

2

Filed on 6-4-2021  
at 10:40 am  
Registrar  
SUPREME COURT OF GHANA



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

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

SUIT NO: .....

J1/7/2021

BETWEEN

EXPORT FINANCE COMPANY LTD.  
Coplan House  
Adabraka-Accra

--- PLAINTIFF

AND

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

--- 1<sup>ST</sup> DEFENDANT

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

--- 2<sup>nd</sup> DEFENDANT

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

EXPORT FINANCE COMPANY LIMITED

The nature of the reliefs sought are as follows:

- a. A declaration that Section 42(5)(a) of the Revenue Administration Act, 2016 (Act 915) in so far as it requires a tax payer objecting to a tax assessment in respect of import duties to fully pay the very tax liability being disputed is inconsistent with and in contravention

1650140  
6-04-2021

of articles 2(1), 17, 19(13), 33(1), 130(1) 132, 137(1) and 140 of the 1992 Constitution which guarantee a fair hearing and a person's right of access to court and consequently null, void and unenforceable.

- b. A declaration that section 42(5)(b) of the Revenue Administration Act, 2016 (Act 915) in so far as it mandatorily requires a tax payer who has lodged a notice of objection to an assessment to, pending final resolution of the objection, pay 30% of the tax assessed as a prerequisite for the notice of objection to be considered is inconsistent with and in contravention of articles 2(1) 17, 19(13) 33(1), 130(1), 132, 137(1) and 140 of the 1992 of the 1992 Constitution which guarantee a fair hearing and a person's right of access to court and consequently null, void and unenforceable.
- c. A declaration that section 42(6) of the Revenue Administration Act, 2016 (Act 915), in so far as it gives the Commissioner-General the discretion to waive, vary or suspend the requirements of subsection (5) of Act 915 is discriminatory and arbitrary, and in contravention of the letter and spirit of articles 2(1), 17, 19(13), 33(1), 130(1), 132, 133(1), 137(1) and 140 of the Constitution which guarantee a fair hearing and the right of all persons to have equal access to the Courts of justice and is consequently null, void and of no effect because it gives the Commissioner the discretion to decide on persons that may have access to the Courts.
- d. A declaration that section 43(3) of the Revenue Administration Act, 2016 (Act 915), which gives the Commissioner General the option to ignore a notice of objection filed by a tax payer and therefore not to make a decision on a notice of objection within the statutory period of sixty(60) days with the resulting effect that the tax payer is to treat such a failure to make a decision as an election to disallow the tax payer's notice of objection is an abuse of discretionary power and therefore in conflict with articles 2(1), 23, 33(1) and 296 of the 1992 Constitution and consequently null and void and of no effect
- e. A declaration that Order 54 rule 4 of the High Court Civil procedure rules, 2004 C.I 47, which requires a tax payer to pay an amount not less than a quarter of the amount payable in the first quarter of the year of assessment as contained in the notice of assessment is inconsistent with and in contravention of articles 2(1), 17, 19(13), 33(1), 130(1) 132, 137(1) and 140 of the 1992 Constitution which guarantee a fair hearing and a person's right of access to court and consequently null, void and unenforceable.

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

*The Plaintiff is a company limited by shares incorporated and operating under the laws of Ghana.*

The address for service of the Plaintiff is as follows:

KOJO THOMPSON ROAD  
COPLAN HOUSE, ADABRAKA  
ACCRA

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

Plot No. 346 B, 2<sup>nd</sup> OTSWE STREET  
SOUTH LA ESTATE  
OSU- ACCRA  
(NEAR LA GENERAL HOSPITAL)

The names and address of persons affected by this writ are as follows:

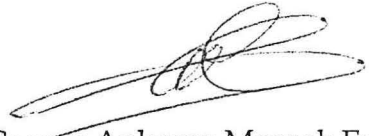
1. GHANA REVENUE AUTHORITY

Off Starlets' 91 Road  
Near Accra Sports Stadium  
Accra

2. ATTORNEY-GENERAL

Attorney-General's Chambers  
Ministry of Justice  
Accra

DATED AT ANKOMA MENSAH & ASSOCIATES, THIS 15<sup>TH</sup> DAY OF  
FEBRUARY, 2020

  
George Ankoma Mensah Esq.  
Solicitor for the Plaintiff

Solicitor's License No. eGAR 01561/21

The Registrar  
Supreme Court  
Accra

ANKOMA MENSAH & ASSOCIATES  
(LAWYERS)  
PLOT NO. 346 B, 2<sup>ND</sup> OTSWE STREET  
SOUTH LA ESTATE  
TEL: 030 2769287 / 024 463 1280

AND FOR SERVICE ON THE ABOVE-NAMED DEFENDANTS:

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

Filed on 6-4-2021  
at 10:40 am/pm  
Registrar  
SUPREME COURT OF GHANA

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

SUIT NO: .....

**BETWEEN**

**EXPORT FINANCE COMPANY LTD.**  
Coplan House  
Adabraka-Accra

--- **PLAINTIFF**

**AND**

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

--- **1<sup>ST</sup> DEFENDANT**

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

--- **2<sup>nd</sup> DEFENDANT**

---

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

---

**1. INTRODUCTION**

My Lords, the Plaintiff filed a writ invoking the original jurisdiction of this Honourable Court seeking the following reliefs:

- a. *A declaration that Section 42(5)(a) of the Revenue Administration Act, 2016 (Act 915) in so far as it requires a tax payer objecting to a tax assessment in respect of import duties to fully pay the very tax liability being disputed is inconsistent with and in contravention of articles 2(1), 17, 19(13), 33(1), 130(1) 132, 135, 137(1) and 140 of the 1992 Constitution which guarantee a fair hearing and a person's right of access to court*

1992 Constitution which guarantee a fair hearing and a person's right of access to court and consequently null, void and unenforceable.

- b. *A declaration that section 42(5)(b) of the Revenue Administration Act, 2016 (Act 915) in so far as it mandatorily requires a tax payer who has lodged a notice of objection to an assessment to, pending final resolution of the objection, pay 30% of the tax assessed as a prerequisite for the notice of objection to be considered is inconsistent with and in contravention of articles 2(1) 17, 19(13) 33(1), 130(1), 132, 135, 137(1) and 140 of the 1992 of the 1992 Constitution which guarantee a fair hearing and a person's right of access to court and consequently null, void and unenforceable.*
  - c. *A declaration that section 42(6) of the Revenue Administration Act, 2016 (Act 915), in so far as it gives the Commissioner-General the discretion to waive, vary or suspend the requirements of subsection (5) of Act 915 is discriminatory and arbitrary, and in contravention of the letter and spirit of articles 2(1), 17, 19(13), 33(1), 130(1), 132, 133(1), 135, 137(1) and 140 of the Constitution which guarantee a fair hearing and the right of all persons to have equal access to the Courts of justice and is consequently null, void and of no effect because it gives the Commissioner the discretion to decide on persons that may have access to the Courts.*
  - d. *A declaration that section 43(3) of the Revenue Administration Act, 2016 (Act 915), which gives the Commissioner General the option to ignore a notice of objection filed by a tax payer and therefore not to make a decision on a notice of objection within the statutory period of sixty(60) days with the resulting effect that the tax payer is to treat such a failure to make a decision as an election to disallow the tax payer's notice of objection is an abuse of discretionary power and therefore in conflict with articles 2(1), 23, 33(1) and 296 of the 1992 Constitution and consequently null and void and of no effect*
  - e. *A declaration that Order 54 rule 4 of the High Court Civil procedure rules, 2004 C.I 47, which requires a tax payer to pay an amount not less than a quarter of the amount payable in the first quarter of the year of assessment as contained in the notice of assessment is inconsistent with and in contravention of articles 2(1), 17, 19(13), 33(1), 130(1) 132, 135, 137(1) and 140 of the 1992 Constitution which guarantee a fair hearing and a person's right of access to court and consequently null, void and unenforceable.*
2. This statement of case is filed for and on behalf of the Plaintiff in accordance with Rule 46 of the Supreme Court Rules, 1996 (C.I. 16) which provides as follows:

