IN THE TAX APPEAL TRIBUNAL
IN THE LAGOS ZONE
HOLDEN AT LAGOS

APPEAL NO: TAT/LZ/VAT/029/2019

BETWEEN:

ESS-AY HOLDINGS LIMITED **APPELLANT**

AND

FEDERAL INLAND REVENUE SERVICE **RESPONDENT**

JUDGEMENT

This is an Appeal by the Appellant against the decision of the Respondent in respect of the Appellant's alleged tax liability for the 2014-2016 accounting years as set out in the Respondent's VAT Re-Assessment Notice dated July 9, 2019 (the "VAT Re-Assessment").

BACKGROUND

The Appellant invests and engages in the development of real properties which are rented or leased to tenants. The said properties are put to both commercial and residential purposes. On the other hand, the Respondent is an agency of the Federal Government. It is responsible for the assessment, collection and general administration of federal taxes on behalf of the Federal Government of Nigeria including the Value Added Tax Act (VAT Act)[1].

Following a tax audit, the Respondent by a letter datedOctober 19, 2018 informed the Appellant of its intention to assess the Appellant to additional taxes particularly with respect to Value Added Tax (VAT) on incomes derived from letting out its properties for the 2014 – 2016 accounting years. As a result of this letter, a series of meetings was held between the parties to reconcile the issues and correspondences were exchanged. The bundle of documents evidencing the correspondences and mee ings is before this Tribunal.

Ostensibly, these meetings did not yield any positive outcome because by July 9, 2018, the Appellant was served amongst others, the Respondent's VAT Assessment Notice in relation to VAT on incomes derived from its commercial tenants. The Appellant objected to the said VAT Assessment Notice via its objection letter dated July 15, 2019.

On the 26th of July 2019, the Respondent served its Notice of Refusal to Amend (NORA) dated July 22, 2019 on the Appellant. Dissatisfied with the Respondent's action, the

[1] Cap V1, Laws of the Federation of Nigeria (LFN) 2004.

Appellant filed this Appeal, the subject-matter of this Judgmentbefore the Tax Appeal Tribunal on August 22, 2019.The Appellant filed three (3) Grounds of Appeal, to wit:

Ground 1

The VAT assessment in the sum of N54, 263, 899.50 (Fifty-four Million, Two Hundred and Sixty-Three Thousand, Eighth Hundred and Ninety-Nine Naira, Fifty Kobo) as Value Added Tax ("VAT") on rental income earned by the Appellant in the period 2014 to 2016 thereby unlawfully subjecting the rental income of the Appellant to VAT contrary to the provisions of the Value Added Tax Act as amended and currently compiled as Cap V1, Laws of the Federation of Nigeria 2004.

Particulars of error

1. Section 2 of the VAT Act provides that VAT shall be charged and payable on the supply of goods and services (referred to as taxable goods and services) other than those goods and services listed in the First Schedule to the VAT Act.
2. VAT is not a tax on returns on investments, such as rent, dividends and interests.
3. Rental incomes are not derived from a supply of goods and services.
4. Rental income cannot be subjected to VAT solely on the premise that it is not exempt from VAT under the First Schedule to the VAT Act.

Ground 2

The Respondent erred in law when it issued a Notice of Refusal to Amend VAT Additional Assessments dated 22 July 2019 ("NORA") where it stated that "income from commercial rent is VAT-able income and the one from residential has administrative exemption".

Particulars of error

1. There are no provisions in the VAT Act which designate rental income as a taxable good or service under the VAT Act in the circumstance that "rent" is neither a good nor service.
2. The VAT Act is devoid of any provisions which: (a) differentiates between commercial rental income and residential rental income; and /or (b) subjects commercial rental income to liability under VAT Act and exempts residential rental income from VAT.
3. The distinction between commercial rent and residential rent for VAT purposes is illegal, null and void.

Ground 3

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 (the "**Circular**") and upon which the Respondent based its decision to impose VAT on the rental incomes of the Appellant is ultra vires, null and void to the extent that it purports to subject commercial rents to VAT.

Particulars of error

1. The Circular cannot override or alter the provisions of the VAT Act.
2. The Respondent does not have any statutory power to amend the VAT Act by purporting to subject to VAT, transactions not envisaged under the VAT Act.

The Appellant prayed the Tribunal to set aside the VAT Assessment issued by the Respondent against it as well as the penalties and interest imposed on the Appellant amongst other reliefs.

The Respondent joined issues with the Appellant on the 15th of November 2019 when it filed its Reply to the Notice of Appeal dated November 11, 2019 and other accompanying documents.

Testimonies by witnesses commenced on 18th November, 2019 and were concluded same day. Both parties called one witness each. Mr. Oyeyemi Oke, a Legal Practitioner and Tax Consultant gave evidence on behalf of the Appellant and tendered 6 documents as Exhibits. Mr. Shittu-Gbeko Afees Lanre, Deputy Manager Tax testified for the Respondent. He tendered one document in evidence. Both witnesses were duly cross-examined.

Parties then closed their cases, following which the Tribunal ordered the filing of Final Written Addresses. The Parties' Final Written Addresses and Respondent's Reply on Point of Law were adopted on the 2nd of March 2020.

Judgment in the Appeal which was initially reserved for May 6, 2020 could not be delivered as a result of the lockdown occasioned by Covid-19 pandemic and was further reserved for today being the 10th day of September 2020.

