Tax & Regulatory Journal

A PwC review and commentary on topical tax issues and recent tax judgements in Ghana

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Content

Commentary

We welcome you to the maiden edition of our Tax & Regulatory Journal. This edition focuses on articles from our Tax Controversy and Dispute Resolution (TCDR) team. The main purpose of this publication is to highlight some important issues from court judgements and unclear provisions of some laws. We highlight some recent tax judgements and share our views on some of the issues. We make the case that Tax is a specialised area and the courts should consider using referees or experts in some of the cases. This will help the court in considering all relevant matters before arriving at a decision.

Our TCDR teams assist clients to avoid controversies with the tax authority by complying with the relevant laws and regulations. Where there is a dispute, our teams assist clients navigate the process to arrive at a successful outcome.

Ghana has seen a gradual rise in tax disputes with taxpayers increasingly challenging tax assessments issued by the tax authority. This is evident in the number of judgments issued by the superior courts of Ghana.

In 2020, the Revenue Administration (Amendment) Act, 2020 (Act 1029) was enacted. This law established the Independent Tax Appeals Board to give the opportunity to taxpayers to settle disputes with the tax authority before the traditional courts are invited. This Board is yet to commence work and we expect taxpayers to take advantage of this opportunity once operations commence.

In this edition, we share some insights on the difficulties some of the 2023 tax amendments currently present to taxpayers. We discuss problems of passing a tax law during the accounting years of taxpayers and the difficulties in adjusting to the new law.

We also discuss four court judgements. The first case we review concerned subcontractors and the applicability of Branch Profit Tax. Both the High Court and Court of Appeal decided that the tax applies to a subcontractor. This issue affects even some petroleum contractors.

The second discussion is on the procedure that taxpayers are to adopt when challenging a tax decision. Are they to appeal the decision or to seek for judicial review of an administrative decision of the Commissioner-General? We explain why some cases involving Practice Notes and Private Rulings should not have been entertained by the courts. We also explain how some judicial review applications which appear as challenges to tax decisions should have been rejected by the courts.

The next article reviews three recent decisions from the Supreme Court on whether the requirement to pay 30% of domestic taxes before challenging an assessment is unconstitutional. The requirement to pay ¼ of taxes before proceeding to the High Court was also challenged. The Supreme Court rejected the unconstitutionality claim relating to both. We analyse the court's reasoning and conclude that the court's justifications did not consider certain factors that could have led to Ghana following the example of other countries that do not have such requirements to enable taxpayers access justice to challenge tax assessments.

The last article reviews the issue on determination of the place of supply when a service is provided to a foreign entity for Value-Added Tax purposes. In that case, the High Court held that the place of supply for such a service is the business location of the recipient of the service. That is, if the recipient is located outside Ghana, then the supply is to be treated as an export and zero-rated automatically.

At PwC, our purpose is to build trust in society and solve important problems. We're a network of firms in 151 countries with over 360,000 people who are committed to delivering quality in assurance, advisory and tax services. Find out more and tell us what matters to you by visiting us at www.pwc.com.

Challenges in implementing the 2023 tax changes

As part of the measures announced in the 2023 National Budget, there were multiple changes to the calculation of income taxes for individuals and businesses. The Growth and Sustainability Levy was introduced and applies to all businesses.

These legislative changes were scheduled to have been completed before 1 January 2023. Unfortunately, they only became effective in May 2023.

Businesses must be careful, particularly with respect to the 2023 year of assessment, to ensure compliance with these new changes especially when the changes may apply to a part of the year.

The Ghana Revenue Authority (GRA) announced that the Income Tax (Amendment) Act, 2023 (Act 1094), which was gazetted on 3 April 2023, would be effective from 1 May 2023. The measures in Act 1094 were announced in the 2023 National Budget and were expected to be passed by Parliament to become effective from 1 January 2023. Another law, the Growth and Sustainability Levy Act, 2023 (Act 1095) was also gazetted on the same day.

Unfortunately, although Parliament's Finance Committee had worked on the Bills before the Christmas recess, Parliament was unable to pass these Bills before 2022 ended. This meant the 2023 calendar year started without the new measures taking effect.

The Income Tax Act, 2015 (Act 896), as amended, allows companies to choose their accounting or financial years. The financial year of most companies in Ghana starts in January and ends in December. Some companies run a July-June financial year among other variations.

The Government's financial year however, as provided by the Public Financial Management Act, 2016 (Act 921), starts from January and ends in December. This means new measures that are announced in the National Budget are almost always going to start from January.

The current problem is that some measures in Act 1094, which were intended to start from 1 January 2023 have been pushed to 1 May 2023. All companies must find ways of complying with the new laws.

Some of the new measures include new graduated tax rates for individuals, increment of 1% concessionary tax rate to 5%, non-deductibility of unrealised exchange losses, and imposition of Growth and Sustainability Levy (GSL). The GSL is an enhanced form of the National Fiscal Stabilisation Levy (NFSL), which operated on selected industries.

We will focus on the non-deductibility of unrealised exchange losses, the imposition of GSL and the introduction of a minimum chargeable income.

Change in deductibility rules for unrealised exchange losses

From 1 May 2023, companies are no longer allowed to deduct unrealised exchange losses.

They must wait until the losses are realised. That is, these losses are only treated as incurred when the foreign debt is paid, or foreign revenue is received.

For most businesses, this new rule came after they had started their financial year. The problem is whether the taxpayer is expected to reverse only unrealised exchange losses suffered after 1 May 2023 or the taxpayer is supposed to reverse the total unrealised exchange loss at the end of the year.

It is worth mentioning that this provision, in and of itself, is problematic because it taxes unrealised exchange gains but does not permit deduction of the unrealised exchange losses. Ideally, once both unrealised gains and losses have not been earned or incurred, they should be treated similarly. This treatment is also necessary because the same item which gives rise to a gain today, may generate a loss tomorrow. We hope this law sees an amendment soon.

Generally, the exchange rate at year-end and the rate used to book the amount are the only relevant rates. This means that taxpayers would ordinarily apply the new provision on the total balance of unrealised exchange losses at year-end. However, for the 2023 year of assessment, taxpayers may consider applying this provision to only unrealised exchange losses incurred after May 2023. That is, they should find the monthly losses up to April and apply the old rules to those amounts especially if the full-year application will negatively affect them.

On this same issue, the amendment also provided that any exchange loss from transactions between two resident persons is not deductible. This is consistent with the Bank of Ghana's directive that discourages pricing, receipting or making payments for goods and services in foreign currency in Ghana without authorisation.

What happens if the person has authorisation from Bank of Ghana? Assuming the business is authorised to invoice in and receive USD in Ghana, it is likely its customers will incur exchange losses. Does this amendment mean these customers cannot deduct the exchange losses, even though they have not broken any law? What about businesses that have USD loans from commercial banks in Ghana? Since both parties are resident, does that mean the business cannot deduct any exchange loss on these loans?

Imposition of GSL

For the tax rate changes in the Income Tax Act, the law already provides a transitional mechanism. Act 896 provides that whenever the tax rate to be applied on income for the year changes during the year, the taxpayer is required to apply the two rates in a specific way.

Let's take the change in rates for individuals, assuming the individual's income is entirely from employment, the employer is required to determine the individual's annual tax using the old rate. After that, the employer must determine the individual's annual tax using the new rate.

So, we will have two annual taxes using both the old and new rates. The law then says the employer is required to do an apportionment. Firstly, the annual tax based on the old rates will be apportioned using the number of months the rate was in existence. Secondly, the same apportionment is done for the annual tax based on the new rates. So, the formula will be (4/12 * annual tax based on old rates) + (8/12 * annual tax based on new rates).

The good thing is that Act 896 anticipates this problem and provides details on how to resolve it. However, there is no such transitional mechanism for the GSL.

The GSL, especially for companies that were not paying the NFSL and are not in the extractive industry, will be a fresh imposition of taxes. This category of persons must generally pay 2.5% of their profit before tax as GSL.

For a company whose financial year ends in December, what does that mean for it? Does the 2.5% apply to the entire profit for the year? Must it apportion the profit since between January and April this Levy was not in force? If it must apportion, does it simply exclude the profits for the first four months of 2023? Is it better to apportion based on the same guidance provided in Act 896?

These are all questions that Act 1095 fails to address. It is understandable that the Government, in submitting the Bill, did not address this problem since it expected the Levy to have commenced on 1 January 2023. When this date was missed, Parliament could have anticipated this problem and catered for it by providing a transitional mechanism.

Had the transitional mechanism even been provided, that would have assisted only businesses whose financial years aligned with the Government's, i.e., January to December. Assuming the GSL had started in January 2023, what about companies whose financial years ended in June 2023? These companies would have done six months without knowledge of the Levy being introduced.

Currently, those companies whose financial years ended in June 2023 would have spent ten months in their year without the GSL being in force. How do they calculate the GSL? Do they do a simple apportionment of the profit based on the two months?

Determining the profit for GSL

As a start, a guiding post for anyone confronted with these issues is that the Constitution, 1992, frowns on retroactive legislation, especially if the legislation affects accrued rights of persons. This ordinarily means a law should not be passed at the end or in the middle of a person's financial year to tax income earned before the law was made.

However, there are views that income and profit are variables that can only be determined at the end of the year and hence a change during the year should apply to the entire year. That is, if the tax is imposed during the year and the tax is supposed to apply to the profit for the year, then the tax should apply to the whole profit. The basis is that so long as the year has not ended, there should be no argument on retroactivity especially when at the time the tax was passed, the final profit was unknown.

At PwC, we believe based on the arguments, the scale tilts in favour of apportioning the profit for the year. The alternative will mean that even on the last day of the year, Parliament could pass a law to impose a new tax on profit for the entire year. This will be unfair to taxpayers and so the profit requires apportionment.

We also support the view that the profit should be apportioned based on the number of months the new tax existed in the year. When Parliament wanted to select a method of apportionment in Act 896, it preferred this method.

Fiscal stability relating to GSL

Another issue is the applicability of GSL on some specific companies that have special Agreements with the Government. These special Agreements contain stabilisation clauses. Some of these clauses provide that the Government guarantees that new tax laws or changes in existing laws will not affect the other parties to the Agreement. These Agreements are required to be approved by Parliament.

However, Section 2 of the GSL law provides language to suggest that the Government is unilaterally amending the special Agreements. It says, "The Levy imposed under section 1 applies to the specified companies and institutions despite any provision to the contrary in any agreement or enactment relating to a tax holiday or exemption from direct or indirect tax applicable to a company or institution".

