

IN THE TAX APPEAL TRIBUNAL
SOUTH-EAST ZONE
HOLDEN AT ENUGU

APPEAL NO. TAT/SEZ/022/14

BETWEEN:

ENUGU STATE BOARD INTERNAL REVENUE.....APPELLANT
AND

- 1. FEDERAL COLLEGE OF EDUCATION, EHA-AMUFU**
2. PROF BENJAMIN N. MBA.....RESPONDENTS

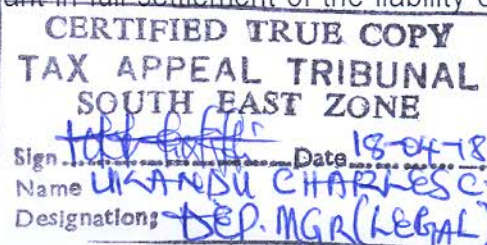
BEFORE THEIR HONOURS

Chairman: Prof. C.J. Amasike
Commissioners: Ignatius Chibututu, Esq.
Dr. (Mrs.) Josephine A.A Agbonika
Prof. Eddy Omolehinwa
Chief Ngozi I. Amaliri

JUDGMENT

The Appellant is a statutory body established by the Personal Income Tax Act for the Government of Enugu State and is vested with the powers to ensure the effectiveness and optimum collection of all taxes and penalties due to the government of Enugu State under the relevant laws. The 1st Respondent is a tertiary institution registered under the Federal Colleges of Education Act, Laws of the Federation of Nigeria 2004, Cap F8, pursuant to section 1(1) and the schedule to the Act. The 2nd Respondent is the Provost and Chief Executive of the 1st Respondent.

This matter was filed by the Appellant at the Tax Appeal Tribunal on 4th August 2014, claiming the sum of four hundred & fourteen million, three hundred & seventy five thousand, two hundred & nine naira (N414, 375,209.00), covering pay as you earn (PAYE) tax, withholding tax, penalties and interests for the period ranging from 2004 to 2011. At the point of hearing, the Appellant disclosed that the Respondents had, in a quest to settle out of the Tribunal paid the sum of twenty seven million, one hundred and five thousand and six naira, (N27, 105,006.00) to the Appellant in full settlement of the liability of four hundred &



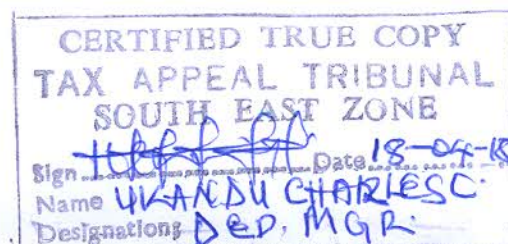
fourteen million three hundred and seventy-five thousand, two hundred and nine naira (N414, 375,209.00). In a bid to know how the reduction was arrived at, the Tribunal summoned the Tax Consultant Prof. Austin Nweze and the 2nd Respondent for clarity.

Upon hearing from Prof. Austin Nweze on behalf of the firm of Chartered Accountants that carried out the audit, it was discovered that a tax audit was conducted by his firm- Messrs Austin Nweze & CO (Chartered Accountants) covering the period from 2004 to 2010. It was also found as a fact that tax liability for the period 2004-2010 which was the period covered by Messrs Austin Nweze & Co was N320, 536, 192.00 and that the difference of N93, 838, 017.00 arose from Jan-Dec 2011 tax liability carried out by Enugu State Board of Internal Revenue.

Prof. Nweze further informed that the Tribunal in the course of the trial that, the Federal College of Education, Eha Amufu held a reconciliation meeting with the Enugu State Board of Internal Revenue at which the liability was further reduced from N320, 536,192.00 to N108, 028,620.00.

