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SUPREME COURT OF GHANA

IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2021

WRIT TO INVOKE THE ORIGINAL JURISDICTION OF THE SUPREME COURT
PURSUANT TO ARTICLES 2(1) AND 130(1) OF THE 1992 CONSTITUTION AND RULES
45(1) AND 45(2) OF THE SUPREME COURT RULES, 1996 (C.I.16)

SUIT NO:

J118/2021
PLAINTIFF

BETWEEN:

RICHARD AMO-HENE
H/No. AM/WP 1243
Hymn Avenue
Amasaman

AND

GHANA REVENUE AUTHORITY
Off Starlets 91 Road
Near Accra Sports Stadium
Accra

1ST DEFENDANT

ATTORNEY GENERAL
Attorney-General's Chambers
Ministry of Justice
Accra

2ND DEFENDANT

JUDICIAL SERVICE
Supreme Court Building
Accra

3RD DEFENDANT

IN THE NAME OF THE REPUBLIC you are hereby commanded within fourteen days after the service on you of the statement of the Plaintiff's case inclusive of the day of service, that you are to file or cause to be filed for you a statement of the Defendant's case in an action at the Suit of: **RICHARD AMO-HENE**

The nature of the relief sought is as follows:

- a) *A declaration that Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) which requires a taxpayer to pay 30% of all outstanding taxes (in case of other taxes) before an objection to a tax decision can be entertained by the 1st Defendant is inconsistent with and in contravention of articles 2(1), 17(1), 125(2), 19(2)(c), 33(1), 33(5),*

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130(1), 132, 133(1), 140, of the 1992 Constitution which guarantee a person's right of access to court, participation in the administration of justice and the presumption of innocence until proven or pleaded guilty hence consequently null, void and unenforceable.

- b) A declaration that Order 54 rule 4(1) of the High Court (Civil Procedure) Rules, 2004 C.I 47 which requires a taxpayer to pay 25% of the disputed tax contained in the notice of assessment before an appeal can be entertained by the High Court is inconsistent with and in contravention of articles 2(1), 17(1), 125(2), 19(2)(c), 33(1), 33(5), 130(1), 132, 133(1), 140, of the 1992 Constitution which guarantees a person's right of access to the court consequently null, void and unenforceable.
- c) An order setting aside Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) as being inconsistent with the letter and spirit of the 1992 Constitution and consequently null and void.
- d) An order setting aside Order 54 rule 4 (1) of the High Court (Civil Procedure) Rules, 2004 C.I 47 as being inconsistent with the letter and spirit of the 1992 Constitution and consequently null and void.
- e) An order of perpetual injunction restraining the Defendants, their agents or servants or assigns or judicial office under the pretext of acting under Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) and Order 54 rule 4(1)) of the High Court (Civil Procedure) Rules, 2004 C.I 47 from hearing or attending to an appeal of a tax decision lodged with the 1st Defendant or the 3rd Defendant under the veneer that the mandatory money requirement has not been complied with.

The capacity in which the Plaintiff is bringing the action is as follows:

The Plaintiff is a Ghanaian Citizen.

The address for service of the Plaintiff is as follows:

**H/No. AM/WP 1243
Hymn Avenue
Amasaman**

The address for service of Counsel for the Plaintiff is as follows:

NOBISFIELDS CHAMBERS
1 Pawpaw Street
East Legon
(Near Melcom at East Legon)
P.O. Box DT 1210
Accra

The names and addresses of persons affected by this Writ are as follows:

- 1. GHANA REVENUE AUTHORITY**
Off Starlets 91 Road
Near Accra Sports Stadium
Accra
- 2. ATTORNEY GENERAL**
Attorney-General's Chambers
Ministry of Justice
Accra
- 3. JUDICIAL SERVICE**
Supreme Court Building
Accra

DATED AT NOBISFIELDS CHAMBERS, 1 PAWPAW STREET, EAST LEGON (NEAR MELCOM), ACCRA (DIGITAL ADDRESS: GA-414-0267) THIS 14TH DAY OF APRIL 2021.

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THE REGISTRAR
SUPREME COURT
ACCRA

AND FOR SERVICE ON THE ABOVE-NAMED DEFENDANTS:

1. **GHANA REVENUE AUTHORITY, OFF STARLETS 91 ROAD, NEAR ACCRA SPORTS STADIUM, ACCRA.**
2. **ATTORNEY GENERAL, ATTORNEY-GENERAL'S CHAMBERS, MINISTRY OF JUSTICE, ACCRA.**
3. **JUDICIAL SERVICE, SUPREME COURT BUILDING, ACCRA.**



IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA
A.D. 2021

SUIT NO: J1/8/2021

BETWEEN

RICHARD AMO-HENE
HM/WP 1243
Hymn Lane
Amasaman, Accra

PLAINTIFF

AND

GHANA REVENUE AUTHORITY
Off Starlets' 91 Road,
near Accra Sports Stadium
Accra

1ST DEFENDANT

ATTORNEY GENERAL
Attorney-General's Chambers
Ministry of Justice
Accra

2ND DEFENDANT

JUDICIAL SERVICE
Supreme Court Building
Accra

3RD DEFENDANT

**STATEMENT OF CASE FILED FOR AND ON BEHALF OF THE PLAINTIFF
PURSUANT TO RULE 46(1) OF THE SUPREME COURT RULES, 1996
[C.I.16] IN SUPPORT OF PLAINTIFF'S WRIT TO INVOKE THE ORIGINAL
JURISDICTION OF THE SUPREME COURT**

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1. Introduction

- 1.1 Respectfully my Lords, the Plaintiff on 14 April 2021 issued a writ invoking the original jurisdiction of this Honourable Court pursuant to articles 2(1) and 130(1) of the 1992 Constitution seeking the following reliefs:
- a) *A declaration that Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) which requires a taxpayer to pay 30% of all outstanding taxes (in case of other taxes) before an objection to a tax decision can be entertained by the 1st Defendant is inconsistent with and in contravention of articles 2(1), 17(1), 125(2), 19(2)(c), 33(1),33(5), 130(1), 132, 133(1), 140, of the 1992 Constitution which guarantee a person's right of access to court, participation in the administration of justice and the presumption of innocence until proven or pleaded guilty hence consequently null, void and unenforceable.*
 - b) *A declaration that Order 54 rule 4(1)of the High Court (Civil Procedure) Rules, 2004 C.I 47 which requires a taxpayer to pay 25% of the disputed tax contained in the notice of assessment before an appeal can be entertained by the High Court is inconsistent with and in contravention of articles 2(1), 17(1), 125(2), 19(2)(c), 33(1), 33(5), 130(1), 132, 133(1), 140, of the 1992 Constitution which guarantees a person's right of access to the court consequently null, void and unenforceable.*
 - c) *An order setting aside Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) as being inconsistent with the letter and spirit of the 1992 Constitution and consequently null and void.*

- d) *An order setting aside Order 54 rule 4 (1) of the High Court (Civil Procedure) Rules, 2004 C.I 47 as being inconsistent with the letter and spirit of the 1992 Constitution and consequently null and void.*
- e) *An order of perpetual injunction restraining the Defendants, their agents or servants or assigns or judicial officers under the pretext of acting under Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) and Order 54 rule 4(1) of the High Court (Civil Procedure) Rules, 2004 C.I 47 from hearing or attending to an appeal of a tax decision lodged with the 1st Defendant or the 3rd Defendant under the veneer that the mandatory money requirement has not been complied with.*

1.2 This Statement of Case has been filed for and on behalf of the Plaintiff pursuant to Rule 46 of C.I. 16.¹ The said rule reads as follows:

“Statement of plaintiff’s case

- (1) *The plaintiff may file a statement of his case with the writ or shall in any case within fourteen days of the filing of the writ file the statement of his case.”*

The Plaintiff takes note of the case of **Oppong v. Attorney-General and Ors**² wherein this Honourable Court struck out the Plaintiff’s action for failure to comply with the time frame within which a Plaintiff must file a statement of case.

1.3 In line with Rule 46(2) of C.I. 16 this Statement of Case sets out the facts and particulars of the Plaintiff’s case using documentary evidence verified by an affidavit signed by Richard Amo-Hene, the Plaintiff.

¹ Supreme Court Rules, 1996

² [2000] SCGLR 275

2.0 Parties to the Action

- 2.1 My Lords, the Plaintiff is a citizen of Ghana and resident in Accra. He is clothed with the capacity to institute the present action which will be addressed in this Statement of Case.
- 2.2 The 1st Defendant is a body corporate with a perpetual succession and a common seal established pursuant to Ghana Revenue Authority Act, 2009, Act 791 to among others provide a holistic approach to customs and tax administration in Ghana. The 1st Defendant is sued due to its mandate under Sections 2 and 3 of Act 791 of ensuring tax compliance and providing one stop service for taxpayers to pay their taxes. **Section 14 of Act 791** states that *“the Commissioner-General shall be responsible of the day-to-day administration of affairs of the Authority”*.
- 2.3 Additionally, Section 41 of the Revenue Administration Act, 2016, Act 915 empowers the Commissioner-General (CG) of the Ghana Revenue Authority (GRA) to make “tax decision” under the tax law.
- 2.4 A “tax decision”³ is defined as a decision by the CG under a tax law, including an assessment or omission, but does not include
- a) a practice note, class ruling, or private ruling,
 - b) a decision or omission to issue, refuse or revoke a practice note, class ruling or private ruling;

³ Revenue Administration Act, 2016 section 41(1)

- c) a decision or omission that affects a person only as a tax officer or employee or agent of the Authority;
- d) a decision or omission of the Commissioner-General including an objection decision under section 43; or
- e) a decision to compound an offence under a tax law.

“Tax” means a duty, levy, charge, rate, fee, interest, penalty or any other amount imposed by a tax law or to be collected by or paid to, the Commissioner-General under a tax law.⁴

2.5 The nucleus of the Plaintiff’s action relates to the enforcement of Act 915 and the requirement of a taxpayer to pay 30% sum of the taxes in dispute before an appeal of tax decision could be heard or entered by the Commissioner-General. My Lords, it is clear from the provisions that the Ghana Revenue Authority is an appropriate party to be sued in this matter.

2.6 The 2nd Defendant is sued in its capacity as the principal legal adviser to the Government of Ghana pursuant to **Article 88(1) of the 1992 Constitution** and as the proper person for an action to be instituted against and on behalf of the state pursuant to Article 88(5) of the Constitution of Ghana, 1992 and Section 9(1) of the State Proceedings Act, 1998 (Act 555). By reason of this position, the Attorney-General is the principal legal adviser to the Executive arm of government who is constitutionally mandated to raise funds through imposition of taxes.

⁴ Revenue Administration Act, 2016, Act 915 (as amended) section 9(1).

2.7 The 3rd Defendant is a member of the Public Services established under Article 190(1)(a) of the Constitution 1992 and the Judicial Service Act, 1960 (C.A. 10) (as Amended by Act 281). The 3rd Defendant's membership has been clearly outlined in C.A. 10 and the Judicial Service Regulations, 1963 (L.I.319). It is the officers of the 3rd Defendant that are legally and constitutionally mandated to administer the filing of court processes in the various courts in Ghana.

