IN THE TAX APPEAL TRIBUNAL

LAGOS ZONE

HOLDEN AT LAGOS

APPEAL NO. TAT/LZ/CIT/015/2017

BETWEEN:

PRIME PLASTICHEM NIGERIA LIMITED …………………. APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE ……………………… RESPONDENT

JUDGEMENT

FACTS OF THE CASE

The Appellant is a private limited liability company which engages in the business of trading in imported plastics and petrochemicals. Following the commencement of the Income Tax (Transfer Pricing Regulations No.1 2012)**(TPR)**Regulation, the Appellant filed its Transfer Pricing Documentation**(TPD)** for 2013 and 2014. In 2013, the Appellant adopted the Comparable Uncontrolled Price **(CUP)** Transfer Pricing Method in determining whether the pricing of its transactions with a related company, Vinmar Overseas Limited **(VOL)** were at arm's length. However, in 2014, due to lack of comparable to enable the Appellant to adopt the **CUP** method, the Appellant adopted the Transactional Net Margin Method **(TNMM).** The Respondent after 3years acknowledged receipt of the Appellant's **TPD** and requested additional information which the Appellant furnished. The Appellant readily obliged the Respondent's request for additional documents/information on several occasions through Exhibits/Annexures **A15,A17,A20** and **A21**. The Respondent in its review of the Appellant **TPD** stated that "*the only controlledtransaction that was disclosed by your company is the purchase of petrochemicals from **VOL**, a connected person"* and that the Appellant's methodology for testingthe pricing *"was in accordance with the arm's length principle*".

The only point of divergence between the Appellant and Respondent was the appropriateness of using Net Profit or EBIT/Operating Revenue as Profit Level Indicator **(PLI)** or Gross Profit/Operating Revenue for the purpose of **TNMM**. The Appellant used Net Profit/Operating Revenue while the Respondent used Gross Profit/Operating Revenue.

The Respondent has served the Appellant with additional assessment of One Billion, Seven Hundred and Thirty Eight Million, Four Hundred and Eighty One Thousand,Eight Hundred and Seventy Five Naira, Thirty Three kobo**(#1,738,481,875.33).** The Appellant objected to the additional assessment by a letter dated 14th February, 2017. Consequently, a Notice of Refusal to Amend **(NORA)** dated 4th May, 2017 was served on the Appellant by the Respondent. The Appellantinsisted that it has complied with all the provisions of the **TPR** and supplied all the necessary information and concluded that the Respondent's request for "*alternative benchmark analysis*" and "*computation ofadditional tax liability payable*" did not have legal basis. The Appellant being dissatisfied with the additional assessments and demand notices issued by the Respondent has appealed to this Tribunal.

ISSUES FOR DETERMINATION

The following issues have been distilled for determination by the parties:

1. Whether the Appellant has proved its case before this Tribunal to be entitled to the claims and reliefs sought against the Respondent.
2. Whether the Respondent's action in benchmarking the Appellant's TP transaction with the Transactional Net Margin Methods **(TNMM)** for the 2013 and 2014 was valid and in accordance with the Transfer Pricing Regulations 2012 and the **OECD/UN** Guidelines.
3. Whether the Respondent's action of using the Gross Profit Margin **(GPM)** Method as the Profit Level Indicator **(PLI)** in the instant Transfer Pricing transaction is valid and in accordance with the TP Regulations, **OECD** and UN Guidelines.
4. Whether the Appellant's failure to file their returns within the prescribed period required by the extant tax laws validates the penalty and interests imposed by the Respondent vis-à-vis the provisions of **para 4(2) of the**

TPRegulations 2012, **Section 55 of the Companies Income Tax Act, Cap C21LFN, 2004** and **Section 32 of the Federal Inland Revenue Service(Establishment) Act 2007.**

5. Whether the Defendant Decision Review Panel purportedly set up by the Respondent was in accordance with the **TPR**.

PARTIES SUBMISSIONS

THE APPELLANT

The Appellant in arguing this case states that, the Appellant is required to provide documentation that, the conditions of the controlled transactions are consistent with the arm's length principle, as provided for by **paragraph 6(10) of the TPR**. That the Appellant duly filed TP Documentation and responded to all queries and request for additional documents. That the Respondent in paragraph 3.7.1 of its written address had copiously highlighted all the documents which were admitted in evidence. That the Respondent after reviewing the documentations of the Appellant made some observations in paragraph 4.1 of its letter of 10th October, 2019 (Exhibit A21a). Further that, the Respondent in his letter of 28th October, 2016 reinforced that the Appellant's methodology for testing the pricing was in accordance with the arm's length principle. That the Respondent agreed with virtually everything done by the Appellant and as such that, the Appellant has discharged the onus ofproof under **paragraph 6(10) of the TPR** that, the conditions of the controlled transaction be consistent with the arm's length principle. The Appellant submits that, facts admitted need not to be proved. The case of **OLOGUN V. FATAYO (2013)1 NWLR (Pt 1335)p. 306-7**is relied upon by the Appellant.

The Appellant states further that, the Respondent haven come to the conclusion that the Appellants methodology for testing the pricing was in accordance with arm's length principle, that there is no rational basis for the Respondent to fault the documentations of the Appellant. That the Respondent as a responsible organization established by law cannot approbate and reprobate. That the Respondent is estopped from faulting the documentations of the Appellant in a manner that will result in additional liability. Therefore, that the additional assessments have no valid legal basis and therefore null and void. The case of

OWENA MASSTRANSPORTATION CO. LTD V. BIDAT VENTURES (2011)9 NWLR 305 is cited to buttress the point.

