IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, [COMMERCIAL DIVISION] ACCRA, HELD ON WEDNESDAY THE 27TH DAY OF FEBRUARY 2018 BEFORE H/L JEROME NOBLE-NKRUMAH, J.

SUIT NO. CM/TAX/000318

EATON TOWERS GHANALTD

VRS

THE COMMISSIONER-GENERAL [GRA]

THE ATTORNEY-GENERAL

PARTIES: Absent

COUNSEL: Dominic Quashigah for Kizita Mensah for the Appellant – Present

Maxwell Owusu Boadi for the 1st Respondent - Present

JUDGEMENT

Following a tax audit embarked upon by the Commissioner General [CG] of the Ghana Revenue Authority [GRA] on the Appellants business, this Appeal has arisen. This audit covering the period 2013 to 2016 culminated in the upward adjustment of the Appellants assessable income from its Vodafone operations and consequently its direct and indirect tax liabilities for the period.

The Commissioner General set off tax credits standing in favor of the Appellant in the aggregate amount of GHC9,431,605.18 against the the assessed tax of GHC40,945,696.83 leaving an outstanding tax amount of GHC31,514,091.65.

Dissatisfied with this assessment the Appellant wrote to the CG on 6th December 2017 and in accordance with **section 42(5) (b) of Act 915** requested a waiver of the required upfront payment of 30% of the tax assessed which is a pre requisite for its assessment. This request was repeated on the 27th of December 2017, this time notifying the GRA of its objection to the tax decision in its letter dated 30th November 2017.

Pursuant to **section 42(5) (a) of the Revenue Administration Act 2016 (Act 915)** the Appellant on 2nd January 2018 paid an amount of GHC9, 454,227. 45 being 30% of the outstanding tax assessment in order to have the CG entertain its objection. After 60 days when the Commissioner General had remained silent over the Appellants objection, the Appellant by letter dated 14th March 2018 treated the silence as rejection of its tax objection and hence this Appeal.

This notice of Appeal filed on the 10th of April 2018 is founded on two main grounds

a. The Commissioner Generals finding that the prices charged to Vodafone are *ridiculously lower than prices paid by other telecommunications operators* is not supported by the facts presented to him by the Appellant in support of its objection
b. The commissioner General erred when he failed in his tax decision as is required of him under section 99 of the revenue Administration Act , 2016 Act 915 to

i. Demonstrate how the transaction between the Appellant and Vodafone Ghana Ltd amounts to a tax avoidance arrangement prohibited by Act 915
ii. Indicate the tax benefit that had accrued to the Appellant over the period of the tax review as a result of the arrangement between the Appellant and Vodafone Ghana ltd

The Appellant attached to this Notice of Appeal documents in support of its grounds together with various exhibits it seeks to rely on.

In respect of its first ground, the Appellant submits that the basis of the 1st Respondents tax assessment is misconceived. That the 1st Respondents finding of the Appellant as engaging in a tax avoidance scheme solely on the ground that Appellant charged Vodafone low prices for the use of its own towers as compared to charges levied other sharers on the towers[referring to Airtel, MTN and other entities sharing the masts with Vodafone]

The Appellant argues that this cannot form the basis of a claim of tax avoidance under **section 112 of the Internal Revenue Act 2000[Act 592], section 34 of the Income tax Act, 2015[Act 896] or section 99 of the Revenue Administration Act, 2016 [Act 915]**, adding that there is nothing fictitious or artificial in its agreement with Vodafone. That contrary to the position held by the 1st Respondent, the agreement with Vodafone comes with great economic effect and commercial value serving the commercial and practical interests of the parties and that to constitute tax avoidance the 1st Respondent must be showing that the agreement with Vodafone is purposed to generate some tax benefit either in the form of lower taxes or complete avoidance of the tax burden.

