IN THE TAX APPEAL TRIBUNAL

IN THE SOUTH WEST ZONE

HOLDEN AT IBADAN

26 July 2023

APPEAL NO: TAT/IB/057/2021

BETWEEN

LAFARGE AFRICA PLC --- APPELLANT

AND

OGUN STATE INTERNAL REVENUE SERVICE --- RESPONDENT

BEFORE THEIR HONOURS:

HON. AKINMADE AJIBOLA (CHAIRMAN)
HON. BIMBO F. ATILOLA (MEMBER)
HON. FALADE S.ALANI (MEMBER)
HON. (MRS.) QUEENSLEY S.SEGHOSIME (MEMBER)
HON. (OTUNBA) SANYA OGUNKUADE

JUDGMENT

Introduction

By a Notice of Appeal dated 12th and filed on 13th of August, 2021. The Appellant instituted this Appeal before the Tax Appeal Tribunal, South West Zone seeking the following reliefs:

i. A Declaration that the Respondent's action amount to a breach of the terms of the settlement agreement.

ii. A Declaration that the Respondent acted in bad faith by issuing an additional assessment after the Appellant had met the conditions under the settlement agreement.

iii. A Declaration that the Respondent cannot renege on the compromise agreement without first establishing that the Appellant had breached the terms of the agreement and that in the absence of any vitiating factors, the Respondent is bound by the terms of the settlement agreement and cannot resile from the agreement

iv. A Declaration that the additional assessment of N135,563,608.45(One Hundred and Thirty-Five Million, Five Hundred and Sixty-Three Thousand, Six Hundred and Eight Naira, Forty-Five Kobo) was issued outside the six-year limitation period and for that reason is null, void and of no effect.

v. A Declaration that the Respondent's delegation of its powers of examination, audit and assessment under sections 47, 54 and 55 to a private firm of accountants is a contravention of section 88 (4) and therefore wrong in law and null, void and of no effect.

vi. A Declaration that any process, document or assessment arising from the wrong delegation of powers in contravention of section 88(4) is null, void and of no effect.

vii. A Declaration that the Respondent's grant of access to Appellant's information to a private firm of accountants is a fundamental breach of Respondent's duty of confidentiality to taxpayers.

viii. A Declaration that the tax audit/investigation report and resulting Notice of Assessment dated 2 November 2018 are void and of no effect whatsoever.

ix. An Order upholding the settlement/compromise agreement between the Appellant and the Respondent.

x. An Order prohibiting the Respondent and/or its assigns or privies from giving effect to the tax investigation or assessment, demand notice and additional assessment dated 2 November 2018, 12 November 2018 and 13 July 2021 respectively.

Further to this, the Respondent issued a revised assessment of ₦191,723,626.08 (One Hundred and Ninety-One Million, Seven Hundred and Twenty-Three Thousand, Six Hundred and Twenty-Six Naira, Eight Kobo), dated 8th May, 2020 (Exhibit LAP/07) in respect of the financial years 2010-2014 as against the earlier assessment of ₦1,285,227,910.43 (One Billion Two Hundred and Eighty-Five Million Two Hundred and Twenty-Seven Thousand, Nine Hundred and Ten Naira, Forty-Three Kobo).

The Appellant paid the revised assessed sum. Thereafter, the Respondent issued another assessment and requested that the Appellant pay an additional ₦20, 452,659.71 (Twenty Million, Four Hundred and Fifty-two Thousand, Six Hundred and Fifty-Nine Naira, Seventy-One Kobo), dated 7th August, 2020, (Exhibit LAP/09). The Appellant paid the additional sum. The Appellant requested for the tax clearance letter by email and the Respondent responded that the tax clearance letter would be ready in a few days.

The Respondent did not issue the tax clearance, but in another letter dated 27th January,2021, (Exhibit LAP/11), the Respondent issued a revised assessment of ₦347,738,894.24 (Three Hundred and Forty Seven Million, Seven Hundred and Thirty Eight Thousand, Eight Hundred and Ninety Four Naira, Twenty Four Kobo). The Respondent then requested that the Appellant pay the outstanding sum of ₦135,563,608.45 (One Hundred and Thirty-Five Million, Five Hundred and Sixty-Three Thousand, Six Hundred and Eight Naira, Forty-Five Kobo) for the financial years 2010- 2014. This was in addition to the ₦191,723,626.08 (One Hundred and Ninety-One Million, Seven Hundred and Twenty-Three Thousand, Six Hundred and Twenty-Six Naira, Eight Kobo) and ₦20,452,659.71 (Twenty Million, Four Hundred and Fifty-two Thousand, Six Hundred and Fifty-Nine Naira, Seventy-One Kobo) which the Appellant had already paid, in order to make up the amount in the new revised assessment of ₦347,738,894.24 (Three Hundred and Forty Seven Million, Seven Hundred and Thirty Eight Thousand, Eight Hundred and Ninety Four Naira, Twenty Four Kobo).

After a period of about six months, the Respondent in a letter dated 13th July, 2021, claimed that the additional assessment arose from untaxed expatriate

income. The Respondent stated the initial assessment of ₦212, 175,285.79 (Two Hundred and Twelve Million, One Hundred and Seventy-Five Thousand, Two Hundred and Eighty-Five Naira, Seventy-Nine Kobo) it had raised was based on the inclusion of local staff to Lafarge Africa Plc. payroll, instead of the expatriate staff only. However, in order to ensure fairness and appropriate treatment, it revised the assessment based on the income of the expatriates that earned the undisclosed payments, and resultant effect is the ₦347,738,894.24 (Three Hundred and Forty-Seven Million, Seven Hundred and Thirty Eight Thousand, Eight Hundred and Ninety Four Naira, Twenty Four Kobo) revised total liability.

This instant Appeal is an objection to the assessment contained in Exhibits LAP/11 and LAP/12.

Issues for Determination and Arguments

In its Final Written Address, the Appellant formulated three (3) issues for determination as follows:

1. *Whether the Respondent can issue the revised assessment (Exhibits LAP/11 and LAP/12) outside the six-year limitation period set in section 55 of the Personal Income Tax Act (as amended) without first establishing that the Appellant committed fraud, willful default or neglect?*

2. *Whether the Respondent lawfully delegated its statutory duties to the Consultant, Ibraheem Jimoh & Co.?*

3. *Whether from the totality of the facts, the Respondent is estopped in law from persistently harassing the Appellant with arbitrary assessments (Exhibits LAP/11 and LAP/12) after the parties agreed and executed the out-of-tribunal resolution of the tax dispute?*

The Respondent in its Final Written Address formulated only one (1) issue for determination as follows:

Whether the Appeal of the Appellant in the circumstance of this case had any merit.

On the various issues, counsels for both parties presented very spirited arguments before the Tribunal. The Appellant, in its Final Written Address, made submissions on each of the issues it raised for determination.

On the Appellant's issue one, the main contention of the Appellant is an objection to the additional sum of ₦135,563,608.45 (One Hundred and Thirty-Five Million, Five Hundred and Sixty-Three Thousand, Six Hundred and Eight Naira, Forty-Five Kobo) assessment by the Respondent against the Appellant dated 27 January, 2021, with respect to the 2010 - 2014 years of assessment.

The Appellant argued that the Respondent is not allowed to issue a revised assessment beyond the six-year limitation period, unless it is established that the Appellant committed fraud, willful default or neglect to pay the tax. The Appellant relied on Section 55(1) and (2) of Personal Income Tax Act which provides as follows:

> *(1) If the relevant tax authority discovers or is of opinion at any time that a taxable person liable to income tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the relevant tax authority may, within the year of assessment or within six years after the expiration thereof and as often as may be necessary, assess the taxable person at such amount or additional amount as ought to have been charged, and the provisions of this Act as to notice of assessment, appeal and other proceedings shall apply to that assessment or additional assessment and to the tax thereunder.*
>
> *(2) For the purpose of computing under subsection (1) of this section the amount or the additional amount which ought to have been charged, all relevant facts consistent with paragraph (b) of the proviso to section 66 (2) of this Act shall be taken into account whether or not known when a previous assessment or an additional assessment on the same taxable person for the same year was being made or could have been made:*
>
> *Provided that where any form of fraud, willful default or neglect has been committed by or on behalf of a taxable person in connection with any tax*

imposed under this Act, the relevant tax authority may at any time and as often as necessary assess that taxable person at such amount or additional amount as may be necessary for the purpose of making good any loss of tax attributable to the fraud, willful default or neglect.

