IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: DOTSE JSC (PRESIDING)

PWAMANG JSC

AMEGATCHER JSC

PROF. KOTEY JSC

OWUSU (MS.) JSC

LOVELACE-JOHNSON (MS.) JSC

PROF. MENSA-BONSU (MRS.) JSC

WRIT NO.

J1/08/2021

30TH NOVEMBER, 2022

RICHARD AMO-HENE ……. PLAINTIFF

VRS

1. GHANA REVENUE AUTHORITY
2. ATTORNEY-GENERAL ……. DEFENDANTS
3. JUDICIAL SERVICE

JUDGMENT

MAJORITY DECISION

AMEGATCHER JSC:-

INTRODUCTION

By his writ, the plaintiff seeks the following reliefs from this court:

a) A declaration that Section 42(5) (b) of the Revenue Administration Act, 2016, Act 915(as amended) which requires a taxpayer to pay 30% of all outstanding taxes (in case of other taxes) before an objection to a tax decision can be entertained by the 1st Defendant is inconsistent with and in contravention of articles 2 (1), 17(1), 125(2)19(2)(c) 33(1) 33(5), 130(1), 132, 133(1), 140 of the 1992 Constitution which guarantee a person's right of access to court participation in the administration of justice and the presumption of innocence until proven or pleaded guilty hence consequently null, void and unenforceable.

b) A declaration that Order 54 rule 4(1) of the High Court (Civil Procedure) Rules, 2004 C.I. 47 which requires a taxpayer to pay 25% of the disputed tax contained in the notice of assessment before an appeal can be entertained by the High Court is inconsistent with and in contravention of articles 2(1), 17(1) 125(2), 19(2)(c), 33(1), 33(5), 130(1), 132, 133(1), 140, of the 1992 Constitution which guarantees a person's right of access to the court consequently null, void and enforceable.

c) An order setting aside Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) as being inconsistent with the letter and spirit of the 1992 Constitution and consequently null and void.

d) An order setting aside Order 54 rule 4 (1) of the High Court (Civil Procedure) Rules, 2004 C. I. 47 as being inconsistent with the letter and spirit of the 1992 Constitution and consequently null and void.

e) An order of perpetual injunction restraining the Defendants, their agents or servants or assigns or judicial office under the pretext of acting under Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) and Order 54 rule 4 (1)) of the High Court (Civil Procedure) Rules, 2004 C. I 47 from hearing or attending to an appeal of a tax decision lodged with the 1st Defendant or the 3rd Defendant under the veneer that the mandatory money requirement has not been complied with.

PLAINTIFF'S CASE

It is the case of the plaintiff that a person is presumed to be innocent until his guilt is proved beyond a reasonable doubt. To ask the taxpayer to pay 30% of the disputed tax is akin to saying the taxpayer is 30% culpable of the tax in dispute. The plaintiff submits that the scope of the right of access to the courts was established for a fair and proper administration of justice. Thus, there are two sides to the concept of access to justice; the first is the ability to walk into the court and initiate a cause of action, and, secondly ability to effectively participate in proceedings. The plaintiff then did a comparative study of access to the courts in other jurisdictions and submits that in Ghana the Directive Principles of State Policy particularly article 35(3) of the Constitution, 1992 entitled citizens to access public facilities and services which can be read to include the courts without any undue fetter or impediment. It is further the case of the plaintiff that the requirement of the pay now and argue later rule which is a condition before tax objection or tax appeal to the courts can be made clearly undermines the fundamental

principles of safeguarding the constitution which articles 2(1) and 130(1) of the Constitution, 1992 stands for. It also undermines the right and duty of a citizen to defend the constitution under Articles 3(4) and 41(b) and that the framers of the Constitution did not envisage a situation where pay now and argue later will be a sine qua non for constitutional litigation in Ghana.

The plaintiff also argues that it is against the spirit of the Constitution, 1992 to demand money (pay now and argue later) as a qualification for enforcing the fundamental rights of citizens. The plaintiff referred us to cases on the issue decided in other Commonwealth countries such as **Metcash Trading Ltd v South African Revenue Services Commission [2000] 11 WLUK 764**, **Fuelex Ltd v Uganda Revenue Authority [2020] UGCC 10,** and **Capstone 556 (Pty) Ltd v Commissioner, South Africa Revenue Service [2016] ZASCA 2.**

Finally, according to the plaintiff, the combined effect of Section 42(5)(b) of Act 915 and Order 54 rule 4(1) is to inhibit a person's right to access the courts, participation in the administration of justice despite the constitutional provision of innocence until guilt proved and, therefore, sins against the Constitution and unconstitutional.

DEFENDANT'S CASE

The defendants in their defence raised a preliminary issue on the jurisdiction of this court to hear the writ. According to the defendants, the plaintiff has not properly invoked the original jurisdiction of this Honourable Court. This is because according to the defendants, the plaintiff is seeking enforcement of the human rights provisions of the Constitution, 1992 which is available in the High Court but has cleverly masqueraded as an interpretation or enforcement matter. Hence, where no genuine

constitutional interpretation or enforcement of the Constitution issue exists, then the High Court is the court that is clothed with original jurisdiction and not the Supreme Court.

On the merits of the plaintiff's writ, the defendants submit that the pay now and argue later concept balances the taxpayer's rights against the need for effective settlement of tax debts while addressing the need to limit the ability of recalcitrant taxpayers to use the objection and appeal procedure strategically to defer payment of their taxes. It is a call on the citizens to pay the right taxes, and to pay them timeously is a duty imposed by the Constitution itself. It is further the case of the defendants that the overriding purpose of the provisions of Section 42(5) of Act 915 and Order 54 rule 4 is to secure revenue to run the machinery of the state while the dispute relating to the tax issue is resolved. Hence, Section 42 of Act 915 and Order 54 rule 4 do not contravene provisions of the Constitution that guarantee a right to a fair hearing and a person's right of access to the courts neither does it amount to an abuse of discretionary power as claimed by the plaintiff. The defendants then concluded that the plaintiff has failed to demonstrate that the above statutory provisions are in contravention of any provision of the Constitution and that plaintiff's action should be dismissed.

MEMORANDUM OF AGREED ISSUES

The following memorandum of issues was filed by the parties and adopted by the Court.

1. Whether or not the plaintiff has properly invoked the original jurisdiction of the Supreme Court.
2. Whether or not Section 42(5)(b) of the Revenue Administration Act, 2016 which requires a taxpayer to pay all outstanding taxes including 30% of the tax in

dispute (in the case of other taxes) before an objection to a tax decision can be entertained by the 1st defendant is inconsistent with the spirit and letter of articles 2(1), 17(1), 125(2), 19(2)(c), 33(1), 132, 133(1), 140 of the 1992 Constitution and to the extent of the inconsistency void.

3. Whether or not Order 54 rule 4(1) of the High Court (Civil Procedure) Rules, 2004 C.I. 47 which requires a taxpayer to pay an amount not less than 25% of the amount payable in the first quarter of that year of assessment as contained in the notice of assessment before an appeal can be entertained by the High Court is inconsistent with the spirit and letter of articles 2(1), 17(1), 125(2), 19(2)(c), 33(1), 33(5), 130(1), 132, 133(1), 140 of the 1992 Constitution and impedes a person's right of access to court, participation in the administration of justice and the presumption of innocence until proven or pleaded guilty and to the extent of the inconsistency void.