Again it is submitted that the Appellant's core business is the construction of, maintenance and renting out of space on telecommunication masts to telecommunications operators while Vodafone is a telecommunications operator whose business involves the provision and sale of data and airtime. Consequently the Appellant has urged on this court that its arrangement with Vodafone is one which suits their individual needs and strengths and that it was primarily to free Vodafone to focus on its core business that the masts per the arrangement were handed over to the Appellant to maintain, manage and rent out with the agreement that Vodafone would pay fees 25% less what it ought to be paying the Appellants for its services. Further Vodafone is responsible for paying all fees relating to the leasing/renewal of the lands hosting the masts and for the maintaining /renewing licenses required for the operation of the masts. The Appellant on the other hand offered operation and maintenance services including supply delivery and installation of spare parts and materials required for operations, ensuring that agreed service levels are maintained, provision of power and security for the equipment on the sites in the agreement. Generally the Appellant has argued by reference to its exhibit I and exhibit II attached to its supplementary Notice of Appeal, that by the agreement in issue it has generated more income that it would have, if it had charged Vodafone fully for the services it rendered it. Consequently according to the Appellant it paid more tax to the 1st Respondent thereby. That the Appellant has not charged or made any money outside that which it has declared and therefore there is no tax avoidance scheme and consequently the 1st Respondents power does not come to play in this regard.

This leads to the second ground where the Appellant has urged on this court that a tax benefit must be shown as accruing to the Appellant as the 1st Respondent must serve a notice specifying [a] a tax benefit, [b] the arrangement and [c] the adjustment made by the 1st Respondent. The Appellants argument here is that its arrangement with Vodafone does not achieve any tax benefits as would be caught under **section 99[4] of the Revenue Administration Act, 2016 [Act 915]**.

Quoting section 99[5] which reads :***An arrangement is a tax avoidance arrangement only if It involves a misuse or abuse of the tax law provision having regard to the purpose of the provision and the wider purposes of the law in which the provision is situated***, the Appellant submits it has neither abused nor misused any tax provision and the 1st Respondents allegation that Appellant has charged other telecommunication operators on the masts more that it has charged Vodafone, even if proven cannot amount to tax avoidance.

1st Respondent responding to the Appellant's trade off argument has urged on this court that Appellants revenue stream derived from the other companies enjoying the benefits of the masts in and of themselves are subject to tax and this is independent of the services rendered by Appellant to Vodafone. That the same tax regime will apply to the value paid or supposed to have been paid by Vodafone [judging from what other users of the mast in the same industry are paying]. The 1st Respondents point here is that for the services provided by the Appellant to the Vodafone there ought not to have been any discount as it were but rather Vodafone ought to have been made to pay the full market price as it was on such a rate the tax would be applied on.

The 1st Respondent further takes on the Appellant in its submission that that it offered additional services of rental which comprises the exclusive allocation of tower space arguing that the Appellant did not provide a breakdown of charges for the various services as it would be seen from them such a differential which tilted in favor of the Vodafone and this cannot be justified economically except it being a tax avoidance.

Again on the Appellants submission that it was required only to operate and maintain them[masts] in consideration of the right to rent out space on the masts and corresponding ground area to other telecommunication infrastructure users, it is urged on this court that it is this very arrangement that the 1st Respondent is frowning upon and it is argued on his behalf that if Vodafone had rented out space directly on the masts it would has accounted for tax distinctly and for the Appellant also it would have also for the services it rendered for the use of the masts and for payments it received from Vodafone, accounted for tax for such payment separately. With the present situation tax which would otherwise have accrued to the 1st Respondent has been undercut by the discount extended to Vodafone

The 1st Respondent in its Tax audit noted that a careful review of the agreement in issue revealed that prices being paid by Vodafone did not reflect the market prices. This is the premise of the 1st Respondent's position. The Appellant has not denied Vodafone is charged less than what other users on the masts are charged. Appellant has stated that Vodafone was allowed to pay fees which were less by 25%. The Appellant has raised its justification for this arrangement. Generally this in comparison with what is charged the other telecommunication companies on the same masts will show a clear tilt in favor of Vodafone. The Appellants own admission that Vodafone pays 25%

