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STANBIC IBTC HOLDING PLC V. FINANCIAL REPORTING COUNCIL OF NIGERIA & ANOR

ANALYSIS ON THE STATUS OF AN UNREGISTERED TECHNOLOGY TRANSFER AGREEMENT

BY TOBILOBA OLULEYE

ARTICLE SERIES

FACTS OF THE CASE

Stanbic Ibtc Holding Plc (the “bank”) had purchased a banking software (“the Software”), which it customised and sold to its South African parent company. The Software was subsequently licensed to the bank for an annual licence fee.

The bank then made an application to register the licensing agreement with the National Office for Technology Acquisition and Promotion (NOTAP) but NOTAP refused to approve the registration. Notwithstanding the non-registration of the licensing agreement by NOTAP, the bank made yearly provisions for the payment of the licence fee in its accounts and proceeded to pay the licence fee to its parent company.

When the bank’s returns were filed at the Financial Reporting Council of Nigeria (FRCN), FRCN conducted investigations into the bank’s accounting practices because of its recognition of the licence fee as an expense in its audited financial statements for 2013 and 2014.

Following the investigations, two key officials of the bank were suspended without an opportunity to explain why disciplinary actions should not be taken against them. The FRCN also imposed a fine of N1 billion on the bank and publicised the sanctions which led to loss of over N22 billion in the bank’s market capitalisation within 24 hours of the imposition of the sanctions.

As a result of these penalties issued against the bank, it initiated proceedings against FRCN and NOTAP at the Federal High Court.

THE FEDERAL HIGH COURT DECISION

In its judgment, the Federal High Court (the “Lower Court”) stated that the failure to obtain NOTAP approval on a registrable contract rendered the contract illegal and void. The Lower Court therefore held that the payment made by the bank to its South African parent company was void as payment could not be made on an unregistered contract.

THE COURT OF APPEAL DECISION [1]

The bank, dissatisfied with the decision of the Lower Court, appealed to the Court of Appeal.

The Court of Appeal identified the two issues below:

a. The interpretation of Section 7 of the NOTAP Act[2] regarding the effect of failure to register an agreement that is registrable under the Act:

The Court of Appeal held that failure to register a registrable agreement under the NOTAP Act is not a criminal offence and does not render the agreement, illegal, null and void or unenforceable.

The Court of Appeal held that the effect of non-registration of a registrable agreement under the NOTAP Act is that the payment of money from Nigeria to the credit of any person outside Nigeria in respect of the financial obligations arising from the agreement, by or on the Authority of the Federal Ministry of Finance, Central Bank of Nigeria (CBN) or any bank licenced in Nigeria, will not be permitted.

b. The interpretation of the NOTAP Act as it applies to agreements for export of technology from Nigeria to a foreign country.

The Lower Court had earlier held that since NOTAP had refused to approve the agreement to export the Software, the subsequent importation agreement cannot be valid in law.

The said agreement to transfer the Software was thus illegal, null and void. The Lower Court further stated that the true intention of Section 4 of the NOTAP Act (which lists the functions of NOTAP to include regulation and control of importation of technology into the country and registration of contracts for the importation of foreign technology), is to prevent a situation where technologies which are beneficial to the country, are shipped out under the guise of the 'business decision' of an organisation.

The Court of Appeal however held that the Lower Court wrongfully imported words that were not contained in Section 4 of the NOTAP Act, or even envisaged and contemplated by the ordinary, grammatical and natural meanings of the words in that section.

Section 4 of the NOTAP Act provides that NOTAP is to register all agreements for the transfer of foreign technologies to Nigeria where the agreements are for the use of trademarks, patented innovations, supply of technical expertise, supply of basis or detailed engineering, supply of machinery or plant, etc.

[1] Stanbic IBTC Holding PLC v. Financial Reporting Council of Nigeria & Anor (2018) LPELR-46507(CA).
[2] National Office for Technology Acquisition and Promotion Act 1979 (NOTAP Act) Cap. N62, Laws of the Federation of Nigeria 2004.

