IN THE TAX APPEAL TRIBUNAL
HOLDENT AT ABUJA

SUIT NO. TAT/ABJ/APP/004/2005

BETWEEN:

R & B FALCON EXPLORATION COMPANY LLC ..... APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE ..... RESPONDENT

CORAM:

Hon. Nnamdi Ibegbu, S.A.N. (Chairman) (Read the Lead Judgment)
Hon. Jude Rex-Ogbuku
Hon. Zulaihat Aboki

JUDGMENT

Sometime in the year 2005, the appellant filed an appeal at the Body of Appeal Commissioners hereafter referred to B.A.C sitting at Abuja. This matter proceeded to trial before the B.A.C. but was not concluded before the B.A.C. Subsequently, the Federal Inland Revenue (Establishment) Act, 2007 was enacted and the Tax Appeal Tribunal was established and vested with the jurisdiction to adjudicate on disputes arising from, amongst other statutes, Companies Income Tax Act. The B.A.C. was, consequently disbanded by virtue of Section 18 of the companies Income Tax (Amendment) Act No. 11 of 2007.

Upon the constitution of the Tax Appeal Tribunal hereafter called T.A.T., all matters/appeals that were previously pending at the B.A.C. were transferred to the TAT by virtue of Order 5 of the Tax Appeal Tribunal (Establishment Order) 2009. The Establishment Order provided that:
"All pending proceedings before the dissolved Body of Appeal Commissioners and Value Added Tax Tribunals are hereby transferred to the Tax Appeal Tribunal".

By a document dated 28th September, 2010 the Secretary of T.A.T Abuja Zone notified Counsel in this matter that this matter has been fixed for 18th October, 2010.

This case was delayed by an interlocutory appeal which was filed by the Respondent's Counsel upon the Tribunal dismissing a motion that this Tribunal has no territorial jurisdiction to hear and determine this case. The appeal was filed in 2012. From 2012 to 2015 no progress was made. Later, the Respondent's Counsel withdrew the appeal and this matter resumed at this Tribunal in 2015. It is necessary to state the cause of the delay of this case.

The Appellant filed Witness Statements On Oath sworn to by Dominic Marizu and Mrs Eworitse Faseun respectively. The Respondent's witness Iroh Nnachi Ukpai swore to his Statement On Oath.

The respective witnesses of the Appellant and the Respondent testified and were duly cross-examined. Exhibits were tendered. At the close of the Respondent's case, the Hon. Tribunal ordered for filing of Written Final Address of both Counsel. The Respondent's Counsel also filed a Reply to the Appellant's Counsel's Written Final Address. These addresses of Counsel were adopted by the respective Counsel and this case was adjourned for judgment to be delivered on the 1st day of June, 2016.

This is an appeal against Notices of Additional Assessment issued on the appellant by the respondent dated 23rd March, 2005 and admitted as Exhibit P8 by the Tribunal. The said exhibit is in respect of 1999, 2000 and 2001 years of assessment, charging the appellant additional Income Tax of $117,928.36, $54,027.89 and $74,321.85 for 1999, 2000 and 2001 respectively, totalling $246,278.1 (Two Hundred and Forty Six Thousand Two Hundred and Seventy Eight Us Dollars, One Cent).

Appellant being dissatisfied with the said notices of additional assessment, sent to the Respondent a notice of objection dated 9th May, 2005. In response, the Respondent issued on the Appellant a notice of refusal to amend the said notice of additional assessment dated 20th October, 2005 hence this appeal, as appearing on the Notice of Appeal dated 18th November, 2005, where three grounds of appeal were raised on its part, the Respondent in its reply dated 7th February, 2011 raised four grounds upon which it contests this appeal as outlined in the Respondent's Grounds and particulars.

At the trial, the appellant called Dominic Marizu and Eworitse Faseun tendered nineteen Exhibits, marked Exhibit "P1 – P19". The Respondent's Counsel cross-examined the Appellant's witness without re-examination. The Respondent called one witness and tendered no exhibit, but relied on

the Appellant's Exhibit P8. The Appellant's Counsel cross-examined the witness but there was no re-examination.

