IN THE TAX APPEAL TRIBUNAL

IN THE LAGOS ZONE

HOLDEN AT LAGOS

APPEAL NO: TAT/LZ/019/2012

BETWEEN

VF WORLDWIDE HOLDINGS LTD **APPELLANT**

AND

FEDERAL INLAND REVENUE SERVICE **RESPONDENT**

JUDGMENT

INTRODUCTION:

On March 24, 2009, the Respondent served the Appellant a Notice of Additional Assessment imposing an additional income tax of GBP174,155 for the 2007 year of assessment because the Respondent disallowed the deduction of sums paid to VF Global Services Nigeria Limited for the execution of the contract between the Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom (UKBA) and the Appellant in Nigeria which the Appellant had deducted in arriving at its turnover for tax purpose in line with the provisions of section 30 (1)(b)(i) of the Companies Income Tax Act.

Dissatisfied with the assessment, the Appellant served the Respondent a Notice of Objection Exhibit VF2, dated 21 April, 2009 stating inter alia that by virtue of the provision of section 30 (30)(b) of CITA and the decision of the Federal High Court in the case of *Halliburton West Africa v Federal Board of Inland Revenue (2013)11 TLRN 84; (2006) 7 CLRN 138*, it is entitled to deduct recharges from its turnover before subjecting same to tax in line with the provision of section 30(1)(b) of CITA. In response, the Respondent issued a Notice of Refusal to Amend/ Revise the Assessment to the Appellant maintaining its position on the additional assessment Exhibit VF3. Hence the Appellant commenced this action on the 24th January, 2014 and later filed amended Notice of Appeal dated 18th September, 2014 and sought for the following reliefs:

i. A declaration that the combined effect of the decisions of the Federal High Court in both Halliburton v FBIR and TSKJ II Construcoes Internacionais' case that recharges incurred by the Appellant are deductible from the turnover of the Appellant before subjecting a percentage to tax at the rate of 30%.

ii. A declaration that it would amount to double taxation of the same income of the Appellant to be taxed for the total contract sum that it received under the contract

inclusive of the money it paid over to VF Nigeria in executing the contract and the amount paid as fees thereto, when VF Nigeria also pays tax on whatever it receives from the Appellant.

iii. An Order discharging the Appellant of the assessment or quashing the assessment served on it by the Respondent.

iv. An Order restraining the Respondent from further assessing the Appellant on the above subject matter.

Or in the alternative
v. An Order directing the Respondent to amend or revise the assessment made on the Appellant in respect of 2007 year of assessment by allowing deduction of recharges before carrying out assessment and charge of tax in accordance with the provisions of section 30(1)(b) of CITA.
Or,
vi. A declaration that based on the nature of the business of the Appellant and arrangement with VF Nigeria, the Appellant can only be taxed on 1% of the turnover attributable to the business in Nigeria at the rate of 30%.
vii. An Order setting aside the assessment made on the Appellant and directing that the Appellant's total tax liability be limited to the tax assessed on 1% of the gross contract sum.
Or
viii. A declaration that based on the provisions of section 30 of CITA, the Appellant is not liable to tax because it does not have a fixed base of operation in Nigeria.
ix. An Order discharging the Appellant of the additional tax assessment for 2007.
x. Such other or further orders as this Tribunal may deem fit to make.

RELEVANT FACTS AND EVIDENCE:

The Appellant is a non resident company. In 2007, the Appellant was awarded a contract to render visa related services to UKBA in many countries including Nigeria. In order to execute the Nigerian portion of the contract, the Appellant set up a Nigerian company called VF Nigeria Limited with which it executed a Service Agreement (Exhibit VF8). Under the agreement with VF Nigeria, the Appellant appointed VF Nigeria to execute the Nigerian portion of the contract further to which the latter was entitled to cost plus 8%. In the 2007 year of assessment, the Appellant paid a total sum of GBP2, 547,874 to VF Nigeria for the execution of the contract out of the total contract sum of GBP2,902,577. Based on the practice of the Respondent, the Information Circular issued by the Respondent and judicial decisions, the Appellant made its self assessment on Turnover Assessment. The Appellant deducted the sum of GBP 2,547,874 it paid to VF Nigeria as recharges from the contract sum of GBP 2,902,577 to arrive at its turnover

for the purpose of the Turnover Assessment. The Appellant thereafter subjected 20% of the excess to tax at the rate of 30% resulting to a tax liability of GBP21,281.

