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IN THE TAX APPEAL TRIBUNAL

SOUTH-SOUTH ZONE

BENIN

APEAL NO: TAT/SSZ/001/2011

BEFORE

ADENIKE A. EYOMA	CHAIRMAM
DANIEL U. UGBABE	MEMBER
BARAU A. SALIHU	MEMBER

BETWEEN

CORELAB NIGERIA LIMITED APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE RESPONDENT

JUDGMENT

The Appellant, Corelab Nigeria Limited, (Corelab) brought this case against the Respondent, Federal Inland Revenue Service, (FRIS) before this Tribunal on 27TH April 2011.

The Appellant, Corelab, a subsidiary of Core Laboratories International B.V. Amsterdam, was incorporated in Nigeria with the principal activity including the provision of proprietary and patented reservoir description, production enhancement and reservoir management services for the

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Nigerian oil and gas industry. Like all other limited liability companies in Nigeria, Corelab is required under the relevant tax statutes and the Practice Directives issued by the Respondent FIRS, to propose taxes payable by it in accordance with the self assessment rules. Corelab asserts that their returns for the relevant years of assessment fully complied with the relevant tax laws and directives.

The Respondent is a Statutory body charged with the responsibility, inter alia, of assessing and collecting taxes on behalf of the Federal Government of Nigeria. For this purpose it is endowed with wide ranging statutory powers and authorities. In the exercise of those powers under **Sections 65(1) and (2), and 22(1) and (2) of the Companies Income Tax Act Cap. 21, Laws of the Federation of Nigeria 2004,** the Respondent carried out a Tax Audit of the Appellant Company's operations in 2005 and issued 'Notices of Refusal to Amend' assessment to the Appellant for the relevant years of assessment in respect of the following additional information after a series of reconciliation meetings.

Financial year	Additional Revenue
2002	N705, 053,700.00
2003	51, 399,253.00
2004	101, 481,859.00
	N857, 934, 812.00

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The Respondent had also considered the following intercompany expenses as not allowable in the computation of the taxable profit of the Appellant;

Year	₦
2000	13,758,460.00
2001	27,401,399.50
2002	30,484,300.00
2003	64,609,835.00
2004	11,535,092.00
	₦147,789,087.00

Dissatisfied with these acts of the Respondent the Appellant sought relief of this Tribunal on the following grounds;

Ground One

The Respondent did not consider all the facts presented by the Appellant in arriving at the alleged additional income tax liability payable for each of the years under review.

Ground Two

The Respondent was wrong to have added back to the Appellant's taxable profits a total of ₦147,789,087.00(one hundred and forty seven million seven hundred and eighty nine thousand and eighty seven only) as disallowable intercompany expenses for 2000 to 2004 FY.

The Appellant is dissatisfied with these revisions because the Respondent in their opinion adopted the Royalty gross up approach in arriving at the difference in turnover for 2002

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and added back debit entries and alleged unreported invoices in the Appellant's turnover ledger for 2003 and 2004 without permitting their 10% sales discount. It concludes that the Respondent was wrong to have used an expense basis for determining turnover for 2002 and failed to provide the basis for determining portions of differences in turnover for 2003 and 2004 financial years. Besides, that the Respondent failed to consider the nature of intercompany expenses as regards the uniqueness of the Appellant's business operation in Nigeria.

The Appellant sought for the following relief as against the Respondent from the Tribunal,

1. An order setting aside wholly the Respondent's Notices of Refusal to Amend reference number **LTP/PH/10253833/2005/78 DATED 26TH November 2007,** issued in respect of Companies Income Tax and Education Tax on the grounds and particulars contained in this Notice of Appeal
2. An order discharging wholly the Respondent's Notices of Additional Assessment in respect of 2002 to 2004 financial years or the 2003 to 2005 years of assessment.
3. An order that the Appellant's tax for 1999 – 2004 financial year(2000 to 2005 years of assessment) is as computed in the tax returns submitted by the Appellant to the Respondent in respect of those years, the full amount of which has been acknowledged by the

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Respondent, and that the tax liability has been paid fully. And

4. Such other reliefs as would be required to give effect to the reliefs sought.

In support of their case the Appellant called in witness, Mr. Ayo Lukman Salami (Ayo) who is a Fellow and of the Chartered Institute of Taxation of Nigeria and an Associate Director with a division of KPMG Professional Services, Auditors to the Appellant. Led in evidence by Counsel to the Appellant, Ayo adopted his Witness Statement on Oath and Further Witness Statement on Oath and tendered eight documents as Exhibits, numbered 1 to 7 and subsequently Exhibit 10.

Exhibit 1 is a letter dated 29th August 2007 addressed to the Appellant by the Respondent annexing Assessment Notices

Exhibit 2 is a letter addressed by the Appellant's Tax Consultant KPMG, to the Respondent dated 27th September 2007 raising objection to the assessment

Exhibit 3 is a letter from the Respondent to KPMG dated 2nd October 2007 responding to the Appellant's objection while informing the Appellant of its conclusion of its tax audit on them

Exhibit 4 and 5 are letters from the Appellant's Consultant KPMG to the Respondent providing 124 pages of documents for the Respondent's further consideration and audit in

support of their claims regarding "debit entries", "construction work-in-progress" and "inter Company expenses". **Exhibit 4 dated 4th October 2007, while Exhibit 5 dated 9th October 2007.**

Exhibit 6, a letter from FIRS, the Respondent conveyed to KPMG annexed Notices of Refusal to Amend assessments

Exhibit 7, sought clarification on Respondent's computed turnover and Value Added Tax this Exhibit was dated 4th October 2007.

