IN THE TAX APPEAL TRIBUNAL

SOUTHWEST ZONE

HOLDEN AT IBADAN

THIS MONDAY, 27TH MAY, 2014

APPEAL NO: TAT/IB/019/2013

BEFORE:

1. Honourable Joseph A. Ushie (Chairman)
2. Honourable Cyril I. Ede (Commissioner)
3. Honourable Jibril N. useni (Commissioner)

OSUN STATE BOARD OF INTERNAL REVENUE - **APPELLANT**

AND:

REGIONAL CENTRE FOR TRAINING IN AEROSPACE AND SURVEYS, ILE IFE, OSUN STATE - **RESPONDENT**

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RULING

BACKGROUND:

1. On the 25th of April, 2013, the Appellant filed this appeal against the Respondent claiming P.A.Y.E remittance under PERSONAL INCOME TAX (AMENDMENT) Act, 2011, against the taxable Nigerian Employees/Workers other than those with diplomatic immunities and privileges under Section 6 (2) of the Diplomatic Immunities and Privileges (Regional Center for Training in Aerial Surveys) Order 1983.

   Section 6 (2) of the said Order provides thus:

   > *"Nothing in this section shall be construed as entitling any person to enjoy any such immunity or exemption if he is a Nigerian, a permanent foreign resident of Nigeria or a locally recruited staff".*

2. The service of the appeal was effected on the Respondent/Applicant on the 29th of April, 2013. More than two (2) months after service was effected, instead of applying for extension of time to file and serve a reply to the appeal, Respondent/Applicant brought a motion on notice dated 19th July, 2013, under Order III Rule 1 and 3 of TAT (Procedure) Rules 2010, challenging the jurisdiction of the Tribunal.

Written addresses were exchanged and adopted. On 11th December, 2013, this Tribunal dismissed the Respondent/Applicant's application and objection. The Respondent/Applicant was directed to file and serve its reply to the appeal within 30 days from the date of the Ruling.

3. On the 28th of January, 2014, after the expiration of the 30 days ordered by the Tribunal to file and serve a reply to the appeal, the Respondent/Applicant brought the present application under the same Order III Rule 1 and 3 of TAT (Procedure) Rules, 2010, challenging the same jurisdiction of the Tribunal. The present application reads in part: "*TAKE NOTICE that this Honourable Court will be moved on ..... as counsel may be heard on behalf of the Respondent/Applicant to the effect that at the hearing, the motion on Notice dated 19th July, 2013, the Respondent/Applicant will, in addition to the prayers seek the following prayers.*"

These are the same prayers that were dismissed by this Tribunal for lack of merit by the Ruling of the Tribunal on 11th December, 2013.

4. **ISSUES FOR DETERMINATION:**

i. Whether the second application by the Respondent/Applicant after the dismissal of the first application is an abuse of court process;

ii. Whether the Tribunal has become Functus Officio having heard and determined the same issues in the privious application.

5. **CONSIDERATION OF THE ISSUES BEFORE THE TRIBUNAL**

ISSUE ONE: WHETHER THE SECOND APPLICATION OF THE RESPONDENT/APPLICANT AFTER THE DISMISSAL OF THE FIRST APPLICATION IS AN ABUSE OF COURT PROCESS -

The Respondent/Applicant was in utter breach of the provisions of Order VIII Rule I of TAT (Procedure) Rules, 2010, by entering appearance after the expiration of over 80 days after service of the Notice of appeal on the Respondent/Applicant.

ORDER VIII RULE I provides thus:

> *"A Respondent shall within 30 days after the service of a notice of appeal on him enter appearance by delivering to the secretary a respondent's reply as in form TAT 3 to the first schedule to the Rules acknowledging receipt of the notice of appeal and stating therein whether he contests the appeal".*

The service of the notice of appeal was effected on the 29th of April, 2013, and the objection on the jurisdiction of the Tribunal was filed on 19th July, 2013.

6. After due consideration of the affidavit evidence and the submissions by both counsel, the Tribunal dismissed the application and objection for lack of merit on 11th December, 2013, and directed the Respondent/Applicant to file and serve its reply to the appeal within 30 days from the date of the Ruling.

7. The Respondent/Applicant disobeyed or ignored the Order of the Tribunal as stated above and proceeded to file a second application and objection on the jurisdiction of the Tribunal under the same Order III Rule I TAT (Procedure) Rules 2010, on the 28th of January, 2014, and canvassed before the Tribunal the same prayers that were dismissed by the Ruling of the Tribunal on 11th December, 2013.