The simple meaning of this provision is that regardless of whatever Agreement a person has that says they are not liable to taxes in Ghana, the GSL will apply. Surely, Parliament was aware of the tax exemptions it approved before approving this provision in the GSL law. Can the Government insist on collecting the GSL from these companies with such Agreements? Can the companies resist and take action under the dispute clauses in these Agreements?

Risk for underestimating GSL?

The GSL is to be paid quarterly and based on estimated profits. What happens if the total payments made by a taxpayer is lower than the correct payment? Can the GRA legally apply provisions in other laws to impose interest for underestimating the Levies as is done for income tax?

Double taxation of GSL

The current nature of the GSL will lead to double taxation for a group of companies in Ghana. That is, if a resident parent company owns a subsidiary in Ghana, both the parent and the subsidiary may pay the GSL on the profits. There is no exemption for the subsidiary. The exemption is necessary because the same person will end up paying the GSL twice.

Lessons can be drawn from Act 896. For dividends, where a resident parent company owns at least 25% of the voting power of another resident company, dividends received by the parent company are exempt from income tax. Tax is only paid when the parent or holding company pays dividend to its shareholders. The same concept should apply to GSL. That is, with a group of companies with layers, GSL should be excluded from any dividend paid to the resident parent company.

	Subsidiary	Parent	Total tax
PBT	100.00	72.50	
GSL	(2.50)	(1.81)	(4.31)
TAX	(25.00)	0.00	(25.00)
PAT	72.50	70.69	
Dividend tax	0.00	(5.66)	(5.66)
Cheque	72.50	65.03	(34.97)

From the illustration in the table, the parent company does not pay any income tax on the dividend it receives but must pay GSL on the dividend. The 1.81 GSL needs to be excluded to avoid the same stream of income getting taxed multiple times in the hands of the same ultimate person.

Minimum chargeable income

Act 1094 also introduces a minimum chargeable income for a specific category of taxpayers. This minimum chargeable income applies to taxpayers who have recorded losses for the past five consecutive years. This is the main qualification criterion among other conditions.

If a person meets all the other conditions, the law provides that the person's chargeable income should be calculated in a special way. 5% of the turnover is deemed as the chargeable income. The tax rate is then applied. However, the law does not make it automatic. It gives the GRA the discretion to apply this provision. That means, this provision can only apply if the GRA writes to a taxpayer or serves them with a notice of assessment.

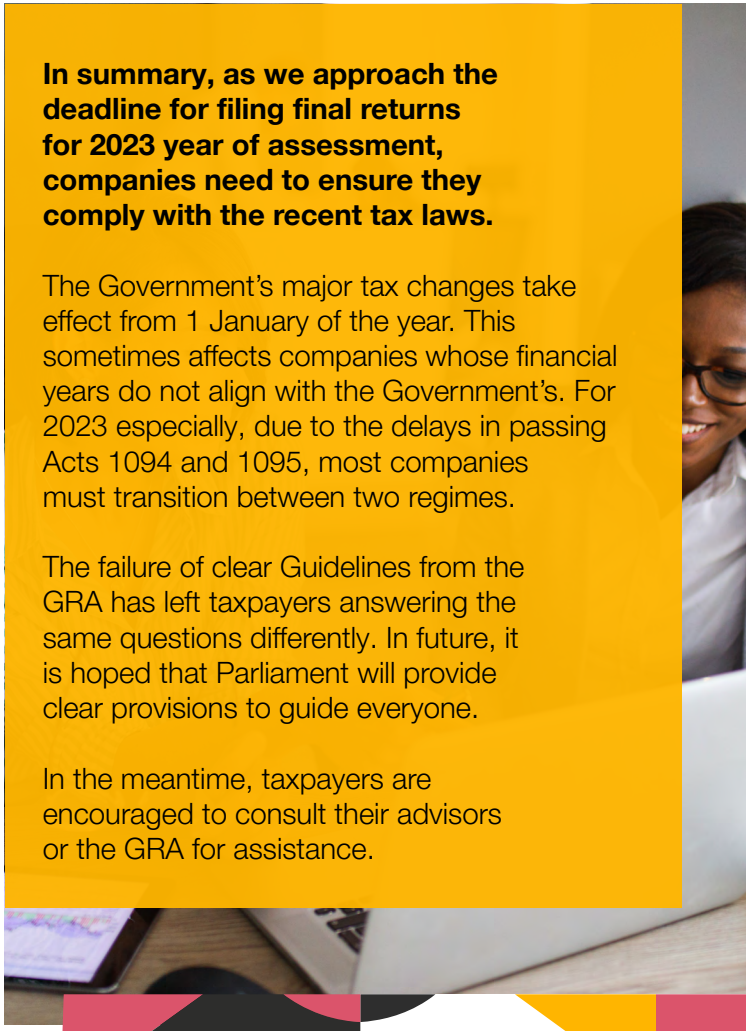
The issue is what happens when a taxpayer meets all these conditions and has normal chargeable income for the year? Can the GRA legitimately calculate tax on both the normal chargeable income and the minimum chargeable income? It appears to us that the intention of the law is to apply only one at a time. The minimum chargeable income only applies if there is no normal chargeable income.
Also, what if a taxpayer has adjusted income and uses its unused tax losses to reduce the income to zero, does that also count as a loss year? That is in counting the five years, must there be an actual amount to be carried forward as tax loss first? Our view is that a loss means excess expenses over income. So even if prior year losses are used to reduce current year income to zero, there is no loss.

In summary, as we approach the deadline for filing final returns for 2023 year of assessment, companies need to ensure they comply with the recent tax laws.

The Government's major tax changes take effect from 1 January of the year. This sometimes affects companies whose financial years do not align with the Government's. For 2023 especially, due to the delays in passing Acts 1094 and 1095, most companies must transition between two regimes.

The failure of clear Guidelines from the GRA has left taxpayers answering the same questions differently. In future, it is hoped that Parliament will provide clear provisions to guide everyone.

In the meantime, taxpayers are encouraged to consult their advisors or the GRA for assistance.



Branch Profit Tax and petroleum operations

This article discusses the Court of Appeal decision in **Maersk Drillship IV Singapore v Commissioner-General**. The appellant is a subcontractor that operates in Ghana as a branch. Its income from petroleum operations is subject to a final tax of 5%, which was confirmed by a High Court.

The main issue that was discussed in the appeal is whether after paying the 5% final tax, there should be tax on repatriation of the after-tax profits. The appellant disagreed with the High Court's conclusions that the tax should apply. The Court of Appeal arrived at a similar decision as the High Court and dismissed the appeal.

In 2016, the legal framework for the upstream petroleum industry was updated. The Petroleum (Exploration and Production) Act, 2016 (Act 919) repealed and replaced the Petroleum (Exploration and Production) Act, 1984 (PNDCL 84). The Income Tax Act, 2015, (Act 896), which became effective in 2016, impliedly repealed the Petroleum Income Tax Act, 1987 (PNDCL 188). PNDCL 188 was substantively repealed by the Revenue Administration Act, 2016 (Act 915). Despite the repeal of PNDCL 84 and PNDCL 188, these two laws continue to apply to Petroleum Agreements (PA) that stabilise petroleum operations under them in Ghana.

The upstream petroleum industry has been busy discussing the applicability or otherwise of Branch Profit Tax (BPT) to petroleum operations in Ghana. Whereas the Ghana Revenue Authority (GRA) believes there is no special provision that shields upstream petroleum contractors and subcontractors from BPT, these businesses believe they are not required to pay BPT.

Currently, Tullow Ghana Limited has taken the Government of Ghana to arbitration at the International Chamber of Commerce in London. One of the issues is a BPT assessment of US$320m that was served on the company by the GRA. This dispute is yet to be concluded. Maersk Drillship IV Singapore, a subcontractor to ENI which is a petroleum contractor, also appealed against an assessment of BPT to the High Court. In July 2022, the High Court ruled that there was legal justification for the assessment. Unhappy, Maersk further appealed. In October 2023, the Court of Appeal unanimously dismissed the appeal against the BPT. Whether Maersk will further appeal to the Supreme Court of Ghana is unclear.

We will focus on the judgement of the Court of Appeal in this article. We will explain why in our view, the court did not consider all the relevant dimensions to this dispute and may have ruled otherwise had it done so.

Appellant's case

Maersk argued and continues to hold that as a subcontractor, its taxes are listed in Article 12 of the ENI PA. This Article provides that a subcontractor is not to be taxed outside Article 12 of the PA in respect of any activity related to petroleum operations in Ghana.

It further adds that the contractor is to withhold 5% tax on all payments for works and services provided by a subcontractor.

Maersk links the said Article 12 of the PA to section 27 of PNDCL 188 which is saved by the provisions of the ENI PA. Section 27 of PNDCL 188 provides that once the contractor withholds the 5% tax, the subcontractor is not liable to any withholding tax under a general law. The section adds that the general law does not apply at all to the calculation of the gains and profits of a non-resident subcontractor who only provides works and services under a petroleum agreement.

To Maersk, the combination of the PA and PNDCL 188 makes the 5% tax withheld on it a final tax. As a result, when the branch is repatriating the after-tax profit to the head office, BPT is inapplicable. Maersk also attempted to rely on Article 26 of the PA, which is on fiscal stability. Maersk explains that the High Court was wrong to rely on Section 6 of Act 896, which is on income from investment. Maersk adds that it only has one client which is inarguably engaged in petroleum operations, hence, there should be no concern over whether its profit is entirely from petroleum operations.

Another argument that Maersk appears to be making is that there is no separation between the head office and the branch as the latter is a legal extension of the former. That is, it is the head office that has the subcontract, and it is that entity that pays the 5% tax. If it is made to pay the BPT, the same entity would be paying BPT on money which is already in its hands. That is, there is no actual repatriation since it is the head office that earned the income.

Respondent's case

The GRA was naturally happy with the High Court's decision on the BPT and said the High Court properly construed all the relevant provisions. The GRA added that the 5% withholding tax for payment relating to works and services has nothing to do with BPT. It added that there was no prohibition against the imposition of BPT for subcontractors. The GRA stated that the final tax of 5% relates to business income whereas BPT is an investment income item and hence the two are separate.

The GRA continued that Section 39(5) of PNDCL 188 allows the general tax laws of Ghana to apply in addition to PNDCL 188. The only way to escape the application of the general tax laws of Ghana is to show an exemption contained in a Legislative Instrument. Since no such Instrument exists, there is no exemption. The GRA also relied on the separate legal personality concept of a permanent establishment under the Act 896 to explain that the branch is a separate person that is distinct from the head office.

