IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT (COMMERCIAL DIVISION) HELD AT ACCRA ON TUESDAY
THE 31ST DAY OF JULY 2018

Suit No. CM/TAX/0448/2017

CORAM: JENNIFER DODOO (MRS)
JUSTICE OF THE HIGH COURT

HON. CLEMENT APAAK PLAINTIFF

VRS

GHANA REVENUE AUTHORITY DEFENDANT

JUDGMENT

It is provided for in Section 100(1) of the Revenue Administration Act, 2016 as follows:

> *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.*

So it came to pass that in consonance with Section 100(1), the Commissioner-General of the Defendant Authority issued Practice Note Number IDT/2017/001 on 23rd June 2017.

Aggrieved by the provisions contained in the Practice Note, the Plaintiff claimed against the Defendant the following reliefs:

a. A declaration that the Defendant's purported act of extending the coverage of the VFRS to importers of taxable goods through the aforesaid Practice Note is unlawful.
b. A declaration that by subjecting importers to both the VFRS and the standard rate of VAT whilst at the same time barring the said importers from deducting input VAT, the Defendant has discriminated against the said importers in contravention of Article 17 of the Constitution .
c. A declaration that all persons currently under the VFRS who paid VAT at the standard rate prior to the coming into force of the 2017 VAT Act have accrued rights to deduct input VAT paid prior to the coming into force of the said Act;.
d. An order for the refund of all input VAT paid or, in the case of VAT that is payable, a set-off against VAT to be paid under and by virtue of the VFRS; and
e. Any such further order or orders as this Honourable Court shall deem necessary in the circumstances of this case.

The Plaintiff's case as set forth in his Statement of Claim was that the Value Added Tax (Amendment) Act, 2017 (Act 948) (referred to hereinafter as the 2017 VAT Act) was passed to provide legal backing to the VAT Flat Rate Scheme (VFRS) to facilitate the collection of value added taxes on the supply of goods in the distribution chain. He contended that the Act imposed a flat value added tax rate of 3% calculated on the value of the taxable supply and proceeded to disqualify a person subject to the flat rate from deducting input tax in respect of goods subject to the tax.

The Plaintiff contended that by virtue of section 1(a) of the Act, wholesalers and retailers of taxable goods were placed on the VFRS and therefore statutorily disqualified from deducting input tax from their sale of taxable supplies.

The Plaintiff submitted further that the Defendant as the public agency responsible for tax administration and for the purpose of implementing the VFRS issued a Practice Note number IDT/2017/001 dated June 23, 2017 titled "Practice Note on the Application of the VAT Flat Rate Scheme under the Value Added Tax Act, 2013 (Act 870)". According to the Plaintiff, the Practice Note sought to implement section 1 (a) of the 2017 VAT Act by extending the coverage

of VFRS to importers of taxable supplies who either sold their goods to retailers or directly to consumers.

Plaintiff further complained that whilst importers were still liable to pay VAT/NHIL at 17.5%, they were also subject to the charge of VAT/NHIL at 3% and that this was unlawful as there was no justifiable basis for this in the 2017 Act.

The Plaintiff also maintained that whilst subjecting importers to both rates of VAT/NHIL, the Defendant disqualified them from deducting their input tax which was a right available to all other persons subject to the payment of the standard rate VAT. This, the Plaintiff said would be subjecting the said importers to dissimilar treatment from these other persons.

Thereafter, the Plaintiff argued that wholesalers and retailers placed on the VFRS upon the coming into force of the 2017 VAT Act had an accrued property right to deduct the input tax on VAT paid prior to the coming into force of the Act and the Act could not retroactively take away this right.

The Defendant in its defence stated that the 2017 VAT Act covered all retailers and wholesalers of taxable goods. Therefore, an importer of taxable goods who sells or supplies the imported goods to consumers or retailers is obliged by the law to account for the VAT payable at a flat rate of 3% calculated of the supply made.

