Tax Appeal Tribunal (TAT) issues controversial judgment on exported services

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Background

Allan Gray International (AGI) is a South African company with an investment fund, "Africa Fund", which it markets across Africa. AGI contracted Allan Gray Investment Management Nigeria Limited (AGIMN or AG Nigeria), a Nigerian company, to help promote its Africa Fund in Nigeria.

Under the arrangement, AG Nigeria provides advertisement and marketing support services in Nigeria. On this basis, AG Nigeria considered its services as exported to AGI, and hence exempted from value added tax (VAT) in line with Nigerian VAT rules.

In 2017, the Federal Inland Revenue Service (FIRS) issued a VAT assessment to AG Nigeria. The FIRS' argument was essentially that because AG Nigeria did not leave Nigeria to South Africa to perform the services, the services were not exported. AG Nigeria subsequently appealed to the Tax Appeal Tribunal (TAT) in *AGIMN v FIRS TAT/LZ/VAT/019/2018*.

AG Nigeria's case at the TAT

AG Nigeria emphasized that AGI, which is resident in South Africa, was the service recipient.

AG Nigeria also stated that its activities in Nigeria were preparatory and ancillary to AGI's business since it did not sign up customers in Nigeria on behalf of AGI.

Also, AG Nigeria stated that such business structures were commonplace, and that the structure was not artificial or intended to avoid tax in Nigeria.

FIRS' case at the TAT

The FIRS argued that AG Nigeria's service does not qualify as exported. In this regard, they stated that the services were performed "to" prospective Nigerian customers "on behalf of" AGI, so the services were consumed in Nigeria.

The FIRS therefore proposed that AG Nigeria created a permanent establishment (PE) for AGI, as it acted as AGI's dependent agent in Nigeria.

In addition, the FIRS argued that the arrangement was artificial.

The TAT's decision

The TAT held that AG Nigeria's activities were subject to VAT in Nigeria based on the following:

1. The TAT mentioned that the services were performed to Nigerian customers, for and on behalf of AGI.

2. The TAT reasoned that through the agency arrangement, AGI is considered to be carrying on business in Nigeria and therefore the service was not provided to a person outside Nigeria. However, the TAT did not expressly claim that AG Nigeria created a PE for AGI in Nigeria.

3. The TAT mentioned that the basis for charging VAT in cross-border transactions is "where the service was performed and not ..the location of the consumer". Therefore, since AG performed its services in Nigeria, such services were not exported and should be subject to VAT.

Analysis and takeaway

On basis 1 above, the position of the TAT is not logical as it ignores the purpose of the services, which is to increase the sales of the seller. In other words, the seller is the economic consumer of the services, and the sales occur outside Nigeria.

On basis 2, the FIRS wrongly tried to support its position by arguing that AG Nigeria created a PE for AGI. However, PE status is used for determining liability to income tax under the Companies Income Tax Act. This is outside the scope of VAT.

The TAT however appeared to support the FIRS position by arguing that the agency agreement brings AGI into the scope of VAT but did not expressly state that AGI has a PE in Nigeria.

On basis 3, the argument contradicts the principles set by the Court of Appeal in *Vodacom v FIRS*, and by the Federal High Court in *FIRS v Gazprom* to the effect that VAT is chargeable in cross-border transactions where the person receiving the service is resident. It therefore seems that the FIRS would apply two different principles to favour its position (i) 'where the services are received' for services provided by non-residents; and (ii) 'where the service is provided' for services provided to non-residents. This is likely to create a misalignment with international VAT principles and potentially double VAT (both in Nigeria and South Africa, in this case).

If Nigerian service providers have to leave Nigeria for their activity to qualify as exported, the exemption is redundant: the service would already be outside the territorial scope of Nigeria's VAT Act.

Conclusion

The implication of the ruling is that businesses in Nigeria providing services to foreign customers may have to charge VAT, especially where those services enhance the offshore customer's business in Nigeria. Taxpayers should continue to monitor if the ruling will be appealed as, based on the TAT decision, there are more questions than answers.

For a deeper discussion, please contact any member of our **Tax Dispute Resolution team** below or your usual contact within PwC Nigeria:

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