The Appellant stated that from the wording of the above it is clear that the limitation period for the issuance of assessments against a taxpayer is within six years after the expiration of the relevant year of assessment. However, that in this Appeal, the additional sum of ₦135,563,608.45 (One Hundred and Thirty-Five Million, Five Hundred and Sixty-Three Thousand, Six Hundred and Eight Naira, Forty Kobo) assessment by the Respondent against the Appellant was dated 27 January, 2021, with respect to the 2010-2014 years of assessment, which the Respondent argued falls outside the six years limitation period for each of the years of assessments and runs contrary to the provision of Section 55(1) of Personal Income Tax Act.

The Appellant cited the case *of Ecobank v. Delta State Board of Internal Revenue* Volume 2 All NTC page 102, where the Tax Appeal Tribunal in interpreting Section 55(2) of Personal Income Tax Act 2011 held as follows:

Assuming without conceding that Section 55(2) of Personal Income Tax Act 2011 (as amended) takes pre-eminence over Sections 54(5), 81, & 82 of PITA 2011, then the onus lies with the Respondent to prove that these exception of fraud, willful default or neglect is committed by the Appellant.

It is the Appellant's argument that the Exhibits LAP/11 and Exhibit LAP/12 will only be valid if the Respondent can establish that the Appellant committed fraud, willful or neglect. The Appellant argued that the Respondent had not provided evidence before the Tribunal in this regard stating that there is nothing in the reasons contained in Exhibit LAP/11 and LAP/12 that proves the commission of fraud wilful default or neglect on the part of the Appellant. The Appellant argued that the standard of proof is that fraud cannot be merely alleged but must be pleaded and proved strictly, the onus and burden of which fell on the Respondent to discharge.

Flowing from the above, the Appellant urged this Honourable Tribunal to hold that the Respondent issued Exhibits LAP/11 and LAP/12 outside the limitation period provided by the law and that the Respondent has failed to prove any conditions preliminary to issuing an assessment outside of the statutory limitation period, and the revised assessment contained in Exhibits LAP/11 and LAP/12 be set aside.

On its issue two, the Appellant argued that the Respondent acted unlawfully when it delegated its statutory duties, powers and responsibilities of tax audit, examination, investigation and tax assessment to a private firm, Ibraheem Jimoh & Co. It was the Appellant's contention that this act of the Respondent runs contrary to the provision of Section 88(4) of Personal Income Tax Act.

The Appellant relied on the provisions of Section 88(3) and (4) of the Personal Income Tax Act, which makes express provision on delegation of powers conferred on a tax authority. The subsections provide as follows:

> *(3) Subject to subsection (4) of this section, the State Board may, by notice in the Gazette or in writing, authorise any person to-*
>
> *(a) perform or exercise on behalf of the State Board, any function, duty or power conferred on the State Board; and*
>
> *(b) receive any notice or other document to be given or delivered to or in consequence of this Act and any subsidiary legislation made under it.*
>
> *(4) Notwithstanding the provisions of subsection (3) of this section, the State Board shall not delegate any power conferred on it under sections 2, 6, 7, 17. 46, 47, 50, 53, 54, 55, 57, 78, 86, 99, 102, 103 and 104 of this Act to any person."*

The Appellant argued that Section 88(4) imposes a mandatory obligation on tax authorities such as the Respondent to avoid the delegation of its powers. The Appellant argued that the assessment issued by the Respondent, were made based on the report on investigation produced by Ibrahim Jimoh & Co, and that therefore all assessment arising from what it argued was an unlawful act of

delegation should be deemed invalid, void and of no effect because from a base or illegal cause, no right of action or benefit can rise and urged this Honourable Tribunal to so hold.

On its issue three, the Appellant stated that the Respondent erred in law when it reneged on the settlement agreement between the Appellant and the Respondent by an issuing additional assessment on the Appellant in the sum of ₦135,563,608.45 (One Hundred and Thirty-Five Million, Five Hundred and Sixty-Three Thousand, Six Hundred and Eight Naira, Forty-Five Kobo). The Appellant further argued that there was a contractual agreement between the parties, which is the out-of-tribunal settlement between the Appellant and the Respondent, and the contractual agreement is binding on the parties, even though it was not written agreement.

The Appellant cited the case *Inji v. Isa* (2022) LPERL-59193 CA where the Court held as follows:

> "*The law is that a contract agreement may be in writing, orally or even by the conduct of the parties. This was the view of the Supreme Court in the case of AG Rivers State V AG Akwa Ibom (2011) 8 NWLR (Pt. 1248) 31, 108, where it was held that an agreement need not be in writing nor signed by the parties. It can be oral or inferred from the conduct of the parties.*"

The Appellant stated that the revised assessment issued by the Respondent and the subsequent payment of the revised liability by the Appellant evinced a settlement agreement reached by both parties even though not in writing, the Appellant performed its part of the agreement by settling the assessments issued to it, and following the failure of the Respondent to issue the tax clearance letter, the Appellant requested the same via its email correspondences with the Respondent's staff Bosede Opawande (Exhibit LAP/28) which is a clear evidence by conduct of the existence of the settlement agreement between the parties.

The Appellant argued that the claim by the Respondent's first witness, Ibrahim Adeosun, under cross-examination that Bosede Opawande does not speak for

the Respondent is unfounded in law, because the principles governing agency is to the effect that in an employment relationship, the employer is the principal and the employee is an agent. As such Bose Opawande, as an employee of the Respondent, was therefore acting on behalf of the Respondent under an implied or ostensible authority in the email exchanges with the Appellant. The Appellant cited *Salbodi Group Ltd & Anor v. Doyin Investment (Nig) Ltd & Ors* (2022) LPELR-57458 (CA).

The Appellant submitted that the Respondent is not to be allowed to benefit from its breach of the out-of-tribunal settlement, and that the Respondent should be estopped from issuing Exhibit LAP/11 and LAP/12 as they were in bad faith.

The Appellant relied on Section 169 of Evidence Act 2011, which provides a statutory basis for the application of the principle of estoppel by conduct. The section provides that:

> "*When one person has, either by virtue of an existing court judgment, deed or agreement, or by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative in interest shall be allowed in any proceeding between himself and such person's representative in interest to deny the truth of that thing*".

The Appellant further argued that the Federal High Court in *Midwestern Oil and Gas Company Plc. & Anor. v. Federal Inland Revenue Service,* Suit No: FHC/ABJ/CS/240/2021 referred to the Supreme Court decision of *Mabamije v. Otto,* (2016) 13 NWLR (Pt. 1529) 171 @ 191 where it clarified the import of the provision of Section 169 of the Evidence Act 2011, thus:

> *"The rule of estoppel prevents a person from asserting the contrary of a fact or state of things which he formerly asserted, by words or conduct. In other words, a person shall not be allowed to say one thing at one time and the opposite at another time. Estoppel is based on Equity and good conscience, the object being to prevent fraud and ensure justice between the parties by*

promoting transparency and good faith. In law and in fact, a party is not allowed to approbate and reprobate at the same time".

In response, the Respondent presented it arguments to the Tribunal in its Final Written Address by addressing the Appellant's grounds of appeal. In response to the Appellant's grounds one and two, the Respondent stated that prior to the letter dated July 13, 2021, (Exhibit LAP/12), it issued an Amended Assessment Notice to the Appellant by letter dated January 27, 2021, for the payment of the additional ₦135, 563, 608. 45 (Exhibit LAP/11) and the letter clearly stated that, in the event of an additional information that necessitates an increase, that the tax liability will be revised accordingly.

The Respondent argued that there was no contract between the parties. The Respondent also stated that, there was no terms of settlement entered into or executed by the parties and that there is no consent judgment, it is only in that instance that, terms of settlement (if any) can be said to become final and binding on the parties.

The Respondent argued that the tax authority has statutory powers to revise or amend an assessment which is beyond dispute as such the Appellant's only recourse was to show by cogent evidence that it owes no such liability which the Appellant failed to do.

The Respondent stated that the Appellant has a constitutional obligation to pay its tax liability and cited Section 24 (f) of 1999 Constitution. Further, that the Appellant cannot escape its tax liability by relying on an error in computation by the Respondent which error was promptly corrected and communicated to the Appellant. Again, the Respondent submitted that the relationship is simply that of an obligation to administer tax and obligation to pay the correct tax, and at the discovery of a mistake in computation of the tax due by the Appellant, the Respondent is obliged to make necessary corrections and serve the taxpayer the correct assessment.

