IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: DOTSE JSC (PRESIDING)
PWAMANG JSC
PROF. KOTEY JSC
LOVELACE-JOHNSON (MS.) JSC
TORKORNOO (MRS.) JSC
PROF. MENSA-BONSU (MRS.) JSC
KULENDI JSC

REFERENCE NO. J6/02/2022

30TH NOVEMBER, 2022

KWASI AFRIFA --- APPLICANT/APPELLANT

VRS

GHANA REVENUE AUTHORITY --- RESPONDENT/RESPONDENT

JUDGMENT

LEAD JUDGMENT

TORKORNOO (MRS.) JSC:-

BACKGROUND

This reference to the Supreme Court was sent by the Court of Appeal, Kumasi. The plaintiff/appellant (referred to as the appellant in this ruling) before the court of appeal

is a lawyer who was given a tax assessment to pay in 2017. He objected to it and following various communications with the Ghana Revenue Authority (GRA), paid what was determined to be his outstanding taxes from 2012 to 2016 inclusive of 30% of the tax in dispute and a sum computed as penalty.

In 2017 and 2018, he was suspended from law practice by the General Legal Council and in June 2019, he applied to the GRA for a tax clearance certificate (TCC). GRA demanded information on his client account, utility and medical expenses and all returns of income for 2018 and 2019. His response was that he did not engage in legal practice over the years 2017 and 2018. The counter response of GRA was that unless the documents requested were supplied, the tax objection by Plaintiff could not be decided on. They further pointed out that he had earlier failed to provide these sets of information to enable the GRA to properly assess his actual tax liability for 2012 to 2016.

The plaintiff brought an action in the high court Kumasi for the enforcement of fundamental human rights under Article 33 and for administrative justice under Article 23 of the Constitution. He sought the following reliefs in the high court:

1. *A declaration 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 inconsistent with and violative of his constitutional right to administrative justice guaranteed under the provisions of Article 23 of the 1992 Constitution and is accordingly unconstitutional*
2. *A declaration that the GRA's letter of 26th July 2019 informing Plaintiff that he did not qualify for a TCC is null, void, and of no effect to the extent that it is inconsistent with Plaintiff's right to administrative justice as provided for in Article 23 of the 1992 Constitution.*

The impugned **section 42(5) of Act 915** is titled **Objection to a tax decision.**

Section 42 (5) reads:

(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

Following an application to refer the question of unconstitutionality of section 42(5) to the Supreme Court, the high court determined that the issue of the plaintiff's objection to his tax liability of 2012 to 2016 was moot since he had paid the assessed tax. Plaintiff appealed and the Court of Appeal determined that the issue was not moot. Citing **Amidu v President Kuffuor & Others [2001-2002] SCGLR 86**, the Court of Appeal pointed out that a moot action is one that does not present a justiciable controversy because the issues involved have become academic or dead. However, if the issue is a recurring controversy, then it cannot be defined as moot. To the court, section 42 (5) of Act 915 is applicable to all eligible tax payers and therefore the issue may arise in another controversy. The Court of Appeal therefore referred this question to the Supreme Court for resolution:

1. **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**

Legal Submissions of counsel for appellant to the Supreme Court

Counsel for appellant makes the following submissions in summary

a. The issue referred essentially invokes this court's enforcement jurisdiction under article 2(1) (a) and Article 130 (1) (a)
b. The impugned legislation being Section 42 (5) of Act 915 is alleged to be inconsistent and violative of Article 23 of the 1992 Constitution. The issue as referred questions the constitutional validity of section 42 (5)
c. Appellant submits that Section 42 (5) places a fetter on the right of the taxpayer to object to the tax assessed as payable by him
d. To the extent that Section 42 of Act 915 confers on the Respondent an administrative power to determine a tax objection, then the law governing the exercise of such administrative power must be fair and reasonable and in tandem with Article 23. He cites **Awuni v West African Examinations Council (2003 -2004) 1 SCGLR** 471, **Civil and Local Government Staff Association of Ghana (CLOSSAG) v The Attorney General and 2 Others** Writ No J1/16/2016 judgement of 22nd June 2017
e. For any law that seeks to restrict or limit the right of a person to administrative justice, the said law must pass the two pronged test of 'necessity' and 'proportionality'.
f. On an application of the necessity test, plaintiff submits that the restriction in Section 42 (5) to pay all outstanding taxes and 30% of the assessed tax is unnecessary for the enhancement of democracy, neither is it for the public good. It is unnecessary for ensuring the right to administrative justice and there is no sound justification for the demand. It also contravenes the right to a hearing or the audi alteram partem rule of natural justice
g. Though it may be contended that it is in the best interest of the state that before an objection to a tax assessment is heard, the taxpayer objecting to the payment of the tax pays a part, the fundamental right of individuals must not be sacrificed for the sole benefit of the state.
h. By so mandating, it implies that where a taxpayer has no resources to fulfil the requirements of section 42 (5) of Act 915, his right to administrative justice is effectively barred and curtailed. He cited from the decisions in **New Patriotic**

