IN THE COURT OF APPEAL
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS
THIS MONDAY, THE 24TH DAY OF JUNE, 2019

27/6/19

BEFORE THEIR LORDSHIPS:

MOHAMMED LAWAL GARBA — JUSTICE, COURT OF APPEAL
UGOCHUKWU ANTHONY OGAKWU — JUSTICE, COURT OF APPEAL
GABRIEL OMONIYI KOLAWOLE — JUSTICE, COURT OF APPEAL

APPEAL NO. CA/L/556/2018

BETWEEN:

VODACOM BUSINESS NIGERIA LIMITED .... APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE (FIRS) .... RESPONDENT

JUDGMENT

(DELIVERED BY UGOCHUKWU ANTHONY OGAKWU, JCA)

This is an appeal against the decision of the Federal High Court, Lagos Division, in its appellate jurisdiction, arising from the decision of the Tax Appeal Tribunal. The facts of the matter are that consequent upon a tax investigation carried out by the Respondent into the affairs of the Appellant, it issued a Notice of Additional Tax Assessment on the Appellant for the payment of Value Added Tax (VAT) in respect of a transaction which the Appellant had with a non-resident foreign company for the supply of satellite bandwidth capacities to the Appellant. The Appellant objected to the assessment and the issue remaining unresolved, the Appellant appealed to the Tax Appeal Tribunal.

J. N. OBIDIKE (MRS.) 27/6/19
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After due hearing, the Tax Appeal Tribunal dismissed the Appellant's matter and ordered it to pay the tax as assessed by the Respondent. The Appellant was dissatisfied with the decision of the Tribunal and appealed to the Federal High Court (lower court) in **SUIT NO. FHC/L/4A/2016: VODACOM BUSINESS NIGERIA LIMITED vs. FEDERAL INLAND REVENUE SERVICE.** The lower court dismissed the Appellant's appeal and affirmed the decision of the Tax Appeal Tribunal. The decision of the lower court which is dated 19th December 2017 but stated by the parties to have been delivered on 18th January 2018 is at pages 736-764 of Volume II of the Records. The Appellant was again dissatisfied and appealed to this court. The extant Notice of Appeal on which the appeal was argued is the Notice of Appeal which is at pages 817-836 of the Records of Appeal.

The Records of Appeal having been complied and transmitted, the parties filed and exchanged briefs of argument. The briefs on which the Appeal was argued and which learned counsel adopted and relied upon at the hearing of the appeal are:

> *"1. Amended Appellant's Brief of Argument filed on 27th February 2019 but deemed as properly filed on 28th February 2019.*
>
> *2. Amended Respondent's Brief of Argument filed on 13th March 2019.*
>
> *3. Appellant's Reply Brief of Argument filed on 12th April 2019 but deemed as properly filed on 9th May 2019."*

Let me state at this outset that the Appellant's Reply Brief was largely a re-argument of the submissions already made in the Appellant's Brief. This is not the purpose of a Reply Brief. It is not proper to use a reply brief to extend the

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scope of argument and submissions in the appellant's brief. See **YANATY PETROCHEMICAL LTD vs. EFCC (2017) LPELR (43473) 1 at 27-28, ABDULLAHI vs. MILITARY ADMINISTRATOR (2009) LPELR (27) 1 at 13** and **ECOBANK NIGERIA LTD vs. HONEYWELL FLOUR MILLS PLC (2018) LPELR (45124) 1 at 9-11.** The Amended Appellant's Brief is of 25 pages. The Amended Respondent's Brief is of 23 pages while the Appellant's Reply Brief is of 22 pages. The reiteration of a submission already made in the Appellant's Brief in a Reply Brief will not improve the quality of the argument or make it acceptable, if it were ordinarily unacceptable. **FSB INTERNATIONAL BANK vs. IMANO NIG LTD (2000) 7 SCNJ 65 at 70** and **MAGIT vs. UNIVERSITY OF AGRICULTURE, MAKURDI (2005) LPELR (1916) 1 at 13.** Accordingly, bearing the function of a reply brief in mind, I will only refer to the submissions in the Reply Brief where it consists of a response to a new issue or argument in the Amended Respondent's Brief.

The Appellant distilled three issues for determination as follows:

> "1. *Considering the facts and circumstances of this case, was the Lower Court right in holding that the subject transaction is VATable? (Grounds 1, 3, 4, 8, 11, 12, 15)*
>
> 2. *Without prejudice to Issue I above, was the Lower Court right when it held the Appellant liable to pay VAT even when the conditions precedent therefor were not fulfilled? (Grounds 2, 5, 6, 7, 11 and 16)*
>
> 3. *Whether the Lower Court was correct in law when it applied the Principles of Tax Laws of Reverse Charge and destination principle without recourse to the fact that there exists no Nigerian statute establishing those principles? (Grounds, 9, 10, 13, 14)"*

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The Respondent equally formulated three issues for determination, namely:

> "1. *Whether the transaction in this case qualifies as supply and consumption of services in Nigeria within the context of the provision of the VAT Act, and therefore liable to VAT? (distilled from Grounds 1, 3, 8, 11, 12, and 15)*
>
> 2. *Whether the obligation of consumer of service in Nigeria to remit VAT from the service is separate, distinct and independent of the obligation of the non-resident supplier of the services to register for VAT and include VAT in its invoice? (distilled from Grounds 2, 5, 6, 7, 11, and 16)*
>
> 3. *Whether the lower Court had done substantial justice by applying Destination Principle, Reserve Charge and/or the clause in the Contract between the Appellant and the supplier (NSS) which contracted the NSS's VAT liability to the Appellant, in upholding the judgement of the TAT, or whether the Destination and Reverse Charge Principles of Tax Laws the Lower Court alluded to in upholding the judgment of the TAT are provided/contained/implicit in the VAT Act, Cap. VI, Laws of the Federation of Nigeria, 2004 (as amended in 2007) ('VATA')? (distilled from Ground 4, 9, 10, 13, 14)."*

Aside from semantical and syntactical preferences, the issues nominated by the parties are the same two and tuppence. Accordingly, it is on the basis of the issues as crafted by the Appellant that I will consider the submissions of learned counsel and resolve this appeal.

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ISSUE NUMBER ONE

Considering the facts and circumstances of this case, was the Lower Court right in holding that the subject transaction is VATable?

SUBMISSIONS OF THE APPELLANT'S COUNSEL

The Appellant submits that the lower court was wrong when it upheld the decision of the Tribunal that the supply of Satellite bandwidth capacities to it by a non-resident foreign company was a VATable transaction. It was opined that there was no dispute that the foreign company is not in Nigeria and that the Satellite through which the services were provided is not without Nigerian territory. It was asserted that there was no appeal on the findings of the Tribunal that the foreign based company did not carry on business in Nigeria and the said decision which was not appealed against remained binding vide **AJIBARE vs. AKOMOLAFE (2011) LPELR-3948 at 79-80** and **OMNIA NIG LTD vs. DYKTRADE (2007) 15 NWLR (PT 1058) 576 at 617.**

It was contended that by the combined reading of Sections 2, 10 and 46 of the Value Added Tax Act, a service supplied by a non-resident person to a person inside Nigeria is only subject to VAT if the service is physically rendered in Nigeria. It was stated that where the service is rendered from outside Nigeria but only received in Nigeria, then the transaction will not be subject to VAT as location is crucial and key to the VATability of any transaction relating to the supply of services from a person not resident in Nigeria to a person resident in Nigeria.

It was argued that for the supply of service made by a non- resident foreign company to be VATable, it has to be an imported service, which by Section 46 of

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the VAT Act is defined as service rendered in Nigeria showing that the emphasis is on where the service was rendered and not where it was received; with the result that where the service is not rendered in Nigeria, it will not be subject to VAT. The Appellant maintained that the lower court was wrong to hold that Section 2 of the VAT Act did not require a combined reading with Sections 10 and 46 of the VAT Act.

It is the further contention of the Appellant that the VAT Act like all other tax statutes must be construed strictly with nothing read into it as the ambit of a statute cannot be widened or restricted in the course of interpretation. The case of **AHMADU vs. GOV OF KOGI STATE (1960-2010) 1 NTLR 244** was referred to. The lower court it was conclusively contended was wrong when it held that electronically supplied services (which are intangible services) are liable to tax in the place of supply, in the absence of any law which stipulates for such.

SUBMISSIONS OF THE RESPONDENT'S COUNSEL

The Respondent refers to Sections 2, 7 and 10 of the VAT Act and submits that Section 2 makes every service in Nigeria liable to VAT except the services listed in the 1st Schedule to the Act; and that the transaction the Appellant had with the non-resident foreign company was not one of the exempted services. It was posited that the rule in determining whether a particular transaction is VATable is whether it is specifically exempted in the 1st Schedule, otherwise it will be VATable. Section 46 of the VAT Act, it was stated defined taxable goods and services as the goods and services not listed in the 1st Schedule. It was asserted that VAT is a consumption tax and that the liability is borne by the final consumer of the goods and services vide **A-G LAGOS STATE vs. EKO HOTEL LTD 92008) ALL FWLR (PT 398) 235 at 239.**

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The Respondent maintains that Section 10 of the VAT Act subjects to VAT the services supplied in Nigeria by a non-resident company and mandates the Nigeria consumer of the services to remit the VAT. It was opined that the controversy is in the meaning of the phrase "supplied in Nigeria" as employed in Section 10 (2) of the VAT Act, and that it was not in issue at the Tribunal whether the foreign company carried on business in Nigeria and so the Tribunal did not hold that the foreign company did not carry on business in Nigeria. The misunderstanding by the Lower Court as to whether the Tribunal held that the foreign company does not carry on business in Nigeria, it was stated, did not affect the decision of the lower court. Section 10 (2) which makes supply of goods or services in Nigeria VATable and the meaning of supply of goods in Section 46 of the VAT Act were referred to and it was stated that it entailed the movement of goods and services from the supplier to the consumer, such that it involved sale and delivery of service which takes place when the goods or service is received and paid for by the consumer. The place of production of the goods or services, it was stated, was not important under Section 10 (2) but that the goods or service were supplied in Nigeria and are available to the consumer in Nigeria.