Finally, the Appellant tendered **Exhibit 10** through the Respondent's Witness during Cross Examination. This document records the minutes of the last reconciliation meeting between the parties to this case and is dated 31st July 2007.

In canvassing their case the Appellant raised three issues for determination in partial agreement with the Respondent including;

1. Whether the Respondent did not act arbitrarily when it added back to the Appellant's taxable profits a total of N857,934,812.00 (Eight hundred and fifty seven million nine hundred and thirty four thousand eight hundred and twelve naira only) as the difference in turnover for 2002, 2003, and 2004 financial years.
2. Whether the Respondent did not act arbitrarily when it added back to the Appellant's taxable profits a total of

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N147,789,087.00 (one hundred and forty seven million seven hundred and eighty nine thousand and eighty seven naira only) as disallowable intercompany expenses for 2000 to 2004 financial years.

3. Whether having regard to the Respondent's failure to issue Notice of Refusal to Amend in respect of Withholding Tax (WHT) and Value Added Tax (VAT) following the objection raised by the Appellant the assessment is not inconclusive.

In their final written address the Appellant expounded on the issues it postulated in its appeal:

On **Issue 1,** Learned Counsel to the Appellant, Innocent Ekpen Esq., while acknowledging the powers of the Respondent to carry out its own assessment under **Section 65(1) and (2) of CITA 2004**, stresses that the Tax Officer must in raising the assessment under the "best of judgment, not act arbitrarily, dishonestly, vindictively or capriciously because he must exercise judgment in the matter. He cites the cases of **Federal Board of Inland Revenue Vs. J. A. Omotesho (2012) 8 TLRN 88 @ 91** and **Income Tax Commissioners vs. Badridas Ramrai Shop. Akota 1937 LR 64. I.A. 102, FBIR vs. IDS Limited,** and **the 6th Edition of Black's Law Dictionary**'s definition of what is "arbitrary". Based on these judgments and the dictionary definition he concludes that the Respondent FIRS had acted arbitrarily. Since the accounts for the financial year 2004 had not been qualified

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by the Auditors he opined that "there was therefore no basis whatsoever for the Respondent to have rejected the returns made by the Appellant in respect of the 2004 financial year".

The Appellant further avers that of all the methods the Respondent may have used in the review of the Appellant's turnover option (iii) Circularisation of the Appellant's client approach represents the most reliable and independent source and ought to have been used by the Respondent in place of the Royalty approach in the circumstances. Because the Royalty approach was used the result obtained is not consistent with the trend of the appellant's financial performance. At Exhibit 10, the Appellant continues, is evidence that the Respondent disallowed Royalty for tax purposes yet charged withholding tax based on it. This it says is ample evidence that the Respondent did not exercise its best judgment but was arbitrary.

Learned Counsel to the Appellant further stresses that even if the Royalty approach is to be relied upon to estimate the Appellant's turnover its application cannot ignore Appellant's agreed method of computing the royalty for each year.

> "For the purpose of recognising the Royalty due, the Appellant's parent company grosses up the actual revenue earned by the Appellant from January to September and recognised 6% of the grossed up amount as royalty receivable. .... when the Actual revenue figure is determined the actual

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> amount due would be recalculated. ....an adjustment (true up) is made for the difference between the estimated royalty and the actual royalty..." (p. 15 Appellant's Final Written Address)

The result of the refusal of the Respondent to follow this computation rule means that the royalty amount obtained is three times the actual royalty cost recognised by the Appellant. This he says is contrary to the principle of the use of 'best of judgment' which considers adjustments where necessary.

The Appellant also says that the Respondent having disallowed Royalty Expense as a charge against income for tax purposes because the 'NOTAP Certificate' was not produced cannot charge withholding Tax (WHT) on it as there cannot be WHT where there is no expense. So the action of the Respondent was arbitrary.

The Appellant also argues strenuously that the Respondent adjusted their turnover of the 2003 and 2004 financial years by adding back debit entries in the Turnover Ledger along with alleged unreported invoices without adjusting for 10% discount on sales and their reversal of certain invoices through credit notes. That while the Respondents agreed at their reconciliation meetings of May 23rd and 24th 2007 to adjust for these debits as evidenced in **Exhibit 10,** it failed to do so. This he says is especially true as the Respondent could not produce evidence at the Tribunal that it carried out what

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it had promised to do at all. He urges this Tribunal to discountenance the claim of the Respondent that it actually adjusted for these items.

