IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL HEADQUARTER
HOLDEN AT ABUJA
ON MONDAY THE 25TH DAY OF JUNE 2018
BEFORE HIS LORDSHIP HONOURABLE JUSTICE IJEOMA L. OJUKWU
JUDGE
SUIT NO. FHC/ABJ/CS/329/2018

OFFICE OF THE DIRECTOR :: RECEIVED SIGN 6/7/18 :: LEGAL SERVICES DEPT.

AK –AY ELEKTRIK NIGERIA LIMITED - PLAINTIFF

AND

FEDERAL INLAND REVENUE SERVICE - DEFENDANT

Parties: Are Absent

APPEARANCES

S.C. Peters with Divine David for the Plaintiff

Ebuka Chima for the Defendant.

FEDERAL HIGH COURT PAID 27 JUN 2018 ABUJA

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RULING/JUDGMENT

By an Originating Summons dated and filed the 26th day of March 2018 and 28th day of March 2018 respectively, the Plaintiff posed the following questions for the determination of the Court:-

A. Whether the Defendant has lawful powers to impose taxes on the Plaintiff under the Companies Income Tax Act and Tertiary Education Fund (Establishment, Etc.,) Act 2011 in respect of the sum of ₦2,168,903,209

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(i.e. Two Billion, One Hundred and sixty-eight million, Nine Hundred and Three Thousand, Two hundred and Nine Naira) not earned as income and/or profit by the Plaintiff but said to be an undisclosed income earned by a certain offshore company as stated in Exhibit G, annexed to the Affidavit in Support of the Plaintiff's Originating Summons.

B. Whether it was not ultra vires the powers of the Defendant to arbitrarily impose the sum of Nine Hundred Million, Five Hundred and Thirteen Thousand, Three Hundred and Twenty Two Naira, one kobo (₦900,513,322.01) as tax on the Plaintiff in respect of allegations among others that the Plaintiff understated its turnover, also overstated cost sales and had disallowable expenses/operating expenses which allegations were unproven and in fact, the alleged acts non existence.

Plaintiff's urged the Court to make the following declarations:-

A. A Declaration that the Defendant has no lawful powers to impose taxes on the plaintiff under the Companies Income Tax Act and Tertiary Education Fund (Establishment, Etc.) Act 2011 in respect of money not earned as income and /or profit by the plaintiff but which in this case, the money is said to be undisclosed income earned by a certain offshore company as stated in Exhibit G annexed to the Affidavit in support of the Plaintiff's Originating Summons.

B. A Declaration that it was ultra vires the powers of the Defendant to arbitrarily impose taxes on the Plaintiff in respect of unproven and non-existent allegations that the Plaintiff understated its turnover, also overstated cost of sales and had disallowed expenses /operating expenses.

C. An Order of this Honourable Court setting aside the taxes imposed by the Defendant on the Plaintiff in respect of the unearned sum of ₦2,168,903,209 (Two Billion, one hundred and sixty eight million, nine hundred and three thousand, two hundred and nine naira) which the Defendant expressed in Exhibit G as undisclosed income earned by offshore company.

D. An Order of this Honourable Court setting aside the taxes imposed by the Defendant on the Plaintiff in respect of unproven turnover and non-existent allegations that the Plaintiff understated its turnover, also overstated cost of sales and had disallowable expenses/operating expenses.

E. An Order of this Honourable Court setting aside the tax of Nine Hundred Million, Five Hundred and Thirteen Thousand, Three Hundred and Twenty Two Naira, one kobo (₦900, 513,322.01) imposed by the Defendant on the Plaintiff as contained in Exhibit G annexed to the affidavit in support of the Plaintiff's Originating Summons.

F. An Order of perpetual injunction restraining the Defendant from imposing any tax on the Plaintiff in

respect of any sum that did not accrue to the Plaintiff as income and/or profit.