The Respondent asserted that the Appellant was wrong in its contention that in order to be VATable, the physical act of rendering the service has to be performed in Nigeria. The word employed in Section 10 (2) it was stated, was "supplied" and not "rendered". It was *arguendo*, further contended that the physical act of rendering a service cannot be restricted to the physical presence of the person since the service in the form of bandwidth capacities supplied to the Appellant is abstract in form and did not require the physical presence of the supplier who can be anywhere, but that it is the place where the possession or effect of the service comes upon the consumer, in this instance Nigeria, that is

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regarded as the place where the service is supplied in under Section 10 (2) of the VAT Act. The legislative purpose of Section 10 of the VAT Act was stated to be to bring to VAT all goods and services supplied by companies based outside Nigeria, but received and used in Nigeria irrespective of how the said goods or services got to the consumer in Nigeria.

RESOLUTION OF ISSUE NUMBER ONE

Prefatorily, the non-resident foreign company supplied satellite network bandwidth capacities for the use by the Appellant in its telecommunications business. By its very nature the satellite is located in orbit and the transmission of the bandwidth capacities to and fro the satellite is done by the Appellant's transponder located in Nigeria. So even though the satellite is in orbit, the service it provides for the Appellant is supplied in Nigeria. The pertinent question is: whether given the nature of the service provided by the satellite network bandwidth capacities, it is a VATable transaction.

Our odyssey starts from the VAT Act. Sections 2, 10 and 46 of the VAT Act are relevant. Section 2 provides:

> "2. *The tax 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 goods and services listed in the First Schedule to this Act."*

It is abecedarian that where the language of a statute is plain, clear and unambiguous, the task of interpretation hardly arises. The duty of the courts will be to give the words used their ordinary, natural and grammatical construction. See **MOBIL OIL NIG LTD vs. FBIR (1977) LPELR (24896) 1 at 22** and **UWAZURIKE vs. A-G FEDERATION (2007) LPELR (3448) 1 at 12.** The plain,

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ordinary, natural and grammatical construction of Section 2 is clear that except for the goods and services listed in the First schedule, VAT shall be paid on the supply of all goods and services. This is underscored by the interpretation Section, Section 46 of the Act, which defines "*taxable goods and services*" as the goods and services not listed in the First Schedule to the Act. The service provided for the Appellant by the non-resident foreign company does not fall within the goods and services listed in the First Schedule, so *ex facie*, it would seem to be within the purview of Section 2 of the VAT Act. But the matter does not end there.

It is a cardinal rule of construction that in seeking to interpret a particular section of a statute, one does not take the section in isolation but one should approach the question of the interpretation on the footing that the section is part of a greater whole. Put differently, where the subject matter construed concerns other sections of the same statute, all the related provisions must be read, considered and construed together as forming a composite whole. See **CHIME vs. UDE (1996) LPELR (848) 1 at 51, MOBIL OIL (NIG) PLC vs. IAL 36 INC. (2008) LPELR (1883) 1 at 24** and **RIVERS STATE GOVT vs. SPECIALIST KONSULT (2005) LPELR (2950) 1 at 35**. This brings into play the provisions of Section 10 of the VAT Act. It stipulates:

> *"10. (1) For the purpose of this Act, a non-resident company that carries on business in Nigeria shall register for the tax with the Board, using the address of the person with whom it has a subsisting contract, as its address for purposes of correspondence relating to tax.*
>
> *(2) A non-resident company shall include the tax in its invoice and the person to whom the goods or*

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services are supplied in Nigeria shall remit the tax in the currency of the transaction."

There are two aspects of the above provision. The first puts an obligation on the non-resident company that carries on business in Nigeria to register for tax with the Respondent and for it to include the tax in its invoice. The second aspect puts an obligation on the person to whom the non-resident company supplies goods or services in Nigeria to remit the tax. It has not been confuted that the foreign company that the Appellant dealt with is a non-resident company. It has also not been confuted that it did not register for tax with the Respondent. There is the unchallenged finding made by the lower court at [pages 762-763 of Volume II of the Records that "*In the contract the supplier (NSS) contracted its VAT liability to the Appellant.*" This shows that the foreign company from the outset did not intend to get involved for purposes of registration for tax in Nigeria or including any tax in its invoice.

The crux of the contention on this Section is whether the service of the foreign company was supplied in Nigeria. The Appellant's contention is that for the service to qualify as one supplied in Nigeria, it has to be physically rendered in Nigeria since it is an imported service. The Respondent maintains the contrary, arguing that the physical act of rendering the service in Nigeria was not a *sine qua non* for the service to be VATable. The following words and phrases are critical to the determination of this contention. They are: "*supplies*", "*supply of services*" and "*imported service.*" They have been defined in Section 46 of the VAT Act as follows:

> *"'Supplies' 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"*

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The transaction between the Appellant *and the non-resident foreign company* involved the performance of a service for a consideration, so it is a supply within the meaning of the VAT Act.

