IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
SITTING AT LAGOS

TAT/LZ/VAT/016/2015

Between

Vodacom Business Nig. Ltd Appellant

And

Federal Inland Revenue Service (FIRS) Respondent

Judgment

Issue for Determination

Section 2 of the Value Added Tax Act (VAT Act) renders vatable all transactions in goods or services backed by consideration. The First Schedule to the Act is a list of exemptions. New Skies Satellites (NSS), a Netherlands-based company, supplied satellite-network bandwidth capacities to the Appellant for use in Nigeria. The Appellant paid for the bandwidth. Bandwidth capacities are not exempted.

Is the transaction between NSS and the Appellant a vatable transaction?

Introduction

The Appellant's position is that because the bandwidth was not supplied inside Nigeria, the VAT Act cannot apply. The Appellant contends that NSS's supply of the bandwidth to the Appellant was a service rendered outside Nigeria. The Appellant concludes that since the VAT Act does not apply to services rendered outside Nigeria, it cannot apply to its transaction with NSS.

The Respondent's position is that because the bandwidth capacities were received in Nigeria through earth-based stations set up in Nigeria by the Appellant precisely to receive them, they were effectively imported into Nigeria. The Respondent cited the destination principle under the International VAT/GST Guidelines, whereby the supply of bandwidth capacities is deemed to have been done in Nigeria. According to the Respondent, this brings the supply within the sphere of vatable imported services.

Facts and Procedural History

NSS entered into a contract with the Appellant for the supply of bandwidth capacities for the Appellant's use in Nigeria. The Appellant did not remit VAT on the bandwidth after NSS issued an invoice to the Appellant for the transaction. The Respondent assessed the transaction to VAT and issued a re-assessment notice with Reference No: LTO/ND/LI/GA/VAT007/TISED/ADD/02.

The Appellant objected several times to the assessment, pointing out that the bandwidth capacities were not supplied in Nigeria but from the Netherlands. The Respondent rejected the Appellant's objections.

The Appellant contended that the transaction was not vatable because NSS is a non-resident company and has no physical presence in Nigeria. It pointed out that transmission of the bandwidth capacities to and fro the satellite is done by the Appellant's transponder located in Nigeria. The Appellant concluded that a satellite in an orbit cannot constitute a fixed base for NSS in Nigeria as it forms no part of Nigeria under international law.

Repeatedly, the Respondent maintained the invalidity of the Appellant's objections and the validity of its VAT assessment. Then the Appellant added a fresh basis to its objection: under its contract with NSS, it fell to the Appellant to provide the earth-based stations, antenna facilities, and equipment for transmitting and receiving signals from the satellite.

Parties' Positions

The Appellant argues that since the bandwidth capacities were not supplied inside Nigeria, they were not vatable.

The Appellant relies on sections 10 and 46, VAT Act and section 12, Value Added Tax (Amendment) Act No. 12, 2007 in arguing that the VAT Act only applies to imported services. The Appellant argues that to qualify as an imported service, the service must be rendered *in* Nigeria by a non-resident company. According to the Appellant, since the bandwidth capacities were not supplied in Nigeria, they are not imported services, thus the VAT Act cannot apply.

Relying on *Gazprom Oil & Gas Ltd v FIRS*,[1] the Appellant submits that it did not contravene section 10, VAT Act because NSS does not carry on business in Nigeria and is not registered with the Respondent for VAT purposes, and thus cannot issue tax invoice. The Appellant concludes that since it was not issued a tax invoice by NSS, no tax could be remitted by them. It pointed out that this is so because under section 10, the obligation to remit tax arises from the issuance of a tax invoice.

The Respondent counters that since the bandwidth capacities could only be utilized once received at an earth-based station in Nigeria, they qualify as imported services.

The Respondent cites sections 2, 3, and 46, and the 1st Schedule to the VAT Act for the proposition that any good or service supplied in Nigeria is liable to VAT.

The Respondent points out that the 1st Schedule to the VAT Act lists goods and services exempt from VAT, and bandwidth capacities are not on the list. The Respondent also points out that receiving bandwidth capacities from the Netherlands through earth-based stations in Nigeria amounts to supply of bandwidth capacities and qualifies the transaction as an imported service.

On the requirement of doing business in Nigeria, the Respondent states that NSS meets this criterion by having a contract with the Appellant.

The Respondent added that section 10(2), VAT Act places the burden of remitting VAT on the person to whom goods or services are supplied. The Respondent submits that it is the Appellant who owes the duty to remit tax, not NSS, and this duty is not dependent on NSS's registration with the Respondent or NSS's duty to issue tax invoice.

The Respondent buttressed its position by referring to paragraph 3, Appendix B of the contract of service between NSS and the Appellant. Paragraph 3 makes the Appellant solely responsible for any tax which may be assessed by local authorities. The Respondent argues that this provision recognizes that the service contract may be subject to local tax laws such as the VAT Act.

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[1] Unreported Judgment in Suit No:TAT/ABJ/APP/030/2014, Delivered on 10 June, 2015 at the Tax Appeal Tribunal, Abuja Zone.

