IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2025

CORAM: SACKEY TORKORNOO (MRS.) C.J (PRESIDING)

AMADU JSC

ASIEDU JSC

GAEWU JSC

DARKO ASARE JSC

2ND APRIL, 2025

CIVIL APPEAL
J4/59/2024

MAERSK DRILLSHIP IV SINGAPORE PTE LTD. **(Suing per its Lawful Attorney,** **JORGEN SCHAFFER)**	}	**APPELLANT/** **APPELLANT/** **APPELLANT**

VRS.

THE COMMISSIONER GENERAL **GHANA REVENUE AUTHORITY**	}	**RESPONDENT/** **RESPONDENT/** **RESPONDENT**

JUDGMENT

TANKO AMADU JSC:

INTRODUCTION

1) My Lords, the instant appeal has arisen out of a dispute over the assessment and imposition of tax from petroleum operations. In its simplest definition, tax is a compulsory levy imposed by the State on an individual or an entity for public purposes. The taxman and the taxpayer are two persons of significant interest to the State. Their common point of interest, is income generation or revenue for the State. While the taxpayer is expected to contribute to the development of the State through the payment of specified taxes, the taxman is enjoined to pursue the taxpayer to ensure compliance with tax obligations, albeit within specially structured and regulated mechanisms provided by law.

2) Tax law is one area of law where enforcement and interpretation of regulatory provisions command strict construction. Under our constitutional and legislative regimes, unless the legislature or such other person empowered by the Constitution and relevant statute sanctions the payment of taxes, or exemptions from payment, no person can deviate nor evade compliance. Any deviation or evasion will attract enforcement and potential sanctions as provided by regulating statutes. Therefore, in any adjudication regarding issues of tax, the adjudicator must confine himself to the law which imposes or dispenses with the element of tax. Upon ascertainment, the statute must be strictly construed and enforced.

3) Baring the abuse of the rights of individuals regarding tax obligations, as well as the attempt by persons to evade their tax obligations, the legislature has carefully delineated a legislative framework to address compliance. What this simply means is that, the tax officer does not wield unregulated power in the administration and enforcement of tax laws. The powers invested in the officer are statutorily and procedurally limited, and hence, any unfair application inconsistent with due process must not be countenanced.

4) At the heart of the instant appeal therefore, is an invitation to this court to balance two cardinal principles of tax and investment law. First, that tax can only be imposed or waived under a legislative fiat and second the principle of *pacta sunt servanda* as pertains to Petroleum Agreements. How does the court balance a Petroleum Agreement ratified by Parliament which contains a stability clause that seeks to guarantee the stability of the contractual and fiscal frameworks of the agreement against the seeming prerogative of the legislature to impose or grant a waiver of tax only under an Act of Parliament?
5) In the instant appeal, the Respondent, the Ghana Revenue Authority (GRA) acting per its Commissioner General has urged this Court to uphold its assessment of tax in relation to the Appellant while the Appellant contends that, the Respondent's assessment is wrongful, as the same is not compliant with the relevant tax statutes and the Petroleum Agreement ratified by the Parliament of Ghana in 2006.

6) Central to the instant appeal, therefore, is an opportunity for this court to re-examine the concurring judgments of the two lower courts affirming the imposition of the sum of a total tax liability of US$28,357,065.17 on the Appellant. This is to be done notwithstanding the stabilization clause embedded in the Petroleum Agreement ratified by the Parliament of Ghana in 2006 which Appellant asserts it is a beneficiary thereof, by virtue of its role as the Subcontractor of a principal party to the agreement.

BACKGROUND AND FACTS

7) The undisputed facts are that; the Appellant, Maersk Drillship IV Singapore PTE Limited is an incorporated company under the laws of Singapore. The Appellant is however, registered in Ghana as an External Company pursuant to Section 304

of the Companies Act, 1963 (Act 179) and in compliance with Section 23(15) of the Petroleum Exploration and Production Law, 1984 (PNDCL 84).

8) The Respondent is the Commissioner-General and the Head of the Ghana Revenue Authority, a statutory establishment under the Ghana Revenue Authority Act, 2009 (Act 791) responsible for tax administration and collection of tax revenue in Ghana.

9) In 2005, the Government of the Republic of Ghana (GoG), Ghana National Petroleum Corporation (GNPC) and Heliconia Energy Ghana Limited entered into a Petroleum Agreement in respect of the Offshore Cape Three Points (OCTP) Contract Area within the Republic of Ghana for a 30-year duration. The Petroleum Agreement was, in accordance with the 1992 Constitution ratified by the Fourth Parliament of the Fourth Republic on 15th March 2006.

10) Subsequently, Heliconia Energy Ghana Limited assigned its interest under the Petroleum Agreement to ENI Ghana Exploration and Production Limited (ENI) as the new Contractor pursuant to Article 25 of the Petroleum Agreement.

11) On 30th January 2015, and pursuant to the Petroleum Agreement, ENI entered into a Subcontract Agreement with Maersk Drillship IV PTE Ltd, the Appellant herein, for the provision of services at the Deepwater DP Drilling Rig for a period of forty-two (42) months commencing 1st July, 2015 or not later than 31st July 2015 to December 2017.

12) Between January, 2015 and December, 2017, the Appellant obtained permits from the Petroleum Commission of Ghana to operate as an Upstream Petroleum Service Company in Ghana. The Appellant asserts that, as a Petroleum subcontractor to

ENI, it used Rigs and a Rig team to operate only in the OCTP block in Ghana for the period of January, 2015 to December, 2017.

13) In the exercise of its mandate under the Petroleum Income Tax Law, 1987 (PNDCL 188) and the Revenue Administration Act, 2016 (Act 915), the Respondent carried out a tax audit into the business affairs of the Appellant for the period 2015-2018. The audit led to the issuance of a Final Tax Audit Report dated the 20th of November,2020 with a total tax liability of US$28,627,295.54 comprising of a direct tax liability of US$20,185,531.36 and an indirect tax liability of US$8,441.746.18.

14) Dissatisfied with the assessment, the Appellant lodged an objection against the assessment pursuant to Section 42 of Act 915. After considering the objection, the Respondent issued its Final Objection Decision on 27th September 2021 with a total tax liability of US$28,357,065.17 comprising a direct tax liability of US$19,915,318.99 and an indirect tax liability of US $8,441,746.18 and served same on the Appellant.

15) More specifically, the direct tax assessed by the Respondent is made up of underpayment of Pay-As-You-Earn (P.A.Y.E) of US$103,300.22, Penalty of US$427.75 for failing to pay PAYE on due dates, Withholding tax of US$336,708.49, Corporate Income Tax of US$2,370,959.33 and Branch Profit Tax of US$17,103,923.20.

16) For the indirect tax, the Respondent granted the Appellant Input VAT/NHIL of US$789,697.22, VAT Relief Purchase Order of US$51,544,901.23 and Output VAT/NHIL of US$60,776,362.63 leading to a VAT/NHIL liability of US$8,441,764.18.

APPEAL TO THE HIGH COURT

17) Still dissatisfied with the Respondent's Final Objection Decision, on 8th November,2021, the Appellant lodged an appeal against same to the High Court praying for the following reliefs:

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

ii. *A declaration that, upon a true and proper interpretation of Article 12(1) and (3) of the Offshore Cape Three Points Petroleum Agreement and Sections 27 and 39(3) of the Petroleum Income Tax Act, 1987 (PNDC Law 188), the provisions of the Internal Revenue Act, 2000 (Act 592) and the Income Tax Act, 2015 (Act 896) is not applicable to the Appellant.*

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

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

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

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

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

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

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

x. An order for the Respondent to issue a revised tax assessment for 2015 to 2017 years of assessment taking into consideration all the reliefs granted by this Honourable Court.

xi. An order for a refund of monies (if any) previously paid by the Appellant to the Respondent based on the annulment of the Final Objection Decision.

xii. General Damages for breach of the provisions of the Offshore Cape Three Points Petroleum Agreement.

xiii. Costs including Lawyer's fees.

xiv. Any other order(s) that the Court may deem fit."

18) After the consideration of the respective cases of the parties, the High Court granted only relief (vi) of the Appellant's grounds and dismissed the other five reliefs sought by the Appellant.

19) In arriving at its judgment, the High Court found as follows:

a. ***That the Appellant is an incorporated external company under the laws of Singapore and registered as a branch in Ghana in accordance with the Companies Act, 1963 (Act 179).***

b. ***The Appellant has permanent establishment in Ghana.***

c. ***The Appellant's Ghanaian Permanent Establishment has earned repatriated profit in Ghana and subject to tax in accordance with section 60 of the Income Tax Act, 2015 (Act 896).***

d. ***For the purposes of tax, Ghanaian Permanent Establishment is treated as distinct and separate from its non-resident owners as provided under Section 107 of the Income Tax Act, 2015 (Act 896).***

e. ***The Petroleum Agreement and PNDCL 188 did not proscribe the imposition of the Branch Profit Tax (that is tax imposed on repatriated profit).***

f. ***The repatriated profit is not a business income but treated as investment income equivalent to the dividend as prescribed in Section 60(3) of Act 896.***

APPEAL TO THE COURT OF APPEAL

20) Both Appellant and Respondent being dissatisfied with the decision of the High Court respectively filed an appeal and cross-appeal to the Court of Appeal on the 14th of November 2022 and 7th December 2022.

21) On 19th October 2023, the Court of Appeal dismissed the Appellant's appeal in its entirety but granted the cross-appeal in part. The Court of Appeal made substantially the same findings made by the High Court referred to above.

APPEAL TO THE SUPREME COURT.

22) In further dissatisfaction with the decision of the Court of Appeal, the Appellant has appealed to this court per Notice of Appeal dated the 31st of January 2024 in which the following grounds have been set out.

1. *"The Judgment is against the weight of the evidence.*

2. *The Learned Justices of the Court of Appeal misdirected themselves by formulating unrelated issues without completely, effectively and finally determining the grounds of appeal and the real issues in dispute.*

   PARTICULARS OF MISDIRECTION

   a. *The Learned Justices of the Court of Appeal misdirected themselves in an attempt to break down a complex and nuanced dispute into its simplest foundational issues.*

   b. *The Learned Justices' formulation of the issue, whose income is the subject matter of the dispute, was unrelated to the effective determination of the case.*

c. *The Learned Justices of the Court of Appeal misdirected themselves in the formulation of the issue of whether the income in dispute is an assessable income.*

d. *The Learned Justices of the Court of Appeal misdirected themselves in the formulation of the issue of whether the income is exempt from income tax.*

e. *The Learned Justices of the Court of Appeal misdirected themselves in reducing the resolution of the whole tax dispute to three simple questions.*

3. ***The Learned Justices of the Court of Appeal committed an error of law by imposing branch profit tax under Section 60 and 63(3) of the Income Tax Act, 2015 (Act 896) in breach of Section 39(3) of the Petroleum Income Tax Act, 1987 (P.N.D.C.L. 188) and the fiscal stability clause in the Petroleum Agreement.***

PARTICULARS OF ERROR OF LAW

a. *The Learned Justices of the Court of Appeal erred in law by holding that Sections 60 and 63(3) of Act 896 apply to the income of the Appellant/Appellant/Appellant in breach of Section 39(3) of PNDCL 188.*

b. *The Learned Justices of the Court of Appeal erred in law by holding that Section 3(2)(b)(ii) of Act 896 applies to the Appellant/Appellant contrary to the fiscal stability clause in the Petroleum Agreement.*

c. *The Learned Justices of the Court of Appeal erred in law by holding that the business income of the Appellant/Appellant/Appellant metamorphosed into investment income without a change in the base of the business income.*

4. ***The Learned Justices of the Court of Appeal erred in law by applying the general tax laws to petroleum operations in breach of Section 39(5) of the Petroleum Income Tax Act, 1987 (PNDCL 188) and the fiscal stability clause in the Petroleum Agreement.***

PARTICULARS OF ERROR OF LAW

a. *The Learned Justices of the Court of Appeal erred in law by holding that the provisions of Act 592 and Act 896 apply to the Appellant/Appellant/Appellant in breach of Section 39(5) of PNDCL 188.*

b. *The Learned Justices of the Court of Appeal erred in law by holding that the provisions of Act 592 and Act 896 apply to the Appellant/Appellant/Appellant contrary to the fiscal stability clause in the Petroleum Agreement.*

c. *The Learned Justices of the Court of Appeal erred in law by misconstruing Section 39(5) of PNDCL 188 to apply the general tax laws of Ghana to the Appellant/ Appellant/Appellant.*

5. ***The Learned Justices of the Court of Appeal erred in law by misapprehending and misapplying the principle of Ghanaian Permanent Establishment.***

PARTICULARS OF ERROR OF LAW

a. *The Learned Justices of the Court of Appeal erred in law by holding that the Ghanaian permanent establishment is the party to the Subcontract instead of the actual party, who is the non-resident entity.*

b. *The Learned Justices of the Court of Appeal erred in law by holding that the Ghanaian permanent establishment is in fact a separate legal entity from the non-resident entity based in Singapore both of which are on and the same entity.*

c. *The Learned Justice of the Court of Appeal erred in law by holding that the Ghanaian permanent establishment is an incorporated entity in Ghana instead of a registration of its business in Ghana.*

6. Additional ground/s may be filed on receipt of the Record of Appeal."

23) No additional ground was filed despite an indication of same in the notice of appeal.

THE CASE OF THE APPELLANT

24) In arguing Grounds '3' and '4' together, Learned Counsel for the Appellant submitted that, the fiscal stability clause contained in the Petroleum Agreement is intended to freeze or maintain the legal and contractual framework within which the terms of the Petroleum Agreement are implemented. According to the Appellant, the fiscal stability in the instant case, freezes the Petroleum Income Tax Law, thus, the Petroleum Income Tax Act, 1987(PNDCL 188) is the income tax law applicable to petroleum operations of the Appellant throughout the Thirty (30) years term and/or duration of the Agreement irrespective of changes in the petroleum income tax laws by way of repeal or amendments. Learned Counsel for the Appellant further submitted that, even if PNDCL 188 is repealed during the pendency of the Agreement, the provisions of PNDCL 188 shall continue to apply unless the occurrence of any of the events listed under Section 135(2) of the Income Tax Act 2015 (Act 896) none of which has from the evidence occurred.

25) Furthermore, it was contended on behalf of the Appellant that, the Internal Revenue Act, 2000 (Act 592) co-existed with the Petroleum Income Tax law, 1987 (PNDCL 188) at the time the Agreement was ratified by Parliament on March 15, 2006. According to Appellant, Section, 27(4) of PNDCL 188 specifically ousts the application of the relevant provision of Act 592 to the Sub-contractor the Appellant herein principally because, the income is from petroleum operations and the Appellant is a person who is a non-resident subcontractor by reason of the provisions of ***work or services for or in connection with the petroleum agreement.*** Additionally, the Appellant argues that, the Learned Trial Court Judge relied on a spent provision i.e., Section 39(5) of PNDCL 188 to apply the general laws of Ghana to petroleum operations which ought not to be the case.

26) The Appellant contended that, per Section 39(3) of PNDCL 188, no tax ought to be charged in the form of dividend paid out of, or arising from income under PNDCL 188. Accordingly, since PNDCL 188 governs upstream petroleum operations, dividend which is akin to branch profit shall not be charged with dividend tax. For Appellant's Counsel, branch profit tax places a withholding tax obligation on the Appellant and not on the shareholder. And Section 66 of Act 692 imposes branch profit tax by placing the withholding tax obligation on the Appellant. However, since Section 27(5) of PNDCL 188 has ousted the application of the relevant provision of Act 592 including Section 66, it implies that branch profit tax can only be imposed under the Provisions of PNDCL 188 and there is no such provision or obligation on the Appellant subcontractor under Section 27 of PNDCL 188. The Appellant Counsel's argument principally is that, by the imperatives of the fiscal stability clause in the PA, the provisions of Act 188 are maintained and hence, Act 896 being a new law, is not applicable to the Petroleum Agreement (P.A).

27) On Ground '5', which alleges an error of law against the judgment of the court below regarding the meaning of Ghanaian Permanent Establishment, the Appellant's Counsel submitted that, the registration of an external company does not amount to an incorporation of a new company. According to Learned Counsel for the Appellant, an external company is not a separate legal entity but the same entity in different jurisdictions while a subsidiary is an incorporated company that has a legal personality that is separate and distinct from its foreign parent/holding company. According to Appellant's counsel, this erroneous distinction led the Court of Appeal to wrongfully hold that, the Appellant is the earner of the income under the Petroleum Agreement.

28) On Ground '2', the Appellant's Counsel attacked the judgment of the Court of Appeal by submitting that, the court formulated unrelated issues blighting the soundness of the judgment. The Appellant's Counsel faults the formulation of the following three issues by the Court of Appeal as being erroneous. They are:

i) whose income is subject matter of the present dispute?

ii) is the income in dispute assessable income?

iii) is the income in dispute exempt income?

