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REGISTRAR
SUPREME COURT OF GHANA

**IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA
A.D. 2022**

SUIT NO: JI/8/2021

BETWEEN

RICHARD AMO-HENE
House Number 26, Mile 7
Achimota

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

SUPPLEMENTARY 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 PURSUANT TO LEAVE GRANTED BY THE SUPREME COURT ON 26 JANUARY 2022

Right to Fair Hearing (Article 23)

1. The Plaintiff submits that the Pay Now and Argue Later rule (30% payment in the impugned Section 42(5)(b) of the Revenue Administration Act 2016, Act 915 (as amended) contravenes the Constitutional right to a fair hearing under **Article 23 of the Constitution 1992**.

2. Article 23 of the Constitution provides that

“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.”

3. The operative words are **fairly** and **reasonably** and *comply with the requirements imposed on them by law.*

4. The right to fair hearing is a component of access to justice as of right. This right is only possible where the disputants are accorded the opportunity to appear before a court, tribunal, administrative body, or other adjudicatory body at first instance.

5. It is important to highlight that without a disputant(s) appearing before an administrative body, or an adjudicatory body, the issue of fair trial would not arise. This underlines the point that it does not suffice to conduct a trial.

6. In *Re Effiduase Stool Affairs (No 2), Republic V Oduro Nimapua, President of the National House of Chiefs; Ex Parte Ameyaw II (No. 2)*,¹ this Honourable Court referred to the right to a fair trial as one of the basic principles of any civilized system of justice. Acquah JSC (as he then was) on behalf of the Supreme Court said as follows:

“For one of the basic principles of any civilized system of justice is that a person is entitled to a fair trial free from prejudice. No system of justice can be effective unless a fair trial to both sides is ensured... This common law right to a fair trial is now elevated to a fundamental right in the 1992 Constitution of Ghana.”

7. In addition to the right to fair hearing, are other guarantees such as equal access to justice and equality of arms, which require that the parties to the proceedings in question are treated without any discrimination and or distinction based on the nature or mode of the trial in both civil and criminal proceedings.

¹ [1998-99] SCGLR 630 at 670

8. The cause of justice is best served when the parties to the trial are accorded equal opportunities to present the merits of their respective cases before the court or the administrative body (in this case the GRA).
9. This is the essence of the protection of rights provided for under **Article 17(1), Article 23** and **Article 19(13)** of the Constitution.
10. In **Re: President's Reference of the Constitution of Vanuatu and the Broadcasting and Television Bill 1992**,² the Court held that the provisions in the constitution covers fundamental rules of natural justice, as was recognised under common law. It clarified that the phrase 'protection of law' should not be given a narrow application to cover rules of natural justice' only but must be applied to cover rights of access to Courts of justice.
11. The Legislature has no power to deny access to justice before an administrative body or court of law to anyone who is aggrieved by a provision in any legislation or acts of a person or institution, to enforce such person's fundamental rights and freedoms, as to do so would be in breach of the Constitution of which the Acts of Parliament are subordinate to.³
12. In *Eugene Baffour-Bonnie*,⁴ the court concluded that

“access to administration of justice and the enforcement of the constitutional right to fair hearing shall be enforced in a manner that ensures that no individual is deprived, in procedural terms, of his/her right to seek justice.”
13. *“A citizen whose Constitutional rights are allegedly being trampled upon must not be turned away by procedural hiccups. Once his complaint is arguable, a way must be found to accommodate him so that other citizens become knowledgeable of their rights....”* This is asserted by Harper J.A in the case of *Attorney General v Ali & Ors*.⁵

² [1993] 1 LRC or Law Reports of the Commonwealth, 141. In this case the impugned Bill gave the Minister powers to remove any member of the statutory corporation without giving reasons therefor; and prevented such action of the Minister from being challenged in a court of law. The issue for determination was whether the term 'protection of law' provided for in the Constitution guaranteed both procedural fairness and fundamental rights.

