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Grey Matter Tax Digest

A specialised newsletter providing strategic alerts and comprehensive analyses on tax matters in Nigeria

ISSUE NO: ALERT 07

TAX APPEAL TRIBUNAL DELIVERS LANDMARK DECISION ON THRESHOLD FOR EXPORTED SERVICE UNDER NIGERIAN TAX LAW

Introduction

The Tax Appeal Tribunal, Lagos Zone ("**TAT**" or the "**Tribunal**"), recently held that services which flow from service providers in Nigeria to third parties (such as, persons resident in Nigeria) on behalf of or for the benefit of persons resident outside Nigeria do not constitute exported service for tax purposes in Nigeria. It also held that a Nigerian resident through whom a non-resident person carries on economic activity in Nigeria for profit-making purposes, is effectively an agent of the non-resident person in Nigeria for tax purposes; and, accordingly, liable to satisfy the tax obligations of that non-resident person in Nigeria. These landmark decisions were reached in the case of **Allan Gray Investment Management Nigeria Limited v Federal Inland Revenue Service** (unreported judgment of the TAT delivered on Wednesday, November 13, 2019 in Appeal No. TAT/LZ/VAT/019/2018) ("**Allan Gray**").

The TAT decision in **Allan Gray** is beyond reproach and constitutes a locus classicus; as it is the first authoritative pronouncement of either the Tribunal or a regular Nigerian court on what constitutes *"exported service"* for tax purposes in Nigeria.

The decision is also logical and unassailable in principle, as it provides a sensible and business efficient basis for the determination of what constitutes exported service in Nigeria; in a manner that is commercially fair to both the taxpayer and the Nigerian government. The decision also does not contradict the Court of Appeal decision in **Vodacom v FIRS** (unreported judgment of the Court of Appeal, Lagos Division, delivered on June 24, 2019 in Appeal No. CA/L/556/2018) ("**Vodacom v FIRS**"), on what constitutes *"imported service"* for tax purposes in Nigeria.

The Allan Gray case

In **Allan Gray**, the FIRS audited the Appellant's tax and financial records for the 2015 – 2017 accounting years (the "**Period**") and discovered that the Appellant had been filing unsubstantiated nil Value Added Tax ("**VAT**") returns for the Period. It accordingly raised VAT assessments on the Appellant for the Period.

Aggrieved, the Appellant approached the TAT, challenging the VAT assessments on the ground that the services it provided within the Period qualify as exported service exempt from VAT under the Value Added Tax Act[1] (the "**VAT Act**"). The Appellant relied on a Marketing and Distribution Agency Agreement executed on November 5, 2013 (the "**Agency Agreement**") between the Appellant and its South African parent company, Allan Gray International Proprietary Limited ("**Allan Gray International**"), wherein it was appointed as the **sole and exclusive representative** of Allan Gray International's equity fund products in Nigeria, that is, the Africa Fund, with a mandate to **market** and **distribute** the Africa Fund in Nigeria **on behalf of Allan Gray International**.

Paragraph 4 of Part II of the First Schedule to the VAT Act exempts taxpayers from the payment of VAT on "all exported services" in Nigeria. The VAT Act defines "exported service" to mean "service performed by a Nigerian resident or a Nigerian company **to** a person outside Nigeria". The Appellant's argument was that exported service for tax purposes does not contemplate the place of performance or consumption of service and that all that is required is that the service provider is a Nigerian resident and the recipient of service is a non-Nigerian resident. The Appellant contended that since it is a Nigerian company which provided the marketing and distribution of the Africa Fund services under the Agency Agreement to Allan Gray International (which is a non-resident company), the said services provided pursuant to the Agency Agreement constitute exported service for tax purposes under the VAT Act and are therefore exempt from VAT.

FIRS, on the other hand, argued that the Appellant's marketing and distribution of the Africa Fund to third parties who are resident in Nigeria **on behalf of** or **for the benefit of** Allan Gray International did not qualify as exported service for tax purposes in Nigeria, since the Appellant performed the services **to** customers in Nigeria, **on behalf of** or **for the benefit of** Allan Gray International. It did not perform the services **to** Allan Gray International as required by the VAT Act.