*“Statement of plaintiff’s case*

*(1) The plaintiff may file a statement of case for the plaintiff with the writ, or shall within fourteen days of the filing of the writ file the statement of the plaintiff’s case.”*

**PARTIES TO THE ACTION**

3. Respectfully My Lords, the Plaintiff is a company incorporated and registered under the laws of Ghana. By the force of this Honourable Court’s decision in NEW PATRIOTIC PARTY V ATTORNEY-GENERAL (CIBA CASE) [1997 - 98] 1GLR 378 the Plaintiff is clothed with the capacity to institute the present action.
4. The 1st Defendant is a body corporate with perpetual succession and a common seal established pursuant to Section 1 of the Ghana Revenue Authority Act, 2009 (Act 791). The 1<sup>st</sup> Defendant’s objective is to provide a holistic approach to customs and tax administration in Ghana, among others. The 1st Defendant is a necessary party to this suit due to its mandate under Sections 2 and 3 of Act 791 which provides that it ensures tax compliance and provides a one stop service for taxpayers to pay their taxes.
5. It is in furtherance of this object that the 1<sup>st</sup> Defendant is tasked with the duty to ensure efficient collection of taxes. However, in execution of its object under Revenue Administration Act, 2016 (Act 915) certain provision of the Act are in contravention of the 1992 Constitution of Ghana. Section 42(5)(a) and 42(5)(b) of the Revenue Administration Act, 2016 (Act 915) requires a tax payer who has filed a notice of objection to a tax assessment to either pay at least 30% of the tax assessed which is in dispute or in the case of import duties to pay the full tax in dispute before the notice of objection shall be entertained. This is a fetter and a clog to person’s right to a fair hearing and access to the Courts as guaranteed under the 1992 Constitution of Ghana.

The gravamen of the Plaintiff’s action rests on the enforcement of Act 915 and with specific reference to the activities of the 1<sup>st</sup> Defendant who has by the force of Act 915 curtailed the right of tax payers to access the Courts by requiring such tax payers to pay the entire disputed sum or a minimum amount of 30% of assessed tax liability before a notice of objection filed by the tax payer will be entertained. Without paying such an amount the effect of section 42(8) of Act 915 is that any notice of objection filed by the tax payer is treated as being of no effect.

Further, the tax assessed becomes final within thirty (30) days from the time it is served on the tax payer by the 1<sup>st</sup> Defendant. Even though the tax payer is given the right to appeal to the Independent Tax Appeals Board and then to the Court within thirty (30) days from the date the tax decision of the Independent Tax Appeal Board is served on him, this only aggravates the fetter and clog to access the Courts. This is because by the operation of section 42(5) of Act 915, the tax payer is still required to pay the entire amount or a minimum 30% of the assessed tax as a condition precedent for the entertainment of his appeal. We will proceed to show in this address that these requirements in Act 915 are contrary to the letter and spirit of the 1992 Constitution. My Lords, it is upon this basis that we submit that the Ghana Revenue Authority is an appropriate party to be sued in this matter.

6. The Attorney General is sued in its capacity as the principal legal adviser to the Government of Ghana pursuant to Article 88(1) of the 1992 Constitution and as the proper person for an action to be instituted against and on behalf of the state pursuant to Article 88(5) of the Constitution of Ghana, 1992 and Section 9(1) of the State Proceedings Act, 1998 (Act 555).

Where a party challenges the constitutionality of a provision within an enactment and also in the High Court Civil Procedure rules, C.I 47 the proper party to be sued is the Attorney General. By reason of the Attorney-General's position, he is the principal legal adviser to the Executive arm of government. The Executive being the recipient and manager of all funds and revenue accrued from imposition of taxes under Article 174 of the Constitution and does so through the Ghana Revenue Authority through the force of Act 791, it is therefore humbly submitted that the Attorney General is a proper party to this suit.

#### CAPACITY OF THE PLAINTIFF

7. The Plaintiff is a company registered under the laws of the Republic of Ghana and therefore qualifies as a person under Article 2(1) of the Constitution of Ghana, 1992. It is therefore clothed with capacity to invoke the interpretation and enforcement jurisdiction of this Honourable Court under 1992 Constitution. The Interpretation Act of Ghana, 2009 (Act 792) in section 46 defines a person as:

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

This interpretation of a *person* has been affirmed in the case of SAM V. ATTORNEY-GENERAL (No 2) [1999-2000] 2 GLR 336 @ 350 where this Honourable Court summed up the position of the law with regards to the capacity of a person to invoke the original jurisdiction of this Honourable Court in the following words:

*"To sum up, the general rule is that any person, natural and artificial, may sue and be sued in the courts under article 2(1) of the Constitution, 1992 but they must be citizens who are seeking the interpretation of the Constitution, 1992 and its eventual enforcement, as plaintiff is seeking to do in this case. For the above reasons, I would hold that plaintiff has standing before this court as provided in the Constitution, 1992, article 2(1) which permits anyone with or even without any personal interest in a case, to invoke the special original jurisdiction of the Supreme Court for the interpretation and enforcement of the Constitution under article 2(1)."*

8. The right conferred by the Constitution 1992 on persons in invoking the jurisdiction of this Honourable Court is also conferred on artificial persons such as the Plaintiff. This position was affirmed in NEW PATRIOTIC PARTY v. ATTORNEY-GENERAL [1997-1998] 1 GLR 378 where it was held in headnote (1) one that:

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

9. Per the rights and freedoms conferred by the Constitution of Ghana, 1992 to both natural and legal persons and under Articles 3(4) (a) and 41(b) of the Constitution, it is the duty of every citizen both natural and legal to defend and uphold the Constitution in so far as they have the capacity set out under article 2(1) of the 1992 Constitution. Article 12 of the Constitution requires that certain specified persons including "*natural and legal persons in Ghana*" such as the Ghana Revenue Authority through its Commissioner General should respect and

uphold the fundamental human rights and freedom enshrined in Chapter 5 of the Constitution, 1992. In effect, proceedings could be taken in court against all such persons for the enforcement of the fundamental rights and freedoms. Similarly, it is possible for legal persons to institute a constitutional law action where an enforcement of legislation affects their rights and freedoms as happened in GHANA INDEPENDENT BROADCASTERS ASSOCIATION v. THE ATTORNEY-GENERAL & ANOR SUIT No. J1/4/2016 (Unreported).