ISSUES FOR DETERMINATION

The Respondent formulated two issues for determination, to wit:

1. *Whether or not the Federal Inland Revenue Service Information Circular No. 9701 dated 1st January 1997 is valid? (Distilled from Ground 3 of the Notice of Appeal).*

2. *Whether rent on commercial real properties is vatable by the combined reading of Sections 2 and 46 of the Value Added Tax Act CAP VI LFN 2004? (Distilled from Grounds 1 and 2 of the Notice of Appeal).*

The Appellant also formulated two issues for determination as follows:

1. *Whether rental incomes are subject to Value Added Tax (VAT) under the Value Added Tax Act CAP V1 LFN 2004 (as amended - VAT Act); and*

2. *Whether the provisions of the Federal Inland Revenue Service Information Circular No. 9701 dated 1st January, 1997 seeking to exempt only rents from residential properties is not ultra vires the Respondent?*

We are of the view that having regards to the grounds of appeal and the arguments of Counsel, the issues formulated by Emeka Ihebie, Esq., for the Appellant best represent the issues calling for determination in this Appeal and should be preferred to those formulated by learned Counsel for the Respondent. It should however be noted that our preference of

the issues formulated by Counsel for Appellant results from their being more compact. Otherwise, the issues are essentially the same.

In arguing issue No.1, Mr Ujah Malachy, the Respondent's Counsel disagreed with the Appellant's position that rent is return on investment. He referred to the definition of rent as contained in ***section 47 Tenancy Law of Lagos State***[2] and the case of ***Oduye Vs Nigeria Airways Limited***[3].

Counsel drew the attention of the Tribunal to the provisions of sections 46 and 2 of VAT Act and submitted that rents on commercial real properties amounts to supply of goods for the purpose of VAT in Nigeria same not being exempt by the provisions of sections 2 and 46 of VAT Act. Relying on section 3 of VAT Act, he asserted that while letting out of taxable goods on hire or leasing is vatable, the letting of commercial property, unlike residential property, was not exempted in the First Schedule to the Act.

He further submitted that the development of land into habitable and commercial properties as admitted by the Appellant's witness under cross examination is the value added by the Appellant to the land by the Appellant and that the letting of the taxable development on the land is vatable and captured under the definition of "supply of goods" in sections 2 and 46 of VAT Act.

Counsel cited a number of judicial authorities to the effect that in construing tax statutes, it is trite that words should be given their ordinary meaning. He also contended that where a statute mentions specific things, those not mentioned are excluded. He called in aid the case of ***Buhari & Anor Vs Yusuf & Anor***[4]amongst others. He raised three questions to wit: does the rent received by the Appellant fall within the exempted goods and services listed in the 1st Schedule to the VAT Act and ***Exhibit EHL 6***? Does the Appellant's business amount to any concern in the nature of trade, commerce or manufacture? is the payment of Input VAT a condition precedent for the charge and collection of Output VAT?

He asserted that the Appellant whose business is development of real properties supplied and or rented such real properties to tenants for residential and commercial purposes. He argued further that payment of Input VAT is not necessary for the charge of Output VAT and cited ***Federal Board ofInland Revenue Vs Ibile Holdings***[5] in support.

Counsel submitted that VAT Act, the VAT Order and ***Exhibit EHL 6*** have sufficiently shown intention to charge VAT on commercial rent obtained from lease, hire or rent of real estates and that the Appellant's obligation was to collect and remit same to the Respondent within the time prescribed by the VAT Act.

He dumped a number of statutory and judicial authorities on the Tribunal without attempting to show their relevance to his argument.

Finally, he enjoined the Tribunal to refuse the declaratory reliefs sought by the Appellant for failing to establish its entitlement to the reliefs in law and facts. He cited ***Chukwumah Vs***

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[2] Cap T1 Laws of Lagos State.
[3] (1987) NWLR (Pt.55) 126.
[4] (2003) LPELR – 812 SC.
[5] 6 All NTC 1.

Shell Petroleum (Nig.) Ltd[6] and ***Ogolo & Ors Vs Ogolo & Ors***[7] and urged the Tribunal to discountenance the Appellant's case.

Submitting that rental incomes, residential or commercial, are not subject to VAT as the transactions giving rise to them do not constitute supply of goods and services under the VAT Act, the Appellant's Counsel, Mr Emeka Ihebie asserted that taxation is statutory therefore the words of the statute are given their literal meaning. He cited the English case of ***Cape Brandy Vs IRC***[8] which according to him was adopted by Nigerian courts in a number of cases including ***SA Authority Vs Regional Tax Board***[9], ***Ahmadu Vs. Gov., Kogi State***[10].

He argued that since there can be no taxation without representation, there must be a direct link between the taxpayer and the liability sought to be imposed on a person.Therefore, no person should be subject to any tax if the taxing statute does not expressly do so. He cited ***Coltness Iron Company Vs Black***[11]. He maintained that the tax liability of the Appellant being demanded by the Respondent must be determined by clear prescriptions of the VAT Act. He argued that the lawmakers had this in mind when it was provided in section 1 of VAT Act that VAT shall be administered as prescribed by the VAT Act.

Relying on section 2 of the VAT Act, he contended that the tax created therein is charged on the supply of taxable goods and services and that whatever is supplied must be either a good or service before its taxability is determined. He pointed out that the words, "goods" and "services" were not defined under the VAT Act.

He said that goods are tangible or moveable personal properties other than money. He relied on the Black's Law Dictionary[12], ***Berende Vs Usman***[13] and ***CNOOC Exploration and Production Nigeria Limited Vs AG, Federation & Ors***[14]. He submitted that rent does not involve supply of goods on the authority of ***Junghenn Vs Wood***[15].

