IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON THURSDAY THE 27TH DAY OF APRIL, 2017
BEFORE HIS LORDSHIP HON. JUSTICE G.O. KOLAWOLE
JUDGE

SUIT NO.: FHC/ABJ/CS/159/2014

BETWEEN:

ORCHID NIGERIA LIMITED ::::::::: ::::::::: PLAINTIFF

AND

1. **FEDERAL INLAND REVENUE SERVICE**
2. **NIGERIAN CUSTOMS SERVICE BOARD** } **DEFENDANTS**

JUDGMENT

By an "Originating Summons" dated 25/2/14 and filed on 27/2/14, the Plaintiff instituted the instant action against the Defendants, and sets down two (2) questions for determination. These questions are:

1. *"Whether the Advanced Simulator Systems imported and installed by the Plaintiff for training of students at Maritime Academy of Nigeria, Oron Akwa Ibom State as a result of the contract awarded to it by the Tenders Board of the Federal Ministry of Transport falls within the contemplation of the phrase "EDUCATIONAL MATERIALS" used in Section 3 of the* ***First Schedule of the Value Added Tax Act*** *CAP.VI, LFN 2007."*

2. *"If the answer to question (1) is in the affirmative, Whether The Nigeria Customs Service was right to have collected on behalf of Federal Inland Revenue Service the sum of Three Million, Four Hundred and Eighty Five Thousand, Seven Hundred and Eighty Six Naira from the Plaintiff as Value Added Tax on the said Advance Simulator Systems which falls under Educational Materials exempted from Value Added Tax."*

In the event that these questions are answered in the way and manner that is favourable to the Plaintiff's *cause of action*, the Plaintiff seeks six (6) reliefs endorsed on the "Originating Summons" against the Defendants. The reliefs are:

(a) *"**A DECLARATION** that the Advanced Simulator Systems imported and installed by the Plaintiff for training of students at Maritime Academy of Nigeria, Oron Akwa Ibom State as a result of the contract awarded to it by the Tenders Board of the Federal Ministry of Transport falls within the contemplation of the phrase "EDUCATIONAL MATERIALS" used in Section 3 of the First Schedule of the Value Added Tax Act CAP.VI, LFN 2007."*

(b) *"**A DECLARATION** that the collection of the sum of N3,485,786.00 (Three Million, Four Hundred and Eighty Five Thousand, Seven Hundred and Eighty Six Naira) by*

the Nigerian Custom Service on behalf of the Federal Inland Revenue Service from the Plaintiff is illegal, null and void."

(c) *"**AN ORDER OF COURT** directing the Defendants to refund the sum of N3,485,786.00 (Three Million, Four Hundred and Eighty Five Thousand, Seven Hundred and Eighty Six Naira) to the Plaintiff."*

(d) *"**AN ORDER OF COURT** directing the Defendants to pay the sum of N1,000,000.00 (One Million Naira) only to the Plaintiff as general damages for the loss suffered by the Plaintiff during the retention of the said sum of money by the Defendants."*

(e) *"**AN ORDER OF COURT** directing the Defendants to pay to the Plaintiff the sum of One Million Naira only being the professional fees paid to the Plaintiff's solicitor by the Plaintiff."*

(f) *"Post Judgment interest on the Judgment sum from the date of Judgment till final liquidation."*

(g) *"The cost of this suit."*

The "Originating Summons" is supported by an 18 paragraphed Affidavit deposed to by one Nwankwo Obioha who in paragraph 1 of the Affidavit, states that he is the "*Administration Manager*" of the Plaintiff.

The Plaintiff's Counsel filed a written address to argue the "Originating Summons", and in the said address which is neither paged nor divided into paragraphs to make references to its specific portions easy, sets down two (2) issues for determination. These are:

1. *"Whether the Advanced Simulator Systems imported and installed by the Plaintiff for training of students at Maritime Academy of Nigeria, Oron, Akwa Ibom State as a result of the contract awarded to it by the Tenders Board of the Federal Ministry of Transport falls within the contemplation of the phrase "EDUCATIONAL MATERIALS" used in Section 3 of the* ***First Schedule of the Value Added Tax Act, 2007****."*

2. *"Whether The Nigeria Customs Service was right to have collected on behalf of Federal Inland Revenue Service the sum N3,485,786.00 (Three Million, Four Hundred and Eighty-Five Thousand, Seven Hundred and Eighty-Six Naira) from the Plaintiff as Value Added Tax on the said Advance Simulator Systems which falls under Educational Materials exempted from Value Added Tax."*

In arguing issue one, the Plaintiff's Counsel took off from the provision of Section 3 of the **Value Added Tax Act, 2007** by which it was argued, that "*Books*" and "*Educational Materials*" were *exempt* from payment of Valued Added Tax (V.A.T.). The Plaintiff's Counsel argued that the subject matter of the contract it secured from the Federal Ministry of Transport as

evidenced by Exhibit 'A' is classified as "*Educational Materials*" which are *exempted* from VAT levy.

The Plaintiff's Counsel submitted in relation to the second issue, that having regard to the arguments *canvassed* on issue one, that issue two (2) "*must be determined in the negative*" and then it was argued, "*is because, any action which is done contrary to the provisions of the law is illegal, null and void irrespective of where it was done or by whom it was done*". It was argued that the act of the Defendants "*is contrary to the provision of Section 3 of the* ***Value Added Tax Act, 2007*** *and not being authorized by law is illegal, null and void in its entirety*". The Plaintiff's Counsel urged the Court to grant the reliefs prayed for in the "Originating Summons" filed.

When the Defendants were served, the 2nd Defendant through its Counsel, Mrs. S.I. Bello filed a "Notice of Preliminary Objection" dated 11/4/14. It was brought pursuant to Section 6(2) of the **Nigeria Customs Service Board Act**, LFN, 2004, Cap.N100. The ground of the objection is:

> "*This suit is not properly instituted by reason of the fact that the Plaintiffs did not first serve the Defendants with Pre-action Notice in compliance with the provisions of Section 6(2) of the* ***Nigeria Customs Service Board Act,*** *Cap.N100; Vol.4 LFN 2004 as such robs the Court of the jurisdiction to entertain this suit.*"

The 2nd Defendant "strangely" supported its "Notice of Preliminary Objection" by an Affidavit deposed to by Isiyaku Kabiru who in paragraph 1 of the Affidavit states that he is "*a Deputy Comptroller Tariff and Trade*

Department" of the 2nd Defendant. I have said that it "strangely" supported the "Notice of Preliminary Objection" with an Affidavit because, in *adjectival law*, such objection is predicated on an assumption that the Defendant/Objector accepts the facts as alleged by the Plaintiff in his "Writ of Summons" and "Statement of Claim", but that the Court nevertheless lacks the jurisdiction to hear and determine the Plaintiff's case and such objection is based on law in which the Defendant/Objector needs no fact to *prove, support* or *sustain* its objection which is to be determined on the basis of the Plaintiff's case as *depitched* in the Originating processes filed. See the Supreme Court's decisions in **ANPP & ORS. v. A.G. OF FEDERATION & ANOR. (2003) 18 NWLR (pt.851) S.C. 182 @ 207** which is to be read alongside its earlier decision in **ADEYEMI v. OPEYORI (1976) 9 – 10 S.C. 31 @ 51**.

