IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE GHANA (COMMERCIAL DIVISION) HELD AT ACCRA ON MONDAY THE 29TH DAY OF APRIL 2019, BEFORE HER LADYSHIP MRS. ANGELINA MENSAH-HOMIAH J.

SUIT NO. CM/TAX/0004/18

FAN MILK LIMITED ... PLAINTIFF

VRS.

COMMISSIONER GENERAL, GHANA REVENUE AUTHORITY ... DEFENDANT

JUDGMENT

...In this world, nothing can be said to be certain, except death and taxes." Benjamin Franklin.

Tax Assessment: Whether or not there has been an unlawful re-classification of tax by the Ghana Revenue Authority resulting in a tax liability to the Appellant.

Discounts and Commissions: Whether subject to withholding tax.

This is an appeal against the Respondent's assessment and imposition of tax liability of GH₵ 7,655,676.22 on the Appellant for the accounting years 2014, 2015 and 2016. The Appellant is a company registered under the laws of Ghana and engaged in the production and distribution of dairy frozen yoghurt and juices. The Respondent is the head of the Ghana Revenue Authority.

BACKGROUND FACTS

The Respondent caused a Tax Audit on the Appellant's business operations for the accounting periods 2014-2016, and assessed a withholding tax liability of GH₵7,655,676.22 against the Appellant. This was as a result of the failure of the Appellant to withhold those taxes from the recipients of what the Appellant termed "discounts". This was communicated by way of a tax audit

report to the Appellant. Dissatisfied with this assessment, the Appellant engaged in discussions with the Respondent, and later filed an objection, after which the instant appeal was lodged. The Respondent raised a preliminary legal issue in the submissions filed on its behalf and that will be determined first.

WHETHER THE APPELLANT HAS SATISFIED THE STATUTORY PRE-CONDITIONS FOR LODGING THE APPEAL.

It is provided under Order 54 Rule 4 (1) and (2) of the High Court Civil Procedure Rules, 2004, C.I. 47 that:

Payment of Tax

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

(2) An appeal shall not be entertained by a Court under these rules unless the Appellant has paid the amount set out in sub rule (1) of this rule.

It is also provided under Section 42 (1) and 42 (5) (b) of the Revenue Administration Act 2016 Act 915 as follows:

Sec. 42 (1)

> *Subject to a tax law to the contrary, a person who is dissatisfied with a tax decision that directly affects that person may lodge an objection to the decision with the Commissioner-General within thirty days of being notified of the tax decision.*

Sec.42 (5) (b)

> *An objection against a tax decision shall not be entertained unless the person has in the case of other taxes, paid all outstanding taxes including 30% of the tax in dispute.*

For the Respondent, counsel submitted that it is incumbent on the Appellant upon coming under Order 54 of C.I. 47, to demonstrate to this Court the extent to which it has complied with the provisions of the law. It was his argument that the Appellant has failed to comply with the mandatory provisions of Order 54 rule 4(1) of C.I. 47 and this renders the appeal incompetent and ought to be dismissed.

On behalf of the Appellant, counsel submitted that following the filing of its objection, the company paid 30% of the assessed amount in the sum of GH₵ 2,215,319.66 in compliance with the mandatory requirements as a precondition before the objection could be considered, but eventually, the Respondent dismissed the objection. The Appellant's position is that it has paid more than the 25% required before an appeal could be filed under Oder 54 of C.I 47.

Exhibit FM2 contains series of correspondences between the parties herein. The Appellant on 7th August 2018, wrote a letter in reaction to the Respondent's letter dated 1st August 2018 demanding payment of all tax liabilities. The last paragraph of the said letter reads:

... Based on the above, we wish to submit a Societe Generale Cheque #036062 dated August 7 2018 for an amount of GHS 2,215,391.66 being 30% of the tax liability in dispute, in order to satisfy the provision in Section 42 (5) (b) and appeal to you to review our objection and make a determination as to the appropriateness of the tax surcharge imposed on the company.

Please acknowledge receipt of the cheque of GHS 2,215,391.66.

On the same day, the Respondent issued a receipt indicating payment of the *GHS 2,215,391.66* by cheque, it described the said payment as *Withholding Income Tax*. The Respondent has not demonstrated to this court that the cheque duly received from the Appellant, was returned unpaid upon presentation to its bankers. In the absence of any evidence to the contrary, the court finds that the cheque of *GHS 2,215,391.66* being 30% of the disputed tax liability of the Appellant was duly cleared.

