IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA - GHANA

AD - 2025

CORAM: G. S. SUURBAAREH, JA (PRESIDING)

NOVISI A. ARYENE, JA

DR. E. O. DAPAA, JA

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CIVIL APPEAL NO.: HI/240/2023

DATED: 8TH MAY, 2025

IN THE MATTER OF ORDER 54 OF THE HIGH COURT (CIVIL PROCEDURE) RULES, 2004 (CI 47)

AND

IN THE MATTER OF AN APPEAL AGAINST TAX ASSESSMENT BY THE COMMISSIONER GENERAL BUMI ARMADA GHANA LTD.	-	**APPELLANT/ RESPONDENT**

VRS

THE COMMISSIONER GENERAL, GHANA REVENUE AUTHORITY	-	**RESPONDENT**

JUDGMENT

SUURBAAREH, JA

This is an appeal against the judgment of the High Court, Accra, dated 5th February 2022, in which the trial court granted all the reliefs sought by the Appellant/Respondent, in respect of an appeal against

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tax assessment by the Respondent/Appellant. The Respondent/ Appellant has mounted the instant appeal on nine (9) grounds of appeal based on his dissatisfaction with the judgment of the trial court, save the ruling on the inclusion of the omnibus ground of appeal by the Appellant/Respondent. The grounds of appeal, which can be found at pages 58 to 61 of Volume 5 of the record of appeal are the following as no additional grounds were filed:

"i. *The holding of the High Court on the preliminary objection that the Appellant/Respondent has complied with Order 54, Rule 4(1) and (2) of the High Court (Civil Procedure) Rules 2004 (CI 47) relating to the payment of an amount not less than a quarter of the amount payable in the first quarter of that year of assessment before the appeal shall be entertained is against the weight of the evidence adduced.*

ii. *The High Court erred in law by holding on the preliminary objection that the Appellant/Respondent had complied with Order 54, Rule 4(1) and (2) of the High Court (Civil Procedure) Rules, 2004 (CI 47)*

Particulars of errors of law

The court erred in law by construing the payment made by the Appellant/Respondent under section 42(5)(b) of the Revenue Administration Act, 2016 (Act 915) to also cover the legal requirement of payment under Order 54, Rule 4(1) and (2) of the High Court (Civil Procedure) Rules, 2004 (CI 47).

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iii. *The holding of the High Court that the scope of the Eni Ghana Exploration and Production Limited's Petroleum Agreement include contract for the supply of services between the Appellant/Respondent and its sub-subcontractors is against the weight of the evidence.*

iv. *The High Court gravely erred in law by interpreting the scope of Eni Ghana Exploration and Production Limited's Petroleum Agreement to include contract for the supply of services between the Appellant/Respondent and its sub-subcontractors.*

Particulars of error of law

a. *The Honourable Court fell in error by failing to construe the Private Ruling issued by the Respondent/Appellant to Eni during the subsistence of the Internal Revenue Act, 2000 (Act 592) as exclusive and restrictive in application to Eni.*
b. *The Honourable Court failed to appreciate the legal effect of the revocation of the Private Ruling issued by the Respondent/Appellant to Eni by the Income Tax Act, 2015 (Act 896).*
c. *The Honourable Court erred by holding that the revocation of the Private Ruling is not applicable to arrangements between subcontractors and sub-subcontractors contrary to section 136 of the Income Tax Act, 2015 (Act 896).*
d. *The Honourable Court erred by holding that Section 71(4) of Act 896 was in* pari materia *with Section 27(1) of the Petroleum Income Tax Act, 1987 (PNDCL 188) without*

recourse to regulation 27(1) of the Income Tax Regulations, 2016 (LI 2244).

e. *The Honourable Court erred in not averting its mind to regulation 27(1) of LI 2244 and therefore alluding that there was absence of specific mention of payment from subcontractors to sub-subcontractors in Act 896.*

f. *The Honourable Court failed to avert its mind to the legal effects of the provisions in the Model Petroleum Agreement which provides for stability of contract between the State, Ghana National Petroleum Corporation (GNPC) and 'Contractor'.*

g. *The Honourable Court misapplied Section 106, subsection (5) of Act 915 to the arrangements between the Appellant/Respondent and its subcontractors.*

h. *The Honourable Court misapplied the principle of retrospective legislation to effect tax arrangement beyond statutory intervention contrary to Article 174 of the Constitution.*

v. *The holding of the High Court that payments of withholding tax and/or pay as (sic) earn (PAYE) are not applicable in view of the provisions under the contract for services is against the weight of evidence adduced.*

vi. *The High Court erred in law by holding that withholding tax and/or pay as earn (PAYE) payments are not applicable in view of provisions under the contract for services and the fact*

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that the applicable law has been extensively discussed in its decision in ground one of the appeal against the assessment.

Particulars of error of law

The Honourable Court erred in not considering the legal effects of Sections 4, 71(3), 104 and 136 of Act 896 and Section 8 of Act 592 on the repealed Petroleum Income Tax Act, 1987 (PNDCL 188).

vii. The order of the High Court that the parties agree on the appointment of an independent auditor to reconcile the issue of assessment of withholding tax for the 2015-2019 years of assessment is against the weight of the evidence adduced.

viii. The High Court erred in law by ordering that the parties agree on the appointment of an independent auditor to reconcile the issue of assessment of withholding tax for the 2015-2019 years of assessment.

