IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT JUSTICE, (COMMERCIAL DIVISION), HELD AT ACCRA, ON TUESDAY, 8TH FEBRUARY 2022, BEFORE HIS LORDSHIP JUSTICE CONSTANT K. HOMETOWU

SUIT NUMBER:CM/TAX/0225/2021

BUMI AMARDA GHANA LTD — PLAINTIFF

VRS

THE COMMISSIONER-GENERAL — DEFENDANT

JUDGMENT

The Appellant is a limited liability company incorporated under the laws of the Republic of Ghana initially as a wholly owned subsidiary of Bumi Armada Offshore Holding Limited ("BAOHL), which is also wholly owned by Bumi Armada Berhad ("BAB"), whose business is operating as a subcontractor under a Petroleum Agreement between Eni Ghana Exploration and Production Limited and the Government of Ghana.

The Respondent is the Commissioner-General of the Ghana Revenue Authority, (GRA) a body established by the Ghana Revenue Authority Act to collect public revenue, including the conduct of an audit on taxpayers.

The Appellant, by an amended Notice of Appeal filed on 30th March, 2021 appealed against the Respondent's Tax Objection Decision dated 31st August, 2020. This resulted in a reviewed tax liability of $3,750,011.19, from an initial tax decision by the Respondent of $4,451,653.32 after a tax audit by the Respondent. The Appellant, dissatisfied with the reviewed tax liability of $3,750,011.19, arrived at after several correspondences to the Respondent as well as satisfying the statutory condition precedent to the determination of a tax Objection, filed the instant appeal to this Honourable Court for determination.

GROUNDS OF APPEAL

The Appellant's grounds of appeal in its amended Notice of Appeal are as follows:

a) the Respondent erred in law by interpreting the scope of the Eni Ghana Exploration and Production Limited's Petroleum Agreement to exclude contract for the supply of services between the Appellant and its sub-subcontractors;
b) the Respondent erred in law by classifying payments made by the Appellant to its sub-subcontractors for the services, including manpower services as subject to withholding tax and/or pay as you earn (PAYE) payments;
c) the Respondent misdirected itself in the assessment of withholding tax for the 2015-2019 years of assessment;
d) the Ruling of the Respondent is against the weight of evidence.

RELIEFS SOUGHT

The Appellant prays for the following reliefs:

a) A declaration that the law applicable to the contracts between the Appellant and its sub-subcontractors is the Petroleum Income Tax Act, 1987 (PNDCL 188) and the Respondent's Ruling dated 1st October 2014 on the application of PNDCL 188 as it relates to the cascading effect of withholding tax.

b) A declaration that the payments made by the Appellant to its sub-subcontractors are not subject to withholding tax.

Or in the alternative,

A declaration that the payments made by the Appellant to its sub-subcontractors are not subject to withholding tax.

c) A declaration that the payments made by the Appellant to its sub-subcontractor for manning services are not subject to withholding tax or PAYE.

Or in the alternative,

A declaration that the Respondent's assessment of the Appellant's withholding tax liability in respect of PAYE was erroneous.

d) An order directing the Appellant and the Respondent to reconcile accounts to ascertain the correct withholding tax liability of the Appellant as it relates to services not connected with the Petroleum Agreement.

e) An order directing the Respondent to refund all monies collected from the Appellant in respect of the disputed tax assessment.

f) An order directing the Respondent to pay interests at the commercial bank lending rate on the remainder of the 30% deposit already paid to the Respondent after the deduction of the undisputed withholding tax claims.

g) Costs, including Attorney's fees.

h) Any other order(s) that the Honourable Court may deem fit.

SUMMARY OF APPELLANT'S APPEAL

It is the Appellant's case that it signed a Charter Party dated 21st July 2015 with Eni Ghana for the provision of patrol vessels (**EXHIBIT T1).** Eni Ghana, by a letter dated 17th June 2014 requested a private ruling from the Respondent on the cascading effect of withholding tax as it related to payments made by a subcontractor under its Petroleum Agreement to the subcontractor's affiliates or 3rd party sub-

subcontractors. The response of the Respondent, per letter dated 1st October 2014 (**EXHIBIT A)**, stated, among others, that the subcontractor had no obligations under Section 27 of the then Petroleum Income Tax law, 1987 (PNDC Law 188) to withhold tax from any payments to such a person in respect of Eni's Petroleum Agreement.

