

**IN THE TAX APPEAL TRIBUNAL
SOUTH EAST ZONE
HOLDEN AT ENUGU**

APPEAL NO.: TAT/SEZ/004/2020

BETWEEN

CELEBRITIES RESTAURANT LIMITED APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE RESPONDENT

BEFORE THE APPEAL COMMISSIONERS:

HON. BARR. CHUKWUEMEKA EZE	- CHAIRMAN
HON. IDE JOHN C. UDEAGBALA	- COMMISSIONER
HON. ANNE C. AKWIWU	- COMMISSIONER
HON. PROF. J.O. ANYADUBA	- COMMISSIONER

PARTIES:

Mr. Somtochukwu Jideonwo (a director of the Appellant) for the Appellant
No representative of the Respondent.

LEGAL REPRESENTATION

Gabriel Onovo, for the Appellant
Evoh Nicholas, for the Respondent

JUDGMENT

BACKGROUND

This is an appeal brought by the Appellant against the Respondent's Additional Assessment Notice dated 30th July, 2019 and Demand Notice dated 29th January, 2020, among other documents, informing the Appellant of its additional assessments on Companies Income Tax (CIT), Value Added Tax (VAT) and Education Tax (ET) liability for the period of 2013 - 2017. The Appellant commenced this appeal vide a Notice of Appeal dated and filed on 7th July, 2020 which was later amended by virtue of Amended Notice of Appeal dated and filed on the 7th October, 2020 which was duly regularized by an Order of this Tribunal made on 8th December, 2020. The Respondent opposed the appeal by originally filing a reply dated 13th of July, 2020 which was amended vide a Respondent's Amended Reply dated and filed on 20th January, 2021.

FACTS

The facts cumulating in this appeal can be summarized as contained below:

The Appellant is a Company duly registered under Part A of the Companies and Allied Matters Act 1990, with its Registered Office at No. 1 Hospital Road, GRA, Enugu. The Respondent is a creation of Section 1 of the Federal Inland Revenue Service (Establishment) Act 2007; it is an agency of Government of the Federation and the relevant tax authority with responsibility for the administration of relevant taxes on behalf of the Federal Government. It has an office at No. 4 John Nwodo Close, Opp. Fire Service Station, GRA, Enugu, Nigeria.

The Appellant is a taxpayer of the Respondent saddled with the responsibility to pay those taxes due to the Federal Government through the Respondent in accordance with the provisions of the relevant laws.

In this regard, the Respondent carried out a tax audit on the Appellant for the period of 2013 to 2017 years of assessment in respect of Companies Income Tax (CIT), Value Added Tax (VAT) and Education Tax (ET). The Respondent issued an additional Assessment and Demand Notices for the sum of N28,989,842 (Twenty-Eight Million, Nine Hundred and Eighty-Nine Thousand, Eight Hundred and Forty-Two Naira) only which were served on the Appellant on 8th August, 2019 and 29th January, 2020 respectively. The assessments as contained in the notices were as follows:

- a. The sum of N2,834,439 (Two Million, Eight Hundred and Thirty-Four Thousand, Four Hundred and Thirty-Nine Naira) only being for Companies Income Tax (CIT).
- b. The Sum of N26,014,535.03 (Twenty-Six Million, Fourteen Thousand, Five Hundred and Thirty-Five, Three Kobo) only being for Value Added Tax (VAT).
- c. The sum of N140,869 (One Hundred and Forty Thousand, Eight Hundred and Sixty-Nine Naira) only being for Education Tax (ET).

The Appellant objected to the Additional Assessment and Demand Notices by a letter dated 20th February, 2020. However, the Respondent refused the objection vide letters dated 17th March, 2020 and 24th March, 2020 on the ground that in line with section 69 (2) (a) of the Companies Income Tax Act (CITA) Cap C21 LFN 2004 as amended, the time frame of 30 days stipulated for objection had elapsed.

Based on the foregoing, the Appellant, being dissatisfied with the Additional Assessment and Demand Notices issued to it by the Respondent, filed this appeal before the Tax Appeal Tribunal, South East Zone, via an initial Notice of Appeal dated 7th April, 2020 and amended vide an Amended Notice of Appeal dated 7th October, 2020 and duly regularized by an Order of this Tribunal made on 8th December, 2020. The Appellant stated the following grounds on its Notice of Appeal:

GROUND 1

The Respondent erred in law when it assessed the Appellant for taxes that are not actual liabilities of the Appellant.

Particulars of error

- a. Before the audit, the Appellant had filed tax returns with the Respondent and paid self-assessed taxes for the period under review.
- b. The Appellant provided all the documents demanded by the Respondent during the tax audit.
- c. The various documents and information supplied by the Appellant were those specifically demanded by the Respondent to enable the Respondent arrive at the actual tax liabilities of the Appellant for the period under review.
- d. However, the Respondent in assessing the Appellant for tax jettisoned all the relevant documents and information supplied by the Appellant during the audit and relied only on the Monthly Reports in the Management Account of the Appellant in determining the alleged tax liability of the Appellant.
- e. The result is that the taxes as assessed by the Respondent were wrongly computed and do not reflect the actual tax liabilities of the Appellant for the period under review.

GROUND 2

The Respondent erred by relying only on the Management Account of the Appellant in arriving at the alleged tax liability of the Appellant.

Particulars of error

- a. During the Audit, the Appellant provided all the documents, including the Appellant's bank statements necessary for the Respondent to arrive at the actual incomes of the Appellant for the purposes.

- b. During the Exit Meeting of 15 July 2019, the Respondent pointed out that some bank statements were not provided and requested that the Appellant provide those outstanding bank statements.
- c. Few days after the Exit Meeting, the Appellant, through one of its directors provided the remaining bank statements together with other documents requested by the Respondent as outstanding documents.
- d. However, the Respondent in determining the tax liabilities of the Appellant abandoned the relevant documents submitted by the Appellant and relied only on the Monthly Reports in the Management Account of the Appellant without reconciling same with the Appellant's bank statements.
- e. Management Account is an internal document prepared by a company for its budget and internal consumption and does not reflect the actual or fair financial state of a company for tax purposes.
- f. The actual fair financial state of the Appellant can only be determined through the 3rd party documents and audited financial statements of the Appellant prepared after proper adjustment have been carried out on the figures as contained in the Management Account of the Appellant.

GROUND 3

The Respondent failed to consider all the various documents and information submitted by the Appellant before arriving at the alleged tax liability of the Appellant.

Particulars of error

- a. At the conclusion of the Exit Meeting, the Respondent demanded for further documents from the Appellant, namely:
 - i. Bank Statements
 - ii. Trial Balance for the audit period
 - iii. Original Bank Offer Letters

iv. Schedule of Input Value Added Tax

b. The Appellant provided all the demanded documents few days after the Exit Meeting.

c. However, the Respondent in assessing the Appellant for tax, failed to consider the various documents submitted by the Appellant including the documents outlined in paragraph "a" herein and relied only on monthly Management Account of the Appellant as stated in the Respondent's letter dated 25 July 2019.

GROUND 4

The Respondent failed to show to the Appellant how it arrived at the alleged tax liability, which it sought to demand from the Appellant.

Particulars of error

a. At the conclusion of the Exit Meeting on 15 July 2019, the Appellant supplied the various documents requested by the Respondent for the purpose of further audit.

b. The next communication from the Respondent is the Letter of Intent dated 25 July 2019 which according to the Respondent contains the Respondent's decision on "all the issues raised."

c. Apart from the monthly reports, the Letter of Intent does not contain any other explanation, source, report or calculation on how the Respondent arrived at the various decisions and figures upon which it based the assessments and alleged tax liability of the Appellant.

d. The Letter of Intent does not contain any source document apart from the Management Account detailing how the decision that the Appellant understated turnover or overstated the disallowed expenses.

e. There is no verifiable basis on how the Respondent arrived at the alleged turnover upon which the assessment of the Appellant's alleged tax liabilities was based.

GROUND 5

The Respondent erred in law by seeking to assess or assessing the Appellant to tax based on a wrongfully determined turnover.

Particulars of error

a. During the audit at the Exit Meeting, the Respondent stated that it intended to rely on turnover as determined in the Management Account of the Appellant as a result of the absence of some of the Appellant's bank statements.

b. The Respondent also pointed out that there were variations in figures reported in the financial statement and the audit figures established.

c. The Appellant in response stated that the variation was as a result of the adjustment carried out by the external auditor to reflect the actual turnover of the Appellant.

d. At the end of the Exit Meeting, the Respondent then demanded for outstanding bank statements ostensibly to properly determine the actual turnover of the Appellant.

e. In compliance with the demand of the Respondent, the Appellant later supplied the Respondent with the outstanding bank statements and other documents necessary for determining the actual turnover of the Appellant.

f. However, the Respondent abandoned these important documents including the Appellant's bank statements and, as stated in the Letter of Intent dated 25 July 2019, determined the Appellant's turnover based solely on the Appellant's Monthly Reports in the Management Account.

g. The Appellant's Monthly Reports are documents meant for internal consumption and cannot reflect the actual turnover of the Appellant.

h. There is nothing in the Letter of Intent or other correspondences between the Appellant and the Respondent to show that the Respondent considered other relevant important documents before arriving at the turnover upon which the assessments were based.

i. There is also neither report nor calculations by the Respondent in its correspondences with the Appellant to show how the Respondent arrived at the alleged turnover on which the assessments were based.

GROUND 6

The Respondent erred by seeking to impose on, and demanded from the Appellant improperly computed Value Added Tax.

Particulars of error

a. Before the audit, the Appellant had computed and remitted to the Respondent the correct Value Added Tax received from its customers for the year under review.

b. During the Exit Meeting of 15 July 2019, the Respondent agreed that the Value Added Tax liability of the Appellant shall be based on the sales made by the Appellant for the period under review but claimed that the Appellant had some Value Added Tax liabilities to defray.

c. The Appellant challenged the claim and informed the Respondent that it had input Value Added Tax from purchases it made during the period under review and went ahead to submit the necessary documents in support of its claim.

d. After the Exit Meeting, the Appellant further provided the Respondent with Input Value Added Tax Schedule as demanded by the Respondent.

e. Despite all the documents provided by the Appellant, the Respondent still went ahead to compute the alleged Value Added Tax liability of the Appellant based on wrongfully computed turnover and wrong figures which the Respondent derived solely from the Appellant's Management Account.

GROUND 7

The Respondent erred in law when it assessed the liability of Appellant on Value Added Tax based on turnover.