8. The contention of the Respondent/Applicant and relying on the case of OKOYE VS NIG. CONSTRUCTION AND FURNITURE CO. LTD (1991) 6 NWLR PART 199 Pg 501, at paragraph 6 of the Respondent/Application written submissions does not avail the Respondent/Applicant. The relevant portion states that:

"Further, as a decision on jurisdiction is not a decision on the merits, it can be brought more than once, IF THE BASIS ON WHICH THE PLEA IS MADE IS NOT A MERE REHASH OF A PREVIOUS APPLICATION".

This is the kernel of the issue for determination. The submission of Appellant/Respondent is basically that the prayers canvassed for in the second application are *"a mere rehash of the previous application"* that was dismissed on the 11th December, 2013.

9. The Tribunal is therefore of the considered opinion that the foregoing amounts to abuse of Court process and it so holds. The Tribunal's decision is buttressed by the Supreme Court decision in DINGYADI AND ANOTHER V INEC (2011) LPELR 950 (SC), where it was held that:

> *"In the case of Arubo V. Aiyeleru (1993) 3NWLR (pt. 280) page 125, the Supreme Court took the stand that, "Once a Court is satisfied that the proceeding before it amounts to abuse of court process, it has the right, in fact the duty, to invoke its coercive powers to punish the party which is in abuse of its process. Quite often, that power is exercised by a dismissal of the action which constitutes the abuse".*

PER ADEKEYE JSC (PP 38-39 paras F-B)

The Tribunal on the above authority, hereby invokes its coercive powers by declaring the Respondent/Appellant application and objection to be incompetent and misconceived and is accordingly dismissed.

10. ISSUE TWO: WHETHER THE TRIBUNAL HAS BECOME FUNCTUS OFFICIO, HAVING HEARD AND DETERMINED THE SAME ISSUES IN THE PREVIOUS APPLICATION -

The Tribunal is of the considered opinion that the questions raised by the Respondent/Applicant challenging the jurisdiction of the Tribunal have been sufficiently addressed by its Ruling dated 11th December, 2013.

It is settled Law that where a Court of competent jurisdiction delivers a judgment or ruling, it has become Functus Officio and cannot re-visit or review or set aside the said judgment or ruling.

IN DINGYADI AND V. INEC (2011) LPELR 950 (SC), HIS Lordship ADEKEYE JSC at pages (44-45 paras E-A) observed that:

> *"A Court is said to be Functus Officio in respect of a matter if the Court has fulfilled or accomplished its function in respect of that matter and therefore lack the potency to review, re-open or re-visit the matter.*

Thus once a Court delivers its judgment on a matter, it cannot re-visit or review or set aside the said judgment.

More importantly, a Court lacks jurisdiction to determine an issue when it is Functus Officio in respect of the issue or where the proceedings relating to the issue is an abuse of Court process".

This Honourable Tribunal is therefore functus officio in relation to the previous application dated 19th July, 2013, which was considered and dismissed on 11th December, 2013.

11. On the issue of two conflicting decisions of the Federal High Court, the learned Senior Advocate of Nigeria relied heavily on the earlier judgment of Ademola J. in preference to the later judgment of Buba J. On the authority of EBITEH vs OBIKO (1992) 5 NWLR part 243, he conceded that this Tribunal has a choice on which of the two decisions to follow.

Though the Senior Advocate of Nigeria urged the Tribunal to follow the decision of Ademola J., he was frank to concede that *"it is of course quite tempting and legitimate for this Honourable Tribunal to prefer that of Buba J. as that would be harmonious with its continued existence and operation".*

The Tribunal agrees with the Learned Senior Advocate of Nigeria that the judgement of Buba J., is harmonious with the continued existence of the Tribunal, but the choice to follow Buba J. is not just because it is favourable to the existence of the Tribunal but because it is later in time.

12. The Tribunal also agrees with the submission of the Appellant/Respondent counsel that the jurisdiction of this Tribunal is protected by the subsequent judgment of Buba J. in suit No. FHC/L/CS/630/2013, Buba J. judgment confirmed the Tribunal's jurisdiction for now.

IN CYRIL OSAKWE VS FCE (TECHNICAL ASABA) AND 20 ORS (2010), 5 SCM page 158 at 202-203, ratio 5, it was held that: *"where there are two conflicting judgments of a Court of co-ordinate jurisdiction, the lower Courts are bound by the later in time".*

Once again, we dismiss the Respondent application and objection. The Appellant is properly before us and the appeal is competent. This Tribunal is clothed with ample jurisdiction to hear and determine this appeal.

The appeal is adjourned for definite hearing during the next sitting of the Tribunal.

DATED AT IBADAN THIS 27TH DAY OF MAY, 2014

1. Honourable Joseph A. Ushie (Chairman)
2. Honourable Cyril I. Ede (Commissioner)
3. Honourable Jibril N. useni (Commissioner)

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