It was the Defendant's argument that while the Act 870 levied 17.5% VAT/NHIL payable at the point of importation, where the same goods were supplied to consumers or retailers, the flat rate of 3% would be charged under the 2017 VAT Act. These were said to be charged under different provisions of the law and for different transactions.

It was their case that the disqualification of any retailer or wholesaler from claiming input VAT was due to the application of section 48 of Act 870 as amended by the 2017 VAT Act.

Furthermore, once the wholesale or retailer had goods in stock, they were obliged to charge the 3% flat rate whenever they supplied such goods.

The issues forwarded for consideration by this court were:

1. Whether or not the purported act of extending the coverage of the VAT Flat Rate scheme to importers of taxable goods is lawful?
2. Whether or not by subjecting importers to both the VAT Flat Rate Scheme and the Standard rate VAT the defendant is discriminating against the said importers in contravention of Article 17 of the 1992 Constitution?
3. Whether or not persons currently under the VAT Flat Rate Scheme who paid VAT at the standard rate prior to the coming into force of the Value Added Tax (Amendment) Act, 2017 have accrued rights to deduct input VAT paid prior to the coming into force of the said Act?
4. Whether or not the Plaintiff is entitled to his claim as endorsed on his writ of summons?
5. Any other issues arising from the pleadings.
6. Whether or not importers of taxable goods who either sell their goods to retailers or directly to consumers are wholesalers or retailers within the meaning of Act 948?
7. Whether or not the defendant has extended the coverage of the VAT Flat Rate Scheme to importers of taxable goods through Practice Note IDT/2017/001 dated 23rd June 2017?

The facts on the face of the pleadings are not in dispute. The matters in contention revolve around the interpretation of the VAT statutes.

The Court therefore invited the parties to address it on the legal issues raised on the pleadings.

Issues 1, 6 and 7 are interrelated. These are:

Issue (1)

Whether or not the purported act of extending the coverage of the VAT Flat Rate scheme to importers of taxable goods is lawful?

Issue (6)

Whether or not importers of taxable goods who either sell their goods to retailers or directly to consumers are wholesalers or retailers within the meaning of Act 948?

Issue (7)

Whether or not the defendant has extended the coverage of the VAT Flat Rate Scheme to importers of taxable goods through Practice Note IDT/2017/001 dated 23rd June 2017?

It was the Plaintiff's case that the constitutional power to impose taxes was derived from Article 174 of the Constitution which states that:

> *(1) No taxation shall be imposed otherwise than by or under the authority of an Act of Parliament.*
> *(2) Where an Act enacted in accordance with clause (1) of the Article, confers power on any person or authority to waive or vary a tax imposed by that Act, the exercise of the power of waiver or variation, in favour of any person or authority shall be subject to prior approval of Parliament by resolution.*

The Plaintiff contended that the 2017 VAT Act in its Section 1(a) was intended to apply to wholesalers and retailers of goods and not to importers of goods. Therefore the Plaintiff argued that the Defendant had acted unlawfully through its Practice Note in seeking to extend the coverage of the VAT Flat Rate Scheme (VFRS) to importers.

Counsel referred the court to Pattington v. Attorney-General (1969) LR 4 HL where Lord Cains had explained the literal rule of interpretation in the following words:

> *As I understand the principle of fiscal legislation it is this – if a person sought to be taxed comes within the letter of the law he must be taxed however great the hardship may appear to the judicial mind to be. On the other hand if the Crown seeking to recover the*

tax cannot bring the subject within the letter of the law, the subject must be free however apparently within the spirit of the law the case might otherwise appear to be.

Counsel also referred to Russel v. Scott (1948) AC1 where the court held that a person is not taxed unless the words of the taxing statute clearly impose the tax on that person.