Court's opinion

The court agreed with the GRA and dismissed this appeal. The court set out for itself three questions. Firstly, it was interested in knowing whose income is the subject of the dispute. That is whether the tax is on the branch or the head office. It answered that the branch earned income from petroleum operation while the head office earned repatriated profits, which is comparable to dividend.

The court then wondered if the income in dispute constitutes assessable income. The court relied on sections 63(3) and 3(2)(b) of Act 896 to conclude that the head office earned chargeable income in Ghana. This chargeable income is attributable to investment income.

Finally, the court looked at whether the income in dispute is an exempt income. The court rejected the appellant's argument that no further tax is to be applied on the income from petroleum operations. The court went back to section 3(2)(b) of Act 896 to insist that the income in the hands of the head office is chargeable income that is taxable in Ghana.

Analysis of the judgement

The appellant did not see a difference between itself as the branch in Ghana and the head office. The respondent on the other hand, argues that so long as the branch was registered under Ghana's laws, it was separate from its head office.

The court concluded that it is the branch which is the subcontractor and not the non-resident person. The court first relied on Section 107 of Act 896, which provides that, **"A permanent establishment [i.e., the Branch] is an entity separate from its owner".** It then said, **"Our view of the separateness of the Appellant from its Ghanaian permanent establishment is bolstered by the provisions of Section 311 of Act 992. This section provides that where an external company's parent company is liquidated in its country of origin, the local manager must go through an entire procedure starting with the notification to the Registrar-General. Without complying with the provisions of Section 311 of Act 992, the locally registered entity, the External Company continues to exist."**

We are sure the court meant to say Section 311 of Act 179. The equivalent in Act 992 is Section 338. On this point about the independence of a branch, yes, we agree that Act 896 is explicit on this. We however want to draw attention

that this is a deemed concept under Act 896 only and it is not the case that legally, a branch is independent of its head office. A branch is not incorporated as a company. It is merely a registration of the foreign company in Ghana- i.e., a fixed place of business. Its registration under Ghana's Companies Act, 2019 (Act 992) depends entirely on notarised documents relating to the head office.

In fact, once the head office ceases to exist, the branch cannot exist. Section 338(4) penalises anyone who continues to carry on business for the branch after its head office stops existing. It says, **"A person who in the Republic carries on, or purports to carry on, business on behalf of the company after the date on which it was dissolved or has otherwise ceased to exist in the country in which it was incorporated, is liable to pay to the Registrar, an administrative penalty …"**

So, clearly, from a purely legal perspective, it is said that the branch is an extension of the head office, hence, there is no difference between a branch and its head office. However, for income tax purposes, especially for Act 896, the two are deemed to be separate and independent.

We submit that outside Act 896, PNDCL 84 requires creation of a branch. Section 23(15)(a) of PNDCL 84 provides that, **"…[a] contractor or sub-contractor which is not an incorporated company in Ghana … shall register an incorporated company in Ghana … to be authorised to carry out solely petroleum operations …and such company shall be a signatory to any petroleum agreement".**

This provision means that a subcontractor could be a non-resident person but if that happens, it had a duty of registering a branch in Ghana so that the branch becomes the subcontractor. So, even if the non-resident person is the party to the contract, it is its branch in Ghana that is deemed as the true subcontractor. That is under PNDCL 84, there cannot be a non-resident subcontractor. The provision works very well for a contractor since the contractor will be subject to tax on its profits under PNDCL 188. It however creates a problem for a subcontractor. That is, PNDCL 84 and PNDCL 188 do not neatly align.

Further, the provision does not directly say the branch will be a signatory to a petroleum subcontract. It rather mentions "petroleum agreement", to which a subcontractor is never a party. Regardless of the literal nature of the text, there are views that the intention of registering a presence is to make the registered entity the subcontractor. We do not share this interpretation but proceed as if it is true.

So, while PNDCL 84 does not anticipate a non-resident subcontractor, PNDCL 188 does. PNDCL 188 defines a subcontractor to mean, "a person who enters into a contract with a contractor for the provision of work or services including rental of plant and equipment, in the Republic for or in connection with the petroleum agreement to which the contractor is a party and where a petroleum agreement so provides includes a "non-resident person" or "non-resident company" as those terms are defined in the Internal Revenue Act, 2000 (Act 592) who under the terms of a contract provide that work or service".

From the definition, the PA needs to provide for the existence of a non-resident subcontractor.

When we check the ENI PA, there seems to be an indication of this. Article 13.5 provides that, "Contractor shall have the right to make direct payments … to those of its Subcontractors … 'not resident in Ghana' … for … performance of services, whether imported into Ghana or supplied or performed therein for Petroleum Operations carried out hereunder, in accordance with the provisions of this Agreement …". It appears to us that once the contractor is given the right to pay subcontractors that are not resident in Ghana, the PA has allowed the contractor to engage non-resident subcontractor. This will mean the PA has provided for existence of a non-resident subcontractor.

Further, Section 27(4) of the revised PNDCL 188 says, "The relevant provisions of the Internal Revenue Act, 2000 (Act 592) do not apply to the calculation of the gains and profits of a person who is a non-resident subcontractor by reason only of the provision by the non-resident sub-contractor of work or services for or in connection with a petroleum agreement." Here, the law appears to be saying that non-resident persons who provide works and services under a PA should not be taxed under a general tax law. The original version of PNDCL 188 provided that, "Nothing in section 2(1) of the Income Tax Decree, 1975 (SMCD 5) shall apply to the calculation of the gains and profits of a person who is a non-resident sub-contractor by reason only of the provision by such non-resident sub-contractor of work or services for or in connection with a Petroleum Agreement."

The original version was saying that the income of the non-resident subcontractor should not be considered as assessable income under the general tax law. The same meaning is maintained in the revised edition since "gains and profits" relate to assessable income.

In other words, PNDCL 188 anticipates existence of a non-resident subcontractor and does not make any provision for the separate legal personality concept. The tax is on the non-resident person and no general tax law is to apply. Unfortunately, although the appellant drew the court's attention to section 27(4), there was no discussion on the implication of this provision.

Special nature of the petroleum industry

The upstream petroleum industry is heavily capital-intensive. As a result, it requires certainty. This helps the industry players to prepare models to support their huge investments. This is one of the reasons why Ghana's laws contain specific provisions for subcontractors.

Subcontractors do not have any contractual arrangement with the Government, but they have special provisions in PNDCL 84 and PNDCL 188. The purpose of the provisions for subcontractors in PNDCL 188 is to create certainty around their taxes and by extension, their costs. Since they work exclusively for the contractors, any increment in their costs will be passed on to the contractor. That is why even the PA contains special provisions for them and gives them stability. So, a petroleum subcontractor is not merely a company operating in the industry. It has special rules that need to be considered.

The court spent some time in establishing that the head office earned chargeable income. It then said, "Consequently, while the income earned by the Ghanaian permanent establishment is not subject to further taxes under the Petroleum Agreement when the Ghanaian permanent establishment remits profits to its parent company, the Appellant, the latter, a non-resident entity earning income from a Ghanaian

permanent establishment, is earning income as contemplated under Section 3(2)(b)(ii) of Act 896. Given that the Appellant is a separate legal entity and is not itself a party to the subcontract, as the party to that agreement would be the income earner - the Appellant's separate and distinct permanent establishment, the Appellant is not contemplated under the Petroleum Agreement or the Petroleum Income Tax Act."

The first discussion point from the passage above is whether Section 3(2)(b)(ii) applies to branch profit. This provision says, "The assessable income of a person for a year of assessment from any employment, business or investment is in the case of a non-resident person, where the person has a Ghanaian permanent establishment, income for the year that is connected with the permanent establishment, irrespective of the source of the income."

This provision is showing how to tax a non-resident person who has as permanent establishment. The tax is ultimately on the non-resident person. The court appears to be saying this same provision applies twice to a non-resident person on the same income.

In the first instance, the non-resident person pays tax based on all the income connected with permanent establishment. The court expects the same section to apply to the same non-resident person for BPT. With due respect, that is not an accurate structure of Act 896. The same section is not the basis of BPT. BPT is imposed on its own under Section 60 and is not connected with assessable income.

The court proceeds to say that the non-resident person is not a party to the subcontract. The court fails to establish any factual basis for this statement. The court does not rely on evidence of the agreement with ENI to say it is the branch that signed and hence it is the subcontractor. The court does not also rely on PNDCL 84 to say the branch is deemed to be the party to the subcontract.

The court may have assumed that it is the branch that signed the agreement in its own capacity. Our experience with these kinds of arrangements, especially when there is a branch involved, is that the main agreement is with the head office and the branch is only set up to execute it. It is more likely than not that the branch is not a signatory to the agreement.

It is striking to us that the court concludes that the Petroleum Agreement, and by extension, the PNDCL 188 do not apply to exempt the repatriated profits from tax without performing any analysis on these two instruments. The appellant argued that it is covered by Articles 12 and 26 of the PA, and section 27 of the PNDCL 188. There was no

discussion on these provisions and so we do not know the court's interpretation of these provisions.

The court spent its entire analysis on Act 896, which is a law whose applicability is questioned by the appellant. It would have been helpful for the court to first explain why the appellant's set of authorities are irrelevant.

BPT and the Contractor

Similarly, a contractor has special tax rules that need to be considered. A contractor cannot be treated as an ordinary company under PNDCL 188. For instance, Section 39(3) of PNDCL 188 provides that after the contractor pays tax on its petroleum income, no tax is to be applied or withholding tax required under the general tax law. The provision specifies that dividend or any income paid out of the amount which has already been taxed under PNDCL 188 should not be taxed.

This means that for a petroleum contractor operating under PNDCL 188, dividend is exempt from tax. Payments like dividends are also exempt from tax. This may be part of Tullow's dispute with the Government. The Government may be relying on the separate legal personality concept at the arbitration. The separate entity concept only applies when there is no special provision disabling it.

If the court's proposition that the PA and PNDCL 188 only cover business profits is to be accepted, one wonders how the court would view the effect of Section 39(3). It says, "There shall be no tax charged, or withholding of tax required, under the provisions of the Income Tax Decree, 1975 (SMCD 5) in respect of any income, or dividends paid out of any income which is taken into account in ascertaining chargeable income or loss under the provisions of this Law, or which is excluded from gross income hereunder."