#### FACTS AND PARTICULARS OF THE CASE

10. It is the contention of the Plaintiff that the facts are not in dispute and consequently it does not intend to call any witnesses in pursuing this instant action. The Plaintiff urges the court to proceed on the practice of the court in making a determination of constitutional matters through legal arguments filed before this Honourable Court.
11. In 2016, Parliament passed the Revenue Administration Act, 2016 (Act 915), which came into force on 10th August, 2016. Its purpose was to govern tax administration in the country. Section 40 of Act 915 empowers the Commissioner General to make a tax assessment and serve a written notice of the assessment on the tax payer.
12. A tax payer who is dissatisfied with the notice of assessment made by the Commissioner General is entitled to proceed under section 42(1) of Act 915 to lodge an objection to the decision of the Commissioner General within thirty days of being notified of the tax decision.
13. However, the right to lodge an objection is curtailed under section 42(5) (a) and (b) of Act 915. This provision requires the tax payer to pay in the case of import duties and taxes all outstanding taxes including the full amount of the tax in dispute or a minimum of thirty percent (30%) of the tax in the case of other taxes as a condition precedent for the notice of objection to be heard by the Commissioner General.
14. In the event that the tax payer fails to pay the entire tax assessment in the case of import duties or a minimum of 30% of the tax in dispute, section 42(5) of Act 915 provides that the objection thereby filed in any case **"shall not be entertained"** unless the tax payer pays all outstanding taxes in the case of import duties and at least 30% of the tax in other taxes.
15. Since the notice of objection lodged without paying the entire assessment or a minimum of 30% of the assessed tax is deemed to be of no effect, the logical effect of 42(5) of Act 915 is that no objection is deemed to have been lodged against the tax assessment made by the Commissioner General.

16. According to section 42(8) of Act 915, a tax decision to which an objection is not made within thirty days is deemed to be final and the tax payer will be required to pay same.
17. A person who is dissatisfied with a decision of the Commissioner General has thirty days to Appeal to the Independent Tax Appeals Board as provided for under section 44 of the Revenue Administration (Amendment) Act 2020, Act 1029 and then a possible Appeal to the High Court.
18. The fetter on a tax payer's right to access the court is further exacerbated when the tax payer decides to go to the High Court for redress. Order 54 rule 4 of C.I 47 provides that before an aggrieved person who has filed an appeal against an assessment, decision or order of the Commissioner can be heard he must pay an amount which should not be less than a quarter of the amount payable in the first quarter of that year of assessment as contained in the notice of assessment.
19. In the event that an appellant decides to explore the path from the Commissioner General's administrative appeal (filing an objection to the assessment), in the case of import duty taxes, that person would have paid more than 100% of the tax liability he seeks to challenge before he can be heard by the Court.
20. The Commissioner General during this period proceed to act in accordance with section 60 of Act 915 to immediately serve notice on all third party debtors of the tax payer (including banks) to more or less garnishee the accounts of the tax payer in order to recover the assessed tax when such tax payers have not been given a right to be heard on their objection.
21. The onerous and extremely burdensome financial obligations placed on an aggrieved tax payer before he is heard is a fetter and a clog on his right to a fair hearing and access to the courts.
22. This definitely contravenes Articles 2(1), 17, 19(13), 33(1), 130(1), 132, 135, 137(1) and 140 of the 1992 Constitution which guarantees a fair hearing and a person's right of access to the court and consequently Section 42(5) of Act 915 and Order 54 rule 4 of C.I 47 are inconsistent with and in contravention of the Constitution and to that extent are null, void and of no legal effect.

**THE VIOLATING PROVISIONS OF THE REVENUE ADMINISTRATION ACT, 2016 (ACT 915)**

23. Respectfully my Lords, for a clearer appreciation of the issue, we hereby reproduce section 42 and 43 of Act 915 as follows:

Section 42:

- (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 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 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 its 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 objectionable decision.*

*(emphasis added)*

Section 43 provides as follows:

- (1) *After consideration of an objection, the Commissioner-General may vary the*

*tax decision in whole or in part or disallow the objection.*

- (2) *The Commissioner-General, shall within sixty days of receipt of an objection, serve the objector with a notice of the decision including reasons for the decision.*
- (3) *Where the Commissioner-General does not serve the persons with the notice within sixty days, the person may, by notice in writing to the Commissioner-General, elect to treat the Commissioner-General as having made a decision to disallow the objection.*
- (4) *A decision is made in respect of an objection-*
  - (a) *On the date the person is served with notice of the decision; or*
  - (b) *If a person makes an election under subsection (3), thirty days from the date the person files the election with the Commissioner-General.*
- (5) *A notice served on a person in respect of an objection is conclusive evidence that a decision has been made and is correct.*

*(Emphasis added)*

**24. Order 54 rule 4 of the High Court Civil Procedure Rules, 2004 C.I 47**

***Payment of Tax***

*4. (1) An aggrieved person who has filed an appeal against an assessment, decision or order of the Commissioner under rule 1 of this Order shall, pending the determination of the appeal, pay an amount not less than a quarter of the amount payable in the first quarter of that year of assessment as contained in the notice of assessment.*

*(2) An appeal shall not be entertained by a Court under these rules unless the Appellant has paid the amount set out in sub rule (1) of this rule.*

*(3) Where the payment of tax has been held over pending an appeal, any tax outstanding under the assessment shall be payable within thirty days from the date of the decision of the Court.*

*(Emphasis added)*

25. My lords, the Plaintiff respectfully submits that sections 42(5) and 43 (3) of Act 915 and Order 54 rule 4 of the C.I 47 are unconstitutional as being a fetter to a fair hearing, a grave obstruction in the walkways of justice, an arbitrary and gross abuse of discretionary power as well as in infringement of the

fundamental human rights of all tax payers in Ghana. It is the Plaintiff's case that this Court annuls the said provision, as it is null, void and of no effect per the letter and spirit of the Constitution of Ghana, 1992.

## THE POWER OF THE SUPREME COURT TO STRIKE DOWN A STATUTE

26. The Supreme Court has the power to declare as unconstitutional an enactment, be it an Act of Parliament or a subsidiary legislation, in the event that such legislation offends a provision in the constitution.

This is in line with Article 2 (1) (a) of the 1992 Constitution which provides as follows:

(1) *A person who alleges that -*

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

(b) *any act or omission of any person;*

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

27. This constitutional provision empowers any person who alleges that an enactment contravenes the constitution or seeks an interpretation of the Constitution, to proceed to the Supreme Court. This Honourable Court speaking through Wood CJ in ASARE BAAH III V ATTORNEY-GENERAL & ELECTORAL COMMISSION [2010] SCGLR 463 laid out the principles guiding the invalidity or unconstitutionality of actions in constitutional litigation. They are the *presumption of validity or constitutionality in favour of legislation* and the *principle of severability of impugned legislation*. The principle of severability of impugned legislation allows this Honourable Court to strike down offending parts of legislations leaving the other parts unaffected. As stated in the *Asare Baah III case* (supra) thus

*“it is perhaps in the area of judicial review of legislative action, that on the principle of severability of impugned legislation, it becomes absolutely essential that the rule be strictly observed. ...On the basis of this principle, the offending parts of legislation may be severed and struck down, leaving other parts intact and unaffected by the exercise.”*

See the cases of:

MARTIN KPEBU v ATTORNEY-GENERAL [2015-2016] SCGLR 171

ADOFO v ATTORNEY - GENERAL [2005-2006] SCGLR 42

FEDERATION OF YOUTH ASSOCIATION OF GHANA (FEDYAG) v. PUBLIC UNIVERSITIES OF GHANA [2010] SCGLR 265.

NEW PATRIOTIC PARTY v INSPECTOR GENERAL OF POLICE [1993-94] 2 GLR 459

ADJEI-AMPOFO v. ATTORNEY-GENERAL & PRESIDENT OF THE NATIONAL HOUSE OF CHIEFS [2011] 2 SCGLR 1104

AKOSA II v. ATTORNEY-GENERAL [2012] 2 SCGLR 107

MORNAH v. ATTORNEY-GENERAL [2013] SCGLR

Based on the above principle of severability of impugned legislation, this Honourable Court can strike down Section 42(5) of Act 915 and Order 54 rule 4 of C.I 47 as being inconsistent and in contravention of the Constitution. This declaration would not affect the other provisions in the enactment nor will it affect the operation of the valid parts of the enactments.

