

IN THE TAX APPEAL TRIBUNAL
SOUTH-EAST ZONE
HOLDEN AT ENUGU

APPEAL NO. TAT/SEZ/016/15

BETWEEN:

**FEDERAL COLLEGE OF EDUCATION, EHA-AMUFU.....APPLICANT/RESPONDENT
AND**

ENUGU STATE BOARD INTERNAL REVENUE SERVICE.....RESPONDENT/APPELLANT

BEFORE THEIR HONOURS

Chairman: Prof. C.J. Amasike

Commissioners: Ignatius Chibututu, Esq.

Dr. (Mrs.) Josephine A.A Agbonika

Chief Ngozi I. Amaliri

Prof. Eddy Omolehinwa

RULING

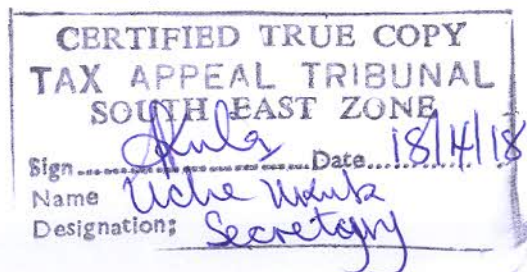
The Applicant filed a motion on notice dated 13th day of October, 2015. The motion was brought pursuant to **Order XXIV(1) Tax Appeal Tribunal (Procedure) Rules 2010; Order VI (1) of the Federal High Court (Tax Appeals) Rules 1992; Order 56 Rules 2 and 8 of the Federal High Court (Civil Procedure) Rules 2009.**

The applicant was praying the Tribunal for the following orders:

An order staying the execution of its judgment delivered on the 15th day of September, 2015 in this matter against the Respondent/Applicant pending the hearing and determination of appeal against the said judgment made to the Federal High Court on the 8th of October, 2015.

And for such further order/s as this Honorable Tribunal may deem fit to make in the circumstance.

The motion on notice was supported by a 14 paragraphed affidavit deposed to by one Nwodo Augustine Okafor, male, the Deputy Bursar in the institution of the Applicant. The affidavit was supported by 3 exhibits. Namely: **Exhibits AA, BB and CC.**

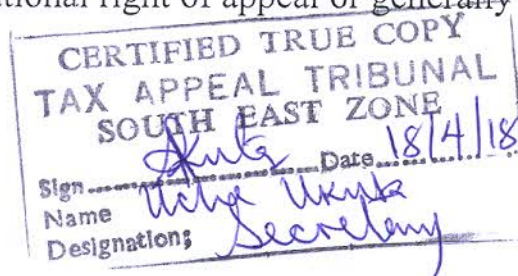


The Applicant filed a written address in support of motion on notice.

Exhibit AA is the judgment of this Honourable Tribunal delivered on the 15th day of September, 2015; exhibit BB is the Notice and Grounds of Appeal against the judgment of this Honourable Tribunal made to the Federal High Court; while exhibit CC is the application made to the Secretary of this Tribunal for expeditious compilation of record.

It is the Applicant's contention that in an application of this nature, the Supreme Court in **Vincent Standard Trading Co. Ltd vs. Xtodeus Trading Co. Nig. Ltd & Anor (1993) NWLR PT. 296 at 686 -688 paragraphs C – D**, had laid down the principles that should govern stay of execution pending appeal. The Applicant while quoting the apex court submitted that:

- (a) The courts have discretion to grant or refuse a stay. In this, like in all other instances of discretion, the court is bound to exercise that discretion both judicially as well as judiciously and not erratically.
- (b) Discretion to grant or refuse stay must take into account the competing rights of the parties to justice. Discretion that does not adequately take into account the Respondent's equal right to justice is a discretion that has not been judicially exercised.
- (c) A winning plaintiff or party has a right to the fruit of his judgment and the courts will not make a practice at the instance of an unsuccessful litigant of depriving a successful one of the fruits of the judgment in his favour until a further appeal is determined.
- (d) An unsuccessful litigant applying for a stay must show special circumstances or exceptional circumstances eloquently pleading that the balance of justice is obviously weighed in favour of a stay.
- (e) What will constitute these special or exceptional circumstances will no doubt vary from case to case. By and large, such circumstances will involve a consideration of some collateral circumstances and perhaps in some cases, inherent matters which may, unless the order for stay is granted, destroy the subject matter of the proceedings or foist upon the Court, especially the Court of Appeal, a situation of complete helplessness or render nugatory any order or orders of the Court of Appeal or paralyse in one way or the other the exercise by the litigant of his constitutional right of appeal or generally provide a situation in



which whatever happens to the case and in particular even if the appellant succeeds in the Court of Appeal, there could be no return to the status quo.

