IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
HOLDEN AT LAGOS
BEFORE
PANEL 1

HON. OLANREWAJU. M. LASSISE-PHILLIPS, ESQ.	CHAIRMAN
HON. MARK A.C. DIKE	MEMBER
HON. TITILOLA AKIBAYO	MEMBER
HON. RASAQ ADEKUNLE QUADRI	MEMBER
HON. KANENG ADOLE, ESQ.	MEMBER

APPEAL NO. TAT/LZ/CIT/067/2021

BETWEEN

NEW SKIES SATELLITES B.V. - APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE - RESPONDENT

JUDGMENT

Background

The Appellant filed the Appeal on the 26th of August 2021 to challenge the Respondent's adverse ruling contained in the Respondent's letters dated the 6th of July 2021 and 26th of July 2021.

The Appellant was incorporated in and is a tax resident of the Netherlands. It engages in the business of distributing satellite capacity across the globe via its network of communication satellites (in geostationary orbit about 36,000 miles from earth). The satellites transmit reliable signals (audio, video and/or data) between different geographical locations regardless of distance. On the other hand, the Respondent is an agency of the Federal Government of Nigeria charged with the statutory duty to administer all federal taxes in Nigeria.

In March 2021, the Nigerian Broadcasting Corporation (NBC) requested the Appellant to confirm its eligibility to enjoy the tax concessions under the Nigeria-Netherlands Double Taxation Agreement/Treaty (DTA or DTT) from the Respondent. The Appellant then made an application for DTA Relief to the

Respondent by its letter dated 21st of May 2021. The Respondent requested additional documents from the Appellant. After reviewing the Appellant's documents, the Respondent ruled that the Appellant was ineligible to enjoy the tax concessions under the DTA in its response letter of 6th July 2021.

The Respondent reasoned that since the preamble to the re-executed contract between the Appellant and NBC named a Nigerian entity – SES Nigeria Limited (SNL) which was a related party of the Appellant, SNL constituted a permanent establishment for the Appellant in Nigeria under Article 5 of the DTA and on that basis, the Respondent ruled that the Appellant would be liable to Nigerian tax. The Appellant clarified to the Respondent that the inclusion of SNL in the preamble to the Agreement was made upon NBC's request to fulfill Federal Government policy and that SNL did not execute or perform any part of the contract.

Earlier in 2016, the Appellant had entered into an agreement with a Nigerian company - Cable Channel Networks Nigeria Limited (CCNL) for the provision of satellite services. CCNL had a license from the NBC to procure satellite capacity and related transmission services for the implementation of the digital switch over in Nigeria. The NBC guaranteed the financial obligations of CCNL to the Appellant under the contract between the Appellant and CCNL. In July 2018, NBC revoked CCNL's license and assumed all CCNL's contractual obligations. The NBC requested that a Nigerian company be made a party to the Agreement pursuant to a Federal Government's Executive Order mandating all ministries, departments and agencies of the Federal Government (MDAs) to include indigenous companies as parties to government contracts with foreign service providers. Consequently, SNL, a related entity of the Appellant, was named as a party to the contract executed with the NBC.

As stated earlier, the Appellant, dissatisfied with the ruling of the Respondent, appealed to the Tax Appeal Tribunal upon the Grounds set out in its Notice of Appeal seeking the under stated reliefs.

a) A DECLARATION that the Appellant has no permanent establishment in Nigeria based on the provisions of Article 5(1), (3) and (7) of the Agreement Between the Kingdom of the Netherlands and the Federal Republic of Nigeria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains.
b) A DECLARATION that SES Nigeria Limited is not a permanent establishment of the Appellant in Nigeria in any regard for the purposes of the Service Agreement between the Appellant and the NBC.
c) A DECLARATION that payments made to the Appellant by the NBC are not liable to income tax and, by extension, withholding tax, pursuant to the provisions of Article 7(1) of the Agreement Between the Kingdom of the Netherlands and the Federal Republic of Nigeria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains.
d) A DECLARATION that the contract is exempted from stamp duties by the express provisions of the Stamp Duties Act, and that the Appellant has no responsibility to defray or bear any stamp duty which may arise thereto.
e) AN ORDER that the Federal Inland Revenue Service should recant and vacate its letter dated 26 July 2021 with Reference Number FIRS/TPAD/GTTE/1021/V.XIV/030 where it

asserted that the contractual arrangement between the Appellant and the NBC gives rise to companies' income tax, withholding tax or stamp duties.

f) AN ORDER directing the Federal Inland Revenue Service to confirm to the NBC that the fees due to the Appellant are covered by the Nigeria-Netherlands DTT, and are not liable to companies' income tax, withholding tax or stamp duties.

g) In the alternative to (a) to (f) above, and only in the event that this Honourable Tribunal finds that the Appellant has a taxable presence in Nigeria, AN ORDER directing the Federal Inland Revenue Service to render all necessary assistance to the Appellant to avoid its being liable to double taxation on the proceeds of the Service Contract with the NBC, including the FIRS initiating the Mutual Agreement Procedure pursuant to Articles 25(3) and (4) of the Netherlands-Nigeria DTT, and to do all other acts, deeds and things as may be necessary in that regard.