In paragraph 4(a) and (b) of the Affidavit, the 2nd Defendant's deponent states:

> 4. *"That I was informed by Bello, S.I. (Mrs.) Counsel for the Defendant/ Applicant in her office, Legal Unit, Nigeria Customs Service on the 1st day of April, 2014 at 9:30am and I verily believe her as follows:*
>
> *(a) That the Plaintiff/Respondent did not issue a Pre-action Notice on the Nigeria Customs Service Board as statutorily required under the* ***Nigeria Customs Service Board Act****.*

(b) *That this case did not come before this Honourable Court initiated by due process of law upon the fulfillment of the conditions precedent to the exercise of its jurisdiction."*

The 2nd Defendant's Counsel also filed a written address to argue the "Notice of Preliminary Objection". In its paragraph 3.1 of the address filed, the 2nd Defendant's Counsel formulated one issue for determination. It is:

(a) *"Whether it is mandatory for the Plaintiffs/Respondents to serve the Defendants/Applicants with Pre-action Notice before the commencement of this suit by virtue of the provision of Section 6(2) of* ***Nigeria Customs Service Board Act,*** *Cap.379 LFN 2004."*

This sole issue was argued on the basis of the provision of Section 6(2) of the **Nigeria Customs Service Board Act**. The said provision reads:

"No suit shall be commenced against the Board before the expiration of a period of one month of intention to commence the suit shall have been served on the Board by intending Plaintiff or his authorized agent and the notice shall clearly and explicitly state:

(a) Cause of action,

(b) Particulars of claim,

(c) The name and place of abode of the intending Plaintiff and the relief which he claims."

The 2nd Defendant's Counsel submitted that the effect of the said provision is "*that service of one month Pre-action Notice on the Defendant is a condition precedent before the commencement of action against the Board*". The 2nd Defendant's Counsel having cited a few appellate Courts' decisions submitted that, "*failure to give such notice renders whatever action so instituted incompetent and liable to be struck out*".

The Court was urged to abide by the *ratios* of the appellate Court's decisions cited and to hold "*that this matter which is commenced in default of Pre-action Notice is premature, incompetent and the Court lacks jurisdiction to entertain same and should be struckout*".

The 2nd Defendant also filed a "Counter-Affidavit in Opposition to Plaintiff's Originating Summons". It's a 21 paragraphed "Counter-Affidavit" deposed to by the same Isiyaku Kabiru who deposed to the "Affidavit in Support of the 2nd Defendant's Notice of Preliminary Objection". The 2nd Defendant attached two exhibits, marked "NCS1" to the "Counter-Affidavit". It's the 2nd Defendant's "*Common External Tariff*" 2008 – 2012; and *Guidelines Issued by the Federal Ministry of Finance* attached as Exhibit "NCS 2". The 2nd Defendant is its "Counter-Affidavit" avers as follows in paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 and they are hereby reproduced:

> 8. "*That the Nigeria Customs Service Common External Tariff (CET) 2008-2013 classifies items for the purposes of collection of duty and VAT under various harmonized system codes (HS codes). The CET 2008-2013 is hereby attached as Exhibit NCS 1.*"

9. *"That the Federal Ministry of Finance further issued import guidelines, procedures and documentation requirements under the Destination Inspection Scheme to guide importation of goods into Nigeria. The Import Guidelines dated April 2006 is hereby attached as Exhibit NCS2."*

10. *"That the Electrical Equipments imported by the Plaintiff are classified under HS code 8530.8000.00 at 5% duty and 5% VAT accordingly."*

11. *"That printed books and other educational materials are exempted from duty and VAT under Chapter 49 of the CET."*

12. *"That instruments, apparatus and models designed for demonstrational purposes which are unsuitable for other uses are also exempted from VAT under H.S code 9023.0000.00."*

13. *"That the items which the Plaintiff imported are not Advanced Simulator Systems, as alleged by the Plaintiff."*

14. *"That the Plaintiff declared the items as Advanced Simulator Systems in order to evade payment of duty and VAT."*

15. *"That the items are neither printed books nor educational materials to qualify for exemption under Chapter 49 of the CET."*

16. *"That the items as imported by the Plaintiff are also not unsuitable for other uses to qualify for exemption under HS code 9023.0000.00."*

17. *"That the Nigeria Customs Service is not empowered by law to vary or remove any duty, levy or to amend the schedule under the CET."*

18. *"That the power to impose, vary or remove any duty, levy and to amend the Schedule of the CET falls under the purview of the President of the Federal Republic of Nigeria under Part 1(11) (1) First Schedule of the CET."*

19. *"That the Plaintiff did not seek for VAT waiver from the President before importing the Electrical Equipments into the Country."*

The 2nd Defendant's Counsel, Mrs. S.I. Bello filed a written address to argue the issues raised in the 2nd Defendant's "Counter-Affidavit".

In paragraph 2.0 of the Address filed, the 2nd Defendant's Counsel sets down two (2) issues for determination. These are: (1) *"Whether the items which the Plaintiff imported qualify for VAT exemption as envisaged by Section 3 of the* ***First Schedule of the VAT Act 2007*** *and the* ***CET 2008***

to 2013;" *and (2) "Whether the Nigeria Customs Service was right to have collected VAT on the items imported by the Plaintiff."*

The 2nd Defendant's Counsel argued that in relation to issue one, the Court's attention was drawn to Section 3 of the **First Schedule of the VAT Act, 2007** which *exempt "Books and Educational Materials"* from tax. It was further contended, that "*Section 49 of the CET 2008 to 2013 as extended, further lists items that are exempted from Duty and VAT to include printed books, brochures, leaflets and similar printed matter, whether or not in single sheets*". The 2nd Defendant's Counsel argued when the above provisions of the law are read together "*with the physical inspection of the items*", that "*it is clear that the items do not qualify for VAT exemptions under any of the provisions*". The 2nd Defendant's Counsel argued that a physical inspection of the items imported by the Plaintiff "*revealed Electrical Equipments and not Advanced Simulator Systems as alleged by the Plaintiff*".

On issue two, the 2nd Defendant's Counsel argued that the 2nd Defendant is "*empowered under the various Sections of the Law to collect Duty and VAT on importations made into the country*".

The Court's attention was drawn to the **Customs and Excise Management Act**, Cap.C.45 and its Section 37 and the CET 2008 to 2013. It was submitted that having regard to the arguments *canvassed* on issue one, the second issue "*must be determined in the affirmative*". The Court was urged to dismiss the Plaintiff's suit as what the 2nd Defendant

has done by the collection of VAT on the items which the Plaintiff imported was right.

The 1st Defendant when served, through its Counsel, Idrissa S. Kogo, Esq. filed a "*Conditional Appearance*" dated 29/4/14 to the Plaintiff's suit.

