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2022 – HC – DEM – CIV – FDA - 47

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

REGULAR JURISDICTION

BETWEEN:

GLENN LALL

Applicant

-and-

ATTORNEY GENERAL OF GUYANA

Respondent

-and-

ESSO EXPLORATION AND

PRODUCTION (GUYANA) LIMITED

Added Respondent

**WRITTEN SUBMISSION ON BEHALF OF THE APPLICANT TO THE
FIRST-NAMED RESPONDENT**

1.0 INTRODUCTION AND BACKGROUND

1.1 The matter before this Honourable Court is for declaratory relief in respect of *ultra vires* acts done by the Minister of Natural Resources, on

behalf of the Government of Guyana (*hereinafter referred to as the "GoG"*), in signing to and thereby consenting to the terms contained in Article 15 of the Petroleum Agreement dated June 27, 2016 (*hereinafter referred to as the Petroleum Agreement*) between the GOG and Esso Exploration and Production (Guyana) Limited, CNOOC/Nexen Petroleum Guyana Limited and Hess Guyana Exploration Limited (*hereinafter referred to as "the Contractors"*). It is respectfully submitted by the Applicant that certain sub-Articles of the said Article 15 of the Petroleum Agreement are *ultra vires*, discriminatory and in breach of **sections 10 and 51 the Petroleum Exploration and Production Act, Cap 65:04** (*hereinafter referred to as the "PEPA"*), and **sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act, Cap 73:01** (*hereinafter referred to as the "FAAA"*) in their effect and purpose. The applicant filed this action claiming the following relief:

- (a) A Declaration that Article 15.1 of the Petroleum Agreement between the Government of the Cooperative Republic of Guyana and Esso Exploration and Production Guyana Limited, CNOOC NEXEN Petroleum Guyana Limited and HESS Guyana Exploration Limited to the extent that it grants exemptions to persons other than licensees, violates sections 10 and 51 of the

Petroleum Exploration and Production Act Cap. 65:04, and is unlawful, null and void and of no legal effect.

(b) A Declaration that Article 15.1 of the Petroleum Agreement violates sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01] and is unlawful, null and void and of no legal effect.

(c) A Declaration that Article 15.4 of the Petroleum Agreement violates sections 10 and 51 of the Petroleum (Exploration and Production) Act Cap. 65:04 and is *ultra vires*, unlawful, null, void and of no legal effect.

(d) A Declaration that Article 15.4 of the Petroleum Agreement violates sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01] and is *ultra vires*, unlawful, null, void and of no legal effect.

(e) A Declaration that section 49 of the Petroleum (Exploration and Production) Act Cap. 65:04 purporting to authorise the Minister to remit any royalty payable by a licensee or to defer the payment of such royalty, is violative of sub-sections 1A and 1B of section

6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01] and is *ultra vires*, null and void and of no legal effect.

(f) A Declaration that Article 15.7 of the Petroleum Agreement violates sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01], and is unlawful, null and void and of no legal effect.

(g) A Declaration that Article 15.9 of the Petroleum Agreement violates sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01], and is unlawful, null and void and of no legal effect.

(h) A Declaration that the second paragraph of Article 15.10 of the Petroleum Agreement violates sections 10 and 51 of the Petroleum (Exploration and Production) Act Cap. 65:04 to the extent that it grants exemptions to persons other than licensees is unlawful, null and void and of no legal effect.

(i) A Declaration that Article 15.10 of the Petroleum Agreement violates sub-sections 1A and 1B of section 6 of the Financial

Administration (and Audit) Act [formerly Cap. 73:01], and is unlawful, null and void and of no legal effect.

(j) A Declaration that Article 15.11 of the Petroleum Agreement violates sections 10 and 51 of the Petroleum (Exploration and Production) Act Cap. 65:04 to the extent that it grants exemptions to persons other than licensees and is unlawful, null and void and of no legal effect.

(k) A Declaration that Article 15.11 of the Petroleum Agreement violates sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01] and is unlawful, null and void and of no legal effect.

(l) A Declaration that Article 15.12 of the Petroleum Agreement violates Article 149 of the Constitution of the Co-operative Republic of Guyana and is unlawful, null and void and of no legal effect.

(m) A Declaration that Article 15.12 of the Petroleum Agreement violates section 5 of the Prevention of Discrimination Act Cap. 99:08, and is unlawful, null, void and of no legal effect.

(n) A Declaration that Article 15.12 of the Petroleum Agreement violates section 51 of the Petroleum (Exploration and Production) Act Cap. 65:04, and is unlawful, null and void and of no legal effect.

(o) A Declaration that Article 15.13 of the Petroleum Agreement violates sections 10 and 51 of the Petroleum (Exploration and Production) Act Cap. 65:04, and is ultra vires, unlawful, null and void and of no legal effect.

(p) A Declaration that Order No.10 of 2016 Petroleum (Exploration and Production) (Tax Laws) (Esso Exploration and Production Limited, CNOOC/Nexen Petroleum Guyana Limited and Hess Guyana Exploration Limited) made under the Petroleum (Exploration and Production) Act Cap. 65:04 is ultra vires, unlawful, null and void and of no legal effect.

(q) In the alternative, a Declaration that to the extent that Order No. 10 of 2016 Petroleum (Exploration and Production) (Tax Laws) (Esso Exploration and Production Limited, CNOOC/Nexen Petroleum Guyana Limited and Hess Guyana Exploration

Limited) made under the Petroleum (Exploration and Production)

Act Cap. 65:04 is valid, that validity applies only to the Licensees.

(r) Such further or other orders as the Court may deem just;

(s) Costs.

