

Tax Appeal Tribunal's judgement on the applicability of penalty and interest to unremitted taxes

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The Tax Appeal Tribunal (TAT or “the Tribunal”) sitting in Lagos on 14 May 2019, delivered judgement in the case of Shell Nigeria Exploration and Production Company Limited (SNEPCO or “the Appellant”) and Lagos State Board of Internal Revenue (LSBIR or “the Respondent”) to the effect that penalty and interest are due on tax collected but not remitted as at when required by relevant provisions of the law.

Facts of the case and issues for determination

The LSBIR issued demand notices to the Appellant for outstanding Pay-As-You-Earn (PAYE) tax, withholding tax (WHT) and state development levy for 2009 – 2012 years of assessment (YOAs), inclusive of penalty and interest. SNEPCO objected to the alleged outstanding liabilities but was dissatisfied with the LSBIR’s refusal to amend the demand notices. Consequently, the Appellant filed a Notice of Appeal at the TAT seeking an order to set aside the demand notices. The Appellant and Respondent subsequently held reconciliatory meetings and reached an agreement on the settlement of the principal portion of the alleged outstanding tax liabilities on which the Tribunal entered a consent judgement. However, the parties could not resolve the dispute regarding the penalty and interest imposed on the additional PAYE and WHT liabilities, which was the crux of the appeal before the TAT.

The Appellant argued that penalty and interest cannot be validly imposed on the alleged PAYE and WHT liabilities which were not final and conclusive given that a valid objection was made to the Respondent within the statutory time limit. The Appellant further contended that the demand notice cannot be deemed to be final and conclusive, and collection of alleged liabilities ought to be held in abeyance pending the determination of the appeal by the TAT. This is in line with Sections 58, 60 and 68(2) of the Personal Income Tax Act (PITA) and Paragraph 13(3) of the Fifth Schedule to the Federal Inland Revenue Service (FIRS) Establishment Act.

The Respondent on its part argued on the basis of Section 32 of the FIRS Establishment Act that where the taxpayer defaults, penalty and interest on PAYE and WHT would begin to accrue following expiration of the prescribed period for remittance of the tax due in the relevant legislation.

The TAT formulated the following issues for determination based on arguments of both parties:

- Whether or not the demand notice is final and conclusive;
- Whether interest and penalties are applicable to an assessment which is not final and conclusive; and
- Whether or not the Appellant is liable to pay penalties and interest on the unremitted PAYE and WHT arising from the assessments.

TAT’s decision

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

- A demand notice shall not be final and conclusive ... until and unless the grounds of the objection are fully resolved;
- Penalties and interest would not apply to an assessment that is not final and conclusive; and
- The Respondent has a right in law to charge the Appellant both penalty and interest on the PAYE and WHT which were collected by the Appellant on its behalf and were **not** remitted as and when due, as required by the relevant provisions of the law.

Comments

The TAT's judgement that an assessment is not final and conclusive where a taxpayer objects to it within the statutory timeline, and that interest and penalty would not apply on such disputed assessment until the dispute is fully resolved aligns with the provisions of the relevant tax laws. However, having laid this premise, the judgement of the Tribunal affirming the Respondent's right to charge interest and penalty on the liabilities, which was the subject of dispute between the parties, when the liabilities were not final and conclusive appears contradictory.

The relevant provisions of the laws are clear on the payment and collection of taxes, and the circumstances in which tax authorities can impose penalty and interest on outstanding tax liabilities. Paragraph 8 of the *Operation of PAYE Regulations 2002* (issued pursuant to the Personal Income Tax Act (PITA) 1993, as amended) requires an employer to remit PAYE tax deducted on a self-assessment basis from its employees to the tax authority within 10 days of the end of any month. The law imposes similar obligation on taxable persons to deduct withholding tax on qualifying transactions and remit same to the tax authority.

Tax authorities are empowered to review taxpayers' records and assess them to additional tax liabilities where shortfalls are observed in the taxpayers' returns. The additional assessment is, however, subject to objection and appeal as provided in the relevant laws. Where the taxpayer objects or appeals to an assessment, the collection of the disputed tax should remain in abeyance until the objection or appeal is determined based on Section 68(2) of PITA and Paragraph 13(3) of the FIRS Establishment Act. Although Sections 76 and 77 of the PITA provide for imposition of penalty and interest on outstanding tax liabilities, such power can only be validly exercised where the taxpayer fails to pay an undisputed liability within two months after the date of service of the assessment notice, or where the taxpayer fails to pay a revised liability within one month after the liability has been determined through an objection or appeal process. In this instance, the assessment is deemed to be final and conclusive.

Given the above, the Tribunal appears to have erred when it relied solely on the provisions of Section 32(1) and Section 74 of the FIRS Establishment Act and the PITA, respectively, in affirming the

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imposition of interest and penalties on assessments against which valid objections were made.

However, these provisions are applicable where a taxpayer fails to remit self-assessed liabilities, collects taxes but fails to remit, or fails to object to an assessment. This position is reinforced in the TAT judgement in *Tetra Pak West Africa Limited vs FIRS* where the TAT held that the laws only "allow for computation of penalties and interests ... when the assessment or demand notices have become final and conclusive."

Interestingly, the TAT in delivering judgement in this case acknowledged that there is no legal basis to impose interests and penalties on a contested tax assessment because interests and penalties are not applicable where an assessment is not yet final and conclusive. Hence, the basis of the Tribunal's decision upholding the Respondent's right to impose penalty and interest, while appeal against the assessment was pending at the TAT, is questionable.

The TAT appeared to have interpreted the consent judgement to mean that the Appellant collected taxes on behalf of the Respondent but failed to remit the taxes to the Respondent within the statutory timeline, and thereby upheld the penalty and interest assessed thereon. However, neither the Respondent nor the TAT established that the Appellant, indeed, collected and failed to remit the taxes. Rather, the additional liabilities arose from a tax audit conducted by the LSBIR. Care must, therefore, be taken in applying the TAT's judgement as a precedent in situations where taxpayers conduct transactions on credit basis and where a taxpayer has not withheld tax and deliberately failed to remit it to the tax authorities.

The Tribunal clearly overlooked the provisions of Section 68(2) of PITA and Paragraph 13(3) of the

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FIRS Establishment Act which provide that an assessment shall become final and conclusive only when a taxpayer fails to object to or appeal against the assessment within the stipulated time, after which a tax authority can charge interests and penalties in addition to recovering the outstanding tax liabilities. This aligns with the TAT's decision in *Weatherford Services S.D.E.R.L vs FIRS*, where the

Tribunal held that " *interest and penalty charges on overdue tax start to run when the taxpayer does not object or appeal within two months.*"

In conclusion, it appears that the TAT's decision might have been different if the demand notice had related to a tax payable by the Appellant in its capacity as a taxpayer, rather than as a tax collecting agent. However, there is no such distinction in the relevant provisions of the law on objection to a tax assessment, appeal against a tax assessment and where an assessment is final and conclusive. Pending further review of the TAT judgement on appeal, it is in the interest of taxpayers to discharge their civic obligation as and when due to avoid penalty and interest.

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