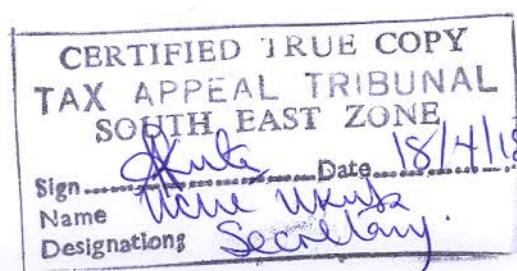
- (f) The onus is on the party applying for a stay pending appeal to satisfy the court that in the particular circumstances of his case, a refusal of a stay would be unjust and inequitable.
- (g) The Court will grant a stay where its refusal would deprive the appellant of the means of prosecuting the appeal.
- (h) The chances of the applicant on appeal are important, if the chances are virtually nil, then a stay may be refused.
- (i) The nature of the subject matter in dispute, whether maintaining the status quo until a final determination of the appeal in the case will meet the justice of the case.
- (j) Whether if the appeal succeeds the applicant will not be able to reap the benefits of the judgment on appeal.
- (k) Whether the judgment is in respect of money and costs, and whether there is a remarkable probability of recovering these from the respondent if the appeal succeed.
- (l) Poverty is not a special ground for granting a stay of execution except where the effect will be to deprive the appellant of the means of prosecuting his appeal.

This was also the position of the court in **Vaswani vs. Savalak (1972) 12 SC 77**.

The Applicant went further to submit that, the Court's discretion to grant a stay of execution must be exercised judiciously and it would be so exercised where it is shown that the appeal involves substantial points of law necessitating the parties and issues being in status quo until the legal issues are resolved.

The Applicant posited that upon looking at the motion and the facts contained in the affidavit, one will not hesitate in coming to a conclusion that the Applicant has established special and exceptional circumstances.

Furthermore, the Applicant contended in paragraph 5 of the affidavit in support, and Ground One of the Grounds of Appeal; exhibit BB, that the Applicant is challenging the jurisdiction of this Tribunal to entertain the claim of the Respondent. It is their argument that Federal Inland Revenue Service [FIRS] Act is only applicable to Federal Inland Revenue Service (FIRS) and to matters where FIRS is a party and is not applicable to Enugu State Board of Inland Revenue (ESBIR) which is a creation of Finance Law, Enugu State. He submitted that the FIRS Act 2007 was totally



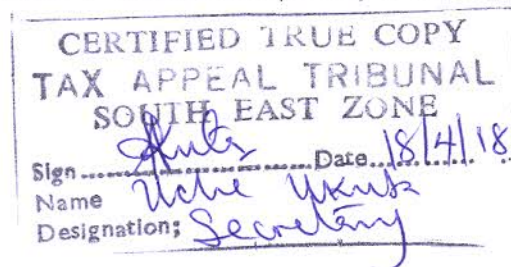
inapplicable to the present case and cited the case of **Prof. Olunloyo v. Adeniran (2001) & MJSC, 120**, in which he said that the court held that where a judgment or order is patently framed upon a fundamental vice or obviously void on issue of jurisdiction, that could be seen as amounting to a special circumstance upon which an Appellant court may base its discretion to stay the execution of such judgment or order.

The Applicant further contended that another serious issue for the consideration of the appellate court is the domestication and application of Federal Tax Enactments vis-à-vis Enugu State. While the Exclusive Legislative List of the 1999 Constitution vests on the National Assembly power to impose taxes; Concurrent List vests on both the National and the State Assemblies power to legislate on collection of personal income taxes. Based on this, he argued The Finance Law Enugu State was enacted. He further submitted that there was no doubt that the law was recondite on the issues raised above; and in such situation, the court is enjoined to stay its judgment to enable the appellate court determine the appeal one way or the other in line with the Supreme Court's decision in **Auto Engineering Sales & Service Ltd Vs. Aina Adeosun & Sons Ltd (1993) 5NWLR, pt. 293, p. 384**:

The Applicant went further to state that one of the conditions that must exist before a stay of execution of judgment is granted is that an Applicant must show that the grounds of appeal show substantial issues of law to be decided on appeal in an area in which the law is to some extent recondite, and where whether either party may have a decision in his favour, may be regarded as a special and exceptional circumstances justifying the grant of the order staying of execution.