It is significant to note that FIRS's argument was not that the services were not exported because the Appellant did not leave Nigeria to South Africa to perform the services. Rather, FIRS's argument was that the issue of the place of performance or

[1] Cap. V1 Laws of the Federation of Nigeria 2004 (as amended in 2007).

consumption of service is merely tangential and quite irrelevant to the point. What is relevant is that for exported service to exist, (i) the service provider must be resident in Nigeria, (ii) the recipient of service must be resident outside Nigeria, and (iii) the service provided must **flow directly** from the Nigerian resident or company **to** the non-resident person. The definition of *"exported service"* in the VAT Act does not contemplate a transaction where the service provided flows from a Nigerian resident **to** third parties resident in Nigeria **on behalf of** or **for the benefit of** a person resident outside Nigeria. FIRS also specifically noted that the position would have been different had the VAT Act defined *"exported service"* to mean *"service performed by a Nigerian resident or a Nigerian company **for** a person outside Nigeria"*.

The implication here is that while the transaction envisaged in the Agency Agreement satisfied the first statutory condition for exported service, that is, that the service provider must be resident in Nigeria (this is because the Appellant as the service provider in the Agency Agreement, is resident in Nigeria); the transaction did not satisfy the second and third statutory conditions for exported service in Nigeria, that is, that **the recipient of service must be resident outside Nigeria** and the service provided must **flow directly** from the Nigerian resident or company **to** the non-resident person. The service provided by the Appellant under the Agency Agreement **flowed** from the Appellant **to** third parties (that is, persons resident in Nigeria) **on behalf of** or **for the benefit of** Allan Gray International (a person resident outside Nigeria). It did not flow from the Appellant **to** Allan Gray International as required by law, and therefore failed to satisfy that crucial statutory condition for exported service in Nigeria.

In addition, and contrary to the Appellant's arguments on the point, Allan Gray International (which is resident outside Nigeria) was NOT the **recipient** of the services provided by the Appellant under the Agency Agreement. Allan Gray International was rather the **beneficiary** of the services provided by the Appellant under the Agency Agreement. The actual **recipients** of the services provided by the Appellant under the Agency Agreement were **third parties who are resident in Nigeria**. Further, assuming without conceding, that Allan Gray International was in fact the **recipient** of the service, the transaction envisaged in the Agency Agreement was structured in a manner that enabled Allan Gray International to conduct business in Nigeria and earn profit therefrom through the Appellant as its agent. It therefore had a presence in Nigeria; and was for the purposes of the Agency Agreement, resident in Nigeria. **The transaction envisaged in the Agency Agreement consequently failed to satisfy the crucial condition that the recipient of service must be resident outside Nigeria**.

In the course of the **Allan Gray** trial, the Appellant also sought to establish that the TAT decision in **Vodacom v FIRS**, is applicable to, and supports its case on the ground that the destination principle referenced by the Tribunal in **Vodacom v FIRS** further amplified its case. In resisting

the Appellant's line of argument in that regard, FIRS contended that: (a) The TAT's decision in **Vodacom v FIRS** is not applicable to the Appellant's case in **Allan Gray**, as the facts and circumstances in **Vodacom v FIRS** are completely different from those of **Allan Gray**, and (b) even assuming, without conceding, that the TAT decision in **Vodacom v FIRS** is applicable to the peculiar facts and circumstances of **Allan Gray**, and the reference to the destination principle is relevant, both the decision in **Vodacom v FIRS** and the reference to the destination principle do not help the Appellant's case in **Allan Gray**. The points on which FIRS based these contentions are that –

(a) While the key issue in **Allan Gray** relates to "exported service", **Vodacom v FIRS** dealt with "imported service". Also, while the service involved in **Vodacom v FIRS** was supplied by a foreign entity to a Nigerian entity, the service involved in **Allan Gray** was supplied by the Appellant (a Nigerian entity) to third parties (customers resident in Nigeria) on behalf of or for the benefit of its non-resident parent entity (Allan Gray International);

(b) The TAT recognised in **Vodacom v FIRS** that Nigeria operates the destination principle which requires that the place where a taxable event occurs; that is, where the actual consumption of the service supplied occurs, should have jurisdiction to tax the event;

(c) The elements of the destination principle are satisfied in **Allan Gray** as the Africa Fund was marketed and distributed in Nigeria, by the Appellant, on behalf of or for the benefit of Allan Gray International, to third parties (persons resident in Nigeria), who are the ultimate final consumers of the service, as shown in the Appellant's financial statements for the Period, and the facts established at the trial; and

(d) Nigeria being the destination where the final consumption of the services provided by the Appellant occurred, the Appellant is obliged in law to remit the VAT elements of its transactions to the FIRS.