The question which arises at this point is, whether the Appellant must pay another 25% of the disputed tax, having already paid 30% prior to the consideration of its objection raised before the Commissioner-General? If this question is answered in the affirmative, the result will be that 55% of the disputed tax ought to be paid before a tax appeal is lodged under Order 54 rule 1 of C.I 47. Certainly, this will be unfair to a person who files an objection before The Commissioner General, prior to filing an Appeal under Order 54 rule 1 of C.I 47. These two (2) provisions must be interpreted with a purposive approach. It appears from these two provisions that the law maker intended that before a person who is dissatisfied with a tax assessment is given any hearing, whether at first instance or by way of appeal, a reasonable portion of the disputed tax liability is to be paid, that is, 25% or 30% respectively as the case may be. A distinction ought to be made in these circumstances. If no objection is filed before the Commissioner-General, a person who files an appeal pursuant to order 54 rule 1 of C.I. 47 must pay 25% of the disputed tax. However, where there is evidence that an appellant has previously paid 30% of the disputed tax liability pursuant to an objection raised before the Commissioner-General under Section 42 (1) of Act 915, the said payment must be considered in determining whether the provisions of Order 54 rule 4 (2) of C.I. 47 have been complied with. I find that a person who has paid 30% of the disputed tax liability pursuant to Section 42 (5) (b) of Act 915, must not be compelled to pay additional 25% of the same disputed tax liability. Since the Appellant herein has already paid 30% of the disputed tax to the Respondent, the statutory precondition has been satisfied. Therefore, the Appeal is properly before this Court, and I will proceed to go into the merits thereof.

GROUNDS OF APPEAL

The Appellant filed four grounds of appeal, namely:

a. The Ghana Revenue Authority (GRA) which is headed by the Respondent, erred in law when it re-classified the existing relationship between the Appellant and entities who out of their own resources, purchased products from the Appellant in bulk quantities hereinafter (Independent Purchases/Distributors), as one of principal-agent relationship.
b. The GRA erred in law when it disallowed discounts from the appellant to the Independent Purchasers/Distributors and re-classified as "commissions", the discounts granted and paid to them by the Appellant.
c. The GRA erred in law when based on its re-classifications indicated in grounds a and b above, it imposed a withholding tax liability on the Appellant in the sum of GH₵ 7,655,676.22.
d. The GRA erred in law when it ignored its own practice of treating discounts granted under the Appellant's Model as exempt from tax which practice the GRA subsequently confirmed by its Practice Notes issued on October 6,2016 and which by its definition of "commissions" does not include "discounts".

THE APPELLANT'S CASE

The Appellant argued the first ground separately, but the remaining grounds were argued together.

GROUND (A)

For the Appellant, counsel submitted that there is no Principal/Agency relationship between the Appellant and the Bulk Purchasers. Counsel referred the Court to Black's Law Dictionary, 8th edition, where "Agency" is defined as "a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions. The Appellant proceeded to identity four ways by which an agent can have power to bind the principal, namely: a) where the principal gives power to the agent's actions, he has actual authority; b) where the agent acts without the principal's

authority but the principal gives retroactive authority (i.e. ratification of the contract); c) where the agent acts without the principal's consent but the law deems the principal to have consented; and d) where the agent acts without the principal's consent but the principal is estopped from denying the agent's authority, the agent is said to have apparent authority. **Oppong Banahene v Shell (Ghana) Ltd (Unreported) Judgment of the Supreme Court Civil Appeal No. J4/34/2016, 6th April 2017**, was cited by counsel to demonstrate the liability of a Principal under an agency relationship.

Counsel proceeded to describe the Appellant's business model as follows: Its manufactured products are purchased directly from it by independent business entities from their own resources. These entities operate from outlets or depots owned or operated independently by them, they finance their own operations and are free to sell at their outlets, products of other manufacturers. Whereas first timers pay for the products upfront, those who had had previous dealings with the Appellant are given an 8-day credit. The Independent Distributers look for their own customers to purchase the products.

On the nature of the relationship, the Appellant told the court that the contract includes indicative discounts which an independent Purchaser/Distributor is entitled to at the end of every month, so the discount is computed and granted based on total purchases made in a particular month as covered under invoices issued for the month. There are no reporting requirements between the Appellant and the Respondent.

The Appellant conceded that their exhibit FM 3 refers to the Independent Purchasers/Distributors as agents, but having regard to Appellant's business model, it prayed the court to focus on the substance, rather than the form, and hold that there is no principal/agency relationship between them. **Attorney General v Balkan Energy (2012) 2 SCGLR 998 at 1034** was cited and relied on. The Appellant concluded that it was erroneous for the model to be re-classified as one of agency subject to commissions and payment of withholding tax thereon.

GROUNDS B, C AND D.