The Appellant posits that, a party that makes an assertion must prove the truth thereof in order to succeed in the action. Also that, for a party to succeed in his action thereof, he must lead some credible evidence relevant to the issues based on the averments in the pleadings thereof. That the Respondent having agreed that the only relevant transaction for the purpose of TP is '' *the purchase ofpetrochemical products from VOL* '' by the Appellant, its job is clearly cut out, which is, to show that the price which VOL sold the products to the Appellant were not at arm's length, that is, were either higher or lower than VOL was selling to unrelated third parties. That the Appellant in its 2013 documentation had shown that VOL, a related party supplied petrochemical products to third parties at a similar price that VOL supplied to the Appellant. The Appellant submits that, it is reasonable to conclude that the Respondent has failed to discharge the onus of proving transfer mispricing or absence of arm's length principle.

The Appellant states that, in its Transfer Pricing Documentation for the 2013, they adopted Comparable Uncontrolled Pricing Method **(CUP).** That the Respondent when reviewing the Appellant for Transfer Pricing for both 2013 and 2014 based its review on Transactional Net Margin Method **(TNMM).**That during the meeting between the Appellant and the Respondent on 2nd August, 2016, the Respondent while recognizing that the Appellant used **CUP** for 2013 also agreed that CUP is the most appropriate method. Also that, in the letter dated 10th October, 2016 the Respondent clearly recognized that the Appellant used **CUP** for 2013 and affirmed that it was the most appropriate method for the transaction in question, that it is the most preferred method for commodities. That however, the Respondent did not provide any explanation for jettisoning **CUP** for **TNMM** beyond the above two-line statement. That the Appellant at the request of the Respondent provided all the information to the Respondent and the various documents/information which the Respondent required including the evidence of the price its sister company sold to 3rd party to prove that it adopted **CUP** for 2013.

The Appellant maintains that, they furnished the information requested by the Respondent via a letter dated 16th August, 2016. That the Respondent served the Appellant with a 3-page summary of its findings. The Appellant replied by

requesting for the basis of the Respondent findings. The Respondent responded with a 2-page letter dated 28th October, 2016 and a list of 123 companies. That the Respondent never informed the Appellant about any specific information required to validate the use of **CUP** method which the Appellant could not provide. That it is unfair for the Respondent to allege lack of sufficient data or information in the face of a deluge of information supplied by the Appellant at different stages. The Appellant submits that, **paragraph 5(3) of the TPR** obligates the Respondent to use **CUP** for the TP Benchmark for 2013. That the Respondent erred by jettisoning **CUP** for **TNMM**. That the failure of the Respondent to adhere to the provisions of the **TPR** renders the resulting assessments and demand notices issued by the Respondent a nullity, invalid and of no effect. That where a law prescribes procedures for carrying a function, that procedure and no other means ought to be adopted. The cases of **OKEREKE V. YAR'ADUA (2008) ALL FWLRPart 430at 626** and **AGIP (NIGERIA) LTD. V. AGIPPETROLI INTERNATIONAL(2010)5NWLR (Pt1187) P 348 at 419 and STAR DEEP WATER V. FEDERAL INLAND REVENUE SERVICE (2016) 23 TLRN 18** are relied upon by the Appellant in support of this position.

The Appellant posits further that, they adopted **TNMM** in 2014 for reasons stated in its TP Documentation and well articulated during audit and meeting with the Respondent. That, it was constrained to use **TNMM** for 2014 for lack of comparable data because there were no **CUP** comparable in that year due to the fact that VOL did not transact with third parties in Nigeria in that year unlike the previous year. That although the Respondent used TNMM in assessing the Appellant for 2014, there is no credible evidence on how the Respondent came up with the figures contained in the assessments and demand notices for the year. That the Respondent bears the onus of proving the exact acts and/or omissions of the Appellant that necessitated the additional assessments. The Appellant maintains that, under cross examination, the Respondent admitted that the Respondent chose no comparables from either Nigeria or Africa or even Asia. That it is therefore clear that the comparables used by the Respondent in benchmarking the Appellant are not only comparables operating in different social and economic environment but are also not suitable as comparables for the purpose of analyzing the transactions of the Appellant for arm's length. Also that the Respondent arbitrarily rejected all the comparables used by the Appellant under the TNMM method without giving any reason in its correspondences with the Appellant. That the

Appellant in its benchmarking analysis merely marked all the comparables used by Appellant with "*n.a*" which the Respondent's witness stated to mean "*not available*". That there is no evidence adduced by the Respondent before this Tribunal to show that the said comparables were not available. That the Respondent did not in all its correspondences and representations to the Appellant inform the latter that the comparables used by the Appellant were not available especially when the Respondent claimed to have used the same database as the Appellant in selecting its comparables. That as such, the transfer pricing audit by the Respondent and the consequent additional assessments and demand notices were based on wrong comparables and consequently incorrect benchmarking by the Respondent. That the Respondent did not provide any form of workings on how it arrived at the figures in its benchmarking, that there were no financials of the companies used as comparables. The Appellant states further that, the Respondent by its action seeks to subject the Appellant to more taxes than necessary. That the Appellant paid taxes as and when due and had been issued with tax clearance certificates by the Respondent for the relevant years under consideration. That it is arbitrary for the Respondent to decide based on wrong basis, that the Appellant is liable to pay more taxes.

