IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON TUESDAY, THE 19TH DAY OF JUNE, 2018.
BEFORE HIS LORDSHIP, HON. JUSTICE A.R.MOHAMMED
JUDGE

SUIT NO: FHC/ABJ/TA/1/2015

BETWEEN:

FEDERAL INLAND REVENUE SERVICE ..... APPELLANT/APPLICANT

AND

GAZPROM OIL & GAS NIG. LTD ..... RESPONDENT

JUDGMENT

This is an appeal against the decision of the Tax Appeal Tribunal, Abuja zone contained in the judgment of the said Tribunal delivered on 10th June, 2015.

Dissatisfied with the judgment of the Tax Appeal Tribunal, the Appellant lodged a Notice of Appeal dated and filed on 10/7/15. The Appellant filed Four Grounds of Appeal. The grounds of Appeal without their particulars are as follows:-

GROUND ONE

The Honourable Tribunal erred in law when it held that the law makers had intended that a non-resident company must have included VAT in it's invoice before a Nigerian Company purchasing the services of the non-resident company can pay Value Added Tax.

GROUND TWO

The Honourable Tribunal erred in law when it held as follows: "Indeed, it will amount to over-stretching the provision of the VAT Act to state once you carry on business with a Nigerian Company one must register with the Board and charge VAT".

GROUND THREE

The Honourable Tribunal erred in law when it held that the VAT Act does not place an obligation on a person with whom a non-resident company has a subsisting contract with to account for or pay VAT, unless it is invoiced.

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GROUND FOUR

The Honourable Tribunal erred in law when it held as follows: "............... it is not in doubt that the non-resident companies, carry on business. What is in doubt whether the businesses is carried on in Nigeria."

The facts given rise to this appeal, as can be deduced from the processes of the parties filed, can be summarized as follows:-

Gazprom EP International B.V. is a Russian Company which engages in oil and gas business in different continent of the world. The company incorporated Gazprom Oil and Gas Nigeria Limited to enable it to do it's business in Nigeria. The company's area of interest includes prospecting, drilling, extracting, pumping, drawing, transporting, purifying, refining, exploration, development and production of oil and gas generally. The Respondent herein engaged several non-resident companies to provide them with consultancy and advisory services on an on-going basis with respect to their business interest in different African Countries. These non-resident companies provided them with the agreed consultancy and advisory services to enable them make investment choices, upon receipt of the said consultancy and advisory

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services, the Respondent paid the non-resident companies the fees agreed. The Respondent made these payments to the non-resident companies without filing the appropriate Tax returns to the Appellant. The Respondent also failed to remit the VAT applicable to the transactions.

That upon a tax audit conducted on the Respondent Company in 2012 on their economic activities for the period between 2008 and 2011, the Appellant found the Respondent liable to account for VAT in the sums of $339,168.87 USD and €50,894.96 Euros and issued the Respondent assessment notices accordingly.

The Respondent as the Appellant at the Tax Appeal Tribunal (TAT) filed an appeal against the Appellant herein on 29/9/2013 at the Abuja zone of the Tax Appeal Tribunal, challenging the assessment on the grounds as contained in the said appeal.

After taking argument of the parties, the Tax Appeal Tribunal held in effect that the Respondent is not liable to pay VAT on the transactions, because, according to the Tribunal, the non-resident companies were not doing business in Nigeria and that until a tax invoice is issued by the non-resident companies, the Respondent cannot be liable to pay VAT on their transactions with non-resident companies.

In the Appellant's Brief of Argument, this issue was formulated for determination:

> "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?

In his argument on the above issue, learned Appellant's counsel stated that Value Added Tax is a specie of tax levied on consumption of goods and services. That it is one of the indirect taxes collected worldwide by countries. VAT is a tax on spending. That the tax is borne by the final consumer of goods and services and usually included in the price paid. That under the VAT Act, VAT are usually paid when returns are being rendered. Reference was made to Section 2 of the VAT Act, 2007, which the Appellant's counsel said that VAT is imposed "on the supply of all goods and services other than those goods and services listed in the First Schedule to the Act". Learned Appellant's counsel then submitted that the strict construction of the provision of Section 2 of the VAT Act means that VAT is chargeable on all transactions that are not expressly excluded, namely: international, inter-state and intra-state supply of goods and services.

