

**IN THE TAX APPEAL TRIBUNAL
IN THE TAX APPEAL TRIBUNAL OF THE ABUJA ZONE
HOLDEN AT ABUJA**

SUIT NO TAT/ABJ/APP/034/2015

BETWEEN:-

BIWATER NIGERIA LIMITED APPELLANT

VS

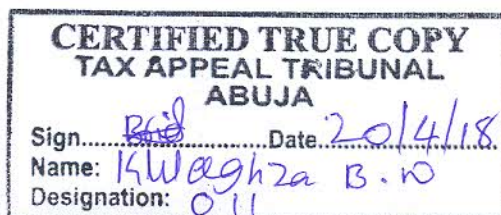
FEDERAL INLAND REVENUE SERVICE RESPONDENT

**Coram: Hon. Nnamdi Ibegbu, Esq, SAN, F.C.I.Arb. [Ag. Chairman]
Hon. Barr. Zulaihat Aboki
Hon. Barr. Jude Rex-Ogbuku [Read the Lead Judgment]**

JUDGMENT

By a Notice of Appeal dated 3rd June 2015 and filed on the 4th June 2015; the Appellant commenced this Appeal against the Respondent seeking the following reliefs:

1. A declaration that the Appellant has discharged its Company's Income Tax, Education Tax and Withholding Tax obligations due and payable to the Respondent for the 2013 year of assessment.
2. An Order discharging the Appellant of additional assessments or quashing the additional assessments or with respect to the 2013 year of assessment and as contained in the CIT Demand Notice and Education Tax Demand Notice.



3. A declaration that the penalties charged by the Respondent against the Appellant with respect to the sums allegedly owed by the Appellant are excessive, disproportionate and an injudicious exercise of administrative power by the Respondent.
4. An Order prohibiting the Respondent from further assessing the Appellant for any further Company's Income, Withholding or Education Tax for the 2013 year of assessment.
5. Such other or further Orders as the Honorable Tribunal may deem it fit to make.

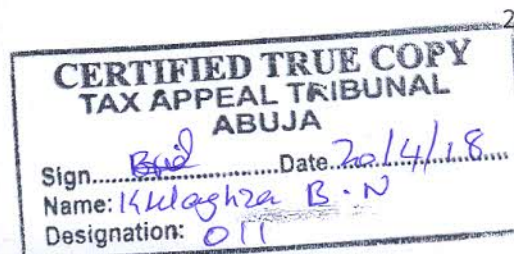
The above reliefs are sequel to Notice of Refusal to Amend dated 29th April 2015 wherein the Respondent refused to amend and/or revise its additional tax assessment on the Appellant for the 2013 year of assessment thus:

S/NO	TAX – YOA	AMOUNT [N]	ASSESSMENT NUMBER
1	CIT – 2013	444,357,259	LTO/ABJ/GA/CIT/14/11A
2	EDT[TETFUND] TAX -2013	29,488,678	LTO/ABJ/TET/14/09A
3	WHT – 2012	52,276,623	LTO/ABJ/GA/WHT/14/21A

In that the reason contained in the Notice of Objection of the Appellant lack any substance to warrant a revision of "our earlier assessment dated 10th February 2015".

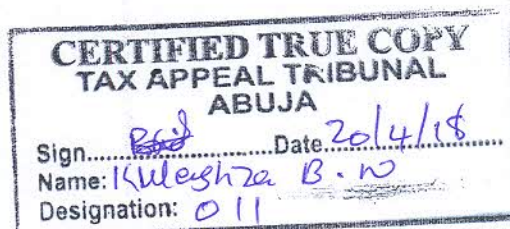
The Appellant appealed to this Honorable Tribunal challenging the additional assessment on grounds contained in the Appellant's Notice of Appeal to wit that;

1. The Respondent erred when it assessed the Appellant's taxable income for the period 1st April 2011 – 31st March 2012 [2013 YOA] as



₦1, 748,322,232.00, its Company's income Tax [CIT] obligation for 2013 YOA as ₦524,496,670.00 and imposed additional CIT obligation for 2013 YOA on the Appellant in the sum of ₦444,357,259.00.

2. The Respondent erred when it treated monies paid in the 2013 YOA to SCC Nigeria Limited, a supplier nominated by the Federal Capital Development Authority [FCDA] for the supply of pipes for Abuja Usuma Water Project, as a work in progress [WIP] and thereafter added the sum to the taxable profit of the Appellant in arriving at the additional CIT of ₦444, 357,259.00 imposed on the Appellant.
3. The Respondent erred when it classified the expenses incurred by the Appellant on the Kagara Water project and the Ilorin Water Pump Project as WIP and added the sums to the taxable profit of the Appellant in arriving at the additional CIT of ₦444, 357,259.00 imposed on the Appellant.
4. The Respondent erred when it decided that all payments to Biwater International Limited [Biwater Uk] made without NOTAP approval were disallowed for tax purposes and added the payment to the taxable profit of the Appellant in arriving at the additional CIT of ₦444, 357,259.00 imposed on the Appellant.
5. The Respondent erred in law when it proposed additional Education Tax on the Appellant for the sum of ₦29,488,679.00 for the period 1st April 2011 – 31st March 2012 [2013 YOA]
6. The assessment by the Respondent against the Appellant for the additional sum of ₦52,276,623.00, allegedly representing outstanding withholding Tax for the period spanning 1st April 2011 – 3rd March



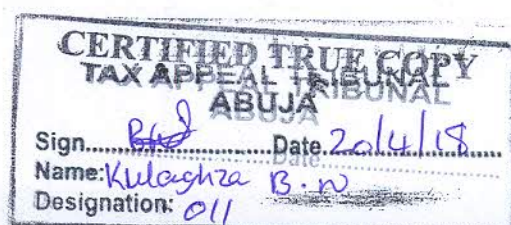
2012, plus accrued interest and penalty thereon, is erroneous and unwarranted, as same does not represent the Withholding Tax payable by the Appellant.