In response to the Appellant's Ground three, the Respondent argued that the Appellant seeks to avoid its tax liability by contending that the sum of

₦135,563,608.45 (One Hundred and Thirty-Five Million, Five Hundred and Sixty-Three Thousand, Six Hundred and Eight Naira, Forty-Five Kobo) is statute barred. The Respondent stated that the Appellant admitted to a mirror account where it channeled all payment to expatriates and the said mirror was discovered further to the tax audit conducted of the Appellant's records in 2014 (see par.3 of Witness Statement on Oath of the 1st Respondent Witness). The Appellant was thereafter subjected to a tax investigation because of the discovery, the basis of which was the suspicion of fraud by the Appellant as evidenced by the existence of mirror account for personnel, other personnel expenses and other wages and salaries.

Furthermore, the Respondent stated that as a result of the investigation, the Appellant paid an additional tax liability of ₦212,175,285.79 (Two Hundred and Twelve Million, One Hundred and Seventy-Five Thousand, Two Hundred and Eighty-Five Naira, Seventy-Nine Kobo), which but for the investigation, the Appellant would never have paid.

The Respondent submits that tax evasion is fraudulent and a crime under the Personal Income Tax Act (1993), and the Respondent can assess the Appellant for as many times as possible and is not caught by the statute of limitation. Citing *Oyo State Board of Internal Revenue v. UI* (2013) LPELR 22151 (CA) pp. 11 - 12, par. C – G, the Respondent stated that there is no limitation time within which the tax authority of a State, in particular, Ogun State, can demand for payment of tax or enforcement of tax law against a defaulting tax payer. The Respondent further relied on Section 29 of the Limitation Law of Ogun State, Vol. 3, Cap. L, Laws of Ogun State 2006.

Responding to the Appellant's Ground four, the Respondent argued that the Claim of the Appellant that the Respondent delegated the core responsibilities of tax examination, audits and assessments are mischievous because all the assessments issued and served on the Respondent were on the letter head paper of the Respondent and under the hand of its Executive Chairman. Secondly, Section 88(3) (a) Personal Income Tax Act confers power on the Respondent to authorize any person to perform any function or duty conferred on it. Although,

Section 88(4) circumscribes the power to delegate, the power to delegate tax audit of companies is not one of such. Section 49(4) of the Personal Income Tax Act 1993, provides for tax audit and is not stated as non-delegable in Section 88(4).

In the Respondent's view, Section 88(4) does not preclude the engagement of professionals by the Respondent in carrying out its functions. It only forbids delegating the function or power.

The Respondent urged this Honourable Tribunal to dismiss the Appeal of the Appellant regarding the amended assessment of ₦135, 563, 608. 45 (One Hundred and Thirty-Five Million, Five Hundred and Sixty-Three Thousand, Six Hundred and Eight Naira, Forty-Five Kobo) and order payment of same to the Respondent.

Determination by the Tribunal

In resolving the various contending issues surrounding the contested assessment the facts presented, evidence in support and the legal arguments of the parties will be properly examined by the Honourable Tribunal.

The Tribunal having gone through the pleadings of the Appellant and the Respondent, and having listened to the arguments of counsels on both sides, is of the view that the issues which call for determination can be delimited into the following questions:

1. *Whether there is a binding agreement or an out-of-tribunal resolution between the parties which estops the Respondent in law from issuing revised or additional assessments?*

2. *Whether the Respondent can lawfully delegate its statutory duties to the Consultant, Ibraheem Jimoh & Co.?*

3. *Whether the Respondent has established that the Appellant committed fraud, willful default or neglect to justify the issuance of the revised assessment outside the six-year limitation period set out under Section 55 of the Personal Income Tax Act?*

Issue One

Whether there is a binding agreement or an out-of-tribunal resolution between the parties which estops the Respondent in law from issuing revised or additional assessments?

The Appellant argued that the Respondent erred in law when it reneged on the settlement agreement between the Appellant and the Respondent by issuing an additional assessment on the Appellant in the sum of ₦135,563,608.45 (One Hundred and Thirty-Five Million, Five Hundred and Sixty-Three Thousand, Six Hundred and Eight Naira, Forty-Five Kobo) on January 27, 2021, (LAP/11).

Prior to this, the Appellant stated that the parties held several reconciliatory meetings and following one of these meetings, both the Appellant and the Respondent agreed to settle the dispute amicably out-of-tribunal. Subsequently, the Respondent issued a revised assessment of ₦191,723,626.08 (One Hundred and Ninety-One Million, Seven Hundred and Twenty-Three Thousand, Six Hundred and Twenty-Six Naira, Eight Kobo) dated 8 May, 2020, (LAP/07), payment of which was made by the Appellant. Again, after three months, the Respondent, vide letter dated 7 August, 2020, issued an additional assessment of ₦20,451,659.71 (Twenty Million, Four Hundred and Fifty-One Thousand, Six Hundred and Fifty-Nine Naira, Seventy-One Kobo) (LAP/09), for which the Appellant again made payment (LAP/10).

The Respondent argued that there was no contract between the parties and there were no terms of settlement entered or executed between the parties. However, the Respondent in its Final Written Address in (paragraph 3.01(v)) admitted that both parties met with a view of reaching an amicable settlement, as a result of which the Appellant paid a total of ₦212,175,285.79 (Two Hundred and Twelve Million, One Hundred and Seventy-Five Thousand, Two Hundred and Eighty-Five Naira, Seventy-Nine Kobo).

The Appellant's argument is that the "terms of settlement" is fundamentally a contractual agreement between the parties and represents a culmination of

negotiations between parties to reach a compromise, citing that this position is affirmed in *Lateef v. First Registrars Nig Ltd* (2017) LPELR-50712.

The Appellant further stated that is trite law that a contract agreement may be in writing, orally or even by conduct of the parties and that it need not be signed by the parties, citing *Inji v. Isa* (2022) LPERL-59193 CA.

The Appellant argued that the import of the agreement is to create an estoppel against the Respondent. Therefore, the Respondent erred in law when it reneged on the settlement agreement between the Appellant and the Respondent by issuing additional assessment on the Appellant in the sum of ₦135,563,608.45 (One Hundred and Thirty-Five Million, Five Hundred and Sixty-Three Thousand, Six Hundred and Eight Naira, Forty-Five Kobo).

The Appellant relied on Section 169 of Evidence Act 2011, which provides a statutory basis for the application of the principle of estoppel by conduct.

The Appellant further cited the dicta of the Supreme Court in *A.G Bendel State v. A.G Federation & Ors.* (1981) LPELR-605 (SC).

> *"Estoppel does not lie in mere imagination or assertion, there must be facts proved which will give rise to estoppel. In Greenwood v. Martins Bank Ltd. (1933) AC 51 at 57, Lord Tomlin defined the essential factors as: (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made; (2)An act or omission resulting from the representation whether actual or by conduct by the person to whom the representation is made;(3)Detriment to such person as a consequence of the act or omission. [See also the definition of estoppels in the book titled Estoppels by Representation by Spencer Bower and Turner, 3rd Edition by Turner at page 4 which is more comprehensive]."*

The Appellant stated the facts sworn to on oath by its witnesses were sufficient to prove its assertion of estoppel by conduct in the instant case and the existence of the essential elements of estoppel. In the Appellant's final submissions to the

Tribunal, the Appellant catalogued the following as its proof of evidence of the essential factors of estoppel:

1. *A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made*: this, the Appellant argued is evidenced by (i)the reconciliatory meetings towards an amicable resolution; and (ii)issuance of the revised assessment for ₦191,723,626.08 (One Hundred and Ninety-One Million, Seven Hundred and Twenty-Three Thousand, Six Hundred and Twenty-Six Naira, Eight Kobo) (LAP/07);

2. *An act or omission resulting from the representation whether actual or by conduct by the person to whom the representation is made:* this, the Appellant argued is evidenced by (i)the Appellant paying the revised assessment of ₦191,723,626.08 (One Hundred and Ninety-One Million, Seven Hundred and Twenty-Three Thousand, Six Hundred and Twenty-Six Naira, Eight Kobo) (LAP/08); (ii)paying the additional assessment of ₦20,451,659.71 (Twenty Million, Four Hundred and Fifty-One Thousand, Six Hundred and Fifty-Nine Naira, Seventy-One Kobo) (LAP/10); and (iii) withdrawing the Appeal No. TAT/IB/041/2019 from the Tax Appeal Tribunal.

