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TAT rules on the interpretation of final and conclusive assessment and other Matters.

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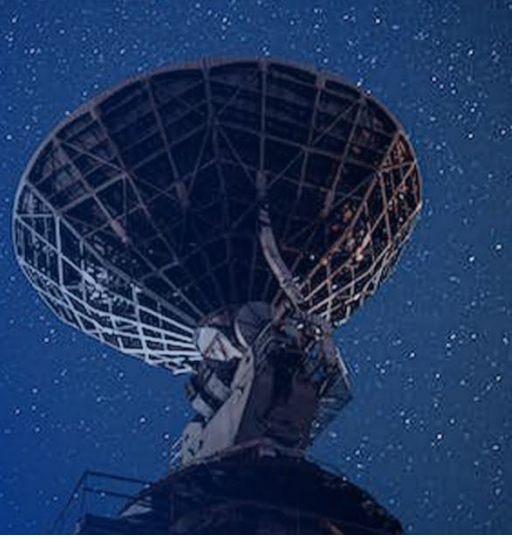


The Lagos zone of the Tax Appeal Tribunal (TAT) recently issued a significant ruling in the case involving *MTN Nigeria Communications Plc (MTN or "the Company" or "the Appellant")* and *Federal Inland Revenue Service (FIRS or "the Respondent")*. The TAT has ruled that interest and penalty should not apply to additional assessments that the taxpayer has validly objected to within the stipulated statutory period. However, the TAT maintains its position that VAT will apply if services are consumed in Nigeria, irrespective of where the provider is located.

Background of the Case

On 10 May 2018, the Office of the Attorney General of the Federation (OAGF) issued a report on its investigation into MTN's Forms A and M transactions, covering 2007 to 2017. In its revised report of 20 August 2018, the OAGF alleged that the Company had outstanding liabilities in respect of import duty and Value Added Tax (VAT) amounting to ₦242.2 Billion (Two Hundred and Forty-Two Billion, Two Hundred Million Naira) (Form M -Visible transactions) while the liabilities relating to VAT and Withholding Tax (WHT) amounted to $1.284 Billion (One Billion, Two Hundred and Eighty-Four Million Dollars) (Form A-Invisible transactions).

In mid-2020, the Respondent informed the Appellant that it had received the report from the OAGF in respect of the Appellant's alleged liability to VAT and WHT. The Appellant, together with its tax consultants, held series of meetings with the Respondents to resolve the tax dispute. The Respondent subsequently issued a reassessment but the Company objected to it. However, in the report issued further to the Appellant's objection, the principal tax liability was less than the alleged principal tax liability while the interest and penalty imposed by the Respondent was higher. The alleged aggregate VAT liability was based on payments made on offshore training services provided to the Appellant's employees, satellite capacity managed by the Appellant (transponder services) provided by a non-resident company to the Appellant and software licensing and upgrade transactions. The Company objected to the revised assessment, but the Respondent issued a Notice of Refusal to Amend (NORA).

Dissatisfied with the NORA, MTN filed an Appeal before the TAT seeking that the liabilities be set aside.

MTN's Argument

The Company submitted that the provision of software licences and upgrades did not qualify as either supply of goods or services for the purpose of VAT, prior to the amendments by the Finance Acts (FA). MTN argued that, for the years under review, the applicable tax laws were the provisions of the VAT Act prior to any amendment effected by the FA 19 and subsequent amendments. Thus, the amendments made by Sections 33 & 46 of FA 19, and Sections 40 & 41 of FA 20 were not applicable in determining the rights of the parties. Furthermore, the Appellant maintained that those amendments suggest that transactions of that nature were not covered under the VAT Act 1993 because if they were included, such amendments would not have been necessary. MTN further stated that tax legislation ought to be translated strictly in line with literal rule of interpretation.

Thus, transactions that do not fall under the category of goods and services should not be subject to VAT regardless of whether a supply has occurred.

