IN THE SUPERIOR COURT OF JUDICATURE IN THE HIGH COURT OF JUSTICE (COMMERCIAL DIVISION), ACCRA HELD ON THURSDAY, THE 10TH DAY OF NOVEMBER, 2022 BEFORE HER LADYSHIP, JANE HARRIET AKWELEY QUAYE (MRS.), JUSTICE OF THE HIGH COURT

SUIT NO. CM/TAX/0125/2022

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

COCA-COLA EQUATORIAL AFRICA LIMITED - APPELLANT

VERSUS

THE COMMISIONER GENERAL - RESPONDENT

JUDGMENT

A notice of appeal against the final objection decision of a tax assessment was filed in the Registry of this Court on 18th November, 2021 by Coca-Cola Equatorial Africa Limited (hereinafter referred to as the Appellant) against the Commissioner General of the Ghana Revenue Authority (hereinafter referred to as the Respondent), on the following grounds: -

i. The Respondent erred in Law by imposing Withholding Tax on the purchase of trademark by the Appellant from Voltic International Inc., a company registered in the British Virgin Islands.

ii. The Respondent erred in Law by imposing Withholding Tax on accrued transactions which were subsequently reversed for non-performance and therefore not invoiced for payment.

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HIGH COURT

COMMERCIAL DIVISION. LLC-ACCRA

iii. The Respondent erred in Law by imposing Withholding Tax on expenses of staff salaries reimbursed to an employment agency when the requisite PAYE taxes had already been withheld by the employment agency and paid over to the Respondent pursuant to Section 114 of the Income Tax Act, 2015 (Act 896).

iv. The Respondent erred in Law by wrongly construing trade discount which had accrued in 2017 year of assessment as a commission and subjecting it to a Withholding Tax of 10%, purportedly pursuant to Section 116(1)(a)(v) of the Income Tax Act, 2015 (Act 896).

v. The Respondent erred in Law by imposing a Withholding Tax of 15% on the same accrued trade discount subsequently made available to the Appellant's customer in the 2018 year of assessment.

vi. The Respondent erred in Law by imposing Value Added Tax (VAT), National Health Insurance Levy (NHIL) and Ghana Education Trust Fund Levy (GETFundL) on a supply of services by the Appellant, which was consumed outside the country, contrary to Item 3(3) of the Second Schedule to the Value Added Tax Act, 2013 (Act 870).

Summary

The Appellant's primary business is the extraction and sale of water under the Voltic brand owned by the Appellant. It is also engaged in the business of providing marketing and other support services related to The Coca-Cola Company ("TCCC") and its affiliates and other related administrative activities to The Coca-Cola Export Corporation. The Respondent is the head of the Ghana Revenue Authority (GRA), a statutory body responsible for tax administration and revenue collection in Ghana. Sometime in December 2019, the Respondent commenced a tax audit into the affairs of the Appellant for the period 2016 to 2018 years of assessment and issued a Final Tax Audit Report dated 29th December 2020, with a total tax liability (inclusive of interest) of **GHS34,059,152.23** comprising a direct tax liability of **GHS26,344,088.67** and an

indirect tax liability of **GHS7,715,063.56**. Particularly, the Respondent raised tax issues regarding wrongful deduction of expenses, failure to withhold tax on payments, under-estimation of income tax payable, as well as failure to impose and the under-declaration of VAT, NHIL, and GETFund.

The Appellant, being dissatisfied with the tax assessment of the Respondent, paid the 30% deposit required under Section 42(5)(b) of the Revenue Administration Act, 2016 (Act 915) and filed an Objection on 25th March 2021 against the said tax assessment raising issues that will be subsequently discussed in this Judgment.

According to Appellant, by a letter dated 17th May, 2021 an Appellate Committee of the Respondent, reviewed the objection of the Appellant wherein the exclusion of income relative to the reversal of impaired intangible asset in the 2018 year of assessment was accepted and the tax liability revised to **GHS33,143,375.15** comprising a direct tax liability of **GHS25,428,311.59** and an indirect tax liability of **GHS7,715,063.56**. In a response to the decision of the Appellate Committee in a letter dated 16th June 2021, the Appellant reiterated its issues as stated in its earlier objection. Subsequently, the parties met and had discussions on the disputed issues after which the Appellant, in a letter dated 24th September 2021, made available to the Respondent, a copy of the Bill of Sale and Bank Transfer Advice regarding the acquisition of the trademark between Coca-Cola Equatorial Africa Ltd. and Voltic International Inc. However, in a letter dated 15th October 2021, the Respondent affirmed the decision of the Appellate Committee. The Appellant being aggrieved by, and dissatisfied with the Respondent's objection decision, filed the instant appeal against the final Objection Decision dated 15th October 2021 in whole to this Honourable Court.

The Respondent served the Appellant with a notice of assessment containing a total tax liability of **GHS 33,143,375.15** (Exhibit 'GRA3' Attached to Respondent's reply) following an audit which covered the period 2016 to 2018. Aggrieved with this assessment, the Appellant brought this Appeal.

Relevant Exhibits

1. Final Tax Audit Report as Exhibit 'CCEAL 1').
2. Receipt of payment of the 30% deposit as Exhibit 'CCEAL 2A'.
3. A copy of the objection letter is Exhibit 'CCEAL 2B').
4. A copy of the Bill of Sale and Bank Transfer Advice as Exhibit 'CCEAL 3A' and '3B').
5. A copy of the Service Agreement between The Coca-Cola Export Corporation and Coca-Cola Equatorial Africa Ltd. as Exhibit 'CCEAL 4'.
6. A copy of the objection decision of the Appellate Committee as Exhibit 'CCEAL 5'.
7. A copy of the response by the Appellant dated 16th June 2021 as Exhibit 'CCEAL 6'.
8. A copy of the letter dated 16th September 2021 as Exhibit 'CCEAL 7'.
9. A copy of the letter dated 24th September 2021, as Exhibit 'CCEAL 8'.
10. A copy of the letter15th October 2021 as Exhibit 'CCEAL 9'.

The Onus of proof in a tax matter is provided for in **Section 92 of the Revenue Administration Act, 2016 (Act 915).**

Section 92 (1) of Act 915 provides that:

> ***"Subject to subSection (2), in proceedings on appeal under Section 41 to 45 or for the recovery of tax under a tax Law, the burden of proof is on the taxpayer or person making an objection to show compliance with the provisions of the tax Law."***

SubSection (2), however states that:

> ***"with respect to the imposition of a penalty, including in proceedings on appeal under or for the recovery of a penalty, the burden of proof is on the Commissioner-General to show non-compliance with the provisions of the tax Law."***

Preliminary legal objection

On the 19th of May 2022, Counsel for the parties in this Appeal were invited to make brief Oral Submissions before the Court. At that stage, Counsel for Respondent objected to the Appellant's Exhibits 'CCEAL 10' and 'CCEAL 11', which they had filed pursuant to the grant of leave by the Court to fill additional documents on the 7th of February, 2022. The Respondent has raised objection on two grounds. The first being that the time for filing evidence under Order 54 Rule 1 of C.I. 47 has elapsed, secondly the Exhibits filed sin against the Stamp Duty Act Section 32(6) as they have not been stamped. Considering the first object, the Court is of the opinion the objection that the time period had lapsed should have been made at the time when the Appellant sought leave to file the said documents which is the 7th of February, 2022. Therefore, having not objected to the filing on that ground, the Respondent cannot object at this time.

