MIKE IGBOKWE (SAN) & CO.

ESS-AY HOLDINGS LIMITED v. FEDERAL INLAND REVENUE SERVICE SHOULD VALUE ADDED TAX(TAX) BE CHARGED ON RENT?

By Aanuoluwapo Ogidan

In a judgment delivered on 10 September 2020 in ESS-AY HOLDINGS LIMITED v FEDERAL INLAND REVENUE SERVICE[1], the Tax Appeal Tribunal, Lagos Zone held that a lease of real properties, does not amount to supply of goods or services and therefore Value Added Tax (VAT) is not chargeable or payable on it.

The appeal was against the decision of the Respondent in respect of the Appellant's alleged tax liability for the 2014-2016 accounting years in connection with incomes derived from the lease of its properties for residential and commercial purposes. The Respondent served a VAT Assessment Notice on the Appellant in relation to VAT on incomes derived from its commercial tenants. The Appellant objected to the VAT Assessment notice, but the Respondent served its Notice of Refusal to Amend (NORA) on the Appellant. Dissatisfied with the Respondent's NORA, the Appellant filed an appeal before the Tax Appeal Tribunal.

The Appellant's contention was premised on the ground that payment of rent either on residential or commercial properties does not amount to supply of goods or services. He argued that VAT is not chargeable on the rent paid by a tenant irrespective of the property involved (whether residential or commercial).The Appellant submitted that no person should be subject to any tax if the taxing statute (which is the VAT Act), does not expressly do so.

The Respondent relied on Sections 46 and 2 of VAT Act and submitted that rents on commercial real properties amount to supply of goods for the purpose of VAT in Nigeria same not being exempt by the provisions of the VAT Act. The Respondent based its decision to impose VAT on the rental incomes of the Appellant on the Information Circular No. 9701 issued by the Federal Inland Revenue Service dated 1 January 1997 and captioned "Detailed List of Items Exempted from Value Added Tax"("FIRS Circular") under Item 6 which exempts residential rent from VAT while indirectly subjecting commercial rent to VAT.

The Tax Tribunal examined whether a lease or tenancy is a transaction for supply of goods or services and if the FIRS Circular which under its list of items exempted from VAT, exempts residential rent from VAT while indirectly subjecting commercial rent to VAT was valid and could avail the Respondent. Below are the

[1] TAT/LZ/VAT/029/2019

salient points noted in the Judgment delivered by the tribunal in respect of the issues raised:

- The Tribunal held that for VAT to be chargeable on a transaction, the transaction must qualify as a transaction for supply of goods or services. The Tribunal thereby relied on judicial authorities and statutes for the definition of goods, and they all stipulated that before a thing can be regarded as a 'good', it must be moveable and tangible. Clearly therefore, the lessor or a landlord in a lease or tenancy is not rendering any "service" to the lessee/tenant. He only transfers his right in the property to the lessee/tenant and nothing more for the period of the arrangement. In the Tribunal's opinion, the transfer of interest in real properties does not amount to rendering a service.[2]

- The Appeal was resolved in favour of the Appellant on the ground that rent derived from the lease of real properties whether for residential or commercial purpose is outside the scope of VAT. It is therefore not subject to VAT under the VAT Act being an incorporeal right as such rights cannot be seen and touched. The Tribunal was of the firm opinion that a lease of real property is a distinct transaction on its own. It is different and distinct from a transaction for supply of goods or services. This is so because a lease of real property is a transaction for transfer of an interest or a right (possessory) in the property.

- With respect to the FIRS Circular, the Tribunal held that Administrative circulars like information circular cannot be said to have any binding legal effect[3], having no statutory authority. It was also held that the VAT Act which does not explicitly provide for VAT on rental income can only be amended through legislation properly made by the Minister of Finance and not information circular[4]. The Respondent's Information Circular which

[2] Federal Republic of Nigeria Vs Yakubu & Ors (2018) LPELR-43930 (CA).
[3] Omatseye v. FRN (2017) LPELR-42719 (CA) per Nincar, JCA
[4] FBIR v. Halliburton (WA) Limited, (2014) LPELR 24230 CA, the Court of Appeal was quite explicit when it held that Exhibit S, (an information circular) the Public Notice, issued by the cross-respondent, does not qualify as a piece of delegated or subsidiary legislation.

sought to exempt residential rent from VAT while indirectly subjecting commercial rent to VAT is null, void and of no legal effect whatsoever. The implication is that non-compliance with the Circular cannot operate to create any liability on the part of the taxpayer.

Conclusively, it is evident that the Value Added Tax Act did not explicitly provide that VAT should be charged on rental income of both commercial and residential properties, as it was resolved that the transaction does not qualify as supply of goods and services. As such, the reliance of the Respondent on the FIRS Circular which sought to exempt residential rent from VAT while indirectly subjecting commercial rent to VAT could not avail it as the Tribunal held that mere information circulars do not have any legal effect and could not vary, amend or alter the provisions of the VAT Act.

Therefore, VAT is not and cannot be chargeable on rental income on residential and commercial properties. What a relief on investors in and owners of real property who are already groaning under multiple tax regimes in Nigeria especially after the economic-disruptive Covid-19 Pandemic!.