points at the fact that fees charged the other entities reflected market prices. The 1st Respondent in such circumstances does a comparison of like services and the tax exigible from fees generated thereby and compares them to that in issue. Clearly from the present matter Vodafone is paying less for the same services rendered by the Appellant to MTN for example on the same mast, logically therefore for the 1st Respondent it notes it will receive less from the Eaton/ Vodafone business that it does from the Eaton/MTN business. Expected tax is denied the 1st Respondent thereby. How so? The Appellant has recourse to its agreement with Vodafone who own the masts. This agreement may be convenient to the parties but works to the disadvantage of the taxman. This arrangement blocks income which otherwise should come to the Appellant. This in turn will squeeze and lower the corporate income tax that Appellant ought to pay to the 1st Respondent. In other words any arrangement that aims at reducing income to that entity ends up reducing corporate income tax. This will work into all the periods the Appellant will receive lower than the fair market price for its business with Vodafone, and consequently the Appellant will be paying to the 1st Respondent lower value added tax. This situation would be different if it charged and was paid fair market price for its services.

By **section 112 of the Internal revenue Act 2000(Act 592)** the 1st Respondent for the purposes of determining tax liability is empowered and may *re characterize or disregard an arrangement or part of an arrangement that is entered into or carried out as part of a tax avoidance scheme*

This enactment and indeed other enactments like the **Income Tax Act, 2015 (Act 896) section 34, Revenue Administration Act, 2016(Act 915) section 99**, and the **Value added Tax Act, 2013(Act 870) sections 43[1], [2] and [3]** in their combined effect empower the commissioner to re characterize the arrangement having noted that by that arrangement what is due it from the services rendered by the Appellant was reduced and thereby avoiding the payment of the right taxes. I find accordingly the 1st Respondents finding on the first ground of appeal was right based on the arrangement between the Appellant and Vodafone.

On the second ground which has been broken down into two, I agree with 1st Respondent counsel that this ground is basically extracted from section **99[2] [a] and [b] of the Revenue Administration Act 2016**

The 1st Respondent has his exhibit GRA 1. It has attached to a cover note from the 1st Respondent a tax audit report on the Appellant. The report states amongst others the scope and observations and findings. Under observations and findings there is reference to the management Contract between the Appellant and Vodafone for the management of towers of Vodafone. It remarks that prices being paid by Vodafone did not reflect market prices. The market prices were not difficult to come by. 1st Respondent only need have a look at fees charged by the Appellant for use of the masts by other telecommunication companies on the same masts

The specific arrangement has been referred to in this regard. Reference has also been made to what is charged by the Appellant for the same services rendered to other telecommunication on the same masts. It is this arrangement which is discriminatory and in favor of Vodafone. This arrangement beneficial to the parties, is not favorable to the 1st Respondent as it reduces his tax revenue. The law recognizing such situations are likely to arise provides at **section 34 of the**

Income tax Act, 2015 (Act 896) the power for the Commissioner General to disregard or to re characterize any arrangement which is fictitious or does not have a substantial economic effect or whose form does reflect its substance. The net effect of this arrangement therefore is that the Appellant paid less tax than it ought to have from its dealing with Vodafone.

On the other leg of this ground I hold the view that the 1st Respondents exhibit GRA1 having presented a table in which the years of assessment are listed with their corresponding assessed revenue and declared revenue and the difference indicated, this leg has been satisfied. This is self-explanatory. It is this difference that represents the benefit to the Appellant.

The general rules of proof in civil matters apply in this tax appeal. It is the duty of the Appellant to prove to the satisfaction of the court its grounds of appeal. The rules on proof on a preponderance of probability apply here. [See **Okudzeto Ablakwa (No. 2) v Attorney General &Another [2012]2 SCGLR 845 @867**]

From the forgoing I find no evidence weighty enough to compel this court to disturb the findings of the 1st Respondent in its assessment of the Appellant. I proceed consequently to dismiss appeal.

SGD

JUSTICE JEROME NOBLE-NKRUMAH

HIGH COURT

ACCRA.

RFERENCES

1. Revenue Administration Act 2016 (Act 915) section 42(5) (a), (b), 99 (4),(5)
2. Internal Revenue Act 2000[Act 592], section 112
3. Income tax Act, 2015[Act 896] section 34
4. Value added Tax Act, 2013(Act 870) sections 43[1], [2] and [3]
5. Okudzeto Ablakwa (No. 2) v Attorney General &Another [2012]2 SCGLR 845 @867