The Respondent, in the said response letter, stated that where a subcontractor enters into a contract with a non-resident person to provide any works or services in connection with Eni's Petroleum Agreement which contract gives rise to income accruing in or derived from Ghana, the subcontractor should notify the Respondent in writing within 30 days of entering into the contract to determine the tax treatment of the income of the non-resident person from such a contract. The Appellant says it wrote to the Respondent on 12th January 2017 (**EXHIBIT C)**, with a reminder two years later on 22nd January 2019 (**EXHIBIT D)** on the issue of the tax treatment as directed, yet the Respondent failed or neglected to respond to this request.

The Respondent finally responded to the Appellant's letters on 10th January 2020 (**EXHIBIT E**), indicating, among others that a contract for the supply of services between the Appellant and a non-resident company does not fall within the scope of Eni Ghana's Petroleum Agreement. The letter also stated that the Income Tax Act, 2015 (Act 896) and the Income Tax Regulations (L. I. 2244) revoked the Cascading Ruling the Appellant had been given, with effect from 2016 hence the Appellant was required to withhold tax when making payments to the non-resident sub-subcontractors for the supply of services and works and pay same to the Respondent. The Appellant appealed against the Respondent's letter by a letter dated 18th June 2020 (**EXHIBIT G)** on the ground that the revocation or amendment of the Cascading Ruling cannot have a retrospective effect but rather will have a prospective effect.

SUMMARY OF RESPONDENT'S RESPONSE

The Respondent states that, by the authority or power conferred on him under section 36 of the Revenue Administration Act, 2016 (Act 915), it issued an introductory letter dated 28th February, 2020 (**EXHIBIT GRA 8)** to the Appellant informing the Appellant that its Tax Returns had been selected for audit and

detailing, amongst others, the tax types to be audited, the records to be made available to the audit team for a tax audit. The audit resulted in a tax liability of $4,451,653.32 which was communicated to the Appellant by the Respondent.

The Appellant, not satisfied with the decision of the Respondent, objected to the Tax Decision by the Respondent.

The Respondent further states that the Appellant, during its operations, had relied on a Private ruling by the Respondent specifically issued to Eni Ghana Exploration and Production Limited, even though the said ruling had been revoked ostensibly to avoid payment of certain taxes by the Appellant, the unmasking of which resulted in the bulk of the Appellant's tax liability. The Respondent states that, following several correspondences, and the Appellant satisfying the statutory condition precedent to the determination of a Tax Objection, the Respondent determined the Appellant's objection by reviewing the initial tax liability of $4,451,653.32 downwards to $3,750,011.19. The Appellant again dissatisfied with the Objection Decision of the Respondent instituted this appeal to this Honourable Court for the determination of the matter.

PRELIMINARY OBJECTION

I will first deal with a preliminary objection raised by the Respondent that the Appellant has failed to provide any proof of its compliance with the mandatory provisions of Order 54 rule 4(1) and (2) of C.I. 47 and as such, renders the instant appeal incompetent and same should be dismissed. The Respondent however, concedes on page 6 of the written submission, in the last paragraph that

> *"My Lord, the Appellant, from the processes so far filed,* ***has not discharged this duty*** *under Order 54 rule 4 on the payment of first quarter 2021 year of assessment corporate taxes, except the 30% payment made is in respect of section 46(1)(b) which is in partial fulfilment of the payment of the adjusted assessment by the Respondent under section 39 of Act 915."*

The Appellant in its Reply to the Respondent provided evidence of the payment of the 30% of the assessed tax liability per KPMG's letter to the Respondent dated 21st July 2020 (**EXHIBIT M**). The amount paid was indicated as 30% of the assessed liability of $4,451,653.32, which comes up to $1,335,490.00 (GHS7,557,337.20), and when compared with the revised tax assessment of $3,750,011.19, the amount paid constitutes about 35.6% which is obviously above the one quarter required under Order 54 rule 4(1).

