Schulich School of Law, Dalhousie University
Schulich Law Scholars

Articles, Book Chapters, & Blogs
Faculty Scholarship

12-2018

The Single Contract Basis of International Corporate Taxation: A Review of Saipem v Firs

Okanga Ogbu Okanga

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/scholarly_works

Part of the Tax Law Commons

THE *SINGLE CONTRACT* BASIS OF INTERNATIONAL CORPORATE TAXATION: A REVIEW OF SAIPEM v FIRS

Okanga Ogbu Okanga*

ABSTRACT

Nigeria's principal corporate tax legislation, the Companies Income Tax Act 1961, stipulates as a basis for the taxation of a nonresident company deriving income in Nigeria, what it terms a "single contract." This, according to the statute, entails a contract that embodies the activities of surveys, deliveries, installations or construction (common features of what is in common parlance termed a "turnkey project"). A major challenge with the application of the provision lies in the comprehension of the pivotal term, "single contract." A diversity of views on the import of the term paints a telling picture of ambiguity and underlies the complication of its applicability. A recent decision of the Nigerian Court of Appeal provided some much-needed judicial perspective on the point. The Court in the said case advanced a line of reasoning which almost certainly guarantees tax liability in Nigeria for a nonresident company participating in a Nigerian turnkey project regardless, it seems, of how the relevant contract is structured or performed – an apparent leaning towards an anti-avoidance objective of statutory interpretation. This paper, in search of clarity, examines the decision of the Court in Saipem Contracting Nig. Ltd & 2 Ors. v Federal Inland Revenue Service & 2 Ors in view of the language of the Act, case law and other perspectives both at home and abroad.

Keywords: *Single contract, International corporate taxation, Nonresident company, Turnkey project.*

INTRODUCTION

The income of a foreign company ('nonresident company') is taxable in Nigeria if the company carries on business in Nigeria and derives profit from that business. Section 9(1) of the Companies Income Tax Act ("CITA" or "the Act") provides that tax is payable for each year of assessment upon the profits of any company accruing in, derived from, brought into, or received in Nigeria. Literally, a foreign company's income is deemed to be derived from Nigeria where: (a) the foreign company derives profit from a fixed base that it has in Nigeria; (b) the foreign company does business in Nigeria through a dependent agent; (c) where the profit derives from a Nigerian single contract; and (d) where the foreign company's profit results from an adjustable transfer pricing arrangement with a related Nigerian enterprise.[1]

Section 13(2)(c) of CITA– of primary interest to this work– reads 'the profits of a company other than a Nigerian company from any trade or business shall be deemed to be derived from Nigeria if that trade or business activities involves a single contract for surveys, deliveries, installations or construction'. Thus, if a foreign company is involved in a 'single contract' bearing a combination of these activities, the foreign company should, ordinarily, be liable to pay tax in Nigeria on the income from that contract.

* **LL.B (Nig.), BL (Abuja). Associate at Streamsowers & Kohn, Lagos. The author has extensive research interest in taxation, dispute resolution and commercial practice.**

1. See CITA, s 13(2).

Electronic copy available at: https://ssrn.com/abstract=3304057

The main challenge in applying the above provision, it seems, lies in defining what the operative term 'single contract' (also called 'turnkey contract') entails. In other words, when would a foreign company be said to have been a party to a single contract in Nigeria? This question is pertinent in the light of the complex contractual arrangements that permeate the corporate world, especially as regards what is called 'engineering, procurement and construction contracts' (EPC contracts). These EPC contracts, which often involve multiple parties – both foreign and local – are commonly associated with the oil and gas sector as well as huge construction projects generally, and often entail a convergence of separate contractual obligations between these multiple participants.[2]

The enquiry is not eased by the apparently ambiguous connotation of the term 'single contract' in the Act. Does it simply mean a contract contained in a single document? Does it entail a contract for survey, deliveries, installations or construction that is wholly executed in Nigeria (that is, without onshore and offshore delineations)? Does it also encompass a contract whose features transcend the listed activities: 'surveys, deliveries, installations or construction?' These are some of the questions that call for answers. The section highlights the difficulty generally confronted in construing tax legislation.

Rules of Construction

It may be important to mention at this stage that jurisprudentially; Nigerian courts have long taken the general view that tax statutes should be construed strictly. The Court in *Aderawos Timber Trading Co. Ltd v FBIR*[3], stated:

> It is the law that the language of a statute imposing a tax duty or charge must receive a strict construction in the sense that there is no room for any intendment and regard must be had to the clear meaning of the words.

This statement of the law followed the decision in the English case of *Cape Brandy Syndicate v IRC* where the court per Rowlatt J. pronounced:

> In a taxing Act, one has to look merely at what is clearly said: there is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in and nothing is to be implied. One can only look fairly at the language used.

