IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT (COMMERCIAL DIVISION) HELD AT ACCRA ON THURSDAY
THE 21ST DAY OF DECEMBER 2017

Suit No. TAX/01/15

CORAM: JENNIFER DODOO (MRS)
JUSTICE OF THE HIGH COURT

TAYLOR & TAYLOR LTD — APPELLANT

VRS

THE COMMISSIONER-GENERAL — RESPONDENTS

THE ATTORNEY-GENERAL

JUDGMENT

There are only two certainties in life: Death and Taxes! There is no escape from either of these variables. The inscription on the IRS building in Washington reads:

"TAXES ARE WHAT WE PAY FOR A CIVILIZED SOCIETY"

The 1st Respondent is the body responsible for tax administration. Apart from filing processes at the inception of this appeal, the 2nd Respondent did not participate in the appeal. The whole appeal was therefore determined with the active participation of the Appellant a limited liability company and taxpayer and 1st Respondent alone.

This is an Appeal against the tax assessment made by the Respondent against the Applicant. The Applicant listed 7 grounds of appeal namely:

1. The Commissioner-General erred in basing his assessment on false and inaccurate figures said to have been received by the Ministry of Health.
2. In arriving at his assessment, the Commissioner-General erred having regard to the discrepancies in the computation on which the assessment is based.
3. The Commissioner-General erred in basing his assessment on the audit report which failed to disclose the rate at which monies allegedly paid by the Ministry of Health to the Appellant in foreign currency were converted into Ghana cedis.
4. The Commissioner-General erred by grounding his assessment on an audit which went beyond the 6-year period within which the Appellant (tax payer) was bound by Section 122(3) of Act 592 to maintain records.
5. The audit report on which the assessment is based failed to take into account what constitutes business income under section 7 of Act 592 in determining the Appellant's alleged undisclosed income.
6. The Commissioner-General erred in notifying the Bank of Ghana to pay GH¢6,713,240.95 to Ghana Revenue Authority on behalf of the Appellant as its tax liability when the Appellant had not been served with a notice of assessment.
7. The Commissioner-General erred when he applied penalty of 30% for the late filing of returns by the Appellant from 2011 to 2013.

The Appellant however abandoned the 1st, 2nd and 3rd grounds of appeal leaving 4 outstanding grounds.

The Appellant's Case

The Commissioner-General erred by grounding his assessment on an audit which went beyond the 6-year period within which the Appellant (tax payer) was bound by Section 122(3) of Act 592 to maintain records.

The Appellant referred the court to section 122 of Act 592 which states:

(1) Unless otherwise authorized by the Commissioner-General, a person liable to pay tax under this Act other than an employee with respect to his employment income shall maintain in Ghana the necessary records to explain the information to be provided in a return or in any other document to be furnished to the Commissioner-General under this Act or to enable an accurate determination of the tax payable by that person.

(2) Where a person does not maintain records as required by subsection (1), the Commissioner-General may adjust that person's liability to tax in a manner that is consistent with the intention of this Act.

(3) The records referred to in this section shall be retained for a period of not less than six years unless the Commissioner-General otherwise specifies in writing.

(4) For the purposes of this section, the records to be maintained by a business shall include a record of all receipts and payments, all revenue and expenditure, and all assets and liabilities of the business.

The Appellant submitted that the Commissioner-General under section 122(2) could only adjust the tax liability to reflect the intentions of the Act when the person failed to maintain records which shall be retained for not less than 6 years unless the Commissioner-General specified in writing. The Appellant argued that the law thus placed an obligation on the taxpayer to maintain records for 6 years and not in perpetuity.

The Appellant said the Desk Audit sought to create the impression that an additional assessment had been made within the intendment of section 79(1) because new information had been discovered about the Ministry of Health payments. In referring to Poku v. Poku (2007/2008) SCGLR 996, the Appellant argued that where the evidence was in existence and could have been ascertained through diligent search, but no such search took place, the court would not allow a party to adduce such evidence.

The audit report on which the assessment is based failed to take into account what constitutes business income under section 7 of Act 592 in determining the Appellant's alleged undisclosed income.

The Appellant contended that it entered into a turnkey project with the Ministry of Health to provide equipment and reagents for laboratories in Ghana. It contended further that part of the money received was used to pay its foreign suppliers. Therefore, it concluded that the money it received did not constitute its business income. It referred to section 7 of Act 592 stating that a person's income from business is that person's gains or profit from any business carried on for whatever period of time by that person. It argued that business income is defined as gains and profits from business. According to the Appellant, the Desk Audit Report had stated that the audit had uncovered undisclosed income of the Appellant and that the team had added the monies paid by the Ministry of Health to the income in the Appellant's financial statements. The Appellant said the audit team relied on 2 fundamental assumptions namely:

1. The monies paid by the Ministry of Health were not included in the income disclosed in the financial statements of the Appellant.
2. All monies paid by the Ministry of Health constituted business income of the Appellant.

The Appellant concluded that the business income was limited to the gains and profits made by a business and not necessarily amounts it had received whilst conducting its business. Therefore, the assumptions made by the Desk Audit Report without having recourse to the contract which gave rise to the payment and the amounts due to foreign suppliers was wrong.

The Commissioner-General erred in notifying the Bank of Ghana to pay GH¢6,713,240.95 to Ghana Revenue Authority (GRA) on behalf of the Appellant as its tax liability when the Appellant had not been served with a notice of assessment.

The Appellant submitted that tax could only be collected when it was due and payable. It referred to Section 134 of the Internal Revenue Act, 2000 (Act 592) which states:

(1) Subject to this Act, tax assessed shall be due on the date on which the person assessed is served with a notice of assessment.
(2) Subject to this Act, tax due in an assessment shall be paid by the person assessed,
(a) In the case of a person subject to section 78, on the due date for furnishing of the return of income to which the assessment relates;
(b) In the circumstances specified in subsection (7) of section 72, on the date specified in the assessment;
(c) In the case of tax payable by instalments or by withholding, at the time provided for in Division III of Part X of Chapter 1; or
(d) In any other case, within 30 days from the date of service of the notice of assessment.

The Appellant argued further that by section 135 it was only when a tax is due and payable that it becomes a debt due to the Commissioner-General of the GRA. Therefore, the Appellant contended that by the combined effect of Sections 134 and 135, the Commissioner-General could only proceed to enforce the collection of tax after the taxpayer had been served with a notice of assessment and the time for payment of the tax had elapsed.

According to the Appellant, the purported tax liability of the Appellant was issued on 28th May 2014 which was 4 days after the Commissioner-General had written to the Bank of Ghana, indicating that the Appellant had a tax liability. The Appellant argued that this action by the Commissioner-General was taken even before the Appellant's tax liability had been determined and was therefore not sustainable under any of the provisions of Act 592.

The Appellant stated further that the Desk Audit Report which showed the purported tax liability was served on it on 7th October 2014. It had under, section 128(1) a 30 period within which it could object to the assessment and until that 30-day period had lapsed the Commissioner-General could not proceed to enforce the collection of the tax. However, the Commissioner-General proceeded to write to the Governor of the Bank of Ghana to enforce the collection of the tax on 21st May 2014, 4 months earlier that the date the Appellant was served with the copy of the Notice of Assessment. It therefore was of the view that at the time the Commissioner-General wrote to the Bank of Ghana, there was no tax liability against it.

