IN THE TAX APPEAL TRIBUNAL

IN THE LAGOS ZONE

HOLDEN AT IKEJA

Appeal No: TAT/LZ/020/2013

Between

Global ScanSystems Limited — **Appellant**

AND

Federal Inland Revenue Service — **Respondent**

Judgment

Issues for Determination

1. The Federal Government and the Appellant entered an agreement in 2005 for x-ray scanning of goods. The agreement provides that the scanners and related equipment to be imported by the Appellant would be exempt from import duties and taxes, including VAT. Yet the Respondent assessed the Appellant to companies-income tax and education tax. Is the Appellant liable to pay those taxes?
2. The Industrial Development (Income Tax Relief) Act exempts companies with pioneer status from tax on the business for which they gained pioneer status. The Appellant was granted pioneer status from 1 January 2007. Is the Appellant nevertheless liable to tax on the associated business?
3. Under the Companies Income Tax Act (CITA), profits derived in Nigeria by a foreign company from a single contract for surveys, deliveries, installations, or constructions are taxable. The Appellant entered a subcontract with SGS, a foreign company, to provide Risk Assessment Reports (RARS) to the Appellant. Are the Appellant's payments to SGS subject to withholding tax?
4. The Companies Income Tax (Rates, etc of Tax Deducted at Source {Withholding Tax}) Regulations require payment of withholding tax on payments for services. The Appellant paid some local companies and a foreign company at various times for goods and services. Are those payments subject to withholding tax?
5. Under section 76 of CITA, an assessment or demand note becomes final and conclusive if no objection is raised within 30 days. The Appellant failed to object to the Respondent's assessments and demand notes within the stipulated period. Have the Respondent's assessments and demand notes become final and conclusive?

Introduction

In 2005, the Federal Government of Nigeria contracted the Appellant to provide, install, operate, and manage x-ray scanning equipment and software for the examination of goods at Nigerian seaports, airports, and land borders. In their agreement, scanners and related equipment the Appellant imports are exempt from import duties and taxes, including VAT. To carry out the contract, the Appellant subcontracted Societe Generale de Survellance S. A. Geneva (SGS Geneva). The Appellant also awarded contracts to other companies for purchase of scanners and equipment and for maintenance services.

In 2011, the Respondent investigated the Appellant's tax-compliance profile for 2006-2009. It discovered that the Appellant had not been paying its companies-income tax, education tax, and withholding tax. The Appellant pointed out that it was exempted from any tax under its agreement with the Federal Government of Nigeria and by virtue of its pioneer status in Nigeria.

Facts and Proceedings

In 2012, the Respondent assessed the Appellant to companies-income tax, education tax, and withholding tax (Exhibits FIRS 2A-2Q).

For companies income tax, the Respondent charged ₦38,337,195.40 for the 2006-2010 years of assessment. For education tax for 2006-2010, the assessment is ₦7,601,428.24. For withholding tax, the naira assessment is ₦224,220,754.94 for 2006-2009; the pounds sterling assessment is £24,700 for 2006; and the euro assessment is €49,400 for 2006.

In its Notices of Assessment, the Respondent imposed penalties at the rate of 10% and 20% interests on each outstanding tax.

The Appellant objected to the assessments by its letter of 9 March 2012 (Exhibit FIRS 4). But the letter of objection was not delivered to the Respondent until 27 March 2014. In that letter, the Appellant claimed that by virtue of the tax-exemption clause contained in its agreement with the Federal Government, it was exempted from tax. The Appellant also pleaded its pioneer status.

Meanwhile, the Respondent wrote a letter to the Appellant on 2 April 2012 advising the Appellant to pay the additional assessments to avoid imposition of penalties and interests (Exhibit AH1A). The Respondent wrote another letter on 1 August 2013 containing additional assessments (Exhibit AH1B). The Respondent claimed penalties and interests on the outstanding taxes and asked the Appellant to respond in 14 days.

The Appellant again objected to the assessments on 19 August 2013. It informed the Respondent that it had paid the undisputed taxes and requested a Notice of Refusal to Amend the disputed taxes. The Respondent rejected the Appellant's objection on 18 September 2013, maintaining that the outstanding tax liabilities with penalties and interests remained payable (Exhibit AH1C).