Issues for determination in this case have been formulated by both Counsel.

The Tribunal's judgment will be based on four issues after carefully reading all the processes filed, listened to evidence, observed the demeanour of witnesses and listened to the Counsel expound on their respective written final addresses.

The issues are:-

(1) After reading Section 26 1(b) of CITA Cap 60 Laws of The Federation of Nigeria 1990 is "*recharge*" made by the Appellant Company which is a non-Nigerian Company to its local logistic support Company R & B Falcon Nigeria LLC deductible in assessing the Appellant's tax under the deemed profit of assessment?

(2) Did the Respondent legally exercise its discretion under Section 26 (1) (b) of CITA Cap 60 Laws of the Federation 1990, in assessing the Appellant to tax by allowing 80% of the Appellant's turnover as legitimate expenses and charging 20% to tax at Company Income Tax rate of 30% considering that the profit of the Appellant for the years of assessment which was not disclosed or known by the Respondent?

(3) Is the assessment of the appellant to additional tax in respect of the 1999 year of assessment in 2005 statute barred, having regard to the provision of Section 48 (1) of CITA Cap 60 Laws of Federation of Nigeria, 1990?

(4) Can the Respondent's Information circular No. 9302 titled "The taxation of Non-Residents in Nigeria" override the provisions of applicable tax Statute?

This tribunal will take these issues herein before seriatim. At this stage in considering the first issue raised by the Tribunal, it is necessary that Section 26 (1) (b) CITA cap 60 Laws of the Federation 1990 should be quoted here.

"*26 (1) 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 outside Nigeria) it appears to Board that for any year of assessment, the trade or business produces either no assessable profits or assessable profits which in the pinion 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 ascertained, the Board may, in respect of the trade or business, and notwithstanding any other provisions of this Act, if the company is

(a) .....

(b) A Company other than a Nigerian Company assess and charge that company for that year of assessment on such fair and reasonable percentage of that part of the turn-over of the trade or business attributable to the operations carried on in Nigeria, as the Board may determine."

The Courts must apply the ordinary meaning of any word or expression when interpreting any statute unless it will result in absurdity or there is a technical meaning of the word or expression which clearly fits in more with the intention of the Legislature. In such cases the special and technical meaning must prevail.

It is the decision of this Tribunal that the provisions of Section 26 (1) (b) CITA Cap 60 Laws of the Federation of Nigeria are clear, then the court shall do its job, as was decided in **A. G. VS AUGUSTUS OF HAMOVIR (1957) A.C. 436.**

In this case both parties obviously are not denying that the Respondent can charge the Appellant tax. The contention of the Respondent is centred on the deductibility of "recharges". "Recharges" mean expenses incurred in the process of deriving income from Nigeria.

The spirit of S 26 (1) (b) stated above is that in respect of trade or business carried on in Nigeria by a non-Nigerian company in Nigeria, the Board may, if it decides that the amount of assessable profits for that company can not be ascertained, assess and charge that company for that year of assessment on such fair and reasonable percentage of that part of the turnover attributable to their operation in Nigeria.

The word "The Board may" depicts discretionary power given to the Federal Inland Revenue Service on what to do under a circumstance such as this.

In the case before us, the Appellant earned income from services it rendered in Nigeria through its Nigerian affiliate. The totality of that income earned in Nigeria is what section 26(1) (b) CITA Cap 60 Laws of the Federation of Nigeria 1990 refers to as " ..... *that part of the turnover attributable to the operations carried on in Nigeria*." The phrase, "that part of the turnover attributable to the fixed base" as stipulated in that Section, means the entire turnover derived from Nigeria. No allowance for any deduction including "recharges" was provided for in that section. It is this Nigerian-derived turnover that is meant to be taxed in Section 26 (1) (b) of CITA Cap 60 Laws of the Federation of Nigeria 1990.

Tax deductibility of recharges made by a non-Nigerian company to its Nigerian fixed base is alien to Section 26 (1) (b) of CITA Cap 60 Laws of the Federation 1990.

