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POTENTIAL VALUE-ADDED TAX LIABILITIES FOR FOREIGN PRIVATE EQUITY FIRMS: THE FALLOUT FROM ALLAN GRAY V. FIRS

INTRODUCTION

The decision of the Tax Appeal Tribunal (TAT) in Allan Gray Investment Management Nigeria Limited v Federal Inland Revenue Service[1] should be of particular interest to private equity firms (which are not resident in Nigeria but which engage agents in Nigeria to provide marketing and business prospecting services) given potential value-added tax ("VAT") liabilities that would arise based on the said decision.

Before the Allan Gray decision, entities (such as Allan Gray) held the view that marketing or prospecting services, provided by Nigerian agents to foreign clients, would qualify as exported services[2] and would therefore be exempt from VAT[3]. Thus, Nigerian VAT-registered agents would not be required to include VAT computations in its invoice to the non-Nigerian company; or to file VAT returns for the relevant financial period, despite receiving payments from foreign clients for the services rendered to the latter.

A SUMMARY OF THE ALLAN GRAY DECISION

The Federal Inland Revenue Service (FIRS) had in 2017 reviewed the audited financial statements and tax computations of Allan Gray Investment Management Nigeria Limited (AGIMNL) for the 2015-2017 accounting years. The FIRS' position was that AGIMNL (a company registered in Nigeria) had been filing nil VAT returns for the said period even though its financial statements showed that it "...had been making taxable income and profits subject to VAT within the period".

AGIMNL rejected the FIRS' position on the basis that it was only contracted to advertise the funds managed by Allan Gray International Limited (AGI), a South African privately owned investment manager. Its position was that AGI had further to a Marketing and Distribution Agreement signed with AGIMNL, appointed it (i.e. AGIMNL) as its exclusive local representative in Nigeria.

[1] This was delivered by the TAT, Lagos Zone in Appeal No. TAT/LZ/VAT/019/2018 on 13 November 2019.
[2] Section 46 of the VAT Act defines exported services as "services performed by a Nigerian resident or a Nigerian company to a person outside Nigeria".
[3]Under Nigerian law, VAT is payable on goods and services consumed by any person, and is ultimately borne by the final consumer of such goods and services. A foreign non-resident person or company that carries on economic activity in Nigeria must register for VAT, using the address of the person with whom it has a subsisting contract for correspondence relating to the tax. However, under the VAT Act, exported services are exempt from VAT.

AGIMNL's mandate was simply to market and distribute AGI's "Africa Fund" to clients resident in Nigeria, on behalf of AGI. On this basis, AGIMNL claimed that
(i)the services provided to AGI are exported services;
(ii)exported services are exempt from VAT; and
(iii)any ambiguity in the VAT Act should be resolved in favour of AGIMNL.

However, the FIRS relied on Section 10 of the VAT Act to argue that AGIMNL's services do not constitute exported services and are not exempt from VAT. The FIRS claimed that AGI conducts business in Nigeria and makes profit therefrom through AGIMNL, since AGIMNL is rendering the services in Nigeria to Nigerian residents on behalf of AGI.

In its decision in an appeal filed by AGIMNL against the FIRS' assessments of VAT liability, the TAT held that AGIMNL was liable to pay the assessed VAT liability. The TAT's decision was based on the view that AGI is effectively carrying on business in Nigeria and generating profit through AGIMNL. Thus, while AGI was not physically present in Nigeria, it was legally present through its agent (i.e. AGIMNL). As the services were performed in Nigeria to Nigerian consumers, the services would not qualify as exported services.

REAL-TIME CONSEQUENCES FOR FOREIGN PE FIRMS

The effect of the Allan Gray decision is that foreign PE firms which engage Nigerian individuals or entities to advertise or prospect for clients or business in Nigeria

REAL-TIME CONSEQUENCES FOR FOREIGN PE FIRMS

The new Finance Act, which makes sweeping reforms to Nigeria's tax laws (including the VAT Act), has provided statutory backing to the TAT's decision in the Allan Gray case. While the Act now defines exported services as a service "rendered within or outside Nigeria by a person resident in Nigeria to a person outside Nigeria", it stipulates that a service provided to the fixed base or permanent establishment of a non-resident person shall not qualify as exported services which are exempt from VAT.

However, we expect that there will be difficulty in determining whether VAT-registered agents engaged by foreign PE firms to provide marketing services in Nigeria, will constitute a fixed base or permanent establishment for the said PR firms. This is because, in the Allan Gray decision, the TAT failed to demonstrate how it arrived at the conclusion that AGIMNL was a fixed base or permanent establishment of AGI, such that AGIMNL was required to charge VAT in its invoices.

[4] Vodacom Business Nig. Ltd v Federal Inland Revenue Service (unreported judgment in Appeal No. TAT/L2/VAT/016/2015)

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Ugonna Ogbuagu

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Contact us at:

4th Floor, Marble House,
1 Kingsway Road, Falomo Ikoyi,
Lagos, Nigeria

Telephone: (+234-1) 4617321-3, 2793367-8, 7406533,

E-mail: lagos@aelex.com

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