3. *Detriment to such person as a consequence of the act or omission*: this, the Appellant argued is evidenced by (i) financial detriment suffered by making the payments relating to the assessments; (ii) failure to prosecute the Appeal No. TAT/IB/041/2019 and possible judgment in its favour; (iii) not receiving tax clearance letter; (iv) monies expended in prosecuting the instant Appeal.

Flowing from the above, the Appellant stated that the Respondent should be estopped from going back on what they had earlier agreed on.

The Respondent did not accept that there was an agreement. At least not an agreement that precluded it from raising assessments on the Appellant. In the

Respondent's view, the move to settle is not final and conclusive and has no binding effect on the Respondent and that only when settlement terms are entered as consent judgment can there be said to be a final and binding agreement on the parties. The Respondent stated that the relationship that occurred between the parties was simply that of an obligation, an obligation to administer tax and obligation to pay correct tax.

In determining the first question, this Honourable Tribunal will need to consider all the evidence before it. We believe it is worthy of note to consider what was said by the Court of Appeal in *Faponle v. U.L.T.H.B.M* (1991) 4 NWLR (Pt.183) 43, on the operation of estoppel by conduct, where the Court of Appeal held that:

> *"Estoppel by conduct is a rule of evidence. It can only operate as a shield and not as a sword and only against the person who made the admission or someone acting on his behalf. Estoppel prevents a person from approbating and reprobating or blowing hot and cold at the same time. Being a rule of evidence therefore, to be on the safe side, it must be pleaded and evidence must be led on it by the person relying on it."*

Going by this, and based on the very forceful argument of the Appellant that there was an agreement, the first requirement that Tribunal would need to be able find is whether on the evidence presented by the parties that there was indeed an agreement?

Having looked into the position of Appellant and the Respondent as presented before the Tribunal it is clear that there was no document executed between the parties as a "terms of settlement" so to speak. No such document was exhibited and the Respondent maintains that none was entered into or executed. The Tribunal accepts this to be true.

How then does the Tribunal construe the conduct of the parties to infer the existence of an agreement or otherwise? Again, to invoke our enquiry into whether we can find on the facts, the ingredients necessary to establish the doctrine of estoppel, the question is that, was there an act by the Respondent which under the circumstances of this case and with the application of the

doctrine of estoppel, precludes the Respondent from re-assessing a tax which they had led the Appellant to believe that they would not re-assess, or that they had accepted or can be deemed to have led the Appellant to have believed that they had accepted such a status affairs between them as being true?

The parties have offered parole evidence on what they considered to be the understanding or agreement between them. They are somewhat opposed to each other on this issue of whether there was an agreement or what specific terms were agreed under any supposed unwritten agreement.

The Appellant made heavy weather about the email exchanges between itself and the Respondent staff Opawande, wherein the Respondent staff had stated that the tax clearance would soon be ready. Assuming this fact is conceded as true, and looking at this last point in isolation, the Tribunal notes without any doubt in its mind that the law is clear on the effect of a tax clearance certificate. First, the position of the law is that the power of the Respondent to review back taxes is statutory and provided for under Section 55 Personal Income Tax Act. Secondly, in *Edo State Board of Internal Revenue v. Niki Manufacturing Company Ltd and Ors.* (2018) 34 TLRN, it was held that the issuance of a tax clearance certificate does not preclude the relevant tax authority from further inquiry into the tax profile and liability of a taxpayer. Therefore, to the mind of the Tribunal, had a tax clearance certificate been issued, it would not have been conclusive proof that the taxpayer had no further tax to pay or that the Respondent could not revise its assessment. (see also *Chief J.W. Ellah, Sons & Company Ltd v. Federal Inland Revenue Service* TAT/SSZ/001/2019, Unreported, delivered on 9th September, 2020, Tax Appeal Tribunal South-South Zone).

On all the evidence presented to the Tribunal on this issue of what was agreed by the parties, the Tribunal is inclined to prefer the documentary evidence provided by the parties in this regard. From the facts, it is clear that the Respondent stated clearly in its letter LAP/07 and LAP/09 that the revised assessment is subject to review, if they found any additional information. The Respondent's letter reads as follows:

". . . Please find attached the summary of the revised assessment and note that, if additional information is received necessitating increase in the tax liability, an additional assessment would be raised."

These documents form part of the various conduct of the parties in this regard. Its contents are therefore relevant to the understanding or the agreement between the parties. These were the documents upon which the Appellant made its payments. They were the documents that induced the Appellant's actions or beliefs. In fact, the Respondent was in the habit of including this qualification and it can be found in virtually all its notice of assessment letters (see LAP/07, LAP/09) all being the documents upon the receipt of which the Appellant made its several payments, including the last one of January 27, 2021, (LAP/11), which formed the basis of the assessment being appealed against under the instant Appeal.

The import of those words to the mind of the Tribunal means there was no finality to the position between the parties. Therefore, there was no agreement which stated that the assessments issued by the Respondent would be final. If there was any agreement at all, it definitely would have to be deemed to have included the term that the assessment could be varied in the future. Therefore, if the Tribunal is invited to uphold relief number six sought by the Appellant in this present Appeal which seeks for *"[a]n Order [of the Tribunal] upholding the settlement/compromise agreement between the Appellant and the Respondent"*; then such an order if it is to be granted could only uphold an agreement that included the term that, *"if additional information is received necessitating increase in the tax liability, an additional assessment would be raised."* This invariably would put the argument of the Appellant in this regard to sleep as it would preserve the right of the Respondent to raise additional or revised assessments.

The Appellant's further argument that the Appellant did not submit any additional information and that the Respondent did not also receive any additional information to warrant the issuance of the revised assessment in LAP/11 is of little effect, as the Respondent did not state that it was to be

additional information to be received from the Appellant. For example, it could very well have been information being received from its consultants who were advising the Respondent. In fact, what the Respondent's witness admitted to under cross-examination was that *no further documentation* was received from the Appellant, not that *no further information* was received. Further, the Respondent stated in its letters LAP/11 and LAP/12 that it was responding to the grounds of objection to the assessment that it had received from the Appellant in response to the assessment. The Respondent also attached the basis of its recalculation. The Respondent further indicated in LAP/12 as follows:

> *"The initial assessment of N212, 175,285.79 raised by OGIRS was based on inclusion of local staff of Lafarge Africa Plc., instead of the expatriate staff only. However, in order to ensure fairness and appropriate treatment, OGIRS revised the assessment based on the income of the expatriates that earned the undisclosed payments, and the resultant effect is N347, 738,894.24 revised total liability."*

Clearly, some information had been considered by the Respondent which was paired with existing documentation that had already been received from the Appellant, which was the basis of the Respondent's decision to revise the assessment.

Assuming, but not conceding on the facts of this case, that the parties had an agreement, or that there was no new information that could have availed the Respondent of the right to raise additional assessments as expressed in the letters; what would be the effect of such an agreement on the parties?

The Tribunal in analyzing this point has considered, Section 54(1) of Personal Income Tax Act, which provides that:

> *"The relevant tax authority shall proceed to assess every taxable person chargeable with income tax as soon as may be, after the time allowed to the person for the delivery of the return provided for in section 41 of this Act, or otherwise as it appears to the relevant tax authority practicable to do so."*

Also, Section 55 (1) and (2) which provides that:

> *"(1) If the relevant tax authority* ***discovers or is of the opinion*** *at any time that a taxable person liable to income tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the relevant tax authority may, within the year of assessment or within six years after the expiration thereof and as often as may be necessary assess the taxable person at such amount or additional amount as ought to have been charged, and the provisions of this Act as to notice of assessment, appeal and other proceedings shall apply to that assessment or additional assessment and the tax thereunder.*
>
> *(2) For the purpose of computing under subsection (1) of this section the amount or the additional amount which ought to have been charged, all relevant facts consistent with paragraph (b) of the proviso to section 66 (2) of this Act shall be taken into account* ***whether or not known when a previous assessment or an additional assessment on the same taxable person for the same year was being made or could have been made****:*
>
> *Provided that where any form of fraud, wilful default or neglect has been committed by or on behalf of a taxable person in connection with any tax imposed under this Act, the relevant tax authority may at any time and as often as may be necessary assess that taxable person at such amount or additional amount as may be necessary for the purpose of making good any loss of tax attributable to the fraud, wilful default or neglect"* **[Underlining Ours]**

The forgoing provisions and especially the underlined and boldened portions simply establish that the tax authority has the statutory power to revise or amend an assessment. The tax authority may at any time revise an assessment and as often as may be necessary assess that taxable person at such amount or

additional amount as may be necessary for the purpose of making good any loss of tax.