GROUND I (paragraph 23-46)

The Respondent erred in Law by imposing Withholding Tax on the purchase of trademark by the Appellant from Voltic International Inc., a company registered in the British Virgin Islands.

Arguments by Counsel for Appellant

It is the position of the Appellant that the Respondent erroneously imposed Withholding Tax, pursuant to Section 115(1) of the Income Tax Act, 2015 (Act 896) on an outright purchase of trademark by the Appellant from Voltic International Inc., a company registered in the British Virgin Islands, on the assumption of incorrect facts that the transaction was a payment for Royalties.

Appellant submitted that, before the Respondent can impose Withholding Tax pursuant to Section 115(1) of Act 896 on the transaction in question, it has to be established that the payment was for Royalties and that the payments had a source in Ghana. That Section 133 of Act 896 defines what constitutes Royalties and it is clear from the definition that the requirement to withhold tax on payment of Royalties pursuant to Section 115(1) (a) and paragraph 8(1) (b) (ix) of the First Schedule to Act 896, refers to payments for the use of or right to use a trademark and similar

intellectual properties. It does not apply to payment for ownership of a patent, trademark, design or model, plan or secret formula or process.

Quoting paragraph 8.2 of the Commentary to the OECD Model Tax Convention in relation to Royalties; *"where a payment is in consideration for the transfer of the full ownership of an element of property referred to in the definition, the payment is not in consideration "for the use of, or the right to use" that property and cannot therefore represent a royalty...."* Counsel further submitted that the legal position on payment of Royalties as opposed to the outright ownership of intangible assets is well-established and definition of Royalties is also in *pari materia* with the definition provided in Section 133 of Act 896.

According to Counsel, the Appellant did not acquire user rights in the trademark but rather full rights of ownership of the trademark as they outrightly purchased same from Voltic International Inc. and made payment. This is evidenced by a Bill of Sale and Bank Transfer Advice which were attached as Exhibits 'CCEAL 3A' and '3B'. The position of the Respondent is that in the absence of any purchase and sale agreement, the Appellant did not purchase the trademark outrightly but rather it was only given a right to use it is arbitrary since it is trite Law that a "Bill of Sale" is a legally recognized document used to evidence a transfer of ownership of an asset to a buyer. That the Supreme Court in the case of P. Y. ATTA & SONS LTD V. KINGSMAN **ENTERPRISES LTD [2007-2008] 2 SCGLR 946** noted that when considering an agreement, the most important or the paramount consideration was what the parties themselves intended to be contained in the agreement. *The intentions should always prevail as well as the* conduct of the parties had to be taken into consideration.
Counsel argued that Clause 2 of the Bill of Sale titled "Conveyance" states that:
"Each Seller does and hereby sell to the Purchaser and its successors, designees and assigns all right, title and interest of such Seller in and to the Assets..." Again, The Bill of Sale was followed by a payment of consideration of an amount of USD 22,080,000.00 from the Appellant to a non-resident company – Voltic International Inc. as evidenced in the transfer advice marked as Exhibit 'CCEAL 3B'. Following the payment for the trademark is the trademark registration in the name of the Appellant as seen on the

certificate of subsequent proprietor of the trademark marked as Exhibit 'CCEAL 10'. In this case, the Appellant and Voltic International Inc. intended to enter into an outright purchase agreement and their intentions were effectuated by a Bill of Sale agreement, Bank Transfer Advice and a Certificate of Trademark.

Counsel concluded that Pursuant to Section 18(2) of the Evidence Act, 1975 (NRCD 323), an inference can reasonably be made from all the above evidence that the fact of outright sale of the trademark to Appellant is evident and any contention to the contrary ignores the intent of the parties along with the evidence adduced. It also would amount to a capricious and arbitrary re-characterization of the transaction contrary to Article 296 of the 1992 Constitution of Ghana.

Arguments by Counsel for Respondent

Counsel for Respondent submitted that the Appellant has a duty to facilitate the conduct of tax audit by the Respondent by making all necessary documents available during the conduct of an audit. The Respondent also has a duty to hear an Appellant where there is any protestation by an Appellant as to the quantum of tax it is required to pay to the Respondent. The procedure is spelt out under Sections 41 to 45 of Act 915.

The Respondent observed during the course of its tax audit, that the Appellant made a payment of GHS 85,862,404.00 to Voltic International, which the Appellant said was for the purchase of trade mark. The transaction is captured in a bill of sale which also makes reference to a sale and purchase agreement. The Appellant failed to make the sale and purchase agreement available to the Respondent for examination as required of the Appellant under Section 27 of Act 915 despite several promptings from the Respondent. The Respondent assessed this amount to tax applying Section 115(1) and paragraph 8(1) of the first Schedule to Act 896 which resulted in tax liability of GHS 12,879,360.60 due the Respondent. This Honourable Court offered the Appellant an opportunity to make the document available to the Court to facilitate the determination of this tax Appeal but the Appellant failed to make the document available for examination by the Respondent.

It is the contention of the Respondent that the evidence of the existence of the sale and purchase agreement such as Exhibits 'CCEAL 3A' and '3B' attached to the Appellant's Notice of Appeal is not sufficient for the purpose of proving that the Appellant made an outright purchase of the trademark from Voltic International. The proof lies in the content of the sale and purchase agreement.

Again, clause 2 of the Bill of Sale, that is the Appellant's Exhibit 'CCEAL 3A' attached to its Notice of Appeal, states that "Each seller does hereby sells to the purchaser and its successors, designees and assigns all right, title and interest of such Seller in and to the Assets as and **to the extent provided in the Asset Purchase Agreement**" Therefore, it is important that the Respondent acquaints itself with the extent of the right, interest and title that has been yielded to the Appellant under the Asset Purchase Agreement. The Appellant has an obligation to make this document available to the Respondent under Section 27 of Act 915 but it failed to do so despite several opportunities made available to it.

Again, also the Bill of Sale subject to the terms and conditions of the Asset Purchase Agreement, under clause 3, it is important that the Respondent reads the Asset Purchase Agreement in order to ascertain the true nature of this agreement and to establish its impact on tax. The content of the Bill of Sale and the evidence of the payment of a lump sum alone is not sufficient as proof that this was an outright purchase of the trademark in question by the Appellant. Whether the transfer is for a limited period or not can only be established by examining the content of the Asset Purchase Agreement.

On the Appellant's contention that royalty payments are made in instalments and therefore their payment of a lump sum indicates that this is an outright purchase of the trademark, the Respondent respectfully disagreed and referred to Ellis, Patent Assignments and Licenses (2ed, 1943) and argued that the mode of payment is not the controlling factor in determining whether a transfer is an assignment or a license.

According to Counsel, granted without admitting that that the transaction in question was an outright purchase of the trademark in question, it does not escape the tentacles of the Section 116(2) of Act 896 since the meaning of royalty under Section 133 of Act 896 also includes a payment of premium or like amount derived as consideration for a total or partial forbearance with respect to any matter referred to therein. This is the import of the cases referred to supra.

Analysis

Section 115(1) of Act 896 provides that: *Subject to subSection (2), a resident person shall withhold tax at the rate specified in paragraph 8 of the First Schedule where that person (a) pays any dividend, lottery winning, interest, natural resource payment, rent or royalty to another person; and (b) the payment has a source in the country.*

Section 133 of Act 896 defines royalty to include *a payment of a premium or like amount, derived as consideration for*

(b) the use of or right to use a patent, trade mark, design or model, plan, or secret formula or process;

Therefore from From **Section 115(1) of Act 896** as stated above, conditions under which Withholding Tax may be imposed which specifically for this instant case are where (1) the person pays any royalty to another person; and (2) the payment has a source in the country.

