

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

Appeal No: TAT/LZ/CIT/071/2014

Between

Prime Plastichem Nigeria Limited

Appellant

And

Federal Inland Revenue Service

Respondent

Judgment

Issues for Determination

1. The Respondent assessed the Appellant to tax for 2007-2012 years of assessment. But the Appellant had already fulfilled its tax obligations for those years.

Must the Appellant pay on the fresh assessments?

2. Section 33(3)(b) of the Companies Income Tax Act (CITA) exempts companies with a minimum imported-equity capital of 25% from minimum tax. The Appellant's equity base is at least 25% imported.

Is the Appellant liable to minimum tax?

3. Section 76 of CITA provides that failure to raise a valid objection to an assessment within the time stipulated under section 69 (30 days) makes the assessment final and conclusive for all purposes of the Act. The Appellant did not object to the Respondent's additional assessments within the time allowed.

Are the Respondent's additional assessments final and conclusive?

Facts

In 2009, the Respondent audited the Appellant's 2007-2008 accounts, and then assessed the Appellant to ₦70,141,395 for just 2007. The Appellant



paid. In 2010, the Respondent further audited and assessed the Appellant for 2007-2008 to additional ₦13,992,743. Again, the Appellant paid.

In 2013, the Respondent audited the Appellant for 2006-2011 accounting years. The Appellant alerted the Respondent by letter and supporting documents that the Appellant had already been audited and assessed for 2007-2008, and that the Appellant had paid. The parties held reconciliation meetings. Later, the Respondent demanded minimum tax from the Appellant, to which the Appellant pointed out that, being a company with at least 25% imported capital, the Appellant was not liable to minimum tax. The Respondent demanded evidence of capital import, which the Appellant provided.

The Respondent assessed the Appellant to additional tax of ₦182,255,051.

The Appellant sued here.

Facts and Proceedings

The Respondent audited the Appellant in February 2013 for the years 2006-2011 (Exhibit C). After the audit, the Respondent sent the audit report to the Appellant and requested a reconciliation meeting (Exhibits D1 and D2). The Appellant replied, informing the Respondent that the Respondent's Kano office had already audited the Appellant for the years 2007-2008 (Exhibits E1-E6).

The Respondent then held a reconciliation meeting with the Appellant on 8 May 2013 (Exhibit F). This meeting continued on 23 May 2013 (Exhibit G1-G2). Another reconciliation meeting took place in July 2013 (Exhibit H). After the meetings, the Appellant submitted documents to the Respondent to clarify some issues outstanding from the audit exercise (Exhibit I1-I2). But the Respondent found no reason to review the audit report.



Consequently, the Respondent informed the Appellant of its intention to raise additional tax assessments on the Appellant. The Appellant did not reply to the Respondent's letter. So the Respondent raised additional assessments against the Appellant for companies' income tax (2011-2012), education tax (2012), withholding tax (2007, 2008, 2009, and 2011), and value added tax (2007-2011). The Appellant did not raise any objection.

At the trial, the Appellant called Ravi Dutt, its Financial Controller as a witness. The Respondent called Sefiu Onabanjo Asiru, a Deputy Manager Tax, in its Large Tax Office (Non-Oil).

Both parties introduced documentary evidence.

Parties' Positions

The Appellant argues that it has already been assessed for 2007-2008 twice. The Appellant asserts that the additional tax assessments have not become final and conclusive, since they were based on a void decision to start with.

The Respondent argues that the earlier assessments issued on the Appellant for 2007-2008 did not reflect the correct tax liability of the Appellant; so it is empowered by law to issue additional assessments. It maintains that since the Appellant did not object to its Notices of Additional Assessment within the 30 days required by law, the assessments are deemed final and conclusive.

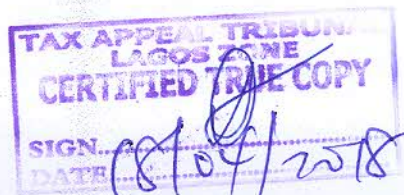
Analysis

Must the Appellant pay on the fresh assessments?