After a tax audit, the Respondent disallowed the Appellant's treatment of recharges as deductible contending that it is 20% of the gross turnover of the Appellant that should be subjected to tax at the corporate tax rate. The Respondent's position is that all costs incurred by the Appellant including the recharges are covered or captured by the 80% of the turnover that is not assessed to tax under the Turnover Basis of Assessment. The Respondent does not dispute the fact that recharges were incurred and that VF Nigeria paid tax on the amount it received from the Appellant as contained on page 2 of Exhibit VF3.

The Appellant called one Witness – Mr. Anthony Okeh, the Manager Finance of VF Nigeria. He joined VF Nigeria in 2008. The following documents were tendered by the Appellant through its sole witness at the hearing:

S/N	DOCUMENT	DATE ADMITTED	EXHIBIT NO.
1.	Notice of Additional Tax Assessment For Income Tax	11/4/2014	VFA1
2.	Notices of Objection	11/4/2014	VF2
3.	Notice of Refusal to Amend Income Tax	11/4/2014	VF3
4.	Notice of Appeal filed at Body of Appeal Commissioners	11/4/2014	VF4
5.	Visa Application Service Agreement	11/4/2014	VF5
6.	Certificate of Incorporation of VF Nigeria	11/4/2014	VF6
7.	Statement of Share Capital	11/4/2014	VF7
8.	Service Agreement between Appellant and VF Nigeria	11/4/2014	VF8
9.	Tax Returns for 2007	11/4/2014	VF9
10.	Companies Income Tax Returns of VF Global Services Nigeria Ltd for 2007 YOA	11/4/2014	VF10

The Respondent filed a reply on points of law and therefore did not call any witness or tender any documentary evidence.

ISSUES FOR DETERMINATION:

Parties formulated four issues for determination.

i. Based on the provision of section 30(1)(b) of CITA, whether:

(a) the Appellant is entitled to treat the sum of GBP2,547,874 incurred from the payments made to VF Nigeria from the contract sum of GBP2,902,577 to arrive at its turnover for the purpose of the turnover assessment, as tax deductible;

(b)it will not amount to double taxation of the same income if the Appellant is made to pay tax on the total contract sum of GBP2,902,577 including the sum of GBP 2,547,874 the Appellant paid to VF Nigeria which had been subjected to tax in the hands of VF Nigeria.

ii. based on the Information Circular issued by the Respondent stating that recharges are deductible, is Appellant entitled to a legitimate expectation that it would not be penalized for complying with a guideline issued by the Respondent pursuant to its statutory power?

iii. assuming without conceding that the Respondent's position is right whether the percentage of the turnover the Respondent subjected to tax in assessing the Appellant to tax is not excessive and unreasonable considering the nature of the Appellant's business.

iv. Whether based on the fact that the Appellant executed the contract through VF Nigeria without having any physical presence in Nigeria, the Appellant is taxable on Turnover Assessment within the context of section 30(1)(b)(i) of CITA.

TREATMENT OF ISSUES:

Based on the provision of section 30(1)(b)(i) of CITA, **whether :**

(a) the Appellant is not entitled to treat the sum of GBP 2,547,874 as deductible incurred from the payments made to VF Nigeria from the contract sum of GBP 2,902,577 to arrive at its turnover for the purpose of the Turnover Assessment;

(b)It will not amount to double taxation of the same income if the Appellant is made to pay tax on the total contract sum of GBP 2,902,577 including the sum of GBP 2,547,874 the Appellant paid to VF Nigeria which had been subjected to tax in the hands of VF Nigeria.

