



# Tax Faculty Newsletter

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## **Tax Appeal Tribunals Restrained from Adjudicating on Federal Revenue**

The Federal High Court of Nigeria in the Abuja Judicial division delivered a judgement on Wednesday, 30<sup>th</sup> December, 2013 in a suit before his Lordship the Honourable Justice G.O. Kolawole restraining the Tax Appeal Tribunals (TATs) from handling Tax Matters and federal revenue disputes.

Please find below the details of the court verdict.

SUIT NO. FHC/ABJ/CR/186/2010

**Between**

**TSKJ CONSTRUCES INTERNACIONALS  
SOCIAD E UNIPESSOAL LDA.....APPELLANTS**

**And**

**FEDERAL INLAND REVENUE SERVICE.....RESPONDENT**

**(judgement delivered by A.F.A. Ademola)**

The Appellant ("TSKJ") a non-resident company, entered into a contract with Nigeria Liquefied Natural Gas (NLNG) for the construction of an LNLG Plant ("the contract").

The Appellant used its Nigerian subsidiary, TSKJ Nigeria, to execute the contract. After the execution of the contract, the profits arising from the contract could not be ascertained.

The Nigerian tax regime provides for an alternative method, the deemed profits basis, of assessment when the profits of a company cannot be readily ascertained. The difficulty of the Appellant assessing the profits made from the contract prompted the Appellant to utilize this basis by filing self-assessment forms for the assessment of its turnover. This, then, enabled the Appellant to calculate its tax liability on an estimate of its likely profit from the execution of the contract.

In the course of assessing its tax liability, the appellant made deductions (in the form of recharges), for the amount paid to its subsidiary, TSKJ Nigeria for the performance of the contract. This deduction was disallowed by the Respondent on the ground that such deduction could not be allowed under the Turn-over basis of assessment as prescribed under section 26(1) of the Companies Income Tax (CITA). Thereafter, the Respondent made an additional assessment to that issued by the Appellant. The Appellant objected to this, but the Respondent refused to amend the additional assessment.

With regards to the first issue, the Appellants argued that the TAT lacked Jurisdiction. Their argument was anchored on the conflict between the provisions of the Federal Inland Revenue Service (Establishment) Act 2007 ("the FIRS Act"), the TAT (Procedure) Rule 2010 and section 251 (1) (a) and (b) of the 1999 Constitution of the Federal Republic of Nigeria (the "Constitution").

Under the fifth schedule of the FIRS Act, the TAT is vested with powers to adjudicate on controversies arising from CITA. The TAT (Procedure) Rule 2010 spells out the procedure to be followed by the TAT when resolving tax disputes. However, sections 251 (1) (a) and (b) of the Constitution, vests exclusive jurisdiction in the Federal High Court in civil cases and matters relating to the revenue of the Government of the Federation in which the Government or any of its organs is a party and matters "connected with or pertaining to the taxation of companies and other bodies established to carry on business in Nigeria

and all other persons subject to Federal taxation.”

The Respondent, however, argued that the TAT was not a court with competing jurisdiction with the FHC, but an administrative panel. The Respondent considered the TAT to be inferior to the FHC, which exercises appellate jurisdiction over the TAT. Thus, the TAT could not be affected by the exclusive jurisdiction of the FHC in section 251 (1) (a) (b) nor be in conflict with it.

After considering the provisions of the relevant laws, the court made a finding that the tax issues of the appellant fell within the exclusive jurisdiction of the FHC as prescribed by section 251 (1) (a) (b) of the Constitution. Reliance was placed on the cases of **STABILINI VISION LTD v F.B.I.R** and **CADBURY (NIG) PLC. v F.B.I.R** which the Respondent strenuously sought to distinguish.

The argument that the TAT was an administrative panel was seen by the court as “mere semantics” as far as their decisions would affect the civil rights and obligations of companies in relation to tax matters and revenue of the Federal Government. The court declared the provisions of Section 59 (1) (a) (b) of the FIRS Act as invalid, since they conflicted with the provisions of Section 251 (1) (a) and (b) of the Constitution.

On the second issue, the court opined that the TAT should have followed the interpretation given to section 26 of CITA by the FHC in the case of **HALLIBURTON WEST AFRICA LTD v F.B.I.R.** (the “Halliburton Case”) particularly in the light of judicial authorities to the effect that the FHC is superior in status to the TAT.

The Halliburton case bears similar facts to the instant case. In that case, the Federal Board of Inland Revenue also claimed that no other form of deduction from turnover is recognized before arriving at deemed profit under section 26 (1) of CITA.

In interpreting section 26 of CITA, the FHC distinguished in the Halliburton case between assessing the tax liability of a Nigerian and Non-Nigerian Com-

panies. The court held that it would amount to double taxation if the money paid to Halliburton’s Nigerian subsidiary for the performance of certain contracts, was also included as part of Halliburton West Africa Limited’s deemed profit assessment. This is because Halliburton Nigeria would also be expected to pay tax on whatever it receives under the contract.

The FHC relied on the decision above in coming to the conclusion that the TAT did not properly interpret the provisions of CITA, especially section 26 (1) in arriving at the conclusion that recharges by the appellant were not allowable deductions in the turnover of the appellant.

The third issue was resolved in line with the second issue and judgement was granted in favour of the Appellant. Additionally, the TATs in Nigeria created under the FIRS Act were restrained from adjudicating on tax matters and Federal Revenue relating to companies. The Minister of Finance, Okonjo Iweala was also ordered to dissolve the eight tax appeals tribunals which were approved and reconstituted during the first half of 2013 in this landmark decision.

(Culled from THIS DAY newspaper of March 11, 2014)

#### UPCOMING PROGRAMMES

Transfer Pricing Regulations-Road map for Implementation Challenges and Compliance at Lagos Airport Hotel on April 11, 2014.

Social service seminar on Personal Income Tax Act as amended in collaboration with Lagos Internal Revenue Service and or Federal Inland Revenue Service for members and other stakeholders in Lagos on May 13, 2014.

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