It stated that contrary to the Respondent's contention that the tax recovered by the Commissioner-General was a withholding tax, it was rather a tax liability based on a Desk Audit Report which had not been served on the Appellant. The Appellant referred to section 84(2) which deals with withholding tax which states:

> *Subject to subsection 4, where a resident person pays a sum to another resident person which does not fall within subsection 1*
>
> > *(a) For the supply or use of goods or property of any kind, or*
> > *(b) For the supply of any services,*
> >
> > *in respect of a contract between the payee and a resident person other than an individual exceeding five hundred currency points, the person making the payment shall withhold tax on the gross amount of the payment at the rate prescribed in Part IV of the First Schedule.*

As a result, the Appellant contended that since it was the Ministry of Health which paid it for the supply of equipment and reagents under the turnkey project, the obligation to withhold tax on payment was on the Ministry of Health. And where the withholding agent had failed to withhold the tax, that agent was responsible to the Commissioner-General. The Appellant referred the court to the Court of Appeal decision in Taylor v. Taylor Co. Ltd v. Ghana Revenue Authority (Civil Appeal No. H1/69/2016) (unreported) where the Court speaking through Larbi JA had this to say:

> *We therefore entirely agree with Counsel for the Plaintiff that the Defendant by claiming directly from the Plaintiff as it did, fell foul of its own law. This is because the Defendant as a statutory body whose mandate was governed by Act 592, withholding tax which a withholding agent fails to withhold is not collected from the person who ought to have paid the tax but from the withholding agent who failed to deduct the withholding tax.*

The Commissioner-General erred when he applied penalty of 30% for the late filing of returns by the Appellant from 2011 to 2013

The Appellant told the court that the Desk Audit Report issued by the Commissioner-General on 28th May 2014 imposed a penalty of 30% to the provisional tax liability of GH¢363,971.83 due to the failure of the Appellant to file returns from 2011-2013 on time. It referred to section 142 of Act 592 which states:

> *A person who fails to furnish a return within the time required under this Act is liable to pay a penalty equal to the Bank of Ghana rediscount rate plus 5% applied to the tax outstanding if the return had been furnished in accordance with this Act calculated for the period the return is outstanding.*

The Appellant also referred to the Internal Revenue (Amendment) Act, 2004 (Act 669) which substituted the above provision to read:

> *Any company or self-employed person that fails to furnish a return of income within the time required under this Act is liable to pay a penalty of one penalty unit in the case of a company and half a penalty unit in the case of a self-employed person in respect of each day during which the default continues.*

Thereafter, the Internal Revenue (Amendment) (No. 2) Act, 2008 (Act 776) substituted the one penalty unit for two currency units for a company for each day of default and half penalty unit with one currency unit for a self-employed for each day of default,

Then the Internal Revenue (Amendment) Act, 2013 (Act 859) increased two currency units to four currency points for each day of default by a company and the one currency unit for self-employed was increased to two currency points.

The Appellant argued that for the years 2011 and 2012, the penalty for failure to file returns was 2 currency units (GH¢2.00) for each day of default and for 2013, four currency units (GH¢4.00)

for each day of default. As a result, the 30% penalty imposed by the Commissioner-General was without legal basis.

In the light of the above submissions, the Appellant urged the court for the following reliefs:

1. An order annulling the assessment appealed against.
2. Any other order that the Court may deem fit.

The Respondent is naturally opposed to the granting of the appeal.

The Respondent's Case

The Respondent gave the background of the instant appeal. The Appellant supplied goods and services to the Ministry of Health. However due to a disagreement between the parties, the Appellant as Plaintiff instituted suit against the Ministry of Health as Defendant. Judgment was entered in Plaintiff's favour.

According to the Respondent, under Sections 84(2) and 87 of the Internal Revenue Act, 2000 (Act 592), the Ministry of Health as withholding agent was obliged to withhold a percentage of the gross amount payable and pay same over to the Respondent as tax due and payable by the taxpayer which happened to be the Appellant.

However, the Ministry of Health could not deduct this amount as required by law as the Appellant as Plaintiff/Judgment-Creditor had already proceeded to levy execution by garnisheeing the accounts at the Bank of Ghana belonging to the Ministry.

The Respondent having been notified of the transaction and amount due invoked section 138 (1) of Act 592 to recover the tax of GH¢6,713,240.95 which it said the Ministry of Health was obliged to withhold and to pay over to the Respondent. The Respondent also argued that under section 91(1), (a) and (b) of Act 592, the tax so withheld was supposed to be held in trust for the

Respondent and was not subject to attachment in respect of a debt or liability of the withholding agent.

The Respondent averred that it recovered this money whereupon the Appellant instituted suit at the Fast Track High Court for recovery of the amount of GH¢6,713,240.95 together with interest and costs.

It contended that prior to this action, it had already notified the Appellant of its intention to carry out a tax audit into the Appellant's business activities but it did not receive the required co-operation. It therefore based its audit on information from the Ministry of Health and the Appellant's records. The amount of GH¢6,713,240.95 was deducted out of the sum total established as tax leaving an outstanding tax liability of GH¢1,052,906.96. The Respondent argued that the audit report contained the details of how the assessment was made. However, it conceded that there was a typographical error on page 1 item 4.1 which captured the undisclosed income in 2008 to be GH¢1,000,721.93 instead of GH¢10,020,721.93. This anomaly had therefore been corrected at page 6 of the report under the year 2008.

The Respondent told the court that at the time the case referred to by the Appellant which had commenced in the High Court and had proceeded to the Court of Appeal, the assessment which had culminated in the instant suit had not been served on the Appellant.

The Commissioner-General erred by grounding his assessment on an audit which went beyond the 6 year period within which the Appellant (tax payer) was bound by Section 122(3) of Act 592 to maintain records.

The Respondent argued that there was nothing in the law which stated that the Commissioner-General is barred from raising an assessment after 6 years. The Respondent submitted that there was a vast difference between assessments under sections 76 to 79 of Act 592 and section 122 of keeping of records. Section 122(3) states:

The records referred to in this section shall be retained for a period of not less than 6 years unless the Commissioner otherwise specifies in writing.

The Respondent argued that if it was the intention of the legislature to ban the raising of assessments after 6 years, it would have stated so in clear language. It referred to the Value Added Tax Act, 1998, Act 546 (now repealed and replaced by Act 870) where it was stated in section 30(1) thus:

The Commissioner shall not raise an assessment after a period of three years unless fraud has been determined by law.

The Respondent argued further that Section 54(3) itself had given the Commissioner-General the power to make an assessment at any time. It argued also that the new Income Tax Act, 2015 (Act 896) had expressly stated that the power of the Commissioner-General to make an original assessment expires after 6 years. It provided as follows:

Subject to subparagraph (4), the power of the Commissioner-General to make an original assessment expires six years from the date on which the Commissioner-General was first entitled to make the assessment.

Therefore, the Respondent contended that where the law intended to limit the power of the Commissioner-General to raise an assessment in terms of years, it would state so explicitly. It submitted that the meaning of section 122 was clear and did not lend itself to the interpretation alluded to by the Appellant.

It was Respondent's contention that from the records available, it was clear that the Appellant had not furnished the Respondent with any records of its dealings with the Ministry of Health and the payments it had received. It stated that either through fraud, gross or willful neglect, the Appellant had failed to furnish it with the material records of its business dealings and receipts. These were only brought to its attention from the Ministry of Health and the Attorney-General's

Office. It deemed this information so brought to its attention as new information in relation to the Appellant's income.

The audit report on which the assessment is based failed to take into account what constitutes business income under section 7 of Act 592 in determining the Appellant's alleged undisclosed income.

The Respondent referred to section 7(2) of Act 592 which states:

> *There shall be included in ascertaining the gains or profits from a business carried on by a person amounts accruing to or derived by that person that are attributable to the business and that would otherwise be included in calculating that person's income from any investment.*

It argued that as long as receipts from the Ministry of Health could be attributable to the Appellant's business in supplying the equipment, it was immaterial what the Appellant did with the receipts. Not having filed the contract it had with the Ministry of Health, it could not rely on it to divert attention from the scale of its business activities.

