

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE PORT HARCOURT JUDICIAL DIVISION
HOLDEN AT PORT HARCOURT
ON FRIDAY THE 11TH DAY OF DECEMBER, 2020
BEFORE HIS LORDSHIP
HON. JUSTICE HILLARY I.O. OSHOMAH [JUDGE]

SUIT NO: FHC/PH/CS/30/2020

BETWEEN

EMMANUEL CHUKWUKA UKALA SAN

(Carrying on Legal Practice under the name and style of E.C. Ukala & Co.)

PLAINTIFF

AND

1. FEDERAL INLAND REVENUE SERVICE

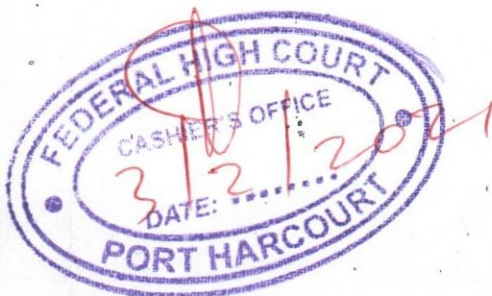
2. ATTORNEY GENERAL OF THE FEDERATION

DEFENDANTS

JUDGMENT

By an Originating Summons dated and filed the 2nd day of March, 2020, the Plaintiff prays this Honourable Court for the determination of the following 5 questions:

- (i) Whether upon the correct interpretation of the provisions of Section 18 to 26, Part II, Section 573 and related provisions of Part B of the Companies and Allied Matters Act, E.C. Ukala and Company is a company formed under the Companies and Allied Matters Act such as to vest it with the status of a body corporate as provided for under Section 37 of the said Act and such as to make it subject to the provisions of the Company Income Tax Act or other taxes administered by the 1st Defendant.
- (ii) Whether upon the correct interpretation of Section 26 of the Federal Inland Revenue Service (Establishment) Act the 1st Defendant has fulfilled the condition precedent for directing a tax audit?



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- (iii) Whether upon a correct interpretation of the provisions of item 59, Part I of the Second Schedule of the Constitution, the correct appreciation of the scheme of the Constitution and the residual powers of the States of the Federation to make laws as well as Section 4 of the Constitution of the Federal Republic of Nigeria, the Federal Republic of Nigeria and the Federal Government of Nigeria are entitled to make laws for the purpose of taxation other than for taxation of incomes, profits and capital gains, and if not, whether the 1st Defendant is entitled to enforce and administer laws inconsistent with, or in excess of the authority of the Federal Republic of Nigeria or the Federal Government of Nigeria to make law?
- (iv) Whether upon a proper construction and interpretation of the provisions of item 59 of the Second Schedule Part I (Exclusive Legislative List) of the 1999 Constitution of Nigeria as amended and Item 7 (a) and (b) of Part II (Concurrent Legislative List) of the 1999 Constitution of Nigeria as amended, the legislative competence of the National Assembly to impose tax and delegate the power of collection of taxes includes the power to levy or impose any form of Sales Tax including Value Added Tax or any other form of Levy?
- (v) Whether upon a correct interpretation of item 59, Part I and Items 7 and 8 Part II of the Second Schedule the power of the Federal Republic of Nigeria to delegate the power of collection of taxes can be exercised for the purpose of delegating the duty to any other person other than the government of a State or other authority of a State?

Upon the determination of the above questions, the Plaintiff seeks from this Honourable Court the following 16 reliefs:

1. A declaration that E.C. Ukala and Company being a registered business name with its address in Port Harcourt Rivers State of Nigeria is not a limited liability company or a company formed under Part II of the Companies and Allied Matters Act, Cap C20, Laws of the Federation and

accordingly not subject to the tax authority of the Federal Inland Revenue Service (the 1st Defendant).

2. A declaration that the 1st Defendant is not entitled to subject E.C. Ukala and Company to a tax audit or to any form of taxation.
3. A declaration that the letter of the 1st Defendant dated 12th February, 2020 directing the tax audit of E.C. Ukala and Company is incompetent, unlawful, null and void.
4. A declaration that there is no constitutional basis for the imposition, demand and collection of Value Added Tax (VAT) by the Defendants from the Plaintiff being that the constitutional powers and competence of the Federal Republic of Nigeria and the Federal Government of Nigeria, represented by the 2nd Defendant, is limited to the taxation of incomes, profits and capital gains which does not include Value Added Tax or any other species of sales tax.
5. A declaration that the constitutional powers of the Federal Republic of Nigeria and the Federal Government to impose taxes is limited to the items listed in item 59 of Part 1 of the Second Schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and does not include the power to impose Value Added Tax, Education Tax on persons other than those falling under its tax authority, Withholding Tax, Technology Levy among others.
6. A declaration that in so far as the Value Added Tax Act purports to impose, levy or authorize the demand and collection of Value Added Tax by the 1st Defendant or any other agency of the Federal Government represented by the 2nd Defendant, it is unconstitutional, illegal, null and void to the extent of its inconsistency with the provisions of the 1999 Constitution of Nigeria, as amended.
7. A declaration that the Constitutional power of the Federal Republic of Nigeria and the Federal Government of Nigeria to delegate the


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collection of taxes is limited by the provisions of items 7 and 8 of Part II (Concurrent Legislative List) of the Second Schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

8. A declaration that by virtue of the provisions of items 7 and 8 of the Part II (Concurrent Legislative List) of the Second Schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the power of the Federal Republic of Nigeria and the Federal Government of Nigeria to delegate the collection of taxes can only be exercised for the purpose of delegating the duty of collection of taxes to the Government of a State or other authority of a State and no other person.
9. A declaration that all statutory provisions made or purportedly made in the exercise of the legislative powers of the Federal Republic of Nigeria, which contain provisions which are inconsistent with or in excess of the powers to impose tax as prescribed by item 59 of Part 1 of the Second Schedule of the Constitution or inconsistent or in excess of the power to delegate the duty of collection of taxes as contained in items 7 and 8 of the Part II of the Second Schedule of the Constitution including, but not limited to (i) Federal Inland Revenue Service (Establishment) Act, (ii) Companies Incomes Tax Act (iii) Personal Income Tax Act, (iv) Value Added Tax Act and (v) Education Tax Act and National Information Technology Development Agency Act, among others are to the extent of their inconsistency or excessiveness, unconstitutional, null and void.
10. A declaration that the 1st Defendant is not entitled to enforce, implement or administer statutory and/or regulatory provisions imposing taxes or for the collection of taxes other than as empowered by item 59 of Part 1 and items 7 and 8 of Part II of the Second Schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended).


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11. A declaration that the Defendants are not entitled to subject the Plaintiff to double/multiple taxation in respect of incomes and profits for which the Plaintiff is liable to pay tax to the tax authority competent to receive taxes from his area of residence, namely; the Rivers State Inland Revenue Service.
12. A declaration that the Defendants are not constitutionally entitled to charge or impose levies, charges or rates (under any guise or by whatever name called) on the Plaintiff or at all.
13. An Order of Perpetual Injunction restraining the Defendants from further harassing, threatening and intimidating the Plaintiff in the name of conducting a tax audit exercise or howsoever invading or threatening to invade his office or chambers for the purpose of conducting any purported tax audit investigation.
14. An Order of injunction restraining the 1st Defendant from entering into the premises of the Plaintiff for the purpose of conducting a tax audit, from demanding for books, records or any other material for the purpose of conducting a tax audit on the Plaintiff or payment of taxes, levies, rates or charges to the 1st Defendant by the Plaintiff.
15. An order of injunction restraining the Defendants by themselves or by their servants, agents or privies from taking any step to compel the Plaintiff to pay any tax, levy or charges to the 1st Defendant or to appear personally before it for examination or to produce or cause to be produced for examination, books, documents and other information at any place or time, or in any manner whatsoever to compel the Plaintiff to submit to the taxation authority of the 1st Defendant.
16. An order of injunction restraining the Defendants by themselves or by their servants, agents, privies from interfering with the conduct of the Plaintiff's business or any manner howsoever causing any restraint or restriction to be placed on the operation of the Plaintiff's bank Accounts

including freezing his bank accounts or restricting access to any of the Plaintiffs Assets or properties.

The Plaintiff supported the Originating Summons with an Affidavit Setting out the Facts Relied Upon deposed to by one Nelson Edet Udoh, Chief Litigation Officer of the Plaintiff. Attached to the Supporting Affidavit are Exhibits A and B. Exhibit A is a copy of the Plaintiff's Certificate of Registration of Business Name "E.C. Ukala and Company" along with Form 2, while Exhibit B is a copy of the 1st Defendant's Letter dated 12th February, 2020 and titled "E.C. Ukala and Company Tax Audit Exercise: (2013 to 2018 Accounts)" addressed to the Managing Director, E.C. Ukala and Company, Port Harcourt, Rivers State.