A key attribute of strict constructionism is that the court entertains no entreaties of equity or empathy, provided the wordings are clear and unambiguous. In other words, it is not the court's business whether the plain language, strictly considered, will yield hardship on the taxpayer or deprive the taxman of revenue.[4] If there are gaps or ambiguities, it is not for the court to rectify, but for the parliament through subsequent legislation.[5]

As noted, strict constructionism is the general approach to interpretation of tax statutes. It is however not the only approach. Indeed, the courts have in many instances sidestepped this approach in favour of other approaches.[6] One such alternative is the purposive rule, which regards

2. See generally Damian McNair, 'EPC Contracts in the Oil and Gas Sector' (PWC Australia January 2016) <https://www.pwc.com.au/legal/assets/investing-in-infrastructure/iif-5-epc-contracts-oil-gas-feb16-3.pdf> accessed 11 September 2018.
3. [1966] LLR 195.
4. See *Citibank Nigeria Limited v FIRS* [2017] 30 TLRN 40.
5. See *FBIR v Integrated Data Services Limited* [2009] 8 NWLR (part 1144) 615 CA.
6. For a comprehensive reading on the interpretation of tax statutes in Nigeria, see Aniefiok Ekanem, 'Illuminations on the Attitude of the Court in the interpretation of Tax Legislations in Nigeria - FBIR v IDS Ltd in view' (SSRN, 21 November 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2873618> accessed 21 July 2018.

Electronic copy available at: https://ssrn.com/abstract=3304057

tax legislation as driven towards tax collection. In essence, such statutes should only be interpreted to suppress tax avoidance and fulfill the purpose of tax collection. The use of this approach in Nigeria may be more precisely traced to the case of some earlier judicial authorities. In *Mobil Oil Nigeria Limited v Federal Board of Inland Revenue*,[7] Bello JSC, pronounced as follows:

> In construing a statute, regard shall be given to the cause and necessity of the Act, then such construction shall be put upon it as would promote its purpose and arrest the mischief which it is intended to deter. Some companies have been manipulating their accounts with intent to hide their true assessable profits and in that manner have been avoiding tax which they ought to have paid. The purpose of section 30 (of the Companies Income Tax Act) is to deter companies from engaging in such a fraudulent practice.

Likewise, and even more directly, in *Phoenix Motors Ltd. NPFMB*,[8] the Court of Appeal per Niki Tobi, J.C.A. postulated as follows:

> If a statute is revenue based or revenue oriented, it will be part of sound policy for a court of law to construe the provisions of the statute literally in favour of revenue or in favour of deriving revenue for the government, unless there is a clear provision to the contrary…No court of law should lend its hand to a person or body bent on beating the efforts of government at collecting revenue by relying on technicalities of the law with a frugal aim to cheat government of its legitimate income.[9]

The above authorities reflect that in construing tax legislation, Nigerian courts would advance either a strict (literal) approach or a purposive approach. While the former looks merely at what is stipulated in the statute, the latter looks at what the statute as a whole seeks to achieve (which in most cases is seen as the collection of tax). The outcome of a given tax case may, therefore, depend heavily on the approach to construction adopted by the court of the statutory provision in play.

THE JUDICIAL POSITION ON SECTION 13(2)(C) OF CITA

The Nigerian Court of Appeal in *Saipem Contracting Nig. Ltd & 2 Ors. v Federal Inland Revenue Service & 2 Ors*[10] ("*Saipem*") provided some insight on the import of a 'single contract' as used in section 13(2)(c) of CITA. The case involved a survey, deliveries, installation and construction contract between the Appellants (three members of Saipem group of companies; the 1st Appellant being the only one of the three companies registered in Nigeria) and the 3rd Respondent (Shell Nigeria Exploration and Production Company Limited – the project owner).

The Saipem group is a multinational group of companies which provides engineering, procurement, project management, construction and drilling services to the oil and gas industry. The Appellants, who are three companies of the group, Saipem Contracting Nigeria, Saipem (Portugal) Maritimo and France-based Saipem SA, entered into a consortium agreement with Shell Nigeria Exploration and Production Company Limited. The contract had distinct onshore and offshore work components. The entire scope of works to be executed by the Portuguese and French companies was to be performed outside of Nigeria, while Saipem Nigeria was responsible for all the onshore work.

7. [1977] 1 NCLR 1 [17].
8. [1993] 1 NWLR (Part 272) 718.
9. We will see later in this work that this case was overtly cited and relied on by the Court of Appeal in *Saipem*.
10. (2018) LPELR-45118(CA).

Electronic copy available at: https://ssrn.com/abstract=3304057

In a bid to ascertain their potential tax treatment in Nigeria, the Appellants had prior to taking up the contract, obtained advance rulings from the FIRS to the effect that the nonresident companies (NRCs) would not be liable to Nigerian corporate income tax, withholding tax or value added tax (VAT) on their respective scope of work, being offshore work. However, the FIRS subsequently reversed its position and assessed tax on the income of the NRCs.

The Appellants challenged these assessments at the Federal High Court, Lagos. It was submitted on behalf of the 2nd and 3rd Appellants that they were not liable to pay income tax in Nigeria because they did not derive income from Nigeria. According to them, the obligations in the contract in question were divisible into onshore and offshore activities and they only carried out the latter, whilst the 1st Appellant (the resident company) undertook the onshore components. The challenge was unsuccessful, except with regard to VAT, which the Court determined was not payable by the Appellants, the providers of the services. The Appellants, thus, appealed to the Court of Appeal, which dismissed the appeal for lack of merit and upheld the decision of the lower court. The Court of Appeal held that the contract in question, regardless of the onshore/offshore structure, was a single contract, in accordance with section 13(2)(c) of CITA. The Court of Appeal saw the onshore/offshore components as intertwined and inseparable components of the same work. The Court held that they were liable to pay tax on their income derived from a Nigerian single contract. The Court's position on this issue is summed as follows:

> The Appellants' contention is that the work they did on the contract was the offshore component of the contract and that it was entirely executed outside Nigeria. That may be so, but the fact that a contract has off-shore and on-shore components does not derogate from it being a single contract. Where the off-shore component of a contract is intimately related, intertwined and interwoven with the on-shore components that without the collaborative execution of the components the contract cannot be fully and duly executed, it would seem translucent to me that notwithstanding the various components, it is a single contract. The component parts are mere links in the same chain.