In support of the Originating Summons was a broad 5 paragraph affidavit deposed to by one Engr. Boniface Ikechukwu Ifesi, a Director of the Plaintiff, where it was averred that the Plaintiff since incorporation and doing business has not made any substantial profit as it has not received its payment from one AK-AY ELEKRIK DIS TICARET KOLL.STI, a company the Plaintiff carried out joint projects with, which matter is before the Court. It was also averred that the majority shareholder of the plaintiff is dead and the deponent took steps to stabilized the company which is also a subject of a consent judgement. Apart from that, that the said AK-AY ELEKTRIK TICARET Company is claiming a huge amount of money as debt from the Plaintiff which is also a subject of a dispute. Further, that agent of the Defendant came to him to establish the status of the Plaintiff and he made them know that the Plaintiff's business is moribund as a result of many litigations since 2014. He averred that Plaintiff came into existence in 2005, and partially stopped functioning in 2011 following the death of one of the Directors and that one Dr. Gumi who received the tax audit letter was not a member of the Plaintiff's Board of Directors, a shareholder or employee to discuss tax matters of the Plaintiff. That he was shown current tax returns of the Plaintiff with his signature which was fictitious. He stated that AK-AY ENERGY AND CONSTRUCTION LTD which has Dr Gumi and one Mursel Gulsen as directors is different from the Plaintiff, and that

Plaintiff has only done business with two government agencies.

It was the additional averments of the Plaintiff that they received a Tax Audit for 2013-2015 for the Plaintiff from Mursel Gulsen by the Defendant when no such audit was actually conducted with any member of the plaintiff or with the plaintiff's documents which are in his possession. He denied the status of the Plaintiff as an offshore company and the assessment made by the Defendant on that account. Exhibits in support of the facts were attached.

In the Plaintiff's written argument, the three questions earlier posed were replicated as issues for determination.

It was submitted in sum that a company which has not earned any income cannot be taxed in respect of an unearned income. He relied on the case of ***GREY V TILEY (1932) 16 TC 414, 422*** where the English Court held that a man cannot be taxed before he earns an income, even when the tax master is statutorily empowered to impose tax. He relied also on ***OHUKA & ORS V THE STATE (1998) 1 NWLR (PT. 72) 539*** in advocating the principle that a man cannot be made to act on something he is not aware of.

Learned Counsel S.C. Peters for the Plaintiff submitted that the imposition of the whooping amount of over One Billion Naira against the Plaintiff as undisclosed income earned by off-shore Company in Exhibit G is atrocious since Plaintiff never earned such amount. He called in aid Section 9 (1) of the Companies Income Tax Act which provides that the tax shall for each year of assessment, be

payable at the rate specified in subsection (1) of Section 40 of the Act upon profits of any company accruing in, derived from, brought into, or received in Nigeria in respect of any trade or business for whatever period of time such trade or business may have been carried on and so on. He reproduced the provisions for ease of reference. He noted that it is not the income but profits from such income that is taxable and that it must be shown that the profits were earned in Nigeria. He posited that the law does not envisage indiscriminate or ambiguous taxation but one predicated upon the law. He placed reliance on ***LOWRY V CONS. AFR. TRUST (1932) TC XV1, 577, LOTHIAN CHEMICALS CO. LTD V I.P. COMMISSIONERS (1926) 11 TC 508, 521*** among others on this issue of law. He noted that the defendant tried to impose indirect tax on the plaintiff from an undisclosed offshore company when the plaintiff did not earn such profit. He submitted that indirect tax cannot apply in the present circumstances being a product of excise and customs and not profit accruing to a company. He referred the court to ***MAPP V ORAM (1968) 3 ALL ER 1, 5.***

Pressing home his argument, he contended that defendant did not conduct an audit assessment of the plaintiff to have come out with allegations of understated turnover or overstated sales in 2014 - 2016 as in Exhibit D. He relied on the averments in the affidavit of Plaintiff and submitted that Defendant acted arbitrarily in the assessment and did not consider the issues and documents referred to by the deponent. He relied on

INLAND REVENUE V OMOTESHO (F.R.C.) 372 among others and quoted extensively from the cited authorities.

