IN THE TAX APPEAL TRIBUNAL
SOUTH-SOUTH ZONE
HOLDEN AT BENIN
NOTICE OF APPEAL

APPEAL NO: **TAT/SSZ/001/2017**

BETWEEN:
DELTA AFRIK ENGINEERING NIG **APPELLANT**
AND
AKWA IBOM STATE BOARD OF INTERNAL REVENUE RESPONDENT

BEFORE:

PROF OBEHI A ODIASE-ALEGIMENLEN	**CHAIRMAN**
DR DAVID ALA-PETERS	**COMMISSIONER**
MRS HILDA OFURE OZOH	**COMMISSIONER**
MR VITALIS FRIDAY AJOKU	**COMMISSIONER**
DR OLATUNDE JULIUS OTUSANYA	**COMMISSIONER**

JUDGEMENT

This Appeal was brought before the Tax Appeal Tribunal (South-South Zone Sitting in Benin), dated 11th January 2017 and filed on the same day in Suit No. TAT/SSZ/001/2017.

The Appellant is a Private Limited Liability Company registered under the laws of the Federal Republic of Nigeria and engaged in providing Engineering and other related activities in the Oil and Gas Sector in Nigeria, whereas the Respondent, the Akwa Ibom State Board of Internal Revenue, is empowered under the Personal Income Tax Act 2011 (as amended) to collect all taxes and penalties due to it from company employees and individuals carrying on business within the State, including the Appellant employees.

Facts of the Case

It is the Appellant's assertion that the Respondent erred in law when it made tax computations of additional Pay As You Earn (PAYE) Tax on the Appellant, based on the Company's Turnover Charge-Out-Rate, forming the basis of the contract or project values in the Appellant's contracts with another party **(Mobil Producing Nigeria Unlimited)**, rather than restricting the basis of PAYE tax to the income of the individual employee as provided for by the Personal Income Tax Act 2011 (as amended).

The Appellant stated that the Respondent conducted a PAYE Tax investigation exercise on the Appellant for 2007 to 2016, which wrongly gave rise to an alleged PAYE Tax liability of **₦14,847,498,665.29 (Fourteen Billion, Eight Hundred and Forty Seven Million, Four Hundred and Ninety-Eight Thousand, Six Hundred and Sixty Five Naira, Twenty Nine Kobo only)** on the Appellant without substantiating and identifying the individual employees.

That the Respondent picked up figures from series of the Company's compensation schedules of contracts of the Appellant with another party, which compensation ordinarily forms the revenue of the Appellant in the contract. The Appellant argued that this amounts to sharing the Company's profit on the employees rather than limiting PAYE tax to income actually paid to the employees.

The Appellant alleged that Respondent had neglected documents provided by the Appellant, particularly PAYE tax returns filed by the Appellant for 2008 to 2015 and records of PAYE tax already remitted with the Respondent for the same period but went ahead to wrongfully accuse the Appellant of contravention of Personal Income Tax Act 2011 (as amended).

Consequently, the Appellant seeks the following reliefs from the Tax Appeal Tribunal:

a. A declaration that the Respondent's demand notice on the Appellant for **₦14,847,498,665.29 (Fourteen Billion, Eight Hundred and Forty Seven Million, Four Hundred and Ninety-Eight Thousand, Six Hundred and Sixty Five Naira Twenty Nine Kobo only)** is excessive, fictitious, arbitrary and inconsistent with the provisions of the Personal Income Tax Act 2011 (as amended).

b. A declaration that it is unlawful and grossly arbitrary for the Respondent to demand PAYE tax from the Appellant for fictitious and non-existent individuals whose PAYE Taxes had been determined through contract or project values quoted in the Appellant contracts.

c. A declaration that the Appellant is not liable to any PAYE taxes of fictitious and non-existent individuals whose PAYE Taxes had been determined through contract or project values quoted in the Appellant contracts.

d. A declaration that having fully made remittances of PAYE Taxes of persons within the PAYE Tax jurisdiction of the Respondent and filed returns for the relevant years respectively, and the Respondent having concluded tax audit on the Appellant for the relevant years, the Respondent is precluded from raising further demand notices on the Appellant.