The Respondent concludes that *Gazprom Oil & Gas Ltd v FIRS (supra)* is a good persuasive authority for holding that the destination principle under the International VAT/GST Guidelines applies to transactions such as this.

Analysis

Can the Respondent charge VAT on the bandwidth capacities received by the Appellant under its contract with NSS?

The VAT Act specifies the requirements and the circumstances enabling the Respondent to charge a transaction to VAT. Let us highlight the relevant sections to help address the issue in this appeal. The sections are: sections 2, 3, and 46 of the VAT Act.

Section 2 of the VAT Act reads:

> The tax shall be charged and payable on the *supply of all goods and services* (in this Act referred to as "taxable goods and services") other than those goods and services listed in the First Schedule to this Act. (our italics for emphasis)

The 1st Schedule to the VAT Act lists goods (Part I) and services (Part II) exempted from VAT. That list does not include bandwidth capacities, the subject matter of the case.

In determining this Appeal, the question is *what amounts to the supply of services under the VAT Act?* This is important because by section 2 of the VAT Act, VAT is chargeable on the supply of all services. Section 46 interprets the phrase "supply of services" to mean "any service provided for a consideration."

Section 2 is the charging clause. It is headed "taxable goods and services." It identifies vatable goods and services. It simply requires the *supply* of all goods and services to be taxed. Section 2 imposes VAT on the *supply* of services. *Supply* refers to transactions (section 46).

But what if the services were supplied by a non-resident company?

The Appellant cites section 10(1), VAT Act requiring a non-resident company that carries on business *in* Nigeria to register for VAT, using the address of the local person with whom it has subsisting contract. The Appellant submits that under section 10 VAT Act, carrying on business in Nigeria is a condition

precedent for VAT registration and since NSS does not carry on business in Nigeria, it did not register for VAT. The Appellant asserts that without such registration, NSS cannot issue VAT invoice and without a VAT invoice, it is impossible to remit VAT. The Appellant cites the *Gazprom* case to buttress this proposition.

In *Gazprom*, the Respondent assessed Gazprom to VAT for advisory services a non-resident company rendered to it. Gazprom objected to the assessment, arguing that the advisory and research services were fully performed by the non-resident company outside Nigeria. It argued that the non-resident company had no physical presence in Nigeria, hence it was not required to register with the Respondent for tax purposes and thus, never charged VAT on any of its invoices to Gazprom. The Tribunal held:

1. The section 10 criteria must be fulfilled consecutively before the section can apply.
2. A VAT invoice from the non-resident company was a condition precedent to VAT remittance.

Section 10 of the VAT Act imposes no duty on the Appellant to pay tax so the Appellant's plea of non-contravention is otiose. Section 10 does not address vatability. It is an *administrative provision* dealing with VAT registration for foreign companies that carry on business in Nigeria. It does not lay down conditions precedent for substantive vatability. Its provisions need not be fulfilled for section 2 to be activated.

The emphasis by the parties, especially the Appellant, on section 10 was exaggerated and misplaced. The *Gazprom* emphasis on section 10 was made *per incuriam* because the charging clause was not highlighted before the Tribunal. Thus *Gazprom* cannot guide us. In *Gazprom* as in this case, the parties threw much darkness on this subject.

The Appellant also asserted that NSS is a non-resident company that has no presence in Nigeria and thus cannot be bound by the VAT Act because laws are territorial. The Appellant is right about that, but NSS is not being taxed. The issue concerned is the *transaction*, the taxable person is the *Appellant* that is in Nigeria. NSS being a foreign company over which neither the Respondent nor this tribunal has jurisdiction, it behooved the Appellant to ensure NSS's section 10 registration to facilitate the Appellant's fulfillment of its VAT obligations.

The applicability of the destination principle under the International VAT/GST Guidelines raised by the Respondent also came up for determination in the *Gazprom* case. The tribunal held that section 10, VAT Act did contemplate the applicability of the destination principle but it could not be applied to the circumstances of the case before it. While not binding on us, that destination principle is a helpful guide in resolving this case. The destination principle provides that for consumption-tax purposes, internationally traded services and intangibles should be taxed according to the rules of the jurisdiction of consumption. VAT is a consumption tax. Bandwidth is intangible. The VAT Act prevails.

Municipal tax laws make no room for a resident business to conduct tax-free transactions. In this case, if not VAT, what? If not Vodacom, who? If not now, when? If not here, where? Omission to tax the Appellant on this transaction would result in a classic case of double non-taxation.

Conclusion

We dismiss the appeal. The Appellant's transaction for the supply of bandwidth capacities is thus chargeable. We uphold the additional VAT re-assessment.

Legal Representation:

Bidemi Daniel Olumide Esq. with Ms Oluwakemi Oyinloye and Paul Okonji Esq. for the Appellant
Mrs Nneka Ezeadili for the Respondent.

DATED THIS 12TH DAY OF FEBRUARY 2016

KAYODE SOFOLA, SAN (Chairman)

CATHERINE A. AJAYI (MRS)
Commissioner

D. HABILA GAPSISO
Commissioner

MUSTAPA BULU IBRAHIM
Commissioner

CHINUA ASUZU
Commissioner