The Plaintiff also filed an Affidavit of Non-Multiplicity of Action alongside the Originating Summons. The Originating Summons is accompanied by a Written Address wherein the Plaintiff formulated three issues for determination, thus:

- (i) Whether the Federal Republic of Nigeria and the Federal Government of Nigeria are entitled to make laws for the purpose of taxation other than for taxation of incomes, profits and capital gains, and if not; whether the 1st Defendant is entitled to enforce and administer laws inconsistent with, or in excess of the authority of the Federal Republic of Nigeria or the Federal Government of Nigeria to make laws?
- (ii) Whether the legislative competence of the National Assembly to impose tax or duties on capital gains, incomes or profits of persons and on documents or transactions by way of stamp duties extends to and includes the power to levy or impose any form of Sales Tax including Value Added Tax or any other form of Levy and if so, whether the power of the Federal Republic of Nigeria to delegate the power of collection of taxes can be exercised for the purpose of delegating the duty to any other person other than the government of a State or other authority of a State?
- (iii) Whether the Plaintiff being a Legal Practitioner carrying on private legal practice in Rivers State can be classified as falling within the tax

authority or jurisdiction of the Defendants in respect of Companies Income Tax, Value Added Tax, Education Tax and Technology Levy and if so, whether the conditions precedent to the conduct of a tax audit investigation has been met by the 1st Defendant?

In addition, the Plaintiff responded to the 1st Defendant by a Further Affidavit of 7 paragraphs dated and filed the 15th of September, 2020 and deposed to by same Deponent of Nelson Edet Udoh. Alongside the Plaintiff's Further Affidavit is a Reply Address dated and filed the same date of 15th of September, 2020.

Also, the Plaintiff further reacted to the 2nd Defendant vide a Further Affidavit of 6 paragraphs dated and filed the 15th of September, 2020 and also deposed to by same Deponent of Nelson Edet Udoh. Contemporaneously with the Further Affidavit is the Plaintiff's Reply Address dated and filed the same date as well.

In response to the Originating Summons, the 2nd Defendant entered an appearance by a Memorandum of Conditional Appearance dated 18th of August, 2020 but filed the 19th of August, 2020 and reacted to the substantive Suit vide a Counter Affidavit of 16 paragraphs dated and filed the 3rd of September, 2020 and deposed to by one Abiye Leslie-Halliday, State Counsel with the Federal Ministry of Justice, South/South Zone, Port Harcourt. Alongside the 2nd Defendant's Counter Affidavit is a Written Address wherein the 2nd Defendant adopted the 1st and 2nd Issues for determination formulated by the Plaintiff.

Furthermore, the 1st Defendant on its part entered appearance by a Conditional Memorandum of Appearance dated and filed the 18th of August, 2020 and launched a frontal attack against the Plaintiff's Suit vide a Notice of Preliminary Objection dated and filed the same date of 18th of August, 2020 that this Honourable Court lacks the jurisdiction to hear and determine this suit as presently constituted against the 1st Defendant and that this Suit be dismissed in limine on the following grounds:

- (1) That the Plaintiff did not issue and serve on the 1st Defendant a pre-action Notice before the commencement of this suit contrary to Section 55 (3) of the Federal Inland Revenue Service (Establishment) Act 2007.
- (2) That the Plaintiff did not comply with Section 56 of the Federal Inland Revenue Service (Establishment) Act for failure to serve the Originating Summons of this Suit on the Executive Chairman of the 1st Defendant at its principal office.
- (3) That the Plaintiff's Originating Summons is incompetent as it is predicated on a defective Originating process.
- (4) That there is no reasonable cause of action in this suit giving rise to an enforceable claim.

The Notice of Preliminary Objection is supported by an Affidavit of 10 paragraphs dated and filed the 18th of August, 2020 and deposed to by one Martha Okumor, Legal Officer in the employment of the 1st Defendant. Alongside the Notice of Preliminary Objection, the 1st Defendant filed a Written Address wherein he formulated three issues for determination, thus:

- (a) Whether or not the Plaintiff's action as presently constituted is incompetent having regard to the undisputed fact that the Plaintiff failed to serve a mandatory pre-action notice to the 1st Defendant by virtue of Section 55 (3) of the Federal Inland Revenue Service (Establishment) Act 2007.
- (b) Whether the Plaintiff's failure to serve the Originating Summons on the 1st Defendant as statutorily provided for renders this suit incompetent.
- (c) Whether there is a reasonable cause of action in this suit giving rise to an enforceable claim.

The 1st Defendant also filed in support of the Notice of Preliminary Objection a Further Affidavit of 11 paragraphs dated and filed the 3rd of September, 2020 and deposed to by one Gladdys Oziegbe, Legal Officer in the

employment of the 1st Defendant. Attached to the Further Affidavit are Exhibits FIRS1 and FIRS2. Exhibit FIRS1 is a copy of the Judgment delivered on the 1st day of June, 2020 by P.I. Ajoku, J. in Suit No. FHC/IB/CS/85/2019 Micheal F. Lana Vs. FIRS while the document attached as Exhibit FIRS1 is not a copy of Judgment of Dr. Nnamdi Dimgba, J. in Suit No. FHC/ASB/CS/75/2019 Dr. Lucky Okparayonte (Trading under the name and style Capitol Hill Clinic/Hospital) Vs. Zenith Bank & FIRS but a repetition of Exhibit FIRS2.

Contemporaneously with the Further Affidavit, the 1st Defendant filed a Reply on Points of Law dated 3rd of September, 2020.

The Plaintiff reacted to the 1st Defendant's Notice of Preliminary Objection vide a Counter Affidavit of 8 paragraphs dated and filed the 25th of August, 2020 and deposed to by the earlier mentioned Deponent of Nelson Edet Udoh. Alongside the Plaintiff filed a Written Address in Opposition wherein the Plaintiff distilled four issues for determination, thus:

- (i) Whether the Notice of Preliminary Objection filed by the 1st Defendant is competent and cognizable before this Honourable Court?
- (ii) Whether the requirement of pre-action notice in Section 55 (3) of the Federal Inland Revenue Service Act is applicable to the 1st Defendant rather than its Executive Chairman, Board Members and other officials specifically named in the sub-section by the statutory provision?
- (iii) Whether the service of the Originating processes on the 1st Defendant is proper and valid and if not, whether having received and responded to the Originating and other processes in this case, the 1st Defendant has not waived the right to complain about improper service in all the circumstances of this case?
- (iv) Whether the Plaintiff's Originating Summons discloses any reasonable cause of action against the 1st Defendant as to vest this Honourable Court with the requisite jurisdiction to entertain the Plaintiff's claim as presently constituted?




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On the substantive suit, the 1st Defendant reacted vide a Counter Affidavit of 19 paragraphs dated and filed the 3rd of September, 2020 and deposed to by the same Deponent of Gladys Oziegbe. Alongside the 1st Defendant's Counter Affidavit to the Originating Summons is a Written Address wherein the 1st Defendant addressed the Court on the issues for determination distilled by the Plaintiff in this suit.

Beginning with the Notice of Preliminary Objection, the 1st Defendant's Learned Counsel of J.N. Nwokolobia Esq. appearing with U. Brown Esq. and G.O. Oziegbe Esq., relied on all the paragraphs of the Affidavit in Support as well as the Further Affidavit and its attached Exhibits, and adopted the 1st Defendant's Written Address and Reply on Points of Law as his oral submission and legal argument to urge this Honourable Court to dismiss the Plaintiff's suit in limine on the grounds canvassed by the 1st Defendant.

In opposing the Preliminary Objection, Plaintiff's Senior Learned Counsel of D.C. Denwigwe (SAN) appearing with M.S. Agwu Esq., Dike Udenna Esq., R.W.B. Nnwoka Esq. and O.M. Akindeko Esq., relied on all the paragraphs of the Plaintiff's Counter Affidavit and adopted the Written Address in opposition as his oral submission and legal argument to urge this Honourable Court to refuse and dismiss the 1st Defendant's Notice of Preliminary Objection.

Senior Learned Counsel urged this Honourable Court to resolve all these issues in favour of the Plaintiff and dismiss the 1st Defendant's Notice of Preliminary Objection.

