IN THE TAX APPEAL TRIBUNAL

IN THE LAGOS ZONE

HOLDEN AT LAGOS

APPEAL NO. TAT/LZ/PIT/016/2021

BETWEEN

LAGOS STATE BOARD OF INTERNAL REVENUE ..... APPELLANT

AND

MEGA TRUST INSURANCE BROKERS LIMITED .....RESPONDENT

JUDGEMENT

FACTS OF THE CASE

An audit exercise was conducted into the books and records of the Respondent after which the Appellant said that the Respondent has failed to accurately deduct and remit the Personal Income Tax of its employees, Withholding Taxes from applicable transactions, Development Levy and Business Premises Levy due to the Lagos State Government. As a result of this discovery, the Appellant served on the Respondent a Demand Notice accompanied by a Notice of Assessment of its established liability for Personal Income Tax, Withholding Taxes, Development Levies and Business Premises Renewal, covering the period of 2015, in the sum of **#2,791,667.39** (Two Million, Seven Hundred and Ninety-one Thousand, Six Hundred and Sixty-Seven Naira, Thirty-Nine Kobo) only.

The relevant provisions of the Personal Income Tax Act (PITA) allows for 30 days window for the Respondent days to object the assessed liability, but that the Respondent failed to utilize the opportunity. Consequent upon this failure, the Appellant then issued a letter of Intention to Obtain Warrant of Distrain dated 29th June, 2017. The Appellant filed this Appeal consequent upon the Respondent's continuous refusal to liquidate the assessed amount in the sum of **#2,791,667.39**

(Two Million, Seven Hundred and Ninety-one Thousand, Six Hundred and Sixty-Seven Naira, Thirty-Nine Kobo) only.

ISSUES FOR DETERMINATION

The following issues have been formulated for determination:

1. Whether failure to object or appeal against an assessment within the statutory time frame makes the assessment final and conclusive.
2. Whether the Appellant was right to include the Respondent's Chairman and Managing Director in the assessed liability.

PARTIES SUBMISSIONS

THE APPELLANT

On the first issue above, the Appellant submitted that, it is trite that a taxpayer has the right to object any assessment issued and served on him by the Relevant Tax Authority, if he disputes the assessment, but that where he failed to object within the time allowed by the law, he will have a maximum of 30 days to pay the assessed liability, citing the provisions of **Section 58 and 68 of Personal Income Tax Act (PITA) 2004**. The Appellant maintained that upon receipt of the Assessment and Demand Notice, the Respondent failed to respond to the letter, either by denying the audit exercise or objecting the assessment, but just waited until the Appellant filed this appeal to recover the outstanding tax liability as a debt due to the Lagos State Government before bringing up an objection by way of a reply to the Notice of Appeal.

The Appellant further submitted that, at the trial, the Respondent could not show any mode of proof of objection to the assessment but was rather insisting that the Managing Director and the Chairman did not earn any income from the Company. The Appellant maintained that the Respondent had forfeited every right to object to the assessment by staying mute for 4 years, after service of the relevant documents on it. This according to the Appellant is despite the statement in the Demand Notice notifying the Respondent of his right to object the assessment within the stipulated statutory period. The Appellant said that by the clear content of **Exhibit A1**, the Respondent was informed of her liability based on the audited assessment and his statutory right to object the liability within 30 days allowed by the relevant

provisions of PITA and that the service of the exhibit on the Respondent was confirmed by **Exhibit A2** which is the way bill.

The Appellant maintained further that, the Respondent failed to object to the assessment within the statutory time and also failed to appeal against the assessment, as required by the extant laws. The Appellant therefore, concluded that the said assessment became final and conclusive, citing as authorities the cases of **LAGOS STATE BOARD OF INTERNAL REVENUE V. SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA (2011) 5 TLRN 60, Section 60 of PITA** and **Order 3 Rules 1 and 2 of the Tax Appeal Tribunal (Procedure) Rules 2021.**

On the second issue, the Appellant submitted that, the Chairman and Managing Director are also employees of the Respondent. This the Appellant said, is because the Respondent is a legal entity different and distinct from its Directors, meaning that, its liable to deduct tax from whatever income or benefit it has paid to its Directors. He cited the provisions of **Section 3 (1) of PITA.** The Appellant further submitted that, **Section 3 (2)(d) of PITA** provides that, employment includes any service rendered by any person in return for any gains or profit. He said, "Employment" has been defined by **Section 108 of PITA** to include any appointment or office, whether public or otherwise, for which remuneration is payable, and therefore these employees shall be construed accordingly.