In order to satisfy **Section 92 of Act 915 which places the onus** on the taxpayer to show that there has been compliance with the Law; Appellant provided the following documents as evidence:

Exhibit 'CCEAL 3A' the Bill of Sale, dated 2nd July, 2016, delivered by Voltic International Inc. and Voltic Ghana Limited (the "Sellers") in favour of the Appellant; Exhibit 'CCEAL 3B', Bank Transfer Advice on the transfer of an amount of USD 22,080,000.00 to Voltic International on 30th June 2016.

Exhibit 'CCEAL 10', the Certificate, dated 22nd June 2017 and signed for the Registrar of Trademarks on change of proprietor of trademark held by Voltic International Inc. to the Appellant herein.

The assets purchase agreement which would have put this matter to rest at the level of the Commission was not produced by Appellant in Court as well even though they had earlier sought leave to do same. What they produced instead are Exhibit 'CCEAL 3A'; the Bill of Sale, Exhibit 'CCEAL3B'; the bank transfer advice, Exhibit 'CCEAL 4', the agreement for services; and per these they urged the Court to infer an intent by the parties to.... Even in the absence of the asset purchase agreement.

The Bill of sale refers severally to an asset purchase agreement. The relevant portions of the Bill of Sale are hereby produced:

This Bill of Sale is delivered this 2nd day of July, 2016 by Votic International Inc. and Voltic (GH) Limited (the Sellers), in favour of Coca-Cola Equatorial Africa Limited (the 'Purchaser').

WHEREAS, European Refreshments, an Affiliate of the Purchaser, and SABMiller Plc ('SABM'), parent company of the Sellers, are parties to that *certain Asset Purchase Agreement, dated November 27, 2014, as amended and restated on 2nd July, 2016 (the 'Asset Purchase Agreement')*; and

WHEREAS, as and to the extent provided in the ASSET Purchase Agreement, SABMiller has agreed to procure that the Sellers sell to the Purchaser, and European Refreshments has agreed to procure that the Purchaser purchases from the Sellers, the Assets as defined therein.

NOW, THEREFORE, in consideration of the mutual benefits to the parties, the receipt and adequacy of which are hereby acknowledged, the parties, intending to be legally bound, agree as follows:

1. Defined Terms. Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Asset Purchase Agreement.

2. Conveyance. Each Seller does and hereby sell to the Purchaser and its successors, designees and assigns all right, title and interests of such Seller in and to the Assets as and to the extend provided in the Asset Purchase Agreement

3. Entire Agreement. This Bill of Sale is subject to the terms and conditions of the Asset Purchase Agreement, including without limitation the representations, warranties and covenants set forth therein, and to the extent this Bill is inconsistent with any terms or conditions of the Asset Purchase Agreement, the terms and conditions of the Asset Purchase Agreement shall control. This Bill of Sale shall not be deemed to limit, enlarge or extinguish any obligations under the Assets Purchase Agreement of the parties thereto, all of which obligations shall survive the delivery of this Bill of Sale in accordance with the terms of the Asset Purchase Agreement.

4. .....

5. .....

The Court finds as a fact that indeed the Appellant had purchased an asset and signed an assets purchase agreement as evidence of the purchase. What asset was purchased is however unidentifiable as same was not named in the Bill of sale.

The Bill of Sale does not specify the subject matter of the sale. It does not also define what was sold or purchased and at what cost and under what terms and conditions. It does not identify the specific trademark that has been purchased. Therefore, as to whether or not the trademark in question is what is being referred to as the asset stated in the Bill of Sale, one cannot tell. The price of the asset purchased was not stated in the Bill of Sale and so one cannot conclude that the amount on the Bank transfer pertains to purchase of the trademark. It is worth noting also that the transfer of the sum of USD 22,080,000.00 had been made already at the time of the execution of the Bill of Sale and yet no reference was made to the said payment.

Court finds that the Bill of Sale subjects its provisions to the Asset Purchase Agreement which is not in evidence. The entire of the Bill of Sale is hinged on an Asset Purchase Agreement and this leads to the conclusion that this Bill of Sale cannot be completely interpreted without reference to the contents of the Purchase Agreement. The Court is therefore unable to ascertain the terms of the agreement and the conditions for the sale without the Purchase Agreement which is not before this Court.

With the unavailability of the Asset Purchase Agreement and the consequent difficulty in ascertaining the amount paid or to be paid, the Court cannot ascertain whether the payment of USD 22,080,000.00 was a part payment of the agreed sum and hence warranted a subsequent payment, upon which the current tax liability has been imposed.

Concerning Exhibit 'CCEAL 10' which is the Certificate of Subsequent Proprietor, the last paragraph of the certificate states as follows: ***"This Certificate is for purposes other than use in legal proceedings or obtaining registration in a foreign country."***

In the case of **HCL LIMITED v. THE COMMISSIONER OF INCOME TAX NEW DELHI, INCOME TAX APPEAL NOS. 93/2002 & 120/2008**, the Court in defining royalty stated as follows:

> ***"The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films of films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience."***

The Court further differentiated between right of use and an outright sale with regards to the use of the term "royalty" as follows:

> ***"The term "royalty" is associated with the payment made for grant of the user right. Grant of user right has to be distinguished from transfer of ownership in intangible property or know-how, i.e., sale of intangible property or know-how by the proprietor to a third person. In the latter case, the consideration paid is not for use of or right to use the intangible property or know-how but to acquire full ownership..."***

The aforesaid legal position is well-established and the OECD commentary on Model Tax Convention, 2010, states under Paragraph 8.2 as follows:

> ***"Where a payment is in consideration for the transfer of the full ownership of an element of property referred to in the definition, the payment is not in consideration 'for the use of, or the right to use' that property and cannot therefore represent a royalty..."***

It is the Appellant's case that the payment made to Voltic International Inc. was not for the right of use of the trademark to attract tax but rather for the sale of the trademark which cannot be termed as royalty which is otherwise taxable.

The Appellant supports its assertion of an outright sale of the trademark with the payment of the amount of USD 22,080,000 per Exhibit '3B'.

However, in the case of **HCL LIMITED v. THE COMMISSIONER OF INCOME TAX NEW DELHI (supra)**, the Court further stated that:

> ***"Importantly, paragraph 5 of the exchange of notes between contracting States clarifies that royalty income can consist of lump sum consideration for transfer even made outside India or imparting of information outside India. Therefore, royalty need not be confined to regular payments such as, yearly, quarterly or monthly or be dependent upon the quantum of production or use of the intellectual property right."***

The Court from the above finds that Appellant has failed to prove that the trademark obtained was an outright purchase and not a right of use. This is because the Bill of

Sale even though it conveys an intention to sell and purchase an asset does not specifically state that the asset is the trademark in issue. The terms and conditions of the said outright purchase of the trademark are unknown, the Bank transfer advice alone is not conclusive of such an outright purchase; the reason for the subsequent payment of GHS 85,862,404.00 to Voltic International cannot be verified as being for the purchase of the trademark; the disclaimer on the certificate; Exhibit 'CCEAL 10' deprives it of any weight before this Court. Every contract has terms and conditions to make it legally binding and this is expressed as the intentions of the parties within the document. The Supreme Court, in dealing with the enforcement of the intentions of parties in a contract, held in the case of **GORMAN & GORMAN v. ANSONG [2012] SCGLR 174 (holding 1)** that in *construction of documents, the Court must give effect to the intentions of the parties as found in the document and not what was intended to have been written, so as to give effect to the intention expressed.* Applying this to the case before the Court, how can the Court know the intentions of the parties when the contract is unavailable for interpretation? Rightly stated by Counsel for Applicant, Section 18(2) of the Evidence Act, 1975 (NRCD 323) allows inferences to be made within certain thresholds of the Law.