This position was settled by the Court of Appeal in the case of **Beiersdorf Ghana Limited v. The Commissioner-General. Suit No. H1/140/2019** with Adjei, J.A. setting out clearly the requirements of Order 54 rule 4(1) and (2) as follows

> *"It was wrong for counsel for the Respondent to deny a payment made to his client by the Appellant and had been used by his said client to prepare a Revised Audit Report for the Appellant. We find from the evidence on record that the Appellant paid more than a quarter of the assessed tax before filing the appeal. ... The combined effect of Order 54 rule 4(1) & (2) is that the payment of the quarter of the amount payable for that quarter may be paid before the appeal is filed, or may be filed simultaneously with the appeal or after the appeal has been filed."*

The appeal filed by the Appellant is therefore valid and properly before this Court for determination and I hereby proceed to make a determination thereon.

ANALYSIS

The issues raised in the grounds of appeal will be addressed in the same order as set out above in this judgment.

Ground 1: The Respondent erred in law by interpreting the scope of the Eni Ghana Exploration and Production Limited's Petroleum Agreement to exclude contract for the supply of services between the Appellant and its sub-subcontractors.

The applicable law the Appellant indicates to be the law governing the tax implications of contracts entered into under a Petroleum Agreement is the

Petroleum Income Tax Act, 1987 (PNDCL 188. Section 27(1) of the PNDCL 188 provides as follows:

> **Where under the terms of a contract an amount due to a subcontractor in respect of work or services for or in connection with a petroleum agreement the person liable under that contract to make payment to the subcontractor shall withhold from the aggregate amount due to the subcontractor the percentage of the aggregate amount due that may be specified in the petroleum agreement and the amount so withheld shall be paid to the Commissioner and payment shall have the effect provided for in subsection (3).**

It is noted that the applicable laws at the time of the tax audit were the **Revenue Administration Act, 2016 (Act 915)**, the **Income Tax Act, 2015 (Act 896)**, and the **Income Tax Regulation, 2016 (L.I. 2244)**, which the provisions in **section 71(4) of the Income Tax Act, 2015 (Act 896)** being *in pari materia* with **section 27(1) of the PNDCL 188**, to the effect that a contractor under a petroleum agreement is required to withhold tax on any payments due to a subcontractor under the same contract.

Owing to the absence of a specific mention of payments from subcontractors to sub-subcontractors in both laws, the Appellant applied to the Respondent for directions on the tax liability of payments from the Appellant to its subcontractors (sub-subcontractors to Eni Ghana).

In respect of an agreement between a subcontractor and a sub-subcontractor, **section 27(2) of PNDCL 188** provides as follows:

> *"When an amount has been withheld from an aggregate amount due to a subcontractor pursuant to subsection 1 of this section the subcontractor shall not in respect of that aggregate amount be liable for tax under the provisions of any other law in force in Ghana."*

It is in respect of clarifying the above stated **section 27(2) of PNDCL 188**, that the Withholding Tax Cascading Ruling of the Respondent dated October 1, 2014 provided in part as follows:

"Where the Subcontractor engages any person to assist in the performance of its obligations in connection with Eni's petroleum agreement, the Subcontractor has no obligation under section 27 of PNDC Law 188 to withhold tax from any payments to such a person in respect of the same contract. The Subcontractor is, however, required to file returns on all transactions with the person who assisted it in the performance of its obligations, with the Ghana Revenue Authority."

With the coming into force of the **Income Tax Act, 2015 (Act 896) and the Income Tax Regulations, 2016 (L.I. 2244)** the above ruling on the Withholding Tax Cascading which provides that the subcontractor should not deduct withholding tax from amounts payable to the sub-subcontractor is revoked as provided under **Paragraph 5(3) of the Seventh Schedule of the Income Tax Act, 2015 (Act 896)** and subsequently under **section 106(3) of the Revenue Administration Act, 2016 (Act 915).**

The revocation of the ruling of the Respondent is however not applicable to arrangements between the subcontractor and sub-subcontractor that entered into force before the passage of **L.I. 2244** as provided under **paragraph 5(5)(a) of the Seventh Schedule to the Income Tax act, 2015 (Act 896)** and subsequently under **section 106(5)(a) of the Revenue Administration Act, 2016 (Act 915).** The provision under **section 106(5)(a) of the Revenue Administration Act, 2016 (Act 915)** is as follows:

"(5) The amended or revoked part of a private or class ruling

(a) does not apply to arrangements commenced before the amendment or revocation."

