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Navigations:

Revisiting The Tax Liability Of Non-resident Shipping Companies In Nigeria

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Taxation of non-resident companies involved in shipping operations has never really been the most settled area in Nigeria's fiscal jurisprudence because of the latitude afforded the tax man in deciding the rate of tax applicable; and in certain cases, profits deemed to have been derived from Nigeria.[1] However, there was a certain level of certainty as regards the tax base of non-resident shipping companies (NRSCs) until the collection of tax by the Federal Inland Revenue Service (FIRS) on demurrage and other ancillary income from inward carriage was challenged in ***CMA CGM Del Masa v. FIRS (Delmas Case)***.[2] The argument of the FIRS and upon which the Tax Appeal Tribunal (TAT) based its judgement, was that such ancillary income were liable to tax under ***section 9 CITA***.

In order to clarify and probably confer an incontestable legitimacy on its action, a new ***section 14(5)*** was added to ***CITA*** by ***section 8 Finance Act 2020***[3] ***(FA2 2020)***. The amendment clarified that the specific provisions of ***section 14*** were inapplicable to income not earned strictly from freight operations of NRSCs, which are to be taxed under ***section 9 CITA***.

This article examines the conundrum of tax liability for NRSCs in Nigeria. It is divided into three parts. The first part looks at the state of the law pre-***FA2 2020*** and argues that ***section 14 CITA*** covered the field as regards taxation of non-freight income; the second part examines the new provision and its effect on the tax base of NRSCs; and the last part considers the fate of NRSCs that are resident in countries which have a ***Double Taxation Agreement (DTA)*** with Nigeria in light of the decision of the TAT in the ***Delmas Case***.

1 See ***section 14 Companies Income Tax Act Cap. C21, Laws of the Federation of Nigeria (LFN) 2004 (CITA)*** which provides for a minimum tax rate of 2% and allows the FIRS to use ratios to determine taxable income.

2 ***(2021) 55 TLRN 28.*** The name of the Appellant Company was spelt in the law report as "*Del Masa*", instead of "*Delmas*". The author will hereafter refer to the Appellant as "*Delmas*".

3 ***No. 1 of 2021***, which received Presidential Assent on 31st December 2020. The predecessor ***FA 2020*** received Presidential Assent on 13th January 2020. The former being the second ***Finance Act*** that received Presidential Assent in 2020, is hereafter referred to as ***FA2 2020***.

'General Things Do Not Derogate From Special … Special Words Derogate From General Ones…'

'Historics': The Position of the Law Pre-FA2 2020

The attitude of the FIRS towards the taxation of NRSCs is well encapsulated by a commentator thus:

"The classification of demurrage and detention charge earned by shipping companies on the late return of their container by vessel charterers as a non-freight income and its treatment under the provision of the Companies Income Tax Act (CITA) is a major concern to shipping companies. The Federal Inland Revenue Service considers demurrage as an income chargeable under the CITA while shipping companies regard it as part of shipping income earned in respect of inbound operation which should not be taxed, as inbound freight income is not taxable in Nigeria." [4]

There is no formal documentation or information from the FIRS on the special regime for taxing the ancillary and incidental income of NRSCs, but practitioners consulted were of the view that the FIRS historically relied on then ***section 14 CITA***[5] to tax demurrage and other ancillary income of NRSCs whether from inward or outward carriage of goods. However, when CMA CGM Delmas contested the legality of levying tax on demurrage and other incidental income from inward carriage the FIRS sang a discordant tune, clinging instead to the wider ***section 9 CITA***[6] as the relevant provision for taxing non-freight income of NRSCs.

Essentially, ***section 9 CITA*** provides generally for the taxation of profits of any company accruing in, derived from, brought in, or received in Nigeria whilst ***section 14 CITA*** provides specifically for the taxation of NRSCs. It is a trite rule of statutory interpretation that general things do not derogate from special. In ***Schroder v. Major***[7] the Supreme Court (SC) per *Agbaje, JSC* opined thus:

"It is an accepted canon of construction that where there are two provisions, one special and the other general, covering the same subject matter, a case falling within the words of the special provision must be governed thereby and not by the terms of the general provision. The reason behind this rule is that the legislature in making the special provision is considering the particular case and expressing its will in regard to the case; hence the special provision forms an exception importing the negative; in other words the special case provided for in it is excepted and taken out of the general provisions and its ambit; the general provision does not apply."

