GRA

(LEGAL AFFAIRS AND TREATIES)

MEMORANDUM

TO	**:**	**HEAD, SPINTEX MTO**
CC	**:**	**DC, LAT** **DC, MTO**
FROM	**:**	**AC, PROSECUTIONS & LITIGATION**
DATE	**:**	**1ST AUGUST, 2018**
SUBJECT	**:**	**JUDGMENT IN TAX APPEAL CASE BETWEEN BIERSDORF GH. LTD AND THE COMMISSIONER-GENERAL.**

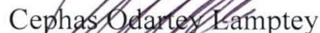
On 8th January, 2018, Biersdorf Gh. Ltd. filed a tax appeal at the High Court, Accra, challenging a tax assessment of GH₵1,085,392.36 raised after an audit was conducted into the business activities of the taxpayer.

After hearing the appeal the court on 13th July, 2018 gave its judgment dismissing the tax appeal.

With the dismissal of the appeal, your office can proceed to enforce payment of the tax together with any interest that has accrued thereon.

Attached is a copy of the judgment of the court for your perusal.

Thank you.



Cephas Odartey Lamptey

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, (COMMERCIAL DIVISION) ACCRA, HELD ON FRIDAY THE 13TH DAY OF JULY, 2018 BEFORE HIS LORDSHIP SAMUEL K. A. ASIEDU, J.

SUIT NO: CM/TAX/0001/2018

BEIERSDORF GHANA LIMITED = PLAINTIFF

VS.

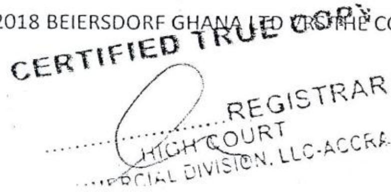
THE COMMISSIONER GENERAL
GHANA REVENUE AUTHORITY
ACCRA = DEFENDANT

PARTIES: PLAINTIFF REPRESENTED BY KOBINA DICKSON.

DEFENDANT REPRESENTED BY GILBERT AMISSAH.

COUNSEL: YAW KYERE AMPADU ESQ., FOR DR. K. AINUSON FOR THE APPELLANT.

GILBERT AMISSAH ESQ., WITH MOHAMMED IBRAHIM ESQ., FOR CEPHAS ODARTEY LAMPTEY ESQ., FOR THE RESPONDENT.



JUDGMENT

This appeal stems from an audit undertaken by the respondent herein into the tax returns of the appellant herein for the accounting period of 2014, 2015 and 2016.

After the said audit exercise, the respondent assessed the tax liability of the appellant at an amount of GH₵1, 689,149.34 and thereafter, requested the appellant to pay the said tax liability within a period of thirty (30) days.

After notification of the tax liability, the appellant objected to the assessment and after further examination by the respondent, the liability was reviewed to an amount of GH₵1,085,392.36 after the appellant had brought to the notice of the respondent evidence of new tax credit payments claimed and also taking into consideration the payment of an amount of GH₵506,744.80 after notification of the tax liability.

The Notice of Appeal, which was filed on the 8th January 2018, is brought upon, basically, three main grounds which are that:

a. The finding of CGRA that royalty payments made by the Appellant to Beiersdorf AG (BDF) pursuant to an agreement between Appellant and BDF for the use of the Nivea brand should not be allowed as a legitimate business cost because of the failure of the Appellant to

comply with prior registration of the Royalty Agreement with the Ghana Investment Promotion Center is wrong in law.

b. The finding of CGRA imposing liabilities with respect to withholding tax is wrong in law.

i. The decision of the CGRA to characterize reimbursements paid to the distributor of Appellant for work done by third party vendors as sales commission paid to the distributors for which a withholding tax of 10% should apply is wrong in law.

ii. The decision of the CGRA to disallow Trade Discount and to treat Trade Discounts offered to the distributors of the Appellant as commission payment which should attract a withholding tax of 10% is wrong in law.

