

IN THE TAX APPEAL TRIBUNAL

IN THE NORTH - WEST ZONE

HOLDEN AT KADUNA

Appeal No. TAT/NWZ/KD/WHT/013/22

BEFORE THEIR HONOURS:

UMAR M. ADAMU	-	CHAIRMAN
KABIRU ISA DANDAGO	-	COMMISSIONER
BAYERO A. S. MUHAMMAD	-	COMMISSIONER
SAMEERAH ABUBAKAR GWANDU (MRS.)	-	COMMISSIONER
AHMED M. KUMSHE	-	COMMISSIONER

BETWEEN:

UNITED BANK FOR AFRICA PLC	-	APPELLANT
----------------------------	---	------------------

AND

KADUNA STATE INTERNAL REVENUE SERVICE -	-	RESPONDENT
-----------------------------------------	---	-------------------

JUDGEMENT

The Appellant commenced this action vide Notice of Appeal dated 1st August, 2022 and filed on 2nd August, 2022.

This was sequel to the Appellant's dissatisfaction with the Notice of Refusal to Amend (NORA) dated 15th June 2022, arising from Withholding Tax (WHT) assessment notice issued by the Respondent with respect to an alleged tax liability of **₦494,911,956.00 (Four Hundred and Ninety-Four Million, Nine Hundred and Eleven Thousand, Nine Hundred and Fifty-Six Naira)** only for the years 2014 - 2022, whose details, as set in the notice of assessment dated 1st September 2021, are as here below appearing:

S/N	Description	Amount (Naira)
1.	Total Commission paid	₦7,561,680,000.00
2.	WHT @ 5%	₦378,084,000.00
3.	Less Remittances	-
4.	Outstanding payable	₦378,084,000.00
5.	Add 10% penalty	₦37,808,400.00
6.	Net payable	₦415,892,400.00
7.	Add 19% interest	₦79,019,556.00
8.	Total liability	₦494,911,956.00

By the Notice of Appeal, the Appellant sought from this Honourable Tribunal the following Reliefs:

A DECLARATION that the sum of **₦378,084,000.00** imposed on the Appellant as outstanding WHT liability is arbitrary, and inconsistent with the provisions of applicable laws.

A DECLARATION that the sum of **₦79,019,556.00** and **₦37,808,400.00** imposed on the Appellant as interest at **19%** and penalty at **10%** respectively is arbitrary, and inconsistent with the provisions of the applicable laws.

A DECLARATION that the decision of the Respondent to impose the above WHT liability, interest, and penalty without considering the Appellant's notice of objection and other relevant documents is a violation of the Appellant's right to a fair hearing as guaranteed by Section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

AN ORDER setting aside the Demand Notice dated 21st September 2021, and the NORA dated 15th June, 2022 for the years 2014 to 2020 for being arbitrary, unreasonable, and excessive.

AN ORDER discharging the Appellant of the tax assessments and/or quashing the Demand Notice and NORA served on it by the Respondent in respect of years 2014 to 2020.

Such other or further orders as this Tribunal may deem fit to make.

The Notice of Appeal was supported by a nineteen-paragraph Affidavit deposed to by one Oladejo Adeyemi, a Senior Manager in Anderson, Tax Consultants.

Summary of Facts on Appeal

The Appellant in this matter is a duly registered Commercial Bank licensed and regulated by the Central Bank of Nigeria to operate as a Deposit Money Bank (DMB). The Respondent on the other hand, is a creation of the Kaduna State Tax (Codification and Consolidation) Law 2020 (as amended) and the sole authority that collects and accounts for all taxes, levies, fees, charges and rates on behalf of the Government of Kaduna State.

In pursuit of its statutory duties and responsibilities, the Respondent initiated a tax audit investigation on the remittance of Withholding Tax on Commission paid to the Appellant's Mobile Money Agents/Bank Agents in Kaduna State for the years 2014 - 2020. The Notification for this tax investigation exercise is as contained vide Respondent's letter to the Appellant dated 24th February, 2021. It was the outcome of this investigation that formed the basis upon which the Assessment of **₦494,911,956.00** was raised against the Appellant. This position was communicated to the Appellant vide Respondent's letter of 1st September, 2021, where the Respondent urged the Appellant to file its objection in writing and invited the Appellant for a reconciliation meeting on 13th September 2021.

In reaction thereto, the Appellant responded vide its Consultant's letter dated 12th November, 2021 informing the Respondent that it had thoroughly reviewed the entirety of the Respondent's claim, together with all the computation of the liabilities and objected to the alleged liabilities, giving grounds for the objection.

To support of its position, the Appellant forwarded to the Respondent the following documents:

The Central Bank of Nigeria approval of the commencement date on Mobile Money Service and Agency Banking, dated 4th November, 2019,

The names and addresses of Mobile Money Agents in Kaduna State.

Evidence and schedule of WHT remittances (for) the relevant period of December 2019 to December 2020.

The Appellant's Audited Financial Statement and,

Trial balances for the 2020 Financial Year.

