Tax Appeal Tribunal Rules that VAT is Applicable on Imported Services in the case between Vodacom Business Nigeria Limited and Federal Inland Revenue Service

Tax Appeal Tribunal judgment delivered on the 12 February 2016 in

Vodacom Business Nigeria Limited
v.
Federal Inland Revenue Service (Suit No.TAT/LZ/VAT/016/2015)

Table of Content

Introduction

The Tax Appeal Tribunal (TAT) sitting in Lagos on 12 February 2016, in the matter between Vodacom Business Nigeria Limited (as *Appellant*) and Federal Inland Revenue Service (as *Respondent*) *(Suit No.TAT/LZ/VAT/016/2015*) delivered its judgment in favour of the Respondent. The decision on the face of it seems to be a departure from the earlier decision of the TAT Abuja Zone on the same subject matter of *'imported services'* in the case of *Gazprom Oil & Gas Nig. Ltd v. FIRS (Suit No. TAT/ABJ/APP/030/2014) delivered on the 10 June 2015.*

Highlights of the decision

a. The Dispute

The dispute in this case arose as a result of the imposition of Value Added Tax (VAT) on the transaction between the Appellant and New Skies Satellites (NSS); a Netherlands based company, which supplied bandwidth capacities to the Appellant for the Appellant's use in Nigeria. The TAT had to determine whether bandwidth capacities are not exempted under section 2 of the Value Added Tax Act (VAT Act) Cap V1 laws of Federation of Nigeria (LFN) 2004.

More importantly, the TAT had to determine whether the transaction between the Appellant and NSS was a transaction subject to VAT in Nigeria.

b. The Appellant's Case

The Appellant argued that since the bandwidth capacities were not supplied inside Nigeria, they were not subject to VAT in Nigeria. The Appellant relied on sections 10 & 46 of the VAT Act and section 12 of the VAT (Amendment) Act No. 12 2007 to argue that the VAT Act only applies to imported services.

The Appellant relied mainly on the TAT decision in *Gazprom Oil & Gas Ltd v. FIRS*. On the strength of the *Gazprom Case*, the Appellant submitted that it did not contravene section 10 of the VAT Act, because NSS does not carry on business in Nigeria and is not registered with the Respondent for VAT purposes, and thus cannot issue tax invoice. The Appellant submitted that since it was not issued a tax invoice by NSS, no tax could have been remitted by them.

c. The Respondent's Case

Relying on sections 2, 3 and 46, and the 1st Schedule of the VAT Act, the Respondent argued that any good or service supplied in Nigeria is liable to VAT. The Respondent restated that bandwidth capacities are not on the list of goods or services exempted under the VAT Act.

The Respondent also stated that receiving bandwidth capacities from the Netherlands through earth-based stations via the Appellant's transponder in Nigeria amounted to supply of bandwidth capacities in Nigeria and thereby qualifies the transaction as an imported service into Nigeria. On the requirement of doing business in Nigeria, the Respondent argued that the contract that NSS has with the Appellant meets the criteria.

The Respondent further submitted that section 10 (2) of the VAT Act places the burden of remitting VAT on the person to whom goods or services are supplied in Nigeria. The Respondent argued that this supported the ***"destination principle"*** advanced in the *Gazprom's Case* which is also in line with the International VAT Guidelines. Hence, the Respondent was of the view that the duty to remit VAT was that of the Appellant and not NSS, and the duty is not dependent on NSS's registration as taxpayer or NSS duty to issue tax invoice. The Respondent also referred to a provision of the contract between NSS and the Appellant which makes the Appellant solely liable for any local taxes which may be assessed by the Nigerian Tax Authorities.

d. The Tribunal's Resolution

The key question which the TAT asked and answered was whether, ***"the Respondent can charge VAT on the bandwidth capacities received by the Appellant under its contract with NSS?"*** In resolving this question the TAT considered the following issues:

i. Supply of services under the VAT Act?