Particulars of error of law

The order was not made in accordance with Order 54, Rule of the High Court (Civil Procedure) Rules, 2004 (CI 47).

ix. The holding of the High Court that withholding tax could not become computed on the discrepancies in trial balance was against the weight of the evidence".

The parties henceforth would be referred to simply as Appellant for the Respondent/Appellant, and Respondent for the Appellant/ Respondent. The Respondent which was incorporated on 19th December 2012, was initially a wholly owned subsidiary of Bumi

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Armada Offshore Holding Ltd. ("BAOHL") which intern was wholly owned by Bumi Armada Berhad (BAB). However, by a shareholder agreement between BAOHL and Cypress Energy Company Ltd. (Cyress), the Respondnet became a joint venture entity. The Respondent, a subcontractor under a Petroleum Agreement between Eni Ghana Exploration and Production Ltd. (Eni) and the Government of Ghana, on 21st July 2015 signed a Charter Party with Eni for the provision of patrol vessels. Before this contract for the provision of patrol vessels by the Respondent for Eni, Eni had in June 2014, requested from the Appellant, a private ruling on the cascading effect of withholding tax in relation to payments made by a subcontractor under the Petroleum Agreement to subcontractor's affiliates or 3rd party sub-subcontractors. In response to this request, the Appellant on 1st October 2014, issued a ruling to the effect, amongst others that, where the subcontractor engages any person to assist in the performance of its obligation in connection with Eni's Petroleum Agreement, the subcontractor had no obligation under section 27 of the Petroleum Income Tax Law, 1987 (PNDCL 188) to withhold tax from payments to such a person, but added that in the case of non-resident persons providing 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 Appellant in writing within 30 days of entry into the contract to determine the tax treatment of the income of such a non-resident person per exhibit "A" at page 183 of Volume 2 of the record of appeal.

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The Respondent, per exhibits T1, T2, T3 and T4, appearing at pages 33, 79, 89 and 116 respectively of volume 3 of the record of appeal, entered into contracts for Charter Party; Bareboat Charter; Ship Management and Marine husbandary services. On 17th January 2017, and again on 22nd January 2019, the Respondent, per exhibits "C" and "D", at pages 235 and 237 of volume 2 of the record of appeal, sought from the Appellant a clarification on its withholding tax implications of payments made under contract with non-resident persons for the supply of services.

The Appellant, in response to exhibits C and D, on 19th January 2020, per exhibit E, at page 240 of volume 2 of the record of appeal, stated that the contract between the Respondent and its non-resident company did not come under the scope of the Petroleum Agreement signed with Eni, and that tax with such non-resident company will be treated under the Income Tax Act, 2015 (Act 896) and the Income Tax Regulations, 2016 (LI 2244), and further that on these laws coming into force, any private or class ruling became revoked in accordance with section 106(3) of the Revenue Administration Act, 2016 (Act 915). The Respondent, per exhibit G, at page 245 of volume 2 of the record of appeal, disagreed with the interpretation of section 106(4) and (5) of Act 915, contending that revocation did not affect arrangements entered into before the revocation by virtue of section 108 of Act 915.

Despite the disagreement on the effect of revocation, the Appellant, per exhibit H, at page 249 of volume 2 of the record of appeal, went ahead

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to assess the tax of the Respondent for the period 2014 to 2019, and came out with a figure of $4,451,653.32, with a directive for it to be paid within 14 days.

The Respondent, who was not satisfied with its tax assessment, per exhibit H, at page 254 of volume 2, objected to it and indicated an intention to exercise its right of appeal under section 42(1) of the Revenue Administration Act, 2016 (Act 915), for the reason that as the Income Tax Act, 2015 (Act 896) came into force in 2016, withholding tax was not applicable to transactions entered into before the law came into force; and further that the computation of the tax using compound interest, instead of 20% to 30% interest stipulated in the Internal Revenue Act, 2000 (Act 592) was wrong.

The Appellant, who in response, per exhibit K, at pages 261 of volume 2, contended that section 106 of the Revenue Administration Act, 2016 (Act 915) was inapplicable to sub-subcontractors, as they were never mentioned in Section 27 of PNDCL 188, further contended that as the Petroleum Agreement did not refer to them, the ruling on cascading effect was limited to entities mentioned in the agreement, and for their benefits only. The appellant went on to issue a notice of tax, per exhibit L, with exhibit M being the supporting documents of the assessment. See pages 263 and 266 respectively of volume 2 of the record of appeal.

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Undaunted, the Respondent, per exhibit N, at page 282 of volume 2 of the record, still disagreed with the tax as assessed, insisting that subcontractors of Eni were not liable to withhold tax, as that will contradict the private ruling per exhibit "A" of 1st October 2014.

The Appellant, who per exhibit "O", at page 297 of volume 2 of the record maintained its position that the private ruling was inapplicable to the Respodent with regard to withholding tax, however conceded that the penalty rate was 3o%, per Section 143(2)(b) of the Internal Revenue (Amendment Act) 2004, (Act 669), and went on to amend the figure assessed to $3,062,847.50.

