IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
HOLDEN AT LAGOS
BEFORE
PANEL 1

HON. OLANREWAJU. M. LASSISE-PHILLIPS, ESQ.	CHAIRMAN
HON. MARK A.C. DIKE	COMMISSIONER
HON. TITILOLA AKIBAYO	COMMISSIONER
HON. RASAQ ADEKUNLE QUADRI	COMMISSIONER
HON. KANENG ADOLE, ESQ.	COMMISSIONER

APPEAL NO. TAT/LZ/EDT/023/2019

BETWEEN

TOURIST COMPANY OF NIGERIA PLC **APPELLANT**

AND

FEDERAL INLAND REVENUE SERVICE **RESPONDENT**

JUDGMENT

BACKGROUND

This is an appeal against the Respondent's Notice of Additional/Amended Assessment No: *LTO/NON-OIL/LAG/AUD/GA/EDT/018* dated 27 March 2017 of ₦14,281,060.00 (Fourteen Million, Two Hundred and Eighty-One Thousand, Sixty Naira) for the Appellant's 2016 year of assessment.

It was on the failure of the Respondent to discharge the EDT (now called the Tertiary Education Tax, TET) Notice of Additional/Amended Assessment or to issue a Notice of Refusal to Amend the said Assessment that Appellant commenced the instant Appeal vides her Notice of Appeal dated 18 July 2019 and filed on 19 July 2019 wherein she sought the setting aside of the EDT

Notice of Additional/Amended Assessment as well as a declaration that the Appellant was not liable to pay the Respondent any additional EDT for the 2016 year of assessment.

The Appellant is a company engaged in the business of hospitality and entertainment duly registered by the Corporate Affairs Commission in Nigeria. The Respondent is a body, agency of the Federal Government of Nigeria vested with the power to administer, assess and collect all taxes due or accruing to the Federal Government of Nigeria including the tax in dispute.

In the exercise of its statutory duties, the Respondent conducted a tax audit on the Appellant for the 2014 and 2015 financial years. By a letter dated 27th of March 2017 (but delivered to the Appellant on the 31st of May 2017), the Respondent informed the Appellant of the Appellant's additional liability to TET in the sum of N14,281,060.00 (Fourteen Million, Two Hundred and Eighty - One Thousand, Sixty Naira) only for the 2016 year of assessment on the grounds that the turnover reported by the Appellant was less than its actual turnover, the sums recorded as impairment/bad debt by the Appellant were non-allowable expenses for the purpose of determining the Appellant's assessable profits, and there was a difference between the cost of sales reported by the Appellant during the audit and the Appellant's actual cost of sales.

The Appellant through its consultant by a letter of 30 May 2016 (sic) responded to the additional assessment insisting that the Respondent's computation of the Appellant's turnover did not take into account the Appellant's internal revenue arising from promotions and incentives given to its customers as a reward for their patronage, impairment/bad debt ought to be allowed as deductible expenses; and the cost of sales figure utilised by the Respondent did not correlate with the Appellant's computation in its trial balance and financial statements for the relevant accounting year.

By a letter dated 3 April 2017 delivered on the 31st of May 2017, the Respondent forwarded to the Appellant a TET Notice of Additional/Amended Assessment No: *LTO/NON-OIL/LAG/AUD/GA/EDT/018* of March 27, 2017 restating the additional assessment of N14,281,060 .00(Fourteen Million, Two Hundred and Eighty-One Thousand, Sixty Naira) for the 2016 year of assessment. Dissatisfied with the Notice of Additional/Amended Assessment, the Appellant's consultant issued a Notice of Objection dated June 12, 2017. The Respondent did not discharge the TET Notice of Additional/Amended Assessment or to issue a Notice of Refusal to Amend the said Assessment. Hence, the Appellant filed this Appeal on the 19th of July 2019 seeking an order of this Honourable Tribunal setting aside the TET Notice of Additional/Amended Assessment and a declaration that the Appellant was not liable to pay the Respondent any additional EDT for the 2016 year of assessment. The Respondent entered appearance when it filed a Respondent's Reply dated the 5th of February 2020.

GROUNDS OF APPEAL

Ground

The Respondent misdirected itself when it failed, and/or neglected to discharge the Notice of Assessment in the light of the Appellant's income tax returns and the Appellant's tax consultant's objection letters dated 30th May 2016(sic) and 12th June 2017.

Particulars

1. Under the provisions of Section 1(2) of the Tertiary Education Trust Fund (Establishment) Act ("'TETFUND Act"), Education Tax is charged on the assessable profit of a Company registered in Nigeria.

2. Pursuant to the provisions of Section 1(3) of the TETFUND Act, the assessable profit on which education tax is charged shall, be ascertained in the manner specified in the Companies Income Tax Act Cap C21, Laws of the Federation of Nigeria 2004 (the "CITA".

3. By the provisions of Section 2(1)(a) of the TETFUND Act, the Respondent shall when assessing a company for income, also proceed to assess the company for education tax.

4. The Notice of Assessment was issued upon the Respondent's wrong computation of the Appellant's turnover and cost of sales during the relevant accounting period. The Respondent also wrongly excluded the Appellant's impairment/bad debt carried forward, from the deductible expenses before computing the Appellant's tax liability.

5. The Respondent's assessment was issued without taking into consideration the tax returns filed by the Appellant's auditors Messrs PriceWaterCooperHouse on 22nd June, 2018, served on the Respondent on 22nd June, 2018, which clearly shows that the Appellant was trading at a loss. Thus, the Appellant had not assessable profit for the purpose of computing its education tax liability.

