IN THE SUPERIOUR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA-GHANA

CORAM:ADJEI, J.A

KWOFIE, J.A

POKU-ACHEMPONG,J.A

SUIT NO.:H1/140/2019

5TH DECEMBER, 2019

IN THE MATTER OF AN APPEAL AGAINST TAX ASSESSMENT BY THE COMMISSIONER GENERAL

BEIERSDORF GHANA LIMITED
5TH FLOOR, GRAND OYEEMAN BUILDING -- APPELLANT/
SOUTH LIBERATION LINK APPELLANT
AIRPORT COMMERCIAL AREA, ACCRA

VRS.

THE COMMISSIONER GENERAL
GHANA RVENUE AUTHORITY --- RESPONDENT/
ACCRA RESPONDENT

JUDGEMENT

ADJEI,J.A:

The Commissioner General of the Ghana Revenue Authority rendered a decision on 14th August, 2017 with respect to tax

0402277
11-12-2019

liability of GH¢1,698,149.34 against Biersdorf Ghana Limited for 2014 to 2016 years of assessment . The tax assessed by the Commissioner was based on the result of a Tax Audit for the Accounting Period of 2014-2016. Biersdorf Ghana Limited dissatisfied with the tax assessment filed an appeal against the decision of the Commissioner General to the High Court. The appeal was filed on 8th January, 2018. Biersdorf Ghana Limited was the Appellant before the High Court and the Commissioner General of the Ghana Revenue Authority was the Respondent. The Appellant dissatisfied with the decision of the High Court delivered on 13th July, 2018 appealed against same to this Court on 11th October, 2018. The High Court shall be referred to as the Court below for the purposes of this appeal. In this appeal, the Appellant/Appellant shall be referred to as Appellant and the Respondent shall be referred to as the Respondent. Simply stated, for the purposes of this appeal and ease of reference the parties shall maintain their respective designations at the court below.

The judge at the Court below discussed all the grounds of appeal and dismissed each and every one as unmeritorious and finally dismissed the notice of appeal filed in the Court below as incompetent. It is upon this background that the Appellant appealed to this Court to reverse the judgement in appeal determined by the Court below. The three grounds of appeal filed against the decision of the Court below are contained in the

Amended Notice of Appeal pursuant to leave granted by this Court on 29th May, 2019 and filed on 31st May, 2019. They are as follows:

"A. ***That the decision of the court is against the weight of evidence.***

B. That the court erred in law by affirming the finding of Commissioner General of Ghana Revenue Authority that royalty payments made by the Appellant to Beiersdorf AG (BDF) pursuant to an agreement between Appellant and BDF for the use of Nivea Brand should not be allowed as a legitimate business cost because of the failure of the Appellant to register the said agreement with the Ghana Investment Promotion Center before making payments under the agreement.

C. The court erred in law when it held that the Appellant had not shown evidence of the payment of at least a fourth of the tax amount payable".

The ground (C) of the appeal is fundamental as it goes to the root of the appeal. The High Court dismissed the appeal as incompetent on the basis that the appellant failed to comply with Order 54 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) which conferred the procedure to be followed by a person who is dissatisfied with a tax assessment by the Commissioner General. The Court below held that the Appellant failed to comply

with Order 54 rule 4 of the High Court (Civil Procedure) Rules, C.I. 47. The provision provides as follows:

> ***"(1) An aggrieved person who has filed an appeal against an assessment, decision or order of the Commissioner under rule 1 of this Order shall, pending the determination of the appeal, pay an amount not less than a quarter of the amount payable in the first quarter of that year of assessment as contained in the notice of assessment.***
>
> ***(2) An appeal shall not be entertained by a court under these Rules unless the appellant has paid the amount set out in subrule (1) of this rule.***
> ***(3) Where the payment of tax has been held over pending an appeal".***