2007-2008

The Respondent audited the Appellant for companies' income tax, education tax, withholding tax, and value added tax for the 2007-2008 assessment years. The Appellant paid as follows:

1. ₦70,141,395 for companies' income tax {Exhibit C1};



2. ~~₦~~4,926,457 for education tax {Exhibit C2};
3. ~~₦~~14,724,459.92 for value added tax (May–September 2007), ~~₦~~6,512,713.90 (October 2007), ~~₦~~827,932 (November 2007), and ~~₦~~4,620,380 (December 2007) {Exhibit C3}; and
4. ~~₦~~4,722,056 for withholding tax (May–September 2007) and ~~₦~~522,525 (paid on 24 December 2007) {Exhibit C4}.

The Respondent again assessed the Appellant for 2007–2008 on 12 May 2010. The Appellant paid additional companies' income tax of ~~₦~~13,992,743 (Exhibit I1).

The Respondent now claims an additional ~~₦~~1,781,995 (for 2007 withholding tax) and ~~₦~~1,146,870 (for 2007 value added tax). The Appellant refused to pay. The Respondent's argument is that it served fresh Notices of Additional Assessment because it previously assessed the Appellant at a figure lesser than it should have been charged.

By virtue of Section 66 of the CITA, the Respondent can validly reassess any company where it is of the opinion that the company:

- a) has not been assessed or
- b) has been assessed at a lesser amount than that which ought to have been charged.

The Appellant is therefore liable to pay *only* the outstanding withholding tax and value added tax for 2007 assessment year.

2009-2012

For 2009-2012 assessment years, the Appellant introduced documentary evidence showing that it did not make any profits for those years. So the Appellant filed returns claiming nil tax for the years (Exhibits F1-F3). The Respondent accepted the Appellant's position, but decided that the Appellant was liable to minimum tax (Exhibits V).

Section 9 of the CITA imposes tax on *chargeable profits*. Generally, this means profits cannot be chargeable if there are no profits. Based on the



evidence before us, the Appellant recorded no profit for 2009-2012 assessment years. It reported a nil-tax liability (Exhibits F1-F3).

Thus, the Appellant cannot be liable to pay tax for 2009-2012 assessment years.

Is the Appellant liable to minimum tax?

The Respondent argues that the Appellant is liable to pay minimum tax since it did not make any profits in the years 2009-2012. The Respondent charged ₦57,670,092.34 as minimum tax. The Appellant disputed this, claiming it is exempted from paying minimum tax because it is a 100% foreign-owned entity. The Appellant submitted its Certificate of Capital Importation to substantiate its claim. The Respondent neither replied to nor acknowledged the Appellant's letter. Five months later, the Respondent informed the Appellant of its decision to impose additional tax of ₦182,255,051 on the Appellant. The Respondent then assessed the Appellant to additional tax for 2007-2012 years of assessment.

Section 33 of CITA requires a company to pay minimum tax where the company's:

1. total assessable profits from all sources result in a loss;
2. ascertained total profits result in no tax payable; or
3. ascertained total profits result in tax payable but less than the minimum tax.

Subsection (2) prescribes the minimum tax a company is required to pay.

But section 33(3) exempts 3 categories of companies from paying minimum tax. They are:

- a) company carrying on agricultural trade or business...
- b) a company with at least 25% imported equity capital; and



- c) any company for the first 4 calendar years of its commencement of business.

Since the Appellant's Certificate of importation (Exhibit Y) proves that it qualifies for exemption under section 33(3)(b) above, then the Appellant is not liable to minimum tax.

Are the Respondent's additional assessments final and conclusive?

The Appellant argues that the additional assessments cannot be *final and conclusive* since they were based on a wrongful procedure. It contends that the Respondent failed to take its earlier payments into account.

The Respondent counters that the Appellant did not raise any objection to the notices of additional assessment within the 30-day period required by section 69 of the CITA. The Respondent submits that the Appellant's failure to object renders the assessments *final and conclusive* according to section 76 of the CITA.

