TAT issues controversial VAT ruling on casino revenue, imported services and foreign third-party recharges

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Background

Tourist Company of Nigeria Plc ("TCN" or the "Appellant") engages in the gaming and hospitality business including the operation of a casino, in Nigeria.

The FIRS assessed TCN to N88m in unpaid VAT (inclusive of penalties and interests) for the 2016 year of assessment (YOA). TCN objected to this assessment and proceeded to the Tax Appeal Tribunal (TAT).

The assessment was driven by VAT on: imported services (including cost recharges from third-party foreign service providers), services from local vendors, and casino revenue.

Facts

Sun International Management Limited (SIML), a related party resident in South Africa, was contracted to provide management services to TCN. SIML does not have any form of physical presence in Nigeria, and provides these services offshore. SIML did not include VAT in its invoices to TCN.

For certain services, SIML also sub-contracts with third party vendors in South Africa and recharges relevant costs (without mark-up) to TCN, among other related entities. SIML also did not include VAT on these recharges. Ikeja Hotels Limited (IHL), a Nigerian company, provides support services to TCN and also did not include VAT in its invoices.

Also, TCN earns casino revenue which is computed as the positive difference between amounts staked by players, and their winnings. Players exchange money for tokens or cards which are used to play on the casino slots and tables. TCN does not charge a fee or commission for the use of casino facilities or access to place bets.

Arguments

TCN's main arguments were that:

1. VAT is not applicable on the management fees because the VAT Act (pre-Finance Act [FA]) required only non-resident companies "carrying on business" in Nigeria to register for and charge VAT. The Nigerian customer was required to deduct ***the*** VAT charged. SIML did not have any form of presence in Nigeria and therefore there was no VAT to pay since none was charged. Nigerian VAT laws did not have reverse or self charge rules, which was why it was introduced by the FA 2019. Also, the court rulings that upheld the self-charge requirement even though it was not in the law, were issued years after TCN's transaction.

   A similar line of argument was put forward for the transactions with IHL.

2. VAT is not applicable on recharge of third party costs paid by SIML, as there was no "value" added by SIML and no consideration for any service performed. This is supported by the TAT ruling in *Brasoil vs FIRS*. Also, the costs were incurred offshore between 2 non-resident companies, and should therefore be outside the purview of Nigerian VAT.

3. VAT is not liable on betting as this was not consideration paid for the supply of goods or services under the VAT Act. TCN's casino revenue is the aggregate of all bets, less winnings paid to players. This itself is not a supply subject to VAT. There is no fee for the use of casino facilities or access to place bets.

4. Penalties and interests are only applicable where an assessment is final and conclusive. An assessment that has been objected to or is under appeal, is not final and conclusive until there is a final determination by the TAT/courts.

The FIRS argued that:

1. Management fees paid to SIML were subject to VAT, irrespective of whether SIML was registered for, or charged VAT on its invoices. This is because management services were not specifically excluded from VAT in the Act, and as such, TCN should self-charge and remit the tax. The FIRS also relied on judicial precedents that a non resident company is *carrying on business* if Nigeria if it has a contract with a Nigerian party.

   Fees to IHL were also subject to VAT on the same basis, even though IHL is a Nigerian company required to collect VAT.

2. The FIRS' argument with regards VAT on third party recharges was not included in the ruling, but it is evident that the FIRS argued for VAT to be applicable.

3. Betting revenue is subject to VAT as the provision of the casino facilities in itself is a supply of a service. Also, the Operating Management Agreement between TCN and SIML acknowledges that VAT was applicable on betting revenue.

4. The FIRS also applied interests and penalties on the additional VAT liability, from the transaction dates.

Decision

The TAT upheld all the arguments put forward by the FIRS as follows:

The TAT ruled that SIML was only an agent who contracted with third parties on TCN's behalf. Therefore, payments by TCN were not reimbursements, but settlement of TCN's obligations. The TAT referred to court rulings which stated that where a principal is disclosed, the principal is in fact liable for relevant obligations under the contracts.

The TAT ruled that for services provided by local vendors, the vendor is an agent for the purpose of collecting VAT from its customers, but that where such vendor fails to do so, this does not mean that the FIRS cannot recover the VAT from the relevant customers.

The TAT acknowledged some intricacies with casino operations, but stated that casinos provide entertainment services and that their revenue that would be subject to VAT is the total bets paid in less winnings paid out.

Takeaway

The decision on imported services is in line with recent court judgments in *Gazprom vs FIRS,* and *Vodacom vs FIRS.* The inclusion of self-charge rules in the FA 2019 suggests that this was not certain beforehand in Nigeria, unlike some other countries that clearly spelt-out such rules in their laws.

On recharges, a number of Nigerian companies have foreign affiliates (or unrelated parties) who incur foreign expenses on their behalf and recharge the costs to them.

This ruling signifies that such structures need to be evaluated. The decision raises more complexities around what a “reimbursement” is and whether they are exempt from VAT, especially considering recent FA amendments to the VAT laws.

With regards to services provided by local vendors, requesting for VAT from the customer and not the vendor (who is legally required to collect and remit the VAT) may result in FIRS double-dipping as FIRS may assess such vendors on their revenue. Such duplication needs to be avoided.

With respect to casino revenue, the TAT defined betting activities as “entertainment” services and subjected the “net inflows” to VAT. This view may be a bit too simplistic as it did not consider the definition of “supply of services” in the VAT Act which requires the services to be provided for consideration.

The money placed on a bet is not a fee for a service rendered but simply cash risked in a game of chance. Funds are returned to the player if the bet is favourable, but retained if unfavourable. Placing or receiving a bet should therefore not equate to a supply under Nigerian VAT laws similar to insurance premium.

Another issue is the base on which the VAT is applied. Applying VAT on the total bets received less winnings paid out has no logic to it as netting off does not result in the balance becoming consideration for services. The decision also did not anticipate complexities that may arise on winnings paid back, especially where winnings exceed bets placed.

Other countries including Kenya and South Africa, have specific rules for taxing (not necessarily VAT) betting income. This can be considered in Nigeria, taking into account its peculiarities and the recent expansion of the industry.

Finally, businesses need to conservatively reassess their risk of exposure to penalties and interest from tax defaults, considering the TAT ruling that these apply from the date the taxes became due.

For a deeper discussion, please contact any member of our Tax team below or your usual contact within PwC Nigeria:

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