IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, GHANA (COMMERCIAL DIVISION) HELD IN ACCRA ON THURSDAY THE 9TH NOVEMBER, 2023 BEFORE HER LADYSHIP JUSTICE AFI AGBANU KUDOMOR

SUIT NO.:CM/TAX/0008/22

IN THE MATTER OF AN APPEAL AGAINST TAX ASSESSMENT BY THE COMMISSIONER

SCANCOM PLC
MTN HOUSE, INDEPENDENCE AVENUE
ACCRA, GHANA. ... **APPELLANT/APPLICANT**

VRS.

THE COMMISSIONER – GENERAL
GHANA REVENUE AUTHORITY
ACCRA, GHANA. ... **RESPONDENT/RESPONDENT**

JUDGMENT

Appellant is dissatisfied with the Tax Objection decision of the Respondent dated 9th September 2021 and has appealed against the said decision to the High Court.

The grounds of appeal are as follows:

1. The Respondent erred in law and acted arbitrarily by imposing Value Added Tax liability on the Appellant for Imported Services for the period January 2014 to December 2017, when
   (i) The Value Added Tax Act, 2013 (Act 870) does not impose Value Added Taxes on Imported Services which are used to make Taxable Supplies;
   (ii) The Appellant had used the Imported Services for that period solely for its Telecommunication business (taxable supplies); and
   (iii) Even if Respondent had identified that some of the Imported Services had been used for the Appellant's Mobile Money business (Exempt Supplies), the Value Added Tax, 2013 (Act 870) does not authorise the imposition of an arbitrary Value Added Tax liability based on the proportion of the total revenue of the Taxpayer generated from the Exempt supplies.

2. That Respondent erred in law by relying on a Ghana Revenue Authority's Internal Practice Notes/Guidelines to impose National Health Insurance Levy and Ghana Education Tax Fund Levy (together with interest and penalties) on the Appellant for Imported services provided by Non-Resident entities, when
   (i) The relevant statutes do not sanction the imposition of those levies on Imported Services utilised to make Taxable Supplies;
   (ii) The Appellant did utilise the Imported Services to make Taxable Supplies;

(iii) It is unlawful for Ghana Revenue Authority to amend a statutory position through Practice Notes; and

(iv) Ghana Revenue Authority's Practice Notes/Guidelines are binding on Ghana Revenue Authority only, and not on Taxpayers.

According to Statement of Facts, Appellant is a Ghana incorporated company operating through its brand name; MTN Ghana. Before 2018, Appellant had telecommunication and mobile money as its two main streams of business.

That whilst the telecommunication business involves telephony, data communication and associated services; the mobile money business involves the provision of financial technology that allows people to receive, store and spend money using mobile devices.

That Appellant kept consolidated books and records and prepared financial statements for both streams of businesses.

Since 2018, a new and separate legal entity known as Mobile Money Limited took over the mobile money business, leaving the Appellant to focus on only the telecommunications business.

That since this separation, both Appellant and Mobile Money Limited began to keep separate books and prepared separate financial statements.

That Respondent is the Executive Head of the Ghana Revenue Authority, an institution established with the function of assessing tax liabilities and collecting tax revenues for the Government of Ghana.

That Appellant is one of the most compliant Taxpayers in Ghana and has consistently been among the largest Taxpayers in Ghana over the last ten years.

On many occasions, Ghana Revenue Authority has acknowledged and awarded the Appellant for its Tax compliance. For instance, in 2013 and 2014, Ghana Revenue Authority recognized Appellant as the Overall Best Taxpayer (Large Taxpayer's Office/Domestic Tax Division).

In 2017 and 2018 respectively, Ghana Revenue Authority also acknowledged Appellant as the highest Taxpayer in Ghana. For the 2018 financial year, Appellant paid over GHS1.48 billion in taxes.

In 2019, Ghana Revenue Authority gave Appellant the "Platinum Award"; the highest award it issues to large Taxpayers. That year, Appellant was the only recipient.

That in early 2020, Ghana Revenue Authority commenced a comprehensive tax audit on Appellant, spanning the period January 2014 to December 2018. The said audit focused on all aspects of Appellant's business including:

a. Input Value Added Tax claims related to goods and services procured by Appellant in Ghana;
b. Value Added Tax on services imported by the Appellant;
c. Input Value Added Tax claims related to office premises constructed by Appellant;

d. National Health Insurance Levy (NHIL) and Ghana Education Trust Levy (GETFund Levy) on imported services; and
e. Withholding taxes on:

    i. Inter-connect and roaming payments to Non-Resident persons;
    ii. trade discounts granted to Distributors; and
    iii. mobile money fees shared with partner banks.

During the said audit, Appellant submitted its business records and other relevant documents to Ghana Revenue Authority and clarified matters the latter raised as well.

By a Tax Audit Report dated 4th May 2021, with reference number LTO/MTN/TAR/05/2021 (the Tax Assessment), Ghana Revenue Authority assessed tax liability against Appellant in the sum of **Six hundred and seventeen million, seventy two thousand, five hundred thousand and nine Ghana cedis, eighty eight pesewas (GHS617,072, 509.88)** comprising:

a. Direct Taxes of **Four hundred and ten million, eight hundred and sixty two thousand, nine hundred and sixty one Ghana cedis, fifty seven pesewas (GHS410, 862, 961.57);** and
b. Indirect Taxes (VAT/NHIL/GETFund Levy) as well as interest of **Eighteen million, six hundred and fifty thousand, eight hundred and sixty Ghana cedis (GHS18,650,860.00)** (the Accepted Liability).

Out of the Tax Assessment of **Six hundred and seventeen million, seventy two thousand, five hundred and nine Ghana cedis, eighty eight pesewas (GHS617,072, 509.88),** Appellant accepted liability of **Eighteen million, six hundred and fifty thousand, eight hundred and sixty Ghana cedis (GHS18,650,860.00)** which it duly paid on 3rd June 2021.

Appellant also applied for a waiver of the interest and penalty of **Twenty six million, nine hundred and fifty five thousand, four hundred and seventy three Ghana cedis (GHS26,955,473.00)** imposed on the Accepted Liability which was granted by Ghana Revenue Authority.

In respect of the Disputed Liability of **Five hundred and seventy one million, four hundred and sixty six thousand, one hundred and seventy seven Ghana cedis (GHC571, 466,177.00)** and Ghana Revenue Authority's reasons for that assessment, Appellant on or about 3rd June 2021 lodged an Objection under section 42 of the Revenue Administration Act, 2016 (Act 915).

As part of the objection process, Appellant was required by statute to make a down payment amounting to thirty percent (30%) of the disputed amount to Ghana Revenue Authority.

At the time, Appellant had a tax credit with Ghana Revenue Authority and so the latter applied **One hundred and fifty million Ghana cedis (GHS150,000,000.00)** of the said tax credit towards the said thirty percent (30%) down payment.

In the objection, Appellant challenged many of the reasons underlying Respondent's Tax Assessment under the following heads:

(a) Withholding Tax

(b) Disallowed Input Value Added Tax
(c) Value Added Tax on Imported Services and
(d) National Health Insurance Levy and Ghana Education Trust Fund Levy on Imported Services.

From Appellant's own assessment as contained in the said Objection, the correct additional tax liability was **Eighteen million, six hundred and fifty thousand, eight hundred and sixty Ghana cedis (GHS18,650,860)** which Appellant had already paid.

That on 9th September 2021, Respondent gave his Objection Decision which was served on Appellant the same day.