28. The Plaintiff's claim is that the requirement for a tax payer who objects to a tax assessment to pay the full assessment of the disputed tax or a minimum of 30% of a tax assessment in dispute as a prerequisite for the consideration of the objection offends the 1992 Constitution and is therefore null, void and of no effect. Furthermore, even after the tax payer has paid and followed the procedure in Act 915 he is still required to pay an additional amount in accordance with Order 54 rule 4 of C.I 47.
29. This Honourable Court is clothed with jurisdiction under Articles 2(1) and 130(1) of the Constitution, 1992 to strike down the offending provisions as unconstitutional and make such orders and give directions as it may consider appropriate.

#### BURDEN OF PROOF IN CONSTITUTIONAL MATTERS

30. In the case of NATIONAL DEMOCRATIC CONGRESS v. ELECTORAL COMMISSION [2001-2002] 2 GLR 340, this Honourable Court laid down the evidential burden that ought to be discharged in constitutional matters such as the instant case by holding that:

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

*(Emphasis added)*

31. Respectfully my Lords, the settled judicial precedent established by this Court is that when there are laws that place any restraint on the fundamental human rights of persons under the Constitution, the burden is on the state agency in question to justify the grounds for such a restraint. This test has been approved and applied by this Court when the court considered the right of independence of the media and freedom of expression in the case of GHANA INDEPENDENT BROADCASTERS ASSOCIATION V. THE ATTORNEY-GENERAL & ANOR SUIT NO. J1/4/2016 (Unreported). Benin JSC gave judicial approval to the holding of *New York Times Co v. United States (The Pentagon Papers’ Case)* 403 U.S 670 (1971) that

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

*(Emphasis added)*

32. It is the case of the Plaintiff that by the force of the judicial precedent binding on this Court, the evidential burden is on the 1<sup>st</sup> Defendant to establish and justify the basis for placing a conditional restraint on the access to a fair hearing and consequently a fetter on a tax payers access to justice by preventing people from disputing a tax assessment, no matter how erroneous such a tax assessment is made, unless they pay the entire challenged assessment in the case of import duties or the said tax payer pays a minimum of 30% of the tax in dispute for all other taxes.
33. It is the case of the Plaintiff that this requirement to pay the entire tax assessment or 30% of the tax in dispute constitutes a breach of the right to a fair hearing and a clog and a fetter on the right of a tax payer to be heard in disputing a notice of assessment that has been served on him regardless of how erroneous or baseless such an assessment is. Further, the need to pay a

percentage of the disputed tax assessment before one will be heard by the Court is an additional fetter on a person's right to a fair hearing and access to the Court. This provision amounts to punishing a party before he or she is heard on a tax decision.

34. The effect of section 42(5) of Act 915 is that once the tax payer files a notice of objection without paying the requisite sum of the disputed tax assessment, the objection so filed will be deemed to be of no effect.
35. The position of the tax payer is further exacerbated by the fact that by the operation of section 42(8) of Act 915, a tax decision to which an objection is not made within thirty days is final.
36. The combined effect of sections 42(8) and 42(5) of Act 915 leads to the inescapable conclusion that a tax payer is deprived of the right to dispute a notice of assessment served on him merely because such a tax payer does not have the exorbitant amounts claimed in the erroneous assessment.
37. The Plaintiff contends that insofar as section 42(8) and 42(5) of Act 915 places a mandatory financial limitation and restraint on the right of persons to dispute a tax assessment served on the person, it is the Defendants that have the evidential burden of providing the justification for such a restraint.
38. The Plaintiff further contends that the 2<sup>nd</sup> Defendant also has the evidential burden of providing the justification for the restraint in Order 54 rule 4 of C.I 47. The 2<sup>nd</sup> Defendant has to justify why a tax payer who has paid the entire tax assessment in the case of import duty to get the right to be heard by the commissioner general, would end up paying an additional amount, a grant total of which is more than 100% of the disputed tax assessment before he is heard by the High Court.
39. A complainant is therefore deprived of the right to be heard administratively by the Commissioner General and also deprived of the right to be heard by the High Court and therefore such a person is totally deprived of the right to be heard as a citizen. The right to be heard is an essential part of a fair hearing and a fundamental right which is entrenched in the Constitution and cannot be subject to any conditional financial incumbrance.

## PLAINTIFF'S LEGAL ARGUMENTS

The bulwark of the Plaintiff's case is hinged on the right of all persons to have a fair hearing and access justice and the courts of law without any limitation or discrimination whatsoever. The right to access justice is inextricably interwoven in the laws of every democratic nation and the Plaintiff shall proceed to set out the jurisprudential basis of such a right as can be gleaned from the international obligations as well as case law from other common law jurisdictions.

### **Jurisprudential basis of Access to Justice**

40. My Lords, it is trite learning that the right to justice is not of recent advent. It dates as far back as the 17<sup>th</sup> and 18<sup>th</sup> century concepts of natural law and individual rights theory on which modern Anglo-American legal systems are grounded.

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

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

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

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

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

43. The scope of the right of access to courts: “in its simplest characterisation, it is a right of access to the court established by the people through their government for the fair and proper administration of justice.” It also “means that the justice available to citizens through the courts of the state must be administered openly and that it must be equally available to all.” The essential purpose of judicial administration is to ensure the “fair and proper administration of justice”. In the context of court proceedings, this purpose is discharged by ensuring that justice is done in those cases and controversies that are presented to the court. There are two sides to the concept of access to justice: the first is the ability to walk into the court and initiate a cause of action and secondly ability to effectively participate in proceedings. It is only the first aspect that constitutes the focus of this submission.
44. Thus, the access to the court must first be provided, and then a corresponding ability of the parties to meaningfully participate in the system to the end that justice is capable of being done.

#### **Fair hearing and Access to Justice in Ghana**

45. Ghana has entrenched provisions in the Constitution, 1992 that seek to promote the respect for the fundamental human rights of all men, which form the cornerstone of our democracy and rule of law. A cursory look at the human rights provisions under the Chapter 5 of the Constitution guarantees the right to a fair hearing and the right of access to court through provisions such as Article 19, 23 and 33 of the Constitution.