What did the 2017 VAT Act set out to do? *Its long title reads: AN ACT to amend the Value Added Tax Act, 2013 (Act 870) to classify the supply of financial services, domestic transportation of passengers by air and supply of immovable property by a real estate developer as exempt supplies, to give legal backing to a VAT Flat Rate Scheme that will facilitate collection of VAT on the supply of goods in the distribution chain and to provide for related matters.*

It is provided for in Section 1(a) of the 2017 VAT Act:

A taxable person who is a retailer or wholesaler of goods shall account for the Value Added Tax payable under this section at a flat rate of three percent calculated on the value of the taxable supply;

The Act has mentioned retailers or wholesalers as being subject of the VFRS. Who is a retailer and who is a wholesaler? These terms have not been defined in the interpretation section of the parent Act, i.e. the Value Added Tax Act, 2013 (Act 870). The 2017 VAT Act which amended Act 870 also does not provide a definition.

The Practice Note (No. IDT/2017/001) issued on 23rd June 2017 gives the following definitions with reference to Black's Law Dictionary in Section 2.2 under the topic Retailing and Wholesaling of Goods – Definition of Terms

Retail is defined as:

To sell by small parcels, and not in the gross. To sell in small quantities.

A Retailer is defined as:

> *A person or business selling goods to the public as against a person or business selling to another business for resale.*

Wholesale is defined as:

> *To sell by wholesale is to sell by large parcel, generally in original packages and not by retail.*

A Wholesaler is defined as:

> *Person or company purchasing large amounts of stock from several producers and then reselling to retailers*

Thereafter, the Practice Note states:

> *NOTE: The definitions above also apply to importers who either resell their goods to retailers (in which case they should be classified as wholesalers) or to consumers directly (in which case they should be classified as retailers). In either case they are obliged by the amendment Act 948 to charge VAT/NHIL at 3% on their taxable supplies. Such importers will however, continue to pay VAT/NHIL at importation at the standard rate of 17.5%.*

Who is an importer? Section 65 of Act 870 defines importer as in relation to

(a) An import of goods , includes the person who owns the goods or any other person who is for the time being in possession of or beneficially interested in the goods; and
(b) Goods imported by means of a pipeline, includes the owner of the pipeline.

Section 151 of the Customs Act 2015 (Act 891) defines an importer as

> *"importer" includes the owner or the person for the time being possessed of or beneficially interested in goods at and from the time of their importation until they are duly delivered out of the charge of the proper officer, and also any person who signs any document relating to imported goods required by this Act to be signed by an importer;*

The Plaintiff has argued that a person is not to be taxed unless the words of the statute clearly impose tax on that person. He has referred to the case of Russel v. Scott (1948) AC 1 and also to Cape Brandy Syndicate v. Internal Revenue Commissioner (1921) 1 KB 64 and argued that in a taxing Act, one has to look at what is clearly stated. There is no room for any intendment. And it is his case that the 2017 VAT Act was not targeted at importers.

What was the intendment of the 2017 VAT Act? In Mangin v. IRC (1971) 1 AER 179 the court in outlining the rules of statutory interpretation as applied to tax legislation held as follows:

> *First the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices.*
> *Secondly,*
> *... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. (Per Rowlatt J in Cape Brandy Syndicate v. Inland Revenue Commissioners approved by Viscount Simons LC in Canadian Eagle Oil Co. Ltd v. Regem)*
> *Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.*
> *Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.*

In this court's view, the reason the 2017 VAT Act was passed was to among other things, facilitate collection of VAT on the supply of goods in the distribution chain. Any taxable person who engaged in the supply of taxable goods either as a retailer or wholesaler would be subject to the 2017 VAT Act.

