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

SUIT NO. TAT/ABJ/APP/006/2006
SUIT NO. TAT/ABJ/APP/017/2010
(Consolidated)

BETWEEN:-

TSKJ II CONSTRUCOES INTERNACIONAIS SOCIADADE UNIPERSSOAL LDA. } APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE } RESPONDENT

CORAM: Hon. Nnamdi Ibegbu, Esq., S.A.N, F.C.I.Arb. (Ag Chairman)
(Read the lead judgement)
Hon. A.M. Gumel
Hon. Barr. Jude Rex-Ogbuku

JUDGEMENT

The Appellant filed Appeal No. TAT/ABJ/APP/006/2006 and subsequently filed Appeal No. TAT/ABJ/APP/017/2010. Upon an application by Counsel on the 6th day of September, 2011, the two matters were consolidated for hearing and determination.

A related matter TAT/ABJ/APP/010/2008 TSKJ II CONSTRUCOES INTERNACIONAIS SOCIADADE UNIPERSSOAL LDA Vs FEDERAL INLAND REVENUE SERVICE came up before this Tribunal and was ripe for hearing. Hearing therefore commenced in that case before the consolidation of the present cases.

As a result, that case TAT/ABJ/APP/010/2008 was heard, but due to the similarity of the facts and circumstances of the three Appeals, the Tribunal decided to adjourn judgment thereon and considered delivering them on the same day. The reason being that the reasoning in the already concluded matter is most likely to affect the attitude of Counsel in the subsequent consolidated Appeals.

This is not the reason why Appellant's Counsel Babajide O. Ogundipe, Esq. would tell the Tribunal to its face during the proceedings that he

already knows what the decision of the Tribunal would be, and went ahead to digress in his Appellant's address to insult the Tribunal, which attitude and arrogance he exhibited in the proceedings.

In his address he stated inter alia as follows:-
"The Tribunal subsequently, on (sic) decided not to deliver its decision on that appeal until the conclusion of these, consolidated appeals. For this reason, the appellant has concluded that the tribunal has already ready reached a decision on the issues raised in these appeals, and the hearing of these appeals in the manner in which they were heard, was in reality, mere for the sake of form .....
The inescapable conclusion, therefore, is that the tribunal has already reached a decision on issues canvassed in these consolidated cases".

This Tribunal is happy that the Tribunal has not been accused of doing anything that is dishonourable throughout the proceedings in the consolidated cases, except adjourning judgment in a sister Appeal No. TAT/ABJ/APP/010/2008, to enable the Tribunal deliver the judgments the same day.

In **UDO VS OKUPA (1991) 5 NWLR Part 191 pg 365 @ 381 D – G** Niki Tobi, J.C.A (as he then was) held that *"As it is, Learned counsel for the defendants/appellants felt so bitter about the way the learned trial judge evaluated the evidence before him; to the extent that he accused him of making up his mind to give judgment to the Plaintiffs/Respondents ..... I do not think it is part of good ethics for counsel to level unfounded criticisms on members of the bench just for the fun of it. On no account should counsel hide under the appellant's process to impugn the integrity of any member of the bench. That is not done in any civilized system, including ours which is civilized ....."*

This Tribunal should leave this issue as it is, and should not be distracted by such conduct of a seemingly senior counsel, which to say the least, is disrespectful. Junior counsel, and indeed the Bar should not copy decorum and conduct of Babajide O. Ogundipe, Esq.
The reliefs sought in TAT/ABJ/APP/006/2006 appear hereunder as follows:-

(i) The Respondent's notices of refusal to amend assessments with reference numbers:
IID/CT/BA/ADD/026
IID/CT/BA/ADD/027
IID/CT/BA/ADD/028
IID/CT/BA/ADD/029
IID/CT/BA/ADD/030
IID/CT/BA/ADD/031
be set aside, wholly, on the grounds and particulars detailed in this notice of appeal.

(ii) The Respondents notices of additional assessments listed in paragraph 1 above be discharged wholly, based on the grounds and particulars contained in this notice of appeal.