The Tribunal agreed with FIRS and essentially held that services which flow from service providers in Nigeria to third parties (such as, persons resident in Nigeria) on behalf of or for the benefit of persons outside Nigeria do not constitute exported service for tax purposes in Nigeria. The Tribunal also held that a Nigerian resident through whom a non-resident person carries on economic activity in Nigeria for profit-making purposes, is effectively an agent of the non-resident person in Nigeria for tax purposes; and, is accordingly liable to satisfy the tax obligations of that non-resident person in Nigeria. The Tribunal consequently arrived at the conclusions that: (i) Allan Gray International was essentially carrying on business in Nigeria and earning profit therefrom through the Appellant as its agent; (ii) the Appellant, as Allan Gray International's agent in Nigeria, was liable to satisfy the tax obligations of Allan Gray International in Nigeria in relation to VAT

obligations arising from the services performed under the Agency Agreement; and (iii) the decision in **Vodacom v FIRS** is not applicable to the peculiar facts and circumstances of **Allan Gray**. The TAT accordingly dismissed the appeal and upheld the FIRS's VAT assessments on the Appellant for the Period. In arriving at its decision in **Allan Gray**, the TAT did not ignore the purpose of the services provided by the Appellant under the Agency Agreement. Indeed, its decision was largely driven by its careful consideration of the purpose of the service; that is, Allan Gray International's marketing and distribution of the Africa Fund to customers resident in Nigeria for profit-making purposes, through the Appellant as its agent in Nigeria.

Commentary

The TAT decision in **Allan Gray** is novel and will continue to set the tone for construction of what species of transactions constitute *"exported service"* for tax purposes under Nigerian VAT law. Of particular interest is the Appellant's argument that the place of performance or consumption of service is immaterial for the purpose of determining existence of exported service for tax purposes; and all that is required is that the service provider is resident in Nigeria and the recipient of service is resident outside Nigeria. This argument of the Appellant was however misconceived.

The issue of the place of performance or consumption of the service was quite irrelevant to the substance of FIRS's argument in **Allan Gray**. FIRS's argument was not that the place of performance or consumption of service determines the existence or non-existence of "exported service" for tax purposes in Nigeria. FIRS's argument was rather that the service provided by the Appellant under the Agency Agreement did not satisfy the statutory conditions for exported service and is therefore taxable under the VAT Act. Indeed, contrary to the Appellant's submissions on the point, the Appellant did not provide the marketing and distribution services **to** Allan Gray International under the Agency Agreement. The Appellant rather provided the marketing and distribution services to third parties (persons resident in Nigeria) **on behalf of** or **for the benefit of** Allan Gray International under the Agency Agreement. The legal distinction between these two species of transactions is very crucial as the implication is that the transaction contemplated in the Agency Agreement failed to meet the threshold for exported service under the VAT Act and is therefore liable to VAT under Nigerian tax law.

We recall that the VAT Act defines *"exported service"* as *"service performed by a Nigerian resident or a Nigerian company*

to a person outside Nigeria". FIRS had argued in **Allan Gray** that the operative word in the statutory definition of *"exported service"* is the word "to". FIRS also argued that the phrase *"service performed by a Nigerian resident or a Nigerian company to a person outside Nigeria"* means that the service must **flow directly** from the Nigerian resident or company to the person outside Nigeria. The statutory definition of *"exported service"* in the VAT Act accordingly does not contemplate a transaction where the service provided flows from a Nigerian resident or company to persons resident in Nigeria (or other third parties for that matter) **on behalf of** or **for the benefit of** persons resident outside Nigeria. The position would have been different had the VAT Act defined *"exported service"* to mean *"service performed by a Nigerian resident or a Nigerian company for a person outside Nigeria".*

Accordingly, the Appellant's contention that the transaction envisaged in the Agency Agreement constituted *"exported service"* under the VAT Act was erroneous in principle as the contention effectively invited the Tribunal to interpret *"exported service"* under the VAT Act to mean *"service performed by a Nigerian resident or a Nigerian company for a person outside Nigeria"*, instead of *"service performed by a Nigerian resident or a Nigerian company to a person outside Nigeria"* as specified in the VAT Act. Neither the Tribunal nor any court of law in Nigeria for that matter has the jurisdiction to entertain an interpretation that effectively amends the provisions of the VAT Act without recourse to the legislature that enacted the statute[2]. It is now settled Nigerian law that tax statutes are accorded a strict and ordinary construction[3]. Accordingly, where upon strict construction of a taxing statute, the taxpayer falls within the statutory tax net, the relevant tax authority is entitled (and indeed, obliged in law) to dip the full length of the largest taxing shovels into the taxpayer's accounts and scoop therefrom the full amount of taxes due on the taxpayer's income or transactions.