The Notice of Appeal and other relevant documents were served on the Respondent on the 27th of August 2021. The Respondent entered Appearance by filing its Respondent's Reply acknowledging receipt of the Notice of Appeal on the 19th of November 2021. The Appellant obtained the leave of the Tribunal to file an Appellant's Rejoinder which was filed on 7th of February 2022. Trial however, commenced on the 8th of March 2022 when the Appellant's sole witness, Olawunmi Olaitan, a Manager in the Tax Regulatory and People Service Division of KPMG, gave his testimony. The witness was cross-examined by the Respondent's Counsel and then re-examined by the Appellant's Counsel. The Appellant closed its case.

The Respondent, on the other hand, opened its defence on the 9th of March 2022 by calling its only witness, Kehinde V. Kajesomo, a Tax Administrator with the Respondent. He was cross examined by the Appellant's Counsel and there was no re-examination. The Respondent then closed its defence.

The Tribunal adjourned sitting to 12th of May 2022 for adoption of Final Written Addresses. This was not to be until the 5th of July 2022 as both parties at different times sought the Tribunal's Leave to enlarge the time within which to file their respective Final Written Addresses. Judgment was reserved for 4th of October 2022.

Issues for Determination

The Respondent's Counsel formulated three issues for determination in the Appeal as follows:

i. Whether the conditions under which a company is deemed to have a Permanent Establishment under Article 5 of the Avoidance of Double Taxation Agreement (Between the Federal Republic of Nigeria and the Kingdom of the Netherlands, have been sufficiently met in the circumstances of this case as to subject the income of the Appellant to tax in Nigeria;

ii. Whether the case of the Appellant offends the rule of "exclusion of oral evidence by documentary evidence" as entrenched in S.128 of the Evidence Act; and

iii. Whether the Service Agreement, being a dutiable instrument, Appellant is liable to pay stamp duties as mandated by Law.

On the other side, four issues were distilled for determination by the Appellant's Counsel, to wit:

i. Whether the mere inclusion of SNL in the re-executed contract between NBC and the Appellant constitutes a PE for the Appellant;
ii. Whether the provision of racks and servers by Computer Warehouse Group ('CWG')- an independent entity acting in the ordinary course of its business, constitutes a PE for a foreign entity such as the Appellant;
iii. Arguendo, what is the effect of the Appellant acquiring a PE in Nigeria due to SNL or CWG;
iv. Whether the Stamp Duties Act (as amended) is applicable to documents executed by the NBC, a government agency.

Argument of Issues

Respondent's Argument

Arguing her Issue One, Awashima Ukpi, Esq., learned Counsel to the Respondent insisted that where a foreign enterprise carried out business through a permanent establishment in Nigeria, Article 7(1) of the Nigeria-Netherlands DTA may operate to rebut the presumption that the income of the Appellant was exempt from tax in Nigeria. She argued that where the evidence showed that a permanent establishment existed in Nigeria, the income derived from or attributed to such permanent establishment would be liable to tax in Nigeria since a permanent establishment was a pivotal factor in determining the extent to which profits from a Non - Resident Company could be subjected to tax in Nigeria. She referred to Article 5 of the Nigeria - Netherlands DTA.

She submitted that Executive Order 5, relating to planning and execution of projects, promotion of Nigerian content in contracts and science, engineering and Technology of the Federal Government of Nigeria, was what qualified the Appellant to bid for a contract with any Ministries, Departments and Agencies (MDAs) in Nigeria.

She argued that the Appellant was under an obligation to comply with Nigeria's legal and regulatory guidelines and should not be allowed to benefit from non-compliance and blatant disregard for the law which would thwart the purpose of the local content inclusion guidelines in the laws aimed at fostering development of local capacity.

She contended that the registration of SNL under the Nigerian laws, implied the existence of a physical address/location which was a prerequisite for company registration in Nigeria. She submitted that registration evidenced the existence of a permanent establishment in Nigeria to the benefit of the Appellant.

She asserted that SNL had the authority to conclude contracts on behalf of the Appellant and its affiliates, jointly referred to as "SES" as contained in *Exhibit F6* - the Service Agreement insisting that the authority was habitual since SNL was set up for the purpose of meeting the local content requirement of the contract with its representation covering every aspect and stage of the contract, including receiving payment and termination as enumerated in Article 3(a) & (c) of *Exhibit F6*.

The Respondent's Counsel submitted that SNL's role was pivotal. It was the foundation on which the award was built. It therefore had authority to habitually conclude contracts on behalf of the SES in Nigeria. The provision of uplinks and transmission services to the Appellant by CWG, a company registered in Nigeria also constituted permanent establishment, Counsel opined. She referred to *Exhibit NSS3*. She concluded that it would be futile to argue that the Appellant did not have a permanent establishment in Nigeria.

On Issue Two, relying on section 128 of the Evidence Act, Counsel posited that the terms and wordings of *Exhibit F6* were without ambiguity requiring no further clarification. She argued that the Appellant could not explain *Exhibit NSS 3* and *Exhibit F6* by *Exhibit NSS01*, the oral testimony of the Appellant's Witness. She cited the following cases in support: ***Uzamere Vs Urhoghide***;[1] ***Bassil Vs Fajebe***;[2] and ***Comptoir Ltd Vs Ogun State Water Corporation.***[3]

She maintained that *Exhibit F6* remained the "Bible" of the relationship between the NBC and the SES Group, represented by SNL and of which the Appellant was a member. She contended that the Service Orders being annexures drew their authority from the Service Agreement and could not be distinguished from the latter.