Coming to the substantive suit, Plaintiff's Senior Learned Counsel relied on all the paragraphs and attached Exhibits of the Affidavit Setting out facts in support of the Originating Summons, the Further Affidavits in reaction to the 1st and 2nd Defendants' Counter Affidavits and adopted the Written Address as well as the respective Replies on Points of Law to the 1st and 2nd Defendants as his oral submission and legal argument to urge this Honourable Court to

discountenance the arguments of the 1st and 2nd Defendants and grant the reliefs sought by the Plaintiff in this case.

In adumbrating, Plaintiff's Senior Counsel submitted that this Honourable Court should uphold the Supremacy of the Constitution as enshrined in Section 1 thereof to hold that the 1st Defendant cannot import into Item 59 of the Exclusive Legislative List any other item not so listed therein as to extend the authority of the 1st Defendant without the amendment of the constitutional provision by the National Assembly in accordance with the procedure laid down by the Constitution.

Plaintiff's Senior Learned Counsel also contended that the 1st Defendant for the first time introduced Item 67 of the Exclusive Legislative List in its oral argument before the court. Senior Learned Counsel submitted that an existing law cannot be introduced or relied upon to override an express provision of the Constitution, more so when this fact was never pleaded or averred to in any of the 1st Defendant's and 2nd Defendant's Counter-Affidavits and aside the fact that the said Item 67 is made subject to the provision of the Constitution.

Senior Learned Counsel submitted that in the determination of the issues submitted to this Honourable Court for resolution, this Honourable Court should take cognizance of the operation of Federal System of governance and the doctrine of separation of power and adopt the principles of interpretation that promotes the systems, particularly that which is in tandem with the intention of the law makers and effect must be given to clear and unambiguous words in the Constitution without making resort to extrinsic aid. Senior Learned Counsel cited the judicial authorities of **A/G Abia State Vs. A/G Federation (2006) All FWLR, Pt. 338, 604 at 736 paras B-D, (2005) All FWLR, Pt. 275, 414 at 450, A/G Ondo State Vs. A/G Ekiti State (2001) FWLR, Pt. 79, 1431 at 1463.**

Senior Learned Counsel for the Plaintiff relied on the judicial precedents of **S.A. Authority Vs. Regional Tax Board (1970) LPELR-2967 (SC) 15 paras C-D,**

FBIR Vs. Integrated Data Service Ltd (2009) LPELR-8191 (CA) 18-21 paras A-C to submit that in construing taxation legislative provisions, the settled principle is that all charges upon the subject must be imposed in clear and unambiguous language and every tax law is subject to the rule of strict interpretation.

Senior Learned Counsel also submitted that the 2nd Defendant, having canvassed no argument in respect of Issue 3 formulated for determination by the Plaintiff, must be deemed to have conceded and accepted the arguments of the Plaintiff on Issue 3 as correct. Senior Learned Counsel relied on the judicial authority of **INEC Vs. Nyako (2011) 12 NWLR, Pt. 1262, 439 at 531** amongst other cited judicial precedents.

In totality, Senior Learned Counsel for the Plaintiff urged this Honourable Court to discountenance the legal argument of the 1st and 2nd Defendants and grant the reliefs sought by the Plaintiff.

In opposing the substantive suit, the 1st Defendant's Learned Counsel of J.N. Nwokolobia Esq. relied on all the paragraphs of the 1st Defendant's Counter Affidavit and adopted the Written Address filed alongside as his oral submission and legal argument to urge this Honourable Court to dismiss the Plaintiff's suit.

In adumbrating, 1st Defendant's Learned Counsel referred this Honourable Court to Item 67 of the Exclusive Legislative List of the Constitution to submit that the provisions thereof covers and accommodates the profit and income of the Plaintiff. 1st Defendant's Learned Counsel also cited the judicial authority of **A/G of Lagos State Vs. Eko Hotels Ltd (2018) 7 NWLR, Pt. 169** to the effect that Section 315 of the Constitution received the VAT Decree made pursuant to the Military Decree which metamorphosed into the VAT Act as known today.

In response to the Plaintiff's contention that it is not a legal personality being an unincorporated body to be imposed VAT on his firm, 1st Defendant's Learned Counsel submitted that if the Plaintiff is not a legal personality, he

has no juristic personality to in the first place institute this action. 1st Defendant's Learned Counsel thus submitted that the Plaintiff is a legal personality that can be and is indeed subjected to the VAT Act.

1st Defendant's Learned Counsel further supplied this Honourable Court the judicial authorities of **A/G, Lagos State Vs. Eko Hotels Ltd (2018) NWLR, Pt. 1619, 518 at 559 paras A-B, A/G Ondo State Vs. A/G Federation (2002) 9 NWLR, Pt. 772, 222 at 241 Ratio 6 and Olafisoye Vs. FRN (2004) 4 NWLR, Pt. 864, 580 at 663 paras C-E** respectively on the constitutional validity of VAT Act, guide to interpretation of constitutional provisions, Items 67 and 68 of Exclusive Legislative List, meaning of the phrase "Incidental and Supplementary" as contained in 2nd Schedule, Part III of the Constitution; and Sections 25-37 (Offences and Penalties Sections) of VAT Act 1993 (as amended).

2nd Defendant's Learned Counsel of N.A. Timothy-Hart Esq. also relied on all the paragraphs of the 2nd Defendant's Counter Affidavit and adopted the Written Address contemporaneously filed with same as her oral submission and legal argument to urge this Honourable Court to dismiss the Plaintiff's suit. It is noted that the 2nd Defendant's Learned Counsel only canvassed argument on Issues 1 and 2 formulated for determination by the Plaintiff and proffered no legal argument on the Issue 3. Moreover, the 2nd Defendant's Learned Counsel legal arguments on the Issues 1 and 2 are verbatim replication and adoption of the 1st Defendant's legal arguments on the said Issues 1 and 2 and as such this Honourable Court will save its time from repetition of the legal arguments.

Having carefully considered the submissions of parties before me after painstakingly listening to the argument and counter argument of Learned Counsel to respective Parties and intimate and discrete perusal and examination of the gamut of processes filed by parties, I shall without ado proceed to determine the merit or otherwise of the Preliminary Objection of the 1st Defendant and in so doing, I hereby adopt the issues for determination as formulated by the 1st Defendant.

On the issue raised by the Plaintiff's Senior Learned Counsel about the competence of the Preliminary objection on the ground that Order 26 and Order 29 of the Rules of Court, only provides for and recognize Application as the process for challenging the jurisdiction of this Court and not a Notice of Preliminary Objection, and as such, since this Notice of Preliminary Objection is alien to the Rules of this Court, same is incompetent and ought to be struck out, I shall waste no time on this issue as towing the line of argument of the Plaintiff's Senior Learned Counsel would amount to holding tenaciously to the string of technicality at the expense of doing substantial justice as rightly contended by the Learned Counsel to the 1st Defendant/Applicant. Courts have moved away from the practice of using technicality to defeat substantial justice.

I am emboldened on this by the recent decision by the pen ultimate court in the case of **Douye Diri Vs. ANDP & 2 Ors (2020) Legalpedia (CA) 15861** where the court held thus:

"Indubitably, nowadays the courts have evolved the paradigm shift from the pangs of technicality to dishing out substantial justice. Justice fairly administered according to the rules of substantive law regardless of any procedural errors not affecting the litigants substantive rights, a fair trial on the merit. Technicality means a harmless error/mistake that does not go to the root of a case. See Olley Vs. Tunji (2013) 10 NWLR, Pt. 1362, 275. The spirit of the law does not reside in form and formalities, nor in technicalities. Substantial justice and technical justice, arch enemies in adjudication, had been in a protracted imaginary battle on which to win and arrest the attention of the Nigeria Courts. In the process of the judicial duel, however, the case law rightly intervened and slaughtered technicality and buried it deeply under the temple of substantial justice. To accede to the argument premised on technicality would be tantamount to resurrecting the deceased technicality. This will be an affront of law."

See also **Bello Vs. A/G of Oyo State (1986) 5 NWLR, Pt. 45, 828.**

Omisore Vs. Aregbesola (2015) 15 NWLR, Pt. 1482, 205.

Aigbobahi & Ors Vs. Edokpayi Aifuwa & Ors (2006) 2 SC, Pt. 1, 82.

State Vs. Gwanto (1963) 1 SCLR, 142.

Odeh Vs. FRN (2008) 3-4 SC, 147.

Chinwendu Vs. Mbamali & Anor (1980) 3-4 SC, 31.

It is trite that equity look at the content rather than the form. Since the contents of the said Preliminary Objection conform with the content of what an application should, either it is called Motion on Notice/Exparte or Notice of Preliminary Objection, whatever name given, such process would be deemed competent before the court.

I therefore over rule the Plaintiff on this issue and hold that the 1st Defendant's Preliminary objection is competent.

I so hold.