The 1st Defendant through Dazi Stephen Hoke filed a 21 paragraphed "Counter-Affidavit to Originating Summons". It was filed on 6/5/14. Let me reproduce paragraphs 5 – 18 of the said "Counter-Affidavit", and they read thus:

> 5. *"That I was informed by Mrs. Deborah Tarfa, Counsel for the Respondent in our office on Tuesday the 25th March, 2014 at about 3:30pm of the following facts which I verily believe to be true:*
>
> *(a) That the Plaintiff in this case filed its Appeal at the Tax Appeal Tribunal Abuja Zone against the Defendants on the 26th of November, 2012 and the annexures to its purported Notice of Appeal showed that the Appeal was predicated on the letter dated 7th of August, 2012 with Reference No. NCS/HQ/T&T/RFD/070/XIX issued to the Plaintiff in this Suit by the 2nd Defendant.*
>
> *(b) That the assessment being complained against was generated by the Plaintiff itself and not by any of Defendants.*

(c) *That the 1st Defendant at the Tax Appeal Tribunal (TAT) raised a preliminary objection to the hearing of the Appeal because it was filed well outside the stipulated time allowed by the rules of the tribunal.*

(d) *That subsequently the Plaintiff filled a Motion to regularize.*

(e) *That the 2nd Defendant in this case has made an application before the Tax Appeal Tribunal to have its name struck out for the reason of not being the party so named in the suit and the tribunal granted its application.*

(f) *That after the striking out of the name of the 2nd Defendant from the suit, it was evident that there was no valid claim against the 1st Defendant as the 1st Defendant was not at any time a party to the assessment being complained about or the collection of the said sum on the imported item which the Plaintiff was alleging was exempt from Value Added Tax.*

(g) *That the Procedure for raising an Objection to an assessment/Refund had not been complied.*

(h) *That the Plaintiff had not raised any objection or filed for a refund if any with the 1st Defendant*

before the commencement of the case at the Tax Appeal Tribunal or institution of this action.

(i) *That based on paragraphs 5(e), (f), (g) and (h), the 1st Defendant, on the 2nd of October, 2013 filed a preliminary objection before the Tribunal asking the tribunal to strike out or dismiss the suit.*

(j) *That on the 9th of October 2013 when the matter came up, for the application by the 1st Defendant, the Plaintiff in this case informed the tribunal that it wanted to withdraw the Appeal, however the matter could not go on because the tribunal did not have a quorum and the appeal was adjourned to 4th of November 2013. The record of proceedings of the said day is hereby attached as Exhibit FIRS 1.*

(k) *That on the returned date of 4th of November, 2013, though the Plaintiff was not represented by a Counsel, the representative of the Plaintiff made an application for the withdrawal of the suit and it was accordingly struck out. A certified true copy of the record of proceedings of the said day is hereby attached as Exhibit FIRS 2.*

(l) *That Exhibit 'D' referred to in paragraph 12 of the Plaintiff's deposition in Support of Originating Summons is not correct or true as the reason it*

withdraw its Appeal was because of the 1st Defendant's Application.

(m) *That the said paragraph 12 referred to an alleged news item dated 14th of November 2013 wherein the Federal High Court ordered for the disbanding of the Tax appeal Tribunals as the reason for withdrawal of its Appeal.*

(n) *That it is very clear from Exhibits FIRS 1 and FIRS 2 that the Plaintiff had first applied to withdraw on the 9th of October 2013 more than a month before the publication of the news item it claim to have read and eventually withdrew its case ten days before the said publication of the news item it claimed to rely on and so exhibited as Exhibit 'D' in paragraph 12 of Affidavit in support of it's claim.*

(o) *That it is a fact that the said Judgment purportedly relied upon to initiate the withdrawal of the Plaintiff's case before the TAT at the sitting of 9th of October 2013 was delivered by the Federal High Court per Ademola J. on the 30th of October 2013.*

(p) *That the claim that the case before the TAT was withdrawn because of the said Judgment is incorrect."*

6. *"That a letter of Demand was written by the Plaintiff to the 1st Defendant on the 2nd of January 2014 over an action allegedly carried out by the 2nd Defendant in application of it's (Nigerian Customs Service) Harmonized code."*

7. *"That the alleged action been complained about was actually done by the Plaintiff itself."*

8. *"That in the circumstances of this case, the letter of demand ought to have been written to the 2nd Defendant who was in a position to address the issues raised by virtue of its functions and the exercise of same on the subject of this suit."*

9. *"That the power to recommend for refund by the 1st Defendant is subject to proper auditing by the 1st Defendant to establish any over-payment of tax as is due where the 1st Defendant has over assessed the a taxpayer or wrongly charged him to tax which is not the case in this suit."*

10. *"That 1st Defendant in this case was not present at the point of inspection of the goods so imported to be able to say what was actually imported as it is the Jurisdiction of the 2nd Defendant."*

11. *"That Exhibit 'D' of attached to the Plaintiff's Affidavit in Support shows that the Plaintiff assessed his goods and identified it as "electrical signaling, safety or traffic control equipment for roads and inland water ways" which makes it liable to the duties and tax so assessed."*

12. *"That in view of paragraphs 6, 8 and 9 above, the question whether the goods so imported were exempted from the payment of Value Added Tax or not would depend on their classification."*

13. *"That the recommendation for refund to the Minister of Finance for approval or otherwise in this instance would be solely within the purview of the 2nd Defendant where it is convinced of any alleged error if any."*

14. *"That this action did not emanate from any action or inaction of the 1st Defendant, therefore the Plaintiff have no claim against the 1st Defendant for a refund, damages or interest on the alleged sum being claimed."*

15. *"That there is nothing in the Affidavit in Support of the Originating Summons establishing any claim against the 1st Defendant or alleging wrongful assessment was made by the Respondent."*

16. *"That this action is commenced in Court almost 2 years after the alleged action complained against."*

17. *"That the action was instituted in this Honourable Court after over three months period from the date it was withdrawn at the Tax Appeal Tribunal."*

18. *"That the Action is statute barred."*

The 1st Defendant's Counsel, Idrissa S. Kogo, Esq. filed a written address undated but filed on 6/5/14 to argue the issues which the 1st Defendant's "Counter-Affidavit to the Plaintiff's Originating Summons" has raised.

In its paragraph 3.0, the 1st Defendant's Counsel sets down two (2) issues for determination. These are: (1) *"Whether the Originating Summons and Affidavit in Support filed by the Plaintiff in this suit discloses a reasonable cause of action against the 1st Defendant;" (2) "Whether the suit as presently constituted is not statute barred."*

The 1st Defendant's Counsel in arguing issue one, submitted that "*the assessment allegedly complained about was not raise (sic) by any of the Defendants but an independent source known to the Plaintiff*". It was argued that "*Exhibit 'A' page 2, B and C clearly shows that the entire action of assessment, valuation of liability to Tax and Duties was personally done by the Plaintiff*". The 1st Defendant's Counsel contended that "*it is clear from the assessment/valuation note generated by the Plaintiff that what was purportedly imported were electrical signaling safety or traffic control equipment for roads and internal water ways which clearly does not fall within the exemption provided by Section 3 of the* ***Value Added Tax 1993***".

