IN THE HIGH COURT OF JUSTICE, ECONOMIC CRIME II, ACCRA

HELD IN ACCRA ON THE 19TH DAY OF APRIL, 2013 PRESIDED OVER BY HIS LORDSHIP, JUSTICE JOHN AJET-NASAM

SUIT NOs. FTRM 76/12, FTRM 77/12, FTRM 78/12

SCANCOM LTD
GHANA TELECOM COMPANY
MILICOM GHANA LTD -- **PLAINTIFFS**

VRS.

THE COMMISSIONER,
GHANA REVENUE AUTHORITY -- **RESPONDENT**

ANTHONY FORSON JNR. WITH REUBEN AMPADU FOR APPELLANTS

CEPHAS ODARTEY LAMTTEY WITH FREEMAN SARBAH AND PATRICK POKU MABOA FOR RESPONDENT

RULING

This is an appeal against tax assessment by the Commissioner, Ghana Revenue Authority. The appellants have come under Order 54 of the High Court (Civil Procedure) Rules 2004, CI 47 Order 54 r 11 (1) provides:

"For the purposes of this Order, Commissioner includes anybody or person from whose decision in a matter relating to tax an appeal lies to the High Court".

Based upon this section the appellants who are Scancom Limited, Ghana Telecom Co. Ltd and Milicom Ghana Limited filed this appeal before this Court. The appellants have filed their individual appeals . During the hearing, the parties prayed the Court to consolidate the various appeals. This is because, the parties are the same, so as the issues for consideration and the lawyers are also the same. The different issue is the quantum of assessment for the appellants. The appeals have therefore been consolidated but I shall not present individual opinion due to the issues I discussed above.

In this my opinion, for expediency sake, the three appellants shall be described simply as appellants and the Commissioner, Ghana Revenue Authority shall be referred to as Respondent. Having dealt with these preliminary matters, I will then begin to look at grounds of the appeal as filed by the appellants. There was no additional ground filed. The grounds were as follows:

1. ***The decision of the Commissioner to charge Communication Service Tax (CST) on inter-connect service amount to double taxation and/or in the alternative is illegal.***

2. ***The decision of the Commissioner that the Appellants are consumers within the meaning of the CST Act is erroneous.***
3. ***The Commissioner's interpretation of the Act to levy CST on Ghana Telecom Company Ltd's interconnect charges is at variance with the express intention of parliament and thus demonstrably wrong.***

In ground 3, the name Ghana Telecom appeared. This is one of the appellants and as the cases have been consolidated, all other appellants are therefore inclusive. The lawyers relied on their written submission to the Court variously filed on the 4th day of April 2012 and 30th April 2012. Both counsel admitted that there are no precedents in our jurisdiction.

The grounds as listed, I am of the opinion that, the decision on ground 1 will definitely resolve that of ground 3. In this regard therefore, ground 1 and 3 will be considered together as one ground. If this is acceptable, I propose to look at ground 2 first.

The said ground states:

"The decision of the Commissioner that the Appellant is a consumer within the meaning of the CST Act is erroneous".

To arrive at a conclusion as to who a consumer is, the best reference should be the CST Act. It is however unfortunate that, the CST Act, 2008, Act 754, at its

interpretation section, there was no definition as to the word "Consumer". Counsel for Appellants looked at the definitions in the Collins on line Dictionary, Black's Law Dictionary 8th Edition and therefore submitted, a service provider cannot be a consumer in the sense of interconnectivity within the meaning of the CST Act 754. The Black's Law Dictionary 8th Edition defines "Consumer" as follows:

"A person who buys goods or services for personal, family or household use, with no intention of resale who uses products for personal rather than business purposes".

The Oxford Advanced Learners Dictionary, 7th Edition defines "Consumer" as "A person who buys goods or uses services".

The question is, does the Appellants fall under the definition given in these dictionaries? The Communications Service Tax Act, 2008, Act 754 states in Section 1 (1) with the heading Imposition of Communication Service Tax

"(1) There is imposed by this Act a tax to be known as the communications Service Tax to be levied on charges payable by consumers for the use of Communication Service".(emphasis mine)

To the ordinary meaning of things, Consumer cannot be referred to the Appellants herein. This definition cannot be stretched to include the Communication Service provider:

Subsection (2) says: ***"The tax shall be levied on all communication service usage charged by communication service providers with class 1 licences..."***

Section 16 of the Act, the interpretation Section however defines what a Communication Service is:

It says: ***"Communication Service include the provision of a service through a Communication System for the transmission or routing of signals or a combination of these functions".***

This leads us to the issue as to interconnectivity. What the telcos do is to use each other's platform to terminate calls when a subscriber or consumer of telco B. The call terminates on telco B in order for the call to go through from telco A to telco B's consumer. This is a Communication Service. One cannot therefore conclude that telco A is a consumer to telco B. that is absurdity. I do not think parliament intended such absurdity. But if such was the intention of parliament, with due respect such is wrong.