On the meaning of service, he again placed reliance on the Black's Law Dictionary[16], and stated that it is the act of doing something useful for a person or company for a fee or an intangible commodity in the form of human effort such as labour, skill or advice. He cited the case of ***Revesby Credit Union Cooperative Limited Vs Commissioner of Taxation***[17]. He submitted that the letting or leasing of property does not constitute service to make the rent collected liable to VAT.

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[6](1993) LPELR – 864 SC.
[7](2003) LPELR – 2309 sc.
[8](1921) 12 Tax Cases 358.
[9](1970) 1 All NLR.
[10](2003) NWLR (Pt.755) 502 at 519.
[11](1881) App ca. 315 at 330.
[12]8th ed at p. 714.
[13](2005) 14 NWLR (Pt. 944) 1 at 24-25.
[14]7 All NTC 371 at 379.
[15](1958) S. R. (NSW) 327 at 330.
[16]Supra, note 12.
[17](1964-65) 112 CLR 564 at 578.

Learned Counsel then attempted to differentiate amongst supply of goods, services and rent by reference to a foreign authority, ***Dwyer Vs Hunter***[18]. He insisted that rental incomes are not earned from transfer of goods or services but from grant of licence or lease, a form of transfer of interest in the property leased as opposed to the transfer of ownership under a supply of goods. He claimed that supply of services involves an active use of skills and not passive as is the case under a leasehold.

While espousing on the meaning of lease, he cited the case of ***Germains (Earl) Vs Williams***[19]. He submitted that what is transferred in a lease is the right of exclusive possession or possessory interest. He submitted further that the transfer of interest in properties is neither a supply of goods nor services under the VAT Act. He cited ***CNOOC Exploration and Production Nigeria Limited Vs AG Fedn & Ors***[20]. He urged this position on the Tribunal.

Replying on Points of Law, Mr. Malachy Ujah for the Respondent mostly restated his previous argument. He submitted that the development of land into habitable and commercial properties as admitted by the Appellant's witness is the value added by the Appellant to the land by the Appellant and the letting of the taxable development on the land is vatable and captured under the definition of "supply of goods" in ***sections 2 and 46 of the VAT Act***.

It was submitted that the supply of real estate properties to tenants for both residential and commercial purposes is captured under the definition of goods as contained in the VAT Act which means "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.

Counsel also stated that rent on real estate properties is not in the list of exempted items in ***section 3 and 1st Schedule to the VAT Act*** and as such vatable as captured under the charging provisions of Sections 2 and 46 of the VAT Act. He then debunked the Appellant Counsel's reliance on the ***CNOOC Exploration and Production Nigeria Limited Vs AG Fed & Ors***[21] which according to learned Counsel was inapplicable to the present Appeal. He maintained that the Federal High Court, like the Appellant, construed the supply of goods and services outside the confines and context of the VAT Act. He referenced ***section 1 of the Interpretation Act***[22] and ***Shettima Vs Gonni***[23]. He submitted that the ratio in ***CNOOC Exploration and Production Nigeria LimitedVs AG Fed & Ors***[24]does not apply. He urged the Tribunal to hold that rents on buildings or real properties of the Appellant is subject to VAT not being exempted under sections 2, 3, 46 and 1st Schedule to the VAT Act. He cited ***Federal Board ofInland Revenue Vs Ibile Holdings***[25] as well as ***Vodacom Business Nigeria Ltd Vs FIRS***[26].

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[18](1951) NZLR 177 CA.
[19] (1823) 2 B & C. 216 at 220.
[20]Supra, note 14.
[21] Ibid.
[22]Cap I 23 LFN 2004
[23](2011) 18 NWLR (Pt.1279) 413.
[24]Supra, note 14.
[25]Supra, note 5.
[26](2018) 35 TLRN 1.

IssueOne centres on whether VAT is chargeable in respect of lease or letting of real property. Put differently, the Tribunal is called to determine whether letting or lease of real property is within the scope of the VAT Act such that the rent paid by a Tenant in consideration for the lease or tenancy is subject to VAT. The challenge with the determination of this issue can be traced to the language employed by the law makers in drafting the Act. To be chargeable to VAT, the transaction in question must amount to a taxable supply of goods or service. While VAT Act defines supply of goods and supply of service, see ***section 46 VAT Act***, it is silent on what goods or services are. This silence is part of the reasons there are ambiguities in the construction of the Act.

By way of a restatement, the Appellant in this Appeal argued that VAT is not chargeable on the rent paid by a tenant irrespective of the property involved (whether residential or commercial). The Appellant's contention was premised on the ground that payment of rent does not amount to supply of goods or services. The Respondent on the other hand argued that VAT was chargeable on the rent paid by a tenant of a commercial property. The Respondent's argument was premised on the notion that rental incomes in respect of commercial properties are not excluded under the VAT Act and Circular No. 9701 made by FIRS dated 1st January 1997 which Circular expressly excluded VAT on the rent for residential properties.