On the meaning of the term "recondite", the Applicant's counsel cited the decision in **Adefulu vs. Okulaja (1993) 2 NWLR, pt. 274, p.240** and told the Honourable Tribunal that it meant an area of law not commonly known or is difficult to understand. He also referred to the case **Lifadu v. Lifadu (1991) 1 NWLR pt. 169,627**.

The Applicant canvassed that the grounds of appeal contained in exhibit "BB", were substantial and arguable. He submitted that it had been held that substantial and arguable ground are strong circumstances in favour of granting a stay of execution and cited the case of **Martins v. Nicannar Foods Ltd. (1988) 2 NWLR (pt. 588) 613**.

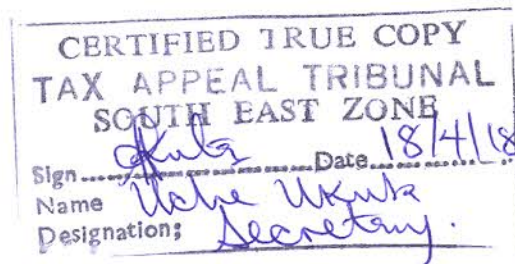


The Applicant submitted that all the seven Grounds of Appeal contained in the Notice of Appeal were substantial points of law and hence, constitutes a special and exceptional circumstance on which this application should be granted.

The Applicant also referred the Tribunal to Ground 7 in the Grounds of Appeal, exhibit "BB", and submitted that the grounds contained therein border on the denial of fair trial and fair hearing by the Honourable Tribunal. He submitted that, that was another fundamental and constitutional issue, which if successful, will render the whole proceedings and its judgment null and void. He submitted that where the Notice of Appeal raises any constitutional issue, it had been held to constitute a substantial issue. He referred the Tribunal to the case of **MADUKOLU v. NKEMDILIM (1962) 2 SCNLR, 341.**

The Applicant went further to submit that the Applicant had shown in paragraphs 7 & 9 of the affidavit in support of this application that the refusal of this application may give rise to a situation where the Applicant is deprived the means of prosecuting this appeal. In such situation the Supreme Court held in **Vincent Standard Trading Co. Ltd vs. Xtodeus Trading Co. Nig. Ltd & Anor** [supra] that a stay should be granted. He reiterated that refusal of the application will deprive it of the means of prosecuting this appeal and urged the Honourable Tribunal to consider this as another special circumstance to warrant the grant of this application. Counsel maintained that the budget of the Applicant for the remaining part of the year was far below the judgment sum, and if a stay of execution was not granted it may foist on the Applicant a situation of helplessness which will deprive it of the means of prosecuting its appeal and cited the case of **Vaswani V. Saralak (1972) 12 S.C 77** to support the argument. It was the Applicant's contention that the refusal of this application will foist on the Federal High Court a situation of helplessness or render nugatory any order(s) of the Federal High Court. Grant of stay will enable the Federal High Court to decide on the issues raised by the Applicant in the Notice and Grounds of Appeal. He urged the Honourable Tribunal to note that the Applicant being a Federal institution, now operates with the present Treasury Single Account [TSA], and hardly had access to its funds.

The Applicant further urged that this Tribunal should exercise its discretion judiciously and judicially.



On the other hand, the Respondent filed a 12 paragraphed counter affidavit, dated 29th October, 2015 opposing the application for stay of execution filed by the Applicant on 13th October, 2015.

The Respondent submitted that the totality of Applicant's arguments can be summarized as follows:

- a. Whether the application for stay of execution of judgment of this Tribunal delivered on 15th day of September 2015, can be enforced against the Respondent.
- b. Whether the Tax Appeal Tribunal has jurisdiction to entertain this matter.