Even in Section 20 of CITA Cap 60 Laws of the Federation of Nigeria 1990 which provides for deductions allowed under CITA, "recharges" made by a non-Nigerian Company to its Nigerian affiliate base is not stated therein.

Section 26 (1) (b) stated above takes that total receipt as the source of income and then empowers the Respondent to determine a percentage on those receipts as the standard for assessing income.

Turnover is the total receipts of the main activity of an enterprise. Second Schedule to companies and Allied Matters Act, 2004 (as amended) Section C Part V paragraph 88 provides that: "*Turnover in relation to a company means the amount derived from the provision of goods and services falling within the company's ordinary activities*. After deduction of (a) Trade discount (b) Value Added Tax; and (c) any other taxes based on the amount so derived".

It is therefore our view that in line with this "recharges" reduces the turnover from their Nigerian contracts and can properly be disallowed by the Federal Inland Revenue Service.

The Court cannot turn itself into a law making body to usurp the function of the Legislature. The ordinary meaning of Section 26 (1) (b) of CITA Cap 60 Laws of the Federation, 1990 should be read and interpreted as it is and nothing should be imported into that sub-section. See **A.G.**

FEDERATION VS ABUBAKAR (2007) 10 NWLR part 1041 Pg 192. See also **EDOZIEN VS EDOZIEN (1998) 13 NWLR Part 580 Pg 133 @ 152;**

It should be noted that tax laws are construed strictly and literally. See **SHELL PETROLEUM INTERNATIONAL MATTSC GAPPIJ B.V. VS FBIR (2011) 4TLRN 97 @ 107** per Belgore, F.C.J

The Appellant did not submit its audited account so the true amount of the assessable profits of the company cannot be ascertained. The company should then be assessed to tax on turn over basis, such fair and reasonable percentage of that part of the turnover or trade attributable to the operations carried on in Nigeria, as the Board may determine.

Section 26 (1) (b) CITA Cap 60 laws of the Federation of Nigeria 1990 does not seek to tax the global turnover of the Appellant. It rather seeks to tax part of the appellant's turnover derived in Nigeria without deduction of any cost (including recharges made to the Appellant's Nigerian subsidiary company)

It should be noted that the Appellant's witness under cross-examination stated that the Appellant did not file audited and detailed financial statement. It is that inability to file same in accordance with Section 41 of CITA Cap 60 Laws of the Federation of Nigeria 1990 that led to assessment of the Appellant's tax on a deemed profit basis under Section 26 (1) (b) as cited above.

The Appellant relied on **HALLIBURTON Vs FBIR (2006) 7 CLRN 138** to claim deduction on recharges. That decision was reversed at the court of Appeal in **FBIR Vs HALLIBURTON W.A. LTD (2014) LPELR 24230 (CA)**

This Tribunal resolves issue No. 1 in favour of the Respondent.

The Second issue to be dealt with is Issue No 2. That is did the Respondent rightly exercise its discretion under Section 26 (1) (b) of CITA in assessing the Appellant to tax by allowing 80% of the appellant's turnover as legitimate expenses and charging 20% to tax at CITA rate of 30%, considering that the profit of the Appellant for the years of assessment was not disclosed or known by the Respondent.

The Respondent having been satisfied that the true amount of the assessable profit of the Appellant could not be ascertained, has the power to assess the Appellant to tax on such fair and reasonable percentage of that part of the Appellant's turnover attributable to the Appellant's Nigerian subsidiary.

Under Section 26 of CITA, the Respondent has absolute discretion to determine what is the "fair and reasonable" percentage to adopt in assessing the Appellant and other companies such as the Appellant who did not provide their Audited Account to tax on turnover basis.

The "fair and reasonable" requirement is fulfilled by the Respondent excluding from 80% of the entire Nigerian derived turnover to the Appellant as legitimate expenses which covers all its costs, including recharges incurred by the Appellant to any other party, without special treatment or classification of such recharges. The remaining 20% of the turnover then assessed to tax at CIT rate of 30% thereby arriving at 6% of the Appellant's Nigerian tax.

