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IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE PORT HARCOURT JUDICIAL DIVISION
HOLDEN AT PORT HARCOURT
ON FRIDAY THE 29TH DAY OF APRIL, 2016
BEFORE HIS LORDSHIP
HONOURABLE JUSTICE B. O. QUADRI
(JUDGE)

SUIT NO.: FHC/PH/CS/13611/2009

BETWEEN:

ALU SUITES CONCEPT COMPANY == == == **PLAINTIFF/APPLICANT**
(A Division of Agbako Construction Co. Ltd)

AND

FEDERAL INLAND REVENUE SERVICE == == **DEFENDANT/RESPONDENT**

JUDGMENT

PREAMBLE:

When I resumed in this Division in April, 2014. I was living at No. 8A Nzimiro Street along the Roadside in Old GRA of Port Harcourt very close to Ogbun-Abali Quarters a troublous suburb of Port Harcourt. That subsequently I had to move out of the premises because of the tense political imbroglio in the area (Ogbunabali).

However, while moving out of Nzimiro Quarters to a new Quarter where some of my colleagues are living at Eleme Street behind Government House in Old GRA of Port Harcourt, this case file was mistakenly forgotten in my study while packing out of the premises, quite a lot of time was spent looking for the case file at my new Quarters and in my Chambers in Court and the Court Archives. But when the said Quarters was

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to be refurbished the case file was found. All these were related to both counsel in the matter and it is an open knowledge that all counsel now subsequently agreed to readopt their addresses when the case file was ultimately found. This explains the long delay in delivery of the ruling.

The Plaintiff in this case commenced this action by originating summons dated 31st July 2009 and submitted the following questions for determination:

1. Having regard to the provisions of the Value Added Tax Act, Cap VI, 1993, No. 102, Laws of the Federation whether the Defendants, (Federal Inland Revenue Service) can legally demand payroll, withholding Tax Return and PAYE remittance, and to use same as computing VAT Returns.
2. Having regard to the provisions of the Value Added Tax Act, Cap VI 1993 No. 102 Laws of the Federation, the Federal Inland Revenue Service, is only required to assess VAT simply from sales/revenue incomes.
3. Whether the closure of the Plaintiff's business, without recourse to the court does not offend provisions of the Constitution of the Federal Republic, 1999.

4. Whether having regard to reliefs 1, 2 and 3, the figure assessed as VAT is not erroneous unlawful and arbitrary.

5. Injunction restraining the Defendants their servants, agents from molesting, sealing and/or obstructing the lawful duties, engagement of the Plaintiff in his business, without recourse to the law.

6. ₦10,000,000.00 (Ten Million) Naira being damages for unlawful closure of the premises by the Defendant.

The Plaintiffs originating summons was supported by a 19 paragraph affidavit together with 10 Exhibits tagged EXHS A to J.

In line with the Rules, the Plaintiff also filed a written address. In its reaction to the Defendant's counter affidavit, the Plaintiff also filed a reply on points of law together with a written address.

In its reaction to the originating summons, the Defendant filed a 32 paragraphed counter affidavit together with 7 Exhibits but tagged FIRS 1 to FIRS 5.

While arguing the originating summons learned counsel to the Plaintiff both in his open court argument and written address referred and relied on all the processes filed by the Plaintiff. He sought the reliefs thereon.

The gist of the Plaintiff's case is as contained in its paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16.

The surrounding facts are that the Plaintiff was registered as a business name on 14th day of May, 2007 and commenced business in November 2007. See EXH A. Thereafter the Plaintiff commenced processes to be appointed as a VAT agent and was actually appointed a VAT Agent on 28th of November 2007 vide EXH B.

According to the Plaintiff, while waiting for the Defendant to access its records/books on VAT payment as required by the law, it made same remittance to the Defendant before it clears off what may be its outstanding payment receipts of its remittances of VAT to the Defendant are annexed as EXHS C and D.