Party v Inspector General of Police 1993-94 2 GLR 459, **Center for Juvenile Delinquency v Ghana Revenue Authority & Another, [2019] GHASC 29**

i. Counsel for appellant submitted that there must be no requirement that a tax objected to and challenged be paid before there is an actual hearing and determination of a tax objection
j. He sets out the 'proportionality' test quoted from the CLOSSAG case as follows: '*is the limitation over-broad such as to effectively nullify a particular right or freedom guaranteed by the Constitution*? He submits that it is incumbent on this court to strike a balance between the need for citizens to pay tax and the need to ensure free adequate reasonable and fair access to administrative justice. He went on to quote from **Center for Juvenile Delinquency v Ghana Revenue Authority** (cited supra) in support of this position
k. On this point, he submits that the fetter set by **section 42 (5)** is a violation of the right to administrative justice because the implication is that only tax payers with the financial wellbeing and capacity to pay the amounts set by **Section 42(5)** would benefit from the right to object to a tax assessment. This flouts the principle of equality before the law which is enshrined by the Constitution
l. Counsel for Appellant therefore prayed for section 42 (5) of Act 915 to be struck down. He cited ***Asare Baah III and Others v The Attorney General and Electoral Commission [2010] SCGLR 463*** and **Center for Juvenile Delinquency v Ghana Revenue Authority & Another** (cited supra) on the jurisdiction and legal premise to strike down a section of the law on this point.

Legal Submissions of counsel for respondent to the Supreme Court

Counsel for respondent established the following backdrop to his submissions.

i. His first submission was that tax is the mainstay of the economy and there is a constitutional duty on citizens under article 41 (j) to declare their income honestly to the appropriate and lawful agencies and to satisfy all tax obligations. Any consideration of a claim to fundamental human rights vis a vis the constitutional duty to pay tax should therefore be evaluated as subject to the overriding consideration of the public interest as dictated by article 12 of the Constitution, public policy, public security and public morality. Counsel for respondent pointed to this position in the dictum of Akuffo JSC as she then was in the **CLOSSAG** case, cited supra

ii. Second, pursuant to article 174 (1), and citing the dictum of Byron CJ in **British American Insurance Company Ltd v Attorney General of Antigua and Barbuda, Civil Appeal No 20 2002 (June 18 2003),** counsel for respondent urged that the imposition of taxation is the sole prerogative of Parliament and so any rate or quantum of tax is supported by law, and constitutes a statutory obligation.

iii. Third, that the policy reasoning behind section 42 (5) is to ensure that taxpayers do not indulge in frivolous tax objections and appeals. Counsel for respondent pointed to the Directive Principles of State Policy in Chapter 6 of the 1992 Constitution and urged this court to appreciate the balance between the interest of the state and the sustenance of the state's developmental agenda and peace as against a private interest. He cited **New Patriotic Party v Inspector General of Police [1993-94] 2GLR 459** and **New Patriotic Party v Attorney- General [CIBA case] 1996-97] SCGLR 729** as constitutional disputes in which this court had drawn on the Directive Principles of State Policy for guidance in arriving at its decisions.

iv. Citing **Karletse-Panin v Nuro [1979] GLR 194 CA, In re Okine [1960] GLR 84, and In re Amponsah [1960] GLR 140**, counsel for respondent submitted that section 42 (5) could not create a fetter against the right to administrative justice because just as the right of appeal is a creature of statute, the objection procedure

provided for in section 42 is a statutory procedure that had been made available to any person subjected to a tax decision.

Counsel went on to urge that the established position of the law from decisions such as **Boyefio v NTHC Properties Ltd [1997-1998] 1 GLR 768** and **Kwabena Obeng & Eric Akwasi Prempeh v Kumasi Metropolitan Assembly and Kojo Bonsu, Civil Appeal No J4/53/2016, dated 14th June 2017**, is that where a statute has set out the procedure for seeking relief, a party subject to a decision regulated by that statute ought to submit to the defined procedure.

Further, decisions of GRA as an administrative body were amenable to judicial review. He pointed to the dictum of this court in **Republic v Committee of Inquiry into Nungua Chieftaincy Affairs, Ex Parte Odai [1996-97] SC GLR 401**. It was his submission that section 42(5) Act 915 therefore could not constitute a fetter on the right to seek justice in a court because a party against whom section 42(5) became applicable would have access to both the right to judicial review and the appellate procedure in Act 915.

v. counsel for respondent pointed out that from the language of section 41(5) of Act 915, a tax decision encompasses the exercise of discretion of the Commissioner. The dictates of article 296 concerning the exercise of discretion by officials had been complied with in section 42 (6) and (7) of Act 915 because these two provisions allow a person objecting to assessed tax to seek a waiver, variation or suspension of part of the assessed tax while the objection is considered.