46. Article 19(13) on fair trial provides:

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

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

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

48. Protection of Rights by Courts is stated Article 33(1):

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

Article 33(3):

*A person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court.*

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

50. In *Center for Juvenile Delinquency vs. Ghana Revenue Authority and The Attorney General Writ No J1/61/2018 dated 30th July 2019 (unreported)* Adinyira JSC stated the importance of the right to access the court thus:

*“The importance of the right of access to the courts lies in the fact that it enables every person to enjoy all the other fundamental human rights and freedoms enshrined in*

51. In an article by Jeremy McBride on 'Access to Justice for Migrants and Asylum-seekers in Europe', CDCJ (2009) 2, para 6, access to justice was described as that concerned with a means for securing vested rights, particularly through the use of courts and tribunals'. The notion of 'procedural access to justice' therefore mainly means being able to use a procedure before a court. Following this approach, one likely focuses on the obstacles people face when trying to bring a case before a court, such as having no access to legal aid and any other impediments introduced by the executive or legislature.
52. The Constitution further goes ahead to place an obligation on the state to ensure access to justice in terms of a **duty of the state to achieve its social objectives**. Article 37(2) of the Constitution mandates the State to enact appropriate laws to assure –
- (a) *the enjoyment of rights of effective participation in development processes including rights of people to form their own associations free from state interference and to use them to promote and protect their interests in relation to development processes, rights of access to agencies and officials of the State necessary in order to realise effective participation in development processes; freedom to form organizations to engage in self-help and income generating projects; and freedom to raise funds to support those activities;*
  - (b) *the protection and promotion of all other basic human rights and freedoms, including the rights of the disabled, the aged, children and other vulnerable groups in development processes.*

Article 37(3) further states that:

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

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

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

### Fair Hearing

54. In a submission to the Victorian Law Reform Commission, Civil Justice Review

on The Right to a Fair Hearing: The Relevance of the Charter of Human Rights and Responsibilities Act 2006 (Vic) to Civil Justice, the authors described fair hearing as follows

*“The right to a fair hearing is an essential aspect of the judicial process and is indispensable for the protection of other human rights. In essence, the right to a fair hearing requires a party to be able to present his or her case and evidence to the court under conditions that do not place him or her at a substantial disadvantage when compared with the other party.”*

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

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

56. In KWABENA OFORI ODURO , MARY ODURO, AGNES ODURO vrs ISAAC KWASI OWUSU (SUBSTITUTED BY ADU BAFOUR) Civil Appeal No. J4/22/2013 29th July 2015 (unreported) Akamba JSC stated thus:

*“I think it is appropriate to state that inherent in the right to be heard, otherwise stated as the *audi alteram partem* rule, is the requirement of fair hearing or trial in a timely manner or within a reasonable time as envisaged under article 19 (13) of the Constitution 1992. The rules of natural justice are meant to provide justice through procedural fairness and to guarantee fair trials, unbiased and transparent judgments to all persons who resort to the law.”*

57. The need for procedural fairness and the guarantee of a fair hearing is meant to keep both parties on an even balance before the courts. Where one party is given an undue advantage in proceedings before the Courts, it undermines the whole justice system and reduces public confidence in the Courts.

58. The right to be heard before the imposition of punishment or liability is an inalienable right entrenched in the 1992 Constitution and thus cannot be taken away by an act of parliament. The right to a fair hearing requires that one party is not placed at a disadvantage in the discharge of Justice. A party must be heard before the imposition of liability. It is contrary to the principles of a fair hearing for onerous financial requirements to be made a prerequisite before one can be heard. This onerous financial requirement is therefore a fetter on a person’s right to a fair hearing.

## LEGAL ISSUE

My Lords, the main legal issue to be determined by this Honourable Court is whether upon a true and proper interpretation of Articles 2(1), 19(13) 33(1), 48(2), 130(1), 132, 133(1), 135, 137(1), 140, 273(1), 273(5) and 280 of the 1992 Constitution, a person can be denied the right to be heard and further prevented from instituting an action in court because such a person cannot meet the onerous monetary demands imposed on him by an Act of Parliament regardless of how wrongful, arbitrary and erroneous the tax assessment is, he must pay the said sum before his right of access is guaranteed.

In other words, can a tax payer's right to a fair hearing and access to the court for the purpose of invoking the jurisdiction of the Court to challenge a tax assessment be curtailed merely because such a tax payer does not have the financial wherewithal to pay the entire assessment or at least 30% of the very tax assessment that he challenges?

#### **FACTUAL EXPLANATION OF THE CONSTITUTIONAL VIOLATION**

59. Respectfully, My Lords, as has been discussed above the Constitutional right to a fair hearing and access to the courts is an inalienable right which cannot be hindered or fettered by an Act of Parliament. However, that is exactly what Section 42(5) of Act 915 and Order 54 rule 4 of C.I 47 seeks to do.
60. Upon the completion of a tax assessment by the Commissioner General, he is required under Section 40 of Act 915 to serve a written notice of the assessment on the tax payer.
61. When the tax payer identifies grievous and completely erroneous mistakes in the assessment, section 42(5) of Act 915 mandates that he cannot challenge this erroneous assessment until he has paid the entire erroneous assessment in the case of import duties and taxes, and in any other case a minimum of 30% of the erroneous assessment.
62. Failure to make payment would mean that the erroneous assessment will be treated as final as provided by section 42(8) of Act 915.
63. The Commissioner General can then proceed to act in accordance with section 60 of Act 915 to immediately serve notice on all third party debtors of the tax payer (including banks) to more or less garnishee the accounts of the tax payer in order to recover the assessed tax when such tax payers have not been given a right to be heard on their objection.

64. Furthermore, even though section 44 of Revenue Administration (Amendment) Act, 2020, (Act 1029) provides that an aggrieved party can appeal to the Independent Tax Appeals Board and then 30 days after a decision of the Appeals board has been served on him, have a further right to appeal to the High Court, that right of appeal (access to the court) is curtailed and fettered because the court cannot hear the matter until the tax payer has paid the entire assessment in the case of import duties and taxes and in any other case a minimum of 30% of the erroneous assessment.

65. This conclusion can be gleaned from the mandatory terms in which section 42(5) is drafted. The provision states:

*"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."*

66. My Lords, permit me to refer to section 42 of the Interpretation Act of 2009 (Act 792) which provides as follows:

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

Thus, by the use of the word 'SHALL' in section 42(5) of Act 915, the Court must insist on the prior payment of the sums stated in section 42(5) as a condition precedent to hearing the case. This is because by the decision in *Boyefio V. Nthc Properties Limited [1997-1998] 1 GLR 768 at page 770*, the court stated

*"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".*

My Lords, the statutory requirement that tax payers pay an amount of money as a prerequisite to be given a right to be heard on any objection is an obligation that cannot be waived. Therefore, by the Court insisting on this requirement it becomes a fetter to the tax payer exercising his right to access the court and his right to a fair hearing.

67. Respectfully my Lords, the road blocks to the tax payers right to challenge an

erroneous tax assessment is further exacerbated by the fact that Order 54 rule 4 of C.I 47 requires that the aggrieved tax payer pays an additional percentage of the erroneous tax assessment before he is heard.

68. Where the tax payer in the case of import duties has already paid a 100% of the erroneous tax assessment before he is heard by the Commissioner General on his objection, and intends to appeal the said decision, such a person would in total have paid more than 100% of the erroneous tax assessment before he is heard by the High Court.

My Lords, we shall now proceed to discuss and explore into detail, the constitutional right of all persons to access justice in order to bring to the fore the unconstitutionality of section 42(5) of Act 915.

### CONSTITUTIONAL RIGHT OF ACCESS TO JUSTICE

69. In *Center for Juvenile Delinquency vs. Ghana Revenue Authority and The Attorney General* Writ No J1/61/2018 dated 30<sup>th</sup> July 2019 (unreported) Adinyira JSC stated in her valedictory judgment thus:

*"A cardinal principle of the Rule of Law is equality before the law and therefore Article 17(1) of the Constitution guarantees all persons equality before the law which includes equal access to courts in order to prosecute or defend a claim or a violation of a right. This right requires the access to be adequate, effective and meaningful."*

70. The courts in Ghana have highlighted the need for all persons to have an unimpeded access to justice. In LABONE WEAVERS ENTERPRISES LTD. v. BANK OF GHANA [1977] 2 GLR 156 Edusei J (as he then was) held that *"every person had an unimpeded access to the law courts of this country, and this basic and fundamental right could only be taken away by an express provision of a Decree or an Act of Parliament provided that Act did not run counter to any provisions of the Constitution that the country might have"*.

