IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA

CORAM: POKU ACHEAMPONG, J.A. (PRESIDING)
BARTELS-KODWO, J.A.
NOBLE-NKRUMAH J.A

SUIT NO: H1/67/2023

19th October, 2023

MAERSK DRILLSHIP IV SINGAPORE
APPELLANT/APPELLANT

VRS

THE COMMISSIONER-GENERAL
GHANA REVENUE AUTHORITY
RESPONDENT/RESPONDENT

JUDGMENT

BARTELS-KODWO, JA:

INTRODUCTION

This is an appeal against the ruling of the High Court, (Commercial Division) Accra dated 19th October 2022 which decision upheld in part, an appeal brought by Maersk Drillship IV Singapore (hereinafter referred to as "the Appellant") against the Final Objection Decision of the Commissioner-General of the Ghana Revenue Authority (hereinafter referred to as "the Respondent) dated 27th September 2021. The dispute between the parties concerns the interpretation and application of Articles 12(1) and (3) as well as Article 26 of the

Offshore Cape Three Points Petroleum Agreement, Sections 27 and 39(3) of the Petroleum Income Tax Act, 1987 (PNDC Law 188), the Internal Revenue Act, 2000 (Act 592) and the Income Tax Act 2015 (Act 896). The instant appeal requires that this Honourable Court properly construe and apply the above provisions. This is because the central contention of the Appellant in this appeal is that on a true and proper construction of the provisions above considered in the appropriate context, the Appellant is not liable to pay any other tax under any other tax law after a 5% final withholding tax is withheld on its behalf by ENI. Specifically, the Appellant avers that the Honourable High Court erred when it held that the Respondent was right in imposing income tax on its earnings for the period 2015-2017 and branch profit tax on same.

The relevant period comprises the 2015-2017 years of assessment. The Appellant, based in Singapore, was registered on the 28th of January 2015 under the laws of the Republic as an external company. According to the statement of facts filed on behalf of the Appellant, the Appellant is "*engaged in the business of providing services to the upstream petroleum industry in Ghana*". On 30th January 2015, the Appellant entered into a subcontract agreement to provide services to ENI Ghana Exploration and Production Limited ("ENI"), the successor to a Petroleum Agreement (PA) entered into by its predecessor Heleconia Energy Ghana Limited and the Government of Ghana acting through the Ghana National Petroleum Corporation.

The PA, which was attached to the Notice of Appeal filed at the registry of the Honourable High Court as Exhibit MDS 2 and can be found on page 18 of Volume 1 of the Record of Appeal, is a Petroleum Agreement entered into between the Republic of Ghana, the Ghana National Petroleum Corporation and Heliconia Energy Ghana Limited in respect of blocks offshore Cape Three Points. This agreement, in its Article 12(1) states as follows;

> "*No tax, duty, fee or other impost shall be imposed by the State or any political subdivision on Contractor, its Subcontractor or its*

Affiliates in respect of activities related to Petroleum Operations and to the sale and export of Petroleum other than as provided in this Article."

Heliconia assigned its interest under the PA to ENI. The statement of facts filed by the Appellant does not say when the assignment happened, neither does it have as an attachment a copy of the deed of assignment (or the consent letter required by Article 25.1 of the PA).

The Appellant says that ENI entered into a Subcontract Agreement dated January 2015 with Maersk Rigworld Ghana Limited (Maersk Rigworld) and the Appellant for the provision of services at the deepwater drilling rig for a period of two years (2015-2017), this contract was entered into evidence by the Appellant as exhibit MDS 4.

In 2018, the Respondent commenced a tax audit into the affairs of the Appellant and issued a Final Tax Audit report dated 20th November 2020 (Exhibit MDS 6). In this report the Appellant was assessed with a total direct tax liability of US$ 20,185,531.36 and an indirect tax liability of US$8,441,746.18, making a total tax liability of US$28,627,295.54.

The Appellant, dissatisfied with the tax assessment, and following failed attempts to resolve the dispute with the Respondent, lodged an objection against the assessment dated 15th January 2021. On 27th September 2021, the Respondent issued its Final Objection Decision in response to the objection in which the direct tax liability was revised downwards to US$19,915,318.99.

Still dissatisfied, on 8th November 2021, the Appellant filed an appeal against the decision of the Respondent at the High Court. On 24th December 2021, the Respondent filed its Reply to the appeal pursuant to Order 54 Rule 7 of C.I. 47. In its appeal, the Appellant sought the following reliefs;

I. A declaration that, upon a true and proper interpretation of Article 12(1) and (3) of the Offshore Cape Three Points Petroleum Agreement and Sections 27 and 39(3) of the Petroleum Income Tax Act, 1987 (PNDC Law 188), the Appellant's income is exempted from further taxes after the 5% withholding tax.

II. A declaration that, upon a true and proper interpretation of Article 12(1) and (3) of the Offshore Cape Three Points Petroleum Agreement and Sections 27 and 39(3) of the Petroleum Income Tax Act, 1987 (PNDC Law 188), the provisions of the Income Tax Act (2015) Act 896 is not applicable to the Appellant.

III. A declaration that the assessed Branch Profit Tax of US$17,103,923.20 is not applicable to the Appellant and therefore the assessment is extinguished.

IV. A declaration that the assessed Corporate Income Tax of US$2,370,959.33 is inapplicable to the Appellant and therefore the assessment is extinguished.

V. A declaration that the Respondent erred in law when he unjustifiably assessed the Appellant to additional Corporate Income Tax in the amount of US$ 2,370,959.33.

VI. A declaration that the Respondent is barred from imposing any income tax under any other law on the Appellant's income emanating from its services carried out in the Offshore Cape Three Points block under the Petroleum Agreement except under the tax provisions of ENI's Petroleum Agreement.