(iii) A determination that the Appellant's tax liabilities for 1997 to 2002 tax years are as computed in the self assessment forms submitted by the Appellant to the Respondent in respect of those years being the sum as follows:

1997	$5,127,596.53
1998	$2,264,672.75
1999	$2,264,672.75
2000	$1,735,515.21
2001	$4,191,114.51
2002	$3,235,786.18

The full amount of which has been acknowledged by the Respondent, and that the tax liabilities have been paid fully.

(iv) Such other reliefs as would be required to give effects to reliefs sought above."

In the sister case which was consolidated with Appeal No. TAT/ABJ/APP/006/2006, which is Appeal No. TAT/ABJ/APP/017/2010 the reliefs sought are:-

(i) That Respondent's notices of refusal to amend assessment with reference number LD/OG/2100133/CRM/0236/401 – PDBA 210 be set aside, wholly, on the grounds and particulars detailed in this notice of appeal.

(ii) That Respondent notices of additional assessments listed in paragraph 1 above be discharged wholly, based on the grounds and particulars contained in this notice of appeal.

(iii) A determination that the appellant's tax for 2008 & 2009 tax years is as computed in the self assessment forms submitted by the Appellant to the Respondent in respect of those years, being the sums of $550,556.74 and nil, respectively, the full amount of which has been acknowledged by the Respondent, and that the tax liability has been paid fully.

(iv) Such other reliefs as would be required to give effect to the reliefs sought above.

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Designation: Officer II Admin

These are the reliefs sought by the Appellant to be considered and determined together as is done in consolidated cases.

Both Counsel filed their processes in accordance with the tax Appeal Tribunal Rules and called one witness each. This case was heard and both counsel closed their cases. Incidentally, the composition of the tribunal changed. As a result both parties were asked to start the matter de novo. When asked, each counsel said that it will be impossible for the respective witnesses who testified to appear before the tribunal again. As a result, both counsel certified copies of the testimony of each witness. In that situation, Appellant's counsel tendered the Certified True Copy of previous proceedings from the Bar in keeping with the law and practice. Exhibits previously tendered were retendered from the bar. The respective cases of both parties were formally closed on the 5th day of July, 2012. Both Counsel adopted their written addresses and the Respondent's reply on law. The consolidated matters were adjourned for judgment to be delivered on Wednesday the 1st day of August, 2012.

The brief fact of the two appeals consolidated by this tribunal are that the Appellant is a non-resident tax payer. The Appellant obtained a contract for the construction of Nigerian Liquefied Natural Gas (NLG) plant for the Nigerian LNG Limited (NLNG).

In executing the said contract, the appellant used TSKJ Nigeria Ltd., hereafter referred to as (TSKJN) to render logistics support services to it in the course of executing the said contract.

The Respondent is a statutory body responsible for the collection of Federal Taxes for the government of the Federal Republic of Nigeria.

The appellant filled self assessment on deemed profit basis (Turn over assessment) meaning that the profit of the appellant could not be ascertained. The Appellant made deduction of what it called Recharges being the cost paid to its local subsidiary.

The Respondent disallowed the said deduction on the ground that the deduction is not allowed under the turn over basis of assessment.

As a result, additional assessment in respect of the supposed wrong deduction the appellant made was disallowed.

The appellant then objected to the Additional assessments. Subsequently, the respondent issued Notices of Refusal to amend, hence the appeals in TAT/ABJ/APP/006/2006 and TAT/ABJ/APP/017/2010 respectively.

The appellant called a witness named Reginald Nwodu who testified that he worked for TSKJ Nigeria Ltd a subsidiary of the Appellant Company. In paragraph 1 of TAT/ABJ/APP/017/2010 and in paragraph 2 of TAT/ABJ/APP/006/2006 respectively of his statement on oath the Appellant was introduced as "one of the corporate vehicles used by a consortium of four corporations engaged as the major contractor for the execution of the liquefied natural gas (LNG) project. It is therefore clear that there is no dispute that this comes under a single contract within the meaning of section 26(b) of CITA. The said witness stated four consortium of companies under cross-examination. There is no evidence that TSKJN was a party to the main contract for the construction (NLNG) plant. There was no evidence before the Tribunal that the contract with the third party (NLNG) was executed by both the Appellant and TSKJN. The Appellant admitted that TSKJN was only incorporated to comply with section 54 of companies and Allied Matters Act Cap CI Laws of the Federation 2004, after the contract with NLNG had been concluded. It shows that TSKJN was not a party to the contract. The witness Reginald Nwodu testified that TSKJN is a subsidiary of the appellant company.