It is the submission of the Appellant that, the use of Gross Profit/Operating Revenue as Profit Level Indicator **(PLI)**by the Respondent is not supported by any law or the prevailing practice. That the position is based on the fact that neither the **TPR** nor the transfer pricing guidelines *(i.e United Nations Practical Manual onTransfer Pricing for Developing Countries and the OECD Transfer PricingGuidelines)* adopted under **paragraph 11 of theTPR** supports the adoption of Gross Profits/Operating Revenue as **PLI** for the purpose of the **TNMM**. That **TNMM** examines the net profit margin relative to an appropriate base (e.g costs, sales, assets) that a taxpayer realizes from a controlled transaction. That according to United Nations Practical Manual on Transfer Pricing for Developing Countries, the analysis with respect to **TNMM** is based on the net return (the earnings determined before interest and tax and extraordinary items, i.e **EBIT**) realized by various companies engaged in a particular line of business (that is, a series of transactions that are appropriate to be aggregated). That by adopting Gross Profit/Operating Revenue, the Respondent seeks to impose a method for determining gross profits margin instead of the method for determining net profit

margin. That the rule behind **TNMM** is that the margin of profit in the controlled transaction must be as near as possible to the profit margin in transaction between two unrelated entities. That to be at arm's length, the profit margin in the transactions between the Appellant and VOL should be similar to that realizable in a transaction between two unrelated companies. That the most important means of determining the arm's length net profit margin for the purpose of **TNMM** is the profit level indicator which is a measure of a Company's profitability that is used to compare comparables with the tested party. That net profit is determined using various forms of PLI as outlined in the UN TP Guidelines and the OECD TP Guidelines. That with the help of "*Profit level indicators"*the net profitability of the controlled transaction is compared to the net profitability of the uncontrolled transactions.

The Appellant maintains that, for 2014 and in line with recognized International Transfer Pricing best practices, adopted Net Profit Margin as **PLI** for the purpose of **TNMM** by weighing the Net Profit or the Earnings Before Interest and Taxes against the Operating Revenue/Sales of the Appellant. That however, the Respondent in its benchmarking adopted Gross Profit Margin as **PLI** in which it ought to divide the Appellant's gross profits by revenues thereby arriving at wrong conclusions and consequently wrongful tax liability. That the adoption of Gross Profit Margin by the Respondent is strange and not supported by any provisions of the UN TP Guidelines or the Organization for Economic Co-operation and Development Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration. That on the contrary, the provisions of the OECD Guidelines actually supports the **PLI** adopted by the Appellant. That this shows that Net Profit Margin is the appropriate **PLI** for the purposes of **TNMM**.

The Appellant submits that, they cannot be accused of having failed to file returns. That on the contrary, the Appellant has always filed its tax returns, paid the accurate taxes and has always been issued Tax Clearance Certificates by the Respondent as can be seen in **Exhibits A1-A5**. That since the Appellant has always been compliant and has never failed to file its returns or pay its taxes as and when due, the issue of imposition of interests and penalties becomes moot as a taxpayer cannot be penalized for being compliant. The Appellant states further that, Transfer Pricing Regulation is relatively new in Nigeria, the Rules are complex and indeed manifestly overwhelming for the Respondent itself. That following the

commencement of the **IncomeTax (Transfer Pricing Regulations No.1, 2012**, the Appellant filed its Transfer Pricing Documentation for the 2013 and 2014. That the Respondent after 3years acknowledged receipt and requested for additional information which the Appellant furnished vide **Annexture 4**.

It is the further contention of the Appellant that, there was no notice whatsoever to the members of the public at any point that the Decision Review Panel **(DRP)**had been established. That in the absence of knowledge of the existence of the **DRP**, the Appellant could not have leveraged on it. That by **Paragraph 14 of theTPR**, the word "*shall*" implies that the Respondent is legally obligated to set up the Panel. The case of **INEC & ANOR V. ASUQUO & ORS (2018) LPELR- 43885** is relied upon in this regard. That even, the letter dated 3rd April, 2019 written by the Respondent to the Appellant on the reference of the matter to **DRP** was in the letter-head of the Respondent and not the **DRP**. That there is no evidence of when or how the Respondent referred the dispute to the **DRP** whose decision is decisive with respect to the fate of the Appellant. That the law is clear that the right to refer disputes to the **DRP** rests on the Appellant who could not do so because the Respondent did not set up any panel, as the Appellant was not informed of the existence of any Panel in the first place. That if the Respondent established any Panel, the proper procedure would have been to advise or inform the Appellant of the existence of the **DRP**, its right to refer the dispute to the DRP and the procedure for such referral. That an arbitrary reference without informing the Appellant is unlawful. That in the circumstance, the Appellant was not present while a dispute involving a huge amount was being considered. That the non-establishment of the **DRP** also constitutes denial of fair hearing as the Appellant was permanently denied an opportunity to utilize an administrative proceedings forum to ventilate its complaint.

The Appellant in the circumstance therefore urges the Tribunal to dismiss the defence of the Respondent, grant the claims of the Appellant and discharge the additional assessments.

THE RESPONDENT

The Respondent on the other hand argues that, the Appellant has failed to discharge the legal burden of proof required to establish its claims and reliefs against the Respondent in this appeal. That the burden of prove in civil cases is on the party who asserts the affirmative. Reference is made to **Section 131** and **132 of the Evidence Act 2011** and also the cases of **SOKWO V. KONGBO (2008) 7 NWLR(Pt. 1086) 342** and **DEVINE IDEAS LTD V. UMORU (2007) ALL FWLR (Pt. 380) 1505** to support the submission. That the Appellant's witness appears to have made contradictory statements both in his Witness statement on Oath and his oral testimony before this Tribunal. That on one hand the Appellant contends in paragraph 52 of his statement on Oath that the Appellant has never been informed by the Respondent of the existence of the panel. On the other hand, the Appellant's Witness testified under Cross-examination that the Appellant received the Respondent letter dated the 3rd day of April, 2017 originating from the **DRP** which is marked **Exhibit A28** and **B9** respectively. That the Appellant also duly acknowledged the Respondent's letter from the **DRP** by its letter dated 6th day of April, 2017 which is marked as **Exhibits A29** and **B10** respectively,that the Appellant's claim that the **DRP** was not set up by the Respondent is misplaced and a calculated attempt to mislead and confuse the Tribunal. That by failing to either refer the matter to the DRP as stipulated by the TPR or submitting to the DRP duly constituted by the Respondent, the Appellant has deprived this Tribunal of the opportunity to navigate through the Appellant's self-inflicted paradox and that, the facts stated in Ground 5, paragraph 2 and 3 of the Appellants Amended Notice of Appeal are untrue.