VII. A declaration that the Respondent erred in law by rejecting the VAT Relief Purchase Orders (VRPOs) in the amount of USS$6,978,174.88 and wrongly imposing a VAT/NHIL liability of US$8,441,764.18 on the Appellant.

VIII. An order for reconciliation of the figures in respect of P.A.Y.E. withholding tax, VAT/NHIL figures by an Independent Court appointed Auditor or the Chartered Institute of Taxation Ghana

IX. An order for the annulment of the whole tax liability assessed in the Final Objection Decision against the Appellant.

X. An order for the Respondent to issue a revised tax assessment of the Appellant for 2015 to 2017 years of assessment taking into consideration all the reliefs granted by this Honourable Court.
XI. An order for a refund of monies (if any) previously paid by the Appellant to the Respondent based on the annulment of the final objection decision.
XII. General Damages for breach of the provisions of the Offshore Cape Three Points Petroleum Agreement.
XIII. Costs including lawyer's fees.
XIV. Any other(s) that the Court may deem fit.

On 8th July 2022, the Honourable High Court delivered its judgement in relation to reliefs (i), (ii), (iii), (iv), (v), (vi), (ix) and (xii) and ordered the parties, in consultation with the Registrar of the Honourable High Court, to appoint an independent auditor reconcile accounts regarding the Appellant's VAT/NHIL liability, PAYE and Withholding Tax Figures, in consultation with the Registrar of the Court, in order to ascertain the actual liability of the Appellant in respect of reliefs (vii) and (viii).

The reconciliation was carried out and on 30th September 2022, a reconciliation report was filed by the parties. Counsel for the Appellant also filed an application for clarification of the decision of the Court on relief (vi) seeking clarity as to whether the Respondent could impose branch profit tax on the Appellant's income emanating from the OCTP block under the petroleum agreement.

NOTICE OF APPEAL

The Appellant, aggrieved by the decision of the High Court, brought the instant appeal before this Honourable Court on the following grounds;

1. The Judgement is against the weight of the evidence.

2. The learned Judge erred in law by holding in her judgement dated 8 of July 2022 and her ruling dated 2nd October 2022 that the Appellant's aggregate amount (income) earned from its works and services carried out under the Offshore Cape Three Points (OCTP) Petroleum Agreement is subject to branch profit tax after being subjected to 5% final withholding tax.

Particulars of error of law

i. The learned Judge erred in law by not treating the 5% final withholding tax on the Appellant's aggregate income earned from its works and services under the OCTP Petroleum Agreement as the only tax Appellant is required to pay on that amount and that no other tax under any other law in Ghana is applicable to the Appellant.

ii. The learned Judge erred in law by subjecting the Appellant's aggregate income from its works and services under the OCT Petroleum Agreement to branch profit tax under the provisions of the Internal Revenue Act, 2000 (Act 592) and Income Tax Act, 2015 (Act 896) contrary to section 27 of the Petroleum Income Tax Act, 1987 (P.N.D.C.L. 188) and Articles 12.1, 12.3 and 26 of the OCTP Petroleum Agreement.

iii. The learned Judge erred in law by misconstruing and wrongly applying section 6(2)(a) of the Income Tax Act, 2015 (Act 896) as the basis for charging branch profit tax as an additional tax on the income of the Appellant earned from works and services rendered under the OCT Petroleum Agreement after payment of the 5% final withholding tax.

3. The learned Judge misdirected herself in her judgement dated July 8, 2022, by holding that the Respondent was right in imposing additional taxes including branch profit tax on the

aggregate amount earned by the Appellant from its works and services under the final OCTP Petroleum Agreement after subjecting the aggregate amount to a 5% final withholding tax.

Particulars of Misdirection

i. The learned Judge misdirected herself by holding that the Respondent was right in applying the provisions of the Internal Revenue Act, 2000 (Act 592) and the Income Tax Act, 2015 (Act 896) to the calculation of gains and profits of the Appellant emanating from the OCTP Petroleum Agreement notwithstanding section 27 of the Petroleum Income Tax Act, 1987 (PNDCL 188).

ii. The learned Judge misdirected herself when she held that the Appellant's income (aggregate amount) is subject to branch profit tax under the general income tax laws of Ghana contrary to the special fiscal regime created for the Appellant by the combined effect of Sections 27 and 39(5) of the Petroleum Income Tax Act, 1987 (PNDCL 188) and Article 12.1, 12.3 and 26 of the OCTP Petroleum Agreement as well as section 135 of the Income Tax Act, 2015 (Act 896).

iii. The learned Judge misdirected herself in law by dismissing reliefs (i) (ii) and (iii).

Arguments of the Appellant

The Appellant starts by arguing the third ground of appeal. Under this ground of appeal, the Appellant cites the decision of the Court below and states that under relief (vi) of the appeal to the High Court, the learned High Court decided in its favour and contends that the decision of the High Court means that "*...the Respondent **IS ONLY PERMITTED** to impose income tax under the relevant provisions of PNDCL 188 on the Appellant's income from its services carried out in*

the Offshore Cape Three Points Block under the Petroleum Agreement" (emphasis the Appellant's).

The Appellant further contends that this means that the Respondent is prohibited from imposing any income tax under any other law on the Appellant's income emanating from the services carried out on the OCTP block under the petroleum agreement. The Appellant then cites portions of **Section 27 of PNDCL 188** and argues that **section 27(4) of PNDCL 188** bars the application of Act 592 and other subsequent tax laws to the Petroleum Agreement and the subcontract, whilst S**ection 27(5) of PNDCL 188** prohibits the application of other tax laws to Appellant as a subcontractor to ENI for services in connection with the Petroleum Agreement.