The Appellant's counsel referred the court to the definition of 'Commission' in the Black's Law Dictionary as *"a fee paid to an agent or employee for a particular transaction, usually as a percentage of the money received from the transaction"*. It was the argument of the Appellant's counsel that the validity of a commission depends on the existence of an agent or employee as the recipient of the fee being paid. Conversely, he argued that a discount does not depend on agency or employment relationship. With reference to the Respondent's Practice Note on withholding taxes, the Respondent submitted that discounts (whether cash or trade), is not subject to withholding under Ghanaian Tax law and practice. By the arrangement between the Appellant and its Independent Purchasers/ Distributors, counsel argued that the true legal position is that the Appellant under the current laws and practice, is not required to withhold taxes on discounts. Specific reference was made to Section 116 (1) (a) (v) 133 (1) of the Income Tax Act, 2015 Act 896, which relate to Withholding tax on supply of goods, services contract payment and the definition of service fees. On this point, it was the argument of Counsel, that for GRA to succeed in treating the discount given as subject to withholding tax, it must first show that the discounts qualify as "service fee". Counsel hammered on the definition of "service fees" as contained in Section 133(1) of Act 896, which in his view does not extend to discounts.

Again, it was argued on behalf of the Appellant that the Practice Note on Withholding Tax, issued by the Respondent herein, that is, Practice Note Number: DT/2016/001, pursuant to schedule 7(2) of the income Act 896, is binding on the Respondent, until revoked. Counsel referred the Court to paragraph 3.1.3 of the Practice Note, where 'service' is defined as:

"the furnishing of labour, time or effort not involving the delivery of a specific end product other than reports, which are merely incidental to the required performance; and includes consulting, professional and technical services but does not include employment agreements or collective bargaining agreements.

Further, Counsel for the Appellant told the court that per the Practice Note, paragraph 3.1.4, the types of payment which are subject to Withholding Tax are as follows:

"the payment subject to withholding tax under this Act is for service rendered by the recipient of the payment through a business of that person or a business of any other person. The

service fee should be for provision of professional, technical or consultancy services ***or other similar services of an independent business character****, other than remuneration for employment. The services include scientific, literary, artistic training activities as well as activities of physicians, surgeon, lawyers, engineers, architects, surveyors, dentists, accountants, auditors and other such professional activities."*

It was further submitted on behalf of the Appellant that the list of payments or services subject to "withholding tax' under Section 116 (1) (a) of Act 896 and under the Practice Note in issue, does not include 'discounts' and that 'discounts' are neither 'service fees', nor can they be described as 'professional, technical or consultancy fees'. In the view of the Appellant, there are no cogent reasons to justify the decision of the Respondent to re-classify 'discounts' as commissions, and surcharge the Appellant on the alleged ground of failure to withhold taxes on discounts.

Two cases were cited by Counsel for the Appellant to demonstrate that tax statutes are to be construed strictly: **Multichoice Ghana Ltd v. The Commissioner, Internal Revenue Service (2011) 2 SCGLR 783; Mangin v IRC (1971)1 AER 179,** quoted **in Clement Apaak v. Ghana Revenue Authority dated July 31, 2018.** He invited the Court to be guided by the ejusdem generis rule, that is to say, where a class of things is followed by general wording that is not itself expansive, the general wording is usually restricted to things of the same type as the listed items. In effect, the argument by Counsel for the Appellant was that any attempt to bring the Appellant's model within the statutory definition of 'service fees' will amount to overstretching the scope and application of 'service fees'.

And, the fact that the 'discounts' do not appear on any sale invoice, and are computed and paid at the end of the month, does not change the 'discount' from its status into 'commissions'. It was also argued that Section 45 of the Value Added Tax Act permits the Appellant to adjust the value of amounts contained in invoices issued to Independent Purchasers/Distributors.

Another submission made on behalf of the Appellant was that, the Respondent failed to act fairly and abused its discretionary powers within the meaning of Article 23 and 296 of the 1992 Constitution of the Republic of Ghana. Given the Appellant's good tax record which span over decades, it was submitted that if there was the slightest indication of a legal obligation to withhold taxes on 'discounts', the same would have been complied with. And, the Respondent cannot retrospectively be punished for an act which was not an offence.

Concluding, it was submitted on behalf of the Appellant that the effect of the decision of the Respondent to surcharge the Appellant with the withholding tax will be that the Appellant would be deprived of its property, which is contrary to Article 18(1) of the 1992 Constitution of Ghana, and that the reasoning of the High Court Judge in *Beiesdorf Ghana Limited v. The Commissioner General (Beiesdorf case),* must not be applied to the Appellant's business model, especially so, when the tax legislation and Practice Note are silent on where discounts must appear on the face of invoices. Relying on Section 26 of the Evidence Act, 1975 NRCD 323, it was submitted by the Appellant that it was led to believe that all relevant documentation submitted for the audit were in order, as such, the Respondent is estopped by its own conduct from raising further issues. The Appellant described the allegation of tax avoidance as unfortunate.

THE RESPONDENT'S CASE

The Respondent argued each ground separately.