The Appellant submits that based on the provision of section 30(1)(b)(i) of CITA, the Appellant is entitled to deduct the recharges it incurred before arriving at its tax liability in Nigeria in applying Turnover Assessment.

Section 30(1)(b)(i) of CITA provides as follows:

> *"Notwithstanding section 40 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 any business are carried on outside Nigeria) it appears to the Board that for any year of assessment, the trade or business produces either no assessable profits or assessable profits 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 ascertained, the Board may, in respect of that trade or business, notwithstanding any other provisions of this Act if the company is a-*

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

(b) If the company is a company other than a Nigerian Company and

(i) "that company has a fixed base of business in Nigeria, assess and charge that company for that year of assessment on such a fair and reasonable percentage of that part of the turnover attributable to that fixed base"

The Appellant asserts that by using the phrase *"...<u>that part</u> of the turnover attributable to that fixed base"* in section 30(1)(b)(i) of CITA, the legislature has shown a clear intention that recharges should not be considered as part of the total assessable profits of the Appellant. The Appellant submits that any other interpretation of that section would lead to manifest absurdity and injustice as the Respondent would be entitled to have the best of two worlds; taxing both the Appellant and its Nigerian subsidiary on the same recharges twice, a classic case of double taxation.

The Appellant further submits that it would amount to double taxation of the same income if the Appellant is to be taxed for the total contract sum that it received under the contract inclusive of the money it paid over to VF Nigeria in executing the contract and the amount paid as fees thereto, when VF Nigeria also pays tax on whatever it receives from the Appellant.

The Appellant cites the case of *ANYAKORA & OTHERS V. OBIAKOR & OTHERS (1990) 2 NWLR (Pt. 130)52 at 66,* where the Court of Appeal held that:

"When the legislature enacts a particular phrase in a statute, the presumption is that it is something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in a statute implies that unless there is a good reason to the contrary, the words add something which would not be there if the words were left out."

The Appellant further cites the case of *U.T.C (Nig) LTD V. PAMOTEI &OTHERS (1989)2 NWLR(Pt.103) 244 at 303 as per Nnaemeka Agu, J.S.C:*

"...it is now settled principle of construction of statutes that the legislature does not use any words in vain."

The Appellant therefore urges this Tribunal to give section 30(1)(b)(i) of CITA its literal and strict interpretation being a taxing legislation as the Court of Appeal held in the case of *AHMADU V. GOVERNOR, KOGI STATE(2002) 3 NWLR 502 at 522* paragraph C-D thus;

"In a taxing legislation, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumption about a tax. Nothing to be read in and nothing to be implied. One can only look fairly at the language used..."

The Respondent counters that section 30(1)(b)(i) of CITA does not expressly, impliedly or by any stretch of interpretation include the deduction of recharges in the assessment of a non-Nigerian company to tax. The Respondent submits that the import of the provision from its unambiguous wording is that in respect of a trade or business carried on in Nigeria by a non-Nigerian company with a fixed base in Nigeria, the Board may, if it is of the opinion that the true amount of assessable profits of that company produces no assessable profits; or produces assessable profits which are less than might be expected to arise from that trade or business, or that the true amount of the assessable profits of the company cannot be ascertained, assess and charge that company for that year of assessment on such fair and reasonable percentage of that part of the turnover attributable to the fixed base.

The Respondent asserts that nothing in section 30(1)(b)(i) of CITA refers to any recharges made by the non-Nigerian company to its fixed base; neither does that provision expressly or impliedly . The Respondent urges this Tribunal to abide by the clear, unambiguous provisions of section 30(1)(b)(i) of CITA and resist the Appellant's temptation to deviate there from by importing the deductibility of recharges into that section. The Respondent submits that it rightly assessed the Appellant to tax on the deemed profit basis of assessment which does not give room for any specific deductions, nor create preference for any expense or costs.