The Court further held as follows:

> It is lucent from the foregoing agreement that it is for specific work to be carried out by the consortium of Contractors namely, Fabrication of Flowlines and Provision of Subsea Installation services. The contract provides that part of the work is to be performed inside Nigeria (in-country) and the remaining part outside Nigeria (out-country), but the work to be performed remained a unit and the Appellants as a consortium, collectively referred to as the Contractor in the contract, agreed to perform and complete the work and be paid as contracted. Doubtless, even though various components of the contract were to be executed at different places by different companies in the consortium, it remained as a single contract which the consortium worked as a team on with a view to performing and executing the contracts as agreed.[11]

The Court buttressed its finding by pointing out some intrinsic factors that, in its view, underscored the single contract nature of the transaction. These include:

1. The fact that the 1st Appellant was authorised to act as leader of the consortium for the purpose of the contract; and
2. The fact that there was a central project management for the contract to manage, coordinate and direct the execution of the work, both offshore and onshore.

11. Emphasis added.

Electronic copy available at: https://ssrn.com/abstract=3304057

COMMENTARY

The *Saipem* decision provides some significant judicial perspective on what qualifies as a single contract under section 13(2)(c) of CITA**.** By the decision, the income of a nonresident company derived from offshore work in respect of a Nigerian consortium/turnkey contract will be subject to tax in Nigeria provided that 'the off-shore component of a contract is intimately related, intertwined and interwoven with the on-shore components that without the collaborative execution of the components the contract cannot be fully and duly executed' (the relatedness test). Thus, even where a turnkey contract is one executed by multi-jurisdictional members of a consortium, in so far as the obligations of the individual members are related components of the same project, the entire contract will be taxable in Nigeria irrespective of where the obligations of each member of the consortium were discharged. Going by the Court's interpretation, it seems immaterial that the parties have separate and distinct obligations under the contract (as is common in consortium arrangements) nor that the obligations of a party are performed 'out-country'.

Consortium Contract

Simply said, a consortium is a group of companies that join or associate in an enterprise.[12] The participant companies come together voluntarily, for a common purpose, and with an object to produce profit or gain. Jointness of effort and common management are, however, absent.[13] Since turnkey projects consist of different activities, sometimes beyond the competence or capacity of a single company, consortium arrangements can be used to aggregate the competences of different companies for the execution of the project. Each entity, however, retains self-management and undertakes its own peculiar endeavours. It follows that where a turnkey project is to be performed multi-jurisdictionally, the consortium contract delineates the different (onshore and offshore) components of work, specifies who is responsible for what and allocates financial responsibilities for the project in like manner. An important advantage of this model is that it affords the project owner a single point of contact with the consortium.

An implication of the *Saipem* decision is that it makes it extremely unlikely for any form of multi-territorial consortium arrangement for a turnkey project in Nigeria not to be caught by the single contract provision**.** From another perspective, the decision may expose the nonresident participant in a Nigerian turnkey project to double taxation – in the absence of a double taxation agreement[14] – since such a nonresident would most likely have to pay tax in the jurisdiction where it performed its component of the work.[15] Could this have been the intent of section 13(2)(c) of CITA**?**

Perhaps the only way a nonresident participant in a turnkey project can avoid income tax in Nigeria is to have a contractual arrangement with its Nigerian project owner that covers only the offshore components of the project while separate contracts are awarded by the project owner for the onshore components. A possible disadvantage of this separatist structure to the project owner, however, is that it may be denied the benefit of effective coordination between the various contractors in the delivery of the project. There is also a loss of the single point responsibility that an EPC contract gives to developers and their lenders, who opt for EPC 'turnkey' contracting simply

12. Black's Law Dictionary (7th edn, 1999) 304.
13. See Amar Gehlot 'Consortium contracts with Government – Legal status' <https://www.lakshmisri.com/Uploads/MediaTypes/Documents/Consortium%20contracts%20with%20Government%20-%20%20Legal%20Status.pdf> accessed 12 October 2018.
14. For instance, Article 7(1) of the DTA between Nigeria and France provides 'the profits of an enterprise of one of the States shall be taxable only in that State unless the enterprise carries on business in the other State through a permanent establishment situated therein. If the enterprise carries on business as foresaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.' By virtue of section 45(1) of CITA, where there is DTA between Nigeria and any country, the DTA shall have effect notwithstanding anything in the Act. The implications of these provisions would appear to be crystal clear.
15. This could potentially be triple taxation if the jurisdiction of performance is different from the nonresident company's resident jurisdiction.

Electronic copy available at: https://ssrn.com/abstract=3304057

because it offers them the comfort that a single contractor is responsible for all aspects of engineering, procurement, construction, installation and commissioning. This single point responsibility is now lost if there are separate onshore and offshore contractors.[16] An internal scheme within the consortium may be programmed to help navigate this challenge and provide some effective coordination.