He testified that the assessment was done under turn over basis, but agreed under cross-examination that the turn over procedure is not the only basis of assessment to a tax-payer such as the appellant who did not submit audited financial statement of account to the Respondent.

The Respondent's only witness DW1 named Iro Nnachi Ukpai testified that he is an accountant, a senior manager working with the respondent. He testified that the appellant deducted an alleged cost of their local company in Nigeria before arriving

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at the turn-over that they used to compile their company income tax based on deemed profit basis, which the respondent regarded as unacceptable. As a result, the Respondent raised an additional tax assessment.

He testified that the appellant is mandatorily required by law, as contained in his statement on oath that at the end of every financial year should prepare its financial statement showing its accessable profit and forward it to the Respondent.

He further testified that the information circular stated that the entire profit of a non-resident company on a Nigerian contract is subject to Nigerian tax.

He testified as stated in his statement on oath that if a company prepared a financial statement showing its assessable profit, the law allows the company to deduct all reasonable cost/expenses.

He testified that the circular cannot be above existing tax law and are nothing but mere explanation of the law to the wider public, that it does not superceed the law.

The cases indeed stem from the additional assessment by the Respondent which the appellant is dissatisfied with, hence the two appeals.

The Appellant and the Respondent's counsel each raised four issues for determination. The Tribunal has indeed compressed these four issues raised into two issues which sorts out the entire issues for determination and deal with all issues arising in the consolidated cases.

The main issues for determination which should include subsidiary issues are:

1. Whether the Respondent could properly include as part of the Appellant 's taxable revenue the sums paid to TSKJ Nigeria Ltd and can the Respondent issue notices of additional assessment; which issue includes the effect of the Halliburton case to this suit?

2. Whether the Appellant having filled its return under section26 CITA, is entitled to any tax deduction from its turnover?

The issues formulated by both counsel indeed revolve around these two issues.

In determining the first issue, it should be noted that TSKJ Nigeria was not in existence as a legal entity at the time when the original contract between the Appellant and NLNG was entered into.

There are indeed two contracts creating two taxable events, TSKJ and TSKJN as its parties.

TSKJN was only contracted to render logistics support services after the contract had been entered into with NLNG as admitted in the pleading of the Appellant at paragraphs 2 and 3.

Looking at this from the purview of privities of contract; the doctrine prevents TSKJN from claiming entitlement to the benefit of the contract between the Appellant and NLNG, since TSKJN was not a party to that contract. See A. G FEDERATION VS A.I.C LTD (2000) 10 NWLR part 675 pg 293 @306 E-F.

There are indeed two contract giving rise to two different taxable events. The first contract is the one between NLNG and TSKJ which gives rise to the tax liability for TSKJ.

The later contract is the one between TSKJ and TSKJN which gives rise to tax liability for TSKJN. Taxing TSKJN on the basis of turnover of the first contract does not lead to double taxation.

There is no proof that the contract with NLNG was executed by both TSKJ and TSKJN. The Appellant admitted that TSKJN was only incorporated after the contract with NLNG had been concluded, puts it beyond contention that TSKJN was not a party to the contract. The Appellant would have tendered the main contract which was not done.

The first contract is the one between NLNG and TSKJ from which the original revenue was derived, any subsequent contract entered into between TSKJ with a third party whether or not a subsidiary would make that third party entitled to a part of the turnover of the first contract.

If TSKJ had entered into subsequent contracts with other companies, arising from the first contract, each of those companies will be entitled to a part of the turnover of the first contract for tax purpose, so TSKJ will be entitled to deduct sums paid to those companies in calculating its turnover from the contract. This will destroy the whole idea of deemed profit basis of taxation which assumes that amounts paid to third parties in execution of a contract (also termed expenses) fall within the 80% of the total turnover which is treated as allowable expenses. If this were to be allowed, companies will be given licenses to enter fictitious number of subsequent contracts or a subsequent contract of a fictitious amount in a bid to beat down their tax liability as much as possible. Section 26 of CITA abhors this.