The court below finally dismissed the appeal on a technical ground that the Appellant failed to demonstrate to the Court that it either attached a statement indicating that an amount of not less than one quarter of the amount payable in first quarter of that year of assessment as contained in the notice of appeal has been paid or evidence that the amount has been paid to the Ghana Revenue Authority. The general principle of law is that where a case is terminated on a legal point such as capacity or jurisdiction , the court is forbidden from discussing the merits of the case even where the appellant may seem to have a cast -iron

case. The above position of law has been stated in several binding decisions including ***Manu v Nsiah [2005-2006] SCGLR 25 and Sarkodee 1 v Boateng 11 [1982-83] 1 GLR 715.*** On the other hand, the Court below discussed the merits of the case before dismissing the whole appeal as incompetent on grounds that it sinned against Order 54 rule 4 ((2) of C. I. 47 which is a mandatory provision and must be complied with it before an appeal under Order 54 rule 1 of C.I. 47 could be maintained or entertained. Assuming the appeal on the competence of the appeal fails, the entire appeal ought to fail as one cannot put something on nothing and expect it to stand. The Appellant has submitted that there was evidence of payment of an amount more than quarter of the amount to be paid in the first quarter to the Respondent while the Respondent disputed the Appellant's claim and further stated that the Appellant failed to comply with Order 54 rule 4 of C.I. 47 and its appeal was incompetent and the lower court was right in dismissing it. We therefore discuss grounds "A" and "C" of the appeal together in the same manner the Appellant argued its appeal and the Respondent also responded. The general position of law is that where a party alleges that a judgement is against the weight of evidence on record , the appellate court is required to correct all factual errors and to some extent some legal errors which were not properly evaluated and considered in accordance with law. The burden on an appellate court as a court correcting error when the omnibus ground is raised has been discussed in cases including

Tuakwa v Bosom [2001-2002] SCGLR 61; Djin v Musah Baako [2007-2008] SCGLR 686 and Oppong Kofi & Others v Attibrukusu 111 [2011] SCGLR 176.

From the evidence on record, the Appellant filed its notice of appeal against the decision of the Commissioner General together with other processes at the registry of the Court below on 8th January, 2018. The list of all the processes filed together with the notice of appeal at the Court below were listed by the lawyer for the Appellant and are found in pages 58 and 59 of the record of appeal. The first process mentioned is "1. List of documents to be relied on at the hearing of this appeal." The said process is contained in pages 30, 31 and 32 of the record of appeal and was labelled as exhibit "C". Exhibit "C" was duly signed by one Alfred Ntiamoah, an Assistant Commissioner on 4th July, 2010. The said Alfred Ntiamoah signed it on behalf of the Commissioner General and no objection was raised to its inclusion to the record of appeal. From exhibit "C" at page 32 of the record of appeal, there is evidence that Appellant made two installment payments before it filed the notice of appeal. From the part of exhibit "C" captioned Revised Assessment", the withholding tax was GH¢ 927,453.05 out of which the Appellant made a part payment of GH¢54,921.26. The part payment made reduced the tax to GH¢ 872,531.79. Thirty percent penalty (GH¢ 261,759.54) was added to the outstanding amount of GH¢ 872,531.79 which brought the Appellant's indebtedness to GH¢

1,134,291.33. The outstanding tax of GH¢ 1,134,291.33 was added to the corporate taxes of GH¢ 457,845.83 and thereby brought its total tax indebtedness to GH¢ 1,592,137.16. The Appellant made a further payment of GH¢ 506,744.80 after audit to the Respondent which reduced its outstanding tax arrears to GH¢ 1,085,392.36. The Appellant paid an amount of GH¢ 561, 666.59 out of the total tax indebtedness of GH¢1, 647,058.19 representing 34.1 percent of the debt. There is sufficient evidence on record to prove that the Appellant paid 34.1 percent of its total indebtedness to the Ghana Revenue Authority before filing of the appeal before the Court below. The judge at the Court below failed to examine all the records filed together by the Appellant and thereby arriving at a wrong conclusion. It is dishonesty on the part of the Respondent to dispute payment made by the Appellant when it had used the payment received from the Appellant to prepare Audit Tax Report on the Appellant between 2014-2016 years of assessment. To buttress the dishonesty demonstrated by lawyer for the Respondent, he made the following statement in his written submission:

> ***"Having failed to furnish the court with evidence of compliance with the mandatory provisions of the rules of court, the appellant cannot be heard to belatedly say that the payment is made when the assessment was made represents compliance with the law. The payment could well have been***

made because the appellant admits liability in respect of that amount."