The Respondent states further that, the Appellant had misrepresented information to the Respondent by stating that Vinmar International Limited **(VIL)** only engages in information collection and liaising activities on one hand, and on the other hand, in its submission to the Tribunal stated that **VIL** engages in sales of similar products as itself the Appellant.That by virtue of the information furnished by the Appellant to this Tribunal on the business activity of **VIL** cannot be used as a comparable in the instant case because they do not engage in the same business as that of the Appellant. That the Appellant adopted the **CUP** method in 2013 but changed to **TNMM** in 2014 claiming that it did not have reliable data to apply it subsequently. That the Appellant confirmed this in its Amended Witness Statement on Oath

before the Tribunal. That the **CUP** method used by the Appellant in 2013 accounting year was the price of **VIL**, that the business of the Appellant remained the same in 2014, **VIL** whose price was used in 2013 was still doing the same business in 2014, yet the Appellant determined that **VIL's** prices in 2014 were not appropriate. The Respondent submits that, a Court of law acts on facts and not on guess work or speculation. The cases of **GEORGE V. UBA LTD (1972)8-9 SC 4** and **OKOROGBA V. STATE (1992)2 NWLR(Pt.222) 244 at 250-254**. That the testimony of AW1 in this matter is peppered with approbation and reprobation, that the witness repeatedly spoke from both side of the mouth. The case of **CHIEF EDMUND AKANINWO & ORS V. CHIEF O.NNSIRIM & ORS (2008) LPELR – 321** is relied upon.

It is the submission of the Respondent that, Benchmarking studies are the critical part of any transfer pricing documentation or policy and are mainly used to test the arm's length nature of the related-party transactions, set the mark-up attached to the transactions carried out between related parties to determine the arm's length range, and to provide an estimate of an arm's length price. That the purpose of benchmarking studies is to determine the general conditions surrounding the transactions conducted by third parties on a given market. That such studies help to elicit a range of values, i.e. the so-called arm's length range or mark-up range. That statistically, arm's length range is defined by the lower quartile and upper quartile and is the range of values of price or profit attached to the comparable transactions between comparable unrelated parties. That when a transfer price determined by a taxpayer for a transaction under review is not found in the applicable arm's length range, the competent tax authority will determine the arm's length price of the transaction under review using value within the arm's length range. That preparing a benchmarking study is obligatory for taxpayers as part of its transfer pricing documentation set out in the Income Tax (Transfer Pricing) Regulations. That the Taxpayers are obliged to prove that prices (Margins, profits) in their transactions were set at a market level, i.e the level that would have been accepted by independent entities acting in comparable conditions. That the benchmarking process is generally the same and the OECD has provided a description of a typical process of a comparability analysis.

The Respondent posits that, in the instance case, the Respondent followed the principles in its benchmarking analysis and acted professionally. That it is misleading that the Appellant could describe the result of a benchmarking analysis

that was professionally done and the basis of which it was provided to the company as arbitrary. It is the submission of the Respondent that the decision of the Respondent to use the **TNMM** is not arbitrary as alleged by the Appellant. That the decision is justified and in line with applicable tax legislation and transfer pricing principles to test the arm's length nature of a transaction. That the Respondent having attempted to test the Appellant's pricing using the **CUP** method, discovered that it could not do so due to lack of relevant data and as such, the Respondent determined in accordance with Regulation 5(2), that **CUP** was not the most appropriate method in the instant case due to unavailability of required information. That the Appellant used the **CUP** method in 2013 but changed to the **TNMM** in 2014 giving the dearth of relevant information as its reason. That the Appellant's attempt at using different transfer pricing methods to similar transactions carried out with the same related party on similar terms runs contrary to the consistency principle. That in transfer pricing analysis, methods must be consistently applied where the facts are not materially different as in this instant case.That the Respondent's rejection of **CUP** was in accordance with the provisions of the Regulation and this position is also in consonant with transfer pricing practice. That the functional analysis of the controlled transaction between **PPNL** and **VOL** in 2013 and 2014 are the same. That it is therefore inappropriate to use different methods to test the arm's length price of a transaction with the same functional analysis.

The Respondent maintains that, the Appellant failed to provide reliable information that would demonstrate that **CUP** was the most appropriate method thereby failing to satisfy the conditions prescribed by the TP Regulations. That the Respondent determined in accordance with the Regulation, that the use of **CUP** was inappropriate in view of lack of reliable information. That the Appellant on its own identified this problem and changed its methodology from **CUP** to **TNMM** in 2015 year of assessment (2014 accounts). That the Appellant used the **CUP** method in its Transfer Pricing Documentation for goods imported from its related party**(VOL)** in 2013. That the Appellant was not able to provide the Respondent with reliable information that satisfactorily explained its use of **CUP** method for that year. That the Respondent has determined in accordance with the TP Regulations, that **CUP** was not the most appropriate method in view of lack of reliable information. That subsequently, the **CUP** method had to be jettisoned. That the Respondent did not

use or agree with the use of **CUP** method because of unavailability of necessary information. That it was for the reason of lack of reliable data that the Appellant on its own volition, changed the methodology from **CUP** to **TNMM** in 2014. That the Appellant admitted at a meeting with the Respondent on Tuesday 2nd August, 2013 which is marked **Exhibit B6** that the use of **CUP** method in 2013 was done in error because there was no reliable information. That by Regulation 5(2), availability of reliable information is a condition for a transfer pricing method to be considered most appropriate.That the Respondent's rejection of **CUP** was in consonance with the provisions of the TP Regulations. That the rejection is also in consonant with the provisions canvassed by the **OECD** in its transfer pricing guidelines.

