Tax & Regulatory Journal

PwC review and commentary on topical tax issues and recent tax judgments in Ghana

July 2024

Content

Commentary

Welcome to the second edition of our Tax & Regulatory Journal. In this edition, we continue to focus on articles from our Tax Controversy and Dispute Resolution Practice (TCDR) Team.

The first article in this edition provides an update to some of the matters discussed in the maiden edition of this journal. We discuss developments regarding taxation of unrealised exchange gains and application of the minimum chargeable income method of taxation. The Commissioner-General has clarified some of the issues and issued a Practice Note setting out the tax authority's interpretation of the laws.

Our next article summarises the decision of a High Court case. One of the issues in this case relates to whether the VAT-associated levies apply to services that have been provided by foreigners to businesses in Ghana. The High Court ruled that those levies apply, meaning any business in Ghana that engages a foreign service provider is required to self-charge the levies and pay to the tax authority. We are aware this decision is currently being appealed at the Court of Appeal.

We also provide highlights from the amendments being proposed to the Ghana Investment Promotion Centre Act, 2013 (Act 865). There is a Bill which is currently before Parliament that aims to remove some of the capital requirements for prospective foreign investors in Ghana. The Bill also contains numerous changes to Technology Transfer Agreements. One of the main changes to these Agreements is the insertion of a provision that any fee paid under an unregistered Agreement cannot be deducted when preparing the income tax of the business. This requires businesses to ensure all their Agreements are registered before claiming tax deductions. At this stage, these are only proposals and Parliament is yet to approve them.

In the next article, we review three cases which deal with the time a taxpayer is required to appeal an objection decision. These cases involve communication with the tax authority after they have responded to an objection. The High Court and Court of Appeal of Ghana view communication after an initial response to an objection as an aberration to the tax objection rules. The effect is that by the time the taxpayer ends up in court and an earlier letter from the tax authority is used as the objection decision, the 30 days would have elapsed. That is, the taxpayer would have forfeited the right to appeal.

In this same article, we examine the power of the High Court to extend the deadline provided in the tax law for appeals to be filed at the High Court. We argue that based on the current state of the law, taxpayers should not depend on that power of extension but should rather act strictly with the 30 days.

Our next article addresses the practice of the tax authority in re-characterising payments made to distributors as commissions. The tax authority treats independent distributors as agents of the manufacturer and levies withholding tax on the payments made by the manufacturer. We submit that the courts erroneously treated normal commercial arrangements such as rebates and retail price maintenance as artificial arrangements designed to avoid paying withholding taxes.

Our final article discusses a case involving location incentives and the time specified to apply for tax refunds. We argue that the location incentives stated in the income tax law are exclusive to the manufacturing business of a company and should not extend to the entire operations of the company that has a manufacturing division. We also argue that, while the court appears to have applied a strict interpretation, a purposive interpretation of the tax laws show that a taxpayer is required to apply for refund within three years. Taxpayers are to take note of this and follow it to avoid unnecessary litigation.

We have provided a list of court cases and other important matters that taxpayers may want to keep an eye on. We will continue updating this list in our subsequent editions with cases we become aware of and upcoming changes to tax laws.

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Recent tax updates – Practice notes, directives and clarifications

In the maiden edition of this journal, we discussed issues relating to some changes that took effect from 2023. The Commissioner-General ("CG") has now provided guidance on some of the issues raised by issuing two Practice Notes ("PN"), two Administrative Guidelines and other clarifications.

The PNs cover how to benefit from double taxation agreements and clarification on minimum chargeable income. The Administrative Guidelines are on VAT relating to real estate and use of approved VAT invoices for income tax deductions.

In this article, we examine the clarification provided by the CG relating to taxation of unrealised exchange gains. We also examine the Administrative Guidelines on the requirement to show an approved VAT invoice before a taxpayer can claim income tax deduction for the expense. Finally, we discuss the PN on paying tax based on the minimum chargeable income.

Unrealised exchange gain

In 2023, Parliament amended the Income Tax Act, 2015 (Act 896) to provide that exchange losses incurred by taxpayers are not tax deductible if they are unrealised. An amount is generally treated as unrealised if certain events need to occur before the amount is owed or earned. Essentially, the unrealised exchange loss is a loss that a taxpayer expects to incur on either an amount it owes or is owed that is stated in a foreign currency.

When the amendment to the law was made, the law only focused on unrealised exchange losses without saying anything about unrealised exchange gains. Taxpayers generally expected the same treatment to apply to both items since the reason for denying the unrealised exchange loss equally applies to unrealised exchange gain. The reason is that these amounts have not yet been incurred or earned. The silence on the treatment of unrealised exchange gain means that there is a strong argument to continue taxing the unrealised exchange gain.

On 1 February 2024, we requested clarification on this issue from the Commissioner of Domestic Tax Revenue Division of the Ghana Revenue Authority on behalf of our clients. The Commissioner confirmed that unrealised foreign exchange gains should not be included in income until they are realised. This confirmation came on 2 May 2024. We have also seen confirmations from tax offices indicating the position stated by the Commissioner.

This means that going forward, especially for businesses that are yet to file their 2023 income tax returns, the necessary adjustments can be made to exclude the net unrealised exchange difference comprising both the gains and losses.

Requirement to show approved invoice

The CG published a notice in the newspapers on 5 March 2024 and announced that from 1 April 2024, it was going to start requiring approved VAT invoices for income tax purposes. The CG indicated that in line with the tax laws, a person who fails to demand an approved invoice that shows that VAT and other levies were charged will not be allowed to deduct the expense from its income when filing its tax return.

On 20 March 2024, the CG published an Administrative Guideline to provide clarity on this directive. The CG said the Revenue Administration Act, 2016 (Act 915) as amended, allows the CG to issue directives that are necessary for administration and implementation of tax laws. The CG relies on section 27 of Act 915, which provides that taxpayers are to maintain invoices to support information or disclosures contained in tax returns. The same provision empowers the CG to specify necessary records to be maintained in Ghana.

The CG states that section 9 of Act 896 allows a taxpayer to deduct expenses that are necessarily incurred in the production of income. In situations where an invoice will serve as evidence of incurring the expense, its Directive will apply. The VAT laws require every VAT-registered supplier to issue approved invoices to cover its supplies.

This means there should be no excuse for a person who is purchasing from a VAT-registered person not to have an approved invoice. So, any taxpayer who intends to deduct an expense which must be supported by an invoice, must ensure that the type of invoice obtained is an approved VAT invoice.

The CG recognises that it is not always the case that approved invoices can be issued. There is an exclusion for supplies that are exempt under the VAT laws. If a business purchases goods or services from a supplier that is not registered for VAT, the CG expects the taxpayer to prove that its supplier is not required to register for VAT before it will be allowed to deduct the expense in its income tax return. The CG expects the business to consider the value of the goods or services it is procuring from the supplier and use that value to estimate if VAT registration is required. The trigger for registration is an annual turnover of GH₵200,000 or its quarterly equivalent of GH₵50,000.

Although the Directive is taking effect from 1 April 2024, the CG expects it to apply to all eligible transactions that took place from 1 January 2024. There are ongoing debates about whether such a Directive is properly grounded in the tax laws of the country. Some tax law experts believe this measure must be inserted into a substantive legislation, while others believe the CG is implementing existing provisions of Act 896 using Acts 870 and 915. The practice of implementing one tax law using another law was held by the Court of Appeal in the case **Beiersdorf Ghana Limited v The Commissioner-General** to be unlawful. Some tax law experts have also alleged that this policy will lead to discrimination where every business will start patronising only supplies from VAT-registered persons to the detriment of suppliers who are not required to register for VAT.

While we share in some of these views, we recognise that until it is successfully challenged, tax officers will implement this Directive. For taxpayers that are not prepared to engage in any future tax disputes, they should demand and retain copies of all records including approved invoices issued or that should have been issued by suppliers as evidence. These taxpayers should also ensure that where the supplier is not registered for VAT, the total transactions with the supplier would not lead to a reasonable conclusion that the supplier should have been registered for VAT.

Minimum chargeable income

Following the passage of the Income Tax (Amendment) Act, 2023 (Act 1094), the CG issued the "Practice Note on the Application of Minimum Chargeable Income Under the Income Tax Act, 2015 (Act 896)" on 20 March 2024. Act 1094 amended Act 896 to provide for a minimum chargeable income ("MCI") regime. Under this regime, a person may be required to pay taxes based on its revenue or income ("turnover") rather than tax profit. That is, the tax will not consider any legitimate business expense incurred by the person.

The base of the tax is 5% of the person's annual turnover. It applies when the person has declared tax losses for five consecutive years. The law excludes new businesses or startups in their first five years of operations and persons engaged in farming. The law does not make it mandatory for persons falling in this category to pay the tax. It says, "… a person may be required…". When a person may be required to use this method is not stated in the law. Our expectation is that the CG has been given the discretion to determine when this method will be required.

Timing for startups

The CG provided several illustrations to indicate when the tax will be on the MCI. Illustration 3 provided an instance where a company was in its seventh year of operations and was making losses throughout. The illustration shows that the company is liable to tax in its seventh year of operations based on its turnover for that year. The effect of the CG's view is that there is no exemption for a startup.

An alternative view is that since the law requires tax losses for five consecutive years and the same provision says the MCI regime does not apply to a startup within its first five years, the first five years of a startup cannot be counted in determining the five consecutive years at any time. This way, for a startup, the MCI regime will only apply in its 11th year of operations. The CG's illustration considers the losses from the second to the sixth year to trigger the MCI tax. This approach does not clearly give effect to the law that, "Subsection (1) does not apply to a person within the first five years of commencement of operations".

With the CG's approach, at what point will the first five years be considered? In our view, since the primary condition for MCI tax is five years of tax losses, without this special exclusion for startups, the MCI tax will not apply until the sixth year. We believe the intention of the law is to recognise that startups usually make losses in their first few years.

Definition of tax loss

Another point of interest is the definition of a tax loss. In paragraph 2, the CG states that, "Loss of a person for a year of assessment from a business or investment is calculated as the excess of amount deducted in calculating the income of that person from the investment or business over amounts included in calculating that income (section 17 of the Act)." This definition is the same as what is in Act 896. It suggests that a loss is recorded when the amounts allowed to be deducted from income exceed the total income.

Illustration 5.5 shows a situation where a tax loss in one year is utilised in subsequent years. In the illustration, after the year in which a tax loss was recorded, the company had five consecutive years of profits. The initial tax loss was used to reduce the profits for the subsequent five years such that no tax was eventually paid. The CG then said, "Though Best Bakery Ltd declared a profit from the second to the sixth year, by reason of the tax loss carried forward from 20X1 through to 20X6, the company would be declaring tax losses for five consecutive years and therefore the MCI would be applicable in the sixth year."

So, although in the five consecutive years, no amount was carried forward as loss incurred for those years, simply by using unutilised losses to reduce profits to zero, the CG deems the taxpayer to have declared losses for those years. In our view, this position appears to contradict the definition of loss in Act 896. This same definition was used by the CG in the PN. That definition says amounts deducted must necessarily exceed income. Where the amounts deducted equal income, the CG however regards a loss to be declared.