Section 76 of the CITA provides that where no valid objection is raised on an assessment within the time stipulated under section 69 (30 days), the assessment becomes *final and conclusive* for all purposes of the Act.

The Appellant received the Respondent's decision to assess it to additional tax on 23 March 2014. It did not object to it. On 3 September 2014, the Appellant filed an appeal at this tribunal.

But before the Respondent issued the Notices of Additional Assessment, there had been series of correspondence between the parties. During this period, the Respondent kept asking for more documents and information, and the Appellant kept providing them (Exhibits G1-G5, Exhibits N, O, P, Q, R, S, and T). When the Respondent finally concluded on the bases for determining the Appellant's tax liabilities, the Appellant did not agree with some of the Respondent's findings. At some point, the Respondent admitted to the Appellant's nil-tax position (Exhibits F1-F3). It then demanded that the Appellant pays minimum tax (Exhibit V). The



Appellant disagreed, claiming that as a 100% foreign-owned entity, it was exempted from paying minimum tax (Exhibit W). The Respondent asked the Appellant to prove its claim (Exhibit X). The Appellant provided its Certificate of Capital Importation (Exhibit Y). Afterwards, the Respondent went silent.

In the Supreme Court decision in *Federal Board of Inland Revenue (FBIR) v Rezcallah*¹, Bairamian FJ determined the effect of *final and conclusive* under section 60 of the Income Tax Act² (now section 69 of the CITA) in the following words:

*'...the Board cannot take shelter under section 60 of this Act, for that section saves an assessment from attack on the grounds of mistake, defect or omission "if the same is in substance and effect in conformity with or according to the intent and meaning of this Ordinance...I am alive to the provision in section 63 [now section 76 of the CITA] that an assessment becomes final and conclusive as to the amount of the chargeable income. I think that presupposes that it was made with jurisdiction; for if it was null and void ab initio, it must remain null and void.'*³

This means an invalid assessment cannot be *final and conclusive*.

Firstly, if the Respondent was dissatisfied with the Appellant's Certificate of Importation (Exhibit Y), the Respondent has a duty under the CITA to inform the Appellant about this. It did not do so. Secondly, the Respondent's additional assessments did not also consider the Appellant's earlier payments (on the same taxes). And for 2009-2012, the Respondent failed to properly apply the provision of section 33(3)(b) of the CITA. These render the additional assessments invalid, thus they cannot be *final and conclusive* against the Appellant.

¹ (1962) 1 ALL NLR 1 ; (2010) 2 TLRN 59

² CAP 92 of 1961

³ (2010) 2 TLRN 59, 73



Conclusion

We allow the appeal in part. For the assessment years 2007-2008, the Appellant is liable to pay *only* the outstanding ₦1,781,995 (for 2007 withholding tax) and ₦1,146,870 (for 2007 value added tax).

For 2009-2012, the Appellant's nil-profit position relieves it from paying any tax. In the same years, section 33(3)(b) of the CITA applies. Companies with a minimum imported-equity capital of 25% are exempted from minimum tax.

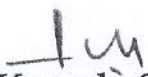
We order the Appellant to pay ₦1,781,995 (for 2007 withholding tax) and ₦1,146,870 (for 2007 value added tax). These figures already include interests and penalties.

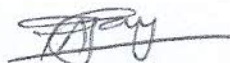
Legal Representation

Emeka Ihebie Esq. for the Appellant.


Mrs Victoria M. Aderibigbe for the Respondent.

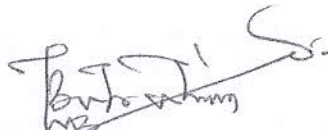
DATED AT LAGOS THIS 31ST DAY OF JULY 2015


Kayode Sofola, SAN
Chairman


Catherine A. Ajayi (Mrs)
Commissioner


Chinua Asuzu
Commissioner


D. H. Gapsiso
Commissioner


Mustafa Bulu Ibrahim
Commissioner