vi. Quoting section 51(1) of Act 915, counsel for respondent points out that under Act 915, tax is a debt due to the Government on the date it becomes payable, that tax is a creature of statute and so section 42(5) only regulates a duty that is established by law. Further, the position of the law settled in **Multichoice Ghana Limited v IRS [2011] 2 SCGLR 783** is that a fiscal legislation ought to be given strict construction

and so Act 915 ought to be strictly construed to achieve the purpose of the law. Since the overriding purpose of section 42(5) of Act 915 is to secure revenue to run the machinery of the state whilst the dispute relating to the tax in issue is resolved, this court should allow itself to be guided by this purpose in evaluating the contentions of the appellant.

vii. Looking abroad into foreign jurisprudence, counsel for respondent cited **Jitendra Chawla (D.B.S/T.A XTRA House) v Director of Immigration and Attorney General of Belize Claim No 640 of 2019**. He submitted that in a similar contention in Belize where a provision of the Belize General Sales Tax (GST) Act No 49 of 2005 which was in pari materia to section 42(5) had been impugned as placing a fetter on a taxpayer's access to court, the court had agreed with the submission, but refused on policy grounds to strike down the law, while urging parliament to amend the GST to allow the exercise of discretion by the Commissioner to stay the collection of the assessed tax spending the hearing of the objection. He pointed out that in contrast with the Belize GST, Ghana's Act 915 incorporated the exercise of discretion proposed by the Belize court in section 42(6).

Again, in **Metcash Trading Ltd v Commissioner for South African Revenue Service and Another [2001] 1 BCLR 1,** also available at (http://www.saflii.org/za/cases/ZACC/2000/21.html) (accessed on 20th November 2022) the South African constitutional court refused to uphold a decision of the high court that had pronounced as invalid a provision similar to **section 42(5)** in their **Value Added Tax Act 89 of 1991**. The constitutional court of South Africa found that the balance required between a taxpayer's right to be heard on an objection to tax assessed, and effective tax collection had been attained in the law and the provision was constitutional. Counsel for respondent submitted that in reading all the provisions of **Act 915** together, this court will see the same balance between **section 42(5)** and the rest of **Act 915.**

On the necessity and proportionality test for determining the constitutionality of conditions that restrict unfettered access to fundamental human rights and freedoms, counsel for respondent urged that **section 42(5)** passes the pillars of the proportionality test being legitimacy, suitability, and necessity. It was a legitimate provision for revenue administration, necessary for revenue mobilization, suitable for stemming frivolous objections, and proportional for supporting the public interest in tax administration as against the private interests of the objector.

Consideration

Article 2(1) of the 1992 Constitution provides:

Enforcement of the Constitution

2(1) A person who alleges that –

a. *An enactment or anything contained in or done, under the authority of that or any other enactment;*
   or
b. *Any act or omission of any person;*

is inconsistent with, or is in contravention of a provision of this Constitution; may bring an action in the Supreme Court for a declaration to that effect

Article 23 also provides:

23. 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

From the above summary of the supporting Statement of Case of counsel for appellant, his contentions are that the prior statutory requirement in Section 42(5) of Act 915 to

pay outstanding taxes and a portion of the assessed tax constitutes a fetter on a tax objector's access to administrative justice as provided for under article 23 of the 1992 Constitution. Second, the scope of the provisions in Act 915 for exercising discretion when a tax objection is raised, disenables officials of GRA from exercising discretion regarding objections to tax assessment in a manner consistent with article 23 of the 1992 Constitution, because they violate the duty placed on administrative bodies and officials to 'act fairly and reasonably'. And this is why Section 42(5) of Act 915 in particular should be struck down as inconsistent with the right to administrative justice granted in article 23. This dispute and reference is therefore about the enforcement of article 23.

A reverse consideration of the conundrum can be set out as:
Do the requirements of Section 42 (5) prevent administrative bodies and administrative officials from acting fairly and reasonably and complying with requirements imposed on them by law and are persons aggrieved by the exercise of such acts and decisions prevented from exercising the right to seek redress before a court or other tribunal when they object to the prior payment of the tax in dispute in the case of import duties, and 30% of the tax in dispute in the case of other taxes?

We have considered all the submissions and are satisfied that the case for enforcement of article 23 of the 1992 Constitutional through a striking down of Section 42 (5) of Act 915 is not sustainable.

The case made to us is not sustainable because the contentions arise from a failure to read Act 915 as a whole, a very fundamental requirement for construing an enactment. When Section 42 (5) is read with other provisions of Act 915, it is easy to see that Act 915 provides the necessary structures that enable the Commissioner-General of GRA to execute the duty to consider tax objections in a manner that is 'fair and reasonable'. Act 915 further provides the necessary safeguards for citizens subjected to tax assessments to object, including a right to be heard in a court of law regarding their objections.

