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INSIGHT: Applying VAT to "Imported" Services in Nigeria



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The Court of Appeal in Nigeria recently upheld the decision of the Federal High Court (FHC) in Vodacom v. Federal Inland Revenue Service to the effect that Vodacom Business Nigeria Limited (Vodacom), a Nigerian entity, had the responsibility to ensure that value-added tax (VAT) was charged and remitted on the value of its contract with a nonresident company. The contract was for the transmission of radio signals ("bandwidth capacities").

The Nigerian Federal Inland Revenue Service (FIRS) regarded this transmission as a supply of service for which VAT should be imposed.

VAT is charged and paid on the supply of all goods and services in Nigeria except those specifically exempted by the Value Added Tax Act (VAT Act) . Furthermore, where a nonresident company carries on business in Nigeria, it is required to register with the FIRS and include VAT in its invoices. The Nigerian entity to which the service is supplied is thereafter required to remit the VAT in the currency of the transaction.

The Dispute

Vodacom—a company that provides corporate connectivity and telecommunications services—entered into an agreement with New Skies Satellite (NSS), a nonresident company, for the supply of satellite bandwidth capacities. Bandwidth is the amount of information that can be sent over a connection at one time.

Vodacom contracted with NSS for the use of NSS's satellite to transmit and receive radio signals to and from Vodacom's transponders located in Nigeria, providing Vodacom with the ability to transmit an agreed range of signals using the satellite.

NSS did not include VAT in its invoice, and Vodacom failed to collect and remit the VAT to the FIRS. After auditing Vodacom, the FIRS issued an additional tax assessment for the payment of VAT arising from the transaction. Vodacom objected to the assessment.

The Judgment

The summary of the Court of Appeal's decision is set out below:

- The supply of satellite bandwidth capacities is a "VATable" transaction.

- The issuance of a VAT invoice by a nonresident company is not a condition precedent to the requirement of a Nigerian entity to remit the VAT arising from the transaction. As such, the Nigerian entity retains the obligation to remit the VAT even if the nonresident company fails to issue a VAT invoice.

- The principles of reverse charge and destination principles are implicit in Nigeria's VAT Act.

In arguing the first point on whether the supply of satellite bandwidth capacities by a nonresident company is "VATable," Vodacom argued that for the supply of services to be "VATable," the service should have been physically rendered in Nigeria. The Court of Appeal held that the service was supplied in Nigeria, because although the satellite was located in outer space (that is, outside Nigeria), transmission of the radio signals, referred to as "bandwidth capacities" by the court, to and

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from the satellite was done by Vodacom's transponder situated in Nigeria.

Another major point of contention between the parties on this point was whether NSS could be seen as ''carrying on business'' in Nigeria. Vodacom relied on the provisions of the Companies and Allied Matters Act (CAMA) which states that a company must be registered in Nigeria to be seen as ''carrying on business'' in Nigeria.

The Court of Appeal held that the CAMA and the VAT Act have different purposes. As such, it would be incorrect to use the provisions of the CAMA, which deal with company regulations, to interpret the VAT Act, which deals with taxation. The Court of Appeal further held that the nature of the transaction means that so long as the ''bandwidth capacities'' were supplied and continually utilized in Nigeria, NSS was correctly deemed to be carrying on business in Nigeria.

On the second issue, Vodacom argued that a VAT invoice issued by the nonresident company was required to enable Vodacom to collect and remit the VAT to the FIRS. Vodacom argued that since the nonresident company had failed to issue a VAT invoice, Vodacom had no obligation to remit any VAT. On this point, the Court of Appeal held that VAT was a consumption tax whose burden was borne by the consumer (in this instance, Vodacom).

The Court of Appeal also stated that the duty of Vodacom to collect and remit VAT was independent of the responsibility of the nonresident company to issue a VAT invoice. The Court also made reference to the statutory obligation of Vodacom to render monthly returns of its ''VATable'' transactions and the power of the FIRS to investigate its VAT liability, and stated that whether an invoice was issued by the nonresident company or not, the FIRS would not rely on such invoice but Vodacom's monthly returns to determine Vodacom's VAT liability.