The Respondent submits further that, the benchmarking analysis of the Respondent was professionally done using the same characterization and parameters adopted by the Appellant from the database. That the Respondent provided the Appellant with a copy of its benchmarking analysis which the Appellant could validate from the database. That the Respondent and the Appellant used the same commercial database for the benchmarking analysis. That the commercial database of Bureau Van Dijk (a famous provider of commercial database for Transfer Pricing Benchmarking analysis) for TP benchmarking was used by both the Respondent and Appellant. That the submission by the Appellant that the comparable in the Respondent's benchmarking analysis do not carry on similar business with the Appellant is not correct and meant to confuse the Tribunal. It is the submission of the Respondent that, in TP comparable companies to be used for benchmarking purposes are those who perform similar functions and bears similar level of risks. That the comparable companies derived from the benchmarking analysis carried out by the Respondent are enterprise bearing functional similarity with the Appellant. That the comparable enterprise obtained by the Respondent from its benchmarking analysis were those that have functional similarity with the Appellant.

The Respondent states further that, the Appellant was provided with Respondent's benchmarking report including the parameters used in conducting the benchmarking analysis. That the provision of the financial statement of the

comparables is not the responsibility of the Respondent. That the Appellant is at liberty to verify the financial or whatsoever other information it desires about the comparables from the database. That the database is available to all subscribers including the Appellant which was why the Appellant was not requested to provide financial statement of companies used in its own benchmarking analysis. That the Respondent simply went to the database to verify the financials of the listed companies. That the submission of the Appellant failed to consider certain important factors in its benchmarking analysis is not correct. That the Respondent considered every relevant factor in its review of the Appellant's controlled transactions. That the adjustments made to the tax liability of the Appellant were not arbitrary as alleged by the Appellant. That the adjustments were in line with applicable Transfer Pricing legislation, principles and practice.

The Respondent maintains that, they communicated the basis for the adjustments to the Appellant vide its letter of 10th day of October, 2016 marked as **Exhibit B7**. That the issues were discussed at various reconciliation meetings held with the Appellant's and its tax consultants *(Messrs. KPMG ProfessionalServices and Tax Planning Support Services*). That the tax adjustments made on the Appellant's tax liability by the Respondent were arrived after due consideration of additional information provided by the Appellant either directly or through its Tax Consultants. That the Respondent upon conclusion of the reconciliation exercise wrote to inform the Appellant of the adjustments proposed and the basis vide its letter of 28thOctober, 2016 which is marked **Exhibit B8** before raising notices of additional assessment. That all the informationprovided by the Appellant indicated that the controlled transactions with **VOL** were not at arm's length. That the actual profits reported by the Appellant were well below what comparable entities operating at arm's length would report. That the information supplied by the Appellant justifying the use of **CUP** method was incomplete thereby making reliable benchmarking impossible. That particularly, the information provided was not enough to do mandatory functional analysis of the Appellant's transactions relative to the transactions of **VIL**, and as such, the documents submitted were inadequate for the purposes of demonstrating that the pricing of the Appellant's controlled transactions were at arm's length. That the Appellant having arrived at the same conclusion, abandoned the use of **CUP** method after using it for just one year i.e 2013.

The Respondent posits further that, by the provisions of Regulation 6(1) of the Income Tax (Transfer Pricing) Regulations, it is the duty of the Appellant to provide sufficient information for the purposes of verifying that pricing of controlled transactions was at arm's length. That here, the information provided by the Appellant was not sufficient to enable the Respondent verify that pricing of controlled transactions with **VOL** was at arm's length. That in order for the Respondent to properly evaluate the appropriateness of the sale price used by **VIL** as appropriate **CUP**, **VIL's** transactions and the Appellant's controlled transactions with **VOL** must possess comparable economically relevant characteristics such as physical features, product quality and contractual terms. That the information provided by the Appellant did not cover all these comparability points. That this made it impossible for the Respondent to verify the Appellant's claim that there was no substantial difference in the prices of sales made by the sister company **VIL** to 3rd parties and the prices of sales made by **VOL** to the Appellant. That the Appellant had also admitted that for the same reason, it changed from **CUP** to **TNMM** after 2013. That the Respondent did not at any time agree with the Appellant that there were no substantial discrepancies in the transactions' prices. That the Respondent provided the Appellant with reasons for the adjustment.

That with regards compliance with the arm's length principle, the Respondent submits that, the Appellant has the duty to ensure that the taxable profits resulting from controlled transactions is in a manner that is consistent with the arm's length principle. That this duty, the Appellant failed to discharge as regards its transactions with **VOL**. That the Respondent is left with no other choice but to make adjustment based on the outcome of its review and analysis using information that is publicly available.

With reference to the Respondent's communication of audit exercise, the Respondent submits that they followed due process in arriving at its decision as indicated in the letters of 17th January, 2017 and 4th May, 2017 to the Appellant which is marked as **Exhibits B3** and **B12** respectively. That the Respondent communicated with the Appellant throughout the audit exercise requesting either for additional information or inviting them to attend meetings to discuss the issues arising from the audit. That the letters inviting the Appellant dated 17th August, 2015, 14th January, 2016, 11th April, 2016, 13th July, 2016, 10th October, 2016 and

28th October, 2016 were delivered to the Appellant which are marked as **ExhibitsB1, B2, B4, B5, B7** and **B8** respectively.

The Respondent submits with regards the Appellant's strategy of cherry-picking comparables unfolded by the Respondent, that the Respondent having professionally reviewed the benchmarking analysis of the Appellant discovered that the company failed to use the appropriate profit-level indicators **(PLI)** thereby producing wrong arm's length prices for the controlled transactions. That the Respondent also observed that the filtering done by the Appellant was essentially cherry-picking of comparables that would enable it arrive at a preconceived result. That this practice is a violation or not the profit level of an enterprise when benchmarked against the profits of comparable entities accords with the arm's length principle. That the Appellant's transactions involved the importation of products into Nigeria for resale and as such, the only relevant profit elements are sales revenue and cost of importing the product to Nigerian Port. That all other transactions beyond this point are not relevant for the purposes of transfer pricing benchmarking analysis. That the **PLI** based on Earnings Before Interest and Tax **(EBIT)** as proposed by the Appellant is not appropriate to this case because it requires taking into account other incomes and costs that were not related to the transaction whereas the transaction merely involve importation of goods, that differences in accounting system in different jurisdictions would distort the outcome and affect comparability with the uncontrolled transactions. That the determination that Gross Profit Margin is the appropriate **PLI** in this case was done in a manner consistent with the **OECD** Transfer Pricing Guidelines.

