TAXNOB RAH PRESENTS:

TAX CASE SUMMARY/BRIEF

DETAILED SUMMARY OF SELECTED GHANAIAN TAX CASES

PREPARED BY: RICHARD AMO-HENE

REVIEWED BY: GIFTY YEBOAH PREKO NYARKO (Mrs)

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EXECUTIVE SUMARY

It is a common knowledge that per Article 11 of the 1992 Constitution of Ghana, Cases as decided by the Superior Court of Ghana form part of the "Laws of Ghana". This side of the law is very living and changes or evolves with the society. It is therefore important that that experts and users of the laws including the general public are abreast with new laws made, changes and clarifications given by the various rulings of the superior court.

Despite the general desire to read through the various cases, at times the volume and content becomes a bit of a load. In view of this that TaxNob RAH and our team have put together a detailed summary of Tax Cases in a manner that do not exclude important information from the case.

The Summary have been structured to give a brief fact of the case, grounds, arguments of both parties (appellant and Accused), ruling of the court, reasoning for the ruling, Tax areas considered, notes for practitioners and references.

We intend to lead the development and expand this work to link this to the various laws, practices and other jurisdictions in our next publications. It is our hope that this document will be useful for your references. We also confirm that these are summaries and not the original case or ruling. User may make reference to the original cases for any purposes.

Please note that we do not intend that this document replaces the text of the cases or references made. Where such appears, the text of the cases and references definitely prevail.

We are very open for your suggestions to enable us improve Please send your suggestion and comments to Richard.amo-hene@taxnobrah.com

Thank you

Richard Amo-Hene

DIRECTOR

TaxNob RAH Ltd

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TITLE: RICHARD AMO-HENE V GHANA REVENUE AUTHORITY, ATTORNEY-GENERAL, JUDICIAL SERVICE

Citation: Unreported Judgement of the Supreme Court (Civil Appeal No. J1/08/2021) dated 30th November 2022

Digital Citation: [2022] GHASC 103

Brief Facts:

The applicant, Richard Amo-Hene, initiated legal proceedings against the Ghana Revenue Authority, the Attorney-General, and the Judicial Service, seeking reliefs related to the constitutionality of the legality of certain tax provisions which requires taxpayers to make upfront payments of a portion of disputed taxes before their appeals can be heard.

Grounds of Application

The applicant invoked the original jurisdiction of the Supreme Court, to declare as unconstitutional, Section 42(5)(b) of the Revenue Administration Act, 2016 (Act 915, as amended), which mandates a taxpayer to pay 30% of all outstanding taxes before objecting to a tax decision, and Order 54 rule 4(1) of the High Court (Civil Procedure) Rules, 2004 (C.I. 47), which requires a taxpayer to pay at least 25% of the disputed tax amount before an appeal can be entertained.

Issues

1. Whether or not the plaintiff properly invoked the original jurisdiction of the Supreme Court?
2. Whether or not Section 42(5)(b) of Act 915 is inconsistent with the spirit and letter of the 1992 Constitution, and the extent of such inconsistency?
3. Whether or not Order 54 rule 4(1) of C.I. 47 is inconsistent with the spirit and letter of the 1992 Constitution and the extent of such inconsistency?

Areas of Tax Law Considered

i. Tax Administration
ii. Dispute resolution mechanisms in taxation
iii. Constitutional rights relating to access to justice

Arguments

Applicant (Taxpayer)

i. Demanding upfront tax payments as a prerequisite for challenging assessments violates the presumption of innocence and hinders access to justice.

ii. He likened the situation to denying citizens access to other fundamental rights based on financial qualifications, arguing it goes against the spirit of the Constitution.

iii. Comparative jurisprudence from other common law countries points to a holistic assessment of the taxpayers obligations including considerations of human rights.

Defendants

i. The defendants argued that the plaintiff improperly invoked the original jurisdiction of the Supreme Court, as the matter concerned the interpretation and enforcement of the Constitution.

ii. They defended the impugned provisions, stating that they balance the taxpayer's rights with the need for efficient tax collection.

iii. They argued that the upfront payment requirement prevents frivolous objections and encourages timely payment of taxes, serving the public interest.

iv. They also pointed to the discretionary power of the Commissioner-General to waive or vary the upfront payment requirement, further mitigating any potential hardship.

Ruling

- The Supreme Court, in a majority decision, dismissed the plaintiff's action and upheld the constitutionality of Section 42(5)(b) of Act 915, finding it consistent with Article 23 of the 1992 Constitution, which guarantees administrative justice.

Reasoning of the Court

i. The Court has already interpretated these provisions and determined that it does not create a fetter on the right to challenge tax decisions.

ii. The Court upheld the constitutionality of Order 54 rule 4(1) of C.I. 47, reasoning that it aims to ensure efficient tax collection and prevent abuse of the appeals process.

iii. There are safeguards within the legislation, which allow for waivers and variations of upfront payment requirements in appropriate cases.

Principles for Tax Practitioners

The case affirms the prerogative to balance efficient tax collection with taxpayers' right of access to justice. While the majority upheld the constitutionality of upfront payment requirements, the dissenting opinion highlights the potential for injustice and underscores the need for careful judicial scrutiny of such provisions.

The decision also emphasises the importance of proportionality and the availability of safeguards, such as discretionary waivers, to mitigate any undue hardship on taxpayers.

References

Constitutional

- Articles 23, 125, 157, and 296 Articles 23, 125, 157, and 296

Statutory references

- Evidence Act, 1975 (NRCD 323)
- Income Tax Act, 2015 (Act 896)
- State Policy on Revenue Mobilisation (2023)
- Revenue Administration Act, 2016 (Act 915)

Procedural Rules

- Section 54 (4)(1) of the High Court (Civil Procedure) Rules, 2004 (C.I. 47)

Case Law

- Belersdorf Ghana LTD v The Commissioner General, Ghana Revenue Authority [HJ1/140/2019 (unreported) 5th December 2019]
- Capstone 556 (Pty) Ltd v Commissioner, South Africa Revenue Service ZASCA 2
- Export Finance Company Limited v Ghana Revenue Authority [SC 30th November 2022 Unreported]
- Fuelex Ltd v Uganda Revenue Authority UGCC 10
- Kwasi Afrifa v Ghana Revenue Authority & Another [SC 30th November 2022 Unreported]
- Metcash Trading Ltd v South African Revenue Service 11 WLK 764

CASE 2

TITLE: EXPORT FINANCE COMPANY LTD V. GHANA REVENUE AUTHORITY & ANOR

Citation: Unreported Judgment of the Supreme Court (Civil Appeal No. J1/07/2021) dated 30th November 2022

Digital Citation: [2022] GHASC 96

Brief Facts:

The plaintiff, Export Finance Company Ltd, sought declarations against provisions in the Revenue Administration Act, 2016 (Act 915) and Order 54 rule 4 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47). The challenge focused on the constitutionality of Section 42(5) of Act 915, which requires taxpayers disputing a tax assessment to pay all outstanding import duties or 30% of other taxes before their objection is heard, and Order 54 rule 4 of C.I.47 which mandates partial tax payment before appealing tax decisions to the High Court.

Grounds of Appeal

The plaintiff invoked the jurisdiction of the Supreme Court to determine the inconsistency of Section 45 (2) of Act 915 and Order 54 rule 4 of C.I 47 that violated the right to a fair hearing (Article 19(13)), imposed discriminatory conditions (Article 17), and restricted access to the courts (Article 33) of the 1992 Constitution.

Issues

1. Whether or not Section 42(5) of Act 915, requiring partial tax payment before entertaining objections, is unconstitutional?
2. Whether or not Order 54 rule 4 of C.I. 47, mandating tax payment before an appeal, is consistent with the constitutional rights to fair trial and access to the court?

Areas of Tax Law Considered

i. Tax assessment

ii. Dispute resolution

iii. Appeals in relation to import duties and general taxation

Arguments

Appellant (Taxpayer)

i. Section 42(5) violates constitutional guarantees of access to courts and a fair hearing.
ii. Order 54 rule 4 imposes an unfair and burdensome condition on taxpayers.
iii. Discretion granted under Section 42(6) to waive or vary payment creates inequality.
iv. Taxpayers should not have to "pay now, argue later" without alternatives to safeguard rights.

Respondent (Ghana Revenue Authority)

i. Tax collection relies on "pay now, argue later" to prevent frivolous objections.
ii. Section 42(6) provides safeguards by allowing discretionary waivers, ensuring fairness.
iii. Tax laws aim to balance taxpayer rights with the public interest in efficient revenue mobilization.

Ruling

The Supreme Court dismissed the plaintiff's claims, holding that both Section 42(5) of Act 915 and Order 54 rule 4 of C.I. 47 were constitutional.

Reasoning

i. Section 42(5) does not violate constitutional rights because it is part of a comprehensive dispute resolution system, including judicial review and appeals.
ii. Order 54 rule 4 complements Section 42, ensuring taxes are not indefinitely delayed. However, the rule of court always yields to the statutory legislation.

Thus, where an appellant to a tax assessment complies with section 42 of Act 915, that appellant will not be required to comply with order 54 (4) of C.I.47.

iii. Public policy justifies temporary restrictions on access to courts to prevent tax evasion and delay tactics.

iv. The "pay now, argue later" rule is a proportional limitation that balances individual rights and public interest.

v. Comparative jurisprudence, including South Africa's Metcash Trading Case and decisions from the Uganda's Courts, are persuasive and relevant to the apex Courts decision.

Principles for Tax Practitioners

The right of appeal is guaranteed for a taxpayer but the tax prepayment conditions provided by the law and rules of court ensured the balance between taxpayer rights and public revenue needs. While access to justice is a fundamental right, it can be limited by reasonable and necessary public policy measures to ensure efficient tax collection. The ruling reinforces that procedural fairness and safeguards are embedded within Ghana's tax dispute resolution framework

References

Constitutional:

- Articles 2, 17, 19(13), 23, 33, 130 of the1992 Constitution of Ghana:

Statutory references

- Sections 42(5), 42(6) of the Revenue Administration Act, 2016 (Act 915)

Procedural Rules

- Order 54 rule 4 High Court (Civil Procedure) Rules, 2004 (C.I. 47):

Case Law

- Beiersdorf Gh. Ltd vrs The Commissioner General, Ghana Revenue Authority [H1/140/2019 (unreported) 5th December 2019]
- Fan Milk Limited v Commissioner General, Ghana Revenue Authority [CM/TAX/0004/18 (unreported) 7th April 2022]
- Fuelex (U) Ltd. V. Uganda Revenue Authority [Constitutional Petition No.3 of 2009]
- Kwasi Afrifa v. Ghana Revenue Authority [2022] GHASC (unreported)
- Metcash Trading Ltd v. Commissioner for SARS [2001] 1 BCLR 1
- Tuffour v Attorney General GLR 637
- Uganda Project Implementation and Management Centre v. Uganda Revenue Authority (SC Constitutional Appeal no. 2 of 2009)

CASE 3

TITLE: AFRIFA V. GHANA REVENUE AUTHORITY (GRA)

Citation: Unreported Judgment of the Supreme Court (Civil Appeal No. J6/02/2022) dated 30 November 2022.

Digital Citation: [2022] GHASC 99

Brief Facts:

This was a tax dispute on appeal to the Supreme Court for interpretation of the constitutionality or otherwise of section 42 (5) of the Revenue Administration Act, 2016 (Act 915).

The appellant, Kwasi Afrifa, a lawyer, challenged the constitutionality of section 42(5) as was applied by the Ghana Revenue Authority (the respondent). Afrifa had been denied the issuance of a tax clearance certificate, which was subject to the submission of specific documents. He had earlier objected to a tax assessment from 2012-2016, but had to settle the same inclusive of a 30% penalty before the disputed tax objection could be entertained.

The appellant claimed that this requirement of the settlement of assessed tax plus penalty before determination of an appeal, violated the fundamental human rights of tax payers under Article 33, and impugned administrative justice requirements under Article 23 of the 1992 Constitution.

The appellant claimed that this requirement of the settlement of assessed tax plus penalty before determination of an appeal, violated the fundamental human rights of taxpayers under Article 33, and impugned administrative justice requirements under Article 23 of the 1992 Constitution.

Grounds of Appeal:

The constitutional question for interpretation was for the Supreme Court to declare section 42(5) of Act 915 as inconsistent with and violative of the right to administrative justice under Article 23 of the 1992 Constitution.

Issues

1. Whether or not section 42(5) of Act 915 imposes a fetter on access to administrative justice by requiring partial payment before hearing an objection to a tax decision?
2. Whether or not the procedural safeguards in Act 915 adequately balance the taxpayer's rights and the public interest.

Areas of Tax Law Considered

i. Tax assessment and dispute resolution under Ghanaian tax laws, particularly, objections to tax decisions
ii. Conditions for administrative appeals.

Arguments

Appellant (Taxpayer)

i. Section 42(5) imposes a barrier to accessing administrative justice which violates Article 23.

ii. The requirement to pay 30% of the disputed tax assessed amounts to a denial of the right to be heard.

iii. The provision disproportionately affects taxpayers with limited resources, violating equality before the law.

iv. Alternative procedural safeguards are preferable to ensure fairness and compliance with constitutional rights.

Respondent (Ghana Revenue Authority)

i. Tax payment is essential for state revenue, and requiring partial payment prevents frivolous objections.

ii. Section 42(5) is part of a broader dispute resolution framework, including discretion under section 42(6) to waive or vary payments.

iii. The law provides adequate procedural safeguards consistent with Article 23 and due process requirements under Article 296.

iv. The balancing of public interest and private rights justifies the conditional payment requirement.

Ruling

The Supreme Court held that section 42(5) of Act 915 does not violate Article 23 of the 1992 Constitution when read in conjunction with the discretionary powers provided under section 42(6) and related provisions. The law adequately balances the need for effective tax administration with taxpayers' rights.

The appeal failed.

Reasoning of Court

1. The fundamental rule in interpretation requires the document to be read as a whole. Section 42(5), read within the context of subsections (6), (7) and articles 23 and 296 of the Constitution do not have the effect of denial of access to the courts for redress against a tax decision by the Commissioner General.
2. Section 42(6) of Act 915 allows the Commissioner-General to waive, vary, or suspend payment requirements, ensuring fairness.
3. Article 296 sets out standards for exercising discretion, providing sufficient protection against arbitrary decisions.
4. Access to courts or judicial review remains available under Act 915 for taxpayers dissatisfied with administrative decisions.
5. The proportionality test supports the constitutionality of section 42(5), as it reasonably advances the public interest without unduly infringing individual rights.

Principles for Tax Practitioners

The case confirms section 42(5) of Act 915 as constitutional as tax laws must balance individual rights with public revenue needs.