71. Any person seised with a cause of action has the right to institute a court action to vindicate same. The procedural rules governing all the courts make this proposition abundantly clear. In case of IN RE PRESIDENTIAL ELECTION PETITION; AKUFO-ADDO, BAWUMIA & OBETSEBI-LAMPTEY (NO.1) V. ELECTORAL COMMISSION (MAHAMA & NATIONAL DEMOCRATIC CONGRESS INTERESTED PARTIES) (No.1) [2013] SCGLR (Special Edition)

per Akoto-Bamfo JSC held at page 12 that: "Generally, a plaintiff who conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant and cannot be compelled to proceed against other persons whom he has no desire to pursue".

72. This Honourable Court speaking through Kpegah JSC in AWUNI v WEST AFRICAN EXAMINATIONS COUNCIL [2003-2004] 1 SCGLR 471 at page 494 of the report expressed its displeasure about bureaucratic bottlenecks placed on the protection of fundamental human rights by the courts. The learned Justice stated:

*"It is clear to me that the intention of the framers of our Constitution is that the individual who alleges that his fundamental rights have been breached or is threatened to be breached, should have cheap and unimpeded access to the High Court."*

He stated again that, there is the need for citizens to freely, and without the burden of undue technicalities, seek redress for flagrant violations of fundamental human rights.

Respectfully My Lords, requiring an aggrieved tax payer to pay the entire tax assessment before he is heard cannot be described as cheap and unimpeded access to the Court. To make matters worse the tax payer must pay an additional percentage of the erroneous tax assessment at the High Court before he is heard. This means that a person seeking to challenge a tax assessment for import duty could pay more than 100% of the tax assessed by the Commissioner General before he is heard by the High Court. This is an onerous prerequisite placed on an aggrieved tax payer before he can obtain justice. This is clearly not cheap and a clear impediment to a person's right to access the Court.

73. Sophia Akuffo JSC (as she then was), in the same case at page 508, shared the view of Kpegah JSC. According to her, "the primary objective of Article 33(1) is to give full effect to the preceding provisions of chapter 5, by making them enforceable by the High Court at the instance of every person who claims to be affected by a past, ongoing or impending breach of any of the said provisions. In order to protect the rights and freedoms enshrined in the chapter five, therefore, the Article gives to every person, who alleges that any of his rights or freedoms has been, is being or is likely to be contravened, a right of access to the High Court for redress. And the High Court, pursuant to its obligation under Article 12(1) to protect and uphold these rights and freedoms, has been given the mandate (under article 33(2)) to exercise the full gamut of its judicial powers to assure effective redress to such a person who brings his or her

*grievance before it."*

### **IMPLICATION OF THE REVENUE ADMINISTRATION ACT, 2016 (ACT 915) ON THE JURISDICTION OF THE COURT**

A critical look at Act 915 reveals that it impedes the right of tax payers to access the Court. My Lords, the capricious nature of the condition provided for in section 42(5) of Act 915 forces a person who is dissatisfied with a tax assessment to pay the entire tax before the appeal is heard. The onerous amount imposes a punitive condition precedent which should ordinarily be a conclusion that can only be arrived at after a judicial determination on a given case. The fact that no judicial process is required before the said condition is imposed makes that discretion by the Commissioner General prejudicial to the interests of the tax payer.

The 1992 Constitution of Ghana is clear and very calculating in the language used under Article 296. The discretion imposes on the person exercising same to be fair and candid. The exercise of the discretion shall not be arbitrary, capricious or bias and neither shall it be prejudicial. My Lords, the condition that the payment of the entire tax assessment be lodged before a tax payer is given a hearing amount to prejudice that the tax payer is liable already before he is heard. We hereby reproduce the said Article 296 of the 1992 Constitution of Ghana for ease of reference by your Lordships:

*"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 wither by resentment, prejudice or personal dislike and shall be in accordance with due process of law; "*

A condition precedent introduced before one can access the Courts of Ghana is contrary to Article 33 of the Constitution of Ghana, 1992 as it denies the right to enforce one's human rights enshrined under Chapter 5 of the 1992 Constitution of Ghana. However, Article 1(2) of the Constitution, 1992 provides that this Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.

The Plaintiff contends that the effect of the offending provisions of Act 915 and Order 54 rule 4 of C.I 47 is to place an outright denial on the protection and

enforcement of fundamental rights of tax payers in Ghana. This is because the right of the tax payer to access justice when challenging a tax assessment is made dependent on his ability to pay the sums stated in Section 42(5) of Act 915 of the tax assessment however erroneous the assessment.

Date-Bah JSC (as he then was) in ADOFO v. ATTORNEY-GENERAL & COCOBOD [2005-2006] SGCLR 42 was also against individuals being hindered from having access to the Court to seek redress for abuse of fundamental human rights. He stated that at page 51 of the report:

*"The unhampered access of individuals to the courts is a fundamental prerequisite to the full enjoyment of fundamental human rights. This court has a responsibility to preserve this access in the interest of good governance and constitutionalism. Unhampered access to the courts is an important element of the rule of law to which the Constitution, 1992 is clearly committed. Protection of the rule of law is an important obligation of this court."*

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

The authorities cited above illustrate the clear and unwavering commitment of this Honourable Court to at all times promote access to the courts in Ghana. The offending provisions of Act 915 and the High Court Civil Procedure Rule C.I 47 are an impediment to the fulfillment of this noble right guaranteed by the 1992 Constitution of Ghana. To demand that a person suffer a liability, the very liability he seeks to challenge before he is heard is an affront to fair hearing and the right to access the courts.

#### **VALIDITY OF ANY STATUTORY OR OTHER LIMITATION PLACED ON A CONSTITUTIONAL RIGHT**

74. Her ladyship Akuffo JSC (as she then was) in CIVIL AND LOCAL GOVERNMENT STAFF ASSOCIATION OF GHANA [CLOSAG] v THE ATTORNEY-GENERAL AND 2 ORS Suit No.J1/1/2016 dated 14 June 2017, *unreported* stated the test for determining if a limitation on a constitutional right and freedom is justified. She stated:

*“Prima facie, constitutional rights and freedoms are to be enjoyed fully subject to the limits which the Constitution itself places thereon in terms of Article 12 (2)...Hence in determining the validity of any statutory or other limitation placed on a constitutional right, the question that need to be determined are:*

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

*b. Is the limitation proportional? Is the limitation over-broad such as to effectively nullify a particular right or freedom guaranteed by the Constitution?”*

75. Respectfully my Lords, the Plaintiff would proceed to address the above points:

#### **A. IS THE LIMITATION NECESSARY?**

The Plaintiff respectfully submits that the limitation is not necessary for the enhancement of democracy and freedoms of all as even within the statute, the effect of section 42(5) of Act 915 has been watered down by Section 42(6) of Act 915. A look at section 42(6) of Act 915 which provides that:

*“(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.”*

What can be gleaned from the above provision is that, the lawmaker recognizes that the payment of the sums in section 42(5) of Act 915 constitute an unnecessary fetter on the right of persons to get a fair hearing and access to the Courts. Consequently, the Commissioner General is given the discretion under section 42(6) of Act 915 to waive this unnecessary requirement in favour of certain persons. This discretion given the Commissioner General is arbitrary and discriminatory in the sense that the Commissioner General is more or less given the power to determine the categories of persons who can have access to justice. In fact, the discrimination of the Commissioner General in this case, could solely be based on the economic status or financial wherewithal of the tax payer and can serious be abused. Article 17(2) of the 1992 Constitution provides that *“A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.”*

The key question that needs to be asked is, *“If the limitation is necessary why can it be waived in favour of some “unspecified persons”?, What is the criteria for*

persons who can have this limitation waived? And “Why can it be waived in respect of some people but not all?”