On issue 2, it was argued that even if the Plaintiff has a *cause of action* against the 1st Defendant, "*the time within which this action could be instituted has since lapsed as it has been almost three (3) years since the action been (sic) complained off (sic) occurred*". The attention of the Court was invited to Section 55(2)(a) of the **FIRS Act, 2007** by which the Plaintiff has three (3) months with which an action such as this should have been filed. The Court was also asked to consider the provision in the "**Fifth Schedule to the FIRS Act, 2007** – its paragraph 13(1) which provides that any one aggrieved by a tax assessment made by the 1st Defendant should do so within 30 days of such decision or assessment to the Tax Appeal Tribunal. The 1st Defendant also called the Court's attention to Section 2(a) o the **Public Officers Protection Act** which he submitted, the provision of Section 55 of the **FIRS Act, 2007** was "*hinged*".

The 1st Defendant's Counsel submitted that in whichever way or law this action may be viewed, the Plaintiff's suit is *statute barred*.

Having regard to the specific wording of Section 55(2) of the **FIRS Act**, supra. the 1st Defendant's Counsel argued that the Court should read and apply the decision in **KASANDUBU v. ULTIMATE PETROLEUM LTD. (2008) 7 NWLR (pt.1086) 274 @ 303 – 304H-A**. By this, it was submitted that "*any person referred to in Section 2(a) of the **Public Officers Protection Act** means both artificial and natural persons alike. This includes corporation sole or public bodies corporate or incorporated*". It was argued that the Defendants, "*particularly the 1st Defendant are covered by the provisions of this Act*".

The 1st Defendant's Counsel in his conclusion, urged this Court "*to resolve this suit in favour of the Defendants, particularly the 1st Defendant as the alleged action being complained against was carried out by the Plaintiff in this suit and to dismiss the Plaintiff's claim for non disclosure of a cause of action or being statute barred*".

When the Plaintiff's Counsel was served with the Defendants' respective processes, in relation to the 1st Defendant, the Plaintiff's Counsel filed a "*Plaintiff's Reply on Points of Law to 1st Defendant's Written Address in Support of Counter-Affidavit dated 6th May, 2014*".

On the proceedings which the Plaintiff had initiated before the Tax Appeal Tribunal, it was argued that as at 9/10/13, the Tribunal did not form a *quorum* and that the Tribunal was subsequently *disbanded* pursuant to a Judgment of the Federal High Court which declared the Tribunal *illegal*. The Plaintiffs' Counsel submitted all of these issues "*are irrelevant and inadmissible in this suit, having being made by a tribunal with no jurisdiction*". When I read this submission, one question which the Plaintiff has not addressed, is whether in terms of *limitation of action*, the time spent in the Tax Appeal Tribunal will be *counted* or *discounted* from the allegation made by the Defendants, that its action is *statute barred* because, the *cause of action*, had by its own showing, arisen on 11th August 2011 when it was allegedly wrongly assessed to pay VAT on goods which it imported based on Exhibit 'A' and which as "*Books*" or "*Educational Materials*" are to be *exempted* by law from tax levy? This question, in my view can hardly be answered by a recourse as was made

by the Plaintiff's Counsel to the provision of Section 64 of the **Evidence Act, 2011**.

The Plaintiff's Counsel, in reference to the deposition in paragraph 5 of the 1st Defendant's "Counter-Affidavit" which I had earlier reproduced in this Judgment, argued that the said deposition *contravened* Section 115(2) of the **Evidence Act**. The Court was urged to strike out the said paragraph in line with appellate Courts' decisions the *excerpts* of a few which were cited.

On the issue that the Plaintiff's suit does not *disclose a cause of action* against the 1st Defendant, it was contended that "*all efforts to make the 1st Defendant to see reason and refund the money has not yielded any fruit as the 1st Defendant have (sic) adamantly refused to refund the money*".

In relation to the objection that the Plaintiff's suit is *statute barred*, the Plaintiff's Counsel submitted that "*it is also an incontroverted fact that the wrongful deduction was made on the 11th day of August, 2011*". It was argued that "*the Plaintiff, upon discovery of this wrongful deduction, began to hold discussions with the 1st Defendant for the refund of the money wrongfully deducted*". The question is: Will this be the same thing as appealing to the appropriate body within the provision of paragraph 13(1) in the **Fifth Schedule to the FIRS Act 2007**? As if to justify that what the Plaintiff did was in line with the law, its Counsel further argued that: "*This state of events continued with the 1st Defendant adamantly holding on and detaining the Plaintiff's money until the Plaintiff made a final demand on the 1st Defendant vide his letter of 2nd January, 2014 which said demand letter was neither replied by the 1st Defendant nor was the*

demand of the Plaintiff met." The Plaintiff's Counsel, in my view, curiously, perhaps in order to create a *factual* situation of *continuing injury* within the *proviso* to Section 2(a) of the **Public Officers Protection Act**, supra. submitted that "*the cause of action accrued from the date of the wrongful deduction by the 1st Defendant and became complete on the date the final demand was made and refused*". He argued, that "*time begins to run from that date and the Plaintiff is well within the time for instituting action against the 1st Defendant*".

When I read this submission, I was unable to hold back a chuckle of laughter. This is because, were the provisions of *limitation laws* be applied in such a *cavalier* manner as *postulated* by the Plaintiff's Counsel's *specious*, if it is *ingenious* submissions, no such law will ever be applied in any proceeding because, the Plaintiff who will be so affected, would have by its own *deliberate conduct* or *default*, re-define the time frame when its *cause of action* will be determined to have arisen. Even if it waits for ten (10) years before sending its letter of final demand to a would be defendant, then the period within which it can institute a *valid* Court action against such a Defendant who can take benefit of a *limitation of action* laws or provision, will be deemed not to count for the provisions of the *limitation law*, and the period will begin to count from when the final *ultimatum* given to the Defendant expired. This is in respect of a Plaintiff who by paragraph 13(1) of the **Fifth Schedule to the FIRS Act, 2007** has 30 days to submit its objection to an alleged wrongful tax assessment or deduction! By my modest understanding of the law, the Plaintiff's *cause of action* had accrued from the day he was allegedly wrongfully assessed

to pay VAT on the items he imported on the strength of Exhibit 'A' attached to its "Originating Summons". It's *cause of action* has arisen from 11th August 2011 as it was required, as a preliminary step, to file its objection within 30 days of the alleged wrongful assessment with the 1st Defendant. The instant action was filed on 27/2/14. I am still not being *persuaded*, that the Plaintiff's action is competent in respect of an alleged wrongful tax levy or assessment made on 11/8/11 when its "Originating Summons" was only filed on 27/2/14. The journey it made to the Tax Appeal Tribunal will not in any way, stop the hands of the clock against its *cause of action* which had accrued and arisen since August 2011 to continue to run, and neither will its efforts to *persuade* the 1st Defendant to see reasons and refund the alleged *wrongful deduction* be discounted from the calculation of the period of *limitation*. Taxation is all about law and no Kobo can be taken or waived except on the authority of extant law on the issue. A Plaintiff who had thirty (30) days within which to file a complaint with the 1st Defendant of an alleged *wrongful* taxation and has three (3) months from 11/8/11 to institute a *valid legal action* against the 1st Defendant in the Federal High Court but who has chosen to do so in February 2014 can hardly be heard as *persuading* the Court, that it had acted *diligently* and *timeously*.

