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

APPEAL NO. TAT/SEZ/015/2015

BETWEEN:

THE SHELL PETROLEUM DEVELOPMENT COMPANY
OF NIGERIA LIMITED ..... APPELLANT/RESPONDENT
AND
ABIA STATE BOARD OF INTERNAL REVENUE .... RESPONDENT/APPLICANT

BEFORE THEIR HONOURS

Chairman: Prof. C. J. Amasike

Commissioners: Ignatius Chibututu, Esq.
Dr. (Mrs.) Josephine A. A. Agbonika
Prof. Eddy Omolehinwa
Chief Ngozi I. Amaliri

RULING

The Appellant/Respondent is a company registered under the Companies and Allied Matters Act, 2004 with its registered office at Freeman House, 21/22 Marina, Lagos, Nigeria. The Respondent/Applicant is an agency of the Abia State Government of Nigeria with its office Behind Aguiyi Ironsi Conference Centre, Off Finbars Road, Umuahia, and is vested with the powers to ensure the effectiveness and optimum collection of all taxes and penalties due to the government of Abia State under the relevant laws.

The Appellant/Respondent after filing this suit, filed a Motion on Notice dated 24th November 2015 seeking the following reliefs from this Tribunal:

a. **AN ORDER** of this Tribunal extending the time within which the Respondent/Applicants may file its Notice of Appeal and other supporting documents against the decision of the respondent not to discharge the Demand Notice (with Reference No. BIR/ABTA/002/VOL.1/1A dated 16th January, 2014) setting out an additional assessment of Personal income Tax (PIT),Withholding Tax (WHT), State Development Levy and Business Premises Levy for the 2006-2011 years of assessment.

b. **AN ORDER** of this Tribunal deeming the Notice of Appeal and other supporting documents already filed and served as having been properly filed and served.

AND FOR SUCH FURTHER OR OTHER ORDERS as this Honourable Tribunal may deem fit to make in the circumstance.

The Motion on Notice was supported by a Fifteen (15) paragraphed Affidavit deposed to by one Mr. Chukwuma Ikwuazom, a Legal Practitioner in the employment of Messrs. Aluko & Oyebode. The Applicant relied on all the averments contained in the Affidavit. The contention was that they had received on 27th August, 2015, a notice of refusal to amend from the Respondent [Abia State Board of Internal Revenue]. The Respondent contended on the other hand that since they posted the notice on the 4th of August, 30 days allowed for objection had elapsed and therefore the Appellant/Applicant were out of time and the notice of appeal defective.

Appellant/Applicants filed a written address in support of the motion on notice, in which they formulated the issue below for determination:

> ***Whether this Honourable Tribunal, in the circumstance of this Application, ought to extend time within which the Applicant may file the Notice of Appeal and other supporting documents?***

Appellant/Applicants' Case

In the counsel's argument, he submitted that, this Honourable Tribunal can and ought to grant the prayers sought by their application to extend the time within which the Applicant may file its Notice of Appeal and other supporting documents, for the reasons adduced in the Affidavit in support of the application. They referred to:

Order X Rule 3 of the Tax Appeal Tribunal (Procedure) Rules 2010(the Rules) which provides thus-

> ***(1)The Tribunal may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by the Rules, or any decision, order or direction to do any act in any proceedings.***
> ***(2) The Tribunal may extend any such period as is referred to in sub-rule (1) of this rule although the application for the extension is not made until after the expiration of the period.***

They submitted that the effect of the above provision was that this Honorable Tribunal was empowered to grant such orders extending time as required, to enable the Applicant file its Notice of Appeal and other supporting documents, all dated 28th September, 2015.

The Applicants stated that from paragraphs 8 to 13 of their affidavit, they, to the best of their knowledge, filed this appeal within the stipulated time by the Rules, but since the Respondents were contending that they received the Respondents' Notice of Refusal to amend earlier than the Applicants' own records indicated, they, out of abundance of caution, had considered it prudent to file the instant application in order to pave the way for proper determination of appeal on the merits. The Applicants submitted therefore that any delay (if at all) in filling and serving its Notice of Appeal and other supporting documents, as shown in the affidavit in support of this application, was not as a sign of disrespect to this Honorable Tribunal or to overreach the Respondent.

They further submitted that in exercising this discretion, the Honourable Tribunal should have regard, to doing substantial justice, as against reliance of technicalities. He referred the Tribunal to the following cases: **Veritas Insurance**

Limited v. City Investment Limited (1993) 3 NWLR (Pt 281) 349 @ 369 and **Complete Comm. Limited v. Onoh** (5 NWLR) (PT 549) 197.

The argued that the principle of law guiding the grant or refusal of an application for the extension of time to take a procedural step had been the subject matter of a number of judicial pronouncements and that the authorities were unanimous to the effect that extension of time was a matter for the exercise of discretion by the Court in question, and as in all such exercise of judicial discretion, the court must exercise this discretion judiciously and judicially to meet the ends of justice.

They referred the Honourable Tribunal to the case of **United Bank of Africa Plc V. Mode Nigeria Limited** (2001) 1 N.W.L.R (Pt 693) 141 @ 148, in which, while considering the exercise of discretion by a court **Per S.A Olagunju, JCA** held that:

> ***The discretion of this court as to the range of matters for which the court may grant the indulgence of extending the time within which to do an act or take a step in pre-trial, trial or post-trial proceedings appears to be infinite. The only limitation is that since the dispensation to extend time is discretionary, it must be extended judicially and judiciously by balancing the interest of the parties appreciating the epigram that the discretion is not a one way traffic.***

It was further submitted before the Honourable Tribunal that, in its judicious and judicial exercise of discretion to extend time under the rules, the Tribunal was required to consider the reason for the delay as placed before it by the Applicant. In support of this, they referred the Tribunal to the case of **Ejikeme V. Ibekwe** (1997) 7 NWLR (pt 514) 592 at 597, paragraph C and **Odutola v. Lawal** (pt 749) 633 at 660 and further to the case of **Mobil Producing (Nig.) Limited v. Umenweke (2002) 9 NWLR (pt. 773) 543 at 554, Paras G-H**; where it was held that:

> ***Rules of court are not there to defeat the course of justice. Consequently, a court must always do justice in any case that is placed before it and it must not allow itself to be deterred by the objection raised on technicalities, particularly when such objection relate to procedural irregularities which are curable.***

They further submitted that in balancing the interest of parties, neither of the parties will be prejudiced by the grant of the instant application.