The Appellant supports this position by citing portions of the judgement of the High Court Judge at page 190 and 191 of the record wherein the learned justice states, "*That said, I think a combined reading of the above quoted positions presents a clear and unassailable meaning that once 5% of the payments due the subcontractor for work and services provided under the P.A. is withheld by the Contractor, the Subcontractor is not liable to pay tax under any law, on that aggregate amount unless and until the occurrence of any of the events listed under Section 135(2) of Act 896 ... To that extent, I agree with the Appellant that Article 12(1) and (3) of the PA created a legitimate exception that no tax or impost will apply to the income of the Appellant other than the 5% withholding tax for works and services rendered as a Subcontractor under the PA.*"

The Appellant then argues that the combined operation of the Articles 12.1, 12.3 and 26.2 of the Petroleum Agreement, the government guaranteed fiscal stability to ENI, the contractor, and its subcontractors, including the Appellant, in respect of activities related to Petroleum Operations. The Appellant contends that despite the High Court's finding that the no tax or impost is applicable to the Appellant beyond the 5% withholding, the High Court "*proceeded to misdirect itself by holding that the Respondent was right in imposing*

additional taxes including branch profit tax on the aggregate amount earned by the Appellant from its works and services under the OCTP Petroleum Agreement after subjecting the aggregate amount to a 5% withholding tax."

The Appellant contends that the holding of the Court amounts to a misdirection because neither PNDCL 188, nor the Petroleum Agreement provide for Branch Profit Tax.

The Appellant also argues that the Court erred when it dismissed reliefs (i), (ii) and (iii) in the light of the fact that it granted relief (iv) because the first three reliefs are declaratory reliefs dependent or consequent on relief (vi). According to the Appellants, if the Court granted relief (vi) it ought, by necessary implication, to have granted the first three reliefs. The Appellant concludes this section of its submission, by praying that this court set aside the holdings of the Court below on its reliefs (i)-(iii) sought.

On the second ground of appeal, Ground B, the Appellant is of the view that the learned High Court Justice erred by holding that the Appellant's aggregate income from its work carried under the OCTP Petroleum Agreement is subject to branch profit tax after being subjected to final withholding tax. The Appellant states that the learned High Court judge erred in law by not treating the 5% withholding tax as the only tax that the Appellant is liable to pay and not declaring that the no other tax law in Ghana is applicable to the Appellant. The Appellant is also of the view that the learned High Court Judge erred when she subjected the Appellant's aggregate income from its works and services under the OCTP Petroleum Agreement to branch profit tax under Act 592 and Act 896, contrary to the provisions of section 27 of PNDCL 188.

The Appellant contends that the High Court misconstrued the legal effect of a final withholding tax. The Appellant says that a final withholding tax is a payment in which a tax withheld satisfies the final tax liability of the withholdee or the recipient. The Appellant

states, such a taxpayer is not liable to pay any more tax "*under any circumstance whatsoever*".

The Appellant contends that since it was already subjected to the 5% withholding tax, it was not liable to pay any more tax, and thus the learned High Court Judge erred when she found that the Appellant was liable to pay additional taxes such as the branch profit tax. In support of this position, the Appellant points to **Section 27(3) of PNDCL 188** in support of this.

The Appellant continues by averring that the court below was wrong to use **Section 6(2) of Act 896** to impose branch profit tax on the Appellant and adds that even if **Section 6(2) of Act 896** was applicable, the Court erred by failing to consider **Section 6(2)b of Act 896**, which the Applicant contends excludes persons who have been subject to withholding tax from the application of **Section 6(2).**

The Appellant argues the omnibus ground of appeal last. After rehashing a number of authorities on the omnibus ground, the Appellant takes particular issue with the court below's finding that the Appellant did not contend that it was incorporated exclusively to provide services as a subcontractor to ENI under the petroleum agreement. Per the Appellant, there is no income accruing to the Appellant in Ghana unrelated to its activity as a subcontractor under the petroleum agreement that is in contention under this appeal. The Appellant refers to paragraphs 25 & 26 of its written submission before the High Court as well as paragraph 10 of its affidavit in support of its motion for clarification before the High Court, and contends that it had made it categorically clear throughout this tax appeals process that the income subject matter of this appeal is exclusively in relation to its work as a subcontractor under the petroleum agreement.

The Appellant also refers to its financial statements which can be found on pages 182-260 of Volume 1 of the Record, particularly in paragraph 17(i) of the 2015 financial statement wherein the

Appellant listed as one of its credit risks that *"the branch's only customer is ENI Ghana Production and Exploration Limited"*. The Appellant adds that it has never been the case of either party in this tax dispute that the income subject matter of this appeal comes from a source other than the Contractor, ENI.

On the foregoing, the Appellant submitted that the findings of the Court below on this issue were unsupported by the evidence on the record and asks that this Court grants all its reliefs set out in the notice of appeal.

The appellant also urged this court to adopt the decision in the case of Maersk Reginald Ghana Ltd. vrs. The Commissioner-General S/N Cm/TAX/0099/22 delivered on 31st January, 2023, unreported (HC) where the appellant Maersk Reginald Ghana Ltd. argued that it was subject to a final withholding tax of 5% pursuant to Article 12 (1) r 2 (3) pg. 26 of the Article 23 pg. 39 (3) of PNDCL 188 because the combined effect of these provisions is that for the term of the PA, regardless of any charge in tax law, the State or any of its political subdivisions (including the Respondent) is prohibited from imposing a tax, duty, fee or other import on ENI as a contractor or the appellant therein as a subcontract or other than as provided in Article 12 of the PA.

It is the Appellant's case in sum that the High Court differently constituted gave judgment to the effect that it was wrong of the Respondent to impose further tax including corporate income tax on the Appellant from 2016 when Act 896 came into force.

