

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE,
(COMMERCIAL DIVISION) ACCRA, HELD ON FRIDAY THE 20TH DAY OF
DECEMBER, 2019 BEFORE HIS LORDSHIP SAMUEL K. A. ASIEDU, J.

SUIT NO: CM/TAX/0142/2019

KWASI NYANTAKYI OWIREDU. = PLAINTIFF.

VS.

COMMISSIONER GEN. GH. REVENUE AUTHORITY = DEFENDANT

PARTIES: PLAINTIFF PRESENT.
DEFENDANT ABSENT.

COUNSEL: ANGELA QUARDE ESQ., JUSTICE ABDULAI ESQ., FOR
THE APPELLANT.
MAXWELL OWUSU BOADI ESQ., FOR RESPONDENT.

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..... REGISTRAR
HIGH COURT
COMMERCIAL DIVISION, LLC-ACCRA

JUDGMENT

This appeal, filed on the 3rd of December 2018, seeks an order of the court to set aside the ruling of the Commissioner General made on the 25th August 2017 and 1st November 2018. The appellant also seeks an order of the court directed at the Commissioner General to allow the appellant to have an upfront deduction of his monthly mortgage interest instead of waiting for a year before having access to same.

The appellant herein has a mortgage with the Ghana Home Loans Limited and pays interest on the said mortgage at the end of every month. The appellant proposed to get his employers deduct upfront, at the end of every month, the interest paid on the mortgage monthly. The appellant's employers indicated that they will require authorization from the Commissioner General of the Ghana Revenue Authority. As a result, the appellant wrote to the Commissioner General of the Ghana Revenue Authority first, on the 28th October 2016 and later a reminder on the 1st March, 2017 and again on the 18th September 2017.

In his response dated the 25th August 2017 and 1st November 2018, the Commissioner General of the Ghana Revenue Authority wrote to the appellant and stated, among others, that:

"The tax laws do not permit the upfront monthly deductions of mortgage interest incurred in respect of an acquisition of an individual's place of residence.

Consequently, your claim for the deduction of the mortgage interest incurred during the year in respect of an acquisition of your place of residence will be available to you after you have filed your annual tax returns for the year".

It is this decision of the Commissioner General of the Ghana Revenue Authority that triggered the instant appeal brought under section 44 of the Revenue Administration Act, 2016, Act 915 for the reliefs indorsed on the Notice of Appeal.

In this appeal, the parties are agreeable that the interest paid on the mortgage is deductible from the assessable income of the appellant in order to determine the chargeable income. Section 8 and 9 of Act 986 provides the basis for the agreement between the parties. It states that:

8. General principles

(1) Subject to the Sixth Schedule, the Commissioner-General shall not allow a deduction for the purpose of ascertaining the income of a person from employment.

(2) The Commissioner-General shall not allow a deduction in respect of domestic or excluded expenses incurred by a person.

(3) A specific deduction rule shall take precedence where more than one deduction rule applies.

9. Residual deduction rule

(1) A person who is ascertaining the income of that person or of another person from an investment or business conducted for a year of assessment or for a part of that year shall deduct from the income, an expense to the extent that that expense is wholly, exclusively and necessarily incurred by the person in the production of the income from the investment or business during the year.

(2) A deduction shall not be allowed under subsection (1) for an expense that is of a capital nature.

(3) For purposes of this section, "expense that is of a capital nature" includes an expense that secures a benefit that lasts for more than twelve months.

Section 9 of the Act deals specifically with the ascertainment of the taxable income of a person from either investment or business conducted for the year of assessment or a part of that year. As far as the appellant is concerned section 9 does not apply.

The section which applies to the case of the appellant is section 8. Under section 8 generally, in ascertaining the taxable income of a person from employment for a year of assessment, the Commissioner General is under legal obligation not to allow any deduction unless that deduction is allowed under the sixth schedule to the Act. That is the essence of the use of the expression "subject to" in section 8(1) of the Act.

What section 8(1) means is that notwithstanding the fact that the Commissioner General is forbidden from allowing a deduction in the ascertainment of the chargeable income of a person from employment for the year of assessment, the Commissioner General shall allow such deductions as are stated or spelt out under the sixth schedule to the Act. Indeed, paragraph 4(3) of the sixth schedule to the Income Tax Act, 2015, Act 896, provides that:

(3) Despite sections 8 and 9 of this Act, in calculating the income of the individual from conducting an employment, business or investment for a year of assessment, deduct mortgage interest incurred during the year.

