

**'pay now , argue later'  
a letter on the constitutional  
right to administrative justice?**

**n.dowuona & co**

# **On 22 January 2023, the Minister of Finance inaugurated into office an 11-member Independent Tax Appeals Board ("ITAB") in accordance with the Revenue Administration (Amendment) Act, 2020 (Act 1029) ("Act 1029") that amends the tax dispute resolution provisions under the Revenue Administration Act 2016 (Act 915) ("Act 915").**

Under section 42 of Act 915, persons dissatisfied with a tax decision directly affecting them have a right to lodge an objection with the Commissioner General of the Ghana Revenue Authority within thirty (30) days of being notified of the tax decision, and a further right to appeal to the High Court against the objection decision under section 44 of Act 915

Act 1029 amends section 44 of Act 915 and establishes the ITAB, an administrative appeal body made up of 11 persons with requisite qualifications appointed for not more than four years from the date of appointment and eligible for re-appointment for another term only, to hear and determine appeals against the decisions of the Commissioner-General concerning objections to tax decisions.

A person dissatisfied with the decision of ITAB can further appeal to the High Court within (30 )thirty days from the date ITAB serves the decision on the person. With the recent inauguration of the ITAB, persons who have lodged objections with the Commissioner General concerning a tax decision and are dissatisfied with the objection decision can appeal to the ITAB and are required do so by submitting their appeal application to the Executive Secretary of the Board.

As an appeal body, ITAB may confirm, reduce, increase, or annul the assessment appealed against or make any other order as it considers fit. If the decision of the ITAB results in an amendment to an assessment, the Commissioner-General is required to amend accordingly and cause a notice setting out the amendment and the amount of tax payable to be served on the person assessed.

This power of ITAB to amend an assessment does not conflict with the Commission General's power to make an adjusted assessment as long as such an adjustment will not re-open any matter already determined on an appeal.

However, where any fraud or any gross or willful neglect has been committed by or on behalf of any person in connection with or in relation to any tax, duty, or levy, the Commissioner-General may make a further adjustment on that person even if the further adjustment involves re-opening a matter already determined on appeal.

## **Pay now, argue later**

'Pay now, argue later' is widely associated with the prerequisite to initiating a tax dispute in section 42(5) of Act 915, which requires a person with an objection against a tax decision to, in the case of import duties and taxes, pay all outstanding taxes including the total amount of the tax in dispute; and in the case of other taxes, pay all taxes due including thirty percent (30%) of the tax in dispute.

This provision has been the subject of several disputes between taxpayers and the taxing authority; and has received recent judicial interpretation.

The Supreme Court, in the cases of Kwasi Afrifa v. Ghana Revenue Authority & Attorney-General (2022) JELR 110070 (SC) and Richard Amo-Hene v. Ghana Revenue Authority & 2 Ors [2022] DLSC11872 interpreted the constitutionality or otherwise of the seeming 'restraint' on the taxpayer's right to be heard and to seek redress before a court, and the principle of law that in general commercial disputes over money alleged to be due, a party that disputes the quantum of the claim will not have to make payment to the claimant until a court has adjudicated and determined all aspects of the disputed liability.

## Key Takeaways

In the Afrifa case, the Ghana Revenue Authority (GRA) gave the appellant a tax assessment to pay in 2017. The appellant initially objected to the assessment and later paid what was determined to be his outstanding taxes from 2012 to 2016, including 30% of the tax in dispute and a sum computed as a penalty after several communications with the

Ghana Revenue Authority (GRA).

The appellant sought a declaration that upon a true and proper interpretation of Article 23 of the 1992 Constitution of Ghana, section 42 (5) of Act 915 is inconsistent with and violative of his constitutional right to administrative justice guaranteed under the Constitution of Ghana and is accordingly unconstitutional.

Article 23 allows for persons aggrieved by decisions of administrative bodies and officials the right to seek redress before a Court.

Upon a referral of this question from the Court of Appeal to the Supreme Court for resolution, the Supreme Court was unanimous in the view that if any citizen has any objection to any tax decision, section 42(5) of Act 915 does not fetter the due hearing of that objection, because there are ample dispute resolution provisions under Act 915.

The Court reasoned that there is no absoluteness about the disputed provision as the Commissioner-General under section 42(6) of Act 915 has the discretion to waive, vary or suspend the requirements of section 42(5) pending the determination of the objection or any other action that the Commissioner-General considers appropriate including the deposit of security.

Additionally statutory standards are provided in section 42(7) for the exercise of discretion as the Commissioner-General is required to 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.

According to the judgment, a reading of these three provisions 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.

There are broad spectrum of tools available to tax administrators to ease the burden of the demand for prior payments of tax obligations and also provides the measurable indicators for exercising that discretion so that tax administrators can be subject to the duty of fairness and not capriciousness anticipated under article 296 of the 1992 Constitution.

- The Supreme Court noted that the current tax dispute resolution mechanism does not foreclose the constitutional right to seek redress for judicial review of administrative actions and decisions and does not prevent a person objecting 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.

- While the decision of the Supreme Court accords with the tax principle of "pay now, argue later", the taxpayer is allowed to request the Commissioner General to waive, vary or suspend the requirement to pay the tax under section 42(7) of Act 915 and, where the taxpayer believes that the Commissioner General has not exercised this discretion in accordance with the law, the taxpayer can seek redress for judicial review from the High Court.

- The original jurisdiction of the High Court to hear judicial review applications remains in place and has not been ousted by the introduction of ITAB.

- ITAB, as an administrative body, is also required to operate within the ambits prescribed under Act 1029 and a taxpayer has the constitutional right to seek redress for judicial review of actions and decisions of the ITAB that are contrary to Act 1029.

- To seek judicial review, an aggrieved taxpayer must apply, on justifiable grounds, for a waiver, variation or suspension of the prior payment.

- The Commissioner General must refuse the request and the refusal must be in a manner not consistent with his duties and office as a public officer, not in accordance with any procedure or law, or that is unfair and capricious.

- The recommendation is for the taxpayer to apply for the judicial remedy as soon as the decision complained of is made or within 30 days thereof but it should not be later than six months.

The Commissioner General will have the opportunity to respond to and oppose the judicial review application.

The Court after hearing the parties will grant orders as it sees fit including quashing the decision of the Commissioner General for the prior payment, granting an injunction to prevent the payment from being made or may confirm the actions of the Commissioner General.



### **Gwendy Bannerman, Partner**

Gwendy is a partner at n. dowuona & company. She has provided legal advice on local laws and regulatory requirements, to local and international businesses, corporations, financial institutions, government agencies and investment companies. She recently advised an international company on an asset purchase transaction of a listed company, advised a joint venture company in Ghana, on its legal obligations particularly on the local content requirements, and is lead counsel for commercial litigation services for a multinational company that operates in the petroleum downstream sector.



### **Lilian Kodjoe, Associate**

Lilian is an associate at n. dowuona & company. Her areas of focus are banking and finance, corporate and commercial, labour and employment, and dispute resolution. Her recent work with the firm includes advising an international company on money lending operations compliance in Ghana and advising on labour and employment related issues.