29) The Appellant's Counsel submitted further that, the Court of Appeal relied on the provisions of Act 896 and Act 992 in answering these questions, none of which addressed the foundational issues provoked by the grounds of appeal. According to Appellant's Counsel, it is indisputable that the income in dispute emanates from petroleum operations, hence, the foundational issues have nothing to do with the

type of income or whose income is the subject matter of the dispute but rather, the laws applicable to the Petroleum Agreement and the petroleum operations.

30) Finally, on the omnibus ground of appeal that, the judgment is against the weight of the evidence, the Appellant's Counsel argued that, the Court of Appeal erred in finding the Appellant as separate from the foreign parent company. The Appellant's Counsel further contended that, the Court of Appeal erred in utilising new laws to impose tax on the Appellant contrary to the terms of the fiscal stabilization clause. It was further submitted that, the position of the Appellant as a privy to the Petroleum Agreement though correctly analysed by the two lower courts, they fell into error by their failure to appreciate that, the external company is not separate from the mother company. Furthermore, the Appellant contended that, the branch profit tax was not provided for either under PNDCL 188 or under the P.A yet the two lower courts relying on Act 592 and Act 896 held the Appellant liable.

31) In concluding, the Appellant's Counsel submitted that, the Court of Appeal erred by holding that, the income of the Appellant was income from investment. According to the Appellant's Counsel, the income earned arose from the works and services performed under the Petroleum Agreement and hence same was business income and not investment income. Further that, even if it were investment income, within the context of the P.A and the stabilisation clause thereof, upon satisfying the 5% withholding tax, the P.A does not provide for new taxes to be imposed on the subcontractor which includes the Appellant therein.

THE CASE OF THE RESPONDENT

32) In prefacing the legal arguments of the Respondent, Counsel for the Respondent submitted that, taxation is a creature of statute, and that, the authority to exempt a person from liability is vested exclusively in Parliament under the provisions of Article 174(2) of the 1992 Constitution. According to Respondent's Counsel, whereas under the Petroleum Agreement, tax exemptions are specifically provided for and that, the branch profits tax is not part of the income exempted from tax under both PNDCL 188 and the Petroleum Agreement.

33) In responding to Grounds '3' and '4', Counsel for the Respondent argued in support of the conclusions reached by the Learned Justices of the Court of Appeal that, Sections 39(3) and 39(5) of the Petroleum Income Tax Law, 1987 (PNDCL 188) as well as Article 26.2 of the Petroleum Agreement did not preclude the imposition of Branch Profit Tax which simply is Repatriated Profit Tax as provided under Sections 63 and 60 of the Internal Revenue Act 2000 (Act 592) and Income Tax Act, 2015 (Act 896).

34) The Respondent's Counsel submitted further that, Section 39(3) of PNDCL 188 had been expressly repealed by the Internal Revenue Act, 2000 (Act 592) under Section 168(1)(a) and therefore, ceased to have legal effect upon the coming into force of Act 592 in 2001. Further, the Respondent's Counsel argued that, under SMCD 5 dividend was exempted from tax per Section 3(1) (t) and since Act 592 did not exempt dividend from tax but made it taxable and the Petroleum Agreement was concluded in 2005 after the coming into force of Act 592, the exemption granted under SMCD 5 ceased to have legal effect.

35) It is further contended by the Respondent's Counsel that, Section 39(5) of PNDCL 188, the applicable law at the time the Petroleum Agreement was entered into, vested the Respondent with power to apply the general tax law including the Internal Revenue Act, 2000 (Act 592) and the Income Tax Act, 2015 (Act 896) in

addition to PNDCL 188 to impose other taxes that are not covered or envisaged by PNDCL 188 such as branch profits tax which is treated as investment income tax, unless, the person is expressly exempted by secretary of Finance, now the Minister of Finance by Legislative Instrument.

36) Counsel for the Respondent further argued that, the claim of the Appellant that, Section 39(5) of PNDCL 188 is spent by virtue of the Laws of Ghana (Revised Edition) Act, 1998 (562) is incorrect since the Laws of Ghana (Revised Edition) (Amendment) Act, 2007 (Act 729) actually came into effect on the 9th of April 2007 per EI 3.

37) The Respondent contended further that, even if the court finds favour in the Appellant's position that, it is Act 896 and not PNDCL 188 which is applicable to the Petroleum Agreement, it will still not affect the assessment of the Appellant's tax liability in view of the fact that, the years between 2015-2018 during which the Respondent assessed the Appellant on Corporate Income Tax and Branch Profit Tax, the Petroleum Income Tax Act, (Act 188), has impliedly been repealed by the Income Tax Act, 2015 (Act 896) , which came into force in September, 2015 by virtue of Section 136(11)(b) because Act 896 has introduced different rates and treatment of withholding tax different from what pertained under PNDCL 188.

38) The Respondent further contended that, by subjecting the Appellant to Corporate Income Tax after 2015, it accords with Sections 1(3), 3(2)(b)(ii), 107(1)(a) of Act 896 and Section 87 of the Petroleum (Exploration & Production) Act 2016, (Act 919).

39) On the Stability Clause, it was submitted on behalf of the Respondent that, per Article 26.2 of the Petroleum Agreement, the stability clause granted by the State was exclusively to the contractor (ENI) and does not extend to cover sub-contractors such as the Appellant. It was further submitted for the Respondent

that, the Appellant as subcontractor not being a party to the Petroleum Agreement cannot benefit from the stability clause intended for the benefit of the contractor only. Furthermore, the word ***"Contractor"*** not having been defined to include the word "subcontractor", the Appellant being a subcontractor not having been expressly mentioned as a beneficiary of the stability clause under Article 26.2 of the Petroleum Agreement, cannot claim benefit from the fiscal stability granted specifically provided to the contractor in view of the principle of privity of contract.

40) With respect to the status of the Appellant as a Parent Company of a Ghanaian Permanent Establishment, the Respondent argued that, the status of the Appellant as founded on the registered documents from the Registrar General's Department has no impact on the substance of the issue. According to the Respondent, even though the parent company and the branch *(Permanent Establishment)* are the same under the corporate structure, in Ghana however, for the purposes of tax, the two are treated separately as if they were distinct and separate persons in the determination of their chargeable income as provided under Section 65 of Act 592. Furthermore, Section 107(2) (a)(i) and (b) of Act 896 also provides that Permanent Establishment and its owners were separate but persons in a controlled relationship meaning any arrangement between them must meet the arm's length standard as described in Section 31 of Act 896.

41) Being a Permanent Establishment, it was argued on behalf of the Respondent that, Maersk Drillship IV Singapore PTE Limited (Ghana Branch) is required to withhold 8% as withholding tax on Branch Profits (Repatriated Profit) Tax in accordance with the Income Tax Act 2015 (Act 896).

42) On Ground '2', the Respondent's Counsel submitted that, the breakdown of the issues in their simplest foundational context will not have any material effect in

the determination of the substance of the appeal. On the contrary, according to the Respondent's Counsel, the breakdown of the issues would rather make the analysis much easier. On the omnibus ground of Appeal, the Respondent submitted that, the judgments of the two lower courts are not against the weight of evidence and that the Appellant has not been able to assail conclusions arrived at by the two lower courts after their evaluation of the evidence on record.

THE LAW ON CIVIL APPEALS

43) The law is settled that, an appeal to this court is by way of re-hearing. This is particularly so, when the Appellant has anchored the appeal on the omnibus ground of appeal that, the judgment being appealed from is against the weight of evidence on record. By this ground, the Appellant implies that, the court below misevaluated the evidence on record, and the same resulted in wrongful conclusion occasioning a miscarriage of justice. As a final appellate court, we are under an obligation in the circumstances, to carefully reevaluate the entire evidence on record, apply the relevant law to the evidence, and correct any errors committed by either the first appellate court, or the second appellate court. For a favourable determination therefore, the Appellant carries the onus to point out the errors either of the evidence, or of misapplication of the law committed by the two lower courts for this court to consider after our own evaluation of the evidence on record. See **DJIN VS. MUSA BAAKO [2007-08] SCGLR 686** where this Court held at page 691 of the report as follows:

> ***"When an Appellant complains that a judgment is against the weight of the evidence, he is implying that there were certain pieces of evidence on the record which if applied in his favour, or certain pieces of evidence has been wrongfully applied against him. The onus is on such an***

Appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against."

44) Indeed, by the peculiar nature of this dispute, this is one of the very few instances where the Supreme Court exercises jurisdiction as a third appellate court. We have formulated an almost entrenched position that, where concurrent findings and conclusions have been reached by both the High Court and the Court of Appeal, the Supreme Court must be very slow to disturb them unless in exceptional circumstances such as an erroneous application of the law to the evidence or a wrong evaluation of the evidence.

45) In the instant case, the attitude of this court to the findings of fact of the trial tribunal and the two lower courts is not based on nothing. There is a rich line of judicial precedent which provides a guide. In the case of **EFFISAH VS. ANSAH [2005-2006] SC GLR 943** Wood JSC *(as she then was)* provided a guide at page 959 of the report in the following words: -

"The well settled rule governing the circumstances under which an Appellate Court may interfere with the findings of a Trial Tribunal, has been examined times without number by this court in a number of cases, as for example, ***FOFIE VS. ZANYO [1992]2 GLR 475, BARCLAYS BANK GHANA LTD. VS. SAKARI [1996-1997] SC GLR 639***. The dictum of Acquah JSC *(as he then was)* in the **SAKARI** case is, for our purposes, highly relevant. His Lordship observed *(at page 650 of the report)* as follows: - ***"…. where the findings are based on undisputed facts and documents, the Appellate Court is in decidedly the same position as the lower courts and can examine those facts and materials to see whether the Lower Court's findings are justified in terms of the relevant legal decisions and principles".***

"…It is thus well settled that specific findings of fact might properly be said to be wrong because the Tribunal had taken into account matters which were irrelevant in law, or had excluded matters which were relevant in law; or had excluded matters which were crucially necessary for consideration; or had come to a conclusion which no court, instructing itself on the law, would have reached and where the findings were not inferences from specific facts, such findings might properly be set aside…"

These settled judicial guidelines to departing from conclusions arrived at by lower courts are relevant in the instant appeal when the findings of the two lower courts are juxtaposed within the context of the findings of the two lower courts from the evidence on record and the conclusions they arrived at which, in my view, are respectively against settled judicial principles.

46) Further, it is worth emphasizing that, this being a tax appeal, and as already observed in the introductory paragraph, the relevant tax statutes must be strictly interpreted. In **MULTICHOICE GHANA LTD. VS. INTERNAL REVENUE SERVICE [2010-11] SCGLR 783:** Wood C.J opined as follows: - *"The general principle is that tax statutes are to be construed strictly. Viscount Simon LC in the Privy Council case of Canadian Eagle Oil Company Limited and The King [1946 AC 119 at 140] relied on Rowlatt J's formulation of the rule in* ***CAPE BRANDY SYNDICATE VS. IRC [1921] 1 KB 64, 71****]. He observed:* ***"In the words of the late Rowlatt J. whose outstanding knowledge of this subject was coupled with a happy consciences of phrase, "in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used****."*

47) This approach to the interpretation of tax statutes, is consistent with the fiscal provisions under the Constitution as pertains to tax. Thus, as provided for under Article 174(1) of the 1992 Constitution, ***"No taxation shall be imposed otherwise than by or under the authority of an Act of Parliament."*** Further, **Article 174(2) of the 1992 Constitution** provides that:

> ***"Where an Act, enacted in accordance with clause (1) of this article, confers power on any person or authority to waive or vary a tax imposed by that Act, the exercise of the power of waiver or variation, in favour of any person or authority, shall be subject to the prior approval of Parliament by resolution."*** And as observed authoritatively by Lord Simmonds in **RUSSELL VS. SCOTT [1948] AC 422** at **433,** ***"the subject is not taxed unless the words of the taxing statute unambiguously impose the tax on him".***

PRELIMINARY OBSERVATIONS IN DETERMINING THE APPEAL

48) In determining this appeal, while I appreciate the attempt by Counsel for Appellant in the formulation of the grounds of appeal to be so detailed in making poignant the issues provoked by the facts of this dispute, it is important to remind all Counsel who appear before this court that, the formulation of grounds of appeal is regulated by the ground rules of court, C.I. 16. It is imperative under the rules regulating procedure that, grounds of appeal are not argumentative nor narrative in formulation, but precise and concise. Indeed, while the rules require that, where an error or misdirection is alleged, the necessary particulars must be set out. In setting out the particulars, this must simply be an isolation of the specifics of the error. The rule does not warrant formulations in the nature of new grounds.

Neither should the grounds be vague or left in general terms requiring further particularizations.

49) In the Appellants Counsel's statement of case, it is observed that, aside most of the grounds being argumentative, some of the particulars of the errors or misdirection are in either in general terms or vague, leaving doubt as to the nature of the particularisation. For instance, having raised the second ground as follows: ***"The Learned Justices of the Court of Appeal misdirected themselves by formulating unrelated issues without completely, effectively and finally determining the ground of appeal and the real issues in dispute",*** the Particulars of Misdirection provided in 2(a) read:

> ***"The Learned Justices of the Court of Appeal misdirected themselves in an attempt to break down a complex and nuanced dispute into its simplest foundational issues."***

Clearly, the above particularisation needs further particularisation. This approach runs through all the myriad of grounds of appeal save the omnibus ground. I do however, recognise the crucial issues provoked by these grounds for determination. Therefore, all will be determined by focusing on their import functionally.

50) In his reply to the statement of case of the Respondent, Counsel for the Appellant objected to paragraphs 24 and 27 of the Respondent's statement in answer under the issue "**AUTHORITY TO IMPOSE TAX IN GHANA"** by contending that, the same is non-compliant with Rules 6(6), 6(7) and 15(4) of C.I. 16. Counsel supposes that there has been no invitation from the Appellant's grounds of appeal to require those submissions.

51) To say the least, I am at a loss as to the essence of the objection. Those submissions of the Respondent highlight the Respondent's appreciation of the constitutional provisions pertaining to the imposition of taxes under Article 147 of the 1992 Constitution. This is a provision which the Appellant itself made reference to. In any event, I do not think that, considering the nature of the issues raised in this appeal, a discussion of the authority to impose tax in Ghana is alien to the rules. In my considered view, the objection is far-fetched, and the same is accordingly overruled.

EVALUATION OF THE GROUNDS OF APPEAL

52) An assessment of the respective cases of the parties exposes the bone of contention, being, whether by virtue of the stability clause in the Petroleum Agreement, the Appellant was liable to pay tax only as envisaged under the Petroleum Agreement and subject only to PNDCL 188, the prevailing statute at the time or, the subsequent tax legislations (including the Petroleum Tax Legislations) which came into force subsequent to the Petroleum Agreement ratified by the Parliament of Ghana. Stated differently, are the provisions under the Income Tax Act 2015 (Act 896) and the Internal Revenue Act, 2000 (Act 592) applicable to the Appellant notwithstanding the fiscal stability clause contained in Article 26.2 and the taxation clauses contained in Articles 12.1 and 12.3 of the Petroleum Agreement?

53) These being the key issues for determination I am in agreement with the Appellant that, it appears the Learned Justices of the Court of Appeal were simplistic when the issues they posited for determination were:

a. Whose income is subject matter of the present dispute?

b. Is the income in dispute assessable income?

c. Is the income in dispute exempt income?

54) In my considered view, the issue for determination is more concerned with the applicable laws. Indeed, being a tax dispute, and barring the constitutional requirement that, no tax can be imposed or waived unless under the authority of an Act of Parliament or resolution of Parliament, the first enquiry in such matters, including the instant case is to ascertain the relevant legislation or instrument applicable to the tax issue. It is after this ascertainment that, the activities of the Appellant can be weighed against the provisions in the statute to determine what is to be taxed, and how much is the taxable quantum. I must however state and place on record my agreement with the Respondent's contention that, even though the Learned Justices of the Court of Appeal simplified the issues, that per se did not deprive the court the power to identify all the relevant issues including those which the Appellant put before the Court and has repeated same in the instant appeal.

55) It is also worth clarifying that, a re-examination of the entire evidence put before the court, and an assessment of the relevant legislations to same is one way of determining the key issue provoked by this appeal. However, it is an entirely different duty in determining whether the approach to re-evaluating the evidence and application of the relevant laws resulted in wrongful findings and conclusions. In my view, despite the issues considered by the Court of Appeal, the Court still examined all the pivotal issues urged on it by the Appellant. I do not therefore find the alleged deviation in respect of the formulation of those three issues as having occasioned any miscarriage of justice. Be that as it may, I deem it prudent to rather consider the appeal within the context of the applicable laws to the tax dispute. That said, I do not find merit in the second ground of appeal and the same is dismissed.

