IN THE TAX APPEAL TRIBUNAL
IN THE LAGOS ZONE
HOLDEN AT LAGOS

APPEAL NO.TAT/LZ/CIT/076/2014

Between

OLOKUN PISCES LIMITED ..... APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE ..... RESPONDENT

JUDGMENT

The Respondent upon receiving notice of additional assessments from 2009 – 2013 years of assessment, the Appellant raised its objections to which the Respondent issued its Notice of Refusal to amend. Appellant then filed its Notice of Appeal dated 5th September 2014 which it amended by an Amended Notice of Appeal dated 8th June, 2015.

The appeal was predicated on the following grounds:

"(a) The Respondent's total reliance on section 19 CITA, which partly favoured it, without considering section 23[1] [q] CITA, which makes profit arising from repatriated export proceeds used exclusively for the purchase of raw materials, plant, equipment and spare parts tax exempt, in charging the appellant to income tax is unlawful, and contrary to the letters and spirit of CITA.

(b) The Respondent wrongly assessed the Appellant to income tax on the proportion of the dividends paid out from the Appellant's export business, which figure is distinct, segmented and separate from the Appellant's local business as contained in the Appellant's financial statements or audit report for the 2009 – 2012 Years of Assessment.

(c) The Respondent failed to apply the combined provisions of sections 19, 23[1][q], 29 and 40 [1] CITA appropriately, which would have limited the Respondent's assessment of the Appellant's income tax for the 2009 - 2012 Years of Assessment to the sum of N72,247,125 arising from the dividends paid out as profits from the local sales of the Appellant [The calculation which the Respondent ought to have adopted is annexed to this Amended Notice of Appeal.

(d) The Respondent did not take cognizance of S.23[1][q] CITA in charging the Appellant to income tax and if it did at all, it erroneously presumed that the Appellant must have engaged in wholly and exclusively export-oriented business before its profit can be tax exempt.

(e) The principle of proportionality or allocation, apportionment and aggregation which are accommodated in section 29 and some other provisions of CITA, was jettisoned by the Respondent, which has charged the Appellant's supposed profits from both the local sales and export sales together notwithstanding that each such source of the profit is distinct in the audited reports accepted by the Respondent.

(f) The Appellant's compliance with section 55[1][a] by filing only one return for each year of assessment for its two segmented business, the local sales and export sales, for its 2009 - 2012 Years of Assessment [sic], does not deprive the Appellant of the tax exempt status it enjoys under section 23[1][q] CITA and which the Respondent should have considered before arriving at the sum payable by the Appellant as income tax.

The original Notice of Appeal dated 5th August, 2014 was supported by a witness statement on Oath of Mr. RAO Maurhripragada. The said witness also deposed to a further additional statement on oath dated 26th January, 2015 mainly contending that it did object to the assessment within time such that the relevant assessment was not final and conclusive.

The Respondent in its reply stated that the Appellant is in the business of fish trawling packaging and exportation of fish, fingerlings, port and prawns [marine products] and therefore subject to the provisions of CITA and that while it declared no profit for 2009 - 2012 YOAs it declared dividends for those years. It contended that the Appellant was

involved in both local and export sales which facts were confirmed by the audit it carried out. Reconciliation meetings culminated in additional CIT assessment notices for the 209 - 2012 YOAs in the aggregate sum of N147, 088,125.00 [One Hundred Forty-Seven Million Eighty-Eight Thousand, One Hundred and Twenty-Five Naira], on the dividend declared for those years on 15th November, 2013. There being no objection within 30 days of the notice of additional assessment the Respondent invoked the provisions of sections 69 and 76 of CITA to contend that the assessments were final and conclusive. The Respondent also contended that the provisions of S. 23[p] and [r] are not applicable to the facts of this appeal. Finally the Respondent stated it issued is Notice of Refusal to Amend pursuant to Section 69[5] of CITA and claimed the following reliefs:

(a) **A Declaration** upholding the notice of additional assessment raised as per tax audit exercise/dividend dated 17th October, 2013 for 2009 - 2012 Assessment years in the sum of N147,088,125 [One Hundred Forty-Seven Million Eighty-Eight Thousand, One Hundred and Twenty-Five Naira].