Several reconciliatory meetings ensued between the parties, but none could achieve the desired result. Whereas the Respondent maintained that the Appellant refused to provide it with up to date information, documents and records to enable it carry out and conclude the back duty audit investigation, the Appellant, on the other hand, maintained that it had provided the Respondent with all the documents it statutorily required to carry out the audit exercise, but inspite of that the Respondent could not provide the basis of the Best of Judgement Assessment (BOJA). In the end, the Respondent issued the Appellant Notice of Refusal to Amend (NORA) vide its letter dated 15th June 2022, directing the Appellant “to pay the outstanding liability of ~~N494,911,956.00~~ on or before 48hrs after receipt of this notice”. This notice was received by the Appellant on 5th July, 2022.

It was at this point that the Appellant approached this Honourable Tribunal for redress.

Proceedings

Even as proceedings commenced on 13th September, 2022, parties maintained that they were exploring amicable resolution of the matter. Additional documents were requested by the Respondent and the Appellant was supplying same accordingly.

It took the intervention of members to call both Counsel to order as their pleas for amicable settlement/resolution were becoming endless. Members took the considered view that trial should have commenced in earnest. This resulted the Appellant to present its only witness in the matter, in the person of **Vincent Okoukoni**, who was a Manager in Anderson, Tax Consultants to the Appellant.

However, before the commencement of trial, Learned Counsel for the Appellant informed the Tribunal that his witness on the Tribunal records was not available but he had filed a Motion on Notice brought pursuant to Order XI Rule 1 and Order XV Rule 2 of the Tribunal’s Procedure Rules. The Motion was dated 14th November, 2022 and filed on the same day.

The Application sought for an Order to file and rely upon an Additional Witness Statement. It also prayed for an Order deeming the Additional Witness Statement and the List of Additional documents already filed and served as being properly filed and served.

The Orders were granted as prayed and the witness mounted the witness box.

The witness was led in evidence by the Appellant Counsel where he affirmed to all his depositions as contained in his Witness Statement on Oath dated 14th

November, 2022. He tendered seven (7) Exhibits which were eventually admitted in evidence as Exhibits 1-7 as below appearing:

Letter dated 1st September, 2021 - Exhibit AW1

Letter dated 25th September, 2021 - Exhibit AW2

Letter dated 12th November, 2021 - Exhibit AW3

Letter dated 15th June, 2022 - Exhibit AW4

Letter dated 4th November, 2019 - Exhibit AW5

UBA WHT on contract schedule - Exhibit AW6

Kaduna State New Payment Receipt - Exhibit AW7

In the course of the examination-in-chief the Appellant witness identified all the seven (7) Exhibits in his Witness Statement on Oath dated 14th November 2022, relied on all the averments as contained therein as his oral testimony and evidence in the matter and urged the Honourable Tribunal to dismiss the withholding tax assessment of **₦494,911,956.00** made against the Appellant and grant all the Reliefs sought by the Appellant.

The witness further reiterated the fact that this claim could not stand as the Appellant commenced the Money Market Operations only subsequent upon receipt of the approval from the Central Bank of Nigeria (CBN) vide its letter dated 4th November, 2019 which has been admitted as Exhibit AW5 He also affirmed the Appellant had paid all appropriate remittances of the WHT to the Respondent, showing proof as contained in the schedule attached to the letter from the CBN dated 4th November 2019 herein admitted as Exhibit AW5.

In concluding his oral testimony, the Appellant witness urged the Honourable Tribunal to discountenance the WHT assessment by the Respondent and proceed to grant all the Reliefs sought by the Appellant as contained in its Notice of Appeal.

Done with his witness, Learned Counsel for the Respondent, Deborah Liman Esq, cross-examined witness. She started by asking the witness to “tell the Tribunal whether the Personal Income Tax Act empowers the Tax Authority to impose interest and penalty on any Tax payer who fails to pay his or her tax as required?”. The witness response to this question was in the affirmative. He however, could not give a categorical yes or no answer. He however reaffirmed the legal right of the Tax Authority to impose interest and penalty, but “with conditions”.

He further asserted that for that right to be enforced, the assessment must be fair and final and not when the assessment was still being disputed.

Learned Counsel for the Respondent also wanted to know from the Appellant's lone witness whether or not it is lawful for the Tax authority to issue Notice of Refusal to Amend (NORA) to a tax payer. The witness affirmed the right of the Tax authority to issue NORA only where the tax payer fails to respond within the stipulated statutory time frame. On the other hand, where the tax payer had some issues to resolved, he or she could approach the Tribunal for redress.

Learned Counsel subsequently referred the witness to paragraph 4 of his deposition and requested to know the exact amount "paid and remitted by the Appellant to the Respondent for the WHT for Mobile Money Agents for the year 2019. The witness responded saying that "based on available records, it is about **₦2,519,000.00 (Two Million, Five Hundred and Nineteen Thousand Naira)**".

