

IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE (COMMERCIAL DIVISION),
ACCRA, HELD ON THURSDAY, THE 14TH DAY OF OCTOBER, 2021
BEFORE HER LADYSHIP, SHEILA MINTA, JUSTICE OF THE
HIGH COURT

SUIT NO. CM/MISC/0245/2021

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REIVEIW

AND

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF
CERTIORARI AND ORDERS OF INJUNCTION**

BETWEEN:

AFRICAN MINING SERVICES - APPLICANT
(GHANA) PTY LTD.

AND

THE COMMISSIONER-GENERAL - RESPONDENT
GHANA REVENUE AUTHORITY

RULING ON JUDICIAL REVIEW

"The fault, dear Brutus, is not in our stars but in ourselves ..." (by William Shakespeare in his book "Julius Caesar"). The Applicant in this suit, which is a limited liability company duly registered under the laws of Ghana engaged in the mining business is seeking five (5) reliefs against the Respondent, who has been mandated by the state to assess and collect taxes, interest and penalties on the taxes due with optimum efficiency and to promote tax compliance. The Applicant unhappy with the procedural conduct of the assessment of its tax

CERTIFIED TRUE COPY

.....REGISTRAR
HIGH COURT
COMMERCIAL DIVISION, LCG, ACCRA

obligation for a relevant period is seeking to invoke the supervisory jurisdiction of this court and has applied for Judicial Review under Order 55 of the High Court (Civil Procedure) Rules, 2004 C.I.47. The reliefs being sought by the

Applicant are as follows:-

- A. *An order of certiorari quashing the Respondent's decision dated 10th December 2020 (and served on the Applicant on 21st December 2020), refusing the Applicant's request for a waiver of 30 percent down-payment as a condition for lodging a tax objection;*
- B. *A declaration that, upon a proper, fair and reasonable consideration of the legal requirements for the exercise of the discretion on whether or not to grant a down-payment waiver, vis-a-vis the facts before him, the Respondent's decision would and should have been to grant the waiver;*
- C. *An order granting the Applicant's request for the waiver of the requirement to make the down-payment as a condition for bringing an objection against the Respondent's tax assessment dated 30th October 2020 (and served on the Applicant on 4th November 2020);*
- D. *An order of mandatory injunction compelling the Respondent to hear, consider and/or entertain the Applicant's objection dated 3rd December 2020 to the tax assessment dated 30th October 2020, without requiring the Applicant to first make the down payment;*
- E. *An order of injunction restraining the Respondent and and/or his agents assigns, delegates representatives, etc., from commencing, continuing and/or doing any acts pursuant, or relating, to enforcing the tax assessment dated 30th October 2020.*

Overview

The background of this case is that sometime in October 2020, the Ghana Revenue Authority (GRA) conducted a tax audit on the Applicant's business

activities for the period 2014-2018. The Respondent (GRA) produced a final audit report on the Applicant Company with a tax assessment. The Applicant being unhappy with the said tax assessment sought to challenge same. The Applicant per its letter dated 30th November, 2020 (Exhibit TAA 2) notified the Respondent of its intention to object to the entire tax assessment, which Applicant has categorized as comprising computational error and/or patent misapplication of the Respondent's practice notes and requested that the Respondent waive the requirement of the payment of 30% of the assessed tax liability relating to the portion it described as computational error before the lodging of an objection in relation to that portion of the tax assessment. The request for waiver was made on the basis that in segregating the purported total tax liability of USD \$14,912,658.71, into USD \$11,196,390.59 (attributable to a computational error) in one part and USD 3,716,268.12 (attributable to interpretation) on the other hand respectively, subsequently paid GH¢6,370,872.72 (equivalent of USD\$1,114,880) being 30% down payment of the part of the tax assessment not related to the computational error alleged.

Grounds for the Applicant's Application.

