IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ACCRA – GHANA

CORAM: **SENYO DZAMEFE JA** **PRESIDING**

P. BRIGHT MENSAH JA

BARTELS-KODWO (MRS) JA

SUIT NO. H1/137/2022

1ST JUNE 2023

BETWEEN:

PERSEUS MINING (GH) LTD ... APPELLANT/APPELLANT

vs

THE COMMISSIONER GENERAL ... RESPONDENT/RESPONDENT

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JUDGMENT

BRIGHT MENSAH JA:

The appellant/appellant herein simply referred to as the appellant, has launched the instant appeal against the decision of the High Court (Commercial Division), Accra dated 08/02/2022 that went in favour of the respondent/respondent herein, also simply referred to as the respondent. The judgment of the lower court complained of, appears on ***pp 180-183 of the record of appeal [roa] Vol. 4.***

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The appellant aggrieved by the said judgment has filed this appeal on a number of grounds, namely that:

1. The judgment is against the weight of evidence.

2. The learned appellate judge erred in law by applying the law without first resolving the primary facts and stating his findings.

   Particulars of error of law

   i) The learned appellate judge erred in law by holding that the respondent/respondent was right in invoking Section 34 of the Income Tax Act, 2015 (Act 896) without making findings of primary facts.

   ii) The learned appellate judge erred in law when he concluded that the forward sales contract involved related parties without any cogent evidence on record to support.

   iii) The learned appellate judge erred in law by holding that the forward sales contract was a tax avoidance mechanism without any cogent evidence on record.

   iv) The learned appellate judge erred in law by holding that the respondent/respondent was right in treating the forward sales contract as a tax avoidance scheme without any cogent evidence on record in support.

3. The learned appellate judge erred in law by misconstruing the legal requirements under Section 92(1) of the Revenue Administration Act, 2016 (Act 915) and the appellant/appellant's obligation in producing sufficient evidence as proof in law.

Particulars of error of law:

i) The learned appellate judge erred in law in holding that the respondent/respondent's evaluation of the documents, acts and transactions vis-à-vis the tax laws, practice and convention in the industry both local and international determined whether the proof offered by the appellant/ appellant is proof in law.

ii) The learned appellate judge erred in law in holding that it is the respondent/respondent who determines whether the evidence offered by the appellant/appellant is capable of discharging the onus of proof.

iii) The learned appellate judge erred in law by relying on the respondent/respondent's evaluation of the appellant/ appellant's documents and the forward sales contract as the standard of proof.

iv) The learned appellate judge erred in law in holding that the production of documentation in support of the appellant/

appellant's case is insufficient in law without actually considering the entire relevant evidence on record offered by the appellant/appellant in support of its case.

4. The learned appellate judge erred in law by holding that the loss from forward sales contract is not deductible from business income.

Particulars of error in law:

i) The learned appellate judge erred in law by misconstruing Regulation 10(2) of the Internal Revenue Regulations, 2001 (L.I 1675) in the light of Section 7(2) of the Internal Revenue Act, 2000 (Act 592), which is a substantive legislation.

ii) The learned appellate judge erred in law by holding that the loss from the forward sales contract is loss incurred from an investment and therefore not deductible from business income.

iii) The learned appellate judge erred in law by focusing on Section 9 of the Income Tax Act, 2015 (Act 896) without taking account of Sections 19, 21 and 25 of Act 896 which specifically deal with the tax treatment of gains and losses from forward sales contract.

iv) The learned appellate judge erred in law by failing to consider the relevant laws and authorities cited by the appellant/appellant in support of the treatment of the loss incurred from the forward sales contract.

v) The learned appellate judge erred in law by holding that the respondent/respondent was right in disallowing the deduction of loss incurred from the forward sales contract from the appellant/appellant's business income.

5. The learned appellate judge misdirected himself by holding that the appellant/appellant used two different prices in calculating royalties paid to Franco Nevada Corporation and the Government of Ghana.

Particulars of misdirection:

i) The learned appellate judge misdirected himself by confusing the royalties paid pursuant to the sale and purchase agreement between Franco Nevada Corporation and the appellant/appellant with the payment of statutory royalties to the Government of Ghana.

ii) The learned appellate judge misdirected himself when, upon clear and cogent evidence on record that payment of royalty to Franco Nevada Corporation was not in dispute, he held on the contrary that the appellant/appellant could not debunk the

accusations that it used both spot gold price and contract price for the payment of royalties.

iii) The learned appellate judge misdirected himself when he used the alleged difference in the price as justification that the forward sales contract was a related party transaction without any cogent evidence on record to support it.

iv) The learned appellate judge's conclusion that Franco Nevada Corporation is related to the appellant/appellant is inconsistent with the finding in his judgment that Franco Nevada Corporation is a third-party company.

6. The learned appellate judge erred in law by failing to measure the respondent/respondent's exercise of discretion of re-characterization of the forward sales contract in accordance with the provisions of Article 296(c) of the 1992 Constitution.

Particulars of error of law:

i) The learned appellate judge erred in law by failing to measure the exercise of discretionary power by the respondent/ respondent in re-characterizing the forward sales contract.

ii) The learned appellate judge erred by holding that the respondent/respondent did not abuse the exercise of his discretionary power to re-characterize the forward sales contract, without any evidence on record in support of it.

7. The learned appellate judge misdirected himself in law and in fact by treating the forward sales contract as a tax avoidance scheme on the basis only of the loss incurred from the forward sales contract.

Particulars of misdirection:

i) The learned appellate judge misdirected himself by holding that the net effect of the forward sales contract was to reduce the appellant/appellant's taxable income.

ii) The learned appellate judge misdirected himself when he concluded that the forward sales contract is an irrational business decision without any evidence on record in support of it.

iii) The learned appellate judge misdirected himself in holding that for hedging or forward sales contract to qualify as a business activity, there must be proof of erratic and consistent downward trend in the price of gold in the open market.

8. The learned appellate judge misdirected himself by holding that the forward sales contract was a related party transaction.

Particulars of misdirection

i. The learned appellate judge misdirected himself when he

concluded that the forward sales contract was a related party transaction contrary to evidence on record.

ii. The learned appellate judge misdirected himself when he held that the respondent/respondent had sufficient reason to treat the forward sales contract as suspicious and economically unreasonable without any cogent evidence on record in support of it.

Further grounds of appeal would be filed upon receipt of the record of appeal. See: ***pp 184-188 Vol. 4 [roa]***

So far, the appellant has not filed any additional grounds of appeal. By this appeal, the appellant seeks from this court the reliefs listed hereunder:

1. An order setting aside the entire judgment of the appellate High Court.

2. An order granting the appellant/appellant all the reliefs set out in the notice of appeal filed in the High Court dated 12th April 2021.

3. Any other order or orders as this honourable court may deem fit

Key Background:

To appreciate the nature of the instant appeal and the determination the lower court made, we chronicle in brief, the facts of the case.