While this section 42 (5) imposes a conditional payment requirement for tax objections, the availability of discretionary relief under section 42(6) and broader procedural

safeguards ensures compliance with the right to administrative justice. Judicial review remains a legal redress mechanism for potential abuses of discretion by tax authorities.

References:

Constitutional:

- Articles 2, 12, 23 and 296 of the 1992 Constitution of Ghana:

Statutory references

- Sections 42(5), 42(6), 42(7) and 44 of the Revenue Administration Act, 2016 (Act 915)

Case Law

- Amidu v. President Kuffuor & Others [2001-2002] SCGLR 86
- Awuni v. WAEC [2003-2004] 1 SCGLR 471
- Center for Juvenile Delinquency v. Ghana Revenue Authority [2019] GHASC 29
- Metcash Trading Ltd v. Commissioner for South African Revenue Service [2001] 1 BCLR 1
- Richard Amo-Hene v Ghana Revenue Authority & 2 Ors (Writ No J1/8/2021 unreported judgment of the Supreme Court) dated 30th November 2022

CASE 4

TITLE: ORICA GHANA LIMITED V. THE COMMISSIONER-GENERAL (GRA)

Citation: Unreported Judgement of the High Court (Commercial Division) CM/TAX/0118/21 dated 19th July 2022

Brief Facts:

Orica Ghana Limited (the Appellant), a company involved in the manufacturing and selling of bulk commercial explosives, disputed tax assessments issued by the Ghana Revenue Authority (the Respondent) for the period 2010–2016. The dispute centered around several key issues, leading to the Appellant to file an appeal against the Commissioner General of the Ghana Revenue Authority (Respondent), objecting to his decision. The main contention was on location incentives and credits in respect of direct and indirect tax payments.

Grounds of Appeal

The Appellant set out ten grounds for appeal, challenging various aspects of the Respondent's tax assessments and their handling of the case which included denial of location incentive, abuse of the discretionary power of the respondent, denial of the use of value added tax credits, denial of the use of legitimate income tax credits, and refusal of VAT Relief Purchase Orders.

Issues

1. Whether or not the Respondent erred in law by denying the appellant them the full entitlement to the location incentive as a manufacturing business under the Income Tax Act, 2015 (Act 896).

2. Whether or not 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.

3. Whether 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.

4. Whether the appellant was lawfully denied the use of its legitimate income tax credits.

5. Whether or not the Rejection of 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).

Areas of Tax Law Considered

i. Income Tax, specifically, the application of location incentives for manufacturing businesses under the Income Tax Act, 2015 (Act 896).

ii. Value Added Tax (VAT) in relation to the utilization of VAT credits and implications of statutory time limits for claiming refunds.

iii. Tax Assessment Procedures which relates to challenges to the Respondent's assessment methodology and the evidence considered in the process.

Arguments

Appellant (Taxpayer)

i. The Appellant argued that their transportation and delivery services for explosives are integral to their manufacturing business and should qualify for the location incentive.

ii. They contended that the Respondent incorrectly separated their income into manufacturing and management service categories, denying them the full location incentive.

iii. The Appellant argued for the recognition of their accrued VAT credits from prior years, citing the permissiveness of the relevant tax provisions.

iv. They challenged the rejection of photocopied VRPOs, arguing that they meet the requirements of the Evidence Act and had been accepted in previous audits.

Respondent (Ghana Revenue Authority)

i. The Respondent argued that the Appellant's transportation and delivery services are distinct from manufacturing and therefore ineligible for the location incentive.

ii. They defended their apportionment of the Appellant's income, asserting that management services are separate and taxable at a different rate.

iii. The Respondent claimed that the Appellant's failure to claim a VAT refund within the statutory timeframe resulted in the forfeiture of those credits.

iv. They justified their rejection of photocopied VRPOs, citing the need for original documents to prevent recycling of invoices and ensure accurate assessments.

Ruling

The Court ruled in favour of the Appellant.

Reasoning

i. The Court found that the Respondent's interpretation of "manufacturing business" was too narrow and that the Appellant's transportation and delivery services are an integral part of their manufacturing activities, thus qualifying them for the location incentive. The appellant's business should have been considered as a whole for tax assessment as their manufacturing activities also included services.

ii. The Respondent's discretionary power in apportioning income was inconsistent with Article 296 (c) of the 1992 Constitution.

iii. The Respondent incorrectly denied the Appellant's VAT and income tax credits, stating that statutory time limits for refunds do not prevent the utilisation of credits to offset current tax liabilities.

iv. The Respondent should have accepted the photocopied VRPOs, ruling that they fulfilled the requirements of the Evidence Act and especially when the originals of these documents had already been inspected and annotated.

Principles for Tax Practitioners

i. Tax laws are generally to be construed strictly. However, comprehensive and purposive interpretation of tax laws are important when necessary to ensure fairness and avoid unduly restricting taxpayers' rights

ii. A taxpayer who is in tax credit with the revenue authorities can appeal to the High Court on a tax decision without referring to the statutory precondition under Order 54 rule 4(1) of C.I.47

iii. Revenue authorities must be consistent in tax administration, particularly regarding the acceptance of evidence and the application of statutory time limits.

iv. The taxpayer has the right to challenge assessments and to clarify the scope of permissible discretionary powers vested in tax authorities.

v. The decision provides valuable guidance on the interpretation of key tax provisions, including those related to location incentives, income apportionment, VAT credits, and the admissibility of evidence.

References

Constitutional

- Constitution of Ghana, 1992

Statutory

- Evidence Act, 1975 (NRCD 323)
- High Court Civil Procedure Rules, 2004 (C.I. 47)
- Income Tax Act, 2015 (Act 896)
- Minerals and Mining Regulations, 2012 (L.I. 2177)
- Revenue Administration Act, 2016 (Act 915)

Case Law

- Cape Brandy Syndicate v IRC KB 64
- Kwadwo Dankwa & Ors v AngloGold Ashanti Limited 137 GMJ @ 30,
- Supreme Court Case of Bamfo (Mrs.) JSC
- Multichoice Ghana Ltd v Internal Revenue Service (SCGLR 783)
- Osei v Ghanaian Australian Goldfields Ltd 1 SCGLR 69
- Republic v Minister for the Interior; Ex-parte: Bombelli DLHC990

CASE 5

TITLE: SCANCOM PLC V. THE COMMISSIONER-GENERAL

Citation: Unreported Judgement of the High Court (Commercial Division) (CM/TAX/0008/22) dated 9th November 2023

Digital Citation: [2023] DLHC16658

Brief Facts

Scancom PLC (the appellant), a Ghanaian incorporated company operating under the name MTN Ghana, disputed a tax assessment by the Ghana Revenue Authority (the respondent) for the period January 2014 to December 2017. Scancom PLC appealed the tax objection decision of the Respondent dated 9th September 2021 at the High Court.

Grounds of Appeal

i. Scancom PLC primarily disputed the imposed Value Added Tax liability for imported services utilised to make both taxable (telecommunication services) and exempt supplies (mobile money business).

ii. The Appellant argued there is no statutory provision that authorises the Respondent to impose Value Added Tax by presuming the amount of total revenue generated through exempt supplies which is proportionate to the amount of imported services used to make taxable supplies.

iii. The Appellant further argued that the Respondent's reliance on internal practice notes/guidelines to impose National Health Insurance Levy (NHIL) and Ghana Education Trust Fund Levy (GETFund) on imported services was contrary to law.

Issues

1. Whether or not the Respondent erred in law and acted arbitrarily by imposing Value Added Tax for imported services from January 2014 to December 2017.

2. Whether or not the Respondent relied on an internal practice note or administrative guidelines to impose NHIL and GETFund Levy on imported services used to make taxable supplies.

Areas of Tax Law Considered

- Direct taxes- Value Added Tax
- Indirect taxes such as the National Health Insurance Levy, Ghana Education Trust Fund Levy.

Arguments

Appellant (Taxpayer)

i. The Value Added Tax Act of 2013 does not permit the imposition of Value Added Taxes on imported services used for exempt supplies.

ii. Between 2014 and 2017, Scancom PLC utilised imported services for its "business" of mobile money, which is exempt, as demonstrated in its financial records.

iii. There is no legal basis or justification in law to impose a Value Added Tax liability by presuming that imported services for exempt supplies correlate with total revenue.

iv. The relevant statutes concerning NHIL and GETFund do not authorise the imposition of levies on imported services used to make taxable supplies.

v. Between August 2018 and December 2018, Scancom PLC utilised imported services for taxable supplies, but the Respondent did not impose Value Added Tax for that period.

vi. Practice Notes are binding on revenue officers but not taxpayers and cannot be used to amend the tax law as stipulated in section 100 (3) and (4) of the Revenue Administration Act, 2016 (Act 915).

Respondent's Argument (Ghana Revenue Authority)

i. During the tax audit, Scancom PLC submitted business records showing it used imported services for both taxable and exempt supplies. The Respondent reviewed these documents and discovered Scancom PLC used imported services for activities not directly attributable to taxable or exempt supplies. These included fees for:

- Management and technical services.
- Intellectual property fees to MTN Dubai.
- Royalties paid for billing and reporting platforms.
- Network infrastructure support services.
- Overseas and Global Procurement services.
- Procurement services from related parties.

ii. Between January 2014 and December 2017, "Mobile Money Limited" was neither trading nor operating as a business entity.

iii. The imported services applied to the production of both taxable and exempt supplies indicated that Scancom PLC was a partial exempt trader and under section 65 of the Value Added Tax Act, spanning January 2014 to December 2017.

iv. Even if Scancom PLC produced and supplied both taxable and exempt supplies, the extent to which it proceeds from both is merged as total sales/revenue, leaving no objective way to extract the proportion of the sales/revenue attributable to exempt supplies.

v. Respondent determined the total value of imported services and calculated the proportion of each stream (exempt supplies vis-a-vis taxable supplies) to the total revenue and then applied splitting the imported services between the exempt supply revenue stream and taxable supply stream.

vi. The apportionment of imported services was an objective method to avoid tax avoidance.

vii. The Respondent's actions regarding NHIL and GETFund are anchored on the applicable provisions of the National Health Insurance Levy and Ghana Education Trust Fund Levy.

viii. Practice Notes/Guidelines clarify the application of existing tax laws and are for the benefit of staff at the Ghana Revenue Authority and do not change the existing tax laws.

ix. In 2018, the National Health Insurance and Ghana Education Trust Fund levies were decoupled from the Value Added Tax and became separate indirect taxes, which are not subject to the standard Value Added Tax rate procedures.

Ruling

1. The Court held that the Respondent did not err in law and did not act arbitrarily by imposing Value Added Tax liability on imported services from January 2014 to December 2017.

2. The Court upheld the Respondent's use of apportionment to determine the deductible input tax under section 49 (2) of the Value Added Tax Act of 2013.

3. The Court found that the Respondent did not rely on any internal practice notes or administrative guidelines to impose NHIL and GETFund Levy on imported services utilised for taxable supplies.

Reasoning

The Court dismissed the appeal for the reasons stated below:

i. The Court considered Scancom PLC as a Partial Exempt Trader for the period 2014 to 2017 and acknowledged the apportionment method as a valid means to isolate the portion of Value Added Tax attributable to exempt supplies.

ii. For the relevant period of August 2018 to December 2018, the Ghana educational trust fund levy and national health insurance levy each of which was 2.5% was applicable on the imported services used to produce taxable or exempt supplies.

Principles for Tax Practitioners

i. The principle of apportionment can be used to determine the deductible Value Added Tax on imported services utilised for both taxable and exempt supplies by a Partial Exempt Trader.

ii. Practice Notes are for the benefit of the Ghana Revenue Authority's staff and do not have the force of law hence cannot be used to amend tax legislation.

iii. The National Health Insurance Levy and Ghana Education Trust Fund levies are separate from Value Added Tax.

References

Constitutional and Statutory references

- Article 174 of the 1992 Constitution of Ghana.
- Ghana Education Trust Fund Act, 2000 (Act 581).
- Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972).
- National Health Insurance Act, 2012 (Act 852).
- National Health Insurance (Amendment) Act, 2018 (Act 971).
- Revenue Administration Act, 2016 (Act 915).
- Value Added Tax Act, 2013 (Act 870).
    - Value Added Tax (Amendment) Act, 2013 (Act 871).

Case Law

- Development Data & 2 Ors v. National Petroleum Authority & Another, Unreported, HC, Suit No. BC553/2009 Dated 5th July 2010.
- Fordjour vrs. Kaakyire 85 GMJ @85.
- Fordjour vrs. Dompeh SCGLR 660.
- Multichoice Ghana Ltd v. The Commissioner, Internal Revenue Service 2 SCGLR 783.
- Newton v. Commissioner of Taxation 1 AC 450 PC.
- Russell v. Scott AC 422 (HL) at 433.

CASE 6

TITLE: UNILEVER GHANA LIMITED VS THE COMMISSIONER-GENERAL, GHANA REVENUE AUTHORITY (GRA)

Citation: Unreported Judgement of the High Court (Commercial Division) CM/TAX/0450/2021 dated 20th July 2023.

Brief Facts

Unilever Ghana Limited (the Appellant) filed an appeal against a tax assessment made by the Commissioner-General, Ghana Revenue Authority (the Respondent) on 17th March 2021. The appeal concerns a tax assessment of GH¢6,236,200 issued on 21st February 2019 for the tax period of 2012-2016. The Appellant objected to the assessment on 20th May 2019, to which the Respondent replied on 19th September 2019. The Appellant, dissatisfied with the response, filed the instant appeal with the Court.

Grounds of Appeal

i. The Respondent did not use a transfer pricing method as required by the Transfer Pricing Regulations, 2012 (L.I 2188).

ii. The Respondent misinterpreted, misunderstood, and misapplied the OECD Transfer Pricing Guidelines in arriving at the tax liability.

iii. Had the Respondent properly applied the OECD guidelines, the Appellant would not have been liable to pay tax on the advertising, marketing, and promotion expenses.

Issues

1. Whether or not the Respondent correctly applied the transfer pricing method in assessing the tax liability of Unilever Ghana Limited?

2. Whether or not the Respondent misinterpreted or misapplied the OECD Transfer Pricing Guidelines?

3. Whether or not the Court have jurisdiction to entertain the appeal, considering that the Appellant filed the appeal outside the statutory time limit?

Areas of Tax Law Considered

- Transfer Pricing
- Tax Assessment and Appeals
- OECD Transfer Pricing Guidelines
- Jurisdiction of the Court
- Statutory limitations

Arguments

Appellant (Taxpayer) Argument:

- Unilever Ghana Limited argued that the Ghana Revenue Authority did not use a valid transfer pricing method and incorrectly applied the OECD Transfer Pricing Guidelines. They argue that the correct application of the guidelines would not result in a tax liability on their advertising, marketing, and promotion expenses.

