Tax Alert

TAT rules that VAT applied on the supply of software licences prior to recent amendments to the VAT Act, among other matters

Background

The Tax Appeal Tribunal (TAT) has ruled that Value Added Tax (VAT) was chargeable on the supply of all goods and services in Nigeria including software licences, even prior to the Finance Acts (FAs) which expanded and clarified the definitions of "goods" and "services" for VAT purposes. The TAT ruled that only items listed as exempt in the VAT Act remain VAT exempt.

The TAT also ruled that training services received outside Nigeria are subject to VAT in Nigeria, and that the FIRS is able to issue assessments beyond the 5-year statute of limitation included in the Federal Inland Revenue Service Establishment Act (FIRSEA).

This ruling was issued in the case between the Federal Inland Revenue Service (FIRS) and MTN (or the "Company"), further to a review carried out on the Company by the Office of the Accountant General of the Federation (OAGF) for the 2007 to 2017 accounting periods. The OAGF provided a report on the review to the FIRS, which subsequently assessed MTN to outstanding taxes (including penalty and interest) of $135m.

MTN's arguments

- Prior to the VAT Act amendments by the FAs, the supply of software licences were intangibles/incorporeal rights which did not meet the definition of goods or services in the VAT Act and therefore were VAT exempt. Such intangibles were only included as "VATable" by the recent amendments and as such, the amendments should not be applied retrospectively.
- Prior to the FAs, "imported services" for VAT purposes were required to be provided in Nigeria and therefore, bandwidth capacity supplied through transponders on a satellite, and training services received offshore, should not be VATable in Nigeria.
- The FIRS is not empowered to issue an assessment beyond 5 years in line with the statute of limitation in the FIRSEA, where the taxpayer did not make any false representation or submission
- The FIRS' computation of interest and penalty was unclear, and they should not be imposed on assessments that are not yet final and conclusive.

The FIRS' arguments

- The Company has the burden of proof and did not present evidence of VAT remittance for the assessed years.
- The supply of software licences is a supply of a service and is subject to VAT because it was not specifically exempt under schedule 1 to the VAT Act. The express listing of exempt goods and services in Schedule 1 means that any goods, services or intangibles not listed are subject to VAT
- Transactions consumed by persons in Nigeria are subject to VAT irrespective of location of supplier, even pre-FA
- The VAT Act did not stipulate a statute of limitation, and that deliberately omitting VATable transactions from a VAT return can warrant a look back beyond 5 years.
- Interests and penalties accrue from the original due date of the tax, and not when the assessment is final and conclusive.

Decision of the Tribunal

The Tribunal ruled that:

1. VAT applied to all supplies to persons in Nigeria other than those expressly exempt in the First Schedule of the VAT Act - The TAT classified the supply of software licences as a service, and ruled that they were subject to VAT pre-FAs.
2. The supply of bandwidth capacity by a non-resident qualified as a VATable service - The TAT also highlighted that the contract between MTN and the non-resident supplier was described as a "service agreement" and that MTN received the services through infrastructure located in Nigeria. Hence, the activities qualified as VATable services supplied to Nigeria.
3. Training services received offshore are VATable in Nigeria - The TAT highlighted that MTN was the ultimate beneficiary of the training and therefore, VAT should apply on the training received offshore.
4. The FIRS was right to go beyond the statute of limitation in the FIRSEA - The TAT highlighted that the taxpayer did not fulfil its obligations under the VAT Act and therefore the FIRS could carry out an investigation beyond the statute of limitation.
5. Penalties and interests are not applicable where the taxpayer has filed an objection within the stipulated timelines. The TAT also ruled that the FIRS has powers to conduct investigation beyond the six-year statute of limitation.

Analysis and Takeaway

Prior to the tax law amendments introduced by the FAs from 2020, the definitions of “supply of goods” and “supply of services” in the VAT Act were not elaborate and therefore were given their literal meaning to exclude intangible property. This was confirmed by the Federal High Court in CNOOC vs FIRS where it was ruled that the transfer of interest in an Oil Mining Licence was an intangible property which fell outside the scope of goods and services. The TAT did not analyse whether the supply of software licences could be classified as goods or services within their ordinary meaning, or whether there was a distinction between the intangibles considered to be exempt in the CNOOC judgement and the nature of software licences in this case.

The ruling on bandwidth services being subject to VAT seems consistent with judicial precedents on the matter, despite contrary historical practice and arguments from many taxpayers. The TAT’s ruling that VAT applied on training delivered and received offshore may be considered contentious, as the service was physically consumed outside Nigeria. The FIRS has also in a previous circular, indicated that such similar activities consumed outside Nigeria should not be subject to VAT, although this was after the FAs. There is also a high likelihood that foreign VAT would have been applied on such transactions, thereby resulting in double incidence of VAT for the Nigerian employer.

Also, the TAT’s ruling that interest and penalties apply from when an assessment becomes final and conclusive varies from recent judgements on the matter and this continues to be an area of uncertainty because of conflicting decisions, especially for periods before the FAs.

Considering the risk that tax rulings may differ from precedents, companies should assess how they provide for and report material tax assessments. Taxpayers in Nigeria can take a cue from the recently introduced Corporate Sustainability Reporting Directive (CSRD) in the EU in this regard.

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