The appellant also attached to the notice of appeal, particulars in support of grounds of appeal together with various exhibits which the appellant seeks to rely upon to prosecute the appeal. After service of the processes filed, the respondent filed a Reply and also attached, thereto, various exhibits it seeks to rely upon. Thereafter, the parties were ordered to file their statements of case.

In respect of the first ground of appeal, the appellant says that its main line of business is the import and distribution of Nivea products from a company based in Germany called BDF whose registered trade mark is Nivea.

According to the appellant, it has a Distribution License Agreement with its parent company in Germany pursuant to which the appellant paid the sums of GH₵474,505.24, GH₵1,231,644.00 and GH₵1,558,025.99 as royalties for the use of the Nivea trademark in Ghana, to the German company for the accounting years of 2014, 2015 and 2016 respectively. The appellant says that after the auditing, the respondent came to the conclusion that since the appellant had failed to register, with the Ghana Investment Promotion Centre, the said Distribution License Agreement, the royalty payments will not be recognised by the respondent, as cost to the appellant company. The respondent therefore treated the said payments as profit earned by the appellant and consequently slapped tax on same.

The appellant contends that the treatment of the said royalty payments as revenue by the respondent, that is; the refusal of the respondent to recognise the said royalty payments as cost and the consequent treatment of same as revenue is wrong in law.

The appellant contends that its business consist entirely of the importation and sale of Nivea branded cosmetic products in Ghana and that without the Nivea brand, the appellant has no business. The appellant has submitted that Nivea is a registered trade mark held by BDF Germany and that by section 3 of the Trade Marks Act, 2004, Act 664, the registration of a trade mark confers exclusive right of use on the person and that since Nivea is

the registered trade mark of BDF Germany, the appellant requires the medium of licence agreement to enable it use the trade mark. Appellant argues therefore that the said payments were made to enable appellant use the intellectual property of BDF Germany and that being so it ought to be recognised as a legitimate expenditure and treated as such under section 9(1) of the Income Tax Act, 2015, Act 896.

The appellant referred to section 37(1) (2) and section 43 of the Ghana Investment Promotions Centre Act (GIPC Act) and submitted that the Distribution Licence Agreement is not a technology transfer agreement in the contemplation of the GIPC Act and therefore it cannot be subjected to the requirement of registration under the GIPC Act. Hence, the refusal of the respondent to recognise the royalty payments on grounds of non-registration is wrongful in law.

In response, counsel referred to sections 37 and 43 of the Ghana Investment Promotion Centre Act, 2013, Act 865 and submitted that the Agreement in issue is a technology transfer agreement in view of the fact that the appellant does not only use the trade mark, service mark and trade name of Nivea but also sells and distributes the Nivea brand of products and that the importation and sale of the Nivea brand of cosmetic products by the appellant is made pursuant to the Distribution License Agreement between the appellant and Beiersdorf AG of Germany. Counsel also

pointed out that section 41(2)(c) of Act 865 gives power to the respondent to treat the payments to the German company as profits and subject it to tax in view of the non-registration of the said agreement.

Section 37 of the Ghana Investment Promotion Centre Act, 2013, Act 865 enables companies and enterprises to enter into technology transfer agreements with other companies for their mutual benefit. The section provides that

37. Technology Transfer Agreements

(1) An enterprise may enter into a technology transfer agreement that the enterprise considers appropriate for the enterprise.

(2) A technology transfer agreement entered into under subsection (1) shall be registered with the Centre.

(3) The Centre shall maintain a record of technology transfer agreements.

(4) The Centre on the receipt of a technology transfer agreement—

(a) intended for registration shall review the agreement; and

(b) shall on registration of the agreement, monitor and ensure compliance with the terms and conditions of the agreement.

(5) A technology transfer agreement registered under this Act comes into force on the date of the registration.

(6) A technology transfer agreement may be renewed with the approval of the Centre and the regulator of the relevant sector and is subject to registration by the Centre.