The Applicant is no longer pursuing Declarations (l) and (m) and sincerely apologises to the Honourable Court and the parties.

1.2 It is the Applicant's submission that by entry into the Petroleum Agreement that grants the concessions under Article 15 of the Petroleum Agreement, the Minister has extended concessions, remissions and waivers in violation of the section 51 of the PEPA and the section 6 FAAA and further has discriminated in favour of expatriate employees in granting concessions not available to Guyanese.

1.3 The GoG represented herein by the First-Named Defendant, the Attorney General, and Mr Gopnauth Bobby Gossai Jr, the Senior Petroleum Co-ordinator in the Ministry of Natural Resources ("Mr Gossai") denied that the GoG represented by the Minister of Natural Resources and the Minister assigned responsibility for Finance acted in violation of the said PEPA and the FAAA. Instead, the First-Named Defendant sought to provide defences that the said Ministers were vested with the power to make concessions and exemptions to the Licensees; that the exemptions

to non-residents under the Petroleum Agreement were lawfully made and confirmed by the **Order 10 of 2016** (“the Order”) made by the Minister of Finance affirmative resolution by the National Assembly; that the Applicant’s interpretation of the **PEPA** was misconstrued as the said **PEPA** only addresses the issue of waiver of taxes and not remission of taxes by the GoG on behalf of Licensees; and further that the said Agreement is in private law.

1.4 This submission by the Applicant seeks to address each of these contentions raised by the First-Named Defendant and to show this Honourable Court how these contentions are flawed and are errors in law and fact.

2.0 ISSUES

2.1 The Applicant will address each of the following contentions in its application for consideration of the court:

- a) Whether the Applicant has *locus standi* to initiate this action.

- b) Whether the Agreement between the Government of Guyana and Exxon Mobil in relation to these proceedings are subject to the principles of private law or public law.

- c) Whether the acts of the Minister of Natural Resources and certain sub-articles of the Petroleum Agreement were *ultra vires* and in breach of **sections 10 and 51 of PEPA, sub-sections 1A and 1B of section 6 of FAAA.**
- d) Whether upon its proper interpretation the PEPA permits the payment of taxes due on behalf of licensees.
- e) Whether the Petroleum Exploration Production Agreement is a Tax Act

3.0 THE LAW

3.1 Whether the Applicant has *locus standi* to initiate this action?

3.2 The Applicant is a citizen of Guyana and the publisher of the National Media and Publishing Company Limited – a newspaper of national circulation, he is also a businessman and a taxpayer. He has commenced these proceedings as a public-spirited citizen of Guyana. Although he is alleging an infringement of his fundamental rights and freedoms in Article 149 of the Constitution of Guyana, he is clear that his interest in these proceedings is not personal and that he will not likely be directly

affected in his individual capacity by the actions of the Minister with responsibility for petroleum and the Petroleum Agreement dated June 27, 2016.

3.3 The Applicant asserts that he has both the capacity and the legal standing to bring these proceedings in his own name in his private capacity for declaratory relief alleging breach of public rights.

3.4 In keeping with the principle established in the case of **AG v Dumas [2017] UKPC 12**, this Honourable Court is entitled to entertain public interest litigation provided the litigation is *bona fide*, arguable with sufficient merit to have a real and not fanciful prospect of success, grounded in a legitimate and concrete public interest.

3.5 As Jamadar, JA at page 511, paragraph h in the **AG v Dumas (supra)**, quoting Baroness Hale, said that “...*too close a concentration on the particular interest which the claimant may be pursuing risks losing sight of what this is all about – fundamentally, as Mark Elliott has said, the issue is not about individual rights but about public wrongs. There are better ways of nipping unmeritorious claims in the bud than too restrictive an approach to standing.*”

3.6 In the case of **R. v Felixstowe Justices Ex. p. Leigh [1987] Q.B. 582**, per **Watkin LJ at 598**, the press was described as the guardians and watch-dogs of the public interest in the proper administration of justice, and allowed to seek review of decisions of magistrates' courts and examining justices. Lord Justice Watkins held that,

"How then is the sufficiency of the applicant's interest in the matter of each of the applications to be judged?... The appropriate approach in this case, it seems to me, is for the court, in using what I regard as its undoubted discretion, to decide the question of sufficient interest on each application primarily within its factual context".

"I have already emphasised the importance to the community at large of open justice and the role of the press as guardian and watchdog of the public interest in this matter, especially in magistrates' courts. Within the context of the administration of justice as a whole, the policy of routine non-disclosure adopted by the Felixstowe bench and their clerk, shared in one form or another by a growing number of justices elsewhere, raises a matter of national importance"

3.7 Citing Lord Diplock in *Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self Employed and Small Businesses Ltd.*

[1982] A.C. 617, at 644, Watkins LJ in **R v Felixstowe** (*supra*) agreed that seeking declarations is the appropriate remedy when matters are brought by public-spirited citizens having a sufficient interest in the matter:

"It would, in my view, be a grave lacuna in our system of public law if ... even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

3.8 Further, in the case of **R. v HM Treasury Ex p. Smedley** [1985] Q.B.

657, a public-spirited taxpayer who raised a serious issue as to the powers to make an order in council, that would automatically lead to substantial expenditure by the government, was held to have standing.

3.9 In **R. v Secretary of State for Foreign and Commonwealth Affairs**

Ex p. Rees Mogg [1994] Q.B. 552, a citizen who had a *"sincere concern for constitutional issues"* was allowed to challenge the lawfulness of the ratification of the Treaty on the EU.

3.10 In the case of **R. (Miller) v Prime Minister** [2020] A.C. 373, an

individual citizen brought successful claims challenging the decision to

prorogue Parliament, and on whether the giving of notice of the intention of the UK to leave the EU required an Act of Parliament.