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e. An order setting aside in its entirely, the Respondent's demand notice for **₦14,847,498,665.29 (Fourteen Billion, Eight Hundred and Forty Seven Million, Four Hundred and Ninety-Eight Thousand, Six Hundred and Sixty Five Naira Twenty Nine Kobo only)** as contained in the Respondent's letters of 05 December 2016, on the grounds and particulars detailed in this Notice of Appeal.

f. An order of perpetual injunction restraining the Respondent from further demanding from the Appellant payment of the PAYE taxes in the sum of **₦14,847,498,665.29 (Fourteen Billion, Eight Hundred and Forty Seven Million, Four Hundred and Ninety-Eight Thousand, Six Hundred and Sixty Five Naira Twenty Nine Kobo only)** as set out in its aforesaid letter of the 5th of December 2016.

g. Such other order(s) as would be required to give effect to the reliefs sought in this Notice of Appeal.

On its part, the Respondent's response to the Appeal was dated the 11th of March 2019 and filed on the same day. An amended response dated 26th April 2019 and filed on 2nd May 2019, argued that the Respondent did not impose an arbitrary and unjustifiable tax on the Appellant and that its additional assessment on PAYE Tax is in line with the provisions of the Personal Income Tax Act, (PITA) Cap P8 of the Federation of Nigeria, 2004, as amended.

The Respondent indicated that it identified an EXXONMOBIL contract awarded to the Appellant in the sum of **$1.1bn (One Billion and One Hundred Million Dollars only)** in which the labour component constituted a significant portion of the Engineering, Procurement, Construction, Installation and Commissioning. It then conducted PAYE Tax investigation on the Appellants based on this contract. That in the course of the investigation, it arrived at an assessment in the sum of **₦14,847,498,665.29 (Fourteen Billion, Eight Hundred and Forty-Seven Million, Four Hundred and Ninety-Eight Thousand, Six Hundred and Sixty-Five Naira Twenty-Nine Kobo only)** as the Appellants liability for PAYE Taxes for the relevant years.

Respondent further indicated that when the Appellant objected to the assessment, several letters were written to the Appellant to provide specific documents to help in resolving the matter. However, the Appellant submitted the documents for 2008 only, (invoices and project weekly Time Sheet Summary) etc, as against the request for the relevant project years 2007 – 2015.

When the Respondent wrote again to the Appellant calling for the outstanding documents, rather than responding to the request of the Respondent, the Appellant

bluntly refused to submit the documents in their letter dated 28th April, 2016 and stated that "a fresh request for documents is unnecessary as nothing emanated from the heaps of documents earlier made available".

The Respondent therefore sought the following reliefs from the Tribunal:

a An Order of this Honourable Tribunal dismissing this Appeal for being frivolous and misconceived.

b An Order of this Honourable Tribunal directing the Appellant to pay the additional tax of **₦14,847,498,665.29 (Fourteen Billion, Eight Hundred and Forty Seven Million, Four Hundred and Ninety-Eight Thousand, Six Hundred and Sixty Five Naira Twenty Nine Kobo only)** as Tax due having become final and conclusive.

c And for such Order as this Honourable Tribunal may deem fit to make in the circumstance.

Trial in this matter commenced on 9th January 2019. In proof of its case, the Appellant called one witness AW1, Mr Kolawole Rufai, its Finance Controller and tendered 25 Exhibits (Exhibits DE 1-25). On its own part, the Respondent also called one witness, Mr. Eseme Samuel Okori, its Chief Inspector of Tax Recovery/Enforcement and tendered 1 Exhibit (Exhibit AKA 1). Trial came to an end on 17th September 2019 and both parties adopted their Final Written Addresses on 28th November 2019. The matter was adjourned to today for judgement.

In its final written address, Appellant Lead Counsel Adedamola Olawale Esq, formulated three (3) issues for determination by the Tribunal as follows:

1 Whether the Respondent can issue Best of Judgement on the Appellant and whether the Respondent met the conditions required by law before issuing Best of Judgement Assessment for PAYE tax liability on the Appellant?
2 Whether PAYE can be levied on a company rather than its employees?
3 Whether there is merit in Respondent arguments?

