Court of Appeal rules that imported services are subject to VAT

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Background

Section 10 of the Value Added Tax (VAT) Act requires a non-resident person carrying on business in Nigeria to register for VAT and, when it provides a service to a person in Nigeria, issue a VAT invoice to the Nigerian recipient who is responsible for remitting the VAT to the Federal Inland Revenue Service [FIRS].

Section 10 has been the subject of litigation in the Gazprom v FIRS and Vodacom v. FIRS cases.

In the Vodacom situation, the company had, through its transponders in Nigeria, received bandwidth services from a Dutch company through the latter's satellites in orbit. Vodacom did not pay VAT for these services neither did the Dutch company issue a VAT invoice to Vodacom. FIRS issued a VAT assessment. Vodacom challenged the assessment but lost at the Tax Appeal Tribunal (TAT) and the Federal High Court (FHC). On further appeal, the Court of Appeal upheld the decision of the FHC. Three issues were addressed in the Court of Appeal judgment:

Issue 1: Was the FHC right considering the facts and circumstances that the transaction (i.e. a satellite bandwidth service with signals transmitted into Nigerian through transponders) is subject to VAT?

Issue 2: Was the FHC right when it held that the company was liable to VAT even if the condition precedent for the non-resident supplier to register and charge VAT was not fulfilled?

Issue 3: Whether the FHC was right to apply principles of "Reverse Charge" and "Destination Principle" even though those principles are not outlined in the Nigerian VAT Act?

The decision

On issue 1:
The fact that satellite transponders receive the signals in Nigeria, the services are supplied in Nigeria, irrespective of the location of the satellite (which is neither in a foreign jurisdiction nor in Nigeria). Reading the VAT Act as a whole and in particular section 2, 10 and 46, a supply of services which are received in Nigeria are subject to VAT in instances where a physical presence in Nigeria is unnecessary to provide the service.

On issue 2:
Section 54 of CAMA (which suggests that carrying on business in Nigeria requires physical presence) cannot be used to interpret Section 10(1) of the VAT Act because the two laws have different purposes and thrust. Bandwidth capacities are supplied in (and are continuously utilised) in Nigeria, therefore this qualifies as carrying on business in Nigeria. Section 10(1) and 10(2) are not conjunctive i.e. 10(1) is not a requirement for 10(2). Since the VAT Act makes provisions for taxable persons to render a return of goods and services supplied and purchased, section 10(2) imposes a duty on the recipient to pay VAT (even if it is not charged by the supplier).

On issue 3:
The same effect of a "Reverse Charge" mechanism is achieved by section 10(2) even though "Reverse Charge" is not mentioned in the Act. "Destination Principle" is not applicable under the Nigerian VAT Act but the FHC's previous judgment was not based on the principle.

Takeaway

DC1The judgment again focused its conclusions on the general meaning of "carrying on" rather than providing a contextual definition of "carrying on business in Nigeria".

Also, the requirement to remit VAT has been expanded to include the obligation to self-charge the tax despite the clear wording of the VAT Act placing the obligation to charge VAT on the supplier.

However, this latest decision stands as the valid case law on this issue unless subsequently overturned by the Supreme Court.

Taxpayers affected by the decision should carry out a review of their specific circumstances. Where the facts are similar then an assessment of likely exposure should be made.

The facts of the case in the Gazprom appeal which is still before the Court of Appeal are not exactly the same. In any case the Court of Appeal is not bound by the decisions of another division of the Court of Appeal hence the case may well be decided in favour of the taxpayer.