The Applicant stated its reasons for the waiver as follows:-

- The Respondent's treatment of repairs and improvement expenditure leading to the tax liability aforementioned was erroneous in law.
- It would be unfair and unjust to require the Applicant to make a down payment before objecting to the assessment when 75 percent of the liability was patently erroneous and in breach of the law.
- The Applicant was facing cash flow challenges in the light of the COVID 19 pandemic and as such insisting on the down payment would be a denial of the Applicants right to justice as well as undermine the integrity of the tax system.

- The Applicant had an exemplary tax compliance record with the Respondent.
- The refusal would jeopardize the Applicant's business and result in a substantial miscarriage of justice.

The Respondent in opposing the application avers that the Applicant is not properly before the court as required by law but rather before the court with an objection to a tax decision as required under **Section 41(5) of the Revenue Administration Act, 2016 (Act 915)** guised as judicial review in relation to a waiver of down payment and therefore perceives the current application as premature, frivolous and without merit and prays that same be dismissed. The Respondent notes that the Applicant is vested with the right to object to the assessment but it is the mode of the Applicant's request that is not in accordance with the **Revenue Administration Act, 2016 (Act 915)**.

It is the Respondent's contention that in refusing the Applicant's request for waiver, the Respondent stated in their letter in response that, under Act 915, the Applicant had three options under the circumstances:

- i) Accept the assessment and settle the debt in full;
- ii) Accept the assessment and pay 30 percent of the part being objected to
or
- iii) Object to the full assessment and pay 30 percent of the full amount.

According to the Applicant, the Respondent's response as above did not address the issue of the power or discretion given him under **Act 915** to grant a waiver.

In my opinion, the grounds for the judicial review have been a mis-mash of:-

1. Illegality,
2. Wednesbury unreasonableness,

3. Breach of Administrative Justice,
4. Denial of fundamental right to access to justice.

It is the Applicant's case that the refusal to waive the 30% amounts to an abuse of discretionary power. In support of its case, the Applicant cites **Articles 296 and 23** of the **1992 Constitution** on discretionary power and avers that when a person is vested with discretionary power, they are required to exercise that power fairly, honestly and without arbitrariness or bias.

Article 296 is on the exercise of discretionary power and 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 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."

Article 23 also 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."

In respect of **Article 23**, the Applicant argues that a person acting in an administrative position is bound to exercise that discretion reasonably and in compliance with the procedure laid down by law and in cases where discretion is not exercised as prescribed by law, an aggrieved person may seek judicial review from the courts.

According to the Applicant the suit is borne out of a tax decision made by the Respondent regarding Applicant's request for Waiver of 30% down payment

required by **Section 42(5) of the Revenue Administration Act 2016 (Act 915)** prior to dealing with a tax objection. It is noteworthy that even though the Applicant is seeking to rely on a human rights issue, it did not bring the application under **Order 67 of C.I. 47 (Enforcement of Fundamental Human Rights)**. This being a tax matter, the Applicant is seeking to impeach the exercise of discretion under **Section 42(6) of Act 915** by the Respondent regarding its request for waiver of the 30% down-payment stipulated by law.

Objection to a tax decision as provided for in **Section 42 of the Revenue Administration Act, 2016, Act 915** provides as follows:

- (1) Subject to a tax law to the contrary, a person who is dissatisfied with a tax decision that directly affects that person may lodge an objection to the decision with the Commissioner-General within thirty days of being notified of the tax decision.*
- (2) An objection to a tax decision shall be in writing and state precisely the grounds upon which the objection is made.*
- (3) A person may, before the expiration of the period specified in subsection (1), apply in writing to the Commissioner-General for an extension of time to file an objection.*
- (4) Where the Commissioner-General is satisfied that there are reasonable grounds for the extension, the Commissioner-General may grant the application for extension and shall serve notice of the decision on the applicant.*
- (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 thirty percent of the tax in dispute.*

(6) Despite subsection (5) the Commissioner-General may waive, 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).

(8) A tax decision to which an objection is not made within thirty days is final.

(9) In this section, "tax decision" means the tax decision objected to, as may have been amended by an objection decision.