Similarly, Respondent Lead Counsel, I.S. Ibe-Bassey Esq, in his Final Written Address also formulated two (2) issues for determination as follows:

1. Whether the Appellant is justified in fact and law to peg, deduct and remit 5% as gross PAYE tax liability of its employees as against the statutory provision of PITA 2011 (as amended) thereby under remitting its tax liability to the Respondent.?

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2. If answer in issue one above is negative, whether the Respondent is entitled to demand from the Appellant PAYE tax liability of **₦14,847,498,665.29 (Fourteen Billion, Eight Hundred and Forty Seven Million, Four Hundred and Ninety-Eight Thousand, Six Hundred and Sixty Five Naira Twenty-Nine Kobo only)** having regards to the facts and circumstances of this Appeal?

ISSUES FOR DETERMINATION

After listening to the witnesses in this matter and evaluating the evidence tendered and arguments canvassed by their Counsel, the Tribunal is of the view that only One (1) issue calls for determination. That is:

"Whether the Respondent is entitled to demand from the Appellant PAYE tax liability of **₦14,847,498,665.29 (Fourteen Billion, Eight Hundred and Forty Seven Million, Four Hundred and Ninety-Eight Thousand, Six Hundred and Sixty Five Naira, Twenty Nine Kobo only)** based on the facts and circumstances of this case"?

In resolving the above issue, some salient facts on the matter need to be highlighted. Going through the evidence before the Tribunal and the arguments canvassed by both counsels as contained in their Final Written Addresses, the bone of contention is purely on PAYE taxes of Appellant employees for a period of Nine (9) years.

This was also established during cross examination when questions were asked to Respondent as follows:

Question: The demand was in respect of how many years?
Answer: For 2007 to 2015, that is Nine (9) years

Question: It means you know that as far as PAYE is concerned, the tax must and can only be recoverable from a known employee of the Appellant?
Answer: Yes, and the Appellant in this case is known

To get to the root of the matter, the Tribunal finds it imperative to examine the relevant sections of the Personal Income Tax Act 2011 (as amended), which is the principal Act that governs the operation of the PAYE scheme of taxation.

Section 54(5) of PITA 2011(as amended) provides that;

> *"Notwithstanding the provisions of this section, no assessment to income tax for a year of assessment shall be made by the relevant tax authority on an employee with respect to his emolument or other income if that tax is recoverable by deduction under the provisions of section 81 of this Act unless, within six years after the end of that year"*

The above provision clearly indicates that under the PAYE Scheme, the Tax Authorities are limited and cannot go beyond six (6) years in carrying out their

back-duty PAYE audit. This is because Section 81 of PITA 2011 (as amended) is a specific provision on the operation of PAYE. This provision does not however preclude the Tax Authority in going beyond the six (6) years limit with respect to other taxes such as Withholding Tax, Value Added Tax, stamp duty and so on.

With regard to this case, the evidence and facts show that, the PAYE assessment was for a period of Nine (9) years which is beyond the statutory Six (6) years limit.

Not withstanding the above provision of PITA, limiting the number of years in which a back audit can be conducted, a *proviso* of Section 55(2) of PITA 2011 (as amended) however allows that:

> *... Provided that where any form of fraud, wilful default or neglect has been committed by or on behalf of a taxable person in connection with any tax imposed under this Act, the relevant tax authority may at any time and as often as may be necessary assess that taxable person at such amount or additional amount as may be necessary for the purpose of making good any loss of tax attributable to the fraud, wilful default or neglect.*

In the case of **JOHN KHAWAM POOLS CO. LTD V FEDERAL BOARD OF INLAND REVENUE (ALL NTC), Vol. 2, Page 102,** the above exceptions were amplified; vis that the Tax Authority has no right to review previous assessments except it can establish fraud, unlawful default or neglect in respect of those assessments.

It is trite law that when a general provision conflicts with a specific provision, the specific provision prevails. The principle of *generalia specialibus non derogant*, means that where a specific provision is made to govern a particular subject matter, it is excluded from the operation of the general provision.

