Any assessment that is not in line with the law cannot be final and conclusive says TAT

June 2016

In brief

In Star Deep Water Petroleum Ltd v. Lagos State Internal Revenue Service[1], the Tax Appeal Tribunal (TAT) Lagos division held that an assessment that is not compliant with the law could not become final and conclusive.

The TAT also held that Regulation 2(2) of the PAYE Regulations which requires a 'manager' to act in place of an employer by furnishing the relevant tax authorities with employees' emoluments, deducting and remitting tax do not apply where the manager does not pay the employees' emoluments.

In detail

Background

Section 58 (1) of the Personal Income Tax Act (PITA) provides that a taxpayer disagreeing with an assessment, is expected to, within 30 days of notice of the assessment, object to the assessment. Failure to object within this period makes the assessment final and conclusive. Once an assessment is final and conclusive, the taxpayer loses its right of appeal to the tax authority and the latter's right to begin recovery and enforcement of tax due is activated.

Regulation 2(2) of the PAYE Regulations provides that where an employee is working under the supervision of a person other than his employer, that person (manager) would be responsible for complying with the employer's obligations (deducting and remitting personal income tax of the employee) under the PAYE system.

Facts of the case

Star Deep Water Petroleum Ltd (Appellant) entered into a Cost Sharing Agreement (CSA) with Chevron Nigeria Limited (CNL), a related party.

Under the terms of the Agreement, the Appellant would use CNL's resources including personnel for the purpose of discharging its obligations under a Master Service Agreement (MSA). The Appellant had no employees.

LIRS assessed the Appellant to PAYE, Withholding Tax (WHT), business premises registration and development levy for the years 2005 – 2009 following which it served a demand notice on the Appellant. The WHT was assessed on best of judgment

[1] TAT/LZ/022/2012 delivered on 15 April 2016.

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(BOJ) basis where LIRS merely applied 10% and 5% to the Appellant's geological and accrued expenses respectively as WHT due.

Following the Appellant's failure to object within 30 days, LIRS issued a Notice of Intention to Obtain Warrant of Distrain on the Appellant.

The Appellant appealed against both notices.

Appellant's position

The Appellant argued that:

- Section 58(1) does not provide that failure to object within 30 days would render an assessment final and conclusive. This was provided by section 66 of PITA which was repealed in 2007.
- The assessment was invalid since LIRS did not comply with the law on BOJ assessments.
- Since it had no employees of its own subjecting it to PAYE obligations would result in double taxation since CNL has accounted for the tax of the employees in question.
- WHT was not due to LIRS as they had already been remitted to the Federal Inland Revenue Service.
- Since it used CNL's premises, it was not liable to business premises registration and development levy.

LIRS' position

LIRS' arguments can be summed up as follows:

- Since the Appellant failed to object within 30 days, the assessment had become final and conclusive.
- By Regulation 2(2) of the PAYE Regulations and section 82 of PITA, the Appellant should deduct and remit taxes on behalf of the employees.
- The Cost Sharing Agreement between the Appellant and CNL was inoperative and vague as it did not contain a commencement date and no cost sharing ratio.
- By section 73 of PITA and the WHT Regulations, the LIRS has powers to impose tax on BOJ basis.
- The Appellant was liable to business premises registration and development levy since it had its head office in Lagos.

The decision

The Tribunal, after considering the evidence before it, allowed the appeal in part and held that the assessment was not final and conclusive because:

- the Appellant did not have any employees and therefore was not required to remit PAYE. Regulation 2(2) would only apply if there was evidence that the Appellant paid salaries to the employees,
- the WHT assessment was set aside as speculative and faulty in law. The Tribunal thereafter directed parties to reconcile their positions, and
- the business premises registration and development levy was set aside subject to CNL's payment of same.

However, the Tribunal did not comment on the Appellant's argument that section 66 of PITA had been repealed. Sections 61 – 67 of PITA on appeals procedure were deleted by section 15 of the Personal Income Tax (Amendment) Act 2011.

The takeaway

Based on this judgement, an important principle was demonstrated. Namely, an assessment can only be final and conclusive if it is compliant with the law under which it was issued.

Even though the Appellant's objection was outside the 30 day period, the Tribunal set aside the assessment.

However, taxpayers are advised to object within the time stipulated by law to any assessment, demand notice, tax liability reports, order or decision made by the tax authorities in the event that such assessments are considered to be in line with the law and to prevent distrain on their goods or premises.

The decision may apply to cases where personnel are sourced from employment agencies, in such cases, it can be inferred that it is the party paying the salaries of the workers that

would be liable to deduct and remit PAYE taxes.

Taxpayers should also make sure that the substance of contracts are consistent with the terms of the contract. This was a decisive factor in the court's decision.

Finally, taxpayers should challenge any BOJ assessments which are demonstrably arbitrary and contrary to extant laws.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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