³ See *Re: Rivas and the Belize Advisory Council* [1993] 3 LRC 261

⁴ Supreme Reference NO. J1/06/2018 7 JUNE 2018

⁵ [1989] LRC 474 at pages 525-526

14. Respectfully my Lords, the requirement to pay 30% of the disputed tax is a procedural hiccup and we have set out Section 42 of the Revenue Administration Act 2016, Act 915 (as amended) verbatim below:

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

- a) in the case of import duties and taxes, paid all outstanding taxes including the full amount of the tax in dispute; and**
- b) in the case of other taxes, paid all outstanding taxes including 30% of the tax in dispute.”**

15. Upon a careful reading of the Plaintiff’s Writ, it will be noted that **Section 42(5)(a) of Act 915** has not been alleged to be in contravention of **Articles 17, 23, 19 of the Constitution 1992.**

16. **Section 42(5)(a) of Act 915** requires that a taxpayer must pay 100% of the disputed amount before an objection can be entertained by the Commissioner-General of the GRA.

17. My Lords, **Section 42(5)(a) of Act 915** deals with border taxes such as Input VAT, Import duties, levies (Covid, NHIL, GETFund Levies) and other border taxes.

Firstly, the design of border taxes is collected on behalf of the government. The taxes imposed on the transaction value of the goods in the case of import duties can easily be ascertainable through a post clearance audit.

Secondly, the without the payment of the taxes, the borders are not released into the custom area.

Thirdly, the tax base in respect of border taxes is straight forward and easy to determine.

Fourthly, a simple post-clearance procedure can disclose the tax due to the government.

18. Respectfully, my Lords, the design of direct taxes and other taxes are different. The tax base for direct and other tax are not easy to determine. That is the reason why **Section 19(1) of the Income Tax Act, 2015, Act 896 (as amended)** provides that

“Subject to this Act, the timing of inclusions and deductions in calculating the income of a person during a basis period shall be made in accordance with generally acceptable accounting principles.”

Accounting involves exercising value judgment and estimates. Consequently, there cannot be correct tax [tax assessment]. In view of that, taxpayers must have the right to object without monetary impediments.

19. Tax litigation procedures are central to an effective tax system. In most countries, the process of filing tax appeals for any wrong assessment is seamless as the objectors are expected to pay a filing fee and other sundry requirement. A filing fee of circa \$60 to \$100 must be paid by the objector.

20. In *Fuelex (U) Ltd v URA*,⁶ the Supreme Court declared that “Section 15 of Tax Appeal Tribunals Act is **unconstitutional** as it is inconsistent with Article 44(c) of the Constitution so far as it subjects an objector to a tax assessment whose objection does not relate to the amount of tax payable, to pay to the tax authority 30 percent of the tax assessed.”

21. The requirement to pay 30% of the disputed tax in the impugned section is not anchored on science, it is without lawful basis, and it is arbitrary. In civil cases before the courts of law where monies are owed to the States, no such draconian requirement must be pre-required before a challenge can be mounted by the aggrieved party.

22. Section 42(5)(b) of Act 915 cloaks the Commissioner-General or tax officials to assess tax in an arbitrary manner to put impediment in the taxpayer’s right to mount a legitimate challenge.

⁶ Ibid. Section 15 of Section 15 of Tax Appeal Tribunals Act related to paying 30% before objection can be entertained as in the present case before your Lordships. Article 44(c) relates to the right to fair trial under the Ugandan Constitution.

Case Scenario 1

An individual who may not be working for three years, may be reported to the GRA under the whistle blower Act, alleging that he has been evading tax. This is entirely based on a lifestyle audit.

The GRA then assesses the individual based on the incorrect information available to them, and subsequently issues a tax assessment of GHS 5,000,000 to the individual.

Per Section 42(5)(b) of Act 915, the individual is required to pay GHS 1,500,000 before he can be heard through an objection procedure.

Case Scenario 2

A company is assessed to tax of GHS16,500,000 by the GRA in respect of transfer pricing of related parties' transactions.

The Company disputes the tax assessment but complies with the 30% pay now and argue later rule.