In relation to the 2nd Defendant's "Counter-Affidavit" and address filed in opposition to the Plaintiff's suit, the Plaintiff's Counsel filed a "*Plaintiff Reply on Points of Law to 2nd Defendant's Written Address in Support of Counter-Affidavit dated 22nd April, 2014*". The "Reply on Points of Law" is dated 7/7/14 and was filed on 8/7/14.

In the Plaintiff's Counsel's submissions, it was argued that the "Common External Tariffs" which "*classified items for purpose of collection of duty and VAT under the Harmonized System Codes*" – which the 2nd Defendant relied upon to assess and collect VAT from the Plaintiff, it was submitted it is not "*an Act of the National Assembly and does not have the force of law*". The Plaintiff's Counsel, who has not by the Plaintiff's suit, *challenged* the said *administrative* "*instruments*" made pursuant to the **Customs and Excise Management Act**, submitted that "it can never over ride the provision of Section 3 of the **First Schedule of the Value Added Tax Act 2007**". Whilst the Plaintiff insisted what it imported into the country were "*Educational Materials*" which are *exempted* from Value Added Tax, the 2nd Defendant who physically inspected the Plaintiff's consignments upon arrival, says that they are "*electrical materials*" which do not fall under the items which the law *exempts* from being levied for value added tax. It is my view, that if the Plaintiff really wanted to contest this fact, it should not have even commenced its action by way of "Originating Summons", but by a "Writ of Summons" and where possible, to tender the equipment as exhibits for the Court to view.

This is an issue which I weighed against the 1st Defendant's "Counter-Affidavit", that it was the Plaintiff who by itself or its appointed agent that made the assessment and paid the Value Added Tax on what it imported. This was one of the reasons why the 1st Defendant argued that the Plaintiff's suit does not *disclose a cause of action*.

The Plaintiff's Counsel, in reference to Section 37 of **Customs and Excise Management Act, 2004** referred to by the 2nd Defendant's Counsel,

submitted that the said Act applies only "*for payment of import duty on goods imported into Nigeria and not VAT which is the exclusive preserve of the* ***Value Added Tax Act, 2007***". By Exhibit 'C' attached to the "Originating Summons", it was submitted that the Plaintiff had already paid the "*import duty*" on the items imported into Nigeria. The Court was urged to apply Section 3 of the **First Schedule of the Value Added Tax Act, 2007** to declare that the items imported by the Plaintiff, contrary to the 2nd Defendant's assertions, are "*educational materials*" which are *exempted* from payment of Value Added Tax, and that the sum which the Plaintiff was wrongly assessed for and which it paid in August, 2011 be ordered to be refunded to it.

In relation to the 2nd Defendant's "Notice of Preliminary Objection" dated 11/4/14, the Plaintiff's Counsel filed a "*Plaintiff's Counter-Affidavit in Opposition to 2nd Defendant's Notice of Preliminary Objection dated 11th April, 2014 and filed on 22nd April, 2014*". It was deposed to by Chimaobi John Abeagowe of Counsel on 8/7/14. It's an 11 paragraphed "Counter-Affidavit".

In the said "Counter-Affidavit", the deponent whilst deposing to facts that the 2nd Defendant was issued and served with a "*Pre-action Notice*", avers in paragraphs 3 and 4 thus:

> 3. "*That contrary to paragraph 4(a) of the 2nd Defendant's Affidavit, the Plaintiff caused his solicitors, OLI & PARTNERS to write to the 1st and 2nd Defendants demanding the refund of the sum of N3,485,786.00*

(Three Million, Four Hundred and Eighty-Five Thousand, Seven Hundred and Eighty-Six Naira) illegally and unlawfully deducted by the Defendant as VAT and notifying them of his intention to proceed to Court if his demands were not met."

4. *"That prior to the commencement of this suit, the Plaintiff's Counsel wrote a letter dated 2nd January 2014 and served same on the 2nd Defendant on the 3rd day of January, 2014 wherein he demanded the refund of the said sum of N3,485,786.00 (Three Million, Four Hundred and Eighty-Five Thousand, Seven Hundred and Eighty-Six Naira) illegally and unlawfully deducted by the Defendants as VAT and also gave them notice of the Plaintiff's intention to proceed to Court within ONE MONTH if his demands are not met by the Defendants. The acknowledgment copy of the letter dated 2nd January, 2014 is hereto attached as Annexture A."*

The said "Annexture" which the Plaintiff's deponent has produced in order to prove that the 2nd Defendant was issued and served a letter dated 2nd January 2014 as a one month "*pre-action notice*" cannot be found in the Court's record. It was not attached to the said "Counter-Affidavit" as averred or to the written address filed. By this omission, it is questionable whether it will be worth the Court's while to review the address filed to argue the "Counter-Affidavit" which appears to have lied against itself.

In the address filed, the Plaintiff's Counsel sets down one issue for determination. It is: "*Whether it is mandatory for the Plaintiff/Respondent to serve the 2nd Defendant/Applicant with pre-action notice before the commencement of his suit by virtue of the provision of S.6(2) of the* ***Nigeria Customs Service Board Act, 2014.***"

It was argued that from the "Counter-Affidavit" filed on behalf of the Plaintiff, that the "*Plaintiff wholly complied with the requirements of the law with respect to the service of pre-action notice on the 2nd Defendant*".

The Plaintiff's Counsel reproduced the provision of Section 6(2) of the **Nigeria Customs Service Board Act, 2004** and submitted that "*while the service of the pre-action notice is mandatory, the form in which the notice is given is directory*". The Plaintiff's Counsel who has not produced Annexture 'A' with the "Counter-Affidavit" filed to enable this Court to even form its view whether what was issued and served, can appropriately be described as a "*pre-action notice*" within the provision of Section 6(2) of the **Nigeria Customs Service Board Act**, supra, proceeded to cite and reproduce *excerpts* of the Supreme Court's decision in **AMADI v. NNPC (2000) 10 NWLR (pt.674) 76**.

The Plaintiff's Counsel contended and urged the Court to "*hold that the Annexture 'A' (which it has not produced for the Court to see) satisfied the requirements of a pre-action notice to the 1st and 2nd Defendants*".

The Plaintiff's Counsel further submitted "*that S.6(2) of the* ***Nigeria Customs Service Board Act, 2004*** *did not provide for the form in which the pre-action notice is to be given to the Board*" and submitted where

even the prescribed form exists, a deviation from the said form, the Plaintiff's Counsel argued, "*can never render a notice given in another form invalid for the purpose of a pre-action notice*". The provision of Section 23 of the **Interpretation Act, 2004** was cited and reproduced. All of these, except the Plaintiff has produced Annexture 'A' which it issued and served on the 2nd Defendant will remain *beautiful legal submissions* which are in *substance* and *essence*, *academic postulations*. I have said this because, where a Plaintiff is by law required to issue and serve a "*pre-action notice*" on a *statutory body* such as the 2nd Defendant, it's part of the efforts at *gathering evidence*, that not only is a copy of such notice issued and served on the body is produced, the copy so produced, must bear on its face, except where the Plaintiff can produce other *independent evidence*, an *acknowledgement of receipt* of the said *notice* by the *statutory body* as a prospective "Defendant". In cases instituted by way of an "Originating Summons", a strategic Counsel and seasoned litigator will produce such "*acknowledged copy*" of the *notice* issued and served as part of its *documentary exhibits*. This is to avoid its time as a "Plaintiff" from wasted by an objection which the production of such served and "*acknowledged copy*" would have made *unnecessary*.