In further arguments the Appellant learned Counsel, Innocent Ekpen Esq., also asserts that the Respondent's witness had contradicted himself severally and his testimony must be discountenanced. The Respondent did not take into consideration the index of other companies in the same industry as required in **FBIR Vs. Owena Motel((2004) 10 MJSC 154 @ 170.** Continuing he added that the evidence of the Respondent's witness during examination-in-chief to the contrary not being pleaded is an afterthought and must be overlooked by the Tribunal. Learned Counsel further seeks shelter under the provisions of **Section 24 Companies Income Tax Act** which he says makes it mandatory the prior deduction from turnover of all expenses by the Company which are wholly, necessarily reasonably and exclusively incurred in the production of those profits. He cites in support of his assertion the cases of **A vs. Commsr.SARS (2012) 8 TRLN @ 81,**

Shell petroleum Development Company (Nig) ltd. Vs. FBIR (1996) 8 NWLR (Pt 446) 256 @ 291, and

Gulf OIL CO.(Nig) Ltd. Vs. FBIR (1997) 7 NWLR (Pt 514) 698 @ 705.

Since the Appellant incurred intercompany expenses on services performed by the Appellant's offshore affiliates

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being highly complex and specialised services for which there are no local or open market alternatives, all intercompany expenses must be deductable from turnover earned through them prior to taxation. Sufficient documentary evidence having been made available to the Respondent as shown in **Exhibit 5** as early as 10th October 2007 and before the Respondent's Notice of Refusal to Amend was received on November 29th, 2007. The Respondent cannot accept or reject intercompany expenses in part as is evidenced in **Exhibit 2** where the Appellant rejected part consideration of these expenses. The Respondent is not entitled to suspect and treat transactions involving the Appellant and its parent Company as artificial under **Section 22(2)(b)** of **CITA** as it never expressed that the intercompany expenses were not made on terms which might fairly be expected to have been made by persons in the same or similar activities as the Appellant, nor did they lead evidence that such transactions were fictitious. A counsel's submission cannot take the place of evidence as ruled in **Buhari Vs. INEC .**

With regards to Construction in progress the Appellant explains that the expenses here relate to Machinery and Equipment imported into the country for purposes of the Appellant's business and so would not attract WHT being transactions done outside Nigeria in conformity with the Respondent's **Information Circular no. 2006/02 published in February 2006.**

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The Appellant further stresses that items locally purchased in the ordinary course of business as set out in **Information Circular 2006/02** and sale in the ordinary course of business is exempt from Withholding Tax. Counsel to the Appellant urges the Tribunal to disregard the add-back of N147,789,087 in intercompany expenses for 2000 to 2004 financial years.

The Respondent contests the Case of the Appellant on two grounds;

1) The Respondent considered all the facts presented by the Appellant in arriving at the alleged additional income tax liability payable for each year under review.
2) The Respondent was right to have added back a total of N147,789,087 as disallowable intercompany expenses for 2000 to 2004 the appellant having failed to substantiate and or defend the said expenses.

The Respondent prays the Tribunal for the following orders:

1. A declaration that the Federal Inland Revenue Service assessment/ decision/ action/ demand notice of PCBA 060,PCBA061, PCBA 062, PCBAET 040, PCBAET 041, PVBAET 041, PCBAET 042, AND PCBAET 043 DATED 7/8/2007 are valid and made in accordance with the law.
2. A decision that the appellant was assessed and charged to tax pursuant to **Section 26(1)(b)**

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3. An Order of the Honourable Tribunal mandating the Appellant to pay its additional tax liabilities of N857,934,812 and N147,789,087.
4. An order of the Honourable Tribunal dismissing this appeal as frivolous and abuse of the processes of this Tribunal
5. And for such other orders as the Honourable Tribunal may deem fit to make in the circumstances.

In support of its case the Respondent called in witness Mr. Nuraini Onikoyi, an employee of the Respondent Federal Inland Revenue Service. He was part of the audit team sent by the Respondent to audit the Appellant for tax purposes He also participated in the post audit reconciliation meetings with the Appellant. The Witness having adopted his sworn Witness Statement on Oath testified that the fact that the annual Self Assessment Returns filed by the Appellant for 1999 - 2004 were rejected based on underpayment of tax combined with the fact that the Auditors to the Appellants had issued qualified opinion on the Appellant's accounts for 2001, 2002 and 2003 financial years triggered the Respondent's resort to its own audit .

During the audit he continues, the Respondent adopted four approaches to determining the appellant's turnover, namely;

i. Invoice by invoice approach (Invoice approach)
ii. Withholding tax credit Approach

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iii. Circularisation of all the Company's clients approach

iv. Royalty with the Company's parents approach (Royalty approach)

For the 2002 financial year, the Royalty approach was adopt as the most viable option because of the deficiencies in the records produced by the Appellant. For the 2003 and 2004 the Respondent used the Invoice approach. The Respondent tendered two exhibits through its witness. Tendered and marked **Exhibit 8(1) (2) and (3)** are the audited financial statements of the Appellant for 2001, 2002 and 2003 while **Exhibit 9** is the Royalty Agreement between the Appellant and its parent company Core Laboratories BV, Amsterdam.

