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# Indirect Tax Alert

# Nigeria's Court of Appeal upholds judgment of Federal High Court regarding imposition of VAT on services provided by nonresident companies

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## Executive summary

Nigeria's Court of Appeal (COA or the Court), sitting in Lagos delivered a judgment on 27 June 2019 upholding the judgment of the Federal High Court (FHC) in the case of *Vodacom Business Nigeria Limited (VBNL) vs. Federal Inland Revenue Service (FIRS)* on the imposition of value added tax (VAT) on services rendered by a nonresident company (NRC).[1]

The Court, deciding in favor of the FIRS, ruled that where goods and services were exchanged for consideration in line with Section 2 of the *VAT Act*, and where such goods and services do not fall within the list of exempt goods and services as specified in the First Schedule to the Act, such transactions should be liable to VAT.

## Detailed discussion

VBNL made an appeal to the COA against the FHC judgment in favor of the FIRS. The FHC had held that VAT was applicable on the provision of bandwidth services from New Skies Satellites (NSS), a nonresident company based in the Netherlands. VBNL sought the order of the COA to set aside the judgment in its entirety on the grounds that:

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1. The physical act of rendering the service was not performed in Nigeria. Specifically, since the bandwidth capacities were supplied from the Netherlands, these should not be liable 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 Tax Appeal Tribunal held that an NRC was obligated to register and charge VAT on its invoices provided it was ascertained that the NRC was carrying on business in Nigeria and not merely by 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* and argued as follows:

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 failure to include VAT in the invoice.

### The Judgment

The Court ruled in favor of the FIRS and upheld the FHC judgment thus dismissing the appeal of VBNL. In confirming the FHC's judgment, the COA noted that a service rendered by a foreign company to a company in Nigeria is subject to VAT in so far as the service is not exempted by the *VAT Act* (First Schedule) and the service is provided for consideration. The pertinent question to consider, the Court noted, is whether the service provided is liable to VAT under the provisions of the *VAT Act*. Based on Section 2 of the *VAT Act* which imposes tax on all goods and services other than those explicitly listed in the First Schedule of the Act, the court found that the service, not being expressly excluded in the First Schedule, is subject to VAT.

Regarding the contention as to the need for physical presence in Nigeria for a supply of an imported service, the COA noted that the terms "supply" and "supply of services" were both defined in the Act as sale of services for consideration. Therefore, since the transaction between VBNL and NSS involved the performance of a service for a consideration, it is a supply within the meaning of the Act, therefore liable to VAT.

Furthermore, aligning with the submission of the FIRS, the Court ruled that the duties to issue a VAT invoice and the duty to remit are not conjunctive; and that even where there is a failure to issue an invoice, the burden to remit VAT remains subject to the provisions of Section 2 of the VAT Act. The Nigerian company which has received a service would be required to self-charge and remit VAT to the FIRS. The Court also disclaimed VBNL's submission on the interpretation of the phrase "carrying on business," noting that the thrust and purpose of the *Companies and Allied Matters Act* (CAMA) and the *VAT Act* were not the same and cannot therefore be read, construed or applied together.

The Court stated that while the lower court may have been wrong in alluding to the "reverse charge" principle in its judgment, its decision that the transaction is liable to VAT under Sections 2, 10 and 46 of the *Vat Act* remains correct. It further stated that although "reverse charge" is not mentioned in the *VAT Act*, Section 10(2) which obliges the person to whom goods or services are supplied to remit the tax is the same as "reverse charge."

The COA, while noting that the destination principle may not be applicable in Nigeria as recognized by the lower court, stated that even if the lower court had based its decision on the principle, it does not affect the judgment of the lower court that the transaction between VBNL and NSS is vatable under the *VAT Act*.

## Implications

Based on the judgment, it appears that the key determinant of VAT applicability on cross-border transactions is the existence of a supply of goods or services for consideration, and not necessarily where the service was rendered or whether the provider of the service is required to register under the *Nigerian VAT Act*. This implies that the supply of imported services not expressly exempt from VAT under the Act should be liable to the tax regardless of the place of performance of the services.

With this judgment, Nigerian recipients of imported services (not expressly exempt) will now be required to self-assess and remit VAT on such services even if the nonresident service suppliers do not include VAT in their invoices.

Nigerian taxpayers with cross-border service contracts should take steps to review such contracts to determine the VAT implication and treatment of services received thereunder.

## Endnote

1. For background, see EY Global Tax Alert, *Nigeria Federal High Court upholds TAT judgment on VAT imposed on bandwidth services provided by nonresident companies*, dated 15 February 2018.

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