The Respondents filed a reply on point of law to the motion for extension of time. In filing this reply on point of law, the Respondents did not file any counter affidavit, but stated, however, that this did not imply that facts deposed to in the affidavit of the Appellants in support of the motion had been admitted by them.

In responding to the motion for extension of time, they referred the Tribunal to paragraph 5 of the Appellant/Applicant's motion, and submitted that by rules of service by post (courier) the letter was deemed to have been received on the day it was posted being 4th of August, 2016.

Counsel urged the Honourable Tribunal to hold that the letter of the Respondent of 4th August, 2015, was received on the same date. They submitted that the contention by the Appellant/Applicant that the letter of 4th August, 2015 was received on 27th August, 2015 was intended to deceive the Tribunal. The Respondent further contended that the courier company could not have served a letter on 27th August, 2015 being a Sunday, and a non working day.

On the application for extension of time, they submitted that the notice of appeal filed on 28th day of September, 2015 was incompetent, having exceeded 30 days after receipt of Notice of Refusal to Amend (NORA) and there was therefore no appeal before this Honourable Tribunal.

The Respondent [ASBIR] argued further, that, ordinarily, a motion for an extension of time to file an appeal can only be made before any appeal could be filed and therefore the application for an extension of time coming after an incompetent notice of appeal had been filed was also incompetent, because a party cannot put something on nothing and expect it to stand.

They referred the Tribunal to the Supreme Court decision in **Auto Import Export Adebayo (2003) ISCM pp 154, at 162, 163 & 169** and submitted that the motion for extension of time was standing on nothing, more so, the Appellant/Applicant had not shown any sufficient cause as provided by Order III Rule 2 of the Rules of the Tribunal.

They argued that the motion for extension of time, coming after an incompetent notice of appeal had been filed was in itself incompetent and that even if the Tribunal held the view that the Appellant/Applicant can still come at this stage through an application for extension of time, the Respondent submitted that for an application for extension time to be competent, it must include the trinity prayers. These trinity prayers they submitted are;

1. Extension of time within which to seek leave to appeal.
2. Leave to appeal.
3. Extension of time to appeal. The Respondent therefore submitted that a perusal of the application for extension of time of the Appellant/Applicant did not contain the trinity prayers, and therefore incompetent.

Counsel for the Respondent urged the Tribunal to dismiss the application for extension of time to file brought by the Appellant/Applicant.

The Respondent [ASBIR] went further to file a motion dated the 29th day of November, 2015, praying the Honourable Tribunal for an order dismissing this suit.

This motion was supported by a 13 paragraphed affidavit, deposed to by one C.C. Onyeabor the Director of Audit of the Respondent/Applicant.

The Respondent/Applicant relied on all the paragraphs of the Affidavit, adducing the following grounds for this application;

a. Lack of locus standi of the Appellant to bring this Appeal. They referred to paragraphs 6 to 11a of the Affidavit in support of the motion.
b. Lack of jurisdiction of the Tribunal to hear and determine the Appeal.
c. That the Appeal was incompetent.

The Respondents filed a written address in support of their motion.

In arguing the grounds, they started with the ground bothering on lack of jurisdiction of the Tribunal to entertain the Appeal and stated that the law was settled that it was the instrument establishing a body that also provides for its jurisdiction and that the Tax Appeal Tribunal was established pursuant to Section 59 of the Federal Inland Revenue Service Act of 2007 and by extension, the powers and Jurisdiction of the Tribunal were as provided under the Tax Appeal

Tribunal Procedure Rules, 2010 made pursuant to the Federal Inland Revenue Service (Establishment) Act of 2007.

They argued that the result was that the Tribunal cannot go outside its powers as provided under these Rules of 2010 and the FIRS Act.

They referred the Honoural Tribunal to Rule and state that by Order III, Rule (1), of the Rules of the Tribunal, a person aggrieved by an assessment or demand notice made upon him by the Service or aggrieved by an action or decision of the Service under the provisions of the tax laws administered by the Service may appeal against such action, decision assessment or demand notice within the period stipulated here under.

In relation to what 'Service' this Rule referred to, they submitted that, "Service" referred to in this Rule meant the Federal Inland Revenue Service established pursuant to Section 1 of the Federal Inland Revenue Service Establishment Act, 2007.

They referred the Tribunal to Order 11 Rule 1 of the rules of the Tribunal, where the interpretation section which defined "the Service" stated that "Service" meant Federal Inland Revenue Service established pursuant to section 1 of the Federal Inland Revenue Service (Establishment Act, 2007).

Taking the argument further, the Respondent stated that an Appellant can only appeal against a disputed decision.

As to the meaning of a 'disputed decision', the Respondent submitted that it meant disputed decision of the Service of the Federal Inland Revenue Service.

This argued that their position was also supported by Order 11 Rule 1 of the Tax Appeal Tribunal Procedure Rules, 2010.

They submitted therefore that the true position of the law was that the appeal this Honourable Tribunal can hear and determine must be an appeal against the disputed decision of the Federal Inland Revenue Service established pursuant to **Section 1 of the Federal Inland Revenue Service (Establishment Act, 2007).**

They submitted that there was therefore nothing in the Rules, or any other enactment entitling the Tribunal to hear and determine an appeal against the

'disputed decision' of the Abia State Internal Revenue Service, established not by the Federal Inland Revenue Service (Establishment) Act, 2007, but by the Abia State Board of Internal Revenue Law of 2008.

Furthermore, the jurisdiction of this Honourable Tribunal, they argued, was limited to those matters for which the Federal High Court was entitled to hear and determine as provided in **Section 251 sub-section 1 of the 1999 Constitution of the Federal Republic of Nigeria.**

They argued further that the Tax Appeal Tribunal Procedure Rules, 2010 provided that appeal from the decision of the Tribunal will lie to the Federal High Court.

Furthermore, they stated that just as the Tribunal cannot entertain appeals against the disputed decision of a State Service, the Federal High Court could not entertain appeal against the disputed decisions of State Service.

Relying on section 251 of the Constitution of the Federal Republic of Nigeria, 1999, they urged the court to decline jurisdiction to hear the appeal on this ground.