The information that forms the basis of the revised or additional assessment does not also have to be new information. Section 55(2) Personal Income Tax Act expressly states that *for the purpose of computing . . . the amount or the additional amount which ought to have been charged, all relevant facts . . . shall be taken into account whether or not known when a previous assessment or an additional assessment on the same taxable person for the same year was being made or could have been made.* Therefore, this statutory power to issue revised or additional assessment cannot be fettered by the novelty or otherwise of the information that forms the basis of the reassessment.

Particularly, and in addition we commend ourselves to the provisions of Section 54(1) Personal Income Tax Act which says that "*[T]he relevant tax authority shall proceed to assess every taxable person chargeable with income tax as soon as may be, after the time allowed to the person for the delivery of the return provided for in section 41 of this Act, or otherwise as it appears to the relevant tax authority practicable to do so.*"

In our view, the import of these foregoing provisions, which we have painstakingly reproduced, is that they are statutory in nature. Therefore, whether or not there was an agreement, such agreement cannot vary the mandatory provisions of the statute. Parties cannot elect to privately contract out of obligations imposed by law.

The Respondent has statutory power and mandate to revise or amend assessments, and as such the alleged agreement could not have impeded the right of the Respondent in law as long as it is done in a manner that accords with the provisions of the law. Concurrently, the Appellant has a constitutional obligation to pay its tax liability (see Section 24(f) 1999 Constitution).

In *F.B.I.R v. Halliburton (WA) Ltd.* (2014) 4 NWLR (Pt.1501) 53 the court held that the supremacy of statutory provisions to the doctrine of legitimate expectation, where it said:

> *"Clear or unambiguous statutory words, such as sections 26(1) and 48(1) of the Companies Income Tax Act, dealing with additional assessment to tax of tax payers, would override any (legitimate) expectation howsoever founded."*

With this background, and on the facts of this case, the Tribunal finds it difficult to accept that the doctrine of estoppel or indeed any purported agreement between the parties can be interpreted to the effect that it operates to create an agreement not to uphold a statutory or constitutional obligation, or for any purported agreement to foreclose an act mandated under law. It would be absurd for the Tribunal to accept to uphold an agreement that intends that one party flays the law or an agreement that may foster an illegality. The statute gives the Respondent its powers. The Tribunal's functions are to interpret and apply the provisions of the law. It would be ultra vires of its functions for the Tribunal to attempt to remove from the Respondent that which resides in it by law. The Tribunal therefore concludes that the Respondent has a power to revise or make additional assessment when necessary and in particular, the Respondent can do so under the circumstances considered in deciding this question of whether they are precluded by reason of any agreement and the doctrine of estoppel.

The Tribunal resolves the issue one in favor of the Respondent.

Issue Two

> *Whether the Respondent can lawfully delegate its statutory duties to the Consultant, Ibraheem Jimoh & Co.?*

The Appellant argued that Respondent's action in the appointment of the tax audit firm above runs contrary to the provisions of the Section 88(4) of Personal Income Tax Act and goes to the root of any exercise of any of the powers for which delegation is prohibited and that where such powers are purported to be exercised by delegation, such exercise is void. The Appellant commended the

Tribunal to consider Section 88(3) and (4) of the Personal Income Tax Act that makes express provision on delegation of powers conferred on a tax authority. The subsections provide as follows:

> *(3) Subject to subsection (4) of this section, the State Board may, by notice in the Gazette or in writing, authorize any person to-*
>
> *(a) perform or exercise on behalf of the State Board, any function, duty or power conferred on the State Board; and*
>
> *(b) receive any notice or other document to be given or delivered to or in consequence of this Act and any subsidiary legislation made under it.*
>
> *(4) Notwithstanding the provisions of subsection (3) of this section, the State Board shall not delegate any power conferred on it under sections 2, 6, 7, 17. 46, 47, 50, 53, 54, 55, 57, 78, 86, 99, 102, 103 and 104 of this Act to any person".*

The Appellant pointed out that Section 88(4) imposes a mandatory obligation on tax authorities such as the Respondent to avoid the delegation of the powers vested in the tax authority in the specific sections listed in the subsection. Among the powers of the State Board that are expressly prohibited from delegation under Section 88(4) Personal Income Tax Act are the powers of *verifying by tax audits* as stated in Section 47(4) thus:

> *"Nothing in the foregoing provisions of this section or in any other provisions of this Act shall be construed as precluding the relevant tax authority from verifying by tax audit any matter relating to the income or gains of a person or any matter relating to entries in any book, document, account or return as the relevant tax authority may from time to tire specify in any guideline by the relevant tax authority."*

The Appellant further argued that the law is very clear in its provisions that the Board shall not delegate its powers under Section 47 among others, to any

person. By Section 47(4) of the Act the relevant tax authority has the power to verify by tax audit any matter relating to the income and gains of any person including the Appellant and cannot delegate same to any person. This means that the Respondent is not empowered to delegate its tax auditing functions to a person other than its staff.

The Appellant therefore urged that the Tribunal should determine that all assessments arising from the Respondent's unlawful act of delegation are invalid, void and of no effect. This Appellant supported its argument with the case of *Akande v. Jegede & Ors.* (2022) LPELR-58911(SC) where the Supreme Court held that:

> *"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there, it will collapse See Albishir v INEC (supra) at 11 a-c per Salami JCA and Labour Party v. INEC (supra) at 336-337 at Ogbuagu JSC".*

In reviewing the import of the foregoing argument, the Tribunal commended itself to the case of *International Breweries Ltd. v. Military Administrator Osun State and Anor.* (2000) 1 NRLR 86, where it was held that:

> *"a statutory power can only be validly exercised by the person or body of person(s) to whom such power had been entrusted. It may be necessarily implied into the provisions of section 85A and 85B of the Personal Income Tax Decree No. 104 of 1993 that the State Board of Internal Revenue in which the functions are vested may delegate them. But such delegation can only be to the staff of the State Internal Revenue Services which is the operational arm of the Board."*

In the extant Appeal, the Respondents stated that it had engaged the services of a private firm of chartered accountants and forensic auditors, Ibraheem Jimoh & Co., to carry out tax audit, examination, and investigation on the Appellants by a letter dated 17 October, 2017, (Exhibit LAP/01). In the content of the letter, the last paragraph stated thus:

> *"We are therefore by this letter notifying the company that the board will commence tax investigation for the years 2010-2014 effective from November 13, 201.7. We crave your cooperation with the audit team - Jimoh Ibrahim [sic] & Co."*

The evidence given by the Respondent's witness Ibrahim Adeosun, particularly in paragraph 13 of his Witness Statement on Oath, is to the effect that the assessment issued by the Respondent were made based on the Report on Investigation produced by Ibraheem Jimoh & Co. It is therefore not in doubt that the firm of Ibraheem Jimoh & Co was used by the Respondent to carry out certain activities.

The Respondent argues in paragraph 4.04 of its Final Written Address that the function that was carried out was an investigation, where the Respondent said:

> *"The uncontroverted evidence of the 2nd Respondent Witness is that he led the team that carried out the investigation of the tax records of the company on May 2, 2018."*

In this regard, the Tribunal also finds the contents of LAP/01 useful where the Respondent wrote to the Appellant that:

> *"We are therefore by this letter notifying the company that the board will commence tax investigation for the years 2010-2014 effective from November 13, 2017. We crave your cooperation with the audit team Jimoh Ibrahim & Co."*

Indeed, the Respondent in its Witness Statement on Oath of Ibrahim Adeosun stated in paragraph 2 that:

*"That the Respondent instructed Messrs Ibraheem Jimoh & Co, a firm of Chartered Accountants and Forensic Auditors to conduct a tax investigation of the Appellant with a view of determining whether it had fully discharged its tax obligation to Ogun State. The said firm conducted the **investigation** and forwarded a report of findings to the Respondent."*

Taking this argument forward, and on strict construction, the Tribunal finds that whilst under Section 88(4) Personal Income Tax Act there might have been a restriction of the delegation of the powers of *verifying by tax audit*, which is the function provided under Section 47(4), and Section 47 is clearly listed as non-delegable under Section 88(4) (see paragraph 56 of Appellant's Final Written Addresss); there is no specific restriction on the power of *investigation*, as Section 47 does not refer to tax investigations, and Section 88(4) does not preclude the delegation of powers of tax investigation. Therefore, the function of conducting investigations may be said to come under the Respondent's general power to ". . .*authorize any person to - perform or exercise on behalf of the State Board, any function, duty or power conferred on the State Board . . .*" as provided under Section 88(3)(a) as follows:

(3) Subject to subsection (4) of this section, the State Board may, by notice in the Gazette or in writing, authorize any person to-

(a) perform or exercise on behalf of the State Board, any function, duty or power conferred on the State Board (a) perform or exercise on behalf of the State Board, any function, duty or power conferred on the State Board

There is no doubt on the facts of this case and to the mind of the Tribunal that an investigation was ordered and conducted by the Respondent on the Appellant and it was after the outcome of the investigation that the assessment in contest was issued. There is also no doubt that on the facts of this case that the assessments and additional assessments, which form the subject matter of this present appeal, was issued and served on the Appellant by the Respondent (*on its letter head paper and under the hand of its Chairman*).