The constitutional edict to be '*fair and reasonable*'

It is important to first settle that as a sui generis and organic document that explains itself through its integral coherence, the practical indicators of the mind and spirit behind the concept of 'fairness' demanded in article 23 has been set out in article 296. As expressed by Brobbey JSC (retired) in **Ablakwa & Another v Attorney General and Another (J14 of 2009) [2012]GHASC** 32 22nd May 2012 '*these provisions* (article 23, article 296 and article 35(8)) *crystalize the conditions or requirements to be satisfied by anyone attacking discretionary power vested in administrative or public officers which are brought under the 1992 Constitution*'. As submitted by counsel for respondent, article 296 explains what 'fairness' and the proper exercise of discretionary power means:

296. Exercise of Discretionary power

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 either by resentment, prejudice or personal dislike*** *and shall* ***be in accordance with due process of law****; and*
c. *Where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this constitution or that other law to govern the exercise of the discretionary power* (Our emphasis)

To be fair and reasonable, an administrative or statutory regime must not incorporate the option for officials to operate with arbitrariness and caprice, or bias provoked by resentment, prejudice or personal dislike. For that reason, Article 296 (c) goes on to require the publication of *constitutional instrument or statutory instrument or regulations* to govern the exercise of discretionary power.

It is important to remind ourselves of the fences that this court has drawn against an over expansion of the demand for regulation that may lead to strangulation of government business in cases such as **Tuffuor v Attorney General [1980] GLR 637,** and **Ransford France (No 3) v Electoral Commission & Attorney-General [2012] 1 SCGLR 705.** In the **Ablakwa** case cited supra, this court speaking through Brobbey JSC pointed out that '*Care should be taken not to use article 296 to stifle or subvert the independence or autonomy of state institutions which operate by the use of the knowledge of technocrats or experts*'.

Be that as it may, it is clear that when the complaint is made that an administrative decision is incapable of 'fairness and reasonableness' because a statutory regime prevents an administrative agency from conducting its work in the 'fair and reasonable' manner required under Article 23, the directions of Article 296 provide the mirror for that assessment. **In Ransford France (No 3),** cited supra, this court had this to say '*Constitutional interpretation should never be mechanical, oblivious of the destructive results or implications of a particular interpretation, when an alternative interpretation is available that could avert the identified mischief…. Accordingly, article 296 (c) has to be interpreted as part of a living Constitution that provides a workable and functional framework for governance in Ghana*'.

So how does section 42 (5) of Act 915 hold up in this evaluation? Section 41 (1) defines **Tax Decisions** and the regime for administering 'tax decisions'. Under section 41 (1), a tax decision is a decision made by the Commissioner-General **under a tax law**, (emphasis ours) including an assessment or omission. **Section 41 (5)** concludes this regime on tax decisions by providing:

41(5) *For the purpose of this section, a reference to the Commissioner-General making a decision includes the Commissioner–General exercising a discretion, making a*

judgment, giving a direction, expressing an opinion, granting an approval or consent, or being satisfied in respect of a matter.

From this foundation in Act 915, it is clear that assessments are required to be made by the Commissioner-General pursuant to existing tax law. Assessments of tax under Act 915 cannot be arbitrarily determined by tax authorities, and even where they exercise discretion, make judgments, give a direction, express an opinion, grant an approval or consent, or express themselves as satisfied in respect of a matter, those acts must comply with law, because pursuant to section 41(1), a tax decision is one made under a tax law. In this wise, tax decisions, the regime under which section 42(5) falls, pass the test of fairness and due process required under Article 296. These tax laws or regulations must also be presumed to pass the test of legality, unless otherwise shown.

To the extent that the complaint of the appellant is not that there is no support in law for the calculation of the import duties required to be paid in full under section 42(5) (a) and the other taxes that 30% of is required to be paid under section 42 (5) (b), it is clear that section 42(5) does not dis-enable the constitutional duty of tax officials to be 'fair and reasonable' in their administration of Act 915 generally, and section 42 (5) specifically. The submissions on the proportionality test will be considered anon.

The constitutional '*right to be heard and to seek redress before a court*'

It is understood that in general commercial disputes over money that is alleged to be due, a party that disputes the quantum of the claim will not be required to make payment to the claimant until a court has adjudicated and determined all aspects of the disputed liability. This principle of law may be what has stirred up the furore over the seeming 'pay now, argue later' structure incorporated in Act 915 through section 42 (5).

It is noteworthy that the impugned section 42 (5) comes under a part of Act 915 headed *DISPUTE RESOLUTION*. The statute therefore informs that the tax decisions and

objections regulated under section 41 to 45 provide a dispute resolution mechanism in tax administration.

Following a tax assessment under section 41, if the subject of the assessment wishes to object to the assessment, section 42 of Act 915 has set out a procedural structure for dealing with that disputed tax assessment. And there is no fetter on the raising or hearing of an objection to a tax assessment in section 42 of Act 915. An objector has thirty days to lodge an objection to a tax decision after being notified of the tax decision. The option to file for extension of time to object is made available in sections 42(3) and 42(4).