The TAT cited section 2 of the VAT Act which provides, *"The tax shall be charged and payable on the supply of all goods and services (in this Act referred to as "taxable goods and services") other than those goods and services listed in the First Schedule to this Act."* The TAT first determined that bandwidth capacities was not exempted under the VAT Act. The TAT relied on section 46 VAT Act, to define what amounts to "*supply of services"* to, *"mean any services provided for a consideration."* It then resolved that supply of services is taxable under section 2 of VAT Act.

ii. Distinguished *Gazprom's Case*

Whereas in the Gazprom's case, the Tribunal took the position that the criteria of Section 10 must be fulfilled before the section can apply and that a VAT invoice from a non-resident company was a condition precedent to remittance. While in the instant case, in determining if the services supplied is taxable for VAT where the service is done by a non-resident company the TAT dismissed the argument of the Appellant and held that section 10 of VAT Act does not impose duty on the Appellant to pay tax neither does the section address VATability rather the section is an administrative provision dealing with VAT registration for foreign companies that carries on business in Nigeria.

The TAT held that the emphasis by the parties on section 10 was exaggerated and misplaced. It stated that *Gazprom's case* emphasis on section 10 was made *per incuriam* (meaning wrongly decided "through inadvertence" or "lack of care" or "characterized by lack of due regard to the law or the facts."). The TAT stated that the operation of section 2 is sacrosanct and it does not need section 10 for it to apply. While section 10 merely deals with the administration of VAT where a party carrying on business in Nigeria is a non-resident company, section 2 imposes VAT on all supply of goods and services in Nigeria, except exempted ones.

The TAT further commented that NSS is a foreign company on who Nigerian Laws does not bound. However, the issue for consideration was the transaction and the person in which the VAT inures, which is the Appellant who is a Nigerian company and according to the TAT, it behoves on the Appellant to ensure NSS registers for VAT further to section 10 to fulfil its (the Appellant's) VAT obligations.

e. Resolved

Relying on the foregoing, the TAT, dismissed the appeal and held that the Appellant's transaction for the supply of bandwidth capacities is chargeable and upheld the VAT re-assessment of the Respondent.

Our analysis of the decision of the TAT

1. Imported Services are liable to VAT

It is important we clarify that imported services are liable to VAT subject to section 10 of VAT Act. Imported service has been defined in Section 46 of the VAT Act as:

"service rendered in Nigeria by a non-resident person to a person inside Nigeria.".

It is also useful to understand the provisions of section 10 (1&2) of VAT Act which provides for registration on non-resident companies for VAT in Nigeria. It reads thus:

"(1) For the purpose of this Act, ***a non-resident company that carries on business in Nigeria shall register for the tax with the Board****, using the address of the person with whom it has a subsisting contract, as its address for purposes of correspondence relating to the tax.*

(2) ***A non-resident company shall include the tax in its invoice and the person to whom the goods or services are supplied in Nigeria shall remit the tax in the currency of the transaction****."*

Having stated that imported services are taxable in Nigeria. There are mainly four duties deducible from the above section to wit:

a. Duty to register for VAT;
b. Duty to include VAT on the invoice;
c. Duty to deduct VAT from the invoice; and
d. Duty to remit VAT.

The first and second duty is solely the duty of the non-resident company. Albeit, the non-resident company should be properly advised by its Nigerian customer on these requirements. The third and fourth duty which is the duty of the Nigeria Company is to ensure that the VAT is not paid together with the contract fee and to ensure that the amount equal to the sum included in the invoice as VAT is duly remitted to the Federal Inland Revenue Service within the specified time.

In its judgment, relying on the combine purport of sections 2 & 10 of the VAT Act, the TAT held that the taxable person is the Appellant, irrespective of whether section 10 was complied with or not. Whereas, this may be correct, considering that it is the consumer of a good or service that bears the liability for VAT. However, where the supplier of the services as in this case is a non-resident company, the service so supplied **must** be supplied in Nigeria, most specifically, the non-resident company must carry on the business in Nigeria.