Despite the Respondent protest, per exhibit P, at page 21 of volume 3 of the record that by the Revenue Administration Act 2016, (Act 915), Sections 106(5) and 108, the ruling on the cascading effect of withholding tax was applicable to it, and further that the amendment did not operate retrospectively, the Appellant insisted, per exhibit Q, that the figure arrived at was the to be paid, and went on to issue a final demand notice, per R (sic), at page 31 of volume 3 of the record of appeal.

It was this disagreement between the parties that resulted in the tax appeal at the High Court, where per the Respondent's amended notice of appeal against the tax assessment at page 163 of volume 2 of the record of appeal, was based on the following grounds:

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a. Error in law on the part of the Appellant in interpreting the scope of the Eni Ghana Exploration and Production Limited's Petroleum Agreement;
b. Error of law on the part of the Appellant in classifying payments made by the Respondent to its sub-subcontractors for services, including manpower services as subject to withholding tax and/or pay as you earn (PAYE) payments.
c. Misdirection on the part of the Appellant in the assessment of withholding tax for the 2015-2019 years of assessment.
d. The ruling of the Appellant being against the weight of the evidence.

Needless to say that in respect of grounds (a), (b) and (c), the Respondent went on to state the particulars of the errors of law alleged, and also to state facts upon which it was relying. Also exhibited to its affidavit of facts were various documents, especially exhibits T1, T2, T3, T4 and T5, in respect of agreements entered into with non-resident persons for the supply of services.

At page 177 of volute 2 of the record of appeal, the Respondent sought the following reliefs:

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

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ii. 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 Respondent's assessment of the withholding tax was erroneous.

iii. A declaration that the payments made by the Appellant to its sub-subcontractors 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.

iv. An order directing the Appellant and Respondent to reconcile accounts to ascertain the correct withholding tax liability of the Appellant as it relates to services connected with the Petroleum Agreement.

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

vi. An order directing the Respondent to pay interest 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 claims.

vii. Cost including Attorney's fees.

viii. Any other relief the Honourable Court may deem fit".

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The Appellant in response to the facts stated by the Respondent, referred to the various correspondence between the parties, which have been narrated earlier, and went on to raise a preliminary objection about the validity of the tax appeal in view of the Respondent's alleged non-compliance with Order 54 Rule 4(1) and (2) of CI 47. The Appellant also went on to dispute the Respondent's interpretation of the law on the private ruling, insisting that its position was the right position.

It was after a consideration of all the processes filed as well as the legal submissions on the appropriate laws, that the trial court entered judgment for the Respondent, against which the Appellant has mounted the instant appeal on the grounds set out earlier in this judgment; and seeking to have the ruling dismissing the preliminary objection of 31/08/21 set aside, and to dismiss the tax appeal in its entirety. See the judgment at pages 43 to 55 of volume 5 of the record of appeal.

The Appellant, in his written submissions, abandoned grounds (i) and (ii) as being moot in view of the decision of the Supreme Court in the case of Export Finance Company Ltd. v Ghana Revenue Authority and the Attorney General, Suit No. J1/07/2021 of 30th November 2022 (unreported).

In respect of the grounds of appeal that the trial court erred in holding that the Eni Agreement covered contracts for the supply of services

between the Respondent and its sub-subcontractors, it was argued that the conclusion was not supported by the evidence on record, and further that the trial Court glossed over the fact that the Respondent was not an affiliate of Eni but its subcontractor; and that failure by the trial court to make a distinction between the Respondent, as a subcontractor of Eni, and the sub-contractors of the Respondent, as far as the Eni Petroleum Agreement was concerned, led to a wrong ruling.

With regard to ground (iv), about error on the part of the trial court in its interpretation of the Eni Petroleum Agreement to include the Respondent in respect of its contract for the supply of services, with its subcontractors, it was submitted that the private ruling issued to Eni under Section 116 of the Internal Revenue Act, 2000 (Act 592) ceased to exist upon the coming in force of the Income Tax Act, 2015 (Act 896) by virtue of Section 71, as well as paragraph 5(3) of the Seventh Schedule of the Act. It was also argued that the trial court erred in holding that Section 71(4) of Act 896 was in *pari materia* with Section 27(1) of the Petroleum Income Tax Act, 1987 (PNDCL 188), as no specific mention was made about payment by subcontractors to sub-subcontractors, when Section 71(4) of Act 896 and regulation 27(1) of the Income Tax Regulations, 2016 (LI 2244) are read together.

Counsel for the Appellant who contended that tax statutes must be interpreted strictly as held in **Multichoice Ghana Ltd. v Internal Revenue Service [2011] SCGLR 783**, further argued that if the trial

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court had considered the provisions of Acts 896 and 915 and the Practice note issued by the Appellant at page 264 volume 2 of the record of appeal, it would have realized that by Section 27 of PNDCL 188, the Respondent, not being a party to the private ruling could not take any benefit under it. Concluding on this ground, Counsel referred to the provisions of Section 135 of the Income Tax Act, 2015 (Act 896), and submitted that any agreement of tax waiver needed the approval of two thirds majority of members of parliament to be effective by virtue of article 174 of the Constitution. Relying on the submissions in respect of ground (iv), Counsel for the Appellant submitted that the Court erred in holding that withholding tax was not applicable to pay as you earn (PAYE) in respect of the Respondent's subcontractors.

