



All Things Not Bright and VATable

'Taxspectives' by Afolabi Elebiju | Originally published in *ThisDay Lawyer*, 28th June 2011, p.12



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*"All things bright and beautiful,
All creatures great and small,
All things wise and wonderful:
The Lord God made them all."*

- Cecil F. Alexander, 1848

Hon. Justice A. Bello of the Federal High Court, Abuja's recent decision (March 2011) in **CNOOC E&P NIGERIA LIMITED v AGF & 2 ORS** [FCH/ABJ/CS/605/07] that assignment of contractor's working interest in a PSC was not VATable, recently brought the above song to mind.

The interest assigned was a chose in action, not "goods" or "services" as defined in the VAT Act (VATA). This write-up examines the ramifications of the decision given the controversy surrounding FIRS' insistence on charging VAT on assignment of license interests, amongst others.

Facts and Decision

CNOOC acquired 90% of South Atlantic Petrol Limited (SAPetrol's) working interests in OML 130 for a consideration; in line with historic practice and the advice of tax consultants, VAT was not invoiced, nor paid, on the transaction. The FIRS, pursuant to a tax audit imposed VAT and demanded same from SAPetrol, which then demanded the VAT from CNOOC. This action was brought for declaratory reliefs that VAT was not applicable to the transaction; CNOOC joined SAPetrol as co-

Defendants with the FIRS and the AGF. Although SAPetrol was also reportedly contesting the FIRS position, CNOOC would have been the party liable to pay VAT (if applicable), on the transaction.

The Court rightly held that VAT was not chargeable because the transaction is outside the scope of VATA: *"I agree entirely with the submissions... that the 3rd Defendant's contractor rights in the ... PSC do not*

constitute either 'goods' or 'service' as contemplated ... the Plaintiff is therefore not liable to the 2nd Defendant for any sum whatsoever as VAT on the purchase of the 3rd Defendant's contractor rights in the PSC." (p. 11)

Why is VAT Compliance Critical?

VATA compliance is significant because of sanctions stipulated for breach. For example, section 29 criminalizes failure to issue tax invoice- vendor/supplier could be liable to "a fine of 50%" of the cost... for which the invoice was not issued." Section 26 prescribes grave exposure to "a fine of ... two times the amount of the tax even being evaded ... or to imprisonment for a term not exceeding three years." Section 34 provides that "a taxable person who fails to collect tax... is liable to pay a

penalty 150% of the amount not collected, plus 5% interests above Central Bank of Nigeria rediscount rate." In addition, the FIRS could proceed against defaulting suppliers for failure to make attribution (section 27, penalty N5, 000).

VATA Coverage: Definition Issues

Does VAT extend to choses in action? A perfunctory response should be "no", because by section 2 VATA, VAT "shall be charged and payable on the supply of all goods and services (in this Act referred to as 'taxable goods and services') other than those goods and services listed in the First Schedule... [VAT exempt list]."

"I agree entirely with the submissions... that the 3rd Defendant's contractor rights in the ... PSC do not constitute either 'goods' or 'service' as contemplated ... the Plaintiff is therefore not liable to the 2nd Defendant for any sum whatsoever as VAT on the purchase of the 3rd Defendant's contractor rights in the PSC."

However, a more exacting analysis is required – checking VATA’s definition of “goods” and “services” vis a vis the ordinary legal meaning of “choses in action” to see whether the latter is caught. Interestingly, whilst VATA did not define “goods” it went to great lengths to define “supply of goods” as “any transaction where the whole property in the goods is transferred or where the agreement expressly contemplates that this will happen and in particular includes the sale and delivery of taxable goods or services used outside the business, the letting out of taxable goods on hire or leasing, and any disposal of taxable goods.” “Supplies” also “means any transaction, whether it is the sale of goods or the performances of a service for a consideration, that is, for money or money’s worth.”