The company pays GHS 5,500,000 in compliance with Section 42(5)(b) of Act 915.

The company provides all necessary documents to correct the assessment through the objection.

Since 2016, the objection decision has not been given by the GRA. GHS 5,500,000 is locked up.

Case Scenario 3

An outspoken Judge at the superior court is assessed to tax of GHS7,500,000 by the GRA (because the appointing authority nominated the outspoken judge for appointment has changed). The only source of income for the Judge is his personal income tax which is deducted at source.

The Judge being a political target, is given that tax assessment. The Judge does not have GHS 2,250,000 to pay in the light of Section 42(5)(b) of Act 915.

The GHS 7,500,000 becomes a tax debt within 30days of failing to object. [*emphasis* Section 42(8) provides that a tax decision to which an objection is not made within thirty days is final]

GRA applies its debt recovery measures against the Judge.

23. By the administrative dispute mechanisms, the legal construct of Section 42 of the Act, makes the Commissioner-General a judge in his own course which is procedural impropriety.
24. The power of the Commissioner-General to accept 30% of the disputed amount from the tax assessment is clearly a huge impediment to the taxpayer's ability to challenge the tax decision from the Commissioner-General.
25. The right to a fair hearing cannot be compromised, limited, or suspended by any other law such as **Section 42(5)(b) of Act 915**.
26. A law that requires one party to a civil dispute to pay 30% of the amount that has been determined as payable by the adverse party, places the objector at a disadvantage, while the adverse party (the GRA) at an advantage. In principle, Section 42(5)(b) of Act 915 defeats the main principles of the right to a fair hearing.
27. No matter how good a taxpayer's case might be, once they do not pay the 30% of the disputed tax, their objection cannot be heard. And once the opportunity to be heard is lost, the GRA is at liberty to recover the whole amount of the disputed sum whether that amount is legally owing or not.
28. The 1st Defendant argues that the Plaintiff's right to access to justice is not an absolute right in the light of Article 12 of the Constitution. That such right(s) can be curtailed in the interest of public interest.
29. Article 295 of the Constitution defines public interest as

"Public interest" includes any right or advantage which enures or intended to enure to the benefit generally of the whole of the people of Ghana.
30. The People of Ghana did not promulgate a constitution to trample on innocent citizens' right and confiscate their economic right to demand 30% of an amount for which the person challenges.
31. It is in the public interest to collect taxes that are legitimately due, and not trample on rights of individuals to meet revenue targets of the States. Such act is not envisaged by the people of Ghana when we swore that

IN A SPIRIT of friendship and peace with all peoples of the world

AND IN SOLEMN declaration and affirmation to our commitment to

Freedom, Justice, Probity and Accountability

.....

The Rule of Law

32. My Lordships, revenue considerations cannot outweigh the rights of people who are vulnerable to socio-economic hardships, discrimination, and general human right abuses to access and enforce their inalienable human rights.

33. The impediment introduced by the Legislation for a taxpayer to pay 30% of the disputed tax before an objection can be entertained by the Commissioner-General thereby results in a denial of access to fair hearing, unfairness, and unreasonableness. That such provision must be constitutionally unsustainable.

34. The 1st Defendant argues that the taxpayer has a right to apply for a waiver of the Pay Now and Argue Later Condition under Section 42(6) of the Revenue Administration Act 2016 Act 915 (as amended). Materially important it is quoted below:

“(6) Despite subsection (5) the Commissioner-General may waive or vary or suspend the requirements of subsection (5) pending the determination of the objection or take any other action that the Commissioner-General considers appropriate including the deposit of security.”

“(7) The Commissioner-General shall consider the need to maintain the integrity of the dispute resolution procedure and the need to protect Government revenue and the integrity of the tax system as a whole in exercising a discretion under subsection (6).”

35. My Lords, the exercise of the discretion imposed on the Commissioner-General is linked to Article 23 and Article 296 of the Constitution.