The witness was also referred to paragraph 12(f) of his deposition where Learned Counsel for the Respondent requested to know from him whether he was "aware that there are two vital documents which the Respondent has requested from the Appellant and the Appellant has refused to issue them to the Respondent?" The witness answered in the negative and concluded that as far as he knew "all documents requested have been provided by the Bank."

Honourable members sought clarification in respect of the actual period within which the sum of **₦2,519,000.00 (Two Million, Five Hundred and Nineteen Thousand Naira)** was remitted to the Respondent. The witness said the period was between January to December 2020.

At the close of the cross examination, Learned Counsel for the Appellant informed the Tribunal that he still had a number off evidence they still wished to file together with Further Witness Statement.

At the next sitting of the Tribunal, the Learned Counsel for the Appellant was unable to present neither the additional evidence (documents) nor his witness as he informed the Tribunal last day of proceedings. He craved the indulgence of the Tribunal for more time to enable him do so.

At the resumed sitting of 20th June 2023, Learned Counsel for the Appellant informed the Tribunal that he was served with the Respondent's Motion on Notice dated 2nd February, 2023 which was filed on 23rd May, 2023.

The Motion on Notice was brought pursuant to Order XI Rules 1 & 2 of the Tribunal's Procedure Rule, 2021, praying the Honourable Tribunal for the following Orders:

AN ORDER of this Honourable Tribunal granting leave to the Respondent/Applicant to enter appearance out of time.

AN ORDER of this Honourable Tribunal for extension of time within which the Respondent/Applicant shall file their Respondent Brief of Argument, Witness Deposition, List of Witnesses and Documents to be relied on in opposition to the Appellant's Brief of Argument.

AN ORDER deeming the Respondent Brief of Argument in opposition to the Appellant's Brief of Argument, Witness Deposition, List of Witnesses and Documents to be relied on as being properly filed and served.

AND FOR such further Order(s) as this Honourable Tribunal may deem fit to make in the circumstance.

The Motion on Notice was supported by the following:-

A five-paragraph Affidavit, deposed to by one Mahmud Nuhu, an Enforcement Officer in the Legal Department of the Respondent/Applicant

A Written Address

Respondent's Reply to the Notice of Appeal and Counter Claim

Respondent/Counter Claimant's Witness Statement/Deposition on Oath and,

List of Witnesses

List of Documents six (6) documents.

However, in the course of moving his Application, members of the Tribunal noted some irregularities and omissions in the dating of some of the Processes and the List of Documents, we therefore decided to have the irregularities rectified and taken before the Motion was moved.

Subsequently, in order to fast tract the process, we invoked **Order XVII Rule 1 of the Tribunal Rules 2021** to have the observed irregularities duly amended and taken, instead of adjourning the matter for another date.

Order XVII Rule 1 provide, thus:-

“The Tribunal shall have the power to conduct its proceedings in a manner it deems fit to ensure speedy dispensation of justice.”

The Motion was eventually moved and all the three Orders contained therein were granted as prayed.

After the cross examination of Appellant’s sole witnesses, and since the Appellant had no further questions for his witness, the witness was discharged. The Respondent on the other hand presented its sole witness in the person of **Abiodun Dada**, the Head of A.O.C. Consulting, Kaduna Office and a member of specialised Tax Audit Team set up by the Respondent to carry out the in-depth back duty investigation remittances of the Withholding Tax on Commission paid to the Appellant’s Mobile Money Agents in Kaduna from 2014 - 2020.

He identified his Written Statement on Oath and adopted same as his oral testimony and evidence in the matter.

The Witness was led in evidence by Learned Respondent Counsel, **Uwaisu Adamu Esq**, where he identified and tendered three (3) documents, that were eventually admitted in evidence as Exhibits, as follows:

Letter dated 24th February, 2021 - Exhibit RW1

Letter dated 2nd December, 2021 - Exhibit RW2

Letter referenced TAB/UBA/MA/2014 –2020/003 and dated 1st September, 2021 - Exhibit RW3

At the end of his testimony, the witness urged the Honourable Tribunal to dismiss the Appellant’s appeal as lacking in merit and grant the counter claim of the Respondent in the sum of **₦494,911,956.00**.

The witness was in turn, cross examined by the Appellant Counsel.

While cross examing the Respondents’ witness, Learned Counsel for the Appellant sought to know the actual designation of the witness.

The witness said that he was the Head of A.O.C Consulting Company, in Kaduna and a member of specialised tax audit team set up by the Respondent/Counter-claimant to carry out in-depth back duty investigation on remittance of withholding Tax on Commission paid to the Appellant’s Mobile Money Agents in Kaduna from 2014 – 2020. He said that they are only paid by the Respondent on Commission Basis.

The respondent lone witness also testified to the fact that they arrived at the Best of Judgment Assessment figure of **N494,911,956.00**, as a result of the failure and refusal of the Appellant "...to supply them with the requested information, documents and records for the specialised back duty tax audit investigation..."

To further justify the BOJA the witness testified that "... we can only know when you provide the document, but since they failed to provide the documents, we don't have any other option than to do the Best of Judgement Assessment".