On who pays value Added Tax, learned Appellant's counsel stated that it is the ultimate consumer of the taxable goods and services that is liable to pay VAT. On this contention, the Court was referred to Section 12 of the VAT Act. Reference was also made to the case of **A.G. LAGOS STATE VS. EKO HOTELS LTD (2008) ALL FWLR PART 398, 235 at 259.** It was therefore submitted that in this case, it is the Respondent as the consumer of the services to pay VAT.

On whether or not the Respondent should pay the tax when same has not been included in a tax invoice by the non-resident companies, learned Appellant's counsel submitted that when both the supplier and the purchaser are resident in Nigeria, Section 12 provides that the taxable person shall pay to the supplier the tax on goods and services supplied by or supplied to the person. It was however submitted for the Appellant that when the supplier is a non-resident person, the purchaser is treated as both the supplier and purchaser and is required to remit the tax expected from the transaction. Reference was made to Section 10 of the VAT Act. Learned Appellant's counsel further contended that though, the non-resident companies are expected to include the VAT in their invoice, but where they failed to do so, the liability to pay the tax is not extinguished, and in this case, learned counsel said, it is the Respondent that should pay the tax, because taxing the consumer, in this case, the Respondent, is the reason for the enactment of the Value Added Tax.

On the contention that the transactions between the Respondent and the non-resident companies are not subject to the VAT Act because they were not doing business in Nigeria, a contention which the Tribunal upheld, learned Appellant's counsel referred to Section 10 of the VAT Act and submitted that since the Act did not define what constitutes "carrying on business", but it was submitted that non-resident companies that have subsisting contracts (as stated under Section 10 of VAT Act) with a Nigerian company are doing business in Nigeria for the purpose of charging VAT. That the non-resident companies are termed "non-resident" because they are not expected to have a place of business in Nigeria. Learned Appellant's counsel then said that is why the VAT Act provides that in registering for VAT, the non-resident companies should use the address of their Nigerian consumer/customer.

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On the reliance by the Tribunal on the case of **EDICOMSA INTL INC. & ASSOCIATES VS. CITEC INTL ESTATES LTD (2005) LPELR - 5584 and (2006) 4 NWLR PART 969, 114** to hold that non-resident companies were not doing business in Nigeria, learned Appellant's counsel however contended that it was held in the same case that "to carry on business" means to conduct, prosecute, or continue a particular vocation or business as a continuous operation or permanent occupation. The repetition of acts may be sufficient". It was then submitted for the Appellant it is evident that the non-resident companies have been carrying on business in Nigeria as shown in page 362 of the Record of Appeal. That the services rendered by the individual non-resident companies to the Respondent were several and that one of them had rendered about 20 consultancy services to the Respondent, with the duration of the contract running into several years, some of them upto 2018. Learned Appellant's counsel then stated that these are clearly continuous activities which qualify as carrying on business under the VAT Act.

It was further the submission of the Appellant's counsel that there is no provision under the VAT Act requiring the non-resident companies to have a physical presence in Nigeria, (by having an office, employees or agents) before they are considered as doing business in Nigeria.

That the non-resident company doing business in Nigeria is only required to register for VAT using the address of it's Nigerian counterpart and the reason for this provision, Appellant's counsel said, is for audit trail purposes, to ensure that a taxable person does not evade tax. Reference was made to Section 10 (2) of the VAT Act.

A reading of Section 10 (2) of the VAT Act, Appellant's counsel said, indicates that carrying on business in Nigeria for the purpose of Section 10 (1) includes the supply of goods or services to a company in Nigeria, that is to say, a foreign company which has supplied services to a company in Nigeria has carried on business in Nigeria. It was further submitted that as in the instant case, the non-resident companies may have performed the consultancy services outside Nigeria, that they may have carried out the research work outside Nigeria, but the consumption of the services was done in Nigeria. In conclusion, Appellant's counsel urged the Court to be guided by the wisdom of the Court of Appeal in the case of PHOENIC MOTORS LTD VS. NATIONAL PROVIDENT FUND MANAGEMENT BOARD (1993) 1 NWLR PART 272 page 718 on the construction of a revenue based statute like the VAT Act.

