IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
SITTING AT LAGOS

APPEAL NO: TAT/LZ/007/2011

BETWEEN

FEDERAL INLAND REVENUE SERVICE ..... APPELLANT

AND

KANDELITE ENGINEERING COMPANY LTD. ..... RESPONDENT

JUDGMENT

The Appellant instituted this appeal in 2011 claiming outstanding tax liability of **N25,580,607** (Twenty – Five Million, Five Hundred and Eighty Thousand Six Hundred and Seven Naira) against the Respondent for 1999 – 2004 tax years. This is based on an Audit Report of 2006. Also the Respondent did not file returns for the period 2006 to 2010 and the Appellant raised BOJ of **N69,792,739.14** (Sixty-Nine Million, Seven Hundred and Nine-Two Thousand, Seven Hundred and Thirty- Nine Naira, Fourteen Kobo) against it.

After the commencement of the appeal the Respondent filed CIT and EDT returns in 2012 for 2006 – 2010. The Appellant raised assessment for the period and the Respondent liquidated same. The Respondent afterwards filed VAT returns for 2006 – 2010 but did not agree with the assessment raised against it. However some payments were made by the Respondent in the interim.

Consequently the Appellant amended its Notice of Appeal and the Respondent filed its Reply to that process. Even then more payment was effected by the Respondent so that as at the commencement of hearing, the claim of the Appellant is that:

i. The Respondent is in default of payment of CIT and EDT for 2000 to 2005 Years of Assessment; and VAT for 2004 amounting to **N23,708,597.00**(Twenty Three Million, Seven Hundred and Eight Thousand, Five Hundred and Ninety Seven Naira).

ii. The Respondent filed late Returns of CIT and EDT for 2006 to 2010 years of assessment thereby making it indebted to **N22,280,875.31** (Twenty Two Million, Two Hundred and Eighty Thousand, Eight Hundred and Seventy Five Naira, Thirty One Kobo) inclusive of VAT BOJ.

iii. The Respondent is therefore liable to pay **N45,989,472.31**(Forty Five Million, Nine Hundred and Eight Nine Thousand, and Four Hundred and Seventy Two Naira, Thirty One Kobo).

The Respondent by its Reply to the Amended Notice of Appeal dated 25th October, 2013 asserted that:

(a) The Respondent is not liable to pay the sum of N24,822,796.00 (Twenty-Four Million Eight Hundred and Twenty Two Thousand and Seven Hundred and Ninety Six Naira) for CIT, EDT, WHT and VAT for Audit years 1999 – 2004; not liable to pay the sum of N1,175,000.00 for late filing of returns of CIT and EDT; N3,790,000.00 as penalty for failure to file VAT returns for the period 2005 – 2009 Audit years and N22,371,466.54 as VAT not collected for period 2005 – 2009 Audit years.

(b) The value of VAT on which the Appellant and Respondent should join issues for the period 2005 – 2009 Audit years should be N22, 371,466.54 which the Appellant described as "VAT not collected" but actually VAT demanded but neither paid nor received on behalf of the Appellant of which fact the Appellant admitted.

(c) The Respondent is making a counter-claim for excess payment of N403,448.52 and N1,350,000.00 for VAT and CIT respectfully. In addition, the Tribunal should direct the Appellant to refund to the Respondent all other admitted overpayments in respect of CIT and

EDT after a thorough and diligent checking of the records of payments to the Appellant.

ISSUES FOR DETERMINATION:

From the treatment of the issues by the counsel to the parties we are of the view that the questions for determination in this appeal raised by the Appellant and set out in the Respondent's written address can be dealt with under the following 2 issues, namely:

(1) What is the effect of the 2006 Tax Audit:- (i) with regards to its proceeding on the basis of a percentage of "costs of the contract" and (ii) on the WHT assessment bearing in mind the Appellant's internal rules contained in Exhibit B3? And whether the Respondent is liable to pay penalties for late filing of returns for 2005 to 2009 accounting years?

(2) Whether the VAT liability assessed is valid in all the circumstances of this case?