Particulars of error

- a. Value Added Tax is a tax imposed on supply of taxable goods and services.
- b. As agreed by the Respondent during the Exit Meeting, the Value Added Tax liability of the Appellant ought to be determined from the sale of taxable goods and services made by the Appellant and not from the Appellant's turnover.
- c. The turnover of the Appellant contains other inflows from other transactions that are not subject to Value Added Tax.
- d. However, from the Respondent's Letter of Intent, it is clear that the Value Added Tax liability of the Appellant was determined from the turnover of the Appellant and not from the record of sales as agreed by the Respondent during the Exit Meeting.
- e. By basing the Value Added Tax liability of the Appellant on turnover instead of actual sales, the Respondent wrongfully included in its computations, the value of transactions that are not subject to Value Added Tax.
- f. The amount of Value Added Tax as stated in the notices of assessment is therefore not the actual Value Added Tax liabilities of the Appellant if any.

GROUND 8

The Respondent erred in law by failing to allow deduction of the interest payable on loans obtained by the Appellant for the period under review.

Particulars of error

- a. During the period under review, the Appellant obtained 3 set of loans as follows:
 - i. Credit facility dated 14 October 2013 from Diamond Bank in the sum of N9,503,998.00 (Nine Million, Five Hundred and Three Thousand, Nine Hundred and Ninety-Eight Naira) with interest rate put at 24% with other charges.
 - ii. Credit facility dated 10 January 2014 from Access Bank Plc in the sum of N3,000,000.00 (Three Million Naira) with interest rate put at 20% per annum with other charges.
 - iii. Credit facility dated 18 June 2014 from Access Bank Plc in the sum of N50,000,000.00 (Fifty Million Naira) with interest rate at 20%.

- b. During the audit, the Appellant informed the Respondent of the loans and requested that they be taken into consideration in calculating the tax liability of the Appellant.
- c. During the Exit Meeting, the Respondent demanded that the Appellant provide the originals of the Letters of Offer relating to the loans.
- d. The Appellant provided the Letters of Offer to the Respondent in proof of the loan.
- e. Despite the fact that the Appellant provided evidence of these loans, the Respondent failed to take them into consideration in assessing the Appellant to tax thereby wrongfully computing the tax liability of the Appellant.

GROUND 9

The Respondent acted arbitrarily and capriciously in its dealings with the Appellant in the circumstances of this case.

Particulars of error

- a. The Appellant provided all the documents demanded by the Respondent for the purpose of the audit.
- b. Upon conclusion of the Exit Meeting on 15 July 2019, the Respondent demanded more documents, which the Appellant delivered few days after the Exit Meeting.
- c. On 25 July 2029, 10 days after the Exit Meeting and few days after the Appellant delivered the final set of documents demanded by the Respondent at the Exit Meeting, the Respondent issued a Letter of Intent to issue assessments against the Appellant.
- d. The Respondent issued the Letter of Intent without reviewing the documents and information delivered by the Appellant after the Exit Meeting.
- e. The Letter of Intent does not contain the Respondent's response or decision with respect to each of the documents submitted by the Appellant after the Exit Meeting.

- f. The Respondent refused, omitted, neglected and failed to consider and respond to cogent and compelling representation/information and documents delivered by the Appellant after the Exit Meeting.
- g. The Respondent failed, neglected and omitted to inform the Appellant of its decision with respect to the various documents delivered by the Appellant after the Exit Meeting.
- h. There is no finding on the part of the Respondent or any evidence to show that the Appellant ought to pay or is owing the amount assessed in the demand notices
- i. The Respondent wrongly treated the demanded tax assessment as having become final and conclusive and refused to grant the Appellant fair hearing.

GROUND 10

The Respondent erred by disallowing and adding back the salaries paid by the Appellant to its staff.

Particulars of error

- a. One of the documents requested by the Respondent for the purpose of the audit is the Appellant's payroll (Nationwide) for the period under review.
- b. The Appellant provided this document in proof of the various salaries and wages paid to its staff.
- c. The Respondent during the Exit Meeting acknowledged that the Appellant provided this document.
- d. Staff payroll or salaries paid to the Appellant's staff was not in dispute during the audit as the Appellant provided all the documents and information necessary for the Respondent to determine the wages and salaries paid by the Appellant.
- e. However, in surprising turn of action and without any basis or reason, the Respondent in its Letter of Intent disallowed the sum of N846,239.00 (Eight

Hundred and Forty-Six Thousand, Two Hundred and Thirty-Nine Naira) being part of the salaries paid by the Appellant to its staff in 2015.

f. The Monthly Report on which the Respondent based the disallowance does not reflect the actual financial state of affairs of the Appellant.

GROUND 11

The Respondent erred in law by unconstitutionally seeking to recover Value Added Tax from the Appellant.

Particulars of error

a. The business of the Appellant which is a restaurant only involves sale of foods and non-alcoholic drinks within Enugu State alone.

b. Value Added Tax on intra State transactions is a consumption tax which is neither on the Exclusive nor Concurrent List of the 1999 Constitution of the Federal Republic of Nigeria.

c. The absence of Value Added Tax on intra State transactions in either under the Exclusive or the Concurrent List means that it is residual and therefore within the exclusive purview of the State Government.

d. The Federal High Court in **Registered Trustees of Hotel Owners and Managers Association of Lagos v. Attorney General of Lagos State and Federal Inland Revenue Service, Suit No. FHC/L/CS/360/2018** and Supreme Court of Nigeria in the cases of **A.G. Ogun State v. Alhaji Ayinke Aberuagba & It's. (1985) NWLR (Pt. 3) 395** and **Attorney General of Lagos State v. Eko Hotels & Anor (2007) LPELR-43713 (SC)** have held respectively that consumption tax on intra State transactions are residual matters and that therefore, States are the exclusively entitled to charge consumption tax on intra State transactions.

e. The Federal High Court held in the case of Registered Trustees of Hotel Owners and Managers Association of Lagos v. Attorney General of Lagos State and Federal Inland Revenue Service Suit No. FHC/L/CS/360/2018 that it is unconstitutional to charge Value Added Tax on intra State restaurant businesses such as that being run by the Appellant.

f. The Enugu State Government in exercised of its residual constitutional powers to impose consumption tax on intra State transactions has enacted a consultation tax law known as Enugu State Hotel Occupancy and Restaurant Consumption Law.

g. It is unconstitutional, unlawful and illegal for the Respondent to seek to impose Value Added Tax liability on the Appellant in the circumstances of this case and in the light of the decisions of the Supreme Court and Federal High Court.

GROUND 12

The Respondent erred when it unlawfully imposed penalties and interests on the Appellant.

Particulars of error

a. Penalties and interests can only arise after a properly determined tax is not paid within the period prescribed in the relevant tax law.

b. The alleged tax liability of the Appellant as determined by the Respondent has no basis.

c. Interests and penalties can only arise if the assessment has become final and conclusive.

d. An assessment can only be final and conclusive if it was properly issued in accordance with the relevant laws.

e. The assessments issued by the Respondent against the Appellant have not become final and conclusive.

f. There cannot be imposition of penalty or interest on assessment that are not yet payable.

RELIEFS SOUGHT BY THE APPELLANT

The Appellant sought the following reliefs from the Tribunal:

a) A declaration by the Tribunal that the decisions of the Respondent as contained in its letters dated 17th March 2020 and 24th March, 2020, are incompetent, unconstitutional, defective, null and void.

b) A declaration of the Tribunal that the Respondent acted arbitrarily and capriciously in its dealing with and treatment of the Appellant in the circumstances of this case.

c) A declaration by the Tribunal that consumption tax on goods and services consumed in a restaurant within a State is a residuary matter within the exclusive administrative and legislative powers of the State and therefore not collectible by the Respondent.

d) A declaration by the Tribunal that the Appellant is not liable to pay the assessed Companies Income Tax and Value Added Tax.

e) A decision of the Tribunal that the Respondent did not grant the Appellant fair hearing in the circumstances of this case.

f) A decision of the Tribunal that the attempt by the Respondent to deem the undue tax assessment as having become final and conclusive is null and void and of no legal effect.

g) A decision of the Tribunal setting aside the notices of assessments dated 30th July 2019 and the demand notices dated 29th January 2020 issued by the Respondent against the Appellant.

h) A decision of the Tribunal setting aside the penalties and interest imposed by the Respondent on the Appellant.

i) Any other order or further orders as may be made by this Honourable Tribunal.

RESPONDENT'S REPLY

In reply to the Appellant's Amended Notice of Appeal, the Respondent filed the Respondent's Reply Acknowledging Receipt of the Amended Notice of Appeal dated 20th January, 2021

The Respondent's grounds for contesting the appeal are as follows:

RESPONSE TO GROUND 1 OF THE AMENDED NOTICE OF APPEAL

The Respondent acted within its statutory powers and in accordance with the extant tax laws when it assessed the Appellant to additional tax liabilities for Companies Income Tax, Tertiary Education Tax and VAT Re-Assessment Notices totaling the sum of N28,989,842.00 after duly conducted field tax audit.

PARTICULARS:

I. The Respondent is a statutory body charged with the responsibilities among others to assess, collect and remit taxes so collected to the Government of the Federation.

II. The Respondent is also empowered by law to conduct tax audit and investigation in order to identify taxpayers that indulge in tax evasion, fraud and other harmful tax practices that deprive the Government of the Federation its legitimate earnings.

III. The Appellant was assessed to additional tax liabilities for Companies Income Tax, Tertiary Education Tax and VAT Re-Assessment Notices totaling to the sum of Twenty-Eight Million Nine Hundred and Eighty-Nine Thousand, Eight Hundred and Forty-Two Naira (N28, 989,842.00) as a result of the outcome of the field tax audit which the Appellant effectively participated.

IV. Further to paragraph (iii) above, the Respondent aver that after the conclusion of the audit exercise in July 2019, a letter of intent dated 25th July which contained the summary outcome of the audit exercise and Add-Backs was served on the Appellant and receipt acknowledged on 29th July 2019.

V. In response to Ground 1 Particulars a – e of the Appellant's Amended Notice of Appeal the Respondent states as follows :

a. The fact that the Appellant had filed its tax returns and paid its self – assessed taxes does not preclude the Respondent from carrying out its statutory function to conduct routine tax audit and investigation to ascertain the level of its tax compliance with the relevant tax laws. Tax audit is the driver of self-assessment tax regime and before the Respondent arrived at the additional tax liability after the audit, tax already paid was accordingly adjusted.

b. Further to paragraph (a) above, it is important to note that the Appellant is a habitual late filer of its audited accounts.