The Court was urged by the Appellant's counsel to:-

i. reverse the judgment of the Tax Appeal Tribunal.

ii. To hold that the Government of Nigeria is entitled to VAT on the transactions between the Respondent and the non-resident companies as contained in the VAT Re-assessment Notices Nos. WCBA/AUDIT/VAT/12 for the sum of $339,168.87 dated 5th March, 2013 and WCBA/AUDIT/VAT/11 for the sum of €50,894.96 as contained pages 300 and 301 of the Record of Appeal.

iii. To hold that a person to whom goods or services are supplied in Nigeria by a non-resident company ought to remit VAT on such goods or services to the FIRS in the currency of the transaction.

iv. To hold that a non-resident company must not have a subsidiary, a permanent office or any physical presence before VAT Act becomes applicable to their transactions with Nigerian Companies, since VAT is a consumption tax charged on the consumer.

v. To hold that the Appellant is at liberty to recover VAT from any of the statutory agents of collection or from the consumer directly whether or not a tax invoice has been issued, especially in this case where the Respondent has admitted the sum due.

vi. To hold that there is a duty placed on the Respondent as a taxable person to file VAT returns on it's taxable goods and services, and to remit the VAT applicable to the transaction between it and non-resident companies.

vii. To hold that the Respondent is liable to remit the VAT applicable to the transaction between them and the non-resident companies, being the consumer of services.

In the Respondent's written address, this issue was formulated for determination.

"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 provided wholly outside Nigeria by non-resident companies that were not carrying on business in Nigeria?

Arguing the issue, learned Respondent's counsel stated that the contention of the Respondent before the Tribunal and which the Tribunal accepted is that under the VAT Act, VAT is not payable on services rendered outside Nigeria by non-resident companies that had no business or physical presence in Nigeria. It was then submitted that the resolution of this question calls for the interpretation of the relevant provisions of the VAT Act by this Court. It was therefore the submission of Respondent's counsel that it is trite law that where the words of a statute are plain and unambiguous, they must be given their literal meaning. The Court was referred to the cases of A.G. KANO STATE VS. A.G. FEDERATION (2007) 3 SC PART 1, 59; ARAKA VS. EGBUE (2003) 17 NWLR PART 848, 1 at 21 and ALHAJI IBRAHIM & ANOR VS. THE KOGI STATE GOVERNMENT (2002) 3 NWLR PART 755, 502 at 522.

On the need for strict construction of a Tax statute, the Court was referred to the case of ADERAWOS TIMBER TRADING CO. LTD VS. FEDERAL BOARD OF INLAND REVENUE (1966) NCLR, 416 at 422.

In the present matter, learned Respondent's counsel stated that the provision of the VAT Act most relevant to the resolution of this appeal are contained in Section 10 of the VAT Act because, the Section, counsel said deals specifically with the circumstances in which services provided to a Nigerian company by non-resident companies are liable to Nigerian VAT. The Court was then referred to Section 10 (1) and (2) of the VAT Act, and it was submitted that:-

a. For a non-resident company to have an obligation to register for VAT tax with the Appellant, that non-resident company must be carrying on business in Nigeria, otherwise the Act must have provided that non-resident companies shall register for tax with the Appellant.

b. The obligation to include the tax (VAT) in the invoice is only on a non-resident company that carries on business in Nigeria and has registered for VAT with the Appellant.

c. The obligation of the person to whom the goods or services are supplied in Nigeria to remit the tax in the currency of the transaction arises only where a non-resident company that carries on business in Nigeria has registered for the tax with the Appellant and has included the tax on it's invoice.

On the Appellant's argument that Section 12 of the VAT Act imposes a duty on a taxable person to pay VAT on goods and services supplied to it, learned Respondent's counsel submitted that Section 12 of the Act contains a general provision that a taxable person shall pay to the supplier, the tax on taxable goods and services purchased by or supplied to the person. The Section (i.e. 12), Respondent's counsel said, does not in any way address the circumstances in which a supply of goods and services made by a non-resident company may be subjected to VAT. The Court was urged to uphold the legal argument of the Respondent and to dismiss the appeal of the Appellant and uphold the judgment of the Tax Appeal Tribunal.

Having reviewed the argument of learned counsel for the parties in this appeal and having also read the record of proceedings of the Tax Appeal Tribunal, the only issue for determination in this appeal, in my humble view 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".

In the determination of the above issue, recourse must be had to the relevant provision of the VAT Act. The Tax Appeal Tribunal relied solely on the provisions of Section 10 (1) and (2) of the VAT Act to reach the conclusion that a non-resident company not carrying on business in Nigeria has no obligation to register for tax with the Appellant. In fact, the Tribunal held specifically in page 437 of the record of proceedings as follows:-

> "Indeed, it will amount to over stretching the provision of the VAT Act to state that once you carry on business with a Nigerian company one must register with the Board and charge VAT".