The appellant is engaged in the business of mining, that is to say the production and the sale of gold.

In the year, 2013 the Ghana Revenue Authority represented by the respondent herein, in the exercise of its statutory mandate as the State's Audit institution, conducted a tax audit into the business activities of the appellant for the period between 2010 and 2012. At the end of the exercise, the respondent on 04/09/2013 issued a tax audit report which report was subsequently revised on 25/11/2013. See: ***pp 21-38 Vol. 3 [roa].***

The appellant was dissatisfied with some portions of the revised tax audit report. The appellant exercising the statutory right to raise an objection to the tax assessment, did file an objection on 21/01/2014. See: ***40-54 Vol. 3 [roa].***

However, on record, it was not until in the year, 2019 that the respondent responded to the appellant's objection by carrying out a second tax audit on the business activities of the appellant for 2010 – 2017 years of assessment. The tax liability imposed on the appellant by the respondent for that period amounted to **US$8,725,387.49.** See: ***pp 13-30 Vol. 4 [roa].***

Pursuant to service of the tax liability referred to supra, the appellant raised objection to it per a letter that appears on ***pp 31-38 Vol. 4 [roa].*** The appellant then in accordance with S. 42(5) of Act 915, went ahead to pay out of the tax liability, an amount of **US$2,501,902.88** representing 30% of the disputed tax assessment pending the determination of the objection the appellant raised. The payment of the 30% by the taxpayer is to allow the Commissioner General to entertain the appellant's objection to the initial tax assessment. The notice for the demand to the appellant to pay its tax liability after the objection hearing and the audit report appear on ***pp 39-41 Vol. 4 [roa].***

It is common knowledge that after several meetings, discussions between the parties, exchanges of correspondence and reconciliation of figures between the respondent and the appellant, the respondent published its objection decision of **US$10,207,164.17,** a revision from the initial sum of **US$8,725,387.49.** The final tax audit report can be found on ***pp 189-195 Vol.3 [roa]***

The appellant dissatisfied with the final tax audit report, requested for a review. This the appellant did by way filing an objection on 20/01/2020. As recounted supra, in compliance with the law, the appellant paid an amount of **Ghc13,385,180.41** the cedi equivalent of **US$2,501,902.00** being 30% of the tax in dispute as condition precedent for the determination of the tax objection the appellant raised. In other words, after several discussions, reconciliation of figures, etc., the respondent revised the total tax liability upwards from **US$8,725,387.49** to **US$10,207,164.17.**

After the respondent had deducted the 30% precondition of **US$2,501,902.00** from the assessed tax liability of **US$10,207,164.17** the outstanding balance the appellant was required to settle then stood at **US$7,509,110.29.** That then became the Objection Decision, which decision appears at ***p. 158 Vol. 3 [roa].*** The objection and the receipts for the payment of 30% condition precedent may be found at ***pp 141-156*** and ***136-139 Vol. 3 [roa]*** respectively.

To ensure the implementation of its decision, the respondent through its Head of Domestic Tax Revenue Division, per its letter dated 06/01/2020 notified the appellant of its liability of **US$7,509,110.29.**

The appellant apparently being dissatisfied with the objection decision filed an appeal in the High Court [Commercial Division], Accra. Upon hearing the case, the lower court affirmed the assessment the respondent finally made. It is against this decision of the lower court affirming the tax assessment the respondent imposed on the appellant that the appellant has further appealed to this court. The impugned judgment appears on appears on ***pp 180-183 Vol. 4 [roa].***

The appeal:

The law is certain that an appeal is by way of re-hearing the case. The Court of Appeal Rules, **C.I 19** per **rule 8(1)** provides that any appeal to the court shall be by way of re-hearing. This rule has received ample judicial interpretation in a legion of cases to mean that the appellate court is enjoined by law to review the whole evidence led on record and to come to its own conclusion and to make a determination as to whether both on the facts and the law, the findings of the lower court were properly made and were supportable. Put differently, the appellate court is under legal obligation to examine the findings of the lower court or the trial court, and to determine on the evidence led on record, whether those findings are supportable in law.

On the authorities, where a trial court that heard the evidence has made findings based on the evidence and come to the conclusion in a case, an appellate court is not required ordinarily, to disturb those findings except where there is lack of evidence to support the findings or the reasons for the findings are unsatisfactory. As Pwamang JSC stated in ***Prof Stephen Adei & Mrs Georgina Adei v Grace Robertson & Sempe Stool (Civ. App. No.***

J4/2/2015) delivered 10/03/2016) (unreported), an appellate court may reverse findings of a lower court where they are based on a wrong proposition of law or a rule of evidence or that the findings are inconsistent with documentary evidence on record.

Indeed, it is settled law that where the findings are clearly unsupported by evidence or where the reasons in support of the findings are unsatisfactory, the appellate court reserves the power to upset those findings of the trial court. See: ***Kyiafi v Wono [1967] GLR 463 @ 466.***

It is important to stress also that where the findings are based on wrong proposition of law, the judgment of the lower court is liable to be set aside. The case, ***Robins v National Trust Co. [1972] AC 515*** illustrates the principle that where the finding is so based on erroneous proposition of law the appellate court is empowered to correct it and having corrected it, the impugned findings then disappear.

Legal analysis & opinion of this court:

We now proceed to consider the merits or otherwise of the appeal.

To begin with, the appeal to the lower court ie the Accra High Court, (Commercial Division), is premised on **Order 54 of the High Court [Civil Procedure] Rules, 2004 [C.I 47]** that deals with tax appeals from the decision of the Commissioner General of the Ghana Revenue Authority. In accordance with **rule 2(1) of Order 54 of C.I 47,** a party exercising that right of appeal to the High Court against the decision of the Commissioner shall file five (5) copies of notice of appeal together with five copies of all relevant

documents with the Registrar within thirty (30) days of receipt of service of the decision or order of the Commissioner.

In considering the appeal, we start off the discussion with the 2nd ground of appeal.

2nd ground of appeal:

The learned appellate judge erred in law by applying the law without first resolving the primary facts and stating his findings.

On the ground that the lower court failed to make primary findings of facts, the court had held as follows:

1. The respondent rightly re-characterized the forward sales contracts for being irrational and without economic sense, and a tax avoidance scheme.

2. The forward sales contracts were related party transactions.

3. Franco Nevada Corporation is an affiliate of the appellant.

See: ***pp 180-181 of Vol. 4 [roa].***

Now, in reiterating the principle that it was the prime duty of a trial court to make primary findings of fact, learned Counsel for the appellant has argued that although per the rules of the lower court as stipulated in the **High Court [Civil Procedure] Rules, 2004 [C.I 47]** the court sat as an appellate court from the decision of the respondent, **Order 54(9) of CI 47** still mandated the court to make findings of facts in the appeal particularly where the facts were

in dispute. He enumerated the under-listed as facts that were in dispute and which ought to have been resolved by the lower court:

a. Whether or not the forward sales contract was a related party transaction.

b. Whether or not the forward sales contract was irrational and without economic sense.

c. Whether or not Franco Nevada Corporation is an affiliate of the appellant.