36. Article 42(6) of Act 915 was introduced in Act 915 to defuse the right to access but it is incurably bad. The Commissioner-General sparely allows for an

application for a waiver from paying the 30% of the disputed tax. If the Commissioner-General grants a waiver, the taxpayer is often asked to provide deposit of security which requires taking a security from a financial institution to satisfy the Pay Now and Argue Later requirement. This security from the financial institutions comes with extra costs to the taxpayers. This tends to limit the ability of taxpayers to challenge tax decisions and get entangled with tax debt which but for Section 42(5)(b) would not have crystallized.

37. Article 296 of the Constitution provides that

“Where in this Constitution or in any other law discretionary power is vested in any person or authority,

a) that discretionary power shall be deemed to imply a duty to be fair and candid.

b) the exercise of the discretionary power shall not be arbitrary, capricious, or biased either by resentment, prejudice, or personal dislike and shall be in accordance with due process of law; and

c) where the person or authority is not a Justice or other judicial officer, there shall be published by constitutional instrument or statutory instrument,

Regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power.”

38. The discretion given to the Commissioner-General under Section 42(6) of Act 915 is a dangerous one.

Firstly, there is always the danger that discretionary powers will be used arbitrarily. Dicey equated discretion with arbitrariness in recent times.⁷ K.C. Davis has argued that discretionary decisions can be arbitrary in the sense that officials may take decisions based on irrelevant factors.⁸

Secondly, another concern is the relationship between discretion and fairness.

⁷ A.V. Dicey, *The Law of the Constitution*, London, 1961 edn. p. 188. See also Lord Hewart, *The New Despotism*, London, 1929, ch. iv.

⁸ K.C. Davis, *Discretionary Justice*, Louisiana, 1969. See also J.L. Jowell, 'The Legal Control of Administrative Discretion', 1973 P.L. pp. 186-192, and D.J. Galligan, 'Arbitrariness and Formal Justice in Discretionary Decisions', in: D.J. Galligan (ed.), *Essays in Legal Theory*, Melbourne UP, 1984.

According to D.J. Galligan,⁹ there are three different but connected conceptions of fairness:

“First, there is fairness in the substantive sense when decisions have to be made about the fairness of the distribution of the benefits or burdens of society.

Second, there is fairness in the procedural sense. Here questions are asked about the fairness of procedures through which important decisions affecting private and public interests are made.

Third, there is the issue of formal fairness. This is expressed in statements like 'treat like issues alike'.

Discretionary decisions can be unfair when officials use their powers of personal assessment to act in ways which go against any of these conceptions of fairness.

Finally, there is the vital issue of guidance.¹⁰ It has been argued that there is virtue in a stable relationship between the state and its citizens. This can be achieved through settled rules. This allows the citizen to know what is expected of him in advance and allows him to plan his life according to known rules.”

Discretion falls short of this ideal because it allows public officials personal judgement on issues of public interest. The citizen cannot know in advance what decisions officials are going to take.”

39. The Commissioner-General is expected to consider the following before granting the waiver under Section 42(6) of Act 915

- a) The need to maintain the integrity of the tax dispute resolution procedure
- b) The need to protect Government revenue
- c) The integrity of the tax system as a whole

⁹ D.J. Galligan, *Discretionary Powers*, op. cit., pp. 153-161.

¹⁰ D.J. Galligan, *ibid.* pp. 161-163. For further reading see K.B. Mensah, *Legal Control of Discretionary Powers In Ghana: Lessons from English Administrative Law Theory Afrika Focus* Vol. 14, Nr. 2, 1998, pp. 119-140

40. The integrity of a tax dispute resolution procedure and of the tax system must be fair. It must be impartial and independent. The Commissioner-General exercises his discretion in most cases to impede access to justice for taxpayers on revenue consideration basis.

41. **“The integrity of the tax system must not be compromised by placing monetary requirement as a condition of objection in a tax appeal.”¹¹**

Proportionality Test

42. A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate.

43. This concept is commonly used by Courts to test the validity of laws that limit rights protected by constitutions and statutory bills of rights. However, proportionality tests can also be a valuable tool for law makers and others to test the justification of laws that limit other important—even if not strictly constitutional—rights and principles.