On Issue Three, Counsel to the Respondent argued that the contract in issue was awarded in Nigeria and payment on the contract was to be made in Nigeria and in Nigerian currency. She relied heavily on section 58 of the SDA, the Federal Treasury Circular with Ref. No. TRYA1&B1/2017 issued by the Accountant - General of the Federation on the collection of stamp duties mandating a 1% Stamp duty on Contract Agreements granted by MDAs to be remitted to the Respondent as well as the Respondent's Information Circular of 29th April 2020 – **Clarifications on the Provisions of the Stamp Duties Act No. 2020/05 – Stamp Duty on Contracts.**

She reasoned that the Nigeria-Netherlands DTA did not cover taxes on documents and that Article 2 of the DTA particularly limited taxes covered under the DTA to taxes on income. The DTA did not exempt transactions by entities of contracting States from payment of Stamp Duties where applicable. Therefore, according to the learned counsel, NBC as an agency of government, had an obligation to deduct the 1% stamp duty charge on the Contract Agreement and remit same to the Respondent.

Finally, Counsel urged the Tribunal to hold the Appellant liable to tax on the income attributable to its activities in Nigeria, particularly from its contract with the NBC since the Appellant had a permanent establishment in Nigeria and therefore taxable in Nigeria as per the terms of the DTT.

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[1] (2011) ALL FWLR (Pt 558) 839 C.A.
[2] (2001) 4 SCNJ 257 at 285-286.
[3] (2002) 4 SCNJ 342 at 356-357

Appellant's Argument

On the other side, Ajibola Olomola, Esq., Counsel to the Appellant, also argued the four issues distilled for the Appellant.

On Issue One, Counsel stated that the taxability of the incomes of Nigerian and foreign companies was determined by the Companies Income Tax Act (CITA) (as amended). He however claimed that where a foreign company was resident in a country which had a DTT with Nigeria, its taxability was determined solely by reference to the applicable DTT. He referenced s.12 of the Constitution of the Federal Republic of Nigeria,1999 (the 1999 Constitution), s. 45 of CITA as well as ***Harka Air Services (Nigeria) Limited Vs Emeka Keazor***[4] and ***Abacha Vs Fawehinmi***[5] in support.

He argued that the Nigeria-Netherlands DTT had ministerial backing, had been enacted into law by the National Assembly, had the force of law and was superior to the provisions of CITA. He submitted that the liability of the Appellant to tax in Nigeria must be determined solely by reference to the provisions of the Nigeria-Netherlands DTT.

He further contended that the Appellant would have to trigger one of the indicators of a permanent establishment defined in the DTT to become taxable in Nigeria. He maintained that the Appellant did not trigger any of the indicators, especially as all its services were provided through satellites in space. Counsel referred to the Organisation for Economic Co-operation and Development's Model Tax Convention on Income and on Capital: Condensed Version 2017 (OECD Commentary) which, in his view, provided clarity on the words used in the DTT. Relying on the OECD Commentary, he submitted that the Appellant had no permanent establishment in Nigeria and was not liable to tax in Nigeria.

Counsel debunked the Respondent's assertion that the Appellant had a dependent agent in Nigeria through whom it undertook the contract in Nigeria. He asserted that SNL had to satisfy three conditions to be considered as a dependent agent of the Appellant, to wit, SNL should have served the Appellant as a dependent agent, SNL should have habitually exercised an authority to conclude contracts in Nigeria that were binding on the Appellant or SNL should have habitually secured orders for the sale of goods or merchandise by the Appellant in Nigeria. He relied on Article 5 (7) of the DTT.

Counsel evaluated each of the three triggers against the background of the Appellant's factual circumstances and concluded that none of the triggers had been activated to warrant subjecting the Appellant's income to Nigerian tax. He asserted that Respondent's contention that SNL constituted a permanent establishment for

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[4] (2011) LPELR-1353.
[5] (2000) 6 NWLR 228.

the Appellant because they belonged to the same group of companies ignored both the facts of this case as well as the law as set out in the DTT. He insisted that the Appellant did not undertake any part of the contract locally and did not utilise the offices of SNL or any of SNL's resources to undertake the contract as the satellites the Appellant used to undertake the contract were located in geostationary orbit.

He argued that the mere affiliation of two related entities was not sufficient to assume that they were undertaking business together, or that they jointly undertook the Service Agreement, insisting that the Appellant and SNL did not jointly render the services to the NBC. He referred to Article 5 (8) of the Nigeria-Netherlands DTT. He claimed that the mere existence of SNL as a related party in Nigeria did not automatically translate into a permanent establishment for the Appellant under the Nigeria-Netherlands DTT. He submitted that there was no basis to find that the Appellant acquired a permanent establishment through SNL under the Nigeria-Netherlands DTT. He urged the same on the Tribunal.

In response to the Respondent's submission that the Appellant attempted to utilise oral evidence to contradict a written document contrary to section 128 of the Evidence Act, Counsel contended that the Appellant's action was to interpret a document by another document and that the Appellant's assertions were supported by the documentary evidence before the Tribunal. He submitted that the Tribunal had a duty to interpret the entirety of the Service Contract including the Annexures which formed part of the Contract. He cited the authorities of ***Adamu Vs Michika;***[6] ***Elvic Investments Ltd Vs Asset & Resource Mgt Company Ltd.***[7]

Counsel wondered how the Respondent arrived at its "fantastical conclusions." The conclusions, according to Counsel, were totally unsupported by the documents provided to the Respondent by the Appellant. He urged the Tribunal to reject and discountenance the incorrect facts and alternative argument presented by the Respondent but find that SNL did not execute or discharge any obligation as per the contract papers and all other documentary evidence before the Tribunal.