'*Supply of services'* is defined as any service provided for a consideration. The service to the Appellant by the non-resident foreign company was provided for a consideration, so it is a *supply of service* within the VAT Act. '*Imported service*' is defined as service rendered in Nigeria by a non-resident person to a person inside Nigeria. Again, the foreign company is a non-resident person. The Appellant is a person inside Nigeria. The crucial question is whether Satellite network bandwidth capacities service which is the transaction between them is a service rendered in Nigeria. The key to unlocking this poser lies in recognizing the fact that the satellite network is in the orbit. It is neither in the residence of the foreign company nor is it in Nigeria. In order for the bandwidth capacities afforded by the Satellite network to be supplied for use, transmission goes to and fro the Satellite by signals, using the Appellant's transponders which are located in Nigeria. So even though the Satellite is in orbit, the supply of services from it is rendered in Nigeria. The hair-splitting by the Appellant on physical presence in Nigeria is of no moment since by the nature of transaction the services rendered in Nigeria were such that physical presence was unnecessary. Indeed the presence of the Satellite in Nigeria territory, as opposed to being in orbit would make unachievable the service that it is meant to supply. In so far as the bandwidth capacities are supplied in Nigeria, the foreign company carries on business in Nigeria, within the meaning of Section 10 (1) of the VAT Act, since its services supplied in Nigeria are being utilised. The bandwidth capacities in the satellite in orbit are used Nigeria.

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In holding that the transaction between the Appellant and the non-resident foreign company is subject to VAT in Nigeria, the lower court reasoned and held as follows at pages 754-755 of the Records:

> *"In the instant case, the Appellant contracted with a Netherlands based company (the NSS) for the supply of satellite network bandwidth capacities services (an intangible service) in Nigeria. The Appellant through its transponder located in Nigeria got the service transmitted to it in Nigeria. The Appellant's argument that a service supplied by a non-resident person to a person inside Nigeria is only subject to VAT if the service is indeed rendered in Nigeria cannot fly. By way of analogy, goods and services can be supplied from a trader outside Nigeria to a person in Nigeria, for instance a Nigerian trader received the supply of frozen fish from a company in Germany, at the port the goods will be liable to VAT and VAT will be charged on the supply. In the case of intangible services, the ports and relevant authorities cannot so charge VAT on services of this nature because such services do not come through the port into Nigeria. This does not make the supplies of this nature less subject to VAT in Nigeria; it is subject to VAT as the supply of frozen fish. In both instances the location of the supplier is of no consequence at this stage. What is important is whether a supply of goods and services is made into Nigeria and for consideration, once that question is answered in the affirmative a VAT chargeable transaction has occurred. In the instant case, the Appellant was supplied in Nigeria satellite network bandwidth capacities for consideration as show* [sic] *by the contract document, and this supply not being within the exempted services is liable to VAT in Nigeria pursuant to Section 2 of the VAT Act. In essence the supply of satellite network bandwidth capacities qualify as 'imported service' because it is supplied by a person outside Nigeria to a person inside Nigeria."*

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The reasoning and conclusion of the lower court in this regard is unassailable. The integral construction of the stipulations of Sections 2, 10 and 46 of the VAT Act leads to the indubitable conclusion that the transaction between the Appellant and the non-resident foreign company is one for which the services were supplied in Nigeria. It is therefore VATable. This issue number one is consequently resolved against the Appellant. The lower court was right in holding that the subject transaction is VATable.

ISSUE NUMBER TWO

> *Without prejudice to Issue I above, was the Lower Court right when it held the Appellant liable to pay VAT even when the conditions precedent therefor were not fulfilled?*

SUBMISSIONS OF THE APPELLANT'S COUNSEL

The Appellant opens its submissions on this issue with the contention that the lower court was wrong and misconceived the provisions of Sections 2 and 10 of the VAT Act when it held that the transaction was VATable. It was stated that the non-resident foreign company is the supplier in the transaction and that the obligation to charge VAT was on the supplier rather than the recipient of the services. It was stated that the non-resident foreign company is not registered for tax purposes in Nigeria and that the lower court was wrong in seeking for extraneous reasons why it should pay tax. It was maintained that the VAT Act did not state what is meant by carrying on business in Nigeria as employed in Section 10 (1) of the Vat Act. Section 54 (1) of the Companies and Allied Matters Act was referred to for the contention that a company only carries on business in Nigeria if it is registered as a Nigerian Company and conducts a business at a particular location as a continuous operation or permanent occupation vide **EDICOMSA**

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INTERNATIONAL INC & ASSOCIATES vs. CITEC INTERNATIONAL ESTATES LTD (2006) 4 NWLR (PT 969) 114 at 125. The Appellant further referred to paragraph 4.0 of the FIRS Circular No. 9302 of 22 March 1993 as it relates to profits or incomes deemed to be derived from Nigeria. The lower court it was posited was wrong in holding that where services are supplied from outside Nigeria by a non-resident company that the recipient of the services is treated as the supplier.

