

**IN THE TAX APPEAL TRIBUNAL
IN THE LAGOS ZONE
HOLDEN AT LAGOS**

TAT/LZ/PIT/005/2015

Between

Technip Offshore Nigeria Ltd

Appellant

And

Lagos State Board of Internal Revenue (LSBIR)

Respondent

Judgment

Introduction

The Appellant challenges the Respondent's PAYE demand of N156,289,465.54 for 2006–2011. The Appellant filed its notice of appeal on 27 February 2015 and an amended notice on 21 April 2015. The Respondent filed its reply to the amended notice of appeal on 1 September 2015.

Facts of the Matter

The Respondent investigated the Appellant's tax affairs for 2006–2011 tax years. Consequently, the Respondent raised assessment and served the Appellant a Demand Notice of N479,083,999.90. The demand notice is dated 2 October 2013 and was admitted as Exhibit AH1. Following the Appellant's objection, the Respondent summoned a reconciliation meeting resulting to a revised Demand Notice of N188,864,170.02 dated 14 August, 2014 – Exhibit AH3. The Appellant still objected and the Respondent called further reconciliation meeting and thereafter raised Demand Notice of N156,289,465.54 dated 2 December 2014 – Exhibit AH5. The Respondent rejected the Appellant's further objection.

Issues for Determination

The Appellant formulated 2 issues for our determination:



1. Is it right for the Respondent to apply deemed-income basis of assessment on the Appellant after the Appellant had provided the Respondent with the actual income and records of its employees?
2. Is the Appellant entitled to set off reliefs sought in this case?

The Respondent's sole issue for determination is:

Is the Respondent right to have used the Appellant's annual returns which it voluntarily filed with the Respondent in raising the assessment in question?

We find no difference between the Respondent's formulation and issue 1 of the Appellant; and find the Appellant's issue 2 consequential to its issue 1.

Parties' Positions

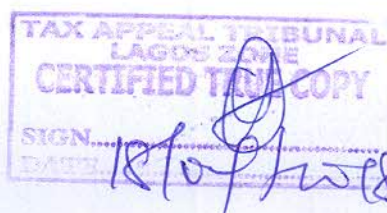
Issue 1

Is it right for the Respondent to apply deemed-income basis of assessment on the Appellant after the Appellant had provided the Respondent with the actual income and records of its employees?

The Appellant states that it initially computed its expatriate employees' Pay As You Earn (PAYE) taxes based on deemed income imposed by the Respondent in prior years' audit exercises. But at investigation, when the Appellant had all its relevant documents and information on actual income, its computed tax liability based on actual income for 2006–2011 amounts to N109,144,573.83. Thus, the Appellant says it is entitled to set off of N47,144,892.00 which should be adjusted against the Respondent's assessment of N156,289,465.54.

The Appellant submits that the Respondent's best-of-judgment discretion under section 54(2)(b) and (3) of PITA is not at large and absolute. Whenever the actual figures are placed before the tax authority, the authority is bound to abandon the deemed-income basis in favour of the actual figures. The Appellant refers to *Group 4 Securicor Nig. Ltd v LSIRS* (Appeal No. TAT/LZ/006/2013, decided on 19 June 2015).

The Appellant asserts that the Respondent by its own processes admitted that it had assessed the Appellant's tax liability based on deemed income. The Respondent's witness admitted under cross-examination that the Respondent used BOJ. It alleged that the Appellant did not file a return at the appropriate time and as a result it adopted BOJ assessment. The Respondent's reply to the amended Notice of Appeal also affirms this position. The Appellant says that



the Respondent's written address unaccountably stated that the assessment was based on the annual returns filed by the Appellant.

The Appellant says that its pleadings and evidence show that the numbers were lower based on its true staff strength. The Appellant argues that it actually forwarded to the Respondent a spreadsheet showing tax exposure, the actual salary information, and overpayments made on the income of some of the expatriates and other documents providing actual income of the staff of the Appellant.

The Appellant posits that the Respondent erroneously suggested that since the Appellant submitted its annual tax returns displaying staff emoluments, the Respondent had no reason to look at other subsequent documents submitted to it.

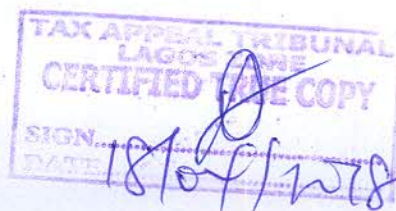
The Appellant also points out that the Respondent never denied the Appellant's over-assessment or the Appellant's over-remittance. The Respondent, concludes the Appellant, could not and did not demonstrate to this Tribunal why it has refused to amend the assessment made on the Appellant.

For its part, the Respondent submits that the Appellant filed its annual returns with the Respondent, and the Respondent adopted the figures therein as the amount ascribed to its employees resulting to N156,289,465.54 PAYE liability. The Respondent says that the Appellant's witness confirmed that the Appellant filed annual returns which the Respondent relied upon in its assessment. Thus, the Respondent asserts that by virtue of section 51 of PITA, on presumption of returns filed, it can be deduced to be a statement or form purporting to be furnished by or on behalf of any person which shall for all purposes be deemed to have been furnished by that person or by his authority as the case may be, unless the contrary is proved and any person signing any such return, statement or form shall be deemed to be cognisant of all matters therein.

The Respondent also submits that the Appellant is culpable under section 95 of PITA for admitting, through its witness at trial, that it has changed its position after validly filing its annual returns with the Respondent.

Issue 2:

Is the Appellant entitled to set off reliefs sought in this case?



