IN THE TAX APPEAL TRIBUNAL
IN THE TAX APPEAL TRIBUNAL OF THE ABUJA ZONE
HOLDEN AT ABUJA

SUIT NO TAT/ABJ/APP/030/2013

BETWEEN:-

GAZPROM OIL & GAS NIG LTD__APPELLANT

VS

FEDERAL INLAND REVENUE SERVICE__RESPONDENT

Coram: Hon. Nnamdi Ibegbu, Esq, SAN, F.C.I.Arb. [Ag. Chairman]
Hon. A.M Gumel
Hon. Barr. Zulaihat Aboki
Hon. Barr. Jude Rex-Ogbuku [Read the Lead Judgment]

JUDGMENT

The Appellant being dissatisfied with the decision of the Respondent as conveyed in a letter dated the 2nd September 2013 with Reference Number FIRS/TPLD/VAT/0122/VOL V/199 upholding [2] two value Added Tax Re-Assessment Notices dated the 5th March 2013 in the sum of USD 339, 168. 87 and Euro 50, 894.96 referenced WCBA/AUDIT/VAT/12 and WCBA/AUDIT/VAT/11 respectively appealed to this honorable Tribunal vide amended Notice of Appeal dated the 4th day of June 2014 and filed on the 11th day of June 2014.

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TAX APPEAL TRIBUNAL
ABUJA
Sign..... Date 20/4/15
Name: Kubaghza B.D
Designation: O11

The claim is as follows:

I. To declare that the Value Added Tax act neither articulates nor imposes a Value Added Tax regime that is bases on the "Destination Principle' as articulated by the Respondent.

II. To declare that for services received by a Nigerian Company and provided by a Non-resident Company to be liable to Value Added Tax, the Non- resident Company must be carrying on business in Nigeria.

III. To declare that to "carry on business" in Nigeria for the purpose of the Value Added Tax Act, the non-resident Company must have some form of presence in Nigeria through an employee, agent, asset, equipment or other representative and the activities in Nigeria must have some form of continuity or performance.

IV. To declare that unless the Appellant receives a Value Added Tax Invoice from the Non-resident Company; the Appellant has no obligation to account for any Value Added Tax or any service received from a Non-resident Company.

V. To discharge the two Value Added Tax RE-Assessment Notices issued by the Respondent on the Appellant both [Notice Reference: WCBA/AUDIT/VAT/12 and Euro 50, 894.96 [Notice Reference: WCBA/AUDIT/VAT/11]

In proof of its case, the Appellant called one Witness – Mr. Evgeny Buben, its Chief Financial Officer who in the course of his evidence tendered [25] Twenty Five Exhibits marked Exhibit 1 to Exhibit 25. He gave evidence to the extent that in the course of his official work; he has had cause to review several documents maintained by the Appellant. It is his testimony that on the 13th June 2012, the Respondent through a letter informed the Appellant of its intention to carry out a Tax Audit for all taxes administered by it for the

years 2008 to 2011. That after the audit; the Respondent forwarded its observations to the Appellant and invited the Appellant to a Reconciliation Meeting to discuss the observation. None of the observations in the said letter referred to Value Added Tax liability. That subsequent to the reconciliation meeting; the Respondent wrote to the Appellant wherein it summarized the outstanding issues for reconciliation which were mainly as a result of Withholding Tax. That after several exchange of correspondence and further reconciliations on the Withholding Tax issues; the Respondent reduced the liability it had earlier computed.

However, by yet another letter dated the 27th November 2013; the Respondent for the first time accused the Appellant of Non-rendition of Value Added Tax returns for Non-Resident Companies that had provided services to the Appellant. That in response thereto; the Appellant replied contesting the liability to Value Added Tax on the basis that the Non-Resident Companies that provided the services in issue were not carrying on business in Nigeria. They were not obliged to register for Value Added Tax. They were not registered for Value Added Tax and they did not charge Value Added Tax. When the Respondent insisted and raised two Notices of Value Added Tax RE-Assessment in the sum of USD 339, 168.87 via Reference: WCBA/AUDIT/VAT/12 and Euro 50, 894.96 with Reference: WCBA/AUDIT/VAT/11 both dated the 5th day of March 2013; the Appellant objected to the RE-Assessment Notices and raised three grounds to wit:

- Only a Non-Resident Company carrying on business in Nigeria has an obligation to register for Value Added Tax.
- Only a Non-Resident Company that has registered for Value Added Tax can charge the Tax and;
- Only a person who has received a Value Added Tax Invoice has an obligation to account for the Tax and for it.

The Appellant contends that the nature of services obtained does not require the presence of the service providers in Nigeria in anyway and that the services were provided by Consultants and relate to advisory and research which were fully performed in the country of Resident of the Consultants. That the services were provided from outside of Nigeria.

The providers having no employee, asset, equipment, representatives or Agents in Nigeria for the provision of the services for which reasons the service providers never charged Nigerian Value Added Tax in any of the invoices presented.

Finally, the Appellant believes that it is only a clarification of the position of the Law by this Honorable Tribunal that can prevent the collection of a Tax that is not imposed under the provisions of the Value Added Tax Act. This is the essence of their appeal to this Honorable Tribunal culminating to the claims therein made.

At the close of their case, the witness was duly cross-examined on the 4th of June 2014 and after re-examination by Counsel to the Appellant, was discharged.

