IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA, GHANA – A.D. 2004

H1/16/2004
DATED 16TH FEBRUARY, 2004

CORAM –

P.K. TWUMASI JA.
OMARI-SASU JA
J.A. OSEI JA

THE COMMISSIONER INTERNAL REVENUE SERVICE ACCRA … DEFENDANT/APPELLANT

VRS.

MULTI CHOICE GH. LTD. ACCRA … PLAINTIFF/RESPONDENT

J U D G M E N T

J.A. OSEI, JA - The undisputed facts of this appeal are that: MULTICHOICE GHANA LIMITED [Plaintiff/Respondent hereinafter referred to simply as Plaintiff] is a Television Company operating in Ghana. It serves its customers in return for their subscriptions which subscriptions the Company saves in a banking account and, as expected earns interest income thereon. From the year 1994 to 1999, the company, without dispute, incurred losses from its Television business as such but made substantial gains from its Banking Account by way of interest. The plaintiff company [Multichoice Ghana Ltd.] then sought to set off its losses incurred from its Television business as such against the interest income earned from the Banking Account. The[Defendant/Appellant]

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the [Commissioner] [hereinafter referred to simply as Defendant] disallowed that move as illegal and insisted that the income derived from the television business, and the interest accruing to the Bank Account should be taxed separately as being two separate sources of income. When the matter came before my learned brother Asiama JA [then sitting as additional High Court Judge] the made a very eloquent observation as follows:-

> "In our present volatile economy where the national currency is very susceptible to frequent depreciation, prudent business practice would dictate that part of the floating capital of an on-going business would be deposited in a banking institution to earn some interest so as to constantly be able to keep up its circulating capital and thereby remain in business. Any financial benefit which might accrue to the money so deposited would be an income derived from the operations of the business which made the deposits at the bank and would from a fractional portion of the full amount of income of the Company"
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> In other words, such an interest must be deemed and treated as part of the income produced by the business: namely, the Television business and not considered as constituting a separate source of income which should be taxed separately as the defendant is, as it were compelling the plaintiff to do in the instant case."

The Defendant has appealed and has based his appeal solely on one major ground of appeal which reads: " that the judgement is not supported by the relevant provisions of the applicable law ie. Section 1(2)(c) 4, 4A, 5 and 11"(1) of the Income Tax Decree of 1975 (as amended) SMCD 5" And according to the Appellant that ground of appeal raises three issues as follows:-

(1) whether on a true and proper interpretation of Sections 1(2)(c) 4, 4A, 5 and "(1) the learned trial Judge was right in declaring the assessments raised by the Commissioner null and void."

(2) Whether on a true and proper interpretation of Section 1(2) (c), the Plaintiff had two sources of income for the years of assessment Relevant to this action ie. 1994, 1995, 1996, 1997, 1998 and 1999.

(3) Whether on a true and proper interpretation of Sections 1(2)C, 4, 4A 5 and 11(1) Plaintiff is entitled to deduction expenses, wholly, exclusively and necessarily incurred in its Television business as a source of income

from another source of income, namely interest income.

In support of issue 2 namely whether or not the plaintiff had two sources of income over the relevant period, Counsel for the Appellant refers to Section 1(2) of the relevant law SMCD 5 which provides as follows:

"The tax shall be payable upon the income of any person accruing in, derived from, brought into or received in Ghana in respect of

(a) gains or profits from any trade, business, profession or vocation for whatever period of time such trade, business, profession or vocation may have been carried on or exercised.

(b) gains or profits from any employment including any allowances or benefits paid in cash or given in kind to or on behalf of an employee other than in respect of medical or dental costs or any passage from or to Ghana.

(c) dividend, interest or discount

any charge or annuity.

(e) royalties, premises and any other profit arising from property including rents from immovable property.

(f) receipts including royalties or periodical or deferred payments of any kind (other than those referred to in paragraph (e) of this sub-section) derived from any transaction wherever and whenever made, affecting directly or indirectly land or any natural resources in Ghana and notwithstanding whether such receipts are paid within or outside Ghana.

(g) Management or technical services fees." Counsel then

submitted that in terms of Section 1(2)C, of SMCD 5, whenever a resident person derives interest or has interest accruing to his or her credit within Ghana, he, or she is required to pay tax on that interest.

It is very useful that Section 1(2) of SMCD 5 (the relevant and applicable law for the material period) provides a LIST of the sources of income which are taxable. And that list includes INTEREST (see Section 1 Sub-section(2) C of the Income Tax Decree 1975 (SMCD 5) as amended by the Income Tax (Amendment) Law 1983 (PNDCL 61). Fortunately for everybody, the Decree (SMCD 5) defines, at its Interpretation Section, namely Section 76 what interest, as used at Section 1 *2(C means. That Section defines INTEREST as including "any loan interest, trade interest, deposit interest, mortgage interest, or debenture interest." The Oxford Dictionary of Current English defines deposit as "money in a bank account; deposit account as bank account that pays interest but is not immediately accessible."

The Learned Trial Judge concluded his judgement thus:

"The interests it (ie. The plaintiff Company, Multichoice Ghana Ltd.) earned from its savings at a Commercial Bank are declared not capable of being severable from the profit and loss accounts of the plaintiff – Company from 1994 to 1999. The tax liability assessed against the Plaintiff by the defendant is declared null and void as the plaintiff suffered losses for the six (6) year period from 1994 to 1999, even with the inclusion of the earned savings account." From that statement, understands the learned trial Judge to have held that because the interests earned from the savings at the Commercial Bank are not severable from the profit and loss account of the plaintiff – Company, the tax liability assessed against the Company (the plaintiff) by the defendant is null and void; and also because the plaintiff suffered losses for the six (6) year period (from 1994 to 1999). I will deal with those issues later.

