



# **FIRS v. Agromix Nig. Ltd. (2024) 87TLRN 1; Can Tax Authorities' Assess Nigerian Companies' Income Tax on the Basis of the Value of Company's Assets?**

## Introduction

Companies in Nigeria are generally subject to annual taxation on their assessable **profits** for the preceding accounting period.<sup>1</sup> The tax structure follows a tiered system: small companies, defined as a company with turnover of ₦25,000,000 or less<sup>2</sup> are tax exempt, while medium and large companies are taxed at rates of 20% and 30% respectively.<sup>3</sup> While size of a company is a primary factor in determining tax obligations, there are additional considerations that affect the calculation of assessable profits and eligibility for tax exemptions.<sup>4</sup> These nuances are extensive and warrant separate analysis which falls outside the scope of this paper.

The law is clear that only the assessable **profits** of a company are taxable. However, CITA allows the Federal Inland Revenue Service (the "**Service**") to charge tax on a "*fair and reasonable*" percentage of the **turnover** of a company's trade or business where in the Service's opinion (a) the company did not produce any assessable profits; (b) the assessable profits of the company are less than what the Service might have expected from the company's trade or business; or (c) the true amount of the company's assessable profits cannot be determined.<sup>5</sup>

CITA, thus, requires every company, whether liable to pay tax or not, to deliver its returns to the Service, failure of which attracts penalty.<sup>6</sup> Where a company fails to deliver its returns within 6 months after the end of its accounting period,<sup>7</sup> the Service is then entitled to determine the defaulting company's tax liability to the best of its judgment and without reliance on any information or documentation provided by the company (referred to as "**Best of Judgment**" assessment).

The recent judgment of the Court of Appeal, *Federal Inland Revenue Service v. Agromix Nig. Ltd*<sup>8</sup> (the "**Agromix Case**"), interpreted sections 65, 55, and 30 of the CITA, as well as other general provisions of the CITA in determining whether the Service is empowered by law to assess a company's income tax based on its assets. This article analyses the decision of the Court of Appeal in the *Agromix Case* and its various implications.

## Summary of Facts of the Agromix Case

The Service alleged that Agromix Nig. Ltd. ("**Agromix**") had not filed its audited accounts and returns for the year 2015/2016 as provided under section 55 (3) of the CITA. Following this failure, the Service commissioned an estate surveyor to value Agromix's real property, whose value was placed at ₦126,870,000. The Service then considered the value of the real property as Agromix's annual turnover, upon which it deemed Agromix as having made a profit of ₦25,374,000 and charged Companies Income Tax ("**CIT**") at ₦7,612,200, being 30% of the deemed profit pursuant to section 30 (1) of the CITA. The *Agromix Case* was filed, at first instance, by the Service. At the Federal High Court (the "**trial Court**"), the trial Court dismissed the suit after determining one sole issue, that is, "*whether the plaintiff has the power to assess the defendant to tax on the basis of the value of the property lying and situate at... Abuja and deeming it profit for the purpose of assessment.*" The Court considered sections 9(1), (2), and (3) and 30(1)(a) of CITA and held that Agromix's properties ought not to have been assessed as turnover unless the company was in the process of being wound up or disposing off its assets.

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<sup>1</sup> Companies Income Tax Act 2007 ("CITA"), ss. 9 and 29(1). The assessment period for new companies, however, differs. See CITA, s. 29 (3) on this.

<sup>2</sup> CITA, s. 23(1) (n).

<sup>3</sup> CITA, s. 40 (b) (c).

<sup>4</sup> CITA, s. 23.

<sup>5</sup> CITA, s. 30.

<sup>6</sup> CITA, s. 55 (1) & (4).

<sup>7</sup> CITA, s. 55 (3) (a).

<sup>8</sup> (2024) 87TLRN 1

On appeal to the Court of Appeal, the Service argued that ss. 65 and 86 of the CITA empower the Service to distrain the property of entities who default in the payment of income tax, and that what the Service did was not an assessment of the company's liability but a distraining of Agromix's property for the company's failure to pay income tax. The Service further argued that the trial Court was wrong to hold that it merely assessed the company to tax based on the value of the company's property.

### The Court of Appeal Decision

The Court of Appeal held that:

1. tax is entirely statutory and in the matters of taxation, there is no role for common law, equity or presumption. All taxes must be clearly provided for in statute, otherwise there can be no tax imposition;<sup>9</sup>
2. tax statutes must be interpreted as strictly as possible. There is no room for the Court to apply the general rules of law. Tax laws must be construed according to the grammatical meaning of the words. In addition, where the provisions of a tax law are ambiguous or capable of two meanings, the one most favourable to the taxpayer should be used;
3. a Court interpreting anti-tax avoidance provisions of a statute is supposed to construe the tax statute in favour of the tax authority. Nevertheless, the Court must not give the statute any meaning other than the grammatical meaning;
4. CITA provides that where the Service assesses a company to tax and the company fails to object to or appeal against such an assessment, the assessment will be final.<sup>10</sup> This provision of the CITA does not, however, preclude the Court from inquiry into the lawfulness of the tax assessed, including any Best of Judgment assessment done by the Service. Consequently, the trial Court's inquiry into the lawfulness of the assessment falls under "other matters" and is not precluded under CITA;
5. even if a company fails to object to the Service's assessment of tax on it, the Court still has the power to enquire whether the tax assessed is unlawful, in which case, the tax imposed will be void. The Court, however, will not have the power to overturn the tax imposed where the assessment of tax is lawful;
6. the Service is empowered to make a Best of Judgment assessment on the income, profits, and consequent tax on a company, where the company fails to file its audited accounts and return;
7. the Best of Judgment assessment is also within the discretion of the Service, but the Service must not exercise that discretion capriciously. For the Best of Judgment assessment to be final, it must be fair, reasonable and strictly restricted to what the Service reasonably considers to be the profits of the company;
8. Best of Judgment assessments must not be based on the company's capital assets. Treating capital asset as profit may be justified only when the company is in the business of selling such asset (for instance, real estate companies) but it must only involve the proceeds of the sale;
9. the Service cannot make an assessment out of thin air or mere assumptions. There must be materials before the tax authority to enable it to make an assessment and the tax authority can compel the submission of such materials to it by the relevant company;

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<sup>9</sup> This position follows an established principle of law. See *FBIR v. Halliburton (WA) Ltd* (2016) 4 NWLR (Pt. 1501) 53 (P. 89, paras. F-G)9; *Ahmadu v. Governor, Kogi State* (2002) 3 NWLR (Pt. 755) 502.

<sup>10</sup> See CITA, s. 76.

10. there is a distinction between the Service's power to distrain and to make a Best of Judgment assessment. The power of the Service to make a Best of Judgment assessment under CITA s. 65 is not intended to be used as a punishment for non-payment of tax or failure to file audited accounts. It is simply a means to combat tax avoidance. CITA s. 55(4) provides the penalty for failure to file audited accounts as ₦2500 in the first month and ₦500 in each subsequent month. Thus, a Best of Judgment assessment must not be made on the company's capital assets but its profits, as that is what is provided under CITA s. 65;
11. the power to distrain, on the other hand, is the power of the Service to withhold any land, premises, or place owned by the tax-paying company. The power to distrain will be exercisable on the assumption that tax was already lawfully assessed. The power to distrain does not give the Service the power to base its Best of Judgment assessment on the capital assets of the company;
12. the Service was wrong and acted *ultra vires* to have assessed tax based on the company's capital assets rather than its profits, since the company was not in the process of being wound up or disposing off its assets; and
13. the situation might be different if the tax-paying company was involved in the business of selling properties, in which case, it would have been appropriate for the Service to tax the company on the value of the assets, especially where such company fails to file its returns within the time stipulated by law.

### What Does Nigerian Law Say?

Section 55 of CITA imposes an obligation on all companies, including companies exempted from incorporation under section 80 of the Companies and Allied Matters Act, 2020 and companies exempted from the payment of tax, to file a self-assessment return with the Service at least once a year. The return must include the audited accounts, tax and capital allowances computation and a true statement of the amount of profit made and their source and evidence of payment of tax. The law, indeed, goes further to provide the applicable penalty for a company that fails to deliver its returns as stated above. The penalty is a fine of ₦2,500 for the first month of default and ₦500 for every subsequent month.<sup>11</sup>

When a company submits its return to the Service as required by CITA s. 55 (1), the Service may assess and charge tax on the turnover or business of a company, where it appears to the Service, in an assessment year, that there was either no assessable profit or the assessable profit is less than what is expected from such a trade or business. The Service must, however, charge such "fair and reasonable percentage" of the **turnover** of the company's trade or **business as the Service may determine**.<sup>12</sup> Importantly, this power under CITA s. 30 is limited to the Service considering the returns and audited accounts provided by the company and should not be confused with the Service's separate authority to make Best of Judgment assessments under CITA s. 65.

On the other hand, the Best of Judgment assessment is only exercisable where a company has failed to deliver its returns and audited account within 6 months of the end of its accounting period. The law mandates the Service to wait for this period of 6 months to elapse prior to the Service exercising its discretion to make the Best of Judgment assessment. However, the Service may make a Best of Judgment assessment any time prior the expiration of the 6-month period **where it is of the opinion that there is any reason of urgency**.<sup>13</sup> The Service is also entitled to reject a company's returns and audited accounts and proceed to use its discretion to undertake a Best of Judgment assessment.<sup>14</sup> The

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<sup>11</sup> CITA, s. 55 (3).

<sup>12</sup> CITA, s. 30.

<sup>13</sup> CITA, s. 65 (4).

<sup>14</sup> CITA, s. 65 (2).