Lawyers must know that they owe a duty to the Republic of Ghana, the courts, their clients and their profession and shall not suppress information on records with the sole aim of taking advantage of the party of the opposing side. 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 next issue to be resolved is when should the payment of at least quarter of the amount payable in the first quarter of that year of assessment is to paid. Order 54 rule 4of C.I. 47 prescribes as follows:

"***1. An aggrieved person who has filed an appeal against an assessment, decision or order of the Commissioner under rule 1 of this Order shall, pending the determination of the appeal, pay an amount not less than a quarter of the amount payable in the first quarter of that year of assessment as contained in the notice of assessment.***

2. An appeal shall not be entertained by a court

under these Rules unless the appellant has paid the amount set out in subrule (1) of this rule."

A purposive interpretation is required to construe provisions of C.I.47 as has been clearly stated in Order 1 rule (2). The provision requires judges to interpret the Rules to achieve speedy and effective justice that will avoid delay and unnecessary expense to ensure that all matters in controversy are heard and determined effectively. 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. However, the court will not have jurisdiction to entertain the appeal until one quarter of the amount payable within the first quarter is paid. It was therefore wrong when the judge of the court below held that the notice of appeal was void for absence of payment of the amount required to be paid under Order 54 of C.I. 47. The interpretation by the Court below runs contrary to the purpose of the law and would be set aside. The purpose of the law is to ensure that an amount of not less than a quarter of the assessed amount for the first quarter shall be paid before the court shall be seised with jurisdiction to proceed with the appeal. Therefore , an appeal which has been filed without the payment of a quarter of the assessed amount for the first quarter shall not be entertained by the Court but shall not automatically render the appeal void unless an application for failure to comply with

Order 54 of C.I. 47 is brought by the Respondent. The grounds "A" and "C" of the appeal succeed after having satisfied ourselves that the Appellant paid 34.1 percent of the assessed tax for the first quarter of that year's assessment but the court below failed to take it into consideration and therefore arrived at a wrong conclusion . We are satisfied that there is no hard and fast rule about payment of quarter of the tax assessment provided it was paid before or at the time of filing the appeal or after the notice of appeal has been filed but the High Court will not have jurisdiction to entertain the appeal until such payment is made. The appeal filed by the Appellant was valid and the court below was therefore seised with jurisdiction to entertain same. We now address ground "C" of the appeal which invites this Court to discuss the legal effect of the royalty payments made by the Appellant to Beiersdorf AG (BDF). The Appellant entered into an agreement with Beiersdorf AG for the use of the Nivea Brand and pursuant to the said agreement the former paid some royalties to the latter. The trial High Court judge rightly found that the agreement between the Appellant and Beiersdorf AG was in substance technology transfer agreement and there will be no need to discuss it again. The Commissioner General disallowed all the royalty payments the Appellant made to Beiersdorf AG and taxed the amount as part of profits earned by the Appellant. The Appellant claims to have legitimately made those royalty payments to Beiersdorf AG based on technology transfer agreement it entered into with Beiersdorf AG. The Commissioner

General on the other hand disallowed the payments made and treated it as profit and taxed it under the Income Tax Act, (Act 896). Income Tax in Ghana is mainly regulated by the Income Tax Act, 2015 (Act 896), Income Tax (Amendment) (No. 2) Act, 2016 (Act 924) and the Income Tax Regulations, 2016 (L.I. 2244). Section 9 of the Income Tax Act, Act 896 is on the residual deduction rule which is the subject matter of this appeal. It provides thus:

> "1. ***A person who is ascertaining the income of that person or of another person from an investment or business conducted for a year of assessment or for a part of that year shall deduct from the income, an expense to the extent that that expense is wholly, exclusively and necessarily incurred by the person in the production of the from the investment or business during the year.***
>
> ***2. A deduction shall not be allowed under subsection (1) for an expense that is of capital nature.***
>
> ***3. For the purposes of this section," expense that is of capital nature" includes an expense that secures a benefit that lasts for more than twelve months."***