Oputa, JSC concurred in the same case that:

"General things do not derogate from special (Generalia specialibus non derogant) ... special words derogate from general ones... words whether they are in deeds or statutes if they be general and not particular, express and precise; are restrained and prevailed upon by particular words appearing in the same statute or section hereof."

4 Opeyemi Bello, '***Rethinking the Taxation of Demurrage Income in Nigeria***', (2018) 9 GRBPL No. 2, p. 14.

5 *"(1) Where a company other than a Nigerian company carries on the business of transport by sea or air, and any ship or aircraft owned or chartered by it calls at any port or airport in Nigeria, its profit or loss to be deemed to be derived from Nigeria shall be the full profits or loss arising from the carriage of passengers, mails, livestocks or goods shipped, or loaded into an aircraft, in Nigeria*
Provided that this section shall not apply to passengers, mails, livestock or goods which are brought to Nigeria solely for trans-shipment or for transfer from one aircraft to another or in either direction between an aircraft and a ship.
(4) For the purposes of this section, the tax payable by any company for any year of assessment shall not be less than two percent of the full sum receivable in respect of the carriage of passengers, mails, livestock or goods shipped or loaded into an aircraft in Nigeria."

6 *"(1) Subject to the provisions of this Act, the tax shall, for each year of assessment, be payable at the rate specified in section 40(1) ... upon the profits of any company accruing in, derived from, brought into, or received in, Nigeria that are subject to tax under the Capital Gains Tax Act, Petroleum Profits Tax Act and Personal Income Tax Act –*
(a) Any trade or business for whatever period of time such trade or business may have been carried on;
(e) Any source of annual profits or gains not falling within the preceding categories;
(f) Any amount deemed to be income or profit under a provisions of this Act or, with respect to any benefit arising from pension or provident fund, of the Personal Income Tax Act;
(g) Fees, dues and allowances (wherever paid) for services rendered."

7 ***[1989] 2 NWLR (Pt. 101), 1 at 21.*** On this point also, see ***Bamgboye v. Administrator-General 14 W.A.C.A. 616.***

Thus, in taxing the profits of NRSCs resident in countries which do not have a ***DTA*** with Nigeria, the only provision to be considered is ***section 14 CITA*** which specifically imposes tax on NRSCs. Consequently, it is strongly submitted that any income not subjected to tax under that provision is tax exempt under Nigerian law. In apparent agreement with this interpretation of ***CITA***, the draftsman begins the general charging provision with the phrase, *"subject to the provisions of this Act"*. The draftsman has thence, subjected ***section 9 CITA*** to other (relevant) sections of ***CITA***.

A fortiori, ***CITA*** is a tax legislation provision, and its interpretation is subject to the *sui generis* rules that guide the interpretation of taxing statutes. In ***Ahmadu v. Gov of Kogi State***[8] *Oduyemi, JCA* was of the opinion that:

"Language must not be strained in order to tax a transaction which had the legislature thought of it, would have be covered by appropriate words. 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 a tax. There is no presumption about a tax. Nothing is to be read in and nothing is to be implied. One can only look fairly at the language used."

A reoccurring theme in cases dealing with the interpretation of tax statutes is that the law imposing the tax must unambiguously subject a class of income to tax. Examining ***CITA***, it is crystal clear that its only provision

which imposes tax on the income of NRSCs is ***section 14 CITA***. Furthermore, it is axiomatic that the only class of income subject to tax under the provision is the full profits of the company *'arising from outward carriage of passengers, mails, livestock or goods'*.[9] The use of *"arising from"*, it is argued, is wide enough to cover profit or loss of the non-resident company from demurrage, Nigerian Maritime Administration and Safety Agency (NIMASA) Levy and any other ancillary income it earns in the course of moving passengers, goods, mails and livestock from Nigeria to another country.

On this premise, *it is safe to say that any attempt by the FIRS to charge to tax the full profits of NRSCs arising from the inward carriage of goods, passengers, mails or livestock including demurrage and other ancillary income, cannot stand in law*. However, capital gains earned from disposal of assets will be liable to tax under the ***Capital Gains Tax Act***,[10] and it can also be rightly argued that the FIRS will be liable to refund the taxes charged previously.[11] It seems unlikely, however, that the FIRS will pay interest on such sums to affected tax payers.