The Commissioner-General erred in notifying the Bank of Ghana to pay GH¢6,713,240.95 to Ghana Revenue Authority (GRA) on behalf of the Appellant as its tax liability when the Appellant had not been served with a notice of assessment.

It was the Respondent's version of events that the matter which eventually ended up at the Court of Appeal related to the Commissioner-General's act of directing the Bank of Ghana to deduct the amount of GH¢6,713,240.95 as withholding tax from the accounts of the Ministry of Health before paying any amount due to the Appellant herein in enforcement of a judgment entered in favour of the Appellant against the Ministry of Health.

It was contended on behalf of the Respondent that the Court of Appeal judgment therefore did not affect the instant suit which turned on the validity or otherwise of an assessment raised and

whether that amount should be set aside or modified. It said it had since appealed against the said Court of Appeal decision.

The Commissioner-General erred when he applied penalty of 30% for the late filing of returns by the Appellant from 2011 to 2013

The Respondent insisted that the penalty awarded for late filing of returns was GH¢101,191.55. Although the Appellant had disputed same, it had not disputed the fact that a penalty was due. What it had failed to do was to suggest alternative figures. It was submitted that this issue could be referred to a Court Expert to re-compute the penalty.

The Respondent urged the court to dismiss the appeal in its entirety as it argued that the onus lay on the Appellant to prove that the assessment was excessive or erroneous and this, it had failed to do.

The court referred this matter to a Court Expert in the person of the President of the Chartered Institute of Taxation. Based on this referral, the Court Expert furnished the court with his findings. The Court Expert provided his opinion under the various grounds of appeal.

The Commissioner-General erred by grounding his assessment on an audit which went beyond the 6-year period within which the Appellant (tax payer) was bound by Section 122(3) of Act 592 to maintain records.

The Court Expert in his opinion stated that Act 592 allowed the Commissioner-General to make a final assessment of the chargeable income of a taxpayer and the tax payable based on the person's returns of income and any other information available to him. Where the person failed to submit a return of income for a year of assessment or where the Commissioner-General is not satisfied with a return of income submitted by a taxpayer, he is allowed to make a final assessment of the chargeable income of the taxpayer and the tax payable based on his best judgment.

He submitted further that section 77 did not indicate a time limit within which the Commissioner-General can make his final assessment. This could be interpreted to mean that the Commissioner-General had unlimited powers as to the period within which he could made this assessment. He was of the opinion however, that such discretionary power needed to be exercised in fairness as enshrined under Article 296 of the 1992 Constitution. He explained that this requirement for fairness in exercising such discretionary power is given credence by the provision in section 122(3) of Act 592 which mandates a taxpayer to maintain records up to 6 years. Thus, records of a year of assessment that have been kept for a period of 6 years is in compliance with the law. In his view, the provision allows enough time for the Commissioner-General to make an assessment of the chargeable income and the tax payable of a person. This also enables the taxpayer to have good memory of his records and limits the cost of keeping records. It was his opinion that in line with the need for fairness, the Commissioner-General in making a final assessment of the chargeable income of a person and the tax payable thereon for periods beyond 6 years, may not be acting in line with the spirit of keeping records for the 6 years.

The Court Expert told the court that section 79 provided for an additional assessment to be made by the Commissioner-General thus amending the original assessment. This would be if there was fraud, a gross or willful neglect by or on behalf of a person, or discovery of new information in relation to the tax payable. In those instances, the Commissioner-General may raise an assessment on a person for periods beyond 6 years. He told the court that in the submissions presented to him, there was no evidence that the information from the Ministry of Health to the Commissioner-General was additional information which had not been considered in the earlier assessment. He said section 79 would not apply in the case of the Commissioner-General's assessment of the Appellant's liability in this case.

The audit report on which the assessment is based failed to take into account what constitutes business income under section 7 of Act 592 in determining the Appellant's alleged undisclosed income.

The Court Expert referred to section 7 of Act 592 and stated that income from business has been given a wide coverage. Thus, to the extent that a person receives gain or profit for carrying out a business activity in Ghana, such gain or profit is a business income. It is provided for in section 7 as follows:

> *A person's income from a business is that person's gains or profits from any business carried out from any business carried out for whatever period of time by that person.*

He however said that a distinction needed to be made between a payment which was a gain or profit arising out of carrying on a business in Ghana and a payment which was not a gain or profit from carrying on a business in Ghana. He told the court that the taxpayer under Division III of Act 592 is allowed to deduct expenses that are wholly, exclusively and necessarily incurred in generating the gains or the profits from the business in determining the chargeable income from the business. Therefore, where supplies had been obtained from other third parties for the purposes of conducting the business, the costs of these supplies are deductible in determining the chargeable income. In carrying out the assignment, copies of the documents on the Contracts between the Appellant and the Ministry of Health were referred to. In arriving at his findings, the Court Expert stated that it was within the powers of the Commissioner-General within the meaning of section 77 (2) and (3) to apply the payments received in assessing the Appellant's tax liability. The onus therefore lay on the Appellant to prove the costs it had incurred which should be deducted from the gross payment before arriving at the chargeable income to determine the tax amount.

He stated further that by the provisions of section 25 of Act 592, a person's income for the purposes of tax is determined in accordance with the generally accepted accounting principles. In the case of a company, the Act required that tax was to be determined on an accrual basis. This required that income and expenses for the purposes of determining the tax are included or

deducted when they are receivable or payable respectively. He said the assessment had included a cash payment received from the Ministry of Health in its computation as undisclosed income (payments). It was his opinion that if the Appellant's accounts had been thoroughly examined, it might turn out to be the case that the income in question had already accrued in the financial statements and therefore did not constituted undisclosed income. Therefore, using the cash payment from the Ministry of Health to determine the profit of the Appellant suggested that the Appellant was assessed to tax on cash basis instead of the accrual basis. The onus still rested on the Appellant to prove that the assessment made by the Commissioner-General ws excessive or erroneous.

The Commissioner-General erred in notifying the Bank of Ghana to pay GH¢6,713,240.95 to Ghana Revenue Authority (GRA) on behalf of the Appellant as its tax liability when the Appellant had not been served with a notice of assessment.

The Court Expert's report stated that recovering tax owed by taxpayers from third parties was one of the mediums provided for under Act 592 for the collection of taxes. This method was however resorted to when the tax in question was due and payable. He referred to sections 138(2) and 134(1) of Act 592 which state respectively:

Section 138(2)

> *The Commissioner may only issue a notice under subsection (1) with respect to tax which is due but not currently payable where the Commissioner reasonably believes that the tax debtor will not pay the tax by the date on which it becomes payable.*

Section 134(1)

> *Subject to this Act, tax assessed shall be done on the date on which the person assessed is served with a notice of assessment.*

The Court Expert told the court also that sections 76-79 of Act 592 provide that an assessment may be made by the Commissioner-General or by the taxpayer. He told the court also that at the time the Commissioner-General issued his letter dated 21st May 2014 to the Governor of the Bank of Ghana requesting the latter to pay the tax due and owing of GH¢6,713,240.95 on behalf of the Appellant, there was no assessment either by the Appellant or the Respondent to determine the Appellant's tax liability. The Appellant had also not been served with any notice of assessment to indicate the tax assessed on it at the time the Respondent wrote to the Bank of Ghana with its demand that the tax be paid. In his view, since the Appellant had not been notified of the assessment the Respondent was wrong in issuing the order to the Bank of Ghana for the payment of tax in respect of the Appellant. He said even if there had been an assessment the Appellant needed to have been given the opportunity to avail itself of the objection processes provided under the Act to establish that there was indeed a tax due or otherwise and the Respondent needed to establish reasonable grounds that the Appellant would not pay the tax before proceeding with the order to the Bank of Ghana.