On Issue Two, learned Counsel to the Appellant explained that CWG was unrelated to, and independent of the Appellant. CWG's commercial activities were not controlled by the Appellant, nor was CWG subject to detailed instructions from the Appellant in respect of its business. The Appellant had no staff or employee in Nigeria at CWG's address or any address at all, as all its services were provided remotely. He claimed there was no dispute between the parties that CWG was an independent entity which was not related to the Appellant or the SES Group in any way.

To qualify as a permanent establishment for the Appellant in terms of Article 5(6) of the DTT, Counsel insisted that the CWG's activities as an entity must have been wholly performed or almost wholly performed, on behalf of the Appellant. He

[6] (2021) LPELR-56645(CA).
[7] (2021) LPELR-54869(CA).

claimed that this was not the case. He argued that the Respondent failed to assert that CWG's entire business was directed by the Appellant and did not proffer evidence to that effect. He submitted that a party seeking to have a court find on any statement of facts, has to prove same. He cited ***Womiloju & Ors Vs Ogisanyin - Anibire & Ors***[8] as well as ***Enwezor Vs Enwezor & Anor***[9] in support. He submitted that the Respondent's plea and argument to find that CWG constituted a permanent establishment for the Appellant must fail.

He maintained that the DTT was a tax legislation and as such its provisions were to be read literally, and in their plain sense. He cited ***Okupe Vs Federal Board of Inland Revenue***[10] as well as ***Ahmadu & Anor Vs The Governor of Kogi State & Ors.***[11] Finally, he submitted that the irresistible conclusion must be that CWG did not constitute permanent establishment for the Appellant. He urged the position on the Tribunal.

On Issue Three, Counsel contended that where, for the argument sake, the Appellant was deemed to have a taxable presence in Nigeria under the DTT, only the proportion of the Appellant's profits attributable to the permanent establishment would be liable to tax in Nigeria. He relied on Article 7(1) and (5) of the DTT.

Relying on the Federal High Court's (FHC) decision in ***JGC Corporation Vs FIRS***,[12] Counsel enjoined the Tribunal to determine the actual amount attributable to such a fixed base/permanent establishment. In the instant appeal, he argued, the amount that would be attributable to a permanent establishment due to SNL would be nil because SNL did not undertake any function or activity under the Service Contract. With respect to CWG, the amount would be capped and limited to the service fee earned by CWG for providing the racks to NSS (less expenses incurred by NSS) because that was the amount attributable to the Appellant through CWG.

He enjoined the Tribunal to adhere to the guidance of the FHC and apply the literal wording of the DTT which limited the taxability of a foreign company to the income attributable to the permanent establishment, assuming that the Appellant had a Nigerian permanent establishment. He urged the Tribunal to discountenance the misconstrued arguments of the Respondent and grant the entirety of the Appellant's prayers as set out in the Notice of Appeal.

On Issue Four, the learned Counsel to the Appellant argued that the NBC had the obligation to discharge the duty of stamp duties on the Service Agreement since the other party was a non-resident entity. He then argued further that by reason of the Schedule to the Stamp Duties Act, the Service Agreement was exempt from stamp duty.

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[8] (2010) LPELR-3503(SC).
[9] (2012) LPELR-8544(CA).
[10] (1974) LPELR-2533(SC).
[11] (2002) 3 NWLR (Pt.755) 502.
[12] (2016) 22 TLRN 37.

He further contended that if the Service Agreement attracted stamp duty, the applicable rate was ₦0.15 kobo as set out for the stamping of contracts and agreements in the Schedule to the SDA rather than the 1% asserted as the applicable stamp duty rate by the Respondent based on a Federal Treasury Circular Ref. No TRY A1 & B1/2017 issued by the Accountant-General of the Federation and the Respondent's Information Circular 2020/05 - **Clarifications On The Provisions Of The Stamp Duties Act** issued on 29 April 2020.

Counsel agreed that the Respondent had powers to issue circulars but insisted that such circulars were not laws. He cited ***Tetra Pak West Africa Limited Vs FIRS.***[13] He submitted that any inconsistency between the provisions of a legislation and a Circular issued by the FIRS must be resolved in favour of the former since legislations outrank circulars issued by the Respondent. In support, he cited the case of ***African Natural Resources & Mines Ltd Vs Ss Minerals Resources Ltd & Ors;***[14] ***Warm Spring Waters & Ors Vs FIRS;***[15] and ***Ess-Ay Holdings Ltd Vs FIRS.***[16]

He reasoned that only the National Assembly or a State House of Assembly could amend the stamp Duties rate for contracts per section 116 of the SDA. He maintained that neither the Respondent nor the Accountant - General could amend the stamp duty rate for contracts. Counsel submitted that the Service Agreement together with its Annexures was not liable to stamp duties because of the specific exemption granted to NBC. Conversely, the Service Agreement could be levied to stamp duty only at the statutory rate of 15 kobo in accordance with the clear wording of the SDA.

Finally, he urged the Tribunal to grant all the reliefs sought in the Notice of Appeal. Counsel posited that in the unlikely event that the Tribunal found the Appellant acquired a Nigerian permanent establishment, the Tribunal should hold that only the profits (if any) from the Appellant's business as may be attributable to the permanent establishment was taxable in Nigeria in line with the provisions of Article 7 of the Nigeria-Netherlands DTT. Counsel urged the Tribunal to find that there should be no stamp duties applicable to the Service Contract, and in the unlikely event that the Tribunal did hold that stamp duties were applicable, that the appropriate rate was 15 kobo.