ISSUE 1

On the issue of whether the original jurisdiction of this court has been properly invoked the crux of the matter is the invitation by the plaintiff to declare unconstitutional the legislation which compels the taxpayer to pay 30% of assessed tax in dispute before an objection to a tax decision can be entertained by the Commissioner General of the Ghana Revenue Authority. This Court differently constituted speaking through Torkornoo JSC in a similar preliminary issue raised by the learned Attorney General in writ no J1/23/2021 intituled **Kwasi Afrifa v Ghana Revenue Authority & Another [SC**

30th November 2022 Unreported] considered the submission of the parties and ruled earlier today as follows:

"It is therefore clear that for the jurisdiction of this court granted by Article 2 (1) to be invoked where there is the allegation that legislation is inconsistent with the Constitution, there is a doctrinal need for the identification of the offending sections of the enactment, or the whole enactment if that is the case put forward, and the sacred provisions of the Constitution sought to be preserved, no matter how wide a scope these provisions are. It is upon these two pillars that the suit around the identifiable dispute in relation to these two sets of provisions can be housed. The dispute may be in relation to different interpretations put on the same constitutional provision because of imprecision and ambiguity, and its effect on the enactment in question, or allegations of inconsistency or conflict between the letter or effect of provisions of the enactment with the clear meaning of identified provisions of the Constitution……From the opening paragraphs of the Plaintiff's case, it is understood that the action seeks to invoke this court's jurisdiction under Article 2 (1) of the Constitution to determine whether the powers conferred on the tax authorities through a plethora of provisions in Act 915 are inconsistent with the exclusive constitutional mandate of the judiciary in article 125, and whether the impugned provisions violate the guaranteed rights of citizens under the Constitution under Chapter 5 of the Constitution, as well as the spirit of the Constitution expressed in Chapter 6. From this premise, this court will evaluate the submissions and reliefs presented."

The Court in the Afrifa writ and Reference cases assumed jurisdiction over the constitutionality of Section 42 of Act 915 and dealt with the parties' submissions on their merit. We adopt the reasoning of this court in the Afrifa case and dismiss the

objection raised in relief 1 by the learned Attorney-General concerning our jurisdiction to hear and determine this writ.

ISSUE 2

The second issue for determination is the constitutionality of Section 42(5)(b) of the Revenue Administration Act, 2016 which requires a taxpayer to pay all outstanding taxes including 30% of the tax in dispute before an objection to a tax decision can be entertained by the Commissioner General. According to the plaintiff, Section 42 of Act 915 is inconsistent with the spirit and letter of articles 2(1), 17(1), 125(2), 19(2)(c), 33(1), 132, 133(1), 140 of the 1992 Constitution and to the extent of the inconsistency is void.

Earlier today, this Court differently constituted interpreted in its judgment the relevant constitutional provisions urged on us alongside Section 42(5) of the Revenue Administration Act, 2016 Act 915 following a reference to it by the Court of Appeal, Kumasi in writ number **J6/02/2022 intituled Kwasi Afrifa vrs Ghana Revenue Authority & Anor [SC 30th November 2022 Unreported].** The reference was formulated as follows:

"Whether upon a true and proper interpretation of Article 23 of the 1992 Constitution, section 42 (5) of the Revenue Administration Act, 2016 Act 915 is inconsistent with and violative of the constitutional right to administrative justice guaranteed under the provisions of Article 23 of the 1992 Constitution."

In a well-reasoned opinion on the reference, Torkornoo JSC speaking on behalf of the Court considered the various constitutional provisions, statutes, and case law and concluded as follows:

"**We are of the firm view that if any citizen has any objection to any tax decision, section 42(5) of Act 915 does not create a fetter to the due hearing of that objection, because of the rest of the dispute resolution provisions under Act 915. To the question under reference, our answer is that upon a true and proper interpretation of Article 23 of the 1992 Constitution, section 42 (5) of the Revenue Administration Act, 2016 Act 915 is not inconsistent with and violative of the constitutional right to administrative justice guaranteed under the provisions of Article 23 of the 1992 Constitution.**

Further, to the extent that any 'tax decision' taken by the Commissioner General is an administrative decision, and tax decisions are by Act 915 made subject to objection, judicial review, and appeal, the regime provided under Act 915 for the regulation of tax decisions by the Commissioner General passes the test of constitutionality."

In his concurring opinion in the Afrifa Reference case, Pwamang JSC also opined as follows:

"Section 42(5) of Act 915 may be inconsistent with article 23, as conceded by the respondent in its statement of case, but as to whether the inconsistency is justifiable under article 12(2) of the Constitution is the real issue……Accordingly, my answer to the reference is; on a proper interpretation of subsection (5) of section 42 of Act 915 within the context of subsections (6) and (7) thereof, it is not inconsistent with a true and proper interpretation of article 23 of the Constitution. Consequently, the letter of the respondent demanding that the applicant paid 30% of the assessed tax before it would entertain applicant's objection was valid."

Similar cases, statutes, and constitutional provisions have also been urged on us in this writ, which Pwamang JSC has addressed in his opinion in this case. We agree with the interpretation this court delivered itself earlier in the day to Section 42(5) of Act 915. In view of the fact that this writ calls on us to interpret the same constitutional provisions in the light of the passage by Parliament of the section of Act 915 in contention, we adopt the reasoning of this court in the Afrifa case (supra). Accordingly, we dismiss reliefs a, c, and e sought by the plaintiff in this writ.

ISSUE 3

The constitutionality of Order 54 rule 4(1) of the High Court (Civil Procedure) Rules, 2004 C.I. 47 is what issue 3 is about. The rule requires a taxpayer to pay an amount not less than 25% of the amount payable in the first quarter of that year of assessment as contained in the notice of assessment before an appeal can be entertained by the High Court. The plaintiff submits that this is inconsistent with the spirit and letter of articles 2(1), 17(1), 125(2), 19(2)(c), 33(1), 33(5), 130(1), 132, 133(1), 140 of the 1992 Constitution and impedes a person's right of access to court, a person's participation in the administration of justice. It also defeats the presumption of innocence until proven or pleaded guilty entrenched in our jurisprudence and to that extent it is inconsistent with the Constitution and, therefore, void.

This court, again, differently constituted considered this morning a similar writ questioning the constitutionality of Order 54 rule 4 in writ no J1/7/2021 intituled **Export Finance Company Limited v Ghana Revenue Authority and Anor [SC 30th November 2022 Unreported].** The Court held as follows:

"We agree with the rationale behind this policy and as a court, would be wary to pronounce legislation that promotes the welfare of the state to be unconstitutional unless there is the clearest evidence on which such a pronouncement could be based. In the same vain, we do not intend to accede to any interpretation of the law that will open wide the floodgates for the citizenry to take advantage and avoid or delay meeting their tax obligations to the state. Therefore, where the provisions of legislation have been carefully crafted to promote the state's welfare and eliminate public mischief of tax avoidance as we have in the legislation under discussion, we would not accede to any invitation to strike it down as unconstitutional, void, and of no effect……. There is a clear public policy rationale against allowing taxpayers and citizens in general to delay or evade their obligations to the state established in statutory rules by taking advantage of loopholes in the law or the slow pace of our justice delivery system to deny the state the needed revenue for developmental purposes……. On that basis, it is our opinion that the Rules of Court Committee did not act unconstitutionally in inserting rule 4 into Order 54 when it was formulating the rules and procedures regulating tax appeals in the country.