But the twist in the turns of events was when the Defendant served the Plaintiff demand and penalty notices for the years 2004, 2005, 2006 and 2007 in the total sum of ₦44,668,990.00

The Plaintiff then insisted that the amount be reviewed because as at 2004 it had not started operations. That the Defendant should follow its statutory procedures that while this negotiation was going on, on the 25th of June 2009 the Defendant drove away the Plaintiff's guest in its premises and sealed up the whole premises without any order of the court to that effect.

According to the Plaintiff, this scenario was even telecasted in the news on Nigerian Television Authority (NTA) and Rivers State Television (RSTV).

Consequent upon the foregoing, the Plaintiff's Solicitors wrote 2 letters (EXH F and EXH G) to the Defendant upon which the Defendant in its reply (EXH J) wherein the Defendant admitted its error but still sent another inflated notice of demand for the years 2007 and 2008 vide EXHS: H and I.

The Plaintiff further stated that the Defendant rather than constituting an Appeal panel as requested by the Plaintiff and required by law. The Defendant demanded some documents books and records which are not with the Defendant's purview to determine VAT able Taxes.

That based on the fictitious demand of the Defendant and their insistence that the Plaintiff must pay those fictitious amounts before any negotiation.

That the Plaintiff in order to mitigate its loss because it was in effect an act in perpetuity. The Plaintiff opened its premises then subsequently file this instant suit.

While arguing this originating summons learned counsel to the Plaintiff gave a brief background fact to this action. He stated it thus: That the Plaintiff is a Tax Agent of the Defendant and based on break down of negotiations between the parties on methods and documents needed to

determine the VAT due to the Defendant. The Plaintiff seeks the court to determine the exercise of the powers and enforcement procedures of the Defendant whether they are not unlawful and arbitrary.

Thereby if held unlawful and arbitrary, the Plaintiff should be awarded damages.

Learned counsel for the Plaintiff distilled 3 main issues for determination in this action. He couched them thus:

1. Whether the Defendant can legally demand payroll Withholding Tax return and PAYE remittance to use same in computing VAT Returns and not simply from Sales/Revenue Incomes.
2. Whether the Defendant acted within its powers to seal the Plaintiff's premises and if the figures assessed is not erroneous and arbitrary.
3. Whether the Plaintiff is not entitled to General Damages.

Conversely, the gist of the Defendant's case is that the Plaintiff registered as a VAT agent on 28th November 2007 for the purposes of collection and remittance of VAT collected by the Plaintiff, but it never remitted any VAT until 25th March, 2009 when it paid N10,000.00 out of N44.6m.

That in 2008 the Defendant had no option but raise best of judgment to assess the Plaintiff from year 2004 to 2007 vide a letter dated 7th November, 2008 which was received and acknowledged by the Plaintiff.

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That by this letter it registered the Plaintiff to produce all its books of account so as to assess the Plaintiff but the Plaintiff refused so the Defendant had to result to best of judgment taking into consideration the turnover of other companies of same status as the Plaintiff.

That the Plaintiff refused to update its payment dispute demand letters sent to it on 8th January 2009 and 20th February 2009 but upon closure of the Plaintiff's premises on 25th June 2009 the Plaintiff paid N150,000.00 on 13th July of 2009, N47,000.00 on 19th November 2009 and N162,300,000.00 on 9th December 2009.

However, upon the sealing of the Plaintiff' premises counsel to the Plaintiff wrote to the Defendant that the Plaintiff would produce its books of account for assessment but the Plaintiff never did despite the Defendant's readiness. The Defendant maintained that all the books requested of the Plaintiff are vat able.

The Defendant maintained also that the Plaintiff has since reopened its premises almost immediately it sealed up same. That the Defendant acted within its Establishment Act to seal up the Plaintiff's premises.

Learned counsel to the Defendant both in his open court argument and written address while opposing this action briefly formulated 4 issues for determination: He distilled them thus:

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The divergent points on the issues raised are as to the forms of commencement of this action, whether the assessment raised is conclusive and if the Plaintiff is entitled to damages.

Now picking the 1st issue, as to the nature of vatable records books and documents the Defendant can legally demand to compute the VAT Returns or Tax liability of the Plaintiff.