In arguing ground (vi) of the grounds of appeal, Counsel for the Appellant contended that the holding of the trial court that by virtue of the repealing of the law by Act 896, withholding tax in respect of PAYE did not apply to the Respondent was untenable, in the face of section 28 of PNDCL 188, and further that by Section 117(6) of Act 896, agreements between the Respondent and its subcontractors was never envisaged.

With regard to ground (vii), Counsel for the Appellant submitted that because the trial court did not appreciate the real issue before it, it went on issue a directive to the parties, after judgment, contrary to the provisions of Order 54 Rule 9 of the High Court (Civil Procedure) Rules, 2004 (CI 47).

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On the last ground about alleged computation of the tax on withholding tax being based on discrepancies on the trial balance figures without any adjustment, Counsel submitted that not only did the Respondent for three years, fail to correct the discrepancies, but that the trial court, after initially rightly stating that the trial balance must be treated alongside figures in the ledger balances, veered off and arrived at the wrong conclusion. He prayed that the judgment of the trial court be set aside and the tax appeal by the Respondent dismissed.

The Respondent, in responding to the submissions filed on behalf of the Appellant, after a narration of the events leading to the tax appeal, and the resultant appeal before this Court, submitted that as the Appellant failed to argue grounds (i) and (ii), they are deemed abandoned.

With regard to ground (iii), it was contended on behalf of the Respondent that, contrary to the submissions that the Eni Petroleum Agreement did not include contract for the supply of services between the Respondent and its sub-subcontractors, that the issue of whether the Respondent was an affiliate did not fall for determination, and that what was in issue was the law applicable to the contracts entered into between the Respondent and its subcontractors, and the legal effect of the revocation of the private ruling of those contracts.

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Counsel for the Respondent went on to argue that even if the Respondent was not an affiliate of Eni, that will not change the decision as far as the applicable law and the effect of the revocation of the private ruling are concerned. Counsel went on to submit that as the contracts entered into by the Respondent and it subcontractors in respect of the bareboat charter, exhibit T2; ship management, exhibit T3; and, for marine husbandry services, exhibit T4, were all entered before the Income Tax Act, 2015 (Act 896) and the Income Tax Regulations, 2016 (LI 2244) came into force, and that the applicable law the time was PNDCL 188.

Responding to arguments in respect of ground (iv), Counsel for the Respondent contended that the trial court never erred in its interpretation of the Eni Petroleum Agreement, when it held that it included contracts for the supply of services between the Respondent and its sub-subcontractors. Counsel argued that as the applicable laws at the time of the Agreement were the Petroleum Income Tax Act 1987 (PNDCL 188), and the Internal Revenue Act 2000 (Act 592), and not the Income Tax Regulations 2016, (LI 2244), the latter statutes could not retrospectively affect agreements entered into before they came into force. Counsel went on to point out that regulation 27(1) of LI 2244 was inapplicable to payments to subcontractors in respect of Eni Petroleum Agreement because, on its coming into force, the private ruling of 1st October 2014 had determined the tax on such payments; by which ruling the subcontractor had no obligation to withhold tax.

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Touching on the effect of the revocation of the private ruling, on the coming into force of Act 896 and LI 2244, Counsel for the Respondent referred to Section 106(3)(a) and (b) of the Revenue Administration Act, 2016 (Act 915) and submitted that the revocation did not affect arrangements entered into before the revocation. On this ground, counsel concluded that the Appellant was estopped from asserting that the private ruling was exclusive or restricted to only Eni and its affiliates relying on Section 26 of the Evidence Act, 1975 (NRCD 323).

On the allegation in ground (v) that the trial court erred in holding that withholding tax did not apply to pay as you earn (PAYE), it was submitted that the trial court did not err as they relate to contract for the supply of services. Counsel for the Respondent reiterated that the issue for determination was not whether the Respondent was or was not an affiliate of Eni, but the incorrect withholding tax rates and the misapplication of accounting principles; used in the assessment, and, whether the Respondent was liable to withhold tax in respect of its subcontractors for the 2015-2019 assessment year.

According to Counsel for the Respondent, to be able to determine its tax liability with its subcontractors, it was necessary to examine each of these contracts. After references to the contracts in exhibit T1, T2, T3 and T4, counsel concluded that the Respondent was not liable to withhold tax in respect of them.

In reaction to the argument on ground (vi) about alleged error on the part of the trial court that the Respondent was not liable to withholding tax on pay as you earn (PAYE), it was submitted that by the provisions of Section 81 of the Internal Revenue Act, 2000 (Act 592) that as the Respondent had no employees of its own in respect of these contracts, payment of PAYE did not arise; and further that under the private ruling issued to Eni, the Respondent was under no obligation to withhold tax in respect of payments made to its subcontractors.

Responding to the argument about the order directing an independent auditor to reconcile the accounts, Counsel for the Respondent contended that the order became necessary because, the Respondent, apart from the admissions made at pages 115 to 117 of Volume 4 of the record of appeal, per exhibit Y, disputed all other issues concerning the withholding tax.

