

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, COMMERCIAL DIVISION HELD IN ACCRA ON THE 8TH DAY OF FEBRUARY, 2022, BEFORE HIS LORDSHIP JUSTICE JUSTIN KOFI DORGU

SUIT NO: CM/TAX/0515/2021

PERSEUS MINING GHANA LTD.) APPELLANT

VRS.

THE COMMISSIONER GENERAL) RESPONDENT

PARTIES: THEOPHILUS BOTSIO REPRESENTS THE APPLICANT
CHARLES AMAKWA REPRESENTS THE RESPONDENTS

JUDGMENT (REASONS)

From my evaluation of the submissions on the appeal, I hold that the Applicant to me, has been unable to show that the prices of gold were so erratic and showed a consistent downward trend to the extent that, it would be prudent to hedge with a lower price than the prevailing market price. This is moreso when gold is not one of the known commodities that has the tendency to fall drastically and for a considerable period.

Since the audit revealed a loss of income which cannot be rationalized to make economic sense and for the fact that the Applicant was unable to debunk the assertion of the report that the hedged price was fixed or dictated by or negotiated by the Applicant's parent company which imports the principle of related transactions especially as they differed considerably from what was prevailing on open market as exhibited in Exhibits GRA 4, 4A and 4B which could reasonably be taken as arm's

length transactions or prices, I hold the view on that point that the Respondent was right to re-characterise this transaction as it did since the net effect of the forward sales contract reduced the taxable income of the Respondent leading to a tax liability to the Respondents.

On that note, it is right for the Respondent to treat the forward sales contracts or hedging arrangements as a tax avoidance mechanism and to invoke Section 34 of Act 896, the Income Tax Act, 2015.

Again, there is no abuse of use of discretionary power by the Respondent as canvassed by the Applicant. By the Applicant's own assertion, there were several meetings and correspondences with the Respondents since the objection was raised and the Respondent has shown that it had sufficient reason to treat the transaction of forward sales contract suspicious and its economic unreasonableness was sufficient basis for the Respondent to exercise his discretion of re-characterisation.

To me, ratification of the agreement is immaterial since the main mining lease agreement was ratified. I do not think that engaging in the sale of the product of the lease agreement also required a separate ratification.

On ground 3, I again agree with the Respondent that the Applicants used two different standards in the payment of royalties to their third party company, Franco Nevada Corporation and that used in computing the royalties due the government of Ghana.

In the former case, the Applicant could not debunk the accusation that they used the spot gold prices whilst they used the contract price for the Government of Ghana. The question that arises is, why that discrepancy if not for purposes of related trading? The Respondent supported their position with Exhibits GRA 7 and GRA 7A. The explanation offered by the Respondent that they did that on the basis of sanctity of contract does not convince me. If a party contracts at contract price (fixed) then all calculations ought to be based on this contract price which to the Respondent, is fair to them. Why then with the same transaction as to royalty payments, a higher price will be used for your trading partner and a lower price which to you is the reasonable

contractual price be used when calculating the same royalty payments to the government who is not your trading partner?

On the ground of whether or not losses occasioned by the Applicant entering into forward sale contracts or hedging was an investment loss and so deductible from investment income has been answered sufficiently by the Respondent, these deductions are not tax deductible and so having been deducted from the business income before arriving at the chargeable income of the Applicants, occasioned a tax liability and the only remedy is to disallow same which the Respondent did. Had the hedging inured to the benefit of the Respondent, will same not have been good income for the Applicants? Why then should the loss incurred from an irrational business decision be deducted before arriving at the chargeable income?

Reference is made to Resolution 10 (2) of the Revenue Regulations, 2001 (L.I. 1675) which states "A loss incurred from a business shall not be set off against or deducted from an income from an investment and a loss incurred from an investment shall not be set off or deducted from an income from a business."

Again, by Section 9 of Act 896, any expense that is deductible ought to be an expense that is wholly exclusively and necessarily incurred in the generation of the income. I agree with the Respondent that assuming without admitting that the hedging or forward sales contracts engaged in was for purposes of generating income for the business, in this particular case, it cannot be said to be a reasonable and necessary expense especially as I stated earlier on that the Respondent failed to prove that prices of gold at the time on the world market were erratic and plummeting for a considerable period.

To me, when the law in Section 92 (1) of Act 915 places the onus of proof on the Appellant in tax appeals, it was not meant for the production of documentation in support of the acts and transactions of the Appellant simpliciter. It goes beyond the production of voluminous documentations that go to rationalize the acts and transactions. It is the Commissioner's evaluation of these documents, acts and transactions vis-à-vis the tax laws, practice and conventions in the industry both

local and international that will determine whether the proof offered is proof in law indeed capable of discharging the burden.

From the forgoing, it is clear to me that the Appellant has not been able to discharge this burden that the assumptions of facts made by the Respondent and the interpretation and or application of the tax laws by the Respondent leading to the objection decision were inaccurate and or wrongly applied to make the decision wrong in law.

What it means therefore is that the appeal cannot succeed and thus fails in its entirety.

The appeal against the Respondent's objection decision conveyed to the Applicant in a letter dated 15th March, 2021 and attached as Exhibit GRA 3 is hereby dismissed as unmeritorious.

Sgd.

**JUSTICE JUSTIN KOFI DORGU
(JUSTICE OF THE HIGH COURT)**

LEGAL REPRESENTATION

DR. ABDALLAH ALI NAKYEA WITH BENEDICT ASARE AND NANA DR. AFFUL GYAMENA FOR THE APPLICANT

MOHAMMED IBRAHIM WITH JOSEPH OWUSU AND CEPHAS ODARTEY FOR THE RESPONDENT

CERTIFIED TRUE COPY
.....REGISTRAR
HIGH COURT
COMMERCIAL DIVISION, LLC-ACCRA