In response to the invitation to adopt the judgment in reference, this court declines to do so for the simple reason that though the

Appellant herein is subject to a final withholding tax of 5% pursuant to Article 12 (1) r 2 (3) pg. 26 of the PA and Section 23 pg. 39 (3) of PNDCL 188 any profit it repatriates to its parent company is also subject by law to branch profit tax as explained in this judgment. The imposition of the branch profit tax does not depend on whether the income is subject to final tax or not, but rather depends on the repatriated profits earned by a non-resident person who carries on business in Ghana through a permanent establishment.

Arguments of the Respondent

The Respondent also argued Ground C of the Appellant's grounds of appeal first. Responding to the arguments of the Appellant, the Respondent averred that the Court below was right in imposing additional taxes in the form of branch profit tax on the aggregate amount earned by the Appellant. The Respondent submitted that the Court below properly construed and evaluated articles 12.1, 12.3 and 26 of the OCTP Petroleum Agreement as well as **sections 27 and 39(5) of the Petroleum Income Tax Law, 1987 (PNDCL 188)** in arriving at her conclusion that the Appellant was subject to branch profit tax on the income subject matter of the present dispute.

The Respondent submitted that the treatment of 5% withholding tax payment on services or works under a petroleum agreement as final tax under section 27 of PNDCL 188 does not preclude the payment of other taxes such as branch profit tax on the same income derived by the Appellant. The Respondent contends in paragraph 27 of its written submission that "*... it is important to emphasize that the fact that an income is treated as final under the tax law does not prevent further imposition of other taxes by treating the same income as either employment or investment income, and that reading article 12(3) of OCTP Petroleum Agreement in conjunction with section 27 of the*

PNDCL 188, which provide for the 5% withholding tax and its treatment as final tax, do not prohibit the imposition of other taxes such as branch profit tax which is classified as an investment income tax..."

The Respondent further goes on to state that the 5% withholding tax, referred to in article 12.3 of the Petroleum Agreement, treated as final tax in section 27 of PNDCL 188 is a business income tax on income earned by the Appellant. The Respondent is of the view that the finality of that tax does not extend to investment income or employment income. In support of this position, the Respondent cites the dictum of the learned High Court Judge at page 28 of the judgement wherein she stated, "*The trap the Appellant seems to have fallen in, with respect, is the misapprehension that the tax imposed on the Appellant in respect of its specific business activities (under the PA) extends to cover taxes payable by its shareholders.*"

The Respondent then lists **Sections 1 and 39(5) of PNDCL 188, Sections 5, 6, 7, 8 and 9 of the Internal Revenue Act, 2000 (Act 592)** as well as **Sections 2, 3, 4, 5, 6 and 60 of the Income Tax Act, 2015 (Act 896)** and proffers that the imposition of the branch profits tax does not depend on whether the income is subject to final tax or not, but rather depends on the repatriated profits earned by a non-resident person who carries on business in Ghana through a permanent establishment. The Respondent submits that this is why the Learned High Court Judge "*held that the Respondent was right in imposing the branch profits on the Appellant's repatriated profits intended for its owners (shareholders).*"

The Respondent also opines that **PNDCL 188 in section 39(5)** empowered the Respondent to apply general tax law such as the Internal Revenue Act, 2000 (Act 592) and Income Tax Act, 2015 (Act 896) to impose taxes not covered by PNDCL 188 such as branch profits tax, which the Respondent says is considered by PNDCL 188 to be a tax on investment income.

The Respondent says that this means that the persons engaged in petroleum operations in Ghana may be subject to other income taxes such as investment income tax and branch profit tax in addition to business income tax. The Respondent says that there's no evidence that the Minister of Energy made regulations exempting the Appellant from the general income tax law under section 41 of PNDCL 188. (The Minister referred to in PNDCL 188 is the Minister of Finance and not the Minister of Energy).

The Respondent then says that the provisions of the OCTP Petroleum Agreement do not purport to prohibit the imposition of Corporate Income Tax (CIT) or Branch Profits Tax on the contractor or its subcontractors, but rather that the Petroleum Agreement restricts the imposition of other business income related taxes except for taxes specifically prescribed in article 12(2) and (3) on the petroleum operations and sale and export of petroleum. The Respondent says that branch profits tax is not considered a tax on income from business, but rather a tax on income from investment equivalent to a tax on dividend, taxable under general income tax law by virtue of **section 39(5) of PNDCL 188.** In support of this position, the Respondent directs this Court to look to **Section 6 of Act 592, Section 5 and 133 of Act 896,** and **Section 38 of PNDCL 188** for statutory explanations on business income and petroleum operations.

The Respondent sought to stress that the branch profits tax imposed is not a tax on the business income of the Appellant, but rather a tax on the investment income of the shareholders of the Appellant, who the Respondent says are non-resident persons carrying on business in Ghana through a permanent establishment, the Appellant. The Respondent says that the jurisdiction to tax comes from the above-referenced provisions of the Income Tax Act, namely **Sections 2, 3, 4, 5 and 6 of Act 896.** The Respondent effectively states that even though the shareholders of the Appellant are non-resident, to the extent their investment income has a source in Ghana, that income is taxable under Ghanaian law.

LAW AND ANALYSIS

In order to render what could be a quite complex dispute manageable and comprehensible, this judgement will attempt to break it down to its simplest foundational issues. In order to make a determination on this matter, this Court must answer a few questions. First, this Honourable Court is tasked with determining whose income is subject of the assessment in dispute before this honourable Court. Secondly, the Court has to determine if the income at hand is Assessable Income. Finally, the Court has to determine whether or not the income is exempt from income tax. Every facet of this dispute comes down to the answer to these three ostensibly simple questions. Consequently, the analysis of this will follow those questions in that order.

WHOSE INCOME IS SUBJECT MATTER OF THE PRESENT DISPUTE

While not expressly stated as an issue in this matter, the parties before this Court have expressed disparate views on the question of whose income is the subject of the assessment in dispute. The divergent views on this question have manifested themselves in the various laws under which the parties believe the income in dispute should be charged.