On whether upon the order made by the Court after judgment, the decision of the trial court was final, Counsel submitted that it was final, as far as the issues before the trial court were concerned, except the issues of misdirection by the Appellant in its assessment of the withholding tax for the 2015-2019 years of assessment.

Counsel for the Respondent then went on in paragraphs 113 to 283 of the written submission to elaborate or the points summarized above, under what he termed "LEGAL ARGUMENTS AND AUTHORITIES", under which various provisions of some tax laws and exhibits were

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referred to and excerpts quoted, and a number of legal authorities also cited. A reading of these paragraphs show that Counsel expatiated on and emphasized the arguments summarized earlier regarding the Respondent's position on the appeal.

From the grounds of appeal, the written submissions of the parties, and the record of appeal before us, the issues that fall for determination in this appeal are: whether or not the Respondent was liable to withhold tax in respect of payments made to its subcontractors in carrying out its contracts to supply Eni with patrol vesels; the effect of the revocation of the private ruling, per exhibit A, given to Eni by the Appellant; and, whether the amendment of the Petroleum Income Tax Act 1987 (PNDCL 188), and the Internal Revenue Act 2000, (Act 592) by the Income Tax Act 2015, (Act 896), the Revenue Administration Act 2016, (Act 915); and, the Income Tax Regulations, 2016, (LI 2244) had retrospective effect on arrangements entered into by the Respondent before the amendments. It will also be necessary to consider whether the order made by the trial court, after judgment, was in accordance with the provisions of Order 54 rule 9 of the High Court (Civil Procedure) Rules, 2004 (CI 47).

It is trite that an appellant who impugns a judgment on any ground, has the onus of satisfying the appellate Court that good reason exists for the appellate Court to interfere with the judgment of the trial or lower court. Where the ground of appeal complains about the evaluation of evidence, upon the omnibus ground of appeal, the

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appellant must identify the evidence in his favour that was either ignored or overlooked, or the pieces of evidence wrongly applied against him, but for which the outcome of the decision would have been different. See **Djin v Musah Baako [2007-2008] SCGLR 680; Tuakwa v Bosom [2001-2002] SCGLR 61; and Brown v Quarshigah [2003-2004] SCGLR 930.**

Where the appellant alleges error of law or misdirection, not only should particulars thereof be stated, but also that the alleged errors of law or misdirection must clearly be pointed out in his written submissions, by stating what the law should be and the alleged error on the part of the lower court. These particulars are necessary to narrow down the issues on appeal and to enable the opponent know in advance the issue he is to respond to. See **Dahabieh v S. A. Turqui Bros. [2001-2002] SCGLR 496 at 501.**

An appeal is by way of rehearing and the appellate court is enjoined to thoroughly sift through the entire record of appeal to satisfy itself whether or not the judgment on appeal is supported by the evidence on record on the preponderance of the probabilities, and also based on a proper application of the relevant laws. See **Praka v Aketewa [1964] GLR 423 at 429, SC, Tuakwa v Bosom** (supra); and **Akuffo v Catherine [1972] 1 GLR 337.**

Bearing the above principles in mind, we shall proceed to deal with the first issue identified, to wit, whether the Respondent was liable to

withhold tax in respect of payments to its subcontractors for the supply of services in respect of its agreement to supply Eni with patrol vessels? To answer this question, it is necessary to look at the Petroleum Income Tax Act 1987 (PNDCL 188); the Internal Revenue Act 2000 (Act 592), as well as Exhibit A, the private ruling, issued by the Appellant to the Respondent on 1st October 2014, at page 183 of volume 2 of the record of appeal.

It is provided in Sections 27 and 28 of the Petroleum Income Tax Act, 1987 (PNDCL 188) as follows under the subheading, "Withholding Tax on amount due to subcontractors, and Expatriate employee".

"27(1) *Where under the terms of contract an amount due to a subcontractor in respect of works 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 certified in the petroleum agreement and the amount so withheld shall be paid to the Commissioner and payment of that amount shall have the effect provided for in Subsection (3).*

(2) *Subject to article 174 of the Constitution, the requirement of subsection (1) may be waived by an express terms of the petroleum agreement where the*

subcontractor is an affiliate of the Contractor whose services are charged to the contractor at cost.

(3) *Where an amount has been withheld from an aggregate amount due to the subcontractor pursuant to subsection (1), the subcontractor is not liable, in respect of that aggregate amount, for tax under any other law in force in the Republic.*

(4) *The relevant provisions of the Internal Revenue Act, 2000 (Act 592) do not apply to a contract for the supply of goods or the provision of work or services for or in connection with a petroleum agreement.*

(5) *The relevant provisions of the Internal Revenue Act, 2000 (Act 592) do not apply to the calculation of the gains and profits of a person who is a non-resident subcontractor by reason only of the provision of the non-resident subcontractor of work or services for or in connection with a petroleum agreement.*

28 *Unless, and to the extent that a petroleum agreement provides in respect of an expatriate employee employed by a contractor or a subcontractor conducting exclusively petroleum operations, the gains or profits of the employee is liable to income tax and the withholding of tax under the laws of the Republic".*

Under the Internal Revenue Act, 2000 (Act 592), Section 116, it is provided as follows, under the subheading "Private Rulings".