The above sequence of events, however makes it clear that there had indeed not been a sale and transfer of the ownership of the Voltic trademark to the Appellant. There was an intention that these payments were to be assumed as user rights and not ownership of an asset. Payment for use rights is what is defined under Section 133 of Act 896 to constitute royalties and therefore subject to the provision of Section 115(1) of Act 896. The payment made by the Appellant to Voltic International Inc. therefore constitute payment of royalties within the contemplation of Section 133 of Act 896 for which reason the Respondent would seek to impose Withholding Tax under Section 115(1) of Act 896. Therefore contrary to the position of the Appellant that the Court should infer an intent of outright purchase of the trademark, the Court under Section 18(2) of the Evidence Act 1975 (NRCD 323) infers an intention that these payments were to be assumed as user rights but rather not ownership of an asset properly so called.

The Respondent is therefore right in categorizing the payment made as royalty in the absence of such proof of sale.

Section 115(1) of Act 896 and Section 105(e) of Act 896 provides that payments which have a source in the country include *royalties paid for the use of an asset in the country, right to use an asset in the country or forbearance from using an asset in the country.*

As stated above, payment of user rights is defined under Section 133 of Act 896 to constitute royalties and therefore subject to the provision of Section 115(1) of Act 896. In the circumstances the Appellant's claim must fail.

GROUND 2(para 47-49)

Whether or not the Respondent erred in Law by imposing Withholding Tax on accrued transactions which were subsequently reversed for nonperformance and therefore not invoiced for payment?

Arguments by Appellant

Appellant admits that it belatedly paid to the Respondent the Withholding Taxes on the accrued transactions for the 2017 and 2018 years of assessment to the Respondent in 2018 and 2019 years of assessment, respectively, but the Respondent failed or neglected to recognize them. For example, the Withholding Tax on the transactions in 2018 were paid in March 2019 and therefore by the Respondent's audit, it is asking the Appellant to pay the same Withholding Taxes twice and also pay interest for an unjustifiably longer duration than the duration for which the Withholding Tax remained unpaid. Applicant prayed the Court to order for reconciliation for the parties to resolve the proper computation of the Withholding Tax and appropriate interest payable thereon.

Argument by Respondent

According to the Respondent, it observed in the course of its tax audit on the activities of the Appellant that not all expenses incurred by the Appellant during the period

under review (2016-2018) were taxes withheld from by the Appellant. The Respondent states that it tabulated all the expenses incurred as captured in the Financial Statement and computed the tax on them. It then deducted the withholding payments the Appellant had made in respect of these transactions to arrive at the amount assessed. Even though the Appellant contends that those expenses were reversed, it failed to show to the Respondent that these transactions were actually reversed. Even the Appellant, in a letter dated 24th November, 2020, Exhibit 'GRA 7'; assured the Respondent that it would make the evidence of the reversals available, the Appellant failed to do that. That the figures in question formed part of the Appellant's financial report for the years under review and therefore if the Appellant had actually reversed the expenses, the said expenses would not have been part of the Appellant's annual returns and financial statements submitted to the Respondent.

It is the position of the Respondent that under Section 17(a) of the Evidence Act, 1975 (NRCD 323), the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof. That the Respondent through its audit established that certain expenses were incurred by the Appellant and these formed part of the Appellant's Financial Statement thereby impacting on the taxes paid by the Appellant for the period under review. Per Section 92 of Act 915, the burden is on the Appellant to show that these expenses were reversed. No evidence has been adduced by the Appellant to show that the said expenses were reversed. The Appellant has therefore failed to discharge the burden of proof imposed on it under Section 92 of Act 915. Respondent concluded that the inclusion of the expenses in the Appellant's Financial Statement means the expenses were deducted from income before arriving at the profits for the year under review.

Analysis

Section 116 of the Income Tax Act, 2015 Act 896 requires that a person making payment for the supply of goods or services to withhold tax from amount paid or payable.

Concerning this issue, the Appellant asserts that it paid the Withholding Tax for the

period 2017 to 2018 late. In Exhibit 'GRA 7', Lawyers for Appellant in the third paragraph of a letter to the Assistant Commissioner dated 24th November, 2020 and titled ***Coca-Cola Equatorial Africa Limited (CCEAL), Response to Tax Audit Findings for 2016 to 2018 Years of Assessment; assured the Respondent;***

> ***"that the Appellant is collating the details of the outstanding transactions that make up the balance of the marketing expense charged to the financial statements and will share the nature of those transactions and the evidence of Withholding Tax deducted, if applicable or otherwise as soon as they are complete."***

In spite of this assurance, the Appellant, did not provide the information it promised to help prove any of the reversals claimed. The Law has already been laid down under Section 92 of the Revenue Administration Act, 2016 (Act 915 as regards proof in tax matters). The burden of proof is on the taxpayer or person making an objection to show compliance with the provisions of the tax Law.

Having failed to provide the necessary proof of their assertion, the Appellant cannot say that Respondent erred by imposing Withholding Tax on the said transaction which they claim to have been reversed.

GROUND 3

The Respondent erred in Law by imposing Withholding Tax on expenses of staff salaries reimbursed to an employment agency when the requisite PAYE taxes had already been withheld by the employment agency and paid over to the Respondent pursuant to Section 114 of the Income Tax Act, 2015 (Act 896).

Argument of Appellant (para 5—54)

According to the Appellant, the imposition of Withholding Tax by Respondent on the reimbursed staff expense described as consulting expenses in the Audit Report was wrong in fact and in Law and therefore ought to be reversed. This is because the reimbursed amount was an amount from which taxes (P.A.Y.E) had already been

withheld and paid to the Respondent, but unfortunately the Respondent imposed Withholding Tax on the reimbursed salaries paid to FKV & Associates which resulted in double taxation of the reimbursed amount. This double taxation came about due to the fact that the Appellant engaged a third party, FKV & Associates, to provide project support services, which involved the supply of staff. The combined effect of clauses 1 and 2 as well as "annex 1" of the agreement, a copy of which is on record as Exhibit 'CCEAL 11', is that the Appellant's obligation to FKV & Associates comprised the payment of a service fee and reimbursement of salaries of the contracted workers to FKV & Associates. Respondent had however erroneously assumed Voltic (GH) Ltd to be the third party that supplied the staff to the Appellant when indeed no such agreement existed in relation to Voltic (GH) Ltd. but rather to FKV & Associates. This wrong assumption informed the Respondent's erroneous position to impose Withholding Tax on salaries that had been reimbursed to FKV & Associates.