GROUND (A)

Counsel referred the Court to Section 34 of the Income Tax Act 2015 (Act 896), which is in pari-materia with Section 112 of the Internal Revenue Act 2000 (Act 592); Section 99 of the Revenue Administration Act, 2016 (Act 915); Section 43 of the value Added Tax Act, 2013 (Act 870) and Regulation 11 of the Valued Added Tax Regulations, 2016 (L.I. 2243), which clothe the Respondent with authority to re-characterise or disregard an arrangement that is entered into or carried out as part of a tax avoidance scheme. After reviewing the Appellant's business model as captured in its affidavit in support of the grounds of appeal, the Respondent referred to its Tax

Audit report (exhibit GRA 1), and contended that the Respondent did not describe the relationship as one of principal -agent relationship, but rather re-characterised the cash payment the Appellant made to the distributors as commission.

Counsel also mentioned the definition of 'cash discount' in the Black's law Dictionary, 9th edition, and submitted that the cash discount paid by the Appellant to its distributors were not deducted from the sales prices, and were also not indicated on the sales invoice issued at the time of purchase by the distributors as required by Regulation 21 of L.I. 2243. The cash discount allowed by the Appellant did not result in the sale price being reduced and no adjustments were made in the books or records of the Appellant to reflect the said cash discount paid.

Discussing exhibit FM3, that is, the *TRADE TERMS CONTRACT FOR AGENTS TERMS & CONDITIONS*, the Respondent submitted that it cannot be said that the cash discount given at the end of each month by the Appellant to its Distributors was based on exhibit FM3. The basis for this argument was that exhibit FM3 does not disclose any name, business name, date and signature of such independent purchaser/distributor as alleged by the Appellant.

The case of ***M/S INDIAN PISTON LTD V TAMIL NADU (1974) 33 STC 742 (Mad)*** was cited to demonstrate a cash discount as opposed to a trade discount as follows:

"It is well known that a scheme of discount adopted by the commercial circles is normally of two types- cash discount and trade discount- and a discount normally denotes a deduction from the amount due as price of the goods in consideration of it being paid promptly or in advance. Trade discount is the one allowed to a customer if he places an order for a certain amount or quantity or more. Such a discount is given to encourage a buyer to buy more as a time or within a period."

The Respondent therefore submitted that what the Appellant claimed to be 'cash discount', cannot be called cash discount in the commercial sense of the word, hence, the re-characterization by the Respondent. The Respondent described the Appellant's arrangement with its

distributers/independent purchasers as a tax avoidance scheme which the tax laws frown upon, that is by disguising the commission paid on volume of sales as cash discount. That apart, it was submitted on behalf of the Respondent, that the Tax Audit did not show that customers and for that matter the Independent Purchasers/Distributers of the Appellant, have benefitted from any trade discount given by the Appellant.

Ground (B)

The findings of the Audit team, exhibit GRA 1, was the foundation for the response to this ground of appeal. Specific mention was made to a portion of exhibit GRA 1, thus:

WITHHOLDING TAX

PAYMENT OF DISCOUNT

"It was noted that you made payments to your distributors which you called cash discount. A careful study of this arrangement shows that in substance this arrangement is payment of commission rather than discount.

Accordingly, per Section 84(1) of Act 592 as amended and Section 116 (1) (v) of Act 896, you were supposed to have withheld tax on these payments which you failed.

We have therefore in consonance with Section 88(1) of Act 592 and 117(3) of Act 896 surcharged you with the tax that should have been withheld totaling GH₵7,655,676.22 for 2014, 2015 and 2016 years of assessment."

On the basis of the foregoing, it was submitted on behalf of the Respondent, that the cash discounts were paid to the Independent Purchasers/Distributers at the end of the month and not at the time of the sale, the said discounts were not indicated on its sales invoice as required by the VAT Regulations, neither were they deducted from the gross sales of the Appellant.

GROUND (C)

The Respondent explained that during the Tax Audit period, sales invoices, sales books, bank statements, annual accounts, contract agreements among others, were examined. The

Respondent's Audit Team found out that the key distributors are restricted to a fixed selling price and not at their own margin. The distributors make full payment for the products purchased and based on the volume of one's purchases, the Appellant applies the formula set in exhibit FM3 to make cash payment to the distributor, which the Appellant had termed cash discount. In the Appellant's view, this arrangement does not constitute a cash discount nor a trade discount and that the obligation of the Appellant to withhold tax on those payments are not taken away by the mere fact that the payments were termed 'discounts.' And, by virtue of Section 117(3) of the Income Tax Act, 2015, Act 896, the Appellant is to pay taxes it ought to have withheld.

GROUND (D)

The Respondent rehashed the submissions contained in the Tax Audit report, exhibit GRA 1, and also made reference to its letter to the Appellant dated 24th November,2017 where it explained the rationale behind treating the 'discounts' given at the end of the month as 'commissions', the said letter reads:

"We are unable to accept your claim that your distributors are independent of the company as they pay for the products delivered to them. Cash discounts received upon purchase of the products should not be disallowed as they are in line with normal trade practice. Independent distributors are free to mark-up and sell the product to end users at whatever price the market wili allow. They add margins to cover their (Distributor's) own cost and profit.

