



Exploring the Value Added Tax Regime in Nigeria: A Special Focus on its Application to Commercial Leases

Introduction

Value Added Tax (“VAT”) is charged and paid on the supply of all goods and services, except those specifically exempted under the first schedule to the Value Added Tax Act (the “VAT Act”).¹ Prior to the Finance Act 2019 and the Finance Act 2020, there was no definition of the terms “goods” and “services” in the VAT Act, thereby leading to confusion amongst tax payers and taxing authorities as to whether VAT is payable on leases of properties used for commercial purposes. For the taxing authority, VAT was payable on commercial leases in Nigeria. The confusion led to the amendment of the VAT Act by the Finance Act 2019 and the Finance Act 2020. This article considers the amendment to the VAT Act and the recent decision of the Tax Appeal Tribunal (“TAT”) in *NGX Real Estate Limited V FIRS*² on whether commercial leases in Nigeria are VATable.

¹ Value Added Tax Act Cap V1, Laws of the Federation of Nigeria 2004.

² TAT/LZ/VAT/099/2022 decided on 19 October 2023

VAT is a consumption tax created by the VAT Act. By the VAT Act, this tax is charged on the supply of all goods and services other than those listed as exempt in the First Schedule to the VAT Act. Such exempt goods and services include medical products, medical services, baby products, books and educational materials, etc.

The question of whether VAT is applicable to lease transactions revolves around the proper classification of a lease transaction as either a supply of goods or services for purposes of VAT. This is because for a transaction to be subject to VAT, the transaction must qualify as a supply of goods or services. However, the VAT Act as originally enacted did not define the terms “goods” and “services”. This lack of definition of “goods” and “services” led to various interpretations.

Notably, the Federal Inland Revenue Service (the “FIRS”) in its Circular No. 9701 titled “*Detailed List of Items Exempted from Value Added Tax (VAT)*” clearly listed “House Rent on Residential Accommodation” as exempt from VAT. Based on this, the FIRS held the view that the express mention of residential leases as VAT exempt in the Circular impliedly meant that VAT was applicable to commercial leases in Nigeria. The FIRS was therefore charging VAT on lease of commercial properties based on its understanding of the law and its circular.

In *Chief JW Ellah & Sons Company Limited v FIRS*,³ the TAT sitting in Benin held that leases of commercial properties in Nigeria are subject to VAT. The Tribunal took the view that commercial leases qualify as supply of goods. This decision of the TAT strengthened the position of the FIRS.

However, shortly after the above decision came the decision in *Essy-Ay Holdings Limited v FIRS*.⁴ In that case, the TAT took a different position, holding that leases of real properties (commercial or otherwise) do not qualify as supply of goods and services under the VAT Act and therefore not subject to VAT. Consequently, the TAT proceeded to nullify the FIRS Circular No. 9701 further to which the FIRS was collecting VAT for rent accruing from commercial properties.

In the words of the TAT:

[...] 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

³ TAT/SSZ/001/2019

⁴ TAT/LZ/VAT/029/2019

services and nothing more. It is trite that where a statute mentions specific things, those things not mentioned are not intended to be included.

The Amendment of VAT Act by the Finance Act, 2019 and Finance Act, 2020

Apparently, in a bid to clarify the confusion regarding the meaning of “goods and “services” subject to VAT in Nigeria, the Finance Act 2019 amended the VAT Act by defining for the first time the meaning of “goods and “services”.⁵ The definition of goods and services under the Finance Act 2019 excluded interest in land. However, there was still confusion whether the exclusion of interest in land applies to lease of the buildings or improvements on land. FIRS took the position that lease of buildings or improvements on land attracts payment of VAT.

As the confusion as to the exact scope of the terms “goods and “services” persisted notwithstanding the intervention by the Finance Act 2019, the Finance Act 2020 was adopted which, in modifying the definitions contained in the Finance Act 2019, defined “goods” as “all forms of tangible properties, movable or immovable, **but does not include land and building, money or securities.**” On the other hand, “services” was defined as:

“a) anything, other than goods, or services provided under a contract of employment; and

b) includes any intangible or incorporeal (product, asset or property) over which a person has ownership or rights, or from which he derives benefits, and which can be transferred from one person to another, **excluding interest in land and building, money or security.**”

Going by the above extant definitions of “goods” and “services”, it is clear that lease of commercial properties in Nigeria is not subject to VAT as leases do not qualify as “goods” and “services” for the purpose of VAT. This is because leases relate to transfer of interest in land, or the buildings attached to the land which are outside the definitions of goods and services.