When asked on the specifics on how they arrived at the BOJA figure of **N494,911,956.00** the witness said that they arrived at that figure "from the information that was extracted from the Audited Financial Statement of UBA and Commission paid by the Bank, certain percentage was calculated for Kaduna Mobile Money".

At one breadth he said that they downloaded the Appellant's Audited Financial Statement from the internet.

However, upon further cross examination, the witness admitted that the Appellant "provided some documents like audit account and Statement of Money Agent in Kaduna, but those documents were not sufficient for our investigation".

In the end, the Learned Counsel for the Appellant sought to know from the witness what prompted the investigation, the witness responded by saying the reasons was to check the compliance level of the Appellant.

That concluded the cross examination by the Appellant. The Respondent Counsel subsequently applied for its witness to be discharge, thus closing their case, as it were.

At the conclusion of the witnesses' testimonies and adoption of their respective Witness Statements on Oath as their oral evidence in this appeal, the matter was subsequently set down for the Adoption of Final Written Addresses by respective Learned Counsel.

Unfortunately, both Counsel were not ready with their Final Written Addresses, members of the Tribunal expressed great concern and displeasure over the attitude of Counsel and ordered Counsel to ensure that they came ready with their Final Written Addresses at the next adjourned date.

At the resumed sitting of the Tribunal on 17th October, 2023, both Counsel were ready with their Final Written Addresses. First to argue and submitted was the learned counsel for the Respondent/Counter-Claimant.

RESPONDENT'S FINAL WRITTEN ADDRESS

The Final Written Address was dated 18th September, 2023 and filed on 9th October, 2023.

The following three (3) issues were submitted for determination:

Whether the decision of the Respondent/Counter-Claimant to assess the Appellant's Mobile Money Agent Withholding Tax liability based on Best of Judgement (is) consistent with the provisions of the law.

Whether the decision of the Respondent/Counter-Claimant to impose interest and penalty in addition to the WHT liability on the Appellant (is) consistent with relevant tax law, and

Whether the Respondent/Counter-Claimant has made out a good case for the grant of its prayers as contained in its counter-claim.

While answering the first issue in the affirmative, Learned Counsel argued that S.47 of the Personal Income Tax Act 2011 (as amended) empowers the relevant Tax Authority to call/request for returns/books/documents or any information in respect of the income or gain of a taxpayer.

He further argued that it was on the strength of this statutory provision that the Respondent/Counter-Claimant requested for certain documents/information from the Appellant as listed in its letter dated 24th February, 2021, here marked as Exhibit RW1.

He state further that the Appellant had failed to furnish the Respondent/Counter-Claimant with the relevant information/documents requested. Learned Counsel concluded that this inaction by the Appellant was what prompted the Respondent/Counter-Claimant to proceed with the back duty tax audit investigation and subsequently assessed the Appellant/Respondent to the counter-claim, to a total liability of **N494,911,956.00**, being the WHT on Mobile Money Agent (MMA) Commission liability.

To further buttress the above position, Learned Counsel cited the statutory provision of Section 54(3) of the Personal Income Tax Act as amended and the Supreme Court Judicial authority in the case of John Ihekwoaba Vs Commissioner of Internal Revenue, All NTC Vol.1 page 87, where the apex Court held that the onus of proving that an assessment was excessive is on the taxpayer.

He therefore concluded that the Best of Judgement assessment made by the Respondent/Counter-Claimant in respect of the Appellant's Mobile Money Agent

Commission liability for the years 2014 - 2020 totaling **N494,911,956.00** (was) consistent with relevant tax laws, thus not arbitrary as being claimed by the Appellant in this matter.

On the second issue, Learned Counsel submitted that it is the position of the law that WHT on Commission is to be remitted to the relevant Tax Authority, and once a tax payer fails/refuses/neglects to make the necessary tax remittance within the statutory stipulated period, the said tax payer shall be liable to pay both interest and penalty in addition to the unremitted tax liability. He relied on Section 74(1) of the Personal Income Tax Act 2011 to justify his position. Learned counsel for the Respondent also cited the provisions of section 58(3) (b) of the PITA, which he argued, permitted the relevant tax authority to serve a notice of its refusal to amend (NORA) on a tax payer who objects to the tax authority's assessment. He concluded that NORA was duly served on the Appellant by the Respondent/Counter-Claimant in this case.

In furtherance, Learned Counsel also cited **Section 105 of the Personal Income Tax Act 2011 (as amended) and also the Supreme Court case of Adejumo Vs Ayantegbe (1989) 3 NWLR (Pt.110) 417 @ 422-423 Ratio 11**, where the Court held that he who comes to equity must come with cleans.

He concluded that the WHT assessment in respect of the unremitted Mobile Money Agent Commission, including interest and penalty so, imposed on the Appellant/Respondent to counter-claim by the Respondent/Counter-Claimant in the total sum of **N494,911,956.00** was neither arbitrary nor inconsistent with relevant tax laws, and that same was in accordance with the provisions of the Personal Income Tax Act 2011 (as amended).

