence be made to enjoy the full rebate. It is the position of the Respondent that it did not deny Appellant their entitlement to location incentive as a manufacturing business. Respondent only limited the location rebate to the portion of the chargeable income attributable to the manufacturing business. This is because these two activities are distinct and separable. This is to the extent that the management services could be performed by another entity. Appellant's contract with their client to perform the two business activities does not make the provision of services inseparable and therefore an integral part of the manufacturing business. Therefore relying on Part 2, Section 1 (2) (6) of the Third Schedule of Act 592 now repealed, and Paragraph 3(6) of Act 896 as amended, Respondent submits that it did not err in limiting the location rebate enjoyed by the Appellant to only manufacturing activity.

High Court (Civil Procedure Rules) 2004, C.I. 47, Order 11 Rule 13 (1)-(3) states:

13. Admissions and denials

"13. (1) Subject to subrule (4) of this rule, any allegation of fact made by a party in the party's pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in pleading or a joinder of issue under rule 14 operates as a denial of it.

(2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.

(3) Subject to sub rule (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit shall be specifically traversed by the party in the party's defence or defence to counterclaim and a general statement of non-admission shall not be a sufficient traverse of them."

The law is that, "where a party makes an admission on a certain state of facts, the Defendant is relieved from her duty to provide evidence on the admitted facts."....see: In **KWADWO DANKWA & ORS v. ANGLOGOLD ASHANTI LIMITED [2019]137 GMJ @ 30**, the dictum of Vida Akoto-Bamfo (Mrs.) JSC.

See also the Supreme Court case of **RE ASERE STOOL; NIKOI OLAI AMONTIA IV (SUBSTITUD BY TAFO AMON II v. AKOTIA OWORSIKA 111 SUBSTITED BY LARYEA AYIKU III [2005-2006] SCGLR 637** this Court held as follows;

"Where an adversary has admitted a fact advantageous to the cause of a party, the party does not need any better evidence to establish that fact than by relying on such admission, which is an example of estoppel by conduct"

Thus a combination of Order 11 Rules 13 (1), (2) & (3) and the law on admission is that where a person makes an admission on certain facts which are not traversed by the opponent then the said facts are deemed to have been admitted.

Respondent from all the facts stated earlier have admitted the status of the Appellant as a manufacturing business. The Court has found that the Appellant's business is a whole which includes manufacturing and management services; if so then by law the Respondent is entitled to the full location tax incentives as provided by the First Schedule of Act 896.

GROUND III

THE RESPONDENT ERRED IN LAW BY DENYING THE APPELLANT THE USE OF VALUE ADDED TAX (VAT) CREDITS WHICH HAD ACCRUED PRIOR TO THE 2013 YEAR OF ASSESSMENT.

Appellant's Arguments (Paragraphs 62-71)

Appellant argued that in 'Exhibit OGL4', Respondent recognized the Appellant's VAT credit when it stated that; ***"VAT credit up to 2015 have been confirmed and accounted for in our computation except that for 2012 and 2011 our figures are GHS613,222.42 and GHS55,237.11 as against yours of GHS628,137.86 and GHS154,378.21."***

Also in 'Exhibit OGL5', Respondent indicated that Appellant's VAT/NHIL has a credit of USD1,547,027.45 as of September 2015. However the Respondent subsequently refused to recognize the credits of the Appellant prior to the 2013 year of assessment on the basis that the Appellant had invoked Section 30 of the Value Added Tax Act, 1998 (Act 546) which prohibited the Commissioner-General from raising an assessment after a period of three years unless fraud had been determined by law.

The Respondent in paragraph 9 of its Reply to the Appellant's third ground of appeal created the impression that by virtue of Section 30 of Act 546, it could not authenticate the Appellant's VAT credit; but this assertion is false because the Respondent had authenticated the Appellant's VAT credit from 2011 to 2015 in the amount of USD1,547,027.45 in its letter of August 13, 2018, only to subsequently reduce the tax credit to US$893,614.76 because the Appellant had invoked Section 30 of Act 546. The Respondent revised the Appellant's VAT credit downwards in its letter dated October 13, 2020, and marked as 'Exhibit OGL 13'. The Respondent can therefore not claim that it could not authenticate the Appellant's VAT credit. Appellant submitted that on the strict constructionist interpretation of tax statutes as already explained in ground II, the Respondent erred in law when it interpreted the limitation in Section 30 of Act 546 to imply that tax credits due to a taxpayer within the restricted period could not be claimed even though no such limitation is imposed on a taxpayer's right to claim its tax credits.