The question before this Court to resolve is whether or not the royalty payments made to Beiersdorf AG was an expense which

is wholly, exclusively and necessary incurred incurred by the Appellant in the production of the income from the business during the year. The Appellant's position is that to enable it sell and distribute Nivea branded cosmetics in Ghana, it entered into an agreement with Beiersdorf AG to use Nivea brand in Ghana and was therefore required under the contract to pay royalties. The agreement made between the Appellant was made on 1st February, 2012 and captioned "Distribution Licence Agreement". Article 3 of the said agreement was on transfer of marketing and management know-how from Beiersdorf AG to the Appellant. The Distribution Licence Agreement which forms part of the record of appeal was not registered under the Ghana Investment Promotion Centre Act, 2013 (Act 865) and according to the Respondent, the parties to it cannot take benefits and incentives under that Act as well as under the Income Tax Act, Act 896. The Respondent did not dispute the fact that the treatment of royalties as expenditure wholly exclusively and necessary incurred but it violated the Ghana Investment Promotion Act, 2013 (Act 867). From exhibit GRA '3' at pages 112 and 113 the respondent stated its position on the effect of failure to register a technology transfer agreement as follows:

> **"We are unable to disagree to the treatment of royalties as expenditure wholly, exclusively and necessarily incurred, however, the treatment violates the Ghana Investment Promotion Act 2013 (Act 865) because you**

have not registered the agreement with the Centre. It should interest you to know that Ghana Revenue Authority has been mandated by Revenue Administration Act 915 section 109 to administer part of GIPC Act. The GIPC Act states in section 41(c) that penalty for non-registration of the agreement mandates the Centre to order the payment or part payment to the appropriate agency of fees, taxes, duties and other charges in respect of benefits granted to the enterprise.

You will agree with us that charging royalties against profit is a way of reducing taxes that should otherwise be paid to the state. We also observed that you relate the treatment of royalties to transfer pricing rules "(arms length principle)". We beg to differ because the TPR does not condone offensive transactions which attract penalty under the GIPC law. Flowing from the above we are unable to grant your request to reverse the transaction".

The basis for the disallowance and surcharging of the profits to the Appellant and its contracting party by Respondent was that the Appellant and its contracting party cannot take benefit under the Ghana Investment Promotion Centre Act, Act 865 by the fact that the technology transfer agreement between them was not registered under it. Section 37 of Act 865 provides that an

enterprise may enter into a technology transfer agreement that the enterprise considers it to be appropriate and such agreement shall come into force on the date of its registration. The relevant part of section 37 of the Act provides as follows:

> **"(1) An enterprise may enter into a technology transfer agreement that the enterprise considers appropriate for the enterprise.**
>
> **(5)A technology transfer agreement registered under this Act comes into force on the date of the registration."**

Therefore, for an enterprise to benefit under technology transfer agreement under Act 865, the agreement should have been registered under it. From the evidence on record, the appellant did not register its technology transfer agreement under Act 865 and cannot take benefits and incentives under it.

To our mind, it is the interpretation given to section 26 of Act 865 by the parties herein that has brought about this appeal. Section 26 (1) of Act 865 provides thus:

> ***"An enterprise registered by the Centre is entitled to the benefits and incentives that are applicable to an enterprise of a similar nature under the Internal Revenue Act, 2000 (Act 592)Value Added***

Tax Act, 1998, (Act 546) and under, Chapters 82,84,85 and 98 of the Customs Harmonised Commodity and Tariff Code Schedule to the Customs, Excise and Preventive Service(Management)Act, 1993 (P.N.D.C.L.) 330) and any other relevant law."