The Respondent asserts that under deemed profit mode of assessment, the consistent practice of the Respondent is to allow 80% of the company's turnover from tax as due consideration for expenses, while 20% of the turnover is deemed as profit and taxed by the 30% rate Of Companies Income Tax. Therefore, the total tax assessed on the company is 6% of its turnover. The Respondent submits that what warranted this deemed profit mode of assessment by the Respondent is that the Appellant filed its returns with deemed profit and not actual profit.

The Respondent also cites the case of *Mobil Oil (Nig) Ltd V FIRB (2011) 5 TLRN 166* where the Supreme Court held that;

"The literal meaning of section 30A is clear and unambiguous. It empowers the Board to assess a company subject to the conditions prescribed therein on such fair and reasonable percentage of the turnover of the company as the Board may determine. In our view, there is no injustice in assessing a company on a percentage of its turnover. Such legislation has received the approval of democratic societies, for example, section 28 of the Australian Income Assessment Act, 1922 and s. 80 of the English Taxes

Management Act, 1970. Furthermore, the literal meaning of the section is compatible with the social policy rule of interpretation of a statute, conservatively known as the mischief rule, which may be epitomized thus: In construing a section, regards shall be given to the necessity of the Act and then such construction shall be put upon it as would promote its purposes and arrest the mischief which it is intended to deter. As the Appeal Commissioners pointed out in their judgment, some companies have been manipulating their account with intent to hide their true assessable profits and in that manner have been evading tax which they ought to have paid. The purpose of section 30A is to deter such companies from engaging in such fraudulent practice."

(b) Whether it will not amount to double taxation of the same income if the Appellant is made to pay tax on the total contract sum of GBP 2,902,577 including the sum of GBP 2,547,874 the Appellant paid to VF Nigeria which had been subjected to tax in the hands of VF Nigeria.

The Respondent submits that it would not amount to double taxation if the Appellant pay tax on 20% of the total contract sum of GBP 2,902,577 at 30% including the sum of GBP 2,547,874 the Appellant paid to VF Nigeria which had been subjected to tax in the hands of VF Nigeria, because this case involves two separate contracts and two taxable events to wit: the contract between the Appellant and UKBA and the contract between the Appellant and VF Nigeria. The Respondent submits that both contracts are separate, distinct, independent of each other, between different parties and more significantly, with different terms. The two incomes are different from each other and therefore separately taxable. The Respondent urges this Tribunal to hold that there is no case of double taxation.

ISSUE TWO:

Based on the Information Circular issued by the Respondent stating that recharges are deductible, is VF Worldwide entitled to a legitimate expectation that it would not be penalized for complying with a guideline issued by the Respondent pursuant to its statutory power.

The Appellant submits that the Respondent's position in this appeal is not consistent with the contents of the Respondent's Information Circular of 2006 issued in respect transactions of the nature as in this appeal. The Appellant further submits that on the doctrine of Legitimate Expectation, the Appellant was right to have treated recharges as tax deductible based on the Information Circular issued by the Respondent and the judicial decision on the matter. The Appellant cites the case of *AUBYN V ATTORNEY GENERAL (1952) A.C 15 at 44*, where it was held that;

'The tax payer is entitled to be told with some reasonable certainty in what circumstances and under what conditions liability to tax is incurred."

The Appellant submits that it acted in good faith. The Appellant disclosed its total contract sum including the amount paid to VF Nigeria in the returns filed with the Respondent and applied the formula set out in the Respondent's Information Circular. The Appellant cites the case of R. *(on the application of Bancoult) V. SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS (NO. 2)(2008) UKHL 61* where the Court held that he had *"no difficulty in accepting as the underlying principle a requirement of good administration, by which public bodies ought to deal straight – forwardly and consistently with the public."*

The Appellant also cites the case of *R V. IRC EX p. MFK UNDERWRITING AGENCIES LTD (1990)* where the Court held that a person does not need to have changed his position or acted to his detriment for him to qualify for legitimate expectation. Consequently, the Appellant urges this Tribunal to resolve this Issue two in favour of the Appellant.