On one hand, the Appellant has made it overwhelmingly clear that it believes that the income on which the assessment was made is the business income of the Appellant, which was rendered exempt from further imposition of taxes after the 5% withholding tax in accordance with the provisions of the Petroleum Income Tax Act PNDCL 188 and the provisions of the Petroleum Agreement, specifically in Article 12 thereof.

On the other hand, the Respondent has argued that the income being assessed for taxation is the investment income of the Appellant, to

whom the profits were repatriated from a Ghanaian-registered entity, a Permanent Establishment separate and distinct from the Appellant, and not income from business of the Appellant. The Respondent then points out that the Appellant, being investors in or shareholders of the Ghanaian Permanent Establishment and being separate legal entities, distinct from the Ghanaian Permanent Establishment, are neither parties to the Petroleum Agreement, nor contemplated thereunder, and therefore investment income earned by them in Ghana is not exempted under the provisions of the Petroleum Agreement or PNDCL 188.

Exhibit MDS 6, the Final Tax Audit Report, authored by the Respondent, is addressed to "Maersk Drillship IV Singapore PTE LTD (Ghana Branch)". In the introduction of the audit, found on page 2 of the report, the Respondent states, *"It was established that Maersk Drillship IV Singapore Ple Limited is a non-resident person* ***operating in Ghana through a permanent establishment****..."* (emphasis supplied) and later *"In view of [the] entity concept,* ***an entity registered under the Ghana Companies Act is seen as a separate legal entity and is different from the shareholders of that company with separate tax obligations****. Thus shareholders are not covered under this agreement and therefore are not exempted from Branch Profit Tax as per Section 60(1)(2)(3) of the Income Tax Act, 2015, Act 896."*

From the above it is clear that the Respondent is of the view that the registration of the Appellant, Maersk Drillship IV Singapore PTE LTD (Singapore) in Ghana renders the "Ghana Branch" of the Appellant as Maersk Drillship IV Singapore PTE LTD (Ghana Branch) – a separate entity from its owner. According to the Respondent, the latter is a company registered in Ghana whose shareholders are the former.

An examination of **Section 107 of Act 896** lends credence to the position of the Respondent. Section 107 reads in part as follows;

"Section 107—Principles of taxation

(1) A permanent establishment is an entity separate from its owner"

It therefore stands to reason that the Respondent is correct to treat the Ghanaian-registered external company as a permanent establishment of the Appellant. This permanent establishment is not a mere place or the act of providing services, but a separate legal entity.

An examination of the second page of the Appellant's own Exhibit MDS 1 Series 2, that is the Appellant's Form 20, the Appellant's registration details, confirms this. Part 5 of this document is entitled "Parent Company Details" and the Appellant is listed at the Parent Company of the Ghanaian Permanent Establishment.

Our view of the separateness of the Appellant from its Ghanaian permanent establishment is bolstered by the provisions of **Section 311 of Act 992.** This section provides that where an external company's parent company is liquidated in its country of origin, the local manager must go through an entire procedure starting with the notification to the Registrar-General. Without complying with the provisions of **Section 311 of Act 992,** the locally registered entity, the External Company continues to exist. (See the exposition of Akamba JSC in the case of **International Rom Ltd Vrs Vodafone Ghana Ltd (J4 2 of 2016) [2016] GHASC 62 (6 June 2016)).**

In the considered view of this Honourable Court, it therefore stands to reason that the Appellant's Ghanaian branch, a separate legal entity from the Appellant, is the party to the subcontract and the earner of the income under the petroleum agreement. It also stands to reason that when the Appellant's Ghanaian branch remits profits to the Appellant, the Appellant has earned repatriated profits from its Ghanaian Permanent Establishment. While it can be said that the Appellant's Ghanaian Permanent Establishment has earned income from petroleum operations, the Appellant itself has earned

repatriated profits, akin to dividends, from its Ghanaian Permanent Establishment and the provisions of **section 63(3) of Act 896** would apply.

IS THE INCOME IN DISPUTE ASSESSABLE INCOME

Section 63 of the Income Tax Act, 2015 (Act 896) reads in part as follows;

> "Division I: Petroleum operations
>
> Section 63—Principles of taxation
>
> (1) There is a tax imposed on the income of a person from petroleum operations, referred to in this Act as the petroleum income tax.
>
> (2) The petroleum income tax payable under subsection (1) shall be calculated for each year of assessment, by applying the rate of tax specified in the First Schedule to the chargeable income of that person from petroleum operations.
>
> (3) Where a person has chargeable income other than income derived from petroleum operations that income shall be charged in **accordance with section 1**." (emphasis supplied)

Section 1 of the Income Tax Act, 2015 (Act 896) states as follows;

> *"Section 1— Imposition of income tax*
> *(1) Income tax is payable for each year of assessment by (a) a person who has chargeable income for the year; and (b) a person who receives a final withholding payment during the year."*

Section 2 of Act 896 tells us what chargeable income of a person is. It states;

" 2 (1) The chargeable income of a person for a year of assessment is the total of the assessable income of that person for the year from each employment, business or investment less the total amount of deduction allowed that person under this Act."

Section 2 of Act 896 also tells us that a person's chargeable income from each employment, business or investment must be determined separately.

Section 104(4) of the Act states;

"(4) A company is resident in the country for a year of assessment if;

(a) that company is incorporated under the Companies Act, 1963 (Act 179); or
(b) the management and control of the affairs of that company are exercised in the country at any time during that year."

Since the Appellant was not incorporated under the Companies Act nor has it been established that the management and control of the company were exercised in Ghana at any time during the assessment period, it is safe to conclude that the Appellant is non-resident for tax purposes. The Appellant can be said to have earned chargeable income "other than income from petroleum operations" as contemplated by **Section 63(3) of Act 896.** Therefore, while the exemptions under the Petroleum Agreement apply to the Appellant's Ghanaian permanent establishment, a separate entity, they do not apply to the Appellant in and of itself.