Contrary to the Appellant's assertion that it filed its tax returns with the Respondent and paid its self-assessed taxes for the period under review, it took the Appellant up to 24th of November 2016, to file its 2013,2014 and 2015 audited accounts. From June 30th 2018 when the duty to file its 2017 annual return became due till this Notice of Appeal was filed, the Appellant was yet to file its 2017 its 2017 audited account with the Respondent. It was during the audit that a copy of its 2017 audited account was handed over to the audit team among other documents.

c. VAT remittances is on a monthly basis, is charged on actual sales of the Appellant that are subject to VAT. But the Appellant being a habitual late filer does not file its VAT returns as at when due.

d. The Appellant did not file its VAT returns (VAT form 002) in the years under review, rather it reluctantly makes payments of any amount it chooses to pay when ever it so pleases to pay without recourse to actual VAT-able sales it made as required by law. For instance January – December 2013 VAT returns were paid in one lump sum of N 300,000 on 26/11/ 14 without filing VAT form 002 to indicate into its total state, Vatable supplies and non-vatable supplies and input VAT. January to October 2014, was paid in one lump sum of N 200,000 in November 2014. Several other months in 2015, 2016 and 2017 were paid several months after the due date without recourse to form VAT 002.

e. At the commencement of the audit exercise, the Respondent, by its letter dated 12th February 2019 requested the Appellant to provide the documents listed

therein for the audit exercise. The Respondent's letter dated 12th February 2019 is hereby notified pleaded.

f. It is not true that the Appellant provided all the documents requested by the Respondent during the audit exercise. Below are the only documents provided by the Appellant:

1. 2017 Annual Financial Statement (yet to be filed with the Respondent)
2. A computer printout Monthly Management Account titled 'Manufacturing, Trading, Profit and Loss Account' from January 2013 – December 2017.
3. Diesel and fuel expenses receipts for the relevant period.
4. Enugu Electricity Distribution Company Bills
5. Access Bank Statements from 2014-2017 with A/C No. 0689401233
6. Union Bank Statements from 2012 – 2017 with A/C No. 001615011145
7. Access Bank Statements from 2012 – 2017 with A /C No. 0065452266
8. Access Bank Statements from 2012 – 2017 with A/C No. 0689297885
9. Purchase receipts evidencing input VAT deducted by the supplier which was provided after the Exit Meeting.

g. The Appellant refused to provide the following documents that were requested by the Respondent during the Exit Meeting.

1. Access Bank Statements with A/C No : 0689151899
 2. Diamond Bank (Now Access Bank) Statements with A/C No: 0032658728
 3. First Bank Statements with A/C No:2020041199
 4. Trial balances for the period.
- e. Original bank offer letter.

h. Contrary to the Appellant's claim, the Respondent did not jettison the documents provided by the Appellant. The Respondent actually reviewed the above-mentioned documents provided by the Appellant before arriving at the tax liabilities.

i. The Respondent did not only rely on Management accounts but it also relied on the above-named documents provided by the Appellant before arriving at the tax liabilities. For instance, the Appellant provided electricity bill receipts, diesel and fuel receipts. Three documents were reviewed and used in determining the audit figures in respect of these expenses. This is to show that the Respondent also reviewed the few sources of documents provided by the Appellant before arriving at the tax liability.

j. The tax liabilities for the relevant years computed by the Respondent after the audit exercise were based on the above documents provided by the Appellant and it reflects the actual tax liabilities of the Appellant.

RESPONSE TO GROUNDS 2 AND 3 OF THE AMENDED NOTICE OF APPEAL

The Respondent did not err in any way or any law by relying on the Management Account provided by the Appellant in determining its tax liability for the relevant years in the absence of complete source documents and bank statements demanded at the beginning of the audit exercise.

PARTICULARS:

i. Ground 2 Particulars (a) is not correct. The Appellant provided the documents earlier mentioned in Ground 1 of the Respondent's Amended Reply as listed hereunder :

1. 2017 Annual Financial Statement (yet to be filed with the Respondent)
2. A computer printout Monthly Management Account titled 'Manufacturing, Trading, Profit and Loss Account' from January 2013 – December 2017.
3. Diesel and fuel expenses receipts for the relevant period.
4. Enugu Electricity Distribution Company Bills
5. Access Bank Statements from 2014-2017 with A/C No 0689401233
6. Union Bank Statements from 2012 – 2017 with A /C No. 001615011145
7. Access Bank Statements from 2012 – 2017 with A /C No. 0065452266
8. Access Bank Statements from 2012 – 2017 with A/C No. 0689297885
9. Purchase receipts evidencing input VAT deducted by the supplier which was provided after the Exit Meeting.

ii. The Appellant did not provide any outstanding bank statements to the Respondent after the Exit Meeting. The only documents provided by the Appellant to the Respondent after the Exit Meeting were purchase receipts which indicated the input VAT deducted by the suppliers. These were extracted and used in adjusting the output VAT before arriving at the final VAT payable.

iii. It is not true that the Respondent abandoned other relevant documents and only relied only on the Monthly management reports. The Respondent relied and adopted the EEDC (Electricity) bills, receipt for Diesel & Fuel, expenses because they were provided by the Appellant.

iv. In determining the income of the Appellant, the Management Report was the most reliable documents to be used because it contained both sales deposited to the bank and cash sales that were expended before depositing them in the bank.

Furthermore, bank statements could not be fully relied upon because all the bank statements of the Appellant were not provided.

v. The Appellant did not provide sales schedules, sales invoices and daily sales registers to the Respondent during the tax audit exercise and after the exercise, therefore, based on the available documents provided by the Appellant, the Management Reports were the most reliable documents to be used in determining the income and expenses.

vi. Management Accounts is actually an internal document of a company from internal control. However, it is one of the important documents required by Respondent from taxpayers during tax audit exercise.

vii. It is not true that the actual fair financial state of the Appellant can only be determined through 3rd party documents and audited accounts. Company's management account can be used to determine its financial state in the absence of comprehensive source documents and bank statements.

It is important to state that the only way a company can effect any variance between Management Reports and Audited accounts is through Audit adjustment journal. Throughout the period of the audit, the Appellant could not provide any audit adjustment journal to show that there were no variances between the Management Reports and the Audited accounts for the several years in dispute.

viii. During the Exit Meeting, the audit adjustment journal was requested for but the Appellant could not provide it.

ix. It is not true that the Appellant provided all the outstanding documents demanded after the Exit Meeting. The only documents the Appellant provided after the Exit Meeting were purchase receipts evidencing input VAT deductions from the suppliers which were extracted by the Respondent and used for adjusting the output VAT before arriving at the additional VAT liabilities.

x. It is not true that the Respondent did not consider the various documents provided by the Appellant. Indeed, the Respondent considered all the documents provided by the Appellant as listed in paragraph (i) above, (which included the monthly Management Reports) before arriving at the additional tax liabilities stated in the Letter of Intent sent to the Appellant dated 25th July, 2019 which was received by the Appellant on the 29th of July, 2019.

RESPONSE TO GROUND 4 OF THE AMENDED NOTICE OF APPEAL

The Respondent's letter of intent dated 25th July, 2019 clearly conveyed the detailed findings and outcomes of the audit exercise to the Appellant which it never objected to.

PARTICULARS:

I. It is not true that the Appellant supplied all the documents requested by the Respondent at the end of the Exit Meeting. The only documents the Appellant provided after the Exit Meeting were purchase receipts evidencing input VAT deductions from the suppliers which were extracted by the Respondent and used for adjusting the output VAT before arriving at the additional VAT liabilities.

II. It is not true that the Respondent did not show how it arrived at the additional tax liability to the Appellant. The Letter of Intent sent to the Appellant contained tax audit add-backs which formed the basis from which the additional tax liabilities were computed and it is self-explanatory.

III. Paragraph 1.0 of the letter of intent contains a table titled 'SUMMARY OF TAX ADD-BACKS'. This includes, UNDISCLOSED TURNOVER, DISALLOWED EXPENSES AND STAFF SALARIES.

The above subject-heads are the areas the audit team discovered discrepancies as per the Appellant's audited accounts and findings during the audit.

Also in the Letter of Intent are paragraphs titled ' COMMENTS ON THE TAX ADD-BACKS'. These paragraphs contain specific explanation on the add-backs and a table detailing the additional VAT liabilities, VAT exempt, input VAT granted, penalties and interest.

IV. In determining the income of the Appellant during the audit, the monthly Management Reports was the most reliable and comprehensive document to be relied upon among the documents provided by the Appellant because it contains the summary of the Appellant's total income and expenses on monthly basis.

V. The Appellant did not provide sales schedule, sales invoices and daily sales register to the Respondents; despite repeated demand. Therefore, the monthly Management Reports were used in verifying the turnover because it contained both sales deposited to the bank and cash sales that were expended before depositing them in the bank. Furthermore, bank statements could not be fully relied upon because the Appellant failed to provide its complete bank statements.

VI. The letter of intent is a standard format for reporting audit findings and stating the discrepancies in the figures reported in the audited accounts and audit findings. It is detailed enough to explain to the Appellant the basis for the additional assessments.

RESPONSE TO GROUND 5 OF THE AMENDED NOTICE OF APPEAL

In response to Ground 5 of the Appellant's Amended Notice of Appeal, the Respondent states that it did not err in any law because the audit turnover was correctly determined in accordance with the extant laws before arriving at the additional tax liabilities.

PARTICULARS:

I. The Respondent admits ground 5 Particulars a, b, c, d of the Amended Notice of Appeal.

In response to Particulars 5(g),(h) and (i), the Respondent states as follows:

II. That the Appellant did not provide any other bank statements to the Respondent after the Exit Meeting making it difficult to rely on the bank statement in determining the turnover. The only documents the Appellant provided after the Exit Meeting were purchase receipts evidencing input VAT deductions from the suppliers which were extracted by the Respondent and used for adjusting the output VAT before arriving at additional tax liabilities.

III. When the Respondent pointed out to the Appellant at the Exit Meeting about the variations between the bank statements and tax audit figures the Appellant could not provide the audit adjustment journal to show how those variances were adjusted.

IV. The Appellant did not provide the outstanding bank statements to the Respondent after the Exit Meeting. Below are the bank statements that the Appellant has not provided to the Respondent:

- a. Access Bank Statements with A/C No : 0689151899
- b. Diamond Bank (Now Access Bank) Statements with A/C No: 0032658728
- c. First Bank Statements with A/C No:202004119.

V. The Respondent did not abandon the documents provided by the Appellant. As we have repeatedly stated, the Appellant could not provide all the documents demanded by the audit exercise. The few ones provided are ones contained in Ground 1 Particulars (v) (f) of this Respondent's Reply. These documents were considered and the Management Report was the most reliable and comprehensive document to be relied upon among the documents provided by the Appellant because it contains the summary of the Appellant's total income and expenses on a monthly basis covering the period under review.