(7) A technology transfer agreement shall, in addition to this Act, be governed by Regulations in force relating to that agreement.

It is clear from the provisions of section 37 above that upon entering into a technology transfer agreement, the enterprise concerned is required, under the law, to submit the said technology transfer agreement to the Ghana Investment Promotion Centre for registration and that it is only after the said technology transfer agreement has been approved and registered by the centre that benefit may be taken thereunder by the enterprise.

Indeed some of the benefits that may be derived from the registration of a technology transfer agreement are listed under section 32 of the Act which provides that:

32. Investment guarantees, transfer of capital, profits and dividends and personal remittances

Subject to the Foreign Exchange Act, 2006 (Act 723) and the Regulations and Notices issued under the Foreign Exchange Act, an

enterprise shall, through an authorised dealer bank, be guaranteed unconditional transferability in freely convertible currency of—

(a) dividends or net profits attributable to the investment made in the enterprise;

(b) payments in respect of loan servicing where a foreign loan has been obtained;

(c) fees and charges in respect of a technology transfer agreement registered under this Act; and

(d) the remittance of proceeds, net of all taxes and other obligations, in the event of sale or liquidation of the enterprise or any interest attributable to the investment in the enterprise.

Thus, as far as the instant matter is concerned, the enterprise, upon the registration of the technology transfer agreement, shall be guaranteed unconditional transferability in freely convertible currency of fees and charges in respect of a technology transfer agreement. In other words, once the said technology transfer agreement is not registered, the enterprise is not guaranteed unconditional transferability, in freely convertible currency, of fees and charges incurred in respect of the said technology transfer agreement.

The question then is whether or not the Distribution License Agreement entered between the appellant and Beiersdorf AG of Germany qualifies as a technology transfer agreement.

Section 43 of the Ghana Investment Promotion Centre Act, 2013, Act 865 defines, among others, technology transfer agreement. It states that:

> "**Technology transfer agreement**" means an agreement with an enterprise which has a duration of not less than eighteen months and which involves—
>
> (a) the assignment, sale and licensing of all forms of industrial property, except trademarks, service marks and trade names when they are not part of transfer of technology;
>
> (b) the provision of technical expertise in the form of feasibility studies, plans, diagrams, models, instructions, guides, formulae, basic or detailed engineering designs, specifications and equipment for training, services involving technical advisory and managerial personnel and personnel training;
>
> (c) the provision of technological knowledge necessary for the installation, operation and functioning of the plant and equipment, and turnkey projects; and

(d) the provision of technological knowledge necessary to acquire, install and use machinery, equipment, intermediate goods or raw materials which have been acquired by purchase, lease or other means"

The agreement in issue is attached to the documents filed by the parties. In particular it is marked as exhibit GRA 6 and attached to a Reply filed by the respondent on the 9th May 2018. The agreement was made and entered on the 1st February 2012 and it "shall remain in force until it is terminated by either party in writing to the end of any calendar year. The notice period shall be 6 (six) months"

In considering whether or not the Distribution Licence Agreement is a technology transfer agreement, regard ought to be paid, in the view of the court, to the content of the agreement, as opposed to the description or name given to the agreement. Thus, notwithstanding the fact that the agreement, exhibit GRA 6, has been described by the parties thereto as a Distribution Licence Agreement, the said agreement provides, among others, under the headings: Licence, Transfer of Marketing & Management Know-How, and Confidentiality as follows:

<u>Article 2- Licence.</u>

BDF shall grant BDF Ghana an exclusive licence to mark the Products and their packaging with the registered Trade Marks in the

Territory and to put them into land-based circulation while making use of the Marketing & Management Know-How, and to advertise such products. In exceptional cases, notwithstanding the exclusivity of the license, BDF may grant Product distribution rights to other parties not subject to this Agreement as long as the exclusivity of the Agreement is not significantly affected.

BDF Ghana shall only be entitled to distribute products outside the Territory with the prior written approval of BDF.