After perusing the affidavits filed by the parties and their Written Submissions, I set the down the issues as follows:-

1. What is the scope of the Respondent's discretion under **Section 42(6) of Act 915**?
2. Does **Act 915** distinguish between objection to *tax decision* on computational grounds and objection on interpretive grounds for the purposes of the 30% down-payment prior to dealing with tax objection relating to the *tax decision*?
3. Was the Respondent's response to the request caught by illegality or Wednesbury unreasonableness?
4. Is the Applicant entitled to its reliefs?

The power of the High Court to preside over matters of Judicial Review of an administrative action taken by a public body and to secure a declaration, order, or award by way of any of the prerogative writs (mandamus, prohibition, quo warranto, habeas corpus, and certiorari) is well set out in **Article 141 of the 1922**

Constitution and in the High Court (Civil Procedure) Rules, 2004 (C. I 47), Order 55. Judicial review is the power of the court to ensure that such activity that affects the rights of persons is done fairly and this in a way controls public administration by examining the abuse or misuse of public power. See the unreported case of the Supreme Court; **Francis Owusu-Mensah & Anor vrs. National Board for Professional & Technical Exams Paul Buatsi & Anor (Civil appeal No. J4/57/2019 dated 9th May, 2018.** From the relevant law, I also hold the view that Judicial Review, in the context of invoking the supervisory jurisdiction of the High Court, is the procedure by which the court is able, based on certain facts and circumstances, to review the legality or otherwise of decisions or actions by some state institutions which affect the rights of the public.

I have taken note of the submissions by the Applicant regarding the scope of the High Court's powers in Judicial Review as exists under the Supreme Court's similar jurisdiction when it relied on in the **Republic vrs. High Court Commercial Division Accra; Ex- parte Electoral Commission (Papa Kwesi Nduom, Interested Party) J5/7/17 2016 Ghasc 20,07/November 2016.** I need to clarify that in cases where the Supreme Court relies on Article 129(4) as interpreted, to make orders or assume jurisdiction, no other court can so rely on it for the same powers. **Article 129(4)** state as follows:-

“For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgment or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the Supreme Court by this Constitution or any other law, the Supreme Court shall have all the powers, authority and jurisdiction vested in any court established by this Constitution or any other law.”

The said clause as interpreted has not been inserted for any other court and was relied on in **Ex parte Electoral Commission** supra to make orders affecting proceedings which were not part of the impeached orders of the High Court proceedings before it. The Supreme Court has relied on such powers to grant Stay of Execution in **Ghana Telecommunications Co. Ltd & Anor vrs. Atta VI [2017-20]1 SCGLR 1090 @ 1110** (Constitutional Stay of Execution). With this clarification or caution, I proceed to consider Issues 1, 2, 3 and 4.

Issue 1: What is the scope of the Respondent's discretion under section 42(6) of Act 915?

The section provides as follows:- *“Despite subsection (5) the Commissioner-General may waive, 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.”* It is the Applicant’s case that the **Section 42(7)** places limitations on the power of waiver given to the Commissioner-General under **Section 42(6)** of the said Act. According to Black Law Dictionary to **“Waive”** means *“to relinquish or to give up a right, benefit or privilege”*; to **“Vary”** means *“to change in some small way, to make something different or cause to alter”* and **“Suspend”** means *“to interrupt; to cause to cease for a time; but with an expectation or purpose of resumption; to forbid a public officer, attorney, or ecclesiastical person from performing his duties or exercising his functions for a more or less definitive interval of time.”*

From the phrase *“... any other action that the Commissioner-General considers appropriate including the deposit of security”* suggests obviously that a request may be made for any of the three heads depending upon one's circumstances and the reasons stated for it. The Respondent may also exercise its discretion regarding the 30% down-payment in granting or refusing the request made or

otherwise responding appropriately according to the nature of the request. It is my opinion that the discretion to be exercised by the Respondent is very broad but not limited to waiver.