ANALYSIS AND DETERMINATION OF ISSUES:

Issue 1

What is the effect of the 2006 Tax Audit (i) with regard to its proceeding on the basis of a percentage of "costs of the contract" and (ii) on the WHT assessment bearing in mind the Appellant's internal rules contained in Exhibit B3.And whether the Respondent is liable to pay penalties for late filing of returns for 2005 to 2009 accounting years?

The Respondent in its written address argues that though the Appellant has discretionary powers of assessment such powers must be exercised in a just and equitable manner. To buttress its test for just and equitable computation, counsel brought in an"expert witness" who testified *"that total profit margin is a percentage of turnover of the business or trade and further stated that allowable total profits on most Mechanical and Electrical Building projects is usually within the range of 15% to 20%"*. The Respondent asserts that the position articulated by the expert witness was

not challenged by the Appellant thereby implying that they conceded the position.

Respondent further argues that the Board is restricted to make assessment within the purview of Sections 65 and 30 of CITA (referred to as Sections 47 and 29 of CITA by the Respondent). The Respondent contends that the revised assessment conducted in 2006 was an assessment without jurisdiction because it was based on percentage of cost of contracts rather than turnover.

The Appellant however maintains that its assessment comes within the ambit of Section 30(1)(a) of CITA.

Neither the Appellant nor the Respondent tendered the audited accounts of the company to support their case. Yet the two parties are in agreement as to the turnover of the company from 1999 to 2004 as purportedly contained in the final accounts and the same figures were adopted as the basis for the tax computation in dispute. The crux of the Respondent's arguments on this issue is the application of percentage of cost of contract in disregard to industry average by the Appellant and refusal to use percentage of turnover instead.

Section 65(2) (a) and (b) provides options for the Board to either accept and rely on returns or refuse and apply best of judgment methodology. "Refusal to accept" connotes denial of access to the accounts thereby making Sub-Sections 2(a) and 2(b) mutually exclusive. Thus, if the Board accepts the audited accounts and returns, it is constrained to operate within its contents and only tinker the figures where there is justification; and if it refuses to accept, it is wittingly limited to the best of its judgment methodology.

Section 30(1)(a) does not confer any extra-ordinary powers on the Board other than elaboration on the mechanism for the use of returns/accounts. The reference is to percentage of the turnover. For the purpose of this Section, the applicable turnover is the one contained in returns filed by a taxpayer.

The Board having accepted and relied upon the return filed for 1999 to 2004 must work within that scope to substantiate or justifiably refute the contents in its determination of allowable and disallowable deductions to

arrive at a revised assessable profit. Otherwise the Board is constrained to invoke Section 30(1)(a) in assessing the Company based on such fair and reasonable percentage of the turnover.

The Respondent has not disputed the justification for the Board to rely on the provisions of Section 30(1)(a) to which effect the Respondent's Expert Witness testified that allowable total profits on most mechanical and electrical building projects is usually within the range of 15% to 20%.

The powers of the Board to conduct tax audit on the Respondent is not in dispute but the calculation mechanism applied in the determination of the Respondent's tax liability is the subject matter of contention by the Respondent. The powers of the Board to make assessment other than BOJ assessments oscillate around returns, accounting books, and records; tax audit is about substantiating facts and figures contained in those records. It is strange for the Board to delve into estimation of figures about the tax affairs of the taxpayer after a tax audit exercise.

The Appellant has erred in assessing the Respondent to tax based on an estimated percentage of cost of contract and administrative expenses. This violates the provisions of Section 66 of CITA but that does not terminate the conversation bearing in mind the fact that the Appellant has invoked Section 30 of CITA. The CIT and EDT liabilities based on the 2006 tax audit are not tenable and are hereby set aside.

We order that the CIT and EDT liabilities of the Respondent be calculated on Gross Profit Margin of 20% of Turnover based on the contents of the returns for 1999 to 2004 tax years, already accepted by the Appellant.