3.11 In the case of **R. (Evans) v Secretary of State for Defence [2010] EWHC 1445 (Admin)**, no objection was taken by the Court to the standing of an activist opposed to the use of troops in Afghanistan in a challenge to the policy and practice governing the transfer of suspected insurgents to the Afghan authorities. Richards LJ in **R. (Evans) v Secretary of State for Defence (supra)** at para 2 held that,

“The claimant is a peace activist who is opposed to the presence of UK and US armed forces in Afghanistan. The fact that she may have a wider objective in bringing her claim is, however, an irrelevance. The claim itself is brought in the public interest, with the benefit of public funding. It raises issues of real substance concerning the risk to transferees and, although the claimant’s standing to bring it was at one time in issue, the point has not been pursued by the Secretary of State.”

3.12 Alternatively, if the Court finds that the common law position as established by the cases are not tenable, the Court is asked to examine **Section 12 of the Judicial Review Act, Cap 3: 06** provides that,

“Section 12. *Where the Court is of the opinion that an action commenced by way of writ of summons should be by the way of application for judicial review, the Court may give such directions and make such orders as it considers just to allow the proceedings to continue as proceedings governed by this Act* (emphasis added).”

3.13 It is the Applicant’s submission that this is a matter ripe for conversion to a Judicial Review application having regard to the fact that this application goes directly to policy. The Judicial Review Act allows him to make an application to the Court for the review of acts and decisions of public authorities and if this Court is satisfied that the application is justifiable in the public interest in the circumstances of this case as the Applicant contends, then this Court has the jurisdiction to convert and treat same as a Judicial Review application.

4.0 *Whether the Agreement between the Government of Guyana and Exxon Mobil in relation to these proceedings are subject to the principles of private law or public law.*

4.1 Administrative law is considered a branch of public law and it deals with the decision making of such administrative units of government that are

part of the executive branch in such areas as international trade, manufacturing, the environment, taxation and so on: **Commonwealth Caribbean Public Law by Professor Albert Fiadjoe.**

4.2 In **LJ Williams v Smith and AG (1980) 32 WIR 395**, Bernard J defined a person as acting in the capacity of a public authority where “the person is endowed under the law with functions, duties and powers of a public nature and for the purpose of the application of the law he was clothed with coercive powers.”

4.3 Additionally, it has been stated that where the State plays a dominant role in the activity of the authority or body, the tendency would be to treat that authority or body as a public authority: **Benjamin et al v Minister of Information et al no. 56 of 1997 High Court of Anguilla.**

4.4 While there is no set definition for a public authority or a public body, **Halsbury’s Laws of England (Volume 61A (2016)/1** provides that a body may be amenable to the court’s review procedure of its decisions by reason either,

“of its source from which it derives its power or because it discharges public duties or performs public functions. It will also be relevant to consider whether the grounds of

challenge raise a public law issue.... As a general proposition, where any person or body exercises a power conferred by statute which affects the rights or legitimate expectations of citizens and is of a kind which the law requires to be exercised in accordance with the rules of natural justice, the court has jurisdiction to review the exercise of that power (emphasis added)...the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers', and a that decision must affect the private rights of some person or deprive another of some benefit which he had been allowed to enjoy, and expected to enjoy in the future or which he has a legitimate expectation of acquiring or enjoying”.

4.5 The general rule is that a public officer may be said to be one who discharges a duty in the performance of which the public is interested: **R v Whitaker** [1914] 3 KB 1283; **Halsbury's Laws of England** 606. By founding the matter under public law (being amenable to judicial

interpretation and review) versus private law (private claim of a of contract) will depend on the following:

“It is also necessary to consider the closely made linked question of the nature of the decision of which complaint is made. The crucial consideration will be whether there is a sufficient public law element to a particular decision. That will involve consideration both of the nature of the decision and the source of the power.”: Halsbury’s Laws of England (Volume 61A (2016))/1 and (Volume 61A (2018))1

4.6 In Guyana, there is recognition for “public law” cases being dealt with by the High Court, particularly the Constitutional/Administrative Law Division: Guyana Constitutional/Administrative Law Court (Practice Direction) 2011 at ss 3 and 5 cited in **Fundamentals of Caribbean Constitutional Law** by Robinson, Bulkan and Saunders, the latter posited at page 212, paragraph 5-003 that,

“...in Guyana the judiciary has set aside a division of the High Court to be called the Constitutional/Administrative Law Division. This division is intended to deal with all cases have a “public law element”, namely those concerning acts and

decisions of public officials and authorities and involving the interpretation or application of the Constitution.”

4.7 In the present case, the Applicant submits that the said Minister responsible for petroleum public authorities and did in fact obtain his power to act in relation to the said Petroleum Agreement under the sections of the **PEPA**. The Petroleum Agreement also clearly states that the Minister responsible for petroleum represents the Guyana Government and accordingly, his functions, duties and powers are of a public nature and he has the authority to ensure compliance with the law, making the state culpable under the state action doctrine.

4.8 Furthermore, the said Petroleum Agreement regulates the exploitation of petroleum in its natural condition which is vested in the state of Guyana; is signed by a cabinet member on behalf of the Government of Guyana; and is the subject of an Order of the National Assembly of Guyana signed by the Minister responsible for Finance.

4.9 The Minister responsible for Petroleum in consultation with the Minister of Finance approved and authorised the tax and royalty provisions outlined in the Agreement. The **Petroleum (Exploration and Production) Act No.3 of 1986 Cap 65:04** confers on these ministers’

functions, duties, and powers of a public nature and responsibility to secure implementation of the law.