The Respondent maintains that, they used Gross Profit Margin**(GPM)** based on the functional characteristics of the controlled transaction and the uncontrolled transactions. That the Appellant was provided with the result of the functional analysis carried out by the Respondent. That the determination of the **GPM** takes into consideration the different classification of costs adopted by companies in their financials. That **GPM** adequately considers the classification of transactions into their relevant segments. That the **GPM**only uses direct trading elements. That in the instant case, the relevant elements are the Appellant's sales revenue and its cost of importing products up to the Nigerian Ports. That at this level, comparability is more objective as there is little possibility of distortion arising from different income and cost profiles of the comparable entities. That the adoption of the **GPM**

as **PLI** is most appropriate to this instant case as it focused on the review on only the items relating to the controlled transaction. That the use of **GPM** is in line with best practices and in accordance with generally acceptable transfer pricing practices. It is the submission of the Respondent that they did not err in by failing to adopt Operating Profit Margin **(OPM)** in its **TNMM** benchmarking analysis. That using the **OPM** would involve the inclusion of income and costs not relevant to the controlled transaction. That this would lead to choosing the wrong comparables. That the Respondent followed the transfer pricing rules as regards the choice of **PLI** in its determination of the appropriate **PLI**. That the use of **OPM** to benchmark the Appellant's transaction would not be appropriate because **OPM** may include costs that are not relevant to the transaction or income from other sources. That these other income or costs would lead to wrong comparables. That the net profit or net loss includes all items of income and cost which are not related to the controlled transaction under review. That the comparable entities must be functionally comparable.

The Respondent states that, the choice of **GPM** was based on actual delineation of the Appellant's controlled transactions derived from the functional analysis. That using **OPM** as the **PLI** would involve inclusion of functions, assets and risk of the comparable entities that are not present in the Appellant's transaction, hence the need to limit income and cost elements to those matching that of the Appellant's transactions. That the use of operating profit margin as was canvassed by the Appellant, is in appropriate in this circumstance. That the use of the **OPM** as **PLI** would extend the analysis to other transactions that are not related to the controlled transactions. That the **OPM** would reflect the functions performed, assets used or risk borne by the Appellant only to the extent that those of the comparable entities are comparable beyond trading level, as such, using the **GPM** as **PLI** is the right thing to do. The Respondent stated that, the OECD Transfer Pricing Guidelines discussed various **PLI** options. That however, it provided that the choice of the most appropriate **PLI** should take account of the respective strengths and weaknesses of the various possible indicators, the appropriateness of the indicator considered in view of the nature of the controlled transaction determined in particular through a functional analysis, the availability of reliable information needed to apply the transactional net margin method based on that indicator and the degree of comparability between controlled and uncontrolled transactions

including the reliability of comparability adjustments that may be needed to eliminate differences between them when applying the transactional net margin method based on that indicator. That the Respondent took account of the various factors enumerated by the OECD in deciding that the **GPM** was the most appropriate **PLI** to apply to the instant case. The Respondent posits further that, the use of **OPM** would actually produce the opposite effect while **GPM** stops at the level of direct income and direct c*osts. That OPM includes other operating income and operating costs. That the **GPM** is actually a level before the OPM. That it is the **OPM** that produces distortion by including other operating income and costs which are not included in* the computation of the **GMP**. That in the instant case, the Respondent limited its analysis to direct sales revenue and direct cost of items produced by the Appellants in order to avoid distorting the comparability analysis.

It is the submission of the Respondent that, the relevant tax laws are settled to the effect that penalties and interest are not imposed or payable until a tax assessment becomes payable. That the tax payable by a tax payer must be paid within the period prescribed in the relevant provisions of **Company Income TaxAct** (**CITA)**particularly **Sections 55** and **77**. That in the instant case, the Appellant woefully failed in paying its tax liability which had become due and payable within the period prescribed in **Section 77 of CITA** .That the Respondent may issue administrative assessment where a taxpayer fails to file returns as and when due or if there is a discovery by the Respondent that a taxpayer has underpaid its tax and such discovery arose from a tax audit or investigation. The Respondent further submits that, the administrative assessment referred to above includes penalties and interests imposed as part of the tax liability due, effective from the time the tax returns became due. The Respondent refers to **Section 32 of theFederal Inland Revenue Service Establishment Act (FIRSEA) 2007.** That the Respondent in the instant case has imposed interests and penalties on the Appellant's which is validated by **Section 32 of FIRSEA**. That with regards the issue of tax adjustments and re-adjustments by the Respondent in relation to **Transfer Pricing Regulations 2012**, the provisions of **Regulation 4(1) TP Regulation2012** is commended. The Regulation said provides that, where a connected taxable person fails to comply with the provisions of the regulation, the Service shall make adjustments where necessary if it considers that the conditions imposed by connected table person in controlled transaction are not in accordance or consistent with arm's length

principle. The in the instant case, the Respondent discovered the Appellants repeatedly employed the use of wrong methods and comparable in the process of conducting its benchmarking analysis to arrive at the arm's length. That the burden of proof always rests on the tax payer in providing the required information and documentation requested by the Respondent.

The Respondent finally urges the Tribunal in view of the evidence adduced and in line with the provisions of the relevant tax laws, dismiss the instant appeal in favour of the Respondent with substantial cost against the Appellant.

ANALYSIS

ISSUE (1)

Whether the Appellant has proved its case before this Tribunal to be entitled to the claims and reliefs sought against the Respondent.