The issue is with how the CG considers deduction of utilised tax loss. Since the definition of the loss does not confine a loss to expenses incurred during the year but uses the expression "amount deducted", it means any amount deductible must be considered before concluding on when there is chargeable income or loss for the year. The steps for calculating chargeable income as outlined in the First Schedule of the Income Tax Regulations, 2016 (L.I. 2244) provide for deduction of utilised tax losses before the final income or loss is determined.

Practice Note or Administrative Guideline?

The CG stated that the purpose of the PN is to clarify provisions of the law and provide direction and guidance on minimum chargeable income. We wish to register a concern with the medium being used to provide this direction, although we admit that nothing is substantially lost.

A PN is a document that the CG is entitled to issue. It is regulated by section 100 of Act 915, which provides that, "To achieve consistency in the administration of tax laws and to provide guidance to persons affected by the tax laws, including tax officers, the Commissioner-General may issue practice notes setting out the interpretation placed on provisions of a tax law by the Commissioner-General … A practice note is binding on the Commissioner-General until revoked. A practice note is not binding on persons affected by a tax law."

The provision above is clear that a PN contains the CG's interpretation of tax laws. It also says the CG's interpretation is not binding on the taxpayer. This means where there is a dispute, a different interpretation may be adopted by the courts. Our view is that Act 1094 does not require the CG to set out its interpretation as to when it will require a person to pay tax based on this regime. It rather requires direction as to the circumstances when the minimum chargeable income will apply. That is, the law has delegated a duty to the CG to specify when it will apply that provision.

If a taxpayer regards the PN as a true PN under section 100 and views it as the CG's opinion, it can take the view that it is not binding on them, which may create tax disputes. It would have been proper for the CG to issue a directive under Act 915 for implementation of Act 1094.

The CG's position, based on what we understand from the PN, is that the MCI tax applies to any company that meets the conditions set out in the law. We understand Act 1094 to be saying that the CG should use discretion to determine when persons who ordinarily meet the requirements in the law should pay tax based on this regime. If the Act had intended an automatic application of this regime, it would not have given the CG the discretion to require it.

We now have a case where "may be required" is being applied as "is required". It is possible the reason the law did not make it mandatory if the conditions are met is that there may be special reasons for the MCI not to apply. By this PN, the CG has decided that it will not take any reason into account and once the primary conditions in the law are met, the MCI regime must apply.

Equity of this system

Although Ghana is not the first country to introduce this method of calculating tax, it is always difficult to justify this tax. The main problem is that this method is unfair. Whereas other businesses pay tax based on profits they make, a struggling business that is making losses is being forced to find resources to pay tax when it is losing money. It is possible for a company to have negative equity, meaning all the money the shareholders pumped into the business has been lost due to cumulative losses made by the business. If shareholders are unable to continue contributing capital, this law will mean the company must borrow to pay the tax.

Countries with variants of this minimum income tax system include Nigeria, Senegal, The Gambia, Liberia, Sierra Leone and Tanzania. These countries have different rules with some treating the minimum tax as a credit against future tax while others treat it as a final tax. Ghana treats it as a final tax. In Kenya, when this policy was introduced, its courts ruled that it was unconstitutional because it did not distribute the tax burden fairly. It was not fair to ask some companies to pay tax from capital and loans while others pay tax on profits. The main policy reason for this system of taxation is that taxpayers engage in tax evasion by deliberately declaring tax losses. There is a collateral effect for a business that is not engaged in any tax evasion practice and genuinely makes losses.

Conclusion

The clarification provided by the CG on the taxation of unrealised exchange gains is comforting news for businesses. This guidance ensures consistency and fairness as it aligns the treatment of unrealised exchange gains with that of unrealised exchange losses. Businesses are entitled to obtain Private Rulings on this issue in a manner that meets the requirements of Act 915 to make it binding as an additional measure of assurance.

The CG's directive requiring approved VAT invoices for income tax deductions has introduced a new layer of compliance for taxpayers. The Administrative Guideline clarifies the necessity of maintaining proper invoices to support tax return disclosures, as mandated by Act 915. Taxpayers must now be diligent in obtaining and retaining approved invoices, especially when dealing with VAT-registered suppliers. Even if the supplier is not registered for VAT, businesses now have a responsibility of checking if the supplier should have registered.

The MCI regime represents a shift in the taxation landscape, as it imposes a tax based on turnover rather than profit on companies. So long as a loss-making business continues to operate and has revenue, it will be liable to 1.25% tax on its revenue if it pays income tax at a general tax rate of 25%. The CG's PN raises questions about the interpretation of tax losses and the timing of the MCI's applicability, especially for startups. The CG's approach, which could potentially subject companies to the MCI tax earlier than anticipated, may not fully align with the legislative intent to exclude startups in their initial years.

Finally, the medium through which the CG has chosen to provide guidance on the MCI regime has its own set of challenges. While PNs are a legitimate tool for the CG to communicate interpretations of tax laws, they are not binding on taxpayers and can lead to disputes. The CG's interpretation that the MCI tax applies automatically to companies meeting certain conditions seems to contradict the discretionary nature of the legislation. The MCI regime, while not unique to Ghana, raises questions about equity and the rationale behind taxing companies that are not profitable, potentially forcing them to secure funds for tax payments through additional capital or borrowing.

Impact of the ruling in the Scancom Vs Commissioner-General on the VAT & Levies on imported services

In 2020, the Ghana Revenue Authority (GRA) conducted a comprehensive tax audit of Scancom PLC (MTN Ghana)'s operations for 2014 to 2018 years of assessment. MTN Ghana initially objected to some of the issues raised in the audit in line with the Revenue Administration Act, 2016 (Act 915) as amended.

Following the GRA's objection decision, MTN Ghana appealed to the High Court on two issues covering the applicability of Value Added Tax (VAT), National Health Insurance Levy (NHIL) and Ghana Education Trust Fund Levy (GETFL) on imported services.

On Thursday, 9 November 2023, the High Court issued its ruling on the case and upheld GRA's assessment on the two issues that were the subject of MTN Ghana's appeal.

Scancom PLC is a registered company in Ghana, which prior to 2018, operated both telecommunication (taxable) and mobile money (exempt) businesses for VAT purposes. The mobile money business was handled by a different entity, Mobile Money Limited, from 2018 onwards. In the VAT Act, 2013 (Act 870) as amended, a taxpayer does not need to account for imported services VAT to the extent that the services are used to make taxable supplies. In the audit, the GRA assessed VAT on some services imported by MTN Ghana on the basis that since the company was engaged in both taxable and exempt supplies over that period, the services would have been used partly to make the exempt supplies. The law is that services imported to make exempt supplies attract imported service VAT.

In the GRA's view, there was a need to find the portion of the foreign services that related to the mobile money business. So, it used an apportionment method prescribed in Act 870 for determining deductible input VAT for suppliers who make both taxable and exempt supplies (mixed supplies) to decide the imported services attributable to MTN Ghana's exempt supplies. This apportionment method considers the ratio of the total amount of taxable (or exempt) supplies to the total amount of supplies made.

MTN Ghana disagreed with this treatment. It argued that the imported services were used to make only taxable supplies despite its setup. In addition, even if that was not the case, Act 870 does not prescribe a particular method for determining the imported services VAT payable in such a case. The GRA was, therefore, wrong in its approach. This was the first issue of the appeal.

The second issue was on whether the GRA relied on an internal practice note or administrative guidelines to impose NHIL and GETFL on imported services used wholly to make taxable supplies. During the audit, the GRA imposed NHIL and GETFL on imported services used to make taxable supplies. The GRA's reasoning is that the combined

effect of the amendments made by the National Health Insurance (Amendment) Act, 2018 (Act 971) and the Ghana Education Trust Fund (Amendment) Act, 2018 (Act 972) to Act 870 was to separate the levies from VAT and make them non-deductible.

In any case, the shift from Act 546 (now repealed) to the new way of accounting for imported services VAT under Act 870 was to take away the need to pay imported services VAT only to claim it back again. Since the levies cannot be claimed in any case, the change to VAT on imported services does not apply to the levies on imported services. This means that the levies apply on imported services whether they were used to make taxable or exempt supplies.

MTN Ghana disagreed with this treatment because the definition of **"import of services"** in section 65 of Act 870, which seeks to exclude VAT on imported services used to make taxable supplies, applies the same way to the two levies. There is no separate definition for **"import of service"** as it relates to the levies. By extension, there should be no imported services levies once the services are used to make taxable supplies.

As mentioned earlier, the High Court rejected MTN Ghana's position and upheld GRA's assessment on both issues.

What does this mean for you?

This judgment is currently being appealed at the Court of Appeal. Unless there is a different outcome, taxpayers need to reflect on the important consequences of this decision. If you import services, you may need to account for VAT, NHIL and GETFL (and COVID-19 Health Recovery Levy) on them.

Therefore, you may consider the following:

1. If you have used imported services to produce both taxable and exempt supplies, you should review your transactions and operations with a view to account for VAT and the levies as necessary.
2. If you have already paid VAT or levies on imported services in the past, you should consider a review of these amounts to verify whether you have paid the correct amount.
3. Review your records and transactions involving imported services and determine whether you have used them to produce taxable supplies, exempt supplies or both.
4. If you have used the imported services to produce taxable supplies only, you may not be required to pay VAT on them, but you may be required to pay the levies on them.
5. If you have used the imported services to produce exempt supplies only, you are required to pay VAT and the levies on them.

You may also consider accounting for VAT and the levies on imported services only when you have used to make exempt supplies. Note that, the GRA in an audit will likely assess the tax in line with the ruling unless there is a change.

Away from the core issue in this case, we wish to draw attention to the fact that the VAT law does not impose imported service VAT on only VAT-registered persons or persons making exempt supplies. The tax is imposed on anybody who receives foreign services. Indeed, any service supplied to a resident person by a non-resident person qualifies for imported service VAT. Registration for VAT only enables the taxpayer to check if the exclusion from imported service VAT is available.

VAT is imposed on two separate kinds of transactions. The first is the supply of goods and services made in Ghana by a taxable person. This is where the person must qualify as a taxable person by meeting the turnover threshold of GH₵200,000 per annum among other conditions. The second category is the import of goods and services. For this category, there is no turnover threshold. The tax is triggered once there is an import.

Taking goods as an example, anyone importing an item into Ghana is generally required to pay the applicable import VAT regardless of whether the person is registered for VAT or not. The same principle applies to imported services. So, resident persons, especially those who are not registered for VAT must be aware that for any service they receive from a foreign service provider, these taxes apply. Businesses that have Technology Transfer Agreements with foreigners are exposed to these levies.

Key changes proposed by the Ghana Investment Promotion Centre (Amendment) Bill, 2023

On 31 October 2023, the Government presented the Ghana Investment Promotion Centre (Amendment) Bill, 2023 to Parliament. This Bill proposes significant changes to the capital requirement and technology transfer agreements. It also proposes conversion of the Ghana Investment Promotion Centre (GIPC) into an Authority. The Bill further imposes administrative penalties and increases existing fines.

The Bill was presented under a certificate of urgency, meaning the Government wanted it passed as a priority item without the 14-day notification to the public as required by the Constitution. As of the publication date of this alert, the Bill is still in Parliament, awaiting certification of the urgency. We have summarised the major changes in this article.