4.10 The Applicant therefore submits that the First-Named Respondent's argument that the said Petroleum Agreement between the licensees and the Government of Guyana is in private law is misconceived and erroneous.

4.11 The Minister with responsibility for Petroleum and the Minister with responsibility for Finance are not acting in their private capacity under the Petroleum Agreement as it is therein distinctly stated that petroleum in its natural condition in strata in Guyana is vested in the State.

4.12 As it relates to the Agreement both ministers are operating on behalf of the Government of Guyana as public authorities. This would mean that the tax and royalty provisions in the Agreement were made in the exercise of a public function and additionally, it would mean that such provisions have the potential to affect public law rights, obligations and expectations.

4.13 Thus, the actions of a public authority or body must be sanctioned by an act of Parliament or other public instrument and must be performed with that power vested in mind, without which the public authority or body would not be capable of performing the said acts or omissions. As such the action must contain a sufficient public law element: **R v British Coal Corpn, ex p Vardy [1993] ICR 720 at 751, [1993] IRLR 104 at 116; Halsbury’s Laws of England (Volume 61A (2016))/1 and (Volume 61A (2018))1, Leech v Deputy Governor of Parkhust Prison [1988] AC 533 at 583, [1988] 1 All ER 485 at 512, HL, per Lord Oliver of Aylmerton.**

4.14 The Petroleum Agreement clearly envisions the possibility that its provisions can affect public law rights, obligations and expectations. This is seen by the fact that the Guyana Geology and Mines Commission (GGMC) is required in the exercise of its responsibilities under the Petroleum Agreement “to ensure for the people of Guyana the maximum benefits there from and for doing such things in relation thereto.”

4.15 In the case of **Williams Construction Ltd v AG of Barbados (1994) 45 WIR 914 (PC)**, William construction Ltd, instituted

proceedings for judicial review against the Cabinet of Barbados in connection with the award of a public contract.

5.0 Whether the acts of the Minister of Natural Resources and certain sub-articles of the Petroleum Agreement were *ultra vires* and in breach of sections 10 and 51 of PEPA, sub-sections 1A and 1B of section 6 of FAAA.

5.1 The general principle is that a public decision-making body or person, particularly those exercising statutory powers or otherwise carrying out public functions, will not be said to be acting lawfully if it acts *ultra vires* or outside the limits of its jurisdiction. Further, such a person or body may lack jurisdiction if it has no power in the narrow sense to take a particular course of action or make a decision but takes it or commits any other error of law: **Halsbury's Laws of England** (Volume 61A (2018))/2; *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 at 701;

5.2 The doctrine of *ultra vires* is regarded as the “juristic basis” for court’s review of the actions, omissions and decisions of public authority, bodies and persons, and its underlying principle for public bodies or officers exercising statutory powers is that the powers are exercised in the way in which Parliament intended. Further, there is a presumption that

Parliament intended for the powers to be exercised lawfully: *Halsbury's Laws of England* (Volume 61A (2018))/2;

5.3 Therefore, any instrument, legislation, act or decision will be regarded as *ultra vires* if it is incompatible with the limits imposed by a superior element of the law in its effect or purpose. As such, the Minister responsible for Finance who has granted his blessing to a document that has the effect of giving concessions to persons not named, defined, stated or referred to in the primary legislation governing it nor entitling that class or group of persons to receive such concessions is *ultra vires* the said primary legislation: *R (on the application of the Public Law Project) v Lord Chancellor and Secretary of State for Justice* [2016] UKSC 39 at [23], [2016] AC 1531, [2017] 2 All ER 423, per Lord Neuberger P; *R v Lord President of the Privy Council, ex p Page* (supra); *O'Reilly v Mackman* [1983] 2 AC 237 at 278, [1982] 3 All ER 1124 at 1128.

5.4 The Applicant submits the following in support of its case of violations:

- i. Ultra Vires sections 10 and 51 of the Petroleum Exploration and Production Act, Cap 65:05 (hereinafter referred to as the "PEPA")

ii. Ultra Vires sub-sections 1(a) and 1(b) of section 6 of the Financial Administration (and Audit) Act, [formerly Cap 73:01 (hereinafter referred to as the “FAAA”)]

(i) Ultra Vires section 10 and 51 of the Petroleum Exploration and Production Act, Cap 65:05 (hereinafter referred to as the “PEPA”)

5.5 Sections 10 and 51 of the Petroleum Exploration and Production Act Cap. 65:04 provide as follows:

(i) Section 10 of the Petroleum Exploration and Production Act Cap. 65:04 provides that:

“The Minister may enter into an agreement (not inconsistent with this Act) with any person with respect to all or any of the following matters, namely –

(a) The grant to that person or to any other person (including anybody corporate to be formed), identified in the agreement, of a licence;

(b) The conditions to be included in the licence as granted or renewed;

(c) The procedure to be followed by the Minister while exercising any discretion conferred upon him by or under this Act and the manner in which the discretion shall be exercised;

(d) Any matter incidental to or connected with the foregoing.”

(ii) Section 51 of the Petroleum Exploration and Production Act Cap. 65:04 provides that:

“(1) The Minister assigned responsibility for finance may, by Order, which shall be subject to affirmative resolution of the National Assembly, direct that any or all of the written laws mentioned in subsection (2) shall not apply to, or in relation to, a licensee where the licensee has entered into a production sharing agreement with the Government of Guyana.

(2) The written laws referred to in subsection (1) are -

(a) the Income Tax Act;

(b) the Income Tax (In Aid of Industry) Act;

(c) the Corporation Tax Act; and

(d) the Property Tax Act.”