It is the further contention of the Appellant that the non-resident foreign company did not issue any invoice for VAT and that the Appellant's obligation to pay the assessed tax is premised on the issuance of a VAT invoice. It was asserted that the condition precedent to the obligation to pay VAT was the issuance of the VAT invoice and where no such invoice has been issued the obligation would not arise as the manner in which the act is to be done has not been complied with. The case of **ADHEKEGBA vs. HON. MIN OF DEFENCE (2013) LPELR-20154 (CA) at 22** was referred to. The Respondent's VAT assessment without any prior invoice from the supplier was said to be wrongful and illegal. The VAT Act it was stated contained no provision for penalising the recipient of services for non-payment of VAT and was silent on what would happen in the event of non-issuance of invoice. The tax laws it was maintained must be strictly and narrowly construed without any room for inference or extrapolation. The cases of **FBIR vs. HALLIBURTON (WA) LTD** *[no year]* **LPELR 24230 (CA)** and **RUSSEL (INSPECTOR OF TAXES) vs. SCOTT (1948) AC 433-434** were relied upon. It was conclusively submitted that by a combined reading of Sections 2, 10 and 46 of the VAT Act and Section 54 (1) of the Companies and Allied Matters Act, there was no obligation on the Appellant to pay the VAT without strict compliance with the attendant conditions. The decision of the lower court was consequently said

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to be perverse and liable to be set aside vide **UDENGWU vs. UZUEGBU (2003) 13 NWLR (PT 836) 136 at 152.**

SUBMISSIONS OF THE RESPONDENT'S COUNSEL

The Respondent submits that Section 10 (2) of the VAT Act creates two duties, one on the non-resident company to include the tax in its invoice and the second on the person to whom the goods or services are supplied in Nigeria to remit the tax. It was stated that the duties are separate, distinct and independent such that whether the non-resident company issues VAT invoice or not, the Nigerian recipient of the goods or services remains duty bound to remit the tax. The condition for the non-resident company to register for VAT and include VAT in its invoice was said not to be a condition precedent for the liability of the Appellant to pay VAT since the Respondent is not bound by the amount of VAT in any invoice in raising an assessment. Section 15 (1) of the VAT Act, it was opined, compels a taxable person to render account of his transaction. Section 8 (1) (e), (h) & (i) of the Federal Inland Revenue Service (Establishment) Act, it was argued, enables and empowers the Respondent to conduct investigation in order to detect and prevent the non-compliance with tax liability. Section 7 (2) of the VAT Act it was posited empowered the Respondent to do anything necessary for the assessment and collection of tax.

The Respondent asserts that the duties on the non-resident company under Section 10 of the VAT Act is only a procedural provision for VAT compliance and does not interfere with the substantive duty of VAT remittance by the Nigeria consumer of service. The provisions of Section 54 (1) of the Companies and Allied Matters Act relied on by the Appellant was said to be meant for a purpose completely different from what is contemplated by Section

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10 of the VAT Act. The case of **EDICOMSA** relied on by the Appellant was said to be an interpretation of Section 54 of the Companies and Allied Matters Act and therefore inapplicable. The cases of **ARBICO LTD vs. FBIR (1996) 2 ALL NLR 303** and **OFFSHORE INTERNATIONAL S. A. vs. FBIR (2011) 4 TLRN 58** were referred to and it was opined that continuity or permanence of activities was not a *sine qua* non to the phrase *carrying on business in Nigeria.* Paragraph 4 of the Respondent's Circular which the Appellant referred to was said to be in respect of Companies Income Tax and not VAT which are different tax regimes; company income tax being on profit and income, while VAT is on simply of goods and services.

APPELLANT'S REPLY ON LAW

In the Reply brief, the Appellant submits that the two duties created by Section 10 of the VAT Act were conjunctive, such that if there is no invoice, the duty to remit would not arise. It was further stated that the Respondent's reference to the provisions of the Federal Inland Revenue Service (Establishment) Act was a new issue for which leave of court was required to raise and that not having obtained leave the submissions thereon should be struck out. In any event, the provisions of the Federal Inland Revenue Service (Establishment) Act were said not to be a magic wand meant to impose any wrongful, unlevied and unclear VAT at all cost when the same is not within the confines of the Act. The case of **PSYCHIATRIC HOSPITAL MANAGEMENT BOARD vs. EJITAGHA (2000) 11 NWLR (PT 677) 154 at 163** was relied upon.

