



Tax Appeal Tribunal's judgement on taxability of gratuity payments

The Tax Appeal Tribunal ("TAT" or "the Tribunal") sitting in Enugu State on 20 June 2019 delivered a judgment in favour of Nigerian Breweries Plc ("Nigerian Breweries" or "Appellant") in a case with Abia State Board of Internal Revenue Service ("ASBIRS" or "Respondent").

The key issue considered in the case, amongst others, was determining whether gratuity paid by Nigerian Breweries to its employees is subject to Personal Income Tax.

In delivering its judgment, the TAT held that section 3 of Personal Income Tax Act 2004, as amended (PITA or the Act), which is the charging provision regardless of the contrary provision in the Third schedule to the Act, does not make any

specific reference to gratuity as a chargeable income. As such, the TAT concluded that a schedule to the Principal Act, being a subsidiary legislation, cannot amend any provisions of the Act itself.

Background/facts of the case

The Respondent had issued a Notice of Refusal to Amend (NORA) to Nigerian Breweries in response to the latter's objections to assessment notices

raised against it. The assessment notices were sequel to a tax audit exercise conducted by the Respondent on the records of Nigerian Breweries for 2014 and 2015 tax years. Specifically, ASBIRS had initially issued an assessment of ₦10,049,644.45 being tax liability for the period under review, including tax on gratuities paid to retired employees of the Appellant. After submission of further documents by the Appellant, the

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liability was revised to ₦3,263,837.92. However, ASBIRS maintained that gratuities paid by Nigerian Breweries to its retired employees were liable to tax and subsequently issued a NORA which ultimately steered the Appellant towards filing a Notice of Appeal at the TAT.

Meanwhile, the Respondent had contested, during the course of the hearing, that TAT had no locus standi to request for its presence in court. ASBIRS argued that it is not a juristic person that can sue and be sued, as its name as established by the Abia State Board of Internal Revenue Law No.7 of 2008 is Abia State Internal Revenue Service (ASIRS).

The three issues for determination before the Tribunal were as follows:

- Whether the action of the court is competent on the ground that the Appellant sued a non-juristic person
- Whether the Appellant is liable to pay penalty and interest within the circumstances of the appeal
- Whether gratuities are wholly tax exempt under the PITA.

The decision

In delivering its judgment, TAT analysed each fact of the case and ruled, citing relevant sections of the law and evaluating various decided cases. The summary of the ruling is set out below:

- a) TAT noted that the Respondent, in its reply acknowledging receipt of the Notice of Appeal, confirmed that it was the person

referred to in the Notice of Appeal processes. Further, the letterhead used by the Respondent in its letters to the Appellant showed ASBIRS as the sender. The TAT also cited section 87 (1) of PITA which provides for the establishment in each state, a Board of Internal Revenue Service and whose operational arm shall be known as State Internal Revenue Service. On this premise, the TAT's posited that each state may choose to engage with the public with either of the two names. Therefore, the TAT ruled that the Respondent is a juristic person.

- b) The Tribunal ruled that penalty and interest stated by ASBIRS in its revised assessment, should be expunged based on the provisions of section 68(1) of PITA which requires payment of taxes to be made within 2 months of the date of receipt of assessment. Also, section 68(2) of PITA states that payment of tax shall be in abeyance once a taxpayer lodges an appeal or objection. Lastly, the Appellant filed its objection/appeal within 30 days as stipulated in section 60 of PITA.
- c) On the third issue, TAT reiterated the fact that section 3 of PITA is the charging section and stated that a subject cannot be taxed unless the charging section clearly and unambiguously imposes the obligation. The Tribunal also affirmed that since gratuity was deleted from the charging section, the maxim of *expression unius est exclusion alterius* holds

(meaning: the express mention of one thing means the exclusion of another).

Our analysis

This case seeks to address two fundamental issues, which are, whether:

- Gratuity payments are fully exempt from tax under PITA
- Penalty and interest charges are applicable on an assessment that has been objected to or appealed

In providing our analysis of the case, it is important to examine the underlying issues vis-à-vis the pertinent legislative provisions as follows:

- a) Exemption of gratuity under PITA:** The Tribunal held that section 3 of PITA, which is the charging section, does not categorically state that gratuity is chargeable to tax. It further held that where the charging section does not subject gratuity to tax, a schedule cannot be used to amend provisions of the principal Act to achieve the opposite. TAT sought to understand the intention behind the Finance (Miscellaneous Taxation Provisions) (No. 3) Decree No.32 of 1996 in deleting the word "gratuities" from the charging section of the Personal Income Tax Decree No. 104 of 1993, other than exempting gratuities from tax.

The import of the Tribunal's decision is that gratuity is not taxable which seems to settle whatever conflict between the charging section of PITA and Paragraph 18(3)

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of the Third Schedule to PITA. While the decision of TAT on the exemption of gratuity from tax under PITA will continue to guide taxpayers on the treatment of gratuity until a contrary decision is reached by a superior court, it would be interesting to know why Paragraph 18 of the Third Schedule was not deleted. It is reasonable to conclude that the intention of Finance (Miscellaneous Taxation Provisions) (No3) Decree No.32 of 1996 was to delete "gratuities" from both the charging section and the Schedule to the Act. However, the provisions of paragraph 18 which sets the limit of the amount to be taxed were not deleted.

The TAT decision therefore invalidates LIRS' position, in its circular issued in 2017 captioned 'Exemption of Compensation for loss of Employment'. In the circular, LIRS maintained that gratuities are only tax exempt if paid under an approved pension scheme but where the payment is made outside the Pension Reform Act, the conditions spelt out under Paragraph 18 of the Third Schedule to PITA will apply. In this case, the Appellant did not make the payment under an approved pension scheme.

It will therefore be interesting to see if a higher court will agree to this or decide otherwise. Nonetheless, companies are advised to make provisions for the tax on the gratuities paid to employees should a higher court overturn the

ruling. The clear conflict between Section 3 of PITA and paragraph 18 of the Third schedule also emphasizes the need to exercise due care whenever our tax laws are updated or a new compilation carried out. The need to synchronize all the related sections and schedules to the law cannot be overemphasized as it tends to minimize or eliminate ambiguity in our laws.

b) Applicability of penalty and interest on

assessment: The Tribunal rightly highlighted that interests and penalties are not due on an assessment until after two months following the date the assessment is issued without objection and appeal. Thus, interests and penalties are not automatically due on outstanding liabilities from an assessment.

The position of TAT aligns with the provision of Section 68 of PITA which states that payment of taxes on assessment is due within two months from the notice of assessment. Also, where an appeal has been made by, or on behalf of a person, the collection of tax would remain in abeyance until the objection or appeal is determined.

Conclusion

The decision of the TAT in this case has shown that gratuity is not liable to personal income tax.

However, section 3(1) (f) of PITA is an omnibus provision which charges to tax any gain or payment not specifically

captured. Another position which can be canvassed is that gratuity falls within "other payment" which should be liable to tax under PITA.

Notwithstanding the foregoing argument, the decision of the TAT that gratuity is not taxable under PITA is the current law until a higher court rules otherwise.

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