44. A structured proportionality analysis involves considering whether a given law that limits important rights has a legitimate objective and is suitable and necessary to meet that objective, and whether—on balance—the public interest pursued by the law outweighs the harm done to the individual right.

45. Proportionality has been received into the constitutional doctrine of courts in continental Europe, the United Kingdom, Canada, New Zealand, Israel, and South Africa, as well as the jurisprudence of treaty-based legal systems such as the European Court of Human Rights, giving rise to claims of a global

¹¹ Prof. Rita De la Feira, Chair in Tax Law, University of Leeds, United Kingdom: A tax training organised by WTS Nobisfields/JTI for Judges on 26 November 2021.

model, a received approach, or simply the best-practice standard of rights adjudication.¹²

46. In the **Civil and Local Government Staff Association of Ghana [CLOSAG] v The Attorney-General and 2 Ors, Suit No J1/16/2016 dated 14 June 2017, (unreported)**, where Sophia Akuffo CJ said:

“Prima facie, constitutional rights and freedoms are to be enjoyed fully but subject to the limits which the Constitution itself places thereon, in the terms of Article 12(2). However, in recognition of the fact that the enjoyment of political rights must also be governed by certain regulations and standards, Article 21(3) makes room for ‘laws and qualifications’ so as to assure that, in the enjoyment of the fundamental freedom to form or join political parties, there will be order as well as proper service to the public good. This is an important aspect of good governance. Hence, in determining the validity of any statutory or other limitation placed on a constitutional right, the questions that need to be determined are:

a. Is the limitation necessary? In other words, is the limitation necessary for the enhancement of democracy and freedoms of all, is it for the public good?

b. Is the limitation proportional? Is the limitation over-broad such as to effectively nullify a particular right or freedom guaranteed by the constitution? [Emphasis supplied]

¹² The Siracusa Principles, noted above, includes a proportionality test: United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (28 September 1984) [10], [11].

47. To make it easier, we have set out again provisions of Articles 17(1), 19(2)(c), 19(13) and 23, for which limitations and restrictions in Article 12 may apply.

Article 17(1) provides that “All persons shall be equal before the law.”

Article 23 provides that “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.”

Article 19(2)(c) provides that “a person charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty

Article 19(13) provides “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 the 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.”

48. In order to assess whether the limitation of 30% is justifiable, it is important to assess the function of the Ghana Revenue Authority

Section 3 of the Ghana Revenue Authority Act, 2009 (Act 791) the functions of the Authority covers:

(a) assess and collect taxes, interest, and penalties on taxes due to the Republic with optimum efficiency;

(b) pay the amounts collected into the Consolidated Fund unless otherwise provided by this Act and other Acts;

(c) promote tax compliance and tax education;

(d) combat tax fraud and evasion and co-operate to that effect with other competent law enforcement agencies and revenue agencies in other countries;

(e) advise District Assemblies on the assessment and collection of their revenue.

- (f) prepare and publish reports and statistics related to its revenue collection;
- (g) make recommendations to the Minister on revenue collection policy; and
- (h) perform any other function in relation to revenue as directed by the Minister or assigned to it under any other enactment.

49. In carrying out its mandate, the GRA is expected to employ technology and administrative efficient means to assist with the collection of tax revenue and boost tax compliance by the citizens.

50. The administrative tax appeal is in the bosom of the Commissioner-General and it is expected that the determination of a tax decision is made **within 60 days** from the date of the lodgement of the tax appeal pursuant to **Section 43(1) of the Revenue Administration Act 2016, Act 915.**

51. The Commissioner-General does not need the 30% of the dispute amount to be efficient. The tax appeal can be decided within 60 days and where the taxpayer is unsuccessful, the Commissioner-General can impose an interest or penalty on the tax due in the light of Sections **70(1) and 71 of the Revenue Administration Act 2016 Act 915.**

52. My Lords, the interest regime under Act 915 is punitive enough- It is **125% of the tax due compounding monthly at the statutory rate (Bank of Ghana base rate).**

53. The State has a remedy at the end of the tax appeal procedure. It may impose interests, penalties, or garnishee the taxpayers bank account or adopt the tax debt recovery proceedings under Act 915.