Furthermore, the Court Expert contended that by the provisions of sections 87 and 88 of Act 592, contrary to the Respondent's assertions that the letter to the Bank of Ghana was for the collection of a withholding tax, it was for the withholding agent to deduct this tax at source. Where the agent failed to do so, the Commissioner-General was to collect same from the agent together with the penalty. The Ministry of Health as withholding agent would then collect the tax from the witholdee but the penalty could not be recovered. He posited that if the Ministry's account had been garnisheed, it was the duty of the said Ministry to inform the Bank of Ghana of its obligation to withhold tax when making payment to the Appellant. He said it would have been proper for the Respondent to have written to the Ministry of Health to remind it of its obligation to pay the withholding tax. There was also no communication from the Ministry of Health to the Respondent indicating its inability to make good the withholding tax obligation. Therefore, the act of writing to the Bank of Ghana copied to the Appellant for the collection of the withholding tax did not give due recognition to tbe provisions of Act 592.

The Court Expert further contended that the practice was to issue tax receipts when the withbolding tax was paid in the name of the withholding agent and the person on whose behalf

the withholding tax was paid would be issued with a Tax Certificate in the witholdee's name. In this case however, Exhibit VD6, a receipt showing evidence of the tax paid was issued in the Appellant's name indicating that the tax was paid directly by the Appellant and not through withholding. The report concluded that the Respondent's claim that it was collecting withholding tax was not accurate and could not be supported.

The Commissioner-General erred when he applied penalty of 30% for the late filing of returns by the Appellant from 2011 to 2013

The calculations given by the Court Expert were as follows:

2011	GH¢2.00
2012	GH¢2.00
2013	GH¢4.00

This was to be applied for each day of continued default. These rates had been provided by law and he referred the court to the Internal Revenue (Amendment No. 2) Act 2008 (Act 776) and the Internal Revenue (Amendment) Act, 2013 (Act 859) respectively. He stated that there was no provision in the Act that gave the Respondent the power to apply a rate of 30% of the tax outstanding in computing the penalty for the late filing of Appellant's returns.

Appellant's comments on the Court Expert's evidence

The Court Expert told the court the Internal Revenue Act did not indicate a time limit within which the Commissioner-General could make a final assessment of the chargeable income and tax payable. The Appellant argued in response that to arrive at the intention of the legislature, the statute must be read as a whole. Appellant Counsel referred to Aharon Barak's book "Purposive Interpretation of Law" where the learned author stated at p. 343 thus:

> *The interpretative process generally begins with a "legislative unit" requiring interpretation. Interpretation does not however, end with that unit. The judge must study*

the statute as a whole. In order to find the legal meaning of a word, an interpreter must read the paragraph framing the word, the article of the statute framing the paragraph, the chapter framing the article and the entire piece of legislation framing the chapter.

He also referred to the book Modern Purposive Approach to Interpretation in Ghana by John Kobina Essel Edzie where the learned author quoting from Halsbury's Laws of England and Odgers Construction of Deeds and Statutes stated respectively as follows:

For the purposes of construction, the context of words which are to be construed includes not only the particular phrase or section in which they occur but also the other parts of the statute. Thus, a statute should be construed as a whole so as, so far as possible, to avoid any inconsistency or repugnancy either within the section to be construed as between that section and to other parts of the statute. The literal meaning of a particular section may in this way be extended or restricted by reference to other sections and to the general purview of the statute.

The statute must be read as a whole and the construction made of all the parts together. The meaning of the statute and the intention of the legislature in enacting it can only properly be derived from a consideration of the whole enactment and every part of it in order to arrive if possible at a consistent plan. It is wrong to start with some a priori idea of that meaning or intention and to try by construction to work that idea into the words of the statute in question.

Counsel referred to sections 77(1) and (2) and sections 122(1) and (3) and argued that the law enjoined a tax payer to retain records for a period of not less than 6 years and therefore it would not be fair for the Commissioner to make a final assessment on the tax payable for periods beyond 6 years.

On the issue of business income, Counsel referred to section 5 of Act 592 and argued that even if the amount paid to the Appellant was business income, the tax assessed should take cognizance of the total amount of deductible expenses incurred by the Appellant and to act accordingly.

He also argued that although the onus was on them to prove that the assessment made by the Commissioner-General was excessive, there had been no assessment and therefore they had not been given an opportunity to do so as they had been made to pay the tax without an assessment as the money had been paid over by the Bank of Ghana to the Respondent.

Respondent's comments on the Court Expert's evidence

The Respondent argued that there was nothing in the law which stated that the Commissioner-General is barred from raising an assessment after 6 years. The Respondent submitted that there was a vast difference between assessments under sections 76 to 79 of Act 592 and section 122 of keeping of records.

The Respondent argued that if it was the intention of the legislature to ban the raising of assessments after 6 years, it would have stated so in clear language. It referred to the Value Added Tax Act, 1998, Act 546 (now repealed and replaced by Act 870) where it was stated in section 30(1) thus:

> *The Commissioner shall not raise an assessment after a period of three years unless fraud has been determined by law.*

The Respondent also referred to section 54 of Act 870 in which it stated that an assessment could be raised at any time.

It was the case of the Respondent that the provisions on time keeping were not intended to have a limiting effect on the power of the Commissioner-General to raise assessments as far as time limits are concerned.

The Respondent was of the opinion that ground 6 of the appeal was no longer a matter for determination as the amount of GH¢6,713,240.95 together with interest had already been

refunded to the Appellant. It stated that the refund meant that the said amount now became part of the unpaid assessed tax subject to the determination of the instant appeal.

In view of the Court Expert's opinion on the use of the wrong law in arriving at the amount of GH¢109,191.90 and penalty for late filing of returns for the years 2011 to 2013, the Respondent prayed the court to direct either the Court Expert or the 1st Respondent to re-calculate the penalty payable for late filing of returns for the years 2011-2013 in accordance with Acts 776 and 859.

It submitted that the Appellant had failed to discharge the burden of proving that the assessment was excessive or erroneous in accordance with section of 132 of Act 592 which stated:

> *In an objection to an assessment or on appeal, under section 129 or 130, the onus is on the person assessed to prove, on the balance of probabilities, the extent to which the assessment made by the Commissioner-General is excessive or erroneous.*

It prayed the court to dismiss the appeal subject to the recalculation of the penalties.

The sole issue is whether or not the appeal should be allowed?

In the case of Koglex Ltd (No.2) v. Field (2000) SCGLR 175 @ 184 per Acquah JSC (as he then was), the court held that where findings were based on established facts, the appellate court was in the same position as the trial court and can draw its own inferences from these established facts.

What are the established facts in this case?

The Appellant as Plaintiff instituted suit against the Ministry of Health as Defendant for the recovery of the outstanding balance of money owing to it for goods and services supplied. Judgment was entered in the Appellant's favour. The Appellant went into execution of its judgment whereupon it successfully garnisheed the Judgment-Debtor's account.

On 28th May 2014, the Appellant was served with a desk audit report for the 2001-2010 assessment years. The total tax liability including penalty for late filing of returns for 2011-2013 came to GH¢1,052,906.96. (See Exhibit No.1 attached to the Notice of Appeal against Tax Assessment) and also Exhibit VD5 attached to the 1st Respondent's Reply).

The Appellant on 24th October, 2014 caused its solicitors to write to the Respondent raising an objectiofn to the assessment. (See Exhibit No. 2)

Prior to the serving of the notice of assessment on the Appellant, the Respondent had on 21st May 2014 written to the Governor, Bank of Ghana informing him that the Appellant owed tax to the tune of GH¢6,713,240.95. (See Exhibit No. 3). The letter further advised the Governor that the Commissioner in exercise of his powers under Act 592 required that monies the Bank of Ghana held on behalf of the Appellant was to be used in settling this tax liability.