The Respondent also argues that purchases made for the relevant tax years were raw materials used in the execution of contracts and are therefore not subject to Withholding Tax in accordance with Exhibit B3 (Appellant Circular No. 2006/02). The Respondent also submits that the Appellant failed to plead facts of Withholding Tax in its pleadings and did not counter the Respondent's position of non-applicability of such tax.

The Appellant maintains that in the instant transaction the Respondent did not meet the requirements set out in Exhibit B3. The exemption under the said Circular is only tenable where a manufacturer/producer acquires materials for its production. The Appellant further submits that the

Memorandum of Association of the Respondent did not show that it is a manufacturing outfit and if otherwise the onus of proof lies with the. Respondent.

The computation of the Withholding Tax liability in dispute is based on the tax audit exercise conducted by the Appellant, albeit premised upon returns rendered by the Respondent for the relevant tax years. The main purport of tax audit is to move the Tax Authority from the realm of speculation to the sphere of reality and facts. It is intriguing that the Board after the tax audit exercise is unable to satisfy itself as to whether or not material purchases covered by suppliers' invoices are for manufacturing and had curiously resorted to the object clause of the company for the justification of its assessment decision.

We are not persuaded that the answer to the question is to be found in the Memorandum and Articles of Association of the Respondent. However, WHT would apply on the relevant payments except it is established that the transaction comes within the definition in Exhibit B3 namely,***"where there is a dual relationship between parties in a business transaction stating that an example of this contract is where a manufacturer/producer requires raw materials from a supplier for its production. This is a dual relationship between both parties and the transaction will not be liable to WHT."*** The party asserting that this condition exists is the Respondent. The onus of proving the assertion falls on the Respondent. See Section 132 of the Evidence Act. Has the Respondent discharged this onus? We answer this question in the negative. Not having established coming within the exception, the WHT must apply. We accordingly hold the Respondent liable to pay the WHT of **N3,641,462.00.**

The Appellant contends that the Respondent filed late returns for 2005 to 2009 accounting years. They averred that returns filed in 2012 for 2005 to 2009 accounting years are indeed late and attract penalty.

The Appellant argues further that the Respondent's claim of being refused to file returns for 2005 to 2009 in 2009, cannot exonerate them from penalty. Returns filed after 6 months of the accounting year would be late as per **Section 55 (1-3) of the Companies Income Tax Act Cap C21 LFN 2004;**

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The Respondent submits that they were denied the right to file the CIT and EDT returns for 2005-2009 Audit Years as and when due by one Mr. L. L. Welebe, an officer of the Appellant and that the Appellant never denied this fact in its final address. The Respondent therefore submits that this is an admission of the facts pleaded by it on the authority of the case of **Bongo v Governor of Adamawa State. (2012) All FWLR pt 633 pg 1908 at paragraph B-C** where it was said that:

> ***"....Where a plaintiff fails to traverse the facts averred in the statement of defence which have not been taken care of by averments in his statements of claim, he would be deemed to have admitted the averments in the statement of defence. In the instance case the Plaintiff failed to traverse facts in the statement of defence, and the court rightly held that he admitted them."***

The Respondent concludes that on the basis of the authority cited, the penalty of **₦1,175,000.00** in respect of CIT & EDT for 2006 to 2010 years of assessment fails, except the Tribunal decides it is equitable for the Appellant to benefit from its own wrong".

The alleged denial of the Respondent to file CIT and EDT returns for years 2005 to 2009 on due dates by an officer of the Appellant was in March 2009. See Exhibit B22. By then the returns for 2005 to 2009 were clearly late. Consequently, we find the Respondent in default and liable to **₦1,175,000.00** penalties for late returns.

Issue 2

Whether the VAT liability assessed is valid in all the circumstances of this case.

The Respondent argues that it filed VAT returns for 2006 to 2010 years of assessment and that this is admitted in the Appellant's final written address. The Respondent in its final address also submits that over 95% of the "**Invoiced Collectable VAT**" received was remitted to the Appellant and the Appellant had not denied this averment. The Respondent therefore submits that the Appellant's claim of **₦3,790,000.00** for not filing returns/remitting VAT from 2006-2010 years of assessment be dismissed for lack of merit.