We proceed to examine the obligations of a non-resident company under the income tax laws of Ghana.

Section 3(2)(b) of Act 896 on what constitutes assessable income states as follows;

" The assessable income of a person for a year of assessment from any employment, business or investment is...

2(b) in the case of a non-resident person,

(i) the income of that person from the employment, business or investment for the year, to the extent to which that income has a source in this country; and
(ii) ***where the person has a Ghanaian permanent establishment, income for the year that is connected with the permanent establishment, irrespective of the source of the income****. (emphasis supplied)*

In sum, **section 3(2)(b) of Act 896** mandates that non-resident persons who earn income that has a source in Ghana, **or whose income is earned through a Ghanaian permanent establishment regardless of where the income is sourced**, have incomes that are chargeable under the income tax laws of Ghana. Since the income in dispute was repatriated to the Appellant from its Ghanaian permanent establishment, it follows that section **3(2)(b)(ii) of Act 896** applies to the Appellant. The income of the Appellant in this dispute from its Ghanaian permanent establishment is therefore assessable income under the contemplation of the **Income Tax Act Act 896**.

At this point it becomes necessary to set out what a Ghanaian permanent establishment is and how it is to be treated by the revenue authority for tax purposes. **Section 110 of Act 896** reads as follows;

""Ghanaian permanent establishment" includes

(a) a place in the country where a non-resident person carries on business or that is at the disposal of the person for that purpose;

(b) a place in the country where a person has, is using or is installing substantial equipment or substantial machinery; and

(c) a place in the country where a person is engaged in a construction, assembly or installation project for ninety days or more, including a place where a person is conducting supervisory activities in relation to that project;

(d) the provision of services in the country;

(e) a place in the country where an agent performs any function on behalf of the business of a non- resident person

(i) including, in the case of an insurance business, the collection of premiums or the insurance of risks situated in the country; but

(ii) excluding a case involving a general agent of independent status with its own legal personality acting in the ordinary course of business".

Given that we have already concluded that the Appellant is a non-resident, it is also apparent from the facts of the case that the Appellant's Ghanaian operations constitute a Ghanaian permanent establishment. We now proceed to look at how the law treats Ghanaian permanent establishments. **Section 107 of Act 896** reads in relevant part as follows;

"Division II: Permanent establishment

Section 107—Principles of taxation

(1) A permanent establishment is an entity separate from its owner and

(a) is subject to tax under section 1 in the same manner as a resident company, if the permanent establishment is a Ghanaian permanent establishment..."

From the above we are able to decipher two things; a. Permanent establishments are considered as entities separate from their owners for tax purposes and; b. Ghanaian Permanent establishments are treated in the same manner as resident companies for the purposes of determining their tax liability. The former deduction is what the Respondent has referred to as "the entity principle".

IS THE INCOME IN DISPUTE EXEMPT INCOME?

We now turn to the Petroleum Agreement. Counsel for the Appellant has pointed to this document and argued that when read in the context of PNDCL 188, the import is that once its contractor, who is party to the Petroleum Agreement, withholds a part of its income from subcontracts made under the Petroleum Agreement, it has no further liability. In other words, the Appellant is arguing that once a percentage of its income from business is withheld, it has no further tax liability.

On the other hand, the Respondent has stressed repeatedly throughout its submissions that the Appellant's shareholders are the persons being assessed. Counsel for the Appellant states that branch profit taxes are not applicable to the Appellant. Counsel for the Appellant also seems to be of the view that its shareholders are also not subject to branch profit taxes. On page 4 of their 9 page response to the submissions of the Respondent, the Appellant makes the assertion that the Appellant is the non-resident person in this case, and the Ghanaian permanent establishment is the physical location from where it registered as an external company to conduct its business in Ghana and cites **Section 110 (a) and (d) of Act 896** in support of its position.

It appears to this Honourable Court that both the Appellant and the Respondent are correct in their explanation of the law. Where they differ, as earlier stated, is whose income is being taxed under this assessment. It is also apparent to this Court that the Appellant is wrong when it says that the income being taxed is income earned by

itself, as paid to it by its contractor, ENI, under the Petroleum Agreement. On the contrary, the evidence examined above and the facts of this case, support the Respondent's assertion that the Appellant's Ghanaian permanent establishment, a separate legal entity, was the earner under the Petroleum Agreement. That income of the Ghanaian permanent establishment, as rightfully impressed upon this Court by the Appellant, is not subject to any further taxes.

However, when the Ghanaian permanent establishment, a separate legal entity under **Section 107 of Act 896**, sends its profits to its parent company, the Appellant, in such a situation becomes a non-resident person who has earned income from a Ghanaian permanent establishment and, **section 3(2)(b)(ii)** above would apply and the income in the instant dispute is, again, assessable income and **Section 60 of Act 896** would apply.

Section 60 reads in part as follows;

> "Section 60—Branch Profit Tax
>
> (1) A non-resident person who carries on business in Ghana through a permanent establishment and who earns repatriated profits shall pay tax on the repatriated profits earned for a basis period ending within the year of assessment.
>
> (2) A non-resident person who has earned repatriated profits under subsection (1) shall pay a final tax on the gross amount of the earned repatriated profits to the Commissioner-General in accordance with the prescribed rate within thirty days after the end of the basis period.
>
> (3) For purposes of subsections (1) and (2), a person shall treat the portion of the net profit of the resident person which corresponds to the interest of the non-resident shareholders as repatriated profits and as dividends distributed in accordance with the respective shares of the non-resident person in the company."