On their part, the Respondent relied on all the exhibit as tendered and also called a single Witness – Mr. Jerome Okoro, one of its employees who testify that the subject matter relates to Consultancy Services supplied to the Appellant by some Foreign, Non-Resident Companies. That the services supplied are liable to Value Added Tax in Nigeria. That the services were rendered under Contractual Agreement between the parties. That the services supplied were imported by the Non-Resident Companies from their own respective addresses outside Nigeria to the Appellant who consumed the services in Nigeria.

He contended that by a letter dated 25th June 2013; the Appellant agreed with the Respondent's position that a Non-Resident Company carrying on business in Nigeria is required to register for VAT using the address of the

Nigeria Company with whom it has a contract and that the liability to pay the VAT is that of the Nigerian Company. He observed that the Non-Resident Companies ought to have registered for Value Added Tax with the Board of the Respondent but failed. He stated further that a person whom goods or services are supplied in Nigeria by a Non-Resident Company ought to remit Value Added Tax on such goods or services to the Respondent in the currency of the transaction and that in this case; the Companies carrying on business were required to have registered for VAT with the Board using the address of the Appellant since they have [had] subsisting contract, as the address of the Non-Resident Companies for purposes of correspondence relating to the Value Added Tax. He contended that the Appellant refused, failed and neglected to advice the Non-Resident Companies who supplied the services but from the Appellant who consumed the services in Nigeria. He stated further that the Appellant has not denied but admitted consuming the services by the Non-Resident Companies in Nigeria. That the VAT RE-Assessment notices served on the Appellant is as a consequence of the Appellant's failure to pay the Tax on the taxable services supplied to it by the Non-Resident Companies and that to hold in favor of the Appellant would mean Nigeria would lose VAT Revenue both on exported and imported services.

Finally, he contended that the assessment made on the Appellant is valid, proper and in accordance with the Law and urged the Honorable Tribunal to dismiss this Appeal in its entirety and Order the Appellant to comply with the VAT Re-Assessment and Demand Notices with interest on the stated sum and cost to the Respondent and Order the Non-Resident Companies to register for VAT with the Respondent's Board and issue VAT Invoices on the services they render to the Appellant. At the close of this case; the Witness was equally Cross-Examined and since there was no Re-Examination; the Respondent closed its case.

This was the state of evidence when this Honorable Tribunal ordered for Written Address. This, the parties did. On the 7th Day of April 2015, this Tribunal granted an Order of extension of time and deeming the final address of the Respondent as having been duly filed and served.

The Respondent in their final address proffered six issues for determination by this Honorable Tribunal. On the first issue:

i. Whether by virtue of the provisions of the Value Added Tax Act, the "the Destination Principle" is applicable in Nigeria.

Learned Counsel submitted that the Destination Principle which implies that Value Added Tax is levied on goods and services in the country of consumption rather than production is applicable in Nigeria. He argued that all goods and services exported from Nigeria to other countries are exempted from VAT while VAT is levied on goods and services imported into the country at the Nigerian rate of VAT. He cited Section 2 of the Value Added Tax Act. It is his further argument that this VAT is collected by a vendor while the taxes are borne by the end user and that where the vendor does not have any physical residence in the country, the obligation to remit the tax is on the purchaser. He cited Sections 12[1] and 10[2] of the Value Added Tax Act to buttress this.

Finally on this issue, Counsel argued that there are two cardinal principles guiding the application of Vat which are the destination Principle and the Origin Principle. That countries are at liberty to apply either of these principles or both. That by virtue of Section 10[2] of the VAT Act, Nigeria applies the Destination Principle. He submitted that the phrase "supplied in Nigeria" used in the section underscores the position of the Respondent and urged the Tribunal to hold that the services supplied to the Appellant by the Non-Resident Companies are subject to VAT in Nigeria. He finally on this

issue, cited the case of *A.G LAGOS STATE V EKO HOTELS LTD [2008] ALL FWLR PT 398* to buttress his argument.

On issues two and three that is:

ii. Whether a Non-Resident Company must be carrying on business in Nigeria in order for services rendered by the Non-Resident Company to a Nigerian Company to be liable to Value Added Tax in Nigeria.

iii. Whether "carrying on business in Nigeria" in the context of the Value Added Tax Act requires having any form of presence in Nigeria.

Counsel arguing the two issues together sought to distinguish the terms "carrying on business and having an established place of business" He argued that for the purpose of the Act it is "carrying on business" in Nigeria that is essential and not having an office, employees or agents. According to him, Section 10[1] clearly states that the Address of the person with whom it has a subsisting contract shall be used as its address for the purpose of correspondence relating to Tax and therefore not necessarily maintaining a physical presence. Counsel argued that the Non-Resident Companies were carrying on business in Nigeria as evidence in there transaction with the Appellant. He referred to the definition of doing business by the 6th Edition of the Black's Law Dictionary pages 482 -483 and 400 and the case of *ELLA V CIE LTD [2006]4NWLR PT 969 114@ 125 also EDICOMSA INTERNATIONAL INC AND ASSOCIATES V CITEC INTERNATIONAL LTD [200] LPELR 5584 [CA]* and submitted that by the content of Exhibit 10 it is evident that the Companies listed have been carrying on business as the services rendered were several by each individual Company and not one off trade or transaction and that this situation was further confirmed by the Witness during Cross-Examination when the Witness testified that some of the

contracts for supply of services could be up to 20 per certain Company. Again, that the duration of the contracts runs into years during which period the Consultant, Non-Resident Company can supply its services each time requested.