2ND GROUND:

LACK OF LOCUS STANDI

On the ground of lack of locus standi to bring this appeal, the Respondent/Applicant relied on paragraphs 6-11 (a) of the affidavit in support of the motion, deposing that the Appellant was not a taxpayer in the Respondent/Applicant's office and that Pay As you Earn taxes were matters between the Respondent/Applicant and the individual employees of the Appellant, who had not appealed to this Honourable Tribunal.

They referred the Tribunal to **7up Bottling Ltd. V. LSIRS (2000) 3 N.W.L.R (Pt. 650) page 565 at 603 paragraph F-H.** and further stated that the Appellant was only an agent of the Respondent for the purposes of deducting and remitting personal income taxes from the employees of the Appellant and remitting same to the Respondent/Applicant.

They argued that the Appellant being an agent of the Respondent can only act in the interest of the Respondent, who is their principal. It therefore did not lie in the mouth of the Appellant to question the principal in the areas of the agency. In this

regard, they referred the Tribunal to **page 412 of Topical issues on Nigeria Tax Laws and related Areas by Josephine A.A. Agbonika.**

They alleged that there was no interest of the Appellant that was affected by the decision of the Respondent/ Applicant against the taxpayers and therefore they lacked the locus standi to bring this Appeal. They referred to the case of **P.M. Ltd. V. The M.V Dancing Sister (2012) 207. LRCN page 168, at 187 k 2.**

On this ground they urged the Honourable court to dismiss the Appeal.

Lastly, it was the contention of the Respondent/Applicant that the notice of Appeal was incompetent having been filed out of time. The result therefore was that there is no appeal before the tribunal.

They referred the Tribunal to paragraph 13 of the written statement on oath of C.C. Onyeabor where he deposed to the fact that the Respondent/Applicant served on the Appellant/Respondent its Notice of refusal to further amend the demand notice on the 4th day of August, 2015, but the notice of appeal was filed on 28th day of September, 2015, more than 30 days provided by the rules for the filing of Appeals.

They relied on Order III Rules 2 of the Tax Appeal Tribunal Rules and also referred the Honourable Tribunal to the Supreme Court case of **Auto Import Export v. Adebayo [2003] ISCM page 104 at page 169** where, they stated, the Court held thus:

> **In particular, failure to file an appeal within the statutory period of time prescribed by law without obtaining an extension of time within which to appeal in accordance with statutory requirements which are conditions precedent to filling of a valid appeal constitute a grave irregularity, so fundamental that there would be no appeal by the Appellant which the Court could lawfully entertain. Such irregularity can by no means be regarded as mere technicality but constitutes an incurable defect that must deprive the appellant's court of jurisdiction to entertain the appeal. And whether or not the irregularity was noticed or that no objection**

was taken to it is not an argument which can legitimately be put forward with any effect when the matter comes before the court.

The Respondent/Applicants' counsel stated further that failure to obtain leave for extension of time to appeal within the specified time or period was a fundamental irregularity which affected the proper foundations of the appeal. This they said was beyond mere technicality which this court could forgive.

They relied on the case of **Auto Import Export V. Adebayo (2003) ISCM, page 104, at of 169"** to conclude that the implication was that there was no appeal before the Tribunal to be heard and determined and urged this honourable Tribunal to dismiss the incompetent notice of Appeal occupying the Tribunal's cause list.

APPELLANT/RESPONDENT'S REPLY [SPDC]

The Appellant/Respondent in opposition to the Respondent/Applicant's motion on Notice dated 20th November, 2015 filed a 13 Counter Affidavit deposed to by Mr. Tochukwu Anaenugwu, a legal practitioner in Aluko & Oyebode, the firm of legal practitioners representing the Appellants/Respondents in this proceeding. They relied on all paragraphs of the counter Affidavit and the exhibits attached thereto. They also filed a written address in support of the counter affidavit in which they formulated the sole issue below for determination:

Whether having regard to the entire factual circumstances of the Application and the principles of law thereon, this Honourable Tribunal ought to grant the reliefs sought by the Applicant in the Application?

The Appellant/Respondent submitted that the Applicant[ASBIR] totally misconceived the principles of law pertaining to the instant application and misapplied the said principles to the facts of the instant cause.

The Appellant/Respondent, through their counsel replied to the arguments as put forward by the Applicant [ASBIR] on each ground of the Application as follows;

Lack of jurisdiction by the Tribunal

They argued that it was a settled principle of law that the source of the jurisdiction of a court or Tribunal was wholly statutory, as they derive their jurisdiction from the statute that created them, other relevant statutes, as well as the constitution and

therefore, cannot venture to assume jurisdiction over a matter, except such jurisdiction had been statutorily prescribed. They referred the Tribunal to the case of **Gov, Ekiti state v. Chairman Ilejemeje L.G.** (2006) ALL FWLR (pt. 341)128 at 1294 (CA).

Where the court held

> **"It is also firmly established that the jurisdiction of a court is so fundamental that in its absence, the proceeding no matter how beautifully conducted will be rendered a nullity. Hence, jurisdiction of a court can neither be implied nor conferred by either the parties or the court itself but can only be conferred or extended by statute."**

They also referred the Honourable Tribunal to the case of **Obiuweubi v. Central Bank of Nigeria** (2007) 7 NWLR (pt. 127) 465, the court per Adekeye, J.S.C. (p. 506, paras. A-B) which held as follows:

> **"Generally speaking, courts are creatures of statute and it is the statute that created a particular court that will also confer on it, its jurisdiction. Jurisdiction may be extended not by the courts but by the legislature. Afribank (Nig.) Plc v. Akiwasa (2006)5 NWLR, PT.974 PG. 619. Okulate v. Atuosanga(2000) JCS 107 Onuorah v. KRPC (2005) 6 NWLR, pt. 921, pg. 393. Messers Mr. Scheep v. The M'V'S Araz (2000) 72 SC., PT 1 Pg.164."**

On the premises of the foregoing authorities, They submitted that the arguments canvassed by the Applicant that this Honourable Tribunal lacked the jurisdiction to entertain the Appeal was untenable, having regard to the provisions of the relevant and applicable tax legislation. They referred this Honourable Tribunal to the provisions of sections 59 of the Federal Inland Revenue Service (Establishment) Act 2007 ("FIRS Act"), and Section 60 Personal Income Tax Act, 2011 (As amended) ("PITA"), which they reproduced in relevant parts as follows;