If the energy expended in defining “supplies” or “supply of goods” had been invested in defining “goods” and “services” in VATA, perhaps the FIRS position in CNOOC might have been tenable; for example, if VATA had expansively defined goods in terms of section 1 Trading Schemes Act 1996 (UK), that ‘goods’ “includes property of any description and a right to, interest in, property”. Professor Abdulrazaq, an authoritative commentator, had noted that the VATA “is singularly unhelpful in pinpointing those events which amount to a supply...” (Nigerian Revenue Law, p.273)

Since VATA does not define ‘goods’, the Court was entitled to resort to definitions in *Black Law's Dictionary* (7th ed.), *Sale of Goods Law of Lagos State 2003* and the UK *Sale of Goods Act 1979*, for guidance. The Black’s definition of ‘goods’ quoted in the judgement are “items of merchandise, supplies, raw materials or finished goods... which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action” whilst “service” relates to “intangible commodity in the form of human efforts, skill or labour.”

Blacks (8th Deluxe ed.) describes ‘goods’ as “tangible or movable personal property other than money”; and “things that have value, whether

tangible or not.” In my view, if this latter definition is used, goods would arguably include choses in action. The US’ *Uniform Commercial Code (UCC)* apparently includes investment securities and things in action amongst goods. *Stroud’s Judicial Dictionary* shows that it is always a function of context and the language used in the legislation. In **FREEMAN v APPLEBY** (32 L.J. Ex.175) certificates of railway stock were not ‘goods’ within section 1 Factors Act 1889 (which provides that “goods shall include wares and merchandise”). However, in **The Noordam [1920] A.C. 904**, goods was held to include bearer securities belonging to the German owners and therefore not exempt from capture or detention pursuant to Art. 4, *Reprisals Order-in- Council, 1915*. Lottery activities are not goods for the purposes of Article 30, *EU Treaty*: **C&E COMMISSIONERS v SCHINDLER** [1994] 2 All ER 1931.

The SAPetrol/CNOOC assignment was clearly not supply of ‘service.’ According to Black’s, ‘choses in action’, is a “proprietary right in personam, such as debt owed by another person, a share in a joint stock company or a claim for damages in tort;” it is “the right to bring an action to recover a debt, money, or thing.” It is on the same basis that transfers of shares are exempt from VAT, not because of “policy exemption” purportedly to reduce the cost of transactions and encourage the growth of Nigerian stock market.

Conclusion

According to the Court in CNOOC (p.11), “if in this country, we need to charge VAT on such incorporeal property like the contractor rights of the plaintiff in the PSC, we need to borrow a leaf from the UK VAT Act, 1994... by amending our VAT Act ... to incorporate the provision of section 5(2) of the UK VAT which provides: ‘anything which is not supply of goods but is done for consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.’ The above provision is clear enough and should be food for thought for thought for the 1st and 2nd defendants in this case.” Even if “supply” is a word of the widest import”

because it covers “any transaction”, yet the VATA has made it of wide import only in respect of “goods” and “services”. I submit that amendment would be necessary to achieve the (UK) effect noted by Abdulrazak (p. 274), whereby “in relation to supply of services, anything provided for a consideration amounts to a supply, including... achieving what is to be done under a contract regardless of whether or not this gives rise to any positive activity.”

Such amendment could also provide clarity on whether land transactions are VATable. Apart from strong doubts whether land is a subset of “goods”, the interest held therein pursuant to the *Land Use Act* (statutory right of occupancy) is arguably a chose in action. But should housing units sold by property development companies not be a subject to VAT - being the “stock-in-trade” of such companies? This could be countered by the legal rule of interpretation that land comprises anything built on it: *quicquid plantatur solo, solo credit*. However, charging VAT on sale of housing units helps the developers recover the input VAT incurred in the purchase of materials used for building the units, so this may not be a contentious issue with the FIRS.

Whilst FIRS’ quest to make “all things bright and VATable”, its insistence on VAT for rental of office accommodation, but not on residential premises is seemingly based on policy grounds - that shelter is a basic necessity of life and it would be incongruous to enforce VAT on such, when other basic necessities (foodstuffs, medicines) are VAT exempt. Otherwise, lease being arguably a service that is not VAT exempt could have been enforced (without “a human face”) across board - whether relating to office or residential accommodation.

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