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Indirect Tax Alert

Nigeria Federal High Court upholds TAT judgment on VAT imposed on bandwidth services provided by nonresident companies

Executive summary

On 19 December 2017, Nigeria's Federal High Court (the Court) upheld the judgment of the Lagos Division of the Tax Appeal Tribunal (the TAT or the Tribunal) in the case of *Vodacom Business Nigeria Limited* (VBNL or the Appellant) *vs. Federal Inland Revenue Service* (FIRS) on the imposition of value added tax (VAT) on services rendered by a nonresident Company (NRC)[1] to the Appellant.

The Tribunal had, on 12 February 2016, in an appeal by VBNL on the assessment made by the FIRS for the payment of VAT on services received from New Skies Satellite (NSS), held that the transaction between VBNL and NSS for the provision of bandwidth services, was subject to VAT and as such, VBNL was liable to pay the VAT due on the transaction (the TAT judgment).

The key implication of the Court's judgment is that the determination of whether VAT is applicable on the invoice issued by an NRC is if there is a supply of goods or services for consideration in line with Section 2 of the *VAT Act* and not necessarily where the service was rendered or whether the provider of the service is required to register under Section 10 of the *Vat Act*.

Accordingly, unless the case is further appealed to the Court of Appeal or Supreme Court, Nigerian companies would be required to self-account and remit VAT due from all non-exempted services provided by NRCs.

Detailed discussion

An appeal was made by VBNL to the Court against the TAT judgement in favor of the FIRS. The TAT had held that VAT was applicable on the provision of bandwidth services from NSS, an NRC to VBNL. Its ruling was on the grounds that the services provided were not specifically exempted under the *VAT Act*.

Based on the foregoing, VBNL brought an appeal to the Court against the TAT judgment, which sought the order of the Court to set aside the judgment in its entirety on the grounds that:

1. The physical act of rendering the service was not performed in Nigeria, specifically since the bandwidth capacities were supplied from the Netherlands, therefore these services should not be subject to VAT under the definition of "imported service" as outlined in Section 46 of the *VAT Act*.
2. NSS did not carry on business in Nigeria, thus it had no obligation to register for and charge VAT on its invoices. VBNL relied on the case between *Gazprom Oil & Gas vs. FIRS* where the Abuja Division of the TAT held that an NRC was obligated to register and charge VAT on its invoices provided it was determined that the NRC was carrying on business in Nigeria and not merely by virtue of a contractual relationship with a Nigerian company.

The FIRS responded to the appeal by primarily relying on sections 2 and 10 of the *VAT Act* as highlighted below:

1. Section 2 of the *VAT Act* provides that VAT should be charged and paid on the supply of all goods and services except those specifically listed as exempt under the First Schedule in the Act for which "bandwidth capacities" is not included.
2. Section 10(2) creates two statutory duties which are the duty of the nonresident to include tax in its invoice and the duty of the consumer in Nigeria to remit the tax. These duties are separate, distinct and independent of each other such that once the service was received in Nigeria by VBNL, the liability to account for the VAT immediately arose, notwithstanding NSS's failure to include VAT in the invoice.

The Court's judgment

The Court ruled in favor of the FIRS and upheld the judgment of the TAT thus, dismissing the appeal of VBNL. In delivering its judgment, the Court clarified that the core of the appeal is whether the services (or the transactions arising from the contract) are subject to VAT and alternatively, whether the requirement of registration is a condition precedent for its accountability.

In response to VBNL's ground (1) above of the appeal, the Court held that the FIRS had correctly relied on Section 2 of the *VAT Act* which imposes VAT on all supplies except those exempt in the *VAT Act*. The Court further stated that VAT is a general tax levied on all goods and services bought and sold for use or consumed in Nigeria and that in all jurisdictions including Nigeria, electronically supplied services are liable to tax in the place of supply which is the place where the supplied services are consumed. Furthermore, the Court indicated that the location of the supplier is of no consequence, and what is important is that supply of goods and services is made into Nigeria for consideration.

In response to ground (2) above of the appeal, the Court concluded that where an NRC has no place of business in Nigeria, the administrative burden of registering in Nigeria should not apply. However, to avoid the administrative burden of registration on the NRC supplying services in Nigeria and to ensure that VAT is accounted for, a reverse charge mechanism should be applied which requires the VAT-registered customer to account for the tax on supplies received from the NRC.

The Court further commented that while the tax authorities can readily proceed against a physically present NRC, such readiness is not applicable for an NRC that is not physically present in Nigeria and as such, the requirement to register an NRC is relaxed in such instance noting that merely not registering an NRC for VAT purposes would be a gratuitous escape route for VAT evasion as all the supplier needs to do is to refuse to register to be excused from the liability to pay VAT for a transaction liable to VAT.

In conclusion, the appeal failed and the Lagos TAT judgment was affirmed by the Court on the basis that VAT is applicable on all supplies for consideration, except those that are exempt under the *VAT Act*.

Implications

The Court noted that NSS, as the supplier, had the obligation to charge VAT on its invoice issued to VBNL, and since this did not happen, VBNL should then be responsible for self-assessing for the VAT and making the necessary VAT payment on administrative grounds.

By implication, taxpayers will now be required to account for the VAT due on their transactions with NRCs where applicable based on the *VAT Act*, unless the Court's judgment is appealed and reversed by the Court of Appeal or the Supreme Court.

While it is unclear whether the case will be appealed, the Court's judgment should prevail over the ruling of the Abuja Division of the TAT in the case of *Gazprom Oil and Gas vs. FIRS* which favors taxpayers in the same circumstances.

Endnote

1. See EY Global Tax Alert, *Nigeria's Lagos Division of Tax Appeal Tribunal rules that bandwidth services provided by nonresident companies are subject to VAT*, dated 8 April 2016.

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