The lower court in the course of hearing the tax appeal has jurisdiction to take evidence or seek expert opinion/assistance to be able to arrive at a decision, Counsel insisted. In support of his contention that it was the primary duty of a court to make findings of facts, Counsel referred us to a number of cases including ***Quaye v Mariamu [1961] 1 GLR 93 SC*** and ***Domfeh v Adu [1984-86] 1 GLR 633***.

It was Counsel's submission that the respondent's objection decision that appears on ***pp 158-184 Vol. 3 [roa]*** was reached on the wrong assumption that the appellant entered into a contract with related parties. Thus, the respondent wrongly relied on **Ss. 31 & 34 of the Income Tax Act, 2015 (Act 896).** He did contend further that although the respondent admits that Franco Nevada Corporation is a third party and not related to the appellant, the lower court nevertheless held otherwise. Having regard to the position of the court contrary to the admission of the respondent, it was Counsel's view that the conclusions the lower court reached were clearly unsupportable by the evidence on record. He added that the undisputed facts were that the

forward contracts the appellant entered into were with the third parties and not with related parties. Thus, the lower court erred in applying the law when it had not resolved such material facts.

It was his submission, therefore, that the non-resolution of the disputed facts constitutes a ground for the judgment to be set aside.

In response, **learned Counsel for the respondent** submits it is incontrovertible as captured in the audit report the respondent carried out that the appellant used two different prices namely, **spot price** to pay for the Franco Nevada Corporation royalty and **forward sales contract** to pay for the Government's royalties. In Counsel's view, the lower court was correct to conclude that the respondent was right to use the objective price to calculate royalties and other taxes the appellant owed the Government.

Next, Counsel referred us to a portion of the judgment of the lower court that appears on ***p. 290 Vol. 4 [roa]*** by which the learned judge had observed, *inter alia,* that the appellant has been unable to show that the prices of gold were so erratic and of a consistent downward trend. It was his position that the court did rightly observe that the respondent never abused its discretion in coming to the conclusion it did. The court also took into consideration, royalty payments made to the Franco Nevada Corporation that was based on the **spot gold price** and concluded that the Government deserved the same treatment, he added.

Accordingly, Counsel submitted that the lower court's observation and conclusion on the issue was profound and sound. Therefore, the conclusion must not be disturbed.

We have critically evaluated the evidence put before the lower court and the written submissions of both Counsel in the instant appeal, particularly on this point. Having regard to the available evidence on record, we are of the opinion that the lower court failed to resolve material facts in the case. It rather proceeded to make the conclusions referred to supra, which conclusions are not supported by the evidence on record. Significantly, the respondent itself has admitted that Franco Nevada Corporation though a third party, it was not related to the appellant. See: ***pp 145-147 Vol. 3 & p. 159 para. 2 Vol. 3 [roa].***

That is a clear admission of a fact advantageous to the cause of the appellant. For, the settled position of the law is that where an adversary has admitted a fact advantageous to the cause of a party, the party does not need any better evidence to establish the fact than by relying on such admission, which is an example of estoppel by conduct. It is a rule whereby a party is precluded from denying the existence of some state of facts which he had formally asserted. That type of proof is a salutary rule of evidence based on common sense and expediency. See: ***In re: Asere Stool; Nikoi Olai Amontia IV (subt'd by Tafo Amon II) v Akotia Oworsika III (subst'd by Laryea Ayiku III) [2005-2006] SCGLR 637 @ 651*** per Seth Twum JSC

In the light of this clear admission, we roundly agree with learned Counsel for the appellant that the lower court erred both in law and on the facts when it held that Franco Nevada Corporation was a related party to the appellant.

Additionally, it is our considered opinion that the lower court erred when it held that the respondent rightly characterized the forward sales contracts for being irrational and without economic sense, and a tax avoidance scheme. This is because that holding is unsupportable by the evidence.

In the circumstance, we allow this ground of appeal.

3rd ground of appeal:

The learned appellate judge erred in law by misconstruing the legal requirements under Section 92(1) of the Revenue Administration Act, 2016 (Act 915) and the appellant/appellant's obligation in producing sufficient evidence as proof in law.

It is material to point out that **S. 92(1) of the Revenue Administration Act, 2016 (Act 915)** places the burden of proof in tax appeals in terms of Ss 41-45 of Act 915. Applying this provision of the law to the facts of the instant case, the lower court held as follows:

> *"To me, when the law in Section 92(1) of Act 915 places the onus of proof on the appellant in tax appeals, it was not meant for the production of voluminous documentation in support of the acts and transactions of the appellant simpliciter. It goes beyond the production of voluminous documentations that go to rationalize the acts and transactions. It is the Commissioner-General's evaluation of these documents, acts and transactions vis-à-vis the tax laws, practice and conventions in the industry both local and international that will determine whether the proof offered is proof in law indeed capable of discharging the burden."*
>
> **[emphasis underscored].** See: ***pp 182-183 of Vol. 4 [roa]***

To the lower court, the appellant was unable to discharge the burden that the assumption of facts made by the respondents and the interpretation and or applications of the tax law by the respondent leading to the objection decision were inaccurate and or wrongly applied to make the decision wrong in law.

Learned Counsel for the appellant concedes that per S. 92(1) of Act 915 the taxpayer, in this case, the appellant bears the burden of proof in respect of tax appeals brought under Ss 41-45 of the Act. He, nevertheless, advocated that the proper means of proof is to show compliance of the provisions of the law and nothing more. Therefore, where the appellant is able to introduce evidence of compliance with the tax laws and such evidence was able to persuade the trier of facts, it was presumed that the appellant had discharged its burden, Counsel added.

Furthermore, Counsel reiterated, the appellant was able to establish that its transaction with Franco Nevada Corporation was not with a related party. Again the appellant established that the income from the **forward sale contracts** was effectively connected with its business income. Thus, the appellant had complied with the provisions of the tax law and so, discharged its burden or onus of proof, it was emphasized. Counsel, therefore, invited the court to allow this other ground of appeal.

Learned Counsel for the respondent, on the other hand, has contended that the judgment reflects the totality of the evidence before the lower court and the claims of the appellant have no legal basis.

Advancing his arguments further, Counsel insisted that the issue before the lower court was whether royalty payment should be taxed on **spot price** or

contract price. Additionally, the court was to determine whether losses that emanated from forward sales contracts were deductible from income. The lower court after considering the totality of the evidence decided that based on S. 9 of Act 896, losses from contract sales were not deductible from income. In Counsel's opinion, the lower court was right in agreeing with the respondent's assertion that the **spot gold price** should be the basis for the calculation of the income of the appellant.

