

Court rules that FIRS cannot assess companies to income tax based on value of properties



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Background

Section 30(1)(a) of the Companies Income Tax Act (CITA) grants the Federal Inland Revenue Service (FIRS) power to assess a company to tax on a fair and reasonable percentage of its turnover where:

- (a) it appears to the FIRS that a company has no assessable profits or;
- (b) the profits, in FIRS' opinion, are less than it expects from such a trade or business; or
- (c) the true amount of a company's profits cannot be ascertained.

This mode of assessment is usually referred to as a Best of Judgment (BOJ) assessment.

Recent FIRS practice

FIRS has been assessing companies, particularly hotels, malls, plazas and other similar businesses to tax based on the value of their landed properties (usually the properties used to generate income). This is on the premise that such companies generate significant income but fail to file returns or pay taxes. The FIRS also relied on banking turnover obtained through BVN information.

Facts of the Case

In Theodak Nigeria Limited v FIRS, FIRS assessed the company, engaged in the letting of office premises, to tax based on a percentage of the value of its property relying on section 30(1)(a) of CITA.

The company challenged the assessment and asked the Federal High Court (FHC) to declare the assessment invalid and also restrain FIRS and/or its agents from taking steps to enforce the assessment.

Parties' position

The company argued that FIRS lacks power under section 30(1)(a) to assess it to tax based on the value of its property since the section requires the assessment to be on a company's turnover. The company further argued that "value of property" is not income chargeable to tax under the CITA.

FIRS argued that it has the power under section 30 to employ a BOJ assessment to determine a company's profits and assess the profits to tax. It also argued that the company did not object to the assessment within 30 days of receipt making the assessment final and conclusive.

FHC Decision

The FHC held that though section 30(1)(a) allows FIRS to assess the company to tax on turnover, the value of the company's property cannot be used as turnover unless the plaintiff is in the business of selling properties and had disposed that particular property.

The FHC also held in interpreting section 69(1) of CITA that a taxpayer is not required to object to an assessment within 30 days of receipt of the assessment because the word 'may', connoting a discretion, is used in the section. So, failure to object within 30 days cannot deny a party access to courts.

Takeaway

In our opinion, section 30 grants the FIRS powers to deem the assessable profits of a company based on the turnover as contained in the company's returns, it does not grant the FIRS powers to deem a company's turnover.

Where a company fails to file returns, the relevant section is s65(3) which empowers the FIRS to deem a company's total (taxable) profit using BOJ. Again this section does not empower FIRS to deem a company's turnover.

With respect to objection under section 69, even though the FHC held that it is not mandatory for a taxpayer to object to an assessment, our view is that a taxpayer who decides not to object to FIRS must appeal to the Tribunal/Court within 30 days of receipt. The word 'may' should be read to give the taxpayer the option of either objecting or appealing within 30 days. This is consistent with Paragraph 13 of the 5th Schedule to the FIRS (Establishment) Act (which overrides CITA).