Please note that these proposals by the Government are subject to amendments by Parliament, and the final law may be different from what is contained in the Bill.

Change in name and other administrative changes

The GIPC will be converted to an Authority to become the Ghana Investment Promotion Authority. This change is to reflect the regulatory nature of the institution. The Centre is already a regulator that is responsible for registering specific agreements, businesses and companies. The Centre will get a Deputy CEO. The Technical Committee that advises the Centre will be abolished because its functions overlap with the board's.

Registration requirement

Currently, enterprises with foreign ownership are required to register with the GIPC before starting operations in Ghana. This registration is renewable every two years. The Government now wants these businesses to renew their GIPC registrations annually.
The Bill also simplifies the definition of an enterprise. The current definition focuses on the activity being undertaken, such as a project, undertaking and business. The new definition simply relies on the Companies Act, 2019 (Act 992). So now, an enterprise will be any company that is incorporated or registered under Act 992 that operates to make profit.
The current law impliedly covers external companies or branches and requires them to also register with the GIPC. The Bill makes it explicit that external companies fit the definition of an enterprise. The definition of external companies in Act 992 has been repeated in the Bill.

Removal of activities reserved for citizens

The current law provides that some activities can only be engaged in by Ghanaians. These activities include petty trading, pool betting business, production of exercise books and retail of pharmaceutical products. The Bill removes this restriction in the GIPC Act. The Government explains that this provision conflicts with the role of other regulators. The GIPC is being freed to focus on promotion and facilitation of investment in Ghana.

Minimum capital requirement

Businesses with foreign ownership are currently required to either have a minimum capital of US$200,000 if they partner with a citizen who has at least 10% shareholding, or US$500,000 if the enterprise is wholly owned by the foreign investor. This capital requirement will be abolished by this Bill.

The Government explains that this capital requirement is a major hindrance in attracting foreign investment. It adds that within the sub-region, Ghana is the only country with this blanket capital requirement, making it easy for investors to take their investments elsewhere. The minimum capital requirement for a trading enterprise of US$1m will be maintained to protect the local economy.

The Bill clarifies the current law that the capital for a trading entity can be brought into Ghana by way of goods, cash or a combination of goods and cash. The amendment also corrects an error whereby the current law created an exception to the capital requirement for enterprises set up solely for both export trading and manufacturing. The Bill replaces the conjunctive "and" with the disjunctive "or".

Technology Transfer Agreements

The Technology Transfer Regulations, 1992 (L.I. 1547) provides that the initial duration of the Agreement shall not exceed 10 years. The Bill revises this to five years and makes room for renewal of the Agreement, which shall also not exceed five years. There is no indication that there cannot be more than one renewal.

The Bill also proposes that fees and charges incurred under an unregistered Agreement cannot be deducted for income tax purposes. There is a new definition for Technology Transfer Agreement, which maintains the 18-month threshold.

Sanctions

The current sanction upon conviction for flouting the GIPC law is a minimum of GH₵6,000 and a maximum of GH₵12,000. There is an additional fine for each day of default of not less than GH₵300 and not more than GH₵600. The Bill revises this fine to a minimum of GH₵24,000 and a maximum of GH₵48,000, with a daily additional fine of GH₵1,200 and GH₵2,400.

The Bill also introduces administrative penalties, which will be a source of income to GIPC. Any enterprise which is required to register with the GIPC but fails to do so is exposed to a monthly penalty of GH₵6,000. This penalty is calculated from the date of incorporation or registration. If the enterprise fails to perform its annual renewal, the monthly penalty is GH₵3,000. Where the enterprise does not pay any administrative penalty, the GIPC will be given the power to close the business of the enterprise.

Given the shortening of the duration of the Technology Transfer Agreement and the fresh sanctions for non-registration, we expect the GIPC to roll out enhanced registration procedures to ensure businesses can register their Technology Transfer Agreements in time. The current process requires considerable time to complete. Both businesses and the GIPC must be mindful of the implications of any delay.

Businesses need to ensure their Agreements are registered to avoid denial of tax deductions. Based on the Court of Appeal's decision in the case of **Beiersdorf v Commissioner-General**, taxpayers are currently able to enjoy deductions for expenses incurred under unregistered Agreements. We encourage businesses to ensure their registrations are up to date before this Bill becomes a law. An issue that needs clarity is what happens when a business accrues the expense, but the registration is completed in a subsequent period. The law says the Agreement is only effective from the date of registration. Does it mean taxpayers cannot go back to enjoy tax deductions even if the process started early?

In our view, the GIPC should have been given the power to direct that the Technology Transfer Agreement is effective from the application date. This is because it averagely takes half a year or more to complete an approval process. This will ensure that the registrants do not lose out and will be in line with our quest to be more friendly towards foreign investments.

The new definition of Technology Transfer Agreement suggests only Agreements entered by companies incorporated in Ghana are required to be registered with the GIPC. That is, if an external company or a branch enters a similar Agreement, there is no requirement to register since the entity would not have been incorporated under Act 992. It seems to us that the definition requires amendment by Parliament to capture branches.

Case review – Objections, notices of appeal and timelines

This article discusses the timelines in the relevant laws for a taxpayer to challenge a tax decision. We review two main cases which show instances where the courts refused to recognise interactions between the taxpayer and the revenue authority after a certain date.

Taxpayers must be vigilant in recognising the revenue authority's first response as potentially the final objection decision and act promptly if they wish to appeal. A practice of sharing draft objection decisions with taxpayers could mitigate disputes.

The article also questions whether the High Court can rely on C.I. 47 to extend the deadline for filing a tax appeal. Recent legislative changes may have limited the High Court's ability to grant such extensions.

Seadrill v The Commissioner-General

After it was served with a tax decision, Seadrill objected to the assessment and asked the Commissioner-General ("CG") to revise the tax assessment downwards. On 8 July 2020, the CG responded to Seadrill with an objection decision by reducing the total assessment. Seadrill believed there was a need for further reduction and on 28 July 2020, wrote back to the CG for a further reduction.

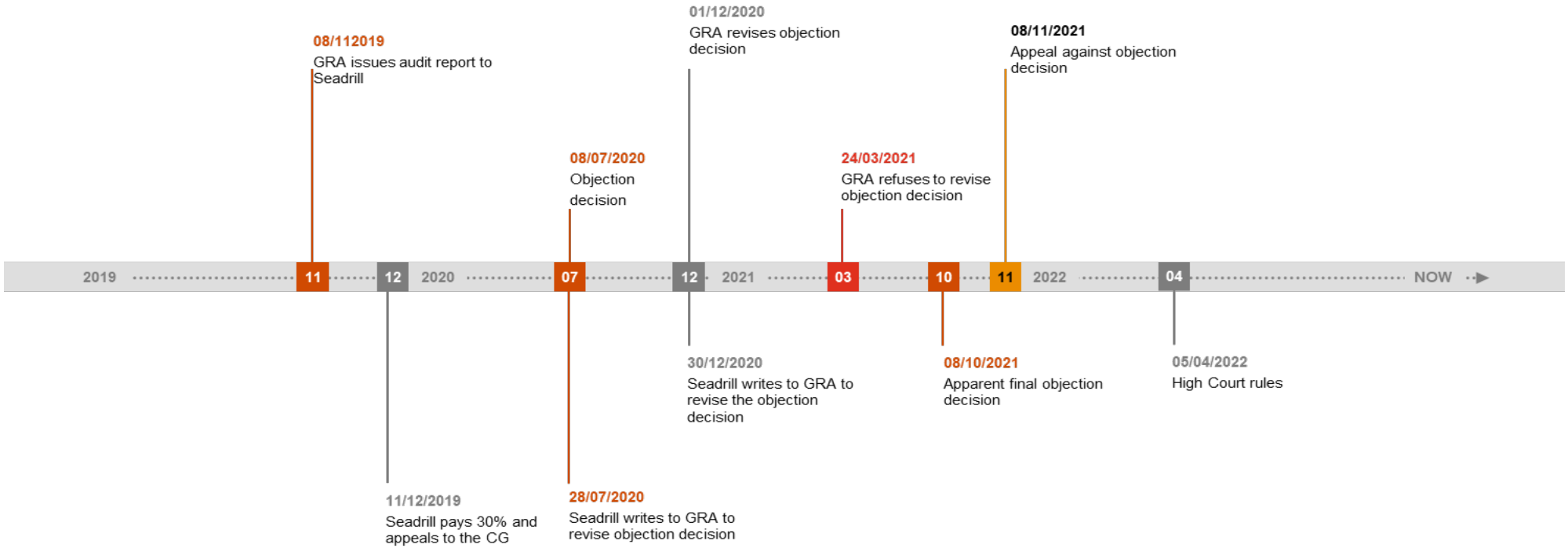
On 1 December 2020, the CG granted this request for further reduction and wrote to Seadrill

with an updated assessment. On 30 December 2020, Seadrill wrote to the CG for a second revision of the objection decision. On 24 March 2021, the CG refused to revise the objection decision any further and said it was standing by its first revised objection decision issued on 1 December 2020. On 8 October 2021, the CG wrote to Seadrill and stood by its position as contained in the 24 March 2021 letter.

Seadrill understood the CG's letter of 8 October 2021 to be the final objection decision and on 8 November 2021, filed a notice of appeal at the High Court, seeking to appeal the objection decision by reducing the liability from US$305m to US$17.9m. To avoid any doubt, there were two objection decisions which revised the original tax decision. The first one was issued on 8 July 2020 and the second one was issued on 1 December 2020. Seadrill however considered the CG's letter of 8 October 2021 to be the final objection decision.

At the High Court, the CG raised a preliminary objection that Seadrill was out of time under all the relevant laws to appeal the objection decision. The appeal should therefore be dismissed. The CG said under the Revenue Administration Act, 2016 (Act 915) as amended, Seadrill had up to 30 December 2020, which was 30 days after being served with the objection decision, to appeal. The CG was therefore considering the final objection decision to be the version issued on 1 December 2020.

Further, the CG said the High Court (Civil Procedure) Rules, 2004 (C.I. 47), which allowed a taxpayer to ask for a three-month extension to file the notice of appeal at the High Court elapsed on 1 February 2021 and so Seadrill's notice of appeal dated 8 November 2021 could not be saved by any law.



Seadrill's response was that the final objection decision was not the one dated 1 December 2020 since it continued to engage the CG beyond that date.

The High Court examined the provisions of section 44 of Act 915, which provides that, **"A person who is dissatisfied with a decision of the Commissioner General may appeal against the decision to the Court within thirty days of the decision".** The High Court also referred to Order 54 rule 2(1) of C.I. 47 which provides that, "The appeal shall be commenced … within thirty days of receiving of service of the decision or order of the commissioner." Sub-rule 2 adds that when the timeline of 30 days is missed, the taxpayer has three months after missing the deadline to apply for extension. Order 54 rule 2(3) of the C.I. 47 provides that, **"No application for extension of time shall be entertained after the time specified in sub rule 2."**

In the High Court's view, the provisions on appeal do not make room for an infinite repetition of objections by an aggrieved taxpayer. An objection decision cannot transform into a tax decision that can be objected to, as the taxpayer claims. Even if the argument of the taxpayer is sustainable, the law

requires that every objection to a tax decision must be based on payment of 30% of the disputed tax or evidence of a waiver of this requirement.