It is important to point out that both the Appellant and the Respondent laid more emphasis on VAT not being charged or being charged on rent paid by a tenant, and this approach, we observe, is unhelpful in the effective determination of the issue at hand. By virtue ***of section 2 of VAT Act***,*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 to this Act.*

The above provision of the VAT Act shows VAT is charged and payable on the transaction itself and not on the consideration paid for the transaction. The consideration paid for the transaction (in this Appeal, the rent) is only relevant to determine the actual amount to be paid as VAT. Thus, in determining whether or not VAT is payable, it is the nature of the transaction that should be looked into and not the consideration paid for the transaction. Under the VAT Act, VAT is payable only in respect of supply of goods or services. Thus, for VAT to be chargeable on a transaction, the transaction must qualify as a transaction for supply of goods or services.

The implication is that in order to determine the Appeal at hand, we must embark on a voyage of discovery to determine whether a lease or tenancy is a transaction for supply of goods or services.

By section 46 of the VAT Act, "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.

Also, in the same section, "supply of goods" means 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.

The VAT Act also provides that "supply of services" means any service provided for a consideration.

However, as stated earlier, the definition of goods and services is not provided under the Act. Yet, the determination of the meaning of these words is sine qua non to a meaningful and effective adjudication of the issue.Therefore, recourse shall be made to other relevant external sources. In doing this, we must bear in mind that it is a fundamental rule of interpretation that words used in a statute must be given their natural meanings, and that a judge is not at liberty to add to or subtract from the provisions of a statute as was held in ***Gana Vs SDP & Ors***[27];***Ogbunyiya Vs Okudo***[28]and ***Abegunde Vs Ondo State House of Assembly***.[29]

Although, a court or tribunal is not at liberty to add to or subtract from the provisions of a statute, however, the court or tribunal is at liberty to consult relevant materials to determine the natural meanings of the words used in a statute. Since the VAT Act does not define the terms "goods" and "services", for our purpose, we have relied on other sources for guidance. The **Blacks' Law Dictionary** defines goods as; *"tangible or moveable property other than money, especially articles of trade or items of merchandise."*

Section 62 of the Sale of Goods Act1893 (a Statute of General Application enforced in England as at 1st January 1990 adopted into Nigeria) defines goods to include all chattels personal other than things and money; and including emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of Sale.The ***Sale of Goods Law of Lagos*** also defines "goods" as:

> *all chattels personal, other than things in action and money... and includes emblements, industrial growing crops and things attached to and forming part of the land which are agreed to be severed before sale or under the contract of sale.*

Similarly, under section 61 of the United Kingdom's Sale of Goods Act of 1979, "goods" are defined as:

> *all personal chattels other than things in action and money ... all corporeal moveables except money; and in particular includes emblements, industrial growing crops and things attached to and forming part of the land which are agreed to be severed before sale or under the contract of sale.*

These definitions are helpful as they separate things which are permanently attached to land from those that can be detached from the land. Consequently, for things attached to land to qualify as goods, there must exist an agreement to sever them from the land either before sale or under a contract of sale and they must be moveable. Thus, it is clear that before a thing can be regarded as a "good", it must be moveable and where it is on a land, it must be severable from the land.

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[27](2019) LPELR 47153(SC).
[28] (1979) 6 - 9 SC 32.
[29] (2015) 8 NWLR (Pt. 1461) 314 at 357.

Service, on its part is defined by the same **Black's Law Dictionary** as"*an intangible commodity in the form of human effort, such as labour, skill or advice.*"That being the case, it is doubtful, indeed it is impossible to regard real properties as an intangible commodity. Granted that human efforts may have been applied ir developing property, the end result of the efforts which is the building cannot be regarded as intangible.

Both Parties agreed that the Appellant is in the business of developing real properties amongst others some of which are leased or let out to tenants for commercial or residential purposes. Their point of divergence is to the nature of the transaction. The Respondent is convinced that the letting of the taxable development on the land to tenants for commercial or residential use is vatable. However, residential lease or tenancy is exempted under the VAT ACT (Modification) Order of 2018. In this wise, Respondent's Counsel submitted that the Appellant's obligation "under VAT Act is to collect VAT from whichever entity to whom it supplies, lets out and or lease its **taxable goods (real properties)** (emphasis supplied) for commercial purposes and remit same to the Respondent within the time stated by the law." The inference here is that the Respondent considers Appellant's real properties as taxable goods.

In ***Federal Board of Inland Revenue Vs Ibile Holdings***[30], an appeal decided by the VAT Tribunal, the predecessor of this Tribunal,the tax authority filed an action against Ibile Holdings for its failure to remit VAT arising from its business of building, selling, and leasing properties for commercial purpose, it was held that Ibile Holdings' transactions were taxable because they constituted supply of goods under the Act. Reason being that section 42 (now s. 46), defined "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."

However, in ***Momotato Nigeria Limited Vs UACN Property Development Company Plc***[31], the Federal High Court held that sale of land, in itself, does not constitute a supply of goods, and therefore, is not liable to VAT. However, the court stated that services rendered in developing the land, such as sand filling, tarred road network, electricity supply and so on, should qualify as supply of services, and therefore liable to VAT. In that case, the Defendant sold a parcel of land to the Plaintiff within its estate and sought to charge VAT. The Plaintiff refused to pay the VAT on grounds that the sale of the property does not constitute goods or services under the VAT Act.