In the said Objection Decision, Respondent deferred his decision on two heads, namely: (a) withholding tax on International Interconnect cost and (b) withholding tax on International Roaming cost of assessments for further consultations. The amount under the two heads is **Two hundred and eighty-one million, five hundred and nine thousand, one hundred and seventy one Ghana cedis, sixty five pesewas (GHS281,509,171.65).**

It was in the said Objection Decision that Respondent agreed to waive the penalty and interest of **Twenty six million, nine hundred and fifty five thousand, four hundred and seventy three Ghana cedis (GHS26,955,473.00)** on the Accepted Liability, which Appellant had already paid.

Although Respondent's position on Appellant's purported Tax Liability was a total of **Three hundred and thirty three million, nine hundred and fifty seven thousand, six hundred and ninety seven Ghana cedis, one pesewa (GHS333,957,697.01),** following deductions amounting to **One hundred and ninety five million, six hundred and six thousand, three hundred and thirty three Ghana cedis (GHS195,606,333.00)** (which comprises the thirty percent (30%) down payment **of One hundred and fifty million Ghana cedis (GHS150,000,000)**, the already paid Tax Liability of **Eighteen million, six hundred and fifty thousand, eight hundred and sixty Ghana cedis (GHS18,650,860.00)** and the waived penalty and interest of **Twenty six million, nine hundred and fifty five, four hundred and seventy three Ghana cedis (GHS26,955,473.00),** Respondent stated that Appellant must pay the amount of **One hundred and thirty eight million, three hundred and fifty one thousand, three hundred and sixty four Ghana cedis, point one pesewa (GHS138,351,364.01)** as the Current Payable Assessment.

That after some internal deliberations, Appellant decided not to contest all but two of the heads of the Current Tax Assessment.

Appellant is dissatisfied with the remaining heads (Value Added Tax on Imported Services and the National Health Insurance/Ghana Education Trust Fund levies on Imported Services) of the said Objection Decision (and their corresponding Tax liabilities which form part of the Current Tax Assessment); the reason for the Tax Appeal to this Court.

On the first ground of appeal, which is the Respondent's imposition of Value Added Tax on Imported Services used to make Taxable supplies, Learned Counsel for Appellant argued that the law does not impose Value Added Tax on Imported Services that are used to make Taxable supplies as provided in sections 1 (1) (b) and 65 of the Value Added Tax Act, 2013 (Act 870).

That there is no statutory provision which clearly and expressly authorises Respondent to impose Value Added Tax by presuming that the amount of total revenue generated through Exempt supplies is proportionate to the amount of imported services used to make Exempt supplies. That any such imposition would be arbitrary and not supported in law.

That the telecommunication services which Appellant offers fall in the category of Taxable supplies; whilst the services which Appellant offers in its "mobile money" business fall in the category of Exempt supplies.

That in the 2014, 2015, 2016 and 2017 financial years, Appellant used the imported services it received to make supplies in its Telecommunications business (taxable supplies).

That Appellant did not use the said imported services to make supplies in its mobile money business (Exempt supplies). That these were demonstrated to Respondent by Appellant's records (spreadsheets and invoices) which it made available to Respondent.

That by virtue of sections 1(1) (b) and 65 of the Value Added Tax Act, 2013 (Act 870), Respondent had no reason, basis or justification in law to impose a Value Added Tax liability on Appellant for imported services in the 2014, 2015, 2016 and 2017 financial years and utilised for its Telecommunications business (Taxable supplies).

That supposing without admitting that Respondent had identified that some of the imported services had been used for Appellant's mobile money business (Exempt supplies), Respondent had no reason or justification in law to presume that the proportion of total revenue generated through Exempt supplies is proportionate to the amount of imported services used to make Exempt supplies.

That these acts and omissions of Respondent have caused a substantial miscarriage of justice to Appellant.

In respect of the second ground of Appeal, which Appellant states is the wrongful reliance on Internal Practice Notes/ Guidelines by Respondent to impose National Health Insurance Levy (NHIL) and GETFund Levy (GETFL) on imported services contrary to law, Learned Counsel for Appellant argued that the long title and preamble of an Act of Parliament are relevant in deriving the intent and object of the Act in compliance with section 13 of the Interpretation Act, 2009 (Act 792).

That the relevant laws governing the National Health Insurance Levy and the Ghana Education Trust Fund Levy are the National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972); which must be read together with the Value Added Tax Act, 2013 (Act 870) as amended by the Value Added Tax (Amendment) Act, 2018 (Act 970).

That from fully reading the above-mentioned statutes, it is clear that the statutes were not intended to and do not impose National Health Insurance and Ghana Education Trust Fund levies on imported services utilised for Taxable supplies.

That, similar to Value Added Tax, these two levies (the National Health Insurance and Ghana Education Trust Fund levies) are not imposed on imported services when they are utilised to make Taxable supplies.

That because between August 2018 to December 2018, Appellant utilised the Imported services to make Taxable supplies, which Appellant submitted supporting evidence to Respondent in the tax assessment, the latter did not impose Value Added Tax on the imported services for the said period.

That by virtue of section 13 of the Interpretation Act, 2009 (Act 792) as well as the combined effect of the Value Added Tax Act, 2013, Act 870 (as amended by the Value Added Tax (Amendment) Act, 2018 (Act 970), the National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972), Appellant was not obliged to pay National Health Insurance and Ghana Education Trust Fund Levies on imported services which were utilised to make Taxable supplies in the 2018 financial year.

That because Respondent did not impose Value Added Tax on the imported services for the 2018 financial year because the said services had been utilised to make Taxable supplies, Respondent had no basis in law to impose National Health Insurance and Ghana Education Trust Fund levies (together with interest and penalties) on Appellant for the imported services for the 2018 financial year.

That although section 100 of the Revenue Administration Act, 2016 (Act 915) authorises Respondent to issue Practice Notes to set out how Ghana Revenue Authority is to interpret certain tax provisions, the said Practice Notes are binding only on Respondent and officers of Ghana Revenue Authority and not on Taxpayers or other persons affected by the Tax law as stipulated in section 100 (3) and (4) of the Revenue Administration Act, 2016 (Act 915).

That Respondent however relied on its Practice Notes/Guidelines to impose National Health Insurance and Ghana Education Trust Fund levies on imported services which Appellant utilised to make Taxable supplies.

That there being no provisions in the relevant statutes (the Value Added Tax Act, 2013, Act 870 (as amended by the Value Added Tax (Amendment) Act, 2018 (Act 970), the National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) that authorise Respondent to impose National Health Insurance and Ghana Education Trust Fund levies on imported services used to make Taxable supplies, this position of law cannot be changed or amended by the said Practice Notes/Guidelines.

Appellant therefore seeks the following reliefs from the Court against Respondent:

a. An order reversing the Respondent's decision to impose additional Value Added Tax of **Eight million, seven hundred and ninety three thousand, five hundred and ninety eight Ghana cedis (GHS8,793,598.00)** and penalty and interest of **Ten million, nine hundred and thirty three thousand, one hundred and nineteen Ghana cedis (GHS10,933,119)** on imported services utilised by Appellant for its telecommunication business.
b. An order reversing the Respondent's decision to impose additional Ghana Education Trust Fund Levy and National Health Insurance Levy of **Six million, three hundred and seventy nine thousand, four hundred and eighty three Ghana cedis (GHC6,379,483.00)** and penalty and interest of **Two million, five hundred and sixty**

six thousand, one hundred and twenty four Ghana cedis (GHC2,566,124.00) on imported services utilised by the Appellant for its business.

c. An order quashing the parts of the Current Tax Assessment relating to the heads "Disputed Assessment", and overturning the Objection Decision by Respondent as it relates to those parts.
d. Any other order(s) that the justice of the case requires.