He finally urged the Tribunal to hold that the Non-Resident Companies are carrying on business in Nigeria. Counsel further submits that the provisions of Section 10[1] of the Act are clear and unambiguous as it talks about carrying on business. It did not mention "having any form of physical presence" neither is there anything in the section translating carrying on business to "having some form of physical presence" Counsel further argued that it is trite law that when a Statutory Provision is clear and unambiguous; the Court is bound to apply the literal rule of interpretation to it – *ANKAR & ORS V LOKOJA & ORS [2001] 4 NWLR [PT 702] 178 @ 194*. He further submitted that Tax Laws are construed strictly and literally –*SHELL PETROLEUM INTERNATIONAL MATTTSC GAPPI] BIV V FBIR [2011] 4 TLRN 97@ 107* and *TIMBER TRADING CO. LTD V FBIR [1966] NCLR 416 @ 422*. The demands of literal interpretation forbid the importation of any extraneous matter into the words of the Statute being literally interpreted. He further cited the case of *M.F.KENT [WA] LTD V MARTCHEM IND. LTD [200] 8 NWLR [PT.669] 459 @ 473* where the Court held that "where the words or a Statute are clear, the Court should refrain from reading into it extraneous matter"

Finally, he submitted that having some form of presence in Nigeria through employee, agent, asset, equipment or other representation in so far as is not stated or even implied in Section 10[1] of VAT Act is an extraneous matter which should not be imported into that section as the Appellant is attempting to do in this case.

On issues four, five and six:

iv. Whether the Appellant receipt of Value Added Tax Invoice from its Non-Resident service providers is a pre-condition for the Appellant's to fulfill his obligation to render returns and settle its liability for Value Added Tax.

v. Whether the Appellant sufficiently proved its case in the circumstances so as to entitle it to the grant of all or any of the reliefs claimed before this Honorable Tribunal.

vi. Whether the reliefs sought by the Appellant are grantable in the circumstances of this case or at all.

Counsel submits that for the purpose of the Act, the Appellant is a taxable person and liable to pay for gods and services supplied to him tangible or intangible regardless of the origin and that if he is being supplied for a consideration then he is liable to pay VAT on the service as in this case. Counsel further submits that for a Nigerian Company engaged in purchase and supply of goods and service with Non-Resident Companies; the liability to remit the Value Added Tax is always on the party supplied. Refers to Section 10[2] of the VAT Act. Submits further that on the Rules of Interpretation of Tax Statutes; the Court had held that when the interpretation of a Statute which is revenue based or revenue oriented is raised ; then the Statute must be construed liberally in favor of revenue. Refers to PHOENIX MOTORS LTD V N.P.F.M.B [1993] 1 NWLR [PT 272] PAGE 718 @ 731 and therefore submitted that in the instant case; Section 10[2] of the Act spells out the duties on both vendor and purchaser and not some condition precedent before the tax shall be remitted.

He argues that a combined read of Section 10[2] and 15[1] of the VAT Act shows that there is no provision to the contrary nor is there an exception to the application of the provision of the enabling

sections. It is clear that whether a Tax Invoice is issued or not; there is an obligation on a taxable person to render returns and once return is rendered; there is an obligation to remit the Value Added Tax on the transactions reported. He argued further that a cursory look at Section 10[2] of the Act shows that the section creates two Statutory duties to wit; the duty of the Non-Resident Company to include the Tax in its Invoice and the duty of the person to whom the goods or service are supplied in Nigeria to remit the Tax.

He further submits that these duties are separate, distinct and independent of each other.

According to Counsel; it will mean that whether the Non-Resident Company had issued the VAT Invoice or not; the Nigerian recipient of the goods or service remains duty-bound to remit the Tax. That there is no provision that precludes the Appellant or any Nigerian Company in this circumstance to disclose this transaction, render returns and pay VAT due in such transaction. He submits that the issuance of an Invoice is not a pre-condition for rendering a return to the Board nor is for remission of the outstanding VAT. Refers to the case of *ACHAJI IBRAHIM & ANOR V THE KOGI STATE GOVERNMENT & 2 ORS [2001] NLTR VOL 1.* He further submits that from the totality of evidence adduced, the Appellant has not been able to prove that the Respondent was in any way wrong in raising the assessment for VAT against it or that what it suppliers had been doing does not constitute carrying on business.

The Respondent argued that though suppliers are Non-Resident Companies; the Appellant who contracted them is a Nigerian who paid them from its Nigeria finances and that the invoices tendered showed how long the Appellant has been engaged in this transaction without paying its Tax. He submits that there were no documents to show that the services were not supplied to a Nigerian Company or

that it did not enjoy such services from each and all the Non-Resident Companies listed in Exhibit 8. He cited a plethora of cases to show that it is a cardinal principle of our civil litigation that whoever asserts must prove to succeed in his claim and that parties are bound by their pleadings. He finally urged the Tribunal to hold that:-

- The government of Nigeria is entitled to VAT in the transaction between the Non-Resident Companies and the Appellant.
- That Exhibit 8 establishes contract amounting to carrying on business in Nigeria but a pattern crafted to avoid paying us Tax liabilities.
- That the services were carried out for a consideration and that the Appellant have not suffered incidence of VAT at the country of origin of service and urge the Tribunal to frown against the act which amounted to avoiding the incidence of Tax.
- That it is not tenable to argue that the Companies are not familiar with the Nigerian Laws since Nigerians sign the contracts on behalf o f he foreign Companies.
- That what is before the Honorable Tribunal is not the correctness or otherwise of the assessment notices but whether the Appellant should be held liable for VAT that arose as a result of the numerous and continuous transactions with some Non-Resident Companies.

He finally submitted that the Appellant had not made out a case to warrant the discharge of the two VAT Re-Assessment Notices and urged the Honorable Tribunal to order the Appellant to render returns and remit the

outstanding Tax liabilities together with penalties and interest, as Appellant cannot hide under any guise to avoid paying its Tax liabilities.