You would agree that your distributers, like agents, are restricted to keep the determined prices of your products. Without markups, the cash discounts are in the nature of a commission and therefore assessed in line with Section 84(1) (C) of Act 592 as amended by Section 116(1) (v) of Act 896. Assessment as per our report of August 25, 2017 is thus maintained."

It was argued that the invoices raised by the Appellant do not reflect cash discounts allowed the distributors who sell the products at prices pre-determined by the Appellant. And, the attempt to mis-describe the cash payment made to the distributers is just an attempt to evade payment of tax due the state on the payments to the distributors.

Concluding, it was submitted on behalf of the Respondent that, under Section 92(1) of Act 915, the burden of proof is on the taxpayer or person making an objection to show compliance with the provisions of the law, but the Appellant herein has failed to discharge that burden. The Respondent invited the Court to dismiss this tax appeal in its entirety.

WHETHER THE RESPONDENT RE-CHARACTERISED THE CASH PAYMENT OR THE RELATIONSHIP BETWEEN THE APPELLANT AND ITS INDEPENDENT PURCHASERS/DISTRIBUTORS.

This issue arises from the first ground of appeal. The tax liability in issue came about as a result of the failure of the Appellant to withhold tax on commission said to have been paid to its distributors.

The Internal Revenue Act 2000, Act 592 was the substantive tax enactment in Ghana until it was amended by the Income Tax Act, 2015 Act 896 on 1st September, 2015. A thorough reading of Section 116(1) of Act 896 reveals that **"discounts" are not subject to withholding tax under Ghanaian Tax law**. (Emphasis added). However, 'commissions' paid to agents are subject to withholding tax. The Respondent does not dispute these facts.

It is observed that a portion of the Tax Audit period predated the coming into force of Act 896. However, Section 112 of Act 592, which gives the Commissioner-General the discretion to re-characterise or disregard an 'arrangement', is in pari materia with Section 34 of Act 896. The effect of those provisions remains the same. This is how both Sections are couched:

"GENERAL ANTI-AVOIDANCE RULE

(1) For the purpose of determining a tax liability under this Act, the Commissioner General may re-charaterise or disregard an arrangement that is entered into or carried out as part of a tax avoidance scheme.

(a) Which is fictitious or does not have a substantial economic effect; or

(b) Whose form does not reflect its substance

(2) For the purposes of this Section,

"arrangement" includes an action, agreement, course of conduct, promise, transaction, understanding or undertaking, which is

(a) Express or implied

(b) *Enforceable by legal proceedings or not;*

(c) *Unilateral or involves two or more persons.*

"tax avoidance" includes an arrangement, the main purpose of which is to avoid or reduce tax liability.

Even though the Respondent in the instant appeal has a discretion to re-characterise "arrangements", it could not have come to a conclusion that the monies paid to the Distributers of the Appellant are 'commissions' rather than 'discounts', without inferring a principal/agent relationship. This is so because '*a commission is the remuneration paid to an agent*'. See the Dictionary of Law by LB Curzon 5th ed. In other words, it is a fee that a business pays to a sales person in exchange for his or her services in either facilitating, supervising or completing a sale.

Counsel have adequately addressed the court on the types of principal/agent relation, I do not intend to belabor that point.

I am persuaded, and I endorse the statement in the Indian case of **Government Milk Scheme v. Assistant Commissioner of Income Tax (2006) 281 ITR (A.T.) 0088**, that:

"For a payment to fall within the category of commission, there must be a relationship of principal and agent. The Commission is a compensation to an agent for services rendered. It is an allowance or reward made to agents. This is calculated on a percentage basis on the amount of the transaction or the profits to the principal."

The dictionary meaning of 'discount' will suffice for the purpose of this judgment. The Black's Law Dictionary, 9th ed. defines a 'Discount' as "*a reduction from the full amount or value of something*". In the business environment, the usual discounts given are 'cash discounts' and 'trade discounts.' In the Black's Law Dictionary, a '*cash discount' is defined as 'a seller's price deduction in exchange for an immediate cash payment*'; a 'trade discount' is also defined as 'a discount from list price offered to all customers of a given type, or the difference between the seller's list price and the price at which the dealer actually sells goods of the trade.' In effect, a trade discount is a routine reduction from the regular or established price of a product. Counsel for

the Appellant made this clear distinction in his submissions, and those arguments are very sound. To add on, a seller will record a cash discount given, with a debit to the accounts - sales discounts, and credit the purchasers account so that there will be a reduction to the cost of the item recorded in the inventory. So, a cash discount should be a reduction to an expense. This is a basic accounting principle.

With a trade discount, the company selling the product will record the transaction at the amount after the trade discount is subtracted, for instance, if the list price is GH¢1,000.00 and a trade discount of 27% is given, both the seller and the buyer will record the transaction at GH₵730.00 in their books. See **Accounting-The Easy Way, 2nd ed. Baron's Educational Series.** Both cash and Trade discounts result in price reduction, depending on the percentage of the discount. In the present case, I am satisfied from the evidence that the payments which the Appellant described as discounts did not lead to any price reduction, whether before or after the sales.