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RESOLUTION OF ISSUE NUMBER TWO

In the consideration of issue number one above, I resolved the same in favour of the Respondent to the effect that based on a holistic construction of Sections 2, 10 and 46 of the VAT Act, the decision of the Tribunal and the lower court that the transaction between the Appellant and the non-resident foreign company is VATable, is the correct decision. Perhaps it is pertinent at this stage to state that an appellate court is concerned with whether the decision appealed against is the correct decision and not whether the reasons given for the decision are correct. See **POATSON GRAPHICS ARTS TRADE LTD vs. NDIC (2017) LPELR (42567) 1 at 36, NDAYAKO vs. DANTORO (2004) 13 NWLR (PT 889) 189 at 220** and **OLUSANYA vs. UBA PLC (2017) LPELR (42348) 1 at 27.** So no matter how flawed the Appellant perceives the reasons of the lower court to be, they are immaterial in so far as the decision arrived at is the correct decision: **DAIRO vs. UBN PLC (2007) 16 NWLR (PT 1059) 69 at 161.**

Without a doubt, Section 54 (1) of the Companies and Allied Matters Act stipulates that a foreign company shall not carry on business in Nigeria and shall not have a place of business or address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents as matters preliminary to incorporation in Nigeria under the Companies and Allied Matters Act. The said provision can however not be used as the basis upon which to construe *"carries on business"* as employed in Section 10 (1) of the VAT Act. This is because the thrust and purpose of the two legislations are not the same. The stipulation of the Companies and Allied Matters expressly forbids a foreign company from having a correspondence address in Nigeria except for purpose of preliminaries for incorporation in Nigeria. Contrariwise, the VAT Act recognises

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that there could be intangible business transactions, as in the circumstances of this matter where a non-resident company carries on business in Nigeria, and expressly provides that in such circumstances the non-resident company is to use the address of the person with whom it has a subsisting contract as its address for purposes of correspondence relating to tax. This is a marked difference and departure from what is enacted in Section 54 (1) of the Companies and Allied Matters Act, thus underscoring that the said Section cannot be resorted to in interpreting Section 10 (1) of the VAT Act.

It will therefore be a blooper to interpret the phrase "*carries on business*" as employed in Section 10 (1) of the VAT Act by reference to the stipulations of Section 54 (1) of the Companies and Allied Matters Act. It is trite law that statutes which are on the same subject matter and have a common purpose are to be read, construed and applied together: **NIGERIAN ARMY vs. AMINUN-KANO (2013) LPELR (2013) 1 at 35**. The Companies and Allied Matters Act and the VAT Act are neither on the same subject matter, nor do they have a common purpose. So since the words used in Section 10 (1) of the VAT Act are clear and unambiguous, the phrase "*carries on business*" used therein and which has not been defined in the VAT Act is to be given its simple, plain, natural and ordinary grammatical meaning. See **OJOKOLOBO vs. ALAMU (1987) 7 SCNJ 98, BERLIET NIG. LTD vs. KACHALLA (1995) 12 SCNJ 147** and **EKULO FARMS LTD vs. UNION BANK (2006) LPELR (40141) 1 at 37-39.**

The phrasal verb "*carry (carries) on*" has been defined to mean "*to continue doing something.*" See the online dictionaries: *oxfordlearnersdictionaries.com, dictionary.cambridge.org, collinsdictionary.com* and *macmillandictionary.com*. I reiterate that for the bandwidth capacities afforded by the Satellite network of

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the non-resident company to be supplied for use (the transaction in question as to whether it is VATable), transmission goes to and fro the Satellite by signals, using the Appellant's transponders which are located in Nigeria. It is not one-off dealing. It is continuous. The bandwidth capacities are supplied in and are continuously utilised in Nigeria. So by the nature of the transaction, the non-resident company has not merely done business with a Nigerian company, it *continues doing something* and therefore *carries on business* in Nigeria.

The further disceptation under this issue is whether the non-resident foreign company ought to have issued a tax invoice before the Appellant's obligation to pay tax would arise. I have already made reference to the finding of the lower court which has not been appealed against and therefore remains binding that the non-resident foreign company contracted its tax liability to the Appellant. See pages 762-763 of the Volume II of the Records. It is necessary to state that VAT is a consumption tax; it is for the consumer to pay, in this case the Appellant. The burden to pay the tax is not on the non-resident foreign company: **A-G LAGOS STATE vs. EKO HOTEL LTD (supra).** In this wise, the Tribunal held at page 512 of Volume II of the Records that "*... NSS (the non-resident foreign company) is not being taxed. The issue concerned is the transaction, the taxable person is the Appellant that is in Nigeria.*" In the same vein, the lower court held as follows at page 762 -763 of Volume II of the Records:

> ""*In the contract the supplier (NSS) contracted its VAT liability to the Appellant. Assuming that the clause contracting the VAT liability in the contract between the Appellant and NSS is nonexistent* [sic] *the Appellant will still be liable to VAT in Nigeria because the transaction falls within the supply of services that is liable to VAT by virtue of Section 2 of the VAT Act.*"

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Now, does the fact that the non-resident foreign company did not issue a VAT invoice absolve the Appellant as consumer of the VATable services from paying the VAT? I will return to this in a trice. But for now, let me state that the Appellant's contention that the Respondent's reference to the provisions of the Federal Inland Revenue Service (Establishment) Act is a fresh issue which requires leave of court before it can be raised is not correct. The Appellant's contention is that the Respondent cannot assess it for VAT in the absence of a VAT invoice by the non-resident foreign company. The reliance on the Federal Inland Revenue Service (Establishment) Act is precisely to show statutory empowerment for the Respondent to so do. It is not a new or fresh issue but a response on the vires of the Respondent to assess for the VAT to be paid on the transaction.