The Appellant on its part also raised six issues for determination of this matter though the issues are similar. We shall summarize them as presented. They are as follows:-

Issue One: Whether the VAT Act articulates or imposes VAT based on the Destination Principle.

Appellant submits that the VAT Act does not articulate or impose VAT based on the Destination Principle. He based his submission on two sub-principles to wit:

a. Based on the literal Rule of Interpretation, Tax Statutes must be read strictly and literally. And;

b. Based on the Contra Fiscum Rule; Tax Statutes are to be interpreted against the Revenue Authority.

Counsel argued that in dealing with Tax issues; the Rules of Interpretation must be the literal rule and cited in agreement with the Respondent's Counsel, the case of *ALHAJI IBRAHIM & ANOR V THE KOGI STATE GOVERNEMENT & 2 ORS [SUPRA]*. He opined that the primary question in this Appeal is whether the Nigerian VAT Act adopts the Destination Principle and concluded that there is no mention of the words "Destination Principle" in Section 10 of the VAT Act so relied by the Respondent and asked rhetorically if the Respondent was allowed to import the words into the provisions of Section 10 for which he answered in the negative. He cited cases to buttress this argument that the literal rule is the proper rule of interpretation in Tax matters and urged the Tribunal to apply same rule in the interpretation of Section 10 of the VAT Act and hold that in the absence of express words; the Destination Principle cannot be imported into the provisions of Section 10. He further argued that the primary responsibility of

the Tribunal is to interpret the law and not make laws. He cited the case of ARAKA V EGBUE [2003] MJSC 17 to buttress the argument that the Tribunal would be in violation of the Literal Rule and the Doctrine of Separation of Powers where its duty is limited to merely interpreting the Law. Also, *AG KANO STATE V AGF [2007] 3 SC [PT 1] 59*

He argued further that any alteration or amendment of any Statute can only be carried out through a legislative process rather than a judicial process and cited the case of *ADEWUNMI V A.G EKITI STATE [2002]2 NWLR [PT 751] 474* and urge the Tribunal to adhere to the Doctrine of Separation of Powers by restricting its duties to interpreting the provisions of Section 10 [2] which are plain and unambiguous for had Section 10[2] intended to imply the Destination Principle; the provision would have expressly stated so. He urged the Tribunal to resolve the issue one in favor of the Appellant.

Still on Issue One; the Appellant contend that while it agrees with the Respondent that Tax Statutes must be interpreted strictly; it disagrees with the principle articulated by Respondent that Tax should be interpreted in a liberal and beneficial manner in favor of the State. It contends that the decision referred to as the basis for liberal and beneficial interpretation which is *PHOENIX MOTORS LTD V NPFMB [SUPRA]*; is a decision of the Court of Appeal while the basis of the strict and literal interpretation in *TIMBER TRADING CO LTD V FBIR [SUPRA]* is decision of the Supreme Court and that by the Common Law System of Judicial Precedent, where there is a conflict between decisions of two Courts, that of the higher Court is the binding precedent. It argued further that while the decision in *Phoenix Motors [Supra]* was an Obiter Dictum, the Timber Trading Case Supra turned on interpretation of a Taxing Statute and indeed was part of the Ratio Decidendi. It submits that it is the Ratio Decidendi of a case that forms a binding precedent and not the Obiter Dictum and cited the case of *ABACHA V FAWEHINMI [2000] 4 SC [PT II]* amongst others in support thereof. Counsel contended further that it is settled under the Nigerian Law that taxes

are based on clear words of the Statute and nothing can be inferred – *S.A AUTHORITY V REGIONAL TAX BOARD [1970] ALL NLR 77* and urged the Tribunal to reject any inference of principle or imposition of a method of VAT not clearly articulated by the Law. Counsel argued further that in other jurisdiction such as the United Kingdom and South Africa where VAT is imposed on services paid for by entities resident within their jurisdiction based on the Destination Principle; the provisions are made clear and require no further elaboration by any Tax Authority. He cited Sections 4[1] and [2] and 7A [2] of the United Kingdom VAT Act 1994 and Section 7[1] of the South African VAT Act 1991 in support. He argued that if the Nigerian VAT Act had intended to achieve same result; clear provisions would have been included in the Act. He stated further that under the Nigerian VAT Act; there is no provision that articulates or imposes VAT solely because the goods and services are paid for from Nigeria.

That the reliance of Section 10[2] by the Respondent to support its proposition that VAT is imposed based on the location of buyer cannot be supported by any stretch of imagination.

Appellant argued that a careful literal reading of the provision shows that it contemplates that the supply referred to will take place in Nigeria. To buttress the point; Section 10[2] must be read in conjunction with Section 10[1] which already contemplates that the Non-Resident Company will be carrying on business in Nigeria. According to him, a community reading of the two provisions will show that the transaction contemplated is that which a Non-Resident Company is supplying goods and services inside Nigeria to a Nigerian Resident. He opined that the Respondent having realized that transaction like the subject matter herein are not covered by the current wording of the VAT Act has sought to amend the provisions through the national Assembly in which Section 16[2] of the proposed VAT Bill pushed by the Respondent provides that:

> "A supply of service that is not made in Nigeria is a "Taxable supply" if the recipient of the supply is a registered person; and had the supply been made in Nigeria by a registered person in the course of an economic activity it would have been taxable".