In looking fairly at the language used in the enactment, if an importer therefore imports goods into the country for his personal use, he would not fall under the group of people known as retailers or wholesalers. He would be an importer simpliciter and not liable to the VFRS. However, if an importer imports goods, gets them out of the proper officer's custody after paying duties and then proceeds to sell the said goods directly to the public, he would put himself in the position of a retailer. If he also decides to sell by large parcel, generally in original packages to retailers, then he is a wholesaler within the intendment of the law. To fall under the VFRS, the 2017 Act at its Section 1 (a) is not concerned with the source of the taxable goods be it imported goods or goods acquired locally. It is more concerned with how the goods are supplied within the distribution chain i.e. either by wholesale or by retail. Therefore any importer of goods who puts his goods into the distribution chain could be either a wholesaler or retailer depending on the quantities of goods supplied and to whom the goods were supplied, either directly to the public or to retailers. As the Practice Note puts it the definition applies to importers: *"who either resell their goods to retailers (in which case they should be classified as wholesalers) or to consumers directly (in which case they should be classified as retailers)."*

Is the importer a taxable person who is either a retailer or a wholesaler? If the importer is either a retailer or wholesaler then they would fall under the VFRS. It is not the Defendant which has unilaterally extended the coverage of the VAT Flat Rate scheme to importers of taxable goods but rather the said importers who had put themselves within the VFRS by constituting themselves into wholesalers or retailers of taxable goods as the case might be. In that case they would be liable to account for the three percent calculated on the value of the taxable supply. In this court's view, the VFRS has not been extended to all importers but to those importers who in addition to importing taxable goods carry out wholesaling and retailing of the said imported goods. If the importer decides not to supply the goods onto the local market on either retail or

wholesale basis, he would not fall within the intendment of the Act and therefore not be liable to account for the 3% under the VFRS.

This brings the court to Issue 2 which is:

Whether or not by subjecting importers to both the VAT Flat Rate Scheme and the Standard Rate VAT whilst at the same time preventing the said importers from deducting input VAT the Defendant is discriminating against the said importers in contravention of Article 17 of the 1992 Constitution?

Section 3 of Act 870 states:

> *Except as otherwise provided in this Act, the rate of the tax is 15% and is calculated on the value of the taxable supply of the goods or services or on the value of the import. An importer by law is to pay tax on imports made into Ghana.*

In Customs and Excise Commissioners v. Redrow Group PLC (1999) 2 AER 1 the court speaking through Lord Millett had this to say at p. 8

> *... VAT, if I may be pardoned for adapting a famous observation of Lord Macnaghten in London CC v. AG (1901) AC 26 @ 35 is a tax on added value. The basic principle of the tax is that it is intended to be a tax on consumption and is borne by the final consumer. But it is not chargeable only when a supply is made to the final consumer. It is chargeable on the value added by every prior taxable transaction in the chain of transactions which leads to him. Each of the parties to such a transaction collects and accounts to the authorities for the output tax in respect of supplies made by him, and deducts the input tax in respect of the goods and services supplied to him. The difference between the cost of the supplies in respect of which input tax is credited and the price of the services on which output tax is charged reflects the value added by the taxpayer.*

This means that VAT is an indirect tax as it is not a tax directly levied on income but is tax levied on every stage of the supply chain where value is added until it reaches the final consumer. The consumer bears the brunt of VAT.

So has there been discrimination in the implementation of the 2017 VAT Act? Section 48(1)(a) of the Act 870 states:

> *Subject to section 49, at the end of the tax period provided for in this Act or prescribed by the Regulations, a taxable person may deduct the following from the output tax due for the period:*
>
> *(a) tax on goods and services purchased in the country and goods imported by that person and used wholly, exclusively and necessarily in the course of the taxable activity subject to the condition that*
>
> *(i) the supply is a taxable supply;*
>
> *(ii) in respect of purchases made in Ghana, the taxable person is in possession of a tax invoice issued under this Act;*
>
> *(iii)in respect of import or removal of goods from a bonded warehouse, the taxable person is in possession of relevant customs entries indicating that tax was paid;*

Input and Output Tax are defined in Section 65 of Act 870 as:

> *"input tax" means tax payable by a taxable person in respect of an acquisition of a taxable supply of goods and services or a taxable import;"*

> *"output tax" means the tax chargeable under subsection (a) of section 1 and other sections of the Act in respect of a taxable supply;"*

Section 1(a) of the 2017 VAT Act provides:

"(2) A taxable person who is a retailer of goods shall account for the Value Added Tax payable under this section at a flat rate of three percent calculated on the value of the taxable supply."