The decision in***Federal Board of Inland Revenue Vs Ibile Holdings***[32] in our view proceeded on the footing that real properties could be classified as goods. We think not. We have seen through the eyes of statutory authorities that an important attribute of goods is that they must be moveable. Unfortunately, that is not true of real properties which by their nature are immoveable. In any event, the decision of the Federal High Court in the case of ***CNOOC Exploration and Production Nigeria Limited Vs Attorney General of the Federation & Ors***[33]marked a watershed in the administration of VAT Act. In that case, which does not

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[30]Supra, note 5.
[31]6 All NTC 37.
[32] Supra, note 5.
[33] Supra, note 14.

involve transfer of title in land, the third Defendant transferred its rights in an oil mining lease ("OML") to the Plaintiff and sought to charge VAT in respect of the sale. The tax authority took the view that such an assignment of right qualifies as a "supply of goods and services" and therefore, liable to VAT. The Federal High Court agreed with Plaintiff that the item assigned was a right and neither good nor service, but a chose in action and, accordingly, the transaction was not liable to VAT. The court noted that in the United Kingdom, statutory intervention accounted for the reason assignment of a right constituted services, the supply of which is vatable.

This case clearly shows that certain transactions may not fit into the traditional classification as goods and services. Those transactions would be outside the province of VAT Act.

From the submission by the Respondent's Counsel above, it is clear that the Appellant develops and lets or leases its properties for commercial as well as residential purposes. The Appellant is a landlord while the persons who take the lease of the properties are its tenants or lessees. Under this type of arrangement, the tenant/lessee is generally considered to be entitled to exclusive possession of the let or leased property for a defined period in exchange for the payment of rent. The rent payment guarantees the right of the tenant to the use and occupation of the property for the agreed period with a reversionary interest in the landlord.

What the tenant acquiresand what the landlord conveys in exchange for the rent paid for the lease or letting of the property is a bundle of rights including a right to exclusive possession to the property for the period of lease or tenancy. In the case of ***Ekebelu & Ors Vs Ejidike & Ors***[34] it was held that a lease is defined in Black's Law Dictionary 9th edition page 970 as a "contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration". See also ***Star Finance & Property Ltd & Anor Vs NDIC.***[35]

The expression *"the letting out of taxable goods on hire or leasing, and any disposal of taxable goods"* used in the Act must be construed by reference to goods properly so-called, that is, goods that are moveable or capable of being severed.

We find it difficult to agree with the Respondent that the lease in this appeal amounts to a supply of goods. Our disagreement stems from the fact that the lease in this appeal is a lease in respect of real properties.Real property is best characterized as property that does not move, or that is attached to the land. See ***Federal Republic of Nigeria Vs Yakubu & Ors***[36]. Because of their nature, real properties cannot be regarded as goods. They are not severable or moveable. Thus, if real properties do not qualify as goods, it follows that anytransaction relating to real properties cannot qualify as a supply of goods.

However, can we then say that the transaction amounted to a supply of services? As we have stated earlier, service is an intangible commodity in the form of human effort, such as labour, skill or advice. In an ordinary lease or tenancy arrangement, beyond providing the vacant property, what other amenity is the landlord expected to provide? In our opinion,

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[34] (2017) LPELR 42835(CA).
[35] (2012) LPELR-8394(CA).
[36] 2018) LPELR-43930(CA).

none. Once the key is handed over to the tenant, interest in the leased property passes to the tenant.

One question that may agitate our minds is, what is the position with respect to the provision of short-term leases? Do they not amount to supply of services? We must note that the provision of short-term leases in a hotel, inn and other places with similar characteristics to hotels, inns and boarding houses, and any premises, in which furnished sleeping accommodation is provided, that are used by or held out as being suitable for use by visitors or travellers including motels, guesthouses, bed and breakfast establishments, private residential clubs, hostels, and serviced flats (other than those for permanent residential use), does not create a landlord-tenant arrangement.

Usually, these places provide lodging with furnished sleeping accommodation and possibly meals and other facilities such as laundry services, shared TV or rest rooms and phone services for guests and visitors. These will amount to the provision of facilities which qualify as a supply of services. Thus, they would be subject to VAT.

Let us illustrate the situation by reference to food consumed at home and in a restaurant. Unarguably, foodstuffs are exempt from VAT. Thus, if a person buys rice from the market for example and goes home to consume same, he consumes it free of VAT. However, if the same man goes to a restaurant to consume the same his consumption is charged to VAT. Why? after all, rice is part of the foodstuff exempted from VAT. The answer is not far-fetched, the restaurant has provided additional facilities to the consumer. The food is prepared and served by the restaurant, entertainment facility like shared cable TV is provided, the consumption takes place in good ambience with air conditioning system working effectively.

In the illustration above, the facilities provided by the restaurant cannot be separated from the consumption of the rice. So it is with short-term lease in hotels and other places of temporary lodging. The hoteliers provide additional facilities to the lodger including bed and breakfast, cleaning, laundry, cable network, internet service. Therein lies the difference between a lease and short-term accommodation.

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 our opinion, the transfer of interest in real properties does not amount to rendering a service. The Tribunal finds wisdom in the case of ***CNOOC Exploration Production Nigeria Limited Vs AG Fed & Ors***[37]. We believe this wisdom may have also accounted for the recent amendment introduced into the VAT Act via the Finance Act 2019. The court had enjoined the country to borrow a leaf from the UK VAT Act if it is desired to charge VAT on incorporeal properties like the grant, assignment or surrender of any right.

Interestingly, the Respondent did not argue before this Tribunal that the Appellant's business amounted to a supply of services. The Respondent's position is that the Appellant was engaged in the supply of goods. Regrettably, that argument does not find favour with the Tribunal for the reason that real properties by their nature are immoveable and incapable of being severed. This defining feature of goods is lacking as an attribute of real properties.

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[37] Supra, note 14.