He then went on to argue that the Respondent realizing the delays associated with the law making process now seeks to amend the VAT Act through the Honorable Tribunal by canvassing for principle that do not currently exist in the Act. That what the Respondent is seeking to do in this Appeal is judicial law making which the Court frowns at. He then cited the Supreme Court case of *AGRO ALLIED DEVELOMENT ENT LTD V M V NORTHERN REEFER & ORS [2009] 12 NWLR [PT 11155] 255 SC.*

He submitted that what the Respondent is seeking through the "Destination Principle" simply does not exist with the Nigerian VAT Act and urge the Tribunal to reason along with the Court in *CNOOC V AGF & ORS [2013] 1 NRLR 88* that if the Respondent will like to expand the VAT Act to cover what it does not expressly provide for, it can only achieve through an amendment.

Finally, the Appellant argue that assuming without conceding that VAT is imposed under the VAT Act; based on the "Destination Principle" and the basis is the phrase "supplied in Nigeria" as provided for under Section 10[2] of the Act, the transaction in issue would still not be caught as the services were not supplied in Nigeria. According to him, uncontroverted evidence show that the services were provided from outside Nigeria and supply was done outside Nigeria. He summarized that the supply of service, subject matter herein are not covered by the provisions of Section 10[2] of the VAT Act to the extent that they were done outside Nigeria. He finally urged that the Issue One be resolved in favor of the Appellant.

Issue Two: - Whether a Non-Resident Company that is not carrying on business in Nigeria is required to register for or charge VAT

Counsel submits that a Non-Resident Company that is not carrying on business in Nigeria is not required under the Nigerian Value Added Tax Act to register for or charge VAT for two reasons:

a. The provisions of the VAT Act are clear and must be strictly construed.

b. Any obligation on a Non-Resident Company that is not carrying on business in Nigeria to register for and charge Nigerian VAT will amount to unlawful extra – territorial application of the Nigerian Law.

He argued that Section 10 of the VAT Act is very clear as to the obligation it imposes. Only a Non-Resident Company that is "carrying on business in Nigeria" is required to register for Tax and charge it on its invoices. The principle of law applicable to this provision is that the express mention of one thing in a Statutory provision automatically excludes any other which would have been included by implication – *OJUKWU V YARADUA [2008] 4 NWLR [PT 1078] 435*. Again that the provision is in line with the general acceptable principle of law that a country cannot impose obligation under its Laws on a Non-Resident Company except the Non-Resident is involved in activities in the country besides, he argued it will amount to a violation of the Act for a person who is not registered for VAT to charge the Tax on its invoice – Section 31 of the VAT Act. He finally submitted that this second issue be resolved in their favor.

Issue three: - Whether a supplier that has no physical presence in Nigeria can be carrying on business in Nigeria under Section 10 of the VAT Act.

Counsel submits that where a supplier has no physical presence in Nigeria, it cannot be carrying on business in Nigeria for the purpose of the Nigerian VAT Act by reason of simple interpretation of Section 10[1] and [2] of the VAT Act. He reasoned that for a Non-Resident Company to be required to register for and charge VAT; both the business carried on and the supply must be in Nigeria. He agreed with the Respondent's definition of carrying on business as held in *EDICOMSA INTERNATIONAL INC and*

A.V CITEC INTERNATIONAL ESTATES LTD [SUPRA] but that the VAT Act does not provide for a Non-Resident that carries on business in Nigeria. The implication is that the conduct, vocation or business as a continuous operation or permanent occupation must take place in Nigeria.

He argued that in the EDICOMSA CASE [SUPRA] after defining what "carrying on business" is, the Court went further to apply the definition to the context of the Statute being interpreted which has similar phrase limiting the "carrying on business" to Nigeria. The Court held that the act of building properties in Nigeria amounted to carrying on business in Nigeria. According to the Appellant, in all the cases cited in support of the definition, after defining the phrase broadly, the Court went ahead to apply the law to the specific limitation created by the law which is that the business must be carried on in Nigeria – *RITZ PUMPEN FABRIK GMBH & CO KG V TECHNO CONTINENTAL ENGINEERS NIGERIA LTD & ANOR.* Counsel contend that any contrary interpretation will lead to an absurdity as it will invariably mean every Non-Resident Company all over the world must register for and charge Nigeria VAT even if they undertake no business activity inside Nigeria. He contends further that whether the activity is repetitive or not is inconsequential as such reasoning is not supported by the clear wordings of the Statute which requires that the business must be carried on in Nigeria. Therefore, the activities that will create the obligation to register for and charge Nigerian VAT must be activities that took place in Nigeria. The Non-Resident Company must be engaged in the activities that will constitute "carrying on business" in Nigeria. He finally submitted that from the overwhelming evidence before the Tribunal; all the activities of the Non-Resident Companies were carried on outside Nigeria. The Non-Resident Companies therefore were not carrying on business in Nigeria for the purpose of the Nigerian VAT and were therefore not required to either register for or charge Nigerian VAT. He finally urged the Tribunal to hold that there must be some physical presence in Nigeria in order for Non-Resident Company to be deemed to

be carrying on business in Nigeria in line with the decision in the Court of Appeal case in Edicomsa [Supra].

Issue Four: - Whether a Company that has not received a VAT Invoice on its transaction with a Non-Resident Company has an obligation to account for or pay VAT.

Counsel submits that under the provisions of VAT Act as amended to date; a Company that has not received a VAT Invoice from a Non-Resident Company has no obligation to account for or pay VAT on its transaction with the Non-Resident Company. Counsel proffered three point arguments to support his submission to wit:

a. Section 10 is a specific provision governing transactions with Non-Resident Companies. Under Nigerian Law, specific provisions override general provisions.

b. The obligation to remit VAT is dependent on the discharge of the obligation to charge the VAT.

c. There is no provision in the VAT Act that places an obligation on a person to account for or pay VAT that has not been charged.