But I think I should remind myself that the relevant and applicable law at the material period was the Income Tax Decree 1975 SMCD 5.

Also, the undisputed facts to remember and consider at this stage are that apart from "business" listed under source (a) of Section 1(2) which is not disputed as a source of income, there is another source, namely, source (c) "INTEREST" which source plaintiff agrees has earned some income over the period. That is also caught by Section 1(2)C of SMCD 5 as a separate and identifiable source of income which according to Section 1(2)C is equally taxable. So, the question whether or not the plaintiff had two sources of income during the period, should be answered in the affirmative. And I so hold, having taken into account what the contention of the plaintiff Coy was on the matter.

In his statement of case Counsel said the Appellant's contends at page 3 of its statement of case that the respondent had two sources of income ie. From pay Television and the interest from its Bank account. The Respondent does not dispute that interest accrued from the moneys deposited in the Bank but says that does not answer the Respondent's contention that losses from the pay, television business ought to be offset against the interest. After all the moneys generating the income were derived from the pay television business whose losses those moneys carried along into the Bank account into which they were lodged."

The foregoing statement brings me to ISSUE 3 raised by the Defendant namely: whether or not on a true and proper interpretation of Section 4, 4A, 5 and 11(1) of SMCD 5 (as amended) the plaintiff is entitled to deduct the Company's expenses wholly exclusively and necessarily incurred in its television business as a source of income from another source of income namely; interest income. Counsel refers once more to Sections 4 and 5 of the Income Tax Decree 1975 (SMCD 5).

The relevant and crucial portion of Section 4 reads as follows:- "For the purpose of ascertaining the income of any person, other than an employee, for any period from any source chargeable with tax under this Decree there shall be deducted all outgoings and expenses wholly, exclusively and necessary incurred during that period by such person in the production of the income."

The relevant portion of Section 5 also reads as follows:-

"Subject to the express provisions of this Decree, for the purpose

of ascertaining the income of any person, no deductions shall be allowed in respect of

(a) domestic or private expenses including cost of travelling between residence and place of business or employment.

(b) any disbursement or expense not being money wholly and exclusively laid out or expended for the purpose of acquiring income------"

It is the submission of Counsel for Appellants that the two provisions namely Section 4 and 5 of SMCD 5 "are very relevant in determining whether the Interest income of the Plaintiff/Respondent can be legally used to setoff the losses made in its television business and that the words wholly, exclusively, and necessarily, used in Section 4 and 5 of the Decree were intended to limit allowable deductions to the particular source of income to which they pertain, so that, for example expenses incurred in producing income from source "A" shall not be deducted from the income from source "B."

What does Respondent say to that contention? That "the Respondent does not dispute that interest accrued from money deposited in bank: but that does not answer the respondent's contention that losses from the pay television business ought to be offset against the interest. After all, the moneys generating the income were derived from the pay television business whose losses those moneys carried along into the bank account, into which they were lodged. In other words, although those amounts were represented in the bank statements as credits in actual fact, those moneys represented losses from the pay television business.

The crucial question to decide is no more whether or not plaintiff, during the Period, kept two separate sources of "income but rather whether it would be legal for it to deduct any losses or expenses incurred from the Television business from he interest income earned from that source. The plaintiff says that such expenses "ought to be offset against the interest account, for, after all the moneys which generated that income were derived from the television business.

The defendant does not dispute Plaintiff/Respondent's claim that the moneys which generated the interest income at the bank were derived from the television business. Counsel did not deny that assertion anywhere: neither in his statement

of case nor his Reply to Respondent's statement of case. Does the applicable law forbid entirely the deductions of expenses incurred by the taxpayer? The answer is No! Does the law indicate the types or categories of deductions a taxpayer is entitled to make, to ascertain his assessable income? The answer is Yes. What then are the implications of Sections 4 and 5.

They are:

(1) That all outgoings and expenses wholly, exclusively and necessarily Incurred by the Company (MULTICHOICE GHANA LTD.) during the period, being 1994 – 1999 can be legally deducted from the interest income if only that company can prove that it wholly exclusively and necessarily incurred them in the production of that income (namely the interest). I so hold.

(2) All other expenses not being money wholly, exclusively and Necessarily laid out or expended for the purpose of acquiring the income should be disallowed. I so order. Since (as contended by Counsel for plaintiff – Company (Multichoice) " all the moneys generating the income were derived from the Television business," it is difficult to see why that Company's expenses incurred in generating that income cannot qualify as money expended " in the production of that income." Counsel for defendant argued in his statement of case to the effect that "the words wholly exclusively and necessarily used in Sections 4 and 5 were intended to limit allowable deductions to the particular source of income to which they pertain, so that for example expenses incurred in producing income from source "A" shall not be deducted from the income from source B." I have read Sections 4 and 5 together but my understanding thereof does not give me that impression. The two Sections in my view, allow for the deduction of expenses which a Company has wholly, exclusively and necessarily incurred "in the production of the income" and I hold that the plaintiff company is so entitled, notwithstanding that it keeps two sources of income.

Consequently, I set aside the order in respect of tax liability made by the learned trail Judge. The Appeal therefore succeeds in part.

J. A. OSEI
JUSTICE OF APPEAL COURT

I agree

P. K. TWUMASI
JUSTICE OF APPEAL COURT

I also agree.

OMARI-SASU
JUSTICE OF APPEAL COURT

PETER KORNOR FOR APPELLANT.

ANTHONY FORSEN JNR. FOR RESPONDENT.