

Blue Sky Products (Ghana) Ltd. v Commissioner-General

Flynote

Revenue Law – Income Tax – Interpretation of Statutes – Free Zone Enterprises (FZEs) – Applicable tax rate after the ten-year concessionary period – Whether an FZE engaged in exporting non-traditional products is subject to the 8% tax rate under paragraph 3(3) of the First Schedule to Act 896 or the 15% rate under paragraph 4 – Distinction between FZEs and other exporters – Application of the literalist approach to fiscal legislation – Concept of tax avoidance and discrimination under Article 17 of the 1992 Constitution.

Case Information

- **Court:** Court of Appeal
- **Coram:** Eric Kyei Baffour JA (Presiding), Novisi Aryene JA, and Stephen Oppong JA
- **Suit No.:** H1/42/2023
- **Date of Judgment:** January 25, 2024
- **Parties:** Blue Sky Products (Ghana) Ltd. (Appellant) v Commissioner-General

Facts

Blue Sky Products (Ghana) Ltd. is a registered Free Zone Enterprise (FZE) engaged in the production and export of non-traditional agro-product. Under section 28(1) of the **Free Zones Act, 1995 (Act 504)**, the Appellant enjoyed a ten-year income tax holiday on its profits.

Upon the expiration of this concessionary period, the Appellant self-assessed its tax liability at a rate of 8%, relying on section 28(2) of Act 504 and paragraph 3(3) of the First Schedule to the **Income Tax Act, 2015 (Act 896)**, which provides an 8% rate for companies exporting non-traditional goods.

The Respondent (GRA) rejected this assessment, applying a higher rate of 15% under paragraph 4 of the First Schedule to Act 896, which specifically targets FZEs after their concessionary period. The Appellant's objection was dismissed by the Commissioner-General and subsequently by the High Court, leading to this appeal.

Issues

1. Whether a Free Zone Enterprise engaged in the export of non-traditional goods is taxable at the 8% rate under paragraph 3(3) or the 15% rate under paragraph 4 of the First Schedule of Act 896 after its initial ten-year tax holiday.
2. Whether paragraph 4 of the First Schedule of Act 896 is inconsistent with section 28(2) of the Free Zones Act.
3. Whether the application of the 15% rate constitutes a breach of the principle of tax avoidance or the right against discrimination under Article 17 of the 1992 Constitution.

Arguments

- **Appellant's Argument:**

- Statutes must be read as a whole; paragraph 3(3) of Act 896 does not explicitly exclude FZEs that export non-traditional products from the 8% rate.
- A taxpayer is entitled to arrange their affairs to pay the least possible tax (tax avoidance), and the court should not deprive them of a more favorable tax regime.
- Subjecting the Appellant to 15% while other non-traditional exporters pay 8% is discriminatory under Article 17 of the Constitution¹⁸¹⁸¹⁸¹⁸.

- **Respondent's Argument:**

- Paragraph 3(3) applies to domestic companies, whereas paragraph 4 specifically addresses FZEs that have already benefited from unique tax holidays.
- The 15% rate was established via amendments (Act 885) and restated in Act 896, effectively overriding older provisions.
- The GRA has the power to disregard arrangements that lack economic substance or misuse tax law.

Ratio Decidendi

1. **Strict Construction of Fiscal Statutes:** Tax laws are creation of statute and must be interpreted literally. There is no equity in tax; liability must be found in the express language of the provision.
2. **Specific vs. General Provisions:** Paragraph 4 of the First Schedule of Act 896 is a specific provision dealing with FZEs "after the concessionary period." It creates a distinct tax regime for FZEs that is separate from the general regime for other exporters of non-traditional goods under paragraph 3(3).
3. **Election of Status:** A company that elects to be registered as an FZE accepts a "bouquet of tax benefits" (such as 10 years of zero-rated tax) and cannot later opt out of the corresponding 15% obligation to join a different regime unless it de-registers as an FZE.
4. **Constitutionality and Discrimination:** Discrimination under Article 17 applies to entities within the same bracket. FZEs and non-FZE domestic exporters are in different legal and tax brackets; therefore, giving them different treatments is not discriminatory.

Decision

The Court of Appeal dismissed the appeal and affirmed the High Court's decision. It held that the 15% tax rate applies to the Appellant, and no discrimination occurred. Costs of GH¢ 10,000.00 were awarded to the Respondent.