It is sagacious to note that on each of these grounds; the Appellant had supplied particulars to justify its reasons. Appellant further called a sole witness, Olosola Ojelola of BDO Professionals Services, a firm of Chartered Accountants and Auditors [Its Tax Consultant] who filed four [4] Witness Statements on Oath viz:

- i. Witness Statement on Oath sworn on the 4th June 2015
- ii. Further Witness Statement on Oath sworn on 30th October 2015
- iii. Further Further Witness Statement on Oath sworn on 26th November 2015
- iv. Additional further Further Witness statement on Oath sworn on 16th May 2015

At the hearing of the appeal; the Appellant through the witness tendered several documents, which were admitted in evidence and marked as Exhibits 1 – 29 and 35.

It is the evidence of the witness that he is an Assistant Manager of the Appellant's Tax Consultant and conversant with the facts leading to this appeal. That the Appellant's Accounting Year commences on the 1st April and ends 31st March each year. For the 2012 year. Appellant turnover and other income as audited by them is ₦1, 984,906,007.00. That after due deductions; the Appellant's total profit or 2013 year of assessment [YOA] amounted to ₦267, 131,370.00 and that the accounts were audited in line with applicable and generally accepted accounting standards. Appellant then remitted the sum of ₦80,139,411.05 representing 30% of its taxable profit to the Respondent as CIT due for the 2013 YOA consequent upon which the Respondent issued it with Tax Clearance Certificate covering 2011, 2012 and 2013 YOA. It also in line with the practice, remitted ₦5,



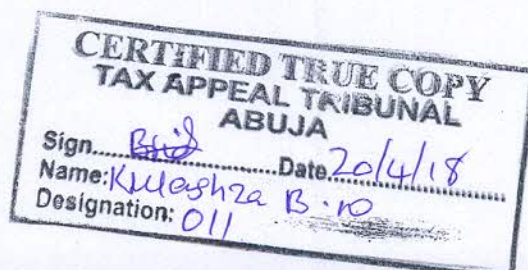
7,769.19 representing 2% of its taxable profit to the Respondent as Education Tax due for 2013 YOA and further computed and remitted the sum of N50, 110,546.00 to the Respondent as Withholding Tax.

It is the witness's evidence that sometime in November 2013; the Appellant received a Tax Audit Report wherein the Respondent raised certain queries in relation to alleged tax obligation to the Appellant.

The Appellant by its Officers and through their Consultants provided responses and documents including but not limited to its Income Tax computations for the 2012 Accounting Year and the Income Tax Clearance Certificate issued to it by the Respondent. To address the issues raised; several reconciliatory meetings were held and documents produced but that despite the further information and documents; the Respondent without taking into account, issued the Appellant Additional Assessment Notices - subject matter of this appeal. It is in all, the case of the Appellant that the additional assessments are without justification and are product of wrong application of the Law.

On their part; the Respondent was granted extension of time within which to file and serve a Reply to the appeal on the 5th of August 2015. The Respondent accordingly filed its Reply dated 6th August 2015 filed on the 7th of August 2015. It contested all grounds raised by the Appellant seriatim thus:

1. The Respondent was right when it assessed the Appellant's taxable income for the period 1st April 2011 – 31st March 2012 [2013 YOA] as N1,748,322,232.00, its Company's Income Tax [CIT] obligation for 2013 YOA as N524,496,670.00 and imposed additional tax – CIT obligation for 2013 YOA on the Appellant in the sum of N444,357,259.00. The details of the assessment is set out below:



S/NO	Particulars	Amount [N]
1	The Appellant total taxable profit for 2013 YOA	267,131,370.00
2	Audit Add Backs	
3	Technical fees paid to dorking without approval	578,629,994.00
4	Kagara cost refund	32,902,056.00
5	Ilorin cost refund	384,330,710.00
6	Cost of pipe by SCC charged returned	448,616,292.00
7	Quarry expenses	36,711,810.00
8	TOTAL [New Assessable Income – 2013 YOA]	1, 748,322,232.00
9	30% of New assessable Income	524,496,670.00
10	Less CIT already paid	80,139,411.00
11	Outstanding CIT	444,357,259.00

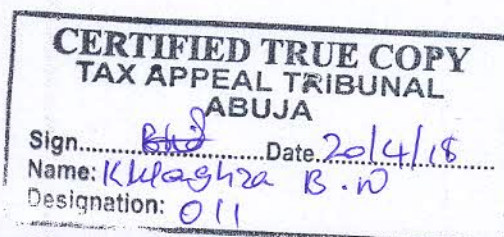
2. The Respondent was right when it treated monies paid in June to SCC Nigeria Limited, a supplier nominated by FCDA for supply of pipes for Abuja Usman Dam Project. The payment for such materials is to be treated as advance project [materials on site] since advance payment are never recognized as income but rather liability in the books of the Company. Only the value certified by engineers are recognized which comprises the value of materials consumed, labour and other factors of production. Furthermore, the cost of pipes cannot be charged in bulk but rather charged in piecemeal as they are consumed.
3. The Respondent was right when it classified the expenses incurred by the Appellant on Kagara and Ilorin Projects because it negates the principle of matching of income with expenses in determining the assessable income. There were no stream of income from Kagara and Ilorin to the taxable profit of the Appellant in arriving at the additional CIT of N444, 357,259.00 imposed on the Appellant.

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ABUJA	
Sign..... <i>B. W.</i>	Date <i>20/4/18</i>
Name: <i>Khalagha B. W.</i>	
Designation: <i>O.I.</i>	

4. The Respondent was right when it decided that all payments to Dorking International Limited without NOTAP approval were disallowed for tax purposes and added the payment to the taxable profit of the Appellant in arriving at the additional CIT of N444, 357,259.00.
5. The Respondent was right when it imposed additional Education Tax on the Appellant for the sum of N29,488,679.00 for the period 1st April 2011 – 31st March 2012 [2013 YOA]
6. The assessment by the Respondent against the Appellant, for additional sum of N52, 276,623.00 representing outstanding withholding Tax for the period 1st April 2011 – 31st march 2012, plus accrued interest and penalty thereon, is in line with the provisions of the various Tax Laws.

