

## Nigerian legislation and its shades of gray - Service rendered by Non-residents and Value Added Tax (2)

### Analysis of Gazprom:

As earlier indicated, the conclusion reached in Gazprom was premised on the provision of Section 10 of VATA regarding registration by a non-resident. Understandably, Section 10(2) of VATA mandates a non-resident that "carries on business in Nigeria" to register for VAT. However, this requirement falls under the administrative provision of VATA. This section, by no stretch of the imagination, imposes VAT on transactions.

The fact that Section 31 of VATA makes it an offence for an unregistered person to issue a VAT invoice does not change this analysis. This is more so as Section 31 goes further to empower "any one authorized" to issue a VAT invoice. Thus, where a non-resident does not "carry on business in Nigeria" and consequently not obliged to register for VAT, such non-resident is still obliged to charge VAT in line with Section 15 of VATA, where the person enters into transactions subject to Nigerian VAT.

Under Section 15 of VATA, VAT invoice may be issued by a "taxable person" (any person) that has made a "supply" (any transaction for a consideration). Therefore, it is arguable that a non-resident is "authorized" to issue a VAT invoice irrespective of the registration requirement, provided it satisfies the other condition for imposition of VAT.

Another consideration of the Abuja TAT in reaching its decision in Gazprom was that VAT is not due unless and until it is charged, based on Section 10(2). While this appears to be valid argument, it is not fool proof in view of the provision of Section 5(1)(a) of VATA.

According to Section 5(1) (a), the value of taxable goods (on which VAT is charged), shall be "deemed to be the amount which with the addition of the tax chargeable is equal to the consideration". In essence, where VAT is not included separately, it is presumed that the contract sum is inclusive of VAT. Therefore,



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irrespective of the issuance of VAT invoice, the Nigerian party is obliged to deduct VAT and remit appropriately.

### Analysis of Vodacom:

Lagos TAT, in Vodacom case on the other hand, relied on the charging provision, which imposes VAT on the underlying transaction. It distinguished (in my opinion, rightly so) Section 10 (an administrative provision) from Section 2 (a charging provision) and concluded that supply of bandwidth by a company outside Nigeria (to a Nigerian company) falls within the ambit of VATA. The Tribunal held that the destination principle supported the provision of the VATA.

While the decision addressed transactions chargeable to VAT, it failed to address a critical issue raised in Gazprom case on whether non-issuance of a VAT invoice is a condition precedent to

payment/remittance of VAT.

Overall, until a court of higher jurisdiction affirms either decision, both are unfortunately valid under our jurisdiction. It thus leaves taxpayers in a dilemma on the path to take. However, this situation could have been avoided if our law was unambiguous.

Nonetheless, tax authorities may rely on some practical approaches to resolve attendant issues. These includes, generating a generic Tax Identification Number (TIN), where TIN is considered absolutely necessary for the issuance of a valid VAT invoice. FIRS could allocate a generic TIN to NRCs that do not have tax presence, warranting tax registration, in Nigeria. This will enable such NRCs quote the generic TIN when issuing a VAT invoice which in turn mandates remittance. This would be similar to generic

TIN created to ensure bulk remittance of withholding tax (by the payer to avoid sanctions) where the recipient has no TIN

In the long run, an amendment to VATA is required, covering amongst others, inclusion of "imported service" within its ambit. The conclusion in the cases might have been different if "imported service" were included in Section 2-5 of VATA. This is because the definition envisaged that services will only be considered "imported" with attendant taxes where a non-resident renders the service in Nigeria. In the same vein, the link between the administrative and charging provisions of VATA may be clearly set out to determine the import of each provision.

The above and many others should be given due consideration when implementing (with attendant

amendments to the laws) the National Tax Policy which identifies the promotion of indirect tax as one of its core focus.

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