VI. The Management Reports contain both sales deposited to the bank and cash sales that were expended before depositing them in the bank. Bank statements could not be fully relied upon because all the bank statements of the Appellant were not provided. The Appellant did not also provide sales schedules, sales invoices and daily sales registers to the Respondent during and after the tax audit exercise.

VII. It is not true that the Appellant's Monthly Management Reports cannot reflect its actual turnover. Monthly Management Reports are reports that reviews and measures a company's financial and operational performance on a month to month basis. It helps a company's management team to track present and future performance and assist it in making informed decisions. Being an internal document, which is usually meant for internal control and appraisal of the business performance, it gives a fair assessment of the Appellant's financial position for the period it relates. Monthly Management Reports is one of the most important documents used in measuring the accuracy of audited accounts.

- i. Access Bank Statements with A/C No : 0689151899
- ii. Diamond Bank (Now Access Bank) Statements with A/C No: 0032658728
- iii. First Bank Statements with A/C No:2020041199

VIII. We have stated severally that the monthly Management Reports was the most reliable documents among the documents the Appellant provided which we have also listed in this reply. The Respondent considered all the documents provided including the monthly Management Report.

RESPONSE TO GROUND 6 AND 7 OF NOTICE OF APPEAL

The Respondent did not err in any law by assessing the Appellant to additional value added Tax Liability of N26, 014,535 (Twenty – Six Million Fourteen Thousand Five Hundred and Thirty-five Naira only) for 2013 to 2017 years of Assessment including penalty and interest.

PARTICULARS:

I. One of the major objectives of tax audit exercise to check the compliance level of tax payers on its self-assessment. In view of this, the tax audit exercise conducted on

the Appellant indicated that it was not remitting fully its Value Added Tax Obligation to the Respondent in years under review. The Appellant was not VAT compliant and was filling its VAT form 002 to the Respondent for the years under review.

II. The sales value in which the Respondent based its Values Added Tax computation is correct, because it was derived from the documents provided by the Appellant. The Appellant's Management Reports was the most reliable and comprehensive document to be relied upon during the audit because it contains the summary of the Appellant's total income and expenses on a monthly basis.

III. It is correct that after the Exit Meeting, the Appellant provided purchase receipts evidencing VAT deducted by its suppliers but did not provide input Value Added Tax schedule as claimed. This purchase receipts happened to be the only documents the Appellant provided to the Respondent after the Exit Meeting the input VAT indicated in the receipts were extracted by the Respondent and used to adjust for the output VAT before arriving at the additional tax liabilities established against the Appellant.

IV. As stated previously in the Reply, the Appellant did not provide all the documents demanded by the Respondent during the audit, among the few ones provided, the monthly Management Report for the years under review were considered the most reliable used in computing the sales made by the Appellant.

V. It is not correct that the additional VAT liabilities were based on wrongfully computed turnover and wrong figure derived from the Appellant's management account. The turnover reported in the Appellant's Monthly Management Account remains substantially the same with the turnovers reported in its audited accounts

for the years under review safe for the few add backs. The Appellants audited accounts for 2013 – 2017 is hereby pleaded.

VI. In response to Ground 7 Particulars a, b, c, d, e and f, it is important to state that it is the responsibility of the Appellant to provide its sales that relate to Vatable goods and those that are non-vatable.

VII. During the audit, the Appellant was requested to provide the components of its turnover that relates to (a) income that are exempted from VAT, (b) income that is zero rated and (c) income that are Vatable. The Appellant could not provide any of these documents to indicate these classifications of income. The Respondent had no option than to apply 3% of the turnover as VAT exempt for bottle water which is not a Vatable income.

VIII. It is therefore not true, that the Respondent computed VAT on all the turnover of the Respondent. All sales that are not subjected to VAT and the input available to the Respondent were all adjusted before arriving at the additional VAT liabilities.

RESPONSE TO GROUND 8 OF THE AMENDED NOTICE OF APPEAL

The Respondent did not err in law by not allowing the interest payable on loans allegedly obtained by the Appellant.

PARTICULARS:

I. The Respondent states that the main purpose of audit exercise is primarily to verify and ascertain the veracity of the figures and claims contained in the taxpayers audit account.

II. The Respondent did not recognize the interest on loans as deductible expenses because the so called loans were not reported on any of the Appellant's Audited

Accounts for the period under review which made it improper for the associated interest to be granted as allowable deductions.

III. Furthermore, these loans were not represented by the assets of the Appellant in the Audited Financial Statements and as such, the interest on the loan were not wholly, reasonably, exclusively and necessarily incurred in generating the income of the business.

IV. The fact that the said loan facility claimed by the Appellant did not reflect in any of its audited accounts is an indication that the fund may have been used for other activities not directly related to the Appellant's business. The Appellant acknowledged this fact by not bringing the interest expense into the audited accounts. Therefore, the claim at this point is an afterthought.

V. The Appellant did not provide any original offer letter to the audit team after the Exit Meeting. The moly document provided after the Exit Meeting are purchase receipts evidencing VAT deducted by its suppliers.

RESPONSE TO GROUND 9 OF THE AMENDED NOTICE OF APPEAL

The Respondent acted professionally and considered every document provided by the Appellant during the audit exercise before issuing its letter of intent.

PARTICULARS:

I. The Appellant did not provide all the requested documents to Respondent, it only provided the following documents :

- a. 2017 Annual Financial Statement (yet to be filed with the Respondent)
- b. A computer printout Monthly Management Account titled 'Manufacturing'
- c. Diesel and fuel expenses receipts for the period
- d. Enugu Electricity Distribution Company Bills

- e. Access Bank Statements from 2014-2017 with A /C No :0689401233
- f. Union Bank Statements from 2012 – 2017 with A/C No. 001615011145
- g. Access Bank Statements from 2012 – 2017 with A /C No. 0065452266
- h. Access Bank Statements from 2012 – 2017 with A/C No. 0689297885
- i. Purchase receipts evidencing input VAT deducted by the supplier which was provided after the Exit Meeting.

II. It is not true that the Appellant provided all the outstanding documents to the Respondent after the Exit Meeting. The only documents it provided after the Exit Meeting were purchase receipts evidencing input VAT deductions from the suppliers which have been utilized before arriving at the additional tax liabilities.

III. It is not true that the Respondent issued a letter of intent without reviewing the documents provided by the Appellant. The Respondent painstakingly reviewed the purchase receipts which were the only documents provided by the Appellant after the Exit Meeting. All the documents supplied by the Appellant before and after the Exit Meeting was carefully reviewed and considered before the letter of intent was issued.

IV. The Respondent did not neglect or fail to consider the purchase receipts indicating input VAT. The information from these documents were used in adjusting the output VAT payable. See paragraph 3.0 of the letter of intent.

V. The Respondent informed the Appellant of its findings and decision through the letter of intent dated 25th July, 2019 which it never objected in accordance with the law.

VI. The letter of intent is a standard format for reporting audit findings and stating the discrepancies in the figures reported in the audited accounts viz-a-viz the audit findings. It is detailed enough to explain to the Appellant the basis for the additional assessments. It contains the tax audit add-backs which formed the basis from which the additional tax liabilities was computed.

VII. Paragraph 1.0 of the letter of intent contains a table titled 'SUMMARY OF TAX ADD-BACKS'. This includes, UNDISCLOSED TURNOVER, DISALLOWED EXPENSES AND STAFF SALARIES. The above subject-heads are the areas the audit team discovered discrepancies as per the Appellant's audited accounts and findings during the audit.

VIII. Also in the Letter of Intent are paragraphs titled 'COMMENTS ON THE TAX ADD-BACKS'. These paragraphs contain specific explanation on the add-backs and a table detailing the additional VAT liabilities, VAT exempt, input VAT granted, penalties and interest.

IX. In determining the income of the Appellant during the audit, the Monthly Management Report was the most reliable document to be used among the other documents provided by the Appellant. The Appellant did not provide sales schedules, sales invoices and daily sales registers to the Respondent, despite repeated demand. Therefore, the Monthly Management Report was used in verifying the audited accounts because it contained both sales deposited to the bank and cash sales that were expended before depositing them in the bank. Furthermore, bank statements could not be fully relied upon because the Appellant failed to provide its complete bank statements to enable the audit team determine its turnover. Secondly, the bank statements contains several inflows that does not relate to third party payments and daily sales.

X. The Respondent was right to have treated these assessments as final and conclusive because the Appellant never objected to it within the statutory period of thirty (30) days after the receipt of the Notices of Assessment in line with the extant tax laws.

RESPONSE TO GROUND 10 OF THE AMENDED NOTICE OF APPEAL

The Respondent did not err by disallowing and adding back the salaries wrongly claimed to have been paid by the Appellant to its staff.

PARTICULARS:

I. The Appellant did not provide its staff payroll to substantiate these expenses apart from the Monthly Management Report from which the Respondent used in determining the salaries the Appellant paid to its staff.

II. The Respondent did not acknowledge the receipt of staff payroll or any document relating to the Appellant's staff salaries at the Exit Meeting. The minutes of the Exit Meeting is hereby pleaded.

III. The Appellant did not provide any other documents to substantiate staff salaries apart from the Monthly Management Report. The Respondent did not request for staff payroll at the Exit Meeting because it had already gotten its information for the years under review from the Monthly Management Reports.

IV. The Respondent added back salaries totaling N846, 239 in 2015 when it discovered that the amount reported in the audited account was higher than the

amount stated in the Monthly Management Report. In 2015, the Appellant claimed in its audited account to have spent N12, 511,667 for staff salaries as against N11, 665,428 it reported in its management account over the same period. The Respondent relied on the Appellant's Monthly Management accounts because the Appellant did not provide staff payroll or evidence of PAYE remittances to the relevant state tax authority

V. It is not true that the Monthly Management Report does not reflect the actual fair financial state of the Appellant. Companies management account can be used to determine its financial state in the absence of comprehensive source documents and bank statements. It is important to state that the only way a company can effect any variance between Management Reports and Audited accounts is through Audit adjustment journal. Throughout the period of the audit, the Appellant could not provide any audit adjustment journal to show that the variances between the Management Reports and the audited accounts got for the years in dispute.

RESPONSE TO GROUND 11 OF THE AMENDED NOTICE OF APPEAL

There is no provision of the constitution or any law that barred the Respondent from collecting the VAT from the Appellant.

PARTICULARS:

I. The Respondent is statutorily empowered by law to assess, collect and remit VAT to the Government of the Federation.

II. The Supreme Court in the case of *A. G LAGOS STATE v. EKO HOTELS & ANOR* (2017) LPELR – 43713, held that the Value Added Tax has covered the field relating

to sales tax. The Court held further and very strongly that the Lagos State House of Assembly cannot validly legislate on a matter covered by an Act of National Assembly. When it does, the law will remain ineffective until the Act of the National Assembly be repealed. The Supreme Court also decided that it would amount to double taxation for two different laws to impose consumption tax twice on a consumer for the same good or service.