6. In computing the education tax payable, the Respondent wrongly recognised various add backs which do not reflect the Appellant's actual financial status for the 2016 year of assessment. These add backs were described as follows:

    a. Turnover differences in the sum of N177,817,000;
    b. Impairment in the sum of N114,803,000;00;
    c. Bad debt in the sum of N44,121,000.00; and
    d. Cost of sales in the sum of N365,655,000.00.

7. The Notice of Assessment wrongly computed the Appellant's assessable profit for the year of assessment as N714,053,000 when the Appellant was trading in a loss position during the financial year. The said sum of N714, 053,000 is made up of the add backs itemised

above without considering the Appellant's computation in its tax returns which shows that the Appellant had no assessable profit.

8. The Respondent's incorrect application of the relevant laws and the evidence provided by the Appellant has resulted in an incorrect computation of education tax in the Notice of Assessment as N14,281,060.

9. Upon the correct application of relevant principles of law, the Appellants' correct assessment and tax liability for the 2016 year of assessment will be NIL.

TRIAL HISTORY

The Appeal came up for the first time on the 21st August, 2019. The Appellant was absent and the Appeal was adjourned to the 25th of September 2019 for further direction or hearing. At the sitting of 25th of September 2019, the Respondent was represented but no Counsel appeared for it prompting the Tribunal to adjourn the Appeal to 21st of October 2019 for hearing.

At the sitting of 21st October, 2019, the Appellant reported that it was served with a Notice of Preliminary Objection (NPO). The Tribunal decided that the NPO shall be taken along with the appeal and ruled on the PO as follows – Respondent should file a Written Address within 14 days of today. The Appellant will file a reply within 14 days of receipt of Respondent's Written Address while the Respondent is granted leave to reply only on points of law within 4 days. Appeal was adjourned to 16th December, 2019 for adoption of Written Addresses and trial. Both parties adopted their respective Written Addresses. While noting that the Respondent was yet to file its Reply to the Notice of Appeal, the Tribunal adjourned to 6th February, 2020 for definite trial. The absence of the Appellant's Counsel on the adjourned date and coupled with the lockdown occasioned by the COVID-19 pandemic delayed further progress on the case until 13th August, 2020 when hearing resumed.

The Respondent's motion to regularise its Reply to the Notice of Appeal, in the absence of any objection from the Appellant, was granted by the Tribunal. The Appeal was adjourned to 8th September, 2020 for hearing. At the sitting of 8th September, 2020, the Appellant called its witness, Bjorn Bjaaland who was examined but later substituted. At the sitting of 8th October, 2020, the Appellant's Counsel's application to rely on additional documents was granted. On the 2nd of December, 2020, parties informed the Tribunal that they were exploring settlement and applied for adjournment. Appeal was adjourned to 3rd February, 2021 on which date matter was adjourned *sine die.*

Hearing in the Appeal resumed on the 8th October, 2021 where parties reported that reconciliation had stalled and applied for a date to continue trial. The Tribunal adjourned proceedings to 7th and 8th December, 2021. The Appellant's Counsel brought an application dated 3rd December, 2021 but filed on 6th December, 2021 seeking to substitute the Appellant's witness from Bjorn Bjaaland to Morenikeji Onaderu, leave to file the Witness Statement and also a leave

to file an Amended List of Witness and an order deeming all documents to have been duly filed and served. This was not opposed by the Respondent's Counsel and the Tribunal granted the application adjourning sitting to the following day.

At the sitting of 8th December, 2021, the Appellant's Counsel called her witness, Morenikeji Onaderu who adopted her Written Statement on Oath admitted in evidence and marked *Exhibit MO1A*. She also tendered other documents on behalf of the Appellant which were also admitted in evidence and marked *Exhibit MO1* to *MO6*. The Appellant's Counsel also tendered a flash drive with Appendices 1 and 2 to *Exhibit MO2* which was not opposed by the Respondent. This was admitted in evidence and marked *Exhibit MO2*. The witness was cross-examined and there was no re-examination.

The Respondent substituted its witness on 4th November, 2022. The Tribunal adjourned the Appeal to 29th November, 2022 for Respondent to open its case. The Respondent opened its case on 6 February 2023 with a sole witness, one Onyeka Iheme-Madukaru, who adopted his witness statement on oath and also tendered one document on behalf of the Respondent. The document was admitted as *Exhibit F1*. He was thereafter cross-examined but was not re-examined. At the conclusion of trial on the 6th of February 2023, this Honourable Tribunal ordered parties to file their respective final addresses and Reply on points of law (if required) which were eventually adopted on the 5th July of 2023. The Tribunal then reserved judgment for 6th October, 2023.

ISSUES FOR DETERMINATION AND ARGUMENT OF ISSUES

Respondent's Issues and Argument

The Respondent formulated one issue for determination, to wit:

> Whether the Notice of assessment for education tax contained in Exhibit M003 was not validly raised having regards to the provisions of the laws?

On his sole issue, learned Counsel for the Respondent, M. A. Gbadebo Esq., relied on section 1(1) and (2) of the Tertiary Education Trust Fund (Establishment, e.t.c) Act, (TETFUND Act)[1] and argued that every company registered in Nigeria was duty-bound to pay education tax charged and payable annually at a rate of two percent (2%) on the assessable profit of the company. Counsel argued that the Appellant was a company registered in Nigeria and was bound to pay the full extent of the tax imposed under the TETFUND Act.