The Respondent submits that Clause 6.1 of the Information Circular 9302;

> *"A Nigerian Project Awarded to a Non-Resident Company but subcontracted in part to a branch, a subsidiary or an associated company." envisages a tripartite arrangement involving a head contract and a sub-contract, which is not the fact in this Appeal. The Respondent submits that two contracts are involved in this Appeal: One between the Appellant and UKBA only and another only between the Appellant and VF Nigeria. The Respondent submits that Clause 6.1 of Information Circular 9302 does not apply to the instant Appeal."*

The Respondent submits that assuming without conceding that Clause 6.1 Information Circular 9302 can be said to relate to the facts of this case by any means, section 30(1)(b)(i) of CITA overrides that clause and would apply to this case in lieu of that clause. The Respondent submits that it is trite law that an information Circular is a mere explanatory note devoid of the force of law, and that in the case of a conflict between a Circular and a statutory provision, the latter prevails and render the former null and void to the extent of the inconsistency as held in the case of Global International Drilling Corporation V, FIRS (2013)12 TLRN 1.

The Respondent cites the case of Halliburton (WA)Ltd (CA/L/320/2009) decided on 2/12/2014, at page 37 where the Court of Appeal held that the doctrine of legitimate expectation is rooted in utmost good faith by stakeholders concerned with tax matters, and in the absence of full disclosure by Halliburton of the total income from the first exercise, Halliburton could not reap benefit from the doctrine. The Respondent therefore submits that in like manner, the deemed profit returns filed by the Appellant which smacks of non-disclosure and bad faith would deprive the Appellant of any benefit from the doctrine.

ISSUE THREE:

Assuming without conceding that the Respondent's position is right, whether the percentage of the Turnover the Respondent subjected to tax in assessing the Appellant to tax is not excessive and unreasonable considering the nature of the business of the Appellant.

The Appellant submits that the practice of the Respondent with respect to section 30(1)(b)(i) of CITA in assessing non-resident companies by subjecting 20% of the turnover of such companies to tax at the corporate tax rate of 30%, is arbitrary and inconsistent with the provision of section 30 of CITA. The Appellant asserts that based on the unique facts of this appeal, the Respondent ought to have assessed and charged a maximum of 1% of the gross contract sum to tax in line with section 30(1)(b)(i) of CITA in the Year of Assessment. The Appellant submits that by virtue of paragraph 15(8) of the Fifth Schedule to the Federal Inland Revenue Establishment Act, 2007, this Tribunal has the power to confirm, reduce, increase or annul any assessment imposed by the Respondent on any tax payer, and therefore urges this Tribunal to hold that the 20% assessed and charged to tax by the Respondent is excessive.

The Appellant submits that the 20% of the turnover used as the basis of assessment of Appellant is excessive, punitive and unreasonable considering the fact that a substantial percentage of the turnover has been assessed and charged to tax in the hands of VF Nigeria, a tax ultimately borne by the Appellant who owns VF Nigeria.

The Respondent submits that the provisions of section 30(1)(b)(i) of CITA underscore the discretionary power of the Board to determine the percentage to which the company is to be assessed to tax where the true amount of the assessable profits of the company cannot be ascertained. The Respondent submits that the Appellant's tax returns for the year of assessment is on deemed profit basis without disclosing the actual profit of the company.

The Respondent submits that the deemed profit assessment at 20% applies in common to all foreign companies that make recharges to their Nigerian affiliates and file deemed profit returns. The Respondent submits that the Appellant failed to advance strong reason for its quest for 1% assessment. The Respondent argues that the Appellant has failed to discharge the onus of proving the amount or percentage by which the assessment on it is made excessive.

