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

SUIT NO. TAT/ABJ/APP/010/2008.

BETWEEN:-

TSKJ II CONSTRUCES
INTERNACIONAIS SOCIADADE
UNIPESSOAL LDA. } APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE } RESPONDENT

Coram: Hon. Nnamdi Ibegbu, Esq., S.A.N., F.C.I.Arb. (Ag. Chairman)
(Read the Lead Judgment)
Hon. A. M Gumel
Hon. Barr. Zulaihat Aboki
Hon. Barr Jude Rex-Ogbuku

JUDGEMENT

The Appellant filed this matter at the Tax Appeal Tribunal, Abuja Zone seeking the following reliefs:-

1. AN ORDER setting aside the Respondent's Notices of Additional Assessment Nos. PRBA 09 dated 19/02/2008 in the sum of US $2,770,689,PRBA 12 dated 19/02/2008 in the sum of US $3,269,488, PRBA 13 dated 19/02/2008 in the sum of US $3,763,319 and PRBA 15 dated 19/02/2008 in the sum of US $3,121,451.

2. A determination that the assessable tax of the Appellants for the years 2004, 2005, 2006 and 2007 is as computed in the self assessment forms submitted by the Appellant in respect of the said years, being the sums of US $6,644,437.79, US $7,258,218.55, US $2,367,982.17 and US $5,211,818 respectively.

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Name: Ganfuya. Y. P
Designation: Officer I/C Admin

Both parties filed their processes in accordance with the Tax Appeal Tribunal Rules and called one witness each.

Both Counsel in this matter after closing their case addressed this Tribunal on the 7th day of March, 2012, on which day, this matter was adjourned for Judgment to be delivered on 16.05.2012, but subsequent is being delivered today.

The brief fact of this appeal to this tribunal are that the Appellant is a non-resident tax payer. The Appellant obtained a contract for the construction of Nigeria Liquefied Natural Gas (NLG) plant for the Nigerian LNG Limited (NLNG).

In executing the said contract, the Appellant used TSKJ Nigeria Ltd hereafter referred to as (TSKJN) to render logistic support services to it in the course of executing the said contract.

The Respondent is a statutory body responsible for the collection of Federal Taxes for the government of the Federal Republic of Nigeria.

The Appellant filed a self assessment on deemed profit basis (Turnover Assessment) meaning that the profit of the Appellant could not be ascertained. The Appellant made deduction of what it called Recharges being the cost paid to its local subsidiary.

The Respondent disallowed the said deduction on the ground that the deduction is not allowed under the Turnover Basis of assessment. As a result, additional assessment in respect of the wrong deduction the Appellant made. The Appellant then objected to the Additional Assessment. Subsequently, the respondent issued a Notice of Refusal to Amend, hence this appeal.

The Appellant called a witness named Reginald Nwaodu who testified on the 2nd day of August, 2011.

He said that he worked for TSKJ Nigeria Ltd a subsidiary of the Appellant Company.

He testified that the assessment was done on turn-over basis, but agreed during cross-examination that the turn-over procedure is not the only method of assessment open to a tax-payer such as the Appellant.

He testified that he is not too comfortable with the turn-over method of assessment. He testified that the Appellant did not submit audited financial statement of account to the Respondent. He said that it was not submitted because of the movement of the Appellant's office, so documents were not located. He testified that certain facts in this appeal are not within his personal knowledge, because he is not a lawyer.

Finally, during cross-examination, he testified that he did not know why the Respondent acted the way it did by way of additional assessment.

The Respondent's only witness DW1 named Iro Nnachi Ukpai testified. That he is an accountant, a Senior Manager working with the Respondent's Criminal Investigation Department. He is also a Barrister and a member of the Chartered Institute of Taxation.

He testified that the appellant deducted an alleged cost of their local company in Nigeria before arriving at the turn-over that they used to complete their Company Income Tax based on deemed profit basis, which the Respondent regarded as unacceptable. As a result the respondent raised an additional tax assessment.

He testified that the Appellant is mandatorily required by law at the end of every financial year to prepare his financial statement showing his accessible profit and forward it to the respondent.

He said that on-the-sight audit was also conducted on the Appellant by visiting the company.

He further testified that the information circular stated that the entire profit of a non-resident company on a Nigerian contract is subject to Nigerian Tax.

He testified also in cross-examination that if a company prepares its financial statement showing it's assessable profit, the law allows the company to deduct all reasonable cost/expenses.

He testified that the circular was issued based on the provision of the Tax law because circulars are nothing but mere explanation of the law to the wider public; that it does not supercede the law.