Indeed, **section 106(5)(b) of the Revenue Administration Act, 2016 (Act 915)** is clear that a revocation applies to arrangements commenced after the revocation when it provides as follows:

"(5) The amended or revoked part of a private or class ruling

(b) applies to arrangements commenced after the amendment or revocation."

The provisions in **section 106(5)(a) and (b) of the Revenue Administration Act, 2016 (Act 915)** are in tandem with the provisions in **article 107(b) of the Constitution 1992** to prevent its breach by not retrospectively imposing any limitations on, or adversely affecting the personal rights and liberties of any person nor imposing a burden, obligation or liability on an any person.

This ground of appeal is thus upheld.

I proceed to the second ground of appeal.

Ground 2: The Respondent erred in law by classifying payments made by the Appellant to its sub-subcontractors for the services, including manpower services as subject to withholding tax and/or pay as you earn (PAYE) payments.

The contract the Appellant had with its sub-subcontractors was one for the provision of services by way of the provision for manpower services. The sub-subcontractors provided their own staff for the execution of the contract and thus were the ones to pay the taxes (PAYE) on its employees.

The issues raised have been dealt with under the first ground of appeal in respect of the applicable law being the **Petroleum Income Tax Act, 1987 (PNDCL 188)** and that the provisions of **section 71(3) of the Income Tax Act, 2015 (Act 896)** were outside the scope of application of **Act 896.**

On the Respondent's statement that *"Respectfully, the Appellant cannot arrange its business affairs according to its personal understanding and expect the Respondent's auditors to accept it or rearrange it to the benefit of the Appellant. As the wise saying goes,* ***"As a man makes his bed so shall he lie.""*** I wish to draw the attention of Learned Counsel of the Respondent to **section 32 of the Revenue Administration Act, 2016 (Act 915)** on correction of tax returns and other information, specifically **section 32(3) and (4)** which provide as follows:

"32(3) where a person discovers that information submitted to the Commissioner-General as a tax return is incorrect or misleading in any material particular, the person shall submit further information to the Commissioner-General in respect of the matter.

(4) the Commissioner-General may take into account information received under subsection (3) in making an assessment or adjusted assessment."

Following from the above provision, the Appellant had the opportunity, which was demonstrated in the Appellant's reply to Respondent when Appellant explained that *"**Sixth**, the Appellant had erroneously posted manpower services rendered by BAB as "staff costs" in 2015. Since these expenses for manpower services were incurred during pre-joint venture stage, BAOHL and Cypress agreed that these expenses should be for the sole account of BAOHL. Accordingly, these expenses were reversed out of the Appellant's books in 2018. The Respondent's assessment of the PAYE tax liability for the Appellant failed to take the reversal into account, making the assessment inaccurate."*

In view of the provisions under the contract being for services, and the fact that the applicable law has been extensively discussed in ground one of the appeal above, I hold that withholding tax and /or pay as you earn (PAYE) payments are not applicable.

I proceed to the third ground of the appeal.

Ground 3: The Respondent misdirected itself in the assessment of withholding tax for the 2015-2019 years of assessment.

It is evident from the appeal of the Appellant and the response of the Respondent on this ground that the focus is on which aspect of the financial statements should be the basis for the determination of the tax base, should it be the figures in the trial balance and balance sheet or the figures in the income statement.

It is trite that taxation is on gains and profits arising out of employment, business or investment, which gains or profits are reflected in the income statement. As rightly stated by the Respondent, *"Respectfully, trial balance is a snapshot of ledger balances on a particular date or the last date of an accounting period. It is the entire cycle of a business's life that gives the balances of the trial balance on a particular date. Hence balances on a trial balance could effectively be said to be movement of balances from the beginning of a business cycle to a particular date in the business cycle, incorporating all other transactions within the period or cycle. So, depending on what balances in financial statements stand for and how previous balances in financial statements affect the subsequent years' financial statement figures, trial balance could reveal discrepancies in a Company's financials with attendant tax implications."*

Well said but its is for the reason of identifying discrepancies that the trial balance is prepared and any errors or discrepancies detected are corrected before the income statement and statement of financial position (balance sheet) can be prepared. It will thus be wrong to assess withholding taxes on figures in the trial balance, more so when adjustments could have been passed to those figures by the auditors of the Appellant hence arriving at the audited financial statements comprising the income statement, statement of financial position (balance sheet), cash flow statement and notes to the financial statements.