Counsel concluded his arguments on this ground of appeal by referring us to **Ss 10 & 11 of the Evidence Act, 1975 (NRCD 323)** and reiterated the position that the appellant as tax payer carried the burden to produce sufficient evidence to avoid a ruling against it. The appellant was required by law to introduce sufficient evidence to show that the **forward sale contract** of gold is recognized in the tax laws of Ghana. He thinks the appellant failed to do so.

Counsel thus invited the court to dismiss this ground of appeal.

This court takes issue with the holding by the lower court that **S. 92(1) of Act 915** was not meant for the production of voluminous documentations that goes to rationalize the acts and transactions as the appellant in the instant appeal did. Rather, according to the court, it was the Commissioner-General's evaluation of those documents, acts and transactions vis-à-vis the tax law, practice and conventions in the industry both local and international, that determines whether the taxpayer, in this case the appellant, has discharged the burden of proof.

We think this is a dangerous proposition of law. The Commissioner General is not the law, neither is it the case that whatever he says must be taken as

the gospel truth. Otherwise, the proposition renders the right of a party to appeal the decision of the Commissioner General as provided for in **rule 2(1) of Order 54 of C.I 47,** redundant. The true and correct interpretation of that provision of the law is that it is by the nature of evidence put forward by a tax payer, and the Commissioner General objectively applying the tax laws and other relevant statutes and conventions to the evidence provided in accordance with law, that settles the issue as to whether or not the tax payer has been able to discharge the burden placed on him.

Admittedly, the Commissioner General has a discretion to determine the quantum of the lawful assessable tax liability to be paid. However, the exercise of that discretion must be grounded in law. It must not be capricious and or arbitrary but guided by **Article 296(c) of the 1992 Constitution of Ghana.**

At the risk of sounding repetitive, a key evidence established in the case was that the financial transaction the appellant entered into with Franco Nevada Corporation was not one with a related party. Additionally, the evidence was that the income from the appellant's **forward sale contracts** was effectively connected with the appellant's business income.

In the light of these 2 key material evidence/facts established on record, we roundly endorse the submissions of learned Counsel for the appellant that the lower court erred in law and the error occasioned a miscarriage of justice when it held that the appellant was unable to discharge the burden placed on it. On the contrary, we think the appellant provided sufficient evidence to prove its case and which ought to be upheld by the court. Put differentiy, the appellant discharged the burden cast on it because it complied with the provisions of the law here above referred to.

Consequently, we allow this other ground of appeal.

That leads us to discussing the next ground of appeal.

4th ground of appeal:

The learned appellate judge erred in law by holding that the loss from forward sales contract is not deductible from business income.

Giving particulars of the error by the lower court, Counsel for the appellant canvassed the point that Regulation 10(2) of the Internal Revenue Regulations, 2001 (L.I 1675) was misconstrued by the court in the light of S. 7(2) of the Internal Revenue Act, 2000 (Act 592), the substantive legislation. It was also the case of Counsel that the learned appellate judge erred in law by focusing on S. 9 of the Income Tax Act, 2015 (Act 896) without taking account of Ss 19, 21 and 25 which specifically deal with the tax treatment of gains and losses from forward sales contract.

Explaining further, Counsel submitted on behalf of the appellant that the respondent misapplied the law when it insisted that loss from forward sales contract was not deductible business income and which decision was affirmed by the lower court. Pressing further, Counsel referred us to ***pp 158-160 Vol. 3 [roa]*** particularly ***p. 159,*** containing the respondent's objection decision that runs in part:

> *"We maintain our position that 'forward contract' on gold sales constitute (sic) an investment activity under the meaning of the Internal Revenue Act, 2000 (Act 592) pursuant to Regulation*

10(2) of the Internal Revenue Regulations, 2001 (L.I 1657)....

.....

Therefore, in accordance with the above Regulation, we maintain our position on the treatment of loss on forward contract as an investment income and not business income."

It is this position of the respondent as endorsed and or affirmed by the lower court that has attracted severe criticisms from Counsel for the appellant. We reproduce here below, that part of the judgment of the lower court affirming the opinion of the respondent:

"On the ground of whether or not losses occasioned by the applicant entering into forward sale contracts or hedging was an investment loss and so deductible from investment income has been answered sufficiently by the respondent, these deductions are not tax deductible and so having been deducted from the business income before arriving at the chargeable income of the applicants, occasioned a tax liability and the only remedy is to disallow same which the respondent did."

See: ***p. 182 of Vol. 4 [roa].***

Now, Regulation 10(2) of L.I 1675 provides:

"A loss incurred from a business shall not be set off against or deducted from an income from investment and a loss incurred

from an investment shall not be set off against or deducted from an income from a business."

It is also provided in section 7(2) of Act 592 as follows:

"7. Income from a business

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

The law as we understand it is that **Regulation 10(2) of L.I 1675** deals with tax treatment of loss from investment and business activities. It provides that a loss from a business shall not be set off or deducted from investment income. The law also relates to loss from forward sales contract which was whether deductible from business income or not. That provision of the law, therefore, becomes operational after an income has been established to be either a business or investment income.

Now, **S. 7(2) of Act 592** which is in *pari materia* with **S. 5(2) of Act 896** is also to the effect that income earned by a taxpayer which is attributed to the business of the taxpayer and would have otherwise been included in calculating income from investment of the taxpayer is business income. It is material to point out that S. 7(2) of Act 592 is the parent legislation. And it is trite knowledge that a subordinate legislation cannot be construed to override or amend a parent legislation. Therefore, the respondent could not have

construed Regulation 10(2) of L.I 1675 to amend or override the parent Act, Act 592. In other words, S. 7(2) of Act 592 cannot be amended by Regulation 10(2) of L.I 1675. See: ***Mornah v Attorney-General [2013] SCGLR (Special Edition) 502***.

At this stage we need to put the facts/evidence of the case in its proper perspective, for purposes of clarity.

As recounted supra, the respondent did two (2) audit tax assessments or exercise. The first was for the period of 2010 – 2012. The appellant raised issue with it. The evidence established that it was not until the year, 2019 that the respondent responded to the concerns of the appellant against its previous objection. To address the concerns so raised, the respondent prepared a new tax audit this time, spanning from 2010 to 2017. At the time the first exercise was carried out the relevant tax law in force was the Internal Revenue Act, 2000 (Act 592). However, during the time ie in 2019 that the second exercise was being carried out, the Income Tax Act, 2015 (Act 896) had been promulgated.

Significantly, in passing the Income Tax Act, 2015 (Act 896) some provisions in the Internal Revenue Act, 2000 (Act 592) were retained. So, we have, for eg., **S. 7(2) of Act 592** which is in *pari materia* with **S. 5(2) of Act 896.** That provision of the law is to the effect that income earned by a taxpayer which is attributed to the business of the taxpayer and would have otherwise been included in calculating income from investment of the taxpayer is business income.