This case stems from the additional assessment by the Respondent which the Appellant is unhappy about, hence this action.

The main issues for determination which should include subsidiary issues are:

1. Whether the Respondent could properly include as part of the Appellant's taxable revenue the sums paid to TSKJ Nigeria Ltd and can the Respondent issue notices of additional assessment; which issue includes the effect of the Halliburton case to this suit?

2. Whether the Appellant having filed its return under section 26 CITA, is entitled to any tax deduction from its turnover?

The issues formulated by both counsels indeed revolve around these two issues.

In determing the first issue, it should be noted that TSKJ Nigeria was not in existence as a legal entity at the time when the original contract between the Appellant and NLNG was entered into.

There are indeed two contracts creating two taxable events TSKJ and TSKJN as its parties.

TSKJN was only contracted to render logistics support services after the contract had been entered with NLNG as admitted in the pleading of the Appellant at paragraphs 2 and 3.

Looking at this from the purview of privity of contract; the doctrine prevents TSKJN from claiming entitlement to the benefit of the contract between the Appellant and NLNG, since TSKJN was not a party to that contract. See A. G. FEDERATION VS A.I.C. LTD (2000) 10 NWLR Part 675 Pg 293 @ 306 E-F.

There are indeed two contracts giving rise to two different taxable events. The first contract is the one between NLNG and TSKJ which gives rise to the tax liability for TSKJ.

The later contract is the one between TSKJ and TSKJN which gives rise to tax liability for TSKJN. Taxing TSKJN on the basis of turnover of the first contract does not lead to double taxation.

There is no proof that the contract with NLNG was executed by both TSKJ and TSKJN. The Appellant admitted that TSKJN was only incorporated after the contract with NLNG had been concluded, puts it beyond contention that TSKJN was not a party to the contract. The Appellant would have tendered the main contract which was not done.

The first contract is the one between NLNG and TSKJ from which the original revenue was derived, any subsequent contract entered into between TSKJN with a third party whether or not a subsidiary would make that third party entitled to a part of the turnover of the first contract.

If TSKJ had entered into subsequent contracts with other companies, arising from the first contract, each of those companies will be entitled to a part of the turnover of the first contract for tax purpose, so TSKJ will be entitled to deduct sums paid to those companies in calculating its turnover from the contract. This will destroy the whole idea of deemed profit basis of taxation which assumes that amounts paid to third parties in execution of a contract (also termed expenses) fall within the 80% of the total turnover which is treated as allowable expenses. If this were to be allowed, companies will be given licenses to enter fictitious number of subsequent contracts or a subsequent contract of a fictitious amount in a bid to beat down their tax liability as much as possible. Section 26 of CITA abhors this.

It is the decision of this Tribunal that Halliburton case is distinguishable from the present case. TSKJN is not entitled to any part of the turnover of the original contract between TSKJ and NLNG, and consequently no deduction from the total turnover of that contract is allowable over and above 80% embarked as expenses as expenses under the deemed profit basis method of accounting for profit.

In distinguishing this case with the Halliburton case, for this tribunal to indeed be firm in the conclusion reached by the Tribunal, reference should be made to page 1of the judgment where the Learned Judge stated thus:-

"The Appellant is non-resident company incorporated in the CAYMAN ISLANDS. It incorporated a Nigerian Company called Halliburton Energy Services Nigeria Limited hereinafter referred to as "Halliburton Nigeria". By an agreement dated 1st January 1994 made between the Appellant and Halliburton Nigeria which agreement was admitted as Exhibit "k", before the Body of Appeal commissioners-hereinafter referred to as "Body of Appeal" it was agreed that the Appellant would obtain contracts

from the third parties in Nigeria. Such agreements would be executed by the Appellant and Halliburton Nigeria. The contract sum between the Appellant and their subsidiary on the Turnover of each company was not incorporated in the main contract between all the parties to the main contract..."

It should be that

(1) The Halliburton case involved one single contract (one taxable event) to which both Halliburton west Africa Limited (the Appellant in that case) and Halliburton Nigeria were parties, but the instant case, involves two separate contracts, therefore two taxable events.

(2) Halliburton Nigeria was in existence as a legal entity at the time when the single contract was entered into. In this present case, TSKJN was not in existence as a legal entity at the time when the original contract between the Appellant and NLNG was entered into.

(3) The fact that both Halliburton West Africa and Halliburton Nigeria Limited executed the contracts entered with third parties was crucial to the finding in that case.

(4) Double taxation was likely to result in the Halliburton case due to the existence of one single contract and therefore one taxable event. Double taxation is not likely to result in the present case as there are two separate contracts and two taxable events.