Our position is Order 54 rule 4 is in the rules to complement the provisions of Section 42 of Act 915. However, Order 54 rule 4 being a subsidiary legislation must yield to the parent legislation in all cases. This implies that where an appellant to a tax assessment by the Commissioner General had complied with the requirements of Section 42 of Act 915, that appellant is not required to comply with Order 54 rule 4 before invoking the appellate jurisdiction of the High Court in a tax appeal. An appellant to a tax appeal would only be required to comply with rule 4 of Order 54 if, at the time of invoking the jurisdiction of the High Court, that appellant had not complied with Section 42 of Act 915. This interpretation accords with common sense and fairness for it could not have been the intention of the lawmaker to compel a prospective appellant to a tax

appeal to pay the percentage twice before invoking the jurisdiction of the High Court. See the decisions of the Court of Appeal in Beiersdorf Gh. Ltd vrs The Commissioner General, Ghana Revenue Authority [H1/140/2019 (unreported) 5th December 2019] and Fan Milk Limited v Commissioner General, Ghana Revenue Authority [CM/TAX/0004/18 (unreported) 7th April 2022].”

The arguments urged on us by the plaintiff in this writ and the references to case law and constitutional provisions are not different from that argued and decided by this court earlier this morning in the Export Finance case referred to above. We do not intend to depart from the position we delivered ourselves of when we interpreted the relevant provisions of the Constitution which were alleged to have been sinned against by the passage of Order 54 rule 4 of C.I. 47.

Since this writ also invites us to interpret the same constitutional provisions and determine its constitutionality test when weighed against Order 54 rule 4 of C.I. 47, we, after a careful analysis adopt the reasoning of this court in the Export Finance case (supra). Accordingly, we dismiss as well reliefs ‘b’ and ‘d’ sought by the plaintiff in this writ.

The plaintiff’s action, therefore, fails in its entirety and is accordingly dismissed.

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)

(JUSTICE OF THE SUPREME COURT)

PROF. H.J.A.N. MENSA-BONSU (MRS.)

(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION:-

PWAMANG, JSC:-

My Lords, on 14th April, 2021, the plaintiff filed a writ in the Supreme Court pursuant to articles 2(1) and 130(1) of the Constitution, 1992 and claimed for the following reliefs;

f) A declaration that Section 42(5) (b) of the Revenue Administration Act, 2016, Act 915(as amended) which requires a taxpayer to pay 30% of all outstanding taxes (in

case of other taxes) before an objection to a tax decision can be entertained by the 1st Defendant is inconsistent with and in contravention of articles 2 (1), 17(1), 125(2)19(2)(c), 33(1), 33(5), 130(1), 132, 133(1) and 140 of the 1992 Constitution which guarantee a person's right of access to court, participation in the administration of justice and the presumption of innocence until proven or pleaded guilty hence consequently null, void and unenforceable.

g) A declaration that Order 54 rule 4(1) of the High Court (Civil Procedure) Rules, 2004 C.I. 47 which requires a taxpayer to pay 25% of the disputed tax contained in the notice of assessment before an appeal can be entertained by the High Court is inconsistent with and in contravention of articles 2(1), 17(1) 125(2), 19(2)(c), 33(1), 33(5), 130(1), 132, 133(1) and 140 of the 1992 Constitution which guarantees a person's right of access to the court consequently null, void and enforceable.

h) An order setting aside Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) as being inconsistent with the letter and spirit of the 1992 Constitution and consequently null and void.

i) An order setting aside Order 54 rule 4 (1) of the High Court (Civil Procedure) Rules, 2004 C. I. 47 as being inconsistent with the letter and spirit of the 1992 Constitution and consequently null and void.

j) An order of perpetual injunction restraining the Defendants, their agents or servants or assigns or judicial office under the pretext of acting under Section 42(5)(b) of the Revenue Administration Act, 2016, Act 915 (as amended) and Order 54 rule 4 (1) of the High Court (Civil Procedure) Rules, 2004 C. I. 47 from hearing or attending to an appeal of a tax decision lodged with the 1st Defendant or the 3rd

Defendant under the veneer that the mandatory money requirement has not been complied with.

The writ was accompanied by a statement of case in which the plaintiff argued his case and referred to decided cases, both local and foreign. Upon service, the 1st defendant responded by a statement of case in which it commendably discussed the appropriate issues of constitutional interpretation and enforcement that arise on the face of the plaintiff's action and referred to relevant provisions of the Constitution and decided cases, also local and foreign. Basically, the 1st defendant took the position that payment of tax is a duty imposed by the Constitution on everyone in the country and it is in the public interest to ensure speedy collection of taxes. As such, the provisions which require the prior payment of tax before an objection or appeal is entertained are justified by the need for the state to receive tax revenue on time. The 1st defendant referred to article 12(2) of the Constitution and cases interpreting it and stated that the Constitution permits the restriction of rights in the public interest. It drew attention to section 42(6) and (7) of Act 915 and submitted that the Act does not completely deny access to justice and the courts but it grants discretion to the Commissioner-General to waive or vary the conditions precedent stated under section 42(5). 1st defendant said the Commissioner-General's discretion would have to be exercised reasonably and is subject to judicial review. The 2nd defendant also filed a statement of along the same lines as the 1st defendant.

At the hearing of the case, the court pointed out to counsel for the plaintiff, that since the plaint is about impediments to the right of redress against decisions of an administrative official, the provision of the Constitution, 1992 directly on point in the case ought to be article 23 on Administrative Justice. In fact, in his statement of case the plaintiff at paragraph 7.37 thereof quoted article 23 and submitted that it "guarantees a full right of access to court", but counsel did not include it among the articles stated on the writ as

being contravened by the impugned enactments. Counsel also did not firmly ground his arguments on this article but dwelled more on cases which relate to general principles of constitutional interpretation. But, in substance, the plaintiff's complaint is that section 42(5) of Act 915 and Order 54 rule 4 of C.I.47 are inconsistent with and in contravention of article 23 of the Constitution. With due respect to counsel for the plaintiff, contrary to what he intimated in the endorsement on the writ, articles 2 (1), 17(1), 125(2), 19(2), 130(1), 132, 133(1) and 140 do not guarantee the general right of access to justice and the courts. Rather, articles 33(5), which the plaintiff mentioned, 37(1) and 125 (3) & (5) are the provisions that in earlier cases were cited in relation to the general right of access to justice and the courts. See; **Adofo v Attorney-General & Cocobod [2005-2006] SCGLR 42** and **Sam(No 2) v Attorney-General (No. 2) [2000] SCGLR 305.** Article 33(1) provides a forum for redress of violations of Human Rights and is not a provision that guarantees rights either in the particular or generally.