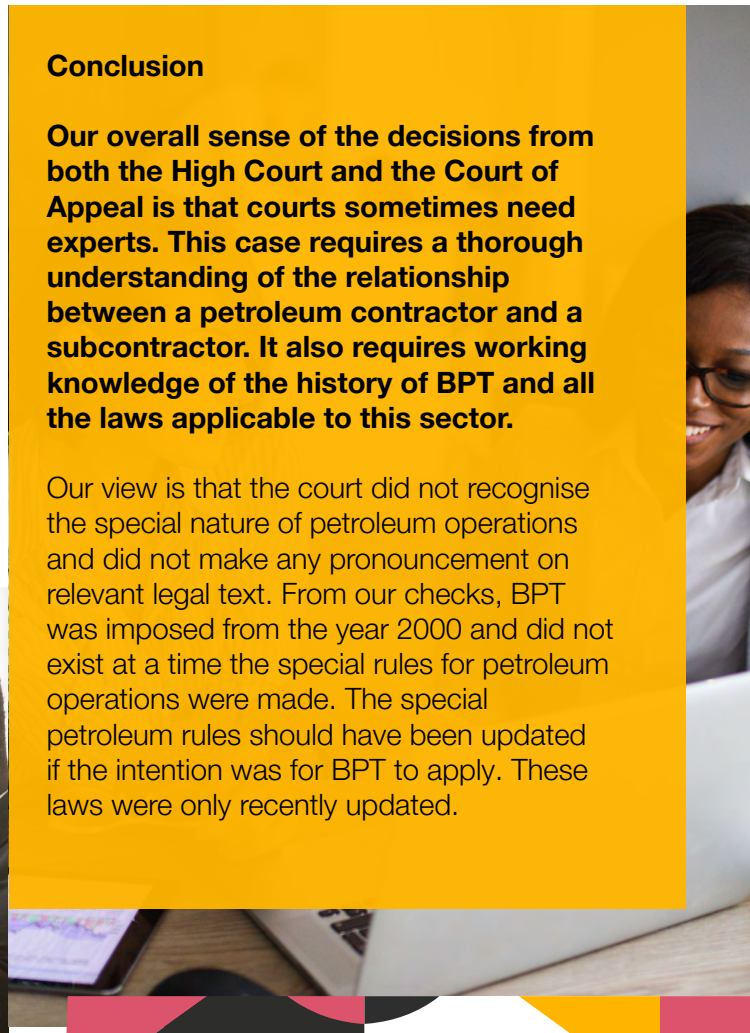
For a contractor that is a subsidiary which operates under the PNDCL 188, clearly, its dividend payments are not taxable under the general tax law. SMCD 5 which was mentioned above, was repealed and replaced by Act 592, which has in turn been replaced by Act 896.

If BPT needs to be looked at as if it were dividend tax as this judgement holds, that means for a contractor that is a branch in Ghana, BPT should not apply. Otherwise, there will be unfair discrimination. A contractor that is not a branch, such as ENI, will not pay dividend tax but Tullow will be required to pay.

Conclusion

Our overall sense of the decisions from both the High Court and the Court of Appeal is that courts sometimes need experts. This case requires a thorough understanding of the relationship between a petroleum contractor and a subcontractor. It also requires working knowledge of the history of BPT and all the laws applicable to this sector.

Our view is that the court did not recognise the special nature of petroleum operations and did not make any pronouncement on relevant legal text. From our checks, BPT was imposed from the year 2000 and did not exist at a time the special rules for petroleum operations were made. The special petroleum rules should have been updated if the intention was for BPT to apply. These laws were only recently updated.



Tax appeals and judicial review: when to use which process

This article reviews the law on challenging a decision made by the Commissioner-General and how the courts have applied those provisions. We argue that in challenging a tax decision, the default position in the Revenue Administration Act is that it must be by an appeal. Seeking judicial review conflicts with the express provision of the law. The courts have given conflicting messages on the correct approach.

Further, not every action can be challenged in court. Private Rulings and Practice Notes have special rules that must be followed to be challenged.

Ghana's tax administration system is regulated by the Revenue Administration Act, 2016 (Act 915). One of the items covered by Act 915 is the right of a taxpayer to challenge a tax decision of the Commissioner-General (CG). In 2020 this law was amended to enhance the appeal process by establishing the Independent Tax Appeals Board (ITAB). Act 915 sets out how decisions taken by the CG can be challenged.

Despite the procedure in Act 915, Ghanaian courts have decided cases contrary to the intention of Parliament. Courts have entertained judicial review applications to tax and objection decisions. The Supreme Court has given conflicting messages on when a taxpayer can appeal and when a judicial review is the appropriate procedure.

Generally, a taxpayer can go to the High Court to appeal an objection decision from the CG. The High Court can also be asked to exercise its discretionary power to judicially review a decision or omission by an administrative body. The reliefs from a judicial review process include forcing the administrative body to do something and setting aside a decision of the administrative body.

Private Rulings and Practice Notes

The first case to be reviewed is **Kwasi Nyantakyi Owiredu v Commissioner-General (CM/TAX/0142/2019)**. In this case, the appellant asked the court to set aside a Private Ruling (PR) issued by the CG. He requested a PR from the CG for confirmation that his mortgage interest, which he incurred monthly, could be deducted from his assessable income for each month. The alternative was to do a one-time deduction of the total annual interest when filing his personal income tax return in April of the next year.

The CG responded that the interest should be deducted in his annual return and not taken monthly. Dissatisfied with the response, he brought an action in court. The court agreed with him, set the PR aside, and declared that he was entitled to monthly deduction of the interest. This case is interesting since it appears to conflict with an express provision in Act 915 on reviewability of a PR.

Our comments are limited to the procedure, and not the substantive issue of whether the law allows monthly deduction of monthly interest.

Section 103(1) of Act 915 provides that a PR contains the CG's position on the application of a tax law to an arrangement. A taxpayer has the right to ask the CG what their position is on an arrangement they have entered or are about to enter. The PR, once it is given, binds the CG who cannot later change their mind in a way that adversely affects the taxpayer. This is like the doctrine of legitimate expectation under the Common Law. The taxpayer is free to depart from whatever the CG says and is not bound by the ruling.

Further, Section 103(6) of Act 915 says, **"A private or class ruling is not subject to challenge but a person may challenge a tax decision made with respect to an arrangement which is the subject of a private or class ruling."** This section is clear that a taxpayer cannot disagree with a PR and seek to challenge it. That is why the taxpayer is given the right to depart from the position contained in the PR. If the GRA applies the PR and issues a tax assessment, that assessment can be challenged as a tax decision.

Our view is that the law was avoiding multiple actions in court that challenge the CG's interpretation of the law when the CG has not demanded any tax based on those interpretations. In most cases, at the time the PR is issued, the taxpayer only contemplates engaging in the arrangement. The taxpayer may decide not to go ahead with the proposed arrangement. It is only when the CG raises an assessment in line with the PR that the taxpayer can properly challenge that interpretation. This is because at the time the CG is raising an assessment, the arrangement must have been entered or become a reality.

From the Nyantakyi case, the CG did not issue any assessment based on the PR. The taxpayer

could have disagreed with the CG and encouraged his employer to deduct the interest monthly. If the CG stands by their ruling and issues an assessment, it is then that the taxpayer or his employer could have objected. The court may have missed the fact that the reliefs sought by the appellant affected a PR and the law was clear that a PR could not be challenged directly.

Another case related to this is **Hon. Clement Apaak v Ghana Revenue Authority (CM/TAX/0448/2017)**. The plaintiff challenged a Practice Note issued by the CG. The plaintiff disagreed with some positions expressed by the CG and sought some declaratory reliefs on the interpretation of a VAT amendment law. This case falls in the same category as the first one because going by the express provision of the law, the court lacked jurisdiction to hear the case. Section 100(1) of Act 915 allows the CG to issue Practice Notes that will explain the CG's interpretation of tax laws.

Like a PR, a Practice Note only binds the CG and there is no obligation for the taxpayer to follow the CG's interpretation. Although there is no express provision that a Practice Note cannot be challenged, our view is that a Practice Note is substantially the same as a Private Ruling. The difference is that in a Practice Note, the CG unilaterally provides his interpretation but in a Private Ruling, a taxpayer requests the interpretation.

So, a taxpayer should not be able to challenge a Practice Note as was done in this case. Act 915 provides the situations that a Practice Note can be amended or revoked, and court declarations are not part. Additionally, Act 915 specifically excludes both a Practice Note and a Private Ruling from decisions that can be appealed against under the dispute resolution mechanism it provides.

How to challenge tax decisions

The substantive item we want to discuss is tax decisions and how to challenge them. Section 41 of Act 915 defines a tax decision as any decision made by the CG under a tax law. A tax decision includes every decision except those specifically excluded by the law. The dispute resolution mechanism provided in the law is that all tax decisions can be challenged within 30 days after they are made, or the taxpayer is notified.

Section 42 contains details of this process. The process involves objecting to the CG to reconsider the decision. If the tax decision relates to an assessment issued by the CG, the full cross-border duty and tax must be paid even if the taxpayer disputes the amount. If the assessment contains other taxes like income tax, any amount not in dispute must be fully paid and 30% of the amount in dispute must also be paid. Section 42(6) of Act 915 empowers the CG to waive, vary or suspend the payment requirement.

That is, if the CG feels the objection can be considered without the payment being made and Government revenue would not be at risk, they can decide to either vary, waive or suspend the requirement. Any tax decision can follow this procedure. Section 41(5) of Act 915 says, "For the purpose of this section, a reference to the Commissioner-General making a decision includes the Commissioner-General exercising a discretion, making a judgement, giving a direction, expressing an opinion, granting an approval or consent, or being satisfied in respect of a matter."

So, an application for tax refunds requires the CG to decide whether to refund or not. This qualifies as a tax decision. Any application that requires a discretion from the CG qualifies as a tax decision which can follow the objection procedure outlined.

Indeed, in **The Republic v High Court, Exparte Afia African Village Limited, Commissioner-General – Interested Party) (J5/08/2022)**, the Supreme Court correctly stated that the applicant failed to properly invoke the jurisdiction of the High Court when it sought a mandamus order to compel the CG to refund tax withheld on it. The High Court had dismissed the application for want of jurisdiction and the applicant proceeded to the Supreme Court to quash the High Court's decision.