The Appellant argues that the collection and remittance of VAT to the Federal Government is on a monthly basis, citing Section 12 (1) of the Value Added Tax Act LFN 2004 which states:

> ***"A Taxable person shall render to the Board, on or before the 21st day of the month following that in which the purchase or supply was made, a return of all taxable goods and services purchased or supplied by him during the preceding month in such manner as the Board may, from time to time determine".***

They argue further that the Respondent never made any payments of VAT for 2005 to 2009 until this matter came before the Tribunal in 2011. And the Respondent did not file VAT returns for 2005 to 2009 accounting years until 2012 vide **Exhibit B16 and B8** thereby making the Respondent liable to penalties.

Exhibit B2 shows that the VAT returns for January 2004 to December 2009 from the Respondent were only received on June 27, 2012 by the Appellant. The returns were clearly late. The Respondent's assertion of over 95% remittance of "**Invoiced Collectable VAT**" is not verifiable from the submissions before us. We find the Respondent liable to **₦3,790,000.00** penalties for late returns.

The Appellant submits that the Respondent as a statutory Agent is, by law, to collect and remit VAT to the Appellant as in Section 11 (1) of the Value Added Tax Act LFN 2004.

The Appellant further argues that the Respondent cannot claim ignorance of the law. Section 30 of the Value Added Tax Act LFN 2004 states:

> ***"A taxable person who fails to collect tax under this Act is liable to pay as penalty 150 per cent of the amount not collected, plus 5 per cent interest above the Central Bank of Nigeria Rediscount Rate".***

The Respondent submits in its Reply to the Notice of Appeal that the Appellant's claims of "VAT not Collected" is the collectable VAT the Respondent has not received. This assertion is also in Exhibits B4, B5 and B8

tendered through W1 which was not challenged during cross-examination. The Respondent contends that this implies acceptance of the assertion, citing **Amadi v. Nwosu** [1992] 5 NWLR (pt.241) 273 at 284 paras G-H.

The Respondent also maintains that it has discharged its Agency duties by remitting the amount received from "Invoiced Collectable VAT" and providing the Appellant, with the details of the "Invoiced Collectable VAT" not received or paid to the Respondent. The Appellant has not denied that the Respondent issued "Invoices" as provided in the Act. The Respondent rendered third party evidence of non-payment of invoiced VAT by customers in Exhibit B12. The Respondent further submits that it is not obliged to remit to the Appellant Invoiced Collectable VAT it has not received. Thus, the Respondent cannot therefore be indebted to the Appellant in the sum of **₦22,371,466.54** because no one can give that which he had not, (*nemo dat quod non habet*).

The Appellant submits that the Respondent filed VAT returns for 2006 to 2010 and was assessed by the Tax Office. The Appellant maintains that the Respondent never accepted the outcome of the assessment thereby making the VAT BOJ still outstanding. The Appellant in its final address submits that the total VAT liability outstanding is **₦21,105,875.31**, inclusive of N3,790,000.00 penalties for late returns.

The Appellant is right to assess the Respondent based on returns or instead invoke Section 18 of VAT Act to raise BOJ assessment. We find no fault with the Appellant's basis of assessments. The Respondent has dutifully invoiced his VATable supplies but has failed in its collection duties under Section 14(1) of the VAT Act. The values of the various supplies were paid net of VAT and the Respondent neither reported his Agency challenges nor filed returns on due dates to avail the Appellant of relevant information.