Service's imposition of tax based on a Best of Judgment assessment does not affect and is without prejudice to any other liability imposed by law on the company for its failure to deliver its returns and audited accounts as required by law.<sup>15</sup>

Although the powers granted under CITA ss. 65 and 30 may appear similar, both of them serve distinct purposes. CITA s. 30 is clear and allows the Service to assess and charge tax on either the **turnover** of the trade or business of a company. The Service's discretion under CITA s. 30 may only be exercised in relation to the rate at which the Service may charge the turnover already established by the company's returns and audited accounts. The Service's discretion under CITA s. 65 appears, however, to be wider and allows the Service to make an assessment of tax liability without reference to the company's audited accounts or return.

### Analysis of the Court of Appeal Decision

It is a long-established principle that imposition of tax and the obligation to pay tax is entirely statutory. The general principles of common law or equity have no applicability in the realm of taxation.<sup>16</sup> Thus, the Court of Appeal was right to uphold this legal position and prevent the Service from imposing tax based on the value of the assets of a company, as there is no such power in any statute in Nigeria. However, the Court of Appeal, it would appear, conflated the provisions of CITA ss. 30 and 65 and at various times in the Judgment used them interchangeably. The authors are of the view that CITA s. 30 is unrelated with Best of Judgment assessment. Rather, CITA s. 30 gives the Service power to determine a fair rate to be charged on a company's established **turnover**. The Service's power under CITA s. 30 is decidedly different to that of CITA, s. 65, under which the Service is required to make its own assessment or prediction of what the company's **profits** may be<sup>17</sup> and then charge tax on that assessment.

Consequently, the Court of Appeal's position that a Best of Judgment assessment cannot be made solely at the discretion of the Service, "on mere assumptions" and without reference to any materials submitted to the Service by the company may, with due respect, be questionable. The law clearly permits the Service to conduct Best of Judgment assessments to determine the profits of a company as it deems appropriate. While a Court of law has power to enquire into the fairness or lawfulness of the Service's assessment, it does not appear that the Court is in a position to mandate the Service to conduct a Best of Judgment assessment with reference to materials submitted by the company.

At the risk of repetition, the law is that upon an assessment by the Service, if a company fails to object to the assessment within the statutorily stipulated time, the assessment will be considered final and incapable of being overturned by the Court.<sup>18</sup> Nevertheless, the Court of Appeal was correct to point out that it had the prerogative to inquire into the lawfulness of an assessment made by the Service. In the *Agromix Case*, the Court of Appeal mentioned that it had that prerogative because there was nothing in the CITA that precludes the Court from enquiring into the lawfulness of an assessment. Moreso, the power of the Court to inquire into the lawfulness of actions by any entity, including regulatory bodies, is a constitutionally protected right which the Courts have been known to guard jealously.<sup>19</sup>

Additionally, the Court of Appeal's obiter that it would have been appropriate for the Service to impose income tax on the company on the basis of the value of its assets if the company was engaged in selling properties appears to have no basis in tax law. Just like the Court of Appeal pointed out, tax laws are entirely statutory and there is no room for principles of equity, and it appears that there is no provision

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<sup>15</sup> CITA, s. 65 (3).

<sup>16</sup> *Okupe v. F.B.I.R* (1974) 4 SC 93; *Aderawos Trading Co. Ltd. v. F.B.I.R* (1966) L.L.R 195.

<sup>17</sup> CITA, s. 65(3) states "Where a company has not delivered a return and the Service is of the opinion that such company is liable to pay tax, the Service may, according to the best of its judgement, determine the amount of the total **profits** of such company and make an assessment accordingly."

<sup>18</sup> CITA, s. 76.

<sup>19</sup>The 1999 Constitution of the Federal Republic of Nigeria s. 6; *Agbakoba v. I.N.E.C.* (2008) 18 NWLR (Pt. 1119) 489 (P. 571, paras. D-E).

allowing a best of judgment on the capital assets of a real estate company in similar circumstances as Agromix. However, the reasoning of the Court of Appeal is commendable, seeing as a real estate company would typically use properties as its primary business. And as such, a Best of Judgment assessment on the assets of such a real estate company should not be out of place.

### **Conclusion**

Ultimately, the Court of Appeal's decision that the Service cannot impose tax on a company based on that company's asset value is correct and laudable. The Court of Appeal also rightly distinguished between the power of the Service to distrain and its power to conduct a Best of Judgment assessment. The Service's power to perform a Best of Judgment assessment, in the opinion of the authors, however, only allows the Service to determine a company's profits as it sees fit and then charge tax on that determined profit, not to charge tax on the company's turnover. On the other hand, the power of the Service to charge tax on a company's turnover under CITA s. 30 is only exercisable where the company has submitted its returns and audited accounts, and the Service is of the opinion that there is no profit or the profits are insufficient. Thus, the Service's powers under CITA ss. 30 and 65 are not the same and should not be conflated.

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