The Appellant filed an appeal against the Respondent's assessments. At the trial, the Appellant called one witness, Afolabi Hakeem, its tax accountant. The Respondent called Agim Francis, a tax manager in its tax-investigation department.

Parties' Positions

The Appellant argues that by virtue of its agreement with the Federal Government and its pioneer status, it is exempted from paying tax.

The Appellant relies on the tax-exemption clause in paragraph 10 of the *Agreement for the Provision, Installation, Operation, and Management of X-Ray Scanning Equipment and Software for the Examination of Goods*. The Appellant also argues that pursuant to section 6 of the Industrial Development (Income Tax Relief) Act, its pioneer status exempts it from tax from 1 January 2007.

For withholding tax, the Appellant asserts that SGS rendered its services from Geneva, not in Nigeria, thus the Appellant was not liable to any withholding tax. The Appellant added that SGS's income is equally exempted from tax because of SGS's own pioneer status.

The Respondent counters that the Appellant's tax exemptions are limited to the provisions of the agreement and its pioneer services, and that the Appellant remained liable to companies income tax, education tax, and withholding tax.

The Respondent argues that the agreement between the Federal Government and the Appellant cannot supersede the provisions of law on Appellant's tax liability. The Respondent maintains that even if the agreement is valid, it only exempts the Appellant from import duties, taxes, and VAT with respect to importation of scanners and related equipment.

The Respondent avers that the Pioneer Certificate granted to the Appellant does not grant the Appellant unqualified exemption from tax. The Respondent points out that the exemption is limited to Appellant's income from its pioneer services only, not other sources of income.

The Respondent also argues that the assessments have become final and conclusive since the Appellant failed to object to the assessments within 30 days as required by law.

Analysis

1. **Is the Appellant exempted from paying the tax assessed?**

Article 10 governs taxation under the agreement between the Appellant and the Federal Government. Article 10.1.1 provides as follows:

> The GOVERNMENT shall ensure that the *scanners and related equipment imported* by GLOBAL SCAN and as specified in Appendix 3, shall be

exempt from the payment of import duties and taxes, including VAT, or the provision of security in relation thereto, throughout the duration of this Agreement. (Emphasis provided)

The literal interpretation of the above clause is that scanners and related equipment *imported* by the Appellant are to be exempted from import duties and taxes. It does not mean or imply that the Appellant or its entire business would be tax-exempt. The tax-exemption clause covers scanners and related equipment, including the 4 equipment specified in Appendix 3 of the agreement.

This position is reiterated in Articles 9.8 and 9.9 setting out the Federal Government's obligations in relation to import duties and tax. According to Articles 9.8 and 9.9, the Federal Government "shall ensure that all scanners and related equipment are exempt from the payment of import duties and taxes and facilitate the entry and customs clearance of all equipment...that will be used in the performance of this Agreement, without requirement for the payment of duties, levies, guarantees, deposits, bonds, or assurance."

Contrary to the Appellant's position, letters by the Federal Ministry of Finance and Nigerian Investment Promotion Commission (NIPC) do not say that the Appellant is exempted from all taxes. They only confirm that the Appellant shall enjoy tax in accordance with the provision of the agreement. Only the Ministry of Finance's letter of 30 November 2005 states that the Appellant is *exempted from all taxes* (Exhibit AH3). Since the letter was referring to the agreement, "all taxes" in the letter means all taxes contemplated in the agreement, not taxes at large.

Article 10 does not exempt the Appellant from paying its taxes as a company operating in Nigeria.

2. Does the Appellant's pioneer status exempt it from all taxes?

The Appellant argues that NIPC granted pioneer status to it and this effectively exempts it from all taxes pursuant to the provisions of Industrial Development (Income Tax Relief) Act. But the Respondent disagrees, pointing out that the Appellant is not exempted from (i) taxes that apply before the pioneer status commenced and (ii) taxes on its income from sources other than its pioneer services.

Section 10 of the Industrial Development (Income Tax Relief) Act exempts companies with pioneer status from tax.

NIPC approved a 3-year pioneer status for the Appellant on 6 January 2008 (Exhibit AH4{i}). NIPC presented a Pioneer Certificate (Exhibit AH4 {ii}) and a Certificate of Production Day (Exhibit AH4 {iv}) to the Appellant. The commencement date is 1 January 2007. Though the Respondent claims that the Appellant is not qualified for grant of pioneer

status by NIPC, there is no evidence before this Tribunal to question the Appellant's qualification for pioneer status.