⁵ Under the Finance Act 2019, “goods” means “(a) all forms of tangible properties that are movable at the point of supply but does not include money or securities; and (b) any intangible product, asset or property over which a person has ownership or rights, or from which he derives benefits and which can be transferred from one person to another excluding interest on land”.... “services” means “anything other than goods, money or securities which is supplied excluding services provided under a contract of employment”

The case of NGX Real Estate Limited v FIRS

Interestingly, the entire controversy was finally put to rest by the TAT on 19 October 2023 in *NGX Real Estate Limited v FIRS*⁶ wherein it delivered a judgment confirming that VAT does not apply to lease of any property (whether bare land or developed land) in Nigeria.

Background of the Case

NGX Real Estate Limited (“NGX”), a company engaged in the acquisition, leasing, hiring and part-exchanging of real property, had classified its rental income as exempt from VAT. On 18 February 2022, the FIRS issued a letter to NGX alleging that the company had not fulfilled its VAT obligations for the 2020 fiscal year. The FIRS also issued a seven-day ultimatum to NGX to fulfil the outstanding obligations. Dissatisfied with the FIRS’ stance and the failure to resolve the matter, NGX filed an appeal with the TAT, seeking to set aside the assessed tax liabilities. The issue before the TAT was whether VAT was applicable to incomes accruing from the buildings on land used for leases which formed the core of NGX’s business.

NGX, as appellant, argued that the definition of goods and services under the Finance Act, 2019⁷ excluded its rental incomes. According to NGX, goods only included tangible products which are movable at the point of supply and intangible products, assets, or property which the ownership or rights can be transferred from one person to another but excluded money, securities and interest in land. NGX maintained that taxable supplies regarding goods envisage a sale of taxable goods. Thus, land, not falling into the category of taxable goods, does not fall into the category of taxable supplies.

On the other hand, FIRS, as respondent, argued that buildings should not be included in the definition of land, especially since the Finance Act 2020 accommodated this distinction. The FIRS argued that land and building were not classified as assets of the same class. Therefore, the exclusion of interest in the land from VAT was introduced in the Finance Act 2019, while the exclusion was extended to buildings in the Finance Act 2020. Consequently, interest in buildings should be subject to VAT for the 2020 financial year.

The Decision of the TAT

The TAT confirmed in its decision that the applicable law was the Finance Act 2019. The TAT held that VAT is not chargeable in respect of lease of land or any building on the land by virtue of the exclusion of interest in land by the Finance Act 2019. The TAT relied on the legal principle

⁶ TAT/LZ/VAT/099/2022

⁷ The Finance Act, 2019 was the applicable law for the 2020 fiscal year which was in dispute in the case.

“*quicquid plantatur solo, solo cedit* (“whatever is affixed to the land belongs to the land”) and reasoned that things affixed to a land including buildings and trees are part of the land. The TAT therefore concluded that “the exemption granted in the Finance Act of 2019 in respect of land, should naturally extend to the buildings affixed to the land.” The tribunal the proceeded to set aside the tax liabilities in the re-assessment notice and resolved the appeal in favour of NGX.

Conclusion

The Finance Act 2020 and the recent decision of the TAT in *NGX Real Estate Limited v FIRS* interpreting the Finance Act 2019 have clearly put to rest the controversy about whether properties under commercial and residential leases are subject to VAT in Nigeria. As the law currently stands, VAT is not chargeable in respect of lease of land or any building on the land in Nigeria.

Note: This article does not constitute a legal advice. For proper legal advice or inquiries on the issues raised in this article or general enquiries relating to payment of VAT, please contact Aret & Bret LLP at ab@aret-bret.com. You can also reach out to the authors:



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