On the his third and last issue, Learned Counsel submitted that the Respondent/Counter-Claimant had led credible and unchallenged evidence backed by law in proof of its counter claim before this Honourable Tribunal. This he argued was found in the affirmation of the Appellant's sole witness, Vincent Okoukani, who affirmed during cross-examination that the Tax Authority can lawfully issue a Notice of Refusal to Amend on a tax payer who had filed its objection to an assessment and also admitted that the Personal Income Tax Act does empower a Ta Authority to impose interest and penalty on any taxpayer who fails to remit tax within the statutory stipulated time.

Learned Counsel also submitted that the Respondent/Counter-Claimant's sole witness, Abiodun Dauda gave evidence as to the basis of the Respondent's assessment and listed the documents/information which the appellant deliberately

failed to furnish to it after the Respondent/Counter-Claimant requested for same. He listed the documents as follows:

The individual Bank (Commission) Statements of each Agent in Kaduna State.

The signed Agreement between the Appellant and its Agents in line with CBN guidelines

The schedule of Commission paid to Agents in Kaduna State

A copy of the Returns filed by the Appellant with the CBN or SANEF within the years under review.

The Appellant's undisputed position and evidence of payment of the undisputed position in respect of Mobile Money Agent Commission.

Learned Respondent Counsel further contended that none of the Exhibits tendered by the Appellant during trial could be taken as its confirmation of its WHT on Mobile Money Agent Commission remittances paid to the Respondent. He added that instead, the Appellant's Exhibits do not in any way apply to its Mobile Money activities and remittances which form the crux of the Respondent's counter claim.

Conversely, Learned Counsel for the Respondent submitted that the Exhibits tendered by the Respondent exhibited the correspondence(s) the Respondent had with the Appellant which prompted the Respondent to raise the WHT assessment on the Appellant and other fees to add up to **₦494,911,956.00**.

He also affirmed the position that by the failure of the Appellant to defend the Respondent's counter-claim, it could be deemed to assume that the Appellant had fully admitted the Respondent's counter-claim. The law is trite he asserted, that what is admitted need no further proof. Here, he cited the case of **Adjarho Vs Agbanelo (2015) 7 WRN, page 116 @ page 182 line 40**.

Learned Counsel for the Respondent, in adopting the Final Written Address as the Respondent's final argument in the matter, concluded that with the above cited legal authorities and statutory provisions that the Respondent had indeed made a good case for its decision to impose WHT liabilities in respect of Mobile Money Agent Commission remittances for the years 2014 – 2020, including penalty and interest in the sum of **₦494,911,956.00**.

He therefore urged this Honourable Tribunal to dismiss the Appellant's Appeal together with all the Reliefs sought and uphold the grant of the counter-claim of the Respondent.

APPELLANT'S FINAL WRITTEN ADDRESS

The Appellant's Final Written Address was dated 14th October, 2023 and filed on 16th October, 2023.

In marshalling the Final Written Address, the Learned Counsel for the Appellant submitted the following three (3) issues for Determination:

Whether the Respondent can validly impose a BOJ assessment on the Appellant after the Appellant has provided the documents and information statutorily required by the Respondent to determine its tax obligations.

Whether the Respondent's BOJ assessment is arbitrary, vindictive, and inconsistent with the provisions of the Personal Income Tax Act.

Whether the Appellant is liable for penalty and interest having objected to the tax assessment within the time limited by applicable law.

In analysing the first issues, the Learned Appellant Counsel submitted that notwithstanding the Appellant's challenge of the tax investigation, the Appellant provided all the documents and information statutorily required to enable the Respondent carry out the tax investigation.

He tendered a summary of the documents, information and dates of acknowledgement of same as here below appearing:

S/No.	Document	Remarks	Action
1	Appellant letter dated 8 th June 2021	Informed the Respondent that all qualifying deductions have been made including where there re any Mobile Money Agency operations. This forms part of the WHT remittances made to the Respondent. The evidence was provided to the Respondent. Additionally, the evidence of the Appellant's nation-wide WHT remittances was also provided to the Respondent in previous audits. This was corroborated by the	Letter sent and acknowledged by the Respondent on 10 th June 2021.