The parties are agreed on the dual duty imposed by Section 10 (2) of the VAT Act, one on the non-resident company to include VAT in its invoice and the other on the person to whom the goods and services are supplied in Nigeria to remit the tax. While one ought to follow the other, I am unable to agree with the Appellant that the duties are conjunctive. Where there is a failure to include the VAT in an invoice, it does not bring to an end the liability to remit the VAT which has already kicked in by the stipulations of Section 2 of the VAT Act which mandatorily requires that VAT is to be charged and paid on all goods and services except those listed in the First Schedule to the Act. It is in this regard that the powers of the Respondent under Section 7 (2) of the VAT Act become relevant. It requires the Respondent to do such things necessary and expedient for the assessment and collection of VAT. When Section 7 (2) is read along with Section 15 (1) of the VAT Act which requires a taxable person, in this instance, the Appellant to make monthly return of all taxable goods and services purchased or

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supplied by him, it becomes effulgent that even without the VAT invoice having been issued, the Respondent can, based on the returns proceed to take steps in discharge of its statutory responsibility of assessment and collection of VAT; which of course includes as they have done in this case, the Appellant's cause of action, the issuance of the Notice of Additional Tax Assessment on the Appellant. Let me say in passing that the Appellant's objection was not on the quantum of the assessment but on whether the tax liability was due at all.

Even in the absence of a return made by the Appellant pursuant to Section 15 of the VAT Act, the object of the Respondent under Section 2 of the Federal Inland Revenue Service (Establishment) Act is to control and administer the different taxes payable in Nigeria subject to the applicable legislation. In the discharge of this object, the Respondent has the function under Section 8 (1) (c) of the said Act to collect and recover any tax under any enactment or law, and under Section 8 (1) (h) to adopt measures on the detection and prevention of non-compliance with the tax regime. By all odds, these afford statutory backing for the assessment issued on the Appellant notwithstanding that the non-resident foreign company did not issue a VAT invoice. The duty on the Appellant to remit the tax remained sacrosanct. This issue number two is resolved in favour of the Respondent.

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ISSUE NUMBER THREE

Whether the Lower Court was correct in law when it applied the Principles of Tax Laws of Reverse Charge and destination principle without recourse to the fact that there exists no Nigerian statute establishing those principles?'

SUBMISSIONS OF THE APPELLANT'S COUNSEL

The quiddity of the Appellant's submission under the issue is that the lower court erroneously applied the Reverse Charge and Destination Principles which are not recognized under Nigeria's body of tax laws and thereby subjected the Appellant to a law that is totally unknown to Nigeria's tax legislation. The case of **AOKO vs. FAGBEMI (1961) 1 ALL NLR 400 at 403** was referred to. It was stated that the lower court engaged in speculation on the applicable principles to VAT law in Nigeria and failed to follow the admonition that tax laws are subject to the rule of strict construction. The cases of **AGIP (NIG) LTD vs. AP INTERNATIONAL (2010) LPELR-250 (SC) at 66-67, AHMADU vs. GOV. OF KOGI STATE (supra) at 244, 260, 261** and **7UP BOTTLING CO. PLC vs. LAGOS STATE INTERNAL REVENUE BOAD (2000) 3 NWLR (PT 650) 565 at 590-592** were cited in support.

SUBMISSIONS OF THE RESPONDENT'S COUNSEL

The conspectus of the Respondent's submission is that the Reverse Charge and Destination Principles are provided/contained/implicit in the VAT Act. Section 2 of the VAT Act, by making every service VATable except the services listed in the First Schedule to the Act, was submitted to literally provide for the destination principle. So also does Section 10 (2) also provide for the destination principle by the use of the phrase "*supplied in Nigeria*". The said Section 10 (2), it

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was opined, further provided for Reverse Charge by the stipulation that the person to whom the goods and services are supplied in Nigeria shall remit the tax. The lower court it was asserted was right in its application of the destination principle and reverse charge.

RESOLUTION OF ISSUE NUMBER THREE

The two principles of tax law at the centre of the disputation in this issue are the Reverse Charge and Destination Principles. In exoteric terms, the Reverse Charge is applicable in European Union Countries whereby the buyer of goods or services from supplier(s) in other EU countries assumes the responsibility of paying the applicable VAT rates instead of the Supplier. By this principle it is the buyer of goods or services that pays the VAT; put differently the VAT is paid by the person to whom the goods or services are supplied. By Section 10 (2) of the VAT Act, the person to whom the goods or services are supplied in Nigeria has the obligation to remit the tax. Even though the phrase Reverse Charge is not mentioned in the VAT Act, it seems to me that the philosophy which requires the person to whom the goods or services are supplied, to be the person to remit the tax is the same as the Reverse Charge which requires that the buyer of the goods or services (the person to whom the goods or services are supplied) assumes the responsibility of paying the tax. The lower court may have been wrong in alluding to Reverse Charge, but its decision that the transaction is VATable by virtue of the provisions of Sections 2, 10 and 46 of the VAT Act is the correct decision.

