IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
SITTING AT LAGOS

APPEAL No. TAT/LZ/006/2013

BETWEEN

GROUP 4 SECURICOR NIGERIA LIMITED..... APPELLANT

AND

LAGOS STATE INTERNAL REVENUE SERVICE ..... RESPONDENT

## JUDGMENT

### INTRODUCTION

The Appellant filed this appeal on June 24, 2013 and an amended one on May 8, 2014. The Appellant's sole ground for the appeal is that the Respondent refused to accept the actual figures of the salaries earned by the Appellant's employees and imposed arbitrary figures as incomes earned and raised assessment for 2010. The tax liability in dispute is **N20,938,480.76** for 2010 year of assessment. The Appellant contends that the Respondent arbitrarily assessed the Appellant's expatriate staff on deemed income for 2010 year of assessment despite the submission of all payroll related documents and records.

The Respondent believes that the Appellant failed to discharge the burden of proof placed on it by the Personal Income Tax Act (PITA). And in the circumstances the Respondent believes that it is in accord with PITA to use deemed income to assess the Appellant's expatriate staff.

### ISSUES FOR DETERMINATION:

The issues for determination are:

1. **Whether the Appellant has the *locus standi* to appeal against a demand notice that was served on the Appellant?**

2. **Whether by rejecting the contracts of employment of the Appellant's employees and considering extraneous materials, the Respondent's exercise of its discretion under section 54(2)(b) of PITA was not arbitrary, biased and unfair?**

**PARTIES' POSITIONS:**

1. **Whether the Appellant has the *locus standi* to appeal against a demand notice that was served on the Appellant?**

This threshold issue questions the right of an employer to appeal against a demand notice served on it under Personal Income Tax Act (PITA). If the Appellant does not have the right to appeal, it will not be competent for the tribunal to go into the substance of the matter.

In a demand notice to the Appellant, the Respondent alleged under-deduction and under-remittance of taxes withheld by the Appellant under the Pay As You Earn (PAYE) scheme. The Appellant objected stating that if the Respondent used the actual remuneration of the employees in question, the Appellant would have no outstanding liabilities. The Respondent refused to amend the notice, stating that the notice had become final and conclusive and would be recovered via other means if not paid within 7 days.

The Appellant sued. The Respondent challenged the Appellant's ability as an employer to sue under PITA.

The Appellant argues that it has *locus standi* because it is LIRS's agent in this case and not a taxable person under PITA. It maintains that if the actual salaries of its employees are used, it would have no outstanding PAYE liabilities.

The Appellant submits that this case should be distinguished from *7UP Bottling Company Plc v Lagos Internal Revenue Service* [2013] 2 NRLR 105 which borders on whether an employer can object to a notice of assessment under the PAYE system.

The Respondent contends that the Appellant has no *locus standi* because it is not a taxable person under PITA being only an agent of the Respondent relying on *Lagos State Internal Revenue Board v First Bank of Nigeria Plc* [1999] 1 NRLR 1, 14 and *7UP Bottling Company Plc v Lagos Internal Revenue Service* [2013] 2 NRLR 105,140 to show that it is only the employee who has the right to protest

under the PAYE scheme and not the employer. It however added that the Appellant as an agent of LIRS can only object in respect of allegation for under-deduction and non-remittance.

The Appellant's right of appeal as an employer under PITA is called to question. The Appellant is charged with a duty to deduct PAYE from its employees' emolument at source and account for the deductions to the relevant tax *authority–LIRS. The Appellant* is therefore a tax-collection agent, not a taxpayer under PITA.

Section 82 of PITA makes the Appellant answerable to the Respondent, for tax deducted. As a result, the Respondent served the Appellant a notice demanding the tax deducted. According to section 82, this is a debt owed by the Appellant to the Respondent. The Appellant bears the burden of the tax liability. If the Appellant fails to pay the debt, the Respondent will take other measures to recover it.