The court further explained at the hearing, that because the defence put up by the defendants is that any limitation to the right of access to justice and the courts occasioned by the impugned provisions is justifiable in the public interest, the plaintiff needed to directly discuss the doctrine of proportionality and articles 12(2) and 296 of the Constitution and their interpretation by our courts as had been done by the defendants. On account of these observations, the court directed the parties to file supplementary statements of case to properly address the matters attention was drawn to and they have done so.

Before I delve into the arguments of law, a brief background of the case will be useful. The authority to impose taxes in Ghana is Parliament and it exercised its power and passed a number of laws imposing different types of taxes including, Value Added Tax, Exercise Tax, Customs Duty Tax and Income Tax. The laws levying these taxes initially established separate independent agencies and charged them with collection of the taxes but after sometime the multiplicity of agencies was found to be hindering efficient

collection of revenue. Thus, in 2009 the different revenue collection agencies were brought under one umbrella organisation by passage of the Ghana Revenue Authority Act, 2009 (Act 791). It appears from the Memorandum to the Bill that was passed into Act 915 that notwithstanding Act 791, the various tax revenue collection agencies still continued to exercise significant operational independence hence the inefficiencies associated with that system persisted. So, in 2016, in order to harmonise the operations of the various agencies and improve efficiency in tax collection, the Revenue Administration Act, 2016 (Act 915) was passed and it assigned the Ghana Revenue Authority, through the Commissioner-General, full responsibility for administering all the tax laws.

The Act sets out the functions of the Commissioner-General, which may be exercised on her behalf by tax officers, gives the Commissioner-General wide powers for investigating non-compliance with tax laws, assessment of tax liability and the collection of tax revenue for the state. Under the Act, tax officers may adopt a number of procedures to obtain information concerning the economic activities of potential taxpayers in order to determine whether they are liable to pay a particular tax and if so how much. In determining tax liability, a tax officer may make use of information provided by a potential taxpayer herself through the system of self-assessment but the Commissioner-General is given authority under the law to disregard the self-assessment and make a determination based on independently obtained information through measures such as tax audits. Tax officers are given protection under the Act and it is an offence to impede them in their work. Sections 78 to 86 of the Act covers offences for which a person may be prosecuted, including a very general offence of failing to comply with a tax law.

The defendants justify the enormous powers of the Commissioner-General by reference to article 41(j) of the Constitution which makes it a duty for every citizen to declare her income honestly and to satisfy all her tax obligations. Nonetheless, taxation entails a taxpayer giving up money that would otherwise be her property so it constitutes an

encroachment on private property rights, though eminently in the public interest. Taxation by its nature has always evoked resistance and strife and, from time immemorial, people the world over have employed strategies to pay as little tax as they can get away with. This makes tax disputation one of the most vexatious contestations persons have taken up against the state. The disputes may take two forms; disagreements as to the accuracy of the information on which tax officials base to raise assessment of tax liability, and the correctness of the interpretation and application of the tax imposing legislation by tax officials. In recognition of the highly controversial nature of taxation, tax administration laws always provide for elaborate dispute resolution mechanisms, both internal and external to the tax administration agency. That has been done in the case of the tax legislation we are concerned with here but then Act 915 and C.I.47 have implanted conditions precedent to be met before an aggrieved person may take advantage of the dispute resolution arrangements put in place. The original provisions on dispute resolution under Act 915 were partly amended by the Revenue Administration (Amendment) Act, 2020 (Act 1029). I shall set out the relevant provisions.

Objection to a tax decision

42. (1) Subject to a tax law to the contrary, a person who is dissatisfied with a tax decision that directly affects that person may lodge an objection to the decision with the Commissioner-General within thirty days of being notified of the tax decision.

(2) An objection to a tax decision shall be in writing and state precisely the grounds upon which the objection is made.

(3) A person may, before the expiration of the period specified in subsection (1), apply in writing to the Commissioner-General for an extension of time to file an objection.

(4) Where the Commissioner-General is satisfied that there are reasonable grounds for the extension, the Commissioner-General may grant the application for extension and shall serve notice of the decision on the applicant.

(5) An objection against a tax decision shall not be entertained unless the person has;

(a) in the case of import duties and taxes, paid all outstanding taxes including the full amount of the tax in dispute; and

(b) in the case of other taxes, paid all outstanding taxes including thirty percent of the tax in dispute.

(6) Despite subsection (5) the Commissioner-General may waive, vary or suspend the requirements of subsection (5) pending the determination of the objection or take any other action that the Commissioner- General considers appropriate including the deposit of security.

(7) The Commissioner-General shall consider the need to maintain the integrity of the dispute resolution procedure and the need to protect Government revenue and the integrity of the tax system as a whole in exercising a discretion under subsection (6).

(8) A tax decision to which an objection is not made within thirty days is final.

Section 44 of Act 915 as amended

1. **A person who is dissatisfied with a decision of the Commissioner-General may, within thirty days, appeal against the decision to the Independent Tax Appeals Board referred to in this Act as "the Appeals Board" as set out in the Fourth Schedule .**
2. **A person who is dissatisfied with a decision of the Appeals Board may appeal against the decision to the Court within thirty days from the date the decision was served on the person.**

Section 45. An appeal against an objection decision shall not operate as a suspension of the objection decision.

The effect of section 42(5) above is, that when the Commissioner-General of the Ghana Revenue Authority has made an assessment as to how much tax a person is liable to pay and served the assessment on the person, the one is allowed to object to the assessment on grounds such as, that the Commissioner-General got the facts wrong or she erred in

the interpretation or application of the tax legislation, and to request the Commissioner-General to vary the assessment. However, the objection and request for variation shall not be entertained unless the aggrieved person first pays either the whole amount assessed or 30% of it. The plaintiff's complaint in this case is in respect of the 30% of taxes other than import duties and he appears to see nothing wrong with paying 100% of import duties before an objection may be heard. The different incidences of import taxes and duties on one hand and other taxes on the other does not affect my analysis of the issues for determination in the case so I treat them under the same category.

Now, the first stage of dispute resolution stated above is administrative and does not involve an aggrieved person applying to a tribunal or court for redress. The objection is addressed to the Commissioner-General who made the assessment or under whose authority it was made in the first instance. It is only after the Commissioner-General has rendered an unfavourable decision on the objection that the Act allows the aggrieved person access to a tribunal in the form of the Independent Tax Appeals Board and after it, further appeal to the High Court. So, the barrier of prior payment of the disputed tax has been erected in front of the Commissioner-General but, since without her decision on an objection recourse cannot be had to the Appeals Board and the court, the barrier effectively impedes access to the Board and court.

Meanwhile, article 23 of the Constitution, 1992 provides as follows;

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

By this article, a person aggrieved by a decision of an administrative official, which the Commissioner-General is, has been guaranteed by the Constitution unfettered right of access to court or other tribunal to seek redress. The assessment of tax liability by the Commissioner-General is an administrative decision and comes within the purview of

article 23. But what section 42(5) does is that it places a fetter on the individual's right to seek redress for any administrative injustice caused by a wrong assessment of tax by the Commissioner-General and this is what the plaintiff argues is inconsistent with and in contravention of the letter and spirit of article 23 of the Constitution.