MTN went on to describe the two ways by which software may be transferred from one person to another. The first is by encoding the software in a tangible disk from which it may be downloaded. The Appellant purported that this transfer is by way of supply of goods. The second transfer method is by transferring the software online without encoding in a tangible device. In this case, the transfer is by licensing the incorporeal rights. This argument was based on Section 51(1) of the Copyright Act Cap C28 LFN 2004 which defines literary work to include computer programs, and the case of *Adenuga vs. Ilesanmi Press (1991).* The Appellant stated that the provisions of the VAT Act pre-FA amendments did not specifically categorize incorporeal properties, such as software licensing, either as goods or service.

Secondly, MTN submitted that bandwidth or satellite capacity did not fall under the definition of goods and services, and it was not provided or rendered in Nigeria to be considered as an imported service. The Appellant stated that the term "service(s)" as used in the Master Service Contract has a special meaning and the court is not allowed to read into a contract, a term different from what the parties have agreed as was decided in the case of *Dragetanos Construction (nig) Ltd vs. F.M.V. Ltd (2011).* The Appellant argued that the transponders are physically located on satellites in geostationary orbit and not in any country per se. The Appellant relied on Section 46 of the VATA to further drive its point. It argued that definition of imported service in the VAT Act has two elements, namely: the service is rendered in Nigeria and the recipient of the service is in Nigeria. The Appellant, therefore, stated that the bandwidth network capacity was never provided to the Appellant in Nigeria and could not form the basis of an additional VAT assessment. The Appellant distinguished the case from the previously decided *VODACOM* case.

Furthermore, the Appellant submitted that the Respondent was not entitled to request additional VAT in 2022, for the 2007 and 2010 to 2017 financial years as these years were outside the statutory limitation period. The Appellant relied on Section 34(2) of the FIRS' Establishment (FIRSE) Act 2007 to validate its point. It stated that, according to the provisions of the stated Act, tax officers could not make demand for the payment or refund of tax if the demand is not made within 5 years of the under assessment or erroneous payments unless such was caused by the production of a document that contains untrue facts in a material respect. The Appellant relied on the case of AG Adamawa State vs. AG Federation (2014) to argue that the proviso of the stated section is obligatory and leaves no room for choice or discretion. As such, a demand for recovery of an under-assessment is valid where it is made within 5 years from the date such under-assessment occurred.

On the issue of training programs provided by offshore facilitators outside Nigeria, the Appellant relied on Section 46 of the VATA to argue its position. It stated that an imported service, according to the section applicable at that time, was defined to mean a "service rendered in Nigeria by a non-resident to a person inside Nigeria". As such, the training programs should not be subjected to taxes in Nigeria.

Finally, the Appellant maintained that penalties and interest could only accrue on additional assessments after such assessments have become final and conclusive. This position was hinged on Paragraphs 13(2) and (3) of the fifth Schedule to the FIRSE Act. The Appellant further stated that the assessments become final and conclusive if a taxpayer does not object to a notice of assessment within thirty days of receiving the notice. MTN maintained that it filed its objections within 30 days as required by law and as such, the notice had not become final and conclusive. Therefore, the imposed penalties and interest on the alleged liabilities were premature.

This position was supported by the cases of *Brasoil Services Company vs. FIRS (2015), Tetra Pak West Africa Ltd vs. FIRS (2016) and Technip Offshore Nig Ltd vs. LSBIRS (2016).* The Appellant also questioned the fact that interest and penalty imposed on the revised assessment was way higher than that imposed on the first assessment although the alleged principal liability contained in the revised assessment was lower. The Appellant further relied on the case of *Adeola Ogunsanwo vs. FIRS (2016) and Nigerian Bottling Company Plc vs. FIRS (2019)* to argue that a taxpayer is entitled to know how the tax authorities arrived at interest and penalty to help defend its case.

FIRS' Argument

The FIRS, relying on the cases of *Lekki Concession Company Ltd vs. FIRS and Vodacom Business Nig. Ltd vs. FIRS*, argued that the provisions of Section 2 of the VATA were clear in stating that the only goods and services exempt from the payment of VAT are those contained in the first schedule to the Act. The Respondent further argued that the expression "any service for a consideration" suggests a legal relationship between the provider and recipient of the service.