CERTIFIED TRUE COPY
TAX APPEAL TRIBUNAL
SOUTH EAST ZONE
Sign ..... Date 18/4/18
Name
Designation: Secretary

Section 59 of the FIRS Act provides as follows:

1. ***A tax Appeal Tribunal is established as provided for in the fifth schedule to this Act.***
2. ***The Tribunal shall have power to settle dispute arising from the operations of this Act under the First Schedule.***

They also referred the Honourable Tribunal to paragraph 11 of the fifth schedule to the FIRS Act, which reproduce hereunder

> ***"11 (1) The Tribunal shall have power to adjudicate on disputes, and controversies arising from the following tax laws (hereinafter referred to as "the tax laws")***
>
> ***(i) Companies income Tax Act.CAP. 60 LFN 1990;***
> ***(ii) Personal income Tax Act No. 104, 1993;***
> ***(iii) Petroleum Profits Tax Act CAP .354 LFN, 1990;***
> ***(iv) Value Added Tax Act No 102, 1993;***
> ***(v) Capital Gains Tax Act CAP.42LNF, 1990; and***
> ***(vi) Any other law contained in or specified in the First Schedule to this Act or other laws made or to be made from time to time by the National Assembly."***

and Section 60 of PITA which provided as follows:

> ***"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."***

and submitted that a combined reading of the above reproduced sections, clearly showed that this Tribunal, in addition to the jurisdiction conferred on it by the FIRS Act, was statutorily vested with the jurisdiction to determine disputes that arise out of the operations of PITA, as was the case in the instant appeal.

They submitted further that a cursory look at the reliefs sought by the Respondent in its appeal reveal undoubtedly that the claims and issues in the Respondent's appeal, arose out of the operations of PITA. Specifically, by its appeal, the

Respondent challenged the decision of the Applicant [ASBIR], in assessing, and refusing to set aside the additional assessments of Personal Income Tax, Withholding Tax, State Development Levy and Business Premises Levy for the 2006-2011 years of assessment as well as penalty and interest for the alleged late payment of the aforesaid taxes. These taxes were levied by the Applicant [ASBIR] in the exercise of its powers pursuant to the provisions of PITA. They submitted, therefore, that the aforesaid claims of the Appellant/Respondent in its appeal fall clearly within the ambit of matters for which this Honourable Tribunal can validly exercise its jurisdiction and urged the Tribunal to so hold.

The Apellant/Respondent noted that the Applicant [ASBIR] did not challenge or impugne the validity of the provisions of Section 60 of PITA which it used to collect and enjoy taxes imposed by PITA while at the same time sought to hide from the adjudication procedure prescribed by PITA.

The submitted that having shown that the jurisdiction of the Tribunal extended to matters/disputes arising out of the operations of PITA, it follows therefore that, the Applicant's contention that the said jurisdiction was circumscribed by the character of the tax authority was unsupportable, having regard to the section 108 of PITA, which defined the term 'relevant tax authority' to mean,

> **"The tax authority of a territory in which an individual is deemed to be resident."**

They further argued that the said section equally defined 'tax authority' to mean,

> **"The Federal Board of internal Revenue, the state Board or the local Government Revenue Committee."**

They argued that the rationale for the above position was not far-fetched and found support in the fact that the Applicant being a tax authority under PITA, the Respondent's Appeal protested the Applicant's decision not to discharge the additional assessments levied against the Respondent in the exercise of its functions under PITA.

Furthermore they argued that another logical conclusion that can be drawn from the expansive jurisdiction conferred upon the Tribunal as well as the provision of

paragraph 11 (1) of the fifth schedule to the FIRS Act was that, contrary to the contention of the Applicant that this Tribunal cannot exercise jurisdiction over decisions of the Applicant, any reference to the Federal Board of Internal Revenue in the rules of this Tribunal, will necessarily be interpreted to include State Board of Internal Revenue, such as the Applicant.

They submitted further that Applicants' [ASBIR] submission that the jurisdiction of this Tribunal was limited to matters which the Federal High Court had jurisdiction under Section 251 of the Constitution, was unmeritorious and misconceived and indeed unsupported by legal submission. They reiterated the point that the jurisdiction of a court was statutorily determined and as such, the fact that the jurisdiction of the Tax Appeal Tribunal had been extended to cover matters arising from the operations of PITA and involving state tax authorities, its jurisdiction cannot be determined by reference to the jurisdiction of the Federal High Court.

Based on the foregoing submissions, they urged the Honourable Tribunal to hold that it possessed the requisite statutory jurisdiction to entertain and determine the Appellant/Respondent's Appeal.

Locus Standi of the Respondent

Counsel for the Appellant/Respondent submitted further that, it was trite that legal standing showed the legal capacity of a plaintiff, based upon sufficient interest in a subject matter, to institute proceedings in a court of law or to pursue a specified cause. They argued that it was the threshold issue which went to the root of a case and determined a court's jurisdiction to entertain the claims of the plaintiff.

They futher argued that the relevant factor which determined whether or not a plaintiff possessed the requisite legal standing to institute an action was whether his claims disclose a legal or justiciable right or sufficient interest in the subject matter of the action that had been adversely affected or was under imminent threat of being affected. As such, plaintiff, whose legal standing hasd been challenged, will only be able to succeed if he demonstrated that he possessed sufficient right/interest, which had been infringed or was under threat of infringement, in the subject matter of an action, aimed at seeking redress. They referred this Tribunal to the cases of **Owodunmi v. Reg. Trustee of CCC** (2000) 10 NWLR (pt. 675) p.