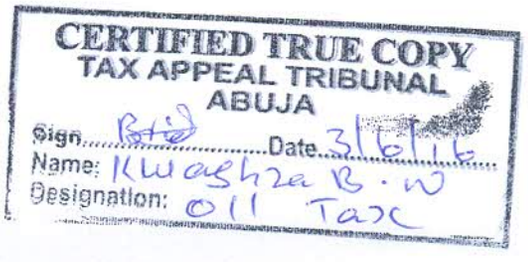
What leads to turnover assessment is the uncertainty as to the amount of the company's assessable profit resulting from the company failure to file its statutory returns alongside with its audited account.

In the Supreme Court decision in **FEDERAL INLAND REVENUE BOARD Vs N.A.S.R. (1964) 3 N.S.C.C. 303 @ 304 Brett, J. S.C.** held that:- *"If a tax payer wishes to hold that the assessment is excessive, but by how much it is excessive".*

It therefore behoves on the Appellant to prove, not only that the assessment is excessive, he must provide sufficient evidence to enable the Court to decide not merely that the assessment is excessive, but by how much it is excessive.

What the Appellant termed recharges is accommodated under the turnover mode of assessment. 80% allowed as legitimate expenses under the mode of assessment subsumes any recharges made by the appellant to its local subsidiary. This meets with a fair and reasonable, criteria of assessment under Section 26(1) (b) of CITA.

The opening words of Section 26 (1) (b) of CITA States:-



"Notwithstanding Section 29 of this Act ....." The effect of that word notwithstanding", when it opens a Section of a statute is to make that Section of a statute independent of other Section(s) mentioned after that word. In **N.D.I.C. Vs OKEM ENTERPRISES LTD (2004) 10 NWLR Part 88 Pg 107 @ 182** it was held that:-

"When the word 'not withstanding' is used in a Section of a statute, it is meant to exclude an impending effect of any other provision of the statute or other subordinate legislation, so that the Section may fulfil itself."

Therefore, the opening words of Section 26 of CITA "Notwithstanding Section 29 of this Act ....." mean that Section 26 of CITA exist and operates independent of Section 29 does not affect or impede the operation of Section 26 of CITA. Section 29 provides for rates of tax, and precisely sub-section (1) of Section 29 states as follows:

"(1) 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 forty kobo for each naira".

By the effect of the words, *"Notwithstanding Section 29 ....."* which opened Section 26, the tax treatments of the Appellant and R & B Falcon Nigeria Ltd under Section 29 and Section 26 (1) (b) respectively are appropriate and so do not amount to double taxation.

The Appellant and R & B Falcon Nigeria Ltd are distinct entities under the Company law, therefore bear separate tax liabilities in the perspective of tax law. The Appellant may be the promoter and majority owner of R & B Falcon Nigeria Ltd, but the law is that under incorporation of the later, it assumes a separate and distinct legal personality. Section 37 of the companies and Allied Matters Act, Cap 20 Laws of the Federation of Nigeria, 2004 is clear on the separate legal personality of a company and its owners. The arrangement between the companies does not affect the fact that each company earns its own income which must be assessed to tax. Since R & B Falcon Nigeria Ltd never paid tax in the name of, or on behalf of the Appellant's income, but on its own income, be it in the form of recharges or otherwise, the assessment of the appellant to tax does not amount to double taxation.

This Tribunal therefore holds that Issue No. 2 is in favour of the Respondent.

On issue No 3 which deals with assessment of the Appellant to additional tax in respect of 1999 year of assessment in the year 2005 is statute barred having regard to Section 48(1) of CITA Cap 60 Laws of the Federation, 1990 it is pertinent to quote that relevant Section here.

Section 48 (1) of CITA sates that *"If the Board discovers or is of the opinion at any time that any company liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the Board may, within the year of assessment or within six years after the expiration thereof and as often as may be necessary, assess such company at such amount or additional amount, as ought to have been charged ....." (Emphasis is that of the Tribunal).*

The words of the Act are very lucid and clear. In calculating six years 1999 to 2000 is one year, 2000 to 2001 is two years, 2001 to 2002 is three years, 2002 to 2003 is four years, 2003 to 2004 is five years and 2004 to 2005 is exactly six years.