(b) **A Declaration** upholding the demand notice dated 15th November, 2013, for Company Income Tax on dividend paid - out for 2009 - 2012 Year of Assessment for the sum of N147,088,125 [One Hundred Forty-Seven Million Eighty-Eight Thousand, One Hundred and Twenty-Five Naira Only]

(c) **A Declaration** upholding the validity of the Respondent's Notice of Refusal to Amend the Assessment dated 4th August, 2014 for 2009 - 2012 Year of Assessment, being the Appellant's additional Company Income Tax liability in the sum of N147,088,125 [One Hundred Forty-Seven Million Eighty-Eight Thousand, One Hundred and Twenty-Five Naira Only]

(d) **A Declaration** upholding the Respondent's position that dividends paid - out is profit and taxable as prescribed under section 19 CITA, LFN Cap C21 2004, and at the rate applicable under Section 40[1] CITA.

(e) **A Declaration** that the Respondent's additional Company Income Tax assessment was final and conclusive, due to no valid objection from the Appellant within 30 days as mandated by Section 69 and Section 76 CITA.

(f) **An Order** dismissing this appeal as incompetent in its entirety.

(g) **An Order** compelling the Appellant to pay the sum as contained in the Demand Note.

PLEADINGS AND BACKGROUND

The Appellant filed its Notice of Appeal dated 5th August, 2014 further additional statement on oath of Rao Manthripragada Seshagin of 25th January, 2015 and its Response/Rejoinder to Respondent's Reply dated 18th December, 2014. It later amended its Notice of Appeal by an amended Notice of Appeal dated 8th June, 2015 by the order of this tribunal dated 9th June, 2015.

The Respondent filed its Reply dated 14th October 2014 and an additional witness Statement of Bayode Omojoye dated 10th March, 2015.

The Respondent pursuant to its statutory powers carried out an audit exercise on the appellant company in 2013 for the 2009 - 2012 years of assessment (YOA). It discovered that notwithstanding that the Appellant declared no profit for the period it paid dividends to its shareholders. This led the respondent to raise additional Company Income Tax liability on the Appellant for the period based on the dividend pay - out which it treated as the total profits.

The Appellant called 2 witnesses and tendered documentary evidence in support of its appeal. The Respondent called one witness who tendered acounts for 2008 - 2011 year of assessment which were already in evidence as exhibit OP2 [i] to OP2[ii].

ISSUES FOR DETERMINATION

The Appellant raised the following issues for determination in its written address:

1. Whether the Respondent can approbate and reprobate by accepting [or admitting] that the Appellant is engaged in two streams of business on one hand, and evading the consequence of that admission [or acceptance], on the other hand.

2. Whether the Appellant's export sale regime for the assessment years of 2009 – 2012 comes within section 23[1] [q] for the purpose of computing its income tax for those years regard being had to the undisputed evidence before the Tribunal.

3. Whether the Appellant is required to prepare and submit separate tax returns for its local sales and export sales, regard being had to section 55[1] CITA.

4 Whether the principle of proportionality or apportionment or segmentation contained in Section 29 and some other sections of CITA is not applicable to the Appellant in the circumstance of this case.

OR

Whether the Respondent is not limited to charge the Appellant to income tax under section 19 CITA only in relation to the dividend paid as or out of profits of the Appellant from local sales within this context.

5. Whether the assessment which the Respondent made against the Appellant was final and conclusive.

6. Whether the Respondent should not revise the Appellant's assessment to be in the sum of N72, 247,125 being the company income tax of the assessable profit from the local sales of the Appellant for 2009 – 2012 Years of Assessment arising from application of section 19 CITA.

The Respondent for its part formulated 9 issues for determination which overlap the Appellant's questions for determination in part as follows:

1. Whether the dividend paid by the Appellant is liable to tax under section 19 of the company Income Tax Act Cap C21 LFN 2004 [CITA]

2. Whether the provisions of section 23q of CITA should be construed in favour of the Appellant.

3. Whether the provisions of section 23[1q] CITA should be construed in favour of the Appellant.

4. Whether the provisions of section 23[1r] should be construed in favour of the Appellant.

5. Whether the appellant is right to rely on section 11[4] of CITA for tax exemption.

6. Whether the Appellant can rely on Export Expansion Grant to claim tax exemption.

7. Whether the appellant is right to have segmented its returns in the course of appeal.

8. Whether the appellant objection to the notice of additional assessment was within the statutory days allowed under section 68[1&2] CITA.

9. Whether notice of refusal to amend was validly issued by the Respondent as prescribed under section 69 [5] CITA.

Both sets of questions are rather too elaborate as issues can conveniently be reduced to 2 without elevating sub-issues to questions for determination.

