TAT upholds FIRS' appointment of non-resident suppliers as agents of VAT collection for taxable supplies in Nigeria

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The Tax Appeal Tribunal (TAT or "the Tribunal") Lagos Zone, in the case between *Bolt Operations OU ("Bolt" or "the Company" or "the Appellant")* and *Federal Inland Revenue Service ("FIRS" or "the Service" or "the Respondent")* has held that the FIRS validly exercised its powers under the Value Added Tax (VAT) Act to appoint Bolt, a non-resident supplier (NRS), as agent of collection of VAT from both the activities of the food vendors and drivers that use the Company's platform to provide services to customers.

The Tribunal also clarified that the FIRS' *Guidelines on Simplified Compliance Regime for Value Added Tax (VAT) for Non-Resident Suppliers* (the Guidelines) is not *ultra vires* Section 10 of the VAT Act.

Facts of the case

The Appellant is a non-resident mobility service company, with headquarters in Estonia. The Company offers a range of services including the facilitation of ride-hailing, food and grocery delivery, and car-sharing services to independent businesses and consumers, including Nigerians, through its mobile application platform.

The Appellant's business model is to connect sellers (i.e., independent businesses such as restaurants, cab drivers, etc.) with buyers (i.e., consumers). The independent businesses are not employees of the Appellant and earn their income/ fees directly from the consumers while Bolt earns a percentage of the income as commission for the use of its platform. The Company alleged that it is fully compliant with the provisions of Section 10 of the VAT Act ("the Act") on compliance obligations of an NRS and remits the VAT charged and collected on its commission. Therefore, the Company objected to its appointment by the FIRS for the collection and remittance of VAT in respect of the services provided by the sellers to the consumers.

The FIRS, however, insisted that the Appellant was obliged to collect VAT on all invoices processed through its platform, regardless of whether the Appellant is the supplier of the goods or services. Therefore, the FIRS reiterated via its letters of 4 February 2022 and 11 April 2022 respectively, that its appointment of the Company as an agent for VAT was consistent with the provisions of the VAT Act.

The Appellant, dissatisfied with the Respondent's decision, filed an appeal dated 6 July 2022 before the Tribunal.

Issues for determination

Based on the arguments submitted by both parties, the Tribunal adopted the following issues for determination:

- *Whether the Respondent erred in law when it appointed the Appellant, a non-resident supplier as the agent to charge, collect and remit VAT on supplies made by Nigerian resident suppliers to their customers using the Appellant's platform?*
- *Whether the Respondent's Guidelines that deemed the Appellant as the supplier and the party primarily responsible to charge, withhold and remit VAT on taxable supplies by resident Nigerian suppliers on-boarded on the Appellant's platform is ultra vires Section 10 VAT Act?*
- *Whether it is lawful to appoint the Appellant as the party responsible for charging taxable supplies made by Nigerian resident suppliers who are exempted from VAT obligations by virtue of Section 15(2) of the VAT Act.*
- *Whether the Respondent erred in law when it imposed an agency arrangement between the taxable suppliers and the Appellant for purposes of charging VAT, when no such agency arrangement had been willfully entered into between both parties?*

Bolt's argument

The Appellant argued that its appointment by the FIRS as an agent to charge, collect and remit VAT on supplies made by Nigerian resident suppliers to their Nigerian

customers is inconsistent with the provisions of the VAT Act. The Company noted that Section 10(3) of the Act only requires an NRS to withhold and collect the VAT charged on taxable supplies made to Nigerian customers in Nigeria. It also argued that although Section 10(4) of the Act allows the FIRS to appoint the Company as an agent to withhold or collect VAT on taxable supplies made by the Appellant in Nigeria, the Respondent misconstrued the provision when it extended it to apply to taxable supplies made by Nigerian suppliers who use the Company's platform to provide services to their customers.

The Appellant noted that the import of Section 10(4) of the Act is to ensure that a taxable person resident in Nigerian that enjoys supply from an NRS is relieved of his obligation to withhold or collect VAT where the NRS has been appointed by the FIRS to collect and remit the VAT on the transaction. However, where the NRS fails to meet its obligation, the taxable person resident in Nigeria will have a secondary obligation to withhold and remit VAT. Therefore, the intention of Sections 10 (3), (4) and (6) of the VAT Act is to bring an NRS within the Nigerian VAT net and not to create an additional VAT obligation for the NRS to collect, withhold or remit VAT on supplies between two Nigerian taxable persons.