The plaintiff also complains about an additional impediment, this time, placed to impede access to the court after an aggrieved taxpayer lodges an appeal to the High Court against a decision of the Tax Appeal Board. The right to this second appeal conferred by section 44 of Act 915 as amended has, in accord with article 23, been conferred without any conditions attached but one has been imposed, not by Parliament, but by the Rules of Court Committee under Order 54 Rule 4 of C.I.47. These rules are supposed to regulate the procedure for Tax Appeals. It provides as follows;

Payment of Tax

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

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

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

By Rule 4(2), though a person dissatisfied with a decision of the Commissioner-General may lodge a second appeal to the High Court, the court shall not hear the appeal unless the appellant has paid a quarter of the amount assessed for the first quarter of the year in question. Here too, as with section 42(5), the effect is that though the right of access to the regular courts to seek redress against decisions of an administrative official is guaranteed under article 23 without any fetters, it has been clogged by this provision and the plaintiff

submits that it effectively denies the right of access to the courts and is therefore unconstitutional.

My Lords, it needs to be pointed out that in a democracy, though the legislature may establish internal dispute resolution systems in respect of certain matters and confer power on internal bodies to determine certain disputes of a specialised nature, there must always be provision to guarantee access to the regular courts for them to supervise the proper operation of the internal arrangements, as well as to be appealed to after exhaustion of the internal dispute resolution scheme. As such, whereas the jurisdiction of the regular courts may be postponed in favour of domestic dispute resolution arrangements, that jurisdiction cannot be totally taken away. This principle applies even to private contracts and non-statutory organisations such as clubs and societies. The Constitution by article 125(3) provides as follows;

(3) The judicial power of Ghana shall be vested in the Judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power.

What is meant is that though agencies other than the judiciary may be given power to adjudicate disputes, their decisions cannot be made final. Their adjudicatory powers are subject to review by the regular judiciary, meaning the regular courts. See; **Boyefio v NTHC Properties Ltd [1997-98] 1 GLR 768** and **Tetteh & Ors v Essilfie & Anor [2001-2002] 1 GLR 440.**

In enacting Act 915 as amended, parliament appeared to heed to the above constitutional admonition but the plaintiff says that it was in appearance only and that in reality, Parliament clawed back the right of access to the courts by enacting section 42(5) and the Rules of Court Committee followed in tandem by Or 54 R 4. This argument of the plaintiff is not debatable and the defendants in their statements of case have conceded that these two pieces of legislation limit the constitutional rights to administrative justice and access to the courts. But they have been quick to argue, that the Constitution permits limitation

of rights guaranteed by it where there is justification so to do and provided the limitation is done in a proportional and reasonable manner. The defendants contend that the limitations occasioned by section 42(5) of Act 915 and Or 54(4) are justified in order to ensure that the state has use of its revenue during the time that disputes are resolved which may take long periods. They contend, that the provisions would also serve to weed out frivolous objections to tax assessments and improve on the efficiency of tax collection. The defendants argue that the Act accommodates the right to seek redress and has made adequate provision for the ventilation of grievances by aggrieved persons so the limitations in the impugned provisions are proportional.

In answer to these submissions of the defendants, the plaintiff argues in his supplementary statement of case that the limitations in issue are unnecessary because the Act already provides for punitive compound interest of 125% per annum on delayed payments of taxes and the imposition of penalties and that these are sufficient to disincentivise taxpayers to deliberately hold back payment of taxes through prolonged and frivolous objections. In addition, the Act empowers the Commissioner-General at the end of the determination of objections to seize assets and garnishee accounts of a tax payer so the Commissioner-General does not lose by waiting for the dispute resolution system to run its course. The plaintiff submits, that against the enormous powers of the Commissioner-General, the Act does not empower a taxpayer who finally wins his objection to be able to take on the state so there is no fair balance between the interests of the state and that of the individual taxpayer. Further, he states that time limitations have been set by the Act and Order 54 for the timely determination of objections and appeals so, there should not be any inordinate delay. The plaintiff therefore insists that the limitations of access to justice and the courts in this case is disproportional and ought to be declared unconstitutional.

My Lords, the right of access to the courts has long been recognised at common law, which is part of the laws of Ghana by virtue of Article 11 of the Constitution. Blackstone in his Commentaries on the Laws of England (1765-1769), stated that:

"A … right of every [man] is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein." (Book I, Chapter 1, "Absolute Rights of Individuals")

Our courts have over the years been unrelenting in upholding and defending the right of unimpeded access to the courts. Edusei J (as he then was), even under the rule of a military regime, in **Labone Weavers Enterprises Ltd v Bank of Ghana [1977] 2 GLR 156** at 157 said that:

*"I am of the view that every person has an **unimpeded access** to the law courts of this country, and this basic and fundamental right can only be taken away by express provision of a Decree or an Act of Parliament if that Act does not run counter to any provisions of the Constitution that the country may have."*

Then, in **Adofo v Attorney-General & Cocobod (supra)** at p 51 Dr Date-Bah, JSC noted as follows;

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

In the fairly recent case of **Centre for Juvenile Delinquency v Attorney-General [2017-2020] 1 SCGLR 567 at p.584**; Sophia Adinyira, JSC speaking for the Supreme Court said as follows;

"A cardinal principle of the Rule of Law is equality before the law and therefore Article 17(1) of the 1992 Constitution guarantees all persons equality before the law which includes equal access

to courts in order to prosecute or defend a claim or a violation of a right. ***This right requires the access to be adequate, effective and meaningful…There are two sides to the concept of access to justice: the first is the freedom to walk into the court and initiate a cause of action and secondly the ability to meaningfully and effectively participate in proceedings*** *i.e. the right to a fair trial in both civil and criminal trials."(Emphasis supplied)*

See also **Sam (No 2) v Attorney-General (No. 2) (supra).**

The above authorities demonstrate the consistency with which our courts, and especially the Supreme Court, have guarded the right of not just access to the courts, but unhampered, effective and meaningful access. The right of access to the courts must be understood in the right perspective as a right not so much for the benefit of the individual person who files a case in court but it is a right that is for the public benefit by ensuring rule of law and that all powers of government are exercised within the confines of law. In the United Kingdom Supreme Court case of **UNISON v Lord Chancellor [2017] UKSC 51;** Lord Reed, with whom the rest of panel agreed, at paragraph 68 of their judgment said as follows;

"At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other. Access to the courts is not, therefore, of value only to the particular individuals involved."

Notwithstanding the prime importance of the right of access to justice and the courts, general democratic principles as well as our Constitution do not make human rights absolute. Article 12(2) of the Constitution states as follows;

(2) Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.