The Appellant is therefore exempted from tax from 1 January 2007. But Appellant's income before this date is taxable.

The Appellant is also liable to tax on income generated from any other trade, business, or activity not covered its Pioneer Certificate. Section 12(1) of the Industrial Development (Income Tax Relief) Act provides that during the tax-relief period, a pioneer company "shall not carry on any trade or business other than a trade or business, the whole of the profits of which are derived from its pioneer enterprise."

The Appellant's Certificate of Production Day states that the Appellant's business is "Deployment of Trade Facilitation Support Infrastructure (namely, the provision of Risk Assessment Report & Operation of Scanning Machines) at Designated Ports."

The Appellant's pioneer status therefore entitles it to enjoy tax exemption on pioneer services only. It does not apply to other activities not covered by its pioneer status.

3. Are the Appellant's payments to SGS subject to withholding tax?

The Appellant contends that the payments it made to SGS based on its subcontract with SGS are not subject to withholding tax. The Appellant points out 2 reasons: (1) SGS Geneva itself carried out the subcontract exclusively outside Nigeria, not through any local subsidiary or from any fixed base as claimed by the Respondent; and (2) SGS Geneva is also exempt from all taxes in Nigeria pursuant to the Finance Ministry's letters confirming the tax exemption under the contract (Exhibits AH3 {i}-{iii}). But the Respondent alleges that (1) SGS Nigeria, SGS Geneva's alleged "fixed base" or local subsidiary, carried out the subcontract and (2) SGS Nigeria is the company that enjoyed tax exemption, not SGS Geneva.

Tax exemptions under the agreement between the Federal Government and the Appellant and the subcontract agreement between the Appellant and SGS Geneva do not provide total exemption. Article 2.4 of the subcontract between the Appellant and SGS Geneva requires the Appellant to pay all fees and charges to SGS, *net of any taxes and other mandatory payments including VAT* charged or imposed in relation to services under the contract.

SGS Nigeria's status as a conduit (according to the Appellant) or a "fixed base" (as argued by the Respondent) is immaterial. This is because under section 13(2)(a) of CITA, profit of a foreign company would be liable to tax for 2 reasons: (1) that the company has a fixed base in Nigeria and (2) the company's profit from the subcontract is *attributable* to its fixed base.

Neither condition has been fulfilled. First, a fixed base is a physical location, not an artificial person. Second, the profit from the subcontract is not attributable to SGS Nigeria.

Whenever there is a trade, business, or activity involving a single contract for surveys, deliveries, installations, or constructions occurs, CITA is interested in the profit from the contract and not the profit attributable to a foreign company's fixed base. Section 13(2)(c) of CITA makes profits derived in Nigeria by a foreign company from a single contract for surveys, deliveries, installations, or constructions tax-assessable.

From the evidence before this Tribunal, the Appellant paid SGS Geneva, a foreign company, for SGS's Risk Assessment Reports (RARS) under the subcontract agreement. Article 2.2 of the agreement requires SGS Geneva to raise invoices while the Appellant pays in dollars. SGS raised invoices for its Risk Assessment, Valuation, and Classification Services (Exhibits FIRS10 {a}-{f}); the Appellant paid for SGS's services (Exhibits FIRS 11{a}-{c}).

The Appellant is consequently liable to fully deduct and remit withholding tax on payments it made to SGS Geneva for services SGS Geneva rendered to the Appellant. By virtue of section 82 of CITA, the Appellant is also liable to pay as a penalty 10% per annum of the tax withheld or not remitted.

4. Is the Appellant liable to withholding tax on the payments it made to other companies?

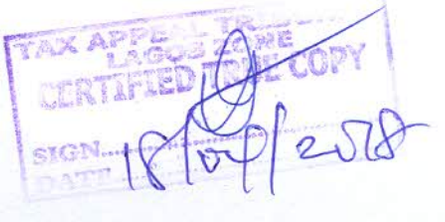
To determine this issue, this Tribunal will answer the following questions:

i. Are Appellant's payments to Smith Detection International Luxemburg SARL (SDIL) subject to withholding tax?
ii. Is the Appellant liable to withholding tax for other contracts it awarded to Patrek Nigeria Ltd (Patrek), Advanced Management & Technical Services Ltd (AMTS), Tara Systems Ltd (Tara), and Zenababs Nigeria Ltd (Zenabas)?
iii. Is the Appellant's income from interests on fixed bank deposits taxable?