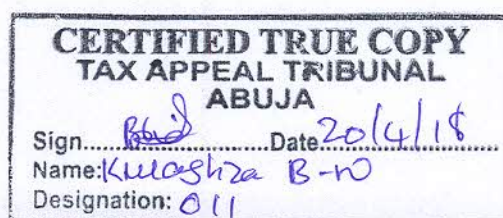
It is again imperative to note that the Respondent also supported each of these responses with particulars and prayed the Tribunal for the following Orders:

1. A declaration that the additional assessment made by the Respondent on the Appellant were valid and in accordance to the Law – Income Tax Act [CITA]
2. An Order of this Honorable Tribunal dismissing this appeal with substantial cost for being frivolous misconceived and abuse of the process of this Tribunal.
3. An Order of this Tribunal compelling the appellant to pay the tax liability contained in the Additional Notices of Assessment forthwith.
4. An Order dismissing this appeal as incompetent in its entirety
5. And for such Order and further Orders as the Honorable Tribunal may deem fit to make in the circumstances.



The Respondent also called one witness who co-incidentally is a Manager, Tax and was part of the team that investigated the Appellant. He stated that facts, materials and depositions herein made were from his personal knowledge except otherwise stated. He testified that the Respondent acted in accordance with the provisions of the relevant laws as it relates to tax matters of the Appellant. He agreed that the accounting year of the Appellant commences from the 1st April and ends 31st March each year. That following a notice of tax audit exercise; a pre-audit meeting was held on the 19th June 2013 by the parties herein. He further admitted as a fact that for the 2012 Accounting year; the Appellant's turnover and other income as contained in the Appellant's Audited Financial Statement amounted to N1,984,906.007 and after deducting all allowable expenses; the Appellant's taxable profit was as stated by the Appellant but that was before the audit add backs. That after the audit exercise; an interim report was sent to the Appellant with a covering letter and a fixed date for reconciliation meeting but that the Appellant wrote shifting the dates on several occasions. That when on 5th September, 2014; the meeting finally held, several issues were discussed amongst which include but not limited to:

- i. The schedule of job certification valuation for all the projects indicates only that of Abuja Water Treatment Plant with Income. The Kagara and Ilorin water projects had no job certification because it had no income and as such was disallowed. They only have expenditure.
- ii. That payment to Dorking was made without NOTAP approval
- iii. That the approval mode of payment is through FORM M in UBA. The Appellant made remittance to Union Bank which was wrong.
- iv. That the supply of pipes by SCC Nigeria Limited charged as direct expenses instead of charging it to stock of material and charged in bits to the profit and loss account as they are used.

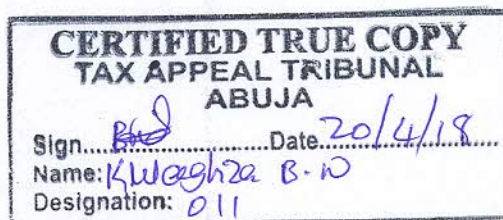


That these issues were later documented and sent to the Appellant. That before the Letter of Intent [LOI] was issued on the 18th of November 2014; an earlier letter for final reconciliation was sent on the 4th of November 2014 to the Appellant. It was after all these that the Respondent issued Appellant with Notice of Additional Assessment for which an Objection Letter was raised by the Appellant's Tax Consultant. That on the 18th of December 2014; the Appellant sent a ledger document wherein payment was made in respect of quarry activities but that same was never disclosed in both their Financial Statement and Business Objectives.

Consequent upon the following; the Respondent raised Assessment and Demand Note dated the 11th February 2015 and served on the Appellant on the 16th February 2015. That on the 11th March, 2015; the Appellant again raised an objection for all the tax types which finally culminated in the Respondent issuing a Notice of Refusal to Amend. Witness stressed that its assessment was based on the audit exercise and that the Appellant's profit for 2013 YOA was ₦1, 748,322,232.00 because of the audit add backs and no longer ₦267, 131,370.00 as they claim and having already paid ₦80, 139,411.00; they are expected to pay the balance of ₦444, 357,259.00 being the CIT on the audit add backs. The Respondent then went ahead to tabulate how it arrived at the balance payment as shown earlier.

Lastly, the Respondent testifies that the major problems with the Appellant are:

- a. Lack of proper accounting standard
- b. Improper treatment of transactions in their books of account
- c. Lots of payment were made without necessary approval
- d. Engaging in activities not included in their scope of services



Finally, Respondent urged the Tribunal to uphold the additional assessment and dismiss the appeal.

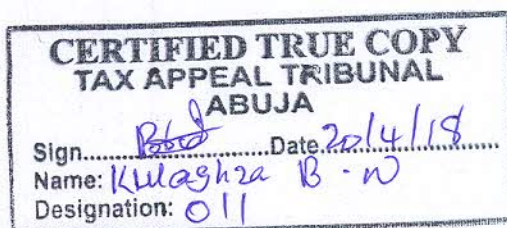
Parties filed and exchanged briefs of argument which they adopted. It is worthy of note, that, in cause of adopting his Written Final Address, the Respondent Counsel had drawn Tribunal's attention to his "Respondent's Reply to the Appellant's Final Written Address" ostensibly in place of a Reply on Points of Law. Matter was then adjourned to the 3rd of June 2016 for judgment. The Respondent had proffered two issues for determination of this appeal namely:

1. Whether the expenses which the Appellant claimed are deductible are actually deductible in Law and;
2. Whether the Appellant has proved the necessary facts to entitle it to the tax deductions.

On its part; the Appellant proffered a sole issue for determination thus: whether the additional assessment should not be quashed or set aside in whole or in part for being unreasonable and without any legal and/or factual basis.

From the issues raised by both parties; it is obvious that all dove-tail into each other. I shall however bear in mind some of the matters covered by the Respondent's issues but will opt for the sole issues as set out by the Appellant.