THE PETROLEUM AGREEMENT AND THE STABILIZATION CLAUSE

56) I will now proceed to examine the relevant provisions of the Petroleum Agreement particularly the stabilization clause the interpretation of which is at the centre of this dispute. This approach is more compelling, having regard to the fact that, the Appellant's case is anchored on the stability clause as well as the taxation provisions in the Petroleum Agreement. The Appellant's assertion is that, it is a beneficiary of the stability clause while the Respondent disputes that assertion on the ground that, the Appellant is not a party to the Petroleum Agreement and to that effect the stability clause is only to the benefit of the contractor being ENI. Furthermore, for the Respondent, in so far as the legislature has legislated an imposition of certain taxes under Acts 896 and 592, the Appellant was bound by the same.

57) Before looking at the tax incidents in the Petroleum Agreement, it is essential to define the parties to the Agreement and the Sub-contract. This is more compelling, since, in the apportionment of tax liabilities the Respondent must be seen to be fixing the right taxes on the proper persons. As already observed, the Petroleum Agreement was executed in 2005, between the GNPC and Heliconia Energy Ghana Limited.

58) Subsequently, and pursuant to Article 25 of the Petroleum Agreement, Heliconia Energy Ghana Limited assigned its interest under the Petroleum Agreement to ENI Ghana Exploration and Production Limited (ENI) as the new Contractor. The Appellant, Maersk Drillship IV PTE Ltd entered into a subcontract agreement with ENI for the provision of some drilling services. The records of appeal disclose the existence of a Joint Venture -Maersk Rigworld Ghana Limited that was also

subcontracted to perform certain operations. It is important to point out that, the said Maersk Rigworld Ghana Limited is a distinct, separate and independent entity of the present Appellant Maersk Drillship IV PTE Ltd.

59) It is of significance to place on record that, the Joint Venture has already been assessed to tax and had appealed against the tax assessment which appeal was determined in the case of **MAERSK RIGWORLD GHANA LTD. VS. THE COMMISSIONER – GENERAL** in **SUIT NO. CM/TAX/0099/2022,** a judgment dated 31st January, 2023 in favour of the Appellant therein against the Respondent herein arising from substantially the same issues as in the instant appeal before us. There is no evidence on record that the Respondent has appealed against that judgment. The instant appeal must therefore, be strictly construed and confined as a contest between the Appellant herein Maersk Drillship IV Singapore PTE Ltd. in its separate and distinct capacity and the Commissioner General of Ghana Revenue Authority.

THE RELEVANT TERMS OF THE PEROLEUM AGREEMENT

60) Article 12 of the Petroleum Agreement which deals with taxation and other impositions provide as follows:

> *"12.1* ***No tax****, duty, fee or other impost shall be imposed by the State or any political subdivision on Contractor, its* ***Subcontractors*** *or its Affiliates in respect of activities related to Petroleum Operations and to the sale and export of Petroleum* ***other than as provided in this Article.***
>
> *12.2 Contractor shall be subject to the following:*

i) Royalty as provided for in Article 10.1(a)

ii) ***Income Tax in accordance with the Petroleum Income Tax Law 1987 (PNDCL 188) levied at the rate of thirty-give percent (35%)***

iii) Additional Oil Entitlement as provided for in Article 10.1(b)

iv) Payments for rental of Government property, public lands or for the provisions of specific services requested by Contractor from public enterprises; provided, however, that the rates charged Contractor for such rentals or services shall not exceed the rates charged to other members of the public who receive similar services or rentals;

v) Surface rentals payable to the State pursuant to Section 18 of the Petroleum Law per square kilometre of the area remaining at the beginning of each Contract Year as part of the Contract Area, in the amounts as set forth below…

vi) Taxes, duties, fees or other imposts of a minor nature and amount insofar as they do not relate to the stamping and registration of this (1) Agreement, (2) any assignment of interest in this Agreement, or (3) any contract in respect of Petroleum Operations between Contractor and any Subcontractor.

12.3 Save for withholding tax at a rate of five percent (5%) from the aggregate amount due to any Subcontractor if and when required by Section 27(1) of the Petroleum Income Tax Law, Contractor shall not be obliged to withhold any amount in respect of tax from any sum due from Contractor to any Subcontractor.

12.4. Contractor shall not be liable for any export tax on Petroleum exported from Ghana and no duty or other charge shall be levied on such exports. Vessels or other means of transport used in the export of Contractor's Petroleum from Ghana shall not be liable for any tax, duty or other charge by reason of their use for that purpose."

61) It is not in doubt that, the Parties to the Petroleum Agreement including the Government of the Republic of Ghana represented by the Ghana National Petroleum Corporation (GNPC) were at all times emphatic on the types of taxes and impositions that were to be levied on the Contractor and its Subcontractors in different provisions of the Petroleum Agreement.

62) It is significant to state that, of particular importance to the distinction is that, where the Petroleum Agreement intended the Subcontractor to be liable with any tax liability, it was emphatic on same. The court cannot, be seen to be on a presumptions voyage nor purport to impose a tax liability by implication on the Appellant *(a Sub-contractor)* when the same has neither been expressly spelt out in the Petroleum Agreement nor the Sub-Contract Agreement between the Appellant and ENI.

63) It is significant to note that, among the various classifications of stability clauses in Petroleum Agreements, the parties to this particular agreement in the instant appeal elected freely for a freezing clause when they could have opted for either an economic equilibrium clause or even a hybrid. And it is the Petroleum Agreement with a freezing stability clause was what was ratified by the Parliament of Ghana in 2006 in favour of the Contracting party and privies. It must therefore be borne in mind that, the ratification by the Parliament of the Republic of Ghana as mandated by the 1992 Constitution and other relevant legislations created on official stamp of validity which finds the parties to the agreement and their privies.

64) The Petroleum Agreement therefore takes its efficacy from the acceptance and approval by the Parliament of the Republic of Ghana, just like the creation of a legislation by the very institution that is empowered by the Constitution to impose taxes or grant tax waivers.

65) On that basis, it would be wholly incongruous to accept the submission that, in so far as an imposition or waiver of a tax must be informed only by an act or resolution of Parliament, the Petroleum Agreement not being an Act of Parliament, qua an Act, cannot insulate the Appellant from the liability of the taxes. When the State undertakes the performance of an obligation, and vests another with certain entitlements, the State cannot be permitted to turn around and obviate its due contractual performance, especially a contract which has also been ratified by the Parliament of the Republic of Ghana.

66) Against this background, I am of the considered view that, the Parliament of the Republic of Ghana sanctioned a particular tax regime and impositions on the Appellant being a Subcontractor under the PA and it is those impositions and waivers only that can operate in relation to the operations of the Appellant. This conclusion I have reached is poignantly founded on the provisions of **Article 12.1** of the Petroleum Agreement which warrants a re-statement as follows:

> ***"No tax, duty, fee or other impost shall be imposed by the State or any political subdivision on Contractor, its Subcontractors or its Affiliates in respect of activities related to Petroleum Operations and to the sale and export of Petroleum other than as provided in this Article."***

67) Against this background, it must be emphasized that, the principle of vested rights plays a critical role in underpinning the legal certainty and stability that

stabilization agreements seek to guarantee in investor-state relations. Section 34(i)(c) of the Interpretation Act, 2009 (Act 792), affirms that, the repeal or amendment of a law does not affect substantive rights, obligations, or liabilities that have already accrued. Our courts have consistently reinforced this principle through decisions that emphasize the non-retrospective effect of legislative changes. See **CFAO VS. ZACCA [1972] 1 GLR 366; GHANA PORTS AND HABOURS AUTHORITY VS. ISSOUFOU [1991] 1 GLR 500).** The case law establishes that vested rights are not to be overridden by subsequent legal amendments unless a clear and express intention to do so is evident. While an enactment may have a clear and express intention to apply retrospectively, this cannot extend to substantive rights which remain protected under Article 107 of the 1992 Constitution.

68) In the context of stabilization agreements, the principle of vested rights ensures that investors are legally shielded from unforeseen regulatory changes. These principles ensure that the legal and fiscal terms agreed upon are preserved, even if there are subsequent legal changes or where the extant statutory tax regime applicable to the investor, in the instant case, the Appellant has been rendered inapplicable by virtue of the scope of the exemption embedded in the fiscal stability clause and subsequently ratified by the collective wisdom of the Parliament of the Republic of Ghana, thereby protecting the inventor's legitimate expectations.

69) In a relevant article co-authored by **Dr. Zuhair Jibril** and **Justice James Agbadu Fishim** published in Global Journal of Politics and Law Research, Vol.9, No.3, pp 11-33, 2021, ISSN 2053-6321, entitled ***"A CRITICAL EXAMINATION OF KEY ISSUES AND CHALLENGES IN STABILIZATION AND RENEGOTIATION CLAUSES IN EXPLORATION AND PRODUCTION AGREEMENT IN***

NIGERIA"; the learned authors stated at pages 18 and 19 as follows; **"SCs (stabilization clauses) serve the following purposes;**

a) *SC serve as a form of protection against political risk to a foreign investor, the primary function of a SC is to protect foreign Investors from subsequent changes in the law of the host state which may result in a direct taking, such as nationalization or expropriation, or indirect taking of the property of the Investors. SC serve as a major risk management function given that international law may not sufficiently protect foreign investors from a State's unilateral change of law.*

b) *SCs provide predictability and certainty to exploration and production agreements which is considered a core element of any legal system for its efficacy. The law applicable to a long-term contract like a petroleum contract is vital in determining the rights and position of the parties and also the eliminating uncertainty as to what the law will be and how it will affect the contract.*

c) *SCs encourage and promote foreign direct investment. The HC's (Host Country) interest in agreeing to a stabilization clause stems from the need to encourage foreign investment, the presence of a SC clause in an Exploration and production agreement (EPA) can function as a psychological boost to give the IOC's confidence with respect to the risk and duration of EPAs. For the HC, given the fact that huge capital is required to start such projects and most developing states lack the resources or technology to undertake such projects it shows a commitment on their part to preserve the original contract.*

d) ***SCs function as a form of indemnity for the IOC against any loss suffered by the IOC resulting from any action or omission on the part of the HC government, this creates a legitimate expectation for the benefit of the IOC that has to be reflected in whatever form of compensation when the agreement is frustrated.***

e) ***SCs serve as risk allocation clauses, it is a way for the parties to allocate between them the risk inherent in long term transactions. Most contracts come with risk which both parties should be willing to bear but the risk inherent in exploration and production contracts in developing countries exceed the level of acceptable risk hence the need for stabilization mechanisms in such agreements".***

70) Guided by these and other persuasive legal literature on the subject therefore, it is worth emphasizing further that, Petroleum Agreements by their special nature envisage negative impacts that can impair a smooth operation of the agreement. As such, and with the intent to sustain its developmental objectives, states normally afford Contractors in such agreements necessary protections from political, legal and/or other socio-economic impediments that could stultify the viability of such agreements. It is therefore, not uncommon that, in most international investment or economic agreements stabilization clauses are included in the agreements to assure the investor the necessary protections. The Petroleum Agreement under consideration is not an exception. Such clauses must, at all times, be upheld and respected by the contracting parties and the domestic courts of the Host Country as in the instant case, unless the agreement or subsequent agreement by the parties, sanction their discontinuance. The domestic court of the Host Country cannot therefore lawfully disregard or depart from the bindingness of stability clauses in Petroleum Agreements.

71) I therefore unhesitatingly accept the submission of Learned Counsel for Appellant on the essence of stability clauses where it was submitted as follows:

> ***"[I]t is trite learning that a stability clause in a contract, particularly in the context of international investment agreements or contracts involving States and foreign investors, serves to provide a level of legal certainty and regulatory predictability for the investor. Thus, a stability clause seeks to protect investors from changes in the host country's laws and regulations that could negatively affect the investment. This includes protection against changes in tax laws."***

72) Article 26.2 of the Petroleum Agreement in the instant case details among others, a fiscal stability clause as follows:

> ***"The State, its departments and agencies, shall support this Agreement and shall take no action which prevents or impedes the due exercise and performance of rights and obligations of the Parties hereunder. As of the Effective Date of this Agreement and throughout its term, the State guarantees Contractor the stability of the terms and conditions of this Agreement as well as the fiscal and contractual framework hereof specifically including those terms and conditions and that framework that are based upon or subject to the provisions of the laws and regulations of Ghana (and any interpretations thereof) including, without limitations, the Petroleum Income Tax Law, the Petroleum Law, the GNPC Law and those other laws, regulations and decrees that are applicable hereto. This agreement and the rights and obligations specified herein may not be modified, amended, altered or supplemented except upon the execution and delivery of a written agreement executed by the Parties. Any legislative or administrative act of the State or any***

<u>of its agencies or subdivisions which purports to vary any such right or obligation shall, to the extent sought to be applied to this Agreement, constitute a breach of this Agreement by the State."</u>

73) Indeed, both lower courts rejected the position of the Respondent that, the Appellant is not a privy to the Petroleum Agreement. The Learned High Court Judge, rightly held that, the Appellant is a beneficiary under this provision and delivered as follows:

> ***"Having been expressly mentioned in Article 12(1) and (3) of the PA, the Appellant, even though not a Party is clearly an "intended" and not an "incidental" beneficiary under the PA and I indeed have no doubt that the Appellant was within the contemplation of the Parties at the time of signing the PA"***
>
> ***…Another provision in point is Article 26(2) of the PA which solidifies the fiscal stability clauses as far as they relate to the Contractor and by extension the Appellant as Subcontractor…"***

74) In similar manner and effect, the Learned Justices of the Court of Appeal rightly held in my view also, that:

> ***"When it comes to the first ground of the cross-appeal, we are of the considered view that while the Cross-Appellant is correct that PNDCL 188's repeal and the introduction of Acts 896 and 919 introduced new fiscal regimes, those cannot apply to the Cross-Respondent's corporate income tax obligations simply because its rights had accrued at the time that the Cross-Respondent became a subcontractor of ENI, a party to the Petroleum Agreement. Accordingly, since the Petroleum Agreement***

says that the contractor and its subcontractors are subject only to the taxes set out in the Petroleum Agreement, and that agreement was ratified by Parliament, additional corporate income taxes cannot be imposed on the External Company…This Court therefore approves the invocation by the Cross-Respondent of the following cases cited on retroactivity; YEW BON TEW V KANDERAAN BAS MARA [1982] 3 ALL ER 833, HON CLEMENT APAAK VS. GRA (2018) JELR 63988 (HC)- SUIT NO. CM/TAX/0448/2017 AND MAERSK RIGWORLD GHANA LTD. VS. THE COMMISSIONER-GENERAL CM/TAX/0099/2022."

75) Having made the above findings, it is obviously incongruous for the two lower courts to arrive at the conclusion refusing to order that the Appellant is in consequence of being privy to and a beneficiary of the stabilization clause, exempt from the tax liability imposed on it by the Respondent.

76) Indeed, the approach of the Respondent in seeking to even argue against those findings of privity of the Appellant to the contract is procedurally misplaced not having filed any variation nor appeal against those findings in accordance with Rule 6(6) of the Supreme Court Rules, 1996 (C.I. 16) which provides that: ***"The Appellant shall not, without the leave of the Court, argue or be heard in support of any ground of appeal that is not mentioned in the notice of appeal."*** In the instant case, the Respondent did not even cross-appeal to be deemed an ***"Appellant"*** within the meaning of Rule 6(6).

77) I do acknowledge that, in appropriate circumstances, the court may exercise its discretion under Rule 6(7) to consider grounds not set out in the notice of appeal. However, I do not think that, such a situation presents itself to warrant the exercise of such discretion. Be that as it may, I find the exposition of the law on privity and its application to the facts and evidence by the two lower courts correct and I affirm

same. Having so held that the Appellant is a beneficiary under the Petroleum Agreement and its stability clause, were the two lower courts right in still subjecting the Appellant to branch profit taxes under the provisions of Act 896 and Act 592? I think not.

78) A combined reading of the provisions under Article 12 of the Petroleum Agreement, pertaining to taxation and impositions as well as the stability clause under Article 26.2 settles that, the state contracted, and Parliament approved that, the Contractor and indeed, its subcontractors including the Appellant herein were to be limited only to the laws *(especially the fiscal legislations)* referenced in the agreement as well as the terms and conditions as provided for in the agreement. The parties were clear in their contractual language that, the Contractor and Subcontractors were guaranteed stability of the terms, conditions, fiscal and contractual framework as provided for in the Agreement.

79) It is quite clear therefore that, the parties to the contract including the State never intended that, subsequent fiscal legislations such as Act 896 can operate to amend the Agreement. Therefore, the only applicable legislations in terms of the imposition or waiver of taxes are those specifically mentioned under the Petroleum Agreement. To that extent, I am unable to appreciate why the Learned Justices of the two lower courts having recognised that the Appellant was a privy to the Agreement, and also, a beneficiary under the stability clause still sought to apply fiscal legislations which were promulgated subsequent to the effective date of the Agreement. That in my considered view is perverse and demonstrably erroneous.