Learned counsel stated that it is obvious that the purported tax returns filed were forged, especially when defendant took no steps in regard to the forged signature of Engr. Boniface Ifesie made in Exhibit D. He placed reliance on ***UTTEH V STATE (1992) 2 NWLR (PT.223) 257,274*** and submitted that by inference, the Defendant has admitted that fact but went ahead to rely on it in the assessment.

The Court was urged to declare the acts of the defendant unlawful and grant the perpetual injunction sought against the defendant for their wrongful act. He relied on ***GOLDMARK (NIG) LTD V IBAFON CO. LTD (2012) 10 NWLR (PT.1308) 291, 352-353*** to buttress his argument.

In reacting to this the Defendant filed a Notice of Preliminary Objection where the Court was urged to strike out the matter for want of jurisdiction. The Court was also urged to hold that the cause of action cannot be effectively determined by way of originating summons as there will be need to call witnesses and conduct cross-examination of these witnesses.

In the affidavit in support, it was averred that the plaintiff is required to register with the Defendant/Applicant as a tax payer under the Companies Income Tax Act, that the only profit exempted from companies income tax are companies limited by guarantee whose income are applied solely towards the promotion of its objects. It was further averred that Plaintiff is required to declare his

income honestly and that the crux of the Plaintiff's case is the basis used by the Defendant in raising the demand notice served on the Plaintiff that having failed to file its Annual Tax Returns, the Defendant applied the best of judgement and issued the Income Tax Demand Notice dated 14th day of November 2016 in respect of the year 2015. Plaintiff did not respond within 30 days of service to object to the assessment. It was also averred that no pre-action notice was served on the Defendant before the institution of this case and that Plaintiff failed to exhaust the internal remedies before instituting this action.

In the submission of learned counsel B.H. Oniyangi, it was contended on the sole issue bordering on the jurisdiction of this Court that the failure to exhaust available legal remedies provided by the law before instituting this matter will oust the jurisdiction of this court. He called in aid the case of ***OKOMALU V AKINBODE (2006) 9 NWLR (PT.985) 343 and KIDA V OGUNMOLA (2006)13 NWLR (PT.997) 377.***

It was argued that Plaintiff did not object within 30 days from the service of the demand notice as is required under section 69 (1) and (2) of the Companies Income Tax which would have led to amendment or otherwise of the Notice. She submitted that failure to object has rendered the notice final and conclusive. Reliance was placed on ***FEDERAL BOARD OF INLAND REVENUE V MANILA INDUSTRIAL SECURITY SERVICES (1976) 2 FRCR 116, and FEDERAL BOARD ON INLAND REVENUE V AZIGBO BROTHERS LTD (2012)6 TLRN 79.***

Learned counsel submitted further that by the combined reading of Sections 69(1) and (2) and Section 76 of the Companies Income Tax Act, the word "may" used in Section 69(1) of the Act is construed as mandatory , and is an obligation on the tax payer to object to any Companies Income Tax demand Notice served on him else such assessment becomes final and conclusive and can be recovered by from such tax payer as debt in accordance with the provisions of Sections 33 and 34 of the Federal Inland Revenue Service Establishment Act, 2007.

On the pre-action notice, it was contended that failure to give pre-action notice where required will diverse the court of jurisdiction to hear and entertain the matter once the defendant raises such objection. She called in aid the case of ***CHIEF VICTORIA OGUNDANA ADEDOTUN & ANOR V FEDERAL INLAND REVENUE SERVICE & ANOR (2011) 4 TLRN 88*** among others. She posited that the requirement of a pre-action notice is a condition precedent and allows the defendant beforehand to consider his position in the matter. Other cases were cited on same issue to drive home the Defendant's objection on this count.