In so far as the Plaintiff has not produced any such "*pre-action notice*" of whatever format, it is idle to continue to *canvass* arguments which are *sterile* and *academic* on an issue which the Plaintiff needs not have expended so much time and energy to dispose of if its Counsel had done the *needful* whilst the case was being prepared for filing.

On 8/3/16, I began listening to the respective parties' Counsel on the Plaintiff's "Originating Summons" filed on 27/2/14. The hearing of Counsel's submissions began with the Plaintiff's Counsel, C.J. Abengowe, Esq. who began his oral submissions by adverting the Court's attention to the Plaintiff's filed processes which I had reviewed in reasonable details in the course of this Judgment. The attention of the Court was drawn to Exhibits 'A', 'B', 'C', 'D' and 'E' attached to the Plaintiff's "Originating Summons". The Plaintiff's Counsel adopted the written addresses filed to argue the Plaintiff's suit and adverted the Court's attention to the "Reply on Points of Law" filed to the Defendants' responses to the Plaintiff's "Originating Summons". The Court was urged to discountenance the defence of the Defendants and to grant the Plaintiff's prayers.

The 1st Defendant's Counsel, Etebong Udoh, Esq. was heard on 27/4/16 and he drew the Court's attention to the 21 paragraphed "Counter-Affidavit" filed on 6/5/14 deposed to by Dazi Stephen Hoke and the Court was urged to consider Exhibits "FIRS 1" and "FIRS 2" which were the *legal instruments* used to assess the VAT the Plaintiff was levied to pay in August 2011. The 1st Defendant's Counsel adopted the "*written address filed in Support of the Counter-Affidavit filed in Opposition to the Plaintiff's Originating Summons*".

The hearing of the 2nd Defendant's Counsel who was absent in Court, occasioned some delay in the determination of this suit.

On 2/2/17, the Court eventually listened to the 2nd Defendant's Counsel, Mrs. Zainab Abdullahi-Musa. The learned Counsel argued the 2nd

Defendant's "Notice of Preliminary Objection" dated 11/4/14 and filed on 22/4/14. The sole issue argued was on the fact that the 2nd Defendant was not served with a "*pre-action notice*" as is required by the provision of Section 6(2) of the **Nigeria Customs Service Board Act**, Cap.N.100, LFN, 2004.

The 2nd Defendant's Counsel also adverted to the "*Counter-Affidavit filed by the 2nd Defendant's deponent, Isiyaku Kabiru to oppose the Plaintiff's Originating Summons*". The address filed "in Support of the Originating Summons" was adopted by the 2nd Defendant's learned Counsel who urged the Court to strike out the Plaintiff's suit on the ground that the 2nd Defendant was not issued and served with a "*pre-action notice*" and or to dismiss the Plaintiff's suit which she argued, *constitutes an abuse of the Court's process*.

The Plaintiff's Counsel, D.I. Ajaba, Esq. was then heard on the Plaintiff's "Counter-Affidavit to the 2nd Defendant's Notice of Preliminary Objection". Plaintiff's learned Counsel referred to the "Counter-Affidavit" deposed to by Chimaobi John Abangowe and the written address filed to argue the said "Counter-Affidavit" which I had reviewed in some details in the course of this Judgment. The Court's attention was drawn to Exhibit 'E' being the Plaintiff's letter addressed to the 1st Defendant dated 2/1/14 and was copied to the 2nd Defendant. This, apparently is the exhibit which the Plaintiff's Counsel intend to use to substitute Annexture 'A' which he failed to produce as an "exhibit" to the "Counter-Affidavit filed to oppose the 2nd Defendant's Notice of Preliminary Objection". The issue remains *mute* and perhaps, *contentious* whether a letter addressed in its substantive form to

the 1st Defendant's Chairman, and copied to the 2nd Defendant will in the eyes of the law and by operation and application of the provision of Section 6(2) of the **Nigeria Customs Service Board Act, 2004**, constitute a "*pre-action notice*" which an intending Plaintiff is required to issue and serve on the 2nd Defendant. I will not think so as both Defendants being a *separate and distinct legal entities* created pursuant to different Acts of the National Assembly, should be dealt with in relation to the requisite provisions of its enabling Act by which it is required to be issued and served with a "*pre-action notice*" prior to the institution of legal proceedings against them. A demand notice written and addressed to the 1st Defendant but copied to the 2nd Defendant can hardly, even with the most *liberal judicial generosity* which the Plaintiff's Counsel endeavoured to *canvass* by reference to the Supreme Court's decision in **AMADI v. NNPC**, supra. avail the Plaintiff in order to meet the *statutory requirement* of Section 6(2) of the **Nigeria Customs Service Board Act, 2004** which I had earlier reproduced in this Judgment.

In the light of this analysis, my *findings* is that the Plaintiff has failed to issue and serve the 2nd Defendant with a "*pre-action notice*" in accordance with the provision of Section 6(2) of the **Nigeria Customs Service Board Act**, supra.

The Plaintiff's Counsel also adverted the Court's attention to the "Reply on Points of Law" respectively filed to the 1st and 2nd Defendants' addresses and adopted same as his oral submissions. The Plaintiff's Counsel referred to Section 122(2)(a) and (n) of the **Evidence Act, 2011** and urged this Court to take *judicial notice* of the provision of Section 318 of the

Constitution and Section 18 of the **Interpretation Act** in terms of who is a public officer and argued that the Defendants are not public officers. He cited the Court of Appeal's decision in **C.B.N. v. NJEMANZE (2015) 4 NWLR (pt.1449) 276 @ 284 – 287**. He concluded his submissions by saying that the Defendants "*have not stated any law that bars us from coming to Court*", and that "*the Tax Appeal Tribunal has by the decision of the Federal High Court, abolished, so we can only come to this Court*".

After both parties through their respective Counsel have been duly heard, I reserved the Judgment till today. I had in the course of reviewing the addresses filed, made certain *findings* and expressed remarks which are borne out of the *facts* and *legal submissions* made by the parties through their respective Counsel.

I have for instance, found that the Plaintiff, regardless of Exhibit 'E' attached to the "Originating Summons" which its Counsel sought to substitute as Annexture 'A' which was not produced with the "Counter-Affidavit filed in Opposition to the Notice of Preliminary Objection of the 2nd Defendant", had not issued and served the 2nd Defendant with a "*pre-action notice*" pursuant to Section 6(2) of the **Nigeria Customs Service Board Act, 2004**. The said provision states:

> *(2) "No suit shall be commenced against the Board before the expiration of a period of one month of intention to commence the suit shall have been served on the Board by the intending plaintiff or his authorized agent and the notice shall clearly and explicitly state –*

(a) the cause of action;

(b) the particulars of the claim;

(c) the name and place of abode of the intending plaintiff; and

(d) the relief which he claims."