The FA2 2020 Amendment

Few weeks after the judgment of the TAT in the ***Delmas Case***, ***FA2 2020*** received presidential assent with a particular amendment bringing far reaching changes to the tax exposure of NRSCs. ***Section 8 FA2 2020*** amended ***Section 14 CITA*** by adding a new ***subsection(5)***. The amendment provides that *"The provision of this section does not apply to income from leasing, containers, non-freight operations or any other incidental income liable to tax under section 9 of this Act."* A number of questions quickly come to mind upon scrutinizing this provision. The first, will this

8 ***[2002] 3 NWLR (Pt.755), 522.*** Similarly, in ***Aderawos Timber Trading Co. Ltd v. FBIR (1966) NCLR 416 at 422,*** *Ikpeazu. J.* held that: *"it is the law that the language of a statute imposing a tax, duty or charge must receive a strict construction in the sense that there is no room for any intendment and regard must be had to the clear meaning of the words. If the state claims a tax under a statute, it must show that that the tax is imposed by clear and unambiguous words, and where the statute is in doubt, it must be construed in favour of the subject, however much within the spirit of the law the case might otherwise be, but a fair and reasonable construction must be given to the language used without leaning to one side or the other."* Also, in ***Halliburton Energy Services Nigeria Ltd v. FIRS (2012) 8 TLRN 15 at 28,*** the TAT quoted *Lord Simmonds'* ratio in ***Russell v. Scott [1948] 2 All ER, 1 at 5,*** thus: *"My Lords there is a maxim of income tax which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him."*

9 Emphasis supplied.

10 ***Cap. C1, LFN 2004.***

11 ***Section 23 Federal Inland Revenue Service (Establishment) Act Cap. F36, LFN 2004 (FIRSEA)*** as amended by ***FA2 2020*** empowers the FIRS to refund over-payment of tax to taxpayers after a proper audit has been conducted by the service.

provision apply to total profits from inward carriage of goods or will it be limited to income earned in outward carriage from leasing, containers, non-freight operations or any other incidental income liable to tax under ***section 9 CITA***?

In this writer's view, this provision is quite ambiguous, and could also be seen as an unnecessary addition, if the sole purpose is to dispel any argument on the taxability of these income sources. This is because ***section 14 CITA*** is by itself, wide enough to capture all profit arising from outward carriage of passengers, goods, mails and livestock including ancillary and incidental income.

Regarding the new ***section 14(5)*** some commentators stated that: *"Section 14 of the CITA has been amended to clarify that revenue earned from leasing, containers, non-freight operation or any other incidental income should be subject to tax under section 9 of the CITA. This provision creates a distinction between revenue from core shipping/freight operations and air activities that should be subject to tax under section 14 of the CITA, and revenue from other incidental activities that should be subject to the general corporate income tax rate of 30%. This amendment resolves the issue with respect to the taxation of ancillary income of nonresident airlines and shipping companies."*[12]

In this writer's view, ***section 14(5) CITA*** can clearly not be read in isolation, but must be read in conjunction with ***section 14(1)-(4).*** On a community reading of ***section 14(1),(2),(3),(4) and (5) CITA***, it is argued that *its scope must be restricted to income from leasing, containers, non-freight operations or any other incidental income of NRSCs companies derived from the outward carriage of passengers, goods, mails and livestock from Nigeria.*[13] *It cannot be extended to income arising from inward carriage which is not liable to tax under the section, as there is no intendment or equity in tax, and any ambiguity must be interpreted in favour of the taxpayer.*[14]

In addition, levying such tax on the income of NRSCs arising from inward carriage of goods might well expose them to double taxation if their country of residence charges taxes on all profits arising from outward carriage and refuses to extend tax credit for the Nigerian tax.

From another view point, it might be that the intention is to increase the tax payable on non-freight and incidental income by NRSCs engaged in outward carriage to 30% or 20% or even 0% depending on turnover. However, before we delve into this issue, it is necessary to determine whether the FIRS can successfully collect this tax relying on ***section 14(5) and 9 CITA***, *since the amendment merely refers to* ***section 9*** *generally, but fails to point out the paragraph under which the tax will be imposed and collected.*

The two paragraphs that the FIRS will likely rely on are ***section 9(1)(a) and (e) CITA***.[15] It is our view that the former will be applicable in a situation where the non-freight operation can be seen as a separate trade or business. Whilst *"trade"* is not defined in ***CITA,*** however, it is regarded by the FIRS as *"the business of buying and selling or bartering goods and services."*[16]

According to an author, I.O. Oni: *"While buying and selling are essentially trading or commercial activities, manufacturing, mining,*

12 Ernst and Young, ***'Nigeria: Highlights of Finance Act 2020'***, 05.02.2021: https://www.ey.com/en_gl/tax-alerts/nigeria-highlights-of-finance-act-2020 (last accessed 02.05.2021).