RESPONDENT'S REPLY

Appellant's challenge of Respondent's position on "VAT ON imported services" and "NHIL AND GETFund Levy on Imported Services" which formed part of the basis of the Tax Assessment/Liability is as captured in the heading b) INDIRECT TAXES on ii) VAT ON IMPORTED SERVICES and iii) NHIL AND GETFUND LEVY ON IMPORTED SERVICES under the heading "OBSERVATIONS AND FINDINGS" of Appendix GRA I (the Tax Audit Report).

Respondent stated that this position was affirmed in its Objection Decision (Appendix GRA III) under the heading "VAT on Imported Services" and "NHIL and GETFund Levy on Imported Service".

Although Respondent reinforced its agreement with Appellant's position that Value Added Tax is not applicable to imported services used to produce Taxable supplies, it explained that its application of the said tax on Appellant was due to the fact that Appellant had also applied the imported services to produce Exempt supplies for the period from January 2014 to December 2017.

That Appellant's assertion that it did not use the said imported services to make Exempt supplies is inaccurate especially as it applies to the 2014, 2015, 2016 and 2017 financial years.

That Appellant in the Objection Letter stated among others in their argument on the heading "(ii) VAT on imported services" that; *"Regarding 2015, 2016 and 2017, the apportionment method should only be used where the company cannot directly attribute the imported services to taxable and exempt supplies. We would however like to state that the company has reviewed the details used in assessing the liability and note that **most** of the imported services indicated are directly attributable to the taxable supply of the company..."*

That Appellant from the above implicitly admitted that some of the imported services were also used to make Exempt supplies.

Respondent stated that it is the proportion of the imported services directly attributable to Exempt supplies that formed the basis of the Value Added Tax. That the legal authority for this is the combined effect of section 1(1) (b) of the Value Added Tax, 2013 (Act 870), the definition of "import" and "import of services" under section 65 and section 2 (c) of the Value Added Tax Act, 2013 (Act 870).

According to Respondent, in the course of the auditing, Respondent discovered that Appellant received and utilised various services from non-resident persons for the period between January 2014 to December 2017 in furtherance of its objects of business that entailed mobile telephony, data services and mobile money services.

That the imported services by their nature were neither distinctly attributable to taxable supplies nor exempt supplies; and were rather applied into the production of both "taxable supplies" and "exempt supplies"

That the said imported services comprised the following:

i. Management and technical services, Intellectual Property Fees to MTN Dubai.
ii. Royalties paid/payable for billing and reporting platforms to non-resident persons.
iii. Royalties paid/payable for network infrastructure support services to non-resident persons.
iv. Fees paid/payable for procurement services from related parties such as Interserve Overseas Ltd and Global Trading Company.

That Respondent in the course of the auditing further noted that Appellant had registered "Mobile Money Limited" as a company to provide mobile money services to the public.

However, between January 2014 to December 2017, "Mobile Money Limited" was neither trading nor operating as a business entity.

However, Appellant as Scancom PLC traded in mobile money business from the years 2014, 2015, 2016 and 2017 which is shown in pages 31, 30 and 31 respectively of the audited financial statements for 2015, 2016 and 2017. The audited financial statements of Appellant for 2014, 2015, 2016 and 2017 are attached as Appendices V, VI, VII and VIII respectively.

That during the said period, the business of mobile money was conducted and reported as a revenue line of Appellant, Scancom PLC Ghana; making logical reasoning that Appellant as Scancom PLC was providing both Taxable and Exempt supplies for the said period with the imported services.

That Appellant was thus a partial Exempt Trader and under section 65 of the Value Added Tax Act, 2013 (Act 870) as amended had imported services to produce Exempt supplies for the period spanning January 2014 to December 2017.

That under the First Schedule of the Value Added Tax Act, 2013 (Act 870) as amended, "mobile money services" are deemed as "financial services". This constituted Exempt supplies and remained so within the said period (January 2014 to December 2017).

That paragraph 19 of the First Schedule of the Value Added Tax Act, 2013 (Act 870) as amended equally applies to the meaning of the transaction as Exempt supplies.

In response to Appellant's ground A(iii) of their grounds of Appeal, Respondent stated that there is nothing arbitrary about Respondent's application of Value Added Tax on Appellant to the extent that the proportion of the sales/revenue attributable to Exempt supplies of Appellant can be extracted from the total sales/revenue.

That Appellant's position that even if the fact is established that it produced and supplied both Taxable and Exempt supplies for the period in question, to the extent that proceeds from both (Taxable and Exempt supplies) are merged as total sales/revenue, there is no objective way provided under the law to determine what is exclusively attributable to Exempt supplies is far-fetched. That to adopt this position would undermine the effect of section 99 of the Revenue Administration Act, 2016 (Act 915).

That as stated in the Respondent's Objection Decision (Appendix GRA III) under the heading "VAT on Imported Services", Respondent's basis for the imposition of the tax is section 65 in addition to sections 1 (1) (b) of and 2(c) of the Value Added Tax Act, 2013 (Act 870) as amended.

That apportionment however became necessary in order to isolate that part of the imported services that can be directly attributable to the Exempt supplies because Appellant had merged both Taxable and Exempt supplies during the said period.

That although Appellant had registered the company Mobile Money Limited for the business of mobile money which is exempt under the Value Added Tax law, it is clear (from pages 31, 30 and 31 of Appendices VI, VII AND VIII (the audited financial statements for 2015, 2016 and 2017 respectively)) that the said company never engaged in trading until 2018.

That for those same periods as well as in 2014, the business of mobile money services was conducted and reported as a revenue line of Appellant.

That being imported services and not distinctly attributable to either Taxable or Exempt supplies, Respondent relied on the said section 65 of the Value Added Tax Act, 2013 (Act 870) as amended Act 870; where "import of services" is clearly defined as a supply of services to a resident person by (i) a non-resident person; or (ii) a resident person from a business carried on by the resident person outside the country; to the extent that the services are utilized or consumed in the country other than to make taxable supplies.

That as section 1(1)(b) of the Value Added Tax Act, 2013 (Act 870) as amended generally imposes Value Added Tax on "imported services", the combined effect of these two provisions is that for imported services, Value Added Tax will not apply only if the imported service is applied in making taxable supplies.

That in the instant case, some of the imported services also went into the making of Exempt supplies and to that extent, Value Added Tax is applicable.

That Respondent therefore applied the definition in section 65 of the Value Added Tax Act, 2013 (Act 870) as amended to the transactions concerned and the total cost of the imported services was consequently determined and apportioned between the Exempt supplies and the Taxable supplies with respect to their contribution to total revenue.

In other words, the proportion of each revenue stream (Exempt supplies vis-a-vis Taxable supplies) to the total revenue was calculated and used in splitting the imported services between the Exempt supplies and Taxable supplies for the relevant years of assessment.

That the percentages/ratios are 2.35% for 2014, 6.02% for 2015, 20.39% for 2016 and 13.64% for 2017 as shown in Appendix GRA IX.

That based on these computed percentages/ratios and on the strength of section 44(2) of the Value Added Tax Act, 2013 (Act 870) as amended, the Value Added Tax assessed on imported services for the years under review were calculated; as well as interests charged on the outstanding tax assessed for the period under review pursuant to section 71 of the Revenue Administration Act, 2016 (Act 915) were imposed on Appellant.

The Value Added Tax assessed on imported services amounted to **Five hundred and eighty thousand, eight hundred and one Ghana cedis, seventeen pesewas (GHS580,801.17), one million, three hundred and fifty eight thousand, two hundred and fifty Ghana cedis, sixty five pesewas (GHS1,358,250.65), Two million, one hundred and thirty five thousand, six hundred and five Ghana cedis, ninety four pesewas (GHS2,135,605.94)** and **four million, seven hundred and eighteen thousand, nine hundred and thirty Ghana cedis, fifty eight pesewas (GHS4,718,930.58)** for 2014, 2015, 2016 and 2017 respectively.

