

## THE REPUBLIC v COMMISSIONER-GENERAL; EX PARTE AFIA AFRICAN VILLAGE LIMITED

Court: Supreme Court of Ghana, Accra

Year: 2022

Judges: Pwamang JSC (Presiding), Dordzie (Mrs.) JSC, Torkornoo (Mrs.) JSC, Honyenuga JSC, Kulendi JSC

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### FLYNOTE

*Administrative Law – Judicial Review – Mandamus – Prerequisites for grant of mandamus – Exhaustion of statutory remedies – Tax decision – Whether High Court had jurisdiction to entertain application for mandamus where applicant failed to exhaust statutory dispute resolution mechanisms under Revenue Administration Act, 2016 (Act 915) – Whether interested party had obligatory duty to refund tax withheld – Application dismissed.*

*Constitutional Law – Supervisory jurisdiction – Article 132 of Constitution, 1992 – Grounds for invoking Supreme Court's supervisory jurisdiction – Error of law on face of record – Whether High Court's dismissal of mandamus application on procedural grounds constituted error of law – Application for certiorari dismissed.*

*Revenue Law – Capital Gains Tax – Compensation for compulsory acquisition – Whether compensation paid for compulsorily acquired land subject to capital gains tax – Sections 35 and 38 of Income Tax Act, 2015 (Act 896) considered – Tax properly withheld.*

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### FACTS

The Applicant's Afia Beach Hotel, including a vast parcel of land, was compulsorily acquired by Executive Instrument No. 59 under the State Lands Act, 1962 (Act 125) on April 19, 2016, for the Marine Drive Investment Project. The parties agreed on compensation of GH¢45,222,397.00.

When the final tranche of GH¢5,222,397.00 was released, the Controller and Accountant-General withheld GH¢2,116,679.78 as capital gains tax and paid only GH¢3,105,717.22 to the Applicant. The Applicant demanded a refund, which the Interested Party (Commissioner-General, Ghana Revenue Authority) refused, stating that the withholding constituted a tax decision subject to the dispute resolution mechanism under Act 915, not mandamus.

The Applicant applied to the High Court for an order of mandamus compelling the refund. The High Court dismissed the application on procedural grounds, finding that the Applicant had not shown that the Interested Party was under an existing and unquestioned obligatory duty to refund the amount, and that the appropriate remedy had not been applied for in the proper circumstances.

The Applicant then applied to the Supreme Court for certiorari to quash the High Court's ruling, arguing that the High Court erred in law by finding that the Interested Party had no obligatory duty to refund amounts wrongfully paid as tax.

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## ISSUES

1. Whether the High Court had jurisdiction to entertain an application for mandamus where the Applicant had not exhausted the statutory dispute resolution procedures under the Revenue Administration Act, 2016 (Act 915).
2. Whether the Interested Party had a statutory duty under Section 69 of Act 915 to refund the amount withheld as tax.
3. Whether the High Court erred in law on the face of the record in dismissing the application for mandamus.
4. Whether the Supreme Court should exercise its supervisory jurisdiction to quash the High Court's ruling.

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## ARGUMENTS

### Applicant's Arguments

1. The Interested Party has a statutory duty under Section 69(1) and (2) of Act 915 to refund amounts wrongly withheld as tax. The use of "shall" in subsection (2) makes this duty obligatory and mandatory per Section 42 of the Interpretation Act, 2009 (Act 792).
2. "Any other tax" in Section 69(2)(b) includes common law, which constitutes part of Ghana's laws under Article 11(1)(e) of the Constitution, 1992.
3. The High Court acted per incuriam by overlooking the mandatory provisions of Section 69(1) and (2) of Act 915, rendering its order amenable to certiorari.
4. Apart from the express statutory obligation, the Interested Party has a common law duty to refund any amount wrongly collected as tax.
5. The High Court's order constitutes a palpable error of law patent on the face of the record.