This power given to the Commissioner General to discriminate and determine who can access justice is a further reason why the limitation placed on a person’s right to access the court is not necessary.

Furthermore, the provision in section 42(5) is wholly unnecessary and therefore does not satisfy the test laid down in the CIVIL AND LOCAL GOVERNMENT STAFF ASSOCIATION OF GHANA [CLOSAG] v THE ATTORNEY-GENERAL AND 2 OR(supra). It is also discriminatory and unconstitutional because it is in conflict with article 17 and 33 of the 1992 Constitution insofar as it gives the Commissioner General the discretionary power to determine the categories of persons that may obtain a fair hearing on objections filed against tax assessments and the rights of such persons to access the Courts.

#### **B. IS THE LIMITATION PROPORTIONAL?**

The Plaintiff respectfully submits that the limitation is over-broad such as to effectively nullify the right to a fair hearing and the right to access the courts as guaranteed by the Constitution.

Respectfully my Lords, the duty to pay taxes is an essential part of being a citizen of Ghana. However, the duty of the Ghana Revenue Authority to ensure the fulfillment of this obligation does not give them the right to unduly interfere with a citizen’s right to a fair hearing and access to the courts.

The right to a fair hearing, has as one of its main tenets the right to be heard. It is trite that a man needs to be heard before he is found liable for any act. The request to hear a tax payer who has been taxed erroneously cannot be hindered by requiring him to pay the entire sum of the wrong assessment before he is heard. This can be equated to demanding an accused person to serve a 10 year jail term before a trial is commenced to determine whether or not he is innocent. This is tantamount to telling a man he is guilty until proven to be innocent. The very idea is contrary to Article 19(2) of the 1992 Constitution of Ghana.

It is respectfully submitted therefore, that hearing a tax payer with respect to an objection that such a tax payer has filed against an assessment does not and cannot serve as a stumbling block to the Ghana Revenue Authority fulfilling their

mandate; The Ghana Revenue Authority must therefore afford all tax payers their right to be heard when such tax payers file an objection to any tax assessment. Such a fundamental right to object to an assessment cannot be taken away from tax payers by requiring them to pay the very tax they are disputing before they can be heard.

Even the High Court under Order 54 of C.I. 47 is also enjoined by the rules of procedure to impose the same capricious position for the hearing of an appeal pursuant to the Commissioner General's decision or order. In the case of the High Court, the justification cannot even be fathomed given that the High court is the repository of justice. That Order 54 rule 4 of C.I. 47 in all its procedural implications also amounts to a violation of a person's right to a fair hearing and access to the court.

His Lordship Kpegah JSC said in *Awuni v West African Examination Council*[2003-2004] 1 SCGLR 471 at 499 to 500 that:

*"I do not think this case is one in which injustice to one individual can be said to be of no consequence because the larger interest owed to society is more important. And a nation that stands by and looks on while the rights of the individual are slowly pecked at, eventually pays the ultimate price of finding its own rights eroded... We accept some limitation on the fundamental rights of the individual only if it is justified and proportionate." [Emphasis mine]*

The Plaintiff respectfully submits that the limitation placed in Section 42(5) of Act 915 and order 54 rule 4 of C.I. 47 does not meet the test laid down in the CLOSAG case (supra) as it is not necessary and it is not proportionate.

My Lord, it is important to emphasize that this is not the first time in the Commonwealth that the Courts have been faced with this kind of law which grossly violates the human rights of persons. In Uganda, section 15 of the Tax Appeals Tribunal Act also required the tax objector to pay at least 30% of the assessed tax before the objection so raised will be entertained. This law was roundly declared as unconstitutional by the Supreme Court of Uganda in the case of *Fuelex (U) Ltd v Uganda Revenue Authority (Constitutional Petition-2009/3)* [2020] UGCC 10 (24 July 2020) in which case the Supreme Court noted as follows:

*“In the instant case before this Court, the impugned provision of section 15 of the Tax Appeals Tribunal Act is a variant of infringement on the fundamental human rights and freedoms enshrined in the Constitution; because it has the grave effect of not merely restricting or fettering, but altogether barring, or serving as an absolute impediment to access to Courts of justice by an aggrieved person who desires to be accorded the protection of the law. The Act contravenes article 20(1) and (2), which provide, respectively, that the fundamental rights and freedoms of the individual are inherent and not conferred by the State; and that all organs and agencies of the State, and all persons must respect, uphold and promote the fundamental human rights and freedom.”*

The Court by a majority decision finally concluded as follows:

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

*(emphasis added)*

Kenneth Kakuru JA/JCC held that:

*“A law that requires one party to a civil dispute to pay 30 percent of the amount of money that has been determined as payable by the adverse party, places on the objector at a disadvantage. It places upon the objector a burden that the adverse party does not have to bear. Further still, it places the adverse party, this time, the tax authority, at an advantage that is, the objector is required to pay money to it before the dispute can be entertained. It may be argued that whenever the Tax Appeals Tribunals Act finds for the objector, the Uganda Revenue Authority has to refund the money. But this is too late. For an objector who does not have the 30% his/her objection however plausible cannot be heard and therefore he/she cannot get an opportunity to be heard. Once the opportunity to be heard is denied on account of failure to raise 30% of the assessed tax, Uganda Revenue Authority is at liberty to recover the whole of the undisputed sum whether*

*that amount is legally owing or not and irrespective of what decision the Tax Tribunal would have made.*

*This in my opinion cannot be consistent with the right to fair hearing envisaged under article 44 of the Constitution. I must emphasize that neither the 1962, nor the 1967 Constitution of Uganda contained similar Articles. The framers of the 1995 Constitution purposefully, intended to ensure that parties before Courts of law are placed at the same footing. Section 15 of the Tax Appeals Tribunals Act, derogates from the principle and right of fair hearing enshrined in the 1995 Constitution, to the extent that it places one party at a disadvantage, while at the same time giving advantage to other. This in my view cannot be described as fair. A hearing premised on the above cannot be said to be a fair hearing. A fair hearing includes the right to be heard. The right to be heard includes a right to appeal. Under the impugned section a person who cannot raise 30% of the assessed tax is denied justice on account of inability to pay. It may be equated to a boxing match at which one of the contestants arm is tied behind his back. I find this to be unfair and unjust.”* (emphasis added)

In this day and age where all forward-looking countries are moving towards fairness, we besiege this Supreme Court to ensure that justice in all its forms is guaranteed in Ghana.

My Lords, even though this case is a foreign case and is therefore only of a persuasive effect on the Courts in Ghana, we shall urge on this Honourable Court to adopt such reasoning.

By reason of the foregoing, we respectfully submit that insofar as the provision of section 42(5) of Act 915 mandatorily requires a tax payer to pay a minimum of 30% before his objection to a tax assessment will be entertained, such a provision constitutes an obstruction in the walkway of justice and must therefore be declared unconstitutional and void.