Counsel submitted that there were differences in the turnover and cost of sales reported by the Appellant in its audited Financial Statements and that the Appellant did not render a true and accurate return on the company's assessable profit for the purpose of education tax. He argued

[1] Cap. T29, Laws of the Federation of Nigeria (LFN) 2004 (as amended).

that Appellant's rationalisation of the discrepancies and deductions made in the Appellant's Financial Statements was not backed up with any particulars and/or proof as required by law.

It was Counsel's arguments, that the Appellant having conceded that impairment/bad debts reported in its audited account were a non- deductible expense, Appellant could not do a *volte face,* to argue the contrary in this case. Counsel urged the Tribunal to hold that the Appellant did not establish its contention of improper audit of its cost of sales by the Respondent. He further argued that the Respondent was justified to have adjusted the differences in the Appellant's turnover and cost of Sales; and, added back the items of impairment and bad debt that were not allowable/deductible expenses. Counsel argued that Appellant's objection failed to fully comply with the provisions of Section 69(2)(b) (i) & (ii) of the Company Income Tax Act, (CITA)[2] and consequently, the Respondent was justified to not have considered it. Counsel relied on ***Alabi Vs The Olubadan in Council & Anor.***[3]

Relying on ***Ukaegbu Vs Nwololo,***[4] he argued that the Appellant's witness' testimony was not reliable, and his evidence should be discountenanced by the Tribunal. Counsel submitted that the provision of section 24(f) of CITA relied upon by the Appellant in its pleadings did not support the Appellant's case. According to him, section 24 of CITA dealt with deductions allowable for the purpose of ascertaining the profits or loss of any company.

Counsel submitted that the Appellant could not hide under section 24(f) of CITA to exclude impairment, turnover and cost of sales as incorporated in the Appellant's claim. Learned Respondent's Counsel argued that the correct interpretation of that provision was that bad debts were the only deductions allowed under the law to ascertain the profits or loss of the Appellant in the year of assessment (YOA) under review. Therefore, the Appellant could not use the provision for bad debts as a blanket to cover all other deductions wrongly made by the Appellant i.e. impairments, turnover and cost of sales deducted from the Appellant's Financial Statements. He cited the following cases: ***C.A.C. Vs Seven-Up Bottling Co;***[5] ***Oloja Vs Gov. Benue State;***[6] and ***Awuse Vs Odili***[7] and submitted that the interpretation agreed with the notable rule of interpretation expressed in the Latin maxim *expressio unus est exclusio ulterius* that is, the express mention of one thing in a statute automatically excluded any other.

Alternatively, learned Counsel for the Respondent submitted that the application of the provision of section 24(f) of CITA to make extensive deductions as done by the Appellant in its audited account was not automatic but subject to proving that the debts have become bad as provided by law. He argued that the Appellant had the burden to prove that the deductions made that put the

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[2] CAP. C21 LFN, 2004

[3] (2021) LPELR-56294 (CA) 12.

[4] (2009) 3NWLR (Pt. 1127) 194.

[5] (2017) 5 NWLR (Pt. 1558) 241 at 258.

[6] (2016) 3 NWLR (Pt.1499) 217 at 242.

[7] (2004) 8 NWLR (Pt.876)481 at 541.

Appellant in a loss position were properly made under the law. It was argued on this score, that the Appellant failed to prove its positive assertion that the Appellant was trading at a loss.

Counsel asserted that the Appellant's witness under cross examination misled the Tribunal when she stated that "that bad debts are deductible and cost of sales are deductible and even doubtful debt are deductible with the approval of the Respondent". He claimed that there was nothing before this Tribunal by way of approval to satisfy the Respondent that the deductions the Appellant made were deductible.

Relying on ***Agbu Vs Civil Service Commission, Nassarawa State,***[8] ***Ajibulu Vs Ajayi*** [9]and several other cases, Counsel submitted that the Appellant was bound by its admission. He concluded that having regard to section 132 of the Evidence Act, the Appellant would fail if no evidence were given in this Appeal and accordingly, the Appeal was bound to fail.

Appellant's Issues and Argument

In the Appellant's view also, only one issue calls for determination by the Tribunal, that is,

> Whether the Appellant is liable to pay EDT for the 2016 year of assessment?(sic)

Arguing this lone issue, the learned Counsel for the Appellant, Chukwuka Ikwuazom, SAN argued that the Appellant traded at a loss in the 2015 financial year and consequently had no assessable profit for the 2016 year of assessment liable for Education Tax.

The learned Senior Advocate referred to TETFUND Act contending that in determining the Appellant's EDT liability if any, the assessable profit of the Appellant must be ascertained in accordance with the provisions of CITA. He submitted that once the question of what constituted valid deductible expenses under the provisions of the CITA was determined as in this case, the Education Tax liability of the Appellant would be determined. He referred to section 24 of the CITA and the case of ***MTN Nigeria Communications Plc Vs FIRS,***[10] in submitting that where a company had demonstrably incurred an expense not necessarily confined to the several examples outlined in CITA during an accounting period, and that expense was wholly, exclusively, necessarily, and reasonably incurred for the purpose of generating profits, and its deductibility was not disallowed by section 27 of CITA (or any other statutory provision), such expense ought to be tax deductible.

Similarly, relying on the case of ***Comviva Technologies Nigeria Limited Vs FIRS,***[11] learned Senior Advocate Counsel submitted that contrary to the Respondent's position, section 24 of CITA only expressly provided for examples of expenses which were deductible as the category

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[8] (2011) 1 NWLR [Pt. 1229] 54.
[9] (2014] 2NWLR (Pt. 1392) 483.
[10] [2020] 50 TLRN 42 at 71.
[11] [2020] 50 TLRN 101.

of deductible expenses was not limited to the general examples set out in the section. He referred to ***Dapianlong & Ors Vs Dariye & Anor*** [12]and submitted that the expression "all" refers to "entire, complete, the whole number of, everyone of." Therefore, the use of the phrase "all expenses" meant that all expenses which met the WREN test qualified as deductible expenses and the Respondent could not box out the Appellant's expenses which were incurred wholly, exclusively, necessarily, and reasonably to produce profit merely because it was not listed as one of the examples in section 24 of CITA.