However, to minimise tax exposure parties will desire to structure so that the onshore and offshore contractors are independently dealing at arms-length with each other, rather than two contractors forming a joint venture or consortium with joint and several responsibilities, so as not to expose the offshore contractor to onshore taxes.[17] It should be cautioned, nevertheless, that even a separatist arrangement, such as described above, may not fly in the face of the *Saipem* decision since what appears to be vital for tax purposes is whether the onshore and offshore contracts are 'related, interwoven and intertwined'. This brings to mind another related decision of Nigeria's Federal High Court. The single contract question came into consideration in the case of *JGC Corporation v FIRS* ('*JGC*').[18] In the *JGC case*[19], the Appellant was the awardee of a contract for the offshore aspects of the EPC3 Bonny Terminal Project of Mobil Producing Nigeria Unlimited ("MPNU"). The onshore components, which included installation, were awarded by MPNU in a distinct contract to the Appellant's Nigerian subsidiary, JGC Nigeria Limited, and another local company, Daewoo Nigeria Limited. The evidence showed that the Appellant executed its contractual obligations wholly outside Nigeria (as specified in the contract) and did not come into Nigeria for the purpose of the contract, and the Appellant did not enlist its Nigerian subsidiary or any Nigerian company for that matter for the execution of the offshore contract. It was also evident that the Appellant did not participate in the onshore contract and that payments were also distinctly made to the Appellant by the MPNU as stipulated in the relevant contract. The Federal High Court, overturning the decision of the Tax Appeal Tribunal ("TAT"), saw no basis for holding the Appellant liable to tax in Nigeria and set aside the taxes assessed on the Appellant by the Respondent.

The Court vividly acknowledged the legitimate right of the Appellant, as a taxpayer, to arrange its transaction in a way that would minimise its tax burden. The Court took no issue with the structuring of the project into separate contracts for offshore and onshore works. Indeed, the Court was persuaded by the view that even a turnkey contract could be regarded as divisible for tax purposes depending on the actual performance of the contract. This is clearly distinct from the view taken by the Court of Appeal in the *Saipem Case*. The case, thus, represents Nigerian judicial authority in support of not taxing a foreign company's income derived from a 'Nigerian contract' where the onshore and offshore components of the turnkey project to which the contract relates are, from the onset, awarded separately.[20] It, however, also raises a few questions: (1) Is *JGC* distinguishable from *Saipem* as a result of the different contract formats used in the two transactions? (2) Would *JGC* have been decided differently if it was decided after *Saipem*? (3) What legal effect could *Saipem* have on JGC given the hierarchy of the courts that decided these cases?

16. Black's Law Dictionary (7th edn, 1999) 304.
17. See Amar Gehlot 'Consortium contracts with Government – Legal status' <https://www.lakshmisri.com/Uploads/MediaTypes/Documents/Consortium%20contracts%20with%20Government%20-%20%20Legal%20Status.pdf> accessed 12 October 2018.
18 For instance, Article 7(1) of the DTA between Nigeria and France provides 'the profits of an enterprise of one of the States shall be taxable only in that State unless the enterprise carries on business in the other State through a permanent establishment situated therein. If the enterprise carries on business as foresaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.' By virtue of section 45(1) of CITA, where there is DTA between Nigeria and any country, the DTA shall have effect notwithstanding anything in the Act. The implications of these provisions would appear to be crystal clear.
19. This could potentially be triple taxation if the jurisdiction of performance is different from the nonresident company's resident jurisdiction.
20. Bernard Ang, 'Splitting EPC contracts for tax savings' (Out-Law, 16 Apr 2018).

Electronic copy available at: https://ssrn.com/abstract=3304057

It has to be said that the Federal High Court's emphasis on place of performance in *JGC* is a marked difference from the Court of Appeal's emphasis on the interconnection between the different aspects of the work in *Saipem*. The former is, perhaps, more justifiable because it is difficult to find rationale for taxing in one country the income of a nonresident company derived from work entirely performed outside the country. This submission would, of course, not apply where the contract structuring is evidently a charade, lacking economic reasonability, designed merely to shift profit, evade tax or actualise an objective of double non-taxation.[21]

In terms of interpretation, it appears on the face of it that the court in *JGC* relied on the strict construction principle while the Court of Appeal in *Saipem* took the path of purposive construction. This was made more obvious, in the latter case because the Court of Appeal quoted Tobi JCA's dictum in *Phoenix Motors*[22] with approval. This firmly suggests that *Saipem* was an apple that fell from the tree of purposive construction. By this reliance, the court showed in no uncertain terms that its reasoning in *Saipem* was strongly influenced by the apparent purposive disposition of the Nigerian court to the construction of tax legislation; for if strict constructionism harbors no sentiment, a construction approach that leans towards a given objective – anti-avoidance – cannot exactly be described as strict or devoid of sentiment.

It is submitted that applying the strict construction rule may have produced a different outcome to that reached by the Court, though not necessarily favourable to the taxpayer. This is to state that a strict construction is capable of producing more than one plausible result.[23] The first – which is favourable to the taxman – is that a contract should be considered single because it is contained in one document (provided it contains the spelt-out activities of surveys, deliveries, installation or construction.). The second outcome – which is more favourable to the taxpayer – is that a contract which contains activities other than surveys, deliveries, installations or construction (examples: procurement, engineering and fabrication) is not captured by the section and should not be taxed pursuant thereto.[24] In *Ahmadu v Gov of Kogi State*,[25] the court made the point as follows:

> It is a well settled rule of law that all charges on the subject must be imposed by clear and unambiguous language because in some degrees they operate as penalty; the subject is not to be taxed unless the language of the statute clearly imposes the obligation. Language must not be strained in order to tax a transaction which had the legislature thought of it, would have been covered by appropriate words. In a taxing legislation, one has to look at merely what is clearly said. There is no equity about a tax. There is no presumption about a tax. Nothing to be read in and nothing is to be implied. One can only look fairly at the language used.[26]

Using the strict approach, as enunciated above, the language of section 13(2)(c) of the Act would not be stretched to accommodate the activities listed in bracket or any activities not listed in the provision. Contrariwise, section 13(2)(c) of the Act may strictly be construed to mean that if a

---

21. See Companies Income Tax Act, CAP 21 LFN 2004, s 22; *Dongfang Electric Corporation v Dy DIT* [2012] 74 DTR 25 / 147 TTJ 579 / 52 SOT 496 (Income Tax Appeal Tribunal, Kolkata) and Derek Obadina 'Aggressive Tax Avoidance in Nigeria: Lifting the Corporate Veil as an Anti-Avoidance Tool' (2015) 6(3) The Gravitas Review of Business & Property Law.
22. *Phoenix* (n 8).
23. The upside for the taxpayer is that ambiguities in tax legislation – being a legislation that imposes pecuniary burden on the subject – are typically resolved in line with the outcome more favourable to the taxpayer. See *Director of Income Tax v M/S E Funds* [2015] 20 TLRN 39.
24. This further amplifies the state of ambiguity in the provision of section 13(2)(c) of CITA.
25. [2000] 3 NWLR (Part 755) 502 Citing *Russell v Scott* [1948] AC 22 (Lord Simonds).
26. Idris J cited, with approval this dictum in JGC, another evidence of the contrast in reasoning between *JGC* and *Saipem*. See *JGC* (n 18) 108.

Electronic copy available at: https://ssrn.com/abstract=3304057

turnkey project is awarded in a single contract document, the court should only be interested in whether the section covers the contract, as drafted, without taking any cognisance of the intendment of the consortium members to be treated separately. In this mood, the court would also not be interested in considering whether taxing the offshore components of the contract in Nigeria would result in a jeopardy of double taxation on a nonresident consortium member. This supports our view that a strict construction of the provision may not necessarily favour the taxpayer. Adjudicatory support for the view in *Saipem* can be found in the opinion of the TAT in *Global Scansystems v FIRS*[27] where the Tribunal pronounced that:

> whenever there is a trade, business or activity involving a single contract for surveys, deliveries, installations, or construction occurs (sic) CITA is interested in the profit from the contract and not the profit attributable to a foreign company's fixed base. Section 13(2)(c) makes profits derived from Nigeria from a single contract for surveys, deliveries, installations, or constructions, tax-assessable.[28]

This view suggests that all CITA is interested in is the entire profits from the contract. No thought is spared for consideration of where aspects of the contract may have been performed. The use of the opening term 'whenever' also suggests the absence of exceptions, which aligns rather firmly with the *Saipem* view. An implication of this view is that if a nonresident company undertakes any one or more of the activities stipulated in section 13(2)(c) as part of a turnkey contract, then its income would be taxed as emanating from a single contract even if its contributions were totally offshore and even if it acted as a distinct entity from other participants in the project.

The argument that section 13(2)(c) of CITA does not contemplate the taxation of activities such as 'procurement' and 'fabrication', both activities that would normally form part of an EPC contract, is plausible in other legal senses. As earlier noted, section 13(2)(c) of CITA expressly mentions the terms 'surveys, deliveries, installations or construction' as components of a single contract. Thus, one can arrive at the above conclusion by applying the expressio unius[29] rule of interpretation. By this interpretation, the income of a turnkey contractor that performs the former activities may not qualify for Nigerian tax since the activities performed are not expressly included in the law.[30] It appeals to reason that the applicability of the single contract tax regime should be confined to profits from operations that are expressly mentioned in CITA, and not extended gratuitously to capture incomes from unreferenced activities.[31] This supposition also finds support in the view that the specific activities mentioned in the provision are inherently activities of a 'local character'; which connotes that they would naturally take place in-country. Moreover, given that engineering and procurement are important processes for infrastructure delivery, perhaps, their omission from the list of activities in section 13(2)(c) of CITA is indicative of a legislative intent not to recognise revenues from such activities as Nigerian incomes.[32]

---

27. [2016] 22 TLRN 14.
28. ibid *28*.
29. The Latin maxim 'e*xpressio unius est exclusio alterius*', in legal parlance translates to: 'the express mention of a thing in a statutory provision automatically excludes what is not mentioned or what could otherwise have been implied'. See *Buhari v Dikko Yusuf* [2003] 14 NWLR (Part 841) 446; *Sun Insurance Nig. Plc v Umez Engineering Construction Co. Ltd* [2015] LPELR-24737(SC).
30. See Kingsley Amaefule, 'Taxation of EPC Contracts: Analysis of Nigerian Case Law and Emerging Trends' (2018) 47 International Tax Journal <http://www.ajumogobiaokeke.com/international-tax-journal-taxation-of-epc-contracts-analysis-of-nigerian-case-law-and-emerging-trends/> accessed 26 August 2018.
31. ibid.
32. ibid.

