

Case Details

- Court: High Court of Justice (Commercial Division), Accra (Superior Court of Judicature)
- Date: 10 November 2022
- Judge: Her Ladyship Jane Harriet Akweley Quaye (Mrs.), Justice of the High Court
- Suit No.: CM/TAX/0125/2022
- Parties: Coca-Cola Equatorial Africa Limited (Appellant) v The Commissioner-General, Ghana Revenue Authority (Respondent)
- Procedural posture: Appeal against the Commissioner-General's Final Objection Decision affirming audit assessments for 2016–2018 (direct and indirect tax exposures).

Flynote

Tax – Ghana – Income tax and VAT – Withholding tax on payment for trademark transfer – Whether lump-sum payment constituted royalty (use/right to use) or consideration for outright sale – Burden of proof in tax appeals – WHT on transactions allegedly reversed – WHT on staff salary reimbursements paid via an employment agency – Characterisation of performance-based “trade discounts” as commissions – VAT zero-rating of exported services under the destination principle – Outcome: WHT upheld on trademark payment (treated as royalty); WHT upheld on unreconciled reversals; WHT set aside on staff reimbursements to employment agency; “discounts” re-characterised as commissions and WHT largely upheld (but rate corrected); VAT/NHIL/GETFund on marketing services set aside as zero-rated export of services consumed outside Ghana.

Material Facts

- The GRA conducted a tax audit (2016–2018) and raised assessments totalling GHS33.1m (direct and indirect taxes, inclusive of interest).
- Disputed heads included: (i) WHT on payment to a non-resident (BVI) for a trademark said by the taxpayer to be an outright purchase; (ii) WHT on transactions later “reversed”; (iii) WHT on reimbursements of staff salaries routed through an employment agency; (iv) WHT on year-end “trade discounts” to a local affiliate; and (v) VAT/NHIL/GETFund on marketing and related services performed in Ghana for The Coca-Cola Export Corporation (USA).

Issues

1. Whether the payment to a non-resident for a trademark was royalty (use/right to use) attracting WHT or consideration for an outright sale (no WHT under the royalty head).
2. Whether WHT was lawfully imposed where the taxpayer claimed the underlying transactions were subsequently reversed.

3. Whether WHT was properly imposed on reimbursements of staff salaries paid to an employment agency where PAYE had already been operated.
4. Whether performance-based “trade discounts” were in substance commissions subject to WHT, and at what rate.
5. Whether VAT, NHIL and GETFund levy applied to marketing/support services provided in Ghana to a US group company, or whether the supply was zero-rated as an export of services consumed outside Ghana.

Holdings and Reasoning

1) Trademark payment characterised as royalty – WHT upheld

- The taxpayer failed to produce the referenced Asset Purchase Agreement; the Bill of Sale was expressly subject to that agreement and did not specify the asset, terms, or price. A bank transfer advice alone did not prove an outright transfer of ownership of the specific trademark.
- In the absence of evidence establishing a sale, the Court inferred the payment related to user rights. Under the statutory definition, that falls within “royalty” and attracts WHT where sourced in Ghana.
- Outcome: WHT on the trademark payment sustained.

2) WHT on transactions allegedly reversed – WHT upheld

- The taxpayer asserted subsequent reversals and late WHT remittances but did not provide the promised documentation to substantiate reversals or reconcile payments.
- Given the statutory burden on the taxpayer in tax appeals, the Court upheld the assessment.
- Outcome: WHT maintained for lack of proof of reversals and reconciliation.

3) WHT on staff salary reimbursements to employment agency – WHT set aside

- Evidence showed a valid, continuing agreement with an employment agency (FKV & Associates) providing staff, with the taxpayer reimbursing salaries and paying a service fee; PAYE had been operated on salaries by the agency.
- The GRA’s approach effectively imposed duplicative WHT over amounts that already had PAYE applied.
- Outcome: WHT on salary reimbursements disallowed; assessment reversed on this head.

4) “Trade discounts” re-characterised as commissions – WHT largely upheld (with rate correction)

- The year-end “discounts” were not shown on VAT invoices as reductions to price and did not operate as contemporaneous trade discounts; they functioned as performance-based payments at year end.
- Consistent with Ghanaian case law and VAT invoicing rules, the Court agreed these were commissions in substance, allowing re-characterisation under the anti-avoidance power where form diverges from substance.

- The Respondent acknowledged the correct WHT rate as 7.5% for payments to resident entities under section 116(2), not 10% for commissions to resident individuals.
- Outcome: Characterisation as commission affirmed; WHT applied at the corrected rate.