The Respondent formulate three issues for determination in this case

1. Whether the Respondent was wrong to have added back to the Appellant's taxable profits a total of N857,934,812.00 or eight hundred and fifty seven million nine hundred and thirty four thousand eight hundred and twelve naira as difference in turnover for the 2002, 2003 and 2004 financial years
2. Whether the Respondent was wrong to have added back to the appellant's taxable profits a total of N147,789,087.00 or one hundred and forty seven million seven hundred and eighty nine thousand and

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eighty seven naira as disallowable intercompany expenses for 2002 to 2004 financial years.

3. Whether the Appellant's additional assessment on VAT has become final and conclusive for failure to appeal against it.

Respondent's Learned Counsel, Daniel Onukun Esq., addressing Issue one submits that the Respondent powers to conduct a Tax Audit is clearly stated at **Section 60(4) Companies Income Tax Act** where the law removes all bars to the Service's verification by tax audit or investigation into any matter relating to the profits of a Company, its returns or its books, documents or accounts no matter how stored. Additionally the Respondent are empowered to have resort to the 'best of its judgment' to determine the amount of the total profits of the company (Appellant) and make an assessment accordingly by **Section 65(2) of the Companies Income Tax Act(CITA). Section 66(1)** of the same Act also permits the raising of additional assessment if the Respondent discovers or is of the opinion at any time that a company liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged. He also draws attention of the Tribunal to the fact that the tax Audit of the Appellant was partly triggered by the qualification of the Appellant's financial statements for 2001, 2002, and 2003. He avers that despite the Auditor's suggestion that the Company's books of account have been properly kept the Respondent's audit found lots of

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inconsistencies in record keeping, a lack of accounts makeup and unexplained narrations such as "Account Import Created". The Respondent further says that it was justified in rejecting the qualified accounts as they were based on inconsistent and ill-defined records the facts of which the Appellant has accepted and did not challenge in its evidence before the Tribunal and so must be accepted as admitted. He refers to the judgment of Court in

AG Edo State & Ors. Vs. Oribhabor (2003) FWLR (Pt. 1470) 1078 @1088, and

Ikono Local Government V De Beacon Finance and Securities Ltd. (2002) FWLR(Pt 114)415 @423

The Respondent affirms that the 'best of judgment' which was their basis of assessing the estimated turnover of the Appellant through the Royalty approach only raised a deemed turnover and not the actual turnover and the question of true up does not arise. The Royalty used derived from **Exhibit 9** which regulates the affairs of the Appellant and its parent Company and is the most reliable as the reported turnovers in **Exhibit 8(1)(2) and (3)** had been discredited. Respondent agrees with the Appellant that their best of judgment fails if found to be arbitrary except however that in **FBRS Vs. Omotesho** the action of the Plaintiff was discredited by Court only because,

> "The Plaintiff did not tell me why the Defendant should be entitled to a relief in one year and not so

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> entitled in the other year...for a man to pay tax of N52 on an annual income of N2,000 and the same man to pay a tax of N200 on the same income of N2,000 in the following year under the same conditions sounds not only capricious and vindictive but oppressive..."

Another question addressed by the Respondent is the appropriateness of subjecting the Royalty paid to the Appellant's parent company to Withholding Tax. Respondent stresses that the Royalty rejected for lack of the NOTAP Certificate was subjected to WHT only, being a contractual payment, and not charged to Company Income Tax as well. That while the Appellant claims contradiction between the Respondent's Witness Statement on oath and **Exhibit 10** on this, paragraphs 25 and 26 of the Statement are a re-affirmation of **Exhibit 10 paragraph 3.90.**

Referring to the WHT on Royalty paid D. Onukun for the Respondent says that WHT is only an advance payment of tax that is recoverable as an offset against the Company Income Tax at the End of a financial year using the Withholding Tax Credit Note issued in acknowledgement by FIRS when received. He rests this claim on

ADDAX Vs. FIRS (2012) 7 TLRN 74 ratio 7 @ 87

The Respondent disagrees with the Appellant that it has no right to adjust the turnover figure of the Appellant for 2003 and 2004 financial years by adding back invoices that were

not captured in their Annual Returns. The Respondent denies adding back to turnover any debit entries in the Revenue Ledger to Revenue. It however accepts and confirms that it added back invoices serially captured during the Tax Audit to the Appellant's Auditor discredited turnover and rightly so.

On **Issue Two** the Respondent contends that it was right to add back the sum of N147, 789,o87as the appellant had failed to substantiate and or defend the intercompany expenses, especially as

- Third party documents were not provided during audit
- Most of the transactions were done through e-mail and could not be verified.
- Intercompany expenses are not allowed where they are not proved

Such expenses being unproved were considered artificial. That **Exhibit 5** which the Appellant considers as proof of the rejected intercompany expenses was not available at the time of their audit but was received long after the audit. While it is true that the Appellant objected to the Respondent's treatment of the intercompany expenses they had also conceded 50% of it as allowable at the reconciliatory meeting with the Appellant of 31st July 2007as evidenced in **Exhibit 10** tendered before the Tribunal by the Appellant. The Respondent further contends that S**ection 21(1) and (2)** empowers it to treat transactions between a Company and

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its subsidiary as artificial and to reject and or request for proof of such. This Section specifically states,

1. Where the Board if of the opinion that any disposition is not in fact given effect to or that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious it may disregard any such disposition or direct that such adjustment shall be made as regards liability to taxes it considers appropriate so as to counteract the reduction of liability to tax affected or reduction which would otherwise be affected by the transaction and any company concerned shall be assessable accordingly.
2. For the purpose of this Section,
    a. "disposition " includes any trust, grant, covenant, agreement or arrangement;
    b. Transaction between persons one of whom either has control over the other or, in the case of individuals, who are related to each other or between persons both of whom are controlled by some other persons, shall be deemed to be artificial or fictitious if in the opinion of the Board those transactions have not been made on terms which might fairly have been expected to have been made by persons engaged in the same or similar activities dealing with one another at arm's length."