A reading of the above holding by the Tax Appeal Tribunal would show that the Tribunal limited itself to a situation where a non-resident company is carrying on business in Nigeria.

However, the Tribunal recognized the need for imposition of VAT under Section 10 of the Act, if it is anticipated that the destination principle is Nigeria, yet the Tribunal came to the conclusion that the situation is not applicable in the circumstances of this matter.

Now, Section 10 (1) of the VAT Act states thus:-

> 10 (1)-*For the purpose of this Act, a non-resident company that carries on business in Nigeria shall register for the tax with the Board, using the address of the person with whom it has a subsisting contract, as it's address for purposes of correspondence relating to the tax".*

A careful reading of Section 10 (1) of the VAT Act has imposed an obligation on a non-resident company carrying on business in Nigeria to register for a tax with the Board (i.e. Appellant herein) using the address of the person with whom it has a subsisting contract, as it's address for purposes of correspondence relating to issues of tax. What should have agitated the mind of the Tribunal is whether the non-resident company in this case is having subsisting contract with the Respondent in this appeal. This is because, once it is established that the non-resident company have a subsisting contract with the Respondent herein for supply of goods and services, it is obligatory for that non-resident company to register with the Appellant herein using the address of the Respondent, being the Nigerian company or person with whom it has subsisting contract. It is interesting to note that none of the parties is disputing the fact that the non-resident companies have been engaged by the Respondent herein to provide them with consultancy advisory services which enable the Respondent to make investment choices while the Respondent pays the non-resident companies their fees, without the Respondent filing the appropriate tax returns.

In the situation above, I cannot see how the Tribunal could overlook the important fact that where a non-resident company provide consultancy services to a Nigerian company on an agreed consideration or fees payable by the Nigerian company, then the non-resident company is automatically deemed as doing or carrying on business in Nigeria. Let me make an illustration of the situation to drive home the point:-

1. The consultancy and advisory services by non-resident company is supplied to the Nigerian company in Nigeria and not supplied elsewhere or to be used in another country other than in Nigeria.

2. The agreed fees payable to the non-resident company is paid by the Nigerian company and not by another company abroad on behalf of the Nigerian company.

3. The Nigerian company, upon receipt of the consultancy advisory services from the non-resident company, enable it to make investment choices in Nigeria.

Looking at the above scenario, how can it be said that the non-resident company is not carrying on business in Nigeria? Is the Honourable Tribunal saying that until the non-resident company has opened an office in Nigeria or until it uses the address of the Nigerian company, its activities with the Nigerian company does not amount to carrying on business? If that were the intendment of the draftsman to Section 10 (1) of the VAT Act, there would not have been the need to insert in Section 10 (1) the requirement of "carrying on business in Nigeria". Perhaps, the draftsman could have simply state in Section 10 (1) that "a non-resident company which is not doing any business with a Nigerian company shall not register for a tax with the Appellant".

I am of the humble view that the words "carrying on business in Nigeria" is not limited to physical presence of the non-resident company. On this score alone, the Tribunal has misconstrued the purport and intendment of Section 10 (1) of the VAT Act. The words "to carry on business" was interpreted in the case of <u>EDICOMSA INTERNATIONAL INC & ASSOCIATES VS. CITEC</u>

INTERNATIONAL ESTATES LTD (2006) 4 NWLR PART 969 page 114 as follows:-

> *"To carry on business" means to conduct, prosecute or continue a particular vocation or business as a continuous operation or permanent occupation. The repetition of acts may be sufficient".*

Now, having shown that the non-resident companies have been supplying consultancy advisory services to the Respondent in Nigeria and the Respondent make use of those consultancy advisory services in Nigeria, the non-resident company have an obligation under Section 10 (1) of the VAT Act to register for a tax with the Appellant.

I now turn to the consideration of Section 10 (2) of the VAT Act. The Section states thus:-

> 10 (2) - *A non-resident company shall include the tax in it's invoice and the person to whom the goods or services are supplied in Nigeria shall remit the tax in the currency of the transaction".*

From the provision of Section 10 (2) of the Act reproduced above, a non-resident company has the obligation to include the tax in it's invoice (in this case, invoice, in my view, should mean the invoice submitted by the non-resident for payment to it for services supplied in Nigeria) where the non-resident company fails to include tax in it's invoice (as in the instant case), the question is, who has the obligation to pay or remit the tax payable on the goods and services supplied? The answer is supplied in the same Section 10 (2), where it was stated thus:

> ....*"and the person to whom the goods or services are supplied in Nigeria <u>shall remit</u> the tax in the currency of the transaction"*. Underlining mine.