Article 23 is part of Chapter Five of the Constitution, so, it is not absolute but the rights guaranteed under it may be limited in order to protect the rights of other persons or in the public interest. The question has, however, always been; when can it be said of a particular limitation of a human right that it is done in the public interest? If the provision limiting the right is justifiable, then it would not be inconsistent with our Constitution but if it is not justifiable then it violates the Constitution. In the instant case, access to the appeals board and the court has been clogged by the requirement of prior payment before being heard which the defendant contends has been done in the public interest. Of course, it lies in the bosom of the court to make that determination, but how do courts approach the question and what parameters are used in deciding whether a limitation of rights is justifiable on grounds of public interest or not? In **Civil and Local Government Staff Association of Ghana [CLOSAG] v The Attorney-General & Others [2017-2020] 1 SCGLR 197 at p.214-215:** Sophia Akuffo, JSC (as she then was) stated as follows;

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

(i)Is the limitation necessary? In other words is the limitation necessary for the enhancement of democracy and freedoms of all, is it for the public good?

(ii)Is the limitation proportional? Is the limitation over-broad such as to effectively nullify a particular right or freedom guaranteed by the Constitution?"

This reference to proportionality of limitation to human rights recalls the proportionality analysis courts usually adopt in judicial review of administrative action but, despite the fact that some factors to be considered in determining proportionality are common to both judicial review of administrative action and judicial review of legislation, which concerns us here, there are significant differences which must be respected. The concept of proportionality in judicial review of administrative action operates from the background of alternative decisions or policies available to an administrative official or body to choose from and then the question becomes whether the option chosen was reasonable under the circumstances in which the decision was made or the policy chosen. The requirement of fairness and reasonableness of administrative action have constitutional anchors in articles 23 reproduced above, and 296(a) & (b) of the Constitution. Article 296(a) & (b) state that;

Where in this Constitution or in any other law discretionary power is vested in any person or authority -

(a) that discretionary power shall be deemed to imply a duty to be fair and candid;

(b) the exercise of the discretionary power shall not be arbitrary, capricious or biased wither by resentment, prejudice or personal dislike and shall be in accordance with due process of law;

Per articles 23 and 296, the scope of the considerations in judicial review of administrative action and discretions, in my opinion, appear to be wider and may include the social and economic reasonableness of a decision. However, my view is that the breadth of considerations in judicial review of Act of Parliament in particular ought to be narrower and be focused more on what Sophia Akuffo, JSC said above; does the limitation effectively nullify the particular right or freedom guaranteed by the Constitution? This ought to be so because courts have been cautious not to exchange their wisdom on the

merits of legislative policy for that of Parliament's and to respect the doctrine of separation of powers. See; **Republic v Fast Track High Court, Accra; Ex parte Daniels [2003-2004] SCGLR 364.** What we are required to do is examine the particular limitation to determine if a less restrictive form of restriction or less intrusive encroachment on the right guaranteed could have been used by the legislature while catering for the public interest aimed to be achieved. The court would consider all the circumstances of the case and decide if the statutory framework affords relief and means of minimising the intrusion into the guaranteed right and if the competing interests at play have been fairly balanced. If there is a fair balance then the limitation would pass the constitutionality test but if the limitation effectively wipes out the right then it would fail the constitutional validity test.

On the facts of this case, it is hardly disputable that the prompt payment of taxes to provide revenue for running the state is in the public interest so it does not require much ink to be spilt on it. The issue here is whether the measures to be adopted to achieve speedy payment of taxes need to include restriction of access to the courts to challenge the Commissioner-General's tax decisions? Even if that is necessary, are the limitations stated under section 42(5) and Or 54 rule 4, viewed against the background of other provisions of those legislations, proportional? In justifying the necessity to impose the precondition of paying the tax complained against before being heard on the objection, which in Ghanaian colloquial parlance is referred to as "Do before you complain", the 1st defendant states at paragraphs 28 and 29 of its statement of case as follows;

28. My Lords, if the collection of part of disputed tax liabilities are suspended, will undermined the revenue mobilization agenda of the State. It will also have the band-wagon as taxpayer will raise frivolous objections to frustrate delay the collection of revenue due the state.

29. It is in this regard, that Parliament in its wisdom provided for payment of 30% of disputed tax liability prior to the determination of the objection. It provides liquidity

to the State during the protracted trial and serve as a deterrent to taxpayers who may want to engage in frivolous objections which could further be escalated to the courts thereby inundating the judicial system with frivolous and vexatious tax appeals.

However, the defendants have not provided any evidence to prove that taxpayers in Ghana had been filing frivolous objections and that determinations of objections were protracted causing adverse effect on the receipts of tax revenue. This could have been in the form of studies they conducted and statistics as to the average time in the past it took to determine a tax objection and the success rate of objections to demonstrate the frivolity of past objections. I read the memorandum to the Revenue Administration Bill, 2016 but there is no information in this regard in it. That notwithstanding, I cannot fail to take judicial notice of the fact that litigation on other issues in our country tend to drag and delays in our public services and the courts is a matter of public knowledge and concern. Reference has been made to the practice from other jurisdictions, especially some African countries, where the system of prior payment before complaining is also in place. That may be a new trend in tax administration but it does not appear to be universal since some other countries the plaintiff referred to do not operate this "Do before you complain" policy.

Nonetheless, in considering this case, it is significant to underscore the fact that the scheme of "Do before you complain" under Act 915 is not a total denial of access to justice and the court and that this case is unlike **Adofo v Attorney-General (supra)** which concerned section 5 of the Ghana Cocoa Board (Re-Organisation and Indemnity) Law, 1985 (PNDCL 125) that provided as follows;

5. No action shall be brought against the Board or any of its Divisions or Subsidiaries or any other person in respect of any obligation, liability or claim arising from the reorganisation of the Board or the termination of employment of any employee of the Board under section 1 of this Law or from any act or omission in connection with or consequent upon such reorganization or termination.

The defendants point out that Parliament created a by-pass for access to administrative justice without the impediment complained of by enacting section 42(6) which allows the Commissioner-General, in deserving cases, to waive or vary the prior payment under section 42(5). This, they maintain, minimises the limitation and ensures a fair balance between the objective of prompt payment of taxes and observance of the constitutional right to administrative justice and access to the courts. This is a substantial argument in support of the proportionality of the limitation in Act 915 and to dislodge this argument the plaintiff needed to prove that, in reality, the proviso has not afforded meaningful relief for aggrieved taxpayers with genuine objections to tax decisions by the Commissioner-General. Proof could be in the form of statistics on the number of applications made under section 42(6) for waiver and the numbers that were granted and denied. Regrettably, the plaintiff in his supplementary statement of case did not even say anything about section 42(6) and the argument made by the 1st defendant that it constitutes a significant opening of access to justice and the courts without the impediment of prior payment. The 1st defendant stated another flaw in the plaintiff's charge of denial of access to the courts by submitting that an aggrieved taxpayer who is refused a waiver or variation of the conditions under section 42(5) has not been denied the right to apply for judicial review of such refusal in court. The plaintiff, unfortunately, did not comment on this part of the defence either but it is a profound point of law that cannot be ignored. In fact, that was the reasoning of the Constitutional Court of South Africa in the case of **Metcash Trading Ltd v The Commissioner of the Revenue Services, Case No CCT 3/2000 dated 24th November, 2000** (www.saflii.org) that the plaintiff made reference to, but it appears he did not take particular note of the reasoning and conclusion reached by the court in that case. I shall discuss that case in detail *in fra*.