The High Court reasoned that since that did not happen, there was no fresh objection and so the amended objection decision of 1 December 2020 was the final objection decision. The count of 30 days and three months should start from this date. The preliminary objection was therefore upheld, and the notice of appeal was dismissed.

Seadrill appealed the decision of the High Court. It tried to convince the Court of Appeal that what the CG and the High Court were calling final objection decision was in fact a tax decision. Seadrill argued that Act 915 allowed the CG to adjust its own assessment and so any adjustment to an assessment qualifies as a tax decision. Seadrill supported its argument with section 42(9) of Act 915 which provides that, **"In this section, "tax decision" means the tax decision objected to, as may have been amended by an objection decision."**

In Seadrill's view, the definition in section 42(9) means any adjustment to a tax decision, even if through an objection, becomes a tax decision. The Court of Appeal held that Seadrill's interpretation is unreasonable and followed the analysis of the High Court by checking the requirements for objecting to any tax decision, i.e., was another 30% paid? The Court of Appeal held that all the letters sent by Seadrill after the 1 December 2020 objection decision could not be considered as part of a new objection and hence are meaningless. The appeal was therefore dismissed.

The main lesson from this case is that the taxpayer must pay a lot of attention to its objection and do everything necessary to ensure that it presents its entire case to the CG. This will avoid the need for the CG to revise is objection decision. By way of best practice, it will be helpful for the CG to share a draft copy of its objection decision with the taxpayer for comments. This will ensure all omissions, reconciliations and other errors are handled so that the dispute reduces to technical positions held by both parties. Once this is done and the final document is issued, the taxpayer can simply proceed to the relevant forum to appeal the objection decision.

If the taxpayer keeps engaging the CG after the objection decision has been issued, there is a chance that the CG will raise a preliminary objection and revert to an earlier letter as the relevant objection decision, as was done in this case. Even if the CG does not raise any preliminary objection, the court itself, in satisfying itself that it has jurisdiction to hear the matter, can check if the taxpayer is out of time.

Seadrill is attempting a final appeal and the Supreme Court has accepted to reconsider this issue. Refer to the section on upcoming events for details.

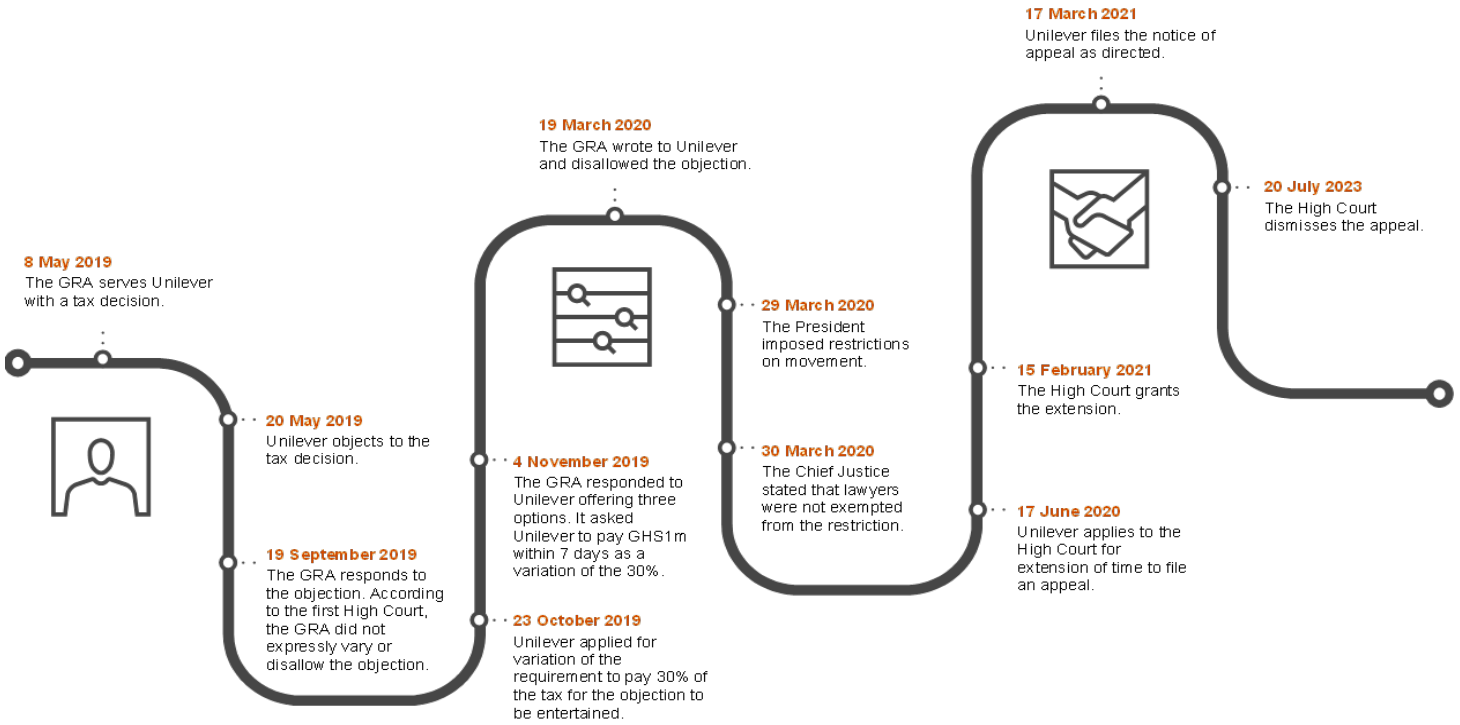
Unilever v The Commissioner-General

In this case too, there was an issue of when the objection decision was issued. On 19 September 2019, the CG responded to a taxpayer's objection. The first High Court did not consider this response as an objection decision while the second High Court treated it as an objection decision.

After the GRA's letter of 19 September, Unilever, on 23 October 2019 applied for variation of the requirement to pay 30% of the disputed tax as required by Act 915. It is not clear why the objection was filed on 20 May 2019 without any payment only for the payment requirement to come up five months later. On 4 November, the GRA responded and asked Unilever to make a deposit. Out of a liability of GH₵6m, the CG directed Unilever to pay GH₵1m within seven days. Unilever complied with this directive and on 19 March 2020, the CG responded and disallowed the objection. This decision is what Unilever and the first High Court considered to be the objection decision.

Unilever did not file the notice of appeal to the High Court within 30 days after receiving the 19 March 2020 letter. Since it missed this deadline in Act 915, it went under C.I. 47 to apply for extension of time. C.I. 47 provides that if the 30 days is missed, the taxpayer can apply within three months from the expiry of the 30 days for extension. The court will consider some factors and if convinced that there was no unreasonable delay, grant the extension and order the taxpayer to file the notice of appeal by a certain date.

So, on 17 June 2020, Unilever sought extension. The first High Court considered reasons such as imposition of restrictions due to the novel corona virus pandemic.



On 15 February 2021, the first High Court granted the extension and ordered Unilever to file the notice of appeal within 30 days. Unilever complied with this order and filed on 17 March 2021 for the merits of the appeal to be determined.

The notice of appeal did not go before the same High Court. It went to a differently constituted High Court. The second High Court was not satisfied that it had jurisdiction to hear the matter and hence checked if the notice of appeal was filed lawfully. In discussing the procedure required, the second High Court noted that Act 915 requires an objection to be made against a tax decision only once.

The second High Court said, **"Therefore, once a decision has been made by the Commissioner-General in respect of tax objection under section 43 (2) of Act 915, the decision become[s] conclusive once it is served on the objector under Section 43 (5) of Act 915 … Consequently, letters, correspondences etc. from an objector after the Commissioner-General has given a decision under section 43 (2) of Act 915 become surplus and legally worthless."**

The second High Court determined that the 19 September 2019 letter was the objection decision and did not consider any letters exchanged after this date. It counted four months from this date and noted that the request for extension of time of 17 June 2020 was outside this period. So, it ruled that the first High Court did not have jurisdiction to grant the extension in the first place and hence dismissed the appeal.

Similar lessons can be drawn from this case. It is however interesting that the second High Court did not consider the fact that the CG directed for payment requirements to be met, which is a precondition to determining an objection. This fact questions the status of the 19 September 2019 letter as the objection decision, especially when the first High Court said the CG did not explicitly disallow the objection.

Can the C.I. 47 unilaterally extend the deadline to appeal?

In the cases discussed in this article, the courts may not have paid attention to the implied repeal of the provision in C.I. 47 on extension. The status of C.I. 47 and other rules of court have been settled by the courts. These rules do not confer jurisdiction or grant rights that did not already exist. The rules cannot conflict with Acts of Parliament, or the Constitution based on the hierarchy of laws in Ghana.

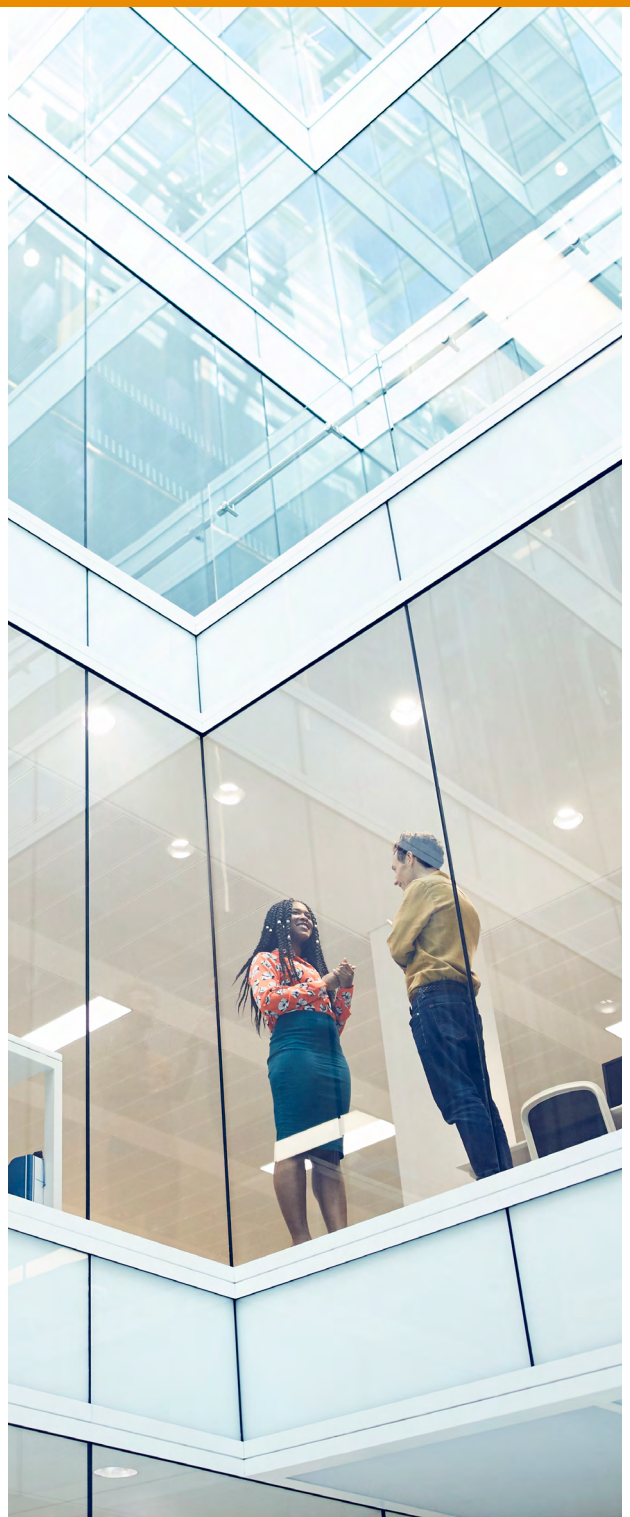
In a recent decision of the Supreme Court (Ex-parte: **Yvonne Amponsah Brobbey - J5/82/2022)**, portions of C.I. 47 relating to criminalising intermeddling were struck down by the Court because the Rules of Court Committee exceeded its authority. The Supreme Court said this authority is limited to making rules to regulate the practice and procedures of the court and not related to matters reserved for substantive legislations.