Furthermore, the FIRS asserted that the VAT Act did not stipulate any statutory limitation on the recovery of VAT and there were no stated conditions necessary to demand or retrieve any VAT due for collection. The Respondent maintained that the provisions of the CITA were distinct from the VATA. The operative word "shall" in the latter makes it mandatory for taxpayers to maintain records of all books and transactions necessary to enable it to determine the amount of tax payable. The FIRS further contended that that there were no statutory limitations on the powers of the Respondent, based on section 8 of the FIRSE Act, to carry out investigation aimed at ensuring compliance or recovering due taxes.

Finally, the Respondent submitted that Section 13 of the FIRSE Act was not a taxing statute. It maintained that the proper law to examine would be the provisions of the VATA as opposed to the fifth schedule of the FIRSE Act referenced by the Appellant. The FIRS argued that, according to section 15 of the VATA, that interests and penalties would begin to run once the taxes were not remitted on the due date. The FIRS stated that the relevant period specified in the Act then was on or before the 30th day of the month following that in which the purchase or supply was made.

Issues for Determination

Based on the prayers and arguments submitted by the parties, the TAT adopted the following issues for determination:

i. *Whether in view of the clear and unequivocal provisions of the VAT Act prior to the amendment by the FAs, the provision of software licensing and upgrades qualified as a taxable supply of goods and services.*

ii. *Whether the supply of bandwidth capacities by Intelsat Global Services & Marketing Ltd, a non-resident entity, through transponders located in the satellite, qualifies as a taxable supply of goods and services.*

iii. *Whether in the absence of the production of any false or untrue document or statement by the Appellant, the Respondent has authority to conduct a tax investigation beyond the 5-year restriction.*

iv. *Whether provision of training programs provided by offshore facilitators outside of Nigeria is liable to VAT in Nigeria.*

v. *Whether the Respondent acted in error when it calculated and imposed interest and penalty on the Appellant's alleged non-remittance of VAT liabilities, the said liabilities having not become final and conclusive.*

TAT's decision

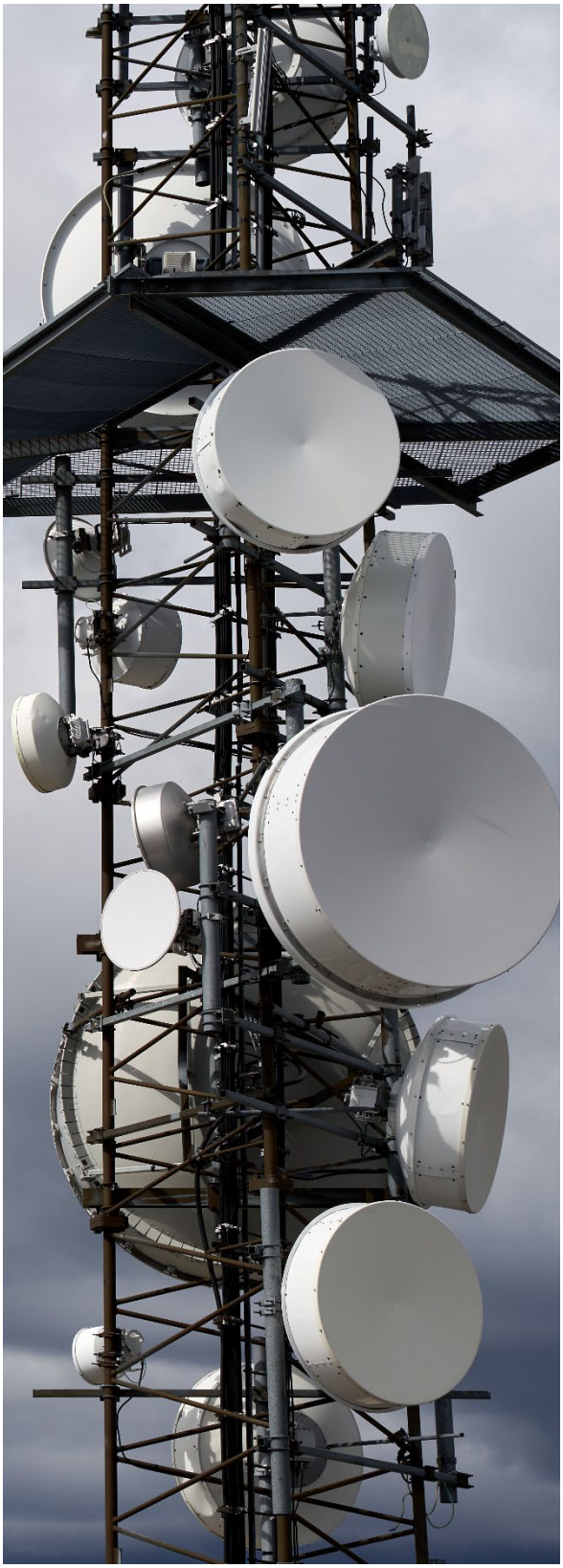
After considering the arguments of both parties, the TAT held that:

(i.) In deciding whether the provision of software licensing and upgrades qualified as a taxable supply of goods and services, the Tribunal referenced Section 2 of the VATA that all goods and services supplied in Nigeria are liable to VAT except goods and services specifically listed in the First schedule to the Act. In line with the destination principle of VAT application in Nigeria, all goods and services consumed or otherwise utilized in Nigeria are subject to VAT. The Tribunal stated that the Software purchased by MTN is not listed in the schedule of exempt items; therefore, it should be VATable under the relevant provisions. The Tribunal relied on the case of *Vodacom Business (Nig) Ltd vs. FIRS (2019)* and held that, based on the wholistic construction of Sections 2, 10 and 46 of the VATA, the transaction between MTN and the non-resident foreign company should be subject to VAT.

The Tribunal also stated the danger of interpreting a particular section of the statute in isolation. According to the TAT, where the subject matter concerns other sections of the same statute, all the related and relevant provisions must be read, considered, and construed together as forming a composite whole. Therefore, relying on the provisions of Section 10 of the VATA, the Tribunal noted two aspects of the provision which ought to be considered in the subject matter. Firstly, a non-resident company that carries on business in Nigeria shall register for tax with the Board… Secondly, a non-resident company shall include tax in its invoice and the person to whom the goods and services are supplied in Nigeria shall remit the tax in the currency of the transaction. The support from this section validates the decision that the transaction relating to Software licensing and upgrades is VATable.

(ii) On issue two, the Tribunal ruled that the evidence made available to the court indicated that the Appellant was present in Nigeria at the time of consuming the said transponder services. The Tribunal interpreted the contract description to mean that the non-resident vendor supplied the said transponder services (through satellite network bandwidth equipment) which were received and consumed by the Appellant through its site base infrastructure in Nigeria. The Appellant is, therefore, placed under legal obligation by the relevant provisions of the VATA to deduct VAT on the transactions and remit same to the Respondent whether the supplier was physically present in Nigeria. Referring to the case of *Saipem Contracting Nig Ltd & Ors vs. FIRS & Ors (2018),* the TAT ruled that the supply of Bandwidth, through transponders located in the satellite, qualified as Vatable supply, and should attract appropriate VAT liabilities.

(iii) In deciding the third issue, the TAT combined reading of the relevant provisions of the VATA, CITA and FIRSE Act to establish that the Appellant had the obligation to pay its liabilities appropriately, but the Appellant had not fully complied with this as at the time of the disputed transactions. Section 35(2) of the FIRSE Act provides that any violation of the responsibilities can trigger tax investigation. Referring *to La Maseer Law Firm vs FIRS (2019), FBIR vs. Integrated Data Services Nig Ltd (2009), Phoenix Motors Ltd vs. National Provident Fund Management Board (1993),* the Tribunal held that the Respondent had the right to conduct investigation.



(iv) The TAT contended that Sections 2 and 46 of the VATA specify that the essential factor for a service to be liable to VAT in Nigeria is whether Nigeria benefits from the service, irrespective of where the service was provided. As a result, the TAT ruled that such training services would be subject to VAT under Nigerian law.