Now, it cannot be overemphasized that the fulcrum around which the case revolved was the real assessable tax liability of the appellant that the lower

court was to address. In considering that fundamental issue, it was incumbent on the lower court to have considered and made the following determination:

i. what constitutes **income that is subject to tax**;
ii. what is meant by **investment income;**
iii. what **spot gold price** is;
iv. the nature and character of **forward sale contract** and how is applied in the gold industry for tax purposes; and
v. the nature of **derivative instrument** as applied in the mining industry for purposes of tax.

To begin with, any income earned from any business activity in which a party [tax payer] is engaged, or a transaction a taxpayer enters into with another party that brings him some form of revenue, is **a business income for purposes of tax.** It is common knowledge that the appellant in our present case is engaged in mining ie the production of gold minerals and the sale of gold. Put differently, the production and sale of gold is the pure business of the appellant. Therefore, the sale of any piece of gold is pure business transaction.

An **Investment income,** on the other hand, has been statutorily defined in **S. 6 of the Income Tax Act, 2015 (Act 896)** to mean and include, *inter alia*:

(1) the income of a person from an investment for a year of assessment is the gains and profits of that person from conducting the investment for the year or a part of the year.

(2) A person who is ascertaining the profits and gains of that

person or of another person from an investment for a year of assessment or for a part of the year shall

(a) include in the calculation, an amount specified in respect of

(i) dividends, interest, annuity, natural resource payment, rent, and royalty;

(ii) a gain from realization of an investment asset calculated under Part IV;

(iii) an amount derived as consideration for accepting a restriction on the capacity of the individual to conduct the investment.

It also includes a gift received by a person other than a gift received in respect of business or employment.

It is pertinent to observe that per the above statutory provision and definition, investment income is quite different and distinct from business income. Investment income is available for tax purposes when a tax payer has earned some income/revenue from any of the incidents such as rent, dividends, interest, annuity, natural resource payment as stated in the law. Beyond that, the respondent is not clothed with the power or jurisdiction to re-characterize a business income as an investment income for tax purposes where none existed.

In the instant case, the evidence did not establish that the appellant earned any of the incidents stipulated in **S. 6 of Act 896** so as to be liable to pay any investment income tax. The respondent cannot, therefore, insist on using that method of assessment in calculating the tax liability of the appellant when the transactions in question were of business income.

The **spot gold price,** according to the **London Bullion Marketing Association**, is a benchmark pricing of gold at any given time. As a benchmark, it provides a guidance for gold commodity transactions. See: *https://www.ibma.org.uk/prices-and-data*.

In simple words, **spot gold price** is the price of gold offered on the open market that takes the character of "cash and carry" system. The buyer pays for it and picks the gold at the prevailing price. That accounts for the description, **spot price.** It has no element of loss or gain. The benchmark provides: *"as is"* price at the time of the sale of gold.

The **forward sale contract,** on the other hand, is an agreement entered into where the gold is unavailable for sale but the seller promises to make a future delivery. In other words, there is that negotiation for delivery in the future. In that case, the purchaser may exercise the option to either pay for the spot price but to wait future delivery of the gold or pay for the price prevailing at the time of delivery. The **forward sales contract price,** therefore, is the price of selling gold by using forward sales contracts which is a derivative financial instrument recognized and accepted under S. 131(1)(a)(ii) of the Income Tax Act, 2015 (Act 896). That provision of the law enacts:

> *"In this Act, unless the context otherwise requires:*
>
> *'financial instrument' means a derivative instrument."*

We shall revisit the issue.

It bears stressing that upon delivery, the spot price may change from the negotiated price. If the price determined at the forward or future date falls, a loss has occurred. In that case, for tax purposes, the loss is deductible from the income of the taxpayer before tax assessment. On the other hand, if at

the time of delivery the spot price has shot up, the difference is treated as profit for purposes of tax assessment. In other words, the profit is added to his business income and assessed to be taxed.

We now proceed to discuss and shed light on what a **"forward sales contract"** is.

The established evidence is that the appellant entered into what is described as **"forward sales contract"**. This kind of business is known in the tax industry as **"a derivative instrument"** recognizable under S. 131 of Act 896. As per **S. 131(3) & (4) of Act 896,** the law recognizes that a financial gain or loss incurred if it was made from a financial instrument or a derivative instrument. In simple terms, the derivative instruments are instruments used in the course of mining business. It follows therefore that they are transactions that are effectively connected to the business of the appellant, the business of mining. A transaction of such nature that yields an income from the sales contract is duly recognized and captured as income from business and therefore cannot be termed as income from investment. These are necessary instruments employed in the normal course of mining business to hedge exposure to future price and currency fluctuation in the primary commodity markets in which a company operates.

The meaning and character of **derivative instrument** was well articulated in the Canadian cases, Counsel for the appellant referred us to. We find them to be a very useful guide. In the cases herein referred to, ie ***Echo Bay Minest Ltd v The Queen 92 DTC 6437*** and ***Placer Dome Canada Ltd v Ontario (Minister of Finance) 2006 SCC 20, [2006] 1 SCR 71*** it was held that the use of derivative instruments was integral to the generation of income by a mining company.

In the ***Placer Dome Canada Ltd*** ***Placer Dome Canada Ltd case [supra],*** the court observed:

> *"Production activities yield no income without sales. Activities reasonably interconnect with marketing the product, undertaken to assure its sale at a satisfactory price, to yield income, and hopefully a profit, are in my view, activities that form an integral part of production which is to yield income and resource profits....."*

In the light of the above, we think that in the instant case, the respondent erred when it failed to treat the forward sales contracts or transactions as income from business but as income from investment. Following that, it is our respectful opinion that the respondent erred when it did not set off the loss from the forward sales contract against the appellant's business income but rather set it off against the appellant's investment income.

It is worth repeating that insofar as the forward sales contract is effectively connected to the business of the gold sales business of the appellant, it must be considered as business income and the loss therefrom should form the basis for deduction from the business income. It other words, the loss should be set off against the business income.

As a matter of emphasis, the appellant engages in the business of mining and the sale of gold. Insofar as the derivative transaction in this appeal arose from the mining of, and the sale of gold and gold simply being the income asset of the appellant, any income and or loss arising from the derivative transaction is effectively connected to the business income of the appellant.

It stands to reason, therefore, that it should have been recognized as a loss from business pursuant to S. 7(2) of Act 592 and not a loss from investment.

In the circumstance, we allow this other ground of appeal.

5th ground of appeal:

The learned appellate judge misdirected himself by holding that the appellant/appellant used two different prices in calculating royalties paid to Franco Nevada Corporation and the Government of Ghana.

It was submitted on behalf of the appellant that the learned appellate judge misdirected himself when, upon clear and cogent evidence on record that payment of royalty to Franco Nevada Corporation was not in dispute, he held on the contrary that the appellant could not debunk the accusations that it used both spot gold price and contract for the payment of royalties.