While treating this issue, learned counsel to the Plaintiff argued that the Plaintiff is prepared to furnish the Defendant all relevant documents as required by law. That under section 11 of the VAT Act what is required are Records and Books relating to Taxable goods and services. That to determine what are Taxable goods and services, section 4 of the VAT Act states that the tax shall be computed at the rate of 5% on all Taxable goods and services as determined under sections 5 and 6 of the VAT Act.

Learned counsel submitted that in its paragraphs 1, 4, 6 of its supporting affidavit, the Plaintiff deposed to the fact that it is a service provider and under section 5 subsections (1) and (3) of the Act, VAT over such services is simply 5 % of the monetary consideration of the service rendered.

He submitted that the monetary consideration is not based on staff payroll, withholding Tax Return and PAYE remittance but on the sales/incomes from goods and services.

He finally submitted that the demand for staff payroll, withholding Tax Return and PAYE in assessing the Plaintiff's VAT are unnecessary and illegal.

While arguing the same issue, learned counsel to the Defendant referred and relied on paragraphs 14, 17, 18 and 19 of its counter affidavit which stated how the Defendant wrote to the Plaintiff to produce its books so as to ascertain its tax liability.

Learned counsel to the Defendant placed reliance on section 11 of the VAT Act on the extent of the powers of the Defendant to examine the Plaintiff's books for purposes of determining the correct amount of tax due under the VAT Act.

He further relied on section 26(1) of the Federal Inland Revenue Act that the Defendant is empowered to demand for payroll withholding Tax Returns and PAYE remittance so as to ascertain the Tax liability of the Plaintiff.

Learned counsel argued that the purpose of these sections to ascertain the amount of tax due from a tax payer. That the refusal of the Plaintiff to produce those books and records requested led the Defendant to issue and serve the Plaintiff the best judgment assessment so as to truly calculate the liability of the Plaintiff thereby reflecting its kind of business considering other hotels of equal status with the Plaintiff.

To resolve this 1st issue, a critical look at the specific legislation regulating Value Added Tax Regime is very necessary.

To start with, under section 2 of the VAT act, the tax shall be charged and payable on the supply of all goods and services other than those exempted.

As regards the rate to be imposed on vatable goods and services, section 4 states that the rate shall be at 5% on the value of such goods and services.

Now to determine the value as stated in section 4, a closer look at sections 5 and 11 the VAT Act is necessary vis a vis argument of both counsel in the matter.

Under section 5(1), the value to be imposed on such goods and services shall be:

(a) For money consideration – The value shall be deemed to be an amount which with the addition of the Tax chargeable is equal to the consideration.

(b) If it is not for money consideration, the value of the supply shall be deemed to be its market value.

For purposes of this judgment, section 5(3) is germane, section 5(3) states that the open market value of supply of taxable goods or services shall be taken to be the amount that would be taken, as its value under

section 5(1) (b), if the supply is for such money consideration as payable in a transaction at Arm's length that is in a transaction on normal open market commercial terms.

The argument of learned counsel to the Plaintiff that under section 5 subsections (1) and (3) of the VAT Act, that the vat rate is simply 5% of the monetary consideration of the service rendered by the Plaintiff.

He referred to paragraphs 1, 4 and 6 of the Plaintiff's affidavit that the Plaintiff is a service provider. That the vatable tax to be paid or imposed on the Plaintiff for services provided for its customers is simply 5% of the monetary considerations paid to its customers.

That the said monetary consideration which is to be taxed at 5% rate is not based on staff payroll, withholding tax return and PAYE remittance etc BUT on the sales or Revenue incomes derived from goods and services, the Plaintiff rendered to its customers.

He maintained that the staff payroll, withholding tax return and PAYE remittance cannot be used to calculate the VAT due or Tax liability of the Defendant.

On his own part, learned counsel to the Defendant took the view that section 5 of the VAT Act is irrelevant to the books and records necessary to ascertain the tax liability of the Plaintiff. He maintained that all such books and records pertaining to all transactions, operations, import and all other

section 5(1) (b), if the supply is for such money consideration as payable in a transaction at Arm's length that is in a transaction on normal open market commercial terms.