The 2nd Respondent [Prof Mba, the Provost of the College] in giving evidence provided the details of the alleged reconciliation by the two parties as follows:-

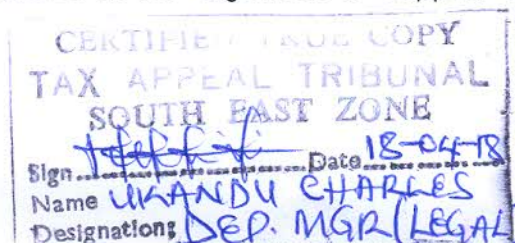
		N	N
1	Total established tax liability as Tax Audit Report		320,536,192.00
	Less 2004 figures said to be statute barred	12,668,848.00	
	Less 2005 figures said to be statute barred	12,422,502.00	
2 (i)	Withholding tax charged	2,517,708.00	



	(ii)	Interest and penalty at 31%	780,489.00	
3	(i)	210 staff disengaged in 2006	2,006,051.00	
	(ii)	Interest and penalty at 31%	621,876.00	
4	(i)	Staff retired, dead and withdrawn from service from 2006-2010	35,655,039.00	
	(ii)	Interest and penalty	11,053,062.00	
5	(i)	Remittances not captured by Audit report	33,201,664.00	
	(ii)	Interest and penalty	10,292,516.00	
6	(i)	Relief on life Assurance Premium paid from 2006-2010	43,200,000.00	
	(ii)	Interest and penalty	13,392,000.00	
7	(i)	Reconciled amount agreed and paid	27,105,006.00	
	(ii)	Interest agreed to be paid, not yet paid	7,590,811.00	
				212,507,572.00
				N108,028,620.00

The Tribunal examined the reconciliation and took the following position in each case.

1. In relation to the issue of statute of limitation, it is instructive to say that the Tax Acts do not anticipate that levies due to the government by way of tax shall become statute barred. The Respondents' Counsel canvassed in his argument in support of the memorandum of



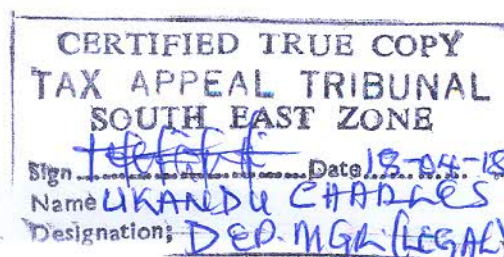
settlement pursuant to the alleged reconciliation meeting that some proportions of the requisite remittances that should have been made to the Enugu State Board of Internal Revenue had become statute barred since it exceeded the 6 years limit given by the Limitation Act and can no longer be demanded.

2. The provision of paragraph **19 of the 5th Schedule to the Federal Inland Revenue Service (Establishment) Act** is however very instructive here. The section provides thus:

The provisions of any statute of limitation shall not apply to any appeal brought before the Tribunal.

Despite the agreement of the Appellant and the Respondents to waive the tax liability for the year 2004- N12,668.848.00 and for the year 2005- N12,422,502.00, it is obvious that they lack the capacity as such an action is both unlawful and illegal and this Tribunal cannot lend support to such fraudulent practice. Consequently, the sum of N25, 091,350.00 must be paid by the Respondent.

2. The Tribunal confirmed that the withholding taxes had been paid, and saw the receipts in this regard. As a result, this item is allowed;
3. In respect of the PAYE tax due from disengaged staff, the Tribunal observed that the PAYE tax deduction ought to have been paid to the State Board of Internal Revenue before their disengagement. This deduction remains a debt in the hand of the Respondent and is therefore disallowed.
4. For retired, dead and staff who withdrew from service, from 2006 to 2010, the PAYE tax had already been deducted prior to those events and remain a debt due to be paid. Total PAYE tax payable by ex- workers and deceased staff as calculated from figures supplied by the parties is **N49, 336,028.00** and must be paid.
5. The un-captured remittances amounting to **N33, 201, 664.00** were confirmed from the records provided by the Respondents and are allowed.
6. Out of the sum of **N56, 592, 000. 00** claimed as life assurance premium, only **N53, 340, 696. 00** was paid, leaving a balance of **N3, 251, 304. 00** which must be paid.