Before delving into the judgment proper; I would like to state that in all the argument proffered; it seems both parties agree to the fact that taxes payable by the Appellant and in their percentage were indeed paid. The dispute therefore is as to what constitutes the taxable profit of the Appellant given the extent, nature and obligations contained in the various contract projects executed by the Appellant. This is clearer when viewed from the line of cross – examination and the extent of attention given by Counsel in their bid to establish the positions of the parties.



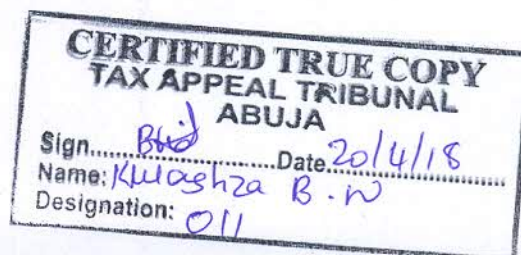
It is also important to note that the manner Counsel canvassed this case is by taking the grounds seriatim. Assertions as to Law were made by Counsel without necessarily citing the particular laws. To save time and in a bid to do a thorough appraisal; I shall attempt to follow the same pattern as issues were joined in arriving at questions to the sole issue.

Section 24 of the Company Income Tax Act [CITA] cap 21 Laws of the Federation provides:

"Save where the provisions of subsection [2] & [3] of sections 14 or 16 of this act apply; for the purpose of ascertaining the profits or loss of any Company or any period from any source chargeable with tax under this Act; then shall be deducted all expenses for that period by that company wholly, exclusively, necessarily and reasonable incurred in the production of those profits including, but without otherwise expending or limiting the generality of the foregoing-

- a. *Any sum payable by way of interest on any money borrowed and employed as capital in acquiring the profits -*

In Paragraph 5 – 10 of the Witness Statement on Oath of the Appellant. Olusola Ojelola testified that the accounting year of the Appellant commenced on the 1st of April and ends on the 31st of March of each calendar year and that for the 2012 account year; the Appellant's turnover and other income amounted to N1, 984,906,007.00 and that after deducting all allowable expenses and capital allowances; the Appellant's total profit for the 2013 YOA amounted to N267,131,411.05 and that the audit which led to this figure was prepared in line with applicable and generally accepted accounting standard relevant to the construction industry which is the Appellant's line of business and based on this, the Appellant remitted the sum N80,139,411.05 representing 30% of its taxable profit to the Respondent for the 2013 YOA.

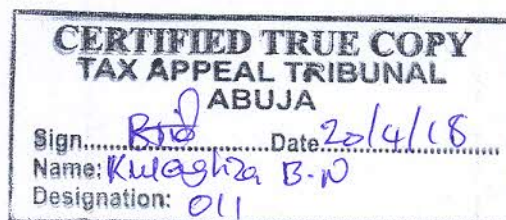


he Respondent admitted this position in its paragraph 7 and 12 of the written deposition of Mr. Unazi S, Otse dated 6th August 2015 and filed on the 7th of August 2015. But that this was before the audit add back.

The Appellant Counsel has invited the Tribunal to note that in putting the Appellant's taxable profit at ₦1, 794,322,232.00 from a total turnover of ₦1, 984,906,007.00; the Respondent considers that the Appellant made a taxable profit of over 90% of its turnover and that no legitimate business enterprise can make a profit of that nature and that it was based on this that the Respondent arrived at its additional assessment of ₦444, 357,259.00 as the CIT. The Appellant further argued that in arriving at the figure of ₦1, 794,322,232.00; the Respondent disallowed for tax purposes; specified expenses relating exclusively to four [4] heads of expenses namely:

1. The sum of ₦578, 994.00 for technical fees paid to Dorkings without approval.
2. The sum of ₦448,616,292.00 for cost of pipe by SCC charged return
3. The sum of ₦36,711,810.00 on quarry expenses
4. The sum of ₦32,902,056.00 on Kagara cost return and;
5. The sum of ₦384, 330,710.00 on Ilorin cost return.

Collectively described in the table attached to paragraph 26 of the Respondent Statement on Oath as AUDIT ADD BACKS; The Appellant submits that exclusively definitive of the issue whether the Respondent's additional CIT assessment should not be quashed or set aside in whole or in part is whether the Respondent had legal or factual justification under applicable law to disallow for tax purposes and to add-back to taxable profit of the Appellant any of the specified five [5] expenses under the specified heads. He submitted further that where there is no legal or factual justification taken; this Honorable Tribunal must reduce the assessable taxable profit of the



Appellant by an amount equivalent to the said expense and quash or set aside such additional assessment as it relates to such expense.

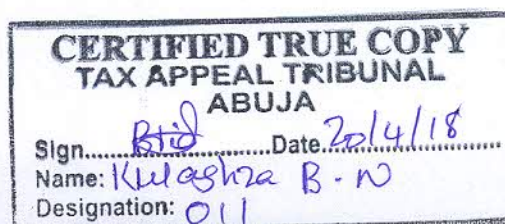
Responding in justification for the additional assessment, the Respondent testified in paragraph 26 of the written deposition of Mr. Unazi S. Otse as follows:

"In response to paragraph 8 of Olusola Ojelola's Statement on Oath; I know as a fact that the Appellant's total taxable profit for 2013 YOA was N1,748,322,232.00 as set out in the table below:"

S/NO	Particulars	Amount [N]
1	The Appellant total taxable profit for 2013 YOA	267,131,370.00
2	Audit Add Backs	
3	Technical fees paid to Dorking without approval	578,629,994.00
4	Kagara cost refund	32,902,056.00
5	Ilorin cost refund	384,330,710.00
6	Cost of pipe by SCC charged returned	448,616,292.00
7	Quarry expenses	36,711,810.00
8	TOTAL [New Assessable Income - 2013 YOA]	1,748,322,232.00
9	30% of New assessable Income	524,496,670.00
10	Less CIT already paid	80,139,411.00
11	Outstanding CIT	444,357,259.00