Also, NOTAP is to provide and encourage a more efficient process for the importation of foreign technology.

NOTAP was not given any function relating to the exportation of domestic technology which was in issue. The Court of Appeal therefore stated that if the legislature had intended to include the exportation of Nigerian technology from Nigeria to a foreign country, it would have expressly stated so in the provisions of the Act.

Consequently, the Court held that the Lower Court was wrong to have held that the provisions of Section 4(d) or any other provisions of the NOTAP Act, apply to agreements or contracts entered into by Nigerians and other parties for the exportation or transfer of Nigerian indigenous technology from Nigeria to a foreign country.

Implications of the Court of Appeal decision on Business Organisations

a. Generally, NOTAP is mandated to register agreements for the transfer of 'foreign technologies' to Nigeria where the agreements are for the use of trademarks, patented innovations, supply of technical expertise, supply of basis or detailed engineering, supply of machinery or plant, and the likes.[3]

The implications of the Court of Appeal's decision therefore is that agreements for the transfer of technology originating from Nigeria or made in Nigeria do not have to be registered at NOTAP.

b. The Court of Appeal held that failure of a party to register a technology transfer agreement does not mean that the agreement would become void or illegal. Instead, the parties to the contract will not be able to make any necessary payment for the completion of the contract to any person outside the country.[4]

The implication of this is that a Nigerian business organisation will not be able to make the due payments arising from such contract to a foreign party through any of the approved channels.

However, the agreement can still be enforced by any of the parties to the contract. Thus, a party cannot give an excuse that the agreement was not registered with NOTAP as the reason for not paying the other party or delivering on the technology.

c. The Court of Appeal did not make any declaration on the implication of failure to register a technology transfer agreement on accounting and auditing policies including recognising such expenses in a company's financial statements.

However, it is important to consider how this decision affects the accounting and auditing policies of the business organisations. In the course of operation,

it is expected that a business organisation will engage in some expenses such as renovation of its facilities, training of its staff, purchase of machinery and software.

[4] Ibid. S.7.

The business organisations usually include these expenses in their financial statements to recover the cost from the profit and this may be allowed by the tax authorities as tax deductions for the purpose of determining chargeable income. One of the expenses that can be included is the transfer of technology.

However, the implication of the Lower Court's decision was that business organisations would not be allowed to include in their financial statements, expenses arising from agreements for transfer of foreign technology if the necessary NOTAP approval was not obtained in respect of such agreements.

This was further reinforced by the actions of certain auditors after the Lower Court's decision, who started challenging business organisations that included unregistered technology transfer agreements in their financial statements.

The actions of the auditors above were further strengthened by the FRCN Rules which require regulatory approval (where mandated) as a pre-condition for any favourable financial treatment. The Rules provide that:

"transactions and/or events of a financial nature that require approval and/or registration or any act to be performed by a statutory body in Nigeria and/or where a statute clearly provides for a particular act to be performed and/or registration to be obtained; such transactions or events shall be regarded as having financial reporting implication only when such act is performed and/or such registration is obtained."[5]

The inference that can be drawn from the above provision is that where any transaction requires registration or approval by a regulatory body such as NOTAP, the only circumstance under which the tax authorities or auditing bodies will allow a business organisation to include such agreement as expenses in its financial statements is if the organisation obtained the necessary approval.

The necessary approval must be obtained not later than 60 days from the date of conclusion or execution of such agreement. Thus, in this present scenario where the technology transfer agreement ought to be registered with NOTAP but was not registered, the bank was not allowed to include the transaction in its financial statements for tax and auditing purposes

However, as earlier mentioned, the Court of Appeal did not make any declaration on this position, so its implication on the accounting and auditing polices of business organisations is debatable.