The Appellant submitted that it is only liable to collect and remit VAT on the commission earned from the drivers and restaurants that use its platform as that is the only taxable supply provided by the Appellant. Further, the powers granted to the FIRS under Section 10(6) of the Act to issue guidelines to give effect to the provisions of Section 10 can only be validly exercised for supplies made by an NRS to a person in Nigeria. There is no provision in the VAT Act that allows a supplier of one service to be deemed the supplier of another service. Therefore, the provisions of the Guidelines that deemed the Company as the supplier and the primary party responsible to charge, collect, and remit VAT on supplies between two Nigerian taxable persons are *ultra vires* the provisions of Section 10 of the VAT Act.

The Company also argued that Section 15(2) of the Act exempts persons who do not meet the taxable supplies threshold of ₦25 million in a calendar year from registering with the FIRS, charging VAT, issuing VAT invoice, collecting VAT or submitting VAT returns. The Appellant submitted that drivers on its platform makes, on the average, ₦2 million yearly and therefore, are exempt from VAT obligations as they do not meet the minimum threshold provided in the Act.

Finally, the Appellant noted that, assuming without conceding, it acts as an agent for the drivers for the purposes of billing, the principal will need to expressly delegate the authority to act as a taxable supplier since the passage of this statutory function cannot be implied. Therefore, there is no basis for the Respondent to hold an agent of a principal responsible for not fulfilling the obligations of the principal as the agent is solely responsible to his principal and no one else. Nonetheless, the Appellant maintained that the current relationship between the drivers and the Appellant is neither created by way of estoppel nor necessity, but a purely contractual and consensual relationship with express limitations and boundaries. Therefore, the FIRS cannot impose an agency arrangement on the Company where none existed.

FIRS' argument

FIRS noted that Section 1 of the VAT Act, which imposes the tax, does not require a taxable person to be a supplier of any good or services for the person to be appointed. It also argued that, in cases where VAT collection obligation is not imposed on the primary supplier, the goods and services are not automatically exempt from tax unless they are expressly listed as exempt under the First Schedule to the Act.

Further, Sections 14(3) and 10(3) of the VAT Act empower the FIRS to appoint any person who is in the position to collect the VAT as the agent of collection. Given that Bolt facilitates the relevant supplies, issues invoices/receipts, processes payment for the supplies and can account for each supply even when payments are made in cash, the Company is in the best position to collect the tax. Consequently, the Respondent has appointed the Company as an agent to collect and remit VAT on the transactions performed on its platform, in line with Section 10 of the Act. The Respondent also noted that the Appellant, in prior correspondence, had neither objected to acting as an agent of collection nor stated that its appointment as an agent of collection was illegal.

FIRS also argued that the Appellant created an agency relationship based on its roles in the transactions carried out on its platform which the FIRS relied on in its appointment. Therefore, the FIRS is relieved of the burden of proof, as required under Section 20 of the Evidence Act, given that the Appellant had clearly admitted in its own words that there is a subsisting agency relationship between itself and the independent businesses.

Finally, the Respondent argued that its information circulars and guidelines, which were merely to clarify its position of the law and provide guidance on the procedure for implementing the provisions of the VAT Act, were in line with Section 61 of the FIRS (Establishment) Act, 2007 (FIRSEA).

TAT's decisions

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

1. Section 10(3) of the VAT Act empowers the FIRS to collect VAT on taxable supply made by an NRS either from the recipient of the taxable supply in Nigeria or such other person as may be appointed by the FIRS. Section 10(6) of the VAT Act empowers the FIRS to issue guidelines for the implementation of the provisions of Section 10 of the Act, including the form, time and procedure for filing returns and payment by an NRS appointed by the Service under Section 10(3) of the Act.