It bears explaining the import of subsection (6) of section 42 in some depth. There is no provision in Act 915 that bars an aggrieved taxpayer whose application for waiver or variation pursuant to subsection (6) has been refused by the Commissioner-General from

applying for judicial review of the refusal. Where an aggrieved taxpayer wishes to be heard on an objection without payment under section 42(5), she may apply to the Commissioner-General under section 42(6) for waiver or variation and assign reasons why the waiver or variation ought to be granted. If the Commissioner-General refuses such application, that would be an administrative decision that can be challenged under Or 55 of C.I.47 on Judicial Review or under Or 67 of C.I.47 pursuant to article 23 of the Constitution on Administrative Justice. It is only an objection to the assessment of tax liability taken before the Commissioner-General and appeal to the court that cannot be entertained without prior payment, but not a challenge to a refusal to waive or vary the requirement for prior payment. In that case if, on the facts and the law, an aggrieved taxpayer feels entitled to the exercise of a discretion of waiver or variation but is denied, the High Court may, on justifiable grounds, reverse the Commissioner-General and grant the waiver or variation prayed for. If the assessment objected to was prima facie erroneous, the Commissioner-General ought to grant waiver or variation under section 42(6) and failing that the High Court may grant such waiver or variation. Subsection (7) of section 42 provides the parameters the Commissioner-General has to consider in exercising her discretion to waive or vary prior payment. I shall repeat it;

(7) The Commissioner-General shall consider the need to maintain the integrity of the dispute resolution procedure and the need to protect Government revenue and the integrity of the tax system as a whole in exercising a discretion under subsection (6).

I understand this provision to set the yard stick to be used by the High Court for judicial review of the discretion conferred on the Commissioner-General by subsection (6). This provision is reinforced by the general provisions on exercise of discretion under articles 23 and 296 of the Constitution. What this engenders is, that the adverse effect of the limitation of access to justice and the court created by section 42(5) is capable of being supervised on a case by case basis by the courts to ensure that it is as minimal as possible.

In the South African case of **Metcash Trading Ltd v The Commissioner of the Revenue Services (supra),** the revenue authority of that country, following a VAT tax audit of the company called Metcash held series of meetings with the company to discuss their audit findings but the parties could not agree on how much VAT the company owed. The Commissioner therefore raised an assessment of VAT liability based on its audit findings running into millions of South African Rands. Metcash objected to the assessment so it exercised its right under the tax law and appealed against the assessment. However, while the appeal was pending, the revenue authority embarked on proceedings under the tax statute to recover the tax assessed from Metcash. This was permissible because it was provided under section 36(1) of the South African tax statute as follows;

36. Payment of tax pending appeal.

(1) The obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law, but if any assessment is altered on appeal or in conformity with any such decision . . .

Metcash sued in the High Court for a declaration that the above provision, together with section 40 of the VAT law, that compelled an aggrieved taxpayer to pay the disputed tax while an appeal was pending constituted a denial of access to justice and the courts, a right guaranteed by the Constitution of South Africa. The High Court Judge upheld their claim but on a final appeal to the Constitutional Court, it was held at paragraph 62 of the judgment that;

"…the effect of the rule [section 36(1)] on individual taxpayers is ameliorated by the power conferred upon the Commissioner to suspend its operation. The rule is not absolute but subject to suspension in circumstances where the Commissioner considers it appropriate. The exercise of this power by the Commissioner constitutes administrative action within the contemplation of section 33 of the Constitution and as such is reviewable as discussed above. The existence of this discretionary power therefore reduces the effect of the principle of "pay now, argue later" in an

appropriate manner. In all these circumstances, therefore, I am persuaded that even if the effect of section 40(5) constitutes a limitation on the right entrenched in section 34 of the Constitution, it is a limitation which is justifiable within the meaning of section 36."

The Constitutional Court concluded their judgment at paragraph 72 as follows;

"…This analysis indicates that sections 36(1), 40(2)(a) and 40(5) of the Act do not oust the jurisdiction of the courts of law. To the extent that it can be argued that section 40(5) does indeed limit an aggrieved vendor's access to an ordinary court of law, such limitation is justified under section 36 of the Constitution."

As was also rightly held by the court in the Metcash case, once an aggrieved taxpayer has pursuant to Orders 55 or 67 of C.I.47 invoked the jurisdiction of the High Court against the decision of the Commissioner-General not to waive or vary the prior payment required under section 42(5), the party may apply for interim relief pending the determination of the judicial proceedings and the court will be competent to consider it.

In the case of **Uganda Projects Implementation And Management Centre v Uganda Revenue Authority (Constitutional Appeal 2 of 2009) [2010] UGSC 17 (28 October 2010)(www.ulii.org);** the constitutional validity of a provision of the tax law of Uganda that required 30% of a disputed tax assessment to be paid before an appeal could be lodged was mounted on grounds that the provision violated the of right of access to justice and the courts guaranteed by the Constitution of Uganda. The Supreme Court of Uganda upheld the constitutionality of the provision, stating that it was justified in the public interest.

The interpretation of sections 42(5),(6) &(7) that I have come to, which is similar to the decision in the Metcash case, is sanctioned by the timeless principle on the interpretation of tax statutes namely; that a tax statute is to be strictly construed and what has not been stated in express language ought not to be implied into it. In **Multichoice Ghana Ltd v Internal Revenue Service [2011] 2 SCGLR 783 at p. 794**, the Supreme Court, speaking through Georgina Wood CJ, stated as follows:

"Our 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 constructed strictly, Viscount Simon LC in the Privy Council case of Canadian Eagle Oil Co. Ltd v The King [1946] AC 119 at 140 relied on Rowlatt J's formulation of the rule in Cape Brandy Syndicate v IRC [1921] 1 KB 64 at 71. He observed:

"In the words of the late Rowlatt J whose outstanding knowledge of this subject was coupled with a happy conciseness of the phrase, "in a taxing Act one has to look merely at what is clearly said. There is no equity about 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."

Besides this being a tax statute, the well-settled principle of ancient pedigree in the interpretation of statutes is, that a statute that purports to deny access to the courts must be narrowly construed in favour of allowing such access, except a strongly worded formula is applied by the law maker. Viscount Simonds, in upholding the general right to sue for declaratory relief notwithstanding a statutory provision limiting access to the court on a specific issue, put it this way in **Pyx Granite Co Ltd v Ministry of Housing and Local Government [1960] AC 260 at p. 286**:

"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words."

Therefore, subsections (5) (6) & (7) of section 42 of Act 915, properly understood as explained above, do not deny access to justice and the courts. Yes, they restrict access but it is justified in the public interest and has been done in a proportional manner. It is within the province of Parliament to determine tax policy and when they have acted being conscious of the right to seek redress for administrative decisions and provided for it in a proportional manner, the court ought to be slow to overturn the policy. It would have been a different matter if no avenue around the "Do before you complain" policy had been provided for. Accordingly, I hold that section 42(5) of Act 915 is not unconstitutional.

I now turn to Or 54 Rule 4 and would commence the consideration of its constitutionality by questioning the authority of the Rules of Court Committee to enact a provision that compels the payment of taxes. The powers of the Committee under article 157 of the Constitution are clearly limited.