2. The phrase "carries on business in Nigeria" has been left undefined

Before engaging into the purport of section 10 & 2 of the VAT Act, the non-resident company must first carry on business in Nigeria. Where such non-resident company is not fully established to carry on business in Nigeria, section 10 of VAT Act cannot be administered on the transaction between the foreign company and it Nigeria customer.

In *Vodacom v. FIRS*, the TAT omitted to define in clear terms the meaning of "carries on business in Nigeria." However in *Gazprom's Case*, the court defined "carrying on business" *inter alia:*

> *"The Courts in a plethora of cases defined "carrying on business" to mean* ***conducting, prosecuting or to continue a particular vocation or business as a continuous operation or permanent occupation****."*

The above definition may be insufficient in this day and age for a lot of reasons, which include the following:

a. Must the non-resident company be present in Nigeria?

There is even a broader question, which is, what does it mean to be present in Nigeria? Could it be said that once

the non-resident company has any form of presence that is actual or virtual, would it suffice for presence in Nigeria?

In the instant case, NSS was far away in the Netherlands, while Vodacom receives bandwidth capacities through its transponders located in Nigeria. By this virtual connection, would NSS be seen to be carrying on business in Nigeria?

b. Where the non-resident company carries on the business via e-commerce or e-business with its Nigerian partner, would that suffice as carrying on business in Nigeria?

Furthermore, where the non-resident company merely transacted with its Nigerian partner via online platforms like e-mails, fax etc. would this be considered as carrying on business in Nigeria? While in the *Vodacom v. FIRS*, the TAT interpreted "**receiving bandwidth capacities through Vodacom's transponder**" situated in Nigeria as carrying on business in Nigeria by the non-resident company. Whereas in *Gazprom v. FIRS*, the Appellant was provided consultancy services by a foreign non-resident company, in its case it argued that the foreign non-resident company has no employee, agent, asset or equipment or representative in Nigeria.

We believe that the drafters of the VAT Act did not contemplate that the non-resident company would not be physically present in Nigeria.

c. What does it mean for services to be rendered in Nigeria or for the service to be received in Nigeria

Where the services so rendered is received in Nigeria by the non-resident company's Nigerian business partner, would that suffice as the services been received in Nigeria?

Imported services must be rendered in Nigeria by the non-resident entity. Where the non-resident company is merely communicating virtually with its Nigerian partner, would that be considered as being present in Nigeria? We believe that the drafters of the VAT Act did not contemplate that the non-resident company would not be physically present in Nigeria.

3. The ruling in Gazprom Case

In reaching its decision, the TAT had to answer three important questions. First, whether the provision of the VAT Act imposes VAT on the basis of the "Destination Principle." In the TAT's view, VAT is a consumption tax payable on goods and services consumed by individuals, Government Agencies or Business Organizations. It stated that two principles guide the application of VAT around the world i.e. Origin and Destination Principle. Relying on the provisions of Section 10, VAT Act 2004 (as amended), the TAT agreed with the Respondent that destination principle is applicable in Nigerian VAT administration. Destination principle implies that VAT is levied on goods and services in the country of consumption rather than production. The Tribunal held that by the use of the phrase "supplied in Nigeria" in section 10 of the VAT Act, underscores the applicability of the destination principle. In resolving the issue the court went further to enumerate certain requisites that must exist for a proper application of section 10, VAT Act. These are:

i. The non-resident company must be carrying on business in Nigeria;
ii. For the purpose of the Tax, the non-resident company shall register with the Board as well as create an obligation to charge the Tax;
iii. The Act assumes that for the non-resident company to do business in Nigeria; it has a person whom it has subsisting contract;
iv. For the purpose of correspondence relating to the Tax; the address of the Nigerian party is the contact address;
v. The non-resident company when issuing its invoice shall include the tax charged;
vi. The person to whom the goods and services are supplied in Nigeria shall remit the Tax; and
vii. Payment should be made in the currency of the transaction.