Accordingly the following questions for determination can be derived from the Grounds of Appeal as follows:

1. **Whether the assessment which the Respondent raised had become final and conclusive. [This is issue 5 in the appellant's address and issue 8 in the Respondent address.]**

2. **Whether the dividend paid by the Appellant is liable to tax under section 19 of CITA bearing in mind the provisions of section 23 [1][q] of CITA.**

ANALYSIS AND CONCLUSION

The Appellant submits that the assessment is only final and conclusive when it has been agreed or has been determined upon any objection, revision or appeal, citing Mobil Oil Nigeria Ltd v. FBIR [2011] 5 TLRN 167 per Bello JSC at pp. 207 and 331 on the interpretation of Section 60 of CITA 1961 now Section 76 CITA as follows.

"Where no valid objection or appeal has been lodged against an assessment as regards the amount of the total profits assessed thereby, or where the amount of the total profits has been agreed to ... or where the amount of such total profits has been determined on objection, revision ... or on appeal, the assessment as made, agreed to, revised or determined on appeal... shall be final and conclusive for all purpose of this act as regards the amount of such total profit..."

The Appellant contends that the original assessment dated 17th October, 2013 Ex OP13 was responded to by their accountants Iyantan & Partners, in Ex OP109 dated 30th October, 2013 after meetings with the Respondent. This was overtaken by another assessment dated 15th November 2013 served on 19/12/2013 by Ex OP14, again responded to by Ex OP111 by Howarth Dafinone dated 12th December 2013 and received on 16th December 2013. A letter dated 25th August 2014 but dispatched on 13th November, 2014 from the Respondent arguing about the status of the payment on the assessment of 17th October, 2013 was sent to the Appellant and responded to by the Respondent's accountant. Howarth Dafinone on 26th March, 2014 vide Ex OP4. These exchanges culminated in the NORA of 4th August, 2014, Ex OP15, which rejected the objections.

The Respondent however contends that the letter of 30th October, 2013 was not an explicit objection such as to satisfy the provisions of Section 69 of CITA. Our view is that the Appellant followed up its oral reservations on the assessments by a letter, which taken together signified its dissatisfaction with the correctness of the assessments. Indeed the parties and particularly the Respondent accepted the Appellant's on-going objections when it issued its NORA against the Appellants objections. The Respondent in paragraph 9 of the issues for determination formulated by it asked "whether notice of refusal to amend was validly issued by the Respondent as prescribed under section 69[5] CITA. We hold that in the circumstances of the appeal the additional assessments cannot be said to be final and conclusive when the objections and appeal hereon had not been determined. See Mobil Oil Nigeria Limited v. FBIR *[supra]*.

2. Whether the dividend paid by the Appellant is liable to tax under Section 19 of CITA, bearing in mind the provisions of Section 23[1][q] of CITA.

Section 19 of CITA provides as follows:

"Payment of dividend by a Nigerian company

Where a dividend is paid out as profit on which no tax is payable due to- [1996 No. 30]

(a) No total profits; or
(b) Total profits which are less than the amount of dividend which is paid, whether or not the recipient of the dividend is a Nigerian company,

Is paid by a Nigerian company, the company paying the dividend shall be charged to tax at the rate prescribed in subsection [l] of section 40 of this Act as if the dividend is the total profits in the company for the year of assessment to which the accounts, out of which the dividend is declared, relates."

In its returns for 2006 - 2011 years of assessment the Appellant declared no profits but disclosed an aggregate sum of N43, 750,000.00 (Forty-Three Million, Seen Hundred and fifty Thousand Naira Only) as dividends paid between 2008 - 2011. FIRS promptly treated the sum as total profit and raised additional assessment in the sum of N147, 088,125.00 (One Hundred and Forty-Seven Million, Eighty-Eight Thousand One Hundred and Twenty-Five Naira Only) the subject-matter of this appeal. The Respondent, placed reliance on Oando v. FBIR [2009] 1 TNLR 61 as well as:

1. Mobil Oil [Nig.] Ltd v. Federal Inland Revenue Board [1997] 1 NCLR 17 special edition, 1 at para. 154.
2. Abubakar v. Yar'adua [2008] 12 MJSC, and
3. Phoenix Motors Ltd v. NPRMB [1983] 1 NWLR [Pt. 272] 908, 830.

The Respondent argued that the enactment, CITA, be given its ordinary meaning and interpreted to promote its purpose.

The Appellant's issues 1, 2, 4 and 6 which state the tax liability should have been limited to N72, 247,125.00 concede the applicability of Section 19 argue that it is moderated by Section 23[q] of CITA.