The word "to", in ordinary English language, means "**in the direction of**"[4]. Indeed, the word "to" has been judicially construed to mean "**towards**"[5]. On the other hand, the word "for", in ordinary English language, means "**as a representative of**" or "**on behalf of**"[6]. In the New Zealand case of **Wilson & Horton Ltd. v Commissioner of Inland Revenue**,[7] a New Zealand Court of Appeal, while interpreting a provision of the New Zealand Goods and Services Tax Act 1985 dealing with provision of services "**for and to**" foreign clients, held that services provided "**for**" foreign clients refers to services provided (a) "**on behalf of or on account of a foreign**

[2]See Basinco Motors Ltd. v Woermann Line & anor. (2009) 13 NWLR (Pt. 1157) 149.

[3] See Federal Board of Inland Revenue v Halliburton (WA) Ltd. (2014) LPELR-24230(CA).

[4] See Bernard S. Cayne, et al., The New Lexicon Webster's Dictionary of the English Language, The Deluxe Encyclopedic Edition, p. 1037.

[5] See Colledge v Harty (1851) 6 Exch. 205, 210, per Pollock CB.

[6] See Bernard S. Cayne, et al., The New Lexicon Webster's Dictionary of the English Language, The Deluxe Encyclopedic Edition, p. 366.

[7] (1996) 1 NZLR 26, 32 – 33

client", or (b) "for the benefit of the foreign client or in favour of the foreign client"[8].

It is noteworthy that the Finance Bill 2019 (the "Bill"), recently passed by the Senate of the National Assembly on November 21, 2019, has proposed an amendment of the provisions of the VAT Act regarding the meaning of *"exported service"* for tax purposes. The Bill defines *"exported service"* to mean: *"A service rendered within or outside Nigeria by a person resident in Nigeria to a person resident outside Nigeria. Provided, however, that a service provided to the fixed base or permanent establishment of a non-resident person shall not qualify as exported service."*

The Bill, if enacted into law, will clarify the point that exported service does not contemplate the place of performance of service. This, however, will not affect the efficacy of the TAT decision in Allan Gray. The reason for this conclusion is that while the definition of *"exported service"* in the Bill (if enacted into law) will clarify the point that the place of performance of service is not relevant for determining the existence of exported service for tax purposes, it does not address the key issues relating to: (i) relevance of the place of consumption of service to determining the existence of exported service for tax purposes in Nigeria, and (ii) the direction in which the services provided by the person resident in Nigeria must flow in order to constitute exported service for tax purposes under Nigerian VAT law.

In our view, the elements of *"exported service"* under the Bill are: (a) the service provider must be resident in Nigeria, (b) the recipient of service must be resident outside Nigeria, (c) the place of performance of service is immaterial, (d) the service provided must flow directly from the Nigerian resident to the person resident outside Nigeria, and (e) services provided to the fixed base or permanent establishments of non-resident persons do not constitute exported service for tax purposes in Nigeria. It will, therefore, still be validly arguable under the Bill (if enacted into law) that exported service does not contemplate a transaction where the service provided flows from a Nigerian resident to third parties on behalf of or for the benefit of non-resident persons in Nigeria. The position would have been different had the Bill defined *"exported service"* to mean: *"a service rendered within or outside Nigeria by a person resident in Nigeria for a person resident outside Nigeria; provided, however, that a service provided to the fixed base or permanent establishment of a non-resident person shall not qualify as exported service"*.

[8] It is settled Nigerian law that when there is no known Nigerian decision on a principle of law, the Nigerian courts and tribunals of law will be persuaded to follow decisions of foreign courts, particularly foreign courts that apply the common law. Thus, English case law (including case law of other jurisdictions that apply the common law) have strong persuasive effect on Nigerian courts and tribunals of law where the law and facts decided are similar (though not necessarily identical), and there is no known Nigerian decision on the same set of facts and principles of law (see Omega Bank Plc v Government of Ekiti State (2007) 16 NWLR (Pt. 1061) 445).

Also, of interest is the Appellant's argument that the Court of Appeal's decision in **Vodacom v FIRS** is applicable to and supports its case in **Allan Gray**. In making this argument, the Appellant contended that even though **Vodacom v FIRS** relates to imported services, the principles laid down by the Court of Appeal in the case are relevant to its case in **Allan Gray**. According to the Appellant, one of the issues determined by the TAT in **Vodacom v FIRS** was whether a foreign company with no physical presence in Nigeria was liable to tax under the VAT Act. And that in determining the issue, the Court of Appeal held in the case that the supply of satellite network bandwidth capacities qualify as *"imported service"* because it was supplied by a person outside Nigeria to a person inside Nigeria. The Appellant further contended that it is only fair and equitable that the same rule to be applied in determining what qualifies as *"exported service"* must be consistent with the rule applied in **Vodacom v FIRS** on the issue of what constitutes *"imported service"* under the VAT Act. As such, what is relevant is the location of the parties to the transaction.