Electronic copy available at: https://ssrn.com/abstract=3304057

Thus, it is plausible to reason that this deliberate omission of 'procurement' and 'fabrication' activities from the single contract net may be rationalised on the ground that these activities do not possess the inherent local character that the mentioned activities possess. It goes without saying that procurement and fabrication activities, by their nature, can, in theory, take place anywhere, unlike surveys, (final) deliveries, installation or construction, which are inherently in-country activities, necessarily requiring the contractor to physically enter the country, in person or by proxy. This thesis, it is submitted, accords with the concept of derivation as the basis of taxation under section 13(2) of CITA. By this, a nonresident company would not be deemed to have derived income in Nigeria if it did not undertake any one of surveys, deliveries, installation or construction in Nigeria.

It has also been contended that the single contract referred to in section 13(2) of CITA is a single agreement in which the nonresident company assumes obligation for surveys, deliveries, installations or construction (cumulatively, it would seem).[33] Therefore, where a Nigerian contractor is introduced into the structure and is engaged to perform the onshore aspect of the turnkey project while the nonresident company remains responsible for the execution of the offshore aspect, section 13(2)(c) of CITA should not apply.[34] This represents another very plausible view which must, however, be qualified by taking into account the stage at which the Nigerian contractor is 'introduced' into the arrangement. If introduced from the onset as an independent entity from the nonresident company, then section 13(2)(c) of CITA should not apply.[35] If, however, the Nigerian entity is only subsequently introduced into the structure as a subcontractor of the nonresident company, then section 13(2)(c) should nevertheless apply[36], as the Nigerian entity would be a mere local conduit of the nonresident company.[37]

Relative Indian Jurisprudence

Perhaps, it would further this discourse to analyse some relevant decisions from the courts of another Common Law country on the issues raised herein. It is pertinent to note from the onset that Indian legislation and judicial authorities recognize a distinction between a consortium, on the one hand, and what is termed an 'association of persons' (AOP) on the other hand.[38] When persons combine together to carry on a joint enterprise and they do not constitute partnership under the ambit of the law, they are assessable as an AOP. Some of the relevant factors for consideration are: receiving income jointly, common purpose, and common action to achieve common purpose (to earn income).[39] Participants in a consortium are treated distinctly for tax purposes, whilst participants in an AOP are regarded as a unit. This distinction applies even where the contract in question is a turnkey contract with onshore and offshore perspectives. The implication is that the consortium contractors would be able to enjoy the benefit of separation for tax purposes, while parties in an AOP would have their contract treated as a 'single contract' for tax purposes. The High Court of Delhi treated this extensively, and in a taxpayer-friendly manner in *Linde AG.*[40] The Court had to determine whether the income of the 2nd Appellant – a German company – derived from the offshore supply of equipment and preparation of related designs was taxable in India under the

33. Olaleye Adebiyi and Ogochukwu Isiadinso, 'CITA Section 13(2)(c) – Taxation of Non-Resident Companies under a Turnkey Project: What Constitutes a Single Contract?' (*Andersen Tax Digest,* 6 February 2018) <https://andersentax.ng/taxation-of-non-resident-companies-under-a-turnkey-project-what-constitutes-a-single-contract/> accessed 27 July 2018.
34. ibid.
35. See *JGC* (n 18).
36. See *Offshore* (n 20).
37. See *Global* (n 27).
38. See section 2(31) of the Indian Income Tax Act 1961. See also *Linde AG, Linde Engineering Division & anr v DDIT* [2014] 365 ITR 1.
39. An AOP may consist of firms, companies, associations and individuals (doing business together) as its members. Indian Income Tax Act 1961.
40. *Linde AG* (n 38).

Electronic copy available at: https://ssrn.com/abstract=3304057

Income Tax Act of India ('ITA') or under the Double Taxation Agreement (DTA) between India and Germany. The Court, construing the AOP of the ITA, came to the conclusion that the turnkey contract was a consortium contract rather than a contract between an association of persons. Thus, each party was entitled to be treated separately rather than as a unit. The court outlined the pointers for making this distinction, to wit:

a. The intention of the consortium that formed the contract (The consortium was considered and described as a single contractor in the contract. However, this did not detract from the intention of the consortium members not to be regarded as one entity, as evidenced in other underlying factors. The MOU, for instance, showed that the consortium was formed for the sole purpose of the contract).
b. The allocation of work (each consortium member had specific, separate and independent work contracted to it and neither member had a direct role to play in the work of the other).
c. Sharing of information between the consortium members (was prominent but this was found to only be necessary to enable each party to effectively execute its scope of work).
d. Project management (each member of the consortium nominated its own 'project director', responsible for overseeing its scope of the work and sharing information with the other member and the client).[41]
e. Liability for default (although liability was stated to be joint and several in the contract, the internal agreement between the companies provided that each company shall be responsible for its respective scope of work in case of any deficiencies in performance).
f. Allocation of payments (each company was paid separately in accordance with its scope of work. There was no arrangement for sharing of profits or losses. Also, in the event of alteration of scope of work, any additional fee payable thereon could only be paid to the company whose scope of work was altered).