When this provision is read, even on the most *generous* manner by construing the words used in its *liberal* and *grammatical* meaning, it cannot be argued that Exhibit 'E' being a demand letter dated 2/1/14 addressed to the "Chairman" of the 1st Defendant and attached to the "Originating Summons" which was copied to the 2nd Defendant *constitutes a "pre-action notice"* under the said provision. So, as far as the Plaintiff's suit is concerned in relation to the 2nd Defendant, it is incompetent as a *condition precedent* in order to institute a *valid legal action* against the 2nd Defendant has not been *fulfilled*. The 2nd Defendant's "Notice of Preliminary Objection" dated 11/4/14 succeeds and the Plaintiff's suit against the 2nd Defendant is struckout.

In relation to the 1st Defendant, the Plaintiff's *cause of action*, by its own showing, had accrued since 11/8/11, but the Plaintiff who was having discussions with the 1st Defendant initially approached the Tax Appeal Tribunal and later in 2013, withdrew its application before the said Tribunal. This was in October, 2013. In January 2014, the Plaintiff apparently woke up to come to the consciousness, that it could on the strength of Section 251(1)(a), (b) and (c) of the **Constitution**, approach the Federal High Court in order to seek the reliefs endorsed on its "Originating Summons". It consequently, in relation to alleged *wrongful* tax

assessment made by the 2nd Defendant (who has just been struckout) on behalf of the 1st Defendant wrote Exhibit 'E' dated 2/1/14 to the 1st Defendant. In the course of this Judgment, I had made certain remarks in relation to paragraph 13(1) of the **Fifth Schedule to the FIRS Act, 2007** by which a *disaffected person* who has been *wrongfully* assessed to pay a tax, should apply within thirty (30) days of such assessment to *challenge* the assessment, argued by its Counsel, that in relation to *limitation of action* provision, the time within which the Plaintiff can institute this action began to run upon the expiration of one month notice it is required to give to the 1st Defendant. Even by Exhibit 'E', the 1st Defendant received Exhibit 'E' dated 2/1/14 on 2/1/14. This action was filed on 27/2/14. The Plaintiff, through its Counsel at the hearing on 2/2/17 argued that the 1st Defendant is not a "public officer" and as such, cannot take benefit of the provision of Section 2(a) of the **Public Officers Protection Act**.

When I read the provision of Section 38 of the **FIRS Act**, it states: "*An officer of the service shall be entitled to protection under* ***the Public Officers Protection Act***." In its "*interpretation*" in Section 69, an "officer" means "*any person employed in the service*". By this definition, the 1st Defendant is not covered by Section 38 of its enabling Act but its officers, and when I read paragraph 13(1) and (2) in the **Fifth Schedule to the FIRS Act, 2007**, the question remains whether the Plaintiff who by its own "Originating Summons" was allegedly wrongly assessed to pay VAT on what it imported and described as "*Educational Materials*" can maintain this action filed on 27/2/14. The said paragraph 13(1) and (2) states:

13(1) *"A person aggrieved by an assessment or demand notice made upon him by the service or aggrieved by any action or decision of the Service under the provisions of the tax laws referred to in paragraph II, may appeal against such decision or assessment 'or demand notice within the period stipulated under this' Schedule to the Tribunal."*

(2) *"An appeal under this schedule shall be filed within a period of 30 days from the date on which a copy of the order or decision which is being appealed against is made, or deemed to have been made by the Service and it shall be in such form and be accompanied by such fee as may be prescribed provided that the Tribunal may entertain an appeal after the expiry of the said period of 30 days if it is satisfied that there was sufficient cause for the delay."*

When these provisions are read, this readily may have *led* to the "Counter-Affidavit" filed by the 1st Defendant in which it was alleged, that the Plaintiff's appeal filed on 26/11/12 at the Tax Appeal Tribunal was objected to because, the Plaintiff failed to bring its complaints within thirty (30) days prescribed by paragraph 13(2) produced above. The Plaintiff, even before the Judgment of the Federal High Court which *led* to the *disbandment* of the Tax Appeal Tribunal had made a move to withdraw its appeal before the Tax Appeal Tribunal. The Plaintiff's appeal which came up on 9/10/2013 was eventually struckout on 4/11/13 by the proceedings in Exhibit "FIRS 2". In Exhibit "FIRS 1" attached to the 1st Defendant's

"Counter-Affidavit" of Dazi Stephen Hoke filed on 6/5/14, the record of the Tax Appeal Tribunal reads thus:

Hon. Ibegbu: *"A motion to strike off this matter was filed by the Respondent's Counsel, but incidentally, the Appellant informed the Tribunal that he is applying to withdraw this suit and for it to be consequently struckout."*

"This matter would have been struckout but a Tribunal which has no quorum cannot make such order. This is because, one of the members of the Tribunal is away to the United States of America to attend the I.B.A. Conference and the other is away on Hajj."

"Consequently, this matter will be adjourned to the 4th November 2013 to enable the Tribunal form a quorum of at least three to make an order in that respect."

This was the proceedings of 9/10/13. At the resumed hearing on 4/11/13, by Exhibit "FIRS 2", the record of the Tax Appeal Tribunal reads thus:

Hon. Ibegbu: *"On 9/10/13 the Appellant sought to withdraw this matter but incidentally this Tribunal did not form a quorum. This matter was adjourned to today for the matter to be struckout."*

"The Representative of the Appellant stands by the earlier application to withdraw this suit. Consequently, this suit is hereby withdrawn with no order as to costs."

By the 1st Defendant's "Counter-Affidavit" in paragraph 5(n) and (o) filed on 6/5/14, it was stated that the application of the Plaintiff as "Appellant" to withdraw its suit in the Tax Appeal Tribunal had come up on 9/10/13 by the proceedings in Exhibit "FIRS 1", and that the Federal High Court's Judgment was delivered by Ademola J. on 30/10/13. It was to argue the point, that the Plaintiff's application to withdraw its suit in the Tax Appeal Tribunal had nothing to do with the Federal High Court's Judgment that was delivered over three (3) weeks prior to the proceedings of 9/10/13 when the Plaintiff as "Appellant" before the Tax Appeal Tribunal signified its intention to withdraw its suit based on the 1st Defendant's objection. Refer to paragraph 5(e), (f) and (g) of the 1st Defendant's "Counter-Affidavit".