Learned Senior Advocate also submitted that all deductible expenses did not require the approval/satisfaction of the Respondent's the Board as "proof to the satisfaction of the Board" was not a general requirement for deductibility under section 24 of the CITA. It was only a requirement in the second part of section 24(f) of CITA i.e. in cases of doubtful debts. In the case of bad debts, the only obligation on a taxpayer claiming a deduction was to prove that they had become bad. According to him, the obligation was discharged once a taxpayer demonstrated by its books of accounts and other relevant records that it had a receivable that the customer would not pay. On the converse, a doubtful debt would have to be *"estimated to the satisfaction of the Service to have become bad during the said period ..."* to be deductible. He referred to the case of ***Stitch Vs AG Federation & Anor***[13] and submitted that even in the case of doubtful debts, there could not be an arbitrary refusal as reasons must be given by the Respondent's Board in such cases. Counsel submitted that Appellant's case referred to debts that had become bad and not merely doubtful as such, the Respondent's approval was not a requirement for deductibility.

Proceeding to consider each head of the deductible expenses under contention, the Senior Advocate submitted that the turnover difference in the sum of N177,817,000.00 was deductible expense. He relied on ***Ikemefuna & Ors Vs Ilondior & Ors***[14] to submit that a clear reading of paragraph 1.0 (i) of the Appellant's Letter of Objection *Exhibit M002*, showed that the Appellant had explained the purported difference noted by the Respondent. Learned Counsel submitted that the said document spoke for itself as it explained the value of complimentary room sales and complimentary food and beverages given for the purpose of ultimately gaining customers' loyalty and boosting sales and revenue. He made specific reference to *Exhibit MO2* and the Notes to the Financial Statement contained in *Tab N26* of *Exhibit MO2*. "Elimination of inter-segment expenses" and this is explained in the last line as "Inter-segment revenue represents complimentary room sales and food and beverage revenue which is included in hospitality revenues". Also, he referred to *Tab N26* of *Exhibit MO2* and submitted that it showed that the Appellant deducted its business promotion expenses which amounted to N159,540,000.00 from its revenue in the 2015 financial year (i.e. 2016 year of assessment) as seen in the "Elimination of inter-segment revenue" line item insisting that *Tab TB (2015)* of *Exhibit MO2* i.e., the Appellant's Trial Balance for 2015 financial year (2016 year of assessment), showed various line items of business promotion expenses e.t.c.

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[12] (2007) LPELR-928 (SC).

[13] (1986) LPELR-3119 (SC).

[14] (2018) LPELR-44840 (CA).

Learned Silk argued that the Respondent did not challenge the validity of *Exhibit MO2* but rather refused to acknowledge it despite it being provided alongside the Appellant's Letter of Objection i.e. *Exhibit MO2*. He further submitted that the Respondent did not deny or contradict the Appellant's assertion that the promotion expenses of the Appellant were wholly, exclusively, necessarily, and reasonably incurred in the production of the Appellant's profit. He contended that the provision of complimentary accommodation, beverages, and food to the Appellant's customers generated profits in gaming and hospitality which was the business of the Appellant and therefore met the WREN test prescribed under section 24 of the CITA, and not excluded by section 27 of the CITA. He referred to ***Comviva Technologies Nigeria Limited Vs FIRS***[15]where this Tribunal held that the business promotion expenses were incurred wholly, exclusively, necessarily, and reasonably by the Appellant for its business purpose and were not disallowed under section 27 of CITA. He urged the Tribunal to allow the turnover difference in the sum of N177,817,000.00 as deductible expense.

On the impairment in the sum of ₦114,803,000.00 and Bad debt in the sum of ₦44,121,000.00, Counsel submitted that contrary to Respondent's submission, at no point did the Appellant concede that the impairment/bad debts reported in its Financial Statement i.e., *Appendix 2* of *Exhibit M02* were non-deductible expenses. Rather, the Appellant merely explained in paragraph 1.0 (iii) of its Letter of Objection dated 30 May 2016 (sic) i.e., *Exhibit M002*, that the impairment related to the closing balance for bad debt which included figures for prior years which had been disallowed in those previous years but included in the 2016 year of assessment as stated in *Appendix 2* of *Exhibit M02*.

Learned Senior Advocate submitted that the Respondent did not challenge the validity of *Exhibit MO2* but rather made a wrong assertion that the value of the bad debt was not reflected, arguing that the Respondent did not (and could not) contend that the bad debts did not arise in the course of the Appellant's business. He urged the Tribunal to hold that the impairments/bad debts were deductible under section 24 of the CITA and were not excluded by section 27 of the CITA from being deductible expenses.

On the cost of sales in the sum of N365,655,000.00, Appellant's Counsel submitted that the Notice of Assessment issued by the Respondent was based on an erroneous computation of the Appellant's cost of sales. The difference in figures was explained in paragraph 1.0 (iii) of its Letter of Objection dated 30 May 2016 (sic) i.e., *Exhibit M002*, contending that the figures in the Trial Balance for cost of sales were the same with the figures in the Financial Statements. He submitted that contrary to paragraph 4.7 of the Respondent's Final Address, the Appellant provided its trial balance in *Tab TB (2015)* of *Exhibit MO2*. i.e., the Appellant's Trial Balance for 2016 year of assessment to show that there was no difference as suggested by the Respondent.