III. Value Added Tax is not just a tax on intra state transactions. It is a consumption tax imposed by law on goods and services consumed both within the states and inter state transactions. The fact that the VAT was not stated in the exclusive or concurrent legislative list does not give the state outright power to legislate on it especially where there is an Act of National Assembly validly made under Section 4 of the 1999 Constitution of the Federal Republic of Nigeria as amended.

IV. The case of **REGISTERED TRUSTEES OF HOTEL OWNERS AND MANAGERS ASSOCIATION OF LAGOS STATE v A. G. OF LAGOS STATE AND FIRS SUIT NO FHC/L/CS/360/2018** is in direct conflict of the decision of the Supreme Court in **A. G LAGOS STATE v. EKO HOTELS (SUPRA)** and **A. G. OGUN STATE v. ALHAJA AYINKE ABERUAGBA & ORS (1985) NWLR (Pt. 3) 395**.

V. There is no provision in the constitution or any law that barred the Respondent from collecting VAT from the Appellant. The decision of the Federal High Court in **REGISTERED TRUSTEES OF HOTEL OWNERS AND MANAGERS ASSOCIATION OF LAGOS STATE v. AG OF LAGOS STATE AND FIRS (supra)** cannot stand by virtue of the Supreme Court decision in **AG LAGOS STATE v. EKO HOTELS (SUPRA)**.

VI. FIRS has appealed the decision of the Federal High Court in REGISTERED TRUSTEES OF HOTEL OWNERS AND MANAGERS ASSOCIATION OF LAGOS STATE v. AG LAGOS STATE AND FIRS (SUPRA) to the Court of Appeal Lagos.

RESPONSE TO GROUND 12 OF THE AMENDED NOTICE OF APPEAL

The Respondent did not err in any law by imposing penalties and interests on the Appellant for failure to remit its accurate taxes as and when due.

PARTICULARS:

I. The additional tax liabilities computed on the Appellant was properly determined through audit exercise which the Appellant fully participated. At the end of the audit, it was discovered that the Appellant was under remitting its taxes especially VAT.

II. It is not true that additional tax liabilities served on the Appellant have no basis. VAT was computed based on the sales value and services and as such all additional VAT the Appellant failed or neglected to report and remit to the Respondent as at the time the sales took place are subject to interest and penalty in accordance with the extant tax laws.

III. The Notice of Assessment served on the Appellant have become final and conclusive because the Appellant failed to object to it within the statutory period of thirty (30) days as prescribed by law.

IV. The Respondent shall contend at the hearing that this Appeal has become statute barred for the failure of the Appellant to raise objection against the assessment within 30 days as provided by law.

V. The Respondent shall rely on all the documents listed above and every other relevant document at the hearing of this appeal.

THEREOF the Respondent prays this Honourable Tribunal for the following orders:

1. A declaration that the Respondent's Notice of Amendment Assessment for Companies Income Tax, Tertiary Education Tax and Value Added Tax for the period of 2014 – 2018 YOA totaling Twenty – Eight Million, Nine Hundred and Eighty-Nine Thousand Eight Hundred and Forty-Two Naira (N28, 989,842.00) were made in accordance with the law and has become final and conclusive.

2. A declaration that the tax audit exercise conducted by the Respondent to determine the Appellant's tax liability for the period of 2013- 2018 YOA was made by virtue of powers conferred on the Respondent by Section 60(4) and 66 (1) of the Companies Income Tax Act, Cap. C21 LFN 2004 (as amended); Sections 29(1) and 35 of the Federal Inland Revenue Service (Establishment) Act 2007 and Section 39 of the Value Added Tax Cap V LFN 2004 (as amended).

3. A declaration that there is no provision of the constitution or any law that barred the Respondent from collecting VAT from the Appellant. The decision of the Federal High Court in **REGISTERED TRUSTEES OF HOTEL OWNERS AND MANAGERS ASSOCIATION OF LAGOS STATE V. THE AG LAGOS STATE AND FIRS (supra)** cannot stand by virtue of the Supreme Court decision in AG LAGOS STATE V. EKO HOTELS.

4. A declaration that by the authority of the Supreme Court in AG LAGOS V. EKO HOTELS, the Value Added Tax Act has covered the field relating to the sales tax or consumption tax an Act of the National Assembly.

5. An order of this Honourable Tribunal mandating the Appellant to pay the additional tax liabilities for the Companies Income Tax, Tertiary Education Tax and Value Added Tax for the period of 2014 – 2018 YOA totalling Twenty – Eight Million, Nine Hundred Thousand Eight Hundred and Forty-Two Naira (N28, 989,842.00) to the Respondent with immediate effect.

6. An order of this Honourable Tribunal dismissing the Appellant’s Notice of Appeal for being frivolous and lacking in merit.

AND for such further Order(s) as this Honourable Tribunal may deem fit to make in the circumstance.

TRIAL AND EVIDENCE

The trial commenced on 8th March, 2021. The Appellant opened its case where it called two witnesses – Mr. Otuonye Chris Chiemela (the Appellant’s tax consultant) and Mr. Somtochukwu Jideonwo (a director of the Appellant) where they both deposed to 37 – paragraph and 36 - paragraph Witnesses Statements on Oath dated 7th October, 2020 respectively. The 1st Appellant’s first Witness (AW1) and 1st Appellant’s second Witness (AW2) both adopted their respective witness Statements on Oath in the cause of the trial as their respective evidences-in-chief on the appeal.

Both parties also filed their respective Final Written Addresses and adopted the same as their legal arguments on this appeal respectively.

In the course of the examination-in-chief of the Appellant's witnesses, the following documents were admitted in evidence and marked accordingly:

- a) Exhibit Celebrities 1 – Witness Statement on Oath of Mr. Otuonye Chris Chiemela sworn on 7th October, 2020;
- b) Exhibit Celebrities 2 – A letter by the Respondent dated 12th February, 2019
- c) Exhibit Celebrities 3 – a letter dated 6th March, 2019
- d) Exhibit Celebrities 4 – a letter dated 8th March, 2019 granting extension of time
- e) Exhibit Celebrities 5 – an email forwarding documents to the Respondent exchanged between Somtochukwu Jideonwo and a staff of the Respondent
- f) Exhibit Celebrities 6 – a bundle of twenty-nine receipts
- g) Exhibit Celebrities 7 (A, B, C, D) – Some copies of VAT returns filed by the Appellant for the period
- h) Exhibit Celebrities 8 (A, B, C, D) – copies of loan documents granted to the Appellant by the Banks
- i) Exhibit Celebrities 9 – copy of minutes of meeting between the parties

- j) Exhibit Celebrities 10 – Respondent’s letter of intent dated 25th July, 2019
- k) Exhibit Celebrities 11 (A & B) – Assessment notices dated 30th July 2019 and Demand notice dated 29th January, 2020
- l) Exhibit Celebrities 13 – Witness Statement on Oath of Somtochukwu Jideonwo filed on 7th October, 2020.
- m) Exhibit Celebrities 14 – Objection letter dated 20th February, 2020
- n) Exhibit Celebrities 15 – Objection letter dated 17th March, 2020

After the respective evidence-in-chief of the Appellant’s witnesses, they were respectively cross-examined by the Respondent’s counsel. During the cross-examination of the AW1, Exhibit Celebrities 12 – Appellant’s objection letter (by Appellant’s consultant) dated 23rd March, 2020 was tendered, while Exhibit Celebrities 16 – a photocopy of a cheque dated 23rd March, 2020 was also tendered through AW2.

After the cross-examination by the Respondent’s counsel, the Appellant closed its case.

The Respondent opened its defence on 11th May, 2021 with the evidence of Mr. Isesele Leonard Imoudu (a manager in the Respondent) who adopted his witness statement on oath deposited to and filed on 20th January, 2021. Through the first Respondent’s Witness (RW1) the following documents were admitted in evidence:

- a) Exhibit FIRS 1 – Witness Statement on Oath of Mr. Isesele Leonard Imoudu
- b) Exhibit FIRS 2 – Appellant’s Audited Financial Statements for 2013 – 2017
- c) Exhibit FIRS 3 – Appellant’s Monthly Management Accounts for 2013 – 2017

- d) Exhibit FIRS 4 – Summary extract from the Monthly Management Accounts
- e) Exhibit FIRS 5 – Purchase receipts evidencing Input VAT deducted at source
- f) Exhibit FIRS 6 – Summary extract from the purchase receipts
- g) Exhibit FIRS 7 – Salaries and wages extract from the Monthly Management Accounts
- h) Exhibit FIRS 8 – Disallowed expenses extract from the Monthly Management Accounts
- i) Exhibit FIRS 9 – VAT form 002 (VAT returns for January, February, March and July 2019).

The RW1 was cross-examined on the same 11th May, 2021 by the Appellant’s counsel. The Respondent’s 2nd Witness (RW2) - Mr. Enegi Saviour (also a tax manager in the Respondent) testified on 7th September, 2021, where he adopted his witness statement on oath deposed to and filed on 20th January, 2021 and was also cross-examined by the Appellant’s counsel.

The following documents were also admitted in evidence through him:

- j) Exhibit FIRS 10 – witness statement on oath of Mr. Enegi Saviour (RW2)
- k) Exhibit FIRS 11 – CTC of Visitors' Log Book from 15th July, 2019 to 30th July 2019
- l) Exhibit FIRS 12 – Letter from the Head of Enugu State Tax Audit to the Tax Controller, Enugu Micro and Small Tax Office dated 29th July, 2019
- m) Exhibit FIRS 13 – Proof of Service of the Assessment Notices dated 2nd August 2019.

ISSUES

The Appellant distilled four (4) issues for determination from the grounds of appeal it filed. The said issues as contained in page 5 of the Appellant's Final Written Address are hereby reproduced thus:

a) Whether the Respondent's additional assessment for CIT, ET and VAT had become final and conclusive?

b) Whether the instant appeal is valid regardless of the validity or invalidity of the Respondent's additional assessments?

c) Whether the Respondent can validly assess the Appellant to VAT in view of the current position of law in Nigeria?

d) Whether the Respondent's Additional Assessments and Demand Notices are liable to be set aside in all the circumstances of this appeal?

The Respondent on its part raised three (3) issues for determination in reply to the Appellant's Notice of Appeal as contained in its written address. The said issues as contained in page 2 of the Respondent's Final Written Address are as follows:

a) Whether the Assessment Notices dated 30th July 2019 and served on 8th August, 2019 without a valid objection have become final and conclusive and whether this Tribunal can reopen an assessment that has by law become final and conclusive?

b) Whether on the strength of the Appellant's case, the evidence led, and exhibits tendered, the Appellant has proved its case to be entitled to the reliefs sought?

c) Whether or not the Appellant is by law bound to remit its VAT returns to the Respondent?