The Supreme Court said, "Instead of the applicant filing an objection under section 41 of Act [915] and appeal against the decision on the objection thereafter, if aggrieved, file an appeal to the Tax Appeal Board under section 44 of Act [915] as amended by Act 1029 and if she was still dissatisfied, file an appeal to the High Court under Order 54 of C.I. 47, she chose to file mandamus. It is noteworthy that the applicant ignored all the necessary procedures and wrongly and prematurely invoked the jurisdiction of the High Court for mandamus under Order 55 of C.I. 47."

Our view is that the Supreme Court rightly decided this case and that judicial review, as provided by Order 55 of C.I. 47, can only be used if what is being challenged is not a tax decision and Act 915 does not prohibit any legal challenge to that decision. It is therefore remarkable when later in 2022, the Supreme Court said a different thing in **Kwasi Afrifa v Ghana Revenue Authority (J6/02/2022)**. This case was a reference from the Court of Appeal. It was on whether Section 42(5) of Act 915, which requires a taxpayer to pay all cross-border taxes and 30% of domestic tax assessed before challenging the assessment, violates the constitutional right to justice and access to the courts. The Supreme Court answered that there is no violation of this constitutional right, and the payment does not create a fetter to the hearing of an objection.

The Supreme Court said this because it believes a taxpayer who is denied a waiver of the payment requirement can bring an action to review the CG's action. The Court said, "Further, to the extent that any 'tax decision' taken by the [CG] is an administrative decision, and tax decisions are by Act 915 made subject to objection, judicial review, and appeal, the regime provided under Act 915 for the regulation of tax decisions by the [CG] passes the test of constitutionality." On the point about judicial review, the Court said the dispute resolution procedure in Act 915 does not oust the High Court's original jurisdiction on judicial review.

Quite contrary to the above, the procedure in Act 915 does not seem to tolerate any judicial review action relating to tax decisions. This is a conclusion the Supreme Court itself came to in the Ex parte Afia case. The Courts have said on several occasions that when a law provides a right with remedies and, also prescribes a procedure to be used to secure that right or remedy, it is that procedure that must be followed.

The Supreme Court reminded itself of this principle when it dismissed the applicant in the Ex parte Afia case and said the CG's decision on an application for tax refund is a tax decision, which must be objected to and then appealed. That taxpayer's judicial review application was therefore dismissed due to the use of a wrong procedure. Why is the exercise of a discretion under Act 915 not a tax decision? What really is the procedure for challenging the exercise of a discretionary power under Act 915?

It is possible that the Court may not have considered the fact that Section 41(5) of Act 915 provides that any discretion exercised by the CG is a tax decision. It is a fact that almost every decision of the CG is an administrative decision which should ordinarily be subject to a judicial

review application. These same administrative decisions have been defined as tax decisions and a procedure has been laid out for challenging them.

Act 915 and the new regime

We understand the attraction of judicial review to the courts and some experts. This is because, historically, on tax matters in Ghana, a taxpayer could only use the objection and appeal process in a tax law to challenge an assessment from the tax authority and not any other decision. An assessment from the tax authority requires the taxpayer to make a payment. All other decisions can only be challenged using judicial review applications.

Under both the Income Tax Act, 1975 (SMCD 5) and the Internal Revenue Act, 2000 (Act 592), a taxpayer could only challenge a tax assessment using the dispute mechanism in these laws. All other decisions were exclusively challenged through judicial review. Even under the repealed Seventh Schedule of the Income Tax Act, 2015 (Act 896), a taxpayer could only object to a tax assessment.

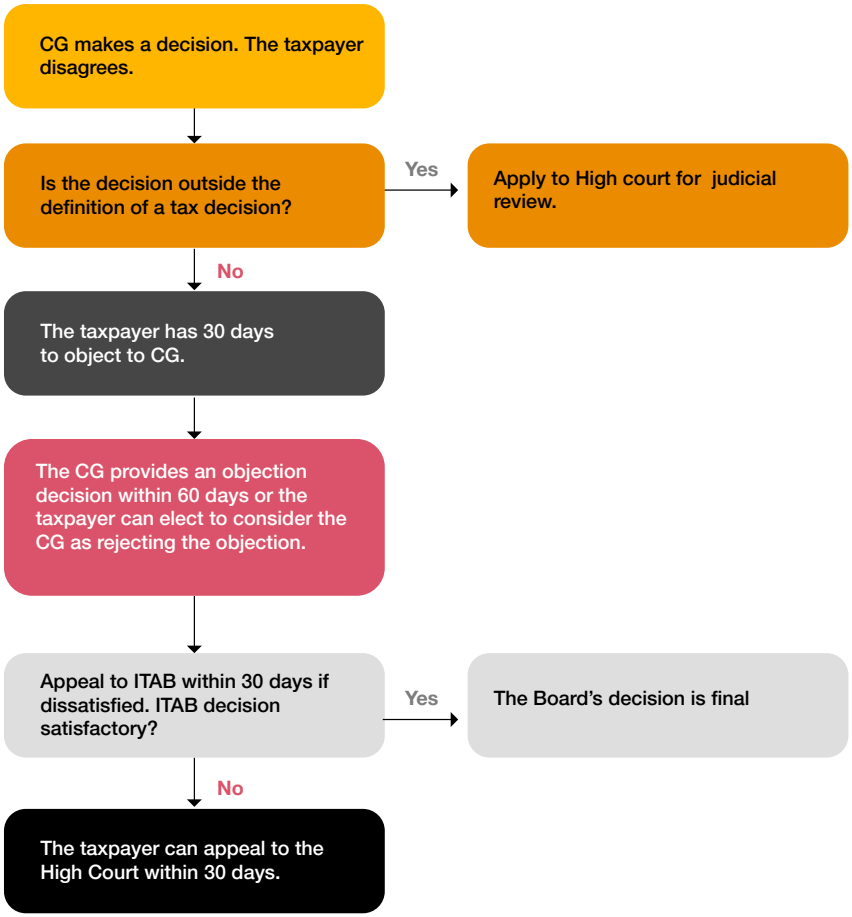
This situation changed from 2017 when Act 915 came into force. Act 915 submits every decision that qualifies as a tax decision to the objection and appeal process. That means the only reason an application for judicial review on a decision from the CG will be valid is when that decision is specifically excluded from the definition of tax decision. The definition of tax decision is very broad and covers every decision made by the CG with only five exceptions.

Implied powers of the ITAB

There is a view that questions the practicality of the ITAB issuing directives such as injunctions to restrain the CG from enforcing a tax decision. The High Court is known for such orders and hence, it is natural for taxpayers to apply to the courts for judicial review. Our view is that Act 915 has impliedly conferred such powers on the ITAB. We admit that Act 915 does not specifically state that the ITAB has powers to issue certain orders.

However, we are minded by Section 21 of the Interpretation Act, which provides that when a person is given authority to do something, that authority includes other powers that are reasonably necessary to enable the exercise of that authority. We cannot imagine why ITAB will be given the power to hear objection decisions such as waiver of 30% payment requirement but cannot issue orders to give effect to its ruling.

So, since the ITAB has been given the authority to handle every objection decision, it is deemed to have all the powers to issue orders necessary to deal with that objection and to deal with consequential matters.



In any case, paragraph 10(2)(d) of the Fourth Schedule to Act 915 allows the Board to make any order it considers fit.

In the Ugandan case of **Century Bottling Company Limited v Uganda Revenue Authority**, the taxpayer appealed an objection decision after the tax authority refused to grant a waiver of the 30% payment requirement. The Tax Appeals Tribunal of Uganda, which performs the same function as Ghana's ITAB is expected to perform, assumed jurisdiction on the matter and explained how exercising a discretion constitutes a tax decision which must be appealed and not judicially reviewed.

The definition of a tax decision under Ugandan laws is identical to Ghana's. In that case, the Tribunal varied the payment requirement by spreading the amount over

four instalments. The Tribunal went ahead to grant an injunction restraining the tax authority from collecting the tax assessed until the objection is finally determined. We submit that Ghana's ITAB has the same powers to deal with all objection decisions emanating from the CG.

The Supreme Court of Ghana seems to have assumed that exercising a discretion is outside the scope of the dispute resolution procedure in Act 915. It may have been helpful for the Supreme Court to explain where it draws the line between a tax decision that is subject to the dispute resolution procedure in Act 915 i.e., objection and appeal, and those tax decisions that must proceed directly to the High Court.

In fairness, when the Supreme Court made this pronouncement, it was not faced with a question on which procedure to use at different times. Its comments may therefore not be a definitive statement.

Taxpayers have applied for judicial review of the CG's decisions in the past. In 2017, Ghana Telecommunications Co. Ltd started the process of asking the court to compel the CG to waive the 30% requirement. That legal process was discontinued. In **African Mining Services (Ghana) Pty Ltd v Commissioner-General (CM/MISC/0245/2021)**, the taxpayer unsuccessfully applied to quash the CG's decision not to waive the payment requirement. In both **Bishop Daniel Obinim v Ghana Revenue Authority & Fidelity Bank (CM//OCC/1033/2019)** and **Bishop Daniel Obinim v Commissioner-General & Ecobank**, the courts refused applications for judicial review because the applicant did not use the objection procedure in Act 915.

Conclusion

We submit that the correct procedure in Act 915 for challenging a tax decision is to first object to the decision and then to appeal the objection decision. The definition of a tax decision is very broad and even decisions that may be considered as discretionary still qualify as tax decisions.

The High Court should ensure the intention of Parliament in Act 915 is fulfilled by accepting only appeals to the decision of the ITAB or temporarily accepting appeals against objection decisions.

We call on operationalisation of the Independent Tax Appeal Board. We are aware budgetary allocations gave been made to the ITAB in the 2024 National Budget.

We therefore expect the ITAB to commence sittings in 2024. Once this happens pressure on formal courts system will reduce.

This will also reserve the courts to only consider appeals to decisions of the Board and judicially review decisions of the CG which are not tax decisions.

Why Ghana insists taxpayers must pay before they can challenge a tax assessment

Whenever the tax authority issues a notice of assessment requiring a taxpayer to pay income taxes, the law is that the taxpayer must pay 30% of the tax before they can challenge it. For all other taxes, the entire amount must be paid before a taxpayer can express any disagreement with the tax. There is a concern that the requirement to pay the tax is unfair because anyone who cannot pay the 30% or 100% loses the right to challenge the assessment.

The Supreme Court was invited to rule that this payment requirement is unconstitutional. It found justification for this provision and ruled that it was constitutional. This article reviews the justification and explores the taxpayer's options.