		Respondent.	
2	CBN letter dated 4 th November 2019 (Exhibit 4)	Authorized the Appellant to commence Mobile Money Agency operations from December 2019.	Sent to, and acknowledged by the Respondent on 7 th December 2021
3	Appellant letter dated 12 th November 2021 (Exhibit 2a)	Indicated the several interactions between the Parties on the tax investigation and that the documents required were forwarded to the Respondent.	Sent to and acknowledged by the Respondent along with the supporting documents on 7 th December 2021.
4	Appellant's letter dated 25 th September 2021	Objection to the BOJ and stating grounds for the same.	Sent to, and acknowledged by the Respondent on 30 th September 2021
5	Appellant's letter dated 12 th July 2022	<p>Response to the NORA.</p> <p>Contrary to the Respondent's position that the Appellant did not participated or corporate during the alleged tax investigation, this letter shows:</p> <ul style="list-style-type: none"> - a chronicle of the Appellant's responses to all request by the Respondent; - confirmation of emails sent with all the documents requested in addition to physical submission of document to the Respondent; - Information that the CBN only gave the go ahead to the 	Sent to, and acknowledged by the Respondent on 2 nd August 2022

		Appellant on 4 th November 2019.	
6	WHT remittances schedule (Exhibit 5)	This was for the part and quantum of activities for the period the Appellant began some Mobile Money Agency operations in Kaduna State sometime in year 2020.	Sent to, and acknowledged by the Respondent on 30 th September 2021
7	Email sent on 3 rd March 2023	Informed the respondent of evidence of its regular remittances on withholding tax shared with the Board during the course of the audits. Attached the evidence of commission paid to Mobile Money agents in Kaduna State. Also indicated before the Appellant makes bi-annual reports to the CBN for its agents as required by the CBN, the details of the said report were also attached to the email.	Sent and acknowledged by the Respondent Counsel 3 rd March 2023.
8	Appellant's Audited Financial Statement for years 2014 to 2020.	Showing the notes clarifying the figures the Respondent claims its picked the figures it used to calculate the BOJ assessment.	Respondent admitted under Cross-Examination this was provided to by the Appellant.

Learned Counsel submitted that the lone witness of the Respondent never indicated or stated that the information the Respondent claimed was not provided by the Appellant.

He further submitted that the Respondent had not satisfied the statutory requirement to trigger a BOJ assessment. In support of this position, Learned

Counsel cited the case of **Mobile Oil Nig Ltd V Federal Board of Internal Revenue (2011) 5 TLRN 167 at pages 207 and 231**, where the Supreme Court held that a tax authority is empowered to make additional assessments only when there is a discovery of new facts and issues. Learned Counsel argued that in the case of **S. E. Ola V Federal Board of Internal Revenue (2011) 5 TLRN, 136 and 138**, the Court held in part that “...additional assessment made by the Tax Authority can be proper and valid when it involves the reopening of the issues and were based on and necessitated by discovery of sources of income which were never previously disclosed by the Tax Payer and were based on new fact. Revenue Officers must not act dishonestly or vindictively or capriciously”.

It was the view of the Learned Counsel that the Respondent had failed to show the Tribunal that its BOJ assessment as valid and proper. The Respondent had not shown that it discovered any undisclosed Mobile Money Operations by the Appellant in Kaduna State for the period. He therefore submitted that since the BOJ assessment did not meet the statutory standard it was incompetent and should be discharged.

Learned Counsel then drew the attention of this Honourable Tribunal to its judgement in the Appeal Number: TAT/NW/WHT/001/19 between United Bank for Africa Plc V Kaduna State Internal Revenue Service (the same Appellant and Respondent) where the Respondent admitted that it audited the Appellant for WHT over a similar period, received nationwide information from the Appellant and yet could not identify any new information or documents that would necessitate a BOJ.

In dealing with the second issue for determination, Learned Counsel submitted that a tax assessment is arbitrary where there is no legal or evidentiary basis for imposing it. “Arbitrary” according to Cambridge dictionary means an action which is “based on chance rather than being planned or based on reason”. He further submitted that in the case of **Federal Board of Inland Revenue Vs J. A. Omotosho (2012) TLRN 88 at page 92**, M. B. Belgore, J. (as he then was), held that in reaching an assessment, the tax man “must not act dishonestly, or vindictively or capriciously, because he must exercise judgement in the matter ...”.

He also argued that the BOJ assessment was inconsistent with PITA, because it did not provide the basis for arriving at or computing the BOJ assessment. Also the Respondent did not provide any evidence that the Appellant failed, or refused to provide to or concealed any relevant information from the Respondent.

Furthermore, the Learned Counsel contended that it was only after trial in the Appeal that the Respondent make a half-hearted attempt to provide a basis for its BOJ assessment, where the Respondent claimed that it relied on figures in the Appellant's Audited Financial Statement. Whereas the figures in the Appellant's Audited Financial Statements represented the Appellant's nation-wide WHT remittances. He submitted further that the Respondent did not differentiate WHT remittances paid to the Federal Inland Revenue Service or to other State Internal Revenue Services. Additionally, the Audited Financial Statements did not state, the commission paid to the Appellant's Mobile Money Agents, consequently it cannot be of any assistance to the Respondent.

He also submitted that the sole Respondent's witness could not, under cross-examination, mention the documents or information the Appellant failed to provide. This clearly showed that the Respondent wanted this Honourable Tribunal to believe that the Appellant did not cooperate with the Respondent during the tax investigation.