It can be seen from the structure of the provisions of **Act 915** that they robustly allow the intervention of the tax objector, exercise of discretion by the Commissioner General, appeal to the Independent Tax Tribunal set up under **section 44 of Act 915** as amended by the **Revenue Administration (Amendment) Act, 2020 Act 1029**, and all of these avenues do not oust the original jurisdiction of the high court for orders in the nature of judicial review under article 141 of the Constitution, if the circumstances of administrative regulation so require..

A simple reading of **Section 42 (5)** shows that as part of the objection procedure, both the taxed citizen, and the Commissioner-General carry responsibilities. The taxed citizen is required to first pay previous taxes that were not disputed. And where the subject of the objections is duties that have been assessed on goods imported by the citizen, s/he is to pay the duties prior to commencement of consideration of the objection. Where the subject of the objections are other taxes, the citizen is required to pay 30% of the assessed tax prior to commencement of consideration of the objection. These are the conditions that have to be fulfilled before the hearing of the written objections. Now what happens if an objector is unable to fulfil these new obligations? Does **Act 915** close the door to their objections being heard at all?

Not at all. What is significant about this statutory arrangement in **section 42 (5)** is that immediately after directing that the tax commissioner ought to see that there are no outstanding previous taxes unpaid before 'entertaining' an objection, as well as the objected import duty or 30% of the objected tax, section 42 (6) grants avenues for the exercise of discretion regarding these conditions by providing further thus:

42 (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'* (emphasis ours)

So there is no absoluteness about **section 42(5).** It places a duty for the interim mobilization of tax assessed pending the hearing of an objection on both the tax authority and the tax objector, while section 42(6) allows the Commissioner General to exercise discretion to waive, vary or suspend the requirements of **Section 42(5),** in the particular case of an objector to assessed tax. Very importantly, **section 42 (7)** provides further statutory standards for the exercise of the discretion that the Tax Commissioner is given in **section 42 (6)** towards the hearing of a tax objection.

What immediately becomes clear from reading **sections 42(5), (6) and (7)** together is that the law is focused on protecting the tax administration system from abuse by both tax administrators and taxed citizens, rather than preventing the hearing of tax objections. It therefore provides a broad spectrum of tools to tax administrators to ease the burden of the demand for prior payments of tax obligations before an objection is heard, and also provides the measurable indicators for exercising that discretion in the two sub sections following section 42(5), so that tax administrators can be subjected to the principles and factor based overview anticipated under **article 296 of the 1992 Constitution**

It will also be noted that no part of **section 42(5)** or the whole **of section 42**, prevents an objector from obtaining a decision of the Commissioner General under section **42 (6)** if the objector has sound reasons for seeking a waiver, variation or suspension of the requirements of **section 42(5).** This is especially made clear by the first words of **Section 42 (6)** which is quoted here again:

42 (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*' (emphasis ours)

No part of **section 42(5)** or the whole of **section 42**, also prevents an objector from seeking judicial review of any step taken or refused to be taken, by the Commissioner General that may be unsupported by law or due process.

Section 43 provides the procedural regime for the delivery of a decision on a tax objection, including the right of an objector to define the silence of the Commissioner-General as a decision after sixty days. Clearly, such silence would include situations where pursuant to **section 42(6)**, a citizen prays for review, variation or suspension of the required payments under section 42(5), and the Commissioner-General chooses not to respond to that prayer.

But more importantly, **section 44** as amended by **Revenue Administration (Amendment) Act 2020 Act 1029**, creates an appellate system that first lies to the Independent Tax Appeals Board when a person is dissatisfied with a decision of the Commissioner – General, and a further right of appeal to the high court under section 44 (2). Section 44 (2) therefore directs all appellate processes into the ultimate authority of the judiciary settled in Chapter 11 of the Constitution. As pointed out already, these appellate processes do not foreclose the constitutional right under article 141 to seek

redress for judicial review of administrative actions and decisions that may be considered as deserving of such judicial review, from the high court.

With this regime, it is clear that **Section 42(5) of Act 915** does not stand on its own in the administrative procedures set out in **Act 915** for tax objections and decisions. It is amply supported by due process, availability of structures for the proper exercise of discretion regarding tax decisions, and an appellate process that allows for hearing of sustainable objections.

The South African Constitutional Court arrived at a similar conclusion in the **Metcash case** cited supra following a careful and wholistic review of their impugned **Value Added Tax Act 89 of 1991**. The dispute questioned the constitutional validity of **section 36(1) and subsections (2)(a) and (5) of section 40** of their **Value-Added Tax Act 89 of 1991 (the Act)**. The court quoted the provisions as reading thus:

"**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 . . . a due adjustment shall be made, amounts paid in excess being refunded with interest . . . and amounts short-paid being recoverable with penalty and interest calculated as provided in section 39(1)."*

"**40. Recovery of tax.—**

(1*) . . . .*

(2)(a) If any person fails to pay any tax, additional tax, penalty or interest payable in terms of this Act, when it becomes due or is payable by him, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so due or payable by that person, and

such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were, a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement.

. . . .

(5) It shall not be competent for any person in proceedings in connection with any statement filed in terms of subsection (2)(a) to question the correctness of any assessment upon which such statement is based, notwithstanding that objection and appeal may have been lodged against such assessment."