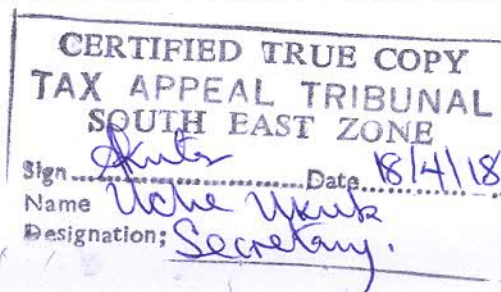
The Respondent submitted that the Applicant having voluntarily admitted liability the judgment sum as contained in the report of terms of settlement filed by the Respondent before this Tribunal, the Applicant could not turn around to approbate and reprobate. He further argued that the Applicant also cannot use the technicality of law to deprive the Government of its legitimate revenue.

The Respondent cited the Court of Appeal case of **Phoenix Motors Ltd. V. National Petroleum Provident Fund Management Board (1993) 1 NWLR (pt. 272) pg. 718 at 73**, quote:

“No court of law should lend its hands to a person or body bent on beating the efforts of the Government at collecting Revenue by relying in the technicalities of law with a frugal aim to cheat Government of its legitimate income”.

The Respondent further submitted that in another breath, the Applicant will not be prejudiced in any form if the sum uncontroverted by the parties during reconciliation be paid to judgment creditor while the controverted portion is deposited with the registry of the Tribunal pending determination of the matter at the Federal High Court. He further argued that it is a trite law that facts admitted need no further proof.

It was the Respondent's submission that the Tax Appeal Tribunal has the legitimate and competent jurisdiction to hear and entertain this matter as filed before this Honorable Tribunal. He based his argument on the provision of **“Paragraph 16(3), Fifth Schedule of the Federal Inland Revenue Service Establishment Act, 2007**.



Order III Rules 1 & 2, and Order IV Rule 1 of the Tax Appeal Tribunal Procedure Rules 2010”and that parties also voluntarily submitted themselves to litigation without any preliminary objection and in line with the provisions of the “**Tax Appeal Tribunal (Procedure) Rules, 2010,**”

The Respondent further argued on the issue of jurisdiction and competence that a Court or Tribunal has jurisdiction or competence when:

- 1) It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and
- 2) The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and
- 3) The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction


and that all these conditions were met by and in the Honourable Tribunal.

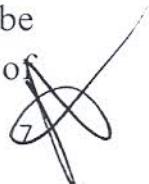
The Respondent again contended that grounds upon which the Applicant strongly opposed the application for stay of judgment of this Tribunal delivered on the 15th day of September, 2015 was unfounded since the judgment was based on unchallenged facts and clear admission of liability by them. **It is the law that facts admitted need no further proof he submitted.** The Applicant admitted liability in the terms of settlement filed before this Tribunal, and therefore need no further delay in liquidating the liability thereto, the Respondent’s counsel further submitted.

Furthermore, the Respondent’s counsel strongly submitted that the Tribunal was empowered to entertain this action and hear same on merit.

In was the Respondent’s submission that the Honourable Tribunal’s discretion as empowered by the proviso in “ **Order III Rule 2**”, must be exercised subject to principles expounded in **First Bank of Nig. Plc. V. T.S.A Industries Ltd. [2010] All FWLR pt 537, p. 640.**

It was also further contended by the Respondent that the Tax Appeal Tribunal Procedure Rules 2010 being a Rule based on Revenue oriented statute must be construed to encourage revenue generation to government and cited the case of

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Phoenix Motors Ltd. Vs. National Provident Fund Management Board (supra)
wherein the Court of Appeal held;

“if a statute is revenue based or revenue oriented, it will be part of sound public policy for a court of law to construe the provisions of the statute liberally in favour of the revenue or in favour of deriving revenue by government unless there is a clear provision to the contrary. ‘No court of law should lend its hands to a person or body bent on beating the efforts of the Government at collecting Revenue by relying in the technicalities of law with a frugal aim to cheat Government of its legitimate income.’”

The Respondent’s counsel finally urged the Tribunal based on their submissions and all legal authorities cited in support thereof, to discountenance, dismiss and jettison the application for stay of execution filed by the Applicant in this matter.