Again, the Respondent sought to imply in paragraph 12 of its response to the third ground of the Appellant's Notice of Appeal that pursuant to Section 50(2) of the Value Added Tax Act, 2013 (Act 870) a right to apply for refund of excess tax is extinguished if a taxpayer failed to apply for a refund within three months but this is not true. To buttress its point, Appellant argued that Section 50(2) of Act 870 provides that ***"a taxable person may apply for a refund under subSection (1)(b) where the credit for the excess amount remains outstanding for a continuous period of three months or more..."*** and is trite that in an enactment, the expression "may" shall be construed as permissive and empowering, and the expression "shall" as imperative and mandatory. This position finds statutory expression in Section 42 of the Interpretation Act, 2009 (Act 792). It is accordingly submitted that a taxpayer is not under any obligation to request for a tax refund under the tax laws within the stipulated period unless there is an express limitation on the right to apply for refund. Therefore, a taxpayer who pays taxes in excess of their liability may either request for a refund, or request for the excess tax to be applied against the taxpayer's liabilities. In this instance, the Appellant is asking that its VAT credits for the 2011 and 2012 years of assessment are recognized and applied to reduce its tax liability.

Respondent's case

Respondent was not in the position to audit Appellant's business activities for 2010 to 2012 years of assessment because Appellant invoked Section 30(1) of Act 546

Therefore, VAT credits relating to those years cannot equally be granted. Section 30 of Act 546 imposed limits to the periods in question, Appellant made it impossible for Respondent to cover the said periods under the audit exercise. The end result of course was to omit those periods. Therefore, if the tax credits that are more than three years according to the law cannot be authenticated per the law, then same cannot be granted.

Again, it is the Respondent's position that if Appellant failed to apply for refund within the three months stipulated by law, then it stands to reason that same is forfeited. However, if Appellant did in fact apply for the said refund, then the onus lies on Appellant to prove that it accordingly per the time periods provided by the law, claimed the said refund but Respondent failed to reimburse same. So far, the Appellant has not provided any evidence to establish that the Respondent used unorthodox means to deny them their rightful claim.

<u>Analysis</u>

Section 30(1) of Act 546 (repealed) stipulates as follows:

> ***"Where a taxable person fails to submit his tax return by the date provided under the Act or Regulations made under the Act or the Commissioner has grounds to believe that a return is incorrect or that any lawful tax has not been paid, the Commissioner-General***
>
> ***a. may base on any information available to him assess the tax due: and***
>
> ***b. shall notify his assessment in writing to the taxable person stating that the tax shall be paid within twenty-one days of the date of the notice:***
>
> ***except that the Commissioner shall not raise an assessment after a period of three years unless fraud has been determined by law."***

The Court finds that it is clear from the above provision that, save that fraud has been determined by law, the Commissioner shall not raise an assessment after a period of three years. This limitation is provided by law only on the Commissioner and not on the tax payer. If the Commissioner should fail to raise an assessment after three years and no fraud charges have also been brought or found against a tax payer, why should the tax payer lose its right to claim VAT credit due to the inaction of the Commissioner? Respondent's argument that they were not in the position to audit Appellant's business activities for 2010 to 2012 years of assessment and therefore VAT credits relating to those years cannot equally be granted to Appellant is misconceived. The evidence is clear that the Respondent has already recognized the VAT credit of Appellant in 'Exhibit OGL4' when it stated that: *"VAT credit up to 2015 have been confirmed and accounted for in our computation".* The three year limitation is on the Commissioner General and not the Appellant so it is wrong for Respondent to ask Appellant to forfeit its tax credit for 2010 to 2012 as there is no limit to the application of tax credit and Appellant is entitled to same. The Court so holds.