It is the decision of this Tribunal that Halliburton case is distinguishable from the present case. TSKJN is not entitled to any part of the turnover of the original contract between TSKJ and NLNG, and consequently no deduction from the total turnover of that contract is allowable over and above 80% earmarked as expenses under the deemed profit basis method of accounting for profit.

In distinguishing this case with the Halliburton case, for this tribunal to indeed be firm in the conclusion reached by the Tribunal, reference should be made to page 1of the judgment where the Learned Judge stated thus:-

"The Appellant is non-resident company incorporated in the CAYMAN ISLANDS. It incorporated a Nigerian Company called Halliburton Energy Services Nigeria Limited hereinafter referred to as "Halliburton Nigeria". By an agreement dated 1st January 1994 made between the Appellant and Halliburton Nigeria which agreement was admitted as Exhibit "k", before the Body of Appeal commissioners-hereinafter referred to as "Body of Appeal" it was agreed that the Appellant would obtain contracts from the third parties in Nigeria. Such agreements would be executed by the Appellant and Halliburton Nigeria. The contract sum between the Appellant and their subsidiary on the Turnover of each company was not incorporated in the main contract between all the parties to the main contract..."

It should be noted that

(1) The Halliburton case involved one single contract (one taxable event) to which both Halliburton west Africa Limited (the Appellant in that case) and Halliburton Nigeria were parties, but the instant case, involves two separate contracts, therefore two taxable events.

(2) Halliburton Nigeria was in existence as a legal entity at the time when the single contract was entered into. In this present case, TSKJN was not in existence as a legal entity at the time when the original contract between the Appellant and NLNG was entered into.

(3) The fact that both Halliburton West Africa and Halliburton Nigeria Limited executed the contracts entered with third parties was crucial to the finding in that case.

(4) Double taxation was likely to result in the Halliburton case due to the existence of one single contract and therefore one taxable event. Double taxation is not likely to result in the present case as there are two separate contracts and two taxable events.

In that case the Learned Judge, Mustapha, J. was called to decide upon the tax liability arising from a sole contract to which Halliburton West Africa and Halliburton Nigeria Limited were parties.

TSKJN was only contracted to render logistics support services after the contract had been entered with NLNG as admitted in the pleading of the Appellant.

At the time the contract between NLNG and TSKJ was entered into, TSKJN was not entitled to "a part of the turnover of the contract" despite the fact that the said contract was entered into prior to the engagement of TSKJN.

This is the decision of this Tribunal with respect to the first issue as stated by this Honorable Tribunal. It is resolved in favour of the Respondent.

Now to the second issue as stated by this Tribunal.

Before this Tribunal deals with that issue, the Tribunal hereby with respect to revenue derived from an illegal contract cites Section 9 CITA which provides that:
"Subject to the provisions of this Act, the tax shall, for each year of assessment, be payable at the ratio specified in subsection (1) of Section 40 of this Act upon the profits of company accruing in, derived from, brought into or received in Nigeria in respect of-

Any trade or business for whatever period of times such trade or business may be carried on."

Any trade or business as used in the section means that it is immaterial that the trade or business is legal or illegal. In CIR VS DELA GOA BAY CIGARETTE C. LTD (1918) TPD 391, the South African Court held that:

"In the income Tax Act, the tax gathered has cast his net wide enough to catch all income, so that once a receipt or an accrual constitutes income, it is subject to the provisions of the Act, regardless of whether it is legal or illegal income."

This Tribunal decides that receipt or accruable income is taxable income whether it is legal or illegally acquired, or whether the company is properly incorporated or not.

This Tribunal proceeds now to determine the second issue.

The other issue is with respect to Section 26 CITA. That is whether the appellant having filed its returns under that Section 26 of CITA is entitled to claim any deduction from its turnover.

Every company liable to pay tax under Companies Income Tax Act No:11 as Amended in 2007 (CITA) is mandated to file its returns containing its audited account and profit.

Section 41 of CITA states as follows:-

"Every company, including a company granted exemption from incorporation, shall, at least once a year without notice or demand therefrom, file a return with the Board in the prescribed form and containing prescribed information together with the following

Information; the audited accounts, tax and capital allowances, computations and a true and correct statement in writing containing the amounts of its profits from each and every source computed in accordance with the provisions of this Act and any rules made thereunder."