The Respondent believes that what happened in this case is as in the case of **Mobil Oil Vs. FBIRS** where the Supreme Court was in agreement with the opinion of Court in the case of **British Imperial Oil Co. Vs. Federal Commissioner of Taxation** that:

> "A firm that carries on Business in London as well as Australia can easily hide the profits of its Australian business by increasing the Invoice Price of the Goods sent to Australia". Per Hiiggins J

The Respondent avers that its powers under **Section 22** is Subjective and depends on the opinion of the Respondent only

To the Respondent all payments regarding contractual transactions to any foreign company from a Nigerian Company is liable to Withholding Tax as income derived from Nigeria. Also the Appellant failed to convince the FIRS that its local purchases were done in the ordinary course of business. The industrial practice in the purchase of machinery and equipment is usually by bid in the Oil and Gas industry not by direct purchases. The Respondent stands by its concession of 50% of intercompany expenses.

THE Respondent addresses **Issue Three** by drawing the Tribunal's attention to the appeal by the Appellant which address only additional assessment to Company Income Tax and Education Tax but now extended to Value Added Tax and Withholding Tax assessments. That since the Appellant has

not appealed Value Added Tax assessment the assessment has become final and conclusive. The Respondent argues further that by virtue of **paragraph 13(1)(2) and (3)** of the **Fifth Schedule** of the **Federal In land Revenue Service (Establishment) Act** Notice of Refusal to Amend has been made optional generally and when the Service fails to issue Notice of Refusal to Amend the Notice of Refusal to Amend must be deemed to have been issued and the assessment becomes final. The Respondent submits that the proviso to **Section 69(5) provides** for the issuance of the Notice of Refusal to Amend, with the enactment of **Section 68(2) of the FIRS (Estab.) Act 2007** this has become optional. Section 68(2) reads;

> If the provision of any law, including the enactments in the First Schedule are inconsistent with this Act, the provisions of this Act shall prevail and the provisions of that other Law shall to the extent of the inconsistency be void.

The Respondent thus concludes that there is no need for the Service (FIRS) to issue Notice of Refusal to Amend Value Added Tax and Exhibit 6 and 7 constitute sufficient Notice of Refusal to Amend. It supports this assertion with the decision in **Oando Supply and Trading Ltd. Vs. FIRS (2011) 4TLRN 113 RATIOS 1,4,and 6-9.** Besides, the Respondent continues the Value Added Tax Act has no provision for the issuance of Notice of Refusal to Amend and since the Appellant does not

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contest the additional assessment on VAT before the Tribunal, the assessment has become final and conclusive.

Respondent argues that in any case Withholding Tax is not a tax as such but an advance payment of company Income Tax as was held in **ADDAX Vs. FIRS (2012) 7 TLRN 74 ratio 7 @ 87.** And so there is no form of Notice of Refusal to Amend Withholding Tax.

The External Auditors to the Appellant wrote in their report to the Directors on the Accounts of Corelab [see Exhibits 8(1) (2) (3)]

> "We believe that our audit provides us with the reasonable basis for our opinion." "Included in the Profit and Loss Account is revenue of N212 million. Because of lack of supporting documents, we are unable to verify the effectiveness of management's internal controls over the completeness of Revenue. Although we performed alternative substantive audit procedures, we were unable to obtain sufficient appropriate audit evidence to satisfy ourselves as to the completeness of revenue for the year ended 31st December 2001."
>
> "In our opinion, except for the effects of such adjustments, if any, as might have been required had we been able to satisfy ourselves as to the completeness of revenue:

I. the Company's books of account have been properly kept;"

This statement is repeated for the Appellant Company's accounts for each of the financial year 2002 and 2003 audited by the same Auditors KPMG Professional Services specifying their separate doubted figures. From this statement qualifying the accounts of these three financial years, 2001 to 2003 of Corelab it is made clear by its Auditors that, try as they may, they were not satisfied as to the completeness of revenue for these three years. They were confronted with the lack of supporting Document and the Directors' of the Appellant Company's nonchalance over the completeness of recorded revenue. Based on the figures disclosed however the books have been properly kept based on the information provided. A full disclosure would require an upward adjustment of the revenue figures.

We agree with the Respondent FIRS that the Revenue figures disclosed in the Company's final accounts as well as the estimated figure disclosed in their self assessment returns are unreliable and were rightly discarded by FIRS. The right of the Respondent to resort to the provisions of **Section 65(1) and (2)** the **Companies Income Tax Act** as acknowledged in the Appellant's Closing Address is rightly exercised. This power of the Respondent is reinforced by **Section 22(4), Section 60(4),and Section 66 of the Companies Income Tax Act.** Because the revenue figures in the Appellant's Account

for 2001, 2002, and 2003 have been declared incomplete and understated they are totally unreliable. Therefore any figures computed in the accounts based on such revenue figures would be wrong also to the extent that the revenue figures themselves are wrong and incomplete.