Respondent (Ghana Revenue Authority)

- The Respondent filed its submissions based on the grounds of appeal by the Appellant.

Ruling

The court ruled that the appeal was null and void as the Appellant filed a notice of appeal outside the statutory time limit.

Reasoning

1. Appeals are conferred by common law or inferred from judicial decisions. They are statutorily conferred and without such jurisdiction, no appeal can lie before an appellate court. To properly invoke such jurisdiction, an appellant must satisfy all the statutory requirements in respect of an appeal. Thus, the right of appeal is provided under section 44 of Act 915 and order 54 of C.I.47, also provides timelines within which such a right would be statute barred, and the court would lack jurisdiction to entertain the action.

2. After a decision to a tax objection has been made, a person has within four months to file an appeal against the decision. Order 54 rule 2(3) of C.I.47 raises a statutory limit based on this timeline.

Principles for Tax Practitioners

i. Under section 43(5) Act 915, there is no power of review of a decision made on a tax objection in respect of a tax decision made by the Commissioner General. The law presumes his decision to be conclusive. Consequently, any further communication after the Commissioner General has given a decision under section 43(5) becomes surplus and legally worthless. An aggrieved person must appeal within the statutory timeline of four months.

ii. The case serves as a reminder for litigants and legal practitioners to exercise diligence and ensure timely filing of appeals to avoid procedural pitfalls that could lead to dismissal of otherwise meritorious claims.

References

Constitutional and Statutory references

- Constitution of Ghana, 1992
- Courts Act, 1993 (Act 459)
- Transfer Pricing Regulations, 2012 (L.I 2188)
- Revenue Administration Act, 2016 (Act 915)
- OECD Transfer Pricing Guidelines

Case Law

- Anin v Ababio and Others [1973] 1 GLR 509
- Bakana Limited v Osei & Another (Civil Appeal No. H1/28/2014) 12 Jun 2014
- Doku v Presbyterian Church of Ghana [2005-2006] SCGLR 700
- Frimpong v Poku [1963] 2 GLR 1-6
- Koranteng II & Others v KLU [1993-94] 1 GLR 280—298
- Oppong v Attorney-General & Others [2017] GHASC 19 (22 June 2017)

- Republic v. High Court (Financial Division) Accra; Ex Parte Tweneboah Kodua [2015] 81 GMJ 191 SC
- Republic v High Court, Kumasi, Ex parte Asare-Adjei (Anin Mensah - Interested Party) [2007-2008] 2 SCGLR.

CASE 7

TITLE: MAERSK RIGWORLD GHANA LTD VS. COMMISSIONER GENERAL AND THE GHANA REVENUE AUTHORITY

Citation: Unreported Judgment of the High Court (Suit No CM/TAX/0099/2022) 31st January 2023

Brief Facts

Maersk Rigworld Ghana Ltd (the Appellant) is a limited liability company engaged in offshore drilling and associated services in the petroleum industry. The Appellant entered into a subcontract agreement with ENI Ghana Exploration and Production Limited (ENI) for the provision of Deepwater DP Drilling Rig services. The Commissioner-General of the Ghana Revenue Authority (GRA) (the Respondent) conducted a tax audit of the Appellant for the period 2015 to 2017. The Respondent issued a Final Tax Audit Report, which included direct and indirect tax liabilities of the Appellant and subsequently issued an objection decision maintaining its position. The Appellant, dissatisfied with the Objection Decision, appealed to the High Court.

The grounds of appeal included disallowance of Withholding Tax Credit Certificates, disallowance of input VAT, and rejection of VAT Relief Purchase Orders (VRPOs). The Appellant had been contracted by ENI, who were in turn contracted by the Government of Ghana in a Petroleum Agreement.

Grounds of Appeal

i. The Respondent erred in law by disallowing Withholding Tax Credit Certificates amounting to US$291,174.81 (which was later abandoned)
ii. The Respondent wrongly assessed the Value Added Tax (VAT) and National Health Insurance Levy (NHIL) (which was later abandoned).
iii. The Respondent erred in law by disallowing the input VAT amount to US$3,888,216.60.
iv. The Respondent erred in Law by rejecting the VAT Relief Purchase Orders issued to the Appellant for services rendered to ENI.

Issues

1. Whether or not the Appellant, as a subcontractor, is subject to a final 5% Withholding Tax under the Petroleum Agreement (PA).
2. Whether or not the Respondent was right to disallow Withholding Tax Credit Certificates.
3. Whether or not the Respondent was correct to disallow input VAT claims.
4. Whether or not the Respondent was right to reject VAT Relief Purchase Orders (VRPOs).
5. Whether or not the stabilisation clause in the Petroleum Agreement extended to the Appellant as a subcontractor.
6. Whether or not the Appellant was required to present tax invoices in a prescribed format, and if not, whether it could rely on other invoices.

Areas of Tax Law Considered

- Withholding Tax
- Value Added Tax (VAT)
- National Health Insurance Levy (NHIL)
- Corporate Income Tax

Arguments

Appellant (Taxpayer)

i. As a subcontractor under the Power Agreement (PA) between the Government of Ghana, GNPC, and ENI, the Appellant is subject to a final 5% Withholding Tax.

ii. The combined effect of Articles 12.1, 12.3 and 26.2 of the PA is that, for the term of the PA, the State is prohibited from imposing any tax other than the 5% withholding tax on the Appellant.

iii. The Appellant is an intended beneficiary of the stabilisation clause (Article 26.2) in the PA, which guarantees the stability of the terms and conditions of the agreement.

iv. The Appellant was entitled to deduct input VAT.

v. The Appellant's tax invoices, though photocopies, should have been accepted by the Respondent.

vi. The VAT Relief Purchase Orders (VRPOs) issued to the Appellant were valid and should have been considered.

vii. The Respondent did not consider all the Withholding Tax Credit Certificates provided.

Respondent (Ghana Revenue Authority)

i. The stability clause in the Power Agreement (PA) applies only to the contractor (ENI), not the subcontractor (the Appellant).

ii. The 5% Withholding Tax is not the final tax, and the Appellant is liable for other taxes including corporate income tax.

iii. The Appellant was required to withhold taxes as a non-final tax.

iv. The Respondent disallowed the input VAT claims because the Appellant did not provide the correct invoices, and the customs entries were not in the name of the Appellant.

v. The Respondent argued that the Appellant had not proven it had authorisation to issue tax invoices differently to those prescribed by law.

vi. The Respondent argued it was correct to disallow VAT Relief Purchase Orders where the amount on the VRPO exceeded the underlying VAT invoice amount.

Ruling

i. The court upheld the appeal in part on ground 1, finding that the 5% Withholding Tax is the final tax for the Appellant.

ii. The court held that tax certificates listed by the Appellant were considered by the Respondent. However, it was erroneous for the Respondent to impose further tax including the Corporate Income Tax on the Appellant from 2016 when Act 896 came into force. Thus, the tax liability resulting from the further imposition ought to be reversed after the 5% Withholding Tax on the Appellant.

iii. The court ruled against the Appellant stating that the Respondent was right to disallow the tax invoices because they did not conform with the regulations

and the Appellant did not prove that they had the authority of the Commissioner-General to issue invoices.

iv. The court ordered a reconciliation of the figures concerning the VAT Relief Purchase Orders, stating that the VAT invoice should be the basis for the VRPO.

Reasoning

i. The court adopted the purposive approach to interpret that the Petroleum Agreement (PA) to determine the intentions of the parties to the Agreement. The court reasoned that the stabilisation clause in Article 26 of the PA applies to the Appellant as a subcontractor as they were intended to be third party beneficiary of the Agreement.

ii. The court noted that laws do not operate retrospectively except in procedure, evidence, and declaratory laws. The Appellant's rights accrued under PNDCL 188 and that Act 896 could not operate retrospectively to impose further tax. The court stated that a statute is retrospective if it takes away or impairs a vested right acquired under existing laws or creates a new obligation, or imposes a new duty, or attaches a new disability in regard to events already passed.

Principles for Tax Practitioners

i. The case clarifies that a stabilisation clause in a Petroleum Agreement can extend to subcontractors, protecting them from additional taxes beyond a specified withholding tax.

ii. The ruling highlights the importance of adhering to the prescribed form for tax invoices, and the need to obtain the necessary authorization from the Commissioner-General.

iii. The case underscores the legal principle that statutes should not be applied retrospectively to alter existing rights or obligations.

iv. The court's decision on the VAT Relief Purchase Orders (VRPOs) reinforces the need for reconciliation where discrepancies exist between the amounts claimed and the underlying tax invoices.

v. The judgment supports the purposive approach to interpretation, emphasizing that the intention of the parties and the context are important for the interpretation of contracts.

References

Constitutional and Statutory references

- Articles 1(2), and 107 of the 1992 Constitution,
- section 5(1) Contracts Act, 1960 (Act 25)
- sections 166 and 167 Evidence Act, 1975 (NRCD 323)
- Income Tax Act 2015
- Interpretation Act, 2009 (Act 792)
- Petroleum Income Tax Act, 1987 (PNDCL 188)
- Petroleum Income Tax Act, 2015 (Act 896)
- Petroleum Exploration and Production Act, 2016 (Act 919)
- sections 41(1), 41(3), 48(1), 48(5), 48(6), 92(2) of the Value Added Tax Act, 2013 (Act 870)
- Value Added Tax Regulations, 2016 (L.I. 2243)

Case Law

- Access Bank Ltd V. Market Direct and Others (2018) JELR 63866 (HC)
- Adjei-Ampofo V. Attorney-General & The President of the National House of Chiefs. 2 SCGLR 1104
- Ata Textile Co. V. Estate of Zotolov 41 (1) P.D. 282
- Fenuku And Another V. John Teye and Another SCGLR 985
- Hossain V. JMU Properties, LLC, 147 A.3D 816 (D.C. 2016)
- Rep V. High Court, Accra; Ex-Parte: Expandable Polystyrene Products Ltd 1 GLR 98

- The Republic V. Nana Osei Kwadwo II DLSC 6238
- Tsatsu Tsikata V. Tullow Ghana Ltd DLCA7824
- Yew Bon Tew V. Kandeeran Bas Mara 3 ALL ER 833

CASE 8

TITLE: FAN MILK GHANA LIMITED VRS THE COMMISSIONER GENERAL, GHANA REVENUE AUTHORITY (GRA)

Citation Suit No H1/247/2020 (Unreported judgment of the Court of Appeal)

Brief Facts

Fan Milk Ghana Limited (the Appellant), an ice cream and dairy products manufacturing company, had its accounts audited for tax purposes for the accounting periods in 2014, 2015 and 2016. The Ghana Revenue Authority (GRA) (the Respondent) imposed a tax liability of GH¢7,655,676.22 on the Appellant for failing to withhold taxes from payments to its distributors who received 'discounts'. The Appellant paid 30% of the disputed tax liability and objected to the tax decision, but the objection was dismissed. The Appellant then requested to pay the outstanding 70%. The Appellant appealed to the High Court, which affirmed the tax decision of the Respondent. Dissatisfied with the decision of the High Court, the Appellant further appealed to the Court of Appeal.

Grounds of Appeal

The grounds of appeal canvassed by the appellant are as follows:

i. The GRA re-classified the relationship between the Appellant and its distributors (Independent Purchases/Distributors) from principal-agent to one of independent purchases.
ii. The GRA reclassified discounts granted to the distributors as commissions.
iii. The GRA imposed a withholding tax liability based on these re-classifications.
iv. The GRA ignored its own practice of treating discounts under the Appellant's Model as exempt from tax.
v. The High Court Judge erred in law by holding that the Appellant's business model was a tax avoidance scheme.
vi. The High Court Judge erred in law by applying a new law retrospectively to invoices issued prior to the law coming into effect.
vii. The High Court Judge erred in law by ruling that discounts must appear on invoices to be valid.
viii. The High Court Judge erred in law by holding that payments to distributors were commissions, not discounts.

ix. The High Court Judge erred in law by upholding the tax liability.

x. The judgment was against the weight of evidence.

Issues

1. Whether or not the Respondent was justified in its tax decision that the Appellant failed to withhold taxes on payments made to its Independent Purchases/Distributors from 2014 to 2016.
2. Whether or not the payments made by the Appellant to its Independent Purchases/Distributors were 'discounts' or 'commissions' in substance.
3. Whether or not the payments made to the distributors were cash discounts.

Areas of Tax Law Considered

- Withholding tax.

Arguments

Appellant (Taxpayer)

i. The relationship between the company and its distributors was not one of principal and agent, but rather a system of 'indicative discounts' at the end of every month.

ii. These payments were discounts, not service fees to sales agents, and therefore not subject to withholding tax.

iii. The discounts were based on purchases made by the distributors and were calculated from invoices raised for the month.

iv. The payments were cash discounts.

v. The word "agents" in the agreement with distributors was not used in its proper legal connotation.

Respondent (GRA)

i. The payments to distributors were commissions, not discounts.

ii. These payments were subject to withholding tax.

iii. The Appellant did not make necessary price adjustments in its books for the discounts. Thus, the Tax Audit did not find price adjustments in the books of the Appellant.

iv. The agreement between the Appellant and its distributors indicates that payments were a motivation for the distributors to achieve targets, which is similar to a commission.

Ruling

The Court of Appeal affirmed the findings of the High Court and dismissed the appeal in its entirety. The Court established that the payments made by the Appellant to its distributors were in substance "commissions" and not discounts". Thus, the Respondent was justified in imposing a withholding tax liability on the Appellant for failing to withhold tax on payments which were actually commissions. The model operated by the Appellant could not be regarded as cash discounts.

Reasoning

1. The Court determined that the fundamental issue was whether the payments made by the appellant to its distributors were discounts or commissions. The court adopted the use of interpretative aids such as the Black's Law Dictionary (8th and 9th Editions) to differentiate between 'discounts' and 'commissions'. The ordinary meaning of a discount for purposes of sales is a reduction in the original price of a product, while a commission is a fee paid to an agent or employee, usually as a percentage of the money received.

2. The court found that the payments were an incentive for the distributor to sell more products, not a reduction in price, and thus were commissions, which the Appellant had not recorded as cash discounts in its accounting books according to standard accounting principles.

3. The court concluded that the arrangement between the Appellant and its distributors was a sham to avoid withholding tax and reiterated that tax avoidance, which is the act of dodging tax without breaking the law, was illegal.