Section 2(b) also provides:

"(7A) A taxable person to whom subsection (2) of section 3 applies does not qualify for input tax deduction in respect of a supply of goods."

From Act 870 a taxable person who supplies taxable goods was entitled to a deduction of input VAT. For an importer of taxable goods, VAT charged at importation constitutes input VAT. The 2017 VAT Act has now disqualified the taxable person to whom the VFRS applies from input VAT deduction. This is what the Plaintiff has complained of as being discriminatory. Article 17 of the 1992 Constitution states:

1. *All persons shall be equal before the law.*
2. *A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status:*
3. *For the purposes of this article "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.*

The 2017 VAT Act has now introduced a flat rate VAT of 3% to be accounted for by both retailers and wholesalers. The VFRS is an alternative to the input-output method of VAT Accounting. It has already been stated above that importers who are either retailers or wholesalers are all subject to the flat rate VFRS of 3%. These importers so described are still required to pay the standard VAT and NHIL of 17.5%. The Standard VAT rate is charged on imports and the VFRS is charged on the supply of goods on the domestic market. In other

words, all other provisions relating to the supply of goods would apply appropriately to the VFRS except the right to deduct input tax. The discrimination that the Plaintiff complains about is not apparent and he has not explained what the discrimination is in respect of and who is being discriminated against and in favour of whom? The importers who are subject to both the standard rate and to the VFRS would either be retailers or wholesalers and these would both be liable to both rates of VAT. An illustration would be as follows in computing the VAT payable under the VFRS:

		GH¢
(a) Cost Price of item	-	100.00
(b) Input Tax (17.5%*100)	-	17.50
(c) Margin and other overheads (10% *117.50)	-	11.75
(d) Taxable Value (a+b+c)	-	129.25
(e) Output tax @ 3% Flat Rate	-	3.88
(f) VAT/NHIL payable (i.e. Flat Rate)	-	3.88
(g) Cost to Consumer (tax inclusive d+f)	-	133.13

In this regards, what becomes apparent is that rather than the importers be they wholesalers or retailers being discriminated against, they would still factor their input VAT on their pricing which would be borne by the consumer as the end user rather than by the Defendant refunding to them the input tax. The importer as retailer or wholesaler would therefore not lose anything. At any rate, it is the Act 870 at section 3 which imposes tax calculated on the value of the taxable supply of the goods or services or on the value of the import. Thereafter, the 2017 Act at section 2 amends Section 48 by stating that a taxable person to whom subsection (2) of section 3 applies does not qualify for an input deduction in respect of a supply of goods. It is the law and not the Defendant which has subjected the importers to both rates of taxation. The law has similarly under section 48 disallowed input tax deductions on imports and purchases in respect of exempt supplies by the taxable person. An input deduction shall also not be made more than once or after the expiration of a period of six months after the date the deduction accrued. A taxable person also does not qualify for deductible input tax in respect of taxable supply or import of a

motor vehicle or vehicle spare parts unless they were in the business of dealing in or hiring motor vehicles or selling vehicle parts to name a few.

The next issue to be considered is:

Whether or not persons currently under the VAT Flat Rate Scheme who paid VAT at the standard rate prior to the coming into force of the Value Added Tax (Amendment) Act, 2017 have accrued rights to deduct input VAT paid prior to the coming into force of the said Act?