13 See also Opeyemi Bello, '***Rethinking the Taxation of Demurrage Income in Nigeria'***, *(2018) 9 GRBPL No. 2, 14 at 18-* where the author opined that: *"In summary, the income received by the ISC in respect of outbound freight is taxable in Nigeria, and consequently demurrage received in respect of this freight is also taxable in Nigeria. The income received by the ISC on inbound freight, however, is not taxable in Nigeria; and consequently the demurrage received thereto is also not taxable in Nigeria, for the reasons adduced above."*

14 ***Aderawos Timber Trading Co. Ltd v. FBIR (supra).***

15 This used to be ***section 9(1) (d)*** but ***section 2(a)(ii) FA 2020*** introduced a new ***(d)***.

16 On this point, see generally FIRS' ***Information Circular, 'What Constitutes 'Trade' for Tax Purposes: Guidelines for the General Public***, August 2010, available at:https://firs.gov.ng/wp-content/uploads/2021/01/CIRCULAR-ON-WHAT-CONSTITUES-TRADE.-IMD-NO.-PCT-T10.2.3.-1021.pdf (accessed 20.04.2021). However, ***Paragraph 1, Fifth Schedule, Personal Income Tax Act (PITA) Cap. P8, LFN 2004*** defines *"trade or business"* as *"trade or business or that part of trade or business the profits of which are assessable under this Act."*

agriculture cannot but involve the buying of raw materials which have to go through certain processes or to which some value added must be incorporated before selling the end product in order to earn profits; in that case, these activities can be described as being in the nature of a trade. Business also includes the selling of services which may be professional, vocational or employment."[17]

Hon. Justice Orojo[18] on his part, in his analysis of ***section 17(a) CITA 1961***[19] defines business thus: "*the word business is a wider term than trade in that it includes anything that occupies the time, attention and labour of man for the purpose of profit.*"

Hence, any non-freight income earned by a non-resident company in the course of outward carriage, which by its nature is a trade or business remarkably distinct from shipping transport, will be liable to tax under ***section 9(1)(a) CITA***.

For income arising from leasing, containers and other incidental income sources which are not distinct businesses or trades, ***section 9(1)(e)*** appears the most likely option. This provision has been referred to as the omnibus charging section of ***CITA***,[20] and seeks to impose tax on "*any source of annual profits or gains not falling within the preceding categories.*" There appears to be no reported Nigerian case on the scope of this paragraph, but the key phraseology are without doubt "*annual profits or gains.*"[21]

It is salutary to state that the "*gains*" referred to in this section bears its natural meaning and does not refer to capital gains which are chargeable to tax under the ***CGTA***.[22] Interestingly, the provision is in *pari materia* with ***Case VI Schedule D*** of the ***Income and Corporation Taxes Act 1988***, and its function has been described as charging all the profits and gains of an income or revenue nature which, through the impossibility of explicit information or otherwise, have not been specifically excluded from tax under any section.[23]

According to the authors of ***Halsbury's Laws of England***:

"*The word 'annual' if used alone, might well imply some kind of periodicity or repetition of the occurrence of profits, so that, if profits arose from a source in one year only, they could not be charged to tax; but the whole expression 'annual profits or gains' must be interpreted, and in this context 'annual' is used as qualifying profits or gains and as indicating profits or gains of an income nature as opposed to capital profits.*"[24]

In ***Cooper (Inspector of Taxes) v. Stubbs***,[25] *Atkins LJ* stated that "*annual profit or gain must be something which is of the nature of income or revenue.*" Furthermore, in ***Martin v. Lowry***, *Pollock MR* rejected the proposition that "*annual*" meant recurring from year to year and posited that "*annual*" meant in the "*current year*".