Determination by the Tribunal

As stated earlier, the Appellant and Respondent submitted four (4) and three (3) issues for determination respectively. However, in our view, only two issues call for determination in this Appeal, to wit:

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[13] Appeal No. LZ/WHT/007/2019 (unreported).
[14] (2021) LPELR-55151(CA).
[15] (2015) 20 TLRN 49.
[16] Appeal No. TAT/LZ/VAT/029/19(unreported).

i. Whether the Appellant, a non-resident company, is deemed to have a permanent establishment in Nigeria and therefore liable to tax in respect of the income derived from Nigeria.
ii. Whether the Service Agreement, being a dutiable instrument, is not liable to stamp duties under the Stamp Duties Act (as amended) in the circumstances of this case.

Issue One, the Appellant, by this Appeal, invited the Tribunal to determine whether the Appellant had permanent establishment in Nigeria. Put in another way, the Tribunal has to determine whether CWG and or SNL constituted a permanent establishment for the Appellant, a foreign company registered in the Netherlands with a DTT with Nigeria, which is ordinarily not subject to tax in Nigeria save on the basis of the terms of the DTT. The Appellant challenged its liability to Nigerian tax on the basis that the threshold for the application of Nigerian tax to its income was never triggered as contemplated under the relevant provision of the DTA between Nigeria and Netherlands. The DTA between Nigeria and the Netherlands which was executed on the 11th day of December 1991 had been ratified by the National Assembly and its provisions have the force of Nigeria in Nigeria.

By Article 5 of the DTA

1. For the purpose of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:
   a. a place of management;
   b. a branch;
   c. an office;
   d. a factory;
   e. a workshop;
   f. a mine, an oil gas well, a quarry or any other place of extraction of natural resources.

The concept of permanent establishment establishes the jurisdiction of Nigeria to tax the income of a non-resident company. It is the condition for liability to Nigerian tax of business income derived from or made in Nigeria. Thus, where a non-resident company has a permanent establishment in Nigeria, it is liable to Nigerian tax on the income from the trade or business derived from Nigeria. However, in the absence of a permanent establishment, the non-resident company takes the income absolutely free of any tax liability.

From the definition of permanent establishment provided under Article 5(1) of the DTA, to qualify as permanent establishment requires three important elements. These are:

i. the place must be fixed. In other words, it must be distinct and possess some reasonable degree of permanence;
ii. it must be a place of business; and
iii. the business of the non-resident company must be carried on through that fixed place wholly or partly.

To underscore this, Article 5(2) and (3) of the DTA then provides examples of what will constitute a permanent establishment under the DTA.

It is trite that the concept of permanent establishment is used interchangeably with fixed base. Thus, judicial authorities relating to the latter apply by equal force to the former. In ***Shell Petroleum International Mattssgappij B Vs FBIR***,[17] the Court of Appeal observed that there was no clear-cut definition of fixed base. It however held that:

> The fact that a company is non-Nigerian and therefore is not resident in Nigeria is not a sufficient excuse that it does not have a fixed base in Nigeria. The Appellant's using of office facilities provided by another company in Nigeria (SPDC) would make it hard to suggest that the Appellant did not have a fixed base in Nigeria.

Thus, an office facility provided by a Nigerian company for the use of the non-resident company is evidence of fixed based. Similarly, a non-resident company may trade or do business in Nigeria through its Nigerian wholly owned subsidiary. See ***Offshore International SA Vs FBIR***.[18]

The Respondent's Counsel had argued before this Tribunal that the provision of uplinks and transmission services to the Appellant by CWG, a company registered in Nigeria also constituted permanent establishment. Learned Counsel to the Appellant had countered that CWG was unrelated to, and independent of the Appellant, its commercial activities were not controlled by the Appellant, nor was CWG subject to detailed instructions from the Appellant in respect of its business insisting that the CWG's activities as an entity must have been wholly performed or almost wholly performed, on behalf of the Appellant. The Appellant's Counsel also maintained that the Appellant did not trigger any of the indicators of a permanent established detailed in the DTA especially as all its services were provided through satellites in space.

The Tribunal however observes that there was no dispute between the parties that CWG, a Nigerian company provided uplink and transmission services to the Appellant in respect of the Nigerian contract. Under Cross Examination, Appellant's witness admitted that CWG assisted to provide racket to enable the Appellant to carry out their services. The witness also admitted that the services of CWG was procured by the Appellant. Clearly, the Appellant had at its disposal the premises at No 10 Adebayo Doherty Road, off Admiralty Road Lekki Phase 1, Lagos where its business was carried on within the meaning of Article 5(1) of the DTA.

It is our opinion that it was not necessary that the Appellant's business was the sole activity of CWG; it is enough that the Appellant's business was partly carried on at the office.

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[17] 5 All NTC 85.
[18] 2 All NTC 67.

The Appellant's Counsel seemed to miss the point when he argued forcefully that CWG was an independent entity which was not related to the Appellant or the SES Group in any way, and to qualify as a permanent establishment for the Appellant in terms of Article 5(6) of the DTA, CWG's activities as an entity must have been wholly performed or almost wholly performed, on behalf of the Appellant. That argument falls flat in view of Article 5(1) and (2) of the DTA. The Article does not require CWG to be related to the Appellant. It suffices that CWG's office is available for the use of the Appellant. See ***Shell Petroleum International Mattssgappij B Vs FBIR.***[19]

Counsel also argued that it was the Respondent's legal burden to provide evidence showing that the CWG's entire business was directed by the Appellant. This argument is flawed. Article 5(6) of the DTA is reproduced below.