The issues for determination raised by the parties to the appeal before this Tribunal are virtually identical hence the issues formulated by both parties will be integrated and re-couched in the resolution of the appeal before this Tribunal.

The issues for determination are hereby re-couched as follows:

a) Whether the Assessment Notices dated 30th July 2019 and served on 8th August, 2019 without an objection to the tax authority by the Appellant have become final and conclusive and whether this Tribunal can reopen an assessment that has by law become final and conclusive?

b) Whether the instant appeal is valid regardless of the validity or invalidity of the Respondent's additional assessments?

c) Whether the Respondent can validly assess the Appellant to VAT in view of the current position of law in Nigeria?

d) Whether the Respondent's Additional Assessments and Demand Notices are liable to be set aside in all the circumstances of this appeal?

ARGUMENTS OF PARTIES, AND THE RESOLUTION OF THE ISSUES BY THE TRIBUNAL

ISSUE 1

Whether the Assessment Notices dated 30th July 2019 and served on 8th August, 2019 without an objection to the tax authority by the Appellant have become final and conclusive and whether this Tribunal can reopen an assessment that has by law become final and conclusive?

The issue herein bothers on what the law says about when an assessment is said to have become final and conclusive. The summary of the respective arguments of the parties are as contained below:

The Appellant vehemently argued that the Respondent's additional assessments of the Appellant for CIT, ED and VAT for the relevant years in the sum of N28,989,842 (Twenty-Eight Million, Nine Hundred and Eighty-Nine Thousand, Eight Hundred and Forty-Two Naira) only are invalid and therefore incapable of being final and conclusive. The Appellant posited that it is the position of law that a tax assessment which is not in accordance with the law or where the basis of the assessment is faulty in law, such assessment cannot become final and conclusive even where the taxpayer fails to object to the same within the time limit prescribed by law. The Appellant referred this Tribunal to the locus classicus of Federal Board of Inland Revenue v. Joseph Rezcallah (2000) 2 TLRN where the Federal Supreme Court held thus:

"An assessment cannot become final and conclusive where the assessment is not in accordance with the law."

The Appellant explained that this judicial position was followed by the Tax Appeal Tribunal (Lagos Zone) in Star Deep Water Petroleum Ltd v. LIRS (2016) 23 TLRN 1 where the Tribunal answered the question as to whether failure to submit notice of objection to the Respondent (LIRS) within the 30 days specified under Personal Income Tax Act can result in an assessment being final and conclusive. Following the

decision in *Federal Board of Inland Revenue v. Joseph Rezcallah* (supra), the Tribunal held that given that the assessment was not valid ab initio, failure of the Appellant to object the assessment within 30 days deadline does not make the assessment final and conclusive.

Now, to prove that the additional assessment on the Appellant by the Respondent was faulty in law, the Appellant argued that the Respondent did not arrive at a valid figure as to the turnover, income profits and VATable sales of the Appellant for the relevant years which was the basis for the Respondent's additional assessment.

With respect to Companies Income Tax (CIT), the Appellant submitted that the basis for CIT is the taxable profit of the corporate entity. The Appellant made reference to Section 9 (1) of the Companies Income Tax Act Cap C21 LFN 2004 which provides thus:

“Subject to the provisions of this Act, the tax shall, for each year of assessment, be payable at the rate specified in subsection (1) of section 40 of this Act upon the profits of any company accruing in, derived from, brought into, or received in, Nigeria”

With respect to Education Tax (ET), the Appellant argued that it is settled law that the basis of Education Tax is the assessable profit of a qualified company (i.e., any Nigerian company other than a small company). The Appellant referred this Tribunal to section 1 of the Tertiary Education Tax Act, 2011 (as amended by section 34 of the Finance Act 2020) which provides thus:

“(1) As from the commencement of this Act, there shall be charged and payable an annual tertiary education tax which shall be assessed, collected and administered in accordance with the provisions of this Act.

(2) The tax, at the rate of two percent, shall be charged on the assessable profit of a company registered in Nigeria, other than a small company as defined under the Companies Income Tax Act.

(3) The assessable profit of a company shall be ascertained in the manner specified in the Companies Income Tax Act and Petroleum Profits Tax Act (in this Act referred to as “the Act”) as the case may be.”

Following the foregoing provisions and the study of the Respondent’s computation of the CIT and ET liabilities for the relevant years, the Appellant strongly submitted that they are not based on actual assessment profit of the Appellant, but on the arbitrary figures drafted solely by the Respondent.

With respect to VAT, the Appellant vehemently argued that the law is apparently certain that the basis of VAT is the actual supply (or sales) by a taxable entity of VATable goods and services for the relevant period. Reference was made to sections 2 and 3 of the Value Added Tax Act, Cap V1 LFN 2004 (as amended). VAT does not apply to exempted goods and services under the VAT Act as listed in the First Schedule to the Act. The Appellant submitted that by the Respondent’s own admission, it never bothered to ensure that the sales on the basis of which it applied VAT against the Appellant were sales of VATable goods. The Respondent conveniently ignored the obvious evidence even during the purported field audit that many items of sales of the Appellant are VAT-exempt goods such as bread, local food delicacies such as fio fio, okpa, yam, akidi, vegetable, water, etc.

The Appellant further explicated that the Respondent clearly informed this Tribunal during the testimonies of its witnesses, that it whimsically allowed only 3% of the total turnover of the Appellant for the relevant years as VAT-exempt sales of the

Appellant. On this, the Appellant referred this Tribunal to paragraph 25 of the witness statement on oath of RW1 where the witness deposed thus:

“During the Exit Meeting, the Appellant mentioned that it sold bottle water which is VAT exempt product and the Respondent applied 3% of the turnover as VAT exempt.”

In light of the above, the Appellant argued that assuming but not conceding that the Appellant consented to the application of the 3% as VAT exempt, such consent or agreement would have been invalid because it is settled law that parties cannot by private agreement defeat or compromise a mandatory provision of the law, and that where the law provides for a particular procedure or way for doing an act, that procedure or way must be followed for doing such an act, otherwise the act will be invalid. The Appellant referred this Tribunal to the decisions in the cases of *Alabi v. Alabi* (2007) 9 NWLR (Pt. 1039) 297; **Gov. Ekiti State V. Akinyemi (2011) 17 NWLR (Pt. 1276) 373**; **Nwankwo v. Yar Adua (2013) 13 NWLR (Pt. 1263) 81** and **Abubakar v. I.N.E.C. (2020) 12 NWLR (Pt. 1737) 37** where the Supreme Court held in the latter case:

“The Constitution or any other law has made provision or prescribed procedure for the doing of an act, it is the Constitution or Act that must be followed. Anything done outside those provisions either by way of addition, subtraction or amendment would render such act an exercise in futility.”

In view of the foregoing, the Appellant submitted that the additional VAT assessment by the Respondent is invalid and incapable of being final and conclusive.

In a general submission, the Appellant's argument was that the figures relied upon by the Respondent in assessing the Appellant for additional sum of N28,989,842 (Twenty-Eight Million, Nine Hundred and Eighty-Nine Thousand, Eight Hundred and Forty-Two Naira) being for CIT, VAT and ET were all based on the Appellant's Management Account (i.e., Exhibit FIRS 3) which is not the proper document for determining the actual income or profit of the Appellant for the relevant years for the purposes of CIT, ET and VAT. The Appellant therefore urged this Tribunal to so hold.

In response to the arguments of the Appellant, the Respondent vehemently contended that the assessment notices dated 30th July, 2019 and served on the Appellant on 8th August, 2019 without a valid objection has become final and conclusive and this Honourable Tribunal cannot reopen an assessment that was not validly objected to in accordance with the law.

The Respondent argued based on section 69 (1) and (2) of the Companies Income Tax Act Cap C21 LFN 2004 (CITA) that the section gave taxpayers who disputes assessment made upon them the right to object in writing within 30 days. The Respondent reproduced the section as follows:

“(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 Subsection (1) of this section shall-

(a) be made within thirty days from the date of the service of the notice of assessment; and

(b) contain the ground of objection to the assessment, that is-

(i) the amount of assessable and total profits of the company for the relevant year of assessment; and

(ii) the amount of tax payable for the year, which the company claims should be stated on the notice of assessment.”

The Respondent further argued that it is the position of law that where no valid objection has been lodged to the tax authority within 30 days as stated in the tax law, the taxpayer loses the right to question or challenge the amount of tax imposed. The Respondent referred this Tribunal to section 77 of the CITA which provides thus:

"Where no valid objection or appeal has been lodged within the time Limited by section 69, 72 or 75 of this Act as the case may be, 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 under Subsection (5) of section 69 of this Act, or on appeal, the assessment as made, agreed to, revised or determined on appeal, as the case may be, shall be final and conclusive for all purposes of the Act as regards the amount of such total profits; and if the full amount of the tax in respect of any such final and conclusive assessment is not paid within the appropriate periods prescribed in this Act, the provisions thereof relating to the recovery of tax, and to any penalty under section 85 of this Act, shall apply to the collection and recovery thereof subject only to the set-off of the amount of any tax repayable under any claim, made under any provision of this Act, which has been agreed to by the Board or determined on any appeal against a refusal to admit such claim... ."

The Respondent therefore argued that the combined effect of these provisions is that where a taxpayer failed to object to an assessment within 30 days as provided by law, the assessment becomes final and conclusive and the taxpayer will lose the right to question or challenge the amount of tax imposed. The Respondent reiterated that the failure of the Appellant to exercise its right of objection or appeal

against Exhibit Celebrities 11A within the stipulated time is grave and fatal to this case. The Respondent supported its argument with the case of **FIRS v. Vital Needs Engineering LTD (2016) 23 TLRN 83**.

The Respondent also referred this Tribunal to what the Appellant confirmed in paragraph 28 of Exhibit Celebrities 13 where the Appellant's Witness stated thus:

"In the spirit of seeking to amicably resolve the disputed assessment, the Appellant did not object to the assessments in writing before the Respondent issued the demand letters dated 29th January, 2020 but delivered to the Appellant under a cover of a letter dated 3rd February, 2020".

The Respondent submitted that the objection raised by the Appellant vide Exhibit Celebrities 14 dated 20th February, 2020 is invalid on the basis that an objection by law cannot not be raised against a demand notice rather against an assessment notice because the Notices were not one and the same. The Respondent referred this Tribunal to the case of Access Bank Plc v. Edo State Board of Internal Revenue (2018) LPELR-44156 (CA).