It was Plaintiff's submission that prior to the coming into force of the 2017 VAT Act, wholesalers and retailers placed on the VFRS had accrued rights to deduct the input VAT and the Act could not retroactively take away these rights. The Plaintiff has referred to the Interpretation Act, 2009 (Act 792) which provides as follows:

> *Where an enactment repeals or revokes an enactment, the repeal or revocation shall not, except as in this section otherwise provided affect a right, a privilege, an obligation or a liability acquired, accrued, or incurred under the enactment that is repealed or revoked.*

The Defendant is of the view that once the goods had not been sold before the VFRS had come into force, the taxpayer is obliged by law to charge the 3% flat rate upon the supply of such goods.

In Fenuku v. John Teye (2001-2002) SCGLR 985 the court held as follows in its holding 2:

> *The general rule was that statutes, other than those that were 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 the future*

only, the character or consequences of transactions previously entered into or of other past conduct.

See also Yew Bon Tew v. Kanderaan Bas Mara (1982) 3 AER 833 @836 where the court held:

A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in regard to events already past.

Article 107 (b) of the Constitution provides:

107. Parliament shall have no power to pass any law –
(b) which operates retrospectively to impose any limitations on or to adversely affect the personal rights and liberties of any person or to impose a burden, obligation or liability on any person except in the case of a law enacted under articles 178 to 182 of this Constitution.

In Modern Approach to the Law of Interpretation in Ghana, by Justice Dennis Adjei, the learned author states at p. 173 as follows:

Any statute which is likely to impose any limitations on or to adversely affect the personal rights and liberties or any person or impose a burden, obligation or liability on any person apart from law made under Articles 178-182 of the Constitution is prospective. It would be unconstitutional to interpret it as retrospective even in cases where the legislature expressly or by necessary implication states so.

The date of Gazette notification of the 2017 VAT (Amendment) Act was 7th April, 2017. The 2017 VAT Act was not enacted under articles178-182 of the Constitution which deal with finances and public funds. The rights of any importer which had existed under Act 870 should not be affected by the subsequent amendment brought into being by the 2017 VAT Act.

Consequently, the retailers or wholesalers whose goods had been cleared and who had paid standard rate VAT before the coming into force of the 2017 VAT Act would have been entitled to a refund of the input VAT or alternatively be entitled to the right to carry forward their tax credit from the previous VAT regime and cause it to be set off against VAT to be paid under the VFRS. For the avoidance of doubt, this is only applicable to those whose goods had been "entered" as put in Customs parlance before the 2017 VAT Amendment came into force. All those whose goods had not been cleared and who had not paid the import VAT would not be eligible for any kind of set off.

In conclusion, the Plaintiff is not entitled to the following:

a. A declaration that the Defendant's purported act of extending the coverage of the VFRS to importers of taxable goods through the aforesaid Practice Note is unlawful.
b. A declaration that by subjecting importers to both the VFRS and the standard rate of VAT whilst at the same time barring the said importers from deducting input VAT, the Defendant has discriminated against the said importers in contravention of Article 17 of the Constitution

However, the Plaintiff is entitled to the following:

1. A declaration that all persons currently under the VFRS who paid VAT at the standard rate prior to the coming into force of the 2017 VAT Act have accrued rights to deduct input VAT paid prior to the coming into force of the said Act and the court accordingly declares same.
2. An order for the refund of all input VAT paid or, in the case of VAT that is payable, a set-off against VAT to be paid under and by virtue of the VFRS.

As a result, all persons currently under the VFRS who paid input VAT before the coming into force of the 2017 VAT Act have the right to carry forward tax credits from the standard VAT regime and set it off against their outputs under the VFRS.

Each party is to bear its own costs.

(SGD)

JENNIFER A. DODOO

JUSTICE OF THE HIGH COURT

COUNSEL

DR. DOMINIC AYINE

C. ODARTEY LAMPTEY

CERTIFIED TRUE COPY

.....REGISTRAR

HIGH COURT

COMMERCIAL DIVISION, LLC-ACCRA