Issue 2: For the purposes of the 30% down-payment prior to dealing with tax objections does the Revenue Administration Act, 2016 (Act 915) distinguish between objection on computational grounds and objection on interpretive grounds?

Section 42(5) lays down the pre-conditions for an objection against a tax decision to be entertained providing only two types of taxes. It states as follows:-

“(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 thirty percent of the tax in dispute.”*

Section 42(5)(b) in contradistinction to "import duties and taxes" talks about "other taxes," and there is no further distinctions. The Applicant's request seemed not to have been made regarding a Section 42(5)(a) objection thus leaving it as one under Section 42(5)(b). Notwithstanding that the objection was one under Section 42(5)(b), the Applicant sought to draw a further distinction within the tax dispute by categorizing between an interpretive issue and a computational one in seeking the request for waiver.

The Applicant's request is contained in its Exhibit TAA 2 in which it sought to object the entire assessment and also at the same time object to only part of the assessment. For the purpose of appreciating the Applicant's problems I will quote the relevant parts of **Exhibit TAA 2** headed **“REQUEST FOR WAIVER OF 30% OF TAX ASSESSMENT ON AFRICAN MINING**

SERVICES (GHANA) PTY LTD – GHANA BRANCH” paragraphs 3, 4, 5 and 5.2.

3. *Pursuant to Section 42 of the Revenue Administration Act, 2016 (Act 915), our Client intends to object to the assessment disclosed in the Audit Report.*
 4. *Our Client takes cognizance of the requirement under Section 42(5) of the Revenue Administration Act regarding the payment of 30% of tax dispute (Down Payment Amount).*
 5. *We have our Client’s instructions to respectfully request the Commissioner-General to waive the payment of the Down Payment Amount relating to the alleged liability arising from the wrongful treatment of repairs and improvement pending a resolution of the issues by our Client in the objection letter ...*
- 5.2 *Down Payment Amount relating to other aspects of Audit Report – The Audit Report discloses alleged tax liability from rental income treatment, employee withholding taxes, capital allowance re-computations and indirect taxes amounting to a total of US\$3,716,268.11 (the “Non-Repair and Improvement Liability”), excluding the assessment made in respect of repairs and improvement. Our Client disagrees with the Non-Repair and Improvement Liability and intends to object to same in its pending objection letter, however, our Client intends to pay the Down Payment Amount relating to this aspect of the Audit Report as the disagreement (although grounded in law and fact) is not patently erroneous. The Down Payment Amount for the Non-Repair and Improvement is US\$1,114,880.43.”*

In my view the further distinction within the tax dispute being categorized between an interpretive issue and a computational one is not supported by the

Act. The law made no distinction between interpretative errors and computational errors in tax objections under Section 42 of the said Act.

Issue 3: Was the Respondent's response to the request caught by illegality or Wednesbury unreasonableness?

Applicant refers to **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1974]11 All ER 680 at 683**, CA where unreasonable was described as "*doing something without considering factors which are not to be considered or doing something so absurd that no reasonable person would ever dream that it lay within the powers of the authority*".

Having created its own categories not known to the Act, the Applicant by Exhibit TAA 2 founded its request for waiver on this unknown category. It is this self-serving distinction that attracted Exhibit TAA 3 as the response of the Respondent. It is this response that the Applicant seeks to attack in these proceedings.

This is where I find the fault not to be in the response by the Respondent but in the form or nature of the request by the Applicant. The Applicant had sought to create the impression that it was objecting to different tax disputes from a tax decision falling under one type of tax dispute known to section 42(5). In the Applicant's view, the 30% down payment relates to interpretive (interpretation error) ground of tax dispute whiles computational ground (patent error) of tax dispute should not be covered by the down-payment. Was this consistent with the law? Obviously not.

The Respondent's response to the request for waiver based on the said new distinction by the Applicant was therefore most appropriate by referring the Applicant to the state of the law. If there was any illegality it was in the request

of the Applicant. To create any new dichotomy of tax dispute so as to subject one to 30% down payment and another to a complete waiver was unreasonable on the part of the Applicant and particularly when same was unknown under the Act.