Also, still on the issue of the VAT credit the position of the Appellant is more probable than the Respondent. The law states that a taxpayer can apply three (3) months or more, see below

Section 50 (2) of the Value Added Tax Act, 2013, Act 870 provides thus: -

> ***50) (2) "A taxable person may apply for a refund under subSection (1)(b) where the credit for the excess amount remains outstanding for a continuous period of three months or more except that where the Commissioner-General orders an audit of the claim for refund for purposes of Section 51 the application shall be treated as received on the date that the audit is concluded."***
>
> ***(50) (13) "Except as otherwise provided in this Section, a credit under subSection 1) shall be carried forward to the next tax period."***

Thus stated, a taxpayer could apply for refund of excess credit outstanding for a period of three months, six months, a year, just to mention a few. Respondent therefore cannot argue that if Appellant failed to apply for refund within the three months stipulated by law, then Appellant forfeits same or that per the time periods provided by the law, they claimed the said refund but Respondent failed to reimburse same. From the above provision, there is no time limit within which a tax credit may be applied for and even a Tax credit can be carried forward by the tax payer. When Section 50(2) and (13) are read together it means that a taxpayer who pays taxes in excess of their liability may either request for a refund, or request for the excess tax to be applied against the taxpayer's liabilities as and when they occur. In this instance, the Appellant is asking that its VAT credits for the 2011 and 2012 years of assessment are recognized and applied to reduce its tax liability and since the law allows as per Section 50(13) for tax credits to be carried forward, the Appellant's credits of 2011 and 2012 years of assessment can be applied to reduce its tax liability as prayed; and the Court hereby grants same.

GROUND IV

THE RESPONDENT ERRED IN LAW BY DENYING THE APPELLANT THE USE OF ITS LEGITIMATE INCOME TAX CREDITS.

Arguments by Appellant (para 86-96)

Appellant submitted as false the claim by the Respondent in paragraph 9 of its reply to the fourth ground of the Appellant's Notice of Appeal that the Appellant's direct tax overpayment in the amount of US$591,404.79 had been denied owing to the six-year limitation period on an original assessment per Section 37(5)(a) of the Revenue Administration Act, 2016 (Act 915); thereby making it impossible to independently confirm the Appellant's tax credits. According to the Appellant, its tax credit has already been confirmed by Respondent in Schedule I of its audit report dated December 21, 2017, marked as 'Exhibit OGL 1'. To buttress its position, the Appellant referred to 'Exhibits OGL 5 & OGL' which are subsequent audit reports of the Respondent dated August 13, 2018 (LTO\DC\TP\08\18) and December 21, 2018 (LTO\DC\TP\12\18.) Appellant argued that its direct tax credit was still maintained and confirmed by the Respondent in those reports and only disregarded the tax credits upon acknowledging that it could not assess the Appellant to tax beyond a period of six years when the right to assess fell due.

Also quoting Section 66 of Act 915, Appellant argued that nowhere in the Section or the entire Act is a taxpayer prohibited from applying for a refund of tax beyond the period of three years. A taxpayer in the event of having paid tax in excess has the option to request for a refund or to request for the excess tax to be applied against their tax liabilities. Even then, where a taxpayer decides to request for a refund, failure to do so within three years of the relevant date cannot be construed as estopping the taxpayer from claiming the said refund as the word "may" used in the Section does not make it mandatory on the part of the tax payer to request for refund within the three years. Furthermore, the case of **UNITED STATES v. ISHAM 84 U.S. 496 (1873); 17 WALL. 496** regarding the principle relating to construing fiscal statutes has established that if there is a doubt as to the liability of an instrument to taxation, the construction is in favour of the exemption. Therefore, if Parliament had intended to estop the taxpayer from claiming a refund after three years, it would have expressly stated so.

Arguments of Respondent (para 76-94)

It is the case of the Respondent that an earlier letter dated 13th October, 2020 established among others, a direct tax overpayment of **US$1,282,094.66** and indirect tax liability of **US$1,060,438** which when set-off, left an overpayment of **US$221,656.42**. However, with an additional payment of **US$553,755.30**, total overpayment came to **US$755,411.32** per **'Exhibit GRA 8'**.

According to the Respondent, the burden of proof has often times been on Appellant to lead evidence to back its claim of being denied its legitimate income tax credits, but has failed to do so. Appellant has not proved that it applied for tax refund but was refused.

Importantly, the excess income tax Appellant is demanding for is a refund within the period of 2010 to 2012. The application here is not indefinite or endless. It behooves on the taxpayer to have applied for this refund within a stipulated period as it is well spelt out in Section 66(4) of the Seventh Schedule of Act 896, failure which the refund can be forfeited.