80) Indeed, I am not unmindful of the constitutional allowance of the retroactive application of certain fiscal legislations. That however, does not include tax statutes within the context of Article 107(b) the 1992 Constitution which provides in mandatory language that**:**

"Parliament shall have no power to pass any law-

(a) …

(b) ***which operates retrospectively to impose any limitations on, or to adversely affect the personal rights and liberties of any person or to impose a burden, obligation or liability on any person except in the case of a law enacted under Articles 178 or 182 of this Constitution."***

81) Clearly, Article 174 of the 1992 Constitution which is the particular provision in the Constitution dealing with taxation is exempt from retroactive application. From the foregoing, it is indubitably clear that, the affirmation by the two lower courts regarding the imposition of branch tax on the Appellant under the Income Tax Act, 2015 (Act 896) is erroneous.

82) The two lower courts in my view took the view that, since at the material time, the prevailing tax legislations included the Internal Revenue Act, 2000 (Act 592), the Appellant was subject to same by virtue of 39(5) of PNDCL 188. However, Section 39(5) of PNDCL 188 provides that:

"Except as specifically provided in this Law or under legislative instruments made under Section 41, the general laws of Ghana relating to tax administration jurisdiction to impose tax and to try offences in respect of tax matters, shall continue to apply to the matters provided for in this Law."

83) The Respondent's view, which is also shared by the two lower courts is that, because PNDCL 188, the very statute which the Appellant argues governs its tax assessments maintains in Section 39(5) that, the general laws of Ghana relating to tax administration authority to impose tax and try offences in respect of tax matters continue to apply, it is not unlawful for the applicability of the Internal Revenue Act, 2000 (Act 592) which makes provision for branch profit tax.

84) What the two lower courts, and indeed the Respondent failed to appreciate is that, the special nature of the transaction between the Appellant and indeed the parties to the Petroleum Agreement demands that, the relevant tax statute, must at all times, be read within the confines or limitations of the mutually agreed expectations of the Petroleum Agreement which was also ratified by Parliament. Quite instructively, and as already pointed out, Articles 12.1, 12.3 and 26 of the Petroleum Agreement seek to stabilize all laws including Act 592 and Act 896 except as expressly provided in the Agreement. As can be observed from the Petroleum Agreement, even when PNDCL 188 was mentioned, the agreement was specific as to the extent of its application that, the tax to be imposed on Appellant should be a final withholding tax of 5% as dictated by Section 27(2) of PNDCL 188.

85) The 5% withholding tax aside, the Agreement was certain on the corporate income exigible and did not require any further additional corporate income. It is my considered view that, apart from the controversy surrounding the meaning of Permanent Establishment/ External Company the true essence is the extent of tax liability. As already found in the foregoing, the taxes which the Appellant was expected to pay, were expressly stated and provided for under the Petroleum Agreement. The Petroleum Agreement further expressly stipulated the tax legislation(s) that the Appellant was to be subjected to and therefore no other legislation can by implication be applied to the Appellant. In my view therefore, the foregoing analysis is adequate to dispose of the entire appeal. The resolution

of the other issues raised in the appeal will be merely academic and will not impact on the findings and conclusions that, I have painstakingly reached.

CONCLUSION

86) In concluding this delivery, let me state that, the judicial oath judges have sworn to uphold requires that justice is fairly administered without fear or favour even in situations where the State with all its robust apparatus is a party to a dispute. Courts are therefore enjoined to at all times, uphold the sanctity of all contracts, especially when the same have not been vitiated by fraud, duress, undue influence, illegality or such other vitiating factor.

87) In this appeal, the State contracted to guarantee the Appellant stability of the terms, conditions, fiscal and contractual framework of the Petroleum Agreement. The State further contracted to limit the Appellant to the payment of certain specific taxes. The State agreed not to apply any amendments, changes, or new laws subsequent to the effective date of the Petroleum Agreement to the Parties thereto. The State must be held to respect its own contractual obligations.

88) Upon an evaluation of the entire record of this appeal, it is my considered view that, the two lower courts having accurately apprehended and appreciated the provisions of Articles 12 and 26 of the Petroleum Agreement pertaining to taxation and the stability clauses, regrettably failed to prohibit the State from imposing certain taxes under legislations which did not govern the Agreement at the material time it came into force. The findings and conclusions of the Court of Appeal in rejecting the Appellant's objections are clearly against the weight of evidence on record and the application of the relevant law.

89) In the process of adjudication, a tribunal of facts or the appellate court could draw mistaken conclusions from indisputable primary facts and may wrongly apprehend the facts on which the foundations of the case will rest. In that situation, as has occurred in the instant case, it will be invidious to suggest that, this final appellate court should not intervene and do what the justice of the dispute requires. Thus, it is my respectful view that, the respected justices of the two lower courts misapplied the relevant legislations in determining the tax liability of the Appellant having placed their respective conclusions in a situation of incongruity with their own finding that, the Appellant is a privy to the Petroleum Agreement and in consequence thereof a beneficiary of the fiscal stability clause. In the result, the appeal succeeds and it is hereby allowed. The concurrent judgments of the two lower courts are accordingly set aside. It is hereby further ordered as follows:

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

ii. Upon a true and proper interpretation of Article 12(1) and (3) of the Offshore Cape Three Points Petroleum Agreement and Sections 27 and 39(3) of the Petroleum Income Tax Act, 1987 (PNDCL Law 188), the provisions of the Internal Revenue Act, 2000 (Act 592) and the Income Tax Act, 2015 (Act 896) is not applicable to the Appellant.

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

iv. A declaration that the additional Corporate Income Tax assessment of US$2,370,595.33 is inapplicable to the Appellant and therefore the assessment is extinguished.

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

90) The Respondent is hereby directed to do the following forthwith:

a. Issue a revised tax assessment of the Appellant for 2015 to 2017 years of assessment taking into account the afore declarations.

b. Refund any excess/tax credit arising from the revised tax assessment in "a" above within 30 days from the date of this Judgment.

(SGD.) I. O. TANKO AMADU
(JUSTICE OF THE SUPREME COURT)

(SGD.) E. Y. GAEWU
(JUSTICE OF THE SUPREME COURT)

CONCURRING OPINION

ASIEDU JSC:

[1]. My Lords, I have had the benefit of reading beforehand the erudite judgment of my brother, Tanko Amadu JSC, and I agree with his analysis and conclusion in the matter. Nonetheless, I wish to add a few observations which I have gathered concerning the way and manner that the two courts below dealt with the instant case.

For that reason, I intend not to narrate the facts underlining the case; except where it is extremely necessary in order to drum home the position of the law.

[2]. My lords, the central issue in this appeal is the correct interpretation and recognition which deserves to be accorded to the stabilization clause contained in the Petroleum Agreement executed by the Government of Ghana, represented by the Minister of Energy and the Ghana National Petroleum Corporation on one hand, and Heliconia Energy Ghana Limited in respect of the Offshore Cape Three Point Contract Area. This agreement, which is marked as exhibit MDS2, can be found at page 18 to 133 of volume 1 of the record of appeal (ROA).

My Lords, in article 12.1 of the said agreement, the parties thereto contracted that:

> "**No tax, duty, fee or other impost shall be imposed** by the State or any political subdivision on Contractor, its subcontractors or its Affiliates in respect of activities related to Petroleum Operations and to the sale and export of Petroleum **other than as provided in this article**".

It is also provided in article 26(2) of the Petroleum Agreement that:

> "The State, its departments and agencies shall support this agreement and shall take no action which prevents or impedes the due exercise and performance of rights and obligations of the parties hereunder. As of the effective date of this agreement and throughout its term, the State guarantees Contractor the stability of the terms and conditions of this agreement as well as the fiscal and contractual framework hereof specifically including those terms and conditions and that framework that are based upon or subject to the provisions of the laws and regulations of Ghana (and any interpretations thereof) including without limitation, the Petroleum Income Tax Law, the Petroleum Law, the GNPC Law

and those other laws, regulations and decrees that are applicable hereto. This agreement and the rights and obligations specified herein may not be modified, amended, altered or supplemented except upon the execution and delivery of a written agreement executed by the parties. Any legislative or administrative act of the State or any of its agencies or subdivisions which purports to vary any such right or obligation shall, to the extent sought to be applied to this Agreement, constitute a breach of this Agreement by the State"

It is these provisions that are generally referred to as a stabilization clause.

[3]. Mario Mansour and Dr Carole Nakhle write in their article titled: Fiscal Stabilization in Oil and Gas Contracts: Evidence and Implications, published in The Oxford Institute for Energy Studies (OIES PAPER: SP 37) that:

"A stabilization clause is a contractual risk-mitigating device to protect investments from variations in the legal environment. This would include risks deriving from a possible exercise of host state sovereignty such as: expropriation, the obsolescence bargain, or any other change which the government might utilize in order to impose new requirements on investor"

In the words of Victoria R. Nalule (2022). in her article titled: "What is the Problem with Stabilization Clauses in Petroleum Agreements?" published in The Journal of Sustainable Development Law and Policy pages 85-102:

"In the context of an international energy contract, the term stabilization applies to all of the mechanisms, contractual or otherwise, which aim to preserve over the life of the contract the benefit of specific economic and legal conditions which the parties considered to be appropriate at the time they entered into the contract."

Nalule (supra), goes on, in her article to discuss eight different types of stabilization clauses in petroleum agreements. For the sake of this opinion, the two main types of stabilization clauses which are the Freezing clauses and the economic equilibrium clauses are explained in the article as follows:

> "Freezing clauses are to the effect that, the governing laws – general and special – applicable to operations under a contract between a company and a sovereign state should be those of the state at the time the contract was executed. When applied strictly, these clauses prohibit the host state from changing its laws, by effectively freezing the laws which were in force on the date that the contract came into effect, hence shielding the IOC [International Oil Company] from any changes in legislation occurring after this date. Freezing clauses may be used in different ways. Besides being applied strictly, they may also be used to prevent the host state from applying changes in the host state's law made after the effective date of the contract to the specific investment contract. Alternatively, the contract may be granted an enclave status by making it exempt from any legal changes occurring in the wider legal regime of the host state. These clauses are not often acceptable to the host governments, since it is unconstitutional to completely restrain the sovereign authority of the host state to amend its laws. In this respect, host governments prefer to limit the applicability of the freezing clauses to a few aspects of the contract (taxes for instance). As such, freezing clauses have increasingly been replaced with the 'Economic Equilibrium' clauses.
>
> "Economic equilibrium/ Economic stabilisation clauses: These seek to re-establish the economic position-the economic equilibrium- of the contract following changes in law which have an economic impact on the bargain struck between the host state and its contractual partner. They provide protection through a renegotiation mechanism. Whereas the investors are supposed to

comply with the new laws, they are entitled to compensation so that they remain in the same economic situation they would have been in had the laws not changed. These function as indemnity clauses which provide balance to the economic equilibrium of the contract by ensuring that appropriate remedies are available to the investor if the host state's actions adversely affect the underlying economics of the relevant project. The common form of remedy is compensation, this can take such forms as: adjusted tariffs, extension of the concession, tax reductions, or monetary compensation. With economic equilibrium clauses, the parties must define the 'Trigger Event', which can either be widely defined (for example, 'any change in law') or narrowly defined (for example, 'any change in tax law')."

[4]. In their book titled: The Taxation of Petroleum and Minerals: Principles, Problems and Practice, edited by Philip Daniel et al; Philip Daniel and E. M. Sunley, in explaining the reasons why Companies want and Governments grant fiscal stability assurances, stated at pages 407 to 409 that:

"Fiscal stability assurances are a possible answer to what is known as the time inconsistency (or dynamic inconsistency) problem in government policies. The problem occurs when a government announces a policy in advance (such as a tax regime), but after the fact finds it welfare-increasing to go back on the commitment implied by the policy. Although the reversal of the commitment might provide the greatest welfare over a short time horizon, the cost comes in perceptions that the government reneges on its promises, and has lost credibility. Future social welfare will then be reduced because the government can adopt only those policies that do not require it to have credibility. When "time-inconsistent" actions such as a unilateral tax change, are an issue, then rules rather than discretionary policy making produce a better outcome. When discretionary policy is maintained, there may be under-investment: companies

become reluctant to invest where the weakness of their bargaining position, once investment is sunk, may be exploited. Fiscal stability assurances are one variety of "rules" that are used to overcome this problem.

Fear of future tax rises can produce sub-optimal investment decisions at each of the margins of exploration, development, and production. Petroleum and mining are both highly capital intensive, so that the risk of failure to go forward with investment in projects at the development stage has especially damaging effects. A credible commitment not to change tax terms once investment has been committed should, in principle, raise the level of investment. This applies both at the level of the country as a whole, for securing the optimal level of exploration and development investment overall, and within as individual project where incremental investment decisions can be made as production proceeds.

Despite desirability of commitment to tax stability on these grounds, it is difficult to achieve. First, the full life-cycle of a petroleum or mining project can be very long, and that of a petroleum or mineral province as a whole much longer. A typical planning horizon for the production phase of a large petroleum field might be 20 to 25 years, after an exploration and development phase that might have taken ten years. A few large mines still operate around the world that are more than 100 years old, among modern developments, productive lives in excess of 25 years are common. These horizons are far longer than the life expectancy of most governments. Governments may be able to make commitments of their own, but cannot bind the legislative competence of the State in future. Contractual assurances of fiscal stability represent efforts to navigate around this feature.

Second, it may be difficult for fiscal arrangements to envisage all possible economic outcomes. Pressures may arise from investors (in adverse circumstances) and from governments (when projects yield returns above expectations) for changes in terms. In addition, the substantial sunk and immobile capital element in a project makes it effectively impossible for investors to switch to other location in the face of an adverse change in fiscal terms. One of the tasks in design of fiscal regimes is to improve their adaptability and progressivity, subject to an appropriate apportionment of risks, so that the probability of contract stability is raised.

Assurances of fiscal stability made by governments have features in common with other institutional devises designed to promote wider fiscal discipline. They may not be quite what they seem. A strict reading of the relevant legal texts may raise questions about the power of the government to make the assurance, about the construction and arbitration of a dispute under its provisions, or about the enforcement of any award. These questions, however, may not cover the underlying purposes of parties to an agreement.

Recent discussion of fiscal institutions and fiscal rules has suggested three hypotheses about the effectiveness of arrangements made to promote fiscal discipline …. By analogy, these are useful in interpreting the operation of fiscal stability assurances.

The first is the "commitment" hypothesis: the presumption that by entering into a fiscal stability agreement, governments have given themselves incentives to abide by a set of fiscal terms, seen as appropriate prior to the investment commitment. Alternatively, this hypothesis can encompass the attempt of one arm of government to bind the actions of another, or of a present government

to bind the actions of a future one, in the belief that the public interest is thereby served.

The second is the "signaling" hypothesis. In this case, the "signal" is to other potential investors in the resource sector, first, that the government has a serious commitment to stability of fiscal terms, and, second, that if a project runs into difficulty, it is not the result of government fiscal impositions. Alternatively, the government is less likely to arrive in circumstances that it will need to turn to heavy resource taxes. On this interpretation, willingness to offer a fiscal stability assurance is part of the promotion of an attractive investment climate.

The third is the "smokescreen" hypothesis. This relates to the transparency of fiscal impositions on a project. A fiscal stability assurance could be constructed so that it remains in place, but when adherence to its full terms becomes too costly, a government "cheat" by use of devises not covered by the assurance. This hypothesis would explain efforts by companies to make such contractual assurances increasingly watertight. It would also pose challenges to attempts to restrict the scope of such assurances".

[5]. Clearly, the stabilization clause in issue, article 12(1) and 26(2) of the Petroleum Agreement herein, is a freezing clause which limits the imposition of taxes on the contractor and its sub-contractors and Affiliates, in respect of activities related to Petroleum Operations, and to the sale and export of Petroleum, **to only the taxes agreed upon in article 12 of the Petroleum Agreement**, exhibit MDS2 herein.

[6]. The issue that triggered this suit is the imposition on the Appellant by the Respondent herein, of a final tax liability, flowing from a tax audit in 2018, and a consideration of an objection by the Appellant in September 2021, of an amount of

US$28,357,065.17 comprising a direct tax liability of US$19,915,318.99 and an indirect tax liability of US$8,441,746.18. For the direct tax, the Respondent assessed the Appellant on the following items: Underpayment of P.A.Y.E- US$103,300.22, Penalty for failing to pay PAYE US$427.75, Withholding Taxes US$336,706.49, Corporate Income Tax liability – US$2,370,959.33 and Branch Profit Tax- US$17,103,923.20. For indirect tax, there was an overall VAT liability of US$8,441,764.18. An appeal to the High Court was largely unsuccessful and an appeal to the Court of appeal was dismissed. The appeal to this Court arises out of the judgment of the Court of Appeal.