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On his own part, learned counsel to the Defendant took the view that section 5 of the VAT Act is irrelevant to the books and records necessary to ascertain the tax liability of the Plaintiff. He maintained that all such books and records pertaining to all transactions, operations, import and all other

activities relating to taxable goods and services are relevant in computing the Plaintiff's tax liability.

He cited in his support section 11 of the VAT Act. He also cited section 26 of FIRS Act.

Now let us look at section 11 of the VAT Act section. Section 11 states thus:

Records and Accounts:

A person who is registered under section 8 of this Act (in this Act referred to as "a Registered Person") shall keep such records and books of all transactions, operations, imports and other activities to Taxable goods and services AS ARE SUFFICIENT TO DETERMINE THE CORRECT AMOUNT OF TAX DUE UNDER THIS ACT (Emphasis mine).

From the wordings of this provision, it is mandatory for all registered persons to keep all records and books pertaining to all its transactions, its operations, its imports and generally records of all activities relating to its taxable goods and services.

Such records in my view from the generic nature of this provision include staff payroll withholding tax returns and PAYE remittance and other records, which according to the last limb of section 11 "AS ARE SUFFICIENT TO DETERMINE THE CORRECT AMOUNT OF TAX DUE UNDER THE ACT.

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The act even goes further in this last limb of section 11 that those records are to be used in computing the correct amount of tax due or payable by such registered person.

To my mind this section gives the Defendant the power to ask for such records or books pertaining to its operations transactions and all other activities relating to the goods and services provided by the Plaintiff so as to enable the Defendant ascertain the Plaintiffs tax liability.

The key words in this provision are registered person to keep records and details of all its operations, transactions and all of its activities relating to its goods and services as it will be sufficient to calculate the amount of tax payable by it under the VAT Tax require.

This section is in contradictory to subsection 5(1) (3) and section 6 of the same Act which only talks about value of taxable goods and value of imported goods.

I am of the view and so do I hold that the Defendant was very right to demand for payroll, withholding tax return and PAYE remittance etc in computing VAT of the Plaintiff and not simply asked for their sales/revenue incomes. I am further reinforced in this view by section 26(1) of the FIRS Act which compliments section 11 of the VAT Act.

The other limb to this issue is whether the Defendant was equally right to have demanded for those set of documents in respect of the years 2004 to 2007.

This is in view of the Plaintiff's EXHS A and B and the Defendant's letter to the Plaintiff tagged as EXH J (by the Plaintiff). The said Defendant's letter was date 7th July 2009.

In EXH A, the Plaintiff was registered by the Corporate Affairs Commission as a Business Name on 14th day of May 2007.

Pursuant to section 8 of the VAT Act, it become registered as a VAT collecting Agent on 28th November 2007 within 6 months as stipulated by section 8 of VAT Act.

This is even stated by the Defendant via its letter of 28th November 2007 Ref No. CORP No. PH/103414 that its Tax identification Number is 01390144. The Defendant even in its paragraph 17 of its counter affidavit stated that the Plaintiff registered with FIRS as VAT agent on 28th November 2007.

Then in EXH J, the letter of the Defendant dated 7th July 2009 in its 3rd paragraph the Defendant acknowledge the Non-existence of the Plaintiff until 2007 thereby adjusting its tax penalties to 2007 upwards.

Having found out these facts as to the date of commencement of operation of the Plaintiff can it then be said that the Defendant can use its

(h) Cash/Bank Books including bank statements, bank reconciliation statements.

(i) Withholding tax returns

(j) PAYE Remittances

(k) Any other documents to engender smooth reconciliation of the records.

In calculating the tax liabilities of the Plaintiff for the months of December 2007 and January to June 2009.

While the Plaintiff is hereby further adjudged to pay to the Defendant the sum of ₦12,750,029.40 for the year 2008 pursuant to section 18 of the VAT Act.

What I am saying in effect here is that the Defendant cannot recover this outstanding sum from December 2008 till June 2009 through self help, it must channel its demand through its appropriate zonal tax tribunal.

Therefore the first issue is hereby resulted in favour of the Defendant.