> An enterprise shall not be deemed to have a permanent establishment in one of the States merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such agent are devoted wholly or almost wholly on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.

Article 5(6) of the DTA under which the Appellant built its argument does not require proof that the CWG's entire business was directed by the Appellant.

Again, it should be noted that the adjudication of tax disputes is *suis generis*. Thus, the burden to prove the excessiveness of an assessment lies with the taxpayer by the declaration of statute. See paragraph 17(5) of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act 2007 (as amended) (the FIRS Act). The onus of first proving any fact lies with the taxpayer.

It is our view that Article 5(6) of the DTA deals with two contrasting situations. These are -

a. when a non-resident company will not be deemed to have a permanent establishment in Nigeria. Thus, the Appellant had the onus to prove by evidence that CWG was a broker, general commission agent or any other agent of an independent status acting in the ordinary course of its business; and
b. when an independent agency is created and deemed to constitute a permanent establishment for a non-resident company.

The Appellant did not provide any evidence before this Tribunal that CWG was a broker, general commission agent or any other agent of an independent status acting in the ordinary course of its business and therefore incapable of constituting a

[19] 5 All NTC 85.

permanent establishment. The second circumstance is inapplicable by reason of Article 5(1) and (2) of the DTA.

The Tribunal therefore finds that the Appellant had at its disposal, an office premises provided by CWG for the provision of uplinks and transmission services to the Appellant. In ***Shell Petroleum International Mattssgappij B Vs FBIR***,[20] the Court of Appeal held in that case that the Appellant's using of office facilities provided by another company in Nigeria constituted fixed base for the Appellant in Nigeria. It is therefore our considered view that the CWG's office on Adebayo Doherty in Lekki Lagos constitutes permanent establishment for the Appellant.

This holding is sufficient to determine Issue One. However, the Tribunal considers it necessary to evaluate other arguments presented by both Counsel with respect to the status of SNL as constituting permanent establishment for the Appellant and otherwise.

The Respondent's Counsel had contended that SNL had authority to conclude contracts on behalf of the Appellant and its affiliates, jointly referred to as "SES" as contained in *Exhibit F6* - the Service Agreement insisting that the authority was habitual since SNL was set up for the purpose of meeting the local content requirement of the contract with its representation covering every aspect and stage of the contract, including receiving payment and termination as enumerated in Article 3(a) & (c) of *Exhibit F6*. Counsel seemed to suggest that SNL was a dependent agent of the Appellant within the terms of Article 5(7) of the DTA.

The proposition was not lost on the Appellant's Counsel who asserted that the Appellant had no dependent agent in Nigeria through whom it undertook the contract in Nigeria, insisting that SNL had to satisfy three conditions to be considered as a dependent agent of the Appellant to wit, SNL should have served the Appellant as a dependent agent, SNL should have habitually exercised an authority to conclude contracts in Nigeria that were binding on the Appellant or SNL should have habitually secured orders for the sale of goods or merchandise by the Appellant in Nigeria. It was his position that the Appellant did not undertake any part of the contract locally and did not utilise the offices of SNL or any of SNL's resources to undertake the contract as the satellites the Appellant used to undertake the contract were located in geostationary orbit. That the existence of SNL as a related party in Nigeria did not automatically translate into a permanent establishment for the Appellant under the Nigeria-Netherlands DTT without more.

Article 5(7) of the DTA is reproduced below.

> Notwithstanding the provisions of paragraphs 1 and 2, where a person – other than an agent of an independent status to whom paragraph 6 applies – is acting in one of the States on behalf of an enterprise of the other State, that enterprise shall be deemed to

[20] 5 All NTC 85.

have a permanent establishment in the first-mentioned State in respect of any activities which the person undertakes for the enterprise if such a person:

a. has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph,
b. .....

When the term "notwithstanding" is used in the section of a statute, it is meant to exclude an impinging or impeding effect of any other provision of the statute or other subordinate legislation so that the said section may fulfil itself. See ***Olatumbosun Vs NISER Council.***[21] See further ***Ndaba (Nig.) Ltd Vs UBN Plc***[22] as well as ***Saraki Vs FRN.***[23] The impinging or impeding provision is Article 5(1) and (2) of the DTA. Article 5(7) has therefore extended the meaning and examples of a permanent establishment to include a dependent agent who acts habitually for a non-resident company in Nigeria in concluding contracts.

Counsel to the Respondent insisted that SNL had the authority to conclude contracts on behalf of the Appellant and its affiliates, insisting that the authority was habitual since SNL was set up for the purpose of meeting the local content requirement of the contract. The Appellant claimed that it did not owe its existence to SNL which was only incorporated in 2017, months after the signing of Agreement with CCNL. It is factual however that the re-execution of a tripartite Agreement has put in abeyance the earlier Agreement. Realistically, NBC would have been unable to progress with the new contract without the introduction of the Nigerian company. In any case, payment regarding obligation was to be settled in Nigerian currency and to SNL's designated bank account.

Moreover, the colouration of the contract was impacted by the policy of the Federal Government of Nigeria in 2018 which required local participation in any contract awarded by MDAs a way to bolster local capacity. Thus, the Appellant, being a non-resident company dealing with an agency of the Federal Government of Nigeria, would not have been able to secure the contract without the participation of SNL, registered in Nigeria.