It is also, the submission of the Appellant that, it does not matter on what capacity a person is serving in a Company, whether as a Director or a Chairman, that person is deemed to be an employee of the Company as long as he enjoys some benefit in the Company, whether by way of salary, wages, allowances, premium, profit or any benefit, no matter how small the benefit maybe. The Appellant said that Cambridge Dictionary defined Managing Director as the person in charge of a Company, who is responsible for what it does and how it is run, which service is not free, but done for some benefits.

The Appellant further submitted that, the Respondent is obligated to file annual income tax returns of its employees and since it failed to include the names of the Managing Director and the Chairman in the annual income tax returns filed, the Appellant by virtue of **Section 55 (1) of PITA** has the power to issue an additional assessment on the Respondent by adding the Chairman and the Managing Director in the payroll. He cited as authority the case of **COMMISSIONER OF FINANCE & ECONOMIC DEVELOPMENT & ANOR V. UKPONG & ANOR (2000)**

LPELR 6931 to support this position. The Appellant maintained that the inclusion of the Chairman and the Managing Director in the payroll is in accordance with the relevant provisions of the law, as **PITA** recognizes them as employees of the Respondent. The Appellant argued that, where a taxpayer asserts that the assessment of tax payable by him is excessive, he must produce sufficient evidence to enable the Tribunal to decide, not merely that the assessment is excessive without establishing by how much. He cited as authorities the case of **MOBIL OIL V. FBIR (1977) 3 S.C 53** and, **Regulation 17 of the Operation of Pay As You Earn (PAYE) Regulations 2002** which makes an employer liable for failure to deduct or remit personal income taxes of its employees and also **Regulation 21 of the Operation of Pay As You Earn Regulation 2002, which** authorizes proceedings against employers who fail to deduct and/or remit. He said that, both **Sections 82 and 74(1) of PITA** make an employer answerable for non-deduction or remittance of tax from its employees.

The Appellant therefore submitted that, the Respondent's action is tantamount to economic sabotage and thus urged the Tribunal to find and hold that the Appellant is entitled to all the reliefs sought and declared that the total sum of **#2,791,667.39** (Two Million, Seven Hundred and Ninety-One Thousand, Six Hundred and Sixty-Seven Naira, Thirty Nine Kobo) is final and conclusive, unpaid and due as debt to the Government of Lagos State from the Respondent for the 2015 year of assessment and should therefore Order that same be paid into the coffers of the Lagos State Government.

THE RESPONDENT

The Respondent in response to the submissions of the Appellant submitted that, the Appellant claims that the Respondent, being an employer of labour, failed to deduct and remit accurately the Personal Income Tax of its employees, Withholding Taxes from its transactions, Development Levy and Business Premises Levy for 2015 year of assessment, which it is required to remit to the Lagos State Government is not in line with the relevant provisions of the rules of evidence, which put the onus on the Appellant to prove the alleged liability of the Respondent. The Respondent cited as authority the provisions of **Sections 131,132,133** and **134 of the Evidence Act, 2011** and the cases of **AGBOLA V. UBA (2011)2-3 SC (Pt11) 43 at 68** and **AUDU V. GUTA (2004)4 NWLR (Pt 864) 463 at 465**. The Respondent maintained that the evidence of **PW1**, the sole witness of the Appellant as shown in his Statement on

Oath is that, when the Respondent failed to discharge its liability, the Appellant caused the records and documentation of the Respondent to be audited after which a Demand Notice was served on it for the sum it was alleged to be in default followed by a final Notice of Intention to Obtain Warrant of Distrain, when it still failed to comply. The Respondent submitted further that, during cross-examination, the said witness admitted that the Appellant sent a team of auditors to visit the office used by the Respondent, but that he was not part of the team. The Respondent stated further that the said witness admitted the fact that the Respondent presented documents to the Appellant showing that, it had only two paid employees at the material time, with evidence of remittances of their **PAYE**. He maintained that the witness said he did not see evidence of dividends or bonuses paid by the Respondent, or contract awarded by the Respondent in 2015 (the year of reference). The witness said that they found the two Directors of the Respondent from the documents of the Corporate Affairs Commission and the Audited Financial Statement of the Respondent, and added them as the employees of the Respondent and assessed their tax liabilities.