Continuing in paragraph 27, the witness had this to say:

"That in response to paragraph 9-12 of Olusola Ojelola's Statement on Oath; I know as a fact that the Appellant did

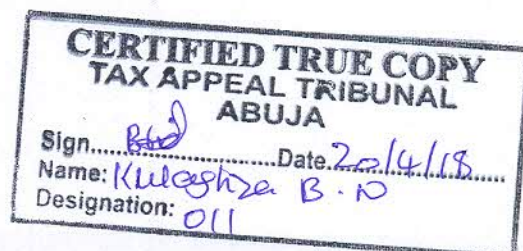


not prepare its audited financial statement in line with the generally accepted accounting standards. This is because the Appellant's total assessable income is ₦1, 748,322,232.00 and 30% of it is ₦524, 496,670.00 after add backs, of which only ₦80, 139,411.00 was paid and the balance of ₦444, 357,259.00 was not paid"

At this point, I agree with the Learned Counsel for the Appellant that "the approach impelled by the foregoing, to a resolution of the sole issue for determination as it relates to the additional CIT assessment is to examine in turn each disallowed expense/expense head against the background of applicable law and the facts to determine whether there exists legal and/or factual justification for disallowing same for tax purposes"

In his brief, Counsel for the Respondent had argued that Respondent was right when it reclassified monies paid in June to SCC Nigeria Limited, a supplier nominated by FCDA for supply of pipes for Abuja Usuma Dam Project. According to him; payment for such materials is to be treated as advance payments [materials on site] since advance payment are not recognized as income but rather a liability in the books of the Company. That only the values certified by Engineers are recognized which comprises the value of material consumed, labour and other factors of production. Furthermore, the cost of pipes cannot be charged in bulk but rather charged in piecemeal as they are consumed.

On his part, Counsel for Appellant argued that the payment was an advance payment made by the FCDA to SCC Nigeria Limited through the Appellant that the payment of ₦448, 616,292.00 to SCC Nigeria Limited was an expense wholly reasonably, exclusively and necessarily incurred in connection with the Usuma project executed by the Appellant for the FCDA and is thus deductible under Section 24 of CITA.

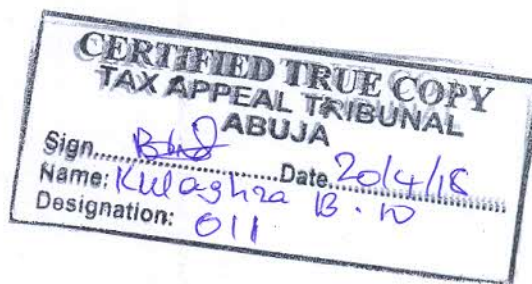


to this end, the testimony of Mr. Unazi during cross-examination on 23/05/2016 bore out clearly the position of the Appellant as all questions put to him with regard to the position of the Respondent were answered in the negative while affirming that of the Appellant which was made even clearer by Exhibit 16 signed by one Engr M.A Soso FNSE, Act Director Engineering Services - the engineer and dated 8th June, 2011.

I accordingly quash and/or set aside the decision of the Respondent in disallowing the said expense of N448, 616,292.00 – cost of pipe by SCC Nigeria Limited charge returned for tax purposes and adding same back to the taxable profit of the Appellant.

On the Kagara and Ilorin cost returned; Appellant argued that both projects in respect of which Appellant incurred the expenses were at the relevant time uncompleted/pending and had not been handed over to the sponsor and that under the contracts governing each of the projects – Exhibit 2 for Kagara Water Project and Exhibit 3 for Ilorin Water Pump Project; the Appellant has a contractual obligation to continue to maintain the facilities and its safety and security prior to handover including periods of temporary stoppages and to maintain the facilities for a further six [6] months following completion and that Appellant will incur liability under the said contract if it failed to discharge the said obligations hence the expenses were incurred in pursuant of its contractual obligations.

The Respondent on its part argued that, the sums were work-in-progress [WIP] on the basis that there were no job valuation certificates relating to the expenses that because the projects were uncompleted and/or pending projects makes the expenses susceptible to be warehoused in WIP pending receipt of payment which makes matching easy and appropriate in accordance with the Principle of Matching Income with expenses in determining the assessable income.



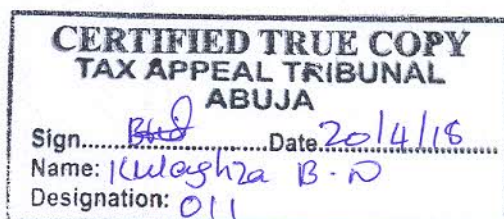
that maintaining facility and ensuring its safety to the tune of N500 Million Naira is not reasonable without reimbursement. During cross – examination of the Appellant witness on the 5th of April 2016; the following dialogue ensued:

Q: How were the amounts expended with respect to the figures I will mention. These are N32, 902,052.00 with respect to Kagara Project and N433, 511,063.00 with respect to Ilorin Water Project?

A: I disagree with the figures stated in respect to the Ilorin Water Project because the amount has been over stated by the Respondent. The actual amount will be seen in my first Witness Statement on Oath which is N384, 330,710.00 for Ilorin Water Project. The two projects were yet to be completed and the expenses incurred on them relate to site administration, maintenance of security and other administrative cost.

The Appellant witness disagreed that Certificate of Completion was given on the 17/01/2011 with respect to the project and that the projects were still in progress and as at that time there was no income that money expended in those projects came from the Company.

I observed from the argument proffered that no serious attempt was made by Respondent to impeach the assertion of the Appellant except to show concern that N500 Million is not reasonable without a reimbursement for facility maintenance and should be charged to WIP. Resolving this ground against the Respondent and in support of the Appellant therefore becomes easy as the reasoning of the Respondent in arriving at its decision cannot be supported by S.24 of the CITA. I accordingly hold that the decision of the respondent disallowing and adding back the said expense of N32,902,056.00 – “Kagara Cost Returned” and N384,330,710.00 – “Ilorin Cost Returned” is without legal or factual basis as same was deductible



Under Section 24 of CITA. I accordingly hold that the said expenses were wholly, reasonably, exclusively and necessarily incurred in connection with the business of the Appellant and ought to be deducted and were accordingly deductible for tax purposes.

