LITIGATION UPDATE

APRIL & MAY, 2018

ADVOCAAT
LAW PRACTICE

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APRIL 2018

IMPORTED GOODS AND SERVICES ARE SUBJECT TO TAX IN NIGERIA:

Appeal No.: FHC/L/4A/2016 – VODACOM BUSINESS NIGERIA LIMITED V. FEDERAL INLAND REVENUE SERVICE (Unreported)

Background

Value Added Tax is regulated by the Value Added Tax Act 1993 and the Value Added Tax (Amendment) Act 2007 and is a tax charged and payable on the supply of all goods and services which the Act refers to as "taxable goods and services". Any individual, corporation sole, group, body corporate or organization that consumes buys, procures or imports taxable goods or services is liable to pay the tax. The rate of value added tax is usually computed at the rate of 5% on the value of all taxable goods and services.

It must be borne in mind that not all goods and services are chargeable under the Act as clearly provided under the First Schedule to the Act. Thus the following are exempted goods: medical and pharmaceutical products, Basic food items, Books and educational materials, Baby products, Fertilizer, locally produced agricultural and veterinary medicine, farming machinery and farming transportation equipment, All Exports, Plant and machinery imported for use in the Export Processing Zone, Plant, machinery and equipment purchased for utilization of gas in downstream petroleum operations, Tractors, ploughs and agricultural equipment and implements purchased for agricultural purposes.

Similarly, these services are exempted from the payment of VAT: Medical services, Services rendered by community banks, peoples Banks and Mortgage Bank institutions, Plays and performances conducted by educational institutions as part of learning and All Export services

This above position has now been further reinforced by the decision in the recent case of **Vodacom v. Federal Inland Revenue Service,** where the Federal High Court sitting on appeal from the Tax Appeal Tribunal held that held that the supply of satellite network bandwidth capacities by a non-resident company to a Nigerian company for a consideration is liable to Value Added Tax (VAT), in line with the provisions of Section 2 of the VAT.

Brief Facts

Vodacom Business Nigeria (Vodacom) executed a contract with New Skies Satellites (NSS), a non-Nigerian company for the supply of bandwidth capacities for Vodacom's use in Nigeria. The bandwidth was received in Vodacom's base stations in Nigeria. NSS did not register for VAT or incorporate VAT in its invoice to Vodacom.

The Federal Inland Revenue Service (FIRS) issued VAT assessment to Vodacom for the transaction which was challenged by Vodacom on the basis that it had no obligation to remit VAT as the receiver of the service rendered by NSS. Vodacom also maintained that NSS as a non-Nigerian entity was not under any legal obligation to register for VAT in Nigeria based on the provision of the VAT Act. Thus, it posited that VAT liability could not have arisen from the transaction. In consequence to this, Vodacom filed an appeal at the Tax Appeal Tribunal (TAT) to challenge the assessment for VAT by the FIRS but the case was decided in favour of the FIRS where the TAT was of the view that Vodacom had the responsibility to charge and remit VAT on the contract between it and NSS. Dissatisfied with the decision of the Tribunal, Vodacom appealed to the Federal High Court (FHC).

The FHC, in its judgment based on the appeal brought before it, upheld the decision of the TAT. The FHC held that the supply of satellite network bandwidth capacities by a non-resident company to a Nigerian company for a consideration is liable to Value Added Tax (VAT), in line with the provisions of Section 2 of the VAT. The FHC also held that the whole purport of Section 2 of the VAT is to impose a charge on the supply of all goods and services except those goods and services exempted in the First Schedule to the VAT Act.

Commentary

This decision has restated the provisions of the Value Added Tax (Amendment) Act 2007 which provides that value added tax is to be charged and payable on the supply of all goods and services.

The decision further raises a practical issue that Nigerian and non-Nigerian companies ought to concern themselves with as far as doing business in Nigeria is concerned. In the light of this decision, foreign companies and entities seeking to do business in Nigeria should, as a preliminary step avail themselves of the applicable tax laws in Nigeria and their necessary implications to their business and as a precautionary measure be familiar with the various tax issues arising therefrom or risk being confronted with similar hitches along the way.

MAY 2018

ADMINISTRATIVE AGENCIES LACK THE POWERS TO IMPOSE FINES AND PENALTIES WITHOUT RECOURSE TO THE COURTS: - NATIONAL OIL SPILL DETECTION AND RESPONSE AGENCY (NOSDRA) V MOBIL PRODUCING NIGERIA UNLIMITED (EXXONMOBIL) (2018) LPELR-44210 (CA)

Background

Administrative agencies are created to provide certain goods and products, render a certain service, manage public assets or resources, implement laws, regulate certain sectors of the economy and or to advise the Federal or State governments through Ministries and departments. To effectively perform the above duties, these agencies usually combine and exercise all functions of the various branches of government such as the Legislative, Executive and Judicial functions. It is the National Oil Spill and Response Agency's (NOSDRA) recent exercise of its legislative and judicial function in imposing a penalty of N10m (Ten Million Naira) (approximately USD 32,680) that has been the subject of Judicial review.

Brief Facts

NOSDRA imposed a penalty of N10m on ExxonMobil Producing Unlimited (ExxonMobil) for the spillage of oil from its Qua Iboe facility, relying on its powers to do so under the National Oil Spill Detection and Response Agency Act and its attendant regulations. The agency instituted an action at the Federal High Court (FHC) in Uyo Akwa Ibom State for the recovery of the said penalty. In its defence, ExxonMobil canvassed that it took all the necessary steps as provided under the NOSDRA Act for the remediation of the spill affected areas. ExxonMobil further argued that NOSDRA being an administrative agency, lacked the powers under the NOSDRA Act to impose fines/penalties. The FHC being the Court of 1st instance for such matters, granted judgment in favour of ExxonMobil stating that the administrative agency acted ultra vires to its powers under the NOSDRA Act as such powers are vested in the Courts.
Dissatisfied with the FHC's Judgment, the Agency appealed to the Court of Appeal (Calabar Division) where the Justices of the Court of Appeal upheld the decision of the lower Court. They held that penalties or fines are imposed as punishment for an offence or violation of the law and the power as well as competence to establish that an offence has been committed belongs to the courts.

Commentary

This landmark decision has the propensity to open the floodgates particularly in relation to the nascent electricity sector and the telecommunications sector as sector participants may challenge the powers of the regulatory agencies of these sectors to impose fines and or penalties on erring sector participants. Although, a further appeal to the Supreme Court will give finality to this issue, this remains the current law on this subject.

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