4. The court emphasized that the burden of proof is on the taxpayer to show compliance with tax laws.

5. The court stated that a withholding agent who fails to withhold tax must pay the tax that should have been withheld.

Principles for Tax Practitioners

1. The case clarifies the distinction between discounts and commissions for tax purposes, emphasizing that the substance of a transaction, not just its label, determines its tax treatment.
2. It is important for a tax practitioner to adhere to standard accounting practices for recording discounts.
3. The court emphasized the illegality of tax avoidance schemes and that the law will not countenance such acts.
4. In highlighting the importance of the burden of proof on the taxpayer, the aggrieved taxpayer must discharge this by leading evidence to show compliance with the law.
5. The case demonstrates that in interpreting technical tax words, the court will look beyond the form of an agreement, and examine the substance, when determining tax liability.
6. The case emphasizes that the failure to withhold taxes can lead to a liability for the amount that should have been withheld.

References

Statutory

- sections 42, 92(1) and (2) and 117(3) of the Revenue Administration Tax Act 2016 (Act 915).
- sections 116(1)(a)(v), and 34 of the Income Tax Act, 2015 (Act 896).

Case Law

- Achor and anor V. Akanfela SCGLR 209
- Greenberg v IRC 3 All ER 136
- Koglex Ltd (NO.2) V. Field SCGLR 175
- Johnson V Jewith 40 TC 231
- Mamudu Wangara v. Gyato Wangara GLR 639

- Shell Company Of Australia Ltd V Nat Shipping Bagging Services Ltd (1988) 2 Lloyd's Rep 1

CASE 9

TITLE: MAERSK DRILLSHIP IV SINGAPORE V COMMISSIONER GENERAL AND THE GHANA REVENUE AUTHORITY (APPEAL TO THE HIGH COURT)

Citation: Unreported Judgment of the High Court (Suit No CM/TAX/0100/2022) 8th July 2022

Digital Citation:

Brief Facts

Maersk Drillship IV Singapore PTE LTD (the Appellant) is a company incorporated in Singapore and registered in Ghana as an external company. The Appellant is engaged in the business of providing services to the Upstream Petroleum Industry in Ghana and provided services at the Deepwater DP Drilling Rig for a period of 2 years, between January 2015 and December 2017.

The Appellant obtained a Petroleum Commission Permit to provide services to the Upstream Petroleum Industry in Ghana and operated in the OCTP block in Ghana as a subcontractor to ENI, using rigs and a rig team.

The Respondent is the head of the Ghana Revenue Authority (GRA), responsible for tax administration and revenue collection in Ghana. In 2018, the Respondent commenced a tax audit into the affairs of the Appellant and issued a Final Tax Audit Report on 20th November 2020.The Respondent issued a Final Objection Decision on 27th September 2021, imposing a total tax liability of US$ 28,357,065.17 on the Appellant. The Appellant was dissatisfied with the assessment and filed an appeal to the High Court.

Grounds of Appeal:

The appeal was mounted based on the following grounds:

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

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

3. The Respondent was liable for breach of the provisions of the OCTP Agreement by assessing the Appellant to Corporate Income Tax (CIT) and Branch Profit Tax (BPT) under Act 592 and the Income Tax Act (Act 896).

4. The Respondent wrongly imposed tax of US$103,300.22 on the Appellant in respect of PAYE taxes when the Appellant had a tax overpayment.

5. The Respondent erred in law by rejecting some of the VAT Relief Purchase Orders (VRPOs).
6. The Respondent erred in the reconciliation of figures.
7. The Appellant sought declarations and orders including a proper interpretation of the OCTP agreement, that the BPT and CIT which they opined that they were are not applicable to them, an order for reconciliation of figures and a refund of monies paid.

Issues

1. Whether or not the Respondent erred in law in subjecting the Appellant's income to further taxes after the 5% withholding tax?
2. Whether or not the Appellant is exempt from Corporate Income Tax (CIT) and Branch Profit Tax (BPT) under the OCTP agreement?
3. Whether or not the Respondent wrongly imposed tax of US$103,300.22 on the Appellant in respect of PAYE taxes?
4. Whether or not the Respondent erred in rejecting some of the VAT Relief Purchase Orders (VRPOs).
5. Whether or not there was an error in the reconciliation of figures?
6. Whether or not the Appellant was entitled to the reliefs sought?

Areas of Tax Law Considered

- Corporate Income Tax (CIT)

- Branch Profit Tax (BPT)
- Withholding Tax, Pay As You Earn (PAYE) tax and Value Added Tax (VAT).
- Interpretation of fiscal stability clauses in petroleum agreements and their impact on tax obligations of subcontractors.
- Tax implications of providing services in the upstream petroleum industry under a petroleum agreement.

Arguments

Appellant (Taxpayer)

i. The Appellant argued that under the OCTP agreement and the Petroleum Income Tax Law, 1987 (PNDCL 188), their income is exempt from further taxes after the 5% withholding tax.

ii. They contended that the agreement created a fiscal enclave for ENI and its subcontractors, including the Appellant.

iii. The Appellant argued that the general tax laws of Ghana are ousted by the specific provisions of the Petroleum Agreement.

iv. They asserted that the Respondent erred in assessing them to CIT and BPT.

v. The Appellant argued that they had a tax overpayment and that the Respondent failed to recognize tax receipts in respect of PAYE.

vi. The Appellant contended that the Respondent wrongly rejected some VAT Relief Purchase Orders and sought for reconciliation of figures.

Respondent (Ghana Revenue Authority)

i. The Respondent argued that the general tax laws such as Act 592, in addition to PNDCL 188, apply to all persons unless specifically exempted.

ii. The Respondent contended that Article 12(1) of the PA does not preclude the state from imposing taxes not specifically related to Petroleum Operations.

iii. The Respondent argued that the provisions of the PA and any other contract cannot oust the general tax laws of Ghana.

iv. The Respondent stated that the Appellant is a permanent establishment in Ghana, and liable to pay taxes under Act 896.

v. The Respondent stated that the Appellant was liable for the payment of CIT and other taxes not connected to services under the PA.

vi. The Respondent argued that Section 39(5) of PNDCL 188 vests power to enable them to apply general tax laws in addition to PNDCL 188.

Ruling

i. The court dismissed the Appellant's claims that the Respondent erred in subjecting their income to further taxes, and that the CIT and BPT assessments were inapplicable.

ii. The court declared that the Respondent was barred from imposing any income tax under any other tax law on the Appellant's income emanating from services carried out in the OCTP block under the Petroleum Agreement except under the relevant provisions of the Petroleum Income Tax Law, 1987 (PNDCL 188) and ENI's Petroleum Agreement (PA).

iii. The court ordered that an independent auditor be appointed to reconcile accounts between the parties in respect of the Appellant's VAT/NHIL liability, PAYE, and withholding tax figures.

iv. The court deferred determination of reliefs relating to a revised tax assessment and refund until submission of the auditor's report.

v. Claim for general damages was dismissed.

Reasoning

i. The court found that the 5% withholding tax does not constitute the entirety of the Appellant's tax obligations. The Appellant is a permanent establishment in Ghana and subject to general tax laws. The court made it clear that the Respondent is not barred from imposing taxes on the income of the Appellant as a corporate entity, that is not directly related to their activities as a subcontractor.

ii. The court emphasized that the fiscal stability clauses in the PA are intended to mitigate the cost exposure of the contractor and not the subcontractor.

iii. The court reasoned that while the Appellant, as a subcontractor, is an intended beneficiary of the PA, they are not a party to it and therefore cannot claim all the benefits thereunder.

iv. The court stated that the Appellant can only seek shelter under the favorable provisions accorded to the contractor for the service that is directly related to the PA.

v. The court noted that Section 135 of Act 896 seeks to insulate the provisions of PNDCL 188 that are covered by a binding agreement from the general provisions of Act 896.

vi. The appointment of an independent auditor to reconcile the figures in respect of PAYE, Withholding tax, and VAT/NHIL, would be the only way to verify the tax liability of the Appellant.

Principles for Tax Practitioners

i. Subcontractors, while intended beneficiaries of Petroleum Agreements (PA), are not parties to them and cannot claim all the benefits accorded to the contractor.

ii. The 5% withholding tax does not necessarily absolve a subcontractor from all other tax liabilities. A company that has a permanent establishment in Ghana (an external company) will be subject to Ghanaian tax laws.

iii. The fiscal stability clauses are primarily intended for the benefit of the contractor, not necessarily the subcontractor, who can only seek shelter under the favourable provisions of a PA for services directly related to work carried out under the PA.

iv. The court has the power, *suo motu* to order an independent audit to reconcile complex accounts to ascertain the actual tax liability of a party.

v. The general tax laws of Ghana will apply unless a specific exemption is provided under the law.

References

Constitutional and Statutory

- The 1992 Constitution of Ghana.
- The Contracts Act, 1960 (Act 25).
- High Court, Civil Procedure Rules, 2004 (CI 47).

- The Income Tax Act, 2015 (Act 896).
- The Income Tax Decree, 1975 (SMCD 5).
- The Internal Revenue Act, 2000 (Act 592).
- The Petroleum Income Tax Law, 1987 (PNDCL 188).
- The Revenue Administration Act, 2016 (Act 915).
- The Value Added Tax Act, 2013 (Act 870)
- Rights in Ghana Law

Books

- The Case for the Enforceability of Third-Party Contractual Rights (Kunbuor, B., Ali-Nakyea, A., & Demitia, W. (2017)). *Law of Taxation in Ghana*. Type Publishers.

CASE 10

TITLE: MAERSK DRILLSHIP IV SINGAPORE V COMMISSIONER GENERAL AND THE GHANA REVENUE AUTHORITY (APPEAL TO THE COURT OF APPEAL)

Citation: Unreported Judgment of the Court of Appeal (Commercial Division. H1/67/23) dated 27th October 2023.

Brief Facts

This is an appeal against the ruling of the High Court, (Commercial Division) Accra dated 19th October 2022 which decision upheld in part. Maersk Drillship IV Singapore ("the Appellant") brought the appeal against the Final Objection Decision of the Commissioner-General of the' Ghana Revenue Authority ("the Respondent) dated 27th September 2021. The dispute between the parties concerns the interpretation and application of Articles 12(1) and (3) as well as Article 26 of the Offshore Cape Three Points Petroleum Agreement, Sections 27 and 39(3) of the Petroleum Income Tax Act, 1987 (PNDC Law 188), the

Internal Revenue Act, 2000 (Act 592) and the Income Tax Act 2015 (Act 896). The instant appeal requires that this Honourable Court properly construe and apply the above provisions. This is because the central contention of the Appellant in this appeal is that on a true and proper construction of the provisions above considered in the appropriate context, the Appellant is not liable to pay any other tax under any other tax law after a 5% final withholding tax is withheld on its behalf by ENI. Specifically, the Appellant avers that the Honourable High Court erred when it held that the Respondent was right in imposing income tax on its earnings for the period 2015-2017 and branch profit tax on same.

In 2018, the Respondent commenced a tax audit into the affairs of the Appellant and issued a Final Tax Audit report dated 20th November 2020 (Exhibit MDS 6). In this report the Appellant was assessed with a total direct tax liability of US$ 20, 185,531.36 and an indirect tax liability of US$8,441,746.18, making a total tax liability of US$28,627 ,295.54.

The Appellant, dissatisfied with the tax assessment, and following failed attempts to resolve the dispute with the Respondent, lodged an objection against the assessment dated 15th January 2021. On 27th September 2021, the Respondent issued its Final Objection Decision in response to the objection in which the direct tax liability was revised downwards to US$ 19,915,318.99.

Still dissatisfied, on 8th November 2021, the Appellant filed an appeal against the decision of the Respondent at the High Court. On 24th December 2021, the Respondent filed its Reply to the appeal pursuant to Order 54 Rule 7 of C.I. 47. In its appeal, the Appellant sought reliefs including the following;

I. A declaration that the assessed Branch Profit Tax of US$ 17,103,923.20 is not applicable to the Appellant and therefore the assessment is extinguished.
II. A declaration that the assessed Corporate Income Tax of US$2,370,959.33 is inapplicable to the Appellant and therefore the assessment is extinguished.
III. A declaration that the Respondent erred in law when he unjustifiably assessed the Appellant to additional Corporate Income Tax in the amount of US$ 2,370,959.33.
IV. A declaration that the Respondent is barred from imposing any income tax under any other law on the Appellant's income emanating from its services carried out in the Offshore Cape Three Points block under the Petroleum Agreement except under the tax provisions of ENI's Petroleum Agreement.

On 8th July 2022, the Honourable High Court delivered its judgement in relation to reliefs (i), (ii) , (iii), (iv), (v), (vi), (ix) and (xii) and ordered the parties, in consultation with the Registrar of the Honourable High Court, to appoint an independent auditor reconcile accounts regarding the Appellant's VAT/NHIL liability, PAYE and Withholding Tax Figures, in consultation with the Registrar of the Court, in order to ascertain the actual liability of the Appellant in respect of reliefs (vii) and (viii).

The reconciliation was carried out and on 30th September 2022, a reconciliation report was filed by the parties. Counsel for the Appellant also filed an application for clarification of the decision of the Court on relief **(vi) seeking clarity as to whether the Respondent could impose branch profit tax on the Appellant's income emanating from the OCTP block under the petroleum agreement.**

NOTICE OF APPEAL

The Appellant, aggrieved by the decision of the High Court, brought the instant appeal before this Honourable Court on the following grounds;

1. The Judgement is against the weight of the evidence.
2. The learned Judge erred in law by holding in her judgement dated 8 of July 2022 and her ruling dated 2nd October 2022 that the Appellant's aggregate amount (income) earned from its works and services carried out under the Offshore Cape Three Points (OCTP) Petroleum Agreement is subject to branch profit tax after being subjected to 5% final withholding tax.
3. The learned Judge misdirected herself in her judgement dated July 8, 2022, by holding that the Respondent was right in imposing additional taxes including

branch profit tax on the aggregate amount earned by the Appellant from its works and services under the final OCTP Petroleum Agreement after subjecting the aggregate amount to a 5% final withholding tax.