2.8 The text of Order 54 rule 4(1) requires an aggrieved taxpayer who files an appeal against a tax assessment by the Commissioner General to pay 25% of the disputed amount as contained in the notice of assessment.

Order 54 rule 4(2) instructs that judges Shall not entertain an appeal until the 25% of the disputed amount has been paid.

2.9 The Plaintiff qualifies as a person under Article 2(1) of the Constitution of Ghana, 1992 in seeking the interpretation and enforcement of the 1992 Constitution. The Interpretation Act of Ghana, 2009 (Act 792) in section 46 defines a person as: -

"person" includes a body corporate, whether corporation aggregate or corporation sole and an unincorporated body of persons as well as an individual."

2.10 This interpretation of a person has been affirmed in the case of *Sam v. Attorney-General*⁵ where this Honourable Court summed the position of the law with regards to the capacity to invoke the original jurisdiction in the following words:

"To sum up, the general rule is that any person, natural and artificial, may sue and be sued in the courts under article 2(1) of the Constitution, 1992 but they must be citizens who are seeking the interpretation of the Constitution, 1992 and its eventual enforcement, as plaintiff is seeking

⁵ (No 2) [1999-2000] 2 GLR 336 @ 350

to do in this case. For the above reasons, I would hold that plaintiff has standing before this court as provided in the Constitution, 1992, article 2(1) which permits anyone with or even without any personal interest in a case, to invoke the special original jurisdiction of the Supreme Court for the interpretation and enforcement of the Constitution under article 2(1).”

2.11 Furthermore Articles 3(4) and 41(b) of the Constitution 1992, provides that:

“Article 3(4); All citizens of Ghana shall have the right and duty at all times to

(a) defend this Constitution, and in particular, to resist any person or group of persons seeking to commit any of the acts referred to in clause (3) of this article; and

(b) do all in their power to restore this Constitution after it has been suspended, overthrown, or abrogated as referred to in clause (3) of this article”.

Article 41(b): Duties of a citizen

“The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly, it shall be the duty of every citizen to uphold and defend this Constitution and the Law”

2.12 In *New Patriotic Party v. Attorney-General*⁶ it was held that as specified under Articles 3(4) (a) and 41(b) of the Constitution, 1992 it is the duty of every citizen to defend and uphold the Constitution.

⁶ [1997-98] 1 GLR 378

2.13 The right conferred by the Constitution 1992 on persons in invoking the jurisdiction of this Honourable Court is also conferred on natural persons such as the Plaintiff. This position was held in holding one that ⁷

“the plaintiff had capacity under article 2(1) of the Constitution, 1992 to bring the action because (a) the proper role of the Interpretation Act, 1960 (CA 4) was that unless the contrary intention appeared in any enactment, the interpretation of words provided in CA 4 should be applied, except where the context in which the word was used would not permit such an interpretation or where the enactment itself provided an interpretation of any particular words used therein. A “person” was defined in section 32 of CA 4 to include a body corporate. Since that meaning fitted the context in which “person” was used in article 2(1) of the Constitution, 1992 there was no necessity for applying the canons of statutory interpretation to determine its meaning. Moreover, the word “person” had been defined in article 297 of the Constitution, 1992 to include a natural as well as a legal person or a corporate person such as the plaintiff. Accordingly, the plaintiff had locus in the case”.

2.14 Per the rights and freedoms conferred by the Constitution of Ghana, 1992 to both natural and legal persons and under Articles 3(4) (a) and 41(b) of the Constitution, it is the duty of every citizen both natural and legal to defend and uphold the Constitution through the enforcement procedure under Article 2(1). Article 12 of the Constitution requires that certain specified persons including “natural and legal persons in Ghana” such as the Ghana Revenue Authority and the Judicial Service

⁷ See foot note 6 and also it was affirmed by the passing of the Interpretation Act (Act 792) in 2009 and addressed by section 46 under the definitions section.

to respect and uphold the fundamental human rights and freedoms enshrined in Chapter 5 of the Constitution, 1992. In effect, proceedings could be taken in court against all such persons for the enforcement of the fundamental rights and freedoms. Similarly, it is possible for legal persons to institute a constitutional law action where an enforcement of legislation affects their rights and freedoms as happened in *Ghana Independent Broadcasters Association v. The Attorney-General & Anor Suit No. J1/4/2016 (Unreported)*.

2.15 Respectfully, my Lords, it is the Plaintiff's case that by virtue of Articles 3(4) and 41(b) of the Constitution, 1992 every citizen of Ghana has the constitutional right to protect the constitutional order established by the Constitution so that it is not abolished or sought to be abolished. Thus, a citizen has to exercise this right by seeking an interpretation as to the meaning and effect of a particular provision or provisions of the Constitution.⁸

3.0 Facts and Particulars of the Case

3.1 It is the contention of the Plaintiff that the facts are not in dispute and consequently it does not intend to call any witnesses in pursuing this instant action. The Plaintiff urges the court to proceed on the practice of the court in making a determination of constitutional matters through legal arguments filed before this Honourable Court.

3.2 In 2016, the **Revenue Administration Act, 2016 (Act 915)** was passed with a commencement date of 1 January 2017 to govern tax administration in the country.

3.3 The Revenue Administration Act replaced **Schedule 7 of the Income Tax Act, 2015, Act 896 (as amended)** with respect to provisions on tax administration in Ghana.

⁸ See *New Patriotic Party v. Attorney-General* [1993-1994] 2 GLR 35 at page 37-38)

3.4 Section 42(5)(b) of Act 915 requires a taxpayer to pay 30% of the disputed tax (hereinafter referred to as “**Pay Now Argue Later rule**” or “**obey before complain rule**” in the military context before an objection to a “tax decision” can be entertained by the Commissioner-General of the Ghana Revenue Authority.

3.5 The Pay Now Argue Later rule traces its root to **Section 131 of Internal Revenue Act 2000 Act 592 (Repealed)** as stated below:

“Where a person has lodged a notice of objection to a notice of assessment under section 128 an amount of thirty per centum of the amount payable as contained in the notice of assessment shall be paid pending the determination of the objection and an appeal.”

3.6 *Order 54 Rule 4(1)(2) of the High Court (Civil Procedure) Rules, 2004 C.I 47 requires a taxpayer mounting an appeal against a tax decision to have paid 25% of the disputed tax before the matter can be entertained by the Court.*

3.7 Under the Revenue Administration Act, 2016 (Act 915) all taxpayers (individuals and legal entities) are required to file their annual returns for each tax year regardless of whether the source of income is exclusively from employment (in the case of individuals) or not.

3.8 Every person is required to assess himself, himself or herself to tax for a year and therefore if a taxpayer is dissatisfied with an assessment, he must pay 30% of the assessment or tax decision before an action can be heard.

These aforementioned provisions impede access to justice and right to a fair trial.

3.9 The Plaintiff prays this Honourable Court that the said **Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) and Order 54 rule 4(1)(2) of the High Court (Civil Procedure) Rules, 2004 C.I 47** be declared unconstitutional and be rendered void.

4.0 The Violating Provisions Of the Revenue Administration Act, 2016 (Act 915)

4.1 My Lords for a better appreciation of the issue one must read section 42(5)(b) of Act 915, we have set out the provision below:

“An objection against a tax decision shall not be entertained unless the person has

(b)in the case of other taxes, paid all outstanding taxes including thirty percent of the tax in dispute.”

4.2 A similar provision was set forth in *Section 49(3) of INCOME TAX DECREE, 1975, S.M.C.D. 5. (Repealed)*

“No application or action shall be entertained by any court in respect of any objection under this Decree unless the taxpayer has paid the amount determined to be payable by him under subsection (1) of this section.”

4.3 Under the Revenue Administration Act, a taxpayer mounting an objection is required to pay the 30% of the disputed tax before the objection can be dealt with. For this purpose, a tax decision to which an objection is not made within thirty days is final.⁹

4.4 My Lords in support further, a mandatory pecuniary condition has been set forth in Order 54 rule 4(1) of C.I.47. We respectfully repeat these texts below:

“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

⁹ RA 2016, section 42(8) The implication of the word “final” is, My Lords, exactly what it means. That is, the taxpayer is presumed to have admitted and therefore liable to pay the assessed amount regardless of the basis and amount used by the revenue authority and therefore all the consequences of Act are visited on the taxpayer.

quarter of the amount payable in the first quarter of that year of assessment as contained in the notice of assessment”

Order 54 rule(2) provides that “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 the rule”

4.5 My Lords, the combined effects of the aforesaid provisions are that a taxpayer who is aggrieved with a tax decision cannot mount an objection at the Commissioner-General’s Level or the High Court except the said taxpayer can afford the 30% or the 25% of the disputed tax raised by the same GRA.

4.6 It is these provisions that the Plaintiff contends and considers as unconstitutional and poses a danger to a taxpayer with prospective appeal either to the GRA or in the courts of Ghana. It is the Plaintiff’s case that this Court annuls the said provision, as it is null, void and of no effect per the Constitution of Ghana, 1992.

5.0 The Power of the Supreme Court to Strike Down A Statute

5.1 There is no dispute to the power of the Supreme Court to delete an enactment be it an Act of Parliament or a subsidiary legislation as null and void if it comes to the conclusion that the said legislation offends a provision in the constitution.

5.2 This is in line with Article 2 (1) of the 1992 Constitution

(1) A person who alleges that -

(a) an enactment or anything contained in or done under the authority of that or any other enactment; or

(b) any act or omission of any person;

is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

5.3 This constitutional provision empowers any person who alleges that an enactment contravenes the constitution or seeks an interpretation of the

Constitution, to proceed to the Supreme Court. This Honourable Court speaking through Wood CJ (as she then was) in *Asare Baah III V Attorney-General & Electoral Commission*¹⁰ laid out the principles guiding the invalidity or unconstitutionality of actions in constitutional litigation. They are the *presumption of validity or constitutionality in favour of legislation* and the *principle of severability of impugned legislation*.

5.4 Important to this case is the principle of severability of impugned legislation which allows this Honourable Court to strike down offending parts of legislations leaving the other part unaffected. This Court's power to pronounce on what the law is pursuant to articles 2(1) and 130(1) is exercised where legislations, acts or omissions are ultra vires or there exist breaches, violations, conflicts, or non-compliance with constitutional requirements or procedures.

5.5 In *Martin Kpebu v. Attorney-General*,¹¹ Georgina Wood CJ (as she then was) stated that "*one of the cardinal features of constitutional democracies governed by the rule of law is the power of judicial review. It is a strong bulwark against illegality and impunity and insulates citizens against their human rights violations*".

5.6 Date-Bah JSC (as he then was) in the case of *Adofo v Attorney –General [2005-2006] SCGLR 42*, spoke the mind of the court on the rationale behind judicial review litigation, the legal process through which the apex court determines the constitutionality of executive or legislative action. He said of the latter:

"The power of judicial review of the constitutionality of legislation, which is explicitly conferred on this court by articles 2(1) and 130 (1) of the Constitution is one that should vigilantly be enforced by this court in the discharge of its obligation to uphold the Constitution of this country... The Constitution expects judges to protect individuals and minorities from the power of the majority. The provisions on challenge(s) of legislative instruments enshrined in the 1992

¹⁰ [2010] SCGLR 463

¹¹ [2015-2016] SCGLR 171 at page 211

Constitution are intended to facilitate the fulfilment by judges of this expectation.” (emphasis mine)

See also the case of *Federation of Youth Association of Ghana (FEDYAG) v. Public Universities of Ghana [2010] SCGLR 265*.