Explaining himself to be understood better, learned Counsel for the appellant distinguished between royalties that were paid to Franco Nevada Corporation and to the Government of Ghana. According to Counsel, the two modes of payment are not the same and do not derive their legal basis from the same source. Counsel made reference to S. 25 of the Minerals & Mining Act, 2006 (Act 703) as amended by S. 1 of the Minerals & Mining (Amendment) Act, 2010 (Act 794) as the legal basis for the computation of royalties to the Government of Ghana.

As regards payment of royalties to Franco Nevada Corporation, the exigible rate is spelt out in the Sale & Purchase Mining Lease made between the appellant and its vendor ie AngloAsanti Corporation Ltd which eventually

assigned its interest to Franco Nevada Corporation. See: Clause 4.1(a),(b),(c) as well as Clause 4.3 of the Sale and Purchase Lease as appearing on ***p. 25 Vol. 1 [roa].*** In the Sale and Purchase Lease, it was stipulated that **spot gold price** was to be used.

We have resorted to the law regarding payment of mineral royalties to the Government of Ghana.

Under S. 25 of the Minerals & Mining Act, 2006 (Act 703) as amended by S. 1 of the Minerals & Mining (Amendment) Act, 2010 (Act 794), a taxpayer is required to pay royalty to the Republic of Ghana at the rate of 5% of the total revenue earned from minerals obtained by the holder. Significantly, S. 1 of Act 794 has also been amended by S. 1 of the Mineral & Mining (Amendment) Act, 2015 (Act 900). That provision of the law enacts:

> *"A holder of a mining lease, restricted mining lease or small scale(sic) mining lease shall, in respect of minerals obtained from its mining operations, pay royalty to the Republic at the rate and in the manner that may be prescribed."*

Significantly, per Clause 21 of the Mining Lease Agreement as appearing on ***p. 82 of Vol. 4 [roa]*** the appellant shall pay to the Government of Ghana royalty as prescribed by statute. Our research into the matter, however, did not reveal that the rate and the manner as indicated in Act 900 has been prescribed. Pursuant to this legal vacuum, we pray in aid, **S. 35(2)(c) & (3) of the Interpretation Act, 2009 (Act 972)** and hold that **the rate of 5% of the total revenue** earned from minerals obtained by the holder prescribed

by S. 1 of Act 794 shall or is continued in force under the new enactment, that is to say, S. 1 of Act 900.

If our proposition is right, it means that the appellant shall pay to the Government of Ghana, royalties in the manner as prescribed in S.1 of Act 794 as continued by S. 1 of Act 900. In other words, the appellant shall pay as royalties, the rate of 5% of the total revenue earned from minerals by the holder. It is undisputed that in the mining industry, the price of gold may be spot price, forward sale contract, or combination of both. Whatever it is, once minerals have been sold the appellant shall compute the royalties and pay same to the Government on the total revenue generated.

Indeed, under Clause 21 of the Mining Agreement that appears on ***p. 82 Vol. 4 [roa]*** it is clearly stated in mandatory terms that the appellant shall pay to the Government of Ghana, royalties in the manner prescribed by legislation for computing royalties payable which we have held to be the rate of 5% of the total revenue earned from minerals obtained by the holder. The total revenue of the appellant and by which 5% was to be computed shall be the total of revenue generated from both the spot price and the forward price contracts sales. These were copiously reported in the appellant's audited accounts filed as part of its case before the courts.

It is material to point out that the royalties the appellant paid to Franco Nevda Corporation, once that company is not the Government of Ghana or a State institution, payment did not fall under S.1 of Act 900. The payment is rather governed or dictated by Clause 4.1(a),(b),(c) and Clause 4.3 of the Sale and Purchase Mining Lease the appellant entered into with the Vendor, AngloAshanti (AAGL) AAGL that subsequently assigned its interest to Franco Nevada Corporation. See: ***p. 22 Vol. 1 [roa].***

It bears emphasis that the royalties paid to Franco Nevada Corporation was in pursuance to Clause 4 of the Sale and Purchase agreement the AAGL by which the appellant acquired mineral rights from AAGL. By the agreement, the appellant made a cash payment in addition to a payment of monthly royalties to AAGL using the spot gold price as its benchmark. Therefore, when AAGL assigned its interest to Franco Nevada Corporation that provision of the payment of the royalty was continued in force. Hence the payment of royalty to Franco Nevada Corporation.

It is instructive, the payment of royalty to the Vendor under the Sale and Purchase agreement was for continuation of royalties to another independent party and not a related party under the Sale & Purchase agreement. As a matter of emphasis, the monthly payment of royalties under the agreement was, strictly or technically speaking, not payment of Government royalties. It follows, therefore, that the royalties paid to Franco Nevada Corporation were not payments for sale of minerals that attract payment of royalties to Government. Instead, they were royalties paid for the acquisition of mineral rights.

In the light of the above, we agree with the submissions of learned Counsel for the appellant that any mode of computing the royalties due Government of Ghana contrary to what is prescribed by legislation is tantamount to breach of statute.

Given the circumstances therefor, and having regard to the evidence on record, we are of the respectful opinion that the payments of royalties to Franco Nevada Corporation was not a scheme the appellant hatched to avoid tax payment. The learned appellate judge, therefore, erred in law when he held otherwise.

On that score, we allow this other ground of appeal.

6th ground of appeal:

The learned appellate judge erred in law by failing to measure the respondent/respondent's exercise of discretion of re-characterization of the forward sales contract in accordance with the provisions of Article 296 (c) of the 1992 Constitution.

It was argued under this ground that per S. 34 of the Income Tax Act, 2015 (Act 896) as amended, the Commissioner General, the respondent herein is given the discretionary power to disregard an arrangement that is entered into or carried out as part of a tax avoidance scheme if the arrangement was fictitious or did not have a substantial economic effect or the form did not reflect its substance. The second step will be to justify the legal and factual basis of the re-assessment or re-characterization of the arrangement.

It is the case of Counsel for the appellant that for the respondent to succeed in an assessment under S. 14 of Act 896 it should be proved that the arrangement was a disguised agreement dishonestly formulated for the purpose of avoiding tax.

In view of Counsel, the respondent proceeded under S. 112 of Act 592 to disregard the forward contract price on the sole misconceived reason that the practice in the industry is for gold to be sold at **gold spot price.**

Next, Counsel contended that Article 296(c) of the 1992 Constitution required that where the person authority was not a judge or other judicial officer, there shall be published by a constitutional instrument or statutory

instrument, regulations that are not inconsistent with the provisions of the Constitution or that other law to govern the exercise of the discretionary power.