Arguments by Respondent

The Respondent's case is that it observed, in the course of its tax audit, that the Appellant had a service agreement with Voltic Ghana Limited to provide the Appellant with water extraction services, Exhibit 'GRA 8'. That the Appellant agreed with the service provider (Voltic Ghana Limited) that the fee would be invoiced on monthly basis in accordance with the applicable Value Added Tax rules. Again, the parties agreed that the Appellant would pay any amount due under this Agreement in Ghanaian Cedis. According to the Respondent, it has not known Voltic Ghana Limited to be an employment agency and the agreement between the Appellant and Voltic Ghana Limited does not indicate that the contract is for the supply of labour. It is therefore inaccurate for the Appellant to assert that Voltic Ghana Limited is an employment agency. Furthermore, the Appellant made a payment to Voltic Ghana Limited in relation to this agreement without withholding the tax as required under the Income Tax Law (Act 896) and the payment was labelled as incentive payment to Voltic in the sales ledger of the Appellant. The Respondent also observed that the Appellant deducted the said amount from the gross sales for Year 2018, Exhibit 'GRA 9'. The Respondent, stated that it however, concedes that the correct tax rate the

Respondent should have imposed on this service is 7.5% instead of the tax rate of 15% which resulted in the tax assessed of GHS 175,749.75 in year 2018. This accords with Section 2 of the Income Tax (Amendment) Act, 2016 (Act 907). Accordingly, the correct amount assessed under this heading is GHS 87,874.86.

Analysis

For the purposes of the ground being discussed the relevant agreement Appellant is referring to is Exhibit 'CCEAL 11'; the Supply of Project Support Services Agreement between Appellant and FKV & Associates and not Exhibit 'GRA 9', the agreement between Appellant and Voltic for water extraction services.

The Exhibit 'CCEAL 11' said agreement dated 1st January 2013 was initially for a period of 12 calendar months and could be extended for a further 12 calendar months as the request of the Appellant. However, attached to the parent agreement for the temporary supply of project support services is an amendment which has a renewal clause which states:

> ***"Section 4.1 of The Agreement is modified to read as follows; "this agreement shall be effective for the period commencing on 1st January 2014 and ending on 31st December 2014. This Agreement will renew automatically for consecutive 12- year periods."***

Thus by the terms of the amendment, said Agreement was in force during the period under review, i.e. the 2016 to 2018 years of assessment

Therefore the imposition of Withholding Tax on the reimbursed staff expense described as consulting expenses in the audit report by Respondent is wrong in fact and in Law and same ought to be reversed and so the Court holds.

GROUND 4 (para 55-65)

The Respondent erred in Law by wrongly construing trade discount which had accrued in 2017 year of assessment as a commission and subjecting it to a Withholding Tax of 10%, purportedly pursuant to Section 116(1)(a)(v) of the Income Tax Act, 2015 (Act 896).

Arguments by Appellant

The case of the Appellant herein is that the Respondent erroneously treated Voltic (GH) Ltd. as a sales agent of the Appellant and thereby re-characterized a trade discount given by the Appellant to Voltic (GH) Ltd. as a commission for a sales agent and imposed a Withholding Tax at the rate of 10% in accordance with Section 116(1)(a)(v) of Act 896. That the Respondent's application of Section 116(1)(a)(v) of Act 896 to the transaction involving Voltic (GH) Ltd. is wrong in Law as a careful reading of the said provision shows that the said provision applies to payments to resident individuals, and Voltic (GH) Ltd. is not an individual nor a sales agent to the Appellant.

Appellant further argued that assuming without admitting that the Appellant were liable to withhold tax from Voltic (GH) Ltd. it would not have been at 10% under Section 116(1)(a)(v) of Act 896 because Voltic (GH) Ltd. is not a resident individual as contemplated under Section 116(1) of Act 896. At best, the Appellant should have been required to withhold tax at 7.5% for payment from the supply of services under Section 116(2) of Act 896 as quoted above.

Furthermore, the Respondent treated the trade discount as commission because in its opinion, trade discount is given at the time of purchase and not at the end of the financial year. Appellant avers that in this instance the discount is granted at the end of the year when there is evidence that the customer has exceeded its purchase target and thus the trade discount can be determined. No payment was made to the customer. The discounted amount was used to defray cost of subsequent purchases. In the absence of any payment, the Appellant could not have withheld any tax under the circumstances.

Appellant relied on the Indian case of **SOUTHERN MOTORS v. STATE OF KARNATAKA AND OTHERS (CIVIL APPEAL NOS. 10955-10971 OF 2016)**, where the Supreme Court opined that:

"The actual quantification of the trade discount, depending on the nature of the trade and the related stipulations, may be deferred till the happening of a contemplated event, so much so that the benefit thereof is extended at a point of time subsequent to that of the original sale."

Also, the case of **UNION OF INDIA & OTHERS v. BOMBAY TYRES INTERNATIONAL PVT LTD [1984(17) ELT 329 (SC)]** the Supreme Court held in respect of trade discounts that:

"Discounts allowed in the Trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods, if established under agreements or under terms of sale or by established practice, the allowance and the nature of the discount being known at or prior to the removal of the goods. Such Trade Discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price."

Appellant concluded from the above cases that the Respondent's view on the grant of trade discount is misplaced because trade discounts must not necessarily be granted at the time of purchase. This is exactly the case of the Appellant because the trade discount is performance based.

Argument by Respondent (para 40-49)

The Respondent asserts that Appellant had disguised the commission as a trade discount because the Appellant's customers paid fully for whatever supply the Appellant made to them during the period under review and the so-called discount did not result in an adjustment of prices paid to the Appellant by its customers. Even though the Appellant labelled the payment as discount, the payment is in substance a commission considering that the payment was made at the end of the financial year. Therefore, it is the case of the Respondent that it construed the trade discount as a commission per Section 116(1)(a)(v) because a discount is given at the time of

purchase and not at the end of the financial year. In addition to this, where a discount is given to a customer, the buyer does not pay first for the amount to be refunded to them later. The Respondent however concedes that the appropriate rate applicable to the gross amount is 7.5% and not 10%. The tax assessed under this heading is therefore revised downward to GHS109,232.25.

Analysis

Section 116(1)(a)(v) provides that:

> *"Subject to subSection (3), a resident person shall withhold tax at the rate provided for in paragraph 8 of the First Schedule where that person*
> *(a) pays a service fee with a source in the country* ***to a resident individual***
> ...
> *(v)* ***as a commission to a sales agent.***"

Per **Regulation 21 of the Value Added Tax Regulations, 2016 (L.I. 2243)**:

(1) A taxable person shall, in accordance with subSection (1) of Section 41 of the Act, on supply of taxable goods or service to a customer issue to the customer a tax invoice.

(2) A tax invoice shall contain the following:

(j) **the rate of any discount;**

The ordinary meaning of discount for the purposes of sale is that there is a reduction in the original price of the product either for prompt payment or bulk payment. The Black's Law Dictionary, 9th Edition defines discount as a ***"reduction from the full amount or value of something"***. The implication is that once a seller offers a discount to a purchaser for products being purchased, the original price of the product is reduced. Trade discounts refer to the reduction in list price known as discount, allowed by a supplier to the purchaser while selling the product generally in bulk quantities to interested purchasers, whereas, cash discounts is discount given by the supplier in its cash payments to recover the cash debts on time as it motivates the

buyer to pay cash early as they are given discount if they pay within the stipulated time.

According to Black's Law Dictionary, 9th Edition Commission ***"is a fee paid to an agent or employee for a particular transaction, usually a percentage of the money received from the transaction".*** Commission regarding sales transaction, also, implies a fee paid to a salesperson in exchange for services in facilitating or completing a sale transaction. The commission may be structured as a flat fee, or as a percentage of the revenue, gross margin, or profit generated by the sale.