Further, the discretion to appoint *"such other person"* without any criteria is exclusively that of the FIRS and FIRS has exercised that discretion in the instant case. Also, the use of the word *"shall"* in the law makes the obligation of the persons appointed by the FIRS under Section 10(3) of the VAT Act mandatory. Given that the suppliers of the goods and services enlisted on the Appellant's platform render vatable goods or services for which there is obligation to withhold and remit VAT, the FIRS is within its statutory right to appoint the Company as the agent to withhold, collect and remit the VAT on the supplies.

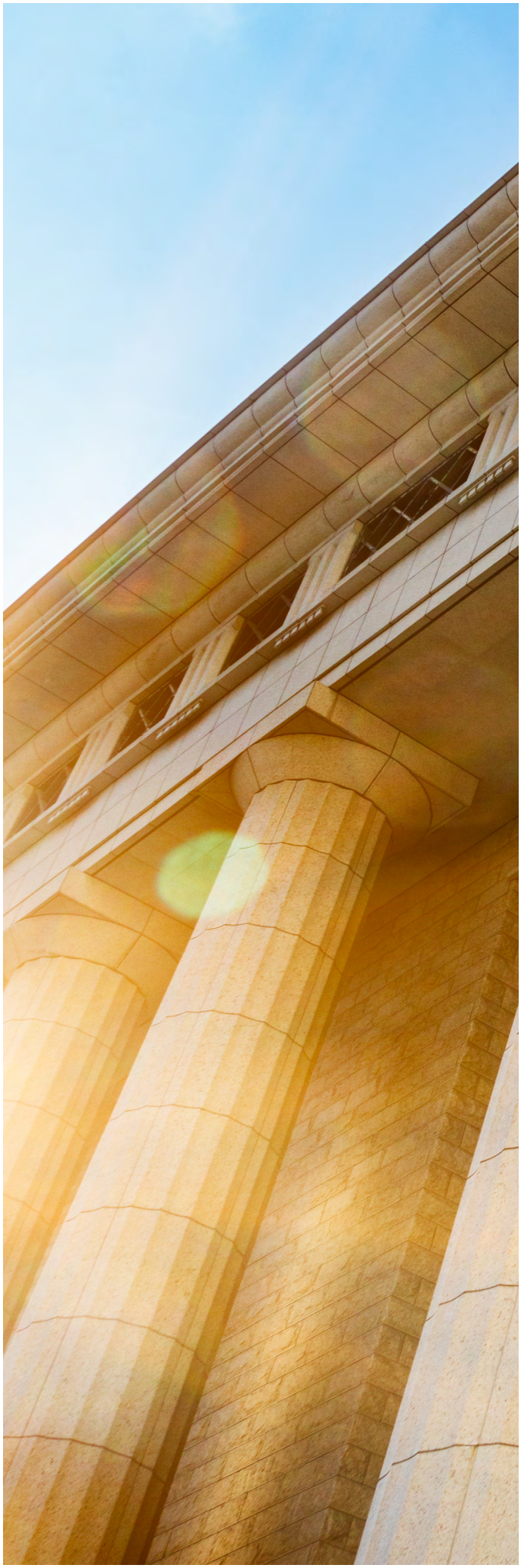
2. Section 10(6) of the VAT Act empowers the Service to issue guidelines for the purpose of giving effect to the provisions of Section 10 of the VAT Act, including the form, time and procedure for filing returns and payment by an NRS appointed by the Service under Section 10(3) of the Act. Therefore, the FIRS' Guidelines appointing the Company as an agent of collection for the VAT on goods and services supplied by food vendors and ride-hailers on the Company's platform is consistent with the provision of Section 10 of the Act.

3. Section 31 of the FIRSEA and Section 49 of the Companies Income Tax Act allow the FIRS to appoint any person to be an agent of a taxpayer where such person is in custody of any money belonging (or due) to the taxpayer. The Tribunal noted that it would be unreasonable to require the FIRS to follow each individual food vendor and driver to collect the VAT due on the transactions and cited the comments of the Supreme Court in the case of *Aberuagba Vs A.G. Ogun State*[1] to buttress its position.