When I pondered over these issues, the question still remains whether the Plaintiff's suit filed on 27/2/14 in respect of a *cause of action* that had accrued since 11/8/11 can be affirmed as *valid*. Whilst I have no doubt, that the 1st Defendant cannot take benefit of the provision of Section 38 of its enabling Act, the question then remains whether the 1st Defendant, in the absence of any specific provision in its enabling Act, is disentitled to seek protection and refuge under the general provision of the **Public Officers Protection Act**, supra. when the Supreme Court's decision in **IBRAHIM v. JUDICIAL SERVICE COMMITTEE, KADUNA STATE (1993) 14 NWLR (pt.584) S.C. 1 @ 11** is read and applied, and this is a pertinent question to answer when the 1st Defendant, by the *sheer force* of Section 1(2)(a) of its enabling Act, is read, and it is whether the 1st Defendant does not fall in the category of such persons as the provision of

Section 2(a) of the **Public Officers Protection Act**, supra. regards as "public officers". Although, the Plaintiff's Counsel in his submissions, adverted the Court's attention to the provision of Section 318 of the **Constitution** which deals with "*interpretation*", "*citation*" and "*commencement*" which he urged the Court to read along with Section 18 of the **Interpretation Act** in order to ground his submissions that the Defendants are not "public officers" within the meaning of Section 2(a) of the **Public Officers Protection Act**, supra. To accede to the Plaintiff's Counsel's submissions in this regard, will amount to an invitation of this Court to act contrary to the *ratio* of the Supreme Court's decision when it dealt with the case of **IBRAHIM v. JUDICIAL SERVICE COMMITTEE, KADUNA STATE**, supra. I have expressed this opinion because, the Respondent in that decision being a creation of a Law just like the 1st Defendant herein, was held to be a "public officer" within the provisions of the **Public Officers' Protection Law of 1963** applicable in Kaduna State and which is in *pari material* with "Section 2(a) of the **Public Officers Protection Act**. See the Court of Appeal's decision in **C.B.N. v. ADEDEJI (2004) 13 NWLR (pt.890) 226 @ 245**. As far as I am concerned, the concept of a *continuing injury* which the Plaintiff's Counsel sought to *canvass* being a *proviso* to the said Section 2(a) of the **Public Officers Protection Act**, cannot avail the Plaintiff who had previously instituted a *defective* or *incompetent proceeding* in the Tax Appeal Tribunal and which as at 9/10/13, it had notified the Tribunal of its intention to withdraw its appeal. This was weeks before the Federal High Court's Judgment was delivered on 30/10/13.

As at 4/11/13 by Exhibit "FIRS 2" when the Plaintiff's suit was struckout by the Tax Appeal Tribunal, the Plaintiff had expressed its decision to discontinue with the action which has not been shown to have been *validly* initiated in accordance with the provision of paragraph 13(1) and (2) of the **Fifth Schedule to the FIRS Act, 2007**. The Plaintiff's complaint in the Tax Appeal Tribunal was required to have been filed within thirty (30) days from 11/8/11 when it was directed to pay VAT on items which it imported and which the Plaintiff argued are not dutiable by Section 3 of the **First Schedule to the VAT Act, 2007**. The Plaintiff cannot by its own act or default, dictate the period within which it should file its action having regard to *limitation laws* or provisions by saying that the *cause of action* accrued after the one month's notice it gave the 1st Defendant by Exhibit 'E' attached to the "Originating Summons" expired even though, the same Plaintiff had initially by a *legal action* before the Tax Appeal Tribunal, *challenged* the VAT it was made to pay by the 2nd Defendant on 11/8/11. If the Plaintiff had a *cause of action* which enabled it to proceed to the Tax Appeal Tribunal, how come that the time *abated* when the suit was withdrawn on 9/10/13 and was eventually struckout on 4/11/13? The provisions of the *limitation of actions* laws do not operate in that manner and cannot be *judicially* applied in the *cavalier* manner as the Plaintiff would want it to be. Its *cause of action* was not a *continuing injury* because, as soon as the assessment was made, whether wrongly or otherwise, by the operation of paragraph 13(1) and (2) of the **Fifth Schedule to the FIRS, Act**, supra, the right of the Plaintiff to *challenge* the assessment

had accrued and its right to get it *reversed* had *crystallized*. In any event, the Plaintiff had already paid the said assessed VAT and its action by this suit, was to seek a refund of the money paid.

A *legal action* filed on 27/2/14 in order to seek a redress of a wrongful tax assessment made in August 2011 and which the Plaintiff admittedly had paid, but wanted a refund, is in my view an action that is caught in the "*strangle hold web*" of the provision of Section 2(a) of the **Public Officers Protection Act**, supra. which the Plaintiff itself, was of the view, by the tenor of the submission *canvassed* by its Counsel on Exhibit 'E' attached to the "Originating Summons", should have been filed within three (3) months against the 1st Defendant. It was the Plaintiff's misconception that the three (3) months within which to institute *legal action* against the 1st Defendant will begin to run from the expiration of the one month's notice it gave in Exhibit 'E' to the 1st Defendant and which *led* it to file the instant action on 27/2/14. The said action was *belatedly* filed as its *cause of action* had accrued since 11/8/11 and the suit should have been filed on or before 10/11/11 for it to be *valid* against the 1st Defendant who the law regards, by virtue of the provision of Section 2(a) of the **Public Officers Protection Act**, supra. as a "public officer".

In the light of all that I have said, the 1st Defendant's objection succeeds and the Plaintiff's action is dismissed as it's a cause of action which can no longer be judicially determined in order to seek and obtain the reliefs it seeks by its "Originating Summons".

In the event that I may be held to be wrong by the Appellate Courts, the Plaintiff's suit would still have been dismissed because, the items which Plaintiff was commissioned to supply to the Maritime Academy of Nigeria, Oron by Exhibit 'A' can hardly qualify as "*Educational Materials*". The mere fact that the items are to be supplied to an educational institution does not make the said items "*Educational Material*". A contractor commissioned to supply a 100KVA generator or Computer Monitors to a university, will not when asked to pay VAT on them, argue that they are "Educational Materials". The items which the Plaintiff imported on the strength of Exhibit 'A' are not "*Educational Materials*" within the provision of Section 3 of the **First Schedule of the VAT Act, 2007** and are therefore not *exempted* from value added tax. The Plaintiff's suit, even on the merit cannot succeed as I see its claim, against the details of the 1st Defendant's depositions in paragraph 5(b) and 7 of the "Counter-Affidavit" filed, that the Plaintiff was the one who prepared the information and assessment by which it was levied to pay VAT by the 2nd Defendant, as an after-thought. I also accept the depositions of the 2nd Defendant's "Counter-Affidavit" in paragraphs 10 – 15 in coming to this *finding* as it physically inspected the items upon arrival before it came to the decision, that although the equipments were imported for an educational institution, the equipment are not "*educational materials*" within the definition given by the applicable Act and regulations.

The Plaintiff's suit is dismissed. I shall like to hear Counsel on the issue as to costs.

This shall be the Judgment of this Court.

HON. JUSTICE G.O. KOLAWOLE
JUDGE
27/4/2017

COUNSEL'S REPRESENTATION:

1. **D.I. AJABA, ESQ. with him is UCHE AMULU, ESQ. for the PLAINTIFF.**
2. **MRS. DEBORAH TARFA with her in ETEBONG UDOH, ESQ. for the 1ST DEFENDANT.**
3. **MRS. ZAINAB ABDULLAHI-MUSA for the 2ND DEFENDANT/ APPLICANT.**

CERTIFIED TRUE COPY
FEDERAL HIGH COURT
A B U J A
11/5/2017
Gimba Alice Maryam
Registrar