The tax laws allow the taxpayer to arrange his affairs in such a manner as to minimise his tax. Some of the ways this is done is through incomplete or non disclosure of Income, exaggeration or overstatement of expenses and costs of all kinds and even the wrong classification of expenses to gain tax advantages conferred. At the same time the Respondent, as tax collectors, will act to maximise tax yield to the State. There is room for conflict of interest.

A careful look at the accounts for the Company's financial years 2001- 2003 presented as Exhibit 8(1)(2) and (3), qualified by the Auditors with a suggestion that the Revenue could be higher, would raise the suspicion of any Tax Collector not least the Respondent. The Appellant is a Company incorporated in Nigeria with an authorised capital of N2,000,000.00, two million naira only. The Company engages in contract works worth several hundred million naira annually. Routinely the Appellant runs a circle of losses every two years capped by one year of profit that is far lower than the loss in each of the loss years. (See the Appellant's Financial Statements for 2001, and 2003 which present seven years financial summary). As at 31st December 2003 the

Appellant had notched up a negative capital of one hundred and ninety six million nine hundred and fifty nine naira, i.e., N196,959,000.00, a negative net current asset of two hundred and eighty eight million six hundred and fifty two thousand naira only, i.e., N288,652,000.00. This Company must be in business in Nigeria only because of some undisclosed advantages where others would have called it quits. At Note 16,of Financial Statement of 31st December 2003, Exhibit 8(3) is proof of this " Core Laboratories International B.V. has indicated that they will provide the company with financial support...Core Laboratories International B. V. has indicated that they have no plans for immediate withdrawal of that support..." As at this account date the company owed N549, 229,379.00 i.e., five hundred and forty nine million two hundred and twenty nine thousand three hundred and seventy nine naira only to its parent and associates. The Respondent are righteously suspicious and were right to invoke their powers under the Relevant tax Acts considering these circumstances.

The question that arises is, Have the Respondent acted dishonestly, vindictively or capriciously, without adequate determining principles in disregard to the nature of things? The Appellant answers this in the affirmative. "the Respondent acted arbitrarily when it added back to the Appellant's taxable profits a total of N857,934,812.00 as difference in turnover...Respondent betrayed every sense of judgment in the matter as it acted without consideration and

regards for the facts and circumstances presented." The Appellant calls to assistance the decision in the cases of **FBIR Vs. J. A. Omotesho,** and **FBIR Vs. IDS Ltd., (supra).** The Respondent on the other hand urges the Tribunal to discountenance the Appellant's claim as they have not only adopted a systematic verifiable approach in their reassessment of the revenue generated in the years of disputed assessments. They did not only disclose their approaches to the Appellant they also held a series of reconciliation meetings with them. During such meetings including that evidenced by **Exhibit 10,** which was tendered by the Appellant, they accepted the concerns of the Appellant and conceded to some of their positions, and adjusted their findings but were convinced that their positions were right on some of the issues raised .

The Appellant urges the Tribunal to disregard this justification of the Respondent as they are vitiated by the adoption of the inconsistent Royalty Approach instead of Third Party Circularisation considered by them as international best approach to the investigation of revenue earned. The Appellant continues that the Respondents where truly arbitrary in that having disallowed Royalty for lack of the NOTAP (National Office for Technology Acquisition and Promotion) Certificate as set off against revenue for tax purposes they cannot adopt a method based on the gross up of the same royalty. We accept that disallowing expenses for tax purposes does not mean that the expenses are not

legitimate company expenses. Secondly, the Respondent assert that the royalty figure was drawn from the Appellant's books submitted to them during their Tax Audit by the Appellant and the Income reported by them to their parent company in Amsterdam upon which royalty is paid yearly. Additionally the Respondent says that in the last analysis the choice of method is in their "best of judgment" as the law permits them. We hold that since the Appellant were not beyond understating their income as indicated by their External Auditors, they are not to be relied on to disclose all sources of income for circularisation or tender all their income derived from non Nigerian sources. The choice of method must be that of the Respondent even where the Appellant decides to confuse issues by harping on the disallowance of royalty for tax purposes which is not the same as saying that Royalty is not a legitimate company paid expense. The possible window of a "true up" or set off of excess Royalty against the subsequent year's computed royalty as speculated by the Appellant is not proved by them and from the Tax audit report is a remote possibility. The Appellant also uses the **Omotesho case(supra)** to disparage the Respondent's approach as not having regards to "...all surrounding facts and circumstances in order to reach a fair and proper estimate." and the trend for years immediately preceding or following year 2002. We have said that a trend analysis of the Company's accounts which is part of an evaluation of its circumstances sufficed to jettison all returns

or possible returns by the Respondent. We also hold that in the circumstance of the qualification of the Appellant's accounts for a number of years over non declaration of their full earnings intercompany comparison of performance is not appropriate. We agree with the Respondent's choice of the Royalty gross up method as the Royalty paid was determined based on in house figures extracted from the Appellant's records.