RESOLUTION BY THE TRIBUNAL

The Tribunal has carefully gone through the plethora arguments of both parties on this issue and therefore made its findings as follows:

It is not in doubt that section 77 of CITA made provisions as to when an assessment has become final and conclusive, but the question that should be borne in mind is whether every assessment made by the tax authority under the earth automatically enjoys the statutory condiments under this section; once such an assessment is not

objected to within the limited period stipulated by law? The Tribunal is not inclined to hold that the application of Section 77 of CITA is automatic to every assessment made by the tax authority because an assessment must definitely pass some legal tests before it can become final and conclusive.

It is settled principle of law that an assessment must pass a legal crucible before its force of being final and conclusive can come to play. See the case of Federal Board of Inland Revenue v. Joseph Rezcallah (2000) 2 TLRN where the Federal Supreme held thus:

“An assessment cannot become final and conclusive where the assessment is not in accordance with the law.”

From the evidence before this Tribunal, it is crystal clear that the bases upon which the Respondent arrived at its additional assessment is faulty in law. The 1st Respondent's witness told this Tribunal in his written disposition particularly in paragraphs 19, 20, 21 and 22 that the Respondent relied majorly on the Monthly Management Accounts of the Appellant to arrive at the turnover of the Appellant with reasons that some bank statements and other documents were not produced by the Appellant as requested by the Respondent. What this deposits in mind is that the Respondent would have done a better job on the assessment of the Appellant if the required documents were completely provided. In other words, the Monthly Management Accounts were resorted to for lack of adequate and sufficient documents to determine the actual turnover of the Appellant for the purpose of tax. This is at best a guesstimate work on the part of the Respondent which is basically frowned at by tax laws.

By the authority of **GTB v. Ekiti State Board of Internal Revenue** (2018) LPELR 46307, the Court of Appeal provided a safety route to follow

where a taxpayer or tax agent is not cooperating in providing relevant documents requested by a tax authority. It is for the tax authority to apply to the appropriate court or tribunal with jurisdiction to compel the taxpayer or tax agent to provide such documents. In our view, it will be inappropriate for the tax authority, after admitting that it had incomplete documents to carry out the audit satisfactorily, to proceed to concoct figures arbitrarily and foist it on the taxpayer or tax agent. Tax administration should be scientific, systematic and methodological. It is logical to state that an audit without the relevant documents cannot satisfy section 66 (1) of the CITA, which empowers the Respondent to serve additional assessment on the Appellant. The law is, therefore, not prostrate in circumstances where a taxpayer or tax agent is recalcitrant in providing relevant documents or information needed by a tax authority to execute its statutory function.

With respect to VAT, the 1st Respondent's witness (RW1) in paragraph 25 of the witness statement on oath deposed that:

“During the Exit Meeting, the Appellant mentioned that it sold bottle water which is VAT exempt product and the Respondent applied 3% of the turnover as VAT exempt.”

The discretion of the Respondent to apply 3% VAT where the VAT Act has provided for 5% is certainly not an action that the Tribunal can support. The Tribunal is in agreement with the submission of the Appellant that it is settled law that parties cannot by private agreement defeat or compromise a mandatory provision of the law, and that where the law provides for a particular procedure or way for doing an act, that procedure or way must be followed for doing such an act, otherwise the act

will be invalid. See **Abubakar v. I.N.E.C. (2020) 12 NWLR (Pt. 1737) 37** where the Supreme Court held thus:

“The Constitution or any other law has made provision or prescribed procedure for the doing of an act, it is the Constitution or Act that must be followed. Anything done outside those provisions either by way of additional, subtraction or amendment would render such act an exercise in futility.”

On this note, the Tribunal holds that there is no merit on the choral of arguments presented by the Respondent as such, this issue is answered in the negative and therefore resolved in favour of the Appellant. The reason being that an assessment which is not based in accordance with the extant laws, is ab initio null and void and therefore incapable of being adjudged as final and conclusive assessment.

ISSUE 2

Whether the instant appeal is valid regardless of the validity or invalidity of the Respondent’s additional assessments?

The arguments of the parties on this issue are as presented below:

The Appellant submitted that apart from the fact that Exhibit Celebrities 11A (assessment notice) as constituted cannot become final and conclusive as the assessment contained therein lacks valid basis, Appellant’s objection to Exhibit Celebrities 11B (demand notice) by its letters dated 20th February, 2020 and 17th March, 2020 suffices as a basis for valid appeal. The Appellant argued that the

wordings of the provisions of the Federal Inland Revenue Service (Establishment) Act, 2007 relating to tax appeals contemplates that a valid appeal can emanate from either of the following:

- a) An assessment by the Respondent;
- b) A demand notice by the Respondent;
- c) An action of the Respondent;
- d) A decision of the Respondent.

The Appellant referred this Tribunal to Paragraph 13 (1) of the 5th Schedule to the FIRS Act which provides thus:

“A person aggrieved by an assessment or demand notice made upon him by the Service or aggrieved by any action or decision of the Service under the provisions of tax law... may appeal against such decision or assessment or demand notice within the period stipulated under this Schedule to the (Tax Appeal) Tribunal”.

The Appellant therefore submitted that the use of the word “or” in the foregoing provision has a disjunctive effect, that is, it gives an alternative or choice. Reference was made to the Supreme Court decisions in *N. U. P. v. I. N. E. C.* (2021) 17 NWLR (Pt. 1805) 305; and *Abubakar v. Yar’ Adua* (2008) 19 NWLR (Pt. 1120) 1.

The Appellant further submitted that even section 69 (1) of CITA which was relied upon by the Respondent uses permissive word “may” instead of mandatory word “shall” in providing for objection. The section provides thus:

“(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”.

With respect to the effect of section 69 (1) of CITA on assessment not objected to within 30 days, the Appellant submitted that the use of word “may” in the section imposed no obligation on the taxpayer to file an objection to FIRS before approaching the Court or Tribunal by way of an appeal. This argument was supported with the Federal High Court decision in **Theodak Nigeria Limited v. Federal Inland Revenue Service Board** (2019) 40 TLRN 1.

The Appellant, thereafter, submitted that the appeal before this Tribunal is valid and worthy of this Tribunal's determination, being that the appeal was properly brought before the Tribunal vide a Notice of Appeal which was duly regularised by the Order of this Tribunal made on 8th December, 2020 which extended the time within which the Appellant should appeal against the additional assessments and deemed the appeal as properly filed.

The Respondent on its part argued on this issue that the appeal before this Tribunal is invalid because an assessment that has become final and conclusive cannot be reopened by the Tribunal. The Respondent on its part contended that the Appellant has failed to exercise its right of objection within the time prescribed by law.

The Respondent expounded that the Appellant was subjected to field tax audit from 6th May to 15th July, 2019 with an Exit Meeting at the end of the audit exercise after

which the Respondent issued a letter of intent dated 25th July, 2019 (Exhibit Celebrities 10) and Notices of Additional Assessment dated 30th July, 2019 were subsequently served on the Appellant on 8th August, 2019 (Exhibit Celebrities 11A). The Respondent therefore contended that at this moment, the Appellant had a legal right to either object in writing or appeal against the assessments to the Tax Appeal Tribunal in line with section 69 (1) and (2) of CITA and Paragraph 13 (1) and (2) of 5th Schedule to the FIRSEA 2007 within 30 days, and that the failure of the Appellant to exercise its right of objection or appeal against Exhibit Celebrities 11A within the stipulated time was grave and fatal to this appeal.

The Respondent explained that Exhibit Celebrities 11A (assessment notice) and Exhibit Celebrities 11B (demand notice) does not relate and does not serve the same purpose and the issuance of those notices are statutory and are governed by law. Exhibit Celebrities 11A is issued on taxpayers whenever an assessment is made or revised either through the determination of objection or appeal. Reference was made to Sections 65, 66, 68 and 69 of CITA. While Exhibit Celebrities 11B (Demand Notice) is served to demand for payment of tax liabilities and calculation of penalties and interest. Reference was made to section 85 (1) (c) of CITA and section 32 (1) (d) FIRSEA 2007.

The Respondent therefore argued in the instant appeal that it raised an additional assessment of N28, 989,842.00 comprising CIT, VAT and EDT after a well conducted field tax audit, and that the Appellant failed to object to the assessment in a way and manner prescribed by law following which the Respondent issued Exhibit Celebrities 11B. The Appellant rather objected to a Demand Notice (Exhibit Celebrities 11B) vide a letter dated 20th February, 2020. On this note, the Respondent urged this Tribunal to determine whether in the circumstances of this appeal, the objection by the Appellant as in Exhibit Celebrities 14 is valid in law considering the fact that Exhibit Celebrities 11A served on the Appellant on 8th

August, 2019 was not objected to in accordance with the law. The Respondent referred this Tribunal to the case of **Access Bank Plc v. Edo State Board of Internal Revenue (supra)**.

The Respondent contended that the mere fact that paragraph 13 (1) and (2) of 5th Schedule to FIRSEA, 2007 gave the Appellant the option of filing an appeal against an assessment or demand notice does not foreclose the right of taxpayers to raise objection in writing against assessment within 30 days. Also that the mention of “an assessment or demand notice” does not make objection raised by the Appellant to be valid in the circumstances of this case. The Appellant’s failure to raise an objection to the assessment notices dated 30th July, 2019 cannot be remedied by its objection to Exhibit Celebrities 11B.

Based on the foregoing, the Respondent submitted that the objection raised on the demand notices dated 29th January, 2020 is invalid in law because the notices of additional assessment dated 30th July, 2019 that gave rise to the demand notices were never objected to. Reference was made to **Aboud v. Regional Tax Board (1966) LPELR-25342 (SC)**.

The Respondent therefore argued that in the absence of any valid objection to the notice of additional assessment dated 30th July, 2019, the assessment has become final and conclusive for all intents and purposes, and the Respondent has the right to enforce payment as demanded in Exhibit Celebrities 11B (Demand Notice). Therefore the appeal before this Tribunal is incompetent.

RESOLUTION BY THE TRIBUNAL

The wordings of Paragraph 13 (1) of the 5th Schedule to FIRS Act specifically provides thus:

“A person aggrieved by an assessment or demand notice made upon him by the Service or aggrieved by any action or decision of the Service under the provisions of tax law... may appeal against such decision or assessment or demand notice within the period stipulated under this Schedule to the (Tax Appeal) Tribunal”.

By virtue of section of section 68 of the FIRS Act, this provision supersedes the provisions of the CITA with respect to tax appeals.

In other words, the fact that the Appellant failed or neglected to object against the Additional Assessments within 30 days, but objected to the Demand Notice served on it within 30 days of service, amounts to the Appellant having taken steps to comply with the provisions of Paragraph 13 (1) of the 5th Schedule to FIRS Act. The Tribunal also recall that the Notice of Appeal filed by the Appellant was regularised by an order of this Tribunal made on 8th December, 2020.