He further argued that the Respondent did not, at any point, in the proceedings provide any evidence to show that there was a discrepancy in the cost of sales reported by the Appellant in its

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[15] *Supra* (n. 11).

Financial Statements and that stated in the Trial Balance. He insisted that the entirety of the Appellant's cost of sales for the 2015 financial year (2016 year of assessment) was wholly, exclusively, necessarily, and reasonably incurred for the purposes of its business. Counsel referred to *Tab TB (2015)* of *Exhibit MO2* i.e., the Appellant's Trial Balance for the 2015 financial year (2016 year of assessment) particularly the various line items that showed the cost of sales incurred by the Appellant.

He concluded that the Appellant was engaged in the business of hospitality and entertainment running hotels as well as restaurants and as such, food items, beverages, guest supplies, guest toiletries amongst other items were necessarily expenses incurred. Again, he referred to ***Comviva Technologies Nigeria Limited Vs FIRS***[16] urging the Tribunal to hold that without further evidence and on available deductions, the cost of sales expenses were incurred wholly, exclusively, necessarily, and reasonably by the Appellant for its business purpose and were not disallowed under section 27 of CITA.

Finally, Appellant's Counsel submitted that the Respondent having failed to controvert Appellant's evidence, such evidence must be deemed admitted. He relied on ***Adisa Vs Adisa & Ors***.[17] He urged the Tribunal to hold that the Respondent wrongly calculated the Appellant's assessable profit for the 2016 year of assessment.

Replying on Points of Law, learned Counsel to the Respondent submitted that the Appellant did not discharge the burden of proof required to show that a debt had become bad in the instant case maintaining that the demonstrations in the Appellant's books of account were an *ipxi dexit* evidence which did not meet the requirement of the law. Counsel further submitted that there were no particulars of the turnover differences before the Honourable Tribunal.

Respondent's Counsel then submitted that ***Comviva Technologies Nigeria Limited Vs FIRS***[18] heavily relied upon by the Appellant was inapposite to the instant case, and thus distinguishable from the facts of this case. Counsel submitted that the Tribunal allowed that appeal because the Appellant presented requisite evidence and necessary particulars by way of third-party invoices and other documents whereas, in the instant case no such documents were put in evidence by the Appellant.

DETERMINATION OF APPEAL

RULING ON RESPONDENT'S NOTICE OF PRELIMINARY OBJECTION

Before determining the sole issue in this Appeal, it is appropriate to determine the Preliminary Objection filed by the Respondent challenging the competence of the Appeal by reason of the

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[16] *Ibid.*

[17] (2015) LPELR-41660 (CA).

[18] (2020) 50 TLRN 101.

Appellant's failure to await the issuance of the Notice of Refusal to Amend (NORA) prescribed under section 69 of CITA before approaching the Tribunal.

It will be recalled that at the sitting of 21st October, 2019, the Appellant reported that it was served with a Notice of Preliminary Objection by the Respondent. The Tribunal decided that the NPO shall be taken along with the Appeal and ordered parties to file their Written Addresses which were adopted on the 16th of December 2021.

The question of the propriety or otherwise of a Notice of Objection or the absence of a Notice of Refusal to Amend was the fulcrum of the holding of this Tribunal in ***Oando Supply & Trading Ltd Vs FIRS***[19] where the Tribunal elaborately ruled on this issue. The Tribunal unequivocally held that –

> Without prejudice to the taxpayer's freedom to explore that part of the taxman's in-house review mechanism, it appears to us that in the instant case in accordance with the text of the Act, the former may equally choose to appeal against an assessment. Therefore an aggrieved taxpayer can apply to this Tribunal without first receiving a Notice of Refusal to Amend from the Federal Inland Revenue Service. NORA is not a requisite pre-action protocol for proceedings here.

That position has not changed. It remains the law.

Having carefully listened to the submissions of the learned Counsel to both parties, this Tribunal is of the firm view that the Notice of Preliminary Objection lacks merit and is hereby dismissed for the following reasons:

i. procedure before the Tribunal is governed by the provisions of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act (FIRS Act) (the Fifth Schedule) not the provision of CITA;
ii. the Fifth Schedule does not require NORA from tax authorities to an aggrieved taxpayer before the latter can approach the Tribunal for redress. See ***Oando Trading & Supply Limited Vs FIRS;***[20]
iii. NORA is not a requisite pre-action protocol for proceedings before Tax Appeal Tribunal as neither section 69 nor section 72 of CITA governs appeals to this Tribunal. See ***Oando Trading & Supply Limited Vs FIRS*** [21]
iv. provisions of FIRS Act of which the Fifth Schedule is an integral part overrides any inconsistent provisions in other laws. See section 68 of the FIRS Act. Therefore, provisions in other statutes purporting to stipulate any such condition precedent are inconsistent with the

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[19] (2013) 1 NTTLR 142.

[20] *Ibid.*

[21] *Ibid.*

FIRS Act and by operation of section 68 of the FIRS Act, void. See ***Oando Trading & Supply Limited Vs FIRS***.[22]

There are three options available to an aggrieved taxpayer under the extant regime. The taxpayer may elect to pursue the procedure prescribed under section 69 of CITA (section 69 Procedure), that is, file an objection, undergo reconciliation and await issuance of NORA before appealing to the Tribunal. It can also file an objection and without waiting for the reconciliation process or the issuance of NORA, appeal to the Tribunal. Finally, the taxpayer can appeal directly to the Tribunal without first objecting to an assessment or other action of the tax authority. The point must be made that issuance of notice of assessment is appealable. See ***Oando Supply & Trading Limited Vs FIRS***.[23]

With regard to this Appeal, the point being made is that an aggrieved taxpayer is at liberty to bypass section 69 procedure without running any risk of its appeal being declared incompetent or premature. It does not have to await the issuance of NORA before appealing to the Tribunal.

