

**OBLIGATION TO PAY VALUE
ADDED TAX ON LEASE OF
COMMERCIAL PREMISES:**

A REVIEW OF THE DECISION IN
SUIT NO. FHC/L/11A/2020-
FEDERAL INLAND
REVENUE SERVICE V. ESS-AY
HOLDINGS LIMITED
(UNREPORTED)



 LAGOS | ABUJA





buttressing its arguments, it stated that while an hotel provides a service chargeable to tax by the Act, the lease of land is the transfer of rights which does not constitute a supply of goods and services.

On the second issue, the Respondent submitted that the ***Federal Inland Revenue Service Information Circular No. 9701 of 1st January 1997 (the Circular)*** provides for a list of goods and services exempted from VAT in addition to the first schedule to the VAT Act and stated that the list included letting out of real property for residential purpose among the items exempted by the circular. Respondent further submitted that in view of ***Section 7(f) of the FIRS (Establishment) Act, 2007, Sections 7(2) and 44 of the VAT Act***, the Circular albeit not a statute derives its validity from those statutory provisions.

In response to the Appellant's argument on issue two, the Respondent submitted that the circular has no force of law as it is trite that tax burden can only be imposed by statute and further argued that although ***Section 38 of the Value Added Tax Act*** empowers the Minister to amend, vary or modify the list of exempted goods and services, the power to exempt tax does not equate to the power to impose tax and as such the Appellant's Information Circular has no foundation and therefore cannot stand.

The Respondent relied on the decision of ***CNOOC Exploration and Production Nigeria Limited V. A. G. Federation & Ors 1 All NTC 371 @ 379*** which supports that Section 46 of the Finance Act 2020 expressly excludes real property from the definition of goods to avoid any ambiguity.

COURT'S DECISION AND BASIS OF THE DECISION

Based on the two issues submitted for determination, the Federal High Court in deciding whether the business of letting out real estate constitutes taxable goods and services and is therefore liable to VAT under the Value Added Tax Act, considered the provisions of ***Section 2 of the Act*** which stipulates that tax should be charged and payable on all goods and services referred to as 'Taxable goods and services' except those listed in the first schedule to the Act and ***Section 3 of the Act*** which limited taxable goods and services by an exemption list in the first schedule to the Act.

The Federal High Court resolved that the letting of property or leasing of same does not belong to the exempt list of the first schedule to the Act and as such the letting out of a house renders the rent liable to VAT. The Court relied on the decision of the Court of Appeal in ***Chief J. W. Elijah Sons & Company Ltd. V. Federal Inland Revenue Service (Appeal No. TAT/SSZ/001/2019) and FBIR V. Ibile Holdings T.L.R.N Vol 2 Page 151*** in arriving at its decision.

On the second issue, the Court stated that the ***Federal Inland Revenue Service Information Circular No. 9701 of 1st January 1997*** is a detailed list of items excluded from VAT signed by the Chairman of the Federal Inland Revenue Service and house rent (i.e rent on residential accommodation only) was exempted from the list. The Court further stated that due to the explicit nature of Section 7 of the Act which stipulates that the Act is to be administered by the Federal Board of Inland Revenue and section 38 of the Act which empowers the Minister to amend and vary the Act where necessary, there is no doubt that the Circular is valid and it is not inconsistent with the Act.

Finally, the Court considered the effect of the provision of Section 46 of the Finance Act, 2019 on the interpretation of the Value Added Tax Act and held that the circumstances leading to the facts of this case arose before the amendment to the Finance Act, and amendments to substantive laws are applicable prospectively and not

retrospectively except so stated. In light of the foregoing, the Court resolved that the amendments introduced by the Finance Act, 2019 was not an issue before the court as the rights of the parties was not affected by its provisions. In the final analysis, Federal High Court allowed the appeal of the Appellant (FIRS) and concluded that the letting of property or leasing of same renders the rent liable to Value Added Tax

CONCLUSION

Based on the foregoing, it is clear that rent from leases of developed land prior to the enactment of Finance Act 2019 and Finance Act 2020 are consumable commodity chargeable to value added tax. Landlords of such leases are therefore advised to ensure VAT is charged on the rental income on such properties and same is rendered to the FIRS to avoid tax liabilities and or prosecution. In turn, lessees are advised to pay the necessary VAT imposed on their leases to avoid eviction and or any claim from lessors.

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