Communication Service Tax is not a direct tax because direct tax is directly imposed on a person and it cannot be transferred the other person. Service tax is levied and collected from clients. So Service Tax is an indirect tax. Interconnect charges include charge for collecting and delivering of calls, for installing maintaining and operating the points of interconnect. There is a charge to fund the

deficit arising due to the provision of universal service. If the funding of such a deficit is covered by the telecom tariff then it should not be a part of interconnection charges, ie there is a need to avoid double-counting in this context.

I am therefore of the view that, a consumer does not, in the context of Act 754 mean a telco. Telcos are involved in interconnection and they provide Communication Service to one another and such must not be construed to mean, a consumer of one telco to another.

Learned Counsel for respondent referred to Regulation 184 of LI1719 which interprets "Consumer, customer or subscriber" to mean: ***"any individual or body corporate or unincorporated who wishes to be provided with any relevant communication service by an operator and who is responsible for payment of all charges and rentals"***.

As discussed above, telco A cannot be a subscriber to telco B. Interconnect charges are paid by telco A to telco B when a call is terminated on the other's platform. Such a description cannot be said to be appropriate to describe one telco as a consumer or customer to another telco. This is the ambiguity and or absurdity I am talking of.

Counsel for Respondent further submitted that, if the Court upholds the definition by Appellants counsel to customer, the CST will only lead to ambiguity or

absurdity in the clear language of Section 1 (2) of Act 754. I had earlier in this opinion, disagreed with this submission. The Court should guard against absurdity and in this instance case, I am of the respectful opinion that it will be absurd to grant the arguments of the Respondent on this ground.

As I indicated earlier, grounds 1 and 3 will be taken together. In arguing these grounds, counsel for the Appellants was of the view that the memorandum to the Act, indicates that, "the tax is NOT meant to be levied on Interconnect Services between service providers". He made extensive references to the debates in Parliament when the bill was introduced. No doubt Parliamentary debates are aid to interpretation. He therefore concluded that "the debates are clear as to what Parliament meant the tax to do. The incidence of the tax is on consumers, ie mobile service subscribers and Not on the service provider.

Learned counsel for the Respondent think otherwise. He is of the view that, the law is very clear in its intention and effect and concluded, ***"from the foregoing the irresistible conclusion to be arrived at is that the intention of the legislation is to make interconnectivity service taxable hence the decision to remove the clause in the bill which otherwise would have excluded that particular service from the tax".***

I have already in this opinion discussed what interconnection charges are. It involves a linking up of one telecom operator to the infrastructure facilities of another interconnection can therefore be considered in terms of network interconnection and access interconnection. Interconnectivity is a service provided between telcos and not between the telcos and the subscriber. As such, on this ground, no service tax shall be payable. No telco can be treated as a subscriber of another telco in the relation to the link established between one telco and another. As such service tax may not be payable. To explain further a customer of MTN, there is a 6% tax on every minute of that call, which Vodafone pays to government; and then the amount that Vodafone pays to MTN for being the network on which the call terminated, is also taxed another 6%. This is what is being contested as double taxation by the appellants.

In the Indian case of Fascel Ltd vrs. Ahmedabad CST 2007 (01) LC X0226, the Court held that: "***No telegraph authority cannot be treated as subscriber of another telegraph authority in relation to the link established between one telegraph authority and another telegraph authority".***

The decision was followed by Power Grid Corporation of India Ltd vrs. Commissioner of Service Tax, New Delhi 2008 (09) LC X 0345. I have therefore clarified, by the above decisions that, interconnection service provided by one telco to another telco is not taxable service. To this end therefore, the Attorney General

of India has opined that, service tax cannot be levied on these charges which are paid by one telcom service provider to another for enabling calls to move from one network to the other. This was on the 30th day of December 2006. It is therefore my considered view that following these authorities, that it is wrong for the respondent to charge the appellants on interconnectivity.

In fact, the then sector Minister, Honourable Haruna Iddrisu was of the same view. He made a statement on the 27th February 2013 as follows: ***"That issue of double taxation facing the telcos under the Communication Service Tax (CST) otherwise known as talk tax, is real, and needed immediate ministerial intervention to deal with it decisively".***

The Honourable Minister continued "***....Government would have to do a review of it (talk tax) and take a consequential decision that assures the industry of some decency in terms of fairness of every tax system".***

So as the outgoing Minister made these remarkable remarks, it is unfortunate that he could not see to the resolution of this matter at the ministerial level. But it is good the Court has given its decision. The appeal hereby succeeds and hereby declare that the three grounds are upheld.

(SGD) JOHN AJET-NASAM

JUSTICE OF THE HIGH COURT