That interest of **one million, six hundred and seventy one thousand, three hundred and ninety seven Ghana cedis, fifty nine pesewas (GHS1,671,397.59), two million, eight hundred and ninety seven thousand, six hundred and seven Ghana cedis (GHS2,897,607.94), two million, eight hundred and fifty six thousand, three hundred and thirty nine Ghana cedis, three pesewas (GHS2,856,339.03)** and **three million, five hundred and seven thousand, seven hundred seventy four Ghana cedis, fifty eight pesewas (GHS3,507,774.58)** were charged on the outstanding tax assessed for 2014, 2015, 2016 and 2017 respectively and imposed on Appellant.

That in all, the tax assessed on imported services amounted to **nineteen million, seven hundred and twenty six thousand, seven hundred and seven Ghana cedis, eighty pesewas (GHS19,726,707.80)**; which have all been explained in Appendix GRA I and its attachment as SCH: IV(C) and also in Appendix GRA X.

In response to the second ground of Appeal, Respondent stated that it is incorrect for Appellant to suggest that Respondent's Tax Assessment in respect of the effect of the National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) on the Tax Assessment was based on Ghana Revenue Authority's internal Practice Notes/Guidelines.

That this is because Respondent's actions were anchored on the applicable provisions of the relevant tax laws.

That the said Practice Notes/Guidelines are for the benefit of the staff of Ghana Revenue Authority in terms of explaining or construing the provisions of Tax laws and their application to given facts in the course of the administration of tax.

That in 2018, the National Health Insurance Levy and Ghana Education Trust Fund Levy were decoupled from the Value Added Tax and became National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972).

The purpose of these two Acts was to make the two levies separate indirect taxes which are not subject to the normal Value Added Tax standard rate procedures.

That section 47 of the National Health Insurance Act, 2012 (Act 852) was amended by the National Health Insurance (Amendment) Act, 2018 (Act 972). The effect of the amendment was to substitute section 47(3) of the principal enactment with a new subsection (3) and (4).

That it is clear from the amendments in sections 47 (3) and (4) of the National Health Insurance Act, 2012 (Act 852) and Section 3A of the Ghana Education Trust Fund, Act, 2000 (Act 581) that they are separate laws from the Value Added Tax Act, 2013 (Act 870) and the two laws impose tax on import of service which is not subject to input tax deduction.

Respondent admitted to not imposing tax on Appellant's imported services for the period between August 2018 to December 2018 because to the extent that the imported services were used to produce only taxable supplies, Value Added Tax was inapplicable.
Secondly, during the said period, the National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) had kicked in and as a result they were applicable laws and distinct levies from the Value Added Tax Act, 2013 (Act 870).

That the National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) imposed taxes (in this instant levies) on import of service which is not subject to input tax deduction; irrespective of whether the imported services were used to produce Taxable or Exempt supplies.

That for the relevant period in 2018, the VAT rate of 12.5% was inapplicable to Appellant but the National Health Insurance and Ghana Education Trust fund levies of 2.5% each were applicable to the imported services by Appellant irrespective of whether these said services were used to produce taxable or exempt supplies.

That even though per the new sections 51(3) of the National Health Insurance (Amendment) Act, 2018 (Act 971) and section 3E (4) of the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) states that "The Value Added Tax, 2013 (Act 870) applies with the necessary modifications to the collection of the levy", Respondent stated that it is of the view that that included in the "...necessary modifications..." is the specific amendment that National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) have effected.

That prior to the coming into force of the Value Added Tax Act, 2013 (Act 870), the repealed Act (Value Added Tax Act, 1998 (Act 546) required a person who imported services to account for and pay tax within twenty-one days and claim it as input tax at the end of the month when filing the Value Added Tax returns. It thus operated on the output-input mechanism within the same month.

That the Value Added Tax Act, 2013 (Act 870) however simplified the Value Added Tax accounting system by providing that one will be required to account for tax on imported services if the said imported services are applied in producing Exempt supplies (section 65 of the Value Added Tax Act, 2013 (Act 870) on the definition of import and import of services).

That the purpose of the Value Added Tax Act, 2013 (Act 870) as amended was to avoid a situation where a person into taxable supply will have to pay and claim it as input tax within the same month bringing the net effect to zero.

That per the effects of National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) the National Health Insurance and the Ghana Education Trust Fund levies were separated as distinct levies imposed on import of services and which are also not subject to input tax deduction.

That Appellant in relying on the interpretation of "import of services" as provided for in section 65 of the Value Added Tax Act, 2013 (Act 870) failed to pay attention to the effect of the two amendments mentioned above on the Value Added Tax, 2013 (Act 870).

That Appellant's prayer to the Court to construe the provisions of the law in the way it (Appellant) sees it is to affirm its (Appellant) attempt to unduly avoid the imposition and payment of the National Health Insurance and the Ghana Education Trust Fund levies on their imported services for the period spanning August 2018 to December 2018.

That Respondent is empowered under section 99 of the Revenue Administration Act, 2016 (Act 915) as part of the general "anti-avoidance" provisions in the tax laws to apply the said provisions in a way as to counteract the tax benefit that a Taxpayer might otherwise secure.

That Respondent's tax assessment in respect of Appellant were anchored on the relevant tax laws and so the Court ought to dismiss the instant tax appeal and refuse the reliefs sought by Appellant as they are without merit.

THE BURDEN OF PROOF

Section 92 (1) of the Revenue Administration Act, 2016 (Act 915) provides as follows:

"Subject to subsection (2), in proceedings on appeal under section 42 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 provision of the tax law."

It is clear from the above provision that Appellant assumes the burden of proving its grounds of appeal.

Section (92) (2) of the Revenue Administration Act, 2016 (Act 915) provides as follows:

"With respect to the imposition of a penalty, including in proceedings on appeal under or for the recovery of a penalty, the burden of proof is on the Commissioner-General to show non-compliance with the provisions of the tax law."

The above provision shows that the Commissioner-General assumes the burden of proof to show non-compliance with the provision of the tax law with respect to imposition of a penalty.

In the Court of Appeal case of ***Fordjour v Kaakyire [2015] 85 GMJ 61 @85***, his Lordship Ayebi J.A. stated the principle of the law on civil proof as follows:

"In civil claims, the burden of first proving the existence or non-existence of a fact lies on the party against whom judgment would be given if no evidence was produced on either side, regard being had to any presumption that may arise on the pleadings".

The burden of persuasion and the burden of producing evidence in all civil cases is proof by preponderance of probabilities. This standard was affirmed by the Supreme Court in the case of ***Adwubeng v. Domfeh [1996-97] SCGLR 660.***

Section 12 of the Evidence Act, 1975 (NRCD 323) defines proof by the preponderance of the probabilities as follows:

"Proof by a preponderance of the probabilities

(1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.

*(2) "**Preponderance of the probabilities**" means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence.*

Section 11(4) of the Evidence Act, 1975 (NRCD 323) spells out the burden of proof required in civil cases as follows:

"In other circumstances the burden of producing evidence requires a party to produce sufficient which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence."

In summary, the Appellant assumes the burden of proof in establishing its grounds for the Tax appeal which is on a preponderance of the probabilities.

Under Ghanaian law, taxes can only be imposed directly and expressly by statute. **Article 174 of the 1992 Constitution** proscribes imposing taxes except by or under the authority of an Act of Parliament.