In that case, the Learned Judge, Mustapha, J. was called to decide upon the tax liability arising from a sole contract to which Halliburton West Africa and Halliburton Nigeria Limited were parties.

TSKJN was only contracted to render logistics support services after the contract had been entered with NLNG as admitted in the pleading of the Appellant paragraph 2 and 3

At the time the contract between NLNG and TSKJ was entered into, TSKJN was not entitled to "a part of the turnover of the contract" despite the fact that the said contract was entered into prior to the engagement of TSKJN.

This is the decision of this Tribunal with respect to the first issue as stated by this Honorable Tribunal.

Now to the second issue as stated by this Tribunal.

Before this Tribunal deals with that issue, the tribunal hereby with respect to revenue derived from an illegal contract cites Section 9 CITA which provides that:

"Subject to the provisions of this Act, the tax shall, for each year of assessment, be payable at the ratio specified in subsection (1) of Section 40 of this Act upon the profits of company accruing in, derived from, brought into or received in Nigeria in respect of-

Any trade or business for whatever period of times such trade or business may be carried on."

Any trade or business as used in the section means that it is immaterial that the trade or business is legal or illegal. In CIR VS DELA GOA BAY CIGARETTE C. LTD (1918) TPD 391, the South African Court held that:

"In the income Tax Act, the tax gathered has cast his net wide enough to catch all income, so that once a receipt or an accrual constitutes income, it is subject to the provisions of the Act, regardless of whether it is legal or illegal income."

This Tribunal decides that receipt or accruable income is taxable income whether it is legal or illegally acquired, or whether the company is properly incorporated or not.

This Tribunal proceeds now to determine the second issue.

The other issue is with respect to Section 26 CITA. That is whether the appellant having filed its returns under that Section of CITA is entitled to claim any deduction from its turnover.

Every company liable to pay tax under Companies Income Tax Act No:11 as Amended in 2007 (CITA) is mandated to file its returns containing its audited account and profit.

Section 41 of CITA states as follows:-

"Every company, including a company granted exemption from incorporation, shall, at least once a year without notice or demand therefrom, file a return with the Board in the prescribed form and containing prescribed information together with the following information the audited accounts, tax and capital allowances, computations and a true and correct statement in writing containing the amounts of its profits from each and every source computed in accordance with the provisions of this Act and any rules made thereunder."

The Appellant did not follow this provision of the tax law, instead the Appellant opted for section 26 of CITA which provides as follows:-

"Notwithstanding section 29 of this Act, where in respect of any trade or business carried on in Nigeria by any company (whether or not part of the operations of the business are carried on in Nigeria) it appears to the Board that for any year of assessment, the trade or business produces either no assessable profits or assessable income which in the opinion of the Board are less than might be expected to arise from that trade or business or, as the case may be, the true amount of the assessable profits of the company cannot be readily ascertained, the Board may, in respect of that trade or business, and notwithstanding any other provisions of this Act, if the company is a –

a. Nigerian Company, assess and charge that company for that year of assessment on such fair and reasonable percentage of the turnover of the trade or business as the Board may determine;

b. If that company is a company other than a Nigerian company and that company has a fixed base of business in Nigeria assess and charge (i) that company for that year of assessment on such fair and reasonable percentage of that part of the turnover attributable to that fixed base, (ii) that company operate a trade or business through a person authorised to conclude contracts on its behalf or on behalf of some companies controlled by it or which have controlling interests in it or habitually maintains a stock of goods or merchandise in Nigeria from which deliveries are regularly made by a person on behalf of the company assess to the extent that the profit is attributable to the business or trade carried on through that person (iii) that company executes one single contract involving surveys, deliveries, installation or construction assess and charge that company on a fair and reasonable percentage for that year of assessment on such a far and reasonable percentage of that part of the turnover of the contract and; (iv) the trade or business is between the company and another person controlled by it or which has controlling interests in it and conditions are imposed between the company and another person controlled by it or which has controlling interests in it and conditions are imposed between the company and such person in their commercial or financial relations which in the opinion of the board is deemed to be artificial and fictitious, assess and charge on a fair and reasonable percentage of that part of the turnover as may be determined by the board." Section 26 of CITA envisages that:-

(a) the business produces no assessable profits; or
(b) does produce assessable profit, but the assessable profit produced less than what might be expected to arise from that trade or business; or

(c) the true amount of the assessable profit of the company cannot be readily ascertainable.

The law provides that the Respondent in assessing tax liability should use a fair and reasonable percentage of the turnover to arrive at the deemed profit of the Appellant.