5.7 This Court has struck down provisions of statutes in several cases.

In *New Patriotic Party v Inspector General of Police [1993-94] 2 GLR 459* this Court struck down Sections 7, 8, 12(a) and 13(a) of the existing Public Order Decree, 1972 (NRCD 68) as the said provisions were inconsistent with article 21 (1)(d) of the Constitution, 1992 and were therefore unconstitutional, void and unenforceable.

Similarly, in *Adjei-Ampofo v. Attorney-General & President of the National House of Chiefs [2011] 2 SCGLR 1104* this court declared null and void Section 63(d) of the Chieftaincy Act, 2008 (Act 759) which criminalized the deliberate refusal to honour a call from a chief to attend to an issue as the said provision was inconsistent with the right of freedom of movement guaranteed under Article 21(1) (g) of the 1992 Constitution.

Furthermore, in *Akosa II v. Attorney-General [2012] 2 SCGLR 1070*, the Local Government Atwima Kwanwoma District Assembly (Establishment) Instrument, 2007 (LI 1853) contained offending provisions which was the substitution of Twede with Foase. The said substitution was in excess of the powers conferred by Parliament under Article 11(7) (c) of the 1992 Constitution. The Supreme Court expunged the said provisions in accordance with Article 2(1) as the said substitution was illegal.

In addition, this Court held in *Mornah v. Attorney-General [2013] SCGLR (Special Edition) 504* that the Rules of Court Committee exceeded its mandate under article 64(3) of the Constitution as rule 69(C)(5) of Supreme Court (Amendment) Rules, 2012 (CI 74) granted the court the power to sit on public holidays. This was in direct conflict with Article 93(2) of the Constitution and was therefore void and of no effect.

In *Martin Kpebu v Attorney General Suit No. J1/13/2015*, this Court struck off section 96(7) of the Criminal and other offences Procedure Act (Act 30) as inconsistent with article 14(1), 15(2) and 19(2)(c) of the Constitution, 1992.

Similarly in **Martin Kpebu v Attorney General Suit No. J1/7/2015**, this Honourable Court in a unanimous decision struck off Section 104(4) of Act 30 as unconstitutional.

Center for **Juvenile Delinquency v. Ghana Revenue Authority Suit No J1/61/2018** dated 30th July 2019, the Court struck down Paragraphs 1 (9) and 2 (8) of the First Schedule of the Revenue Administration Act, 2016, Act 915 as unconstitutional

5.8 The controversy as to whether the requirement of a taxpayer to pay 30% of a disputed tax before he can challenge tax assessment/ or tax decision offend the Constitution, 1992 and such determination is subject to the interpretation of the Constitution, 1992.

5.9 For this reason, the Plaintiff's case is that it is an important matter, which is justiciable and which the Supreme Court has jurisdiction under Articles 2(1) and 130(1) of the Constitution, 1992 to adjudicate upon and make such orders and give such directions as it might consider appropriate as per the approach adopted in **Tuffuor v Attorney**.¹²

6.0 Burden of Proof in Constitutional Matters

6.1 Constitutional Law is part of the body of civil law and consequently this Honourable Court has insisted that the burden of proof is that of a civil standard. In **National Democratic Congress v. Electoral Commission**,¹³ the Supreme Court reiterated the burden of proof when a party invokes its original jurisdiction. This Honourable Court held that:

“Where an act or omission of any person was challenged under article 2 of the Constitution, 1992 on the ground that it contravened a provision of the Constitution, 1992, the party had to show that: (a) such an act or omission had taken place; and (b) it fell foul of a specific provision of the Constitution, 1992 or, at the very least, the spirit of an actual provision. Thus, in the instant case, the plaintiff was required, as

¹² [1980] GLR 637

¹³ [2001-2002] 2 GLR 340

provided under rule 46(2) of the Supreme Court Rules, 1996 (CI 16), to produce sufficient, cogent and clear evidence to support his allegation that in issuing the notice the defendant had breached a specific constitutional provision. But the plaintiff did not discharge the evidential burden on him by simply making reference to article 89(2) (c) of the Constitution, 1992, an enabling constitutional provision, nor by merely referring to article 242 of the Constitution, 1992, since there was no perceptible manner in which the issuing of the notice by the defendant could amount to a contravention of the provisions of that article.”

6.2 In the words of Justice Acquah (as he then was) in the aforementioned case:

“The obvious purpose of rules 46(2) and 48(2) of the Supreme Court Rules, 1996 (CI 16) is to ensure that both parties to the suit are given the opportunity to adduce sufficient evidence in proof of whatever allegation necessary for the determination of the action.

Accordingly, the failure of the plaintiff to furnish the relevant particulars, documentary or otherwise in proof of its allegation of the withdrawal of the district chief executives and the government nominees is sufficient to entitle the court to dismiss the action.”

6.3 This interpretation is in line with the language of the Article 2(1) of the 1992 Constitution which states that:

“A person who alleges that-

(a) an enactment or anything contained in or done under the authority of that or any other enactment;

is inconsistent with or is in contravention of a provision of this Constitution may bring an action in the Supreme Court for a declaration to that effect.”

“He who “alleges” must proof” is a trite statement in evidence and the language of article 2(1) above confirms same.

6.4 However, this Honourable Court has held that, when it comes to fundamental human and constitutional right such as access to justice as in this instant case, the

burden of justifying prior restraint in a law on a right guaranteed under the constitution is on the state. The state must justify the basis for which it is seeking this restraint for the court to evaluate whether this restraint is in accordance with the law. This was the test when the court considered the right of independence of the media and freedom of expression in the case of **Ghana Independent Broadcasters Association V. The Attorney-General & Anor Suit No. J1/4/2016** (Unreported). Benin JSC gave judicial approval to the holding of *New York Times Co v. United States (The Pentagon Papers' Case)*¹⁴ that

“Any system of prior restraints of expression comes to this court with a heavy presumption against its constitutional validity... the Government thus carries a heavy burden of showing justification for the imposition of such a restraint.”

6.5 The Plaintiff therefore contends that it is the 1st Defendant and 3rd Defendant who has the evidential burden to justify the basis of this prior restraint of having access to justice only upon paying the 30% of the disputed tax or 25% of the disputed tax in the case of the High Court.

7.0 Plaintiff's Legal Arguments

7.1 The fundamental theme of the Plaintiff's case is on the **Presumption of Innocence** and **Freedom of Access to Court of Law which in effect amounts to access to justice**. The Plaintiff deems it appropriate to set out the jurisprudential basis of this access to the Court, the international obligations of access to justice and the obligations in our modern constitution.

- **Presumption of Innocence**

7.2 Article 19(2)(c) of the 1992 Constitution provides that “a person charged with a criminal offence is presumed innocent until proven guilty or has pleaded guilty”

¹⁴ 403 U.S 670 (1971)

7.3 **The Universal Declaration on Human Right (UDHR)**¹⁵ provides that *“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”*

7.4 The presumption of innocence is also expressly regulated in **Art. 66 of the Rome Statute of the International Criminal Court**, according to which *“Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.”*

7.5 Respectfully My Lords, this principle is anchored in our rule of law and respect of fundamental human right.

7.6 Although Article 19(2)(c) of the 1992 Constitution is specifically on a charge of a criminal offence, it can be extended to quasi-criminal offences and penalties such as tax liabilities .

7.7 Apart from Tax involving the Commissioner raising assessments on a taxpayer, it has been defined to include *penalty* in Section 9(1) of Act 915 (as amended).

7.8 **Sections 70 to 86** of the Revenue Administration Act 2016, Act 915 deal with offences which may be imposed on a person flowing from failure to comply with the tax law among other things. As a consequence, an offence could involve the Commissioner-General imposing interest and penalties on a taxpayer who has

¹⁵ See article 11(1) Universal Declaration of Human Rights (UDHR) 1948, See also, Section 11(d) of the Canadian Charter of Rights and Freedoms, 1982, Article 6.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe all enforces the presumptive innocence of a person charged with any offence.

The principle of the presumption of innocence finds a first legal Regulation 6 of the famous Declaration of the Rights of Man and of the Citizen. It happened on August 26, 1789, when the Marquis of Lafajette, in front of the Estates-General, read the Declaration that represented the spirit of independence brought by the French volunteers in the North American War of Independence

genuine dispute against the assessment and would have to raise tax objection with the Commissioner-General.

7.9 My Lords, to ask a taxpayer to pay 30% of the disputed tax is akin to saying the taxpayer is 30% culpable of the tax in dispute.

7.10 My Lords, it is submitted that regarding imposition of penalty, the burden of proof is the Commissioner-General

“With respect to the imposition of a penalty, including in proceedings on appeal under or for the recovery of a penalty, the burden of proof is on the Commissioner-General to show non-compliance with the provisions of the tax law.¹⁶”

7.11 It is imperative that taxpayers should have unfettered access to objection and be presumed innocence until the final determination of the fact and/or legal issue in dispute.

7.12 In *A.P., M.P. and T.P. v. Swiss and E.L., R.L., and J.O.- L., v. Swiss*, the taxpayer’s heirs were charged with fees charged to the taxpayer. The European Court of Human Rights (ECtHR) considered that according to the principle of the individuality of the sanction, criminal charges end with the death of the subject; therefore, a fee imposed on the heirs was a violation to their right to presumption of innocence.

¹⁶Revenue Administration 2016, Act 915 Section 92(2)

7.13 My Lords, the burden of proof¹⁷ on a taxpayer in a tax matter does not equate to being guilty. It is to allow the taxpayer to provide information to a Revenue Authority to show his or her compliance with the tax law.

7.14 The High Court is to provide a shelter to citizens when their legal right crystallises or are dissatisfied with an administrative body or tribunal. However, **Order 54 rule 4(1) (2) of C.I. 47** imposes a condition on the taxpayer to pay 25% of the disputed tax before the tax appeal can be entertained.¹⁸

7.15 By the same token, the requirement alludes to the taxpayer being guilty as charged and removes the presumption of innocence in the light of the Constitution.

7.16 In the case of *Fan Milk Limited v Commissioner-General, Ghana Revenue Authority (Suit No. CM/Tax/0004/18) Unreported*, the 1st Defendant argued that the tax appeal should not be entertained by the High Court because 25% payment of disputed tax had not been paid. The appellant had already paid the 30% of the disputed tax. Her Lordship Mrs Angela Mensah-Homiah J. (as then was) ruled that the combined effect of Section 42(5)(b) of Act 915 and Order 54 rule 4(1)(2) is not for the taxpayer to pay 55% of the disputed tax. She went further to say

“If no objection is filed before the CG, a person who files an appeal pursuant to Order 54 rule 4(1) must pay 25% of the disputed tax. However, where there is evidence that an appellant has previously paid 30% of the disputed tax before lodging an appeal before the CG, the said

¹⁷ Revenue Administration Act 2016, Act 915 (as amended) section 92(1).