On issue 1,

It is trite that before a court can properly assume jurisdiction over a matter, the case comes before the court initiated by due process of law and upon fulfillment of condition precedent to exercise jurisdiction" Madukolu Vs. Nkemdilim (1962) 2 SCNL 341 [Underlining is mine for emphasis].

The Supreme Court of Nigeria in the case of **Nigerian Ports Plc Vs. S.E.S Ltd (2016)17 NWLR (PT 1541) P.191 at 212, Paras A-C**, while explaining the meaning and nature of pre-action notice stated as follows:

"A pre-action notice by the plaintiff to the opponent of the reason why the plaintiff is instituting a legal action against the opponent, and the purport of it, is to intimate the opponent of what to expect or to be confronted with in the course of the legal proceedings. The law requires that a plaintiff must meet all the requirements contained in the relevant statute, for it is by so doing that the defendant will be seised of the action contemplated against the defendant, so that the defendant can give the claim a proper consideration on the step to take e.g. whether

to contest the action or settle out of court. A pre-action notice is a letter usually given by the intending plaintiff's solicitors to the prospective defendant, giving him notice against him for the recovery of whatever money that was being owed to prospective plaintiff, or to remedy whatever the cause of action was, usually within seven days, failing which legal proceedings would be instituted. Nigerian Ports Plc Vs. NTIERO (1998) 6 NWLR (PT 555) 640 at 650-651 Paras H-B. Failure to serve a pre-action notice where it is so prescribed by statute is not a mere irregularity, rather it is a condition precedent of which failure to comply with deprive the trial court of any competence or jurisdiction to try the case. See Adegoke Motors Ltd Vs. Adesanya (1989) 3 NWLR (Pt 109) P.250 at 274; Madukolu Vs. Nkemdilim (Supra); Umukoro Vs. NPA (1997) 4 NWLR (PT 502)."

It is noteworthy that a pre-action notice is not limited to statute alone but at times also by contract which is given by a prospective plaintiff to a prospective defendant informing or intimating the defendant in respect of violation of plaintiff's right by the Defendant.

See E. A Agbale, "Pre-Action Notice and the Right of Access to Court", Ambrose Alli University Law Journal (2003), Volume 1, No 2 at P. 35.

It is therefore incumbent on the court that once a defendant raises an objection as to non-compliance with condition precedent to the exercise of court's jurisdiction, it is for the court seised of the proceedings to examine the objection and ascertain whether it can adjudicate.

Section 55 of the Federal Inland Revenue Service (Establishment) Act 2007 provides thus:

- 55: (1) Subject to the provisions of this Act, the provisions of the Public Officers Protection Act shall apply in relation to any suit instituted against any member, officer or employee of the Service.
- (2) Notwithstanding anything contained in any other law or enactment, no suit against the Executive Chairman, a member of the Board, or any other officer or employee of the Service for any

act done in pursuance or execution of this Act or any other law or enactment, or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or any other law or enactment, duty or authority, shall lie or be instituted in any court unless it is commenced;

- (a) Within three months next after the act, neglect or default complained of; or
 - (b) In the case of a continuation of damage or injury, within six months next after the ceasing thereof.
- (3) No suit shall be commenced against the Executive Chairman, a member of the Board, or any other officer or employee of the Service before the expiration of a period of one month after written notice of the intention to commence the suit shall have been served on the Service by the intending plaintiff or his agent.
- (4) The notice referred to in subsection (3) of this section shall clearly and explicitly state the -
- (a) cause of action;
 - (b) particulars of claim;
 - (c) name and place of abode of the intending plaintiff; and
 - (d) relief which he claims.

From the clear and unambiguous provisions of section 55(3) of the Act, it is as clear as crystal that the Act specifically mentioned the Executive Chairman, a member of the Board, or any other officer or employee of the Service, but not the Service, i.e. the 1st Defendant. The 1st Defendant's Learned Counsel has submitted that to really get the intendment of the drafters of the law, Section 55 (3) and (4) should be read along with the definition of "Service" in Section 1 (1) of the Act.

Section 1 (1) of the Act provides thus:

1(1) There is established a body to be known as the Federal Inland Revenue Service (in this Act referred to as "the Service").

There is nothing in section 1(1) of the Act to spur this court to agree with the Defendant's Learned Counsel that the provision of section 55(3) is to the effect that a pre-action Notice must mandatorily be served on the 1st Defendant before any suit can be competently commenced against the 1st Defendant.

Interestingly, section 1(2) provides that the Service, shall be a body corporate with perpetual succession and a common seal, may sue or be sued in its corporate name and may acquire, hold or dispose of any property, moveable or immovable, for the purpose of carrying out any of its functions under this Act. The section did not provide that the Service may sue or be sued in the name of the Executive Chairman, a member of the Board, or any other officer or employee of the service.

I agree wholeheartedly with the Plaintiff's Learned Senior Counsel that there is no ambiguity of any sort in the provisions of Section 55 (3) and (4) of the FIRS (Establishment) Act and same ought to be given its ordinary literal meaning without resort to external aid, and by rule of interpretation the express mention of Executive Chairman, Members of Board, Officer or employee excludes all others not mentioned in that provision.

I take refuge in the ancient Latin maxim *expressio Unius est exclusio alterius*, meaning, the express mention of one thing automatically excludes any other one unmentioned.

See *Ehuwa Vs. OSIEC* (2006) 18 NWLR, Pt. 1012, 544.

A/G of Lagos State Vs. A/G of Federation (2014) 9 NWLR, Pt. 1412, 217.

Buhari Vs. Yusuf & Anor (2003) 14 NWLR, Pt. 841, 446.

Opia Vs. INEC & Anor (2014) LPELR-22185 (SC).

Shinkafi & Anor Vs. Yari & Ors (2016) LPELR-26050 (SC).

Sun Ins. Nig. Plc Vs. Umez Eng. Const. Coy. Ltd (2015) LPELR-24737 (SC).

As rightly contended by the Plaintiff's Senior Learned Counsel, that the Lawmakers know the difference between the corporate entity, the statutory



body as distinct, separate and different from the officials or employees of the statutory body and thus sets out with exactitude in each enactment as to which of the two a Pre-action Notice is required. If they had wanted a Pre-action notice to be served on the 1st Defendant before commencement of action against it, they would have expressly and specifically mentioned the Service in section 55(3) like they did in section 57 (1) where it is provided that in any action or suit against the Service no execution or attachment of process in the nature thereof shall be issued against the Service unless not less than three months' notice of the intention to execute or attach has been given to the Service.

I equally in no less agree with the Plaintiff's Senior Learned Counsel that the Judgment of this Honourable Court delivered on 12th of December, 2019 by my Learned Brothers, Dr. Nnamdi Dimgba J. in Suit No. **FHC/ASB/CS/75/2019 Dr. Lucky Okparayonte (Trading under the name and style Capitol Hill Clinic/Hospital) Vs. Zenith Bank and FIRS**, decision of P.I. Ajoku, J. delivered on the 1st of June, 2020 in Suit, No. **FHC/IB/CS/85/2019 Michael F. Lana Vs. FIRS** and which Judgments I have read extensively are rendered per incuriam, and found as such, I refuse and resist the temptation to follow and/or adopt same, more so that the said decisions are merely persuasive and not binding on this Court.

See **Obeziako Vs. Nwagbogu & Anor (1972) 6 SC (Reprint) 31.**

Obeya Vs. Sowade (1969) NNLR, 17.

Arugu & Ors Vs. RSIEC & Anor (2010) LPELR-9086 (CA).

I therefore resolved the 1st issue against the 1st Defendant.

I so hold.

On issue 2, it is trite that service of Court process (Originating Process inclusive) is a crucial part of the adjudication process. It is the law that failure to effect service of a Court process where required constitutes a fundamental

defect. It goes to the root and lack of same deprives the Court the legal capacity and competence to hear and determine the matter.

See **Emeka Vs. Okoroafor & Ors. (2017) LPELR - 41738 at 31 -32 Paras E-B;**

Okeke Vs. Lawal & Ors. (2018) LPELR - 43929 at 20 - 21 Paras E - E;

Sha'aban Vs. Sambo (2010) 19 NWLR (PT. 1226) 353 at 360 Paras D-G; and Awoniyi Vs. Registered Trustees of AMORC (2000) 10 NWLR (Pt. 676) 522.

Proper service of an originating process is a condition precedent for the exercise of a Court's jurisdiction in a matter. The Supreme Court per *Rhodes-Vivour JSC* held thus:

"Indeed in **Madukolu & Ors. Vs. Nkemdilim (1962) 2 NSCC (PT. 374)**, this Court per *Bairamian JSC* made some observation on jurisdiction and the competence of a Court when His Lordship said that a Court is competent when:

1. It is properly constituted as regards numbers and qualifications of the members of the bench, and no members is disqualified for one reason or another; and
2. The subject matter of the case is within the jurisdiction, and there is no feature in the case which prevents the Court from exercising its jurisdiction; and
3. The case comes before the Court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction."