After a careful consideration of submissions by counsel to both parties, this Honourable Tribunal set out the following issues for determination:

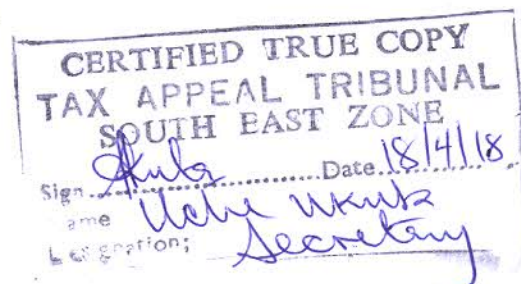
Issues for Determination:

- 1. Whether the Applicant has complied with a condition precedent for going on appeal as provided in the FIRS Act.**
- 2. Whether this Honourable Tribunal has jurisdiction to hear the case filed by Enugu State Board of Internal Revenue which judgment led to this application for stay of execution.**

Issue 1:

Whether the Applicant complied with a condition precedent for going on appeal as provided in the FIRS Act.

The position of the law in tax appeal matters of this nature is very clear, and the steps to be taken by a party who is not satisfied with the decision of this Honourable Tribunal have been spelt out in the FIRS Act.



Where a party sets out to appeal the decision of this Honourable Tribunal, he/she must pay the amount assessed as tax within one month of receiving such notification.

The provision of **Paragraph 16(3) of the 5th Schedule of the FIRS Act, 2007** is very instructive and clear on this point.

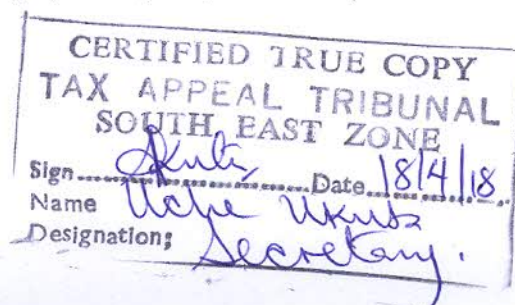
Paragraph 16(3) of the 5th Schedule of the FIRS Act, 2007 provides thus:

“Notwithstanding that an appeal is pending, tax shall be paid in accordance with the decision of the Tribunal within one month of notification of the amount of the tax payable in pursuance of subparagraph (1) of this paragraph”.

The word ‘**shall**’ in the forgoing provision of Paragraph 16(3) of the 5th Schedule of the FIRS Act, 2007 makes it mandatory for the Applicant to pay the judgment sum and where same has not been paid, this Honourable Tribunal lacks the power to grant the Applicant’s application for stay of execution especially when the Applicant is acting in gross violation of the law. The case of **Phoenix Motors Ltd. Vs. National Provident Fund Management Board (supra)** is apt here. We find it difficult to appreciate how a party to a suit would disobey the order/judgment of a court [which it ought to obey] and come back to the same court to seek for a relief.

Finally on this point see the Federal High Court case **Hotel Royal Damgrete V. FIRS unreported Suit No. FHC/UM/M/53/2015**, in which the Applicant sought to stay the judgment of the Honourable Court, just as in this case, and in which the Court relying on **paragraph 16(3) of the Fifth Schedule of the FIRS Act 2007**, ordered inter alia:

“That within 30 days from the date of this Ruling the Appellant/Applicant shall pay to the Respondent the sum of N14,401,317. 00 [Fourteen Million Four Hundred and One Thousand, Three Hundred and Seventeen Naira] less the sums of N1,343,000.00 [One Million Three Hundred and Forty-Three Thousand] (which is evidenced by Exhibits A to A5) and the sum of N1,312,794.70 (One Million Three Hundred and Twelve Thousand Seven Hundred and Ninety-Four Naira Seventy Kobo) evidenced by Exhibits B to B11 and the sum of N2,000,000.00 (Two Million Naira). In simpler terms the Appellant /Applicant shall pay N9,745,522.30 (Nine Million Seven



Hundred and Forty-Five Thousand Five Hundred and Twenty Naira Thirty kobo) to the Respondent”.