In arguing the Appellant's third issue, Learned Counsel submitted that the Appellant is not liable for penalty and interest because the Appellant objected to the assessment within the time limited by law, based on the decision of **Ahmadu Vs Governor of Kogi State, (2009) 1 TLRN 319**. Therefore there was no legal basis for subjecting the Appellant to penalty and interest in this Appeal. He also cited the case of **Weatherford Services, S.D.E.R.L. V FIRS (2016) 26 TLRN 44**, where the Court held that interest and penalty will only start to accrue if the tax payer does not object or appeal against the tax assessment within the period prescribed by statute. He also cited the case of **Tetra Pak West Africa Limited V FIRS (2016) 24 TLRN 95 at 107** to further support his argument.

Learned Counsel submitted that the Appellant filed its Notice of Appeal within 30 days from the date it received the Respondent's Notice of Refusal to Amend the additional assessment. Thus the assessment has not become final and conclusive.

In further maintaining that the assessment carried out by the Respondent was arbitrary and vindictive and ought to be set aside, he cited the case of **Nigeria Breweries Plc V LSIRB (2002) 5 NWLR (759) 1**.

Learned Counsel for the Respondent further submitted that if the Respondent was insisting that more monies were paid as commission to which WHT due to Kaduna State was not accounted for, then the burden is on the Respondent to prove same, but this was not done by the Respondent, therefore the burden of proof lies with the Respondent, here he cited the Supreme Court decision in the case of **Abdullahi**

Adamu Nammagi Vs Dr. Hussaini Tabagi Akote, where the Court held that he who asserts must prove under the Evidence Act. That since the Respondent had failed to sufficiently prove how it arrived at the BOJ, same should be set aside by this Honourable Tribunal and, concluded by urging the Tribunal to grant the Reliefs sought by the Appellant in this appeal.

ISSUES FOR DETERMINATION BEFORE THIS HONOURABLE TRIBUNAL

We have carefully and exhaustively studied the oral and documentary evidence presented by parties in this appeal, as well as the submissions of Counsel as marshalled in their respective Final Written Addresses and have formulated the following three (3) issues for determination, to wits:

Whether the decision of the Respondent to impose a Best of Judgement Assessment on the Appellant's Mobile Money Agent Withholding Tax liability of **₦494,911,956.00** covering the years 2014 - 2020 was justifiable and consistent with the provisions of the law.

Whether the decision of the Respondent to impose interest and penalty in addition to the Withholding Tax liability on the Appellant was justifiable and in consonance of applicable laws.

Whether the Respondent has made and established a good case for the grant of its Counter-Claim.

We now shall proceed to tackle the above issues, *seriatim*:

Issue One

From the evidence led before this Honourable Tribunal, the period of assessment undertaken by the Respondent was for a period of seven (7) years, 2014 -2020. Evidence has however shown that the Appellant only commenced its Mobile Money Operations from December, 2019 to December, 2020 a period of thirteen (13) months. This was sequel to the approval given the Appellant by the apex Bank vide the latter's letter dated 4th November, 2019, admitted as Exhibit AW5. In other words, the Respondent could not adduce any evidence before this Honourable Tribunal to prove the fact that the Appellant indeed commenced the Mobile Money Operation prior to December, 2019.

What is more, the Respondent could not justify the Best of Judgment Assessment of **₦494,911,956.00**. What the Respondent seemed to have relied upon to arrive at the BOJA was the Audited Financial Statements of the Appellant for the period 2014 - 2020.

It is therefore our considered view that the decision to impose the Best of Judgment Assessment in the sum of **₦494,911,956.00** by the Respondent for the years 2014 – 2020 was unjustifiable.

This issue is resolved in favour of the Appellant.

Issue Two

By the provision of Section 76 of the Companies Income Tax Act, an assessment becomes final and conclusive “when no valid objection or appeal has been lodged within the time limited by Section 69, 72 or 75 of this Act as the case may be...”

It could be gleaned from the evidence before this Honourable Tribunal that the Appellant objected to the Respondent’s tax assessment as contained in the Respondent’s letter of 1st September, 2021, which was tendered and admitted in evidence as Exhibit AW1. The Appellant’s objection thereto came vide letter dated 25th September, 2021 from Anderson Tax, the Consultants to the Appellant, tendered and admitted in evidence as Exhibit AW2.

In view of the above, the Appellant has complied with the provision of the law by serving the Respondent with its objection within the stipulated time - see the case of **Ahmadu V Governor of Kogi State (2009) 1 TLRN 319**, see also the case of **Weatherford Services S.D.E.R.L. (WSSDRL) V FIRS (2016) 26 TLRN 44**, where it was held that interest and penalties will only start to accrue if the taxpayer does not object or appeal against the tax assessment within the period prescribed by statute.

Indeed, the Tax Appeal Tribunal, in the case of **Tetra Pak West Africa Ltd V Federal Inland Revenue Service (2016) 24 TLRN 95 at 107** held that:-

“The issue here relates to the computation of penalties and interests when additional assessments or demand notices have been raised on a taxpayer. Section 13 of the 5th Schedule to the FIRS Act applies. Its provisions allow computation of penalties and interests only when the assessment or demand notices have become final and conclusive. Assessment or demand notices become final and conclusive if a taxpayer fails to file a notice of appeal within 30 days after the order or decision being appealed is made.