### Interested Party's Arguments

1. The High Court made a finding of fact based on affidavit evidence, not a legal proposition, so it could not have "erred in law on the face of the record."
2. The Interested Party communicated a tax decision to the Applicant, which should have been challenged through the statutory procedures: first by objection under Section 42 of Act 915, then by appeal under Section 44 to the Tax Appeals Board, and finally by appeal to the High Court under Section 108 and Order 54 of C.I. 47.
3. The Applicant's sole ground misstates the learned judge's ruling.
4. There was no error of law on the face of the ruling.

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## HOLDING

The Supreme Court DISMISSED the application for certiorari.

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## REASONING

### 1. Prerequisites for Mandamus

The Court reiterated the well-established prerequisites for granting mandamus:

- a) the duty to be compelled must be of a public nature;
- b) the applicant must have sufficient interest to be protected;
- c) there must be a demand for performance of the duty and a refusal by the duty bearer; and
- d) there must be no other equally convenient remedy available

### 2. Exhaustion of Statutory Remedies

The Court held that where a statute provides a right with remedies and prescribes the procedure to secure that right or remedy, that procedure must be followed.

The proper procedure under Act 915 was:

1. Lodge an objection to the tax decision under Section 42 within thirty days
2. If dissatisfied, appeal to the Tax Appeals Board under Section 44 within thirty days
3. If still dissatisfied, appeal to the High Court under Section 108 and Order 54 of C.I. 47

The Applicant failed to follow any of these steps, making the application for mandamus premature.

### 3. Section 69 of Act 915 does not Create an Independent Duty

The Court rejected the Applicant's reliance on Section 69(1) and (2) of Act 915. The Court held that this provision merely creates a special account for refunds but does not establish an independent mandatory duty to refund without the Applicant first demonstrating that all conditions under Act 915 (Sections 41, 42, 44) were met. The Applicant demonstrated nothing.

### 4. Capital Gains Tax Properly Applied

The Court found that the Applicant, having earned income or gains from compensation, was required to pay capital gains tax under Sections 35 and 38 of the Income Tax Act, 2015 (Act 896). The Interested Party was therefore legally justified in withholding the tax.

### 5. No Error of Law on Face of Record

The Court agreed with the Interested Party that the High Court Judge made findings of fact, not a legal proposition. The High Court correctly identified that the Applicant failed to follow proper procedure and dismissed the application on procedural grounds.

For certiorari to lie, there must be a fundamental, substantial, material, or grave error of law going to the root of the matter. The Court found no such error.

#### 6. High Court Lacked Jurisdiction

The Court held that the High Court had no jurisdiction to entertain the mandamus application because its jurisdiction was prematurely invoked. The Applicant had not commenced, let alone exhausted, the statutory procedures under Act 915.

#### 7. Certiorari is Discretionary

The Court emphasized that certiorari is a discretionary remedy granted to correct wrongs, not to protect wrongs or illegalities. Courts should frown on granting certiorari to protect non-existent rights vitiated by illegalities.

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### DECISION

The application to invoke the Supreme Court's supervisory jurisdiction for certiorari to quash the High Court's ruling dated November 2, 2021, was DISMISSED.

The High Court correctly dismissed the mandamus application on procedural grounds, and there was no error of law on the face of the record.

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### RATIO DECIDENDI

1. Where a statute prescribes a specific procedure for enforcing a right or remedy, that procedure must be exhausted before resort to alternative remedies such as mandamus.
2. An application for mandamus is premature and incompetent where the applicant has failed to exhaust statutory dispute resolution mechanisms.
3. Section 69 of the Revenue Administration Act, 2016 (Act 915) creates a refund account but does not establish an independent mandatory duty to refund tax without the taxpayer first following the objection and appeal procedures under the Act.
4. The supervisory jurisdiction of the Supreme Court under Article 132 of the Constitution should only be exercised in manifestly plain and obvious cases where there is a patent error of law on the face of the record that goes to jurisdiction or makes the impugned decision a complete nullity.
5. Compensation received for compulsorily acquired property constitutes a gain subject to capital gains tax under the Income Tax Act, 2015 (Act 896).