In the case of ***Development Data & 2 Ors v. National Petroleum Authority & Another, unreported, HC, Suit No. BC553/2009 dated 5th July 2010***, the Court held that a tax law can only be imposed if sanctioned by a law passed by Parliament.

In the interpretation of tax statutes, there is no room for intendment, presumption or equity. Due to the fact that taxes are strictly governed by statute, one has to look at what is clearly stated in the law, and not what one believes may be intended or what should have been stated, or even what a person considers to be convenient. See the case of ***Russell v. Scott [1948] AC 422 (HL) at 433*** in support of this submission.

It is only when the literal interpretation will lead to an absurdity or occasion injustice, and the wording of the statute permits an interpretation that will avoid such injustice or absurdity, that the literal interpretation can be abandoned. See the case of ***Multichoice Ghana Ltd v. The Commissioner. Internal Revenue Service*** *[2011] 2 SCGLR 783.*

ANALYSIS

1. **WHETHER OR NOT RESPONDENT ERRED IN LAW AND ACTED ARBITRARILY BY IMPOSING VAT LIABILITY ON APPELLANT FOR IMPORTED SERVICES FROM JANUARY 2014 TO DECEMBER 2017.**

Learned Counsel for Appellant argued that it had used the import services for the period solely for its telecommunication business which are taxable supplies. That because the Value Added Tax Act, 2013 (Act 870) as amended does not impose value added taxes on imported services which are used to make taxable supplies, Respondent erred in law by imposing the said Value Added Tax liabilities on Appellant during the said period. He denied that the imported services were used for both Taxable and Exempt supplies of Appellant. That they were used but exclusively for its telecommunications business which are Taxable supplies.

Learned Counsel for Appellant further argued that even if Respondent had identified that some of the imported services had been used for Appellant's mobile money business which are Exempt supplies, the Value Added Tax Act, 2013 (Act 870) as amended does not authorise the imposition of a Value Added Tax liability based on the proportion of the total revenue of the Taxpayer generated from the Exempt supplies.

He further argued that the dispute arose because a compiled list of services provided by foreign consultants which Respondent obtained from Appellant (which learned Counsel maintained were used to support Appellant in only its telecommunication business) can be said to have also been used by Mobile Money Limited to make Exempt supplies (financial services). That the only reason this issue arose was because Appellant included Mobile Money Limited's revenue in its consolidated financial statement.

He argued that neither the Value Added Tax Act, 2013 (Act 870) as amended nor any other statute sanctions Respondent's act of combining income from Taxable and Exempt supplies to guess or estimate the Value Added Tax for Taxable supplies simply because a parent company included the revenue and expenses of its wholly owned subsidiary in its consolidated financial statement.

That Documents 6 to 16 attached to Appellant's documentation in respect of the instant Tax Appeal show that the relevant imported services were used solely for Appellant's Telecommunications business; and so it was wrong, arbitrary and unfair for Respondent to ignore these documents which were all duly supplied to Respondent during the audit exercise, and choose to impose Value Added Tax on all imported services without reference to the specific imported services, and what they were used for.

He therefore urged the Court to reverse Respondent's Tax Assessment based on these wrongful computations of Apportionment.

Counsel for Respondent however argued that Appellant for the period under review had used the imported services into the production of both Taxable and Exempt supplies.

That Appellant's argument that none of its imported services were used for the benefit of its mobile money business is untrue. This is because Appellant in its objection letter (Appendix II) stated that most of the imported services are directly attributable to the Taxable supply of the company; an implicit admission that some of the imported services went to support their Exempt supply (mobile money business).

That a careful study of Appendices XI to XX attached to the Response of Respondent to Additional Documents filed by Appellant which was filed on 18th July 2022 shows that mobile money business of Appellant enjoyed the support of the imported services for the relevant period.

That Respondent in its tax decision had informed Appellant of its classification as a "partially exempt" trader and so within that context and the imported services of Appellant being applied to service both Taxable supplies and Exempt supplies (and not distinctly), an apportionment method was resorted to by Respondent.

That it is in no doubt that mobile money also enjoyed the benefit of the imported services as Appellant had during the period under review imported services which were used in the production of their mobile money services (Exempt supplies) which are subject to Value Added Tax imposition.

That to endorse Appellant's suggestion that even if it is established that Appellant produced and supplied both Taxable and Exempt supplies during the period, there is no objective way under to law to apportion these supplies distinctly and separately is legally untenable; as it will amount to endorsing a Tax Avoidance arrangement by Appellant contrary to section 99 of the Revenue Administration Act, 2016 (Act 915). He referred to the case of Newton v. Commissioner of Taxation [1958] 1 AC 450 PC; [1958] 2 All ER 759 in support of this submission.

He argued that the basis for the imposition of the Value Added Tax in this matter is the combined effect of section 65, paragraph 19 of the First Schedule together with sections 1 (1) (b) and 2 (c) of the Value Added Tax Act, 2013 (Act 870) as amended.

Learned Counsel for Respondent argued that Respondent applied the definitions of "import of services" and "import" in section 65 of the Value Added Tax Act, 2013 (Act 870) as amended and first determined the total value of the 'imported services' for the respective period. This total value was then apportioned between Exempt supplies and Taxable supplies in line of their respective and distinct contribution to Appellant's total revenue for the period.

That the proportion of each revenue stream (Exempt supplies vis-à-vis Taxable supplies) to the total revenue was calculated and used in splitting the imported services between the Exempt supply and Taxable supply for the period; which are 2.35%, 6.02%, 20.39% and 13.64% for 2014, 2015, 2016 and 2017 respectively (as per Appendix GRA IX).

That on the basis of the computed ratios as well as section 44 (2) Value Added Tax Act, 2013 (Act 870) as amended, the Value Added Tax assessed on imported services were calculated as well as the interests charged on the outstanding tax assessed for the said period.

The main question to be answered here is whether the imported services for the period in question were applied exclusively for the benefit of Appellant's telecommunications business (Taxable supply), exclusively for the benefit of its mobile money business (Exempt supply) or for both the telecommunication and mobile money business (Partial Exempt business).

Appellant in its Objection letter (attached as Document 3) by Appellant and Appendix GRA II by Respondent) under the heading "(ii) VAT on imported services" at the fifth paragraph which is reproduced as follows:

*"Regarding 2015, 2016 and 2017, the apportionment method should only be used where the company cannot directly attribute the imported services to taxable and exempt supplies. we would however like to state that the company has reviewed the details used in assessing the liability and notes that **most** of the imported services indicated are directly attributable to the taxable supply of the company..."*

From the above, Appellant impliedly admits that some of the imported services were also directly attributable to their Exempt supplies.

Although learned Counsel for Appellant urged the Court not to rely on Respondent's reliance on this "slightly inaccurate language in a communication by a taxpayer to override the empirical evidence contained in documents which were in GRA's possession", the Court is not minded to do so.

This is because Appellant itself stated here that it was after reviewing the documents used by Respondent in assessing its liability, that it arrived at that conclusion which makes it factual.

Respondent in paragraph 17 of its Reply stated that in the course of its Audit on Appellant, it discovered that Appellant had received and utilised various imported services for the period of assessment in furtherance of its objects of business that entailed mobile telephony, data services and mobile money services.
That the imported services by their very nature were neither distinctly attributable to taxable supplies nor exempt supplies. These imported services included the following:

i. Management and technical services, Intellectual Property Fees to MTN Dubai
ii. Royalties paid/payable for billing and reporting platforms to non-resident persons
iii. Royalties paid/payable for network infrastructure support services to non-resident persons
iv. Fees paid/payable for procurement services from related parties such as Interserve Overseas Ltd and Global Trading Company.

A careful study of Documents 6 to 16 indicates that they compare favourably with the documents labelled as Appendices XI to XV attached to Respondent's reply to the Tax Appeal.