In consideration of the foregoing, the Court held that the contract did not qualify for taxation as an AOP. The 2nd Appellant was regarded as a consortium contractor, entitled to be treated separately; and, having performed its share of the work offshore, was not liable to pay tax in India.[42] The Court reasoned that for joint tax liability to be imputed, it does not suffice that parties had a common arrangement. That arrangement must also have the ingredients of an actual partnership. In other words, a mere cooperation between persons in serving a business objective would not be enough to constitute an AOP. A common enterprise, which is managed through some degree of joint participation, is an essential condition for constituting an AOP.[43] The key take from this decision is that when faced with a multiparty turnkey contract, the court would first look at whether the parties engaged as an AOP or a consortium. If the answer is the former, the contract would be taxed as one. If the reverse is the case, then the court would treat each party separately. Further, if a party is nonresident, and its income is in respect of offshore work, then it would not be liable to pay tax in India. This is in-line with a dominant position held by Indian courts that income from offshore work – even from turnkey contracts – is not taxable in India.[44]

In *DIT* v *LG Cable Ltd*[45] the Indian High Court upheld a finding that even in turnkey contracts, profits derived from offshore supplies were not taxable if transfer of title to the purchaser took place abroad. At the point of transfer, title passes to the purchaser such that by the time the supplies came onshore, they were no longer in the hand of the nonresident supplier and could, therefore not be taxed in its hand. Quite interestingly, in this case, the Respondent, a Korean company, was the

41. See similarly *Hyundai Rotem Co., Korea / Mitsubishi Co., Japan, In re* [2010] 190 Taxman 314.
42. Emphasis added.
43. See Amar Gehlot (*supra*).
44. See *DIT v Ericsson Radio System AB* [2012] 343 ITR 470 / 66 DTR 1 / 246 DTR 422 (Delhi HC).
45. [2011] 237 CTR 438.

Electronic copy available at: https://ssrn.com/abstract=3304057

awardee of two contracts by an Indian corporation, one for onshore execution of the Fibre Optic Cabling System Package Project and the second for offshore supply of equipment and services. The Respondent even established a 'project office' in India for rendering the onshore services and paid tax on its onshore income. Despite having an actual presence in India in respect of the project, and despite the fact that the onshore and offshore components were clearly two sides of a coin, the court held that the offshore supply could not be taxed in India. This decision takes things even beyond the Nigerian *JGC* case where the onshore aspect of the project was performed by another entity, albeit a subsidiary of the nonresident company.

The above cases may be contrasted with the cases of *Dongfang Electric Corporation v Dy DIT*[46] and *Raytheon Company* v *DDIT.*[47] In the former case, the Appellant, a Chinese company, entered into two contracts with the West Bengal Power Development Corporation Limited, one for the *offshore supply* of equipment and the other for *onshore supplies*, design, engineering and construction. Payments were allotted separately to the contracts with the offshore contract taking a significantly greater value. The Appellant sought to rely on the principle exempting offshore supply profits from tax. The tax authority and the Tribunal, however, delved into the substance of the two contracts and found sufficient ground to hold that they constituted a single contract, with the split only made for convenience. The Tribunal held that in certain cases where the values assigned to the onshore services are 'prima facie unreasonable' compared with values assigned to the offshore supplies, which make 'no economic sense' when viewed objectively, the transactions should be looked at as a whole, and not on standalone basis, when the overall transaction is split in an '*unfair and unreasonable manner with a view to evade taxes*.' The Tribunal also took cognisance of the fact that there was a "*cross fall breach clause*" in the contracts which entails that a breach in one contract will automatically be classified as breach of the other. The Tribunal considered this further indication that the offshore contract and onshore contract ought to be viewed as "an integrated contract."

In the latter case, the Income Tax Appeal Tribunal in New Delhi also regarded two separate contracts for onshore and offshore turnkey services as a single contract for tax purposes. The Appellant, a USA company, entered into the two contracts with the same entity in India, one for supply of equipment (offshore) and the other for installation and training services (onshore). The Tribunal considered the two contracts as constituting *one agreement* partly because they were substantially for the same purpose; the contract for supply of equipment and software was inseparable from installation and performance services. The Tribunal looked beyond the paper structure of the contract to conclude that, in substance, it was one contract cut in two. It is submitted that the cases of *Dongfang* and *Raytheon* are predicated on their peculiar facts and ought to be considered exceptions to the general position against taxing offshore work. More importantly, they reflect the point that each case ought to be treated on its own merits, based of course, on specific guiding principles. It was also apparent that the tests adopted in *Dongfang* were aimed at curbing tax evasion, rather than tax avoidance, which is permissible.

It is worth noting that the Supreme Court of India had in *Ishikawajima-Harima Heavy Industries Ltd v DIT*[48] set a major blueprint for not taxing offshore services when it held that a turnkey contract can be considered as a divisible contract with the onshore and offshore aspects subject to different tax treatments. This reasoning underlay both the *Linde* and *LG Cable* decisions and was also favourably referred to by the Nigerian Federal High Court in *JGC*. Suffice it to state that the reasoning in that case is at variance with the common interest view expounded in *Saipem*.

46. *Dongfang* (n 21).
47. *201-ITR VITAT-DEL-139*.
48. [2007] 288 ITR 408 (SC).

Electronic copy available at: https://ssrn.com/abstract=3304057

Interestingly, one of the main factors considered by the Nigerian Court of Appeal as depicting a single contract in *Saipem* was the description of the consortium participants as a single party jointly quoted 'the Contractor'. The weight accorded this description by the Court in *Saipem* contrasts sharply with that accorded by the Indian court in *Linde*, which preferred to dwell more on the substantive intent of the consortium participants and less on the description given in the turnkey contract. Another difference in judicial approach is that whilst the Indian court in *Linde* regarded communication between the consortium members as a mere necessity for effectively executing their individual aspects of the work, the Nigerian court saw it as proof that the consortium members were 'a team'. It was, likewise, of no tax significance to the Nigerian court that different components of the contract were to be executed in different jurisdictions and by different consortium members. In contrast, this stood as a key factor for the severability of the contract in the eye of the Indian court.