The Tribunal is 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. The right so transferred, assigned or granted to the tenant is an incorporeal right. Incorporeal rightsare cognizable by law though such rights cannot be seen or touched.

We therefore find that the Appellant's lease or letting of its real properties does not amount to a supply of goods or services.

We hold that the lease of real properties does not amount to supply of goods or services and therefore VAT is not chargeable or payable on the transaction. A transaction for lease of real property is not one of the transactions to which the VAT Act applies. The application of the VAT Act is limited to transactions for supply of goods or services and nothing more. It is trite that where a statute mentions specific things, those things not mentioned are not intended to be included. See ***SEC Vs Kasumu***[38];***Ehuwa Vs Ondo State Independent Electoral Commission & Ors***[39]and ***Ports and Cargo Handlings Services Co Ltd & Ors Vs Migfo (Nig) Ltd & Anor***[40].

The Respondent asserted that the Appellant was involved in an economic activity, that it was exploiting some property for the purpose of obtaining income therefrom by way of trade or business. Indeed, that may be the law. However, the economic activity or the exploitation of property to which the section applies must be one that is within the scope of the VAT Act. If the transaction is outside the scope of VAT Act, then VAT is not chargeable. See the case of ***CNOOC Exploration and Production Nigeria Limited Vs Attorney General of the Fed & Ors***[41].

This issue is resolved against the Respondent. 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.

On issue No. 2, Counsel to the Respondent, Mr Malachy Ujah argued that the FIRS Circular No. 9701 (***Exhibit EHL 6***) did not seek to impose VAT on the Appellant. He submitted that ***Exhibit EHL 6*** is lawful and valid. In support of the validity of ***Exhibit EHL 6***, Counsel referred the Tribunal to sections 7, 38, 42 and 44 of ***Value Added Tax Act***(VAT Act) as well as sections 2, 7, 8, 25, 60, 61, 63, 64 and 68 of the ***Federal Inland Revenue Service (Establishment) Act*** (FIRS Act) together with its 1st Schedule.

He argued that the Minister of Finance is empowered to vary the Schedules to VAT Act. It is Counsel's position that anything required to be done by the Board under VAT Act may be signified under the hand of the Chairman or other senior officer assigned to do so by him. He stated that the Board mentioned in VAT Act is now the Federal Inland Revenue Service (FIRS) pursuant to section 63, 64 and 68 of the FIRS Act.

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[38] (2001) 10 NWLR (Pt.1150) 509.
[39] (2006) LPELR-1056(SC).
[40] (2012) LPELR-9725(SC).
[41] Supra, note 14.

The Respondent's Counsel maintained that the Value Added Tax Act (Modification) Order (the VAT Order) made by the Finance Minister pursuant to powers under section 38 of VAT Act strengthened the view that rent from commercial property was vatable. He submitted that ***Exhibit EHL 6*** is an information circular detailing items exempted from VAT but does not seek to amend VAT Act. He urged the Tribunal to give ***Exhibit EHL 6*** its ordinary and natural meaning. He cited ***Ahmadu Vs Gov. Kogi State***[42]and ***Al-Maser Law Firm Vs FIRS***.[43]

He claimed that section 38 of VAT Act is clear and enables the Minister to amend, vary or modify the Schedule to VAT Act while section 44 of VAT Act empowers the Minister to donate such power to the Respondent including power to issue ***Exhibit EHL 6***. He submitted that having not disputed the Minister's power to vary the list of VAT exempted items, the Appellant could not contest the validity of ***Exhibit EHL 6***. He then urged the Tribunal to take judicial notice of***Exhibit EHL 6*** and the ***VAT Act (Modification) Order*** as subsidiary legislations because they have the force of law. He relied on ***Amusa Vs State***.[44]

He contended that the Appellant did not offer any evidence of contradiction between ***Exhibit EHL 6*** and VAT Act or that the Respondent's Chairman made it without lawful authority or that due process was not followed in the making of the Exhibit. He concluded that the Appellant's assertion failed for the reason that it did not offer any evidence relying on sections 131 and 133 of the Evidence Act and the case of ***Chemiron Int'l Ltd Vs Stabilini Visinoni***.[45] He submitted that ***Exhibit EHL 6***having been made in a manner substantially regular, it is presumed that formal requisites for its validity were complied with. He cited section 168 (sic) of the Evidence Act as well as the case of ***Ogunye & Ors Vs State***[46]and ***Ezechukwu & Anor Vs I.O.C. Onwuka***[47]. Finally, he urged the Tribunal to discountenance the Appellant's arguments on the issue.

On his part, Counsel to the Appellant, Mr. Emeka Ihebie began his argument with an assertion that a tax could only be imposed on any person when such tax is imposed by statutes. He called in aid the cases of ***Williams Vs Lagos State Development & Property Corporation***[48], ***S. A. Authority Vs Regional Tax Board***[49]and ***Polaris Bank Vs Abia State Board of Internal Revenue***[50]. He stated that VAT must be administered in accordance with VAT Act and not Circulars. It is Counsel's view that amendment to VAT Act could only be done by stipulated procedures not by Circulars through which the Respondent sought to subject rental income to VAT when the VAT Act did not.