Appellant through their consultants, EY, raised the issue of denial of direct tax overpayment due to Appellant in the 2010 year of assessment in a letter dated 9th November, 2020 per 'Exhibit GRA 7'.

However, Appellant's direct tax overpayment in the amount of US$591,404.79 had been denied owing to the six-year limitation regarding assessment of a taxpayer per Section 37(5) (a) of the Revenue Administration Act, 2016 (Act 915). Appellant is requesting for refund spanning from 2010 to 2012 which obviously goes beyond the six-year limitation. Furthermore, Appellant should have applied for a refund of its excess tax and upon verification by Respondent; and where Respondent is satisfied that there is indeed an excess tax, Respondent would accordingly apply (a) or (b) of Section 68(1) of Act 915. Appellant simply failed to apply for the excess tax he so claimed. Per Section 66(1) of Act 915, Appellant had three years within which to apply. Appellant has forfeited its right to the refund.

Section 66(1) of Act 915 provides as follows:

"**66. Application for tax refund**

1) A person may, within three years of the relevant date, apply to the Commissioner-General for a refund of tax paid in excess of the tax liability of that person.

2) The Commissioner-General shall prescribe the form of the application.

3) An application for a tax refund shall be in writing and contain an explanation as to how the excess is calculated and attach evidence relevant to that calculation.

4) In this Section, "relevant date" means the later of—

(a) the event that gave rise to payment of the excess tax;

(b) the date on which a tax return is filed by the person with respect to the payment; and

(c) the date of payment.

68. (1) Where the Commissioner-General is satisfied that that person has paid excess tax, either on application for a refund by that person; or by reason of an order of a Court or tribunal, the Commissioner-General shall

(a) Apply the excess in reduction of any outstanding tax liability of the person"

Analysis

From all the evidence, the Court finds as a fact that the Respondent suddenly disregarded the tax credits of the Appellant which they themselves had hitherto assessed as seen in 'Exhibits OGL1, OGL5 and OGL7' the moment the Appellants invoked Section 37(5) of Act 915 which barred the Respondent from assessing a tax payer beyond a period of six years. The Court has already held that the interpretation placed on Section 37(5) by the Respondent is misconceived as the Section only placed the limitation on the Respondent solely and did not imply a limitation on Appellant from making use of its tax credits.

Section (50) (13) of Act 870

"Except as otherwise provided in this Section, a credit under subSection (1) shall be carried forward to the next tax period"

This Court is of the opinion that to the extent that Section (50) (13) of Act 870 allows for tax credit to be carried forward over to the next tax period, then there is no limit to the application of a tax credit and there is no bar on the Appellant against applying excess tax payment as credits. So, the Respondent cannot ask the Appellant to forfeit its tax credit.

Respondent refers to the limitation period for an application for tax refund pursuant to Section 66(4) of the Seventh Schedule of Act 896, but that is repealed law. Again, Section 66(1) of Act 915 does not place a limitation on the period within which a tax payer can apply for refund of excess credit, however Appellant is asking for the tax credit to be recognized and to be allowed to make use of the credits on its future tax liabilities. The Commissioner has not denied that the Appellant has tax credits. Indeed, the Respondent admits same in paragraph 88 of its Written Submissions as follows:

> ***Para. 88:*** ***"My Lady, it is the case that the Respondent in an earlier letter dated 13th October, 2020 established among others, a direct tax overpayment of US$1,282,094.66 and indirect tax liability of US$1,060,438 which when set-off, left an overpayment of US$221,656.42. However, with an additional payment of US$553,755.30, total overpayment came to US$755,411.32. A copy of the said letter is attached and marked as "Exhibit GRA 8"."***

Based on Order 11 Rule 13 of C.I. 47 mentioned supra and the authority of **KWADWO DANKWA & ORS (supra)**, the Respondent having admitted the tax credit of Appellant cannot now turn around and say that because the Respondent was not in the position to audit Appellant's business activities for 2010 to 2012 years of assessment because Appellant invoked Section 30(1) of Act 546, therefore VAT credits relating to those years cannot equally be granted. That argument is misconceived. Subsequently, the Court orders that the Appellant's tax credit in the amount of US$591,404.79 be considered by the Respondent in computing the Appellant's tax liability.