Also, in the old English case of ***Ryall (Inspector of Taxes) v. Hoare***,[26] the omnibus nature of the provision was laid bare as the

17 Isaac Olajide Oni, ***'Nigerian Companies Income Tax Law and Practice'***, (Spectrum, 2008), p. 45.
18 J. Ola Orojo, ***'Company Tax Law in Nigeria'***, (Sweet and Maxwell, 1979), p.16.
19 *In pari materia* with ***section 9(1)(a) CITA. CITA 1961 as amended*** was consolidated into the ***LFN 1990 as Cap. 60,*** which was further consolidated (with its several amendments) as ***CITA Cap. C21, LFN 2004.***
20 Chioma Ogechukwu Nwabachili, ***'Critique of Company Income Tax Act and Its Impact on Investments in Nigeria'***, NAUJILJ Vol. 11 No. 2 (2020) p.34.
21 Emphasis supplied.
22 According to ***Halsbury's Laws of England,*** (4th ed. Reissue (2002)), Vol. 23(1), p. 15, Para 1 - "In the Income Tax Acts reference to profits or gains do not include reference to chargeable gains ... and chargeable gain has the same meaning as in the Taxation of Chargeable Gains Act 1992."
23 Tax is charged in respect of any annual profits or gains not falling under any other case of ***Schedule D*** and not charged by virtue of ***Schedule VI: A, B, C*** or ***E***.
24 ***Halsbury's (supra)***, p. 77, Para 89.
25 ***[1925] 2KB 753 at 775.***
26 ***[1923] 2KB 447.***

English High Court relied on it to charge to tax, a commission paid by a company to its directors in consideration of their acceptance to personally guarantee a bank overdraft extended to the company during a time of financial constraint.

It then appears that income or revenue earned by an NRSC in Nigeria in a year outside of profit earned from outward shipment of goods and passengers and any other trade or business will be liable to income tax under ***section 9(1)(e) CITA***. Having satisfied ourselves that income from leasing, container, non-freight income and other incidental income will be liable to tax under ***section 9(1)(a) and (e) CITA***, we shall now consider the earlier question on the applicable rate of tax.[27]

It is our humble submission that in calculating the turnover of NRSCs under ***section 9***, income from both ***section 9(1)(a)*** and ***(e)*** will be summed up to determine the applicable turnover as the entire ***section 9*** must be read conjunctively. In essence, the turnover to be used will be the total revenue generated by the NRSC from non-freight sources taxable under ***section 9 CITA***. And assessment of the tax liability of

NRSCs is now made easier by the new ***section 55(1A) CITA*** which requires non-resident companies (NRCs) generally to file *inter alia* their audited financial statements and a true and correct statement in writing showing the amount of profit from all sources in Nigeria. However, the FIRS might still refuse the returns made by the NRSC and instead determine taxable profit of the NRSC to the best of its judgement under ***section 65 CITA***.[28]

Taxation of NRSCs Resident in DTA Countries

Nigeria is a signatory to fourteen (14) ***DTAs***[29] and the covered taxes in all but the agreement with Italy includes ***CITA*** and ***CGTA***. From the provision of ***section 45 CITA*** and even case law, it is axiomatic that domestic tax laws will not regulate the taxation of companies resident in the Contracting State.[30] This means that the fate of NRSCs resident in ***DTA*** countries will be governed exclusively by the provisions of the ***DTA***. However, there is no general rule on the tax base or rate, as the wordings of the ***DTAs*** differ from country to country. Hence, liability to tax must be decided on a case by case basis.

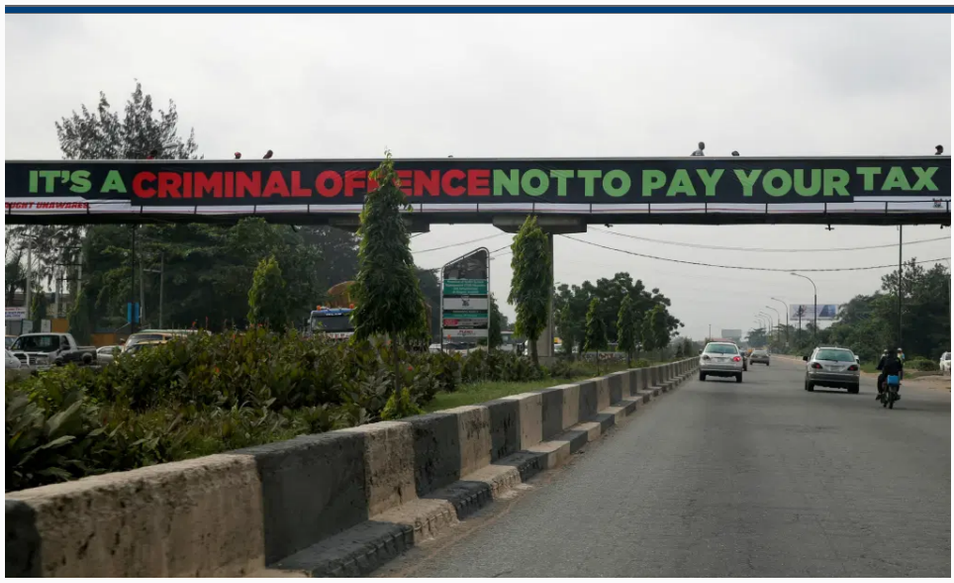
This is moreso as the provisions of most of the ***DTAs*** differ from both the ***Organisation for Economic Cooperation and Development (OECD) Model Tax Convention (MTC)*** and the ***United Nations (UN) MTC***. This by extension means that the commentaries on the ***MTCs*** will be not always be helpful in interpreting Nigeria's ***DTAs***. For reasons of space, we shall restrict the analysis of the ***DTAs*** to a few countries.