Article 157(2) is as follows;

(2) The Rules of Court Committee shall, by constitutional instrument, make rules and regulations for regulating the practice and procedure of all courts in Ghana.

The power of the Committee is limited to regulating the practice and procedure of the courts but Rule 4 of Order 54 is headed "Payment of Taxes". This is plainly ultra vires the powers of the Committee. The common law has always maintained that any limitation to substantive rights may only be done by primary legislation and not under subsidiary legislation. See **Raymond v Honey [1983] 1 AC 1**. We are here talking about a right guaranteed by the Constitution so if there is any necessity to restrict it in the public interest, then it ought to be by a substantive Act of Parliament such as has been done under Act 915. Though this point was not raised by the plaintiff, it arises from a provision of the Constitution and is fundamental so the court may take it up itself. See **Asare v Brobbey [1971] 2 GLR 331.**

On the substance of the arguments on Or 54 R 4, the first question is, can it be said that it is a necessary limitation to the right of access to the court? The defendants in their statements of case did not suggest any specific need for this exceptional limitation of access to the High Court safe the justification for section 42(5). The Attorney-General who represents the 3rd defendant, which I take to be synonymous with the Rules of Court Committee that made the impugned rule, states as follows at paragraph 41 of his statement of case;

"41. The provisions of Act 915 and C.I.47 are designed to create an efficient and effective tax system and revenue administration regime in Ghana and above all to

weed out frivolous objections to avoid situations where the revenue would be tied up and the economy would not be able to function properly."

The above submission does not address the fact that if an aggrieved tax payer paid 100% of tax liability under section 42 (5) there would be no outstanding tax to pay under Or 54 R 4 so the provision becomes otiose in those circumstances. If the purpose is to prevent challenges to the commissioner's tax assessment delaying the payment of taxes, then that has already been catered for by section 42(5) of Act 915. Therefore, the tax administration system can do without Or 54 Rule 4. A reading of the whole of Or 54 shows that a special appeal procedure, new in our jurisdiction, has been fashioned out to ensure that a tax appeal in the High Court would be determined not later than two months of it being filed. The notice of appeal is to be filed within a limited time together with all documents to be relied on at the hearing and same for the respondent Commissioner-General who is also given a limited time to file any response with all documents. I am confident that this new procedure would curtail delays associated with appeals in our jurisdiction.

The second question to be answered, and the more important for me, is whether Or 54 R 4 limits the right of access to the court in a proportional manner by minimising its possible adverse effects. My answer to that question is a straight no. If the 25% payable under Or 54 R 4 is meant to be additional to the 30% payable under section 42(5) of Act 915, then it is too onerous and unjust in that it effectively takes away the right to appeal to the High Court. An aggrieved taxpayer who managed to meet the 30% payment under section 42(5) but is handed an unfavourable decision by the Appeals Board would most probably abandon appealing to the High Court no matter the merits of his objection. Worst of all, unlike Act 915 which provides a window of discretion for the Commissioner-General to, in appropriate cases, waive or vary the payment under section 42(5), Or 54 R 4 is stated in absolute terms without a proviso. For a court of law, a superior court at that, to be denied the opportunity to exercise discretion in cases where the justice of the matter may merit a waiver or variation, it makes the limitation over-broad and disproportional. Even

the Commissioner-General and the Tax Appeals Board are not so restricted, how much more a superior court?

The correct interpretation and application of Or 54 Rule 4 against the back drop of the prior payment required under section 42 (5) of Act 915 was discussed by the Court of Appeal in the case of **Beiersdorf Ghana LTD V The Commissioner-General, GRA, Suit No H1/140/19 unreported judgment dated 5th December, 2019;** There an appellant who paid 34.1% of the tax assessed by the commissioner pursuant to section 42(5) was said by the Court of Appeal to have satisfied the requirement of Or 54 R 4 and its appeal was accordingly held to be competent. But 25% of first quarter assessment in addition to 30% of the disputed assessment would have been more than the 34.1%. At pages 9 to 10 the court per Dennis Adjei, JA said that;

"The purpose of the law [Or 54 R 4] is to ensure that an amount of not less than a quarter of the assessment for the first quarter shall be paid before the court shall be seised with jurisdiction to proceed with the appeal…We are satisfied that there is no hard and fast rule about payment of quarter of the tax assessment provided it was paid before or at the time of filing the appeal…"

So, for the Court of Appeal, the payment required under Or 54 R 4 shall be calculated including amounts paid under section 42(5) and it is not separate and additional to those payments. Thus, the Court of Appeal, by exercise of the power of judicial interpretation, decorously disregarded Or 54 R 4, obviously to avoid the unjustness of the rule. The rest of the present bench in this case agree with me on the unjustness of a taxpayer paying additional 25% before appealing to the High Court. Their view is that if a taxpayer had her objection determined without payment under section 42(5) then she must automatically pay the 25%. But what the Court of Appeal did not advert their mind to, and this present bench fail to note is, that non-payment under section 42(5) before an objection is decided by the Commissioner-General is only possible where the Commissioner-General waived or varied the payment and that must be for justifiable reasons. However, the High Court has not been given similar discretion to decide if the

waiver by the Commissioner-General should, on justifiable grounds, continue during the hearing of the appeal and that is the kernel of the disproportionality in Or 54 R 4. The decorous disregard of the real import of the rule through interpretation does not cure its failure to meet the constitutional validity test I explained supra. The proper order is for the Supreme Court to exercise its power and strike down the provision.

In the case of the **Centre for Juvenile Delinquency v GRA (supra)** this court struck down a provision in this same Act 915 that placed a condition precedent to filing a case in court in the form of mandatory stating of a Tax Identification Number on the originating process. The court took the view that it was an unreasonable and disproportional limitation to the right of access to the courts. Sophia Adinyira, JSC on behalf of the court concluded the judgment thus at pp. 590-591 of the report;

"We need to strike a balance between the need for citizens to pay tax and the need to encourage free access to the law courts which is one of the basic characteristics of constitutional democracy where the rule of law is prevalent and serves as a barometer to measure good governance and accountability in a country through judicial review. Judicial review has been described as a strong bulwark against illegality and impunity and insulates citizens against their human rights violations. It is through the vigilance of persons like the Plaintiff herein that actions can be taken to protect the Constitution.

I do not think the decision we are compelled to arrive at in this case will be subversive of the important public duty of every citizen to comply with his or her tax obligations as expected by the Constitution and revenue statutes. It is rather a decision which seeks to balance the democratic rights of citizens as enshrined in the Constitution to have unimpeded access to justice in the courts against bureaucratic impediments, imposed obviously in the public interest for the GRA to collect revenue."

This dictum remains valid and is applicable on the occasion of this judgment. While I find a fair balance between the need for timely receipt of revenue and the right of access to justice and the courts in sections 42(5),(6) and (7) of Act 915, I do not see such balance in

relation to Or 54 R 4. Therefore, on account of all of the above reasons, I hold that Or 54 R 4 of C.I.47 is unconstitutional and I accordingly grant the plaintiff's reliefs (b) and (d). Order 54 Rule 4 is hereby struck down as unconstitutional. I however, dismiss the other reliefs claimed by the plaintiff also for the reasons explained.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

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