

Bumi Armada v Commissioner-General (Court of Appeal)

Flynote

1. Withholding Tax Liability on Subcontractor Payments in Petroleum Operations

Withholding Tax – Petroleum Income Tax Act 1987 (PNDCL 188) – Income Tax Act 2015 (Act 896) – Subcontractor Liability – Scope of Petroleum Agreement – Applicability to Sub-Subcontractors – Private Ruling – Taxation of Service Payments – Charter Party Agreement – Eni Ghana Exploration and Production Ltd. – Whether Bumi Armada Ghana Ltd. was liable to withhold tax on payments made to its subcontractors under contracts related to the Eni Ghana Exploration and Production Ltd. Petroleum Agreement.

2. Effect of Revocation of Private Rulings and Transitional Provisions

Private Ruling – Revocation – Section 106 Revenue Administration Act 2016 (Act 915) – Section 71 Income Tax Act 2015 (Act 896) – Transitional Provisions – Arrangements Commenced Before Revocation – Savings Clauses – Legal Effect of Revocation on Existing Contracts – Retrospective Legislation – The legal effect of revoking private tax rulings following the enactment of new tax legislation, and whether such revocation affected existing contractual arrangements.

3. Applicability of New Tax Laws to Pre-Existing Contracts

Retrospective Legislation – Transitional Provisions – Applicability of Income Tax Act 2015 (Act 896) and Income Tax Regulations 2016 (LI 2244) – Pre-Existing Contracts – Constitutional Law – Article 174 – Non-Retrospectivity – Savings and Transitional Clauses – Whether the Income Tax Act 2015 (Act 896) and Income Tax Regulations 2016 (LI 2244) applied retrospectively to contracts entered into before their commencement.

4. PAYE Liability for Subcontractor Employees and Contractual Tax Obligations

PAYE – Pay As You Earn – Subcontractor Employees – Liability for Employee Taxes – Contractual Allocation of Tax Responsibility – No Employees Engaged by Subcontractor – Ship Management and Marine Husbandry Services – Taxation of Manpower Services – Whether Bumi Armada Ghana Ltd. was liable for PAYE (Pay As You Earn) tax in respect of employees engaged under its subcontractor agreements.

5. Tax Assessment Methodology and Use of Trial Balance Figures

Tax Assessment – Methodology – Use of Trial Balance vs. Ledger Balances – Burden of Proof in Tax Appeals – Onus on Taxpayer – Evidence of Erroneous Assessment – Appointment of Independent Auditor – Judicial Review of Tax Computation – The appropriateness of using trial balance figures instead of ledger balances in the tax assessment, and the burden of proof on the taxpayer to demonstrate error.

6. Judicial Orders and Appointment of Independent Auditor in Tax Appeals

Order 54 High Court (Civil Procedure) Rules, 2004 (CI 47) – Appointment of Independent Auditor – Timing of Expert Assistance – Finality of Judgment – Procedural Requirements for Tax Appeals – Scope of Court's Discretion in Tax Disputes – Whether the High Court was correct in appointing an independent auditor to reconcile accounts after judgment, and the procedural requirements for such orders.

Facts:

Bumi Armada Ghana Ltd. ("the Respondent") was a subcontractor under a Petroleum Agreement between Eni Ghana Exploration and Production Ltd. ("Eni") and the Government of Ghana. The Ghana Revenue Authority ("the Appellant") assessed Bumi Armada for withholding tax on payments made to its own subcontractors (sub-subcontractors) for the years 2014-2019. The dispute centered on whether Bumi Armada was liable to withhold tax on these payments, the effect of a private tax ruling previously issued, and whether subsequent amendments to tax laws had retrospective effect on existing contracts. The High Court ruled in favour of Bumi Armada, and the Ghana Revenue Authority appealed.

Issues Before the Court:

1. Whether Bumi Armada was liable to withhold tax on payments made to its subcontractors in connection with its contract to supply Eni with patrol vessels.
2. Whether amendments to the Petroleum Income Tax Act, Internal Revenue Act, and the introduction of the Income Tax Act 2015 and related regulations had retrospective effect on contracts entered into before their enactment.
3. Whether Bumi Armada was liable to withhold Pay As You Earn (PAYE) tax in respect of its contracts.
4. The propriety of the High Court's order for the appointment of an independent auditor to reconcile the accounts after judgment.
5. Whether the tax assessment could be based on discrepancies in trial balance figures.

Holding:

The Court of Appeal upheld the High Court's decision in part and dismissed the appeal on the main substantive issues. The Court held that:

- Bumi Armada was **not liable** to withhold tax on payments to its subcontractors for contracts entered into before the new tax laws came into force, as these were covered by the previous private ruling and the applicable law at the time (PNDCL 188).
- The revocation of the private ruling and the amendments to the tax laws did **not have retrospective effect** on arrangements entered into before the new laws came into force.
- Bumi Armada was **not liable** to withhold PAYE tax as it had no employees of its own under the relevant contracts.
- The High Court erred in appointing an independent auditor after judgment to reconcile accounts, as such expert assistance should be sought during the hearing, not after judgment.
- The use of trial balance figures for tax assessment was improper unless it was demonstrated how this led to an erroneous assessment; the onus was on Bumi Armada to prove this, which it failed to do.

Reasoning of the Court:

- **On Withholding Tax Liability:** The Court examined Section 27 of the Petroleum Income Tax Act (PNDCL 188) and the private ruling issued in 2014, which stated that a subcontractor (like Bumi Armada) had no obligation to withhold tax from payments to persons assisting in the performance of its obligations under the Petroleum Agreement. The Court found that the contracts in question were entered into before the new Income Tax Act 2015 (Act 896) and its regulations came into force, and thus the previous law and private ruling applied.
- **On Retrospective Application of Law:** The Court relied on the savings and transitional provisions in the new tax laws (Act 896, LI 2244, Act 915), which explicitly stated that amendments or revocations of private rulings do not affect arrangements commenced before such changes. The Court emphasized that retrospective application of tax laws would contravene constitutional provisions.
- **On PAYE Liability:** The Court found that Bumi Armada had no employees of its own under the relevant contracts, and thus was not liable to withhold PAYE tax.
- **On Appointment of Auditor:** The Court interpreted Order 54 Rule 9 of the High Court (Civil Procedure) Rules, 2004 (CI 47), holding that any expert assistance or evidence should be sought during the hearing of the appeal, not after judgment.
- **On Use of Trial Balance Figures:** The Court held that real income, not trial balance figures, should be used for tax computation. However, Bumi Armada failed to provide evidence showing how the use of trial balance figures led to an erroneous assessment.

Disposition:

The Court of Appeal dismissed the appeal on the substantive issues, upholding the High Court's decision that Bumi Armada was not liable for withholding tax or PAYE on the relevant contracts. However, it set aside the High Court's order for the appointment of an independent auditor and held that the tax assessment should be maintained for the years 2014- 2019, less the withholding tax in respect of the specific contracts entered into before the new laws came into force.