54. The taxpayer does not have any adequate remedy if the State fails to act appropriately. This impedes the right of the taxpayer.

55. On a balance of the right of access to justice and fair hearing and revenue consideration (public interest) on the other hand, it is my considered view that access to justice and right to fair hearing outweighs public interest.

56. In *New Patriotic Party v Inspector General of Police*,¹³ Hayfron-Benjamin JSC stated that

“[T]he 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.”

Interpretative Approach

57. Tax law is a creature of statute, not common law principles. The maxim "No equity in tax" can be found in the judgment of Lord Cairns in *Partington v. Attorney General*,¹⁴ where he said:

As I understand the principle of our fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be.

On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

58. Traditionally, the interpretation of tax legislation must be construed strictly. Although most commonwealth jurisdictions (including the UK) have moved away from the strict constructionist approach.

59. Most of the authorities in Ghana relied upon for the interpretation of tax statutes have been overruled in the UK.

60. The rules of statutory interpretation as applied to tax legislation were outlined by Lord Donovan in *Mangin v. I.R.C.*¹⁵

» First the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices ...

¹³ [1993-1994] 2 GLR 459 at 509

¹⁴ (1869) LR 4 H L 100

¹⁵ [1971] AC 739

- » Secondly, ‘one has to look merely at what is said. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used’ (Per Rowlatt, J, in *Cape Brandy Syndicate v. I.R.C*¹⁶).
- » Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If, therefore, a literal interpretation would produce such a result, and the language admits of an interpretation, which would avoid it, then such an interpretation may be adopted.
- » Fourthly, the history of an enactment and the reasons which led to it being passed, may be used as an aid to its construction.

61. In *Pepper v Hart*,¹⁷ the UK Supreme Court (formerly House of Lords) set the tone for parliamentary proceedings which were captured in the Hansard to be used as an aid in the construction of the Finance Act 1976. In departing from earlier authorities on the issue, the court resolved that those proceedings in parliament could be used as an aid to the interpretation of the tax statute.

62. The Memorandum of the **Interpretation Act 2009, Act 792** enjoined judges to adopt the Purposive approach in interpreting all statutes.

63. **Section 36 of the Interpretation Act 2009, Act 792** provides that

“An enactment shall be construed as always speaking and anything expressed in the present tense shall be applied to the circumstances as they occur, so that effect is given to each enactment according to its true spirit, intent and meaning.”

Section 42 of the Interpretation Act of 2009, Act 792 provides that

“In an enactment the expression "may" shall be construed as permissive and empowering, and the expression "shall" as imperative and mandatory.”

¹⁶ [1921] 1KB 64)

¹⁷ [1993] 1 All ER 42

64. The provision in **Section 42(5) of Act 915** states that **“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.”

This provision makes the payment of the 30% of the dispute as sine quo non for challenging a tax decision.

The words used in the impugned section is obvious, straightforward and without vagueness and makes no room for further interpretation.

The use of the word **“shall”** in the section makes it mandatory and suggests that a person or taxpayer shall not be allowed to object a tax decision unless he or it has paid the 30% of the tax in dispute.

65. The requirement of the 30% of the dispute tax places a fetter on the right to access to justice and the right to fair hearing. It can be simply put as ***“No 30% payment, no access to be heard” and/or “No 25% payment, no access to court.”***

66. A similar provision can be found in Order 54 rule 4(1) of the C.I. 47 (as amended) and they are quoted below:

4. (1) 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 quarter of the amount payable in the first quarter of that year of assessment as contained in the notice of assessment.

(2) 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 this rule.