It is worth noting that Appellant registered Mobile Money Limited as a company to provide mobile money services for the public. That for the period beginning January 2014 to December 2017, Mobile Money Limited was neither trading nor operating as a business entity.

It can be noted from carefully studying Appendixes V, VI, VII and VIII, the audited financial statements for 2014, 2015, 2016 and 2017 of Appellant that the business of mobile money services was conducted and reported as a revenue line for the said period.

It is therefore logical that Appellant was providing both Taxable and Exempt supplies with the imported services during the period in question.

For example, Mobile Money (MOMO) as a service during the period of assessment thrived on the existence of a mobile number which number is on the telecommunication infrastructure. In other words, without a telecommunication network, a significant portion of MOMO services could not have worked.

It flows from the above that Appellant had imported services during the period of assessment that went to support activities and infrastructure used to service both the mobile money business (Exempt supplies) and the telecommunications business (Taxable supplies) of the Appellant.

It is therefore more probable rather than not that Appellant was using the imported services for the production of both Taxable and Exempt supplies for the period from 2014 to 2017.

In this regard, Appellant was a Partial Exempt Trader. With reference to **section 49 of the Value Added Tax Act, 2013 (Act 870)** as amended, a Partial Exempt Trader or Business is one who simultaneously engages in both Exempt supplies and Taxable supplies.

Respondent's first tax decision to Appellant (Appendix GRA I which is the same as Document 1 attached to the tax appeal process) did infact consider Appellant as a Partial Exempt Trader.

Under the heading "VAT ON IMPORTED SERVICES", Respondent states as follows:

"... We further observed that though Mobile Money Limited was registered for the business of mobile money, yet it never engaged in trading until 2018. Evidently, the business of mobile money was carried on by Scancom PLC and reported as its revenue line for the period January 2014 to December 2017.
In our carefully considered view, Scancom PLC was a partial exempt trader and under section 65 of the VAT Act, 2013 (Act 870) as amended had imported services to carry out exempt supplies for the period January 2014 to December 2017."

Based on the above discussions, the Court is of the opinion that the status of Appellant for the period from 2014 to 2017 was a Partial Exempt Trader (its imported services having been applied to service both Taxable supplies and Exempt supplies). This is because Appellant's mobile money business was not run distinctly and independently as a separate entity.

The Court therefore finds that Appellant for the period from 2014 to 2017 had applied its imported services for the production of both the Telecommunication business and Mobile money business; thereby giving Appellant the status of a Partial Exempt Trader for the period under review.

The next question to answer is "Did Respondent err in law and act arbitrarily by imposing VAT liability on Appellant for imported services from January 2014 to December 2017?"

The question to answer here is how is Value Added Tax to be calculated for the Exempt supplies for Appellant's imported services which were used for both Taxable and Exempt supplies? In other words, how can the imported services used for Exempt supplies be isolated in order for Value Added Tax to be imposed on same?

As stated in Respondent's Objection Decision (Appendix GRA III) under the Heading "VAT on Imported Services" as follows:

"...On the contrary, GRA did not assess VAT on the imported services based on section 49(4) of the VAT Act 870, rather it was assessed in line with section 65 of the VAT Act 870 which defines imported services as services provided by a non-resident person to the extent that the services are utilized or consumed in the country other than to make taxable supplies. In other words, imported services support or facilitate the operation of the Mobile Money Business (an exempt supply) for which reason the tax is due, hence the apportionment."

Respondent argued that the basis of the imposition of the Value Added Tax is sections 65, 1 (1) (b) and 2 (1)(c) of the Value Added Tax Act, 2023 (Act 870) as amended together with paragraph 19 of the First Schedule to the said Act.

Section 65 of the VAT Act, 2013 (Act 870) defines "Import of services" as that which has the meaning assigned to it in paragraph (b) of the definition of "import".
"import" means a supply of services to a resident person by

(i) A non-resident person; or
(ii) A resident person from a business carried on by the resident person outside the country;

to the extent that the services are utilised or consumed in the country other than to make taxable supplies.

Section 1 (1) (b) of the said Act 870 which generally imposes Value Added Tax on imported services provides as follows:

"There is imposed by this Act a tax to be known as the value added tax which is to be charged on the
(b) import of goods or import of services other than exempt import."

Section 2 (1) (c) of the Value added Tax Act, 2013 (Act 870) as amended provides as follows:

"Except as otherwise provided in this Act, the tax shall be paid

(c) in the case of an import of services, by the recipient of the service"

Under this provision, the person liable to pay Value Added Tax on imported services (services supplied by non-residents) is the recipient of the service for use in Ghana.

From a reading of paragraph 19 of the First Schedule to the Value Added Tax, Appellant's mobile money business qualifies an Exempt supply under the said law.

As discussed earlier, the combined effect of these above provisions is that for imported services which are utilised by Appellant to produce taxable supplies (that is the telecommunication business) for the period of assessment, there is no imposition of value added tax. However, where the Appellant uses the imported service to produce Exempt supplies (mobile money business), it is subject to value added tax imposition.

Sections 49 (1) and (2) of the Value Added Tax Act, 2013 (Act 870) as amended provides as follows:

"49. (1) A taxable person who makes both taxable and exempt supplies may deduct the input tax on the taxable purchases and taxable imports which can be directly attributed only to the taxable supplies made.

(2) Where a taxable person has made both taxable and exempt supplies, but cannot directly attribute input tax to the taxable and exempt supplies under subsection (1), that person may deduct as input tax on the taxable purchases and taxable imports, an amount that bears the same ratio as the taxable supplies bear to the total supplies, applying the apportionment formula specified in the Fifth Schedule."

It is clear from the above provision that Apportionment becomes necessary in order to isolate the part of the imported services that went directly to the production of "Exempt supplies" because Appellant had merged both Taxable and Exempt supplies.
The apportionment is an objective method under the law to apportion the value of the imported services between Taxable and Exempt supplies.

This arrangement qualifies as a tax avoidance arrangement in order for a Taxpayers not to unduly avoid payment of tax if the value added tax is not imposed because the said Taxpayer had applied the imported services on both Taxable and Exempt supplies in a way so as not to make the composite values of the imported services distinctly and exclusively attributable to the Taxable and Exempt supplies.

In view of the status of Appellant as a Partial Exempt Trader and applying the definition in section 65 of the Value Added Tax Act, 2013 (Act 870) as amended, the proportion of each revenue stream (Exempt supplies as against Taxable supplies) to the total revenue was calculated and used in splitting the imported services between the Exempt supply and Taxable supply for the years of assessment (2014 to 2017).

The application of the apportionment formula (for purposes of determining the deductible input tax under **section 49 (2) of the Value Added Tax Act, 2013 (Act 870)** as amended is specified in the **Fifth Schedule to the said Act** which gives the formula as follows:

$A \times B \div C$ where A is the total amount of input tax for the period that is not directly attributable to taxable or exempt supplies;

B is the total amount of taxable supplies made by the taxable person during the period; and C is the total amount of all supplies made by the taxable person during the period.

The percentages after these calculations in respect of the Exempt supplies for the respective years are as follows:

2014	-	2.35%
2015	-	6.02%
2016	-	20.39%
2017	-	13.64%

Section 44 (2) of the Value Added Tax Act, 2013 (Act 870) as amended states as follows:

"Subject to subsection (3), the value of an import of services is the amount of the consideration for the import."

Section 44 (3) of the Value Added Tax Act, 2013 (Act 870) as amended defines the value of the import of services as the open market value of the import of the service where an import of service is made for no consideration or for a consideration that is less than the open market value of that import.