Our view is that the Appellant's argument that the rule to be applied by the TAT in determining what constitutes *"exported service"* in **Allan Gray** must be consistent with the rule applied by the Court of Appeal in **Vodacom v FIRS** to determine what constitutes *"imported service"* under the VAT Act, is not only erroneous in principle, but hinged on faulty logic. While *"imported service"* is defined in the VAT Act to mean *"service **rendered in Nigeria** by a non-resident person **to** a person inside Nigeria"*, the VAT Act defines *"exported service"* to mean *"service **performed** by a Nigerian resident or a Nigerian company **to** a person outside Nigeria"*. The provisions of the VAT Act on the meaning of *"imported service"* and *"exported service"* are therefore very clear and unambiguous; and show a marked distinction between what constitutes *"imported service"* for tax purposes and what constitutes *"exported service"* for tax purposes in Nigeria. While, for purposes of *"imported service"*, the service must be **rendered in Nigeria** by a non-resident person to a person inside Nigeria, *"exported service"* need not be rendered in Nigeria **in so far as the service performed by the Nigerian resident or Nigerian company flows directly from the Nigerian resident or the Nigerian company to the person outside Nigeria**. This clear distinction between both concepts is therefore an unassailable reason why the Appellant's argument in **Allan Gray** that the same set of rules should apply to a determination of what constitutes both concepts cannot be correct in both law and fact.

In any event, and contrary to the Appellant's arguments on the point, the location of the service provider and recipient of service in **Vodacom v FIRS**, though of relevance in the case, was not the key issue considered by the Court of Appeal in arriving at its decision. The question of whether the service supplied by the non-resident entity to Vodacom was **supplied in Nigeria** for tax purposes was the key issue considered by the Court of Appeal in **Vodacom v FIRS**, and the basis upon

which it arrived at its decision in the case. In deciding the issue, the Court of Appeal in **Vodacom v FIRS** considered the fact that even though the satellite bandwidth capacities supplied by the non-resident company were in orbit, the bandwidth capacities were transmitted through satellite signals using Vodacom's transponders located in Nigeria. The Court of Appeal also considered the fact that the bandwidth capacities **were ultimately used and enjoyed by Vodacom in Nigeria**.

Accordingly, in addition to our belief that the Appellant was misconceived in its argument that the same set of rules applied by the Court of Appeal in **Vodacom v FIRS** to determine what constitutes *"imported service"* for tax purposes should have also applied to the TAT's determination of what constitutes *"exported service"* for tax purposes in **Allan Gray**; we also recognise that even assuming without conceding that the rule in **Vodacom v FIRS** were applicable in **Allan Gray**, the rule in that case does not support the Appellant's arguments on the point. The reason for this conclusion is that, in addition to the physical location of the service provider and recipient of service in **Vodacom v FIRS**, the Court of Appeal considered the additional condition that the service must be rendered in Nigeria as distilled from the definition of *"imported service"* in the VAT Act.

Applying the same logic as that applied in **Vodacom v FIRS**, the TAT in **Allan Gray** was right to have arrived at the conclusion that, in addition to the physical location of the Appellant and Allan Gray International, the additional conditions that (i) **the actual recipient of the service performed by the Nigerian resident must be a person resident outside Nigeria**, and (ii) **the service performed must flow directly from the Nigerian resident to the person outside Nigeria**, and not from the Nigerian resident or company to persons resident in Nigeria **on behalf of** or **for the benefit of** the person outside Nigeria, must be satisfied.

Accordingly, the TAT decision in **Allan Gray** does NOT in any way suggest that Nigerian service providers must leave Nigeria for their services to qualify as exported. **It only clarified the points on who should be the actual recipient of the service provided, and the direction in which the service provided must flow**. There is, therefore, no misalignment with international VAT principles or potential for double VAT (both in Nigeria and South Africa) in **Allan Gray**. It will be interesting to see: (i) how superior courts of law in Nigeria will react to the TAT decision in **Allan Gray** on appeal (if the Appellant decides to appeal the decision), or (ii) how the Tribunal and regular courts of law in Nigeria will interpret the TAT decision in **Allan Gray** within the meaning of *"exported service"* under the Bill (when the Bill is enacted into law).

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