27 ***Section 40 CITA*** provides for the applicable tax rate for different companies in Nigeria depending on their turnover, and a community reading of ***sections 23(1)(o), 40*** and ***105(1) CITA*** reveals that companies with a turnover of less that ₦25 million (*"small companies"*) are exempt from CIT; those with a turnover above ₦25 million but less that ₦100 million (*"medium sized companies"*) are liable to tax at 20%; and those with a turnover that exceeds ₦100 million (*"large companies"*) are liable to tax at the rate of 30%.

28 Also, see Afolabi Elebiju, ***'Rendezvous': Implications of Tax Provisions of Nigeria's Finance Act (No.2) 2020 for Non-Residents'***, *LeLaw Thought Leadership Reflections, January 2021*: https://lelawlegal.com/add111pdfs/TLR_AE_-_FA2_2020.pdf (accessed 01.05.2021). The author stated at p.4 thus: *"... **section 14 CITA** (tax regime for NR shipping and aviation companies) is still extant, but **section 8 FA2 2020** excludes 'income from leasing, containers, non-freight operations and any other incidental income liable to tax under section 9 [CITA]' from being subject to **section 14 CITA,** does it mean that income from the listed operations **will never** be subject to tax on deemed basis? This is because **sections 14** and **15 CITA** arguably still recognises the possibility of deemed basis for shipping, aviation and cable companies. It appears that some clarity would still be needed, given propriety of questions of implied repeal of some seemingly conflicting **CITA** provisions. One way of reconciling seeming conflict is to say the new **section 55 CITA** does not prevent the FIRS in deserving cases, from still issuing best of judgment assessments, a la **section 65(2) CITA,** notwithstanding that NRCs filed audited accounts of their Nigerian operations. Another is that pre-**FA2 2020 section 55 CITA** amendment, the Courts have held that any conflict would be resolved in favour of **section 30(1) CITA**, given its 'supremacy intent'."*

29 The countries are: Canada, Pakistan, Belgium, France, Romania, Netherlands, United Kingdom, China, South Africa, Italy, Philippines, Czech Republic, Slovakia and Singapore. All of the DTAs are comprehensive apart from the DTA with Italy which covers only air and shipping. See FIRS, ***'Tax Treaties'***: https://firs.gov.ng/tax-treaties/ (last accessed on 03.05.2021).

30 See ***section 45 CITA*** which provides that DTAs shall have effect notwithstanding anything in ***CITA***. Also see ***section 50(5) FIRSEA*** which allows the FIRS to disclose secret information in order to comply with a double tax obligation.



Article 8.1 Nigeria-Romania DTA (which is *in pari materia* with the ***OECD MTC 2017***) provides that: *"Profits of an enterprise of a Contracting State from the operations of ships in international traffic shall be taxable only in that state."*[31] The takeaway from the OECD commentary on this Article is that the gamut of profits made by NRSCs from operating a ship are covered by the paragraph.

Meanwhile, ***Article 8 Nigeria- France DTA (NFDTA)***[32] provides thus:
"1. A resident of a Contracting State shall be exempt from tax in the other Contracting State in respect of profits or gains derived from the operations of ships or aircraft in international traffic.

2. However, no exemption shall be granted if such operations in international traffic are carried on by an enterprise of only one of the Contracting States. In such a case, the tax charged shall not exceed 1% of the ***earnings*** *of the enterprise derived from the other Contracting State.*
For the purpose of this paragraph, "earnings" means income from the carriage of passengers, mails, livestock or goods less refunds and payments of emoluments of ground staff in the Contracting State."