The Court was urged to uphold the preliminary objection of the Defendant.

The Defendant also filed a response to the Plaintiff's Originating Summons and denied the averments of the Plaintiff. It was stated that a proper audit was carried out and plaintiff was assessed accordingly. He particularly averred that Plaintiff refused and neglected to file an

objection after service of the Demand Notice as required by the law which rendered the assessment a final one. He also averred that no pre-action notice was filed and that the plaintiff failed to exhaust the internal remedies prescribed by the law before instituting this action.

In the written address of learned counsel B.H. Oniyangi, two issues were distilled for the determination of the Court thus:-

1. Whether the Defendant has lawful powers to impose taxes on the Plaintiff under the Companies Income Tax Act and Tertiary Education Fund in the sum of Nine Hundred Million, Five Hundred and thirteen Thousand, Three Hundred and Twenty-two Naira, One kobo (₦900,513, 322.01) as tax on the Plaintiff.

2. Whether this Honourable Court has jurisdiction to entertain this matter as presently constituted vis-à-vis the provisions of section 69 of the Companies Income Tax and Section 55 (3) of the Federal Inland Revenue Establishment Act.

On the first issue, it was submitted that the Defendant carried out an audit of the Plaintiff and consequently issued letter dated 11th day of December 2017 which is Exhibit G and the defendant having failed to object to the demand notice as required by law has accepted the audit of the defendant as in Exhibit G.

On the second issue, the argument on jurisdiction canvassed in the preliminary objection was adopted in its totality.

In their reaction, Plaintiff filed further processes, a counter affidavit to the preliminary objection and further and better affidavit to the originating summons. The Plaintiff maintained the case earlier placed before the court and stated that exhibit G was issued without an audit exercise on Plaintiff and Defendant never raised a best judgement assessment or issued the Companies Income Tax Demand Notice dated 14th day of November 2016 but exhibit G which is not a demand notice. He noted that it was Mr. Mursel who is not a member of the Plaintiff that sent them a copy of exhibit G.

In his argument, learned counsel Sepiribo Cromwell Peters submitted in reaction to the case of the Defendant that the Defendant under Section 55 (3) of the Federal Inland Revenue Service Act is not entitled to the service of a pre-action notice. He reproduced the provisions of the Act and noted that the Defendant is not one of the persons specified by the law who is entitled to the service of a pre-action notice, not being one of the persons mentioned. He called in aid the provisions of Section 1 of the Act which created the Defendant and imbued it with a legal personality with the powers to sue or be sued in its own name. He further relied on the case of ***CHIEF OBAFEMI AWOLOWO V ALHAJI SHEHU SHAGARI (1PLR) 1980 227-228*** on the rules of construction of statutes. He argued that defendant not being included by Section 55 (3) cannot claim such liberty. He relied on ***OJUKWU V YARADUA (2008) 4 NWLR (PT.1078) 435, 461*** to buttress that issue of law.

Learned counsel argued that the Defendant misconstrued the import of Exhibit G in stating that it was a demand notice when the contents bear credence that it was an audit exercise that was carried out by the defendant without the input of the Plaintiff. He noted that the requirements of sections 66, 68 and 69 of the Companies Income Tax were not complied with and Exhibit G cannot transmute to those requirements. Extensive arguments were proffered in furtherance of the position of the Plaintiff as earlier canvassed and contained in the Originating Summons.

He also submitted that Originating summons is best suited for this matter, the suit not being a hostile one. He relied on ***ALFA V ATTAI & ORS (2018) NWLR (PT.1611) 59*** and submitted that the facts are not contentious and can be resolved by affidavit of the parties and the documents exhibited.

The Court will rely on all the process filed, arguments on issues and point of law as canvassed by the parties in this case.