(v) Section 76 of CITA provides that an assessment becomes final and conclusive when no valid objection or appeal is lodged against it within 30 days or any longer period as the Tribunal may allow. Further, according to Section 13(2) and (3) of the 5th Schedule to the FIRS Act, penalty and interest begin to accrue only after an assessment becomes final and conclusive i.e., when the taxpayer does not object to the assessment within the period stipulated under the stated section. This position was taken in cases such as *Federal Board of Inland Revenue vs. The Nigerian General Insurance Company Ltd (1922 – 2014), FBIRS vs. Azigbo Brothers Ltd (1922 – 2014), Aboud vs Regional Tax Board (1922 – 2014), FBIR vs. Innomaco Photo LBB (1922 – 2014) and FBIR vs. Samarola (1922 – 2014).* The Appellant objected appropriately to the Respondent's within record time. The TAT, therefore, held that the charging of penalty and interest by the Respondent is illegal.

Ultimately, the matter is resolved mostly in the Respondent's favor and the Appellant is directed to pay the principal tax liabilities in the re-assessment notice but disregard the penalties and interest in accordance with the judgment.

Commentaries

In this case, the TAT reiterates that only the law in operation as at the time of a transaction should apply. In other words, retroactive application of law has no legal basis. The National Tax Policy also supports this. It is, therefore, important that the FIRS begin to apply this principle in its interpretation of changes to the tax laws, starting from the FA, 2023. Changes to tax laws should only be operative from the commencement date and not prior to that date. In fact, to avoid unnecessary disputes, Nigeria may need to adopt a transition period of one year before any new law can become effective. This is the practice in leading democracies.

It is interesting to note that the TAT did not consider in its ruling whether provision of software licensing/upgrades and bandwidth capacity qualify as 'services' based on the provisions of the VATA prior to the amendments incorporated by the Finance Acts. The only matter it concerned itself with was whether those services were on the exempt list of goods and services. According to the TAT, any item not specifically listed will be subject to VAT. The TAT also failed to address the argument to the effect that the amendments made in the FAs would not have been necessary if the law had wanted such intangible transactions to be subject to VAT in the first place. The ruling underlines the importance that taxpayers must attach to the form, and not only the substance, of their contracts or agreements. The description of every word in a contract/agreement may have a significant impact if that contract becomes a subject of dispute in future. Taxpayers should, therefore, state exactly the scope of the work required and avoid ambiguous words.

The issue of whether the FIRS can conduct audit/investigation for periods beyond six (6) seems not to have been satisfactorily resolved. In its ruling, the TAT only acknowledged the rights of the tax authorities to conduct such tax compliance activities. However, this was not in dispute in this case. The issue disputed was whether such investigations could go beyond 6 years given the provision of the Companies and Allied Matters Act that require companies to keep accounting records for 6 years.

It is high time that this matter was adjudicated; otherwise, it would continue to be a contentious matter between tax authorities and taxpayers. One thing is clear: it would not be fair and equitable to taxpayers for a tax investigation to be open-ended. The concept of reasonable time should apply.

One other key takeaway from the ruling is that services would be liable to VAT if those services are consumed in Nigeria. It does not matter where the service provider is located as of the time of the provision of the service. This position has been re-echoed in all the rulings on the applicability of VAT to services provided outside of Nigeria. Consequently, taxpayers must ensure that they self-account for related VAT on such transactions based on the destination principle in order to avoid unnecessary exposure to additional taxes.

Perhaps, the most significant aspect of the ruling is the interpretation given to a final and conclusive assessment and the resultant implications for interest and penalty. The TAT remarkably ruled that an assessment could only become final and conclusive where the taxpayer does not object within the statutory period for objection as stated in the relevant law. The implication, therefore, is that an assessment that has not become final and conclusive cannot be liable to interest and penalty. However, the key question is whether the Federal High Court (FHC) would uphold this interpretation as the FIRS has challenged this aspect of the judgment. It is instructive to note that the FHC (Lagos Judicial Division) has ruled, in the *CMA CGM Delmas vs. FIRS,* that objecting to a tax assessment within the stipulated period does not absolve a taxpayer from the obligation to pay interest and penalties on additional tax assessment arising from audits. This ruling may, therefore, provide only a temporary reprieve.

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