On the payment made to Dorking International Limited; the Appellant had contended that the ₦578, 629,994.00 were monies paid in lieu of supply of materials and equipment and a Working Capital Loan obtained by the Appellant from its Parent Company – Biwater UK.

The case of the Respondent on the other hand is that the payment were made to Dorkings as Technical Fees without NOTAP approval reasons for which it disallowed same for tax purposes and added the payment to the taxable profit of the Appellant.

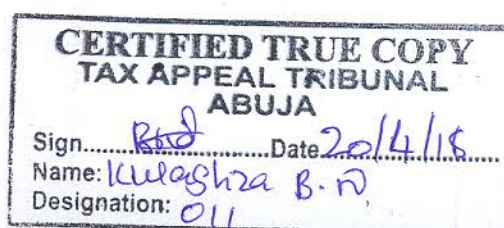
Section 7 of the NOTAP ACT CAP N62 LFN provides:

"Subject to Section 8 of this Act, no payment shall be made in Nigeria to the credit of any person outside Nigeria by or on the authority of the Federal Ministry of Finance, the Central Bank of Nigeria or any licenced Bank in Nigeria in respect of any payment due under a contract or agreement mentioned in Section 4[d] of this Act, unless a Certificate of Registration issued under this Act is presented by the party or parties concerned together with a copy of the contract agreement certified by the National Office in that behalf"

Section 4[d] lists out contracts, nature of which need to be registered with NOTAP to include"

iii .The supply of technical expertise in the form of the preparation of plans, diagrams, operating manuals or any other form of technical assistance of any description whatsoever.

iv. The supply of basic or detailed engineering.



v. The supply of machinery and plant and;

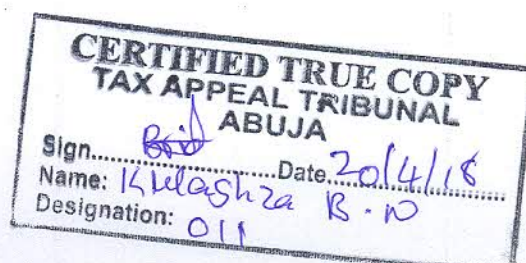
vi. The provision of operating staff or managerial assistance and the training of personnel

The Respondent in justifying their position stated in ground 4 particular 1 thus:

1. "The Respondent in its letter dated 11h February, 2015 disallowed all payment to Dorking International AND NOT BIWATER UK without NOTAP approval and subsequently assessed those payments to taxable profit of the Appellant" *emphasis mine*.
2. The Appellant made technical fees payment to Dorking International Limited AND NOT IMPORTATION as misrepresented in the course of executing its project which needs NOTAP approval.
3.
4.
5. Payment made to Dorking International is purely technical fees AND NOT SOURCING MATERIAL
6. Most OF THE PAYMENT purported for tangible products based on Form M opened with UBA in 2006 were made through another bank, evidence abound.
7. No CBN approval through Form A was ever given to the Respondent team in the course of this audit neither is the Certificate of Capital Importation.

I shall now resolve these points one after the other as it will be the basis for justification of the position taken by the Respondent.

- a. 1st who is Dorking International Limited? On 11th May 2016 during cross-examination of the Respondent witness; witness was shown Exhibit



13 wherein at the end of the 2nd paragraph it was stated "also all payments to Biwater UK without NOTAP approval are hereby disallowed for tax purposes" In response the witness stated thus:

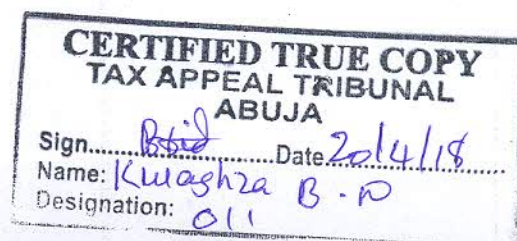
"Biwater Uk is situate at Dorking Street. Every mention of Dorking refers to Biwater Uk. It was disallowed because what they submitted did not substantiate the issues raised during the audit."

It is obvious from the response that Respondent knew all the while that Dorking was same thing as Biwater Uk. That ground therefore is most mischievous and I so hold.

b. What was the payment meant for? I must observe that apart from the averment in the Respondent's Reply; no evidence was adduced to substantiate the allegation that the money was meant for technical fees payment. Having not supported by evidence I shall deem same to have been abandoned – *Balogun v Amubikanhen [1985] 2 NWLR [PT II] at page 27* cited by the Appellant. On the part of the Appellant; credible evidence was placed before this Tribunal to prove that the cost was partly for the supply of materials and equipment to the Appellant for the execution of the Appellant's contracts in Nigeria particularly the Usuma Project for which proof Appellant tendered Exhibit 1 – the Contract Agreement; Exhibit 20 – shipping documents obtained in respect of the supply of material for Biwater UK and Exhibit 21 – copies of Bank Statements, Cheque deposits, UBA acknowledgment of payment of Customs Receipts. etc

c. Whether the payment to Dorking is purely technical fee and not for sourcing materials: this is adequately catered for by answers in "b" above and need no further comment.

d. Most payment purported for tangible products based on Form M in UBA made through another Bank: Again this reasoning is absurd mostly



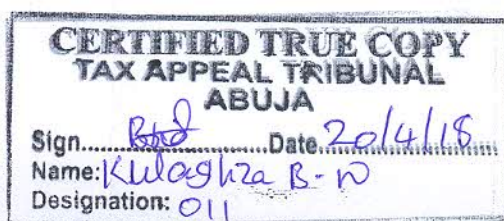
that Respondent had stated that evidence are abound. However, when confronted with Exhibit 42 tendered by the Respondent; he had this to say:

"There are twelve [12] items paid on Form M which was opened in UBA PLC. It is in response from them to our query. It was from this Exhibit in response to our audit finding that we saw that some of their remittances went through Union Bank as against UBA PLC where Form M was opened"

It must be noted that on the twelve [12] items; witness admits only two [2] items – 10 and 11 were paid through Union Bank and the items are only on Form A. witness was to answer further that Form A is used for invisible trade as against Form M used for visible trade. He agreed further that example of invisible trade for which Form A is used is repayment of foreign loan. However, that he only realized that Appellant took loan in this Tribunal. In sum total, this reason proffered in justifying the position of the Respondent is baseless and I so hold.