On the basis of the computed ratios as indicated earlier on as well as **section 44(2) of the Value Added Tax Act, 2013 (Act 870)** as amended, the VAT assessed on imported services for the years of assessment amounted to the following:

YEAR	OUTPUT VAT ON IMPORTED SERVICE	INTEREST	TOTAL LIABILITY
2014	580,801.17	1,671,397.59	2,252,198.76
2015	1,358,250.65	2,879,607.94	4,255,858.59
2016	2,135,605.94	2,856,339.03	4,991,944.97
2017	4,718,930.89	3,507,774.58	8,226,705.48
TOTAL:	**8,793,588.65**	**10,933,119.14**	**19,726,707.80**

The interest charged on the outstanding tax assessed and imposed on Appellant is in line with **section 71 of the Revenue Administration Act, 2016 (Act 915).**

Based on the discussions above, the Court finds that Respondent did not err in law and did not act arbitrarily by imposing Value Added Tax liability on Appellant for imported services from January 2014 to December 2017.

GROUND B: WHETHER OR NOT THE RESPONDENT RELIED ON AN INTERNAL PRACTICE/NOTE OR ADMINISRATIVE GUIDELINES TO IMPOSE NHIL AND GETFUND LEVY ON APPELLANT FOR IMPORTED SERVICES PROVIDED BY NON-RESIDENTS AND USED TO MAKE TAXABLE SUPPLIES

Learned Counsel for Appellant argued that at page 7 of the Audit report, Respondent relied on Section 3A of the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) and the National Health Insurance (Amendment) Act, 2018 (Act 971) to charge Ghana Education Trust Fund Levy and National Health Insurance Levy on services from non-resident providers which Appellant utilised for its telecommunication business.

That in its objection to Respondent's assessment, Appellant analysed the said provisions within the broader context of all the tax statutes as well as the Value Added Tax Act, 2013 (Act 870) as amended. That Appellant demonstrated that Respondent was wrong in assessing the levies on the imported services which were used to make taxable supplies because there is no law that imposes Value Added Tax, National Health Insurance Levy and Ghana Education Trust Fund Levy on import services used in making taxable supplies.

That faced with Appellant's convincing analysis in the Objection Decision (MTN Document 5), Respondent then asserted that it had used its Practice Notes 2 in interpreting the statutory provisions in contention and concluded that the levies were applicable irrespective of whether the imports were incurred in the furtherance of a Taxable or Exempt activity. This was stated at page 7 of the Objection Decision.

According to Learned Counsel for Appellant, the law allows Respondent to issue Practice Notes/Administrative Guidelines on how it understands and interprets certain provisions in Tax laws as per section 1 of the Revenue Administration Act, 2016 (Act 915). That these Practice Notes/Administrative Guidelines only explain how Respondent understands the law as passed by Parliament which are therefore binding on only Respondent and not the Taxpayer (as per section 100 (3) of the Revenue Administration Act, 2016 (Act 915); especially as they are for internal administrative purposes and are not statutory.

That even if Respondent purported to have interpreted the provisions of the Value Added Tax Act, 2013 (Act 870) as amended and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) and the National Health Insurance (Amendment) Act, 2018 (Act 971) to mean that National Health Insurance Levy and Ghana Education Trust Fund Levy can be charged on imported services used for taxable supplies, that interpretation is not lawful and ought to be questioned if it is inconsistent with a proper interpretation of the relevant statute. That Respondent was therefore wrong to have based a Tax Assessment on its own Practice Notes.

That as already stated, Tax laws are strictly imposed by express statutory provisions and cannot be imposed in the absence of clear words of a statute passed by Parliament.

That it is Appellant's contention that upon a proper interpretation of the relevant laws, National Health Insurance and Ghana Education Trust Fund levies are not to be imposed imported services that are used to produce Taxable services.

That both the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) and the National Health Insurance (Amendment) Act, 2018 (Act 971) were meant to only take away the input-output method of computation and nothing else.

That at the same time these two amendment laws were passed, Parliament also passed the Value Added Tax Amendment Act. The preamble to the Value Added Tax Amendment Act was to amend the Value Added Tax, 2013 (Act 870) to revise the Value Added Tax rate downwards from 15% to 12.5% and to provide for related matters.

That Parliament provided in section 2 of the National Health Insurance (Amendment) Act, 2018 (Act 971) and section 3 of the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) that "The Value Added Tax, 2013 (Act 870) applies with the necessary modifications to the collection of the Levy".
That this provision means that the modes and methods by which Value Added Tax is collected applies to the collection of the two levies.

That a reading of these three statutes together does not show that Parliament at any point attempted to change the dynamics of payment for all three taxes were charged. That the mechanics of payment for all three taxes were to be taken from the Value Added Tax Act, 2013 (Act 870).

Learned Counsel argued that under sections 1 and 65 of the Value Added Tax Act, 2013 (Act 870), a Taxpayer is not required to charge Value Added Tax for imported services which are used to make Taxable supplies. A Taxpayer is only required to charge Value Added Tax if the imported services were used to produce Exempt services which Respondent does not dispute. That Respondent did not charge Value Added Tax for Taxable supplies for August 2018 to December 2018 but strangely enough imposed National Health Insurance and Ghana Education Trust Fund levies on the said supplies which Learned Counsel already argued is not warranted by law.

That it is noteworthy that the National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) do not define "import of service" and so by virtue of section 2 of the National Health Insurance (Amendment) Act, 2018 (Act 971) and section 3 of the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972), the meaning of "import of service" in relation to the two levies ought to be taken from the Value Added Tax Act, 2013 (Act 870).

Thus, for Value Added Tax, Ghana Education Trust Fund and National Health Insurance levies to be chargeable, the payment must be for an Exempt supply and not Taxable supplies that if the services were for Taxable supplies, Value Added Tax, Ghana Education Trust Fund and National Health Insurance levies will not be applicable.

That a proper review of the three statutes leads to only one conclusion that similar to Value Added Tax, the Ghana Education Trust Fund and National Health Insurance levies are not to be charged by Appellant when it pays for imported services which were used for its Telecom business.

Learned Counsel denied that Appellant was engaged in any tax avoidance activities as it is a conscientious Taxpayer and pays its legitimate taxes without any quibbles.

Learned Counsel for Respondent denied that the said Tax Assessment in respect of the National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) was based on "GRA's internal Practice Notes/Guidelines.

He argued that Respondent's actions were anchored on the applicable provisions of the respective tax laws. That the Practice Notes are for the benefit of the staff in explaining or construing the provisions of the respective laws and how they apply to given facts in the course of the administration of the tax by the Respondent.

That the National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) were enacted with the purpose to make the two levies separate indirect taxes which are not subject to the normal Value Added Tax standard rate procedures.

That Section 47 of the National Health Insurance Act, 2012 (Act 852) was amended by the National Health Insurance (Amendment) Act, 2018 (Act 971). The effect of the amendment was to substitute section 47(3) of Act 852 with a new subsection (3) and (4).

According to Learned Counsel for Respondent, the two statutes; that is the National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) have new subsections which both provide that "The Levy is not subject to input tax deduction".

That it is obvious from the wordings of the two statutes that they are separate from the Value Added Tax Act, 2013 (Act 870) and these two laws impose taxes on import of services which is not subject to input tax deduction.

He admitted that Respondent did not impose value added tax on Appellant's imported services for August 2018 to December 2018 because the said services were used to produce only taxable supplies. That for the said period, the amendment of the National Health Insurance and the Ghana Education Trust Fund levies were already operational and so were applicable laws and distinct from the Value Added Tax Act, 2013 (Act 870).