The Appellant did not follow this provision of the tax law, instead the Appellant opted for section 26 of CITA which provides as follows:-

"Notwithstanding section 29 of this Act, where in respect of any trade or business carried on in Nigeria by any company (whether or not part of the operations of the business are carried on in Nigeria) it appears to the Board that for any year of assessment, the trade or business produces either no assessable profits or assessable income which in the opinion of the Board are less than might be expected to arise from that trade or business or, as the case may be, the true amount of the assessable profits of the company cannot be readily ascertained, the Board may, in respect of that trade or business, and notwithstanding any other provisions of this Act, if the company is a –

a. Nigerian Company, assess and charge that company for that year of assessment on such fair and reasonable percentage of the turnover of the trade or business as the Board may determine;

b. If that company is a company other than a Nigerian company and that company has a fixed base of business in Nigeria assess and charge (i) that company for that year of assessment on such fair and reasonable percentage of that part of the turnover attributable to that fixed base, (ii) that company operate a trade or business through a person authorised to conclude contracts on its behalf or on behalf of some companies controlled by it or which have controlling interests in it or habitually maintains a stock of goods or merchandise in Nigeria from which deliveries are regularly made by a person on behalf of the company assess to the extent that the profit is attributable to the business or trade carried on through that person (iii) that company executes one single contract involving surveys, deliveries, installation or construction assess and charge that company on a fair and reasonable percentage for

that year of assessment on such a fair and reasonable percentage of that part of the turnover of the contract and; (iv) the trade or business is between the company and another person controlled by it or which has controlling interests in it and conditions are imposed between the company and another person controlled by it or which has controlling interests in it and conditions are imposed between the company and such person in their commercial or financial relations which in the opinion of the board is deemed to be artificial and fictitious, assess and charge on a fair and reasonable percentage of that part of the turnover as may be determined by the board." Section 26 of CITA envisages that:-

(a) the business produces no assessable profits; or
(b) does produce assessable profit, but the assessable profit produced less than what might be expected to arise from that trade or business; or
(c) the true amount of the assessable profit of the company cannot be readily ascertainable.

The law provides that the Respondent in assessing tax liability should use a fair and reasonable percentage of the turnover to arrive at the deemed profit of the Appellant.

The law does not define what amount is a fair and reasonable percentage of the turnover. In the case of SHELL PETROLUEM INTERNATIONAL MATTSC GAPPIJ BIV VS FEDERAL BOARD OF INLAND REVENUE (2011) 4 TLRN 97 @ 110, the court recognizes discretionary powers of the Board in respect of turnover tax.

The discretion in this respect rests with the Respondent, not the tax payer.

This Tribunal is of the firm view that the Respondent has exercised its discretion in this respect by giving the tax payer 80% of the turnover as the expenses incurred in arriving at the profit of 20%. The said 20% is therefore subject to tax at the corporate rate of 30% in accordance with Section 29 of CITA which provides as follows:-

"There shall be levied and paid for each year of assessment in respect of the total profits of every company tax at the rate of Thirty Kobo for every naira."

It is only 6% of turnover that is claimed as tax under the Turnover Basis of Assessment.

The Appellant obviously cannot take advantage of Section 41 of CITA because it did not file its returns on the basis of audited financial statement of account showing assessable profit.

The Appellant's intention to claim deductions of the costs paid to TSKJN for logistics support services rendered by TSKJN to the Appellant in executing the project will deprive the Respondent and indeed the Federal Republic of Nigeria legitimate Revenue.

The case of SHELL PETROLEUM INTERNATIONAL MATTSCGAPPIJ B.V VS FEDERAL BOARD OF INLAND REVENUE (2011) 4 TRLN 97 @ 107 held that interpretation of income tax legislation is one of strict interpretation. In N.S Bindra's interpretation of Statutes 10th Edition this was reiterated. At page 1107 of that book the case of Re Bijah Singh AIR 1980 Cal 641, pg 644 was cited to have held that: " The Court cannot undertake , out of its own notions of what is fair, to adopt or rearrange the machinery of taxing statute."