This Honourable Court is of the considered view that the provisions of **Section 60** set out above apply to income earned by the Appellant from its Ghanaian permanent establishment. The Court also finds from the above that the income earned by the Appellant is not exempt from tax by the provisions of the Petroleum Agreement.

Flowing from the above, a non-resident person, who earns repatriated profits (or investment income) through a Ghanaian permanent establishment (which is treated as a resident company) is liable to pay investment income tax on the repatriated profits.

This is not exempted from the provisions of the Petroleum Agreement which applies to the business income (income from the provision of services) of the Ghanaian permanent establishment, and not the investment income of its parent company.

CONCLUSION

After careful consideration of the arguments and analysis presented before this Honourable Court, it is imperative to distil the decision of the Court on this complex and nuanced dispute into a coherent conclusion.

First and foremost, as stated above, the resolution of this dispute raises questions at the heart of this matter which revolve around three crucial aspects: the determination of identity of the party whose income is under assessment, the determination of whether that income qualifies as assessable income, and lastly, whether the income in question is exempt from income tax under Ghanaian law and the Petroleum Agreement.

Addressing the question of whose income is subject to the assessment, it is clear that a divergence of views exists between the Appellant and the Respondent. The Appellant asserts that the assessed income pertains to its business operations and is therefore exempt from further taxation, citing provisions in the Petroleum

Income Tax Act and the Petroleum Agreement. Conversely, the Respondent contends that the income in question is the investment income of the Appellant, shareholder of, and a distinct legal entity separate from, the Ghanaian-registered external company, the Appellant's Ghanaian Permanent Establishment. Based on our analysis of the facts of this case and application of the law to the facts as done above, this Court finds that it is the income of the Appellant, a separate legal entity from its Ghanaian Permanent Establishment, which was remitted to it by its Ghanaian Permanent Establishment, which is the subject matter of the dispute.

Secondly, with regard to the assessability of the income in dispute, this Court finds that the income in dispute is assessable income under section 3 of Act 896. Given that this Court has found that the Ghanaian Permanent Establishment of the Appellant is a Ghanaian permanent establishment from which the Appellant has earned income, per the provisions of Section 3(2)(b)(ii) of Act 896, the income of the Appellant from its Ghanaian Permanent Establishment is assessable income for the purpose of determining the Appellant's tax liability. Under Section 3(2)(b) of Act 896, non-resident entities with income sourced in Ghana or earned through a Ghanaian permanent establishment are subject to Ghanaian income tax. Given that the income in question arises from the Ghanaian permanent establishment of the Appellant, Section 3(2)(b) logically applies, rendering the income assessable for tax under the Income Tax Act.

Lastly, the question of whether the income is exempt from taxation hinges on the interpretation of the Petroleum Agreement. The Appellant argues that once a portion of its business income is withheld by its contractor under the Petroleum Agreement, it incurs no further tax liability. Conversely, the Respondent emphasizes that the shareholders of the Appellant are the ones being assessed, asserting that branch profit taxes do not apply to the Appellant or its shareholders.

The crux of their disagreement lies in whose income is subject to taxation in this assessment. It is evident that the income being taxed does not pertain to the Appellant itself but rather to its Ghanaian Permanent Establishment, a separate legal entity. Consequently, while the income earned by the Ghanaian permanent establishment is not subject to further taxes under the Petroleum Agreement when the Ghanaian permanent establishment remits profits to its parent company, the Appellant, the latter, a non-resident entity earning income from a Ghanaian permanent establishment, is earning income as contemplated under Section 3(2)(b)(ii) of Act 896. Given that the Appellant is a separate legal entity and is not itself a party to the subcontract, as the party to that agreement would be the income earner – the Appellant's separate and distinct permanent establishment, the Appellant is not contemplated under the Petroleum Agreement or the Petroleum Income Tax Act. As such, Section 60 of Act 896 applies, rendering the income of the Appellant from repatriated profits of its Ghanaian Permanent Establishment liable to branch profit tax.

In summary, this Honourable Court finds that the Appellant's income arising from its Ghanaian permanent establishment is indeed assessable income, and the provisions of the Petroleum Agreement do not exempt it from taxation. Therefore, the Appellant, a non-resident entity earning repatriated profits through a Ghanaian permanent establishment is subject to investment income tax under Section 60 of Act 896.

CROSS APPEAL

The Respondent, also not completely satisfied with the decision of the High Court, filed a notice by Respondent of Contention that the judgment should be varied in compliance with rule 15 of the Court of Appeal Rules, 1997 (C. I 19) based on the following grounds;

1. The High Court erred in law when it barred the Respondent from imposing any income tax under any other law on the Appellant's income from its services carried out in the Offshore Cape Three

Points Block under the Petroleum Agreement except under the relevant laws of the Petroleum Income Tax Law,1987, (PNDCL 188) and ENI's Petroleum Agreement (PA)

Particulars of error of law

a) The High Court erred in law when it relied on section 27 of the Petroleum Income Tax Law, 1987 (PNDCL 188) to bar the Respondent from imposing any income tax, when the said provisions had been repealed by section 136(1)(b) of the Income Tax Act 2015 (Act 896) and item 10 of the Third Schedule to the Revenue Administration Act, 2016 (Act 915) at the material time the tax was imposed by the Respondent.

b) The High Court erred in law when it disregarded the express provisions in sections 87 and 96(2) of the Petroleum (Exploration and Production) Act, 2016 (Act 919) which provides that a licensee contractor, sub-contractor and the Corporation shall pay taxes including petroleum income tax and capital gains tax in accordance with applicable enactments and shall comply with the relevant provisions of the Act.

c) The High Court erred in construing the stability clause (i.e., Article 26) of the Petroleum Agreement between the Contractor (ENI) and the State to cover the Appellant who is a sub-contractor and therefore not in any way covered by the Petroleum

2. The High Court erred in construing the stability clause (i.e. article 26.2) of the Petroleum Agreement between the Contractor (ENI) and the State to cover the Appellant who is a sub-contractor and therefore not in any way covered by the Petroleum Agreement.

