

CASE BRIEF

MAERSK DRILLSHIP IV SINGAPORE PTE LTD v. THE COMMISSIONER GENERAL, GHANA REVENUE AUTHORITY

Supreme Court of Ghana
Civil Appeal No. J4/59/2024
Date: 2nd April, 2025

FLYNOTE

Tax Law – Petroleum Agreement – Stabilization Clause – Fiscal Stability – Subcontractor Rights – Branch Profit Tax – Whether subcontractor to petroleum agreement protected by fiscal stability clause from taxation beyond 5% withholding tax – Whether Parliament's ratification of petroleum agreement with freezing stabilization clause insulates subcontractor from subsequent tax legislation – Whether branch profit tax applicable to income from petroleum operations covered by stability clause

Held: (Majority - Amadu JSC, Asiedu JSC, Gaewu JSC) Parliament ratified petroleum agreement with fiscal stability clause freezing tax regime for contractor and subcontractors. Once 5% withholding tax paid on petroleum operations income, no further taxes imposable. Branch profit tax under subsequent legislation cannot apply. Appeal allowed.

(Dissent - Torkornoo CJ, Darko Asare JSC) Stability clause protects only income from direct petroleum operations subject to withholding tax. Investment income and repatriated profits remain taxable under general tax laws. Appeal dismissed.

FACTS

- Government of Ghana and GNPC entered Petroleum Agreement with Heliconia (later assigned to ENI) for Offshore Cape Three Points in 2005, ratified by Parliament March 2006
- Agreement contained fiscal stability clause (Article 26.2) and tax provisions (Article 12)
- ENI subcontracted Maersk Drillship IV Singapore PTE Ltd (Appellant) in January 2015 for drilling services
- Appellant registered as external company in Ghana with permanent establishment
- GRA conducted tax audit 2015-2018, assessed total tax liability of US\$28,357,065.17

- Assessment included branch profit tax of US\$17,103,923.20 and corporate income tax of US\$2,370,959.33
- Appellant objected, claiming protection under stability clause limiting tax to 5% withholding

ISSUES

1. Whether fiscal stability clause in petroleum agreement protects subcontractor from taxes beyond 5% withholding tax
2. Whether Income Tax Act 2015 (Act 896) and Internal Revenue Act 2000 (Act 592) apply to petroleum operations covered by stability clause
3. Whether branch profit tax applicable to Appellant's income from petroleum operations
4. Proper interpretation of Articles 12 and 26 of Petroleum Agreement and Section 27 of PNDCL 188

RELEVANT LEGAL PROVISIONS

Constitutional Provisions

- **Article 174(1) & (2), 1992 Constitution:** No taxation except by Act of Parliament; tax waivers require Parliamentary approval
- **Article 107(b), 1992 Constitution:** Parliament cannot pass retrospective laws imposing burdens except under Articles 178 or 182

Petroleum Agreement Provisions

- **Article 12.1:** No tax imposed on Contractor, Subcontractors or Affiliates except as provided in Article 12
- **Article 12.3:** Only 5% withholding tax on subcontractor payments as per Section 27(1) PNDCL 188
- **Article 26.2:** State guarantees stability of fiscal and contractual framework throughout agreement term

Statutory Provisions

- **Section 27(1), Petroleum Income Tax Law 1987 (PNDCL 188):** Withholding tax on subcontractor payments at rate specified in petroleum agreement
- **Section 27(3), PNDCL 188:** Subcontractor not liable for tax under any other law after withholding tax paid

- **Section 27(4) & (5), PNDCL 188:** Internal Revenue Act provisions don't apply to petroleum operations contracts or non-resident subcontractor gains
- **Section 39(3), PNDCL 188:** No tax on dividends from petroleum income (repealed by Act 592 in 2000)
- **Section 60, Income Tax Act 2015 (Act 896):** Branch profit tax on repatriated profits
- **Section 135, Act 896:** Fiscal stability agreements continue until agreement ends, is altered, or rights relinquished