[7]. The main question for determination in this appeal is whether the Respondent has the right or power to impose on the Appellant herein any tax other than those spelt out in article 12 of the Petroleum Agreement. In my opinion, in order to understand the Agreement between the State and the Contractor herein, the whole of article 12 must be read together in the context of the entire agreement under discussion. Article 12(1) prohibits the State from imposing on either the Contractor, Sub-contractor or its Affiliates any tax, fees, duty or other impost in respect of activities related to petroleum operations and to the sale and export of petroleum, except taxes which are specifically stated in article 12. This Court, following the common law position on the interpretation of laws which impose taxes on persons, decided in Multichoice Ghana Ltd. Vs. Internal Revenue Service [2011] 2 SCGLR 783, specifically at page 794 that:

> "The Court's conclusion has been dictated by the strict construction approach to the interpretation of statutes reserved for fiscal legislation. The general principle is that tax statutes are to be construed strictly"

With respect to the Appellant subcontractor, therefore, article 12(3) of the Petroleum Agreement, exhibit MDS2, provides that:

> "12.3 Save for withholding tax at the rate of five percent (5%) from the aggregate amount due to any subcontractor if and when required by

section 27(1) of the Petroleum Income Tax Law, Contractor shall not be obliged to withhold any amount in respect of tax from any sum due from contractor to any subcontractor".

Indeed, section 27(1) of the Petroleum Income Tax law, PNDC LAW 188 also provides that:

"27. Withholding tax on amounts due to subcontractors

(1) Where under the terms of a contract an amount due to a subcontractor in respect of work or services for or in connection with a petroleum agreement the person liable under that contract to make payment to the subcontractor shall withhold from the aggregate amount due to the subcontractor the percentage of the aggregate amount due that may be specified in the petroleum agreement and the amount so withheld shall be paid to the Commissioner-General and payment of that amount shall have the effect provided for in subsection (3)".

Thus, a duty was imposed, by virtue of the provisions in article 12(3) of the Petroleum Agreement herein and section 27(1) of the Petroleum Income Tax law, PNDC Law 188, on the Contractor, in this case, ENI, to withhold five percent (5%) of the aggregate amount due to the Appellant herein for any services rendered by the Appellant in connection with petroleum operations under the Petroleum Agreement, and then pay the withheld amount to the Respondent herein. The withholding of the amount required by law has the effect stated in section 27(3) of Petroleum Income Tax law, that is:

"(3) When an amount has been withheld from an aggregate amount due to a subcontractor pursuant to subsection (1), the subcontractor is not liable, in

respect of that aggregate amount, **for tax under any other law in force in the Republic**".

Thus, section 27(3) re-echoes the provision in article 12(1) of the Petroleum Agreement to the effect that once the five-percentage withholding tax is deducted from the income of the Appellant, the Appellant shall not be liable for the payment of any tax under any law in force in the Republic. In other words, the Republic agrees to freeze the imposition of further tax on the sub-contractor, the Appellant herein, once the five percent withholding tax is withheld by the Contractor, ENI. It implies further that; the general tax laws of the Republic do not apply as far as the income earned by the Appellant in its operations under the Petroleum Agreement is concerned. This is the effect of the stabilization clause contained in article 12(1) and 26 of the Petroleum Agreement. The learned High Court Judge, therefore, erred in applying **section 60 of the Income Tax Act, (Act 896)** to justify the imposition of Branch Profit Tax on the Appellant by the Respondent. In like manner, the learned Justices of the Court of Appeal equally erred in affirming this position of the High Court in the imposition of Branch Profit Tax on the Appellant.

[8]. At the time of the execution of the Petroleum Agreement between the Republic of Ghana and Heliconia, the existing regime of petroleum income tax law was the Petroleum Income Tax Law, PNDC Law 188. The Internal Revenue Act, 2000, (Act 592) was also in force. However, section 27(4) of PNDC Law 188 specifically ousted the application of the relevant provisions of Act 592 to the Appellant herein. Section 27(4) and (5) of PNDC Law 188 provided as follows:

"(4) The relevant provisions of the Internal Revenue Act, 2000 (Act 592) do not apply to a contract for the supply of goods or the provision of work or services for or in connection with petroleum operations.

(5) The relevant provisions of the Internal Revenue Act, 2000 (Act 592) do not apply to the calculation of the gains and profits of a person who is a non-resident subcontractor by reason only of the provision by the non-resident sub-contractor of work or services for or in connection with a petroleum agreement".

In the judgment of the High Court, found at page 242 volume 5 of the record of appeal, the learned Judge held that:

"Having been assessed for the period 2015-2018, it was fit and proper for the Respondent to apply the provisions of Act 896 in its assessment of the Appellant".

This holding of the High Court was affirmed by the learned Justices of the Court of Appeal when they also held at page 157 of volume 7 of the record of appeal that:

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

By the provisions of section 136 of the Income Tax Act, 2015, Act 896 is successor to the Internal Revenue Act, 2000, (Act 592). Section 27(4) and (5) of PNDC Law 188 has ousted the application of the relevant provisions of Act 592 to *"a contract for the supply of goods or the provision of work or services for or in connection with petroleum operations"*, and also to *"the calculation of the gains and profits of a person who is a non-resident*

subcontractor by reason only of the provision by the non-resident sub-contractor of work or services for or in connection with a petroleum agreement".

As stated above, these provisions are in accord with the freezing stabilization clause agreed between the Government of Ghana and ENI in the Petroleum Agreement herein. As far as the Petroleum Agreement is concerned, therefore, the laws of the land cannot be changed to negatively affect the Appellant herein or any beneficiary under the Agreement and take away or nullify rights bestowed on a party under the agreement. Therefore, to the extent that PNDC Law 188 ousted the application of the relevant provisions of the Internal Revenue Act, 2000 (Act 592) to "a contract for the supply of goods or the provision of work or services for or in connection with petroleum operations" and also to "the calculation of the gains and profits of a person who is a non-resident subcontractor by reason only of the provision by the non-resident sub-contractor of work or services for or in connection with a petroleum agreement", that benefit is not lost to the Appellant by virtue of the repeal of Act 592. Specifically, the gains or profit of a non-resident person, like the Appellant, subcontractor herein, shall not be subjected to tax as far as it is earned from services or works "in connection with a petroleum agreement". It was, therefore, wrongful for the Court below to indorse the imposition of tax by the Respondent on the profits or income on investment, however described, on the Appellant's profit in the name of Branch Profit Tax.

[8.1]. Indeed, by the provision of article 12(1) of the Petroleum Agreement, in deciding to impose tax on the Appellant, one question ought to be asked by the Respondent. That is; whether or not the intended tax is provided for or is allowed under article 12 of the Petroleum Agreement? If the answer is in the affirmative, then that tax may be imposed. However, if the answer is in the negative, then the tax shall not be imposed. A critical scrutiny of article 12 of the Agreement does not show that the parties thereto agreed to the imposition of Branch Profit Tax on the income of the Appellant. The

imposition of the said tax, therefore, in my opinion, breaches the Petroleum Agreement. The whole of article 12 of the Petroleum Agreement has eight (8) sub-clauses. Article 12.1 of the Agreement makes provision for the general fiscal agreement between the Republic of Ghana and Heliconia, the original Contractor and its sub-contractors and Affiliates, and goes further to state that apart from the taxes agreed upon in that article, the Republic of Ghana shall not impose any other taxes however described on the Contractor, its sub-contractor and Affiliates. Article 12.2 then zones-in on the various taxes that may be imposed by the Republic on the Contractor. Article 12.3 also provides for the kind of tax that shall be imposed on the sub-contractor. Further, article 12.4 exempts the Contractor from the payment of export tax with respect to the exportation of Petroleum from Ghana. Again, this clause also exempts the Contractor from paying taxes on the vessels used in exporting its Petroleum from Ghana. Article 12.5 exempts the Contractor and its sub-contractors from paying taxes and duties on plant, equipment and materials to be used solely and exclusively in the conduct of petroleum operations subject to a right of purchase by GNPC of these machineries should they be put out for sale in the future. Article 12.6 permits the foreign national employees of the Contractor, Sub-contractor and Affiliates to import personal effects free of import duties into Ghana except that, GNPC shall have the first right of purchase should these effects be put out for sale in future. Article 12.7 allows foreign national employees to freely export out of Ghana personal effects which they have imported for their use in the country. Finally, article 12.8 subjects the foreign national employees of the Contractor, Sub-contractor and Affiliates to the income tax generally applicable to all other workers in the country except where these nationals work in the country for thirty-days or less.

Thus, it is clear that the kind of taxes that could be imposed on the Contractor, Sub-contractor and Affiliates under the Petroleum Agreement have been earmarked specifically under the various clauses of article 12. It can therefore not be reasonably argued that because the contractor is subject to pay more taxes, then, automatically,

the sub-contractor should also be subjected to more taxes. That perception or argument is ill-founded and is tantamount to a breach of the Petroleum Agreement between the parties thereto.

[8.2]. It is also clear that the provisions of the Income Tax Act, 2015, Act 896 regulate the taxation of income earned generally in the Republic as stated in the long title: that it is "AN ACT to provide for the imposition of income tax and for related purposes", whiles the provisions of the Petroleum Income Tax Law, PNDC Law 188 regulate specifically the taxation of income earned through operations in relation to petroleum activities. The long title states that it is "AN ACT to provide for the payment of tax on petroleum operations and for related matters". In interpreting these laws, therefore, the provisions of the general Act, the Income Tax Act, 2015, Act 896 must yield to the provisions of the special Act, Petroleum Income Tax Law, PNDC Law 188 which was enacted by Parliament to specifically regulate the taxation of income earned from petroleum activities. See Bonney & Others (No.1) vs. Ghana Ports & Harbours Authority (No.1) [2013-2014] SCGLR 436. What this implies, therefore, is that since the Petroleum Income Tax Law, PNDC Law 188, has specifically prohibited the taxation of "the gains and profits of a person who is a non-resident subcontractor by reason only of the provision by the non-resident sub-contractor of work or services for or in connection with a petroleum agreement", this provision should have been accorded pre-eminence over the general provision on taxation of income provided for in the Income Tax Act, 2015, (Act 896).

[8.3]. One source of confusion which plagued the Court below is the way the Court treated the Appellant as an incorporated entity in Singapore and the registration of the Appellant as an external company in Ghana. The effect of this treatment is that, it led the Court below to envision the Appellant as two different entities: One incorporated in Ghana and doing business in Ghana, and one resident in Singapore and receiving dividend on its investment in Ghana; for which reason, the Respondent

ought to impose tax on the dividend as Branch Profit Tax. At page 157 volume 7 of the record of appeal, the Court of Appeal reasoned as follows:

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

At the time of the registration of the Appellant company in Ghana, the Act in force was the Companies Act, 1963, (Act 179), and not the Companies Act of 2019, (Act 992) which was extensively relied upon by the Court of Appeal. Section 302(2) [The equivalent provision in the new Companies Act, 2019, Act 992 is section 329(2)] of the Act defines an external company as follows:

> "302. Meaning of "external company"

(2) An external company is a body corporate formed outside the Republic which, at or subsequently to, the commencement of this Act has an established place of business in Ghana.

(3) The expression "established place of business" means a branch, management, share, transfer, or registration office, factory, mine, or any other fixed place of business, but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of the body corporate or maintains a stock of merchandise belonging to that body corporate from which the agent regularly fills orders on its behalf".

Thus, the fact that an external company has established a permanent place of business in Ghana does not imply that the external entity in Ghana is incorporated in Ghana and as such has a different personality from its mother or parent company. The external company registered in Ghana is not technically different from its parent company incorporated abroad. It is one and the same company. The Appellant company is, therefore, not different from the company which was registered to do petroleum business in Ghana which is recognised herein as the subcontractor. It is because the Court of Appeal erroneously treated the Ghanaian permanent establishment as separate and distinct from the Appellant that it treated the income of the Appellant as an investment income or branch profit, and this misleading description caused the Court of Appeal to affirm the imposition of tax on the so-called branch profit as though the said income had been earned by a separate legal entity which was then transferring the said income to its shareholders abroad. However, the said income is income earned by the Appellant whose branch was established in Ghana and operated in Ghana and earned the said income for the Appellant. There was, therefore, nothing like repatriation of income for which tax should be imposed thereon by the Respondent.

[9.0]. The unfortunate distinction which was drawn by the Court of Appeal between the Appellant as an incorporated entity in Singapore, an external company, and the established branch of the Appellant in Ghana, misled the Court below to arrive at an erroneous conclusion in its judgment when it held at page 157 of the record of appeal, among others, that:

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

The problem with the above analysis and reasoning is that, if the income being taxed does not pertain to the Appellant but to its Ghanaian Permanent Establishment and it is agreed that the income of this Ghanaian Permanent Establishment is not subject to further taxes under the Petroleum Agreement, why should the same income now be subject to taxation under section 3(2)(b)(ii) of Act 896 just because the so-called Ghanaian Permanent Establishment decides to carry its income out of the country?

Does the fact of carrying its income out of the country change the fact that that income is the income of the Ghanaian Permanent Establishment? The truth of the matter, as shown above, is that the Appellant company is not an entity different from the branch company which it established in Ghana. Indeed, as stated in section 302 of the Companies Act, 1963, Act 179, which was the Act in force at the time of the registration of the branch of the Appellant in Ghana, the established presence of the Appellant company in Ghana is not a legal entity with a different legal personality as held by the Court of Appeal. To the extent that the Ghanaian Permanent Establishment is not a separate legal entity but is subsumed in the Appellant, whatever income that is earned by the Ghanaian Permanent Establishment is the income of the Appellant and it shall not be subject to any further taxes in accordance with article 12(1) and (3) of the Petroleum Agreement. At any rate, in view of the Petroleum Agreement, the Government of Ghana cannot change the terms of the Agreement without re-negotiating fresh terms with either the Appellant or ENI, and as such it is erroneous for the Court of Appeal to apply the provisions of Act 896 to the Appellant herein.
Surprisingly, having held that "the income being taxed does not pertain to the Appellant itself but rather to its Ghanaian Permanent Establishment", the Court of Appeal, in the next paragraph at the same page 157 held that:

> "In summary, this Honourable Court finds that the Appellant's income arising from its Ghanaian Permanent Establishment is indeed assessable income, and the provisions of the Petroleum Agreement do not exempt it from taxation".

With respect to the learned justices of the Court of Appeal, this conclusion reached by them is erroneous as shown above.

[10]. Finally, it was held by the trial Judge that an agreement cannot be reached by parties to override the laws of Ghana and that all agreements are subject to the laws of the country. The above statement of the law is generally correct. However, the

Petroleum Agreement in question was entered between the Government of the Republic of Ghana and Heliconia, and subsequently ratified by Parliament. The parties hereto are all ad idem that the Petroleum Agreement was ratified by Parliament. Indeed, article 174(1) and (2) of the Constitution gives power to Parliament to exempt persons as may be appropriate from the payment of taxes. The article provides that:

> "174. Taxation
>
> (1) No taxation shall be imposed otherwise than by or under the authority of an Act of Parliament.
>
> (2) Where an Act, enacted in accordance with clause (1) of this article, confers power on any person or authority to waive or vary a tax imposed by that Act, the exercise of the power of waiver or variation, in favour of any person or authority, shall be subject to the prior approval of Parliament by resolution".

It must be pointed out that, any lawful agreement entered into by the Government of Ghana and ratified by the resolution of Parliament as required by the Constitution of Ghana is as potent and binding on the parties to the agreement as any law passed by Parliament under article 106 and other relevant provisions of the Constitution. This implies, therefore, that the Petroleum Agreement between the Government of Ghana and Heliconia ratified by Parliament, under which the Appellant claims, is no less binding than any law of the land. And the Government of Ghana as well as the parties to the agreement and others recognised as beneficiaries under the agreement, are bound by the terms of the Petroleum Agreement. It is, therefore, wrong for the impression to be created that the Petroleum Agreement, in the state in which it was executed, can easily be overridden by an Act of Parliament. See Banful vs. Attorney

General [2017-2020] 1 SCGLR 82; Gyamfi vs Attorney General [2017-2020] 2 SCGLR 811.

[11]. In conclusion, I wish to state that it is for the reasons stated herein, as well as those stated in the lead opinion by my respected brother, Amadu JSC, that I vote to set aside the judgment of the Court of Appeal delivered on the 19th October 2019. The appeal therefore succeeds.

