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FEDERAL HIGH COURT JUDGEMENT ON GAZPROM V. FIRS

Background

The Federal High Court has set aside the Tax Appeal Tribunal (TAT) ruling of 2012 exonerating Gazprom Oil & Gas Nigeria Limited (Gazprom) from paying VAT on services supplied to it by non-resident entities. Gazprom had appealed to the TAT against VAT assessments served on it by the Federal Inland Revenue Service (FIRS), resulting from payments by Gazprom to some non-resident consultants.

> *"...the Tribunal rightly upheld the Respondent's appeal to the effect that the Respondent is not liable to self-assess and remit VAT to the Appellant in respect of services received from outside Nigeria..."* - Gazprom

Click to see our newsletter of June 2015 on the ruling of the TAT.

The Judgement

FIRS's brief of argument was for the FHC to determine

"Whether in the light of the provisions of the Value Added Tax Act, the Honourable Tax Appeal Tribunal was right in holding that the Respondent ought not to have been held liable to pay VAT on the services it purchased/consumed from non-resident companies"

Gazprom on its part requested that the Court determines:

"Whether upon a proper construction of the VAT Act, the Tribunal rightly upheld the Respondent's appeal to the effect that the Respondent is not liable to self-assess and remit VAT to the Appellant in respect of services received from outside Nigeria and provided by non-resident companies that were not carrying on business in Nigeria"

In giving its judgment, the FHC concluded that the issue for determination is:

"Whether the supply of goods and services made by a non-resident company to a Nigerian company or person should be subject to VAT"

The judgment referred to Section 10 (1) and (2) of the VAT Act, which were variously quoted in the arguments of the parties and the TAT and confirms that a non-resident company has obligation to register for VAT even when it has no permanent or physical presence in Nigeria. The Judge opined that the existence of a subsisting contract automatically places an obligation on the non-resident entity to register for VAT with FIRS using the address of the Nigerian entity since a contract suggests that a service is being rendered and enjoyed simultaneously in Nigeria.

The judge also held that Section 10 (2) must also be read with the understanding that even though the non-resident is obliged to include VAT on its invoice, the ultimate responsibility is that of remitting the tax, which is placed on the Nigerian recipient of the services. This decision is also hinged on the provision of Section 12 which places the ultimate burden of the tax on the ultimate consumer of taxable goods and services.

In conclusion, the decision of the FHC relied on the Mischief Rule (in the interpretation of tax statutes) which interprets tax statute by trying to ascertain the intention of legislature at the time of making the law. In this context, the intention of the VAT Act is for revenue generation from goods and services supplied, therefore, relying on the non-inclusion of VAT on the invoice issued by a non-resident company as a basis of tax avoidance defeats the purpose of the legislation.

The FHC also relied on the Court of Appeal Judgement in the case of Phoenix Motors Limited V. National Provident fund Management Board (1993) 1 NWLR pt. 272 p. 718 where it was stated that If a statute is revenue based or revenue oriented, It will be part of a sound public policy for a court of law to construe the provisions of the statute liberally in favour of revenue or in favour of deriving revenue by government.

> **"....Nigerian companies must be proactive in recognising that virtually all services purchased from abroad are liable to VAT in Nigeria....."**

Our Comments

This judgment tends to agree with another judgment by the Lagos division of the same court, which also revolves around the applicability of VAT on payments to non-resident entities. The Abuja FHC Judgement does not come as a surprise, in view of the economic implications a contrary judgement would have on Nigeria. Also, a contrary judgment would also depart sharply from global best practice regarding the principles of operating a VAT system, including the principle of charging VAT on international transactions as promoted by the Organisation for Economic Co-operation and Development (OECD).

While a further appeal of this judgment to the Court of Appeal is not unlikely, Nigerian companies must be proactive in recognising that virtually all services purchased from abroad are liable to VAT in Nigeria. Until this judgment is upturned, Nigerian companies have an obligation to self-charge and remit the VAT to FIRS in due time.

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