

CASE BRIEF

BEIERSDORF GHANA LIMITED v. COMMISSIONER GENERAL, GHANA REVENUE AUTHORITY

Court: High Court of Justice, Commercial Division, Accra

Suit No: H1/140/2019

Date of Judgment: 5th December, 2019

Judge: Dennis Adjei, Henry Kwofie, Alex Poku-Acheampong

Flynote

Tax – Appeals procedure – Order 54 rule 4 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) – Payment of not less than a quarter of the assessed tax as a jurisdictional precondition to entertaining a tax appeal – Purpose and timing – Payment may be made before, at the time of, or after filing the appeal, but the High Court lacks jurisdiction to entertain the appeal until payment is made – Appeal not void merely because payment evidence was not attached to the notice of appeal.

Income tax – Deductibility of royalties – Section 9, Income Tax Act, 2015 (Act 896) – Royalty payments under a distribution/technology transfer arrangement recognised as expenses “wholly, exclusively and necessarily” incurred – Failure to register the technology transfer agreement under the Ghana Investment Promotion Centre Act, 2013 (Act 865) affects eligibility for GIPC incentives/benefits only; it does not negate deductibility under the Income Tax Act – GIPC sanctions do not displace the Income Tax Act’s residual deduction rule.

Withholding tax – Liability in respect of tax that ought to have been withheld – Appeal on this head failed.

Disposition – Appeal allowed in substantial part; High Court’s dismissal for non-compliance with Order 54 set aside; royalties deductible under section 9 Act 896 notwithstanding non-registration under Act 865; parties to take accounts to determine the correct tax payable; appellant’s challenge to withholding tax liability dismissed.

Procedural history: Following a tax audit for 2014–2016, the Commissioner-General assessed Beiersdorf Ghana Limited (BGL) in the sum of approximately GHS 1.698 million (inclusive of various heads, penalties, and revised assessments). BGL appealed to the High Court. The High Court dismissed the appeal as incompetent for alleged non-compliance with Order 54 r 4 of C.I. 47 (failure to demonstrate payment of at least one-quarter of the assessed amount). BGL appealed to the Court of Appeal.

Facts

- BGL distributed Nivea-branded products in Ghana under a Distribution Licence Agreement with Beiersdorf AG (Germany), which included royalty payments and transfer of marketing/management know-how.
- The agreement was not registered as a technology transfer agreement under the GIPC Act, 2013 (Act 865).
- The GRA disallowed royalty payments as deductible business expenses and treated them as taxable profits, also imposing penalties and asserting liabilities including withholding tax.
- On the Order 54 precondition, BGL had made part payments totalling about 34.1% of the total assessed tax before filing the High Court appeal, as reflected in the GRA's own revised audit documentation on record.

Issues

1. Whether the High Court erred in dismissing the appeal as incompetent for failure to comply with Order 54 r 4 of C.I. 47 (payment of not less than a quarter of the assessed amount).
2. Whether royalty payments under the BGL–Beiersdorf AG arrangement were deductible under section 9 of the Income Tax Act, 2015 (Act 896), notwithstanding non-registration of the agreement under the GIPC Act, 2013 (Act 865).
3. Whether GRA could rely on the GIPC Act (including sanctions for non-registration) to deny deductibility under the Income Tax Act.
4. Whether the appellant's challenge to withholding tax liability succeeded.

Holdings

Order 54 compliance: The Court of Appeal held that BGL had paid more than the required one-quarter before filing the appeal. Further, purposively construed, Order 54 r 4 requires payment before the court can entertain the appeal, but does not render a filed appeal void if payment evidence does not accompany the notice; payment can be before, contemporaneous with, or after filing, provided the court does not proceed until payment is made. The High Court's contrary view was wrong.

Deductibility of royalties: The Court held that royalties paid by BGL were deductible under section 9 of Act 896 as expenses “wholly, exclusively and necessarily” incurred in producing the income. Non-registration under the GIPC Act does not vitiate deductibility under the Income Tax Act; it only means the taxpayer cannot claim GIPC-specific incentives/benefits.

Interaction between Acts: Section 26 of the GIPC Act confers additional benefits on enterprises registered under specified laws; it does not deprive enterprises of benefits under those other laws if they are not registered under the GIPC Act. Sanctions in section 41 of Act 865 relate to offences under that Act and do not displace Act 896's deductibility rules.

Withholding tax: The appeal failed on the aspect concerning failure to withhold or pay withholding tax due.

Reasoning

Order 54 r 4, C.I. 47 (Quarter-Payment Precondition)

The Court emphasised purposive interpretation (Order 1 r 2, C.I. 47). The combined effect of Order 54 r 4(1)–(2) is that:

- Payment of not less than one-quarter of the assessed amount for the first quarter is a jurisdictional precondition to the High Court “entertaining” the appeal.
- The notice of appeal is not a nullity if filed without attaching proof of payment; however, the court lacks jurisdiction to proceed until payment is effected.
- On the record, the taxpayer had in fact paid approximately 34.1% before the High Court filing; the lower court failed to evaluate the documentary record (including GRA’s own revised audit schedule reflecting part-payments).

Deductibility of Royalties and Effect of Non-Registration under Act 865

- Section 9 of Act 896 (residual deduction rule) permits deduction of expenses wholly, exclusively and necessarily incurred in producing income, excluding capital expenses.
- The Court characterised the arrangement as a technology transfer agreement in substance but stressed that failure to register the agreement under the GIPC Act affects entitlement to GIPC Act incentives/benefits only; it does not preclude deductions otherwise allowable under the Income Tax Act.
- Section 26 of Act 865 envisages that enterprises registered under specified laws (including the income tax legislation) may enjoy additional GIPC benefits if they are also registered under the GIPC Act. It does not operate to remove benefits under those other statutes in the absence of GIPC registration.
- The Court rejected reliance on *generalia specialibus non derogant*; there was no true conflict between the statutes necessitating that canon. The appropriate approach was ordinary/purposive interpretation in line with the Interpretation Act.

Withholding Tax

- The Court affirmed liability for amounts that ought to have been withheld but were not remitted, and the appeal on this head failed.

Disposition

- Appeal allowed in substantial part.
- High Court’s dismissal for non-compliance with Order 54 r 4 set aside; appeal found to have been validly before the High Court once quarter-payment was made.

- Royalty payments held deductible under section 9 of Act 896 notwithstanding non-registration under Act 865; however, the taxpayer is not entitled to benefits and incentives under the GIPC Act absent registration.
- Appeal on withholding tax aspect dismissed.
- Parties directed to take accounts within one month to determine the appropriate tax payable in accordance with the Court's judgment.

Key Takeaways for Tax Controversy Practice

- Evidence of quarter-payment need not accompany the notice of appeal; what matters is that the High Court does not entertain the appeal until such payment is made. Ensure the record reflects payments clearly to avoid technical dismissals.
- Non-registration of a technology transfer agreement under the GIPC Act is not, without more, a basis to disallow otherwise allowable deductions under section 9 of Act 896. It only bars GIPC-specific incentives and benefits.
- When GRA disallows deductions citing GIPC non-registration, scrutinise whether the disallowance improperly uses GIPC sanctions to override the Income Tax Act's deduction framework.
- Withholding tax compliance remains critical; failure-to-withhold exposures are conceptually distinct from expense deductibility and may be sustained even where substantive deductions are allowed.