The claim of the Appellant was that the request of the Respondent for "alternative benchmarking analysis and imposition of additional tax liability of #1,738,481,875.33 (One Billion, Seven Hundred and Thirty Eight Million, Four Hundred and Eighty One Thousand Eight Hundred and Seventy Five Naira, Thirty Three kobo has no legal basis.

The Appellant while arguing on this issue maintained that he is placed under obligationby Paragraph 6(10) of the Transfer Pricing Regulation to provide documentations to show that the conditions of the controlled transactions are consistent with the arm's length principle as provided in the Transfer Pricing Regulation. The Appellantargued that they have discharged this obligation because all the TP documentations were duly filed, all queries were promptly responded to and infact additional documentswere provided in the discharge of this obligation. In addition, the Appellant stated that the only point of divergence between the Appellant and the Respondent was the appropriateness of using Net Profit or EBIT/Operating Revenue as Profit Level Indicator (PLI) or Gross Profit/Operating Revenue under the Transactional Net Margin Method (TNMM) to apply the arm's

length principle. That while the Appellant used the Net Profit/Operating Revenue, the Respondent used the Gross Profit/Operating Revenue.

The Appellant further averred that since the Respondent has come to the conclusion that the Appellant's methodology for testing the pricing was in accordance with arm's length principle, there isno rational basis for the Respondent to fault the documentations of the Appellant. The Respondent as a responsible organization established by law cannot approbate and reprobate at the same time. The Appellant therefore states that the Respondent is therefore estopped from faulting the documentations of the Appellant in a manner that will result in additional liability and hence has therefore proved its case before the Tribunal.

The Appellant stated that the Respondent is estopped from faulting the documentations of the Appellant in a manner that would result in additional liability and therefore submitted that the additional assessment has no legal and valid basis. The Appellant cited the case of Owena Masstransportation Company Ltd v Bidat Ventures (2011) 9 NWLR pg. 305, in support of this position.

The Respondent on the other hand argued that the Appellant has failed to discharge the legal burden of proof required to establish its claims and reliefs against the Respondent in this appeal.They maintained that the documentation provided by the Appellant is not sufficient to discharge the burden placed on them by the provisions of sections 131 and 132 of the Evidence Act 2011. The cases of Sokwo v. Kongbo (2008) 7 NWLR (Pt. 1086) 342 and Devine Ideas Ltd v. Umoru (2007) ALL FWLR (Pt. 380) 1505 were cited to support the above assertion. The Respondent went further to say that the Appellant failed to provide reliable information that would have demonstrated that Comparable Uncontrolled Price (CUP) method was the most appropriate method to use in this instant case thereby failing to satisfy the conditions prescribed by the Transfer Pricing Regulations. In view of this, the Respondent went ahead to determine in accordance with the TP Regulation, that the use of CUP was inappropriate in view of lack of reliable information. The Respondent went further to state that the Appellant on its own identified this problem of lack of reliable data and changed its methodology from CUP used in 2014 assessment year to TNMM in 2015 assessment year. That since the Appellant was unable to provide to the Respondent reliable information that

satisfactorily explained its use of CUP method for 2014 assessment year, the Respondent has no choice but to jettison the CUP method used and adopt the TNMM for 2014 and 2015 assessment years respectively. The Respondent justified it's rejection of CUP method because its decision was in accordance with the TPR and also in consonance with the provisions canvassed by the OECD in its transfer pricing guidelines. This fact is alluded to by the testimony of the Appellant Witness who admitted in the course of his evidence before this Tribunal that the use of CUP methods requires reliable data.

Accordingly and based on the above arguments, the Tribunal agrees with the submission of the Respondent that the Appellant has not proved its case to the satisfaction of this Tribunal to enable it to be entitled to the claims and reliefs sought against the Respondent in this appeal.

ISSUE (2)

Whether the Respondent's action in benchmarking the Appellant's TP transaction with the Transactional Net Margin Methods (TNMM) for the 2013 and 2014 was valid and in accordance with the Transfer Pricing Regulations 2012 and the OECD/UN Guidelines.

The Respondent's action in benchmarking the Appellant's TP transaction with the Transactional Net Margin Methods (TNMM) for 2013 and 2014 was based on the following valid points:

1. The Appellant used the CUP method in its Transfer Pricing Documentation for goods imported from its related party (VOL) in 2013 but could not provide the Respondent satisfactory explanation for its use of CUP method for that year.

2. Furthermore, the Respondent averred that Appellant, for lack of reliable data on its own volition, changed the methodology of benchmarking from CUP to TNMM in 2014. The Respondent claimed that the Appellant admitted at a meeting with the Respondent on Tuesday 2nd August, 2016 which document was marked as **Exhibit B6** that the use of CUP method in 2013 was done in error because there was no reliable information, and that, it is for this reason that the Appellant itself changed from CUP to TNMM in 2014.

3. That by the provisions of Regulation 5(2), availability of reliable information is a necessary condition for a transfer pricing method to be considered most appropriate. So the Respondent's rejection of **CUP** was in consonance with the provisions of the TP Regulations and that the rejection is also in consonance with the provisions canvassed by the **OECD** in its transfer pricing guidelines.

4. Consistency in the application of benchmarking method from year to year is also very important and fundamental. (Par. 29.4 of the OECD TP Guidelines.)

In view of the above expositions, it is the considered decision of this Honorable Tribunal that the action taken by the Respondent is in line with the Transfer Pricing Regulations and the OECD Transfer Pricing Guidelines.

ISSUE 3.

Whether the Respondent's action of using the Gross Profit Margin (GPM) Method as the Profit Level Indicator (PLI) in the instant Transfer Pricing transaction is valid and in accordance with the TP Regulations, OECD and UN Guidelines.

Gross Profit Margin (GPM) is one of the Profit Level Indicators to measure a company's profitability that is used to compare comparable with the tested party.

