

# Nigerian legislation and its shades of gray - Service rendered by Non-residents and Value Added Tax (1)

In the last two years and within 7 months apart, two divisions of the Tax Appeal Tribunal (TAT), in Abuja and Lagos, gave conflicting decisions on two cases with similar facts. The underlying issue for consideration was the applicability of Value Added Tax (VAT) is applicable on services rendered by a non-resident<sup>1</sup> to a Nigerian company.

In **Gazprom Oil & Gas Nig. Ltd (Gazprom) v Federal Inland Revenue Service (FIRS)**, Abuja TAT held that a non-resident company (NRC), which rendered service to a Nigerian company exclusively outside Nigeria was not obliged to register for VAT pursuant to Section 10 of the Value Added Tax Act (VATA). The NRC was therefore under no obligation to charge VAT on its invoice. Consequently, Abuja TAT held that since VAT was not charged, the Nigerian company had no obligation to deduct VAT as the provision of Section 10(2) of VATA, which mandates deduction of VAT (from payment to a non-resident service provider), was not triggered.

Conversely, in **Vodacom Business Nig. Ltd (Vodacom) v FIRS**, TAT sitting in Lagos relied on Section 2, the charging provision that imposes VAT on supply of goods and services, in reaching its conclusion. Lagos TAT held that VAT applied to supply of bandwidth by an offshore entity with no presence in Nigeria. Thus, the Nigerian recipient of the service was obliged to deduct and remit VAT to the tax authorities in the currency of the transaction.

The representatives of Vodacom drew Lagos TAT's attention to the decision in Gazprom to persuade the Tribunal to reach the same conclusion. Lagos TAT however stated that the Gazprom case was held in error (per incuriam) as Section 10 (which formed the basis of Gazprom's decision) is an administrative provision which does not impose VAT.

These conflicting decisions show the inadequacies and ambiguities in VATA



regarding the taxation of "imported service". In this regard, it becomes imperative to examine the legislative provisions critically.

Generally, substantive tax laws have three major ingredients:

- Charging provisions – these are provisions that impose tax
- Ambit – this relates to eligible persons and transactions
- Administrative provisions – these are provisions relating to collection and dispute resolution procedures

VATA, which imposes a consumption tax on end user, is not any different from most tax laws in this respect. The relevant ingredients of VATA are further assessed below:

- Charging provisions (is there a tax?):** VATA, via its charging provision (Section 1) imposes VAT.
- Ambit (on whom/ what does the tax apply?):** Sections 2 to 5 of VATA impose the tax on "supply of all goods and service" except those set out in its Third Schedule. The exemptions are quite restrictive, listing out specific goods and services.
- Administrative provisions (how is the tax collected?):** The administrative provisions

of VATA set out the modalities for giving effect to the "charging provisions" and the "ambit". Essentially, the administrative provisions will only be triggered if the person/ transaction falls within the ambit of the law. Where the person or underlying transaction does not fall within the ambit of the law, the administrative requirements are superfluous.

The administrative provisions cover registration, invoicing, collection and remittance requirements etc. Sections under this head in VATA include Section 10.

The wide charging provision/ ambit and restrictive nature of the exceptions under VATA connote that Nigerian VAT, if interpreted strictly, applies to sale of all goods and services. If given this strict interpretation, Nigerian VAT will apply regardless of whether the sale is carried out within or outside Nigeria or between Nigerians and non-Nigerians, provided they do not fall within the listed exceptions in the Third Schedule.

This strict interpretation appears absurd and would most likely be impracticable in view of the territorial nature of tax laws. The most likely interpretation would be that VAT applies on supply of goods and

services which falls under territorial powers of the Nigerian tax authority. This would include transactions with Nigerian supplier or recipient (subject to relevant exceptions). Considering that tax is levied on the end user, it is arguable that Nigerian VAT applies where the person that enjoys the service (obliged to bear the responsibility) is resident in Nigeria.

In technical terms, this principle could be subsumed under the 'destination principle', which stipulates that VAT should be charged where the person enjoying the benefit resides. Although, not expressly stated in our laws, the destination principle is one of the globally acceptable bases of charging VAT.

The above principle therefore, raises the underpinning issue of whether Nigerians are bound to pay VAT on services rendered to them by non-Nigerians, outside Nigeria. This question becomes more pertinent because by implication (based on the provisions of Sections 5 and 6, which describe how to ascertain underlying value of goods), VAT applies to imported goods. On the other hand, "imported services" are not expressly listed as falling within the ambit of VATA. This is because other than

the definition of "imported service" ("service rendered in Nigeria by a non-resident person to a person inside Nigeria"), there is no other reference to the term within the entire legislation. In effect, it is arguable that the definition is inconsequential and does not serve any purpose in VATA.

Please look out for the concluding part(s) of this article in subsequent TaxTake publications in The Guardian newspaper.

<sup>1</sup> A person or entity with no physical presence in Nigeria

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