The Appellant's Counsel drew the Tribunal's attention to the cases of ***Halliburton (WA) Limited Vs FIRS***[51]and ***Warm Spring Waters & Ors Vs FIRS***[52] where the legal status of Information Circulars was determined and submitted that the VAT Act could only be

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[42] (2003) 3 NWLR (Pt. 755) 502 at 519.
[43] (2019) 12 NWLR (Pt.1687) 555.
[44] (2003) LPELR – 474 SC.
[45] (2018) 17 NWLR (Pt.1647) 62.
[46] (1999) LPELR – 2356 SC.
[47] (2016) LPELR – 26055.
[48] 2 All NTC 365
[49] 1 All NTC 269.
[50] Appeal No. TAT/EZ/001/2016.
[51] 6 All NTC 57.
[52] Suit No. FHC/L/CS/157/2015 delivered May 11, 2015.

amended through legislation and not Information Circular. He submitted also that the Respondent's Information Circular which sought to exempt residential rent from VAT while indirectly subjecting commercial rent to VAT is null, void and of no legal effect whatsoever.

In his Reply on Points of Law, Respondent's Counsel submitted that paragraph 2(c) of item 6 of ***Exhibit EHL 6*** does not derogate from the provisions of the VAT Act and that it is a generous application of the VAT Act without which rents from both commercial and residential lease of real properties would be subject to VAT. He submitted that the VAT Order, made pursuant to section 38 of the VAT Act and approved by the Federal Executive Council, has restated the relevant provisions of ***Exhibit EHL 6*** and therefore rents on real properties used for commercial purposes are vatable.

Now***Exhibit EHL6*** is FIRS Information Circular. Like all circulars, it can be identified by its serial number 9701. It is titled "***Detailed List of Items Exempted from Value Added Tax (VAT)***" as it is

common with circulars to have a subject matter. The Information Circular was duly published on the 1st of January 1997.

Item 6 of sub category headed *"Other Exempted Goods and Services which by Inference Fall within Categories and (b) above"* provides that (H)ouse rent (i.e. rent on residential accommodation only) is exempt from VAT. The implication is that rent from commercial lease or letting is subject VAT.

We have analysed the arguments of Counsel above. Respondent's Counsel reasoned that it is within the sub delegated powers of the Respondent acting through its Chairman to make the Information Circular. He argued further that the Information Circular thus made must be viewed as a subsidiary legislation having the force of law. The Appellant's Counsel, meanwhile drew the Tribunal's attention to the cases of ***Halliburton (WA) Limited Vs FIRS***[53]and ***Warm Spring Waters & Ors Vs FIRS***[54]and submitted that the VAT Act could only be amended through legislation and not Information Circular. He submitted also that the Respondent's Information Circular which sought to exempt residential rent from VAT while indirectly subjecting commercial rent to VAT is null, void and of no legal effect whatsoever.

It seems to this Tribunal that a good starting point is to demystify the words, Information Circular.

Information circular is a specie of circular. Circulars are ordinarily documents through which information is disseminated by administrative bodies and departments either within the administrative bodies or to the members of public concerning some subject. They provide guidance and opinions which reflect the subjective view of the body making them sometimes on a point of law. They can be administrative, departmental or information circulars. Such description is a question of nomenclature. In ***Omatseye Vs Federal Republic of Nigeria***[55], the Court of Appeal per Ninpar, JCA when considering whether administrative circulars (like information circular) could create an offence (liability in the present case) held that

[53] Supra, note 51.
[54] Supra, note 52.
[55] (2017) LPELR – 42719 CA at p. 15 – 16.

> *"Administrative circulars or notices have its place in government but cannot create an offence. The apex Court in the case of MAIDERIBE v. FRN (2013) LPELR-21861(SC) on circulars held thus: "In Administrative Law Book, Eight Edition Co Authored by Prof. W. Wade and C. Forsyth page 851 throws light on the status of departmental circulars generally. Such circulars are- "a common form of administrative document by which instructions are disseminated; Many such circulars are identified by serial numbers and published and many of them contain general statements of policy... they are therefore of great importance to the public giving much guidance about Governmental organization and the exercise of discretionary powers. In themselves they have no legal effect whatsoever, having no statutory authority, Exhibit "PD16z" is not known to law and therefore cannot create an offence because it was not shown to have been issued under an order, Act, Law or statute. In the absence of statutory authority in the said Exhibit "PD16z" or legal notice it cannot be said to have any legal effect. See MAIDERIBE V. FRN (supra)."*

The implication is that non-compliance with the Circular cannot operate to create any liability on the part of the taxpayer.

While in jurisdictions like Britain[56], there are contradictory opinions on the legal status of Information Circular, the position in Nigeria appears to be settled.

In ***Halliburton (WA) Limited Vs FBIR***[57], it was stated emphatically that the FIRS Information Circular is neither law nor regulation but merely information to the general public and in particular all taxpayers' representatives or advisers and the staff of Revenue Services. They contained what the FIRS considers to be its interpretation of the various Nigerian Tax Acts and thus constitute its opinion on a point of law with no legally binding effect.

This position was affirmed on appeal by the Court of Appeal per Joseph Shagbaor Ikyegh JCA delivering the lead Judgment held that

> *I do not agree with the cross-appellant that Exhibit S, the Public Notice, issued by the cross-respondent, (pages 524 - 538 of the record) qualifies as a piece of delegated or subsidiary legislation deriving its efficacy from Sections 2 (1) and(4) and 3 (1) and (3) of CITA, the parent law. Because both sections subject the cross-respondent's powers to the Minister of Finance which powers are to be exercised in the manner prescribed by the minister. The power to amend the First Schedule to CITA is also given to the minister under Section 4 of CITA, showing the minister is the appropriate person to make bylaws under CITA*[58].