5.6 Further, the interpretation section of the PEPA defines licensee and holder in Section 2(1) (p) and (k) respectively as:

(p) licensee, "...the holder of a licence"

(k) "holder", in relation to a licence, means the person to whom the licence is granted and, where a licence is granted to a person jointly with others, means everyone one of the persons to whom the licence is jointly granted, and includes every person to whom the licence is jointly granted, and includes every person to whom the licence or an interest therein is lawfully transferred;"

5.7 Notwithstanding the above provisions, Article 15.1 and paragraph 2 of Article 15.10 of the Petroleum Agreement of Guyana provide that, "***...no tax, value-added tax, excise tax, duty, fee, charge or other impost shall be levied at the date hereof or from time to time thereafter on the Contractor or Affiliated Companies, in respect of income derived from Petroleum Operations or in respect of any property held, transactions, undertaken or activities performed for any purpose authorised or contemplated hereunder other than...***", and "***...that Affiliated***

Companies or Non-Resident Sub-Contractors shall not be subject to the provisions of the Income Tax Act (Cap 81:01) and Corporation Tax Act of Guyana (Cap 81:03) during the expiration period on income earned in Guyana for any given tax year if the Affiliated Company or Non-Resident Sub-Contractors has conducted business for one hundred eighty-three (183) days or less on a cumulative basis in the tax year of assessment,” respectively. It is respectfully submitted that Article 15.1 and paragraph 2 of Article 15.10 fly into the teeth of the legislation or it violates or offends the language and spirit of the legislation.

5.8 Similarly, Articles 15.11 and 15.12 (ii) of the Agreement purport to on the one hand, allow that there be “...*no tax, duty, fee, withholding, charge or other impost applicable on interest payment, dividends, deemed dividends, transfer of profit or deemed remittance of profits for Contractor’s, Affiliated Companies’ or Non-Resident Sub-Contractors’ branch in Guyana to its foreign or head office or to Affiliated Companies*” and on the other hand, provides that, “*expatriate employees of Contractor, Affiliated Companies or Non-Resident Sub-Contractors shall not be subject to the provisions of the Income Tax Act of Guyana (Cap. 81.01) and shall not be liable for personal income tax in Guyana on income earned in Guyana for any given tax year if the expatriate is*

physically present in Guyana for one hundred eighty-three (183) days or less on a cumulative basis in the tax year of assessment.”

5.9 It is our respectful submission that Articles 15.1, 15.11 and 15.12 are *ultra vires* sections 10 and 51 of the PEPA as they purport to disapply the written laws set out in section 51 (2) to persons other than licensees, namely to Affiliated Companies, expatriate employees of Contractors and non-resident sub-contractors.

5.10 The plain language of section (2)(1)(p) in the interpretation section of the PEPA, defines licensee as a holder of a Petroleum licence and the Applicant submits that the licensees of the Petroleum Agreement are Esso Exploration and Production Guyana Limited, CNOOC NEXEN Petroleum Guyana Limited and HESS Guyana Exploration Limited who are collectively identified in the Petroleum Agreement as the Contractor. Therefore, the Applicant submits that the plain interpretation of the PEPA did not encompass or expressly provide for sub-licensee/sub-contractors or affiliated companies of the licensee.

5.11 It is the Applicant's submission that the Parliamentary debate that took place when the PEPA bill was introduced gave this Court a clear aid of interpreting PEPA. Such a position is supported by the authority

Pepper (Inspector of Taxes) v Hart [1992] UKHL J1126-2. The Applicant submits that the intention of the legislature in drafting the PEPA can be construed from the Parliamentary debates. In the instant case, Lord Browne-Wilkinson held at pages 23-24 that,

“reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria.”

5.12 At the first the second and third readings of **Petroleum (Exploration and Production) Bill No. 1 of 1986 of Guyana**, the then Deputy Prime Minister for Planning and Development, Comrade W.A.L.H Parris, M.P (as he then was) stated that,

*“The Bill...makes provision for the grant, **in appropriate cases of tax concessions or exemptions to holders of petroleum prospecting or production licences** (emphasis added) and it makes provision for the remission of royalties in certain cases and, where applicable, the deferment of the payment of royalty.*

*The assessment of a **Bill such as this**...would be incomplete if I did not give some idea of the economic objectives which...**fall into three main categories which the petroleum agreements are supposed to adhere to in terms of what occurs under this legislation.***

*...**Firstly**, the objectives are that we should be able to have terms in those agreements which will encourage that development of all commercial finds including even the most marginal ones... **The second** is that the terms we would attempt to put in place must benefit from some experience that we have had and a lot of people have had. Put very simply...If in a negotiation between two people either of them arranges to abuse the strength in relation in the other one in such a way that you lock a man into an agreement or you force an agreement that is simply untenable in terms of the pressure*

*which you bring to bear on that person, then you can bet your bottom dollar that that agreement is going to blow up in your face sooner or later and it will be a non-agreement by virtue of the inequity inherent in the agreement. Therefore, we have a concern to derive terms that will help to ensure that the agreement reached reflects the relationship between both sides which will ensure, which will not come under pressure of inequity born simply on inadequate negotiating strength and **thirdly**, having derived stability of the life of the agreement given the first two objectives... ” : **The Parliamentary Debates Official Reports [Volume 11] Proceedings and Debates of the First Session (1986) of the National Assembly of the Fifth Parliament of Guyana Under the Constitution of the Co-operative Republic of Guyana, 10th Sitting dated Monday, 14 April 1986**, also referred to as the Hansard.*

5.13 The Applicant contends that “licensee” as defined by section (2)(1)(p) of the Petroleum Exploration and Production Act Cap. 65:04 do not apply to sub-contractors or affiliated companies or expatriate employees. Therefore, these persons should not benefit from the tax concessions provided in the PEPA for the licensees/contractors. As such, the Contractor, according to **section 10 of the PEPA** is “*identified in the*

agreement, of a licence” and this section further prohibits the Minister from entering into any Agreement inconsistent with the Act.

