

Taxpayers relieved from tax investigation beyond six years unless tax authorities can prove fraud, neglect or wilful default

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KPMG Nigeria

The Tax Appeal Tribunal (TAT or “the Tribunal”) sitting in Benin on 8 October 2020 decided in *Citibank Nigeria Limited (Citibank or “the Appellant”)* and *Rivers State Board of Internal Revenue (RSBIR or “the Respondent”)* that tax authorities must prove that a taxpayer has committed fraud, wilful default or neglect in order to invoke the provisions of Section 55(2) of the Personal Income Tax Act, Cap P8, Laws of the Federal Republic of Nigeria (LFN), 2004 (as amended) (PITA) to investigate taxpayers beyond the six-year statutory period.

Facts of the case

In August 2018, RSBIR notified Citibank of its intention to carry out a back-duty Pay-As-You-Earn (PAYE) tax investigation of the Appellant’s records for a nineteen (19) year period covering 1999 to 2017 financial years (FYs). The Appellant responded to the notice stating its inability to provide documents beyond the six (6) years provided for document retention by Section 332(2) of the Companies and Allied Matters Act, 1990, CAP C20, LFN, 2004 (CAMA), and requested for a meeting with the Respondent.

The Respondent, however, ignored the Appellant’s request to meet and issued a best of judgment (BOJ) assessment amounting to ₦303.9 million (including penalty and interest) in respect of PAYE taxes for 2006 to 2017 FYs, covering a twelve (12) year period. The Appellant disagreed with the BOJ tax assessments and objected in writing within the statutory 30-day period, reiterating its earlier position. Further, the Appellant reminded the Respondent that some of the documents requested for 2010 to 2015 FYs have been previously submitted to the Special Tax Audit Reconciliation Committee of the Respondent. The RSBIR, however, re-issued the BOJ tax assessment as final and conclusive.

Issues for determination

Based on the prayers and arguments submitted by the parties, the Tribunal formulated only one key issue for determination, which was, “*Whether CITIBANK is liable to the BOJ assessment for unremitted PAYE taxes imposed by RSBIR?*”

TAT’s decision

After considering the arguments of both parties, the TAT held that:

- i. a tax assessment can only be final and conclusive where the taxpayer fails to meet the three conditions provided in the tax law for a valid objection, namely:
 - the objection must be in writing;
 - it must state clearly the grounds of objection; and
 - it must be made within 30 days from the date of service of the notice of assessment.
- ii. it was not within the RSBIR’s rights to determine whether the Appellant was guilty of fraud, wilful default or neglect as provided in Section 55 (2) of PITA. Such determination is the remit of the TAT or any other court of competent jurisdiction.

However, where the Respondent is of the view that the Appellant may have committed any of the above acts, the burden of proof lies with the Respondent before Section 55(2) of PITA can be triggered.

Based on the pieces of evidence provided, the RSBIR failed to prove that Citibank committed any act of fraud, wilful default or neglect. Therefore, the six-year statute of limitation subsists and the RSBIR is barred from carrying out an audit or investigation on years earlier than 2012.

- iii. the Respondent, in applying the provision of BOJ assessment, failed to evince its duty of fairness and due diligence based on actual figures and facts. Consequently, the BOJ assessment was set aside by the Tribunal.

Commentaries

The issue of invoking the provisions of section 55(2) of the PITA by the tax authorities for periods beyond the six-year limitation period has been a contentious issue between taxpayers and the tax authorities. Typically, the tax authorities would issue tax investigation letters to taxpayers for periods beyond the stipulated six-year statute-barred period without any proof that a fraud, neglect or wilful default has been committed by the taxpayer as provided by Section 55(2) of the PITA. The TAT's decision reaffirms the provisions of the extant tax laws for conducting back-duty investigation, and the conditions that must be established before such exercise can be initiated by the tax authorities for statute-barred periods under Section 55 (2) of PITA or 66 (1) of Companies Income Tax Act, Cap C21, LFN, 2004. The TAT further held that only it or any court of competence jurisdiction has the power to determine that such fraud, wilful default or neglect has been committed.

Further, the TAT's decision has again clarified that an assessment cannot be deemed final and conclusive where a valid objection letter has been filed by the taxpayer in line with the provisions of the relevant tax laws. Therefore, the tax authorities should refrain from treating assessments as final and conclusive unless the conditions stipulated in Section 66 of the PITA, or the other similar provisions of extant tax laws have been met.

Finally, the TAT clarified that a BOJ assessment must be reasonable, fair and not oppressive. The TAT further noted that a BOJ assessment must be based on actual figures and facts and computed on a yearly basis for clarity. This reinforces an earlier decision of the TAT Lagos Zone in the case of *Nexen Petroleum Nigeria Limited vs Lagos State Internal Revenue Service* on the use of discretionary powers to assess employees to tax on a BOJ basis of assessment. Therefore, tax authorities should ensure that BOJ assessments, where necessary, are based on factual figures and broken down into relevant tax years, where an audit or investigation covers several years.

Conclusion

The TAT's decision reinforces the provisions of Section 55 (2) of the PITA and will provide impetus to taxpayers to challenge the indiscriminate audit and investigation exercises conducted by tax authorities beyond the six-year limitation period. It is hoped that tax authorities would, going forward, conduct their tax audits within the stipulated period. This will minimise the pervasive practice of using tax investigation as basis for extending the period of the audit, even though no fraud, wilful default or neglect has been committed by the taxpayer.

For further enquiries, please contact:

Wole Obayomi

NG-FMTAXEnquiries@ng.kpmg.com

home.kpmg/ng

home.kpmg/socialmedia



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