It is therefore clear that the respondent indeed acted within time in charging the Appellant with additional tax. The Law provides that the outstanding tax may be charged within one year, that is 1999, or within six year from the expiration of 1999 that is within six years from the year 2000. Since it used the words "after the expiration thereof". The year 1999 should be excluded thereby calculating the period properly in accordance with Section 48 (1) thereof shall be from the year 2000 as year one, 2001, year two, 2002 year three, 2003 year four, 2005 is year five and indeed 2006 year six.

The additional assessment of tax for the year 1999 is therefore not statute barred. It is valid and in keeping with Section 48(1).

This Tribunal resolves this ISSUE NO. 3 in favour of the Respondent against the Appellant.

Now to consider the fourth issue as stated by this Tribunal, with respect to information circular No 9302 of the Respondent, whether it can override provision of applicable tax statute.

With respect to the fourth issue which has to do with information circular of the Respondent, and whether the Respondent is estopped from assessing the Appellant's tax on the ground of Exhibit P4, P9 and P11,

Minutes of meetings dated 20/09/89 and a letter from the office of the Respondent dated 19/07/94.

This Tribunal shall view these documents stated above as against the statutory provision contained in Section 26 (1) (b) of CITA Cap 60 Laws of the Federation 1990 which provides for the taxation of "that part of the company's turnover attributable to that fixed base".

Paragraph 5.2 (1) of the Information Circular No. 9302 explains that it would be wrong to tax the company on its total turnover once a fixed base is established.

The mode of assessment is pursuant to the discretion of the Respondent under Section 26 (1) (b), which discretion is stated thus "the true amount of the assessable profits of the company cannot be ascertained", as is the case here. The Information Circular No. 9302 does not separate recharges made to affixed base from other expenses captured as turnover under the turnover assessment.

It should be noted that Section 26 (1) (b) of CITA overrides that circular. Information Circular is a mere explanatory note devoid of the force of law, so if there is any conflict with a statutory provision, the statutory provision prevails and renders the information circular null and void with respect to the extent of the inconsistency. In **GLOBAL MARINE INTERNATIONAL DRILLING CORPORATION Vs FIRS (2013) 12TLRN 1 Pg 25** delivered by the Tax Appeal Tribunal South South Zone, it was held that:-

"That Information circular Exhibit G, is in the nature of Explanatory note cannot by any stretch of statutory interpretation override or supersede the clear and unambiguous meaning of any statutory provision Exhibit G, cannot, therefore be clothed with any legal authority giving it statutory flavour. As earlier stated, it remains in the nature of a mere explanatory note to the extant statutory provisions it purports to explain".

This Tribunal hereby follows the erudite judgment of the South South Zone of the Tax Appeal Tribunal headed by the Chairman Adenike Aduke Eyoma.

Tax Liability being a statutory matter cannot be determined in a meeting between two parties or in a correspondence. Therefore the doctrine of legitimate expectation cannot erode the clear provision of an Act of the Legislature.

This Tribunal resolves this issue in favour of the Respondent.

This Tribunal therefore holds that the appeal of the Appellants in Suit No. TAT/ABJ/APP/004/2005 is hereby dismissed with the reliefs sought in this matter.

Cost is assessed and fixed at N50,000 (Fifty Thousand naira) against the appellant in favour of the Respondent. This Tribunal commends both Counsel for the industry and commitment both of them put into this matter.

Hon. Jude Rex-Ogbuku ----- I agree.

Hon. Zulaihat Aboki ----- I agree.

DATED THIS 1ST DAY OF JUNE, 2016

.....
HON. NNAMDI IBEGBU, ESQ., S.A.N., F.C.I.Arb.
(Chairman)

.....
Hon. Jude Rex-Ogbuku
(Hon. Commissioner)

.....
Hon. Zulaihat Aboki
(Hon. Commissioner)

E/R& B Falcon Vs Fed.IRS 1-12.