The question now is whether the Appellant has *locus standi* to bring the Respondent action. Addressing the issue of *locus standi* in *Ikeja Hotels Plc v Lagos State Board of Internal Revenue* [2005] 17 NWLR 343, 361D-E, Salami JCA said "a person must disclose a benefit or an interest in the subject matter which *prima facie* ought to show an infringement [or threat] of that interest." Since the Respondent's demand notice activates its right to threaten the Appellant, the Appellant is permitted to seek relief through the present action.

The Appellant is before this tribunal appealing against a demand notice, not a notice of assessment (as it did not receive any and is not entitled to one). The demand notice alleges that the Appellant owes the Respondent. The Appellant therefore has sufficient interest to sustain its appeal in the present action.

**2. Whether by rejecting the contracts of employment of the Appellant's employees and considering extraneous materials, the Respondent's exercise of its discretion under section 54(2)(b) of PITA was not arbitrary, biased and unfair?**

The Appellant argues that the Respondent assessed the employees of the Appellant on their actual income in 2009. But in 2010 the Respondent assessed the same employees on deemed income, relying on the same principles applied on the employees of the Appellant's sister company - Outsourcing

Services Ltd. (OSL). The Appellant's objection to the deemed income assessment was refused by the Respondent. The grouses of the Appellant are that the assessment is arbitrary, has different contract and circumstances with OSL, and that all records and explanations were provided to the Respondent.

The Appellant insists that the Respondent must exercise its discretionary powers reasonably in good faith and uninfluenced by extraneous factors. The Appellant cited a number of decided cases to support its position.

The Appellant argues that OSL and the Appellant are into different businesses. The testimony of Mr. Charles Chigbu on re-examination confirms that OSL is into purely security guard business whereas the Appellant provides protocol services plus CCTV services. The Appellant also asserts that OSL was assessed on deemed income for 2006 to 2008 years of assessment despite protests. Thus, the Appellant maintains that it is unreasonable to compare and benchmark its employees' remuneration to that of OSL.

The Appellant says it provided all the documents and explanation required by the Respondent to determine the tax affairs of its employees. The Appellant argues that the mere reason that two entities are related does not mean that their employees will earn the same salary. The Appellant posits that the remuneration of employees is a matter of contract and not an issue for the tax authority to speculate upon.

The Appellant insists that it has made full disclosure of its employees' incomes and that the payslips and payroll information support the staff costs in its audited financial statements. The Appellant believes that the Respondent was not faithful in its duty and obligation by refusing to accept all the documents presented to it that contain consistent information on the incomes of the Appellant's employees. Thus, the Respondent was influenced by the deemed income figure earlier imposed on OSL to assess the Appellant's expatriate employees.

The Respondent asserts that the salaries/incomes of the Appellant's expatriate employees as disclosed were unreasonably lower compared with those earned by expatriate staff of Outsourcing Services Ltd. (OSL) – a sister company of the Appellant. And that the taxable income of the expatriate staff declared by the Appellant excludes money paid as bonuses and other Benefit in Kinds (BIK). Thus,

the Respondent applied N13.5million as deemed income per annum for each of the expatriate staff. The Respondent maintains that the Appellant's tax payments for 2008 and 2009 shows that OSL and the Appellant are in the same line of business of risk management. And that the status and job position of the expatriate staff in both companies are the same. The Respondent believes that the salaries of expatriate employees of the Appellant are artificial in comparison with the salaries earned by the same category of employees of OSL. The Respondent says it relied on Sections 17(1); 54(2)(b); and 58(3) of PITA to raise Best of Judgment assessment on the Appellant's employees.

The Respondent argues that in resorting to best of judgment assessment, it acted in honest and fair manner. The Respondent says it relied on OSL's expatriate staff salary of N10.5million to N12.5million paid from 2006 to 2008 years of assessment to deem N13.5million for the expatriate staff of the Appellant for 2010 year of assessment.

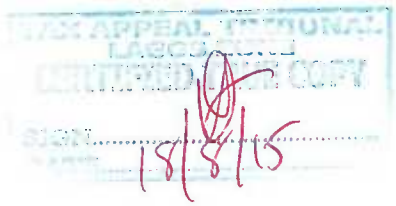
The Respondent also states that the Appellant omitted and expressly excluded the bonuses paid from the basic and guaranteed remuneration in the contract of employment. Hence, the Respondent asserts that the Appellant has deliberately excluded taxable income from the contract of employment with its expatriate staff resulting in under-deduction and under-remittance of taxes.