It is therefore not a defence to hold, as the Tribunal has done, that because the non-resident company has not included the tax in it's invoice, then the Nigerian company is not under any obligation to pay. This is because Section 12 (1) of the VAT Act has imposed payment of the VAT on the ultimate consumer. The Section states thus:

> 12(1) - *A taxable person shall pay to the supplier the tax on taxable goods and services purchased by or supplied to the person".*

Now, since payment of VAT is imposed on the consumer, it follows that where the non-resident company fails to include the tax in it's invoice, the Nigerian company (which is the ultimate consumer of the goods and services supplied or purchased by it), shall pay the tax notwithstanding the fact that the tax was not included in the invoice of the non-resident company.

It is pertinent to make the following observation, which is, what is the object of the Value Added Tax? Is it not to collect tax on goods and services supplied or purchased by a consumer? The answer, no doubt, is in the affirmative. For Section 2 of the VAT Act state thus:-

> 2 -"*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*".

If the object of the Value Added Tax Act is to collect tax on goods and services supplied or purchased by a consumer, is it fair and just to say, as the Tax Appeal Tribunal has held, that non-inclusion of tax invoice by a non-resident company should be a ground not to pay VAT by a resident company when the resident company has not denied being supplied services by the non-resident company and the services was consumed in Nigeria? If that were to be the intendment of the VAT Act, then many resident companies may find it convenient to collude with the non-resident companies by simply asking the non-resident companies not to include tax in their invoices in the services they supplied to the resident companies. In this situation, the huge loss in revenue that would be occasioned to the Government could be colossal. In fact, the situation would definitely defeat the object for which the VAT Act, 2007 was made.

I cannot end this judgment without quoting his lordship Tobi JCA (as he then was) of blessed memory, while stressing the proper approach in the construction of a revenue based statute, in the case of **PHOENIX MOTORS LTD VS. NATIONAL PROVIDENT FUND MANAGEMENT BOARD (1993) 1 NWLR PART 272, page 718.** The learned jurist stated the principle thus:-

> *"If a statute is revenue based or revenue oriented, it will be part of 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, unless there is a clear provision to the contrary. This is because it is in the interest of*

the generality of the public and to the common good and welfare of the citizenry for Government to be in revenue and affluence to cater for the people. That is the only way it can distribute wealth to the people to facilitate development to all and sundry. And this is more so in a country such as ours, where most citizen open their mouths with all gluttony to receive assistance and welfare packages from Government in almost all sectors of development in our very frail and feeble economy. No Court of law should lend it's hands to a person or body bent on beating the efforts of Government at collecting revenue by relying on technicalities of the law with a frugal aim to cheat Government of it's legitimate income".

I cannot but endorse the above passage by his lordship Tobi JSC of blessed memory.

In the case at hand, I cannot find any justification in this appeal for exonerating the Respondent from paying VAT to the Appellant in the peculiar circumstances of this appeal. It is clearly absurd and a travesty of justice for the Tax Appeal Tribunal to hold that just because the non-resident companies that have been supplying services to the Respondent, (and which services are consumed in Nigeria) should not pay VAT simply because the non-resident companies have no business address in Nigeria or because the non-resident companies have not include tax in their invoices submitted to the Respondent for the services rendered and consumed by the resident in Nigeria.

On the whole, I find merit in the Appellant's appeal against the judgment of the Tax Appeal Tribunal delivered on the 10th day of June, 2015 in Suit No. TAT/ABJ/APP/030/2014.

In consequence of the above, the Appellant's appeal has succeed and I make the following orders:-

1. The Decision of the Tax Appeal Tribunal delivered on 10th June, 2015 is HEREBY SET ASIDE.

2. AN ORDER IS HEREBY MADE upholding the VAT Re-assessment notices served on the Respondent in this suit.

3. No Order as to cost.

HON. JUSTICE A. R. MOHAMMED
JUDGE
19/6/18.

APPEARANCES:

S. A. Ajayi Esq. for the Applicant.

C. Ikwuazom Esq. with D. Killi Esq. for the Respondent.

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