The Appellant averred that, the use of Gross Profit/Operating Revenue as Profit Level Indicator **(PLI)**by the Respondent is not supported by any law or the prevailing practice. The Appellant posited that neither the **TPR** nor the Transfer Pricing Guidelines *(i.e United Nations Practical Manual onTransfer Pricing for Developing Countries and the OECD Transfer PricingGuidelines)* adopted under **paragraph 11 of theTPR** supports the adoption of Gross Profits/Operating Revenue as **PLI** for the purpose of the **TNMM**. That **TNMM** examines the net profit margin relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realizes from a controlled transaction. That according to United Nations Practical Manual on Transfer Pricing for Developing Countries, the analysis with respect to **TNMM** is based on the net return realized by various companies engaged in a particular line of business. That by adopting Gross Profit/Operating Revenue, the Respondent seeks to impose a method for determining gross profits margin instead of the method for determining net profit margin. That the rule behind **TNMM** is that the margin of profit in the controlled transaction must be as near as possible to the profit margin

in transaction between two unrelated entities. That to be at arm's length, the profit margin in the transactions between the Appellant and VOL should be similar to that realizable in a transaction between two unrelated companies. That the most important means of determining the arm's length net profit margin for the purpose of **TNMM** is the Profit Level Indicator which is a measure of a Company's profitability that is used to compare comparable with the tested party. The Respondent on the other hand maintained that they used Gross Profit Margin (GPM) based on the functional characteristics of the controlled transaction and the uncontrolled transactions. That GPM only uses direct trading elements and in this instant case, the relevant elements are the Appellant's sales revenue and its cost of importing products up to the Nigerian Ports. The reason for this is to eliminate factors that may introduce distortions arising from different incomes and cost profiles of the comparable entities and because this PLI focusses on the item relating to the controlled transaction. The Respondent went further to say that the use of GPM is in line with the best practice and in accordance with generally acceptable transfer pricing practice. They maintained that failing to adopt the Operating Profit Margin (OPM) in its TNMM benchmarking is not an error but deliberately used to remove the distortion and wrong comparable that would have resulted if the OPM had been used because this would involve inclusion of income and costs that are not relevant to the controlled transaction. The Respondent concluded by saying that the OECD Transfer Pricing Guidelines discussed various PLI options and that the choice of the most appropriate PLI should take account of the respective strengths and weaknesses of the various possible indicators. That the appropriateness of the indicator considered in view of the nature of the controlled transaction determined in particular through a functional analysis and the availability of reliable information needed to apply the Transactional Net Margin Method. This according to them is based on the indicator and the degree of comparability between controlled and uncontrolled transactions, including the reliability of comparability adjustments that may be needed to eliminate differences between them when applying the TNMM based on that indicator. The Respondent therefore took account of the various factors enumerated by the OECD in deciding that the GPM is the most appropriate PLI to use in this instant case, accordingly, the Respondent limited its benchmarking analysis to direct sales revenue and direct cost items produced by the Appellant in order to avoid distorting the comparability analysis.

Considering the argument and counter-argument canvased by the parties on this issue, this Tribunal is persuaded by the position and the argument of the Respondent, especially considering the fact that it has been able to establish that the use of GPM is in line with best practices and also took account of the various factors enumerated by the OECD in deciding that the GPM is the most appropriate PLI to use in similar situations.

ISSUE 4.

Whether the Appellant's failure to file their returns within the prescribed period required by the extant tax laws validates the penalty and interests imposed by the Respondent vis-à-vis the provisions of para 4(2) of the TPRegulations 2012, **Section 55 of the Companies Income Tax Act, Cap C21LFN, 2004** and **Section 32 of the Federal Inland Revenue Service(Establishment) Act 2007.**

Paragraph 4(2) of the TP Regulations 2012 state that "where a connected taxable person fails to comply with the provisions of this regulation, the Service shall make adjustments where necessary if it considers that the conditions imposed by connected taxable persons in a controlled transactions are not in accordance or consistent with the arm's length principle". Section 55 of the Companies Income Tax Act, Cap c21 LFN, 2004 on the other hand talks about the requirement of every company to file Self-Assessment returns with the Service while section 32 of the FIRSEA, 2007 prescribes penalties for failure to pay tax within the periods prescribe under the relevant tax laws. The import of all of these provisions is that the FIRS has the power to disregard the TP method adopted by the taxpayer, so long as this is done with due regard to Paragraph 5(2) of the TP regulations and impose penalties enshrined in the relevant tax laws on the Appellant for failure to file their returns and pay the relevant taxes as at when due.

ISSUE 5.

Whether the Defendant Decision Review Panel purportedly set up by the Respondent was in accordance with the TPR.

Paragraph 14(1) of the TP Regulations 2012 mandates the FIRS to set up a Decision Review Panel for the purposes of resolving any dispute or controversy arising from the application of the provisions of this Regulations. The contemplation of the law as stated in Paragraph 14(3) of the TP Regulation is that the Taxpayer may within 30 days of the receipt of the assessment on the adjustment carried out under Paragraph 4(2) of the TP Regulation refer the assessment to the Panel. The action to trigger filing of the appeal is the receipt of the Assessment on the Adjustment and not a formal notification from FIRS of the setting up of the Decision Review Panel. It is evident that FIRS set up the Panel and subsequently invited the taxpayer.

CONCLUSION.

In view of the resolution of the issues in favour of the Respondent, the appeal filed by the Appellant is hereby dismissed in its entirety and the parties should bear their respective costs.

DATED AT LAGOS THIS 19TH DAY OF FEBRUARY 2020

PROFESSOR A. B. AHMED ESQ (Chairman)

P. A. OLAYEMI ESQ
Commissioner

BABATUNDE E. SOBAMOWO ESQ
Commissioner

SAMUEL N. OHWERHOYE ESQ.
Commissioner

TERZUNGWE GBAKIGHIR ESQ
Commissioner