RESOLUTION OF SUBSTANTIVE ISSUE

Both parties postulated one issue (each) for determination in this Appeal. Both issues are similar in context. However, the Tribunal has adopted the sole issue formulated for the Respondent as follows:

> Whether the Notice of assessment for education tax contained in Exhibit M003 was not validly raised having regards to the provisions of the laws

The legal framework for the assessment of TET is the Tertiary Education Trust Fund (Establishment, Etc.) Act, 2011 (TETFUND Act). The TETfund Act in section 1 provides that -

1) As from the commencement of this Act, there shall be charged and payable an annual tertiary education tax which shall be assessed, collected and administered in accordance with the provisions of this Act.
2) The tax at the rate of 2 percent shall be charged on the assessable profit of a company registered in Nigeria (in this Act referred to as "a company").
3) The assessable profit of a company shall be ascertained in the manner specified in the Companies Income Tax or the Petroleum Profits Tax Act (in this Act referred to as "the Act") as the case may be.

From the foregoing, it is apparent that the determination of a taxpayer's TET liability is by reference to its assessable profit to be ascertained in accordance with the relevant provisions of the Companies Income Tax Act (CITA). The issue in dispute between the Appellant and Respondent is whether the Respondent's add-backs were valid or were deductible expenses

[22] *Ibid.*

[23] *Ibid.*

under the provisions of the CITA. The answer to this question will determine whether indeed the Appellant recorded an assessable loss or made an assessable profit for the 2015 year of assessment upon which it could be liable to the additional liability sought to be imposed on it by the Respondent.

The framework for deductibility of expenses is section 24 of CITA in collaboration with section 27 which further qualifies the provision of section 24 of CITA. In other words, section 27 provides for expenses which may have passed the test of section 24 of CITA but are specifically excluded. The language of section 24 of CITA is expansive. The use of the expression, "including, but without otherwise expanding or limiting the generality of the foregoing" presupposes that the lawmakers have not closed the categories of allowable deductions. The Tribunal is in agreement with Appellant's Counsel that the expression "all" refers to *"entire, complete, the whole number of, everyone of."* Therefore, the use of the phrase "all expenses" means that all expenses which meet the WREN test qualify as deductible expenses and the tax authority cannot refuse a taxpayer's expenses which are incurred wholly, exclusively, necessarily, and reasonably to produce profit merely because they are not listed in section 24 of CITA unless they are excluded by section 27 of CITA.

The relevant provision of section 24 is reproduced below.

> Save where the provisions of subsection (2) or (3) of section 14 or 16 of this Act apply, for the purpose of ascertaining the profits or loss of any company of any period from any source chargeable with tax under this Act, there shall be deducted all expenses for that period by that company wholly, exclusively, necessarily and reasonably incurred in the production of those profits including, but without otherwise expanding or limiting the generality of the foregoing [...]
>
> (a) .....
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> (f) bad debts incurred in the course of a trade or business proved to have become bad during the period for which the profits are being ascertained, and doubtful debts to the extent that they are respectively estimated to the satisfaction of the Service to have become bad during the said period notwithstanding that such bad or doubtful debts were due and payable.

On the other hand, section 27 of CITA states that -

> Notwithstanding any other provision of this Act, no deduction shall be allowed for the purpose of ascertaining the profits of any company in respect of-
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> (a) capital repaid or withdrawn and any expenditure of a capital nature;
> (b) any sum recoverable under an insurance or contract of indemnity;
> (c) taxes on income or profits levied in Nigeria or elsewhere, other than tax levied outside Nigeria on profits which are also chargeable to tax in Nigeria where relief for

the double taxation of those profits may not be given under any other provision of this Act;

(d) any payment to a savings, widows and orphans, pension, provident or other retirement benefit fund, society or scheme except as permitted by paragraph (g) of section 24 of this Act;

(e) the depreciation of any asset;

(f) any sum reserved out of profits, except as permitted by paragraph (j) of section 24 or 25 of this Act or as may be estimated to the satisfaction of the Board, pending the determination of the amount, to represent the amount of any expense deductible under the provisions of that section, the liability for which was irrevocably incurred during the period for which the income is being ascertained;

(g) any expense of any description incurred within or outside Nigeria for the purpose of earning management fee unless prior approval of an agreement giving rise to such management fee has been obtained from the Minister;

(h) any expense whatsoever incurred within or outside Nigeria as management fee under any agreement entered into after the commencement of this section except to the extent as the Minister may allow;

(l) any expense of any description incurred outside Nigeria for and on behalf of any company except of a nature and to the extent as the Board may consider allowable.

In ***Comviva Technologies Nigeria Limited Vs FIRS,***[24] this Tribunal in explaining the regime of deductibility of expenses stated that –

> The question of deductibility of expenses is governed by the provisions of sections 24 and 27 of the Companies Income Tax Act Cap C21 Laws of the Federation of Nigeria (LFN) (CITA). Under section 24, the law allows as deductible any expenses that is wholly, exclusively, necessarily, and reasonably incurred for the purpose of earning the profits of a company.