It is therefore important to check if the power granted the High Court in C.I. 47 to save taxpayers who miss the 30-day window is still grounded in any substantive law. We start from the repealed Income Tax Decree, 1975 (SMCD 5). Section 41A(2) of SMCD 5 provided that if the taxpayer was unable to appeal a notice of refusal (now called objection decision) within 30 days, they might still bring the notice of appeal if they satisfied the court that they were late because they were either absent from Ghana or sick or had some reasonable explanation. In this case, the substantive law permitted going beyond the 30 days.

A similar provision existed in the Internal Revenue Act, 2000 (Act 592), which replaced SMCD 5. Section 129(3) provided that, "A person may lodge a notice of appeal after the date specified in subsection (2) if that person proves to the satisfaction of the Court that the delay in lodging the notice of appeal is due to that person's absence from Ghana, sickness, or other reasonable cause and that there has been no unreasonable delay on that person's part." It is therefore not surprising when Order 54 Rule 2 of C.I. 47 says, "Where the aggrieved person does not file an appeal within the time prescribed in rule 2 (1) [30 days], he may apply for an extension of time to do so within three months from the date of the expiry fixed in subrule (1), and the Court may, if satisfied that the delay in filing the notice of appeal was due to his absence from the country, sickness or other reasonable cause and that there has been no unreasonable delay on his part, grant him extension of time to file his notice of appeal."

It is necessary to state that the same provision existed in the Income Tax Act, 2015 (Act 896) between 2016 and 2017. It is obvious that the same practice that used to exist under SMCD carried through under Act 592 and Act 896. That is, the deadline given in the substantive Act was a soft deadline and where there were genuine reasons and some other conditions were met, the court was allowed to receive notices of appeal from late appellants. The substantive Acts did not state how late the taxpayer could be. C.I. 47 filled that gap and used three months as the time that a person can be reasonably late.

However, we see a change from 2017. On 1 January 2017, Act 915 became effective and did not contain any provision as to extension of the 30 days. Even when section



44 of Act 915 was amended in 2020, nothing was said about this extension. The question therefore is if no provision has been made for extension of time to bring a notice of appeal in a substantive law, can a taxpayer rely exclusively on C.I. 47 to seek the extension?

We are concerned that the right to seek extension may have been taken away. If the decisions of the courts on the relationship between C.I. 47 and substantive laws are fully applied, there is an implied repeal of the portion of C.I. 47 that allows the extension. The current state is that the provision on extension contradicts Act 915. Act 915 expects the right of appeal to be lost after 30 days. C.I. 47 is still allowing applications for extensions. It is possible for the High Court to one day decide that there has indeed been an implied repeal.

It is not clear why the provision that can be traced all the way to 1975 suddenly disappeared in 2017. The Memorandum accompanying the Bill which later became Act 915 did not contain any explanation as to this significant policy change. There was no debate or discussion on this provision in Parliament to help us understand the change.

It is also interesting that the taxpayer is allowed to apply for the CG to extend the deadline for objecting the tax decision. This right also existed since 1975 and based on similar grounds, taxpayers could ask for the CG to extend the 30 days so they could properly object to the tax decision. This right continues to exist even after 2017. It is therefore possible that the failure of Act 915 to continue to provide that the High Court can extend the time to bring the notice of appeal is an oversight.

It won't be difficult for anyone to argue that Act 915 was simply avoiding a repetition of what is already in C.I. 47. That is, since the provisions on extension were already in C.I. 47, Parliament simply chose not to repeat it in Act 915 and intended the provision in C.I. 47 to continue to apply. This position can be countered by the fact that when Act 896 was being passed in 2016, Parliament repeated the provisions.

Another argument is that non-tax appeals have similar extension provisions in C.I. 47 and so the provisions on tax extensions must align with the general extensions. The difficulty with this argument is that for most non-tax appeals, there is no substantive law that fixes the timeline as Act 915 does. Generally, those deadlines are guided by the Constitution, 1992, Courts Act, 1993 (Act 459), C.I. 47 and other Rules of Court. Where a substantive law provides for a deadline for filing an appeal, it is that provision that applies. It is when a specific law provides for the right to appeal but says nothing about the deadlines to appeal that the general rules apply.

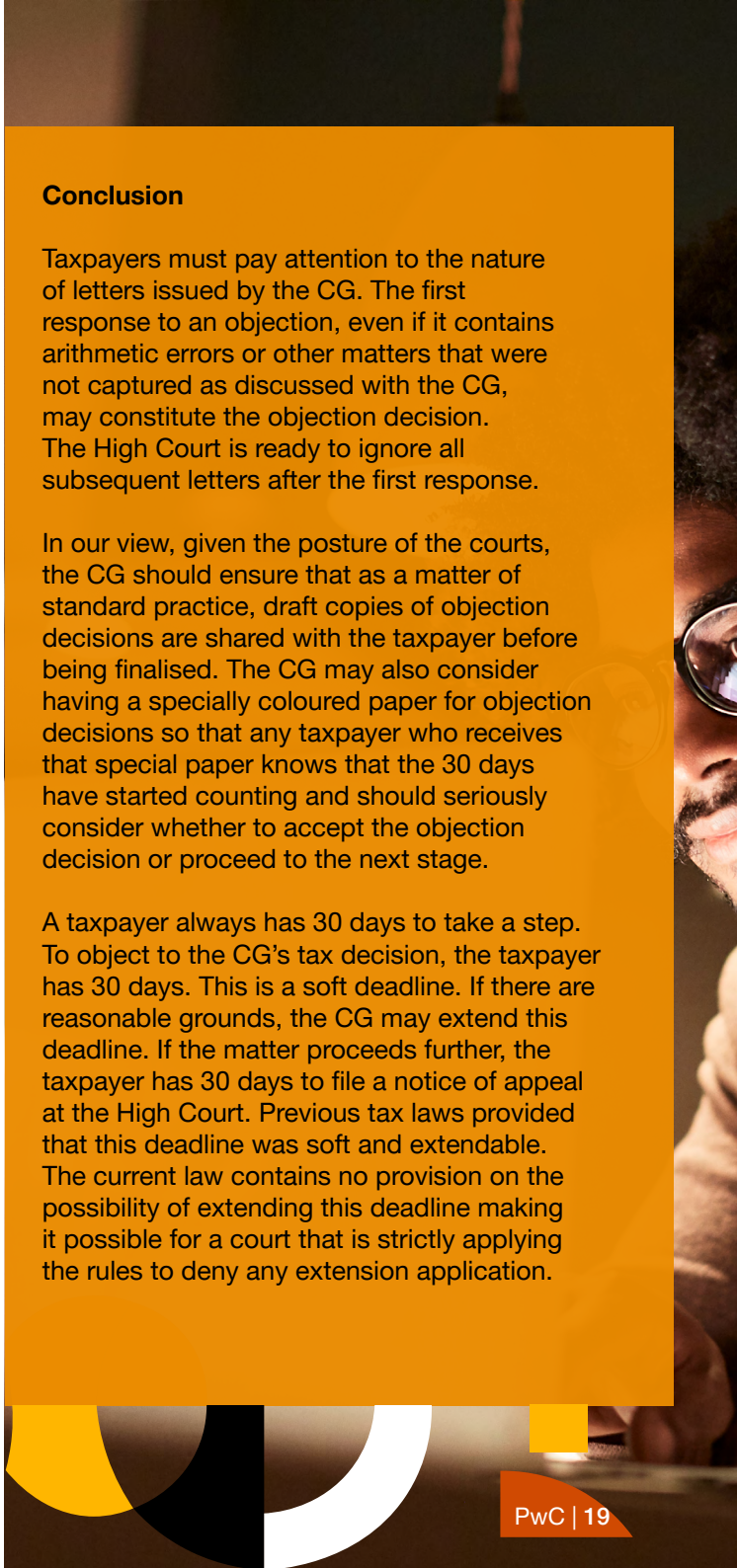
We call on the Ministry of Finance to urgently consider this matter to avoid the High Court insisting that there is no right after the 30 days. Until there is a clear and final judicial pronouncement on this or there is a much-needed amendment, we encourage taxpayers to be mindful of the timelines and strictly adhere to them.

Conclusion

Taxpayers must pay attention to the nature of letters issued by the CG. The first response to an objection, even if it contains arithmetic errors or other matters that were not captured as discussed with the CG, may constitute the objection decision. The High Court is ready to ignore all subsequent letters after the first response.

In our view, given the posture of the courts, the CG should ensure that as a matter of standard practice, draft copies of objection decisions are shared with the taxpayer before being finalised. The CG may also consider having a specially coloured paper for objection decisions so that any taxpayer who receives that special paper knows that the 30 days have started counting and should seriously consider whether to accept the objection decision or proceed to the next stage.

A taxpayer always has 30 days to take a step. To object to the CG's tax decision, the taxpayer has 30 days. This is a soft deadline. If there are reasonable grounds, the CG may extend this deadline. If the matter proceeds further, the taxpayer has 30 days to file a notice of appeal at the High Court. Previous tax laws provided that this deadline was soft and extendable. The current law contains no provision on the possibility of extending this deadline making it possible for a court that is strictly applying the rules to deny any extension application.



Case review – Discounts, Rebates and Agency relationship

In **Fan Milk Ghana Limited v. The Commissioner-General**, the Court of Appeal affirmed a High Court decision that endorsed the recharacterisation of discounts as commission. The two courts did so because although the taxpayer claimed the payments made to its distributors were **"discounts"**, the courts did not see the necessary accounting entries for cash discounts. Disclosures required on the invoices for trade discounts were also not made. Hence the payments were considered as artificial.

This article submits that the payments were rebates which were lawful and not artificial. The concerns from the courts are normal commercial practices and the courts should have considered the assistance of court referees or experts to clarify these practices.