The Destination Principle in taxation stipulates that goods imported from a State are exempted from VAT and are instead taxed for VAT in the destination State in which the goods are imported. It is a principle promoted by the Organization for Economic Co-operation and Development (OECD) which is an

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intergovernmental economic organization with thirty six member countries, of what is commonly known as the developed nations. Nigeria is not one of the member countries of the Organization for Economic Co-operation and Development. But was the destination principle applied by the lower court? It does not appear to be so. This is what the lower court stated at page 761 of Volume II of the Records:

> *"Assuming the OECD International VAT/GST Guidelines published on 12 April 2017, is binding on the Tribunal and this Court, (but they are not so binding) the guidelines states that the destination principle should apply to internationally traded services and intangibles."*

So the lower court recognized that the destination principle was inapplicable. Howbeit, even if the lower court had given the destination principle as its reason, it does not affect the correct decision of the lower court that the transaction between the Appellant and the non-resident foreign company is VATable under the VAT Act. Hear my Lord, *Kekere-Ekun, JSC,* in **MTN NIGERIA COMMUNICATION LTD vs. CORPORATE COMMUNICATION INVESTMENT LTD (2019) LPELR (47042) 1 at 18-19:**

> *".......an appellate court is more concerned with whether the decision reached by the lower court is correct and not necessarily whether a wrong reason was given for reaching a right decision... If the decision is right, it will be upheld notwithstanding the fact that a wrong reason was given for the decision. It is only where the misdirection has caused the court to come to a wrong decision that it would be material."*

In a coda, this issue number three is resolved against the Appellant.

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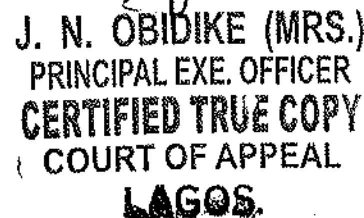
The issues for determination have all been resolved against the Appellant. This signposts that this appeal is unmeritorious. The same fails and it is accordingly dismissed. The decision of the lower court, *Coram Judice: Babs Kuewumi, J.* is hereby affirmed. There shall be costs of ₦100, 000.00 in favour of the Respondent.

UGOCHUKWU ANTHONY OGAKWU
JUSTICE, COURT OF APPEAL

Appearances:

Paul Usoro, Esq., SAN (with M. O. Liadi, Esq. Ms. Chioma Ezenduka, O. C. H. Onyekwelu, Esq. & A. E. Phillips, Esq.) for the Appellant .

L. I. Ugwu, Esq. for the Respondent.



J. N. OBIDIKE (MRS.) 27/6/19
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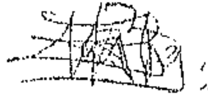
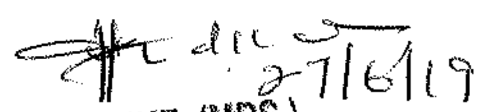
APPEAL NO. CA/L/556/18
MOHAMMED LAWAL GARBA, JCA

I agree.



MOHAMMED LAWAL GARBA
JUSTICE, COURT OF APPEAL



J. N. OBIDIKE (MRS.)
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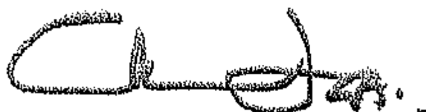
CA/L/556/2018

GABRIEL OMONIYI KOLAWOLE, JCA

I had the privilege to read in its draft, the lead judgment of my learned brother, ***Ugochukwu Anthony Ogakwu, JCA,*** wherein he came to the conclusions that all three (3) issues submitted for determination having been resolved against the Appellant, that the appeal herein lacks merit and consequently dismissed it.

I agree with the said judgment that the appeal lacks merit, I also abide with the consequential order as to costs awarded in favour of the Respondent.



GABRIEL OMONIYI KOLAWOLE
JUSTICE, COURT OF APPEAL

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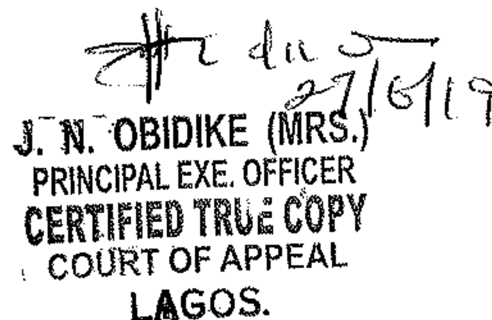

C.T.C of Judgment = ₦1,000.00