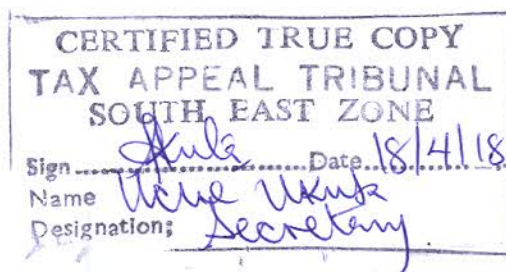
This Honourable Tribunal therefore holds that the Applicant must comply with the provision of the paragraph 16(3) of the Fifth Schedule of the FIRS Act 2007 before it can entertain any application for stay of execution of its judgment delivered on 15th September, 2015.

Issue 2:

Whether this Tribunal has the jurisdiction to hear the case filed by Enugu State Board of Internal Revenue which judgment led to this application for stay of execution.

In resolving this issue, the Tribunal holds that:

- a. It is trite law that the issues of the jurisdiction can be raised at any time during the trial before a court and before judgment, but in this particular case, both parties submitted to the jurisdiction of this tribunal and went through the full trial and never at any moment was any issue of jurisdiction raised and there is now a subsisting judgment. This Honourable Tribunal is therefore *funtus officio* and would not be dragged into another trial of the same matter under any guise. See the case of **Madukolu V. Nkemdilim [1962] 2 SCNLR p. 341**. Where the court held that where a competent court has determined an issue and entered judgment thereon, neither party to the proceedings may re-litigate that issue since the matter is *res judicata*.
- b. That the judgment of this Honourable Tribunal was based on clear and unambiguous admissions by the Applicant and on the documents originating from and tendered by the Applicant and admitted in evidence in the course of the trial.
- c. That the FIRS Act 2007, conferred clear, unambiguous, unfettered jurisdiction on the Tax Appeal Tribunal and that the said statute is an Act of the National Assembly [Act of Parliament], and is therefore part of the body of our jurisprudence or part of the body of laws of Nigeria.
- d. That by virtue of the said FIRS Act 2007, paragraph 11[1][ii] of the 5th Schedule, Personal Income Tax [PAYE], which was hugely contested by the Applicant, is one of those taxes which this Honourable Tribunal was conferred



jurisdiction upon. The said FIRS Act comprehensively provides at paragraph 11(1) that:

“The Tribunal shall have powers to adjudicate on disputes, and controversies arising from the following tax laws [hereinafter referred to as ‘the tax laws’]”,

- i. Companies Income Tax Act CAP60 LFN;1990,
- ii. Personal Income Tax Act No. 104, 1993,
- iii. Petroleum Profit Tax Act CAP. 354LFN;1990,
- iv. Value Added Tax Act No. 102;1993,
- v. Capital Gains Tax Act CAP. 42 LFN, 1990, and
- vi. Any other law contained in or specified in the First Schedule of this Act or other laws made or to be made from time to time by the National Assembly.

See also Section 60 of the Personal Income Tax [Amendment] Act 2011 which provides:

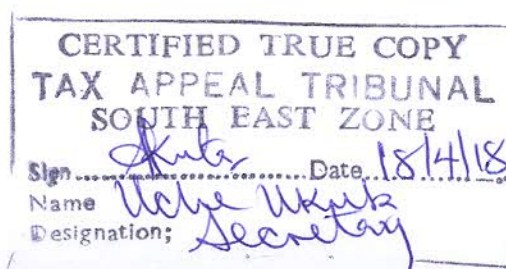
“The Tax Appeal Tribunal established pursuant to Section 59 of the Federal Inland Revenue Service [Establishment] Act, 2007 shall have the powers to entertain all cases arising from the operations of this Act”.

It is therefore abundantly clear from the above that this Honourable Tribunal has both the jurisdiction and competence to adjudicate on all tax matters stated in the Fifth Schedule of the FIRS Act 2007 including Personal Income Tax matters, specifically referred to in paragraph 11[1][ii].

- e. All the tax issues raised by the Applicant in this application as in the previous case [Ref. No. TAT/SEZ/016/15] come within the purview of the Fifth Schedule of the FIRS Act 2007 and that this Honourable Tribunal has jurisdiction and is competent to adjudicate on all tax disputes stated therein.

Finally, this Honourable Tribunal finds the arguments and submissions of the Applicant/Appellant rather preposterous in that the Judgment of this Honourable Tribunal which it is now seeking a stay of, was based essentially on unambiguous admissions of the Applicant and on the documents originating from it , tendered and admitted by it in the course of the proceedings.