HOLDING & JUDGMENT

MAJORITY DECISION (3-2)

Per Amadu JSC (Asiedu JSC and Gaewu JSC concurring):

ALLOWED THE APPEAL

Key Findings:

1. **Privity and Third-Party Beneficiary Status:** Appellant is beneficiary of petroleum agreement under doctrine of privity, expressly mentioned in Articles 12.1 and 12.3
2. **Effect of Fiscal Stability Clause:** Article 26.2 guarantees stability of fiscal framework. Parliament ratified agreement limiting taxes on subcontractors to those specified in Article 12
3. **Strict Construction of Tax Statutes:** Tax laws must be strictly construed. No tax imposable unless clearly stated
4. **Article 12.1 Creates Tax Enclave:** "No tax, duty, fee or other impost shall be imposed...other than as provided in this Article" creates definitive limitation
5. **Vested Rights Protected:** Section 34(i)(c) Interpretation Act 2009 protects vested rights from legislative changes. Stability clause creates legitimate expectations
6. **Section 27(3) PNDCL 188 Determinative:** Once withholding tax paid, "subcontractor is not liable, in respect of that aggregate amount, for tax under any other law"
7. **Parliamentary Ratification Binding:** Ratified agreement as potent as statute. State cannot unilaterally impose new taxes
8. **Retrospective Application Prohibited:** Article 107(b) Constitution prohibits retrospective tax burden; Act 896 cannot apply retrospectively

Orders Granted:

- Income exempted from taxes after 5% withholding tax
- Act 592 and Act 896 not applicable to Appellant
- Branch profit tax (US\$17,103,923.20) extinguished
- Corporate income tax (US\$2,370,959.33) extinguished
- GRA directed to issue revised assessment and refund excess within 30 days

DISSENTING OPINION (2 Justices)

Per Torkornoo CJ (Darko Asare JSC concurring):

DISMISSED THE APPEAL

Key Findings:

1. **Section 39(3) Already Repealed:** Protection from dividend tax under PNDCL 188 repealed by Act 592 in 2001, before 2005 petroleum agreement signed
2. **Article 12.3 Limited Scope:** Only references Section 27(1) regarding withholding tax rate, not entire Section 27
3. **Article 12.2 Applies to Contractor:** Main contractor subject to income tax (35%), royalties, and other taxes - absurd if subcontractor exempted entirely
4. **Three Income Sources Distinguished:**
 - o Income as subcontractor to ENI (subject only to 5% withholding) ✓
 - o Investment income as shareholder in Maersk Rigworld Ltd (taxable) ✓
 - o Income of Ghana branch as permanent establishment (taxable) ✓
5. **Section 27(3) Prevents Double Taxation Only:** "In respect of that aggregate amount" means no double tax on same payments, not blanket exemption
6. **Section 107 Act 896:** Permanent establishments treated as separate entities for tax purposes
7. **Stability Clause Limited:** Protects specific petroleum operations income, not all income derived in Ghana
8. **General Tax Laws Apply:** Section 39(5) PNDCL 188 allows general tax laws unless specifically exempted by legislative instrument

RATIO DECIDENDI (MAJORITY)

Where Parliament ratifies a petroleum agreement containing a fiscal stability clause that freezes the tax regime and limits taxation on subcontractors to specified taxes including 5% withholding tax, the State cannot impose additional taxes through subsequent legislation. The stability clause creates binding contractual and constitutional obligations that protect vested rights. Tax statutes must be strictly construed, and no tax can be imposed by implication.

SIGNIFICANCE

- Affirms binding nature of Parliamentary ratification of international agreements with fiscal stability clauses
- Establishes that freezing-type stability clauses in petroleum agreements prevent application of subsequent tax legislation
- Protects legitimate expectations of investors in extractive industries
- Balances Parliamentary sovereignty with *pacta sunt servanda* in investment agreements
- Creates precedent for interpretation of fiscal stability provisions in resource agreements

Counsel:

Professor Abdallah Ali-Nakyea with Benedict Asare for Appellant
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