On the first point, Counsel argued that the provisions of Section 10 of the VAT Act is a specific one that provides for where a Non-Resident Company carried on business in Nigeria and charges the Tax, the Nigerian counterpart is required to withhold the Tax and remit same to the Authority. The provision is clear and there cannot be any ambiguity since it is a specific provision it overrides other general provisions relating to payment of Tax within the Act. It is a settled principle of law that a specific provision excludes the application of general provision. He cited the case of *GOVERNMENT OF KADUNA STATE V KAGOMA [1982] 6 SC 87* and urge the Tribunal to apply the provisions as enacted.

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On the second point, the Appellant argues that the obligation to charge VAT in Section 10 is distinct from the obligation to remit the TAX. That the two obligations are on two different persons but not mutually exclusive.

In fact, the obligations to remit are dependent on the obligation to charge. Counsel submits that the provision hinges the obligation on the recipient of the service to discharge the obligation on the provider of the service. He reasons that:

- The use of the word "and" links the two obligations together into one obligation;
- The use of the phrase "the Tax" in the second sentence presupposes a reference to the phrase "Tax in its Invoice". The Tax that the recipient is required to remit is the Tax that is included in the supplier's Invoice and;
- If the second sentence did not exist in the Law; the Non-Resident supplier that has raised a VAT Invoice would have been required under the provisions of the Act to collect the VAT on its invoice from the recipient.

This implies that VAT which would have been remitted in any event would have been VAT that was charged on the supplier's Invoice. It is that VAT on the supplier's invoice that the Act has now directed the recipient to withhold and remit directly to the Respondent.

On the third point, Counsel stated that Taxes are Statutory and there are no equities or presumptions. What is not stated is not levied – *S.A AUTHORITY V REGIONAL TAX BOARD SUPRA*. The general framework of the VAT Act is that it is paid when a VAT Invoice is issued to the recipient of the goods or services. The Act presupposes that when a VAT Invoice is not issued; the VAT will not be paid. There is no provision in the Act that requires anyone to account for or pay VAT unless it has been charged. Counsel contended

that to create an obligation to pay VAT when an Invoice is not issued is one that seeks an amendment of the VAT Act through the Tribunal. He argued that all over the world, countries that require VAT to be paid even when an Invoice is not issued clearly provide for it under their Laws.

This makes it mandatory for recipients of services to account for and pay VAT in instances when a VAT Invoice will not be issued and it is called "Reverse Charge Mechanism". He referred to Section 14[1] of the South African VAT Act 1991 and Section 8[1] of the United Kingdom VAT Act 1994. He contended further that reverse charge mechanism is not one to be implied and this is because VAT is a Tax that is collected by a supplier. Any exception to this rule is always provided for separately. He stated that three exceptions are created under Section 10[2] and 13 of the Act. He stated further that Section 15 of the Act which deals with rendering of returns should not be brought to the present situation as it deals with rendering returns as opposed to payment of Tax. He argued further that the obligation created by provisions of Section 15 is clear and nothing can be implied into it. The Taxable Person should render a return of all taxable goods and services purchased or supplied by him. The section does not require such person to subject itself to Tax if the supplier did not and also does not require the taxable person to pay a Tax that has not been charged.

Counsel concluded by stating that it is in recognition of non-existence of a "Reverse Charge Mechanism" within the VAT Act that the Respondent now seeks for an amendment of the Act wherein it's Section 39[2] of the proposed Bill provides:

> "2" VAT payable by the recipient of a supply of imported service is both output Tax and input Tax of that person
>
> "3" If an adjustment event occurs in relation to supply of services which are, or would be because of the adjustment event, imported

service, the recipient of the service is treated as if it were also the supplier of the service.

He concluded by saying that as a result of the delays in enacting this amendment, the Respondent is seeking to achieve from the Tribunal what ordinarily is the responsibility of the Legislature.

Issue Five: - Whether this Honorable Tribunal ought to grant this Appeal.

Counsel submits that the Honorable Tribunal ought to allow this Appeal and grant all the reliefs sought by the Appellant. Counsel premised submission on two grounds to wit:

1. The technical argument supports the case of the Appellant in this Appeal.

Counsel argued that the technical argument canvassed support the case of the Appellant that the two Value Added Tax Re-Assessment Notices both dated the 5th day of March 2013 in the sum of USD 339, 168.87 [Notice Reference WCBA/AUDIT/VAT/12 and EURO 50, 894.96 [Notice Reference WCBA/AUDIT/VAT/11 should be set aside by this Honorable Tribunal having been issued erroneously and contrary to the provisions of the Value Added Tax Act. He argued that the Appeal is hinged on mainly issues of law. The grounds of Appeal are all grounds of appeal. The case of the Appellant is therefore based on the provisions of the VAT Act; the Non-Resident Companies with whom the Appellant had transactions with were not carrying on business in Nigeria. They had no obligation to charge VAT on their invoices, they did not charge Vat on their Invoices and Appellant who had not received a VAT Invoice was not under an obligation to account for or pay VAT. He submitted that Appellant has made a case for the Appeal to be allowed.