See **SLB Consortium Ltd Vs. NNPC (2011) 4 SC (Pt. 1) PG. 86;**

NNPC VS. CLIFCO Nig. Ltd (2011) 4 SC (Pt. 1) PG. 46;

Dangana & Anor. Vs. Usman & 4 Ors. (2012) 2 SC (Pt. 111) PG. 103.

"It follows that where a case is commenced before a Court without fulfilling the condition precedent, such a Court will lack the requisite competence to hear and determine the matter placed before it.

Failure to effect service of the Originating Processes in accordance with the law no doubt robs the Court the requisite jurisdiction to entertain the suit."

It is a settled principle of law that where the law prescribes the method of doing a thing, that method and no other method must be followed.

See **Yaki Vs. Bagudu (2015) 18 NWLR (Pt. 1491) 288 at 348;**

Saude Vs. Abdullahi (1989) 4 NWLR (Pt. 116) 387 at 422;

Adhekegba Vs. Minister of Defence (2013) 17 NWLR (Pt. 1382) 126 AT 147.

Section 56 of the Federal Inland Revenue Service (Establishment) Act, 2007 provides thus:

"a notice, summons or other document required or authorized to be served on the Service under the provisions of this Act or any other law or enactment may be served by delivering it to the Executive Chairman or by sending it by registered post addressed to the Executive Chairman at the principal office of the Service".

The Defendant has contended that the service, in this instance suit, was effected on the FIRS Micro and Small Tax Audit 1 Office, South-South Regional Tax Audit Office, in Port Harcourt, rather than directly on the Executive Chairman or by sending it by registered post addressed to Executive Chairman, was done in bad faith and in defiance of the statutory provision and therefore renders the suit incompetent.

With the choice of word "may" used in section 56 of the Act, could it be said that the only permissible way of effecting service on the Defendant are as stated in the Act? This I shall answer anon.

The etymological meaning of "may" is permissive and facilitative, and seldom can be "must" and imperative, it assumes this last-mentioned character, when there is anything in the provision that makes it the duty on the person on whom the power is conferred to exercise that power. When the exercise

of the power is coupled with a duty on the person to whom it is given to exercise it, then it is imperative.

The Supreme Court in **Edewor Vs. Uwegba & Ors. (1987) LPELR-1009 (SC)** on interpretation of the word "may" held thus:

"Generally the word 'may' always means 'may'. It has long been settled that may is a permissive or enabling expression. In **Messy Vs. Council of the Municipality of Yass (1922) 22 S.R.N.S.W. 494** per Cullen, C.J at pp.497, 498 it was held that the use of the word 'may' prima facie conveys that the authority which has power to do such an act has an option either to do it or not to do it. See also Cotton, L.J. in **Re Daker, Michell v. Baker (1800) 44 CH.D 282**. But it has been conceded that the word may acquire a mandatory meaning from the context in which it is used. See **Johnson's Tyre Foundary Pty Ltd. Vs. Shire of Maffra (1949) A.L.R. 88**. The word may also acquires a mandatory meaning from the circumstances in which it is used. Most of the cases in which the word 'may' has a mandatory meaning relate to cases in which they are used in penal statutes conferring powers to Courts. In **Re Baker (Supra)** Cotton L.J. said - "I think great misconception is caused by saying that in some cases "may" means must. It never can mean (must) so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases where a Judge has a power given him by the word 'may', it becomes his duty to exercise it". In **Over v. Felton (1966) A.L.R. 1088** Jenkyn, J. said that "it lies upon those who contend that an obligation exists to exercise that power to show in the circumstances of the case something which according to the above principles, creates that obligation." Per NNAMANI, J.S.C. (as he then was).

See also **Nigerian Navy Vs. Labinjo (2012) 17 NWLR, Pt. 1328, 51**.

Abah Vs. Monday (2015) 14 NWLR, Pt. 1480, 565.

I have not seen anything in section 56 of the Act suggesting that the word "may" as used therein is used in the context of "shall," as such, it is my considered and humble view that Service can be effected on the Defendant in another way permissible in law.

The issue now is, is there any other way provided by any other law through which the Defendant could be served?

I make recourse to the Civil Procedure Rules of this Honourable Court.

Order 6 Rule 8 of the Rules of this Court provides thus:

"where the suit is against a corporation or a company authorized to sue and be sued in its name or in the name of an officer or trustee, the writ or any other document may be served, subject to the enactment establishing that corporation or company or under which the company is registered, as the case may be, by giving the writ or document to any director, secretary, or other principal officer, or by leaving it at the office of the corporation or company."

By the combine and community reading of Section 56 of the Act and Order 6 Rule 8 of the rules of this court, the Defendant may be served by delivering it to the Executive Chairman or by sending it by registered post addressed to the Executive Chairman at the principal office of the Service or by giving the writ or document to any director, secretary, or other principal officer, or by leaving it at the office of the Defendant.

I am not unmindful of the fact that this provision is made subject to section 56 of the Act, however as earlier pointed out the provision is permissible and not mandatory and is made to allow the applicability of the provisions of Order 6 Rule 8 of the Rules of this Honourable Court.

It is interesting to note that the service of the Originating process(es) of the Court for that matter is made necessary in the interests of the Defendant so that the Defendant will be aware of the pendency of a claim against him and so that orders may not be made behind his back.

It is not in dispute that the 1st Defendant was served at the 1st Defendant's Micro and Small Tax Audit 1 Office, South/South Regional Tax Audit Office, in Port Harcourt. The Defendant is not contesting the fact that the service was not effected in it office, instead the 1st Defendant is only contending that it

was not properly served in accordance with the law. The 1st Defendant had not only entered appearance in this suit, though in protest, and filed a defence to the originating summons. Even as the 1st Defendant had entered only conditional appearance, what was the injustice caused to it by the mode of service, which was effective and effectual? The line of cases vehemently cited and heavily relied upon are clearly inapplicable as it is distinguishable being that: (1) the Defendant had not controverted service, (2) had not shown that where the Service was effected is not its office. (3) has not shown why this Court should not take judicial notice of the fact that its Micro and Small Tax Audit 1 Office, South/South Regional Tax Audit Office, in Port Harcourt is the Defendant's office.

See **Bulet Int'l Ltd & Anor Vs. Olaniyi & Anor (2017) LPELR-42475 (SC).**

Cityscape International Development Plc Vs. Gwam (2018) LPELR-44512(CA)

Kalu Mark & Anor Vs. Gabriel Eke 17 NSCQR 60;

Chiazor Vs. Tukur (2007) All FWLR Pt. 354 Pg. 394.

As rightly contended by the Learned Senior Counsel to the Plaintiff, the proper way for the Defendant to dispute service by the Bailiff in the light of the Proof of Service put in the Court's File by the Bailiff of this Court is to file a Counter Affidavit to the affidavit of the Bailiff which the Defendant failed to do in this instant case. The 1st Defendant's Learned Counsel has contended that the service was disputed in the Affidavit in Support of their objection. I hold that this is not enough as the only way to controvert an Affidavit is to file a Counter Affidavit, failing which it will be deemed that the Affidavit is unchallenged.

I take solace and emboldened by the position of the law which was well captioned in the case of **IBWA Vs. Sasegbon (2007) 16 NWLR, Pt. 1059, 195** when the court held thus:

"Where there is a Proof of Service on a party by means of an Affidavit of Service or Proof of Service by a Bailiff or Officer of Court in the Court's File, the only recommended way of challenging or rebutting

the presumption of such service by the party concerned is by filing a Counter Affidavit to controvert the Affidavit of Proof of Service. Where a Notice of Preliminary Objection supported by an Affidavit or a Motion on Notice supported by an Affidavit praying the Court to set aside the service on the ground of no service or improper service, since the Proof of Service or Affidavit of Service has not in the strict sense of it been rebutted or effectively challenged, it therefore remains valid and the service deemed to be properly and validly effected."

See also *Fatokun Vs. Somade* (2003) 1 NWLR, Pt. 802, 431.

Ethiopian Airlines Vs. Onu (2005) 11 NWLR, Pt. 936, 214.

Uko Vs. Ekpeyoung (2006) 5 NWLR, Pt. 972, 70.

