Case Title and Citation

Beiersdorf Ghana Limited v The Commissioner-General, Ghana Revenue Authority
High Court (Commercial Division), Accra — 13 July 2018
Suit No: CM/TAX/0001/2018
Coram: Samuel K. A. Asiedu J

Flynote

Tax — Technology transfer agreements — Requirement to register with Ghana Investment Promotion Centre (GIPC) under Act 865 — Royalty payments under unregistered distribution licence agreement — Whether deductible as business expenditure — Withholding tax — Characterisation of reimbursements and trade discounts — VAT invoices and evidentiary burden — Tax appeals — Condition precedent of paying one-quarter of assessed tax prior to hearing — Appeal dismissed.

Procedural Posture

Appeal by the taxpayer from revised tax assessments issued by the Ghana Revenue Authority (GRA) following an audit for the 2014–2016 years of assessment. The initial assessment of GHS 1,689,149.34 was reduced to GHS 1,085,392.36 after objection, credits, and part-payment were considered. The taxpayer appealed on three principal grounds concerning disallowance of royalty deductions and two withholding tax determinations. The High Court dismissed the appeal in its entirety and awarded costs to the GRA. The Court further held that the appeal was not properly before it due to non-compliance with Order 54 rule 4 of the High Court (Civil Procedure) Rules on pre-payment of a portion of the assessed tax.

Material Facts

Beiersdorf Ghana Limited (the appellant) imports and distributes NIVEA-branded products in Ghana under a "Distribution Licence Agreement" with Beiersdorf AG (BDF) of Germany. Under that agreement, the appellant paid royalties of GHS 474,505.24, GHS 1,231,644.00, and GHS 1,558,025.99 for 2014–2016 respectively for use of the trademarks and know-how. The GRA's audit concluded that, because the agreement had not been registered with the GIPC as a technology transfer agreement (TTA), the royalty payments could not be recognised as deductible costs and were to be treated as part of taxable profits.

The GRA also imposed withholding tax on two streams of payments: (i) amounts the appellant described as reimbursements to distributors for third-party artisans' work on branded display stands; and (ii) trade discounts allegedly given to customers via distributors. The GRA treated both categories as payments attracting withholding tax at 10%, noting the absence of discounts on VAT invoices and the lack of evidentiary support for the appellant's assertions.

Issues

1. Whether the Distribution Licence Agreement between the appellant and BDF Germany constituted a "technology transfer agreement" within the meaning of section 43 of the Ghana

Investment Promotion Centre Act, 2013 (Act 865), thereby requiring registration under section 37 before royalty payments could be recognised and transferred.

2. Whether the GRA lawfully imposed withholding tax: a. On payments described as reimbursements to distributors for costs of third-party artisans and materials for branded displays; and b. On amounts the appellant characterised as trade discounts.
3. Whether the appeal could be entertained in the absence of proof that at least one-quarter of the assessed tax had been paid prior to the appeal, as required by Order 54 rule 4.

Holdings

1. The Distribution Licence Agreement was, in substance, a technology transfer agreement under Act 865. Because it was unregistered, the GRA acted within its powers in disallowing the royalty payments as deductible expenses and treating them as part of taxable profits.
2. The GRA lawfully imposed withholding tax: a. Payments routed through distributors for third-party artisans and materials constituted payments for services and were subject to withholding tax. Characterising them as reimbursements did not negate the withholding obligation. b. Alleged trade discounts were not established. In the absence of discounts being reflected on VAT invoices and evidentiary support, the GRA properly treated the amounts as commission payments subject to withholding tax.
3. The appeal was not properly before the Court because the appellant failed to demonstrate payment of at least one-quarter of the assessed tax prior to the hearing, as mandated by Order 54 rule 4(1)–(2).

Reasoning

On the technology transfer question, the Court emphasised substance over form. Although styled a "Distribution Licence Agreement," the agreement granted an exclusive licence to mark products and packaging with registered trademarks and obligated BDF to transfer marketing and management know-how, share ongoing experience and improvements, and maintain confidentiality protocols. These features matched the statutory indicia of a TTA under section 43 of Act 865, including licensing of industrial property and provision of technical expertise and know-how. Under section 37, such agreements require registration with the GIPC, and benefits, including transferability of fees and charges in convertible currency, attach only upon registration. Given the absence of registration, the GRA was entitled to refuse recognition of the royalty payments as deductible costs and to treat them as profits.

On withholding tax for reimbursements, the Court found that the underlying payments were for services of third-party artisans—payments that would have attracted withholding tax if made directly. Using distributors as intermediaries did not alter the nature of the payments or the statutory withholding obligation. The Court referenced the appellant's own concession that such payments would at minimum attract withholding at applicable rates, viewing the challenge as an attempt to evade lawful tax.

On trade discounts, the Court accepted the GRA's position that discounts must be reflected on VAT invoices to be recognised. Sections 41(1)–(2) of the VAT Act, 2013 (Act 870) require issuance and retention of tax invoices with prescribed details. The appellant bore the burden of producing evidence

under sections 14 and 17 of the Evidence Act, 1975 (NRCD 323), but failed to provide sufficient proof—beyond assertions—that discounts were granted. Without documentary substantiation, particularly on VAT invoices, the GRA's characterisation of the amounts as commission payments subject to withholding tax was upheld.

Finally, the Court underscored that Order 54 rule 4 imposes a condition precedent to the hearing of tax appeals: payment of not less than one-quarter of the assessed amount payable in the first quarter of the year of assessment. As no evidence of such payment accompanied the notice of appeal or was presented thereafter, the Court held the appeal was not properly before it and dismissed it on that basis as well.

Disposition

Appeal dismissed in full. Costs of GHS 10,000 awarded to the respondent. The GRA may proceed to enforce payment of the assessed tax together with accrued interest.

Key Legal Principles

- Substance over form in characterising agreements for tax and regulatory purposes; agreements that transfer industrial property rights and technical know-how constitute technology transfer agreements requiring registration under Act 865.
- Unregistered TTAs cannot ground recognition of related royalties as deductible costs; such payments may be treated as profits for tax purposes.
- Payments for services attract withholding tax notwithstanding intermediary routing or "reimbursement" labels.
- Trade discounts must be evidenced, typically by reflection on VAT invoices; absent evidence, amounts may be recharacterised and subjected to withholding tax.
- Compliance with Order 54 rule 4 is a jurisdictional precondition to the hearing of tax appeals; failure to prepay one-quarter of the assessed tax renders the appeal not entertainable.

Counsel

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