In the Indian Case of **Harihar Cotton Pressing Factory v. CIT (1960) 39 ITR 594**, the Court explained the distinction between commission and discount as follows:

The expression 'commission' has no technical meaning but both in legal and commercial acceptation of the terms, it has definite signification and is understood as an allowance for service or labour in discharging certain duties such as for instance of an agent... or any other person who manages the affairs or undertakes to do some work or renders some service to another. Mostly, it is a percentage of the price or value or upon the amount of money involved in any transaction of sale or service or the quantum of work involved in a transaction. It can be for a variety of services and is of the nature of recompense or reward for such services. 'Rebate', on the other hand, is a remission or a payment back and of the nature of a deduction from the gross amount. It is sometimes spoken of as a discount or a draw-back...

In **Assistant Commissioner of Income Tax v. Idea Cellular Ltd (2009) 317-ITR(A.T.)-0176**, the court held that a discount allowed on outright purchase is not commission, especially, where

there is no relationship of principal and agent, and the transaction is done on principal to principal basis.

The Respondent has told the court that its Tax Audit Team did not find any price adjustments in the books of the Appellant. The Appellant has also not demonstrated to this court that the necessary adjustments were made in its books concerning the so-called discounts given to its distributors. If the monies so paid were discounts, why were the necessary price adjustments not made as is always the case in commercial or business transactions? If the Appellant had given cash discounts, and had recorded the same in the usual way, there would not have been any basis for the Respondent to re-characterise them as commissions.

That apart, the evidence before this court shows that the Appellant controls the prices at which its products are sold out by the Distributors to customers nationwide, meaning that the distributors do not add any margin. Rather, they receive what the Appellant terms as 'discounts' at the end of the month based on the volume of sales. Indeed, that is a wrong tag placed on those payments! The bitter truth is that the payments made to the distributors at the end of each month's sales, which did not result in any price reduction, cannot by any stretch of imagination, be described as a cash or trade discount, they are commissions. The Appellant, by its exhibit FM3 disguised those commissions as discounts. And those commissions are paid because the Distributers are Agents of the Appellant, per its own exhibit FM3, which governs the relationship between the Appellant and its Distributors. Such commissions are subject to withholding tax.

Section 41 of the value Added Tax Act, 2013 Act 870, requires a taxable person, on making a taxable supply of goods or services, to issue to the recipient a tax invoice in the form and with the details prescribed by the Commissioner-General. Regulation 21 of the Value Added Tax Regulations (2016) L.I. 2243, states:

(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:*

- (a) *The name, address and Tax Identification Number of the taxable person;*
- (b) *The date and time of supply;*
- (c) *The number of the invoice taken from a consecutive series;*
- (d) *The type of transaction by reference to the following categories:*
  - (i) *Sales;*
  - (ii) *Hire purchase, hire, lease or rental;*
  - (iii) *Exchange*
  - (iv) *Goods and services supplied form the taxable person's own supplies*
  - (v) *The tax inclusive charge for each description of goods or services supplied.*
  - (vi) *The rate of tax*
  - (vii) *The total charge of the invoice, exclusive of tax*
  - (viii) ***The rate of discount***
  - (ix) *the total tax charged; and*
  - (x) *the total charge inclusive of tax.*

(3) *Unless a registered person is authorized by the Commissioner-General in writing to print that person's own invoice similar to the invoice prescribed by the Commissioner-general, the tax invoice issued by a registered person shall be the invoice printed by the Commissioner-General.*

From the foregoing, the Appellant's argument that the Tax laws of Ghana do require discounts to be stated on sales or tax invoices is erroneous. It is true that the Value Added Tax Regulations, L.I 2243 came into force on 3rd August, 2016. Bearing in mind that the tax audit covered the 2014, 2015 and 2016 accounting years, one may argue that L.I 2243 does not apply to transactions made before 3rd August, 2016.

The Value Added Tax Regulations were made pursuant to Section 64(1) of Act 870 which *empowers the Minister to prescribe rules for the necessary and effective implementation of the Act, among others.* Prior to L.I 2243, Section 41(1) of Act 870 made provision for the issuance of tax invoice or sales receipt.

The law is settled that substantive laws are prospective, but matters which are purely procedural are retrospective, unless the statute specifically or by necessary implication states otherwise. In ***Fenuku & Anor v John-Teye & Anor (2001-2002) SCGLR 985***, the Court in holding 2 thereof stated as follows:

The general rule was that statutes, other than those which are merely declaratory, or which related to matters of procedure or of evidence, were prima facie prospective; and retrospective effect was not to be given to them unless by express words or necessary implication, it appeared that, that was the intention of the legislature. In general, the Courts would regard as retrospective any statute which operated on cases or facts coming into existence before its commencement in the sense that it affected, even if for future only, the character or consequences of transactions purely entered into or of other past conduct. Thus, a statute was not prospective merely because it affected existing rights nor was it retrospective merely because parts of the requisites for its action was drawn from a time antecedent to its passing."