On the strength of the foregoing judicial decisions, I no less wholeheartedly agree with the Plaintiff's Senior Learned Counsel that presumption of good, valid and sufficient service of the Originating Processes on the 1st Defendant as evidenced vide the Proof of Service put in the Court's File by the Bailiff of this Honourable Court remains uncontroverted, unchallenged and uncountermanded and this Honourable Court is bound to act on it.


I so hold.

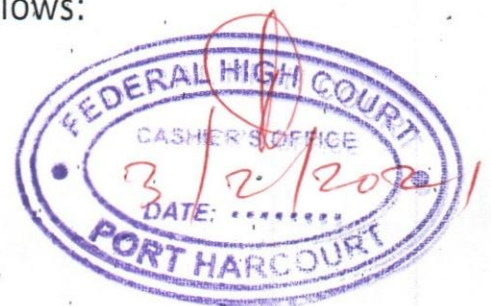
More importantly, even if the service was irregular, (without conceding that it was irregularly done) to my mind, it does not render the action void; but it voids the service.

Skye Bank Vs. Tuns Farms Nig. Ltd (2015) LPELR- 25812 (CA).

I therefore hold that the 1st Defendant was properly served in substantial compliance with section 56 of the Act and Order 6 Rule 8 of the Rules of this court. This issue is resolved against the Defendants.

On issue 3, the apex court in the case of *Chevron Nigeria Ltd. Vs. Lonestar Drilling Nig. Ltd.* (2007) 16 NWLR, Pt. 1059, 168 on the meaning of cause of action and reasonable cause of action held as follows:


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"a cause of action is the entire set of circumstances giving rise to an enforceable claim. It is, in effect, the fact or combination of facts which give rise to a right to sue and it consists of two elements-the wrongful act of the defendant which gives the plaintiff his cause of complaint and the consequent damage. It is every fact that would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. A reasonable cause of action means a cause of action with same chance of success when only the allegations in the pleadings are considered. If when those allegations are examined, it is found that the alleged cause of action is certain to fall, the statement of claim should be struck out. Ibrahim Vs. Osim (1988) 1 NSCC 1184; Akilu Vs. Fawehinmi (No. 2) (1989) 2 NWLR (Pt, 103) 122. Per Oguntade JSC.

In the same vein, Karibi-White JSC in **Bello Vs. A.G Oyo State** (1986) 5 NWLR (Pt. 45) 828 at 876 held thus:

"I think a cause of action is constituted by the bundle or aggregate of facts which the law will recognize as giving the Plaintiff a substantive right to make the claim against the relief or remedy being sought. Thus, the factual situation on which the plaintiff relies to support his claim must be recognized by the law as giving rise to a substantive right capable of being claimed or enforced against the defendant. In other words, the factual situation relied upon must constitute the essential ingredients of an enforceable right or claim. See *Trower S Sons Ltd. Vs. Ripstein* (1944) AC 254 at 263; *Read Vs. Brown* 22 QBD 128; *Cooke Vs. Gill* (1873) LR 8 CP 107; *Sugden Vs. Sugden* (1957) ALL ER 300; *Jacson Vs. Spittal* (1870) LR 5C p. 547. Concisely stated, an act on the part of the defendant which gives to the plaintiff his cause of complaint is a cause of action."

In order to find a Defendant liable in civil proceedings, the Plaintiff must prove that the legal conduct of the Defendant has done some wrong to the Plaintiff, a wrong which justifies a relief in law. In other words, there must be a legal

nexus between the claim and the legal conduct of the Defendant in such a way that a court will find the Defendant liable. Where there is no such nexus, a trial judge cannot find the Defendant liable and the claim must fail.

The Plaintiff by this suit is challenging the decision and action of the 1st Defendant directing a tax audit to be carried out on the Plaintiff who, according to the Plaintiff, is not a limited liability company and not under the tax jurisdiction of the 1st Defendant in respect of VAT, Education Tax, Withholding Tax and Technology Levy contrary to the provisions of the Constitution and other extant laws of Nigeria, and the 1st Defendant's insistence on enforcement of invalid and inapplicable tax laws against the Plaintiff.

The Plaintiff in paragraph 7 of the Affidavit Setting Out the facts relied upon in Support of the Originating Summons averred that the 1st Defendant by its Letter of 12th February, 2020 addressed to the Managing Director, E.C. Ukala and Company and under the caption "E.C. Ukala & Co., Tax Audit Exercise: (2013) to 2018 Accounts)" wherein the 1st Defendant indicated that the Plaintiff's Company (firm) has been referred for routine tax audit. The audit will cover all taxes (VAT/PAYE/Company Income Tax/Capital Gain Tax/Education Tax, Technology Levy) administered by the Federal Inland Revenue Service and that a team of tax audit inspectors from the 1st Defendant's office will be visiting the Plaintiff's Office/Company on 3rd March, 2020 at 10.00am prompt for this exercise.

Also in paragraph 8, the Plaintiff averred that E.C. Ukala & Co. is a registered business name and not a limited liability company and does not have a Managing Director, any Director or Company Secretary and is not within the jurisdiction of the 1st Defendant in respect of Company Income Tax, Capital Gains Tax not being a business involving capital gains, Education Tax and Technology Levy and that it is generally not a business under the tax authority of the 1st Defendant.

Yet in paragraph 9, the Plaintiff further averred that before proposing the 3rd day of March, 2020 as the date for storming his law office/chambers for the purpose of conducting the propose tax audit, the 1st Defendant did not call for any tax return from the Plaintiff and even the questionnaire attached to the letter (Exhibit A) is not applicable to any business other than a body corporate which has Managing Director or Company Secretary.

From the foregoing averments, it is crystal clear that the alleged wrongful act of the 1st Defendant which the Plaintiff complained of is the decision of the 1st Defendant to subject the Plaintiff to tax laws and regime which, according to the Plaintiff, is only applicable to Limited Liability Company and not persons like the Plaintiff and coupled with the fact that the conditions precedent for calling for tax return and/or audit if at all, was not met by the 1st Defendant before its Letter dated 12th February, 2020.

The totality of the foregoing in my view gives rise to an enforceable claim and as such this suit discloses a reasonable cause of action against the Defendant.

This issue is again resolved against the 1st Defendant.

I so hold.

Having resolved all the issues against the 1st Defendant, I hereby hold that the Preliminary objection of the 1st Defendant is totally unmeritorious and I find no substance in the said objection and same is accordingly dismissed.

I so hold.

Now on the substantive suit, I hereby adopt the three issues as formulated by the Plaintiff for the determination of the substantive Originating Summons. However, issues 1 and 2 will be taken together.

On issues 1 and 2, Section 1 (1) of the 1999 Constitution provides thus:

"This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria."

The above principle was succinctly enunciated in **INEC Vs. Musa (2003) 3 NWLR (Pt. 806) 7**, where it was held among other things that:

“Where the Constitution has enacted exhaustively in respect of any situation, conduct or subject, a body that claims to legislate in addition to what has been enacted must show that it has derived the legislative authority to do so from the Constitution.”

It was also held in that case that where the Constitution has set the condition for doing anything, no other Act of the National Assembly or Law of a State can alter those conditions in any way, directly or indirectly, unless the Constitution itself as an attribute of its supremacy expressly authorizes it.

Section 4 (2)(3)(4) of the Constitution gives the National Assembly the power to make laws for the Federal Government for all the matters under the Exclusive Legislative List and for matters under the Concurrent Legislative List while in contra-distinction, Section 4 (7) (a & b) thereof provides that the House of Assembly of a State shall have power to make laws for any matter not included in the Exclusive Legislative List, for matters prescribed in the Concurrent Legislative List and matters outside both the Exclusive and Concurrent Legislative Lists.

See **F.R.N. Vs. Okey Nwosu (2016) 17 NWLR (Pt. 1541) 226 at 304**.

The general provisions that relate to or touch on taxation and revenue begins when Section 24 (f) of the Constitution stated that every citizen shall “declare his income honestly to appropriate and lawful agencies and pay his tax promptly”; continued with Section 44 (2) (a) that “nothing in subsection (1) of Section 44 shall be construed as affecting any general law for the imposition or enforcement of any tax, rate or duty”. Thus Section 44 rolled in taxation by payment of taxes, rates and duties wherein no other law can affect.

The 1999 Constitution in limiting the powers exercisable by the National Assembly to make laws on stamp duties, taxation of incomes, profits and capital gains, except as otherwise prescribed by this Constitution is more expository in Items 58 and 59 of the Exclusive Legislative List under Part 1 of the Second Schedule to the 1999 Constitution, Items 7–10 and 18 and 19 of

the Concurrent Legislative List and S.32 of Item N, Part 1 of the Third Schedule of the 1999 Constitution.