At this point we consider whether the Respondent can legitimately subject the royalty payment disallowed as deduction from income for tax purposes to Withholding Tax (WHT). The Respondent argues that WHT is an advance payment of tax payable on all contractual income derived from Nigeria as declared in **Section 9(1)(c) CITA** for which credit is given on assessment. This claim is not disputed by the Appellant who hold unto the erroneous ground that a disallowance of an expenditure for tax purposes is the same as saying that the rejected sum is not a legitimate company expense the most notorious of these being Depreciation. We hold that WHT has been properly levied on royalty actually paid to the Appellant's parent Company.

We answer the question raised by the Appellant if Respondent were right to have adjusted the turnover of the Appellant for 2003 and 2004 financial years through the rejection and add back of debit entries in the turnover ledger as well as unreported invoices by reference to the

Companies and Allied matters Act (CAMA) and the Companies Income Tax Act(CITA) **CAMA** at **section C Part V** and at **paragraph 88 says**

> ' "Turnover", in relation to a company, means the amounts 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 amounts so derived.'

Thus any debit entries to the Turnover Ledger other than listed in CAMA above are permitted add backs to the Turnover Ledger of any company in Nigeria for tax purposes. **Section 27 (c) of CITA** also says,

> " ...no deduction shall be allowed for purpose of ascertaining the profits of any company in respect of-
>
> (c) taxes on income or profits levied in Nigeria or elsewhere, other than taxes levied outside Nigeria on profits which are also chargeable to tax in Nigeria where relief for double taxation of those profits may not be given under any other provision of this Act;"

These provisions bind the parties in this case and if found to have been breached by either party the respective action shall be reversed by this Tribunal.

Before this Tribunal and in its written addresses the Respondent denies adding back debit entries in the turnover ledger and where adjustment had been pointed out and agreed with the Appellant at their reconciliation meetings they "... arose out of consideration to cancelled invoices and debit entries affecting turnover not earlier considered" as recorded in **Exhibit 10** and They had adjusted for their mistake before raising additional assessments and appropriately informed the Appellant through their letter of Intention to Raise Assessment. Respondent agrees however, that they added to turnover, invoices in the records of the Appellant which they had previously excluded from their Turnover Ledger.

The Appellant considers the rejection of intercompany expenses by the Respondent as not wholly, exclusively, reasonably and necessarily incurred for the purpose of the Appellant's business in Nigeria as arbitrary. The Respondent rejected the sum of N147,789,087 in supposed intercompany expenses which was then assessed to profit tax and education tax for 2000 to 2004 financial years. We disagree with the Appellant that once an expense claim is made deduction from turnover for tax purposes is mandatory. Such expenses must necessarily be proved to have been truly

wholly, exclusively, necessarily and reasonably incurred in the production of the profits. This is one of the tasks for an audit team, tax or external audit, examining the accounts of a company. After enquiry and explanations the audit team at its discretion accepts or rejects the expenses considered. The audit team cannot be furnished explanations or documents in support of rejected claims two years after the conclusion of an audit and made to reverse its conclusion except as prior year adjustment. For the tax audit under examination at the Tribunal we accept that the audit exercise had concluded but the revised assessment had not been raised as at the time **Exhibit 4 and 5** were received by the Respondent. There is evidence that the Respondent examined these documents and rejected quite a couple on grounds that,

I. Third party documents were not provided upon request during audit.

II. Most of the transactions were done through e-mail and could not be verified.

III. Intercompany expenses are not allowed where they are not proved.

To us these excuses sound flimsy but we see in them a recurring emphasis by the Respondent on proof which must come not only in the bill forwarded to the Appellant, which could be gratuitous and artificial. Proof must be in evidence that the Appellant requested of their associates or parent the service rendered relevant to the job in hand. Further proof

comes in the certification that the assignment was concluded and may be paid for. All of these must be presented along with the bill for payment. Unless all these three are available the bill or invoices are suspect and may be rejected as artificial. Air tickets and hotel bills are not enough proof of the Appellant benefiting from specialised services from their associate or parent company and are often veritable avenues of tax evasion for multinationals. We notice that the Respondent had conceded to accept 50% of the intercompany expenses as allowable. They audited, received explanations in support yet rejected 50% of the intercompany expenses proposed as deduction from turnover. The Tribunal does not consider itself in the position to further reduce the add back to turnover in years 2000 to 2004 in the absence of requisite details from the Appellant. The Appellant fails to convince us that all the services rendered and paid for were necessarily incurred.

Construction in progress which bears "a significant portion... relates to 'machinery and equipment' imported into the country for purposes of the Appellant's business" is a most unclear classification of the expenses involved and is similar to the Ledger Account called "Account Import Created". From the Appellant's Financial Statement dated 31st December 2003 financial year there were no additions to Machinery and Equipment (note 6) there is therefore no indication of any purchase of Machinery or Equipment during that financial year. Construction in Progress however,

increased by N71.14 million Naira perhaps with some value for Machinery and Equipment built into it even when there is a clear separation of Construction in Progress from Machinery and Equipment in the Appellant's Ledger. If the Respondent were suspicious of the Appellant after completion of their Tax Audit and considered their transaction artificial, there is ample reason to do so from the circumstances of the company. They even merged non qualifying withholding tax expenditure with qualifying expenditure and yet loudly contest concessions granted by the Respondent. We cannot fault the concessions they have already granted to the Appellant. We therefore hold that the Respondent was right to levy additional taxes on the total of N147,789,087.00 arising from the rejected intercompany expenses.

