

NB: This judgment has been overturned by the Supreme Court

Maersk Drillship IV Singapore Ltd v Commissioner-General

Flynote

Revenue Law – Income Tax – Petroleum Industry – Taxation of non-resident entities – Interpretation of Petroleum Agreements (PA) – Whether a non-resident subcontractor's income is assessable under the **Petroleum Income Tax Act, 1987 (PNDCL 188)** or the **Income Tax Act, 2015 (Act 896)** – Repatriated profits of a Permanent Establishment (PE) – Stability clauses and the application of Section 60 of Act 896 – Distinction between investment income tax and corporate income tax in the petroleum sector.

Case Information

- **Court:** In the Court of Appeal, Accra.
- **Coram:** Poku Acheampong JA (Presiding), Bartels-Kodwo JA, and Noble-Nkrumah JA.
- **Suit No.:** H1/67/2023.
- **Date of Judgment:** October 19, 2023.
- **Parties:** Maersk Drillship IV Singapore (Appellant) v The Commissioner-General, Ghana Revenue Authority (Respondent).

Facts

The Appellant, a non-resident company incorporated in Singapore, provided drilling services to Eni Ghana Exploration and Production Ltd under the Offshore Cape Three Points (OCTP) Petroleum Agreement (PA). The Appellant operated in Ghana through a registered branch (an external company), which constituted a Permanent Establishment (PE).

The Respondent (GRA) conducted an audit and issued a tax assessment, asserting that the Appellant was liable for tax on its "repatriated profits" under **Section 60 of Act 896**. The Appellant challenged this, arguing that as a subcontractor under the PA, its tax obligations were strictly limited by the terms of the PA and **PNDCL 188**, which (according to the Appellant) did not provide for the taxation of repatriated profits or branch profits. The High Court largely upheld the GRA's assessment, leading to this appeal.

Issues

1. Whether the Appellant's income earned from its activities in Ghana is exempt from taxation under the terms of the OCTP Petroleum Agreement.
2. Whether the Appellant, as a non-resident entity with a PE in Ghana, is subject to tax on repatriated profits under Section 60 of the Income Tax Act, 2015 (Act 896).
3. Whether the application of Act 896 violated the "Stability Clause" in the Petroleum Agreement which protects contractors/subcontractors from adverse changes in law.
4. Whether the Respondent could retrospectively apply new tax obligations to a subcontractor whose fiscal regime was supposedly "locked in" by PNDCL 188.

Arguments

- **Appellant's Argument:**
 - The Petroleum Agreement is the primary document governing its fiscal obligations.
 - Under Article 12 of the PA and Section 27 of PNDCL 188, a subcontractor is only liable to a final withholding tax on its gross income.
 - Section 60 of Act 896 (tax on repatriated profits) is a "new" tax not contemplated by the PA or PNDCL 188 and its application breaches the stability clause.
- **Respondent's Argument:**

- The PA does not grant a blanket tax exemption; it specifically states that subcontractors are subject to the laws of Ghana except where expressly exempted.
- The tax under Section 60 is an investment income tax on the PE of a non-resident, which is distinct from the corporate income tax discussed in the PA.
- The stability clause protects the "Contractor" (Eni), but the Appellant is a "Subcontractor" and does not enjoy the same level of fiscal protection.

Holding

1. **Liability to Tax:** The Appellant is **not exempt** from taxation. The income arising from its Ghanaian PE is assessable income under the general tax laws of Ghana.
2. **Application of Section 60:** The Appellant, as a non-resident entity earning repatriated profits through a PE, is **subject to investment income tax** under Section 60 of Act 896.
3. **Petroleum Agreement Limits:** The provisions of the PA and PNDCL 188 do not override the general requirement for non-resident entities to pay tax on repatriated profits unless an express exemption is provided.
4. **Cross-Appeal:** The court allowed the cross-appeal in part, clarifying that while the tax applies, the GRA cannot purport to impose further taxes that result in double taxation or contradict the specific mechanics of the branch's registration.

Ratio Decidendi

1. **Scope of Stability Clauses:** Stability clauses in Petroleum Agreements primarily protect the "Contractors" (the parties to the agreement with the State). Subcontractors only benefit from these clauses to the extent specifically mentioned.
2. **Statutory Interpretation:** In revenue law, unless a statute or a validly executed agreement provides an express exemption, the general tax law applies. Section 60 of Act 896 introduced a specific tax on the repatriated profits of PEs which is applicable to all non-resident entities operating through a branch in Ghana.
3. **Nature of the PE:** Once a non-resident entity creates a Permanent Establishment, that PE is treated as a distinct taxpayer for certain purposes, including the tax on profits deemed to have been sent back to the parent company.

Decision

The Court of Appeal **affirmed** the High Court's judgment. It held that the Appellant's income from its Ghanaian PE is assessable and subject to Section 60 of Act 896. The appeal was dismissed, and the cross-appeal succeeded only in part regarding the variation of the tax calculation methodology.