In response, learned Counsel for the respondent submits that the respondent did not abuse its discretionary power as enshrined under Article 296 of the Constitution on the account only that the respondent has not published regulations to govern the exercise of its discretionary power. According to Counsel, the proper interpretation of the article was articulated by the Supreme Court in ***Ransford France (No.3) v Electoral Commission & Attorney General [2012] 1 SCGLR 703*** and particularly, in ***Gregory Afoko v Attorney General, Suit No. J1/8/2019 dated 19/06/2019 (unreported)*** where Article 296 was interpreted as follows:

> *"It is not with the exercise of every discretionary power that must meet the requirement of article 296 of the Constitution, such as publication of constitutional or statutory instrument or regulations and thus, obligation to make regulations should be limited to discretion which is quasi-judicial situation."*

It was the contention of Counsel for the respondent, therefore, that the respondent never exercised its discretionary power vested in him under S. 112 of Act 592; S. 34 of Act 896 and S. 99 of Act 519 unfairly, arbitrarily and capriciously when the respondent used the spot gold price and disregarded the forward sale contract price of gold.

Now, it is important to stress that at the initial stages of the tax assessment, the respondent's role is purely of administrative nature and is allowed and or

required to exercise best discretion in the matter. See: ***R v Commissioner of Income Tax; Exparte Maatschappij De Fijnhouthandel N.V. (Fynhout) [1971] 1 GLR 213 @ 217.***

However, where the tax payer has raised a tax objection to the assessment by the respondent and the objection has been brought to his notice, the respondent's administrative role is catapulted into an adjudicator in which case the discretionary power is guided by Article 296(c) of the 1992 Constitution and other statutes.

We have evaluated the evidence put before the court and are of the respectful opinion that there was no clear evidence of abuse of the discretionary power as required by Article 296. Nevertheless, we think that the respondent applied the wrong mode or method in calculating the tax assessment as copiously articulated elsewhere in this judgment. In exercising discretion, an adjudicator *qua* adjudicator may proceed on wrong basis. However, once he exercised the discretion within jurisdiction the decision being wrongful may be corrected through an appeal process or by any other lawful means like judicial review.

In the circumstance, we disallow this ground of appeal.

Ground 7: The learned appellate judge misdirected himself by holding that the forward sales contract was a related transaction.

In respect of this ground, Counsel argued that the evidence on record established that the appellate entered into forward sales contracts with Macquarie Bank Ltd and Credit Sussie AG. None of these 2 companies is an affiliate of or related to the appellant. Thus, any of them cannot be

described as a controlled arrangement or related party transaction contracted between the appellant and either of them.

Assailing the judgment of the lower court, learned Counsel referred to **S. 31 of Income Tax Act, 2015 [Act 896]** to point out that the provision of that law requires persons in a controlled relationship to calculate their income, and tax payable according to the arm's standard. Counsel additionally referred us to **S. 128 of Act 896** that determines what constitutes a controlled relationship.

Counsel emphasized that **S. 31 of Act 896** does not apply to transactions between independent parties. Thus, a transaction which in the opinion of the Commissioner General is not at arm's length, does not become a related party arrangement unless a controlled relationship can be established under **S. 128 of Act 896.**

He next referred to a sale and purchase agreement between the appellant and the AngloGold Ashanti (Gh) Ltd by which agreement the appellant made some cash payments in respect of a mining concession and referred us to Clause 4 of the agreement that provided for monthly payment of royalties to AngloGold Ashanti. Subsequently, by a deed of assignment, AngloGold Ashanti assigned its interest in the concession to Franco Nevada Corporation, Canada, Counsel added.

Learned Counsel has maintained that the appellant's transaction with AngloGold Ashanti was a transaction between independent parties so not subject to **S. 31 of Act 896.** He equally insisted that once Franco Nevada Corporation was not affiliated to the appellant the payment of royalties to Franco Nevada Corporation was merely an assignment or extension of an

independent party transaction to another independent party and not subject to **S. 31 of Act 896.**

Counsel consequently submitted that once the respondent made the admission which admission appears on ***p. 159 para. 2 Vol. 3 [roa]*** the respondent's objection decision found on ***pp 158 – 184 Vol. 3 [roa]*** was mainly centred on the wrong assumption that the appellant entered into a contract with related parties. The lower court having affirmed that wrong assumption erred in law on the issue and the court's holding be set aside.

The response by **learned Counsel for the respondent** was that the lower court in dismissing the appellant's appeal did not base its decision solely on whether the forward sales contract the appellant engaged in was with related. The court also considered whether the losses incurred from forward sales contract were wholly, exclusively and necessarily incurred for the production of the income as required S. 13 of the Internal Revenue Act 2000 (Act 592) and Ss 9 and 81 of Act 896, Counsel maintained.

Furthermore, Counsel argued, the lower court also considered whether the appellant had the legal justification to hedge with a lower price than the prevailing market price. Counsel thus concluded that the judgment of the court reflects the totality of the evidence before the court and dismissed the claims of the appellant as lacking any legal basis and unsupportable by the evidence.

We have critically evaluated the evidence on record.

At the risk of sounding repetitive, the core business of the appellant is gold mining, production, marketing and sale of gold. There is that evidence that the appellant entered into forward contracts with Macquarie Bank Ltd and

Credit Suisse AG for the sale of gold produced in the course of its business. According to the appellant, it entered into the forward contract sales to manage the risk of price volatility. It was their case that the appellant agreeing to sell gold for a fixed price at a future date provided some degree of certainty of the future income stream of the business. According to the appellant these are derivative transactions that are undertaken in the normal course of business including mining business. See: ***p. 30 of the written address of Counsel for the appellant filed 22/06/2022.***

As sufficiently explained elsewhere in this judgment, derivative contract by the appellant entered into with such independent parties such as Macquarie Bank Ltd and Credit Suisse AG is not an investment activity but a necessary activity in the sale of gold it produced in gold mining activity. Thus, per Regulation 10 of L.I 1675 which takes its roots from S. 22 of Act 592 any losses on the forward contract sale are losses from business transaction and not an investment transaction and the appellant is entitled to set-off the losses against business income as they are losses from a business transaction.

Now, having regard that the derivative transaction arose from the gold which is the income asset of the appellant in terms of S. 7(2) of Act 592, the income or loss arising from the derivative transaction was effectively connected to the business income of the appellant. Thus, that should have been recognized as a loss from business. The lower court therefore erred in law when it accepted the wrongful characterization by the respondent of tax liability.

We now turn our attention to the omnibus ground of appeal.

1st ground of appeal:

The judgment is against the weight of evidence.