The Appellant through its Counsel protested this act by letter dated 24th June 2014. It stated that no tax assessment had been served on it prior to the letter of 21st May 2014 addressed to the Governor. (See Exhibit No. 6).

On 25th June 2014, a receipt was issued in the Appellant's name for an amount of GH¢6,713,240.95. (See Exhibit No. 11 and Exhibit VD6).

On 17th November 2011, the Respondent made a demand on the Appellant for the amount of GH¢1,052,906.96 (See Exhibit No. 7).

This triggered a response from the Appellant stating that its objection against the assessment had not been considered. It therefore evinced its inability to pay the tax until its objection had been considered. (See No. 8). The matter finally ended up in the Commercial Court as a Tax Appeal. The court needed to look at the big picture, pick up the patterns and make sense of the patchwork quilt of evidence both oral and documentary. The grounds of appeal will be considered in the order in which they were listed.

1. **The Commissioner-General erred by grounding his assessment on an audit which went beyond the 6-year period within which the Appellant (tax payer) was bound by Section 122(3) of Act 592 to maintain records.**

I have reminded myself of Osei v. The Republic (1976) 2 GLR 383, in considering the evidence of the Court Expert. His evidence is also to be subjected to judicial scrutiny and not to be swallowed hook, line and sinker by the court. In other words, his evidence is to be evaluated in addition to the other evidence on record.

Section 77 of Act 592 states:

(1) Subject to section 78, the Commissioner shall, based on a person's return of income and on any other information available, make a final assessment of the chargeable income of that person and the tax payable on that assessment.

(2) Where

(a) A person defaults in furnishing a return of income for a year of assessment, or

(b) The Commissioner is not satisfied with a return of income for a year of assessment furnished by a person,

the Commissioner may according to the Commissioner's best judgment make a final assessment of the chargeable income of that person and the tax payable on that assessment for the year.

(3) The Commissioner shall, on making an assessment under paragraph (b) of subsection (2), include with the assessment a statement of reasons as to why the Commissioner is not satisfied with the return.

(4) In the circumstances

In the instant case, an interpretation is to be placed on Section 122(3) which states:

The records referred to in this section shall be retained for a period of not less than 6 years unless the Commissioner otherwise specifies in writing.

Currently, the modern purposive approach has characterized the interpretation of deeds and statutes. Justice Sir Dennis Adjei in his book Modern Approach to the Law of Interpretation in Ghana has referred at p. 62 to Aharon Barak's Statutory Interpretation at p. 343 in stating:

> *The interpretative process in general begins with a "legislative unit" requiring interpretation. Interpretation does not, however end with that unit. The Judge must study the statute as a whole. In order to find the legal meaning of a word, the interpreter must read the paragraph framing the word, the article of the statute framing the paragraph, the chapter framing the article, and the entire piece of legislation framing the chapter. The same phrase may have different meaning in two different statutes, because they aspire to different purposes. Generally, the same phrase has the same meaning everywhere it appears in a single statute, because it is designed to achieve the same purpose.*

The Act has to be read as a whole and an interpretation given to section 122 alongside other provisions. With that in mind what should be the interpretation given to section 122 of Act 592 which has given a period of 6 years within which records shall be kept bearing in mind that it did not specify a maximum period for which records may be kept?

Section 79 is also of relevance here. It deals with additional assessments and states:

(1) Subject to subsections (2) and (3), the Commissioner may, within three years after service of a notice of assessment, make an additional assessment amending an assessment previously made.

(2) Where the need to make an additional assessment arises by reason of fraud or a gross or willful neglect by, or on behalf of, a person or the discovery of new information in relation to the tax payable for any year of assessment, the Commissioner may make an additional assessment for that year at any time.

(3) The Commissioner shall not make an additional assessment amending a previous assessment if the previous assessment has been amended or reduced pursuant to an order of the High Court unless that order is obtained by fraud.

Although the Respondent stated in its submissions that the records it received from the Ministry of Health and the Attorney-General constituted new information, it failed to show that it had made an earlier assessment based on the records of the Appellant and after that, it had made a further assessment based on the records from the Ministries of Health and Justice. Section 79 would therefore not apply to this case as there was no previous assessment for which an additional assessment could have been made. This leaves the court with the interpretation to be given to section 122.

In his book Taxation in Ghana, Principles, Practice and Planning (3rd edition, 2014), Abdallah Ali-Nakyea Esq. states at p. 45 as follows:

> *It is worthy of note that by virtue of section 122(3) of Act 592, the Commissioner-General can make an assessment not later than 6 years after the end of the chargeable period to which the assessment relates, since taxpayers are required under this provision to retain records for a period of not later than 6 years unless the Commissioner-General otherwise specifies in writing.*

This dovetails into the Court Expert's opinion when he refers to the exercise of discretion and Article 296 of the Constitution saying:

> *Section 77, however does not indicate a time limit within which the Commissioner-General can make a final assessment of the chargeable income and the tax payable by a person. This may be interpreted to mean that the Commissioner-General has unlimited powers as to the period within which he can make a final assessment of the chargeable income of a person and the tax payable on the chargeable income. Thus, by the provisions of section 77 of Act 592, the Commissioner-General appears to have a discretionary power in determining the years of coverage in making a final assessment of the chargeable income and tax payable of a person. Such discretionary power however needs to be exercised in fairness as enshrined under Article 296 of the Constitution.*

Article 296 of the 1992 Republican Constitution states:

> *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 that 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.*

As the court put it in the case of The State v. General Officer Commanding the Ghana Army, Ex parte Braimah (1967) GLR 192 at 200-201:

> *... the scales are to be held evenly, at any rate in normal times, between the community, that is the State and the individual and there can be no question of "leaning over backward" so to speak, to favour the State at the expense of the citizen or to favour the citizen at the expense of the community. And the court's vigilance in protecting the citizen against any encroachments on his liberty by the executive becomes meaningful and real only when pursued on the basis of this principle.*

There has been no evidence to show that the Commissioner-General had made an additional assessment. It is in this court's view that in reading Act 592 as a whole and with the rules of interpretation in mind, the Commissioner-General's power to make assessments should be within the 6-year minimum period within which the taxpayer is mandated to keep records. This is because it could not have been the legislature's intention to require the taxpayer to, as the Appellant has aptly put it, keep records "in perpetuity."

2. **The audit report on which the assessment is based failed to take into account what constitutes business income under section 7 of Act 592 in determining the Appellant's alleged undisclosed income.**

Section 7(1) of Act 592 defines business income as:

A person's income from a business is that person's gains or profits from any business carried on for whatever period of time by that person.

Section 7(2) provides:

> *There shall be included in ascertaining the gains or profits from a business carried on by a person amounts accruing to or derived by that person that are attributable to the business and that would otherwise be included in calculating that person's income from any investment.*

The taxpayer however is allowed to deduct expenses under Division III which provides in section 13 thus:

Subject to this Act, for the purposes of ascertaining the income of a person for a basis period from any business or investment there shall be deducted:

(a) All outgoings and expenses wholly, exclusively and necessarily incurred during that period by that person in the production of the income;
(b) Any other deductions as may be prescribed by Regulations made under section 114 (as amended by the Internal Revenue (Amendment) Act, 2002 (Act 622)

Thereafter, section 25 which deals with the Method of Accounting provides:

(1) Subject to this Act, for the purposes of ascertaining a person's income accruing or derived during a basis period, the timing of inclusions and deductions shall be made according to generally accepted accounting principles.
(2) Subject to subsections (1) and (3), and unless the Commissioner prescribes otherwise in a particular case, a person shall account for tax purposes on a cash or accrual basis.
(3) A company shall account for tax purposes on an accrual basis.

(4) A person may apply in writing for a change in that person's method of accounting and the Commissioner may by notice in writing, approve the application but only if satisfied that the change is necessary to clearly reflect that person's income.

