

BEST CHILDREN INTERNATIONAL SCHOOL LIMITED V FEDERAL INLAND REVENUE SERVICE: THE COURT OF APPEAL'S DECISION ON THE TAXATION OF EDUCATIONAL INSTITUTION.

TAX ALERT

Introduction

The Court of Appeal (CA) sitting in Abuja on 11 December 2018, delivered its judgment in the case between Best Children International School (BCIS) also referred to as the Appellant and Federal Inland Revenue Service (FIRS) also referred to as the Respondent. The Appeal Court resolved the case in favour of the Respondent and held that BCIS failed to prove that it is an educational institution and can benefit from tax exemption as provided under Section 23(1)(c) of Companies Income Tax Act (CITA) Cap C21 Laws of Federation of Nigeria (LFN) 2004. See below the highlights of the judgment and our comments.

Highlights of the Decision

a. The Disputes

BCIS challenged an assessment by FIRS in a letter dated 1st September 2014 and under the following liability heads:

- i. Companies Income Tax for the year 2008, 2009, 2010, 2011 and 2012 amounting to a total of N28,917,318.98K;
- ii. Educational Tax for the year 2008,2009,2010,2011 and 2012 amounting to a total of N2,006,122.49k;
- iii. Other Withholding Tax for the year 2009,2010 and 2011 amounting to a total of N33,250 and;
- iv. PAYE for the year 2009,2010 and 2011 amounting to a total of 1807,644.40k.

The dispute was submitted to the Federal High Court (FHC) where judgment was given against BCIS as the court maintained that BCIS does not qualify to enjoy tax exceptions under Section 23(1)(c) of Companies Income Tax Act (CITA) Cap C21 Laws of Federation of Nigeria

(LFN) 2004 because it is a company limited by shares and reiterated that only companies limited by guarantee as registered under section 26 of the Companies and Allied Matters Act 1990 as amended (CAMA) are qualified to benefit from tax exemptions provided under Section (23)(c) of CITA . BCIS further appealed to the CA.

b. The Appeal

BCIS appealed against the decision of the Federal High Court urging the Court of Appeal to determine the appropriateness of the Federal High Court's reliance on Section 26 of Companies and Allied Matters Act (CAMA) in determining its exemption status under CITA and to provide an injunction restraining FIRS from enforcement of the assessment on the Appellant.

c. The Judgment of the Court of Appeal

The Court of Appeal upheld the decision of the lower Court holding that BCIS is liable to pay Companies Income Tax as it is not registered as a company limited by guarantee. Also, the Court held that a company limited by shares was created for the sole purpose of profit making and does not take on a charitable or public character. Similarly, the Court held that the fact that BCIS is an educational institution does not exempt it from the payment of taxes. Hence, they are liable to pay all the taxes assessed by FIRS.

Implication of the Judgment.

The judgment delivered in this case is one that requires an educational institution, albeit a company, to show proof that it is of a public character. This decision appears to change the course of how the Courts view the taxability of the profits of Educational Institutions in Nigeria. The Courts considered three situations before delivering its judgment and they are:

a. Type of Business activity

The business must be educational in nature. CITA did not clearly express this, but educational activities are clear and easy to identify. In this instant case, BCIS was able to prove that it is an educational institution.

b. The Activity must be of a public character

BCIS failed to show proof that its educational activities are of a public character. Therefore, it cannot be exempt from taxes. Also, the argument put forth by BCIS that it should be exempted from payment of taxes merely because it is an educational institution will not suffice in itself.

Comparing this decision with that given in the case of American International School (AIS) and FIRS which was before the Tax Appeal Tribunal (TAT) in 2015, the Court seems to have departed from the decision given in the above-mentioned case. FIRS assessed AIS with companies income tax on grounds that it was not an educational institution of “public character”, even though AIS was registered as a Company Limited by Guarantee. The main grounds of FIRS argument is that the services rendered by AIS was for a fee and could not be said to be available to every Nigerian hence it lacked public character.

TAT ruled in favour of AIS, on the following bases:

- No segment of the Nigerian public was excluded from the services rendered by AIS – FIRS did not provide any evidence of exclusion of any segment
- AIS’ profit/income was not distributed to AIS’ directors or guarantors
- AIS derives profit only from educational services.

c. Profit Derived from the Business

The Court of Appeal in delivering its decision based it on the fact that BCIS was making profit. Thus, the Court applied the strict interpretation of CITA, which is offering educational services at a fee with a view to making profit would constitute a business which invalidates the exemption. Applying this strict interpretation would be detrimental, as Section 23(1)(c) of CITA is an exemption provision. It anticipates that educational institutions would make profits, it only exempts those profits from tax. This view was reaffirmed in the case of AIS v FIRS where TAT held that charging fees for educational services is not strange to the income generation activities of a school.

d. The taxability of Company Limited by Guarantee

It is well known that companies limited by guarantee are not taxable and do not need exception as they are not in the tax net (exemption only applies to what is ordinarily taxable in nature. Furthermore, looking at this decision critically, it could be said that Companies limited by guarantee do not make profit. They make surplus and surplus needs no exception only profits.

e. The Literal Rule of Interpretation

It is trite that whenever a tax law is interpreted, the Court adopts the literal rule. It can be said that there is no proviso under Section 23(1) (c) of CITA that only companies limited by guarantee are entitled to tax exemptions.

Matters Arising

Below are important matters for consideration that the Courts should have strongly and critically addressed.

- i. What is the test for determining what constitutes Public character? Is it gender based (girls-only or boys-only)? special needs? foreigners only and so on.
- ii. Does the fee charged by the schools ensure availability to all segments of the Nigerian public, or does it ensure that only the segment of the public that pays enjoy the benefit?
- iii. Were only companies limited by guarantee contemplated in the drafting of section 23 (1) (c) to the exclusion of other forms of companies?
- iv. Were established principles of tax legislation properly considered by the court in this judgment?
- v. By this judgment, is the Nigerian judicial system indirectly mandating all and any educational institutions in Nigeria to register



as company limited by guarantee under section 26 of CAMA in order to enjoy the tax exemption under section 23 (1) (c) of CITA? What is the implication of same in relation to the intendment of the legislature and how consistent is such requirement with international best practices and procedure in other leading jurisdictions?

In Conclusion

The decision given by the Court of Appeal poses serious concerns for educational institutions in Nigeria. The implication is that, educational institutions, charitable organizations and ecclesiastical bodies that are registered as companies limited by shares or other forms of companies under Companies and Allied Matters Act other than companies limited by guarantee will not benefit tax exemption status under Section 23(1)(c) of the CITA.

It is clear from Section 23(1)(c) of CITA that there was no mention as to the type of company that would be granted tax exemption. Thus, it is generally expected that Section 23(1)(c) should apply to all types of companies given that the literal interpretation is to be applied in interpreting tax laws and the strict and the ordinary meaning of words used in tax laws should be adhered. Nigeria will be one of the first countries to tax its educational institutions when the international and globally acceptable standard is that education is subsidized and not taxing its educational institutions. From the decision, it appears that focus is given to form rather than substance.

Considering the foregoing, it is recommended that the appellant appeals against this judgment at the Supreme Court in order to get clarity on some of the issues as raised. The Appellant should contact our legal team for further critical analysis of the matter.

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