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# Applicability of VAT to Services Provided Outside Nigeria by a Non-resident Company

**Newsletter**

**The Tax Appeal Tribunal (TAT or "the Tribunal") sitting in Lagos recently ruled in favour of the Federal Inland Revenue Service (FIRS or "the Respondent") in its case with Vodacom Business Nigeria Limited (Vodacom or "the Appellant"). The dispute was over the applicability of value added tax (VAT) to satellite-network bandwidth capacities provided to the Appellant outside Nigeria by New Skies Satellites (NSS), a Netherlands-based non-resident company (NRC).**

## Background

In Nigeria, VAT is chargeable on the supply of goods and services, other than those exempted under the VAT Act, Cap. V1, Laws of the Federation of Nigeria, 2004 (as amended by the VAT (Amendment) Act, 2007).

Section 10 of the VAT Act requires an NRC carrying on business in Nigeria to register with the FIRS using the address of the Nigerian party with which it has a subsisting contract (i.e. its Nigerian customer). The NRC is also required to include VAT on the invoices it issues to the Nigerian customer. This VAT is to be remitted directly by the Nigerian customer to the FIRS, in the currency of the transaction.

## Facts and Judgment

NSS entered into a contract with Vodacom for the supply of bandwidth capacities for the Appellant's use in Nigeria. The bandwidth capacities were transmitted by the NRC to its satellite in orbit and received in Nigeria by Vodacom via its earth-based satellite. NSS did not charge VAT on its invoice to Vodacom for the service rendered. Consequently, the latter did not remit VAT to the FIRS on the transaction.

The FIRS assessed Vodacom to VAT on this transaction. The company objected to the assessment several times, but the FIRS refused to amend its position. Consequently, Vodacom filed an appeal at the Tribunal to determine whether the transaction between it (Vodacom) and NSS is a VATable transaction.

Vodacom argued that NSS' supply of bandwidth was a service provided outside Nigeria; and that based on the VAT Act, services provided by an NRC would only qualify as "imported services" if they are rendered in Nigeria. Thus, the Appellant's position was that the VAT Act does not apply to the transaction, given that NSS provided its services outside Nigeria.

The Appellant further argued that it did not contradict section 10 of the VAT Act, since its receipt of a tax invoice from NSS is a precondition for withholding and remitting the VAT due on the transaction to the FIRS. However, NSS could not issue a tax invoice because it did not carry on business in Nigeria and was not registered with the FIRS. This argument was based on the TAT Abuja Zone's decision in the case between Gazprom Oil & Gas Nigeria Limited and the FIRS[1] ("the Gazprom case").

The FIRS, on its own part, relied on the destination principle under the International VAT/GST Guidelines. Based on the principle, the FIRS argued that the services provided by NSS were effectively imported into Nigeria, because the bandwidth capacities were received in Nigeria through earth-based stations set up in Nigeria by Vodacom to receive them.

[1]The TAT Abuja zone ruled that Gazprom would only have the obligation to withhold and remit VAT to the FIRS if the NRC is, among other things, registered for VAT purpose in Nigeria and issues its customer with a tax invoice.

On the strength of the above argument, the FIRS then asserted that the "imported service" enjoyed by Vodacom is liable to Nigerian VAT, since services supplied in Nigeria fall within the purview of Section 2 to the Act, and "bandwidth capacities" are not on the list of VAT-exempt services (in the First Schedule to the VAT Act).

The Respondent also contended that, by having a contract with the Appellant, NSS meets the requirement of doing business in Nigeria. However, according to the FIRS, the NRC's failure to register for VAT purpose in Nigeria and issue a tax invoice, does not preclude the Appellant from fulfilling its obligation under Section 10 of the VAT Act, to withhold and remit the VAT due on the transaction. The FIRS supported its position with a paragraph in the contract between Vodacom and NSS that makes the Nigerian company responsible for any tax that may be assessed by local authorities.

After considering the arguments of both parties, the TAT held that:

- Section 2 of the VAT Act imposes tax on the supply of all services, other than those exempted under the First Schedule to the VAT Act. Given that bandwidth capacities are not exempted under the Schedule, the services provided by the NRC are liable to VAT in Nigeria.

**Our view is that the primary matter in dispute, which was whether a service provided offshore by an NRC should be liable to VAT in Nigeria, was not addressed by the Tribunal. .**

- Section 10 of the VAT Act is merely an administrative provision, not a precondition for the imposition of VAT on a transaction between a Nigerian company and an NRC. Thus, its provisions do not need to be fulfilled for Section 2 to apply.

- The Appellant was right in arguing that the NRC did not have a presence in Nigeria and was, therefore, not bound by the VAT Act. However, it is the Appellant, rather than the NRC, that is being taxed, and that has the obligation to pay the VAT due on the transaction.

- The Appellant should have ensured that the NRC registered for VAT in Nigeria and issued tax invoices, to facilitate the Appellant's fulfilment of its VAT obligations.

- The destination principle, though not binding on the Tribunal, is a useful guide to apply in resolving the case at hand. The principle should, therefore, be applied to the transaction to avoid a "classic case of double non-taxation".

## KPMG Comments

Our view is that the primary matter in dispute, which was whether a service provided offshore by an NRC should be liable to VAT in Nigeria, was not addressed by the Tribunal. Although the Tribunal's reference to the destination principle (relied upon by the FIRS) suggests that it is cognizant of the primary issue at hand, it did not show if and how it relied on it to reach its decision.

Another issue that the TAT might have addressed better, is the import of Section 10 of the VAT Act. Unlike the TAT Abuja Zone in the Gazprom case, the TAT Lagos Zone did not critically analyse the provisions of the section. Its position that the section is merely an administrative provision that imposes no duty on the Appellant to pay tax, is therefore debatable.

The TAT's position that the destination principle is a useful guide to apply in resolving the case at hand is also of interest. By taking this view, the Tribunal has inadvertently validated the FIRS's argument that a service qualifies as "imported service" if it is received in Nigeria, regardless of where it is supplied/rendered by the non-resident service provider. It has however failed to reconcile this conclusion with the definition of "imported service" in Section 46 of the VAT Act as *"service rendered in Nigeria by a non-resident person to a person inside Nigeria"* (emphasis ours).

In conclusion, the Tribunal missed an excellent opportunity to address the question of what constitutes an imported service, especially in the context of the definition provided in Section 46 of the VAT Act. Furthermore, its conclusion on the relevance of Section 10 is in sharp contrast to that of the TAT Abuja zone in the Gazprom case. In the circumstance, we will have to wait for the ruling of a higher court on the subject matter. Meanwhile, taxpayers with similar arrangements would be well-advised to start reviewing their transactions to evaluate their potential exposure.




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