

TAT decides on tax exempt status of educational institutions

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In brief

In a recent decision, the Tax Appeal Tribunal (TAT) sitting in Lagos confirms that the income of a company limited by guarantee, whose object is the provision of educational services is not taxable under the Companies Income Tax Act (CITA). The TAT also held that not being subject to CITA, such companies are also exempt from paying Tertiary Education Tax (TET).

In detail

Background

Under CITA, all Nigerian companies are subject to tax on their profits. Section 9 of CITA provides that profits of a Nigerian company accruing in, derived from or brought into Nigeria from any trade or business shall be liable to tax.

However, section 23 exempts companies engaged in specific activities from tax. For example the profits of companies engaged in ecclesiastical, charitable or educational activities of a public character are exempt from tax provided such profits are not derived from a trade or business carried on by such company.

In addition, under the Tertiary Education Tax Act 2011 (TETA) (which repealed the Education Tax Act) all Nigerian companies are liable to education tax at 2% of their assessable profits (tax adjusted profit before capital

allowances). Non-resident companies and unincorporated entities are exempt from Tertiary Education Tax.

Facts of the case

The Appellant, American International School of Lagos (AIS) is a school incorporated as a company limited by guarantee under Part C of the Companies and Allied Matters Act (CAMA). The Federal Inland Revenue Service (FIRS) assessed AIS to Companies Income Tax (CIT) and Education Tax for the years 2008 to 2013.

AIS objected to the assessment on the ground that it is engaged in providing educational activities of a public character and is therefore exempt from paying the taxes assessed by the FIRS. The FIRS refused to amend the assessment hence the appeal to the TAT. The appellant was also refused its application for tax clearance certificate (TCC).

Questions before the TAT

The questions brought before the TAT were:

- Whether AIS being an educational institution exempt from CIT? If so, whether exemption from CIT translates automatically into exemption from education tax?
- That the FIRS should issue a Tax Clearance Certificate to AIS in the absence of a valid reason to refuse it?

AIS' position

AIS argued that it is exempt from paying CIT because it is engaged in educational activities of a public character. In defining 'public character' AIS relied on the definition of public character in the 5th Schedule to CITA (which defines 'public character' as being for 'the benefit of Nigerians in general and particularly the public'.

AIS also argued that it does not engage in any other form of trade or business apart from its principal activity of providing education to school children in Nigeria.

Further, AIS argued that if the TAT finds that it is exempt from CIT, then it should automatically be exempt from education tax which is assessed on a company's assessable profit.

In respect of the question on TCC, AIS argued that the FIRS is bound to comply with section 101 of CITA which directs the FIRS to either issue a TCC or deny the application with reasons.

FIRS' position

The FIRS contended that AIS did not qualify as an educational institution of a public character because its services are not free and therefore not available for the benefit or use of all Nigerians.

It further argued that the fees are so high as to limit its services to a select few and therefore strips it of public character.

Relying on section 9(1)(d) and (f) of CITA, the FIRS urged the TAT to uphold its argument that AIS is liable to pay CIT.

FIRS also argued that AIS is entitled to a TCC only after discharging its tax liability.

The decision

The TAT held that section 23(1)(c), being a specific provision

overrides the more general section 9. Accordingly, the TAT found that AIS, being a not-for-profit entity established as a company limited by guarantee to provide educational services, is tax exempt. The TAT also found that it was not uncommon for schools to charge tuition fees to enable them carry out their object (provision of educational services). This is regardless of the fee levels.

Based on these findings and the failure of the FIRS to provide evidence that:

- a. AIS derives income or profits from sources (other than the provision of educational services) or
- b. any segment of the Nigerian public is excluded from benefiting from the AIS' educational services or
- c. profit or income is distributed to AIS' directors or guarantors

the TAT held that AIS is exempt from paying CIT and consequently, there was no basis to charge it education tax.

The TAT dismissed the additional assessment and directed the FIRS to issue a TCC to AIS.

The takeaway

This decision is in accordance with the provisions of s.23 (1)(c) of CITA which exempts the profits of a company engaged in ecclesiastical, charitable or educational activities of a public character from tax provided

such activities are not derived from a trade or business carried on by the company. It is also in line with the CAMA which precludes companies limited by guarantee from carrying on business for the aim of making profits for distribution.

This judgement helps to further support the prevailing understanding of the law that companies limited by guarantee are not subject to tax since they are not expected to carry on business for the purpose of making profit. However some important questions still remain unanswered which did not really come up for consideration in the judgement. These include:

- What exactly does "public character" mean? The inference from the judgement suggests that it simply means being open or available to the public.
- Will the exemption per s.23 (1)(c) apply to all companies regardless of whether the company is limited by guarantee or otherwise?
- Are there instances where a school providing education could be deemed as trading or carrying on a business?

Considering the foregoing, it is unlikely that this judgement will conclusively settle this matter especially given the FIRS' increased drive for revenue, we expect an appeal of the decision or fresh disputes on the subject in the near future.

Let's talk

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

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