Ghana's Supreme Court (SC) recently delivered three judgements which bordered on the same issues. The first issue is on whether when the Revenue Administration Act, 2016 (Act 915) requires taxpayers to pay taxes that they disagree with before they can be heard, their right to fair trial is infringed. That is what happens if the taxpayer cannot afford to pay.

The second issue is similar and is on High Court (Civil Procedure) Rules, 2004 (C.I. 47). Taxpayers are also required to pay a proportion of taxes before they can be heard at the High Court. The SC ruled that both provisions are not unconstitutional because they serve a greater public purpose. For Act 915, aside the greater good it serves, the taxpayer still has another path to remove this payment requirement.

In this article, we examine some of the reasons the SC gave for supporting the payment requirement in Act 915. We also explain how the requirement in C.I. 47 can be interpreted differently if perceived another way.

30% requirement

As mentioned in the previous article, Section 42(5) of Act 915 requires a taxpayer to pay the full disputed tax for customs tariffs and taxes and 30% of any other disputed tax. This issue was discussed in **Richard Amo-Hene v Ghana Revenue Authority & 2 Others (J1/08/2021), Export Finance Company Ltd. v Ghana Revenue Authority & Attorney General (J1/07/2021)** and **Kwasi Afrifa v Ghana Revenue Authority (J6/02/2022).**

In these three different cases at the SC, the constitutionality of this provision was challenged on the basis that it denies access to the courts. The argument is that if a person cannot afford to pay the 100% or 30% then the person will be unable to challenge the tax assessment, even if the assessment is unfounded. This is unfair to taxpayers.

The counterargument is that Act 915 also provides that the CG may waive, vary or suspend this payment requirement. And so, if the CG refuses to waive, vary or suspend this payment requirement,

the taxpayer is free to proceed to court for a judicial review of that decision. So, since the taxpayer can still access the courts through a different channel to insist on the waiver or suspension, it is fair to maintain the payment requirement.

The SC heavily relied on the South African case of **Metcash Trading Ltd v Commissioner for South African Revenue Services**, where the South African Supreme Court declined to confirm that a provision in their VAT Act prevented access to courts. That court said judicial review was still available to the taxpayer. It is worth mentioning that soon after that decision in South Africa, an amendment was passed to prescribe how the tax authority's discretion was to be exercised. These prescriptions were subsequently moved to Section 164(3) of South Africa's Tax Administration Act 28 of 2011.

The South African prescriptions include consideration of the taxpayer's compliance history, the amount involved, risk of the taxpayer dissipating assets, whether the payment will impose financial hardship, and existence of fraud. These prescriptions can put a check on the Commissioner's discretionary power and the Commissioner will have no other choice if those conditions are satisfied.

Ghana's SC was invited to follow Uganda's example of judicial intervention in the operation of a similar payment requirement. In **Fuelex (U) Limited v Uganda Revenue Authority**, decided in 2020, the taxpayer went to the Constitutional Court of Uganda to challenge the constitutionality of the provision for making tax payment before objecting to an assessment.

The Ugandan Supreme Court, in 2009, dealt with a similar provision in a repealed law in the case of **Uganda Projects Implementation and Management Centre v Uganda Revenue Authority** (UPIMC case). The Ugandan Supreme Court ruled that a similar payment requirement was not unconstitutional.

The Ugandan Constitutional Court was therefore bound to follow the Supreme Court's ruling when deciding the Fuelex case. However, four out of five members of the panel were convinced that the case before them was different from what the Ugandan Supreme Court was faced with in 2009. Three of them therefore distinguished the Fuelex case from the UPIMC case and concluded that the payment provision was a clear violation of the right to access the courts. They could however only modify the application of the UPIMC case by saying where the objection is not to the amount payable, the payment requirement should not apply.

It seems to us that Ghana's Supreme Court did not consider the analysis of the Ugandan Constitutional Court, whose ruling, remains the position in

Uganda, simply because it was not a Supreme Court. Ghana's SC said, **"We, therefore, prefer the decision of the Supreme Court of Uganda (which is the highest court in the country) in the Uganda Project Implementation and Management Centre case to the split decision of the Constitutional Court which was bound to follow the decisions of the Ugandan Supreme Court. Our position is supported by the fact that the Supreme Court of Uganda in arriving at its decision cited with approval another judgment on the subject matter from South Africa also a Commonwealth Country…".**

The basis for this preference is arguable. Whether the Ugandan Constitutional Court breached any law in narrowing the effect of the UPIMC case, in our view, is a matter for the Ugandan legal system to handle. What matters is whether Ghana's SC is impressed by the reasoning of the Ugandan Constitutional Court on this issue, especially the parts the Constitutional Court claimed was not considered by the earlier decision.

In any event, the Constitutional Court also considered the UPIMC case and by implication, the Metcash case. Further, the original jurisdiction of constitutional interpretation and enforcement that is reserved for Ghana's SC is the same power reserved for Uganda's Constitutional Court.

Let's look at this public policy reason why the SC thought the payment requirement was proportional or fair. The SC is afraid that taxpayers will take advantage of no payment requirement to bring up frivolous objections and the payment requirement, by inference, is the main thing preventing these frivolous objections. The SC also notes that the payment requirement enables the State to get the needed tax revenue without any long delay.

We do not share the SC's view that the payment requirement is a gatekeeper to discourage frivolous objections. If indeed the objection is frivolous, we believe the CG can quickly decide on it and provide an objection decision.

The CG is required to respond to an objection within 60 days. With a frivolous objection, we believe a decision should be ready in 15 days or earlier. On the SC's concern that revenue will be locked in long judicial processes, we believe a look at the countries that do not have the payment requirement, would have given some support on whether or not this fear is the reality. For instance, Kenya does not require any payment of disputed taxes. The Gambia only considers an objection as validly lodged if the tax not in dispute is paid. Tanzania requires payment of the higher of 30% of the tax assessed or the tax not in dispute. Regardless, 70% of direct tax will still be locked up anyway.

As noted in **African Mining Services (Ghana) Pty Ltd v Commissioner-General**, there are instances where what the taxpayer is objecting to is not a technical disagreement but correction of errors. In that case, the taxpayer noted computational errors and requested the tax authority to correct them, while it objected to other technical issues. It asked the tax authority to waive the payment requirement on the tax liability created by the computational errors, but this was denied. Assuming this had happened to a struggling business, where there are computational errors in the assessment, it would be forced to take drastic measures to raise the 30% amount before the tax authority will investigate the complaint. In the interest of fairness, such a taxpayer should be able to get a fair hearing without paying first.

Since the South African case persuades Ghana's SC, it would have been helpful for the SC to consider other factors within the South African landscape. For instance, in South Africa, tax refunds are paid promptly and with interest. The same cannot be said for Ghana.

If a taxpayer manages to raise the 30% and prevails in the substantive case, at best, it will receive only the amount paid without any interest. Further, South Africa has reduced the level of discretion and clearly set out some of the factors the tax authority will consider when considering a waiver request.

The SC's decision that since there is an avenue to challenge the CG's decision to reject a waiver request, there is no constitutional harm is inadequate. Currently, there are no rules on what the CG will consider before granting an application to waive, vary or suspend the payment requirement. Even if the taxpayer appeals to the ITAB or as suggested by the SC, seeks judicial review, what factors will the ITAB or the High Court consider in deciding whether there is a case for waiver, variation or suspension?

Order 54 Rule 4(1)

This provision of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) says, **"An aggrieved person who has filed an appeal against an assessment, decision or order of the Commissioner under rule 1 of this Order shall, pending the determination of the appeal, pay an amount not less than a quarter of the amount payable in the first quarter of that year of assessment as contained in the notice of assessment."**

This piece of law has frequently been brought up by the CG whenever a taxpayer appeals a tax assessment to the High Court. The Court of Appeal settled the position that whenever a taxpayer pays 30% of the disputed tax, the payment requirement under C.I. 47 would be automatically met since 30% is bigger than 25%.

Despite this decision, the CG brought it up again in the Fan Milk case, where the High Court had to rely on the Beiersdorf decision. Two persons challenged the constitutionality of this provision. The Supreme Court upheld its constitutionality. We review the text of Rule 4(1) and submit that if it is considered carefully, there will be no need for all these legal challenges. We explain that the text means something different from how it has been applied in the courts. We also submit that the court got it wrong in its reasoning to uphold this provision.

It is necessary to discuss the background to the tax assessment regime that used to exist, together with the dispute resolution procedure. The Income Tax Decree, 1975 (S.M.C.D. 5) contained identical provisions as the Internal Revenue Act, 2000 (Act 592) and so we will discuss only Act 592, which was in force when C.I. 47 became law.

Section 76 of Act 592 provided that at the beginning of the year, the Commissioner might issue a provisional assessment to a taxpayer that would indicate the tax payable for that year. Section 80 required the tax to be paid quarterly. Section 128(1) allowed a taxpayer who disagreed with the provisional assessment to object to the Commissioner.

Section 131(1) said, **"Where a person has lodged a notice of objection to an assessment under section 128, in respect of a provisional assessment under section 76, an amount of not less than the amount payable in the first quarter of the year of assessment, as contained in the notice of assessment shall be paid pending the determination of the objection and any appeal."**

We submit that the original provision contained in Act 592 was copied into C.I. 47 in 2004, although it was modified. The modification is that instead of the first quarter payment being made before the objection is considered, C.I. 47 required a quarter of that first quarter payment.

To be clear, the provisional assessment was to be paid in four quarters. The amount in the first quarter, which was what Act 592 required the taxpayer to pay before objecting, was to be further divided into four, making it 6.25% of the amount payable for that year of assessment. We believe there was an error when the provision in Act 592 was being copied into CI. 47.

We find it unusual for C.I. 47 to require a quarter of an amount that was supposed to be fully paid. This is especially confusing because unlike Act 915, under Act 592, there was no power given to the CG to waive, vary or suspend the payment requirement. It would have been expected that before a taxpayer could appeal to the High Court, the CG would have enforced the payment requirement.

The amount payable was not for a previous year of assessment. It was for the current year, that is why a portion of the amount payable in the first quarter is required to be paid under C.I. 47. That is, C.I. 47 applies exclusively to provisional assessments or assessments that were in force before the year ended. Once the year ends, C.I. 47 can no longer apply. The situations in which the CG raised preliminary objections at the High Court involved adjusted assessments or assessments that were not provisional assessments.