¹⁸ With the Amendment of the Act 915, an appeal from the Commissioner-General will now lie at the Independent Tax Appeals Board which is yet to be operationalised by the Ministry Finance.

payment must be considered in determining whether Order 54 rule 4(1) of C.I. 47 has been complied with”

- 7.17 The combined effects of Section 42(5)(b) of Act 915 and Order 54 rule 4(1) do not respect the presumption of innocence.
- 7.18 These provisions have inhibited a person’s right of access to court, participation in the administration of justice and the presumption of innocence until proven or pleaded guilty hence inconsistent with the Constitution.
- 7.19 My Lords, the relationship between the Pay Now and Argue Later and access to the court since independence have resulted in fewer tax cases which is not good for our tax jurisprudence.

List of Tax Cases	
1	Development Data and 2 Others v National Petroleum Authority & Another Suit No. BC 553/2009 (Unreported)
2	Scancom Ltd, Ghana Telecom Co and Millicom Ghana Ltd v. The Commissioner General, Ghana Revenue Authority Suit No. FTRM 76/12, FTRM 77/12, FTRM 78/12 (Unreported), High Court
3	Fan Milk Limited v Commissioner-General, Ghana Revenue Authority Suit No. CM/Tax/0004/18 Unreported
4	Taylor & Taylor Co. Ltd v Ghana Revenue Authority Suit No. Tax 01/15 dated 21 December 2017
5	Beiersdorf Ghana v Commissioner General of the GRA
6	Kwasi Afrifa v Ghana Revenue Authority Suit NO C12/149/19
7	Bishop Daniel Obinim v GRA and Ecobank
8	Republic v GRA (ex parte: Export Finance Co. Ltd and Universal Merchant Bank
9	Unilever Ghana Limited v Commissioner General of the GRA Suit No. CM/TAX/0683/2020

10	Kwasi Nyantakyi Owiredu v Commissioner-General of the GRA Suit No. CM/Tax/0142/2019 (Unreported)
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7.20 My Lords, the above cases do not suggest that Ghanaian taxpayers are not litigious but simply that the Pay Now and Argue Later rules do not give taxpayers the right to defence or raise objection at the commissioner-General’s level or a tax appeal at the High Court.

7.21 It is our humble submission that Section 42(5)(b) of Act 915 and Order 54 rule 4(1)(2) of C.I. 47 sins against the Constitution.

- **Jurisprudential basis of Access to Justice**

7.22 Modern Anglo-American legal systems are grounded in seventeenth- and eighteenth-century concepts of natural law and individual rights theory.

Natural law theory recognizes three categories of “absolute rights”: the rights to (1) personal security, (2) personal liberty, and (3) private property.

7.23 These rights have been recognized as either being natural in origin, intrinsic to the individual, or granted by society in exchange for the rights and benefits of society itself—including **the right to protection of such rights**. In one characterization or another, these core or absolute rights have been articulated and re-articulated in every statement of individual rights and freedoms from the *Magna Carta* to the Declaration of Independence, to the United Nations Declaration of Human Rights, and to more recent statements of the inherent rights of individuals. (see also the International Convention on Civil and Political Rights) ICCPR & the rest).

7.24 In the Anglo-American experience, protection of these absolute rights has served as the expressed *raison d’etre* of a constitutional government. Blackstone explained it this way: “The first and primary end of human laws is to maintain and regulate [the] *absolute* rights of individuals . . . the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute . . . ”¹⁹

¹⁹ William Blackstone, Commentaries on the Laws of England Vol. 1: Of the Rights of Persons 120-121 (U. Chicago Press 1979) (1765).

7.25 While natural law theory recognized three areas of “absolute rights,” the maintenance and protection of which is the “first and primary end of human laws,” it was also understood that such rights are meaningless if there is no means for their enforcement. Consequently, the Anglo-American tradition recognized a class of subordinate rights, the primary purpose of which is to enable the individual to protect and enforce his or her primary or absolute rights. Among these subordinate rights is the right to seek and secure relief in the courts. As **Blackstone** explained in his Commentaries:

A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man’s life, liberty, and property, *courts of justice must at all times be open to the subject and the law be duly administered therein*. The emphatic words of *Magna Carta*, spoken in the person of the king, who in judgment of law (says Sir Edward Coke) is ever present and repeating them in all his courts, are these; “*nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam*: [To no man will we sell, or deny, or delay, right or justice] and therefore every subject,” continues the same learned author, “for injury done to him *in bonis, in terris, vel persona*, by any other subject, be he ecclesiastical or temporal without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.”

7.26 The scope of the right of access to courts: “in its simplest characterisation, it is a right of access to the court established by the people through their government for the fair and proper administration of justice.”²⁰ It also “means that the justice available to citizens through the courts of the state must be administered openly and that it must be equally available to all.”²¹ The essential purpose of judicial administration is to ensure the “fair and proper administration of justice”. In the context of court proceedings, this purpose is discharged by ensuring that justice is done in those cases and controversies that are presented to the court. There are two sides to the concept of access to justice: the first is the ability to walk into the court and initiate a cause of action and secondly ability to effectively participate in proceedings. This second aspect is not the focus of this submission.

²⁰ Ibid at page 394

²¹ Ibid at page 395

7.27 Thus, that access for the sake of access to the court must be first provided, with then a corresponding ability of the parties to meaningfully participate in the system to the end that justice is capable of being done.

- **International Regime on Access to Justice**

7.28 The right to an independent, competent and impartial tribunal is set forth in the Universal Declaration of Human Rights.²² Article 10 of the UDHR provides that:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

A fundamental feature of **Article 10** is the right to be presumed innocent until proven guilty, and the right not to be compelled to testify against yourself. The right to a fair trial has been accepted beyond dispute by every country.²³

7.29 In addition, there are International Conventions such as the **Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels**, which guarantees access to justice and Ghana is a signatory of this Declaration of the United Nations. **Article 14** of the **Declaration** states that:

“We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid”.

7.30 Article 2(3) of the **International Covenant on Civil and Political Rights** mandates each party:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have effective remedy, notwithstanding

²² 1948 Universal Declaration of Human Rights (UDHR)

²³ <https://www.standup4humanrights.org/layout/files/30on30/UDHR70-30on30-article10-eng.pdf>

that the violation has been committed by persons acting in an official capacity.

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy.

(c) Human Rights Committee's General Comment 31 on the right of access to court:

Article 14(1) of ICCPR reads in material part that:

"In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent and impartial tribunal established by law."

7.31 The **European Convention of Human Rights (ECHR)** equally guarantees access to a court in the Convention system and this was affirmed in **Golder v. UK**²⁴ where the Court qualified the right of access to court as 'an inherent aspect of the safeguards enshrined in Article 6 of ECHR. Even though Article 6 focuses on fair trial, the courts are mindful of the importance and subsequent relationship of access to court and fair trial.

- **Comparative Countries on Access to Justice**

7.32 The right of access to justice has been considered in plethora of authorities under American Law. This right of access is fundamental and has been affirmed and reaffirmed throughout the course of the nation's and Washington State's history. Chief Justice John Marshall observed in the landmark case of **Marbury V. Madison**²⁵ that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."²⁶ A century later, the Supreme Court declared that "[t]he right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other

²⁴ ECHR 21 FEB (1975)

²⁵ 1 Cranch 137 1802

²⁶ Marbury v. Madison, 5 U.S. 137, 163 (1803).

rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.”²⁷

7.33 The Constitution of South Africa and its Bill of Rights provide a clear right of access to court in section 34. It states that:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

7.34 According to the Constitutional Assembly’s **“Theme Committee 4 Fundamental Rights-Report and Explanatory Memorandum on the Right of Access to Courts”**, the nature of the right involves an obligation of the state “to enforce this right by ensuring that every person has access to impartial and independent courts and tribunals for the settlement of disputes and that the jurisdiction of the courts is not excluded by law.” In terms of application of the right, the Constitutional Assembly held that “the right operates vertically against the state in the sense that the state is required to ensure access to a court of law. The right will operate horizontally to ensure that both natural and juristic persons (i.e. non-state actors) submit their dispute to courts of law for determination.”²⁸

7.35 Under South African Law the right of access to courts invokes more than being able to have access to legal services or the provision of legal aid provided by the state. This means that the concept of access to justice is a much broader right and is linked to social justice, gender justice, economic justice and environmental justice...[It] unlocks all the other human rights that are entrenched in the Bill of Rights, allowing these rights to be respected and protected. The principle of the right of access to justice lies in the fact that it enables everyone to enjoy success to all 27 human rights found in the Constitution. This is an important principle for everyone to appreciate especially in a society like ours that is plagued by high levels of poverty, deep inequality and high unemployment. Further, access to justice enables people who are more vulnerable to socio-economic hardships, discrimination and general human rights abuses to access and enforce their inalienable human rights.²⁹ (South African Human Rights Commission).

²⁷ Chambers v. Ohio R.R. Co., 207 U.S. 142, 148 (1907).

²⁸ <http://www.justice.gov.za/legislation/constitution/history/REPORTS/tc4-ACCESS.PDF> Page 3.

²⁹ <https://www.sahrc.org.za/home/21/files/Access%20to%20Justice%20Pamphlet.pdf>

- **Access to Justice in Ghana**

7.36 Ghana has a Bill of Rights in the Constitution, 1992 which sets out our basic human rights, which form the cornerstone of our democracy and rule of law. A cursory look at the human rights provisions under the Bill of Rights of the Constitution i.e. Chapter 5 reveals that no express mention is made of the right of access to court.

An implied right of access to court is found in article 19(13) of the Constitution on the right to a fair hearing within a reasonable time:

“An adjudicating authority for the determination of the existence or extent of a civil right or obligation shall, subject to the provisions of this Constitution, be established by law and shall be independent and impartial; and where proceedings for determination are instituted by a person before such an adjudicating authority, the case shall be given a fair hearing within a reasonable time”.

7.37 **Article 23** on Administrative Justice guarantees a full right of access to court: It provides:

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal.

7.38 Protection of Rights by Courts is stated under Article 33(1):

Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.

Thus, the notion of right to a fair trial is a much more common expression than the notion of access to justice under Ghana’s legal jurisprudence. The term does not, for example, feature expressly in the Constitution of Ghana, 1992. However,

this notion could further be inferred in the Constitution per Articles 2(1) and 130(1).

A cardinal principle of the Rule of Law is equality before the law; that all persons are equal before the law and that disputes between the government and citizens are settled in the ordinary courts according to the laws of the state. **Article 17(1) of the Constitution 1992** guarantees all persons in Ghana equality before the law. This right guaranteed under the constitution gives each person in Ghana equal access to the courts in order to prosecute or defend a claim or a violation of a right. This right is guaranteed because, justice emanates from the people of Ghana and consequently it belongs to the people of Ghana and it is “administered in name of the Republic by the Judiciary”; the Judiciary being independent and subject only to the 1992 Constitution.

In the article by Jeremy McBride on *‘Access to Justice for Migrants and Asylum-seekers in Europe’*, *CDCJ (2009) 2, para 6*, access to justice was described as that concerned with a means for securing vested rights, particularly through the use of courts and tribunals’. The notion of **‘procedural access to justice’** therefore mainly means being able to use a procedure before a court. Following this approach, one likely focuses on the obstacles people face when trying to bring a case before a court, such as having no access to legal aid and any other impediments introduced by the executive or legislature.