Therefore, in substance, commissions are fees paid by a person who enjoys a service rendered to another person for some services provided. For purposes of sales, discounts are either cash discounts or trade discounts as provided for in the Black's Law Dictionary, 9th Edition. In accounting practice and as discussed in the renowned Accounting Book **Frank Wood's Business Accounting Vol. 1, 13th Edition**, trade discount is executed when a buyer is initiating a buy order. Trade discount is not recorded, as the amount payable is calculated after deducting the discount from the invoice itself. On the other hand, a cash discount is executed when the buyer initiates payment. Cash discount is recorded at the debit side on the cash book.

So in substance, a seller will record a cash discount given, with a debit to the accounts – sales discount, and credit the purchaser's account so that there will be a reduction to the cost of the item recorded in the inventory. So in effect, a cash discount should be a reduction to an expense. Any simple audit of the accounts book of a trader who provides cash discount must clearly indicate an entry of cash discount given to the buyer.

Furthermore; the case of **BEIERSDORF GH. LTD v. THE COMMISSIONER GENERAL OF THE GHANA REVENUE AUTHORITY, AUGUST 2018, HIGH COURT, CASE NO CM/TAX/0001/2018**, falls on all four with this ground before this Court. In that case, the Tax Authorities, CGRA, issued an assessment into the affairs of Beiersdorf Ghana Ltd. In the said audit, product discounts paid to third party

vendors had been characterized as sales commissions subject to Withholding Tax of 10%. The Appellants contended that the finding of CGRA imposing liabilities with respect to Withholding Tax is wrong in Law and the decision of the CGRA to characterize reimbursements paid to the distributor of Appellant for work done by third party vendors as sales commission paid to the distributors for which a Withholding Tax of 10% should apply is wrong in Law. The decision of the CGRA to disallow Trade Discount and to treat Trade Discounts offered to the distributors of the Appellant as commission payment which should attract a Withholding Tax of 10% is wrong in Law.

The Appeal was dismissed by the High Court and the learned judge held as follows:

> ***"In the opinion of the Court if it is true that the Appellant gave trade discounts to its customers in order to boost its sales, then the said trade discount must be clearly stated on the VAT invoices issued to the customers. In the instant action, the respondent conducted a tax audit of the books and other documents kept by the Appellant and came out with a finding that the VAT invoices do not show that customers of the Appellant have benefitted from any trade discount given by the Appellant."***

In addition to this, in the recent case of **FAN MILK GHANA LIMITED v. THE COMMISSIONER GENERAL, SUIT NO.: H1/274/2020 DATED 7TH APRIL, 2022**, the Court of Appeal affirmed the above position when it came to "discounts" and "commissions". The Court held that the ordinary meaning of discounts is that there is a reduction in the original price of the product either for prompt or bulk payment as confirmed by the 9th Edition of the Black's Law Dictionary. The Court held that the combined reading of the definitions implied that once a seller offers a discount to a purchaser for products being purchased, the original price of the product is reduced.

Applying this position to this case, the presence of the said discount on the invoice is one of the most cogent ways that Appellant could have used to prove the fact that

indeed it is a discount and not a commission. However, this was not stated on their tax invoice as is expected by Act 870.

The Court finds that, from the combined readings of Section 116, and the cases cited supra, the Respondent did not err when they construed the discount as a commission and subjected it to the Withholding Tax in the circumstances. The Respondent has the right to re-characterize or disregard a transaction under Section 34 of Act 896, where the form of the transaction does not reflect its substance.

Ground 5

The Respondent erred in Law by imposing a Withholding Tax of 15% on the same Accrued trade discount subsequently made available to the Appellant's customer in the 2018 year of assessment.

Appellant submitted that the Respondent had admitted in paragraph 43 of its Reply that both GROUNDS 4 and 5 of Appeal refer to the same transaction and the transaction has therefore not been taxed twice. However, the Respondent in its decision dated May 17, 2021, Exhibit 'CCEAL 5', described the trade discount as a "Discount Commission" under the Withholding Tax details for 2017 and taxed it at 10%, while it described the same trade discount as a "Voltic Incentive" and taxed it at 15% under the Withholding Tax details for 2018.

Furthermore, that under the Withholding Tax details for 2017, the Respondent used the figure (GHS 1,456,430.00) which it claims in paragraph 37 of its Reply to have been the understated difference in revenue between the declaration of VAT returns for the 2017 year of assessment as compared to the amount disclosed in the Statement of profit or loss and other comprehensive income (audited financial statements) for 2017. Upon explanation by the Appellant that the difference between the VAT declarations and the audited financial statements resulted from a trade discount granted to Voltic (GH) Ltd. in the amount of GHS 1,171,665.00, the Respondent used the GHS 1,171,665.00 under the Withholding Tax details for the 2018 assessment year. It is therefore the case of the Appellant assigning different descriptions to the trade discount and applying different Withholding Tax rates to each is an indication that the

Respondent did not really appreciate the real nature of the trade discount for tax purposes and just wanted it taxed by any means. The Respondent in effect taxed the same income twice at different tax rates. Such guesswork is not acceptable in taxation. It is a legal principle that where there is doubt as to a taxpayer's liability, the construction must be in favor of the taxpayer and not the State. The Court should hold that the arrangement between the Appellant and Voltic (GH) Ltd. was a trade discount not subject to tax and not a commission to a sales agent as claimed by the Respondent. The Respondent contests this ground of Appeal and repeats its arguments under Ground (IV) of the grounds of Appeal. The Respondent did not tax this transaction at the rate of 15%. As stated under Ground (IV), the Respondent erroneously taxed the transaction at the rate of 10% instead of the correct rate of 7.5% under Section 116(2) of Act 896. It is therefore incorrect that the Respondent taxed this transaction twice at different rates. The amount of GHS 1,171,665.00 that the Appellant referred to under its Ground (V) of appeal is completely different from the amount that was taxed under Ground (IV) above. It is therefore a different figure from the amount of GHS 1,456,430.00 taxed under Ground (IV). Exhibit 'GRA 2' is Appellant's own document and in the said document, paragraph 1(a) deals with understated revenue amounting to GHS 1,456,430.00. This is what the Respondent taxed under Ground (IV). The amount of GHS 1,456,430.00 is different from what the Appellant discussed under paragraph 1(d) of the same Exhibit 'GRA 2' attached to the Respondent's Reply to the Appellant's Notice of Appeal. The fact that the Appellant discussed these two figures under two different headings confirms that the two figures are not the same.

Analysis

Section 116(2) of Act 896 provides as follows:

> *(2) A resident person, other than an individual, shall withhold tax on the gross amount of the payment at the rate specified in the First Schedule when the person makes a payment to another resident person who does not fall within subSection (1) or Section 114 for*

(a) the supply or use of goods,

(b) the supply of any works, or

(c) the supply of services,

in respect of a contract between the payee and the resident person.

Order 13 Rule (1) of C.I. 47

Subject to subrule (4) of this Rule, any allegation of fact made by a party in the party's pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in pleading or a joinder of issue under Rule 14 which operates as a denial of it.

The Law is that, "where a party makes an admission on a certain state of facts, the Defendant is relieved from her duty to provide evidence on the admitted facts."....See In **KWADWO DANKWA & ORS v. ANGLOGOLD ASHANTI LIMITED [2019] 137 GMJ @ 30**, the dictum of Vida Akoto-Bamfo (Mrs.) JSC.