The Respondent submitted further that, the Chairman of the Respondent (the only witness of the Respondent in this matter), testified that the Respondent has not been a viable Company, but was only managing to exist and using the Office of another business. Also, that at the material time, it had only two full time employees whose taxes were duly deducted and remitted. He said that the then Managing Director, who was merely used to fulfil the regulatory requirement, did not earn any salary, but that despite providing all the necessary information to the Appellant, the Appellant still went on to add the Chairman of the Respondent and the said Managing Director to the payroll as paid employees of the Respondent. In addition the Respondent said that the two paid employees of the Respondent, were assessed based on their overall payments instead of their basic salaries. The Respondent maintained that, they did not pay any dividend or bonuses and did not award any contract in 2015 and that all these facts were made available to the Appellant, whose Officers visited the Office used by the Respondent.

The Respondent maintained that all the Appellant's communications to the Respondent were immediately and promptly responded to. The Respondent further stated that, during cross examination, the Chairman of the Respondent as the a witness maintained that all the communications by the Appellant were responded to by the Respondent, who objected to the assessment by the Appellant. He explained that he had not benefitted financially from the Respondent but had been using his own funds to keep the Respondent going. Also, that when the representatives of the

Appellant visited the Respondent, they were shown the Respondent's Statement of Account which revealed that, himself and the Managing Director were not paid salaries and that he pays tax as an individual to the Government. He maintained that the Appellant did not do any form of investigation into the affairs of the Respondent before coming up with the bogus assessment, and that they had no reason to disbelieve the information provided by the Respondent. He maintained that if they did, they would have discovered that both the Chairman and Managing Director were not paid by the Respondent. He said that, no law makes it compulsory for Directors of a Company to be paid salaries, citing the provisions of **Section 267(4) of Companies and Allied Matters Act as authority**.

The Respondent stated further that, Appellant witness under cross examination stated that the data used in assessing the tax liabilities of a Company is the one provided by the Company, and that it was the Respondent that provided the data with which it was assessed. Also, that the Respondent got to know about the two Directors of the Respondent from their audited financial statement, and added them as paid employees of the Respondent and that the only principle, which would permit the Appellant to make the additions is the "Best of Judgement Rule". He argued that under the Personal Income Tax Law of Lagos State, the rule is applied against a person who is in default, and it applies only to individuals. The case of **NIG BREWERIES PLC V. L.S.I.R.B (2002) 5 NWLR (Pt. 759) 1** is cited to support the assertion.

The Respondent therefore submitted that, the assessment by the Appellant is manifestly arbitrary, vindictive, imaginary and unreliable and urges the Tribunal to dismiss the Appeal with substantial cost.

ANALYSIS

ISSUE ONE

Whether failure to object or appeal against an assessment within the statutory time frame makes the assessment final and conclusive.

A tax assessment is final and conclusive when the taxpayer loses the right to question or challenge the amount of tax imposed due to his failure to carry out some steps

within specified periods set out under applicable laws. This may take the following forms:

a) failure of the taxpayer to present a valid objection to an assessment within the number of days prescribed by Statute;
b) failure of the taxpayer to appeal within the number of days prescribed by Statute against any decision of the tax authority refusing to revise or amend an assessment;
c) failure of the taxpayer to appeal against the decision of the Tax Appeal Tribunal or any court within the number of days prescribed by Statute; and
d) where a valid revised assessment has been agreed between the taxpayer and tax authority.