It is now a settled principle of law that the omnibus ground of appeal that the judgment is against the weight of evidence throws up the entire case for consideration and determination by the appellate court. The principle was reiterated in ***Owusu-Domena v Amoah [2015-2016] SCGLR 790*** in which case the apex court stated that the sole ground of appeal that the judgment is against the weight of evidence throws up the case for a fresh consideration of all the facts and law by the appellate court. The court ruled:

> *"The decision of Tuakwa v Bosom has erroneously been cited as laying down the law that when an appeal is based on the ground that the judgment is against the weight of evidence then, only matters of fact may be addressed upon. Sometimes, a decision on facts depends on what the law is on the point or issue. And even the process of finding out whether a party has discharged the burden of persuasion or producing evidence is a matter of law."*

The Supreme Court in the oft-quoted case, ***Djin v Musah Baako [2007-2008] SCGLR 686*** had propounded the law that:

> *"Where an appellant complains that a judgment is against the weight of evidence he is implying that there were certain pieces of evidence on the record which if applied could have changed the decision in his favour, or that there are certain pieces of*

evidence that had been wrongly applied against him. The onus is on such an appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against."

It is, therefore, incumbent on the appellate court to analyze the entire record of appeal, take into account the testimonies and documental evidence adduced at the trial before arriving at its decision, as so satisfy itself that on the preponderance of probabilities, the conclusion of the trial judge were reasonable or amply supported by the evidence. See: ***Oppong v Anarfi [2001] SCGLR 556 Holding 4.***

In ***Akuffo Addo v Catherine [1992] 1 GLR 377*** this Court re-echoed the rule that where an appeal is against the weight of evidence, the appellate court had the jurisdiction to examine the totality of the evidence before it come to its own decision on the admitted and undisputed facts.

Guided by the principles stated supra and applying same to the instant appeal we note that there is that established evidence on record that the core business of the appellant is gold mining, production, marketing and sale of gold. Additionally,

It is also noted that the respondent disregarded the forward sales contracts between the appellant and independent third parties thereby substituting the agreed contract price between the parties with a spot gold without satisfying the legal requirements or conditions for re-characterization as stipulated under S. 34 of Act 896.

We have held elsewhere in this judgment that as appearing on ***pp 145 – 147 Vol. 3 [roa]*** and ***p. 159 Vol. 3 [roa]*** there is that undisputed evidence where

the respondent has accepted the treatment of the royalty payment made to Franco Nevada Corporation by the appellant. To rehash the point, we reproduce below, the said admission. It reads:

"Franco Nevada Corporation, Canada

We have considered your explanation on the above issue and accepted the treatment of the royalty payments to Franco Nevada Corporation as an allowable deduction for tax purpose.

The add back as per our audit report has therefore been reviewed."

The above admission notwithstanding, the respondent treated the payment of royalty under S. 5 of Act 896 instead of what pertained under the Sale and Purchase Agreement. These clearly show that the judgment was patently against the weight of evidence.

Having regard also to the established evidence that statute had prescribed a mode for determining the royalties to be paid to Government, it was against the weight of evidence for the respondent to have another method which method though wrongful, the lower court affirmed it.

Before drawing curtains on the discourse, we note that learned Counsel for the respondent has criticized of the use of foreign cases ie Canadian cases by learned Counsel in support of his submissions. In his view, the Canadian cases therein referred to, are based on Canadian tax law and therefore, inapplicable in Ghana and to this case, in particular.

To the extent that those cases are of foreign origin, they are persuasive and not binding. However, where there is poverty of judicial authorities on a matter or issue in our municipality and there exists cases of comparable

consideration in other commonwealth jurisdictions, it is our respectful opinion that no rule of law or statute prevents our courts from adopting and applying the foreign cases/decisions to issues on hand. This position is in consonance with the statement of law Hayfron-Benjamin JSC espoused in ***Afranie v Quarcoo [1992-93] GBR 1451 @ 1503*** that runs as follows:

> *".....where there are laws governing a decision of our courts on a particular matter within our municipality, a court ought not apply any foreign law of interpretation or decision except where such laws and decisions are in pari materia with our own."*

It is in the light of the above principle that the Supreme Court in ***Adjei-Ampofo v Attorney General & President of the National House of Chiefs [2011] 2 SCGLR 1104 @ 1131-1132*** took the opportunity to endorse and apply the American doctrine of *"void for vagueness"* into the Constitutional interpretation of **Article 21 of the 1992 Constitution** *vis-a-vis* **S. 63(d) of the Chieftaincy Act, 2008 (Act 759).**

Thus, although our courts are not required to pay obeisance to otherwise invaluable scholarship in foreign decisions, where there are not enough case law in our jurisprudence and our statutes are in *pari materia* with foreign cases from other jurisdictions particularly those from the British Commonwealth, our courts may adopt and apply them to suit our circumstances.

Therefore, we find it helpful and useful, the dictum in the Canadian Supreme Court case of ***James S.A. Macdonald v Her Majesty The Queen SCC File***

No: 38320, 2019 that turned on the interpretation of ***financial derivatives.*** In considering the test to apply, that court resorted to the definition and explanation offered in ***The Law of Financial Derivatives*** and came to the conclusion that the first issue to settle relates to the connection between the derivatives transaction and some other underlying transaction. If a sufficient link exists between the two transactions, then the derivatives transaction will take on the character of the underlying transaction described as the "linkage" principle. The second issue, according to the Canadian Supreme Court, addresses the relationship between the derivatives transaction and the taxpayer's business operations. If sufficient integration exists, then the transactions will be income account described as "integration" principle.

Given the evidence put before our courts in the present case, we find that the test by the Supreme Court of Canada fits in squarely with S. 7(2) of Act 592 where we think the forward contract is effectively connected with or linked to the appellant's sale of gold business. It cannot be put to any serious doubt that the appellant as a gold producer whatever income it derives from the sale of gold shall be treated as a business income for purposes of tax. Thus, gold sales contract that the appellant entered into with Macquaries Bank Ltd and Credit Suisse AG whether paid for in advance or at the time of the delivery of gold is treated as a business income for tax purposes. And that is the nature of the forward sales contract.

We think at this stage that we have sufficiently addressed every salient point worth addressing and which is capable of disposing of this matter. In the circumstance we do not intend to address any outstanding issue that we think is at the periphery or already addressed in this judgment.

Conclusion:

Overall, the appellant has demonstrated a good cause why we ought to disturb the judgment of the lower court for which we set aside for the reasons copiously addressed in this judgment. Save our disagreement with the contention that the respondent failed to measure its exercise of discretion properly under Article 296 (c) of the 1992 Constitution, the appeal succeeds and is hereby allowed in its entirety.

Consequently, we grant all the reliefs the appellant set out in the notice of appeal filed 12th April 2021. That is to say, we set aside the entire judgment of the appellate High Court and make an order granting the appellant all the reliefs set out in the tax appeal put before the lower court.

Appellant's costs assessed at Ghc50,000.00.

sgd

P. BRIGHT MENSAH
(JUSTICE OF APPEAL)

sgd

I agree

SENYO DZAMEFE
(JUSTICE OF APPEAL)

sgd

I also agree

JANAPARE BARTELS-KODWO (MRS)
(JUSTICE OF APPEAL)

COUNSEL:

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REBBECA EDUAFO-ABRAHAM FOR THE RESPONDENT/ RESPONDENT/RESPONDENT