

Federal High Court Says Bottled Water is Exempt From VAT

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In brief

The Federal High Court (Court) has held that water is a basic food item and therefore exempt from Value Added Tax (VAT) regardless of whether it has been processed or packaged. In its ruling, the Court distinguished and did not follow an earlier decision in the case of *Monamer Khod Enterprise V. FIRS* where it was held that sale of packaged water is liable to VAT.

The Court also held that the FIRS cannot amend the provisions of a statute by issuing a circular.

In detail

Background

The Value Added Tax Act (Act) imposes VAT on supply of goods and services. Part 1 paragraph 2 of the First Schedule to the Act exempts certain goods including 'basic food items' from VAT. However, the Act does not define basic food item.

There had always been the question of whether water is a basic food item and therefore exempt from VAT. In order to address this issue, the FIRS had issued an Information Circular dated 1st December 2009 which contained a list of items exempt from VAT. The Circular defines basic food items to include satchet water *other than bottled and packaged water*.

In a similar manner, the Court, in an earlier decision held that water, once processed and packaged, was liable to VAT but the particular production

process was exempt under the Third Schedule to the Act.

In view of the information circular and the earlier decision, the FIRS demanded VAT from some manufacturers of bottled water (Bottlers) and in some instances refused to issue Tax Clearance Certificates (TCC) to them for not collecting and remitting VAT.

Facts of the case

The Bottlers are manufacturers of bottled waters who are members of the Association of Food, Beverage and Tobacco Employers (AFBTE).

The FIRS assessed one of the Bottlers to about NGN1 billion for VAT on bottled water. It also withheld their TCCs.

The Bottlers then instituted an action against the FIRS claiming, amongst other things, that:

- water is a basic item and exempt from VAT,
- the FIRS does not have powers to amend, vary or modify the Act,
- the information circulars as far as they seek to modify the Act are null and void,
- the VAT assessment be discharged, and
- that the FIRS be restrained from withholding the Plaintiff's TCC for non-payment of VAT.

The Bottlers' position

The Bottlers raised two questions for determination. They are:

- whether bottled water constitutes a basic food item under paragraph 2 of Part 1 of the First Schedule to the VAT Act 1993, and

- whether the FIRS is statutorily empowered to amend, vary or modify provisions of the VAT Act 1993 by its VAT Exemption Circular No 2007/02 of 30 November 2007.

The bottlers' arguments can be summarised as follows:

- according to the Oxford Dictionary and National Food and Drug Administration and Control Act, 'food' includes water,
- treatment and packaging of water does not change the character of water from a basic food item,
- the decision in the Monamer case can be distinguished because the question in that case was whether packaged water was a manufactured good and liable to tax rather than whether it is a basic food item exempt from VAT,
- based on the rule of literal interpretation no other consideration should be applied to the exemption. Once an item is a basic food item, it ought to be exempt, and
- the FIRS has no powers to amend, vary or modify the First Schedule to the Act and any attempt to do so by the Information Circular of 2009 is null and void.

FIRS' position

The FIRS' argued that:

- the issue of whether packaged water was liable to VAT was settled in Monamer's case,
- bottled water is a luxury good and should be liable to tax as the Act does not intend to exempt luxury goods,

- since the Act does not exempt bottled water, a purposive interpretation should be applied to protect the revenue of the government,
- packaging, processing, purification and filtration have removed bottled water from the ambit of basic food item,
- the Information Circular did not seek to amend the Act but to clarify it and aid the effective administration of VAT, and
- as some of the Bottlers had collected and paid VAT, they had waived their right to complain.

The decision

The Court granted all the requests of the Bottlers and in giving its decision, it distinguished the decision in Monamer's case and held that the relevant question was whether water was a basic food item and exempt from VAT as opposed to what manufacturing process had been applied. According to the Court, *to begin to find out in what form an exempted item is, is to rewrite the law.*

The Court also held that water, being a basic food item, was not a luxury good and therefore not liable to VAT.

The takeaway

This decision settles the issue of whether water, either packaged or processed, is exempt from VAT being a basic food item.

It is laudable that the Court applied and adhered to the rule of literal interpretation in arriving at its conclusion. This is

the principal rule in interpreting tax statutes.

There is the potential to extend the reasoning to other food items that may have undergone some form of processing or packaging before being sold to consumers. For example, flour, garri, bread, cooked rice, fruit juice, etc.

This is another important decision that seeks to define the scope of VAT in Nigeria. Two earlier decisions had clarified that Nigerian VAT was not applicable on the transfer of contractual rights (being neither a good nor a service) and no VAT on imported service where the service provider is not carrying on business in Nigeria. This third decision provides some clarity that bottled water is exempt from VAT and establishes the principle that mere packaging, for instance, does not change the status of an item for VAT purposes.

The decision confirms the need for the FIRS to limit its functions to the application of the laws as enacted and not seek to modify or expand the laws. Where necessary, the FIRS should seek an amendment through the law making process.

This case also provides further support for the proposition that taxpayers should be willing to challenge the actions of the FIRS when they act outside the scope of enabling laws.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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