5.14 It bears noting that at the date of this Agreement, i.e., 27th. June 2016, a significant discovery of petroleum (the Liza 1 Well) had already been announced by the Contractors (May 2015) and another discovery was underway (Payara Well), announced in January 2017). The Applicant submits that by the date of the Agreement there was no longer as great a risk warranting concessions as evidenced by the discoveries and that the concessions were intended to apply to a pre discovery situation in which the project risks were considerably higher. It is therefore submitted this was not an appropriate case for the scale and range of tax concessions under PEPA should be granted. To the best of the Applicant’s knowledge, no government publications have highlighted the justification of the factors the Minister took into account upon signing the Petroleum Agreement. Moreover, if the Minister wished to extend fiscal concessions to affiliated companies, sub-contractors and expatriate employees of the Contractor, affiliate companies or non-resident sub-contractors this could only have been done by a provision to that effect under a Tax Act.

5.15 It is our respectful submission that by the use of the word “licensee”, Parliament intended that any concessions and waivers could not be

extended to non-resident subcontractors, affiliated companies or associated companies.

5.16 It is our submission that the that the Minister has clearly acted outside of the provisions of the Act by agreeing to contract terms of the said Petroleum Agreement that unlawfully extend the statutory provisions regarding tax exemptions and concessions to other classes of persons other than the licensee. It is our further submission that the court's duty, whether the legislation is a taxing Act or any other legislation is to give effect to the intention of the Legislature.

5.17 It is our further submission that the said Minister violated section 10 and section 51 of the PEPA by signing and thereby agreeing to certain *ultra vires* sub-Articles of Article 15 of the Petroleum Agreement. We contend that the PEPA existed prior to the Petroleum Agreement and is the basis upon which both the Ministers of Natural Resources and Finance are vested with the powers to enter into any petroleum agreement and grant fiscal concessions for a licence. Therefore, the Minister had sufficient opportunity to be aware of the statutory obligations under which he was bound to exercise his powers to act and make the decision of signing the Petroleum Agreement. It is therefore our submission that if the said Ministers and GoG wished to extend the concessions to sub

licensees, affiliated companies and expatriate employees then they could have caused Parliament to amend the PEPA to be amended to include such categories of persons.

- (ii) Ultra Vires the Financial Administration (and Audit) Act, [formerly Cap 73:01 (hereinafter referred to as the “FAAA”)]

5.18 Section 6 of the FAAA provides that,

“(1) Save as maybe expressly provided by any law for the time being in force, no expenditure involving a charge on the revenue shall be incurred; nor shall any sum due to the revenue be remitted, unless the Minister is empowered by the specific provisions of the relevant tax Act to permit the remission or by Order or other subsidiary legislation made under such Act.

(1A) Except as provided in subsections (1C) and (1CC), no remission, concession, or waiver is valid unless the remission is expressly provided for in a tax Act or subsidiary legislation.

(1B) No remission, concession, or waiver of tax by Order or other subsidiary legislation is valid unless the Act under which the subsidiary legislation is made expressly permits the Minister to provide such a remission, concession, or waiver.

(1C) The Minister may make regulations or other subsidiary legislation to release the taxpayer under the procedure and conditions specified therein in whole or in part from the liability to pay tax otherwise due in cases where the taxpayer's ability to pay tax due has been affected by natural disaster, disability, mental incapacity, or death, or if the taxpayer has been rendered homeless or destitute.

(1CC) The Minister may by order which shall be subject to negative resolution of the National Assembly exempt Diplomatic, Consular, International, Charitable and Non-Profit Organisations, semi-autonomous agencies, Government departments, and public corporations from the payment of want-of-entry charges, stamp duty and environmental tax.

(1D) The Minister has the power to issue a notice making an adjustment in the tax rate so as to take into account fluctuations in the price of essential imported goods (for example, fuel); provided, however, that the effect of the change is at least revenue neutral.

(1E) Nothing in this section shall be construed to limit or restrain the Minister in the exercise of his duty to enforce the law and to exercise oversight in respect of the operations of the Ministry.”

5.19 However, in addition to the Articles examined above, that is Articles 15.1, 15.10, 15.11 and 15.12, further Articles of the Petroleum Agreement that violated the FAAA are Articles 15.4, 15.5, 15.7 and 15.9. These latter Articles provide as follows:

(Article 15.4) “The Minister hereby agrees:

(a) that a sum equivalent to the tax assessed pursuant to Article 15.2 and 15.3 will be paid by the Minister to the Commissioner General, Guyana Revenue Authority on

behalf of the Contractor and that the amount of such sum will be considered income of the Contractor; and

(b) that the appropriate portion of the Government's share of Profit Oil delivered in accordance with the provisions of this Agreement shall be accepted by the Minister as payment in full by the Contractor of Contractor's share of each of the following levies, whatsoever the applicable rate of such levies may be, which the Minister shall then pay on behalf of the Contractor under Article 15.4 (a) to the Commissioner General, Guyana Revenue Authority or such successor authority:

(i) the Contractor's share of the income taxes imposed by the laws of Guyana, including, but not limited to, income tax imposed by the Income Tax Act and corporation tax imposed by the Corporation Tax Act and payable at the date hereof, or from time to time thereafter, and any other levy or charge on income or profits which may become payable from time to time under any laws, acts, statutes, regulations or orders by the Government; and

(ii) any other similar charge imposed and payable in respect of Petroleum Operations at the date hereof, or from time-to-time hereafter, except charges of the type specified in Article 15.1 (a-b).”