However, the point of divergence between the parties is that, whereas the appellant argues that the mortgage interest paid can be deducted upfront on a monthly basis, the Commissioner General is of the opinion that the mortgage interest can only be ascertained at the end of the year when the appellant files his annual income tax returns.

Therefore the only issue for determination is whether or not it is permissible under the tax laws of Ghana for an employee who pays mortgage interest on his only residential premises on monthly basis to claim or deduct the mortgage interest paid in determining his monthly chargeable income.

It has been submitted on behalf of the appellant that the mortgage interest is paid monthly and that by section 19(2) of the Income Tax Act, 'for the purpose of ascertaining the income of an individual for income tax purposes from an employment or investment, an individual shall account on a cash basis' and that for cash basis accounting, a person incurs an expense when that expense is paid for. The appellant says that to the extent that he pays the mortgage interest monthly, he must be allowed to deduct the said interest once he can prove its payment at the end of a particular month.

The argument of the Commissioner General is to the effect that the income of an individual from employment, business or investment for a year of assessment can only be ascertained after the end of the year when tax returns are filed and therefore, it is at the filing of tax returns that the mortgage interest incurred during the year may be claimed.

The court wishes to state that the deduction of mortgage interest is not premised on the ascertainment of the yearly income of an employee. It is rather based on the fact that the mortgage interest has been duly paid by the employee in accordance with section 19(2)

and 20(b) of the Income Tax Act. Mortgage interest is not a tax relief; it is rather a tax concession granted on a temporary basis to enable an employee acquire for himself one house during his life time. Indeed, once the employee is done with the payment of the mortgage on the said house and the house becomes, thereby, owned by the employee without any liability hanging over the said house by way of mortgage payment, the tax concession comes to an end and the employee can, thenceforth, not deduct any mortgage interest payment within the meaning of section 134 and the sixth schedule to the Act.

Regulation 4 (2) (3) (4) of the Income Tax Regulation, 2016, LI 2244 enjoins employers to make, on a monthly basis, estimates of the tax liability of their employees for the year of assessment. Regulation 4(3) in particular provides that:

(3) For purposes of a calculation under sub regulation (2), the employer may at the time of making a qualifying cash payment to an employee,

(a) make a reasonable estimate of

(i) tax liability of the employee from employment for the year of assessment during which the payment is made; and

(ii) the amount of qualifying cash payments yet to be made by the employer to the employee during the year of assessment; or

(b) consider whether or not an estimate made under paragraph

(a) is still accurate and, if not, make a new estimate under that paragraph.

Thus, whenever an employer decides to make a payment to an employee which is subject to tax, the employer is enjoined to make an estimate of the tax liability of the said employee and withhold same from the payment to be made, in favour of the tax liability of the employee. It follows therefore that it is not wholly correct to say that it is only at the end of the year when returns are filed by an employee that one can determine the tax liability of an employee and reliefs which he is entitled to.

The court will hold that to the extent that an employer is under an obligation, whenever he is "making a qualifying cash payment to an employee" to make estimate of the tax liability of an employee and withhold such estimate against the tax liability of the said employee, so also is the employer enjoined under paragraph 4(3) of the sixth schedule to the Income Tax Act, 2015, Act 896 to make deduction in favour of an employee, upon proof by the employee of the cash payment of a mortgage interest at the time of "making a qualifying cash payment to an employee." It ought to be noted that, unlike companies whose profits are mostly assessed at the end of the year, most employees are not remunerated at the end of the year but periodically within the year to enable them make ends meet as human beings.

The court is satisfied that, in coming to his conclusion, the Commissioner General did not take the effect of Regulation 4(2) (3) (4) of the Income Tax Regulation, 2016, LI 2244 into consideration and that in so far as an employee has made cash payment for interest on mortgage and once he is able to furnish proof of such payment to his employer, the employee is at liberty to have such mortgage interest deducted in his favour within the meaning of paragraph 4(3) of the sixth schedule to the Income Tax Act, 2015, Act 896.

The court will therefore allow the appeal and set aside the decision of the Commissioner General and declare that the appellant is entitled under the law to have an upfront deduction of mortgage interest paid by him at any time that his employer makes a qualifying cash payment to him, be it weekly, monthly or yearly. The appellant does not necessarily have to wait till the end of the year before getting mortgage interest paid deducted in his favour upon the filing of tax returns.

(sgd.)

**SAMUEL K. A. ASIEDU, (J.A)
JUSTICE OF THE COURT OF APPEAL
(SITTING AS AN ADDITIONAL
HIGH COURT JUDGE)**

R.A.A.

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