Tax law on this issue is clear and certain, so there is no ambiguity whatsoever in sections 41 and 26 of CITA respectively, with respect to money paid to a subcontractor in any transaction by the tax payer is not an allowance deductable under Section 20 of CITA

From paragraph 6.1 of the information circular, sub- contract can only be claimed as expenses only when the profit of the company is known and not like in this case, where the profit of the Appellant is unknown.

On resolving this issue in favour of the Respondent, it is not in dispute that the Appellant filed its return on turnover basis, so under that basis, it is the Respondent who defines what amount is fair and reasonable percentage of Turnover. It is undisputed that 80% covers all the cost incurred by the taxpayer when using the Turnover basis of Assessment.

There is no provision of the law which makes subcontract allowable deduction.

It is clear that the Appellant cannot make any deduction in favour of its local company under the contract because the local company is not a party to the main contract and was also paid for the services it rendered to the Appellant. The money paid to TSKJN for services rendered to the Appellant is not tax deductible under Section 26 of CITA because it is already part of 80% under the turnover basis of Assessment.

The issue is therefore resolved in favour of the Respondent.

The Tribunal hereby dismisses these two appeals filed by the Appellant in the consolidated case TAT/ABJ/APP/017/2010 and order with respect to TAT/ABJ/APP/006/2006 and decide as follows:-

(i) An Order that the Respondent's notices of refusal to amend assessment with reference numbers:
IID/CT/BA/ADD/026
IID/CT/BA/ADD/027
IID/CT/BA/ADD/028
IID/CT/BA/ADD/029
IID/CT/BA/ADD/030
IID/CT/BA/ADD/031
are hereby upheld, wholly.

(ii) An order that the Respondent's notices of Additional assessments listed in paragraph 1 above are upheld wholly.

(iii) An order that the Appellants tax liabilities for 1997, 1998, 1999, 2000, 2001 and 2002 years as computed in the self assessment forms submitted by the Appellant to the Respondent in respect to those years being the sum as follows:

1997	$5, 127,596.53
1998	$2, 264, 672.75
1999	$2, 264, 672.75
2000	$1, 735, 515.21
2001	$4, 191, 114.51
2002	$3, 235, 786.18

and the tax liabilities have not been fully paid, but the Appellant shall pay tax as assessed by the Respondent.

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ABUJA
Sign..... Date 11/12/2013
Name: Olanfuja Y.P
Designation: Officer II Admin

The foregoing is with respect to the decision and orders concerning TAT/ABJ/APP/017/2010.

This Tribunal further decided as follows:-

(i) An Order that the Respondent's notices of refusal to amend assessment with reference number LD/OG/2100133/CRM/0236/401 – PDBA 212 and LD/OG/2100133/CRM/0236/401 – PDGA 210 is hereby upheld as proper and wholly.

(ii) The Respondent's notices of Additional Assessment listed in paragraph 1 above are hereby upheld wholly.

(iii) An Order that the appellant's tax liabilities for 2008 & 2009 tax years as computed in the self assessment forms submitted by the Appellant to the Respondent in respect to those years being the sums of $550,556.74 respectively and the tax liabilities have not been fully paid, but the Appellant shall pay tax as assessed by the Respondent.

The foregoing is with respect to the decision and orders concerning TAT/ABJ/APP/017/2010.

This Honourable Tribunal therefore dismisses Appeal No. TAT/ABJ/APP/006/2006 and TAT/ABJ/APP017/2010 and the respective reliefs sought. Cost follows events cost with respect to TAT/ABJ/APP/006/2006 is fixed and assessed against the appellant in favour of the respondent at N100,000 (One Hundred Thousand Naira). Cost with respect to TAT/ABJ/APP/017/2010 is fixed and assessed against the Appellant in favour of the Respondent at N100,000 (One Hundred Thousand Naira).

DATED THIS 1ST DAY OF AUGUST, 2012.

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NNAMDI IBEGBU, ESQ., S.A.N., F.C.I.Arb.
Ag. Chairman Tax Appeal Tribunal
Abuja Zone.

E/Tribunal 6-12

I CONCUR.

Hon. Barr. Jude Rex-Ogbuku

I CONCUR

Hon. A. M. Gumel

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Designation: Officer IT Admin.