7.18 The Constitution further goes ahead to place an obligation on the state to ensure access to justice in terms of a **duty of the state to achieve its social objectives**.

Article 37(2) mandates the State to enact appropriate laws to assure—

“(a) the enjoyment of rights of effective participation in development processes including rights of people to form their own associations free from state interference and to use them to promote and protect their interests in relation to development processes, rights of access to agencies and officials of the State necessary in order to realise effective participation in development processes; freedom to form organizations to engage in self-help and income generating projects; and freedom to raise funds to support those activities;

(b) the protection and promotion of all other basic human rights and freedoms, including the rights of the disabled, the aged, children and other vulnerable groups in development processes”.

Article 37(3) further states that:

“In the discharge of the obligations stated in clause (2) of this article, the State, shall be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes”.

7.19 The Plaintiff contends that under the directive principles of state policy particularly Article 35(3) of the Constitution 1992, citizens are entitled to access public facilities and services which can be read to include the courts without any undue fetter or impediment. **Article 35(3)** provides:

“The State shall promote just and reasonable access by all citizens to public facilities and services in accordance with law.”

8 Legal Issue

8.1 My Lords, the main legal issue to be determined by this Honourable Court is whether upon a true and proper interpretation of Articles 2(1), 3(4), 17(1), 125(2), 19(2)(c), 33(1), 33(5), 41(b), 130(1), 132, 133(1), 140, of the 1992 Constitution, a taxpayer’s appeal/objection of a tax decision cannot be heard or looked into by the Court or the GRA because the taxpayer has not paid 30% or 25% of the amount of tax assessment for which the same amount is in dispute.

9 Interpretation and Effect of the Offending Provision

9.1 This Court has adopted and applied the modern purposive approach to the interpretation of statutes. The learned author *Edzie, Modern Purposive Approach to Interpretation in Ghana (2015)* at page 421 has provided the basic rules in the interpretation of statute as follows:

“a) Interpretation to be as near as possible to the purpose(s) at the core of the text.

b) Interpretation of the statute or particular part of it is at first instance to be sought for from the text itself, taking into account of its proper context.

c) The statute or part therefore is to be construed as a whole.

- d) *The court or judge must give effect to the ordinary or where appropriate the technical meaning of the words in the general context of the statute and if the application of the words in their ordinary sense will procure a result that is contrary to the purpose(s) at the core of the statute, the court or judge may apply them in the secondary meaning they are capable of bearing in the context.*
- e) *The court or judge has limited power in the appropriate circumstances to read words which he considers to be necessarily implied or inferred from the words which are already in the statute.*
- f) *The court or judge has limited power in appropriate circumstances to add to, alter or ignore statutory words in order to prevent the provision from being absurd.”*

9.2 Thus, in **Customs, Excise and Preventive Service v. National Labour Commission & Attorney General**,³⁰ this Honourable Court held that CEPS is a security organisation comparable to those institutions listed in Section 1 of the Labour Act, 2003 (Act 651). Hence, its workers could not form a trade union.

9.3 The Plaintiff invites this Honourable Court to apply the rule of construction based upon the four corners of the Act – *ex visceribus actus* in accordance with the modern purposive approach to interpretation. Thus, it was stated by Justice Coke in the **Lincoln College case**,³¹ as follows:-

“The office of a good expositor of an Act of Parliament is to make construction on all parts together, and not of one part only by itself, - for no one can rightly understand any part without perusing the whole again and again.”

9.4 Justice V.C.R.A.C Crabbe, in his invaluable book, **“Understanding Statutes”** at page 60 listed the following as the factors a court of law must look for when construing an Act of Parliament.

- a. *“A Court of law will not be astute to find out ways in which to defeat the object of the Act, see Smith’s case (In re London Marine Insurance Association)³²”*

³⁰ [2009] SCGLR 530

³¹ (1595) 3 Co. Rep. 586

³² (1869) LR 4 Ch. App. 611 at 614

b. A court of law will not only look at the language of the preamble or of any particular section but at the language of the whole Act. (Bywater v Branding³³).

c. A court will look at the context, the collocation and the objects of the words relating to the matter in hand in order to interpret the meaning of the words according to what would appear to be the meaning intended to be conveyed by the use of the words. Rein v Lane.³⁴

d. A court of law will not admit the principle that abstract justice would require or justify a departure from the established rule of construction. See Exp. Sepulchre's.³⁵

e. A court of law will not, in the treatment of two consecutive subsections in an Act, isolate one from the other and give effect to each without regard to the other unless it is absolutely necessary."

9.5 As has been indicated above, Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 and Order 54 rule 4(1)(2) provide clearly that an appeal shall not be entertained by the Commissioner-General of the GRA and/or the Court unless the 30% or 25% of the disputed amount has been paid.

9.6 In the Plaintiff's view, the whole tenor of Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 and Order 54 rule 4(1)(2) of C.I. 47 wherein the word "shall" is employed, invariably leads to the conclusion that the said provision is purposefully designed to curtail the discretionary power vested in the courts by the Constitution, and administrative bodies to give fair hearing to all manner of persons. To this end, the offending provisions impede a taxpayer's right to access to justice and right to defend an action brought against him or her.

³³ (1828) 7 B & C 643 at p. 660

³⁴ (1867) LR 2 QB 144 at p. 151

³⁵ (1864) 33 LJCH 372 at 375

9.7 The use of the word “shall” denotes an obligation as defined by section 42 of the Interpretation Act, 2009, (Act 792), which provides: “In an enactment the expression “may” shall be construed as permissive and empowering and the expression “shall” as imperative and empowering.”

9.8 My Lords, it is the Plaintiff’s view that there is no such exception provided by the Commissioner-General to any person as at now and if the language employed in the context of the word “shall” is properly construed, it is seen as a fetter on a person’s right to have dealings with the Court, then there may be a time where few cases may be allowed to be filed in the Courts of Ghana. It is the Plaintiff’s case that the word “shall” is intended to prohibit a taxpayer’s access to the Courts and therefore an unlawful addition to the constitutional limitations carefully circumscribed under Article 2(1).

The word “shall” constitutes a constitutional infraction designed to prevent access to justice, which in principle is enshrined in the Constitution through various articles such as articles 2(1), 17(1), 125(2), 19(2)(c), 33(1), 33(5), 130(1), 132, 133(1), 140, of the 1992 Constitution.

My Lords, by the provisions of Section 42(5)(b) of Act 915 and Order 54 rule 4(1)(2), there is no contention that the GRA and the Courts are enjoined to sacrifice justice of the 30% and 25% respectively of the disputed amount. The 30% or 25% is unsupported, arbitrary and presumes that the taxpayer is guilty before being heard by the GRA or the Court.

Section 42(5)(b) of Act 915 and Order 54 rule 4(1)(2) suggest that a person must pay 30% or 25% of the total assessment raised by the GRA even if the assessment is final and it is littered with errors in the notice of assessment.

9.9 Respectfully My Lords, tax is very important for every country, however, a taxpayer should not be forced to admit 30% or 25% of a liability for which the said amount is in dispute.

Tax law is part of our civil justice system and therefore mandatory 30% or 25% required before a challenge of a tax decision can be made is discriminatory. Civil cases can be appealed without an arbitrary amount imposed by the administrative body or by the Court.

Equality before the law includes access to courts or tribunals or administrative bodies. The right to prosecute or defend a claim or a violation of a right.

If a taxpayer does not have money to pay the 30% or 25% aforementioned, then the decision of the Commissioner-General becomes conclusive. The taxpayer must pay the total amount of the tax assessment. Consequently, it crystallises into tax debt after 30 days of failure to pay the said amount.

The Commissioner-General can use the enforcement measures available to the GRA to enforce the tax liability when the objection window is closed.³⁶

The simple effect of this law is that before a taxpayer can access justice in Ghana the taxpayer must obey the 'Pay Now Argue Later' rule. If the person fails to comply, the appeal shall be dismissed. In much brevity, NO 30% or 25% [of disputed tax paid] NO HEARING.

Constitutional Right to Access Justice

9.10 The courts in Ghana have given the position of the law with regards to access to justice. In **Labone Weavers Enterprises Ltd. v. Bank of Ghana**³⁷ Edusei J (as he then was) held that *“every person had an unimpeded access to the law courts of this country, and this basic and fundamental right could only be taken away by an express provision of a Decree or an Act of Parliament provided that Act did not run counter to any provisions of the Constitution that the country might have”*.

³⁶ See Revenue Administration Act, 2016, Act 915 (as amended) ss. 51 to 57. The CG can garnishee the bank accounts of the taxpayer when the tax decision is deemed as final.

³⁷ [1977] 2 GLR 156

9.11 Thus, save as instances where court exercises its power to strike down pleadings pursuant to Order 11 Rule 18 of High Court (Civil Procedure) Rules, 2004 (CI 47) on account that the pleading discloses no reasonable cause of action or defence; or is scandalous, frivolous or vexatious; or it may prejudice, embarrass, or delay the fair trial of the action; or it is otherwise an abuse of the process of the Court, any person with a cause of action has an unfettered right to bring an action in vindication of his right. (See also the case of **Afeke v. Agble**.³⁸)

9.12 As further confirmation of this legal position, it is trite learning that any person possessed with a cause of Action has the right to institute a court action. The procedural rules governing all the courts make this proposition abundantly clear. It is provided in **Order 4 r 1 and 2 of the High Court Civil procedure rules, 2004, CI 47** thus

Rule 1—Right to take Proceedings

(1) Subject to these Rules, any person may begin and carry on proceedings in person or by a lawyer. (Emphasis is mine).

Rule 2—Joinder of Causes of Action

(1) Subject to rule 4 of this Order, a plaintiff may in one action claim relief against the same defendant in respect of more than one cause of action.

9.13 In case of ***In Re Presidential Election Petition; Akufo-Addo, Bawumia & Obetsebi-Lamptey (No.1) v. Electoral Commission (Mahama & National Democratic Congress Interested Parties) (No. 1)***³⁹ per Akoto-Bamfo JSC held that: “Generally, a plaintiff who conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant and cannot be compelled to proceed against other persons whom he has no desire to pursue”.

9.14 Who a person is, has been defined above in section 46 Act 792 supra. Hence, the argument can be made that there must exist no restriction on a person who possesses a cause of action and seeks a redress in court. *With regards to the position of the*

³⁸ [1987-88] 2 GLR 572

³⁹ [2013] SCGLR (Special Edition) at page 12

law, one cannot have an opportunity to enter the room of justice unless the person has paid 30% of the tax which he disputes.

10 Implication of the Law on Access to Justice

10.1 The implication of this law in various facets of our legal system further reveals the violating nature of access to justice including the jurisdiction of the court.

- ***Condition Precedent***

10.2 Respectfully my Lords, the law is suggesting a condition precedent before one can object to a tax decision or a tax appeal filed in the courts can be entertained. This is because according to the case of **Boyefio v. NTHC Properties Limited**,⁴⁰ *“where the law was clear that if an enactment had prescribed a special procedure by which something was to be done, it was that procedure alone that was to be followed”*. It is the Plaintiff’s respective view that the legal effect of these provision caws a taxpayer to admit liability and possibly negotiate for instalment.