The next issue is whether the Defendant acted within its power to seal up the Plaintiff's premises.

Learned counsel to the Plaintiff submitted that the Defendant acted ultra vires to seal off the premises and or send parking the occupants of its premises because section 33 of FIRS only provides for detrain and not sealing of taxable persons property.

He took the view that any unpaid tax by the Plaintiff constitutes a debt which could only be recovered through a court action and not by sealing up the premises of the Plaintiff.

However, learned counsel to the Defendant submitted that under section 33 of the FIRS Act 2007 that the intervention of the court is only necessary at the point of disposal of the property detrained if it is a landed property. He placed reliance on section 33 (b) of FIRS Act 2007.

First under section 39 (1) of VAT Act, an authorized officer of the Board has a right to enter any premises with or within a warrant to ascertain whether the occupier of the business premises or any person carrying on business in the premises is doing such business in compliance with the VAT Act. Upon such an entry the authorized officer may carry out such inspection and make such requirement as may be specified by the Board.

However, under section 20 of the VAT Act, the Board can only recover any tax penalty or interest from any person or body corporate through proceedings in a Value Added Tax Tribunal.

In fact, under the 2nd schedule in item 11, the Board can only recover tax interest and penalty unpaid from taxable person through the proceedings at the Zonal Tribunal.

I am of the view and so do I hold that even if the FIRS Act under section 68 (1) and (2) especially section 68 (2) states that if the provision of

any other law are inconsistent with the provisions of the FIRS Act, the provision of the Act should prevail and the provision of any other law shall be the extent of its inconsistency be void.

Section 34 (1) of the FIRS and section 20 of the VAT Act accords and compliments the constitutional provision of 1999 Constitution of the Federal Republic of Nigeria under Section 6 (6) (b) of which forbids self help.

In this light, I am of the view that while the Board has right of inspection under section 39 (1) of the VAT Act to enter any business premises so as to ascertain it compliance with the ACT, and carry out such inspection and make such requirement as may be specified by the Board. The same Board can only recover taxes from taxable persons or corporate bodies only through proceedings in the VAT Tribunal and not by self help of sealing up a premise without the order of a court or Tribunal.

In this light, this issue is hereby resolved against the Defendant they have no right to seal up a premises without the order of the VAT Tribunal or the court.

As regards the 3rd issue of this action can be commenced by way of originating summons, this threshold issue. There is no substantial dispute of fact in this matter. The principal question at issues raised by the Plaintiff divest mostly on construction of an application of various legislation VAT Act and the FIRS Act and there are various Exhibits attached by both

parties to resolve crew where there are seemingly but slight conflicts in the affidavit evidence of both parties. To my mind, this action was properly initiated by originating summons.

This issue is hereby resolved in favour of the Plaintiff.

On the issue of damages, I am of the view that same for the sealing of the Plaintiff's premises which the Plaintiff reopened same day, it was sealed by their own affidavit evidence in its paragraph 16 of its supporting affidavit, that the seal was reopened to mitigate its loss without recourse to any court of law or tribunal. I am of the view that the Plaintiff cannot benefit from its own writing by claiming damages having earlier found out that the Plaintiff is in default of tax payment to the Defendant. Consequently, this last issue is also resolved against the Plaintiff.

Consequently, the 1st question in the originating summons is hereby answered in the affirmative yes the Defendant can legally demand payroll withholding tax return and PAYE Remittance in computing VAT Return.

Also, the second question is also answered NO not in favour of the Plaintiff, the Defendant is not only required to assess VAT simply from sales/revenue income.

The 3rd question is answered positively in favour of the Plaintiff, the Defendant strictly does not have the power on its own to seal up the

Plaintiff's premises without an order of the court since it can only recover its VAT through Zonal Tribunal.

Question 4 and reliefs 5 and 6 are also in the negative and the all afore stated reliefs sought in 5 and 6 are hereby refused.

Otokini Wokoma for the Plaintiff

O.E. Ihensekhien leading U. Brown for the Defendant

Judgment read and delivered in open court.

HON. JUSTICE B. O. QUADRI
JUDGE
29/4/2016

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