The Appellant submits that the demand Notice of 2 December 2014 (Exhibit SBO4) for N156,289,465.54 is the Respondent's position on the Appellant's tax affairs. The Appellant says that even if this were correct, the Appellant has demonstrated through Exhibit SBO5 that it over-deducted and consequently over-remitted N47,144,892.00 to the Respondent. The Appellant argues that the Respondent did not deny the figures in Exhibit SBO5 and did not produce any document to prove the figure incorrect. Rather the Respondent drew the attention of the Appellant to sections 83 and 84 of PITA, which guide application for tax offset.

The Appellant also argues that the Respondent did not in the least refute the Appellant's claim of over-deduction and over-remittance. The Appellant submits that by the Respondent's pleadings and the wordings of its letter of 27 January 2015, the Respondent has admitted the Appellant's claim regarding over-remittance. The Appellant cites *PIPC Security Ltd v Vlaçhos & Anor* [2008] 4 NWLR (Part 1076) 1, 20D-F.

The Appellant argues that it relies on the principles of section 81(4) of PITA for set-off of the over-deduction against the Demand Notice served on it by the Respondent. The Appellant says that since it has already paid the balance of the sum that exceeds the Appellant's set-off, it is no longer liable to the Respondent on the basis of the Respondent's Demand Notice of 2 December 2014.

The Appellant states that it is innocent of any of the infractions deserving penalty under sections 16, 17, 55, 73, 95, and 96 of PITA.

The Appellant points out that it objected to the Demand Notices of the Respondent within the statutory timetable. Thus, the Appellant is not in default until the determination of its objection and now appeal. The Appellant says it has instead complied with the provisions of section 68(2) of PITA by paying the undisputed portion of its tax liability.

Lagos State Board of Internal Revenue v Shell Petroleum Development Company of Nigeria (2011) 5 TLRN 60 is authority for the proposition that a demand notice does not attain finality until the taxpayer does not resist it within the statutory timetable or until objections and appeals are exhausted.

Analysis and Decision

Paragraphs 6 and 7 of the Respondent's reply to the amended notice of appeal affirm that the Respondent's assessment was generated based on tax audit



investigation conducted on the Appellant's tax records. The initial demand notice of 2 October 2013 is a product of that investigation exercise – Exhibit AH1. All consequential reconciliation outcomes were predicated upon the Appellant's series of objections and are premised on the same Exhibit AH1. Paragraphs 7 – 9 of the Respondent's witness statement of Adebola Haroun dated 13 January 2016 corroborate this position. Paragraphs 1(1) – (4) of the Respondent's written address further reinforce the fact that the assessment is the outcome of tax audit investigation. Amazingly, in paragraph 3(1) of its written address, the Respondent, in apparent contradiction, says "We hereby humbly submit that the basis of the Appellants assessment is the annual returns filed. The Respondent has adopted the figures submitted voluntarily by the Appellant."

Assessment based on annual returns is premised on section 54(2)(a) of PITA and the one in default of annual returns (while returns have been filed) is BOJ and guided by section 54(2)(b) of PITA. The Respondent has not shown evidence that its tax investigation exercise was predicated upon the provisions of section 46 of PITA or based on the Respondent's invocation of section 54(2)(b) of PITA by default. The Respondent has not established that its tax investigation was triggered by the paucity of the annual returns as required by section 46 of PITA. The annual returns the Respondent claims as its basis of assessment are not in evidence before us. Thus, the preponderance of the Respondent's submissions show that its assessment is based on the tax investigation exercise and is a product of BOJ assessment.

BOJ assessment at the expense of annual returns or actual data rendered to the tax authority raises questions. The Appellant's computations as in Exhibit SBO5 show that some of the expatriate staff overpaid their PAYE. The Respondent's computations as in Exhibit AH5 reveal that all those names with over-deduction in Exhibit SBO5 are omitted from Exhibit AH5. The gap between these two exhibits represents the crux of this appeal. And the Respondent did not show justification for its action or inaction on the expatriate staff who the Appellant says have cases of over-deduction.

On the other hand, the Appellant admits in paragraph 2.3 of its written address that: "The Appellant had initially computed the PAYE taxes due to [sic] its expatriate employees based on deemed income imposed by the Respondent in the prior years during audit. However, at investigation when the Appellant had its relevant documents and information on actual income available to it, it computed tax liability based on actual income."



The Appellant's submission shows that it discovered the over-deduction and over-remittance of PAYE of some of its expatriate staff on changing the basis of assessment from deemed to actual income. The change from deemed to actual basis of assessment revealed over-deduction and over-remittance of N47,144,892.00, says the Appellant.

The Appellant's case for over-deduction and over-remittance have not been sufficiently made out. Nor has the Respondent been able to justify its failure or refusal to look into the records and tax affairs of those specific expatriate staff for whom the Appellant claims over-deduction and over-remittance.


On interests and penalties, a tax that has not been conclusively determined cannot form the basis of interest and penalty calculations. In this case the Appellant objected to the assessment within the time allowed by law and thereafter proceeded on appeal.

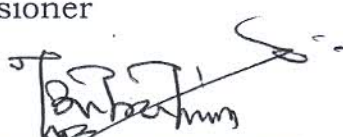
Conclusion:


We direct the Respondent to re-examine the records of the Appellant's expatriate staff with cases of PAYE over-deduction as asserted by the Appellant in Exhibit SBO5 and whose names are not reflected in Exhibit AH5. Following the re-examination, the Respondent must then reassess them based on their actual earnings. The outcome of this exercise will determine the Appellant's obligation to pay or its entitlement to tax set-off.

DATED AT LAGOS THIS 2ND DAY OF JUNE 2016


KAYODE SOFOLA SAN (Chairman)


CATHERINE A. AJAYI
Commissioner


MUSTAFA BULU IBRAHIM
Commissioner


D. HABILA GAPSISO
Commissioner


CHINUA ASUZU
Commissioner