SEE ALSO; **THE SUPREME COURT CASE OF RE ASERE STOOL; NIKOI OLAI AMONTIA IV (SUBSTITUD BY TAFO AMON II V AKOTIA OWORSIKA 111 SUBSTITED BY LARYEA AYIKU III [2005-2006] SCGLR 637** this Court held as follows;

"Where an adversary has admitted a fact advantageous to the cause of a party, the party does not need any better evidence to establish that fact than by relying on such admission, which is an example of estoppel by conduct"

Thus a combination of Order 11 Rules 13 (1), (2)& (3) and the Law on admission is that where a person makes an admission on certain facts which are not traversed by the opponent, then the said facts are deemed to have been admitted.

In paragraph 43 of the Reply by the Respondent, they stated as follows:

"The Respondent further submits that this amount was taxed at the rate of 10% and not 15% as the Appellant claims. In further response, the Respondent says both the fourth and fifth grounds of appeal refer to the same transaction. The transaction has therefore not been taxed twice."

The Court has already concluded concerning ground four that the payment of the amount of GHS 1,456,430.00 was a commission under the guise of discounts, per the **FAN MILK CASE (supra).** Therefore, since the Respondent admits that both the fourth and fifth grounds of Appeal refer to the same transaction, then the Respondent cannot come up with another figure of GHS 1,171,665.00 under the Withholding Tax details for the 2018 assessment year.

Assuming the Court is even to go by the assertion in the Respondent's Written Submission, that the figures are different as quoted below:

"The amount of GHS 1,171,665.00 that the Appellant referred to under its ground (v) of appeal is completely different from the amount that was taxed under Ground (IV) above. It is therefore a different figure from the amount of GHS 1,456,430.00 taxed under Ground (IV)."

Then one would ask the question, ***"why is the Respondent silent with no justification for the tax imposition on the second amount GHS 1,171,665 taxed?"*** If in their opinion, the trade discount was categorized as a commission, then how would they explain the "Voltic incentive?" If Respondent was specific to re-characterize the first amount of GHS 1,456,430.00 as commission, then they should also have categorically stated the second amount as commission, and not incentive and the onus laid on them at this point to prove otherwise. Having failed to make it clear that the second amount was a commission then same will be treated as trade discount. If so, then there is no provision in Act 896 which mandates or permits the taxing of trade discounts. Consequently, the Respondents did err by imposing a Withholding Tax of 15% on the trade discount made available to the Appellant's customer in the 2018 assessment and the Court so holds.

GROUND 6

Whether or not the Respondent erred by imposing Value Added Tax (VAT), National Health Insurance Levy (NHIL) and Ghana Education Trust Fund Levy (GETFundL) on a supply of services by the Appellant, which was consumed outside the country, contrary to Item 3(3) of the Second Schedule to the Value Added Tax, 2013 (Act 870)?

Argument by Appellant

Appellant argues that pursuant to the Service Agreement between the Appellant and The Coca-Cola Export Corporation, a USA-based entity, see, Exhibit 'CCEAL 4', the Appellant provides several support services to The Coca-Cola Export Corporation. The Appellant provides marketing and other services to The Coca-Cola Export Corporation to support brand awareness and the increase in its sale of concentrate. The brand marketing and advertising service provided by the Appellant to The Coca-Cola Export Corporation was consumed outside Ghana and therefore must be subject to VAT at zero-rate pursuant to Section 36(1) and Item 3(3) of Act 870. Section 36(1) of Act 870 provides that a taxable supply is taxable at zero-rate if the supply is specified in the Second Schedule to Act 870. Item 3(3) of the Second Schedule to Act 870 provides that a supply of services to the extent that the services are consumed elsewhere than in Ghana is a zero-rated supply.

Counsel argues further that, Item 3(3) adopts the destination principle of VAT as opposed to the origin principle. However, the Respondent by its Reply and submissions in Court is inviting the Court to enforce the origin principle by asserting that to the extent that the service was supplied in Ghana, then the supply is deemed to have been used in Ghana. However, this is not in consonance with the destination principle as provided in Item 3(3) of the Second Schedule to Act 870.

Unfortunately, Act 870 does not define what would constitute "use" or "consumption" and by extension how to determine the place where a service would be deemed to have been used or consumed.

Appellant relies on the Kenyan case of **COCA-COLA CENTRAL EAST AND WEST AFRICA LIMITED v. THE COMMISSIONER OF DOMESTIC TAXES, INCOME**

TAX APPEAL 19 OF 2013, which it states fall on all fours with Ground Six of the tax Appeal before this Honourable Court, where the Court was faced with a similar challenge, the Court relied on the OECD's International VAT/GST Guidelines 2017 for insight on the determination of the place of taxation for cross-border supplies of services and intangibles.

Reference was made also by Appellant to the case of **COCA-COLA CENTRAL EAST AND WEST AFRICA v. THE COMMISSIONER OF DOMESTIC TAXES, TAX APPEAL NO. 5 OF 2018**, in answering the question who the consumer or user of a service was, which in turn cited the case of **COMMISSIONER OF DOMESTIC TAXES v. TOTAL TOUCH CARGO HOLLAND HC ML ITA NO. 17 OF 2013 [2018] EKLR** in which the Court stated that:

> ***"The location where the service is provided does not determine the question of whether the service is exported or not. The test is the location (or place) of use or consumption of that service. Therefore, the relevant factor is the location of the consumer of the service and not the place where the service is performed."***

The Court in the case of **COCA-COLA CENTRAL EAST AND WEST AFRICA v. THE COMMISSIONER OF DOMESTIC TAXES, TAX APPEAL NO. 5 OF 2018** proceeded to decide the case in favour of the Appellant and held that although the Kenyan consumers of the beverage were the target audience of the advertising service, the benefit of the service was accrued by The Coca-Cola Export Corporation who enhanced the business and sales of selling and manufacture of concentrate. The Court therefore held that in accordance with the destination principle United States of America had the taxing right.

Again, in the case of **COCA-COLA CENTRAL EAST AND WEST AFRICA LIMITED V THE COMMISSIONER OF DOMESTIC TAXES, INCOME TAX APPEAL 19 OF 2013**, where the High Court of Kenya had the responsibility to decide the place of use

and consumption of marketing and advertising service by Coca-Cola Central East and West Africa to The Coca-Cola Export Corporation similar to the instant case, the Court relying on Guideline 3.2 of the OECD's International VAT/GST Guidelines held in favour of the taxpayer.

The Court further acknowledged that the business model was not a sham to avoid VAT taxes. The Court agreed that inbuilt in the cost of concentrate that was imported into Kenya were expenses incurred by The Coca-Cola Export Corporation in the promotional and marketing activities in Kenya and that all costs in the chain of activities prior and up to the point of importation of the concentrate into Kenya were paid by the bottlers when they purchased it. Therefore, the expense on promotional and marketing activities did not escape the VAT charge because the charge of VAT on the concentrate would partly be a charge on its costs, which included the promotion and marketing expenses.

Argument by Respondent

To the Respondent, the contention is where the supply of service was made. If it is established that the supply was made in Ghana, then the supply is subject to VAT at the standard rate. If it is established that the supply was made outside the boundaries of Ghana, then the supply is subject to VAT at the rate of zero. That per the recital to the agreement between the Appellant and Export, it is clear that the Appellant was hired to perform services for Export in Ghana. Appellant is required under the agreement to monitor the activities of the user of the brands in Ghana to ensure that they abide by the specifications of the brands. The fact that Export is based in the United States of America does not negate the fact that the services were performed for it in Ghana.