Issue Three relates to the failure of the Respondent to issue Notice of Refusal to Amend on Value Added Tax and Withholding Tax. In this situation the Appellant insists that in the absence of the Notice (NORA) the assessments to VAT and to WHT have not crystallised especially as the Appellant had objected to these assessments as evidenced in **Exhibit 2.** And the Respondents have not complied with **Section 69(5) of CITA.,** which is a mandatory provision. To counter the Appellant's stand the Respondent draw attention to what it considers as the current position of the law to be found in the **Federal Inland Revenue Service (Establishment) Act 2007** at **paragraph 13 (1) (2)and (3) of the Fifth Schedule** as

well as **Section 68** particularly **subsection(2)**. We are also referred to **Oando Supply and Trading Ltd., Vs. Federal Inland Revenue Service (supra).** The Appellant insist on the superiority of the decision in the **Ilorin Native Authority** case (supra) over the **Oando Limited** case (supra) as this Tribunal is not competent to decide otherwise. We are of the opinion that the FIRS (Establishment) Act 2007 quite clearly supersedes all previous tax legislations' provisions for Notice of Refusal to Amend assessment. Paragraph 13 (2) of the Act clearly states,

> "An appeal under this schedule shall be filed within a period of 30 days from the date on which a copy of the order or decision which is being appealed against is made or deemed to have been made by the Service and it shall be in such form and be accompanied by such fee as may be prescribed provided that the Tribunal may entertain an appeal...."

While Paragraph 13 (3) says,

> "Where a notice of appeal is not given by the appellant as required...within the period specified, the assessment or demand notice shall become final and conclusive and the Service may charge interest and penalties in addition to recovering the outstanding tax liabilities..."

Section 68 FIRS (estab.) Act ousts provisions of all previous tax laws specifically in the following word,

1. Notwithstanding the provisions of this Act, the relevant provisions of all existing enactments including, but not limited to, the laws in the First Schedule shall be read with such modifications as to bring them into conformity with the provisions of this Act.
2. If the provisions of any other law, including enactments in the First Schedule are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that other law shall to the extent of the inconsistency be void.

The statutes on which the decision in the Ilorin Native Authority case was based as to the paramount need for NORA are voided as "the provisions of that other law shall to the extent of the inconsistency be void"

We find that the Respondent had considered all the facts presented to it, orally or in written form as well as the circumstances in which it found the Appellant and the relevant legal provisions in arriving at the additional income tax liability payable for each of the years under review

The Respondent having given the Appellant every opportunity to produce satisfactory evidence regarding intercompany expenses and granted concessions to the

Appellant where it was convinced to do so, and the Appellant having failed to convince us otherwise, we hold that the Respondent was right to have added back to the Appellant's taxable profits a total of N147,789,087.00(one hundred and forty seven million seven hundred and eighty nine thousand and eighty seven only) as disallowable intercompany expenses for 2000 to 2004 FY.

Having considered all the evidence before us we hold that the Notice of Refusal to Amend assessments number LTP/PH/10253833/2005/78 OF 26TH November 2007 issued by the Respondent in respect of the Appellant's Company Income Tax and Education Tax is in accordance with the law and valid

We confirm the validity of the Respondent's notices of Additional Assessment in respect of 2002 to 2004 financial years or the 2003 to 2005 years of assessment. The self assessment returns or any other tax returns submitted by it to the Respondent is legally reviewed and varied by the Respondent and cannot be the basis of the Appellant's taxes for 1999 to 2004 as requested by the Appellant.

We dismiss the Appeal of the Appellant Core Laboratories Nigeria Limited as an abuse of the Administrative processes under the Tax Laws.

Accordingly we find for the Respondent and order,

1. That the Federal Inland Revenue Service assessment/ decision/ action/ demand notice of PCBA 060,PCBA061, PCBA 062, PCBAET 040, PCBAET 041, PVBAET 041, PCBAET 042, AND PCBAET 043 DATED 7/8/2007 are valid and made in accordance with the law.
2. That the Appellant shall pay its additional tax liabilities on its additional Profit, earnings and expenses of N857,934,812 and N147,789,087 according to the relevant years of assessment.
3. We make no order as to costs.

HON ADENIKE EYOMA

25/4/14

ACTING CHAIRMAN

HON UGBABE DANIEL UGBABE

COMMISSIONER 25/04/14

HON SALIHU.A.BARAU

25/4/14

COMMISSIONER

Appellant Counsel: Innocent Ekpen Esq.

Respondent Counsel: Daniel Onukun with Osatohon Ihesekhien Esq

TAX APPEAL TRIBUNAL
SOUTH SOUTH ZONE
17 APR 2018
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SIGN