Arguments of the Appellant (Taxpayer)

1. The learned High Court decided in its favour and contends that the decision of the High Court means that "...the Respondent IS ONLY PERMITTED to impose income tax under the relevant provisions of
2. PNDCL 188 on the Appellant's income from its services carried out in the Offshore Cape Three Points Block under the Petroleum Agreement" (emphasis the Appellant's). The Appellant further contends that this means that the Respondent is prohibited from imposing any income tax under any other law on the Appellant's income emanating from the services carried out on the OCTP block under the petroleum agreement; referencing his argument to portions of Section 27 of PNDCL 188 and argues that section 27(4) of PNDCL 188 bars the application of Act 592 and other subsequent tax laws to the Petroleum Agreement and the subcontract, whilst Section 27(5) of PNDCL 188 prohibits the application of other tax laws to Appellant as a subcontractor to ENI for services in connection with the Petroleum Agreement.
3. Appellant further cited portions of the judgement of the High Court Judge at page 190 and 191 of the record wherein the learned justice states, "That said, I think a combined reading of the above quoted positions presents a clear and unassailable meaning that once 5% of the payments due the subcontractor for work and services provided under the P.A. is withheld by the Contractor, the Subcontractor is not liable to pay tax under any law, on that aggregate amount unless and until the occurrence of any of the events listed under Section 135(2) of Act 896. To that extent, I agree with the Appellant that Article 12(1) and (3) of the PA created a legitimate exception that no tax or impost will apply to the income of the Appellant other than the 5% withholding tax for works and services rendered as a Subcontractor under the PA."
4. The Appellant then argues that the combined operation of the Articles 12.1, 12.3 and 26.2 of the Petroleum Agreement, the government guaranteed fiscal stability to ENI, the contractor, and its subcontractors, including the Appellant, in respect of activities related to Petroleum Operations.

The Appellant contends that the holding of the Court amounts to a misdirection because neither PNDCL 188, nor the Petroleum Agreement provide for Branch Profit Tax.

1. On the second ground of appeal, Ground B, the Appellant is of the view that the learned High Court Justice erred by holding that the Appellant's aggregate income from its work carried under the OCTP Petroleum Agreement is subject to branch profit tax after being subjected to final withholding tax. The Appellant states that the learned High Court judge erred in law by not treating

the 5% withholding tax as the only tax that the Appellant is liable to pay and not declaring that the no other tax law in Ghana is applicable to the Appellant. The Appellant is also of the view that the learned High Court Judge erred when she subjected the Appellant's aggregate income from its works and services under the OCTP Petroleum Agreement to branch profit tax under Act 592 and Act 896, contrary to the provisions of section 27 of PNDCL 188.

2. The Appellant contends that the High Court misconstrued the legal effect of a final withholding tax. The Appellant says that a final withholding tax is a payment in which a tax withheld satisfies the final tax liability of the withholdee or the recipient. The Appellant states, such a taxpayer is not liable to pay any more tax "under any circumstance whatsoever".
3. The Appellant contends that since it was already subjected to the 5% withholding tax, it was not liable to pay any more tax, and thus the learned High Court Judge erred when she found that the Appellant was liable to pay additional taxes such as the branch profit tax. In support of this position, the Appellant points to Section 27(3) of PNDCL 188 in support of this.

The Appellant continues by averring that the court below was wrong to use Section 6(2) of Act 896 to impose branch profit tax on the Appellant and adds that even if Section 6(2) of Act 896 was applicable, the Court erred by failing to consider Section 6(2)b of Act 896, which the Applicant contends excludes persons who have been subject to withholding tax from the application of Section 6(2).

It is the Appellant's case in sum that the High Court differently constituted gave judgment to the effect that it was wrong of the Respondent to impose further tax including corporate income tax on the Appellant from 2016 when Act 896 came into force.

Arguments of the Respondent (GRA)

1. Responding to the arguments of the Appellant, the Respondent averred that the Court below was right in imposing additional taxes in the form of branch profit tax on the aggregate amount earned by the Appellant. The Respondent submitted that the Court below properly construed and evaluated articles 12.1, 12.3 and 26 of the OCTP Petroleum Agreement as well as sections 27 and 39(5) of the Petroleum Income Tax Law, 1987 (PNDCL 188) in arriving at her conclusion that the Appellant was subject to branch profit tax on the income subject matter of the present dispute.
2. The Respondent further submitted that the treatment of 5% withholding tax payment on services or works under a petroleum agreement as final tax under section 27 of PNDCL 188 does not preclude the payment of other taxes such as branch profit tax on the same income derived by the Appellant.
3. The Respondent further goes on to state that the 5% withholding tax, referred to in article 12.3 of the Petroleum Agreement, treated as final tax in section 27 of PNDCL 188 is a business income tax on income earned by the Appellant.

The Respondent is of the view that the finality of that tax does not extend to investment income or employment income. In support of this position, the Respondent cites the dictum of the learned High Court Judge at page 28 of the judgement wherein she stated, "The trap the Appellant seems to have fallen in, with respect, is the misapprehension that the tax imposed on the Appellant in respect of its specific business activities (under the PA) extends to cover taxes payable by its shareholders. "

4. The Respondent also opines that PNDCL 188 in section 39(5) empowered the Respondent to apply general tax law such as the Internal Revenue Act, 2000 (Act 592) and Income Tax Act, 2015 (Act 896) to impose taxes not covered by PNDCL 188 such as branch profits tax, which the Respondent says is considered by PNDCL 188 to be a tax on investment income.

The Respondent says that this means that the persons engaged in petroleum operations in Ghana may be subject to other income taxes such as investment income tax and branch profit tax in addition to business income tax.

LAW AND ANALYSIS

To render what could be a quite complex dispute manageable and comprehensible, the Court attempted to break it down to its simplest foundational issues. And in order to make a determination on this matter, the Court answered a three (3) questions:

- Firstly, this Honourable Court is tasked with determining whose income is subject of the assessment in dispute before this honourable Court.
- Secondly, the Court has to determine if the income at hand is Assessable Income.
- Finally, the Court has to determine whether or not the income is exempt from income tax.

“Every facet of this dispute comes down to the answer to these three ostensibly simple questions. Consequently, the analysis of this will follow those questions in that order”.

WHOSE INCOME IS THE SUBJECT MATTER OF THE DISPUTE

From the analysis of evidence provided by the parties, the Honourable Court agreed that the Respondent (GRA) was right to treat the (the Appellant) a Ghanaian-registered external company as a permanent establishment of Maersk Drillship IV Singapore – The Branch (Permanent Establishment) and the Parent (Drillship IV Singapore) are separate legal entities. To the Court, whilst Maersk Drillship IV Singapore’s Ghanaian Permanent Establishment has earned income from Petroleum Operations under the said agreement

with government; Maersk Drillship IV Singapore itself (the Parent of the Branch) has earned repatriated profits, which is comparable to dividends, from its Ghanaian Permanent Establishment and the provisions of sections 60 & 63 of Act 896 will apply.

IS THE INCOME IN DISPUTE ASSESSABLE INCOME

The Court haven resolved the issue income is the subject matter of the dispute, determined whether that income is assessable income. The Court found that, a "non-resident person who earns income that has a source in Ghana, or whose income is earned through a Ghanaian permanent establishment regardless of where the income is sourced, have incomes that is assessable under the Ghanaian tax las. The income earned by Maersk Drillship IV Singapore being a repatriated income (Branch profit income) from the Ghanaian permanent establishment, the income is thus assessable income. The Court arrives that the branch profit as income earned from a permanent Establishment is an Assessable income. This leads to the third and final question.

IS THE INCOME IN DISPUTE EXEMPT INCOME?

The Court arrived that, the Branch Profit (being profit earned by the parent company (Maersk Drillship) from its Ghanaian Permanent Establishment being income, is not exempted from tax by the provisions of the Petroleum Agreement. Therefore, branch profit earned by the Parent (Maersk Drillship IV Singapore), a non-resident entity its Ghanaian permanent establishment is tax under Section 60 of Act 896 (as amended).

Finally, the judgment of the High Court dated 19 th October, 2022 is hereby affirmed subject to the variation in respect of the second ground of the cross-appeal.

RULING

The judgment of the High Court dated 19th October, 2022 is hereby affirmed subject to the variation in respect of the second ground of the cross-appeal. The Appeal Dismissed.

NOTE:

Our Team understand that the Appellant has appealed at the Supreme Court and the ruling has been delivered in favour of the appellant. On this note, further

commentary is withheld and to be provided pending receipt of the full judgement and reviews application by the respondent.

References

Constitutional and Statutory

- The 1992 Constitution of Ghana.
- The Contracts Act, 1960 (Act 25).
- High Court, Civil Procedure Rules, 2004 (CI 47).
- The Income Tax Act, 2015 (Act 896).
- The Income Tax Decree, 1975 (SMCD 5).
- The Internal Revenue Act, 2000 (Act 592).
- The Petroleum Income Tax Law, 1987 (PNDCL 188).
- The Revenue Administration Act, 2016 (Act 915).
- The Value Added Tax Act, 2013 (Act 870)
- Rights in Ghana Law

Books

- The Case for the Enforceability of Third-Party Contractual Rights (Kunbuor, B., Ali-Nakyea, A., & Demitia, W. (2017)). *Law of Taxation in Ghana*. Type Publishers.

CASE 11

TITLE: MOVELLE COMPANY LTD VRS GHANA REVENUE AUTHORITY.

Citation: suit number CM/RPC/0499/2020 dated 25 October 2021

Brief Facts:

Movelle Company Ltd (the Plaintiff), is an importer and trader of frozen meat and meat products. The Plaintiff imported 1,750 metric tons of frozen chicken and chicken parts, loaded in reefer container and the goods arrived at the Tema and Takoradi ports. The Government of Ghana introduced a policy requiring permits for all poultry imports to safeguard the local poultry industry.

It was the case of the Plaintiff that it arranged with its suppliers to import the products before the government policy was introduced. The Plaintiff subsequently applied for permits after the goods arrived, but before the permit was granted, the Defendant (Ghana Revenue Authority), had auctioned the goods.

The Plaintiff asserted that 41 forty-footer containers were seized and auctioned and claimed that the auction was unlawful. The plaintiff thus sought several reliefs, including a declaration of unlawful seizure, damages, and a refund.

The Defendant, the Ghana Revenue Authority (GRA), however stated that the goods were perishable and were not cleared within the statutory period, justifying the auction. The Defendant further claimed that the Plaintiff failed to apply for a permit in time and the goods were rightfully auctioned.

Issues

The issues set down for trial were:

1. Whether the seizure and auction of the Plaintiff's forty-one (41) forty-footer containers of imported frozen chicken and chicken parts was lawful?
2. Whether the Defendant complied with the mandatory administrative and statutory procedures relating to the seizure and auction of the Plaintiff's goods?

3. Whether or not the Plaintiff was entitled to an account of the proceeds from the auction sale of the goods?
4. Whether the Plaintiff passed the necessary customs and paid the appropriate duties and taxes to have the imported goods cleared within the statutory period.

Area of Tax Law Considered

- the legality of the seizure and auction of goods and the proper procedure to follow in accounting for the proceeds
- Minor consideration on customs procedures, which are related to taxation on imported goods.

Arguments

Applicant (Taxpayer)

- The seizure and auction were unlawful because the Defendant failed to follow proper procedures.
- The government's directives regarding permits were new and that they had made prior arrangements with suppliers to import their goods.
- The Plaintiff was working to obtain the necessary permits when the goods were seized. Adequate notice of the auction should be given by the defendant while the permitting processes were ongoing.
- They had a proprietary interest in the goods which in their estimated were valued at US$3,894, 750 and were entitled to the proceeds of the sale
- Since the goods were in refrigerated containers, they should not have been considered perishable.

Defendant (Ghana Revenue Authority)

- The Plaintiff failed to clear the goods within the statutory period and that the goods were perishable.
- The goods were lawfully auctioned in accordance with the law. Procedurally, they are not obliged to inform the Plaintiff of the proceeds from the auction but must inform the Commissioner of the balance.
- The Plaintiff did not obtain the necessary permits in time.
- The Plaintiff failed to apply in writing to the Commissioner for the balance, within the legally permissible time limit.

Ruling

1. The seizure and auction of the forty-one (41) containers were lawful due to the perishable nature of the goods and the failure of the Plaintiff to clear the goods within the statutory period.
2. The Defendant did not properly account for the proceeds of the sale and ordered for the account for the proceeds of the auction sale of the 41 containers to be made available within one month from the date of the judgment.
3. The Defendant was ordered to provide an account of the auction sales, which should include costs in the discharge of duties, expenses of removal and sale, rent and charges due to the Government, freight and other charges. The Defendant was ordered to pay any balance to the Plaintiff, after the above deductions, within three weeks of receipt of the account.
4. The Plaintiff's claim that the value of goods in the 41 containers was $3,894,750. This was estimated at a value at $1,442,072.50.

Reasoning

i. Tax laws must be strictly interpretated.

ii. The court stated that although the seizure and auction were lawful due to the perishable nature of the goods, the Defendant did not provide evidence of the auction or how the proceeds were calculated.

iii. The Defendant had a duty to show that the auction was conducted fairly and in accordance with the law and provide a proper accounting of the proceeds.

iv. Any balance of the proceeds after deductions must be paid to the owner of the goods and not paid into the consolidated fund, unless it was in circumstances of forfeiture.

v. The were no basis for the claims of damages.

Principles for Tax Practitioners

i. Goods can be lawfully seized and auctioned for failure to clear them within the statutory period, especially if they are perishable. However, the authority

responsible for the auction must account for the proceeds in accordance with the law.

ii. The burden of proof lies with the authority to demonstrate that the auction was conducted lawfully and that the proceeds were properly accounted for.

iii. Even when goods are perishable and can be sold without notice, the owner is still entitled to the balance of the proceeds from the sale, after deducting all legitimate charges.

iv. The court used the Defendant's own admission of the value of the containers to calculate the total value, when the Defendant could not provide records of the auction sales.

References

Statutory

- sections 116, 117, 118, and 288 of the Customs Excise and Preventive Service (Management) Act, 1993 (PNDCL 330)
- section 60 of the Evidence Act, NRCD 323.

Caselaw

- Cape Brandy Syndicate v IRC [1921] 1 KB 64 at 71
- In Re Asere Stool; Nikoi Amontia VI (substituted by) Laryea Ayiku II (2005-2006). SCGLR 637
- Multichoice Ghana Ltd v Internal Revenue Service (SCGLR 783)

CASE 12

TITLE: MOVELLE COMPANY LTD VRS GHANA REVENUE AUTHORITY. (ON APPEAL TO THE COURT OF APPEAL)

Citation Judgment of the Court of Appeal referenced ….

Brief Facts:

Movelle Company Ltd (the Appellant) is a company engaged in the importation and trading of frozen meat products. The Appellant imported 1,750 metric tons, which was claimed to be about 58 forty-footer containers of frozen chicken and chicken parts, into Ghana between December 2013 and January 2014. As a matter of Government policy, such importations required import permits before importation and clearance of the products. The Appellant obtained an import license, but there was a delay in clearing goods at the port of Tema.

The Ghana Revenue Authority (the Respondent) auctioned twenty-one (21) forty-foot containers of frozen chicken on 17th April 2014, followed by another auction of twenty (20) containers on 20th June and 12th August 2014. The Appellant claimed that the forty-one (41) containers were unlawfully seized and auctioned, and the auction did not follow laid down procedures. The Appellant also claimed that the total value of the 41 containers was US$3,894,750.00.

