Court rules that companies should self-charge VAT on imported services

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Introduction

The Federal High Court ("**FHC**") overruled the decision of the Tax Appeal Tribunal ("**TAT**") in *Gazprom Oil & Gas Nig. Ltd vs. Federal Inland Revenue Service ("**FIRS**").*

At the TAT, Gazprom Oil & Gas Nig. Ltd was able to establish that it received consultancy and advisory services from foreign/non- resident companies. On the basis that the services were wholly performed outside Nigeria, the TAT discharged the FIRS re-assessment notices based on Section 10 of the VAT Act ("VATA"). See link to our previous analysis on Section 10 [link]

The TAT held that:

1. As no activity was carried out in Nigeria (in providing the service), the non-resident company did not carry on business in Nigeria;
2. Only a non-resident carrying on business in Nigeria must register with the FIRS and charge VAT on its invoice;
3. The local recipient of the service only has a duty to remit VAT when it is included in the invoice.

The Federal High Court decision

The FHC identified the sole issue for determination as "*whether the supply of goods and services made by a non-resident company to a Nigerian company or person should be subject to VAT*". The FHC applied S.10(1) & (2) and 12 of VATA in reaching a judgment.

The FHC held that based on S.10(1) of the VATA, once it was established that the non-resident company had a subsisting contract with a Nigerian company, it became mandatory for the non-resident company to register with the FIRS (using the address of the Nigerian company).

The FHC further held that a non-resident company will be deemed to be carrying on business in Nigeria if it is providing services to a Nigerian company on an agreed consideration; and it was irrelevant that the non-resident company did not have a physical presence in Nigeria.

In reaching this conclusion, the FHC relied on *Edicomsa International Inc & Associates vs Citec International Estates Limited (2006)* which established that 'to carry on business' means to conduct, prosecute or continue a particular vocation or business as a continuous operation or permanent occupation (the repetition of acts may be sufficient)". The judgment disregards the phrase "in Nigeria" under S.10(1).

The FHC also held that in the event that VAT is not included, the Nigerian company will be liable to pay VAT on the basis of S.12(1) VATA, as the consumer of the service.

Takeaway

The FHC's decision follows similar reasoning of an earlier decision of the same court in *Vodacom Business Nigeria Limited v FIRS (decided 19 December 2017)*. By doing so, the Nigerian courts have given validity to the 'destination principle' in interpreting the VATA even though it is not a concept that is defined in the law in its currently form.

The decision also relied on *Phoenix Motors Ltd vs National Provident Fund Management Board (1993)* to give a broad interpretation outside the words of the VATA to capture more revenue for the government.

It is advisable for Nigerian companies receiving services from non-resident companies to assess their transactions to determine how they will treat any related VAT going forward. Companies should make the assessments based on their risk appetite as there is still scope to challenge the conclusions from the judgment.

It is also unclear how the FIRS or even the FHC will apply the judgment to exported services which should be the exact opposite of this. Based on the logic in the judgment, Nigerian companies should not charge VAT when they provide services to non-residents irrespective of the location of the service.

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