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"116(1) The Commissioner may, upon application by a person, issue to that person a private ruling setting out the Commissioner's position regarding the application of this Act to that person with respect to a transaction proposed or entered into by that person.

(2) Where a person issued with a ruling under subsection (1) makes, prior to the issue of the ruling

a. a full and true disclosure to the Commission to the ruling, and

b. the transaction proceeds in all material respects as described in the person's application for the ruling, the ruling shall be binding on the commissioner with respect to the application of this Act (as in force at the time of the ruling) to that person with respect to the transaction.

(3) Where there is an inconsistency between a practice note and a private ruling, priority is given to the terms of the private ruling".

By the provision of Section 129 of the Internal Revenue Act, 2000 (Act 592) a person dissatisfied with an assessment of his tax may appeal against same to the High Court, by filing a tax appeal within a stipulated time, and, the High Court, upon hearing the matter may confirm, reduce, increase or annul the assessment and make any appropriate order. By Section 132 of Act 592, the onus of proof in an

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objection to a tax assessment is on the person assessed, to prove that the assessment was excessive or erroneous, upon the preponderance of the probabilities.

The Respondent, exercising its right under Section 129 of Act 592, filed a tax appeal under Order 54 of the High Court (Civil Procedure) Rules 2004 (CI 47). The trial Court found in its favour and against which the Appellant launched the instant appeal.

On the issue of whether or not the Respondent was liable to withhold tax in respect of payments to its subcontractors in connection with its agreement with Eni to provide patrol vessels for its operations, it is important to note that the contract between the Respondent and Eni for the provision of patrol vessels was in connection with Eni Ghana Exploration and Production Ltd. Petroleum Agreement. Eni, acting under Section 116 of the Internal Revenue Act, 2000 (Act 592), on 17th June 2014, requested from the Appellant a private ruling on the cascading effect of withholding tax as it related to payments made by a subcontractor under its Petroleum Agreement to subcontractor's affiliates and 3rd party sub-subcontractors.

In response to Eni's request, the Appellant, per exhibit A at page 183 of volume 2 of the record of appeal stated thus at paragraph 2, under "Ruling":

> *"the withholding tax provisions under Section 27 of the Petroleum Income Tax Law 1987 (PNDCL 188) are applicable to transactions*

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between the contractor and a subcontractor as defined. Any aggregate amount received by a subcontractor from Eni payment for works and services in connection with Eni petroleum agreement is liable to withholding tax at a rate specified in that agreement. Payment received by the subcontractor in respect of the sale of tangible goods in connection with the petroleum agreement are not liable to withholding tax. The subcontractor is, however, required to file its tax returns so that any profits earned from the sale of the tangible goods will be subject to tax under the general tax law of Ghana, the Internal Revenue Act, 2000 (Act 592).

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 PNDCL 188 to withhold tax from any payment 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.

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 said subcontractor shall notify the Commissioner General in writing within thirty days of entering into the contract for the Commissioner General to determine the tax

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treatment of the income of the non-resident person from such a contract. Details such as the nature of the contract, the likely duration of the contract; the name and postal address of the non-resident person to whom payments under the contract are to be made; and the amount estimated to be payable under the contract to the non-resident person should be provided in the notification to the Commissioner General".

By the Charter Party agreement entered into between the Respondent and Eni on 22nd July 2015, for the provision of patrol vessels, the Respondent thereby became a subcontractor under Eni's petroleum agreement between Eni Ghana Exploration and Production Ltd. (Eni) and the Government of Ghana. It was also in furtherance of the agreement for the provision of patrol vessels for Eni's petroleum agreement that the Respondent entered into the contracts contained in exhibits T2 - T4. From exhibit T2, the Charter Party Agreement, at pages 33 to 78 of volume 3 of the record of appeal, Article 28 deals with issues of taxes. As indicated, it was pursuant to exhibit T1, that the Respondent entered into the agreements in exhibits T2 - T4 for Bare boat charter; ship management contract; and Marine Husbandry Services, all of which were meant to assist it perform its obligation under the Charter Party agreement with Eni. These contracts can be found at pages 79, 89 and 116 of volume 3 of the record of appeal respectively, and were entered into on 12th June 2015 and 4th April 2016, after the Appellant had given the private ruling per exhibit A.

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The Respondent challenged the tax assessed for the period on many grounds including its liability to withhold tax in respect of its contracts in exhibits T2 - T4, insisting that it was a beneficiary of the private ruling given to Eni, contrary to the view held by the Appellant. The trial Court found that the Respondent's interpretation of the law was right and upheld its position that it was not liable to withhold tax in respect of the payments made pursuant to the contracts in exhibits T2 - T4. The court also upheld the Respondent's position that the revocation of the private ruling and the amendment of the tax law by the Income Tax Act 2015 (Act 896) and the Income Tax Regulations 2016 (LI 2244) as well as the Revenue Administration Act, 2016 (Act 915) did not deprive it of the benefit of the private ruling as the new laws were not retrospective in nature, and further that the revocation and amendment did not affect arrangements entered into before they came into force.