The trial High Court found the seizure and sale of the goods unlawful but did not grant all of the reliefs sought by the Appellant. The trial judge accepted a statement of account filed by the Respondent after judgment, and the Appellant applied to set this aside. The Appellant then appealed the judgment of the trial court.

Grounds of Appeal

i. The trial judge erred in holding that the Appellant failed to prove that the seized and auctioned containers were valued at US$3,894,750.00.

ii. The trial judge erred in accepting the statement of account filed by the Respondent after judgment was delivered.

iii. The trial court did not have jurisdiction to accept a statement of account after it had delivered judgment on the substantive matter, as it was functus officio.

Issues

1. Whether or not the seizure and auction of the Appellant's forty-one (41) footer containers of frozen chicken was unlawful?
2. Whether or not the Appellant proved the value of the forty-one (41) containers of frozen chicken?
3. Whether or not the Respondent failed to follow mandatory statutory and administrative customs procedures regarding the seizure and auction of goods?
4. Whether the Appellant had a property interest in the auctioned products and the proceeds of the auction?
5. Whether the trial judge erred in accepting the statement of account filed by the Respondent after judgment was delivered and was functus officio in dealing with the statement of account after judgment was given?
6. Whether or not the value of the containers was admitted by the Respondent in their pleadings.

Areas of Tax Law Considered

- the legality of the seizure and auction of goods and the proper procedure to follow in accounting for the proceeds
- Minor consideration on customs procedures, which are related to taxation on imported goods.

Arguments

Appellant

- The seizure and auction of the forty-one (41) containers were unlawful as the Respondent failed to follow the correct procedures.
- The Appellant has a proprietary interest in the auctioned goods and is entitled to the proceeds.
- The trial judge was wrong to accept the statement of account filed by the Respondent after judgment was given.

- The trial judge was functus officio and had no jurisdiction to deal with the statement of account after judgment.
- The value of the seized containers was US$3,894,750.00 and this was admitted by the Respondent in their pleadings.
- The Appellant had no obligation to prove the value of the seized goods.

Respondent (Ghana Revenue Authority)

- The Respondent denied any liability for the refund of monies to the Appellant.
- The Appellant failed to obtain the required permit to clear the goods, which was the Appellant's responsibility.
- The goods were perishable and did not need any notice before being auctioned.
- The money realised from the sale was paid to the government, after covering costs.
- The Respondent contended the statement of account was accurate.

Ruling

The appeal was substantially successful.

1. The Court of Appeal found that the trial High Court Judge erred in accepting the statement of account after delivering judgement because the trial judge was functus officio.
2. The court ruled that the trial court made a wrong finding that the appellant had not proved the value of the 41 containers, when the value had in fact been admitted in the Respondent's pleadings.
3. The Court of Appeal ordered the Respondent to properly file a statement of account backed by necessary documentation including duties, expenses and obligations, within 21 days of the judgment.
4. The Court determined and subsequently ordered that the value of the containers seized amounting to US$3,894,750.00, less expenses, should be refunded to the Appellant.

Reasoning

i. The trial High Court Judge's acceptance of the statement of account filed after judgment was delivered was contrary to law and thus made him functus officio.

This meant that a Judge could no longer exercise his power to change or alter a decision once it is final.

ii. The court noted that the trial judge should have dealt with the issues concerning the statement of account as part of the proceedings, rather than as an ancillary matter after judgment.

iii. The Court found that the trial judge's ruling that the appellant failed to prove the value of the 41 containers was wrong because the Respondent had admitted the value in its pleadings. The Court clarified that a party's admission of fact in pleadings does not need to be proved by the other party. In this regard, the value of the containers was in fact proven through invoices which amounted to $3,914,750, which was a value higher than the amount claimed by the Appellant. The court underscored the need for a fair accounting for the proceeds of the sale.

iv. The court highlighted that a statement of account must be backed by documentation, not just figures.

v. The Court held that the seizure and auction of the goods was lawful because the goods were perishable.

Principles for Tax Practitioners

i. When a policy requires compliance by a person, there should be careful adherence to the policy to avoid legal consequences.

ii. The principle of functus officio prevents a judge from revisiting a decision after final judgment is delivered, especially to determine matters of substance.

iii. A statement of account filed after final judgment cannot be admitted by the Court.

iv. A party's admission of fact in pleadings does not require additional proof from the other party and is generally accepted as evidence of that fact.

v. When goods are sold under legal authority, the proceeds must be properly accounted for, with expenses and other charges deducted, and the balance paid to the owner of the goods.

vi. Statements of accounts should be backed by proper documentation and should be authentic.

vii. A party is permitted to appeal against two decisions of a lower court in the same case.

References

Statutory

- Sections 5, 8, 136, and 178(4) of the Evidence Act, 1975 (NRCD 323),
- Rule 20(4) and Rule 31 of the Court of Appeal Rules, 1997 (C. I. 19)
- sections 116, 117 and 118 of the Customs Excise and Preventive Service (Management) Act, PNDCL 330,

Caselaw

- Adams Addy v Solomon Mintah Arkaah (unreported) Suit No: J4/19/2021.
- Asante v Bogyabi (1966) GLR 232.
- British Columbia (Director of Forfeiture) v Sanghera 2017 BCSC 1519.
- Dam v J. K. Addo & Brothers (1962) 2 GLR 200.
- Faroe Atlantic Ltd v Attorney-General Civil Appeal Number (unreported) J4/22/2004. (26th January 2005)
- In Re Asere Stool; Nikoi Olai v Amontia IV SCGLR 637.
- Nana Ampofo Kyei Barfour v Justmoh Construction Ltd 2 SCGLR 288.
- Opanin Nantwi Ababio v Pastor Nana Edusei (unreported).Civil Appeal Suit No: J4/19/2014.
- Peter Egyin Mensah v Intercontinental Bank Ltd (unreported) Suit No: J4/13/2009.
- Qiu v Minister of Citizenship & Immigration 2019 FC 389.
- R. T. Briscoe v Amponsah (1969) CC 99.
- Stanley Kotei Hammond v Agbleze (unreported). Civil Appeal suit no J4/13/2021
- West African Enterprise Ltd v Western Hardwood Enterprise 1 GLR 155.

CASE 13

TITLE: PERSEUS MINING GHANA LTD v THE COMMISSIONER GENERAL, GHANA REVENUE AUTHORITY

Citation: Unreported judgment of the Court of Appeal….

High Court SUIT NO: CM/TAX/0515/2021 (8th February 2022)

Brief Facts:

Perseus Mining Ghana Limited (PMGL), a mining company engaged in the production and sales of gold was subjected to a tax audit by the Ghana Revenue Authority (GRA) covering assessment years from 2010 to 2017. The GRA issued a revised tax assessment, raising the company's tax liability from $8,725,387.49 to $10,207,164.17, citing tax avoidance concerns related to forward sales contracts.

PMGL objected to the assessment, contending that losses incurred from forward sales contracts should be deductible as business losses. However, the GRA maintained that these transactions constituted investment losses, not business losses. The High Court ruled in favor of the GRA, prompting PMGL to appeal to the Court of Appeal.

Grounds of Appeal

i. The Judgment of the High Court was against the weight of evidence as the Court erred in evaluating the facts.
ii. The High Court wrongly upheld the GRA's position on tax avoidance and hence misapplied the law.
iii. The Court erred in treating forward sales contracts as tax avoidance mechanisms.
iv. The Court wrongly classified forward sales losses as investment losses instead of business losses.
v. The Court misdirected itself by concluding that PMGL used different prices for royalty payments to the Government of Ghana and Franco Nevada Corporation.
vi. The GRA failed to justify its discretionary power in recharacterizing the forward sales contract and abused its exercise of discretion under Article 296(c) of the 1992 Constitution.
vii. The Court erred in treating forward sales contracts as related party transactions without evidence.

Issues:

1. Whether or not the forward sales contract losses should be classified as investment losses or business losses for tax purposes?
2. Whether or not GRA's recharacterization of transactions complied with Ghana's tax laws?
3. Whether PMGL's royalty payments were miscalculated based on spot gold prices and contract prices?
4. Whether the GRA lawfully exercised its discretion under Article 296(c) of the 1992 Constitution?

Areas of Tax Law Considered

i. Corporate tax – Tax treatment of business income and deductible losses.
ii. Transfer pricing – Application of related party transaction rules.
iii. Tax avoidance – GRA's power to recharacterize transactions under Section 34 of the Income Tax Act, 2015 (Act 896).
iv. Computation of Royalties – Treatment of mineral royalties under the Minerals & Mining Act, 2006 (Act 703), as amended.

Arguments

Appellant (Taxpayer)

- Forward sales contracts are business transactions, not investments. Losses incurred should be deductible from taxable income under Sections 19, 21, and 25 of Act 896.
- Forward sales contracts were conducted with independent third parties (Macquarie Bank Ltd and Credit Suisse AG), making them legitimate transactions rather than related party dealings.
- The High Court misapplied Section 34 of Act 896, as the forward contracts were neither fictitious nor a tax avoidance scheme.
- Royalty payments were correctly computed based on contractual obligations, distinguishing between statutory royalties (to the Government) and contractual royalties (to Franco Nevada Corporation).

Respondent (Ghana Revenue Authority)

- Forward sales contracts were tax avoidance schemes, structured to reduce taxable income artificially.
- Losses from forward sales contracts were investment losses, not business losses, and thus not deductible.
- PMGL used different prices to compute royalties, leading to inconsistencies.
- Under Section 34 of Act 896, it had the power to disregard transactions structured to minimize tax liability artificially.

Ruling

The Appeal succeeded.

i. The Court of Appeal ruled that Forward sales contract losses are deductible business losses, not investment losses, as per Section 7(2) of Act 592 (now Section 5(2) of Act 896).
ii. The respondent misapplied its discretionary power under Section 34 of Act 896, failing to provide sufficient evidence that PMGL's transactions were tax avoidance schemes.
iii. Royalty computations were correctly done by PMGL, with contractual payments to Franco Nevada Corporation separate from statutory royalties owed to the Government.
iv. The forward sales contracts were legitimate business transactions, not related party dealings.
v. The High Court failed to resolve primary facts, making conclusions unsupported by evidence.

Reasoning

i. The burden of proof in tax appeals (Section 92(1) of Act 915) lies with the taxpayer, but the GRA must objectively apply tax laws.
ii. GRA's discretion is subject to Article 296(c) of the 1992 Constitution – it must be exercised fairly and consistently.
iii. Investment losses and business losses are distinct – business losses incurred in the normal course of trade are deductible.

iv. Royalty payments should follow statutory and contractual obligations – PMGL did not engage in price manipulation.

Principles for Tax Practitioners

i. Forward sales contracts in mining are valid business transactions – losses from such contracts can be deducted from taxable income.

ii. The GRA must apply discretion fairly and within statutory limits – recharacterization of transactions must be evidence-based.

iii. Taxpayers should maintain clear documentation to defend the legitimacy of business transactions.

iv. Courts will uphold legitimate tax planning but strike down abusive tax avoidance schemes.

References

Constitutional and Statutory

- Article 296(c) 1992 Constitution of Ghana
- Sections 5(2), 9, 19, 21, 25, 31, 34, 131 of the Income Tax Act, 2015 (Act 896)
- Section 92(1) of the Revenue Administration Act, 2016 (Act 915)
- Section 7(2) Internal Revenue Act, 2000 (Act 592)
- Minerals & Mining Act, 2006 (Act 703), as amended by Act 794 and Act 900

Caselaw

- Placer Dome Canada Ltd v. The Queen
- James S.A. Macdonald v. Her Majesty the Queen (2019), Supreme Court of Canada

CASE 14

TITLE: BLUE SKY PRODUCTS (GHANA) LTD V COMMISSIONER OF GRA (DOMESTIC TAX) - (COURT OF APPEAL)

Citation: Unreported judgement of the Court of Appeal Suit No H1/42/2023 (25th January 2024)

Brief Facts:

This was an appeal against the decision of the High Court which dismissed a tax appeal brought by Blu Sky Products (Ghana) Ltd (the appellant) against the Final Objection decision of the Commissioner General of the Ghana Revenue Authority (the respondent). The objection was in respect of the interpretation of section 28(2) of the Free Zones Act 1995 (Act 504), and paragraphs 3(3) and 4 of the First Schedule of the Income Tax Act, 2015 (Act 896). Section 28 (1) of Act 504 exempts free zones enterprises from payment of income tax on profits for the first ten years from the commencement of operation in business. The appellant contends that after the ten year concession period, agro-processing company engaged in the export of non-traditional exports shall be assessed income tax a rate not exceeding 8%.The Appellant being a free zones agro-processing company had assessed its own liability for the first half of the year under this Act and not 15% under the first schedule of Act 896. However, the respondent argued that the tax assessment of the appellant should have been worked out at 15% under Act 896. This was objected to by the appellant which submitted the appeal decision by the GRA to the High Court.

The High Court dismissed the appellants submission that they operated within two tax regimes and affirmed the tax decision of the respondent.

Grounds of Appeal:

1. The High Court erred in law when it held that the appellant is a free zones enterprise and had previously enjoyed the benefits of the tax regime applicable to free zones enterprises, and therefore no longer entitled as a producer and exporter of non-traditional products to the more favourable tax regime even though the appellant can be categorized as such. This conclusion flies in the face of the basic distinction in tax law between tax evasion and tax avoidance.

2. The High Court erred in law when it ruled that the appeal is not against the Constitutional provisions of article 17.

Issues:

1. Whether or not the appellant after the tax concessionary period under section 28(1) of Act 504 was taxable under paragraph 3(3) or paragraph 4 of the first schedule of Act 896.
2.

Areas of tax law considered

i. Interpretation of tax laws.
ii. Application of tax laws after the expiry of a tax concession.
iii. Free zones companies
iv. Tax avoidance

Arguments

Appellant (Taxpayer)

i. Statutes must be read as a whole which in this instance was not considered by the High Court.
ii. It is a rule of tax law and practice that a taxpayer can organize his affairs to pay the least possible tax. Thus, the Court erred in considering the act by the appellant as tax evasion.
iii. The conclusion by the High Court that the appellant after enjoying a decade tax concession under the Free Zones Act could no longer be considered under paragraph 3(3) of Act 896. Thus, after the tax concession, section 28(2) of the freezones Act kicked in and they could not be asked to pay more than 8% after profit in tax.
iv. The definition of discrimination by the High Court was in error and that was so because the company is a foreign company.