Appellant's payments to SDIL

The Appellant contends that there is no basis for liability to withholding tax on payments it made to SDIL since the Appellant paid for the purchase and importation of scanners and spare parts, not for services. The Respondent disagrees, alleging that the Appellant paid fees and charges to SDIL for purchasing, installing, commissioning, and maintaining HCV Mobile X-Ray scanners in Nigeria in 2006.

The Companies Income Tax (Rates, etc., of Tax Deducted at Source {Withholding Tax}) Regulations list the payments from which tax is to be deducted at source and the rate of tax:



1. All aspects of building, construction, and related activities- 5%

2. All types of contracts and agency agreements, other than sales in the ordinary course of business- 5%

3. Consultancy and professional services- 10%

4. Management services- 10%

5. *Technical services*- 10%

6. Commissions- 10%

(Emphasis provided)

Under *Technical services* above, the Appellant would be liable to deduct and remit 10% withholding tax on any maintenance fees it paid to SDIL.

The Appellant entered a *maintenance-service agreement* with SDIL in April 2006. This agreement was approved and registered by the National Office for Technology Acquisition and Promotion (NOTAP) in January 2010 with remittable technology fees of €3,760,000 (Exhibit FIRS 7F).

But the Appellant's evidence during trial has proved that the *maintenance* agreement was not consummated. The Appellant's evidence shows that the scanners and other equipment were eventually maintained by Merry Aviation Communications, Electronics & Industries Nigeria Ltd (MACE) {Annexures 1-5} and Leventis Motors Ltd (Annexures 38, 39, 40, 43, 44, and 46). Withholding tax were paid on payments made to MACE (Annexures 17, 17A-T) and Leventis Motors Ltd for their services (Annexures 48, 48A-D).

These items of documentary evidence were not challenged by the Respondent.

Therefore, Article 8.1.2 and 8.1.3 of the Maintenance Service Agreement (Exhibit FIRS 9) which provides that SDIL would deliver, install, and commission the scanners do not apply since logistic challenges did not allow the parties proceed.

Other payments made by the Appellant to SDIL involving equipment and spare parts are not also liable for withholding tax. This Tribunal finds that Exhibits 7B, C, D, E, and G (on which the Respondent relies to prove Appellant's liability for other payments it made to SDIL) do not make the Appellant liable to withholding tax. The Respondent has failed to prove that Appellant's payments to SDIL were for maintenance fees, not equipment.

The Appellant's contract awards to Patrek Nigeria Ltd (Patrek), Advanced Management & Technical Services Ltd (AMTS), Tara Systems Ltd (Tara), and Zenababs Nigeria Ltd (Zenababs)

Contract with Patrek

The Respondent alleges that the Appellant failed to deduct or remit withholding tax when it paid Patrek for installation and construction services rendered to the Appellant in 2006. But the Appellant counters that it already deducted and remitted withholding tax on the payments it made to Patrek. The Respondent relies on the Appellant's cheque-payment voucher and Diamond Bank cheque (Exhibits FR2 and FR3) in favor of Patrek. They are dated 21 December 2006. From the contract between the Appellant and Patrek (Exhibit FIRS7), the total payment due to Patrek was ₦ 28,607,680, inclusive of VAT and withholding tax.

The Appellant is liable to withholding tax on its contract with Patrek.

Contracts with AMTS and Tara

The Respondent says it discovered in its investigation that the Appellant paid consultancy fees to AMTS and Tara without fully remitting the withholding tax payable on the transactions.

The Appellant, through its tax adviser's letter of objection of 9 March 2012 (Exhibit 4), admits that it has "no objection to other areas of [Respondent's] findings as it relates [sic] to withholding tax on AMT...". This admission needs no proof and renders the Appellant liable.

But the Appellant's alleged failure to remit withholding tax on payment to Tara is not supported with any evidence. Since it is the Respondent that alleges Appellant's failure to remit withholding tax on the payment, it is the Respondent's burden to prove this. The Respondent has failed to discharge this burden.

Contract with Zenababs

The Respondent alleges that the Appellant did not withhold tax when it paid Zenababs £400,000 GBP.