While Items 7–10 of the Concurrent Legislative List provides that:

7. "In the exercise of its powers to impose any tax or duty on (a) capital gains, incomes or profits of persons other than companies; and (b) documents or transactions by way of stamp duties; the National Assembly may, subject to such conditions as it may prescribe, provide that the collection of any such tax or duty or the administration of the law imposing it shall be carried out by the Government of a State or other authority of a State.
8. Where an Act of the National Assembly provides for the collection of tax or duty on capital gains, incomes or profit or the administration of any law by an authority of a State in accordance with paragraph 7 hereof, it shall regulate the liability of persons to such tax or duty in such manner as to ensure that such tax or duty is not levied on the same person by more than one State.
9. A House of Assembly may, subject to such conditions as it may prescribe, make provisions for the collection of any tax, fee or rate or for the administration of the Law providing for such collection by a local government council.
10. Where a Law of a House of Assembly provides for the collection of tax, fee or rate or for the administration of such Law by a local government council in accordance with the provisions hereof, it shall regulate the liability of persons to the tax, fee or rate in such manner as to ensure that such tax, fee or rate is not levied on the same person in respect of the same liability by more than one local government council.

It is apparent that based on the above, the National Assembly is only empowered to make laws for imposition of stamp duties, taxes on incomes, profits and capital gains and no more. A look at Item 59 of the Exclusive Legislative List only takes cognizance of contrary provisions elsewhere in the 1999 Constitution, and no such divergent or dissimilar provision occur

anywhere else in the 1999 Constitution. In this regard, it is noted that Items 7 and 8 of the Concurrent Legislative List merely restates the inter-relatedness of what the Constitution itself prescribed in Items 58 and 59 of the Exclusive Legislative List. The only difference is that Item 8 of the Concurrent List further mandates the National Assembly to make laws that would regulate States in the collection of the Federal Taxes for which it had exclusive jurisdiction that is stamp duties, taxes on incomes, profits and capital gains on behalf of the Federal Government. The concurrence between the two Legislative Lists on taxation of incomes, profits, capital gains and stamp duties is demonstrative of an unwavering restriction and limitation on the powers of the National Assembly to make laws that seek to impose general taxes on the citizenry.

It is clear as crystal that the 1999 Constitution expressly prohibits the National Assembly from enacting a law on any other head of revenue or taxation except for capital gains, incomes of profits of persons and payment of stamp duties on documents and transactions. Thus, to my considered legal view if the National Assembly veers into making laws for any other item of taxation outside those for which the 1999 Constitution expressly and specifically vests the National Assembly with powers to make laws, they become a nullity and are voided by reason of such inconsistency. See Section 1 (2) of the 1999 Constitution.

In **Attorney General of the Federation Vs. Attorney General of Lagos State (2013) 16 NWLR [Pt. 1380] 249**, the Supreme Court warned thus:

"In effect, the Federal Government lacks the Constitutional vires to make laws outside its legislative competence which are by implication residual matters for the State Assembly. The National Assembly cannot, in exercise of its powers to enact some specific laws, take liberty to confer authority on the Federal Government or any of its agencies to engage in matters which ordinarily ought to be the responsibility of a State Government or its agencies. Such pretext cannot be allowed to inure to the Federal Government or its agencies so as to enable them encroach upon the exclusive Constitutional authority conferred on a State under its residual power."

It ordinarily flows from the provisions of Items 58 and 59 of the Exclusive Legislative List, and Items 7 and 8 of the Concurrent Legislative List that the power vested in the National Assembly to regulate the administration of the collection of stamp duties, taxes on incomes, profits and capital gains does not include arrogating to itself the power to enact laws and to allocate powers to collect any of the classes of taxes outside its legislative competence as stated above. The purpose of this provision in the 1999 Constitution is rather to ensure that there is uniformity in the administration and collection of stamp duties, taxes on incomes, profits and capital gains, to secure the role and purpose States are to fulfill their responsibility under the Constitution in that regard and to reinforce the principle of federalism.

On the contrary, Items 9 and 10 of the Concurrent Legislative List under Part II of the 1999 Constitution vests on the States powers that are the converse of what is provided for under Items 59 of the Exclusive List and Items 7 and 8 of the Concurrent Legislative List. Items 9 and 10 of the Concurrent Legislative List provide that States Houses of Assembly shall make laws for the imposition, demand, assessment, collection and administration of "any tax", fees, levies and rates.

As stated in the earlier part of this Judgment it is trite that what is not expressly included or mentioned in a statutory instrument is excluded. This principle is conveyed by the Latin Maxim, *expressio unius est exclusio alterius* as stated in the case of **Ogbuniya Vs. Okudo (1976) 6-9 S.C. 32; PDP Vs. INEC (1999) 11 NWLR (Pt. 626) 200, A/G of Lagos State Vs. A/G of Federation (supra), Shinkafi & Anor Vs. Yari & Ors (supra) and Opia Vs. INEC & Anor (supra).**

To my considered humble but strong view a combine and community reading of Items 59 of the Exclusive List and Items 7-10 of the Concurrent Legislative List shows that the deliberate omission from the entries contained within Items 59 of the Exclusive List and Items 7 and 8 which dwells on taxation of incomes, capital gains and duties on documents and transactions on the one hand; and on "any tax", levies, rates and fees stated in Items 9 and 10 of the Concurrent Legislative List on the other hand draws a Berlin Wall of separation between what the Constitution authorizes the National Assembly to do, and what States Houses of Assembly should do. It ordinarily follows that the express mention of taxation of incomes, capital gains and duties on

documents and transactions expressly excludes any references to "any tax", levies, rates and fees.

This is why vesting the National Assembly with powers to arrogate to itself authority to allocate powers to levy, impose or collect any form of Sales Tax including Value Added Tax or any other form of Levy is to my considered humble view contrary to the express provisions of the 1999 Constitution.

I so hold.

There is no way the National Assembly could validly address an issue that has been constitutionally reserved for States and Local Government Councils and such acts be held to be valid. It is therefore unconstitutional for 1st Defendant to enforce and administer laws inconsistent with, or in excess of the authority of the Federal Republic of Nigeria or the Federal Government of Nigeria to make laws.

I so hold.

It is trite, as rightly contended by the Plaintiff's Senior Learned Counsel that once the law has prescribed a particular mode of doing a thing or exercising a statutory power, any other mode of exercise of it is excluded (1) **Amasike Vs. The Registrar General C.A.C. & Anor (2010) 5-7, SC, Pt. 1, 147**, (2) **Nig. Social Ins. Trust Fund Mgt. Board Vs. Kilfco Nig. LTd (2010) LPELR-2006 (SC)**. (3) **Co-operative & Commerce Bank Nig. Plc Vs. A/G of Anambra State & Anor (1992) LPELR-875 (SC)**.

Item 7 specifically, expressly, unequivocally and unambiguously states that the National Assembly may, subject to such conditions as it may prescribe, provide that the collection of any such tax or duty or the administration of the law imposing it shall be carried out by the Government of a State or other authority of a State. Flowing from the foregoing, doing otherwise by delegating the power to collect any tax or duty or administration of the law imposing it on private citizens and/or corporate organization, such as the 1st Defendant, is to my strong but humble view unconstitutional, unlawful and null and void.

Issues 1 and 2 are hereby by order of this Honourable Court resolved in favour of the Plaintiff.

I so hold.

On issue 3, The Black's Law Dictionary defines tax as "a charge by the Government on the income of an individual, corporation or trust as well as the value of an estate or gift. The objective in assessing the tax is to generate revenue to be used for the needs of the public". The Webster Dictionary defines tax in its Business Dictionary as "a charge or burden, usually pecuniary, laid upon persons or property for public purposes". It also says it is "a forced contribution to wealth to meet public needs of a government".

The 1999 Constitution prescribes in section 24(f) that it shall be the duty of every citizen to declare his income honestly to appropriate and lawful agencies and pay his tax promptly. This means that lawyers who are Nigerian citizens have a constitutional duty to pay taxes. It presented that taxes be paid to all the three tiers of Government by citizens (lawyers inclusive) who earn incomes from such sources as spelt out hereunder: - Federal Taxes as spelt out in the Part 1 of the Exclusive Legislative List in items 16, 25, 58, 59 which are customs and excise duties, export duties, stamp duties, taxes on corporate profits and gains respectively.

State Taxes as spelt out in item D, paragraph 7 of Part II of the Second Schedule in the Concurrent Legislative List to wit: Personal Income Tax and Stamp duties on documents and transactions by individual lawyers.

Local Government taxes in the form of rates and licenses as stipulated in paragraph 1(b) of the Fourth Schedule.