Going by the general position that procedural law is retrospective, then L.I 2243 which is procedural in nature, and which has its basis on the substantive tax law, can operate as such.

It is to be borne in mind that L.I *2243 does not operate in a vacuum, it was passed pursuant to Section 64(1) of Act 870,* which specifically required the issuance of a tax receipt upon sale of taxable goods or services. If a tax invoice is to be issued, then the entire transaction must be recorded and the applicable taxes indicated. For instance, if a cash discount is given at the time of sale, it affects the gross amount of the transaction and this must reflect on the tax invoice. Alternatively, if there is a subsequent trade discount which alters the previously agreed

consideration, then the necessary adjustments ought to be made under Section 45 of Act 870. In the instant appeal, the Appellant has not introduced any cogent evidence of any cash discounts recorded in the tax invoices issued out prior to the coming into force of L.I 2243, or afterwards. Further, the Appellant has failed to show that it did any price adjustments after payment of what it described as 'discounts' after the sale, either before or on the coming into force of L.I 2243. The true position is that even before the coming into force of L.I 2243, discounts were to be recorded on tax invoices as they affected sales made. A taxable person could not pick and choose what to put on a tax invoice.

The irresistible conclusion is that the commissions were disguised as discounts to avoid the payment of withholding tax by the recipients, i.e. the Distributers or agents of the Appellant.

Based on the Audit findings, exhibit GRA1, the Respondent did not err in re-characterising the 'discounts' as 'commissions', and by inference, recognizing the distributers as agents of the Appellant. The first ground of appeal has no merit, and it accordingly fails.

WHETHER THE GRA ERRED IN LAW WHEN IT DISALLOWED DISCOUNTS FROM THE APPELLANT TO THE INDEPENDENT PURCHASERS/DISTRIBUTORS AND RE-CLASSIFIED AS "COMMISSIONS", THE DISCOUNTS GRANTED AND PAID TO THEM BY THE APPELLANT.

The submissions of counsel for the Appellant on this ground of appeal will not find favour with the court. The Respondent has always been mindful that discounts genuinely given to customers cannot be disallowed. What the Respondent did was to re-characterise the 'discounts' given by the Appellant, because *their form does not reflect the substance*. From the evidence before this court, what the Appellant termed 'discount', did not result in any price adjustment which would have enured to the benefit of the Distributors.

Did the Respondent fail to act fairly as contended by the Appellant? The Respondent is expected to act fairly in interpreting and applying the tax laws. On the basis of the Tax Audit report, exhibit GRA 1, the Respondent had every right to disregard the arrangement between the Appellant and its Distributors, and to re-characterise the cash payments as commissions. Whatever the Respondent did is perfectly within the ambit of Section 34 (1) of Act 896, which is in pari materia

with Section 112 of Act 592. The Appellant was duly notified of this re-characterisation by way of the Tax Audit report. Thereafter, the Appellant exercised its right of objection to the tax decision under Section 42 of Act 915, and he was given a hearing.

The Appellant could not adduce any cogent reasons to offset the Tax Audit findings. The fact that the Appellant is unhappy with the outcome of the decision of the Commissioner-General does not make the act of the Commissioner-General capricious.

On the facts and evidence before this court, it is wrong for the Appellant to say that the Respondent acted capriciously or unfairly in re-characterising the payments made by the Appellant. Having found that the payments made by the Appellant were neither cash nor trade discount, but are commissions, the actions of the Respondent cannot be termed as dis-allowance of discounts and I so find.

WHETHER THE GRA ERRED IN LAW WHEN BASED ON ITS RE-CLASSIFICATIONS, IT IMPOSED A WITHHOLDING TAX LIABILITY ON THE APPELLANT IN THE SUM OF GH₵ 7,655,676.22.

Section 87(1) and 88 (1) of Act 592 states that:

> *Sec 87(1) "Subject to subsection (2), a withholding agent shall pay to the Commissioner a tax that has been withheld or that should have been withheld under this Subdivision within fifteen days after the end of the month in which the payment subject to the withholding tax is made by the withholding agent.*

Sec 88 (1) "A withholding agent who fails to withhold tax in accordance with this Subdivision is personally liable to pay to the Commissioner the amount of tax which has not been withheld, but the withholding agent is entitled to recover this amount from the payee."

Section 116(1) (v) of Act 896 of 2015, also states 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 pays a service fee with a source in the country to a resident individual as a commission to a sales agent.

Section 117 (3) and (5) of Act 896 provides that:

117 (3) "a withholding agent who fails to withhold tax in accordance with this Division shall pay the tax that should have been withheld in the same manner and at the same time as tax that is withheld.

117(5) "A withholding agent who fails to withhold tax under this subdivision but pays the tax that should have been withheld to the Commissioner-General in accordance with subsection (1) is entitled to recover an equal amount from the withholdee.