In substance, **section 36(1)** of the Act said that upon assessment by the Commissioner for the South African Revenue Service (the Commissioner), and notwithstanding the noting of an "appeal", a taxpayer is obliged to pay the assessed value added tax (VAT) plus consequential imposts there and then. Possible adjustments and refunds were to be left for dispute and determination later. **Section 40(2)(a)** empowered the Commissioner, where payment of an assessment is overdue, to file a statement at court which has the effect of an exigible civil judgment for a liquid debt; and **subsection (5)** put the correctness of the assessment beyond challenge in such execution. In essence **section 40 (2)(a) and (5)** empowered the Commissioner to exact summary payment of the assessed amounts.

Clearly these provisions are not the same in content when it comes to **section 42 (5) of Act 915** that we are dealing with in this suit. However the issue, similarly, was whether these provisions unjustifiably limited the right of access to courts protected by **section 34** of the South Africa Constitution, and allowed the Commissioner to literally enter a judgement that the parties and the court had to presume to be right.
The trial judge found that these relevant sections of the Act infringed the fundamental right of access to the courts afforded to everyone by section 34 of the South Africa

Constitution. She also held that they were neither reasonable nor justifiable when subjected to scrutiny as against the edicts of the Constitution.

The Constitutional Court disagreed with the trial judge and held that she had erred in construing the provisions as constituting a fetter to the right of access to courts. After a review of other linked provisions of the Act, the court was satisfied that within the framework of the objection and appeal procedures set into the Act, **sections 36(1)** and **subsections (2)(a) and (5) of section 40** of the **Value-Added Tax Act 89 of 1991** should be seen in appropriate context with the rest of the provisions in that part of the Act. Read as a whole, they provide aggrieved vendors an opportunity to challenge the assessments and associated decisions. A special Court/Board was created where the administrative decisions of the Commissioner could be appealed against, with a further right to proceed to court.

The mechanism created by the Act would also not exclude the right to judicial review in the ordinary course of access to justice, which right must be implied as a constitutional and statutory given. The law had the objective of ensuring that vendors, who had the initial opportunity to do a self-assessment before the Commissioner would be provoked to do his assessment, if theirs were not forthcoming, first paid the tax assessed while any disputes raised were being considered. A second objective allowed any refund to be made when necessary, after due resolution of the disputed sums.

The court went on to say that

'Once the Commissioner has disallowed an objection an aggrieved vendor can appeal such decision. What section 36 clearly does not do is place any impediment in the way of such an appeal, either to the Special Court or from its decision to an ordinary court of law. The crucial point, however, is that the section expressly does not preclude a disgruntled vendor against whom an assessment has been made from resorting to a court of law for whatever other relief that may be appropriate in the circumstances.

Although the Act vests jurisdiction to vary or set aside assessments — and other decisions by the Commissioner — in the Special Court in the first instance (and prescribes the avenue for further consideration of the case by the ordinary courts thereafter), there is nothing in section 36 to suggest that the inherent jurisdiction of a high court to grant appropriate other or ancillary relief is excluded.'

We find this review and opinion to be wholly in sync with our assessment of the scope of provisions around the objection mechanisms in Act 915.

We are satisfied that **Act 915** carries within it, extensive procedures to ensure that in carrying out their administrative duties, tax administrators are guided by '*requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions have the right to seek redress before a court or other tribunal*', as directed by Article 23.

We are also satisfied that the references to the opinions and decision of this court in **Awuni v WAEC** cited supra, which dealt with officials of WAEC taking decisions affecting the rights of citizens without any form of hearing being given to the exam candidates, misconceive the import of the facts of that particular case.

The proportionality test for conditions against free access to fundamental human rights and freedoms

It is also clear to us that the circumstances of tax objections are distinguishable from the circumstances of the controversy in the case of **Center for Juvenile Delinquency v Ghana Revenue Authority & Another, [2019] GHASC 29.**

The focus of that suit was **Section 11** and the **First Schedule of Act 915** that had respectively provided for Taxpayer Identification Numbers (TIN) and listed the courts as an institution that was compelled to demand a TIN before allowing anyone to conduct official business with the courts. The plaintiff in the suit had argued that by **Section 11**

(2) and **Paragraph 1(9), 2(8) and 2(9)** of the **First Schedule of Act 915** requiring that a person shall not be permitted to file a case with the courts or transact business with the courts unless that person quotes their Taxpayer Identification Number, there was an infringement of the right of access to the courts, especially of vulnerable groups such as the aged, the incapacitated, juveniles and accused persons in custody who may not be in a position to readily obtain a TIN. The Plaintiff further contended that the provisions are discriminatory against such groups of persons and prayed the Court to declare the said provisions unconstitutional.