(5) If a person's method of accounting is changed, adjustments to items of income, deduction or credit shall be made in the basis period following the change, so that an item is not omitted nor taken into account more than once.

The Appellant has argued that the business income is limited to gains and profits from a business and not necessarily, the amounts received by a business in conducting its affairs.

Under cross-examination of CW1 on 19th July 2017, the following was elicited:

Q: As a tax Court Expert, can you tell the Court the difference between a 'Desk Audit' and a 'Field Audit'?

A: A desk audit is normally carried out by the Commissioner-General from records and documents available to the Commissioner-General which are examined in the tax office. A field audit as its name implies, extends beyond the Revenue Office. It may be initiated with a desk audit but then the tax officers will follow up with actual visits to the premises of the tax payer or any other place outside the office which in the opinion of the Commissioner-General holds data or information relevant to the audit being carried out.....

Q: In this case, the assessment according to the Commissioner-General was based on documents received from the Ministry of Health indicating according to it, payments it had made to the Appellant over a period of time. Not so?

A: My Lord that is so.

Q: So, the assessment was based on a desk audit. Is that correct?

A: To the extent that it was on records obtained and examined in the tax office, we could describe it as a desk audit. I must add that the law (Act 592) permits the Commissioner-General to use this approach where returns are not filed or the Commissioner-General has considerable difficulty in assessing information relating to the tax liability of the person.

Q: In this case the receipts of money by the Appellant were considered as constituting business income not so?

A: My Lord, in the audit report shown to me and Exhibit CE1, the amounts in question have been indicated as "undisclosed income". As indicated in our response to Ground 5 of the appeal as in Exhibit CE1, to the extent that these amounts are received by the Appellant, it is within the power of the Commissioner-General to consider the amounts as income. However, assessment of the tax liability is based on the taxpayer's chargeable income which is determined by setting off allowable deductions from amounts considered by the Commissioner-General as income.
Q: The allowable deductions referred to by you would include expenses incurred wholly exclusively and necessarily in generating the income. Not so?
A: My Lord indeed, Section 13 to Section 24 of Act 592 has provisions that allow for deductions and arriving at chargeable income which include all outgoings and expenses that are wholly, exclusively and necessarily incurred in producing the income.

The witness was then asked the following:

Q: You would agree that because the assessment was based on the desk audit, it did not involve the examination of the Appellant's entire books to determine its chargeable income.
A: Yes. My Lord. The evidence as we saw from the records shown to us, showed that there wasn't thorough examination of the accounts and records of the Appellant. I must add that it was based on the Commissioner's best judgment due to what the Respondent indicated as difficulties in getting full information from the Appellant. Indeed, there was no thorough examination from what we have seen.

In cross-examination of the witness by the Respondent on 28th July 2017, the following ensued:

Q: In your opinion in respect of Ground 5 of the appeal, you stated that the argument of the Appellant was that the payment received from the Bank of Ghana on behalf of the Ministry of Health was not business income and therefore not subject to withholding tax. Is that so?
A: My Lord, that ground actually questioned the inclusion of the amount received for services rendered to the Ministry of Health in the assessment raised by the Respondent on the contention that some of the receipts were also made as payments to other 3rd parties in connection with the service rendered by the Appellant.

As far as that ground 5 is concerned, our view is that it is primarily within the right of the Commissioner-General to treat those amounts received as part of the income of the Appellant to be assessed to tax. We also did not that the inclusion of those payments received by the Appellant appear to be on the cash basis rather than an accrual basis by which a taxpayer of the nature of the Appellant is required to prepare its account under section 25 of Act 592.

Q: From Exhibit VD5, page 2 you would see that the Respondent went through certain steps from the year 2001 to arrive at the tax liability for each year, that is, from 2001 through to 2010.
A: Yes. My Lord, the Respondent in the exhibit referred to, show the steps it had taken in terms of computations in arriving at the tax liability assessed.
Q: In the said computations you can see clearly that reference is made to the accounts of the Appellant.
A: Yes. My Lord. Respondent clearly indicated that the assessment arising from the computations was based on the examination of the account of the Appellant.
Q: The opening paragraph of the same page 2 also stated that payments received from the Ministry of Health and the annual financial statement for the period were examined in arriving at the tax liability.
A: Yes. My Lord. There was a comparison of the payment received from the Ministry of Health and the amounts shown as income in the Appellant's account for those years.
Q: Indeed, the purpose of the audit has been stated in paragraph 2.0 (i) to be to ascertain the accuracy and reliability of all tax returns submitted by the tax payer for tax assessment.
A: Yes. My Lord. That was so indicated under the paragraph 2(1) of the assessment.
Q: So, you would agree with me that from the details of the work as contained in Exhibit VD5, the Respondent did examine the tax records of the Appellant available to the Respondent.
A: Yes. My Lord. The Respondent showed in the computation that they had examined the accounts of the Appellants and returns as availahle to him, the Respondent and records of the payments made to the Appellant on behalf of the Ministry of Health. From the information and documents provided to us, these were the records examined by the Respondent.

Q: You also indicated in your report that you took steps to obtain certain documents from the Registry of this court in carrying out your work. These are numbered as Appendix 1.
A: Yes. My Lord. That is right. We took steps to get other documents that would give us a better understanding of the nature of the contract between the Appellant and the Ministry of Health.
Q: In your concluding opinion on Ground 5, you stated that the onus is on the Appellant to prove the extent to which the assessment made by the Commissioner-General is excessive or erroneous in accordance with section 132 of Act 592.
A: Yes. My Lord, we did conclude on ground 5 by reference to section 132 of Act 592 which places a burden of proof on the Appellant. This was as indicated in our report, whiles it is within the power of the Commissioner-General to include amounts received by the Appellant in his assessment, if it should so happen that the assessment was erroneous, it is the Appellant who has to show proof ordinarily with relevant supporting documents to demonstrate that the assessment is erroneous.
Q: Did the Appellant provide you with any documents to support its contention that the monies received from the Ministry of Health does not constitute business income under the law?
A: My Lord, we made it clear that the Commissioner-General has the power to include those amounts. The documents we received which were examined in the course of our work did indicate the involvement of other parties in the contract between the Appellant and the Ministry of Health. There were no specific documents among which we received showing payments made by the Appellant to those other parties if any.

On the fact of it we did make that conclusion on ground 5 that the onus is on the Appellant to prove that the Respondent's assessment was erroneous. We could not come to a conclusion as far as that was concerned on the face of the information and documents made available to us.

So, was the undisclosed income a business income within the meaning of section 7 of Act 592? In consonance with Act 592, the income received by the Appellant is that person's gains and profits from any business it had carried out.

On May 21 2014 the Respondent wrote to the Governor of the Bank of Ghana in respect of a Notice to Pay Tax on Behalf of Tax Debtor: Taylor and Taylor Company Ltd. The Governor was requested to pay an amount of GH¢6,713,240.95 in this regard.

Thereafter on May 28 2014 it wrote to the Appellant stating as follows:

> *Dear Sir*
> *TAYLOR & TAYLOR COMPANY LIMITED FOR THE ASSESSMENT YEARS, 2001-2010*
>
> *Please find attached a desk audit report on your company for the 2001-2010 assessment years. This report is based on information received by the GRA from the Ministry of Health. The audit resulted in a tax liability of GH¢1,052,906.96 as follows:*

Details	*Amount GH¢*
Outstanding liability from audit	*5,889,966.43*
Penalty on tax outstanding at 30%	*1,766,989.93*
Penalty for late filing of returns for 2011-2013 GH¢363,971.83 at 30%	*109,191.55*
Total outstanding tax liability	*7,766,147.91*
Less total payment	*6,713,240.95*
Total tax liability	*1,052,906.96*

> *You are required to issue a cheque to settle the outstanding liability within 30 days on the receipt of this letter.*
>
> *The Head (Legon MTO) is, by a copy of this letter, required to ensure payment.*

From the Respondent's own showing in its letter of May 28 2014, it based its conclusions in assessing tax on the business income to the information it had received from the Ministry of Health on payments it had made to the Appellant. On the face of the letter, it did not have access

to the Appellant's version of events as to the amount it had paid out to its foreign suppliers and other sundry expenses which should have been deducted to arrive at the actual profit arising from the various transactions which would have been subject to tax. This letter belies the Audit Report (Exhibit VD 5i) which states "Examination of your records revealed the following undisclosed income ...