At the time the Respondent entered into the contracts per exhibits T2 – T4, the applicable law in relation to withholding tax was Section 27 of the Petroleum Income Tax Law 1987 (PNDCL 188). At the time of the tax assessment, the operational laws were the Income Tax Act, 2015 (Act 896); the Revenue Administration Act, 2016 (Act 915) and the Income Tax Regulations, 2016, (LI 2244). Section 71 of the Income Tax Act 2015 (Act 896), which deals with withholding tax for petroleum operations, provides in subsection (4) as follows:

> *"71(4) Where under the terms of a contract, an amount is due to a subcontractor in respect of work or services for or*

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in connection with a petroleum agreement, the person liable under the contract to make payment to the subcontractor shall withhold tax at the rate specified in the first schedule and pay the amount of tax withheld to the Commissioner General".

A reading of Section 71(4) of Act 896 shows that it is in *pari materia* with Section 27(1) of PNDCL 188, by which a subcontractor under a petroleum agreement is not liable to withhold tax in respect of payments by virtue of the private ruling issued to Eni, per Exhibit A.

By paragraph 5 of the Seventh Schedule to the Income Tax Act 2015, (Act 896), the Commissioner-General may by notice in writing amend or revoke a private ruling in whole or in part, which amendment shall be in accordance with subparagraph (4). The paragraph also provides in subparagraph (3) that legislation enacted subsequent to a private ruling revokes the private ruling to the extent of its inconsistency with the legislation. Subparagraphs (4) and (5) of paragraph 5 however provide as follows:

"(4) The amendment or revocation of a private ruling, in whole or in part, has effect

(a) from the date specified in the notice of the amendment or revocation, issued under subparagraph (1); or

(b) from the date of commencement of the legislation, in the case of legislation referred to in subparagraph (3).

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

(a) continues to apply to arrangements commenced before the amendment or revocation; and,

(b) does not apply to arrangements commenced after the amendment or revocation".

Despite the provisions in Section 136(1) of the Income Tax Act 2015 (Act 896) about the repeal of the Internal Revenue Act, 2000 (Act 592) and any other laws to the extent that they are inconsistent with the Act, it goes onto provide in subsections (2) and (3) as follows:

"(2) Despite the repeal of the enactments in subsection (1), the Regulations, notices, orders, directions, appointments or any other act lawfully made or done under the repealed enactments and in force immediately before the commencement of this Act with necessary modification shall continue to have effect until reviewed, cancelled or determined.

(3) Any right or privilege acquired by a person under the repealed legislation ceased to exist on the date this Act comes into effect under Section 139, unless it is expressly provided in this part of the Regulations that the right or privilege remain in existence".

The Income Tax Regulations, 2016 (LI 2244), made pursuant to Section 127(1)(a), (b) and (d) of the Income Tax0 Act, 2015 (Act 896),

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contains in regulations 3 to 6 provisions on withholding tax. It goes on in regulation 37(2) to provide that despite the revocation of the Internal Revenue Regulations, 2000 (LI 1675), any document issued, notice or ruling given under the revoked Regulations and in force on the commencement date of these Regulations shall continue in force until it is expired, reviewed or replaced. What this means is that despite the provisions in Regulations 27 of LI 2244 requiring a subcontractor to withhold tax, the Respondent's position with regard to withholding tax, as the contracts in exhibits T2 – T4 were entered into before Act 896 and LI 2244 came into force, was unaffected by the amendment. Also see the provisions of Section 136 and 138 of the Internal Revenue Act 2000 (Act 592) on repeals and savings.

The Revenue Administration Act, 2016 (Act 915), which provides for private or class rulings in Section 105, goes on to provide in Section 106, how a private or class ruling may be amended or revoked. It however goes on to provide in subsection (5) that such an amendment or revocation does not apply to arrangements commenced before the amendment or revocation.

From the laws referred to, and having considered the submissions by both Counsel on the issue of withholding tax, we have no difficulty in accepting the position urged on us by Counsel for the Respondent that the Respondent was not liable to withhold tax in respect of payments to subcontractors it engaged to perform the contracts in exhibits T2 – T4, and further that the revocation of the private ruling or the

amendments of the income tax laws by Act 896; LI 2244; and, Act 915, did not have effect on these contracts, they being arrangements or transactions entered into before they came into force. See Section 108 of Act 915 on the interpretation of "arrangements". As emphasized by Counsel for the Respondent, to hold otherwise will amount to giving retrospective effective to those legislations in contravention of the Constitution provisions on retrospective legislation.

On the issue of whether the Respondent was liable to withhold tax in respect of pay as you earn (PAYE) in respect of the contracts entered into in exhibits T2 – T4, Article 28 of the Charter Party, exhibit T1, provides that unless otherwise stated, "*the OWNER shall bear and be liable for all Taxes and shall, at its own expenses pay all TAXES in accordance with APPLICABLE LAWS AND REGULATIONS*". See page 63 of volume 3 of the record of appeal.

From the Addendum to the Bareboat Charter Agreement, exhibit T2 at page 88 of volume 3 of the record of appeal, the OWNER is Bumi Armada Navigation International Ltd., with the Respondent being the charterer. With regard to the Shipmanagement Contract, Exhibit T3 at page 89 of volume 3 of the record of appeal, the Respondent did not have to do anything apart from payment of the sums due the managers of the Ship, per clause 9 of the agreement.