The Tribunal further iterated that under Nigerian law, the fact that an expense satisfied the four—way test of wholly, exclusively, necessarily, and reasonably (also called the WREN test) did not always translate to automatic deduction because such expense must also pass the test of section 27 of CITA. The inference is that where an expense is specifically disallowed under section 27 of CITA, it cannot be deductible. Thus, to be deductible, an expense must pass both tests.

There was no dispute between both parties that the Appellant was not exempted from TET. However, the Appellant in its processes, identified the add-back of four items of expense by the Respondent which allegedly turned its assessable loss to assessable profit and upon which the Respondent raised the additional liabilities as:

i. turnover difference in the sum of ₦177,817,000.00;

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[24] (2022) 3 NTTLR 82.

ii. impairment in the sum of ₦114,803,000.00;
iii. bad debts in the sum of ₦44,121,000.00; and
iv. cost of sales in the sum of ₦365,655,000.00.

We will now turn to consider specific points of add-back.

Turnover Difference in the sum of ₦177,817,000.00

The Appellant admitted in paragraph 36 **of its** Final Written Address that the purported difference arose as a result of the Respondent's failure to take into account the value of the complimentary rooms sales and complimentary food and beverages given to the Appellant's customers as rewards for their patronage. Suffice it is to mention that in arriving at assessable loss, the 'internal revenue' was deducted from the Appellant's turnover taking into consideration issues mentioned above. The Tribunal however notes that:

i. corporate expenses (including feeding materials, laundry, etc.) would have been incurred in generating this 'internal revenue;'
ii. the expenses noted above may have been avoided should the company have contracted the promotions out thereby eliminate the revenue;
iii. services were rendered in the form of accommodation, meals, etc. while providing the 'internal revenue.'

Based on the above analysis, 'internal revenue' constitutes part of the revenue income of the Appellant and should not have been deducted in arriving at the assessable loss. We must state that the case of ***Comviva Technologies Nigeria Limited Vs FIRS***[25] referenced by the Appellant deals with revenue expenditure and not revenue income. It is therefore irrelevant. This matter is in respect of revenue income.

We must state that internal control documents are not necessarily proof that an expense has passed the WREN test. In an adversarial system of tax dispute adjudication like ours, a taxpayer who desires the Tribunal to find in its favour concerning any legal right or liability which is dependent on the existence of any facts which it asserts must prove that those facts indeed exist. It is trite also that the onus to prove that an assessment was excessive lies with the Appellant. See paragraph 15(7) of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act. This is a statutory burden. The tax authority is shielded away from discharging the burden of proof that an assessment is wrong or excessive. Thus, the Appellant must provide such quality of evidence or proof which has the capacity to tilt the scale of justice in its favour. See ***Herbal Options Nigeria Limited Vs FIRS***.[26] It is doubtful if such taxpayer can successfully do this using its internal control documents only. It is one thing to assert that an expense qualifies for deduction, it is another to prove what figure constitutes the deductible expense. ***Herbal Options Nigeria Limited Vs FIRS***.[27]

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[25] *Ibid.*
[26] (2022) NTTLR 222.
[27] *Ibid.*

In addition, during cross-examination of the Appellant's witness, when asked whether the Appellant has before the Tribunal what the Appellant termed as promotional items, the Appellant witnessed answered that when the Respondent came, the Appellant's books were open to it. The Witness did not answer the question put to her for reasons best known to her.

Accordingly, having regard to the circumstances of this case, we believe that the Respondent was right to have added back the sum of ₦177,817,000.00. The turnover difference added back, by the admission of the Appellant was internal revenue. It is in our view not deductible.

Impairment in the sum of N114,803,000.00; and Bad Debts of N44,121,000.00

An impairment is a permanent reduction in the value of a company asset. It may be a fixed asset or an intangible asset. An impairment loss is recognised whenever recoverable amount is below carrying amount. In other words, it is a recognised reduction in the carrying amount of an asset that is triggered by a decline in its fair value. Thus, if it passes the statutory check popularly referred to as the WREN test under section 24 of the CITA, it is deductible.

The Respondent's Counsel had submitted that the Appellant could not hide under section 24(f) of CITA to exclude impairment nor could the Appellant use the provision for bad debts as a blanket to cover all other deductions wrongly made by the Appellant including impairments. Yet, the Respondent failed to address the issue of impairment. The issue was merely glossed over by the Respondent.

As it were, there is no evidence controverting the Appellant's position on the issue of impairment, this Tribunal is under an obligation to act on the Appellant's evidence. The evidence to this effect was given by the Appellant's witness in her evidence-in-chief. The testimony remains unchallenged.

This head of expense is hereby allowed. The law is trite that uncontroverted evidence must be accepted. See ***AG Lagos State Vs Purification Techniques (Nig) Ltd.***[28]

Concerning bad debt, section 24 of CITA provides that –

> Deductions Allowed
> ...
> f. bad debts incurred in the course of a trade or business proved to have become bad during the period for which the profits are being ascertained and doubtful debts to the extent that they are respectively estimated to the satisfaction of the Board to have become bad...

[28] [2003] LPELR-13108(CA) 18-19.

Generally, therefore, bad debt incurred in the course of trade or making the profit is deductible subject to certain conditions including:

i. the debt must be bad as a matter of fact. This is because whether a debt is bad is a question of fact and the burden lies on the taxpayer;
ii. the debt must have been incurred in the course of a trade or business of the taxpayer making the claim;
iii. the debt must be proved to have become bad during the year of income; and
iv. doubtful debts must be estimated to have become bad in the year of the income to the satisfaction of the Board.