Various laws constitute the legal basis for taxation of lawyers amongst other citizens. Usually, lawyers work as either employees or self-employed persons. They usually practice as sole proprietorships or partners or limited firms. Whichever category a lawyer falls into, he must pay taxes for as long as he earns income except where the law provides otherwise. Lawyers in different

fields will pay different taxes. This means that all lawyers do not and will not pay the same taxes. For example, lawyers who are employees will pay taxes under the Pay As You Earn (PAYE) Scheme monthly deduction from salaries at graduated rates after enjoying reliefs.

See **Section 3 (1) paragraph B of Personal Income Tax Act.**

However, lawyers with practicing firms will pay as self-employed persons based on their incomes either as individuals, partners or registered firms.

See **Section 3 (1) paragraph A of Personal Income Tax Act.**

The rates of taxes differ among these categories. This should be noted from the onset as horizontal and vertical equity demand that lawyers on the same income level pay same taxes while those on different income levels pay different taxes. While the lawyers who are employees pay taxes on their salaries (incomes) on graduated rates up to a maximum of 25%, those in partnerships or registered firms will pay taxes based on ratios of sharing and 30% of adjusted profit respectively.

The various laws that impose taxes on individuals, partnerships, corporate bodies or property under which lawyers pay taxes are as follows: A. The 1999 Nigerian Constitution B. The tax Laws: (1) The Personal Income Tax Act, Cap P8, LFN, 2004 (2) Value Added Tax Act, Cap 41VI, LFN, 2004 (3) Stamp Duties Act Cap S8, LFN, 2004 (4) Capital Gains Tax Act, Cap C1, LFN, 2004 (5) The Companies Income Tax Act Cap C21, LFN, 2004 (6) Customs & Excise Management Act Cap C45, LFN, 2004 (7) Taxes and Levies (Approved List for Collection) Act, Cap T2, LFN, 2004. 8. Local Government bye-laws.

However, Company Income Tax is tax to be paid by Companies and not individual.

See section 9 and 10 of the Companies Income Tax Act CAP C21 LFN 2004. Section 105 of the Companies Income Tax Act CAP C21 LFN 2004 which is the interpretation section defines Company as any company or corporation (other than a corporation sole) established by or under any law in force in Nigeria or elsewhere.

In the same vein, the interpretation section of Companies and Allied Matter Act, 2020 also defines Company or existing Company as "Company formed and registered under this Act or, as the case may be, formed and registered in Nigeria before and in existence on the commencement of this Act. A Company that is incorporated under part B of the Companies and Allied Matters Act is a limited liability company and not a registered business under which category the Plaintiff falls into. In other words, the Plaintiff is not a taxable person under the Companies Income Tax Act and does not fall within the tax authority or jurisdiction of the Defendants in respect of Companies Income Tax, Value Added Tax, Education Tax and Technology Levy.

See **FCDA Vs. Unique Future Leaders International Ltd (2014) LPELR-23170.**

In a nutshell, all that this Honourable Court is saying is that as a general principle of law taxes cannot be imposed on any subject without the consent of the Parliament and Learned Counsel are in adidem on this trite position of the law and judicial decisions cited by parties apposite and correctly stated the legal position.

See **LSDPC Vs. Williams (1978) SC.**

S.A. Authority Vs. Regional Tax Board (1970) LPELR-2967 (SC).

Best Children Int'l Schools Ltd Vs. FIRS (2018) LPELR-46727 (CA).

In the instant case, the germane question is, where is the consent of Parliament. This is the jurisprudence of Tax Law.

The consent of the Parliament is or are deduced by statutes and Acts passed by the Parliament and which of course includes Decrees passed by Military regimes by doctrine of Political adventure and thus becomes part and parcel of our law by virtue of Section 315 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

This therefore leads us to Taxes and Levies (Approved List for Collection) Decree, 1998, now Act, LFN, 2002.

This particular law confers separation of Taxing powers on the three tiers of Government to wit:

- (a) The Federal Government of Nigeria, whose Agent is the Federal Inland Revenue Service (FIRS).
- (b) Component States Government whose Agent are the States respective State Board of Internal Revenue (SBIR).
- (c) Local Government Councils, whose Agent is the Local Government Revenue Committee (LGARC).

From the foregoing Tax jurisprudence and in tandem with the entrenched spirit of federalism, none of the three above listed tiers of Government should interfere or make incursion into the jurisdiction of the other.

As held earlier in the foregoing, the income arising and/or derived from trade or vocation of limited liability companies under the Companies and Allied Matter Act (CAMA) is vested on the Federal Inland Revenue Service, the 1st Defendant as an Agent of the Federal Government of Nigeria.

The issue before this Honourable Court is that the Plaintiff is contending that he is not a limited liability company because he is practicing under the name and style of E.C. Ukala & Co., being a mere registered business name, and thus qualifies as an individual under Section 3 (1) paragraph (a) of Personal Income Tax Act (PITA) 1993 (As Amended).

In this instance, it is not in doubt that the Plaintiff's income arises and is derivable from his trade, vocation and/or profession as a legal practitioner and plying his trade in Port Harcourt, Rivers State of Nigeria. Apart from carrying on his business in Rivers State, there is a non-contestable fact that the Plaintiff is equally resident and domiciled in Rivers State apart from occasional movement to other States within Nigeria.

See uncontroverted and uncontradicted depositions in paragraphs 3, 6, 11 and 12 of the Supporting Affidavit of the Plaintiff's Originating Summons.

As a corollary, since the Plaintiff's income is derived from private legal practice as an individual and the Plaintiff is domiciled and resident in Port Harcourt, Rivers State, it is therefore within the ambit of Section 3 (1) of paragraph (a) of Personal Income Tax Act (PITA), 1993, as amended by

Personal Income Tax Amended Act (PITAA) 2011, and since there exist no evidence before this Honourable Court that the Plaintiff has incorporated the trade name of E.C. Ukala & Co. into a limited liability company, it is my considered strong view that the Plaintiff retained his individual personal status different and quite distinct from the entrenched doctrine in the notorious judicial precedent of **Solomon Vs. Solomon (supra)**.

To the consideration of the three Tax Authorities as to who have jurisdiction to tax the income of the Plaintiff, I shall seek guidance from Part 2 of Taxes and Levies (Approved List for Collection) Act, Laws of the Federation of Nigeria, 2004.

By virtue of this Act, the Authority entitled and enabled to collect taxes from the Plaintiff as an individual is in no doubt the Rivers State Board of Internal Revenue.

The grievance and grouse of the Plaintiff is that he was served with a Notice of Impending Tax Audit by the 1st Defendant, Federal Inland Revenue Service.

The germane question to ask at this juncture is, does the Plaintiff comes within the purview of persons within the jurisdiction of the 1st Defendant?

I honestly do not think so and the answer is a thundering No!

This is because the Plaintiff is an individual income earner plying, carrying and practicing his trade, vocation and profession in his personal capacity.

On the strength of the foregoing, it is my strong but humble view that the Plaintiff's earned income do not come within the purview and scope of income arising and derived from the operations of a limited liability company and therefore, the only and relevant Tax Authority obligated by law and vested with the capacity and jurisdiction to demand Tax Audit from the Plaintiff is the Rivers State Board of Internal Revenue.

I so hold.

Therefore, the Notice(s) issued by the 1st Defendant on the Plaintiff in this regard purporting to bringing the Plaintiff's Operational activity into the regime of the Federal Inland Revenue Service was issued in error and ultra

vires the powers and jurisdiction of the 1st Defendant and therefore null and void of whatsoever.

I so hold.

Having held that the Plaintiff is not within the tax authority or jurisdiction of the Defendants in respect of Companies Income Tax, Value Added Tax, Education Tax and Technology Levy, I find it otiose to go ahead to determine if the 1st Defendant has fulfilled the conditions precedent to the conduct of a tax audit investigation.

Issue 3 is hereby resolved in favour of the Plaintiff.

In the light of the foregoing, I find merit in the Plaintiff's suit and I by the order of this Honourable Court grant Reliefs 1, 2, 3, 4, 11, 12, 13, 14, 15 and 16 as sought and contained on the Originating Summons commencing this suit dated and filed the 2nd day of March, 2020.

I make no order as to cost.

Judgment read and delivered in the open Court.


HON. JUSTICE HILLARY I.O. OSHOMAH

JUDGE

11/12/2020

Appearances:

D.C. Denwigwe (SAN) with M.S. Agwu Esq., Dike Udenna Esq., R.W.B. Nnwoka Esq. and O.M. Akindeko Esq. for the Plaintiff.

J.N. Nwokolobia Esq. with U. Brown Esq. and G.O. Oziegbe Esq. for the 1st Defendant.

N.A. Timothy-Hart Esq. for the 2nd Defendant.


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