(Article 15.5) “The Contractor shall provide the Minister with the Contractor’s income tax returns to be submitted by the Minister to the Commissioner General, Guyana Revenue Authority so the Minister can pay income tax on behalf of the Contractor as provided under Article 15.4 (a). On such returns, the Minister shall note that he is paying the income taxes on behalf of the Contractor, so that the Commissioner General, Guyana Revenue Authority can properly prepare the receipts required under this Article 15.5. Within one hundred and eight (180) days following the end of each year of assessment, the Minister shall furnish to the Contractor proper tax certificates in the Contractor’s name from the Commissioner General, Guyana Revenue Authority evidencing the payment of the Contractor’s income tax under the Income Tax Act and corporation tax under the

Corporation Tax Act. Such certificates shall state the amount of tax paid individually on behalf of the Contractor or parties comprising the Contractor and other particulars customary for such certificates.”

(Article 15.7) “Subject to the conditions of section 49 of the Act, the Minister may remit in whole or in part, or defer payment of, any royalties payable by Contractor.”

(Article 15.4) “The Minister hereby agrees that the Contractor shall be exempted from the Property Tax Act pursuant to section 51 of the Act and any other act which amends or replaces in part or in whole the Property Tax Act.”

5.20 Notwithstanding the provisions of section 6 of the FAAA, Articles 15.1, 15.4, 15.5, 15.7, 15.9, 15.10, 15.11 and 15.12 of the Petroleum Agreement granting tax concessions to affiliate companies, non-resident sub-contractors, and expatriate employees alter tax laws which affect these entities or persons but were not provided for in a tax act. It is our submissions that these provisions of Article 15 of the said Agreement are

ultra vires the FAAA and are clearly discriminatory to Guyanese businesses, taxpayers and Guyanese employed in the petroleum industry.

5.21 The Financial Administration and Audit Act, Cap 73:01, arose out of Act 39 of 1961, to regulate the receipt control and disbursement of public monies, to provide for the audit of the accounts in relation thereto and to provide for other matters connected with or incidental to the purposes aforesaid. Section 6 reproduced above has at all times remained part of the Act. It is submitted that this section predates the PEPA and that in any case the PEPA is not a tax act and any law purporting to remit any sum due to the revenue would therefore violate section 6 (1). To impose a tax as defined in the case *Matthews v Chicory Marketing Board (Vict) 5 (1938) 60 CLR 263 at 276* per Latham CJ as “a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered.”

5.22 Additionally, attention is drawn to section 6 (1) (c) which specifies the conditions under which a tax payer is released in whole or in part from the liability to pay tax where the tax payers’ ability to pay tax due has been affected by natural disaster, disability, mental incapacity, or death, or if the tax payer has been rendered homeless or destitute. It is obvious that none of these circumstances applies to the added respondent or its

fellow contractors HESS and CNOOC. Moreover, it is unknown to our tax laws for the government to pay the taxes of a tax payer as Article 15.4 purports to do.

6.0 Whether upon its proper interpretation the PEPA permits the payment of taxes due on behalf of licensees.

6.1 Section 6 (1C) of the FAAA specifies the conditions under which a tax payer is relieved *“in whole or in part from the liability to pay tax otherwise due in cases where the tax payers’ ability to pay tax due has been affected by natural disaster, disability, mental incapacity, or death, or if the tax payer has been rendered homeless or destitute.”*

6.2 It is submitted that none of the aforementioned circumstances applies to the added respondent or its fellow contractors HESS and CNOOC. Moreover, it is unknown to our tax laws for the government to pay the taxes of a tax payer as Article 15.4 of the Petroleum Agreement purports to do.

6.3 The Applicant further submits that in any remission, concession or waiver must be under a tax Act and further, Section 10 of PEPA requires that such persons of any such remission, concession or waiver be named.

In the present case the expatriate employees purportedly granted exemptions from taxes under Article 15.12 (ii) of the Petroleum Agreement constitute a violation of sections 10 and 51 (2) of PEPA.

6.4 It is submitted that the payment of the tax by the GOG on behalf of the Contractor is not a waiver, remission or concession, and merely a substitution of the person liable to the tax by the GOG. It is further submitted that the Court should consider whether the GOG can substitute for any tax payer.

7.0 Whether the Petroleum Exploration and Production Agreement is a Tax Act

7.1 *In Littman v. Barron (Inspector of Taxes, [1951] 2 A.E.R. 393*, a decision of the Court of Appeal where Cohen, LJ. said : "the principle that in case of ambiguity a taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section clearly imposing liability".

7.2 Order No. 10 of 2016 made under section 51 (1) of the PEPA cites itself as a tax law, the "*Petroleum (Exploration and Production) (Tax Laws) (Esso Exploration and Production Limited, CNOOCNexen Petroleum*

Guyana Limited and Hess Guyana Exploration Limited) Order 2016,” as a procrustean attempt to bring itself under a section 6 (1) of the FAAA.

7.3 It is the Applicant’s submission that the Order cannot be construed as a tax law nor can it convert the PEPA into a tax act. Further, the Order is therefore invalid as it has not been made under a tax law. Alternatively, even if it does apply, it would be contrary to section 51 (2) of the PEPA in relation to section 10 of the PEPA as the expatriate employees are not named. Further, the intended object of the Order as contemplated by section 10 of the PEPA and section 6 of the FAAA is to waive taxes under a tax act and it is submitted that, in the present case, neither Order No. 10 of 2016 nor the PEPA is a tax act.