BDF Ghana may only use the Trade Marks in the form as registered. Any deviation, whether or not significant, required the prior written approval of BDF.

Article 3 – Transfer of Marketing & Management Know-How.

Unless transferred prior to this Agreement, BDF shall transfer the Marketing & Management Know-How to BDF Ghana immediately after this Agreement enters into force.

BDF shall inform BDF Ghana of any further experience and knowledge gained over the term of this Agreement concerning the distribution of the Products and advise BDF Ghana regularly of respective improvements and developments.

Article 4 – Confidentiality

1. BDF Ghana shall not disclose, use, publish, disseminate or otherwise communicate the Marketing & Management Know-How or any other information received by BDF under this Agreement (hereinafter referred to as the "Confidential Information") directly or indirectly, in whole or in part, at any time or in any manner without the prior written consent of BDF and is obliged to undertake the necessary measures to ensure confidentiality and secrecy of the Confidential information at any time.
2. Notwithstanding the foregoing, BDF Ghana may use the Confidential Information for the sole purpose of this Agreement and may disclose Confidential Information to those of its employees who have a need to know the Confidential Information for such purpose and who are under an obligation to BDF Ghana or BDF to protect said Confidential Information as provided herein.

   BDF Ghana shall ensure that its employees observe the obligation of secrecy and shall be responsible for any breach of this Agreement by any of its employees.

   Moreover, to the extent necessary BDF Ghana may disclose Confidential Information to third parties with whom it cooperates in the Marketing and distribution of the Products (eg. Customers or

advertising agencies). BDF Ghana shall ensure that such third parties are under a confidentiality obligation. ***

3. The restriction on use and disclosure set out in Section 4.1 and 4.2 shall not apply to any information which:

   (i) Is already known to BDF Ghana (as evidenced by its written records) at the Effective Date of this Agreement and was not acquired directly or indirectly from BDF; or

   (ii) Is acquired by BDF Ghana from any third party who did not acquire such information directly or indirectly from BDF and was not otherwise in breach of any obligation of confidentiality; or

   (iii) Is already in the public domain or becomes available to the public other than by reason of any act by BDF Ghana ; or

   (iv) Is developed by employees of BDF Ghana independently of and without reference to the Confidential Information.

   BDF Ghana shall have the burden of proof in establishing any of the exceptions hereinbefore.

4. The obligation to observe secrecy shall continue to apply for unlimited time after the termination of this Agreement.

5. All Confidential Information furnished hereunder shall remain the sole property of BDF and shall upon termination of this Agreement be

returned to BDF or destroyed promptly by BDF Ghana at BDF's written request, together with all copies made thereof by BDF Ghana BDF Ghana shall erase all Confidential Information from any computer system, disk or other device containing it. Upon request, BDF Ghana shall confirm in writing the destruction and/or the deletion to BDF. Notwithstanding the return, destruction or deletion of the Confidential Information, BDF Ghana will continue to be bound by the obligations of confidentiality hereunder.

In the opinion of the court, the terms of the agreement and in particular the grant of 'exclusive licence to mark the product and their packaging with the registered trade marks', the undertaken by Beiersdorf AG of Germany to 'transfer the marketing and management know-how' and also to 'inform BDF Ghana of any further experience and knowledge gained over the term of the agreement concerning the distribution of the product and advise BDF Ghana regularly of respective improvements and developments', among others, constitute transfer of technology within the meaning of technology transfer as defined under section 43.

In particular these agreements constitute 'the assignment and licensing of industrial property' and 'the provision of technical expertise in the form of feasibility studies, plans, models, instructions, guides, formulae, ...

services involving technical advisory..." as provided for under section 43 of Act 865.

It is the opinion of the court therefore that once the Distribution Licence Agreement is a technology transfer agreement, the appellant should have registered the said agreement as required by the Ghana Investment Promotion Centre Act, 2013, Act 865. It was therefore within the remit of the respondent to treat the said royalty fees or payments by the appellant as part of the profits of the appellant and impose the relevant taxes on them. The appellant fails on this ground of appeal which is therefore dismissed.