Respondent has to be sure in assessing withholding tax on any figures in the trial balance, those figures tally with those in the financial statements, to take account of any adjustments that may have been effected to the figures. The Appellant admitted to some payments related to management fees, office rental expenses, audit fees, accounting fees and professional fees specifically for 2014 to 2018, but disputes all other items forming the basis of the Respondent's withholding tax assessments.

I hold and direct that the Appellant and Respondent agree on the appointment of an independent auditor to reconcile this issue and report back to this Court on the final determination.

I now proceed to the fourth and final ground of appeal.

Ground 4: The Ruling of the Respondent is against the weight of evidence.

Appellant has cited a plethora of cases in respect of this omnibus ground of appeal as in **Adu Kofi Djin v. Seidu Musa Baako [2007-2008] SCGLR at page 686; Charles Quaye v. Joseph Nii teiko Amuzu [2020] CA (Suit No. H1/72/2019; Delivered on 27-05-2020) (Unreported); and Standard Chartered Bank v. Cal Bank Ltd. [2020] CA (Suit No. H1/122/2019; Delivered on 27-05-2020) (Unreported)**. Appellant states that the Respondent was exercising an adjudicative function hence the decisions in the above cited cases should apply *mutatis mutandis* to this appeal.

The Appellant is of the further conviction that as was held in the cases of **Republic v. Commissioner of Income Tax; Ex Parte Maatschapij de Fijnhouthandel N. V. (Fynhout) [1971] 1 GLR 213; and Commissioner of Income Tax v. Maatschapij de Fijnhouthandel N. V.**, the Appellant's invocation of this omnibus ground of appeal is worth considering, citing the Respondent's use of wrong figures and wrong rates in Respondent's tax assessment of the Appellant's tax liability.

The Respondent responds that Order 54 which governs Tax appeals states at rule 3(2) that: **"(2) No ground of appeal which is vague or general in form shall be stated".** It is evident that the cases cited by the Appellant in the two **Fynhuot cases** above stated the grounds of *certiori* to quash the decision of the Commissioner of Income Tax, and the Commissioner's review application. In the reply of the Appellant, **Order 54 rule 10(1) of C.I. 47** was canvassed without mentioning **Order 54 rule 10(2).**

The rules on Tax Appeals are clearly set out in **Order 54** and I hold that **Order 54 rule 3(2)** and **Order 54 rule 10(1) and (2)** are relevant in this regard and there is no evidence of the rules in Tax Appeals having been modified to admit of omnibus grounds of appeal. More so, elsewhere in this judgement, the wrong figures and rates used have been addressed by way of the invitation of an independent auditor to reconcile and address the discrepancy.

The invocation of this Court's jurisdiction on the omnibus ground of appeal is thus declined.

CONCLUSION

The preliminary objection fails as the Appellant is properly before this Court and the Court's jurisdiction has been properly invoked.

Consequently, ground (a) of the appeal succeeds as the Respondent erred in law by interpreting the scope of the Eni Ghana Exploration and Production Limited's Petroleum Agreement to exclude contract for the supply of service between the Appellant and its sub-subcontractors.

Ground (b) of the appeal succeeds as the Respondent erred in law by classifying payments made by the Appellant to its sub-subcontractors for the services, including manpower services as subject to withholding tax and/or pay as you earn tax (PAYE) payments.

On ground (c), the Appellant and the Respondent are to agree on an independent auditor to be appointed by this Court to reconcile this issue in respect of the errors and discrepancy, and report back to this Court on the final determination.

Ground (d) of the appeal fails as the provisions of Order 54 on Tax Appeals do not provide modifications to the rules to admit of omnibus grounds of appeal.

I make no orders as to cost. (SGD)

CONSTANT K. HOMETOWU

(JUSTICE OF THE HIGH COURT)

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