ISSUE FOUR:

Whether based on the fact that the Appellant executed the contract through VF Nigeria without having any physical presence, the Appellant is taxable on Turnover Assessment within the context of section 30 of CITA.

The Appellant submits that it carries out the execution of the Visa related services for UKBA wholly through VF Nigeria. The Appellant asserts that it does not oversee the business of VF Nigeria neither does the Appellant send any of its employees to work in the office of VF Nigeria, therefore the Appellant cannot be said to have a fixed base of business for Turnover Assessment within the context of section 30(1)(b)(i) of CITA. The Appellant argues that a non-resident company is taxed on turnover basis only if it has a fixed base in Nigeria. The Appellant urges this Tribunal to grant all the reliefs sought by the Appellant.

The Respondent submits that the term 'fixed base' does not necessarily mean the address of the non-resident company, or an address in the ownership or possession of the foreign company, but rather an address through which the company earned its Nigerian income, such as the address of the Nigerian affiliate or subsidiary of the foreign company as in the case of *Addax V FIRS (2013)9 TLRN 126* where this Tribunal held that "A fixed base is a definite address and Addax Nigeria's facilities constitute a definite address."

The Respondent submits that the justification for an assessment under section 30(1)(b)(i) of CITA is that the Respondent deems anything in the commercial or financial relations between the Appellant and VF Nigeria to be artificial or fictitious.

The Respondent finally submits that section 30(1)(b)(i) of CITA has a common purpose with its sub-paragraphs- namely, the taxation of non-resident companies' trade or business in Nigeria to which there is: no profit, less than expected profit, or unascertainable profit. The Respondent urges this Tribunal to so hold.

ANALYSIS:

The Court of Appeal reasoned that a circular is not a subsidiary legislation and therefore has no force of law. The Court of Appeal also said that even if the circular were a subsidiary legislation, CITA would prevail.

The case has not been made by the Appellant that there was a receipt of a specific amount of tax paid to the Respondent from the Nigerian affiliate with respect to such recharges which should be set off from the tax liability and we shall make no more comment on such speculation in this appeal.

With regard to the doctrine of legitimate expectation, the Court of Appeal also held that the doctrine of legitimate expectation thrives on fairness and openness of dealings. To benefit from the doctrine, a person must have made full disclosure or displayed utmost good faith in the transaction. The doctrine cannot stand when it conflicts with a clear statutory provision.

The Appellant did not declare its profits to the Respondent. The Respondent had to compute the Appellant's tax liability using the deemed profit mode. Section 30(1)(b)(i) of CITA is clear and it supersedes any legitimate expectations that the Appellant might harbor.

The Respondent by subjecting 20% of the total contract sum to 30% tax rate is not being arbitrary or excessive.

CONCLUSION:

In Halliburton's case, the Court of Appeal held that all of a foreign company's Nigerian derived income was taxable in Nigeria, irrespective of any make-up contributions to the foreign company's Nigerian subsidiary. The Appellant is liable to tax for all income derived from its operations in Nigeria through its Nigerian affiliate VF Nigeria. The recharges form part of the Appellant's Nigerian derived income and is thus assessable.

Recharges are thus not allowable deductions when calculating a foreign company's income tax. We order the Appellant to pay all the additional assessments totaling GBP 174,155 for the 2007 year of assessment.

LEGAL REPRESENTATION:

Maxwell Ukpebor Esq. with Olumayowa Oluwole Esq. for the Appellant.
Jerome Okoro Esq. for the Respondent.

DATED AT LAGOS THIS 18TH DAY OF DECEMBER 2015

KAYODE SOFOLA SAN (Chairman)

CATHERINE A. AJAYI
Commissioner

D. HABILA GAPSISO
Commissioner

MUSTAFA BULU IBRAHIM
Commissioner

CHINUA ASUZU
Commissioner