Consequently, the Tribunal holds that the appeal before it is valid.

ISSUE 3

Whether the Respondent can validly assess the Appellant to VAT in view of the current position of law in Nigeria?

The parties' arguments on this issue are:

The Appellant argued that the current position of law in Nigeria as it relates to imposition and collection of VAT is that the Federal Government of Nigeria (whose

agent the Respondent is) lacks the power to impose VAT relating to supply of goods or services within a State in Nigeria. The Appellant referred this Tribunal to a plethora judicial decisions:

Attorney General of Rivers State v. Federal Inland Revenue Service & Anor (2021) 61 TLRN 1;

E.C. Ukala SAN v. Federal Inland Revenue Service & Anor (2021) 56 TLRN 1;

Uyo Local Government Council v. Akwa Ibom State Government & Anor (2020) LPELR-49691 (CA);

Registered Trustees of Hotel Owners and Managers Association of Lagos v. Attorney General of Lagos State & Anor (2020) 52 TLRN 1; and

Attorney General of Ogun State v. Aberuagba (1985) 1 NWLR (Pt. 3) 395, 405.

The Appellant submitted that the combined effect of the decisions in these cases is that the Respondent lacks the jurisdiction or power to collect VAT and that Value Added Tax Act (as amended) is unconstitutional and therefore null and void to the extent that it purportedly empowers the Federal Government to impose and collect VAT in respect of intra-state trade and commerce.

The Appellant further supported its argument with the case of **Attorney General of Ogun State v. Aberuagba (supra)** where the Supreme Court held that a State could validly legislate to impose sales or consumption tax on transactions that occur within the boundaries of the State, the imposition of sales tax being a power incidental to the residual power of a State to regulate intra-state trade and

commerce; also that the Federal Government could validly and exclusively legislate to impose sales tax on inter-state and international transactions, the imposition of sales tax being a power incidental to the exclusive power of the Federal Government to regulate inter-state and international trade and commerce.

The Appellant thus submitted that the incontestable facts of this appeal are that the Appellant carries on its restaurant business only within Enugu State and that the Appellant therefore engages in intra-state business in respect of which the Respondent has no power, under the current state of tax laws and decisions of superior courts in Nigeria to assess, demand for or collect VAT.

The Appellant further submitted that since those relevant decisions of the superior courts have not been overturned, such decisions of courts remain valid and subsisting and that the pendency of appeal(s) against a valid judgment of a court does not serve to invalidate the judgment. It supported its argument with the Court of Appeal decision in **Tells v. Usman (2000) 11 NWLR (Pt. 677) 95** where the Court held thus:

“A judgement of court remains binding until it is set aside by a competent court. To hold otherwise is to clothe a party against whom the judgment has been obtained with a discretion to decide which judgment is invalid and not binding on him. This is an invitation to anarchy. Therefore, even where the judgment ex-facie is a nullity for want of jurisdiction, the power to nullify it is in a court of competent jurisdiction and not the parties.”

The Appellant therefore urged this Tribunal to follow the decision of the cases enunciated above to hold that in the circumstances of this appeal, the Appellant is not bound by law to remit VAT to the Respondent.

The Respondent on its part argued vehemently that the Appellant is bound by law to remit its VAT returns to the Respondent and that the Respondent is statutorily empowered by law to assess, collect and remit VAT to the Government of the Federation. The Respondent supported its position with the Supreme Court judgment in **AG Lagos State v. Eko Hotels & Anor (2017) LPELR-43713** where the Court held that Value Added Tax Act has covered the field relating to sale tax and that the Lagos State House of Assembly cannot validly legislate on a matter covered by an Act of the National Assembly.

The Respondent further argued that the fact that VAT was not stated in the exclusive or the concurrent legislative list does not give the State outright power to legislate on it especially where there is an Act of the National Assembly validly made by virtue of section 4 of the Constitution of the Federal Republic of Nigeria 1999, as amended. The case of **Registered Trustees of Hotel Owners and Managers Association of Lagos v. Attorney General of Lagos State & Anor. (supra)** is in direct conflict with the decision of the Supreme Court in **AG Lagos State v. Eko Hotels & Anor (supra)** and **Attorney General of Ogun State v. Aberuagba (supra)**.

The Respondent also submitted that the decisions in **Registered Trustees of Hotel Owners and Managers Association of Lagos v. Attorney General of Lagos State & Anor (supra)** and **Attorney General of Rivers State v. Federal Inland Revenue Service & Anor. (supra)** have been appealed to the Appeal Court and particularly on the latter case, the Court of Appeal sitting in Abuja has also granted an injunction

restraining parties from giving effect to the judgment pending the determination of the case before it. The Court also held that the status quo ante be maintained by parties.

Based on the foregoing, the Respondent submitted that until these cases are decided by the Appellate Court, the status quo remains. The Respondent therefore, urged this Tribunal to discountenance the Appellant's appeal and hold that FIRS remains the competent authority duly empowered by law to administer VAT as provided in section 7 of the VAT Act.

RESOLUTION BY THE TRIBUNAL

The controversy relating to VAT has indubitably become a topical matter that had attracted plethora of views and opinions. However, the Tribunal is not inclined to delve into the academic play store to take a position on the issue rather, it will hold firm on the extant laws and principles of hierarchy of courts/judicial precedents.

The Respondent is statutorily empowered by law to access, collect and remit VAT to the Government of the Federation. See Section 7 (1) of the VAT Act which provides that the tax shall be administered and managed by the Federal Board of Inland Revenue. VAT is not just a tax on intra-State transactions, but a consumption tax imposed by law on goods and services consumed both within the states and outside the states.

The Tribunal is in agreement with the submissions of the Respondent that there are decisions of the Supreme Court which has held that VAT Act has covered the field relating to Sales Tax, thus frowned at the State laws, such as Lagos State House of

Assembly passing legislation on a matter legislated by an Act of the National Assembly.

Furthermore, the current position is that the Court of Appeal being a higher court has made an Order that the status quo remains until the issue is finally determined. On this note, the Tribunal resolves this issue in favour of the Respondent to the effect that the Respondent herein (FIRS) can validly assess the Appellant to VAT. In other words, the Appellant is bound by law to remit its VAT returns to the Respondent.

ISSUE 4

Whether the Respondent's Additional Assessments and Demand Notices are liable to be set aside in all the circumstances of this appeal?

The Appellant submitted that it relied on all its submissions in issues 1, 2 and 3 to urge the Tribunal to set aside the Respondent's additional assessments of the Sum of N28, 989,842 comprising CIT, ET and VAT on the ground that they lack valid bases in law and that the Respondent lacked the power to validly assess the Appellant to VAT in view of the current position of law in Nigeria.

The Respondent on its part argued that its additional assessment on the Appellant is valid on the basis that it is empowered by law to carry out such act. Reference was made to section 26 (4) of FIRSEA, 2007. It further submitted that the bases of its assessment was valid and proper and that it was the Appellant's failure to produce the complete documents requested during the audit exercise that made the Respondent to rely on the Appellant's Management Account for the period in dispute to determine the Appellant's turnover. The Respondent referred this

Tribunal to paragraphs 19, 20, 21 and 22 of Exhibit FIRS 1 and Paragraphs 16, 17, 18 and 9 of Exhibit FIRS 10.

RESOLUTION BY THE TRIBUNAL

This issue tied to Issue 1 above, thus the issue is resolved in favour of the Appellant for the reason given under ISSUE 1 above, that is, the Respondent having failed to comply with the extant laws but based the same on speculative parameters, then the finding of the Tribunal is that the Additional Assessments Notice dated 30th July, 2019 and the Demand Notices dated 29th January, 2020 be and are hereby set aside in all the circumstances of this appeal.

CONCLUSION

Having resolved three out of the four critical issues of this appeal in favour of the Appellant, this appeal hereby succeeds.

The Tribunal hereby invokes its powers under Paragraph 15(8) of the 5th Schedule to the FIRSEA to order the Appellant to pay the sum of **N5,239,123,58 (Five Million, Two Hundred and Thirty-Nine Thousand, One Hundred and Twenty-Three Naira, Fifty-Eight Kobo) only.**

It had admitted to pay this having admitted to do so prior to the filing of the Notice of Appeal. This will be in accordance with public policy to hold the Appellant to its undertaking.

Paragraph 15(8) of the 5th Schedule to FIRSEA, which is germane to the invocation of our powers, provides:

"The Tribunal may, after giving the parties an opportunity of being heard, confirm, reduce, increase or annul the assessment or make any such order as it deems fit."

The resolution of Issues 1, 2 and 4 in favour of the Appellant has not impugned the voluntary undertaking of the Appellant to pay a sum, notwithstanding that it is a lesser sum than the amount demanded by the Respondent, to the Respondent. Ordering the Appellant to make the payment will accord with the justice of the case as the Tribunal will not lend its weight to any act that is contrary to the tax laws or public policy.

ORDER

The Tribunal orders the Appellant to pay its admitted tax liability of **N5,239,123,58 (Five Million, Two Hundred and Thirty-Nine Thousand, One Hundred and Twenty-Three Naira, Fifty-Eight Kobo)**.

Consequently, the Tribunal grants the Appellant's reliefs a, b, d, f, g and h, as modified, and strikes out reliefs c and e. For the avoidance of doubt, the reliefs granted are hereby reproduced as follows:

1. A declaration by the Tribunal that the decisions of the Respondent as contained in its letters dated 17th March 2020 and 24th March, 2020, are incompetent, defective, null and void.
2. A declaration of the Tribunal that the Respondent acted arbitrarily in its dealing with and treatment of the Appellant in the circumstances of this case.

3. A declaration by the Tribunal that the Appellant is not liable to pay the assessed Companies Income Tax and Value Added Tax except as have been admitted by the Appellant.

4. A decision of the Tribunal that the deeming by the Respondent of the tax assessment as having become final and conclusive is null and void and of no legal effect.

5. A decision of the Tribunal setting aside the notices of assessments dated 30th July 2019 and the demand notices dated 29th January 2020 issued by the Respondent against the Appellant.

6. A decision of the Tribunal setting aside the penalties and interest imposed by the Respondent on the Appellant.

This is the Judgment of this Tribunal.

Dated this 14th day of April, 2022.

HON. BARR. CHUKWUEMEKA EZE

CHAIRMAN

I concur

HON. IDE JOHN C. UDEAGBALA

COMMISSIONER

I concur

HON. ANNE C. AKWIWU

COMMISSIONER

I concur

HON. PROF. J.O. ANYADUBA

COMMISSIONER