See the cases of **AMERICA SPECIFICATION AUTOS LTD & ANOR V AMCON (2017) LPELR-44016(CA), MINI & ORS V YAKURR L.G.A & ORS (2019) LPELR-46300(CA), SCHRODER V MAJOR (1989) 2 NWLR (pt. 101)1, F.M.B. N. V OLLOH (2002) 9 NWLR (pt 773) 475 AKPAN V STATE (1986) 3 NWLR (pt. 27) 225 and N.N.D.C. V PRECISION ASSOCIATES LTD (2006) 16 NWLR (pt. 1006) 527 at 553.**

Clearly then, to carry out an audit after the statutory limit of six years, the Respondent has to prove that Section 55 (2) is operational in the extant matter, that is, the Appellant has been guilty of fraud, unlawful default or neglect in respect of the assessments that the investigation covers. In the absence of this, the six year limitation under section 54 (5) of PITA stands.

In **MTN v. CHINEDU (2018) LPELR-44621(CA)**, the learned Judge stated that:

"Fraud is defined in Black's Law Dictionary, 9th edition, page 731 as follows:-

(1) A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases (especially when the conduct is wilful) it may be a crime.

(2) A misrepresentation made recklessly without belief in its truth to induce another person to act.

(3) A tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment.

(4) Unconscionable dealing especially in contract law, the unfair use of the power arising out of the parties relative positions and resulting in an unconscionable bargain".

Suffice it to say, that it is not enough that fraud is merely alleged, fraud is a serious crime and in civil matters, the particulars must be pleaded and proved strictly. See the case of **UMONAM NIG LTD & ANOR v. EFFIONG (2012) LPELR-20037(CA).**

It is also trite law that a person alleging fraud is not only required to make the allegation in his pleadings but must set out particulars of fact establishing the alleged fraud. See **OTUKPO v. JOHN & ANOR (2012) LPELR-25053(SC)**

An allegation of fraud also implies that "the act is done deliberately and intentionally, not by accident or inadvertence but so that the mind of the person who does the act goes with it" per Lord Russell of Killowen C,J in **R.V. SENIOR (1895-9) ALL E.R. REP. 511 AT 514.**

In addition, fraud is not synonymous with neglect, which is defined as, "Neglect in its legal connotation implies failure to perform a duty which the person knows or ought to know, per Simmonds J. in **RE HUGHES, REA V. BLACK, (1943) 2 ALL E.R. 269 AT 271**

The courts have also decided in **HILLENBRAD V IRC (1966) 42 TC 617** that "The onus of establishing fraud, willful default or neglect is upon the Board, it cannot be established by presumption of guilt":

In our view, fraud can only be established before this Tribunal or any other court of competent jurisdiction if a taxable person evades tax, with intention and or willful default or if neglect can be proved. Wilful default may also be inferred if

the taxable person deliberately does not or refuses to submit returns at all, contrary to Section 41 (1) of PITA which makes it obligatory for every taxable person to file returns without notice or demand from the tax authority of the State in which the taxable person is deemed to be resident.

In the extant case, the Appellant has however been filing returns and showed proof of payment of his tax liability based on its assessment and returns filed with the tax authority. The issue that has brought both parties before the tribunal is the issue of whether the correct amount was paid.

This was highlighted during cross examination when Respondent was responding to questions put across to him as follows:

Question: Did you receive PAYE Tax remittances from the Appellant?
Answer: Yes
Question: You never received tax remittances on PAYE Tax returns of any of the other years and even 2008?
Answer: I had earlier confirmed that the Respondent have been receiving Appellant's PAYE receipt, but the payments were grossly inadequate, that necessitated the tax investigation into their operations.

Since the Respondent agreed that the Appellant paid taxes and the contentious issue was the quantum paid, this coupled with the inability of the Respondent to show a wilful intention by the Appellant to avoid tax payment automatically removes the operation of section 55 (2) of PITA. In addition, it is quite surprising that the Tax Authority on perceiving that the Appellant had according to them, short paid taxes from 2007 to 2015, both years inclusive, suddenly woke up from its slumber to conduct a back duty audit for Nine (9) years. It is a well-known legal maxim that equity aids the vigilant not the indolent. We therefore make good to say that the Respondent slept over its right and cannot be heard to complain in this matter.