Respondent (Ghana Revenue Authority)

i. The appellant's position is erroneous and untenable as paragraph 3(3) of the first schedule applied to companies outside the free zones operating within the domestic economy which are involved in the export of non-traditional

products whiles paragraph 4 applies to free zone enterprises which export goods or services outside the national customs territory.

ii. The appellant fell under paragraph 4 of the first schedule of Act 896.

iii. Alleged inconsistencies in section 28(2) of Act 504 and paragraph 4 of the first schedule of Act 896 are untenable in law.

iv. The law permits the Commissioner General under section 34 (2) of Act 896 to disregard any tax avoidance arrangements.

v. Appellant failed to prove alleged discrimination.

Ruling

The appeal failed.

1. The company is required to pay the 15% tax under paragraph 4 of the First Schedule of Act 896 and not 8% under paragraph 3(3) of the same schedule.
2. Respondent was justified in applying the 15% tax rate in the assessment of the appellants tax liabilities.

Reasoning:

1. Fiscal statutes are subject to the general rules of interpretation and thus must be read as a whole and not in piecemeal. Where the language used in the fiscal legislation is ambiguous, which would require the courts to fall on external aids to interpretation, the strict constructionist approach will not be applied. The literalist approach may be more applicable.
2. The company after enjoying the ten-year period tax concession, cannot opt to be considered under paragraph 3(3) of the first schedule of Act 896.
3. The status of the appellant as a free zone entity by election placed it under paragraph 4 of the first schedule of Act 896. The concessionary rate of 8% applies only to companies that are not registered as free zones companies

Principles for Tax Practitioners

i. Tax minimization schemes that are outside the spirit law may be disregarded by tax authorities

ii. Where a claimant establishes a prima facie case on the existence of a tax avoidance arrangement, the onus will shift to the respondent to demonstrate that this tax avoidance arrangement was not abusive.

iii. The concessionary rate of 8% under paragraph 3 of the first schedule of Act 896 applies only to companies that are not registered as free zones companies.

References

Constitutional

- Article 17 of the Constitution

Statutory

- sections 28 (1) and (2) of the Free Zones Act 1995 (Act 504)
- paragraphs 3(3) and 4 of the First Schedule of the Income Tax Act, 2015 (Act 896).

Caselaw

- Afrifa v Ghana Revenue Authority and Attorney General [2022] GHASC (unreported)
- Amidu No (3) v Waterville Holdings (BVI) Ltd. & Woyome (No. 2) (2013-2014) 1 SCGLR 606
- Asare Baah III and Ors v Attorney General and Electoral Commission [2010] SCGLR 463
- Copthorne Holdings Ltd v Canada [2011] 3 SCR 721
- IRC v Fishers Executors (**1926**) AC 395
- Republic v Commissioner of Income Tax; Ex parte Maatschappij De Fijlmhouthandel [1974]1GLR 28
- Mangin v IRC [1971] All ER 179
- Multichoice Ghana Ltd v Commissioner IRS [2011] 2 SCGLR 783

Books

- Dominic Adjei (2020). Modern Approach to the Law of Interpretation. 3rd edition
- Yaw D Oppong (2022). Contemporary Trends in the Law of Immovable Property.

CASE15

TITLE: COCA-COLA EQUATORIAL AFRICA LIMITED VRS THE COMMISSIONER-GENERAL

Citation:

Brief Facts

Coca-Cola Equatorial Africa Limited (the **"Appellant"**) is a company engaged in the business of extraction and sale of water under its Voltic brand and provides marketing and other support services to its affiliates as well as other related administrative activities to the Coca-Cola Export Corporation. The Commissioner-General of the Ghana Revenue Authority (the **''Respondent''**) is the head of the Ghana Revenue Authority ("GRA"), a statutory body responsible for tax administration and revenue collection in Ghana.

In December 2019, the Respondent conducted a tax audit into the activities of the Appellant from 2016-2018. After the assessment, the Respondent issued a final audit report and after appeal against same by the Appellant, a final tax liability of GHs33,143,375.15 comprising a direct tax liability of GHs25,428,311.59 and an indirect tax liability of GHs7,715,063.56 was imposed on the Appellant. The Appellant still aggrieved by the Respondent's decision filed an appeal at the High Court.

Grounds Of Appeal

The Appellant filed an appeal on the following grounds:

1. The Respondent erred in law by imposing withholding tax, pursuant to Section 115(1) of the income Tax Act,2015(ACT 896) on the outright purchase of trademark by the Appellant from Voltic International Inc under the wrong assumption that the transaction was a payment for royalties;
2. The Respondent erred in law by imposing withholding tax on accrued transactions/expenses which were subsequently reversed for non-performance and therefore not invoiced for payment;
3. The Respondent erred in law by imposing withholding tax on expenses of staff salaries reimbursed to an employment agency when the requisite PAYE taxes had

already been withheld by the employment agency and paid over to the Respondent pursuant to section 114 of the income Tax Act, 2015 (Act 896);

4. The Respondent erred in law by wrongly construing trade discount which had accrued in 2017 year of assessment as a commission and subjecting it to a withholding tax of 10%, purportedly pursuant to section 116 (1)(a)(v) of the income Tax Act 2015 (Act 896);

Issues:

1. Whether or not the payment of GHS88,862,404.00 by the Appellant to Voltic International constitutes an outright purchase of a Trademark and therefore not subject to withholding tax?
2. Whether or not the Appellant is not liable for withholding tax on transactions between 2017-2018 which were later reversed and not invoiced for payment?
3. Whether or not the withholding tax on the reimbursed staff salaries amounted to double taxation when the required PAYE taxes had already been paid to the Respondent by the employment agency of the Appellant?
4. Whether or not the Respondent erred by construing the Appellant's trade discount as a commission and therefore subjected same to a withholding tax of 7.5% in the 2017 assessment?
5. Whether or not the Respondent erred in law by imposing a withholding tax of 15% on the Appellant's trade discount in the 2018 assessment?
6. Whether or not the supply of service by the Appellant consumed outside the jurisdiction is subjected to VAT, NHIL and GETFund Levy by the Respondent contrary to item 3(3) of the second schedule of the Value Added Tax, 2013 (Act 870)?

Areas of Tax Law Considered

i. Tax discounts
ii. Withholding tax
iii. Value added tax

Arguments

Appellant (Taxpayer)

i. payment made to Voltic International Inc. was in respect of outright purchase of intangible asset (trademark) than royalties for the use of trademark. Withholding should therefore not apply to the payment.

ii. Trade discount is performance based and can be accumulated and given at the end of the year. The discount should therefore not be construed as commission for the purposes of Withholding tax.

iii. The Commissioner-General cannot in law impose withholding tax on accrued transactions/expenses which were subsequently reversed for non-performance and therefore not invoiced for payment.

iv. Reimbursement of staff salary to an employment agency should not suffer withholding tax particularly since PAYE have already been deducted by their employers before the amount were finally paid to them.

v. The respondent was wrong to impose Value Added Tax (VAT); National Health Insurance Levy (NHIL) and Ghana Education Trust levy (GETFundL) on a supply of services by the Appellant, which was consumed outside the country, contrary to item 3(3) of the second schedule to the Value Added Tax, 2013 (Act 870).

Respondent (Ghana Revenue Authority)

i. The Appellant failed to provide the Respondent with all the necessary documents to establish that the payment for the trademark to Voltic International was an outright purchase and not payment of royalties. The Appellant failed to provide a sale and purchase Agreement to that effect and hence, withholding tax was applicable..

ii. Transactions/expenses for which withholding tax was imposed were captured from the financial statements of the Appellant. The Appellant did not provide any evidence to prove that the expenses incurred were subsequently reversed and

indeed if the transactions had been reversed, it would not have formed part of the Appellant's annual returns and financial statements.

iii. The service agreement between the Appellant and Voltic Ghana Limited for the provision of water extraction services did not evidence a contract for the supply of labour. Further, the Appellant made payment to Voltic Ghana Limited without withholding tax as required under the Income Tax Act. The Respondent, however, concedes that the correct rate to have been used is 7.5% instead of 15% which was used in the tax audit report.

iv. A trade discount is given as a reduction on the original invoice price and not given at the end of the year.

v. The trade discount was in substance a commission pursuant to Section 116(1)(a)(v) because the Appellant's customers still paid the full price of every supply made to them during the period under review. The commission is therefore subject to tax and the Respondent concedes that the appropriate rate to have been used is 7.5% and not 10% as used in the tax audit report. The Respondent did not double tax the Appellant, it merely erroneously taxed the amount at 10%. The commission is different from the understated revenue and as such, could not refer to the same thing.

vi. The fact that export is based in the USA does not negate the fact that the services for it were performed in Ghana and thus, by the combined effect of Sections 1 and 5 of the VAT Act, 2013 (Act 870), the supply of service is subject to VAT.

Ruling and Reasoning

ISSUE 1: The Appellant failed to prove that the trademark obtained was an outright purchase and not a right of use. Though the Appellant provided a Bill of Sale which conveys an intention to sell and purchase an asset, it does not state that the subject matter is the trademark in question or define what was sold and at what cost. The Bill of Sale subjects itself to the Asset Purchase Agreement which the Appellant failed to share with the court. In the absence of same, the Court

infers that payments made were for user rights. Payments for user rights constitutes payment of royalties which are subject to withholding tax under Section 115(1) of the Income Tax Act.

ISSUE 2: The Appellant failed to provide the requisite documents to prove the reversal of the transactions/expenses incurred between 2017-2018 which was subjected to a withholding tax by the Respondent. The Appellant failed to execute the burden of proof laid on him to show that there had been compliance with the provisions of the tax laws as such, the Respondent did not err in subjecting the transactions to withholding tax.

ISSUE 3: The agreement in question is the Supply of Project Support Services agreement between the Appellant and FKV & Associates (the "Agreement") and not the agreement between the Appellant and Voltic for water extraction services as mistaken by the Respondent. The Agreement was still in force for the period under review and therefore the imposition of a withholding tax on the reimbursed staff salaries when the requisite PAYE taxes had already been withheld by the employment agency was wrong in fact and in law and same be reversed by the Respondent.

ISSUE 4: The Respondent did not err in construing the discount as a commission and subjecting same to a withholding tax of 7.5% in the 2017 assessment as provided under section 116(1)(a)(v) of Act 870 and Regulation 21 of the Value Added Tax Regulation,2016(LI 2243). The alleged tax discounts were not stated on the tax invoices issued by the Appellant hence, there was no proof of discounts given. The Respondent has the right to re-characterise or disregard a transaction under Section 34 of Act 896 where the form of the transaction does not reflect its substance. The discount was in fact a commission.

ISSUE 5: the Respondent, in its Reply, admitted that the fourth and fifth ground of appeal refer to the same transaction. 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 be admitted. On issue 4, the court already concluded that the amount was a commission under the guise of a discount. The Respondent cannot come up with another figure already considered as trade discount and fail to characterise its nature as a commission while imposing tax on same without justification. The Respondent thereby erred in imposing 15% withholding tax on the trade discount made to the Appellant's customers in the 2018 assessment.

ISSUE 6: If the consumer business is located outside the country, the consumption of the service is deemed to be outside the country. Such services are therefore exported and zero rated for VAT purposes under item 3 of the Second Schedule of the VAT Act ("Act 870"). In the instant case, the services rendered by the Appellant under the agreement were mainly in the form of advice and recommendations to the Coca-Cola Export Corporation which is located outside the country, hence, the consumption of the service is also outside the country and should be zero rated for VAT purposes. The destination principle as espoused by OECD was applied.

Principles for Tax Practitioners

i. In tax matters, the taxpayer bears the burden to show that there has been compliance with the provisions of the tax law per Section 92 of the Revenue Administration Act, 2016 (Act 915).

ii. With respect to the imposition of a penalty, including proceedings on appeal under or for the recovery of a penalty, the burden rests on the Commissioner-General to show non-compliance with the provisions of the law per Section 92 of the Revenue Administration Act, 2016 (Act 915).

iii. Trade discounts offered to customers should always be written on the VAT invoice while cash discounts should be recorded on the debit side of the cash book evidencing that the customer has received the benefit.

iv. The Commissioner-General of the GRA has the right to re-characterise or disregard a transaction under Section 34 of Act 896 where the form of the transaction does not reflect its substance.

v. Where the consumer business is located outside the country, the consumption of the service is deemed to be outside the country for VAT purposes. As such, VAT must be zero rated.

CASE16

TITLE: KWASI NYANTAKYI OWIREDU VRS. COMMISSIONER-GENERAL GHANA REVENUE AUTHORITY)

Citation: Unreported Judgment of the Supreme Court (Civil Suit No. CM/TAX/0142/2019) dated 20th December 2019.

Digital Citation:

Brief Facts:

This was an appeal to the High Court by a mortgagor (Kwasi Nyantakyi Owiredu) who has a mortgage with the Ghana Home Loans Ltd with monthly interest payment. The appellant proposed for his employers to deduct this monthly interest payment upfront. However, the employers requested for an authorization from the Commissioner General of the Ghana Revenue Authority. The appellant subsequently wrote to the Commissioner General twice on 25th August 2017 and 1st November 2018 for this authorization. The Commissioner General however responded that Ghana's tax laws did not permit the upfront monthly deductions of mortgage incurred in respect of an acquisition of an individual's place of residence and such a claim would be available after the appellant had filed his annual tax returns.

The appellant thus appealed seeking a quashing of the decisions of the Commissioner General on 25th August 2017 and 1st November 2018, and for an order that allows the appellant to have his mortgage deductions made upfront on a monthly basis rather than annually. This appeal was brough under section 44 of the Revenue Administration Act 2016 (Act 915).

Ground of Appeal:

Both the appellant and the tax authority agree that the interest paid on the mortgage is deductible from the assessable income of the appellant in order to determine the chargeable income under sections 8 and 9 of the Income Tax Act, 2015 (Act 896).

However, the appellant claims that section 8 does not apply and that mortgage interest paid can be deducted on a monthly basis whiles the Commissioner General claims that this can only be allowed after a person has filed his annual returns.

Issues:

The central issue is whether mortgage interest can be deducted upfront monthly under Ghana's tax laws for an employee paying mortgage interest on their residential premises. The determination is whether it is permissible under the tax laws of Ghana for an employee who pays mortgage interest on his only residential premises on monthly basis to claim or deduct the mortgage interest paid in determining his monthly chargeable income.

The deductibility of the mortgage interest in general was not in issue as stated by the court. The issue was to do with the timing or whether it could be done monthly or at the end of the year after annual returns have been filed.

Issue

Whether or not it is permissible under Ghana's tax laws for an employee who pays mortgage interest on his only residential property on monthly basis to claim or deduct the mortgage interest paid in determining his monthly chargeable income?

Areas of Tax Law Considered

i. Mortgage Interest Payment
ii. Personal Income Tax

Arguments

Appellant (Taxpayer)

i. Mortgage interest is paid monthly according to section 19 (2) Act 896 and for cash basis accounting, a person incurs an expense when that expense is paid for.

ii. To the extent that the monthly mortgage interest is paid monthly, the said interest must be allowed to be deducted once this can be proven every month.