To grant the application for stay of execution in this case, as the Applicant is seeking, will amount to depriving a successful litigant the fruits of his labour and this




Honourable Tribunal is not inclined to doing so, as the Applicant has not made out any special or exceptional circumstance to warrant us to do so. See the case of **Martins V. Nicannar Foods [1988] 2 NWLR pt. 588**, where the court held that it is already settled that a stay of execution will only be granted by the court if and only if it is satisfied that there are special or exceptional circumstances to warrant doing so. The reason being that a judgment of a court of law is presumed to be correct and rightly given until the contrary is proved or established.

See also the case of **Vaswani V. Savalak [1972] 12 SC 77**, where the Supreme Court held that the Court of Appeal should not grant a stay of execution unless there are special or strong circumstances for doing so, meaning some collateral circumstances and perhaps in some cases inherent matters which may unless the order for stay is granted, destroy the subject matter of the proceedings or foist upon the court, especially the court of appeal, a situation of complete helplessness or render nugatory any order or orders of the court of appeal or paralyze in one way or the other, the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case, and in particular even if the Appellant succeeds in the court of appeal there could be no return to the status quo.

Having reviewed extensively the arguments and submissions of both counsel, and reviewed the law and legal authorities cited, this Honourable Tribunal has come to the inescapable conclusion that this application is solely aimed to cheat the Government of its legitimate income and this Tribunal cannot lend its support to the unlawful act.

It is regrettable to note this is a tax liability of Three Hundred And Twenty Million, Five Hundred And Thirty-Six Thousand, One Hundred and Ninety-Two Naira [N320, 536,192.00] covering the period 2004 – 2010, in which the Applicant by some strange arrangement claimed to have liquidated by paying mere Twenty-Seven Million One Hundred And Five Thousand, and Six Naira [N27,105,006.00] as full and final payment of all taxes until the bubble finally burst. We note with disappointment that the tax liability has remained unpaid for nearly Twelve [12] years i.e. 2004 – 2016, with the Applicants hiding information and evading tax [we mean tax evasion not tax avoidance] and yet is being funded by tax payers funds.

We have refrained from reporting this criminal/unlawful act as provided in paragraph 12 of the 5th Schedule of the FIRS Act 2007, in the hope that the Applicant would take

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quick and necessary steps within 14 days of this Ruling in liquidating this tax liability. The said paragraph 12 provides:

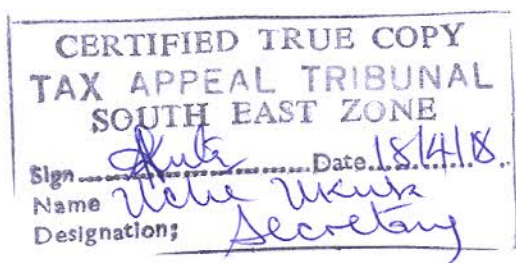
“Where in the course of its adjudication, the Tribunal discovers evidence of possible criminality, the Tribunal shall be obliged to pass such information to the appropriate criminal prosecuting authorities, such as the Office of the Attorney-General of the Federation or the Attorney-General of any State of the Federation or any relevant law enforcement agency”.

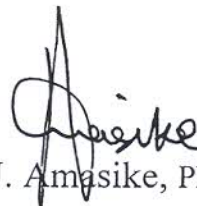
This Honourable Tribunal must state in very clear terms that the general conduct of the Applicant, in this application as well as the judgment it is seeking a stay of, is unconscionable especially for an institution that is supposed to be producing professional teachers which professionals are supposed to be moral and civic beacons for our children and the society. Such an institution should be in the forefront of fulfilling its civic duty including payment of taxes and should never be seen to evade tax [a criminal/unlawful act] which proceeds ultimately are used for the development and maintenance of such institutions as schools, hospitals, roads, etc. and for the general welfare of the citizens.

This Honourable Tribunal therefore holds that this application is not only frivolous, but an abuse of the judicial process as well as lacks merit and ipso facto is hereby dismissed.

There is no order as to costs and parties are at liberty to appeal this ruling.

This is the ruling of this Honourable Tribunal.



Signed: 
Prof. C.J. Amasike, Ph.D
Chairman

Tax Appeal Tribunal, South East Zone
Date: 