Indian Reforms

In a bid to improve clarity on the application of the AOP/consortium dichotomy, which has tax bearings, and in a bid also to ease compliance with extant court decisions on the point, the Indian Central Board of Direct Taxes ('CBDT') released a circular dated 7 March 2016. The Circular stipulates four main features which, if present, will see a multiparty turnkey contract not designated an AOP:

a. Each member is independently responsible for executing its part of the work and there is a clear demarcation in both the scope of work and costs between the consortium members;
b. Each member earns profit or incurs losses, based on performance of the contract falling strictly within its scope of work. Contract price at gross level may, however, be shared to facilitate convenience in billing;
c. Men and materials used for any area of work are under the risk and control of the respective consortium members;
d. Control and management of the consortium is not merged, and common management is exercised for internal coordination between consortium members for administrative convenience.

The afore-listed elements are not exhaustive, as in specific cases, additional factors may be considered, depending on the specific facts of the case in point.[49] Also, the application of the Circular is expressly excluded in cases where consortium members are 'associated enterprises', a term associated with Indian transfer pricing regulations. Whether this limitation is traceable to the statute or case law is another question for another discuss.[50]

CONCLUSION

Despite the perspective given by the Nigerian Court of Appeal in our focus case, questions still exist on the import and gamut of the CITA provisions on the taxation of single contracts, especially as distinct from consortium contracts. Administratively, the view taken by the taxman with respect to taxation of turnkey contracts is captured in paragraph 4.4 of its FIRS Information Circular No 9302 of 1993[51] which states:

> a turnkey project is defined as a "single contract involving survey, deliveries, installation or construction." The profit on a turnkey project is liable to tax in Nigeria. Such a profit should not be split between the so-called "Nigeria source" and "off-shore" profits but taxed wholly in Nigeria

49. ibid.
50. See Trilegal, 'Clarity on Taxability of Consortium Members in EPC and Turnkey Projects' (Mondaq, 24 March 2016) <http://www.mondaq.com/india/x/476442/tax+authorities/Clarity+on+Taxability+of+Consortium+Members+in+EPC+and+Turnkey+Projects> accessed 27 July 2018.
51. FIRS Information Circular Published on 22 March 1993.

Electronic copy available at: https://ssrn.com/abstract=3304057

It is fair, perhaps, to infer that what the tax authority is interested in is the profit from the entire contract and not merely the part attributable to an onshore performance base. Although the Nigerian courts do not attach significant weight to administrative interpretations, such as contained in the Circular,[52] it is, nevertheless, discernible that the FIRS view, and the views of the TAT and the Court of Appeal in *Global Scansystems v FIRS*[53] and *Saipem* respectively flow from the same fountain.

Saipem is presently the highest authority on the point. The case may in effect subject every EPC or turnkey contract to tax as a single contract notwithstanding the peculiarities of the arrangement. We advocate a more distilling approach such as advanced by the High Court of Delhi and largely codified by the Indian tax authority vide its 2016 Circular. We agree with the perspective that the categorisation of single contracts should not merely be premised on the existence of a single contract document for a turnkey project or the existence of a common objective in the various components of the project. We submit that each case should be treated on its own peculiarities bearing in mind factors similar to those elucidated in *Linde*, as well as by Nigeria's Federal High Court in *JGC*. Perhaps, the Indian Circular could be a useful reform guide for a change of status quo in dealing with the single contract question under Nigerian tax law. Where there are multiple parties in a multi-territorial turnkey contract, regard should be had to the evidence to see if it is a question of 'one contract' or multiple contracts in one document.[54] Indeed, the case for treating contract parties separately may in specific instances be buttressed by the existence of certain fiscal benefits and reliefs that one consortium member in a turnkey project may be legally entitled to, that another may not be entitled to. Regard should, therefore, in each case, be had to the intent of the parties as evidenced by the text and execution of the contract. Incidentally, the Court of Appeal's reliance on its own dictum in *Phoenix Motors*[55] speaks to a judicial inclination to ensure tax payment in Nigeria regardless of the contractual arrangement in play. A peculiar case like *JGC* – if it stands the furnace of appeal – would, therefore, seem like a rare refuge in the courthouse. If, indeed the principles in *JGC* do withstand the flames of appeal, then bifurcation of turnkey contracts may become the way out; the only way out.[56]

---

52. See *FBIR v Halliburton WA Limited* [2016] 4 NWLR (Part 1501) 53; *Transocean Drilling UK Ltd v FIRS* [2017] 29 TLRN 67.
53. *Global* (n 27).
54. This is important because States conventionally do not enjoy a universal tax jurisdiction (to tax business activities no matter where they take place) except as regards the incomes of resident corporations which are taxed on a worldwide basis. Thus, a State can either tax on a source or residence basis.
55. *Phoenix* (n 8).
56. See Oyeyemi Oke, 'Bifurcation of Contracts – A "Legal Kevlar" Against the Single Contracts Doctrine Of Taxation of Non-Residents In Nigeria?' (*Mondaq,* 4 May 2017). >http://www.mondaq.com/Nigeria/x/591226/tax+authorities/Bifurcation+of+contracts+A+Legal+Kevlar+against+the+single+contracts+doctrine+of+taxation+of+nonresidents+in+Nigeria> accessed 30August 2018.

Electronic copy available at: https://ssrn.com/abstract=3304057