The contract between the Appellant and Zenababs was executed on 19 October 2006 (Exhibit FIRS 8). The contract was for Zenababs to develop and install application software and related equipment to automate customer's risk-management system.

The Appellant has not disputed the Respondent's assessment of payments the Appellant made to Zenababs. The Appellant's tax adviser's letter of objection admits Appellant's liability to withholding tax on its payment to Zenababs (FIRS 4). The Appellant is liable.

Are the Appellant's interests on fixed deposits taxable?

The Appellant contends that the Respondent should not have assessed the interest income it derived from fixed deposits with its bankers to tax since they are also tax-exempt. But the

Respondent counters that interests on deposits constitute income from non-pioneer activities, thus they are not exempted from tax.

In the pre-investigation meeting between the Respondent and the Appellant on 18 April 2011 (Exhibit FIRS 7G), the Appellant's Managing Director confirmed that one of its sources of income is interest on fixed deposits. But this is not sufficient. This Tribunal cannot also rely on the Respondent's witness statement claiming that the Appellant earned income from fixed deposits without any supporting document. Thus, the burden of proof is still hanging on the Respondent.

Section 78 of CITA, governing withholding tax on interest, rent, and others, cannot therefore apply to render the Appellant liable to the withholding tax on fixed deposits assessed by the Respondent.

Have the Respondent's assessments and demand notes become final and conclusive?

The Appellant argues that the 30-day period within which an aggrieved person must object to an assessment under CITA cannot bar the Appellant from appealing to the Tribunal since the Respondent's additional assessments are illegal.

The Respondent counters that as far as the Appellant did not raise any objection to the Notices of Assessment and Demand Notes within the period required by section 69 of CITA, they have become final and conclusive.

The Respondent served a letter dated 16 February 2012 on the Appellant. It enclosed Notices of Assessment and Demand Notes. The Appellant received the letter on 21 February 2012. The Appellant objected to the assessments and Demand Notes on 27 March 2012.

Section 76 of CITA provides that failure to raise a valid objection to an assessment within the 30-day period stipulated under section 69 makes the assessment final and conclusive.

From the findings of this Tribunal on the Appellant's tax liabilities, some of the bases for assessing the Appellant to withholding tax do not conform with the provisions of CITA and Companies Income Tax (Rates, etc., of Tax Deducted at Source {Withholding Tax}) Regulations. For the Respondent's assessments and Demand Notes to be final and conclusive, they must be in accordance with the provisions of the law. *Federal Board of Inland Revenue (FBIR) v Rezcallah* controls.[1]

As determined in the this Tribunal's treatment of the issues above, not all the Respondent's Notices of Assessment and Demand Notes on the Appellant complied with the provisions of the law. Notices are only final and conclusive to the extent of their compliance with the relevant statutes.

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[1](2010) 2 TLRN 59, 73

Conclusion

The appeal is allowed in part.

The Appellant is entitled to tax exemption under its contract with the Federal Government of Nigeria but this exemption is limited to import duties and taxes on imported scanners and related equipment only. The Appellant's pioneer status also allows it to enjoy tax exemptions on its pioneer trade, business, or activity as covered by the Pioneer Certificate.

But the Appellant is liable to companies' income tax and education tax. The Appellant's non-pioneer incomes are also liable.

We order the Appellant to pay the outstanding companies-income tax and education tax as assessed by the Respondent.

For withholding tax, the Appellant is not liable to pay withholding tax on payments it made to Smith Detection International Luxemburg and the alleged payments to Tara Systems Limited. We discharge the withholding-tax assessments. But the Appellant's payments to Societe Generale de Survellance S. A. Geneva, Patrek Nigeria Limited, Advanced Management and Technical Services Limited, and Zenababs Nigeria Limited are subject to withholding tax. We order the Appellant to pay accordingly.

Legal Representation:

Godson C. Ugochukwu Esq. for the Appellant.

Ms M. Okpe with I. Okoro Esq. Mrs B. D. Akintola and B. Chukwu Esq. for the Respondent.

DATED THIS 30TH DAY OF OCTOBER 2015

KAYODE SOFOLA, SAN *(Chairman)*

CATHERINE A. AJAYI (MRS)
Commissioner

D. HABILA GAPSISO
Commissioner

MUSTAFA BULU IBRAHIM
Commissioner

CHINUA ASUZU
Commissioner

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DATE 18/09/2018