7.4 The choice between a strict and a liberal construction arises only in case of doubt in regard to the intention of the legislature manifest on the statutory language. Indeed, the need to resort to any interpretative process arises only where the meaning is not manifest on the plain words of the statute. If the words are plain and clear and directly convey the meaning, there is no need for any interpretation. It appears to us the true rule of construction of a provision as to exemption is the one stated by this Court in *Union of India v. Wood Papers Ltd., [1990] 4 SCC 256:*

"..... Truly speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction...."

7.5 In the case *Novopan India Ltd. v. Collector of Central Excise and Customs* the principle that in the case of ambiguity, a taxing statute should be construed in favour of the assessee- assuming that the said principle is good and sound does not apply to the construction of an exemption or an exempting provision, they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision.

7.6 The authorities on the application of exemption provisions in tax statutes are simply summed up in the recent case *Commissioner of Customs*

(Imports), Mumbai v M/S. Dilip Kumar and Company and Ors 2018 is summed up as follows. The reference holding as under Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification. When there is ambiguity in exemption notification which is subject to strict interpretation, **the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.**

7.7 It is therefore submitted that in applying the principles of strict interpretation, in respect of exemption clauses that since the PEPA did not expressly exempt affiliated companies, sub-contractors and their expatriate employees then such exemptions cannot be applied. In relation to can't mean the persons stated above because 51.10 states the persons must be identified to get the benefits. Alternatively, Order 10 couldn't do this because it has to be made under the Tax Act and PEPA isn't a tax act. Provisions regarding relief taxes to the petroleum sector are set out in the section.... Of the income tax act. Any waiver the Order has to be made under the Tax Act which is provided for under the Income Tax Act. There must be some corresponding act by the legislature to give effect to additional category of persons to receive exemptions or a modification to the definition of licensee.

7.8 It is further submitted that even if the exemption could apply in relation to sub-Articles 15.1, 15.4, 15.7, 15.9, 15.10, 15.11, 15.12 (ii) and 15.13, it would be tantamount to turning taxation on its head that the State is required to pay the taxes of the Contractor as provided for in Article 15.4 having regard to section 51 (2) of PEPA and section 6 of the FAAA.

8.0 CONCLUSION

- a) In conclusion, and relying heavily on the above-mentioned submissions and cases I urge the Honourable Court to dismiss the First Named Respondent's Defence and to grant the declarations and cost sought by the Applicant.

Mohamed R. Ali

MOHAMED R. ALI

ATTORNEY-AT-LAW

DATED this ^{3rd} day of June, 2022.

LIST OF STATUTES

1. Petroleum Exploration and Production Act, Cap 65:04
2. Financial Administration (and Audit) Act, Cap 73:01
3. Article 149 of the Constitution of the Co-operative Republic of
Guyana
4. Income Tax Act (Cap 81:01)

LIST OF AUTHORITIES

1. AG v Dumas [2017] UKPC 12
2. R. v Felixstowe Justices Ex. p. Leigh [1987] Q.B. 582
3. R. v HM Treasury Ex p. Smedley [1985] Q.B. 657
4. R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. Rees Mogg [1994] Q.B. 552
5. R. (Miller) v Prime Minister [2020] A.C. 373
6. R. (Evans) v Secretary of State for Defence [2010] EWHC 1445 (Admin)
7. LJ Williams v Smith and AG (1980) 32 WIR 395
8. Benjamin et al v Minister of Information et al no. 56 of 1997 High Court of Anguilla
9. Halsbury's Laws of England (Volume 61A (2016))/1
10. R v Whitaker [1914] 3 KB 1283
11. Halsbury's Laws of England 606
12. Halsbury's Laws of England (Volume 61A (2018))/1;
13. R v British Coal Corpn, ex p Vardy [1993] ICR 720 at 751, [1993] IRLR 104 at 116
14. Leech v Deputy Governor of Parkhurst Prison [1988] AC 533 at 583, [1988] 1 All ER 485 at 512, HL
15. Williams Construction Ltd v AG of Barbados (1994) 45 WIR 914 (PC)
16. Halsbury's Laws of England (Volume 61A (2018))/2;

17. R (on the application of the Public Law Project) v Lord Chancellor and Secretary of State for Justice [2016] UKSC 39 at [23], [2016] AC 1531, [2017] 2 All ER 423
18. O'Reilly v Mackman [1983] 2 AC 237 at 278, [1982] 3 All ER 1124 at 1128.
19. Pepper (Inspector of Taxes) v Hart [1992] UKHL J1126-2
20. Matthews v Chicory Marketing Board (Vict) 5 (1938) 60 CLR 263 at 276
21. Littman v. Barron (Inspector of Taxes, [1951] 2 A.E.R. 393
22. Union of India v. Wood Papers Ltd., [1990] 4 SCC 256
23. Novopan India Ltd. v. Collector of Central Excise and Customs
24. Commissioner of Customs (Imports), Mumbai v M/S. Dilip Kumar and Company and Ors 2018

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ATTORNEY-AT-LAW

Dated at Georgetown, Demerara

This ^{3rd} day of June, 2022.

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IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE
REGULAR JURISDICTION

BETWEEN:

GLENN LALL

Applicant

-and-

ATTORNEY GENERAL OF GUYANA

Respondent

-and-

ESSO EXPLORATION AND

PRODUCTION (GUYANA) LIMITED

Added Respondent

.....
WRITTEN SUBMISSIONS ON BEHALF OF THE
APPLICANT TO THE FIRST NAMED RESPONDENT
.....