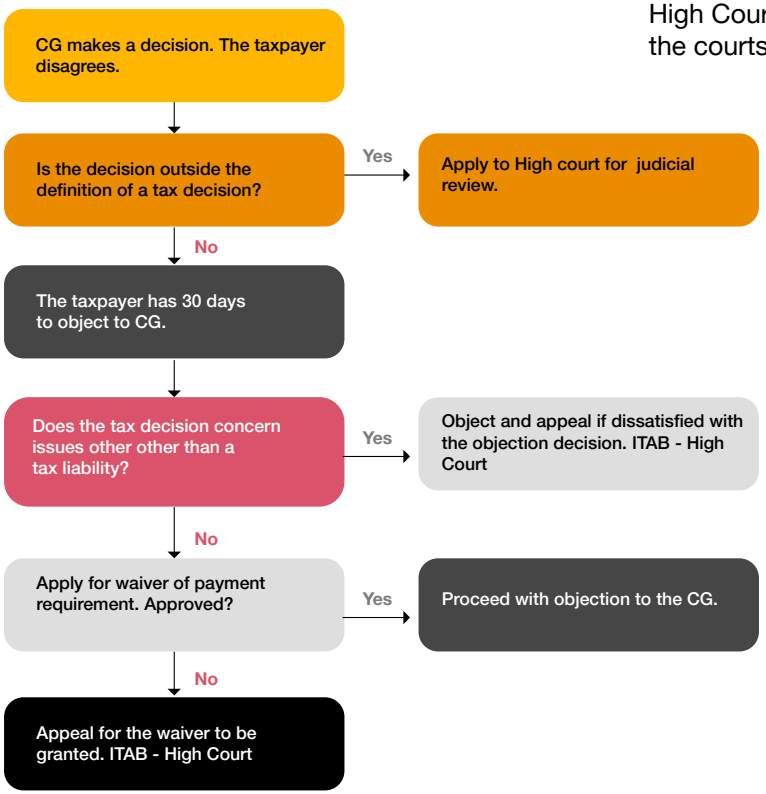
For completeness, we mention that in 2006, Act 592 was amended to provide that every objection application must attract payment of 30% of the full amount in dispute. This expanded the scope of the payment requirement beyond provisional assessment, as it originally existed.

Under the current law, Act 896, the provisional assessment regime that existed under SMCD 5 and Act 592 has been removed and Ghana has now moved to a self-assessment regime. This means that the C.I. 47 requirement is inapplicable, regardless of whether the High Court is considering an objection to a provisional amount or an adjusted assessment.

Given that the interpretation above is not what happens in practice, we now turn to the SC's decision. The SC said the requirement in C.I. 47 is constitutional. It said it agrees with the

rationale behind the policy because ruling otherwise "will open wide the floodgates for the citizenry to take advantage and avoid or delay meeting their tax obligations to the state."

It also noted that it will be against public policy to encourage taxpayers to find loopholes or rely on the slow pace of justice delivery system in Ghana to deny Ghana the needed revenue. It endorsed the Beiersdorf decision that C.I. 47 will not apply if the taxpayer already paid the 30% and said the payment will be required if the 30% was not paid, probably through a waiver or suspension. The SC concluded that as harsh as C.I. 47 may seem, it does not deny a person access to the courts and the right to fair trial.



We find the SC's conclusion very interesting. It argues that under Act 915, the taxpayer can go for judicial review if the CG refuses to waive or suspend the payment requirement as provided and hence there is no denial of access to the courts. It fails to recognise that there is no similar provision for waiver of the payment requirement in C.I. 47.

This is a very important difference that the dissenting opinion in the Richard Amo-Hene case realises. If a taxpayer manages to secure a suspension of the Act 915 requirement and the dispute ends up in court, it would not have paid the amount disputed, based on the misinterpretation of C.I. 47. The High Court does not seem to have a similar waiver power and the payment must be made before the High Court can hear the case, based on how the courts have interpreted this provision.

Conclusion

Although none of these cases was successful, they paint a clear picture for a taxpayer. Anytime the CG issues an assessment they cannot pay, they should apply for waiver or variation. If the CG rejects the application, they can obtain an objection decision and appeal against that decision to the ITAB. We do not agree with the SC's view that the taxpayer should apply for judicial review especially when that decision qualifies as a tax decision.

Since Section 45 of Act 915 says an appeal does not suspend the objection decision, the taxpayer should apply for an injunction. Taxpayers should not worry about the payment requirement in C.I. 47 since that applies exclusively to provisional assessments which have almost faded out.

We urge the CG to issue a Practice Note on the issues it will consider when deciding on an application for waiver, variation or suspension of the payment requirement. On other matters such as extension of time to file a return or pay taxes, the CG has specified how it will exercise the discretionary power. Same should be done here and the South African example should be followed.

The ITAB should also exercise its review powers over all tax decisions, not only tax assessments, as done by tribunals in other countries. The ITAB can also come up with factors it will consider when reviewing a case that seeks to challenge this discretion.

Place of supply rules for services provided to a foreign business

This article discusses the High Court's decision that the place of supply for services exported to non-resident businesses should be deemed to be the location of the non-resident person. The effect of this decision is that any time a VAT-registered person provides some specific services to a non-resident person, the taxpayer must charge VAT at 0%.

We assess the basis of the decision and conclude that the decision raises several questions. We explain how a different decision could be arrived at although we believe the conclusion of the decision is favourable for international trade.

This article discusses one of the six issues from the case, **Coca-Cola Equatorial Africa Limited v Commissioner-General (Suit No. CM/Tax/0125/2022)**, which was decided on 10 November 2022. This issue is on the place of supply of a service for Value Added Tax (VAT) purposes. The VAT Act, 2013 (Act 870), as amended, imposes VAT on services supplied in Ghana. Act 870 contains rules to determine whether a service has been supplied in Ghana or not. The concept is that any supply of taxable service that is deemed as supplied outside Ghana will be taxed at a rate of 0% instead of the current standard rate of 15%.

There are two main rules for locating the place of supply for services in Act 870. The general rule is that if the service provider provides the services from its business location in Ghana, then Ghana is the place of supply (see Section 42(3) of Act 870). There are several exceptions to this rule. These include using the place where the service is actually provided irrespective of the business location of the supplier, and locating where the recipient uses the service as the place of supply. Section 42(4) lists some services, such as advertising and other professional services, for which the place of supply is linked to the place that the service is used.

The dispute in this case involves advertising services and the interpretation to be put on Section 42(4)(d), which says, **"The supply of … [advertising services] takes place where the recipient uses the service".** Does Act 870 require the service provider to check where the customer uses the service? Or should it not matter where the service is used and what should be considered is the customer's location? That was the question before the court.

Appellant's case

The appellant, Coca Cola, admitted to providing marketing and advertising services to a customer, which was in the USA. The services were to promote brand awareness and increase sales for the customer in Ghana. Coca Cola argued that since the customer was not located in Ghana, the customer was not using the service in Ghana. According to Coca Cola, Ghana adopts the **"destination principle"** and not the

"origin principle". By this, Coca Cola meant that Ghana does not impose VAT on services based on where the supplier is located (i.e., origin principle). Rather, the standard VAT will apply based on where the services are consumed (i.e., destination principle). Its services are consumed at the customer's location in the USA and hence the rate should be 0%. Coca Cola relied on two cases from Kenya: **Coca-Cola Central East and West Africa Limited v The Commissioner of Domestic Taxes (Tax Appeal No. 19 of 2013)**, which was determined by the Kenyan High Court, and **Coca-Cola Central East and West Africa Limited v The Commissioner of Domestic Taxes (Tax Appeal No. 5 of 2018)**, which was determined by the Kenyan Tax Tribunal.

Both cases relied on the **Recommendation of the Council on the Application of Value Added Tax/Goods and Services Tax to the International Trade in Services and Intangibles** ("the Guideline"), published by the Organisation for Economic Co-operation and Development (OECD). They specifically refer to the portion of the Guideline that provides that the place of supply for services should be the location of the recipient, and it should not matter where the recipient uses the services.

Respondent's case

The Ghana Revenue Authority's argument was that the place of supply was Ghana since the services were performed in Ghana. Additionally, although the recipient of the service was not located in Ghana, it had business interests in Ghana which the services concerned served. That is, the services provided were used by the foreign company to further its business interest in Ghana and so the services were used in Ghana.

Court's opinion

The court ruled in favour of the appellant. The court relied on the 2017 version of the OECD's Guideline and quoted Guideline 3.2 which provides that **"…for business-to-business supplies, the jurisdiction in which the customer is located has the rights over internationally traded services or intangibles."** The court referred to the Kenyan High Court case of **Commissioner of Domestic Taxes v Total Touch Cargo Holland (Tax Appeal No. 17 of 2013)**. That case also relied on OECD's Guideline. So, the main authority from all these Kenyan cases is the OECD Guideline. The court in this case also relied on the same authority. Due to the limited analysis done by the court on this issue, and the wholesome reliance on Kenyan cases and the OECD, we will review those references.

Overview of the judgement

On the surface, it seems the court's task was to find the meaning of the word "uses". Once that was done, it could then identify if the appellant's customer used the advertising services in Ghana, as provided in Section 42(4) of Act 870. The court however appears to have adopted the OECD Guidelines since Kenyan courts and Tribunal did same. It may have been helpful to see an independent analysis for what the meaning of the word "uses" is including by reference to any dictionary.

In our view, there was no proof of ambiguity or absurdity with the ordinary meaning of the word. Similarly, it would have been helpful for the court to explain the basis for relying on the OECD Guideline in light of Section 10 of the Interpretation Act, 2009 (Act 792), especially when no ambiguity has been explained by the court.

Legal force of the Guideline

The Guideline is a legal instrument numbered OECD/LEGAL/0430 which was issued as a Recommendation. According to the OECD, its Recommendations are not legally binding on members and non-members of the OECD and

are only political commitments. Ghana is not a member of the OECD. Further, Ghana is not an adherent to this legal instrument and so this instrument has no legal force in Ghana (see the OECD's website for the list of instruments to which Ghana has adhered). The point here is that the OECD's Guideline cannot be used to override the ordinary meaning of a provision of Act 870.

The three Kenyan cases cited in this case all rely entirely on the OECD Guideline. In our view, if the Guideline is not considered at all or ceases to exist, those cases would be differently decided. Kenya's acceptance of the Guidelines from the OECD mainly started in **Unilever Kenya Limited v The Commissioner of Income Tax (Income Tax Appeal No. 753 of 2003)**. In that case, although Kenya's Income Tax Act required the arm's length standard to be used for some transactions, there was no local guidance on how the standard was to be determined. The court therefore agreed to rely on the OECD's Guidelines on Transfer Pricing.