10.3 My Lords, a condition precedent introduced to access the Courts of Ghana frowns upon Article 33 of the Constitution of Ghana, 1992 as it denies the right to enforce one’s human rights enshrined under Chapter 5 of the 1992 Constitution of Ghana. However, **Article 1(2) of the Constitution, 1992** provides *this Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.*

10.4 A review of the provision shows that the framers of the constitution did not place any condition precedent before invoking the jurisdiction of the court.

Under Article 2(1) “A person who allegesmay bring an action in the Supreme Court...”

Under Article 33 (1) “Where a person who alleges thatmay apply to the High Court for redress.”

⁴⁰ [1997-1998] 1 GLR 768 at page 770

Under Article 48(2) "A person aggrieved by a decision of the tribunal ... may appeal to the Court of Appeal.."

Under Article 280(2) "Where a commission of inquiry makes adverse finding against any person, ... an appeal shall lie as of right ...to the Court of Appeal."

Thus, the framers of the Constitution gave a "person" an automatic right to invoke the jurisdiction of the High Court, Court of Appeal and Supreme Court in these instances without any condition precedent.

10.5 Date-Bah JSC (as he then was) in **Adofo v. Attorney-General & Cocobod**⁴¹ was also against individuals being hindered from having access to the Court to seek redress for abuse of fundamental human rights. He stated that at page 51 of the report: *"The unhampered access of individuals to the courts is a fundamental prerequisite to the full enjoyment of fundamental human rights. This court has a responsibility to preserve this access in the interest of good governance and constitutionalism. Unhampered access to the courts is an important element of the rule of law to which the Constitution, 1992 is clearly committed. Protection of the rule of law is an important obligation of this court."*

He added that *"A further reason for prohibiting the barring of access to the courts is that it brings into question the very function of the judiciary. Under our Constitution, 1992 the judiciary is given the role of a watch-dog against abuse or excess of power by the executive or the legislature. This function of the judiciary as a third pillar of responsible and accountable government would be undermined by the ouster of the jurisdiction of the courts in any matters relating to justiciable rights."*

- **Implication on Enforcement of Human Rights**

10.6 Chapter 5 of the Constitution 1992 guarantees the rights of all persons in Ghana. The protection of human rights is a cardinal feature of democratic states and under

⁴¹ [2005-2006] SGCLR 42

Chapter 5 of the constitution, there are elaborate provisions on human rights which are insulated from legislative and executive manipulation and abuse. These rights are fundamental because they have a special status in the sense that they should not be violated either at all or can only be interfered with in extreme circumstances; such extreme circumstances being a state of emergency.

10.7 My Lords, Article 33(1) of the 1992 constitution provides:

33(1). Protection of rights by the Courts

“Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress”.

10.8 Thus, where a person’s fundamental rights are or have been threatened to be infringed upon, such a person shall have the undeniable right to institute an action to enforce his right in the High court. Where an action is commenced pursuant to Article 33(1), the High Court may “issue such directions or order or writs including writs or order in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as it may consider appropriate for the purposes of enforcing or securing the enforcement of any provisions on the fundamental human rights and freedoms to protection of which the person is entitled”.

This proposition is supported by the case of **Adjei-Ampofo (No 1) v. Accra Metropolitan Assembly & Attorney General (No. 1)**⁴² where it was held that:

The High Court’s enforcement power is, therefore, to be exercised within the scope of Article 33(1), the language of which is clear.

Hence the emphasis we must not lose sight of in Article 33(1) is the phrase “in relation to him.” In other words, in the High Court, the actual,

⁴² 2007-2008] 2 SCGLR 613

ongoing or threatened contravention of the fundamental human rights or freedom must be in relation to the plaintiff and no one else.

Where the right of a person is being infringed upon; for example, where the person is subjected to torture or other cruel, inhuman or degrading treatment or punishment which is in clear violation of Article 15 of the 1992 Constitution, such a person must be given full access to the administrative tribunal or court for a redress to abate such violation of the constitution.

10.9 Any attempt by any Act of Parliament or even an executive fiat to place procedural impediments in the way of such a person with a cause of action must be resisted by this Court with all the forces of law it deserves. Thus, the pay now, argue later rule to prevent persons with legitimate grounds from objecting a tax decision or being heard by the Court must be resisted by this court and declared unconstitutional. In the case of **Ghana Independent Broadcasters Association v. The Attorney-General & Anor Suit No. J1/4/2016** (Unreported) Benin JSC held: *“As stated in the case of New York Times Co v. United States (The Pentagon Papers’ Case) 403 U.S 670 (1971): “Any system of prior restraints of expression comes to this court with a heavy presumption against its constitutional validity... the Government thus carries a heavy burden of showing justification for the imposition of such a restraint.”*

Every individual shall have the right to have his cause heard. This comprises:

(a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.....

In *Amidu v President Kufour*⁴³ Acquah JSC (as he then was) said at page 100: *“... where it is alleged before the Supreme Court that any organ of government or an institution is acting in violation of a provision of the Constitution, the Supreme Court is duty bound by articles 2(1) and 130(1) to exercise jurisdiction, unless the*

⁴³ [2001-2002] SCGLR 86

Constitution has provided a specific remedy, like those of Articles 33 and 99 for dealing with that particular violation. It follows therefore that neither individual nor creature of the Constitution is exempted from the enforcement provision of Article 2 thereof. No one is above the law. And no action of any individual or institution under the Constitution is immune from judicial scrutiny if the constitutionality of such an action is challenged.”

The Plaintiff contends that the requirement of the pay now and argue later rule as a condition before tax objection or tax appeal to the Court can be made clearly undermines the fundamental principles of safeguarding the constitution which articles 2(1) and 130(1) of the Constitution 1992 stands for, as well as right and duty of a citizen to defend the constitution under Articles 3(4) and 41(b). The Plaintiff further contends that framers of the Constitution 1992 did not envisage a situation where pay now and argue later will be sine qua non for constitutional litigation in Ghana.

- **Affront to the Spirit of the Constitution**

The Plaintiff contends that the provision under the microscope of this Honourable is an affront to the Spirit of the Constitution. In *Tuffour v Attorney General*,⁴⁴Sowah JSC (as he then was) stated that:

“a written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people’s search for progress. It contains within it their aspirations and their hopes for a better and fuller life. The Constitution has its letter of the law. Equally, the Constitution has its spirit ... Its language, therefore, must be considered as if it were a living organism capable of growth and development ... A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time.”

⁴⁴ [1980] GLR 637 at 647-648

It is against the spirit of the Constitution 1992 to demand money (pay now and argue later) as a qualification for enforcing fundamental rights of citizens. Wood CJ (as she then was) in *Brown v Attorney-General*,⁴⁵ of the report that the “spirit of the 1992 constitution, a judicially established aid to interpretation, is embodied not only in the actual texts under consideration, but also the goals and objectives as captured in the preamble, the directive principles of state policy and indeed the entire document”.

The Plaintiff further contends that any attempt by any Act of Parliament or an Executive fiat to place procedural impediments in the way of a person with a cause of action must be resisted by this Honourable Court. The attempt by Section 42(5)(b) of Act 915 (as amended) and Order 54 rule 4(1)(2) of C.I. 47 to prevent persons who does not have the money to comply must be resisted by this court and declared unconstitutional. In *Martin Kpebu (No.2) v. Attorney-General (No.2)*,⁴⁶ opined: “Indeed any law that violates any of the Chapter 5 rights under the Constitution is itself unconstitutional.” Similarly, in *NPP v. IGP* supra, per Hayfron-Benjamin JSC at page 500 stated: “...in other words the citizen’s freedoms may be restricted by law on the grounds stated in the constitution, 1992 but they cannot be denied. Any such denial will be unconstitutional and void...”

In the locus classicus case of *Tuffuor V. Attorney-General*,⁴⁷ the Court pronounced conclusively that the very first principle that is enshrined in the Constitution is in article 1 (2) which provides: “ This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void and of no effect, this is the constitutional criterion by which all acts can be tested and their validity or otherwise established”.

⁴⁵ [2010] SCGLR 183 held at page 204

⁴⁶ [2015-2016] 1 SCGLR 171 Benin JSC at page 199

⁴⁷ *ibid*

11 Practical Argument

11.1 My Lords, the GRA is a human institution, and there is a high degree of a tax “decision” being fraught with errors or making mistakes.

11.2 At this stage it is important to examine what is assessment in the definition of “tax decision” and how they are determined under our tax system.

11.3 An “Assessment” is a determination of the amount of tax liability made under a tax, whether by the Commissioner-General or by way of self-assessment, and includes the matters identified in the Second Schedule.⁴⁸ In other words, it is calculating the amount of tax that a person is subject to or liable to pay to the Revenue Authority.

11.4 An Assessment under our system is grouped into *provisional assessment*; *self-assessment*; *adjusted assessment* and *pre-emptive assessment*.⁴⁹ These are discussed in turns:

- a) **Provisional Assessment:** This is when the Commissioner-general uses its best judgment to determine how much tax a person must pay in a tax year. In respect of this, the tax is determined based on a person’s prior year financial information available or in the case of a new company based on what the CG thinks is likely to be the tax for year. The CG is required to use his best judgment to make the assessment. The taxpayer must make quarterly instalment payment of the provisional assessment. The manner of making the determination is subjective.
- b) **Self-Assessment:** This is where the taxpayer (based on its budget financial information) estimates how much tax it is eligible to pay in a tax year. The taxpayer makes quarterly payment of the self-assessed. Every person is eligible to assess itself to tax in a tax year.⁵⁰
- c) **Adjusted assessment:** This is where the CG makes an assessment based on an available self -assessment or an assessment based on a tax return filed. Although the CG will make the assessment based upon the information

⁴⁸ Revenue Administration Act, 2016, Act 915 section 108.

⁴⁹ Revenue Administration Act, 2016, Act 915 sections 37 and 38

⁵⁰ This was not the case until the come into force of Income Tax Act 2015 on 1 September 2015. Prior to that self-assessment was limited to entities that by gazette had been permitted by the CG to do so. It was mainly companies with the Large Taxpayer Office (LTO) who used the self-assessment.

available, it hinges on best judgment as it is littered with subjectivity and value judgment.

d) **Pre-emptive assessment:** This involves the CG raises tax on a person in the following circumstances:

- Person is bankrupt or goes into liquidation or wound up
- The CG believes on reasonable grounds that a person is about to leave the country indefinitely or is about to cease business activity in Ghana
- A person has committed an offence under a tax law.
- A person failed to maintain adequate document for its business.

Here too, the CG will exercise judgment to determine the tax liability of the person.

11.5 My Lords, in making an assessment of tax, a person's income ought to be considered. Income is not defined in the municipal tax law. Income is a constructed idea, inherently driven by policy objectives and pragmatic concerns.⁵¹ Flowing from this, because income is a constructed concept, it allows us to better answer the question "what is income."