The second question the TAT resolved was whether carrying on business in Nigeria imposes a duty to register and charge VAT by the non-resident company. The TAT was of the view that under section 10, VAT Act, the use of the word "shall" denotes that it is compulsory i.e. the foreign company or non-resident company cannot legally carry on business in Nigeria without registering with the Tax Board, using the address of the person with whom it has a subsisting contract. The TAT submitted that in upholding the intendment of the lawmakers, the non-resident companies must register with the Board and charge VAT.

The third issue is whether receipt of VAT Invoice is a pre-condition to remittance of VAT from a non-resident company. The TAT answered in the affirmative relying on the provisions of section 10 (2), VAT Act. It posited that the Respondent can only demand for remittance of VAT from the Appellant where it had been invoiced by its non-resident business counterpart. In the light of the preceding views, the TAT concluded that the appeal succeeds in favour of the Appellant and sets aside the two VAT re-assessment notices against the Appellant.

Our Comments

1. Imported services must be rendered in Nigeria to be Vatable in Nigeria going by the definition of imported services, thus *"imported service" means service rendered in Nigeria by a non-resident person to a person inside Nigeria;"*

2. The question then is, did the TAT actually contradict itself for the same or different reasons and are the two judgments not correct for different reasons [Gazprom's consultancy services rendered outside Nigeria (or in Nigeria?) and Vodacom bandwidth Services delivered in Nigeria or outside Nigeria?];

3. Gazprom was on consultancy services rendered by a non-resident company to a Nigerian Company. From the judgment, it appears that the "place of rendition/delivery of the services" does not appear clearly but the TAT and the parties agreed that it was rendered/delivered outside Nigeria. The issue that was left in abeyance was if the service was electronically delivered, would the decision be correct? But if the service was delivered to Gazprom in hard copies, then we may want to agree with the TAT in Gazprom's decision. However, if the service was electronically delivered via e-commerce, then, the delivery/sales of the services was actually made in Nigeria and therefore, the judgment would be *per incuriam*;
4. In the Vodacom's case, in our view, the TAT inadvertently gave the right judgment for different reasons. The fact as we could see it is that the services were actually delivered/rendered in Nigeria and not outside Nigeria because the bandwidth capacities were "received in Nigeria through the transponders of the Appellant located in Nigeria." This obviously cannot be said to be a services rendered/delivered fully outside Nigeria;

5. Unless the TAT gives judgment on the same similar sets of fact, it could not be said that it has contradicted itself. The definition of imported services makes it clear to discern the correct position from imported services perspectives.

It is our conclusion that Vocadom's case was rightly decided on the ground that the services was rendered in Nigeria. If the assumption that the Services was rendered/delivered in Nigeria is incorrect, then, the case would be said to have been delivered *per incurian*. Contrarily, *Gazpron's case* was equally rightly decided because the services were rendered/delivered outside Nigeria. Contrary to the view of the TAT in *Vodacom's Case* that *Gazprom's Case* was wrongly decided, we believe that the two cases were actually rightly decided for different reasons. Future disputes on imported services should be critically analyzed from a more factual position in arriving at a justifiable judgment.

Disclaimer

Please note that this memorandum is not intended to give specific technical advice and it should not be construed as doing so. It is designed to alert clients to some of the issues. It is not intended to give exhaustive coverage of the topic. Professional advice should always be sought before action is either taken or refrained from as a result of information herein. In any case, Ascension does not accept any responsibility for any decision whatsoever made based thereon or any liability incurred for failure to consult with professionals on any specific areas of issues raised.

Ascension Legal Services – Offices:

Lagos:
11 Daniyan Natalia Street, 3rd Round about, Lekki Phase 1, Lagos

Port Harcourt:
102 Old Aba Road Shell Industrial Area, Rumuobiakani, Port Harcourt, River State.

Abuja:
Apo Sparkligh Mall (Suite CC10, 2nd Floor), Durumi Phase II, (Federal Capital Territory)

Contact:
Azeez – azeez.alatoye@ascensionlegalservices.com
Regina – regina.osaro@ascensionlegalservices.com
Dickson – dickson.okoro@ ascensionlegalservices.com
www. ascensionlegalservices.com
info@ascensionlegalservices.com
+23417614701