In addition to the above, the taxpayer must prove:

i. a breakdown in relationship - it is not possible to simply write off a debt without engaging in relevant dialogue with the debtor. The taxpayer must show that it originally had a relationship with the debtor which has deteriorated. Then provide as much documentation as it can, for example, placement of the order, transaction confirmation, any receipts and other correspondence entered into with the debtor with the evidence showing that the debtor willingly conducted a transaction with the taxpayer – that they understood the terms and conditions of the contract they entered into – and then reneged on their financial obligations; and

ii. that the debt cannot be collected. A 'bad' debt is one that is impossible to settle. Therefore, the taxpayer must have exhausted every possible avenue of enquiry and investigation available before writing the debt off as bad. The taxpayer must demonstrate attempts to collect the payment as well as all instances in which the company reminded the debtor of its obligation to pay. Records of phone calls, letters, emails and any legal action taken will all be beneficial in proving the claim.

Thus, the existence of a bad debt is a question of fact and the onus to establish same lies with the taxpayer. In the instant case, there is evidence in Appellant's books that there are bad debts. It is certainly not enough to merely assert that there are bad debts in the taxpayer's Financial Statements without more. If that were the case, almost every other expense can be passed off as bad debts.

Moreover, the debts however are not owed by Appellant's books. They are owed by persons; persons whom the Appellant knows, and for some reasons have refused to reveal to this Tribunal. The situation makes it difficult to make a finding of debt whether recoverable or bad. This is because, like conventional courts, this Tribunal cannot proceed on hypothesis, or conjectures. The Tribunal cannot act like an Ifa Oracle, that will gaze into the crystal ball, and pronounce a new Oba.

To be deductible, the taxpayer must particularise the debt because deductible bad debt must be of specific nature, see ***The Rudiments of Nigerian Taxation***[29] and the attempts made to recover the debt must be detailed.

In the circumstances, and having regard to the paucity of evidence of what debt is owed, by whom, since when, and what efforts had been made to secure payment without success, we are constrained, and must indeed make a finding, that no credible evidence of bad debt has been proffered to warrant a favourable finding in favor of the Appellant. There is no credible evidence of the existence of bad debt in the sum of N44,121,000.00 in this case, and the respondent was right to have taxed it as it did.

Cost of Sales in the sum of ₦365,655,000.00

Cost of sales, also referred to as the cost of goods sold, represents the direct costs related to the manufacturing of goods/services that are sold to customers. It is the accounting term used to describe the expenses incurred to produce the goods sold by a company. When subtracted from revenue, cost of sales helps to determine a company's gross profit. Claiming cost of sales and other business expenses can increase a company's tax deductions while lowering its business profit. Hence, it is not alien to the regime of deductibility.

The issue with cost of sales is usually the quantum of allowance. Usually, it is for the tax authority to dispute the taxpayer's position. In the present case, the Respondent did not.

Is it inconceivable that expenses would be incurred for the purposes of sales? We do not think so. Unfortunately, the Trial Balance as at 30th of June 2014 relied on by the Appellant which was said to have been tendered and admitted by the Tribunal as an exhibit did not contain the breakdown of the Trial Balance and note from the Financial Statements. In fact, the Audited Financial Statements for the year under focus was not made available to the Tribunal. This makes it difficult to compare the added back figure with that of the Trial Balance. Notwithstanding, the Respondent failed to controvert the Appellant's shaky evidence. In fact, the Respondent did not controvert the Appellant's position on the cost of sales at all. The law is that any matter not specifically denied or stated not to be admitted should be regarded as established. See ***Debs & Ors Vs Cenico (Nig) Ltd.***[30] See also ***Lewis & Peat (N.R. I) Ltd. Vs A. E. Akhimien.***[31]

The only fact before this Tribunal is that the Appellant incurred the sum of **₦365,655,000.00** as cost of sales. It is uncontroverted. It is trite that a trial court including a tribunal is entitled to rely and act on the uncontroverted or uncontradicted evidence of a party or its witness. In such a situation, there is nothing to put or weigh on the imaginary scale of justice. In the circumstance the onus of proof is naturally discharged on a minimum proof. See ***Military Governor of Lagos State & Ors Vs Adeyiga & Ors.***[32]

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[29] Olugbenga Obatola, *The Rudiments of Nigerian Taxation*, (ASCO Publishers: 2014) at p.256.

[30] [1986] LPELR-934(SC) 4.

[31] [1976] 7 SC157 at 163/164.

[32] [2012] LPELR-7836(SC) 46-47.

For the above reason, the only logical conclusion the Tribunal may come to, in the absence of controverting evidence and in the circumstances of this case, is to allow the cost of sales in the sum of ₦365,655,000.00. The cost of sales in the above-mentioned sum is hereby allowed by this Tribunal.

In the final analysis, in the circumstances of this case, the Tribunal allows the impairment in the sum of N114,803,000.00. as well as cost of sales of N365,644,00.00. However, the turnover difference in the sum of N177,817,000.00 and bad debt of N44,121,000.00 are disallowed by this Tribunal.

The Appeal succeeds in part and the Respondent is accordingly ordered to re-assess the Appellant's tax liabilities in the light of this Judgment.

Dated this 6th day of October 2023.

Olanrewaju M. Lassise-Phillips, *Esq.*
Chairman

Mark A.C. Dike
Hon. Commissioner

Mrs. Titilola Akibayo
Hon. Commissioner

Rasaq Adekunle Quadri
Hon. Commissioner

Mrs. Kaneng Adole, *Esq.*
Hon. Commissioner

Appearances
Chidi Opara, Esq. - for the Appellant
S. A. Kanabe- for the Respondent

Representation
Appellant - Nil
Respondent - Nil.