It is our considered view that *the intent of this Article is to exempt in totality from tax, profits or gains derived by French or Nigerian companies derived from operating a ship in a contracting state (whether inward or outward traffic)*. However, if no Nigerian or French shipping company carries on shipping operations in the other Contracting State, then a tax will be charged on its earnings from freight, mails and sale of ticket at a rate of 1%. The tax is not imposed on all the profits and gains derived from its shipping operations, but on income from the carriage of passengers, mails, livestock and goods less refunds of expenses and staff cost. This indicates that the draftsman was well aware that other earnings can accrue from operating a ship in international traffic, but restricted its meaning.

Delmas Case Analysis

This ***Article 8 NFDTA*** fell for interpretation in the ***Delmas Case***.[33] The brief facts are that the Appellant, a French shipping company, had earned income in Nigeria from demurrage, container cleaning fees, container sales/damages, shipping line agency commission, bonded terminal commission, and NIMASA Levy. The FIRS audited the Appellant's returns for 2014 and 2015 and made an additional assessment of ₦1,047,005,282.08 based on the streams of income above. The Appellant had argued that based on the commentaries to the ***OECD MTC***, the Respondent (FIRS) was precluded from taxing profits or earning from income other than carriage of passengers, goods, mails, livestock from Nigeria. TAT

'4,420 Ships Arrived In Nigerian Ports In 2019, Merchandise Trade Stood At US$117. 789 Billion'

United Nations Conference on Trade & Investment (UNCTI),

31 Commenting on the ***Article***, the OECD stated thus: *"Containers are used extensively in international transport. Such containers frequently are also used in inland transport. Profits derived by an enterprise engaged in international transport from the lease of containers are usually either directly connected or ancillary to its operation of ships or aircraft in international traffic and in such cases fall within the scope of the paragraph. The same conclusion would apply with respect to profits derived by such an enterprise from the short-term storage of such containers (e.g. where the enterprise charges a customer for keeping a loaded container in a warehouse pending delivery) or from detention charges for the late return of containers."* OECD, ***'Model Tax Convention on Income and on Capital: Condensed Version 2017'***, *21.11.2017, p.223:*https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page223 (accessed 23.04.2021).

32 ***Double Taxation Relief (Between the Federal Republic of Nigeria and the French Republic) Order 1991, CITA- Subsidiary Legislation.***

33 ***(2021) 55 TLRN 28.***

in its ruling held, and quite rightly so, that the ***OECD Commentaries*** were not applicable because the ***NFDTA*** was not *in pari materia* with the ***OECD Model Law***.

In interpreting ***Article 8 NFDTA***, the TAT held that: *"The Article is not shy in declaring what is meant by profits and earnings. According to Article 8(2) the term earnings means income from carriage of passengers, mails, livestock or goods less refunds and payments of wages and salaries of ground staff. In other words income to be exempt from tax in Nigeria must relate to carriage of passengers, mails, livestock or goods in international traffic whether inbound or outbound. That is the proper scope of Article 8 of the DTA."*[34]

Continuing, the TAT stated that *"it is our firm view that Article 8 of the DTA only covers income from international traffic in which case other income earned in Nigeria fall to be taxed under the provisions of domestic tax statute, in this case CITA and more specifically under section 9 of the said statute."*[35]

We respectfully disagree with the TAT on these points. It appears that the TAT's interpretation is deliberately stretched to favour the FIRS as it does not in any way capture the proper scope of the Article. ***Article 8(1)*** covers profits or gains of French companies derived from operating *a ship* ***in*** *international traffic, and not income* ***from*** *international traffic.* What makes traffic international according to ***Article (3)(1)(h) NFDTA*** is that the transport is not operated solely between places in Nigeria.[36]