The second ground of appeal deals with the treatment of withholding tax by the parties and it is sub-divided into two main grounds of appeal. In the first part of this ground of appeal, the appellant alleges that:

(b) The finding of CGRA imposing liabilities with respect to withholding tax is wrong in law.

(i) The decision of the CGRA to characterize reimbursements paid to the distributor of Appellant for work done by third party vendors as sales commission paid to the distributors for which a withholding tax of 10% should apply is wrong in law.

In respect of this ground the appellant says that it has Distributors who distributes the Nivea products in specially branded stands and display/show cases in various retail outlets. The appellant says that the cost of building these display/show cases are borne by the Distributors and therefore;

20. The Appellant pays the distributor for the services that it provides by identifying the said tradesmen and supervising the work of the tradesman. However, the Appellant reimburses the distributor for the out of pocket expenses it incurs by way of the cost for the materials for the tradesmen and also paying for the services of the tradesmen.

21. It is the case of the Appellant therefore that two different payments are made to the distributors for the creation of the specially branded show cases at the various retail outlets. One payment is the service fee/agency fee that is paid to the distributor for its services and the second payment is to reimburse the distributor for money paid as actual cost of creating the display cases, show cases and branding materials.

The appellant argues therefore that:

23. Appellant shall say that CGRA has lumped the two payments together as commission paid to the distributor and has slapped a withholding tax of 10%. Appellant admits that the first category of

payment is clearly a service fee/agency fee/commission paid to the distributor which should rightly attract a withholding tax of 10%, however the second payment which is in actual fact is payment to the tradesman and cost of materials are just reimbursement cost which should not attract a withholding tax of 10%.

The court finds this ground of appeal to be very lame indeed. This is so because it seeks to imply that once these payments are meant as reimbursement to the so-called Distributors for the cost of the display/show cases, they should not attract withholding tax. However, in actual fact they are payments for services rendered by artisans described as tradesmen and if they had been paid directly to those artisans the payments would have been subject to the deduction of withholding tax. In the opinion of the court therefore, the obligation of the appellant to withhold tax on those payments are not taken away by the mere fact that the payments are rendered through people described as Distributors. The appellant seems to concede this fact when it was submitted on its behalf that:

24. At worse, the reimbursement cost which are payments to tradesmen should attract a withholding tax of 5% for the 2014 and 2015 accounting year as per the Internal Revenue Act, 2000 (Act 592) (Now repealed) and 7.5% per the income Tax (Amendment) Act, 2016 (Act 907).

The above concession by the appellant is evidence of attempt by the appellant to evade the payment of lawful tax due to the State through the respondent and such conduct or action should never be countenanced by a court of law. Section 116 of the Income Tax Act, 2015 Act 896 empowers the appellant to withhold tax on the payments made to the so-called Distributors and section 117(3) provides that:

> (3) A withholding agent who fails to withhold tax in accordance with this Division shall pay the tax that should have been withheld in the same manner and at the same time as tax that is withheld.

The court is of the view that the appellant has not succeeded in showing that the respondent was wrong in surcharging the appellant with the tax which the appellant should have withheld from monies paid to third parties for services rendered to the appellant company. The court will therefore dismiss this ground of appeal also.

In the second part of the second ground of appeal, the appellant alleges that:

(b)The finding of CGRA imposing liabilities with respect to withholding tax is wrong in law.

(ii) The decision of the CGRA to disallow Trade Discount and to treat Trade Discounts offered to the distributors of the Appellant as

commission payment which should attract a withholding tax of 10% is wrong in law.

The appellant alleges under this head that in order to boost its sales, it offers trade discount by causing the Distributors to give customers extra products for a number of products purchased and once the Distributors show proof of having given out that extra product, they are then given the trade discount. Nevertheless, the respondent treated the trade discount as payment of commission to the distributor and raised withholding tax on it.