7. The amount of **N27,105,000.00** agreed to be paid, following the so called reconciliation meeting, had been paid and vouched with both Receipt and bank statement supplied were confirmed by the Tribunal. This amount is also deducted.
8. The interest agreed to be paid had not been paid, at the time of consideration. This amount is disallowed and should be added back in the sum of **N7, 590,811.00**.

To get the final reconciliation, certain disallowed deductions will need to be added back to the initial reconciled figure of **N108,027,620.00**.

N

108,027,620.00.

These are as follows;

1. The 2004 & 2005 Tax Liability Alleged To Be Statute Barred	25,091,350.00
2. Unpaid PAYE taxes for disengaged, retired and dead staff	49,336,028.00
3. Unpaid portion of insurance premium	3,251,304.00
4. Unpaid agreed interest	7,590,811.00
Final tax liability	<u>N193,297,113.00</u>

The final position based on the reconciled calculation is now a liability of **N193, 297,113.00**

9. The Respondents' Counsel argued against the joinder of the 2nd Respondent (Prof Mba). The question that needs to be asked is: Is the 2nd Respondent a necessary party within the context of this suit?

The position of the Court of Appeal per Aboki JCA in the matter of **Oluwaniyi v. Bwala (2011) All FWLR pt 565 at 348** is very instructive about who is a necessary party. The court defined a necessary party to a suit as follows:

A necessary party to a suit is a party who is not only interested in the subject matter of the proceeding but also a party in whose absence the proceeding could not be fairly dealt with. Thus, a necessary party to a case is a person whose presence is necessary for the effectual and complete adjudication of the question involved in the cause or matter...



The 1st Respondent is a juristic person that can be proceeded against in a matter like this, without the necessity of adding the 2nd Respondent who is only an officer working in the 1st Respondent's College.

The courts over the years have given us a glimpse of what a cause of action is. The Court of Appeal in **Petroleum Training Institute v. Matthew (2012) All FWLR pt 623 at 1966**, held thus:

A cause of action involves and means:

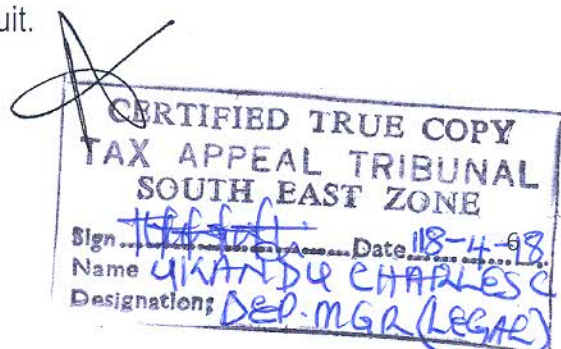
- a. a cause of complaints;*
- b. a civil right or obligation for determination by a court of law; and*
- c. a dispute in respect of which a court of law is entitled to invoke its judicial powers to determine.*

Added to the above, a cause of action involves a factual situation which enables one person to obtain a remedy from another in court with respect to an injury. So it consists of every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. In addition to this decision of the Supreme Court in Thomas v. Olufosoye, a reasonable cause of action is taken to mean a cause of action with a real chance of success if only the allegations in the statement of claim are considered...

As regards whether or not the 2nd Respondent was wrongly joined, we have looked at the whole notice of appeal and do not find any direct claim against the 2nd respondent. The basis of every case is the existence of a cause of action.

Going by the foregoing, it can be discerned that there is no reasonable cause of action against the 2nd respondent. Since the Tribunal can find no evidence of this, the natural thing to do is to strike out the name of the 2nd Respondent. This is an action founded on the office rather than the individuals holding those offices. It is therefore a mis-joinder. The name of the 2nd Respondent is therefore struck out from this suit.

The Tribunal therefore Orders as follows:



1. That the Respondent shall pay to the Appellant, with immediate effect, the sum of
N193,297,113.00

2. That the name of the 2nd Respondent is hereby struck out from the suit.

Parties are entitled to appeal against this judgment .

Sign:

Prof. C.J. Amasike, Ph.D

Chairman Tax Appeal Tribunal,

South East Zone.

Date:

15/09/2015