In view of the foregoing, the Tribunal is of the view that the period of Six (6) years limitation caught up with the Respondent. If the period is counted from 2015 backward, the years of 2007 to 2009 are therefore statute barred. The valid years of assessment for the consideration of this honourable Tribunal is for the period of 2010 to 2015. This is in line with the position of the court in the case of **GULF OIL COMPANY (NIGERIA) LIMITED V FEDERAL BOARD OF INLAND REVENUE (ALL NTC), Vol. 3, Page 1**, where a similar situation arose. The Court allowed the Appeal in part and proceeded to dismiss other parts... they said that;

> "*Appeal against assessment for 1974 and 1975 is allowed as being statute barred, while appeal against assessment for 1976, 1977 and 1978 is dismissed and the decision of the Commissioners in respect of it is affirmed*".

This Tribunal associates itself wholly with the position of the Court in this matter, and recognises that the Respondent is entitled to Audit the Appellant for the years 2010-2015 only.

The tribunal noted that the evidence given by the Appellant before this Tribunal in Exhibit DE 13(a-h), DE14(a-c), a PAYE schedule of tax deductions and tax remittances supported by the receipts in Exhibit DE16 to DE 24 issued by Respondent, shows that the Appellant actually remitted the amount above the 5 % stated in the contract with its Employees, in their letters of employment, which reveals a substantial compliance with the PAYE Graduated Tax Rates as provided in Schedule VI of PITA 2011 (as amended). In **ELEPHANT INVESTMENT LTD v. FIJABI (2015) LPELR-24732(CA),** the learned judge Amina Adamu Augie J.C.A (Pp.) 43-45, paras. E-A) while delivering the lead judgement, emphasized that

"the party that asserts the existence of a particular fact must prove it, and if he fails to prove that fact, his case will ultimately collapse."

The law also provides, that once a claimant has proved its case, the burden of proof then shifts to the Respondent, See the case of **AKINDOSOYE v IKUGBAYIRE & ANOR (2010) LPELR-3684 (CA).**

In its case before the Tribunal, the Respondent in ground 2 of the Respondent Amended Reply computed PAYE taxes of the Employees on the Appellant Labour component of oil & gas contracts sum of **$1.1bn (One Billion, one Hundred million Dollars only**) with Exxon Mobil in the state. This position as canvassed by the Respondent is not in line with the provision of **PITA 2011** (as amended) which requires the PAYE assessment to be based on the employee's emolument. In addition, the Tribunal observed that the employment component as in Exhibit DE14 (a-c) cuts across four (4) states where the employees of the Appellant resides based on their Principal Place of Residence.

To get the judgement of this Tribunal, the Respondent needed to have proved that the Appellant did not pay adequate taxes by providing the Tribunal evidence to buttress their claim, in addition, that it (the Respondent) is entitled to carry out an additional audit as detailed in section 55 (2). Furthermore, there is nowhere in PITA that empowers the Tax Authority to deduct taxes based on the Contract sum of the company. The Respondent has therefore not been able to show this Tribunal how it arrived at the additional assessment for those years. The law is on this matter is very clear, that he who asserts must prove. See **AKINDOSOYE v IKUGBAYIRE & ANOR** Supra.

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We therefore hold that, the Appellant appeal has merit and therefore succeeds. Judgement is therefore entered in favour of the Appellant and the Appeal is sustained. The demand notice on the Appellant for **₦14,847,498,665.29 (Fourteen Billion, Eight Hundred and Forty Seven Million, Four Hundred and Ninety-Eighty Thousand, Six Hundred and Sixty Five Naira Twenty Nine Kobo only)** as contained in the Respondent's letters of 05 December 2016 is set aside in its entirety.

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Dated this 20th day of January 2020.

Signed:

Hon. Prof. Obehi Adetokunbo Odiase-Alegimenlen
Chairman

Hon Dr. Ala-Peters David
Member

Hon. Mrs. Hilda Ofure Ozoh
Member

Hon. Barr. Ajoku Vitalis Friday
Member

Hon. Dr. Otusanya Olatunde Julius
Member

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