By the provisions of **Section 58 of PITA**, any objection by a tax payer on a tax assessment served, has to be made within 30 days upon service of same. The section provides;

> *If a person disputes an assessment he may apply to the relevant tax authority by notice of objection in writing, to review and to revise the assessment and the application shall state precisely the grounds of objection to the assessment and shall be made within thirty days from the date of service of the notice of assessment.*

Section 68 of PITA provides that;

> *Income tax charged by an assessment which is not or has not been a subject of an objection or appeal, shall be payable after the deduction of any set-off for the purposes of collection or any amount deposited against the tax at the place stated in the notice of assessment within two months after the date of service of that notice.*

A combined reading of the two sections of PITA cited above establishes the fact that a taxpayer has a right to object to any assessment issued and served on him by the Relevant Tax Authority, if he disputes the assessment. However, an assessment becomes final and conclusive when the taxpayer failes to present a valid objection to an assessment within the thirty (30) days allowance prescribed by the Statute. At

the expiration of the said 30 days the taxpayer losses the right to question or challenge the amount of tax imposed. The Court in the case of **MEDOX LTD V. COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICE (2016) 21 TLRN 73** held thus;

> "*This Court has over the years confirmed that, where no objection is made to an assessment issued by the relevant tax authority, the assessment is final and conclusive as between the tax authority and the tax payer*".

This similar position was held in the cases of **FEDERAL INLAND REVENUE SERVICE V. VITAL NEEDS ENGINEERING LTD (2016) 23 TLRN 83** and **GLOBAL SCAN SYSTEM LTD V. FEDERAL INLAND REVENUE SERVICE (2016)22 TLRN 14**.

The very vital question to be addressed by this Honourable Tribunal in relation to this issue is "Whether the Respondent has actually raised any form of objection to the demand notice served on it by the Appellant in relation to the "**DEMAND NOTICE ON LIABILITIES FOR PAYE, WITHHOLDING TAXES ETC (2015) TAX AUDIT**" dated 1st Day of February, 2017, with reference number, **LA/IRS/TA/C11125/DN/16546/02/17** signed by one Bolaji Akintola for and on behalf of the Executive Chairman, Lagos State Internal Revenue Service detailing the tax liability of the Respondent to the tune of **#2,791,667.39** (Two Million, Seven Hundred and Ninety-One Thousand, Six-Hundred and Sixty-Six Naira, Thirty-Nine Kobo).

It is apparently clear from both documentary and oral testimony of the Respondent that upon the receipt of this said demand notice accompanied by a notice of assessment dated the 1st Day of February, 2017, the Respondent on the 15th Day of February, 2017 raised an objection to the said assessment in its entirety, giving some grounds of objection to the assessment and urged the Appellant to review the assessment. This clearly shows that the Respondent promptly objected to the assessment within the 30 days allowed by the relevant provisions of PITA. The relevant documentary evidence show clearly that the date of the demand letter is 1st of February, 2017 and the date on the letter of objection by the Respondent is 15th Day of February, 2017. The means that the objection letter was served on the

Appellant 15 days after the service of the assessment, which is the record time. This fact has actually been alluded to by both the witness of the Appellant and that of the Respondent. The only point of controversy between their testimonies before this Honourable Tribunal is the fact that the witness of the Appellant insisted that said letter of objection was addressed and served on the Station Manager, Lagos State Internal Revenue Services, City Hall Complex, Catholic Mission Street, Lagos Island, Lagos. This, the Appellant has argued is not a good service, as it was not addressed and served on the Executive Chairman of the Internal Revenue at the Good Shepherd House, 5th Floor Block H, Plot H1, Central Business District, Opposite Lagos State Government Secretariat Main Gate, Alausa, Ikeja, who is the only legitimate officer to receive such a mail. The Respondent on the other hand maintained that the said Station Manager is a legitimate agent of the Appellant and therefore any service to them for the Appellant is a good and legitimate service.

This Honourable Tribunal is not persuaded by the argument canvassed by the Appellant on the service of the letter of objection. This is because the Appellant in their presentation before this Honourable Tribunal never led any evidence or argument establishing the fact that the said Station Manager is not a staff of the Appellant. In fact it is the conclusion of this Honourable Tribunal, that as a legal and legitimate office established by the Government of Lagos for tax purpose and also carrying the seal of the Lagos State Internal Revenue Service as clearly shown on the documents tendered by both parties and which fact was alluded to in the oral testimonies, the office and by extension, its staff, for all intent and purposes, are legally recognized agents of the Government of Lagos State Internal Revenue Service, and by legal implication agents of the Lagos State Government for revenue purposes. It is therefore, our conclusion that the Respondent duly served the said letter to the Appellant through the Station Manager at City Hall Tax Office, who is the agent of the Appellant.

