

CASE SUMMARY

MAERSK DRILLSHIP
IV SINGAPORE
PTE LTD v THE
COMMISSIONER
GENERAL



Tax Law
Alert
22 December 2022

High Court rules that a Branch operating in the Upstream Petroleum Sector is subject to a deemed branch profit tax

On 8 July 2022, the High Court of Ghana (Commercial Division) in *Maersk Drillship IV Singapore PTE Ltd Vs. The Commissioner General*, Suit No. CM/Tax/0100/2022 handed down its judgment.

Factual Background

Maersk Drillship IV Singapore PTE LTD (Maersk) is a company incorporated under the laws of Singapore and registered under the laws of Ghana as an External Company engaged in the business of providing services to the Upstream Petroleum Industry in Ghana.

The Government of Ghana together with the Ghana National Petroleum Corporation and Heliconia Energy Ghana Limited (Heliconia) entered into a Petroleum Agreement (PA) in respect of the Offshore Cape Three Points Petroleum Contract Area in or about the year 2005.

The interest of Heliconia was assigned to ENI Ghana Exploration and Production Limited (ENI) as a new contractor under the Petroleum Agreement. ENI also entered into a Subcontract Agreement with Maersk Rigworld Ghana Limited (Maersk Rigworld) and Maersk on 30th January 2015. This subcontract was for the provision of services at the Deepwater DP Drilling Rig for a period

of 2 years. During the period of January 2015 to December 2017, Maersk obtained a Petroleum Commission Permit to provide services to the Upstream Petroleum Industry in Ghana.

The Commissioner General (in 2018) commenced a tax audit into the affairs of Maersk and issued a Final Tax Audit Report dated 20th November 2020.

The said report raised an amount of Twenty Eight Million Six Hundred and Twenty Seven Thousand Two Hundred and Ninety-Five United States Dollars Fifty Four Cents (US\$28,627,295.54) as the total tax liability of Maersk. This total tax liability comprised of a direct tax liability of Twenty Million One Hundred and Eight Five Thousand Five Hundred and Thirty One United States Dollars Thirty Six Cents (US\$20,185,531.36) and an indirect tax liability of Eight Million Four Hundred and Forty One Thousand Seven Hundred and Forty Six United States Dollars Eighteen Cents (US\$8,441,746.18).

Upon an objection raised by Maersk on the said tax assessment, the Commissioner General revised the tax liability of Maersk to Twenty Eight Million Three Hundred and Fifty Seven Thousand Sixty Five United States Dollars Seventeen Cents (US\$28,357,065.17) being a direct tax liability of Nineteen Million

Nine Hundred and Fifteen Thousand Three Hundred and Eighteen United States Dollars Ninety-Nine Cents (US\$19,915,318.99) and an Indirect Tax Liability of Eight Million Four Hundred and Forty One Thousand Seven Hundred and Forty Six United States Dollars Eighteen Cents (US\$8,441,746.18) as its Final Objection Decision.

Grounds of Appeal

Maersk in challenging the Commissioner General's decision filed the following grounds of appeal.

- a. The Commissioner General wrongly construed Articles 12(1), 12(3) and 26 of the Offshore Cape Three Points Petroleum Agreement (OCTP) and Sections 27 and 39(3) of the Petroleum Income Tax Law, 1987 (PNDCL 188) by

applying the provisions of the Internal Revenue Act, 2000 (Act 592) and the Income Tax Act, 2015 (Act 896) to Maersk.

- b. The Commissioner General erred in law by subjecting Maersk's income to further taxes after the 5% final withholding tax.
- c. The Commissioner General is liable for breach of the Provisions of the OCTP Agreement by assessing Maersk to Corporate Income Tax (CIT) and Branch Profit Tax (BPT) and ACT 592 and the Income Tax, 2015 (Act 896).
- d. The Commissioner General wrongly imposed tax of US\$103,300.22 on Maersk in respect of PAYE taxes when in fact Maersk had a tax overpayment of US\$129,165.722.
- e. The Commissioner General erred in law by rejecting some of the VAT Relief Purchase Orders (VRPOs) in the amount of US\$6,978,174.88 which resulted in a tax liability of US\$8,44,764.18 to Maersk.
- f. The Commissioner General erred in the reconciliation of the figures for which reason Maersk demands a proper reconciliation of the figures in issue herein.

Decision

The High Court ruled that the Commissioner General could not impose income tax under any tax law on Maersk's income arising from services or work carried out in the OCTP block under the Petroleum Agreement. However, Maersk being an External Company engaged in the business of providing services to the Upstream Petroleum Industry in Ghana, is a Permanent Establishment (PE) in the country and therefore falls under the general tax laws of Ghana. Therefore, any income accruing to Maersk in Ghana that is not related to its activities as a Subcontractor under the Petroleum Agreement is subject to tax. An example of taxes that can be imposed on Maersk is the Corporate Income Tax since Maersk is a Corporate Entity.

Again, the court held that Maersk is not exempt from being assessed by the Commissioner General in respect of Corporate Income Tax and the Branch Profit tax. The assessment is meant to aid the Commissioner General to determine whether Maersk is liable to pay these taxes. The court added that once Branch Profit earned by the shareholders of Maersk is income connected with Maersk being a Permanent Establishment registered under



the tax laws of Ghana and this same branch profit accrued in or is derived from Ghana, it should be taxable just as dividends paid to shareholders of a Ghanaian registered company are taxable.

In relation to the wrongful computation and imposition of PAYE taxes, rejection of VRPOs and erroneous reconciliation of figures, the court ordered that an Independent Auditor be appointed to reconcile the figures.

Lastly, the court refused Maersk's ground of appeal on damages.

IMPLICATIONS AND KEY TAKE AWAYS

1. An agreement for the provision of goods or services cannot limit the tax liability of a party only to that agreement. The terms of a Petroleum Agreement or any other contract cannot 'oust' or exclude the application of the general tax laws of Ghana to any person or institution.
2. The tax liability in a contract is only limited to the activity conducted under the contract. However, the general tax laws of Ghana will be applied to any other activity conducted outside the contract including the provision of goods or services.
3. A non-resident person who has a Permanent Establishment in Ghana will be assessed and taxed by the Ghana Revenue Authority of any income made in relation to the Permanent Establishment regardless of the source of the income.
4. Branch Profit Tax is imposed on a non-resident person that has a Permanent Establishment in Ghana. This tax is treated like dividend tax and is taxed in the same manner as the dividend(s) of a resident company is taxed.
5. A non-resident person who has a Permanent Establishment in Ghana is subject to pay tax for its existence as a corporate entity. Corporate Income Tax and Branch Profit Tax are tax liabilities imposed on payment(s) made to shareholders as dividends.

CONCLUSION

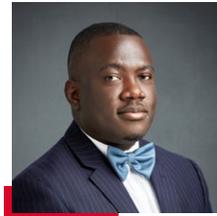
The High Court dismissed the Appeal in part and allowed it in part.



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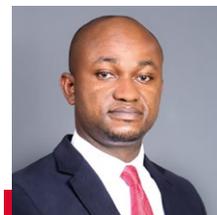
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