11.6 This point is fortified by Section 19 of the Income Tax Act 2015 Act 896 (as amended) to the effect that "*the timing of inclusions and deductions in calculating the income of a person during a basis period shall be made in accordance with generally accepted accounting principles*". Although financial statements are prepared in accordance with generally accepted accounting standards, it might be an obvious starting point for taxable profits, they do not offer a panacea for the problems of determining the tax base.⁵²

⁵¹ J.R. Brooks, "Definition of Income" 71 Tax Law Review 253 (2018) p.254

⁵² J. Freedman, "Accounting Standards: A Panacea? [2004] eJournal of Tax Research 71. Due to the fact that accounting principles (involves estimates and judgement) underpins accounts upon which tax returns are prepared from, it is not correctness of tax. The reason is estimates can sway the amount of tax due.

Full convergence of financial account and tax account cannot be achieved and should not be aimed.⁵³ In the light of this, any notion that there is one true 'profit' figure or tax will be an unhelpful oversimplification.

11.7 Respectfully, My Lord, it is manifest that there is no such thing as correct taxes assessment flowing from the above. That a taxpayer should not be prevented from legitimately challenging an assessment raised by the CG.

11.8 The GRA is motivated by the desire to meet targets and may in certain situations unprofessionally do its work and assess taxpayers to huge sums of tax which 30% will be impossible to meet. If the taxpayer fails to object, My Lords, the amount becomes tax debts and will be subject to the enforcements measures available to the CG:

11.9 My Lords, we have set out the Revenue Targets of the GRA below. The quest for achieving a yearly target, can push the GRA to act unprofessionally and impose assessments which are gargantuan to the extent that a taxpayer may not be able to object by reason of the pay now and argue later rule. In this sense, the taxpayer is cowed to accept the tax liability. Exceeding revenue targets provides pecuniary benefits to the CG and the staff of the GRA. Should we put pecuniary benefits at the altar of justice?

Fiscal Year	Revenue Target GHS (billions)	Revenue Achieved GHS (billion)
2015	21.57	22.19
2016	29.00	27.00
2017	33.43	32.30
2018	39.80	39.00
2019	43.00	43.10
2020	42.77	53.39
2021	60.00	

***Source: Ministry of Finance**

⁵³ J. Freedman, "Financial and Tax Accounting: Transparency and 'Truth'" University of Oxford Faculty of Law Legal Studies Research Paper Series Working Paper No 02/2008

My Lords, these human tendencies points to the fact that the tax system should be fair so that taxpayers may asserts their rights. Asking for 30% of the disputed tax before you can mount a challenge of a tax decision is not consistent with the Constitution.

The GRA is an administrative body. It assesses tax and the taxpayer is obliged to accept 30% of the liability before it can complain. It is our considered opinion that it amounts to the GRA being a judge in their own case. The likelihood of the GRA closing up on their own errors after the payment of the 30% is high. In Practice, sometimes, they relax after the payment of the 30% and the outstanding objections can be pending for over two years.

12 How Countries Have Dealt with Pay Now and Argue Later Rule

- 12.1 Most commonwealth countries which had the pay now and argue later rule in their tax systems have taken steps to remove these provisions.
- 12.2 The pay now argue later applies to only objections respect to Value Added Taxes, Sales Tax, Customs Duties.⁵⁴
- 12.3 The reason is that these taxes are being collected by the taxpayer (vendors) on behalf of the States. Custom duties are assessed on the value of the goods by the Revenue Authority directly.
- 12.4 Unless income tax which is driven by value judgement. As a result, availability of information to the Revenue Authority is key.
- 12.5 In view of the fact that there is nothing like 'correct tax' when it comes to income tax according to Professor Judith Freedman (2020).⁵⁵
- 12.6 Effective tax administration is what most international organisation are pushing for in tax systems.⁵⁶
- 12.7 In South Africa, they have a pay now argue later rule in respect of indirect tax, not income tax.
- 12.8 In *Metcash Trading Ltd v South African Revenue Service Commissioner*⁵⁷

The Commissioner assessed Metcash to VAT under the Value Added Tax Act 1991 s.36(1) following dissatisfaction with the returns submitted by M between

⁵⁴ Some jurisdictions with the pay now and argue later limits to indirect taxes. For example, India, South Africa.

⁵⁵ In a lecture delivered at Oxford University in September 2020

⁵⁶ <https://www.oecd.org/gov/regulatory-policy/45424233.pdf>

⁵⁷ (63 SATC 13); [2000] 11 WLUK 764

July 1996 and June 1997. Metcash was required to make an immediate payment under s.36(1), with any dispute being left to subsequent determination by the Commissioner or on appeal to the Special Income Tax Court. The Commissioner refused Metcash's objection to the assessment and gave notice for payment with summary payment in default under s.40(2)(a), following which the assessment could not be challenged by virtue of s.40(5). Metcash complained that s.36 and s.40 of the 1991 Act were contrary to the right of access to a court guaranteed by the Constitution of the Republic of South Africa s.34. The complaint was upheld by the High Court, which found that s.36 and s.40 were invalid and referred the matter to the Constitutional Court for confirmation.

Held, refusing to confirm the High Court decision, that s.36 did not oust the jurisdiction of the court and any VAT assessment made by the Commissioner remained subject to judicial review and control even when the Commissioner invoked his powers under s.36 and s.40. Any restriction on Metcash's right of access to the court pursuant to s.40(5) of the Act was justified under s.36 of the Constitution, with reference also to the practice in other States where immediate payment with later dispute resolution was provided for under other taxation statutes.

My Lords from *Metcash*, the Court admitted that the pay now and argue later limited an aggrieved vendor's access to ordinary court of law.

In *Capstone 556 (Pty) Ltd v Commissioner, South Africa Revenue Service*,⁵⁸ the Court had this to say:

“The considerations underpinning the “pay now, argue later” concept include the public interest in obtaining full and speedy of tax debts and the need to limit the ability to recalcitrant taxpayers to use objection and appeal procedures strategically to defer payment of their taxes.....Thus, the consideration which persuaded the Constitutional court to reject the attack on the aforesaid provision in the VAT Act in Metcash case might not apply

⁵⁸ (20844/2014) [2016] ZASCA 2 (9 February 2016).

altogether equally in any scrutiny of the constitutionality of the equivalent provisions in the [Income Tax] Act.”

In *Fuelex Ltd v Uganda Revenue Authority*,⁵⁹ the Ugandan Constitutional court ruled that

“Section 15 of the Tax Appeals Tribunal Act- in so far as it compels an objector to a tax assessment whose challenge is not with regard to the amount of tax payable, to pay to the tax authority 30% of the tax assessed is inconsistent with Article 44 of the Constitution; hence is unconstitutional”

Flowing from the above, it is sufficiently clear that the pay now and argue later raises constitutional issues.

Our contemporary countries that we have similar constitutional traditions and also members of the commonwealth that had pay now and argue later have abolished them and their revenue authorities are able to efficiently collect taxes include

Zimbabwe ⁶⁰	Tanzania ⁶¹
Nigeria	South Africa ⁶²
Kenya ⁶³	Egypt
Gambia ⁶⁴	Liberia
Sierra Leone ⁶⁵	

These countries have effective tax appeal to speedily dispense of tax objections and tax appeals.

⁵⁹ [2020] UGCC 10

⁶⁰ Section 62 of the Income Tax Act 1967 (as amended) with 11 schedule

⁶¹ Section 91(1) of the Income Tax Act 1973

⁶² Section 104 of the Tax Administration Act

⁶³ Section 51(3) of Tax Procedures Act

⁶⁴ Section 176(12) of the Income and Sale Tax Act 2004

⁶⁵ Section 137 of the Income Tax Act 2000 (as amended)

In Sierra Leone, for example, no money is required before mounting an objection, but the taxpayer will be penalised with interest at 25% on the difference between that assessment and the undisputed tax liability where the taxpayer loses.⁶⁶

The tax regime can be amended to allow imposition of penal cost should taxpayer lose on appeal. A cue can be taken from the Sierra Leone example.

13 Steps taken by the Parliament of Ghana to Improve Tax Disputes/Tax Administration

13.1 The policy rationale for having the pay now and argue later rule is to ensure that the Revenue Authority can collect money due from the taxpayer as early as possible.

13.2 The pay now and argue later of 30% before objection can be raised was first introduced into our tax system in 2006.⁶⁷ It was to enable the Revenue Authority to cash in tax assessment quicker regardless of whether there is a dispute of the amount.

13.3 This provision has hindered tax jurisprudence in Ghana. Tax decided cases in the High Court does not amount to 10. This is not good for a middle-income status country.

- **Period to make determination of tax decision**

- a) Parliament has reduced the period that the Commissioner-General of GRA must decide tax decision from 90 days to 60 days. This is to put pressure on the GRA to amicably resolve tax matters.

- b) The Commissioner-General does not need to collect 30% of a disputed tax before looking into a tax decision. The Commissioner-General can impose penalty

⁶⁶See Section 105(3)(c) of The Consolidated Income Tax Act, 2000 Updated to reflect all tax legislation through Finance Act, 2009 substituted by Paragraph (c) of section 105(3) was inserted in 2008 by section 8(b)(i) of the Finance Act, 2008 (No.7).

⁶⁷ Internal Revenue (Amendment) Act, 2006, Act 700. Section 10. Although

under law where it turns out that the taxpayer was liable. In practice, the GRA do not handle objections speedily. Yet, it could have taken 30% of the disputed tax from the taxpayer. Consequently, this causes cashflows for business community.

- c) If the GRA works swiftly on tax objections, these matters will be disposed off and it can enforce the final assessment.

- **Burden of Proof**

- a) Parliament has under changed the burden of proof which since independence has been on the taxpayer.

- b) Under Section 132 of Internal Revenue Act 2000, Act 592 (repealed) provided

“Burden of proof is on the person assessed to prove, on the balance of probabilities, the extent to which assessment made by the Commissioner is excessive or erroneous.

- c) Under Section 92(1) of Revenue Administration Act 2016, Act 915 the burden of proof in proceedings on appeal or for the recovery of tax is on the taxpayer or the person making an objection to show compliance with the provisions of the tax law.

- d) The burden of proof only shifts to the GRA in respect of imposition of a penalty, including in proceedings on appeal under or for the recovery of a penalty, the burden of proof is on the Commissioner-General to show non-compliance with the provisions of the tax law. (**See Section 92(2) of Act 915**). This position is modification of the traditional burden of proof in tax matters.

- **Tax Appeal Boards**

- a) Parliament has passed into law Independent Tax Appeals Board to act as a court of first instance of appeal of tax decisions from the CG of the GRA.⁶⁸
- b) The Tax Appeal Board is to hear and determine appeals against decisions of the CG regarding objections to tax decision.
- c) The momentum is to ensure speedy adjudication of tax matters in Ghana.
- d) As a consequence, the pay now and argue later rule will impede access to justice.

- **Mandatory Requirement to File Annual Returns**

- a) Every person must file annual tax return for income (from employment, investment and business made within a tax year).⁶⁹
- b) The annual return is within four months after the end of the year of assessment.⁷⁰
- c) This is mandatory for all citizens except a resident who does not have an income.
- d) My Lords, this is the case when if your income is exclusively from employment and your employer has paid the taxes on your behalf. A person is required to complete the annual return form and pay any due tax (if any).
- e) In the light of this, My Lords, if a Judge files her annual return in a tax year from her income exclusively from the employment from the Judicial Service (Government of Ghana) and the CG of GRA brings an assessment of GHS 8,000,000, she will be required to pay 30% of the 8,000,000 before an objection to the assessment can be entertained.