The Appellant filed its notice of appeal within 30 days from date it received the Respondent’s notice of refusal to amend the additional assessments. The assessments have not become final and conclusive.

We hold that the penalties and interests were wrongfully computed by the Respondent.”

Furthermore, paragraph 13(3) of the Fifth schedule to the Federal Inland Revenue Service (Establishment) Act 2007 is also instructive in this regard and provides as follows:

“Where a notice of appeal is not given by the appellant as required under subparagraph (1) of this paragraph within the period specified, the assessment or demand notices shall become final and conclusive and the Service may charge interests and penalties in addition to recovering the outstanding tax liabilities which remain unpaid from any person through proceedings at the Tribunal.”

Section 76 of the Companies Income Tax Act provides that an assessment becomes final and conclusive when no valid objection or appeal is raised or lodged against it within 30 days.

See the Supreme Court case of the **FEDERAL BOARD OF INLAND REVENUE V THE NIGERIAN GENERAL INSURANCE COMPANY LTD (1922 - 2014) 1 ALL NTC 261 (SC)**.

See also:

BOARD OF INLAND REVENUE V AZIGBO BROTHERS LTD (1922 - 2014) 1 ALL NTC 131 (HC)

ABOUD V REGIONAL TAX BOARD (1922 - 2014) 1 ALL NTC 183 (SC)

FEDERAL BOARD OF INLAND REVENUE V INNOMACO PHOTO LBB (1922 - 2014) 9 ALL NTC 277 (TAT)

FEDERAL BOARD OF INLAND REVENUE (FIRS) V SAMAROLA (1922 - 2014) 9 ALL NTC 245 (TAT)

See also the following cases to further support our position:

FBIR VS OMOTESHO J.A. 1 ALL NTC 379

FIRS VS GENERAL TELECOM 9 ALL NTC 409

COMM, REVENUE VS ATTA M.O. 1 ALL NTC 279

FIRS VS MEGA TECH SOFTWARE LIMITED 8 ALL NTC 39

Chairman of the Board of Inland Revenue Vs. Joseph Rezcallah & Sons Limited (1962) 1 SCNLR 1; (1962) LPELR - 25159 (SC)

NDDC V. Rivers State Board of Internal Revenue 3 NWLR 371

It is therefore the position of the Honourable Tribunal that the Appellant is not liable for the payment of penalty and interest having objected to the tax assessment within the time prescribed by law.

The Appellant submission on this issue is thereby allowed.

Issue Three

As posited by the Learned Counsel for the Respondent, the Appellant's sole witness in the person of Vincent Okoukoni affirmed during cross examination that the tax Authority can issue a Notice of Refusal to amend.

However, he added by stating that "the tax payer has right to approach the Tribunal to resolve whatever dispute they have".

Furthermore, the witness also affirmed during cross examination that the tax authority can impose penalty and interest on erring tax payers. He however concluded by saying in categorical terms that "...but there are conditions before penalty and interest to be imposed".

In view of the above therefore, the Respondents' claim that by the above testimonies, the Appellant had accepted liability on those accounts is not correct.

Moreso, the Respondent's claim that the Appellant had failed to defend the counterclaim having regard to the totality of the evidence before this Honourable Tribunal and the submission of Learned Appellant Counsel in his Final Written Address cannot be sustained.

The Respondent's submission on this issue is hereby refused.

Tribunal Decision

Considering the resolutions of our formulated issues for determination, we are of the considered opinion that the Respondent has not justified the imposition of the BOJ Assessment in the given sum of **N494,911,956.00 (Four Hundred and Ninety-four Million, Nine Hundred and Eleven Thousand, Nine Hundred and Fifty-six Naira)** only for the period of seven (7) years

(2014-2020) for the following reasons:

i. That the Appellant only commenced its Mobile Money Operations from December, 2019 to December 2020, a period of thirteen (13) months as evidenced by the CBN letter of Notification on commencement of Mobile Money Services dated 4th November, 2019 and marked as Exhibit, AW5

and,

ii. The Schedule of WHT remittances covering the period of thirteen (13) months (December 2019 to December 2020), as highlighted in Exhibit AW3.

In view of the above therefore the alleged withholding tax assessment imposed by the Respondent against the Appellant in the cumulative sum of **N494,911,956.00 (Four Hundred and Ninety-four Million, Nine Hundred and Eleven Thousand, Nine Hundred and Fifty-six Naira)** only is hereby set aside and the Reliefs (iv) sought by the Appellant are hereby granted.

This is the Judgement of the Tribunal.

Dated: this **12th** day of **December**, 2023.

Counsel Representation:

SIGNED

Umar M. Adamu (Chairman)

Appellant: Represented by Samuel Esuga Esq and M. D. Akpa Esq.

Respondent: Represented by Deborah Liman Esq and Uwaisu Adamu Esq.