It is an elementary principle of law that in Agency relationship, the acts of the Agent binds the Principal. In the case of **WEMA BANK V. AJAH (2019) LPELR 47848**, the Court of Appeal stated that, an agent is one who is authorized to act for and on behalf of the Principal and binds the principal by words or actions. Similarly, in **REGISTERED TRUSTEES OF THE WORD OF POWER GLOBAL MINISTRIES INTERNATIONAL (THE TRUMPANT CHRISTIAN CENTRE) V. DN TYRE AND RUBBER PLC (2016) LPELR 42255,** it was stated that, the law with respect to agency is that, he who acts through another acts

himself. It follows by this principle that, the act of an agent in the course of his employment is the act of his principal. See also the cases of **LEVENTIS TECHNICAL LTD V. PETROJESSICA ENTERPRISES LTD (1999) 6 NWLR (Pt605) 45** and **ANTHONY IDEHEN OGIDA V. JACKSON OSAZE OLIHA (1986)1 NWLR (Pt19)786**. More so, the Demand Notice on the Respondent was equally signed on behalf of the Executive Chairman by one Bolaji Akintola, who is an agent of the Executive Chairman. This gives credence to the fact that, the Executive Chairman has agents who act on his behalf in official engagements. It is therefore the decision of this Honourable Tribunal that the service of the said letter of objection, on the agent, that is, the Station Manager, Lagos State Internal Revenue Service, City Hall Complex, Catholic Mission Street, Lagos Island, Lagos is a proper service on the principal, that is, the Executive Chairman.

The demand notice therefore cannot be said to be final and conclusive in the face of a valid, legal and legitimate objection by the Respondent, and so the collection of the alleged liabilities must be held in abeyance pending the determination of the issues raised in the objection by the Respondent. This Honourable Tribunal, so hold that the assessment was not final and conclusive, since there was a valid objection by the Respondent in that regard and also, that penalty and interest cannot be validly imposed on the alleged PAYE and WHT liabilities which were not final and conclusive given that a valid objection was made to the Appellant within the statutory time limit in line with Sections 58, 60 and 68(2) of the Personal Income Tax Act (PITA).

ISSUE TWO

Whether the Appellant was right to include the Respondent's Chairman and Managing Director in the assessed liability.

In the objection letter by the Respondent dated the 15th Day of February, 2017, the Respondent strongly and categorically argued that none of the directors is on salary or any form of benefit from the Respondent, inclusive of the Chairman and the acting Managing Director. The Respondent maintained, through documentary evidence, that the Chairman as a private Legal Practitioner has always respected his tax obligations and tendered all the tax clearance certificate of the Chairman to the audit team that visited the Respondent, and that the Managing Director is a pensioner. In his oral testimony before this Honourable Tribunal, the Chairman confirmed this position and further established that he submitted all his Tax

Clearance Certificate to the auditors of the Appellant. This fact was never contradicted by the Appellant either in their written submission or oral testimony before this Honourable Tribunal.

Evidence presented before this Honourable Tribunal establishes the fact that documentary evidence was presented to the staff of the Appellant that went on the audit of the Respondent, but no evidence was before the Tribunal that those documents were the basis of the judgment of the Appellant that led to the revised assessment served on the Respondent. The Chairman and the Managing Director were simply added to the payroll and assigned annual salary without any clear basis. This gives credence to the argument of the Respondent that there was no clear basis for the liability imposed on the two staff of the company, since there was no evidence to show that they have actually earned some income in their services to the company.

This Honourable Tribunal wish to make it categorically clear that before the liability of PAYE can be established and claimed by a Relevant Tax Authority, under the relevant provisions of PITA, understanding the fact that PAYE is a tax imposed on individual income, two basic conditions under the said provisions of PITA must be satisfied. These are firstly, that the said taxpayer is a resident of the Relevant Tax Authority and secondly that the taxpayer has earned income that is taxable. These two pre-conditions must at all times be established as satisfied by the said Relevant Tax Authority before any claim can be made on the taxpayer. PAYE is not a tax imposed on a company and therefore it is only after the liability of the individual taxpayer is established as an employee of a particular employer, that the responsibility of the said employer began, which is to deduct the appropriate PAYE tax and remit to the Relevant Tax Authority.