The accessed tax of GH₵ 7,655,676.22 represents the taxes which the Appellant ought to have withheld from the Commissions paid to its Distributors, but which it failed to withhold by camouflaging the payments as "discounts". After unmasking the true nature of the payments made by the Appellant to its distributors and re-characterising the same, the Appellant is enjoined to pay the assessed withholding taxes for the Tax Audit period. Therefore, the Respondent did not err in law by imposing a tax liability of GH₵ 7,655,676.22 on the Appellant. The Appellant is at liberty to exercise its rights under Section 117(5), after it has paid the assessed tax. Ground (C) accordingly fails.

WHETHER THE GRA ERRED IN LAW WHEN IT IGNORED ITS OWN PRACTICE OF TREATING DISCOUNTS GRANTED UNDER THE APPELLANT'S MODEL AS EXEMPT FROM TAX WHICH PRACTICE THE GRA SUBSEQUENTLY CONFIRMED BY ITS PRACTICE NOTES ISSUED ON OCTOBER 6, 2016 AND WHICH BY ITS DEFINITION OF "COMMISSIONS" DOES NOT INCLUDE "DISCOUNTS".

It is provided under Section 100(1) of the Revenue Administration Act, 2016 Act 915 that:

To achieve consistency in the administration of tax laws and to provide guidance to persons affected by the tax laws, including tax officers, the Commissioner-General may issue practice notes setting out the interpretation placed on provisions of a tax law by the Commissioner-General.

One of such practice notes which is in issue is dated 6th October, 2016 wherein the Commissioner-General defines "service" and the types of services on which taxes are to be withheld. It states

'Service' is defined as:

"the furnishing of labour, time or effort not involving the delivery of a specific end product other than reports, which are merely incidental to the required performance; and includes consulting, professional and technical services but does not include employment agreements or collective bargaining agreements.

3.1.4, the types of payment which are subject to Withholding Tax are as follows:

"the payment subject to withholding tax under this Act is for service rendered by the recipient of the payment through a business of that person or a business of any other person. The service fee should be for provision of professional, technical or consultancy services ***or other similar services of an independent business character****, other than remuneration for employment. The services include scientific, literary, artistic training activities as well as activities of physicians, surgeon, lawyers, engineers, architects, surveyors, dentists, accountants, auditors and other such professional activities."*

The Appellant is right in arguing that the list of payments or services subject to "withholding tax' under Section 116 (1) (a) of Act 896 and under the Practice Note in issue, does not include 'discounts' and that 'discounts' are not 'service fees'. On the basis of the Tax Audit report, the Respondent cannot be said to have disregarded its Practice Note of 6th October, 2016. The practice Note cannot override the provisions in Section 116 (1) (a) (v) of Act 896, under which 'commissions to agents' are subject to withholding tax. The Respondent has not disallowed discounts, it re-characterised the cash payments as commissions. The Respondent duly re-

characterised the masqueraded discounts, as commissions, and treated them as any other commissions payable to agents. By law, such commissions are subject to withholding tax.

CONCLUSION

Section 92 (1) and (2) of the revenue Administration Act, 2016 Act 915 provides that:

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

(2) With respect to the imposition of a penalty, including proceedings on appeal under or for recovery of a penalty, the burden of proof is on the Commissioner-General to show non-compliance with the provisions of the tax-law.

The arrangement between the Appellant and its Distributors/Agents is indeed a tax avoidance scheme in favour of the recipients of the monthly payments. The Appellant ought to have withheld the taxes. The Appellant has not demonstrated that it has complied with Section 116 (1), (v) of Act 915, and so the burden of proof has not been discharged. Rather, the Respondent has satisfied the court that its acts in re-charactersing the arrangement between the Appellant and its Distributors/Agents is in compliance with the tax law.

Accordingly, the Court confirms the assessment done by the Respondent and, the Appellant shall pay the remaining 70% of the taxes it failed to withhold from its distributors/agents, in the sum of **GH₵ 5,440,284.56,** for the 2014, 2015 and 2016 accounting years. After paying the full amount to the Respondent, the Appellant is at liberty to recover the same from its Distributors/agents who are said to have received those payments.

Before I sign off, I wish to state that when it comes to taxes, everyone has an opinion, but what the law says supersedes the opinion of individuals.

Accordingly, the appeal is dismissed in its entirety. Costs of GH₵10,000.00 is awarded against the Appellant in favour of the Respondent.

(SGD)
ANGELINA MENSAH-HOMIAH J, (MRS.)
JUSTICE OF THE HIGH COURT

COUNSEL

1. KWADWO OHENE-BOAKYE WITH RICHARD ADU DARKOR HOLDING BRIEF FOR BENJAMIN SACKAR FOR THE APPELLANT PRESENT
2. FREEMAN SARBAH FOR THE RESPONDENT

LIST OF CASES

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