5) VAT/NHIL/GETFund on services to US group company – Zero-rated as exported services

- Applying the destination principle and OECD VAT Guidelines for B2B supplies, the consumer of the marketing and support services was the US recipient (The Coca-Cola Export Corporation).
- Although operational activities occurred in Ghana, the “use/consumption” for VAT purposes was outside Ghana where the customer is established.
- NHIL and GETFund follow VAT’s base; zero-rating extends to those levies.
- Outcome: VAT/NHIL/GETFund assessments on these services set aside; supplies treated as zero-rated exports.

Disposition

- Appeal allowed in part and dismissed in part:
 - WHT on trademark payment: upheld.
 - WHT on alleged reversed items: upheld.
 - WHT on staff salary reimbursements via employment agency: set aside.
 - WHT on “trade discounts” re-characterised as commissions: upheld, but with rate corrected to 7.5% for resident-to-resident services.
 - VAT/NHIL/GETFund on services to The Coca-Cola Export Corporation (USA): set aside as zero-rated exports.

Legal Provisions Considered

- Revenue Administration Act, 2016 (Act 915)
 - Section 42(5)(b) (deposit for appeal)
 - Section 92 (burden of proof in tax appeals)
 - Section 27 (duty to produce documents during audit)
- Income Tax Act, 2015 (Act 896)
 - Section 34 (Commissioner’s power to re-characterise for substance over form)
 - Section 114 (PAYE withholding by employers)
 - Section 115(1) (WHT on royalties and other specified payments)
 - Section 116(1)(a)(v) (commission to resident individuals)
 - Section 116(2) (WHT at 7.5% for payments to resident persons other than individuals for supply of goods, works, services)
 - Section 108(e) (source rules, including royalties)
 - Section 133 (definition of “royalty”)
 - First Schedule, para. 8 (WHT rates)

- Value Added Tax Act, 2013 (Act 870)
 - Section 36(1) (zero-rating where specified in Second Schedule)
 - Section 41 (tax invoices)
 - Second Schedule, Item 3(3) (services consumed elsewhere than in Ghana)
- VAT Regulations, 2016 (L.I. 2243)
 - Regulation 21(2)(j) (discount to be shown on the tax invoice)
- Evidence Act, 1975 (NRCD 323)
 - Sections 17(a), 18(2) (burdens and inferences)
- High Court (Civil Procedure) Rules, 2004 (C.I. 47)
 - Order 11/13 (admissions), procedural references

Notable Authorities Cited by the Court

- Beiersdorf Ghana Ltd v Commissioner-General, GRA (High Court, 2018) — discounts vs commissions on VAT invoices.
- Fan Milk Ghana Ltd v Commissioner-General (Court of Appeal, 7 April 2022) — ordinary meaning of discounts; invoice presentation.
- HCL Ltd v Commissioner of Income Tax (India) — royalties vs outright sale; lump-sum can still be royalty depending on rights transferred.
- OECD International VAT/GST Guidelines (2017) — destination principle; B2B place-of-consumption rules.

Practical Significance for Tax Controversy and Corporate/TP Practitioners

- Evidentiary discipline is decisive: where key transactional documents (e.g., the Asset Purchase Agreement) are referenced but not produced, courts may infer user rights and sustain WHT on royalties notwithstanding lump-sum payments.
- Salary reimbursements via bona fide employment agency arrangements should not be double-taxed: ensure payroll/PAYE evidence and agreements are maintained and produced.
- “Trade discounts” must appear as invoice-level price reductions to avoid re-characterisation. Year-end performance payments risk commission treatment and WHT; align commercial documentation, invoicing, and accounting entries with intended tax treatment.
- Exported services: for B2B intra-group arrangements, the destination principle and customer-location proxy can support zero-rating where consumption is outside Ghana. Contract framing, evidence of customer establishment, and functional analysis of who benefits are key.
- Rate accuracy matters: even where characterisation favours the tax authority, misapplied rates should be corrected to the statutory 7.5% for resident-to-resident services under section 116(2).

Summary

The Court partially upheld the GRA's assessments: it sustained WHT on the trademark payment and on unsubstantiated "reversals", disallowed WHT on staff reimbursements handled by an employment agency, affirmed re-characterisation of purported trade discounts as commissions (with rate corrected), and set aside VAT/NHIL/GETFund on marketing/support services as zero-rated exported services consumed outside Ghana.