(SGD.) S. K. A. ASIEDU
(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

SACKEY TORKORNOO, CJ:

Background

[1] In 2005, Government of Ghana, acting by Ghana National Petroleum Corporation (GNPC), signed a petroleum agreement with a company called Heliconia in respect of oil fields in Offshore Cape Three Points (OCTP). This petroleum agreement (hereafter alternatively referred to as PA) was to last thirty years and is found in the records of this appeal as exhibit MDS2 (page 18 of Vol1). On an unknown date, Heliconia assigned its interest in the petroleum agreement to another company called ENI Ghana Exploration and Production Limited (ENI). This Heliconia/Eni and Government of Ghana contract is hereafter called the 'main contract' for ease of reference.

[2] On 30th January 2015, ten years after the entry into force of the petroleum agreement, ENI entered into a subcontract agreement with two companies to provide services to ENI at a location called Deepwater DP Drilling Rig, as part of ENI's

execution of the main contract. This subcontract is found on page 69 of Volume 2 of the Records of Appeal (ROA)

The first of the subcontracting companies is the Appellant before this court Maersk Drillship IV Singapore Pte Limited (hereafter referred to as Appellant or Maersk Drillship Singapore). The Appellant is a Singaporean company, with a branch of the company in Ghana registered as an external company with permanent establishment in Ghana.

The second subcontractor is a Ghanaian company registered in Ghana called **Maersk Rig World Ghana Limited** (hereafter referred to as Maersk Rig World). It is noteworthy that the Respondent clarifies in the opening lines of the Introduction of the Audit assessment that precipitated this litigation that Maersk Rig World is owned 65% by Maersk Drillship IV Singapore Pte Limited, (the Appellant herein) and 35% owned by Rigworld International Services Limited, a Ghanaian company. For the purposes of executing the subcontract with ENI, the Appellant Maersk Drillship Singapore entered into a Joint Venture arrangement with its subsidiary Maersk Rigworld Ltd and the two worked as separate corporate entities as Joint Venturers for ENI.

The subcontract services were to be provided at a location identified as the Deepwater DP Drilling Rig for a period of 2 years.

Context of Taxation of Appellant in this dispute

[3] The Respondent to this appeal conducted a tax audit on the operations of the Appellant in 2018. It issued a Revised Final Tax Audit Report on in November 2020 (exhibit MDS6 found from page 146 of Volume 1 of the Record of Appeal). The Respondent determined that the Appellant owed a total tax liability of US$28,627,295.54 comprising direct tax liability of US$20,185,531.36 and indirect tax liability of US$8,441,746.18.

[4] In arriving at how the tax liability was computed, the Respondent made a number of distinct and significant statements.

First, the audit report clarified (can be seen on the page 149 of Volume 1 of the Appeal record) that the Appellant, as an external company with permanent establishment in Ghana as a branch, was responsible for the rendering of services on the subcontract from outside the territory of Ghana, and responsible for 85% of the sub contract cost and entitled to 85% of sub contract revenue.

Maersk Rig World, as a Ghanaian company fully resident in Ghana was responsible for rendering local services from within the territory of Ghana, and responsible for 15% of the sub contract cost, and entitled to 15% of the subcontract revenue.

[5]The Respondent also stated that the separate corporate make up and ownership structures of the subcontractors in joint venture – i.e. Maersk Rigworld Ghana Ltd, and Maersk Drillship IV Singapore Pte Limited (Appellant herein) made them subject to **section 33 of Internal Revenue Act, 2000 Act 592** and **section 28 of the Income Tax Act, 2015 Act 896**. These provisions read respectively:

Section 33 of Internal Revenue Act, 2000 Act 592 –

33. Jointly owned investment

For the purposes of ascertaining the income of a person from an investment which is jointly owned with another person, inclusions and deductions with respect to the investment shall be apportioned among the joint owners in proportion to their respective interests in the investment

Section 28 of the Income Tax Act , 2015 Act 896

28. Jointly owned investment

(1) *In calculating the income of a person from an investment which is jointly owned with another person, the amounts to be included in the income and deducted from the income shall be apportioned among the joint owner in proportion to their interests in the investment.*

(2) *Where the interests of joint owners cannot be ascertained, the interests of the joint owners shall be treated as equal .*

[6] The audit report continued that '*in view of entity concept, an entity registered under the Ghana Companies Act is seen as a separate legal entity and is different from the shareholders of that company, with separate tax obligations. Thus, shareholders are not covered under this agreement and therefore are not exempted from Branch Profit Tax as per Section 60 (1) (2) (3) of the Income Tax Act, 2015, Act 896'*.

[7] In essence, the tax obligations of Maersk Rigworld as a legal entity will be computed separately from its two shareholders. Maersk Drillship Singapore, and Rigworld International Ltd, as 65% and 35% respective shareholders of Maersk Rigworld. This is because the shareholders are different entities from their company Maersk Rigworld, and the tax liability of the two companies (Maersk Drillship Singapore, and Rigworld International Ltd) from their earnings in the work of Maersk Rigworld, will be computed as separate tax obligations from that of Maersk Rigworld.

[8] Further, because shareholders of parties to the petroleum agreement <u>are not parties to the petroleum agreement</u>, (emphasis mine), Maersk Drillship Singapore, whose branch in Ghana is registered as an external company in Ghana, will not be exempted from Branch Profit Tax on its earnings as shareholder of Maersk Rigworld, as per Section 60 (1) (2) (3) of the Income Tax Act, 2015, Act 896'. **Section 60 (1) (2) (3)** read:

Branch Profit tax

60 (1) *A non-resident who carries on business in Ghana through a permanent establishment and who earns repatriated profits shall pay tax on the repatriated profits earned for a basis period ending within the year of assessment*

(2)A non-resident person who has earned repatriated profits under subsection (1) shall pay a final tax on the gross amount of the earned repatriated profits to the Commissioner-General in accordance with the prescribed rate within thirty days after the end of the basis period

(3) For purposes of subsections (1) and (2), a person shall treat the portion of the net profit of the resident person which corresponds to the interest of the non-resident shareholders as repatriated profits and *as dividends distributed in accordance with the respective shares of the non-resident person in the company*

Liability of Appellant to be Taxed

[9] The second significant position which was articulated from the covering letter of the audit report was a clarification of the following 'PRESUMPTION FOR AUDIT POSITION'.

The presumption is '*that the subcontractors (in the Heliconia/ENI/GNPC petroleum agreement) are covered by the stability clauses under the Petroleum Agreement. The Commissioner-General reserves the right to adjust the assessment (of their tax obligations) under section 39 of the Revenue Administration Act, 2016, where it is established that upon the repeal of the Petroleum Income Tax Law 1987 (PNDCL 188), the current tax laws in force are applicable to all category of subcontractors*.'

The said section **39 of Revenue Administration Act, 2016, Act 915** reads in part:

Adjusted assessment

39(1) *The Commissioner-General may adjust an assessment in a manner that ensures that the taxpayer is liable for the correct amount of tax in the circumstances to which the assessment relates.*

To provide a further context to the reference to **Petroleum Income Tax Law 1987 [PNDCL 188], section 39 (3) and 39 (5)** of the **Petroleum Income Tax Law 1987 PNDCL 188** (hereafter also referred to as **PITL 1987, PNDCL188)** in its original form, and before its repeal, had provided that:

Section 39(3)

> *There shall be no tax charged, or withholding of tax required, under the provisions of the Income Tax Decree, 1975 (S.M.C.D 5) in respect of any income, or dividends paid out of any income which is taken into account in ascertaining chargeable income or loss under the provisions of this law, or which is excluded from gross income hereunder.*

39 (5) *Except as specifically provided in this law or under legislative instruments made under section 41, the general laws of Ghana relating to tax administration, jurisdiction to impose tax and to try offences in respect of tax matters, shall continue to apply to matters provided for in this law.'*

Section 41 also read: *Where he deems fit the Secretary may by legislative instrument exempt a contractor from operation of any general law or provisions thereof relating to taxation other than this law*

(section 41 was later amended by the Statute Revision Commissioner who carried out his work pursuant to the **Laws of Ghana (Revised Edition) Act, 1988 Act 562** to reflect the priority of the 1992 Constitution to read '*Subject to article 174 of the Constitution, the Minister may, by legislative instrument, exempt a contractor from the operation of a general law or a provision of the law relating to taxation other than this Act.*)

[10]When these original provisions in section 39 (3) are read together with section 39 (5) and section 41, it becomes clear that under the **PITL 188 of 1987**, **section 39 (3)** seemed to provide a seemingly unfettered protection from tax on petroleum income and dividends. However, the same law in **section 39 (5)** qualified that the seemingly unfettered protection from petroleum income tax on income and dividends provided for under **section 39 (3)** should be specifically administered through provisions in the **PITL 188 of 1987** itself or legislative instruments made by the Secretary under **section 41.**

[11] From the above outlay, our reading of the caveat raised by the Respondent in the 'PRESUMPTION FOR AUDIT POSITION' is that though the Commissioner recognized '*that the subcontractors* (in the Heliconia/ENI/GNPC petroleum agreement) *are covered by the stability clauses under the Petroleum Agreement*', the Commissioner-General also reserved the right to adjust the assessment of the tax obligations of the Appellant, who was the subject matter of the tax audit, '*under section 39 of the Revenue Administration Act, 2016, where it is established that upon the repeal of the Petroleum Income Tax Law 1987 (PNDCL 188), the current tax laws in force are applicable to all category of subcontractors.*'.

[12] It is important to clarify at this point that in the year 2000, the **Internal Revenue Act 2000 Act 592** was passed. **Section 168 (1) (a) of Act 592** expressly repealed the **Income Tax Decree, 1975 (S.M.C.D 5)** thereby removing the protection of tax on

chargeable income that included dividend that **section 39 (3)** of the **PITL PNDC Law 188 affected.**

Section 168 (2) of Act 592 further provided that

(2) A right or privilege acquired by a person under a repealed enactment ceases to exist on the date this Act comes into effect unless it is expressly provided in section 169 or in the Regulations made under section 114 that the right or privilege is to remain in existence.

Just to provide context, the PITL PNDCL 188 as an enactment was not repealed until the passage of the Revenue Administration Act, 2016, in the Third Schedule.

[13] **APPEAL TO THE HIGH COURT**

The Appellant appealed the Objection Decision and final tax assessment of the GRA Commissioner General to the High Court on the following grounds:

GROUNDS OF APPEAL

i. The Respondent wrongly construed Articles 12(1), 12(3) and 26 of the Offshore Cape Three Points Petroleum Agreement and Sections 27 and 39(3) of the Petroleum Income Tax Act, 1987 (PNDC Law 188) by applying the provisions of the Internal Revenue Act, 2000 (Act 592) and the Income Tax Act, 2015 (Act 896) to the Appellant.

ii. The Respondent erred in law by subjecting the Appellant's income to further taxes after the 5% final withholding tax.

iii. The Respondent is liable for breach of the provisions of the Offshore Cape Three Points Petroleum Agreement by assessing the Appellant to Corporate Income Tax and Branch Profit Tax under the Internal Revenue Act, 2000 (Act 592) and the Income Tax Act, 2015 (Act 896)

iv. The Respondent wrongly imposed a tax of US$103,300.22 on the Appellant in respect of PAYE taxes when in fact the Appellant had a tax overpayment of US$129,165.72

v. The Respondent erred in law by rejecting some of the VAT Relief Purchase Orders (VRPOs) in the amount of US$6,978,174.88 which resulted in a VAT/NHIL tax liability of US$8,441,764.18 to the Appellant.

vi. The Respondent erred in the reconciliation of the figures and therefore demands for proper reconciliation of the figures in issue herein

Appellant's Claim To Protection from any form of Taxation beyond withholding tax

[14] In the appeal to the High Court, the appellant's discernible case was that by reason of the terms of **article 12** and **article 26** of the Petroleum agreement between Heliconia/ENI/GNPC representing the Government of Ghana, subcontractors stood as third-party beneficiaries of tax rights conferred on Heliconia/ENI within the main contract.

Article 12(1) of the Petroleum Agreement reads:

No tax, duty, fee or other impost shall be imposed by the State or any political subdivision on Contractor, its Subcontractors or its affiliates in respect of activities related to Petroleum Operations and to the sale and export of petroleum other than those provided in this article'. (emphasis provided)

[15] Appellant went on in its submissions on to quote from article 12 (3) which reads:

Article 12(3):

Save for withholding tax at a rate of five percent (5%) from the aggregate amount due to any Subcontractor if and when required by Section 27(1) of the Petroleum Income Tax Law, Contractor shall not be obliged to withhold any amount in respect of tax from any sum due from contractor to any Subcontractor.

Section 27 of the **Petroleum Income Tax Act 1987 (PNDC Law 188)** is set out hereunder in extensor. It reads:

Section 27(1) - Withholding tax on amounts due to subcontractors.

Where under the terms of a contract, an amount due to a subcontractor in respect of work or services for or in connection with a petroleum agreement the person liable under that contract to make payment to the subcontractor shall withhold from the aggregate amount due to the subcontractor the percentage of the aggregate amount due that may be specified in the petroleum agreement and the amount so withheld shall be paid to the commissioner and payment of that amount shall have the effect provided for in subsection (3). (emphasis provided by Appellant.

Section 27(2)

Subject to article 174 of the constitution, the requirement of subsection (1) may be waived by express terms of the petroleum agreement where the subcontractor is an affiliate of the contractor whose services are charged to the contractor at cost.

Section 27(3) provides:

When an amount has been withheld from an aggregate amount due to a subcontractor pursuant to subsection (1), the subcontractor is not liable, in respect of that aggregate amount, for tax under any other law in force in the Republic.

Section 27(4)

The relevant provisions of the Internal Revenue Act, 2000 (Act 592) do not apply to a contract for the supply of goods or the provision of work or services for or in connection with petroleum operations.

Section 27(5)

The relevant provisions of the Internal Revenue Act, 2000 (Act 592) do not apply to the calculation of the gains and profits of a person who is a non-resident sub-contractor of work or services for or in connection with a petroleum agreement.

[16] From the above, the Appellant posited that the only tax that could be claimed from a subcontractor of ENI was 5% withholding tax. It submitted that '*The combined*

effect of these two provisions in the light of Article 12.3 of the PA is that ENI as the Contractor is under an obligation to withhold tax at a rate of 5% from payments it makes to the Appellant (as a subcontractor for works or services rendered under the PA and the Subcontract to be paid to the Respondent on behalf of the Appellant as a final tax. By this final tax, no other tax obligation is required of the Appellant as a Subcontractor under the PA'.

[17] It is from this premise that Appellant has objected to the tax claims made on it by the Respondent regarding employee PAYE, Corporate Income Tax, and Branch Profit Tax and fought the current case from High Court to Supreme Court. It claims that **articles 12.1, 12.3,** and **article 26** of the PA, and **sections 27.1 and 27.3** of **PNDC Law 188** '*create a fiscal enclave for ENI and its subcontractors by which the jurisdiction of the tax laws of Ghana is ousted as far as ENI and its subcontractors*'. It goes on to claim that '*in effect, the provisions of the PA take precedence over any tax law in force in Ghana, and that this interpretation is reinforced by sections 27 (4) and 27 (5) of PNDC Law 188'.*

Article 26 (2) of the Petroleum Agreement reads:

> (2). *The state, its departments and agencies, shall support this agreement and shall take no action which prevents or impedes the due exercise and performance of rights and obligations of the Parties hereunder. As of the Effective Date of this Agreement and throughout its term, the state guarantees contractor the stability of the terms and conditions of this Agreement as well as the fiscal and contractual framework hereof specifically including those terms and conditions and that framework that are based upon or subject to the provisions of the laws and regulations of Ghana (and any Interpretations thereof) including without limitation, the Petroleum Income Tax Law, the Petroleum Law, the GNPC Law and those other laws, regulations and decrees that are applicable hereto. This Agreement and the rights and obligations specified herein may not be modified, amended, altered or supplemented except upon the execution of delivery of a written agreement executed by the parties. Any legislative or administrative Act of the state or any of its agencies or subdivisions which purports to*

vary any such right or obligation shall, to the extent sought to be applied to this Agreement, Constitute a breach of this Agreement by the state.

[18] Appellant went on to urge that the **Part X Temporary and Transitional Provisions** of the **Income Tax Act Act 2015 Act 896** which repealed **Act 592**, and became operational in September 2015 provided for the extension of protection from taxation it was claiming, with the exception of withholding tax. **Subsection 135 (1) and 135 (2)** provide that

Section 135 (1) of Act 896

135 (1) Subsections (2) and (3) apply where the Government of Ghana has concluded, whether before or after the commencement of this Act, a binding agreement with a person that purports to modify the manner in which tax is imposed including by reason of a fiscal stability clause

(2)Where this subsection applies, the provisions of the old tax that are modified or protected by the agreement continue to apply until the earlier of

a. the end of the agreement or relevant clauses in the agreement'

b. the first alteration of the agreement after the commencement of this Act; and

c. the relinquishment by the person of the person's right to modified tax treatment

Respondent's position

[19] While Appellant urged the position that from the terms of the PA that it was a subcontract to, its liability to taxation was for the payment of only withholding tax of 5% as final tax, the Respondent first agreed that indeed, the law that was applicable to the PA and its clauses that fiscal stability was guaranteed for in 2005, was the **Petroleum Income Tax Law of 1987 PNDC Law 188**. This is the law that was specifically referenced in **articles 1.52, 12.2 and 26.2** of the PA which was signed in the year 2005.