Ghana's courts have repeatedly endorsed the tax authority's recharacterisation of discounts as commission. This first occurred in **Beiersdorf Ghana Limited v. The Commissioner General (No. CM/TAX/0001/2018)**, where the Ghana Revenue Authority (GRA) recharacterised reimbursements as commission. The reimbursements were based on discounts given to customers by Beiersdorf's distributors. The GRA argued and the High Court agreed that if indeed discounts were given, why didn't the invoices capture that, as required by VAT laws? So, the GRA imposed 10% withholding tax liability on Beiersdorf as if the distributors were sales agents of Beiersdorf who were individuals.

In another case, the Court of Appeal of Ghana unanimously affirmed a decision of a High Court in the case **Fan Milk Ghana Limited v. The Commissioner-General (No. HI/247/2020)**. This case also saw recharacterisation of discounts as commission and treatment of distributors as sales agents. Subsequently, on 10 November 2022, a High Court, in the case of **Coca-Cola Equatorial Africa Limited v Commissioner-General (No. CM/Tax/0125/2022),** relied on the two cases above to also recharacterise discounts as commission. The Fan Milk case will be discussed since this issue travelled beyond the High Court in that case.

The Fan Milk case was decided on 7 April 2022 and was an appeal by Fan Milk Ghana Limited against the decision of the High Court from 19 April 2019. The GRA issued Fan Milk with a notice of assessment after auditing it for 2014-2016 years of assessment. Fan Milk objected to the GRA. The GRA stood by its audit report and so Fan Milk appealed to the High Court.

The dispute concerned payments that Fan Milk made to its distributors. Fan Milk considered these payments as arising out of discounts, but the GRA viewed them as commissions that needed to attract withholding tax. GRA went ahead to impose withholding tax of GH₵7.6m on Fan Milk.

Court Proceedings

Similar arguments were made in both the High Court and the Court of Appeal. Fan Milk argued that the GRA wrongly treated the payments as commission being paid to sales agents i.e., the GRA erroneously labelled the distributors as sales agents. In Fan Milk's view, the distributors were not sales agents since they were independent of Fan Milk. Fan Milk sold its products to them. For new distributors, they paid upfront and with regular distributors, they were given a period of 8 days to pay. At the end of the month, Fan Milk would aggregate the total purchases made by the distributors and refund a portion of the amount paid to them. This was probably how the distributors made profit since the price at which they sold the products was controlled by Fan Milk.

Fan Milk further said that none of the four usual ways of creating an agency relationship under the Common Law was present to justify GRA's recharacterisation of discounts as commissions. It said the distributors did not have actual authority to carry out any instruction on its behalf, the distributors did not have any apparent authority, and there was no agency by necessity or by ratification. Fan Milk admitted that in the agreement it signed with the distributors, it used the word "agent", but that was not the legal label for the distributors, and so the court should examine the actual relationship to conclude that the distributors were not agents.

The GRA responded that:

1. it did not say the distributors were agents of Fan Milk,
2. there was no evidence that trade discounts were given, and
3. if the payments were cash discounts, they should have been stated on the invoices as required by VAT laws, and that accounting standards required adjustments in the books of Fan Milk to account for cash discounts, which were not done.

Judgment

Firstly, the court relied on accounting textbooks to appreciate the treatments of cash and trade discounts. It said trade discounts did not require any adjustments, unlike cash discounts. Cash discounts necessarily required price adjustments or adjustments in Fan Milk's books. None of these were produced as evidence and so the payments could not possibly be discounts. In addition, another tax law, VAT law, required discounts to be stated on the invoices. Failure to do this, the court reasoned, suggested that the payments were not really discounts.

The High Court looked at the meaning of commissions and admitted that for the payment to truly be called commission, there must have been a principal-agent relationship between Fan Milk and the distributors, contrary to the GRA's claim. Since it was sure the payment was not a discount it must therefore be commission. It said Fan Milk was engaged in a tax avoidance scheme. The court did not deal with how the agency relationship was created and if the known Common Law rules could be applied to that agency.

The Court of Appeal said although in theory the distributors dealt with third parties in their own name and not in Fan Milk's name, since Fan Milk controlled the price at which the products were sold to third parties, the distributors owed an obligation to Fan Milk. The court labelled this arrangement as an "indirect agency". The court then concluded that the arrangement, "is a sham, put in place by the Appellant, to avoid the withholding tax obligation imposed by the law".

Comments on the judgments

Under normal circumstances, the 10% withholding rate should not have been used by the GRA. This rate applies to only individuals who are sales agents, and not entities. This error is however not fatal because the GRA could have used 7.5% had the rate been challenged.

Based on the contract between the parties, the distributors buy the products from Fan Milk. With the creation of this so-called "indirect agency", is the transaction covered by the Sale of Goods Act, 1962 (Act 137)? If there is a dispute between Fan Milk and the distributors, what legal framework would apply? Can the customers of the distributors sue Fan Milk directly for any breach of the distributor's fundamental obligation to deliver the products to the customers? Does Fan Milk ever transfer property in the goods to the distributors? Where does the risk in the goods sit?

This article first examines the existing and known laws on agency relationship, especially its formation. We will argue that the idea of "indirect agency" is new and does not conform with the established rules on formation of any agency relationship. We will review the accounting standards and examine rebates and distinguish them from discounts. Finally, we will discuss the business model of distributorship and how it is different from agency. We will touch on how the arrangement where the manufacturer controls the price at which the goods are sold to the final consumer is a normal commercial practice.

The interpretation section of Act 896 does not explain the expressions "sales agent" and "commission". So, the ordinary meanings of these expressions must be used. The main word that requires a definition is "agent". There is no statute that specifically deals with agency relationships in Ghana. These relationships are governed by Common Law principles. There are various definitions of agency, but at the heart of each definition is a relationship in which by virtue of some authority, a person called an agent acts on behalf of another person called the principal and binds the principal.

Generally, a person can be an agent through four ways. Either:

1. the person agrees expressly with the principal to be their agent,
2. the person is held out as an agent by the principal although there is no express agreement,
3. a law recognises the person as an agent, or
4. the person becomes an agent where the person goes ahead to act on behalf of the principal without any authority and the person's activities are subsequently ratified by the principal.

A sales agent is a type of agent. From its ordinary meaning, it refers to an agent whose duties include concluding contracts of sale for and on behalf of the principal. That is, a sales agent sells the principal's products and renders account to the principal for the sale. The legal effect is that the sales agent brings the customer and the principal into a legal relationship or contract.

The agent receives commission as remuneration and does not buy the products from the principal. To the extent that the sales agent sells goods, it is necessary to refer to the Sale of Goods Act, 1962 (Act 137). Act 137 defines a mercantile agent as, "an agent having in the ordinary course of business as an agent authority to sell goods, or to consign goods for sale, or to buy goods, or to raise money on the security of goods".

The definition of mercantile agent covers a sales agent. The sales agent must specifically have the authority of the principal to sell the principal's goods, and the sale is usually in the ordinary course of business. The agent does not conclude the sales contract in their capacity as owning the goods, the property and risk reside in the principal.

Accounting standard

For the period audited, the relevant accounting standard on revenue was IAS 18. One of the necessary conditions for recognition of revenue with respect to sale of goods is that the significant risks and rewards in the goods must be transferred to the buyer. Paragraphs 9 and 10 of IAS 18 also provided that "[Revenue] is measured … taking into account the amount of any trade discounts and volume rebates allowed by the entity." Two key concepts are required here, trade discounts and volume rebates. The courts have already dwelled on trade discounts, and we do not intend to discuss it further. However, the courts did not consider volume rebates, which we think is important to this case.

A volume rebate is related to trade discount. The difference is that a trade discount is given before the transactions are recorded on the invoice. The seller usually agrees to reduce the price before the contract is concluded. Volume rebates on the other hand, are granted after recording the transactions or after entering the contract. Volume rebates are still based on discounts granted. Since the transactions have already concluded, the amount of reduction in price must be refunded.

The Black's Law Dictionary, which both courts used to explain discounts, also explains rebates as, "A return of part of a payment, serving as a discount or reduction". The accounting treatment of rebates does not follow that of trade discount. Since rebates happen after the buyer pays the full price, there should be no expectation to see price adjustments on invoices. What must be proven is a reduction in the revenue reflecting a rebate, as required by the accounting standard. Further, Fan Milk's rebate was based on volume discount and not cash discount. Our view is that had the courts considered the concept of rebates, this case could have been decided differently.

In 2018, Fan Milk adopted the new accounting standard on revenue. It stated in its financial statements that, "The company has applied IFRS 15 prospectively. As a result, the comparative information provided continues to be accounted for in accordance with the company's previous accounting policy. Rebates granted in 2017 have therefore been included in distribution expenses. Rebates granted in the current year are classified under revenue."

The rebates mentioned in the financial statements are the items before the courts as fake discounts. Why Fan Milk did not explain to the courts that the payment it made to the distributors are rebates, as it did in its financial statements, is not clear. From the disclosure in the financial statements, there is evidence that revenue is being reduced by the amount repaid to the distributors. That is the accounting adjustment the courts should have focused on rather than what is stated on the invoice.

Concept of Retail Price Maintenance

The courts had concerns about the fact that Fan Milk controlled the price at which the distributors sold the products. This situation is common. For instance, oil marketing companies (OMCs) enter agreements with independent filling stations and the price at which the products are sold are fixed by the OMCs. The OMCs do not own all their filling stations. Generally, a distributor sells the product at a price that covers its cost and includes its profit. In some models however, the manufacturer controls the price.

This means the price at which the product is bought by the distributor is reduced by the manufacturer. This enables the distributor to sell at the price recommended by the manufacturer. This model is called the Manufacturer's Recommended Retail Price, Retail Price Maintenance or Resale Price Maintenance (RPM). The Black's Law Dictionary defines the RPM as, "A form of price-fixing in which a manufacturer forces or persuades several different retailers to sell the manufacturer's product at the same price, thus preventing competition". This arrangement is therefore normal in commercial transactions where a retailer sells a product at a recommended price.

This means the manufacturer either sets the price or influences it. RPM is regulated in some countries since it prevents fair competition. Ghana does not currently forbid RPM. Ghana's Contracts Act, 1960 (Act 25) has modified some Common Law provisions on contracts such as privity of contracts. Section 5(2)(a) says the exception to the concept of privity of contract, which allows third parties to enforce benefits conferred on them, does not apply to RPM. This is a statutory recognition of RPM.

One of the popular cases on this topic is **Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915]** AC 847. That case involved an arrangement not to sell tyres below a fixed price. The manufacturer directly controlled the price that the distributor could sell the products to the retailer. It also required the distributor to compel the retailer not to sell below a fixed price. The retailer failed to sell the products at the recommended price and the manufacturer sought to enforce the contract between the retailer and the distributor. The court ruled that the manufacturer was a third party to the contract between the distributor and the retailer and could not enforce it. This position continues to apply in Ghana because Act 25 provides that although third parties could enforce contracts, they could not enforce contracts relating to RPM.

So, the concept of RPM is not new and should not be confused with an arrangement that is artificial.

Nature of Fan Milk's arrangement with the Distributors

Fan Milk's revenue policy in the applicable financial statements stated that its income was from sale of goods and interest. The accounting standard required transfer of significant risk and rewards in the goods to the buyer before the seller could recognise revenue from sale of good. Fan Milk claims it followed this standard.