This court speaking through Adinyira JSC, rightly recognized the issue as addressing a '*fundamental prerequisite to the full enjoyment of the fundamental human right of* ***access to the courts***' *(emphasis ours) if by the operation of a statute, a citizen could not access the courts without first having and quoting a TIN*. The decision of this court was that '*the requirement under paragraph 2(8) of the First Schedule of Act 915 that a person shall not be permitted to file a case in Court unless he quotes his TIN is an unjustified interference with the right of an individual to access the court for justice. It is an unreasonable restriction and limitation on the right to access the law courts and therefore fails the proportionality test*'.

On the balance between the public interest and a constitutional right, this court was satisfied that the decision would not 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, because it seeks to balance the democratic rights of all citizens (not only those subject to taxation) to have unimpeded access to justice in the courts against bureaucratic impediments, imposed obviously in the public interest for the GRA to settle an efficient tax administration machinery.

The circumstances of that case were therefore in vast contradistinction to the circumstances envisaged under Section 42(5). First, while section 11 applies to all citizens including those who may not be in a position to obtain a TIN before needing access to

the courts, **section 42(5)** can only be applicable to those who have actually placed themselves in a position to incur a tax liability through importing goods into Ghana, or obtaining taxable income, thereby bringing themselves into the bracket of persons with obligations and rights within the tax regime.

Article 34(1) mandatorily requires that the Directive Principles of State Policy contained in Chapter six of the Constitution guide the Judiciary in applying or interpreting any law, and the Constitution. It is to be noted that article 41 falls under chapter six of the Constitution. A**rticle 41 (j)** reads

41. Duties of a Citizen

The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly, it shall be the duty of every citizen

j. *To declare his income honestly to the appropriate and lawful agencies and to satisfy all tax obligations*;

The specific constitutional duty to honestly assist tax authorities to assess one's own tax obligations and to pay all taxes found due, is the duty that makes the obligation in **section 42 (5)** necessary to achieve the public interest expected from the revenue mobilization function of **section 42(5),** and the constitutional compliance culture of a country set on the rule of law, such as Ghana. The conditions set out within **section 42(5)** regarding payment of undisputed but outstanding tax obligations, assessed import duties, and thirty percentage of current assessed tax therefore pass the necessity and proportionality tests for any restriction placed on rights conferred by law. Especially when the same Act 915 ensures that in fact specific cases, public officers have the tools to exercise discretion to waive, vary or suspend the payment of the required tax pending the consideration of objections to tax. On this basis therefore, any issue that a citizen may have with the correctness of any assessed tax will constitute a private dispute that is justiciable from the particular facts of that private dispute.

Conclusion

We are of the firm view that if any citizen has any objection to any tax decision, section 42(5) 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.

Before closing, we reiterate that the plaintiff's cause of action in this matter is one in respect of which Act 915 has prescribed routes for resolution of disputes under the dispute resolution regime in sections 41 to 45.

We are minded to refer to circumstances that provoked Akuffo JSC (as she then was) to express the following opinion in **Bortier & Quaye v Electoral Commission & Attorney General [2012] 1 SCGLR 433**.

'*Since it is axiomatic, that in reading or construing a national Constitution, the court is required (as with all other legal instruments), to read the entire provisions with a view to assuring that every provision is given effect and any internal conflict is duly resolved without doing damage to any provision thereof, it is quite inexplicable that the plaintiffs chose to ignore totally the impact of the said article 48 on their case, and did not attempt to address the same, even in their reply to the first defendant's statement of case. …*

The plaintiffs' cause of action herein is one in respect of which article 48 of the 1992 Constitution has prescribed a specific course of action involving the establishment of a tribunal consisting of three persons appointed by the Chief Justice, a constitutional body which clearly does not include the Supreme Court"

If the appellant had chosen to read Act 915 as a whole, and to consider the sections immediately following sections 42(5), we do not think that he would have disturbed himself with seeking this reference.

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY
(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)

E. YONNY KULENDI
(JUSTICE OF THE SUPREME COURT)

CONCURRING OPINION

PWAMANG JSC:-

My Lords, I have a different approach to the case though my conclusion is somewhat similar to that in the lead judgment. I therefore state my opinion as follows.

This case is a reference from the Court of Appeal who stated the question for constitutional interpretation and enforcement as follows;

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

The applicant is a practicing lawyer based at Kumasi who engaged in disputations about his tax liability with the respondent through a number of letters they exchanged. He filed an objection against the assessment of his tax liability by the respondent but it demanded that he paid 30% of the tax assessed before the objection would be entertained. The respondent made the demand for 30% payment on strength of section 42(5) of the **Revenue Administration Act, 2016 (Act 915)** which is as follows;

(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.

The applicant took the view that article 23 of the Constitution, 1992 guarantees him a right to seek redress against decisions of administrative officials so section 42(5) by impeding that access to a tribunal or court for redress contravenes the Constitution. Article 23 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.

The applicant therefore filed an application in the High Court pursuant to article 33(1) of the Constitution for protection of his constitutional right to Administrative Justice and prayed for, among other reliefs, a declaration that section 42(5) is inconsistent with article 23 and therefore respondent's letter demanding payment of 30% of tax from him is null, void and of no effect. Article 33(1) provides as follows;

(1) Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.