2. The Appellant has not contravened the provisions of any Law.

Counsel stated that the Respondent sought to raise emotion in the matter by alleging that the Appellant planned its affairs to avoid incidence of Tax and connived with foreigners to defraud Nigeria. He contended that these weighty allegations that bordered on crime needed proof beyond reasonable doubt but that the Respondent failed to lead any evidence to support same. He urged the Tribunal to discountenance the allegations. He went further to argue that assuming without conceding that the Appellant planned its affairs in a way to minimize the Tax exposure; unless the actions are artificial or contrary to the provisions of the Law; the Appellant s cannot be reprimanded for not being taxable – *INLAND REVENUE SERVICE V DUKE OF WESTMINISTER [1936] 19 TC 510.* He said it is important to note that in this case; there is no evidence of any Tax planning activity and the Appellant simply complied with the provisions of the VAT Act and did not self – charge itself VAT because it was not required and finally submitted that it was the duty of this Tribunal to protect the Appellant from an obligation which is not provided for under the VAT Act as amended to date.

I have carefully perused the issues for determination identified or formulated by the parties in this Appeal and came to the conclusion that the issues raised by both parties are practically addressing same questions. However, in my view the issue can be summarized in three which in my opinion deals with the main areas of dispute in this Appeal. They are:

1. Whether the provisions of the Value Added Tax Act imposes Value Added Tax on the basis of the Destination Principle.

   The issue arose from the argument and evidence of both parties as to when VAT becomes payable by a Non-Resident Company. It is generally agreed that Value Added Tax is a consumption Tax payable on the goods and services consumed by individual person, Government Agencies or Business Organizations. World over, two principle guide the application of VAT. These principles are "Destination Principle" and "Origin Principle". Countries generally apply either of the two or both.

Simply put, VAT is either imposed at the place of consumption or at the place of origin of goods regardless of whether VAT is charged at the place of destination of the goods or services or both ways depending on the nature of the Legislation enacted by the country. However, the bone of contention herein is the interpretation of Section 10 of the Value Added Tax Act 1993 as amended [1996 No. 31]. The Act provides:

> *"[1] For the purpose of this Act; a Non-Resident Company that carries on business in Nigeria shall register for the Tax with the Board using the address of the person with whom it has a subsisting contract, as its address for purpose of correspondence relating to the Tax*
>
> *"[2] A Non-Resident Company shall include the Tax in its Invoice and the person to whom the goods or services are supplied in Nigeria shall remit the Tax in the currency of the transaction"*

The contention of the Respondent is that the phrase "supplied in Nigeria" as used in Section 10[2] of the Act underscores the applicability of the destination principle by which phrase - goods and services supplied in Nigeria are subject to VAT. The Appellant on the other hand argue that Tax imposes pecuniary burden and under the Rule of Interpretation subject to strict construction. The words of the Statute therefore should be given their plain meaning. I have reproduced the section in order to ease reference and attempt to give it an unbiased interpretation.

In the first place, it is a general Rule of Interpretation of Statute that words in a statute must be given their ordinary meaning. However, in Tax, laws are construed narrowly or strictly , sticking to the ordinary meaning of the words used therein without adding any gloss on them –

AHMADU & ANOR V THE GOVERNOR OF KOGI STATE & ORS [2002 3 NWLR [PT 755] 502 @ 522. Giving the section, a community reading, and the following scenario emerges. To wit;

1. The Non-Resident Company must be carrying on business in Nigeria.

2. For the purpose of the Tax, the Non-Resident Company shall register with the Board which entitles it as well as create an obligation to charge the Tax.

3. The Act assumes that for the Non-resident company to do business in Nigeria; it must have a person whom it has a subsisting contract with;

4. For the purpose of correspondence relating to the Tax; the address of the Nigerian is the contact address.

5. The Non-Resident Company when issuing its Invoice shall include the Tax charged.

6. The person to whom the goods and services are supplied in Nigeria shall remit the Tax and;

7. In the currency of the transaction.

For the section to be applicable to a situation; these circumstances must flow from one to the other. To apply the section where there is a break in progression will lead to absurdity.

Juxtaposing the following to the case at hand, one is tempted to ask; Are the Non – resident Companies in Exhibit 24 carrying on business in Nigeria? The Courts in a plethora of cases defined "carrying on business" to mean conducting, prosecuting or to continue a particular vocation or business as a continuous operation or permanent occupation. The repetition of acts may be sufficient. It also means to hold oneself out to others as engaged in the selling

of goods or services – *BLACKS LAW DICTIONARY 5TH EDITION P.194* also *EDICOMSA INTERNATIONAL INC & ASSOCIATES V CITEC INTERNATIONAL ESTATES LTD [SUPRA]*. It is not in doubt therefore that the Non-Resident companies carry on business. What is in doubt is whether that business in carried on in Nigeria.

In paragraph 30 of the Witness Statement of Evgeny Buben as adopted; the Witness stated thus:

> "I know as a fact that the nature of services does not require the presence of service providers in Nigeria in anyway. The services were provided by consultants and they relate to advisory and research services which were fully performed in the country of residence of the consultants"

On Cross – Examination, the Counsel to the Respondent asked:

> Q: So, in this your case where the Appellant Company dealt with a Foreign Company; who remits VAT?
>
> A: In this situation, nobody remits VAT since the Non-Resident Companies are not carrying on business in Nigeria.