It follows therefore that the intention of Executive Order 5 was to ensure that the Nigerian company would 'front' for the foreign contractor not as a dummy but to ensure participation. The word 'participation' would not mean having physical presence of staff but physical location and responsibilities since the Nigerian company is to be seen to be representing the foreign company. It is doubtful if a company will be registered to operate in Nigeria without a registered address in Nigeria.

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[21] (1988) 3 NWLR (Pt. 80) 25.
[22] (2009) 13 NWLR (Pt. 1158) 256 at 304.
[23] (2016) LPELR-40013(SC) 96.

It is in evidence that the contract between NBC and SES was a composite contract for satellite services and provision of ground services such as digital uplink services. It is also in evidence that the Service Agreement dated 1st October 2018 was entered into between NBC on the one hand and New Skies Satellites B.V and MX1 GmbH, represented by SNL and collectively referred to as "SES". It is not in contention that SNL represented the interest of the Appellant in Nigeria and under the contract in question.

The second paragraph of the Service Agreement reads *inter alia* –

> New Skies Satellites B.V. ... MX1 Gmbh... represented by SES Nigeria Limited hereunder Collectively referred to as 'SES'

The provision quoted above suggests that the SNL had the authority of the Appellant to conclude contract on the Appellant's behalf which can be said to be habitual.

The Appellant's Counsel had argued that the incorporation of SNL was not for the purpose of the contract without providing a scintilla of evidence other than the fine argument of Counsel which cannot avail however brilliant and well presented. See ***Omisore & Anor Vs Aregbesola & Ors.***[24] Any evidence showing the business objects of SNL and other businesses concluded in Nigeria would have greatly assisted the case of the Appellant.

It is safe therefore to conclude, in the absence of any positive evidence to the contrary, that the Appellant acquired permanent establishment in Nigeria through SNL. The SNL is an integral party to the contract, representing the Appellant's interest in Nigeria.

Consequently, we hold the view that the Appellant acquired permanent establishment as contemplated under Article 5 of the DTA and is therefore liable to tax in Nigeria in accordance with the prescription of Article 7 of the DTA.

This Issue is resolved in favour of the Respondent.

Issue Two, section 3 of the Stamp Duties Act (as amended) (SDA) states as follows:

> From and after the commencement of this Act, the duties to be charged upon the several instruments specified in the Schedule to this Act shall be the several duties set out in the said Schedule... and shall be subject to the exemptions contained in this Act and in any other Act for the time being in force.

The SDA thus regulates the charge of stamp duties on instruments in Nigeria in line with the rates specified in the Schedule to the SDA. It provides for instruments that stamp duties could be imposed on with certain exemptions. We align with the

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[24] (2015) LPELR-24803(SC) p. 108.

submission of the Appellant's Counsel that all instruments relating to transactions to be performed in Nigeria (whether executed in Nigeria or not) were subject to stamp duties, if they were specifically listed as a dutiable instrument in the SDA.

One of the instruments mentioned in the Schedule is an agreement and or a contract. The Service Agreement, being a form of contract, is a dutiable instrument within the context of the SDA.

Both parties agreed that the Service Agreement was liable to stamp duty. However, they differed on whom had a duty to discharge the statutory obligation. The Appellant insisted that NBC was the appropriate person to bear the stamp duty chargeable on the contract since it had the closest link to Nigeria. The learned Counsel to the Respondent maintained that NBC as an agency of government, had an obligation to deduct the stamp duty charged on the Contract Agreement and remit same to the Respondent. In effect, she presumed that the liability to pay the stamp duty rested on the Appellant while NBC merely had to deduct and remit the same.

Counsel also differed on the rate chargeable. The Respondent's Counsel claimed that the Service Agreement was liable to a 1% stamp duty relying on section 58 of the SDA (which in our view is completely irrelevant to this case), the Federal Treasury Circular with Ref. No. TRYA1&B1/2017 issued by the Accountant-General of the Federation on the collection of stamp duties mandating a 1% stamp duty on Contract Agreements granted by MDAs to be remitted to the Respondent as well as the Respondent's Information Circular of 29th April 2020 - **Clarifications on the Provisions of the Stamp Duties Act No. 2020/05 - Stamp Duty on Contracts**. On his part, the learned Counsel to the Appellant maintained that the statutory rate was 15 kobo in accordance with the clear wording of the SDA. He even argued further that the Service Agreement was in the category of exempt instruments and therefore not liable to stamp duties.

Generally, there is no clarity in the SDA regarding the party obliged to ensure that a dutiable instrument is stamped in all cases. In other words, the SDA is silent on the party to bear the burden of paying stamp duty on some qualifying transactions one of which is stamp duty on agreement and or contract. The Schedule to the SDA provides that -

> AGREEMENT or any MEMORANDUM of an AGREEMENT under hand only and not otherwise specifically charged with any duty, whether the same be only evidence of a contract or obligatory upon the parties from its being a written instrument 15

Nevertheless, inferences can be drawn from the provisions of section 23(3) of the SDA regarding the persons that are liable to penalty for not stamping a qualifying instrument (notwithstanding that the provision deals with instruments chargeable with *ad valorem* duty) in order to determine the party that is obliged to bear the stamp duty burden. The section is reproduced below.