[20] However, there is the undebatable position that tax laws are strictly construed, and therefore, the exactitudes of application of the **Petroleum Income Tax Law**, as

referred to in **article 26 (2)** must be followed to properly construe how this fiscal stability clause applies to the Contractor and its subcontractors.

As noted earlier in our background review, the Respondent urged that since **section 39 (3)** of **PITL PNDCL 188** which provided that '*There shall be no tax charged, or withholding of tax required, under the provisions of the Income Tax Decree, 1975 (S.M.C.D 5) in respect of any income, or dividends paid out of any income which is taken into account in ascertaining chargeable income or loss under the provisions of this law, or which is excluded from gross income hereunder*' had been expressly repealed in **Section 168 (1) (a)** of the **Internal Revenue Act 2000 Act 592,** thereby lifting the protection of tax on chargeable income that included dividend, the strict construction of **PNDCL 188** was the proper approach to the law. This repeal had occurred five years prior to the execution of the Petroleum Agreement that Appellant was claiming benefit from.

[21] Additionally, **section 41 of PNDC Law 188** required that '*Where he deems fit the Secretary may by legislative instrument exempt a contractor from operation of any general law or provisions thereof relating to taxation other than this law*'.

The Respondent therefore urged that to bring itself into any protections from tax under **PITL PNDCL 188**, the Appellant has to rely on the **PITL PNDCL 188** itself, or a legislative instrument specifically giving the Appellant the protection it claims. Since neither the **PITL PNDC Law 188** nor any legislative instrument gives the Appellant protection from the application of any tax except double taxation in relation to aggregate sums that withholding tax has been applied on, the Appellant cannot claim shelter through **article 26** to object to the corporate income tax, and branch profit tax that it had been assessed to pay.

Judgment of the high court

[22] The first legal point of note by the high court found on page 15 of the judgment (page 190 of Volume 5) is that pursuant to article 11 of the 1992 Constitution, tax laws of Ghana are enactments made under the authority of parliament, and so the general

terms of the Petroleum Agreement – entered into in 2005 - cannot 'oust' the application of the general tax laws of Ghana to any person. As such in the event of any inconsistency between the tax laws of Ghana and terms of the PA, '*the provisions of the PA are to be read as subject to PNDCL 188, which give teeth to article 12 (1) and (3) of the PA*'.

[23] The Judge also agreed that the Appellant, as subcontractor of ENI, was within the contemplation of the parties to the PA and a beneficiary of **article 12 (3)** of the PA. To that extent, the Appellant can claim benefits under the PA. This is especially so when **section 5 of the Contracts Act 1960, Act 25** allows a designated person to enforce a contract that confers benefit on that designated person. To the extent that **article 12 (3)** of the PA provided for the taxation of subcontractors within a certain enclave, the appellant, as subcontractor to ENI was also entitled to rely on that benefit.
She also found support under the common law doctrine of privity of contract for third party beneficiaries.
[24] It was also her opinion that **article 26 (2)** of the PA provided fiscal stability for the contractor and by extension its subcontractors and any legislative change or administrative act that adversely affected the rights or obligations of the Contractor and subcontractor amounted to a breach of the PA by the State.

[25] Reading the PA together with **PNDCL 188** therefore, the learned high court judge agreed with Appellant that '*no tax or impost will apply to the income of the Appellant other than the 5% withholding tax for works and services rendered as subcontractor under the PA*'. And in this context, the court was clear that the reach of the fiscal stability clauses embodied in **article 12 (1) and (2) and 26 (2)** compelled construction of Appellant's tax liberties within the strict confines of only **section 27 (1) of PNDCL 188**. This construction would place the application of withholding tax to '*work or services for or in connection with a Petroleum Agreement* ' and nothing more.

[26] The court disagreed that the provisions of **section 27 (1) and (2) of PNDCL 188** absolved the Appellant as an entity or subcontractor under the PA from the general tax laws of the country just by reason of having performed a service under the PA.
Pointing out that it was not the case of the appellant that it was incorporated to provide services exclusively as a subcontractor to ENI under the PA, it was the reasoning of the court that any income accruing to the Appellant in Ghana that is unrelated to its activity as subcontractor under the PA is subject to tax, including corporate income tax and branch profit tax. Further, the privileges afforded under **section 27 (1) and (2) of PNDCLaw 188** were specifically designed to mitigate the cost exposure of the Contractor and not its subcontractors , who are not parties to the PA, but third party beneficiaries by reason of **article 12 (3).**

[27] The court drew attention to the anticipation of **PNDC Law 188 section 1,** and **section 3 (1) of Act 896** that assessable incomes of each person will be incomes deriving from employment, business or investment. This includes non-resident persons with permanent establishment in Ghana.
The court was also satisfied that **section 39 (5) of PNDCL 188,** despite the repeal, had itself been clear that the general tax laws of Ghana would apply unless a contractor is excluded from tax by a legislative instrument. And the statute was specific in not including subcontractors.

[28] A further nailing point made by the high court was to point out that **section 1** of the **PITL PNDCL 188**, as a general provision, and before the repeal of **SMCD 5** including **article 12 (2), of the PA** provided for income tax to be paid on chargeable income by '*every person carrying on petroleum operations*'.
Her conclusion was that '*it cannot be reasonably argued that the gross income of the Appellant (who relies on the benefit of the Contractor under the PA) is free from further taxes after the final 5% withholding tax*'

[29] The court also found that **section 135** of the **Income Tax Act, 2015, Act 896** intended to insulate the provisions of **PITL PNDCL 188** that cover a binding agreement that had not ended, been altered or relinquished by the time of enactment of **Act 896** in 2015. She therefore concluded that so far as it came to the services or work done under the OCTP main contract covered by the PA, the defendant could not impose income tax under any tax law on the Appellant's income arising Appellant's work for the petroleum exploration. But there was an exception. And the exception was as reiterated – beyond income obtained in respect of work or services for or in connection with the PA, the said provisions of **section 27 (1) and (2) of PNDCL 188** did not absolve the plaintiff from payment of tax under the general tax laws of the country.

Taxable Income

[30] The court held that '*any income accruing to the Appellant in Ghana that is unrelated to its activity as subcontractor under the PA is subject to tax*'. This includes Corporate Income Tax imposed on Appellant as a corporate entity, especially in view of the fact that Maersk Drillship (Ghana Branch) is a permanent establishment in Ghana by reason of its registration as an external company.

It was therefore fit and proper for the Respondent to apply the provisions of both **PNDCL 188** and **Act 896** in its assessment of the income of the Appellant outside of its income from the operations under the PA. The high court Judge also pointed to **article 12 (2) (ii)** of the PA which provides for Heliconia, the original contractor in the PA to pay Royalty and Income tax in accordance with the **PNDCL 188**

The court therefore held that the Appellant was right to have assessed and imposed Corporate Income Tax (CIT), and Branch Profit Tax (BPT) which are not specifically covered by **sections 27 (1) and (2) of PNDCL 188** on the plaintiff.

[31] Still on the nature of taxes that may be imposed on the Appellant, it was her opinion that

'the trap appellant seems to have fallen in with respect, is its misapprehension that the tax imposed on the Appellant in respect of its specific business activities (under the PA) extends over taxes payable by its shareholders. It is trite learning that a company is an entity, separate and distinct from its owners, for this reason tax imposed on shareholders of a company cannot be deemed taxes levied on the company as an entity (p. 28 of the judgment)

On branch profit tax, the trial Judge was satisfied that '*once branch profit earned by the shareholders of Appellant is income connected with Appellant as a permanent establishment registered under the tax laws of Ghana and the same accrues in or is derived from Ghana, it stands to reason that the same should be taxable just as dividends paid to the shareholders of a Ghanaian registered company are taxable*'. She pointed out that '*it is trite learning that a company is an entity, separate and distinct from its owners for this reason tax imposed on shareholders of a company cannot be deemed taxes levied on the company as an entity*'.

ORDERS

[32] On the above premises, the high court dismissed reliefs (i), (ii), (iii), (iv), (v), (ix), (xii) and deferred determination of reliefs (x) and (xi) pending submission of an auditor's report to reconcile accounts on VAT/NHIL and withholding tax figures pursuant to reliefs (vii) and (viii). She granted relief (vi) by declaring that the defendant is barred from imposing any income tax on plaintiff's income from services carried out under the PA.

In the final submission of the auditor's report, the high court entered judgment for agreed sums premised on reliefs (vii) and (viii) and refused to award costs.

APPEAL TO COURT OF APPEAL

[33] Dissatisfied, the Appellant appealed to the Court of Appeal.

GROUNDS OF APPEAL

a. The Judgment is against the weight of the evidence.

b. The learned Judge erred in law by holding in her judgment dated 8th of July 2022 and ruling dated 12th October 2022 that the Appellant's aggregate amount (income) earned from its works and services carried out under the Offshore Cape Three Points (OCTP) Petroleum Agreement is subject to branch profit tax after being subjected to 5% final withholding tax.

Particulars of error of law

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

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

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

c. The learned Judge misdirected herself in her judgment dated July 8, 2022, by holding that the Respondent was right in imposing additional taxes including branch profit tax on the aggregate amount earned by the Appellant from its works and services under the OCTP Petroleum Agreement after subjecting the aggregate amount to 5% final withholding tax.

Particulars of Misdirection

i. The learned Judge misdirected herself by holding that the Respondent was right in applying the provisions of the Internal Revenue Act, 2000 (Act 592) and the Income Tax Act, 2015 (Act 896) to the calculation of gains and profits of the Appellant emanating from the OCTP Petroleum Agreement notwithstanding section 27 of the Petroleum Income Tax Act, 1987 (P.N.D.C.L 188), section 135 of Act 896 and Articles 12.1, 12.3 and 26 of the OCTP Petroleum Agreement.

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

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

d. Further grounds of appeal would be filed upon receipt of the record of appeal.

Reliefs sought from the Court of Appeal included

a. An order setting aside the holding of the Appellate High Court in respect of Ground 3;

b. An order setting aside the Appellate High Court's decision in respect of reliefs (i), (ii), (iii) of the Judgment dated 8th July 2022.

c. An order setting aside the ruling of the Appellate High Court dated 12th October 2022

d. A declaration that on a true and proper interpretation of Article 12(1) and (3) of the Offshore Cape Three Points (OCTP) Petroleum Agreement and Sections 27 and 39(3) of the Petroleum Income Tax Act, 1987 (PNDCL 188) as well as

section 135 of Act 896, the Appellant's income earned from its works and services carried out under the Petroleum Agreement is exempt from further taxes including branch profit tax after payment of the 5% final withholding tax.

e. An order directed at the Respondent/Respondent to issue a revised tax assessment of the Appellant for 2015 to 2017 years of assessment taking into account all the reliefs granted by this Honourable Court.

f. An order directed at the Respondent/Respondent to refund any excess/tax credit arising from the tax assessment herein within 30 days from the date of Judgment, failing which the Statutory Rate of interest shall apply from the date of Judgment until the date of final refund of the excess tax.

g. Any other order or orders as this Honourable Court may deem fit.

COURT OF APPEAL

[34] The court of appeal distilled the salient issues for resolution into the three questions that the High Court had clearly evaluated to be the basis for the imposition of tax by the Respondent.

First Question was 'whose income is subject of the assessment in dispute'? In answering this question, the court was satisfied that **section 107(1) of Act 869** which reads in part as set out below satisfactorily answered the issue of whether the Appellant had corporate identity in Ghana for the purpose of taxation.

Principles of Taxation

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

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

[35] The Second Question was whether the Appellant's income arising from its Ghanaian permanent establishment is assessable income. And the answer was that the Respondent is correct to treat the Appellant's branch in Ghana as a separate legal entity and the earner of the income under the petroleum agreement. They also found that the Appellant's income from repatriated profits is also assessable for tax purpose. The Third Question is whether the income that was assessed by the Respondent is exempt from income tax. And the court's conclusion was that in relation to the income of the external company in Ghana, the Appellant can be said to have earned chargeable income '*other than income from petroleum operations*' as contemplated by **section 63 (3) of Act 896**. Further, '*since the income in dispute was repatriated to the Appellant from its Ghanaian permanent establishment, it follows that section 3 (2) (b)(ii) of Act 896 applies to the Appellant. The income of the Appellant in this dispute from its Ghanaian permanent establishment is therefore assessable income under the contemplation of the Income Tax Act 896*' (Pages 19 and 20 of judgment).

[36] The court concluded that '*a non-resident person, who earns repatriated profits (or investment income) through a Ghanaian permanent establishment (which is treated as a resident company) is liable to pay investment income tax on the repatriated profits. This is not exempted from the provisions of the Petroleum Agreement which applies to the business income (income from the provision of services) of the Ghanaian permanent establishment, and not the investment income of its parent company*'. (page 24)

[37] Once again dissatisfied, the Appellant came to the Supreme Court with the following grounds of Appeal.

Grounds of Appeal

1. The judgment is against the weight of the evidence.
2. The learned Justices of the Court of Appeal misdirected themselves by formulating unrelated issues without completely, effectively, and finally determining the grounds of appeal and the real issues in dispute.

Particulars of Misdirection

a. The learned Justices of the Court of Appeal misdirected themselves in an attempt to break down a complex and nuanced dispute into its simplest foundational issues.
b. The learned Justices' formulation of the issue, whose income is the subject matter of the dispute, was unrelated to the effective determination of the case.
c. The learned Justices of the Court of Appeal misdirected themselves in the formulation of the issue of whether the income in dispute is an assessable income.
d. The learned Justices of the Court of Appeal misdirected themselves in the formulation of the issue of whether the income is exempt from income tax.
e. The learned Justices of the Court of Appeal misdirected themselves in reducing the resolution of the whole tax dispute to three simple questions.

3. The learned Justices of the Court of Appeal committed an error of law by imposing branch profit tax under section 60 and 63 (3) of the Income Tax Act. 2015 (Act 896) in breach of section 39(3) of the Petroleum Income Tax Act, 1987 (P.N.D.C.L 188) and the fiscal stability clause in the Petroleum Agreement.

Particulars of error of law

a. The learned Justices of the Court of Appeal erred in law by holding that sections 60 and 63(3) of Act 896 apply to the income of the Appellant/Appellant/Appellant in breach of section 39(3) of PNDCL 188.
b. The learned Justices of the Court of Appeal erred in law by holding that section 3(2)(b)(ii) of Act 896 applies to the Appellant/Appellant/Appellant contrary to the fiscal stability clause in the Petroleum Agreement.

c. The learned Justices of the Court of Appeal erred in law by holding that the business income of the Appellant/Appellant/Appellant metamorphosed into investment income without a change in the base of the business income.

4. The learned Justices of the Court of Appeal erred in law by applying the general tax laws to petroleum operations in breach of section 39(5) of the Petroleum Income Tax Act, 1987 (P.N.D.C.L 188) and the fiscal stability clause in the Petroleum Agreement.

Particulars of error in law

a. The learned Justices of the Court of Appeal erred in law by holding that the provisions of Act 592 and Act 896 apply to the Appellant/Appellant/Appellant in breach of section 39(5) of PNDCL 188.

b. The learned Justices of the Court of Appeal erred in law by holding that the provisions of Act 592 and Act 896 apply to the Appellant/Appellant/Appellant contrary to the fiscal stability clause in the Petroleum Agreement.

c. The learned Justices of the Court of Appeal erred in law by misconstruing section 39(5) of PNDCL 188 to apply the general tax laws to the Appellant/Appellant/Appellant.

5. The learned Justices of the Court of Appeal erred in law by misapprehending and misapplying the principle of Ghanaian Permanent Establishment.

Particulars of error in law

a. The learned Justices of the Court of Appeal erred in law by holding that the Ghanaian permanent establishment is the party to the Subcontract instead of the actual party, who is the non-resident entity.

b. The learned Justices of the Court of Appeal erred in law by holding that the Ghanaian permanent establishment is in fact a separate legal entity from the non-resident entity based in Singapore both of which are one and the same entity.

c. The learned Justices of the Court of Appeal erred in law by holding that the Ghanaian permanent establishment is an incorporated entity in Ghana instead of a registration of its business in Ghana.

