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Tax Disputes & Dispute Resolution Options Pursuant to Petroleum Agreements in Ghana

Introduction

Disputes with the Ghana Revenue Authority (GRA) usually arise where a taxpayer disagrees with a tax decision of the Commissioner-General (CG) of the GRA. This article will address key issues in challenging an assessment by the CG with particular emphasis on petroleum agreements entered between 2003 and 2006.

Review of the legal landscape

Petroleum agreements are contracts between contractors, the Ministry of Energy, and the Ghana National Petroleum Corporation. The petroleum agreements entered between 2003 and 2006 (the "Petroleum Agreements"/ the "PAs") subject the petroleum contractors to corporate income tax under the Petroleum Income Tax Act, 1987, (PITA). Despite the repeal of the PITA by the Revenue Administration Act 2016 (Act 915), it remains relevant due to stabilisation clauses in the agreements. These clauses allow contractors to pay petroleum income tax based on the repealed PITA, even with the presence of a new income tax law in effect.¹

Challenging a tax assessment under PITA involves filing an objection to the Commissioner-General (CG) within 30 days of receiving the assessment. If dissatisfied with the CG's decision, the taxpayer can appeal to the newly established Independent Tax Appeals Board (ITAB). Appeals from ITAB decisions can then be made to the High Court and ultimately to the Supreme Court.

Additionally, the petroleum agreements include a dispute resolution mechanism that mandates international arbitration for any disputes arising from the agreements.

Questions arising given the legal landscape

Tax disputes usually occur when there are discrepancies in interpreting tax laws or understanding transactional details. While a taxpayer may construe a provision of a tax law to mean one thing, the CG may also construe the provision differently. Taxpayers may also challenge the CG's disallowance of a transaction as a deductible expense based on various reasons. Insufficient documentation or explanation provided to the CG can result in the disallowance of a transaction.

¹ The Income Tax Act, 2015 (Act 896), came into force in 2015

It's important to note that while there is an underlying agreement, the scenarios described above do not border on the agreement, but rather they arise from the application of the law specified in the agreement for determining the income tax of the contractor.

The question is whether challenging the CG's assessment, based on it being outside the scope of Article 12 of the PAs, is a tax dispute or a contractual dispute under the PAs, which would activate the PA's dispute resolution mechanism. The answer is not clear-cut.

Firstly, it can be easily argued that where the applicable law for determining contractor income tax stipulates the procedure for the resolution of disputes arising from a tax assessment, it is that procedure that must be followed. Given that the PITA is recognised by the PA as the law for the determination of the income tax of the upstream petroleum companies, any tax decision arising from the application of the PITA should be subject to the dispute resolution mechanism in the PITA.

Alternatively, the challenge to the assessments can be argued to be related to the introduction of tax elements beyond the scope of the PITA provisions, thereby violating the stabilisation provisions of the PAs which seek to maintain the validity of the PITA for petroleum contractors where a new law is enacted. Therefore, while the aim is to dismiss or reduce the tax assessment, in this context the dispute becomes contractual and primarily centres on enforcing the stabilisation provisions of the PAs, rather than directly challenging the tax assessment itself. In this context, the decision to pursue a claim in international arbitration becomes a sensible option.

The next question to consider is whether arbitration proceedings in respect of a claim such as described in the paragraph above will be viewed as a tax dispute by the courts in Ghana and if yes, whether an award from such an arbitration can be enforced in Ghana.

The Ghana Alternative Dispute Resolution Act 2010 allows the enforcement of foreign arbitral awards to the extent that the matter submitted to arbitration is (i) not "beyond the scope of submission to arbitration", (ii) capable of settlement by arbitration under the laws of Ghana, and (iii) not contrary to the public policy of Ghana. - these questions touch on the arbitrability of tax disputes in Ghana.

Ghana's arbitration law² provides that arbitration and other forms of alternative dispute resolution do not apply to matters related to the public interest. Taxation is generally recognized as a subject of public interest due to its significant impact on the economy, public finances, and the provision of essential services. The government's ability to collect taxes efficiently and fairly is crucial for sustaining public infrastructure, social programs, and economic development. Moreover, ensuring transparency, accountability, and equitable distribution of resources in tax administration is vital for fostering public trust. Consequently, tax matters fall within the domain of public interest in Ghana. Therefore, based on Section 1 of Act 798, it is arguable that disputes arising from tax matters, being issues of public interest, are not arbitrable.

There are no reported cases in Ghana specifically addressing the arbitrability of tax disputes, however a notable example from Nigeria is the case involving a major international oil company (IOC) and the Nigerian National Petroleum Corporation (NNPC). In this matter, the IOC was a party to a Production Sharing Contract (similar to Ghana's Petroleum Agreement) with NNPC. The contract governed the operation of the parties and specified the terms for lifting different categories of crude oil (royalty oil, cost oil, tax oil, and profit oil). The contract also included a stabilisation clause, similar to the Petroleum Agreement.

The arbitration dispute centered around the issue of tax and the IOC sought to enforce the stabilisation clause and claim damages based on it. The Tribunal ruled in favor of the IOC, granting all the requested reliefs and awarding damages exceeding US\$2 billion.

² Section 1 (a) Alternative Dispute Resolution Act 2010

However, the enforcement of this award faced challenges for over 10 years. At every level of the Nigerian court system, jurisdictional objections were raised regarding the tribunal's capacity to issue an award that essentially determined the amount of taxes payable by the party and the method of computation.

Conclusion

In conclusion, resolving tax disputes in the upstream petroleum industry in Ghana is a complex matter that requires careful consideration. While international arbitration is advised in certain circumstances, there is still a risk that the petroleum contractors might find it difficult to enforce a successful award in a Ghanaian Court. The answer appears to be in the framing of the claim before the arbitral tribunal.