- e. No CBN approval through Form A nor Certificate of Capital Importation: for this, the Appellant tendered Exhibit 23 – Certificate of Capital Importation dated 20/09/2011 recognizing the Capital Loan of N254, 100,000.00 and Exhibit 24 – Certificate of Capital Importation dated 19/01/2012 recognizing the Financial Tranche of the Working Capital Loan of £450,000.00 and finally Exhibit 25 – set of Invisible Trade Transaction Form [Form A]. Again I cannot help but dismiss the point raised by the respondent as a no – issue.

In the final analysis, I hold that the justification put forward by the Respondent in disallowing and adding back the expenses of N578, 629,994.00 is baseless and mischievous. I accordingly quash same being without any factual or legal basis.

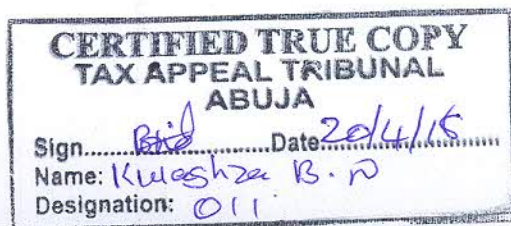


On Quarry – Appellant contend that the quarry expenses forms part of the cost of sales shown in the Appellant's Financial Statement for 2012 and is thus captured even though not separately identified. Counsel referred us to Exhibit 43, it contended further that it operated the quarry solely and exclusively for the purpose of sourcing aggregates/stones for its construction projects and that it considers the operation of the quarry as incidental, convenient and conducive to its construction business and referred us to Exhibit 54 – Memo and Articles of Association of the Appellant with emphasis on Object 3[a] and 3[v].

The contention of the Respondent is summarized in paragraph 30[d] of the Statement on Oath that "The major problem of the Appellant are engaging in activities not included in their scope of activities."

Assuming that this is true, the Respondent will be expected to go more than mere rhetorics and show how that engagement results in profit distinct from what have been declared and then proceed to tax it accordingly but this Respondent failed woefully to do. Accordingly, on the balance of evidence I am minded to agree with the Appellant that the operation of the quarry is mere incidental to the attainment of its object and therefore comprised in the N568, 416,423.53 captured as "Cost of Sales" on the Abuja WTP for the 2012 Financial Year and accordingly set aside the decision of the Respondent disallowing and adding back the said expense of N36, 711,810.00 – "Quarry Expense" for tax purposes and I so hold.

It is also the case of the Appellant that the Respondent erred in law when it imposed additional Education Tax on it for the sum of N29, 488,679.00 for the period 1st April 2011 – 31st March 2012 and that was premised on the Respondent's erroneous computation of Appellants total assessable profit for 2013 YOA as the sum of N1, 748,322.232 and that the taxable income for which the Education Tax is based is arbitrary. That it duly paid its Education Tax in the sum of N5, 477.766.00 and is not liable to any further Education Tax. He maintained that the Respondent acted Ultra Vires its

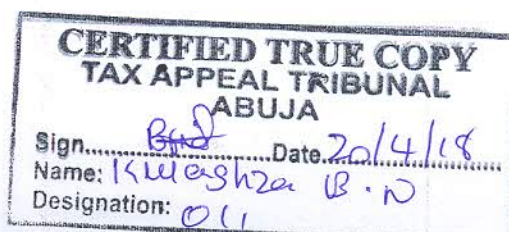


power as prescribed by the Tertiary Education Trust fund [Establishment] Act when it assessed the Appellant with respect to an item which is not a taxable profit under the Act. Testifying on this point, the Appellant stated that based on the Tax Self-Assessment Mechanism, the Appellant via an Education Self – Assessment Notice – Exhibit 7 remitted the sum of ₦5,477,769.19 representing 2% [two percent] of its taxable profits to the Respondent as the Education Tax for the 2013 year of assessment. Respondent on its part justified its imposition of additional tax on the Appellant for the sum of ₦29,488,679.00 as an outstanding Education Tax premised on the Appellant's total assessable profit of ₦1,748,322,232.00 and this is due to the reassessment of the taxable income of the appellant on the audit add backs which is as a result of wrong treatment of expenses in the Appellant's book.

He emphasized in his testimony that the Appellant did not prepare its Audited Financial Statement in line with the generally accepted accounting standard and the ₦29,488,679.99 represents 2% of Appellant's taxable profit after add backs for the 2013 YOA.

From the argument of the parties a resolution of what is proper Education Tax for the year 2013 YOA becomes easy as it will amount to 2% of whatever the Appellant taxable profit for 2013 YOA is. However, this Tribunal cannot determine the figure not until all the issues are duly x-rayed. Notwithstanding, it is instructive to note that in the event that this Tribunal quashes or set aside the Additional Assessment, the Education Additional Assessment of ₦29,488,679.00 automatically abates as will no longer have a stable to stand on.