ARGUMENTS OF THE PARTIES TO THE CROSS APPEAL

On the first ground of appeal, the Respondent/Cross-Appellant (referred to in the remainder of this section of the Judgement as the Cross-Appellant) argued that all agreements, including the Petroleum Agreement at the centre of this dispute, are subject to law, and that where there was a conflict between the law and the Petroleum Agreement, the law of the land ought to prevail over the Agreement. The Cross-Appellant referred to Article 174 of the 1992 Constitution in support of this position.

The Cross-Appellant also argued that the provisions on fiscal stability contained in the Petroleum Agreement do not apply to the Appellant/Cross-Respondent (hereinafter, the Cross-Respondent) since the Cross-Respondent was not a party to the OCTP Petroleum Agreement.

The Cross-Appellant then contended that the obligation imposed on the Contractor under the OCTP Petroleum Agreement to withhold 5% of payments to subcontractors does not absolve the Subcontractor, who is not a party to the OCTP Petroleum Agreement from the income tax obligations under PNDCL 188. It is also impressed on this Honourable Court by the Cross-Appellant that the repeal of PNDCL 188 rendered the decision of the learned High Court Judge complained of, wrong in law.

The Cross-Appellant contends that the learned High Court Judge failed to appreciate that the withholding tax paid by the Contractor ENI on behalf of the Cross-Respondent was a payment on account in advance on behalf of the Cross-Respondent and that this lack of appreciation led to the erroneous conclusion that the Cross-Appellant could not impose further taxes on Cross-Respondent.

On the second Ground of Appeal the Cross-Appellant argued that the learned High Court Judge erred when she found that the Cross-

Respondent was covered as a subcontractor by the OCTP Petroleum Agreement.

ANALYSIS

On the second ground of the cross-appeal, to the extent that we have found that the Appellant is not the subcontractor contemplated by the Petroleum Agreement, and that it is rather its Ghanaian Permanent Establishment, its external company/subsidiary registered as a separate legal entity from the Appellant, we uphold the ground of appeal and will not spill much more ink on the subject as the finding referenced above has been discussed at length hitherto.

When it comes to the first ground of the cross-appeal, we are of the considered view that while the Cross-Appellant is correct that PNDCL 188's repeal and the introduction of Acts 896 and 919 introduced new fiscal regimes, those cannot apply to the Cross-Respondent's corporate income tax obligations simply because its rights had accrued as a subcontractor contemplated by the Petroleum Agreement at the time that the Cross-Respondent became a subcontractor of ENI, a party to the Petroleum Agreement. Accordingly, since the Petroleum Agreement says that the contractor and its subcontractors are subject only to the taxes set out in the Petroleum Agreement, and that agreement was ratified by Parliament, additional corporate income taxes cannot be imposed on the External Company subsidiary of the Appellant, a separate legal entity from the Appellant as explained at length above. This Court therefore approves the invocation by the Cross-Respondent of the following cases cited on retrospectivity; **Yew Bon Tew v. Kanderaan Bas Mara [1982] 3 All ER 833, Hon. Clement Apaak v. GRA (2018) JELR 63988 (HC) - Suit No. CM/TAX/0448/2017 and Maersk Rigworld Ghana Ltd. v. The Commissioner-General CM/TAX/0099/2022.**

The Court will therefore uphold the position of the lower Court that the Cross-Appellant cannot purport to impose further taxes on the Cross-Respondent's subsidiary, its Ghanaian Registered External company. However, this does not absolve the Appellant itself from its obligation as a person with a Ghanaian permanent establishment, to pay taxes on profits repatriated to it. The Appellant is not a contractor or subcontractor under the OCTP Petroleum Agreement, but merely a parent company of the subcontractor. It is therefore not contemplated under the exemptions granted to contractors and subcontractors under Clause 12 of the OCTP Petroleum Agreement.

In light of these considerations, this Court hereby renders its decision, affirming the tax liability of the Appellant for the income in dispute, in accordance with the applicable provisions of the Income Tax Act, 2015 (Act 896).

In conclusion therefore, the main appeal brought by the Appellant fails and is hereby dismissed in totality. With regard to the cross appeal however, the second ground of appeal is upheld as stated in a few paragraphs above here. Concerning the first ground of appeal, as already explained earlier matters of retrospectivity as put by decided cases referred to earlier will not apply to the Cross Respondent hence this ground of appeal as brought by the Cross Appellant fails and it cannot purport to impose further taxes on the Cross-Respondent's subsidiary, its Ghanaian Registered External company. The cross appeal therefore succeeds in part only. The crux of the matter on the main appeal however remains as found by this Honourable Court that the Appellant's income arising from its Ghanaian permanent establishment is indeed assessable income, and the provisions of the Petroleum Agreement DO NOT exempt it from taxation. Therefore, the Appellant, a non-resident entity earning repatriated profits through a Ghanaian permanent establishment is subject to investment income tax under Section 60 of Act 896.

Finally, the judgment of the High Court dated 19th October, 2022 is hereby affirmed subject to the variation in respect of the second ground of the cross-appeal as indicated above.

(Sgd.)
JANAPARE A. BARTELS-KODWO (MRS.)
(JUSTICE OF APPEAL)

Poku-Acheampong, (J. A.) *I also agree*

(Sgd.)
ALEX POKU-ACHEAMPONG
(JUSTICE OF APPEAL)

Noble-Nkrumah, (J. A.) *I agree*

(Sgd.)
JEROME NOBLE-NKRUMAH
(JUSTICE OF APPEAL)

COUNSEL:

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- **Mohammed Ibrahim for Respondent/Respondent**