The Appellant in contesting the appointment as one of the grounds of its Appeal argued that the Respondent failed to provide the gazette or document wherein the said consultant was appointed as provided for in section 88(3) of Personal Income Tax Act.

The Respondent however claimed it authorized and appointed the firm of Ibraheem Jimoh & Co. as its consultant in this regard. The procedural requirement for the appointment is as expressed under section 88(3) Personal Income Tax Act, earlier reproduced as follows:

> *". . .the State Board **may**, by notice in the Gazette or in writing, authorize any person to. . .".*

The requirement for a formality in the manner of appointment is expressed in discretionary language and not in the mandatory language used when the law intends it to be so. The *notice . . . in writing* is also not expressed as being required to be directed or written in any particular manner. There is evidence tendered before this Tribunal of the letter written by the Respondent with a "cc: Jimoh Ibrahim & Co." (LAP/01), which carried a notice that the consultant was to carry out an investigation. This was a notice and it was in writing. It was addressed to the Appellant and copied to the consultants. Therefore, the Tribunal cannot conclude that there was an improper delegation or a delegation in contravention of the law, or that the process was conducted in fundamental breach of procedural requirements, and therefore should be void and ineffectual, as claimed by the Appellant.

The Tribunal therefore resolves the question under this issue two in favour of the Respondent.

Issue Three

> *Whether the Respondent has established that the Appellant committed fraud, willful default or neglect to justify the issuance of the revised assessment outside the six-year limitation period set out under section 55 of the Personal Income Tax Act?*

On the argument of a six-year limitation being a bar to the revised assessment issued by the Respondent, the Tribunal considers it expedient to critically examine Section 55 of Personal Income Tax Act. Earlier in this judgment, we had reproduced the provision in full. However, we shall again cite the relevant portions for the present purposes.

Section 55 of the Personal Income Tax Act explicitly provides a limitation period on issuing assessments against any taxpayer. The section provides as follows:

> *(1) If the relevant tax authority discovers or is of opinion at any time that a taxable person liable to income tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the relevant tax authority may, within the year of assessment or within six years after the expiration thereof and as often as may be necessary, assess the taxable person at such amount or additional amount as ought to have been charged, and the provisions of this Act as to notice of assessment, appeal and other proceedings shall apply to that assessment or additional assessment and to the tax thereunder.*

In its argument on the interpretation of this provision, the Appellant cited *Delta Afrik Engineering Limited v. Akwa Ibom State Board of Internal revenue Service,* Unreported, TAT/SSZ/001/2017, delivered 20 January, 2020, Tax Appeal Tribunal, South-South Zone, where it was stated that the interpretation of provisions of Section 54 of Person Income Tax Act, 2011, clearly indicates that:

> *"Under the PAYE Scheme, the Tax Authorities are limited and cannot go beyond six (6) years in carrying out their back-duty PAYE audit. This is because Section 81 of PITA 2011(as amended) is a specific provision on the operation of PAYE. This provision does not however preclude the Tax Authority in going beyond the six (6) years limit with respect to other taxes such as Withholding Tax, Value Added Tax, stamp duty and so on.*

The Tribunal accepts the argument that it can be concluded from the wording of Section 55(1) of Personal Income Tax Act that the limitation period for the

issuance of assessments against a taxpayer must be within six years after the expiration of the relevant year of assessment.

Therefore, on the fact and with regards to this extant case, it is clear that the additional assessment of ₦135,563,608.45 (One Hundred and Thirty-Five Million, Five Hundred and Sixty-Three Thousand, Six Hundred and Eight Naira, Forty Kobo) assessment with respect to the 2010-2014 years by the Respondent against the Appellant was dated 27 January, 2021, of assessment, and thus falls outside the six-year limitation period for each of the years of assessments and runs contrary to the provision of Section 55(1) of Personal Income Tax Act.

However, the provision of Section 55(2) of Personal Income Tax Act 2011 creates exceptions in the proviso which states that:

> *Provided that where any form of fraud, wilful default or neglect has been committed by or on behalf of a taxable person in connection with any tax imposed under this Act, the relevant tax authority may at any time and as often as may be necessary assess that taxable person at such amount or additional amount as may be necessary for the purpose of making good any loss of tax attributable to the fraud, wilful default or neglect".*

In its argument on this point, the Appellant cited *John Khawam Pools Company Limited v. Federal Board of Inland Revenue* Volume 2 All NTC page 102, where it was held that:

> *"The Tax Authority has no right to review previous assessment except it can be establish fraud, unlawful default or neglect in respect of those assessment."*

The Appellant further cited *Ecobank v. Delta State Board of Internal Revenue* Volume 2 All NTC page 102. Where the Tax Appeal Tribunal in interpreting Section 55(2) of Personal Income Tax Act 2011 held as follows:

> *"Assuming without conceding that Section 55(2) of Personal Income Tax Act 2011 (as amended) takes pre-eminence over Sections 54(5), 81, & 82 of PITA*

2011, then the onus lies with the Respondent to prove that these exception of fraud, willful default or neglect is committed by the Appellant."

The Appellant stated that Exhibits LAP/11 and Exhibit LAP/12 will only be valid if the Respondent can establish that the Appellant committed fraud, willful default or neglect.

The Tribunal again aligns itself with the Appellant's foregoing arguments as representing the state of the law on this matter.

The Respondent, in trying to counter the Appellant's case, anchored the argument on the fact that the tax audit report for the year ended 31 December, 2014, revealed the existence of the following accounts which were never disclosed by the Appellant during the tax audit of previous years:

"Mirror Account for Personnel.....N961,650,240.525
Other Personnel Expenses.....N523,168,606.96
Other wages and salaries....N660,174,801.25"
(Paragraph 1, Respondent's Reply)

This, the Respondent said, prompted them to conduct a tax investigation for the period 2009-2014. Consequently, the Respondent raised an initial, best of judgment assessment of ₦2,601,583,683.46 (Two billion, six hundred and one million, five hundred and eighty-three thousand, six hundred and eighty-three naira and forty-six kobo) on the Appellant as tax liability for 2009-2014 assessment years by its letter dated March 9, 2017, to which the Appellant objected (LAP/13). Thereafter, the Respondent issued a revised assessment of ₦191,723,626.08 (One Hundred and Ninety-One Million, Seven Hundred and Twenty-Three Thousand, Six Hundred and Twenty-Six Naira, Eight Kobo) dated 8 May, 2020, (LAP/07), which the Respondent paid with payment with receipt exhibited (LAP/08). Subsequently, after three months, the Respondent, vide letter dated 7 August, 2020, issued an additional assessment of ₦20,451,659.71 (Twenty Million, Four Hundred and Fifty-One Thousand, Six Hundred and Fifty-Nine Naira, Seventy-One Kobo) (LAP/09). Again, the Appellant made the payment (LAP/10). In total the Appellant paid the sum of ₦212,175,285.79 (Two Hundred

and Twelve Million, One Hundred and Seventy-Five Thousand, Two Hundred and Eighty-Five Naira, and Seventy-Nine Kobo).

The Respondent stated that the Appellant admitted to maintaining a mirror account where it channeled all payments regarding expatriates. The mirror account was discovered further to the tax audit conducted on the Appellant's records (see paragraph 3 of the Witness Statement on Oath of the Respondent Witness). The Respondent claimed that the basis of the investigation was the suspicion of fraud by the Appellant as evidenced by the existence of mirror account for personnel, other personnel expenses and other wages and salaries.