The question is whether by simply sending off invoices without more, in the circumstances set out above, the collection duties of the Respondent can be said to have been discharged?. The invoiced 3rd parties are the parties liable to pay the consumption tax and the Respondent is merely the agent of the Appellant for collection purposes. The VAT amount should be part of the vendor's bill. The Respondent should subsume this amount in its

composite bill so that payment of the bill by the 3rd party customer should not be severable from the perspective of the customer. According to the authors of "Revenue Law – Principles and Practice" 26th Edition edited by Natalie Lee,at P. 975: ***"In general, VAT is charged on the basis of invoices issued to customers irrespective of whether payment has been received".*** *In the UK, there is the concept of VAT relief for bad debts subject to certain set criteria, such that "The result of a successful claim will be either a reduction in output VAT payable in the relevant quarter or, in appropriate circumstances a refund of VAT". This is a post VAT payment scenario*. Whether in a proper case the tax collector can be absolved of responsibility by showing its proper discharge of that function does not arise in this appeal as we are of the firm view that the cavalier sending off of invoices without more does not satisfy the test of a reasonable agent/collector in all the circumstances of this case. Section 30 of the Value Added Tax Act LFN 2004, renders the Respondent liable to pay **₦21,105,875.31** (inclusive of penalties).

The Respondent also argues that provision of Section 58 of CITA, 2007 is not applicable for recovery of VAT because the VAT Act provided for recovery of tax in Section 16. This issue does not take into cognizance paragraph 4 of the amended Notice of Appeal dated 20th June, 2012 which refers to all the relevant statutory provisions relied upon by the Appellant inclusive of the VAT Act. Moreover, a claim for a relief in law which is available under law will not be vitiated by reference to a mistaken provision. The Respondent contends that it is illegal for the Appellant to plead that the issue of VAT liability of **N4,627,012.00** for 2004 as being final and conclusive. On the submission that the "final and conclusive" allusion is improper we think it is sufficient to say that we have not predicated any part of the decision on this ground.

The Respondent also argues that the Appellant did not plead the VAT claim before the Tribunal.But the Appellant submits that the 2004 VAT was not a claim distinct from the Audit report of August 2006 as stated in the Notice of Appeal and statement on oath with other Taxes, thereby making it a claim pleaded.

It must be noted that the Tax Appeal Tribunal is not a forum for forensic advocacy where there is emphasis on technicalities with regard to procedural requirements. It is the last fact-finding forum before recourse to the court system. After revenue issues a NORA, the tax tribunal revisits the

correctness of the assessment as an independent panel consisting of lawyers, accountants and tax administrators who review all available data to verify the propriety of the assessment. The amended Notice of Appeal of 20th June, 2012 in paragraph 4 alludes to the relevant enabling statutory provisions for the subject-matter of this appeal. The Appellant witness statement on oath and the attached computation bring into play all the issues for determination in this appeal including the withholding tax claim at paragraph 7 of the Revised Tax Computation attached to the Witness Statement on oath of Mr. Okeke. The witness statement had referred to earlier witness statements of the Respondent and attached the basis of all the Appellant's claims. It is evident that the case of the Appellant had contradicted the claims raised by the Respondent. In view of our findings, the basis of the Respondent's alleged counter-clam is no longer tenable and same is accordingly refused.

Conclusion

i. The CIT and EDT tax liabilities of N16,171,901 and N1,140,232 respectively raised on the basis of the 2006 tax audit are hereby set aside. We order the computation of the Respondent's CIT and EDT obligations for the tax audit period (1999 to 2004) on Gross Profit Margin of 20% of Turnover based on the contents of the returns submitted, and accepted by the Appellant, for 1999 to 2004 tax years.

ii. The Tribunal orders the Respondent to pay the following:

   a) Withholding Tax of **N3, 641,462.00**.

   b) Outstanding VAT of **N4, 327,012.00 for** 2004.

   c) Penalties for late filing of CIT and EDT returns of **₦1, 175,000.00**.

   d) VAT and Penalties for late returns totaling **₦21, 105,875.31.**

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Legal Representation:

Ms Umezuruike Nwayikwe for the Appellant

Olasupo Ademosu Esq. with M. Abatan Esq. for the Respondent

DATED AT LAGOS THIS 11TH DAY OF JUNE, 2014

Kayode Sofola, SAN
Chairman

Catherine A. Ajayi (Mrs)
Commissioner

D. H. Gapsiso
Commissioner

Mustafa Bulu Ibrahim
Commissioner

Chinua Asuzu
Commissioner

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