315 and **Re-Ijelu V. L.S.D.P.C.** (1992) NWLR (Pt. 266) 414, In the latter case they argued that the court in considering the relevant essentials for the requisite locus standi held as follows;

> **In order to have a locus standi in a matter, whether by way of commencement of an action or in the exercise of an appellate right, the party must go beyond mere interest to show that he has in law sufficient interest to prosecute the matter. An agglomeration of these interests or supposed or speculative interests bordering on egotism and the like will not suffice. Similarly, a mere vulgar, pretentious or community interest is not enough. So also when the interest paraded by the party before the court is only peripheral and intangible. On the contrary the party must show that his legal interest is really at stake and that he must commence the action to retrieve a known and genuine interest which he does not necessarily share with the members of the public.**

They further referred to the cases of **Mohammed v. Attorney-general Kaduna State and Another** (1981) 1 N.C.L.R. 117 and **Akure v. N.P.N Benue State** (1984) 5 N.C.L.R. 449 and argued that locus standi or standing must emanate from and be rooted in sufficient interest conferred on the party by law and furthermore should be an element of propriety and not that the party commonly shared in union or in unison with the generality of the public.

They further referred to the cases of **Ovie Whiskey v. Olawonyi** (1985) 6 N.C.L.R. 156; **Alhaji Agbonikhena and others v. Egba and others** (1987) 2 NWLR (PT. 57) 494; **Aberuagba v. Attorney-General Ogun State** (1984) 5 NCLR 667.

They also referred to the case of **Chief Ojukwu v. Governor of Lagos State** (1985) 2 NWLR (pt.10) 806, where the court held:

> **The test of interest to determine a party interested in a matter is whether the person could have been joined as party to the suit. See also Mbanu v. Mbanu (1961) 1 All NLR 652; (1961) 2 SCNLR 305, Maja v. Johnson (1951) 13 WACA 194.**

One other test of sufficient interest is whether the party seeking for the redress of remedy will suffer some fundamental injury or hardship arising directly from the litigation. If the court is satisfied that he will so suffer then he must be heard as he is entitled to be heard. But the injury or hardship which must be real and tangible must be directly related to the litigation.

They submitted that based on the above authorities the Appellant/Respondent possesses the necessary legal standing to prosecute its appeal, as the Respondent had a legal and justiciable right in the subject matter of the appeal, that will be adversely affected should the Tribunal hold otherwise, by granting the Application. In the succeeding paragraphs, they demonstrated to this Honourable Tribunal that the Respondent possesses sufficient interest to prosecute its appeal.

They argued that Sections 81 and 82 of PITA imposed a statutory obligation on an employer, where the tax authority so demanded, to deduct the personal income tax from the emoluments paid to its employees, and remit same to the tax authority. This obligation they argued extended to making such employer responsible/accountable for the amount of tax deducted and remitted, such that same may be recoverable from the employer as a debt due to the tax authority and referred Sections 81 and 82 of PITA, which are reproduced in relevant part below.

Section 81 (1) "Income tax chargeable on an employee by an assessment whether or not the assessment has been made, shall if the relevant tax authority so directs, be recoverable from any emolument paid, or from any payment made on account of the emolument, by the employer to the employee.

Section 82 "An employer require under a provision of this Act to make deductions from emoluments or amounts on account of emoluments paid by him to an employee shall account to the relevant tax authority in such manner as the relevant tax authority may prescribe for the deductions so made, and in the event of failure by the employer to make the deduction, or properly to account thereof, the amount thereof together with a penalty of 10 per cent per annum of the amount plus interest at the prevailing

commercial rate, shall be recoverable as a debt due by the employer to the relevant tax authority.

They submitted that the purport/effect of the above sections operated to attach liability to an employer who was alleged not to have deducted the tax or failed to account properly for the tax deducted and that such employer assumes the rights and obligations of its employees with respect to the deduction and remittance of their personal income tax. They submitted further that the aforesaid sections conferred sufficient interest on an employer who had deducted PAYE taxes from the emoluments of his employees to challenge the decision of a tax authority that alleged that such employer had under- deducted or under-remitted the taxes.

They argued they had as required by law, fully deducted and remitted the PAYE taxes due on its employees income to the Applicant and that by imposing additional assessment of tax, what the Applicant had done was to claim that the Respondent had failed to perform its statutory obligation to fully deduct and remit the said taxes and hence levied the Respondent, additional assessment of taxes to make up for the amount the Applicant claimed were not deducted and and/or remitted. It was therefore their submission that, having claimed that the Respondent failed in its statutory obligation to deduct and remit the taxes in issue, applicant cannot contend that the Respondent has no legal standing to challenge its decision that imposed an additional liability on the Respondent and we urge this Honourable Tribunal to so hold. He referred the Tribunal to the case of **LSBIR. V. SPDCN** (2011) 5 TLRN 60.

Further, it is also a settled principle of law that when the legal standing of a plaintiff to institute an action is challenged, the court ought to look at the plaintiff's originating processes, in order to discern if such plaintiff has the requisite right or interest to maintain such action. He referred the Tribunal to the cases of **Ladejobi V. Oguntayo** (2001) FWLR (pt.45) 780; **Thomas v. Olufosoye** (1988)2 SC 325.

They submitted that a perusal of the Appellant/Respondent's notice of Appeal, together with other supporting documents and exhibits, clearly showed that the additional tax assessments were directed at the Respondent itself and not on its individual employees, on the basis that the Respondent under deducted and under remitted the taxes due from the income of its employees to the Applicant and in

addition, these additional assessments were made final and conclusive against the Respondent, giving the Respondent a 7 days period within which to pay over the assessed liability. These assessments were levied directly against the Respondent, whom by its notice of appeal, sought to challenge the veracity and authenticity of the figures stated therein.

They argued that, the case of **7up Bottling Co. Plc. V. LSIRB** (2000) 3 NWLR (pt. 650) 565, relied upon by the Applicant in support of its contention that the Respondent does not have the requisite legal standing to prosecute their appeal did not support its contention, having regard to the peculiar factual circumstances of the Respondent's Appeal and that the case rather supported the Respondent's position that, since the additional tax assessments were directed at the Respondent itself and not on its individual employees, on the basis that the Respondent under-deducted and/or under-remitted the taxes due from the income of its employees to the Applicant, the Respondent can validly object to the assessments. This position was, according to the Appellant/Respondent endorsed by the Court of Appeal in the said case, (pp.616.paras.E-F) where it held per Nzeako, JCA., as follows:

> ***One issue kept recurring in one's mind as the complaint of the appellant in this appeal was being considered. It is that due to the provisions of Decree 104 of the 1993 which is applicable to the matter in consideration, it would appear that the party which ought to complain if unjustly assessed or taxed is the tax payer, not the employer such as the appellant herein. For, the duty of the employer is to deduct tax in accordance with the law and the directive of the relevant tax authority. Respondent's counsel also raised this point. There is however in my view this qualification that an employer who is accused of failure to deduct and remit tax pursuant to section 72 of the Decree, is entitled to the type of defence such as that being put up by the appellant in this case that such tax is not deductible. But, then, that employer also has a duty, it must be stated, to proffer sufficient evidence to buttress his defence that the relevant tax, either under the PAYE or WHT system, is not deductible.***

They argued that, in the case of **LSBIR V. SPDCN** (supra), the court when faced with the question, on who was legally competent to object to a personal income tax

assessment in respect of PAYE liability, applied the decision in **7up Bottling Co. Plc. V. L.S.I.R.B.** (supra), and held that although objections to an assessment can only be made by an employee, there existed deserving cases where an employer can challenge an assessment imposed on him in respect of a PAYE obligation, such as where the tax authority served a demand notice on the employer and not the employee. In the words of the court (p. 77).

> ***The court finds the claimant's demand notice dated 29th March 2005 (Exhibit CW 4) having being served on the defendant who is the employer and not the employee, can be validly objected to by the defendant.***

It was the Appellant/Respondent submission that to the extent that the additional tax assessments were levied against the Respondents and not against the individual employees of the Respondents, and having regard to the fact that the Respondent had the obligation to deduction and remit the assessed sum, the Respondents therefore has sufficient interest to vest them with the requisite legal standing to ventilate their claims before this Tribunal.

They submitted that it is was preposterous to suggest that, the Respondent, who had been moved by the statutory scheme into the shoes of a debtor to the Applicant [ASBIR] did not have the requisite locus standing, to maintain an action in court, challenging the debt and/or the process employed at arriving at such debt. They submitted further that, the Respondent had a legal and justiciable right conferred upon it by virtue of sections 81 and 82 of PITA, which will be adversely affected, if the Respondent was denied access to this Honourable Tribunal to ventilate their claims and urged this Honourable Tribunal to so hold.

Competence or otherwise of the appeal.

The Applicant contended, at paragraph 4.6. of their written address that the Respondent's notice of Appeal was incompetent by reason of the fact that same was filed out of the time prescribed by the rules of this Tribunal. In response to this contention, the Appellant/Respondent submitted that the mere fact that an appeal had been filed out of time did not of itself render the appeal incompetent. Such an appeal was rather voidable and can be regularized upon an application by an Appellant, seeking the discretionary order of the court, extending time within

which to appeal and a deeming order deeming the appeal as having been properly filed.

They submitted that having filed the appeal on Monday 28 September 2015, in circumstances where the prescribed 30 day period expired on Sunday 27 September 2015, the appeal was filed within time. In support of this submission, they referred to this Honourable Tribunal the provision of Order X Rule 1 (d) of The Tax Appeal Tribunal's Rules which provide thus:

> ***"Where the time expires on a public holiday, Saturday or Sunday, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards not being a public holiday, Saturday and Sunday."***

Assuming but not conceding that this Honorable Tribunal is minded to agree with the Applicant that the Respondent's appeal was filed out of time, we submit that this Tribunal possesses the power under its rules to extend the time within which the Respondent may file her notice of Appeal and deem the otherwise incompetent appeal as having been properly filed.

Order X rule 3 of the Tax Appeal Tribunal (Procedure) Rules, 2010 (the "Rules") provides thus-

> ***"(1) The Tribunal may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or any decision, order or direction to do any act in any proceedings.***
> ***(2) The Tribunal may extend any such period as is referred to in sub-rules (1) of this rule although the application for extension is not made until after the expiration of the period."***

They further referred the Hon. Tribunal to, paragraph 13 (2) of the fifth Schedule to the Federal Inland Revenue Service (Establishment) Act which provides that, the Tribunal, "may entertain an appeal after the expiry of the said period of 30 days if it is satisfied that there was sufficient cause for the delay." And submitted that the effect of the above provisions was that this Honourable Tribunal was

empowered to grant such orders extending time as required, even if such application was made after the expiration of the period, to enable the Respondent file its notice of Appeal and other supporting documents, all dated 28 September, 2015.

They argued that in exercising this power, the Tribunal was required to consider the reason for the delay as placed before it and act with a view to doing substantial justice between the parties and that all authorities are unanimous to the effect that extension of time was a matter for the exercise of discretion by the court in question, and as in all such exercise of judicial discretion, the court must acts this discretion judiciously and judicially to meet the ends of justice. They referred the Honorable Tribunal to the cases of **United Bank for Africa Plc v. Mode Nigeria Limited** (2001) 1 N.W.L.R (Pt. 693)141 and **Ejikeme v. Ibekwe** (1997) 7 NWLR (PT. 514) 592.

They argued that in their paragraphs 7 to 12 of their counter Affidavit, they Respondent averred that, to the best of its knowledge, this filed the appeal within the time stipulated by the rules but since the Applicant contending that the Respondent received the Applicant's Notice of Refusal to Amend much earlier than the Respondent's own records indicated, the Respondent, out of an abundance of caution, had considered it prudent to file the instant application in order to pave the way for the proper determination of this appeal on the merits.

They argued that the Applicant, address, seemed to suggest that an application for extension of time must be first sought and obtained before an appellant can file its notice of appeal and submitted that such contention was incorrect having regard to the fact that the filling of an application for extension of time after the filling of the Notice of Appeal, was not unusual or outside the contemplation of our procedural rules and that was the very reason why a deeming order was usually sought, and was in fact sought in this case. They referred to this Honourable Tribunal the decision in **Nwakwo v. Abazie** (2003) NWLR (pt. 834) 381 at 412D where the Court of Appeal (per Obadina JCA) had this say:

> ***"The position of the law is that where a process is to be filed within a specific time prescribed by law, and the process is filed outside the prescribed time, that process is incompetent. A prayer to the court***

asking the court to deem the incompetent process as duly and properly filed cannot cure the defect in filling the process out of time unless there is a substantive prayer for extension of time within which to file the process.

They argued that, to accept the Applicant's contention would mean that (a) once a party to legal proceedings out of time to take a procedural step, that party must refrain from taking the step until and unless extension of time was granted; and (b) the deeming prayer will be obliterated from our procedural law and neither of these possible consequences can be right or in the interest of justice and for this reason, they urged this Honourable Tribunal to reject the Applicant's contention.