6. Additional ground/s may be filed on receipt of the Record of Appeal.

RELIEFS SOUGHT FROM THE SUPREME COURT

The Appellant/Appellant/Appellant is seeking the following reliefs:

i. An order setting aside the whole Judgment on the Appeal and holding one of the Cross-Appeal.
ii. An order setting aside reliefs (i), (ii), (iii), (iv), and (v) of the Appellate High Court.
iii. An order granting the Appellant/Appellant/Appellant reliefs (i), (ii), (iii), (iv), and (v) set out in the Notice of Appeal filed in the High Court dated 8th November 2021.
iv. An order directed at the Respondent/Respondent/Respondent to issue a revised tax assessment of the Appellant/Appellant/Appellant for 2015 to 2017 years of assessment taking into account all the reliefs granted by this Honourable Court.
v. An order directed at the Respondent/Respondent/Respondent to refund any excess/tax credit arising from the tax assessment in relief (iv) herein within 30 days from the date of Judgment, failing which the Bank of Ghana rediscount rate shall apply from the date of Judgment until the date of final payment.
vi. Any other order or orders as this Honourable Court may deem fit.

OUR CONSIDERATION AND ANALYSIS

[38] It is important to state at the outset that the Appellant has managed to present the very simple circumstances identified by the Respondent as a complicated situation. The complication introduced into the dispute lies in the three contexts that have been dealt with at all the levels of decision making below us.

Corporate identity

While absolutely agreeing with the Appellant that the Court of Appeal erred by holding that the Ghanaian permanent establishment is the party to the Subcontract instead of the actual party, who is the non-resident entity; and holding that the Ghanaian permanent establishment is in fact a separate legal entity from the non-resident entity based in Singapore instead of being one and the same entity; we are absolutely satisfied that the Appellant is still urging an obfuscation of the very simple context for taxation that the Respondent set out correctly, and this identified error that the Court of appeal fell into does not change the correctness of the Respondent's positions and the final outcome of the judgment of the court of appeal.

[39] Why do we say so? Because simply, the Respondent never said, and the records never showed that it is the the Ghanaian permanent establishment that was the party to the Subcontract. We go back to the background to this opinion that we set out in these words:

> '*The first of the subcontracting companies is the Appellant before this court Maersk Drillship IV Singapore Pte Limited (hereafter referred to as Appellant or Maersk Drillship Singapore). The Appellant is a Singaporean company, with a branch of the company in Ghana registered as an external company with permanent establishment in Ghana.*
>
> *The second subcontractor is a Ghanaian company registered in Ghana called Maersk Rig World Ghana Limited (hereafter referred to as Maersk Rig World) It is noteworthy that Maersk Rigworld Ltd is owned 65% by Maersk Drillship IV Singapore Pte Limited, (the Appellant herein) and 35% owned by Rigworld International Services Limited, a Ghanaian company. For the purposes of executing the subcontract with ENI, the Appellant Maersk Drillship Singapore entered into a Joint Venture arrangement with its subsidiary Maersk Rigworld Ltd and the two worked as separate corporate entities as Joint Venturers for ENI.*

[40] From this record stated by the Respondent, it is clear that it is the Appellant, an external company, that engaged in a joint venture for the sub contract. And it entered into the joint venture with its Ghanaian subsidiary Maersk Rigworld as a partner. And this context, which the high court got right and the court of appeal got wrong, did not make the taxation decision of the Respondent wrong.

Because as has been rightly pointed out at all levels, Appellant's shareholding in Maersk Rigworld Ltd constitutes nothing other than investment in the company. That subsidiary, Maersk Rigworld Ltd, has a separate legal identity. That subsidiary has earned income in Ghana and repatriated moneys to its majority shareholder, the Appellant, in Singapore. The repatriated sum identified in the Respondent's communication, is $166,748,098 million. (see bottom of page 151 of Volume 1)

[41] It is this income that was taxed and not the business income of Appellant in its separate work as joint venturer on the ENI project, and the Respondent was very clear about the basis for the taxation in its final Objection Decision that triggered this appeal.

It is for the above reason that though we agree with Appellant that the Court of Appeal had misdirected itself in the evaluation that the Appellant carried out its subcontracting work through its Ghanaian permanent establishment, we are satisfied that the Respondent did not urge such a position as the basis for the tax imposed.

[42] The Respondent rightly evaluated that the Appellant, as a subcontractor entitled to application of the fiscal stability clauses in the PA, was not entitled to be charged only 5% withholding tax for the very reason that neither **section 27 (1)** and **section 39 of the PITL PNDCL 188**, nor **article 12** of the PA, when read together, meant to make the application of withholding tax as the final tax on every form of income derived by the Appellant from within the jurisdiction. This is the core thrust of the Respondent's imposition of the various taxes, and our consideration and analyses agree with it.

Section 39 of the PITL PNDCL 188

[43] We will start with section 39.

The dates in this saga centered on statute and contract are significant. As earlier analyzed, **section 39 of SMCD 5** ceased to have application in the **PITL PNDCL 188** with the passage of **Act 592** in 2001. SMCD 5 of 1975, was the basis of dividends being removed from tax obligations under section 39 (3) of the PITL 1987. The repeal of SMCD 5 occurred even earlier than execution of the Heliconia/ENI/GNPC petroleum agreement in 2005. Act 592 came into effect on 1st January 2001.
So even before the Petroleum Agreement whose benefits are being sought to be enforced was conceived and entered into in 2005, the protection over taxation of dividends found in **section 39 (3) of the PITL** through SMCD 5 had been become spent.

[44] We are satisfied that this is why the Statute Law Revisioner notes at **Section 39 of the PITA** that the provision is 'spent' and not 'repealed'. The relevance of **section 39 (3)** in 2005 had become spent by the enactment of Act 592 which came into effect on 1st January 2001. This is what makes it critical to appreciate that there was no protection of dividends from taxation under **section 39 (3) of the PITL** by the time the agreement that the Appellant is seeking shelter under as a third party beneficiary was even signed.

[45]The issue for the Respondent therefore was : Was the Appellant an anticipated subject/party in the Petroleum Agreement? And the answer in the PRESUMPTIONS of the Audit was 'yes', because of article **12 (1)**. The Appellant was anticipated to be affected by the terms of the PA as a subcontractor under **article 12 (1) and (3).** The Appellant was also anticipated to be affected by the fiscal stability clause in **article 26 (2)** of the PA.

[46] However, these presumptions were rebuttable by the proper application of law. And it is easy to see that to the extent that the protection from taxation of dividend in investments in petroleum businesses was repealed at a time when the PA had not even been signed, it cannot be said that it was within the contemplation of the PA that the

ENI or its subcontractors would not be subject to payment of income tax or they would be protected from taxation of dividends within Ghana, because of the 'spent' **section 39 of PNDCL 188**.

Article 12 (2) of the PA

[47] And this is especially so when the PA itself recognized the operation of income tax on the income of Heliconia/ENI as the principal to the PA in **article 12 (2).**

It is interesting that the submissions of Appellant seem highly focused on **article 12 (1)** and **article 12 (3)** of the PA and ignore **article 12 (2).** Setting out only sub clauses (i), (ii), (iii) and (vi) will suffice. They provide:

12.2 *Contractor shall be subject to the following (every emphasis ours now)*

i. royalty as provided for in article 10. 1.a

ii. Income Tax in accordance with the Petroleum Income Tax Law 1987 (PNDCL 188) levied at the rate of thirty five percet (35%)

iii. Additional Oil Entitlement as provided for in Article 10.1 (b)

vi. Taxes, duties fees or other inposts of a minor nature and amount inso far as they do not relate to the stamping and registration of this (1) Agreement, (2) any assignment of interest in this Agreement, or (3) any contract in respect of Petroleum Operations between Contractor any subcontractor.

[48] A simple reading of **article 12 (2)** leaves no doubt that it was not the intention of the makers of the Heliconia/ENI contract to protect the company and its affiliates from the specific array of royalties, taxes, duties, fees etc very expressly laid out in **article 12 (2)**. By operation of **article 12 (2)**, even ENI, the main contractor and party to the petroleum agreement, was not protected from income tax and other forms of tax on its income and profits.

By the very first rule of interpretation of statutes and agreements to read statutes and agreements as a whole, and lauded succinctly in cases such as….., it was never anticipated that either ENI or its affiliates and subcontractors would be protected from every form of tax, except withholding tax.

[49] Our humble view is that it would be an absurd interpretation of article 12, if article 12 (3) was read as subjecting the Contractor's subcontractors to only withholding tax while the main contractor, the principal to the PA, was to pay income tax under **article 12 (2).** If **article 12 (2)** made the main contractor subject to payment of income tax, then **article 12 (1)** by application could not confer a benefit that the contractor could have.
[49] Thus the provisions of the **Internal Revenue Act of 2000** on different forms of taxes, except as excluded from **article 12 (2)** of the PA and other related clauses, were definitely intended to apply to ENI itself and its affiliates. Indeed, the contract is so emphatic that taxation and imposts against the contractor are to be applied that it uses the mandatory 'shall' in **article 12 (2).**

[50] Since this is the clear meaning of article 12 (2), what is the import of **article 12 (3)** that Appellant has set camp on? For ease of analysis, we will repeat it here.
Article 12(3): *Save for withholding tax at a rate of five percent (5%) from the aggregate amount due to any Subcontractor if and when required by Section 27(1) of the Petroleum Income Tax Law, the Contractor shall not be obliged to withhold any amount in respect of tax from any sum due from contractor to any Subcontractor.* (emphasis ours)

[51] To our mind, THE MOST CRITICAL POINT OF NOTE in this dispute is that the Appellant has gone on to stretch **article 12 (3)** to cover all of **section 27 of PNDCL 188**, when **article 12 (3)** only references **section 27 (1) of PNDCL 188**.
Article 12 (3) leaves no doubt that the rate for imposition of withholding tax is supposed to stand at 5% for subcontractors of ENI within the context of the PA. Beyond that, **article 12 (3)** does not pretend to provide for any other form of taxes.

[52] **Article 12 (3)** clarifies that the Contractor is obliged to withhold tax of 5% from the aggregate amount due to any subcontractor if and when required under **Section 27 (1)** of the **Petroleum Income Tax Law PNDC Law 188**. Read facetiously, and purposively, **Section 27 (1)** provides for the imposition and collection of withholding

tax by a Contractor while **article 12 (3)** provides for the rate of tax to be the 5% in the PA between ENI and its subcontractors. Beyond this, the two provisions do not bind together to provide any other tax enclave.

Section 27 of PNDCL 188

[53] This brings us to an examination of the clear words of the rest of section 27 of PNDCL 188. The objective of the Act itself is stated as:

'*AN ACT to provide for the payment of tax on petroleum operations and for related matters'*. (emphasis ours)

Section 27(1) - Withholding tax on amounts due to subcontractors.

Where under the terms of a contract, an amount due to a subcontractor in respect of work or services for or in connection with a petroleum agreement the person liable under that contract to make payment to the subcontractor shall withhold from the aggregate amount due to the subcontractor the percentage of the aggregate amount due that may be specified in the petroleum agreement and the amount so withheld shall be paid to the commissioner and payment of that amount shall have the effect provided for in subsection (3).

[54] This is all that **article 12 (3)** did in the words,

Article 12(3):

Save for withholding tax at a rate of five percent (5%) from the aggregate amount due to any Subcontractor if and when required by Section 27(1) of the Petroleum Income Tax Law, Contractor shall not be obliged to withhold any amount in respect of tax from any sum due from contractor to any Subcontractor.

Without a reference to the rest of section 27, the Appellant has roped in the rest of section 27 of PNDCL 188 as insulating it from the payments of every other tax. So we will look at the remainder of section 27.

Section 27(3) provides:

When an amount has been withheld from an aggregate amount due to a subcontractor pursuant to subsection (1), the subcontractor is not liable, in respect of that aggregate amount, for tax under any other law in force in the Republic.

[55] It is clear from the words 'in respect of **that** aggregate amount' that where a subcontractor has paid withholding tax on any payments received in relation to work or supplies pursuant to petroleum operations, it is not bound to pay any further tax on those payments, including the aggregated payments. We can only surmise that this is to ensure that there are no double taxes imposed on the specific aggregate amounts received by subcontractors working for the contractor, when the aggregate amount has been first subjected to withholding tax from a contractor.

[56] It must be recalled that under **article 12 (2),** the liabilities of the Contractor have been spelt out to include royalties and all the other specific taxes and imposts spelt out in **article 12 (2)**. When **article 12 (2) and article 12 (3)** are read together, the intention of the makers of the PA become clear. That notwithstanding the array of taxes and imposts placed on the Contractor, as between the Contractor and its subcontractors, the obligation of the Contractor is only to apply withholding tax for the state. When **article 12 (3)** and **section 27 (3)** are read together, the 'aggregate amount' paid by the Contractor to the subcontractor is insulated from double taxation.

[57] But the Appellant is also seeking insulation from taxation under **section 27 (4)** and **section 27 (5)** of **PITL PNDC L188** and urging that there can be no calculations on the gains and profits of a non-resident subcontractor of work or services for or in connection with a petroleum agreement by reason of these provisions. They read:

Section 27(4)

The relevant provisions of the Internal Revenue Act, 2000 (Act 592) do not apply to a contract for the supply of goods or the provision of work or services for or in connection with petroleum operations.

Section 27(5)

The relevant provisions of the Internal Revenue Act, 2000 (Act 592) do not apply to the calculation of the gains and profits of a person who is a non-resident sub-contractor of work or services for or in connection with a petroleum agreement.

[58] Their reading can only invoke the appreciation that since the specific context of section 27 is 'withholding tax on amounts due to subcontractors' and these are provisions of general application, the 'relevant provisions of Act 592' referred to in Section 27 (4) and 27 (5) can therefore only be read within the specific context of the regime on withholding taxes in Act 592, and not stretched to confer finality of taxation on the Appellant after the application of withholding tax. We therefore agree with the high court and court of appeal that **sections 27 (4) and 27 (5),** without more, could not insulate the Appellant from the general administration of taxes in the jurisdiction.

Exigible tax

[59] We have no difficulty in agreeing with the learned Justices below us that when it comes to liability for tax on assessable income, the Appellant earned three types of income from Ghana.

First as a subcontractor to ENI. In that role, it was to be charged withholding tax under **article 12 (3).** That rate of withholding tax was frozen by the fiscal stability clause in **article 26.** The Respondent has not contested this position and the courts below have upheld this position. This consensus therefore has no effect on the judgment of the court of appeal.

[60] The second type of income earned by the Appellant was as a shareholder in Maersk Rigworld Ltd. That income is dividend and or investment income. This is separate and distinct from income and costs of Maersk Drillship Singapore when it worked directly as a subcontractor to ENI. To the extent that Maersk Rigworld Ltd

earned any income in Ghana for its shareholders, the profits it repatriated to its 65% shareholder Maersk Drillship Singapore was taxable income and the rate and mode of taxation was not subject to **section 27** of **PNDCL 188**. That provision, applied through **article 12 (3)**, was relevant only in Appellant's income as a subcontractor to ENI. We recognize that the Appellant's case is that apart from the aggregate amounts it received working as subcontractor for ENI, it earned no other money in the jurisdiction.

[61] What the record shows is that the 'Subcontractor' of ENI was a joint venture, and not only the Appellant. The subcontractor was made up of the Appellant and Maersk Rigworld Ltd, a company in which the Appellant held majority shares. Indeed, the record of appeal includes (on page 17 of Volume 1) a parent company guarantee in favor of its own operations with ENI and the operations of Maersk Rigworld Ghana Limited with ENI. The Appellant cannot refute this.

[62]The third source of taxation that both the high court and court of appeal recognized and we concur on is the income of the branch office of the Appellant in Ghana. As delineated by the learned Justices of the Court of Appeal, **section 107 of Act 896**, (and indeed the Companies Act as amended) treat external companies in Ghana as separate legal entities for the purpose of taxation.
Thus, even if the profit or income on investments and or dividends from Maersk Rigworld to its 65% shareholder, the Appellant, was held by the Appellant branch registered as an external company in Ghana, that external company was required to be taxed for income deriving from Ghana. It is in this context that we found no need to belabor the error that the Court of Appeal opined that the appellant conducted its subcontracting work through its Ghana branch, when the agreement with ENI makes clear that that the work would be done by the Appellant outside of Ghana.

[63] Whatever the Ghana branch of the Appellant company earned during its life time and on its own, to the extent that the source is from Ghana, is taxable, and it is the duty of the Respondent to determine that sum.

[64] We are therefore satisfied that under company law, contracts law, the law on proper construction of agreements and tax laws of Ghana, the appellant's invitation to apply allegedly 'nuanced' constructions on **article 12 and article 26** of the PA, the import of the repeal of **section 39 of PITL in the PITA,** and the effect of the fiscal stability clause of the agreement, does not stand the test of exonerating the Appellant from the tax liability properly levied by the Respondent.

CONCLUSION

We find no need to consider the specifics of the figures and orders of the court of appeal because these figures were laboriously reviewed by the parties together with an agreed auditor and submitted to the high court prior to entry of judgment. We dismiss the appeal in its entirety.

(SGD.) G. SACKEY TORKORNOO (MRS.)
(CHIEF JUSTICE)

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