From the welter of the oral and documentary evidence placed before this Honourable Tribunal by both the Appellant and the Respondent in this matter, it is quite obvious that the Chairman and the Managing Director, as employees of the Respondent, if we may use the word "employee" loosely, have no established salary income or any other income for that matter, from the company that was said not to be viable at the material time and which claim was not in any way contradicted by the Appellant. The only witness of the Respondent, who is the Chairman of the company, in his evidence before this Honourable Tribunal, established the fact that the company made available to the Auditors sent by the Appellant, all the necessary information showing that both him, the Chairman and the Managing Director, are not salaried

employees of the company and that the company had not paid any dividend or bonuses to them during the period under review, even though the Chairman said under cross examination that as a Legal Practitioner, he has other sources of income and he is up-to-date in his payment of all the relevant taxes. Also, that the Respondent did not award any contract in 2015, all of which facts were made available to the Appellant, through the Auditors sent by the Appellant. See the case of **D.S.A. Agrixc Mach. MFG. Co Ltd v Lagos State Internal Revenue Board (2006) LPELR-11560 (CA),** Per SALAMI, J.C.A at Pages 22-25, paras. D

The assessments being considered in this matter, were therefore, not based on the documents provided by the Respondent to the Appellant. As a matter of fact and law, if as residents and employees working in Lagos State, if the Chairman and Managing Director, will be liable as employees of the Respondent to pay any PAYE to the Lagos State tax authorities, it must first of all be established that in addition to their being resident in Lagos State, they have earned income from their engagement with the Respondent, before the issue of non-remittance of the tax deducted by the Respondent can legally be established. This is because, the role of the Respondent, under the relevant laws, is that of a collecting agent, for and on behalf of the Relevant Tax Authority. There is nothing before the Tribunal that any tax liability, as far as the relationship between the said Chairman and the Managing Director, have earned any such income based on all the documentary evidence tendered by both the Appellant and the Respondent. What the Appellant has done is more of speculation, which is baseless and arbitrary.

The Court of Appeal in the case of **GTB PLC V EKBIR (2019) 40 TLRN 53** maintained that the Relevant Tax Authority must always consider all the relevant facts, records and documents before making an assessment of a taxpayer and that a tax authority cannot make a valid assessment of a taxpayer where information, records and documents are submitted by the taxpayer but not considered by the tax authority in the course of making an assessment. Where such information, records or relevant documents are not made readily available, then the relevant tax authority can invoke its powers conferred on it by Section 54 (1) PITA 2011 and assess the taxpayer on the basis of its best of judgement. See **FBIR V F M SOLANKE (2011) 4 TLRN 164.** However, the Court in **FIRS V GTB 9 All NTC 409**, maintained that the use of Best of Judgement needs not be worst of judgement. So, in **ITC V BADRIDAS (2011) 4 TLRN 164** the Court held that the Relevant

Tax Authority, has the powers to resort to the use of its Best of Judgement against a taxpayer who is in default of supplying relevant information, records and documents. However, in doing so, it must not be dishonest, vindictive or capricious, as it must at all times not be arbitrary, excessive or capricious. In **ERICSSION V BSBIR 9 ALL NTC 255 at 273,** the Court held that it is an error of law for the Relevant Tax Authority to argue that a Best of Judgement has become final and conclusive, when there is a valid objection by the taxpayer.

It is therefore, our submission that the accumulated PAYE outstanding in the sum of #1,967,171.36 in this case is arbitrary and not based on any document or information from the company. It is also, our conclusion that the Withholding Tax, Penalty and Interest calculated on the total PAYE have no legal basis, while the Development Levy and Business Premises have been fully paid.

It is our final decision that the assessment of the tax liabilities of the Respondent by the Appellant in this matter, is clearly arbitrary, imaginary and unreliable and therefore this Appeal is hereby dismissed without any cost.

DATED AT LAGOS THIS 23RD DAY OF MARCH, 2022

23/03/2022.

PROFESSOR A. B. AHMED ESQ (Chairman)

23/03/2022.

P. A. OLAYEMI ESQ
Commissioner

23/03/2022

BABATUNDE E. SOBAMOWO ESQ
Commissioner

23/03/2022

SAMUEL N. OHWERHOYE ESQ
Commissioner

23/03/2022

TERZUNGWE GBAKIGHIR ESQ
Commissioner