The final issue was whether the FHC had imported foreign principles in determining the issues before it. The Court of Appeal held that, in its opinion, the FHC had not applied a foreign principle, as the first principle of reverse charge simply mirrored the operation of the VAT Act. Regarding the second principle mentioned by the FHC, the destination principle, the Court of Appeal held that this had no impact on the eventual decision of the FHC as the FHC had itself recognized that the destination principle was not binding.

The Court of Appeal further stated that, in any event, once a correct decision was reached by a lower court, as in the current situation, it would not matter that the lower court reached the correct decision by applying a wrong reasoning.

Our Thoughts

Some legal issues which arise from the reasoning of the Court of Appeal in its decision are:

- Did the Court of Appeal misunderstand the nature of the transaction in question when it held that NSS was carrying on business in Nigeria?

- Did the Court of Appeal limit the application of its judgment in its analysis of what constitutes ''supply in Nigeria'' especially in light of the changing technological landscape?

On the first issue, the Court of Appeal correctly explained the general structure of the transaction in setting out the role of the satellite and Vodacom's transponders. However, the FHC and Court of Appeal consistently stated that the service, what it referred to as supply of bandwidth capacity, was supplied and used in Nigeria; and on this basis held that NSS carried on business in Nigeria.

As noted earlier, bandwidth capacity is the maximum amount of signals that can be transmitted over a wireless connection. This means that NSS simply allowed Vodacom to transport a certain amount of radio signals through NSS's satellite. Furthermore, the service cannot be said to be utilized in Nigeria, as the bandwidth capacity, meaning the maximum signal traffic paid for by Vodacom, is vested in the satellite which is in space. Vodacom could have decided to transmit no signal and NSS would still have fulfilled its obligations by making the bandwidth space on its satellite available to Vodacom.

As such, the Court of Appeal's position that the supply of the ''capacity'' to and from the transponders in Nigeria provided the required nexus to impose VAT on the transaction in Nigeria is factually impossible, and the presence of the transponders in Nigeria made no difference to NSS's fulfillment of its contractual obligations to Vodacom.

With regard to the second question, assuming that the Court of Appeal's reasoning that the presence of Vodacom's transponders in Nigeria means that the service was supplied in Nigeria is correct, it begs the question of what happens where there is no physical device such as a transponder in Nigeria. Would this mean that the transaction would be deemed not supplied in Nigeria? With the advent of cloud-based computing, where transactions can be concluded without the need for a physical device, it may be argued that the Court of Appeal decision cannot be applied to impose VAT on such transactions.

How will Nigerian law adapt if the reasoning of the Court of Appeal is still tied to physical devices? For instance, how will the acquisition of access to a data room of a consumer be treated by the Nigerian courts? Such service could be used in Nigeria, but the service effectively ''supplied'' in a non-physical place, that is, the seller's cloud storage. The case does not address this issue.

Essentially, the FIRS seems to be taking positions which are apparently contrary to the provisions of the VAT Act, perhaps in a bid to widen the tax net. In fact, FIRS, in an ongoing case at the Tax Appeal Tribunal, has argued that an exported service which should ordinarily be VAT exempt under the First Schedule to the VAT Act is taxable.

In that case, a Nigerian company marketed the services of its nonresident parent company to consumers resident in Nigeria, for which it invoiced the nonresident parent company without including VAT, on the basis that the service was exported. The FIRS's argument was that the related Nigerian company was merely an agent for its parent company and as such the Nigerian company could not be regarded as exporting the services. Rather, the nonresident parent company was carrying on business in Nigeria through its related Nigerian company and the business was liable to the imposition of VAT.

Planning Points

The Court of Appeal's decision implies that in Nigeria VAT will be charged on transactions relating to the supply of goods and services from a nonresident company in so far as the service is viewed by the courts to have been received in Nigeria.

As such, in the course of doing business, prospective buyers resident in Nigeria and seeking supply of services from a nonresident company should ensure that VAT is included in the nonresident company's invoice, to make sure that such buyers do not bear penalties for failure to deduct and remit VAT. This arises from the Court of Appeal's interpretation that the obligation to remit VAT when it is included in the nonresident company's invoice is separate from the Nigerian company's obligation to collect and remit VAT to the FIRS.

Where the nonresident company fails to include VAT in its invoice, the Nigerian resident buyer which bears the VAT burden from inception should nonetheless account for and remit the VAT to the FIRS.

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