The law does not define what amount is a fair and reasonable percentage of the turnover. In the case of SHELL PETROLUEM INTERNATIONAL MATTSC GAPPIJ BIV VS FEDERAL BOARD OF INLAND REVENUE (2011) 4 TLRN 97 @ 110, the court recognizes discretionary powers of the Board in respect of turnover tax.

The discretion in this respect rests with the Respondent, not the tax payer.

This Tribunal is of the firm view that the Respondent has exercised its discretion in this respect by giving the tax payer 80% of the turnover as the expenses incurred in arriving at the profit of 20%. The said 20% is therefore subject to tax at the corporate rate of 30% in accordance with Section 29 of CITA which provides as follows:-

"There shall be levied and paid for each year of assessment in respect of the total profits of every company tax at the rate of Thirty Kobo for every naira."

It is only 6% of turnover that is claimed as tax under the Turnover Basis of Assessment.

The Appellant obviously cannot take advantage of Section 41 of CITA because it did not file its returns on the basis of audited financial statement of account showing assessable profit.

The Appellants intention to claim deductions of the costs paid to TSKJN for logistics support services rendered by TSKJN to the Appellant in executing the project will deprive the Respondent and indeed the Federal republic of Nigeria legitimate revenue.

The case of SHELL PETROLEUM INTERNATIONAL MATTSCGAPPIJ B.V. VS FEDERAL BOARD OF INLAND REVENUE (2011) 4 TLRN 97 @ 107 held that interpretation of income tax legislation is one of strict interpretation. In N.S. Bindra's Interpretation of Statutes 10th Edition this was reiterated. At page 1107 of that book the case of Re Bijah Singh AIR 1980 Cal 641, Pg 644 was cited to have held that: "The court cannot undertake, out of its own notions of what is fair, to adopt or rearrange the machinery of the taxing statute."

Tax law on this issue is clear and certain, so there is no ambiguity whatsoever in sections 41 and 26 of CITA respectively paid to a subcontractor in any transaction by the tax payer is not an allowance deductable under Section 20 of CITA.

From paragraph 6.1 of the information circular, sub-contract can only be claimed as an expenses only when the profit of the company is known and not like in this case, where the profit of the Appellant is unknown.

On resolving this issue in favour of the Respondent, it is not in dispute that the Appellant filed its returns on turnover basis, so under that basis, it is the Respondent who defines what amount is fair and reasonable percentage of the Turnover. It is undisputed that 80% covers all the costs incurred by the taxpayer when using the Turnover Basis of Assessment. There is no provision of the law which makes subcontract allowable deduction.

It is clear that the Appellant cannot make any deduction in favour of its local company under the contract because the local company is not a party to the main contract and was also paid for the services it rendered to the Appellant. The money paid to TSKJN for services rendered to the Appellant is not tax deductible under Section 26 of CITA because it is already part of 80% under the turnover basis of Assessment.

This issue is therefore resolved in favour of the Respondent.

This Tribunal hereby dismisses this appeal filed by the Appellant and orders as follows:-

1. AN ORDER that the appeal in this Suit No. TAT/ABJ/APPI010/2008 is hereby dismissed.

2. AN ORDER that the assessment of tax made by the Respondent on the Appellant is hereby upheld and the Appellant shall pay same forthwith to the Respondent as contained in the Respondent's Notices of Additional Assessment No. PRBA 09 dated 19/02/2008 the sum of US $2,770,689 (Two Million Seven Hundred and Seventy Thousand Six Hundred and Eighty Nine U.S. Dollars), PRBA 12 dated 19/02/2008 the sum of US$3,269,488 (Three Million Two Hundred and Sixty Nine Thousand Four Hundred and Eighty Eight US Dollars), PRBA 13 dated 19/02/2008 the sum of US$3,763,319 (Three Million Seven Hundred and

Sixty Three Thousand Three Hundred and Nineteen US Dollars), and PRBA 15 dated 19/02/2008 the sum of US $3,121,452 (Three Million One Hundred and Twenty One Thousand Four Hundred and Fifty One US Dollars).

Cost of this appeal is hereby fixed and assessed at N100,000 (One Hundred Thousand Naira) in favour of the respondent against the Appellant.

DATED THIS 1ST DAY OF AUGUST 2012.

NNAMDI IBEGBU, ESQ., S.A.N., F.C.I.Arb.
Ag. Chairman Tax Appeal Tribunal,
Abuja Zone.

I Concur.

Hon. Barr. Zulaihat Aboki

I Concur.

Hon. A. M. Gumel

I Concur.

Hon. Barr. Jude Rex-Ogbuku

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Name:
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