Furthermore, the Respondent stated, as a result of the investigation the additional tax liability of ₦212,175,285.79 (Two Hundred and Twelve Million, One Hundred and Seventy-Five Thousand, Two Hundred and Eighty-Five Naira, and Seventy-Nine Kobo) paid by the Appellant would not have been discovered but for the investigation, and the Appellant would never have paid. As such, the tax evasion was itself fraudulent and amounted to a crime under the Personal Income Tax Act.

The Appellant argued conversely that the mirror account was not hidden and that it flows into the staff cost disclosed in the Appellant financial statement. Further that the Appellant is a quoted company on the Nigerian Stock Exchange and its financial statements are publicly available to the public (see par.38-47 of the Appellant's Further Witness Statement on Oath). We reproduce the Appellants arguments below:

> *"I will now set the record straight in this regard. The Appellant does not deny that there is a mirror account for personnel in its accounting system. The mirror account is not hidden and it's among many ledgers that constitute the staff cost disclosed in the Appellant's Financial Statements. The Appellant is a quoted company on the Nigerian Stock Exchange and its financial statements is available to the public. Furthermore, the Appellant willingly provided details of the mirror account to the Respondent during the audit. Therefore, we are surprised at the Respondent's claim to discover an account that is available to the public.*

The mirror account for personnel is one of our many ledgers. Before 2011, the salaries and wages of both expatriate staff and local staff were reported in the same ledger (Account 650000 - Salaries and Wages). However, from 2011 - 2014, we used the mirror account for personnel to account for expatriate staff costs only. This is the reason why the mirror account balances in the trial balance for the 2010 and 2011 years are nil and N1,214,818.24 respectively, with a jump in the balance to N894,175,118.33 in 2012.

The administrative decision of the Appellant to separately record the staff costs for expatriate and local staff and record expatriate staff costs in the mirror account is the reason the amounts recorded in the mirror account for personnel increased for the years 2012 - 2014. There is therefore no basis for the Respondent's recommendation in Exhibit OGIRS A of the sum of N600million for the 2010 and 2011 years as undisclosed expenses.

The Respondent and MIJC have also displayed a fundamental lack of understanding of the relationship between payrolls and ledgers. The staff payroll is the company's record of the staff in its employ. However, in accounting for the payroll for reporting purposes, the expenses in the payroll are posted to the ledger and recorded as part of the accounts of the company. The third-party firm has, however, treated the Appellant's staff payroll as a separate expense from the salaries and wages ledger of the Appellant's books. The effect of this is that the Respondent now seeks to tax both the staff payroll and the ledgers used to record the expenses incurred in respect of the staff payroll, therefore, levying Personal Income Tax twice on the same emoluments and leading to a situation of double taxation.

A review of Appendix A5 of Exhibit OGIRS A shows that OGIRS is attempting to tax ledger records on which tax has already been paid. The OGIRS, rather than reconcile the Appellant's payroll with entries in the various ledgers, is seeking to impose tax both on the Appellant's payroll, and the records of the payroll which have been transmitted to the ledgers, thus taxing the same payment twice."

In analysing this issue, the Tribunal finds it important to state and explain in simple terms what a revised assessment and an additional assessment are. A revised assessment occurs, where accounts are submitted and the basis of the assessment is faulted, the original assessment earlier made is amended in line with the new information as disclosed in tax computations. While additional assessment is a redetermination of liability for a tax, it is a further assessment for a tax of the same character previously paid in part. However, whether an additional assessment is due to omission by tax-payer or to fault, of assessment authority, the amount assessed becomes due only when notice of additional assessment is served see *Azikiwe v. Federal Electoral Commission* (1967) 3 LRN 286; (1979) NCLR 276.

Also, the Tribunal wishes to draws from the exchange at the trial of this case, during the cross examination of the Respondent Witness, Ibrahim Adeosun as follows:

> *"Appellant's Counsel: Three (3) months after the payment of the additional N20million to make the total payment to N212 million, the Respondent issued another revised assessment, is that correct?*
>
> *Respondent Witness: Yes.*
>
> *Appellant's Counsel: How much was the further revised assessment?*
>
> *Respondent Witness: N135 million.*
>
> *Appellant's Counsel: Was any further documents presented to the Respondent that made them to further revise the assessment to N135 million?*
>
> *Respondent Witness: No further document was required."*

Therefore, the Respondent stated that the additional assessment issued on the Appellant in the sum of "135million" was based on the earlier documents they had received from the Appellant, and that no further document was required. The Respondent further stated the basis for the additional assessment as illustrated in the following exchange:

"Appellant's Counsel: Okay. The question is, what was the reason/basis for the revision from N212 million to N347 million, where you now ask the Appellant to pay a further N135 million, what was the basis?

Respondent Witness: The basis is what I just said earlier, that the undisclosed income which happens to be the contentious issue here was treated as local staff cost, then we now discovered that and we arrived at that N212 million, then after a further review of the assessment, we then discovered that, that particular expenses was treated inappropriately, and for us to correct our mistake, we have to correct our mistake, and brought it down as expatriate cost, we added as BIK to the expatriate income."

Furthermore, in the Respondent's Final Written Address, and by their own admission it was stated that they discovered that in computing the tax liability which culminated in the above stated sum which the Appellant paid, it had made an error in calculating the liability on the emoluments of local staff rather than that of expatriate staff. On this point of an error been made by the Respondent in its calculation, the Tribunal recognises that this alone would not have precluded the Respondent from revisiting the assessment; and as stated by the Respondent, they indeed had to do a recalculation. In *Azikiwe v. Federal Electoral Commission* (1967) 3 LRN 286; (1979) NCLR 276, the court held:

"Whether additional assessment is due to omission by tax-payer or to fault, of assessment authority, amount assessed becomes due only when notice of additional assessment is served."

The foregoing establishes what the Respondent presented before this Tribunal as to why and how the revised assessment was done.

We now return to the issue of proof of the allegation of fraud. In *Oguntimehin v. Unity Bank PLC* (2017) LPELR-43244 (CA) the Court of Appeal emphatically opined that:

"Once there is an allegation of fraud in a civil proceeding, the person who alleged the fraud must prove it"

See also *Chianugo v. State* (2002) 2 NWLR (Pt.750) PG.225.

> *"It is also trite law that a person alleging fraud is not only required to make the allegation in his pleadings but must set out particulars of fact establishing the alleged fraud. See Otukpo v. john & Anor. (2012) LPELR-25053(SC)."*

Similarly, in *Citibank Nigeria Ltd v. Rivers State Board of internal Revenue,* Unreported. TAT/SSZ/017/2018, delivered 8 October, 2020, by Tax Appeal Tribunal, South-South Zone (Benin), the Tribunal in determining the proper body that can affirm whether fraud willful default or neglect has been committed held as follows:

> *"The courts have also decided in HILLENBRAD v. IRC (1966) 42 TC 617 that "The onus of establishing fraud, willful default or neglect is upon the Board, it cannot be established by presumption of guilt".*
>
> *Clearly then, to carry out an audit after the statutory limit of six years, the Respondent has to prove that Section 55 (2) is operational in the extant matter, that is, the Appellant has been guilty of fraud, unlawful default or neglect in respect of the assessments that the investigation covers. In the absence of this, the six-year limitation under section 54 (5) of Personal Income Tax Act 2011 (as amended) stands. In the length and breadth of this matter, we could not find where the Respondent was able or even attempted to prove these allegations.*
>
> *In our view, it is only this Tribunal or any other court of competent jurisdiction that can determine that these exceptions of fraud, wilful default or neglect has been committed as provided in Section 55(2) of Personal Income Tax Act 2011 (as amended)."*

In *Elephant Investment Ltd v. Fijabi* (2015) LPELR-24732 (CA) the court held that:

> *"the party that asserts the existence of a particular fact must prove it and if he fails to prove that fact, his case will ultimately collapse".*

From the dicta of the courts the Tribunal's enquiry shall be limited to a finding of whether there has been any proof of fraud, wilful default or neglect relating to the assessment which is the subject matter of the instant Appeal. We have to bear in mind that this singular assessment is the one being challenged under this Appeal and this is the first time that the Respondent's numerous assessments upon the Appellant as presented in the facts of this present Appeal has had to pass through judicial scrutiny and in particular be subjected to the provisions of Section 55(2) of Personal Income Tax Act.