Furthermore, once the activity took place in Ghana, by the combined effect of Sections 1 and 5 of VAT Act, 2013, Act 870, the supply of the service in question is taxable in Ghana. Further, there is no doubt that the use and enjoyment of the service is in Ghana and is therefore taxable in Ghana.

Respondent argues that the correct view of the Law is that such a non-resident person has business interest in Ghana which earns that person income and any service provided to the business is subject to VAT at the standard rate and not at the zero rate. Export has proprietary interest in Ghana and the services being provided are in respect of that interest. For a taxable supply to be treated as zero-rated under Section 36(2) of Act 870, the exporter is required to show documentary proof acceptable to the Commissioner-General that substantiates the person's entitlement to apply the zero rate to the supply. There is no evidence on record that the Appellant provided the services outside Ghana. It is therefore obvious that the service was provided by the Appellant in Ghana and not in the United States of America where the employer of the Appellant is stationed. The rate of zero cannot therefore be applied to the service because it does not qualify as an export of service under item 3 of the Second Schedule to Act 870. Respondent prays this honourable Court to affirm its decision to assess the Appellant to tax to the tune of GHS 7,715,603.67.

Analysis

Section 36 of Act 870 provides as follows:

(1) A taxable supply is taxable at a zero rate if the supply is specified in the Second Schedule.

Part 1(2) of the Second schedule of the Act provides as follows:

1. The supplies listed in this Schedule and defined in this item are zero-rated supplies for purposes of Section 36.

(2) "Export country", in this Schedule, comprises any country other than in this country and includes any place which is not situated in this country.

Item 3 of the Second Schedule of Act 870 also provides as follows:

3. Supply of services

(1) A supply of services directly in connection with land or any improvement to land situated outside the country.

(2) A supply of services directly in respect of personal property situated outside the country at the time the services are rendered.

(3) A supply of services to the extent that the services are consumed elsewhere than in the country.

(4) A supply of services comprising the filing, prosecution, granting, maintenance, transfer, assignment, licensing or enforcement of any intellectual property rights for use outside the country.

(5) A supply of freight and insurance directly attributable to the export of goods.

The OECD (2017), International VAT/GST Guidelines provides some rules which are noteworthy.

> *"1.8 C. Under the destination principle, tax is ultimately levied only on the final consumption that occurs within the taxing jurisdiction.*
>
> *1.9 The application of the destination principle in VAT achieves neutrality in international trade. Under the destination principle, exports are not subject to tax with refund of input taxes (that is, "free of VAT" or "zero-rated") and imports are taxed on the same basis and at the same rates as domestic supplies.*
>
> ***Accordingly, the total tax paid in relation to a supply is determined by the rules applicable in the jurisdiction of its consumption and all revenue accrues to the jurisdiction where the supply to the final consumer occurs.***
>
> *For these reasons, there is widespread consensus that the destination principle, with revenue accruing to the country of import where final consumption occurs.*

The destination principle is the international norm and is sanctioned by World Trade Organization ("WTO") WTO's Agreement on Subsidies and Countervailing Measures"

Guideline 3.1 provides that: *"For consumption tax purposes internationally traded services and intangibles should be taxed according to the rules of the jurisdiction of consumption."* The commentary under this guideline acknowledged in relation to business-to-business supplies that ***"VAT systems generally use proxies for the place of business use or final consumption to determine the jurisdiction of taxation based on features of the supply that are known or knowable at the time that the tax treatment of the supply must be determined."***

Guideline 3.2 provides the general rule for business-to-business supplies which states that: ***"For the application of Guideline 3.1, for business-to-business supplies, the jurisdiction in which the customer is located has the taxing rights over internationally traded services of intangibles."***

Paragraph 3.9 of the Commentary on Guideline 3.2 stated as follows: ***"By and large, when a business buys in services or intangibles from another jurisdiction, it does so for the purposes of its business operations. As such, the jurisdiction of the customer's location can stand as the appropriate proxy for the jurisdiction of business use, as it achieves the objective of neutrality by implementing the destination principle."***

Guideline 3.3 provides that: ***"For the application of Guideline 3.2, the identity of the customer is normally determined by reference to the business agreement.*** In this case the customer is The Coca-Cola Export Corporation based in the USA."

According to an IFS Report, R189 by the Institute of Fiscal Studies and the Tax Policy Unit of the Ministry of Finance, Ghana,

"VAT in Ghana uses the destination principle, meaning imports are subject to VAT, but exports are zero-rated."

"The National Health Insurance Levy (NHIL) applies to the same range of goods and services as VAT with a rate of 2.5% applied to the VAT-exclusive price. Supplies that are exempt from VAT are also exempt from NHIL; suppliers operating under the VFRS also do not charge NHIL).

The GETFund Levy (GETFL) functions in the same way as NHIL – it applies at a rate of 2.5% on the VAT-exclusive price of all VATable supplies and there is no allowance for deducting input GETFL."

The High Court in the case of **COMMISSIONER OF DOMESTIC TAXES v. TOTAL TOUCH HOLLAND CARGO** affirmed the internationally accepted VAT destination principle on international trade and services. ***It was held that in a business-to-business transaction, the consumer of the service is the business and if it is located outside the country, the service is clearly consumed outside the country. Such services are therefore exported and zero rated for VAT purposes.***

In the case of **W.E.C LINES KENYA LIMITED v. COMMISSIONER OF DOMESTIC TAXES, REPUBLIC OF KENYA, IN THE APPEALS TRIBUNAL AT NAIROBI, APPEAL NO. 137 OF 2018.**

The Tribunal notes that the VAT Act, 2013 does not define the terms "use" and "consumption" in relation to export of service. In **IBM INDIA PRIVATE LTD. & OTHERS v. COMMISSIONER OF CENTRAL EXCISE & OTHERS, CUSTOMS, EXCISE & SERVICE TAX APPELLANT TRIBUNAL SOUTH ZONAL BENCH, BANGLORE**, it was observed that services being intangible, what constitutes export of service is difficult to conceive and define unlike in the case of goods which are tangible.

Now, the issue in contention is whether the service rendered to the Coca Cola Export Corporation is located outside the country and if the service rendered by Coca Cola

Equatorial Africa Limited was consumed outside the jurisdiction and therefore constitutes a zero rate service per part 3 of the second schedule of the act.

The combined reading of the OECD guidelines and the cases cited supra exhibit clearly that if the consumer business is outside the country, then indeed, the consumption of the service should be deemed to also be outside the country.

In this case, the obligations of CCEAL under the service agreement were mainly in the form of advice and recommendations to the Coca-cola Export Corporation. Coca Cola Export Corporation is located outside the country, hence, the consumption of the service is also outside the country.

Based on this, the Court is of a considered opinion that the conclusion is that the services were consumed by Coca-cola Export Corporation. The services were therefore consumed elsewhere within the meaning of item 3 of the Second Schedule of Act 870. Where the supply of the services is done by CCEAL within this jurisdiction, the consumption and processing of the said services is done outside of Ghana.

(SGD.)

H/L JANE HARRIET AKWELEY QUAYE (MRS.)
(JUSTICE OF THE HIGH COURT)

Representation

Appellant absent

Respondent represented by Mathew Adzoyi

Counsel for Appellant – Benedict Asare with Ismail Ibn Ibrahim and Dr. Nana Gyamera Afful for Dr. Abdallah Ali-Nakyea present

Counsel for Respondent – Abdulai Iddrisu for Cephas Odartey Lamptey present

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