That even though per section 51(3) of the National Health Insurance (Amendment) Act, 2018 (Act 971) and section 3E (4) of the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972), "The Value Added Tax, 2013 (Act 870) applies with the necessary modifications to the collection of the levy," included in the "necessary modifications" is the specific amendment that the National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) have effected.

That Appellant by relying on the interpretation of "import of services" as provided for in section 65 of the Value Added Tax Act, 2013 (Act 870) failed to pay attention to the effect of the two amendments mentioned above on the said Value Added Tax Act.

Prior to the coming into force of the **Value Added Tax Act, 2013 (Act 870)**, the repealed Act, the **Value Added Tax Act, 1998 (Act 546)** required a person who imported services to account for and pay the tax within twenty-one days and claim it as input tax at the end of the month when filing the Value Added Tax returns; thus, operating on the output-input mechanism within the same month.

However, the **Value Added Tax Act, 2013 (Act 870)** simplified the accounting system by providing that one will only be required to account for tax on imported services when the said services are consumed or utilised in the country other than to make a taxable supply. This means that value added tax on imported services is paid by the importer (Appellant in this case) only when it is applied in producing Exempt supplies. This is in reference to **section 65 of the Value Added Tax Act, 2013 (Act 870)** in respect of the definition of "import" and "import of services".

The purpose of the **Value Added Tax Act, 2013 (Act 870)** was to avoid a situation where a person into taxable supplies will pay the tax and later claim it as input tax within the same month; thereby bringing the net effect to zero.

Section 47 (3) and (4) of National Health Insurance Act, 2012 (Act 852) per the amendment states as follows:

"(3) The Levy is not subject to an input tax deduction.
(4) Any goods on which the Value Added Tax Flat Rate is imposed is not subject to the levy."

Section 3A (3) and (4) of the GETFund Amendment Act, 2018 (Act 972) provides as follows:

"(3) The Levy is not subject to an input tax deduction.

(4) Goods subject to the Value Added Tax Flat Rate are exempt from the Levy on the supply of goods."

It is clear from the provisions of the two statutes as amended that the National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) are separate from the Value Added Tax Act, 2013 (Act 870) as amended. That the two laws impose tax on import of service which is not subject to input tax deduction.

The two laws impose tax or levy on import of services which is not subject to input tax deduction irrespective of what the imported service was going to be used for.

It is therefore clear why Respondent did not impose value added tax on the imported services as long as they were used to produce only taxable supplies. However, but due to the amendments of the two statutes **(the National Health Insurance (Amendment) Act, 2018 (Act 971)** and the **Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972))** had come into effect; and as a result, had become distinct levies from the **Value Added Tax Act, 2013 (Act 870).**

It is therefore clear that for the relevant periods in 2018 (August 2018 to December 2018), the Value Added Tax rate of 12.5% was inapplicable on Appellant but the National Health Insurance and Ghana Education Trust Fund levies of 2.5% each were applicable on the imported services by Appellant irrespective of whether these imported services were used to produce Taxable or Exempt supplies.

It is also clear that Respondent did not rely on any internal Practice Notes/Guidelines to impose the said taxes on Appellant for imported services utilized for taxable supplies but on the relevant statutes as discussed above.

Respondent therefore did not err in law when it imposed National Health Insurance Levy and Ghana Education Trust Fund Levy (together with interest and penalties) on the Appellant on their Imported Services from August 2018 to December 2018 irrespective of whether they were applied to Taxable or Exempt services.

The Court finds that Respondent did not rely on an internal Practice Notes or Administrative Guidelines to impose National Health Insurance Levy and Ghana Education Trust Fund levy on Appellant for imported services provided by non-residents and used to make Taxable supplies.

CONCLUSION

In summary of the discussions above, Appellant was using the imported services to provide both Taxable and Exempt supplies for the period of assessment from 2014 to 2017. In that regard, Appellant was a Partial Exempt Trader.

The imported services being applied to service both Taxable supplies and Exempt supplies; and not distinctly, Apportionment became necessary in order to isolate the part of the imported services that is directly attributable to Exempt supplies.

By virtue of the combined effect of the said provision of the **Value Added Tax Act, 2013 (Act 870)** for imported services, Value Added Tax will not apply only if the imported services were applied in making Taxable supplies (telecommunication business). Value Added Tax will however apply if the imported services were applied in making Exempt supplies (mobile money business).

Respondent was therefore right in applying the definition in **section 65 of the Value Added Tax Act, 2013 (Act 870)** to the transactions concerned in determining the total cost of imported services and apportioned between the Exempt and Taxable supplies with respect to their contribution to total revenue.

Respondent therefore did not err in law and did not act arbitrarily by imposing Value Added Tax liability on the Appellant for Imported Services for the period January 2014 to December 2017 because of Appellant's status a Partial Exempt Trader for the period of the assessment.

On the second ground of appeal, it is clear from the provisions of the two statutes as amended that the **National Health Insurance (Amendment) Act, 2018 (Act 971)** and the **Ghana Education Trust Fund Act, 2018 (Act 972)** are separate from the **Value Added Tax Act 2018 (Act 870).** That the two laws impose tax on import of service which is not subject to input tax deduction.

The two laws impose tax or levy on import of service which is not subject to input tax deduction irrespective of what the imported service was going to be used for during the period under review.

For the relevant periods in 2018 (August 2018 to December 2018), the Value Added Tax rate of 12.5% was inapplicable on Appellant but the Ghana Educational Trust Fund Levy and National Health Insurance Levy each of 2.5% were applicable on the imported services by Appellant irrespective of whether these imported services were used to produce Taxable or Exempt supplies.

Respondent therefore did not err in law when it imposed National Health Insurance Levy and Ghana Education Trust Fund Levy (together with interest and penalties) on the Appellant on their Imported Services from August 2018 to December 2018 irrespective of whether they were applied to Taxable or Exempt services.

It is for these reasons that the instant Tax Appeal fails. There will be no order as to costs. Each party is to bear its own costs.

(SGD.)
AFI AGBANU KUDOMOR, J (MRS.)
(JUSTICE OF THE HIGH COURT)

COUNSEL

1. JOSEPH KWADWO KONADU WITH NAA-AMAKUMA BARNOR AND BERNICE MORTEY FOR DAVID A. ASIEDU FOR APPELLAN PRESENT.

2. MAXWELL OWUSU BOADI FOR RESPONDENT PRESENT.

LIST OF CASES

1. FORDJOUR VRS. KAAKYIRE [2015] 85 GMJ 61 @85.
2. ADWUBENG VRS. DOMFEH [1996-97] SCGLR 660.
3. NEWTON V. COMMISSIONER OF TAXATION [1958] 1 AC 450 PC; [1958] 2 ALL ER 75.
4. DEVELOPMENT DATA & 2 ORS V. NATIONAL PETROLEUM AUTHORITY & ANOTHER, UNREPORTED, HC, SUIT NO. BC553/2009 DATED 5TH JULY 2010
5. RUSSELL V. SCOTT [1948] AC 422 (HL) AT 433

6. MULTICHOICE GHANA LTD V. THE COMMISSIONER. INTERNAL REVENUE SERVICE [2011] 2 SCGLR 783

STATUTES

1. VALUE ADDED TAX ACT, 1998 (ACT 546).
2. VALUE ADDED TAX ACT, 2013 (ACT 870).
3. NATIONAL HEALTH INSURANCE ACT, 2012 (ACT 852).
4. NATIONAL HEALTH INSURANCE ACT, 2018 (ACT 971).
5. GHANA EDUCATION TRUSTFUND ACT, 2000 (ACT 581).
6. REVENUE ADMINISTRATION ACT, 2016 (ACT 915).
7. ARTICLE 174 OF THE 1992 CONSTITUTION OF GHANA