In view of the fact that it was one tax decision that had resulted in the tax dispute, the reasonable thing to do was for the Applicant to request for a variation or suspension of the 30% down payment knowing that it was ready and willing to pay USD\$1,114,880.43. But to split the tax dispute into categories unknown to the law and request for waiver could only attract an answer that directed the Applicant to the three scenarios that could arise from a tax decision. It is only when a request is situated within one of the three scenarios that a request for any of the four strands for the Respondent's exercise of discretion could be made.

Issue 4: Is the Applicant entitled to its reliefs?

Certiorari is a discretionary remedy and should not be granted automatically, it is granted on grounds of excess of jurisdiction and/or some breach of a rule of natural justice as postulated by the Supreme Court in the case of **Republic vrs. High Court, Sekondi, Ex Parte Ampong Aka Akrufa Krukoko I (Kyerefo III & Others - Interested Parties) [2011] 2 SCGLR 716 @ 722**. This is an application for judicial review and so this court will not go into the merits of the tax assessment taken by the Respondent. But assuming that the assessment was indeed erroneous as claimed by the Applicant, the Act does not permit the Applicant to vary the decision and pay the 30% down-payment for part of the assessment it describes as "valid error" but no down-payment for what it describes as "invalid error". In choosing to do one of the four things in section 42(5), the Respondent was acting within his jurisdiction; the trouble was with the mode of Applicant's request.

The grant of reliefs under Judicial Review being discretionary, the unmeritorious or unreasonable conduct of the Applicant can deny it a grant of its reliefs. See **Republic vrs. High, Accra: Ex parte Attorney-General (Delta Foods Case) (1996-98) SCGLR 595**. Having discussed above that it does not lie with the Applicant to categorize into two headings created by itself coupled with its failure to make a 30% down payment of the disputed assessed sum makes it difficult for the court to consider the Applicant's reliefs. The general principle is that tax statutes are to be construed strictly and as stated by Wood CJ in the case of **Multichoice Ghana Limited vrs. IRS [2011] 2 SCGLR 783** and referred to by the Respondent, tax is a creation of statute and as such has been dictated by the strict constructionist approach to the interpretation of statutes reserved for fiscal legislation. A dichotomy relied upon by the Applicant must therefore be one expressly stated or known to the Act failing which the application founded thereon must be dismissed.

It is the opinion of the court that the law has provided for the way the Applicant ought to seek redress against the decision of the Respondent including the extent of the Respondent's discretionary power but the path taken by the Applicant is not supported by the law and I regret to hold that judicial review cannot assist it in the path chosen. The Applicant's relief A is therefore declined. No reason has been offered by the Applicant for excluding variation or suspension from the Respondent's discretion. At any rate the response of the Respondent to the Applicant's request founded on a dichotomy unknown to Section 42(5) was an appropriate answer.

Relief B is also declined as the basis of seeking such declaration is not consistent with the taxonomy known to section 42(5). In **Boateng vrs. Dwinfuor (1979) GLR 360** it was held that *"the general rule was that the grant of a declaratory relief was discretionary and should be exercised with care and*

caution and judicially with regard to all the circumstances of the case." See also **Republic vrs. High Court Accra: Exparte Osafo (2011) 2 SCGLR 966**

For the reasons as explained above, reliefs C, D and E are also declined.

(SGD.)
SHEILA MINTA, J.
JUSTICE OF THE HIGH COURT

REPRESENTATION:
PARTIES – ABSENT

DAVID ADU-TUTU JNR. WITH JOSEPH KONADU FOR DAVID A. ASIEDU FOR THE APPLICANT – PRESENT

PATRICK K. INTARMAH FOR CEPHAS LAMPTEY FOR RESPONDENT – PRESENT

CERTIFIED TRUE COPY
.....
REGISTRAR
HIGH COURT
COMMERCIAL DIVISION, L.C.C. ACCRA