76. Any attempt by any Act of Parliament or even an executive fiat to place procedural impediments in the way of such a person with a cause of action must be resisted by this Court with all the forces of law it deserves. In the case of **Ghana Independent Broadcasters Association v. The Attorney-General & Anor** Suit No. J1/4/2016 (Unreported) Benin JSC held:

*"As stated in the case of New York Times Co v. United States (The Pentagon Papers' Case) 403 U.S 670 (1971): "Any system of prior restraints of expression comes to this court with a heavy presumption against its constitutional validity... the Government thus carries a heavy burden of showing justification for the imposition of such a restraint."*

**Final submission:**

The Plaintiff respectfully submits that it has made out a strong case for the grant of all its reliefs as from the analysis above, section 42(5) of Act 915 and Order 54 rule 4 of the High Court Civil procedure rules, 2004 C.I 47 are in contravention and inconsistent with the 1992 Constitution to the extent that it seeks to hinder and place a fetter on a person's right to a fair hearing and access to the courts. The words of Hayfron-Benjamin JSC in **New Patriotic Party v Inspector General of Police** [1993-94] 2GLR 459 at 504, are instructive on this point when he stated that :

*"[T]he framers of the Constitution, 1992 intended that the citizens of this country should enjoy the fullest measure of responsible human and civil rights. Therefore any law which seeks to abridge these freedoms and rights must be struck down as unconstitutional."*

It is against the backdrop of the foregoing exposition of the law and facts that the Plaintiff humbly prays this Honourable Court for the following reliefs:

- i. *A declaration that Section 42(5)(a) of the Revenue Administration Act, 2016 (Act 915) in so far as it requires a tax payer objecting to a tax assessment in respect of import duties to fully pay the very tax liability being disputed is inconsistent with and in contravention of articles 2(1), 17, 19(13), 33(1), 130(1) 132, 135, 137(1) and 140 of the 1992 Constitution which guarantee a fair hearing and a person's right of access to court and consequently null, void and unenforceable.*
- ii. *A declaration that section 42(5)(b) of the Revenue Administration Act, 2016 (Act 915) in so far as it mandatorily requires a tax payer who has lodged a notice of objection to an assessment to, pending final resolution of the objection, pay 30% of the tax assessed as a prerequisite for the notice of objection to be considered is inconsistent with and in contravention of articles 2(1) 17, 19(13) 33(1), 130(1),*

132, 135, 137(1) and 140 of the 1992 of the 1992 Constitution which guarantee a fair hearing and a person's right of access to court and consequently null, void and unenforceable.

- iii. A declaration that section 42(6) of the Revenue Administration Act, 2016 (Act 915), in so far as it gives the Commissioner-General the discretion to waive, vary or suspend the requirements of subsection (5) of Act 915 is discriminatory and arbitrary, and in contravention of the letter and spirit of articles 2(1), 17, 19(13), 33(1), 130(1), 132, 133(1), 135, 137(1) and 140 of the Constitution which guarantee a fair hearing and the right of all persons to have equal access to the Courts of justice and is consequently null, void and of no effect because it gives the Commissioner the discretion to decide on persons that may have access to the Courts.
- iv. A declaration that section 43(3) of the Revenue Administration Act, 2016 (Act 915), which gives the Commissioner General the option to ignore a notice of objection filed by a tax payer and therefore not to make a decision on a notice of objection within the statutory period of sixty(60) days with the resulting effect that the tax payer is to treat such a failure to make a decision as an election to disallow the tax payer's notice of objection is an abuse of discretionary power and therefore in conflict with articles 2(1), 23, 33(1) and 296 of the 1992 Constitution and consequently null and void and of no effect.
- v. A declaration that Order 54 rule 4 of the High Court Civil procedure rules, 2004 C.I 47, which requires a tax payer to pay an amount not less than a quarter of the amount payable in the first quarter of the year of assessment as contained in the notice of assessment is inconsistent with and in contravention of articles 2(1), 17, 19(13), 33(1), 130(1) 132, 135, 137(1) and 140 of the 1992 Constitution which guarantee a fair hearing and a person's right of access to court and consequently null, void and unenforceable.

Respectfully submitted.

DATED AT ANKOMA MENSAH AND ASSOCIATES, ACCRA THIS 31<sup>ST</sup> DAY OF MARCH 2021.

  
LAWYER FOR PLAINTIFFS

Practicing license No. eGAR 01561/21

ANKOMA MENSAH & ASSOCIATES  
(LAWYER)

PLOT NO 346 B, 2ND OTSWE STREET  
SOUTH LA ACCRA

2768287 / 024 4631280

THE REGISTRAR  
SUPREME COURT -ACCRA

AND FOR SERVICE ON THE ABOVE NAMED DEFENDANTS

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

---

SUIT NO: .....

EXPORT FINANCE COMPANY LTD. --- PLAINTIFF

Coplan House Adabraka-Accra

*AND*

1. GHANA REVENUE AUTHORITY --- 1<sup>ST</sup> DEFENDANT

Off Starlets' 91 Road,

near Accra Sports Stadium Accra

2. ATTORNEY GENERAL --- 2<sup>nd</sup> DEFENDANT

Attorney-General's Chambers

Ministry of Justice, Accra

---

**LIST OF AUTHORITIES**

---

1. NEW PATRIOTIC PARTY V ATTORNEY-GENERAL (CIBA CASE) [1997 – 98] 1GLR 378
2. SAM V. ATTORNEY-GENERAL (NO 2) [1999-2000] 2 GLR 336
3. BOYEFIO V. NTHC PROPERTIES LIMITED [1997-1998] 1 GLR 768

4. CENTER FOR JUVENILE DELINQUENCY VS. GHANA REVENUE AUTHORITY AND THE ATTORNEY GENERAL WRIT NO J1/61/2018 DATED 30TH JULY 2019.
5. LABONE WEAVERS ENTERPRISES LTD. V. BANK OF GHANA [1977] 2 GLR 156.
6. IN RE PRESIDENTIAL ELECTION PETITION; AKUFO-ADDO, BAWUMIA & OBETSEBI-LAMPTEY (NO.1) V. ELECTORAL COMMISSION (MAHAMA & NATIONAL DEMOCRATIC CONGRESS INTERESTED PARTIES) (NO.1) [2013] SCGLR (SPECIAL EDITION).
7. AWUNI V WEST AFRICAN EXAMINATIONS COUNCIL [2003-2004] 1 SCGLR 471.
8. ADOFO V. ATTORNEY-GENERAL & COCOBOD [2005-2006] SGCLR 42
9. CIVIL AND LOCAL GOVERNMENT STAFF ASSOCIATION OF GHANA [CLOSAG] V THE ATTORNEY-GENERAL AND 2 ORS SUIT NO.J1/1/2016 DATED 14 JUNE 2017.
10. FUELEX (U) LTD V UGANDA REVENUE AUTHORITY (CONSTITUTIONAL PETITION-2009/3) [2020] UGCC 10 (24 JULY 2020)

DATED AT ANKOMA MENSAH & ASSOCIATES, THIS 30<sup>TH</sup> DAY OF MARCH, 2021.



**LAWYER FOR PLAINTIFF**  
**PRACTICING LICENCE No. eGAR 01561/21**

ANKOMA MENSAH & ASSOCIATES  
(LAWYER)  
PLOT NO 346 B, 2ND OTSWE STREET  
SOUTH LA ACCRA  
TEL: 030 2768287 / 024 4631280

THE REGISTRAR  
SUPREME COURT  
ACCRA

And for service on;-

1. The 1<sup>st</sup> Defendant, Ghana Revenue Authority, near Accra Sports Stadium, Accra.
2. The 2<sup>nd</sup> Defendant, Attorney General, Attorney General's Chambers, Ministry of Justice, Accra.