In ground six [6] of the grounds of appeal and its supporting particulars, the Appellant stated that the additional assessment of ₦52,276,623.00 representing outstanding Withholding Tax for the period spanning 1st April 2011 – 31st March 2012 plus accrued interest and penalty is erroneous and unwarranted and that the Respondent's assessment is not borne out by the Appellant's records. It testified that the interest and penalty were arbitrarily



imposed, without any basis and is an injudicious exercise of administrative powers by the Respondent. Arguing on this, the Appellant Counsel stated that Exhibit 50 [its Objection Notice] shows that immediately following the receipt of Additional WHT Assessment Notice; the Appellant objected to the WHT Assessment on the ground inter alia that "the details of how the Withholding Tax on Sub Contractors/Suppliers, Rent, Professional Consultancy and Agent Fees were arrived at were not made available to the Company by the Revenue" That despite the said objection, the Respondent did not make the basis of its computation available to the Appellant. Further, that the Respondent did not adduce any evidence of the basis of the additional assessment. The Respondent had in its ground formulated in justifying its position insisted that its action are in line with the provisions of the various Tax Laws same being borne out of the Appellant's records. Testifying in paragraph 29 of its written deposition; Mr. Unazi S.Otse reiterated that "I know as a fact that the Appellant's Withholding Tax is N52, 276,623.00 after add back for the 2013 YOA" Arguing on this, the Respondent Counsel in paragraph g on page 7 of his written address stated:

"The witness in his testimony admitted the Appellant was liable to Withholding Tax and it is our submission this goes to support the case of the Respondent that the Appellant is liable to Withholding Tax. I refer your Honors to the case of *Federal Board of Inland Revenue V Akwa Ibom Water Co & Ors Vol 6 All NTC pg. 273*"

The facts as borne out by the records of this Tribunal do not lay credence to Counsel's assertion. On the 5th April 2016 during cross-examination of the Appellant Counsel, the following dialogue ensued:

Q: Is the Appellant exempted from paying Withholding Tax?

A: No



Q: Why was the Company not deducting and remitting Withholding Tax to the Respondent since the Company suffers Withholding Tax from the employer - FCDA

A: FCDA is not the employer of Biwater Nigeria Ltd and Biwater Nigeria Ltd as stated in my Statement on Oath has remitted N50, 110,546.00 to the Respondent.

Q: Is your Appellant supposed to pay N92, 611,865.00 to the Respondent as Withholding Tax?

A: No. the amount is baseless

Respondent Counsel: That will be all.

From the above, it is clear Counsel cited the case completely out of line and I shall accordingly ignore it. Having said that, it is a foundational Principle of Law that he who alleges must prove – Section 135 & 136 of the Evidence Act. Also see the case of *Edeani Nwavu & 11 Ors V Chief Patrick Okoye & 19 Ors* [2008] 18 NWLR Pg 29 pt Pg 34.

Having failed again woefully to prove both in law and fact what substance allowed for the imposition of the additional assessment to the tune of N52,276,623.00, I hold that it is baseless, unwarranted and arbitrary even as it amounts to an injudicious exercise of administrative powers by the Respondent. I accordingly quash the additional WHT Assessment of N52, 276,623.00. In the main, the sole issue to wit, *whether the additional assessment should not be quashed/set aside in whole or in part for being unreasonable and without any legal and/or factual basis is hereby resolved in favor of the Appellant and against the Respondent.*

In the sum total I hold that this Appeal succeeds and accordingly grant Reliefs 1 - 4 contained in the Notice of Appeal dated 4/6/2015. That is to say:



1. It is hereby declared that the Appellant has discharged its Company's Income Tax, Education Tax and Withholding Tax obligations due and payable to the Respondent for the 2013 year of assessment.

2. An Order is hereby made discharging the Appellant of additional assessments or quashing the additional assessments or with respect to the 2013 year of assessment and as contained in the CIT Demand Notice and Education Tax Demand Notice.

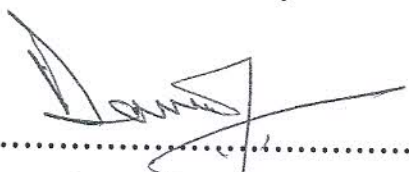
3. It is hereby declared that the penalties charged by the Respondent against the Appellant with respect to the sums allegedly owed by the Appellant are excessive, disproportionate and an injudicious exercise of administrative power by the Respondent.

4. An Order is hereby made prohibiting the Respondent from further assessing the Appellant for any further Company's Income, Withholding or Education Tax for the 2013 year of assessment.

Cost is assessed and fixed at N50, 000.00 against the Respondent in favor of the Appellant.

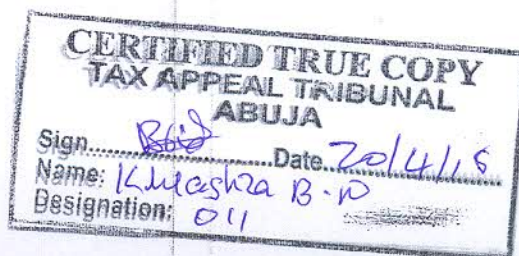
DATED THIS 3rd JUNE 2016

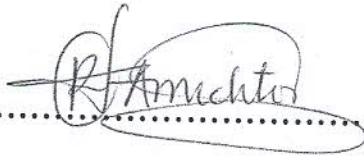
I have had the privilege of reading in draft this judgment and in mind it captioned the salient fact and law applicable hereto and I totally agree with the reasoning. I also bound by the cost as awarded.




Nnamdi Ibegbu Esq., S.A.N, F.C.I.Arb

Ag. Chairman Tax Appeal Tribunal, Abuja Zone

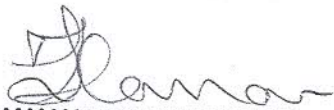




HON. BARR. JUDE REX-OGBUKU

CERTIFIED TRUE COPY	
TAX APPEAL TRIBUNAL	
ABUJA	
Sign: 	Date: 20/4/15
Name: Kwashza B. P.	
Designation: O/I	

I have had the advantage of reading in draft a copy of the lead judgment by my brother Coommissioner – Jude Rex-Ogbuku Esq; I agree with him that this Appeal has merit. I would also set aside the Additional Tax Assessment on the appellant for the 2013 Year of Assessment as being without any legal and/or factual basis. I abide by the Order on cost made in the lead judgment.



HON. BARR. ZULAIHAT ABOKI