(3) In the case of such instruments hereinafter mentioned as are chargeable with *ad valorem* duty, the following provisions shall have effect-

(a) .....
(b) if any such... shall be guilty of an offence and liable on conviction to a fine of twenty naira, and in addition...there shall be paid a further penalty equivalent to the unpaid duty thereon...
(c) the instruments and persons to which the provisions of this subsection are to apply are as follows:

Title of Instrument as described in the Schedule	*Person liable to penalty*
Bond, covenant or instrument of any kind whatsoever	The obligee, covenantee or other person taking the security

The Black's Law Dictionary[25] defines a covenant as *a formal agreement or promise, usu. in contract...* The same Dictionary views a covenantee as *a person to whom a promise by covenant is made; one entitled to the benefit of a contract.* In the same way, an obligee is *one to whom an obligation is owed...* See the Black's Law Dictionary.[26]

In the extant case, NBC is the party to whom an obligation was owed. It is also the party to whom a promise was made by contract. If NBC was the beneficiary of the service, it then stands to reason that NBC, consistent with the provision of section 23(3) of the SDA, ought to be liable to pay the chargeable stamp duty on the Service Agreement.

It is therefore this Tribunal's view that the Appellant is not liable to pay the stamp duty chargeable in respect of the transaction evidenced by the Service Agreement.

It is recommended that the National Assembly and the relevant stakeholders revisit the SDA in order to provide clarity particularly regarding the party obliged to ensure that a dutiable instrument is stamped in all cases. After all, certainty is an essential feature of a good tax system.

Back to Counsel's contention. Parties likewise diverged on the applicable chargeable duty. What then is the appropriate rate? The Respondent's Counsel had argued that the applicable rate was 1% in line with some Circulars issued by the office of the Accountant-General of the Federation and the Respondent itself. The Appellant's Counsel conceived the rate to be 15 kobo as provided in the Schedule to the SDA.

As we have seen, in the Schedule to the SDA, it was expressly provided that contracts save those specifically charged with stamp duty in the SDA are charged to 15k stamp duty flat. There is no evidence before this Tribunal that the Service Agreement is not a contract or that it is a contract specifically charged with stamp

[25] Black's Law Dictionary, Bryan A. Garner (ed) 8th ed. at 392 to 393.
[26] Black's Law Dictionary, Bryan A. Garner (ed) 8th ed. at 1106.

duty in the body of the SDA. The Respondent's assertion of 1% stamp duty is unsupportable in view of the unequivocal provision of the SDA.

It is trite that a Circular is incompetent to vary, supplant, or override the provisions of an Act of the National Assembly. See ***Tetra Pak West Africa Limited Vs FIRS.***[27] See also ***Halliburton (WA) Limited Vs FIRS***[28] and ***Warm Spring Waters & Ors Vs FIRS.***[29] In ***Omatseye Vs Federal Republic of Nigeria,***[30] the Court of Appeal per Ninpar, JCA when considering whether administrative circulars (like information circular) could create an offence (tax liability in the present case) held that

> "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 ..."

Section 116 of the SDA expressly provides that -

> (1) The National Assembly may by resolution increase, diminish or repeal the duty chargeable under any of the heads specified in the Schedule to this Act in respect of the documents regarding which the government of the Federation is competent to make laws and in respect of any other matter within such competence may add new duties or otherwise add to, vary or revoke the Schedule.
> (2) .....

It is glaring therefore that both the office of the Accountant-General of the Federation and the Respondent lack the *vire*, the power and or authority to amend the rates specified under the Schedule to the SDA by their respective Circulars or by other means howsoever. The amendment of the rates prescribed in the Schedule to the SDA is a legislative function reserved exclusively to either the National Assembly as in the instant case or a State House of Assembly.

Consequently, we find that the applicable stamp duty rate is 15 kobo flat as specified in the Schedule to the SDA.

But then again, does it end there? We do not think so. The Appellant's Counsel had argued that NBC was a department of the Federal Government, and any stamp duties payable by it would be payable by Government, therefore, the Service Agreement should be exempted from stamp duties.

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[27] Appeal No. LZ/WHT/007/2019 (unreported).
[28] 6 All NTC 57.
[29] Suit No. FHC/L/CS/157/2015 delivered May 11, 2015.
[30] (2017) LPELR – 42719 CA at p. 15 – 16.

The SDA's Schedule under general exceptions provides that

3. All instruments on which the duty would be payable by Government.
4. All instruments on which the duty would be payable locally by Government in Nigeria or any of the departments thereof.

These exemptions are applicable in this case. There is no disputation over the status of the NBC as an agency of the Federal Government of Nigeria. The liability for the stamp duty rests on the NBC. However, in view of the provision quoted above, that liability is excused. We so hold.

In effect, Issue Two is resolved in favour of the Appellant.

For the avoidance of doubt, the Tribunal holds that the Appellant has a taxable presence in Nigeria and is therefore liable to tax in Nigeria in line with the provisions of Article 7 of the DTA. On the other hand, the Tribunal holds that the Appellant is not liable to stamp duty chargeable on the contract for reasons detailed above. Consequently, this Appeal succeeds in part.

Dated this 4th day of October 2022.

Olanrewaju M. Lassise-Phillips, *Esq.*
Chairman

Mark A.C. Dike
Hon. Commissioner

Mrs. Titilola Akibayo
Hon. Commissioner

Rasaq Adekunle Quadri
Hon. Commissioner

Mrs. Kaneng Adole, *Esq.*
Hon. Commissioner

Appearances

Abosede Adeboye, *Esq.* - for the Appellant
Awashima Ukpi, *Esq.* - for the Respondent

Representation

Appellant - Nil
Respondent - Nil