The Appellant argues that the proceeds of its trawling business involve both local and export sales. The Appellant contends that while the sales for the local market are liable to tax this is not the case for export sales which enjoy statutory incentives in Section 23[1][q].

Section 23[1][q] provides as follows:

"23 Profits exempted
(1) There shall be exempt from tax -

[p] dividend received from investments in wholly export -oriented businesses;
[1996 No. 31]

[q] the profits of any Nigerian company in respect of goods exported from Nigeria provided that the proceeds from such export are repatriated to Nigeria and are used exclusively for the purchase of raw materials, plant, equipment and spare parts;
[1996 No. 32]

[r] the profit of a company whose supplies are exclusively inputs to the manufacturing of products for export, provided that the exporter shall give a certificate of purchase of the inputs of the exportable goods to the seller of the supplies;
[1996 No 32]

[s] the profit of a company established within an export proceeding zone or free trade zone:

Provided that 100 percent production of such company is for export otherwise tax shall accrue proportionately on the profits of the company.

The Appellant relies on Section 29 CITA to the effect that the Act envisages the situation where a tax payer may have different streams/sources of income. It contends that exportation is an independent stream that should enjoy the incentive contained in Section 23[1] [q] of CITA. There are 3 conditions attached to Section 23[1] [q] incentive.

(i) The profits must be in respect of goods exported from Nigeria
(ii) The proceeds of such sale must be repatriated to Nigeria, and
(iii) The proceeds should be used exclusively for the purchase of raw materials, plaint, equipment and spare parts.

These conditions are conjunctive. There is no serious dispute as to the tax liability arising from the paying out of dividends when no profit has been declared as in the

instant case. The aggregate dividends will be treated as the total profits of the company concerned according to the rules laid down by Section 19 of the CITA. The dispute however is whether Section 23[1] [q] applies to exempt the Appellant from taxation of the proceeds of the export sales on the assumption that there can be a segregation of the dividends on the basis of local as distinct from export sales.

With regard to Section 11 [4] CITA Respondent submits that this is irrelevant to the facts of this case. The Appellant is of this same view and we hold that this head of exemption is not applicable. The Respondent argues that export expansion grant does not deal with exemptions and is irrelevant to the consideration of this appeal. The Appellant is of the same view and we so hold, namely that EEG is inapplicable to this appeal.

Filing of returns: it is established that the Appellant's business was fish trawling for local and export sales. The Respondent's witness stated that it was substantially local sales while the Appellant's witness used the term '50 - 50' thereabouts. It was agreed that the sales were both local and export, contained in the composite returns filed. The significance of this does not turn on its being 'wholly' export in terms of Section 23 [1] [p] as that is not the provision being urged on us by the appellant in this appeal. Rather what is at issue is section 23[i][q].

We find no merit in the invocation of estoppel to debar the Appellant from claiming an exemption for export sales if all the preconditions are satisfied merely because it filed annual returns in a composite form as required by law. We equally find no basis to apply estoppel regarding the letter of 30/6/2014 issued by a staff of the Respondent as his opinion is not conclusive on the matter.

We agree with the Appellant that its appeal is predicated on Section 23[1] [q], and not Section 23 [1] [p] or [r] and the requirement for 'wholly' export is not contained in that provision.

Section 23 [1] [q]:

From appendix OLI the Appellant submits that there is undisputed evidence that the sales for 2008 - 2011 have been duly repatriated. The minor differences can reasonably be attributed to exchange rate fluctuations.

The final condition is whether the amounts were used exclusively for the purchase of raw materials, plant requirement and spare parts. It is argued that the amounts involved in 2008 – 2011 years proceeds were used for raw materials, plant requirement and spare parts according to appendix OL2. But OL2 is not the proof of repatriation. The Appellant's allusion in its final address to 'Exhibits OP28 to OP108' falls short of the requisite proof of repatriation of proceeds.

Legal Representation:

C. Eze Esq. with Mrs V. N. Eze, I. Orogbangba Esq. & O. Nwosu Esq. for the Appellant.

Mrs L. O. Adedipe for the Respondent.

DATED AT LAGOS THIS 14TH DAY OF JANUARY 2016

KAYODE SOFOLA SAN (Chairman)

CATHERINE A. AJAYI
Commissioner

D. HABILA GAPSISO
Commissioner

MUSTAFA BULU IBRAHIM
Commissioner

CHINUA ASUZU
Commissioner

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