The above provision is clear and unambiguous as it provides that enterprises registered under Act 865 are entitled to benefits and incentives which enterprises registered under other laws including the Internal Revenue Act, Act 592 may also benefit under those enactments. However, it does not provide that enterprises registered under those laws including the Internal Revenue Act, Act 592 cannot in addition to any benefits and incentives conferred on them by their respective Acts of Parliament take any incentives and benefits under Act 865. It is trite to say that section 136 of the Income Tax Act, Act 896 repealed Act 592 and the former is the predecessor enactment of the latter. Therefore, any reference to Act 592 is now referable to Act 892. The position of the law is that an enterprise registered under Act 892 may take any benefits and incentives under it and may also be entitled to other benefits and incentives under Act 865 provided it is registered under it. An enterprise registered under the Income Tax Act, Act 896 shall be entitled to benefits and incentives under it and where it is not registered under the Ghana Investment Promotion Centre Act, Act 865, it shall not

benefit under it. We hold that the Plaintiff is entitled to benefits and incentives under the Income Tax Act, Act 896 but cannot in addition benefit under the Ghana Investment Promotion Centre Act, Act 865 as it did not register its technology transfer agreement under it in accordance with section 37 subsections (1) and (5). The interpretation given to section 37 by the Commissioner General and affirmed by the Court below is wrong as section 26 of Act 865 is on additional benefits that enterprises registered under laws including the Income Tax Act may benefit if registered under the Ghana Investment Promotion Centre Act. The general principle of law under purposive interpretation is that when interpreting a statute an account must be taken of the words of the Act according to their ordinary meaning as well as the context in which the words and consideration is given to the subject matter, the scope, the purpose and to some extent the background of the Act. There is no ambiguity as the meaning to be given to section 26 of Act 865 and the Court is not required to use external aids as provided by section 10(1) of the Interpretation Act, 2009 (Act 792). Furthermore, the language of the Act is neither ambiguous or obscure and external aids cannot be used under the guise of section 10(2) of the Interpretation Act, Act 792. The only meaning that could be deciphered from section 26 of Act 865 is that an enterprise registered under the Income Tax Act, Act 896 or the other laws mentioned in it could get other benefits and incentives under Act 865 in addition to those benefits and incentives they are entitled to under those laws.

Some of the benefits and incentives an enterprise registered under Act 685 have been outlined in section 32 of the Act and it includes guaranteed unconditional transferability in freely convertible currency of dividends, net profits, loan servicing where a foreign loan was obtained, and fees and charges in respect of technology transfer agreement subject to the Foreign Exchange Act, 2006 (Act 723) and the Regulations and Notices issued under it. The Appellant and its contracting party for the technology transfer agreement are entitled to any benefits and incentives under the Income Tax Act but are not entitled to any incentives and benefits under the Ghana Investment Promotion Centre Act as they did not register under it in accordance with section 37 of the Act. Ground "B" of the appeal succeeds with respect to the wrong disallowance and surcharging of the Appellant of the incentives and benefits conferred on it under section 9 of the Income Tax Act, Act 896.

Sanctions imposed on enterprises under Section 41 of the Ghana Investment Promotion Centre Act, Act 865 relates to offences committed under the Act and not the Income Tax Act. Counsel for the Appellant invited the court to use *generalia specialibus non derogant* rule to interpret the seemingly confusion between the Income Tax Act and the Ghana Investment Promotion Centre Act with respect to the effect of failure to register an enterprise under the latter Act. The latin maxim is used where two provisions of an enactment or two legislations conflict each other

and the conflict is irreconcilable. In that sense, the conflict is resolved in favour of the special legislation. We are satisfied that there is no conflict between the two enactments for us to use the implied rule or the *generalia specialibus non derogent* rule to resolve it and we shall decline to use it. Maxims and cannons are used as good savants when they are necessary and not at all times.

The appeal against the failure to pay the tax which the Appellant should have withheld or withheld but failed to pay to the Respondent fails. Subject to the above the appeal succeeds in respect of grounds "A", "B" and "C". The parties are to go into account within one month from today to determine the appropriate tax payable in terms of the judgement of this Court.

(sgd.)

DENNIS ADJEI

JUSTICE OF THE COURT OF APPEAL

HENRY KWOFIE, J.A: **I agree** **(sgd.)**

HENRY KWOFIE

JUSTICE OF THE COURT OF APPEAL

POKU-ACHEAMPONG, J.A: I also agree

(sgd.)
ALEX B. POKU-ACHEAMPONG
JUSTICE OF THE COURT OF APPEAL

COUNSEL

- DR. KWEKU AINUSON FOR APPELLANT
- MR. ODARTEY LAMPTEY FOR THE RESPONDENT