Respondent (Ghana Revenue Authority)

i. The income of an individual from an employment, business or investment for a year of assessment can only be ascertained by the end of the year when tax returns are filed. Thus, it is at the filing that a mortgage interest incurred during the year can be claimed.

Respondent (GHANA REVENUE AUTHORITY):

i The income of an individual from an employment, business or investment for a year of assessment can only be ascertained by the end of the year when tax returns are filed. Thus, it is at the filing that a mortgage interest incurred during the year can be claimed.

ii The Commissioner General stated that "the tax laws do not permit the upfront monthly deductions of mortgage interest incurred in respect of an acquisition of an individual's place of residence".

iii Consequently, the claim for the deduction of the mortgage interest incurred during the year in respect of an acquisition of your place of residence will be available to you after you have filed your annual tax returns for the year.

Ruling:

The High Court held that the deduction of mortgage interest is not premised on the annual income of the employee but rather on the fact that the mortgage interest has been duly paid in accordance with section 19 (2) and 20 (b) of Act 896.

The Appeal succeeded and the Court declared that the appellant is entitled under law to have an upfront deduction of a mortgage interest payed by him at anytime that the employer makes a qualifying cash payment to him being weekly, monthly or yearly.

Reasoning of the Court:

i Mortgage interest is not a tax relief, but a concession granted on a temporary basis to allow an employee to acquire for himself one house during his lifetime. Once the employee has completed the payment of this mortgage, this concession expires and the employee subsequently cannot deduct mortgage payment in accordance with section 134 and the sixth schedule of the Act.

ii Regulation 4 (2), (3),(4) of Income Tax Regulation 2016 (LI2244) enjoins employers to make on a monthly basis, estimates of the tax liabilities of employees for the year of assessment.

iii An employer is enjoined under paragraph 4 (3) of the sixth schedule of Act 896 to make deduction in favour of an employee who can prove the cash payment of a mortgage interest.

iv The argument of the Commissioner General is not wholly correct. He should have considered the provisions of Regulation 4 of LI 2244.

v The appellant does not need to wait till the end of the year for mortgage interest payment to be made in his favour after the filing of a tax return.

vi The Commissioner General did not take the effect of Regulation 4(2) (3) (4) of the Income Tax Regulation, 2016, LI 2244 into consideration and that in so far as an employee has made cash payment for interest on mortgage and once he is able to

furnish proof of such payment to his employer, the employee is at liberty to have such mortgage interest deducted in his favour within the meaning of paragraph 4(3) of the sixth schedule to the Income Tax Act, 2015, Act 896.

Principles for Tax Practitioners:

An employee is entitled to an upfront deduction of mortgage interest paid any time their employer makes a qualifying cash payment, provided they can prove the mortgage interest payment. This is in accordance with Regulation 4(2)(3)(4) of the Income Tax Regulation, 2016, LI 2244 and paragraph 4(3) of the sixth schedule to the Income Tax Act, 2015, Act 896.

References:

Statutory references

- section 19 (2) and 20 (b) of Act 896
- Regulation 4 (2), (3), (4) of Income Tax Regulation 2016 (LI2244)
- Section 44 of the Revenue Administration Act, 2016, Act 915.
- Section 8 and 9 of Act 986.
- Paragraph 4(3) of the sixth schedule to the Income Tax Act, 2015, Act 896.
- Section 134 and the sixth schedule to the Act.

CASE17

TITLE: BUMI AMARDA GHANA LTD VRS THE COMMISSIONER-GENERAL (GHANA REVENUE AUTHORITY)

Citation: **Unreported Judgment of the High Court – Commercial Division (Civil Suit No. CM/TAX/0225/2022) dated 8 February 2022.**

Digital Citation:

Brief Facts:

Bumi Armada Ghana Ltd (the "Appellant") is a company incorporated under the laws of Ghana as a wholly owned subsidiary of Bumi Armada Offshore Holding Ltd (BAOH), also wholly owned by Bumi Armada Berhad (BAB). The company is a subcontractor under a Petroleum Agreement with Eni Ghana Exploration and Production Ltd and the Government of Ghana. The respondent is the Commissioner General of the Ghana Revenue Authority.

The Company had relied on an earlier a private ruling from the Respondent in the year 2014 (June) on the cascading effect of withholding tax as it related to payments made by a subcontractor under its Petroleum Agreement to the subcontractor's affiliates or third-party subcontractors; in this application, the respondent (Commissioner-General of GRA) and stated that the subcontractor had no obligations under Section 27 of the then Petroleum Income Tax law, 1987 (PNDC Law 188) to withhold tax from any payments to such a person in respect of Eni's Petroleum Agreement.

In 2021, GRA performed an audit on Bumi Amarda which resulted in a $4,451,653.32 . This amount was challenged and revised to $3,750,011.19. The bulk of this liability stemmed from the Appellant's reliance on the earlier private ruling leading to a failure to withhold tax on

payment to associated sub contractors to the Appellant.

The Appellant, dissatisfied with the revised tax liability of $3,750,011.19, filed an appeal at the High Court. This instant appeal was against the tax decision by the respondent of $3,750,011.19.

Ground of Appeal:

i The Respondent erred in law by interpreting the scope of the Eni Ghana Exploration and Production Limited's Petroleum Agreement to exclude contracts for the supply of services between the Appellant and its sub-subcontractors.
ii The Respondent erred in law by classifying payments made by Bumi Armada to its sub-subcontractors for the services, including manpower services as subject to withholding tax and/or pay as you earn (PAYE) payments.
iii The Respondent misdirected itself in the assessment of withholding tax for the 2015-2019 assessment years
iv The tax decision of the Respondent is against the weight of evidence..

Issues:

i Whether or not the appellant has duly invoked the jurisdiction of the Court

ii Whether or not the Respondent erred in law by interpreting the scope of the Eni Ghana Exploration and Production Limited's Petroleum Agreement to exclude contracts for the supply of services between the Appellant and its sub-subcontractors.

iii Whether or not the Respondent erred in law by classifying payments made by Bumi Armada to its sub-subcontractors for the services, including manpower services as subject to withholding tax and/or pay as you earn (PAYE) payments.

iv Whether or not the Respondent misdirected itself in the assessment of withholding tax for the 2015-2019 years of assessment.

v Whether or not the ruling of the Commissioner General dated 1st October 2014 on the application of PNDCL 188 has any legal effect.

Areas of Tax Law Considered

- Jurisdiction of the Court in Tax Appeals
- Cascading effect under PNDC Law 188
- Retrospectivity of Tax Laws
- Tax Assessments under Petroleum Agreements
- Withholding Taxes and Pay as You Earn (PAYE) in relation to 3rd party non resident companies.

Arguments

Appellant (Taxpayer):

i. The Appellant signed a charter party with Eni Ghana for the provision of patrol vessels. Due to this agreement, Eni Ghana in a letter dated 14th June 2014 requested a private ruling from the respondent on the cascading effect of withholding tax as it relates to payments made by a sub-contractor under the Petroleum Agreement to its affiliates or to 3rd party sub-subcontractors.

ii. The respondent's reply in a letter dated 1st October 2014 indicated that the subcontractor had no obligations under section 27 of PNDCL 188 to withhold tax under the agreement with Eni Ghana Limited. The respondent further provided that in agreements with 3rd parties who were non-resident under the agreement, which gives rise to income accruing in or derived in Ghana, the subcontractor should give a notice to the respondent in writing in 30 days of entering the contract to determine the treatment of such tax issues arising out of the contract.

iii. The respondent failed to respond to such a request from the Appellant, two years after such a request was made by the Appellant (first letter written on 12th January 2017 and a reminder sent on 19th January 2019).

iv. The respondent in a response dated 20th January 2020 indicated that a contract for the supply of services with a non-resident company does not fall under the Eni Agreement. The letter also indicated that the Cascading rule afforded the appellant under PNDCL 188 has been abolished by the introduction of the Income Tax Act 2015 (Act 896) and the Income Tax Regulations 2016 (LI 2244). Thus, the Appellant is required to deduct withholding taxes when dealing with services from non-resident companies who are providing services under the Eni Agreement.

v. The Appellant appealed against this decision arguing that the revocation of the cascading rule should have a prospective and not a retrospective effect.

Respondent (Commissioner General)

i The appellant failed to provide any proof of its compliance with Order 54 rule 4 (1) and (2) of the High Court Civil Procedure Rules 2004 (C.I.47), which renders the suit incompetent and must be dismissed.

ii Tax Appellant could not come under omnibus grounds in a tax appeal.

iii GRA argued that the said private ruling had been revoked by L.I 2244.

iv The Respondent further argued that the Appellant relied on a revoked private ruling and also the ruling was specifically issued to Eni Ghana to avoid payment of certain taxes; "the unmasking of which resulted in the bulk of the Appellant's tax liability".

Ruling:

i The High Court's jurisdiction has been properly invoked to entertain the matter between the parties

ii In the ruling of the honourable court, it was upheld that the Agreement between the Appellant and its sub contractor(s) preceded the passage of LI 2244 and hence the revocation of the cascading effect does not apply retrospectively to it.

iii Section 106(5)(b) of the Revenue Administration Act 2016 (Act 915) makes it clear "the amended or revoked part of a private or class ruling and does not apply to

arrangements commenced after the amendment or revocation". Grounds 1 upheld.

iv The Court Upheld Grounds 2 that "the Respondent erred in law by interpreting the scope of the Eni Ghana Exploration and Production Limited's Petroleum Agreement to exclude contracts for the supply of services between the Appellant and its sub-subcontractors".

i. The Appellant provided further information to the effect that the manpower was not their employees but persons that the 3rd sub contractors used to perform the service. It is not the responsibility of the Sub-contractor (Appellant) to deduct PAYE on the 3rd Sub-contractor employees. manpower services as subject to withholding tax and/or pay as you earn (PAYE). This ground of appeal succeeded.

v On Ground 3, the Court directed the Parties to appoint an independent auditor to perform a reconciliation of the discrepancies.

vi The provisions of Order 54 of C.I 47 on Tax Appeals do not provide modifications to the rules to admit of omnibus grounds of appeal. This appeal failed.

(Note: The parties finally applied to the court to do the reconciliation between themselves and after the reconciliation, the Court Adopted the report and the liabilities there in in a later ruling in a SUIT NO.: CM/TAX/0100/2022, 19 October 2022).

Reasoning of the Court:

i The Agreement between the Appellant and its sub contractor(s) preceded the passage of LI 2244 and hence the revocation of the cascading effect does not apply retrospectively to it.

ii Section 106(5)(b) of the Revenue Administration Act 2016 (Act 915) makes it clear "the amended or revoked part of a private or class ruling and does not apply to arrangements commenced after the amendment or revocation". Grounds 1 upheld.

iii The Court Upheld Grounds 2 that "the Respondent erred in law by interpreting the scope of the Eni Ghana Exploration and Production Limited's Petroleum Agreement to exclude contracts for the supply of services between the Appellant and its sub-subcontractors".

iv The Appellant provided further information to the effect that the manpower was not their employees but persons that the 3rd sub contractors used to perform the service. It is not the responsibility of the Sub-contractor (Appellant) to deduct PAYE on the 3rd Sub-contractor employees.

v The appellant had made a payment of the sum of $1,335,490, which when compared with the initial tax assessment of the respondent, constitutes about 35.6 of the tax amount, which is above the one-quarter provision under order 54 of C.I.47. This is on the authority of Biesdorf Ghana Ltd v The Commissioner General.

vi The applicable laws at the time of the tax audit were Act 915, Act 896 and LI 2244. Section 71(4) of Act 896 is in pari-materia with section 27 (1) of PNDCL 188 to the effect that a contractor under a petroleum agreement is required to withhold tax on any payments due to a subcontractor under the same contract. The revocation of the ruling on the cascading effect by the respondent is not applicable to arrangements between the subcontractor and sub-subcontractor that entered into force before the passage of LI 2244. Section 106 (5) (b) of the Revenue Administration Act,2016 (Act 915) are in tandem with article 107 (b) with the 1992 Constitution which prohibits retrospectivity of laws.

vii The contract between the appellant and its sub-subcontractors was one for the provision of services by way of the provision of manpower services by which they provided their own staff for the execution of the contracts and hence, were responsible for the payment of their taxes. Thus, the payment of withholding tax and or PAYE is not applicable.

viii The rules on tax appeals are clearly set out in Order 54 of C.I.47 and nowhere in the rules are provisions made for omnibus tax appeals based on the provisions of Rule 3(2) of Order 54 of C.I 47.

Principles for Tax Practitioners:

i. Assessments are not done on the trail balance but on the Income Statement, Statement on Financial Position, cashflow and statement and notes to the

financial statement. When in doubt, a professional auditor should be consulted for assistance.

ii. Tax appeals must be specifically drafted and not to be considered on omnibus grounds as this will not succeed.

iii. Tax laws may also be prospective and provisions of new tax legislations must be studied to ensure that it either prospective or retrospective.

iv. Article 107(b) of the 1992 Constitution prevents the imposition of limitations and burdens retrospectively, hence the revocation does not apply to arrangements which were made before the passage of the new laws.

LAW REFERENCES:

Constitutional

Article 107 (2) of the Constitution 1992

Statutory references

- Income Tax Regulation 2016 (LI2244)
- Section 106 (5) (b) of the Revenue Administration Act,2016 (Act 915)
- section 27 of the Petroleum Income Tax Act, 1987 (PNDCL 188)
- Order 54 of the High Court Civil Procedure Rules 2004 (C.I.47)
- Income Tax Act, 2015 (Act 896),
- Income Tax Regulation, 2016 (L.I 2244)
- Section 27 (1) of PNDCL 188

Caselaw:

i. Biesdorf Ghana Ltd v The Commissioner General.

ii. Republic V. Commissioner of Income Tax; Ex Parte Maatschappij De Fijnhouthandel N.V. (Fynhout) [1976] 1 GLR 380-386

iii. Adu Kofi Djin v. Seidu Musa Baako (2007 - 2008) SCGL page 686

iv. Charlse Queye V. Joseph Nii Teiko Amuzu

v. Standard Chartered Bank V. Cal Bank Ltd (2020) CA Suit No. H1/1/2019

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CONTACT US:

WEBSIT

https://taxnobrah.com/

RICHARD AMO-HENE:

Richard.amo-hene@taxnobrah.com

SOCIAL MEDIA HANDLES

YouTube

https://www.youtube.com/@TaxNobRAH

LinkedIn

www.linkedin.com/in/taxnob-rah-247590357

Twitter

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