4. Section 10(3) of the VAT Act did not impose any condition precedent before the FIRS can exercise its powers to appoint any other person as an agent for VAT collection for taxable supplies made by an NRS in Nigeria. Therefore, the argument that there is no existence of an agency arrangement (willful or not) between both parties is immaterial in the instant case. The TAT noted that the agent appointed by the FIRS in this instance can be regarded as an agent of necessity. Based on the *RSUST Vs Okezie*[2] case, an agent of necessity arises by reason of an urgent emergency which will render it impracticable to receive instructions from the principal. Given that it is practically impossible for the Respondent to receive instructions from the taxable suppliers (i.e., food vendors and drivers) who are the principals in this circumstance, the Respondent validly exercised its powers under the law to appoint the Appellant as an agent of collection of VAT.

5. The restaurants and drivers, and not the Company, should be the aggrieved party in the instant case. Therefore, the Tribunal questioned the *locus standi* of the Appellant to challenge the Respondent's decision to appoint it as the agent of VAT collection on the grounds that the independent businesses are exempt from VAT as they do not meet the threshold prescribed in the VAT Act.

Based on the above, the Tribunal resolved all the issues in favor of the Respondent and dismissed the appeal.



[1] (1995) SC NWLR (Pt. 3) 385
[2] (2019) LPELR 46460

Commentary

The VAT obligations for businesses operating online marketplace business model has been a subject of contentious debate between the FIRS and the affected businesses. The government, through Finance Acts 2020 and 2021, sought to clarify some of these issues by defining the VAT compliance obligations for the various players and empowering the FIRS to appoint and/ or allocate obligations to any of the players for ease of collection of the tax. The Tribunal's decision clarifies the conflicting positions held by the different parties regarding the powers of the FIRS to appoint any person involved in online marketplace transactions to collect and remit the VAT due.

Based on the TAT's decision, online marketplace businesses now have additional VAT obligations in respect of domestic transactions between taxable persons resident in Nigeria. One significant clarification provided by the TAT is that the VAT Act does not impose any condition precedent before the FIRS can exercise the power to appoint any person as the agent of VAT collection. The TAT's position appears to be hinged on the principles of convenience and management of cost of collection of taxes. As far as the TAT is concerned, it is much easier and cheaper for the FIRS to deal with marketplace platform owners than the sellers.

While the logic behind the TAT's reasoning may seem simple and straightforward, it does not remove the complexity of the marketplace operating model. For example, there is merit in the argument submitted by the Appellant that it is not the supplier of the ride-haling services and food to the customers and therefore, should not be required to charge and collect VAT on the supplies. In other words, they do not provide services to the consumers. Rather, the drivers and restaurant owners are those that provide services to the consumers.

Although Section 10(3) of the VAT Act empowers the FIRS to appoint any person as the agent of VAT collection, however, it does not appear to extend such powers to allow the FIRS to deem Bolt as the supplier for the services/ goods between the drivers or restaurants and their customers. This appears to be the crux of the Appellant's disagreement in the appeal. The Company's position is that, while it does not dispute the powers of the FIRS to appoint it as the agent of VAT collection on the transactions, it can only collect the VAT that has been charged by the vendors. This is especially as it is not empowered by the Act to charge VAT on the transactions between the independent businesses and their customers notwithstanding that it often acts as the collection agent for the entire income on the transactions.

The case also highlights the seeming disconnect between the online marketplace business model and the extant tax laws in Nigeria. Unlike Nigeria, most jurisdictions have taken steps to update their VAT/ GST laws to capture the ride-hailing service providers in order to address the disconnect and capture the peculiarities of their business model in their tax laws. For example, the Indian government, in a 2021 central government notification, imposed GST on fare paid for auto-rickshaw ride or a bus ride through the platforms of electronic commerce operators (ECO), which uses the marketplace business model. Also, on 14 March 2022, a court decision in the UK confirmed that Uber and other ride-hailing apps were principals and are, therefore, required to charge and collect VAT on services provided by the drivers. The above cases have helped to clarify the responsibilities of the ECOs and ensure that the users of the platforms are aware that VAT/ GST is applicable on the services procured thereon. Following the UK judgment, Uber and other ride-hailing companies have revised their business model to reflect their current status and change their VAT treatment processes accordingly.

While the TAT's decision in the instant case focuses on the powers granted the FIRS under the VAT Act to appoint any person as agents of VAT collection, it is important that the VAT Act be amended to include specific provisions that address the peculiar business model of services delivered through online marketplace or intermediation platforms to avoid any unnecessary disputes.