The court said, "We live in what is now referred to as a "global village". We cannot overlook or side-line what has come out of the wisdom of taxpayers and tax collectors in other countries. And especially because of the absence of any such guidelines in Kenya, we must look elsewhere. We must be prepared to innovate, and to apply creative solutions based on lessons and best practices available to us … And that is also how we shall encourage business to thrive in our country. Therefore, I cannot ignore the time-tested experiences and best practices of others…".

In that case, Kenya's Income Tax Act required a method but did not explain it, hence a method must be settled on. The appeal to the OECD's Guidelines on Transfer Pricing in that case is therefore not entirely unexpected. This is not the same for the three relevant cases. The Kenyan Tribunal and courts in the three relevant cases simply relied on the VAT Guidelines and cited the Unilever case as their authority. In our view, their task was to explain what the VAT Act means when it says exported service means a service provided for use or consumption outside Kenya.

Additionally, it would have been helpful for Ghana's court to interrogate the basis of the acceptance of the VAT Guidelines in Kenya, especially when Ghana's Interpretation Act, 2009 (Act 792) provides rules on this. Did Act 870 or its Bill ever refer to the VAT Guidelines from the OECD? Has the court resorted to technicalities in construing this provision, as prohibited by Section 10(4)(d) of Act 792?

The OECD's Guideline which Ghana's court used, essentially said when the place of supply of a service is to be determined, the customer's location should be treated as the place of supply. Act 870 does not say the customer's location should be used, it says the location where the recipient uses the service should be used, making the location dynamic.

The recipient could use the service in Ghana, regardless of the location of its business. In fact, when Ghana wanted to rely solely on the customer's location in the past, it did so under the old VAT law, Act 546 (now repealed). Regulation 15(a) of L.I. 1646, which operated under the old VAT law, said, "…the place of supply…in the case of services…for a customer operating outside this country, [is] the place of the customer's business to which the service is supplied".

So, under the old law, it was explicit that the recipient's location was to be used as the place of supply for those services. From 2014 when Act 870 came into force, Ghana no longer used a fixed location. The new law emphasised the "place where the recipient uses the service". This change shows that Ghana deliberately wanted to change the law from a fixed location to a place of use which is dynamic. In any case, Ghana did not give an indication that its VAT law is based on the OECD Guideline.

Is Ghana's rule unique?

Ghana is not alone in using a dynamic location. The Tanzanian VAT Act provides that, "A supply of services shall be zero-rated if the customer is outside the United Republic at the time of supply and effectively uses or enjoys the services outside the United Republic". Usage and enjoyment of the service must be outside Tanzania to qualify as export. Uganda's VAT law also provides that services exported are to be taxed at 0%. It defines export of services to have occurred when "the services were supplied for use or consumption outside Uganda…".

Again, there is no automatic reference to one location but there must be a search for where the service is used. The Gambia's Income and VAT Act also says, "…a supply of services is zero-rated if the recipient of the supply is outside The Gambia at the time of supply and will effectively use or enjoy the services outside the Gambia".

These three countries are just a few of the numerous countries whose VAT laws rely on the place the service is used, enjoyed or consumed by the recipient.

Even the OECD admits that there are countries that do not rely on its general rule of using the location of the recipient. It recognises that countries use different place of supply rules that conflict with its first recommended rule. It says, **"location of movable or immovable tangible property, actual location of the customer, or place of effective use and enjoyment"** are all place of supply rules that do not follow the general rule it gives and labels these exceptions as the **"specific rule"**.

The OECD says the specific rule should be used if they give a more accurate effect to the destination principle than the general rule. This destination principle is that the place where the service is consumed should be the place where the VAT should be imposed.

In paragraph 3.165, the OECD gives examples of circumstances where a specific rule should be used instead of the general rule. They are circumstances where:

1. particular services are typically supplied to both businesses and final consumers,
2. the service requires, in some way, the physical presence of both the person providing the supply and the person receiving the supply, and
3. the service is used at a readily identifiable location.

The third item above is the most important to this discussion. It essentially means that the general rule from the OECD is not a rule that

must be applied no matter what. If the service is being used in a readily identifiable location, then it is that location that is the place of supply and not automatically the recipient's location. So, there are exceptions to this general rule.

Analysis of the opinion

The Ghanaian High Court said, "The combined reading of the OECD guidelines and the cases cited supra exhibit clearly that if the consumer [sic] business is outside the country, then indeed, the consumption of the service should be deemed to also be outside the country." This statement, with respect, is not necessarily always the case. As we have shown, the cases used by both the appellant and the court all rely on the OECD's Guideline.

The Guideline itself says it has two rules, general and specific. It states the conditions that the specific should be used rather than the general. A discussion of how the general rule applies in the Coca Cola case instead of the specific rule, especially when the tax authority explains that the service was being used in Ghana to serve the business interest of the foreign company in Ghana, may have been instructive. The assertion being attributed to the OECD, when there are different rules is not entirely accurate.

The suggestion that Ghana adopts the destination principle, which is defined exclusively to be the location of the recipient is inaccurate. There is no legal instrument specifying this principle. What matters is whether the rules in Act 870 are indicative of the destination principle.

Section 42(3) is clear that the location of the supplier of the service is the place of supply unless the law says otherwise. Act 870 also says the place where an immovable property is located, if the service relates to that property, is the place of supply. For personalty, the place of supply is where the service is performed. These are all exceptions to the general rules in both Act 870 and the OECD Guideline. There is no one single destination principle that is linked to the location of the recipient.

The interpretation that the non-resident recipient's place of business is by default the place where the service is used may create an internal inconsistency in Act 870. Section 65 defines "import of services" as "a supply of services to a resident person … to the extent that the services are utilised or consumed in the country, other than to make taxable supplies". If we understand the court rightly, the place where a business uses a service is the location of that business. If that is true, Act 870 could have assumed that a resident person carrying out business in Ghana will automatically use the service from a foreigner in Ghana. The definition would not require us to check whether a Ghanaian business is using a foreign service in Ghana or not.

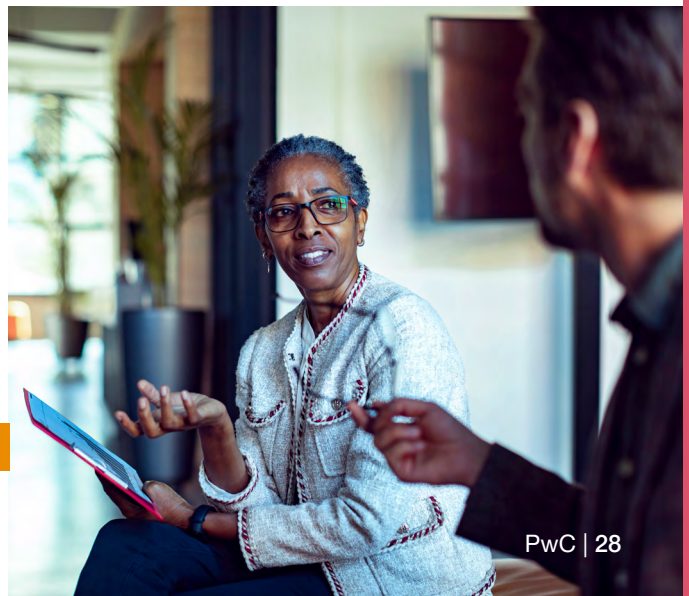
It is instructive to note that the ninth edition of the Black's Law Dictionary, which the court used on the other issues in the same judgement, defines commercial use as, "A use that is connected with or furthers an ongoing profit-making activity". One wonders what impact, if any, this definition would have made on the decision had the court averted its mind to it.

Proposed reform

The reasoning of the court in arriving at its decision, although raises some questions, is understandable. In the world of international trade today, it is important for countries to harmonise their tax regimes to avoid encouraging double taxation and by extension, discouraging cross-border trade.

The general guideline from the OECD of deeming the place of business as the place of supply is aimed at reducing double taxation. One of the major problems of using the actual place of use is that it is sometimes difficult for the place a service is actually used to be determined.

For instance, if an architect operating a business in Ghana designs buildings for a non-resident business, and these buildings are meant to be constructed in Ghana, at what time can we be sure that the service has been used in Ghana? What if the foreign business never goes ahead to construct the buildings in Ghana? At the time of supply, how will the architect determine where the foreign business is going to use the service?



The difficulty presented by Ghana's current rules have been avoided by the OECD Guideline. The OECD's rule, in fact, achieves the neutrality it seeks. That is, it ensures the VAT is only paid by the final consumer. For instance, if a Ghanaian advertising company provides services to a foreign retailer, the OECD expects VAT of 0% to be charged by the Ghanaian company. Where an individual in Ghana ends up ordering from the foreign retailer, the individual may pay VAT to clear the goods at the port. So, the VAT is collected once.

If on the other hand the retailer is a Ghanaian business, the advertising company will charge VAT on its services and the retailer will also charge VAT. VAT will be collected twice. The retailer may claim input VAT and hence the total VAT collected reduces to the one from the final consumer, i.e., once.

If we only interpret the law as it is written and say the foreign retailer used the services in Ghana, VAT will be collected twice. No input VAT will be available to the foreign business, which may not be fair. That is, the intermediary (foreign retailer) pays VAT it cannot claim, and the final consumer also pays VAT.

What does this mean for taxpayers?

This is a High Court decision and unless the GRA appeals, it is a final decision that binds both parties. It also means the GRA must apply this ruling in future assessments raised on this same taxpayer if nothing changes. Due to the design of Ghana's court system, a dispute on this same matter may end up with a differently constituted High Court, which is not bound to follow this decision.

Conclusion

We call for a reform of the current policy that requires the supplier to hunt for the place the recipient will use the service. This case has shown that there are more efficient and tax-neutral ways of handling this situation and that Ghana should follow international best practices.

We support a reversal to the position in the old law where the place of supplier was clearly stated to be the place of business of the recipient. This ensures the neutrality of the VAT system and prevents the complication of the current rule.

However, a dispute will only arise if the GRA departs from this decision when dealing with other taxpayers. That act will undoubtedly require the GRA to treat two taxpayers differently even if the same law is being applied to the same set of facts. That may raise constitutional issues because administrative bodies are supposed to act fairly. Our expectation therefore is that the GRA will apply the Coca Cola ruling in all matters of this nature.

Let’s talk

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