It was argued in vain before the appellate court that Exhibit S which was the information circular issued by FIRS on 22.03.93 for the administration of Companies Income Tax Act (CITA) pursuant to Sections 2(1)(4) and 3(1)(3) of CITA was wrongly held to be an opinion on a point of law upon which there was no estoppel when Exhibit S had the force of law and

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[56] Wade and Forsyth, Administrative Law (10th Ed. Oxford University Press) at 743.
[57] Supra, note 51.
[58] FBIR Vs Halliburton (WA) Ltd (2014) LPELR 24230 CA.

did not conflict with the parent law, CITA, nor was it an element of illegality as to make it ultra vires the enabling or parent legislation and is binding on the FIRS, the cross-respondent who should have followed the same Exhibit S in the 2002 assessment to final tax of the cross-appellant.

Similarly, the Federal High Court in ***Warm Spring Waters & Ors Vs FIRS***[59]put it beyonddoubt that FIRS Information Circulars cannot modify the provisions of VAT Act nor can it alter or vary the list of exempted items under the First Schedule to VAT Act.

Learned Counsel to the Respondent enjoined the Tribunal to view the Information Circular as a form of delegated legislation. In ***FBIR Vs Halliburton (WA) Limited***[60], *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.

What is more, in ***The Registered Trustees of Hotel Owners and Managers Association LagosVs AG Fed & Anor***[61], which centered on the powers of the Finance Minister to amend the Schedule to the ***Taxes and Levies (Approved List for Collection) Act***[62] the Federal High Court held delegated legislation to be an exercise of powers given by the Legislature to another body to give effect to the enabling legislation and not to override it. The court went further to state that theSchedule to an enactment cannot be amended by delegated legislation since it is actually part of the enabling legislation having the same legal force as the Act itself. Therefore, any exercise of power that affects the terms and wordings of the enactment cannot be delegated legislation but an amendment to the legislation.

Under Cross Examination, Respondent's witness agreed that ***Exhibit EHL 6*** was made by the Respondent not the Finance Minister but under the authority delegated by the Finance Minister. None of the Parties deny that ***Exhibit EHL 6*** is an Information Circular.

What shall we say to these things? We find that ***Exhibit EHL 6*** is an Information Circular made by the Respondent. We hold that ***Exhibit EHL 6*** does not in our view and cannot constitute a regulation within the meaning of VAT Act. It is not, as the Court of Appeal held, a subsidiary or delegated legislation. We hold further that it is the opinion of the Respondent as to the interpretation of tax laws. it is subjective and does not command the force of law. The Information Circular alone cannot be the basis for charging a particular transaction to VAT. We must however point out that the FIRS can legally issue the Information Circulars. They are useful tools in the smooth administration of tax laws as they provide insights into the mind of the tax authority. They help a tax payer arrange his tax affairs if he agrees with the Circulars, whether they are binding on the said taxpayer is another issue.

It is our considered view that an amendment to the Schedule of the VAT Act cannot be done by an Information Circular, it must be by way of Regulations properly so called, made by the appropriate authority which in our view is the Minister for Finance. It is trite that only the appropriate authority can validly exercise a delegated power. We recognise that there are instances where delegated powers can be further delegated. However, it is our view

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[59]Supra, note 52.
[60] Supra, note 58.
[61]Suit No. FHC/L/CS/1082/2019 delivered May 8, 2020.
[62]Cap T2 Laws of the Federation of Nigeria (LFN) 2004.

that even if the Minister has further delegated the power to the FIRS or its Chairman as argued by the Respondent's Counsel, Information Circular is not an appropriate framework for the making of such delegated legislation.

One issue which the recent decision of the Federal High Court in the case of ***The Registered Trustees of Hotel Owners and Managers Association Lagos Vs AG Fed & Anor***[63]***(HOMAL's case)***has thrown up is whether the Minister for Finance can validly amend the provisions of a Schedule to an Act, the Schedule being an integral part of the Act itself without the risk of running afoul of the principle of separation of power. Though the Respondent's Counsel cursorily argued that the VAT Order made by the Finance Minister pursuant to powers under ***section 38 of VAT Act*** strengthened the view that rent from commercial property was Vatable, it is our view that this argument is unhelpful to the Respondent's case. Reason being that the Federal High Court in ***HOMAL's case*** held that the National Assembly could not donate its power of legislation to any other body, not even its own Committee and that ***section 1(2) of the Taxes and Levies (Approved List for Collection) Act*** (similar to section 38 of VAT Act) which gave the Minister of Finance the power to amend the Act was in breach of the doctrine of separation of powers and therefore null and void. Need we say more? In sum, this issue is also resolved against the Respondent, in favour of the Appellant.

In the final analysis, the Tribunal finds merit in this Appeal which is accordingly upheld. The assessed VAT liability of the Appellant together with the interest and penalties is hereby set aside.

Dated this 10th day of September 2020

O.M. LASSISE-PHILLIPS, ESQ.
Chairman

M. A. C. DIKE
Hon. Commissioner

MRS.T. AKIBAYO
Hon. Commissioner

R. A. QUADRI
Hon. Commissioner

TAX APPEAL TRIBUNAL
LAGOS ZONE
CERTIFIED TRUE COPY
SIGN.....
DATE 14/09/2020

APPEARANCES

Temitope Adewale, Esq. - for the Appellant

[63] Supra, noted 61.

Folashade Kalesaro, Esq. – for the Respondent

REPRESENTATION

Appellant – *None*
Respondent - *Abioye, M. O.*