<u>GROUND V</u>

THE RESPONDENT ERRED IN LAW BY REJECTING PHOTOCOPIES OF THE VAT RELIEF PURCHASE ORDERS (VPROS) CONTRARY TO SECTION 91 OF THE REVENUE ADMINISTRATION ACT, 2016 (ACT 915) AND SECTION 166 OF THE EVIDENCE ACT, 1975 (NRCD 323).

<u>Appellant's Arguments (para86-96)</u>

It is the case of the Appellant that the Respondent rejected the VRPOs because they are photocopies of the original. However, Respondent is under an obligation to accept photocopies of original invoices or VRPOs. This is because the original VRPOs in question were identified by the Respondent's Officers and initialled by them in an earlier audit regarding the same tax period as the current audit in contention. It was these same initialled copies of the VRPOs which were scanned by the Appellant and presented to the subsequent audit team of the Respondent and yet the Respondent refuses to recognize them and terms them "unsatisfactory evidence". However, pursuant to Section 91(1) of Act 915, the Respondent is enjoined to accept the copies of the VRPOs because it has already recognised them.

Applicant further argued that the Evidence Act, 1975 (NRCD 323); Section 179 defines "writing" to include *handwriting, typewriting, printing,* photostating, *photographing, mechanical or electronic recording, and any other means of recording upon a tangible thing, a form of communication or representation, including letters, words, pictures, sounds or symbols, or combinations of those things.*

Again, Section 166 of the Evidence Act, 1975 (NRCD 323) provides that a duplicate of a writing is admissible to the same extent as an original of that writing, unless a genuine question is raised as to the authenticity of the original or the duplicate, or in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Furthermore, Section 167 of NRCD 323 provides that evidence other than an original writing is admissible to the same extent as an original to prove the content of a writing if the originals are lost or have been destroyed unless the loss or destruction resulted from the fraudulent act of the proponent of the evidence.

Finally, Counsel submits that the Respondent's assertion, that the refusal to accept photocopied VRPOs is to prevent recycling of invoice is unfounded because VRPOs have unique serial numbers and therefore taxpayers cannot present the same VRPO twice.

<u>Respondent's arguments (para 95-107)</u>

The thrust of the Respondent's argument is that the Commissioner-General is under no obligation to accept photocopies of original invoices or VRPOs. The word "***copy***" in Section 41 (2) of the Act 870 is in reference to a duplicate copy and not photocopy.

VAT invoices are value books and therefore originals, duplicates and triplicates are of utmost importance during audit hence photocopies are unacceptable. Respondent's refusal to accept photocopied VRPOs is to prevent recycling of the invoice which is the re-submission of earlier invoices that have already been dealt with or worked on.

Section 91(1) of Act 915 on the admissibility of documents provides:

> *"The following are admissible in proceedings on appeal or in recovery of tax under a tax law without calling the person who prepared or signed it:*
>
> *(a) a document **that has been seized or obtained by a tax officer** acting in the performance of duties under a tax law, relating to the tax affairs of a person;*
>
> *(b) a statement relating to the tax affairs of a person that is made to a tax officer acting in the performance of duties under a tax law; and*
>
> ***(c) a copy of, translation of or extract from a document or statement referred to in paragraph (a)** or (b)."*

Respondent does not deny that they had already inspected and initialled the original VRPO's in question and it was the same one that has been photocopied. Therefore, the evidence of the Applicant stands. Since the Respondent has already authenticated the original, if they have cause to be concerned about the photocopies then they could easily have cross checked or verified them with the serial numbers on the original as no two serial numbers are the same.

Importantly, Respondent did not refer the Court to any part of Act 870 which defines the copy mentioned in Section 41(2) as meaning duplicate and excluding photocopy.

The photocopied VRPOs having met the threshold requirements in the Evidence Act, and the Respondents having not disputed that they had earlier authenticated the originals by initialling same as provided by Section 91(1) (a) and (c) of Act 915, nothing stands in the way of this Court in holding that the Respondent should accept the said VRPO's in its assessment of the Appellant's tax liability. The Tax Appeal is upheld. No order as to costs.

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

Representation

Appellant absent

Respondent absent

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

Counsel for Respondent – Emma Otoo for Mrs. Joyce Ampah absent

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