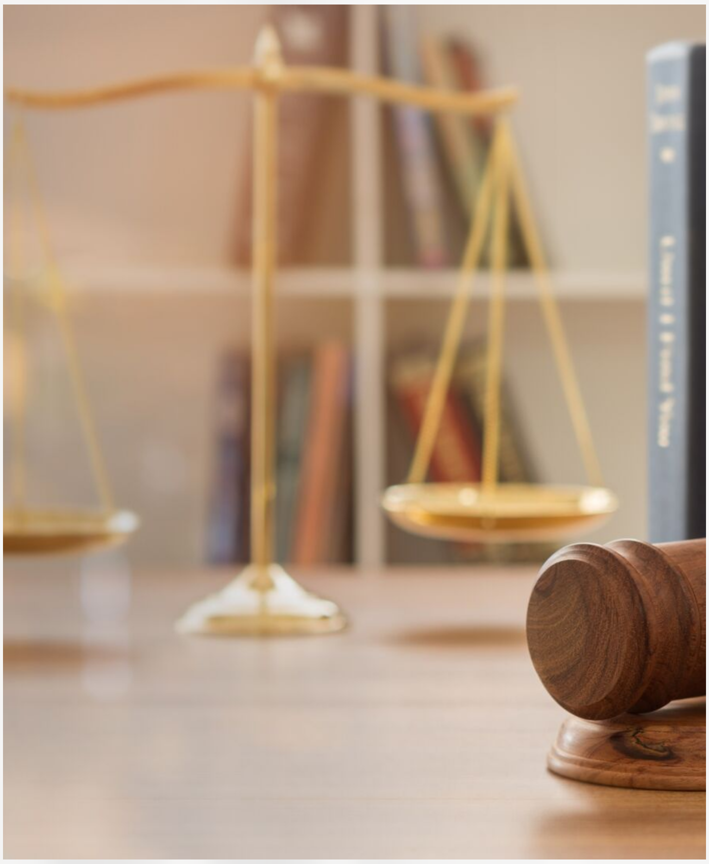
[5]The Financial Reporting Council of Nigeria (FRCN) Rule 4.

Some believed the foregoing provisions of the FRCN Rules still applied while some believed that the Court of Appeal, by holding that the unregistered technology transfer agreement is legal, means that business organisations can include the accompanying expenses in their financial statements.

This uncertainty was effectively resolved when the FRCN, after the Court of Appeal's decision, on Monday, 5th August 2019, issued a public notice which revoked its Rule 4. The revocation took effect from 11th July 2019 and it is to be applied retroactively. This revocation appears to be an effect of the Court of Appeal's decision in Stanbic IBTC Holding PLC v. Financial Reporting Council of Nigeria & Anor[6] discussed above.

Thus, with the FRCN's public notice and with the Court of Appeal's decision, technology transfer agreements which are required to be registered with NOTAP, but are not registered, can be included by business organisations as expenses for tax and auditing purposes regardless of whether they were registered with NOTAP.

However, the tax-deductibility of such expenses is doubtful given the requirement of Section 27(g) of the Companies Income Tax Act[7] that NOTAP approval must be obtained before such expenses can be tax-deductible.



CONCLUSION

The decision of the Court of Appeal in the above matter is instructive and apparently a trigger to the revocation of Rule 4 by FRCN. With this decision, organisations can carry out their business activities without unnecessary constraints as failure to register their technology transfer agreements does not render their agreements void or prevent the recognition of related expenses in their financial statements.

However, it is advised that NOTAP's approval for foreign technology transfer agreements is obtained within the 60-day timeline to ensure the tax-deductibility of such related expenses.

[6] Supra.
[7] Cap. C21, Laws of the Federation of Nigeria 2004.

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TOBILOBA OLULEYE

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Contact us at:

4th Floor, Marble House,
1 Kingsway Road, Falomo Ikoyi,
Lagos, Nigeria

Telephone: (+234-1) 4617321-3, 2793367-8, 7406533,

E-mail: lagos@aelex.com

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