Now in the determination of the issue of the jurisdiction of this Court to hear and entertain this matter;

The ground for seeking the striking out of this case is centred majorly on the failure to give a pre-action notice to the Defendant and failure or neglect to exhaust the internal legal remedies prescribed by the law before instituting this matter.

Without much ado, Section 55 (3) of the Federal Inland Revenue Service Act provides that;

"No Suit shall be commenced against the Executive Chairman, a member of the Board, or any other officer or employee of the Service before the expiration of a period of one month after written notice of the intention to commence the suit shall have been served on the Service by the intending Plaintiff or his agent".

By the provision of this Section, the persons named, who are entitled to the issuance of a pre-action notice are the Executive Chairman of Federal Inland Revenue Service, members of the Board of Federal Inland Revenue Service, or any officer or employee of Federal Inland Revenue Service. The Federal Inland Revenue Service itself is a juristic person under section 1 of the Federal Inland Revenue (Establishment Etc.) Act 2007 and is imbued with the powers to sue or be sue or nomine. The Section 55 (3) for all intents and purposes was made for the benefit of individuals and not the institution. Therefore the attempt to smuggle the Defendant (The Service) into the liberty of Section 55 (3) cannot fly in the face of sections 1 of the ACT and the specific provisions of section 55 (3). This Court does not have the latitude to expand the law but expound it as made by the draftsman. I believe it was purposefully made and this Court can only accord the ordinary meaning intended by the legislators. See ***MERIL GUARANTY SAVINGS & LOANS LIMITED & ANOR V WORLDGATE BUILDING (2012) LPELR -9719 (SC).***

The other aspect of jurisdiction which was canvassed by the defendant was that the Plaintiff did not explore the legal remedies prescribed by the law under section 69 (1) and (2) Company Income Tax Act before instituting this action. On that score, it was the contention of the Defendant did not raise an objection as required by the Act, therefore the demand notice for the year 2015 is deemed final and conclusive. Arguments of the parties have been stated earlier in the proceedings.

Now Section 69 (1) and (2) of the Companies Income Tax Act provides that (1) if any company disputes the assessment, it may apply to the Board, by Notice of objection in writing, to review and to revise the assessment made upon it. (2) An application under this subsection (1) shall be made within thirty days from the date of service of the notice of assessment and contain the ground of the objection to the assessment,; the amount of assessable and total profits of the company for the relevant year of assessment and the amount of tax payable for the year, which the company claims should be stated on the notice of assessment.

Incidentally, this is also embedded in the case of the Plaintiff for the reason that Plaintiff questioned the rationale for Exhibit G, (the tax audit exercise) emanating from the office of the Executive Chairman of the Defendant.

Be that as it may, the law in Section 68 of the Companies Income Tax Act mandates the Board of Federal Inland Revenue Service (FIRS) to serve on or sent by registered

post to each company, or person in whose name a company is chargeable, whose name appears on the assessment lists, a notice stating the amount of the total profits, tax payable, the place at which such payment should be made, and setting out the rights of the company under section 69 of the Act to object to the assessment and the grounds of the objection.

Curiously, the Defendant who raised this issue of non-compliance with condition precedent before the institution of the action did not exhibit any evidence of compliance with Section 68 of the Act. Defendant heavily relied on Exhibit G of the plaintiff. This Exhibit G is titled "AK-AY ELEKTRIK NIGERIA LIMITED (01301683-0001), TAX AUDIT EXERCISE: (2013-2015 ACCOUNTS). The letter stated that a tax audit was carried out in the Plaintiff's company and Defendant came to certain position on some matters. These matters were stated on the face of the letter to include Income tax and Education tax, Additional Income, Overstated cost of sales withholding Tax liability among others. The summary of additional tax liabilities was stated as Nine Hundred Million, Five Hundred and Thirteen thousand, Three Hundred and Twenty-two Naira, One kobo (₦900, 513, 322.01).

At the end it said "Note that the relevant notices of additional assessment and demand notes are being raised and would be forwarded to you soon. Please pay promptly to avoid imposition of further penalties and interests for late payment."