Furthermore they argued that, the Applicant's reliance on the **Auto Import Export v. Adebayo** (2003) ISCM, page 104, did not operate to aid their case. This is because, the case envisaged a situation where the appeal was filed out of time and the motion, filed subsequently, to regularize same was incompetent by reason of its non-service on the Respondents and therefore, technically speaking there was no motion or valid order for extension of time as at the hearing of the appeal. They submitted that this was far from the case in the instant appeal, as the Respondent's appeal had not been heard yet and there was already before this Honourable Tribunal a pending application for extension of time within which the Respondent may file its notice of appeal.

Going further, they argued it is a settled principle of law that where there were two competing motions, one seeking to terminate the proceedings on ground of irregularity; and the other seeking to regularize the irregularity, the latter one was to be heard first. If the application to regularize was granted, the one seeking to terminate shall be withdrawn by its applicant or will be struck out by the court. They referred this Tribunal to the cases **Nalsa & Team Associates V. NNPC** (1991) 11 SCNJ 51 and **Long-John V. Blakk & Ors.** (1998) 5 SCNJ 68.

On the basis of the aforesaid authority, they submitted that this Honourable Tribunal ought to hear and determine the Respondent's application for extension of time one way or the other, before it proceeded to determine the Applicant's application. They argued that where the Hon. Tribunal granted their prayer the ground of incompetence canvassed by the Applicant [ASBIR] would be irrelevant.

Based on the foregoing canvassed arguments, the Respondents' urged the Honourable Tribunal to wholly discountenance the submissions and the authorities relied on by the Applicant tried to show that:

a. This Tribunal had the requisite jurisdiction to entertain the Respondent's Appeal.
b. The Respondents has the legal standing to prosecute her Appeal.
c. The Appeal was not incompetent.

Date of services of notice of refusal to amend

They argued that the Respondent [ASBIR] misquoted the date on which they received the notice of refusal to amend ("NORA" as 27 September 2015 instead of 27 August as stated at paragraph 5 of the affidavit in support of this application deposed to by Chukwuka Ikwuazom on November 2015. They urge the Honourable Court to refer to its records in this matter in order to resolve this point.

Furthermore, they submitted that the NORA that was frontloaded bore their date stamp showing clearly that the document came into their office on 27th August 2015, and that the Respondent whose agent the said courier company referred to at paragraphs 1.3-1.4 of its written address was not identified and their evidence not taken. They submitted that the Respondent having not filed a counter affidavit cannot in a written address attempt to give evidence to contradict averments in an affidavit. In support of their submission, they referred the Honourable Tribunal to the decision of the Supreme Court (per Muntaka-coomasie JSC) in **Mallam Yusuf Olagunju v. Chief E.O. Adesoye & Anor** (2009) 9 NWLR (Pt. 1146) 225 at 255 G-H, where it was stated that:

> **"Though the appellant tried strenuously to convince this court that the name "BASHORUN" is the same as "OSINNOLOHUN", nowhere in the proceedings was such evidence given or explained. It is trite that the counsels' address cannot take the place of evidence."**

They urged this Honourable Tribunal to reject the Respondents' [ASBIR] unsupported contention.

The application for extension of time filed after the notice of appeal

They submitted that the filling of an application for extension of time after the filling of the notice of Appeal, out of time was not unusual or outside the contemplation of our procedural rules and that, that was the very reason why a deeming order was usually sought, and was in fact sought in this case. They referred the Honourable Tribunal to the decision in **Nwankwo v. Abazie** [2003] NWLR (pt. 834) 381 at 412 D where the Court Of Appeal (per Obadina JCA) had this to say:

> **"The position of the law is that where a process is to be filed within a specific time prescribed by law, and the process is filed outside the prescribed time, that process is incompetent. A prayer to the court asking the court to deem the incompetent process as duly and properly filed cannot cure the defect in filing the process out of time unless there is a substantive prayer for extension of time within which to file the process."**

They argued that the Respondent did not quarrel with the substantive reason given for the delay i.e. that the last of the 30 days for filling fell on a Sunday, the 27th of September 2015, rather, the Respondents' quarrel; was that they filed their appeal first, and thereafter sought to regularize it. To accept the Respondent's contention will mean that: (once a party to legal proceedings was out of time to take a procedural step, that party must refrain from taking the step until and unless extension of time was granted; and (b) the deeming prayer will be obliterated from our procedural law and submitted that neither of these possible consequences can be right or in the interest of justice. They urged the Honourable Tribunal to reject the Respondent's contention.

Trinity prayer

They submitted that the Respondent's argument on the necessity of a trinity application was totally misconceived at best and devoid of any merits and stated that while they agree with the Respondents' enumeration of the contents of a 'trinity application' as set out in the second page (final page) of its written address, they submitted that a 'trinity application' was neither relevant nor applicable in the circumstances of this case.

They argued that the Respondent in arguing the necessity of the 'trinity prayers' either misunderstood the legal character of the their right to challenge a tax assessment after the issuance of a NORA or misunderstood the essence of a 'trinity application'.

They argued that in considering the essence of a 'trinity application' the decision in considering **Ogbogboro v. Omenuwoma** [2005] 1 NWLR (pt. 906) 1 at 14-15 A and C where the Court Of Appeal (per Augie JCA) stated thus was very important:

> ***"Mr. Izoma replied that the "trinity" prayers will be required and is necessary only where the appeal is not as of right and leave is required, but that the applicant is applying as of right and so did not need extension of time within which to appeal... to start with, I agree with Applicant's counsel that the Trinity prayers will not be necessary in this case. As the principle that there must be a union of three prayers for an application for enlargement of time within which to appeal is applicable only when such an application is combined with an application for leave to appeal which is not the situation here."***

They argued regarding the character of the right to appeal against the decision contained in a NORA that the provisions in paragraph 13 of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act, 2007 and the Personal Income Tax, 2011 (as amended) make it abundantly clear that an appeal was as of right and that there was no requirement for leave, whether of the Respondent or of this Honourable Tribunal or indeed of any other person.

They submitted that on the basis of the argument set out in their original written address, as well as the arguments herein, they urged the Honourable Tribunal to grant their application as prayed.