Act 137 defines a contract of sale of goods to mean, "[A] contract by which the seller agrees to transfer the property in the goods to the buyer for a consideration called the price, consisting wholly or partly of money". Fan Milk's accounting policy states that delivery occurs when the products are accepted. This means both property and risk in the goods are transferred when the buyer accepts the products. Based on provisions of Act 137 and the accounting standard, the transaction qualifies as a sale of goods.

To summarise this concept, a distributor is not an agent since a distributor buys the goods. An agent however does not have property in the goods, even if the agent is in possession of the title to the goods or in possession of the goods itself. An agent cannot pass a good title in the goods unless certain conditions are met. A distributor typically determines the price at which to sell the goods it purchased. However, in some arrangements, the price is influenced by the manufacturer. The influence is such that the goods are sold to the distributor at a discounted price to enable the distributor to maintain its profit margin.

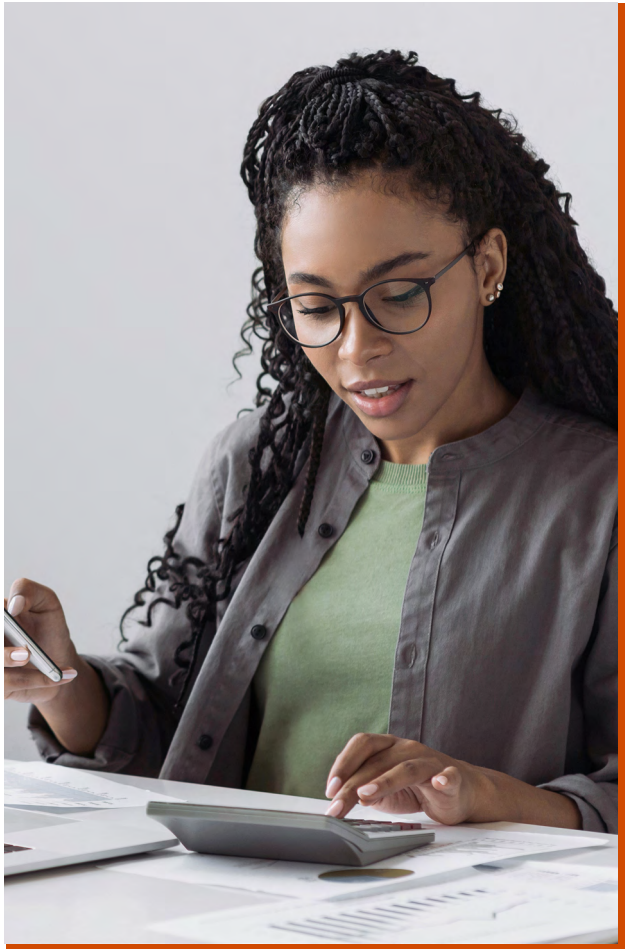
Unnecessary use of VAT laws

This issue is an income tax matter, and any supposed breach of a VAT law should not determine how the income tax law should treat the transaction. The VAT laws themselves contain sanctions for breaches relating to any requirement. Nonetheless, it is correct that the VAT Regulations require discounts, specifically, trade discounts to be stated on the invoice. However, the same Regulations do not require any rebate to be stated on the tax invoice.

The Regulations state that rebates are acceptable for VAT purposes once they meet some conditions. The main VAT law itself defines consideration, which is essentially the amount paid for VAT purposes, to exclude rebates. This means that the tax laws, in addition to accounting principles recognise rebates.

Time for court experts

It would have been helpful for the court to have invited the independent statutory auditor who certified the financial statements as meeting the accounting standards to assist the court. The auditor has the primary responsibility in determining whether the accounting standards are being followed by Fan Milk. This would have saved the courts from discussing the accounting treatment of a cash discount, which, with respect, is irrelevant to this case. The courts could have also requested assistance from the Institute of Chartered Accountants, Ghana or Chartered Institute of Taxation, Ghana as experts.



Other matters

This case is generally on withholding tax obligations in Ghana. We wish to make some comments which are outside this case. It is high time there was a reform in withholding tax regime in Ghana. The Income Tax Act, 2015 (Act 896) imposes tax on two main forms of income – chargeable income and final withholding payment. The tax on final withholding payments is payable through the withholding mechanism and becomes a final tax once the withholding agent pays them.

Tax on chargeable income is also paid through the withholding mechanism, but there are other ways of collecting this tax. The payee is required to pay taxes on quarterly basis and file an annual return to pay any outstanding tax relating to the same income. Whenever a withholding agent fails to withhold tax on a final withholding payment, it is proper for GRA to demand both the tax and the interest. This should not be the case for chargeable income. Since the payee is required to pay quarterly taxes and file an annual return, if the withholding agent fails to withhold, there is no tax revenue lost. GRA can easily trace the payee through the withholding agent.

We suggest that the law is amended such that for chargeable income, a withholding agent who is in default will only pay interest for failing to withhold, since the payee would have already paid the tax. It is not progressive for GRA to demand withholding tax 3 years after the event, when the payee has filed its return and paid its taxes in full. If the final tax has already been determined due to passage of time, why withhold again? In this case, if Fan Milk recovers the amount from the distributors, the distributors can use these certificates to reduce their tax liabilities. If their annual tax returns already show the correct tax position or have been audited, these certificates will become excess tax payments and trigger a refund process.

Conclusion

The decisions of both the High Court and Court of Appeal are based on the accounting treatments that Fan Milk gave to the payments it made to the distributors. The courts complained that the arrangement the two parties entered was a sham that was meant to avoid paying taxes. The courts also said the fact that Fan Milk influenced the price that the distributors sold the products meant the distributors were under the control of Fan Milk, making them agents.

We submit that the courts focused on the wrong concept and applied a test for discounts whereas the correct test should have been for rebates. Rebates are part of commercial ways a seller can drive sales by refunding part of monies paid after volume or trade discounts are given. Rebates are also recognised by Ghana's tax laws. We also submit that the practice of Fan Milk influencing the price that its products are sold is not unusual and is a normal commercial practice. Finally, the courts did not apply any of the known laws on creation of an agency relationship. The conclusion on the existence of an indirect agency relationship is not situated within any body of laws.

Taxpayers who have similar models are to ensure they disclose the exact nature of the relationship to the tax authority if it comes up. A clear distinction should be made between trade discounts and rebates.

Case review – Tax refunds and location incentives

In this review, we will look at two issues from the case **Orica Ghana Limited v The Commissioner-General (No. CM/TAX/0118/2022)**, decided on 19 July 2022. The High Court held that a taxpayer was not bound to apply for a tax refund within three years, despite the time stated in the law.

Further, there is no need to separate a company's business for the purpose of applying different tax rates. This article argues that on both issues, the court's interpretation could have been decided differently.

The first issue concerns tax refunds as provided in the Revenue Administration Act, 2016 (Act 915) as amended and whether a taxpayer has a window within which to apply for the refund. The second issue is on location incentives given to manufacturers in the Income Tax Act, 2015 (Act 896) and whether the incentive applies to a manufacturing company's entire operations or just its manufacturing segment.

Issue 1 - Tax refunds

Section 66 of Act 915 provides that, **"A person may, within three years of the relevant date, apply to the Commissioner-General for a refund of tax paid in excess of the tax liability of that person."**

Orica's case

The appellant said it had an income tax credit of US$755,411.32, which the GRA had treated as forfeited. This forfeiture was because the GRA said Orica did not apply for refund within the time window provided in the law. In Orica's view, the three years provided in Act 915 was not a strict timeline that it had to comply with since Section 66 uses the word **"may"**. That word does not require the application for refund to be within three years. That is, the law did not use **"shall"**, which would have indicated a mandatory timeframe.

The appellant relied on the contra fiscum principle which states that when there is doubt as to what the text of the tax law is saying, the interpretation should favour the taxpayer and no tax should be imposed on the taxpayer. Orica then said, **"…if Parliament had intended to estop the taxpayer from claiming a refund after three years, it would have expressly stated so."** The application could therefore be submitted even after the three years.

The GRA's case

The respondent admitted that it audited Orica for 2010-2012 years of assessment which concluded with an income tax overpayment on one hand and an indirect tax liability on the other. It reduced the income tax overpayments by the indirect tax liability so that the overpayment fell from US$1.28m to US$221K. Based on additional payments made by Orica, the total amount due Orica became US$755K.

The GRA presented two reasons why the overpayment had to be forfeited. Firstly, Section 37(5) of Act 915 disabled it from raising any assessment after six years. The refund was coming from 2010-2012 period. The GRA did not explain how this was relevant especially when it had already confirmed the overpayment as of 13 October 2020. Secondly and more importantly, Act 915 gave three years to a taxpayer to apply for refund. If no application is submitted by the end of the third year, the overpayment is lost.

Court's verdict

The court first dismissed the GRA's argument on the effect of Section 37(5) of Act 915. It said that provision applied to the GRA and does not say anything about taxpayers losing their credits or overpayments beyond six years. That is, even if GRA cannot open periods beyond six years for auditing, credits and overpayments determined by the taxpayer are still valid and are not lost.

The court then said, **"...section 66(1) of Act 915 does not place the limitation on the period within which the taxpayer can apply for refund of excess credit…".** The court did not show how it came to this conclusion, but it is clear it agreed with the appellant. So, it dismissed the respondent's claim about the limitation placed by law on the date of the application without any detailed discussion.

Review of the ruling

This issue required the interpretation of the legal text on refund of excess tax payments. While Orica claimed the period stated in the law is irrelevant to the taxpayer, the GRA argued that a taxpayer interested in applying for refund must stick to the timeline. This is where we think the court's energy should have been exerted to bring clarity to the law.

Orica's argument was entirely anchored on the meaning it put on the word **"may"**.Orica said that since the law did not use **"shall"**, the timeframe is not binding on the appellant's right to apply for the refund. Given the confirmation in 2020, we are not entirely sure how the GRA was counting the three years. We will however focus on the court's interpretation.

Section 42 of the Interpretation Act, 2009 (Act 792) explains that the word **"may"** in a law is to be construed as empowering or permitting an action. It also says the word **"shall"** is to be understood as making the action imperative and mandatory. From normal usage, an auxiliary modal verb modifies the main verb and indicates a mood. In this case the main verb of section 66(1) is the word **"apply".** Usually, a modal verb comes before the main verb so section 66(1) can be rewritten as, **"Within three years of the relevant date, a person may apply to the Commissioner-General for a refund of tax paid in excess of the tax liability of that person."** This rearrangement does not in any way change the meaning of the original sentence. What is being permitted by the law is the application for the refund. If the law had used the word **"shall"**, it would have meant that every taxpayer with an overpayment must apply for a refund, even if they feel like donating that money to the Government. The word **"may"** therefore creates a right for the taxpayer to apply.

In addition to the approach above, section 66(4) of Act 915 shows how the three years should be calculated. If the appellant's interpretation is adopted, it will mean that section of the law that shows how to calculate the three years will serve no purpose in the law. One of the presumptions of interpretation is that Parliament does not speak in vain. So, any interpretation that suggests that Parliament is speaking in vain must be carefully considered.