Relating the foregoing law and erudite judicial precedents to the facts of the instant Appeal, the Tribunal also had to consider the claim of the Respondent in (paragraph 4, 5, and 6 of the Respondent's Reply). In these the Respondent stated that the Appellant held back on relevant documents required for the purpose of ascertaining the extent of its tax liability and only afforded its tax audit firm access to the trial balance and ledger balances of staff related costs for the purpose of the tax investigation. The Respondent claimed that Appellant denied the tax audit firm appointed by the Respondent access to its books and records, payment vouchers, salary vouchers journal vouchers and other accounting records and that the request for a "read only access" the company's data base was equally turned down.

The Respondent further stated that, the Appellant reduced an exercise that should be a detailed investigation of its accounting books and records to a mere analysis of its trial balance and ledger balances of staff related costs which were the only documents released for the purpose of the investigation.

Conversely, the Appellant argued that they did not deny the Respondent access to its books, records, payment vouchers, etc. Also, the Respondent's assertion that its request for a "read only access" to the company's database was turned down was also incorrect as the Respondent did not request a "read only access" to the company's database. Rather, the Respondent through its third-party consultant, Messrs. Ibraheem Jimoh & Co, requested that the internet protocol (IP) details of the Appellant's entire system be provided to them.

The Appellant further stated that the agents of the Respondent in making this request asked that details of the Appellant such as I.P addresses, host name, port number of the Appellant's entire IT infrastructure be made available to it and the Appellant gave them all the necessary support they needed to conduct the tax investigation. The Appellant also stated that they made available for them a dedicated laptop and an employee of the Appellant was assigned to them to assist with the downloading of all the information requested. The laptop was connected to a projector and all the information required by the consultant was downloaded and the analysis were conducted on the projector for everyone (see paragraph 6-12 of the Appellant's Further Witness Statement on Oath).

Flowing from the above it is clear from the facts of the instant Appeal that the Appellant did not deny that there was a mirror account, and at the time when the Respondent issued the assessment being contested under this Appeal, all the documents including the mirror accounts that were reviewed by the Respondent were the same documents that had earlier been presented to the Respondent. The accounts were found by the Respondent's consultants during the tax audit and subsequent investigation, but there is no evidence to conclude that they were hidden before they were found, especially if they were in the Appellants public statements. Therefore, we do not make a finding that anything had been hidden by the Respondent, especially with regard to the information used to arrive at the assessment presently under appeal.

The Respondent's chronology of events was that by the time it raised a best of judgment on March 9, 2017, it had already discovered the mirror account and other relevant accounts. Subsequent to this initial best of judgment, the consultant had forwarded its report with detailed ledger analysis (see paragraph 6-12 of the Respondent's Reply), which had considered these heretofore alleged "hidden" accounts. The Respondent exhibited these in detail. Several assessments were issued by way of revised assessments and additional assessments (including under the Notice of Assessment of July 26, 2018 (OGIRS L) and Final Demand Notice issued in January 15, 2019 (OGIRS O), subsequent to a post investigation payment of ₦168,014,077.40(One Hundred and Sixty-

Eight Million, Fourteen Thousand, Seventy-Seven Naira and Forty Kobo) by the Appellant).

The Respondent admits that subsequent to reconciliatory meetings held, the Appellant paid the sum of ₦212,175,285.79 (Two Hundred and Twelve Million, One Hundred and Seventy-Five Thousand, Two Hundred and Eighty-Five Naira, and Seventy-Nine Kobo), which was paid vide an initial assessment of ₦191,723,626.08 (One Hundred and Ninety-One Million, Seven Hundred and Twenty-Three Thousand, Six Hundred and Twenty-Six Naira, Eight Kobo) and a further assessment of ₦20,451.659.71(Twenty Million, Four Hundred and Fifty-Two Thousand, Six Hundred and Fifty-Nine Naira, Seventy-One Kobo). The most recent assessment is now the one requesting for a further ₦135,563,608.45(One Hundred and Thirty-Five Million, Five Hundred and Sixty-Three Thousand, Six Hundred and Eight Naira, Forty-Five Kobo). What is clear on the facts is that at the time of this assessment, nothing was said by the Respondent to have been "hidden" by the Appellant in their notice of assessment LAP/11. The Respondent had all the documents. Had the Respondent been able to prove that the Appellant had hidden further accounts from it at the time of this revised assessment, the Respondent may have clearly founded a form of fraud, willful default or neglect.

The further reference in the subsequent letter of July 13 (LAP/12) was that:

> *"The documents and information sent to us are exactly the same documents and information given to the investigators, which the forensic firm used to detect the undisclosed payments of N1,581,748,586.14 "hidden in" Mirror Account of Lafarge to expatriates for years 2012-2014. Since no new information is provided to controvert the outcome of the investigation, we stand by the investigation job done by the investigators."*

It is doubtful from this that the Tribunal can draw a finding that fraud alleged by the Respondent has been proved by the Respondent. The Respondent's expression itself shows the Respondent as being doubtful of its assertion when it said "hidden" in quotation marks. No specific aspect of the work of the investigators is referred to as being related to fraud or a finding of fraud. On the

balance of the arguments what is clear is that the Respondent recalculated the Appellant's assessment on several occasions, initially arising from information it received after the investigation and then subsequently as a result of a recalculation based on the information it already had. In essence, at the point at which the last assessment of ₦135, 563,608.45 (One Hundred and Thirty-Five Million, Five Hundred and Sixty-Three Thousand, Six Hundred and Eight Naira, Forty-Five Kobo) was issued, it was a matter of treatment and appropriate apportionment by the Respondent, not a matter of the Appellant hiding anything. Whilst there is no conclusion been made by the Tribunal on the argument of whether these assessments were excessive or not, it is clear that the timing of the assessments raises a question on whether it falls within the limits of Section 55 Personal Income Tax Act and the exceptions of Section 55(2). This is the simple test that determines whether the assessment can stand or fall.

The Respondent showed that the Appellant paid and agreed to pay previous revised and additional assessments, but the Respondent did not demonstrate that these arose out of fraud, wilful default of neglect especially as regards what led to the recalculation of the sum of last assessment and demand for ₦135,563,608.35 (One Hundred and Thirty-Five Million, Five Hundred and Sixty-Three Thousand, Six Hundred and Eight Naira, Forty-Five Kobo). In particular the Respondent alleged it was fraud, which in legal jurisprudence has a high threshold of proof.

In the assessment notices that the Respondent issued, there was no mention that the Appellant was found guilty of fraud, wilful default or neglect. The fact that an investigation for crime was carried on does not mean that the crime has been established. Sufficient proof must be adduced, beyond merely saying that the Appellant agreed to pay or the mere fact that they had paid previous revised or additional assessments.

It can be said that the Respondent had not carried out its duty diligently over the years. Section 55(2) of Personal Income Tax Act, limits the tax authorities to carry investigation beyond six years unless fraud, willful default or neglect is committed which the Respondent has not been able to prove.

The Tribunal is therefore of the view that the period of six (6) years limitation caught up with the Respondent. This in line with the position of the Court in the case of *Gulf Oil Company (Nigeria) Limited v. Federal Board of Inland Revenue* (ALL NTC), Vol. 3, page 1.

The Tribunal associates itself wholly with the position of the Court of Appeal in this matter and recognizes that the limitation caught up with the Respondent having failed to prove that fraud, willful default or neglect has been committed by the Appellant.

The Tribunal therefore resolves issue three in favor of the Appellant.

Consequently, the Tribunal grants the Appeal of the Appellant on the basis of the ground 3 and makes a declaration that the additional assessment of ₦135, 563,608.35 (One Hundred and Thirty-Five Million, Five Hundred and Sixty-Three Thousand, Six Hundred and Eight Naira, Forty-Five Kobo) was issued outside the six year limitation period and for that reason is null void and of no effect.

This is the unanimous decision of this Honourable Tribunal and we so hold.

DATED THIS 26TH DAY OF JULY, 2023.

SIGNED:

HON. AKINMADE AJIBOLA (CHAIRMAN) .....

HON. FALADE S. ALANI .....

HON. (MRS.) QUEENSLEY S. SEGHOSIME .....

HON. (OTUNBA) SANYA OGUNKUADE .....

<u>Legal Representation:</u>

Appellant- E.C Akpeme and D. Okon

Respondent- T.O Shokunbi and B.A George