The respondent says in response that in order for a discount to be recognised the said discount must reflect on the VAT invoices issued to the customers and that in the case of the appellant, the alleged discounts never appeared on any of the VAT invoices examined by the respondent during the tax audit.

The court agrees with the position adopted by the respondent in respect of the treatment of trade discount granted to customers. Indeed, without the discount given appearing on the VAT invoice issued to customers it will be practically difficult to assess the integrity of any claim that a discount has been offered to a customer. Section 41(1) and (2) of the Value Added Tax Act, 2013, Act 870 provides in clear language that

41. Issue of tax invoice or sales receipt

(1) A taxable person shall, on making a taxable supply of goods o services, issue to the recipient, a tax invoice in the form and with the details that are prescribed by the Commissioner-General.

(2) A taxable person on issuing a tax invoice shall retain a copy of the invoice in a sequential identifying number order.

In the opinion of the court if it is true that the appellant gave trade discounts to its customers in order to boost its sales, then the said trade discount must be clearly stated on the VAT invoices issued to the customers. In the instant action, the respondent conducted a tax audit of the books and other documents kept by the appellant and came out with a finding that the VAT invoices do not show that customers of the appellant have benefitted from any trade discount given by the appellant. The appellant has argued that the trade discount are primarily given by the Distributors who thereafter show evidence thereof to the appellant before it makes a refund to the said Distributors. This implies that the appellant values the need for evidence. Section 14 and 17 of the Evidence Act, 1975, NRCD 323 provides that

14. Allocation of burden of persuasion

Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that party is asserting.

17. Allocation of burden of producing evidence

Except as otherwise provided by law,

(a) the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof;

(b) the burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact.

The court has also explained in **Okudzeto Ablakwa (No. 2) vs. Attorney General & Another [2012] 2 SCGLR 845 at 867** that:

> "If a person goes to court to make an allegation, the onus is on him to lead evidence to prove that allegation, unless the allegation is admitted. If he fails to do that, the ruling on that allegation will go against him. Stated more explicitly, a party cannot win a case in court if the case is based on an allegation which he fails to prove or establish. This rule is further buttressed by section 17 (b) which, emphasizes on the party on whom lies the duty to start leading evidence..."

Indeed, it is the duty of the appellant to prove to the satisfaction of this court that, it actually gave trade discount to its customers through its Distributors in order to boost its sales up. Before this court practically no

such evidence has been brought forth other than the mere say-so by the appellant and its lawyer. The court has therefore no reason to disturb the finding of the respondent on the issue of trade discount. The court will therefore proceed to dismiss this ground of appeal also as being without merit.

Finally the respondent has raised a very important issue for the consideration of the court. Order 54 rule 4 subrule 1 and 2 provides that

4. Payment of tax

(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 subrule (1) of this rule.

Order 54 rules 1 and 2 sets out a condition precedent to the hearing of a tax appeal. That is to say that in order that a court may hear a person who has lodged an appeal against a tax assessment, the appellant is required

first and foremost to pay at least a quarter of the assessment payable in the first quarter of the year of assessment. It is the duty of the appellant to produce evidence of the payment of the minimum of a fourth of the assessment due for the first quarter. In the opinion of the court such evidence must be filed together with the Notice of Appeal filed by the appellant because subrule 2 of rule 4 of Order 54 forbids the court from entertaining the appeal without evidence of the payment of the required tax. Evidence of the payment of the tax required under Order 54 must be attached to the Notice of Appeal or must be shown to the court immediately after the Notice of Appeal is filed. No evidence of the payment of this tax has been produced before the court. In the circumstances, the court holds that the appeal is not even properly before the court. The court will therefore proceed to dismiss the appeal.

Costs of GH¢10,000.00 to the Respondent against the Appellant.

(SGD.)
SAMUEL K. A. ASIEDU, J
(JUSTICE OF THE HIGH COURT)

R.a.a

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............REGISTRAR
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