It Is What It Is, It Ain't What It Ain't: Examining the 'VATability' of Rents in the Light of The TAT's Decision in Ess-Ay Holdings v. FIRS*

Background

As the popular quote reads, "…in this world nothing can be said to be certain, except death and tax.[1] This underscores not just the importance of tax, but the relative constancy - the inevitability. Given that it is a major source of revenue, and in view of the dwindling fortunes prompted by the pandemic, it is understandable that the government is ever more interested in this area and would thrive to exact as much tax as much as it can. Only influenced by the man's innate prudency, the taxpayer would equally seek to avoid liability by all *means*. In recent times, there seems to be no other interest-generating area within the Nigerian tax space or any subject that has pitched the two interests against one another more than the Value Added Tax (VAT) implication of rents. An area beclouded by conflicting decisions,[2] the recent decision of the Tax Appeal Tribunal sitting in Lagos, on September 10, 2020, represents a long sought clarification on this nascent aspect of Nigeria's tax jurisprudence.

Brief Facts

The Appellant, who is into development of real properties which are rented or leased to tenants for both commercial and residential purposes, was in 2018 served with a letter of the Respondent's intent to assess for additional taxes particularly with respect to VAT on incomes derived from letting out its properties for the 2014 - 2016 accounting years, after an audit conducted by the Respondent.

After a failed negotiation, the Respondent on July 9, 2018, severed on the Appellant a VAT Assessment Notice in relation to VAT on incomes derived from its commercial tenants. The Appellant objected to the said VAT Assessment Notice via its objection letter dated July 15, 2019 which elicited from the Respondent, a Notice of Refusal to Amend (NORA) dated July 22, 2019. Dissatisfied with the Respondent's NORA, the Appellant filed the Appeal before the Tax Appeal Tribunal on August 22, 2019, raising three Grounds of Appeal from which two issues were distilled.

Upon review of the facts, the Tribunal adopted the issues formulated by the Appellant as capturing the essence of the Appeal, thus: *(i) Whether rental incomes are subject to Value Added Tax (VAT) under the Value Added Tax Act CAP V1 LFN 2004 (as amended - VATA)*; and (2). *Whether the provisions of the Federal Inland Revenue Service Information Circular No. 9701 dated 1st*

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[1] Smyth, Albert Henry (1907). The Writings of Benjamin Franklin, Vol. X (1789-1790). New York: Macmillan. p. 69. <https://archive.org/details/writingsbenjami00smytgoog>

[2] Cf *Federal Board of Inland Revenue v. Ibile Holdings* 6 All NTC 1 and *Momotato Nigeria Limited v. UACN Property Development Company Plc* 6 All NTC 37.

January, 1997 seeking to exempt only rents from residential properties is not ultra vires the Respondent?

Arguments

On the first issue, the Appellant argued that taxation was strictly statutory and in so far as the VATA did not mention rent incomes – whether received on residential or commercial premises, it was safe to assume that the VATA never contemplated rent as being amendable to VAT. He further argued that rent does not come within "supply of goods and services", the basis for charging VAT as prescribed under Section 2 of the VATA. On the other hand, the Respondent argued that a reading of the VATA (particularly Sections 46 and 2) shows that the Act did not expressly exempt rent and as such, rent would be deemed to be subject to VAT. He referred to Circular No. 9701 dated January 1, 1997 which expressly excluded rents received on residential premises in drawing the conclusion that rent received on commercial premises, as in the instant case, were subject to VAT, having not been exempted in the same Circular.

Furthermore, he argued that the development of land into habitable and commercial properties is the value added by the Appellant to the land and that the letting of the taxable development on the land is vatable and captured under the definition of "supply of goods" in Sections 2 and 46 of VAT Act. Reliance was also placed on Section 47 of Tenancy Law of Lagos State and the case of Oduye vs Nigeria Airways Ltd (1987) NWLR (Pt.55) 126 on the definition of rent.

On second issue, the Appellant argued that tax could only be imposed on any person by statutes and not by Circular. He further added that the VAT could only be amended through the proper legislative procedure and not through issuance of a Circular.

On the other hand, the Respondent argued that Exhibit EHL 6, the Information Circular, does not seek to amend the VAT Act, but merely set out the details of items exempted from VAT. He argued that the Circular is presumed regular having been made by the Chairman of the Respondent, a delegate of the Minister - who by Section 38 of VATA has power to vary the schedule to the VAT. He thereafter urged the Court to take judicial notice of the Circular as a subsidiary legislation.

The Decision

On the first issue, while stressing that the nature of the transaction is what must be given priority in constructing whether a transaction is amendable to VAT or not, the Court held that real properties (the basis of the rent sought to be charged to VAT) are not goods as they are not severable or moveable. The Court further held that they are not services either as services require human effort and skills. Also, the Court shed more light on the expression "the letting out of taxable goods on hire or leasing, and any disposal of taxable goods" contained in Section 46 by holding that same must be understood with reference "to goods properly so-called, that is, goods that are moveable or capable of being severed." The Court drew a sharp contrast with short-term leases offered by hotels which provide other services such as furnishings, meals, laundry services, phone services etc. and are justifiably subjected to VAT not on the basis of their value as real properties but because of the services rendered. Finally, the Court held that lease does not amount

to supply of goods and services, but merely transfer of right. Reliance was placed on **CNOOC Exploration and Production Nigeria Limited Vs AG, Federation & Ors 7 All NTC 371 at 379.**

On the second issue, the Court held, while the FIRS can validly issue out Information Circular, same cannot constitute a regulation within the meaning of VAT Act or or delegated legislation. The Court further held that an Information Circular is the subjective opinion of the Respondent as to the interpretation of tax laws; it does not command the force of law and cannot be the basis for charging a particular transaction to VAT as the Respondent is praying in the instant case. Reliance was place **Omatseye Vs Federal Republic of Nigeria (2017) LPELR – 42719 CA at P. 15 – 16.** In Wrapping up, the Court noted that "…if the transaction is outside the scope of VAT Act, then VAT is not chargeable."

Comments

The decision of the Tax Appeal Tribunal represents a watershed and a restatement of the correct position of the law on the two vexed issues of VAT implication of rental incomes and the legal status of Circulars often issued by MDAs. While the need for resort to external aids in interpreting an enactment may be justified in appropriate instances, the object or mischief of an enactment must not be lost. In other words, while it may be right to say that all items not expressly exempted in VATA is chargeable to VAT, care must be taken not to expand the meaning rather too widely.

On the other hand, it is also instructive to note that the purported power of a Minister to amend Act of the National Assembly is illegal – for instance S. 38 of the VATA. A case in mind would be **HOMAL v. AG Fed & Anor Suit No: FHC/L/CS/1082/2019** where the Court held that the Minister of Finance minister could not amend the schedule to an Act, the schedule itself being a part of the Act. This also holds true of Circulars which the Court rightly held that are no more than the Tax Authority's explanation of the Tax laws, but not laws in themselves. These decisions could not come at a better place than now when there is a spate of 'so-called tax regulations'.

However laudable the decision of the TAT is, it is important that to note the developments in law heralded by the Finance Act 2019. Specifically, contrary to the Tribunal's holding that the definition of goods does not admit of incorporeal rights or choses in action, the Finance Act 2019 has now defined intangible goods to include incorporeal rights, with the exclusion of interest in land.

In all, and as admonished by the Court, where the legislature is desirous of having rent vatable, the legislature could borrow leaf from England and make explicit amendments in this regard. Until this is done, as it relates to VAT implication of rental incomes, "It is What it is, it Ain't What it Ain't".