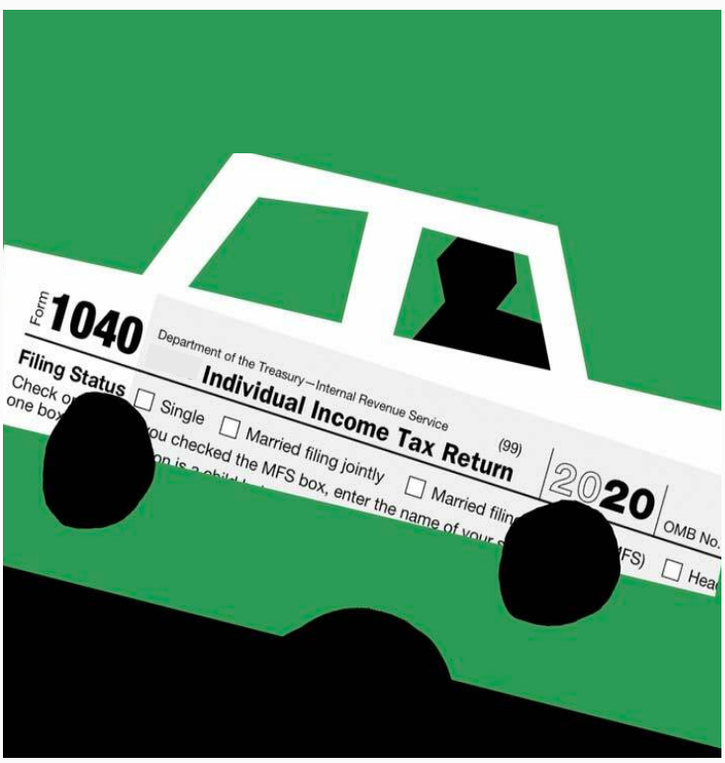
The ***Article*** also does not in any way exempt **earnings** as defined in the proviso to ***Article 8(2)***, from income tax. Rather, the only profits or gains of French shipping companies liable to tax in Nigeria are ***income from carriage of passengers, mails, livestock or goods less expenses to be refunded and personnel cost of ground staff***.[37] If this were not so, the draftsman would not have bothered to restrict the meaning of "*earnings*" for the purposes of ***Article 8(2)*** tax to income arising from the carriage of passengers, mails, livestock or goods less the stated refunds.

The TAT concluded that: *"it is our view that incomes from container demurrage, container cleaning, shipping line agency charge (SLAC), bonded terminal commission, NIMASA environmental levy, and container sales/damage recovery cost arising in relation to contracts for the carriage of goods into Nigeria are not part of international traffic. They are outside the scope of the DTA. Therefore, Article 8 of the DTA does not apply since it only applies to income from international traffic. However, these incomes are incomes derived from Nigeria and are taxation (sic) under section 9 of CITA."* [38]

34 ***Delmas Case*** (***supra***), *p.70*.
35 *Ibid.*
36 Emphasis supplied. *A fortiori*, a foreign vessel is prohibited under ***section 3 Coastal and Inland Shipping (Cabotage) Act Cap. C51, LFN 2004*** from operating in domestic carriage of cargo and passengers.
37 Emphasis supplied.
38 ***Delmas Case*** (*footnote 39* (***supra***)).

This writer vehemently disagrees with the TAT on this point. Tax is statutory and the ***DTA*** has stated in clear terms, the class of earnings of NRSCs liable to tax and the applicable rate. This means that the FIRS or the court is not entitled to rely on intendments.[39] The fact that the ***DTA*** took out time to define the earnings for which tax is to be levied, shows a clear appreciation of the fact that other earnings will accrue to the NRSC while operating in international traffic.

Thus, it will be disingenuous to even infer that other earnings not accruing from the carriage of passengers, mails, livestock and goods are not dealt with under the ***DTA***. In our view, the Appellant was only liable to pay CGT at 10% for gains, if any, made from the sale of its containers in Nigeria.[40]



'Maritime Transport Is The Backbone Of Global Trade And The Global Economy. About 80% Of World Trade In Goods Is Carried By The International Shipping Industry'.

Conclusion

Maritime transport is the backbone of global trade and the global economy, as about 80% of world trade in goods is carried by the international shipping industry.[41] According to the United Nations Conference on Trade and Investment (UNCTI), 4,420 ships arrived in Nigerian ports in 2019, while merchandise trade stood at US$117. 789 billion.[42] Hence, the tax exposure and liability of NRSCs to tax in a country affects the cost of imported items.

This article has tried to navigate the tax conundrum of non-resident shipping companies in Nigeria, and it is hoped that soon further litigation on the point (including potentially appellate decision in ***Delmas Case***, if the Plaintiff should appeal), will bring much needed clarity in the area.

39 ***Ahmadu v. Gov of Kogi State (supra).***
40 ***Article 13 NFDTA.***
41 European Community Ship Owners' Association, ***'Shipping and Global Trade-Towards an EU External Shipping Policy'***, *February 2017, p.3*: https://tes/default/files/publications/2017-02-27-ECSA-External-Shipping-Agenda-FINAL.pdf (accessed 13.04.2021).
42 United Nations, ***'Maritime Profile Nigeria'***, *11.11.2020*: https://unctadstat.unctad.org/countryprofile/maritimeprofile/en-gb/566/index.html (accessed 13.04.2021).