In this court's view, this should be the net income being the gross income less the deductions envisaged in section 13 of the Act.

As the Court Expert put it at p. 3 of his report at the last paragraph thus:

> *However, a distinction needs to be made between a payment which is a gain or profit arising out of carrying on a business in Ghana and a payment which in NOT a gain or profit from carrying on a business in Ghana. By the provisions under Division III of Act 592, the taxpayer is allowed to deduct expenses that are wholly, exclusively and necessarily incurred in generating the gains or the profits from the business in determining the chargeable income from the business. Where supplies have to be obtained from other third parties for the purpose of conducting the business, the cost of these supplies are deductible in determining the chargeable income.*

Moreover, at p. 4 of the report specifically in paragraphs 4 and 5 the Court Expert said:

> *It is however important to note that by the provisions of section 25, a person's income for the purposes of tax is determined in accordance with generally accepted accounting principles. In the case of a Company, the Act requires that tax is determined on an accrual basis. This requires that incomes and expenses for the purpose of determining the tax are included or deducted when they are receivable or payable respectively.*
>
> *The Commissioner-General's assessment has included a cash payment received from the Ministry of Health in its computation as undisclosed income. There is no indication that inclusion of the supposed undisclosed income (payments) was based on the accrual*

concept. If the accounts of the Appellant had been thoroughly examined, it might turn out that the income in question was already accrued in the financial statements and did not constitute undisclosed income. Therefore, using the cash payment from the Ministry of Health to determine the profit of the Appellant suggests that the Appellant was assessed to tax on cash basis instead of the accrual basis.

To the extent that the Appellant was assessed on records from the Ministry of Health on its payments to the Appellant without recourse being had to an analysis of the outgoings and deductions, which would have reduced these payments, in this court's view, would not be a fair assessment of the profits generated by the Appellant's business dealings with the said Ministry.

As a result, the assessment would not meet judicial scrutiny and would be set aside.

3. **The Commissioner-General erred in notifying the Bank of Ghana to pay GH¢6,713,240.95 to Ghana Revenue Authority (GRA) on behalf of the Appellant as its tax liability when the Appellant had not been served with a notice of assessment.**

The Notice of Assessment was dated 28th May 2014.

The letter to the Bank of Ghana was dated 21st May 2014. It requested the Governor of the Bank of Ghana to pay the tax due and owing on behalf of the Appellant.

It is provided by Section 134(1) as follows:

Subject to this Act, tax assessed shall be due on the date on which the person assessed is served with a notice of assessment.

The question to ask at this point is how come there was a request for tax due and owing when the Appellant as taxpayer had not been made aware that it owed tax to the tune demanded in the letter to the Bank of Ghana? The action the Respondent took in writing to the Governor, Bank of Ghana to demand payment to be made on behalf of the Appellant without first serving a notice of

assessment was in effect to use an idiomatic English expression, was putting the cart before the horse. This was an error of great magnitude on the Respondent's part and was premature.
The Respondent has argued that the tax it applied to the Governor for, was withholding tax. This is provided for in sections 87 and 88 of Act 592 as follows:

Section 87

(1) Subject to subsection (2) a withholding agent shall pay to the Commissioner, a tax that has been withheld or that should have been withheld under this subdivision fifteen days after the end of the month in which the payment subject to withholding tax is made by the withholding agent.

(2) When a person is required to withhold tax from a payment under subsection (2) of section 86, the tax shall be paid to the Commissioner at the time specified in the Commissioner's notice.

(3) An amount withheld under this subdivision is treated as if it were tax due and payable on the date referred to in subsection (1) or (2).

(4) Subject to sections 10(2) and 84(4) a provision in an agreement which prohibits the deductions or withholding of a tax required to be deducted or withheld under this Act or any other enactment administered by the Commissioner is void.

Section 88

(1) A withholding agent who fails to withhold tax in accordance with this subdivision is personally liable to pay to the Commissioner the amount of tax which has not been withheld, but the withholding agent is entitled to recover this amount from the payee.

(2) The liability imposed by subsection (1) is treated as if it were tax due and payable on the date referred to in subsection (1) or (2) of section 87.

It was the duty of the Ministry of Health to withhold the tax and then pay same to the Respondent. Failing which the Respondent was to take steps to recover it from the Ministry of

Health which in turn would have the liberty to recover same from the Appellant. The Respondent however chose to take the withholding tax from the Appellant.

Section 89 deals with the issuance of tax credit certificates. It states:

(1) The Commissioner shall, upon receipt of an amount paid under section 87, issue to the withholding agent in favour of the payee a tax credit certificate in the form prescribed by the Commissioner stating the amount deducted.

(2) A withholding agent shall deliver to the payee a tax credit certificate setting out the amount of tax withheld under this subdivision together with a statement of the amount of the payment from which tax has been withheld.

(3) A payee who is required to furnish a return of income shall attach to the return the tax credit certificate or certificates supplied to the payee for a basis period of the payee ending within the year of assessment for which the return is filed.

The law stipulates that a certificate is to be issued to the payee for the payment of the withholding tax after it is received from the withholding agent. The receipt issued in respect of the retention of funds by the Bank of Ghana was in the name of the Appellant and not the Ministry of Health which was the withholding agent. Therefore, the law was not followed in respect of the issue of withholding tax. The Respondent's arguments do not warrant the exception to the procedure.

In any case, the withholding tax payment was the responsibility not for the Appellant, but for the Ministry of Health and Respondent had no business exacting same from the Appellant.

Moreover, the demand for withholding tax request should have been served on the Ministry of Health in the first instance and not on the Appellant. The Appellant could not be made liable to the claim for withholding tax. The Respondent in its letter to the Governor, Bank of Ghana and the actions taken thereon were not in consonance with Act 592. These were acts of self-help and should be deprecated. Indeed, the court regards the Respondent's conduct with grim disfavour as its behavior smacked of capriciousness!

Furthermore, to the extent that the tax liability had not been determined and served on the Appellant in the form of a notice of assessment of tax, the Respondent was wrong in writing to the Governor of the Bank of Ghana to collect that tax on its behalf. In the case of Taylor & Taylor v. Ghana Revenue Authority (unreported) Civil Appeal No. H1/69/2016 the Court of Appeal speaking through Larbi J. A. stated as follows at p. 15:

> *We therefore, entirely agree with Counsel for the Plaintiff that the Defendant by claiming directly from the Plaintiff as it did, fell foul of its own law. This is because the Defendant as a statutory body whose mandate was governed by Act 592, withholding tax which a withholding agent fails to withhold is not collected from the person who ought to have paid the tax but from the withholding agent who failed to deduct the withholding tax.*

The Bank of Ghana should have brought this demand to the notice of the court which was to hear the garnishee application and told the court that it had a reason why part of the funds in its custody should not be released to the Judgment-Creditor in that suit and informed the court that part of the funds was subject to withholding tax. Then the court could itself have made its own determination after hearing from both the Ministry of Health and the Appellant.