Under the Marine and Husbandry Services Agreement, exhibit T4 at page 116 of volume 3 of the record of appeal, clause 6 provides that

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the contractor, Cypress Energy Ltd. shall be liable for all taxes arising from and in respect of any amount payable by the Company, the Respondent in this case being the Company.

Apart from the provisions in these contracts, it has not been disputed that the Respondent did not engage any employees of its own for these contracts, but relied on the staff of the various companies it had engaged. As the Respondent had no employees of its own it was therefore not liable to withhold tax on pay as you earn (PAYE) as rightly held by the trial Court.

Ground vii of the grounds of appeal complains about the trial Court's appointment of an independent auditor to reconcile the accounts on grounds of alleged discrepancies, through the use of trial balance instead of the ledger balances. On this ground, it was submitted on behalf of the Appellant that the Respondent, who was aware of the alleged errors or discrepancies, for three years failed to take steps to rectify them, and did not also lead any evidence to show how the alleged discrepancies affected the assessment of tax for the period. Counsel for the Respondent however contended that the trial judge was justified in making the order due to the discrepancies and wrong formula used in assessing the tax for the period.

A Respondent who is dissatisfied with the assessment of its tax by the Appellant has a right to file an appeal against the assessment under Section 129 of the Internal Revenue Act, 2000 (Act 592). Section 132

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however provides that the onus is upon such an aggrieved party to prove, on the balance of probabilities, that the tax assessed was excessive or erroneous. It is not enough for it to merely allege that because the trial balance figures were used, that resulted in a wrong assessment. It was incumbent on it to demonstrate how the use of the trial balance figures, which it presented, wrongly affected the tax assessed. Again, it was incumbent on the Respondent to show that wrong accounting principles were used. From the period of the exchanges leading to the tax appeal resulting in this appeal, the Respondent did not demonstrate how these allegations affected the figure of the tax assessed against it. In the absence of the appropriate evidence that the Appellant used a flawed formula in assessing the tax for the period, the trial judge was not justified in granting the Respondent relief 3, alleging misdirection on the part of the Appellant in the assessment of its tax for the period. The trial Court, in its judgment at page 53 of volume 5 of the record of appeal, whilst accepting as correct the statement of the Respondent in its written address, went on to state in the next paragraph that it is for the purpose of identifying discrepancies that trial balance is prepared for any errors and discrepancies detected to be corrected before the income statement and statement of the financial position can be prepared. As indicated, the Respondent took no steps to correct any of the discrepancies alleged or the wrong formula used in the assessment, and thus failed to discharge the onus of proof on it in respect of its relief 3, and the trial court thus erred in entering judgment for it, and upon which it proceeded to appoint an

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independent auditor on account of the alleged discrepancies and misdirection on the assessment of the tax. As a general principle of tax law, real income, and not trial balance figures should be used in the computation of tax. The onus however fell on the Respondent to adduce sufficient evidence to prove or show the use of wrong formula or of trial balance adversely affected the tax assessment. This in our view it failed to demonstrate from its affidavit evidence.

Closely related to ground vii is the complaint in ground viii about the propriety in appointing an independent auditor after the trial Court had entered judgment on the issues before it.

In our identification of the issues for determination in this appeal, this was one of the issues we found deserved our consideration. This will require a look at the provisions of Order 54 of the High Court (Civil Procedure) Rules, 2004 (CI 47) particularly, rule 9 which provides as follows:

> "9. *The court upon hearing an appeal under this order may take evidence or seek expert assistance and may confirm, reduce, increase or annul an assessment on which the decision is based and may in all cases make such decisions as the Court considers appropriate".*

Our understanding of this provision is that any evidence or expert assistance should be sought in the course of hearing a tax appeal filed under Order 54 of CI 47, upon which the court, acting on such

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evidence or expert assistance, will go on to give its decision in respect of the tax appeal before it. We acknowledge that a court, in hearing a matter, has a lot of discretion, having regard to the circumstances of each case, and may make orders after judgment that will help give effect to the judgment. Such orders must however be made within the ambit of the law. In this case, the High Court would not have made the order if it was satisfied that the Respondent had discharged the onus of proof on it about misdirection in the assessment of the tax for the period. The order made for the appointment of an independent auditor to reconcile the accounts was therefore made in error. If the trial court had averted its mind to the provision in rule 9 of Order 54 of CI 47 quoted supra, it would have realized that the independent auditor should have been invited to reconcile any discrepancies in the tax assessed during the trial, if the court was satisfied that the Respondent had provided sufficient facts supporting the alleged discrepancies or misdirection in the assessment of its tax for the period.

From our evaluation of the evidence on record, and after an anxious consideration of the submissions on the law, we find no merits in grounds iii to vi of the grounds of appeal and same are accordingly dismissed. We however find merit in grounds vii, viii and ix, and proceed to uphold them accordingly.

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In sum therefore, we find that the tax assessed for the years 2014 to 2019, should be maintained, less the withholding tax in respect of the contracts in exhibit T2 – T4, as well as T5.

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(SGD.)
G. S. SUURBAAREH
(JUSTICE OF APPEAL)

NOVISI A. ARYENE, JA, I agree

(SGD.)
NOVISI A. ARYENE
(JUSTICE OF APPEAL)

DR. E. O. DAPAA, JA, I also agree

(SGD.)
DR. E. O. DAPAA
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