In the Edicomsa's Case [supra], Rhodes – Vivour [JCA, as he then was] delivering the Lead Judgment held:

> "My Lords, by virtue of the provisions of Section 54[1] of the Companies and Allied Matters Act; any Foreign company seeking to carry on business in Nigeria shall take steps to obtain incorporation for that purpose but until so incorporated; the foreign Company shall not carry on business in Nigeria or exercise any of the powers of a registered Company"

Although the case has to with the status of the Appellant viz avis the provisions of the company and allied Matters Act, it is instructive to note that the Nigerian Laws become operative only when such Company intend or in fact does business in Nigeria. Indeed, it will amount to over stretching the provision of the VAT Act to state once you carry on business with a Nigeria Company one must register with the Board and charge VAT. It is therefore right to say that whilst a careful interpretation of Section 10 of the VAT Act, anticipates the destination principle as a basis for imposing VAT in Nigeria; same is not applicable in the circumstance of this Appeal. This is further strengthened by the uncontroverted evidence that the Non-Resident Companies are not carrying on business in Nigeria and the services were to be provided outside Nigeria – article 2 of Exhibit 24.

It will therefore absurd to expect that the Non – Resident Company, who is not doing business in Nigeria, should register with the Board. Suffice to state that, since it is not registered with the Board, it cannot charge VAT and so there will be no need to give the address of the Nigerian Company and will not include VAT in its invoice. This will mean that the Nigerian Company will have nothing to remit in whatever currency.

In the final analysis, I hold that this issue is resolved in favor of the Appellant as the circumstance for the application of the provision of Section 10 of VAT Act does not apply to the transaction under dispute.

Issue Two: Whether carrying on business in Nigeria imposes a duty to register and charge Value Added Tax by Non – Resident Company.

A Non – Resident Company that carries on business in Nigeria is by the provisions of Section 10 of the VAT Act under an obligation to register for the Tax with the Board. The operative word here is "Shall". In the interpretation of Statute, the word shall denote a level of compulsion.

Put another way, a Foreign Company or a Non – Resident Company as it were, cannot legally carry on business in Nigeria without registering with the

Tax Board, using the address of the person with whom it has a subsisting contract, as its address for purposes of correspondence relating to the Tax. The Non – Resident Company for all intent and purposes is a taxable person and every taxable person is expected to register with the Board by virtue of Section 8 of the VAT Act. It is for the purpose of verifying the level of compliance with the Law that the VAT Act in Section 39 empowered staff of the Board to undertake inspection of premises without hindrance. Failure to register attracts penalty in Section 8[2] and 32 of the Act.

The Act went further to place same level of compulsion on the Non – Resident Company to include Tax in its Invoice which failure attracts severe penalty. Section 29 provides:

> "A person who fails to issue Tax Invoice for goods sold or services rendered, is guilty of an offence and liable on conviction to a fine of 50% of the cost of the goods or services for which the Invoice was not issued"

In the case of AHMADU V GOV OF KOGI STATE [2002] 3 NWLR [PT 755] 502 @ 519 PARAGRAPH B – the Court held:

> "The Court is not supposed to add anything to the law if the wordings therein are clear and unambiguous. The natural meaning shall prevail. What it ought to be interpreting has no place where the words used in the Legislation are clear. One should not lose sight of the fact that the purpose of interpretation exercise is principally to discover the intention of the law maker. To achieve this goal one has to fall in the language of words used.
>
> Where the words used are clear, precise and unambiguous, they should be given their plain and grammatical meaning. Also, Ifezue v Mbadugba [1984] 1 SCNLR 427.

From the very clear but guarded provisions and wordings of Section 10 of the VAT Act; it is obvious that the lawmakers had intended to have a Non – Resident Company register and charge Value Added Tax. It is in this premise that I so hold.

Issue Three: Whether receipt of Value Added Tax Invoice is a pre – condition to remittance of VAT from a Non – Resident Company.

Section 10 [2] provides that

> "A Non – Resident Company shall include the Tax in its Invoice and the person to whom the goods or services are supplied in Nigeria shall remit the Tax in the currency of the Transaction"

I have in cause of this judgment earlier reproduces the entire section in a bid to show the true intent of the provision. As it is, the law makers had intended and indeed created an obligation on the recipient to remit the Tax in the currency of the transaction once it is invoiced. Of course remittance on the face value is a function of same having been charged. The mere fact that it is expected that both Non – Resident and Nigeria Company work together creates a duty on the part of the Nigeria Company to ensure collection of the Tax.

Section 26 of the Act provides:

> "A person who;
>
> [a] participates in; or
>
> [b] Takes steps with a view to make evasion of the Tax by him or any other person, is guilty of an offence and liable on conviction to a fine of N30, 000.00 or two times the amount of the Tax being evaded, whichever is greater or to imprisonment for a term not exceeding three years"

The above section however would appear to deal with situation where such allegation which borders on crime is proven. Otherwise the clear interpretation of the Act is that the recipient will only pay when a VAT Invoice is issued for the good or service.

In the circumstance, effect can only be given to the clear and unambiguous wordings of the Statute – Alhaji Ibrahim & Anor v The Kogi State Government & 2 Ors [Supra]. Therefore, I do not hesitate that issue number three be resolved in the affirmative.

In the final analysis, I hold that for the reason proffered above; this Appeal succeeds.

I set aside the two Value Added Tax Re – Assessment Notices dated the 5th March 2013 in the sum of USD 339, 168 .87 and Euro 50, 894 .96 referenced WCBA/AUDIT/VAT/12 and WCBA/AUDIT/VAT/11 respectively and accordingly grants all the reliefs contained in this Appeal.

No Order as to cost.

DATED THIS 10TH JUNE 2015

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Nnamdi Ibegbu Esq., S.A.N, F.C.I.Ard

Ag. Chairman Tax Appeal Tribunal, Abuja Zone

CERTIFIED TRUE COPY
TAX APPEAL TRIBUNAL
ABUJA
Sign.....Date 20/4/18
Name: Kwaghza B.D
Designation: O11