This scenario is provided for in Order 47 of the High Court Civil Procedure Rules, 2004 (CI 47) especially at rules 1(1), 1(2) and 6 which deal with attachment of debt due to judgment debtor and claims of third persons respectively. These state as follows:

> *1(1) Where a person in this Order referred to as "the judgment creditor" has obtained a judgment or order for the payment of money by some other person referred to as "the judgment debtor" and judgment or order is not for the payment of money into court, and another person within the jurisdiction, referred to as "the garnishee" is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any enactment, order the garnishee to pay to the judgment creditor the amount of an debt due or accruing to the judgment debtor from the garnishee, or as much of it as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.*

1(2) An order under this rule shall in the first instance be an order to show cause, and shall specify the time and place for further consideration of the matter, and in the means time attach such debt as is mentioned under subrule (1), or as much of it as may be specified in the order, to satisfy the judgment or order mentioned in that subrule and the costs of the proceedings.

6(1) If in garnishee proceedings it is brought to the notice of the Court that some person other than the judgment debtor is or claims to be entitled to the debt sought to be attached or has or claims to have a charge or lien on it, the Court may order that other person to attend before the Court and state the nature of the claim with particulars of it.

6(2) After hearing any person who appears before the Court in compliance with an order under subrule (1), the Court may summarily determine the questions in issue between the claimants or make such other order as it considers just, including an order that any question or issue necessary for determining the validity of the claim of the other person as is mentioned in subrule (1) be tried in any manner in which any question or issue in an action may be tried.

But from the evidence, instead of having recourse to the procedure elaborated under Order 47, the Respondent arrogated to itself the mandate to deduct from money garnisheed when the account should have been frozen until the court had made its own determination. The Bank of Ghana was also wrong to release the funds when by practice, funds from garnisheed accounts could not be touched until the court had ordered otherwise. Both organizations, I daresay were sailing close to the wind and could have attracted the court's ire and ran a clear risk of being cited for contempt!

4. **The Commissioner-General erred when he applied penalty of 30% for the late filing of returns by the Appellant from 2011 to 2013**

Penalties are regulated by law. The penalties for 2011to 2013 are provided for in the Internal Revenue (Amendment) (No. 2) Act, 2008 (Act 776) and the Internal Revenue (Amendment) Act, 2013 (Act 859) respectively. These state:

Section 142 as amended by Act 776:

> *Any company or self-employed person that fails to furnish a return of income within the time required under this Act is liable to pay a penalty of two currency units in the case of a company and one penalty unit in the case of a self-employed person in respect of each day during which the default continues.*

Section 142 as amended by Act 859

> *Any company or self-employed person that fails to furnish a return of income within the time required under this Act is liable to pay a penalty of four currency units in the case of a company and two currency points in the case of a self-employed person in respect of each day during which the default continues.*

In the case of Jonah v. Kulendi & Kulendi (2013/14) SCGLR 272 the court at p. 288 stated:

> *"A statute like the Legal Profession Act, 1960 (Act 32), could be both procedural and substantive. It confers rights to be exercised and regulates the procedural steps for seeking reliefs for violations of those rights. In our respectful opinion, as the Act itself regulates its own procedure for redressing any cause of action arising from it, this court should not resort to any statute for assistance. In the case of Boyefio v. NTHC properties 1996/97) SCGLR 531 @ 533, this court was of the opinion that the law was clear that where an enactment had prescribed a special procedure by which something was to be done, it was that procedure alone that was to be followed. In the instant case, an application to the court must be made by motion as clearly stated under section 41 of the Act and it does not call for any statutory interpretation in view of its plain and unambiguous language."*

The procedure for calculating penalties had been provided for so on what basis did the Respondent make its penalty calculations? Where did it get its variables from? In the Act it is GH¢2.00 for each day of default in respect of 2011 and 2012. In 2013 this was increased to GH¢4.00. The imposition of 30% was unknown to the law. This was a clear attempt to change the law when the lawmakers themselves had not done so. A veritable usurpation of the legislative function!

In the case of Asare v. Donkor and Serwaah II (1962) 2 GLR 76 the court held that where the evidence of the only independent witnesses on a vital issue corroborates the evidence of one party or the other, a court is bound to accept the case of the party so corroborated, unless there are good reasons for discrediting the independent witnesses, in which case the reasons for discrediting them should be clearly stated in the judgment. The testimony of the Court Expert to a large extent corroborates the Appellant's case.

The Respondent in its dealings with the Appellant has fallen short of its obligations under the law and the court holds so accordingly. It has in some cases behaved illegally. But both parties as well as all and sundry are bound by the law, the whole law and nothing but the law!

The Respondent would be liable for any consequences arising from its illegal acts. In the case of Nicol v. Customs Excise and Preventive Service (CEPS) (1992) 1 GLR 135 @ p. 137, the court quoting from Rookes v. Barnard (1964) AC 1129 @ 1226 per Lord Devlin had this to say:

> *"The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category—I say this with particular reference to the facts of this case—to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the*

government are also the servants of the people and the use of their power must always be subordinate to their duty of service."

The Respondent is a powerful entity whose actions are regulated by law but it did not act reasonably under the law and has to pay for its failure to do so. Since the Respondent behaved in such flagrant disregard for the law, it could not pray in aid that same law to assist it.

See also the case of Awuni v. West African Examinations Council (2003/2004) SCGLR 471 at 489 where the court held that the phrase to act fairly and reasonably imported a duty to observe the common law maxim of audi alteram partem and other principles of natural justice. As the court put it:

"I cannot contemplate how a person could be said to have acted fairly and reasonably if he did not give notice or hearing to another who was entitled to such notice or hearing before taking a decision which adversely affects his rights; neither can I contemplate a situation where a person could be said to have acted fairly as a judge in his own cause or give a biased and perverse decision."

It is a maxim of law that no man shall take advantage of his own wrong and I daresay, no institution shall do so either. The Respondent argues that with their evidence they are entitled to judgment as the Appellant has not proven on a balance of probabilities that the Commissioners assessment was excessive or erroneous. That conclusion eludes me. It is provided for in section 132 of Act 592 as follows:

In an objection to an assessment or on an appeal, under section 129 or 130, the onus is on the person assessed to prove, on the balance of probabilities, the extent to which the assessment made by the Commissioner is excessive or erroneous.

On the basis of the foregoing, the court finds that the calculations on which the assessment was made was erroneous taking into consideration the evidence adduced at the appeal. Insofar as the

Appellant was not even served with an assessment before the Respondent proceeded to exact same, the assessment cannot stand as it breaches the audi alteram partem rules.

Consequently, the court annuls the assessment made on the Appellant's business income. The Respondent is at liberty to re-assess the Appellant's tax liability afresh.

State institutions may take guidance from Shakespeare's Measure for Measure Act II, Scene 2 where it is stated:

"O! It is excellent to have a giant's strength but it is tyrannous to use it like a giant."

I cannot end this judgment without congratulating both Counsel for the Appellant and the Respondent on the industry they have portrayed in addressing the court. Their addresses were masterpieces of forensic advocacy, perfect in construction, delivery and content. The court also acknowledges with appreciation, the work of the Court's Expert, the Honourable President of the Chartered Institute of Taxation in the person of Nii Ayi Aryeetey, whose evidence certainly illuminated my path in writing this judgment. It must also be placed on record that he refused to exact his fee stating that he regarded his role as national service! A true patriot indeed! That Ghana may have more of his ilk!

Costs of GH¢12,500.00 is awarded against 1st Respondent.

(SGD)
JENNIFER A. DODOO
JUSTICE OF THE HIGH COURT

COUNSEL

S. K. AMOAH (WITH WILLIAM DEMITIA AND NANA AMA PANYIN AMOAH) FOR THE APPELLANT

ODARTEY LAMPTEY (WITH ANATU BOGOBIRI) FOR 1ST RESPONDENT

NO APPEARANCE FOR 2ND RESPONDENT