⁶⁸ Schedule 4 of the Revenue Administration Act 2016, Act 915 (as amended), See Revenue Administration (Amendment) Act 2020 Act 1029

⁶⁹ Section 124 (1) of Income Tax Act 2015 Act 896 (as amended)

⁷⁰ Section 124(2) of Income Tax Act 2015 Act 896 (as amended)

- f) The above reforms in our tax laws in tune with the global win blowing. We must learn not to glorify inefficiencies or delays from the GRA by allowing the pay now and argue later rule which has been in our statute books for 15 years to infringe our beloved and dynamic constitution.

It is time now to correct the wrong.

14.0 Conclusion

14.1 In a nutshell, the Plaintiff contends that:

- a) *A declaration that Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) which requires a taxpayer to pay 30% of all outstanding taxes (in case of other taxes) before an objection to a tax decision can be entertained by the 1st Defendant is inconsistent with and in contravention of articles 2(1), 17(1), 125(2), 19(2)(c), 33(1),33(5), 130(1), 132, 133(1), 140, of the 1992 Constitution which guarantee a person's right of access to court, participation in the administration of justice and the presumption of innocence until proven or pleaded guilty hence consequently null, void and unenforceable.*
- b) *A declaration that Order 54 rule 4(1) of the High Court (Civil Procedure) Rules, 2004 C.I 47 which requires a taxpayer to pay 25% of the disputed tax contained in the notice of assessment before an appeal can be entertained by the High Court is inconsistent with and in contravention of articles 2(1), 17(1), 125(2), 19(2)(c), 33(1), 33(5), 130(1), 132, 133(1), 140, of the 1992 Constitution which guarantees a person's right of access to the court consequently null, void and unenforceable.*

- c) *An order setting aside Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) as being inconsistent with the letter and spirit of the 1992 Constitution and consequently null and void.*
- d) *An order setting aside Order 54 rule 4 (1) of the High Court (Civil Procedure) Rules, 2004 C.I 47 as being inconsistent with the letter and spirit of the 1992 Constitution and consequently null and void.*
- e) *An order of perpetual injunction restraining the Defendants, their agents or servants or assigns or judicial office under the pretext of acting under Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) and Order 54 rule 4(1) of the High Court (Civil Procedure) Rules, 2004 C.I 47 from hearing or attending to an appeal of a tax decision lodged with the 1st Defendant or the 3rd Defendant under the veneer that the mandatory money requirement has not been complied with.*

14.2 In *New Patriotic Party v. Inspector General of Police*⁷¹ Hayfron-Benjamin JSC, stated that, *“...I have no doubt in my mind that the framers of the Constitution, 1992 intended that the citizens of this country should enjoy the fullest measure of responsible human and civil rights. Therefore, any law which seeks to abridge these freedoms and rights must be struck down as unconstitutional. The requirement of a permit or license is such abridgement of constitutional right...”*

14.3 It is in this light that the Plaintiff prays the court for an order:

- a) Setting aside Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) an Order 54 rule 4(1) of the High Court (Civil Procedure) Rules, 2004

⁷¹ [1993-94] 2 GLR 459 at page 505

C.I 47 as being inconsistent with the letter and spirit of the 1992 Constitution and consequently null and void.

- b) Order of perpetual injunction restraining the Defendants, their agents or servants or assigns or judicial office under the pretext of acting Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) and/or Order 54 rule 4(1) of the High Court (Civil Procedure) Rules, 2004 C.I 47 from doing anything to prevent any taxpayer from mounting a challenge to tax assessment.

14.4 It is in this light that we would think “...*that it was self-evident the continued enjoyment by any community of fundamental human rights was incompatible with any requirement that a permit or license be first obtained...*”⁷² Amua Sekyi JSC, posited. Thus, the people from whom justice emanates from should not be tied to the money obligation before accessing justice in respect of tax appeals.

Respectfully submitted.

DATED AT Nobisfields Chambers, ACCRA THIS 15TH DAY OF APRIL 2021.


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The Registrar
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Accra.

⁷² New Patriotic Party v. Inspector General of Police [1993-94] 2 GLR 459 page 473

AND FOR SERVICE ON THE ABOVE-NAMED DEFENDANTS

1. **GHANA REVENUE AUTHORITY** WHOSE ADDRESS FOR SERVICE IS OFF STARLETS' 91 ROAD, NEAR ACCRA SPORTS STADIUM, ACCRA
2. **JUDICIAL SERVICE** WHOSE ADDRESS FOR SERVICE IS THE SUPREME COURT COMPLEX, ACCRA
3. **ATTORNEY GENERAL** WHOSE ADDRESS FOR SERVICE IS ATTORNEY-GENERAL'S CHAMBERS, MINISTRY OF JUSTICE ACCRA.

**IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA
A.D. 2021**

SUIT NO:

BETWEEN:

RICHARD AMO-HENE

PLAINTIFF

H/No. AM/WP 1243

Hymn Avenue

Amasaman

AND

GHANA REVENUE AUTHORITY

1ST DEFENDANT

Off Starlets 91 Road

Near Accra Sports Stadium

Accra

ATTORNEY GENERAL

2ND DEFENDANT

Attorney-General's Chambers

Ministry of Justice

Accra

JUDICIAL SERVICE

3RD DEFENDANT

Supreme Court Building

Accra

LIST OF AUTHORITIES RELIED ON BY THE PLAINTIFF

CONSTITUTION

Constitution of Ghana, 1992

Constitution of South Africa

STATUTES

Ghana Revenue Authority Act, 2009 (Act 791)

High Court Civil Procedure Rules 2004 (CI 47)

Income Tax Act 2015, Act 896.

Interpretation Act, 2009 (Act 792)

Judicial Service Act, 1960 (C.A. 10) (as Amended by Act 281)

Revenue Administration Act, 2016 (Act 915)

State Proceedings Act, 1998 (Act 558)

Supreme Court Rules, 1996 (C.I. 16).

INTERNATIONAL CONVENTIONS & INSTRUMENTS

Canadian Charter of Rights and Freedoms, 1982

Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe

African Charter on Human and Peoples' Rights

Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels

European Convention of Human Rights

International Convention on Civil and Political Rights

Universal Declaration of Human Rights (UDHR) 1948

CASE LAWS

Adjei-Ampofo (No 1) v. Accra Metropolitan Assembly & Attorney General (No. 1) [2007-2008] 2 SCGLR 613

Adjei-Ampofo v. Attorney-General & President of the National House of Chiefs [2011] 2 SCGLR 1104

Adofo v Attorney –General [2005-2006] SCGLR 42

Afeke v. Agble [1987-88] 2 GLR 572

Akosa II v. Attorney-General [2012] 2 SCGLR 1070

Amidu v President Kufour [2001-2002] SCGLR 86

Martin Kpebu V Attorney General No.1 and No2.

Asare Baah III v Attorney-General & Electoral Commission [2010] SCGLR 463

Awuni v West African Examinations Council [2003-2004] 1 SCGLR 471

Beiersdorf Ghana Limited v The Commissioner-General of the GRA suit no: CM/Tax/001/2018 High Court Unreported dated 13 July 2018

Boyefio v NTHC Properties Limited [1997-1998] 1 GLR 768
 Brown v Attorney-General [2010] SCGLR 183
 Capstone 556 (Pty) Ltd v Commissioner, South Africa Revenue Service
 (20844/2014) [2016] ZASCA 2 (9 February 2016)
 Chambers v. Ohio R.R. Co., 207 U.S. 142, 148 (1907)
 Customs, Excise and Preventive Service v National Labour Commission & Attorney
 General [2009] SCGRL 530
 Development Data and 2 Others v National Petroleum Authority & Another Suit No.
 BC 553/2009 (Unreported)
 Fan Milk Limited v Commissioner-General, Ghana Revenue Authority Suit No.
 CM/Tax/0004/18 Unreported
 Federation of Youth Association of Ghana (FEDYAG) v Public Universities of
 Ghana [2010] SCGLR 265
 Fuelex Ltd v Uganda Revenue Authority [2020] UGCC 10
 Ghana Independent Broadcasters Association v. The Attorney-General & Anor Suit
 No. J1/4/2016 (Unreported)
 Golder v UK ECHR 21 FEB (1975)
 In Re Presidential Election Petition; Akufo-Addo, Bawumia & Obetsebi-Lamprey
 (No.1) v. Electoral Commission (Mahama & National Democratic Congress
 Interested Parties) (No. 1) [2013] SCGLR (Special Edition)
 Kwasi Afrifa v Ghana Revenue Authority Suit NO C12/149/19
 Labone Weavers Enterprises Ltd. v. Bank of Ghana [1977] 2 GLR 156
 Lincoln College case, (1595) 3 Co. Rep. 586
 Marbury V. Madison 1 Cranch 137 1802
 Martin Kpebu v Attorney General [2015-2016] SCGLR 171 at page 211
 Martin Kpebu (No.2) v. Attorney-General (No.2) [2015-2016] 1 SCGLR 171
 Metcash Trading Ltd v South African Revenue Service Commissioner (63 SATC 13);
 [2000] 11 WLUK 764
 Mornah v. Attorney-General [2013] SCGLR (Special Edition) 504
 National Democratic Congress v. Electoral Commission [2001-2002] 2 GLR 340
 New Patriotic Party v Attorney-General [1997-98] 1 GLR 378
 New Patriotic Party v. Attorney-General [1993-1994] 2 GLR 35
 New Patriotic Party v Inspector General of Police [1993-94] 2 GLR 459
 Bishop Daniel Obinim v GRA and Ecobank
 Opong v. Attorney-General and Ors. [2000] SCGLR 275
 Republic v GRA (ex parte: Export Finance Co. Ltd and Universal Merchant Bank
 Sam v Attorney-General (No.2) [1999-2000] 2 GLR 336
 Scancom Ltd, Ghana Telecom Co and Millicom Ghana Ltd v. The Commissioner
 General, Ghana Revenue Authority Suit No. FTRM 76/12, FTRM 77/12, FTRM
 78/12 (Unreported), High Court

Taylor & Taylor Co. Ltd v Ghana Revenue Authority Suit No. Tax 01/15 dated 21 December 2017

Tuffuor v Attorney [1980] GLR 637

Unilever Ghana Limited v Commissioner General of the GRA Suit No. CM/TAX/0683/2020

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J.R. Brooks, "Definition of Income" 71 Tax Law Review 253 (2018) p.254

J. Freedman, "Accounting Standards: A Panacea? [2004] eJournal of Tax Research 71.

J. Freedman, "Financial and Tax Accounting: Transparency and 'Truth'" University of Oxford Faculty of Law Legal Studies Research Paper Series Working Paper No 02/2008

OTHER LEGAL DOCUMENTS

Access to Justice for Migrants and Asylum-seekers in Europe', CDCJ (2009)

Black's Law Dictionary 9th and 10th editions

Edzie, Modern Purposive Approach to Interpretation in Ghana (2015)

Justice V.C.R.A.C Crabbe, "Understanding Statutes (2012)

William Blackstone, Commentaries on the Laws of England Vol. 1: Of the Rights of Persons 120-121 (U. Chicago Press 1979) (1765)