67. My Lords, **Section 42(5)(b) of Act 915 and Order 54 rule 4(1)** poses an unreasonable restriction and limitation on the right to access the law courts and also obtaining a fair hearing before an administrative body (in this case the GRA) and for that reason, fails the proportionality test. Consequently, the impugned provisions must be declared as constitutionally unsustainable.

68. Taxpayers must pay the right taxes, but a balance must be struck between the need for citizens to pay tax and the need to encourage free access to the law courts, which is one of the basic characteristics of constitutional democracy where the rule of law is prevalent and serves as a barometer to measure good governance and accountability in a country through the judiciary. (See *Centre for Juvenile Delinquency vrs GRA and AG*¹⁸).

69. My Lords, we agree with Adinyira JSC in *Centre for Juvenile Delinquency vrs GRA and AG* that striking off **Section 42(5)(b) of Act 915 and Order 54 rule 4(1)** will not be subversive of the public duty of every citizen to comply with his or tax obligations as expected by the Constitution and the tax laws. It will rather promote the democratic rights of citizens as enshrined in the Constitution to have unimpeded access to justice in the courts against bureaucratic impediments, imposed obviously in the public interest for the GRA to collect revenue.

70. In *Awuni v West African Examination Council*,¹⁹ Kpegah JSC stated that

“I do not think this case is one in which injustice to one individual can be said to be of no consequence because the larger interest owed to society is more important. And a nation that stands by and looks on while the rights of the individual are slowly pecked at, eventually

¹⁸ Writ No J1/16/2018 dated 30 July 2018

¹⁹[2003-2004] 1 SCGLR 471 at 499 to 500

pays the ultimate price of finding its own rights eroded... **We accept some limitation on the fundamental rights of the individual only if it is justified and proportionate.**"

71. My Lords, enforcing Section 42(5)(b) of Act 915 and Order 54 rule 4(1) will deprive a majority of people of their right to exercise their fundamental human right to access to justice and right to fair hearing which are not only against the spirit and tenets of our Constitution but also against international conventions to which Ghana as a truly constitutional and democratic state is committed to.

72. In **Adofo v. Attorney-General & Cocobod**²⁰, Date-Bah JSC (as he then was) said:

"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 to. 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 watchdog against abuse or excess of power by the executive or the legislature. This function of the judiciary as a third pillar of responsible and

²⁰ [2005-2006] SGCLR 42 at page 51

accountable government would be undermined by the ouster of the jurisdiction of the courts in any matters relating to justiciable rights.

73. My Lords, I respectfully submit that **Section 42(5)(b) of Act 915 and Order 54 rule 4(1)** clearly offend the letter and spirit of the Constitution as they violate the right of access to law courts by taxpayers in Ghana. Consequently, these provisions are in contravention of Article 2(1), 17(1), 19(2)(c), 19(13), Article 23, 33(1), 33(5), 125(2), 130(1), 132, 133(1), 140 of the Constitution.

74. My Lords, respectfully submitted.

DATED AT NOBISFIELDS CHAMBERS, 1 PAWPAW STREET, EAST LEGON (NEAR MELCOM), ACCRA (DIGITAL ADDRESS: GA-414-0267) THIS 7TH DAY OF FEBRUARY 2022

*Nobisfields Chambers
Barristers & Solicitors
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**THE REGISTRAR
SUPREME COURT
ACCRA**

AND FOR SERVICE ON:

- 1. THE ABOVE-NAMED 1ST DEFENDANT OR ITS LAWYER, C. ODARTEY LAMPTEY ESQ. GHANA REVENUE AUTHORITY, LEGAL AFFAIRS AND TREATIES DEPARTMENT, OFF STARLETS 91 ROAD, NEAR ACCRA SPORTS STADIUM, ACCRA.**
- 2. THE ABOVE-NAMED 2ND AND 3RD DEFENDANTS OR THEIR LAWYER, GRACE M-EWOAL (MRS), CHIEF STATE ATTORNEY, ATTORNEY-GENERAL'S CHAMBERS, MINISTRY OF JUSTICE, ACCRA.**