By the time the application was being heard in the High Court, the applicant had paid the 30% of the tax demanded from him. Nonetheless, the applicant contended that his application raised a matter for interpretation and enforcement of the Constitution so, pursuant to article 130(1) of the Constitution, the High Court ought to make a referral to the Supreme Court. The respondent argued that since the applicant had paid the 30%, the question was moot and a reference ought not to be made. The High Court agreed with the argument of mootness and dismissed the prayer for a referral. The applicant appealed to the Court of Appeal arguing that the constitutional question that arises from his application is a recurring one and needed to be settled by the Supreme Court. The Court of Appeal upheld his submissions and accordingly made this reference we are considering.

There is an important matter of procedure that was pointed out by the High Court but it merits emphasis. The applicant commenced the proceedings in the High Court under article 33(1) but he ought to have proceeded by Order 67 of the High Court (Civil Procedure) Rules, 2004 (C.I.47) on Enforcement of Human Rights. These rules were

made by the Rules of Court Committee pursuant to article 33(4) of the Constitution and once specific rules have been made in that regard, all applications based on article 33(1) ought to be in accordance with those rules. We are still witnessing actions seeking enforcement of provisions under chapter five of the Constitution on Human Rights commenced by modes other than as provided by Or 67 of C.I.47.

At the hearing of the reference in the Supreme Court, we requested the parties to file detailed statements of case arguing their respective positions on the question referred to us. The substance of the case of the applicant is that article 23 guarantees the right for redress before a court without any conditions attached but section 42(5) has placed an impediment to the exercise of that right as a person who fails to pay the 30% cannot obtain redress. At this stage, the respondent has now reacted to the substance of the constitutional arguments of the applicant and states that Act 915, read as a whole, has provided for an opportunity for redress against decisions of the Commissioner-General without payment of the 30%. He submits that subsection (5) ought to be read within the context of the other subsections of section 42. I shall reproduce the whole section;

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.

Act 915 contains another provision on redress of grievance against a tax decision which is relevant for our discussion here. It is section 44 as amended by the **Revenue Administration (Amendment) Act, 2020 (Act 1029).** It provides as follows;

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 respondent's argument is, that subsection (6) above gives the Commissioner-General discretion to waive or reduce payment required under subsection (5). That is a discretion that must be exercised in accordance with articles 23 and 296(a) & (b) of the Constitution. If an aggrieved taxpayer applies for waiver under subsection (6) but is met with a refusal for reasons contrary to what is required of any administrative official under articles 23 and 296, the aggrieved taxpayer may challenge the refusal in the High Court on judicial review. The respondent maintains that subsection (5) is necessary for efficient tax administration in order to weed out frivolous objections that may protract and deny the state timely receipt of revenue. It states the obvious, that without timely receipt of revenue the state cannot properly operate so the provision, though a limitation of the right guaranteed by article 23, is necessary in the public interest.

The respondent partly based its arguments on article 12(2) of the Constitution which permits the limitation of constitutionally guaranteed rights in the public interest. Both parties addressed this point in their statements of case and the applicant's position is that the limitation in this case does not conform to the principle of proportionality that courts have used to determine validity of limitations of rights. In my opinion in the case of **Richard Amo-Hene v Ghana Revenue Authority & 2 Ors, Writ No J1/8/2021 unreported judgment of the Supreme Court dated 30th November, 2022,** I discussed at length the question whether the limitation imposed by section 42(5) of Act 915 on the right to Administrative Justice guaranteed by article 23 has been done proportionally. I came to the conclusion that section 42(5), read within the context of subsections (6),(7), and articles 23 and 296 of the Constitution, does not have the effect of denial of access to the courts for redress against a tax decision by the Commissioner-General. In that opinion I said as follows;

"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."

Therefore, the applicant's charge of denial of administrative justice in this case is misconceived. The applicant is the one who has limited his rights by confining himself to section 42(5) of Act 915. There are alternative routes to the High Court including action for judicial review and enforcement of right to administrative justice that have not been clogged. An aggrieved taxpayer who has properly invoked the jurisdiction of the High Court to challenge the administrative decision of the Commissioner-General under section 42(6) should be entitled to apply for interlocutory relief, provided there are strong grounds to merit it.

From the above discussion, the question for interpretation and enforcement as posed in the reference by the Court of Appeal was not the complete one that ought to have been referred. The real relief the plaintiff prayed for in the High Court was for the nullification of the letter demanding that he paid 30% of the assessment before his objection could be considered. 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. The defect in the question most probably resulted from the fact that the respondent did not respond to the merits of the arguments of the applicant in the courts below as it has done before us. 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.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

COUNSEL

NANA BOAKYE MENSAH-BONSU ESQ. FOR THE PLAINTIFF.

ODARTEY LAMPTEY ESQ. WITH FREEMAN SARBAH ESQ. AND PATRICK INTARMAH ESQ. FOR THE DEFENDANTS.