TRIBUNAL

We must start by commending both counsel in this case for their ingenuity in bringing to bear abundant literature and advocacy in respect of the issues at stake.

These arguments emanated from a pending appeal by the Appellants in respect of additional assessments and interests in respect of Personal Income Tax liabilities of the Appellant's employees. The Respondents raised a preliminary objection which among other issues touched on the issue of jurisdiction of the Tax Appeal Tribunal, incompetence of the Appeal for having been brought outside the time allowed by the statute and locus standi of the Appellants in this issue. The first issue under consideration therefore is the issue of jurisdiction of the Tax Appeal Tribunal.

Jurisdiction is the life wire of every case and can be raised at any time. When it is so raised, it must be considered before delving into any voyage of discovery in respect of the matter. See **Governor of Ekiti State v. Chairman Ilejemeje L.G.** (Supra).

The Respondent Applicants that TAT lacked the jurisdiction to hear and determine this Appeal, unless it is an appeal against a disputed decision of the Federal Inland Revenue Service. He relied on Section 1 of the FIRS (Establishment) Act. And that that the definition restricted the definition of 'the Service' to the FIRS only and therefore did not cover disputes from the State Board of Internal Revenue Service. There is no doubt that the word 'Service' as defined by the FIRS Act 2007 means Federal Inland Revenue Service as defined by S. 1.

We are not unmindful of Section 59 which created the TAT and the various laws which by the 5th Schedule in paragraph 11(1) it is obliged to adjudicate on.

The TAT shall no doubt have jurisdiction to handle all disputes arising from the laws mentioned thereunder. Personal Income Tax being one of the taxes so mentioned is therefore under the jurisdiction of the Tax Appeal Tribunal. To make issues abundantly clear, section 60 PITA provides for jurisdiction of the Tribunal over disputes emanating from the operations of the Act.

TAT is not conferred with the powers provided under Section 251 of the Constitution as that is the prerogative of the Federal High Court. TAT powers are partly derived from section 59 and assessments such as additional assessments of Personal Income Tax, withholding taxes and levies and business premises levies from 2006 to 2011 as well as penalties and interests come under the purview of its scope of its adjudication. We are persuaded by all the arguments of the

Appellant/Respondent in this regard and hold that this Tribunal possesses the requisite statutory jurisdiction to entertain and determine this appeal.

The second issue is that of the competence of the appeal having been filed 30 days after the Respondent had issued a notice of refusal to amend (NORA) to the Appellant.

While the Respondent contends that the notice was received by the Appellant on the 4th of August, 2015 when the notice was posted, the Appellant alleges that the notice was not received until 27th August, 2015 and therefore their 30 days expired on the 27th of September, 2015 thereby making the appeal one day late.

We are in agreement with the Respondent that the date of postage is deemed to be the date of acceptance of the document in question. 30 days from the 4th of August would fall on the 3rd of September, 2015. Even if the Tribunal was to accept that they received the document on 27th August which was the date of their stamp on the document, thirty days will end on the 26th of August. Filing on the 28th of September, 2015 was clearly out of time.

By virtue of Section 13(2) of the Fifth Schedule to the FIRS Act, 2007, it is provided that,

> **The Tribunal may entertain an appeal after the expiration of the said 30 days if it is satisfied that there was sufficient cause for delay.**

The Appellant has shown through the documents filed before this Tribunal, that it received the NORA on the 27th of August, 2016 and that because the 30th day fell on a holiday, they filed on the next working day being 28th September, 2015. To properly place this proceeding before the Tribunal, the Appellant has brought a motion on notice seeking extension of time and for their documents to be deemed to be proper before the Tribunal.

By virtue of Order X Rule 3 of the Tax Appeal Tribunal (Procedure) Rules 2010, the Tribunal may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or any decision to do any act in any proceedings. See the case of **Nwankwo v. Abazie** (Supra), where the Court of Appeal emphasized that,

a prayer to the court asking the court to deem the incompetent process as duly and properly filed cannot cure the defect in filing the process out of time unless there is a substantive prayer for extension of time within which to file the process.

This Tribunal is guided by the above authorities and holds that although the processes of the Appellant was incompetent having been filed out of time, by their application, time is hereby extended to cover when they filed and their processes and are deemed to be proper before this Tribunal. We hold in favour of the Appellant on this ground. It is important to note that the TAT is not bound by strict rules of procedure and can dispense with issue of seeking leave to amend as required by the trinity rule. Besides, the appeal in this case is as of right and does not require leave to file.

The third leg of the objection of the Respondent is as to the locus standi of the Appellant to sue. Their contention is that the Appellant not being the taxpayer in respect of Personal Income Tax, had no locus standi to sue. The Appellant is the agent of the Respondent for the purpose of deducting and withholding those amounts from its employees and remitting same to the Respondent. Where the Appellant fails to deduct or deducts and fails to remit, the Respondent can proceed against them for the amount involved. The duty to deduct and remit is statutorily imposed on employers by sections 81 and 82 PITA.

In **Owodunmi v. Registered Trustees of CCC** (2000) 10 NWLR (Pt. 675) p. 315, it was held that, a plaintiff whose legal standing has been challenged will duly be able to succeed if he demonstrates that he has sufficient right or interest which has been infringed or is under threat of infringement in the subject matter of an action, aimed at seeking redress.

Since there is liability on the Appellant to deduct and remit to the Respondent or account for the sum where they fail to so do, that confers sufficient interest on the employer to deduct and remit taxes as the case may be, so that they are not treated as a debtor in respect of that sum.

We hold therefore that the Appellants/Respondents have the locus standi to institute this action.

The Tribunal holds for the Appellants/Respondents on the three issues raised and dismisses the preliminary objection of the Respondents/Applicants. Time for filing the appeal is hereby extended and the appeal is properly before the Tribunal. This is our ruling. No orders as to costs. Parties are entitled to appeal.

Signed:

Prof. C.J. Amasike, LL.B[Hons]; Ph.D; FCI.Arb; F.DRI; M.ADRg; ACIT
Chairman,
Tax Appeal Tribunal, South East Zone
Date: 03/06/2016

CERTIFIED TRUE COPY
TAX APPEAL TRIBUNAL
SOUTH EAST ZONE
Sign ..... Date 18/4/18
Name Ucha Ukuta
Designation Secretary