One way to resolve this issue is to engage in a purposive interpretation of the provision. Section 10(2) of Act 792 allows a court to look at the history of a law when searching for the intention of the lawmakers, especially when there is some ambiguity. The immediate past legal provision on this is the repealed Seventh Schedule of Act 896. Paragraph 66(4) of this Schedule said, **"…a person may apply for a refund under this paragraph and the application shall be made to the Commissioner-General in writing within six years of the later of…".** The old law also placed a timeframe on the application. This same provision existed in Section 159(4) of the Internal Revenue Act, 2000 (Act 592) and the taxpayer had six years to submit the application under that law.

Another place the court is allowed to look at is the Memorandum accompanying the Bill. Page (vi) of the Memorandum to the Revenue Administration Bill, 2016 says, **"A person may apply to the Commissioner-General for a refund of tax paid in excess of the person's tax liability under clause 66 of the Bill. The application for refund must be in writing and be submitted within three years of the date of payment of the tax."** From the Memorandum, there is sufficient evidence to support a contrary position that the application is not intended to be made at any time. The three years stated in the law serves a purpose.

The fact is that historically, the applications for tax refunds have always had time limits and there is nothing in the new law that suggests a contrary intention. Further, the new law itself says it intends to limit the application period and Parliament did not make any amendment to this intention.

Issue 2 – Location incentives

Paragraph 3(6) of the First Schedule to Act 896 provides that, **"The chargeable income of a company for a year of assessment from a manufacturing business not included in subparagraphs (1) and (3), other than a manufacturing business located in Accra or Tema, is taxed at the rates indicated…".** Manufacturing businesses located in regional capitals except Accra are to enjoy 25% reduction in the company income tax. Those manufacturing businesses located elsewhere aside Tema are to enjoy 50% reduction in their taxes.

Orica manufactures explosives for a mining company. The manufacturing process involves transportation to the blast site. The company bills the manufacturing income separately from the transportation income. The GRA considers the sale of the explosives to be part of manufacturing business but the storage and transportation of the explosives to be part of management services or non-manufacturing income.

Orica's case

Orica had a problem with the GRA's split of its revenue between manufacturing and non-manufacturing income. In Orica's view, the GRA exercised a discretion to perform the split and the discretion was exercised capriciously. To Orica, Section 58(4) of Act 896 applies to this issue. The provision says, **"Subject to this Act, all activities of a company are treated as conducted in the course of a single business of that company."**

Orica stands on this provision to say the non-manufacturing income that the GRA identified is integral to the manufacturing business and hence there should be no split.

The GRA's case

For the GRA, the location incentives are only available to the manufacturing business of the company. If a manufacturing company engages in other income-generating activities such as provision of services, the location incentive will not be available to the chargeable income from services since the law targets only income from manufacturing.

The GRA claimed that the manufacturing process was completed before the transportation commenced. Therefore, the transportation was not a manufacturing activity and hence was not part of the manufacturing business. It used Orica's own invoices to show how the two streams of income have been separated, suggesting that transportation was not part of the manufacturing process.

The GRA's final argument is that other manufacturers of explosives subcontract the services identified as non-manufacturing activities and so those activities are not integral to the manufacturing process.

Court's verdict

The court ruled in favour of Orica. The court's main reasoning was that tax laws require strict construction, although it recognises that Act 792 requires purposive interpretation of statutes. It said since Act 896 did not define **"manufacturing business",** and the fact that Act 896 does not contain special provisions for manufacturing business like those existing for banking and insurance, everything a manufacturing business does must be seen as one business.

It proceeded to provide a test based on a strict interpretation that if a manufacturing business engages in other activities which are not banking or insurance, and for which no special tax rate has been provided for in sub-paragraphs 3-4 of Paragraph 3 of the First Schedule to Act 896, then those other activities must be treated as towards a single manufacturing business.

The court also relied on Regulation 15 of the Minerals and Mining Regulations, 2012 (L.I. 2177), which is on issuance of certificates of competency to individuals who handle explosives for storage and transportation of explosives. In the court's view, since there is a licence under this law that covers transportation and storage, manufacturing can be defined to include these services. These services are therefore conducted in the course of a single business.

Review of the ruling

We understand there are technicalities to the manufacturing process of explosives such that what is transported to the site may not be a finished product and the manufacturing activities continue after the transportation. However, this nuance was not discussed before the court, and we will not dwell on it.

We submit that the derivation of a definition of manufacturing using L.I. 2177 is problematic. This is because Regulation 207 of the same L.I. 2177 already contains a definition of the word. It says manufacture **"means to produce explosives through a physical or chemical process from a number of precursor substances".** It must be noted that L.I. 2177 grants separate licences for storage, manufacture and transportation to an entity in Regulations 23, 26 and 27 respectively.

However, Regulation 15 of L.I. 2177 which the court uses, relates to individuals. There is no general licence that covers both transportation and manufacturing for us to conclude that manufacturing must be explained to include transportation. L.I. 2177 seems to rather support the GRA's claim since that law does not see manufacturing activity to encompass transportation and storage, as the court claimed. L.I. 2177 may therefore not be of any assistance in resolving this issue.

Regarding strict construction of tax law, as Kwame Adjei-Djan explains in his book "Income Tax Law in Ghana – Exposition and Critique", there is no place for such a rule of interpretation in Ghana. This is because Act 792 promotes purposive interpretation of all laws and does not make any exception for tax laws. Further, both Acts 896 and 915 state that the substance of transactions should be considered, and interpretations should look at the overall purpose of the provisions for tax avoidance purposes.

Our principal concern with the ruling of the court is the interpretation of Section 58(4) of Act 896. The fact that it says activities of a company are to be treated as towards a single business, in our view, does not mean a company can only engage in a single business or at any rate, have a single tax rate. We believe the word "business" used in this context does not require the technical definition provided in Act 896. It should be interpreted to mean business from the viewpoint of the Companies Act, 2019 (Act 992), where in some cases, it requires the authorised business of the company to be indicated.

This is because whereas Act 992 considers all the activities of a company set up for profit to be business, Act 896 further splits these activities into two. Activities relating to trade and provision of services are business for tax purposes and activities relating to investment are grouped under investment income. So, to say everything a company does is for business for purposes of calculating the chargeable income will not be accurate especially if the company engages in investment activities.

Assuming a company engaged in provision of professional services acquires shares of a company listed on the Ghana Stock Exchange and holds the shares for dividend income or capital appreciation, that activity will not be a business activity for tax purposes but rather an investment activity.

Section 2 of Act 896 says the chargeable income of a company from business and investment sources should be separately determined. If it is indeed true that every activity of a company for tax purposes is classified as a business activity, at what point will a company have investment income? The essence of separating the activities of banking and insurance companies is to ensure income from those core activities are reported and taxed separately.

There are other instances where such separations are required. For instance, in section 98 of Act 896, any activity that a club or trade association engages in is deemed to be conducted in the course of a single business, just like an ordinary company. However, Act 896 provides that the business income derived by the club or trade association is not exempt from taxes, although entrance fees and subscriptions are exempt from taxes. This requires separate identification of business income that is taxable and income that is exempt.

For instance, the law provides a tax of 8% on the chargeable income of a company from export of non-traditional goods. It is only the chargeable income from export of the non-traditional goods that will enjoy the 8% tax rate. Export of traditional goods must be taxed at the general rate of 25%. Further, Act 896 says income from loans granted to a farming enterprise by a financial institution is to be taxed at 20%. All these examples show that the chargeable income from those activities mentioned can be ring fenced and taxed separately from other activities of the company.

Conclusion

While this remains the current position of the law on refunds, there is a chance that a different interpretation will be put on the provision relating to tax refunds if the matter comes up for dispute again. It is advisable for taxpayers to continue to observe the time limit provided for tax refunds. Whenever there is an overpayment, the taxpayer should make the application within three years. Even if the GRA does not work on it, the obligation on the taxpayer would have been discharged.

The GRA's online portal currently ring fences income tax overpayments and does not carry these overpayments from one year of assessment to another. This will make it possible for the GRA to wipe away any tax overpayment on the portal that is beyond three years. Although the treatment on the portal is in accordance with the law, taxpayers have become accustomed to carrying forward overpayments from previous years, making refund applications less common.

Tax auditors usually recognise past overpayments even if it is beyond three years. However, it is not clear when the GRA will want to strictly adhere to the three years. The best way to protect such overpayments is to cover them with the refund application.

Another implication of this decision is that a company that principally provides services only needs to have a small manufacturing wing outside Accra and Tema to claim that all its activities are towards a single business. This interpretation will lead to a lot of internal inconsistences in the law because the same expression is used when Act 896 specifies the location incentives for farming business, agro-processing business, cocoa by-product business, rural banking business, and waste processing business. Young entrepreneurs in seven specified businesses also enjoy locational incentives. In all these instances, it is the business that is attracting the locational incentive and not the person.

Upcoming and new major events

Case	Court	Appellant	Areas of law
Scancom PLC v Commissioner-General	Court of Appeal	Scancom PLC	Applicability of GETFund, NHI and COVID levies to services provided to a resident business by a foreigner. The court below ruled that the levies applied even if the service was used to make taxable supplies.
Perseus Mining v Commissioner-General	Supreme Court	Commissioner-General	Treatment of losses from forward sales contracts, whether the taxpayer could use a different price other than the spot price to compute the Government's royalty. The taxpayer raised a procedural issue that the CG did not seek special leave to appeal to the Supreme Court. On 19 June 2024, the Supreme Court directed the CG to file processes for the substantive case to be heard.
Maersk Drillship v Commissioner-General	Supreme Court	Maersk Drillship	Applicability of branch profit tax to a petroleum subcontractor operating under a stabilised petroleum agreement. The courts below had ruled that this tax applied.
Seadrill Ghana Operations LTD v Commissioner-General	Supreme Court	Seadrill Ghana	On 10 July 2024, the Supreme Court granted Seadrill's application for special leave to appeal the decision of the Court of Appeal. This application was forcefully opposed by the tax authority. Seadrill argued that there were novel matters that the court needed to pronounce on such as whether or not an adjustment to an objection decision by the tax authority qualifies as a tax decision that requires a fresh objection. Further, whether or not the 30 days restart whenever the tax authority adjusts an objection decision. Seadrill has been directed to file its Statement of Case within 14 days for the case to be heard in October after the legal vacation.

Legislation	Details
Ghana Investment Promotion Centre (Amendment) Bill, 2023	This Bill was considered by the Government to be urgent. It has however not been passed. If Parliament fails to pass it before 7 January 2025, it will lapse. Details of the Bill have already been provided in this journal.
New Practice Notes	
Practice Note on Obtaining Double Taxation Relief under the Income Tax Act, 2015 (Act 896) – GRA/AG/2024/002	This was issued on 24 March 2024
Practice Note on the Application of Minimum Chargeable Income under the Income Tax Act, 2015 (Act 896)	This was issued on 24 March 2024
Supply by the Estate Developer and the Supplier of Immovable Property for Rental Purposes (VAT Administrative Guidelines)	This was issued on 24 March 2024
Amended Practice Note on Taxation of Gross Gaming Revenue and Winnings from Lottery Operations under the Income Tax Act, 2015 (Act 896) - DT/Lottery/Vrs2/2024	This was issued on 24 April 2024 and revokes DT/Lottery/01/2023 which was issued on 5 June 2023

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