**Analysis and Decision:**

The Appellant submits that the Respondent assessed OSL on deemed income for 2006 to 2008 years of assessment. And that the Respondent imposed its decision on OSL despite protest. The Respondent in its final demand notice dated May 21, 2013 – **Exhibit BOI/7** – echoed the basis of its assessment of the Appellant as follows:

***"Group 4 Securicor Nigeria Limited closely related in operation to Outsourcing Services Limited are both owned by the same parent company G4S Plc United Kingdom. G4S Nigeria and OSL Nigeria are in the same business of Integrated Security and Risk Management Services, utilising manpower with the same skills and competences. Operation wise G4S is not separated from OSL in Nigeria. Therefore income utilised for expatriates on Outsourcing Services Limited payroll in 2010 tax audit was adopted for expatriate staff of G4S for the same year".***





The Respondent's witness, in paragraphs 8 & 9 of his statement on oath dated 24/10/2013 – **Exhibit BS,** claims that parties agreed to use N13.5million as the least basic salary for the expatriate staff of the Appellant. This position is said to be contained in the report of the Tax Audit Review Committee's meeting admitted in evidence as **Exhibit BS4.** The Respondent also alluded to this assertion in paragraph 2.2 of its address. But we did not find any reference to an application of deemed income in **Exhibit BS4.**

The Appellant alleged in paragraphs 9 and 11 of its witness' further statement on oath dated March 10, 2014 – **Exhibit BBO** – that OSL was assessed on deemed income for 2006 to 2008. The Respondent never disputed that it imposed best of judgment assessment on OSL in 2006 to 2008. Paragraphs 11 and 12 of the Respondent's witness statement on oath dated October 24, 2013 – **Exhibit BS** – lend credence to the application of best of judgment on OSL. Unfortunately OSL is the only company quoted as industry reference by the Respondent. Therefore, reference to OSL figures is invariably reference to the Respondent's prior best of judgment figures. Thus, the Respondent appears to set the industry standard for the best of judgment assessment of the Appellant.

The decision to discard returns in favour of best of judgment is typically activated by the tax authority's prior knowledge of similar circumstances that make the particular return in question appear to result in less than normal tax. And that the parameters that informed the rejection decision must be put in context in the new decision. Thus, relative comparison with that which is generally accepted as normal is inherent in any best of judgment assessment. Best of judgment must bear semblance to normal tax assessment of identical or closely related companies in similar or identical circumstances. Industry average is a norm for best of judgment reference. Accordingly, a best of judgment assessment cannot be established on prior best of judgment. It must originate from actual industry results or the parameters must be realistic within industry context. These factors are germane to the reasonableness and fairness of any best of judgment.

The Respondent's resort to best of judgment in this case is legitimate and all the sections of PITA relied upon are in concurrence therewith. But the reference parameter for this particular best of judgment assessment is faulty. Because the Respondent benchmarked its best of judgment to a prior best of judgment it

established on OSL. The Respondent cannot set the industry average and dovetail best of judgment assessment to that which it established.

**Decision:**

We accordingly vacate the best of judgment assessment on the Appellant and direct that the company in this instance be assessed on the actual data produced by the Appellant.

**Legal Representation:**

Moshood Olajide Esq. with F. Akinla Esq. for the Appellant.

Emeka Ihebie Esq. for the Respondent.

**Dated at Ikeja, Lagos this 19th day of June 2015**

**KAYODE SOFOLA, SAN**
Chairman

**CATHERINE A. AJAYI (Mrs)**
Commissioner

**D. H. GAPSISO ESQ.**
Commissioner

**MUSTAFA BULU IBRAHIM**
Commissioner

**CHINUA ASUZU ESQ.**
Commissioner

TAX APPEAL TRIBUNAL
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SIGN.....
DATE... 18/8/15