Now, having stated the requirements of the Demand Notice envisaged by Section 68 of the Act, can this letter, Exhibit G constitute the Demand Notice prescribed under the law?

I will not hesitate to answer in the negative. The reasons are very obvious. In the letter Exhibit G, the Defendant by inference admitted that it has not sent the demand notice but will do so in future. None was tendered. The letter does not contain the requirements under Section 69 which must be communicated to the Plaintiff in the Demand Notice. This was the case in ***NIGERIAN BREWERIES PLC V LAGOS STATE INTERNAL REVENUE BOARD (2002) 5 NWLR (PT.759) 1, 18-19***, there a letter which did not comply with 32 of the Personal Income Tax Laws of Lagos State Cap.142which is in parimatira with the instant Section 68 of Companies Income Tax Act was held to be invalid and did not constitute a proper notice.

Flowing from the above, the Defendant is precluded to raise this objection on this ground it did not comply with the demand notice. It is only when the proper demand is made and the Plaintiff fails to object within the statutory period that the demand can be said to be final and conclusive. See also the case of ***LSBIR V SPDCN (2011) 5 TLRN 63 and FBIR V OWENA MOTELS (2010) 2 TLRN 89.***

It is for the above reasons that the objection of the Defendant must fail. It is hereby overruled.

Now to the substantive matter, the Court had earlier stated that the grouse of the plaintiff here is also founded on wrong assessment, this observation was also reflected

in the colour of the argument canvassed by the parties themselves. What the law requires the Plaintiff to do where it feels that a wrong assessment was made and communicated is to raise an objection. Here again the Defendant failed to exhibit the assessment as required by law and relied on the said audit carried out by the Defendant. Here again, Sections 68 and 69 of the Companies Income Tax Act come to bear. Exhibit G from all indications is not conclusive of what the defendant intended to do for the reason that Plaintiff was asked to await additional assessments and demand "notes". Exhibit G was a letter to the effect that tax audit exercise was being conducted. The law requires the service of Assessment Notice on the company. In ***OLA V FEDERAL INLAND REVENUE BOARD (1976) NCLR 85***, the Court held that the practice of Federal Board of Inland Revenue cannot legalize omission of particulars required in assessment notices which provides for the contents of notice of assessment in substance and effect, the particulars on which the assessment is made, is a mandatory enactment and its requirement can neither properly nor validly be varied or modified by administrative practices of the Board.

In ***FBIR V DOHERTY (J.H) LTD (1971) 2 NCLR 9,*** the Court held that an assessment may be set aside where statutory pre-conditions for assessment was not complied with. This may include service of notice of assessment and the Court will declare the assessment invalid and will set it aside. See also EBOSELE V STATE BOARD OF TAX (1977) NCLR 274. The Defendant is required to send proper

notice with the particulars specified in Section 69 of the Companies Income Tax Act. They failed to do so. Perhaps if the right thing was done, it would have afforded the Plaintiff an opportunity to raise an objection and table the facts averred in the affidavit before the Defendant, for a re-assessment or otherwise.

In effect, what the Court is saying is that the assessment/exercise carried out by Defendant is invalid for failure to adhere to the conditions precedent before the assessment and imposition of tax was made. Both the Statutes and case laws have provided for the procedure and conditions precedent. It is observed that the implementation of our tax laws is still nascent, but the proper thing must be done by both the Tax masters and the Tax payers to achieve the objectives of the law.

Flowing from the above, the position of this Honourable Court is that the Defendant failed to comply with the provisions of the law and proper procedure before the imposition of the tax on the Plaintiff. This non-compliance has rendered the imposition of the said tax invalid and it is hereby set aside for the failure to comply with conditions precedent.

No order as to cost.

HONOURABLE JUSTICE IJEOMA L. OJUKWU
JUDGE
25/06/2018

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